

CLIMATE CHANGE DESKBOOK

by

Tom Munteer

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CLIMATE CHANGE DESKBOOK

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ELI's Climate Change Deskbook

Climate change is a defining issue of the next generation of environmental law. While our first generation of environmental statutes largely focused on media-specific approaches to addressing environmental issues, climate change calls us to reevaluate our energy system, the way we do business, the dynamics of consumption, and the fundamental relationship between economy and ecology.

The *Climate Change Deskbook* is part of ELI's comprehensive program to address climate change and energy challenges. We believe any approach to climate change must be strategic, comprehensive, and creative, as no single solution, from federal cap-and-trade legislation to international treaty, will be sufficient to meet these challenges. As described on ELI's website at www.eli.org, ELI's climate program coordinates climate and energy governance, works to ensure effective implementation of energy and climate laws and policies, and harnesses the creative intellectual capacity of environmental professionals to combat global warming. This deskbook is an example of the program at work, as we seek to make climate law more accessible to practitioners.

The *Climate Change Deskbook* is part of Environmental Law Institute's Deskbook series, which combines the invaluable experience of the top practitioners in the field with the encyclopedic coverage and keen insight provided by the staff of the *Environmental Law Reporter*. Deskbooks provide practicing attorneys, students, environmental professionals, and government officials an "at-the-fingertips" resource for accessing and understanding environmental law. The series covers endangered species, wetlands, NEPA, TSCA, FIFRA, and many other topics by combining in-depth analysis of the topic with necessary reference materials, such as regulations, guidance documents, and forms.

The Deskbooks are natural partners to ELI's flagship resource, the *Environmental Law Reporter*. *ELR* is an attorney-edited gateway to researching and understanding environmental law and policy, with coverage since 1971 available on-line in an easily searchable format. *ELR* couples thousands of insightful articles on environmental law and policy with the most important updates, decisions, statutes, regulations, and agency documents and a cumulative index and bibliography to help you navigate this highly complex area of law. More information about both the Deskbooks and *ELR* is available at www.eli.org.

The *Climate Change Deskbook* was authored by Tom Munteer and his very able colleagues at Paul Hastings by building on their many years of distinguished practice in environmental law. We are very grateful to them for their hard work and dedication in bringing the Deskbook into being. *ELR* staff also deserve our sincerest thanks for their effort and skill in helping us to create this valuable resource.

The Environmental Law Institute makes law work for people, places, and the planet. With its non-partisan, independent approach, ELI promotes solutions to tough environmental problems. The Institute's unparalleled research and highly respected publications inform the public debate and build the institutions needed to advance sustainable development. We hope the *Climate Change Deskbook* provides valuable insight into this fascinating and complex new area of environmental law and regulation.

Leslie Carothers
President
Environmental Law Institute

CLIMATE CHANGE DESKBOOK

Foreword

My colleagues and I completed the first draft of the manuscript for this Deskbook shortly before the 2008 Presidential election. It had been many election cycles since environmental concerns were quite so prevalent in the national dialogue, with climate change and related energy issues front and center. That we were working on an issue at the crossroads of American political discourse gave purpose to our writing.

While large teams of lawyers frequently work collaboratively on major transactions or litigation, it is less frequent that so many contribute to a single piece of writing. It is safe to say that there has never been a collaboration of so many of my Paul *Hastings* environmental colleagues on a single matter as on this publication. Before we were done, 22 of us had a hand in it.

When we accepted the challenge to prepare a Deskbook on climate change for the Environmental Law Institute, we were generally aware of the myriad legal and policy implications of the topic and had counseled clients in various aspects of it. We probably did not, however, fully appreciate all its rich dimensions.

It seems ironic that Corporate Average Fuel Economy (CAFE) standards had nothing to do with reducing greenhouse gas (GHG) emissions when first enacted into law a generation ago. Yet the standards were at the center of efforts to bring about a change in public policy—given the delay in comprehensive federal climate change legislation—through litigation. Then, in 2007, amendments to the federal law creating CAFE standards had GHG emissions reductions as a focus. When you overlay National Environmental Policy Act requirements on top of CAFE standards, you get a fascinating exhibition of modern environmental law at work.

Environmental lawyers are generally aware of the various tax incentives for alternative and renewable energy sources. That is to be expected. Whenever the

incentives are set to expire, articles about the investor uncertainty created by their limited terms appear in the trade press. Environmental lawyers are not as frequently reminded of the many ways in which the Internal Revenue Code encourages fossil fuel production and consumption. Comprehensive climate change policy has to take into account these aspects of tax policy.

As we were completing the manuscript, Rep. John D. Dingell (D-Mich.) laid down his “marker” for the next administration—his discussion draft of a comprehensive climate change bill. Always provocative, Representative Dingell proposed preempting state and regional climate change programs, where most progress toward regulating GHG emissions has been made in the first decade of the 21st century.

So we encountered many interesting twists and turns—some expected, some not—as we tackled this monumental topic. As we were preparing this manuscript, it also quickly became apparent that, by accepting the Institute’s challenge to write the manuscript that became this publication, we signed up for inevitable subsequent editions. Not only does comprehensive federal legislation hold the prospect of materially altering the terrain, developments on many of the other fronts covered in this volume are equally susceptible to change.

As those developments continue to unfold, we trust this volume will provide a useful resource to its readers. We hope too that it contributes to improving the discourse as we collectively refine public policy in this area.

Tom Munteer
Washington, D.C.
October 14, 2008

CLIMATE CHANGE DESKBOOK

About the Authors

Tom Munteer

Tom Munteer, a partner in Paul *Hastings'* Washington office, helps businesses comply with state and federal environmental laws for controlling air and water pollution and for managing and cleaning up solid and hazardous waste. He helps buyers, sellers, and parties to financings identify, quantify, and allocate environmental liabilities associated with businesses and real estate. He also represents businesses before U.S. Congress and federal and state agencies in a wide range of environmental, health, and safety areas. Mr. Munteer is the author of many scholarly and professional articles and a frequent speaker on a variety of environmental law topics. Since 1997, Mr. Munteer has been an adjunct professor in the masters in environmental law program at George Washington University Law School.

Paul Hastings

Paul *Hastings* is an international law firm with 18 offices and more than 1,200 lawyers throughout Asia, Europe, and the United States. Paul *Hastings'* national environmental practitioners advise clients on all aspects of complex environmental matters, including technical and scientific issues, health-based risk assessments, political concerns, land use issues, litigation exposures, insurance issues, cleanup strategies, government agency interactions, regulatory requirements, and permitting issues. In 2008, combining numerous resources within the firm, Paul *Hastings* formally chartered its Sustainability and Global Climate Change Practice Group. This Practice Group allows the firm to approach its clients' sustainability issues comprehensively. The Sustainability and Global Climate Change Practice Group advises on renewable energy projects, regulatory compliance matters, and drafting legislation to ensure responsible use of resources at the international, national, and local level and assisting in the development of LEED-certified buildings.

Many members of the firm's Sustainability and Global Climate Change Practice Group contributed to the preparation of the Deskbook.

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