

# Widener University Delaware Law School

---

From the Selected Works of David R. Hodas

---

1998

## Special Committee on Climate Change and Sustainable Development: 1997 Annual Report

David R. Hodas

American Bar Association Special Committee on Climate Change and Sustainable Development, *American Bar Association Special Committee on Climate Change and Sustainable Development*



Available at: [https://works.bepress.com/david\\_hodas/12/](https://works.bepress.com/david_hodas/12/)

**SPECIAL COMMITTEE ON CLIMATE CHANGE  
AND SUSTAINABLE DEVELOPMENT<sup>1</sup>  
1997 Annual Report**

I. CLIMATE CHANGE: NEGOTIATION AND ADOPTION OF THE KYOTO PROTOCOL

On December 11, 1997, in Kyoto, Japan, the Conference of Parties to the UN Framework Convention on Climate Change (FCCC) unanimously adopted the "Kyoto Protocol to the United Nations Framework Convention on Climate Change" (Kyoto Protocol). The FCCC concluded nearly two years of international negotiations involving various FCCC subsidiary bodies and resulted in an international agreement calling for binding obligations on Annex I Parties (developed countries) to reduce their greenhouse gas emissions at least five percent below 1990 levels by 2008-2012. Initial reactions in the U.S. were mixed. Some environmentalists criticized the agreement as inadequate, while others thought it was a satisfactory start. One business group characterized the protocol as "a terrible deal . . . [that] the President should not sign." The chief U.S. negotiator, Stuart Eizenstat, hailed the protocol as an "historic first step."

Under Article 23, the Kyoto Protocol will be open for signature and subject to ratification, acceptance or approval by Parties to the FCCC from March 16, 1998, to March 15, 1999. Accession to the protocol can occur after the latter date. Ratification by the U.S., which may not occur for several years (*see* discussion in I.B.2, *infra*), will entail signature by the President and advice and consent by the Senate under the U.S. Constitution.

If the Kyoto Protocol enters into force and the U.S. ratifies it (*see* discussion in I.B, *infra*), the U.S. will have, during the first commitment period of 2008-2012, binding obligations to reduce its 1) carbon dioxide, methane and nitrous oxide emissions seven percent below 1990 levels and 2) hydrofluorocarbon, perfluorocarbon and sulfur hexafluoride emissions seven percent below 1990 or 1995 levels. The same base years or base periods apply to all Annex I Parties except for countries with economies in transition (EITs), which are allowed some flexibility in the selection of a base year or base period. The "assigned amounts" (targets) are set forth in Annex B to the protocol and include the following:

Iceland	110%
Australia	108%
Norway	101%
Russia, Ukraine, New Zealand	100%
Croatia	95%
Japan, Canada, Poland, Hungary	94%
U.S.	93%
European Union (EU) collectively, Switzerland, other EITs	92%

A. *The Negotiation Process*

Several delegates characterized the end-game of negotiations in Kyoto as "negotiation by exhaustion." Because adoption of the Kyoto Protocol required consensus, the closing

---

<sup>1</sup> This report was prepared by Laura Kosloff of Trexler and Associates, Inc., David R. Hodas of Widener University School of Law, William Fang of Edison Electric Institute, Alan Miller of the Global Environmental Facility, Donald Goldberg of the Center for International Environmental Law, Valerie Ann Lee and Madeline June Kass of Environment International Ltd., and Margaret Kirkpatrick of Stoel Rives L.L.P.

days of negotiations saw inevitable compromises and trade-offs on major issues. Among the key compromises were the following:

1. Targets and timetables and binding obligations

Known as Quantified Emission Limitation and Reduction Objectives (QELROs), the binding commitments and targets and timetables for Annex I Parties are set forth in Article 3 and Annexes A and B. The key compromise was the EU as a bloc agreeing to a collective eight percent reduction under its so-called "bubble" (*see* Article 4 and discussion in I.A.2 *infra*), with the U.S. agreeing to a seven percent reduction level and Japan agreeing to a six percent reduction level. Thus, the commitments are politically differentiated but were not determined by any formulaic means.

Critical components of the agreement on targets and timetables were agreements on coverage of gases -- the so-called "basket" approach -- and "sinks," or forestry-based offsets. Coverage of all six gases was crucial to the U.S. The option of being able to elect a different baseline for the second set of gases was important to Japan and other countries. No clear consensus could be reached on sinks, so the Parties agreed to limit removals by sinks to afforestation, reforestation and deforestation since 1990, subject to later decisions by the conference, taking into account work by the Intergovernmental Panel on Climate Change. *See* Articles 3.3, 3.4 and 3.7.

"Banking" of excess reductions from the first commitment period to meet obligations in a subsequent commitment period was allowed, but "borrowing" of reductions from a subsequent commitment period to meet obligations in the first commitment period was not. *See* Article 3.13.

2. Policies and measures, and the EU bubble

Under Article 4, the EU received its bubble, under which it collectively will be responsible for an eight percent reduction but will also have the flexibility to assign different targets to individual Parties. Thus, some EU countries will be able to increase their emissions while others (such as the United Kingdom and Germany) will bear a larger share of the reductions. Failure by the EU to meet the collective eight percent target will mean that each Party shall be responsible for meeting its own level of emissions set out in the EU agreement. *See* Article 4.5. However, the EU was only able to obtain a weakened version of policies and measures (PAMs) in Article 2. While there is still mandatory language in Article 2 regarding implementation or "elaboration" of such PAMs appears to be discretionary in accordance with individual Parties' national circumstances.

3. Emissions trading and commitments for developing countries

These two issues threatened to crater the negotiations in the early hours of December 11. Ultimately, the U.S. and other Annex I Parties insisted on emissions trading, and the non-Annex I Parties (developing countries) acceded in order to avoid total collapse of negotiations. Later, however, although many Annex I Parties and some non-Annex I Parties sought to include a U.S.-sponsored provision so that advanced developing countries could "opt in" to Annex I commitments, the U.S. acceded to the developing countries' insistence that the protocol exclude binding obligations for developing countries, the opt-in provision, and even establishment of a process for developing such commitments for developing nations.

#### 4. Emissions trading, joint implementation and the Clean Development Mechanism

Because no clear consensus could be forged on many critical issues, numerous framework, shell or placeholder provisions are scattered throughout the Kyoto Protocol. Notable among these are the following provisions: emissions trading (Articles 3.10, 3.11 and 16 bis); joint implementation among Annex I Parties (Articles 3.10, 3.11 and 6); the so-called Clean Development Mechanism (Articles 3.12 and 12), which became a substitute for joint implementation between Annex I and non-Annex I Parties and for the Brazil-sponsored Clean Development Fund; credit for early action from the year 2000 (Article 12.10); and enforcement and noncompliance (Article 17).

#### B. *The Post-Kyoto Process*

##### 1. Entry into force

Under Article 24, the Kyoto Protocol does not enter into force until ninety days after fifty-five Parties to the FCCC, incorporating Annex I Parties that accounted for at least fifty-five percent of the total carbon dioxide emissions of Annex I Parties in 1990, have ratified, accepted, approved or acceded to the protocol. This means that the protocol can enter into force without the U.S. having ratified it, although many observers believe that this is an unlikely scenario as a practical matter.

##### 2. The ratification process

The fate of the Kyoto Protocol is uncertain, given the numerous important placeholder provisions (such as emissions trading) and other critical issues (such as commitments for developing countries) that remain to be worked out in 1998 and subsequent years. The Parties announced two sets of meetings to work on these issues 1998: subsidiary body meetings in Bonn, Germany, in June, and Buenos Aires, Argentina, in November. In addition, many issues remain to be resolved by the meeting of the parties, which cannot meet at the earliest until after the protocol enters into force and which thus may not meet for several years (*see also* discussion *infra*).

In the U.S., early indications are that the Administration will not submit the Kyoto Protocol to the Senate for advice and consent until 1999 at the earliest, pending the outcome of work at the two aforementioned meetings in 1998 and the pursuit of bilateral and multilateral discussions with developing countries. In the Senate, many Republicans and several Democrats have indicated that they will not consent to the protocol, whether under the yardstick announced by the President on October 22, 1997, regarding meaningful participation by key developing countries, or under the terms of Senate Resolution 98 (agreed to by a 95-0 vote on July 25, 1997) which resolved that the U.S. should not be a signatory to any protocol or other agreement regarding the FCCC that would: 1) mandate new commitments by Annex I Parties to limit or reduce greenhouse gas emissions unless the protocol or other agreement also mandates "new specific scheduled commitments" for developing countries to limit or reduce emissions within the same compliance period; or 2) result in serious harm to the U.S. economy.

On the latter point, calculations based on Energy Information Administration Annual Energy Outlook 1998 numbers show that a return to 1990 emission levels would actually entail about a twenty-five percent decrease from projected 2010 emissions in the U.S. Therefore, reducing emissions to ninety-three percent of 1990 levels would represent approximately a thirty-one percent decrease from projected 2010 emission levels. The



economic costs of such reductions have been heavily debated. A number of economists argue that emissions reductions of the magnitude called for by the Kyoto Protocol would decrease U.S. Gross Domestic Product by three to four percent and result in significant job losses, while other economists contend that such emission reductions could be achieved at low cost or a net benefit to the U.S. economy.

## II. SUSTAINABLE DEVELOPMENT

### A. *International Sustainable Development Initiatives and Activities: "Rio Plus Five" Special Session of the U.N. General Assembly*

The "Rio Plus Five" Special Session of the U.N. General Assembly took place in New York from June 23 through June 27, 1997. The Special Session opened with a call for renewed commitments and efforts to achieve sustainable development in the spirit of the 1992 Rio Earth Summit. The participants of the Special Session, however, failed to reach agreement on any significant new programs. Participants postponed opportunities to name a new executive director for the U.N. Environmental Programme (UNEP) and to decide whether to proceed with a treaty for managing the world's forests. Although an effort to draft a declaration on sustainable development implementation also failed, participants agreed to a Programme for the Further Implementation of Agenda 21 that reaffirmed the Rio commitment to Agenda 21. With respect to global warming in particular, many of the governmental participants declined to take action, choosing instead to wait for the FCCC meeting in Kyoto, Japan scheduled for December. Member States did commit themselves to ensuring that the next comprehensive review of Agenda 21 in the year 2002 will demonstrate greater measurable progress in achieving sustainable development.<sup>2</sup>

Leaders from Germany, Brazil, Singapore, and South Africa, nonetheless, put forth their own initiative for advancing sustainable development at the Special Session.<sup>3</sup> This four nation initiative included a pledge to work on development of environmentally sound mass transit systems and an endorsement of a German proposal for a 1999 International Conference on Sustainable Urban Development. The 1999 Conference will focus on the problems associated with rapid growth in cities and will initiate a campaign designating the years 2000 to 2010 as the "Decade for the Sustainable Production and Use of Energy."

The first session of the Intergovernmental Forum on Forests was held in October 1997 in New York. The U.N. General Assembly established the Forum under the aegis of the Commission on Sustainable Development to continue and to encourage international policy dialogue on sustainable development of forests.

---

<sup>2</sup> Special Session of General Assembly on Implementation of Agenda 21 Concludes at Headquarters 23-27 June, U.N. GAOR, 19th Special Sess., 11th mtg. at 9, U.N. Doc. GA/9276 ENV/DEV/442 (1997).

<sup>3</sup> U.N. Doc. A/S-1 (1997).

## National Sustainable Development Initiatives and Activities

### 1. United States

President Clinton created the President's Council on Sustainable Development<sup>4</sup> in 1993 to provide advice on sustainable development and to develop new approaches to integrate economic, environmental, and equity issues.<sup>5</sup> In January 1997, the President's Council issued its second report, *Building on Consensus: A Progress Report on Sustainable America*. This second report presents the work of the Council's three task forces in the areas of international leadership, new national opportunities, and innovative local, state, and regional approaches to sustainable development.

In April 1997, a revised charter extended the Council's work through February 1999. The purpose of the extension was to allow the Council additional time to seek consensus on sustainable development policy, demonstrate policy implementation, conduct outreach and constituency building, and to evaluate and report on its progress. In addition, the 1997 charter extension directed the Council to ensure integration of social equity issues in its work and to develop linkages with related federal working groups.

The President's Council met on April 29, 1997, to formulate a new organizational structure and to discuss development of a workplan. At the meeting, the Council created four new task forces (Climate, Environmental Management, International Leadership, and Metropolitan and Rural Strategies) to focus on the administration's priority policy areas. The President's Council met again in September 1997, in Tulsa, Oklahoma, to evaluate progress on its workplan. The President's Council also continued planning efforts for a National Conference on Sustainable Development scheduled for fall 1998.

Although the President's Council helped build consensus on some sustainable development issues, it has no statutory authority to implement or oversee the implementation of its recommendations. The United States has no formal policy to foster sustainable development and no executive branch entity with overall responsibilities for sustainable development; there is little evidence that the Rio conference has had an effect U.S. law or policy.<sup>6</sup>

### 2. National Initiatives Outside the United States

Activities on sustainable development are moving ahead in many nations around the world. Embracing Agenda 21's recommendation for the creation of national councils for sustainable development, more than 100 national councils (or similar institutions) exist today for developing policy recommendations or monitoring progress toward sustainability.<sup>7</sup>

---

<sup>4</sup> Exec. Order No. 12,852, 58 Fed. Reg. 35,841 (1993), amended by Exec. Order No. 13,053, 62 Fed. Reg. 13,053 (1997). The Council is administered as a federal advisory committee under the Federal Advisory Committee Act.

<sup>5</sup> The President's Council on Sustainable Development formed following the UNCED's call for all nations "to address the challenges of sustainable development." THE PRESIDENT'S COUNCIL ON SUSTAINABLE DEVELOPMENT, THE ROAD TO SUSTAINABLE DEVELOPMENT: A SNAPSHOT OF ACTIVITIES IN THE UNITED STATES (March 1997).

<sup>6</sup> John Dernbach and the Widener University Law School Seminar on Law and Sustainability, *U.S. Adherence to its Agenda 21 Commitments: A Five-Year Review*, 27 ENVTL. L. REP. 10,504 (1997).

<sup>7</sup> THE PRESIDENT'S COUNCIL ON SUSTAINABLE DEVELOPMENT, THE ROAD TO SUSTAINABLE DEVELOPMENT: A SNAPSHOT OF ACTIVITIES IN THE UNITED STATES (March

Moreover, many nations prepared and submitted reports on their progress toward sustainable development for the Fifth Session of the U.N. Commission on Sustainable Development (UNCSD) held in April 1997 and the Rio Plus Five Special Session.

### III. STATE AND LOCAL INITIATIVES

The most notable state climate change development last year occurred in Oregon. In June 1997, Oregon enacted a law that is intended to curb carbon dioxide (CO<sub>2</sub>) emissions from new electricity-generating facilities.<sup>8</sup> The law authorizes the State Energy Facility Siting Council (EFSC) to adopt standards that address the impact of CO<sub>2</sub> emissions on climate change and sets a specific standard for base-load, natural-gas-fired, generating plants.<sup>9</sup> The standards apply only to CO<sub>2</sub>.

The law sets the initial standard for stand-alone, base-load, natural-gas-fired, power plants (base-load gas plant) at a net rate of 0.7 lbs. CO<sub>2</sub>/kWh.<sup>10</sup> The law defines a base-load gas plant and details how to calculate and implement this standard. This initial rate of 0.7 lbs. CO<sub>2</sub>/kWh is seventeen percent lower than the CO<sub>2</sub> emissions of the most efficient similar currently operating commercially in the United States, which translates into a 7,200 Btu/kWh plant. After two years, EFSC may change the standard by rule, provided the new standard is seventeen percent below the CO<sub>2</sub> emission rate of the most efficient base-load gas plant then operating in the United States. EFSC must also set specific CO<sub>2</sub> standards for other types of fossil-generating facilities.

A plant with a heat rate of 7,200 Btu/kWh has a gross emission rate of 0.8 lbs. CO<sub>2</sub>/kWh. The law anticipates that some applicants may propose a plant that has a lower gross emission rate. Although plant efficiencies may improve, manufacturers do not yet offer turbines that could meet Oregon's standard solely through efficiency. Accordingly, applicants must provide CO<sub>2</sub> offsets to meet the new standards.

The law defines an offset as an action that will be implemented by the applicant, a third party, or a "qualified organization" to avoid, sequester, or displace CO<sub>2</sub> emissions. The statute limits offsets to new projects. To meet the standard through cogeneration or other offset projects, an applicant may implement specific projects (either directly or through a third party) or use a monetary path defined in the statute. An applicant may meet the new standard through cogeneration that wholly or partially offsets the plant's fossil fuel emissions.<sup>11</sup> The EFSC will evaluate CO<sub>2</sub> emission reductions from cogeneration over a thirty-year period.

Alternatively, the standard may be met by implementing offset projects. If an applicant proposes specific offset projects, the EFSC will determine the quantity of CO<sub>2</sub> emission reductions reasonably likely to occur from each project.<sup>12</sup> EFSC must consider the cost

---

1997). See also, Jonathan Lash, *Toward a Sustainable Future*, 12 NAT. RESOURCES & ENVIRONMENT 83 (Fall 1997).

<sup>8</sup> The recommendation to adopt the CO<sub>2</sub> standard came from the Oregon Energy Facility Siting Task Force, which reviewed all energy facility siting standards at the request of Governor Kitzhaber and the Oregon legislature. OREGON ENERGY FACILITY SITING TASK FORCE, REPORT OF THE OREGON ENERGY FACILITY SITING TASK FORCE (Oct. 21, 1996) (hereinafter "Task Force Report"); also, Report of the Special Committee on Climate Change and Sustainable Development, 1996 YEAR IN REVIEW 144, 148 (1997).

<sup>9</sup> OR. REV. STAT. §§ 469.501(1)(o), 469.503(2)(a) (1997).

<sup>10</sup> OR. REV. STAT. § 469.503(2)(a) (1997).

<sup>11</sup> OR. REV. STAT. § 469.503(2)(e)(I) (1997).

<sup>12</sup> OR. REV. STAT. § 469.503(2)(c)(A) (1997).

<sup>13</sup> OR. REV. STAT. § 469.503(2)(c)(B) (1997).

that the projected offsets will be achieved. EFSC's ability to determine reductions resulting from the projects is based on the monitoring and evaluation program proposed by the applicant, and the extent to which the CO<sub>2</sub> reductions would have occurred in the absence of the project. EFSC's evaluation will likely take place as part of a quasi-judicial, contested-case proceeding. EFSC may adopt site certificate conditions to ensure that the proposed projects are implemented; however, it may not require that the applicant guarantee that it will achieve the predicted CO<sub>2</sub> offsets.

The law imposes no limitation on types of CO<sub>2</sub> offset projects. However, the law prohibits EFSC from allowing credit for offsets already allocated or already awarded CO<sub>2</sub> reduction credits in another regulatory setting. Likewise, EFSC will hold in trust the CO<sub>2</sub> offsets that are necessary to meet the standard. These CO<sub>2</sub> offsets cannot be traded or used elsewhere.

Instead of implementing an offset project, applicants may elect to pay an amount-per-ton of CO<sub>2</sub> to meet the standard.<sup>14</sup> The law presently sets the amount of \$0.57 per ton of CO<sub>2</sub>. EFSC may adjust this amount based on empirical evidence regarding the cost of CO<sub>2</sub> offsets and findings that meeting the standard through the monetary path will be economically achievable for base-load gas plants.

EFSC may not adjust the payment rate until the year 2000. After that, it may not adjust the rate more than fifty percent in either direction during any two-year period. The law provides that a "qualified organization" will be the primary mechanism for implementing the monetary path. If an applicant chooses the monetary path, EFSC will determine the required amount of reductions and will calculate the amount of offset funds the applicant must provide. When the applicant has provided the specified amount of funds, it will have fulfilled its obligation to meet the CO<sub>2</sub> standard. The monetary path allows an applicant to both avoid a contested case to prove the projected CO<sub>2</sub> offsets from specified projects and forego responsibility for implementing offset projects.

The applicant is responsible for two types of payments under the monetary path: 1) the offset funds based on \$0.57 per ton of CO<sub>2</sub> reductions needed to meet the standard and, 2) administrative funds for the qualified organization. The administrative funds are equal to ten percent of the first \$500,000 of offset funds owed and 4.286 percent of any offset funds in addition to \$500,000.

The Oregon Climate Trust, a non-profit organization, was formed to serve as a qualified organization. The energy facility developers who helped draft the law are supporting the Trust while it gets started and prepares to receive offset funds. It is estimated that it will be at least mid-1998 before offset funds are available.

As of the end of 1997, two base-load gas plant applications are pending before EFSC for determination of compliance with the new standard. Both applicants have chosen the monetary path. The Council is scheduled to consider the first application in January 1998 and the second in March 1998. Based on information in the pending applications, if approved, these two projects would provide over \$4.5 million in offset funds to the Oregon Climate Trust.



---

<sup>14</sup> OR. REV. STAT. § 469.503(2)(c)(C) (1997).