State Attorneys General Environmental Leadership Agenda

Columbia Law School National State Attorneys General Program

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Background

During late 2008, under the auspices of the National State Attorneys General Program at Columbia Law School (the Program), a study was undertaken of the most pressing environmental legal issues facing the Obama administration from the perspective of representatives of state attorneys general offices. The study included a number of visits to selected state attorneys general offices during the fall, culminating in a meeting in mid-December at Columbia Law School with thirteen leading state environmental attorneys from around the nation. Drawing from the views shared by this diverse group, the objective was to develop a coordinated agenda of environmental legal issues requiring immediate attention by the incoming administration in Washington.

The study was led by James Kilbreth, former chief deputy attorney general of Maine, and Jeff Pidot, former chief of that office’s natural resources division. Guiding and participating in the study were James Tierney, director of the Program and former Attorney General of Maine; Richard Frank, executive director of the California Center of Environmental Law and Policy at University of California Law School at Berkeley and former chief deputy Attorney General of California; Ellen Chapnick, Dean for Social Justice Initiatives at Columbia Law School; and Tam Ormiston, Deputy Director of the Program and chief deputy Attorney General of Iowa.

General Points

Despite their geographic diversity, the state environmental attorneys participating in the study expressed an extraordinary degree of consensus.

As a generally shared observation, for years state attorneys general offices have often labored against what they have perceived as undermining efforts by the federal administration on national and global as well as regional and state environmental issues. While the Justice Department has sometimes engaged in welcome joint enforcement initiatives with its state counterparts, frequently the state attorneys general have found themselves occupying the front lines of environmental law enforcement. The routine federal response to many state legal initiatives on environmental issues has been seen as neglectful, resistant and even antagonistic. The view is commonly shared that the federal government has used its vast resources to actively avoid environmental regulation and standards on the national level, while simultaneously deploying preemption and other theories to stop states in their efforts to fill the void. Nowhere has this been more evident than in the regulation of greenhouse gas emissions leading to global warming.
Given this history, the impending change in administration on the national level presents a rare opportunity to build bridges between federal and state governments on many important environmental legal matters. In this context, the perspective and attention of state attorneys general is focused on environmental issues having immediate importance in pending cases and legal matters involving the states. These are matters on which state attorneys general offices have a knowledgeable and authoritative voice on environmental issues that are both nationally prominent and imminently in need of resolution.

Seen through a larger lens as well, many state attorneys general offices wish to restore relationships with the federal government that are mutually supportive. There is an expressed and pronounced desire to end what has been seen as a state role in legally combating federal efforts to relax national standards, minimize environmental enforcement, displace science with ideology and prevent states from taking their own proactive measures to protect their citizens.

In sum, on matters requiring immediate legal attention from the new administration as well as those involving state environmental interests looking ahead, there is a keen interest among leading state environmental lawyers surveyed in fashioning a cooperative partnership with the federal government based upon a renewed federal commitment to environmental laws.

**Priority Matters Requiring Immediate Attention**

A strong consensus of opinion is reported among the state attorneys general environmental leaders surveyed in ascribing highest priority to the following matters involving the legal and environmental interests of the states. These matters require the most immediate attention and clearest path forward by the new administration.

1. **Regulate Greenhouse Gases under the Clean Air Act.** In a landmark decision, the United States Supreme Court agreed with the plaintiff states that EPA had unlawfully evaded regulation of carbon dioxide and other greenhouse gas emissions that cause global warming. ([Massachusetts v. EPA](https://www.supremecourt.gov/decisions/07pdf/07pdf0949.pdf), 2007). Following this ruling, EPA issued a vast and unfocused document ("Advance Notice of Proposed Rulemaking" or "ANPR"), expansively setting forth issues but establishing little direction in moving forward. Several states have recently submitted comments to EPA on the ANPR, demanding regulatory action in the immediate future. The state environmental lawyers surveyed agree that EPA must act without further delay to comply with the Supreme Court's decision, by issuing a determination that carbon dioxide and other pollutants that contribute to global warming "endanger" human health and welfare under the Clean Air Act. Once this determination is formally made (recognizing that there is no credible debate to the contrary), the establishment of regulatory standards for greenhouse gas emissions can proceed as mandated under the Clean Air Act.

As the most recent manifestation of the federal government’s flawed actions on this front, on December 18 the EPA Administrator adopted a formal “interpretation” that the government lacks authority to regulate such emissions by coal-fired power plants under the Prevention of Significant Deterioration (PSD) permitting program. This action by EPA creates further obstacles to dealing with global warming. As a top priority, the state environmental lawyers
surveyed agree that the new administration should reconsider this decision and set the nation on the right course to formulate regulations of greenhouse gas emissions.

2. **Preserve the States' Right to Regulate Greenhouse Gases.** In an unprecedented move, EPA acted to block California’s and other states’ efforts to regulate greenhouse gas emissions from automobiles. In so doing, even while EPA has itself refused to regulate these emissions, it asserted federal preemption under the Clean Air Act to deny states the opportunity to pursue their own regulatory programs. A legal challenge by the petitioning states followed. (California v. EPA, 2008). Since the federal government's brief in this case is imminent and will tend to cement the government's position, immediate action is required by the new administration to reverse course, so that EPA can reconsider granting the states' request to implement these programs to reduce global warming emissions. In a similar vein, in a case where the lower court upheld state greenhouse gas emission standards against a preemption challenge by auto manufacturers (Green Mountain Chrysler v. Crombie, 2007), the federal government recently submitted an amicus brief in support of industry’s appeal. The new administration should withdraw this brief.

3. **Adopt Science-Based Regulation of Mercury Emissions.** A large coalition of states led by New Jersey successfully challenged EPA's failure to adopt scientifically health-based regulations for mercury emissions. (N.J. v. EPA, 2008). In an effort to overturn this constructive decision, the federal government and industry have sought certiorari in the U.S. Supreme Court, with the states’ opposition brief due to be filed in January. The state environmental attorneys surveyed agree that the new administration should immediately review this case and withdraw the federal government’s petition for certiorari. EPA should then move forward with devising a legally and scientifically sound program for regulating mercury emissions that risk human health and pollute the nation’s air, waters and natural resources.

4. **Enable Meaningful Energy Efficiency Standards.** For years, the Department of Energy has failed to adopt serious energy efficiency standards for appliances, transformers, furnaces and buildings, while DOE has preempted states from meaningfully regulating in this area by refusing to act on state waiver requests to do so. There are a number of pending state lawsuits against DOE which, according to the state environmental attorneys surveyed, the federal government should settle immediately so that urgent action can be taken to move forward with meaningful national standards. Meanwhile, DOE should work with states in fashioning waivers to enable them to set their own higher standards.

**Conclusion**

There is remarkable coalescence around the points made above among the leading state environmental lawyers surveyed, despite the geographic and political diversity of their offices. These lawyers express a palpable sense of enthusiasm, opportunity and hope for a new era of cooperation among state and federal governments in implementing a shared mission of administering and enforcing environmental laws at all levels. The new federal administration has a unique opportunity to take advantage of the energy, resolve and expertise among environmental lawyers at state attorneys general offices.