

## COMMENTARY

## ENVIRONMENTAL LAW

DAVID G. MANDELBAUM

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MANDELBAUMD@GTLAW.COM

## When Will Paris Affect Pennsylvania Environmental Practice?

On Dec. 12 in Paris, representatives of almost all the nations of the world entered into an agreement on mitigation of and adaptation to climate change. As luck would have it, that weekend brought record warm temperatures to the East Coast: 71 degrees in Philadelphia on Dec. 13. I am sure some Pennsylvania environmental lawyers saw this as the biggest event in our field this year—and perhaps this century. Others wonder why everyone talks about these climate-change things because they never seem to affect our day-to-day practice. I suggest that something like the Paris agreement will at the same time affect what we do (a) almost immediately and (b) never.

In order to matter in the practice of most of us, the Paris agreement would have to change, at least arguably, some of our clients' rights or obligations. It would have to require private parties, municipalities, or the commonwealth to do something or to not do something, or give rights to non-governmental environmental groups to demand that something be done or not done. Otherwise, maybe the Paris Agreement is just something important—or at a minimum interesting—to talk about.

You will find useful summaries of the provisions of the Paris Agreement in many of the major newspapers published over the Dec. 12-13 weekend, but lawyers like to see the text. You will find it here: <http://unfccc.int/resource/docs/2015/cop21/eng/109r01.pdf>. The first 20 pages of the typescript are not the agreement, but a preamble in 140 numbered paragraphs. The agreement itself is the annex that follows.

The Paris Agreement came about at the 21st Conference of the Parties ("COP 21") under the United Nations Framework Convention on Climate Change. The Framework Convention was negotiated in 1992 and ratified as a treaty by the United States Senate that year. The Framework Convention became binding domestic law when it came into force in 1994. Currently 195 polities are parties to the Framework Convention.

*David G. Mandelbaum is national co-chair of the environmental practice group of Greenberg Traurig. His principal office is in Philadelphia. He teaches "Oil and Gas Law" and "Environmental Litigation: Superfund" in rotation at Temple University's Beasley School of Law and serves as vice chair of the Pennsylvania Statewide Water Resources Committee.*

Since 1994, the parties have negotiated a number of "protocols" and "accords" under the Framework Convention, of which the 1997 Kyoto Protocol may be the most familiar. The legal status of the Kyoto Protocol in the United States was ambiguous because the Clinton administration signed it, but never submitted it to the Republican-controlled Senate for ratification.

For the past several years, the parties to the Framework Convention have been negotiating a binding supplement to the Kyoto Protocol, whose obligations generally were expiring. The Paris Agreement is, more or less, that new agreement. The parties intend many of its provisions to be binding, although as with many international agreements, what that in fact means is not perfectly obvious. The agreement will come into force when 55 of the 195 parties sign it. The signatures are due in April 2016.

There are several greenhouse gases, but the science behind the Paris Agreement primarily focuses on emissions of carbon dioxide. Carbon dioxide necessarily occurs during combustion. If you burn something to heat a building, to produce electricity, or to power a vehicle, you emit carbon dioxide. Indeed, you will typically emit somewhat more weight of carbon dioxide than the weight of the fuel you burn. Conversely, one can sequester carbon dioxide in various ways, among them, growing plants. That is why biofuels are sometimes treated as carbon-neutral.

The Kyoto Protocol attempted to get developed economies to control their net emissions of greenhouse gases by encouraging establishment of economy-wide caps, and then allowing trades in offsetting credits. Because the credits could be obtained by reducing emissions or protecting a sink (like a forest) in a developing country, resources were expected to be available for reductions universally. But for a variety of reasons, there were too many credits. Moreover, some of the economies with the fastest growing greenhouse gas emissions—like China's—were under no obligations.

The Paris agreement takes a somewhat different approach. Each party to the Paris Agreement—that is, each country or the European Union—is to make a submission to a central repository. In that submission, the party will set out its "nationally determined contributions to the global response to climate change." Those include measures to reduce net greenhouse gas emissions, measures to adapt to climate change, and measures to transfer technology and financial resources to those economies that need them for the purpose. Each economy is to measure its progress using a transparent accounting system to be established under the Framework Protocol.

Once a country makes a submission, those measures become legally binding. They may be made more ambitious at any time, but seem not to be susceptible of being scaled back. Developed economies are expected to achieve "peak emissions" of greenhouse gases promptly, with less-developed economies achieving

that peak over time. The goal is to reduce emissions to a point where the mean temperature increase across the globe is projected to be less than 2 degrees Celsius over pre-industrial temperatures.

The United States has already submitted its "intended nationally determined contribution" or "INDC," as have over 160 countries. They may be found at [http://unfccc.int/focus/indc\\_portal/items/8766.php](http://unfccc.int/focus/indc_portal/items/8766.php). "The United States intends to achieve an economy-wide target of reducing its greenhouse gas emissions by 26-28 percent below its 2005 level in 2025 and to make best efforts to reduce its emissions by 28 percent."

The United States does not intend to do so with some special new statute or a new set of rules. It instead relies on the Clean Air Act, the Energy Policy Act, and the Energy Independence and Security Act as authority for a series of rule-makings we already know about such as the Clean Power Plan. Thus, the Paris Agreement would, in effect, internationalize the greenhouse gas regulatory proposals of this administration with respect to electricity generating units and

various forms of mobile sources.

The United States does commit, however, ultimately to achieve an economy-wide regulation. One can see that currently in efforts to regulate methane emissions from the natural gas production and transmission industries, for example. Moreover, the United States commits to its greenhouse gas inventory.

This is nothing particularly new. If you have clients subject to regulation under these Clean Air Act rules, the Paris Agreement will not change much. It will affect our practice immediately, and, in a sense, not at all.

The Paris Agreement does purport to preclude backsliding on these commitments. However, it disavows any adversarial or punitive enforcement. It is therefore called a "naming and shaming" agreement. It works to the extent the parties care whether other countries say bad things about them.

Nevertheless, to reiterate a note I have sounded repeatedly in these columns, climate change commitments reinforce the inadequacy of the precautionary principle and other very conservative approaches to environmental permitting.

The United States intends to agree that this economy must change significantly in order to meet the United States' nationally determined contribution to the global effort on climate change. We need different power plants, different power transmission infrastructure, different transportation infrastructure, different urban patterns, perhaps different automobile factories, and on and on. We need adaptation measures like more robust power grids, rail lines and road networks. No rule that requires each individual facility to show that it does not have an adverse environmental impact standing alone will allow the sort of rapid change necessary to mitigate the aggregate environmental impact of what we have.

You only hate change if you think what you have is the right stuff. Paris reinforces the proposition that we probably do not. However, most environmental permitting programs are intensely conservative; they look only at the very local environmental change wrought by a new facility. So too with the way some would read the Environmental Rights Amendment to the Pennsylvania Constitution. Perhaps the Paris Agreement helps support the proposition that sometimes what a regulated entity wants to do is in fact better on balance than leaving things the way they are, even if the proposed project has a locally adverse environmental impact. •

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