

# WANTED: FARMER-FRIENDLY CLIMATE CHANGE LEGISLATION

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## I. INTRODUCTION

Global warming is a threat considered to be “the most pressing environmental challenge of our time.”<sup>1</sup> Due to its global nature, the ability to regulate the affluence of greenhouse gases presents a significantly larger challenge than other environmental regulation schemes. Greenhouse gas emissions rise to the stratosphere, an area of the atmosphere that, when so affected, has worldwide effects. If global emissions continue at their current level, we will soon see drastic changes in the world we live. The world temperature will rise, but there will also be changes in weather patterns, resulting in desertification of some areas and extensive flooding in others. Because regulation of the United States is only one

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1. Massachusetts v. EPA, 549 U.S. 497, 505 (2007) (quoting Petition for Writ of Certiorari at 22, Massachusetts v. EPA, 549 U.S. 497 (2007)).

piece of the solution to global warming, the United States has been slow to act, even refusing to ratify the Kyoto Protocol.<sup>2</sup> In the absence of federal regulation, states have taken the burden upon themselves to reduce emissions.<sup>3</sup>

Global warming has special significance for the agricultural sector of the Midwest. One of the most abundant greenhouse gases, methane (CH<sub>4</sub>), is a substantial byproduct of agriculture. Agriculture also produces carbon dioxide (CO<sub>2</sub>) and nitrous oxides (NO<sub>x</sub>). It is unlikely, however, that any greenhouse gas regulatory system could be successful without utilizing agricultural offsets such as methane destruction, afforestation, and nitrous oxide reduction.

In the short term, the increases in global temperature will be small—one to two degrees centigrade—which will likely show a growth for some crops such as grains that adapt easily to climate.<sup>4</sup> In the long term, however, the increases in temperature will not stop at one to two degrees,<sup>5</sup> which will likely show a sharp deterioration in yields for farmers.<sup>6</sup> A rise in temperature will also lead to more heat stress for livestock which in turn will decrease productivity.<sup>7</sup> In addition, hotter temperatures, heavy rainstorms, and flooding in the Midwest have been estimated to increase forty percent,<sup>8</sup> which not only has implications for lost cropland and lost crops, but could also make barge transportation of crops very difficult as river navigation becomes unwieldy.<sup>9</sup>

In the wake of negotiations for the next worldwide climate change effort, Congress has attempted to react to this issue. The last serious attempt at legislation was in 2009 when the House of Representatives passed H.R. 2454,<sup>10</sup> the

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2. See William L. Andreen, *Climate Change Legislation: The Should, the Bad, and the Maybe*, 3 ENVTL. & ENERGY L. & POL'Y J. 261, 263 (2008).

3. See *id.*

4. *Hearing to Review the Potential Economic Impacts of Climate Change on the Farm Sector Before the Subcomm. on Conservation, Credit, Energy and Research of the H. Comm. on Agric.*, 111th Cong. 28 (2009) [hereinafter *Hearing on Impacts*] (statement of Dr. Joseph Glauber, Chief Economist, USDA).

5. See UNION OF CONCERNED SCIENTISTS ET AL., CLIMATE CHANGE IN THE UNITED STATES: THE PROHIBITIVE COSTS OF INACTION 1 (2009), available at [http://www.ucsusa.org/assets/documents/global\\_warming/climate-costs-of-inaction.pdf](http://www.ucsusa.org/assets/documents/global_warming/climate-costs-of-inaction.pdf).

6. *Hearing on Impacts*, *supra* note 4, at 28.

7. Maggie Borman, *What's Ahead? Warmer Winters, Wetter Springs, Experts Contend*, THE TELEGRAPH.COM (Nov. 21, 2009), <http://www.thetelegraph.com/articles/warmer-33395-wetter-springs.html>.

8. UNION OF CONCERNED SCIENTISTS ET AL., *supra* note 5, at 5.

9. *Id.*

10. *Bill Summary & Status: 111th Congress (2009-2010), H.R. 2454, All Congressional Actions*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR02454:@@X> (last visited May 22, 2011) [hereinafter *Bill Summary & Status: H.R. 2454*].

American Clean Energy and Security Act of 2009,<sup>11</sup> and the Senate considered S. 1733,<sup>12</sup> the Clean Energy Jobs and American Power Act.<sup>13</sup> The American Clean Energy and Security Act of 2009, sponsored by Representatives Waxman and Markey, passed the House with a vote of 219 to 212 on June 26, 2009, but failed in the Senate.<sup>14</sup> The Clean Energy Jobs and American Power Act, sponsored by Senators Kerry and Boxer, did not progress out of the Senate.<sup>15</sup> Opposition to the bills came from all sides, and strong voices came both from big business and the agricultural sector.<sup>16</sup> Climate change legislation is inevitable, if not because of our willingness—out of necessity.

Regulating climate change with respect to agriculture differs from the regulations necessary in other sectors, like oil and business. Regulating agriculture means regulating farmers. The regulation of farmers requires the government to step onto the land of the farm. Because of this, farmers are more apt to see attempts at legislation as attempts by the government to dictate their livelihood. This necessary intrusion is absent in other sectors. The advent of climate change regulation for the agricultural sector carries with it high emotion. Many farmers consider themselves to be the ultimate stewards of the land. The “ultimate steward” is being told he is not a steward at all, but rather a major polluter. The government is attempting to tell farmers all over this country the farming methods they use, and the methods used by generations before them, are wrong. This inherent difference, between the agricultural sector and other sectors necessitating regulation in terms of climate change, needs to be addressed in any proposed legislation. This Note will explore existing state laws regarding greenhouse gas regulations and available enforcement remedies. Additionally, this Note will examine federal regulations, potential preemption of state laws, offsets, and how future regulations will financially affect the farmers of the Midwest.

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11. American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (1st Sess. 2009).

12. *See Bill Summary & Status: 111th Congress (2009-2010), S. 1733, All Congressional Actions*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:S.1733:@@X> (last visited May 22, 2011) [hereinafter *Bill Summary & Status: S. 1733*].

13. Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2d Sess. 2010).

14. *See Bill Summary & Status: H.R. 2454, supra* note 10 (H.R. 2454 was placed on the Senate Legislative Calendar, but no further action was taken).

15. *See Bill Summary & Status: S. 1733, supra* note 12 (S. 1733 was placed on the Senate Legislative Calendar, but no further action was taken).

16. Press Release, Am. Farm Bureau Fed'n, AFBF: Rushing Climate Bill Would be 'Height of Folly' (July 22, 2009), <http://www.mdfarmbureau.com/Files/PDFs/HeightofFolly.pdf>.

## II. EXISTING STATE CLIMATE CHANGE REGULATION

While the federal government has chosen to delay its regulation of greenhouse gases, individual state governments have not. Iowa, Minnesota, Wisconsin, and Illinois have all adopted their own climate change legislation with specific reduction goals. Additionally, they have joined forces with Michigan, Kansas, and Manitoba, Canada, to form the Midwestern Greenhouse Gas Reduction Accord—an organization aimed at reducing Midwestern carbon emissions.<sup>17</sup>

### A. Iowa

In 2007, the Iowa legislature enacted Iowa Code section 455B.152 which created a greenhouse gas inventory and registry.<sup>18</sup> The Department of Natural Resources (DNR) has jurisdiction over the registry,<sup>19</sup> and it is required to develop a method of data collection from greenhouse gas emitters which then must be reported.<sup>20</sup> The information collected from each emitter will include the source type, as well as the type and amount of gas emitted.<sup>21</sup> While participation in the inventory is mandatory for all emitters, participation in the registry is voluntary.<sup>22</sup> The goal of the registry is to use the information collected from the inventory, in cooperation with other states, to track emission reductions.<sup>23</sup>

### B. Minnesota

Minnesota's legislature adopted specific reduction goals for greenhouse gas emissions in 2007, when it passed the Next Generation Energy Act of 2007.<sup>24</sup> Minnesota's goals are based on 2005 emission levels, and aim for a fifteen percent reduction of those levels by 2015, thirty percent by 2025, and eighty percent by 2050.<sup>25</sup> Along with these ambitious goals, the legislature directed the com-

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17. MIDWESTERN GOVERNORS ASS'N., MIDWESTERN ENERGY SECURITY & CLIMATE STEWARDSHIP SUMMIT, MIDWESTERN GREENHOUSE GAS ACCORD 2007 2, 4 (2007), available at <http://graphics2.jsonline.com/graphics/news/img/nov07/MGAGreenhouseGasAccord.pdf> [hereinafter MIDWESTERN GREENHOUSE GAS ACCORD].

18. Greenhouse Gas Emissions-Miscellaneous Provisions, S.F. 485, 82d Gen. Assemb., Reg. Sess. (Iowa 2007) (codified at IOWA CODE § 455B (2011)).

19. *Id.*

20. § 455B.152.

21. *Id.*

22. *Id.*

23. *Id.*

24. See Next Generation Energy Act of 2007, S.F. No. 145 2d Engrossment, 85th Leg. Reg. Sess. (Mn. 2007) (codified at MINN. STAT. ANN. § 216H (West 2010)).

25. § 216H.02.

missioners of several committees to create a climate change action plan.<sup>26</sup> The commissioners of Commerce and the Pollution Control Agency are instructed to prepare a report, every two years, of current pollution reduction, and the progress toward these goals.<sup>27</sup> Every year, those same commissioners are instructed to prepare new legislative proposals detailing the measures necessary to meet the state's reduction goals.<sup>28</sup>

In 2009, Minnesota adopted the Omnibus Environment and Natural Resources Bill: a greenhouse gas inventory and reporting system similar to that of Iowa.<sup>29</sup> Section 216H.021 of the Minnesota Code requires a reporting system for emissions to be in place for: 1) all stationary source polluters requiring a federal permit, and 2) those polluters who emit carbon dioxide above a threshold level, to be set by the commissioner of the Pollution Control Agency, which would likely be between 10,000 and 25,000 thousand tons.<sup>30</sup> Unlike the Iowa system which is under the jurisdiction of the DNR, this inventory and regulatory system is under the jurisdiction of the Pollution Control Agency.<sup>31</sup>

### C. Wisconsin

Wisconsin had a voluntary greenhouse gas emissions reduction registry in place that has now been discontinued.<sup>32</sup> In its place, Governor Jim Doyle issued Executive Order No. 191, calling for the creation of a Governor's Task Force on Global Warming.<sup>33</sup> This effort, undertaken by the DNR and the Public Service Commission, called in a diverse group of Wisconsinites to evaluate the effects and solution of global warming.<sup>34</sup> Unlike the plans of Iowa and Minnesota, this task force included representatives from critical pollution industries in Wisconsin, including farming, forestry, and the pulp and paper industry.<sup>35</sup> Their initial tasks included creating an estimate of 1990 greenhouse gas emission levels, estimates of current levels, and the creation of short and long term goals for

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26. *Id.*

27. *Id.* § 216H.07(3).

28. *Id.* § 216H.07(4).

29. Omnibus Environment and Natural Resources Bill, H.F. No. 2123, 86th Leg., Reg. Sess. (Mn. 2009) (codified at MINN. STAT. ANN. § 216H.021(1-2) (West 2010)).

30. § 216H.021(1-2).

31. Compare § 216H.021(1), with IOWA CODE § 455B.152 (2011).

32. *The Wisconsin Voluntary Emissions Reduction Registry*, WIS. DEP'T OF NAT. RES., <http://dnr.wi.gov/air/vol/registry> (last updated Dec. 12, 2008).

33. *Governor's Task Force on Global Warming: Executive Order No. 191*, WIS. DEP'T OF NAT. RES. (Apr. 5, 2007), <http://dnr.wi.gov/environmentprotect/gtfgw/order191.html> [hereinafter *Exec. Order No. 191*].

34. *Id.*

35. *Id.*

reducing greenhouse gas emissions.<sup>36</sup> The Task Force's Final Report to Governor Jim Doyle was submitted to the Governor in July 2008.<sup>37</sup> It contains emission reduction goals, suggested policies to reach these goals, and discussions of additional policies that could be employed.<sup>38</sup> Also, unlike other plans which have the singular goal of cutting total greenhouse gas emissions, the Task Force was implemented with the express goal of making "Wisconsin a leader in [the] implementation of global warming solutions."<sup>39</sup>

#### *D. Illinois*

Illinois has adopted a system similar to that of Wisconsin. Governor Rod Blagojevich formed a Climate Change Advisory Group designed to recommend tactics to meet their greenhouse gas emission reduction goals.<sup>40</sup> The state specific goals were announced in 2007, and aim to reduce Illinois emission levels to the 1990 levels by 2020.<sup>41</sup> By 2050, they aim to be sixty percent below the 1990 levels.<sup>42</sup>

Another important climate-focused Illinois program is the Chicago Climate Exchange (CCX): "a voluntary greenhouse gas reduction and offset trading platform."<sup>43</sup> Formed in 2003, the CCX was an attempt to prepare industry for potential federal regulation.<sup>44</sup> It is a cap-and-trade program with a credit scheme involving all greenhouse gases (CO<sub>2</sub>, CH<sub>4</sub>, N<sub>2</sub>O, HFC's, PFC's, and SF<sub>6</sub>).<sup>45</sup> The CCX trades the "Carbon Financial Instrument (CFI) contract, which represents 100 metric tons of [carbon dioxide] equivalent."<sup>46</sup> This exchange allows major carbon emitters, like factories, to purchase carbon offsets from those that perform

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36. *Id.*

37. TASK FORCE ON GLOBAL WARMING, WISCONSIN'S STRATEGY FOR REDUCING GLOBAL WARMING, WIS. DEP'T OF NAT. RES. 1, 3 (2008), available at [http://dnr.wi.gov/environmentprotect/gtfwg/documents/Final\\_Report.pdf](http://dnr.wi.gov/environmentprotect/gtfwg/documents/Final_Report.pdf).

38. *See generally id.*

39. *Exec. Order No. 191*, *supra* note 33.

40. *See* Press Release, Office of the Governor, Gov. Blagojevich Sets Goal to Dramatically Reduce Greenhouse Gas Emissions in Illinois (Feb. 13, 2007), [www.illinois.gov/pressreleases/ShowPressRelease.cfm?subjectID=2=2&RecNum=5715](http://www.illinois.gov/pressreleases/ShowPressRelease.cfm?subjectID=2=2&RecNum=5715).

41. *Id.*

42. *Id.*

43. *Overview*, CHI. CLIMATE EXCHANGE, <http://www.chicagoclimatex.com/content.jsf?id=821> (last visited May 22, 2011).

44. *See id.*

45. ENVIRONMENTAL STATE CLIMATE CHANGE/GLOBAL WARMING LAWS ILLINOIS (Matthew Bender & Co., Inc. eds., Aug. 18, 2009) [hereinafter STATE CLIMATE CHANGE/ GLOBAL WARMING LAWS].

46. *Overview*, *supra* note 43.

offsetting activities,<sup>47</sup> such as no-till farming or tree planting. This way, producers are held accountable for their actions. While initial involvement in the exchange is voluntary, participants are required to sign a binding contract attesting they will meet their specified reduction.<sup>48</sup> Those parties that reach beyond their individualized reduction goal receive monetary reward, while those that do not, must purchase enough CFI contracts to meet their goal.<sup>49</sup> The control year for this program is the 2000 emission levels, or the average of the 1998 to 2001 levels.<sup>50</sup> Since this program began in 2003, the amount of carbon dioxide reduced has been almost 700 million metric tons, which is the equivalent of taking approximately 140 million cars out of commission for one year.<sup>51</sup> Such an accomplishment is encouraging, and shows that despite the government's silence, people are willing to voluntarily reduce their carbon emissions in favor of a better tomorrow.

The Illinois Legislature also attempted global warming legislation with an interesting distinction from other states. Illinois Senate Joint Resolution 21 was aimed at reducing the state's emission levels while creating American jobs and keeping energy prices low.<sup>52</sup> This failed bill was proposed in the wake of the loss of over 245,000 manufacturing jobs.<sup>53</sup> This large loss of jobs in Illinois' largest economic sector motivated the provision of the bill dealing with "emissions leakage."<sup>54</sup> Instead of allowing Illinois industries to simply outsource their emission intensive tasks to reduce their levels, this bill called for a prevention of "emissions leakage,"<sup>55</sup> a prevention that was intended to create many jobs for Illinois citizens. While this bill did not pass,<sup>56</sup> the state eventually addressed its job concerns, in 2007, through the Illinois Cool Cities Act.<sup>57</sup>

Taking a local approach to this problem, unlike other Midwestern states, the Illinois Cool Cities Act endorses local governments to join the U.S. Conference of Mayors Climate Protection Agreement that calls for a seven percent re-

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47. *See id.*

48. *Id.*

49. *See id.*

50. STATE CLIMATE CHANGE/GLOBAL WARMING LAWS, *supra* note 45.

51. *Overview, supra* note 43.

52. *See* S.J. Res. 21, 96th Gen. Assemb., Reg. Sess. (Ill. 2009).

53. *Id.* (loss of jobs calculated within Illinois since 1998).

54. *See id.*

55. *See id.*

56. *Bill Status of SJR0021*, ILL. GEN. ASSEMBLY, <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=21&GAID=10&DocTypeID=SJR&LegId=44121&SessionID=76&GA=96> (last visited May 22, 2011).

57. Illinois Cool Cities Act, S. 1242, 95th Gen. Assemb. (Ill. 2007) (codified at 415 ILL. COMP. STAT. ANN. 145/5 (West Supp. 2010)).

duction from the 1990 levels by 2012.<sup>58</sup> This reduction is higher than the same reduction the U.S. would have been subject to had they signed the Kyoto Protocol.<sup>59</sup> The Act allows for any city in Illinois to request designation as an “Illinois Cool City” if that city’s government has ratified the U.S. Mayors Climate Protection Agreement, and if the city has a plan in place for meeting the seven percent reduction requirement.<sup>60</sup> This plan must be deemed sufficient by the Director of the EPA, and the Director must also see evidence of the city’s commitment to the project.<sup>61</sup> Upon fulfilling these conditions, a city will receive the designation of “Cool City.”<sup>62</sup> Adoption of the Illinois Cool Cities Act signifies the Illinois government recognizes global climate change as a significant threat, not only to the environment, but also to the State’s economy and public health.<sup>63</sup>

### *E. Midwestern Greenhouse Gas Reduction Accord*

Due to its intense agricultural and manufacturing sector, the Midwest depends heavily on electricity from coal fired power plants and imported petroleum.<sup>64</sup> In recognition of this, and the area’s many renewable resources, the Midwestern Greenhouse Gas Reduction Accord was created in an attempt to lead the country in climate change resolutions.<sup>65</sup> The Accord recognizes the region’s potential for wind energy, corn, ethanol, and biodiesel industries, and geologic CO<sub>2</sub> reservoirs, as well as the extensive test area available for methane mitigation and terrestrial carbon sequestration programs.<sup>66</sup> Together the entities involved will work toward program-wide goals to mitigate greenhouse gas levels and establish a market-based, multi-sector cap-and-trade system to reach those lowered levels.<sup>67</sup> This plan, agreed to in 2007, was to be complete and implementation-ready by June 2010.<sup>68</sup> The plan was completed, but in anticipation of federal legislative climate

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58. 415 ILL. COMP. STAT. ANN. 145/5.

59. See Kyoto Protocol to the United Nations Framework Convention on Climate Change, *adopted* Dec. 10, 1997, 37 I.L.M. 22 (entered into force Feb. 16, 2005).

60. 415 ILL. COMP. STAT. ANN. 145/15(a).

61. *Id.* 145/15(b).

62. *Id.* 145/15.

63. *Id.* 145/5.

64. MIDWESTERN GOVERNORS ASS’N., MIDWESTERN ENERGY SECURITY & CLIMATE STEWARDSHIP SUMMIT, ENERGY SECURITY & CLIMATE STEWARDSHIP PLATFORM FOR THE MIDWEST 2 (2007), *available at* <http://www.midwesterngovernors.org/Publications/EnergyPlatform.pdf>.

65. See MIDWESTERN GREENHOUSE GAS ACCORD, *supra* note 17, at 2.

66. *Id.*

67. *Id.* at 3.

68. See *id.* at 4.

change action, no further action was taken by the group.<sup>69</sup> Many of the founding governors comprising the group are no longer in office; it is currently unclear what direction the group will now take.<sup>70</sup>

Currently, several offsets related to the agricultural industry are under discussion. Potential offsets include: methane destruction, including anaerobic digestion and lagoon covers; fuel switching, including, but not limited to, methane; soil sequestration; and nitrous oxide reduction, including fertilizer management, wetlands management, and nitrogen fixing crops.<sup>71</sup> All of these offsets could have a significant effect on Midwestern farmers.

Most state programs now in action do not include offset allowances because they have the singular goal of emission reduction within the state. However, the Midwestern Greenhouse Gas Accord encompassed the entire Midwestern region and impacts all member states, as well as Manitoba.<sup>72</sup> The implementation of a cap-and-trade system would result in the cooperation of all entities involved.<sup>73</sup> Intensely urban areas of the Midwest, like the Chicago area and the Minneapolis area, will undoubtedly be investing in offsets to allow for their increased level of greenhouse gas emissions. The offsets do not need to be limited to just those available within the state; this regional initiative allows for cooperation within the region to solve this global problem.

### III. AVAILABLE REMEDIES

Throughout history, the private suit has been an important part of America's enforcement of environmental regulations. Traditionally, the Environmental Protection Agency (EPA) has been responsible for ensuring compliance with environmental regulations; however, the Agency cannot be expected to go after everyone who violates an environmental law. This is why the citizen suit mechanism is important which allows private parties to bring suit against a polluter not complying with an environmental law. This right can be executed in three ways: 1) a citizen can sue a governmental agency (like the EPA) for not enforcing regulations; 2) a citizen can sue another citizen for not complying with a regulation;

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69. Ken Paulman, *Midwest Cap and Trade: Not Dead, Just Sleeping*, MIDWEST ENERGY NEWS (March 4, 2011), <http://www.midwestenergynews.com/2011/03/04/midwest-cap-and-trade-is-it-dead-or-no/>.

70. *Id.*

71. See MIDWESTERN GREENHOUSE GAS REDUCTION ACCORD ADVISORY GROUP, SUMMARY OF MEETING 3, 21-22 (2008) (on file with author); LCFS ADVISORY GROUP, CHICAGO MEETING, 8-9 (Feb. 17-18, 2010) (on file with author).

72. See MIDWESTERN GREENHOUSE GAS ACCORD, *supra* note 17, at 4.

73. See *id.* at 3.

or 3) a suit can be brought for a common law nuisance.<sup>74</sup> Many EPA enactments have specific provisions ensuring the citizen suit, like the Clean Air Act and the Clean Water Act.<sup>75</sup> Many successful cases have been litigated under these provisions, including *Massachusetts v. EPA*.<sup>76</sup>

In this landmark case, several private organizations, local governments, and states brought a citizen suit against the EPA requesting the EPA begin emission regulation of four major greenhouse gases.<sup>77</sup> The EPA refused to do so, contending the agency lacked authority to set out mandatory regulations for global climate change.<sup>78</sup> The United States Supreme Court held it is irrefutable that greenhouse gases fit within the EPA's definition of "air pollutant;" therefore, their regulation is within the EPA's authority.<sup>79</sup> While the EPA has authority to decline regulating air pollutants, the Agency is required to provide reasons for declining.<sup>80</sup> This requirement ensures the action is not arbitrary or capricious.<sup>81</sup> In this case, the Supreme Court held the reasons provided by the EPA for declining to regulate greenhouse gases did not fit within those articulated by the statute.<sup>82</sup> The case was then remanded for further proceedings.<sup>83</sup>

On April 24, 2009, the EPA made a proposal to formally include greenhouse gases in the definition of "air pollutant" which unquestionably brings greenhouse gases under their jurisdiction.<sup>84</sup> EPA Administrator Lisa Jackson officially signed the Final Mandatory Reporting of Greenhouse Gases Rule on September 22, 2009.<sup>85</sup> This rule requires engine and vehicle manufacturers and suppliers of industrial greenhouse gases or fossil fuels to report greenhouse gas emission for facilities emitting 25,000 metric tons or more of gases.<sup>86</sup> While this

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74. See Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws: The Citizen Suit Provisions*, SD88 A.L.I.-A.B.A. 819, 822 (1999).

75. See Clean Water Act, 33 U.S.C. § 1365 (2006); Clean Air Act, 42 U.S.C. § 7604 (2006).

76. See *Massachusetts v. EPA*, 549 U.S. 497, 510 (2007) (private organizations filed petition asking EPA to regulate emission of four greenhouse gases).

77. *Id.* at 505.

78. *Id.* at 511.

79. *Id.* at 532.

80. *Id.* at 533.

81. *Id.* at 534.

82. See *id.* at 533-34.

83. *Id.* at 535.

84. Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886, 18,886 (proposed Apr. 24, 2009) (to be codified at 40 C.F.R. ch. 1).

85. *Climate Change—Regulatory Initiatives: Greenhouse Gas Reporting Program*, EPA, <http://www.epa.gov/climatechange/emissions/ghgrulemaking.html> (last visited May 22, 2011).

86. Mandatory Greenhouse Gas Reporting, 74 Fed. Reg. 56,260, 56,266-67 (Oct. 30, 2009) (codified at 40 C.F.R. pt. 98).

rule is undoubtedly a step in the right direction, the reports constructed from this data may not be as complete as those done at the state level, such as in Minnesota, due to Minnesota's reporting requirement of emissions from facilities emitting a level between 10,000 and 25,000 tons of gas.<sup>87</sup> It should be noted, however, that this step only calls for a national inventory and does not address goals for greenhouse gas emissions. The lack of such goals necessitates Senate action on a climate bill, such as the action that was proposed in the American Clean Energy and Securities Act of 2009 (ACES) or the Clean Energy Jobs and American Power Act.

Ironically, the case that motivated the EPA to declare greenhouse gases air pollutants was a citizen suit,<sup>88</sup> and recent unsuccessful climate change legislation ended up dropping this important enforcement avenue.<sup>89</sup> While the citizen suit was originally contained within the ACES, the citizen suit was eventually removed as a possible remedy in order to have a better chance at passing in the Senate.<sup>90</sup> Before the citizen suit fell to the wayside, the standing necessary for the citizen suit was to be given through the Clean Air Act.<sup>91</sup> However, it was thought that allowing this provision would result in extensive litigation costs for companies on top of the already high costs they faced in complying with the bill.<sup>92</sup> Typically, the remedy for a citizen suit is enforcement of the violated rule.<sup>93</sup> However the ACES provision allowed not only enforcement, but also up to a \$75,000 damage remedy.<sup>94</sup> Additionally, while the Clean Air Act citizen suit provision requires plaintiffs to have been harmed or to be facing imminent harm,<sup>95</sup> the ACES, version required plaintiffs to only show a reasonable expectation of harm.<sup>96</sup> Historically the requirement of actual injury has been the gate-

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87. See MINN. STAT. ANN. § 216H.021(1)-(2) (West 2010).

88. See generally *Massachusetts*, 549 U.S. 497.

89. See generally American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (1st Sess. 2009) (passed by the House on June 26, 2009 without including a "citizen suits" provision); Lucy Wheatley & Cyrus Frelinghuysen, *Removal of "Citizen Suit" Provisions Eased Passage of ACES*, GLOBAL CLIMATE L. BLOG (June 26, 2009), <http://www.globalclimatelaw.com/2009/06/articles/climate-change-litigation/removal-of-citizen-suit-provisions-eased-passage-of-aces/>.

90. Wheatley & Frelinghuysen, *supra* note 89.

91. See *id.*

92. *Id.*

93. Gil Keteltas & Cyrus Frelinghuysen, *Significance of the Removal of Citizen Suit Provision from ACES*, GLOBAL CLIMATE L. BLOG (July 1, 2009), <http://www.globalclimatelaw.com/2009/07/articles/climate-change-litigation/significance-of-the-removal-of-citizen-suit-provision-from-aces/>.

94. *Id.*

95. *Id.*

96. *Id.*

keeper for citizen suits.<sup>97</sup> Without this requirement, representatives could see nothing else to deter citizens from bringing suit.<sup>98</sup> Thus, the standard for harm would have been substantially less than that under the Clean Air Act.<sup>99</sup> Because of the significant concern of “landslide litigation” from environmental groups, the provision was hacked.<sup>100</sup> Although citizen suits were dropped from recent legislation, citizen suits can still be brought under the Clean Air Act.<sup>101</sup>

Two pending federal appeals cases explore the question of whether public nuisance cases can be brought in an effort to curtail greenhouse gas emissions.<sup>102</sup> In *Connecticut v. American Electric Power Co.*, eight states, three environmental groups, and New York City proceeded against electric utilities, alleging the carbon dioxide emissions from the companies were a public nuisance by contributing to global warming.<sup>103</sup> The case was originally dismissed in 2005 by the U.S. District Court for the Southern District of New York when the court held the claims were a “non-judiciable political question.”<sup>104</sup> However on appeal, the Second Circuit vacated the dismissal and remanded the case, holding that the political nature of the inquiry did not ban it from the court system.<sup>105</sup> The Second Circuit also addressed two other issues, in holding the plaintiffs had made a successful nuisance claim under federal common law and all parties involved had standing.<sup>106</sup> The United States Supreme Court granted certiorari for this case on December 6, 2010.<sup>107</sup> Because all three issues were preserved for appeal, the Supreme Court will have the opportunity to comment on any of the three issues decided by the Second Circuit Court of Appeals, hopefully resulting in some definitive answers.

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97. *See id.* (noting the requirement of showing imminence and actual harm having been a significant hurdle in citizen suits).

98. *See id.*; Wheatley & Frelinghuysen, *supra* note 89.

99. Keteltas & Frelinghuysen, *supra* note 93.

100. Wheatley & Frelinghuysen, *supra* note 89.

101. *See* Kelteltas & Frelinghuysen, *supra* note 93 (stating while suits can still be brought under the Clean Air Act, ACES was broader, had provided a damage remedy, and modified the standing requirement).

102. John H. Stam & Robert C. Cook, *Major Courts: Supreme Court Hears Erosion Control Case; Greenhouse Gas Nuisance Cases Proceeding*, DAILY ENV'T REP., Jan. 21, 2010, at 9.

103. *Connecticut v. American Electric Power Co.*, 582 F.3d 309, 314 (2d Cir. 2009).

104. *Connecticut v. American Electric Power Co.*, 406 F. Supp. 2d 265, 273 (S.D.N.Y. 2005).

105. *American Electric Power Co.*, 582 F.3d at 315.

106. *Id.*

107. *American Electric Power Co. v. Connecticut*, No. 10-174, 2010 U.S. Lexis 9461 (Dec. 6, 2010).

*Comer v. Murphy Oil Co.* is another case in which plaintiffs asserted a theory of nuisance based on global warming.<sup>108</sup> It was denied mandamus following the Supreme Court's grant of certiorari in *American Electric Co.*<sup>109</sup> This case involved Mississippi property owners suing energy companies and the Tennessee Valley Authority for alleged climate change-related damages. The plaintiffs alleged the defendants' emission of greenhouse gases contributed to global warming and added to the ferocity of Hurricane Katrina which harmed their coastal property.<sup>110</sup> The district court dismissed the case, holding that it involved too many political and policy considerations, but the Fifth Circuit panel did reason that, "because there is no commitment of those issues exclusively to the political branches of the federal government by the Constitution itself or by federal statutes or regulations" the questions posed are not political, and can therefore be decided by a court.<sup>111</sup> Due to procedural twists, the appellate decision was dismissed.<sup>112</sup>

The outcome of *American Electric Power Co.* will reflect the judiciary's commitment to address the battle against climate change. Allowing climate change public nuisance suits to be brought (and won) in federal court would be an important step toward holding industries accountable for their actions. However, it should also be noted that a public nuisance suit for the production of greenhouse gases could be in the foreseeable future for the agriculture industry. While power plants and other public utilities are often cast in the role of the antagonist, the public response to a suit against the agricultural sector would likely not be greeted with the same fervor as the two cases previously discussed.

#### IV. CURRENT FEDERAL REGULATION

In response to the Supreme Court decision in *EPA*, holding "greenhouse gases" fall within the definition of "air pollutant" and thus are under EPA's regulation,<sup>113</sup> the EPA formally declared carbon dioxide and the other greenhouse gases to be within their jurisdiction on December 15, 2009.<sup>114</sup> The EPA quickly

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108. See *Comer v. Murphy Oil Co.*, 585 F.3d 855 (5th Cir. 2009).

109. Ilya Shapiro, *Supreme Court Non-Rulings More Important Than Cases it Actually Hears*, CATO@LIBERTY (Jan. 11, 2011, 1:16 PM), <http://www.cato-at-liberty.org/supreme-court-non-rulings-more-important-than-cases-it-actually-hears/>.

110. *Comer*, 585 F.3d at 859.

111. *Id.* at 870.

112. Shapiro, *supra* note 109.

113. *Massachusetts v. EPA*, 549 U.S. 497, 532 (2006).

114. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, 74 Fed. Reg. 66,496, 66,536 (Dec. 15, 2009) (codified at 40 C.F.R. ch. 1) [hereinafter Endangerment and Cause].

laid the regulatory groundwork for greenhouse gas regulation.<sup>115</sup> The declaration of greenhouse gases as air pollutants,<sup>116</sup> and the resulting proposed regulation of them,<sup>117</sup> triggered a necessary reconsideration of the Johnson Memorandum. This Memorandum, written during the Bush Administration, articulated the EPA's position on greenhouse gas regulation under the Clean Air Act.<sup>118</sup> The Agency's view was "regulation adopted by EPA under the Clean Air Act . . . requires actual control of emissions of that pollutant."<sup>119</sup> The reconsideration of this Memorandum was triggered because in May 2010, the EPA issued its Tailpipe Emission Standards, which officially regulated greenhouse gas emissions.<sup>120</sup> These standards were only intended to regulate mobile sources of greenhouse gases,<sup>121</sup> but due to the Johnson Memorandum, the rule inadvertently applied to stationary sources as well.<sup>122</sup> In an attempt to remedy the situation, the EPA enacted a tailoring rule to limit the application of the Johnson Memorandum to only the largest stationary emitters, those emitting more than 25,000 metric tons of carbon dioxide equivalent.<sup>123</sup> This tailoring necessitated more EPA rulemaking, and in December 2010, the EPA issued a rule revoking the state plans of twenty four states that had emission limit thresholds of less than 25,000 metric tons of carbon dioxide equivalent.<sup>124</sup>

## V. PREEMPTION

As thoroughly discussed, Midwestern states have recognized the necessity of climate change legislation and have decided to act on it. Such sweeping state action demonstrates national action is also necessary.<sup>125</sup> With federal legis-

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115. *See id.*

116. *See Massachusetts*, 549 U.S. at 532.

117. *See Endangerment and Cause*, *supra* note 114.

118. *See Memorandum from Stephen L. Johnson, Administrator, EPA, to Regional Administrators 1* (Dec. 18, 2008) (on file with author).

119. *Id.*

120. *See Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600; 49 C.F.R. pts. 531, 533, 536-38) [hereinafter *Light-Duty Vehicle Greenhouse Gas Emission Standards*].

121. *See id.*

122. *See Memorandum from Stephen L. Johnson*, *supra* note 118.

123. *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514, 31,521, 31,567 (June 3, 2010) (codified at 40 C.F.R. pt. 52).

124. *See Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans*, 75 Fed. Reg. 82,536, 82,537-82,539 (Dec. 30, 2010) (codified at 40 C.F.R. pt. 52) [hereinafter *Limitation of Approval of Prevention*].

125. *Andreen*, *supra* note 2, at 265.

lation sure to be introduced in the future, preemption is an issue which must be addressed. Will the current state regulations be incorporated into future legislation or will it be necessary for states to default to the federal provisions? Surely states may want to adopt more stringent requirements than the federal government does, in the interest of trying to preserve the state.<sup>126</sup> As seen by the December 2010 EPA rulemaking, states may not be held to any threshold less than 25,000 metric tons of carbon dioxide equivalent,<sup>127</sup> meaning that if a state desires to additionally reduce its greenhouse gas contribution, it must do so voluntarily and in conjunction with an entity other than the EPA. It is not uncommon for Congress to approach federal regulation with a ceiling preemption, meaning Congress sets the upper limit on regulations and states are not allowed to adopt more stringent standards than those Congress prescribed.<sup>128</sup> This ceiling approach, however, is not the one typically taken with respect to congressional environmental regulations related to stationary sources of pollution.<sup>129</sup> Instead, Congress sets environmental floors for such regulations, meaning the regulations set by the states must be *at least* as stringent as those set by Congress.<sup>130</sup> It should be noted that these state regulations are for stationary sources only, as mobile sources are regulated by the federal government.<sup>131</sup>

The benefit to Midwestern farmers of using floor regulation, as opposed to ceiling, would be that no further adjustments to their practices would be necessary, assuming that the federal regulations are less stringent than any of the current statutes in Iowa, Illinois, Wisconsin, or Minnesota. The floor regulation is an attractive option to Congress because it allows the states to remain as testing grounds.<sup>132</sup> This way, Congress can monitor the progress of states for potential national regulations. In the opinion of University of San Francisco Law Professor Alice Kaswan, a federal floor regulation “could provide the best of all worlds; it takes advantage of the economies of scale of a federal approach, while allowing state experimentation.”<sup>133</sup> The USDA, preparing for a Senate Agricul-

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126. *Id.* at 284.

127. *See* Limitation of Approval of Prevention, *supra* note 124, at 82,539.

128. Andreen, *supra* note 2, at 285.

129. *See id.*

130. *See id.*

131. *See generally* Light-Duty Vehicle Greenhouse Gas Emission Standards, *supra* note 120.

132. Andreen, *supra* note 2, at 297.

133. *Id.* (quoting Alice Kaswan, *A Cooperative Federalism Proposal for Climate Change Legislation: The Value of State Autonomy in a Federal System*, 85 DENV. U. L. REV. 791, 800 (2008)).

tural Committee hearing, advocated either federal pre-emption of state and regional climate change efforts, or a harmonization.<sup>134</sup>

In relation to farmers, adopting a national floor regulatory system would allow for different parts of the country to engage in different regulations, specific to the industries and practices in use in each state.<sup>135</sup> Such personalized regulation could help to mitigate the damage potentially posed by unilateral decision making at the federal level.<sup>136</sup> Examples of potential downfalls of unilateral regulation would be lack of administrative inertia, potential for poor regulatory rules to go unchanged, and inadequate budgetary resources.<sup>137</sup> In an area like climate change legislation, where regulation at the federal level has been so hard to come by, the ability to avoid any future setbacks is key.<sup>138</sup> Allowing the states to serve as laboratories,<sup>139</sup> a main point of the Eleventh Amendment, would preserve the strength of federal legislation.

The patchwork system of regulation currently in operation poses several problems for business;<sup>140</sup> companies with several branches constantly have to change their procedures to make sure they are up to code with different states' enacting legislation. In response, corporations, banks, and others are openly lobbying for national regulation.<sup>141</sup> Congress recognizes the potential difficulties for industry, which is one of the powerful reasons why Representative Ike Skelton of Missouri introduced legislation to repeal EPA's authority under the Clean Air Act to regulate greenhouse gases.<sup>142</sup> Representative Skelton does not want greenhouse gas emission regulations set by "unelected bureaucrats at EPA;" he wants regulations to be set by Congress.<sup>143</sup> While Representative Skelton's urgency for regulation is from his desire to act before the EPA,<sup>144</sup> rather than a desire to create a uniform system for the good of all industry, the fact remains that

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134. See Stephen Clapp, *USDA Sees 'Small, but Significant' Effects on Agriculture from Climate Change Bill*, FOOD & FIBER LETTER 2 (July 27, 2009), available at <http://www.entrepreneur.com/tradejournals/article/205567691.html> [hereinafter *USDA Sees 'Small but Significant' Effects*].

135. See Andreen, *supra* note 2, at 298.

136. *Id.*

137. *Id.*

138. See *id.*

139. See *id.* at 264.

140. See MICHAEL G. LUFKIN, STATES, COURTS DRIVE CLIMATE CHANGE POLICY WHILE FEDERAL GOVERNMENT SITS ON SIDELINES, 2008 EMERGING ISSUES 2998 (Matthew Bender & Co., Inc. eds., Oct. 10, 2008).

141. *Id.*

142. Steven D. Cook, *Climate Change: Skelton, Peterson, Emerson Introduce Bill to Eliminate EPA Greenhouse Gas Authority*, DAILY ENV'T REP., Feb. 4, 2010, at A2.

143. *Id.* (quoting Rep. Skelton).

144. See *id.*

Congress has begun to feel a sense of immediate need for national regulation. Luckily, the reasons behind the sentiment matter little, for it seems likely that the real goal of implementing national regulation grows ever closer.

## VI. OFFSETS

One of the primary elements of ACES was that it set up a system of cap and trade.<sup>145</sup> The trading system would allow carbon credits to be purchased and traded by industries that are producers of greenhouse gases.<sup>146</sup> Under ACES, the agricultural industry would have been exempt from having to purchase credits; however, farmers would be able to sell credits they generate,<sup>147</sup> resulting in added income.<sup>148</sup> This system of cap and trade would be regulated by the EPA.<sup>149</sup> The agricultural sector, lead by the American Farm Bureau Federation, fiercely opposed ACES due to enormous costs that would be imposed.<sup>150</sup> The imposition of such costs would give agricultural companies impetus to relocate overseas in countries without climate change legislation.<sup>151</sup> The House of Representatives noted the marketability of such a system, and such an approach was used in the Senate bill as well.<sup>152</sup> The idea of an offset market that will reward farmers, ranchers, and forest landowners for their efforts in greenhouse gas reduction and sequestration activities seems likely to persuade the public and politicians to pass such legislation.<sup>153</sup> To satisfy farm groups, however, a system would ideally allow for unlimited emissions offsets generated from agriculture and forestry.<sup>154</sup> Several major agricultural groups, including the National Farmers Union, the American Farmland Trust, and the National Corn Growers Association, lobbied

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145. Jason Hancock, *Fallon to Boswell: Do As Al Gore Would Do*, IOWA INDEP., (June 16, 2009), <http://iowaindependent.com/16261/fallon-to-boswell-do-as-al-gore-would-do>; see H.R. 2454, 111th Cong. § 703 (1st Sess. 2009).

146. Hancock, *supra* note 145; see H.R. 2454 § 724.

147. Hancock, *supra* note 145.

148. Steven D. Cook, *Climate Change: Climate Change Bill Presents Opportunity To Increase Farm Income, Economist Says*, NAT'L ENV'T DAILY, Nov. 12, 2009, 2009 WL 3758791 [hereinafter *Climate Change Bill Presents Opportunity*].

149. Hancock, *supra* note 145.

150. Press Release, *supra* note 16.

151. *Id.*

152. See H.R. 2454, 111th Cong. § 788 (1st Sess. 2009); S. 1733, 111th Cong. § 155 (2d Sess. 2010).

153. *Economic Opportunities for Agriculture, Forestry Communities, and Others in Reducing Global Warming Pollution: Hearing Before the S. Comm. on the Env't and Pub. Works*, 111th Cong. (2009) [hereinafter *Economic Opportunities for Agriculture*] (statement of Bill Hohenstein, Director, Global Climate Change Program, USDA).

154. *Farm Groups Seek Greater Participation in Cap-and-Trade Program*, FOOD & FIBER LETTER, June 8, 2009, at 3.

for these unlimited emission offsets and also for regulation by the USDA, rather than the EPA.<sup>155</sup> This offset market will also need to be diverse in the offsets offered. The Clean Energy Jobs and American Power Act provided for offsets through tree planting, changes in tillage, changing the form, timing, and rate of the application of nitrogen fertilizers, and the use of nitrogen inhibitors.<sup>156</sup> Anaerobic digesters, methane reducing feed, and pasture improvements qualified for offsets as well.<sup>157</sup> Providing as many options as possible for offsets allows farmers to maintain the freedom to farm their land as they see fit. Providing only one option for an offset will not meet a warm reception, as it will likely be seen as the government dictating how farmers can farm.

Currently, the more popular offset projects for sequestering carbon include reforestation, conversion of farmland to pasture, and no-till agriculture.<sup>158</sup> Texas A&M University Professor Bruce McCarl predicts that a cap on carbon dioxide emissions could bring in money to farmers in ways other than offsets.<sup>159</sup> He hypothesized that by increasing the price of fossil fuels, farm income would double, since ethanol would turn into a more competitive industry.<sup>160</sup> Also, by increasing fossil fuel prices, the price of food and corn would also increase.<sup>161</sup> University of Tennessee professor, Burton English predicts a future where farmers find it more economical to raise fewer animals in order to reduce emissions.<sup>162</sup> Such a reduction in supply would cause a rise in demand, yielding a higher profit for farmers.<sup>163</sup> English also directs operators of large farms to recognize the potential income to be gained from the installation of manure digesters, which would allow farmers to sell the methane produced as energy.<sup>164</sup>

Congress has recognized the potential for offsets is unlimited;<sup>165</sup> it is likely that before Congress will approve a climate change bill, there will be a list defining exactly which agricultural offsets will qualify for compensation under the bill, as requested by House Agriculture Committee Chairman Colin Peterson for H.R. 2454.<sup>166</sup>

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155. *Id.*

156. *Id.*; S. 1733 § 733; *Economic Opportunities for Agriculture*, *supra* note 153.

157. S. 1733 § 733; *Economic Opportunities for Agriculture*, *supra* note 153.

158. *Climate Change Bill Presents Opportunity*, *supra* note 148.

159. *See id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *See* S. 1733, 111th Cong. § 733 (2d Sess. 2010).

166. *Climate Change Bill Presents Opportunity*, *supra* note 148.

## VII. FINANCIAL BURDEN

Naturally, citizens and politicians are resistant to ideas and legislation that will result in rising costs. Under ACES, the USDA postulated that farm expenses for fuel, oil, and electricity, would increase by approximately 6.4 percent.<sup>167</sup> They also predicted that total farm production expenses could increase by approximately 0.3 percent.<sup>168</sup> These estimates were rough, as they include many assumptions, like that farmers would remove a generous number of acres from crop production, turning those acres to trees.<sup>169</sup> That calculation would be delicate, involving a cost benefit analysis for both the offset side and also from the world food production view.<sup>170</sup> These figures are in contrast to the average that would be seen in the average household.<sup>171</sup> The Congressional Budget Office estimated that the ACES legislation would have meant a daily increase of approximately \$0.44.<sup>172</sup> The EPA, however, calculated that the daily increase would only be between \$0.22 and \$0.30.<sup>173</sup>

The Congressional Budget Office has predicted that emission allowances for the cap-and-trade scheme from ACES will “cost approximately \$15 per metric ton of carbon or carbon dioxide equivalent.”<sup>174</sup> The cost is predicted to increase incrementally to \$26 in 2019 and \$28 in 2020.<sup>175</sup> The increasing prices are meant to effectively wean consumers off of carbon and carbon dioxide.

## VIII. OTHER CONSIDERATIONS

Many different groups align themselves with the agricultural sector. However, they do not always have the same goals with regards to climate change legislation. In addition to the areas that apply universally to the agricultural group, different groups weigh issues, such as the impacts on the cost of food, the availability of food, and thresholds. In a letter to the Senate Environment and

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167. *USDA Sees ‘Small but Significant’ Effects*, *supra* note 134.

168. *Id.*

169. *Id.*

170. *See id.*

171. MEREDITH IRVIN, MEREDITH G. IRVIN ON THE AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009, 2009 EMERGING ISSUES 4097 (Matthew Bender & Co., Inc. eds., Aug. 5, 2009) (citing *EPA Analysis of the American Clean Energy and Security Act of 2009 H.R. 2454 in the 111th Congress*, ENVTL. PROTECTION AGENCY (June 23, 2009), [http://epa.gov/climatechange/economics/pdfs/HR2454\\_Analysis.pdf](http://epa.gov/climatechange/economics/pdfs/HR2454_Analysis.pdf) [hereinafter *EPA Analysis*]).

172. *Id.* (citing CONG. BUDGET OFFICE, THE ESTIMATED COSTS TO HOUSEHOLDS FROM THE CAP-AND-TRADE PROVISIONS OF H.R. 2454 (2009) [hereinafter CONG. BUDGET OFFICE]).

173. *Id.* (citing *EPA Analysis*, *supra* note 171).

174. *Id.* (citing CONG. BUDGET OFFICE, *supra* note 172).

175. *Id.*

Public Works Committee, the National Meat Association, National Turkey Federation, and the National Council of Farmer Cooperatives, among others, wrote that the areas of most concern to them were, “allowances, thresholds, offsets, preemption issues, and trade.”<sup>176</sup>

One major concern for the corn industry is the idea of giving credit to farmers for employing reduced tillage and carbon sequestration.<sup>177</sup> Their concern is that corn growers would be penalized by such a credit, since most farmers who are able to grow their crops under reduced tillage already do so; those that do not, largely cannot.<sup>178</sup> Since credits will not likely be given to farmers currently practicing good stewardship, these farmers will lose out on money that they would have been able to claim had they been practicing poorer farming prior to the enactment of legislation allowing for such a credit.

Another concern for the corn industry, as well as the agricultural community at large, is the idea of forestation.<sup>179</sup> Under ACES, the USDA predicted thirty-six million acres of farmland in the Midwest would be planted with trees due to the incentives for forestation.<sup>180</sup> Needless to say, this is an alarming figure to a Midwestern farmer, and one that will likely not be as high in the legislation that eventually passes the Senate.

The financial aspect of climate change legislation is one of the easiest pieces to attack in order to grow opposition to proposed legislation. Senator Charles Grassley of Iowa repeatedly worries about the costs associated with proposed litigation, despite reassurance from governmental groups that such increased costs will be either negligible or manageable.<sup>181</sup> He has remained pessimistic about the ability of Congress to adopt meaningful legislation and skeptical about the need for any such legislation.<sup>182</sup> Senator Grassley has cautioned his constituents that proposals to limit emissions of certain gases are not without significant costs.<sup>183</sup> He wishes “to weigh *any* environmental benefit against the inevitable costs.”<sup>184</sup> Skepticism about the need for legislation from such a prominent figure in the Midwest is passed on to Senator Grassley’s constituents, people

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176. Stephen Clapp, *Food Trade Associations Urge Caution on Climate Change Legislation*, FOOD CHEMICAL NEWS, Aug. 10, 2009, at 15.

177. Georgina Gustin, *A Few Minutes with the Voice of American Corn Growers*, ST. LOUIS POST-DISPATCH, Dec. 18, 2009, available at 2009 WLNR 2555221.

178. *Id.*

179. *Id.*

180. *Id.*

181. See Telephone Conference with Senator Charles E. Grassley, R-Iowa (Jan. 5, 2010) (transcript available from CQ Transcriptions, LLC).

182. See *id.*

183. Letter from Senator Charles E. Grassley to Author (Jan. 5, 2010) (on file with author).

184. *Id.*

who will be seriously affected by agriculturally related climate change regulation. Instead of figuring out what system of regulation would work best for farmers, there is a denial of necessity to act.

#### IX. RESPONSE

While the agricultural sector may be pounding Congress with their recommendations for future legislation, it seems as though the Congressmen are listening. The Senate Agriculture Committee was working hard to find out the position of the agricultural sector, writing to the USDA requesting an update on a study done during the discussions regarding the ACES bill.<sup>185</sup> Specifically the Senators requested additional information on those areas that are central to the agriculture sector: acreage adjustments, proposed effects of the legislation on agricultural commodity prices, the benefits accruing among methane, agriculture soils, and nitrous oxide and afforestation reductions.<sup>186</sup>

The farming industry has found a fierce ally in Minnesota Representative Colin Peterson, the Chairman of the House Agriculture Committee.<sup>187</sup> He has taken a special interest on behalf of the rural communities and farmers.<sup>188</sup> Central to his stance are indirect land use, agriculture offsets, and renewable biomass definitions.<sup>189</sup> The final ACES bill that passed the House reflected many of the modifications that he had suggested to benefit the farmers and rural communities.<sup>190</sup>

#### X. CONCLUSION

While states have reached the conclusion that climate change legislation needs to be enacted, the federal government still abstains from making such an assertion. Currently, at least thirty-three states have enacted their own greenhouse gas regulations, turning the nation into a veritable patchwork of regulation.<sup>191</sup> While some industries are crying out for uniform regulation, fierce opposition still stands in the way of federal action, demonstrated by the assertions of the current Congressional session. With the importance of the agricultural sector

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185. *Senate Republicans Request Additional Climate Change Briefings from USDA*, ENTREPRENEUR.COM (Aug. 3, 2009), <http://www.entrepreneur.com/tradejournals/article/206174395.html>.

186. *Id.*

187. *See IRVIN, supra* note 171.

188. *See id.*

189. *See id.*

190. *Id.*

191. Andreen, *supra* note 2, at 263.

to the passing of any climate legislation, strict attention to the wants and needs of agriculture must be paid. Adopting the suggestions of the agricultural sector shows Congress' willingness to take the agricultural sector into account. Although neither climate change bill was ultimately passed, the United States government cannot remain silent on this issue forever. Eventual bill passage seems likely, resulting in the United States finally taking a stance on global warming, the first step to correct the damage that has been done.