

## Construction Industry: Carbon Emission Liability: Take Action Now to Avoid Risk

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Laws regulating carbon emissions are being enacted worldwide and at a rapid pace. As laws change, so do the risks of the industries affected by the changing laws and regulations. The construction industry is one of the industries which will need to change and, it will be one of the targets for liability arising from carbon emissions, the changing environment and the resulting injury suffered by property and individuals.

Many of the climate change actions have been prompted by the recommendations made in the United Nations' global warming and greenhouse gas reduction agreement known as the Kyoto Protocol. The Protocol was passed in 2003 and became law in 2006 with countries all over the world becoming members and pledging support. Today, the United States and Australia are the only industrialized countries that are not members. Member states have 36 months, until the end of 2008, to implement the directive in to law and then another three years to create regulations for energy performance certificates. In addition, by April, 2008, the United Kingdom will introduce regulations mandating energy performance certificates for commercial buildings and requiring public buildings to display energy certificates.

While the United States has not yet signed the Kyoto Protocol, in December, 2005 the Governors of seven states signed the Regional Greenhouse Gas Initiative (RGGI), an agreement to implement a mandatory program to limit GHG emissions from power plants in their states. In 2006, California signed into law two seminal global warming laws, Assembly Bill 32 and Senate Bill 1368. These Bills establish comprehensive programs designed to combat greenhouse gases and promote the development of energy-efficient technologies.

Buildings have been cited as one of the main culprits in the emission of carbon. For instance, according to an article published in *Scottish Planning and Environmental Law* in 2007, London's commercial and domestic buildings contribute approximately 73% of the capital's carbon emissions. It has been estimated that in the United States, a similar percent of emission is from the building sector.

Construction industry risk, affecting owners, developers and contractors, will likely be significant and change swiftly due to the rapidly changing laws and public sentiment regarding greenhouse gases. When this occurs, it is generally followed by mass litigation. This has happened in the recent past. For instance, the asbestos litigation of the 1980's happened quickly, with one suit after another being filed across the country for both property damage and bodily injury against manufacturers and contractors. Hazardous waste litigation developed the same way. In the 1980's, there was little concern about companies discharging by-products into the soil or waterways. However, CERCLA was enacted and public awareness increased almost overnight and one class action after another was filed against major companies seeking damages for bodily injury and property damage.

With the change in public sentiment and regulatory matters regarding asbestos and hazardous waste, came a change in the industry risk, and with that change in risk, very real threats to the corporate bottom line. In hindsight, companies should have been sensitive to the change, so that they could have altered their risk portfolios and considered how those risks might be transferred to better prepare for the future. However, little of that occurred and the results of

being unprepared were disastrous to many of these companies. For instance, Hughes Aircraft, Teledyne and Aerojet entered decades of litigation and incurred excessive costs for defense fees and damages that no doubt affected their bottom line. See, *Yslava v. Hughes Aircraft Co.*, 845 F. Supp. 705 (D. Ariz. 1993); *Aerojet-General Corp. v. Transport Indemnity Co.*, 948 P.2d 909 (Cal. 1997). Perhaps the most well known example of being unprepared for the shift in risk is the Johns-Manville Corporation, which filed for bankruptcy under chapter 11 because of the asbestos litigation.

The same risk shifting signs are developing at an alarming rate regarding carbon dioxide gas emissions and their impact on the environment, personal health and property. These emissions have been linked to a number



of natural disasters including the Hurricanes that ripped through the South East and caused billions of dollars in property damage. To avoid the ramifications of asbestos and hazardous litigation, it is time for the construction industry to consider and prepare for this risk.

Owners, developers and contractors should consider the following initial steps:

- Develop a portfolio of assets and consider short and long term plans regarding your asset portfolio.
- Prepare a formal review of your company's risk, the regulatory and litigation possibilities.
- Develop a risk map to address your company's potential risks in the order of import to your company, shareholders and bottom line.
- Consider various risk shifting options, such as insurance or other methods such as captives.
- Stay abreast of the changing laws to enable your company to use products

and techniques that are in line with future building codes and requirements.

- Conduct quarterly reviews of the state of your risk, altering your risk maps and transfer methods if necessary.
- Determine the potential liability and your company's capital reserve for those risks your company may chose not to shift.

Engage a professional to review your insurance contracts to ensure that you have ordinance and other key coverage. For instance, as owners of property, should fire, flood or wind damages occur requiring repair, rest assured that the building ordinances will be changing quickly in the area of climate control. It is likely many new techniques and methods will be required. If you do not have ordinance cover in place, it can easily cost you millions of dollars to repair or rebuild.

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