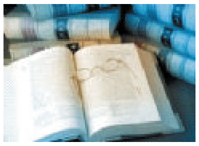
The Climate Report
Fall 2018

JONES DAY

THE CLIMATE REPORT
Fall 2018

Climate Change Regulatory Issues & Updates



Comment Period Ending on EPA's Affordable Clean Energy Proposal
A 60-day public comment period on the Affordable Clean Energy rule to replace the Obama Administration's Clean Power Plan ends on October 30, 2018.
[Details]

Carbon-Free California
On September 10, 2018, California Governor Jerry Brown set California on an ambitious clean energy path with the signing of Senate Bill 100, which requires that by 2045, 100 percent of California's electricity be generated from zero-carbon sources. Governor Brown also signed an executive order establishing a new statewide goal to reduce California's overall emissions to zero by 2045 and then go negative thereafter.
[Details]

Land Use and Forestry to Contribute to Greenhouse Gas Emissions Reduction Under the European Union Framework
On May 30, 2018, the European Parliament and Council adopted Regulation (EU) 2018/841 "on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework." The Regulation does not set any obligation for private parties, but it may ultimately result in stronger obligations for actors in the sector.
[Details]

IN THIS EDITION

EDITORIAL BOARD

REGIONAL CONTACTS

United States: Kevin P. Holewinski

Europe: Françoise S. Labrousse

Asia: Sushma Jobanputra

Australia: John Emmerig

Latin America: Mauricio Llamas

View Our Related Climate Change Publications

Climate Change Litigation Issues & Updates

Ninth Circuit Once Again Upholds a State's Clean Fuel Standards
For the second time in five years, the United States Court of Appeals for the Ninth Circuit has upheld a state's regulatory efforts to reduce greenhouse gas emissions from transportation fuels. On September 7, 2018, a divided Ninth Circuit panel affirmed the United States District Court for the District of Oregon's dismissal of industry groups' lawsuit challenging Oregon's Clean Fuels Program.
[Details]

Environmental Organizations Challenge Rollback of Obama-Era Methane Rule
On September 28, 2018, several environmental groups filed suit, challenging the U.S. Bureau of Land Management's rule rescinding almost all provisions of the Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule.
[Details]

Climate Change Transactional Issues & Updates

Corporate Sustainability Disclosures—Ways to Manage and Reduce Risks

Although sustainable corporate development has been embraced by virtually every public company, it is increasingly the case that a company's sustainability disclosures may expose it to increased litigation or government investigation risks. Corporate management and boards of directors therefore must assess how to balance increased sustainability disclosures with management of corporate risk.
[Details]

The Lost Decade? Leadership Spills and Climate Change Policy in Australia

Australia's national energy and climate change policy has unfortunately stalled once again due to a leadership spill in late August 2018 that led to former Treasurer Scott Morrison replacing Malcolm Turnbull as Prime Minister. What does this mean for the future of the Turnbull government's "National Energy Guarantee" policy?
[Details]

THE CLIMATE REPORT
Fall 2018

Climate Change Regulatory Issues & Updates

Comment Period Ending on EPA's Affordable Clean Energy Proposal

On August 31, 2018, the Environmental Protection Agency ("EPA") proposed the Affordable Clean Energy ("ACE") rule to replace the Obama Administration's Clean Power Plan ("CPP"). Both rules set out guidelines for greenhouse gas emissions from existing electric generating units ("EGUs") based on authority provided by Section 111(d) of the Clean Air Act. The similarities between ACE and CPP end there.

A Jones Day *White Paper* explores, in detail, the new aspects of ACE that are likely to draw significant public comment. Those aspects include, but are not limited to: (i) relying solely on heat rate improvements to achieve reductions, rather than a combination of heat rate improvements, increased gas-fired generation, and increased renewables; (ii) allowing states to select the appropriate reductions for coal-fired EGUs from a menu of available techniques, rather than assigning hard-and-fast limits that each state must achieve for all of its EGU emissions, combined; (iii) proposing rate-based limits (pounds per megawatt-hour), instead of mass-based limits (tons per year), for coal-fired units, thereby making emissions trading less likely as a means of compliance with ACE; (iv) excluding existing gas-fired power plants from regulation under ACE; and (v) making considerable revisions to New Source Review permitting of EGUs to facilitate the energy-efficiency upgrades needed for ACE compliance.

A 60-day public comment period on the ACE proposal ends on October 30, 2018. The next step, once comments are submitted, is to continue engaging EPA during its review of public comments and to think beyond the proposal toward a comprehensive plan for compliance with a final ACE rule.

— Charles T. Wehland (+1.312.269.4388, ctwehland@jonesday.com) and Casey Fernung Bradford (+1.404.581.8119, cbradford@jonesday.com)

Carbon-Free California

On September 10, 2018, California Governor Jerry Brown set California on an ambitious clean energy path with the signing of Senate Bill 100 ("SB 100"), which requires that by 2045, 100 percent of California's electricity be generated from zero-carbon sources. To make this lofty goal even more of a challenge, Governor Brown also signed an executive order establishing a new statewide goal to reduce California's overall emissions to zero by 2045 and then go negative thereafter.

SB 100 makes California the largest economy in the world to commit to generating 100 percent of its power from clean energy. Despite its groundbreaking nature, this bill was the next logical step for California, which has been steadily increasing its renewable portfolio standards ("RPS"), from an initial goal of 20 percent by 2017, to 60 percent by 2030, to this new 100 percent by 2045 target. Unlike prior iterations under the RPS, however, this 100 percent by 2045 target requires only zero-carbon resources rather than specifying renewable sources allowed under California's RPS laws. Accordingly, while hydropower and nuclear power plants did not qualify as renewable energy under the RPS legislation, they likely will qualify under SB 100, given the zero-carbon flexibility beyond 2030. This new bill also leaves open the possibility for other carbon-reducing innovations such as carbon capture and sequestration technology.

SB 100 requires the California Public Utilities Commission, California Energy Commission, and California Air Resources Board, along with other state agencies, to incorporate this policy into all relevant planning. It also requires these entities to prepare a joint report to the California legislature by January 1, 2021, and every four years thereafter. This report will include a review of the 100 percent clean energy policy, including forecasts, resources, barriers, and impacts on reliability. In addition, SB 100 requires that its implementation does not increase carbon emissions elsewhere in the western grid and does not permit resource shuffling, a limitation that effectively prevents California from relying on fossil fuel generation from outside the state to serve the state's electricity needs.

While California currently has its own single state independent system operator, CAISO, many analysts believe the 100 percent goal will be next to impossible to achieve without a wholesale market that includes multiple western states. Indeed, Governor Brown attempted to tie his signing of SB 100 to a partner bill that would have allowed California to join a multistate regional transmission organization through an expansion of CAISO. Proponents of joining a larger regional market believe it will help California meet its 100 percent carbon-free goal by enabling California to access large renewable electricity sources such as wind and at the same time provide California a market to sell its excess solar power. Such flexibility would allow California to meet peak demand in the evening, which is currently satisfied primarily by natural gas.

That said, opponents of joining a larger regional market believe it could result in resource shuffling and encourage the development of coal and natural gas plants in other western states. While Governor Brown ultimately dropped his demand for this partner bill and signed SB 100 without it, whether California is able to achieve its 100 percent carbon-free goal by 2045 without the ability to access a larger regional market remains to be seen, as SB 100 sets California on an ambitious clean energy path that is not without challenges.

— Eric Lauria-Banta (+1.612.217.8875, elauriabanta@jonesday.com)

Land Use and Forestry to Contribute to Greenhouse Gas Emissions Reduction Under the European Union Framework

On May 30, 2018, the European Parliament and Council adopted Regulation (EU) 2018/841 "on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework" ("LULUCF Regulation"). Removals of greenhouse gases from the atmosphere occur as a result of absorption of such gases in forests or other natural environments that act as carbon sinks.

Building on the Paris Agreement, which emphasizes the importance of climate mitigation through land use activities, the LULUCF Regulation supplements the regulatory framework to reduce greenhouse gas emissions. This consists of: (i) the EU Emission Trading System ("ETS"), which covers mainly large-scale industrial facilities and the aviation sector; (ii) the Emission Sharing Decision for non-ETS sectors (e.g., waste, agriculture); and now (iii) the LULUCF Regulation regarding greenhouse gas emissions and removals from land use, land use change, and forestry.

In order to limit deforestation and conserve carbon stocks, the LULUCF Regulation provides that Member States must ensure that emissions do not exceed removals, calculated as the sum of total emissions and total removals on their territories in all of the land accounting categories (so-called "no-debit rule"). There is some flexibility in how Member States comply with the no-debit rule, including but not limited to the ability of Member States to trade their total net removals with other Member States.

The LULUCF Regulation does not set any obligation for private parties, but it may ultimately result in stronger obligations for actors in the LULUCF sector. It also recognizes land use and forestry as acceptable methods of greenhouse gas removal, contrary to the European Union's previous position on this matter.

— Armelle Sandrin-Deforge (+33.1.56.59.39.47, asandrindeforge@jonesday.com) and Pierre Chevillard (+33.1.56.59.38.16, pchevillard@jonesday.com)

[Return to Homepage]

THE CLIMATE REPORT
Fall 2018

Climate Change Litigation Issues & Updates

Ninth Circuit Once Again Upholds a State's Clean Fuel Standards

For the second time in five years, the United States Court of Appeals for the Ninth Circuit has upheld a state's regulatory efforts to reduce greenhouse gas emissions from transportation fuels. On September 7, 2018, a divided Ninth Circuit panel affirmed the United States District Court for the District of Oregon's dismissal of industry groups' lawsuit challenging Oregon's Clean Fuels Program ("Program"). *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903 (9th Cir. 2018).

The Oregon legislature created the Program in 2009, after finding that global warming posed a serious threat to Oregon's economic well-being, public health, natural resources, and environment. The Program is designed to reduce the average amount of greenhouse gas emissions from transportation fuels produced in or imported into Oregon to at least 10 percent lower than 2010 levels by 2025.

Modeled after California's low carbon fuel standards ("LCFS"), the fuel standards are based on the annual average carbon intensity for a given fuel, which reflects all stages of fuel production and use, including feedstock generation or extraction, production, distribution, and combustion of the fuel by the consumer. Producers and importers of transportation fuels comply with the standards by obtaining sufficient credits to offset the deficits they incur. Deficits are generated when the carbon intensity exceeds the fuel standard in a given year, and credits are generated when the carbon intensity is lower than the standard.

In March 2015, several industry groups filed suit in the district court, alleging that the Program violated the Commerce Clause of the U.S. Constitution and was preempted by § 211(c) of the Clean Air Act ("CAA"). Several entities intervened in support of the Program, including conservation organizations, the California Air Resources Board, and the State of Washington. The district court dismissed the lawsuit in September 2015, holding that the Program did not unlawfully discriminate against out-of-state fuel producers and was not preempted by the CAA. The industry groups appealed in February 2016.

On September 7, 2018, a divided Ninth Circuit panel affirmed the district court in rejecting the industry groups' challenge to the Program. Relying significantly on the Ninth Circuit's decision upholding the analogous California LCFS in *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), the majority rejected the industry groups' Commerce Clause and CAA arguments.

With regard to the Commerce Clause, the majority held that: (i) the Program was not facially discriminatory; (ii) the industry groups failed to plausibly allege that the Program was discriminatory in purpose or effect; and (iii) the Program did not legislate extraterritorially. According to the majority, the Program lawfully "discriminates against fuels based on lifecycle greenhouse emissions, not state of origin."

The majority also rejected the industry groups' argument that the Program was preempted, given the U.S. Environmental Protection Agency's ("EPA") decision not to regulate methane under § 211(k) of the CAA. The court held that EPA's decision not to regulate methane under that section was not a finding that regulating methane's contributions to greenhouse gas emissions is unnecessary, and therefore Oregon's regulations were not preempted. Circuit Judge N. Randy Smith dissented, concluding that the Program is facially discriminatory under the Commerce Clause because it incorporates location and distance data into the calculation of carbon-intensity values, which imposes higher costs on out-of-state fuel producers.

As of this publication, it is unclear whether the industry groups will seek further review. But given that the U.S. Supreme Court declined to hear the analogous *Rocky Mountain* case, it is somewhat unlikely that it would take up *American Fuels*. Thus, barring an unforeseen reversal, the *American Fuels* decision solidifies the Ninth Circuit's view on clean fuel standards similar to those enacted by California and Oregon. Although California and Oregon remain the only states with enacted LCFS, similar LCFS legislation is currently under consideration in the Washington legislature.

— Brian L. Greenert (+1.412.394.7220, bgreenert@jonesday.com)

Environmental Organizations Challenge Rollback of Obama-Era Methane Rule

On September 28, 2018, several environmental groups filed suit, challenging the U.S. Bureau of Land Management's ("BLM") rule rescinding ("Rescission Rule") almost all provisions of the Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule ("Waste Prevention Rule"). *Sierra Club v. Zinke*, No. 3:18-cv-5984 (N.D. Cal.).

The Waste Prevention Rule, promulgated by BLM during the Obama Administration, became effective on January 17, 2017. The Waste Prevention Rule aimed to reduce waste and climate change-causing methane emissions by requiring waste-minimization plans, gas-capture percentages, and leak detection and repair, along with other provisions.

The Rescission Rule rescinds numerous requirements of the Waste Prevention Rule, including those pertaining to waste-minimization plans, gas-capture percentages, well drilling, well completion and related operations, and leak detection and repair. The Rescission Rule also includes changes to the amount of methane gas that must be captured on public and tribal land. The Rescission Rule is set to become effective on November 27, 2018.

According to the Trump Administration, the Waste Prevention Rule stepped on state and federal regulations and underestimated the cost for businesses to comply, thereby encumbering energy production, constraining economic growth, and preventing job creation. The Interior Department believes that the Rescission Rule "will eliminate complicated and expensive regulations for companies that operate on federal land."

The environmental groups, on the other hand, argue that the Rescission Rule "unlawfully revokes reasonable protections designed to limit waste of natural gas by oil and gas companies on federal public and Indian lands resulting from venting, flaring (burning gas without capturing its energy), and equipment leaks." They also argue that BLM is focusing on industry profit and disregarding "its legal obligations to protect the public and environment." The complaint questions why BLM's position is now so dramatically changed from 2016.

The environmental groups have requested a declaratory judgment that BLM violated the Administrative Procedure Act, Mineral Leasing Act, Federal Land Policy Management Act, and National Environmental Policy Act, and acted arbitrarily, capriciously, contrary to law, and in excess of statutory authority by issuing the Rescission Rule. The environmental groups ultimately request that the court vacate the Rescission Rule and reinstate the Waste Prevention Rule in its entirety. An initial case management conference is scheduled for January 16, 2019.

— Nicholas M. Faas (+1.412.391.3939, nfaas@jonesday.com)

[Return to Homepage]

THE CLIMATE REPORT
Fall 2018

Climate Change Transactional Issues & Updates

Corporate Sustainability Disclosures—Ways to Manage and Reduce Risks

Although sustainable corporate development has been embraced by virtually every public company, it is increasingly the case that a company's sustainability disclosures may expose it to increased litigation or government investigation risks. Institutional investors, pension funds and endowments, politicians, social activists, academics, the media, and shareholders are all asserting pressure on reporting companies for additional sustainability disclosures, pressure that is unlikely to abate given that millennials are far more likely to be influenced by a company's stance on sustainability issues when making purchasing, employment, and investment decisions. *Sustainable Signals: The Individual Investor Perspective*, Morgan Stanley Institute for Sustainable Investing (Feb. 2015).

Not surprisingly, however, increasing levels of disclosure around sustainability have become fodder for the plaintiffs' bar and active government investigators and prosecutors. The class action plaintiffs' bar, for example, has filed putative securities class actions alleging that sustainability disclosures, generally as part of other disclosures, were misrepresented or omitted material information that caused a stock price drop and related losses. At the federal level, sustainability disclosures may be subject to review by the Securities and Exchange Commission ("SEC"). Thus, companies are faced with increasing pressure to disclose more about their sustainable corporate development, yet then are potentially exposed to increased risk of litigation or investigation as a result of such disclosures. Corporate management and boards of directors therefore must assess how to balance increased sustainability disclosures with management of corporate risk.

First, senior management and the board should understand the company's strategy around current and future sustainability disclosures. The board and senior management should ensure they are in accord with what the company is disclosing about sustainability and also confirm that the statements on sustainability reflected in such disclosures are part of the broader corporate strategy.

Second, sustainability should not be used as a mere marketing tool and should be carefully considered. While it is clear that a sizeable and vocal group of stakeholders desire corporations to play a larger role in the social issues of the day, the loudest voices on these issues (e.g., social media and activists) do not always represent the interests of even a small number of the company's stakeholders. A potential solution is for the company to view sustainability disclosures as an opportunity to be proactive and thoughtful, rather than reactive.

Third, companies should consider bringing sustainability disclosures within their existing controls and compliance processes. This could be achieved by ensuring that sustainability disclosures flow through the disclosure committee controls, even if such disclosures are not made in an SEC filing, or by creating a sustainability disclosure committee that would serve a similar function. It may also mean having the internal audit function consider sustainability disclosures in developing its audit plan and including sustainability elements as part of the corporate risk assessment and compliance program.

Fourth, in making sustainability disclosures, companies should be accurate, complete, and measured, including making appropriate disclaimers where necessary. The pressure to disclose more about sustainability is likely to escalate in the coming years, so companies should take steps now to ensure those disclosures do not inadvertently expose them to greater litigation or regulatory risks.

— David R. Woodcock (+1.214.969.3681, dwoodcock@jonesday.com)

The Lost Decade? Leadership Spills and Climate Change Policy in Australia

Australia's national energy and climate change policy has unfortunately stalled once again due to a leadership spill in late August 2018 that led to former Treasurer Scott Morrison replacing Malcolm Turnbull as Prime Minister. This latest change in leadership follows the ousting of several Australian Prime Ministers by their own parties, including Tony Abbott in 2015, Julia Gillard in 2013, and Kevin Rudd in 2010. Turnbull, like Kevin Rudd and Tony Abbott, was removed from office for reasons that included his climate change policies.

Largely due to rising energy prices across the country, energy policy in Australia has taken center stage politically. In addition, after storm damage caused a statewide power outage in South Australia in 2016, energy reliability has become a key issue.

Originally, the Turnbull government's "National Energy Guarantee" ("NEG") policy sought to address the issues of energy affordability, energy reliability, and emissions reductions in one plan. This was never implemented, however, as it failed to get backing from all of the states.

The NEG also included a proposal that would have enshrined into law Australia's commitment to meet its Paris Agreement targets of reducing its total emissions by 26–28 percent below 2005 levels by 2030, and reaching net zero emissions by 2050. Prime Minister Turnbull eventually scrapped this due to pressure from within his own party in the lead-up to the August leadership spill.

Various Australian business groups have weighed in on the NEG and the decision to scrap the emissions targets from the plan, with many voicing their frustration with the lack of certainty surrounding Australia's energy and climate policy. Jennifer Westacott, CEO of the Business Council of Australia, a lobbying group that had supported the NEG, urged the government and the opposition parties to "work together to deliver a workable and durable energy and climate change policy that will drive investment and improve certainty." *Business Council Statement on the National Energy Guarantee*, Business Council of Australia (Aug. 20, 2018).

While Prime Minister Morrison has signaled a continuation of Turnbull's climate change policies, including confirming Australia's commitment to the Paris Agreement emissions reduction targets, he has stopped short of legislating those emissions reductions into law. Moreover, given that a federal election will be held before the end of 2019, the future direction of Australia's energy and climate change policy is unlikely to become clear until after that election is decided.

— Jim Parker (+61.2.8272.0777, jimparker@jonesday.com)

[Return to Homepage]