JONES DAY

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THE CLIMATE REPORT

DEPARTMENTS

INITIALLY . . .

2009 BROUGHT MUCH ACTIVITY, UNCERTAIN RESULTS

The past year brought far more governmental attention in the U.S. to greenhouse gas emissions, and to the closely related issue of low-carbon energy development, than ever before. In February 2009, Congress passed an economic stimulus bill that allocated tens of billions of dollars to support renewable energy technologies, including smart grid development. By July, the House of Representatives had passed the 1,400-page Waxman-Markey climate change bill, which included both a cap and trade program designed to reduce greenhouse gas emissions by 83 percent over the course of a generation and an extensive range of energy-related programs that would affect energy usage throughout the U.S. economy. The Senate Energy and Public Works Committee passed its own version of cap and trade legislation, the Kerry-Boxer bill, in November.

The incoming Obama administration hit the ground running on climate change as well. In March, U.S. EPA issued a proposed rule requiring thousands of U.S. facilities to begin monitoring and reporting their greenhouse gas emissions, and in April, EPA Administrator Lisa Jackson issued a proposed finding that greenhouse gases from motor vehicles endangered public health and public welfare, a finding that would establish the legal basis for regulating such emissions under the Clean Air Act. By September, before the endangerment finding had even become final, U.S. EPA had issued proposed Clean Air Act regulations covering greenhouse gas emissions from

CARBON MARKET TRANSACTIONS

Dickson Chin, Editor

BROWNFIELDS PROVIDE RENEWABLE ENERGY DEVELOPMENT OPPORTUNITIES

U.S. EPA estimates that there are approximately 490,000 sites and almost 15 million acres of potentially contaminated properties across the country, including Superfund, Resource Conservation and Recovery Act (RCRA) sites, so-called brownfields, and abandoned mine lands. Development of renewable energy facilities at these sites, which generally have limited potential for conventional redevelopment, often presents an economically viable reuse option, because such sites: (i) offer thousands of acres of land with few site owners; (ii) often have critical pre-existing infrastructure, including nearby electric transmission lines and roads; and (iii) are already zoned for commercial development. For example, in recent years solar power systems have been installed on contaminated sites in Colorado, California, and Pennsylvania.

Driving Factors

When contemplating a solar project on contaminated land, an organization should consider key solar market drivers, such as renewable portfolio standards (RPS) and government incentives. An RPS is a state statute that requires a local utility to supply a specified amount of customer load with electricity from eligible renewable resources by a given date. An RPS may also mandate that a certain percentage of the required renewable energy be provided from solar resources, known as a "solar set-aside." A utility can meet the solar set-aside either by producing a certain amount of its electricity from solar resources or by purchasing solar energy or the associated renewable energy certificates (RECs) from a third party.

Additionally, state and local programs often provide rebates, low-cost loans, grants, or tax incentives to reduce the up-front cost of solar installations. Federal programs, such as the 30 percent Investment Tax Credit, also abate the cost of installing new solar capacity.

To leverage these market drivers and incentives, many solar arrays are not purchased outright by the site owner. Rather, they are typically covered by a Solar Power Purchase Agreement (SPPA), where a solar services provider finances, develops, owns, operates, and maintains the solar system, and a host/customer provides a site for the system on its property and agrees to purchase the system's electric output under a long-term contract, typically at a fixed or reduced rate. The solar services provider (or its investors) retains the benefit of all governmental incentives, as well as the right to sell the RECs generated by the system to third parties, such as utilities, to meet RPS requirements.

An SPPA enables the site owner to avoid many of the traditional barriers to solar installation, such as high up-front capital costs, system performance risk, and complex design and permitting processes. In addition, an SPPA that provides the produced power below prevailing utility electric rates can be immediately cash-flow positive for the site owner. However, for the SPPA structure to be feasible for a brownfield site, state laws must require the local utility to interconnect the solar system to the power grid and include favorable "net metering" requirements, so that customers receive credit on their utility bills for their solar generation.

Selected Success Stories

At Nellis Air Force Base northeast of Las Vegas, the U.S. Air Force worked with the Nevada Power Company, SunPower Corp., and MMA Renewable Ventures LLC to develop a solar system on property including a former landfill to provide a quarter of the base's energy needs. The Air Force hired SunPower to construct the system from June to December 2007 using private-sector funds from companies that received federal tax credits for solar power investment. MMA owns and operates the system, and the Air Force purchases electricity under a 20-year contract at a guaranteed fixed rate. The local utility, Nevada Power Company, purchases RECs from MMA to meet the Nevada RPS.

In June 2009, Aerojet-General Corp. and Solar Power, Inc. began development of a six-megawatt solar system on a portion of Aerojet's Sacramento, California corporate campus to help supply energy for the remediation system Aerojet uses to clean up contaminated ground water at the site. During its first year of use, the Aerojet system is expected to offset more than 6,000 tons of carbon dioxide, more than 23 tons of sulfur dioxide, and more than nine tons of nitrogen oxide that

CLIMATE CHANGE LITIGATION

Kevin P. Holewinski, Editor

FIFTH CIRCUIT ALLOWS CLIMATE CHANGE TORT CLAIMS TO PROCEED AGAINST INDUSTRY, WHILE ONE FEDERAL DISTRICT COURT DOES NOT

On October 16, 2009, the U.S. Court of Appeals for the Fifth Circuit joined the Second Circuit in allowing a climate change common-law nuisance case to proceed against emitters of greenhouse gases. In *Comer v. Murphy Oil USA, Inc. et al.*, 585 F.3d 855 (5th Cir. 2009), *rehearing petitions filed* (Nov. 27, 2009), the defendants include more than 33 companies from various industries, including utilities, oil, gas, coal, and chemicals. As discussed in our Fall 2009 edition, the Second Circuit recently allowed such a lawsuit to proceed against a group of utility defendants based on a federal common-law public nuisance theory in *Connecticut v. American Electric Power Co.*, 582 F.3d 309 (2nd Cir. 2009), *rehearing petition filed* (Nov. 5, 2009).

Meanwhile, the U.S. District Court for the Northern District of California dismissed common-law nuisance and other state law claims against those same industry segments in a suit brought by an Alaskan native village in *Native Village of Kivalina v. ExxonMobil Corp., et al.*, No. 08-1138, 2009 WL 3326113 (N.D. Cal. September 30, 2009), *appeal pending*.

(Jones Day is counsel of record for Xcel Energy Inc. in *Connecticut, Comer*, and *Native Village of Kivalina.)*

Comer

In *Comer*, a group of Gulf Coast landowners brought a class action against a group of companies, arguing that the defendants were responsible for greenhouse gas emissions that caused a sea level rise and increased the severity of Hurricane Katrina. The plaintiffs, among other things, asserted nuisance, trespass, and negligence claims. Unlike the plaintiffs in *Connecticut,* the *Comer* plaintiffs sought millions of dollars in damages, not just injunctive relief.

In its decision on October 16, 2009, a three-judge panel of the Fifth Circuit overturned a lower court's dismissal of the case on political question and standing grounds and allowed *Comer* to proceed in the district court. The *Comer* court relied upon the U.S. Supreme Court's decision in *Massachusetts v. EPA* to find that the plaintiffs had adequately alleged that their injuries were caused by a condition—climate change—that was fairly traceable to the defendants' conduct. The court of appeals went on to find that the resolution of the case did not present a political question.

Like the Second Circuit in *Connecticut*, the Fifth Circuit framed the case as a simple tort suit between private plaintiffs, noting that the Second Circuit's reasoning was "fully consistent" with its own. Also like the Second Circuit, the *Comer* court looked to the historic use of nuisance litigation to resolve cross-border air and water pollution cases and found it to be an adequate tool to address alleged climate change-related injuries.

Kivalina

In *Kivalina v. ExxonMobil*, the Native Alaskan town of Kivalina sued a host of major energy companies and electricity providers, arguing that the emissions attributable to their fuels and power plants were contributing to a public nuisance, climate change. The *Kivalina* plaintiffs requested up to $400 million to enable them to relocate their village, which was allegedly threatened by melting sea ice.

In a decision released shortly before the Fifth Circuit's *Comer* decision, the U.S. District Court for the Northern District of California granted the defendants' motion to dismiss, holding that the case presented political questions not suitable for decision by the judicial branch. The court went on to hold that the plaintiffs lacked standing to bring the suit, because they could not show that climate change was fairly traceable to the defendants' conduct. The *Kivalina* court conceded that the Supreme Court had found standing to challenge a climate change-related injury in *Massachusetts v. EPA*, but it distinguished that case on the ground that the plaintiffs in *Massachusetts* asserted a statutory right, rather than one based on the common law.