



# THE CLIMATE REPORT



## U.S. REGULATORY DEVELOPMENTS

Jane K. Murphy, Editor

### ■ CALIFORNIA FINALIZES GREENHOUSE GAS “CAP AND TRADE” REGULATIONS

As expected, the California Air Resources Board (“CARB”) adopted greenhouse gas emission cap and trade [regulations](#) on October 20, 2011, and the California Office of Administrative Law approved the regulations on December 13, 2011. The program is a key component of CARB’s effort to reduce greenhouse gas emissions to 1990 levels by 2020, as required by California’s Global Warming Solutions Act of 2006 (AB 32).

The new regulations set a statewide limit on sources responsible for 85 percent of California’s greenhouse gas emissions. The regulations will cover [360 businesses](#) representing 600 facilities, in two phases: the first, beginning in 2013, will include all major industrial sources along with electric utilities; the second, starting in 2015, will include distributors of transportation fuels, natural gas, and other fuels. To achieve the required reduction in emissions by 2020, CARB will lower the annual statewide cap on greenhouse gas emissions from all covered sources each year (except in 2015, when additional entities enter the program).

Beginning in January 2013, and annually thereafter, covered entities must acquire a sufficient number of “compliance instruments” (emission allowances, offset credits,

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and sector-based offset credits) to account for their greenhouse gas emissions. CARB will give away emission allowances to certain sectors in the first phase of the program, will hold some in an Allowance Price Containment Reserve, and will auction the rest at a minimum price of \$10 per metric ton of carbon dioxide equivalent in 2012. This minimum price will increase five percent per year thereafter, plus an inflation adjustment. A covered entity may also buy offset credits, but only to meet up to 8 percent of its compliance obligation, and only if the offset credits comply with one of four offset protocols approved by CARB. By the end of each compliance period, covered entities must surrender compliance instruments at least equal to their greenhouse gas emissions over that time period.

The first compliance period is from January 1, 2013 until December 31, 2014. Other key deadlines and time periods include:

- Sources must register with CARB by January 31, 2012 if they meet program inclusion thresholds for any year between 2008 and 2011. An entity cannot hold an emission allowance or offset credit until CARB's Executive Officer approves the entity's registration.
- July 15, 2012 is the deadline for an entity to submit an auction registration application for the first emission allowance auction, which will be held on August 15, 2012. On or before November 1, 2012, CARB will place individual emission allowances into the holding accounts of eligible covered entities. The second auction of emission allowances will be held on November 14, 2012.
- The first sale from the Allowance Price Containment Reserve will be held on March 8, 2013.
- The deadline for most covered sources to surrender compliance instruments for carbon dioxide equivalent emitted in calendar year 2013 is November 1, 2014.

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*For additional details on California's cap and trade program, see Jones Day's White Paper entitled "[California Adopts Cap and Trade](#)."*

■ **EPA POINTS TO GREENHOUSE GAS EMISSION REDUCTIONS TO SUPPORT NEW UTILITY STANDARDS**

On December 21, 2011, U.S. EPA [released](#) final Mercury and Air Toxics Standards ("MATS Rule") under Section 112 of the Clean Air Act for emissions of mercury, acid gases, and other "hazardous air pollutants" (or "HAPs") from coal-and oil-fired electric generating units, reflecting what EPA believes is the maximum achievable control technology for regulated HAP emissions from such sources.

EPA believes the MATS Rule can be met by various methods, including the installation of new control technology, fuel switching, and, in some cases, the curtailment or retirement of coal-fired units. Existing units have three years to comply with the new standards, although (as discussed in the following article) the period can be extended up to five years in certain cases.

U.S. EPA estimates that compliance with the MATS Rule will cost \$9.6 billion, with health benefits in the range of \$37 billion to \$90 billion (in 2007 dollars). However, almost all of EPA's estimated benefits (\$36 billion to \$89 billion) are attributable to the rule's coincidental reduction in emissions of fine particles smaller than 2.5 microns in diameter, known as "PM<sub>2.5</sub>," regardless of whether such fine particles contain a HAP. Another \$360 million of EPA's estimated benefits are based on reductions in greenhouse gas emissions caused by the curtailment or retirement of coal-fired units that EPA expects the MATS Rule to produce. EPA believes that lowering such emissions will reduce climate-related costs, such as decreased agricultural productivity and property damage caused by flooding. However, like PM<sub>2.5</sub>, greenhouse gases are not regulated as HAPs under the Act.

This has led some to question the validity of EPA's cost-benefit analysis of the MATS Rule. Notwithstanding the debate over EPA's reliance on PM<sub>2.5</sub> and climate-related "co-benefits," the

imposition of significant new compliance costs on the use of coal-fired electric generating units under a non-climate related program could result in the reduced use or early retirement of these units, an outcome that EPA seems to view as a welcome benefit of additional regulation.

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#### ■ FERC ISSUES WHITE PAPER ON RELIABILITY CONCERNS OVER FINAL MATS RULE

EPA's final MATS Rule, coupled with more stringent regulation of utility cooling water intake structures and greenhouse gas emissions, is [predicted](#) to accelerate the retirement of some existing coal-fired power plants and to lead to the [retrofitting](#) of others. EPA, the Federal Energy Regulatory Commission, investor-owned utilities, and other industry stakeholders are debating whether the retirement of these plants or their removal from service for extended periods for retrofitting could lead to bulk electric system reliability problems and cost increases, and FERC recently solicited comments on a proposal for reviewing such concerns.

The MATS Rule addresses reliability concerns by providing for one-year extensions where, for example, the permitting authority finds, based on information from an RTO or other entities with relevant expertise, that continued operation of a unit slated for retirement is necessary to avoid a serious risk to reliability. In addition, EPA's Office of Enforcement and Compliance Assurance issued a December 16, 2011 [policy statement](#) that provides a pathway for units that are critical for reliability purposes to take up to five years to achieve compliance with MATS. The policy statement provides that within one year after the MATS Rule effective date, an owner/operator should submit written notice of its compliance plans for each of its electric generator units, and should identify those units it plans to deactivate and those it intends to retrofit. To obtain an administrative order providing additional compliance time, the owner/operator would be required to provide a written analysis of the reliability risks if the units in

question were not operational due to deactivation or delays from installing pollution controls.

President Obama issued a [memorandum](#) simultaneously with the MATS Rule to address reliability concerns. Citing Section 112(i)(3)(B) of the Clean Air Act, the memorandum directs EPA to work with state and local permitting authorities to make an additional year broadly available to achieve compliance. The memorandum also notes that Section 113(a) of the Act "provides the EPA with flexibility to bring sources into compliance over the course of an additional year, should unusual circumstances arise that warrant such flexibility." However, it stops short of defining such circumstances or directing EPA to provide a fifth year for compliance. Instead, the memorandum directs EPA to make information concerning any anticipated use of its authority under Sections 112 and 113 of the Act available to the public.

FERC has issued a [white paper](#) on how it plans to treat requests for administrative orders. FERC staff recommend that each administrative order request be filed with FERC as an "informal filing" and that FERC review these filings to assess whether, based on the circumstances presented, there might be a violation of FERC-approved reliability standards. Such a finding would reflect a preliminary view based on the information presented, not a final agency action triggering civil penalties or other enforcement actions. FERC requests comments to its proposal by [February 29, 2012](#).

FERC's action stems in part from a [technical conference](#) held in November 2011 to address reliability concerns generally. At this conference, representatives from [utilities](#), [Regional Transmission Organizations](#), the [North American Electric Reliability Corporation](#), state utility regulators, EPA, and other stakeholders provided comments and testimony on the potential impacts of power plant retirements and retrofitting on the bulk electric system.

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## CLIMATE CHANGE ISSUES FOR MANAGEMENT

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### ■ EPA STEPS UP ENFORCEMENT TO ADDRESS FRAUDULENT ENVIRONMENTAL CREDITS

Recent fraud actions brought under the federal Renewable Fuels Standard, 42 U.S.C. § 7545(o), underscore the importance of exercising care in the purchase of credits and allowances in the marketplace. The enforcement actions address the purchase of Renewable Identification Numbers (“RINs”) used to demonstrate compliance with renewable fuel quota requirements for entities that produce or import gasoline for consumption in the continental United States, including refiners, importers, and blenders. These obligated entities must acquire a sufficient number of RINs to demonstrate compliance with requirements to use a specified amount of renewable fuel in their products. The renewable fuel program was enacted to reduce dependence on foreign sources of petroleum, to diversify the nation’s energy portfolio, and to reduce carbon dioxide emissions that contribute to climate change.

#### **The Enforcement Actions**

In October 2011, the U.S. Attorney for the District of Maryland filed a criminal action under the Clean Air Act, among other statutes, alleging that Clean Green Fuel, LLC, and its owner Rodney Hailey, sold more than 32 million RINs, representing the production of more than 21 million gallons of non-existent fuel, to brokers and major oil companies for upwards of \$9 million. The RINs were often sold and resold, resulting in the purchase and use of the RINs by 24 major oil companies to meet their compliance obligations under the Renewable Fuel Standard.

In addition to enforcement against the entity that sold the RINs, actions have also been initiated against the companies that purchased them. In November 2011, the Environmental Protection Agency issued 24 notices of violation to companies that retired invalid RINs generated by Clean Green Fuel to comply with their renewable fuel obligation. According to EPA, it sent settlement offers in January 2012 to all of the

companies that used the allegedly invalid RINs generated by Clean Green Fuel. EPA takes the position that invalid RINs cannot be used to comply with renewable fuel quotas regardless of the party’s good faith belief that the RINs were valid at the time they were acquired; upon determination that a RIN is invalid, the party must adjust its compliance calculations to reflect deletion of the invalid RIN under 40 C.F.R. § 80.1131(b).

Separately, an application for a seizure warrant was filed with the U.S. District Court for the Northern District of Texas in October 2011 alleging that EPA’s RIN tracking data system showed that Absolute Fuels, LLC, had sold more than 46 million RINs for more than \$40 million between September 10, 2010 and September 30, 2011, even though Absolute Fuels produced no renewable fuel during that period. EPA may issue Notices of Violation to those that purchased those RINs directly or indirectly from Absolute Fuels. EPA issued Absolute Fuels an NOV on February 2, 2012. The NOV alleges the company generated more than 48 million invalid biomass-based diesel RINs without producing any qualifying renewable fuel and transferred the majority of these invalid RINs to others.

#### **Buyer Beware**

Obligated parties can acquire the necessary RINs by producing renewable fuels, or through the purchase of RINs generated by, for example, a refinery that overcomplies with its annual RIN obligation (as was claimed by Clean Green Fuel and Absolute Fuels). EPA has posted a [warning](#) of improper or illegal RIN trading practices. Examples include sellers recalling RINs (purportedly to correct a billing or volume error) and then reissuing different RINs, and sellers transferring RINs to a buyer without the accompanying transfer of renewable fuel. EPA characterizes both practices as a violation. An assigned RIN cannot legally be transferred without simultaneously transferring a volume of renewable fuel to the same party. 40 CFR § 80.1128(a)(3).

The Renewable Fuel Standard is not the only program that authorizes the purchase of credits to meet environmental obligations. An earlier credit program under the Clean Air Act’s New Source Review Program, 42 U.S.C. § 7503, authorizes the purchase of offset credits to cover the air emissions of new sources seeking to locate in nonattainment areas. A more recent program, California’s greenhouse gas cap

and trade program, Title 17, California Code of Regulations, §§ 95970 *et seq.*, involves the use of credits to offset emissions of greenhouse gases. When exercising the option to purchase credits under these and other programs, management must exercise caution to verify that the credits are legitimate. Enforcement, including criminal prosecution, has been brought against entities that create bogus credits, and serious negative ramifications can flow to those that purchase them.

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#### ■ INVESTORS CALL FOR “INVESTMENT-GRADE” CLIMATE POLICY

Leading up to the latest round of United Nations climate negotiations in Durban, a group of 285 investors, collectively managing more than \$20 trillion in assets, issued a “2011 Global Investor Statement on Climate Change,” urging governments and institutional policy makers to take new policy action to stimulate private sector investment in climate change solutions. According to a [press release](#) accompanying the Statement, “[c]urrent levels of investments in low-carbon technology and infrastructure are substantially lower than the \$500 billion per year deemed necessary by the International Energy Agency to hold the increase of global average temperatures below 2 degrees Celsius—the target agreed in Cancun last year.”

A [report](#) entitled “Investment-Grade Climate Change Policy: Financing the Transition to the Low-Carbon Economy,” was released with the Statement. The report emphasizes the importance of investment-grade policy to encourage institutional investors to allocate capital toward climate change solutions, including appropriate governmental incentives to compensate for increased risk and sufficient scale of technology deployment. In addition, the report stresses that long-term policy stability is critical and that retroactive policy changes can significantly damage investor confidence.

The group of investors calls for domestic and international policy action, including:

- Definition by governments of clear short-, medium-, and long-term greenhouse gas emission targets and enforceable legal mechanisms and timelines;
- Lasting financial incentives that favor low-carbon assets;
- Lasting and comprehensive policies that accelerate implementation of energy efficiency, clean energy, and renewable energy;
- A legally binding international climate change treaty;
- Support for the development of the Green Climate Fund and other funds to assist developing countries to address climate change; and
- Increased efforts to reduce deforestation.

Investor support for climate action has more than doubled since 2008, when 150 investors with \$9 trillion in assets under management first [urged](#) government leaders to act on climate change.

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#### ■ MAPLECROFT’S “RISK ATLAS” ASSESSES CLIMATE CHANGE VULNERABILITY

Some of the world’s fastest growing population centers are at the greatest risk from impacts of climate change, according to the latest annual release of the “[Climate Change and Environmental Risk Atlas](#)” by Maplecroft, a UK-based risk analysis and mapping company that [examined](#) climate change risks and adaptive capacity in 193 countries, factoring in population concentration, development, natural resources, agricultural dependency, and conflict.

Thirty countries are rated as “extreme risk” by Maplecroft’s Climate Change Vulnerability Index, with the top 10 being Haiti, Bangladesh, Sierra Leone, Zimbabwe, Madagascar, Cambodia, Mozambique, DR Congo, Malawi, and the Philippines. Since this index [reportedly](#) assesses potential climate impacts down to 25 square kilometers, it also assesses potential impacts on cities and towns. Of the world’s 20 fastest growing cities, six were classified as “extreme risk,” including Calcutta, India; Manila, the Philippines; Jakarta, Indonesia; Addis Ababa, Ethiopia; and Dhaka and Chittagong



in Bangladesh. Cities ranked as “high risk” reportedly include Guangdong, China; Karachi, Pakistan; Lagos, Nigeria; and Mumbai, Delhi, and Chennai in India.

According to Maplecroft, infrastructures that struggle to cope at 2011 levels will face greater difficulties with large population increases in the future. This in turn is projected to make disaster response less effective while climate change impacts may make such disasters more frequent.

**CNN quoted** Dr. Charlie Beldon, a principal environmental analyst at Maplecroft, as saying “[c]ities such as Manila, Jakarta and Calcutta are vital centers of economic growth in key emerging markets, but heat waves, flooding, water shortages and increasingly severe and frequent storm events may well increase as climate change takes hold.” According to Dr. Beldon, such impacts could have far-reaching consequences, not only for local populations, but on businesses, national economies, and the balance sheets of investors around the world.

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■ **INTERMITTENT GENERATORS SHOULD CONSIDER THE RISKS OF ECONOMIC CURTAILMENT WHEN NEGOTIATING PPAs**

In November 2011, the Utility Variable-Generation Integration Group released an updated version of its [summary](#) of energy markets and market rules for wind energy capacity in North America. The key findings of the updated summary are as follows:

- Wind generation facilities are increasingly being allowed to bid into the day-ahead market for energy and, if the marginal unit, to set price; and
- Wind generation is increasingly being factored into the economic dispatch process.

These findings may signal a trend toward requiring, or at least permitting, wind generation facilities (and perhaps other intermittent generation facilities, such as solar) to participate in forward energy markets in which the system operator schedules and dispatches the facilities on the basis of bids submitted to supply energy, with the lowest bidders taking precedence. If such a trend does develop, these facilities will most likely be subject to economic curtailment.

Assume, as is often the case, that a load-serving utility and the facility’s owner have entered into a power purchase agreement (“PPA”) enabling the utility to purchase all of the facility’s output. If the facility is subject to economic curtailment, the terms of the PPA will determine whether the facility’s owner is entitled to compensation for the decrease in revenues and, possibly, associated tax credits or renewable energy credits. Historically, however, economic curtailment was not specifically addressed in such PPAs, particularly in energy markets where the rules did not provide for the economic dispatch of intermittent generation resources at the time the PPAs were negotiated.

PPAs often entitle the buyer to direct the seller/facility owner to curtail the facility’s output where such curtailment is not

mandated by the transmission-system operator for reasons of system reliability, stability, and safety or for similar noneconomic reasons, provided the buyer pays the seller the PPA price for the energy the facility would otherwise have produced and compensates the seller for any related decrease in tax benefits or renewable energy credits. This right to buyer-directed, voluntary curtailment allows the buyer to minimize its losses when it would incur incremental costs by taking delivery, such as transmission congestion surcharges, and when the sum of those costs and the PPA price exceeds the price the buyer can recover.

Conversely, the terms of such PPAs typically do not require the buyer to pay for energy that is not produced, or for decreased tax benefits or renewable energy credits, when the facility is curtailed by order of the transmission-system operator for reasons of system reliability, safety, and stability or for similar noneconomic reasons.

Economic curtailment may occur in energy markets whose rules allow the transmission-system operator to:

- Administer a forward market for energy (such as a day-ahead market);
- Use locational marginal prices (“LMPs”) for energy in the forward market as price signals reflecting electricity supply and demand at multiple locations on the transmission system; and
- Use the forward market and market-determined prices to schedule and dispatch generation facilities, on the basis of the lowest prices to supply energy bid into the forward market.

If market rules require (or permit) wind or solar generation facilities to participate in such a forward market, and if the facility’s output is contracted to be sold under a PPA, the PPA buyer typically acts as the scheduling coordinator for the facility’s output in the forward market. In this capacity, it must (or may choose to) bid a minimum price at which the PPA buyer/scheduling coordinator is willing to sell the facility’s output into the forward market at a particular location in a given hour.

If the LMP at that location and hour is significantly below the PPA price (reflecting a significant oversupply of electricity) or is even negative (in effect, a congestion surcharge on energy

delivered at that hour and location, intended to prevent congestion by discouraging overproduction), the PPA buyer/scheduling coordinator might choose to bid a minimum price into the forward market that, for example, is equal to the PPA price. If other generators bid lower prices for a sufficient quantity of output to serve the load at that location and hour, the system operator would schedule and dispatch the output of those other generators rather than the output of the wind or solar facility.

A system operator’s decision not to schedule and dispatch a facility’s output (or to schedule and dispatch less than the facility is capable of producing), based on its bid into the forward market, essentially constitutes economic curtailment directed by the system operator. In that respect, it arguably resembles curtailment mandated by the system operator for reasons of system reliability, safety, and stability or for similar noneconomic reasons. Under this view, if the parties to an existing PPA did not address the possibility of economic curtailment, including whether and how the seller would be compensated for the resulting decrease in its revenues and possible tax benefits and renewable energy credits, the seller may not be entitled to any such compensation. Accordingly, given the trend toward increased economic dispatch of intermittent generation, even in markets where economic curtailment does not yet apply, parties negotiating PPAs should recognize that it may apply in the future and thus should address whether and how the seller will be compensated under such circumstances.

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## ■ FERC ORDER NO. 1000 COULD PROFOUNDLY AFFECT RENEWABLE ENERGY DEVELOPMENT

The Federal Energy Regulatory Commission’s Order No. 1000, which became effective on October 11, 2011, just may be “the most progressive clean energy action the federal government will take this year,” according to Richard Caperton of the Center for American Progress. Order No. 1000 imposes sweeping new requirements on transmission providers relating to the planning of new electric transmission facilities on

a regional and interregional basis. Among other things, FERC now requires transmission providers to consider state and federal public-policy requirements in their regional transmission planning processes and to develop cost-allocation methodologies for all projects selected in these processes. Accordingly, Order No. 1000 has the potential to play a critical role in the development of the electric transmission grid, particularly with respect to the integration of renewable energy resources, state and federal renewable energy goals, energy efficiency, demand response, and distributed generation policies.

Order No. 1000 requires all transmission providers to participate in a transparent and inclusive regional planning process that evaluates transmission alternatives and produces a regional transmission plan. Through this process, transmission providers are obligated to evaluate transmission solutions that could meet the region's transmission needs more efficiently than the projects proposed by any single transmission provider. Notably, in a departure from prior rules, transmission providers are obligated under Order No. 1000 to consider and facilitate the impacts of existing public policies, such as state renewable portfolio standards, state and federal energy-efficiency mandates, and U.S. EPA's air regulations, in devising their regional plans. Order No. 1000 also requires interregional planning by requiring neighboring transmission planning regions to determine whether a more efficient solution to mutual transmission needs can be achieved through coordination.

In addition, under Order No. 1000, it is no longer permissible for an incumbent utility to be the default sponsor and developer of new transmission infrastructure projects. Instead, transmission projects proposed by incumbent utilities are to be considered alongside any and all alternative transmission projects proposed by other entities through the regional planning process. Moreover, even when the incumbent utility's proposed transmission project is selected, the utility will no longer be the automatic choice for project developer—that role too is to be assigned through a broadly inclusive regional selection process, leaving the door open for independent developers.

Because transmission infrastructure is critical to developing renewable energy projects, the impact of Order No. 1000

is likely to be greatest on the renewable energy industry. The majority of renewable energy sources are location-constrained. That is, wind farms must be built where the wind blows, and solar projects must be constructed where the sun shines. The problem, however, is that these sites are often located far from existing transmission facilities and therefore require the construction of new transmission infrastructure to connect to the grid and deliver power to consumers.

If transmission providers do not plan transmission projects to meet the growing demand for renewable energy on a regional basis, the result may well be transmission “solutions” that are no solutions at all, due to inefficiency and greater costs to both the environment and renewable energy developers. That is precisely why Order No. 1000 is so critical to renewable energy development—it is designed to force transmission providers to plan transmission projects on a regional and interregional basis and to attempt to facilitate public policies favoring renewable energy development in their transmission planning.

Whether Order No. 1000 will achieve its intended result remains to be seen. Effective cost-allocation methodologies and state participation will be critical to this goal. States must work with regional transmission providers to ensure that their public-policy requirements are effectively considered in the transmission providers' planning process, and cost allocation must also be considered on a regional and interregional basis as part of that process.

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## ■ CLIMATE CHANGE “PUBLIC TRUST” LAWSUIT TRANSFERRED TO D.C. FEDERAL COURT

After remaining inactive for several months, there have been a number of significant developments in the federal lawsuit filed by advocacy groups in the name of minor children against a number of states and the federal government, *Alec L. v. Lisa Jackson et al.*, C.A No. 11-2203 EMC (N.D. Ca.). In that suit, plaintiffs claim that defendants, among other things, breached their fiduciary duty under the “public trust doctrine” by not regulating greenhouse gas emissions.

First, on September 28, 2011, plaintiffs filed a motion for issuance of a preliminary injunction, asking the district court to order defendants to submit a climate recovery plan by March 12, 2012, so reductions in greenhouse gas emissions could begin in January 2013. Plaintiffs argued that such an injunction is necessary because: (1) they have suffered irreparable harm from global warming in the form of direct health effects, damage to the natural ecosystem where they live, and psychological impacts from extreme weather events; (2) immediate emission reductions are needed to prevent permanent and devastating impacts; (3) the injunction is in the public interest; and (4) the balance of harm weighs in favor of granting the injunction.

Second, on October 31, 2011, the National Association of Manufacturers (“NAM”) moved to intervene in the litigation, arguing that NAM should be allowed to intervene because: (1) its motion was timely; (2) it has protectable interests affected by the suit, namely that the economic upheaval that will result from a cap on greenhouse gas emissions will deprive NAM members of their investments without any public input; (3) a disposition in this case will impair NAM’s ability to protect these interests because the relief does not incorporate any means for NAM or other members of the public to provide input on the requested climate recovery plan; and (4) it is not adequately represented by the governmental defendants because their focus is on the broader public

interest, not on the narrow interest of certain businesses, and because NAM’s prior challenges to governmental greenhouse gas regulations demonstrate that the interests of NAM and defendants are not aligned.

Defendants and NAM also filed separate motions to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted on October 31, 2011. Both motions argued that the case should be dismissed because: (1) the federal government has not waived sovereign immunity; (2) plaintiffs lack prudential standing because their complaints are more properly addressed to other branches of the federal government; (3) plaintiffs lack Article III standing because the court cannot redress their alleged injury; (4) no federal “public trust doctrine” exists, and even if one does, plaintiffs’ claims do not fall within its bounds; and (5) plaintiffs have no valid federal law claim because any such claim has been displaced by the Clean Air Act.

Third, on November 4, 2011, defendants filed, and NAM supported, a motion to transfer the case to the U.S. District Court for the District of Columbia. Defendants argued that the case should be heard in the District of Columbia because: (1) defendants and the agencies they represent are in the District of Columbia, while only some of the plaintiffs reside in the Northern District of California; (2) the District of Columbia has a stronger local interest than any other district when adjudicating agency actions, especially ones of global scope like those involving climate change; (3) the District of Columbia courts are less congested; and (4) transfer would serve the interests of justice because the case involves federal agencies headquartered in Washington, D.C.

Fourth, on November 14, 2011, Dr. James Hansen, Director of the NASA Goddard Institute for Space Studies, moved for leave to file an amicus curiae brief in support of the plaintiffs’ position. In his brief, Dr. Hansen argued that action by the federal district court is necessary because the President has not used his authority to act against climate change and any delay vastly increases the eventual impact of climate change. Dr. Hansen also argued that the relief sought by the plaintiffs is consistent with the scientific understanding of what is minimally needed to avoid a dangerous climate change.

On December 6, 2011, the district court granted defendants' motion to transfer the case to the District of Columbia, because: (1) the operative facts did not occur in the Northern District of California, but likely occurred in the District of Columbia; (2) plaintiffs are not all located in the Northern District of California; (3) the majority of the parties reside in or have a connection to the District of Columbia; (4) the witnesses are located all over the country; (5) the relevant evidence is likely located in the District of Columbia where the agencies are located; (6) the District of Columbia has the strongest interest, because it is where the relevant government policies arose; and (7) the court has not ruled yet on any of the other pending motions.

The transferred case has been assigned to Judge Robert L. Wilkins of the U.S. District Court for the District of Columbia and docketed under case number 1:11-cv-02235-RLW.

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■ **COMER II: IS "IF AT FIRST YOU DON'T SUCCEED, TRY, TRY AGAIN" A VALID LEGAL STRATEGY?**

*Comer, et al. v. Murphy Oil USA, et al.*, No. 1:11-cv-00220 (S.D. Miss.) ("*Comer II*"), is a class-action complaint brought by Mississippi residents that is nearly identical to another action, *Comer, et al. v. Murphy Oil USA, et al.*, No. 1:05-cv-00436-LG-RHW ("*Comer I*"), previously dismissed by the federal courts. In the *Comer II* complaint, as in the original action, plaintiffs allege that selected companies should be held liable in tort for contributing to the worldwide phenomenon of global warming, which purportedly contributed to strengthening Hurricane Katrina and, in turn, damaged plaintiffs' property.

*Comer I* was dismissed by the U.S. District Court for the Southern District of Mississippi in 2007 on standing and political question grounds and, thereafter, plaintiffs' appeal was dismissed by the U.S. Court of Appeals for the Fifth Circuit. 607 F.3d 1049 (5th Cir. 2010). Plaintiffs' subsequent petition for

a writ of mandamus was denied by the U.S. Supreme Court. *In re Comer*, U.S. No. 10-294 (Jan. 10, 2011).

In an October 14, 2011 omnibus motion to dismiss, defendants argue that by ignoring the district court's prior judgment, the Fifth Circuit's dismissal, and the Supreme Court's order denying relief, plaintiffs have attempted simply to pick up where they left off when *Comer I* was dismissed. Defendants contend that plaintiffs' renewed lawsuit is patently defective and should be dismissed with prejudice for multiple reasons, including: (1) under the terms of the *Comer I* judgment, the suit is barred by principles of res judicata and collateral estoppel; (2) plaintiffs lack Article III standing, and their claims raise nonjusticiable political questions; (3) the suit is barred by the statute of limitations; (4) plaintiffs cannot establish that any supposedly tortious emissions of defendants proximately caused plaintiffs' hurricane-based injuries; (5) plaintiffs' claims are impermissibly predicated on a supposed duty to the world at large, rather than a more circumscribed duty to specific persons, or groups of persons; and (6) plaintiffs' attempt to invoke federal common law is directly contrary to the Supreme Court's recent holding in *Connecticut v. AEP*, 131 S.Ct. \_\_\_\_\_, 2537 (2010), that such claims have been displaced by the Clean Air Act; and (7) plaintiffs' reliance on state law fares no better, because any such claims have been preempted by federal law.

On December 9, 2011, plaintiffs filed their opposition, arguing that defendants' motion should be denied, but not specifically addressing a number of defendants' arguments. Instead, plaintiffs principally argue that their claims should not be dismissed on statute of limitations grounds because Mississippi law allows the refiling of the action within one year after the Fifth Circuit's dismissal of their appeal, and that dismissal is otherwise inappropriate because: (1) the Supreme Court's decisions in *Massachusetts v. EPA*, 549 U.S. 497 (2007), and *Connecticut v. AEP* refute defendants' proximate causation arguments; (2) they have standing to bring an action for damages because they have suffered injury in fact, and such injuries are traceable to defendants' emissions; and (3) the Clean Air Act does not displace their federal common law claim nor preempt their state law claims.

Defendants' reply brief in support of dismissal was filed on January 20, 2012.

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#### ■ UNITED NATIONS'S CLIMATE CHANGE CONFERENCE IN DURBAN MAKES INCREMENTAL PROGRESS

The 17th Conference of the Parties (“COP-17”) to the United Nations Framework Convention on Climate Change (“UNFCC”) concluded in Durban, South Africa on December 11, 2011 after a 36-hour extension to the negotiations. While some observers were **disappointed** with the lack of detail and extended timing of some of the final compromises, COP-17 advanced several key initiatives from the **1997 Kyoto Protocol**, **2009 Copenhagen Accord**, and **2010 Cancun Agreement**.

First, COP-17 established an Ad Hoc Working Group on **Durban Platform for Enhanced Mitigation** to develop “a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties” to reduce greenhouse gas emissions. The third option—“an agreed outcome with legal force”—was added after intense late-breaking negotiations, and some **speculate** that the language could result in a final agreement that would be weaker than a protocol or other legal instrument.

In a break from the traditional divide between developed and developing countries over the extent to which the latter should be forced to limit their emissions, the Platform calls for “the widest possible cooperation by all countries and their participation in an effective and appropriate international response.” The Platform expresses concern over the significant gap between emissions reduction pledges to date and the degree of reduction the UNFCC believes is necessary. It also reconfirms the long-term goal of holding the increase in global average temperature to below 2 degrees Celsius or 1.5 degrees Celsius above pre-industrial levels.

Second, the parties at Durbin **agreed** that the 1997 Kyoto Protocol, set to expire in 2012, will continue into a second commitment period beginning January 1, 2013. Under the agreement, parties to this second commitment will turn economy-wide targets into quantified emission limitation

or reduction objectives and submit them for review by a UNFCCC working group by May 1, 2012. In a setback for proponents, however, Canada, Russia, and Japan, three of the larger nations that joined the Kyoto Protocol, **declined** to join the second commitment, arguing that because the Protocol does not cover heavy emitters such as China and India, it now addresses only about 15 percent to 20 percent of the world's emissions.

Finally, COP-17 established implementation instruments and revisions for the 2009 Cancun Agreement, the most significant being **approval** of the governing instrument for that Agreement's Green Climate Fund. A Green Climate Fund Board now is tasked with making the fund operational as quickly as possible. The Board must establish a "transparent no-objection procedure to be conducted through national designated authorities" for fund approvals that are consistent with national climate strategies and plans and "a country driven approach." The Board must also "provide for effective direct and indirect public and private sector financing by the Green Climate Fund."

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■ **AUSTRALIAN SENATE APPROVES CARBON PRICING SCHEME**

The Carbon Pricing Scheme, to be implemented in Australia via the Clean Energy Bill 2011 (Cth) and 12 additional pieces of supporting legislation, was passed into law by the Australian Senate on November 8, 2011 and received Royal Assent. The scheme will operate like an emissions trading scheme with a fixed carbon permit price that transitions into a cap and trade scheme after three years. It consists of two phases—a fixed-price phase commencing July 1, 2012, followed by a floating-price phase commencing automatically on July 1, 2015.

The scheme will cover the emission of four of the six Kyoto Protocol greenhouse gases (carbon dioxide, methane, nitrous

oxide, and perfluorocarbons), from stationary energy (*e.g.*, electricity generation), industrial processing (*e.g.*, aluminum smelting), fugitive emissions (except from decommissioned coal mines), and emissions from landfill waste and waste water treatment (except for emissions from legacy waste). Natural gas retailers will be liable for the greenhouse gas emissions embodied in the gas that they supply. Transport fuels will be excluded from the carbon pricing scheme, as will emissions from the agricultural and land sectors, including fisheries and forestry.

An entity will be liable under the carbon pricing scheme if it has operational control of a facility that emits more than 25,000 tons of carbon dioxide equivalent ("tCO<sub>2</sub>-e") per year. Facilities such as coal mines, power stations, smelters, and natural gas processing plants will be affected. A liable entity may be able to transfer that liability to another member of its corporate group or to an entity outside its corporate group that has financial control over that facility.

In the fixed-price phase of the scheme, the carbon price will commence at \$23/tCO<sub>2</sub>-e emissions, indexed annually at a real rate of 2.5 percent per year. In the floating price phase, an annual cap on the number of carbon permits will be issued in each year, and the price of those permits will be determined by the market forces of supply and demand. However, for the first three years of this phase, there will be a carbon permit floor price of \$15/tCO<sub>2</sub>-e (increasing by 4 percent per year in real terms) and a carbon permit ceiling price of \$20 above the expected international price (increasing by 5 percent per year in real terms). This price collar is intended to minimize any price volatility that may occur upon the switch to the full market trading of carbon permits in this phase.

A liable entity in a financial year must, by February 1 of the next year, acquire and surrender eligible emissions units equal to the person's covered greenhouse gas emissions for the year. An entity may satisfy its carbon liability either by surrendering the requisite number of eligible emissions units or by paying a unit shortfall charge (if inadequate emissions units are available) in cash. An entity's carbon liability for the year is calculated with reference to the applicable carbon price at the time and the emissions exceeding the threshold value.

The legislation also allows for emissions-intensive, trade-exposed industries and coal-fired power generators to receive assistance to offset their carbon liabilities, by way of free carbon units.

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## ■ FRANCE OUTLAWS “FRACKING”

In response to public and parliamentary concern regarding the potential environmental impacts of hydraulic fracturing (“fracking”), the French government has outlawed this technique, the only currently known means of extracting shale gas and oils. On July 13, 2011, France enacted Law No. 2011-835, which authorizes the government to abrogate exploration permits issued to oil companies using unconventional techniques. A special procedure instituted by the new statute affords permit holders the option of filing a report with the government outlining the techniques used or contemplated for use, so that the authorities may determine whether abrogation is warranted under the circumstances. In the absence of such a report within the timeframe afforded by the statute (two months), or where reference in the report is made to use of hydraulic fracturing, the law provides for the abrogation of the permits.

In October 2011, an American and a French company had their exploration permits abrogated under the new law. The French company has recently announced its intent to litigate and seek judicial review of this abrogation, since its report did not express an intent to use hydraulic fracturing, but rather made reference to continued research and development to identify alternative techniques, an assertion the French authorities considered questionable.

The new prohibition is based on the precautionary principle of the Environmental Charter appended to the French Constitution and on the preventive action principle of

Article L. 110-1 of the French Environmental Code. These, however, could be insufficient grounds, for at least two reasons.

First, the precautionary principle calls for “temporary and proportionate” measures toward the prevention of a “severe and irreversible” harm to the environment. The legal question for debate is whether a blanket ban that does not afford operators an opportunity to make their case for a clean and sustainable use of hydraulic fracturing on a case-by-case basis is a “proportionate” measure.

A second issue is whether deprived operators are entitled to seek indemnification, which neither the law nor parliamentary papers exclude. Under strict conditions, indemnification is warranted when a law causes harm that is unintended and is, in fact, a collateral consequence of that law. Such a demonstration would be difficult to make in this case, as it was foreseeable that the new law would harm the holders of otherwise valid permits.

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