




U.S. REGULATORY DEVELOPMENTS
Jane K. Murphy, Editor

■ **EPA ISSUES EMISSIONS RULE FOR HYDRAULICALLY FRACTURED NATURAL GAS WELLS**

Natural gas exploration and drilling has greatly increased over the past several years. One reason for this boom has been the development of new drilling techniques using hydraulic fracturing, or “fracking,” to extract gas from shale beds that were formerly not economical to develop. New fracking wells in Pennsylvania, Ohio, West Virginia, Texas, Wyoming, North Dakota, and other states have led to calls for increased regulation by the federal government.

On April 17, 2012, the U.S. Environmental Protection Agency responded with new air emission regulations for the oil and gas industry under the Clean Air Act. Most notably, one of these new regulations governs air emissions from natural gas fracking wells, including emissions of greenhouse gases. Air emissions from natural gas wells were not previously subject to federal regulation.

The new regulations set “new source performance standards” under the Act for hydraulically fractured wells, which EPA claims will reduce harmful emissions from such wells by 95 percent. The primary requirement is for hydraulically fractured

DEPARTMENTS	
U.S. Regulatory Developments	1
Climate Change Issues for Management	4
Renewable Energy and Carbon Markets	6
Climate Change Litigation	9
Climate Change Regulation Beyond the U.S.	11

natural gas wells to incorporate “reduced emissions completion” or “green completion” to capture excess gas that is currently released into the atmosphere or burned off through flaring when the well is fractured. Green completion allows this excess gas to be recaptured and sold at market rather than being lost into the atmosphere. Wildcat (exploratory) wells, delineation wells, and low-pressure wells are exempt from the requirement for green completion.

EPA estimates that the net benefit of selling this gas will completely offset the cost of regulation to the industry, and in fact will yield a net savings to the industry of \$11 million to \$19 million per year once the rule is fully implemented. EPA also estimates that the new requirements will reduce annual volatile organic compound emissions by 190,000 to 290,000 short tons, hazardous air pollutant emissions by 12,000 to 20,000 tons, and methane emissions by 1.0 million to 1.7 million tons (equivalent to 19 million to 33 million tons of carbon dioxide).

Reduced emissions completions are already occurring in several areas around the U.S. They are required by state law in Wyoming and Colorado and by local law in Fort Worth and Southlake, Texas. However, industry impressed upon EPA that there are only about 300 of the required green completion devices currently available for use. In an open letter to EPA just days before the new rule was published, the American Petroleum Institute estimated that to meet current production levels, the industry would need approximately 1,000 such devices to comply with the rule. EPA acknowledged this limitation and delayed the green completion requirement until January 1, 2015 to provide additional time to build and deploy additional units.

In addition to the green completion requirement, the new regulation establishes new source performance standards for other oil and gas operations, including reciprocating and centrifugal compressors, pneumatic controllers, and storage vessels. The rule also establishes new National Emissions Standards for Hazardous Air Pollutants for gas transmission and storage facilities along with oil and gas production facilities.

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■ EPA PROPOSES GREENHOUSE GAS LIMITS FOR NEW ELECTRIC GENERATING UNITS

The U.S. Environmental Protection Agency proposed the first greenhouse gas emission limits applicable to new electric generating units, or “EGUs,” on March 27, 2012. The proposal—described by EPA as a “Carbon Pollution Standard”—would effectively prohibit the construction of most new coal-fired generating units, unless they utilize carbon capture and storage either upon construction or no later than the 11th year following construction.

The proposed rule is in the form of a “new source performance standard” under the Clean Air Act that applies to EGUs with a base load rating of more than 73 megawatts that commence construction after April 13, 2012. Certain municipal waste combustor units, solid waste incineration units, biomass-fired units, and units in noncontinental portions of the U.S. are exempt. In addition, “transitional sources” that received Prevention of Significant Deterioration permits prior to April 13, 2012 (the date the proposed rule was formally published in the Federal Register) and start construction within the next 12 months would also be exempt from the standards. EPA estimates that there are about 15 projects that will qualify as transitional sources.

The emission standard in the proposed rule is 1,000 pounds of carbon dioxide (“CO₂”) per gross output in megawatt-hours (“MWh”) on a 12-operating-month annual average basis. Alternatively, an EGU that uses coal or petroleum coke for fuel and is designed to allow for the future installation of carbon capture and storage may emit up to 1,800 lbs/MWh of CO₂ on a 12-month annual average basis for the first 10 years

of operation, but no more than 600 lbs/MWh of CO₂ on a 12-month annual average basis for the next 20 years. EPA estimates that the average emission rate from a coal-fired EGU is 2,249 lbs/MWh of CO₂.

EPA based the new emission limit for new EGUs on the performance of natural gas combined cycle units, which EPA believes will likely be the predominant fossil-fuel-fired technology for new EGUs, based on economic factors such as the significantly lower price of natural gas and energy industry modeling forecasts. The 1,800 lbs/MWh limit can be met, EPA claims, if a new EGU uses supercritical steam. EPA recognizes that carbon capture and storage (“CCS”) technology is currently very expensive but predicts that the technology will become less costly in the future. The proposed rule does not, however, contain any proposals to modify or streamline the permitting burdens associated with CCS.

Although the proposed rule does not apply to existing or reconstructed units, EPA has requested comment on how greenhouse gas emission limits should apply to such units. Criticisms of the proposed rule include assertions that it is based on faulty predictions regarding both the price of natural gas (making natural-gas-fired EGUs economically attractive) and the development of technologically and economically viable CCS options.

EPA will accept comments on the proposed rule until June 12, 2012.

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■ EPA PROPOSES THIRD PHASE OF GREENHOUSE GAS “TAILORING RULE”

On March 8, 2012, the U.S. Environmental Protection Agency announced a proposed rule representing the final phase of the Agency’s three-phase “Tailoring Rule” approach to regulating greenhouse gas emissions from new and modified stationary sources under the Clean Air Act. EPA’s proposal declines to extend regulation of greenhouse gas emissions

to smaller sources and seeks to streamline permitting for sources that are already regulated.

The EPA previously laid out the first and second phases of the Tailoring Rule, with “Phase 1” taking effect in January 2011 and “Phase 2” taking effect in July 2011. During the first two phases, EPA established greenhouse gas emission thresholds, above which permits are required for new stationary sources and major modifications to existing stationary sources under the major source permitting requirements of the Clean Air Act’s Prevention of Significant Deterioration (“PSD”) and Title V operating permit programs. These thresholds were designed to limit regulation of greenhouse gas emissions to only the largest emitters.

In Phase 3, EPA considered whether smaller sources of greenhouse gases should be regulated and ultimately determined that such sources should not be regulated because state air permitting capabilities “have not improved to the extent necessary for additional sources to be brought into the system.” If finalized as proposed, the Tailoring Rule would continue to apply to only the following categories of large greenhouse gas emitters:

- New and existing facilities with potential carbon dioxide equivalent (“CO₂e”) emissions above 100,000 tons per year (and potential greenhouse gas emissions of at least 100 tons per year on a mass basis) would be required to obtain Title V operating permits;
- New facilities with potential CO₂e emissions of 100,000 tons per year or more (and 100 or 250 tons per year of potential greenhouse gas emissions on a mass basis, depending on the source) would be required to obtain preconstruction PSD permits;
- Existing facilities with potential CO₂e emissions of 100,000 tons per year or more (and 100 or 250 tons per year of potential greenhouse gas emission on a mass basis, depending on the source) that make changes that increase their potential CO₂e emissions by 75,000 tons per year or more, would need to obtain PSD permits; and
- Facilities triggering PSD permit requirements due to emissions of other regulated pollutants also would be required to address any potential CO₂e emissions increases of 75,000 tons or more in the PSD permit.

In addition to maintaining existing thresholds, EPA proposes to streamline the permitting process through two approaches. First, EPA proposes to increase flexibility and improve the usefulness of “plantwide applicability limitations” or “PALs” for greenhouse gas emissions. EPA proposes to allow permitting authorities to issue greenhouse gas PALs on either a mass basis or a CO₂e-basis, and to allow PALs to be used in determining whether a project should be deemed a major modification that subjects the facility’s greenhouse gas emissions to regulation. Second, EPA proposes to allow issuance of “synthetic minor” permits for greenhouse gas emissions when EPA itself (as opposed to a state or local agency) is the PSD permitting authority.

EPA is expected to issue a final rule this summer.

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■ **NRDC ISSUES FIRST STATE-BY-STATE REVIEW OF PREPAREDNESS FOR CLIMATE CHANGE IMPACTS RELATED TO WATER**

In early April 2012, the Natural Resources Defense Council (“NRDC”) issued what it calls the first comprehensive and comparative review of each state’s preparedness for the potential risks associated with climate change impacts on water resources. The report, entitled “Ready or Not: An Evaluation of State Climate and Water Preparedness Planning,” explores the various measures each state is taking to identify, analyze, and address these water-related risks and concludes that while many states have developed comprehensive and integrated strategies, their research suggests that many states have not even begun to identify, much less plan for, these risks. (For a summary Issue Brief, visit <http://www.nrdc.org/water/readiness/files/Water-Readiness-issue-brief.pdf>).

NRDC premised the study on a finding by the U.S. Global Change Research Program that warmer climatic temperatures are causing changes to the water cycle, which include changes in precipitation and drought patterns, loss of lake and river ice, and untimely and altered patterns of snow accumulation and melting. These changes, they report, result in impacts to the nation’s water resources that include increased risk of pollution to or limitation of water supply, impaired hydropower development, expanded flooding and erosion, saltwater intrusion into coastal freshwater aquifers, and even changes to the pH of the ocean.

Figure ES-1 of the report summarizes the analysis and breaks these risks down further to the state level, providing a summary of the study’s findings insofar as the specific risks faced by each. According to the report, every state faces at least two material threats to water resources, and most states face many more.

The report ranks each state on its progress in identifying and planning for these risks and presents a summary of priority planning tools for those states that rank lowest in the study. In reviewing the actions already taken by each state, the report evaluates two components of each state's planning: reduction of greenhouse gas pollution and preparation for climate change impacts on water resources.

Not surprisingly, California is among the nine states that achieved the highest ranking by NRDC. According to the report, California, along with several New England states, is a leader with respect to both components.

Trailing behind, according to NRDC's evaluation, are the Midwestern states together with Texas and Alabama. The report identifies these states as either lacking or having inadequate greenhouse gas reduction plans and as having no preparedness/adaptation plan in place for addressing anticipated water resource risks. The latter issue could be of critical importance to business leaders seeking reliable infrastructure, such as a clean and sufficient water supply.

Finally, the report recommends a number of strategies for states to consider in developing their climate change risk management plans. In particular, the following are presented as among the top priority planning tools, according to NRDC, many of which are focused on addressing climate change itself rather than planning for the risks should they manifest themselves:

- Set greenhouse gas pollution reduction targets or goals and develop a plan for meeting these reduction levels;
- Foster partnerships to stay current on climate science and sector-specific developments;
- Conduct a statewide vulnerability assessment to determine potential climate change impacts; and
- Develop a comprehensive adaptation plan to address climate risks in all relevant sectors and integrate climate change preparedness into existing planning processes.

NRDC also includes "federal action" as another element of this toolbox, using the report as an opportunity to press for federal climate change legislation. From a business perspective, the vulnerability assessment and adaptation plan elements would enable states to address the water supply and other water risks potentially associated with climate change

in a comprehensive, proactive manner, rather than risking impacts with no system for protecting valuable, critical water resources.

Depending on the receptiveness of the audience, the NRDC report could encourage state government officials to increase efforts at greenhouse gas regulation and long-term climate change planning, although it comes at a time when even the most aggressive states are, at best, holding steady and in some cases scaling back their climate change-related regulatory efforts.

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■ **INSURANCE INDUSTRY REPRESENTATIVES HOLD CAPITOL HILL CLIMATE CHANGE RISK PRESS CONFERENCE**

Among recent developments potentially affecting how businesses manage their climate change risks, on March 1, 2012, Senators Bernie Sanders (I-VT) and Sheldon Whitehouse (D-RI) hosted a press conference with representatives of leading insurance companies to discuss the costs of climate change on business and taxpayers. Vermont and Rhode Island experienced extreme flood events in 2011 as a result of Hurricane Irene, which killed at least 45 people and caused more than \$7 billion in damage. According to the sustainability advocacy group, Ceres, property and casualty insurers experienced \$44 billion in losses last year, attributable in part to more severe and unpredictable weather conditions.

According to a statement made at the press conference, annual weather-related claims increased from about \$3 billion a year in the 1980s to approximately \$20 billion annually by 2010. Mark Way, head of Swiss Reinsurance Company Ltd., expressed concern that a "warming climate will only add to this trend of increasing losses," asking Congress to act now regarding greenhouse gas emissions.

This sentiment was endorsed by Pete Thomas, chief risk officer at Willis Reinsurance, and Franklin Nutter, president of the Reinsurance Association of America. Speaking to this point,

Mr. Nutter concluded that “[f]rom our industry’s perspective, the footprints of climate change are around us and the trend of increasing damage to property and threat to lives is clear.” As Senator Sanders put it, “Perhaps no industry better understands the impact of global warming than the insurance industry whose job it is to analyze risk.”

In addition to providing representatives of the insurance industry with an opportunity to press for regulatory changes that may help insurers manage these risks, the event highlighted the tension between business and insurance carriers over identifying and attempting to quantify and cover climate change risks. Climate change risks carry enormous complexities, ranging from causation to predicting future impacts and the potential costs of those impacts, including business interruption costs due to supply issues, severe storms and flooding, and sea level changes. As part of their own risk management planning, business leaders will need to stay alert to the developing world of insurance coverage of climate change risks.

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■ DEPARTMENT OF DEFENSE EXPANDS ITS COMMITMENT TO RENEWABLES

A recent white paper from Arizona State University notes that, with more than 300,000 buildings and two billion square feet of building space, the Department of Defense (“DOD”) consumes more than three-quarters of the energy used by the federal government (by comparison, the white paper notes that Wal-Mart has only 4,200 buildings and approximately 700 million square feet of space in the United States). According to DOD, buildings and fleet vehicles represent roughly 40 percent of DOD’s greenhouse gas emissions.

In this context, the United States Government Accountability Office (“GAO”) issued a report in April 2012 on renewable energy project financing at DOD. The GAO report comes as DOD continues to push for ways to improve energy efficiency. For example, DOD intends to produce or procure from renewable energy sources not less than 25 percent of the total energy consumed within its facilities during fiscal year 2025 and each year thereafter.

The GAO reviewed DOD’s current approach to financing renewable energy projects and recommended that, among other things, DOD provide additional guidance for considering the business case for each project as well as the costs and benefits of different financing approaches. According to the GAO report, DOD should develop guidelines for choosing between “up-front appropriations” that rely on government funds versus “alternative financing” options that tap private capital.

The GAO report suggests that alternative financing, such as Energy Savings Performance Contracts and Utility Energy Service Contracts, have been used primarily for energy-efficiency projects rather than renewable energy. In the past, DOD has used a limited number of Power Purchase Agreements to fund projects such as the 14-megawatt solar

array located on Nellis Air Force Base. Alternative financing also includes “enhanced-use leases,” where the military services enter into long-term leases with private entities. For example, at Fort Irwin, the Army has proposed to lease land to a contractor to build a 500-megawatt solar array.

DOD has embraced a majority of the GAO report’s recommendations, pledging to develop comprehensive guidance on the full range of financing options, public and private. Moreover, DOD’s Strategic Management Plan aims to expand the use of private capital for energy efficiency and renewable energy projects by 15 percent in 2012 and 2013. To put this goal in context, in fiscal 2010, DOD awarded \$323 million in contracts for energy efficiency and renewable energy projects financed with Energy Savings Performance Contracts and Utility Energy Service Contracts.

“Project SolarStrong” represents another avenue for private capital to finance renewable energy installations for the military. The project, which is led by SolarCity and proposes to build \$1 billion in solar power projects for privatized U.S. military housing communities, has recovered from the U.S. Department of Energy’s decision to cancel a conditional loan following the Solyndra LLC bankruptcy. In March, SolarCity joined with U.S. Bancorp to launch a renewable energy tax equity fund to support SolarStrong. This comes on top of \$350 million in debt financing SolarCity already has received from another large commercial lender.

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■ FISH & WILDLIFE SERVICE ISSUES WIND ENERGY PROJECT GUIDELINES

On March 23, 2012, the U.S. Fish & Wildlife Service (“FWS”) released final “Land-Based Wind Energy Guidelines” to guide wind energy project developers in minimizing the impact of land-based wind projects on wildlife and their habitats. Although the Obama administration’s clean energy policy strongly favors the development of renewable energy sources, there has long been uncertainty surrounding the

dichotomy of wind energy development and wildlife protection laws. The new guidelines represent the first clear guidance to industry on the protection of federally endangered or threatened species in connection with wind energy development activities.

The FWS touts the guidelines, together with the underlying regulatory framework, as “the best practical approach” to protecting species of concern in connection with the development and operation of wind energy projects. The stated purpose of the guidelines is to help developers identify species of concern that could be affected by a proposed project, quantify the risks of a particular project to the identified species, and evaluate those risks to make appropriate siting, construction, and operational decisions.

The guidelines seek to accomplish the FWS objectives through a tiered approach of increasing detail and involvement. This approach involves three preconstruction tiers and two post-construction tiers. Project developers are expected to utilize some or all of these tiers, as appropriate, in connection with each wind energy project:

- Tier 1—Preliminary site evaluation conducted using publicly available data when the developer is taking a first look at a broad geographic area for potential development. Tier 1 is intended to help the developer identify a site or sites to consider for wind development.
- Tier 2—Site characterization to be conducted when a developer has a few specific sites in mind for a project. A Tier 2 study should include at least one site visit by a biologist to adequately assess whether the potential site presents any wildlife issues.
- Tier 3—Quantitative field studies to assess the potential risks of the selected site. The developer reports the results of such studies to the FWS, which provides written comments to identify concerns and offer recommendations.
- Tier 4—Post-construction studies to estimate a project’s impacts on wildlife, including fatality monitoring and habitat impact evaluations.
- Tier 5—Highly individualized studies specifically suited for situations where (i) actual fatalities at a project site are greater than estimated, (ii) implemented mitigation

measures are not effective, and/or (iii) estimated impacts could lead to population declines in affected species of concern. The FWS estimates that Tier 5 studies will not be necessary for most projects.

The new guidelines are “voluntary,” and adherence to them will not relieve a party from compliance with applicable environmental laws, including any obligation to obtain an “incidental take” permit under the Endangered Species Act (“ESA”). If a law such as the ESA is violated, however, the FWS has indicated that it “will consider a developer’s documented efforts to communicate with the Service and adhere to the Guidelines” in determining whether to take enforcement action. The guidelines generally do not address local compliance issues. States and project developers will thus need to determine how the FWS guidelines work within state regulatory frameworks.

It is expected that most developers will utilize the FWS guidelines as wind energy projects are subject to numerous wildlife protection laws, including the ESA, the Migratory Birds Treaty Act, and the Bald and Golden Eagle Protection Act. These laws carry significant civil and criminal penalties for an unauthorized “taking” of a covered species, and, in certain circumstances, a project developer can be ordered to curtail and/or stop operations or construction activities.

Under some (but not all) wildlife protection laws, permits can be obtained that provide a level of protection against penalties for an authorized taking of a protected species. Even where available, however, such permits are not easily obtained, and it may take several years before a permit is issued. Furthermore, the preoperational and operating restrictions that could be imposed by such permits are difficult to predict. As a consequence, there has been little consistency in the industry on the process for determining when take permits are necessary in connection with wind energy projects. Rather than obtaining permits, many wind energy developers have instead relied on mitigation plans and FWS enforcement discretion to manage the risks associated with an unauthorized taking in this context.

Environmental groups, such as the National Fish & Wildlife Foundation, are generally in favor of the new FWS guidelines.

The American Wind Energy Association has also come out in support of the guidelines. While it remains to be seen how and to what extent wind project developers will ultimately embrace them, the guidelines provide at least some structure for dealing with wildlife issues at wind project sites where none previously existed.

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■ CLIMATE CHANGE TORT SUIT OVER HURRICANE KATRINA DAMAGES OFF TO THE FIFTH CIRCUIT AGAIN

On March 10, 2012, the latest chapter in a class of plaintiffs' efforts to hold various industrial defendants liable for their greenhouse gas emissions was dismissed. *Comer, et al. v. Murphy Oil USA, et al.*, No. 1:11-cv-00220 (S.D. Miss.) ("*Comer II*"). The dismissed action was filed by Mississippi residents and was nearly identical to another action, *Comer, et al. v. Murphy Oil USA, et al.*, No. 1:05-cv-00436-LG-RHW ("*Comer I*"), which was previously dismissed by the federal courts, *see, Comer, et al. v. Murphy Oil USA, et al.*, 607 F.3d 1049 (5th Cir. 2010), as was an effort to secure a writ of mandamus from the United States Supreme Court. *In re Comer*, U.S. No. 10-294 (Jan. 10, 2011).

In the *Comer II* complaint (as in *Comer I*), plaintiffs allege that a group of defendant companies should be held liable in tort for contributing to the worldwide phenomenon of climate change, which purportedly contributed to strengthening Hurricane Katrina and, in turn, damaged plaintiffs' property. In agreeing with every basis asserted by the defendants, the U.S. District Court for the Southern District of Mississippi held that dismissal was appropriate for the following reasons: (i) under the terms of the *Comer I* judgment, the suit is barred by principles of res judicata and collateral estoppel; (ii) plaintiffs lack standing to bring the claims under Article III of the Constitution, and their claims raise nonjusticiable political questions; (iii) the suit is barred by the statute of limitations; (iv) plaintiffs cannot establish that any supposedly tortious emissions of defendants proximately caused plaintiffs' hurricane-based injuries; (v) 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 (vi) plaintiffs' attempt to invoke federal common law is directly contrary to the U.S. Supreme Court's recent holding in *Connecticut v. AEP*, 131 S.Ct. 2527 (2010).

Consistent with the history of *Comer I*, the plaintiffs filed a notice of appeal to the U.S. Court of Appeals for the Fifth Circuit on April 16, 2102.

(Jones Day is counsel of record to Xcel Energy Inc. and its affiliated entities in the Comer II case.)

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■ ENVIRONMENTAL GROUPS CHALLENGE CALIFORNIA'S "CAP AND TRADE" REGULATIONS

On March 27, 2012, two public interest groups filed suit in San Francisco Superior Court against the California Air Resources Board ("CARB"), challenging the offset credits allowed under California's "cap and trade" regulations. *Citizens Climate Lobby and Our Children's Earth Foundation v. California Air Resources Board*.

As discussed in previous editions of *The Climate Report*, CARB's cap and trade regulations are a key component of California's effort to implement the Global Warming Solutions Act of 2006 (AB 32). Emission sources subject to the program must annually surrender "compliance instruments" equal to their emissions of specified greenhouse gases, collectively expressed as CO₂e. Compliance instruments can be obtained in several ways, including the purchase of offset credits, which can be generated from projects that reduce greenhouse gas emissions from activities that are not otherwise regulated under the cap and trade program. To qualify as offset credits, the greenhouse gas reductions must be real, additional, quantifiable, permanent, verifiable, and enforceable.

In their complaint, plaintiffs allege that the offset program violates AB 32 and that CARB's tests to determine whether an offset is truly additional are inherently subjective and uncertain. The complaint also alleges that the "performance standard" used in each of the four offset protocols approved

by CARB is flawed because it recognizes offset activities that are “significantly better than average” and thus includes activities that already exist. As a result, the complaint alleges, the offset projects are not “in addition to any greenhouse gas emission reduction that otherwise would occur” and thus violate AB 32.

Plaintiffs ask the Superior Court to order CARB to repeal (i) the four offset protocols; (ii) several definitions, including the definition of “additional”; and (iii) the offset program set out in sub-articles 13 and 14 of the regulations. Plaintiffs also seek a declaration that the relevant regulatory provisions are invalid and a permanent injunction prohibiting CARB from authorizing the use of offset credits as compliance instruments.

A court order prohibiting the use of offset credits would be a huge blow to the cap and trade program and to industry’s ability to comply with the substantial greenhouse gas emission reductions required by AB 32.

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For additional detail on California’s cap-and-trade program, see Jones Day’s White Paper entitled “California Adopts Cap and Trade.”

■ **D.C. FEDERAL JUDGE GRANTS MOTIONS TO INTERVENE IN CLIMATE CHANGE “PUBLIC TRUST” LAWSUIT**

As reported in the last edition of *The Climate Report*, a number of youth-oriented nonprofit advocacy groups have filed a lawsuit in the name of minor children against the federal government alleging breach of the government’s fiduciary duty under the “public trust doctrine” to regulate greenhouse gas emissions. *Alec L. v. Jackson*, No. 1:11-cv-02235-RLW (D.D.C).

The plaintiffs seek a court order requiring the defendants to reduce carbon dioxide emissions, such that global carbon dioxide emissions will peak by the end of 2012 and decline by at least 6 percent per year beginning in 2013.

There was a flurry of motions in the fall of 2011, culminating with the U.S. District Court for the Northern District of California granting the defendants’ motion to transfer the case to the U.S. District Court for the District of Columbia on December 6, 2011. When the case was transferred, several unresolved motions were pending: (i) the plaintiffs’ motion for issuance of a preliminary injunction; (ii) the defendants’ motion to dismiss the complaint; (iii) a motion by the National Association of Manufacturers (“NAM”) to intervene in the case, accompanied by a proposed motion to dismiss; and (iv) the plaintiffs’ motion to strike NAM’s proposed opposition to the plaintiffs’ motion for preliminary injunction.

Activity continued after the case was transferred. On March 5, 2012, a group of individual companies and trade associations filed another motion to intervene. In that motion, the potential intervenors argued that any relief granted to the plaintiffs requiring the government defendants to set greenhouse gas emissions standards would impose considerable costs on the intervenors (or their members) to retrofit their vehicles and equipment to meet such standards, which could cause many of those businesses to shut their doors. The potential intervenors also argued that the government defendants and NAM could not adequately defend their interests because the government defendants are not businesses with business interests, and NAM’s members have different business interests than the intervenors.

In addition, the potential intervenors filed a proposed motion to dismiss the complaint, arguing that the complaint (i) failed to state a claim upon which relief can be granted; (ii) asserted claims that were displaced by the Clean Air Act; and (iii) presented a nonjusticiable political question.

On April 2, 2012, Judge Robert Wilkins granted the motions to intervene after hearing oral argument from the parties. At the hearing, Judge Wilkins also set a briefing schedule for

the defendants' motion to dismiss, with arguments on May 11, 2012, and stayed the plaintiffs' motion for preliminary injunction pending the resolution of the motion to dismiss.

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■ **EU AVIATION DIRECTIVE TRIGGERS THUNDERSTORM IN OTHERWISE “OPEN SKIES”**

On December 21, 2011, the Court of Justice of the European Union (“CJEU”) returned a ruling in the matter *Air Transport Association of America, et al. vs. Secretary of State for Energy and Climate Change* (C-366/10). At stake was the validity of Directive 2008/101/EC amending Directive 2003/87/EC (establishing a scheme for greenhouse gas emission allowance trading within the European Community and amending Council Directive 96/61/EC) to extend the EU Emissions Trading Scheme to aviation activities including non-EU air carriers.

Under the extended scheme, all flights departing from or arriving at an EU airport are subject to Directive 2008/101/EC regardless of the carrier’s country of registration or the flight’s point of origin or destination. Since January 1, 2012, transatlantic flights operated by U.S. companies have been accountable for all carbon dioxide emissions generated thereby, not just emissions from the legs of such flights occurring over EU territory.

This led several U.S. airline companies and trade associations to seek judicial review of the Directive’s United Kingdom implementation measures in the High Court of Justice of England and Wales. The High Court decided to stay the proceedings and to refer the matter to the CJEU for a preliminary ruling.

Among the arguments raised by the claimants were that the Directive violated the Chicago Convention on International Civil Aviation, the 1997 Kyoto Protocol, and the 2007 Open Skies Agreement between the EU and the U.S. The claimants also raised a series of challenges based on international law principles, including the principle that each Member State has complete and exclusive sovereignty over its airspace, the principle that no Member State may validly purport to subject

any part of the high seas to its sovereignty, and the principle that guarantees the freedom to fly over the high seas.

The CJEU found it could not examine the validity of the Directive in light of the Chicago Convention, because the powers previously exercised by the Member States under that Convention have not been assumed in their entirety by the European Union, and therefore the EU is not bound by that Convention. Similarly, the court found that the provisions of the Kyoto Protocol invoked by the claimants were not “unconditional and sufficiently precise so as to confer on individuals the right to rely on it in legal proceedings” challenging the validity of the Directive.

In contrast, the CJEU found that the Directive was subject to review under principles of international law and the Open Skies Agreement. However, the court ultimately found that the Directive did not contravene the requirements of either body of law, concluding that its examination of the Directive “disclosed no factor of such a kind as to affect its validity.”

As far as the ability of the EU's legislature to regulate those parts of flights not conducted over EU airspace, the court concluded that the fact that certain activities contributing to the pollution of the air, sea, or land territory of the Member States occur partly outside that territory is not sufficient to call into question the full applicability of European Union law in that territory.

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**■ UK DEPARTMENT OF ENERGY AND CLIMATE CHANGE
CONSULTS ON SIMPLIFIED CRC ENERGY EFFICIENCY
SCHEME**

The United Kingdom's CRC Energy Efficiency Scheme is a UK-only mandatory “cap and trade” emissions trading

scheme for large non-energy-intensive organizations in the private and public sectors. Introduced by the CRC Energy Efficiency Scheme Order 2010 (SI2010/768), the CRC came into operation on April 1, 2010, despite concerns among those affected that its complexities would be disproportionately difficult to administer. On March 27, 2012, the UK's Department of Energy and Climate Change (“DECC”) published a consultation paper seeking responses to proposals to simplify the country's CRC Energy Efficiency Scheme with a view to delivering a “leaner” and “refocused CRC” so as to reduce the administrative and regulatory burden on participants.

The CRC requires organizations to measure and report on their energy consumption, and to purchase carbon allowances based on that consumption. The scheme is divided into several phases and is presently in the introductory phase. In light of “teething problems” being experienced in the introductory phase, the consultation seeks responses by June 18, 2012, with a view to changes implemented by legislation coming into force on April 1, 2013 (i.e., before the second phase of the CRC commences).

Proposals include:

- Providing greater business certainty by introducing two fixed-price allowance sales per year (one forecast and one retrospective), rather than auctions of allowances in a capped system. Accordingly, the “cap and trade” aspect of the CRC would be lost.
- Making rules on organizational structures more flexible so that organizations can participate in “natural business units.” This is opposed to current rules, which require participation of a group under the highest parent undertaking and where only significant undertakings may be disaggregated to participate separately.
- Reducing the reporting burden by (i) reducing the number of fuels reported from 29 to 4, (ii) using only electricity measured by settled half-hourly meters for qualification purposes, (iii) ending the requirement for carbon footprint reports, and (iv) other practical measures, such as reduced recordkeeping requirements.
- Reducing complexity by removing the residual percentage rule, known as the “90% Rule,” and the Climate Change Agreement (“CCA”) exemption rules.

- Reducing overlap with other schemes by no longer requiring organizations covered by CCAs to register for the CRC and by no longer requiring EU Emission Trading Scheme installations to buy allowances for electricity supplies.

It seems, at this time, that the CRC is here to stay. In particular, the controversial landlord and tenant rule, by which landlords are responsible for supplies of energy to their tenants (save in certain circumstances) will remain. The UK government is still of the view that landlords are better placed to implement the most cost-effective energy efficiency measures, rather than tenants. That said, the government has indicated that unless significant cuts in administrative burdens can be achieved from the ongoing review, it will bring forward proposals in autumn 2012 to replace the CRC with an alternative environmental tax.

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