

# THE CLIMATE REPORT




## U.S. REGULATORY DEVELOPMENTS

Jane K. Murphy, Editor

■ **CALIFORNIA'S GREENHOUSE GAS "CAP AND TRADE" PROGRAM SURVIVES LEGAL CHALLENGE**

On June 19, 2012, a California Court of Appeal issued its long-awaited decision in *Association of Irrigated Residents v. California Air Resources Board*. The Court of Appeal held that the Climate Change Scoping Plan adopted by the California Air Resources Board ("CARB") complies with AB 32, California's Global Warming Solutions Act of 2006. The decision brings to a close an early legal challenge to California's greenhouse gas "cap and trade" regulations.

AB 32 requires CARB to prepare a blueprint, known as a "Scoping Plan," for reducing California greenhouse gas emissions to 1990 levels by the year 2020. One of the key programs set out in the Scoping Plan approved and adopted by CARB on December 12, 2008 is a cap and trade program. As described in Jones Day's *Commentary*, "[California Superior Court Enjoins California's Cap and Trade Program for Greenhouse Gas Emissions](#)," 13 petitioners, including the Association of Irrigated Residents ("AIR"), filed suit against CARB on June 10, 2009, alleging that the Scoping Plan did not comply with AB 32, and that CARB's approval of the Scoping Plan did

DEPARTMENTS	
U.S. Regulatory Developments	1
Climate Change Issues for Management	4
Renewable Energy and Carbon Markets	6
Climate Change Litigation	8
Climate Change Regulation Beyond the U.S.	10

not comply with the environmental review requirements of the California Environmental Quality Act ("CEQA").

On March 18, 2011, the San Francisco Superior Court ruled that while the Scoping Plan did not violate AB 32, CARB had not adequately evaluated alternative approaches to achieving greenhouse gas reductions as required by CEQA. On May 20, 2011, the Superior Court issued a writ of mandate prohibiting CARB from taking any action in reliance on the Scoping Plan (including implementing the cap and trade program) until CARB complied with CEQA. CARB appealed the Superior Court's CEQA decision, and AIR and the other plaintiffs filed a cross appeal on the Superior Court's decision that the Scoping Plan complied with AB 32. On June 24, 2011, the California Court of Appeal, First Appellate District, stayed enforcement of the Superior Court's order. While the stay was in effect, CARB prepared and issued a supplement to its environmental review of the Scoping Plan, which it certified under CEQA on August 24, 2011. On December 5, 2011, the Superior Court discharged the writ of mandate, and the Court of Appeal dismissed CARB's appeal as moot. Thus, what remained was the plaintiffs' cross-appeal of the Superior Court decision that the Scoping Plan complied with AB 32.

In its June 19, 2012 opinion, the Court of Appeal determined that adoption of the Scoping Plan fell within the scope of authority conferred on CARB by AB 32. The Court of Appeal evaluated whether the Scoping Plan "is reasonably necessary to effectuate the purpose of the statute," which "requires the court to determine only whether the Board exercised its discretion arbitrarily and capriciously, without substantial evidentiary support." Using this deferential standard, the court evaluated the plaintiffs' specific challenges to the Scoping Plan, including their assertion that CARB (i) improperly limited the Scoping Plan to only those measures necessary to achieve the minimum reductions required by AB 32; (ii) failed to create and apply standard criteria for cost-effectiveness; and (iii) failed to include feasible and cost-effective direct regulations for the agricultural and industrial sectors (choosing only to regulate industry through the cap and trade program, and allowing agricultural sources to provide carbon offsets to industry).

The Court of Appeal rejected each of these challenges. It found that CARB "went to exceptional lengths" to develop measures to achieve greenhouse gas reductions and that "AIR points to no recommendation included in the plan, and no rejection of a suggested recommendation, for which substantial evidence was not presented and considered" by CARB. The Court of Appeal concluded that tools are not available to compare the cost-effectiveness of one greenhouse gas reduction approach to others, and it was satisfied that there was support in the record for the recommendations adopted by CARB in the Scoping Plan. The Court of Appeal also upheld the Scoping Plan as it applied to the industrial sector, as it did for the agricultural sector, concluding that the record reflects "extensive analysis" of numerous potential measures for the agricultural sector and that CARB's inclusion of only voluntary agricultural measures in the Scoping Plan was reasonable and supported by a sound explanation.

#### **Challenge to the Cap and Trade Offset Protocols Continues**

As discussed in *The Climate Report*, Spring 2012, two environmental groups filed suit in San Francisco Superior Court challenging the four offset protocols adopted by CARB as part of the cap and trade and early action offset credit programs. *Citizens' Climate Lobby and Our Children's Earth Foundation v. California Air Resources Board*. The challenged offset protocols, which set out the requirements for offset projects to qualify for offset credits, are incorporated into CARB's cap and trade regulations. Such offset credits can be purchased and sold, and used to partially fulfill California greenhouse gas reduction obligations. The four challenged protocols address Ozone Depleting Substances Projects, Livestock Projects, Urban Forest Projects, and U.S. Forest Projects.

The lawsuit is still in its early stages. Several parties have intervened on behalf of CARB, including the Climate Action Reserve, the Environmental Defense Fund, and a business group that includes (among others) major California utilities and energy companies. Jones Day represents The Nature Conservancy, which intends to file an amicus brief in support of the U.S. Forest Project protocol. Briefing is to be complete by October 5, 2012, and a hearing on the petition is scheduled for November 6, 2012.

**Thomas Donnelly**  
+1.415.875.5880  
[tmdonnelly@jonesday.com](mailto:tmdonnelly@jonesday.com)

**Charles Hungerford**  
+1.415.875.5843  
[chungerford@jonesday.com](mailto:chungerford@jonesday.com)

■ **EPA FINALIZES THIRD PHASE OF GREENHOUSE GAS  
“TAILORING RULE”**

On July 3, 2012, the U.S. Environmental Protection Agency published its [final rule](#) implementing the last 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. In the final rule, EPA retained the permitting thresholds for greenhouse gases that were established in Steps 1 and 2 of the Tailoring Rule and authorized the use of plantwide applicability limits (“PALs”) to streamline the permitting process for industrial facilities.

The current applicability thresholds, established under Step 2 of the Tailoring Rule, went into effect on July 1, 2011. Under these thresholds, new and existing facilities with potential carbon dioxide equivalent (“CO<sub>2</sub>e”) emissions above 100,000 tons per year must obtain Title V operating permits. New facilities with potential CO<sub>2</sub>e emissions of at least 100,000 tons per year and existing facilities with potential CO<sub>2</sub>e emissions of at least 100,000 tons per year making modifications that increase their potential CO<sub>2</sub>e emissions by at least 75,000 tons per year must obtain a “prevention of significant deterioration” (“PSD”) permit, which requires implementation of the “best available control technology” for emissions of greenhouse gases and other regulated air pollutants. Facilities triggering PSD permit requirements due to emissions of other regulated air pollutants must also address any potential CO<sub>2</sub>e emissions increases of 75,000 tons or more in the PSD permit.

In its proposal for Phase 3 of the Tailoring Rule, EPA considered whether smaller sources of greenhouse gases should be regulated. EPA ultimately decided not to regulate such sources because the Agency determined that state air permitting authorities have not had sufficient time to develop

the infrastructure or expertise to handle additional permitting demands that would be created by covering these sources.

In addition to maintaining the existing regulatory thresholds, the final rule streamlines the permitting process by allowing the use of PALs for industrial facilities. Permitting authorities may issue greenhouse gas PALs on either a mass basis or a CO<sub>2</sub>e basis, and PALs, rather than specific emission points, can be used to determine whether a project should be deemed a major modification that subjects the facility’s greenhouse gas emissions to regulation. This has the effect of allowing sources that utilize PALs to make changes without triggering PSD permitting requirements as long as overall emissions do not increase above the limit established by the PAL.

The final rule becomes effective on August 13, 2012.

**Kristin Parker**  
+1.312.269.4342  
[kristinparker@jonesday.com](mailto:kristinparker@jonesday.com)



## ■ VIRGINIA SUPREME COURT CONFIRMS DENIAL OF INSURANCE COVERAGE IN CLIMATE CHANGE SUIT

As reported in *The Climate Report*, Fall 2011, the Virginia Supreme Court unanimously held in September 2011 that an insurer did not have a duty to defend a commercial general liability policyholder accused of contributing to the effects of climate change. *The AES Corporation v. Steadfast Insurance Co.*, 715 S.E.2d 28 (Va. 2011).

The dispute at issue stemmed from AES Corporation being named as a defendant in *Native Village of Kivalina v. Exxon Mobil Corp.*, in which Kivalina, a coastal Alaskan village, sued AES and 23 other oil, gas, and utility companies for allegedly damaging the village by causing global warming through emission of greenhouse gases. AES requested that Steadfast Insurance Company provide a defense and insurance coverage for the *Kivalina* claim under AES's commercial general liability ("CGL") policies. Steadfast provided AES a defense under a reservation of rights and later filed a separate action seeking a declaratory judgment that AES was not entitled to coverage or defense.

The Virginia Supreme Court's September 16, 2011 decision agreed with Steadfast that the allegations in the *Kivalina* complaint were insufficient to trigger coverage under the relevant CGL policies. The court noted that, under the policies, the duty to defend applied only to suits claiming "property damages" caused by an "occurrence." Under Virginia law, "occurrence" is synonymous with "accident." Because the *Kivalina* complaint alleged that the "damages it sustained were the natural and probable consequences of AES's intentional emissions," the court held that there was no allegation of an "accident." Therefore, Steadfast had no duty to defend or indemnify AES.

Following that ruling, AES filed a petition for rehearing. The petition was granted, and the court set aside and withdrew its September 16 opinion.

On April 20, 2012, the Virginia Supreme Court again decided that Steadfast owed AES no coverage with respect to the *Kivalina* complaint. In an opinion that substantially mirrored its prior opinion, the court held that "[i]f an insured knew or should have known that certain results were the natural or probable consequences of intentional acts or omissions, there is no 'occurrence' within the meaning of [the] policy." The court again found that the *Kivalina* complaint did not allege an "accident," even if AES were actually ignorant of the effect of its actions and/or did not intend for damages to occur.

In a concurring opinion, Justice Mims cautioned that the opinion's reasoning could not be limited to the four corners of the policies at issue or the specific allegations of the complaint. He noted that under Virginia case law, a dichotomy exists between allegations of an "accident" and of "negligence"; to prevail on an action for negligence, a plaintiff must prove that the injury that occurred was reasonably foreseeable, or the "natural and probable consequence" of the tortious breach. But, under the court's reasoning, if the alleged damage was the "natural and probable consequence" of an injurious action, there can be no insurance coverage. Justice Mims found no rationale to distinguish the policies at issue from other CGL policies. Thus, he noted that the decision was correct under Virginia precedents but warned that the Supreme Court's jurisprudence is "leading inexorably to a day of reckoning that may surprise many policy holders."

The consequences of this decision may be far-reaching. Although the court made some effort to confine its discussion to the particular nature of the claims in the *Kivalina* complaint, Justice Mims may be correct in finding little basis for limiting the underlying reasoning to this case. Thus, the availability of insurance coverage under CGL policies for negligence-based claims is now an open question in Virginia. In the climate change arena, the decision will undoubtedly be cited as precedent in insurance cases, although other jurisdictions could adopt different interpretations based on their own state laws.

Further, another of Steadfast's arguments may have recently received additional support. As an alternative to its contention regarding the interpretation of "occurrence," Steadfast had also argued that the claims in the *Kivalina* complaint fell within the scope of the pollution exclusion in AES's CGL policies. The Virginia Supreme Court did not reach the pollution

exclusion argument. However, as discussed elsewhere in this edition of *The Climate Report*, the U.S. Court of Appeals for the District of Columbia Circuit [upheld](#) a set of greenhouse gas regulations promulgated by the U.S. Environmental Protection Agency under authority of the Clean Air Act on June 26, 2012. Some practitioners anticipate that the insurance industry will now point to that decision to bolster arguments that greenhouse gases that contribute to global warming are “pollutants” for purposes of applying pollution exclusions in CGL policies.

**Sarah Fox**

+1.212.326.3655

[sfox@jonesday.com](mailto:sfox@jonesday.com)

#### ■ RIO+20 CONFERENCE ON SUSTAINABILITY ATTRACTS GREATER CORPORATE INVOLVEMENT

As described elsewhere in this edition of *The Climate Report*, the [United Nations Conference on Sustainable Development](#), more commonly referred to as “Rio+20,” was held in Rio de Janeiro, Brazil in June 2012. Part of the framework for promoting Rio+20’s themes of a green economy and sustainable development included an [initiative](#) for increased public-private partnerships and corporate action. For example, more than 400 companies made a commitment at the conference to have zero net deforestation in their supply chains by 2020. Some consider the success in securing these and other commitments from the private sector to be the most significant accomplishment at Rio+20.

Two hundred [commitments](#), mostly related to energy and climate, were also submitted by private businesses to the UN Global Compact, a voluntary initiative designed to stimulate and track corporate commitments. Among those commitments, a *Fortune* 500 company pledged \$50 billion over 10 years to finance energy efficiency, renewable energy, energy infrastructure, lower-carbon transportation, and other activities addressing climate change; two energy companies committed to ensure that 500 million people have access to energy by 2025; and 45 chief executive officers agreed to promote sustainable water management practices. Another *Fortune* 500 company [announced](#) the rollout of an internal carbon fee on its operations in more than 100 countries as

part of a plan to be carbon-neutral by 2013. An Italian oil company said it would reduce its flaring of natural gas, and a foreign soft-drink bottler said it would obtain 85 percent of its in-country energy needs from renewable sources.

Rio+20 also revealed an increased interest in corporate sustainability reporting. Five major stock exchanges, including NASDAQ and exchanges in Johannesburg, Egypt, Istanbul, and Brazil, [agreed](#) to work through the World Federation of Exchanges to promote corporate sustainability reporting. Jonathan Pershing, Deputy Special Envoy for Climate Change for the United States Department of State, predicted that, going forward, private sector engagement in addressing the threat of climate change “will be very active, very significant,” as companies work to protect the “enormous funds at stake” in supply chain interruptions from climate change. Sustainable corporate practices (or the lack thereof) are likely to be subject to increasing levels of attention and scrutiny.

**Sarah Fox**

+1.212.326.3655

[sfox@jonesday.com](mailto:sfox@jonesday.com)



## ■ FERC PROPOSES NEW ACCOUNTING AND REPORTING RULES FOR ENERGY STORAGE

Recent and anticipated technological developments in energy storage have made it an area of increasing interest for the energy industry and particularly for public utilities. It is increasingly acknowledged that energy storage assets are unique in that they can serve multiple purposes—production, transmission, or distribution—whereas traditional electric plant assets serve only one of those purposes. As energy storage technologies mature and this area of the industry grows, both industry and regulators will have an active role to play in facilitating increased use of energy storage assets by utilities and other energy industry participants.

On June 22, 2012, the U.S. Federal Energy Regulatory Commission issued a Notice of Proposed Rulemaking (139 FERC ¶ 61,245) that formally recognized the uniqueness of energy storage assets, services, and operations, and proposed a number of new accounting and reporting requirements under FERC's Uniform System of Accounts for public utilities and licensees, based on comments received in response to a June 16, 2011 [Notice of Inquiry](#). FERC's goals in proposing new accounting and reporting rules for energy storage assets are to ensure that both it and state utility commissions can reliably obtain information about a utility's financing condition and results of operations, and to ensure that U.S. accounting and reporting requirements keep pace with the evolution of the electric industry. FERC's focus is to ensure that inclusion of a utility's energy storage asset in its cost-based rates and market-based rates is accounted for in a transparent and traceable manner. With these goals in mind, FERC has proposed for public comment the following changes to its accounting and reporting rules in relation to energy storage assets:

**Electric Plant Accounts.** Three new accounts were proposed for recording the installed cost of energy storage equipment, based on whether the function of the asset is production,

transmission, or distribution. Where an asset is used to perform more than one function, the cost is allocated among those functions based on the services provided by the asset or, where the cost was included in developing cost-based rates, the cost is allocated based on the allocation used by the rate-setting body for the rate development. Public utilities will also be required to maintain records identifying the types of functions each individual energy storage asset supports and performs.

**Power Purchased and Fuel Supply Expense Accounts.** Recognizing that energy storage devices may need to maintain a particular state of charge (or minimum pressure, in the case of compressed air facilities), a new account was proposed to account for the cost of (i) power purchased and stored for resale, (ii) power purchased that will not be resold, but instead consumed in operations during the provisioning of services, and (iii) power purchased to sustain a state of charge.

**Operation and Maintenance (“O&M”) Expense Accounts.** Currently, there are no O&M expense accounts specifically dedicated to accounting for the cost of energy storage operations, which FERC has determined differ from conventional assets enough to warrant the creation of new accounts. Six new accounts are proposed: two separate accounts—one for operation and one for maintenance—for each of the three functional classifications of production, transmission, and distribution.

Notably, FERC did not propose any new revenue accounts for revenue associated with energy storage operations. FERC concluded that existing revenue accounts sufficiently provide for the accounting of revenue associated with energy storage assets and that the recording of revenue by type of customer, product, or service is equally as appropriate in the context of energy storage revenues as in the context of conventional electricity sales revenues.

Finally, in the Notice of Proposed Rulemaking, FERC proposed revisions and additions to the schedules to Form Nos. 1, 1F, and 3-Q, including two new schedules to the Form Nos. 1 and 1F and additional fields to various other schedules that require public utilities to report statistical and cost data related to energy storage. These include: (i) megawatts

purchased, delivered to the grid, lost in conversion, and sold, (ii) costs of various operation and maintenance items, (iii) costs of various capital items, (iv) allocations of various costs as between functional classifications, and (v) name and location of each energy storage plant, by project and functional classification.

These proposed changes should facilitate the utilization of energy storage assets to help meet industry needs for production, transmission, and distribution.

**Omar Samji**

+1.832.239.3639

[osamji@jonesday.com](mailto:osamji@jonesday.com)

## ■ NEW FERC MANDATE ON GRID INTEGRATION PROVIDES POTENTIAL BOOST TO RENEWABLE ENERGY

Order 764, issued by the Federal Energy Regulatory Commission on June 21, 2012, requires transmission service providers to permit renewable energy generators and other transmission service customers to schedule transmission service in intervals of 15 minutes or less, rather than the current hourly intervals that were originally designed for fossil-fuel and nuclear generation. In the near term, this should reduce the exposure of renewable energy generators to imbalance charges they would otherwise be unable to avoid due to the intermittency of their wind, solar, or other renewable generation resources, and thus enhance the cost-certainty of renewable generation operations. In the mid- to long-term, intra-hour scheduling may provide even greater benefits to renewable energy growth by providing the framework for renewable energy generators to also be dispatched in intra-hour intervals.

### **The Scope of Order 764**

When Order 764 takes effect next summer (12 months after its publication in the Federal Register, assuming it does not become subject to rehearing or federal court review), it will require transmission service providers to offer all transmission service customers, including most significantly wind, solar, and other renewable energy generators, the option to schedule transmission service in 15-minute intervals. This will be the case unless a provider can demonstrate that it has

implemented an alternative to such intra-hour scheduling that provides equivalent or greater benefits in reducing (i) the exposure of renewable energy generators to imbalance charges and (ii) reliance on comparatively high-cost reserves of dispatchable generation capacity to correct imbalances of generation output and load attributable to the variability of renewable energy generation.

The rule will also require new renewable generators to provide meteorological and forced outage data for their facilities to their transmission service providers, to help the transmission providers manage the flow of renewable energy onto their systems with improved power production forecasting.

FERC declined, however, to adopt a proposed requirement that transmission providers provide renewable energy generators with generation-balancing services, which use capacity reserves to offset the frequent changes in output of renewable generation. Likewise, while the new rule requires intra-hour scheduling, it does not require transmission service providers also to dispatch renewable energy generators in the same intra-hourly intervals.

### **Did FERC Go Far Enough?**

While the proof will be in the implementation of the new rule, some initial reactions from renewable energy proponents reflect disappointment that FERC simply did not go far enough to level the playing field for renewable energy generators. Indeed, FERC recognized in Order 764 that a commenter on the proposed version of the rule had contended that implementing intra-hour scheduling absent an established market for dispatchable resources to manage variability could potentially do more harm than good to grid integration of renewable energy generation. The same commenter had also recommended that FERC allow public utility transmission providers to provide intra-hour schedules at intervals of 30 minutes as an interim step to participation in an energy imbalance market.

FERC expressly acknowledged in Order 764 that additional market reforms—such as intra-hour imbalance settlement, an intra-hour transmission product, increasing frequency of resource commitment through sub-hourly dispatch, and formation of intra-hour imbalance markets—could yield additional benefits for both public utility transmission providers

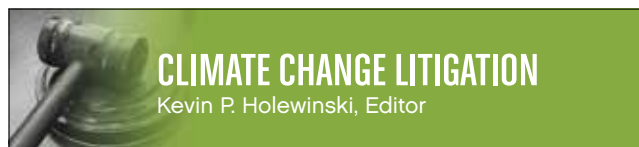
and their customers. FERC concluded, however, that those additional reforms could have significant costs associated with them, and that a more measured approach to promoting grid integration, which allows greater flexibility to transmission service providers to achieve the desired benefits, is more appropriate at this time. FERC expects that intra-hour scheduling will, in time, facilitate the creation by market participants of intra-hour balancing products to manage the variability of renewable energy generation and the development of intra-hour trading in such products.

FERC also expressed its expectation that, as the liquidity of intra-hour energy products stabilizes, market participants may begin to commit or otherwise acquire fewer reserves in advance, and instead increasingly plan to purchase additional reserves on an as-needed basis from third parties. This suggests that FERC believes that market-driven intra-hour trading will ultimately provide a more cost-effective means for integrating the variability of renewable generation into the grid than would FERC-imposed market reforms. FERC noted that requiring public utility transmission providers to offer intra-hour scheduling is a necessary predicate to facilitate market opportunities for such intra-hour trading.

**Michael C. Gibbs**

+1.212.326.3792

[mjibbs@jonesday.com](mailto:mjibbs@jonesday.com)



■ **FEDERAL APPEALS COURT UPHOLDS EPA'S GREENHOUSE GAS REGULATIONS UNDER CLEAN AIR ACT**

A three-judge panel of the U.S. Court of Appeals for the District of Columbia, on June 26, 2012, dismissed challenges by various states and industry petitioners to the U.S. EPA's greenhouse gas regulations in a *per curiam* opinion, which reaffirmed each of the challenged rules in their entirety. *Coalition for Responsible Regulation v. EPA*, D.C. Cir., No. 09-1322, 6/26/12.

At issue in these consolidated cases was a cascading series of rulemakings issued by EPA in response to the U.S. Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), which held that greenhouse gases are an "air pollutant" subject to regulation under the Clean Air Act. The challenged EPA actions were: (i) an "Endangerment Finding," in which EPA determined that greenhouse gases may "reasonably be anticipated to endanger public health or welfare"; (ii) the "Tailpipe Rule," which set emission standards for cars and light trucks; (iii) the "Timing Rule," which concluded that under its longstanding interpretation of the Act, once greenhouse gases became an "air pollutant" that is "subject to regulation" under Act via the Tailpipe Rule, major stationary source emitters of greenhouse gases would be subject to Prevention of Significant Deterioration ("PSD") and Title V programs on the date the Tailpipe Rule became effective (January 2, 2011); and (iv) the "Tailoring Rule," wherein EPA determined that because greenhouse gas emission from millions of industrial, residential, and commercial sources exceed the Act's 100/250 ton per year ("tpy") thresholds for permitting, which would place severe burdens and costs on both emitters and permitting authorities, EPA should depart from the statutory thresholds and initially apply alternative greenhouse gas thresholds (75,000 or 100,000 tpy) that only the largest emitters would trigger. As described below, the challengers contended that the Agency misconstrued the statute and otherwise acted arbitrarily and capriciously.



### **Endangerment Finding**

The state and industry petitioners challenged several aspects of the Endangerment Finding, including (i) EPA's interpretation of § 202(a)(1) of the Clean Air Act, which sets out the endangerment finding standard; (ii) the adequacy of the scientific record supporting the Endangerment Finding; (iii) EPA's decision not to "quantify" the risk of endangerment to public health or welfare created by climate change; (iv) EPA's choice to aggregate six distinct greenhouse gases into a single defined "air pollutant"; (v) EPA's failure to consult its Science Advisory Board before issuing the Endangerment Finding; and (vi) EPA's denial of all petitions for reconsideration of the Endangerment Finding. The Court of Appeals rejected each of these arguments, ultimately concluding that the Endangerment Finding was consistent with *Massachusetts v. EPA* and the text and structure of the Act, and was adequately supported by the administrative record.

### **Tailpipe Rule**

The state and industry petitioners did not challenge the substantive standards of the Tailpipe Rule, but instead contended that in promulgating the rule, EPA again relied on an improper interpretation of § 202(a)(1) of the Act and was arbitrary and capricious in failing to justify and consider the immense costs that would necessarily flow from the Agency's conclusion that adopting the Tailpipe Rule would also trigger stationary-source regulation under the Act's PSD and Title V provisions. The petitioners maintained that if EPA had considered these cost impacts, the Agency would have been required to either exclude carbon dioxide from the scope of the Tailpipe Rule, decline to issue the rule entirely, or apply an "avoidance of absurd results" approach "to interpret the statute so as not to automatically trigger stationary source regulation." The Court of Appeals concluded, however, that both the plain text of § 202(a) and legal precedent, including the decision in *Massachusetts v. EPA*, refuted the petitioners' contentions.

### **Timing Rule and Tailoring Rules**

Once the Court of Appeals resolved the challenges to the Endangerment Finding and the Tailpipe Rule, it then addressed the heart of the petitioners' challenge: application of the Clean Air Act's stationary source permitting requirements to major greenhouse gas emitting facilities.

First, the court analyzed the petitioners' challenge to EPA's interpretation of the Act's § 165(a) stationary source permitting requirements for major emitting facilities located in areas in attainment for a particular National Ambient Air Quality Standard (or in areas that are unclassifiable for such a standard). "Major emitting facilities" are defined under § 169(1) of the Act as "any...stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant." EPA has interpreted "any air pollutant" to mean any air pollutant regulated under the Clean Air Act. Thus, under this interpretation, once greenhouse gases were defined as a pollutant and regulated under the Tailpipe Rule, the Act's stationary source requirements were also triggered for greenhouse gases.

Before reaching the merits of the challenge, the court addressed its timeliness. Observing that EPA first interpreted the relevant statutory provisions in a 1978 rule (and then reiterated its position in subsequent 1980 and 2002 rules), the court noted that under the Clean Air Act, a rule can be challenged only within 60 days of its promulgation unless new grounds arise after those 60 days. The petitioners argued that the Tailpipe Rule was just such a new ground. The court agreed, because at least two of the petitioners were not subject to the stationary source permitting requirements prior to the Tailpipe Rule and thus only now had ripened claims to challenge EPA's statutory interpretation.

After determining that the challenges were timely, the Court of Appeals turned to the merits of the petitioners' challenge. The petitioners argued that the Act could have been interpreted to avoid extending permitting to greenhouse gas emitters and provided three alternative interpretations of the statute. The court was unpersuaded by all three of the alternatives and held that, based on the plain language of the statute, the use of the term "air pollutant" in other sections of the Act, and the Supreme Court's holding in *Massachusetts v. EPA* that the greenhouse gases are pollutants under the Act, the term "any air pollutant" appearing in the stationary source permitting provisions must include any regulated air pollutant, including greenhouse gases.

After upholding EPA's interpretation of the stationary source permitting requirements, the court finally addressed the petitioners' challenges to the Timing and Tailoring Rules. The

petitioners argued that EPA is not allowed to depart from statutory requirements that require any major emitting facility with the potential to emit more than 100 tons per year to obtain construction and operating permits. EPA justified its departure from the statutory thresholds by arguing that (i) applying the permitting requirements to all greenhouse gas emitters would cause “absurd results” not intended by Congress; (ii) a phased approach was an administrative necessity to prevent overburdening EPA and state regulators with greenhouse gas permit applications, and (iii) the judicial doctrine of “one-step-at-a-time” allows agencies to implement regulatory programs one piece at a time.

The Court of Appeals, however, never reached the merits of this argument because it found that the petitioners could not prove that the Tailoring Rule had caused them any harm that could be redressed by the court, and thus lacked standing to bring the claim. The petitioners argued that, as a result of the Timing and Tailoring Rules, they were now subject to regulation of their greenhouse gas emissions and/or must obtain permits for new greenhouse gas sources. The court rejected this argument, holding that this injury was not a result of the Timing and Tailoring Rule, but instead resulted from the automatic operation of the Act itself. In fact, the court noted the Timing and Tailoring Rules actually mitigated those damages by reducing the number of sources initially subject to the requirements.

In an attempt to avoid the industry petitioners’ jurisdictional defect, the state petitioners presented two alternative standing arguments, both of which were rejected by the Court of Appeals. First, the state petitioners argued that they had standing because vacating the rules—thereby causing EPA to extend greenhouse gas permitting requirements to millions of small emitters—would cause Congress to act and mitigate their injuries. The court disagreed, stating that there was no certainty that Congress would act to address their injuries. Second, the state petitioners argued that they had standing under *Massachusetts v. EPA* based on EPA’s failure to regulate greenhouse gas emissions sooner. The court rejected this argument because the state petitioners raised it only in their reply brief and failed to present any evidence that they are adversely affected by climate change.

It seems relatively safe to predict that the petitioners are likely to seek further review in the D.C. Circuit and/or the U.S. Supreme Court. For now, however, EPA’s greenhouse gas regulatory program will be the legal framework with which states and industry will be required to deal.

**Kevin P. Holewinski**  
+1.202.879.3797  
[kpholewinski@jonesday.com](mailto:kpholewinski@jonesday.com)

**Daniella Einik**  
+1.202.879.3775  
[deinik@jonesday.com](mailto:deinik@jonesday.com)



## ■ UNITED NATIONS'S "RIO+20" CONFERENCE PRODUCES FEW CONCRETE COMMITMENTS

Twenty years after the 1992 Earth Summit in Rio, more than 100 heads of state gathered again in Rio on June 20–22, 2012 for the United Nations's "Rio+20" Conference on Sustainable Development, described as the largest-ever UN gathering of heads of state. The original 1992 conference produced noted global agreements on combating climate change and protecting biodiversity, as set forth in the Rio Declaration (principles setting out the basic standards of international environmental law), Agenda 21 (a roadmap aiming at achieving sustainable development), and the Forest Principles (a nonbinding good practice document on practice management). The Rio+20 Conference, however, produced far fewer tangible results.

The Brazilian negotiators of the Conference's final 283 consensus points document, "The Future We Want," removed several major commitments from the earlier draft, including specific targets for cutting carbon emissions, a \$30 million fund for sustainable activities in developing countries (an initiative of the Group of 77+China, it was rejected because developing countries were reluctant to accept a requirement that they also contribute), and a European proposal to transform the United Nations Environmental Programme into a full-fledged UN environmental agency. Instead, the final document generally contained vague language and few concrete commitments, leading to criticism from many participating environmental groups and nongovernmental organizations.

Among the outcomes of the Conference, however, was the launch of a process to negotiate "Sustainable Development Goals," including economic, social, and environmental aspects of sustainable development, to mirror and replace the UN's "Millennium Development Goals" when they expire in 2015. Rio+20's other accomplishments included voluntary pledges worth \$513 billion from governments, private

companies, and multinational agencies toward a series of "sustainable development projects."

**Marcello Hallake**

+55.11.3018.3933

[mhallake@jonesday.com](mailto:mhallake@jonesday.com)

## ■ JAPAN'S NEW FEED-IN-TARIFF SYSTEM FOR RENEWABLE ENERGY

Effective July 1, 2012, Japan implemented a new feed-in tariff system pursuant to the Act on Special Measures Concerning the Procurement of Renewable Energy by Operators of Electric Utilities, also known as the "FIT Law," enacted on August 26, 2011. Under this new system, power utilities in Japan are required to purchase electricity from renewable energy sources generated by certified facilities. The Ministry of Economy, Trade and Industry sets the applicable purchase price and purchase period for each type of renewable energy on an annual basis, taking into account the cost of supply and appropriate return to the power generators.

The initial purchase price for large-scale solar is 40 Yen (0.5 USD)/kWh and for large-scale wind is 22 Yen (0.275 USD)/kWh, in each case for a 20-year purchase period. These prices are among the highest in the world, reflecting both the initial high cost of implementing a renewable energy project in Japan and the desire of the Japanese government to provide incentives for renewable project developers by ensuring an attractive return on such investments. The implementing ordinance specifies the details of the system, including the criteria for certification of a renewable generating facility, the requirements for utilities to enter into power supply agreements and power connection agreements with power generators with certified renewable facilities, and the circumstances under which renewable generators may be required to restrain power output at the request of the utilities.

While the new feed-in tariff system reflects the Japanese government's desire to expand the renewable energy sector, especially in light of the current uncertainty over the future of nuclear power in Japan, there are still a number of challenges to be addressed. These include the need to liberalize or eliminate legal and regulatory restrictions that hinder the

development of renewable energy projects (such as land use restrictions and time-consuming filing obligations), as well as the limitations of the power grids that make it difficult for extensive cross-regional power transmission within Japan.

**Kaoru Umino**

+81.3.6744.1616

[kumino@jonesday.com](mailto:kumino@jonesday.com)

**Junko Dochi**

+81.3.6800.1876

[jdochi@jonesday.com](mailto:jdochi@jonesday.com)

*The new feed-in tariff system is discussed in more detail in the Jones Day Commentary, “Japan Launches the Feed-in Tariff System for Renewable Energy” (July 12, 2012).*

*The FIT Law is discussed in more detail in The Climate Report, Fall 2011.*

■ **AUSTRALIAN ENFORCEMENT INITIATIVE TARGETS  
CLAIMS OVER NEW CARBON PERMIT SCHEME**

Australian legislation, including the Clean Energy Act 2011, now requires carbon emitters to purchase permits. Initially there will be an open number of permits available at a fixed price and later a fixed number of permits with market-based prices. The minority Labor government was required to adopt this deeply unpopular legislation to gain the support of the Greens Party to retain control of the government after the last election.

The government claims that there are a growing number of hyperbolic assertions by some heavy emitting businesses about how costly and damaging to employment the new scheme will be. Some “green” businesses allegedly also make inflated claims in order to promote “green” technologies.

To try to dampen down claims that are fueling political opposition to the carbon permit scheme, the government has asked the Australian Competition and Consumer Commission (“ACCC”) to vigorously enforce the law against misleading conduct. The ACCC responded with a specific enforcement

initiative. Under pressure to deliver tangible results, in July the ACCC extracted undertakings from two solar businesses that had predicted power price rises of 400 percent by 2019.

Australia’s constitutional court (the High Court) recognizes an implied right to freedom of expression in connection with elections. As the next election approaches, some businesses that are the subject of ACCC action may seek to rely on this right.

**Nick Taylor**

+61.2.8272.0715

[njtaylor@jonesday.com](mailto:njtaylor@jonesday.com)

*Further details as to the ACCC’s position can be found in a Jones Day Antitrust Alert, “Australian Government Pushes Antitrust Authority to Firing Line in Battle with Businesses Over Greenhouse Caps and Trade,” April 2012.*

■ **MANDATORY GREENHOUSE GAS EMISSIONS  
REPORTING FOR UK-LISTED COMPANIES**

On June 20, 2012, the United Kingdom announced that all UK companies listed on the Main Market on the London Stock Exchange will be required to report their annual levels of greenhouse gas emissions from the start of April 2013. The new requirement will initially affect an estimated 1,100 companies and, following a review scheduled in 2015, could lead to a decision to extend the requirement to all “large companies” for the purposes of the Companies Act 2006, thus affecting an additional 24,000 businesses. A consultation on draft regulations to implement the policy decision is to follow later this year.

The affected companies will be required to report on all six greenhouse gases covered by the Kyoto Protocol in terms of their carbon dioxide equivalents. The companies will be able to use the existing UK Guidance on emissions, conversion factors on calculating their emissions. The UK Guidance is based on the internationally recognized greenhouse gas protocol for quantifying corporate accounts and reporting greenhouse gas emissions, and it aligns with the [International Organization for Standardization \(ISO\) 14064-1](#).

**Chris Papanicolaou**

+44.20.70.39.5321

[cpapanicolaou@jonesday.com](mailto:cpapanicolaou@jonesday.com)

*Further details as to the policy statement can be found in the Jones Day Commentary, "[Mandatory Greenhouse Gas Emissions Reporting for UK Listed Companies](#)," June 2012.*

## THE CLIMATE REPORT EDITORIAL BOARD

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### EDITORIAL BOARD

**Dickson Chin**

New York Office

Energy

+1.212.326.7893

[dchin@jonesday.com](mailto:dchin@jonesday.com)**Christine M. Morgan**

Atlanta Office

Environmental, Health &amp; Safety

+1.404.581.8215

[cmmorgan@jonesday.com](mailto:cmmorgan@jonesday.com)**Chris Papanicolaou**

London Office

Environmental, Health &amp; Safety

+44.20.7039.5321

[cpapanicolaou@jonesday.com](mailto:cpapanicolaou@jonesday.com)

### EXECUTIVE EDITOR

**John A. Rego**

Cleveland Office

Environmental, Health &amp; Safety

+1.216.586.7542

[jrego@jonesday.com](mailto:jrego@jonesday.com)**Kevin P. Holewinski**

Washington Office

Environmental, Health &amp; Safety

+1.202.879.3797

[kpholewinski@jonesday.com](mailto:kpholewinski@jonesday.com)**Jane K. Murphy**

Chicago Office

Environmental, Health &amp; Safety

+1.312.269.4239

[jkmurphy@jonesday.com](mailto:jkmurphy@jonesday.com)

## CONTACTS

---

### CALIFORNIA

**Thomas M. Donnelly**

San Francisco Office

Environmental, Health &amp; Safety

+1.415.875.5880

[tmdonnelly@jonesday.com](mailto:tmdonnelly@jonesday.com)

### NEW YORK

**Thomas C. Havens**

New York Office

Energy

+1.212.326.3935

[tchavens@jonesday.com](mailto:tchavens@jonesday.com)

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**Jason F. Leif**

Houston Office

Energy

+1.832.239.3727

[jfleif@jonesday.com](mailto:jfleif@jonesday.com)

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+33.1.56.59.39.46

[shagege@jonesday.com](mailto:shagege@jonesday.com)

### GEORGIA

**G. Graham Holden**

Atlanta Office

Environmental, Health &amp; Safety

+1.404.581.8220

[ggholden@jonesday.com](mailto:ggholden@jonesday.com)

### OHIO

**John A. Rego**

Cleveland Office

Environmental, Health &amp; Safety

+1.216.586.7542

[jrego@jonesday.com](mailto:jrego@jonesday.com)

### WASHINGTON, D.C.

**Kevin P. Holewinski**

Washington Office

Environmental, Health &amp; Safety

+1.202.879.3797

[kpholewinski@jonesday.com](mailto:kpholewinski@jonesday.com)

### ASIA

**Kaoru Umino**

Tokyo Office

Banking &amp; Finance

+81.3.6744.1616

[kumino@jonesday.com](mailto:kumino@jonesday.com)

### ILLINOIS

**Charles T. Wehland**

Chicago Office

Energy

+1.312.269.4388

[ctwehland@jonesday.com](mailto:ctwehland@jonesday.com)

### PENNSYLVANIA

**Mary Beth Deemer**

Pittsburgh Office

Environmental, Health &amp; Safety

+1.412.394.7920

[mbdeemer@jonesday.com](mailto:mbdeemer@jonesday.com)

### AUSTRALIA

**Tony J. Wassaf**

Sydney Office

Energy

+61.2.8272.0527

[twassaf@jonesday.com](mailto:twassaf@jonesday.com)

### LATIN AMERICA

**José Estandía**

Mexico City Office

Energy

+52.55.3000.4081

[jestandia@jonesday.com](mailto:jestandia@jonesday.com)

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---

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