




U.S. REGULATORY DEVELOPMENTS

Jane K. Murphy, Editor

■ **U.S. EPA'S 2013 REGULATORY AGENDA INCLUDES CLIMATE CHANGE**

On December 21, 2012, the U.S. Environmental Protection Agency published its [semi-annual regulatory agenda](#) outlining its rulemaking priorities for 2013. The agenda includes a timetable for finalizing federal rules to curb greenhouse gas emissions from both motor vehicles and stationary sources, as well as new requirements for the geologic sequestration of carbon dioxide.

U.S. EPA recently completed an agenda item related to the Renewable Fuel Standards program, which requires that four categories of renewable fuel be blended into transportation fuels in increasing amounts each year, reaching 36 billion gallons by 2022. Each renewable fuel category must emit lower levels of greenhouse gases than the petroleum fuel it replaces. U.S. EPA finalized the 2013 volume requirement for only [one renewable fuel](#)—biomass-based diesel—before the end of 2012, but [proposed](#) 2013 volume requirements for the other three categories—cellulosic biofuel, advanced biofuels, and total renewable fuels—on January 31, 2013. The proposal would require that 16.55 billion gallons of renewable fuels, including 14 million ethanol-equivalent gallons of cellulosic biofuel, be blended into the nation's transportation fuel supply in 2013. This represents a 60 percent increase in the cellulosic biofuel

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requirement above last year's level, despite a recent federal appeals court [decision](#) vacating the 2012 cellulosic biofuel requirement, because U.S. EPA had used an unreasonably optimistic methodology to project the available volume.

With respect to stationary emission sources, the regulatory agenda indicates that U.S. EPA plans to finalize the first-ever greenhouse gas "new source performance standards" for electric generating units in March 2013. An April 2012 [proposed rule](#) asked for public comment on a number of issues, including a range of greenhouse gas emission standards. The proposed standards would establish a limit on carbon dioxide emissions per megawatt hour for all fossil fuel-fired electric generating units with a base load rating of more than 250 million Btu/hour heat input (73 megawatts) that commenced construction after April 13, 2012.

According to the regulatory agenda, U.S. EPA also intends to issue a final rule in April 2013 to conditionally exclude certain carbon capture and storage activities from hazardous waste management requirements under the Resource Conservation and Recovery Act ("RCRA"). In August 2011, U.S. EPA [proposed](#) to exclude supercritical carbon dioxide streams from such requirements, but only when injected into [Class VI injection wells](#) regulated under the Safe Drinking Water Act's Underground Injection Control ("UIC") program under certain conditions. According to U.S. EPA, regulation under UIC rather than RCRA should facilitate the development of carbon capture and storage technology, but industry has expressed concern that the Class VI requirements are too stringent and may deter the geologic sequestration of carbon dioxide.

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■ **CALIFORNIA CONTINUES TO IMPLEMENT "CAP AND TRADE" WHILE DEFENDING PROGRAM IN COURT**

The California Air Resources Board ("CARB") has taken several recent steps to amend, implement, and defend its regulations establishing a state greenhouse gas "cap and trade" program, which sets a declining cap on such emissions and requires covered sources to have sufficient "compliance

instruments," which include emission allowances and offset credits, to cover their emissions.

On December 14, 2012, [CARB announced](#) its approval of two offset registries. The registries are authorized to list offset projects that comply with protocols approved by CARB. On January 25, 2013, the San Francisco Superior Court denied a petition for writ of mandate filed by two environmental groups challenging the offset protocols. The court concluded that the protocols' standards-based approach to additionality is consistent with A.B. 32, the authorizing statute, and that the four approved protocols are neither arbitrary nor capricious.

In early January 2013, CARB [proposed amendments](#) to link the California cap and trade program with the program enacted by Quebec. If the two cap and trade programs are linked, allowances and offset credits issued by either jurisdiction may be used to meet compliance obligations in either program.

CARB continues to hold auctions for the sale of allowances and will hold its second auction on February 19, 2013. [CARB's notice](#) of the upcoming auction describes steps that must be followed to participate in the auction. The California Chamber of Commerce has filed suit challenging CARB's regulations authorizing the auctioning and sale of emission allowances. *California Chamber of Commerce et al. v. California Air Resources Board et al.*, Sacramento Superior Court, Case No. 34-2012-80001313.

For a more detailed discussion of these developments, please see Jones Day's [Special California Update to The Climate Report](#).

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■ FERC REVISITS SEVERAL DECISIONS AFFECTING RENEWABLE ENERGY DEVELOPMENT

In late 2012 and early 2013, the Federal Energy Regulatory Commission took several actions that, in various ways, may support renewable energy resource development within the U.S.

Enhancing the Integration of Variable Energy Sources.

On December 20, 2012, the FERC [revisited](#) Order No. 764 regarding variable energy resources (“VERs”) and extended the compliance deadline from September 11, 2013 to November 12, 2013 to avoid implementing the new requirements during the summer peak season. VERs are energy sources (such as wind and solar) that are renewable, cannot be stored by the facility owner or operator, and have variability that is beyond the control of the facility owner or operator.

As [originally issued](#), Order No. 764 required all public utility transmission providers to offer VERs intra-hourly transmission scheduling at 15-minute intervals and required interconnecting VERs to provide meteorological and forced outage data to the public utility transmission provider to facilitate power production forecasting. On rehearing, in addition to modifying the compliance deadline, the FERC clarified that the intra-hour scheduling reform applied to all transmission customers, including load serving entities and network service customers. The FERC also agreed that in the absence of sub-hourly settlement and dispatch, a public utility transmission provider must account for intra-hour imbalances to ensure that they are properly factored into the calculation of hourly imbalance charges.

Responding to comments from the wind industry, the FERC also emphasized that a public utility transmission provider must explain how the variations of all resources and loads are accounted for in its Section 205 filing. VERs will have an opportunity to challenge these individual filings to the extent that the provider has not justified how it accounts for all variations.

Affirming Finding of Discriminatory Actions Against Wind

Generation. The FERC also revisited its decision on a complaint that pitted two renewable resources against each other: hydroelectric resources operated by the Bonneville Power Administration and wind facilities operated in the Pacific Northwest. In its [original decision](#), the FERC found that Bonneville’s Environmental Redispatch Policy discriminated against wind resources by enabling Bonneville to issue dispatch orders that required wind generation to reduce its output. Bonneville then unilaterally substituted energy generated by its own hydroelectric system for energy no longer produced by the curtailed wind generation.

In a December 20, 2012 [order denying rehearing](#), the FERC denied challenges to its order based on jurisdictional grounds and rejected arguments that hydroelectric and wind facilities were not similarly situated due to operational differences or Bonneville’s statutory environmental obligations. Instead, the FERC found that Bonneville’s actions affect the ability of certain resources to inject energy at a point of receipt by effectively changing the point of receipt from the affected resource to Bonneville’s hydroelectric facility. The FERC held that this unilateral action interrupts the firm point-to-point transmission service of non-federal transmission customers, without causing similar interruptions to firm transmission service for federal resources. Thus, the FERC concluded, Bonneville’s actions result in the noncomparable treatment of certain generation connected to Bonneville’s transmission system.

Guidance for Merchant Transmission Project Developers.

Finally, in a January 17, 2013 [Final Policy Statement](#) that could strengthen the ability of certain transmission projects to reach remote renewable generation resources, the FERC clarified its policies governing the allocation of capacity for new merchant transmission projects and new nonincumbent, cost-based, participant-funded transmission projects. The new policy gives merchant transmission projects more options by allowing them to allocate up to 100 percent of their projects’ capacity through bilateral negotiations, as long as the developers follow the FERC’s new open solicitation

process. That process includes a broad notice that ensures that all potential and interested customers are informed of the proposed project and specifies the criteria that the developer plans to use to select transmission customers. Developers are also required to make a post-selection demonstration showing that the process was consistent with the FERC's policy and open access principles.

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■ **SURVEY INDICATES THAT MANY AMERICANS CONSIDER COMPANIES' GLOBAL WARMING ACTIONS WHEN PURCHASING**

According to a recent report, "[Americans' Actions to Limit Global Warming in September 2012](#)," for the past four years, roughly 25 percent of U.S. consumers have either rewarded or punished companies for those companies' actions related to climate change. The report, based on findings from a nationally representative survey of 1,061 adults conducted by the Yale Project on Climate Change Communication and the George Mason University Center for Climate Change Communication between August 31 and September 12, 2012, indicates that a sizeable portion of the consumer market continues to care year-to-year about the stance of companies on global warming. The report also concludes that individuals who have not used purchasing power to either reward or punish companies in the past year plan to increase personal acts of consumer activism in the next year.

The report indicates that in the last year, about one in three American adults has rewarded a company that took steps to reduce global warming. Although the September 2012 survey results are a significant uptick from a 2010 low of 26 percent, the percentage of consumers reporting that they reward companies by buying their products is down from a high of 35 percent in May 2011. These results appear to indicate that consumers support companies that align with their individual values in addition to considering price, quality, and brand loyalty.

In addition to rewarding companies for taking actions to reduce global warming, 24 percent of those surveyed in September 2012 indicated that they had at some point in the past year chosen not to purchase products by companies that oppose steps to reduce global warming. Similar to the trend observed for rewarding companies, the percentage of consumers reporting that they used purchases to

punish companies that oppose steps to reduce global warming peaked in May 2011 at 27 percent after overcoming a low in 2010 of 22 percent.

When asked to contemplate future behavior, 52 percent of individuals surveyed expressed the intent to either reward or punish companies sometime in the next year for the companies' action or inaction to reduce global warming. Since researchers from Yale and George Mason began collecting data four years ago, slightly more than half of Americans have consistently reported plans to use purchasing power to either reward or punish companies. In November 2008, consumers indicated the greatest willingness (58 percent) to either buy or not buy based on a company's actions on global warming. In the 2010 trough of the Great Recession, willingness to utilize purchasing power to support global warming action fell to 51 percent. Since then, consumer support for utilizing purchasing power has remained at just over half of the surveyed American adults.

The Yale and George Mason researchers also studied three other prongs of climate actions by citizens: (1) saving energy, (2) citizen behavior, and (3) communication behavior. Even though a majority of American adults report that they always or often set their thermostats below 68 degrees and take other actions like replacing traditional light bulbs with compact fluorescent light bulbs, the researchers noted a decline in Americans' belief that certain energy-saving actions can reduce global warming. Americans are less confident today than four years ago that their individual actions will reduce their contribution to global warming.

Consistent with a reduced belief in the efficacy of individual energy-saving actions, Americans are now less likely to often or even occasionally discuss global warming with friends and family. While Americans may be less optimistic about their individual impact on global warming, the report's authors observed that a growing number of Americans say they contacted a government official in the past year to support mitigation of global warming. Additionally, in the next year, more Americans intend to urge government officials to take action on global warming.

Overall, the Yale and George Mason polling data indicate that Americans continue to be concerned about global warming

and are willing to use political and consumer activism to push for action on global warming.

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■ INSTITUTIONAL INVESTOR COALITIONS UNITE FOR ACTION ON CLIMATE CHANGE

Four regional climate change investor groups have formed the [Global Investor Coalition on Climate Change](#) to provide a global platform for dialogue among investors and governments on international policy and investment practice related to climate change. The coalition, consisting of the European Institutional Investors Group on Climate Change, the North American Investor Network on Climate Risk, the Australia/New Zealand Investor Group on Climate Change, and the Asia Investor Group on Climate Change, was formed on November 26, 2012, shortly before the start of the United Nations' international climate negotiations in Doha, Qatar. The four groups collectively represent more than 200 institutional investors with more than \$22.5 trillion in assets.

One week ahead of the Doha conference, the new coalition, joined by the United Nations Environment Programme Finance Initiative and the Principles for Responsible Investment Initiative, authored a [letter](#) to the governments of the world's largest economies that sets forth principles for effective policies to encourage future low-carbon investment. The letter begins by asserting that climate change already has disruptive effects on investments and that delay in implementing ambitious policies "will increase investment risk for institutional investors and jeopardize the investments and retirement savings of millions of citizens."

After reviewing effective policies in countries around the world, the letter suggests that a dialogue should begin to establish policies that meet six objectives:

1. Include comprehensive, enforceable legal mechanisms for achieving short-term, medium-term, and long-term greenhouse gas emission reduction objectives and targets;

2. Provide incentives to shift the risk/reward balance in favor of low-carbon investment;
3. Recognize that scale is critical to making low-carbon investment opportunities more cost-effective than high-carbon opportunities;
4. Develop incentives that evolve over a predictable and appropriate timeframe;
5. Harness the power of markets to find the least costly ways to reduce emissions; and
6. Align with economic, energy, resources, and transport objectives.

The letter's authors see evidence that institutional investors will significantly increase their low-carbon investment allocations under the right policy conditions. The groups end by urging the world's largest economies to enter a dialogue with institutional investors to hasten the transition to a low-carbon economy, because institutional investors play an increasingly central role in financing low-carbon energy solutions.

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■ **EXTENSION OF FEDERAL PRODUCTION TAX CREDIT BOOSTS WIND ENERGY SECTOR**

After months of fierce lobbying by the wind power industry, a last-minute addition to the highly controversial “fiscal cliff” legislation was the fifth—and possibly last—extension of the federal production tax credit (“PTC”) for wind energy facilities. Specifically, as part of the American Taxpayer Relief Act of 2012 (“ATRA”) passed by Congress on January 1, 2013, Section 45 of the Internal Revenue Code of 1986 was revised to extend the PTC for wind energy facilities and certain other renewable power projects, the “construction of which begins before January 1, 2014.”

The ATRA provision not only extended the PTC deadline from January 1, 2013 to January 1, 2014, but even more significantly, altered the required status of a PTC-eligible project from having to be “placed in service” by the deadline to only starting construction by year-end 2013. Congress’ intent in changing the operative standard in Section 45 was to provide more “breathing room” for projects to qualify for the PTC following the 11th hour, one-year extension. This modification to Section 45 should permit many more wind projects to qualify for a PTC than would have been the case if the “placed in service” requirement had been retained.

Under revised Section 45, taxpayers can claim a PTC for electricity generated from eligible renewable projects over a 10-year period. In addition to wind projects, the revisions extend the PTC to qualifying geothermal, biomass, landfill gas, hydropower, trash-to-energy, and marine and hydrokinetic facilities that begin construction before January 1, 2014. The PTC for wind energy, geothermal, and closed-loop biomass facilities is 2.2 cents per kilowatt-hour (“kWh”), while the credit for open-loop biomass, landfill gas, hydropower, trash-to-energy, and marine and hydrokinetic facilities is 1.1 cents per kWh (each indexed for inflation).

The ATRA also amended Section 48 of the Code to allow projects using the PTC-eligible technologies that begin construction in 2013 to claim a 30 percent investment tax credit (“ITC”) in lieu of the PTC. In addition to extending the PTC and ITC election for eligible renewable power projects, the ATRA also renewed the first-year “bonus depreciation” for such projects under Section 168(k) of the Code (equal to 50 percent of the eligible cost basis of such projects) if they are placed in service in 2013.

The ATRA does not define the construction activities that must be completed in 2013 for a PTC-eligible renewable project to be deemed to have started construction this year. But the new standard in Section 45 mimics the rule that was used to qualify for a U.S. Department of Treasury cash grant in lieu of a tax credit under the now-expired Section 1603 cash grant program created under the 2009 “stimulus bill,” formally known as the American Recovery and Reinvestment Act. In general, under the guidance issued by Treasury in March 2009 for the 1603 grant program, a taxpayer could establish that an eligible renewable energy project had begun construction either by performing “physical work of a significant nature” or by satisfying a more objective “safe harbor” by incurring at least five percent of eligible project costs.

Under the “physical work” test, the taxpayer (project owner) must perform “significant” physical construction work at the project site, such as excavating foundations for wind turbines, and such activities, once begun, must be part of a “continuous” program to construct the project. To qualify a project under the “5 percent safe harbor,” the taxpayer generally must pay or incur at least five percent of the total eligible costs of the project. Treasury is expected to issue formal guidance on amended Section 45 in the coming months, which should reveal whether and to what extent the new standard will be interpreted in a similar fashion to the 1603 grant program.

Importantly, Section 45, as revised, no longer expressly requires that a PTC-eligible renewable project be “placed in service” by a certain date to qualify for a PTC. One concern is that developers could attempt to qualify numerous, perhaps uneconomic, projects for valuable federal tax benefits by starting construction in 2013, with an unlimited amount of

time to complete construction. Some are therefore questioning whether Treasury, in its forthcoming interpretive guidance, will place an outside date on when a project that commences construction before January 1, 2014 must be completed and placed in service.

However, construction periods vary widely across renewable energy projects and technologies. For example, the construction period for onshore wind projects generally is from four to 10 months but is much longer for offshore wind projects. Treasury, therefore, could not address these concerns by simply imposing a single “placed in service” deadline for all PTC-eligible renewable projects that start construction this year, without also threatening the legislative purpose behind the change in Section 45. It is more likely that Treasury will largely follow the guidance it issued for the Section 1603 grant program, particularly since a taxpayer’s compliance with either a “physical work” or “5 percent safe harbor” test will virtually ensure project completion within a reasonable period of time. Even without a specific “placed in service” deadline, developers will have strong commercial incentives to bring projects into service as soon as practicable and begin to earn a return on the substantial capital they will have to commit and invest this year in equipment and services to “start construction” and qualify for these important tax credits.

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■ CAPITAL MARKET FINANCING OF UTILITY-SCALE SOLAR PROJECTS: WILL THERE BE A TREND?

For the most part, 2012 proved to be a markedly changed landscape for large-scale (i.e., 200 megawatts and larger) solar project investment from that of 2010 and 2011. With the expiration of the cash grant program and the winding down in September 2011 of the Department of Energy’s Loan Guaranty Program, the two primary drivers of large utility-scale acquisition and development were essentially sidelined. In addition, recent power purchase agreement pricing in California did not permit the same returns that were achievable with contracts of the 2008–09 era.

However, the emergence of MidAmerican Energy as an acquirer of utility-scale solar projects and its use of an \$850 million bond issuance to help fund the 550-megawatt Topaz Project heralded the possibility of large-scale solar being able to access capital markets in a new way. The announcement in January 2013 that MidAmerican had also acquired the 579-megawatt Antelope Valley projects in Los Angeles and Kern Counties seemed to reinforce that possibility. The question is whether tapping the bond markets was a function more of the promise of large, utility-scale solar economics generally or of the somewhat unusual involvement of the Berkshire Hathaway-owned MidAmerican in the projects' capital structure.

A proposed \$700 million bond issuance for the Topaz project was oversubscribed (by some \$500 million), which prompted an increase in amount to \$850 million. In describing the criteria for rating the Topaz bonds, Standard & Poors (which gave the bonds its lowest investment grade rating of BBB-) noted the following beneficial conditions:

- The credit quality of MidAmerican (burnished substantially by being 89.8 percent held by Warren Buffet's Berkshire Hathaway);
- MidAmerican's significant (50 percent) equity stake in Topaz;
- The presence of a top-tier solar engineering, procurement, and construction ("EPC") contractor, First Solar;
- The tenor of the 25-year power purchase agreement with Pacific Gas & Electric;
- The construction risk mitigation measures built into the EPC contract, which also specified a fixed price and a firm completion date;
- The set of milestone clauses in the EPC contract that will incentivize First Solar to meet its contractual obligations (e.g., complete power blocks on-time and at-cost);
- The four-month cushion specified in the EPC contract allowing MidAmerican to replace First Solar with another EPC firm without project delays, should First Solar fail to meet the contract's milestone clauses;
- The heavy stake First Solar has in the Operation & Maintenance contract, which also promises to incentivize their performance; and

- The cost caps built into the Operation & Maintenance contract: \$16.5 million for the first year with an index to inflation thereafter.

Moreover, at the time of issue, the Topaz bonds (5.75 percent unsecured debt due in September 2039) carried an interest rate nearly 3.8 percent higher than U.S. Treasury Bills, which is an attractive yield in an interest-starved investing environment.

The Antelope Valley projects' facts essentially mirrored those of Topaz. The size of the projects, the quality of SunPower as an EPC contractor, and the tenor of the power purchase agreements with Southern California Electric are sufficiently similar to the Topaz facts to suggest that a similar financing option may be available—for MidAmerican.

MidAmerican's acquisition of Antelope Valley was presaged somewhat when Warren Buffet, in his February 25, 2012 letter to Berkshire Hathaway's shareholders, said with respect to MidAmerican, "[L]ate last year we took on two solar projects—one 100 percent-owned in California [Topaz] and the other 49 percent-owned in Arizona [Agua Caliente]—that will cost about \$3 billion to construct. *Many more wind and solar projects will almost certainly follow.*" (emphasis added). Whether other large utility-scale project sponsors will be able similarly to access the public debt markets remains to be seen.

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■ D.C. CIRCUIT DENIES REHEARING *EN BANC* IN CHALLENGE TO U.S. EPA'S GREENHOUSE GAS REGULATIONS

On December 20, 2012, the U.S. Court of Appeals for the District of Columbia Circuit denied, by a vote of 6 to 2, rehearing *en banc* of its June 26, 2012 *per curiam* opinion dismissing various petitions for review of the greenhouse gas regulations promulgated by the U.S. Environmental Protection Agency under the federal Clean Air Act. *Coalition for Responsible Regulation v. EPA, D.C. Cir.*, No. 09-1322, 12/20/2012. Circuit Judges Brown and Kavanaugh each wrote extensive opinions dissenting from the Circuit Court's denial of rehearing.

In her dissent, Judge Brown addressed what she called interpretive shortcomings of the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), and U.S. EPA's subsequent endangerment finding. Judge Brown argued that the Clean Air Act is not in fact applicable to greenhouse gases because the purpose of the Act is to address the direct health effects of specific air pollution problems through tailored remedies. When Congress has deviated from this direct nexus requirement in the past, i.e., with stratospheric ozone and acid rain, it has done so through negotiated legislative compromise and not through U.S. EPA action under the existing Act.

As to the endangerment finding, Judge Brown argued that U.S. EPA failed to prove whether greenhouse gases were "reasonably anticipated" to endanger public health and welfare. U.S. EPA's finding that greenhouse gases may ultimately endanger human health and welfare was insufficient, she concluded, because U.S. EPA must prove that greenhouse gases are a reasonably direct cause of harm to public health and welfare.

Judge Brown argued that the Circuit Court's opinion took *Massachusetts v. EPA* to its illogical end by applying that case's holding to the Clean Air Act's Title V operating permit

and Prevention of Significant Deterioration ("PSD") preconstruction permit programs for stationary emission sources under U.S. EPA's so-called Tailoring Rule. She argued that applying the Act's stationary source provisions to greenhouse gas emissions according to the Act's specified applicability levels would so greatly expand the number of regulated entities that there was no way this could have been Congress' intent. Therefore, Judge Brown reasoned that the D.C. Circuit's opinion was at odds with the U.S. Supreme Court's 2000 opinion in *FDA v. Brown & Williamson*, 529 U.S. 120, in which the Supreme Court refused to defer to the Food and Drug Administration's discretion to regulate tobacco because it was Congress' clear intent that tobacco not be regulated by the FDA.

Judge Kavanaugh's dissent focused on the tension between U.S. EPA's application of two key statutory aspects of the Clean Air Act's PSD provisions. Judge Kavanaugh disputed U.S. EPA's longstanding interpretation of the term "any air pollutant," 42 U.S.C. § 7479(1), as overly broad. He noted there would initially appear to be two plausible interpretations of the term "air pollutant" for purposes of the PSD statute: (i) more broadly, any airborne compound that is deemed harmful and is regulated by U.S. EPA in any Clean Air Act program, including greenhouse gases such as carbon dioxide; or (ii) more narrowly, those air pollutants that are regulated by U.S. EPA in setting and enforcing National Ambient Air Quality Standards ("NAAQS"), which would cover carbon monoxide, lead, nitrogen dioxide, ozone, particulate pollution, and sulfur dioxide, but not greenhouse gases.

With that choice, Judge Kavanaugh faulted U.S. EPA for choosing the broader interpretation, which created "a glaring problem" for the Agency in light of the Clean Air Act's numerical emissions thresholds at which PSD permitting requirements are triggered. The Act's regulatory thresholds present "a very low trigger for emissions of greenhouse gases because greenhouse gases are emitted in far greater quantities than the NAAQS pollutants." Indeed, U.S. EPA itself recognized this exact problem but chose to address it by applying higher ("tailored") regulatory emissions thresholds, rather than by revisiting the Agency's interpretation of "any air pollutant." Because taking the statute at its word and interpreting "any air pollutant" broadly to include greenhouse gases leads to what both he and U.S. EPA consider to be "absurd

results,” Judge Kavanaugh insisted that U.S. EPA and the D.C. Circuit were obligated to read “any air pollutant” more narrowly. *See* Dissenting Op. at 3–10 (Kavanaugh, J).

The petitioners have until March 20, 2013 to petition the Supreme Court for review. It is expected one or more of the petitioners will do just that.

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■ FEDERAL DISTRICT COURT DISMISSES CLIMATE CHANGE “PUBLIC TRUST” LAWSUIT

As discussed most recently in *The Climate Report, Spring 2012*, several advocacy groups filed a lawsuit in the name of minor children against a number of states and the federal government alleging breach of the government’s fiduciary duty to regulate greenhouse gas emissions under the “public trust doctrine.” *Alec L. v. Lisa Jackson et al.*, No. 1:11-cv-02235-RLW (D.D.C.). The plaintiffs sought declaratory and injunctive relief requiring the defendant governments to reduce carbon dioxide emissions by at least six percent per year beginning in 2013.

On May 31, 2012, the U.S. District Court for the District of Columbia issued its [decision](#) dismissing the plaintiffs’ amended complaint with prejudice for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). The court held that no federal “public trust doctrine” existed and, even if the plaintiffs could allege a public trust claim sounding in federal common law, such a cause of action would be displaced by the Clean Air Act.

Relying on the U.S. Supreme Court’s pronouncement in *PLL Montana, LLC v. Montana*, 132 S. Ct. 1213 (2012), that “the

public trust doctrine remains a matter of state law” that “[did] not depend upon the Constitution,” the district court concluded that the public trust doctrine is wholly a creature of state law. The district court thus rejected the plaintiffs’ contention that their amended complaint raised a federal question sufficient to invoke the federal court’s jurisdiction.

In the alternative, the district court held that even if the public trust doctrine was at one time actionable under federal common law, it would be displaced by the Clean Air Act with respect to regulation of carbon dioxide. The court regarded the U.S. Supreme Court’s decision in *American Electric Power Company v. Connecticut*, 131 S. Ct. 2527 (2011), as dispositive. In *AEP*, the Supreme Court stated that “the Clean Air Act and the U.S. EPA action it authorizes displace any federal common law right to seek abatement of carbon dioxide emissions from fossil-fuel fired power plants.” According to the district court, *AEP* stands for the proposition that the Clean Air Act displaces *any* federal common law right to regulate carbon-dioxide emissions.

Following dismissal, the plaintiffs moved for reconsideration. The plaintiffs argued that reconsideration was necessary because they had not had an opportunity to brief the issues raised in *PLL Montana*; that, in addition to a federal common law claim, they had alleged that the defendants violated specific provisions of the U.S. Constitution; and that the district court’s reading of *AEP* was overbroad. The plaintiffs also requested, in the alternative, that they be granted an opportunity to further amend their complaint. In opposition briefs, federal defendants and intervenor National Association of Manufacturers countered that the plaintiffs had ample opportunity, in the hundreds of pages of briefing and lengthy oral arguments held regarding the motions to dismiss, to address the issues raised in the motion for reconsideration. The motion has not yet been ruled on by the district court.

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■ **PENNSYLVANIA FEDERAL COURT JOINS OTHERS IN HOLDING THAT STATE COMMON LAW CLAIMS ARE PREEMPTED BY THE CLEAN AIR ACT**

In *Bell v. Cheswick Generating Station, GenOn Power Midwest, L.P.*, No. 2:12-cv-929, 2012 BL 267976 (W.D. Pa. Oct. 12, 2012), the U.S. District Court for the Western District of Pennsylvania applied the reasoning of two seminal climate change cases to dismiss state common law tort claims of nuisance, negligence, recklessness, trespass, and strict liability. The plaintiffs alleged that emissions from Cheswick Generating Station, including coal dust, fly ash, and other particulates, were damaging the properties of a putative class of at least 1,500 individuals who reside or own residential property within a one-mile radius of the plant.

In granting the defendant's motion to dismiss, the court relied on several recent cases precluding common law claims that encroach on the Clean Air Act, including two in which plaintiffs had sought injunctive relief or damages for companies' alleged contribution to climate change, *American Electric Power Co. v. Connecticut*, 131 S.Ct. 2527 (2011), and *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012). The court in *Bell* found that "the Clean Air Act represents a comprehensive statutory and regulatory scheme that establishes the standards with which the Cheswick Generating Station must abide," and that the plaintiffs' "claims impermissibly encroach on and interfere with that regulatory scheme" because the relief requested "would necessarily require this Court to engraft or alter those standards, and judicial interference in this regulatory realm is neither warranted nor permitted." 2012 BL 267976, at *8.

The plaintiffs have appealed the district court ruling to the U.S. Court of Appeals for the Third Circuit. If the district court is affirmed, it may make it more difficult to bring future state common law claims to address alleged impacts from emissions regulated by the Clean Air Act.

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■ **U.N.'S DOHA CONFERENCE MOVES TOWARD NEW GLOBAL CLIMATE CHANGE DEAL**

The 18th Conference of the Parties to the 1992 U.N. Framework Convention on Climate Change ("UNFCCC") came to a close in Doha, Qatar on December 8, 2012 with the adoption of agreements intended to set a pathway to achieve a new global climate change treaty by 2015. Seen as a modest step forward, the Doha agreements seek to provide that by 2020, all nations accept more ambitious global greenhouse gas emission reduction commitments to close the gap between current pledges under the Kyoto Protocol and the reductions needed to hold global warming below 2°C. To meet the 2015 deadline, a timetable for meetings and workshops in 2013 was set, and it is anticipated that a meeting of world leaders will be convened in 2014 to give the required political momentum to the UNFCCC's work.

Certain nations, excluding key players such as the U.S., China, and Japan, agreed to extend their Kyoto Protocol commitments eight more years from 2013 to 2020, to conclude a round of negotiations launched in Bali, Indonesia in 2007. The agreements direct the Kyoto parties to consider strengthening their targets in 2014 and also provide a compromise over how to carry forward certain emission credits awarded to nations that were considered "economies in transition" when the Kyoto Protocol was signed in 1997.

The European Union has confirmed its participation in the Kyoto Protocol's "second commitment period" starting on January 1, 2013. The European Commission also confirmed that for the second Kyoto Protocol commitment period, the EU has established an emissions reduction commitment in line with its domestic target of cutting emissions by 20 percent of 1990 levels by 2020 but has left the door open to stepping up this reduction to 30 percent if the conditions are right.

The Doha conference made progress with setting up various bodies designed to channel technology and finance to developing nations. The Green Climate Fund, announced in 2010 at the 16th Conference of the Parties in Cancun, Mexico, will be established in the Republic of Korea, which was also chosen as the location for work of the Standing Committee on Finance. The fund's activities are expected to be up and running in 2014. In addition, the Doha conference endorsed the proposal of a consortium led by the United Nations Environment Programme to host the Climate Technology Centre, the implementing arm of the UNFCCC's technology mechanism, for an initial term of five years.

The Doha agreements continued the pledge of financial support from developed to developing countries, including a pledge to compensate developing countries for "loss and damage" caused by climate change. Further arrangements are to be established at the 19th Conference of the Parties, to be held in Warsaw, Poland at the end of 2014.

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■ CHINA ANNOUNCES PLAN TO ADDRESS AIR POLLUTION

On December 5, 2012, China's Ministry of Environmental Protection ("MEP") announced its 12th Five-Year Plan on Air Pollution Control in Key Regions, which aims to dramatically cut emissions of pollutants in economically dynamic areas. This is China's first comprehensive pollution plan and comes at a time of growing social unrest due to worsening pollution levels.

The government has pledged 350 billion yuan (US\$56 billion) to curb pollution in major cities by 2015. According to the MEP, China will reduce the intensity of fine particulate emissions (known as "PM_{2.5}") by at least five percent in 13 major areas covering 117 cities. PM_{2.5} refers to fine particles 2.5 microns or less in diameter, which are particularly harmful to humans as they can travel deep into the respiratory tract to the lungs. For the Beijing-Tianjin-Hebei Province, the Yangtze River Delta, and the Pearl River Delta, areas most severely affected

by pollution, PM_{2.5} levels will be cut by at least six percent. The plan also calls for a reduction of larger 10-micron particulate emissions ("PM₁₀"), sulfur dioxide, and nitrogen dioxide by 10 percent, 10 percent, and seven percent respectively.

The plan focuses on the areas of the country that account for almost 50 percent of sulfur dioxide, nitric oxide, smoke, and dust, and explores ways to reduce the burning of fossil fuels, a significant contributor to climate change. A major obstacle to China's pollution reduction goals is the country's coal consumption. The MEP is responding to this by planning coal consumption caps in key regions, so as to phase out the use of coal-fired boilers and encourage the use of more efficient energy sources, such as renewable sources and combined heat and power technologies.

The plan contributes to China's broader commitment under the [12th Five-Year Plan \(2011-2015\)](#) to invest in clean energy and climate change programs. Key targets under the Five-Year Plan include a 16 percent reduction in "energy intensity" (energy consumption per unit of GDP), increasing non-fossil energy to 11.4 percent of total energy use, and a 17 percent reduction in "carbon intensity" (carbon emissions per unit of GDP).

As China's economic development and urbanization continues, the need for heightened consideration for environmental repercussions has never been so clear. According to the MEP, high on the agenda of the 12th Five-Year Plan on Air Pollution Control in Key Regions is optimization of industrial structures and layout, as well as the setting of strict limits for projects involving coal-fired plants, iron and steel production, cement, and petrochemicals, all of which are heavy polluters. The progress of the plan will be reviewed every year after 2013, with a final assessment conducted in 2016. The extent to which the plan will affect future infrastructure and commercial investments in the country remains to be seen.

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■ UNITED KINGDOM SETS ITS SIGHTS ON SOLAR ENERGY IN 2013

On December 27, 2012, the United Kingdom's Department of Energy and Climate Change published [an update](#) to the "Renewable Energy Roadmap" launched in July 2011. The update recognizes solar photovoltaic ("solar PV") as a "key technology" in UK government policy for the first time. As the UK is not known for its sunny climate, previous policy has focused on other technologies, such as wind, hydroelectric, and bioenergy. However, in 2012 the UK solar market was ranked eighth in the world by the European Photovoltaic Industry Association, and according to the Department, solar PV has 82 percent public support. This confidence is reflected in government data: solar PV capacity in the UK increased by more than five times between June 2011 and June 2012.

The new policy direction aims to address some of the previous challenges in developing solar PV. Currently, compared to other key technologies, solar PV has the lowest load factor because there are more grey days than sunny days in the UK. In the update, the range of future deployment has been assessed to be between seven and 20 gigawatts. To maximize deployment, the UK is seeking innovation in cost-effective storage solutions and power grid management. These developments would target a step-change in affordability, introducing the potential for solar PV to be a key source of renewable energy in the UK over the long term.

Developers have previously questioned the longevity of governmental financial support for solar PV. Following a review of solar PV tariffs, changes to the Feed-in Tariff scheme for installations of less than five megawatts and Renewable Obligation Certificates ("ROCs") for larger projects will come into force on April 1, 2013. The changes to the banding under the ROCs system include two new bands: one for building-mounted solar PV and the other for all other types of solar PV above 50 kilowatts in size. Also, Contracts for Difference are to continue beyond March 2017. These protect investors against short-term volatility in electricity prices by providing a steady income through the repayment of excess revenue received during a price spike. The changes have been made with a view to the long-term sustainability of tariffs, taking into account both present and future solar PV costs.

The Department of Energy and Climate Change wants to produce a solar PV strategy in 2013 that adds to the Renewable Energy Roadmap and, according to the recent update, "gives the industry confidence to invest." Through this new strategic approach, the UK government intends to tackle issues such as cost reduction through working with industry and, in some cases, learning from overseas solar PV sectors. The Department intends to establish new structures, such as advisory groups, for communication between government and industry. In addition, the Department intends to work with network companies to ensure clarity for proposed solar PV installations in relation to costs and timetable for their grid connection.

On research and design, the UK Research Council has awarded a £4 million grant to a consortium of researchers in the fields of new materials and systems performance to establish a national solar cell efficiency measurement facility to assist solar PV installations in the UK. In 2013, a further £5 million grant will be awarded to research that aims to reduce the costs of solar energy by optimizing solar PV systems.

The UK government's update highlighted the substantial increase in activity in the UK on installations of more than five megawatts over this coming year and beyond. Globally, solar PV is now the third-largest renewable energy source in terms of installed capacity. The new policy direction evidenced in the update suggests a governmental commitment to increasing the deployment of large-scale solar PV projects in the UK over the long term.

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