



INITIALLY . . .

President Obama Announces Climate Change Strategy for Second Term

Echoing a theme of his second inaugural address five months earlier, on June 25, President Obama outlined a second-term climate change strategy to meet “a moral obligation to future generations to leave them a planet that is not polluted and damaged.” The President’s “[Climate Action Plan](#)” is structured in three parts: mitigation efforts designed to reduce “carbon pollution” in the United States, adaptation efforts designed to minimize the impacts of climate change on U.S. communities, and international leadership to promote global mitigation and adaptation efforts.

Reflecting the likely insurmountable political headwinds that climate change legislation continues to face in Congress, the President’s plan relies almost entirely on administrative actions. For example, through directives to the military and other federal agencies—collectively the country’s largest property owner, largest consumer of goods and services, and largest energy user—the administration has significant opportunities to influence market demand for renewable energy and the adoption of energy efficiency measures.

Key Elements of the President’s Mitigation Strategy

The President reaffirmed the administration’s goal of reducing total U.S. greenhouse gas emissions by 17 percent below 2005 levels by 2020. He proposes to accomplish this by imposing new emission limitations for power plants (discussed in more detail elsewhere in this newsletter), continuing to promote renewable energy with a goal

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of doubling renewable electricity generation by 2020, further reducing greenhouse gas emissions from the transportation sector via fuel economy standards and biofuel development, and achieving greater energy efficiency in buildings and appliances with a goal of doubling “energy productivity” by 2030 compared to 2010 levels.

The President proposes to increase federal funding for “clean energy” technology by 30 percent in the FY 2014 budget to approximately \$7.9 billion. Such spending would be applied to a wide range of programs and initiatives, encompassing technology to reduce greenhouse gas emissions from fossil fuel use (such as carbon capture and sequestration), renewable energy technologies (such as wind power), and advanced nuclear power technologies.

Key Elements of the President’s Adaptation Strategy

The President’s plan seeks to address the physical impacts of climate change by directing federal agencies to identify and remove federal policy barriers to “climate resilient” investments by states, communities, and private companies; providing leadership in establishing climate resilience standards and practices; and improving the climate resilience of federal facilities and infrastructure. The administration intends to use the disaster relief funding authorized by Congress in response to Superstorm Sandy to address climate vulnerability in restored areas and to use the experience to develop more broadly applicable adaptation strategies.

Key Elements of the President’s International Climate Change Strategy

On the international level, the President’s plan proposes to continue and expand a range of existing bilateral and multilateral initiatives designed to reduce greenhouse gas emissions in major emerging economies (such as China, India, and Brazil) and to promote foreign investment in low-carbon energy technologies. The plan points to the importance of U.S. leadership in forging, by the end of 2015, a successor to United Nations’ Kyoto Protocol climate change treaty.

To make fossil fuel use a less attractive global energy source, the President’s plan calls for an end to U.S. financial support, both directly and indirectly through multilateral development banks, for construction of new coal-fired power plants overseas, except in very limited circumstances. The President

also reaffirmed his pledge to seek a global phase-out of fossil fuel tax subsidies, which the plan values at more than \$500 billion annually.

Potential Political Opposition to the President’s Plan

President Obama clearly expects opposition to his plan from some members of Congress, particularly his direction to U.S. EPA to promulgate new greenhouse gas standards for power plants, and he has expressed no patience for any negotiation that does not accept the scientific premise for his plan. In the public remarks that accompanied release of his Climate Action Plan, the President likened opponents of climate change regulation to members of “the flat earth society,” which was not viewed as a rhetorical olive branch.

It is unlikely, however, that Congress will be able to derail the nonlegislative elements of the plan, as long as the President is prepared to accept public reaction to the inevitable charges that climate change regulation will increase energy costs and kill jobs. While the President will have a difficult time obtaining the additional funding and fossil fuel tax changes he seeks in his 2014 budget proposal—it’s unlikely that Congress will even pass a formal 2014 budget—Congress has very limited power under the Congressional Review Act to overturn agency actions, such as the forthcoming power plant standards. Although such standards can and likely will be challenged in court, the administration’s previous greenhouse gas regulations have thus far survived such review.

Congress can seek to limit agency discretion via a budget bill (or, in the absence of a budget, in a Continuing Resolution to fund the government) by prohibiting an agency from using any appropriated funds to develop particular rules. Last month, the House of Representatives approved an FY 2014 Department of Defense appropriations bill that bars the DOD from using biofuels, and a House subcommittee approved an FY 2014 appropriations bill covering, among other agencies, U.S. EPA that expressly restricts EPA’s ability to develop certain regulations, including the power plant standards. However, it seems unlikely that the Senate will agree to a budget with such provisions, and the history of recent budget battles does not suggest that opponents of climate change regulation have the votes to force a government shutdown over the issue.

The results of federal midterm elections in 2016 might change the balance of power in Congress. Current projections foresee a greater opportunity for Republicans to take control of the Senate than for Democrats to take control of the House of Representatives. While the latter situation might open the door for legislative action in support of President Obama's Climate Action Plan, the former situation would leave the President with his authority to veto legislation seeking to curtail that plan.

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■ **PRESIDENT OBAMA TARGETS POWER PLANT EMISSIONS IN NEW CLIMATE CHANGE PLAN**

On June 25, President Obama unveiled a "[Climate Action Plan](#)" including measures designed to reduce greenhouse gas emissions in the United States using the President's executive powers. Greenhouse gas emission standards for power plants are a prominent feature of the President's plan. In a [memorandum](#) released the same day as the plan, President Obama directed U.S. EPA to promulgate "new source performance standards" for greenhouse gas emissions from both new and existing power plants under section 111 of the Clean Air Act.

EPA previously [proposed](#) new source performance standards for carbon dioxide emissions from new fossil fuel-fired power plants on April 13, 2012. Final standards for new power plants were initially expected in March 2013, according to EPA's [Uniform Agenda](#). However, after receiving more than two million public comments on that proposal, U.S. EPA prepared a new proposal for new power plants, which is currently [under review](#) by the Office of Management and Budget. The President directed EPA to publish the proposal for new power plant standards by no later than September 20, with a final rule to follow "in a timely fashion after considering all public comments, as appropriate."

In an even more ambitious move, President Obama also directed EPA to propose, by June 1, 2014, the first-ever new source performance standards for greenhouse gas emissions from *existing* U.S. power plants, with a final rule to follow no later than June 1, 2015. As described in the President's memorandum, EPA will rely on Clean Air Act Section 111(b) to directly set greenhouse gas emission standards for any existing power plant that undergoes a major modification or reconstruction, and will also employ its rarely used authority under Section 111(d) of the Act to require states to set emission standards for unmodified existing power plants in accordance with federal guidelines. The President called for EPA to require submission of "state implementation plans" with

greenhouse gas emission standards for unmodified power plants by June 30, 2016.

Although President Obama's deadlines for the new power plant regulations are clear, EPA has not hinted at what form the standards for existing power plants will take. The April 2012 proposed standards for new power plants would have required compliance with electricity-output-based limits in pounds of carbon dioxide per megawatt hour. EPA may choose the same approach for existing power plants, or it may attempt to design a more flexible regime with a market-based system, such as emissions trading. The President's June 25 memorandum specifically instructed EPA, to the greatest extent possible, to seek "direct engagement with States" and to "develop approaches that allow the use of market-based instruments, performance standards, and other regulatory flexibilities."

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■ **NOMINEE FOR FERC CHAIRMAN SUPPORTS DEMAND RESPONSE AND ENERGY EFFICIENCY**

President Obama recently [nominated](#) former Colorado Public Utilities Commission chairman Ron Binz to succeed Jon Wellinghoff as the next chairman of the Federal Energy Regulatory Commission. Like Mr. Wellinghoff, Mr. Binz spent time as a consumer advocate, serving as director of the Colorado Office of Consumer Counsel. Mr. Binz also shares Mr. Wellinghoff's enthusiasm for demand response ("DR"), which incentivizes customers to reduce electricity demand during periods of peak usage. "[The Colorado Public Utilities Commission] treated DR and EE [energy efficiency] very much like generation resources, requiring the utilities to list it on their "Loads and Resources" table, right there with the gas turbines," Mr. Binz said in an [interview](#) with the Association for Demand Response + Smart Grid. Mr. Binz sees demand response and energy efficiency as "important compliance channels for coming new EPA carbon regulations for existing utility generation resources."

Indeed, the FERC's current top priorities—natural gas and electric [coordination](#), [smart grid](#), demand response,

[integration of renewables](#), and [transmission planning and cost allocation](#)—are consistent with Mr. Binz's prior initiatives as a state commissioner. While Mr. Binz was Chair, the Colorado Public Utilities Commission implemented a 30 percent Renewable Energy Portfolio Standard and the [Clean Air-Clean Jobs Act](#), which offered incentives for closing coal-fired power plants and switching to natural gas.

Mr. Binz is also [on record](#) as supporting a federally mandated carbon market to combat global warming. In a [paper](#) Mr. Binz recently coauthored, he opined that the absence of a coherent federal energy and climate policy was an impediment to progress on the challenges facing the electric industry but argued that "much can be done within existing law at the state level to improve outcomes in electricity markets." The paper suggests three areas in which the electric industry and its regulators could make substantial progress: risk-aware regulation, regulatory models that respond to changing utility business models, and reforms in wholesale market structures. The paper discusses the first two areas in detail but leaves the third area for a "future article." Given that one of FERC's core responsibilities is to regulate wholesale electricity markets, Mr. Binz's views on reforms in wholesale market structures may get expressed through new regulations.

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■ **CALIFORNIA CONSIDERS SIGNIFICANT CHANGES TO GREENHOUSE GAS CAP AND TRADE PROGRAM**

On July 15, staff of the California Air Resources Board ("CARB") released a [discussion draft](#) of potential revisions to CARB's greenhouse gas emission "cap and trade" regulations. Significant issues covered by the discussion draft include:

Market Implementation and Oversight. One set of proposed revisions relates to the surrender of compliance instruments. Under existing regulations, CARB removes compliance instruments from a covered source's compliance account on November 1 of each year. A covered source may use offset credits to satisfy up to 8 percent of its compliance obligation. CARB staff propose to add a Section 95856(h), under which

all offset credits in the account will be removed first, not just the 8 percent offset credit amount, followed by removal of greenhouse gas allowances. This would mean that more than 8 percent of the offset credits could be removed by the end of the applicable three-year compliance period and those “excess” credits would be lost. To avoid this possibility, covered sources should carefully manage the transfer of compliance instruments from their holding accounts to their compliance accounts. CARB staff has indicated a willingness to consider alternatives to this approach, as long as there is a default order of surrender.

Timing Issues. Under the current program, some covered sources will not know their compliance obligation until after the registration period ends for the annual Reserve Sale on September 9, which is the final opportunity to purchase greenhouse gas allowances before the November 1 surrender deadline. To address this issue, CARB staff has proposed to move up the emission verification deadline from September 3 to August 15 of each year.

Insider Trading. In an effort to protect the market from insider trading and collusion, CARB staff propose to amend Section 95814(a)(6) to prohibit a covered source’s consultants and employees with access to information relating to compliance instruments from becoming “voluntary associated entities” able to purchase, sell, and hold compliance instruments. CARB staff has also proposed to amend Section 95830 to require identification of the consultants and employees on the covered source’s application to register with CARB.

Allocation of Allowances. The discussion draft amends Table 8 of the regulations to extend to 2015–2017 the period of 100 percent free allowances for sources with medium and low risk of leakage, and to change the percentage of free allowances from 50 percent to 75 percent for these sources in 2018 and 2020. The change is intended to provide additional time for covered sources to transition to lower carbon production methods. The draft also amends several of the product-based emission efficiency benchmarks on Table 9.1 of the regulations. Special allocation rules are also proposed for other source categories, including “legacy contract generators,” universities, public service facilities, refineries, and natural gas suppliers.

Cost Containment. A proposed Section 95870(j) provides that starting in 2015, 10 percent of future greenhouse gas allowances would be allocated to the Allowance Price Containment Reserve, if needed. Under a new Section 95913(f)(5), these additional allowances would be available at the highest price tier (currently \$50 per allowance), to cap allowance prices at this price.

Formal proposed regulations are expected in early September, followed by a 45-day public comment period; a hearing is scheduled for October 24 and 25.

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The CARB discussion draft is discussed in greater detail in the recent Jones Day Alert entitled, “California Air Resources Board Considers Important Amendments to Greenhouse Gas Emission Cap-and-Trade Regulations.”



■ INSURANCE INDUSTRY THINK TANK TURNS ATTENTION TO CLIMATE CHANGE

The United States has experienced numerous extreme weather events in the past year. From Superstorm Sandy along the East Coast, to extreme drought in the Midwest, to deadly wildfires in Colorado, these weather events have caused enormous loss of both life and property. Some in the scientific community attribute an increase in both the number and severity of natural disasters to the effects of climate change.

The brunt of the financial loss from these natural disasters is likely to fall on the insurance and reinsurance industries. According to the Property Casualty Insurers Association of America, natural disasters in 2012 generated **\$35 billion in direct insured property losses** (before reinsurance recoveries) for all insurers, an increase of \$1.3 billion from 2011. Beyond property losses, changing weather patterns may also render prior risk models obsolete, requiring new modeling and adjustments to premiums.

Despite the potential impact of climate change on its business model, the insurance industry has been slow to lend its support to political action to counteract climate change, or to otherwise respond to insuring in a changed environment. A recent industry publication may signal a shift in this trend. In June, the Geneva Association, an international insurance “think tank,” issued a report, “[Warming of the Oceans and Implications for the \(Re\)insurance Industry](#).”

The report explores the evidence for ocean warming since the mid-20th century, the impact of ocean warming on extreme events, and the consequent impact on the global insurance industry. In this final category, the report notes a “significant upward trend in the insured losses caused by ... extreme weather events” for both primary insurance and reinsurance providers. With increased losses and newly ambiguous return periods due to extreme weather, the report questions the continuing commercial viability of the catastrophe risk business in some areas. The report then focuses on potential

industry responses to predicted impacts of extreme weather through internal risk reduction and external risk mitigation.

Regarding internal risk strategies, the report predicts that use of “simple stationary climatological approaches to quantify probabilities of extreme events” will increasingly fail. A company that does not adequately adapt to this issue could face penalties from ratings agencies. The report therefore calls for updated internal risk modeling that takes into account a reasonably wide range of “hypothetical but scientifically justifiable scenarios.”

As to external risk reduction, the report expresses concern that the public reaction to recent climate events could be increased self-insurance coupled with decreased self-protection, creating “a risk environment that is uninsurable in some regions.” Consequently, the report calls on the insurance industry to play an active role in raising awareness of the impacts of climate change through risk education and dissemination of risk information. The report also notes new market opportunities in the transition to a low-carbon economy and calls on the insurance industry to support this transition by using its “unique knowledge base to inform the debate on climate change and actively lobby[ing] government to take action to reduce risks and curb emissions of greenhouse gases.” Such actions, the report predicts, “will help the insurance industry to avoid market failures and increase societal resilience.”

The Geneva Association’s recommendations rest on market analyses of the potential impacts of climate change to the insurance industry’s business model. Responses from the industry may also be fueled by regulatory factors. California, New York, and Washington now mandate that major insurers disclose how they are managing climate change risks. At the federal level, changes are occurring to the National Flood Insurance Program, which has long provided federally subsidized flood insurance to property owners in designated areas. In 2012, the Biggert-Waters Flood Insurance Reform and Modernization Act required changes to the program, including a scaling back of subsidized rates and a redrawing of rate maps to reflect actual risk.

Mounting evidence of the impacts of climate change on current risk models and business practices is likely to lead the

insurance industry increasingly into the climate change policy debate.

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■ VOLUNTARY BANK LENDING PRINCIPLES NOW INCLUDE CONSIDERATION OF CLIMATE CHANGE

Effective June 4, the members of the Equator Principles Association voted to amend and strengthen the Equator Principles to include consideration of the effects of major projects on climate. The Equator Principles are voluntary standards designed to guide banks in their evaluation and management of the environmental and social risks presented by loans used to finance large projects. The Equator Principles are based on Performance Standards developed by the International Finance Corporation (“IFC”), part of the World Bank Group. The Principles provide that member banks will give loans only to covered projects that meet its 10 principles.

At their core, the Equator Principles provide that lending banks will require borrowers associated with major projects to assess the environmental and social risks of their proposed projects and to address issues raised by the assessment. At a minimum, borrowers must comply with the laws of the host country that pertain to environmental and social issues. If the host country is not one of the 31 countries designated as having robust environmental and social governance programs, the borrower must also comply with the IFC Performance Standards on Environmental and Social Sustainability and with the World Bank’s Environmental, Health and Safety Guidelines. Most of the designated countries are in Europe. The United States and Canada currently are the only designated countries in North and South America. Australia, New Zealand, Japan, the Republic of Korea, and Israel are also designated countries.

Changes in 2013

The Equator Principles were originally adopted in 2003 by a group of international private sector banks and were revised in 2006. As discussed in *The Climate Report*, a 2012

draft proposed significant changes to the 2006 Equator Principles. After the changes were adopted in June 2013, the Equator Principles for the first time specifically address climate change.

The preamble to the Equator Principles now provides that the negative impacts of a project on climate should be avoided where possible, and if the impacts are unavoidable, they should be minimized, mitigated, and/or offset. The Principles also provide that projects with expected annual emissions greater than 100,000 tons of carbon dioxide equivalent are to conduct an alternatives analysis for options that generate lower greenhouse gas emissions.

An annex also sets out specific reporting requirements related to greenhouse gas emissions. Under these requirements, the borrower is to report publicly on an annual basis the greenhouse gas emission levels during the operational phase of the project if the project emits more than 100,000 tons of carbon dioxide equivalent annually. Borrowers are encouraged to report publicly on projects emitting more than 25,000 tons of carbon dioxide equivalent annually, which may be an indication of a lower future reporting threshold. The public reporting requirement can be satisfied via regulatory requirements for reporting. While not specifically mentioned, U.S. EPA and California reporting requirements regarding carbon dioxide equivalent emissions may meet this requirement.

Other changes to the 2006 Equator Principles significantly expanded their coverage. The 2006 Principles applied to Project Financing (where a lender generally considers a single project) and Project Finance Advisory Services, in both cases where the total project capital costs are \$10 million or more. The 2013 Principles now also apply to Project-Related Corporate Loans (also generally related to a single project) that meet certain conditions, including a total aggregate loan amount of at least \$100 million, and to short-term (less than two years) Bridge Loans that are intended to be refinanced by Project Finance or Project-Related Corporate Loans. Other changes include expanded reporting requirements, such as a requirement to annually report covered transactions that have closed, and a requirement that each bank report on its process and experience in implementing the Principles.

Transition

The 2013 Equator Principles do not apply to transactions signed before June 4, with the caveat that they apply to an expansion or upgrade of an existing project taking place after June if the changes may create new significant environmental and social risks. While the effective date of the revised Principles was June 4, there is a transition period out to December 31. The 2006 Principles can be applied to new transactions up to December 31, but signatories are encouraged to apply the 2013 revision as soon as possible. The 2013 Principles should be applied to all new transactions after 2013.

Impact

The number of banks that have agreed to implement the Equator Principles has increased to 79 throughout the world, including five U.S. banks (Bank of America, Citigroup, Export-Import Bank, JPMorganChase, and Wells Fargo). While the Principles apply only to the largest loan transactions and have been formally adopted by only some lenders, they are establishing the precedent of lending institution consideration of climate change issues in loan evaluation and management. This could have the effect of channeling loan financing toward projects that minimize their greenhouse gas emissions.

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■ THE SAUDI K.A.CARE PROGRAM: A MULTITUDE OF OPPORTUNITIES

The King Abdullah City for Atomic and Renewable Energy (“K.A.CARE”) was established via a Saudi Royal Order in April 2010 with the mandate principally to transition the fuel mix that powers Saudi Arabian energy generation toward a far greater use of renewable resources. K.A.CARE set a goal of generating a total of 54 gigawatts (“GW”) of energy from renewable resources by 2032, almost 80 percent of which is designated to come from solar power, with the remainder coming from a mix of wind, geothermal, and waste-to-energy resources. The aim is to reach around 5.1 GW by 2018 and 23.9 GW by 2020. This program not only portends what will be one of the world’s largest and most comprehensive alternative energy undertakings, but its ambitious scope also offers the promise of developing another major industrial sector for the economy of the Kingdom of Saudi Arabia.

In February, K.A.CARE released a [white paper](#) detailing the establishment of a competitive procurement program to attract to Saudi Arabia the best renewable energy methods and designs. Officially called the “Competitive Procurement Process,” CPP was designed to reflect the K.A.CARE charter in the pursuit of a “sustainable energy mix that emphasizes education, research, global collaboration, local integration, commercialization and social benefit.” The white paper invited public comment from prospective bidders into the CPP until April 5. The two stated objectives of the CPP are: “(i) to kick-start the Kingdom’s renewable energy sector and (ii) to validate the existing globally benchmarked prices across multiple technologies while applying these prices to the local market context.”

According to the white paper, the initial phase of the CPP will be conducted over the next two to three years and will consist of an introductory round, as well as first and second procurement rounds. The three rounds are designed to target up to seven GW of project capacity. In the introductory round, K.A.Care is targeting procurement of 500 to 800

megawatts (“MW”) of renewable energy capacity. The white paper explains that this round will consist of five to seven projects of “varying technologies at pre-packaged sites offered to bidders at locations that can be easily connected to the grid.”

The white paper also provides that the subsequent two rounds projected for the next two to three years will seek to procure two to three GW of capacity, and three to four GW of capacity, respectively. Although their timing will be determined based upon the length of the preceding rounds, it is expected that a single round will last between six and 10 months. According to the white paper, “[a]fter the nine to twelve month process culminating in the selection of the winners of the Introductory Round, the first full-scale procurement round shall be initiated.” The timing of subsequent rounds is expected to be announced as the CPP program proceeds.

The white paper specifies that each round will follow a similar pattern, consisting of a Request for Qualifications (“RFQ”) from prospective bidders followed by a Request for Proposal (“RFP”) that will go out to qualified bidders. Before issuing the initial RFQ under the CPP, K.A.CARE anticipates distributing a draft RFP and draft power purchase agreement (“PPA”) to bidders who have registered for the CPP on the K.A.CARE web site. In addition, K.A.CARE proposes having a series of technical workshops for bidders in order to hear comments on the draft RFP and draft PPA prior to issuing the first RFQ (which will be combined with an Expression of Interest and Statement of Qualifications from bidders).

Overall, projects are expected to be evaluated on such factors as their financial strength, project development status, and degree of local content. Tellingly, the white paper provides that “[p]roponents that integrate local content into their projects will benefit from strong incentives through the rated criteria evaluation for utilizing labor and equipment that provide a positive net benefit to the local economy.” An integral part of Saudi Arabia’s solar plans, detailed in the white paper, is to establish a solar technology hub in the country and ensure local companies play a major role in the country’s burgeoning solar industry.

K.A.CARE expects to have 1.1 GW and 1.3 GW of photovoltaic solar power systems installed under the first and second

procurement rounds. Overall, the CPP program is targeting 16 GW of photovoltaic and 25 GW of solar thermal by 2032, although it is possible that mix will change. Solar thermal systems that are bid into the introductory round must include at least four hours of storage capability.

On balance, the K.A.CARE program and the CPP appear to present excellent opportunities to international solar companies across all parts of the solar power value chain to partner with local Saudi solar developers, both to realize an incredible plan for the expansion of solar power and to help the Kingdom of Saudi Arabia build an industrial economic base to complement its oil and gas industry.

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■ MARYLAND ADOPTS NEW RECOVERY MECHANISM FOR OFFSHORE WIND ENERGY

Recently, the State of Maryland took a significant step to enable the financing of offshore wind energy projects located on the Outer Continental Shelf between 10 and 30 miles off Maryland’s coast by enacting the [Maryland Offshore Energy Act of 2013](#). The Act provides a carve-out for offshore wind energy in Maryland’s renewable energy portfolio standard (“RPS”) program, commencing in 2017. The size of the annual carve-out amount for offshore wind energy is to be determined by the Maryland Public Service Commission subject to a cap of 2.5 percent of total Maryland retail electricity sales.

To be included in Maryland’s RPS program, offshore wind energy must be generated by a “qualified” Maryland offshore wind energy project. To qualify, a project must meet the siting requirements specified in the Act, connect to the PJM Interconnection grid on the Delmarva Peninsula, and be approved by the Public Service Commission under the Act.

Qualified projects will be entitled to one “offshore wind energy credit” or “OREC” for all of the generation attributes

(including electric capacity, energy, and environmental benefits) of each megawatt-hour (“MWh”) of offshore wind energy they produce during a period of up to 20 years, and payment by the Maryland retail electricity suppliers of a price approved by the Public Service Commission for each of their ORECs, not to exceed \$190/MWh (in 2012 dollars), as specified in the Commission’s approval order. Each qualified offshore wind energy project will in turn be required to sell into the markets operated by the PJM Interconnection all of the energy, capacity, and ancillary services associated with each OREC for which it receives payment. It will also be required to distribute the proceeds of such sales to the Maryland retail electricity suppliers for refunding or crediting to ratepayers, based on their consumption of energy that is subject to Maryland’s RPS program.

The Act provides that the Public Service Commission may not approve a proposed project unless: (i) the project demonstrates positive net economic, environmental, and health benefits to Maryland, based on evaluation criteria specified in the Act, (ii) the projected net rate impact to the average residential customer from the proposed project, combined with the net rate impact of all other qualified offshore wind projects, does not exceed \$1.50 per month (in 2012 dollars), (iii) the projected net rate impact on the average nonresidential customer of the proposed project, combined with the net rate impact of all other qualified offshore wind projects, does not exceed 1.5 percent of such customer’s total annual electric bill, and (iv) the proposed OREC price does not exceed \$190/MWh (in 2012 dollars).

The Public Service Commission is required to use criteria specified in the Act to evaluate and compare proposed offshore wind projects that apply for approval. Those criteria are reasonably detailed and may be summarized as follows:

- The lowest cost impact to ratepayers from the proposed OREC price;
- Potential reductions in transmission congestion prices within Maryland and in locational marginal pricing;
- Potential changes in capacity prices within Maryland, including potential long-term changes in such capacity prices from the proposed project as compared to conventional energy sources;

- The extent to which the cost–benefit analysis submitted by the applicant demonstrates positive net economic, environmental, and health benefits to Maryland;
- The extent to which the applicant’s plans meet certain statutory goals for engaging small businesses, provide for use of skilled labor with an agreement designed to ensure the use of skilled labor, and provide for compensation consistent with Maryland wage laws;
- Siting and project feasibility;
- The extent to which the project would require electric transmission or distribution infrastructure improvements in Maryland;
- Estimated ability to assist in meeting Maryland’s RPS (13.1 percent from certain renewable sources in 2017, increasing to 20 percent in 2022 and subsequent years); and
- Any other criteria the Commission determines to be appropriate.

The Act requires the Public Service Commission to adopt the implementing regulations by July 1, 2014. An application for approval of an offshore wind project may be submitted to the Commission after the effective date of regulations implementing the Act’s core provisions relating to the project approval process and OREC funding mechanism. The submission of such an application triggers an application period of at least 90 days, during which other proposed offshore wind projects may submit applications for approval to the Commission.

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■ D.C. CIRCUIT STRIKES DOWN EPA'S EXEMPTION FOR CARBON DIOXIDE EMISSIONS FROM BIOMASS

A little over a year after upholding the U.S. Environmental Protection Agency's endangerment finding and finding that states and regulated industries lacked standing to challenge the Tailoring Rule, *see Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), the U.S. Court of Appeals for the District of Columbia Circuit struck down one part of EPA's plan to regulate the emission of greenhouse gases. On July 12, in a 2–1 decision, the D.C. Circuit held that EPA's so-called Deferral Rule, which postponed regulation of biogenic carbon dioxide sources for three years, was arbitrary and capricious. *Center for Biological Diversity, et al. v. EPA*, Nos. 11-1101, 11-1285, 11-1328, 11-1336.

In July 2011, EPA promulgated the Deferral Rule to temporarily stay the application of the federal Clean Air Act's Prevention of Significant Deterioration of Air Quality ("PSD") and Title V permitting programs to major sources of biogenic carbon dioxide emissions. *See* 76 Fed. Reg. 43,490 (July 20, 2011). EPA reasoned that the complex and uncertain net atmospheric impact of biogenic carbon emissions, i.e., those "directly resulting from the combustion or decomposition of biologically-based [sic] materials other than fossil fuels and mineral sources of carbon," warranted further consideration by EPA over a three-year deferral period. During the deferral period, biogenic carbon dioxide sources that had the potential to emit over the applicable thresholds would be exempt from PSD and Title V permitting obligations.

Several environmental organizations petitioned the D.C. Circuit for review, arguing that the Deferral Rule violated the plain language of the Clean Air Act. EPA invoked three principles of administrative law in support of its decision: the *de minimis*, one-step-at-a-time, and administrative necessity doctrines.

Writing for the majority, Judge Tatel rejected each of the three principles proffered for the Deferral Rule. EPA conceded that the *de minimis* doctrine could be invoked only to establish permanent exemptions from regulation. Because the Deferral Rule was a temporary measure, it could not be sustained under the *de minimis* doctrine.

The appellate court further noted that to invoke the one-step-at-a-time doctrine—which allows agencies to promulgate regulations piecemeal—the agency must first explain what "full compliance" with the "statutory mandate" would entail. In other words, EPA was required to clarify what the Deferral Rule is one step toward, which the majority concluded that EPA had failed to do.

The D.C. Circuit lastly rejected EPA's invocation of the administrative necessity doctrine, which "permits an agency to 'avoid implementing a statute ... by showing that attainment of the statutory objectives is impossible.'" The agency's application of the doctrine was rejected because EPA had not adopted the narrowest possible regulatory exception. The court noted that EPA had rejected, without explanation, a narrower option that would have limited PSD and Title V permitting obligations to major biogenic carbon dioxide sources that failed voluntarily "to take some steps to reduce their emissions."

In dissent, Judge Henderson opined that EPA had correctly used the one-step-at-a-time doctrine to defer regulating biogenic carbon dioxide emissions. According to Judge Henderson, EPA had reasonably attempted to balance its duty to regulate greenhouse gases with the reality that it, and its state counterparts, have limited resources and experience in this area.

Judge Henderson also suggested that prudential ripeness should have prevented the court of appeals from reaching the merits of the case. Prudential ripeness precludes judicial review where, by staying its hand temporarily, the court is never required to address the dispute. Not passing on the validity of the Deferral Rule would, according to Judge Henderson, give petitioners the opportunity to convince EPA to promulgate a rule more to their liking.

EPA has not yet indicated whether it will seek panel rehearing or rehearing *en banc*.

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■ GLOBAL WARMING TORT LITIGATION SUITS COME CLOSER TO FINAL RESOLUTIONS

In May, the latest chapters in the two remaining global warming tort litigation suits closed, bringing the lengthy saga of these cases closer to a final resolution. In one case, the U.S. Supreme Court declined to hear a final appeal, and in the other, a federal appeals court upheld the lower court's dismissal.

Native Village of Kivalina v. Exxon Mobil Corp.

As reported in *The Climate Report*, on September 21, 2012, the Ninth Circuit upheld a decision by the U.S. District Court for the Northern District of California dismissing federal common law nuisance and civil conspiracy damage claims by the Native Village of Kivalina and the City of Kivalina against a group of U.S. oil, energy, and utility companies. The plaintiffs alleged that the companies' greenhouse gas emissions were contributing to global climate change, causing severe erosion of the Alaskan island where Kivalina is located and threatening the island with imminent destruction. *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012). The Ninth Circuit held that, based on the Supreme Court's decision in *American Electric Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011), the claims must be dismissed because the Clean Air Act displaces all federal common law claims related to federal regulation of greenhouse gases. The Ninth Circuit denied the plaintiffs' petition for rehearing *en banc* in November 2012.

On March 20, the Supreme Court denied the plaintiffs' petition for writ of certiorari, finally closing the book on Kivalina's claims.

Comer, et al. v. Murphy Oil USA, et al.

As reported in *The Climate Report*, on March 10, 2012, the U.S. District Court for the Southern District of Mississippi dismissed an action filed by Mississippi residents alleging that

a group of companies were liable in tort for contributing to climate change, which purportedly contributed to strengthening Hurricane Katrina, and in turn damaged plaintiffs' properties. *Comer, et al. v. Murphy Oil USA, et al.*, No. 1:11-cv-00220 (S.D. Miss.) ("*Comer II*"). The plaintiffs had admittedly filed a nearly identical action in 2005 that was dismissed by the same court in 2007 on standing and political question grounds. *Comer, et al. v. Murphy Oil USA, et al.*, No. 1:05-cv-00436-LG-RHW ("*Comer I*"). *Comer I* was also dismissed by the Fifth Circuit when the court lost a quorum to hear the case *en banc*, see, *Comer, et al. v. Murphy Oil USA, et al.*, 607 F.3d 1049 (5th Cir. 2010), and then the Supreme Court denied the plaintiffs' petition for writ of mandamus. *In re Comer*, U.S. No. 10-294 (Jan. 10, 2011). The district court's dismissal of *Comer II* was based in part on a finding that the doctrine of res judicata barred the plaintiffs' claims. Under the doctrine of res judicata, a party is precluded from relitigating issues that could have been raised in a prior action when the prior action resulted in a final judgment on the merits.

On May 14, the Fifth Circuit again upheld dismissal of the plaintiffs' claims, holding they were barred by the doctrine of res judicata, because *Comer I* was a final judgment on the merits. *Comer, et al. v. Murphy Oil USA, Inc., et al.*, No. 12-60291 (5th Cir. May 14, 2013). The Fifth Circuit held that the *Comer I* district court judgment was final for purposes of res judicata, because the district court properly entered final judgment and, since no mandate was issued by the Fifth Circuit before it lost a quorum to hear the appeal *en banc*, the district court's judgment was never modified or disturbed on appeal.

In addition, the Fifth Circuit panel found the plaintiffs' argument for an equitable exception—on the basis that they had not received meaningful appellate review of the *Comer I* decision—unavailing, because the Supreme Court does not recognize a general equitable exception to the doctrine of res judicata. The court of appeals further held that the *Comer I* judgment was on the merits, even though the decision was based on the jurisdictional issues of standing and justiciability, because it has been a long-standing rule that principles of res judicata apply to jurisdictional issues.

The plaintiffs may still petition the Supreme Court for a writ of certiorari to review the case. However, based on the Supreme Court's denial of the petition for a writ of certiorari in *Native*

Village of Kivalina v. Exxon Mobil Corp., 185 L. Ed. 2d 1116 (U.S. 2013), it is at best questionable whether the Supreme Court would entertain such a petition.

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

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■ **INDIA RELEASES DRAFT NATIONAL OFFSHORE WIND ENERGY POLICY**

On May 29, India's Ministry of New and Renewable Energy ("MNRE") released the "Draft National Offshore Wind Energy Policy, 2013." The Policy is the result of the National Action Plan on Climate Change conceived by the government of India in 2008. The Action Plan recognized the challenges presented by the lack of policies and regulatory framework to encourage the renewable energy sector in India.

The government aims through the Policy to promote investment in the clean energy sector, reduce India's carbon footprint, and achieve energy security in a relatively new industry. Offshore wind farms are preferred because of the minimal impact on the environment and the nonavailability of land in densely populated coastal areas in India with high wind potential. The objectives of the Policy are: (i) to provide a conducive environment for harnessing offshore wind energy in India and reducing the dependence on thermal coal power, which results in a significantly larger carbon footprint; (ii) to develop offshore wind energy in a systematic manner; (iii) to overcome the existing barriers to generation and transmission of offshore wind energy; and (iv) to create technological and implementation capabilities within the country for the generation and harvesting of wind energy from offshore wind farms.

The Policy is intended to be a comprehensive document to assist prospective developers with preliminary resource assessment and demarcation of blocks; provide guidance on conducting an Environment Impact Assessment study of a proposed offshore wind farm's effects on aquatic life; provide guidance on conducting oceanographic studies to determine construction, operational, and maintenance costs; assist in sea bed lease arrangements; and offer a single-window procedure for statutory approvals, grid connectivity, incentives, technology, and data security.

The MNRE's role includes monitoring, coordinating with other government departments, issuing guidelines for development

of offshore wind energy, supporting the National Offshore Wind Energy Authority (“NOWA”), and promoting indigenous research for technology development. NOWA is to be established under the MNRE as a nodal agency that will carry out resource assessments and surveys in India and enter into contracts with project developers for development of offshore wind energy projects in territorial waters. NOWA will act as a single-window agency and coordinate with the other Ministries for necessary clearances.

NOWA will undertake a preliminary resource assessment through specialized agencies. Private players can take part in the assessment, but ownership of the data will be shared, and the data collection policy will be similar to that followed in oil and gas exploration and production. Clearances required for commissioning the project will be obtained from various ministries including the Ministry of Defense, Ministry of Petroleum & Natural Gas, and the Ministry of Environment and Forests. The offer of blocks will be through an open international competitive bidding process. Sea bed leasing will be undertaken by NOWA, with such leases limited to the exploration and exploitation of wind energy.

Project developers will enter into a power purchase agreement with a designated nodal agency of state, and wind power will be purchased directly as per the norms and guidelines fixed by the Indian Central Electricity Regulatory Commission and the respective State Electricity Regulatory Commissions.

To incentivize development of India’s offshore wind capacities, the following measures are being considered:

- A tax holiday for the first 10 years, concessions in custom duties, and exemptions in excise duty may be available for manufacturers of offshore wind turbines;
- A call for development of certain blocks without any lease fee paid for such blocks, with ownership of these projects transferred to the government of India after a specified period; and
- Autonomous research and development for Offshore Wind Turbine Models offered by the Centre for Wind Energy Technology, to assist the owner of the project in

ensuring that the design of the structure is suitable for use in the allotted block on the seabed.

India’s Agency for Non-Conventional Energy and Rural Technology has been entrusted with the task of conducting a wind monitoring study with the assistance of the government of The Netherlands to identify potential offshore sites. The data gathered so far shows a potential of about 1 gigawatt from installations along the coasts of Indian states of Kerala, Karnataka, Goa, Tamil Nadu, and Gujarat.

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■ CHINA KICKS OFF ITS FIRST EMISSIONS TRADING SCHEME

On June 18, China’s first mandatory carbon emissions trading scheme was launched in the city of Shenzhen by the National Development and Reform Commission. The Shenzhen ETS is the first of seven pilot exchanges, with Beijing, Shanghai, Tianjin, Chongqing, Guangdong, and Hubei to follow. The seven pilots will account for 700 million tons of carbon by 2014, and the trading schemes are expected to play a key role in meeting China’s long-term goal of establishing a national carbon trading system by early 2016.

The rules for each scheme will vary so that China can test different designs for its national program. Shenzhen’s market will be based on an absolute emission limit—mimicking the schemes in other major economies—set at around 32 million tons. Companies will be allocated a quota of carbon emissions, and companies will need to purchase additional credits should they wish to exceed their quota. For now, 635 enterprises and 200 public buildings will participate in the Shenzhen market, which will account for about 38 percent of the city’s emissions. The scheme will cover 26 sectors, including electricity and natural gas, water supply, and industrial manufacturing.

China is determined to offer a sophisticated carbon trading market, and the Shenzhen emissions trading scheme

signifies a first for the institutionalization of carbon markets in China. However, the scheme is still in its early stages, and the need for an effective system to record carbon emissions, as well as legislation to give legal recognition to carbon trading, are only some of the unresolved issues.

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■ EC CARRIES OUT ANTI-DUMPING AND ANTI-SUBSIDY PROCEEDINGS AGAINST CHINESE SOLAR PANELS

In September 2012, the European Commission initiated [anti-dumping proceedings](#) against imports of solar panels from China, and in November 2012, the Commission added [anti-subsidy proceedings](#) with respect to the same imports. These investigations are among the largest ever carried out by the European Commission, as the value of solar panel imports from China into the European Union amounts to €21 billion a year.

These investigations cover not only solar modules but also cells and wafers. This means that if definitive trade defense measures are imposed, prices of solar panels and their main components in the European Union are going to increase substantially. Indeed, modules, cells, or wafers manufactured in China or exported from China—the biggest solar panel exporter in the world—would be subject to trade defense measures, which in principle consist of additional import duties. This would be a peculiar outcome, considering that several EU Member States have significantly subsidized, and still subsidize, companies and private individuals who decide to use solar panels.

On June 5, the European Commission imposed [provisional anti-dumping duties](#) amounting to 11.8 percent. However, this rate was only temporary. As of August 6, the provisional anti-dumping duty ranges from 38.3 percent to 67.9 percent.

Over the two months during which the European Commission imposed the “lower” provisional anti-dumping duty, the EU and China negotiated a deal in the form of a so-called “undertaking.” EU anti-dumping law allows the Commission to grant an undertaking instead of imposing definitive trade defense duties. The undertaking, which entered into force on August 6, establishes a minimum price for up to a certain level of imports into the EU that will not be subject to the duty. After the import level threshold has been exceeded, the anti-dumping duty will be due, at the higher provisional rates mentioned above. Exports to the EU made by Chinese exporting producers who did not agree to the undertaking will all be subject to the anti-dumping duty.

Failed negotiations would likely have led to a “trade war” between the EU and China, which is a situation that both parties wanted to avoid. This is certainly true in the European Union: in May, 18 EU Member States opposed the adoption of anti-dumping measures. Even Germany voiced strong opposition to trade defense measures on solar panels, even though the complainant in the proceedings is a German company.

The Commission has not adopted provisional anti-subsidy measures and stated on August 7 that it will not do so, but definitive anti-subsidy measures can still be imposed. The deadline for the imposition of definitive anti-dumping and anti-subsidy measures is December 5.

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