JONES DAY®

FALL 2013 ISSUE

THE CLIMATE REPORT

U.S. REGULATORY DEVELOPMENTS

Jane K. Murphy, Editor

NEW PROPOSED GREENHOUSE GAS EMISSION STANDARDS ISSUED FOR NEW COAL-FIRED AND NATURAL GAS-FIRED POWER PLANTS

The Environmental Protection Agency ("EPA") issued a new proposal differentiating the carbon pollution standards for new coal-fired and new natural gas-fired plants on September 20, 2013. While existing technology should generally allow new natural gas-fired plants to meet the emissions standards relatively easily, the stringent emissions levels in these new regulations may make it extremely difficult to construct a new coal-fired plant that does not include carbon capture technology. These final regulations mark the Obama administration meeting its first self-imposed deadline in its aggressive rulemaking agenda to address greenhouse gas emissions announced in June 2013.

The new rule will apply only to new fossil fuel-fired electric generating units. It will not apply to existing units, units undergoing modification, reconstructed units, or units that commenced construction prior to publication of the new proposed rule. For natural gas-fired stationary combustion turbines larger than 850 mmBtu/hr, the proposed standard is 1,000 pounds of CO_2 per megawatt-hour ("lb CO_2/MWh-gross"). For units smaller than 850 mmBtu/hr, the proposed standard is 1,100 lb CO_2/MWh-gross.

DEPARTMENTS

U.S. Regulatory Developments	1
Climate Change Issues for Management	4
Renewable Energy and Carbon Markets	6
Climate Change Litigation	7
Climate Change Regulation Beyond the U.S.	10

Depending on which standard best suits the unit, the proposed limits for fossil fuel-fired utility boilers and integrated gasification combined cycle are 1,100 lb CO_2/MWh-gross over a 12-operating month period, or 1,000-1,050 lb CO_2/MWh-gross over an 84-operating month (seven-year) period. The aim of the longer compliance period is to provide flexibility as carbon capture and storage use is phased in for each unit. The operator has the option to use some or all of the 84-operating month period to optimize the system. EPA is specifically seeking comments on what the standard should be within the proposed range.

The rules have been challenged on a Congressional level. Four hundred and ten current and former democrats sent a letter to President Obama citing "serious concerns" regarding the new standards and urging the President to balance investment in renewable energy resources with similar levels of investment in developing cleaner fossil fuel-generated energy. A proposed House Resolution would require EPA to hold additional "public listening sessions" in those states with the heaviest reliance on electricity generated by coal-powered power plants. The comment period for the proposed carbon pollution standards for new power plants will remain open for 60 days after publication in the Federal Register, which had not yet occurred as of EPA's October 17, 2013 website update. Comments submitted previously in response to the April 2012 rule will have no association with the new proposed rules and must reference docket ID: EPA-HQ-OAR-2013-0495.

After the close of the comments period and after holding public hearings, EPA will likely move directly toward final analysis of its reasoning and conclusions on the rulemaking record, including the comments, scientific data, expert opinions, and facts accumulated during the pre-rule and proposed rule stages. If the rulemaking record contains persuasive new data, EPA may change aspects of the rule. If the changes are major, EPA will publish a supplemental proposed rule, but if the changes are minor or a logical outgrowth of the proposed rules, EPA will directly proceed with the final rule. Simultaneous to finalization of the current proposed rule for new power plants, the Obama administration aims to issue a proposed rule for existing power plants by June 1, 2014.

Jennifer M. Hayes
+1.412.394.7992
jhayes@jonesday.com

CALIFORNIA UPDATES CLIMATE CHANGE SCOPING PLAN

On October 1, 2013, California Air Resources Board ("CARB") staff released a discussion draft of the first update to CARB's Scoping Plan, which is CARB's plan for achieving the greenhouse gas ("GHG") emissions reductions required by AB 32. CARB must update the plan every five years.

The draft update focuses on three issues: operation of the program over the past five years, what is needed to achieve the requirement of reducing GHG emissions to 1990 levels by 2020, and what is needed to continue reducing GHG emissions to meet long-term goals. The update focuses on six sectors of the economy: energy, transportation and fuels, agriculture, water, waste management, and natural and working lands.

In reviewing the programs to date, the update concludes that total statewide GHG emissions decreased by 2.7 percent between 2000 and 2011. Because California's population increased by 10.5 percent during that time, California's per capita GHG emissions decreased by 1.9 percent between 2000 and 2011. Breaking down the statistics to a sector level, the draft indicates that the transportation sector reduced its GHG emissions by 4.4 percent between 2000 and 2011, the electric power sector reduced its GHG emissions by about 37 percent between 2001 and 2011, and the industrial sector reduced its GHG emissions by 2.4 percent between 2000 and 2011. The GHG emissions from several sectors increased, including from agriculture and waste management.

To meet the 2020 goal, the update identifies the need for increased use of renewable energy, continued improvements in energy efficiency, and increased use of zero-emission vehicles powered by electricity or hydrogen. It also emphasizes reducing high global warming potential chemicals through CARB's Refrigerant Management Program and reducing short-lived climate pollutants such as black carbon, diesel smoke, and methane.

The update envisions a continuation of the effort to reduce GHG levels past 2020. It concludes that scientific evidence indicates global emissions must be reduced by 80 percent below 1990 levels by 2050 in order to achieve climate stabilization. It also recommends that a midterm target be established for 2030 in order to drive progress toward the 2050 goal. The update does not recommend a specific target reduction level but instead cites recommendations from the Union of Concerned Scientists (44 percent below 1990 levels by 2030 for the U.S.) and the Netherlands (37 percent below 1990 levels by 2030 for the U.S.).

CARB likely cannot require GHG emissions reductions to less than the 1990 levels without additional statutory authority. Nevertheless, meeting the 2050 target proposed by CARB would require significant acceleration of current GHG reduction rates. Emissions from 2020 to 2050 would have to decline at more than twice the rate needed to reach the 2020 emissions limit. The update concludes that this is technically achievable if emissions reductions are significantly accelerated by (i) reducing energy demand, (ii) large-scale use of electric vehicles and energy-efficient building and industrial appliances, and (iii) production of electricity through renewable and other near-zero-emission technologies.

CARB staff held a public workshop on October 15, 2013 to discuss the draft and will make presentations to the Board regarding the draft at hearings scheduled for October 24–25 and December 12, 2013. Each of these events will include an opportunity for public comments. CARB is scheduled to consider approval of the update at a hearing held the second quarter of 2014.

Thomas M. Donnelly
+1.415.875.5880
tmdonnelly@jonesday.com

Charles M. Hungerford
+1.415.875.5843
chungerford@jonesday.com

OBAMA'S FIRST CHOICE TO LEAD FERC WITHDRAWS AMID CHARGES OF ANTI-COAL

President Barack Obama's first pick for the next chairman of the Federal Energy Regulatory Commission, Ron Binz, withdrew his name from consideration amid charges that he was anti-coal. While disagreements over carbon and climate change policies appear to be responsible for Binz's failed nomination, it is debatable what role FERC could ultimately play under its current legislative mandates. Binz stated that he withdrew because he could not win the support of the Senate Energy and Natural Resources Committee. As an independent commission charged with protecting energy infrastructure and ensuring certain wholesale electric and natural gas transportation rates are just and reasonable, FERC typically remains out of the partisan crosshairs in Washington. But as Politico recently reported, "Conservative and libertarian groups celebrated Binz's withdrawal as a setback for Obama's climate agenda, while his supporters lamented that partisan bickering had defeated a qualified candidate." Speculation on whom Obama will tap next for FERC's top job includes current FERC commissioner Cheryl LaFleur, who spent more than 20 years with National Grid prior to joining FERC, and Arkansas utility commissioner Colette Honorable, who serves on the National Association of Regulatory Utility Commissioners and spent time as a state government attorney overseeing Medicaid fraud cases.

Mosby G. Perrow
+1.202.879.3410
mgperrow@jonesday.com

STEYER, BLOOMBERG, AND PAULSON LAUNCH RISKY BUSINESS INITIATIVE TO ASSESS ECONOMIC IMPACT OF CLIMATE CHANGE

In early October 2013, hedge fund billionaire Tom Steyer, along with former U.S. Secretary of the Treasury Hank Paulson and New York City Mayor Michael Bloomberg, launched a new initiative to assess the economic risk to the United States associated with climate change. The initiative, called "Risky Business—The Economic Risks of Climate Change," will focus on two core components, as follows:

> An independent risk assessment will combine existing data on the current and potential impacts of climate change with original research that will quantify potential future costs. The results, to be released in the summer of 2014, will reveal the likely financial risk the United States faces from unmitigated climate change.
>
> An engagement effort will target the economic sectors most at risk from a changing climate, and begin the process of helping leaders from across these sectors prepare a measured response to the risks they face. The engagement will be led by a risk committee composed of top national and regional leaders from across the American economic and political spectrum.

The initiative grew out of concerns by the team that the United States has not developed sound risk assessment protocols related to climate change, which they describe as "one of the greatest humanitarian and economic challenges of our time." The management team intends to break down economic risk factors by region and by sector with a goal of arming decision-makers with information that quantifies climate change risk and allows educated risk tolerance decisions. Press coverage of the new initiative indicates that, ultimately, the goal of Risky Business is to substantiate from an economic perspective the benefits of carbon emissions control to limit the more catastrophic economic risks they believe will result from unchecked greenhouse gas emissions.

The format for the analysis will follow the blueprint used by New York City in its PlaNYC initiative, as further refined in the wake of Hurricane Sandy. First developed in 2007, PlaNYC began as a sustainable growth strategy for New York City, which included assessment of climate change risks facing this waterfront city. This summer, following the devastation of Hurricane Sandy, Mayor Bloomberg announced the Special Initiative for Rebuilding and Resiliency ("SIRR") to evaluate how to rebuild the city to be more resilient in the face of climate change-related weather events. The SIRR will focus on both potential improvements to infrastructure and buildings to enhance climate change resilience in the medium and long term as well on how to support communities themselves to become more resilient. The lessons from PlaNYC and the SIRR will serve as a starting point for Risky Business's national climate change risk management initiative.

The Risky Business initiative intends to issue a report in 2014 documenting the risk assessment component of the analysis and to follow this work with development of climate change risk management measures designed according to sector and specific risk points.

Christine M. Morgan
+1.404.581.8215
cmmorgan@jonesday.com

ACTIVIST INVESTOR GROUP CERES ISSUES ASSESSMENT OF 2013 PROXY SEASON

The activist investor group Ceres recently issued its findings with respect to 2013 shareholder resolutions relating to corporate sustainability issues, including climate change, supply chain issues, and water-related risks. Ceres tracked more than 100 shareholder resolutions filed with 94 U.S. companies, reporting that environmental/social resolutions accounted for 40 percent of resolutions, up from 30 percent just three years ago.

Ceres reports that many of the resolutions directed to the manufacturing and service industries involved requests for board oversight of corporate sustainability issues as well as for comprehensive disclosure of data through sustainability reports. Ceres's analysis found that shareholders achieved favorable results in a number of key areas, including the following:

Responsible Sourcing and Supply Chain Management. A number of shareholder groups filed resolutions to press for "sustainable" sourcing of raw materials, in these cases primarily sustainable palm oil supplies. Ceres reports that a number of companies targeted by the resolutions agreed to convert to palm oil certified by one or more sustainability-focused organizations, such as the Roundtable on Sustainable Palm Oil, which oil supply has a smaller greenhouse gas footprint than palm oil generated from more invasive clear-cutting practices. Similarly, though focused more specifically on social issues, investors pressed for consideration of sustainability in supply chain management, coming in large measure on the heels of the human tragedies of the Bangladesh building fire.

Corporate Sustainability Reporting. Companies in a number of sectors (financial, manufacturing, housing) agreed to begin comprehensive sustainability reporting as a result of shareholder resolutions. In one instance, a resolution filed with a large manufacturer seeking sustainability reporting received more than 67 percent of shareholder votes, indicating strong investor interest in sustainability data, including data related to climate change and greenhouse gas emissions.

Separately, Ceres performed an additional review of resolutions related specifically to climate change and fossil fuel use. Among other findings, Ceres reported that investors filed a number of resolutions with energy sector companies and that more than 40 such resolutions were withdrawn after the target companies agreed to reduce greenhouse gas emissions, gas flaring, and adverse impacts from hydraulic fracking.

These reports reflect the continued focus by activist investor groups on sustainability reporting generally and on climate change issues and risks specifically. This has been a consistent trend in recent years and places continued pressure on corporate boards to closely evaluate their company's sustainability data and to anticipate and manage activist investor resolutions such as the ones highlighted in these reports.

Christine M. Morgan
+1.404.581.8215
cmmorgan@jonesday.com

IRS CLARIFIES PREVIOUS GUIDANCE ON "START OF CONSTRUCTION" FOR PURPOSES OF PTC/ITC ELIGIBILITY

On September 20, 2013, the Internal Revenue Service (the "IRS") released Notice 2013-60 (the "September Notice"), supplementing its previous guidance in Notice 2013-29 (the "April Notice") with respect to the requirement in the American Taxpayer Relief Act of 2012 that a qualifying facility must "begin construction" before January 1, 2014 in order to be eligible for a production tax credit ("PTC") or investment tax credit ("ITC"). Notably, the September Notice establishes a new "safe harbor," by treating the taxpayer as having satisfied the "program of continuous construction" and "continuous efforts" requirements in the April Notice, as long as the facility is placed in service prior to January 1, 2016. The clarification under the September Notice has removed a major uncertainty that had plagued wind power project developers and investors since the April Notice was issued—namely, how to ensure that the highly subjective continuous program/efforts tests would be met.

As previously reported in the Spring 2013 edition of *The Climate Report*, the April Notice provided two methods for a taxpayer to establish that construction of a qualified facility has commenced in 2013: (i) by starting "physical work of a significant nature" on the facility before January 1, 2014, and thereafter maintaining a "continuous program of construction" until the facility is placed in service; and (ii) by paying or incurring 5 percent or more of the eligible costs of the facility before January 1, 2014, and thereafter making "continuous efforts to advance towards completion" of the facility. The IRS did not express any views in the April Notice as to whether facility construction needed to be completed by a specific date in order for parties to have satisfied either the "continuous program" or "continuous efforts" test. However, the addition of a "continuous efforts" requirement to the 5 percent safe harbor under the April Notice injected a new element of subjectivity, and thus uncertainty, into what had been a relatively straightforward, objective standard, leading to calls for clarification by industry participants.

The September Notice, in effect, adds the certainty of a bright-line test to the tax credit qualification analysis, by stipulating that if construction of a facility has commenced in 2013 in accordance with IRS guidance, the taxpayer will be deemed to have met the "continuous program/efforts" elements of the guidance as long as the facility is placed in service by the end of 2015. In cases where completion occurs after 2015, the IRS will apply a more stringent "facts and circumstances" analysis to determining eligibility for a PTC or an ITC. This revision will help significantly to ease the concerns of sponsors and financing parties about pursuing wind power projects that may not be construction-ready by year-end but are reasonably capable of being completed within two years.

The September Notice included two other important clarifications to the previous IRS guidance. The April Notice had provided that, solely with respect to projects qualifying under the "physical work" test, if a taxpayer enters into a binding written "master contract" in December 2013 for a specified number of components (such as wind turbine generators), and thereafter assigns its rights to certain of such components to an affiliated special purpose vehicle that will own the project, work performed under the master contract in 2013 may be taken into account in determining whether such affiliate "began construction" on the project in 2013. The September Notice makes it clear that the master contract provision in the April Notice also applies to projects that start construction through making a 5 percent safe harbor payment in 2013.

Second, the September Notice clarifies that a subsequent transferee/taxpayer of a facility that had satisfied the beginning of construction requirement in 2013 will also be eligible to claim a PTC or an ITC for such facility. The April Notice was silent as to whether a transfer of a facility during construction would impact the eligibility of the transferee to claim the tax credit. The lack of guidance had led to concerns about the transferability of such tax credits, particularly since the guidance for the Section 1603 cash grant program had limited the circumstances under which tax credit eligibility would be preserved in connection with such transfers. The September

Notice effectively recognizes that the PTC/ITC eligibility established by commencing construction in 2013 will follow the facility to subsequent owners/taxpayers, rather than be specific to the taxpayer that owned the facility in 2013.

Tom Havens
+1.212.326.3935
tchavens@jonesday.com

CLIMATE CHANGE LITIGATION
Shimshon Balanson, Editor

SUPREME COURT TO REVIEW EPA'S REGULATION OF GREENHOUSE GAS EMISSIONS FROM STATIONARY SOURCES

On October 15, 2013, the U.S. Supreme Court granted six petitions for certiorari challenging U.S. EPA's regulation of greenhouse gas emissions from stationary sources. Specifically, the Supreme Court agreed to review the single issue of whether EPA acted within its authority under the Clean Air Act when it determined that its regulation of greenhouse gas emissions from motor vehicles triggered permitting requirements for stationary sources that emit greenhouse gases. The cases were consolidated for one hour of oral argument.

The Court, however, denied three other petitions challenging EPA's endangerment finding addressed in *Massachusetts v. EPA* and EPA's Tailpipe Rule. The Court also appeared to reject questions implicating EPA's authority to modify the statutory permitting requirements as part of its so-called "tailoring rule."

Daniella Einik
+1.202.879.3775
deinik@jonesday.com

SUPREME COURT REFUSES TO HEAR TRADE GROUPS' CHALLENGE TO E15 FUEL WAIVERS

On June 24, 2013, the U.S. Supreme Court ended a dispute between the ethanol industry and trade groups over U.S. EPA's approval of the use and sale of gasoline blended with 15 percent ethanol. *Grocery Mfrs. Ass'n v. EPA*, No. 12-1055; *Alliance of Auto. Mfrs. v. EPA*, No. 12-1167; *Am. Fuel & Petrochemical Mfrs. v. EPA*, No. 12-1229. Following of a decision by the D.C. Circuit holding that the trade groups lacked standing to challenge EPA's approval of E15, various trade associations representing stakeholders in the engine manufacturing, petroleum, and food industries filed petitions for writ of certiorari with the Supreme Court. The Supreme Court

denied those petitions, handing a victory to the ethanol industry.

The dispute stemmed from EPA's statutory duty to approve the introduction of most new renewable fuels. The Renewable Fuel Standard ("RFS") of the Clean Air Act requires qualifying refiners and importers of fuel to bring to market an increasing volume of renewable fuels. Unless a new renewable fuel is "substantially similar" to fuels used in the federal emissions certifications for motor vehicles manufactured after model year 1974, a fuel manufacturer must apply to EPA for a waiver before introducing the new renewable fuel. 42 U.S.C. § 7545(f)(4).

In March 2009, Growth Energy, an ethanol industry trade group, applied for a waiver to introduce E15. In the first of two waiver decisions, EPA approved the introduction of E15 for use in light-duty motor vehicles for model year 2007 and later. *See* "Partial Grant and Partial Denial of Clean Air Act Wavier Application Submitted by Growth Energy to Increase the Allowable Ethanol Content of Gasoline to 15 percent," 75 Fed. Reg. 68,094 (Nov. 4, 2010). It denied the waiver for all model-year 2000 and earlier vehicles. Because it was awaiting further testing results from the Department of Energy, EPA deferred its decision for model-years 2001 through 2006 light-duty motor vehicles. After receiving those results, EPA issued a second partial waiver, permitting the use of E15 in light-duty motor vehicles from model-years 2001 through 2006. "Partial Grant of Clean Air Act Wavier Application Submitted by Growth Energy to Increase the Allowable Ethanol Content of Gasoline to 15 percent," 76 Fed. Reg. 4662 (Jan. 26, 2011).

The three industry groups subsequently petitioned the D.C. Circuit to review EPA's E15 waivers. Growth Energy intervened in support of EPA. In August 2012, in a split decision, the D.C. Circuit dismissed the petitions for lack of jurisdiction. *See Grocery Mfg. Ass'n v. EPA*, 693 F.3d 169 (2012). Writing for the court, Chief Judge Sentelle concluded that none of the petitioners had standing to bring a claim against EPA.

The engine manufacturers argued that E15 may harm their engines and expose them to warranty and safety-related lawsuits by consumers and the government. Chief Judge Sentelle rejected both arguments, noting that the engine manufacturers had provided "no support for their assertion that E15 'may' damage the engines" and that any potential injury resulting from lawsuits depended on the intervening acts of third parties not before the court. Chief Judge Sentelle similarly rejected arguments of the petroleum trade associations that the partial approval of E15 effectively compelled their members to incur substantial costs to introduce and/or accommodate E15. The court reasoned that the petroleum trade petitioners had failed to establish that the partial waiver, and not economic forces, would force importers, refiners, and downstream entities to introduce or handle E15. Decisions to import, refine, or handle E15 are thus the product of self-interest and not any particular administrative action.

In contrast to the dismissal of the engine-manufacturer and petroleum groups' claims for failing to establish Article III standing, the D.C. Circuit dismissed the food group's petition on prudential standing grounds. The food group could not show that the interest it sought to protect—prices its members were required to pay for corn—was arguably within the zone of interests protected or regulated by the statute in question or any provision integrally related to it.

Judge Kavanaugh dissented on multiple grounds and would have struck down EPA's waivers as plainly running afoul of the statutory text of the Clean Air Act.

After being rebuffed by the three-member panel in the D.C. Circuit, petitioners separately sought panel rehearing or hearing en banc, which were denied on January 13, 2013. Shortly thereafter, petitioners filed petitions for writ of certiorari. In their petitions, the trade associations argued that the D.C. Circuit's decision conflicted with Supreme Court precedent regarding Article III and prudential standing. Petitioners also contended that the Supreme Court should grant certiorari to determine whether EPA had forfeited its ability to challenge the food group's prudential standing by failing to raise the issue. In response, EPA argued that the D.C. Circuit properly applied Supreme Court precedent and that the fact-specific

inquiry undertaken by the D.C. Circuit was not suited to review by the Supreme Court. EPA also noted that petitioners did not timely preserve in the D.C. Circuit their argument that EPA had forfeited prudential standing.

Shimshon Balanson
+1.216.586.7151
sbalanson@jonesday.com

D.C. CIRCUIT FINDS STATE AND INDUSTRY PETITIONERS LACK STANDING TO CHALLENGE EPA GREENHOUSE GAS REGULATIONS

As previously reported in the Spring 2013 edition of *The Climate Report*, the states of Texas and Wyoming, along with industry groups, challenged in U.S. Court of Appeals for the District of Columbia the U.S. EPA's plan for implementing greenhouse gas emissions regulations (*State of Texas v. the United States Environmental Protection Agency*, No. 10-1425). This latest dispute in a series of legal skirmishes revolved around implementation of Part C permitting requirements in states without implementation plans for greenhouse gases as of January 2, 2011. Texas, Wyoming, and the industry groups contended that five rules promulgated by EPA were based on impermissible interpretations of the Part C Prevention of Significant Deterioration ("PSD") Program and ran afoul of the Clean Air Act's "orderly process" for revising State Implementation Plans ("SIPs"). Petitioners acknowledged that states were obligated to update their SIPs to incorporate greenhouse gas emissions into their PSD programs but raised procedural and substantive challenges to the timing and methods employed by EPA in requiring revisions to SIPs. Petitioners, moreover, argued that the Clean Air Act permitted states to issue lawful PSD permits under the previously approved SIP during the three-year period to which states were entitled to revise their SIPs. Oral argument was heard on May 7, 2013.

On July 26, 2013, the three-judge panel of Judges Rogers, Tatel, and Kavanaugh, in a 2–1 ruling, dismissed the petitions for lack of jurisdiction, finding that the states and the industry groups lacked Article III standing to challenge the rules. The majority of the court concluded that, pursuant to the plain text of Clean Air Act §§ 165(a) and 167, PSD permitting requirements are self-executing and apply directly to major stationary sources irrespective of an applicable SIP. Specifically, the court held that the industry petitioners failed to show sufficient injury-in-fact to sustain a challenge of the rules because the challenged rules actually mitigate an injury that industry petitioners would have otherwise sustained by not being able to obtain lawful PSD permits until the states revised their SIPs. As to the state petitioners, the court held that vacating the challenged rules would not redress the state's alleged injury to their quasi-sovereign interests in regulating air quality within their borders because the claimed injury was caused by the automatic operation of Section 165(a), rather than the challenged rules.

Judge Kavanaugh dissented, arguing that the EPA rules should be vacated because a long-standing EPA regulation gives states three years to revise their SIPs to incorporate new EPA regulations, and the EPA rules at issue stripped the states of the prescribed period to update their SIPs to include greenhouse gases. In addition, Judge Kavanaugh argued that these states should have been allowed to issue PSD permits under their old SIP during the three-year interim period.

Daniella Einik
+1.202.879.3775
deinik@jonesday.com

TOWARD A SYSTEM FOR REDUCING EMISSIONS FROM THE SHIPPING SECTOR

On June 28, 2013, the European Commission published a proposal for Regulation EU 525/2013 on "the monitoring, reporting and verification of carbon dioxide emissions from maritime transport."

The Regulation aims to establish an EU-wide system for the monitoring, reporting, and verification ("MRV") of all emissions from combustion of fuels by large ships starting in January 2018.

Only "large" vessels (5,000 gross tons or more) arriving at, within, or departing from ports under the jurisdiction of a Member State would be affected. Companies (which includes the owner, manager, charterer, or any other person who has assumed the responsibility from the ship owner for its operations) would have to bear MRV obligations. Companies must submit an annual monitoring plan, indicating the method chosen to monitor and report emissions and other climate-relevant information, as well as an emissions report to an independent and accredited verifier. Information on the emissions reported in the concerned companies' compliance will be made publicly available by the European Commission.

The proposal leaves the system for the assessment of penalties to the Member States. It nevertheless provides for the possibility for national State port authorities to issue an expulsion order in the case of noncompliance with the monitoring and reporting requirements.

The purpose of the regulation is to promote the reduction of greenhouse gas emissions in order to achieve a 2 percent reduction compared to business as usual, thus completing the existing EU system addressing greenhouse gas emissions from certain stationary sources and the aviation sector. This new proposal begins the EU legislative process and is expected to enter into force on July 1, 2015.

Anne-Caroline Urbain
+33.1.56.59.39.93
aurbain@jonesday.com

FRENCH CONSTITUTIONAL COURT CONFIRMS SHALE GAS FRACKING BAN

On October 11, 2013, the French constitutional court finally issued its long-awaited ruling on the July 13, 2011 law banning hydraulic fracturing and confirmed its constitutional validity.

In response to the cancellation of its research permits pursuant to the foregoing legislation, Shuepbach Energy LLC used the new constitutional review tool known as the "priority preliminary constitutional ruling" (*question prioritaire de constitutionnalité*) in an attempt to challenge the constitutional validity of the fracking ban. In its brief, the company raised four series of grievances, but to no avail. All four were dismissed by the court.

At the outset, the claimant alleged that the ban on fracking in the shale gas prospecting and exploitation context violated equal treatment principles since fracking is otherwise lawful in the management of geothermal reservoirs. The court rejected that argument, stating that fracking techniques themselves, the number of fracking wells, and the nature of fluids used actually warrant such risk-based differentiated legal treatment.

The claimant also stated that the ban violated the freedom of enterprise principle. In this respect, the court recalled that the restriction applies to both conventional and nonconventional resources in the framework of an administrative authorization regime, in the context of which administrative authorities act in furtherance of the general interest. It therefore concluded that, based on current scientific knowledge, the ban is not a disproportionate measure and is consistent with the environmental protection objective pursued by the legislator.

On the violation of property rights, the court considered that in allowing the abrogation of research permits on the basis of which fracking is carried out, the legislator merely drew the consequences of a statutorily established fracking ban and did not infringe on lawfully acquired rights. It further asserted a well-established principle according to which administrative authorizations do not create proprietary rights. As a consequence, the abrogation of permits on the basis of the fracking ban does not qualify as a property deprivation against which the Constitution protects.

Finally, with regard to the alleged violation of certain provisions of the French constitutional environmental charter, the court recalled that article 6, which states that "public policies shall promote sustainable development," does not establish *per se* rights or freedoms that are guaranteed by the Constitution. As far as the precautionary principle of article 5 goes, the court merely stated that "by all means" such principle cannot be invoked with respect to a perennial prohibition such as that established by the 2011 law.

Unfortunately, the court skipped the claim of an overly rigorous enforcement of the precautionary principle, leaving the matter to indemnity claims that are reportedly pending already.

David Desforges
+33.1.56.59.46.58
ddesforges@jonesday.com

AUSTRALIAN CARBON PRICING MECHANISM TO BE REPEALED

On September 7, 2013, Australia held its federal election, and a new government was elected. One of the policies of the new government is to repeal the carbon pricing mechanism ("CPM")—the carbon tax scheme. The government has released exposure drafts of eight repeal bills ("Bills") and an accompanying Repeal of the Carbon Tax Consultation Paper.

The Bills are open for public consultation, and submissions must be made by November 4, 2013. The Bills were tabled in Parliament on November 13, 2013. For the Bills to be passed, they must be approved by the House of Representatives and the Senate. The Senate is not controlled by the new government, so the support of independents will be required to pass the Bills. Following the election, a new set of independents will hold the balance of power in the Senate beginning July 1, 2014. The government will be counting on support from this new set of independents if the existing independents in the Senate do not pass the Bills before that date.

Key features of the Bills are to be as follows:

- The repeal of the CPM is to take effect from July 1, 2014, whenever the Bills are passed.
- The CPM is to continue operating until that time.
- The National Greenhouse and Energy Reporting Scheme is to continue to operate.
- Industry assistance provided under the Jobs and Competitiveness Program ("JCP") and the Energy Security Fund is to continue in 2013–2014, but there is to be a "true up" process for any under- or over-allocation of free units issued under the JCP.
- Planned 2015–2016 carbon price-related tax cuts are to be repealed.
- Any carbon units auctioned before the repeal takes effect are to be cancelled and refunded.
- The Climate Change Authority is to be abolished.

Also, it will be illegal to charge "unreasonably high" prices. The Australian competition authority will have extensive temporary extrajudicial investigative and administrative enforcement tools. Fines will be set according to the tariff for serious antitrust violations—up to 10 percent of the company's annual total turnover. Buyers of energy and synthetic gases can avoid honoring contracts or seek damages where the prices previously agreed with them or now offered to them are "unreasonable."

Tony Wassaf
+61.2.8772.05.27
twassaf@jonesday.com

THE CLIMATE REPORT EDITORIAL BOARD

EDITORIAL BOARD

Shimshon Balanson
Cleveland Office
Business and Tort Litigation
+1.216.586.7151
sbalanson@jonesday.com

Christine M. Morgan
Atlanta Office
Environmental, Health & Safety
+1.404.581.8215
cmmorgan@jonesday.com

Chris Papanicolaou
London Office
Environmental, Health & Safety
+44.20.7039.5321
cpapanicolaou@jonesday.com

Dickson Chin
New York Office
Energy
+1.212.326.7893
dchin@jonesday.com

Jane K. Murphy
Chicago Office
Environmental, Health & Safety
+1.312.269.4239
jkmurphy@jonesday.com

EXECUTIVE EDITOR

John A. Rego
Cleveland Office
Environmental, Health & Safety
+1.216.586.7542
jrego@jonesday.com

CONTACTS

CALIFORNIA

Thomas M. Donnelly
San Francisco Office
Environmental, Health & Safety
+1.415.875.5880
tmdonnelly@jonesday.com

NEW YORK

Thomas C. Havens
New York Office
Energy
+1.212.326.3935
tchavens@jonesday.com

TEXAS

Jason F. Leif
Houston Office
Energy
+1.832.239.3727
jfleif@jonesday.com

ASIA

Kaoru Umino
Tokyo Office
Banking & Finance
+81.3.6744.1616
kumino@jonesday.com

GEORGIA

G. Graham Holden
Atlanta Office
Energy
+1.404.581.8220
ggholden@jonesday.com

OHIO

John A. Rego
Cleveland Office
Environmental, Health & Safety
+1.216.586.7542
jrego@jonesday.com

WASHINGTON, D.C.

Kevin P. Holewinski
Washington Office
Environmental, Health & Safety
+1.202.879.3797
kpholewinski@jonesday.com

AUSTRALIA

Tony J. Wassaf
Sydney Office
Energy
+61.2.8272.0527
twassaf@jonesday.com

ILLINOIS

Charles T. Wehland
Chicago Office
Energy
+1.312.269.4388
ctwehland@jonesday.com

PENNSYLVANIA

Mary Beth Deemer
Pittsburgh Office
Environmental, Health & Safety
+1.412.394.7920
mbdeemer@jonesday.com

EUROPE

Sophie Hagège
Paris Office
Mergers & Acquisitions
+33.1.56.59.39.46
shagege@jonesday.com

LATIN AMERICA

Mauricio Llamas
Mexico City Office
Government Regulation
+52.55.3000.4082
mllamas@jonesday.com

JONES DAY GLOBAL LOCATIONS

ALKHOBAR
AMSTERDAM
ATLANTA
BEIJING
BOSTON
BRUSSELS
CHICAGO
CLEVELAND
COLUMBUS
DALLAS
DUBAI
DÜSSELDORF
FRANKFURT
HONG KONG
HOUSTON
INDIA
IRVINE
JEDDAH
LONDON
LOS ANGELES
MADRID
MEXICO CITY
MIAMI
MILAN
MOSCOW
MUNICH
NEW YORK
PARIS
PITTSBURGH
RIYADH
SAN DIEGO
SAN FRANCISCO
SÃO PAULO
SHANGHAI
SILICON VALLEY
SINGAPORE
SYDNEY
TAIPEI
TOKYO
WASHINGTON

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our web site at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.

© 2013 Jones Day. All rights reserved. Printed in the U.S.A.