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THE CLIMATE REPORT

DEPARTMENTS

U.S. REGULATORY DEVELOPMENTS

Jane K. Murphy, Editor

PROPOSED CARBON REGULATIONS FOR NEW SOURCES CONTINUE TO MEET RESISTANCE

Pursuant to new source performance standards proposed by the Environmental Protection Agency ("EPA") on January 8, any new fossil fuel-fired power plants commencing construction after that date will be required to meet new carbon emissions standards. The agency proposed one set of standards for gas-fired units and second pair of alternative standards for coal-fired units. Most new combined cycle gas-fired units already meet the proposed standard. By contrast, neither recently built nor recently proposed coal-fired units can meet the EPA's proposed standard without using carbon capture and sequestration ("CCS"), a technology that some electric utilities are likely to assert has not yet been deployed cost-effectively on a commercial basis.

The agency's proposed rule has met significant resistance within the administration, Congress, industry, and the public at large. Central to the critiques of the agency's proposed regulation is the charge that the agency has improperly concluded that CCS is "adequately demonstrated." Although EPA relied on literature reviews, pilot projects, and projects under construction to justify its finding, groups like EPA's Scientific Advisory Board have questioned whether peer review of the literature reviews was sufficient. While the Scientific Advisory Board has distanced itself from its initial critiques,

other agencies have voiced skepticism about the merits of EPA's determination and the need for the regulation in an interagency review drafted by the Office of Management and Budget ("OMB").

Recently, the state of Nebraska filed suit against EPA alleging that the proposed regulation violated the Energy Policy Act of 2005. Under the Energy Policy Act, EPA may not consider CCS projects funded by the act when determining whether a technology is "adequately demonstrated." Nebraska alleges that three of the four projects cited by EPA received more than $2.5 billion in funding under the Energy Policy Act. Others question whether these facilities meet the Data Quality Act's requirement that the data that forms the basis of a regulation be "substantially reproducible."

In response to OMB's interagency review, EPA explained that it was issuing the rule despite EPA's prediction that no new coal plants will be built in the future because "in order to issue emission standards for existing sources, the Agency must first propose standards of performance for new sources." EPA plans to issue proposed guidance for existing sources no later than June 1. Such a move will require states to develop and implement emissions reduction plans for sources already regulated by hazardous air pollutant standards. However, conflicting statutory language in the Clean Air Act suggests that these sources may not be dually regulated unless there is change to the statute.

Comments to the proposed New Source Pollution Standard can be submitted online or via email, mail, or fax until March 10.

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EPA FINALIZES RULE ON CARBON CAPTURE AND SEQUESTRATION REQUIREMENTS

On December 19, 2013, the EPA issued a final rule that outlines requirements for CCS technologies to protect underground sources of drinking water. The new rule clarifies that such captured and stored carbon dioxide streams will be excluded from the Resource Conservation and Recovery Act's ("RCRA") hazardous waste regulations for discarded waste. The rule is intended to provide regulatory clarity to facilitate the development and implementation of CCS technologies in light of the proposed emission standards for new power plants, published for public comments on the Federal Register on January 8.

CCS is the process of capturing carbon dioxide from industrial or energy sources and injecting it into deep subsurface rock formations or depleted reservoirs for long-term storage. According to EPA, management of carbon dioxide streams under the specified conditions does not present a substantial risk to human health or the environment, and therefore additional regulation pursuant to RCRA's hazardous waste regulations is unnecessary.

The new CCS rule creates a new class of wells, Class VI, under the Safe Drinking Water Act's Underground Injection Control Program ("UIC Program"). This new classification is particularly relevant to the oil and gas industries, which often pump sequestered carbon into depleted oil and gas reservoirs to coax additional recovery of oil and gas. These wells are regulated as Class II under the UIC Program, and such injections for enhanced recovery of oil and gas are not considered waste management activities under RCRA. However, if the purpose of the carbon dioxide injections changes from enhanced oil or gas recovery to permanent storage, then the storage well must meet the more onerous requirements for classification as Class VI. The EPA has released draft guidance for transitioning Class II wells to Class VI wells for the purpose of permanent storage.

This CCS rule comes on the heels of the controversial proposed rule on emissions standards for new power plants that is part of the Obama administration's global warming initiative. Without utilizing CCS technologies, it is unlikely that new coal-fired power plants could meet the proposed carbon emissions standards. While CCS technology is decades old, it remains expensive and energy-intensive, creating uncertainty on whether its adequacy and commercial viability are sufficient to meet the requirements under the Clean Air Act.

Despite this opposition, EPA insists that these rules and emissions standards will facilitate the development of commercially viable CCS technologies that will allow new power plants to operate within the Obama administration's efforts to reduce carbon pollution. To spur this development, the Department of

Energy recently announced plans to invest nearly $84 million to research second-generation technologies for carbon capture from coal-fired power plants.

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IMPLEMENTATION OF CALIFORNIA'S PROGRAM TO ADDRESS CLIMATE CHANGE

California is taking a number of steps in 2014 to further implementation of its Global Warming Solutions Act. These steps include an update to the strategy (the "Scoping Plan") for reducing the emission of greenhouse gases ("GHG"), continuing the state auctions to sell GHG emissions allowances, and developing the link between the California and Quebec cap-and-trade programs.

The California Air Resources Board ("CARB") issued a discussion draft of an update to the Scoping Plan on October 1, 2013. In late January 2014, CARB staff released a draft proposed update to the Scoping Plan, as well as an environmental assessment of the update. In February, CARB will hold a board meeting that includes a discussion of the draft and time for additional public comments. CARB is scheduled to convene a board hearing to consider the final Scoping Plan Update and environmental assessment in the spring.

One of the key strategies under the Scoping Plan is the cap-and-trade program, and an important part of the program is the auction of GHG emissions allowances. As done in 2013, CARB will hold quarterly allowance auctions in 2014. The allowance auction dates will be February 19, May 16, August 18, and November 19. At the first quarterly auction in 2014, 19,538,695 (2014 vintage) allowances and 9,260,000 (2017 vintage) allowances will be offered. A total of 80,980,578 (2014 vintage) allowances and 37,040,000 (2017 vintage) allowances will be offered at the four auctions held in 2014. The auction reserve price (the minimum price that CARB will accept for one allowance) for all of the auctions in 2014 will be $11.34, as established by a formula set out in the cap-and-trade regulations. This compares to an auction reserve price of $10.71 in 2013. These numbers include California-owned allowances and the allowances to be consigned by the electricity distribution utilities.

California and Quebec formally linked their cap-and-trade programs on January 1, and there are plans for jointly held allowance auctions by the two jurisdictions. Under the linked programs, covered entities are able to purchase on the secondary market, and use, allowances issued by either California or Quebec. Thus, industries in Quebec can purchase allowances from California on the secondary market in order to meet Quebec targets for GHG emissions reductions, and industries subject to California's cap-and-trade program can purchase allowances from Quebec's carbon market to satisfy California requirements. However, covered sources from one jurisdiction are not able to purchase allowances at an auction held in the other jurisdiction until joint auctions are held. Participation in the auctions is restricted to entities registered in the jurisdiction holding the auction. A joint auction is expected later this year. Quebec held an auction in early December 2013 for emissions allowances that covered both 2013 and future needs. The allowances sold at the reserve price of $10.75 per allowance.

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CLIMATE CHANGE ISSUES FOR MANAGEMENT

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SHAREHOLDER RESOLUTIONS ADDRESS CLIMATE CHANGE

State pension funds for New York and Connecticut filed shareholder resolution proposals for this proxy season that ask electric utilities to report on their progress in achieving the Obama administration's goal of an 80 percent reduction in greenhouse gas emissions by 2050. In addition to reporting, the resolutions ask the companies to consider innovative energy generation technologies and strategies such as renewable energy and distributed generation, and to evaluate best practices among domestic and international peers. The proposed resolutions have been filed with Ameren, CMS Energy, Entergy, FirstEnergy, and Southern Company.

The shareholder proposals refer to various studies and reports that predict transformative changes in the power generation sector, including a 2013 report by Edison Electric Institute that urges the industry to "proactively assess the impacts and alternatives available to address disruptive challenges." In a similar vein, the shareholder proposals refer to the International Energy Agency conclusion that only one-third of proven fossil fuel reserves can be consumed if the world is going to hold the global temperature increase below 2° C. This line of thought leads activists to talk about the possibility that some fossil fuels and the assets associated with their extraction and consumption will be stranded in the future, and it prompted Bloomberg to launch an electronic Carbon Risk Valuation Tool at the end of 2013 to quantify these risks for investors.

On January 9, FirstEnergy reached an agreement with the New York and Connecticut pension funds for the withdrawal of the proposed shareholder resolution. According to the agreement, FirstEnergy will incorporate information "on additional policies the Company could adopt and additional actions the Company could take to reduce its greenhouse gas emission . . . in connection with President Obama's goal of a 80 percent reduction in greenhouse gas emissions" in its Sustainability Report scheduled to be published on October 1.

The agreement also requires a committee of independent directors to discuss the shareholder resolution proposal and an outline of related issues. The committee's discussion will include evaluation of long-term actions related to the age and life of the existing generation fleet and drivers of future replacement generation. The standards that EPA plans to issue for greenhouse gas emissions at new and existing electricity generating units are among the drivers listed in the outline.

In press statements following the agreement with FirstEnergy, the New York State Treasurer indicated his goal is to reach similar agreements with other companies. Indeed, the proposal filed with FirstEnergy was part of a larger effort with Ceres that is meant to ensure that the profitability of energy companies is sustainable.

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PART ONE OF GLOBAL INITIATIVE FOR SUSTAINABILITY RATINGS NOW COMPLETED

Ceres and the Tellus Institute, not-for-profit organizations that promote sustainable business practices, are working together on a joint project to develop a standard for corporate sustainability ratings. Their joint project is called the "Global Initiative for Sustainability Ratings" or GISR. GISR has recently completed the first of its three-part process to establish the standard.

The standard under development by GISR is designed to serve as a benchmark for assessing an organization's sustainability performance. Rather than simply releasing the standard, GISR is planning to implement an accreditation system based on the standard. Under this approach, GISR will confer accreditation on the rating systems administered by other organizations that meet the standard. Thus, the standard will be implemented by organizations that voluntarily seek accreditation of their rating system from GISR and that apply the GISR standard to companies that are undergoing a sustainability performance assessment.

According to GISR, an accreditation system is needed because of the volume and variety of current rating systems. About 100 different organizations rate corporate sustainability. The ratings cover a wide range of target audiences, including investors, consumers, and companies, and a variety of interests, ranging from issue-specific to multi-issue. The various sustainability ratings have led to a multitude of requests that companies respond to questionnaires and analyst inquiries, which can often lead to "survey fatigue." GISR also points out that while the large number of surveys can be annoying, they can be very valuable in helping investors and consumers evaluate a company's capacity to anticipate and manage risks, including risks presented by climate change.

Leading organizations actively involved with sustainability ratings include the Global Reporting Initiative, the Sustainability Accounting Standards Board, and the International Integrated Reporting Council. These organizations focus on the "supply side" of the issue. The Global Reporting Initiative ("GRI") has developed a standard for sustainability reports that include information about economic, environmental, social, and governance performance. Companies use the GRI guidelines to produce their sustainability reports. The Sustainability Accounting Standards Board ("SASB") provides standards for publicly listed companies in the U.S. to develop mandatory disclosures for filings with the SEC, such as Forms 10-K and 20-F. The International Integrated Reporting Council ("IIRC") promotes integrated corporate reporting that includes financial and non-financial information about a company's strategy, governance, performance, and prospects over the short, medium, and long term. GISR seeks to complement the reporting focus of these three organizations by fully using the reported sustainability information. GISR focuses more on the demand side and investor understanding and use of the reported information.

The GISR standard will be made up of three components: Principles, Issues, and Indicators. The "Principles" are the attributes of a rating system that give the system credibility. To develop the Principles, GISR reviewed the principles used or adopted by a representative sample of other sustainability assessment systems. The "Issues" are aspects of sustainability that are material in assessing a company's sustainability performance. The "Indicators" are metrics that measure a company's sustainability performance for each of the Issues. In developing Issues and Indicators, GISR will review a representative sample of issues and indicators to identify those that are most commonly used, those that are uncommonly used but significant, and those that are absent but material to assessing sustainability. GISR conducts these reviews to maximize coordination with leading current standard setters, including GRI, SASB, and IIRC.

In December 2013, GISR released the Principles component of its standard, which is designed to apply to any rating system that assesses corporate sustainability performance. The Principles are made up of five process Principles and seven content Principles. Among the key process Principles are transparency (the rating should be transparent to those that use the rating), impartiality (the rating should be protected from undue influence by the rated company), and assurability (the rating should allow for independent third-party assurance that the rating comports with the GISR standard). Key content Principles include materiality (the rating should assess performance based on relevant sustainability issues), comprehensiveness (rating should assess impacts on human, intellectual, natural, and social capital), long-term horizon (the rating should enable evaluation of long-term performance), and comparability (the rating should allow users to compare performance of the same company over time and of different companies within the same time period).

GISR plans to develop the "Issues" component of its standard in 2014 and the "Indicators" component in 2015. Development of each component will take place in three steps—issuance of a draft, issuance of a second draft, and issuance of the final version. The first two steps will be followed by a pubic consultation period. An accreditation process will accompany each component, and accreditation levels will be cumulative. Thus accreditation at level 1 will be based upon consistency with the standard's Principles, accreditation at level 2 will be based upon consistency with the standard's Principles and Issues, and accreditation at level 3 will be based upon consistency with all three components of the standard. GISR protocols and tools will accompany release of each of the components in order to assist raters, and users of the raters' evaluation, in applying the three components of the standard.

More information about GISR, and a copy of Component 1 of the standard, is located here.

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CALIFORNIA'S NEW ENERGY STORAGE MANDATE

On October 17, 2013, the California Public Utilities Commission ("Commission") issued its final rule promulgating energy storage requirements intended to encourage emerging storage technologies and progress toward market transformation in a technologically neutral fashion. The storage requirements apply to California's numerous community choice aggregators ("CCAs"), electric service providers ("ESPs"), and three investor-owned utilities ("IOUs"). The Commission issued these rules pursuant to Assembly Bill 2514 (AB 2514), passed by the California legislature in 2010. These rules also serve to forward California's objective of procuring one third of its total procurement from renewable sources by 2020.

Energy storage is seen by policymakers as a means to avoid or defer new fossil power plants, better integrate intermittent renewable power, and reduce greenhouse gas emissions. AB 2514 mandated the Commission with evaluating whether to establish a new energy procurement program, which these rules are a part of.

The Commission established a target for the procurement of 1,325 megawatts of energy storage for the three IOUs—Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company—by 2020. Installation of such energy storage must be achieved by the end of 2024. The IOUs may not own more than 50 percent of the storage projects, with the majority of the storage projects needing to be owned by third-party providers. CCAs and ESPs must procure energy storage equal to one percent of their annual 2020 peak load by 2020, and installation must also be completed by the end of 2024.

What Counts as "Energy Storage." The California Public Utilities Code section 2835(a)(1) defines an "energy storage system" as a "commercially available technology that is capable of absorbing energy, storing it for a period of time, and thereafter dispatching the energy." An energy storage system must "be cost effective" and accomplish one of the following:

reduce emissions of greenhouse gases; reduce demand for peak electrical generation; defer or substitute for an investment in generation, transmission, or distribution assets; or improve the reliable operation of the electrical transmission or distribution grid. Additionally, an energy storage system must (i) "use mechanical, chemical, or thermal processes to store energy that was generated at one time for use at a later time"; (ii) "store thermal energy for direct use for heating or cooling at a later time in a manner that avoids the need to use electricity at that later time"; (iii) "use mechanical, chemical, or thermal processes to store energy generated from renewable resources for use at a later time"; or (iv) "use mechanical, chemical, or thermal processes to store energy generated from mechanical processes that would otherwise be wasted for delivery at a later time."

The Commission noted that systems in existence prior to January 1, 2010 will not count toward the procurement targets, in compliance with section 2835(c). In an effort to encourage new and emerging technologies, the Commission also excluded large-scale pumped storage projects greater than 50 MW because such projects would "dwarf other smaller, emerging technologies" and "inhibit the fulfillment of market transformation goals."

Intermediate Procurement Targets. The IOU procurement targets are divided into three separate categories, called storage grid domains: (i) transmission; (ii) distribution; and (iii) customer-sited. The storage grid domains are distinguishable by where they interconnect with the grid. The transmission storage grid domain includes co-located energy storage (such as wind and energy storage or gas-fired generation and thermal energy storage) and stand-alone energy storage. The distribution storage grid domain includes distributed generation and energy storage and substation energy storage. Finally, the customer-sited storage grid domain includes electric vehicle charging. The procurement targets for CCAs and ESPs are not divided into the storage grid domains, and these entities may meet their procurement targets in any configuration.

To build up to the 2020 procurement goal, intermediate procurement targets were established for the IOUs. The establishment of these targets was met with opposition from the electric utilities, noting the cost and lack of flexibility in the incremental targets. Nonetheless, the first solicitation to procure energy storage has been slated for December 1, 2014, with the IOUs' first procurement application due March 1, 2014. Additional solicitation periods will be held every two years. CCAs and ESPs do not have intermediate procurement targets.

In an effort to be flexible, the Commission is permitting an IOU to defer up to 80 percent of its procurement target to a later procurement date if the IOU shows that it cannot procure enough viable projects (operationally or economically). Additionally, up to 80 percent of the MW requirements may be shifted between the transmission and distribution storage grid domains. However, no shifting is permitted with the customer-sited domain. Lastly, overprocurement in one period may be "banked" to count toward the procurement target in a later period.

The Commission will conduct a comprehensive evaluation of this energy storage framework by no later than 2016 to determine, in addition to applying lessons learned from its implementation, whether: (i) the energy storage procured under this framework optimizes the grid, integrates renewable, and/or reduces greenhouse gas emissions; and (ii) implementation of the framework progresses California toward market transformation.

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CLIMATE CHANGE LITIGATION

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SUPREME COURT TO ADDRESS CHALLENGE TO EPA'S REGULATION OF GREENHOUSE GASES FROM STATIONARY SOURCES UNDER THE CLEAN AIR ACT

The United States Environmental Protection Agency's ("EPA") attempts at regulating greenhouse gas emissions from stationary sources have been fraught with legal challenges. However, the U.S. Supreme Court may provide some clarity regarding EPA's authority to regulate stationary sources when it hears oral argument on February 24 in connection with challenges to EPA's regulation of greenhouse gas emissions from stationary sources under the Clean Air Act's ("CAA") Prevention of Significant Deterioration ("PSD") program.

EPA's regulation of greenhouse gases from stationary sources began with the Supreme Court's 2007 decision in *Massachusetts v. EPA*, 549 U.S. 497, in which the Supreme Court determined that greenhouse gases were "air pollutants" under the CAA and held that EPA must regulate emissions of greenhouse gases from new motor vehicles if it finds that these emissions may reasonably be anticipated to endanger public health or welfare. Following this decision, EPA determined, in the so-called Endangerment Finding, that greenhouse gases from new motor vehicles may "reasonably be anticipated to endanger public health or welfare" and subsequently issued the Tailpipe Rule limiting the amount of greenhouse gas emissions from new motor vehicles.

In promulgating the Tailpipe Rule, EPA took the position that the regulation of greenhouse gases from new motor vehicles automatically triggered certain permitting requirements for stationary sources that emit greenhouse gases under the CAA's PSD program. This automatic trigger meant that thousands of once-unregulated sources were now required to obtain a permit for their greenhouse gas emissions. As a result, EPA issued the Tailoring Rule to avoid the "absurd result" of requiring thousands of new commercial and residential sources of greenhouse gases to obtain permits. Under the Tailoring Rule, only stationary sources emitting 75,000 or 100,000 tons per year would be required to obtain permits—instead of the statutory threshold of 100 or 250 tons per year—until the EPA had time to study the possibility of implementing streamlined permitting requirements for smaller sources.

Industry representatives and several states quickly challenged these rules in the United States Court of Appeals for the District of Columbia. As reported in the Summer 2012 *Climate Report*, on June 26, 2012, a three-judge panel upheld EPA's interpretation of the CAA that the PSD program was automatically triggered by the new motor vehicle regulations. The court then dismissed petitioners' challenge to the Tailoring Rule because they could not prove that they had suffered any injury as a result of the Tailoring Rule itself. Rather, the court held, any injury suffered by petitioners would be as a result of the automatic trigger of the PSD Program. In this respect, the court noted that the Tailoring Rule mitigated petitioners' damages by reducing the number of sources subject to the PSD Program requirements.

On October 15, 2013, following a December 2012 denial of rehearing en banc, the United States Supreme Court granted six of nine petitions for certiorari, agreeing to review the single issue of whether the 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. Petitioners filed briefs in support of their petitions in December 2013. They argued that EPA's automatic trigger interpretation was impermissible because EPA could have avoided the absurd results by interpreting the PSD provisions as applying only to certain pollutants that do not include greenhouse gases, or by reading section 166 of the CAA as the only mechanism for adding pollutants to the PSD program. In addition, petitioners argued that EPA's tailored regulation of greenhouse gases under the PSD program would be an unconstitutional delegation of authority because the CAA provides no intelligible principle for such an exercise of discretionary power. They also requested that the Supreme Court revisit *Massachusetts v. EPA* and possibly overrule it if it requires coverage of greenhouse gases under the PSD program.

Respondents, EPA, and several other states filed response briefs on January 21. Respondents argued that EPA's position that greenhouse gas emissions are automatically covered by the PSD program as a result of their regulation under other parts of the CAA is consistent with the statute and

EPA's longstanding interpretation of the statute. Respondents asserted, moreover, that EPA's interpretation is consistent with the Supreme Court's decisions in *Massachusetts v. EPA* that greenhouse gases are air pollutants under the CAA and its decision in *AEP v. Connecticut*, 131 S.Ct. 2527, 564 U.S. _____ (2011), that the CAA displaces federal common law with respect to greenhouse gas emissions from stationary sources.

The Supreme Court's eventual decision in the Tailoring Rule challenge will likely provide some finality as to whether EPA has authority to regulate greenhouse gases under the CAA. However, the Supreme Court's decision is not likely to forestall all further legal challenges to EPA regulation of greenhouse gas emissions from stationary sources. For example, on January 8, EPA proposed new source performance standards limiting greenhouse gas emissions from fossil fuel-fired electric utility generating units that will likely see challenges of its own. (For more on EPA's proposed standard, read our *Jones Day Commentary*, "EPA's Proposed New Source Clean Air Act Standards and Carbon Capture and Storage Technology: Can the Courts Find the Technology Has Been 'Adequately Demonstrated' Under the CAA and/or in Compliance with the Energy Policy Act?")

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LAWSUIT CHALLENGES APPROVAL OF TMDLs FOR FAILURE TO CONSIDER CLIMATE CHANGE

The Conservation Law Foundation has filed a lawsuit against EPA, alleging that EPA's approval of nitrogen total maximum daily loads ("TMDLs") in embayments located on Cape Cod and Nantucket violated the Clean Water Act, in part because EPA did not analyze the impact of climate change. *Conservation Law Found., Inc. v. U.S. Envtl. Prot. Agency*, No. 1:13-cv-12704-MLW (D. Mass. Oct. 24, 2013).

The Conservation Law Foundation brought similar claims against EPA back in 2010, but the United States District Court for the District of Massachusetts granted EPA's motion for summary judgment on August 29, 2013, holding that plaintiffs did not have standing to assert their claims. *Conservation Law Found., Inc. v. U.S. Envtl. Prot. Agency*, 2013 U.S. Dist. LEXIS 123731, No. 1:10-cv-11455-MLW (D. Mass. Aug. 29, 2013). With regard to its climate change allegations, plaintiffs relied on affidavits from two members, but the court held the affidavits were insufficient to "place injury in fact in genuine dispute" because they did "not assert any connection between the declarants' injuries and the EPA's alleged failure to consider the effects of climate change when approving the TMDLs." *Id.* at *33, *37. In addition, the court held that plaintiffs failed to show that the injury would be redressed by a favorable ruling:

> The fact that, in general, more TMDLs may be required and adjustments to pollution controls may need to be made in some areas as a result of climate change does not constitute evidence that the EPA's inclusion of the effects of climate change in the TMDLs at issue in this case would likely alter the pollution levels that are affecting plaintiffs' interests in the particular embayments on Cape Cod involved in the instant case.

Id. at *48.

The latest complaint filed by the Conservation Law Foundation includes more specific climate change allegations than the prior complaint from the unsuccessful 2010 action. For example, the 2013 complaint cites a 2002 paper titled "Climate Change Impacts on U.S. Coastal and Marine Ecosystems," coauthored by EPA scientist James Titus, which found that

> [e]stuarine impacts from climate change will be manifested through exacerbation of current stresses, including those imposed by a significantly altered nitrogen cycle . . . . Climate change will likely influence the vulnerability of estuaries to eutrophication in several ways, including changes in mixing characteristics caused by alterations in freshwater runoff, and changes in temperature, sea level, and exchange with the coastal ocean.

Compl. ¶ 109 (alteration and omission in original). The complaint also alleges that climate and weather data from monitoring stations near the Cape Cod embayments show "a trend of increasing ambient temperatures consistent with and/or more accelerated than predictions in climate science literature that was created by or available to EPA at the time of its review and approval of the Cape Cod TMDLs." *Id.* ¶ 118. Thus, the complaint

alleges that EPA's failure to consider climate change when evaluating the TMDLs was arbitrary and capricious. The complaint further alleges that the improper approval of the TMDLs "further endangers these already degraded waters" and that "[a]s a result of Defendants' acts and omissions, including its omission of any climate change analysis . . . , CLF members have suffered and will continue to suffer injuries to their aesthetic, environmental, recreational, and economic interests in enjoying and utilizing the affected Cape Cod waters." *Id.* ¶ 135.

Whether this 2013 lawsuit will be more successful than the 2010 lawsuit remains to be seen. A scheduling conference was set for January 24, 2014.

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CLIMATE CHANGE REGULATION BEYOND THE U.S.

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ON THE ROAD TO EU CARBON ALLOWANCE BACK-LOADING

Directive 2003/87/EC establishing a scheme for greenhouse gas emissions allowance trading within the European Community and amending Council Directive 96/61/EC provides for general principles on the auctioning of EU carbon allowances, in particular for the Commission to monitor and submit each year a report on the functioning of the European carbon market.

In the November 2012 report on the state of the European carbon market in 2012, the Commission reported that "the EU ETS has created a functioning market infrastructure . . . . However, the effect of the crisis compounded by a number of regulatory provisions related to the transition to Phase 3 have caused serious imbalances to emerge between supply and demand in the short term with potentially negative long-term repercussions." The imbalance between supply and demand comes from several factors, including the renewed economic slowdown and other temporary elements related to the transition to Phase 3 (such as record use of international credits and auctioning of Phase 2 allowances and remaining allowances in the new entrant reserve), and the efficiency of projects under the Clean Development Mechanism.

In order to address the rapid increase of supply and to provide certainty for market participants, the Commission proposed to change the auctioning timetable provided for in Regulation (EU) No 1031/2010 of November 12, 2010.

The Commission proposed a draft amendment to Regulation (EU) No 1031/2010, approved by the Climate Change Committee on January 8, 2014, which aims at reducing the auctioning of 900 million allowances from 2014 to 2016 (400 in 2014, 300 in 2015, and 200 in 2016) and at postponing their auctioning to 2019 (300), and 2020 (600) (thereby completing Article 10(2) of Regulation (EU) No 1031/2010 and adding the Annex IV).

The impact assessment carried out by the Commission demonstrates that such "back-loading" technique will improve the market balance by slowing down the build-up of the surplus in the early years of Phase 3. The back-loading is also expected to increase the carbon price with limited impact on competitiveness for the energy-intensive sector.

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EU PROPOSES 40 PERCENT CUT IN GREENHOUSE GAS EMISSIONS BY 2030

On January 22, the EU Commission published a white paper policy framework for climate and energy for the period from 2020–2030, setting a cut in carbon emissions by 40 percent below the 1990 level in 2030. This nearly doubles the current EU target of a 20 percent reduction by 2020. At the same time, the Commission seeks a renewable energy target of at least 27 percent of the EU energy supply by 2030. The target applies to the EU as a whole. Individual member states will not have individual targets. The expectation is that the 40 percent target by 2030 will keep the EU on track for a minimum 80 percent greenhouse gas reduction by 2050 and will contribute to future international commitments to reduce global warming. This target will assist in the framework for EU climate energy policies through to 2030. The proposal has been published ahead of the EU leaders' summit in March 2013 with a view to the 40 percent reduction target being endorsed by the leaders. That way, the EU would have an agreed target set prior to the climate summit in New York in the fall of this year. The 40 percent reduction target would be based on the EU's own greenhouse gas emissions and, specifically, would not include reductions in non-EU emissions users' offsets.

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CHINA TO "RATE" ENVIRONMENTAL PROTECTION EFFORTS

As a "green" start to the new year, the Ministry of Environmental Protection of the People's Republic of China ("MEP") announced on January 2 the introduction of a credit rating scheme ("Scheme") that will measure a company's environmental protection efforts according to a designated standard. The Scheme is due to launch on March 1.

The rules that govern the Scheme will apply to companies that are responsible for high levels of pollution and pose great risk to the environment. Industries caught by the Scheme will include energy, transportation, thermal power, steel, cement, electrolytic aluminum, coal, metallurgy, chemical, petrochemical, building materials, paper, brewing, pharmaceutical, fermentation, textile, leather, and mining. Companies that exceed prescribed emissions standards, use or produce toxic and hazardous materials, have caused significant environmental damage, have been fined more than 50,000 RMB or possess a recordable offense, or have been identified by environmental protection departments at provincial levels will also be included. Those who do not fall within the scope of the Scheme may choose to participate by their own volition.

Each company will be assigned a rating according to a four-colored scale—green (trustworthy), blue (good), yellow (warning), and red (adverse)—which will be determined based on the company's carbon emissions and efforts to curb pollution. The ratings will then be used by banks and financial institutions in China to evaluate whether a new loan offering or subsidy should be granted to the company in question. The MEP has recommended that companies with the worst ratings should be prevented from receiving new funding until their environmental credit rating improves.

It is anticipated that the assessment period for the Scheme will run from January 1 to December 31, and that the rating will be published by April of the following year; however, timelines may differ by province. The provincial environmental protection departments will be responsible for monitoring the credit rating scheme and can delegate tasks to other institutions.

As the world's biggest emitter of greenhouse gases, China is increasing efforts to address its environmental concerns while attempting to appease mounting civil unrest. The government has set itself an ambitious target to reduce carbon intensity by 40–45 percent below 2005 levels by 2020, and officials believe the new Scheme will help the country achieve this goal. Although the Scheme can only *recommend* that financial

providers and government departments penalize the worst offenders, most importantly it offers a formal incentive for businesses to take action to curb their emissions and adhere to environmental regulations. The success of the Scheme will rest on how severely the financial community will apply its rules and the extent to which authorities will incorporate environmental issues into their economic decisions.

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