JONES DAY®

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CALIFORNIA PREPARES FOR THE NEXT STAGE OF ITS GREENHOUSE GAS EMISSIONS REDUCTION PROGRAM

Scoping Plan. The California Air Resources Board ("CARB") will consider updates to its Scoping Plan at the Board's monthly meeting scheduled for May 22 and May 23, 2014. The current Scoping Plan outlines the measures California will take to meet the 2020 emissions reduction target established by Assembly Bill 32 ("AB 32"). The update evaluates the progress California has made in meeting this target and outlines additional measures to reduce greenhouse gas ("GHG") emissions beyond 2020. The Board also will consider the environmental analysis prepared for the update, and staff's written responses to comments on the analysis. The deadline for submitting comments on the environmental analysis and proposed update was April 28, 2014.

Cap-and-Trade Regulations. CARB considered amendments to the state's cap-and-trade program at its meeting on April 24 and April 25, 2014. The amendments are staff's response to the Board's direction to modify amendments that were proposed on September 4, 2013. The amendments fine-tune the regulations but also make substantive changes on such topics as legacy contracts and disposition of allowances. The Board certified the environmental analysis, adopted Findings and a Statement of Overriding Considerations, approved staff's responses to comments,

DEPARTMENTS

U.S. Regulatory Developments	1
Climate Change Issues for Management	4
Renewable Energy and Carbon Markets	6
Climate Change Litigation	8
Climate Change Regulation Beyond the U.S.	11

and adopted amendments to the cap- and-trade regulations. It also directed staff to finalize the Statement of Reasons and to submit the completed rulemaking package to California's Office of Administrative Law.

Approved Offset Projects. Offset credits can be used to satisfy up to eight percent of a covered source's compliance obligations under the cap-and-trade regulations. One way to generate offset credits is through early action projects, which are projects that have been issued offset credits by an approved early action offset program based upon GHG reductions that occurred between 2005 and 2014. On April 2, CARB released a list of recognized early action offset projects that includes 30 projects under a livestock protocol, 30 projects under an ozone protocol, and 20 projects under a forest protocol. CARB must approve the offset credits issued by an early action offset program before the credits can be used to satisfy cap-and-trade requirements.

Offset credits can also be generated by offset projects registered with a CARB-approved offset project registry using a compliance offset protocol that has been promulgated by CARB. As with early action offset credits, offset registry credits must be approved by CARB before they can be used to meet cap-and-trade compliance obligations. On April 9, 2014, CARB announced its approval of the first forestry offset project under CARB's forestry offset protocol. The project is operated by the Yurok Tribe and is located in Humboldt County, California.

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LEGAL CHALLENGES TO CALIFORNIA GHG REGULATORY PROGRAMS

Legal challenges to California's greenhouse gas ("GHG") regulatory programs continue to work their way through California and federal courts. With the most significant challenge facing possible review by the U.S. Supreme Court, two other challenges pending before the California Court of Appeal, and a fourth prompting CARB to redo part of its rulemaking, the long-term viability of California's latest efforts to curb GHG emissions is uncertain.

GHG Emissions Allowances and Offset Credits. Under California's cap-and-trade program, covered operators of stationary sources of GHG emissions must surrender compliance instruments—emissions allowances or offset credits—for each ton of GHGs they emit. In *Our Children's Earth Foundation v. CARB*, No. CGC-12-519554 (S.F. Sup. Ct., March 8, 2013), two environmental groups are seeking a writ of mandate that would stop CARB, at least temporarily, from distributing any offset credits. The petitioners argue that CARB's methods of distributing credits violate the implementing statute by failing to ensure that only new or "additional" emissions reductions qualify for credits. The Superior Court rejected this challenge, holding that CARB acted within its statutory authority to implement the offset credit program. The petitioner's appeal is pending.

In *California Chamber of Commerce v. CARB,* No. 34-2012-80001313 (Sac. Sup. Ct., Nov. 12, 2013) (consolidated with *Morning Star Packing Company v. CARB*), the petitioners challenge CARB's authority to sell GHG emissions allowances at auctions. They also argue that the auctions create a tax that was not authorized by a two-thirds vote in the legislature, as required by the California Constitution. The Superior Court rejected both challenges, holding that CARB acted within its delegated authority to design a system for distributing allowances, and that auction payments are valid regulatory fees that are not subject to the supermajority requirement. In early March 2014, the petitioners filed their appeals with the California Court of Appeal.

Low Carbon Fuel Standard. The Low Carbon Fuel Standard ("LCFS") assigns "carbon intensity scores" to all transportation fuels used in California. A fuel's score is based on the GHG emissions it generates over its entire "lifecycle" on its "pathway" from production to consumption. CARB uses carbon intensity scores to impose compliance costs on fuel

producers, which must surrender credits to offset any emissions its fuel generates in excess of the annual emissions cap, as measured by the carbon intensity score.

In *Rocky Mountain Farmers Union v. Goldstene*, 730 F.3d 1070 (9th Cir. 2013), the Ninth Circuit held that the LCFS does not facially discriminate against interstate commerce or regulate extraterritorially in violation of the Commerce Clause. The court reasoned that, although the LCFS expressly distinguishes between fuels on the basis of geographical origin, those distinctions are based on real differences in the carbon intensities resulting from transportation and other factors. The LCFS is not an unconstitutional extraterritorial regulation, the court held, because the regulation creates incentives that influence out-of-state activity, not mandates that control out-of-state activity. In March 2014, after the Ninth Circuit denied a petition for rehearing en banc, the challengers filed a petition for certiorari to the U.S. Supreme Court.

In *Poet LLC v. CARB*, 217 Cal. App. 4th 1214 (App. 5th Dist. 2013), the California Court of Appeal held that CARB committed procedural violations of the California Environmental Quality Act and the California Administrative Procedures Act when it enacted the LCFS. However, the Court of Appeal also allowed CARB to continue enforcing the LCFS while it works to cure the defects. On March 11, 2014, CARB held a public workshop to discuss potential amendments to the LCFS. It will propose a revised regulation in the fall of 2014. (For more on EPA's proposed standard, read our *Jones Day Alert*, "Update on Litigation Challenging California's Greenhouse Gas Regulatory Programs").

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ANTICIPATED FEDERAL REGULATION OF METHANE EMISSIONS FROM OIL AND GAS PRODUCTION

Methane emissions from the oil and gas sector will be directly regulated by 2016 under a plan announced by the Obama administration in March 2014. With methane's climate change impact estimated to be more than 20 times greater than carbon dioxide over a 100-year period, the methane strategy is the latest step in the Obama Administration's Climate Action Plan to cut greenhouse gas emissions in the range of 17 percent below 2005 levels by 2020. More recently, on April 15, 2014, EPA released five whitepapers regarding potentially significant sources of emissions: compressors; emissions from completions and ongoing production of hydraulically fractured wells; leaks from gas production, processing, transmission and storage; and pneumatic devices. These papers now undergoing peer review will likely serve as the foundation for EPA regulation as the papers identify contributions from the sources and available controls.

Despite EPA estimates, the rate and volume of methane emissions from the oil and gas sector are hotly disputed. In September 2013, the University of Texas—in partnership with the Environmental Defense Fund and participating energy companies—found that total methane emissions from natural gas production from all sources were comparable to EPA estimates, but the methane emissions from well completion flowback are 97 percent lower than EPA estimates from April 2013. At the same time, methane emissions from pneumatic equipment and storage leaks were significantly higher than EPA estimates. In contrast, researchers from Stanford and Harvard published a February 2014 article in *Science* finding that methane is leaking from oil and natural gas drilling sites and pipelines at rates 50 percent higher than EPA estimates.

The Climate Action Plan recognizes that states are the primary regulators of oil and gas production activities and the distribution of natural gas. Colorado is the first state to directly target methane emissions. As such, Colorado's new regulations that directly target methane emissions from oil and gas operations may become a model for federal regulation, especially given that they were developed by industry and environmentalists.

Colorado intends for its rules to complement the new source performance standards, but they also apply along the entire production chain. This includes monitoring and reporting for the well site, storage tanks, gathering lines, compression stations, and processing plants, as well as descriptions of the required pollution equipment and control practices. The rules are expected to reduce methane emissions in the state by approximately 65,000 tons per year.

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CLIMATE CHANGE ISSUES FOR MANAGEMENT

Christine Morgan, Editor

ACTIVIST INVESTOR GROUP CERES ISSUES CLIMATE CHANGE REPORTING ASSESSMENT ALONG WITH NEW PROPOSED STANDARDS FOR SUSTAINABILITY DISCLOSURE, RECOMMENDING ENHANCED REPORTING OBLIGATIONS

Activist investor group Ceres has issued two new documents focused on climate change and sustainability reporting, just as companies are in the midst of the busy financial reporting season. Using the spring reporting season as a backdrop that brings with it heightened scrutiny on corporate disclosure requirements and policies, one report assesses developments in climate change reporting and in Securities and Exchange Commission ("SEC") guidance from 2010 through 2013, while the other presents recommendations for stock exchange requirements related to sustainability reporting. A brief review of each report is presented below.

***Cool Response: The SEC & Corporate Climate Change Reporting—SEC Climate Guidance & S&P 500 Reporting—2010 to 2013*, by Ceres (Coburn and Cook), February 2014.** Ceres' February 2014 Cool Response report evaluates the scope of climate risk disclosure of S&P 500 companies from 2009 through 2013, reviews the extent of SEC enforcement and other activity related to corporate climate change risk disclosure, and concludes with recommendations—directed to both the SEC and to publicly traded companies—for improvements to risk disclosure for investors.

The assessment starts with the fundamental premise that climate change creates material risks for many companies and that without climate change risk assessment in SEC filings, investor decisions do not adequately account for these risks. According to the report, early pressure from Ceres and other groups regarding this data gap resulted in the SEC's issuance of its 2010 Guidance Regarding Disclosure Related to Climate Change, following which the SEC has issued a number of comment letters and, through its staff, has focused increased attention on climate disclosure issues.

From this starting point, *Cool Response* presents an assessment of 10-K filings by S&P 500 corporations from 2009 through 2013. Ceres' key findings include the following:

- While the adoption by the SEC of the Guidance triggered an increase in disclosure of climate change risk in 2010, climate change disclosure leveled off thereafter, resulting in little improvement since 2010.
- Many corporations do not discuss climate change risk in their annual SEC filings.
- There is wide variability, in both length and quality, in the climate change disclosures made in annual filings.

Cool Response at 11. The report then turns to the SEC's own review of annual filings during this time, analyzing the extent to which SEC staff members issued comment letters that addressed climate change risks. Ceres concludes generally that the SEC issued a minimal number of letters, that high-risk sectors were not adequately targeted, that the comment letters were limited in scope, and that the letters resulted in little change in actual disclosures. *Cool Response* at 26–27.

Based on the assessment summarized above (and presented in significant detail in the report), Ceres presents a series of recommendations to both the SEC and companies for improvements to climate change disclosure in annual filings. The report's recommendations include a suggestion that the SEC place more scrutiny on climate change disclosures in annual filings and exercise its comment letter authority more aggressively. The report also recommends that the SEC should target those industry segments most at risk from climate change, including fossil fuel components of the energy sector and the transportation sector. In addition, Ceres recommends that the SEC create a task force to focus on review of climate change risks as well as better inter-agency coordination, such as formal information-sharing with the United States Environmental Protection Agency. *Cool Response*, 28–31. In terms of recommendations to companies, the report recommends the development of corporate governance structures and systems that address climate issues, including both risks and opportunities, as well as enhanced recordkeeping of emissions and emissions trends. The report also encourages companies to better identify and understand risks associated with climate change and disclosure of this information in its SEC filings. *Cool Response*, at 31–35.

Ceres has established itself in the climate change disclosure arena, and companies should follow the SEC's reaction to this report closely. Given the heightened focus that may result from the recommendations coming out of Ceres' review, companies should continue to diligently review and disclose climate change risks in accordance with the SEC's requirements. Companies may also find value in reviewing the report's assessment as it relates to additional "best practices" to improve the adequacy of SEC disclosures, which could help protect companies in the event of greater SEC scrutiny.

***Investor Listing Standards Proposal: Recommendations for Stock Exchange Requirements on Corporate Sustainability Reporting*, by Ceres and the Investor Network on Climate Risk (a project of Ceres), March 2014.** Ceres also recently issued a report presenting proposed minimum global standards for corporate sustainability reporting, which standards would provide investors with improved sustainability information on a variety of levels. The proposed standards, prepared by investor members of Ceres, consist of a three-part recommendation for a listing rule on sustainability disclosure. Section II of the report presents a detailed description of the three parts, briefly outlined as follows:

> Item 1. ESG Materiality Assessment: The standards would require a sustainability, or ESG ("Environmental, Social and Governance"), materiality assessment to be disclosed in annual financial filings, in which management will discuss its approach to identifying the company's material ESG issues.
>
> Item 2. ESG Issue Disclosure: This Item would require specific ESG disclosure, "on a 'comply or explain' basis," for a number of key ESG categories.
>
> Item 3. ESG Disclosure Index: The new standards would create an avenue for cross-referencing annual financial filings and ESG information through an ESG Disclosure Index.

Proposal at 5.

For each Item, the report describes the basis for the recommendation, includes a detailed explanation of the recommendation, and provides recommendations for implementation.

The report also summarizes investor feedback on the proposal as well as further recommendations for issuers, exchanges, and regulators as these groups evaluate the proposal and implementation challenges.

As with the findings and recommendations discussed with respect to the *Cool Response* report, if the proposal presented by Ceres gains traction with the SEC or other exchanges, companies will want to understand the proposal and, more importantly, take steps to ensure they have a voice in the drafting of any future standards.

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RECENT FERC ENFORCEMENT ACTIONS AND NEW PROPOSED MARKET RULES ARE CHANGING THE LANDSCAPE FOR DEMAND RESPONSE RESOURCES

Since the Federal Energy Regulatory Commission ("FERC") ruled in 2011 that ISOs and RTOs generally must pay demand response resources the full wholesale price as generation resources, the organized markets are experiencing a dramatic increase in demand response services. Recent enforcement action by the FERC and proposed rule changes in the organized electricity markets show that the FERC and the markets are paying attention. New proposed disclosure requirements, proposed information requirements on the nature of particular demand response services, and the FERC's civil penalty authority to assess $1 million per day, per violation, mean that investors and demand response resources must pay attention too.

The FERC defines "demand response" as "a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to lower consumption of electric energy." Grid operators—Independent System Operators ("ISOs"), Regional Transmission Organizations ("RTOs"), or utilities—and other entities use demand response programs to curtail or shift loads instead of building more generation. In recent enforcement actions, the FERC investigated and penalized demand response service providers for not ensuring that load actually could be curtailed or shifted.

For example, the FERC investigated Enerwise Global Technologies, Inc. ("Enerwise") for registering a customer for a load reduction amount that Enerwise knew could not be achieved reliably, then instructing the customer to artificially increase load prior to a baseline test. In a settlement with the FERC in June 2013, Enerwise agreed to pay $780,000 in civil penalties, disgorge $20,726 plus interest, invest $500,000 in technology improvements, and submit to compliance monitoring. In another enforcement action, the FERC investigated a

demand response resource for submitting inaccurate metering information that the FERC found revealed a lack of due diligence and violated PJM Interconnection, Inc.'s tariff. In a settlement with the FERC in December 2012, that company agreed to pay $820,000 in civil penalties, disgorge $656,806 plus interest, develop a compliance plan, and submit to compliance monitoring.

In addition to enforcement actions, the FERC and the organized markets are creating more stringent standards for measuring and verifying demand response resources. For example, PJM now requires demand response providers to submit specific and comprehensive information about their services at least 15 business days before every auction. These "demand response sell offer plans" include:

- Identities of existing demand response resources;
- Details of, and key assumptions underlying, planned demand resource quantities;
- An officer certification that the information is true and correct and that the provider reasonably expects to physically deliver the amount offered; and
- Customer site-specific information in high-risk areas—when (i) the transmission zone has aggregate cleared offers from the last auction that exceed actual or expected demand response and (ii) the demand response provider is offering demand reductions that exceed that provider's highest previous levels.

The FERC held a technical conference on PJM's proposal to consider, among other issues, evidence that demand response in zones with high demand response penetration are less likely to perform than in other zones. Opponents argued at the conference that PJM's assertions regarding high-risk areas were unsupported by evidence and that the requirements were unduly burdensome. In February 2014, the FERC approved the proposal, finding that "as penetration levels increase, a closer examination of additional demand response offers may be warranted" and that the revisions will "help ensure that demand response continues to be a valuable resource." These changes will increase costs for participants in PJM's demand response programs and elsewhere as these heightened standards are adopted by other ISOs and RTOs.

The FERC also recently amended its regulations to incorporate by reference updated business practice standards adopted by the Wholesale Electric Quadrant of the North American Energy Standards Board ("NAESB") to support the measurement and verification of demand response and energy efficiency products and services for ISOs and RTOs. The standards provide common definitions and processes for demand response products, while leaving each ISO and RTO flexibility to select from among methods identified. Industrial customers argue that the standards would hurt their efforts to participate in the market for demand response. But the FERC indicates that these concerns are outweighed by the new standards' benefits, which include transaction cost reductions, increased market participation, harmonized regional performance evaluations, and improvements in measuring demand response resources' performance.

The Government Accountability Office ("GAO") recently issued a report praising the federal government's efforts to facilitate demand response activities, including the FERC's approval of ISO and RTO demand response programs, and adopting the NAESB standards to assist in quantifying demand response resources. At the same time, the GAO criticized the FERC's data collection and reporting efforts involved in its annual reports on demand response, finding that the FERC should reevaluate the scope of reporting and should document any adjustments it makes to data to improve consistency to comply with best practices.

As standards for measuring and verifying demand response heighten, activities that qualify for demand response programs may be expanding, as in the case of behind-the-meter generation. The FERC recently granted a complaint against New York Independent Service Operator, Inc. ("NYISO"), finding it discriminated by excluding behind-the-meter generation from one of its demand response programs. The FERC found "from the perspective of the transmission grid, demand response produces a load reduction in the wholesale market from a validly established baseline, whether the demand response involves only curtailment of load or is facilitated by the use of behind-the-meter generation." A separate dissenting statement was issued, emphasizing that NYISO has little control over such generation, that it is not subject to the metering and

reporting requirements of the program, that there are opportunities to game the system, and that there were environmental concerns with older diesel-fired back-up generation. The FERC granted a request for rehearing in January 2014.

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CLIMATE CHANGE LITIGATION

Shimshon Balanson, Editor

NINTH CIRCUIT ERECTS IMPEDIMENT TO GREENHOUSE GAS CITIZEN SUITS

By denying rehearing en banc in *Washington Environmental Council v. Bellon* (Nos. 12-35323, 12-34324, 12-35358), the Ninth Circuit has left in place a decision that may severely curb the ability of individuals and environmental groups to bring Clean Air Act citizen suits targeting greenhouse gas emissions.

In March 2011, plaintiffs Washington Environmental Council and the Sierra Club, Washington State Chapter, brought a suit against the Washington State Department of Ecology and two regional air agencies in the U.S. District Court for the Western District of Washington. Plaintiffs alleged that under Washington's Clean Air Act State Implementation Plan ("SIP"), the agencies were obligated to regulate greenhouse gas emissions from the state's top five refineries. The Western States Petroleum Association ("WSPA"), where the five refineries were members, intervened on behalf of the agencies. The District Court awarded plaintiffs summary judgment and enjoined defendants to promulgate emission limits called "reasonably available control technology" ("RACT") by May 2014.

On appeal, WSPA argued for the first time that plaintiffs lacked Article III standing. Under Supreme Court precedent, a plaintiff must satisfy three elements to have standing to pursue a claim in federal court: (i) an injury in fact that is concrete, particularized, and actual or imminent; (ii) the injury is fairly traceable to the challenged conduct; and (iii) the injury is likely to be redressed by a favorable court decision. With respect to the first prong, the Ninth Circuit panel assumed without deciding that plaintiffs had adduced "specific facts" of immediate and concrete injuries.

Moving to the second prong, the court noted that plaintiffs were required to show that their injury was "causally linked or 'fairly traceable' to the Agencies' alleged misconduct, and not the result of misconduct of some third party not before the

court." The court concluded that plaintiffs had failed to satisfy their evidentiary burden of establishing causality. According to the panel, plaintiffs offered "only vague conclusory statements" that the agencies' failure to set and apply standards for RACT at the oil refineries contributed to greenhouse gas emissions, which subsequently contributed to climate change that resulted in their injuries. The court considered this "attenuated chain of conjecture" insufficient to support standing, especially where there are numerous independent sources of greenhouse gas emissions, inside and outside the United States, that were responsible for the changes contributing to plaintiffs' injuries.

The panel also rejected plaintiffs' argument that the U.S. Supreme Court's holding in *Massachusetts v. EPA*, 549 U.S. 497 (2007), entitled them to relaxed standing requirements. The Ninth Circuit panel explained that relaxed standing was warranted in *Massachusetts* based on two factors, neither of which was present in *Bellon*. First, the state of Massachusetts was exercising its procedural right to challenge EPA's rejection of its rulemaking petition, and, second, Massachusetts was conferred special solicitude as a sovereign state. Plaintiffs, by contrast, were all private organizations seeking substantive relief in the form of an injunction requiring the agencies to promulgate regulations. In the panel's view, even if plaintiffs were entitled to a relaxed standing standard, plaintiffs would still be unable to establish standing because they could not show that greenhouse gas emissions from the five oil refineries in Washington did not provide a "meaningful contribution" to global greenhouse gas concentrations.

Turning to redressability, the panel stated that plaintiffs failed to satisfy that prong for many of the same reasons as it was unable to establish causation. The court also noted that the record was devoid of evidence that the relief sought by plaintiffs, the promulgation of RACT standards, would appreciably reduce greenhouse gas emissions from the refineries. Even if RACT standards eliminated all greenhouse gas emissions, the court explained, plaintiffs still could not show that the effect of the collective emissions of the oil refineries was anything but "scientifically indiscernible." Having concluded that plaintiffs had not met their burden in satisfying the requirements for standing, the panel vacated the district court's order and remanded with instructions that the action be dismissed for lack of standing.

Shortly after the Ninth Circuit panel issued its decision, a judge on the Ninth Circuit *sua sponte* called for a vote on rehearing en banc. A majority of the nonrecused active judges on the Ninth Circuit failed to vote in favor of rehearing. On February 3, 2014, the Ninth Circuit issued an order denying rehearing en banc. Judge Ronald Gould authored a strong dissent to the denial. Judge Gould opined that the *Bellon* panel had improperly interpreted and applied the Supreme Court's holding in *Massachusetts*. Judge Gould would find causation and redressability satisfied in environmental challenges relating to global climate change, independent of plaintiff's sovereign status, whenever "some incremental damage is sought to be avoided." Judge Gould argued that by requiring plaintiff to show that the oil refineries' emissions provided a "meaningful contribution" to global greenhouse gas concentrations, the panel imposed "on environmental organizations a mandate to show some unidentified threshold of emissions before" bringing their suit. This has the effect, according to Judge Gould, of denying standing to any non-state plaintiff seeking to enforce the Clean Air Act's provisions relating to climate change and, according to Judge Gould, interferes with the principle that "individual states can experiment on a tough problem."

Judge Milan Smith, the author of the original panel opinion, concurred in the denial of rehearing en banc. Judge Smith took umbrage with Judge Gould's characterization of *Massachusetts* and accused the dissent of ignoring the Supreme Court's distinctions between sovereign states and private litigants, and procedural and substantive injuries.

The Ninth Circuit's decision in *Bellon* represents a further constraint on the ability of environmental groups and individuals to bring suit based on alleged injuries relating to climate change. As previously discussed in the Summer 2011 issue of The Climate Report, in *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011), the Supreme Court held that the Clean Air Act displaced federal common law claims relating to injuries purportedly caused by climate change. A year later, as

discussed in the Fall 2012 issue of *The Climate Report*, the Ninth Circuit, in *Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), held that all claims, including claims for damages, were displaced by the Clean Air Act. Ninth Circuit and Supreme Court precedent now severely reduces the common law *and* statutory options available to environmental groups seeking to compel emitters to limit greenhouse gas emissions.

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OKLAHOMA SUES U.S. FISH & WILDLIFE SERVICE CITING "TIMETABLE" ESA DECISION-MAKING

States, farmers, ranchers, and energy companies have sued the U.S. Department of the Interior and its agency, the U.S. Fish and Wildlife Service ("FWS"), for entering into and carrying out the terms of settlement agreements reached with environmental groups last year over listing decisions under the Endangered Species Act ("ESA").

The lawsuit, filed in the Northern District of Oklahoma, claims that the FWS has colluded with special interest groups to change its rulemaking process without going through the legally required channels. The plaintiffs' claims allege violations of the Administrative Procedures Act ("APA"), the Endangered Species Act, the FWS's own regulations, as well as the Due Process clause of the Fifth Amendment to the U.S. Constitution. Plaintiffs also say that the FWS has violated Article II of the U.S. Constitution by ceding its congressionally delegated authority to special interest groups.

The court-approved settlement agreements between the FWS and two environmental groups, WildEarth Guardians and the Center for Biological Diversity, respectively, bind the FWS to either drop species from a list of over 250 candidates or propose a rule to list them as threatened or endangered by September 30, 2015. The FWS's candidate-species list includes several that have been under consideration for many years, most with ranges in the plaintiffs' states. The FWS's determination to list a species as threatened or endangered can have major impacts on development and impose significant costs. Plaintiffs say that the settlement agreements inappropriately fast-track listing decisions by removing the option of keeping the species on the candidate list until the FWS is ready to make a decision.

Plaintiffs' main concern is that the FWS has eliminated one of its statutory options when it considers whether to list a species as threatened or endangered. The ESA lays out three options for the FWS when a petitioner brings forward a candidate species: (i) not warranted; (ii) warranted; and (iii) warranted but precluded. It is the third option, which results in leaving the species on the candidate list, that the settlement agreements remove.

Plaintiffs say the loss of "warranted but precluded" status is problematic because: (i) omitting a statutory alternative without the use of science-driven priorities is contrary to the ESA; (ii) relying on a procedural timetable rather than substantive statutory criteria violates the FWS's statutory obligations; (iii) the FWS is violating its own guidelines that establish a priority system for removing species from the candidate species classification; and (iv) the FWS cannot adopt binding policies that conflict with their own regulations outside the APA-mandated process.

Plaintiffs also raise constitutional concerns. They say that adopting a binding rule, like the settlement deadlines, without public participation, deprives the public of their right to due process under the Fifth Amendment. They are also troubled that the FWS appears to have abdicated its responsibility for how it will make ESA-listing determinations.

Finally, plaintiffs say that the FWS should have allowed more time for the recently approved conservation plans to recover the at-risk species. Over the last year, plaintiffs had agreed to participate in several Candidate Conservation Agreements for candidate species that were subject to the settlement agreements. States and private industry have spent millions of dollars to implement these plans. Plaintiffs say that but for the settlement agreements' deadlines, the FWS would have allowed these conservation plans to operate, retaining the "warranted but precluded" status for the species, in order to gauge the prospects of recovery.

The FWS has not issued any public statements regarding the lawsuit.

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MITIGATION OF CLIMATE CHANGE IN BRIEF

On April 12, 2014, the Intergovernmental Panel on Climate Change ("IPCC") published the third of three Working Group reports entitled *Climate Change 2014: Mitigation of Climate Change*. This report constitutes, along with a Synthesis Report due October 2014, the IPCC's Fifth Assessment Report on climate change ("AR5"). The aim of AR5 is primarily to guide the United Nations to prepare a new treaty to limit emissions in 2015.

AR5 shows that global emissions of greenhouse gases have risen to unprecedented levels despite a growing number of policies to reduce climate change. Nevertheless, many pathways to substantial emissions reductions are yet available.

AR5 includes data up to 2010 and incorporates scientific literature about risks related to climate change, adaptation, and mitigation strategies (i.e., a human intervention to reduce the sources or enhance sinks of greenhouse gases). In essence, the report says emissions need to be cut off within a wide range of human activity, including energy production and use, industry, transport, buildings, agriculture, forestry and other land use, and urbanization.

About half of cumulative anthropogenic carbon dioxide emissions between 1750 and 2010 have occurred in the last 40 years. The report reveals that globally, economic and population growth continue to be the most important drivers of increases in carbon dioxide emissions from fossil fuel combustion. So, without additional efforts to reduce greenhouse gases emissions, baseline scenarios would result in global mean surface temperature increases between 3.7 and 4.8°C in 2100, when compared to pre industrial levels.

IPCC experts are clear: The more we delay mitigation efforts through 2030, the more difficult it will be. Indeed, with drastic technological measures and changes in behavior, it would still be possible to limit the increase in global mean temperature to 2°C above pre-industrial levels. Nonetheless, to get there,

greenhouse gas emissions will have to be cut by 40 percent to 70 percent, compared with 2010 levels, by midcentury, and to near zero by the end of this century.

In addition to cutting greenhouse gases, AR5 provides that climate change can also be reduced with some significant measures in energy supply and highlights some recommendations, such as decarbonizing (i.e., reducing the carbon intensity of) electric generation, carbon dioxide capture and storage technologies, and, of course, deployment at significant scale of renewable energies.

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