SUMMER 2014 ISSUE

THE CLIMATE REPORT

U.S. REGULATORY DEVELOPMENTS

Jane K. Murphy, Editor

EPA'S AUTHORITY TO REGULATE GHG EMISSIONS FROM POWER PLANTS AFTER *UARG*

The United States Supreme Court's recent decision in *UARG v. EPA* offers insight as to how future courts will evaluate the authority of the Environmental Protection Agency ("EPA") under the Clean Air Act ("CAA") to regulate greenhouse gas ("GHG") emissions from power plants and other stationary sources. In *UARG*, EPA had interpreted the CAA, through the Tailoring Rule, as requiring Prevention of Significant Deterioration ("PSD") and Title V permitting on the sole basis of a source's potential to emit GHGs. The Supreme Court rejected this interpretation, holding that Congress must "speak clearly if it wishes to assign to an agency decisions of 'vast economic and political significance.'" Thus, the takeaway from *UARG* is that EPA rulemaking—especially rulemaking that would bring about an "enormous and transformative expansion in EPA's regulatory authority"—must be grounded in and judged against the statutory text of the CAA.

EPA's recent proposal to establish GHG emission guidelines for existing power plants under CAA § 111(d) is likely to test the standard set by the Supreme Court in *UARG*. Like the Tailoring Rule, the proposed guidelines will have significant economic and political impacts. Forty-nine states will need to achieve GHG emission reductions ranging

DEPARTMENTS

U.S. Regulatory Developments	1
Climate Change Issues for Management	4
Climate Change Litigation	6
Climate Change Regulation Beyond the U.S.	8

from 11 to 72 percent by 2030 (see map below). Even by EPA's own estimates, the costs of compliance with the guidelines are expected to reach $7 billion to $8 billion annually by 2030.

In addition, the guidelines represent an unprecedented expansion of EPA authority in several ways. While § 111(d) requires EPA to "establish a procedure" for states to submit plans with standards of performance for existing sources, it fails to specify how detailed the EPA procedure should be or suggest whether EPA can require states to achieve a particular standard of performance. In the proposed guidelines, EPA purports to require compliance with specific statewide GHG emission standards in pounds per megawatt-hour. EPA also utilizes § 111(d) more expansively than ever before by proposing measures that extend outside of individual sources in the regulated source category, such as setting statewide emission reduction targets, regulating state efforts to increase renewable energy capacity, and prescribing an increase in state demand-side energy efficiency efforts. This "beyond the fence" approach is not apparent from the statutory text of § 111(d) and, in practice, would extend the reach of the guidelines to many sources outside of the regulated category.

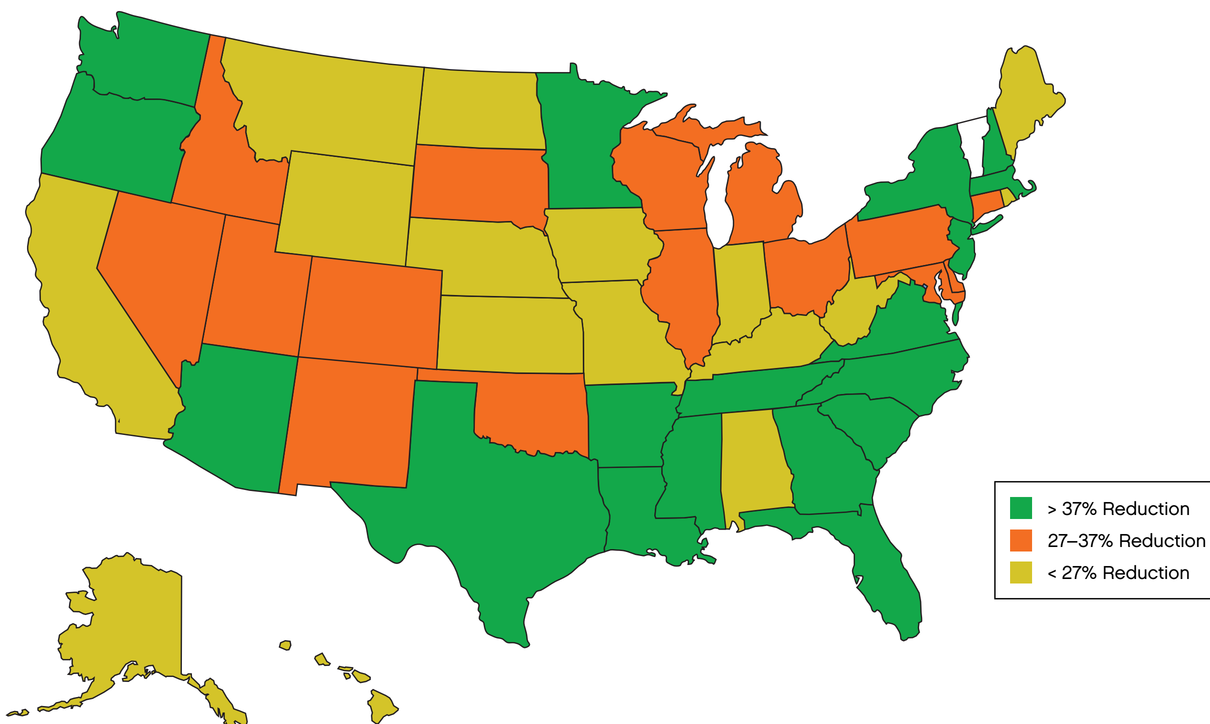
Though *UARG* does not touch on EPA's § 111(d) rulemaking authority, the decision emphasizes the need for EPA to base its rulemakings in explicit statutory authority. The question that EPA must address, and future courts will have to resolve, is whether § 111(d) provides "clear congressional authorization" to support the proposed guidelines for existing power plants. In *UARG*, the Supreme Court noted that it is skeptical "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy." Given the unusual scope and significance of the proposed guidelines, EPA will need to identify specific provisions of § 111(d) that justify its proposed approach.

Charles T. Wehland
+1.312.269.4388
ctwehland@jonesday.com

Casey Fernung Bradford
+1.404.581.8119
cbradford@jonesday.com

Simon P. Hansen
+1.404. 581.8988
shansen@jonesday.com

EPA CLEAN POWER PLAN – PROPOSED STATE REDUCTIONS BY 2030



SUPREME COURT DECLINES TO REVIEW CALIFORNIA'S LOW CARBON FUEL STANDARD

On June 30, 2014, the U.S. Supreme Court denied a petition for certiorari in *Rocky Mountain Farmers v. Corey*, a case challenging the constitutionality of California's Low Carbon Fuel Standard ("LCFS"). The LCFS attempts to reduce greenhouse gas emissions by requiring producers or importers of California's transportation fuels to surrender credits for fuels that fail to meet a target "carbon intensity," or the greenhouse gas emissions generated over the lifecycle of a fuel, from production through consumption. Credits may be purchased, or earned through provision of low-carbon intensity fuels. Because the LCFS regulations assume a higher "carbon intensity" for certain fuel components, such as ethanol, produced outside California, petitioners challenged the regulations under the Dormant Commerce Clause.

In a divided opinion, last year a three-judge panel of the Ninth Circuit held that the LCFS does not facially discriminate against interstate commerce and is not an unconstitutional extraterritorial regulation. Even though the LCFS categorizes fuels based on place of origin, the Ninth Circuit panel held that those regional characterizations are based on real differences in carbon intensities resulting from different methods of production and the transport of fuels into California. When the Ninth Circuit denied the petitioners' request for rehearing en banc, Judge Milan Smith, joined by five other Ninth Circuit judges in dissent, described the panel decision as "squarely at odds with Supreme Court precedent." This did not persuade the Supreme Court to grant the petition for certiorari, however.

The case will now head back to the District Court, which must decide if the LCFS discriminates in purpose and effect, or imposes an excessive burden on interstate commerce. The Supreme Court's decision may have consequences beyond California. Oregon and Washington have already taken steps toward implementing their own LCFS regulations. Eleven northeastern states previously explored adopting a regional Clean Fuels Standard. Although the program has been largely dormant for several years, that could change if those states interpret the Supreme Court's decision as an implied legal authorization for California's approach.

Thomas M. Donnelly
+1. 415.875.5880
tmdonnelly@jonesday.com

Daniel L. Corbett
+1.415.875.5885
dcorbett@jonesday.com

CALIFORNIA REGULATORY DEVELOPMENTS

The California Air Resources Board ("CARB") approved the First Update to the Climate Change Scoping Plan at its public hearing on May 22, 2014. The next update will be due by May 2019. CARB amendments to its cap-and-trade regulations were approved by the California Office of Administrative Law and became effective on July 1, 2014. The update and amendments are discussed in the Spring 2014 *Climate Report*.

In accordance with the cap-and-trade regulations, CARB held its seventh auction of greenhouse gas allowances on May 16, 2014. CARB reported that all of the 2014 allowances available for sale at the auction (16,947,080 allowances) were sold at a settlement price of $11.50 (as compared to a reserve price of $11.34 per allowance). Approximately half of the 2017 allowances available for sale at the auction were sold at a settlement price of $11.34 per allowance. The eighth auction will be held on August 18, 2014.

California and Quebec have linked cap-and-trade programs, and the first joint auction of allowances is planned for November 2014. Notice of the date of a practice auction, which is expected to take place in early August 2014, will be posted on the CARB and Quebec websites on July 29, 2014.

Thomas M. Donnelly
+1.415.875.5880
tmdonnelly@jonesday.com

Charles M Hungerford
+1.415.85.5843
chungerford@jonesday.com

CLIMATE CHANGE ISSUES FOR MANAGEMENT

Christine Morgan, Editor

RISKY BUSINESS REPORT OUTLINES REGIONAL CLIMATE CHANGE RISKS

As reported in Jones Day's Fall 2013 *Climate Report*, Risky Business, an initiative cochaired by hedge fund billionaire Tom Steyer, former U.S. Secretary of the Treasury Hank Paulson, and former New York City Mayor Michael Bloomberg, was launched to assess the economic risk to the United States associated with climate change.

In addition to the three well-known cochairs, the Risky Business initiative includes influential business leaders, investors, and elected officials. These include former U.S. Secretary of Housing and Urban Development and former Mayor of San Antonio Henry Cisneros, Executive Chairman of Cargill, Inc. Gregory Page, former U.S. Secretary of the Treasury Robert E. Rubin, former Director of the Office of Management and Budget George P. Shultz, President of the University of Miami and former U.S. Secretary of Health and Human Services Donna E. Shalala, former U.S. Senator Olympia Snowe, and Dean Emeritus of the Bloomberg School of Public Health Dr. Alfred Sommer.

Released in June 2014, *The Economic Risks of Climate Change in the United States* divides the continental United States into six regions and assesses the climate change risk factors for each, along with those for Alaska and Hawaii.

The Risky Business team hopes to avoid the current political squabbles associated with potential climate-change-driven actions by framing the debate in terms of risk, insurance, and opportunity. The report considers both "likely risks" and also "tail risks," defined in the report as risks less likely to occur but with particularly severe consequences should they come to pass. "This focus on 'tail risks' is not unique to climate change. After all, households and businesses pay a premium for insurance to protect themselves against those tail risks, such as the possibility of flood or fire that they deem unacceptable." *Id*. at 11.

Northeast. In the Northeast region, the report highlights the risks of rising sea levels and accompanying storm surges. The analysis identifies a likely risk of climate-driven rise in sea level of .9 to 1.6 feet near New York City by the middle of this century and increases of 2.1 to 4.2 feet by 2100.

The findings also predict a 2.4 to 4.5 foot rise in the sea level near Atlantic City by the end of this century, with Boston experiencing a two-foot to four-foot rise over the same time period.

The report also suggests that likely average annual property damage caused by climate-change-driven hurricane activity in the region will increase over current levels by $6 billion to $17 billion.

Southeast. In the Southeast region, the report focuses on risks associated with increased heat and humidity, stating it is likely that heat-related mortality will increase by 15 to 21 additional deaths per 100,000 people per year by the end of the century.

The report also cites climate-change-driven heat increases as a factor in decreased labor productivity, particularly in the region's construction, mining, utilities, transportation, agriculture, and manufacturing sectors.

Midwest. For the Midwest, the Risky Business report identifies the impact of climate change on the region's agriculture industry, largely due to significant increases in extreme heat.

While the report gives credit to the proven ability of farmers to innovate and adapt to challenges via creative farming methods and new technology, it predicts that increases in heat and humidity will make it increasingly difficult or impossible to work outside during summer days. "[B]y the middle of the next century, [the average Midwesterner] can expect to experience 20 full days in a typical year of [Humid Heat Stroke Index] over 95° F, during which it will be functionally impossible to be outdoors." *Id*. at 31.

Great Plains. In the Great Plains region, the report highlights the impact of climate change on energy demands. The report concludes that by 2050, energy increases due to air conditioning demands will likely increase by 3.4 to 9.2 percent in Texas alone. "Meeting higher peak demand will likely require

the construction of up to 95 GW of additional power generation capacity over the next 5 to 25 years, the rough equivalent of 200 average-size coal or natural gas power plants." *Id*. at 35.

Northwest. The report states there is a lower risk of severe climate change impact in the Northwest than in the other regions but still notes a 1-in-100 chance of an elevation in sea level near Seattle of up to five feet by 2100, potentially accompanied by a significant increase in the number of extremely hot days.

Southwest. Finally, in the Southwest, the report identifies significant risk due to increased heat and a rise in sea levels. "Eighty-seven percent of all Californians live in coastal counties, and 80 percent of the state's GDP is derived from those counties." *Id*. at 38. In discussing the already hot areas in the Southwest region, such as the Arizona deserts, the report expects "one to two additional months of days of 95° F each year within the lifetime of babies being born right now in this region." *Id*.

Advocating Change. The report concludes by advocating changes by businesses, investors, and the public sector to reduce the identified risks. The report hopes rational business actors will adapt to the risks posed by climate change in the same way they adapt to other risks. Simultaneously, the report presses investors to consider the effects of climate change in their investment strategies, which in turn will put additional pressure on businesses to adapt.

About the same time Risky Business released its report, cochairman Hank Paulson published an op-ed in *The New York Times* advocating for a carbon tax to address climate change in the United States. Similar to the Risky Business report, Mr. Paulson suggests that a combination of government policies and private sector action is the best way to address climate change risk. "A tax on carbon emissions will unleash a wave of innovation to develop technologies, lower the costs of clean energy and create jobs as we and other nations develop new energy products and infrastructure," he wrote.

Mr. Paulson further suggests that a carbon tax is essential in demonstrating to developing countries, particularly China, that the United States is serious about addressing climate change, thereby encouraging the developing countries to do the same. However, it does not necessarily follow that a self-imposed carbon tax in the United States will encourage action in China any more than American standards of human rights and intellectual property have influenced change in China.

Pressure to account for risks associated with climate change is increasing at many levels. While Congress does not appear likely to take any significant steps, several federal agencies, including the Environmental Protection Agency are addressing the issue. As previously reported in *The Climate Report*, investor groups and the SEC are ramping up pressure for corporations to disclose climate risks.

The prominent members of the Risky Business initiative are similarly leveraging their influence over government, the investment community, and businesses to encourage corporate risk managers and decision-makers to factor climate change risk into their decisions.

Jeffrey S. DeVore
+1.412.394.7295
jsdevore@jonesday.com

U.S. SUPREME COURT RESTRICTS EPA'S REGULATION OF GREENHOUSE GASES UNDER THE CLEAN AIR ACT

In its third encounter with greenhouse gas emissions in the context of the Clean Air Act ("CAA"), the United States Supreme Court, in *Utility Air Regulatory Group v. EPA*, No. 12-1146, 573 U.S. _______ (June 23, 2014) ("*UARG*"), reinforced bedrock separation of powers principles—not to mention conventional canons and settled principles of administrative law—by emphatically rejecting the claim of authority of the Environmental Protection Agency ("EPA") to rewrite indisputably unambiguous statutory language that not only disregarded the text and context of the statute but that could have transformative, economic, social, and systemic impacts (if unchecked).

In *UARG*, the Supreme Court determined "[w]hether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the CAA for stationary sources that emit greenhouse gases." In Justice Scalia's June 23, 2014 opinion, the Court first held that the general definition of "air pollutant" analyzed by the Court in *Massachusetts v. EPA* does not prevent EPA from applying narrower definitions in the operative provisions of the Act; thus, there was no "insuperable textual barrier" preventing EPA from interpreting the Prevention of Significant Deterioration ("PSD") and Title V provisions to exclude greenhouse gases.

The Court also held that EPA's interpretation was not reasonable because it expands the programs beyond their statutory purposes and would place excessive demands on permitting authorities. On the other hand, the Court concluded that EPA's decision to require Best Available Control Technology ("BACT") for greenhouse gases ("GHGs") emitted by sources otherwise subject to PSD requirements is a permissible interpretation of the statute because the BACT provisions specifically apply to "each pollutant subject to regulation" under the Act. Justices Breyer and Alito authored separate opinions concurring in part and dissenting in part.

The Supreme Court's decision in *UARG* could have the following implications for future claims or future regulation of GHGs:

1. It seems future claims of deference by EPA in the context of greenhouse gas regulation will, at a minimum, be closely scrutinized. The *UARG* decision could effectively stop any future effort by EPA to arrogate to itself unlimited power and discretion as to what GHG sources to regulate and when—to the point of rewriting the CAA.
2. The impact of the decision on the pending EPA rules under Section 111 of the CAA for greenhouse gas emissions from new and existing power plants will be a source of continuing debate and litigation. Although the Court recognized that its prior decision on the CAA's displacement of federal common law nuisance claims in *American Electric Power Co. v. Connecticut* was based on the authorization in Section 111 to establish standards for greenhouse gas emissions from power plants, the decision reasonably contemplated the possibility that EPA might lawfully "decline to regulate [those sources] altogether at the conclusion of its pending rulemaking." Thus, industry members or a future presidential administration will have an opportunity to argue that nothing in *Massachusetts v. EPA* or *UARG* compels EPA to regulate greenhouse gas emissions, particularly where the regulations are arguably "incompatible" with "the substance of Congress' regulatory scheme."
3. The Court's discussion of BACT in the PSD process for "anyway sources" has obvious relevance to EPA's determination of the best system of emission reduction for electric generating units under Section 111 of the CAA.

For greater detail on this subject, please see the Jones Day *Commentary*, "*Utility Regulatory Group v. EPA:* U.S. Supreme Court Stops EPA's Rewrite of the Clean Air Act."

Daniella Einik
+1.202.879.3775
deinik@jonesday.com

MURRAY ENERGY AND NINE STATES SEEK TO QUASH EPA'S PROPOSED POWER PLANT RULE

On the very same day that EPA published its proposed power plant rule, Murray Energy Corp. ("Murray") filed a petition for extraordinary writ with the D.C. Circuit, seeking to block EPA's proposed standards. *In re: Murray Energy Corp.*, No. 14-1112 (D.C. Cir.). Under the proposed rule, EPA established a 2030 deadline for cutting carbon dioxide emissions by 30 percent for existing coal-fired power plants. In its petition, Murray claims that the proposed rule constitutes unlawful "double regulation" by EPA in excess of its delegated powers by mandating state-by-state emission standards for power plants that are already subject to a national emission standard. A week after Murray filed its petition, nine states, led by the attorney general of West Virginia, filed an amicus brief with the D.C. Circuit in support of Murray.

In February 2012, EPA promulgated a national emission standard for power plants pursuant to EPA's authority under Section 112 of the Clean Air Act. Challenges to that standard were rejected by the D.C. Circuit. *See White Stallion Energy Ctr. LLC*, No. 12-1100 (Apr. 15. 2014). Despite the existence of this national emission standard, on June 18, 2014, EPA published a proposed rule, under Section 111(d) of the Clean Air Act, requiring states to design and issue state-by-state emission standards for greenhouse gas emissions. According to Murray and the nine states, this second set of regulations is expressly prohibited by the Clean Air Act. Section 111(d)(1) of the Clean Air Act limits EPA's authority to mandate state-by-state emission standards for existing power plants to emissions that are not "from a source category which is regulated under section 112" of the Act. In other words, because existing power plants are already subject to a national emission standard promulgated under Section 112, EPA is prohibited from mandating state-by-state emission standards for those same power plants.

To overcome this seemingly clear proscription, in its proposed rule, EPA asserts that Section 111(d) contains an ambiguity that allows the agency to subject the statute to its own reasonable interpretation. The EPA's claim turns on apparent inconsistencies in Section 111(d) between House and Senate versions of 1990 amendments to the Clean Air Act. The House version prohibited double regulation of *source categories* already regulated under Section 112, while the Senate version prohibited EPA double regulation of *emissions* of pollutants regulated under Section 112. Both versions were inadvertently included in the final bill as published in the Statutes at Large.

Murray and the nine states counter that the EPA's claim of an ambiguity is baseless and predicated on a clerical error that cannot alter the plain terms of Section 111(d) in the U.S. Code, which contains only the House version. The two versions of Section 111(d) retained in the Statutes at Large were simply a substantive amendment (the House version) and a clerical amendment (the Senate version). According to Murray and the states, an erroneous clerical entry that conflicts with a substantive provision of that statute cannot create an ambiguity. Without an ambiguity, they argue, EPA's regulatory action is illegal and should be struck down.

Shimshon Balanson
+1.216.586.7151
sbalanson@jonesday.com

IOWA TORT CLAIMS FOR POLLUTION NOT PREEMPTED BY FEDERAL OR STATE CLEAN AIR ACTS

The Iowa Supreme Court has reversed and remanded a class action suit seeking to determine the rights of land owners against a corn processing facility allegedly causing "harmful pollutants and noxious odors to invade their land." *Freeman v. Grain Processing Corp.*, No. 13-0723 (June 13, 2014). Plaintiffs asserted claims of common law and statutory nuisance as well as common law torts of trespass and negligence. The defendant, Grain Processing Corporation ("GPC"), was granted summary judgment by the state district court on several grounds, including preemption under the federal Clean Air Act and Iowa state law. On appeal, the Iowa Supreme Court unanimously disagreed.

The Iowa Supreme Court's opinion dispelled the notion that the United States Supreme Court's decision in *American Electric Power Co. v. Connecticut* ("*AEP*") compelled the trial court's result. In *AEP*, the U.S. Supreme Court held that the Clean Air Act displaced "any federal common law right to seek abatement of carbon dioxide emissions from fossil-fuel fired power plants." Several federal district courts have extended *AEP*'s reasoning to state common law claims combating air pollution, and the Iowa trial court's ruling followed suit. Notwithstanding this precedent, the Iowa Supreme Court reached the opposite

conclusion and emphasized that the differences between displacement of federal common law and preemption of state common law required a different result.

Rather than relying on recent precedent trending toward the complete preemption of common law remedies for pollution, the Iowa Supreme Court turned to the U.S. Supreme Court's 1987 decision in *International Paper Co. v. Ouellette*. In *Ouellette*, the U.S. Supreme Court held that state common law claims could proceed against a polluter as long as the claims were brought under the law where the polluter emitted the offending substance. The Iowa Supreme Court also relied on the Third Circuit's recent decision in *Bell v. Cheswick Generating Station*. *Bell* reaffirmed *Ouellette*'s holding that the affected state's common law is preempted while the source state's common law is not.

The Iowa Supreme Court also rejected GPC's argument that the issues raised by plaintiffs were political questions that should not be resolved through the judicial process. The court held that there was no textual commitment of the issues raised in the case to another branch of government and that the matter was not so complex that it ought to be entrusted to a branch of government with more expertise.

Whether GPC will petition the U.S. Supreme Court to decide the federal preemption issue remains an open question. The Iowa appeal generated several amicus briefs from out-of-state law professors as well as the National Association of Manufacturers, indicating that interest in the case extends well beyond Iowa's borders.

Brigid DeCoursey
+1.202.879.3651
bdecoursey@jonesday.com

CLIMATE CHANGE REGULATION BEYOND THE U.S.

Chris Papanicolaou, Editor

AUSTRALIAN FEDERAL CLIMATE CHANGE ACTION

On July 17, 2014, the Australian federal parliament passed the Clean Energy Legislation (Carbon Tax Repeal) Act 2014, repealing the carbon tax legislation with effect, aside from a few transitional provisions, taking place retrospectively from July 1, 2014.

In order to pass the carbon repeal legislation, a number of concessions had to be agreed to by the government. Importantly, this included retaining the Renewable Energy Target of achieving 20 percent of energy in Australia to come from renewable sources by 2020 and ensuring that the Australian Renewable Energy Agency remained. The Australian Renewable Energy Agency was previously created to fund a variety of projects and programs for research and development of renewable energy in Australia.

In addition to the repeal of the various carbon tax legislations, a number of temporary consumer protection measures were implemented with the objective of ensuring the cost savings associated with the repeal are passed to consumers. Powers were given to the Australian Competition and Consumer Commission to ensure no price exploitation takes place in relation to the carbon tax repeal.

The government released its Emissions Reduction Fund White Paper in April 2014 ("White Paper"), which contained designs of the Emission Reduction Fund (the "Fund") proposed to deal with reductions in emissions. The Fund is the centerpiece of the government's Direct Action Plan. The government is committing AUD 2.55 billion to the Fund.

After public consultation on the White Paper, the government released a Carbon Farming Initiative Amendment Bill 2014 exposure draft on June 18, 2014 to establish the Fund and give effect to the Direct Action Plan.

The Fund's overriding objective is to reduce emissions at lowest cost over the period to 2020 and make a contribution

toward Australia's 2020 emissions reduction target of five percent below 2000 levels by 2020.

The features of the Fund are as follows:

- The Clean Energy Regulator will issue Australian Carbon Credit Units ("Units") for genuine emission reductions estimated and verified in accordance with approved streamlined methods to the registered project proponent. Genuine emission reductions are reductions that would likely not have occurred without the Fund, are verifiable and calculated on a conservative basis, and can be counted toward Australia's emission reduction target. Projects will receive the Units over a crediting period of seven years in general, although sequestration projects will have a 15-year crediting period.
- The Units can be used in the voluntary National Carbon Offset Standard, and the government will cancel credits issued to it under the Kyoto Protocol where Units are used under that Standard. Units cannot be exported out of Australia's registry for the first three years of the Fund.
- Emission reductions will be purchased by the Regulator through auctions. Project proponents who are registered can participate in the auctions. Bids that provide emission reductions at the lowest cost will be selected. There will be a benchmark price set by the Regulator above which emission reductions will not be purchased. There will be guidelines published for the auctions including a minimum project size.
- There will be standard contracts for the purchase of the emission reductions.
- There will be a safeguard mechanism effective July 1, 2015, whose objective is to ensure that the emission reductions achieved under the Fund are not displaced by a significant rise in emissions elsewhere in the economy. The mechanism will apply at the facility level and will be restricted to facilities with direct emissions of 100,000 metric tons or more of CO_2-e a year.
- The Carbon Farming Initiative will become part of the Fund.

The government has committed to reviewing its international targets in 2015, and the Fund will be reviewed toward the end of 2015.

Despite the repeal of the carbon tax legislation going through, it is not known at this time whether the Direct Action Plan legislation will be supported by the new members of the Australian Senate, who have the balance of power. These new members have expressed a general support of carbon reduction initiatives, although they may require further revisions to the legislation before the legislation is passed.

Tony Wassaf
+61.28272.0527
twassaf@jonesday.com

EXCESS EMISSIONS OF GREENHOUSE GASES: NO POSSIBILITY FOR NATIONAL COURTS TO VARY THE 100 EURO PENALTY

Pursuant to Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the European Community, any operator that does not surrender sufficient allowances by April 30 of each year to cover its emissions during the preceding year shall be held liable for the payment of an excess emissions penalty of 100 euros for each ton of carbon dioxide equivalent emitted not surrendered.

At the national level, Swedish companies tried to challenge the excess emission penalties they had been subject to, arguing that they had sufficient emission allowances in their holding accounts to cover their total emissions for the preceding year. They also argued that the failure to surrender their allowances in time was only due to an internal administrative breakdown. In the context of a preliminary ruling, the Swedish court asked the Court of Justice of the European Union ("CJEU") to clarify the concept of "excess emission." The Swedish court also asked the CJEU whether the excess emission penalty may be varied by national courts on the basis of the principle of proportionality.

In its decision in *Billerud Karlsborg AB and Billerud Skärblacka AB v. Naturvardverket* (C-203/12) of October 17, 2013, the CJEU ruled that operators that did not surrender the allowances equal to their emissions for the preceding year by April 30 of the current year may not avoid the imposition of a penalty for the excess emissions, even where they hold a sufficient number of allowances on that date. Therefore, the concept of

punishable “excess emissions” consists in the failure to surrender allowances equal to the emissions for the preceding year by April 30, “irrespective of the reason for the non-surrendering or of the number of allowances actually held by the operators.” This interpretation is justified by the very nature of the European Union emissions trading system (“EU-ETS”), which is based on a strict accounting of the issuance, holding, transfer, and cancellation of allowances.

In addition, the CJEU considered that the excess emission penalty may not be modified by national courts on the basis of the principle of proportionality. Indeed, the creation of a predefined penalty in Directive 2003/87/EC was justified by the protection of the EU-ETS from distortions of competition resulting from market manipulations. According to the CJEU, such a fixed penalty does not carry “drawbacks which are incommensurate with the advantages to be gained by the EU’s fulfillment of its commitments under the Kyoto Protocol.”

Anne-Caroline Urbain
+33.1.56.59.39.93
aurbain@jonesday.com

Caroline Tourtet
+33.1.56.59.38.16
ctourtet@jonesday.com

THE WAR ON POLLUTION: CHINA AMENDS ITS ENVIRONMENTAL PROTECTION LAW

In an attempt to further strengthen China’s commitment to curb its pollution crisis, the Standing Committee of the National People’s Congress passed significant amendments to its Environmental Protection Law on April 24, 2014 (the “Revised Law”). Although China remains the world’s biggest carbon emitter, this is the first time the Environment Protection Law has been amended since its enactment in 1989. The Revised Law is due to take effect on January 1, 2015.

The Revised Law is particularly robust compared to its predecessor and imposes harsher punishments for environmental wrongdoing. Previously, polluting enterprises were subject to one-time penalties only; however, the amounts were not significant enough to provide a serious deterrent. The revision enables the Environmental Protection Bureaus (“EPBs”) to now (i) fine offending companies on a daily basis until compliance with the EPB-issued orders are achieved, (ii) restrict production, and/or (iii) shut down operations, provided approval is granted at the national level. The Revised Law states that companies will be named and shamed for breaking environmental protection laws.

Responsible persons could also face up to 15 days’ detention should their company fail to comply with an issued order to (i) submit an Environmental Impact Assessment, which is now required prior to the commencement of construction, (ii) obtain a license prior to creating pollutants, (iii) halt the use of prohibited pesticides for agriculture, or (iv) comply with suspension orders. Personal liability also arises should any responsible person attempt to circumvent supervision by falsifying monitoring data or improperly using pollution prevention equipment.

Companies will also be obliged to adhere to both government and provincial standards for pollution control, which vary according to industry. The provincial governments will be primarily responsible for monitoring companies operating within their jurisdiction, according to the pollutant quotas allocated by the government.

Finally, the Revised Law allows for the formal introduction of public interest environmental litigation in China. Although the process is currently restricted to registered civil-level organizations, it is anticipated that the impact will be considerable as it legally empowers the public to seek redress for environmental protection violations.

It is likely that the implementation of the Revised Law will take some time, and its success remains to be seen; however, it does send a clear message to current operators in China: the war on pollution has officially begun.

Ostiane Goh-Livorness
+852.3189.7296
ogohlivorness@jonesday.com

THE CLIMATE REPORT EDITORIAL BOARD

EDITORIAL BOARD

Shimshon Balanson
Cleveland Office
Business and Tort Litigation (USA)
+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 C. 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
Projects & Infrastructure
+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

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

José Estandía
Mexico City Office
Energy
+52.55.3000.4081
jestandia@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
PERTH
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.

© 2014 Jones Day. All rights reserved. Printed in the U.S.A.