




U.S. REGULATORY DEVELOPMENTS

Jane K. Murphy, Editor

■ **PUBLIC COMMENT PERIOD HIGHLIGHTS CONCERNS ABOUT EPA'S CLEAN POWER PLAN**

EPA is roughly four months into the public comment period for its proposed [Clean Power Plan](#) (“Plan”) to reduce greenhouse gas emissions from existing power plants. Although the public comment period on the Plan will remain open until the first of December 2014, states and regulated entities have already raised numerous concerns about the legality, feasibility, and electric reliability impacts of the Plan during [EPA public hearings](#) and in litigation challenging the Plan.

As currently proposed, the Plan would establish statewide limits on carbon intensity in pounds of carbon dioxide emissions per megawatt-hour (“lb/MWh”). The statewide limits are based on EPA’s determination of the potential for increasing renewable energy deployment, projected demand-side management savings, and utilization of natural gas-fired power plants. As authority for the Plan, EPA relies on Clean Air Act § 111(d), which calls for EPA to develop a procedure by which states establish standards of performance for existing sources of certain air pollutants.

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Our [prior article](#) outlined some legal concerns with EPA's reliance on CAA § 111(d), especially in light of the United States Supreme Court's recent analysis of CAA authority in *UARG v. EPA*. In addition to challenging EPA's basic legal authority for the Plan, electric utilities, state environmental agencies, and state electric regulatory agencies and system operators are raising concerns with the details of the Plan.

A handful of those concerns are summarized below.

Inappropriate Baseline. EPA's selected baseline year (2012) is not an appropriate frame of reference for determining historical emission levels and setting state goals. In fact, no single year is appropriate as a baseline, and 2012 was especially unusual in terms of capacity factors for combined cycle and coal facilities in many areas. States and electric utilities are urging EPA to use an earlier, multiyear baseline.

Unrealistic Building Blocks. State budgets in the Plan are based on an unrealistic assumption of achieving a 6 percent efficiency improvement across coal units and an average capacity factor of 70 percent for natural gas combined cycle facilities. The Plan also assumes renewable energy expansion and customer energy efficiency increases that are well above achievable levels in many states.

Difficulty Translating State Limits. The Plan gives states the option of translating EPA's rate-based goals (lb/MWh) into mass-based caps (lbs), but there is no clear method of translation in the Plan. States may have difficulty ensuring consistent methods, assumptions, and outcomes among the different types of limits.

Conflicts with Existing Trading Programs. Many states will prefer multistate emission trading programs as a means of compliance, especially states that already have carbon trading programs like the Regional Greenhouse Gas Initiative. However, the details of the Plan may not be consistent with existing trading programs due to differences in baseline periods, planning horizons, and allowance budgets.

Infeasible Compliance Period. States and electric utilities are concerned that the Plan does not allow sufficient time for planning and implementation of measures to reduce emissions.

The first state submissions to EPA would be due just one year after a final rule is expected. More detailed plans would be due one or two years later, depending on whether a state chooses to be part of a multistate plan. After submission of a state plan, EPA budgets just one year for its own review and approval process. Considering that the proposed interim compliance period begins in 2020, electric utilities will have very little time after EPA approval of final state plans to implement the required measures.

Electric Reliability Concerns. The short compliance period may compromise electric reliability because there will not be enough time to build the new generation and transmission capability needed to compensate for projected unit retirements. Changes in the long-term supply and pricing of natural gas could exacerbate these negative impacts on electric reliability.

State Authority. By influencing the operation of power plants and the electric system as a whole, the Plan treads on areas that are traditionally reserved for the authority of state electric utility agencies and system operators.

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■ EPA PROPOSES TWO RULES TO LIMIT HYDROFLUOROCARBONS WITH HIGH GLOBAL WARMING POTENTIAL

EPA recently proposed a pair of rules under the Significant New Alternatives Policy ("SNAP") program to substitute hydrofluorocarbon ("HFC") refrigerants that possess high global warming potential ("GWP") with low-GWP alternatives. These rules are pursuant to the Obama administration's efforts under

the Climate Action Plan and the Montreal Protocol to phase out the production and use of chlorofluorocarbons and HFCs with high GWP.

The Clean Air Act's SNAP program (Section 612) mandates that EPA continuously review alternatives to ozone-depleting substances to find substitutes that pose less overall risk to human health and the environment. EPA then has the authority to update the published lists of "acceptable" and "unacceptable" substitutes.

On July 9, 2014, EPA [proposed a rule](#) under the SNAP program that would list certain hydrocarbons as acceptable substitutes for HFC refrigerants. Under this proposed rule, EPA would approve the use of low-GWP hydrocarbons (ethane, isobutane, and propane) and a hydrocarbon blend (R-441A) in stationary equipment such as household refrigerators and freezers, retail food refrigeration, vending machines, and air conditioners. In addition, the proposed rule would exempt these substitutes from the current venting prohibition for refrigerants under Section 608 of the Clean Air Act because EPA determined that the venting, release, or disposal of these hydrocarbons would not pose a threat to human health or the environment. According to EPA, these hydrocarbons are widely used as refrigerants in Europe and Asia and possess zero ozone depletion potential and very low GWP.

A few weeks later, on August 6, 2014, EPA [proposed](#) to modify the listing of certain common HFCs and HFC-containing blends to "unacceptable" for some uses under the SNAP program. Although the targeted HFCs initially were approved as acceptable substitutes to chlorofluorocarbons, EPA determined that other substitutes—including the hydrocarbon substitutes listed in the earlier proposed rule—are now available for the same uses that pose lower risk overall to human health and climate. Therefore, the change in status would make the targeted HFCs unacceptable for use in both new equipment and for retrofitting existing equipment. Under this proposal, the most abundant HFC (HFC-134a) could no longer be used in new light-duty vehicle air-conditioning systems beginning in model year 2021 or in new retail food refrigeration equipment and new vending machines beginning in 2016. Other products likely to be affected by the proposed rule include consumer aerosols and plastic foam products.

Taken together, EPA Administrator Gina McCarthy stated that these proposed rules would significantly reduce greenhouse gas emissions—between 31 million and 42 million metric tons of carbon dioxide equivalent by 2020—and would encourage companies to pursue environmentally friendly alternatives. The public comment periods for the proposed rules ended on September 8, 2014 and October 20, 2014, respectively.

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CLIMATE CHANGE ISSUES FOR MANAGEMENT

Christine Morgan, Editor

■ KELLOGG COMPANY JOINS BICEP

September 2014 was a good month for the Business for Innovative Climate & Energy Policy (“BICEP”). On September 19, 2014, [BICEP announced](#) that Kellogg Company had joined BICEP. BICEP, a project of Ceres, was launched in 2008 as an “[advocacy coalition of businesses](#) committed to working with policy makers to pass meaningful energy and climate legislation.”

According to the [Ceres website](#), “BICEP’s members are primarily consumer companies that are not major greenhouse gas emitters, but will nevertheless be impacted by climate regulations and other climate-related impacts. BICEP members believe that climate change will impact all sectors of the economy and that various business perspectives are needed to provide a full spectrum of viewpoints for solving the climate and energy challenges facing America.”

Diane Holdorf, Chief Sustainability Officer, Kellogg Company, stated: “As a global food company, [Kellogg understands the issues of climate change](#) and food security, making us mindful of the risks and opportunities our growers, their communities and our business face as a result. . . . Solutions to complex challenges, like climate change, require multi-stakeholder collaboration, and we value continued engagement with stakeholders such as BICEP on this important issue.”

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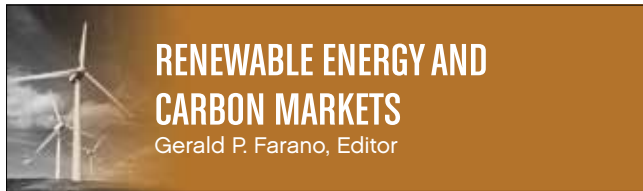
■ CALLS TO REGULATE METHANE EMISSIONS FROM THE OIL AND GAS INDUSTRY

In separate letters, two groups called on EPA to regulate methane emissions from the oil and gas industry. The October 9, 2014 request came from [a coalition of investors](#), including Trillium Asset Management, LLC and Mercy Health, with more than \$300 billion in assets. In calling for “robust” regulations, the [coalition cited four justifications](#): (i) methane emissions are a serious climate problem; (ii) there are proven, cost-effective solutions that will dramatically cut emissions; (iii) insufficiency of voluntary initiatives and state-level action; and (iv) methane policy can reduce risk and create value for investors and the economy. The October 10, 2014 request came from BlueGreen Alliance, a partnership of 15 of the country’s largest unions and environmental groups. [In calling for national regulations](#), the Alliance stated that proven, low-cost technologies exist that could eliminate half of all methane emissions from onshore oil and gas operations in the next five years.

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■ WORLD'S LARGEST CARBON CAPTURE AND SEQUESTRATION PROJECT COMMENCES CONSTRUCTION

On July 15, 2014, NRG Energy, Inc. ("NRG") announced that it is building a \$1 billion project to capture carbon dioxide emissions from the W.A. Parish coal-fired power plant in Texas and ship them 82 miles away to help boost an oil field's production. Construction for the project broke ground on September 5, 2014. The Petra Nova Carbon Capture Project ("PNCCP"), a joint venture between NRG and JX Nippon Oil & Gas Exploration in Japan ("JX"), will be the largest in the world to use a process that scrubs away the carbon dioxide ("CO₂") after coal has been burned to produce electricity.

This is a revolutionary approach to reduce millions of tons of CO₂ emissions from the atmosphere in a manner that, for the first time, attracted private, for-profit investment from the energy industry and that is likely to be repeated in the next few years.

PNCCP is innovative in four very significant ways.

First, the project acts as a bridge between the power industry and oil and gas industry. The power industry increasingly requires CO₂ to be managed, while there is a huge demand for CO₂ in the oil industry.

Second, the construction of PNCCP will not result in any unplanned outage at the W.A. Parish generation facility and will otherwise have no impact on the operation of the power plant. This is a significant accomplishment in light of the nature of the project's construction and a testament to the innovative engineering that went into its design.

Third, PNCCP is the first carbon capture and sequestration project anywhere in the world to be developed and constructed by an independent power producer without the support of ratepayers or taxing entities. While the balance of the

world's other projects relied upon either a regulated public utility placing the project into rate base or a state-owned company developing the project on a state-subsidized basis, NRG created a structure to develop and finance PNCCP in a competitive marketplace.

Finally, the capital for the project was sourced from several entities to the extent that each participant was suited to manage the deal's various risks. A \$167 million grant from the U.S. Department of Energy's Clean Coal Power Initiative Program covers the cost of the noncommercial demonstration aspects of the project. In addition, \$300 million in equity came from JX to manage the oilfield exploration and production risks, along with \$300 million from NRG to manage the power plant and regulatory risks of the deal. And finally, \$250 million of project debt from the Japan Bank for International Cooperation and Mizuho Bank (with a NEXI guaranty) was structured to finance the less risky aspects of this combined carbon capture and sequestration/enhanced oil recovery project.

From a borrower's perspective, and due to attempting to implement a novel technology on a large scale, NRG and JX were required to supplement the DOE grant to provide a very significant portion of the project cost as equity financing.

The lenders, on the other hand, needed to view what appeared to be a complicated project with multiple components principally through the lens of a loan made on the somewhat more traditional revenues from enhanced oil production.

Operationally, the project is designed to capture approximately 90 percent of the CO₂ from a 240MW slipstream of flue gas from NRG's W.A. Parish power generation facility and to use or sequester 1.6 million tons of this greenhouse gas annually.

The captured CO₂ will be used to enhance production at mature oil fields in the Gulf Coast region. The first site to use CO₂ from the W.A. Parish carbon capture system is Hilcorp's West Ranch Oil Field. Through enhanced oil recovery ("EOR"), oil production is expected to be boosted from around 500 barrels per day to approximately 15,000 barrels per day during the project's peak years. This field is currently estimated to hold approximately 60 million barrels of oil recoverable from EOR operations.

The impetus for the project was born from the growing realization that CO₂ emissions will be significantly regulated in the United States sooner rather than later. For example, EPA proposed in June 2014 a rule to cut carbon emissions, a regulation that is really targeting coal power plants, which emit more CO₂ than natural gas power plants.

Carbon capture technology is one way for power plant owners to comply with any new rules that may eventually be enacted. But the technology remains largely in the research and demonstration stages, mainly because it is very expensive with no offsetting increase in revenues or cost efficiency to pay for the capture systems.

That's where this project breaks through the status quo. PNCCP is the first carbon capture project that will pay for itself with incremental revenues (from oil sales) created by the project. NRG is already making plans to offer carbon capture development and construction to other coal power plant owners worldwide and will also encourage commercial lenders to enter the project finance market for CCS/EOR projects.

On balance, the project further reduces the carbon footprint of an otherwise highly efficient coal-fired generation facility, benefits the global environment by reducing CO₂ generally, and reduces the nation's dependence on foreign sources of oil by enhancing domestic oil production from legacy oil fields.

From the perspective of JX, it permits the company to increase the amount of oil available domestically in Japan while furthering its presence in the U.S. market. Perhaps most importantly, it positions NRG and JX to offer the market a blueprint for bridging the commercial gap between the power industry and oil and gas industry in a manner that benefits both.

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CLIMATE CHANGE LITIGATION

Shimshon Balanson, Editor

■ STATES CHALLENGE 2011 SETTLEMENT REQUIRING EPA TO PROPOSE AND FINALIZE A RULE REGULATING EXISTING COAL-FIRED POWER PLANTS

On August 1, 2014, several states petitioned the United States Court of Appeals for the District of Columbia Circuit for review of a final settlement agreement between United States Environmental Protection Agency and various other states, governmental entities, and private organizations. Pursuant to the settlement agreement, EPA committed to proposing and finalizing a rule requiring states to regulate existing coal-fired power plants under Section 111(d) of the Clean Air Act (“CAA”). On June 18, 2014, EPA issued a proposed rule regulating greenhouse gas emissions from existing coal-fired power plants under Section 111(d).

In the petition for review, the petitioner-states argue that certain intervening events following execution of the settlement agreement, but before EPA issued its proposed rule of June 18, 2014, rendered unlawful EPA’s regulation of existing coal-fired power plants under Section 111(d). Namely, the petitioners argue that EPA’s February 26, 2012 rule finalizing regulations for stationary sources, including coal-fired power plants, under the hazardous air pollutants program of Section 112 of the CAA, did not permit EPA to regulate those same stationary sources under Section 111(d) because the United States Supreme Court held in *American Electric Power, Inc. v. Connecticut*, 131 S. Ct. 2527 (2011), that EPA may not regulate a pollutant under Section 111(d) if existing stationary sources of the pollutant in question are regulated under Section 112 of the CAA.

Despite the fact that the settlement was finalized in 2011 and the CAA provides for only a 60-day review period, the petitioners argue that their petition is timely under a recognized exception to the rule when a claim is based solely on grounds occurring after the statutory 60-day review period. Petitioners contend their claim did not ripen until EPA issued its June 2, 2014 legal memorandum setting out its final position regarding its purported legal authority to propose and adopt a rule for existing coal-fired plants under Section 111(d).

Shortly after the petition for review was filed, on September 2, 2014, several private organizations and states that were parties to the original 2011 settlement agreement filed unopposed motions to intervene, arguing, among other things, that as parties to the settlement agreement, they have a legitimate interest in participating in an action challenging that settlement agreement. The motions to intervene were granted on October 2, 2014.

The parties currently are debating the timeline for the case moving forward. On September 3, 2014, the petitioner-states filed a motion to set a consolidated briefing schedule and to expedite consideration. In the motion, they assert that the states will suffer irreparable injury if the case is not expedited because, due to the complex nature of EPA’s Section 111(d) rulemaking, states as well as stakeholders must begin immediately to develop and implement procedures pursuant to the proposed power-plant rule. On the same day, EPA filed a motion to extend time to file dispositive motions and record, arguing that there are substantial jurisdictional issues that need to be briefed. Each party has filed an opposition to the other party’s scheduling motion. The court has not yet ruled on the motions, so the schedule in this matter is still unclear. In the interim, however, EPA will continue moving forward with its Section 111(d) rulemaking.

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■ COLORADO DISTRICT COURT VACATES APPROVALS FOR MINING EXPLORATION DUE TO FAILURE TO ADEQUATELY CONSIDER GREENHOUSE GAS EMISSIONS

On June 27, 2014, the United States District Court for the District of Colorado held that several federal agencies violated the National Environmental Policy Act (“NEPA”) for failing to disclose projected greenhouse gas (“GHG”) emissions associated with expanded mining exploration activities in the North Fork Valley in western Colorado. *High Country Conservation Advocates v. U.S. Forest Serv.*, No. 13-cv-01723-RBJ (D. Colo. June 27, 2014).

The environmental-group plaintiffs alleged multiple failures by the federal agencies to adequately disclose the effects of GHG emissions in environmental impact statements (“EISs”) required by NEPA. One such failure related to lease modifications approved by the Bureau of Land Management and the U.S. Forest Service, which added new lands to a preexisting mine. While the EIS for the lease modifications contained anticipated economic benefits, it did not discuss the impacts of anticipated GHG emissions, stating that they could not be quantified or predicted. The court held that including estimated benefits while excluding estimated costs due to GHG emissions was arbitrary and capricious, particularly when “the social cost of carbon protocol” is a tool available to estimate such costs.

Plaintiffs also alleged failures to adequately disclose the effects of GHG emissions relating to the approval of a rule that provided an exemption for temporary road construction to enable coal mining and mining exploration in the North Fork Valley (“North Fork Exception to the Colorado Roadless Rule”). The first alleged failure associated with this rule was that, although the EIS indicated that increased methane emissions were a foreseeable result of the rule, it did not quantify the emissions or analyze their impacts because those emission rates purportedly were too speculative and depended on mine-specific factors that could not be understood until actual exploration occurs. The court held that the failure to calculate the reasonably foreseeable GHG emissions associated with the rule was arbitrary because (i) “[s]uch projections were possible as demonstrated by an expert opinion that used data from existing North Fork mines to extrapolate expected emissions under the extended mine lives enabled by the [rule]”; and (ii) the EIS included “a detailed economic analysis of the benefits associated with the rule.

Plaintiffs further asserted that the EIS failed to estimate GHG emissions associated with combustion of coal facilitated by the rule. The agencies argued that they did not include an estimate because (i) it would be too speculative, given varying degrees of power plant efficiency; (ii) new technology, like carbon capture and sequestration, might be available by the time the coal is burned; and (iii) “the overall amount of

coal consumed by the marketplace would remain unchanged because there are perfect substitutes for North Fork Coal.” The court found these explanations unsupported by the record. Given that the EIS contained detailed estimates of the amount of coal to be mined, it would not be too speculative to estimate the emissions. In addition, the court found it was improper to rely on “unsupported assumptions that future mitigation technologies will be adopted.” It also found that the increased supply of coal would affect the demand for coal relative to other fuel sources, such that the reasonably foreseeable effect of emissions from the burning of that additional coal must be analyzed.

Plaintiffs lastly argued that the EIS for the North Fork Exception to the Colorado Roadless Rule failed to address an expert report submitted by plaintiffs to the federal agencies. NEPA requires federal agencies to respond to “any responsible opposing view.” 40 C.F.R. § 1502.9(b). The expert report submitted by plaintiffs argued that consumers would be unable to find a perfect substitute for the coal, and, therefore, approval of the rule would lead to increased GHG emissions. The court held that the expert report was a “responsible opposing view,” and the agencies’ failure to address it was a violation of NEPA.

Although the court held that the agencies violated NEPA, it postponed its decision on remedies to allow the parties to meet and confer and submit additional briefing. After briefing was completed, on September 11, 2014, the court ordered that the lease modifications be vacated, finding that “vacation will best serve the deliberative process mandated by NEPA.” With respect to the North Fork Exception to the Colorado Roadless Rule, the court found that it could be severed from the rest of the Colorado Roadless Rule. Accordingly, the court vacated the North Fork Exception to the Colorado Roadless Rule and allowed the remainder of the rule to stand. The impact of the court’s decision on future rulemaking regarding the North Fork Valley remains to be seen.

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■ **TEXAS, WYOMING, AND INDUSTRY GROUPS ASK
DC CIRCUIT TO REHEAR SIP RULE CASE**

Over the last two years, the D.C. Circuit has dismissed several challenges to EPA's GHG rules, including lawsuits brought by states and industry groups relating to the timing and methods employed by EPA in requiring revisions to State Implementation Plans ("SIPs") to incorporate GHGs. As previously reported in *The Climate Report*, in July 2013, the U.S. Court of Appeals for the District of Columbia dismissed challenges to the SIP rules brought by Texas, Wyoming, and industry groups because the petitioners lacked Article III standing. *See Texas v. EPA*, 726 F.3d 180 (D.C. Cir. 2013). In reaching its decision, the D.C. Circuit concluded that Prevention of Significant Deterioration ("PSD") permitting requirements in Clean Air Act § 165(a) are self-executing and apply directly to major stationary sources irrespective of an applicable SIP. Accordingly, the court held, among other things, that vacating the challenged rules would not redress the states' alleged injury to their quasi-sovereign interests in regulating air quality within their borders because the claimed injury was caused by the automatic operation of Section 165(a), rather than the challenged rules.

In September 2014, the states and industry groups petitioned the D.C. Circuit for a rehearing and requested that the D.C. Circuit reverse its earlier ruling, citing a conflict with the U.S. Supreme Court's decision in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014). In *Utility Air Regulatory Group*, the Supreme Court held that Section 165(a) is not self-executing, meaning that rulemaking was a necessary step to PSD permitting of GHG emissions. According to petitioners, the Supreme Court's decision undermined EPA's interpretation of the statute as mandating a permitting process for GHG emissions and undercut the D.C. Circuit's reasoning for dismissing the SIP cases for lack of standing. Petitioners also argue that EPA must conduct new rulemaking before regulating GHGs under the PSD provisions, giving the states an additional three years to revise their SIPs. On October 6, 2014, the D.C. Circuit requested responses to the petition for rehearing from EPA and intervenor parties.

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■ **UK LANDLORDS PREPARE FOR MINIMUM ENERGY
PERFORMANCE STANDARDS OF BUILDINGS**

In September 2014, the UK government closed its consultation on the introduction of minimum energy performance standards ("MEPS") for domestic and nondomestic lettings in the private sector in England and Wales. The proposed MEPS rules are the next logical step in the continued drive to force the property industry to improve the energy efficiency of buildings and so reduce the UK's carbon emissions. Landlords of nondomestic (i.e., commercial) property will be required to take steps to ensure buildings they let achieve the minimum standards to be set.

The consultation document fails to provide the text of the proposed new regulations that will be introduced under the Energy Act 2011. That said, it seems clear that actual improvements to the energy efficiency of the least efficient buildings—that is, those with an Energy Performance Certificate ("EPC") rating of "E" or lower—will need to take place beginning in April 2018. The consultation suggests that, subject to certain exemptions, this restriction will apply to any new lettings from that date (the so-called "soft" start date), while existing lettings will fall within the restrictions from the "hard" start date of April 1, 2023 (but with an earlier hard start date of April 1, 2020 for domestic, i.e. residential, lettings). In essence, action will need to be taken not just prior to the grant of new lettings but on existing ones in place on those dates. It is therefore important to consider the risk of letting "F" and "G" rated premises whose term will still be running on the hard start dates.

Enforcement of the regime will rest with the local trading standards offices, as is the case for enforcement of the EPC regime, but without the certainty that failure to enforce within the EPC six-month time limit will mean no further action can be taken. Once a transgression of the rules is established, an enforcement officer can require a landlord to pay a penalty that will be subject to a minimum cap and a maximum cap

currently proposed at £5,000 for the domestic market. A different approach is being considered for the nondomestic sector with the possibility of a penalty being linked to the level of rent reserved. In addition, an energy efficiency improvement notice could be served requiring action within the next six months, with the risk of further enforcement action for failure to comply.

It is also apparent that the “E” rating trigger will rise over time to a higher standard, but no clarity is offered in the consultation as to when this will be or as to the eventual rating required. That said, an “A” rating for all buildings by 2050 is discussed. Landlords will now need to pay greater attention to EPC ratings in view of the penalty and cost implications.

Landlords may not have to carry out improvement works where to do so would mean incurring expenditure that would otherwise fail the UK government’s Green Deal funding mechanism’s “golden rule” test (i.e., the total energy savings are outweighed by the costs) or would result in a net material decrease in the property’s value. A compliance exemption is also offered where a third-party consent is needed to do the works and that consent is not forthcoming, “through no fault of the landlord” despite having used “best endeavors.” This in itself is an onerous test to meet. The suggestion is that any exemption would be limited to a maximum of five years and then the need for improvements will have to be reassessed. If a consent was refused from the occupational tenant itself, then it is proposed that the exemption will last only until that tenant moves out.

As a further concession, it is proposed that a landlord will not have to carry out the improvement works if it cannot raise the up-front costs through the government’s Green Deal funding mechanism or, in the case of domestic property, both under that initiative and/or under any available grant funding. If it can do so, then the landlord will have to do the works but will not have to use either funding mechanism. Wherever a landlord does claim an exemption, it will need to keep an audit trail of the reasons and be prepared to produce them to any enforcement officer.

Where a building is let on a shell and core basis, it will be necessary to ensure that the works are done to ensure build-out works are undertaken to meet the MEPS. Most typically, this will be covered by the agreement for lease, and the obligation

to do the works could be placed on the tenant under the agreement, but ultimately it will be for the landlord to ensure such works are done. Care should be taken that tenant alterations are not made during the course of the lease that would alter the EPC rating below the MEPS. Landlords are already updating their lease precedents to cover these points as well to address any unintended consequences on the usual rent review clauses. In particular, care should be taken in drafting such clauses to militate against the risk of a tenant taking an unfair advantage on any rent review, claiming that it should have a discount because a letting of a property with an EPC asset rating below the permitted MEPS is unlawful. One can see the argument potentially being raised where the hypothetical lease assumes a shell and core letting that could mean a below-MEPS rating at grant, where after the anticipated build-out (in practice paid for by the landlord) would ensure a compliant rating.

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■ **NER300: A €1 BILLION AWARD TO SUPPORT 19 CLIMATE CHANGE PROJECTS**

On July 8, 2014, the European Commission [adopted](#) the “Award Decision Under the Second Call for Proposals of the NER300 Funding Programme” in order to award funding to 19 climate change projects under the NER300 Funding Programme.

Created by amended [Directive 2003/87/EC](#), NER300 is a financing instrument managed jointly by the European Commission, the European Investment Bank, and the EU Member States, that sets aside 300 million allowances in the New Entrants’ Reserve of the European Emissions Trading Scheme for subsidizing installations of innovative renewable energy technology and carbon capture and storage (“CCS”).

NER300 aims at protecting the climate and making Europe less energy dependent by covering a wide range of CCS technologies (pre-combustion, post-combustion, oxyfuel, and industrial applications) and of renewable energy (bioenergy, concentrated solar power, geothermal power, photovoltaic, wind power, ocean energy, smart grids). [Commission Decision](#)

[2010/670/EU](#) sets out the rules and criteria for the selection and implementation of those projects and the basic rules for the monetization of allowances and for the management of revenues.

Under the 2010–2012 first call for proposal, NER300 projects were awarded 200 million allowances. The remaining 100 million allowances were awarded under the second round to 19 projects hosted in 12 EU Member States: Croatia, Cyprus, Denmark, Estonia, France, Ireland, Italy, Latvia, Portugal, Spain, Sweden, and the United Kingdom.

The European Commission is responsible for the overall management and implementation of NER300 projects.

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