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THE CLIMATE REPORT

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LEGAL AND POLITICAL FIGHTS LOOM FOR CLEAN POWER PLAN

At a White House ceremony on August 3, 2015, President Obama and the U.S. Environmental Protection Agency issued the Clean Power Plan, the administration's regulatory plan to reduce carbon dioxide emissions from existing fossil fuel power plants to 68 percent of their 2005 levels by 2030. The plan does not directly regulate any sources. Instead, EPA has specified emission rates that each state in the continental U.S. must achieve and a set of regulatory tools that the states may use to achieve those rates. EPA also issued a proposed "federal implementation plan" that would be used to achieve the necessary reductions in states that either decline to participate or fail to submit a state implementation plan that EPA finds approvable.

The Clean Power Plan represents the most far-reaching single action EPA has ever taken under the Clean Air Act. Far from simply regulating certain emissions from certain industrial sources, the plan seeks to dramatically restructure the U.S. power system to reduce the contribution of coal from 36 percent of total generation capacity today to 27 percent over the next 15 years, while stimulating much broader deployment of renewable technologies as an alternative to both coal and natural gas. Indeed, opponents of the plan assert, and plan to argue in upcoming legal challenges, that many elements of the plan extend beyond the bounds of environmental regulation and simply exceed the authority Congress conferred on EPA in the Clean Air Act.

DEPARTMENTS

EPA has relied on Section 111(d) of the Clean Air Act as authority for the plan. That Section does not permit direct regulation of existing power plant emissions, but rather authorizes EPA to require state implementation plans based on the "best system of emissions reduction" that has been "adequately demonstrated" for the emissions at issue. In the Clean Power Plan, EPA concludes that the best system for reducing carbon dioxide emissions from fossil fuel power plants consists of three "building blocks": (i) increasing the operational efficiency of such plants; (ii) shifting generation from higher emitting plants, generally coal-fired, to lower emitting plants, generally natural gas-fired; and (iii) increasing generation from "zero-emitting" energy sources, primarily wind and solar. As initially proposed by EPA in 2014, the plan included a fourth building block—improving demand-side energy efficiency, such as better insulation of homes and the use of LED light bulbs. Although energy efficiency is not a formal building block in the final version of the plan, EPA continues to emphasize the importance of the concept throughout the text.

The final Clean Power Plan also includes standards for new, reconstructed, and modified sources. As in EPA's 2014 proposal, the standards for new sources continue to be based on partial carbon capture and sequestration, a technology whose commercial viability remains far from certain.

While 2030 may seem a long way off, the requirements of the Clean Power Plan will begin affecting states much sooner. Proposed plans must be submitted to EPA for review by September 6, 2016, and the final plans must be submitted within two years after that. In addition to the 32 percent emissions reduction that must be achieved by 2030, the plan establishes interim targets that must be achieved between 2022 and 2029.

Emissions trading, either within or among states, is not required by the final plan, but EPA strongly endorses the concept and encourages states to view emissions trading as a market-based tool that allows emissions reductions to occur in the most cost-effective manner. A group of nine northeastern states have already been administering an emissions trading program for power plants, known as the Regional Greenhouse Gas Initiative, for six years, and California began implementing a multisector cap-and-trade program several years ago. Moreover, EPA's proposed federal implementation plan for states that do not submit approvable state plans is based in large part on emissions trading.

Predictable political battle lines were well established even before the final Clean Power Plan was released. A coal company and a group of 15 states, largely Republican-led, attempted to have the U.S. Circuit Court for the District of Columbia Circuit block the plan even before it was finalized, while a similarly sized group of states, largely Democrat-led, publicly supported the proposal. While the D.C Circuit deemed the legal challenge premature pending a final plan, that litigation will presumably resume as soon that the final plan is formally published in the Federal Register, probably in September 2015. Trade groups and additional states will likely file their own actions challenging the plan, while environmental groups and additional states will undoubtedly weigh in on the side of EPA.

In addition to arguments that the Clean Power Plan's broad regulation of energy markets exceeds EPA's authority under the Clean Air Act, opponents have raised the more specific objection that EPA lacks authority to regulate power plant emissions under Section 111(d), because EPA is already regulating such emissions under the Act's "air toxics" program. In a fascinating issue of statutory construction, this argument turns on the fact that the Senate and the House of Representatives passed different versions of the key language back in 1990, a discrepancy that Congress never resolved. It seems likely that the legality of the plan will ultimately be decided by the U.S. Supreme Court several years from now.

In Congress, partisan positions on the Clean Power Plan mirror those from 2009–10, when a Democrat-controlled House passed the American Clean Energy and Security Act, a national greenhouse gas cap-and-trade program that the Democrat-controlled Senate never brought up for a vote. As was the case in the 111th Congress, current Republicans overwhelmingly oppose the Clean Power Plan, while current Democrats overwhelmingly support the plan.

With majorities in both house of Congress, Republicans appear to have the votes to pass a joint resolution of disapproval to invalidate the plan under the Congressional Review Act, a statute that allows Congress to invalidate rules with a simple majority vote that is not subject to filibuster. However, a major—and likely dispositive—difference between then and

now is that in 2010 opponents needed only 40 Senate votes to defeat legislation via filibuster, while in 2015 they will need support from two-thirds of Congress to prevail. Since a joint resolution of Congress is subject to the President's constitutional veto power, ultimate success under the Congressional Review Act will require 290 votes in the House and 67 votes in the Senate to override a certain presidential veto. Absent very vocal public opposition to the Clean Power Plan, it seems unlikely at this time that opponents would be able attract sufficient votes.

However, even if direct disapproval fails, with Republicans in control of the agenda in Congress, repeal measures will likely be incorporated into various measures, beginning with EPA's annual appropriation bill. And the plan will undoubtedly become a very visible point of debate in the 2016 election cycle, with Republicans denouncing the plan as "Democrats' job-killing national energy tax" and Democrats raising the specter of ever-increasing hurricanes, droughts, and wildfires for generations to come.

The Clean Power Plan is more than 1,500 pages long, not counting its companion proposal for a federal implementation plan, which adds another 755 pages. Jones Day will be releasing in the near future a special edition of *The Climate Report* to provide a deeper dive into the structure, requirements, and legal issues associated with the plan.

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IMPLICATION OF *MICHIGAN V. EPA* FOR CHALLENGES TO THE CLEAN POWER PLAN

On June 29, 2015, the U.S. Supreme Court issued its opinion in *Michigan v. EPA*, which may have serious implications for legal challenges to the Clean Power Plan ("CPP"), which seeks to cut carbon emissions by 30 percent from 2005 levels by 2030. In a 5-4 decision, the Court invalidated U.S. Environmental Protection Agency ("EPA") regulations setting limits on mercury, arsenic, and acid gas emissions from coal-fired power plants ("MATS Rule" or "Rule") by determining that EPA should have considered the compliance costs imposed on utilities at the first stage of the Agency's regulatory analysis. The Court's opinion is a solid endorsement of the need for agencies to engage in a cost–benefit analysis in deciding whether to regulate. The opinion is also another example of the Court's gradual shift away from paying broad deference to EPA decisions. *See*, e.g., *Utility Air Regulatory Group v. Environmental Protection Agency* (rejecting EPA's request for deference to its interpretation of the Clean Air Act to require certain air permits for greenhouse gas emissions from stationary sources) and *King v. Burwell* (expressly refusing to apply *Chevron* deference to an agency's interpretation of the Affordable Care Act).

Given that the Court remanded the case to the D.C. Circuit, the MATS Rule will technically remain in effect while that court determines EPA's next steps. The form of the final D.C. Circuit mandate will make a difference for whether and when compliance with the Rule is ultimately required. For example, if the D.C. Circuit remands to EPA, the Rule may remain in effect while the Agency is considering the required costs and benefits. If the court vacates the Rule, however, EPA must begin the regulatory process again, and power companies may not have to comply with upcoming deadlines imposed by the Rule.

The Supreme Court's decision and the D.C. Circuit's ultimate resolution of the case also will have implications for electric and coal companies' legal challenges to the CPP. The CPP is promulgated by EPA under § 111(d) of the Clean Air Act. Two versions of § 111(d) of the Clean Air Act were signed into law—one from the Senate and one from the House—and critics of

the CPP argue that one version forbids EPA from issuing carbon emissions standards under § 111(d) for sources already covered by other regulations like the MATS Rule.

If the MATS Rule is ultimately vacated and fossil-fuel-fired power plants are not subject to regulation under the hazardous air pollutant provisions of the Clean Air Act, critics of the CPP may lose one of their legal arguments against the new greenhouse gas regulations. Alternatively, if the D.C. Circuit remands to EPA and the MATS Rule remains in effect, the court's decision will preserve power companies' § 111(d) argument in their challenge of the Plan. Given the significant implications of the D.C. Circuit's upcoming decision, power companies and other challengers of the CPP are likely to press for a speedy resolution. Nevertheless, resolution may not occur before the challenges to the CPP unfold.

Additional information on the Court's decision in *Michigan v. EPA* can be found in our Jones Day *Commentary*, "Supreme Court Rejects EPA Mercury Rule for Power Plants and Raises Questions about Judicial Deference to Future EPA Rules."

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EPA'S PROPOSED ENDANGERMENT FINDING FOR AIRCRAFT GREENHOUSE GAS EMISSIONS OPENS DOOR TO ADDITIONAL INDUSTRY REGULATION

On June 10, 2015, EPA proposed an endangerment finding that it calls "a preliminary but necessary first step to begin to address GHG emissions from the aviation sector" under the Clean Air Act ("CAA"). EPA also issued an Advance Notice of Proposed Rulemaking ("ANPR") proposing domestic adoption of the forthcoming International Civil Aviation Organization ("ICAO") rules, which are expected in February 2016. The proposed finding that greenhouse gas ("GHG") emissions from certain classes of aircraft engines contribute to climate change and endanger public health and welfare is in response to a citizen petition and exempts military and smaller aircraft, including most private aircraft.

It is not clear from the finding whether EPA is seeking to regulate only domestic operators or whether it will also attempt to regulate international parties operating in the United States. While the Obama administration likely will not have time to promulgate regulations before leaving office, once EPA finalizes the endangerment finding, the CAA requires the new administration's EPA to issue standards of some kind regulating aircraft emissions from the identified classes of engines. There has been industry concern that, because EPA must act on a finalized endangerment finding, if ICAO fails to meet its February 2016 deadline, EPA will be forced to promulgate its own rules, possibly leading to the piecemeal regulation ICAO's international efforts seek to avoid.

The aviation industry has been proactive in reducing carbon emissions. The International Air Transport Association ("IATA"), the world's largest aviation trade group, has set goals to stabilize net carbon dioxide emissions by 2020 and halve carbon dioxide emissions by 2050. In the area of technology, IATA believes that aviation biofuels can reduce carbon dioxide emissions by up to 80 percent over their full lifecycle. In the area of operations efficiency, Boeing, Alaska Airlines, the Port of Seattle, and FAA have worked together on the Greener Skies over Seattle program to reduce emissions by improving flight protocols, with the goal of using these protocols as a template for improving efficiency across the United States.

In its call for input, EPA is taking comment on when carbon standards should take effect, how stringent they should be, and whether standards should apply only to newly designed aircraft or to designs already in production. Comments are due by August 31, 2015, at 11:59 p.m., EST. A public hearing will be held in Washington, D.C. on August 11, 2015.

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CALIFORNIA AIR RESOURCES BOARD AIMS TO REDUCE SHORT-LIVED CLIMATE POLLUTANTS AND READOPT THE LOW CARBON FUEL STANDARD

The California Air Resources Board ("ARB") published a Concept Paper on May 7, 2015, proposing initial strategies for reducing emissions of short-lived climate pollutants ("SLCPs"). SB 605, signed into law by Governor Jerry Brown on September 21, 2014, directs ARB to develop a comprehensive strategy by January 1, 2016, for reducing SLCP emissions. SLCPs are agents with a relatively shorter lifetime in the atmosphere but a greater warming influence than carbon dioxide.

ARB's Concept Paper identifies three categories of SLCPs—methane, black carbon (particulate matter from combustion sources), and fluorinated gases—that ARB estimates may be responsible for up to 40 percent of global warming to date. The Concept Paper contains "initial ideas" for reducing SLCP emissions. ARB will publish an initial draft Strategy and hold public discussion forums in the summer of 2015, and it will present a draft Strategy to the Board during the fall of 2015.

In developing the SLCP strategy, ARB will consider, for example, how to reduce methane emissions from California's natural gas infrastructure and agricultural sector (particularly dairies), eliminate the disposal of organic material in landfills, and expand the use of wastewater treatment facilities to recapture renewable natural gas and soil amendments. Regarding black carbon, ARB will look to expand upon ongoing programs for reducing diesel particulate matter emissions in the freight transportation and other sectors, and black carbon emissions from burning biomass (such as wood stoves, agricultural wastes, and wild fires). ARB will consider regulations limiting or prohibiting the use of high-global-warming-potential fluorinated gases from new refrigeration and air conditioning units, insulating foams, and aerosols, and for reducing leaks from current and end-of-life units.

ARB also is moving toward readoption of the Low Carbon Fuel Standard ("LCFS"). In *Poet, LLC v. ARB (2013)*, the California Court of Appeals ordered ARB to correct deficiencies in the rulemaking process and readopt the LCFS. ARB published a proposed regulation readopting the LCFS in December 2014 and an amended version in June 2015. The amendments would, among other things, streamline the process for recertification of certain fuel pathways previously certified under the original regulation and remove certain limitations on the sale or transfer of LCFS credits. ARB will hold a public hearing on the proposed amended regulation on September 24, 2015.

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CLIMATE CHANGE ISSUES FOR MANAGEMENT

Christine Morgan, Editor

CERES ISSUES NEW REPORT ON PROGRESS OF ITS 2013 CARBON ASSET RISK INITIATIVE

In September 2013, the investor group Ceres launched the Carbon Asset Risk Initiative. Carbon asset risk ("CAR") is the idea that the world's fossil fuel companies hold more oil, gas, and coal reserves "than can realistically be burned in order to avoid catastrophic global warming." This initiative was part of an effort by investors to obtain greater disclosure from these fossil fuel companies of information related to these "stranded assets." On June 30, 2015, Ceres issued the report *Carbon Asset Risk: A Review of Progress and Opportunities*.

The report begins by discussing a "paradigm shift" in the fossil fuel industry. Previously, the concern was running out of fossil fuels, or not being able to access them cheaply enough. Recent developments, however, have shifted the concern to the buildup of unburnable carbon assets. The report attributes this paradigm shift to three changes in the industry: (i) hydraulic fracturing and other technological innovations have drastically increased the exploitable reserves of oil and natural gas; (ii) a movement to slow the burning of carbon fossil fuels in the face of mounting evidence of climate change has been gaining momentum; and (iii) technological advances have driven down the cost of clean energy alternatives. Report at 3. Part of the CAR Initiative's objective was to address the tension between the fact that companies are spending increasing amounts of capital to find and develop fossil fuels reserves, while the value of those reserves is becoming increasingly less stable.

The Initiative set forth two goals: (i) to prevent shareholder capital from being wasted on developing carbon assets that may become "unburnable," and (ii) to drive companies to acknowledge and plan for the escalating physical impacts of climate change. Report at 5.

The Initiative employed two strategies for achieving these goals. First, there was a push for better disclosure by companies of the kinds of information that would help investors to assess the scope of CAR that each company faces. Further, companies have been urged into action through shareholder resolutions and pressure to change company practices relating to climate change.

The report highlights five keys changes that Ceres believes the Initiative has spurred or accelerated in the industry. First, the report notes that in response to investor requests, more than 20 companies have disclosed information on how the company treats CAR. Ceres notes that these "first-ever disclosures" have provided "information that has been used to challenge faulty demand assumptions and create new awareness about the risks and uncertainty in investing in fossil fuels."

Second, the report states that growing concerns over CAR have caused fractures in the usual alliances in the fossil fuel industry. Notably, the report points to the fact that several European oil companies have adopted shareholder resolutions on climate change and have started to publicly support the environmental benefits of natural gas over coal.

Third, the report notes that mainstream acceptance of CAR is growing among investors, regulators, and analysts. Fourth, Ceres notes that technological breakthroughs have made renewable energy more efficient and cost-effective. These advances have subsequently undercut the carbon demand assumptions that drive major investment decisions at large fossil fuel companies.

Finally, the report notes that investors have become increasingly aggressive in forcing companies to address CAR, by pushing shareholder resolutions requiring the company to disclose information related to CAR, as well as nominating board members with expertise on climate issues. In fact, as noted above, several companies have adopted shareholder resolutions that require additional reporting on CAR.

While the report indicates that the CAR Initiative has been quite successful in its objectives, it also points to several opportunities for future progress. The report asserts that more action is still needed in the regulatory sphere. While several companies have started to disclose CAR information in response to shareholder resolutions, the overall rate of voluntary disclosure remains low. In fact, an increasing concern among investors

over this lack of disclosure led Ceres to send a letter to the SEC in April requesting agency action regarding the alleged failure of companies to disclose CAR information.

The report also suggests that companies should start to integrate low-carbon scenarios into capital planning and take steps to manage CAR. Ceres points to the International Energy Agency's suggestions of ways that companies can address the risks posed by climate change: (i) reducing the carbon intensity of their assets; (ii) divesting from their most carbon-intensive assets; and (iii) diversifying their business by investing in lower-carbon energy sources. Report at 26. Looking ahead, we expect Ceres to continue to press forward with its CAR Initiative, heightening the focus on businesses potentially affected by CAR.

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"RISKY BUSINESS" ISSUES INITIAL FOCUSED REPORT ON THE ECONOMIC RISKS OF CLIMATE CHANGE WITH FOCUS ON CALIFORNIA

As discussed in the Fall 2013 issue of *The Climate Report*, in October 2013, hedge fund billionaire Tom Steyer, former U.S. Secretary of the Treasury Hank Paulson, and former New York City Mayor Michael Bloomberg launched the initiative "Risky Business–The Economic Risks of Climate Change" to assess the economic risks of climate change in the United States.

In June 2014, Risky Business issued its inaugural report, detailing the economic risks of climate change in the United States. In April 2015, the initiative issued a follow-up report focusing on California: "From Boom to Bust? Climate Risk in the Golden State." The report reached the conclusion that, on the current path of global emissions, California faces multiple and significant economic threats from climate change. However, the report also concludes that if business leaders and policymakers act soon to reduce emissions and adapt to climate change, they can significantly reduce those risks.

Specifically, the report identified several statewide trends resulting from climate change:

- Increasing heat;
- Accelerated sea level rise;
- Changes in water availability;
- Declines in agricultural productivity;
- Increases in electricity costs and demands; and
- Heat-related increases in mortality and decreases in labor productivity.

Report at 9-13. The report found that climate change presents a particularly high economic risk to California's agriculture. The report notes that two impacts in particular are likely to have a major effect on California's crops: rising temperatures and changes in precipitation.

California's agriculture is made up largely of fruits, nuts, and vegetables. Many of these crops are perennial, meaning they require several years of growth development. These crops are therefore particularly sensitive to even small temperature changes during certain phases of development. Orchard crops, for example, require a certain amount of time each year below 45°F in order to rest and prepare for the next season's budding and flowering. In fact, the report notes that higher temperatures and the current drought already appear to be affecting California's almond crop, which produces 80 percent of the world's almonds.

California's agriculture is also heavily dependent on irrigation and therefore will be particularly hard-hit by the expected decrease in the Sierra region's winter snowpack. This snowpack is a critical provider of freshwater for the state and is therefore also critical to crop irrigation. Finally, agriculture will also face challenges in caring for livestock and combating invasive weeds and pests.

The report remains optimistic, however, that the agricultural industry is well-equipped to adapt to and mitigate these potential impacts, through practices such as seed modification, crop switching, and crop relocation. However, such mitigation opportunities may be limited by time, cost, infrastructure, transportation, soil quality, and competing land uses.

The report goes on to discuss several other economic risks facing California. Due to the high population density along the coastal regions, accelerated sea level rise is expected to

cause billions of dollars of property and infrastructure damage in coming years. Additionally, the expected increase in frequency and severity of extremely hot days will put an increased demand on electricity systems for residential and commercial cooling, leading to increased energy costs. Finally, changes in the timing and amount of precipitation are expected to lead to increased flooding and drought.

Despite concluding that climate change poses many serious risks to California's economy, the report asserted that the state can reduce these risks and avoid many of the worst impacts if certain steps are taken to mitigate the damage. The report advises three specific strategies: (i) changing everyday business practices to become more resilient to climate change, particularly in agriculture; (ii) incorporating risk assessments related to climate change into capital expenditures and balance sheets; and (iii) instituting policies to mitigate and adapt to climate change. Report at 52-53.

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RENEWABLE ENERGY AND CARBON MARKETS

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THE MANY FACES OF BATTERY STORAGE

Much of the popular discussion around energy storage has focused on its utilization as part of a broader "edge of grid" strategy for homeowners and businesses. For example, a residential battery storage solution, if competitively priced, could permit a homeowner who has deployed roof-top solar panels to arbitrage electricity prices by filling up batteries with cheap power (from an abundant solar resource that generates electricity during the workday) and using that stored energy rather than peak-priced electricity purchased from the local utility to serve the increased home load that results from the family's return at day's end.

But even in a world of sharply falling lithium-ion cell prices made possible by the likes of Tesla Motors' planned gigafactory in Sparks, Nevada, the near-term demand for energy storage is less apt to be a result of people seeking to leave the grid and more likely to come from utilities seeking fast-response resources to regulate the frequency of electrical current and keep the grid stable.

In jurisdictions like California where renewable generation resources are plentiful as a result of both policy and geography, the juxtaposition of renewable resource availability and demand requires an abundance of standby power most often in the form of gas-fired peaking facilities. As California strives to achieve its aggressive renewable portfolio standard, the need for peakers and their importance to grid stability continues to increase. That said, gas peakers are not inexpensive to build, are subject to commodity price risk with respect to their fuel requirements, emit greenhouse gases, and take several minutes to come online for their intended purpose.

Battery storage provides a compelling alternative to the traditional gas-fired peaking facility for purposes of frequency regulation and grid stability. As prices for battery storage have dropped, the cost of a grid-level battery storage unit has achieved rough parity with the construction cost of a simple cycle combustion turbine gas-fired peaking facility. For

example, at the 2014 NY–BEST Capture the Energy Conference, John Zahurancik, Vice President of AES Energy Storage, quoted pricing for AES's Advancion lithium-ion battery storage solution of $1,000 per kilowatt and $250 per kilowatt-hour. That equates to an installed grid-level battery storage system for $1 million per MW with a four-megawatt-hour discharge capability.

In addition to a competitive acquisition cost, battery storage generally has the added advantage of a zero fuel cost and, due to fewer moving parts, a more predictable and likely less burdensome operating cost. As importantly, a battery bank can respond to power demand almost instantly: less than a millisecond as opposed to several minutes. Finally, a battery storage unit can serve both as load—storing the energy produced by wind and solar resources, for example—as well as a generation resource.

In 2013, California mandated that by 2020, the state's three large investor-owned utilities add a huge amount of storage—about 1.3 gigawatts, or more than 10 times the amount of storage deployed worldwide in 2011. For now, in California and elsewhere, the likes of those utilities are most likely to use battery storage solutions to relieve their distribution systems of peak loads that would otherwise require the construction of gas-fired peakers, the expensive improvement of wires and other equipment, or both. That said, grid stability and frequency regulation are only two of energy storage's evolving faces. With time and the continuing reduction in costs, batteries will no doubt also play a meaningful role in the ongoing and rapid development of distributed generation, in particular moving away from large utility-scale, centralized solar farms and toward residential or neighborhood-scale solar power.

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CLIMATE CHANGE LITIGATION

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D.C. CIRCUIT DISMISSES CHALLENGES TO CLEAN POWER PLAN

As previously reported in the Summer 2014, Fall 2014, and Spring 2015 issues of *The Climate Report*, Murray Energy and a group of states challenged EPA's legal authority to promulgate the Clean Power Plan, arguing that EPA is precluded from regulating existing coal-fired power plants under Clean Air Act § 111(d). *In re: Murray Energy Corp.*, No. 14-1112; *State of West Virginia v. EPA*, No. 14-1146. On June 9, 2015, a panel of the United States Court of Appeals for the District of Columbia Circuit dismissed those challenges, holding that that they were premature and that any challenge would have to wait until EPA promulgated its final agency rule. The panel concluded that EPA's proposed Clean Power Plan rule did not constitute "final agency action" subject to review by the D.C. Circuit. Writing for the panel, Judge Kavanaugh noted that proposed rules are not entitled to challenge because "[t]hey are not the 'consummation of the agency's decisionmaking process' and . . . they do not determine 'rights or obligations,' or impose 'legal consequences.'"

In dismissing the petitioners' challenges, the D.C. Circuit rejected all three of the petitioners' arguments in favor of review of the proposed agency rule. The panel, first, rebuffed the petitioners' assertion that the All Writs Act, 28 U.S.C. § 1651(a), authorized the court to address the proposed rule. The court explained that a writ of prohibition was not necessary or appropriate to aid the court's jurisdiction because after EPA issues its final rule, parties with standing will be able to challenge the rule. The court also rejected the petitioners' contention that incurring costs in preparation for the anticipated final rule should allow the court to consider the challenge, reasoning that an organization altering its behavior based on what it thinks is likely to come in the form of new regulations has never been a justification for allowing courts to review proposed agency rules.

The court similarly rejected the petitioners' argument that EPA's public statements regarding its legal authority to regulate greenhouse gas emissions constituted final agency action.

The court observed that an agency's public statements about its legal authority to adopt a proposed rule is not the consummation of the agency's decision-making process. Furthermore, EPA's statements regarding its legal authority did not impose any legal obligations or prohibitions on the petitioners because any such legal obligations or prohibitions would be imposed only after EPA finalized the Clean Power Plan.

Lastly, the court rejected the petitioners' effort to challenge a 2011 settlement agreement between EPA and several states and environmental groups. According to the panel, the settlement did not obligate EPA to issue a final rule restricting carbon dioxide emissions from power plants but simply set a timeline for EPA to decide whether to promulgate such rules. By setting a timeline for agency action, without dictating the content of that action, the settlement did not impose an injury on the petitioners.

Judge Henderson authored a concurring opinion in which she agreed that the petitioners' challenge should be dismissed but wrote separately to note that, contrary to the panel's opinion, the court had jurisdiction to issue a writ of prohibition pursuant to the All Writs Act but should decline to do so because "the passage of time has rendered the issuance all but academic."

On July 24, 2015, the petitioners moved for panel rehearing or rehearing en banc, arguing that the D.C. Circuit's decision violated circuit and U.S. Supreme Court precedent. The petitioners, alternatively, requested that the court stay the mandate until the final Power Plan rule is published in the *Federal Register*.

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D.C. CIRCUIT DISMISSES ENVIRONMENTAL GROUPS' PETITION TO STOP COVE POINT LNG TERMINAL CONSTRUCTION

In April 2013, an energy company requested authorization from the Federal Energy Regulatory Commission ("FERC") to site, construct upon, and operate an already existing liquefied natural gas ("LNG") terminal in Calvert County, Maryland. Although the facility began operations in 1972, originally as an import site for LNG, the company sought to repurpose the facility to allow for the export of close to one billion cubic feet of natural gas per day to customers in India and Japan. After conducting a lengthy environmental assessment, FERC green-lit the project in September 2014, concluding that the construction and operation of the terminal would have no significant impacts on the environment.

On October 15, 2014, a group of environmental organizations requested a rehearing on FERC's approval of the project and a halt to the planned construction. Seven months passed before FERC eventually denied the requests, during which time the company began building on the site.

On May 7, 2015, the environmental groups filed suit in the United States Court of Appeals for the District of Columbia Circuit. *EarthReports Inc. v. FERC*, No. 15-1127. The environmental groups petitioned for expedited review of FERC's previous authorization and for an emergency stay on construction pending the court's decision.

The groups argued that FERC failed to take a "hard look" at the indirect effects of exporting natural gas from Cove Point. In addition to issues arising from pre-construction activities, petitioners cited to potential upstream and downstream consequences of the multibillion-dollar project. They argued that the terminal would lead to heightened production of LNG from the Marcellus Shale region, which would result in emissions of climate-disrupting pollutants from the increased drilling and pipeline transportation. Moreover, customers in India and Japan would likely burn the LNG, releasing greenhouse gases that contribute to climate change.

In response, FERC and the company disputed the petitioners' conclusions as overly speculative and lacking the requisite causation to warrant a halt to construction. FERC explained that the source of the gas to be exported from Cove Point is relatively unknown and will likely change throughout the operation of the terminal. Therefore, an increase in the production of LNG from the Marcellus Shale region and the resulting greenhouse gas emissions are not reasonably foreseeable impacts of the project. Likewise, FERC and the company argued that the release of climate-disrupting pollutants associated with the consumption of exported LNG by foreign countries is too

speculative to quantify and would occur regardless of the terminal's operations.

On June 15, 2015, the D.C. Circuit rejected the petition in a one-page order. The court held that the petitioners fell short of satisfying the requirements for an emergency stay on the construction. The court further noted that the groups failed to articulate any "strongly compelling" reasons why their request for expedited review should be granted.

This litigation may foreshadow additional challenges by environmental groups to the domestic LNG export industry. Although Cove Point will be the first export terminal on the east coast, four others are currently being constructed throughout the United States. Three more export terminals have already been approved and await construction, highlighting the expansion of the industry within the last few years.

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D.C. CIRCUIT HOLDS THAT PETITIONERS LACK STANDING TO CHALLENGE CARBON SEQUESTRATION RULE

As previously reported in the Spring 2015 issue of *The Climate Report*, the Carbon Sequestration Council, its member Southern Company Services, and the American Petroleum Institute ("API") filed a petition for review of EPA's final rule promulgated under the Resource Conversation and Recovery Act ("RCRA") that conditionally excluded from the definition of "hazardous waste" hazardous carbon dioxide streams that are injected into Class IV wells for purposes of geologic sequestration and that meet other criteria. *Carbon Sequestration Council & S. Co. Servs. Inc. v. EPA*, No. 14-1046.

The petitioners argued that the carbon dioxide emissions used in geologic sequestration are not "solid waste" and, therefore, not subject to RCRA, negating the need for the conditional exclusion.

On June 2, 2015, the D.C. Circuit dismissed the petition, holding that the petitioners lacked standing to challenge EPA's determination that supercritical carbon dioxide stream at issue are not RCRA solid waste. In their petition, the Carbon Sequestration Council and API asserted representational standing on behalf of Southern Company Services, Inc. and Occidental Oil and Gas, respectively. With respect to the Carbon Sequestration Council and Southern, the panel concluded that Southern had failed to allege that it uses or intends to use any Class VI wells and, therefore, failed to establish that it would be injured by the rule. The court rejected Southern's argument that it is harmed by EPA's decision to include captured supercritical carbon dioxide stream in the definition of "solid waste" because Southern would have to incur costs determining if any carbon dioxide stream it captures is a RCRA hazardous waste. The court found persuasive EPA's unequivocal statements in the final rule, its briefing, and oral argument that the solid waste determination applied only to supercritical carbon dioxide stream injected into Class VI wells for the purpose of geologic sequestration, and not to any of the applications and services in which Southern used supercritical carbon dioxide stream.

For its part, Occidental acknowledged that it was not directly regulated by the rule and conceded that EPA explicitly declined to assert jurisdiction over the activities engaged in by Occidental. The affidavits submitted by Occidental, instead, asserted that the rule "will influence Occidental's business decisions," forcing it to incur costs in anticipation of future regulation. The court held that Occidental's "speculative concern that EPA may choose to regulate its business at some point in the indefinite future" is not enough to demonstrate injury sufficient to meet the threshold Article III standing requirements.

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CLIMATE CHANGE REGULATION BEYOND THE U.S.

Chris Papanicolaou, Editor

DUTCH COURT ORDERS THE GOVERNMENT TO REDUCE GREENHOUSE GAS EMISSIONS

On June 24, 2015, the Hague District Court ruled that the government of the Netherlands must reduce the country's greenhouse gas emissions by 25 percent compared to 1990 levels by 2020. The Urgenda Foundation, a nonprofit organization focused on preventing climate change, brought suit against the Netherlands on its own behalf and on behalf of almost 900 individuals, arguing that the Dutch government has a legal duty to protect its citizens from climate change.

In its suit, Urgenda claimed that the government's climate policy was inadequate and breached its duty of care to Urgenda, the other plaintiffs, and Dutch society generally. In addition, Urgenda argued that, considering the Netherland's high greenhouse gas emissions, the country was unlawfully exposing the international community to the risk of climate change and attendant damage to human health and the environment. On these grounds, Urgenda sought a declaratory judgment that (i) greenhouses gases, to which the Netherlands is one of the largest contributors in the world, are causing damaging temperature increases that threaten humans and the environment; and (ii) the government of the Netherlands is liable for the country's unlawful volume of emissions if it does not reduce national annual greenhouse gas emissions by 25 percent compared to 1990 levels by 2020 or, alternatively, by 40 percent by 2030. Urgenda also asked the court to order the government of the Netherlands to make these reductions.

In response, the Netherlands first argued that Urgenda did not have standing because it was bringing the action in the name of current and future generations of individuals in other countries and because the country had not taken any unlawful actions toward Urgenda. The Netherlands agreed that global temperature rise must be constrained but argued that (i) its current and future climate policies, including international agreements and European Union standards and targets, were aimed at meeting this objective; (ii) it had no legal obligation to take the specific measures requested by Urgenda; (iii) Urgenda's claims were inimical to the Netherlands' discretionary power; and (iv) Urgenda's claims interfered with the Netherlands' system of separation of powers and its international negotiating position.

The court agreed with Urgenda. It found that Urgenda had standing to bring the action on its own behalf because, under Dutch law, an environmental organization has standing to bring a claim to protect the environment. The court, however, concluded that it had insufficient detail regarding the individual plaintiffs and left the question of their standing unanswered. Substantively, the court ruled that (i) the government of the Netherlands has a duty of care to mitigate the impact of climate change; (ii) the Netherlands target of 14 to 17 percent reduction by 2020 is below the standard that has been scientifically accepted for harm reduction and would cause harm to humans and the environment, and that such harm would be attributable to the Netherlands; and (iii) reductions of 25 percent compared to 1990 levels by 2020 are within the Netherlands' discretionary authority and would not be burdensome. Accordingly, the court ordered the government to reduce the nation's greenhouse gas emissions by 25 percent compared to 1990 levels by 2020.

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THE FRENCH NATIONAL LOW-CARBON STRATEGY: A STEP TOWARD COP 21

In the context of the COP 21, the French Parliament adopted, on July 22, 2015, the Energy Transition Bill (the "Bill"), which is currently being reviewed by the French Constitutional Court prior to its publication in the Official Gazette. In essence, the Bill provides for a national low-carbon strategy, as an implementation of the decision 1/COP 16 (Cancun 2010) and of the European Regulation (525/2013) "on a mechanism for monitoring and reporting greenhouse gas emissions and for reporting other information at national and Union level relevant to climate change."

The strategy, as defined by Article 48 of the Energy Transition Bill, will allocate carbon budgets (i.e., greenhouse gas emission thresholds) between key sectors and will provide sectoral

and national guidelines to meet the defined targets. This strategy will cover, in particular, sectors that are not included in the European Union's Emission Trading System. The implementing decrees will define both carbon budgets and a roadmap. The roadmap will take into account French international and European undertakings as well as the competitiveness issues in sectors facing international competition. In addition, governments will have to assess the potential social, economical, and environmental impacts of these new tools.

The Bill will add new reporting obligations for institutional investors. To date, institutional investors are required to indicate in their annual report how their investment policies include social and environmental dimensions. Pursuant to the Bill, institutional investors will have to demonstrate how these policies contribute to energy transition and to mention their efforts to meet the objectives of limiting global warming. If their contribution is below the "indicative targets"—determined in keeping with the low-carbon strategy—institutional investors will have to justify in their annual report the reasons for their insufficient contribution. Moreover, institutional investors will have to provide data on their exposure to climate risks.

Finally, the Bill will extend the reporting obligations applicable to certain types of companies. Public companies will have to provide in their annual report a list of measures implemented to mitigate the climate-change-related financial risks and to respect the national low-carbon strategy. Similarly, all limited liability companies whose turnover will exceed the threshold (fixed by decree) will have to include in their business report the impact on climate change resulting from the use of the services and goods they provide, along with the existing obligations to assess the social and environmental impacts of their activities. These new obligations will apply not only to limited liability parent companies but also to their subsidiaries and controlled companies.

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