




U.S. REGULATORY DEVELOPMENTS

Jane K. Murphy, Editor

■ **DEPARTMENT OF INTERIOR ANNOUNCES MORATORIUM ON NEW COAL LEASES ON FEDERAL LANDS**

Following up on President Obama’s vow in his most recent State of the Union Address to more effectively manage federal coal and oil resources to “better reflect the costs they impose on taxpayers and our planet,” the United States Department of the Interior [announced a moratorium](#) on most new coal leases on federal lands while the Department undertakes a comprehensive review of its leasing procedures.

About 40 percent of the annual coal production is mined from federal lands pursuant to leases administered by the Department, and that coal accounts for approximately 10 percent of the greenhouse gas emissions in the United States each year. The leasing program was last reviewed in 1986, and the Department asserts that this moratorium is the latest in a series of periodic reviews.

The moratorium does not affect existing leases, which reportedly include about 20 years of reserves. The [Associated Press](#) estimates that approximately 30 applications currently in process in nine states could be blocked as a result of the moratorium.

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The review of the leasing program during the moratorium will take the form of a Programmatic Environmental Impact Statement (“PEIS”) prepared by Interior’s Bureau of Land Management (“BLM”) addressing three main concerns identified during 2015 listening sessions:

- Whether BLM receives a fair rate of return for the coal that is mined—about 90 percent of coal lease sales have only one bidder, and the royalty rate of 8 percent for coal mined underground and 12.5 percent for surface mines may not be appropriate.
- The impacts of the coal leasing program on climate change—burning coal results in the release of about twice the carbon dioxide emissions of natural gas, and the BLM identified tension between the coal leasing program and reduction of greenhouse gas emissions.
- Recent reductions of coal production and financial difficulties faced by some coal producers, including the ability of bankrupt entities to reclaim federal land after coal mining has ended.

Exemptions from the moratorium include leases for metallurgical (as opposed to thermal) coal, leases for which National Environmental Policy Act (“NEPA”) review is complete and a record of decision issued, small lease extensions, and certain emergency leases.

In a related development to address greenhouse gas emissions from federal lands, BLM recently [proposed rules](#) to limit venting, flaring, and leaks during oil and natural gas production activities on federal lands. Comments on the proposed methane rules are due April 8, 2016, and BLM has indicated the methane rules will be finalized by the end of this year.

BLM has also indicated that the review period during which the moratorium will be effective should last about three years. The next step will be the preparation of a scoping PEIS, which is planned for late 2016.

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■ EPA PROPOSES AMENDMENTS TO GREENHOUSE GAS REPORTING RULE

On January 15, 2016, the United States Environmental Protection Agency (“EPA”) published [proposed revisions](#) to the [greenhouse gas reporting rule](#) (“GHGRR”). The proposed revisions are the most substantive changes to the GHGRR since it first became effective in 2009.

Several provisions in the proposed rule are intended to streamline reporting obligations. For example, EPA seeks to clarify when covered entities may cease reporting under the GHGRR if annual emissions are less than 25,000 metric tons of carbon dioxide equivalent (“mtCO₂e”) for five reporting years or less than 15,000 mtCO₂e for three reporting years, or if process operations are permanently shut down. EPA is also proposing to allow abandoned underground coal mines, which previously could not take advantage of those thresholds, to similarly cease reporting where emissions are below certain levels.

By contrast, some of the proposed revisions may increase obligations for reporting entities. For instance, EPA proposes to revise the nitric acid production source category to require reporting from all reporters that produce nitric acid, regardless of the nitric acid strength. EPA also seeks to require reporting of the date of installation of any nitrogen dioxide abatement technology.

The proposed rule includes several minor, technical amendments to the GHGRR and confidentiality determinations for certain reporting data. Most of the proposed changes would be effective for reporting year 2017. Comments on the proposed rule will be accepted through February 29, 2016.

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■ U.S. BUSINESSES EVALUATE PARIS AGREEMENT THAT CREATES FRAMEWORK FOR GLOBAL GREENHOUSE GAS EMISSIONS

As reported elsewhere in this edition of *The Climate Report*, on December 12, 2015, 195 countries, including the U.S., adopted the “Paris Agreement,” which creates a framework for reducing global greenhouse gas emissions in an effort to address climate change. Among the Agreement’s primary goals is to limit the increase of the global average temperature to below 2°C over pre-industrial levels. [Paris Agreement Preamble](#), December 12, 2015, art. 2. The Parties also agreed to “pursue efforts” to limit the increase to only 1.5°C above pre-industrial levels. *Id.* To accomplish these goals, each country will submit an Intended Nationally Determined Contribution (“INDC”), or emissions pledge, it intends to achieve. *Id.* art. 4.

Developed countries will strive toward absolute emissions reductions targets, while developing countries are encouraged to move to absolute targets over time. *Id.* Currently, 180 countries have already submitted INDCs. Since the current plans are not sufficient to keep the global temperature increase below the stated goal of 2°C, the Agreement contains a ratcheting mechanism under which each country must review its INDC every five years, beginning in 2020, to determine if it can achieve more stringent reductions. *Id.*

The Agreement also calls for a transparency system. The system requires countries to supply, every two years, a national inventory of emissions and other information necessary to track progress in achieving their INDC. *Id.* art. 13. The specific reporting and monitoring measures have not yet been determined, but the mechanism provides for an independent and a public review of countries’ reports.

Status of the Agreement and Issues Moving Forward. Among the Agreement’s more notable features, particularly in the U.S., is that it contains mechanisms to help assess and monitor the emissions reductions of developing countries such as China

and India, which are among the world’s largest sources of greenhouse gas emissions.

First, the ratcheting mechanism requires each country to review its INDC every five years to determine if it can achieve more stringent emissions reductions. The ratcheting mechanism was a point of contention because large developing countries did not want to be pressured into establishing more stringent emissions reductions. The U.S. supported the mechanism, and it was ultimately included in the final Agreement.

Second, the Agreement creates a transparency system under which countries’ progress toward achieving emissions reductions can be monitored. Again, large developing countries like China and India opposed this provision, but it was ultimately included in the final Agreement.

The ratcheting mechanism and the transparency system thus help to alleviate, at least in theory, the concern that large developing countries will not do their fair share to achieve emissions reductions.

The Agreement leaves many questions regarding implementation, particularly in the U.S. For example, the U.S. submitted a target of reducing emissions by 26 to 28 percent below 2005 levels by 2025. Whether the U.S. can accomplish this will largely depend on the fate of the recently enacted Clean Power Plan (“CPP”). The CPP, which is aimed at reducing emissions from existing coal-fired power plants, is facing numerous legal challenges in the U.S. It is unclear how the U.S. will achieve its target emissions reductions if all or part of the CPP is struck down or modified. Further, there is widespread concern over the economic and technical feasibility of the measures that will be required for the U.S. to meet its target emissions rate.

On a more global scale, as mentioned above, the current INDCs are insufficient to meet the Agreement’s goal of a 2°C limit on temperature increase, meaning further commitments will need to be made. The Agreement also does not make it clear from where the funding required to support target emissions reductions, particularly in developing countries, will come.

Finally, because the Obama administration took the position that the Agreement is not a treaty, it has not been approved

by the U.S. Senate. Progress toward target emissions reductions will therefore depend on measures taken during the remainder of the administration's term. The next administration may decide to withdraw from, or simply not implement, the Agreement.

From a business perspective, in addition to the Paris Agreement, U.S. business interests are also watching a number of potential developments insofar as they relate to U.S. disclosure obligations. Recent regulatory and legislative developments are indicators of increased public interest in climate disclosures after the New York Attorney General's recent [investigations](#) into company statements regarding climate change and the newly penned Paris Agreement.

During a January 28, 2016 conference at the Northwestern University Law School conference in Coronado, CA, Securities and Exchange Commission ("SEC") Chairman Mary Jo White stated that the SEC is considering requirements that would increase the frequency of public company disclosures about climate change. According to a January 28, 2016 subscription service report by Bloomberg BNA, the change in climate change disclosure requirements is a part of a larger effort by SEC to evaluate the state of disclosures. Furthermore, the Government Accountability Office released a report that [reviewed](#) "(1) the types of climate-related supply chain risks companies are disclosing in their SEC filings and other channels through which companies may disclose climate-related supply chain risks; (2) how SEC considers climate-related supply chain risks when monitoring and enforcing compliance with disclosure requirements; and (3) what actions, if any, SEC has taken to identify climate-related supply chain risk information that investors may need." On Capitol Hill, Jack Reed (D-R.I.) introduced an [amendment](#) (S. Amdt. 2990 to S. Amdt. 2953) to a larger energy package, known as the Energy Policy Modernization Act (S. 2012), aimed at requiring SEC to update oil and gas industry guides and consider disclosure recommendations of the World Resources Institute. In the private sector, [investor groups](#) are asking public energy companies to disclose statements regarding climate change and activities to affect climate policy. Each of these developments marks

efforts to increase the amount and substance of climate change disclosures for public companies.

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■ TRENDS IN EARLY 2016 RENEWABLE POWER M&A

From their emergence in the market in the latter half of 2013 until early summer 2015, North American power yieldcos played a major role in the sustained growth of renewable power mergers and acquisitions activity. Complemented by renewable project development that was, in turn, spurred by the only recently salvaged expiration of production tax credits (“PTCs”) and investment tax credits (“ITCs”), the yieldco participation—fueled both by sponsor drop-down activity and third-party acquisitions by yieldcos—brought significant buying power to the renewable power market.

That role was stymied somewhat beginning late in the second quarter of 2015 by a significant decline in value of many of the publicly traded yieldco vehicles, which negatively affected the access those yieldcos had to the currency that drove their acquisitions across the prior 24 months. As a consequence of an inability quickly to access relatively inexpensive sources of capital, yieldcos will likely go missing to a large extent as a primary driver of the renewable energy M&A market for much of 2016. That is not to suggest that the model itself lacks viability. In fact, the fundamentals of most yieldcos remain very sound insofar as they are the holders of high-quality, long-term, contracted power assets with creditworthy off-takers as counterparties. Rather, it poses the question of what players, if any, will step in to drive renewable power transactions for the foreseeable medium-term future.

Some of the slack created by the absence of yieldcos in the renewable project acquisition pipeline will likely be made up by a mix of utility companies, infrastructure funds, traditional private equity funds, and even direct investment by pension funds. The former—in an effort to digest the Clean Power Plan, meet existing and evolving state renewable portfolio standards, and navigate the volatile home solar market in many jurisdictions—could find themselves buyers and, subject to overcoming some hurdles presented by normalization, may be able to finance renewable asset acquisitions with tax equity and include those assets in rate base. Infrastructure investors

could also benefit from a yieldco retreat and may, with lower return thresholds than traditional private equity fund investors, discover themselves advantageously positioned to acquire high-quality contracted assets if the price is right. Similarly, as pension funds continue to increase their direct participation in the power asset class generally, they too may become buyers of renewable projects or portfolios.

Finally, the level of certainty and predictability brought about by the extension of the PTC until 2020 and the ITC indefinitely (albeit tapering down to 10 percent in 2022) should spur meaningful and sustained renewable power project development over the next four or more years, setting up what should be a robust renewable power M&A market for any and all potential participants. Who those participants will be in the short term, and how aggressively the market will heat up, remain to be seen.

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■ LEGAL CHALLENGES TO U.S. EPA'S CLEAN POWER PLAN CONTINUE IN THE D.C. CIRCUIT AND U.S. SUPREME COURT

The legal battle over the Clean Power Plan (“CPP”) continues to take shape, with many new developments occurring in the final months of 2015 and the first few weeks of 2016. When the U.S. EPA announced the final rule on August 3, 2015, it was immediately met by legal challenges from states and industry. However, as previously reported in *The Climate Report*, the United States Court of Appeals for the District of Columbia dismissed these challenges as premature, because the final rule had not yet been published in the Federal Register.

The CPP was finally published on October 23, 2015. See 80 Fed. Reg. 64966. Upon publication, dozens of states and industry groups again challenged the rule in the D.C. Circuit. See *West Virginia v. EPA*, No. 15-1363. At bottom, petitioners claim that EPA lacks authority under the Clean Air Act (“CAA”) to issue the CPP. Before reaching the merits of that claim, however, the D.C. Circuit first addressed several procedural motions. One of those motions worked its way to the U.S. Supreme Court, leading to a dramatic result.

Petitioners Seek Stay of the Rule. Petitioners asked the D.C. Circuit to stay the CPP pending judicial review. Petitioners asserted that a stay was necessary because states, businesses, and local communities must immediately take steps to meet deadlines imposed by the CPP, including submission of a State Implementation Plan (“SIP”) by September 2016.

Petitioners further contended that businesses and local communities would be irreparably harmed if the rule was not stayed. For example, according to petitioners, because the CPP focuses on moving from coal-fired to natural-gas-fired power plants, existing coal-fired plants, as well as associated businesses such as mines, railways, and equipment manufacturers, would be forced to shut down. Petitioners also claimed that the CPP would harm the reliability of electric grids and cause electricity prices to rise, thereby irreparably harming the

general public. Lastly, petitioners asserted that they were likely to prevail on the merits because EPA lacked the legal authority to issue the rule.

EPA responded that the rule is legal and that petitioners would not suffer any irreparable harm if the rule remains in place pending judicial review. EPA noted that states have up to three years to submit their final SIPs if they receive an extension, and that the rule does not require any changes to be made until 2022, with additional phasing-in through 2030. EPA also disputed petitioners’ assertions of irreparable harm in the energy industry, claiming that the rule simply builds upon preexisting industry trends.

In reply, petitioners countered that the far-off deadlines and phasing-in nature of the rule means that EPA cannot demonstrate any public harm if the rule is stayed.

On January 21, 2016, the D.C. Circuit denied petitioners’ motions to stay the CPP, holding that petitioners failed to satisfy “the stringent requirements for a stay pending court review.” Undeterred, on January 26, 2016, petitioners asked the Supreme Court to stay the CPP, reiterating in their application to the Supreme Court that a stay is necessary to prevent irreparable harm to states and industry while the CPP is being litigated, and further emphasizing that EPA lacks CAA authority to issue the rule. EPA, again, countered that the agency has the authority to issue the rule and that petitioners would not suffer irreparable harm, especially because the D.C. Circuit has now agreed to expedite its hearing of the underlying case.

On February 9, 2016, the Supreme Court voted 5–4 to stay the CPP. The one-page Order does not provide the reasoning for the Court’s decision. The Order also stays the rule pending disposition of petitions for review in the Supreme Court, if sought. The Supreme Court’s ruling may prefigure how it will rule on the merits if the case does end up in the Court, which now seems likely.

Challengers Seek Expedited Judicial Review and Bifurcated Briefing. In addition to seeking a stay, petitioners have asked the D.C. Circuit to expedite the briefing schedule and hold oral arguments on their challenges in the spring of 2016. Just as they argued in support of a stay, petitioners contended that

expedited review was necessary because the CPP's deadlines require states and industry to take immediate measures to begin implementing the rule, which will cause irreparable harm.

Petitioners also asked the D.C. Circuit to create two separate briefing schedules: one related to EPA's legal authority to issue the rule and a second on state and implementation-related programmatic issues. Petitioners argued that these issues are so complex that they warrant separate briefing.

In opposing bifurcation, EPA disputed that the issues involved are so complex as to require bifurcated briefing and also argued that petitioners had failed to articulate a sound basis for separating the issues. EPA further asserted that bifurcated briefing would ultimately delay resolution of the issues by creating potentially duplicative rounds of briefing and oral argument. Lastly, EPA argued that the bifurcation and scheduling motions ignored the fact that the D.C. Circuit had yet to rule on petitioners' motions to stay the rule pending appeal. EPA contended that the court's decision on a stay would have an impact on the merits briefing of the case, and therefore the motions for expedited review and bifurcated briefing were premature.

On January 21, 2016, the D.C. Circuit granted petitioners' motion for expedited judicial review. Regarding the bifurcated briefing issue, the court ordered the parties to submit a proposed briefing format, reminding the parties that "the court looks with extreme disfavor on repetitious submissions." Oral argument on the challenges to the CPP will be held on June 2, 2016.

States and Cities Join EPA in Defense of the CPP. Although publication of the CPP triggered a wave of challenges from states and industry, a coalition of 18 states, six cities, and one county, led by New York Attorney General Eric Schneiderman, intervened in the consolidated challenges for the purpose of defending the rule. Attorney General Schneiderman pointed to the fact that New York had reduced greenhouse gas emissions by 45 percent between 2005 and 2014 as evidence that the CPP's requirement that existing plants reduce emissions by 32 percent by 2030 is feasible.

In support of intervention, the coalition cited the negative effects that climate change has on industry and their citizens. Iowa, for example, asserted that climate change negatively

affects the state's agricultural industry. Virginia, for its part, pointed to rising sea levels that threaten the Hampton Roads metropolitan area, as well as Naval Station Norfolk, the largest naval base in the world, and other military bases in the state.

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■ TENTH CIRCUIT REJECTS CHALLENGE TO COLORADO'S RENEWABLE ENERGY STANDARDS; SUPREME COURT DENIES CERT

On December 7, 2015, the U.S. Supreme Court denied a petition for writ of certiorari in *Energy & Environment Legal Institute v. Epel*, No. 15-471, which sought to overturn the United States Court of Appeals for the Tenth Circuit's July 13, 2015 opinion, 793 F.3d 1160, affirming a federal district court's judgment upholding Colorado's Renewable Energy Standards.

Petitioners challenged the constitutionality of a Colorado statute and related regulations (the "Renewable Energy Standards") requiring "qualified retail utilities" to "generate, or cause to be generated," electricity from Colorado-approved renewable sources in specified minimum amounts. Specifically, the Renewable Energy Standards require 30 percent of electricity supplied by investor-owned utilities to be obtained from Colorado-approved renewable sources by 2020.

Petitioners argued that the Renewable Energy Standards eliminate competition with other states by requiring a specified amount of electricity to come from renewable sources and then limiting what qualifies as a renewable source. One example of in-state favoritism cited by petitioners is that the Renewable Energy Standards do not consider ocean thermal and ocean wave electricity generation—methods that cannot themselves be generated within Colorado's borders—as approved renewable sources, even though other states, such as California, do. Petitioners argued the Renewable Energy Standards thereby favor Colorado over other states by approving methods of electricity generation that can be generated within Colorado.

While petitioners argued in their petition for writ of certiorari that Colorado's Renewable Energy Standards violate the

Commerce Clause, Full Faith and Credit Clause, and Due Process Clauses, the only issue before the Tenth Circuit was whether the Renewable Energy Standards violate the dormant Commerce Clause under the line of cases stemming from *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). The Tenth Circuit found that there were only three cases total in this line: *Baldwin*; *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986); and *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989). The court explained that the common thread among these cases is that they involved “(1) a price control or price affirmation regulation, (2) linking in-state prices to those charged elsewhere, with (3) the effect of raising costs for out-of-state consumers or rival businesses.” The Tenth Circuit held that Colorado’s statute did not fall within the bounds of these cases because “it isn’t a price control statute, it doesn’t link prices paid in Colorado with those paid out of state, and it does not discriminate against out-of-staters.” It further noted that the Renewable Energy Standards equally hurt in-state and out-of-state fossil fuel producers that provide energy to the grid, while equally helping in-state and out-of-state renewable energy producers.

Although the Tenth Circuit upheld Colorado’s Renewable Energy Standards under the *Baldwin* line of cases—a decision that will not be reviewed by the Supreme Court—it left the door open to a challenge under other lines of dormant Commerce Clause cases, namely *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (“allowing judges to strike down state laws burdening interstate commerce when they find insufficient off-setting local benefits”), and *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (“appl[ying] to state laws that ‘clearly discriminate’ against out-of-staters”).

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■ WHAT THE PARIS CLIMATE AGREEMENT MEANS FOR RENEWABLE ENERGY

The Paris Agreement, reached on December 12, 2015 after the two-week negotiations in France during the course of the 21st Conference of the Parties (“COP21”) to the United Nations Framework Convention on Climate Change (“UNFCCC”), says very little about renewable energy but means a lot to these activities.

In fact, the only reference to renewable energy appears in the recitals of the Decision, the first part of the text agreed upon on December 12, 2015 and to which the Agreement is annexed. There, the Conference of the Parties acknowledges “the need to promote universal access to sustainable energy in developing countries, in particular in Africa, through the enhanced deployment of renewable energy.”

While this is the only direct reference to renewable energy, the Paris Agreement is expected to have a very significant impact on the energy market and its development, considering the goals set out by the Parties: limiting the increase of the global average temperature to “well below” 2°C over pre-industrial levels (and if possible to 1.5°C above pre-industrial levels), reaching peak greenhouse gas emissions as soon as possible, and achieving “net zero” greenhouse gas emissions in the second half of this century.

Limiting greenhouse gas emissions will require a low-carbon transition, including a massive shift toward renewable energies, as well as energy-efficient and climate-resilient systems. Financing the development of these systems will be organized through public and private funding. In particular, the Paris Agreement calls for a fund of US\$100 billion per year, by 2020, to help developing countries achieve their goals. Part of this significant effort, which is yet to be organized and funded, will most certainly go toward the financing of renewable energy projects.

The focus is on the development of systems and projects in developing countries. The main reasons for such choice is that some parts of the world, for instance Africa or small island states, are heavily affected by climate change, although they do not contribute much to anthropogenic emissions. Also, the goal of the Paris Agreement is to promote development, in a sustainable way, in countries that are still “developing.” As a consequence, the interpretation and implementation of the Paris Agreement is expected to foster renewable energy projects, particularly in developing countries.

The momentum created by the Paris Agreement is also expected to stimulate the implementation of existing plans or regulations, such as the U.S. Clean Power Plan or the EU Renewable Energy Directive, and to encourage the adoption of new legislation.

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■ WHAT THE PARIS CLIMATE AGREEMENT MEANS FOR CARBON PRICING

Since the adoption of the United Nations Framework Convention on Climate Change’s (“UNFCCC”) Kyoto Protocol in 1997, a number of emissions trading markets have been created, including the self-imposed, rather stringent European emissions trading system (“EU ETS”), as well as a number of voluntary markets and exchange of carbon units or Kyoto credits. In addition, some nations or regions have adopted a carbon taxation scheme, thus giving a monetary value to carbon emissions. However, none of these systems is global, so far, and fragmented markets may not be as efficient as the potential, future worldwide carbon pricing system in order to disincentive emissions.

One of the uncertain outcomes of COP 21, which took place in Paris last December, was whether an agreement would be reached, or a framework proposed, to price carbon dioxide emissions.

On December 12, 2015, COP 21 adopted the Paris Agreement together with a decision in which all 195 Parties recognized “the important role of providing incentives for emissions reduction activities, including tolls such as domestic policies and carbon pricing” (§137 of the Decision). This statement is the only direct reference to carbon pricing in the Paris Agreement and appears in the Decision, acting as preamble to the Agreement. It is considered, at this stage, to be nonbinding, compared to the provisions of the Agreement itself.

Furthermore, the Paris Agreement allows the use of “internationally transferred mitigation outcomes to achieve nationally determined contributions” (Art. 6 §3 of the Agreement), on a voluntary basis. Such provision paves the way for countries seeking to buy or sell carbon credits as a way to offset greenhouse gas emissions. While such provision recognizes the existence of current emissions trading systems, it should also help the implementation of a renewed international carbon market, through mutual recognition of existing schemes or the creation of links between regional trading systems.

Additionally, Article 6 §4 of the Paris Agreement refers to a mechanism to contribute to the mitigation of greenhouse gas emissions, under the authority of the Conference of the Parties. Such mechanism, the details of which are yet to be defined, is expected to take over after 2020, potentially in a manner that differs from the existing Clean Development Mechanism under the Kyoto Protocol. In any case, this provision also calls for emissions trading, and thus carbon emissions pricing, though on a voluntary basis.

The addition of such language in the Paris Agreement is therefore one step closer to a global, harmonized carbon pricing system.

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