SUMMER 2016 ISSUE

# THE CLIMATE REPORT

## DEPARTMENTS



## U.S. REGULATORY DEVELOPMENTS

Jane K. Murphy, Editor

### EPA PROPOSES CLEAN ENERGY INCENTIVE PROGRAM DESIGN DETAILS

On June 30, 2016, the United States Environmental Protection Agency ("EPA") published a proposed rule titled Clean Energy Incentive Program Design Details ("Proposed Rule"). The Clean Energy Incentive Program ("CEIP") is a voluntary aspect of the Clean Power Plan ("CPP"), an EPA rule finalized in 2015 that regulates carbon dioxide ("$CO_2$") emissions from existing power plants. The Proposed Rule serves as a guide for states that choose to participate in the CEIP. EPA will accept public comment on the Proposed Rule until August 29, 2016.

Participation in the CEIP authorizes states to distribute allowances or to issue emission reduction credits ("ERCs") to eligible clean energy projects, including low-income community projects (demand-side energy efficiency and solar projects implemented to serve low-income communities) and zero-emitting renewable energy projects (wind, solar, geothermal, and hydropower in all communities). EPA then awards matching allowances or ERCs, which the CEIP project could sell or transfer to power plants that would use them for compliance with the CPP's $CO_2$ emissions limits.

The Proposed Rule addresses obligations for states that choose to participate in the CEIP and the requirements for CEIP-eligible projects. In addition, the Proposed Rule

clarifies that EPA will award matching allowances or ERCs up to a national limit of 300 million short tons of $CO_2$ emissions, which will be apportioned among CEIP-participating states based on the amount of reductions from 2012 $CO_2$ emission levels that the affected power plants in each state are required to achieve relative to those in other CEIP states. The matching pool will be divided evenly, with 50 percent made available for renewable energy projects and 50 percent made available for low-income community projects.

The CEIP was intended to incentivize early actions for $CO_2$ emission reductions prior to the start of the CPP compliance periods in 2022, but the CPP was stayed by the U.S. Supreme Court on February 9, 2016. EPA's decision to move forward with developing the Proposed Rule thus creates some confusion. For example, it remains unclear at this time whether CEIP projects would still need to generate renewable energy and energy savings during 2020 and 2021 to be eligible. Many have argued that all compliance deadlines associated with the CPP must be postponed in light of the stay, but EPA continues to assert that whether and to what extent tolling is appropriate will not be addressed until after the resolution of ongoing litigation challenging the CPP.

Additional information about the Proposed Rule is available here.

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## CARB PROPOSES CAP-AND-TRADE EXTENSION

On July 12, 2016, the California Air Resources Board ("CARB") issued a Preliminary Draft Proposed Regulation Order and Staff Report, which would amend California's cap-and-trade regulations, 17 C.C.R. §§ 95801 *et seq*., to achieve greenhouse gas reductions of 40 percent from 1990 levels by 2030, as called for by Governor Brown in Executive Order B-30-15. Among other things, the proposed amendments would extend the major provisions of the cap-and-trade program to beyond 2020 (the program's current expiration date), establish emission caps from 2021 to 2030, enable California's compliance with federal requirements under the Clean Power Plan, allow for the extension of allowance allocation, and continue cap-and-trade linkage with other jurisdictions.

Although the amendments are not scheduled for approval until March 2017, questions are already arising with regard to whether CARB has the statutory authority to extend the cap-and-trade program (or any other provisions of A.B. 32, the California Global Warming Solutions Act). For instance, in an April 19, 2016, letter to California Senate Republicans, the nonpartisan California Legislative Counsel concluded that "[A.B. 32] does not authorize the Governor or the [C]ARB to establish a greenhouse gas emissions limit that is below the 1990 level and that would be applicable after 2020."

A bill to extend provisions of A.B. 32 to 2030, S.B. 32, is currently before the Senate Committee on Appropriations. However, it is not clear that S.B. 32 would extend CARB's authority for market-based compliance mechanisms, under which cap-and-trade was adopted. Moreover, S.B. 32, if passed without a two-thirds supermajority, is likely to encounter similar legal challenges to those that have plagued A.B. 32—that the auction program (an essential component of the cap-and-trade) is invalid because it constitutes a "tax," and A.B. 32, under which the auction was promulgated, was passed without the supermajority required to pass a tax under the California Constitution. *See California Chamber of Commerce v. California Air Resources Board*, Case No. C075930; *Morning Star Packing Co. v. California Air Resources Board*, Case No. C075954. Thus, it is likely that any extension to cap-and-trade adopted by CARB is likely to be met with legal challenges. CARB's proposed regulations are set for public comment from August 5, 2016, to September 19, 2016.

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## GREENHOUSE GAS EMISSION STANDARDS FOR AIRCRAFT ARE ON THE HORIZON

With the recent finalization of the finding that greenhouse gas emissions from certain classes of aircraft engines endanger public health and welfare, the EPA must promulgate aircraft engine emission standards under Clean Air Act ("CAA") Section 231. The endangerment finding applies to subsonic jet aircraft with a maximum takeoff mass greater than 5,700 kilograms and subsonic propeller-driven (e.g., turboprop) aircraft with a maximum takeoff mass greater than 8,618 kilograms, which are "covered aircraft." The finding does not include smaller turboprops, smaller jet aircraft, piston-engine aircraft, helicopters, or military aircraft. Examples of covered aircraft include smaller jet aircraft such as the Cessna Citation CJ3+ and the Embraer E170, up to and including the largest commercial jet aircraft—the Airbus A380 and the Boeing 747 as well as larger turboprop aircraft, such as the ATR 72 and the Bombardier Q400.

As a member to the Convention on International Civil Aviation ("Chicago Convention"), the United States is obligated under treaty to adopt domestic law generally in accord with the standard-setting and recommendations of the International Civil Aviation Organization ("ICAO"). In the past, when ICAO has adopted emission standards, EPA has subsequently initiated rulemaking under CAA Section 231 to establish domestic standards at least as stringent as the ICAO standards. In 2007, the U.S. Appeals Court for the D.C. Circuit affirmed this practice as a "reasonable interpretation" of the agency's obligations under Section 231.

In 2010, ICAO began the process of developing an emission standard for carbon dioxide. ICAO's new carbon dioxide emission standards will likely apply to new aircraft type designs as of 2020 and new deliveries of current in-production aircraft types from 2023. According to the White House, the standards are expected to reduce carbon emissions more than 650 million tons between 2020 and 2040, equivalent to removing over 140 million cars from the road for a year. In October 2016, the ICAO Assembly is expected approve these new carbon dioxide emission standards to be formally adopted in March 2017. If these final standards are adopted, the U.S. emission standards promulgated by EPA will need to be at least as stringent as the ICAO standard.

Regardless of the status of the ICAO carbon dioxide emission standards, EPA now has an independent obligation under the endangerment finding to set emission standards for greenhouse gases from the covered classes of aircraft engines. Entities that manufacture and sell aircraft engines and aircraft in the United States can expect future regulatory action to curb greenhouse gas emissions.

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# CLIMATE CHANGE ISSUES FOR MANAGEMENT

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## DEBATE ON ROLE AND DEPTH OF CLIMATE RISK DISCLOSURES CONTINUES TO SIMMER

Although the Securities and Exchange Commission ("SEC") issued its Climate Risk Disclosure Guidance in 2010, few stakeholders have been satisfied with the current state of climate change disclosures made by publicly traded companies. In April 2015, the SEC received coordinated letters from institutional investors and the New York City and New York State comptrollers calling for the SEC to increase attention to climate-related disclosures from companies in the energy industry. In contrast, Congressman Bill Posey, R-Fla, has repeatedly introduced legislation to block the SEC climate risk guidance. Posey's most recent effort has been incorporated into financial services bill H.R. 5485, which passed the U.S. House of Representatives on July 7, 2016. On the same day, the Federal Acquisition Regulatory Council proposed a rule to require vendors and contractors supplying to the federal government to identify if and where those entities publicly disclose greenhouse gas emissions, greenhouse gas reduction targets, and climate risks.

While some stakeholders have focused on whether more or less disclosure regarding climate risks should be required, others have criticized the SEC's current enforcement of its 2010 guidance. In recent years, the number of "comment letters" issued to companies to improve financial reporting addressing climate risk dwindled from dozens in 2010 and 2011 to just less than a dozen since 2013. In October 2015, 35 members of Congress wrote a letter to the SEC to express concern about the "level of scrutiny the SEC is utilizing to robustly and effectively enforce" the SEC's climate risk guidance. Some states have taken a more active role in enforcing appropriate disclosure of climate risks and companies' knowledge of climate change.

Whether the SEC will update its guidance documents, increase its enforcement of the current guidance or even have the power to require climate disclosures remains uncertain, but global trends suggest that continued transparency regarding climate risks will be forced by markets and global entities. At the request of G20 nations, the Financial Stability Board, an international body that monitors and makes recommendations about the global financial system, set up a Task Force on Climate-related Financial Disclosures to provide final recommendations regarding voluntary climate-related financial risk disclosures for use by companies in December 2016. Voluntary reporting programs, including the Ceres Carbon Disclosure Project, the Climate Registry, and EPA Climate Leaders, continue to grow. Additionally, as countries seek to fulfill their Paris Agreement pledges and conduct greenhouse gas inventories, multinational companies may be subject to new greenhouse gas reporting requirements.

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## CERES ISSUES REPORT ON FOSSIL FUEL INVESTMENTS OF U.S. INSURANCE SECTOR

On May 24, 2016, the investor group Ceres released a report that analyzes the fossil fuel investments of 40 major U.S. insurance groups. The report found that many U.S. insurance groups are significantly invested in oil and gas and other fossil fuels. In the aggregate, these groups hold fossil fuel investments totaling $459 billion, based on 2014 year-end filings.

The report labels fossil fuel holdings "increasingly risky," citing carbon asset risk exposure, as well as the frequency of bankruptcies and credit downgrades among oil and gas companies. Ceres president Mindy Lubber stated that the "global trend toward clean energy has significant implications for fossil fuel companies and their investors if action is not taken to manage climate risks. Our hope is the report recommendations provide a roadmap for insurers and regulators to better manage these risks and seize opportunities that come from this energy transformation."

Of the $459 billion in total fossil fuel investments, $237 billion are held in the electric/gas utilities sector, while $221 billion are held in the oil and gas sector. Insurers' coal investments accounted for only $1.8 billion, while investments in renewable energy accounted for $7.2 billion. The report notes that insurers' investments in renewable energy are growing but asserts

that these investments "do not yet reflect the scale of clean energy investment opportunities required to avoid dangerous climate change." The report also cites a Mercer study that states that average annual expected returns on clean energy investments are expected to increase from more than 6 percent to as high as 10 percent.

The report states that the risks of fossil fuel investments are even greater in light of the Paris Agreement, citing estimates that one-third of oil reserves, half of natural gas reserves, and more than 80 percent of coal reserves from 2010 to 2050 will need to remain unused in order to meet the Paris Agreement's goal of limiting global temperature increase to below two degrees Celsius.

The report provides several recommendations for insurers and regulators to manage the risks associated with fossil fuel investments. First, the report calls on insurance boards of directors to make climate risk management an integral part of their investment decision-making. The report also recommends that boards consider requiring the insurers' Investment Policy Statement to expressly include a climate risk management strategy, and that the strategy be reviewed annually.

As for regulators, the report recommends requiring insurers to disclose their investments and adopt a universally recognized source to provide that information, such as Supplemental Investment Risk Interrogatories.

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# RENEWABLE ENERGY AND CARBON MARKETS

Dickson Chin, Editor

## FERC ELIMINATES REACTIVE POWER EXEMPTION FOR WIND GENERATORS

On June 17, 2016, the Federal Energy Regulatory Commission ("FERC" or the "Commission") issued a final rule ("Order No. 827") eliminating exemptions for wind generators (and an option for solar generators to elect certain exemptions) from the requirement to provide reactive power. Unlike real power, which transfers net energy to the grid for use by consumers, reactive power is used for grid reliability, supporting voltages used for grid stability.

FERC requires that power generators design their systems to provide adequate amounts of reactive power to the transmission system to which they are interconnecting in order to maintain grid stability. Prior to the entry of Order No. 827, however, wind generators were exempted from the reactive power requirement, which required an interconnecting generator to design its generating facilities to have a reactive power capability of 0.95 leading to 0.95 lagging. This reactive power band essentially represents the range of reactive power that generators' systems must provide so that their respective transmission system operator may adjust the reactive power within that range in order to manage the reliability of the transmission system.

The basis for the prior exemption for wind generators from having to design systems that produced reactive power within this set range was primarily policy driven. In short, because the cost to design and build wind generators that were capable of providing reactive power was high, there was a view that such costs would deter the development of wind generation. Accordingly, the exemption was used to facilitate and encourage the development of wind power in the United States.

FERC found in Order No. 827 that the existing exemption was unjust, unreasonable, and unduly discriminatory and preferential. It based its finding on two primary factors. First, it found that technological advancements in the wind industry have sufficiently progressed, and driven costs down, to the point

that the cost to wind generators to provide reactive power no longer presents an obstacle to the development of wind generation. Second, the Commission recognized that an increasing number of wind generators interconnecting to certain transmission systems, coupled with a growing number of non-wind generator retirements, could leave those transmission systems with a potential shortfall of necessary reactive power. Given that sufficient amounts of reactive power are necessary to ensure the reliability of the transmission system, if the number of wind generators increases, yet those wind generators are not providing a corresponding increase in necessary reactive power on the system to accommodate that increase, the system is potentially vulnerable to negative reliability events.

While the requirement that wind generators must provide reactive power will not be received favorably by many in the wind industry, the Commission did undertake to minimize the additional costs such generators would have to bear. For example, although the Commission originally proposed that wind generators' provision of reactive power be measured at the Point of Interconnection (i.e., the point where the facilities connect to the transmission provider's transmission system), it ultimately determined that reactive power be measured at the high-side of the generator substation, which can often be anywhere from 50 to 80 miles from the Point of Interconnection. In reaching this decision, the Commission considered that although providing reactive power at the Point of Interconnection would result in the greatest amount of reactive power being supplied to the transmission system, the cost in doing so did not justify the higher cost, when providing it at the high-side of the generator substation would cost less yet supply adequate reactive power. Specifically, the Commission determined that imposing a requirement on wind generators to enhance reactive power capabilities at the Point of Interconnection would unreasonably force those generators to incur unnecessary additional costs that provide no commensurate benefits to the transmission system.

As a result, Order No. 827 now requires all newly interconnecting non-synchronous generators to provide reactive power at the high-side of the generator substation as a condition of interconnection. Specifically, all newly interconnecting non-synchronous generators that have not yet executed a Facilities Study Agreement as of the effective date of Order No. 827 will be required to provide dynamic reactive power within a power factor range of 0.95 leading to 0.95 lagging.

The Commission used the execution of the Facilities Study Agreement as the point in the interconnection process for transitioning to the requirements of Order No. 827 for the following reasons: (i) the execution of a Facilities Study Agreement by the interconnecting generator and the transmission provider represents the point in the interconnection process when the transmission provider and generator developer have already agreed to the general technical requirements that will be needed for the generator to reliably interconnect to the transmission system; (ii) requiring wind developers to amend their projects after having already established their interconnection requirements in the Facilities Study Agreement would impose additional undue costs on these developers and would make it difficult, if not impossible, to make reasoned business decisions; and (iii) execution of the Facilities Study Agreement is a distinct point that would avoid confusion in applicability of the new requirement.

It is also important to note that Order No. 827 will not apply to existing non-synchronous generators making upgrades to their existing facilities that require new interconnection requests, provided that those generators would not have been required to provide reactive power under the previous framework. In crafting this exclusion to the new requirement, the Commission reasoned that: (i) there are a variety of triggering points for a new interconnection request in the various transmission provider regions; (ii) an existing non-synchronous generator upgrading its system may not be installing new equipment; and (iii) the resultant cost to wind generators would not be justified in an upgrade scenario. Moreover, Order No. 827 does permit certain variations and expressly provides that a transmission provider may justify any departures from the requirements of the order in its compliance filing with FERC, which must be filed within 90 days after Order No. 827's publication in the *Federal Register*.

Order No. 827 comes at a time of an increasing proliferation and acceptance of wind generation as a viable alternative to traditional fossil fuels in the present-day generation mix.

While Order No. 827 is an acknowledgment of the growing parity between wind and other forms of traditional generation resources, those engaged in the wind development business may view the added costs of compliance resulting from Order No. 827 unfavorably.

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## CLIMATE CHANGE LITIGATION

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### EIGHTH CIRCUIT UPHOLDS RULING INVALIDATING MINNESOTA'S RESTRICTION ON POWER PLANT CARBON DIOXIDE EMISSIONS

On June 15, 2016, the United States Court of Appeals for the Eighth Circuit affirmed a district court ruling that struck down as unconstitutional a portion of a Minnesota statute limiting increases in carbon dioxide emissions from energy facilities. *North Dakota v. Heydinger*, No. 14-2156. North Dakota and coal and energy industry groups ("Plaintiffs") brought the suit to challenge a restrictive provision in Minnesota's Next Generation Energy Act ("NGEA"), which prohibited the construction of new large energy facilities, importation of power from new large energy facilities, and creation of new long-term power purchase agreements that would increase "the total annual emissions of carbon dioxide from the generation of electricity within the state and all emissions of carbon dioxide from the generation of electricity imported from outside the state and consumed in Minnesota." The prohibition would not apply if a carbon reduction project offset the emissions contributed by a proposed new power plant. Plaintiffs challenged the Minnesota law as a violation of the Commerce Clause found in Article 1, Section 8 of the U.S. Constitution. The Minnesota district court found in favor of Plaintiffs, concluding that the Minnesota statute was an extraterritorial regulation and thus a per se violation of the dormant Commerce Clause.

As in many other states, the electricity industry in Minnesota operates on a regional grid system with transmission facilities owned by member utility organizations and operated by an independent system operator. In Minnesota's case, the independent system operator is the Midcontinent Independent Transmission System Operator ("MISO"). Under this regional grid system, electricity generated both inside and outside of Minnesota is channeled into a single interstate pool of electricity controlled by MISO. As a result of this pooling system, utilities have no way to preclude electricity generated in a plant wholly outside of Minnesota from reaching a Minnesota electricity consumer.

This regional electrical interconnectivity means that Minnesota's NGEA would impact not just power plant construction, power importation, and power purchase agreements within Minnesota's borders, but, as the Eighth Circuit reasoned, it also would impact an entire regional grid that includes 14 other states and parts of Canada. For example, a North Dakota utility cooperative was apprehensive about entering long-term power purchase agreements needed to meet new demand in North Dakota because of fear of violating Minnesota's law. Accordingly, Judge Loken, in a portion of the Eight Circuit opinion not joined by the other two members of the panel, held that the "district court correctly concluded that the challenged prohibitions have the practical effect of controlling conduct beyond the boundaries of' Minnesota."

The other two judges on the Eighth Circuit panel agreed that the Minnesota statutory provisions should be struck down, but for reasons other than their extraterritorial reach. Judge Murphy concluded that the district court's injunction should be upheld because the statutory provisions are preempted by the Federal Power Act, which "gives the Federal Energy Regulatory Commission ("FERC") exclusive jurisdiction to regulate wholesale sales and the transmission of electric energy in interstate commerce." Judge Colloton likewise concluded that the challenged provisions are preempted by federal law. He agreed with Judge Murphy that FERC has exclusive jurisdiction over the market at issue. But he found the statute provisions preempted only insofar as the Minnesota statute bans wholesale sales of electric energy in interstate commerce. Judge Colloton, nevertheless, reasoned that even where the Minnesota statute permits wholesale sales through carbon offsets, the statute is preempted on different grounds because it conflicts with the Clean Air Act's regulatory scheme.

Minnesota requested and received an extension to July 13, 2016, to file a petition for rehearing, but did not ultimately file the petition.

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## D.C. CIRCUIT COURT DELAYS SCHEDULE IN CHALLENGES TO EPA'S NEW PLANT STANDARDS AND CLEAN POWER PLAN

On June 24, 2016, the United States Court of Appeals for the District of Columbia granted a motion by opponents of EPA's Carbon Pollution Standards for New, Modified, and Reconstructed Power Plants ("New Source Rule") to suspend the briefing schedule in the case while some of the petitioners appeal EPA's denial of petitions to reconsider the Rule. *See North Dakota v. EPA*, No. 15-1381.

Five parties, including three that are also parties to the case pending in the D.C. Circuit, asked EPA to reconsider the New Source Rule on various grounds, including lack of viable carbon capture technology. On May 6, 2016, EPA denied the petitions for reconsideration.

Subsequently, several petitioners asked the D.C. Circuit to suspend the briefing schedule to allow the parties whose petitions were denied by EPA to file petitions for review in the D.C. Circuit. Petitioners also asked the court to then consolidate those petitions with the challenges to the New Source Rule currently pending in the court, given how closely linked the issues are in the two cases.

In granting the motion to suspend briefing, the D.C. Circuit panel ordered that motions to consolidate be filed by July 12, 2016, and motions to amend the briefing schedule and format be filed no later than August 4, 2016. The court also stated in its order that parties "are strongly urged to submit a joint motion and are reminded that the court looks with extreme disfavor on repetitious submissions…."

The D.C. Circuit also recently pushed back the schedule in the case challenging the EPA's closely related Clean Power Plan ("CPP") which, in contrast to the New Source Rule, applies to existing power plants. Oral argument in that case had been scheduled for June 2, 2016, after the court granted motions for expedited briefing. However, on May 16, 2016, the court ordered that oral argument be rescheduled for September 27, 2016. *See West Virginia v. EPA*, No. 15-1363.

The court further ordered that the case be heard en banc, rather than by a three-judge panel as originally scheduled.

The CPP currently is stayed pending resolution of the D.C. Circuit challenging, under an unusual order issued by the U.S. Supreme Court in February 2016. That order, on which the Justices split 5–4, was thought to foreshadow the Court eventually striking down the CPP. However, the unexpected death of Justice Antonin Scalia, who voted in favor of the stay, has rendered that result less certain.

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## CALIFORNIA COURT OF APPEAL REJECTS BAY AREA CITIZENS' CHALLENGE TO REGIONAL GHG REDUCTION PLAN

On June 30, 2016, California's First Appellate District Court of Appeal rejected a challenge to a regional plan ("Plan") to reduce greenhouse gas emissions ("GHG") adopted by the Bay Area's Metropolitan Transportation Commission and the Association of Bay Area Government (collectively, "Agencies"), and approved by the California Air Resources Board ("CARB"). *Bay Area Citizens v. Association of Bay Area Governments, et al.*, No. A143058. Bay Area Citizens ("Citizens") filed a petition for writ of mandate in August 2013 in the Alameda County Superior Court to challenge the Plan and appealed after the Superior Court denied the petition.

The Agencies created the Plan in response to legislation enacted in California in 2008, known as the "Sustainable Communities and Climate Protection Act of 2008" ("Act"). The Act empowers CARB to set targets for each of California's regional planning agencies to reduce GHG from automobiles and light trucks in its region. In 2010, CARB issued its GHG reductions targets for the Bay Area region, which specifically required the Agencies to develop regional land use and transportation strategies that would result in per capita percentage reductions in emission of seven percent by 2020 and 15 percent by 2035, as compared to emissions in 2005. The Agencies complied, and the Plan was approved by CARB in April 2014.

Citizens argued that, under the Plan, the Agencies imposed unnecessary land use restrictions on the Bay Area to meet 2020 and 2035 emissions reductions targets. Specifically, Citizens argued that the Agencies ignored GHG reductions expected from preexisting statewide mandates, making the Plan unnecessary. Citizens' main concern was that the Agencies planned to meet CARB's targets "primarily through reduction in the vehicle miles traveled of passenger motorcars and light trucks" resulting from "high-density land-use patterns" and "construction and extension of light and heavy rail." The Plan required "78 [percent] of new housing and 62 [percent] of new jobs, through 2040, to be located within priority development areas," i.e., "'[l]ocations within existing communities that present infill development opportunities and are easily accessible to transit, jobs, shopping and services.'" The new development was to be concentrated in areas that covered only five percent of the Bay Area's surface area. In Citizens' view, the Agencies unnecessarily adopted "a draconian, high-density land-use regime."

Citizens relied heavily on the language of the Act, which states that regional targets "must take account of" GHG reductions expected from statewide mandates. However, the Appellate Court explained that the Act requires CARB to consider statewide mandates in formulating regional targets, *not* that the regional agencies consider the reductions expected from the statewide mandates in determining how to meet those targets. According to the court, the "only legally tenable interpretation of [the Act] is that it requires the Board to set targets for, and the Agencies to strive to meet these targets by, emissions reductions resulting from regionally developed land use and transportation strategies, and that it requires those reductions to be in addition to those expected from the statewide measures." If Citizens' argument that the statewide mandates targets were sufficient for the regional plan was correct, then the Act's requirement for "an elaborate planning process" to create, adopt, and approve a regional plan would be superfluous. The court ultimately held that it was within CARB's discretion to require the Agencies to "achieve emissions reductions entirely through regional planning strategies so as to produce emissions reductions beyond those produced by statewide mandates" and affirmed the trial court's denial of Citizens' petition.

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## UK GOVERNMENT COMMITS TO FIFTH CARBON BUDGET FOLLOWING UK BREXIT VOTE

The UK referendum vote on June 23, 2016, to leave the European Union has led the House of Commons Energy and Climate Change Committee to ask questions as to how this will affect the "UK position with respect to existing EU pledges and policies, and its future interaction with the EU bloc to fight climate change." UK climate change policy to date has seen stand-alone national initiatives as well as collaborative international policies being adopted. At the same time, and in light of the 2015 Paris Agreement requirements, the European Commission is considering how the impact of Brexit may lead to a revisiting of individual Member States contributions to meet the EU's target of cutting emissions to at least 40 percent by 2030 from 1990 levels.

Until it formally ceases to be a member of the EU, which is not expected to happen for at least two years, and possibly no earlier than 2019, the United Kingdom continues to be bound by and must comply with applicable EU obligations. At a time when the United Kingdom's overall share of carbon allowances has not yet been agreed at the EU level for the purposes of the EU 2030 Paris Agreement commitment, it is notable that the United Kingdom has continued to set its own national budget. Shortly after the Brexit vote, the United Kingdom passed the Carbon Budget Order 2016 to adopt its fifth carbon budget. The budget (which is a legal requirement under the Climate Change Act 2008) sets a cap of 1.725 billion tons of $CO_2$ equivalent for the period from 2028–32. This would limit UK annual emissions in this period to an average of 57 percent below 1990 levels. The cap excludes international maritime emissions from the domestic budget. What remains unclear is how the government will take steps to implement these goals, with measures to be set out at the end of this year. What is also unclear is what the United Kingdom's future role might be under the EU Emissions Trading Scheme, which will depend on negotiations surrounding Brexit.

## NEW COMPENSATORY FEE REGIME TO REPLACE (PARTIALLY) FEED-IN TARIFFS APPLICABLE TO RENEWABLE ENERGIES

In late May 2016, the French Environment Ministry adopted several new Decrees implementing a new regime to transition the support for renewable energy from feed-in tariffs to a compensatory fee scheme. Such transition was required by the European Commission, which considers feed-in tariffs as State aids and requests a more stringent review of such aids.

The Decrees have been adopted in accordance with Article 104 of Law of August 17, 2015, on the Energy Transition, which required the energy produced by renewable energies (e.g., solar, biomass, hydropower) to replace feed-in tariffs with a compensatory fee. The compensatory fee replaces the feed-in tariff regime for some renewable installations. This new mechanism aims at improving the integration of renewable energies to the electricity market, as required by the European Commission. The principle of this new scheme is to allow a producer to sell its electricity directly on the market, while limiting the risks associated with the volatility of the market prices.

Decree n° 2016-691 specifies which installations will be eligible for the compensatory fee and which remain under the feed-in tariff regime. It should be noted that the feed-in tariff regime is maintained for small-sized installations and for wind energy producers that do not elect to benefit from the compensatory fee scheme.

Decree n° 2016-682 sets out the conditions under which the installations are eligible for the compensatory fee and establishes the calculation methods and payments: the compensatory fee will be proportional to the energy produced by the installation and calculated out of a reference fare, based in particular on an estimate of the investment and operational costs of a "sample" installation and a reference market price. It should be noticed that, in practice, the implementation of such scheme may allow installations that will perform better

than the "sample" installation used for the determination of the compensatory fee to actually earn more than they currently do based on the feed-in tariffs.

The French Environment Ministry stated that "this new regime provides visibility for the renewable energy sector and allows to accelerate the development of renewable energies in accordance with the objective of the transition to other sources of energy."

To date, the sector of renewable energy is awaiting the publication of the ministerial orders that will determine the details of the compensatory fee as well as the terms and conditions for each concerned sector (e.g., wind, solar, biomass, hydropower), which should define the level of support granted to each concerned renewable technology.

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## AUSTRALIA LAUNCHES CLEAN ENERGY INNOVATION FUND AMID FRACTIOUS FEDERAL ELECTION

Climate policy has been a highly controversial topic in Australia over the last three election cycles. In July 2016, a closely contested Federal election saw the conservative party returned to government with a slim majority in the Lower House of Parliament and a likely minority of votes in the Upper House.

The current Prime Minister, Malcolm Turnbull, has reiterated his commitment to the conservative party's Direct Action Plan, the centerpiece of which is a series of reverse auctions that finance emission reductions programs. Mr. Turnbull famously lost the party leadership in 2009 in large measure due to his support for an emissions trading scheme ("ETS"). For its part, the labour party opposition supports the introduction of two such schemes, one applying to the electricity industry and the other applying to the rest of the economic at large. The minority parties—which are likely to hold a balance of power in the Senate—have adopted an array of policy positions ranging from the reintroduction of carbon pricing and a transition to a net-zero carbon economy, to an increase of the current renewable energy target ("RET") to 50 percent by 2030, to the abolition of the RET altogether and the holding of a Royal Commission into the alleged "corruption" of climate science.

Given these divisions, the Australian Parliament is unlikely to pass any significant, climate-related reforms in the near future. A review of climate policy, scheduled to take place in 2017, may provide the occasion for further consensus-building in this area. In the meantime, government financing of renewable energy projects is likely to survive the political turmoil.

On that note, in July 2016, the Australian government launched an AUD 1 billion Clean Energy Innovation Fund ("Fund") to support emerging technologies. The Fund will invest in projects and businesses using technologies that have progressed beyond the research and development phase but that are unlikely to attract private sector capital for a variety of reasons. The Clean Energy Finance Corporation ("CEFC") will be directed to make AUD 100 million of its legislated funds available to the Fund in 2016–17, with an additional AUD 100 million available in subsequent years up to the limit of AUD 1 billion.

The Australian government will determine a target rate of return and risk level for the Fund, which will be jointly managed by the Australian Renewable Energy Agency and the CEFC. Their "reinvigorated" mandate is quite significant, the previous government having favored the abolition of both entities.

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