




U.S. REGULATORY AND LITIGATION DEVELOPMENTS

Jane K. Murphy, Editor

■ **EPA PROPOSES TO RESCIND CLEAN POWER PLAN**

What EPA Did

In a decision expected and promised since the election of President Donald Trump, the United States Environmental Protection Agency [proposed on October 16, 2017](#), to rescind the [Clean Power Plan](#) based on a revised interpretation of EPA's authority under the Clean Air Act provisions that originally were used to authorize the Clean Power Plan.

In the Clean Power Plan, and pursuant to the Agency's authority under Section 111(d) of the Clean Air Act, EPA established guidelines for carbon emission reductions at existing power plants based on the "best system of emissions reduction." The guidelines were based on the assumed ability to shift electricity generation from coal-fired units to gas-fired units and renewable generation. In its new proposal, EPA concludes that these Clean Power Plan guidelines are inconsistent with its revised interpretation of "best system of emissions reduction" which is "[limited to emission reduction measures that can be applied to or at an individual stationary source.](#)"

EPA's revised legal interpretation of "best system of emission reduction" does not allow EPA to require generation shifting to units outside of an existing unit. EPA based

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this revised interpretation on its review of the statutory text, the legislative history, prior Agency practice, statutory context, and broader policy concerns. Considering all of these factors together, EPA decided that the prior interpretation that supported the use of generation shifting to units outside of an existing system was beyond the Agency's authority under the Clean Air Act.

What EPA Did Not Do

EPA did not propose to rescind the entire legal memo supporting the Clean Power Plan. This is important because the legal memo contains several other legal positions that were the [subject of intense scrutiny](#) in the judicial proceedings challenging the Clean Power Plan. For example, the legal memo concludes that EPA's regulation of existing generating units pursuant to Section 112 of the Clean Air Act pursuant to the Mercury and Air Toxics Standards (MATS) does not prevent the issuance of emissions guidelines for existing generating units under Section 111(d).

Similarly, the revised legal interpretation does not suggest that EPA has no legal duty to proceed with regulation of carbon emissions from existing electric generating units under Clean Air Act Section 111(d). It also does not propose to rescind the endangerment finding that undergirds the entire regulatory effort. In fact, the proposal suggests that EPA will be issuing future proposals to implement emission guidelines that are consistent with the revised legal interpretation.

Impact on Future Rules

The efficiency improvements that were part of Building Block 1 in the Clean Power Plan will likely be continued in some form in a new proposal. It is also possible that a future administration could try to find that carbon capture and storage (which can be implemented at the site of an existing unit) is an appropriate basis for the emission guideline. Alternatively, a future administration could seek to require generation shifting by returning to the legal interpretation that the Obama administration used.

Impact on Pending Clean Power Plan Litigation

EPA used the proposed rule to [support a request for the United States Court of Appeals for the District of Columbia Circuit to continue to stay its decision](#) on the petitions for

review of the Clean Power Plan following the en banc argument that occurred in September 2016. [Environmental groups](#) and [some states](#) have renewed their requests for the court to issue a decision or take some other action that would have the effect of removing the February 2016 United States Supreme Court [stay](#) of the Clean Power Plan. The court proceedings will become even more complicated and unpredictable should EPA finalize its proposal to rescind the Clean Power Plan.

The deadline for commenting on the proposed rule was recently [extended](#) to January 16, 2018.

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■ CALIFORNIA MOVES FORWARD WITH REDUCTION STRATEGY FOR SHORT-LIVED POLLUTANTS

The California Air Resources Board ("CARB") has begun implementing its [Short-Lived Climate Pollutant \("SLCP"\) Reduction Strategy](#) ("SLCP Strategy"), which was approved by CARB in March 2017. The SLCP Strategy outlines a range of options, including regulations, incentives, and other market-supporting activities, to accelerate SLCP emission reduction measures in California, with a focus on anthropogenic black carbon (soot), methane, and hydrofluorocarbons ("HFCs").

CARB's SLCP Strategy was developed pursuant to [SB 605](#) (2016) and [SB 1383](#) (2016). SB 605 required CARB to develop a comprehensive strategy to reduce SLCP emissions in California, including completing an inventory of SLCPs in the state, identifying existing and new control measures to reduce emissions, and prioritizing the development of new measures for SLCPs that offer cobenefits. SB 1383 required CARB to approve and begin implementing the SLCP Strategy by January 1, 2018, and set targets for statewide reductions in SLCP emissions of 40 percent below 2013 levels by 2030 for methane and HFCs and 50 percent below 2013 levels by 2030 for anthropogenic black carbon.

The SLCP Strategy aims to reduce black carbon emissions by replacing old fireplaces and woodstoves with EPA certified wood-burning devices, electric, propane, or natural gas heaters. Residential wood combustion is forecast to be the largest individual anthropogenic source of black carbon in 2030, so a reduction of household wood combustion is anticipated to help set California on its path toward meeting SB 1383's 2030 target. Monetary incentives to aid the removal of old wood burning devices have been popular and the SLCP Strategy proposes to work with air districts to encourage the installation of nonwood burning centralized heating in new construction to avoid new residential wood combustion emissions.

Methane emissions are addressed in the SLCP Strategy in the context of agriculture, landfills, and oil and gas industrial activities, which combined account for nearly all of California's methane emissions. Agriculture emission reduction measures include dairy manure management practices, such as switching from flush water lagoon systems to anaerobic digesters or solid manure management practices, and new feeding and dietary practices to reduce methane emissions from dairy and livestock digestive processes. Landfill and wastewater treatment measures include the development of CalRecycle regulations to reduce disposal of organic waste by 50 percent of 2014 levels by 2020 and 75 percent by 2025 and the use of financial incentives and/or regulatory actions to ensure that new and existing wastewater treatment plants implement methane capture systems and maximize digestion of regional organic materials. Oil and gas emission reduction measures include a CARB greenhouse gas emission regulatory standard for crude oil and natural gas facilities, enhanced monitoring of underground gas storage facilities for methane emissions, and efforts to minimize natural gas leaks from state regulated transmission and distribution gas pipelines and facilities.

HFC emissions are tackled by focusing on refrigeration and air conditioning system fugitive refrigerant emissions, which make up the majority of HFC emissions in California. HFC emission reduction measures include an incentive program to encourage the use of low-global warming potential ("GWP") refrigerants, a prohibition on the sale or distribution of refrigerants with 100-year GWP values of 2500 or greater, and a prohibition on the use of high-GWP refrigerants in new commercial, industrial, and residential stationary refrigeration and air conditioning equipment.

The SLCP Strategy will be integrated into CARB's 2017 Climate Change Scoping Plan Update, which sets forth a comprehensive plan for achieving SB 32's statewide 2030 GHG limit of 40 percent below 1990 levels. Other concurrent planning efforts in California are expected to identify additional activities to reduce SLCP emissions, such as the California Energy Commission's Integrated Energy Policy Report, the Healthy Soils Initiative, and the Forest Carbon Plan.

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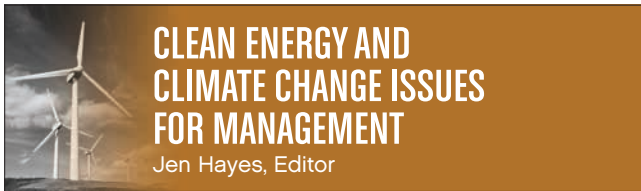
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■ **NONPROFIT ORGANIZATION PUBLISHES REPORT ARGUING THAT COMPANY BOARDS MUST BE “SUSTAINABILITY-COMPETENT” IN CLIMATE OF UNPREDICTABILITY**

Ceres, a sustainability nonprofit organization that works with influential investors and companies to build leadership and drive solutions throughout the economy, issued a report on September 14, 2017, titled “[Lead From the Top: Building Sustainability Competence on Corporate Boards](#).” The report posits that company boards must be sustainability-competent in order to achieve long-term financial performance goals, increase the company’s competitive advantage and also to meet their fiduciary responsibilities to the companies.

The report identifies key characteristics that make up sustainability-competent boards and provides key practices that corporate directors can utilize to ensure their boards are competent to make thoughtful decisions on issues such as climate change, water scarcity, and pollution. Specifically, Ceres argues that a sustainability-competent board has the following characteristics:

- Integrates knowledge of material sustainability issues into the board nominating process to recruit directors that ask the right questions;
- Educates directors on material sustainability issues to allow for thoughtful deliberation and strategic decision-making at the board level; and
- Engages with external stakeholders and experts on relevant sustainability issues.

In the report, Ceres argues that company directors must be able to determine which sustainability risks are the most material to their companies and direct their companies to capitalize on the market opportunity created by resolving sustainability challenges. According to Ceres, the key practices that corporate directors should follow to ensure boards are sustainability-competent include:

- Incorporating material sustainability issues into qualifications for potential board candidates;
- Finding directors that can make the connections between environmental and social issues and the business context;
- Recruiting candidates representing a diversity of backgrounds and skills to improve decision-making;
- Integrating new directors with sustainability competence into current board deliberations, especially on strategy and risk;
- Requiring regular education on material sustainability issues for the whole board;
- Finding regular opportunities for boards to engage stakeholders on environmental and social issues; and
- Incorporating material sustainability issues into board-investor dialogues.

Ceres explains that it is the new norm for corporations—and their boards—to mitigate disruptive forces stemming from environmental and social issues, citing the impacts of Hurricane Irma. Ceres notes that boards have a legal responsibility to act when environmental and social issues pose material risks on business models and financial performance. This legal responsibility, often referred to as fiduciary duty, generally arises under state statutory law and requires board members to exercise diligence, care, and skill in performing their roles. According to Carol Browner, former U.S. Environmental Protection Agency administrator, “[s]ustainability should be a primary matter for all board members, not just those with environmental or energy expertise and backgrounds ... Expanding board expertise on sustainability should be part of every company’s board strategy.”

Ceres developed the new report based on existing research and in-depth interviews with several experts, including corporate directors, investors, senior company leaders, and governance experts. The report builds on another report Ceres published in 2015, “[View from the Top: How Corporate Boards Can Engage on Sustainability Performance](#),” which detailed a two-pronged approach for integrating sustainability into decision-making via board governance systems and board actions.

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■ CARBON METRICS BECOME PART OF STANDARD FINANCIAL DATA FOR SOME INDICES

On October 30, 2017, S&P Dow Jones Indices, a provider of investable and benchmark indices to the financial markets, became the first such provider to publically publish carbon metrics for many of its equity indices, including the S&P Global 1200, S&P 500®, and Dow Jones Industrial Average®. S&P Dow Jones Indices will publish the data online on a monthly basis alongside its standard financial data. The debut metrics include: (i) carbon footprint defined as the metric tons of CO₂e (carbon dioxide equivalent) per \$1 million invested against the index; (ii) carbon efficiency defined as the metric tons of CO₂e per \$1 million of a company's revenues against the index; and (iii) fossil fuel reserves defined as the greenhouse gas emissions that could be generated if the proven and probable fossil fuel reserves owned by constituents were burned, per \$1 million invested.

The new metrics follow on S&P Dow Jones Indices [expansion](#) of its Environmental, Social and Governance portfolio with the acquisition of a controlling interest in the environmental data and analysis firm Trucost in October 2016 and are responsive to increased interest in understanding and evaluating climate risk. Hannah Skeates, Senior Director, Strategy and ESG Indices, S&P Dow Jones Indices explained the move as increasing transparency and shifting the market towards managing carbon risk: "As we move towards a low and zero carbon global economy, having carbon metrics as standard is likely to become commonplace. Once market participants understand their carbon exposure, they can begin to find solutions to manage this exposure and potential risk." Trucost provides the data and analysis for the metrics.

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■ RECENT DEVELOPMENTS AND FUTURE CONSIDERATIONS REGARDING CORPORATE ELECTRIC VEHICLE FLEETS

On October 4, 2017, the governors of Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming [signed a Memorandum of Understanding](#) ("MOU") to provide a framework for an electric vehicle ("EV") corridor through their

respective states. The MOU calls for a coordination group to take the following actions:

- Create best practices and procedures that will enhance EV adoption by promoting EV consumer acceptance and awareness by addressing range anxiety;
- Coordinate on the locations of EV charging stations, minimize inconsistencies between charging infrastructure in each state, and leverage economies of scale;
- Create voluntary minimum standards for EV charging stations, including standards for administration, interoperability, operations, and management;
- Identify and develop opportunities to incorporate EV charging station infrastructure into planning and development processes, such as building codes, metering policies, and renewable energy generation projects;
- Encourage EV manufacturers to stock and market a wide variety of EVs within the states; and
- Identify, respond to, and, where possible, collaborate on funding opportunities to support the development of the Regional Electric Vehicle West EV Corridor.

State governors are not the only ones taking steps to facilitate the increased use of electric vehicles. On September 19, 2017, The Climate Group [launched EV100](#), an initiative to bring global companies together to increase the number of electric corporate fleet vehicles. EV100 is currently made up of 10 transnational corporations. The member companies committed to integrate EVs into their corporate fleet by 2030 and/or install EV charging stations for customers and employees.

However, for companies considering a shift to EV fleets, some uncertainty remains. A potentially landmark announcement for EV came in November 2016 when the U.S. Department of Transportation announced that it was [establishing 48 EV charging corridors on national highways](#). Under the Trump administration, the ultimate fate of these corridors, or the DOT's ongoing enthusiasm for their development, is unclear.

Further complicating matters is the [potential rollback of automobile emissions standards](#). And, while the IRS currently offers [tax credits of up to \\$7,500 for EV purchases](#), the program begins to phase out once a manufacturer sells 200,000 qualified vehicles. Recent tax bills have [proposed to eliminate the credit](#), and regardless, it may be unlikely that the [current](#)

administration and Congress would extend this tax incentive even if it is not eliminated outright. In short, automakers may soon be facing fewer sticks and fewer carrots when it comes to developing EVs, which could in turn make a shift to EV fleets less attractive for companies.

On the other hand, while the future of federal incentives may be uncertain, [many states also offer EV incentives](#). However, such incentives can also be [subject to political winds](#).

In the end, whether to shift to an EV fleet may come down to situation-specific practical considerations. For example, even if the federal EV charging corridors continue to move forward, it would leave several [large areas of the country uncovered](#), even accounting for the western states' MOU. Therefore, "range anxiety" may remain a real concern for companies that use fleets for long distance operations in these areas.

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■ **UK GOVERNMENT THREATENED WITH LEGAL ACTION ON CLIMATE CHANGE**

The nonbinding nature of the commitments in the Paris climate change accord means that national legislatures have flexibility over how to combat climate change. In the absence of a binding multilateral agreement, citizens are holding national legislatures to account over their policies to reduce greenhouse gas ("GHG") emissions. Legal challenges have already been brought against the Dutch and Belgian governments by groups seeking to pressure them to commit to larger GHG emission reductions. The UK government is also being threatened with legal action.

In *Urgenda v Kingdom of the Netherlands*, a court in the Hague found in favor of 900 Dutch citizens who argued that the Dutch government's existing legislative commitment to reduce GHG emissions by 17 percent on 1990 levels by 2020 was insufficient to meet the requisite duty of care to the claimants. The Dutch government has appealed. A similar case in Belgium, *VZW Klimaatzaak v Kingdom of Belgium, et al.*, is currently pending.

On September 29, 2017, Plan B, a charitable group supporting "strategic legal action" against climate change, launched judicial review proceedings with a pre-action letter that attacks the failure of the UK government to revise its 2050 carbon target under the UK Climate Change Act 2008.

Plan B alleges that the Secretary of State for Business, Energy, and Industrial Strategy's failure to make more ambitious targets for 2050 is beyond the scope of its authority, irrational, and a breach of fundamental human rights. The group further alleges that the UK government is wrong in its opinion that the target of the Paris accord to keep global warming under 1.5°C is "aspirational" rather than "essential." Tim Crosland, barrister, and director of Plan B, describes this view as "like a pilot saying, as his plane careers towards the mountainside, that he's not quite

ready to change trajectory as he needs more time to study his map. It is not a reasonable or rational response to the situation.”

Plan B seeks to force the Secretary of State to change the 2050 target to a more ambitious one in respect of GHG emission reduction targets. This challenge also aims to further strengthen cases of similar groups worldwide who seek to use legal action against governments as a way of protecting the environment. This will be the first case in the UK to directly tackle climate change targets set by the UK government, although climate change targets have been raised in a number of other judicial review cases. *R (Hillingdon LBC) v Secretary of State for Transport* concerned plans for a third runway at Heathrow and *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* concerned a planning application for the installation of wind turbines. In *Hillingdon* the judge held that, in principle, statements concerning a government’s commitment to climate change were subject to judicial review and in *Derbyshire Dales* the judge supported the effect upon climate change as a ground for a policy decision. The Plan B case will offer further insight into whether the UK courts will stray further into a politically sensitive area or hold back and defer to the UK Parliament.

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■ UK GOVERNMENT ANNOUNCES CLEAN GROWTH STRATEGY

The UK government has belatedly published its Clean Growth Strategy, which sets out how it aims to meet its legal obligations under the Climate Change Act 2008. Clean growth is defined in the report as growing national income while cutting greenhouse gas emissions. The report first sets out the successes that the UK has already had in meeting climate change targets before exploring future policies. The report brings attention to the fact that the percentage of electricity

that is low carbon is double that of 2010 at 47 percent, and that England recycles approximately four times as much as in 2000.

Highlights of the strategy include:

- £2.5bn invested in low carbon innovation from 2015–2021;
- Ban on sales of combustion engine vehicles beginning in 2040;
- £1bn supporting the take-up of ultra-low emission vehicles, including helping consumers to overcome the upfront cost of an electric car; and
- Investing £1.2bn to make cycling and walking the natural choice for shorter journeys.

The document is focused on harnessing the economy to reduce carbon emissions to a greater degree than the Carbon Plan, published in 2011. The economic opportunities that exist in the move to cleaner energy are described by Greg Clarke, Secretary of State for Business, Energy, and Industrial Strategy as “one of the greatest industrial opportunities of our time.”

Despite this, many of the strategies are vague, for example to “Explore new and innovative ways manage emissions from landfill.” It is important, therefore, to note that this is not a collection of fully considered policies, but rather a broad signal of the UK government’s intention to push forward with projects that are proactive in their aim to combat climate change whilst benefiting the economy, a trend likely motivated by the wide-ranging success of the off-shore wind industry in the UK.

The strategy has been criticized by some pressure groups, including ClientEarth who argue that the strategy “fails to put us on track to meet legally binding emission targets,” missing them by 116MtCo₂e (or 53 percent versus a 57 percent target). ClientEarth is considering its legal options—any such challenge would likely be centered on sections 13–14 of the Climate Change Act 2008, which state that the government must enter into policies that allow the carbon budgets to be met and report on these policies. The UK government could, however, argue either that the unquantified portion of the strategy will allow them to meet their targets or that they could

rely on mechanisms contained within the Climate Change Act. Such mechanisms include the purchase of international offsets, or offsetting current surpluses or deficits against those in past or future budgets.

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■ FRANCE CONSIDERS PHASING OUT HYDROCARBON EXPLORATION AND PRODUCTION BY 2040

On October 10, 2017, the French National Assembly took the first step to adopt an energy-related bill that would phase out conventional and unconventional oil, gas, and coal exploration and production on French territory by 2040, if ultimately adopted after review by the Senate. This initiative is part of France's greenhouse gas reduction effort under the Paris Agreement and calls to "leave fossil fuel in the subsoil" in order to help reduce the consumption of fossil fuels in France.

No Issuance of New Permits

A law dated July 13, 2011, repealed the permits that had been granted for the exploration and production of unconventional hydrocarbon using hydraulic fracking techniques, and currently prevents public authorities from granting new permits for these activities. If adopted, the new law would extend this framework to all exploration and/or production techniques and all hydrocarbons, whether conventional or unconventional, with the exception of mine gas (an extremely minor activity with only one small site in the North of France). The law would also prohibit granting permits for applications currently under review. In contrast, the permits already granted for the exploration or production of conventional oil and gas could be prorogated until January 1, 2040, under certain conditions. As a result, the exploration and exploitation of hydrocarbons and coal would be phased out.

A Progressive Implementation

It should be noted that the original language of the bill was amended from the "ban" of oil and gas exploration and production to refer to a "phase out." Such amendment should preserve the rights of existing permit holders to have their permits prorogated if needed, thereby avoiding having the new law be struck down by the Constitutional Court. The French government believes that the increased predictability of the new framework should prevent potential compensation claims, which cannot, however, be entirely ruled out.

A Broad Territorial Scope

The new law, if adopted, will apply to the French territory (including the subsoil of land territory, internal waters, territorial sea), as well as the soil and subsoil of the exclusive economic zone. It would apply in most overseas territories, with the exception of French Polynesia and New Caledonia, which have jurisdiction to adopt legislation regarding mining activities whether on land or marine territories, and also the exception of marine areas around the French Caribbean islands of Saint-Martin and Saint Barthélemy. However, for the avoidance of doubt, this new law will only apply to fossil fuel produced on the French territory. France will actually keep importing fuel produced abroad, which represents 99 percent of oil and gas consumption in France.

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