SPRING 2018 ISSUE

# THE CLIMATE REPORT

DEPARTMENTS

Climate Change Regulatory Issues & Updates 1
Climate Change Litigation Issues & Updates 4
Climate Change Transactional Issues & Updates 6

## CLIMATE CHANGE REGULATORY ISSUES & UPDATES

### EPA RELEASES 2018 EDITION OF THE GREENHOUSE GAS EMISSIONS INVENTORY

On February 6, 2018, the U.S. Environmental Protection Agency ("EPA") released a new version of its Greenhouse Gas Emissions Inventory indicating a decline in U.S. total net greenhouse gas emissions of roughly 12 percent from 2005 to 2016. This includes a decrease of about 2.5 percent from 2015 to 2016 due in part to substitution of natural gas and other non-fossil fuel energy sources for coal in the electric power sector. Gross emissions in 2016 are still higher than 1990 levels (the baseline year for the inventory) but only by 2.4 percent, down from a high of 15.7 percent above 1990 levels in 2007.

EPA Administrator Scott Pruitt characterized the inventory as support for the agency's ongoing rollback of Obama-era climate change regulations, including the Clean Power Plan. Greenhouse gas emissions from the electric power sector were down roughly 25 percent in 2016 from 2005 levels according to the inventory. A regulatory agenda released in May 2018 indicates that EPA will propose a replacement for the Clean Power Plan in June 2018 and a final rule rescinding it by the end of the year.

In the oil and gas sector, EPA found a 1.5 percent decrease in methane emissions from 2015 to 2016 and a total decrease of about 14 percent since 1990. EPA came under fire recently for withdrawing efforts by the Obama Administration to establish methane guidelines for existing sources in the oil and gas industry. EPA's Office of Inspector General has rejected claims that EPA used flawed information to estimate methane emissions.

The inventory has no direct effect on emission standards or other requirements for industries that emit greenhouse gases. However, it does seem to play a role in EPA's planning of the current regulatory agenda, as reflected in the administrator's comments when announcing it. More broadly, the inventory has value in showing that many U.S. industries are reducing greenhouse gas emissions, despite an ongoing narrative to the contrary.

**Casey F. Bradford**
+1.404.581.8119
cbradford@jonesday.com

**Charles T. Wehland**
+1.312.269.4388
ctwehland@jonesday.com

## NEW CLEAN ENERGY TARGETS OF EUROPE'S ENERGY REFORM

The 2030 climate and energy framework, set by the European Council in 2014, provides for three main goals for the year 2030:

- At least a 40 percent reduction in greenhouse gas emissions compared with 1990 levels;
- At least 27 percent of total energy consumption from renewable energy; and
- At least a 27 percent increase in energy efficiency.

In order to achieve the European Union's 2030 climate and energy framework, the European Commission introduced, on November 30, 2016, the "clean energy" legislative package. It includes a recast of several directives from the 2030 framework. In this context, parliamentary proceedings began in late 2016 and resulted on November 28, 2017, in the proposal of two new binding objectives:

1. Each EU country must set its own national energy-efficiency targets that are needed to reach the EU objective of 40 percent reduction in energy consumption; and
2. By 2030, a minimum of 35 percent of all energy consumed in the European Union must come from renewable sources. For the transportation sector, at least 12 percent of the energy consumed in each Member State should be produced from renewable energy sources.

On January 17, 2018, the European Parliament adopted provisional versions of two directives and one regulation regarding energy efficiency, promoting the use of energy from renewable sources and governance of the Energy Union:

- On energy efficiency, the Parliament voted in favor of a binding minimum of 35 percent reduction in energy consumption (instead of the 40 percent suggested in the November 2017 proposal) as the EU target and indicative national ones (to be suggested by each Member State).
- The share of renewable energy should be 35 percent of energy consumption in the European Union in 2030. National targets should also be set, from which Member States would be allowed to deviate by a maximum of 10 percent under certain conditions.
- To achieve such Energy Union targets, each Member State will be required to file an integrated national energy and climate plan to the EU Commission by January 1, 2019, then every 10 years. The first plan should cover the period from 2021 to 2030. Subsequent plans should cover the 10-year period immediately following the end of the period covered by the previous plan.

It will take another several months until this legislative framework is adopted in its final version, and modifications could still be made. One purpose of adopting such regulations is to strengthen European leadership in the area of renewable energy by increasing incentives for affordable and integrated clean energy solutions through the implementation of financial instruments to boost private-sector investments, including, for instance, ongoing EU-financed investment programs such as the European Fund for Strategic Investments. Opportunities will include the development of renewable energy as well as the implementation of new techniques, in particular for energy storage, or new ways to reduce water consumption in energy

production. The European Parliament also insists on finding cost-effective methods for increasing energy efficiency.

**Armelle Sandrin-Deforge**
+33.1.56.59.39.47
asandrindeforge@jonesday.com

## MEXICO IMPLEMENTING CLEAN ENERGY REFORM

In the framework of implementing its Energy Reform and National Climate Change Strategy, Mexico has established clean energy and emission reduction goals as well as requirements to acquire clean energy certificates starting in 2018.

Through the enactment of the General Law of Climate Change on June 6, 2012, Mexico set out a roadmap to: (i) adopt renewable energy resources; (ii) become more sustainable; and (iii) reduce carbon emissions. Mexico committed to reduce greenhouse emissions 30 percent by 2020 and 50 percent by 2050 from 2000 levels. Additionally, by 2024, 35 percent of energy generation must be from clean energy sources. (*See Jones Day Commentary*, "Mexico Pursues Comprehensive Legal Framework to Address Climate Change.")

In 2013, Mexico reformed the energy sector through a constitutional amendment and the enactment of the Electric Industry Law, its corresponding regulations, and the enactment of the Law on Energy Transition and the Wholesale Electricity Guidelines in 2014 and 2015 (collectively, "Energy Reform"). (*See Jones Day Commentaries*, "Mexico's New Electricity Market Guidelines," "New Electricity Legal Framework in Mexico," and "Mexican Congress Approves Bill to Open Mexico's Electricity Industry to Private Investors.")

The Energy Reform overhauled the existing legal framework, allowing the private sector participation in the generation and sale of electric power, creating a wholesale electricity market, and promoting the transition to clean energy. In particular, the Law on Energy Transition provides that by 2018, at least 25 percent of energy generation will be clean energy; by 2021, at least 30 percent will be clean energy; and by 2024, at least 35 percent will be clean energy.

Further, under the new legal provisions, electricity suppliers and users must consume or purchase clean energy certificates ("CECs") for the following percentage of annual energy consumption: 5 percent in 2018, 5.8 percent in 2019, 7.4 percent in 2020, 10.9 percent in 2021, and 13.9 percent in 2022.

Clean energy power generation plants have the right to receive a CEC for each additional megawatt-hour generated without fossil fuel, which can then be sold to electricity suppliers and users through purchase agreements, through the clean energy certificates market, or through auctions of long-term purchase agreements for clean energy.

The auctions for long-term purchase agreements were developed to allow the electricity supplier to sign 15-year contracts for clean energy and power, and 20-year contracts for CECs in order to comply with its clean energy obligations.

The first auctions of long-term agreements took place in March 2016, September 2016, and November 2017, with results that, at the time, were the lowest price for renewable energy in the world.

Now, the clean energy certificates market is set to begin operation in 2018. It will be an annual spot market for the purchase and sale of CECs between those who do not cover their clean energy consumption obligations and those who have surpluses to sell. This presents yet another opportunity for low-price renewable energy.

**Teresa Souza**
+52.55.62.834.026
tsouza@jonesday.com

### THE WAVE OF CLIMATE CHANGE TORT SUITS AGAINST INDUSTRY CONTINUES

In the latest effort by municipalities seeking to hold fossil fuel companies liable for their alleged contribution to climate change, the city and county of Boulder, Colorado, and the county of San Miguel filed suit against two companies on April 17, 2018. *Board of Commissioners of Boulder County et al. v. Suncor Energy (USA) Inc. et al.*, (District Court, Boulder County, Colorado). This is the first such lawsuit by noncoastal communities against the fossil fuel industry. Other similar lawsuits filed last year by coastal municipalities and counties in California and New York City seek to hold those companies liable for the costs to be incurred by them in dealing with climate change impacts in their jurisdictions, including sea level rise. Those all remain pending in different courts in various procedural postures (*see* "Federal Court in California Denies Remand of Climate Change Litigation" and "Another Federal Court in California Grants Remand of Climate Change Litigation"). No decision on the merits has been issued in any of those cases.

The Colorado suit asserts claims of public and private nuisance, trespass, and unjust enrichment, as well as violations of Colorado consumer protection laws. The suit asserts, among other things, that the defendants, through the production, promotion, marketing, and sale of fossil fuels, knowingly contributed to climate change generally and, more specifically in the case of the Colorado communities, impacts to fragile high-altitude ecosystems, increased wildfires, and increased flooding and drainage. The suit also alleges various climate change-related impacts affecting roads and bridges, parks and forests, buildings, farming and agriculture, the ski industry, and public open space. The municipalities seek, among other things, past damages as well as future damages and costs to mitigate the impact of climate change.

Whether the Colorado action will be followed by other allegedly similarly situated municipalities in other parts of the United States remains to be seen. However, given press reports indicating that certain municipal entities have received authorization to retain outside counsel to investigate the possibility of filing such suits, it is likely that more can be expected in the future.

**Kevin P. Holewinski**
+1.202.879.3797
kpholewinski@jonesday.com

**Daniella A. Einik**
+1.202.879.3775
deinik@jonesday.com

### SUIT INVOLVING ACADEMIC DISPUTE OVER THE SCIENCE OF CLIMATE CHANGE IS WITHDRAWN

On February 22, 2018, Stanford University civil and environmental engineering professor Mark Z. Jacobson voluntarily withdrew his $10 million libel lawsuit against an academic critic and the National Academy of Sciences' ("NAS") official journal for publishing a report disputing his research on renewable energy sources in the United States. Professor Jacobson sued NAS and Vibrant Clean Energy CEO Christopher Clack, the lead author of a paper that rebutted Professor Jacobson's research on the future of renewable energy. Professor Jacobson's paper claimed that it is "technically and economically feasible with little downside" to transition to 100 percent renewable energy sources in the United States by 2050. NAS's journal, the *Proceedings of the National Academy of Sciences* ("PNAS"), published Professor Jacobson's original report in December 2015. Thereafter, PNAS published its critique of Professor Jacobson's research, written by Mr. Clack and 20 coauthors. That paper claimed that Professor Jacobson's paper "used invalid modeling tools, contained modeling errors and made implausible and inadequately supported assumptions." Professor Jacobson's suit alleged, among other things, that the backlash and disparaging media attention to his work following the Clack rebuttal damaged his reputation.

Professor Jacobson's suit is one of a growing trend of other recent lawsuits arising out of the debate on the science of climate change. The withdrawal of it leaves for both another day and another court to get involved—and potentially declare sides—in the dispute about different aspects of the science of

climate change. Inevitably, the court in Professor Jacobson's suit would have been required to evaluate the specific issues raised by both his article and Mr. Clack's rebuttal to it, which would have required the court to opine on weighty issues about the science of climate change and the potential transformation of the world's economy through the use of renewable energy—something no court has yet been required to do. With no sign of the intensity of the climate change science debate subsiding, it is likely other suits of the same kind will be filed by those who find criticism of their views actionable.

**Kevin Holewinski**
+1.202.879.3797
kpholewinski@jonesday.com

**Nick Faas**
+1.412.394.9550
nfaas@jonesday.com

## COALITION OF STATES FILES SUIT OVER EPA DECISION TO REEVALUATE FUEL EMISSIONS STANDARDS

On May 1, 2018, California, joined by 16 states and the District of Columbia, filed a Petition for Review of the U.S. Environmental Protection Agency's ("EPA") April 13, 2018, notice of withdrawal of the Final Determination of the Mid-Term Evaluation of greenhouse gas ("GHG") emission standards for model year 2022–25 light-duty vehicles previously issued under the Obama Administration. *California v. U.S. Envtl. Prot. Agency*, No. 18-1114 (D.C. Cir.). This case has been consolidated with later-filed petitions for review of the same notice by environmental groups and the National Coalition for Advanced Transportation. *Nat'l Coal. for Advanced Transp. v. U.S. Envtl. Prot. Agency*, No. 18-1118 (D.C. Cir.); *Ctr. for Biological Diversity v. U.S. Envtl. Prot. Agency*, No. 18-1139 (D.C. Cir.). The states' and National Coalition for Advanced Transportation's statements of issues are due June 4, 2018. The environmental groups' statement of issues is due June 18, 2018.

EPA's April 13 notice indicates that key assumptions EPA relied upon for the prior Mid-Term Evaluation "were optimistic or have significantly changed and thus no longer represent realistic assumptions." 83 Fed. Reg. 16077, 16078. EPA now believes that the GHG emission standards present feasibility and practicability challenges for auto manufacturers. California, on the other hand, argues that the standards are science-based and achievable and that auto manufacturers are on track to meet or exceed the standards.

The outcome of this suit has the potential to directly affect what GHG fuel emissions standards the light-duty auto industry must comply with in the next several years. It also foreshadows a fight between California and EPA regarding whether California can continue to set its own GHG emissions standards based on its Clean Air Act waiver, as EPA Administrator Scott Pruitt has indicated that EPA is assessing whether to discontinue this waiver. While the current administration has recently shown some willingness to work with California on emissions standards, there remains uncertainty regarding the fuel emissions standards that may be applicable to the auto industry in the near future.

**Jane Borthwick Story**
+1.412.394.7294
jbstory@jonesday.com

**SOLAR PANEL TARIFFS SHAPING UP TO BE A SPEED BUMP RATHER THAN A ROADBLOCK**

Earlier this year, the Trump Administration announced that it would impose tariffs on solar panels and cells imported into the United States. In advance of this decision, solar developers and installation companies feared substantial trade barriers could disrupt their burgeoning businesses. However, based on early evidence, the tariffs appear to be a project development speed bump rather than a roadblock.

The administration's decision on tariffs is the ultimate result of a petition argued before the U.S. International Trade Commission ("ITC") by Suniva Inc. and SolarWorld Americas Inc., two domestic manufacturers of solar photovoltaic panels. Following proceedings at the ITC, the President agreed to impose tariffs that will stay in effect for four years, beginning in 2018, and are set at a 30 percent rate in the first year, declining 5 percent in each of three successive years to a 15 percent rate in 2021.

Analysts currently anticipate that installations in 2018 will roughly match those in 2017, and the tariffs' impact appears to have been less dramatic than feared for a number of reasons. First, the rates announced are lower than the 50 percent duties sought by Suniva and SolarWorld. The tariffs are certainly a substantial additional cost for developers and installers, but given other efficiencies and cost reductions in panel and cell costs, their effect is to bring project prices back roughly to where they were in late 2016 or early 2017. Many rooftop installers have announced that they will simply absorb the tariffs' cost, although the economics of utility-scale projects are more vulnerable because the panel cost represents a greater proportion of overall project costs.

Another reason is that the tariffs do not apply to all solar panels, such as certain kinds of thin-film panels. The Administration's decision also exempts the first 2.5 gigawatts of imported panels each year from the tariffs. And while no one anticipates a surge in domestic panel manufacturing, a couple of companies have announced plans to set up operations in the United States—in part to avoid paying the tariffs.

Finally, companies had time to prepare for the tariffs' impact and have made adjustments to their businesses to stay competitive. Some developers and installers stockpiled panels in advance of the imposition of tariffs, providing at least a short-term supply of lower-priced panels. Companies have also sought to distinguish themselves by pairing solar projects with energy storage and/or grid services capabilities, while others have targeted niche markets such as community solar.

None of this is to say that the tariffs will not have any impact. Companies are adjusting as well as can be expected, but analysts estimate that over the next four years, installations will be 10–15 percent lower than they would have been without the tariffs. Although some companies have announced layoffs, most now predict that the tariffs' employment impact will be in stifling job creation rather than eliminating existing jobs. All in all, the tariffs do not appear to be the game-changing development that many in the industry feared.

**Patrick T. Metz**
+1.202.879.4697
pmetz@jonesday.com

**DECRIMINALIZATION OF INCIDENTAL TAKES UNDER MIGRATORY BIRD TREATY ACT IS POTENTIAL BOON FOR ENERGY INDUSTRY**

2018 marks the 100-year anniversary of the Migratory Bird Treaty Act ("MBTA"), which protects migratory birds from "takes." On the eve of this anniversary, the Trump Administration's Interior Department issued Opinion M-37050, which decriminalized "incidental takes"—the taking/killing of a migratory bird that results from, but is not the purpose of, an activity—by concluding that the MBTA does not prohibit incidental takes. This is a reverse in course from the Obama Administration's interpretation that the MBTA criminalizes any action that kills a migratory bird. *See* Opinion M-37041.

This shift in interpretation is a potential boon to the energy industry, which has previously faced significant enforcement actions for incidental takes of migratory birds in connection

with wind turbines, solar panels, and spills, to name a few. This is particularly true because, unlike other statutes protective of wildlife, the MBTA does not have a provision to allow a party to obtain a permit to cover incidental takes. Thus, companies faced automatic criminal penalties in the past, both under the Obama Administration's interpretation of the MBTA and before that, under the holding of *United States v. FMC Corp*., followed by the majority of courts.

Notably, in issuing Opinion M-37050, the Trump Administration's Interior Department employed an analysis similar to a more recent opinion from the Fifth Circuit, which limited the definition of a "take" under the MBTA by finding that it applied only to hunting and poaching situations.

The Interior Department's current position does not, however, provide complete protection to the energy industry with respect to incidental takes because it is limited to enforcement actions that might otherwise be taken under the MBTA. Companies may still be subject to liability pursuant to the broader definition of "take" under the Endangered Species Act or the Bald and Golden Eagle Protection Act as clarified in the Interior Department's April 2018 guidance memorandum and attached Q&A regarding the effect of Opinion M-37050.

**Jennifer M. Hayes**
+1.412.394.7992
jhayes@jonesday.com

# THE CLIMATE REPORT EDITORIAL BOARD


EDITORIAL BOARD

**Casey F. Bradford**
Atlanta
+1.404.581.8119
cbradford@jonesday.com

**Armelle Sandrin-Deforge**
Paris
+33.1.56.59.39.47
asandrindeforge@jonesday.com

**Danielle M. Varnell**
Washington
+1.202.879.4696
dvarnell@jonesday.com

**Chris Papanicolaou**
London
+44.20.7039.5321
cpapanicolaou@jonesday.com

**Jane Borthwick Story**
Pittsburgh
+1.412.394.7294
jbstory@jonesday.com


# REGIONAL CONTACTS


UNITED STATES

**Kevin P. Holewinski**
Washington
+1.202.879.3797
kpholewinski@jonesday.com

ASIA

**Sushma Jobanputra**
Singapore
+65.6233.5989
sjobanputra@jonesday.com

LATIN AMERICA

**Mauricio Llamas**
Mexico City
+52.55.3000.4082
mllamas@jonesday.com

EUROPE

**Françoise S. Labrousse**
Paris
+33.1.56.59.39.48
flabrousse@jonesday.com

AUSTRALIA

**John Emmerig**
Sydney
+61.2.8272.0506
jemmerig@jonesday.com


# GLOBAL LOCATIONS

ALKHOBAR
AMSTERDAM
ATLANTA
BEIJING
BOSTON
BRISBANE
BRUSSELS
CHICAGO
CLEVELAND
COLUMBUS
DALLAS
DETROIT
DUBAI
DÜSSELDORF
FRANKFURT
HONG KONG
HOUSTON
IRVINE
JEDDAH
LONDON
LOS ANGELES
MADRID
MELBOURNE
MEXICO CITY
MIAMI
MILAN
MINNEAPOLIS
MOSCOW
MUNICH
NEW YORK
PARIS
PERTH
PITTSBURGH
RIYADH
SAN DIEGO
SAN FRANCISCO
SÃO PAULO
SHANGHAI
SILICON VALLEY
SINGAPORE
SYDNEY
TAIPEI
TOKYO
WASHINGTON


Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our “Contact Us” form, which can be found on our web site at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.

© 2018 Jones Day. All rights reserved. Printed in the U.S.A.