



THE CLIMATE REPORT
Spring 2019

Climate Change Regulatory Issues & Updates



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houses of the U.S. Congress, signifies a new phase in the national debate over climate change policy in America. A central question of this debate is whether Congress should curtail fossil fuel use across American industries through a broad array of social and economic reforms and public works projects.

[\[Details\]](#)

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authorized on federal land in Wyoming.

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The [Green New Deal resolution](#), introduced in February to both houses of the U.S. Congress, signifies a new phase in the national debate over climate change policy in America. A central question of this debate is whether Congress should curtail fossil fuel use across American industries through a broad array of social and economic reforms and public works projects.

At a high level, the Green New Deal identifies a goal of keeping the global average temperature to less than 1.5 degrees Celsius above preindustrialized levels by (i) reducing global greenhouse gas emissions from human sources by 40 to 60 percent from 2010 levels by 2030; and (ii) achieving net zero global greenhouse gas emissions by 2050. A number of sweeping measures are proposed for the United States to help achieve these goals on a global scale; for example, meeting 100 percent of the U.S. power demand with renewable, zero-emission energy sources, and eliminating pollution and greenhouse gas emissions from the manufacturing, industry, agricultural, and transportation sectors "as much as technologically feasible."

While the political makeup in Washington makes it implausible that the Green New Deal will become law in the near term, further legislative efforts to achieve these outcomes may be on the horizon. The potential impact of the ensuing debate will vary from company to company but, in almost all cases, warrants serious attention in business, political, and legal planning efforts. For more information, see the related [Jones Day Commentary](#), which also discusses a recent preliminary injunction request challenging fossil fuels in a federal circuit court case.

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The French government is starting to implement a new "low-carbon label" created by a decree and a [ministerial order, both dated November 28, 2018](#). This low-carbon label aims at contributing to France's National Low-Carbon Strategy by certifying voluntary projects for the reduction of anthropic greenhouse gas ("GHG") emissions, implemented on French territory.

The low-carbon label recognizes the reduction of direct ("scope 1") GHG emissions, as well as "scope 2" indirect emissions (i.e., emissions related to the production of energy used by the project's activities) and "scope 3" indirect emissions (i.e., emissions which occur in the value chain of the project—including upstream and downstream emissions—such as raw material production or transportation, use of the

finished product, etc.). GHG trapping qualifies as an emission reduction for purposes of the low-carbon label. The certification is granted by an independent third party, itself certified for other emission reduction schemes, such as Kyoto quotas or the European Union Emissions Trading System ("EU ETS").

The purpose of the low-carbon label is to certify voluntary reduction projects that go above and beyond standard practice. As a consequence, emission reductions that are otherwise implemented to comply with mandatory requirements, in particular the EU ETS, cannot qualify for the low-carbon label. In addition, low-carbon label certified emissions are not recognized as financial instruments and cannot be transferred or traded on a market.

The French low-carbon label certified emissions standard aims at answering the increasing appetite of the market, in particular the financial market for "green" projects, which may be difficult to identify in the midst of self-proclaimed labels or unregulated certification schemes. To promote the financing of the certified projects, the low-carbon label certified emissions standard specifically provides for the participation of financial partners who will be able to claim that they contributed to the additional GHG reductions resulting from such projects.

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D.C. Circuit Remands Environmental Assessments for Wyoming Oil and Gas Leases to BLM to Consider GHG Emissions

On March 19, 2019, the U.S. District Court for the District of Columbia granted in part plaintiff nongovernmental organizations' motion for summary judgment, remanding nine environmental assessments ("EAs"), and corresponding findings of no significant impact ("FONSIs"), to the U.S. Bureau of Land Management ("BLM") to further consider the climate change impacts of oil and gas leasing

operations BLM authorized on federal land in Wyoming. *WildEarth Guardians v. Zinke*, No. 16-1724 (D.D.C. Mar. 19, 2019).

The first issue addressed by the court was whether the plaintiffs had standing to bring the challenge. While plaintiffs' challenge to the lease authorizations was based on an allegation that BLM failed to adequately consider the climate change impacts of the leases as required under the National Environmental Policy Act ("NEPA"), the court found plaintiffs had standing based on the alleged aesthetic injuries to two individuals caused by drilling rigs and associated haze and dust in areas of Wyoming that the individuals said they had visited and planned to visit again.

In addressing the merits of plaintiffs' argument, the court found that it was BLM's duty to assess the reasonably foreseeable impacts of greenhouse gas ("GHG") emissions at the leasing stage because BLM would not be able to fully prevent GHG emissions from oil and gas operations once leases were issued. While BLM argued that attempting to assess such impacts would be too speculative, the court found that the information BLM had on the number of wells to be developed—as well as the GHG emissions from each well; the GHG emissions produced by all wells overseen by certain field offices; and the GHG emissions produced by all wells in Wyoming—was sufficient to reasonably quantify the GHG emissions from development of the leased parcels in the aggregate.

The court also found that BLM must consider: (i) the downstream use of oil and gas as a reasonably foreseeable effect of oil and gas leasing; and (ii) the cumulative impact of GHG emissions from all of BLM's lease sales throughout the country, past, present, and foreseeable future. BLM need not, however, use the social cost of carbon protocol to specifically monetize climate change impacts at the leasing stage.

The court's ruling that NEPA requires BLM to undertake a more robust analysis of GHG emissions associated with the leases—both in terms of the direct emissions from the oil and gas operations on the leased land and the indirect emissions from downstream use—does not mean that these (and future) leases will not ultimately be authorized. Indeed, the court denied plaintiffs' request for vacatur, instead remanding EAs and FONSI to BLM, because the probability that BLM will be able to justify its authorization of the leases is sufficiently high. But BLM must take this obligation seriously, as the court retained

jurisdiction over the matter should plaintiffs seek to argue that BLM's work on remand still does not fulfill NEPA's requirements.

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Australian Court Rejects Proposed Coal Mine in Gloucester Valley, New South Wales

Citing significant adverse social impacts, the Land and Environment Court of New South Wales recently rejected Gloucester Resources Pty. Ltd.'s ("GRL") appeal of the Minister for Planning's refusal of a state significant development application for consent for the Rocky Hill Coal Project (the "Project"), a proposed new open cut coal mine in the Gloucester Valley in New South Wales, Australia, which would produce 21 million tonnes of coking coal over 16 years. *Gloucester Resources Pty. Ltd. v. Minister for Planning* [2019] NSWLEC 7 (8 February 2019).

Gloucester Groundswell Inc., a local community action group, was allowed to join as a party to the proceedings and submitted that the Project should be refused because the GHG emissions from the Project would adversely impact measures to limit anthropogenic climate change.

GRL did not contest that climate change is real or that anthropogenic GHG emissions must be reduced rapidly in order to meet the internationally agreed temperature targets of 1.5 or 2 degrees Celsius, but did contest that the Project needs to be refused in order to achieve these targets. The Court disagreed, finding that:

- Refusing approvals for new coal mines that will produce substantial new GHG emissions is a legitimate way to assist in achieving targets set by international agreements.
- Although the aggregate estimated GHG emissions over the life of the Project represent a small fraction of total global GHG emissions, the Project is a sizeable individual source that will contribute cumulatively to global GHG emissions. Aggregate Scope 1, 2, and 3 emissions (covering both direct and various types of indirect emissions) over the life of the Project are estimated to be at least 37.8 Mt CO₂-e.
- GRL presented no evidence of any specific plans to net out GHG emissions and make the Project carbon neutral. The Court, therefore, rejected as speculative and hypothetical the argument that the Project will not necessarily exceed the carbon budget because emissions can be reduced in other ways.
- The Project is unnecessary because other existing and approved coal mines can meet the future demand for coking coal. Relying on Dutch and U.S. cases, the Court rejected the argument that GHG emissions will occur whether or not the Project is approved because of market substitution (opening of mines in countries with lower environmental standards) and carbon leakage. The Court ignored prior Australian cases that have accepted the market substitution argument.

In short, the Chief Judge found that an open cut coal mine in this part of the Gloucester Valley would be in the wrong place at the wrong time. Wrong place because an open cut coal mine in this scenic and cultural landscape, proximate to many people's homes and farms, will cause significant planning, amenity, visual, and social impacts. Wrong time because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when a rapid and deep decrease in GHG emissions is urgently needed to meet generally agreed climate targets.

This case does not mean that a coal mine proposal in New South Wales will never be approved. But for a project proponent to obtain consent for any new coal mine proposal, the project must demonstrate significant net benefits and provide meaningful mitigation measures.

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UK Coal Mining Planning Applications: Recent Cases

The potential impact of two new coal mining projects on climate change has recently been considered by separate UK decision makers.

In March 2018, then UK Secretary of State for Housing, Communities & Local Government, Sajid Javid, refused a planning application for a three million-tonnes open cast coal mine in Northumberland. He cited reasons that GHG emissions from the proposed development would adversely impact measures to limit

climate change, departing from the appointed planning inspectorate's recommendation to approve the scheme.

In his decision letter, the secretary of state said: *"He agreed that GHG emissions would be emitted in the short-term resulting in an adverse effect of substantial significance, reducing to minor significance in the medium-term; and that greenhouse gas emissions in the long-term would be negligible, but that the effects of carbon in the atmosphere would have a cumulative effect in the long-term. Given that accumulative affect, and the importance to which the Government affords combatting climate change, he concludes that overall the scheme would have an adverse effect on greenhouse gas emissions and climate change of very substantial significance, which he gives very considerable weight in the planning balance."*

While this ruling was commended by environmental campaigners, the developer sought judicial review, and in December 2018, the High Court quashed the secretary of state's decision. It found that, among other things, he had erred in his decision by giving considerable weight to the adverse effects of GHG emissions. The Court decided that the Secretary of State had agreed to many of the planning inspectorate's findings on the proposal—for example, that there was a need for coal to meet the UK's energy needs and that there was a window within which coal from the proposed development would be used for that purpose—but reached a very different decision and had given inadequate reasons. This included the failure to explain how the UK's energy needs would be met by low carbon sources instead of coal. The application is now due to be reconsidered by a new secretary of state.

In contrast, planning permission for a deep coal mine project was granted by Cumbria County Council in March 2019. The developer will have permission to extract nearly 2.5 million tonnes of coal a year, mainly from under the seabed at Whitehaven, resulting in the release of an estimated 450 million tonnes of carbon dioxide over the 50-year lifespan of the project. The "coking coal" to be extracted will be used in the manufacture of steel. In GHG emissions terms, the argument put forward was that, because the coal would be used in the United Kingdom or Western Europe, it would actually reduce the need to import product from much further afield—the principal sources being the United States, Russia, and Australia. The applicant argued that this would save 5.3 million tonnes of carbon dioxide in transportation emissions over 50 years and, therefore, weighed in favor of the proposals when assessing its overall impact—this, at a time when the UK National Planning Policy Framework suggests that councils should be wary about coal-related projects and that planning permission should not be granted unless *"the proposal is environmentally acceptable"* or *"if it provides national, local or community benefits which clearly outweigh its likely impacts."*

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The Future of Energy Storage in the United States is Bright

As utilities, independent power producers, and large corporates shift away from fossil fuels and toward renewable energy sources, energy storage is becoming a key piece of the renewable energy solution in the United States. Unlike fossil fuels where generators can control the amount of energy supplied and when it is supplied, solar and wind power are intermittent resources that produce energy only when the sun shines or when the wind blows.

Energy storage is therefore critical not only to solve this intermittency challenge, but also to permit generators to respond rapidly to fluctuations in demand, thereby increasing grid resiliency and reducing the need for peaking plants to backstop such resources during periods of high electricity demand. As a result, energy storage will play a key role in the future of renewables development in the United States.

Like other forms of renewable resources, the cost of storage, and of batteries in particular, has declined sharply over recent years, driven by expanding manufacturing capabilities and an increase in the storage technology learning curve. This reduced cost has led to an increase in deployment of storage solutions. Battery storage, for example, has increased rapidly in recent years and appears poised for explosive future growth. While the United States currently has a little more than one GW of installed battery storage capacity, market predictors estimate that number could grow to more than seven GW of utility-scale and grid-connected battery storage by 2022. Indeed, Wood Mackenzie Power & Renewables' latest report on energy storage projects that energy storage deployments will grow thirteenfold over the next six years. *Global Energy Storage Outlook 2019: 2018 Year in Review and Outlook to 2024*. Within the United States, this growth will likely come in key markets such as California, although other states such as Hawaii, Arizona, Texas, Minnesota, and Colorado are also jumping on the energy storage train. Growth in storage projects will also be driven by utilities adopting storage as a capacity solution and as [solar-plus-storage projects become increasingly more popular](#). Indeed, in February, Arizona's largest utility, Arizona Public Service ("APS"), announced plans to install an additional [850 megawatts of energy storage by 2025](#), the largest procurement by a U.S. utility thus far, in an effort to shift customer delivery of solar power into the evening, when it becomes more valuable for the grid—a solution that is both cleaner and cheaper than relying on natural gas peaker plants. However, a recent fire at an APS storage project, which resulted in the hospitalization of four firefighters, will be a key challenge for the storage industry to tackle as it charts its path forward.

In addition, policy support will open new markets for storage in 2019 and beyond. Federal Energy Regulatory Commission Order 841, unanimously approved in February 2018, which directs regional wholesale market operators to clarify how storage can participate in the markets based on its unique attributes, will be a key storage policy driver. Moreover, in May 2018, the Department of Energy's Advanced Research Projects Agency committed \$30 million in funding for long-term energy storage

innovation. Additionally, several states have passed legislation aimed at increasing energy storage or have announced energy storage targets or incentives. In New York, for example, Governor Cuomo recently announced \$280 million in incentives for energy storage projects as a way to accelerate growth within the industry and drive down energy storage deployment costs. New York's goal is to lead the nation in energy storage deployment, [with a target of 3,000 MW by 2030](#). This confluence of events bodes well for the future of storage in the United States and will likely result in more renewable resources coming online and a continued shift away from fossil fuels.

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Germany Introduces Obligation to Install Need-Controlled Nighttime Identification of Wind Turbines

Wind energy has been a success story in Germany up to now. In 2018, Germany's wind power generation, both onshore and offshore, totaled nearly 60,000 MW, accounting for more than 20 percent of German electricity production. As discussed in a recent *Jones Day Talks* podcast, both operators of and investors in wind farms should be aware, however, of a recent amendment to the German Renewables Energies Act ("EEG"), which will increase costs of operations for many wind farms in Germany.

On December 21, 2018, the seventh amendment to the EEG was enacted. The most relevant change to come out of this amendment is the new obligation to equip wind turbines with need-controlled nighttime identification. Prior to this amendment, wind turbines in Germany with a height of 100 meters or more were required to be marked by flashing signals at night for aviation security reasons. However, the amendment requires that after July 1, 2020, plant operators will be obligated to install need-controlled nighttime identification to ensure that the signals only start flashing at night when an aircraft actually approaches. This obligation applies to both new and existing installations and therefore will require that existing wind farms be retrofitted. Moreover, it applies not only to onshore wind farms, but also to certain offshore farms, namely those in the territorial sea, in zone one of the exclusive economic zone of the North Sea and those in the exclusive economic zone of the Baltic Sea.

This obligation is not to be taken lightly. First, the penalty for noncompliance is costly. During any period of noncompliance, the feed-in tariff will be reduced to the monthly market value for the period that the operator of the wind farm remains in violation, meaning that the operator will lose the right to receive the so-called "market premium" for the power generated during any period of noncompliance. Next, this new requirement affects a majority of the wind turbines currently in operation in Germany. Indeed, according to estimates, it will affect approximately 18,000 wind turbines in Germany. Put another way, 60 percent of the approximately 30,000 wind turbines currently operating in Germany will need to be retrofitted to comply with this obligation.

The costs of retrofitting will depend on which technology is used. Until now, only rather expensive radar systems were legally permitted, at a cost of around 100,000€ per turbine. The amended EEG expressly provides, however, that equipment for the use of transponder signals from aircraft can also be used. This solution is considerably more cost effective, as according to the explanatory memorandum to the law, the costs for these receivers are approximately 30,000€ for an entire wind farm. Unfortunately, this transponder technology is not yet approved and although the general administrative regulation for the marking of aviation obstacles is likely to be adapted soon, wind farm operators who want to use the transponder technology for retrofitting should keep a close eye on developments with respect to the approval of such technology.

It is also important to note that permits must be obtained to retrofit a nighttime identification system. The device must be approved by German Air Traffic Control for nighttime identification. Prior to use on a turbine at a specific location, the approval of the responsible aviation authority is also required. In addition, from an emission control law perspective, the installation will often be an ancillary installation to the wind turbine which requires, prior to installation, a notification of change in accordance with Section 15 of the Federal Emission Control Act. Of course, the determination of which permits will be required ultimately depends on the concrete technical solution in the individual case.

Given the rather ambitious timeframe for the implementation of this retrofitting obligation, an extension option has been incorporated into the law, pursuant to which the Federal Network Agency can extend the implementation period if the necessary technical equipment is not available in the market in sufficient quantities. The Federal Network Agency may, upon application, also allow exceptions in individual cases,

in particular for smaller wind farms, if the fulfilment of the obligation is economically unreasonable. This is a discretionary decision of the Federal Network Agency for individual cases and the criteria under which such exemptions may be granted are not yet clear.

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