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CARBON QUARTERLY

ISSUE HIGHLIGHTS

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“Reliable, competitively priced energy and responsible environmental stewardship are not mutually exclusive.”

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What's Inside

The Carbon Quarterly is a newsletter covering developments in carbon policy, law, and innovation. No matter your views on climate change policy, there is no avoiding an increasing focus on carbon regulation, resiliency planning, and energy efficiency at nearly every level of government and business. Changes in carbon—and more broadly greenhouse gas—policies have the potential to broadly impact our lives and livelihoods. Carbon Quarterly offers a rundown of attention-worthy developments, including:

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Carbon Policy

U.S. HOUSE DEMOCRATS PROPOSE COMPREHENSIVE LEGISLATION TO ADDRESS CLIMATE CHANGE

On 2 March, Democratic leaders of the House Energy and Commerce Committee unveiled an updated version of their Climate Leadership and Environmental Action for our Nation's (CLEAN) Future Act. The sweeping, nearly 1,000-page bill would transform key sectors of the economy with the stated goal of achieving net zero greenhouse gas (GHG) emissions by 2050. The bill sets an interim goal of 50 percent reduction in GHG emissions from 2005 levels by 2030. The bill also lays the groundwork for what climate-related policies might ultimately be incorporated into a subsequent, multitrillion dollar infrastructure package.

The CLEAN Future Act specifically addresses energy generation, building efficiency standards, transportation, federally funded projects, and mandates climate-related risk reporting to the Securities and Exchange Commission (SEC). The bill would also address other items on President Biden's agenda, including environmental justice issues, waste reduction strategies, and workforce initiatives to retrain workers impacted by the transition to climate-friendly practices. Each of these issues is discussed briefly below.

Power

The CLEAN Future Act would set a Clean Electricity Standard goal of 100 percent clean electricity for all retail electricity suppliers by 2035. It would invest in clean energy distributed energy resources, grid infrastructure, and microgrids, all with the goal of creating a more resilient grid. The bill has provisions supporting various forms of energy generation, including efforts to streamline permitting for hydropower facilities and to support advanced nuclear technology. It would also make substantial changes to the Natural Gas Act, including placing the burden for the public interest test on a project's proponents, and instructs the Federal Energy Regulatory Commission to consider climate change in its decision making.

Buildings

The package sets new energy efficiency standards for buildings and provides funding for various programs that would make improvements to resiliency, including US\$8 billion in rebates for retrofitting projects. It sets benchmarks

to reduce water usage and annual targets to reduce energy and water usage in federal buildings.

Transportation

The bill would target transportation emissions (the largest single source of GHG pollution) with sizable investments in transportation electrification, new federal grant programs, and various other incentives to accelerate the transition to a net zero-emissions future. Provisions of interest to the transportation industry include language that would authorize US\$500 million for electric vehicle supply equipment; allocate US\$2.5 billion per year to transition to zero-emissions school buses; expand domestic manufacturing of advanced vehicles; invest US\$375 million in the Clean Cities Coalition Program; and increase the percentage of alternative fueled vehicles acquired in federal agency fleets.

Industry

The bill would create a new "Buy Clean" program at the Environmental Protection Agency (EPA), modeled after the "Buy American" program, to reduce the emissions footprint of federal-funded projects. The EPA would also establish a "Climate Star" program, similar to the existing "Energy Star" labelling program, to promote products manufactured with lower carbon footprints. It would also create a Clean Energy and Sustainability Accelerator of US\$100 billion to help states, municipalities, and businesses transition. Public companies would be required to disclose climate-related risks to the SEC.

Climate Risk Disclosures

The CLEAN Future Act would amend the Securities Exchange Act to require disclosure of climate-related risks. Specifically, companies would be required to disclose potential financial impacts of, and any risk management strategies relating to, the physical risks posed by climate change; to describe established corporate governance processes and structures to identify, assess, and manage climate-related risks; and to describe specific actions the company is taking to mitigate identified risks. The bill would require the SEC to issue "climate risk disclosure rules" within two years, which would include specific reporting standards for disclosing direct and indirect GHG emissions and what information must be included in the required risk analyses. Summaries of these disclosures would be made publicly available on the SEC's website and updated annually.

Environmental Justice

A key focus of the Biden administration, the bill includes a lengthy title focused on addressing environmental justice (EJ) issues, including those caused by climate change. There is an emphasis on involving EJ communities by increasing participation in the regulatory process under the Clean Air Act and the Solid Waste Disposal Act. The bill would create a private right of action to compel agencies to comply with EJ requirements. It includes provisions to increase air monitoring programs in fence line communities and establishes a US\$1 billion climate justice grant program to address climate change impacts in EJ communities.

State Plans

Echoing the Obama administration's Clean Power Plan, the CLEAN Future Act would require states to adopt State Climate Plans to achieve interim and mid-century emissions reductions goals set by EPA to collectively meet the national goal. The plans would set interim goals at 10-year intervals, drawing from a portfolio of state-level strategies developed by EPA. These strategies would include performance-based fuel standards, carbon removal strategies, and pollution phase out plans. The EPA would be tasked with certifying and verifying compliance with the plans.

Waste Reduction

The measure includes a title focused on reducing plastics and increasing recycling. Permitting for new or expanding plastics production would be temporarily halted pending a review of regulations by the EPA to focus on impacts to EJ communities. It also includes provisions focused on the recycling and reprocessing of batteries and key components of wind and solar technologies. Sustainable solutions for batteries and solar panels, both essential to the transition to renewable energies, will become more and more important as this equipment begins to reach the end of its useful life.

Workforce

The bill includes language aimed at retraining and supporting workers and communities impacted by the economic transition proposed in the bill. It would focus on new sources of funding for communities that lose revenue as a result. A new Office of Energy and Economic Transition within the White House would be the coordinator of related activities.

The bill will, no doubt, go through significant changes as stakeholders continue to digest the proposals and get involved in drafting future iterations of the legislation. The expansive reach of the bill, however, underscores the priorities of President Biden and Democrats in Congress looking to make good on their campaign promises to address the climate crisis.



Social Cost of Carbon Returns to US\$51 Per Ton (For Now)

Before the end of his first day in office, President Biden issued a sweeping executive order entitled “Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis” (Executive Order 13990).¹ The order called for an immediate review of agency actions during the previous administration to determine whether they were, among a number of other policy priorities, based on science. The order also reinstated an Interagency Working Group (Working Group) dedicated to determining the social costs of carbon (SCC), nitrous oxide (SCN), and methane (SCM). The Working Group was originally established under President Obama and later disbanded during the Trump administration.

Biden’s Executive Order 13990 called for publication of an interim SCC, SCN, and SCM within 30 days, which federal agencies are then to use “when monetizing the value of changes in [GHG] emissions resulting from regulations and other relevant agency actions until final values are published” in January 2022.²

On 26 February 2021, the Working Group set an interim value for the social cost of greenhouse gases at US\$51 per ton for carbon, US\$1,500 per ton for methane, and US\$18,000 per ton for nitrous oxide. By way of comparison, the Trump administration set the SCC numbers at a fraction of the interim values. Under Trump, the costs were set at US\$1-\$6 per ton for carbon and US\$55 per ton. This is very significant as the SCC is used in estimating the benefits of regulations, permits and projects. The group also published a 48-page technical support document. The supporting document notes that the Working Group is choosing to adopt the same values as those originally developed in 2013 and 2016, adjusted for inflation, due to an immediate need for a more accurate value. The Working Group noted it will be taking comment on “recent developments in the science and economics for use in a more comprehensive update.” According to the Working Group, next year’s update “will more fully address the recommendations of the National Academies of Sciences, Engineering, and Medicine . . . and other pertinent scientific literature.”

President Biden issued a memorandum emphasizing that “scientific and technological information, data, and evidence are central to the development and iterative improvement of sound policies, and to the delivery of equitable programs, across every area of government.”³ The White House says the “social cost of greenhouse gases’ combines climate science and economics to help Federal agencies and the public understand the benefits of reducing greenhouse gas emissions. The metric is a range of estimates, in dollars, of the long-term damage done by one ton of greenhouse gas emissions.”

In the executive summary of its technical support document, the Working Group elaborates on this net harm to society:

In principle, it includes the value of all climate change impacts, including (but not limited to) changes in net agricultural productivity, human health effects, property damage from increased flood risk natural disasters, disruption of energy systems, risk of conflict, environmental migration, and the value of ecosystem services.⁴

The concept of placing a monetary value on greenhouse gases can trace its roots to an executive order from President Bill Clinton, which required cost benefit analysis for all rulemakings. The order read, in part:

In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.⁵

In 2008, a decision from the Ninth Circuit Court of Appeals zeroed in on carbon emissions. The decision remanded a fuel economy standard back to the U.S. Department of Transportation, finding the agency should have monetized carbon dioxide emissions reductions in promulgating the regulation.⁶

The final values assigned to these emissions by the Working Group, expected January 2022, will have the potential to tip the balance for cost/benefit analyses in rulemakings across federal agencies and will affect carbon pricing throughout the United States. The Working Group underscores the importance of considering the global impact of emissions, “because climate impacts occurring outside the U.S. borders can directly and indirectly affect the welfare of U.S. citizens and residents” in the form of “international trade, tourism, and spillover pathways such as economic and political destabilization and global migration.”

The Working Group is co-chaired by the Office of Science and Technology Policy, Office of Management and Budget, and Council of Economic Advisers. As this body works on a final value, the public and stakeholders are expected to have an opportunity to comment.



SCALE ACT OVERVIEW

On 17 March 2021, Senator Chris Coons (D-Delaware) introduced the Storing CO₂ and Lowering Emissions Act (SCALE Act or the Act) in the U.S. Senate.⁷ The bipartisan bill, co-sponsored by Senator Bill Cassidy (R-Louisiana), seeks to address carbon capture, removal, and storage (collectively CCS) to further address climate change in the United States. The purpose of the legislation is to develop CCS infrastructure to reduce carbon dioxide (CO₂) emissions while also serving as an economic driver, creating jobs across the United States. The SCALE Act serves as both a financial mechanism and policy driver to support integration of CCS into the American economy. Fully recognizing barriers to wholesale buy-in to the SCALE Act, the legislation establishes multiple avenues by which Congress may overcome the high financial burden and shift policy goals to reflect the need for CCS integration into the U.S. energy market.

The SCALE Act intends to accomplish CCS integration through four approaches:

1. Create a Secure Geologic Storage Infrastructure Development Program to provide the U.S. Department of Energy (DOE) a cost sharing mechanism to support commercial CO₂ storage hubs;
2. Increase funding to the Environmental Protection Agency (EPA) for permitting Class VI CO₂ storage wells and grants for states to establish their own Class VI permitting programs to ensure rigorous and efficient permitting of CO₂ infrastructure;
3. Establish the CO₂ Infrastructure Finance and Innovation Act (CIFIA) Programs⁸ to finance shared CO₂ transport infrastructure; and
4. Fund grants for state and local governments to procure CO₂ utilization products for infrastructure projects and support state and local programs that create demand for materials, fuels, and other products made from captured carbon.

In addition to implementing those mechanisms, the SCALE Act also sets several policy objectives, including among others to develop standards and certifications within DOE's carbon utilization program for products that use CO₂. If implemented in its current form, the SCALE Act would generate 13,000 direct and indirect jobs over its five-year authorization period.⁹

The SCALE Act intends to serve as a bridge to a more climate friendly future. The Act has received broad endorsement from a coalition of labor, environmental, and industry stakeholders and was co-sponsored by U.S. Senators Tina Smith (D-Minnesota), John Hoeven (R-North Dakota),

Sheldon Whitehouse (D-Rhode Island), Shelley Moore Capito (R-West Virginia), Tammy Duckworth (D-Illinois), Mike Braun (R-Indiana), Jon Tester (D-Montana), Lisa Murkowski (R-Alaska), and Joe Manchin (D-West Virginia).

ALIGNING CARBON CAPTURE AND ENVIRONMENTAL JUSTICE

Carbon capture and environmental justice (EJ), once considered incompatible, are now the focus for potentially new and enduring synergies fueled by initiatives from Congress and the Biden administration.

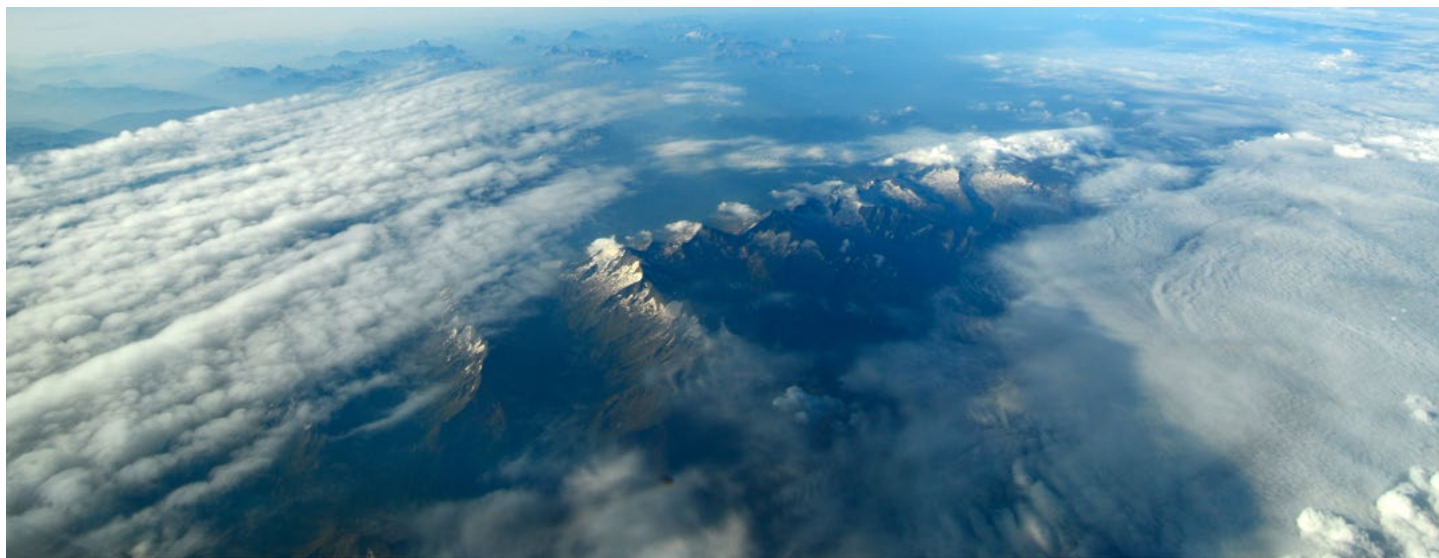
Past opposition to carbon capture has centered on two issues: the argument that it prolongs dependency on fossil fuels because it allows extraction and production to continue at the expense of demand for renewable energy, and the concern that continued coal- and gas-fired energy production adversely impacts the health of marginalized communities located near fossil fuel-based facilities, thereby perpetuating environmental injustice.

However, evolving perspectives reason that while air pollution and other environmental harms in marginalized communities are environmental injustices that must be addressed, carbon capture is a critical bridge to clean energy that will ultimately replace fossil fuel-based sources. Moreover, growing scientific consensus asserts that the only way to reach net zero carbon within a timeline that prevents irreversible damage from climate change is to leverage carbon capture technology. Indeed, in modeling scenarios to keep global warming below two degrees Celsius, the International Energy Agency concludes that a total of 15 percent of all emissions reductions to meet net zero by 2070 must come from carbon capture. With pressure mounting on the Biden administration to commit to a 50

percent reduction in greenhouse gas emissions by 2030 in order to meet its Nationally Determined Contribution under the Paris Agreement, the United States will be hard-pressed to reduce carbon through all available means. Nationally determined contributions (NDCs) are at the heart of the Paris Agreement and embody efforts by each signatory country to reduce national emissions and adapt to the impacts of climate change. The Paris Agreement (Article 4, paragraph 2) requires each signatory country to develop and maintain NDCs through domestic mitigation measures.

In the Energy Act of 2020, carbon capture utilization and storage technologies (CCS) were big winners, receiving a US\$6.2 billion¹⁰ boost. Six CCS demonstration projects will benefit from these funds—two for coal-fired facilities, two at natural gas-fired facilities, and two at other industrial facilities such as steel and cement production facilities. In addition, large-scale commercial carbon dioxide removal projects received US\$447 million in research and development funding.

Project proponents emphasize that in addition to mitigating climate change impacts, these large scale efforts contribute to environmental justice not only by limiting emissions, but also by bringing high-wage industrial, energy, and manufacturing jobs to the communities in which they are built, including “expanded support for training and apprenticeship programs undertaken in partnership with community colleges, trade unions, and other local institutions in affected communities.”¹¹ The Carbon Capture Coalition, a non-partisan collaboration of more than 80 businesses and organizations, cites a Rhodium Group analysis finding that carbon capture deployment at industrial facilities and power plants, along with deployment of the associated carbon dioxide transport infrastructure can support an annual average of up to 68,000 project jobs over a 15-year period



and 35,800 ongoing operational jobs while capturing 592 million metric tons of carbon dioxide (CO₂) per year.¹² As the United States emerges from over a year of economic damage wrought by the COVID-19 pandemic, increases in steady high-wage employment are critical to recovery, especially in hard-hit marginalized communities.

Increased employment and emissions reduction may not be enough to address the harms incurred due to environmental injustice. Enter the Biden administration's **"The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity"** (the EJ Plan). The EJ Plan revives the **EJScreen**, an Obama administration tool for identifying communities adversely impacted by environmental injustice. Identifying these communities will make it easier to implement the EJ Plan's goal to dedicate 40 percent of clean energy federal funding to EJ communities, including funding for CCS projects, and may also result in more Environmental Protection Agency enforcement actions against pollution in those communities. Additionally, the EJ Plan calls for a new environmental justice position at FERC to add EJ considerations to FERC decisions, and as part of NEPA review.

Moreover, members of Congress are actively drafting EJ legislation. In early March, Energy and Commerce Committee Chairman Frank Pallone, Jr. (D-New Jersey), Environment and Climate Change Subcommittee Chairman Paul Tonko (D-New York), and Energy Subcommittee Chairman Bobby L. Rush (D-Illinois) introduced the **Climate Leadership and Environmental Action for our Nation's (CLEAN) Future Act**. Among a multitude of policy proposals, this bill proposes specific EJ regulatory actions alongside CCS proposals. For example, Section 606 would amend the Clean Air Act such that no new or renewed permit may be granted to a major source in a census tract overburdened by pollution. Section 614 would require biennial public meetings on environmental justice issues in each region to gather public input from EJ stakeholders on EJ strategies and efforts by the EPA. In addition, Section 621 would amend the Safe Drinking Water Act to create a new class of underground injection wells used in enhanced oil recovery that use carbon dioxide to both project drinking water and sequester CO₂.

As always, whether these aspirations are attainable will be in the details. Unanticipated externalities may require a reassessment of whether deploying CCS aligns with the environmental justice needs of a community. Altogether, though, efforts to inject EJ considerations into energy decisions, along with the infusion of funding for CCS, lead to optimism that carbon capture, essential to mitigating climate change impacts, can also be a critical element in redressing harm from past environmental injustice.



Carbon Litigation and Regulation

CLIMATE CHANGE LITIGATION REACHES THE U.S. SUPREME COURT

In January 2021, the U.S. Supreme Court heard oral argument in *BP P.L.C. v. Mayor and City Council of Baltimore*,¹³ a case in which the local government plaintiffs seek recovery, under state law, from large energy companies for harms relating to climate change. The narrow, arcane issue before the Court involves the appropriate scope of review of a federal district court's order remanding a case to state court. Although the case turns on a narrow procedural issue, it is nevertheless poised to set the stage for future climate change litigation.

An ever-growing number of state and local government entities across the United States are bringing lawsuits in state court against energy companies seeking damages and equitable relief for coastal flooding, adverse health outcomes, and other effects of climate change. The energy companies, in the case before the Supreme Court and others, have sought to remove these cases to federal court, believing it to provide a more favorable forum. In support of removal, these energy companies have argued that the cases belong in federal court because, among other reasons, the alleged harms stem from activities undertaken at the direction of the federal government, and the claims necessarily arise under federal common law.¹⁴ The energy companies' attempts to remove the cases to federal court have generally (but not universally) been unsuccessful at the district court level. In turn, the energy companies have appealed the district court orders that remand the cases back to state court.

While a remand to state court typically is not appealable, 28 U.S.C. § 1447(d) permits a court of appeals to review a remand order where the removing defendant premised removal on the federal-officer removal statute (28 U.S.C. § 1442). The energy companies in the *Mayor & City Council of Baltimore v. BP P.L.C.* (like other similarly situated defendants) relied upon this provision in filing an appeal with the Court of Appeals for the Fourth Circuit, and then argued that the district court's remand order was reviewable in its entirety.¹⁵ Judge Floyd, writing for the Fourth Circuit, held that section 1447(d) only permitted review of removal under the federal officer removal statute, and not any other potential grounds for removal, and affirmed the district court's remand order for lack of sufficient federal officer involvement.¹⁶ The energy companies then filed a petition for writ of certiorari with the Supreme Court.

In September 2020, the Supreme Court granted certiorari, agreeing to review the Fourth Circuit's decision with respect to the scope of appellate review of a remand order.¹⁷ The petitioner energy companies argue that the Court should construe the scope of review under 1447(d) in accordance with the plain language of the statute, which provides that, in cases removed on federal-officer grounds, the court of appeals may review the district court's remand "order" without reference to the particular grounds for removal that permitted the appeal. But perhaps more notably, the energy companies also argue that the Supreme Court should proceed to address the remaining grounds for removal (even though the Fourth Circuit did not) and affirmatively hold that the case, and others like it, belong in federal court. Specifically, the petitioners request the Court to hold that claims alleging injury based on interstate emissions necessarily and exclusively arise under federal common law—such that the city's state law claims would effectively be dead on the merits to boot. The petitioners argue that the Court should take this somewhat unusual step to preserve judicial resources, given the proliferation of similar lawsuits across the country.¹⁸

The Supreme Court's decision in this case will have significant implications for the many climate change lawsuits that are currently pending in various federal and state courts across the country. Should the Court limit the scope of review under section 1447(d) to the particular grounds for removal that permitted the appeal, state and local governments will be able to continue their lawsuits against fossil fuel companies with limited fear of removal to federal court. Conversely, if the Supreme Court holds that section 1447(d) allows the courts of appeal to more broadly review all grounds for removal addressed in a remand order, it would give the energy companies new life in their battle to keep climate change lawsuits out of state courts. If the Supreme Court takes the energy companies up on their bold request to hold that the city's claims are exclusively governed by federal common law, it could spell the end for the city's and other plaintiffs' state law claims on the merits.

In the event that the Supreme Court declines the energy companies' invitation to consider the "federal common law" issue, similar cases are poised to raise the same question in the near future. Last year, in *City of Oakland v. BP PLC*,¹⁹ the U.S. Court of Appeals for the Ninth Circuit ruled that the plaintiffs' state law-based public nuisance claims were not preempted by, and did not arise under, federal law, reversing

the district court's decision to the contrary. On 8 January 2021, the energy company defendants in that case filed a petition for writ of certiorari with the Supreme Court.²⁰ This case may provide the Supreme Court a vehicle to address some of the core issues at the heart of the state and local governments' climate change lawsuits, even if the Court decides to avoid those issues in the pending *Baltimore case*.



THE PAST—AND FUTURE—FOR FEDERAL REGULATION OF POWER PLANT CARBON EMISSIONS

Currently before the Environmental Protection Agency (EPA) is the difficult task of developing impactful, workable, and legally sustainable regulations addressing power plant greenhouse gas (GHG) emissions under the Clean Air Act (CAA). Depending on one's point of view, the EPA's actions will provide an opportunity or risk to stakeholders and a reason to keep a close eye on future developments.

On 19 January 2021, on the eve of inauguration for the Biden administration, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) struck down EPA's last attempt at such rules, the Affordable Clean Energy Rule (ACE Rule).²¹ Issued under the Trump administration's EPA, the ACE Rule had repealed and replaced the Clean Power Plan (CPP), which the Obama administration EPA had promulgated in 2015. Whereas the CPP was an expansive rule that attempted to shift electric generation away from fossil fuel-fired plants to low- and zero-emitting alternatives, the ACE Rule sought to more narrowly require heat rate improvements at existing

coal-fired plants. Now, with the D.C. Circuit's vacatur of the ACE Rule, the EPA must go back to the drawing board and develop new rules governing power plant GHG emissions.

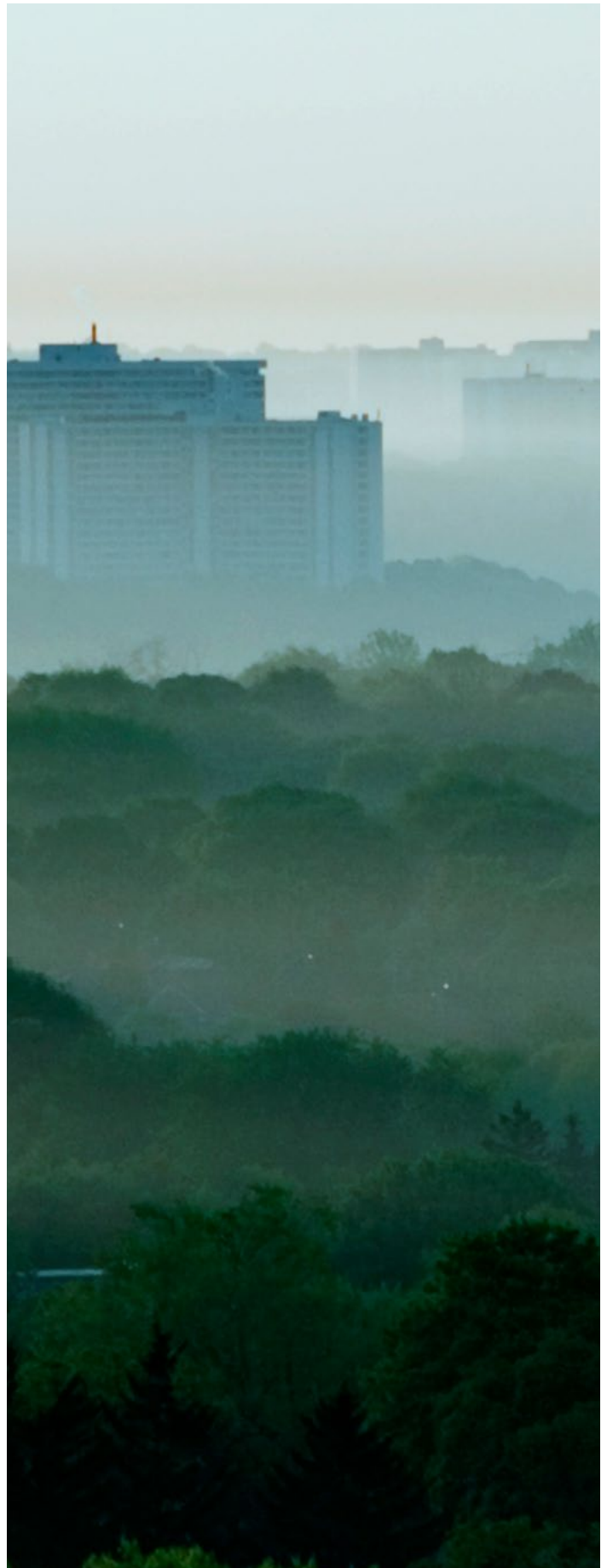
The EPA's regulation of power plant GHG emissions is traceable to the U.S. Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). In that decision, the Supreme Court held that carbon dioxide and other GHG emissions constituted "air pollutant[s]" for purposes of motor vehicle regulation under Title II of the CAA.²² The Court directed the EPA to establish standards for GHG emissions from vehicles unless the EPA determined that such GHGs did not contribute to climate change.²³ The EPA subsequently found that GHGs endanger public health and welfare (the endangerment finding) and that their emission from vehicles contribute to this endangerment (the cause or contribute finding).²⁴ These findings, as a corollary, were viewed by many as triggering an obligation for the EPA to adopt GHG performance standards (for new power plants) and emissions guidelines (for existing power plants) under Section 111 of the CAA.²⁵ This Section of the statute directs the EPA to regulate stationary source categories in this manner if they "cause[], or contribute[] significantly to, air pollution" that "may reasonably be anticipated to endanger public health or welfare."²⁶ Accordingly, the CPP and ACE Rule represent the EPA's most recent efforts to conform existing power plants' emission levels to the strictures of the CAA.

The EPA's immediate response to the D.C. Circuit's vacatur of the ACE Rule provides a hint that the EPA wants additional time before undertaking a new rulemaking action addressing existing power plants' GHG emissions under the Clean Air Act. In the aftermath of the D.C. Circuit's decision, the EPA filed an unopposed motion with the court requesting a "partial stay of the mandate" with respect to the court's vacatur of the ACE Rule's repeal of the CPP.²⁷ This motion, which the court promptly granted,²⁸ serves to prevent the CPP—with its past-due compliance deadlines and emissions reduction goals that have been largely achieved—from springing back into effect pending the EPA's next regulatory action on remand. This partial stay provides the EPA the time needed to carefully consider its options for crafting a new regulation, and a new window of opportunity for interested parties to make their views known to the EPA.

In carrying out its mandate to regulate power plant GHG emissions, the EPA's next moves will surely reflect the Biden administration's goals to address climate change, including a nationwide carbon pollution-free electric grid by 2035 and a net-zero GHG emission by 2050.²⁹ Perhaps the biggest challenge for the EPA will be drafting a regulation that both reflects the new administration's priorities while simultaneously surviving judicial scrutiny. While the D.C. Circuit's 19 January 2021 decision embraced the Obama

administration's broader view of the EPA's authority under CAA § 111, and rejected the Trump administration's narrower view, there is no guarantee that the Supreme Court will agree. Notably, the Supreme Court previously issued an unprecedented stay of the CPP while challenges proceeded before the lower courts, suggesting that a majority of the Court was skeptical of the broader view of the EPA's authority.³⁰ Since that time, the Court has only grown more conservative with former President Trump's appointment of three Justices.

In pursuit of something more likely to survive judicial scrutiny, the Biden administration may look to thread the needle and develop rules akin the CPP but without some of its more controversial, and legally vulnerable, elements. Another alternative would be to designate GHG's as "criteria pollutants" subject to National Ambient Air Quality Standards under Section 110 of the CAA—although it's not clear that such an action would resolve the agency's obligation under CAA § 111 or its related obligation under the D.C. Circuit's recent decision on remand. Whatever path the EPA takes, it is likely that any future power plant-specific rules will be but one part of a much larger and more ambitious climate agenda that includes a variety of regulatory and legislative components. Stakeholders now have an opportunity to discuss with the EPA how certain regulatory approaches may impact their respective interests, before the EPA establishes its new regulatory framework.



Carbon Business

UTILITIES ARE LOOKING TO GREEN HYDROGEN TO PROVIDE ENERGY STORAGE

U.S. utilities are beginning to deploy technology that can produce green hydrogen from renewable energy sources in an effort to expand their energy storage capacity. Green hydrogen, or hydrogen produced by the electrolysis of water, offers a means by which the intermittency of renewable generation from wind and solar may be offset by converting “excess” renewable energy into hydrogen and storing it for future use. The hydrogen, in essence, acts as battery storage for energy generated from wind and solar when that energy cannot be immediately put to use.

In Utah, the coal-fired Intermountain Power Project is transitioning to turbines that will use natural gas blended with 30 percent hydrogen, increasing to 100 percent hydrogen in the coming decades.³¹ The hydrogen used by the Intermountain Power Project will be produced via electrolysis using electricity generated from wind and solar. Nearby, the Advanced Clean Energy Storage project is seeking to develop and repurpose an underground salt dome for the storage of compressed hydrogen, potentially creating up to 150,000 megawatt-hours of energy storage capacity.

The Intermountain Power Project is also investigating how electrolyzers developed by Siemens Energy could be combined with hydrogen compression, storage, and power plant controls technology. The development of the Siemens Energy electrolyzers will be funded by a grant from the U.S. Energy Department, and is the latest of three such grants to test hydrogen technology in the United States. The other two grants include a pilot program with Duke Energy and Clemson University, and another grant to Siemens Energy to design a mechanical system to integrate hydrogen with new and existing fossil fuel-based electric generating plants.

While the United States lacks a national hydrogen energy strategy similar to Europe’s, utilities are nonetheless beginning to expand into green hydrogen. The Intermountain Power Project is emblematic of the trend towards increased integration of hydrogen into the generating capacity of traditional fossil fuel powered utilities. The project is also typical in that most hydrogen projects are being sited near underground structures suitable for hydrogen storage and near a cooperative utility with a net-zero carbon target.

Another example of the types of green hydrogen projects being proposed is the Berkley Pit. Located in Montana, this site is a massive former open-pit copper mine filled

with contaminated water. Mitsubishi Power has opened discussions with local government on a plan to convert that contaminated water into hydrogen using the increasing amount of wind power installed in Montana and Wyoming. The project could also include a 400-mile hydrogen pipeline to connect the Berkley Pit site to the Utah salt dome project.

The projects listed above all have in common the concept that green hydrogen will be treated primarily as an energy storage device, rather than a replacement for traditional fuels. Compared to the costs of creating lithium-ion or other storage technologies, green hydrogen is a much less expensive alternative to building out traditional battery capacity to balance the intermittency of wind and solar generation. While green hydrogen projects are still in the development phase in the United States, we can expect to see continued research and development of green hydrogen as an alternative energy storage mechanism.



COMPULSORY CORPORATE DISCLOSURES ON CLIMATE COMMITMENTS AND RISK: LEVELING THE PLAYING FIELD OR MANDATING A NEW FIELD?

What once was viewed as a personal hobby for the few and far between—dabbling in stock investing based on a company's environmental stewardship and idealistic principles—is now top of mind for many investors. As this trend has accelerated, the volume of companies promising that they fit environmental criteria—and increasingly social and governance criteria as well—has grown substantially. But what these statements mean and how to tell if the purported commitments are real has been a key question for many investors—and regulators—for years.

Policing Pledges

Carbon reduction pledges are a good example of the trend in corporate America, as an increasing number of companies seek to satisfy investors' wants for corporations to take responsibility for their energy footprints. Net-zero carbon commitments increased threefold between the end of 2019 and the first nine months into 2020 from 500 to 1,541, which includes more than a quarter of S&P 100 companies.³² Likewise, roughly 30 percent of Fortune Global 500 companies have made carbon-neutral, sourcing 100 percent renewable energy, or other science-based target commitments by 2030.³³ Such climate promises, including carbon reduction pledges, and details on them, are appearing most often in sustainability reports posted to corporation's websites, corporate blogs, social media postings, and in other marketing materials and platforms. While these commitments may have started as a goodwill and branding initiative, however, they have grown to carry the responsibility of our future, so policing misleading statements has arisen as a top priority.

But as this momentum toward credible verification of action builds, a problem has surfaced around standardization of reporting. A 2018 report by Ceres, a nonprofit organization that focuses on sustainable investing, reported that a majority of global companies—roughly around 58 percent—provide “no evidence of formal assurance of sustainability disclosures”³⁴ verified through a neutral third party or the equivalent. Indeed, only 17 percent of global companies “disclose which specific stakeholder constituencies they are engaging, how they engaged with them, what feedback they received, and how that feedback was incorporated into corporate strategy and reporting”;³⁵ only 15 percent of global companies provide “strong disclosure” of the role of that company's board in overseeing sustainability, including “evidence of formal board mandates for sustainability and disclosure of how relevant environmental and social issues

are discussed at the board level”;³⁶ and less than 10 percent of global companies “provide third party verified disclosures with some recommendations for improvements.”³⁷

From Discretionary Disclosures to Required Releases

The majority of carbon reduction disclosures is not driven by legal requirements or mandates, but rather has been done on a voluntarily basis. Because the nature and extent of disclosures are not required to be consistent and standardized, companies are able to benefit from greenwashing with little risk. Consequently, a new conversation has arisen to promote moving from “encouraged” reporting for the benefit of environmental, social, and corporate governance (ESG)-focused investors to mandatory, standardized reporting for the benefit of all investors and the general population. This fresh dialogue is rebalancing the risk-reward scale. The reward will extend beyond pocketbooks and into effectuating actual change to global climate crisis, since more accurate data on corporate climate footprints will help evaluate if climate change is being adequately and timely addressed.

Updated Guidance, New Rules, or New Legislation?

The Biden administration has signaled that companies will be required to disclose climate risks. On 24 February 2021, the Securities Exchange Commission (SEC) then-Acting Chair Allison Herren Lee announced that she was directing the Division of Corporation Finance to “enhance its focus on climate-related disclosure in public company filings” by updating the SEC 2010 guidance on climate disclosures with 2020 guidance.³⁸ Lee has directed SEC staff to take the results of this exercise and update the 2010 guidance on climate disclosures, as well as incorporate climate-related issues that have arisen since then.

Lee's directive, however, is just the beginning. Now that President Biden's nominee Gary Gensler has been confirmed as Chairman of the SEC, even more ambitious efforts to regulate companies on climate-related risks are bound to be implemented. This is for two reasons. First, commissioners Lee, Crenshaw, and Gensler all support more rigorous climate disclosures than are currently in place. Despite the apparent skepticism of Republican Commissioners Peirce and Roisman, Gensler, Crenshaw, and Lee together carry a majority of the votes on the Commission, paving the way for not only updating existing guidance, but potentially issuing new guidance. In light of this, expect that the SEC will soon start moving on new rules and therefore urge companies to expect a Notice of Proposed Rulemaking mid to late 2021

(which will go through public comment). Second, Gensler has indicated that he may be interested in rethinking how materiality standards impact climate-related disclosures. Gensler's vision of climate disclosure mandates would generally require a new, broad directive about reporting on climate change. Federal law presently does not expressly require publicly traded companies to disclose specific climate-related risks and rather only requires them to disclose climate-related risks if such risks are "material" to investors.³⁹ Thus, the way the law is currently written provides discretion to the reporting company in determining what information it deems as "material," which has led to voluntary, inconsistent, unreliable, and incomparable reporting disclosures amongst public companies. It may be that the SEC under Gensler makes this reporting mandatory.

The likelihood of Gensler's proposal materializing may depend in part on some recently introduced legislation. On 2 March, Democratic leaders of the House Energy and Commerce Committee announced the development of a Climate Leadership and Environmental Action for our Nation's (CLEAN) Future Act. Under the CLEAN Future Act, public companies would be required to disclose climate-related risks to the SEC. This includes reporting direct and indirect greenhouse gas emissions, as well as reporting risk management strategies used to identify and mitigate the physical and transition risks presented by climate change. This could conceivably include carbon reduction pledges. However, the Commission is clearly not waiting for legislation. On 4 March, the SEC announced the establishment of a Climate and ESG Task Force within the SEC's Division of Enforcement.⁴⁰ The Task Force's work may result in the development of a rule mandating disclosure of climate-related risks, even if the CLEAN Future Act is ultimately not passed.

Upshot

Climate disclosure mandates appear increasingly likely. However, what those disclosure requirements will look like is not yet clear. Nonetheless, it's likely they will incorporate measures to increase transparency, increase tracking of corporate climate-related initiatives, and a framework to compare initiatives. Changes at the federal level, whether it's through legislation or SEC rulemaking, will also have a trickle effect on private companies, at least those eyeing the public markets.

MICROSOFT CARBON REMOVAL PROJECT

In January 2020, Microsoft pledged that by 2030 the company will be carbon negative (meaning that by that date Microsoft will have removed from the atmosphere more carbon dioxide than the company emits in its operations), and by 2050, Microsoft will have removed from the environment all of the carbon dioxide that the company has emitted, either directly or as a result of the production of its electrical supply, since the company was founded in 1975. In July 2020, Microsoft issued a request for proposals for the first phase of its procurement of carbon removals to meet this ambitious goal. In response to the request for proposals, Microsoft received proposals from 79 project sponsors representing 189 carbon removal projects located in over 40 countries around the world.

In January 2021, on the first anniversary of its carbon negative pledge, Microsoft's President and Chief Legal Officer, Brad Smith, posted on the Official Microsoft Blog a report (Brad Smith, *One year later: The path to carbon negative — a progress report on our climate 'moonshot'*, THE OFFICIAL MICROSOFT BLOG (Jan. 28, 2021)) on the progress made by Microsoft on its pledge during the first phase of its carbon removal procurements. The blog post links to a white paper (Microsoft carbon removal—Lessons from an early corporate purchase) that provides a detailed description of the carbon removal proposals that Microsoft received, and the carbon removal procurement contracts that it entered into, during the first phase, along with a summary of the lessons learned by Microsoft as a result of the process. Microsoft's issuance of the white paper was intended in part to incentivize other companies to follow Microsoft's example.

During the first phase of its carbon removal procurements, Microsoft purchased the removal of 1.3 million metric tons of carbon from 15 separate suppliers and 26 separate carbon removal projects. In selecting projects from which to procure carbon removals, it was critical to Microsoft that the project contribute to additionality—in other words, that the payments made by Microsoft for carbon removals from the project result in carbon removals in excess of carbon removals that would have been achieved under a "business as usual" scenario (meaning removals that would have occurred in the normal course as a result of existing legal and regulatory requirements, current industry practices, and current carbon market incentives). It was also critical to Microsoft that the carbon removals be durable—in other words, that the carbon dioxide removed by the project remain sequestered from the atmosphere for an extended period (the durability period). Also, it was critical to Microsoft that the project not result in "leakage," meaning that the project not result in a decrease in carbon sequestration or increase in carbon

emissions outside the boundaries of the project as a result of implementation of the project.

The projects selected by Microsoft in the first phase of its carbon removal procurements fall into three broad categories based on the type and durability of solution they represent. They include (1) short-term nature-based solutions, such as forest projects involving afforestation and reforestation, and sustainable agriculture projects, that are projected to have a durability period of up to 100 years; (2) medium-term blended solutions, in the form of projects producing and using biochar (a charcoal-like substance produced by pyrolysis (a process that involves the heating of organic agricultural and forestry waste in the absence of oxygen) that is rich in carbon and that can be used as a soil additive in place of fertilizers), that are projected to have a durability period of between 100 and 1,000 years; and (3) long-term engineered solutions, such as direct air capture and storage (which involves chemically capturing carbon dioxide from the ambient air by filtering the air through large scrubbers and then storing the trapped carbon dioxide underground permanently in basaltic caverns in which the carbon bonds with the basalt and becomes part of the formation itself) and bioenergy with carbon capture and storage (which involves taking atmospheric carbon dioxide captured in biomass, converting the biomass through pyrolysis (the same process used in creating biochar) into a carbon-containing bio-oil, and injecting

the oil into deep geologic storage), that are projected to have a durability period of more than 1,000 years. More than 99 percent of the total volume of carbon removals that Microsoft purchased in the first phase of its carbon removals procurement comes from short-term nature-based solutions, and less than half a percent comes from medium-term blended or long-term engineered solutions. Those proportions reflect the degree to which the carbon removal solutions that are currently available align with Microsoft's project selection criteria.

The Microsoft blog post states that the first phase of its carbon removals "is both a giant leap and a modest step. On the one hand, we believe this is the largest annual carbon removal purchase any company has ever made. It's creating a new and dynamic economic market that the world needs. But compared to what we need to accomplish by 2030, it's only an initial step. . . [I]f our goal is to get to the moon by the end of this decade, this is the equivalent of sending an astronaut into orbit around the earth. It puts us on the right path, but we have a long journey ahead."⁴¹

Microsoft is now about to embark on the next phase of its carbon removal procurements, which will involve the purchase of a much larger quantity of carbon removals from many more projects, and for a longer duration, than in the first phase. K&L Gates assisted Microsoft in the first phase of its carbon removal procurements and is pleased to be assisting Microsoft also in the second phase.



Carbon Spotlight

NEXT DECADE—TAKING ENERGY TO THE NEXT LEVEL

In 2015, the Paris Accord broke new ground in the global fight to control climate change by having countries make carbon reduction commitments and progressively strengthen them over time. Known as Nationally Determined Contributions, countries around the world are actively seeking to meet their Paris Accord commitments through a host of efforts. The natural gas industry anticipates that soon countries around the world will demand that delivered fuels have a low carbon intensity or are carbon neutral.

A pioneer in this space is NextDecade, which is leading the natural gas industry in an effort to deliver the “Greenest LNG in the World” and is developing what is expected to be the first liquefied natural gas (LNG) export facility in the United States that is carbon neutral.

NextDecade is developing an export facility, Rio Grande LNG, in Brownsville, Texas. Rio Grande LNG will be capable of exporting 27 million metric tons of LNG per year. When fully operational, Rio Grande LNG will be the largest and greenest LNG export solution linking Permian Basin and Eagle Ford Shale natural gas to the global LNG market. The company’s overarching strategy to provide long-term, reliable LNG is expected to have the lowest lifecycle greenhouse gas (GHG) emissions on a free-on-board basis.

NextDecade plans to deliver sustainable energy solutions by reducing carbon dioxide (CO₂) emissions through a variety of efforts. For instance, NextDecade will partner with sustainable gas producers that will supply responsibly sourced natural gas to Rio Grande LNG. However, far and away the most significant commitment NextDecade is making relates to the work of its recently formed wholly owned subsidiary, NEXT Carbon Solutions.

NEXT Carbon Solutions is developing one of the largest carbon capture and storage (CCS) projects in North

America. With a design capacity to capture and store more than five million metric tons of CO₂ annually, NEXT Carbon Solutions’ CCS project is expected to generate high-quality, verifiable carbon offsets. NEXT Carbon Solutions will also have the capability to offer its proprietary carbon capture processes to other CO₂ emitters to help reduce CO₂ emissions associated with their own activities. In this way, NextDecade has significantly evolved its commercial offering from “just LNG” to low-GHG LNG and more.

Following regulatory and other approvals, the ambitious CCS project will be located adjacent to the Rio Grande LNG facility, capturing a significant portion of the CO₂ emissions from that facility. NEXT Carbon Solutions recently partnered with Oxy Low Carbon Ventures, which will assist it with transporting and storing the captured CO₂ in secure geologic locations in the vicinity of the Rio Grande LNG facility.

In a recent interview with K&L Gates, the company’s chairman and chief executive officer, Matthew Schatzman, confirmed, “Efforts to reduce global greenhouse gas emissions are at the very foundation of our company, and we firmly believe that reliable, competitively priced energy and responsible environmental stewardship are not mutually exclusive. We are eager to demonstrate the transformative and impactful contributions our company will make to the global energy industry and the quest for a net-zero future.”

It is sometimes said that good things come in small packages. While companies much larger than NextDecade continue to announce aspirational emissions reduction targets that will not manifest for several decades, NextDecade’s convincing and thoughtful approach will yield tangible impacts in a much shorter timeframe. As the world strives to achieve the Paris Accord’s CO₂ reduction targets, this is a player to watch, as NEXT Carbon Solutions may yet prove that it is indeed possible to substantially reduce CO₂ emissions in the global gas market and provide the world access to cleaner energy.

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Endnotes

¹ 86 FR 7037.

² *Id.*

³ *Memorandum on Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking*, (Jan. 27, 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/memorandum-on-restoring-trust-in-government-through-scientific-integrity-and-evidence-based-policymaking/>.

⁴ The White House, Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990, *2 (Feb. 2021) https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf.

⁵ 58 FR 190, available at <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>.

⁶ *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1200 (9th Cir. 2008).

⁷ A similar bill was introduced in the House of Representatives by Congressmen Mark Veasey (D-Texas) and David McKinley (R-West Virginia).

⁸ The SCALE Act intends for CIFIA to provide flexible, low-interest loans for CO₂ transport infrastructure projects and grants for initial excess capacity on new infrastructure to facilitate future growth and Front-End Engineering Design studies for CO₂ transport infrastructure.

⁹ Industrial Economics, Inc., EMPLOYMENT EFFECTS OF INVESTMENTS IN CO₂ TRANSPORT INFRASTRUCTURE AND GEOLOGIC STORAGE – THE 2021 SCALE ACT (Feb. 2021), <https://www.catf.us/wp-content/uploads/2021/03/2021-SCALE-Act-Jobs-Report.pdf>.

¹⁰ All currencies are in U.S. dollars.

¹¹ Memo from Carbon Capture Coalition to Biden Presidential Transition Team, Priorities for Carbon Capture, Removal, Transport, Use and Storage (Oct. 28, 2020).

¹² *Id.*

¹³ U.S., No. 19-1189.

¹⁴ See, e.g., *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 567 (D. Md. 2019), *as amended* (June 20, 2019), *aff'd*, 952 F.3d 452 (4th Cir. 2020), *cert. granted*, 141 S. Ct. 222, 207 L. Ed. 2d 1165 (2020).

¹⁵ *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452 (4th Cir.), *cert. granted*, 141 S. Ct. 222, 207 L. Ed. 2d 1165 (2020).

¹⁶ *Id.* at 471.

¹⁷ *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 222, 207 L. Ed. 2d 1165 (2020).

¹⁸ *Pet'r's Br.*, *BP P.L.C. v. Mayor and City Council of Baltimore*, No. 10-1189 (Nov. 16, 2020).

¹⁹ 960 F.3d 570 (9th Cir. 2020), *amended and superseded on rehearing*, 969 F.3d 895 (9th Cir. 2020).

²⁰ *Chevron Corp. v. City of Oakland*, No. 20-1089.

²¹ *Am. Lung Ass'n v. EPA*, No. 19-1140, 2021 U.S. App. LEXIS 1333 (D.C. Cir. Jan. 19, 2021).

²² See 549 U.S. 497, 528 (2007). On the other hand, in *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014), the Supreme Court concluded that GHGs are *not* “air pollutant[s]” for purposes of the permitting triggers under the CAA stationary source permit programs, which apply to power plants.

²³ 549 U.S. at 533.

²⁴ 74 Fed. Reg. 66,496 (Dec. 15, 2009).

²⁵ 42 U.S.C. § 7411.

²⁶ *Id.* §§ 7411(b)(1)(A), (d)(1).

²⁷ Respondents’ Motion for a Partial Stay of Issuance of the Mandate, *Am. Lung Ass'n v. EPA*, No. 19-1140 (D.C. Cir. Feb. 12, 2021).

²⁸ Order, *Am. Lung Ass'n v. EPA*, No. 19-1140, 2021 U.S. App. LEXIS 1333 (D.C. Cir. Feb. 22, 2021).

²⁹ Executive Order on Tackling the Climate Crisis at Home and Abroad, THE WHITE HOUSE, BRIEFING ROOM, PRESIDENTIAL ACTIONS, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/> (last visited March 26, 2021).

³⁰ See Order in Pending Case, *North Dakota v. EPA*, No. 15A773 (S. Ct. February 9, 2016), https://www.supremecourt.gov/orders/courtorders/020916zr4_4g15.pdf.

³¹ See Jeff St. John, *How Siemens Energy is Targeting the US Green Hydrogen Opportunity*, GREENTECH MEDIA (Mar. 1, 2021), <https://www.greentechmedia.com/articles/read/how-siemens-energy-is-targeting-the-u.s-green-hydrogen-opportunity>.

³² Sarah Golden, Companies made climate commitments—now its time to stop making climate chaos, (Apr. 8, 2021), <https://www.greenbiz.com/>

article/companies-made-climate-commitments-now-its-time-stop-making-climate-chaos.

³³ Natural Capital Partners, How the Fortune 500 is delivering climate action and the urgent need for more of it, (Oct. 6, 2020), <https://www.naturalcapitalpartners.com/news-resources/response-required>.

³⁴ CERES report, p. 2.

³⁵ *Id.*

³⁶ *Id.* at p. 1.

³⁷ *Id.* at p. 2.

³⁸ As part of Lee's "enhanced focus" directive, she asked the SEC staff to (i) evaluate the nature and extent to which public companies have so far addressed the topics identified in the 2010 guidance, (ii) evaluate public companies' compliance with disclosure laws under federal security laws, (iii) conduct public outreach with public companies as part of this exercise, and (iv) analyze how the market is currently managing climate-related risks.

³⁹ *Climate-Related Risk Disclosure Under U.S. Securities Laws*, Congressional Research Service (Sept. 10, 2019).

⁴⁰ The Task Force will create initiatives to "proactively identify ESG-related misconduct." The Task Force will start with (1) identifying material gaps or misstatements in registrant's disclosures of their climate risks under the existing SEC rules, (2) disclosure compliance in investment advisers' and funds' ESG strategies, and (3) analyze and hunt down tips and whistleblower complaints on ESG-related issues.

⁴¹ Brad Smith, *One year later: The path to carbon negative — a progress report on our climate 'moonshot'*, THE OFFICIAL MICROSOFT BLOG (Jan. 28, 2021).

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