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Executive Summary (2012)

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EXECUTIVE SUMMARY

By: Gina S. Warren

2011 was a year full of Energy. One could not open a (virtual) newspaper without seeing an article or commentary on energy-related issues, such as the U.S. Supreme Court's decision in *American Electric Power Co. v. Connecticut* regarding greenhouse gas ("GHG") regulation, the future of renewable energy, and natural gas extraction via hydraulic fracturing, to list a few. GHG emissions, renewable energy development, and hydraulic fracturing have historically been left to the states to police; however, the Environmental Protection Agency ("EPA") is set to commence regulation of GHG emissions as early as May 2012 and is currently studying hydraulic fracturing and its potential impact on drinking water. Regardless of the EPA's activities, it will be interesting to see how states address these issues over the next year.

AMERICAN ELECTRIC POWER CO. V. CONNECTICUT

In *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011), the U.S. Supreme Court held that the EPA's anticipated regulation of GHG under the Clean Air Act "displaced" a federal common law nuisance claim seeking reduction in GHG emissions from fossil-fuel fired power plants. While the court struck down federal common law nuisance claims, it is unclear how states will address pending cases wherein plaintiffs are seeking redress for alleged harm caused by GHG emissions under state common law nuisance.

The EPA has not yet finalized its standards for regulating carbon-dioxide emissions, but it has promised final standards by May 2012 for power plants and by November 2012 for refineries. In the meantime, states continue to enact their own carbon reduction legislation. For example, New Mexico recently passed carbon pollution reduction legislation requiring that the high polluting facilities reduce GHG emissions, with a goal of 25% below 1990 levels by 2020. While the EPA issued guidelines at the end of 2010 seemingly offering states considerable discretion to enact GHG reducing legislation—especially against the largest industrial facilities—it is unclear how (or whether) existing state regulations and new EPA standards will work in tandem.

RENEWABLE ENERGY DEVELOPMENT

A majority of states and the District of Columbia have renewable energy standard ("RES") mandates, and an additional handful have voluntary goals wherein a certain percentage of energy must come from a renewable energy source by a certain date. As the RES deadlines approach, utilities will have increased pressure to develop new

renewable energy facilities. Arguably one of the biggest obstacles to expeditious development of renewable energy is an inability to connect renewables to the U.S. electric grid. In general, renewable energy, such as wind and solar, are located in remote areas (open plains and deserts) that are not readily accessible to the grid and not transportable by other means. As a result, much renewable energy has remained undeveloped while awaiting construction of new power lines.

While the federal government has previously considered regulating interstate transmission siting, to date, regulation is left to the states or local governments to manage. Most large-scale transmission projects must pass through local and state regulatory agencies and courts before the projects are finalized. Even for utilities with eminent domain power, this process is expensive and time-consuming. To further complicate the issue, many renewable energy developers are not utilities and do not have eminent domain authority. As pressure mounts for energy companies to meet renewable energy initiatives and to reduce carbon emissions, local and state agencies could see more applications for transmission siting, and state courts could see an increase in litigation over the approvals and rejections of those applications.

HYDRAULIC FRACTURING

The process of horizontal drilling and hydraulic fracturing (“fracking”) has garnered significant media attention over the last year. Fracking arguably has substantial benefits in allowing the industry to recover gas once believed to be unrecoverable. The industry has created jobs and contributed to the economy in a time of need. Natural gas is a cleaner burning energy source than other fossil fuels, such as oil and coal, which have come under scrutiny in the fight against climate change. Nonetheless, many are concerned that these benefits may not outweigh the negative impacts on the environment and human health, with water quantity and quality taking center stage (and with earthquakes gaining attention).

Fracking requires millions of gallons of fresh water per well. In Texas (Barnett Shale) and other states where fresh water is generally at a premium, this has become a significant problem during a time of drought. In the upcoming year, Texas and other similarly situated states may need to establish water quantity restrictions through legislation or potentially through case law evaluating whether it is reasonable to allow unfettered use of freshwater in the fracking process. With regard to water quality, several states, including Texas and Pennsylvania (Marcellus Shale), have passed recent legislation requiring public disclosure of fracking fluid components for each well site; however, most states have carved out trade secret exceptions to disclosure. As states begin to enforce these disclosure requirements, courts could see an increase in litigation as the industry asserts trade secret exemptions and the public demands disclosure. Furthermore, with the dis-

closure of this information, states will also need to determine whether restrictions should be placed on the types of chemicals and additives that may be used in fracking fluid. This is especially true given the recent report by the EPA that fracking was likely linked to contaminated local water supplies in Wyoming.

