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# Climate, Energy, & Air Update Weeks of May 1 – 14, 2014

MAY 14, 2014

*Kyle Danish, Shelley Fidler, Erin Bartlett, Tracy Nagelbush, Avi Zevin*

*White House releases National Climate Assessment, which finds climate change is having current impacts in many regions . . . EPA Administrator McCarthy: agency will issue proposed rule setting greenhouse gas emission standards for existing power plants on June 2 . . . EPA issues ANPR on future fracking fluid disclosure rulemaking . . . Senate fails to vote on Shaheen-Portman energy efficiency bill or amendments that would authorize Keystone XL . . . FERC EIS finds no significant impact for Cameron LNG facility . . . D.C. Circuit upholds EPA rejection of petition for rulemaking on coal mine methane emissions . . . D.C. Circuit also upholds 2013 RFS volume requirements, and revised fine particulate matter NAAQS.*

## Executive Branch

- **White House Releases National Climate Assessment.** On May 6, the White House released the Third U.S. National Climate Assessment, the most authoritative and comprehensive source of scientific information to date about climate-change impacts across all U.S. regions and on critical sectors of the economy. The report, created by more than 300 experts guided by a 60-member Federal Advisory Committee and subject to extensive public, government, and peer review, includes national overviews, ten chapters on regional impacts (Northeast, Southeast, Midwest, Great Plains, Southwest, Northwest, Alaska, Hawaii and Pacific Islands, Oceans, and Coasts), and 10 chapters on sectors (energy; water; transportation; agriculture; forests; human health; ecosystems; urban; indigenous peoples; land use and land cover change; rural communities; and biogeochemical cycles). For the first time, the report also assesses progress in climate change response strategies, including decision support, mitigation, adaptation, and research needs. Among other things, the report concludes that all regions of the country are already feeling the impacts of climate change, with costs of inaction rising over time. A graphic and media-heavy based version of the report is available at <http://nca2014.globalchange.gov/>. For more information, see the May 6, 2014 VNF Alert at <http://www.vnf.com/2805>. (Van Ness Feldman partner T.C. Richmond served as Vice-Chair of the Federal Advisory Committee in a private capacity).
- **White House Announces Solar and Efficiency Commitments and Executive Actions.** On May 9, the Obama Administration updated progress on the President's Climate Action Plan (CAP) and announced a series of private sector, state, local, and federal commitments from over 300 organizations to advance solar energy and energy efficiency, among other CAP initiatives. In order to meet the federal commitments, the Administration announced a number of executive actions including: making a new commitment to over \$2 billion of energy efficiency investments in Federal buildings over the next 3 years; clarifying IRS rules on investment so that real estate investment trusts (REITs) can be used to help finance renewable energy; expanding the existing Fannie Mae and Federal Housing Administration Green Preservation Plus program, which provides extra loan proceeds to affordable housing properties that make energy- and water-efficiency improvements; and supporting training programs at 6 community colleges that are focused on the solar industry. The Department of Energy also announced the launch of a High Performance Outdoor Lighting Accelerator; the finalization of new appliance efficiency standards for certain electric motors and walk-in coolers and freezers; and the preliminary adoption of the latest commercial building energy code. Along with these announcements, the White House also issued a progress report on solar energy deployment. A fact sheet on the public and private sector commitments and Executive

Branch actions is available at <http://www.whitehouse.gov/the-press-office/2014/05/09/fact-sheet-president-obama-announces-commitments-and-executive-actions-a>. The Solar Progress Report is available at [http://www.whitehouse.gov/sites/default/files/docs/progress\\_report--advancing\\_toward\\_clean\\_energy\\_future.pdf](http://www.whitehouse.gov/sites/default/files/docs/progress_report--advancing_toward_clean_energy_future.pdf).

- **EPA Seeks Information for Potential Future Regulation on Fracking Fluid Disclosure.** The EPA released a prepublication version of an Advanced Notice of Proposed Rulemaking (ANPR) aimed at gathering information and beginning a public participation process on potential rules to require disclosure of the chemicals and other mixtures used in hydraulic fracturing. While hydraulic fracturing is exempt from chemical disclosure requirements under the Safe Drinking Water Act, EPA's ANPR was issued in response to a petition from environmental organizations under the Toxic Substances Control Act (TSCA). In addition to mandatory disclosure rules, EPA is also considering voluntary disclosure and recognition programs. EPA indicated it is seeking to minimize reporting burdens and duplication of state reporting requirements, as well as potential disclosure requirements from fracking on federal land proposed by the Bureau of Land Management. Comments will be due 90 days after publication of the ANPR in the Federal Register. The prepublication draft of the ANPR is available at [http://www.epa.gov/oppt/chemtest/pubs/prepub\\_hf\\_anpr\\_14t-0069\\_2014-05-09.pdf](http://www.epa.gov/oppt/chemtest/pubs/prepub_hf_anpr_14t-0069_2014-05-09.pdf).
- **Federal Financial Support for Clean Energy**
  - The Department of Energy announced commitments for up to \$141 million over three years to three offshore wind projects in New Jersey, Oregon, and Virginia. In New Jersey, Fisherman's Energy is developing a 5 MW project off the coast of Atlantic City; however the project has twice been denied approval from the New Jersey Board of Public Utilities. In Oregon, Principle Power plans to install five floating turbines and has received needed approvals from the Bureau of Ocean and Energy Management. In Virginia, Dominion Power plans to install two turbines 26 miles off the Virginia coast. Additional information about these projects is available at <http://energy.gov/eere/wind/offshore-wind-advanced-technology-demonstration-projects>.
  - The Department of Agriculture announced up to \$70 million in grants and loan guarantees for renewable energy projects on rural land under the Rural Energy for America Program (REAP). REAP was recently extended as part of the 2014 farm bill. Additional information is available at [http://www.usda.gov/wps/portal/usda/usdahome?contentid=2014/05/0079.xml&navid=N\\_EWS\\_RELEASE&navtype=RT&parentnav=LATEST\\_RELEASES&edeployment\\_action=retrievecontent](http://www.usda.gov/wps/portal/usda/usdahome?contentid=2014/05/0079.xml&navid=N_EWS_RELEASE&navtype=RT&parentnav=LATEST_RELEASES&edeployment_action=retrievecontent).
- **EPA Seeks Comment on Action Plan to Encourage Renewables.** EPA released the second version of its draft action plan for the RE-Powering America's Land Initiative. This Initiative encourages renewable energy development on current and former contaminated land, landfills, and mine sites through outreach, technical assistance and "tailored redevelopment tools." EPA's recently released Action Plan details EPA's plans over the next 2 years. The draft Action Plan is open for comment through May 30 and is available at [http://www.epa.gov/oswercpa/action\\_plan.htm](http://www.epa.gov/oswercpa/action_plan.htm).
- **FERC EIS Finds No Significant Impact for Proposed Cameron LNG Facility.** The Federal Energy Regulatory Commission (FERC) issued its final environmental impact statement (EIS) for the Sempra Energy-owned Cameron LNG export terminal in Cameron Parish, Louisiana. The final EIS was consistent with FERC's finding in its draft EIS that the facility will have no significant impact on the environment. FERC is expected to approve the Cameron LNG facility by July 29. DOE had already issued an export license for the Cameron LNG terminal in February, conditional, in part, on FERC approval. The final EIS is available at <https://www.ferc.gov/industries/gas/enviro/eis/2014/04-30-14-eis.asp>. For a more in-depth analysis of the natural gas export process, see the March 22, 2013 VNF Alert at <http://www.vnf.com/1104>.

- **DOE Announces Gasoline Reserve in Northeast.** As part of the focus on adaptation in President Obama's Climate Action Plan, the Department of Energy announced the creation of a Northeast regional gasoline reserve. This reserve is designed to provide 1 million gallons of refined gasoline across two locations in the Northeast to combat shortages caused by extreme weather events. Contracts will be awarded in late summer 2014. DOE's announcement is available at <http://energy.gov/articles/energy-department-announces-first-regional-gasoline-reserve-strengthen-fuel-resiliency>.
- **EPA Agrees to Issue Final Wood Stove NSPS in 2015.** EPA issued a proposed consent decree committing it to issue final performance standards for new residential wood heaters by Feb. 3, 2015. This consent decree is in response to challenges by environmental organizations that EPA had not met its obligation to consider revisions to the New Source Performance Standard every 8 years. EPA had proposed standards limiting emissions of particulate matter (PM) from residential wood heaters, fireplace inserts, hydronic boilers, and wood burning masonry heaters on January 3, for which the public comment period ended May 5. Unlike the majority of New Source Performance Standards, this proposed rule would require manufacturers to certify stoves and heaters to certain emission levels. EPA is taking comment on the consent decree, available at <https://s3.amazonaws.com/public-inspection.federalregister.gov/2014-10691.pdf>, through June 9.
- **EPA Staff Concludes Current Lead NAAQS Is Adequate.** EPA has released its "Policy Assessment for the Review of the Lead National Ambient Air Quality Standards." The Policy Assessment presents analyses and staff conclusions regarding the policy implications of the key scientific and technical information that will inform a review of the primary (health-based) and secondary (welfare-based) NAAQS for lead. The primary conclusion of the Policy Assessment is that the available scientific and technical analysis supports both primary and secondary NAAQS as stringent as the current NAAQS. The Policy Assessment is available at [http://www.epa.gov/ttn/naaqs/standards/pb/data/140501\\_pa\\_pb\\_fin.pdf](http://www.epa.gov/ttn/naaqs/standards/pb/data/140501_pa_pb_fin.pdf).
- **In Personnel News.** On Monday May 12, Dr. Steven Croley was confirmed as the Department of Energy's General Counsel by the Senate by voice vote. Since 2012, Croley has served as Deputy Counsel to the President and from 2011-2012 served as Special Assistant to the President for Justice and Regulatory Policy at the Domestic Policy Council.

### Legislative Branch

- **Bicameral Duo Introduces Green Bank Legislation.** On April 30, Rep. Chris Van Hollen (D-MD) and Senator Chris Murphy (D-CT) introduced H.R. 4522 and S. 2271, companion bills entitled the "Green Bank Act of 2014." Among other things, the bills would create a federal Green Bank as an independent, self-sustaining, not-for-profit, wholly owned corporation of the United States. The bank would have an initial capitalization of \$10 billion, and a maximum capitalization of up to \$50 billion. It would provide financing support for qualifying clean energy and energy efficiency projects across the United States. Additional information on the legislation is available at <http://vanhollen.house.gov/media-center/press-releases/house-democrats-introduce-the-green-bank-act-of-2014>.
- **Senators Send Letter to CEQ on NEPA and GHGs.** On May 1, Senate Environment and Public Works Committee Ranking Member David Vitter (R-LA) joined Senators Jim Inhofe (R-OK) and Richard Barasso (R-WY) in signing a letter to Council on Environmental Quality (CEQ) Acting Chairman Michael Boots. The letter urges Boots to "withdraw [CEQ's] February 2010 draft guidance that would dramatically expand the scope of the National Environmental Policy Act (NEPA) by requiring agencies to address greenhouse gas (GHG) emissions in a NEPA review." The letter is available at [http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord\\_id=37bc0895-af84-e440-fa93-347b2e6c95d9&Region\\_id=&Issue\\_id=](http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=37bc0895-af84-e440-fa93-347b2e6c95d9&Region_id=&Issue_id=)

- **Senator Releases White Paper on Energy-Water Nexus.** On May 6, Senate Energy and Natural Resources Committee Ranking Member Lisa Murkowski released a white paper entitled “The Energy-Water Nexus: Interlinked Resources That Are Vital for Economic Growth and Sustainability.” The report presents an “overview of the interdependencies between energy and water, as well as key challenges and opportunities.” Additionally, the report lists recommendations on how the federal government can “take a leadership role in not only promoting a better understanding of this “energy-water nexus,” but realizing its full potential.” The report is available at [http://www.energy.senate.gov/public/index.cfm/files/serve?File\\_id=9d529812-659b-43a1-a2d1-ef0e67894636](http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=9d529812-659b-43a1-a2d1-ef0e67894636).
- **House Holds Hearing on EPA Inspector General’s Office.** On May 7, the House Oversight and Government Reform Committee held a hearing entitled “Is EPA Leadership Obstructing It’s Own Inspector General?” Witnesses include Bob Perciasepe, EPA’s Deputy Administrator; and Allan Williams, EPA’s Deputy Assistant Inspector General for Investigations. The Committee reviewed the John Beale case as well as the most recent contentious interactions among the EPA Inspector General’s Office, EPA staff, and Congressional staff. A webcast of the hearing and additional information is available at <http://oversight.house.gov/hearing/epa-leadership-obstructing-inspector-general/>.
- **House Committee Passes Bill on Cross-Border Energy Projects.** On May 8, the House Energy and Commerce Committee voted 31 to 19 to pass H.R. 3301, the “North American Energy Act.” H.R. 3301, sponsored by Committee Chairman Fred Upton (R-MI) and Representative Gene Green (D-TX), would change the process for the approval of cross-border natural gas pipelines, electric transmission lines and oil pipelines. The Committee considered five amendments. Two were accepted by voice vote, one was withdrawn, and the last two were defeated. Additional information, including the text of the amendments considered and webcast of the mark-up are available at <http://energycommerce.house.gov/markup/full-committee-vote-hr-3301-hr-4343-and-legislation-reauthorize-satellite-television>.
- **Senate Fails to Consider Energy Efficiency Measure.** On May 12, the Senate voted 55 to 36 to invoke cloture on S. 2262, the “Energy Savings and Industrial Competitiveness Act of 2014.” The vote invoked a procedural filibuster, forcing Majority Leader Reid (D-NV) to stop the Chamber’s consideration of S. 2262 and move on to consideration of other legislation. According to statements by both Senators Jeanne Shaheen (D-NH) and Rob Portman (R-OH), the vote fell short due to failed negotiations on how many and which amendments might be considered. The proposed amendments included amendments that would have precluded EPA from promulgating greenhouse gas emission standards for power plants and an amendment that would have authorized construction of the Keystone XL Pipeline.

## Judicial Branch

- **D.C. Circuit Upholds EPA’s 2013 Renewable Fuel Standards.** On May 6, the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) rejected challenges by regulated entities to the EPA’s 2013 renewable fuel standard (RFS). *Monroe Energy LLC v. EPA*, No. 13-1265. Under EPA’s 2013 RFS, petroleum refiners and importers are required to blend 16.55 billion gallons of ethanol and other renewable fuels into the nation’s fuel supply. Refiners must meet their compliance obligation by submitting credits called “Renewable Identification Numbers” (which represent gallons of renewable fuels that have been blended into the fuel supply) by June 30, 2014. EPA issued its 2013 RFS rule in August 2013, eight and a half months after the statutory deadline of November 30, 2012. The missed deadline did not impact the D.C. Circuit’s decision. Rather, the court found that the agency acted within its statutory authority under the Clean Air Act when EPA reduced the cellulosic ethanol blending requirement in the 2013 rule, but did not reduce the overall advanced biofuel requirements: “[t]here is no requirement to reduce these latter quotas, nor does the statute prescribe any factors that EPA must

consider in making its decision.” Several other challenges not addressed by the court have been severed from the *Monroe Energy* case and are being reviewed by the agency.

- **D.C. Circuit Upholds EPA’s Fine Particulate Matter Standard.** On May 9, the D.C. Circuit upheld EPA’s decision under the Clean Air Act (CAA) to tighten the National Ambient Air Quality Standard (NAAQS) for fine particulate matter (PM<sub>2.5</sub>). *National Ass’n of Manufacturers v. EPA*, No. 13-1069. Under the CAA, EPA is required to set NAAQS for criteria pollutants, including PM<sub>2.5</sub>, and the agency must review and, as necessary, revise a NAAQS every five years. The new NAAQS lowers the annual standard for PM<sub>2.5</sub> from 15 micrograms per cubic meter (µg/m<sup>3</sup>) to 12µg/m<sup>3</sup>—a significant decrease, which the agency says will provide annual public health benefits of between \$4 billion and \$9 billion, including reductions in emergency care, heart attacks, and premature deaths. Industry groups challenged the PM<sub>2.5</sub> standard on multiple grounds, including that EPA’s “weighing of the scientific evidence” was unreasonable and that EPA acted unreasonably by amending the PM<sub>2.5</sub> monitoring requirements. As to the weight of the scientific evidence, the court found that the industry petitioners “simply have not identified any way in which EPA jumped the rails of reasonableness in examining the science.” The D.C. Circuit then proceeded to reject the remainder of the petitioners’ challenges. The petitioners also filed a petition for reconsideration with the agency regarding the issue of whether EPA improperly relied on Census Bureau data when determining the PM<sub>2.5</sub> monitoring requirements without providing the opportunity for public comment; that issue was not addressed by the court.
- **Federal Court Rejects Commerce Clause Challenge to Colorado Renewable Electricity Standard.** On May 9, the Federal District Court for the State of Colorado rejected a challenge to the state’s renewable electricity standard (RES) that claimed that the RES was in violation of the Dormant Commerce Clause. *Energy and Environmental Legal Institute v. Epel*, Civil Action No. 11-cv-00859-WJM-BNB (May 9, 2014). The plaintiff, a conservative legal think tank, argued that the RES exerts extraterritorial control of commerce by forcing production of renewable energy in other states. The court disagreed, holding that the RES does not mandate any particular methods of producing and selling energy wholly in other states; instead, it only exerts influence over those out-of-state energy producers that opt to do business with Colorado utilities. The court further held that this influence—in the form of an incentive to produce and sell renewable energy rather than fossil energy—does not violate the Dormant Commerce Clause. The court also rejected arguments that the Colorado RES impermissibly burdens interstate commerce because it is inconsistent with other state renewable portfolio standards or because it diminishes the market for fossil energy. The plaintiffs have said they will appeal the decision. The decision comes on the heels of a decision by the Federal District Court for Minnesota, which struck down that state’s carbon dioxide standards for power sales on the grounds that the standards violate the Dormant Commerce Clause. See our May 1 CEA update: <http://www.vnf.com/2772>.
- **D.C. Circuit Upholds EPA Rejection of Petition to Regulate Coal Mine Methane.** On May 13, the D.C. Circuit rejected a petition for review of an EPA decision not to undertake a rulemaking to determine whether to regulate coal mine methane under CAA Section 111. *WildEarth Guardians v. EPA*, No. 13-1212. In 2010, environmental groups petitioned the agency to add coal mines to the list of stationary source categories under the CAA’s New Source Performance Standards (NSPS) because, according to the petitioners, coal mines account for 10.5% of the nation’s methane emissions. EPA denied that petition in 2013 after finding that at the time, the agency “must prioritize its actions in light of limited resources and ongoing budget uncertainties, and at this time, cannot commit to conducting the process to determine whether coal mines should be added to the list of categories under” the CAA. The agency left open the possibility of future regulations of coal mines under the NSPS program. The environmentalists challenged EPA’s decision in the D.C. Circuit, arguing that EPA’s reasons for denying the petition for rulemaking did not conform to the reasoning in the

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**If you have question about topics covered in this Update, please contact Kyle Danish at [kwd@vnf.com](mailto:kwd@vnf.com).**

"endangerment" decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). The D.C. Circuit disagreed, finding that EPA has broad discretion under *Massachusetts* to determine the "timing and priorities of its regulatory agenda," and that EPA provided a "reasonable explanation as to why it cannot or will not exercise its discretion' to regulate coal mines at this time." The court it reasonable for the agency to choose to focus on regulating more significant sources of air pollutants before determining whether or not to regulate coal mine methane emissions.

## About Us

With offices in Washington, D.C. and Seattle, WA, Van Ness Feldman is recognized as a leading law and policy firm in the areas of traditional and renewable energy regulation and project development, climate change regulation and greenhouse gas emissions trading, environmental and natural resources regulation, and infrastructure development. Van Ness Feldman has been recognized nationally and regionally by *Chambers USA*, *Chambers Global*, and *U.S. News / Best Lawyers* for its Energy, Environment, Government Relations, Transportation, and Native American Law practices. The firm's Climate Change practice has received top recognition by *Chambers USA* and *Chambers Global*.

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