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Climate, Energy, & Air Update Weeks of March 6 – 19, 2014

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White House announces climate data initiative . . . House passes bill blocking EPA power plant greenhouse gas regulations while Senate Democrats host climate “talk-a-thon” . . . DOE cracks down on energy-intensive flakers and nuggeters in the ice-making industry . . . Senate Foreign Relations Committee airs it out on Keystone XL . . . This is not the MATS decision you are looking for: D.C. Circuit rejects petition challenging particulate matter New Source Performance Standards for power plants.

Executive Branch

- **White House Announced Climate Data Initiative.** Representing the White House, on March 19, Counselor to the President John Podesta and Director of the White House Office of Science and Technology Policy John Holdren announced the launch of a new climate data initiative aimed at providing the public with easy access to data on climate change impacts. The initiative includes a platform hosted at data.gov that can serve as a central clearinghouse for maps, data files, and other tools related to climate preparedness, with an initial focus on coastal flooding and sea level rise; a Coastal Flooding Challenge to encourage entrepreneurs to develop data-visualization tools; and a number of private sector partnerships for the development and use of similar data. A White House statement said that the aim of the initiative is to help communities and businesses “better understand, manage, and prepare for the real-world impacts associated with climate change.” A fact sheet on the initiative is available at <http://www.whitehouse.gov/the-press-office/2014/03/19/fact-sheet-president-s-climate-data-initiative-empowering-america-s-comm>. The data platform is accessible at <http://climate.data.gov>.
- **U.S. Participates in First 2014 International Climate Negotiations.** Diplomats, including from the United States, met from March 10 through March 14 in Bonn, Germany for the year’s first round of climate negotiations as part of an effort to develop a new global agreement by December 2015. One critical success was the selection of “contact groups” of select countries to begin working on the text of the 2015 agreement at the next meeting in June. Consistent with this development, the Department of State issued policy guidance on March 7 directing all American diplomats, not just those specifically tasked with environmental portfolios, to make climate change a top priority in managing relationships with other countries and in implementing other new foreign policy initiatives.
- **DOE Proposes New Appliance Efficiency Standard for Commercial Ice Makers.** The Department of Energy proposed a new appliance efficiency rule that, if finalized, will require commercial ice makers, now including those that make “flake” and “nugget” in addition to “cubed” ice, to be as much as 30 percent more energy efficient than the current standard. DOE predicts that the proposed standard would reduce greenhouse gas (GHG) emissions by 15 million metric tons and save consumers \$1.75 billion in electric bills over the next 30 years. The proposed rule is open for public comment for 60 days. Additional information about the commercial ice makers proposal can be found at <https://www.federalregister.gov/articles/2014/03/17/2014-05566/energy-conservation-program-energy-conservation-standards-for-automatic-commercial-ice-makers>.

- **DOE Supports Wind Energy Regional Resource Centers.** The Department of Energy announced \$1.2 million in funding for renewable energy groups to partner with the agency and the National Renewable Energy Laboratory to establish six Wind Energy Regional Resource Centers. The purposes of the centers include providing accurate information about wind development in each region, developing and disseminating best practices, and working with regional decision-makers to ensure they have the needed tools and policy to make informed decisions about wind energy. DOE's funding announcement is available at http://www.windpoweringamerica.gov/filter_detail.asp?itemid=4144.
- **CEQ Announces New General Counsel.** The White House Council on Environmental Quality (CEQ) announced that Brenda Mallory will take over as CEQ general counsel in April. Mallory most recently was EPA acting general counsel and principal deputy general counsel. She also worked in other EPA offices and spent 15 years in private practice focusing on environmental issues.
- **DOE Science Advisory Board Issues Report on FracFocus.** On March 6, the Secretary of Energy Advisory Board (SEAB) released a Task Force report on FracFocus 2.0, the platform for collection of hydraulic fracturing fluids injected into unconventional oil and gas wells. Use of the FracFocus website is generally on a voluntary basis but has been required by some states. Similar requirements are being considered for fracking on federal land. The Task Force Report finds that disclosure of fracturing fluids through FracFocus is easy, low-cost and beneficial to the public, and recommends actions to improve the effectiveness, accuracy, and completeness of disclosure. On March 10, SEAB announced that it will accept comments on its report through March 25 via email at seab@hq.doe.gov. More information and the Task Force report are available at <http://www.energy.gov/seab/secretary-energy-advisory-board-seab-task-force-fracfocus-20>.

Legislative Branch

- **House Passed Bill Blocking EPA Power Plant GHG Regulations.** On March 6, the House passed H.R. 3826, the "Electricity Security and Affordability Act" by a vote of 229 to 183. The bill would prevent EPA from moving forward with its planned GHG emission standards for new and existing power plants. The author of the legislation is House Subcommittee on Energy and Power Chairman Ed Whitfield (R-KY). Senator Joe Manchin (D-WV) has introduced S. 1905, companion legislation currently pending in the Senate Committee on Environment and Public Works. The White House has announced that the President will veto the bill if it comes to his desk.
- **Senate Talk-a-thon on Climate.** On March 10, the Senate Climate Action Task Force organized an all-night "talk-a-thon" in an effort to bring attention to the debate on climate policies. Thirty Democratic Senators took time on the Senate floor to highlight studies on the human impacts on climate and to call for more robust policy measures. Additional information is available at http://www.epw.senate.gov/public/index.cfm?FuseAction=Majority.PressReleases&ContentRecord_id=2ef9ffe0-06b3-3078-2b07-3e46adc4f543.
- **House Committee Issues Subpoena.** On March 11, the House Natural Resources Committee issued a subpoena to the Fish and Wildlife Service (FWS) seeking unredacted copies of emails and other internal documents that were previously made available to the Committee in redacted form, as well as documents about specific enforcement cases, internal policies, and regulations that the Committee had previously requested and not yet been provided voluntarily. The subpoenas are part of an ongoing investigation into the implementation and enforcement of the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. Additional information is available at <http://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=372448>.

- **Senate Committee Does Not Take Votes on LNG Amendments.** On March 12, Senator John Barrasso (R-WY) filed two amendments to the economic assistance package to Ukraine considered by the Senate Foreign Relations Committee to promote the U.S. exportation of liquefied natural gas (LNG). Senator Barrasso's first amendment would allow the United States to export liquefied natural gas (LNG) to Ukraine and members of the North Atlantic Treaty Organization (NATO). The second amendment would allow the United States to export LNG to members of the World Trade Organization. Senate Foreign Relations Committee Chairman Menendez (D-NJ) ruled the amendments were outside of the Committee's jurisdiction and did not permit the Committee to consider the amendments. Senator Barrasso pledged to offer his amendments to the bill again when the package is considered in the Senate. Additional information is available at http://www.barrasso.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=3054da64-06a3-e9eb-9b6f-ba5347cf0c61.
- **Senate Committee Holds Hearing on Keystone XL.** On March 13, the Senate Foreign Relations Committee held a hearing entitled "Keystone XL and the National Interest Determination." Witnesses included Karen Alderman Harbert, President and CEO Institute for 21st Century Energy; Michael Brune, Executive Director of the Sierra Club; and, General, USMC, (Ret.) James L. Jones, President of the Jones Group International. Senators and witnesses reviewed many of the arguments for and against proceeding with the development of the Keystone XL Pipeline. This debate included concerns over various costs associated with building the pipeline. A webcast of the hearing, full list of witnesses and written testimony are available at <http://www.foreign.senate.gov/hearings/keystone-xl-and-the-national-interest-determination>.
- **House Democrats Send Letter Opposing KXL.** On March 14, Congresswoman Jan Schakowsky (D-IL) was joined by 26 House Democrats in sending a letter to Secretary of State John Kerry. The letter urges Secretary Kerry to reject the Keystone XL Pipeline Presidential Permit Application. Citing the U.S. pledge under the 2009 Copenhagen Accord to help avoid an increase of global temperatures above 2 degrees Celsius, the letter states that "green lighting Keystone XL will put us on an environmentally unsustainable path of tar sands development." The letter is available at <http://schakowsky.house.gov/press-releases/schakowsky-quigley-and-holt-urge-secretary-kerry-to-oppose-harmful-keystone-xl-pipeline/>.

Judicial Branch

- **D.C. Circuit Upholds EPA New Source Performance Standards for Power Plants.** The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) upheld EPA's New Source Performance Standards (NSPS) for power plant particulate emissions after finding that the petitioners' claims were premature. *Utility Air Regulatory Group v. EPA*, No. 12-1166. In February 2012, EPA developed performance standards for new coal- and oil-fired power plants by setting more stringent emissions limits for particulate matter, sulfur dioxide, and nitrogen oxides. In the same rulemaking, EPA also issued more stringent mercury and air toxics standards. Collectively, the rulemaking is known as the Mercury and Air Toxics Standards (MATS). The court's March 11 decision did not address the separate challenge to the mercury and air toxics standards— that decision is expected shortly. As related to the NSPS, the court rejected the petitioners' arguments that it found were raised for the first time in a petition for reconsideration to the agency. According to the court, "[o]bjections raised for the first time in a petition for reconsideration must await EPA's action on that petition." Petitioners' other arguments were rejected by the court after it found that EPA's actions were reasonable.
- **EPA Requests "Voluntary Remand" of Several Rules in Light of Recent Case.** EPA is seeking a voluntary remand of its 2011 standards for industrial, commercial, and institutional boilers and process heaters— as well as some of the rules proposed when it reconsidered the regulations

The Climate, Energy, & Air Update is intended as a general summary of major policy developments that we judge to be of interest to a broad range of our clients and friends. We welcome your comments and suggestions. Coverage in, and selection of topics for, the Update is not intended to reflect the position or opinion of Van Ness Feldman or any of its clients on any issue. This document has been prepared by Van Ness Feldman for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.

If you have question about topics covered in this Update, please contact Kyle Danish at kwd@vnf.com.

last year. *United States Sugar Corporation v. EPA*, No. 11-108. EPA is also seeking a voluntary remand of part of its utility maximum achievable control technology (MACT) air toxics rule for new sources. *Chesapeake Bay Foundation Inc. et al. v. EPA*, No. 13-1200. The agency is seeking the voluntary remands from the D.C. Circuit in light of that court's recent ruling in *National Association of Clean Water Agencies (NACWA) v. EPA*, No. 11-1131. In the NACWA case, the court remanded EPA's sewage sludge incinerator air rule after finding that the upper prediction limit (UPL) statistical method used by the agency needed better explanation as to how it complies with the Clean Air Act (CAA) requirements. Since EPA used the UPL in both the boilers and MACT air toxics rules it has asked the court to allow the agency a new opportunity to analyze and defend the UPL method.

- **Power Company Seeks Supreme Court Review of CAA Preemption Issue.** GenOn Power Midwest filed a petition with the U.S. Supreme Court, asking it to review a U.S. Court of Appeals for the Third Circuit (Third Circuit) decision, which found that the CAA does not displace trespass, nuisance, and negligence claims brought under state common law against the power plant. *GenOn Power Midwest L.P. v. Bell*, No. 13-1013. In April 2012, property owners brought a class action on behalf of over 1,500 neighbors against GenOn, alleging that emissions from its coal-fired Cheswick Generating Station are polluting the air and damaging their properties. The Third Circuit determined that the property owners could bring their claims against the power company. GenOn's petition asks the Court to consider whether the CAA preempts the property owners' state law nuisance claims with respect to air emissions in light of the Court's decision and related reasoning in *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011). In that case, the Court held that the CAA displaces nuisance suits brought under federal common law, but did not directly address whether the CAA also displaces state common law claims. GenOn asserts that the reasoning in *American Electric Power* applies with equal force to state common law claims. The petition states that there is no dispute that the Cheswick Generating Station is in compliance with its CAA Title V permit.

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*.