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# Climate, Energy, & Air Update

## Weeks of Aug. 28 – Sept. 10, 2014

SEPTEMBER 10, 2014

*[Kyle Danish](#), [Shelley Fidler](#), [Avi Zevin](#), [Erin Bartlett](#), [James Bayot](#)*

*During brief September session, House Republicans plan to vote on a package of previously-passed energy-related bills . . . House passes bill blocking EPA re-definition of “waters of the United States” for purposes of wetlands permitting . . . EPA staff recommends promulgation of more stringent ozone standard . . . NRC promulgates waste-confidence rule . . . Federal judge finds BP “grossly negligent” in Deepwater Horizon oil spill, opening the door to major penalties under the Clean Water Act . . . Petitions for review filed on EPA’s Cooling Water Intake Rule.*

### Executive Branch

- **EPA Staff Report Recommends Tightening Ozone Standards.** The Environmental Protection Agency’s (EPA) Office of Air Quality Planning and Standards staff issued a report on August 29 recommending that the EPA lower the primary public health-based national ambient air quality standard (NAAQS) for ozone from 75 parts per billion (ppb) to a level between 60-70 ppb. This range is consistent with the June 4 recommendation of EPA’s Clean Air Scientific Advisory Committee (CASAC). The primary standard was last updated in 2008, and the agency is under a court deadline to review the NAAQS by December 1 and to finalize proposed changes by October 2015. Consistent with the CASAC recommendations, EPA staff also recommended a secondary environment-based ozone NAAQS of 7-17 ppm-hrs. The 597-page staff report is available at <http://www.epa.gov/ttn/naaqs/standards/ozone/data/20140829pa.pdf>.
- **EPA Lays Out Rulemaking Process for Aviation Greenhouse Gas Standards.** In response to a petition from environmental organizations and in preparation for U.S. compliance with international standards, EPA has released a regulatory roadmap for domestic greenhouse gas (GHG) emission standards for aircraft. EPA has committed to move forward with a determination under Section 231 of the Clean Air Act of whether aircraft GHG emissions cause or contribute to air pollution which may reasonably be anticipated to endanger public health and welfare. Agency officials say that they anticipate releasing proposed “cause/contribute” and “endangerment” findings by late April 2015 and finalizing such findings approximately one year later. EPA has also committed to issuing an advanced notice of proposed rulemaking (ANPRM) regarding the use of section 231 of the Clean Air Act to regulate GHG emissions from aircraft consistent with U.S. participation in international standard setting organizations. EPA’s roadmap is available at <http://www.epa.gov/otaq/documents/aviation/us-ghg-endangerment-ip-9-3-14.pdf>.
- **EPA Approves First Long-Term Underground CO<sub>2</sub> Sequestration Permit.** EPA issued the first Safe Drinking Water Act permit for underground injection of carbon dioxide (CO<sub>2</sub>) into “Class VI wells” to the FutureGen Industrial Alliance. Class VI wells are those meant for long-term storage of CO<sub>2</sub> and require extensive monitoring and financial responsibility commitments. The FutureGen Alliance is participating in a public-private partnership to develop a near-zero emitting coal-fired power plant through retrofit of an existing facility in Morgan County, IL with technology to capture 90 percent of CO<sub>2</sub> emissions and store that CO<sub>2</sub> underground. FutureGen’s Class VI permits are available at <http://www.epa.gov/r5water/uic/futuregen/>.
- **EPA Proposes State “SIP Call” on SSM Affirmative Defense.** On September 5, EPA issued a supplemental notice of proposed rulemaking (SNPR) to require states to remove provisions from state implementation plans (SIPs) that provide sources with an affirmative defense for excess

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emissions during periods of startup, shutdown, and malfunction (SSM). This SNPR supplements EPA's February 22, 2013 proposed response to a petition from the Sierra Club that EPA review its SSM interpretation. It aims to bring EPA's interpretation in line with an April D.C. Circuit decision that overturned EPA's prior interpretation on the grounds that the Clean Air Act requires the courts, not EPA, to decide when civil penalties are warranted. *NRDC v. EPA*, No. 10-1371. EPA is expected to finalize the February proposal and this SNPR in a single final action by May 2015. States would have until 2016 to modify their SIPs. Public comments may be submitted on the SNPR until November 6. A pre-publication draft of EPA's proposed rule is available at [http://www.epa.gov/airquality/urbanair/sipstatus/docs/SNPRM\\_SSM\\_Petition.pdf](http://www.epa.gov/airquality/urbanair/sipstatus/docs/SNPRM_SSM_Petition.pdf).

- **NRC Finalizes Waste Confidence Rule.** The Nuclear Regulatory Commission (NRC) approved a rule regarding storage of spent fuel at nuclear power plants, previously dubbed the "waste confidence rule" and renamed as the "continued storage of spent nuclear fuel rule." The revised rule does not approve any particular facility to store waste on-site, but is required for the NRC to make final licensing and renewal decisions for nuclear power plants. The rule was issued in response to a 2012 D.C. Circuit ruling that struck down the previous version of the rule for failure to adequately evaluate environmental impacts of on-site nuclear fuel storage. *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012). The new rule revises the determination of the environmental impacts of continued storage of spent nuclear fuel at commercial sites, including analysis of the impacts of spent fuel pools and indefinite storage in the event a permanent storage solution is not developed. The rule also clarifies that the NRC may rely on the generic determination in the generic environmental impact statement (GEIS) when evaluating independent spent fuel storage installation, license renewals, early site permits, and reactor construction permits. The GEIS provides information about well-understood environmental impacts of certain elements that are common to all nuclear power plants. More information is available at <http://pbadupws.nrc.gov/docs/ML1423/ML14238A326.pdf>; the NRC's order is available at <http://www.nrc.gov/reading-rm/doc-collections/commission/orders/2014/2014-08cli.pdf>.
- **Obama Nominates Honorable for FERC.** On August 28, President Obama announced his intent to nominate Colette Honorable to the Federal Energy Regulatory Commission (FERC). Honorable is currently chairwoman of the Arkansas state Public Utility Commission, a position she has held since 2008, and president of the National Association of Regulatory Utility Commissioners (NARUC). Honorable would replace Commissioner John Norris, who left the commission in August to take a position at the U.S. Department of Agriculture. More information on the nomination is available at <http://www.ferc.gov/media/news-releases/2014/2014-3/08-28-14.pdf>.

## Legislative Branch

- **House Votes on Waters of USA Bill.** On September 9, the House passed H.R. 5078, the "Waters of the United States Regulatory Overreach Protection Act of 2014" by a vote of 262 to 152. H.R. 5078, which was introduced by Representative Steve Southerland (R-FL) on July 11, would block the U.S. Army Corps of Engineers and the Environmental Protection Agency from moving forward with the proposed rule that modifies the definition of "Waters of the United States" under the Clean Water Act for purpose of wetlands permitting any other requirements
- **House Majority Leader Announces Combined Energy Bill.** In a recently released summary of expected House actions prior to Congress departing for the mid-term elections, House Majority Leader Kevin McCarthy (R-CA) listed a number of energy-related bills to be combined into one package. He explained that the goal is for the House to pass the package before the end of the current session on September 19. The consolidated legislation will include:
  - H.R. 3, the "Northern Route Approval Act," which would allow the construction, operation and maintenance of the Keystone XL Pipeline without a presidential permit;
  - H.R. 6, the "Domestic Prosperity and Global Freedom Act," which would direct the Department of Energy to make a final decision on an application to export liquefied

natural gas to a country with which the United States does not have a Free Trade Agreement within 45 days of finalization of a National Environmental Policy Act review for the relevant terminal;

- H.R. 1582, the “Energy Consumers Relief Act,” which would prohibit the EPA from finalizing any energy-related rule estimated to cost more than \$1 billion if the Secretary of Energy determines that the rule will cause “significant adverse effects” to the economy;
  - H.R. 1900, the “Natural Gas Pipeline Permitting Reform Act,” which would alter the Federal Energy Regulatory Commission’s permitting authority for natural gas pipelines;
  - H.R. 1963, the “Bureau of Reclamation Conduit Hydropower Development Equity and Jobs Act,” which would remove federal statutes that currently prevent irrigation districts from developing hydropower on Bureau of Reclamation (BOR) canals, ditches, and conduits;
  - H.R. 2640, the “Central Oregon Jobs and Water Security Act,” which would allow for construction of a hydropower facility at the Bowman Dam;
  - H.R. 2641, the “Responsible And Professionally Invigorating Development Act,” which would expedite the review process required by the National Environmental Policy Act (NEPA) for construction projects that are partly or fully financed with federal funds or require permits or approvals from federal regulatory agencies;
  - H.R. 2728, the “Protecting States’ Rights to Promote American Energy Security Act,” which would prohibit the Interior Department from enforcing federal hydraulic fracturing regulations in any state that already has regulations and recognize states’ authority to regulate hydraulic fracturing;
  - H.R. 2824, the “Preventing Government Waste & Protecting Coal Mining Jobs in America Act,” which would prevent the Office of Surface Mining Reclamation and Enforcement from promulgating the 2008 Stream Buffer Zone Rule, which regulates the impacts of coal mining on bodies of water.
  - H.R. 3301, the “North American Energy Act,” which would streamline the process for the approval of cross-border natural gas pipelines, electric transmission lines and oil pipelines;
  - H.R. 3826, the “Electricity Security & Affordability Act,” which would prevent EPA from moving forward with its planned GHG emission standards for new and existing power plants;
  - H.R. 4801, which would provide for studies about the impact and cost effectiveness of thermal insulation in federal buildings; and
  - H.R. 4899, the “Lowering Gasoline Prices to Fuel an America That Works Act of 2014,” which would eliminate certain restrictions on drilling for oil and gas on federal lands, and streamline project approvals.
- **House Energy & Commerce Hearing on EPA’s Proposed “Clean Power Plan” Rule.** On September 9, the House Energy & Commerce Subcommittee on Energy & Power held a hearing entitled “State Perspectives: Questions Concerning EPA’s Proposed Clean Power Plan.” The Subcommittee heard from the state regulators about implementation challenges and the effect on electricity rates, electric reliability, economic growth, businesses, and consumers. Officials from Texas, Indiana and Montana questioned the feasibility of meeting the emission targets in the EPA proposed rule while representatives from state agencies in Washington and Maryland highlighted the flexibility given to states to meet the emission goals, particularly through regional efforts at cooperation such as the Regional Greenhouse Gas Initiative (RGGI). Additional information,

including a webcast, is available at <http://energycommerce.house.gov/hearing/state-perspectives-questions-concerning-epa%E2%80%99s-proposed-clean-power-plan>.

- **House Science, Space & Technology Hearing on Bakken Petroleum.** On September 9, the House Science, Space & Technology Subcommittee on Energy and Subcommittee on Oversight held a joint hearing entitled “Bakken Petroleum: The Substance of Energy Independence.” The Subcommittee heard from officials from PHMSA, DOE, the North Dakota Petroleum Council, and Turner, Mason, & Company about research on the volatility and flammability of Bakken crude as well as efforts to ensure safe transport of oil by rail and pipeline. Several Republican Subcommittee members emphasized the need for more pipelines while Democratic members of the Subcommittee focused on developing renewable energy instead of fossil fuels. Additional information, including a webcast, is available at <http://science.house.gov/hearing/subcommittee-energy-and-subcommittee-oversight-joint-hearing-bakken-petroleum-substance>.

## Judicial Branch

- **Environmental Groups and Industry Groups Sue EPA Over Cooling Water Intake Rule.** On September 2 and 5 respectively, several environmental groups, the American Petroleum Industry (API), and the Utility Water Act Group (UWAG) filed lawsuits in five separate U.S. Courts of Appeals against the EPA’s recently finalized cooling water intake rule promulgated under section 316(b) of the Clean Water Act. The environmental petitioners’ primary lawsuit was filed in the Second Circuit; *Riverkeeper v. EPA*, No. 14-3225, API’s lawsuit was filed in the Seventh Circuit; *American Petroleum Institute v. EPA*, No. 14-02970; and UWAG’s suit was filed in the Fifth Circuit; *Util. Water Act Grp. v. EPA*, No. 14-60623. EPA’s final rule, which was published in the *Federal Register* on August 15, establishes performance standards for the regulation of cooling water intake structures at existing power plants and other facilities. The standards are intended to protect fish and other aquatic wildlife by minimizing capture both in screens attached to intake structures (impingement mortality), and in the actual intake structures (entrainment mortality). The environmental group petitioners argue that the standards do not adequately protect fish and aquatic life and that they fail to meet the agency’s statutory obligation to prescribe the “best available technology” to minimize impingement and entrainment mortality. API’s petition does not specifically identify the issues it is challenging; however, API has publicly taken issue with the data EPA used to estimate the benefits and costs of the 316(b) rule. UWAG’s petition likewise does not specify the issues it is challenging.
- **Federal Judge Finds BP’s Actions “Grossly Negligent” in 2010 Gulf Oil Spill.** On September 4, Judge Carl Barbier of the U.S. District Court for the Eastern District of Louisiana released a decision finding that oil company BP’s “grossly negligent” actions caused the massive 2010 oil spill in the Gulf of Mexico, which killed 11 people and released oil from a deep underwater well for nearly three months. *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010*, No. MDL-2179. The decision may force BP to pay upwards of \$18 billion in “enhanced penalties” under the Clean Water Act because Judge Barbier found BP’s actions were “grossly negligent” and that the company engaged in “willful misconduct.” The decision also found that the actions of Transocean Ltd. and Halliburton were negligent. The exact amount of penalties to be paid by the companies has not yet been calculated and will depend, in part, on how many gallons of oil Judge Barbier determines were spilled. BP was very critical of the decision, and stated its intention to appeal.
- **Seventh Circuit Finds 60-day Requirement to Challenge EPA Rules is Non-Jurisdictional.** In a circuit-splitting decision, the U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit) determined that a Clean Air Act limit on filing legal challenges to EPA regulations within 60 days of their final issuance was non-jurisdictional and proceeded to determine the case on the merits. *Clean Water Action Council of Northeastern Wisconsin, Inc., et al. v. EPA*, No. 12-3388. At issue in the case was a challenge brought by environmentalist groups against EPA’s decision to issue a Title V permit to a paper production facility in Wisconsin. Prior rulings from the U.S. Court of Appeals for

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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).**

the District of Columbia (D.C. Circuit) and Tenth Circuit would have found that the Seventh Circuit did not have jurisdiction to hear the case on the grounds that: (1) the petition was not filed within 60 days after EPA published its decision issuing the Title V permit in the *Federal Register*; and (2) the proper venue was in the D.C. Circuit, not the Seventh Circuit. However, the Seventh Circuit found: "That the Council did not bring its claim within 60 days of the regulation's publication (or in the D.C. Circuit) . . . does not affect this court's jurisdiction." The Seventh Circuit then proceeded to assess the case on the merits, upholding EPA's method for allocating pollution allocations to older industrial sources under the facilities' prevention of significant deterioration (PSD) permits. The environmentalist petitioners had argued that when an existing source undergoes a major modification triggering PSD, the CAA requires the source to be treated the same as a new source, with all of its emissions counting toward the increment. EPA stated that it does not believe the CAA requires this methodology and the Seventh Circuit's decision deferred to the agency's interpretation of the statute.

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