



# Alaska Energy & Environmental Policy Update

*January 15, 2010*

This edition focuses on a number of federal developments of interest to Alaska as we move into the second session of the 111th Congress. On the subject of energy policy, there is a distinct possibility that the Congress will consider and pass energy legislation by the end of the 111th Congress, though it is highly unlikely the Democratic leadership will round up the 60 votes necessary to move legislation to cap greenhouse gas (GHG) emissions. While the Obama Administration continues to press for the legislation, the EPA aggressively will pursue regulation of GHG emissions administratively under the Clean Air Act.

In Alaska, the regulatory landscape continues to shift with the designation of significant areas of critical habitat under the Endangered Species Act, and with the recent release by the Obama Administration's Interagency Ocean Policy Task Force of an Interim Framework on Coastal and Marine Spatial Planning. At the project level, planning moves forward on large energy development prospects, including the Federal Energy Regulatory Commission's review of a preliminary permit application for the Chakachamna Hydroelectric Project, and offshore oil and gas exploration in the Beaufort and Chukchi Seas.

Our review of recent federal activity concludes with a look at a few of the legislative initiatives of Alaska's congressional delegation that are designed to ensure responsible development in Alaska's Arctic marine environment.

## *In this Issue...*

### Administration

- Critical Habitat in Alaska (P. 2)
- Marine Spatial Planning Framework Promises New Regulatory Future for Oceans (P. 3)
- FERC to Rule on Successive Preliminary Permit Application for Chakachamna Hydroelectric Project (P. 4)
- Shell Offshore Exploration Plans Clear Significant MMS, EPA Hurdles (P. 5)
- Larry Persily Named Alaska Pipeline Coordinator (P. 6)
- Joel Neimeyer Named Denali Commission Co-Chair (P. 6)
- Dennis McLerran Appointed as EPA Region 10 Director (P. 6)

### Congress

- Senator Murkowski Maneuvers to Avoid "Command and Control" Carbon Rules (P. 6)
- Attention on Arctic Ocean Builds in Wake of Arctic Marine Shipping Assessment (P. 8)
- Senator Murkowski Introduces Legislation to Identify Arctic Port Options (P. 9)
- Senator Begich's Arctic Research Legislation Moves Through Commerce Committee (P. 9)



## ADMINISTRATION

### ***Critical Habitat in Alaska***

Alaska is beginning to experience the emerging application of the federal Endangered Species Act (ESA), with effects that are likely to increase in the coming years. While much media attention has been paid recently to addressing climate change on a global and national scale, advocacy groups have turned to an existing environmental law, the ESA, to address the impacts of climate change on plant and animal species in the lower 48 states as well as in Alaska. The effects of the application of the ESA to climate change issues could be felt most in Alaska, far more than other states.

Currently, there are eighteen Alaska species listed under the ESA, ranging from polar bears and bowhead whales in the north to beluga whales and sea otters in southcentral and southeast, with ten additional species currently being considered for protection. Several of these species have been proposed recently based on the anticipated effects of climate change on their habitat, such as declining areas of sea ice coverage.

The federal government also has designated and proposed significant tracts of "critical habitat" for Alaska's listed species, a requirement under section 4 of the ESA. Critical habitat must contain "all areas essential to the conservation" of a listed species, and may be on private or public lands.

In October, the U.S. Fish and Wildlife Service (USFWS) proposed designating more than 200,000 square miles of the U.S. Arctic as critical habitat for the polar bear. USFWS also issued a final decision in October to designate almost 6,000 square miles in the Aleutian Islands, Bering Sea and Alaska Peninsula as critical habitat for the region's sea otter population. More recently, on December 2, the National Oceanic and Atmospheric Administration (NOAA) proposed to designate more than 3,000 square miles of Cook Inlet as critical habitat for the resident beluga whale population.

While Alaska is no stranger to the ESA, the recent listing actions and critical habitat designations will bring increased federal involvement and oversight to activities and land uses in the state. For landowners and companies seeking to do business in the state, this development carries compliance obligations that must be understood prior to conducting activities that may affect a threatened or endangered species or alter habitat that has been designated as critical habitat for a listed species. Due to the large amount of federal lands in Alaska and the types of development projects, such as natural resources exploration and extraction, that require federal permits, the number of projects subject to ESA requirements will increase in the future as more species are listed and more critical habitat is designated. As application of the ESA becomes more widespread, the associated compliance-related delays and project modifications could well increase the cost of doing business in Alaska.

***Law Seminar: Endangered Species Act - Impacts on Alaska***  
John Iani, Matthew Love, and Rick Agnew will speak at the Dena'ina Center on February 25 about the impact of federal ESA decisions in Alaska. For more information, visit this link: <http://www.vnf.com/news-events-127.html>.



## ***Marine Spatial Planning Framework Promises New Regulatory Future for Oceans***

On December 9, the Obama Administration’s Ocean Policy Task Force released its Interim Framework for Effective Coastal and Marine Spatial Planning (Interim Framework) for a 60-day public review and comment period. The Interim Framework represents a critical planning step in President Obama’s efforts to integrate federal, state and tribal planning for the nation’s oceans and the Great Lakes.

President Obama established the multi-agency Task Force on June 12, 2009, and directed the Task Force to develop, within 90 days, recommendations for revising U.S. policy on oceans and coastal ecosystems. The President further directed the Task Force to develop, within 180 days, and with public input, a framework for “effective coastal and marine spatial planning.”

Coastal and Marine Spatial Planning (CMSP), according to the Interim Framework, “is a comprehensive, adaptive, integrated, ecosystem-based, and transparent spatial planning process, based on sound science, for analyzing current and anticipated uses of ocean, coastal, and Great Lakes areas.” In practical terms, the Interim Framework continues, “CMSP provides a public policy process for society to better determine how the ocean, coasts, and Great Lakes are sustainably used and protected now and for future generations.”

The Interim Framework establishes that marine spatial planning will be developed and implemented using a regional approach. The U.S. will be subdivided into nine regional planning areas based on “large marine ecosystem” areas, or LMEs, with flexibility to develop sub-regional plans for Alaska, which encompasses multiple LMEs.

A new National Ocean Council (NOC) will work with States and tribes, including Alaska Native Villages, and other indigenous communities, to create regional planning bodies, consisting of Federal, State, and tribal authorities, and indigenous community representatives. Regional planning bodies will be tasked with developing regional Coastal Marine Spatial (CMS) Plans.

Each CMS Plan will contain, among other things, mechanisms for coordinating decision-making and addressing user conflicts; spatial determinations for conservation and uses; a dispute resolution process; mechanisms to enhance coordination and cooperation among decision-makers and to promote consistency in the application of laws and regulations; monitoring and evaluation mechanisms; and a regional process for requesting variances and amendments to the CMS Plan.

CMS Plans will not be regulatory, although agencies will be encouraged to incorporate components of the CMS Plan into their regulations. Adherence with CMSP would be achieved through Federal and State agencies and tribal authorities incorporating CMS Plans into their pre-planning, planning, and permitting processes, to the extent consistent with existing laws and regulations.

Implementation of the Interim Framework will occur in three phases, spanning five years. In Phase I (1 – 12 months), the NOC will conduct organizational meetings with federal agencies, hold workshops for



potential regional planning body representatives, and establish the regional planning bodies. In Phase II (9 – 24 months), regional planning bodies will identify issues that are of highest regional priority, develop work plans, engage the public and stakeholders, and, at the end of Phase II, submit work plans. In Phase III (18 months – 5 years), regional planning bodies will scale up efforts to establish a comprehensive CMSP process in each region, with all regions expected to have initial CMS Plans certified and implementation started by mid-2015. The Interim Framework is available for public review and comment through Friday, February 12, 2010. To view or comment on the Interim Framework, visit this link: <http://www.whitehouse.gov/administration/eop/ceq/initiatives/oceans/interim-framework>.

***FERC to Rule on Successive Preliminary Permit Application for Chakachamna Hydroelectric Project***

In late December, the Federal Energy Regulatory Commission (FERC) issued a notice of TDX Power Services, LLC’s (TDX) application for a successive, three-year preliminary permit to study the feasibility of developing the Chakachamna Hydroelectric Project (Chakachamna), which would be located on the natural Chakachamna Lake and the Chakachamna and MacArthur Rivers, approximately 80 miles west of Anchorage in the Kenai Peninsula Borough. With a proposed installed capacity of 300 megawatts and location in Alaska’s Railbelt, Chakachamna could be an essential element in achieving Alaska’s goal of meeting 50 percent of electricity demand through renewable resources by the year 2025.

FERC’s preliminary permit proceeding is just the first step in the long and complex process for federal and state regulators to review a proposed hydroelectric project development. Should FERC decide to grant TDX a successive permit for Chakachamna, federal and state regulators, Alaska Native entities, local governments, and members of the public would have opportunities to participate in the consultation process required to support TDX’s license application – a process that TDX initiated under its previous preliminary permit for Chakachamna, which expired on November 1, 2009. In the event FERC grants TDX a successive permit, TDX will be required to diligently pursue a FERC license for

Chakachamna by continuing its feasibility studies, undertaking environmental studies in consultation with federal and state regulators, and otherwise developing a license application in accordance with the process and study requirements in FERC’s regulations.

Finally, the preliminary permit, if granted, would give TDX priority status against other competitors for Chakachamna should TDX file a license application with FERC during the permit term. Accordingly, FERC’s December 17 notice invites any interested party to file comments and/or motions to intervene within 60 days (by February 15, 2010). Any entity wishing to compete for Chakachamna must file a preliminary permit application and/or notice of intent to file a license application by the same date.

***Van Ness Feldman to Co-Sponsor NHA Alaska Regional Meeting in Juneau***

Van Ness Feldman will join the Alaska Power Association, Alaska Energy Authority, the Southeast Conference, and other sponsors for a regional meeting of the National Hydropower Association in Juneau on March 11-12. Mike Swiger and Rick Agnew of Van Ness Feldman will participate as speaker and moderator, respectively. Learn more by visiting <http://www.hydro.org/Alaska%20Regional%202010%20Announcement.pdf>



Questions regarding regulation of hydroelectric power can be directed to Mike Swiger, [mas@vnf.com](mailto:mas@vnf.com), Rick Agnew, [raa@vnf.com](mailto:raa@vnf.com), Chuck Sensiba, [crs@vnf.com](mailto:crs@vnf.com), or to any other member of Van Ness Feldman's hydroelectric practice.

### ***Shell Offshore Exploration Plans Clear Significant MMS, EPA Hurdles***

On December 7, Department of the Interior Secretary Ken Salazar announced that the Minerals Management Service (MMS) would conditionally approve Shell's Exploration Plan to drill three exploration wells next summer in the Chukchi Sea. The Environmental Protection Agency (EPA) proposed to approve an air quality permit for Shell's Chukchi operations on January 7, with public comments due February 17.

Approval of Shell's 2010 Chukchi exploration plan, however, is conditioned on approval by the Court of Appeals for the D.C. Circuit of MMS's revised assessment of environmental impacts on the offshore region. Shell obtained its Chukchi leases through Lease Sale 193, conducted under MMS's 2007-2012 Five-Year Oil and Gas Leasing Program for the Outer Continental Shelf (OCS). Last April, the D.C. Circuit vacated the five-year program with respect to Alaska's OCS "on the grounds that the [2007-2012] Program's environmental sensitivity rankings are irrational."

MMS's revised assessment is expected soon, as the agency must finalize the revised environmental assessment for Shell to have assurances that it can move forward with its Chukchi plans this summer. MMS also is considering a Bush Administration proposal to approve a new five year plan, for 2010-2015. It remains unclear whether action on the proposed 2010-2015 plan will be announced together with the revised assessment for the 2007-2012 plan.

MMS has also approved Shell's plan to drill exploration wells next summer at two of the company's leases in the Beaufort Sea.

The Alaska Eskimo Whaling Commission and the Inupiat Community of the Arctic Slope filed suit in mid-December to overturn MMS's approval of Shell's Beaufort drilling plan. A coalition of 10 environmental groups and the village of Point Hope also filed a suit.

The Anchorage Daily News reported last month that the North Slope Borough, which has lobbied to increase environmental protections with regard to offshore oil and gas projects, would not sue over MMS's Beaufort decision. The Borough challenged Shell's proposed 2007-2009 Beaufort plan, which was initially struck down by the Ninth Circuit Court of Appeals and ultimately withdrawn by Shell. However, North Slope Borough Mayor Edward Itta observed that Shell's 2010 plan has been scaled down significantly and observed that MMS has required under the plan, for the first time, a shutdown of drilling during the fall bowhead hunt that would otherwise affect whaling activities of residents of Nuiqsut and Kaktovik.



### ***Larry Persily Named Alaska Pipeline Coordinator***

President Obama nominated Larry Persily, a former aide to Governor Sarah Palin, to serve as the Federal Coordinator for Alaska Natural Gas Transportation Projects. Mr. Persily currently handles oil and gas issues for Representative Mike Hawker in the Alaska Legislature. Mr. Persily has also worked as a deputy commissioner at the Alaska Department of Revenue under Governor Frank Murkowski, and worked briefly in Governor Palin's Washington, D.C. office on oil, gas, Arctic, and various other issues.

Mr. Persily will take the place of Drue Pearce, a Republican and former president of the Alaska Senate. The Deputy Federal Coordinator, Admiral Thomas Barrett, will serve as Acting Federal Coordinator pending confirmation of Mr. Persily by the U.S. Senate.

### ***Joel Neimeyer Named Denali Commission Co-Chair***

On December 18, U.S. Commerce Secretary Gary Locke announced the appointment of Joel Neimeyer as the federal Co-Chair of the Denali Commission. Mr. Neimeyer is a former program manager for the Alaska Native Tribal Health Consortium and also served as an environmental health officer for the Indian Health Service. He will be the first Alaska Native to serve as head of the Denali Commission.

### ***Dennis McLerran Appointed as EPA Region 10 Director***

On Wednesday, January 13, EPA Administrator Lisa Jackson announced that Dennis McLerran will be nominated to be the Regional Administrator for EPA's region 10, a region that encompasses Alaska, Idaho, Oregon, Washington.

Mr. McLerran most recently served as Executive Director of the Puget Sound Clean Air Agency, a regional agency that adopts and enforces air quality standards. Prior to that, McLerran served as City Attorney for the City of Port Townsend and Director of the Seattle Department of Construction and Land Use.

## **CONGRESS**

### ***Senator Murkowski Maneuvers to Avoid "Command and Control" Carbon Rules***

With compromise on health care reform expected soon, energy is back in the spotlight for the 111th Congress. Once health care is out of the way, Congress is likely to take up legislation to address climate change, though many believe a cap-and-trade bill cannot be worked out during this Congress. Nevertheless, Congress is under pressure to devise a new legislative solution before the Environmental Protection Agency (EPA) regulates greenhouse gases (GHGs) under the current Clean Air Act framework.

With its recent finding that GHGs from motor vehicles contribute to an endangerment of human health and welfare (due to climate change impacts like sea level rise, droughts, hurricanes, wildfires, and



disease outbreaks), the EPA laid the groundwork to move ahead with regulation of GHG emissions from cars, trucks, and other motor vehicles beginning with model year 2012. Because of the structure of the Clean Air Act, once EPA regulates GHGs from new motor vehicles, GHG emissions from “stationary sources” like power plants, factories, and pipelines also will automatically be regulated under the Prevention of Significant Deterioration and Title V provisions of the Clean Air Act, meaning that these companies will need to obtain approval from EPA and/or the Alaska Department of Environmental Conservation before constructing a new stationary facility, or modifying an old one. This automatic trigger for stationary sources has some currently unregulated companies—including small mines, pipelines, and small manufacturers—concerned that they will be swept into the Clean Air Act program, and be forced to install costly new GHG control technologies. EPA has proposed a “tailoring” rule to limit the impact on smaller GHG emitters and make the program more administratively feasible. The legality of EPA’s tailoring rule is questionable.

Despite EPA’s efforts to regulate GHG emissions under the Clean Air Act, EPA Administrator Lisa Jackson, along with many other stakeholders across the political spectrum, agree that new legislation from Congress would be a preferable approach, since the current Clean Air Act was authored before widespread awareness of the threat of climate change and the nature of the GHG connection was fully understood. Thus, all eyes are on the Senate to pass a companion bill to the climate and energy bill passed in the House last year.

With an upcoming election, in which cap-and-trade will certainly be a pressure point in many hotly contested races, many Members of Congress are reluctant to expend political capital on passing a new climate and energy bill. Some Members, like Senator Lisa Murkowski, are pushing to pass interim legislation that would buy Congress time to fully consider a climate and energy bill, without, as Senator Murkowski described, having EPA “hold a gun to Congress’s head” to act before the Clean Air Act stationary source trigger kicks in.

The EPA may delay the regulatory trigger on its own, or Congress may force a delay with Senator Murkowski’s legislation. Regardless, a climate and energy bill could take shape around some basic compromise principles announced by Senators John Kerry (D-MA), Lindsey Graham (R-SC) and Joseph Lieberman (I-CT) in a mid-December letter to President Obama. The focus of these broad principles was protecting American jobs and industry, increasing environmentally appropriate domestic oil and gas production, and investing in nuclear and clean coal power. For the full text of the letter to the President and the climate framework, click [http://kerry.senate.gov/newsroom/pdf/Climate\\_Framework.pdf](http://kerry.senate.gov/newsroom/pdf/Climate_Framework.pdf).

Senator Murkowski expressed interest in the package, an important nod to the effort given that the senior senator from Alaska may be positioned to play a decisive hand in any major climate and energy package that passes during the 111th Congress.

***Webinar: 2010 Outlook for U.S. Energy and Environmental Policy***

Van Ness Feldman hosted a webinar on January 13, 2010 during which the speakers, Kyle Danish, Curt Rich, and Ben McMakin, discussed the major trends pertaining to energy, environmental, and climate policy. To download the PowerPoint slides from this presentation visit <http://www.vnf.com/news-events-128.html>



### ***Attention on Arctic Ocean Builds in Wake of Arctic Marine Shipping Assessment***

All three members of the Alaska delegation have introduced legislation that would bring the United States a step closer to investing substantial new resources and adopting new protocols for maritime activity in the Arctic Ocean. As climate change advances and melting sea ice in the Arctic opens up new navigational routes and resource development opportunities in Arctic waters, marine activity is projected to increase significantly in the years to come.

For this reason, the Arctic States—Canada, Denmark (including Greenland and the Faroe Islands), Finland, Iceland, Norway, the Russian Federation, Sweden and the United States—through an intergovernmental forum called the Arctic Council, recently published a multi-year report that recommends adoption of uniform safety and environmental standards in order to mitigate the potential impacts of oil spills, collisions with other ships or sea ice, and other emergencies that current legal and physical infrastructure are not designed to accommodate. The lack of emergency response in the Arctic, aside from the Norwegian coast and northwest Russia, the diversity of ship types and industry practices, and the lack of meteorological, oceanographic, and hydrographic data (icebergs, etc.) currently make Arctic navigation particularly dangerous.

Although the Assessment predicts that ice melt due to climate change will not be sufficient to unlock trans-Arctic travel by 2020, increased marine activity to develop Arctic natural resources (e.g., hydrocarbons, hard minerals and fisheries, with oil and gas volumes projected to be as high as 40 million tons per year by 2020 on the western Northern Sea Route) seem to justify the effort to adopt new mandatory rules to govern Arctic marine shipping.

Senators Mark Begich and Lisa Murkowski and Representative Don Young each have introduced bills that would authorize the Coast Guard to work through the United Nations to establish enforceable Arctic maritime laws designed specifically to address the following Arctic issues: (1) placement and maintenance of aids to navigation; (2) appropriate icebreaking escort, tug, and salvage capabilities; (3) oil spill prevention and response capability; (4) maritime domain awareness, including long-range vessel tracking; and (5) search and rescue.

The Murkowski and Young bills, which are identical, would require the Coast Guard to promote icebreaking where “needed to assure the reasonable demands of commerce.” They also would authorize \$765 million in federal funds to the Coast Guard, primarily to construct two new “polar capable icebreakers.” In addition, the Murkowski and Begich bills would establish a \$5 million Department of Transportation demonstration project fund to reduce emissions or discharges from vessels in the Arctic.

Senator Begich’s bill is more expansive than its Republican counterparts. It recommends that any international agreement entered by the U.S. address storage of ship-generated waste, improve navigational charting, and improve communication and tracking of vessels. It requires numerous Coast Guard studies including an assessment of vessel traffic risks, and a report on the feasibility of a deep water port in the Arctic. The bill also would require the Army to complete construction of a Central



Bering Sea “harbor of refuge” on St. George Island, Alaska within 3 years. Finally, the bill would authorize more funding for Arctic activities, including an additional \$90 million for polar class or polar capable icebreakers, \$100 million for construction of forward operating bases in Barrow, Nome and Saint Paul Island, Alaska, and \$15 million for gathering new data on the coastal changes and hydrographic conditions in the Arctic in order to ensure safer navigation.

### ***Senator Murkowski Introduces Legislation to Identify Arctic Port Options***

In December, Senator Murkowski introduced S. 2849, the Arctic Deep Water Sea Port Act of 2009, which would direct the Secretary of Defense to conduct a study on the feasibility and potential of establishing a deep water sea port in the Arctic to protect and advance strategic U.S. interests in the Arctic region. The Secretary of Defense would be required to report to Congress regarding the findings of the study within two years of enactment of the bill.

Ports likely to be considered include Nome, which recently spent close to \$90 million renovating its port; Kotzebue, which would propose to build a deep-water port a few miles from the town; and Barrow, which has hosted cruise ships and Coast Guard patrol boats, but would need to significantly upgrade its docking facilities. A port could serve industry, local emergency responders, and the U.S. Coast Guard. The Arctic Marine Shipping Assessment, completed by the Arctic Council in April, found that more than 6,000 ships now transit the Arctic waters.

### ***Senator Begich’s Arctic Research Legislation Moves through Commerce Committee***

Legislation sponsored by Senator Mark Begich to improve coordination of scientific research activities for the Arctic Ocean was marked up and passed by the Senate Commerce Committee in December. Senator Begich is a member of the committee.

S. 1562, the Arctic Ocean Research and Science Review Act, calls for a study of existing Arctic Ocean research programs and advisory groups, existing scientific information, and gaps in research and the coordination of research activities. The legislation directs the Secretary of Commerce to recommend a comprehensive strategy for coordinating and synthesizing Arctic Ocean research and to recommend a comprehensive long-range Arctic Ocean research and monitoring plan.

Added to the bill was S. 1538, legislation introduced by Committee Chairman Senator Jay Rockefeller (D-WV), which requires research into black carbon (soot) and other airborne particulates and its effect on climate.

S. 1562 is one of seven Arctic policy bills introduced by Begich earlier this year that he called the “Inuvikput” package. S. 1562 is largely responsive to concerns of residents of the North Slope regarding gaps in scientific research on the Arctic Ocean and the potential impact on the Arctic marine environment of human activities. But the legislation also could prove invaluable to industry and other Arctic stakeholders.



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The Alaska Energy & Environmental Policy Update is intended as a general summary of major energy and environmental 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.

**ABOUT VAN NESS FELDMAN, P.C.**

With 80 lawyers and policy professionals in Washington, DC and Seattle, WA, Van Ness Feldman has a unique and significant understanding of federal and state laws, regulations, and policies that impact companies and other organizations operating in Alaska. Members of the firm have been involved in the drafting and enactment of many of Alaska’s landmark federal laws or have served in a federal agency with oversight responsibility over Alaska natural resources and environment issues. This knowledge and experience, together with excellent professional relationships with the Alaska Congressional Delegation and other key policy makers in the Congress, the executive branch agencies, and the Alaska State government, make Van Ness Feldman uniquely situated to develop and implement cost-effective strategies and solutions for clients on a broad range of Alaska-related matters, from energy and natural resources development to the unique concerns of Alaska municipalities and Alaska Native organizations.

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