



# Alaska Energy & Environmental Policy Update

*March 19, 2010*

Alaskans who traveled to Washington, D.C. earlier this month experienced an 80 degree variation in temperature. It may be 40 below in Alaska, but it's springtime in D.C., and as partisan politics heat up we can expect a strong push to enact federal energy and climate change initiatives by summer's end.

Looking to advance climate change and energy legislation, President Obama met with 14 key U.S. Senators, including Senator Murkowski, to focus on developing a legislative package, while a bipartisan trio of Senators pushed their vision for a new compromise on Capitol Hill. Meanwhile, Senator Murkowski delayed plans to remove EPA's authority to regulate GHGs under the Clean Air Act pending movement by Senator Rockefeller on legislation that would delay EPA regulation by two years.

While federal legislators and Administration officials mull over national climate change policy, the City of Kivalina and the Alaska Native Village of Kivalina appealed their claim for damages the Village claims it has suffered as a result of climate change to the Ninth Circuit Court of Appeals.

Energy developers are looking to the Federal Energy Regulatory Commission (FERC) to help move major energy initiatives in Alaska. The federal "open season" process for the Alaska Pipeline Project will move forward this spring, with the Project's open season plan now before

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FERC. FERC has also granted a second three-year preliminary permit for the Chakachamna Hydroelectric Project, while suggesting that the agency likely will exercise “a greater standard of oversight” over the project.

With the future of Alaska hydro development a focal point of the National Hydropower Association’s first-ever regional meeting in Alaska last week, the Department of Energy announced its intent to fund new research and development of ocean, wave, tidal, current, free-flowing river and ocean thermal technologies.

Our report also covers issues associated with the proposed regulation of soot under the federal Clean Water Act, denial of ConocoPhillips’ CD-5 permit application, the Department of the Interior’s plans to issue a revised environmental assessment for the five-year leasing plan for Alaska’s outer continental shelf, the National Marine Fisheries Service’s proposed authorization of five-year incidental take regulations for Arctic offshore development, a new emphasis on consideration of GHG emissions for development proposals subject to the National Environmental Policy Act, and the Obama Administration’s plans for the future of the Tongass National Forest.

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## ADMINISTRATION

### ***CEQ Issues Draft NEPA Guidance on Consideration of the Effects of Climate Change and Green House Gas Emissions***

On February 18, 2010, the Council on Environmental Quality (“CEQ”) released, for public review and comment, a draft “Guidance Memorandum” on the consideration of greenhouse gas (“GHG”) emissions and climate change impacts as part of compliance with the National Environmental Policy Act (“NEPA”).

NEPA requires federal agencies to review the environmental effects of proposed federal actions. The NEPA review process, which may require the development of either an environmental assessment (“EA”) or a more detailed environmental impact statement (“EIS”), is often determinative of the timing and completion of federal permitting and authorization decisions.

Development of an EA or EIS is a familiar hurdle for project sponsors in Alaska, because projects within the state or offshore of Alaska often occur on federal lands or waters or require a federal permit, triggering NEPA review.

The Guidance Memorandum addresses two related issues in the context of NEPA reviews:

- The treatment of GHG emissions that may directly or indirectly result from the proposed federal action; and
- The analysis of potential climate change impacts upon the proposed federal action.



CEQ has announced a ninety-day comment period for the draft Guidance Memorandum, with public comments due May 24, 2010.

Van Ness Feldman Members Sam Kalen, Joe Nelson, and Jonathan Simon summarize and review the Guidance Memorandum in greater detail on our website at <http://www.vnf.com/news-alerts-441.html>.

***NMFS and MMS Working on EIS for Authorizing Incidental Take of Marine Mammals During Oil and Gas Exploration in Alaska’s Beaufort and Chukchi Seas***

The National Marine Fisheries Service (“NMFS”) announced in early February its intent to prepare, in cooperation with the Minerals Management Service (“MMS”), an environmental impact statement (“EIS”) to analyze the environmental impacts of issuing Incidental Take Authorizations (“ITAs”) pursuant to the Marine Mammal Protection Act (“MMPA”) to the offshore oil and gas industry. Comments, statements, and questions regarding the scoping process and preparation of the EIS are due April 9, 2010.

***Van Ness Feldman Attorneys Speak on Endangered Species Act issues in Anchorage***  
On February 25, Van Ness Feldman co-sponsored an in-depth seminar in Anchorage on the impacts of the Endangered Species Act (“ESA”) in Alaska. In recent years, the ESA has gained increased prominence in Alaska. The conference examined evolving legal and policy issues associated with species listings and critical habitat designations, climate change, fisheries, and incidental take authorizations. Three attorneys with the firm—John Iani, Matt Love, and Tyson Kade—spoke at the event. The agenda is available at <http://www.lawseminars.com/detail.php?SeminarCode=10ESA>.

The MMPA directs the Secretary of Commerce, who acts through NMFS, to permit, upon request, the incidental, but not intentional “take” of small numbers of marine mammals by citizens who engage in a specified activity within a specified geographical region under certain conditions. A “take” under the MMPA includes actions which “harrass, hunt, capture or kill” marine mammals or that have the potential to injure a marine mammal or marine mammal stock in the wild or the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns. NMFS must authorize a taking if the taking will have a negligible impact on the species or stock and will not have an “unmitigable adverse impact” on the availability of the species or stock for subsistence uses.

The proposed EIS will assess the environmental impact of issuing ITAs in Alaska’s Beaufort and Chukchi Seas for purposes of permitting future offshore oil and gas exploratory activities, including seismic surveys and exploratory drilling operations.

The EIS also will assess whether or not NMFS and MMS should implement a long-term planning process under the MMPA by implementing regulations for five-year time periods. NMFS has indicated to Arctic stakeholders that concerns regarding the potential impacts of oil and gas activities on annual subsistence harvests could be remedied through the development of the regulations. Also, mitigation and monitoring requirements imposed on the oil and gas industry would be consistent from year to year, and not determined on an annual basis.



## ***“Open Season” Process for Alaska Natural Gas Pipeline Project Moving Forward***

The federal “open season” process for the Alaska Pipeline Project, a joint project of TransCanada Corporation and ExxonMobil, continues to move forward before the Federal Energy Regulatory Commission (“FERC”).

The open season is a process through which gas producers and other entities may reserve space on the pipeline by making long term financial commitments to the pipeline. In simple terms, the open season puts the project to a test of the market. During the open season, the project sponsor provides information about the proposed project to potential shippers of natural gas, including details such as anticipated project costs, engineering design, tariffs and timelines. The shippers assess this project information and determine their interest in shipping natural gas through the pipeline under the offered terms and whether to make long term commitments to reserve capacity on the pipeline. These advance commitments are important to securing the financing necessary to build and operate a pipeline project.

FERC is now well into its 90-day review of the open season plan filed by the Alaska Pipeline Project on January 29, 2010. Assuming FERC approval, the Alaska Pipeline Project will hold its open season with potential shippers from May through July 2010.

TransCanada and ExxonMobil agreed in June 2009 to work together towards construction of a natural gas pipeline from the North Slope of Alaska to gas markets under the terms of the Alaska Gasline Inducement Act (“AGIA”). AGIA, enacted by the State of Alaska in 2007, solicited applications for an enforceable State license requiring the licensee pipeline builder to meet certain requirements to advance the project, in exchange for up to \$500 million in matching funds to advance the project. TransCanada was awarded the AGIA license in December 2008.

Competing with the Alaska Pipeline Project’s proposal is a partnership between ConocoPhillips and British Petroleum, called Denali – the Alaska Gas Pipeline. ConocoPhillips and BP announced in January that the Denali partnership will file its open season plan with FERC this April.

### *Two Options – An All-Alaska Line to Valdez or an Alaska-Canada Line*

During the Alaska Pipeline Project’s open season, energy companies that want to ship gas to markets both inside and outside Alaska will evaluate the technical and financial feasibility of two alternative pipeline routes.

One option would transport North Slope natural gas across Alaska to Alberta, Canada, where it would be sent on existing pipelines to North American gas markets. A key component of this option would be to construct gas off-take locations along the route to supply the needs of utilities, homes and industry in Alaska.



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Another option is to move the natural gas to Valdez, where shippers would liquefy the gas and ship it on tankers to markets in Asia and the west coast of North America. Communities in Alaska would have access to gas under this option as well.

### *Open Season – Focus on Fair and Equal Access*

Although much of the focus during the open season will be on the three big natural gas producers (likely to be the largest volume potential shippers), smaller volume in-state gas supply developers will have an equal opportunity to bid for capacity.

The federal Alaska Natural Gas Pipeline Act of 2004 (“ANGPA”) requires that all proposed projects to transport North Slope gas, including the Alaska Pipeline Project, prepare a study to assess Alaska’s in-state gas needs, and provide connections to the pipeline, called off-takes, that would allow local developers to obtain gas to meet community needs. At least five local service connections would be provided in Alaska.

ANGPA requires that there be no discrimination or preference in awarding capacity. Congress designed this so that all shippers, big and small, have an equal opportunity to use the pipeline to transport their natural gas and to encourage future exploration for natural gas on the North Slope.

In reviewing each open season plan, FERC is responsible for ensuring that the project takes steps to ensure non-discrimination in the open season process, including:

- Separation of the gas producing company that may bid for space on the pipeline from the entity building and operating the pipeline. (ExxonMobil, which is subject to this provision, has set up the necessary “firewall” procedures required by federal regulators.)
- Disclosure of all information to potential shippers on an equal basis. Thus, the Alaska Pipeline Project has committed to make all required project documentation accessible through three or more “data rooms” that will open on May 1 at the start of the open season, providing appropriate levels of access for the general public, regulators and potential bidders.
- Submitting plans for the open season in advance to FERC for approval and public comment. As noted above, the Alaska Pipeline Project’s open season plan is making its way through the FERC review process, and Denali has announced that it will file its plan later this spring.

### *The First Open Season – What to Expect*

Major pipeline builders rarely report open season results immediately. Shippers’ bids to reserve pipeline capacity almost always include conditions, not unlike the contingencies written into a contract for the sale of a home. With the close of the open season bidding period, follow up negotiations will commence to resolve those contingencies. In the case of the Alaska Pipeline Project, TransCanada and



ExxonMobil have announced that they plan to complete the review and negotiation process and make the open season results public by the end of 2010.

Shippers likely will include in their bids some conditions beyond the control of the project sponsors, including the resolution of state natural gas taxation policies, royalty rates, and future mechanisms for financing additional capacity in the pipeline to encourage further exploration of Alaska's natural gas resources. Final resolution of these external issues could require action by Alaska's Governor and Legislature.

Under the AGIA license, the Alaska Pipeline Project must continue to pursue the application for the FERC certificate to build the project through 2012, regardless of the outcome of the initial open season. The AGIA licensee also must conduct additional assessments of potential demand for the pipeline's use and AGIA requires the project to solicit demand for pipeline expansion at least every two years. For the Alaska Pipeline Project as well as for Denali – the Alaska Gas Pipeline, there could therefore be a follow up open season to the initial one as early as 2012.

*More Detail Available*

Federal policy established by FERC orders and opinions establishes that all new interstate pipeline construction be preceded by a nondiscriminatory open season process. ANGPA further required FERC to issue regulations to formalize this policy with specific regulations governing the conduct of open seasons for an Alaska natural gas transportation project.

FERC Orders No. 2005 and 2005–A, govern the rules for opens seasons for the proposed Alaska Natural Gas Transportation Projects, and are available at these links:

- <http://www.ferc.gov/whats-new/comm-meet/020905/C-1.pdf>
- <http://www.ferc.gov/whats-new/comm-meet/052505/C-7.pdf>

FERC staff also conducted workshops—one in Anchorage on January 12, and one in Washington, D.C. on February 22—at which FERC officials discussed the open season process. Materials from the workshops, as well as other materials associated with the proposed Alaska Natural Gas Pipeline projects, are available at FERC's "Alaska Natural Gas Transportation Projects" website, at <http://www.ferc.gov/industries/gas/indus-act/angtp.asp>.

Ultimately, FERC's role in the open season process is to ensure that there is no discrimination or preference in awarding capacity in an open season, i.e., to ensure the would-be project sponsors take those steps necessary to ensure non-discrimination in the open season process.

The comment period for the open season plan submitted by the Alaska Pipeline Project has closed. FERC will request public comment on the open season plan of Denali – the Alaska Gas Pipeline, following its submittal to FERC, expected in April.



### ***FERC Grants Successive Preliminary Permit and License Application Priority Status for Chakachamna Hydroelectric Project***

As noted in our January 15, 2010 Alaska Energy & Environmental Policy Update, TDX Power Services, LLC (TDX) is seeking to continue its study of the feasibility of the proposed 300 megawatt 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. In furtherance of its efforts, TDX obtained a 3-year preliminary permit from FERC in 2006, and in November 2009 TDX filed an application with FERC that sought a successive 3-year preliminary permit.

On February 25, 2010, FERC granted TDX a successive preliminary permit. FERC found that, under the previous permit, TDX made “progress with the analysis of the project's feasibility, and towards the development of this project.” At the same time, FERC noted that its awarding of a successive preliminary permit “can warrant a greater standard of [FERC] oversight,” to ensure progress in feasibility analyses and license application development. FERC’s order stated that it will monitor TDX’s progress and indicated that if TDX “fails to make significant progress toward developing a license application, the permit may be subject to cancellation.”

TDX’s preliminary permit for Chakachamna is for a 36-month term beginning February 1, 2010. Should TDX conclude feasibility studies, complete pre-filing consultation requirements with federal and state resource agencies and stakeholders, and file a license application with FERC during the term of the permit, its license application will enjoy priority status at FERC, in the event any other entity decides to file a competing development application for Chakachamna.

### ***Funding Available for Development of Marine and Hydrokinetic Power***

On March 10, the U.S. Department of Energy’s (“DOE”) Wind and Hydropower Technologies Program announced its intent to fund a program aimed at advancing water power technologies. The first of its kind, the Marine and Hydrokinetic Technology Readiness Advancement Initiative is intended to support research and development of ocean, wave, tidal, current, free-flowing river and ocean thermal technologies.

The DOE announcement divides the grant program into two topic areas: Concept Development funds and Technology Readiness Level funds. DOE does not plan to restrict eligibility for Concept Development funds. However, the funds available through the Technology Readiness Level will be restricted to industry members or industry-led partnerships. The industry member or industry lead can be a technology developer, project developer, private utility, or a public municipal or cooperative utility, privately-funded research organization, or services company.

DOE anticipates opening the application process by March 31, 2010.



### ***National Hydropower Association Holds First-Ever Regional Meeting in Alaska***

Van Ness Feldman recently co-sponsored the National Hydropower Association's first-ever regional meeting in Alaska, held in Juneau March 11-12. The purpose of the meeting was to discuss hydropower issues in Alaska, including Alaska's role in developing the estimated 60,000 megawatts of hydropower available for development nationwide. Participants heard about new and proposed hydropower projects in the state, state and federal mechanisms for funding hydropower projects, and issues specific to Alaska electric systems. All three members of the Alaska Congressional delegation addressed the meeting via video and expressed their support for hydropower development in the state. Several Van Ness Feldman attorneys participated in the meeting. Rick Agnew lead a discussion on developing new hydropower in the Bush and Native Villages, and Mike Swiger gave a presentation on federal permitting issues. Presentations from the meeting are available on NHA's website, at <http://www.hydro.org/events/events.php>.

### ***Corps of Engineers Denies Permit for NPR-A Development***

On February 5, 2010, the U.S. Army Corps of Engineers denied ConocoPhillips Alaska's request for a permit to build a road, a production pad, and a bridge over the Colville River needed to begin drilling at the CD-5 Alpine Satellite Development on the North Slope. CD-5 is located about six miles west of the producing Alpine field in the National Petroleum Reserve-Alaska ("NPR-A"), near Prudhoe Bay.

The rejection of the permit, required under section 404 of the federal Clean Water Act, will delay development and construction of production infrastructure necessary for the CD-5 project. The project would produce approximately 5 million barrels of domestic oil per year, creating 400 construction jobs, 100 operating jobs, and infrastructure that would support new exploration and development in the NPR-A.

Section 404 of the Clean Water Act establishes a program under which the Corps of Engineers regulates the discharge of dredged and fill material into waters of the United States, including wetlands. The Corps found that issuance of the permit would not be in compliance with section 404(b)(1) guidelines, which state "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." The Corps' decision concluded "that there are other practicable alternatives [for CD-5] that would have less adverse impact on the aquatic ecosystem and still meet the overall project purpose." In particular, the Corps pointed to horizontal directional drilling as an alternative with fewer environmental impacts. A directional drilling alternative would require submission of new permit applications.

Governor Parnell has requested withdrawal of the Corps' decision, arguing that federal regulations require district engineers to refer a decision to issue or deny permits to the division engineer for resolution when the recommended decision is contrary to the written position of the Governor of the state in which the work would be performed. The State of Alaska had previously expressed its support for issuing the permit.



The North Slope Borough also has formally expressed its support for the CD-5 permit and disappointment with the Corps' decision. The permit proposal represented a compromise reached by ConocoPhillips and the North Slope Village of Nuiqsut. The February 5, 2010 decision is being appealed by ConocoPhillips.

### ***Interior Due to Re-Issue Environmental Assessment for Five-Year Oil and Gas Leasing Program for Alaska's Outer Continental Shelf***

By the end of March, the Department of the Interior's Minerals Management Service ("MMS") is expected to issue a revised environmental sensitivity analysis for the federal 2007-2012 Five-Year Oil and Gas Leasing Program for Alaska's Outer Continental Shelf. A review of the five-year leasing program's assessment of environmental impacts on the marine environment in Alaska was ordered in April 2009 by the Court of Appeals for the D.C. Circuit, which vacated the program on the grounds that "the [2007-2012] Program's environmental sensitivity rankings are irrational."

Approval of Shell Oil's 2010 Chukchi exploration plan is conditioned on approval by the D.C. Circuit of MMS's revised assessment. Shell obtained its Chukchi leases through Lease Sale 193, conducted under the 2007-2012 leasing program.

As addressed in our last report (available at <http://www.vnf.com/news-policyupdates-424.html#ShellOffshoreExploration>) MMS has approved Shell's plan to drill exploration wells this summer at leases in the Chukchi and Beaufort Seas. The Environmental Protection Agency (EPA) Region 10 anticipates issuing final Prevention of Significant Deterioration (PSD) Air permits for Shell's exploration activities in the Chukchi Sea on March 29 and for activities in the Beaufort Sea on April 10. These permits will be final and are considered the most stringent PSD permits ever issued by the agency.

### ***EPA Petitioned to Regulate Deposit of Black Carbon "Soot" On Glaciers and Sea Ice***

On February 22, the Center for Biological Diversity ("CBD") petitioned the EPA act on reducing black-carbon pollution under the federal Clean Water Act ("CWA"). CBD's petition states that black-carbon, or soot, is both harmful to inhale and a dangerous contributor to global warming, in that it accelerates the melting of ice by blackening Arctic sea ice and glaciers. The petition is the first of its kind, seeking the protection of water in its solid form.

If EPA were to adopt water-quality criteria for black-carbon, the State of Alaska would be required to adopt or comply with EPA standards established to control its release in order to protect sea ice and glaciers. The State would have to take into account emissions from ships and older heavy-duty vehicles and construction equipment, primary sources of black-carbon.

Legislation introduced by Senator Jay Rockefeller (D-WV) requires research into black-carbon emissions and its effect on climate. Senator Rockefeller's bill has been attached to a research bill sponsored by Senator Mark Begich, the Arctic Ocean Research and Science Review Act. Senator Begich's bill calls for a



review of existing Arctic Ocean research programs and advisory groups, existing scientific information, and gaps in research and the coordination of research activities for the Arctic Ocean.

## CONGRESS

### ***Senator Murkowski Asks Forest Service to Consider Survival of Tongass Timber***

At a hearing before the Senate Energy and Natural Resources Committee this week on the U.S. Forest Service's proposed Fiscal Year (FY) 2011 budget, Senator Lisa Murkowski called on the agency to help Southeast Alaska's struggling timber industry transition to a second-growth forest products economy by allowing already-approved timber sales in the Tongass National Forest to go forward.

The Forest Service's FY 2011 budget indicates that the Administration will focus federal funding on "forest restoration resources." The budget establishes a pilot program for "long-term, landscape scale restoration activities that emphasize resiliency, health, and sustainable economic development."

Testifying before the Committee, Forest Service Chief Tom Tidwell assured the senators that timber cutting would be part of the mix of activities pursued by the Forest Service, but indicated that the Forest Service will no longer hold below-cost timber sales, a policy that may have the immediate impact of preventing traditional timber sales in the Tongass, where road building is expensive.

Chief Tidwell also suggested that the Administration will delay any significant policy actions on roadless areas in national forests until federal courts settle court battles focused on which version of the Clinton-era "roadless rule" is legally binding.

The Forest Service is expected to formally announce a new policy direction for the Tongass within the next four weeks. The revised Tongass policy likely will focus Forest Service resources on management of second growth for restorative purposes and future harvesting when existing second growth matures in several decades.

Tongass timber advocates lost a related battle in late February, with Judge John Bates of the U.S. District Court for the District of Columbia dismissing a lawsuit that challenged the Forest Service's 2008 Tongass Land Management Plan ("TLMP") Amendment and argued that the Amendment improperly reduced the amount of land available in the Tongass for the timber harvest. In an order granting the Forest Service's motion for summary judgment, Judge Bates wrote that the lawsuit, filed by a collection of Southeast Alaska governments and industry representatives, attempted "to hold the Forest Service to a standard that it is not required to fulfill."

### ***Alaska Congressional Delegation Meets with NOAA on Marine Planning***

On March 12, 2010, Congressman Don Young, Senator Lisa Murkowski, and Senator Mark Begich met with Dr. Jane Lubchenco, Administrator for the National Oceanic and Atmospheric Administration



(“NOAA”) and Eric Schwaab, the Assistant Administrator for the National Marine Fisheries Service. The meeting focused on marine planning issues under NOAA's jurisdiction that will affect Alaska, including the proposed Critical Habitat for the Cook Inlet beluga whale, the upcoming biological opinion on the Steller sea lion, petitions to list the ice seals under the Endangered Species Act, and a federal initiative focused on “marine spatial planning” for U.S. oceans.

Marine spatial planning has become the subject of growing interest in Alaska. On December 9, 2009, the Obama Administration’s Ocean Policy Task Force released its Interim Framework for Effective Coastal and Marine Spatial Planning (“Interim Framework”) for public review. The Interim Framework is a product of President Obama’s efforts to integrate federal, state and tribal planning for the nation’s oceans. Administration officials believe that President Obama will issue an executive order in the next several weeks that will give force to the Framework. Last week, the Alaska Eskimo Whaling Commission sponsored a meeting in Washington, D.C. to discuss coastal and marine spatial planning in the Arctic and the role of the Arctic people in the planning process. For more information about the Interim Framework and marine spatial planning, read our latest review of the federal initiative at <http://www.vnf.com/news-policyupdates-424.html#MarineSpatial>.

### ***Obama Meets with 14 Key Senators, including Senator Murkowski, on Climate Change Legislation, While Bipartisan Trio of Senators Pushes New Compromise***

President Barack Obama recently convened a bipartisan group of 14 key Senators, including Senator Lisa Murkowski, at the White House to discuss prospects for passing climate change and clean energy legislation this year. At the meeting, the President pledged to make concessions on oil and gas exploration and support for nuclear power in exchange for the Senators’ support for a binding greenhouse gas (“GHG”) emissions cap. The President and Senators were joined by the Administration’s top energy and environmental officials, including Director of the White House Office of Energy and Climate Change Policy Carol Browner, Energy Secretary Steven Chu, and Environmental Protection Agency (“EPA”) Administrator Lisa Jackson.

Meanwhile, at a meeting with major industry stakeholders, including the U.S. Chamber of Commerce, National Association of Manufacturers, and American Petroleum Institute—all of whom opposed the House-passed cap-and-trade bill—Senators Kerry, Graham, and Lieberman outlined a new approach to a climate bill, built on what some have called “unprecedented” input of diverse stakeholders. The core components of the outline include:

- An economy-wide cap on carbon emissions that would begin in 2012, with a target of reducing carbon pollution 17 percent by 2020 and 80 percent by 2050, where emitters would have to pay for “allowances” from the federal government, half of which would be recycled back to consumers in the form of a rebate;
- Separate caps on carbon emissions by the electric utilities and manufacturing sectors;
- A straight fee, paid at the pump, on transportation fuels;
- A “carbon tariff” on imports from countries that do not regulate carbon emissions;
- A federal-only system that preempts states from imposing separate carbon caps; and



- Incentives for oil refining, farming, coal, clean energy innovation, production of nuclear energy, and oil and natural gas drilling.

For up-to-date coverage of major climate change-related policy developments, sign up to receive our weekly Climate Change Policy Update at <http://www.vnf.com/news-signup.html>.

### ***Senator Murkowski Delaying Disapproval Vote***

Senator Lisa Murkowski recently told reporters that her resolution of disapproval of EPA's finding that GHGs endanger public health and welfare is "on hold." If the Congress were to pass the Murkowski resolution and President Obama signed it, EPA would be prohibited from promulgating the "disapproved" regulation until expressly authorized by Congress. Senator Murkowski said that she is waiting to see if Senator Rockefeller is "serious about moving" his separate bill to delay EPA regulation of stationary sources of GHG emissions by two years. Senator Murkowski also wrote to EPA Administrator Lisa Jackson requesting: information on the number of stationary GHG emission sources that would be regulated under the Clean Air Act at different points in time under EPA's planned implementation schedule; clarification on the full range of anticipated economic and employment impacts of the regulation; and an analysis of the potential for the "leakage" of carbon-intensive production and related jobs to other countries due to GHG regulation. In addition, five Democratic members of the House of Representatives wrote to President Obama to ask that his Administration "take immediate steps to halt" plans to regulate GHG emissions at stationary sources, and to let Congress develop a national climate policy.

A group of 20 state governors, including Governor Parnell, sent a letter to congressional leaders stating their support for efforts to prevent EPA from implementing GHG regulations under the Clean Air Act. In the letter, the 18 Republican and 2 Democratic governors argued that GHG policies should be developed by elected representatives and, in reference to the recent proposal by Senator Rockefeller, suggested that a mere delay in EPA GHG regulations would be insufficient to prevent job loss and economic harm that might result from such regulations.

## **JUDICIARY**

### ***Native Alaskan Village Urges Ninth Circuit to Allow GHG Relief in Kivalina v. Exxon***

The City of Kivalina and the Alaska Native Village of Kivalina submitted an appeal to the U.S. Court of Appeals for the Ninth Circuit last week, seeking tort damages for climate change related-injuries allegedly caused by GHG impacts from industrial operations of defendants Exxon Mobil Corporation, eight other oil companies, 14 power companies and one coal company. The Village argues that the GHGs emitted by industry defendants contribute to global warming, which, because of resulting erosion along the Alaska coastline, threatens the community's existence. The U.S. District Court for the District of Northern California ruled last September that it was unable to review the case, on grounds that "the law suit raised non-justiciable political questions and that the plaintiffs did not have standing, because



their harm was not fairly traceable to the defendants' conduct." The Village's appeal argues that "The judiciary is fully capable of hearing the evidence as to defendants' contributions to global warming, their knowledge of the harms to which they are contributing, the conspiracy of some of them to continue their behavior, the impact of global warming specifically on Kivalina, and the damages suffered."

To win monetary damages, the Village must prove that GHG emissions from individual facilities may be causing damages. But even without monetary damages, a win for the Village would likely put significant pressure on the U.S. Congress to enact a comprehensive climate policy, and stave off a series of lawsuits like this one.

A similar GHG-based nuisance suit will be moving ahead in the U.S. Court of Appeals for the Second Circuit. On March 5, that court refused industry defendants' plea to rehear its landmark September 2009 decision in *Connecticut v. AEP*, in which the court held that a group of state and private plaintiffs could proceed with a federal common law action premised on alleged harm resulting from climate change. The defendants in that litigation, which included five of the nation's largest coal-burning utilities, had petitioned the Second Circuit to rehear the case *en banc*. The Second Circuit's action means that the utilities now have 90 days from the date of the denial of rehearing to file a petition for certiorari (review) with the U.S. Supreme Court.

The decision sets the stage for a possible split with the Fifth Circuit Court of Appeals, which decided the previous week to hold *en banc* rehearing of *Comer v. Murphy Oil Co.*, a case brought by survivors of Hurricane Katrina making common law claims for climate change-related damages. The Fifth Circuit's decision is widely believed to augur a dismissal of the Comer plaintiffs' claims.



## Alaska Energy & Environmental Policy Update

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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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