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## Climate, Energy, & Air Weekly Update Week of January 17-20, 2011

*The President absorbs barbs and praise for his denial of the Keystone permit, but will he ultimately approve it in 2013? . . . EPA says proposed GHG standards for new and modified power plants are on track to be released by the end of the month. . . EPA pledges not to enforce the 2011 boiler MACT while it finalizes a revised version . . . D.C. Circuit wants accelerated briefing for CSAPR case and oral argument by April 13 . . . House Oversight Committee Chairman Issa (R-CA) believes EPA is rushing to judgment on regulating hydraulic fracturing . . . USGBC and fifteen partners release a new report on existing legal authorities the Executive Branch can use to promote energy efficiency and sustainable building practices in commercial and residential buildings.*

### Executive Branch

- **President Denies Permit for Construction of Keystone XL Pipeline.** President Obama announced on January 18 that the Administration would deny a Presidential permit requested by TransCanada for the construction of Keystone XL, a proposed 1,700-mile pipeline that would link oil sands in Canada to refining facilities on the Gulf Coast. Claiming that the decision was “not a judgment on the merits” of the Keystone XL application, the President said that the Administration had no choice but to reject the pipeline given the “rushed and arbitrary deadline insisted on by congressional Republicans” for the decision. As part of legislation that temporarily extended the payroll tax cut, the President was required to make a decision on the pipeline permit by February 21; previously, the President had said his Administration would render judgment on the pipeline sometime in 2013. The President stated that the expedited deadline resulting from a provision added to the the payroll tax cut legislation did not give adequate time for the State Department to evaluate the environmental, health, and safety impacts of the pipeline. The President’s statement is available at <http://www.whitehouse.gov/the-press-office/2012/01/18/statement-president-keystone-xl-pipeline>.

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- **EPA Confirms GHG Standards for New and Modified Power Plants Nearing Release.** The Environmental Protection Agency's (EPA) Assistant Administrator for Air and Radiation, Gina McCarthy, stated that the agency is "close" to meeting its previously announced goal of issuing proposed New Source Performance Standards (NSPS) for greenhouse gas (GHG) emissions from new and modified electric generating units by the end of this month. The standards, which EPA committed to issue under a December 2010 settlement agreement with various environmental organizations, have been under review at the White House Office of Management and Budget (OMB) since November 2011. McCarthy added that the standards will not apply to existing plants that are undertaking modifications in order to comply with the agency's recently finalized Mercury and Air Toxics Standards (commonly referred to as the "Utility MACT" standards). She did not clarify when NSPS for *existing* electric generating units would be proposed, saying only that EPA continues to negotiate with the other parties to the settlement on a new deadline and hopes to resolve the timing issue "soon."
- **EPA Commits Not to Enforce Boiler MACT Standards Following Court Reinstatement.** In the wake of a decision by the United States Court of Appeals for the District of Columbia Circuit reinstating hazardous air pollutant standards for industrial boilers that EPA issued – and promptly suspended – in early 2011, EPA has committed not to enforce those standards for the time being. In a letter to Sen. Ron Wyden (D-OR), EPA Administrator Lisa Jackson noted that EPA has proposed a revised suite of boiler standards (known as the "Boiler MACT" rule) that it expects to finalize in April of this year. Pending the completion of those standards, Jackson stated that EPA would not enforce notification obligations that might otherwise apply to existing sources under the 2011 standards reinstated by the D.C. Circuit. Jackson also stated that if any newly constructed boilers become subject to the 2011 standards, EPA will consider issuing a 90-day stay of the rule under the Clean Air Act. The letter is available at <http://www.vnf.com/assets/attachments/jackson-letter-boilermact.pdf>.
- **President's Council on Jobs and Competitiveness Issues Recommendations on Energy Policy.** A Presidential commission comprising business interests, labor unions, investors and other sectors has issued a report containing numerous recommendations for promoting job growth and reviving the economy, including several recommendations on energy policy. Calling for an "all-in approach" to energy policy, the report recommends: expanding and expediting the opening of Federal lands and offshore waters to renewable energy development and fossil fuel extraction; deploying aggressive energy efficiency measures, including making energy audits part of the "standard practice of buying, selling and valuing a home" and incentivizing states to adopt strict building efficiency codes; "doubling or tripling" the amount of funding for basic energy research undertaken by the Department of Energy (DOE) and Federal laboratories; and establishing a "Clean Energy Development Administration" to support start-up companies working to commercialize new

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energy technologies. The report is available at [http://files.jobs-council.com/files/2012/01/JobCouncil\\_2011YearEndReportWeb.pdf](http://files.jobs-council.com/files/2012/01/JobCouncil_2011YearEndReportWeb.pdf).

- **DOE Proposes Updated Energy Efficiency Standards for Commercial Heating, Air Conditioning, and Water Heating Equipment.** The DOE has proposed to amend energy efficiency standards and test procedures for a variety of commercial equipment to reflect the most recent voluntary standards issued by the American Society of Heating, Refrigerating, and Air Conditioning Engineers (ASHRAE) and the Air Conditioning, Heating, and Refrigeration Institute (AHRI). The revised standards would apply to water- and evaporatively-cooled commercial air conditioners, certain water-source pumps, single-package vertical air conditioners and heat pumps, computer room air conditioners, and commercial water heaters. The proposed standards are available at [http://www1.eere.energy.gov/buildings/appliance\\_standards/pdfs/ashrae\\_90\\_1\\_nopr\\_fed\\_re\\_g.pdf](http://www1.eere.energy.gov/buildings/appliance_standards/pdfs/ashrae_90_1_nopr_fed_re_g.pdf).

## Congress

- **Congress Responds to Keystone Decision.** Republican leadership in both chambers has announced plans for Congressional hearings and legislative activity in the coming weeks in response to President Obama's decision to reject TransCanada's application to build the Keystone XL Pipeline. House Energy and Commerce Committee Chairman Fred Upton (R-MI) announced that he will hold a hearing entitled "American Jobs Now: A Legislative Hearing on H.R. 3548, the North American Energy Access Act" on Wednesday. This North American Energy Access Act (H.R. 3548), authored by Congressman Lee Terry (R-NE), would give the Federal Energy Regulatory Commission jurisdiction over the Keystone permit. Meanwhile, Senate Energy and Natural Resources Chairman Jeff Bingaman (D-NM) stated he was not surprised by the outcome. He pointed to Secretary of State Hilary Clinton's prior warning that, if forced to make a decision on the pipeline before completion of all environmental studies, she would recommend rejecting it.
- **House Committee asks Secretary of State Clinton to Testify on Keystone Decision, Will Send Deputy.** On Wednesday, House Energy and Commerce Committee Chairman Fred Upton (R-MI) and Energy and Power Subcommittee Chairman Ed Whitfield (R-KY) requested that Secretary of State Hillary Clinton testify before the Subcommittee to review the Keystone XL Pipeline decision. Late in the week, the State Department announced that Kerri-Ann Jones, Assistant Secretary of State for Oceans and International Environment and Scientific Affairs, will testify in lieu of the Secretary.
- **House Committee Sends DOE and EPA letters on Hydraulic Fracturing.** House Oversight and Government Reform Committee Chairman Darrell Issa (R-CA) sent two letters, the first to EPA and the second to the Department of Energy (DOE), regarding the processes by which each agency is crafting hydraulic fracturing policies. Issa's letter to EPA Administrator Jackson expresses concern that the agency is prejudging the environmental

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threats of hydraulic fracturing. “According to documents obtained by the Committee”, the letter states, “it appears that EPA is preparing to regulate the practice of hydraulic fracturing in such a way as to make it an unreliable method of obtaining natural gas.” Issa’s second letter, to Secretary of Energy Stephen Chu, follows up on an investigation by Issa’s committee of the selection process used to appoint members to the DOE Hydraulic Fracturing Advisory Panel. The Issa letter asserts that DOE has “unlawfully continued to refuse to supply all of the relevant documents listed in the subpoena” issued by the Committee on October 5. A copy of the letter to DOE Secretary Chu can be found here: [http://oversight.house.gov/images/stories/Letters/2012-01-19\\_DEI\\_to\\_Chua-DOE\\_-\\_transcribed\\_interviews\\_week\\_of\\_2-19\\_Hydraulic\\_Fracturing.pdf](http://oversight.house.gov/images/stories/Letters/2012-01-19_DEI_to_Chua-DOE_-_transcribed_interviews_week_of_2-19_Hydraulic_Fracturing.pdf) and a copy of the letter to EPA Administrator Lisa Jackson can be found here: [http://oversight.house.gov/images/stories/Letters/2012-01-19\\_DEI\\_Lankford\\_to\\_Jackson\\_re\\_hydraulic\\_fracturing.pdf](http://oversight.house.gov/images/stories/Letters/2012-01-19_DEI_Lankford_to_Jackson_re_hydraulic_fracturing.pdf)

## Judicial

- **Ninth Circuit Rejects Challenge to CAA Regulation in Montana.** A panel of the U.S. Court of Appeals for the Ninth Circuit held on January 19 that challenges to the way the EPA has implemented the Clean Air Act (CAA) in Montana are without merit. The petitioner in the consolidated case, Montana Sulfur and Chemical Co., challenged EPA’s 2002 disapproval of the part of Montana’s CAA state implementation plan (SIP) that addresses sulfur dioxide, and the agency’s subsequent requirement that the state promulgate a new sulfur dioxide SIP, an action known as a “SIP call.” Lastly, the petitioner also challenged the EPA’s 2008 rule taking over the regulation of sulfur dioxide from the state, by issuing a federal implementation plan (FIP). The appeals court found that all three actions by EPA were reasonable and did not exceed the agency’s authority.
- **D.C. Circuit Releases Briefing Schedule, Oral Argument Date, and Merits Panel in CSAPR Case.** The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) released a briefing schedule on January 18 for the case challenging the Cross State Air Pollution Rule (CSAPR). The court denied motions to file separate briefs and the petitioners’ request to bifurcate briefing into stages. The briefing schedule provides that the case will be moving at a rapid pace. Briefs for the petitioners are due February 9, and the joint brief for interveners and amicus curiae in support of petitioners is due February 14. The brief for respondents is due March 1, and the brief for interveners supporting respondents is due March 6. The reply brief for petitioners is due March 12, with final briefs due March 16. In a separate order, the court scheduled oral argument in the case for April 13 and identified the merits panel as Judges Rogers, Griffith, and Kavanaugh.
- **Environmental Group File Notice of Intent to Sue Over Coal Ash Regulation.** On January 18, the environmental group Earthjustice filed a notice of intent to sue EPA. The group, which filed on behalf of Physicians for Social Responsibility, the Sierra Club, and the Environmental Integrity Project, as well as other groups, alleges that the EPA has failed to

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perform nondiscretionary duties by failing to finalize regulations for coal ash. The effort to issue a new coal rule ramped up after a large spill of coal ash in 2008 contaminated an area in Tennessee. The EPA previously issued a proposed rule for coal ash in May 2010, but the rule did not provide a clear direction for regulation because it consisted of several options, one of which would label coal as a hazardous waste under subtitle C of the Resource Conservation and Recovery Act (RCRA) and one of which would keep its status as solid waste under subtitle D. The classification of coal ash as hazardous or non-hazardous waste is critical. A hazardous classification would preclude its use in recycling, and would require strict monitoring and control of its disposal. The EPA has 60 days to finalize regulations or otherwise respond to the issues raised in the Earthjustice notice. If this does not occur, the group states that it will file a lawsuit in federal district court.

- **D.C. Circuit Declines Requests to Include Inspector General Report in GHG Cases.** On January 13, the D.C. Circuit stated that it would not consider an Inspector General's (IG) report that criticized EPA's peer review process for scientific data used by the agency in making its "endangerment finding" for GHGs. Various industry groups had requested that IG's report be included in the three on-going cases challenging a series of EPA GHG rulemakings, including the endangerment finding. The IG's report came out in October, after the endangerment finding rulemaking was over and after the industry groups had filed their petitions for review. The industry petitioners filed with the court a request for "judicial notice" of the document. In a one-sentence statement, the court denied the request. The result of this decision is that the report cannot be considered as part of the record of the cases. Oral argument for all three consolidated GHG cases is to be held on February 28 and 29.

## States

- **New Jersey Issues One Year Hydraulic Fracturing Moratorium.** On January 17, New Jersey Governor Chris Christie signed State Senate bill S. 2576. The bill bans hydraulic fracturing ("fracking") in the State for one year, providing State regulators more time to analyze the environmental impacts of the natural gas harvesting process. Governor Christie previously asserted that a permanent fracking ban would be premature without additional scientific data and a more thorough regulatory review. A copy of the bill is located [here](#).
- **New York Issues Draft Rules on CO<sub>2</sub> Limits and Environmental Justice for Power Sector.** The New York Department of Environmental Conservation ("DEC") released draft rules on CO<sub>2</sub> limits for power plants. The draft regulations apply to new plants with more than 25 MW of capacity and existing plants that seek an increase in capacity past 25 MW. Plant operators have the option of output-based or input-based emissions limits. The CO<sub>2</sub> output limits are 925 pounds per MW hour for fossil fuel fired plants and 1,450 pounds per MW hour for simple cycle combustion turbines. The CO<sub>2</sub> input limits are 120 pounds per million Btu for fossil fuel fired plants and 160 pounds per million Btu for simple cycle combustion turbines. DEC also proposed environmental justice standards, which will

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require new power plants to consider air quality impacts from construction on surrounding low-income communities. DEC Commissioner Joe Martens says the proposed environmental justice regulations are the nation's first. More detail on the proposed rules can be found [here](#).

- **CO<sub>2</sub> Emissions for RGGI States Projected to be Less than Program's Cap.** Environment Northeast, a research and advocacy nongovernmental organization, released a report projecting that 124 million tons of CO<sub>2</sub> emissions were released in 2011 within the 10 states that make up the Regional Greenhouse Gas Initiative ("RGGI"). RGGI is a regional cap-and-trade program for power plant CO<sub>2</sub> emissions. The participating states are New York, Massachusetts, New Hampshire, Rhode Island, Vermont, Connecticut, Delaware, Maine, and Maryland. New Jersey Governor Chris Christie announced in May 2011 that his State would withdraw from RGGI by the end of 2011. Environment Northeast's projection is 34 percent lower than the 188 million ton cap established by the RGGI states, and represents the lowest total since program inception in 2009. The report says lower emissions are attributable to regional energy efficiency programs, decreased coal-fired electricity generation, and increased use of renewable energy. A copy of the report is located [here](#).

## Industry & NGOs

- **Industry and Environmentalists Respond to President Obama's Keystone XL Pipeline Decision.** During a speech at the National Press Club, American Petroleum Institute President and CEO Jack Gerard questioned President Obama's desire to create jobs by rejecting "the largest shovel ready project in America." Gerard said the pipeline would create 20,000 new American jobs over the next two years and 500,000 new jobs by 2035. Michael Brune, Executive Director of the Sierra Club, issued a statement in support of the President's decision. Brune said the decision was "another down payment on the Administration's plan to move our country beyond oil." The Natural Resources Defense Council said the pipeline was never in America's national interest and Obama's decision "is helping move America down a cleaner, safer path."
- **Report Backed by Top Energy Executives Seeks Responsible Shale Gas Production.** The Bipartisan Policy Center's Energy Project ("BPCEP") issued a report calling for the responsible development of shale gas production. The report argues that shale gas production gains could be squandered if environmental impacts of harvesting are not addressed. BPCEP's board includes Clarence Cazalot, Chairman, President, and CEO of Marathon Oil Corp.; William Colton, Vice President Exxon Mobil Corp.; and James Hackett, Chairman and CEO of Anadarko Petroleum Corp. The full report is located [here](#).

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## Studies & Reports

- **USGBC and Fifteen Partners Release Report on Existing Legal Authorities to Improve Efficiency and Sustainability of Residential and Commercial Buildings.** The U.S. Green Building Council (USGBC) and fifteen partner organizations have released a new report, entitled *Better Buildings Through Executive Action: Leveraging Existing Authorities to Promote Energy Efficiency and Sustainability in Multifamily, Residential and Commercial Buildings*, that identifies nearly three dozen opportunities for over 23 Federal programs to use existing legal authorities to promote more energy efficient and sustainable buildings. An update of a comprehensive report on existing legal authorities published in April 2010, the new report also discusses progress and developments that have occurred with respect to the recommendations offered in that earlier report. Both reports were prepared by Van Ness Feldman, which has undertaken several studies on existing legal authorities in recent years for a variety of clients. The new report is available at <https://www.usgbc.org/ShowFile.aspx?DocumentID=10856>.
- **MIT Study Considers Impact of Shale Gas on Costs of Reducing GHG Emissions, Development of CCS and Renewables.** A new study by researchers at the Massachusetts Institute of Technology (MIT) provides projections of the likely supply and cost of domestically produced natural gas from shale, and considers the impacts of inexpensive shale gas on the achievement of GHG reduction targets and the commercialization of renewables and carbon capture and sequestration (CCS). The study concludes that when combined with a carbon tax or an aggressive renewable portfolio standard, shale gas can significantly reduce the costs of lowering GHG emissions. However, the study notes that the development of shale could keep natural gas prices so low as to prevent the deployment of renewable energy technologies beyond any minimum levels required by a portfolio standard. Inexpensive gas would have an even more severe effect on the introduction of CCS, according to the study – potentially delaying the introduction of CCS for coal-fired sources by one to two decades. The study is available at [http://globalchange.mit.edu/files/document/MITJPSPGC\\_Reprint\\_12-1.pdf](http://globalchange.mit.edu/files/document/MITJPSPGC_Reprint_12-1.pdf).

If you have questions about topics covered in this Update, please contact Kyle Danish, head of the Climate Change and Emissions Trading Practice, at [kwd@vnf.com](mailto:kwd@vnf.com).

*The Climate, Energy, & Air Weekly 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.*

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*In early 2012, Van Ness Feldman will combine its practice with the Seattle land use, real estate, and natural resources law firm GordonDerr LLP. The combined firm will continue to be known as Van Ness Feldman, A Professional Corporation, and the firm's Seattle office will use the name Van Ness Feldman GordonDerr for a transition period. For more information, please visit [www.vnf.com/gordonderr](http://www.vnf.com/gordonderr).*