

March 27, 2013

## Climate, Energy, & Air Update Weeks of March 13-27, 2013

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*Obama proposes fund to finance energy R&D with revenues from federal oil and gas leasing . . . Energy companies and environmental groups form entity to certify hydraulic fracturing activities . . . In votes on the Budget Resolution, Senators take positions on Keystone XL and carbon tax . . . Sens. Murkowski and Landrieu push revenue-sharing bill . . . Senate committee moves WRDA bill . . . Court finds FERC was treading on CFTC jurisdiction in punishing gas trader . . . Supreme Court receives petitions to hear challenges to D.C. Circuit decision upholding EPA GHG regulations.*

### Executive Branch

*Also see our updated table of “Key EPA Rulemakings Affecting the Energy Sector” at the end of this report.*

- **White House Calls for \$2 Billion Energy Security Trust Fund to be Financed by Existing Oil and Gas Leases.** In a March 15 speech at the Argonne National Laboratory, President Obama reiterated his call for an “Energy Security Trust Fund” that would fund research into technologies that will “shift our cars . . . off oil.” The White House indicates that such a Fund could reach \$2 billion over ten years, and would be funded by royalties from oil and gas leases on federal lands. President Obama’s Deputy Assistant for Energy and Climate Change, Heather Zichal, clarified that the Trust would be funded entirely from leases in areas identified in the Administration’s current 5-year plan for energy development, and would not allow for expanded drilling on federal lands—a position that is at odds with that of some Republicans in Congress. Obama first proposed the Energy Security Trust Fund in his January 2013 State of the Union address (*see our [February 13 Update](#)*).
- **EPA Withdraws Refinery MACT and NSPS Rule from OMB Review.** On March 12, EPA withdrew from White House Office of Management and Budget (OMB) review a proposed rule that would have revised EPA’s assessment of public health risks from petroleum refinery emissions. The withdrawn rule also would have updated new source performance standards (NSPS) for conventional pollutants at refineries. The rule, entitled “Petroleum Refinery Sector Risk and Technology Review and NSPS,” was originally issued in 2009 by the Bush Administration, but was subsequently withdrawn for reconsideration by the Obama EPA. The EPA sent a revised version of the rule—which includes

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new findings about public health risks from refineries—to OMB for pre-publication review in September 2012. According to an EPA spokesperson, EPA's March 12 withdrawal of the rule from OMB review will allow EPA to complete additional technical analyses to support the rule. EPA's website projects that it will complete the rulemaking process by August 2013.

- **NRC Strengthens Requirements for “Hardened” Venting Systems, Delays Decision on Requiring Radiation Filter Systems at Nuclear Plants.** On March 19, the Nuclear Regulatory Commission (NRC) ordered Commission staff to strengthen existing standards for “hardened” containment vents at certain nuclear plants, and initiated a formal rulemaking process to consider the addition of radiation filtering systems on nuclear reactors. NRC officials said both decisions result from lessons the NRC has learned from the Fukushima disaster. The decision to pursue a formal rulemaking to consider radiation filtering systems likely means that a final rule on such systems will not be issued until 2017—later than safety advocates had requested.
- **DOE Announces \$226 Million in Additional Funding for Small Nuclear Reactors.** On March 11, the U.S. Department of Energy (DOE) announced a new round of funding to support the development of “innovative” designs for small modular nuclear reactors. The new round of funding will enable one additional cost-sharing project between DOE and a private company or companies to demonstrate the viability of producing nuclear energy in modular reactors rated at 300 MW or less. In 2012, DOE and nuclear energy developer Babcock & Wilcox agreed to share the costs of designing, certifying, and licensing one model for a small modular reactor. The new round of funding could allow a second small nuclear reactor design to receive government support. DOE's announcement is available here: <http://energy.gov/articles/energy-department-announces-new-funding-opportunity-innovative-small-modular-reactors>.
- **NRC Tightens Security Requirements for Handling of Radioactive Materials.** On March 19, the NRC published a final rule tightening security requirements for using and transporting dangerous amounts of radioactive materials. The new rule, which was initially proposed following the September 11 terrorist attacks, would enhance security clearance requirements for access to Category 1 and 2 quantities of radioactive materials, and would require companies that deal with radioactive materials to establish plans for physically securing radioactive materials and to notify the NRC prior to shipping Category 1 quantities.
- **Energy Companies, Environmental Groups Announce Agreement on Voluntary Performance Standards for Hydraulic Fracturing.** Several oil and gas companies and environmental groups have announced an agreement to create an independent entity that would certify energy companies on a set of voluntary environmental performance standards for hydraulic fracturing in shale formations. The new entity will be called the Center for Sustainable Shale Development (CSSD), and will be responsible for certifying companies that comply with the standards as well as for developing additional standards. For additional information on the initial, voluntary standards, see the CSSD's website: <http://www.sustainablehale.org/>.

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## Congress

- **House Subcommittee Holds Hearing on Natural Gas Infrastructure.** On March 19, the House Energy and Commerce Subcommittee on Energy and Power held a hearing entitled “American Energy Security and Innovation: The Role of Regulators and Grid Operators in Meeting Natural Gas and Electric Coordination Challenges.” According to Committee-issued documents, the hearing was intended to examine the role of federal and state regulators and electric grid operators as they deal with natural gas reliability issues. Witnesses included FERC Commissioners Phillip Moeller and Cheryl LeFleur. The Commissioners’ comments focused on natural gas reliability issues, particularly in the Northeast region, because of a lack of pipeline infrastructure. Committee documents, a full list of witnesses and the webcast of the hearing are available at <http://energycommerce.house.gov/hearing/AESI-role-regulators-and-grid-operators-meeting-natural-gas-and-electric-coordination-challenges>.
- **Senate Committee Unanimously Passes WRDA Bill.** On March 20, the Senate Environment and Public Works Committee unanimously passed S. 601, the “Water Resources Development Act of 2013,” a bill to reauthorize the law that authorizes federal flood control, navigation and various environmental studies. Both Chairman Barbara Boxer (D-CA) and Ranking Member David Vitter (R-LA) issued statements lauding the bill and the process by which the Committee came to a unanimous agreement. Traditionally, WRDA used to be reauthorized every two years with bipartisan support; however, the last WRDA reauthorization was signed into law in 2007. Senate Majority Leader Harry Reid (D-NV) has said that the Senate will consider the bill in April or May. The House Transportation and Infrastructure Committee and its Subcommittee on Water Resources and Environment have begun holding hearings on the measure with stakeholders. The text of S. 601 and updated summary are available at [http://www.epw.senate.gov/public/index.cfm?FuseAction=Majority.PressReleases&ContentRecord\\_id=88dd6359-cd13-f25c-b607-e75caf055efb](http://www.epw.senate.gov/public/index.cfm?FuseAction=Majority.PressReleases&ContentRecord_id=88dd6359-cd13-f25c-b607-e75caf055efb).
- **Senators Introduce Revenue Sharing Bill for Offshore Energy Production.** On March 20, Senate Energy and Natural Resources Committee Ranking Member Lisa Murkowski (R-AK) and Senator Mary Landrieu (D-LA) introduced S. 630, “Fixing America’s Inequities with Revenues (FAIR).” The bill would authorize 37.5 percent of revenues from offshore energy production to be allocated to states, regardless of the type of energy produced. The bill would also gradually lift the current congressionally mandated \$500 million annual cap on revenues kept by Gulf Coast producing states. A summary of the bill is available at <http://www.energy.senate.gov/public/index.cfm/republican-news?ID=7b94e31e-4c22-4731-be52-6cc7c53390cd>.
- **Senate Committee Votes to Confirm Interior Nominee.** On March 21, the Senate Energy and Natural Resources Committee voted 19 to 3 to approve the nomination of Sally Jewell to be Secretary of the Interior. The three Senators who voted against Jewell were Senators John Barrasso (R-WY), Mike Lee (R-UT) and Tim Scott (R-SC). The nomination will now be considered by the full Senate.
- **House Republicans Send Letter to EPA.** On March 14, House Energy and Commerce Committee Chairman Fred Upton (R-MI) joined 13 Republicans on the Committee to pen a letter to EPA Acting Administrator Bob Perciasepe expressing concerns about pending EPA

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greenhouse gas regulations addressing power plants. The letter states that the legislators are “concerned about the impacts of these [pending greenhouse gas] regulations and also of new additional regulations.” The letter goes on to ask for additional information regarding “climate change actions under consideration” by the EPA. The letter was accompanied by two attachments listing specific questions about the scope and intentions of several actions by the agency. The letter requests a response by April 5, 2013. A copy of the letter is available at <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/letters/20130314EPA.pdf>.

- **House Subcommittee Votes on REINS Act.** On March 20, the House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law voted 6 to 3 to pass H.R. 367, the “Regulations From the Executive in Need of Scrutiny Act of 2013.” Also known as the “REINS Act,” the bill would require a joint resolution of approval from Congress within 70 legislative days before any agency-promulgated rule may take effect that has a greater than \$100 million impact on the economy. The House passed an identical version of this bill in December of 2011. At that time, four Democrats joined Republicans to support the measure, which passed by a vote of 241 to 184. A transcript of the mark-up and the latest version of the bill are available at [http://judiciary.house.gov/hearings/Markups%202013/mark\\_03202013.html](http://judiciary.house.gov/hearings/Markups%202013/mark_03202013.html).
- **House Committee Holds Mark-Up.** On March 20, the House Natural Resources Committee voted 17 to 12 to approve H.R. 678, the “Bureau of Reclamation Small Conduit Hydropower Development and Rural Jobs Act.” H.R. 678, sponsored by Congressman Scott Tipton (R-CO), would streamline the installation of small canal and pipeline hydropower development projects by authorizing the utilization of all Bureau of Reclamation conduit facilities for hydropower development. A full list of the bills considered by the Committee at the March 20 Committee meeting and a summary of amendments is available at <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=324063>.
- **Two Ranking Members Send Letter to EPA on RINS.** On March 20, Senate Environment and Public Works Committee Ranking Member David Vitter (R-LA) and Senate Energy and Natural Resources Committee Ranking Member Lisa Murkowski (R-AK) sent a letter to EPA’s Office of Air and Radiation Assistant Administrator Gina McCarthy. The letter asks Administrator McCarthy to “utilize any and all existing regulatory authority and flexibility to address the issue of rising Renewable Identification Numbers (RIN) costs and alleviate the threat of increased consumer fuel costs.” The letter also requests that the EPA respond within 14 days with a detailed plan to address the issues raised in the letter. A copy of the letter is available at [http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord\\_id=899fb70f-ee0b-4fbd-83f2-73a5af3155f6&Region\\_id=&Issue\\_id](http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=899fb70f-ee0b-4fbd-83f2-73a5af3155f6&Region_id=&Issue_id).
- **Senate Votes on Energy Amendments to the Budget.** The Senate voted on March 22 and 23 on several energy and environment related amendments to S. Con. Res. 8, the Fiscal Year 2014 Budget Resolution. The Budget Resolution sets a budget for fiscal year 2014 spending, revises some budgetary levels for fiscal year 2013, and sets forth budgetary levels for fiscal years 2015 through 2023. The resolution passed by a vote of 50 to 49. More than 300 amendments were filed; 43 were voted on during the debate. Energy-related amendments included limitations on EPA’s ability to regulate greenhouse gas emissions, changes to the permit process for the Keystone XL pipeline and changes to the Mercury and Air Toxics Standard. None of the

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amendments have the force of law, although they serve as indicators of Senatorial sentiment on the issues raised and voted on. A full list of the amendments considered in a marathon session known as a “vote-a-rama” is available at <http://democrats.senate.gov/2013/03/23/wrap-up-for-friday-march-22-saturday-march-23-2013/>. (See the next two items for more detail on two important issues that received a vote during the session to consider the Budget Resolution).

- **Senate Rejects Carbon Tax Amendment to the Budget.** On March 22, the Senate rejected an amendment to the Fiscal Year 2014 Budget Resolution that would have established a tax on carbon pollution and required the revenue raised to be returned in the form of deficit reduction, reduced federal tax rates, and other cost savings. The amendment, which was proposed by Senator Sheldon Whitehouse (D-RI), failed by a vote of 41-58, with no Republican Senators supporting the amendment and several Democrats from energy-producing states opposing passage. A full summary of Senators’ votes on the amendment is available here: [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=113&session=1&vote=00058](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00058).
- **Senate Adopts Keystone XL Pipeline Amendment to the Budget.** On March 22, the Senate adopted an amendment to the Fiscal Year 2014 Budget Resolution that expresses support for the construction of the Keystone XL pipeline. The amendment, which was proposed by Senators John Hoeven (R-ND) and Max Baucus (D-MT), was adopted by a vote of 62-37. No Republicans voted against the amendment, and several Democrats from energy-producing states supported passage. A full summary of Senators’ votes on the amendment is available here: [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=113&session=1&vote=00061](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00061).

## Judicial

For more information on pending environmental law cases, see the VNF Environment Appellate Litigation Tracking Tool at <http://www.vnf.com/litigationtracker>.

- **Parties File Cert Petitions with Supreme Court Challenging EPA’s GHG Regulations; Supreme Court Extends Deadline for Additional Petitions.** On March 20, three entities, including the Commonwealth of Virginia (Virginia), timely filed petitions for a *writ of certiorari* to the U.S. Supreme Court, requesting that the Court hear their challenges to the U.S. Court of Appeals for the District of Columbia Circuit’s (D.C. Circuit) decision in *Coalition for Responsible Regulation v. EPA*, D.C. Cir., No. 09-1322. In that case, the D.C. Circuit upheld four EPA climate rules promulgated in the wake of *Massachusetts v. EPA*, 549 U.S. 497 (2007)—the Supreme Court’s decision finding that carbon dioxide (CO<sub>2</sub>) is a “pollutant” under the Clean Air Act (CAA). EPA’s CAA climate rules include the agency’s 2009 determination that greenhouse gas (GHG) emissions from motor vehicles endanger public health and the environment (endangerment finding), and thus should be regulated—as well as EPA’s subsequent emissions standards for new vehicles. EPA’s climate rules also include the agency’s determination that the CAA requires major stationary sources to obtain GHG permits under the CAA’s Title V and Prevention of Significant Deterioration (PSD) programs, as well as the agency’s “Tailoring Rule,” which limited such permitting to stationary sources that are large emitters of GHGs. Two of the *cert* petitions— those filed by Virginia and the Pacific Legal Foundation—ask the Supreme Court to

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review EPA's endangerment finding. The third petition—which was filed by the Utility Air Regulatory Group (UARG)—asks the Court to review whether the agency properly determined that it was compelled to include GHGs in the Title V and PSD permitting programs. In addition, the Supreme Court issued a series of letters between March 8 and March 14 granting other parties to the case an extension of time in which to file their *cert* petitions. Approved parties will now have until April 19 to file their petitions with the Court.

- **D.C. Circuit Strikes Down FERC's \$30 Million Civil Penalty Against Natural Gas Trader.** On March 15, the D.C. Circuit struck down the Federal Energy Regulatory Commission's (FERC) \$30 million civil penalty against Brian Hunter, a former Amaranth natural gas trader. The court held that regulatory jurisdiction over the commodity futures market lies with the Commodity Futures Trading Commission (CFTC); therefore, FERC had no authority to impose the penalty against Hunter. FERC accused Hunter of allegedly manipulating the gas futures market operated by the New York Mercantile Exchange (NYMEX), which is regulated by the CFTC. (*For more information on the lawsuit, which is the first litigated case under section 4A of the Natural Gas Act, see our March 18, 2013 Alert at <http://www.vnf.com/assets/attachments/1008.pdf>.)*
- **Tenth Circuit Dismisses Energy Producers Suit Against the BLM on Jurisdictional Grounds.** On March 12, the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit) dismissed six energy producers' and an energy coalition's appeal of the Department of the Interior's (DOI) decision not to issue auctioned oil and gas leases under the Mineral Leasing Act (MLA). The MLA requires the Bureau of Land Management (BLM), an agency within DOI, to issue oil and gas leases within sixty (60) days of receiving full payment. The petitioners paid \$2 million for 118 leases on parcels of public land in Utah and Wyoming, which BLM auctioned for lease between 2005 and 2010. The Secretary of Interior, Ken Salazar, did not issue any of the leases after environmental groups filed protests on all 118 leases. The Tenth Circuit dismissed the petitioners' appeal on jurisdictional grounds after finding that the district court decision in the case, *Western Energy Alliance v. DOI*, D. Wyo., No. 10-cv-226, had remanded the case back to the BLM to determine whether the leases should be issued. Because of the remand, the Tenth Circuit found that there had been no final decision by the district court, and thus, the case was not appealable.
- **Industry Groups File Lawsuit and Reconsideration Petition over EPA's New PM<sub>2.5</sub> Standards.** On March 15, the National Association of Manufacturers sued EPA in the D.C. Circuit in *National Ass'n of Manufacturers v. EPA*, No. 13-1069, challenging the EPA's more stringent air quality standard for fine particulate matter (PM<sub>2.5</sub>). Under the CAA, EPA is required to set National Ambient Air Quality Standards (NAAQS) for criteria pollutants, including PM<sub>2.5</sub>. The new standard was published by final rule on January 15 and set the annual PM<sub>2.5</sub> standard at 12 micrograms per cubic meter (µg/m<sup>3</sup>). The previous standard was 15 µg/m<sup>3</sup>. On March 18, several industry groups also sued EPA over the strengthened air quality standard (*Utility Air Regulatory Group v. EPA*, D.C. Cir., No. 13-1071). Additionally, industry groups have filed a petition for administrative reconsideration with EPA. The petition asks the agency to reevaluate particular aspects of the final rule, including a request to eliminate near-road PM<sub>2.5</sub> monitoring and to stay the rule until EPA finalizes its requirements for implementing the standard. See the Request for Reconsideration here: [http://op.bna.com/fcr.nsf/id/jcos-95ypqr/\\$File/per.pdf](http://op.bna.com/fcr.nsf/id/jcos-95ypqr/$File/per.pdf).

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- **Supreme Court Grants Review of National Forest Management Plan.** The U.S. Forest Service (Forest Service) released a plan in 2004 to manage 11 national forests in California's Sierra Nevada mountain range. The plan was challenged by environmentalists on the basis that it did not adequately protect wildlife. On March 18, the U.S. Supreme Court granted the Forest Service's petition to review a 2012 ruling from the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit), *U.S. Forest Service v. Pacific Rivers Council*, No. 12-623. The Ninth Circuit's decision upheld the environmentalists' challenge and found that the Forest Service failed to adequately evaluate the plan's impact on native fish species under the National Environmental Policy Act (NEPA). The plan would allow increased logging and decreased grazing permit requirements within the national forests.

**NEW: Van Ness Feldman's Hurricane Sandy Resource Center**

The Van Ness Feldman Hurricane Sandy Resource Task Force has created a resource center that provides information on key federal and state-administered programs tasked with disaster recovery in the Northeast, including information on federal disaster relief funding opportunities. For more information, please visit the Van Ness Feldman [Hurricane Sandy Task Force](#) resource center.

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Status of Selected EPA Rulemakings Affecting Energy

Rule	Status
<b>Greenhouse Gas New Source Performance Standards for Power Plants</b>	Rule for new power plants is currently in proposed format. EPA is likely to finalize in the first quarter of 2013. This will trigger an obligation for EPA to promulgate an NSPS covering existing plants. EPA has said it such an NSPS is “years away.” However, environmental groups are pushing EPA to move forward.
<b>Utility Mercury and Air Toxics Rule (Utility MATS Rule)</b>	Litigation is underway. Petitioners filed briefs in 2012. EPA filed response in January. Limited reconsideration by EPA of new unit standards and startup, shutdown and malfunction requirements.
<b>Cross-State Air Pollution Rule (CSAPR)</b>	D.C. Circuit denied rehearing of the panel decision. EPA has not said if it will appeal to Supreme Court. Pending court action or development of a new rule, the Clean Air Interstate Rule is in effect.
<b>Cooling Water Intake Rule (§ 316(b) Rule)</b>	Rule is currently in proposed format. EPA is required to finalize by June 27, 2013.
<b>Coal Combustion Residuals Rule</b>	Rule is currently in proposed format. EPA has said that it wants to finalize in 2014. Environmental groups and ash recyclers have filed suit in district court to compel expedited agency action.
<b>Effluent Guidelines for Power Plants</b>	Deadline to propose rule: April 19, 2013 and deadline to finalize: May 22, 2014. EPA has said it wants to harmonize an Effluent Guidelines rule with the Coal Combustion Residuals Rule. In January, EPA sent draft proposed rule to White House Office of Management and Budget for review.
<b>Oil and Natural Gas Sector New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants</b>	Rule was finalized in 2012. In January, EPA asked the D.C. Circuit to hold litigation while it reconsiders the rule. For the NSPS, EPA said it will propose a reconsidered rule covering some issues by March 29, 2013, and a final rule by July 31, 2013; the agency might address certain additional NSPS issues in a rule proposed by December 17, 2013 and finalized by November 25, 2014. For the NESHAPs, EPA said it intends to propose a reconsidered rule by April 30, 2014, and finalize it by March 31, 2015.
<b>2008 8-Hour Ozone National Ambient Air Quality Standard</b>	The D.C. Circuit heard oral argument on a legal challenge to the 2008 ozone NAAQS in late 2012; a decision is likely in the first quarter of 2013. Under the Clean Air Act, EPA is required to review the ozone NAAQS in 2013. The agency is likely to propose a more stringent standard.

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Rule	Status
Fine Particulate Matter National Ambient Air Quality Standard	EPA finalized a new, more stringent PM2.5 NAAQS at the end of 2012. The agency will move forward with nonattainment designations and implementation in 2013. Due to a recent D.C. Circuit decision – NRDC v. EPA, No. 08-1250 (2013) – the agency and states will have less implementation flexibility. In March, two lawsuits were filed by industry and manufacturing groups in the D.C. Circuit, challenging the new PM2.5 NAAQS. Industry groups also petitioned the EPA for administrative reconsideration of the final rule.
Regional Haze Rule	EPA had allowed several states to use CSAPR compliance in lieu of source-specific Best Available Retrofit Technology requirements. Invalidation of CSAPR will force EPA to revisit this policy.
Renewable Fuels Standard	EPA has proposed Renewable Volume Obligations for 2013 and proposed a Quality Assurance Plan to prevent fraud in the issuance of Renewable Identification Numbers. In January, the D.C. Circuit upheld 2012 overall volume requirement, but invalidated cellulosic biofuels requirement.
Tier III Transportation Fuel Standards	A proposed rule is under review at OMB. According to the EPA Unified Agenda, the agency will issue proposed rule in March and final rule in December. The rule is expected to tighten cap on sulfur in gasoline from 30 ppm to 10 ppm. In March, refiners met with EPA and OMB and urged the agency to scrap the proposed rule and instead release an advanced notice of proposed rulemaking (ANPRM) to explain the agency's justification for its Tier III standards.

If you have questions about topics covered in this Update, please contact Kyle Danish at [kwd@vnf.com](mailto:kwd@vnf.com).

*The Climate, Energy, & Air Update is intended as a general summary of major policy developments that we judge to be of interest to a broad range of our clients and friends. We welcome your comments and suggestions. Coverage in, and selection of topics for, the Update is not intended to reflect the position or opinion of Van Ness Feldman or any of its clients on any issue. This document has been prepared by Van Ness*

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*In February 2012, Van Ness Feldman expanded its capabilities by combining practices with the Seattle law firm of GordonDerr LLP, a preeminent real estate, land use, water law, and civil litigation firm in the Pacific Northwest. Learn more at [www.vnf.com](http://www.vnf.com).*