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# Climate, Energy, & Air Update

## Weeks of Mar. 20 – Apr. 2, 2014

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*Interagency review begins for EPA existing power plant rule . . . White House releases interagency strategy to address methane emissions. Under the strategy, EPA will consider new controls for existing oil and gas infrastructure that would be in place by the end of 2016 . . . EPA and Army Corps of Engineers propose revised definition of “waters of the United States” for purposes of wetlands permitting . . . Congress holds multiple hearings on LNG exports . . . Committees begin hearings on budget . . . Supreme Court denies case on EPA’s retroactive veto of a dredging permit for a coal mine . . . More petitioners want Supreme Court to review Ninth Circuit case on California’s Low Carbon Fuel Standard.*

### Executive Branch

- **OMB Begins Review of Existing Power Plant Rule.** The Environmental Protection Agency (EPA) has formally submitted its proposed guidelines setting carbon dioxide “standards of performance” for existing power plants under section 111(d) of the Clean Air Act to the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA). Section 111(d) outlines a federal-state process for regulation, under which states submit plans to EPA with standards of performance for the regulated sources. In past section 111(d) rulemakings, EPA typically has published an “emission guideline document” setting a benchmark performance level for the state plans. OIRA’s coordination of interagency review is limited to but may be shorter than 90 days, making EPA’s March 31 submission consistent with a public release of the proposed rule by June 1, as directed by President Obama’s Climate Action Plan.
- **White House Outlines Strategy to Reduce Methane Emissions.** On March 28, the White House released the Administration’s “comprehensive interagency strategy to cut methane emissions” (Methane Strategy). The Methane Strategy includes both regulatory actions and voluntary incentive programs that federal agencies will use to combat methane emissions. These actions target a number of sectors: landfills, coal mines, agriculture and oil and gas. Of note, while the Methane Strategy does not mandate new regulations for methane emissions from the oil and natural gas sectors, it requires a process for EPA consideration of such regulations, and provides that – if regulations are promulgated – they should be in place by the end of 2016. Additionally, the Methane Strategy outlines key steps to improve the measurement of methane emissions. The Methane Strategy is available at [http://www.whitehouse.gov/sites/default/files/strategy\\_to\\_reduce\\_methane\\_emissions\\_2014-03-28\\_final.pdf](http://www.whitehouse.gov/sites/default/files/strategy_to_reduce_methane_emissions_2014-03-28_final.pdf). For a more in-depth analysis of the Methane Strategy, see the March 31 VNF Alert at <http://www.vnf.com/2346>.
- **EPA and Army Corps Issue Long-Awaited Proposed Regulation Clarifying Clean Water Act Jurisdiction.** On March 25, EPA and the U.S. Army Corps of Engineers (Army Corps) issued a proposed joint rule that purports to clarify “considerable debate and uncertainty” on which “waters of the United States” are jurisdictional under the Clean Water Act (CWA). The CWA prohibits the discharge of any pollutant into “navigable waters” except as authorized by the statute, and gives both the EPA and Army Corps authority to issue permits allowing for the discharge of pollutants and dredge and fill material into U.S. waters. However, the statute only gives permitting authority to the agencies if the waters are considered “waters of the United States.” The joint proposed rule would affect project development and operations across the energy, water, construction, building, agricultural and transportation sectors by expanding the types of waters that will be considered jurisdictional and subject to CWA permitting requirements. Under the proposed rule, jurisdictional waters would include: all “tributaries” of jurisdictional waters, and all waters located within a

riparian area or a floodplain, which have historically been subject to case-by-case determinations; certain “isolated” wetlands and ditches dug in uplands, which were categorically excluded from jurisdiction under prior agency guidelines and case law; and certain “other” waters that are deemed to have a “significant nexus” to jurisdictional waters. Concurrent with the proposed rule, the agencies also announced the issuance of an “Interpretive Rule” that implements certain agricultural permitting exemptions under CWA section 404(f)(1)(A) and, according to the agencies, is intended to incentivize conservation practices. EPA’s pre-publication proposed rule is available at [http://www2.epa.gov/sites/production/files/2014-03/documents/wus\\_proposed\\_rule\\_20140325\\_prepublication.pdf](http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_20140325_prepublication.pdf) and its Interpretive Rule is available at [http://www2.epa.gov/sites/production/files/2014-03/documents/cwa\\_section404f\\_interpretive\\_rule.pdf](http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_section404f_interpretive_rule.pdf). For a more in-depth analysis of the proposed rule, see the March 27 VNF Alert at <http://www.vnf.com/2321>.

- **DOE Conditionally Approves Export from Jordan Cove LNG Facility.** The Department of Energy (DOE), which has responsibility for authorizing the import and export of natural gas, conditionally approved export of liquefied natural gas (LNG) from the proposed \$7.5 billion Jordan Cove LNG export terminal in Coos Bay, Oregon. DOE’s export license approval is conditional on approval of the facility by the Federal Energy Regulatory Commission (FERC), which has responsibility for approving liquefaction and LNG terminal construction and operations. In 2012, FERC revoked its approval for a previous iteration of the Jordan Cove project on the grounds that the current export project exceeded the scope of the original authorization. Jordan Cove has reapplied for a new FERC license, but FERC has not issued a timeline for decision. DOE’s approval limits exports to 0.8 billion standard cubic feet per day (Bcf/d) of natural gas for 20 years. DOE’s decision is available at <http://energy.gov/sites/prod/files/2014/02/f7/ord3391.pdf>. For a more in-depth analysis of the natural gas export process, see the March 22, 2013 VNF Alert at <http://www.vnf.com/1104>.
- **DOI Takes First Step Towards Oregon Wave Energy Project.** The Department of the Interior Bureau of Ocean Energy Management (BOEM) announced a 30-day public comment period to gauge competitive interest and potential environmental impacts for the development of federal waters 5 miles off the Oregon coast to test wave energy facilities. This is the first step in approving a proposal by the Northwest National Marine Renewable Energy Center at Oregon State University to install an up to 10 MW array of commercial-scale marine hydrokinetic devices. If there is no competitive interest, BOEM may move forward with a noncompetitive federal lease. BOEM’s announcement is available at: <http://www.boem.gov/Press03212014/>. Oregon State’s project proposal is available at <http://www.boem.gov/NNMREC-Unsolicited-Lease/>.
- **EPA Remands Air Permit for Failure to Account for Biomass Emissions.** On March 26, the EPA Environmental Appeals Board (EAB) partially remanded a Puerto Rican facility’s air pollution permit under the Prevention of Significant Deterioration (PSD) program based on its failure to account for greenhouse gas (GHG) emissions from biomass. This is one of the first decisions regarding the emissions of GHGs from facilities burning biomass following a July 12, 2013 United States Court of Appeals for the District of Columbia (D.C. Circuit) decision vacating an EPA rule that would have provided facilities burning biomass a three-year exemption from requirements to obtain an NSR permit for their carbon dioxide emissions (the Deferral Rule). *Center for Biological Diversity v. EPA*, No. 11-1101. EPA had established the three-year exemption to coincide with a study of and accounting framework for the lifecycle emissions of biomass combustion, which it has asked its Science Advisory Board (SAB) to review. EPA is currently evaluating the SAB comments, but has not announced a schedule for releasing its findings. The EAB decision is available at [http://yosemite.epa.gov/oa/EAB\\_Web\\_Docket.nsf/CAA-Decisions/087FA0AC7FBoCoF685257CA60065AC33/\\$File/Energy%20Answers%20Arecibo.pdf](http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/CAA-Decisions/087FA0AC7FBoCoF685257CA60065AC33/$File/Energy%20Answers%20Arecibo.pdf). EPA’s 2011 Accounting Framework is available at <http://www.epa.gov/climatechange/Downloads/ghgemissions/Biogenic-CO2-Accounting-Framework-Report-Sept-2011.pdf>. The SAB’s comments are available at [http://yosemite.epa.gov/sab/sabproduct.nsf/0/57B7A4F1987D7F7385257A87007977F6/\\$File/EPA-SAB-12-011-unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/0/57B7A4F1987D7F7385257A87007977F6/$File/EPA-SAB-12-011-unsigned.pdf).
- **Director of White House Office of Science and Technology Embraces IPCC Report on “Impacts, Adaptation, and Vulnerability.”** Assistant to the President for Science & Technology and Director of the White House Office of Science & Technology Policy John Holdren issued a statement following the release of the United Nation’s Intergovernmental Panel on Climate Change (IPCC)

Working Group II (WGII) report on "Impacts, Adaptation, and Vulnerability." This latest report is the second section of the Fifth Assessment Report to be released by the IPCC, a subsidiary body of the United Nations tasked with reviewing and assessing on a regular basis recent scientific, technical, and socio-economic information relevant to understanding climate change. The WGII report concludes, in much stronger language than used in the past, that higher global temperatures are already having a significant impact on the planet and that economic, poverty, food security, human security, natural disaster, and other impacts will get more severe and will touch every region of the globe absent significant action to reduce GHG emissions. The report did take notice of North American efforts, including those in the United States and specifically in New York City, to move forward with proactive adaptation. In his statement, Holdren reiterated the report's conclusions regarding the importance of taking action and highlighted President Obama's Climate Action Plan. The WGII report, including the condensed "Summary for Policymakers" is available at <http://ipcc-wg2.gov/AR5/>. John Holdren's statement is available at <http://www.whitehouse.gov/blog/2014/03/30/statement-john-p-holdren-ipccs-report-climate-impacts>.

### Legislative Branch

- **Senator Introduces CCS Bill.** On March 24, Senator Heidi Heitkamp (D-ND) introduced S. 2152, the "Advanced Clean Coal Technology Investment in Our Nation Act of 2014" (ACCTION Act). S. 2152 would provide incentives for utility companies to invest in technologies that reduce the carbon footprint of coal-fired power. The incentives include tax credits, grants and technical support for carbon capture and sequestration projects. A summary of S. 2152 is available at <http://www.heitkamp.senate.gov/public/index.cfm/press-releases?ID=ca053159-28f7-4352-8aa9-8fc4d6b6d8c5>.
- **House Approves Bill to Stop Stream Buffering Rule.** On March 25, the House voted 229 to 192 to approve H.R. 2824, the "Preventing Government Waste and Protecting Coal Mining Jobs in America Act." H.R. 2824 would prevent the Office of Surface Mining Reclamation and Enforcement from promulgating the 2008 Stream Buffer Zone Rule that regulates the impacts of coal mining on bodies of water. Additional information on H.R. 2824 is available at <http://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=374000>.
- **Congressional Committees Begin Hearings on Budget.** Throughout the last two weeks, members of President Obama's Cabinet and other senior level political appointees have testified before both House and Senate Committees to justify the President's Budget Request. The EPA Administrator has testified before the Senate Environment and Public Works Committee and will testify before the House Energy and Commerce Committee on Wednesday. Energy Secretary Ernie Moniz is set to testify later this week before the House Energy and Commerce Committee and is expected to testify before the Senate Energy and Natural Resources Committee in the coming weeks.
- **Senator Plans to Offer Amendment on EPA Rules.** On April 1, Senate Minority Leader Mitch McConnell (R-KY) announced that he will offer an amendment to stop the EPA from moving forward with several regulations. The amendment will be offered to H.R. 3979, the legislative vehicle for the Unemployment Insurance Extension currently being debated in the Senate. Specifically the amendment would prohibit the EPA from moving forward on regulations effecting coal mining and greenhouse gas emissions. Additional information is available at [http://www.mcconnell.senate.gov/public/index.cfm?p=PressReleases&ContentRecord\\_id=576fb81b-e971-4b0d-9143-d6a41882e002&ContentType\\_id=c19bc7a5-2bb9-4a73-b2ab-3c1b5191a72b&Group\\_id=ofd6ddca-6a05-4b26-8710-a0b7b59a8f1f](http://www.mcconnell.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=576fb81b-e971-4b0d-9143-d6a41882e002&ContentType_id=c19bc7a5-2bb9-4a73-b2ab-3c1b5191a72b&Group_id=ofd6ddca-6a05-4b26-8710-a0b7b59a8f1f).
- **House and Senate Committees Hold Hearings on LNG.**
- On March 25, the Senate Energy and Natural Resources Committee held a hearing exploring policies relating to LNG exports. The hearing was entitled "Importing Energy, Exporting Jobs. Can it be Reversed?" Witnesses included Adam Sieminski, Administrator of the U.S. Energy Information Administration; and Jaroslav Neverovic, of the Ministry of Energy of the Republic of Lithuania. A

webcast, full list of witnesses, and written testimony is available at

<http://www.energy.senate.gov/public/index.cfm/hearings-and-business-meetings?ID=ddobea89-obbd-449b-8651-7ef390e88e44>.

- On March 25, the House Energy and Commerce Subcommittee on Energy and Power held a legislative hearing to consider H.R. 6, the “Domestic Prosperity and Global Freedom Act.” H.R. 6 would approve “without delay or modification” all pending LNG applications to non-Free Trade Agreement (FTA) countries for which the application has been noticed in the Federal Register as of March 6, 2014. The legislation also modifies the standard of review for future export applications, shifting the benchmark from FTA countries to World Trade Organization member countries. Witnesses included Paula Gant, Deputy Assistant Secretary for Oil and Natural Gas; and Dave Schryver Executive Vice President, American Public Gas Association. Additional information is available at <http://energycommerce.house.gov/hearing/hr-6-domestic-prosperity-and-global-freedom-act>.
- On March 26, the House Foreign Affairs Committee held a hearing entitled “The Geopolitical Potential of the U.S. Energy Boom.” Witnesses included Admiral Dennis C. Blair, USN, (Retired), Member of the Energy Security Leadership Council, Securing America’s Future Energy and former Director of National Intelligence; and, Harold Hamm, Chairman of the Domestic Energy Producers Alliance. A webcast, full list of witnesses and written testimony is available at <http://foreignaffairs.house.gov/hearing/hearing-geopolitical-potential-us-energy-boom>.

### Judicial Branch

- **Supreme Court Denies EPA Permit Veto Case.** On March 24, the U.S. Supreme Court denied a petition to review a decision from the D.C. Circuit, which held that the EPA has the statutory authority to retroactively veto portions of a CWA permit issued by the Army Corps under section 404 of the CWA. *Mingo Logan Coal Co. v. EPA*, No. 13-599. The Army Corps had issued a 404 dredge-and-fill permit to Mingo Logan to fill in more than six miles of streams with debris from its coal mining operations. Nearly four years later, EPA used its authority under section 404(c) to veto the Army Corps’ issuance of the permit after the EPA found the discharges would have unacceptably adverse effects on the streams. The Supreme Court’s denial of Mingo Logan’s petition will leave this “veto” in place. However, the case will now return to the district court, which will decide if the EPA acted “arbitrarily and capriciously” when it vetoed the permit.
- **EPA Will Miss Deadline to Issue Final Effluent Limitation Guidelines for Steam Electric Power Plants.** In a status report filed March 18, the EPA announced that it would not be able to meet the D.C. Circuit’s court appointed deadline of May 22, to finalize the agency’s Effluent Limitation Guidelines (ELGs) for all electric generating units that produce steam (including units powered by nuclear, coal, oil, and natural gas (collectively referred to as EGUs)). *Defenders of Wildlife v. Jackson*, No. 1:10-cv-01915. EPA released its proposed ELGs standards on April 19, 2013. The new, proposed standards are intended to reduce the amount of toxic metals and other wastewater discharges from steam EGUs into surface waters by strengthening the technology-based standards in the ELGs. In 2010, the agency was sued by environmental groups who requested that the agency review and revise the ELGs standards because they had not been updated since 1982. As part of a settlement agreement with the environmental groups, EPA agreed to undertake a rulemaking to update the standards based on the best practicable technology that is currently available. Once finalized, the ELGs rule will revise or establish technology-based performance standards for new and existing EGUs that discharge directly into surface waters or indirectly discharge into surface waters through publicly owned treatment works.
- **Additional Groups Petition Supreme Court Over California Fuel Standards.** On March 20, ethanol industry groups filed a petition with the U.S. Supreme Court, asking it to invalidate the State of California’s Low-Carbon Fuel Standard (LCFS) because the groups allege the LCFS violates the U.S. Constitution’s Dormant Commerce Clause by unfairly discriminating against other states’ fuel

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

standards and by exceeding California's jurisdictional powers. *Rocky Mountain Farmers Union v. Corey*, No. 13-1148. The Dormant Commerce Clause prohibits states from enacting legislation that improperly burdens or discriminates against commerce between the states. A similar petition was filed with the Court by a coalition of energy, trade, and farm groups. *American Fuel & Petrochemical Manufacturers Association v. Corey*, U.S., No. 13-1149. On January 22, 2014, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit), denied petitioners' request to rehear the case *en banc* after finding that the LCFS was constitutional because the law establishing the LCFS has a nondiscriminatory purpose – to reduce greenhouse gas emissions - and was designed appropriately to achieve that purpose (No. 12-15131). In the *Rocky Mountain* petition, petitioners argue that the Ninth Circuit circumvented "strict scrutiny, which is the accepted framework ... for analyzing whether discrimination that purports to advance legitimate ends does so through illegitimate legislative means." For more information on the case, see a VNF Update here: <http://www.vnf.com/1875>.

- **Supreme Court Rejects the Term "Prudential Standing."** On March 25, in a unanimous decision, the U.S. Supreme Court rejected the term "prudential standing" and held that a determination of standing is limited to the U.S. Constitution's Article III "case or controversy" requirements. *Lexmark International, Inc. v. Static Control Components, Inc.*, No. 12-873. In *Lexmark*, the Court considered the appropriate analytic framework for determining a party's standing to maintain an action under the Lanham Act for false advertising. The Court appeared to hold that for claims brought under a statute and where Article III standing requirements are satisfied, rather than evaluating "prudential standing," a court must determine if a plaintiff (and presumably a petitioner) comes within the "zone of interests" for the particular statute at issue using traditional tools of statutory construction. This decision leaves several issues unresolved, including whether standing requirements are satisfied when one petitioner or plaintiff satisfies Article III standing requirements and another petitioner or plaintiff satisfies the "zone of interests" test, and whether the court is required to address the "zone of interests" test if an intervenor raises the issue even if the government has waived it. While *Lexmark* did not involve a cause of action under an environmental statute, this decision will likely directly impact environmental organizations' ability to bring cases under environmental statutes, for which prudential standing has historically been critical.

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With offices in Washington, D.C. and Seattle, WA, Van Ness Feldman is recognized as a leading law and policy firm in the areas of traditional and renewable energy regulation and project development, climate change regulation and greenhouse gas emissions trading, environmental and natural resources regulation, and infrastructure development. Van Ness Feldman has been recognized nationally and regionally by *Chambers USA*, *Chambers Global*, and *U.S. News / Best Lawyers* for its Energy, Environment, Government Relations, Transportation, and Native American Law practices. The firm's Climate Change practice has received top recognition by *Chambers USA* and *Chambers Global*.

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