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# Climate, Energy, & Air Update Weeks of April 2 – 16, 2014

APRIL 16, 2014

*Kyle Danish, Shelley Fidler, Erin Bartlett, Tracy Nagelbush, Avi Zevin*

*D.C. Circuit rejects industry, state and environmentalist challenges to EPA's mercury and toxics standards rule for power plants . . . EPA releases "white papers" on methane emissions from oil and gas sector – possible precursor for future rulemaking . . . Senate committee reports tax extenders bill . . . House subcommittee reports bill expanding authority for LNG exports.*

## Executive Branch

- **EPA Posts "White Papers" on Control of Methane Emissions from the Oil and Gas Sector.** On April 15, the Environmental Protection Agency (EPA) released five "white papers" on practices and technologies for controlling emissions of methane and volatile organic compounds in the oil and natural gas sector. The papers will undergo a technical peer review, but EPA also has invited "technical information and data" from the public. The five papers cover: compressors; completions and ongoing production from hydraulically fractured oil wells; leaks; liquids unloading; and pneumatic devices. The papers were anticipated in the White House's March 28 "Comprehensive Interagency Strategy to Cut Methane Emissions." The March 28 document explained that the papers are intended to capture the state of the science on measurement and control of emissions, and that EPA will use the papers to determine "what if any" regulatory authorities to apply to limit methane emissions from the sector. Any new requirements are expected to be in place by the end of 2016. The March 28 document also suggests that one potential pathway for regulation of methane from the oil and gas sector is under section 111 of the Clean Air Act, which is the same basis of authority that EPA is using to set greenhouse gas (GHG) emission standards for existing power plants. The white papers are available here: <http://www.epa.gov/airquality/oilandgas/whitepapers.html>. The VNF Alert on the March 28 Methane Strategy is available here: <http://www.vnf.com/2346>.
- **DOE Proposes New Appliance Efficiency Standards for Overhead Lamps and Finalizes Standards for Certain Refrigerators and Freezers.** The Department of Energy proposed new appliance efficiency rules for incandescent reflector lamps and general service fluorescent lamps. DOE predicts that the proposed standard would reduce GHG emissions by 100 million metric tons and save consumers \$8 billion in electric bills over the next 30 years. DOE also finalized new standards that will require new open air refrigerators and walk in freezers to be up to 40% more efficient. DOE predicts that the finalized standard would reduce GHG emissions by 142 million metric tons and save consumers \$12 billion in electric bills over the next 30 years. The proposed lighting standard is available at [http://energy.gov/sites/prod/files/2014/04/f14/gsf1\\_irl\\_ecs\\_nopr.pdf](http://energy.gov/sites/prod/files/2014/04/f14/gsf1_irl_ecs_nopr.pdf). The final refrigerator and freezer standard is available at <http://www.regulations.gov/#!documentDetail;D=EERE-2010-BT-STD-0003-0104>.
- **DOE Report Outlines Consequences of Failure to Approve PTC.** A new report from the Department of Energy's National Renewable Energy Laboratory (NREL) indicates that a failure to extend the production tax credit (PTC) for wind, which expired at the end of 2013, would result in a 45-65% decrease in yearly wind capacity installations in 2013-2020. Such a decrease would also negatively impact domestic wind turbine and component manufacturing. The report finds that adoption of policies that would gradually reduce the tax credit would also result in reduced annual deployments of wind and related impacts on the domestic wind supply chain; however, such

impacts would not be as drastic as the continued failure to extend the PTC for wind. The NREL report is available at <http://www.nrel.gov/docs/fy14osti/61663.pdf>.

- **Department of Interior Releases Climate Change Mitigation Strategy.** The Department of Interior's (DOI) Energy and Climate Change Task Force released a report detailing a new mitigation strategy aimed at shifting mitigation from a project-by-project to a four-step landscape-level approach. This report is the first step in complying with Secretary Jewell's November 2013 Secretarial order. DOI Bureaus will begin to implement and, simultaneously, continue to develop, this landscape-level mitigation strategy. The report is available at <http://www.doi.gov/news/loader.cfm?csModule=security/getfile&pageid=526203>.
- **Report Recommends Separate Standards for Medium- and Heavy-Duty Natural Gas Vehicles.** The National Research Council released a report recommending that the Obama Administration develop GHG emission and fuel economy standards specifically for medium- and heavy-duty vehicles that run on natural gas, separate from standards for such vehicles that run on diesel fuel and gasoline. The report follows a February order from President Obama directing EPA and the Department of Transportation to issue emission and fuel economy standards for post-2018 model year medium- and heavy-duty vehicles by 2016. The National Research Council is a branch of the National Academy of Sciences, a non-profit organization chartered and primarily funded by the federal government. The report is available at [http://www.nap.edu/catalog.php?record\\_id=18736](http://www.nap.edu/catalog.php?record_id=18736).
- **Administrator McCarthy Discusses Existing Source Power Plant Standards at BPC Event.** EPA Administrator Gina McCarthy spoke at an event hosted by the Bipartisan Policy Center on the upcoming regulation of CO<sub>2</sub> from existing power plants under section 111(d) of the Clean Air Act. Administrator McCarthy highlighted EPA's intent to provide states significant flexibility in complying with the standards, but stressed that such flexibility will not be "unlimited or unbridled" and that there will be specific mandates. McCarthy also indicated that EPA will take grid reliability into account in issuing the standards. McCarthy's appearance came soon after EPA submitted a draft of the proposed rule to the Office of Management and Budget for interagency review. A webcast of Administrator McCarthy's speech is available at <http://bipartisanpolicy.org/events/2014/04/state-regional-and-company-approaches-reduce-power-sector-ghg-emissions>.
- **Secretary of State John Kerry Embraces IPCC Report on "Mitigation of Climate Change."** Secretary of State John Kerry issued a statement following the release of the United Nations' Intergovernmental Panel on Climate Change (IPCC) Working Group III (WGIII) report on options to mitigate climate change and the economic costs and opportunities of those options. This latest report is the third 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 WGIII report highlights the critical importance of the next 15 years for the mitigation of climate change, after which options become more limited and costs rise significantly. The report found that if countries stick to their current Copenhagen commitments, warming would be limited to 3 degrees Celsius, 1 degree higher than the 2 degrees Celsius goal that has become an international consensus. In his statement, Kerry highlighted the economic potential of investing in the technologies that will help mitigate climate change, and reiterated the report's conclusion that delaying mitigation will increase its cost. The WGIII report, including the condensed "Summary for Policymakers," is available at <http://mitigation2014.org/report/>. Secretary Kerry's statement is available at <http://www.state.gov/secretary/remarks/2014/04/224755.htm>.

## Legislative Branch

- **Senators Introduce Energy Efficiency Tax Bill.** On April 1, Senators Ben Cardin (D-MD), Dianne Feinstein (D-CA) and Brian Schatz (D-HI) introduced S. 2189, the "Energy Efficiency Tax Incentives Act." S. 2189 would provide new or expanded tax credits for commercial and

residential energy efficiency products, including combined heat and power and industrial water reuse. A summary of the bill is available at

<http://www.cardin.senate.gov/newsroom/press/release/cardin-feinstein-schatz-legislation-will-boost-american-jobs-by-promoting-energy-efficiency/>.

- **Senate Committee Passes Tax Extenders Bill.** On April 3, the Senate Finance Committee approved the Expiring Provisions Improvement Reform and Efficiency (EXPIRE) Act by a voice vote. As reported from the Committee, the EXPIRE Act would extend almost 50 expiring or expired tax credits, including extending the Production Tax Credit for 2 years. Additional information on the EXPIRE Act is available at <http://www.finance.senate.gov/legislation/details?id=67094f10-5056-a032-52ff-257830e0a938>.
- **House Subcommittee Holds Hearing on LNG Exports.** On April 2, the House Foreign Affairs Subcommittee on Terrorism, Nonproliferation and Trade held a hearing entitled "The Crude Truth: Evaluating U.S. Energy Trade Policy." Witnesses included Senator Lisa Murkowski (R-AK) and Michael Jennings, Chief Executive Officer and President of HollyFrontier Corporation. Senator Murkowski pointed to the Administration's inaction as the roadblock to moving forward with the development of LNG exports. Jennings warned that any increase in exports would result in increased prices for natural gas domestically. A full list of witnesses and webcast of the hearing are available at <http://foreignaffairs.house.gov/hearing/subcommittee-hearing-crude-truth-evaluating-us-energy-trade-policy>.
- **Senate Panel Holds Nomination Hearing.** On April 8, the Senate Environment and Public Works Committee held a hearing to consider the nominations of: Janet McCabe to be the Assistant Administrator for Air and Radiation of the U.S. Environmental Protection Agency (EPA); Ann E. Dunkin to be the EPA Assistant Administrator for Environmental Information; and, Manuel H. Ehrlich, Jr., to be a Member of the Chemical Safety and Hazard Investigation Board. Republicans used the opportunity to criticize the Administration's climate policies and regulations affecting the coal industry, including during opening statements and in questions directed at Janet McCabe. Written testimony and a webcast of the hearing are available at [http://www.epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=5ea38ab5-c76d-605d-0d71-953c4ba338f4](http://www.epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=5ea38ab5-c76d-605d-0d71-953c4ba338f4).
- **Subcommittee Approves LNG Export Bill.** On April 9, the House Energy and Commerce Subcommittee on Energy and Power voted 15 to 11 to pass 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, extending presumptive authorization not only to FTA countries but also to World Trade Organization member countries. The Committee accepted one amendment by voice vote offered by Congressman Bobby Rush (D-IL) that would require any applicant to publically disclose the specific destination of any such authorized LNG exports. Additional information on H.R. 6 and committee activity is available at <http://energycommerce.house.gov/markup/markup-notice-subcommittee-vote-lng-exports-bill-next-week>.
- **Senate Committee Holds Hearing on Cyber Security.** On April 10, the Senate Energy and Natural Resources Committee held a hearing entitled "Keeping the Lights on – Are We Doing Enough to Ensure the Reliability and Security of the US Electric Grid?" Witnesses included FERC Commissioners Cheryl LaFleur (the Acting Chair) and Phillip Moeller. A full list of witnesses, written testimony and webcast of the hearing are available at <http://www.energy.senate.gov/public/index.cfm/hearings-and-business-meetings?ID=791ff8ea-66db-4a9f-987c-c15bfef8be41>.

*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 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.*

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

## Judicial Branch

- **District Court Vacates EPA Water Transfers Rule.** On March 28, the U.S. District Court for the Southern District of New York vacated EPA's Water Transfers Rule, a rule exempting transfers of water between two "waters of the United States" from the Clean Water Act's (CWA) National Pollution Discharge Elimination System (NPDES) permitting requirements. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, No. 08-CV-5606 (S.D.N.Y. Mar. 28, 2014). The District Court held that EPA's interpretation in which the NPDES permit requirement would not apply to the transfer of water from one water of the U.S. to another is not consistent with the plain meaning of the Clean Water Act and prior U.S. Court of Appeals for the Second Circuit and Supreme Court precedents interpreting it. Without the Water Transfers Rule, municipal water systems such as those in New York City, San Francisco, and Los Angeles, will likely be required to apply for NPDES permits. It is anticipated the EPA will appeal this decision to the Second Circuit.
- **D.C. Circuit Upholds EPA Mercury and Air Toxics Rule.** Following 4 hours of oral argument, the Court of Appeals for the District of Columbia Circuit issued a 100-page split decision upholding EPA's Mercury and Air Toxics Standards (MATS) rules for coal-fired power plants against challenges on all sides from industry groups, environmental groups, and States. *White Stallion Energy Center LLC v. EPA*, 12-1100. EPA promulgated the MATS rules in 2012 after the agency issued a finding on the health benefits of reducing mercury emissions; the agency concluded it is "appropriate and necessary" to regulate these emissions. EPA's first rule set maximum achievable control technology (MACT) standards for mercury and other toxic heavy metals, acid gases, and certain toxic organic compounds; the second rule established new source performance standards (NSPS) for electric generating units (EGUs). The Court rejected industry's argument that EPA was required to consider the costs of installing expensive control technologies, which industry groups said will force multiple coal-fired power plants to close. Instead, Judge Rogers, writing for herself and Judge Garland, held that EPA was due deference because Congress neither expressly required nor forbade the consideration of costs. In a partial dissent, Judge Kavanaugh disagreed, finding that any determination of whether it is "appropriate and necessary" to regulate involves the consideration of costs.
- **EPA and Environmental Groups Agree to 16-Month Extension to Finalize Effluent Limitation Guidelines for Power Plants.** On April 10, four environmental groups that previously have brought suit against the EPA for failing to update the agency's effluent limitation guidelines (ELGs) for power plants since 1982 agreed to grant the agency a 16-month extension to finalize a revision rule. *Defenders of Wildlife v. Jackson*, No. 1:10-cv-01915. The agency now has until September 30, 2015 to finalize the rule and has agreed not to ask for additional extensions. The EPA published the proposed rule on April 19, 2013 and was initially expected to finalize the rule by January 31, 2014 but sought an extension until May 22, 2014. EPA announced in March that it would not be able to meet the May deadline. The new, proposed ELGs standards are intended to reduce the amount of toxic metals and other wastewater discharges from power plants into surface waters by strengthening the technology-based standards in the ELGs. For more information on the ELG rule, see a VNF Alert here: <http://www.vnf.com/1105>. Under the settlement agreement, EPA has also committed to finalize its coal ash waste disposal rule by December 19, 2014. If the agency fails to meet that deadline, the settlement agreement allows the environmental groups to require the ELGs rule to be finalized earlier.

## About Us

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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