

May 8, 2013

Climate, Energy, & Air Update  
Weeks of April 25-May 8, 2013

*Kyle Danish, Shelley Fidler, Tracy Nagelbush, Erin Bartlett, Ilan Gutherz*

*The D.C. Circuit hears oral arguments on whether EPA can take over GHG permitting for Texas . . . Citing lack of funding and other priorities, EPA says it will not set methane standards for coal mines . . . Senators Wyden and Murkowski are introducing nuclear waste legislation . . . Bipartisan sponsors introduce bill extending MLP tax mechanism to renewables . . . Retirement of Sen. Max Baucus (D-MT) could clear way for Sen. Landrieu (D-LA) to take over chairmanship of the Senate Energy and Natural Resources Committee.*

**Executive Branch**

- **EPA Submits Proposed CCS RCRA Exemption to OMB for Review.** On April 25, EPA submitted to the Office of Management and Budget (OMB) for review a proposed rule that addresses how EPA would treat Carbon Capture and Sequestration (CCS) under the Resource Conservation and Recovery Act (RCRA). EPA and others have touted CCS as a potentially useful technology for reducing the emission of greenhouse gases (GHGs) from power plants and other large sources. The proposed rule, which was originally proposed in August 2011 ([see http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2010-0695-0001](http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2010-0695-0001)), would provisionally exempt the geological sequestration of large amounts of carbon dioxide, a greenhouse gas, from the requirements of RCRA. The proposed CCS RCRA rule would complement a related Safe Drinking Water Act (SDWA) rule that EPA finalized in 2010 ([see http://water.epa.gov/type/groundwater/uic/class6/gsreregulations.cfm](http://water.epa.gov/type/groundwater/uic/class6/gsreregulations.cfm)). EPA's 2010 SDWA rule authorized the use of special "injection wells" for CCS projects. EPA's recently proposed New Source Performance Standards (NSPS) rule for regulating GHG emissions from new power plants identifies CCS as one acceptable method for power plants to achieve the GHG reductions called for by the rule. (For more on EPA's proposed GHG power plant rule, see our March 29, 2012 Issue Alert: <http://www.vnf.com/news-alerts-696.html>.)
- **EPA Rejects Petition to Regulate Coal Mine GHGs, Citing Budget Cuts.** On April 30, the EPA sent a letter to environmentalists indicating that it would not move forward with regulating emissions of GHGs from coal mines, despite the environmentalists' petition

About Van Ness Feldman

With over 100 professionals in Washington, D.C. and Seattle, WA, Van Ness Feldman focuses on law and policy relating to:

- Electricity
- Energy Efficiency, Demand Response & Smart Grid
- Environment
- Climate Change & Emissions Trading
- Renewable Energy, Cleantech, & Biofuels
- Coal & CCS
- Natural Gas
- Nuclear Energy
- Hydropower
- Infrastructure Development
- Indian Law
- Oil & Products Pipelines
- Public Lands & Natural Resources
- Transportation

Learn more at [www.vnf.com](http://www.vnf.com)

May 8, 2013

urging EPA to do so. In the letter, which responded to a June 2010 petition for rulemaking, Acting Administrator Bob Perciasepe cited “limited resources and ongoing budget uncertainties” as justifications for prioritizing EPA’s other rulemaking activities ahead of the coal mining rule. EPA has previously committed in a lawsuit settlement to issue regulations under section 111 of the Clean Air Act to limit GHG emissions from new and existing power plants, as well as from new and existing refineries. EPA’s denial of environmentalists’ petition constitutes final agency action, which the petitioners may now challenge in federal court. Environmentalists’ June 2010 petition for rulemaking is available here:

[http://www.biologicaldiversity.org/programs/climate\\_law\\_institute/global\\_warming\\_litigation/clean\\_air\\_act/pdfs/Coal\\_Mine\\_Petition-06-15-2010.pdf](http://www.biologicaldiversity.org/programs/climate_law_institute/global_warming_litigation/clean_air_act/pdfs/Coal_Mine_Petition-06-15-2010.pdf). EPA’s April 30 notice of final action on the petition is available here:

[http://www.ofr.gov/\(S\(alzgh2wtvh0xe0dmiv0hyfmd\)\)/OFRUpload/OFRData/2013-10827\\_PI.pdf](http://www.ofr.gov/(S(alzgh2wtvh0xe0dmiv0hyfmd))/OFRUpload/OFRData/2013-10827_PI.pdf).

- **EPA Moves Up Alternative GHG Monitoring Request Deadline for Oil and Natural Gas Operations.** On May 1, EPA published a final rule that revises the annual deadline by which oil and gas owners and operators must submit applications for alternative GHG monitoring methods. The sector is required to monitor and report its emissions to EPA on an annual basis under Subpart W of the GHG emissions reporting rules. The final rule would move the deadline from September 30 to June 30, in order to allow EPA sufficient time to process the large number of applications it expects to receive in future years. The final rule is available here: <https://www.federalregister.gov/articles/2013/05/01/2013-10184/greenhouse-gas-reporting-rule-revision-to-best-available-monitoring-method-request-submission>.
- **DOI Issues Rule Protecting Solar, Wind Right-of-Ways from Mining Claims.** On April 30, the Department of Interior (DOI) Bureau of Land Management (BLM) published a final rule that would allow BLM to temporarily protect from mining claims areas of public lands where solar or wind projects have requested BLM’s approval for a right-of-way. BLM issued the rule in order to head off situations in which a mining claim is staked after a renewable energy developer has submitted an application for a right-of-way over federal land, but before BLM can process and grant the right-of-way. Under the final rule, BLM would “segregate” areas of land for up to two years while the agency considers the wind or solar developer’s application. The rule is expected to increase certainty for developers of renewable energy projects on federal lands. The full text of the rule is available here: <https://www.federalregister.gov/articles/2013/04/30/2013-10087/segregation-of-lands-renewable-energy>.

## Congress

- **Senate Finance Chairman Announces Retirement.** On April 23, Senate Finance Committee Chairman Max Baucus (D-MT) announced that, after 35 years in the United States Senate, he will not run for re-election in 2014. His departure leaves the top Democratic slot on the Finance Committee vacant. The Senator next in line for the post is current Senate Energy and Natural Resource Committee Chairman Ron Wyden (D-OR). If Chairman Wyden takes the Finance Committee spot, Senator Mary Landrieu (D-LA) is in line

May 8, 2013

to take over as chair of the Energy and Natural Resources Committee. Baucus' full statement is available at <http://www.baucus.senate.gov/?p=video&id=1306>.

- **Senate Committee Holds Hearing on Hydro and Efficiency Bills.** On April 23, the Senate Energy and Natural Resources Committee held a legislative hearing to consider energy efficiency and hydropower bills. The purpose of this hearing was to hear testimony on S. 306 and H.R. 678, the "Bureau of Reclamation Small Conduit Hydropower Development and Rural Jobs Act"; S. 545, the "Hydropower Improvement Act of 2013"; H.R. 267, the "Hydropower Regulatory Efficiency Act of 2013"; and S. 761, the "Energy Savings and Industrial Competitiveness Act of 2013." Witnesses included Rep. Cathy McMorris Rodgers (R-WA), who sponsored H.R. 267, and officials from the Department of Energy and the Department of the Interior. Both Chairman Ron Wyden (D-OR) and Ranking Member Lisa Murkowski (R-AK) vowed that the Senate would pass the bills. The full list of witnesses, testimony and webcast are available at <http://www.energy.senate.gov/public/index.cfm/hearings-and-business-meetings?ID=d5660354-9d29-4107-af2e-704edd02eefd>.
- **Bipartisan, Bicameral Legislation Introduced on MLPs.** On April 24, Senators Chris Coons (D-DE), Jerry Moran (R-KS), Debbie Stabenow (D-MI) and Lisa Murkowski (R-AK) introduced S. 795, the "Master Limited Partnerships Parity Act." Representatives Ted Poe (R-TX), Mike Thompson (D-CA), Peter Welch (D-VT) and Chris Gibson (R-NY) introduced H.R. 1696, companion legislation in the House that is also dubbed the "Master Limited Partnerships Parity Act." The legislation would allow nontraditional energy and renewable fuels companies to form master limited partnerships (MLPs), which would allow them to use the funding advantages of corporations and the tax advantages of partnerships. MLPs are a common tax and investment mechanism in the natural gas sector. According to documents released by Senator Coons' office, the legislation is intended to "level the energy playing field by giving investors in renewable energy projects access to a decades-old corporate structure whose tax advantage is available now only to investors in fossil fuel-based energy projects." Additional information is available at <http://www.coons.senate.gov/newsroom/releases/release/senators-coons-moran-stabenow-and-murkowski-re-introduce-bill-to-level-the-playing-field-for-renewable-energy-technologies>.
- **Senate Committee Holds Hearing on EPA Budget.** On April 24, the Senate Appropriations Subcommittee on Interior, Environment and Related Agencies held a hearing on the Fiscal Year 2014 Environmental Protection Agency Budget Request. Acting Administrator Bob Perciasepe, the only witness, defended the proposal to reduce the agency's funding by \$296 million over 2012 levels, a 3.5 percent decrease for the agency. Senators' interests varied throughout the hearing, from questioning the \$472 million cut to the Drinking Water and Clean Water state revolving funds to the \$10 billion reduction in the brownfields cleanup program for lightly contaminated sites. A webcast is available at <http://www.appropriations.senate.gov/webcasts.cfm?method=webcasts.view&id=47a2d012-529d-4fef-9999-35a7cab3b0e4>.

May 8, 2013

- **House Subcommittee Holds Hearing on Fisker Loan Guarantee.** On April 24, the House Oversight and Government Reform Subcommittee on Economic Growth, Job Creation, and Regulatory Affairs held a hearing entitled “Green Energy Oversight: Examining the Department of Energy’s Bad Bet on Fisker Automotive.” The objective of the hearing, according to Subcommittee Chairman Jim Jordan (R-OH), was to investigate the \$529 million Advanced Technology Vehicles Manufacturing Loan Guarantee for the development and production of two lines of plug-in hybrid electric vehicles in Delaware. Fisker Automotive, which only drew \$192 million of the amount awarded, sold approximately 2,000 vehicles before ceasing production. In his opening statement, Subcommittee Chairman Jordan asserted that the decision to award the loan guarantee to Fisker was motivated by political influence. The Chairman went on to state that the hearing was just the beginning of the Committee’s investigation into this specific loan guarantee award. Witnesses included Nicholas Whitcombe, Supervisory Senior Investment Officer within the Department of Energy’s Loan Programs Office and Henrik Fisker, Former Executive Chairman & Founder of Fisker Automotive. The full list of witnesses, written testimony and a webcast of the hearing are available at <http://oversight.house.gov/hearing/green-energy-oversight-examining-the-department-of-energys-bad-bet-on-fisker-automotive/>.
- **Senators Release Draft Nuclear Waste Legislation.** On April 25, Senate Energy and Natural Resources Committee Chairman Ron Wyden (D-OR) and Ranking Member Lisa Murkowski (R-AK) joined Senate Appropriations Subcommittee on Energy and Water Development Chairwoman Diane Feinstein (D-CA) and Ranking Member Lamar Alexander (R-TN) in releasing draft legislation entitled the “Nuclear Waste Administration Act of 2013.” According to Committee-issued documents, the draft bill “aims to create a sustainable, participatory process for managing nuclear waste.” The Senators said they are seeking comments and suggestions on the draft bill, as well as on alternative language for siting an interim storage facility proposed by Senators Alexander and Feinstein. Additional information on the draft and link to a comment page is available at <http://www.energy.senate.gov/public/index.cfm/nuclear-waste-bill-feedback>.
- **House Subcommittee Holds Hearing on Fracking Study.** On April 26, the House Science and Technology Subcommittee on Energy and the Subcommittee on Environment held a joint hearing entitled “Review of Federal Hydraulic Fracturing Research Activities.” According to Committee-issued documents, the hearing was intended to examine research activities conducted under an agreement signed by the Environmental Protection Agency, Department of Energy and the Department of Interior in April of 2012. That agreement created an interagency effort to “address the highest priority challenges” related to the production of domestic unconventional oil and natural gas resources. Throughout the hearing, the Members and witnesses focused on the lack of funding available for the study, which was due to be released toward the end of 2012. Witnesses included Kevin Teichman, Senior Science Advisor at Environmental Protection Agency’s Office of Research and Development; and Guido DeHoratiis, Acting Deputy Assistant Secretary for Oil and Gas within the Department of Energy’s Office of Fossil Energy. The full list of witnesses, a press release, and a webcast of the hearing are available at <http://science.house.gov/hearing/subcommittee-energy-hearing-review-federal-hydraulic-fracturing-research-activities>.

May 8, 2013

- **Senators Send Letter to the CFTC and FERC.** On April 29, Senate Energy and Natural Resources Committee Chairman Ron Wyden (D-OR) and Ranking Member Lisa Murkowski (R-AK) joined Senate Appropriations Subcommittee on Energy and Water Development Chairwoman Diane Feinstein (D-CA) in sending a letter to the Commodities Futures Trading Commission (CFTC) and Federal Energy Regulatory Commission (FERC). The letter urges the CFTC and FERC “to execute more robust Memorandums of Understanding that will ensure comprehensive oversight of energy markets, as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act.” The Senators cite recent disputes between the two agencies when determining violations and enforcement of market manipulation. The letter points to the clarification provided by a ruling of the Court of Appeals for the District of Columbia Circuit, “which concluded that CFTC has the responsibility to protect consumers in natural gas futures markets and FERC has the responsibility to protect consumers in natural gas cash markets.” The text of the letter is available at <http://www.feinstein.senate.gov/public/index.cfm/2013/4/feinstein-to-cftc-ferc-resolve-disputes-cooperate-on-energy-market-oversight>.
- **House Leader on Climate Wins Senate Primary.** On April 30, Congressman Ed Markey (D-MA) defeated Stephen Lynch (D-MA) in the primary for the special election to fill the Senate seat left vacant by now Secretary of State John Kerry. Congressman Markey coauthored H.R. 2454, the American Clean Energy and Security Act (ACES), which passed the House in 2009 and would have established an economy-wide cap-and-trade program. If elected to the Senate, Markey would leave his post as Ranking Member of the House Natural Resources Committee. Congressman Peter DeFazio (D-OR) is widely expected to be the next Committee member in line to fill that position.
- **House Subcommittee Holds Hearing on Natural Gas Export Policies.** On May 7, the House Energy and Commerce Subcommittee on Energy and Power held a hearing entitled “U.S. Energy Abundance: Exports and the Changing Global Energy Landscape.” Both Members of the Subcommittee and witnesses spoke to the potential impacts of exporting natural gas, and the effects of crafting a policy that might bar exports of natural gas. Witnesses included two former U.S. Senators: Bennett Johnston, Jr. (D-LA), who now serves as the Chairman of Johnston and Associates; and Byron Dorgan (D-MD), who is Co-Chair of the Bipartisan Policy Center. The full witness list, committee documents, and webcast are available at <http://energycommerce.house.gov/hearing/us-energy-abundance-exports-and-changing-global-energy-landscape/>.

## Judicial

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

- **Ninth Circuit Vacates Forest Management Consent Decree Because of Failure to Include Timber Company Input.** On April 25, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reversed and remanded a decision by the District Court for the Western District of Washington, which had approved a consent decree amending the Northwest Forest Management Plan (Management Plan), *Conservation Northwest v.*

May 8, 2013

*Sherman*, No. 11-35729. As part of the consent decree negotiation process, the U.S. Forest Service, the Bureau of Land Management, and the U.S. Fish and Wildlife Service engaged in discussions with environmental groups but excluded timber companies from the negotiations. The consent decree amended the Survey and Manage Standard—a controversial provision within the Management Plan used to track the well-being of 400 non-endangered species within the federal lands. Timber companies argued that the consent decree was an abuse of the agencies’ discretion because the agencies failed to adhere to the administrative process for amending the Survey and Management Standard. The Ninth Circuit agreed with the timber companies, finding that the federal agencies’ negotiations with selected litigants were an abuse of agency discretion.

- **Ninth Circuit Upholds Air Quality Permits Allowing Shell to Drill in the Arctic.** The Ninth Circuit upheld two Clean Air Act air quality permits issued by the EPA that authorized Shell Oil Co. to engage in drilling operations on the Arctic Outer Continental Shelf. The permits, which included an exemption for support vessels not attached to a drillship, had been challenged by several Native and environmental groups. The permits exempted these support vessels from complying with best available control technology (BACT) requirements. The Ninth Circuit had previously reviewed the permits, and released an opinion on December 26; however, the court agreed to reconsider the permits in light of the CAA’s legislative history. The court released its amended opinion on April 23 after deferring “to the EPA’s reasonable construction of the statute, as adopted by the [Environmental Appeals Board] that BACT does not apply to mobile support vessels unattached to the drillship.” The court also held that EPA’s grant of an ambient air quality exemption within a 500-meter radius of a drillship was not inconsistent with the agency’s regulations.
- **D.C. Circuit Holds Lawsuit Challenging E15 Rule’s Labeling Requirements in Abeyance.** On April 25, the Court of Appeals for the District of Columbia Circuit (D.C. Circuit) agreed to hold in abeyance a lawsuit challenging EPA’s rule requiring gasoline retailers to label fuel pumps selling fuel containing more than 10 percent of ethanol. The ground for holding the case in abeyance is the pending U.S. Supreme Court action related to other challenges to EPA’s ethanol rule, *Alliance of Automobile Manufacturers v. EPA*, No. 11-1334. Under the CAA, fuel suppliers must obtain a waiver from EPA to introduce gasoline with higher blends of ethanol into the market. EPA has granted a partial waiver for the use of gasoline containing 15 percent ethanol (E-15) in newer passenger vehicles. Petroleum groups, automobile manufacturers and food producers have recently petitioned the U.S. Supreme Court to overturn that partial waiver, after the D.C. Circuit dismissed the industry groups’ challenges for lack of standing, thereby upholding the waiver. If the Supreme Court overturns EPA’s waiver for E-15 use, the pump labeling rule challenge would become moot. Industry groups’ motion to hold the pump labeling rule litigation in abeyance was unopposed.
- **Court of Federal Claims Dismisses Biodiesel Firm’s Lawsuit.** On April 26, the U.S. Court of Federal Claims dismissed portions of a damages claim filed by a biodiesel firm, which alleged that the federal government failed to reimburse the firm for its clean energy projects under the Recovery and Reinvestment Tax Act of 2009 (RRTA), *Clean Fuel LLC v.*

May 8, 2013

*United States*, No. 2-cv-00079. Clean Fuel, a biodiesel producer, claimed compensatory damages amounting to \$9 million related to several clean energy projects developed by the firm. Clean Fuel argued that under the RRTA, the U.S. Treasury Department is required to distribute reimbursement grants for specified clean energy projects, which should include Clean Fuel's projects. The Treasury Department denied Clean Fuel's applications for the reimbursement grants in 2011. The court found that it had no jurisdiction over the claim because the plaintiff had failed to identify any source of law that mandates awarding consequential damages. The court left open the question of whether Clean Fuel may be able to pursue its related claim for \$3.107 million in grant awards, which the firm argues it was improperly denied.

- **Three States Challenge EPA's Approval of SIPs, Arguing Lack of "Good Neighbor" Provisions.** Connecticut, Delaware and Maryland filed two lawsuits on May 2 in the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) alleging that EPA failed to comply with CAA requirements designed to protect downwind states from upstate air pollution, *Connecticut v. EPA*, No. 13-3557. Under section 110(a)(2)(D) of the CAA's "good neighbor" provision, State Implementation Plans (SIPs) are required to prohibit interstate transport of air pollution that significantly contributes to the inability of downwind states to attain and maintain National Ambient Air Quality Standards (NAAQS). In March, EPA approved Kentucky's and Tennessee's SIPs for ozone attainment. The lawsuits allege that the SIPs fail to meet the "good neighbor" requirement. EPA's most recent attempt to address interstate air pollution in the Eastern U.S.—the Cross-State Air Pollution Rule (CSAPR)—was vacated in August 2012 by the D.C. Circuit in *EME Homer City Generation LP v. EPA*, No. 11-1302. EPA and environmental groups have petitioned the U.S. Supreme Court to review the D.C. Circuit's vacatur of CSAPR.

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*

*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.*

© 2013 Van Ness Feldman, LLP. All Rights Reserved.

#### **About Van Ness Feldman**

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*.

*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).*