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Climate, Energy, & Air Update Weeks of January 16 – 29, 2014

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President promotes natural gas production and climate initiatives in SOTU . . . EPA will propose new air transport rule by October . . . House approves House-Senate conference version of Farm bill 251-156 , continuing a string of actual legislating in the Congress . . . Tier 3 rule under interagency review . . . EPA will reconsider cellulosic ethanol target for Renewable Fuel Standard . . . EPA Science Advisory Board will not study status of carbon capture and sequestration technology . . . House Energy & Commerce Committee reports bill restricting EPA authority to set GHG emission standards for power plants, and bill promoting commercial building tenant energy efficiency initiatives . . . Senate committee holds hearing on President's Climate Action Plan . . . Landfill owners challenge modification to GHG reporting rule.

Executive Branch

- **Obama State of the Union Emphasizes Executive Action and Natural Gas.** President Obama addressed the Congress on January 28 in his sixth State of the Union speech. Consistent with his recent speeches on the subject, the theme of the President's remarks was reliance on executive authority to address problems that Congress has not acted upon. On energy and environmental issues, he stated that he would cut red tape for the construction of factories using natural gas; protect more federal land; and increase fuel economy standards for trucks in the coming months. He also reiterated his directive to EPA to work with states to set greenhouse gas standards for power plants. President Obama also highlighted the recent successes of an "all of the above" energy strategy with increased domestic energy production, and focused on natural gas as a "bridge fuel that can power our economy with less of the carbon pollution that causes climate change." He further amplified his intention to accelerate, analyze and prioritize construction of energy infrastructure. The text and video of the State of the Union is available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/01/28/read-obamas-2014-state-of-the-union-address/>.
- **OMB Begins Review of Tier 3 Rule.** On January 24, EPA formally submitted its final "Tier 3" rule setting stringent standards for vehicles and fuels to the White House Office of Management

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and Budget (OMB), triggering the normal 90 day interagency review process. However, EPA has indicated that it still projects that the rule will be finalized by February 2014. See the EPA rule tracking website at <http://yosemite.epa.gov/oepi/RuleGate.nsf/byRIN/2060-AQ86?opendocument>. EPA published the Tier 3 proposed rule on March 29, 2013, and had previously confirmed that it would not finalize the rule until early 2014 due to the receipt of over 200,000 comments. As proposed, the standards would have significant implications for automakers, fuel producers, and the environment. The proposed rule is available at <http://www.gpo.gov/fdsys/pkg/FR-2013-05-21/pdf/2013-08500.pdf#page=1>. For more information on EPA's proposed Tier 3 standards for vehicles and fuels rule, see April 2013 VNF update at <http://www.vnf.com/1109>.

- **Social Cost of Carbon Deadline Extended.** OMB has announced that it is extending the deadline to submit comments on revisions to the social cost of carbon for 30 days to February 26, 2014. The social cost of carbon is a regulatory estimate of the economic cost to society associated with continued GHG emissions. In November 2013, OMB opened for comment its update to the 2010 estimate based on changes in the underlying scientific and economic models, which resulted in a significant increase in the estimated cost of each ton of CO₂ emitted. The increase has been subject to significant criticism and OMB had received a number of requests to extend the comment deadline. The Federal Register notice announcing the extension is available at <https://www.federalregister.gov/articles/2014/01/27/2014-01605/technical-support-document-technical-update-of-the-social-cost-of-carbon-for-regulatory-impact>. OMB's original notice is available at <https://www.federalregister.gov/articles/2013/11/26/2013-28242/technical-support-document-technical-update-of-the-social-cost-of-carbon-for-regulatory-impact>.
- **Commerce and ITC Launch Solar Panel Dumping Investigation.** On January 23, the Department of Commerce and the U.S. International Trade Commission (ITC) responded to a petition by U.S. solar manufacturer SolarWorld Industries America Inc. by opening an investigation into alleged dumping of precursor products to photovoltaic solar panels by China and Taiwan. This 2014 claim arises out of a 2012 case against Chinese solar module manufactures in which the ITC imposed tariffs of 24 to 255 percent on imported Chinese modules for five years. SolarWorld claims that this suit is aimed at closing a loophole through which China provides subsidized materials to manufacturers in countries such as Taiwan, which then export reduced price modules to the U.S. without facing the tariff. The ITC has stated it will make a preliminary ruling on February 14. A Department of Commerce fact sheet is available at <http://enforcement.trade.gov/download/factsheets/factsheet-multiple-solar-cells-initiation-012313.pdf>.
- **EPA Agrees to Reconsider RFS Cellulosic Biofuels Mandate.** On January 23, 2014, EPA issued a letter granting American Petroleum Institute and American Fuel and Petrochemical Manufacturers Association petitions requesting that the Agency reconsider its 2013 cellulosic biofuel requirement under the Renewable Fuel Standard. An August 2013 EPA regulation required 6 million ethanol-equivalent gallons of cellulosic biofuels to be blended into the

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gasoline supply. The petitions argued, and EPA accepted, that the reduced cellulosic fuel production estimates from KiOR Inc. – expected to constitute the majority of 2013 cellulosic biofuels – warrant reconsideration of the target. EPA stated in its letter that it will now initiate a rulemaking to reconsider its 2013 target. EPA has proposed a 2014 target of 17 million gallons, for which it is currently taking comment. EPA’s letter granting the petition is available at <http://www.epa.gov/otaq/fuels/renewablefuels/documents/api-01232014.pdf>. The 2013 RFS target rule is available at <http://www.gpo.gov/fdsys/pkg/FR-2013-08-15/pdf/2013-19557.pdf>.

- **President Obama Announces First Advanced Manufacturing Hub.** President Obama announced \$200 million in funding from the Department of Energy and four other agencies to create the first National Network for Manufacturing Innovation (NNMI) “hub,” the Next Generation Power Electronics Manufacturing Innovation Institute. This hub will focus on wide-bandgap semiconductors, a technology that could greatly increase the energy efficiency of electronics. It will be headquartered at North Carolina State University and bring together 25 companies, universities, and state and federal organizations. This is the first of three such hubs that were announced in President Obama’s 2013 State of the Union address, which the President vowed to expand to eight in 2014 in his 2014 State of the Union Address. The White House announcement is available at <http://www.whitehouse.gov/the-press-office/2014/01/15/president-obama-announces-new-public-private-manufacturing-innovation-in>. A Department of Energy Factsheet on the hub and wide-bandgap semiconductors is available at <http://energy.gov/articles/factsheet-next-generation-power-electronics-manufacturing-innovation-institute>.
- **EPA Science Advisory Board Decides Not to Review CO₂ New Source Performance Standards (NSPS) for Power plants.** On January 21, EPA’s Science Advisory Board (SAB) voted unanimously not to review EPA’s proposed NSPS for CO₂ from power plants. The SAB had been considering whether to review the science underlying carbon capture and sequestration (CCS) technology, an important underpinning of the recent EPA proposal. Among other things, EPA’s NSPS proposed rule would set performance standards for new coal-fired electric utility boilers based on an emission limitation achievable through the partial application of CCS technology. The SAB was initially interested in whether sequestration is viable given questions regarding the peer review of two Energy Department National Energy Technology Laboratory studies. However, the SAB accepted EPA’s argument that questions regarding sequestration were outside the scope of the NSPS rule, which requires capture but relies on other existing rules to regulate sequestration. The SAB voted instead to draft a letter to EPA advising the agency to engage in ongoing review of the implementation of CCS technology. The minutes of the January 21 teleconference at which the SAB decided not to review the proposed rule are available at [http://yosemite.epa.gov/sab/sabproduct.nsf/a84bfee16cc358ad85256ccd006b0b4b/3BA3D4561ADC643985257C4300587AEC/\\$File/Minutes-01+21+14-final.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/a84bfee16cc358ad85256ccd006b0b4b/3BA3D4561ADC643985257C4300587AEC/$File/Minutes-01+21+14-final.pdf). The initial memorandum to SAB members outlining the initial concerns is available at

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<http://yosemite.epa.gov/sab/sabproduct.nsf/18B19D36D88DDA1685257C220067A3EE/%24File/SAB+Wk+GRP+Memo+Spring+2013+Reg+Rev+131213.pdf>.

Legislative Branch

- **Senate Committee Holds Hearing on President's Climate Plan.** On January 16, the Senate Environment and Public Works Committee held a hearing entitled "Review of the President's Climate Action Plan." Witnesses included EPA Administrator Gina McCarthy and Council on Environmental Quality Chair Nancy Sutley. Each defended the President's June 2013 plan. Among other things, McCarthy asserted that of 97 percent of the scientific community believes that human activities are causing climate change. The Committee's Ranking Member, David Vitter (R-LA), expressed frustration with the EPA in particular for not responding to inquiries from his office about the EPA's recent release of proposed greenhouse gas emission standards for new power plants, and the validity of those standards under the Energy Policy Act of 2005. Other witnesses expressed skepticism about the risks of climate change and the merits of the President's plan. The full list of witnesses and webcast of the hearing are available at http://www.epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_id=e07101a7-0715-7690-b6e9-c39e56a3b468&CFID=61603225&CFTOKEN=10010071.
- **Senate Committee Holds Hearing on Energy Production.** On January 21, the Senate Small Business and Entrepreneurship Committee held a field hearing at the University of Louisiana in Lafayette, LA, entitled "Fueling America – Enabling and Empowering Small Businesses to Unleash Domestic Production." The Committee heard from independent oil and gas producers about the benefits the sector provides through high paying jobs. Senate Small Business and Entrepreneurship Committee Chairman Mary Landrieu (D-LA), who is set to take over the Chairmanship of the Energy and Natural Resources Committee if current Chairman Ron Wyden (D-OR) takes the Chairmanship of the Senate Finance Committee, attended the hearing.
- **House Committee Reports Energy Bills.** On January 27 and 28, the House Energy & Commerce Committee held a markup of H.R. 3826, the "Electricity Security and Affordability Act," and H.R. 2126, the "Better Buildings Act." H.R. 3826 would restrict the EPA's authority under the Clean Air Act to regulate greenhouse gas emissions from new and existing power plants. H.R. 2126 would amend the Energy Independence and Security Act of 2007 to require the Department of Energy (DOE) to perform a study on approaches to improve the energy efficiency of tenant-occupied spaces in commercial buildings. After a full day of opening statements, the Committee passed H.R. 3826 by a vote 29 to 19 and H.R. 2126 by voice vote. Additional information, including a webcast of the mark-up, is available at <http://energycommerce.house.gov/markup/full-committee-vote-hr-3826-electricity-security-and-affordability-act-and-hr-2126-better-buildings-act/>.

Judicial Branch

- **D.C Circuit Invalidates EPA Air Permitting Rule for Indian Country as it Applies to Non-Reservation Lands.** On Jan. 17, the U.S. Court of Appeals for the District Columbia Circuit (D.C. Circuit) vacated an EPA rule under the Clean Air Act that would have applied federal new

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source review permitting requirements for Indian Country to areas outside the demonstrated jurisdiction of Indian tribes. *Okla. Dep't of Env'tl. Quality v. EPA*, D.C. Cir., No. 11-1307. Under the Clean Air Act, states generally have primary responsibility for air permitting, but Indian tribes retain such authority in areas in which they have jurisdiction, and EPA may act for a tribe it lacks the capacity to do so. The State of Oklahoma challenged a 2011 EPA federal implementation plan for new source review permitting for "Indian country" on the grounds that it would apply to Indian country regions that lie outside legally-established reservations. The court agreed, holding that unless and until a jurisdictional determination is made, the states have primary authority over permitting in non-reservation Indian country lands.

- **Ninth Circuit Sends EIS for Chuckchi Sea Oil Lease Sale Back to BOEM for Revised Production Estimate.** On Jan. 22, the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit") ruled that the Bureau of Ocean Energy Management's (BOEM) Environmental Impact Statement (EIS) for a 2008 sale of leases for oil exploration activities in the Chuckchi Sea off the coast of Alaska were arbitrary and capricious. *Native Village of Point hope v. Jewell*, 9th Cir., No. 12-35287 (Jan. 22, 2014). The basis for the court's 2-1 ruling was a finding that BOEM had unreasonably based its final estimate of potential oil production associated with the lease sales on the lower end of a range of estimates, thereby underestimating potential environmental impacts. The case has been remanded to the federal district court. The decision is the latest salvo in a five-year case brought by two Alaskan native villages and a nearly dozen environmental organizations seeking to block the lease sales in the Chuckchi Sea.
- **Waste Management, Inc., Challenges EPA Rule Increasing Global Warming Potential for GHG Reporting Program.** On Jan. 28, Waste Management, Inc., filed a petition for review in the D.C. Circuit challenging EPA's Nov. 2013 rule modifying the global warming potential of certain GHGs for purposes of the agency's mandatory greenhouse gas reporting program. *Waste Management, Inc. v. EPA*, No. 14-1013 (D.C. Cir.). Waste Management is the country's largest owner of recycling stations and landfills. Many landfills are subject to the EPA GHG reporting program on account of their emissions of methane. As part of the Nov. 2013 rule, EPA increased the global warming potential for methane from 21 times the impact of carbon dioxide to 25 times. EPA modified the global warming potential in the reporting program to make them consistent with the findings of the Intergovernmental Panel on Climate Change's Fourth Assessment Report. The modified global warming potential could mean that more facilities become subject to the reporting requirement, which generally applies to facilities that emit 25,000 metric tons or more of carbon dioxide equivalent per year. Under the revised global warming potential calculation, landfills with methane emissions of 1,000 metric tons or more would be required to report.

If you have questions about topics covered in this Update, please contact Kyle Danish at kwd@vnf.com.

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