

Climate, Energy, & Air Update Weeks of Feb. 18 – Mar. 5, 2014



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EPA finalizes Tier 3 rule requiring reductions in sulfur from gasoline . . . House Ways and Means Chairman releases draft tax reform bill . . . President directs EPA and DOT to develop GHG and fuel economy standards for post-2018 model year medium- and heavy-duty vehicles . . . DOE issues loan guarantee for Vogtle nuclear power plant . . . Supreme Court hears oral argument in GHG permitting case . . . House passes energy efficiency bill, and begins consideration of Whitfield-Manchin bill. The latter would block EPA's GHG regulations for power plants, and already has drawn a White House veto threat.

Executive Branch

- **EPA Finalizes Tier 3 Performance Fuel and Vehicle Emission Standards.** On March 3, EPA finalized the long-awaited "Tier 3" emissions standards for fuels and vehicles. The standards will have significant implications for automakers, fuel producers, and the environment. The fuel requirements of the Tier 3 rule would significantly reduce pollution from gasoline: sulfur by more than 60%, particulate matter by 70%, and volatile organic compounds (VOCs) and NOx by 80%. The final rule sets the default fuel for automobile testing as one containing 10% ethanol (E10), rather than the current test fuel which contains no ethanol (E0) or the proposed rule which would have required test fuel containing 15% ethanol (E15). The rule also sets more stringent conventional pollutant tailpipe and evaporative emission standards for cars and trucks. Additional information, including the final rule itself, is available at <http://www.epa.gov/otaq/tier3.htm>. For information on EPA's Tier 3 proposed rule, see our April 2, 2013 Alert at <http://www.vnf.com/1109>.
- **President Orders New Heavy-Duty Truck Fuel Efficiency and Emission Standards.** Following up on a State of the Union promise, President Obama directed EPA and the Department of Transportation (DOT) to propose greenhouse gas (GHG) emission standards and fuel economy standards for post-2018 model year medium- and heavy-duty vehicles by March 2015. EPA and DOT would then be expected to issue final rules by March 2016. This proposal will build on the first action on this arena, which set model year 2014-2018 medium- and heavy-duty vehicle efficiency standards in 2011. A White House fact sheet is available at <http://www.whitehouse.gov/the-press-office/2014/02/18/fact-sheet-opportunity-all-improving-fuel-efficiency-american-trucks-bol>.
- **DOE Issues Final Approval for Nuclear Loan Guarantee.** The Department of Energy (DOE) issued \$6.5 billion in loan guarantees for the construction of two nuclear power reactors at Georgia's Vogtle nuclear power plant. The proposed 1100 megawatt reactors have received Nuclear Regulatory Commission operating licenses, and are scheduled to go online in 2017 and 2018. They would become the first new nuclear reactors in the United States in almost 30 years. The loan guarantees were authorized by the Energy Policy Act of 2005. A DOE press release with additional details is available at <http://www.energy.gov/articles/sec-moniz-georgia-energy-department-scheduled-close-loan-guarantees-construct-new-nuclear>.

- **EPA Gives States a Tool To Claim Clean Air Credit for Efficiency and Renewables Programs.** The EPA released an anticipated new tool that will allow states to estimate the reduction of conventional and greenhouse gas pollutants that result from state energy efficiency and renewable energy programs. The “AVoided Emissions and geneRation Tool” (AVERT) was designed to help states account for the clean air benefits of efficiency and renewable energy programs in their State Implementation Plans (SIPs) in a relatively straightforward and cost effective manner. However, the tool may also help states claim credit for CO₂ emission reductions from efficiency and renewable energy under EPA’s anticipated GHG standards for existing power plants under section 111(d) of the Clean Air Act. More information and the AVERT tool is available at <http://epa.gov/avert/>.
- **EPA Proposes Revision to GHG Reporting Rule for Oil and Gas Sector.** EPA has issued a proposed revision of its GHG reporting rule for the oil and natural gas sector. The revised reporting rule would eliminate the Best Available Monitoring Methods (BAMM) alternative estimate tool that allowed the oil and gas industry to use engineering calculations or supplier data rather than more standardized monitoring and quality assurance methods that will remain in place. The proposal would also require separate reporting of emissions of each of the six key GHGs, including methane and nitrous oxide, rather than reporting total CO₂-equivalent emissions. The proposal will be open for public comment for 45 days following publication in the federal register. A pre-publication copy is available at <http://www.epa.gov/ghgreporting/documents/pdf/2014/documents/SAN5705-preamble-and-rule.pdf>. EPA’s fact sheet is available at http://www.epa.gov/ghgreporting/documents/pdf/2014/documents/SAN5705_factsheet.pdf.
- **DOE Proposes and Finalizes New Commercial Appliance Efficiency Standards.** The Department of Energy proposed a new appliance efficiency rule that, if finalized, will require commercial clothes washers to be as much as 15% more energy efficient than the current standard. DOE predicts that the proposed standard would reduce 6 million metric tons of CO₂ emissions and save consumers \$1 billion in electric bills over the next 30 years. The proposed rule is open for public comment for 60 days. EPA also finalized a new appliance efficiency standard for commercial refrigerators and freezers, which it predicts will reduce 48 million metric tons of CO₂ emissions and save consumers \$400 billion through 2030. Additional information about the commercial clothes washer proposal can be found at <http://www.regulations.gov#!documentDetail;D=EERE-2012-BT-STD-0020-0021>. The final commercial refrigeration equipment rule can be found at http://energy.gov/sites/prod/files/2014/02/f8/cre_ecs_final_rule.pdf.
- **EPA Extends GHG Power Plant NSPS Comment Deadline.** EPA announced a 60-day extension of the deadline to submit public comments for its proposed rule setting CO₂ emission standards for new power plants. The extension also applies to the Notice of Data Availability EPA issued for the proposed rule on January 8. Comments on both are now due by May 9. *For an in-depth analysis of the proposed NSPS rule, see the September 24, 2013 VNF Alert at <http://www.vnf.com/1032>.*
- **EPA Commits to Finalize New Ozone Standard by November 2015.** In a court filing, EPA committed to finalizing revisions to its ozone national ambient air quality standards (NAAQS) by November 2015. This would come 32 months after the March 2013 Clean Air Act deadline for review of the standards. EPA’s timeline is six weeks longer than that proposed by advocacy groups in the 2013 case they filed against the EPA for violating a requirement under the Clean Air Act to review, and as necessary, revise the NAAQS every five years. *See Sierra Club v. EPA, No. 13-cv-2809.*
- **State Department Inspector General Clears Keystone XL Environmental Review.** The Department of State’s Office of Inspector General (OIG) has found that the Department did not act improperly in selecting Environmental Resources Management Inc. (ERM) to produce the environmental review of the Keystone XL pipeline. The State OIG found that ERM had disclosed previous work for the project developer TransCanada and that the past work did not directly conflict with its ability to provide an impartial review of the Keystone XL project. Some environmental groups have criticized the validity of the January 31 Final Supplemental Environmental Impact Statement for the pipeline based on allegations of a conflict of interest. While the OIG report disagreed, it did criticize State’s public disclosure policies as potentially creating the *appearance* of a conflict. The OIG report can be found at <http://oig.state.gov/documents/organization/222809.pdf>. *For an in-depth analysis of the Final Supplemental Environmental Impact Statement, see the VNF February 5 Alert at <http://www.vnf.com/2177>.*
- **EPA Agrees to Revise Method of Calculating Industrial Emissions.** Under a proposed consent decree, EPA has agreed to consider revising its method for calculating VOC, CO, and NO_x emission factors under section 130 of the Clean Air Act for certain

industrial sources, including refineries, petrochemical plants, and wastewater treatment systems. EPA has agreed to propose revisions by August 19, 2014, and finalize any proposed revisions by December 19, 2014. This consent decree would settle a suit brought by local Louisiana and Texas environmental advocacy organizations. The proposed consent decree, which is open for public comment until March 27, is available at <http://www.gpo.gov/fdsys/pkg/FR-2014-02-25/pdf/2014-04112.pdf>.

Legislative Branch

- **House Passes Energy Efficiency Bill.** On March 5, the House passed H.R. 2126, the "Energy Efficiency Improvement Act" by a vote of 375-36 under suspension of the House Rules. H.R. 2126 would require the Administrator of the General Services Administration (GSA), to develop model commercial leasing provisions and best practices for use in leasing documents that designate a federal agency as a landlord or tenant to encourage the investment in energy efficiency measures. Passage of the legislation under suspension indicates that it was largely non-controversial. Additional information on H.R. 2126 is available at <http://energycommerce.house.gov/fact-sheet/energy-efficiency-improvement-act-2014>.
- **House Begins Consideration of Bill Blocking EPA Power Plant GHG Regulations.** The House began consideration of H.R. 3826, the "Electricity Security and Affordability Act." The bill would prevent EPA from moving forward with its planned GHG emission standards for new and existing power plants. The bill sponsors are House Subcommittee on Energy and Power Chairman Ed Whitfield (R-KY) and Senator Joe Manchin (D-WV). The White House has announced that the President would veto the bill if it came to his desk.
- **Senators Send Letter on Section 316(b) Cooling Water Intake Rule.** On February 18, Senate Environment and Public Works Committee Ranking Member David Vitter (R-LA) joined Senators John Thune (R-ND), John Boozman (R-AR) and Marco Rubio (R-FL) in sending a letter to Department of Interior Secretary Sally Jewell and Department of Commerce Secretary Penny Pritzker. The letter expresses concerns regarding the Section 7 consultation process under the Endangered Species Act between the U.S. Fish and Wildlife Service, the National Oceanic and Atmospheric Administration, and the Environmental Protection Agency (EPA) for EPA's proposed rule under 316(b) of the Clean Water Act to regulate cooling water intake structures at power plants. The letter asserts that the initiation of the consultation process is not required under the Endangered Species Act, and prevented the proposed rule from being finalized in June. The EPA recently committed to finalizing the rule by mid-April. The letter concludes: "At a time when resources are limited and regulatory uncertainty is high, we do not believe that this exercise is a prudent use of time or limited taxpayer resources." The letter is available at <https://www.politicopro.com/f/?f=24016&inb>.
- **House Ways and Means Chairman Releases Tax Reform Draft.** On February 26, House Ways and Means Committee Chairman Dave Camp (R-MI) released the "Tax Reform Act of 2014," a draft bill to amend the tax code. Under Chairman Camp's discussion draft, the current 35% top corporate rate would be reduced over five years to 25%. The proposed corporate rate reduction would be phased in by two percentage points each year from 2015 through 2019. To offset the revenue loss from reducing the corporate tax rate, the draft would eliminate permanently over \$1.2 trillion (10-year estimate) of business tax provisions including accelerated depreciation, and almost all of the current or recently expired fossil renewable energy and energy efficiency tax incentives. <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=370987>.
- **Senator Introduces Bill to Promote Energy Efficiency.** On February 27, Senator Mark Begich (D-AK) introduced S. 2059, the "Energy Efficient Heating and Cooling Tax Credit Act." S. 2059 would create a tax credit of \$5,000 for the purchase of efficient home space heating and cooling or water heating appliances using a range of clean fuel choices, including natural gas and biomass. Additional information is available at <http://www.begich.senate.gov/public/index.cfm/pressreleases?ID=1d09d8e6-4e4e-413b-a8a9-2c2e551ba1a5>.
- **House Subcommittee Hold Hearing.** On February 27, the House Energy and Commerce Subcommittee on Energy and Power held a hearing entitled "Benefits of and Challenges to Energy Access in the 21st Century: Electricity." According to committee-issued documents, the hearing was intended to "focus on the benefits of access to affordable and reliable electricity, including why such access is critical to promoting economic and job growth, raising standards of living, and responding to severe weather events and natural disasters." Additionally, the committee focused on "current challenges to energy access, including U.S.

regulatory policies that may affect access to electricity both domestically and internationally.” Democrats and Republicans used the hearing to air their concerns or support for the Obama Administrations proposed and impending actions to limit carbon dioxide emissions from power plants. A full list of witnesses and webcast are available at

<http://energycommerce.house.gov/hearing/benefits-and-challenges-energy-access-21st-century-electricity>.

- **Shaheen-Portman Energy Efficiency Bill Re-Introduced.** On February 27, Senators Jeanne Shaheen (D-NH) and Rob Portman (R-OH) re-introduced S. 2074, the “Energy Savings and Industrial Competitiveness Act (ESIC).” In documents released by the duo, this bill is a “renewed push for a national energy efficiency strategy.” The bill incorporates an additional ten bipartisan amendments that were offered last year when an earlier version of this bill was considered by the Senate. S. 2074 is cosponsored by Senators Mary Landrieu (D-LA), Susan Collins (R-ME), Mark Warner (D-VA), Kelly Ayotte (R-NH), Joe Manchin (D-WV), Roger Wicker (R-MS), Al Franken (D-MN), Johnny Isakson (R-GA), Chris Coons (D-DE), and John Hoeven (R-ND). Additional information is available at <http://www.shaheen.senate.gov/news/press/release/?id=39aada3b-777f-4459-9473-03b2e3c41796>.
- **Senate Confirms Deputy Secretary.** On February 27, the Senate voted unanimously to confirm Michael Connor to be the Deputy Secretary of the Department of the Interior.

Judicial Branch

- **Nebraska Court Rules Keystone XL Legislation is Unconstitutional and State Appeals the Ruling.** On February 19, Nebraskan Attorney General Jon Bruning filed a notice of appeal contesting a state district court’s February 13 ruling invalidating state legislation that created an expedited method for evaluating and approving oil pipeline routes through the state – including the Keystone XL pipeline. *Thomson v. Heineman*, Neb. Dist. Ct., No. 12-2060. The legislation, which was enacted in 2012, vested the power for granting initial pipeline route approval with the Nebraska Department of Environmental Quality and final approval with the governor. Nebraska Governor Dave Heineman approved the Keystone XL route in January 2013, which gave authority for the state to use its eminent domain power to begin taking personal property. However, the court found that the state’s constitution vested the power to review and approve pipeline routes with the state Public Service Commission, and thus, the legislation violated the separation of powers clause in the state’s constitution and was an unlawful delegation of the governor’s authority over common carriers. The court’s ruling also placed an injunction prohibiting the state from taking any action pursuant to Gov. Heineman’s approval for the Keystone XL pipeline route.
- **Oral Argument Set in Lawsuit Over EPA’s 2013 Renewable Fuel Standards.** The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) scheduled oral argument to hear a group of refiners’ challenges to EPA’s 2013 renewable fuel standards (RFS). *Monroe Energy, LLC v. EPA*, 13-1265. The oral argument will take place on April 7. The refiners have argued that EPA did not have statutory authority and adequate data for its decision to increase the RFS’s volumetric obligations for blending biofuels. Under the 2013 rule, refiners are required to blend 16.55 billion gallons of ethanol and other renewable fuels into the nation’s fuel supply. Judges Judith Rogers, Thomas Griffith, and Cornelia Pillard will hear the case.
- **Supreme Court Hears Oral Argument in EPA Greenhouse Gas Permitting Case.** On February 24, the U.S. Supreme Court heard oral argument in a prominent environmental case involving EPA’s greenhouse gas (GHG) permitting program under the Clean Air Act’s Prevention of Significant Deterioration program. *Utility Air Regulatory Group v. EPA*, No. 12-1146. The meaning of the CAA phrase “any air pollutant” as used in the statute’s PSD provisions was central to the Court’s questioning. Consistent with a long-standing interpretation, EPA determined that the phrase covers not only traditional “criteria” air pollutants but also GHGs, and therefore has required major new and modified stationary sources with GHG emissions above certain thresholds to obtain PSD permits. Industry and state petitioners argued that the agency’s interpretation is invalid, particularly because it leads to “absurd” results that EPA only could mitigate through its “Tailoring Rule” – under which EPA developed new GHG-specific pollution thresholds that far exceed pollution thresholds expressly set forth in the statute. Asserting that the case involved the “apex of *Chevron* deference,” Justice Elena Kagan asked industry petitioners to explain and comment on the three statutory interpretations proffered by EPA. Justice Stephen Breyer asked the state petitioners why the case did not present a permissible example of a federal agency reading an exception into the statute. However, Justices representing two of the traditional “swing”

votes, Chief Justice John Roberts and Justice Anthony Kennedy, expressed concerns over the Tailoring Rule's deviation from the statutory text. Justice Samuel Alito asked whether EPA was making a one-time deviation from the CAA's permitting thresholds based on the nature of GHG emissions or whether EPA was claiming broader authority to deviate from the CAA's statutory text. Justice Antonin Scalia said that EPA's "34-year agency interpretation is not a statute."

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

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