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Climate, Energy, & Air Update Weeks of April 17 – 30, 2014

MAY 1, 2014 (CORRECTED MAY 2, 2014)

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

Supreme Court reverses D.C. Circuit decision vacating the Cross-State Air Pollution Rule . . . District Court judge plans to order EPA to issue proposed revised ozone NAAQS by December 2014, final rule by October 2015 . . . President delays decision on Keystone XL permit . . . House committee reports bill that would accelerate decisions on LNG exports . . . EPA lowers 2013 target for cellulosic biofuel under the Renewable Fuel Standard, sends proposed 2014 Renewable Volume Obligations to OMB for review . . . House marks up bill that would ease authorization of LNG exports . . . Environmental groups to push EPA on cooling water intake rule.

Executive Branch

- **EPA Publishes Final "Tier 3 Vehicle" and Fuels Regulation.** On Monday April 28, the Environmental Protection Agency (EPA) published its final "Tier 3" emissions standards for fuels and vehicles in the Federal Register. EPA had published a final version of the rule on its website on March 3, however publication in the Federal Register was the last step before the rule became legally binding. The standards will have significant implications for automakers, fuel producers, and the environment. The fuel requirements of the Tier 3 rule will significantly reduce pollution from gasoline: sulfur by more than 60%, particulate matter by 70%, and volatile organic compounds (VOCs) and NOx by 80%. The published rule is available at https://www.federalregister.gov/articles/2014/04/28/2014-06954/control-of-air-pollution-from-motor-vehicles-tier-3-motor-vehicle-emission-and-fuel-standards. For information on EPA's Tier 3 standards, as proposed, see our April 2, 2013 Alert at http://www.vnf.com/1109.

- **EPA Determines Light-Duty Automakers Exceed GHG Goals for 2012.** EPA published its first report on the status of greenhouse gas (GHG) emission standards for light-duty vehicles. Those standards, issued jointly by EPA and the National Highway Traffic Safety Administration (NHTSA) in 2010, were the first emission standards issued for GHGs from any source by EPA. The standards went into effect for model year (MY) 2012 vehicles. EPA found that automakers' overall GHG performance for MY 2012 vehicles was, on average, 286 grams of GHG/mile, which is a 22 gram/mile reduction from MY 2011 vehicles and 9.8 gram/mile better than what the 2012 standards required. This corresponded to a 1.2 mile per gallon improvement in average fuel economy from MY 2011 vehicles. The report asserts that automakers have exceeded the MY 2012 standard because of flexibility built into the rule that allows manufacturers to transfer credits across years, between fleets, and even between manufacturers. EPA's report is available at http://www.epa.gov/otaq/climate/documents/420f14011.pdf. For more information on the GHG standards, see the April 6, 2010 VNF alert at http://64.106.168.122/webfiles/CEA.4.6.10.pdf.

- **EPA Retroactively Reduces 2013 Cellulosic Biofuels Mandate, Submits 2014 Mandates to OMB.** On April 22, 2014, EPA published a direct final rule significantly reducing the amount of cellulosic biofuel refiners are required to blend into the gasoline supply under the Renewable Fuel Standard (RFS). EPA now requires refiners to submit a total of 810,185 Renewable Identification Numbers (RINs)—tradable credits, each representing 1 gallon of biofuels blended into the fuel supply. This represents a significant decrease from the 6 million RINs initially required for 2013 and the 1 billion RINs required under the 2007 Energy Independence and Security Act of 2007 (EISA). In January, EPA had agreed to reconsider the 2013 cellulosic biofuel requirement after the American Petroleum Institute submitted a petition arguing that the reduced cellulosic fuel production estimates from KiOR Inc. – expected to constitute the majority of 2013 cellulosic biofuels – would prevent compliance of the target as originally proposed. EPA has proposed a 2014 target of 17 million gallons of cellulosic biofuels and has recently submitted the final regulation for White House review

(see below). The direct final rule is available at http://www.epa.gov/otaq/fuels/renewablefuels/documents/2013-cellulosic-standard-dfr-04-22-14.pdf.

- **EPA Submits Regulations to OMB for Review.** EPA has sent a number of regulations to the Office of Management and Budget (OMB) for interagency review. Under Executive Orders 12866 and 13563, such review takes up to 90 days, after which the agency is expected to publish the regulations in the Federal Register.
    - On April 21, EPA submitted a proposed rule to establish CO_2 emission standards for modified and reconstructed power plants. EPA would regulate modified and reconstructed sources under section 111(b) of the Clean Air Act, the same provision under which EPA proposed CO_2 emission standards for new power plants in January. President Obama's Climate Action Plan calls for EPA to propose regulations by June 1, 2014, concurrently with CO_2 emission guidelines for existing power plants under section 111(d) of the Clean Air Act. These existing source regulations are also currently under OMB review.
    - CORRECTED: On April 28, EPA submitted a final rule to OMB establishing new "pathways" and implementing other modifications to the renewable fuel standard regulations.

- **BLM Floats Methane Reduction Program for Mines.** The Bureau of Land Management (BLM) within the Department of the Interior published an Advanced Notice of Proposed Rulemaking (ANPR) on April 29, seeking public comment on a potential rulemaking to reduce methane emissions from mining operating on public lands. BLM's ANPR seeks comment on proposals to allow capture, use, sale, or destruction of waste mine methane from Federal coal and other mine leases. This pre-proposal is part of President Obama's strategy to cut emissions of methane, which is a GHG, as part of his Climate Action Plan. BLM is accepting comment through June 30, 2014. The ANPR is available at https://www.federalregister.gov/articles/2014/04/29/2014-09688/waste-mine-methane-capture-use-sale-or-destruction.

- **White House Announces Measures to Boost Solar Power.** At a solar energy summit hosted by the While House on April 17, senior advisor John Podesta, Energy Secretary Ernest Moniz, and others announced a series of measures to increase solar deployment. The Department of Energy announced a variety of funding, technical assistance and other measures to assist homeowners; businesses; state, local, and tribal governments; and others in deploying solar. EPA, the Department of Agriculture's Rural Utilities Service, and the Department of Defense also announced solar deployment initiatives. In addition, the White House celebrated ten "Solar Champions for Change," individuals driving policy changes to increase solar at the local level. It also called on the private sector to make commitments to increase solar penetration and committed to publicizing those commitments in the coming weeks. A full list of White House and agency and measures are available at http://www.whitehouse.gov/the-press-office/2014/04/17/fact-sheet-building-progress-supporting-solar-deployment-and-jobs.

- **State Department Announces Keystone XL Decision Delay.** On April 18, the State Department announced that it would be delaying a decision on whether to issue a Presidential Permit for the Keystone XL pipeline in order to provide federal agencies additional time to comment. The State Department stated that such additional time was needed due to ongoing litigation in the Nebraska Supreme Court, which may affect the pipeline route in that state. The Department of State's announcement is available at http://www.state.gov/r/pa/prs/ps/2014/04/224982.htm.

- **DOE's ARPA-E Announces $60 Million in Funding for Emission Monitoring and Energy Efficiency Technologies.** DOE's Advanced Research Projects Agency – Energy announced $60 million for two new programs. ARPA-E's MONITOR program will fund $30 million in projects that detect and measure methane emissions from the oil and gas sector. The new DELTA program will provide up to $30 million to develop innovative systems to reduce the energy needed to heat and cool buildings. DOE's announcement is available at http://energy.gov/articles/arpa-e-announces-60-million-disruptive-technologies-cut-emissions-boost-energy-efficiency.

- **DOE Report Highlights Hydropower Potential.** On April 29, Secretary of Energy Ernest Moniz announced a new DOE goal to double U.S. hydropower by 2030. This announcement came at the release of a new DOE report finding the potential for 65 GW of additional hydropower in the United States, primarily at undeveloped rivers and streams as well as by expanding existing hydropower facilities. The DOE report, produced by the Oak Ridge National Laboratory, is available at http://nhaap.ornl.gov/nsd.

Legislative Branch

- **Delegation Sends Letter to Secretary Kerry on PPL Pipeline.** On April 18, Senators Jeanne Shaheen (D-NH) and Kelly Ayotte (R-NH) joined Representatives Carol Shea-Porter (D-NH) and Annie Kuster (D-NH) in sending a letter to Secretary of State John Kerry requesting that a new Presidential Permit be required if the Portland Pipe Line Corporation (PPLC) seeks to change the direction and content of the Portland-Montreal pipeline. The signatories, making up the entire New Hampshire delegation, expressed concern that PPLC intends to change the content being carried through the pipeline from Portland, Maine to Montreal and reverse the flow of these contents. The text of the letter is available at http://www.ayotte.senate.gov/?p=press_release&id=1390/.

- **Senate Committee Holds Field Hearing on Climate.** On April 22, the Senate Commerce, Science, and Transportation Committee's Subcommittee on Science and Space held a hearing entitled "Leading the Way: Adapting to South Florida's Changing Coastline" in Miami Beach, Florida. According to committee-issued documents, the intention of the hearing was to get an overview of climate science analyses conducted by federal agencies and by Florida universities that inform state and local government adaptation plans. Witnesses included Philip Levine, Mayor of the City of Miami Beach; and, Kristin Jacobs, Broward County Commissioner and Member of the White House Task Force on Climate Preparedness and Resilience. A full list of witnesses and webcast are available at http://www.commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=acba50cf-892a-4838-aab0-a5ae7b19caff.

- **House Committee Completes Mark-Up on LNG Export Bill.** On April 30, the House Energy and Commerce Committee voted 33 to 18 to pass H.R. 6, the "Domestic Prosperity and Global Freedom Act." The Committee also passed H.R. 2689, the "Energy Savings Through Public-Private Partnerships Act of 2013" and H.R. 4092, the Streamlining Energy Efficiency for Schools Act of 2014 by voice vote. The Committee made significant changes to H.R. 6. The version of the bill that passed out of the Subcommittee earlier this month effectively would have directed the Department of Energy to provide export approvals to all WTO member countries (not just countries with which the US has an agreement for "national treatment" for trade in natural gas). The bill as amended by the full Committee today removes this provision. Instead, it directs the Department of Energy to issue a "decision," rejection or approval, on any export application within 90 days of the later of the end of the comment period for the application or the date of enactment of the Act. As passed by the Committee, H.R. 6 also includes provisions for judicial review – any challenge to a DOE order goes to the Circuit Court for the Circuit in which the project is located – and for expedited review. H.R. 2689 and H.R. 4092 both encourage energy efficiency; the first in federal buildings and the second in schools. A webcast of the mark-up, text of amendments considered and committee issued documents are available at http://energycommerce.house.gov/markup/committee-consider-hr-6-hr-2689-and-hr-4092.

Judicial Branch

- **U.S. Supreme Court Upholds EPA's Cross-State Air Pollution Rule**. On April 29, in a 6-2 decision written by Justice Ruth Bader Ginsburg, the U.S. Supreme Court reversed and remanded a decision by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) that had vacated the

EPA's Cross-State Air Pollution Rule (CSAPR). *EPA v. EME Homer City Generation*, U.S., 12-1182. CSAPR implements the "Good Neighbor" provision of the Clean Air Act (CAA) by requiring 28 upwind states in the Midwest, East, and South to reduce power plant emissions of nitrogen oxides and sulfur dioxide to help downwind states meet national ambient air quality standards (NAAQS) for ozone and fine particulate matter. Before the Court was the question of whether two elements of the CSAPR exceeded EPA's authority under the CAA: (1) EPA's two-step process for determining each listed upwind state's emission reduction obligations (including a cost-effectiveness analysis); and (2) EPA's imposition of Federal Implementation Plans (FIP) simultaneously with its quantification of the states' reduction obligations. The court held for EPA on both issues. The cases will now go back to the D.C. Circuit, which could take up other legal issues it did not reach in its earlier decision. In addition, there is uncertainty about how to address CSAPR's already-passed 2012 and 2014 compliance deadlines. Look for an upcoming VNF Alert on the court decision.

- **District Court Orders Timeline for Revision of Ozone NAAQS.** On April 29, a judge for the U.S. Dist. Court for the Northern Dist. of California announced from the bench that she will rule that EPA must propose a revised ozone National Ambient Air Quality Standard (NAAQS) by December 1, 2014 – and must finalize the revised NAAQS by October 1, 2015. *Sierra Club v. EPA*, N.D. Cal., No. 13-2809. The ozone NAAQS currently in effect was promulgated in 2008. The Clean Air Act requires EPA to review and considering review NAAQS every five years. In 2013, the Sierra Club and other environmental groups challenged EPA's delay in meeting this requirement. EPA had responded that it could issue a proposed revised rule by no earlier than January 15, 2015, but the court rejected that timeline. Agency officials have indicated that they are considering lowering the NAAQS from its current level of 75 parts per billion (ppb) to between 60 and 70 (ppb), which likely would put a large swath of the country in "nonattainment" status.

- **Federal Judge Rejects Coal Ash Agreement That Would Waive Requirement For Court's Approval**. On April 24, a federal district judge rejected a proposed consent decree between the EPA and petitioner environmental groups that would have set a December 19 deadline for the agency to finalize its coal ash regulations but also allow the parties to extend that deadline without further court approval. *Appalachian Voices v. McCarthy*, D.D.C. No. 12-00523. While the judge found that the consent decree was acceptable in all other respects, she required the parties to resubmit a consent decree that would require the parties to return to the court for approval of any deadline extensions beyond December 19.

- **Environment Group Plans to Reopen Lawsuit Against EPA Over Delayed Cooling Water Rule**. After agreeing to five extensions for EPA to finalize the agency's cooling water intake rule under section 316(b) of the Clean Water Act since 2010, the environmental group plaintiff has refused to consent to a sixth extension and will likely reopen its lawsuit against the EPA. *Riverkeeper v. Jackson*, S.D.N.Y. No. 93-civ-00314. Under the current settlement agreement, EPA was required to finalize the rule by April 17. The final rule will regulate the design, location, and construction of power plant cooling water intake structures to minimize damage to aquatic life. Riverkeeper now claims that EPA is in breach of the settlement agreement between the parties and plans to return to federal court and seek an order compelling the EPA to issue the finalized rule.

- **D.C. Circuit Upholds EPA's Cement Kiln Rules, But Vacates Affirmative Defense**. On April 18, the D.C. Circuit upheld the EPA's revised national emissions standards for hazardous air pollutants and new sources performance standards for the Portland cement kiln industry. *NRDC v. EPA*, No. 10-1371. EPA issued the rule in 2013 and was sued by environmental groups arguing that the agency was prohibited from weakening the existing emission limits and that the EPA was prohibited from considered costs associated with emissions reductions when finalizing the rule. The court rejected these arguments, finding that EPA's regulatory decisions were reasonable. However, the court did vacate the cement kiln rule's affirmative defense, which would have limited the authority of federal courts to assess civil penalties against kiln-operators found to have violated emission limits during equipment malfunctions. The court found that the Clean Air Act requires the courts, not EPA, to decide when civil penalties are warranted: "[a]s the language of the statute makes clear, the courts

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

determine, on a case-by-case basis, whether civil penalties are 'appropriate.'" This is the first time the D.C. Circuit has addressed the legality of the affirmative defense, which EPA has included in several of its other rules (air toxics standards for boilers and incinerators). In light of the court's decision in *NRDC*, EPA may now be required to remove the affirmative defense from these rules, unless the agency decides to appeal the decision.

- **Federal Judge Strikes Down Minnesota Law Limiting Carbon Emissions as Unconstitutional**. On April 18, a federal judge in Minnesota struck down a state law aimed at controlling carbon dioxide (CO_2) emissions from power plants, finding that it violated the U.S. Constitution's Dormant Commerce Clause. *North Dakota v. Heydinger*, D. Minn., No. 11-CV-3232. The law, known as the Next Generation Energy Act (NGEA) of 2007, was designed to increase Minnesota's energy conservation and decrease the state's contribution to climate change. NGEA also prohibited Minnesota utilities from importing electricity from large out-of-state fossil-fuel-powered plants that were not operating as of January 1, 2007. North Dakota challenged the law, arguing that it "unduly burdened interstate commerce" in violation of the Constitution's Commerce Clause. The court found that allowing NGEA to stand would have led to the "kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." The court focused in particular on the NGEA's prohibition providing that "no person" shall import power from outside Minnesota that would contribute to carbon dioxide emissions in Minnesota. The court reasoned that the term "person" was not limited to persons in Minnesota and therefore would impermissibly authorize extraterritorial regulation, *e.g.*, by allowing the state to regulate out-of-state persons conducting transactions that "wheel" power through Minnesota.

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