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# Climate, Energy, & Air Update Weeks of May 15 – 28, 2014

MAY 28, 2014

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

*D.C. Circuit strikes down FERC's authority to regulate prices offered for demand response services . . . EPA issues final Cooling Water Intake Rule . . . Remember: June 2 is the release date for the proposed rule setting CO<sub>2</sub> standards for existing power plants . . . EPA issues proposed rule regulating toxic emissions at refineries . . . D.C. Circuit upholds EPA decision to hold off on secondary standards for NO<sub>x</sub> and SO<sub>2</sub> and Supreme Court will not review 10<sup>th</sup> Circuit cases upholding EPA rejections of SIPs addressing regional haze.*

## Executive Branch

- **EPA Issues Final Cooling Water Intake Rule.** After a long delay, on May 19, 2014, the Environmental Protection Agency (EPA) released its final rule to establish performance standards for the regulation of cooling water intake structures at existing power plants and other facilities pursuant to section 316(b) of the Clean Water Act (CWA). The standards are intended to protect fish and other aquatic wildlife by minimizing capture both in screens attached to intake structures (impingement mortality), and in the actual intake structures (entrainment mortality). Consistent with the 2011 proposal – but strongly opposed by the environmental organizations whose lawsuits prompted EPA to propose and finalize this section 316(b) rule – the final rule will not require all existing plants to use closed-loop systems, otherwise known as cooling towers. The final rule also provides a broad range of compliance measures for meeting impingement mortality standards, and adopts a site-specific standard for meeting entrainment mortality standards. A pre-publication version of the final rule is available at <http://water.epa.gov/lawsregs/lawsguidance/cwa/316b/#final>. For a more in depth discussion, see the May 22, 2014 VNF Alert at <http://www.vnf.com/2895>.
- **EPA Proposal Would Require Revised Toxic Emission Standards and Increased Monitoring at Refineries.** On May 15, EPA issued a proposed rule that would set more stringent emission control requirements for toxic pollutants and volatile organic compounds (VOCs) from storage tanks, flares and coking units at petroleum refineries. EPA's proposed rule would also require additional monitoring of concentrations of benzene in the air at refinery fence lines to ensure compliance. Consistent with recent EPA rulemaking, the rule would eliminate exemptions for startup, shutdown and malfunction. It also would provide technical corrections to the 2008 Petroleum Refinery New Source Performance Standards. EPA will accept public comment for 60 days following publication in the Federal Register. A pre-publication version of EPA's proposed rule is available at <http://www.epa.gov/ttn/atw/petrefine/20140515fr.pdf>.
- **EPA Promulgates Final Continuous Opacity Monitory System Rule.** On May 16, EPA issued a final rule establishing quality assurance and quality control (QA/QC) procedures for continuous opacity monitoring systems (COMS) used to demonstrate compliance with opacity standards included in various New Source Performance Standards. In a change from the proposed rule, EPA has extended the compliance deadline to 180 days to allow for proper training. The final rule is available at <http://www.gpo.gov/fdsys/pkg/FR-2014-05-16/pdf/2014-11226.pdf>.
- **Federal Financial Support for Clean Energy**
  - The Department of Energy announced \$10 million in grant funding through its SunShot Initiative for six projects aiming to further develop thermochemical storage as part of

Concentrating Solar Power (CSP) projects. DOE's announcement is available at <http://energy.gov/articles/energy-department-announces-projects-advance-cost-effective-concentrating-solar-power>.

- **FERC EIS Finds No Significant Impact for Proposed Downeast LNG Facility.** The Federal Energy Regulatory Commission (FERC) issued its final environmental impact statement (EIS) for the Downeast LNG export terminal in Washington County, Maine. The final EIS found that, including proposed mitigation measures, the facility will have no significant impact on the environment. FERC is expected to make a final decision on whether to approve the Downeast LNG facility. Citing environmental and safety concerns, the Canadian ambassador to the U.S. has indicated that Canada opposes the project and will not cooperate on any coordination or planning for the project. The final EIS is available at <https://www.ferc.gov/industries/gas/enviro/eis/2014/05-15-14-eis.asp>. For a more in-depth analysis of the natural gas export process, see the March 22, 2013 VNF Alert at <http://www.vnf.com/1104>.
- **FTC Requests Comments on Fuel Economy Label Revisions.** The Federal Trade Commission (FTC) is requesting public comment on whether to revise its Guide Concerning Fuel Economy Advertising for New Automobiles, which establishes requirements on fuel economy advertising. FTC's proposed revisions would make fuel economy labels more consistent with EPA requirements, including requiring disclosure of combined city and highway miles-per-gallon estimates. FTC is accepting comments until July 10. The FTC notice is available at [http://www.ftc.gov/system/files/documents/federal\\_register\\_notices/2014/05/140515fueleconomyfrn.pdf](http://www.ftc.gov/system/files/documents/federal_register_notices/2014/05/140515fueleconomyfrn.pdf).
- **Obama Administration Regulatory Agenda Indicates Intent to Tackle Important Energy, Air Issues.** The Obama Administration has released its Spring 2014 regulatory agenda, which provides information about expected timelines for proposal and issuance of major rules. The agenda does not bind agencies to its timelines, but is meant to provide notice of expected timelines for rulemakings. Some of the agenda's highlights include plans by EPA to take action on the following rulemaking initiatives: a final rule revising the 2014 renewable fuel standard (by June 2014); a final rule revising the "definition of solid waste" under RCRA (by July 2014); a proposed rule setting effluent limitation guidelines for unconventional oil and gas extraction under the Clean Water Act (by October 2014); a proposed rule to revise National Ambient Air Quality Standards (NAAQS) for ozone (by December 2014); a proposed rule setting greenhouse gas emissions and fuel efficiency standards for medium- and heavy-duty vehicles (by March 2013); and a final rule establishing the definition of "waters of the United States" under the Clean Water Act (by April 2015). Meanwhile, the Department of Energy's regulatory agenda indicates that the agency aims to finalize a number of appliance efficiency standards. The Spring 2014 Unified Agenda is available here: <http://www.reginfo.gov/public/do/eAgendaMain> (use the drop-down menu to view the agenda of specific agencies).

## Legislative Branch

- **Rhode Island Senator Writes to Florida Senator on Climate.** On May 15, Sen. Sheldon Whitehouse (D-RI) sent a letter to Sen. Marco Rubio (R-FL) regarding Sen. Rubio's recent statements on climate change. Sen. Whitehouse specifically cited Sen. Rubio's comment that he does not believe that human activity is causing changes to the climate and his skepticism that laws can "do anything about it." Sen. Whitehouse relayed similarities between the impacts of climate change on Florida and Rhode Island as well as his experiences talking with Florida leaders during a recent trip to the state. Sen. Whitehouse concluded the letter asking Sen. Rubio to reconsider his views. A copy of the letter is available at <http://www.whitehouse.senate.gov/news/release/sen-whitehouse-challenges-rubio-comments-on-climate-change>.
- **Senate Holds Hearing on Nominees.** On May 20, the Senate Energy and Natural Resources Committee held a hearing to consider pending nominations. The Committee considered the

nominations of Cheryl LaFleur and Norman Bay to be Members of the Federal Energy Regulatory Commission for five year terms. Despite some bipartisan support for both nominees, Senators were critical of the duo; LaFleur for her work as Acting Chair of the Commission, and Bay for his work as the head of the FERC's enforcement office. A webcast is available at <http://www.energy.senate.gov/public/index.cfm/hearings-and-business-meetings?ID=850764ab-d008-4095-b7ce-e2c57075b55c>.

- **House Subcommittees Hold Hearings.** On May 21, the House Natural Resources Subcommittee on Energy and Mineral Resources held a hearing entitled "American Energy Jobs: Opportunities for American Manufacturing." Witnesses included Toby Mack, President and CEO of Energy Equipment and Infrastructure Alliance; and, Carol Williams, Special Advisor to the Dow Chemical Company. Additional information is available at <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=379683>. Later that day, the Committee's Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs held a hearing entitled "Oil and Gas Activities within Our Nation's Wildlife Refuge System." The Subcommittee reviewed the Fish and Wildlife Service (FWS) advanced notice of proposed rulemaking to regulate oil and gas development that occurs on roughly half of the nation's 562 refuges. Witnesses included Kip Knudson, Director of State and Federal Relations for the State of Alaska; and, Noah Matson, Vice President for the Defenders of Wildlife. Knudson critiqued the FWS notices as being based on spills that happened long ago while Matson compared the current permitting process to the "wild West." Additional information is available at <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=379670>.
- **House Member Releases Draft Bill on Climate Tax.** On May 21, Rep. John Delaney (D-MD) released a discussion draft of the "State's Choice Act." As currently drafted, the proposed bill would give states the option of complying with the impending EPA CO<sub>2</sub> standards for existing power plants by implementing a carbon tax. A summary and draft text is available at <http://delaney.house.gov/media-center/press-releases/delaney-releases-discussion-draft-of-legislation-allowing-states-to/>.
- **House Subcommittee Holds Hearing.** On May 21, the House Energy and Commerce Subcommittee on Energy and Power held a legislative hearing on the "Promoting New Manufacturing Act." As currently drafted, the bill would require that the EPA implement regulations and guidance for New Source Review permits concurrently with any new or revised National Ambient Air Quality Standard (NAAQS). The bill also directs EPA to report to Congress on steps being taken by the agency to expedite the permitting process. Witnesses included Ross Eisenberg, Vice President of Energy and Resources Policy at the National Association of Manufacturers; and, Lorraine Krupa Gershman, Director of Regulatory & Technical Affairs at the American Chemistry Council. Additional information is available at <http://energycommerce.house.gov/hearing/promoting-new-manufacturing-act>. The Subcommittee has scheduled a mark-up on the measure on May 28<sup>th</sup> at 4:30 pm.
- **Senate Passes Two Bills.** On May 22, the Senate passed H.R. 724 and H.R. 316, the "Collinsville Renewable Energy Production Act" by unanimous consent. H.R. 724 would amend the Clean Air Act to remove the requirement for dealer certification of new light-duty motor vehicles and a redundant requirement for certification. H.R. 316 would permit the town of Canton, CT to operate two small, currently inactive hydropower dams and generate locally produced power. The two bills now await signature by the President.

### Judicial Branch

- **D.C. Circuit Rejects FERC's Demand-Response Program.** On May 23, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) struck down the Federal Energy Regulatory Commission's (FERC) authority to regulate the prices offered for demand-response services implemented in some regional transmission organizations. *EPSA v. FERC*, No. 11-1486. For more

information on the decision and its potential implications, please see a VNF Alert here: <http://www.vnf.com/2909>.

- **Supreme Court Denies Two Petitions for *Certiorari* to Review EPA's Regional Haze Compliance Program.** On May 27, the U.S. Supreme Court denied petitions for *certiorari* in *Oklahoma v. EPA*, Tenth Circuit, No. 13-921, and *North Dakota v. EPA*, Eighth Circuit, No. 13-940. Both cases involved appeals of appellate court decisions that had upheld EPA's authority to reject Oklahoma and North Dakota's state implementation plans (SIPs) after EPA determined their SIPs did not comply with the agency's regional haze regulations. The Regional Haze Rule is aimed at restoring visibility around national parks and wilderness areas by limiting nitrogen oxides (NO<sub>x</sub>), sulfur dioxide (SO<sub>2</sub>), and particulate matter (PM) emissions from major stationary sources. After the Supreme Court's denial, the appellate courts' decisions will stand.
- **D.C. Circuit Denies Environmentalists' Petition to Review EPA's Decision to Delay Issuing Secondary NAAQS to Address Acid Rain.** On May 27, the D.C. Circuit denied environmentalists' petition seeking review of EPA's decision to delay issuing its secondary NAAQS for oxides of nitrogen (NO<sub>x</sub>), oxides of sulfur (SO<sub>x</sub>), and other pollutants that are precursors of acid rain. *Center for Biological Diversity v. EPA*, No. 12-1238. The agency determined it needed to perform additional scientific studies before it could finalize the rule. The court held that EPA's decision was reasonable after finding "[i]t is ridiculous to suppose that the Clean Air Act required EPA to promulgate a secondary standard that would immediately violate the Act. Yet that is where petitioners' arguments lead."
- **D.C. Circuit Dismisses Coal Fee Case.** On May 14, the D.C. Circuit dismissed a case challenging an export fee levied by the U.S. Interior Department (Interior) after finding that the lawsuit was "untimely." *Coal River Energy LLC v. Jewell*, No. 13-5119. Coal River Energy, a coal company, brought suit against Interior alleging that the agency's fee – which applies to coal from federal lands that is sold, transferred, or used by the mine owner – is an unconstitutional tax in violation of the U.S. Constitution's Export Clause. The fee is authorized by the Surface Mining Control and Reclamation Act of 1977 (Surface Mining Act). The funds raised from the fee are used to reclaim lands that have been damaged by coal mining. The D.C. Circuit declined to hear the case because it was brought after the 60-day deadline established by the Surface Mining Act for judicial review.
- **U.S. Supreme Court Declines to Hear Similar Coal Fee Case.** On May 19, the U.S. Supreme Court denied a petition of *certiorari* brought by more than 100 coal companies, similarly challenging the Interior's coal mining fee as an unconstitutional tax. *Aracoma Coal Co. v. United States*, No. 13-941. The petitioners sought review of a ruling of the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) finding that the fees are constitutional because they are imposed when the coal is extracted, not when the coal is in the export stream. The Federal Circuit decision will stand after the U.S. Supreme Court's denial of *certiorari*.
- **Connecticut & Maryland Challenge EPA's Approval of Virginia's Ozone Plan.** On May 21, the states of Connecticut and Maryland filed a petition for review in the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) challenging the EPA's decision to approve Virginia's SIP to address the 2008 National Ambient Air Quality Standards for ozone. The petitioning states allege that Virginia's plan fails to protect downwind states from interstate pollution. *Connecticut v. EPA*, No. 14-1490. On March 27, EPA approved Virginia's SIP as required by Section 110(a)(2) of the Clean Air Act. In EPA's approval, the agency acknowledged that Virginia's SIP fails to address the Clean Air Act's "good neighbor" provision; however, the agency said it could not require states to address air pollution that crosses state lines because a recent D.C. Circuit ruling vacated EPA's Cross-State Air Pollution Rule (CSAPR). The U.S. Supreme Court overturned the D.C. Circuit's vacatur last month. See a VNF Alert here: <http://www.vnf.com/2800>.

*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).**

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