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Climate, Energy, & Air Update Weeks of June 12 – 25, 2014

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Supreme Court largely upholds EPA permitting for GHG, but sends warning shot across bow on agency interpretation of its Clean Air Act authority . . . It's "Energy Week" in the House with bills already passed on LNG exports and cross-border projects . . . Department of Commerce allows some exports of petroleum products, but insists they are not in contravention of crude export ban . . . House committee grills EPA on "Clean Power Plan" proposal, which Senate hears pro-climate-policy messages from former EPA Administrators from both parties . . . Senate committee moves FERC nominees.

Executive Branch

- **FTC Proposes Revised Energy Labeling for Some Appliances.** On June 18, the Federal Trade Commission proposed changes to its Energy Labeling Rule, which requires manufacturers to attach yellow "EnergyGuide" labels to certain products and requires that labels include information about estimated yearly costs and energy use compared to other similar products. The new proposal would make changes to energy labeling for lighting, clothes washers, dishwashers, refrigerators, ceiling fans, and room air conditioners. The rule also proposes an online label database. The FTC is accepting comment on the proposal through August 18, 2014. The FTC's proposed rule is available at http://www.ftc.gov/system/files/documents/federal_register_notices/2014/06/140618energylabelingfrn.pdf.
- **EPA Finalizes Cellulosic Targets and Extends Deadline for 2013 RFS.** EPA has indicated that it did not receive any adverse comments on its May 2, 2014 Direct Final Rule revising the 2013 Renewable Fuel Standard (RFS) cellulosic biofuel targets—a set quantity of cellulosic biofuels the agency requires refiners to blend into the fuel supply—by the June 2 comment deadline. This allows EPA to implement its revised target of 810,000 gallons of cellulosic biofuel, effective July 1, 2014, without going through a full notice-and-comment rulemaking. In addition, pointing to its delay in finalizing the 2014 RFS, EPA has extended the deadline for compliance with the 2013 RFS from June 30, 2014 to September 30, 2014. The agency's direct final rule extending the compliance deadline for the 2013 RFS is available at <http://www.gpo.gov/fdsys/pkg/FR-2014-06-16/pdf/2014-14019.pdf>.
- **Federal Funding for Clean Energy**
 - On June 13, the U.S. Department of Agriculture (USDA) announced the availability of \$14.5 million in financial support for companies developing bioenergy as authorized by the 2014 Farm Bill. USDA is seeking applications for \$12 million for biorefineries under the Repowering Assistance Program, and \$2.5 million for biofuel R&D under the Sun Grant Initiative. USDA's announcement is available at <http://www.usda.gov/wps/portal/usda/usdahome?contentid=2014/06/0122.xml>.
 - On June 18, the Department of Energy (DOE) announced the issuance of \$100 million for 32 projects as part of the Energy Frontier Research Center program. These projects—which are run by universities, National Labs, and non-profits—are targeted at R&D to solve clean energy "grand challenges." The funding announcement can be found at <http://energy.gov/articles/doe-awards-100-million-innovative-energy-research>, and a list

of the funded projects can be found at

http://science.energy.gov/~media/bes/efrc/pdf/FY_2014_EFRC_Award_List.pdf.

- **In Personnel News**, two energy officials have announced plans to step down. Nuclear Regulatory Commission (NRC) Commissioner George Apostolakis's four year term will expire at the end of June and he will not be renominated. DOE deputy administrator Daniel Poneman, who has been in that position since 2009, will step down this fall.
- **FERC Approves Cameron LNG Facility**. The Federal Energy Regulatory Commission—has responsibility for approving liquefaction and LNG terminal siting, construction and operations—has given the go-ahead to the Sempra Energy-owned Cameron LNG export terminal in Cameron Parish, Louisiana. FERC approval includes 75 conditions to mitigate potential adverse environmental impacts. FERC issued a final Environmental Impact Statement in April. The report did not consider the upstream impacts of natural gas export, which some environmental advocates have argued is necessary. The Department of Energy, which has responsibility for authorizing the import and export of natural gas, had already approved the Cameron Facility's LNG export permit in February, conditional on FERC approval. FERC's approval decision is available at <http://www.ferc.gov/whats-new/comm-meet/2014/061914/C-1.pdf>. For a more in-depth analysis of the natural gas export permitting process, see the March 22, 2013 VNF Alert at <http://www.vnf.com/1104>.
- **Department of Interior Advances Two Offshore Renewables Projects**.
 - The Bureau of Ocean Energy Management (BOEM) in the Department of Interior announced that it would make a new Massachusetts Wind Energy Area (WEA)—a 742,974 acre block on the Outer Continental Shelf (OCS) located approximately 12 miles offshore—available for leasing. If completed, the new WEA would be the largest contiguous offshore wind energy area in the U.S. and would nearly double the area of the federal OCS available for lease to commercial wind energy projects. BOEM proposes to auction the Massachusetts WEA over the course of four separate lease sales. For more information on the announcement see the June 19 VNF Alert at <http://www.vnf.com/2981>. BOEM's Proposal is available at <http://www.gpo.gov/fdsys/pkg/FR-2014-06-18/pdf/2014-14116.pdf>.
 - BOEM also announced that it had determined that there was no competitive interest in the development of federal waters 5 miles off the Oregon coast to test wave energy facilities. This clears the way for BOEM approval of a non-competitive lease for the Northwest National Marine Renewable Energy Center at Oregon State University to install an up to 20 MW array of commercial-scale marine hydrokinetic devices. BOEM will also coordinate with FERC, which is responsible for the granting of licenses for the construction and operation of hydrokinetic projects on the OCS. BOEM's announcement and other information on the project are available at <http://www.boem.gov/PMEC-SETS/>.
- **Planning Begins for Next Offshore Oil and Gas Lease Plan**. BOEM has begun the development of the next 5-year offshore oil and gas lease program for July 2017 to June 2022. This plan identifies the areas of the OCS that will be eligible to be put up for lease in the future. BOEM is accepting comment, through July 31, on issues related to its preparation of a programmatic EIS. BOEM's announcement is available at <http://www.boem.gov/79-FR-34349/>.
- **EPA Requests Science Review of Waters of US Proposal**. EPA has requested a Science Advisory Board (SAB) review of the scientific and technical basis for its recent proposed rule defining "waters of the U.S." under the Clean Water Act. The proposed rule, which was issued by EPA and the U.S. Army Corps of Engineers, would expand the streams, wetlands, and other waters considered "waters of the United States" and therefore subject to permitting requirements under the Clean Water Act. Comments on the rule are due October 20, 2014. It is not yet known whether the SAB report on the scientific basis for the rule will be released before the end of the comment deadline.

For more information on the Waters of the U.S. proposed rule, see the March 27 VNF Alert at <http://www.vnf.com/2321>.

Legislative Branch

- **House Votes on Energy Bills.** It is “Energy Week” in the House of Representatives. The chamber is acting on a suite of bills:
 - On June 24, the House voted 238-173 to pass H.R. 3301, the “North American Energy Act.” H.R. 3301, sponsored by Committee Chairman Fred Upton (R-MI) and Representative Gene Green (D-TX), would change the process for the approval of cross-border natural gas pipelines, electric transmission lines and oil pipelines. The White House has threatened to veto H.R. 3301 if it is enacted.
 - On June 25, the House approved H.R. 6, the “Domestic Prosperity and Global Freedom Act.” The vote was 266-150; 46 Democrats voted in favor of the bill. Introduced by Rep. Cory Gardner (R-CO), H.R. 6 would direct DOE to make a final decision on an application to export liquefied natural gas to a country with which the United States does not have a Free Trade Agreement within 45 days of finalization of a National Environmental Policy Act review for the relevant terminal. Additionally, H.R. 6 includes provisions for judicial review – any challenge to a DOE order goes to the Appeals Court for the Federal Circuit in which the terminal project is located – and for expedited review.
 - Later this week, the House is expected to vote on H.R. 4899, the “Lowering Gasoline Prices to Fuel an America That Works Act of 2014.” The bill, which was introduced by Rep. Hastings (R-WA), would eliminate certain restrictions on drilling for oil and gas on federal lands, and streamline project approvals. The bill also would make more offshore areas available for production, including regions off the East Coast. More information about H.R. 4899 is available at: <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:HR4899:/>.
- **House Committee Holds Mark-Up.** On June 24, the House Science, Space and Technology Committee passed H.R. 4012, the “Secret Science Reform Act of 2014” by a vote of 17 to 13. H.R. 4012 would prohibit the Administrator of the EPA from proposing, finalizing, or disseminating a covered action unless all scientific and technical information relied on to support such action is specifically identified and publicly available in a manner sufficient for independent analysis and substantial reproduction of research results. The text of amendments and other committee issued documents are available at <http://science.house.gov/markup/full-committee-markup-hr-4012-secret-science-reform-act-2014>.
- **Senate Energy Committee Votes on FERC Nominees.** On June 18, the Senate Committee on Energy and Natural Resources confirmed Norman Bay by a 13-9 vote and Cheryl LaFleur by a 21-1 vote to be FERC Commissioners. Much of the debate focused on which nominee would be Chair of the FERC. Specifically, Ranking Member Lisa Murkowski (R-AK) expressed opposition to confirming Bay, the President’s pick for Chairman, arguing that he lacks significant policy experience. Murkowski offered praise for LaFleur’s performance as Acting Chair and referenced her talent, expertise, and good judgment. Senator Bernie Sanders (D-VT) explained that he voted against LaFleur’s nomination because Bay would be an outstanding FERC Chairman. During questioning by Senator Sanders, Committee Chief Counsel Sam Fowler confirmed that the Senate’s role is only to confirm nominees and that the President has the authority to designate the Chair of FERC.
- **Senate Energy Committee Considers Keystone Legislation.** On June 18, the Senate Committee on Energy and Natural Resources considered a draft bill entitled “Keystone XL Pipeline Approval Act.” Sponsored by Chairwoman Landrieu, the bill passed by a vote of 12-10. Democrats on the Committee, with the exception of Chairwoman Landrieu (D-LA) and Senator Joe Manchin (D-WV), voted against the bill. Chairwoman Landrieu emphasized that developing the Keystone Pipeline would allow the U.S. to import more oil from an ally rather than from volatile countries. She also

stated that the pipeline would result in lower emissions than transporting the oil by rail and truck. Committee Members Cantwell (D-WA) and Sanders (D-VT) voiced opposition to the bill, stating that there is a need to foster alternative energy technologies and move away from fossil fuels to avoid the impacts of increased emissions on climate change. Additional information on the bill, including a webcast of the mark-up, is available at

<http://www.energy.senate.gov/public/index.cfm/2014/6/business-meeting-to-consider-pending-calendar-business-and-pending-nominations>.

- **Former EPA Administrators Testify before Environment and Public Works Committee.** On June 18, the Senate Environment & Public Works Subcommittee on Clean Air and Nuclear Safety held a hearing entitled, "Climate Change: The Need to Act Now." Witnesses included former EPA Administrators William Ruckelshaus, Christine Todd Whitman, William Reilly, and Lee Thomas. Former Administrator William Ruckelshaus pointed the Committee to the opinion piece crafted by the four Former EPA Administrators that recommended that "America get serious" about reducing its contribution to changing the world's climate rather than accepting the avoidable consequences. Former Administrator Christine Todd Whitman expressed her hope that Congress will acknowledge that climate change is real and "that the potential consequences of inaction are far greater than the projected costs of action." A webcast is available at http://www.epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=a26b916b-b182-45cb-f502-930b93f8a24b&CFID=130462508&CFTOKEN=21460046.
- **Both House and Senate Act on Energy and Water Appropriations.** On June 18, the House Appropriations Committee approved the FY 15 Energy and Water Development, and Related Agencies Appropriations Bill by voice vote. On June 17, the Senate Appropriations Subcommittee on Energy and Water advanced their version of the Energy and Water spending measure with a unanimous vote. The House is expected to vote on their version of the spending measure this week. The Senate is not expected to take the measure to the floor until after the elections in November.
- **Shake Up in House Leadership.** House Majority Leader Eric Cantor (R-VA) announced he will cede his leadership post on July 31 after being defeated by David Brat in the Virginia primary election. On June 19, the House Republican Caucus elected Rep. Kevin McCarthy (R-CA) to become the next House Majority Leader. The Caucus also elected Steve Scalise (R-LA) to succeed McCarthy as Majority Whip. McCarthy and Scalise will govern for 12 legislative days between July 31 and November's midterm elections.
- **House Energy and Commerce Hearing on EPA's Proposed "Clean Power Plan" Rule.** On June 19, the House Energy & Commerce Subcommittee on Energy & Power held a hearing entitled, "EPA's Proposed Carbon Dioxide Regulations for Power Plants." Janet McCabe, Acting Assistant Administrator for Air and Radiation for the U.S Environmental Protection Agency (EPA), was the only witness. Acting Assistant Administrator McCabe testified about the proposed Clean Power Plan rule. The rule, which was proposed pursuant to EPA's authority under section 111(d) of the Clean Air Act, would set state-specific goals to reduce carbon dioxide emission rates for existing power plants and require states to submit regulatory plans to meet those goals. (For more information on the EPA proposal, see the June 2 VNF Alert at <http://www.vnf.com/2929>.) Subcommittee Chairman Ed Whitfield (R-KY) criticized the plan, arguing that the EPA is forcing states to redesign their electricity generating systems. He also questioned the legality of the proposed rule. Subcommittee Ranking Member Bobby Rush (D-IL) supported the proposal, and cited statements from former EPA Administrators indicating that the agency has the authority to regulate greenhouse gas emissions under the Clean Air Act. Full Committee Ranking Member Henry Waxman (D-CA) criticized Republicans and the fossil fuel sector for continually claiming that regulations under the Clean Air Act will shut down businesses, destroy jobs, drive up energy prices, and cripple the U.S. economy. Additional information, including a webcast, is available at <http://energycommerce.house.gov/hearing/epa%E2%80%99s-proposed-carbon-dioxide-regulations-power-plants>.

- **House Natural Resources Subcommittee on Energy and Mineral Resources Holds Hearing on "American Energy Jobs: Opportunities for States and Localities."** On June 18, the House Natural Resources Subcommittee on Energy and Mineral Resources held a hearing entitled, "American Energy Jobs: Opportunities for States and Localities." Witnesses included Rodney Arbuckle, Sheriff of DeSoto Parish in Louisiana; and Kateri Callahan, President of the Alliance to Save Energy. Callahan discussed a goal of doubling U.S. energy productivity by 2030 that was set by Alliance's Commission on National Energy Efficiency Policy. She stated that the goal is achievable and can be accomplished "simply by broad adoption of policies and programs that are in place in certain states and cities already." Additional information is available at <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=381702>.

Judicial Branch

- **Supreme Court Holds that EPA Is Not Obligated to Regulate GHG Emissions for Stationary Sources, Cannot Rewrite Statutory Limits.** On June 23, the Supreme Court ruled that EPA's regulation of greenhouse gas (GHG) emissions from new motor vehicles did not compel the Agency to implement permitting requirements for stationary sources of GHG emissions. *Utility Air Regulatory Group v. EPA*, U.S., No. 12-1146. The Court further held that EPA could not "tailor" the emissions levels that trigger permitting requirements to better fit GHG emissions, because such levels were clearly defined in statute. However, the Court held that EPA can impose GHG limits for stationary sources that already require permits due to emissions of other Clean Air Act pollutants. For more information, see the June 24 VNF Alert at <http://www.vnf.com/2991>.
- **FERC to Seek Rehearing on Demand Response Rule.** On June 11, FERC Commissioner LeFleur announced that the Commission will seek *en banc* review of a 2-1 decision by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) that invalidated FERC's demand-response compensation rule. In its May 23 decision, the D.C. Circuit ruled that FERC had overstepped its authority by promulgating a rule that regulated retail electricity markets. *EPSA v. FERC*, No. 11-1486. For more on the May 23 D.C. Circuit Court decision and the invalidated rule, see the May 27 VNF Alert at <http://www.vnf.com/2909>.
- **D.C. Circuit Dismisses Environment Groups' Challenge to EPA Memo on Review of State Air Pollution Plans.** The D.C. Circuit ruled on June 13 that environment groups had not shown "actual or imminent" injury from an EPA memo that advised regional offices on how to review state air pollution plans after the D.C. Circuit vacated the Cross-State Air Pollution Rule (CSAPR) in 2012. *Sierra Club v. EPA*, No. 13-1014. The memo instructed EPA's regional offices on how to use the Clean Air Interstate Rule (CAIR), CSAPR's predecessor, in approving state air pollution plans. The D.C. Circuit ruled that environment groups' arguments about injury from potentially lower emissions reductions achieved through EPA's use of the CAIR rule were too speculative to establish standing. Although the Supreme Court overturned the D.C. Circuit's vacatur of CSAPR on April 29, the D.C. Circuit continued to hear the case on EPA's CAIR memo, noting that the Agency has not yet determined a new policy and that there are several remaining challenges to CSAPR. *EPA v. EME Homer City Generation*, U.S., 12-1182.
- **Supreme Court to Hear Two Cases on Notice-and-Comment Requirements for Revisions of Interpretive Rules.** On June 16, the Supreme Court granted *certiorari* to hear two consolidated cases to decide whether notice-and-comment procedures are required when an agency revises an interpretive rule that originally resulted from a notice-and-comment process. *Perez v. Mortgage Bankers Association*, No. 13-1041, and *Nickols v. Mortgage Bankers Association*, No. 13-1052. Generally, notice and comment procedures are not required for interpretive regulations. However, D.C. Circuit precedent requires that agencies engage in notice-and-comment procedures when revising "definitive" interpretive regulations, *i.e.* those that were promulgated through a notice-and-comment process. Other circuits, on the other hand, have held that agencies need not engage in a notice-and-comment process in such instances. The Supreme Court's decision in the two

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

consolidated cases will resolve the circuit split and could determine procedural requirements for revisions to interpretive rulemakings across federal agencies.

- **First Lawsuit Filed to Stop EPA’s Proposed “Clean Power Plan” Rule.** On June 18, coal mining company Murray Energy filed the first lawsuit against EPA’s proposed “Clean Power Plan” rule in the U.S. Court of Appeals for the District of Columbia Circuit. Murray Energy contends that the Clean Air Act prohibits EPA from making a rule that regulates power plant emissions under section 111(d) when the industry is already regulated under section 112. Typically, courts will not allow petitions for review of rules that are not yet final. For more on the proposed rule being challenged, see the June 2 VNF Alert at <http://www.vnf.com/2929>.

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