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Climate, Energy, & Air Update

Weeks of July 16 – 30, 2014

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DOE announces methane initiatives . . . EPA public hearings on the proposed Clean Power Plan Rule are underway . . . EPA inspector general says the agency should do more to address methane leaks from gas distribution systems . . . EPA issues guidance to regional administrators on PSD permitting in the wake of [UARG v. EPA](#) decision . . . More filings in the on-going CSAPR litigation . . . District court rejects climate change-based Endangered Species Act listing of bearded seals as too speculative.

Executive Branch

- **Secretary Moniz Announces Methane Reduction Initiatives.** At the July 29 “capstone” session of a series of roundtables focused on methane emissions from natural gas infrastructure, Secretary of Energy Ernest Moniz announced a set of measures that the Department of Energy (DOE) will carry out. These include: developing energy efficiency standards for new natural gas compressor stations; establishment, in collaboration with industry, a manufacturing research and development initiative to improve natural gas system efficiency and leak reduction; development of recommendations for the Federal Energy Regulatory Commission on ways to provide greater certainty for cost recovery for new investment in modernization of gas transmission infrastructure; and a technical partnership with the National Association of State Regulatory Utility Commissioners for modernization of gas distribution networks. More information on these initiatives is available here: <http://www.energy.gov/articles/factsheet-initiative-help-modernize-natural-gas-transmission-and-distribution>.
- **GAO Report Says EPA Should Evaluate New Risks Related to Hydraulic Fracturing.** On July 28, the Government Accountability Office (GAO) issued a report recommending that the Environmental Protection Agency (EPA) assess whether existing safeguards are adequate to address emerging risks to water from hydraulic fracturing at gas wells. EPA categorizes such wells as “Class II” wells for purposes of the Underground Injection Control regulations. The GAO report found that Class II safeguards are sufficient for most purposes, but calls into question whether the safeguards are responsive to the emerging issues of seismic activity and “overly high pressure in geologic formations leading to surface outbreaks of fluids.” The report is available at <http://www.gao.gov/assets/670/664499.pdf>.
- **EPA Inspector General: Agency Should do More to Address Methane Emissions from Gas Distribution.** On July 25, the EPA Office of the Inspector General issued a report calling for improvements in the agency’s efforts to address methane emissions from natural gas distribution pipelines. Distribution pipelines are those pipelines that provide largely local, intrastate delivery of natural gas to retail users. The report includes five recommendations: (1) work with the Pipeline and Hazardous Materials Safety Administration to address methane leaks from a combined environmental and safety standpoint; (2) develop a strategy to address the financial and policy barriers that hinder reductions from the distribution sector; (3) establish performance goals; (4) track distribution sector emissions and use that data to help determine if future regulation would be appropriate; and (5) assess whether data from ongoing studies should be used to update distribution sector emission factors. The report explained that EPA agreed with recommendations 1 and 2, and “provided corrective action plans that meet the intent of the recommendations.” EPA “partially agreed” with recommendations 3, 4 and 5. The report states that the latter three

recommendations “are considered unresolved.” The report is available at:
<http://www.epa.gov/oig/reports/2014/20140725-14-P-0324.pdf>.

- **White House Reports Highlights Costs of Climate Inaction.** On July 29, the President’s Council of Economic Advisers released a report finding that each decade of delayed action to meet climate commitments increases the costs of meeting those targets by 40 percent. In addition, the report highlights the costs of failure to meet global climate targets, including reducing global output by 0.9 percent per year—corresponding to reduced U.S. output of \$150 billion per year—for a 1 degree increase in global temperatures over the 2 degrees Celsius target. The report frames mitigation activities as “climate insurance” against the most expensive and severe consequences of climate change. The report is available at http://www.whitehouse.gov/sites/default/files/docs/the_cost_of_delaying_action_to_stem_climate_change.pdf.
- **EPA Issues Guidance Memo to Regional Offices Regarding GHG PSD and Title V Requirements.** Janet McCabe, EPA’s Acting Assistant Administrator for Air and Radiation, issued a memo providing guidance to the agency’s Regional Administrators regarding how the regional offices should treat Prevention of Significant Deterioration (PSD) and title V permit requirements for stationary sources emitting greenhouse gases (GHG). The memorandum directs regional offices to act consistent with the Supreme Court’s decision in *UARG v. EPA*, No. 12-1146, which upheld EPA’s authority to require GHG emission limitations reflecting best available control technology (BACT) only for those sources already subject to PSD permitting requirements for non-GHG, conventional pollutants. The *UARG v. EPA* decision also held that EPA may not require PSD and title V permits for sources solely on the basis of their GHG emissions, i.e., for sources that do not otherwise trigger the permitting requirements on the basis of their emissions of non-GHG pollutants. EPA notes that states with PSD and title V permitting authority may have to change their laws to reflect these interpretations. However, the memorandum outlines EPA’s interpretation that the Supreme Court’s *UARG* decision does not overturn GHG permitting or emission limitation requirements authorized by independent state law. The McCabe memo is available at <http://www.epa.gov/airprog/oar/oaqps/nsr/documents/20140724memo.pdf>.
- **NRC Releases a Draft Final Rule for Continued Storage of Spent Nuclear Fuel.** On July 24, the Nuclear Regulatory Commission (NRC) issued a draft final rule entitled, “Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions” and a generic environmental impact statement (GEIS) to serve as the regulatory basis for the final rule. The final rule revises the determination of the environmental impacts of continued storage of spent nuclear fuel at commercial sites, including analysis of the impacts of spent fuel pools and indefinite storage in the event a permanent storage solution is not developed. The rule also clarifies that the NRC may rely on the generic determination in the GEIS when evaluating independent spent fuel storage installation license renewals, early site permits, and reactor construction permits. However, the final rule does not discuss continued storage safety or repository availability. A copy of the rulemaking issue is available at <http://www.nrc.gov/reading-rm/doc-collections/commission/secys/2014/2014-0072scy.pdf>.
- **Obama Nominates Two for NRC.** On July 22, President Obama announced his intent to nominate Jeffrey M. Baran and Stephen Burns as Commissioners to the Nuclear Regulatory Commission (NRC). Baran is currently Staff Director for Energy and Environment on the House Energy and Commerce Committee. Burns is currently Head of Legal Affairs for the OECD Nuclear Energy Agency and previously served as General Counsel of the NRC. More information on the nominations is available at <http://www.whitehouse.gov/the-press-office/2014/07/22/president-obama-announces-more-key-administration-posts>.
- **Obama Will Attend UN Summit on Climate Change.** The White House announced that President Obama will attend a one-day United Nations climate change summit that will be held in New York on September 23. UN climate chief Christiana Figueres has stated that Chinese President Xi Jinping

has also confirmed that he will attend. The goal of the summit is to encourage governments and industries to make commitments to address climate change issues.

Judicial Branch

- **U.S. Supreme Court Receives Petition to Review EPA's Air Toxics Rule for Power Plants.** On July 15, the U.S. Supreme Court received three separate petitions asking the Court to review an April 2014 decision by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) upholding EPA's mercury and air toxics standards (commonly referred to as the MATS rule). *White Stallion Energy Center LLC v. EPA*, No. 12-1100. The petitions for a writ of *certiorari* were filed on behalf of: a coalition of 21 state governments; the National Mining Association; and the Utility Air Regulatory Group. For more information about the case and the MATS rule, see a VNF CEA Update here: <http://www.vnf.com/2412>.
- **State Tort Claims Are Not Preempted by Clean Air Act in Coal Ash Case.** On July 17, the U.S. District Court for the Western District of Kentucky found that plaintiffs alleging their properties are covered with coal dust and ash from a nearby power plant in violation of the Clean Air Act may proceed with their state tort law claims because their claims are not preempted by the Clean Air Act. *Little v. Louisville Gas & Electric Co.*, No. 13-1214. The defendants argued that the court should follow a recent decision from the U.S. Court of Appeals for the Fourth Circuit, which held that allowing state common law actions under such circumstances would create "considerable potential mischief." However, the district court instead followed the precedent of the U.S. Court of Appeals for the Sixth Circuit, which held that the Clean Air Act does not preempt state common law claims based on the law of the state where the source of pollution is located. Though the district court dismissed several of the petitioners' claims under the Resource Conservation and Recovery Act and the Clean Air Act, it approved their state law tort claim and their claim that the Cane Run Power Plant was operating without a valid permit in violation of the Clean Air Act. The plaintiffs may now proceed to bring their state law tort claims against Louisville Gas & Electric and PPL Corp.
- **D.C. Circuit Upholds \$72 Million Fine Against Volvo.** On July 18, the D.C. Circuit upheld a \$72 million fine against Volvo Powertrain Corporation after a district court found that a 1999 consent decree between Volvo Powertrain's sister company -- AB Volvo Penta -- and the federal government also applied to Volvo Powertrain. *United States v. Volvo Powertrain Corp.*, No. 12-5234. The consent decree stemmed from a 1998 EPA allegation that several major engine manufacturers, including Volvo Truck Corp., were violating federal law by manufacturing engines with "defeat devices." These devices were allegedly designed to suppress emissions during EPA-administered emissions tests in cases where the emissions would otherwise be above the legal emission limits. The engine manufacturers settled the allegations by entering into the consent decree, in which they promised, among other things, to manufacture engines to meet specific nitrogen oxides (NOx) emissions standards. After EPA determined that several thousand model year 2005 engines did not meet the 2006 NOx emissions standards, EPA sent Volvo a demand letter seeking over \$72 million in penalties. Volvo Powertrain argued that it was not subject to the consent decree because the engines were manufactured by AB Volvo Penta. The district court disagreed, finding that the consent decree covered engines manufactured by both AB Volvo Penta and Volvo Powertrain, because Volvo Powertrain assumed the obligations of Volvo Truck Corp. (the original signatory to the consent decree) after a corporate reorganization. The D.C. Circuit affirmed this decision.
- **Texas Asks D.C. Circuit to Vacate CSAPR as Applied to State.** On July 17, state and industry petitioners filed briefs with the D.C. Circuit with recommendations on how the court should consider challenges to the Cross-State Air Pollution Rule (CSAPR) that still remain after the Supreme Court decision in *EPA v. EME Homer City Generation*, which upheld the basic structure of the rule. Many of the state and industry briefs address issues related to findings in the CSAPR as applied to particular states. The State of Texas filed a motion for summary *vacatur* of the CSAPR as it applies to Texas, arguing that the existing administrative record demonstrates that the rule would result in "impermissible over-control" of emissions at power plants in the state. In previous filings,

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

EPA has requested that the D.C. Circuit lift its stay on implementation of the CSAPR, and to push the compliance deadlines back by three years, which would put the first compliance deadline in 2015. See our previous VNF CEA Update at <http://www.vnf.com/3053>.

- **Court Rejects Bearded Seal ESA Listing That Was Based on Future Climate Impacts.** On July 25, a federal district court held that a decision of the National Marine Fisheries Service (NMFS) to list bearded seals as a “threatened” species under the Endangered Species Act was arbitrary and capricious. *Alaska Oil and Gas Ass’n v. Pritzker*, 13-18-RRB, D. Alaska. NMFS had based its listing in large part on its projections of impacts on bearded seals over the next century as a result of climate change. The court held that “an unknown, unquantifiable population reduction, which is not expected to occur until nearly 100 years in the future, is too remote and speculative to support a listing as threatened.” The challenge to the listing was brought by the North Slope Borough and the Alaska Oil and Gas Association.

Note that the Update is not covering Legislative Branch developments in this edition. Our coverage will continue in the next edition.

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With offices in Washington, D.C. and Seattle, WA, Van Ness Feldman is recognized as a leading law and policy firm in the areas of traditional and renewable energy regulation and project development, climate change regulation and greenhouse gas emissions trading, environmental and natural resources regulation, and infrastructure development. Van Ness Feldman has been recognized nationally and regionally by *Chambers USA*, *Chambers Global*, and *U.S. News / Best Lawyers* for its Energy, Environment, Government Relations, Transportation, and Native American Law practices. The firm's Climate Change practice has received top recognition by *Chambers USA* and *Chambers Global*.

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