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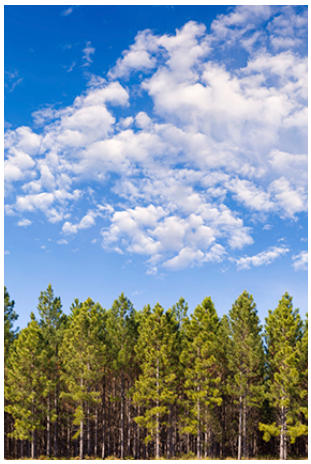

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Climate, Energy, & Air Update Weeks of August 14 – 27, 2014

AUGUST 27, 2014

Kyle Danish, Avi Zevin, Erin Bartlett

D.C. Circuit upholds FERC Order 1000 . . . DOE finalizes new procedures for reviewing applications for LNG exports to non-FTA countries . . . EPA decides not to change RICE NSPS . . . Coal company tries new legal theory in challenge to EPA proposed rule setting GHG standards for existing power plants . . . EPA asks D.C. Circuit to lift stay on CSAPR.

Executive Branch

- **GAO Report Outlines Interagency Process for Developing Social Cost of Carbon.** On August 25, the Government Accountability Office (GAO) released a report reviewing the Obama Administration's interagency working group process for developing social cost of carbon estimates, which have been used in regulatory impact analyses for major environmental and energy rulemakings. The interagency group increased the estimates from $24/mt in 2010 to $37/mt in 2013. The GAO report was requested by a group of four Republican legislators, including Senate Environment and Public Works Committee Ranking Member David Vitter (R-LA) and Chairman of the House Energy and Commerce Committee's Subcommittee on Oversight and Investigations Tim Murphy (R-PA). These and other conservative policy-makers have criticized the Administration for not following a notice-and-comment process in developing the estimates, which they contend are too high. The GAO did not evaluate the accuracy of the estimates themselves, but described the interagency working group's processes and methods. The report found that the these processes and methods reflected the principles of consensus-based decision-making, reliance on existing academic literature and models, disclosure of limitations and incorporation of new information provided in public comments. The GAO concluded that the estimates were developed "consistent with federal standards for internal control" and that the agencies received and considered public comments on the estimates in the various rulemakings in which the estimates were used. The report is available at: http://www.gao.gov/products/GAO-14-663.

- **EPA Rejects Call to Designate 57 Areas as Ozone Nonattainment Areas.** EPA refused a request by environmental organizations to designate 57 areas as being in nonattainment for the 2008 ozone National Ambient Air Quality Standard (NAAQS). In 2013, the Sierra Club filed a petition, based on EPA data from 2008-2010, challenging the designation of the areas as in attainment for the 2008 ozone NAAQS. The Clean Air Act requires states to issue significantly more stringent emission controls for new and existing facilities within nonattainment areas. EPA issued a letter rejecting the petition from the environmental organizations, finding that 22 of the areas have since reached attainment and that that it is appropriate to provide states time to develop pollution reduction strategies for the remaining areas.

- **EPA Sticks with 2013 Backup Diesel Generator Hazardous Emissions Rule.** EPA also rejected three petitions—from environmental organizations, industry, and states—calling on the agency to revise its hazardous air pollution standards for Reciprocating Internal Combustion Engines (RICE), which are frequently used as emergency backup diesel generators. In January 2013, EPA finalized a rule allowing RICE to run without emissions controls for up to 100 hours per year and allowing certain RICE to operate an additional 50 hour per year in nonemergency situations—including for peak-shaving generation—whereas the prior rule exempted the engines for only 15 hours. However, the rule required RICE to use ultralow-sulfur diesel fuel beginning in 2015. In June 2013, EPA agreed to reconsider this rule. However, on August 14, EPA announced its final decision not to

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Hydro Newsletter – Vol. 8 – July 31, 2014

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make any changes to the 2013 final rule. EPA's decision is available at http://www.gpo.gov/fdsys/pkg/FR-2014-08-15/pdf/2014-19062.pdf.

- **DOE Finalizes Revision to LNG Export Permit Approval Procedures.** On August 14, DOE finalized, without significant changes, its June proposal to revise the process by which it considers petitions regarding the export of liquefied natural gas (LNG) to countries with which the United States does not have a free trade agreement. Under the new policy, DOE will no longer issue conditional decisions for new export applications, but instead wait to act on applications until a proposed export facility has obtained a final NEPA decision from the Federal Energy Regulatory Commission (FERC). The new policy only commits DOE to act on an application *no earlier* than completion of the FERC NEPA review for the project. DOE explicitly rejected a commenter's recommendation that it adopt a *deadline* for its review of an application. DOE's final policy is outlined at http://energy.gov/sites/prod/files/2014/08/f18/Addendum%20FR%20Notice%2008_15_14.pdf.

- **DOE Report Finds Wind Power Installation Slowdown but Future Potential Based on EPA and DOE Policy.** On August 18, the Department of Energy released its 2013 Wind Technologies Market Report. This report outlines market trends over the past year, technological development, and future prospects for the wind power industry. The report found that the 2012 expiration of the production tax credit (PTC) led to a significant decrease in capacity additions in 2013. However, the temporary extension for new units that begin construction by the end of 2013 should ensure capacity additions through 2015. Nonetheless, because federal tax support is in doubt and current state policies will not support historic rates of capacity growth, the future of the wind industry is somewhat uncertain. This may be tempered by DOE R&D investments and EPA's proposed greenhouse gas emission standards for new and existing electricity generating units. The Wind Technologies Market Report is available at http://energy.gov/eere/wind/downloads/2013-wind-technologies-market-report.

Judicial Branch

- **EPA Ask D.C. Circuit to Lift Stay on CSAPR**. In a brief filed on August 22, EPA argued to the Court of Appeals for the District of Columbia Circuit that it should lift the stay on the Cross-State Air Pollution Rule in the wake of the Supreme Court's decision in *EPA v. EME Homer City Generation LP*. The agency filed its brief in reply to briefs filed by several petitioners that have various challenges to the CSAPR that were not resolved by the Supreme Court's decision. These petitioners have argued that the stay on the CSAPR should be sustained until their various petitions are resolved. EPA's reply brief asserts that, even if one or more of these petitions ultimately is granted, none would require vacatur of the rule, but rather mere modifications. For this reason, the agency's brief argues, the court need not continue its stay of the CSAPR while the petitions are pending. The proceeding in the D.C. Circuit is *EPA v. Homer City Generation LP,* D.C. Cir., No. 11-1301.

- **FERC Order 1000 Upheld.** On August 15, 2014, a three judge panel of the D.C. Circuit unanimously denied the appeals of forty-five petitioners and sixteen intervenors, upholding the Federal Energy Regulatory Commission's (FERC) Order No. 1000. *South Carolina Public Service Authority v. FERC*, Nos. 12-1232 et al. (D.C. Cir. Aug. 15, 2014). FERC's landmark rulemaking, issued in August 2011 and supplemented thereafter by Order Nos. 1000-A and 1000-B, implemented a series of significant reforms related to the regional and interregional planning and development of electric transmission facilities, including mandatory cost allocation to beneficiaries of new transmission projects and the elimination of rights of first refusal from FERC-jurisdictional tariffs and agreements. The D.C. Circuit's much-anticipated decision held that FERC acted within the scope of its authority under the Federal Power Act (FPA) when it adopted Order No. 1000, and that the Final Rule was not arbitrary and capricious or unsupported by substantial evidence. The Court's decision sets the stage for possible future appeals to the Supreme Court and additional contested proceedings at FERC as the regions continue to implement Order No. 1000's controversial regional planning and cost allocation

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

reforms. For more information on the court's decision and its potential implications, see the VNF Alert here: http://www.vnf.com/3136.

- **Coal Company Files Second Lawsuit Challenging EPA's Proposed "Clean Power Plan" Rule.** On August 15, Murray Energy filed a lawsuit in the D.C. Circuit alleging that that the EPA is barred from regulating CO_2 emissions from existing power plants under Section 111(d) of the Clean Air Act. *In re: Murray Energy Corp.*, D.C. Cir., No. 14-1112. Murray Energy previously filed a legal challenge to the proposed Clean Power Plan rule immediately after its promulgation. In both of its lawsuits, the coal company is trying to overcome an argument that the D.C. Circuit lacks jurisdiction because the proposed rule is not a "final agency action." The company's response is that the proposed rule is sufficiently final with respect to the threshold issue of whether EPA has any authority at all to regulate power plants under Section 111(d) of the Clean Air Act. To this end, Murray Energy is pointing to conflicting 1990 House and Senate amendments to Section 111(d) that were never reconciled. The House version would preclude Section 111(d) regulation of any source category already subject to regulation under Section 112 of the Clean Air Act, which addresses toxics. Under this House version, EPA could not regulate power plants because of the agency's 2011 promulgation of the Mercury and Air Toxics Standards Rule.

- **Groups Unanimously Seek Dismissal of Cellulosic Blending Mandate Lawsuit.** On August 14, EPA, petroleum refiners and biofuels producers unanimously asked the D.C. Circuit to dismiss petitions for review of the 2013 renewable volume obligation for cellulosic ethanol under the Renewable Fuel Standard. *Monroe Energy LLC v. EPA,* D.C. Cir., No. 14-1033. The parties asked the court to voluntarily dismiss the lawsuit after the EPA issued a direct final rule in May reducing the 2013 renewable fuel standard for cellulosic ethanol to reflect actual production of the fuel that year (79 *Fed. Reg.* 25,025).

Note that the Update is not covering Legislative Branch developments due to the Congressional recess.

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