

May 22, 2013

Climate, Energy, & Air Update
Weeks of May 9-22, 2013

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House scheduled to vote on bill to approve Keystone XL pipeline, defying Obama veto threat . . . Senate approves Ernest Moniz as Secretary of Energy . . . EPA proposes crediting fuels derived from landfill biogas as renewable transportation fuels under the RFS program . . . DOI issues revised proposal for regulating hydraulic fracturing on public lands . . . The Supreme Court will not disturb two circuit court decisions that denied plaintiffs the ability to sue energy companies for climate change tort damages . . . DOE approves a second application for an LNG export terminal . . . The White House issues a memorandum on speeding up infrastructure projects . . . Senate passes WRDA bill . . . Senate Agriculture Committee passes farm bill and full Senate starts consideration . . . Senate EPW Committee approves Gina McCarthy as EPA Administrator on party-line vote; Senator Vitter and other Republicans seek commitments on improved transparency.

Executive Branch

- **EPA Proposes Crediting Fuels Produced from Landfill Biogas as Renewable Transportation Fuels.** On May 21, the Environmental Protection Agency (EPA) proposed new “pathways” under the Renewable Fuels Standard (RFS) regulations under which certain fuels produced from landfill biogas could earn credits – called Renewable Identification Numbers (RINs) – when used as transportation fuels. The RFS program requires fuel providers to ensure that certain amounts of renewable fuels are blended into transportation fuels. Compliance is achieved by holding RINs. The RFS regulations designate which fuels count toward the obligation and how many RINs/gallon are available for each type of fuel. The May 21 proposal would add new pathways for renewable diesel, renewable naphtha, and renewable electricity (as used in vehicles) produced from landfill biogas. Also included in the May 21 proposal are amendments to other RFS regulations (including to the revised compressed natural gas/liquefied natural gas pathway), as well as certain technical corrections to the E15 misfueling mitigation regulations, and changes to survey requirements for the ultra-low sulfur diesel program. The proposal is available at <http://www.epa.gov/otaq/fuels/renewablefuels/documents/nprm-pathways-2-signature-version.pdf>.

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May 22, 2013

- **DOI Issues Revised Proposal for Regulation of Hydraulic Fracturing on Public Lands.** On May 16, the U.S. Department of Interior (DOI) issued a revised proposed rule that would update disclosure, well testing, and wastewater management requirements for hydraulic fracturing (or “fracking”) operations on public lands. The revised proposed rule replaces a proposal that DOI issued in May 2012 and subsequently withdrew. Under the revised proposal, companies would be required to disclose the chemicals they use in fracturing operations, but would not be required to disclose trade secrets, unless specifically required by the DOI Bureau of Land Management (BLM). In addition, fracturing operations on public lands would be required to pressure test new and refractured wells and to demonstrate to BLM that the wells used in the operation are not leaking. However, the rule allows fracturing operations that comply with equivalent or more stringent state or Tribal regulations to be considered in compliance with DOI regulations, or to seek a variance from DOI regulations. Finally, the rule requires operators to have a plan for managing the stream of wastewater from fracturing wells known as “flowback.” BLM’s proposed rule is available here: http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/public_affairs/hydraulicfracturing.Par.91723.File.tmp/HydFrac_SupProposal.pdf.
- **DOE Announces Public-Private Partnership with Carmakers to Reduce Barriers for Hydrogen Fueled Vehicles.** On May 13, the U.S. Department of Energy (DOE) announced a partnership with carmakers and other entities involved in developing and producing hydrogen fuel and fuel cells that aims to “advance[e] hydrogen infrastructure to support more transportation energy options for U.S. consumers, including fuel cell electric vehicles.” The partnership will aim to coordinate public and private research and to identify cost-effective solutions for deployment of infrastructure for the delivery of hydrogen fuel for transportation. Partnership members include large automakers such as Toyota, Hyundai, Nissan, and Mercedes-Benz, as well as the American Gas Association, the Association of Global Automakers, the California Fuel Cell Partnership, the Electric Drive Transportation Association, the Fuel Cell and Hydrogen Energy Association, ITM Power, the Massachusetts Hydrogen Coalition, and Proton OnSite. For more information, see DOE’s Press Release: <http://energy.gov/articles/energy-department-launches-public-private-partnership-deploy-hydrogen-infrastructure>.
- **FWS Grants Exemption from Endangered Species Act for Wind Farm in California Condor’s Range.** According to news reports, the U.S. Fish and Wildlife Service (FWS) has concluded in a Biological Opinion (“BiOp”) issued for the planned Alta East 308 MW wind project that it would not penalize the wind developer for an “incidental take” of a California Condor over the projected 30-year life of the project. The Endangered Species Act (ESA) generally prohibits unpermitted “takes” of endangered species like the California Condor—including harming, killing, harassing, or destroying the habitat of the species. In addition, the ESA requires that federal agencies obtain a BiOp from FWS for projects that may affect endangered species; the BiOp is required to assess the potential impact of the federal action and recommend mitigation measures. FWS prepared the BiOp for the Alta East project because it will be built partly on federal land and must therefore obtain a permit from BLM. BLM will likely publish the BiOp if and when it issues a “record of decision” approving the project.

May 22, 2013

- **White House Memorandum Aims to Speed Up Infrastructure Permitting.** On May 17, the White House issued a memorandum that directs federal agencies to “do what it takes to cut timelines for breaking ground on major infrastructure projects in half.” The memorandum builds on a March 22, 2012 executive order (Executive Order No. 13604) that aims to facilitate faster regulatory reviews of proposed transportation, water resources, renewable energy, electric transmission, oil and gas pipeline, and other projects. The memorandum is available here: <http://www.whitehouse.gov/the-press-office/2013/05/17/presidential-memorandum-modernizing-federal-infrastructure-review-and-pe>.
- **DOE Grants Conditional Approval to Second Major U.S. LNG Export Facility.** On May 17, the Department of Energy approved the export of up to 1.4 billion cubic feet per day of liquefied natural gas (LNG) from the Freeport LNG facility in Quintana Island, Texas, subject to the facility’s receipt of a construction certificate from the Federal Energy Regulatory Commission (FERC). DOE’s conditional approval marks the second time that an LNG export terminal has been approved to sell LNG to countries with which the U.S. does not have a free trade agreement (FTA). Exports to FTA countries are approved automatically. DOE is currently evaluating 19 applications to build LNG terminals around the country.

Congress

- **House Committee Released White Paper on RFS.** On May 9, the House Energy and Commerce Committee released a white paper entitled “Greenhouse Gas Emissions and Other Environmental Impacts.” This third white paper in a series exploring the renewable fuel standard (RFS) is also intended to “provide an overview of an issue and solicit input from interested stakeholders in the form of answers to questions posed.” The White Paper provides a legislative history of the RFS and other Clean Air Act requirements and then poses seven questions for stakeholders to respond to by May 24. All three white papers are available at <http://energycommerce.house.gov/content/white-paper-series-on-renewable-fuel-standard>.
- **Senate Committee Passes Hydro and Efficiency Bills.** On May 8, the Senate Energy and Natural Resources Committee passed S. 306 and H.R. 678, the “Bureau of Reclamation Small Conduit Hydropower Development and Rural Jobs Act”; S. 545, the “Hydropower Improvement Act of 2013”; H.R. 267, the “Hydropower Regulatory Efficiency Act of 2013”; and, S. 761, the “Energy Savings and Industrial Competitiveness Act of 2013.” The Committee approved the hydropower bills by voice vote; however, S. 761 was passed by a recorded vote. Both Chairman Ron Wyden (D-OR) and Ranking Member Lisa Murkowski (R-AK) vowed that the Senate would pass the bills. The webcast of the business meeting is available at <http://www.energy.senate.gov/public/index.cfm/hearings-and-business-meetings?ID=8d568ac6-6642-4df1-9293-69fd1fdada2e>.
- **Senate Committee Passes Farm Bill, Full Senate Begins Consideration.** On May 14, the Senate Agriculture Committee passed S. 954, the “Agriculture Reform, Food and Jobs Act of 2013” by a vote of 15 to 5 and the Senate began consideration of the bill on May 20. During

May 22, 2013

Committee deliberation, four Republicans and one Democrat voted against the bill: Sens. Mitch McConnell (R-KY), Mike Johanns (R-NE), Pat Roberts (R-KS), John Thune (R-SD) and Kirsten Gillibrand (D-NY). According to Committee documents, the energy title includes \$241 million in mandatory funding for the Rural Energy for America Program (REAP). As currently drafted, the bill also provides funding for the Biomass Crop Assistance Program (BCAP), the Biorefinery Assistance Program (BAP) and the Biomass Research and Development Initiative. The Senate is expected to continue consideration of the bill and amendments through the end of the week and possibly continue through the first week of June after the Memorial Day Work period. Additional information on the committee activity is available at

<http://www.ag.senate.gov/hearings/markup-agriculture-reform-food-and-jobs-act-of-2013> and a list of amendments being considered is available at <http://democrats.senate.gov/2013/05/21/amendments-to-s-954-the-farm-bill/>

- **Senate Appropriators Question DOE Budget for Clean-Ups.** On May 15, the Senate Appropriations Energy and Water Development Subcommittee held a hearing entitled “The Fiscal Year 2014 Energy Budget.” According to Subcommittee Chairwoman Diane Feinstein (D-CA), this second hearing on the Department of Energy Budget Request was intended to focus specifically on funding for energy and environmental clean-up programs in the Agency. Department of Energy Deputy Secretary Daniel Poneman, the only witness, fielded questions on a variety of topics, including questions about the proposal to privatize the Tennessee Valley Authority (TVA) and funding to move radioactive transuranic waste stored at the Los Alamos National Laboratory. A webcast of the hearing is available at <http://www.appropriations.senate.gov/webcasts.cfm?method=webcasts.view&id=5998dbfa-2742-4d45-8ad1-fc2749310393>.
- **House Committee Votes on Reliability Bill.** On May 15, the House Energy and Commerce Committee passed H.R. 271, the “Resolving Environmental and Grid Reliability Conflicts Act of 2013” by voice vote. H.R. 271 addresses potential conflicts between the authority of the Department of Energy to direct emergency operation of electric generating facilities to maintain the reliability of the bulk power system and the authority of EPA to enforce environmental laws. The Committee voted on five amendments, only one was adopted. Identical legislation passed the House in the 112th Congress. Committee issued documents and the full list of amendments considered are available at <http://energycommerce.house.gov/markup/hr-271-resolving-environmental-and-grid-reliability-conflicts-act-2013-hr-1407-animal-drug>.
- **Secretary Jewell Testifies Before Senate Indian Affairs Committee.** On May 15, the Senate Committee on Indian Affairs held a hearing entitled “To Receive the Views and Priorities of Interior Secretary Jewell with Regard to Matters of Indian Affairs.” Witnesses included Secretary of the Interior Sally Jewell and Deputy Assistant Secretary for Indian Affairs at the Department of the Interior Lawrence Roberts. Committee members and witnesses focused on a variety of topics, including energy development on public lands. Secretary Jewell also mentioned climate change adaptation and its effects on American Indian communities. She specifically pointed to the Native communities in Alaska where sea ice and shore erosion have already begun to affect the region. The webcast is available

May 22, 2013

at

<http://www.indian.senate.gov/hearings/hearing.cfm?hearingID=fd14634f4ddf1ce4be238de7c9afb5fd>

- **Senate Passes WRDA Bill.** On May 15, the Senate passed S. 601, the “Water Resources Development Act of 2013” by a vote of 83-14. The water infrastructure bill is the first to clear the Senate since 2007 and is the first WRDA bill to be passed without Congressional earmarks. Lawmakers in the House of Representatives are expected to consider their own version of the bill this summer, according to Transportation and Infrastructure Committee Chairman Bill Shuster (R-PA). However, Chairman Shuster has indicated that he is not comfortable with circumventing the earmarking process, as it would grant Congressional authority to the Army Corps of Engineers to select which water resources projects should move forward.
- **House Subcommittees Hold Joint Hearing on EPA Budget.** On May 16, the Energy and Commerce Subcommittee on Energy and Power joined the Subcommittee on Environment and the Economy to hold a joint hearing entitled “The Fiscal Year 2014 EPA Budget.” EPA Acting Administrator Bob Perciasepe, the only witness, was set to answer questions about the President’s Budget Request, but also took time to review specific effects of sequestration to EPA programs. He stated that the Agency would likely be able to fund 12 fewer Superfund cleanups, as well as 10 fewer brownfields. Additional information on the hearing and written testimony are available at <http://energycommerce.house.gov/hearing/fiscal-year-2014-environmental-protection-agency-budget>.
- **Senate Committee Holds Mark-Up.** On May 16, the Senate Energy and Natural Resources Committee held a business meeting to vote on 26 bills. The bills passed by the committee included bills promoting geothermal electricity generation, authorization of a new wastewater treatment plant in Northeast Oregon and funding mitigation efforts in drought-affected areas in Oregon and elsewhere in the West. Twenty of the bills were passed by voice vote; six were passed by roll call votes. The full list of bills and the webcast is available at <http://www.energy.senate.gov/public/index.cfm/hearings-and-business-meetings?ID=c8447722-335d-4904-8f84-6077031191b0>
- **Senate Confirms Energy Secretary.** On May 16, the Senate voted to confirm Ernest Moniz to be Secretary of Energy by a vote of 97 to 0. The vote came after Senator Lindsay Graham (R-SC) lifted a hold on the nomination, citing concerns over whether the agency would adequately fund the Mixed Oxide Fuel (MOX) facility in Graham’s home state of South Carolina.
- **Bill to Approve Keystone Pipeline Goes to House Floor.** At press time for this Update, a bill to approve the Keystone XL pipeline was scheduled for a vote on the floor of the House, notwithstanding a veto threat from the White House. H.R. 3, the “Northern Route Approval Act,” would allow the construction, operation and maintenance of the Keystone XL Pipeline without a presidential permit, was referred to three separate House Committees. On May 16, the House Transportation and Infrastructure Committee voted 33 to 24 to approve the

May 22, 2013

bill. The Energy and Commerce Committee approved the bill on April 17 and the Natural Resources Committee approved the bill on April 24. The Transportation and Infrastructure Committee vote was the last action necessary before bringing the bill to the House floor under regular order. Additional information on the Transportation and Infrastructure vote is available at <http://transportation.house.gov/markup/full-committee-markup-may-9-2013>.

- **Senate Committee Approves EPA Nominee.** On May 16, the Senate Environment and Public Works Committee voted 10 to 8, along party lines, to approve the nomination of Gina McCarthy to be EPA Administrator. The approval came after Committee Republicans boycotted the vote last week. According to Ranking Member David Vitter (R-LA), the minority agreed to attend the vote after sending a letter to Acting Administrator Bob Perciasepe requesting “additional progress” towards transparency in five broad categories. The letter is available at http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=05015692-268c-493b-bba7-dc1c964e6a19
- **House Committee Holds Hearing on Energy Development on Public Lands.** On May 16, the House Oversight and Government Reform Subcommittee on Energy Policy, Health Care and Entitlements held a hearing entitled “Opportunities Lost: Constraints on Oil and Gas Production on Federal Lands and Waters.” Department of the Interior Acting Assistant Secretary for Land and Minerals Management Tommy Beaudreau and Government Accountability Office Natural Resources and Environment Director Frank Rusco were the only two witnesses. During the hearing, Members of the committee and witnesses discussed tools to reduce permitting delays, including pilot programs, for energy development on federal lands. A webcast of the hearing is available at <http://oversight.house.gov/hearing/opportunities-lost-constraints-on-oil-and-gas-production-on-federal-lands-and-waters/>.
- **House Committee Holds Hearing on Cybersecurity.** On May 21, the House Energy and Commerce Committee held a hearing entitled “Cyber Threats and Security Solutions.” According to committee-issued documents, the hearing was intended to “examine steps the Federal government and the private sector are taking to bolster the security of the nation’s critical infrastructure and mitigate exposure to cyberattacks.” Witnesses included Under Secretary of Commerce for Standards and Technology of the National Institute of Standards and Technology Director Patrick Gallagher. While being questioned by the panel, Gallagher stated that the federal government should leverage private sector activity when setting cybersecurity standards. A full list of witnesses and additional information about the hearing is available at <http://energycommerce.house.gov/hearing/cyber-threats-and-security-solutions/>.

May 22, 2013

Judicial

For more information on pending environmental law cases, see the VNF Environment Appellate Litigation Tracking Tool at <http://www.vnf.com/litigationtracker>.

- **Federal Court Dismisses Lawsuit Brought By Hurricane Katrina Victims.** On May 14, the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) upheld the dismissal of a lawsuit, which alleged that the GHG emissions from various energy companies contributed to global warming, and thus intensified Hurricane Katrina. *Comer v. Murphy Oil*, No. 12-60291. The lawsuit was filed by a group of Mississippi Gulf Coast residents (Plaintiffs) seeking recompense for their hurricane-damaged property. The case was originally dismissed in 2007 by the U.S. District Court for the Southern District of Mississippi (S.D. Miss.) after that court found that the Plaintiffs lacked standing, and that their claims were not justiciable under the political questions doctrine. In 2009, a panel of the Fifth Circuit reversed and remanded that finding; however, the case was eventually dismissed. The U.S. Supreme Court denied petitions for a writ of mandamus. In 2011, the Plaintiffs filed essentially the same case with the S.D. Miss., which the court eventually dismissed based on the doctrine of res judicata—a legal doctrine which bars a final judgment of a case by a competent court from being relitigated by the same parties. The recent ruling by the Fifth Circuit affirmed the dismissal.
- **Fourth Circuit Upholds Army Corps Dredge-Fill Permit.** In *Ohio Valley Environmental Coalition, Inc. v. U.S. Army Corps of Engineers*, No. 12-1999, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) upheld a dredge-and-fill permit issued by the U.S. Army Corps of Engineers (Army Corps). The permit, issued under section 404 of the Clean Water Act (CWA) in March 2011 authorized the Highland Mining Company to place excess mining rocks into an adjacent valley. The Army Corps issued the permit after determining there was no need to develop an environmental impact statement (EIS), finding that the “fill material” would not have a “substantial cumulative impact on the water quality in the relevant watershed.” Several environmental groups challenged the Army Corps’ decision, arguing that the agency failed to take a “hard look” at the potential environmental impacts of the mining project, as required by the National Environmental Policy Act (NEPA). However, the Fourth Circuit upheld the Southern District of West Virginia’s ruling, which found that the Army Corps had analyzed a “wide array of evidence about water quality” to support its decision to issue the permit.
- **Environmental & Industry Groups Sue EPA Over Nonhazardous Secondary Materials Rule.** The D.C. Circuit has received multiple petitions requesting the court to review the EPA’s final Nonhazardous Secondary Materials Rule (NSMR). The rule, which was finalized on February 7, clarifies which materials may be treated as fuels (rather than solid wastes) when the materials are burned in boilers or solid waste incinerators. Ten of the eleven petitions for review have been consolidated under *National Ass’n of Clean Water Agencies v. EPA*, No. 13-1152. Solid wastes are more strictly regulated than fuels under separate sections of the Clean Air Act (CAA). For more information on the NSMR please see a VNF Update here: <http://www.vnf.com/news-policyupdates-806.html>.

May 22, 2013

- **D.C. Circuit Holds Lawsuit over EPA's Tailoring Rule in Abeyance.** On May 10 the D.C. Circuit released an order that will hold in abeyance a lawsuit challenging the third and final step of the EPA's Tailoring Rule, *American Petroleum Institute v. EPA*, No. 12-1376. The abeyance order is in effect until the U.S. Supreme Court decides whether or not to hear appeals related to other EPA greenhouse gas (GHG) regulations, including a challenge to the original Tailoring Rule, *Utility Air Regulatory Group v. EPA*, No. 12-1146. The third step of the Tailoring Rule requires new facilities that emit 100,000 tons per year of carbon dioxide-equivalent (CO₂e) and existing facilities that increase their emissions by 75,000 tons per year of CO₂e to obtain CAA Prevention of Significant Deterioration and Title V operating permits. Both petroleum and industry groups filed challenges to the EPA's GHG regulations, including the original Tailoring Rule. However, on June 26, 2012, a three-judge panel of the D.C. Circuit rejected all the challenges. As related to the Tailoring Rule, the three-judge panel did not reach the merits of the petitioners' argument after finding that they lacked standing because they could not demonstrate that the Tailoring Rule caused them "injury in fact," nor that their injury could be redressed by vacatur of the rule. (See a VNF Alert here: <http://www.vnf.com/news-alerts-727.html>). The petitioners have now petitioned the U.S. Supreme Court for *certiorari* to review the D.C. Circuit's decision. For more information about the Tailoring Rule, see a VNF Alert here: <http://www.vnf.com/news-alerts-463.html>.
- **D.C. District Court Stays Lawsuit over EPA's Refinery Air Rule.** On May 8, the U.S. District Court for the District of Columbia granted the joint motion to stay proceedings in *Air Alliance Houston v. EPA*, No. 12-1607. The lawsuit was filed by environmentalists seeking a court order to compel the EPA to issue two overdue air toxics rules to set maximum achievable control technology (MACT) standards for petroleum refineries. The court granted the parties' request to stay the court proceedings until September 20 to allow the parties to negotiate a consent decree that would resolve the suit. Under the CAA, EPA is required to perform "residual" risk reviews of existing regulations eight years after they are implemented and update the regulations as necessary to protect human health and the environment. The environmentalists' suit alleged that EPA had "failed to perform nondiscretionary duties" under the CAA by not updating the refinery MACTs. On September 15, 2012, EPA sent a proposed refinery rule to the White House Office of Management & Budget (OMB) for pre-publication review, but withdrew the proposed rule on March 12, 2013.
- **U.S. Supreme Court Denies *Certiorari* in Alaskan Natives Lawsuit Against Oil Companies.** On May 20 the Supreme Court declined to hear a petition for *certiorari* by an Alaskan Natives village, which was previously dismissed by the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit), *Native Village of Kivalina v. ExxonMobil Corp.*, No. 12-1072. The Alaskan Natives had filed tort claims against various energy industry defendants, claiming that the defendants are at fault for the impending loss of their village due to climate change-induced flooding. Melting ice and rising sea levels are causing the village to sink into the ocean, and about 400 people must be relocated at costs of up to \$400 million. The Ninth Circuit, relying on *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011), held that the Alaskan Natives' federal common law public nuisance claim had been displaced by both the CAA and the EPA's actions under the Act to regulate greenhouse gas

May 22, 2013

emissions from power plants. The petition was denied by the Supreme Court without explanation and Justice Alito took no part in the consideration or decision of the petition.

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

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