

Energy and Environment Law Update August 20, 2012



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Monday, August 20, 2012

Energy and Climate Debate

In the midst of the Congressional recess, the election season is in full swing, and energy issues continue to make headlines.

When Congress does return from the August recess and political conventions September 10, both chambers will consider a six month continuing resolution to keep the government funded at fiscal year 2012 levels since none of the fiscal year 2013 appropriations measures have been finalized. During their short September session,

the Senate is also likely to consider a veteran's jobs bill and judicial nominations, and members continue to prepare for intense negotiations on both cybersecurity and a broad tax extenders package, which are likely to continue during the lame duck session following the November elections.

Congress

A123's Remaining Recovery Funds Questioned

Senators John Thune (R-SD) and Chuck Grassley (R-IA) sent a letter to Energy Secretary Steven Chu August 14 questioning whether A123 Systems Inc. is still eligible to receive stimulus funds after China-based Wanxiang purchased \$200 million of the company's secured debt and provided up to \$250 million in additional financing August 9. The deal results in Wanxiang owning 80 percent of A123. Of \$249 million awarded to the Michigan-based lithium ion battery maker in 2009, about \$120 million has yet to be disbursed.

Administration

CAFE Standards Delayed

With the White House reviewing the Environmental Protection Agency and National Highway Traffic Safety Administration's final fuel economy and greenhouse gas emission standards for model year 2017-2025 cars and light-duty trucks, the agencies missed an internal deadline August 15 to finalize the rule. The agencies anticipate that the Office of Management and Budget will soon complete its review, but the administration has no legal deadline to finish the rule.

Department of Agriculture

\$8 Million for Rural Energy

The Department of Agriculture awarded August 14 \$8 million for 106 clean energy projects in 29 states, Guam, and Puerto Rico. The grants and loan guarantees are made available through the Rural Energy for America program, which funds renewable energy and energy efficiency projects.

Department of Defense

\$7 Billion Army RFP

The Army issued a request for proposals last week for alternative energy to help meet the Department of Defense's goal of producing or procuring 25 percent of its electricity from renewable sources by 2025. The contracts, for 2.5 million MW of energy by type, including solar, wind, biomass, geothermal, and potentially fuel cells and ocean oscillation systems, will be issued on an indefinite delivery and quantity basis and could total up to \$7 billion if all options are renewed.

Department of Energy

Wind Energy Up

The Department of Energy released a report August 14 examining the impact of the wind energy industry. The report, *2011 Wind Technologies Market Report*, finds that wind energy accounted for 32 percent of all new domestic electric capacity last year, for a total of 6,800 MW of new wind capacity, and for \$14 billion in new investment. The study also demonstrates that 70 percent of the equipment installed at American wind farms last year was domestically manufactured, up from 35 percent in 2005. The agency also forecasted a lower rate of wind energy growth in 2013 because of the possible expiration of federal tax incentives such as the Production Tax Credit.

\$8 Million for Efficient Vehicles

Energy Secretary Steven Chu announced August 13 research grants for seven projects to hasten the development of stronger and lighter materials that will increase the fuel efficiency of American vehicles. Through the Materials Genome Project, the agency will provide \$8 million this year in grants and has requested \$13.75 million for fiscal year 2013 to fund projects to develop lightweight, stronger alloys for vehicle engines and modeling tools to deliver high-performance carbon fiber composites and advanced steel products.

Dishwasher Test Procedures

The Department of Energy proposed August 16 to amend its test procedures for residential dishwashers to update certain obsolete dishware, flatware, and food items, make minor amendments to the definition of the normal cycle, and update the ambient temperature and preconditioning requirements and the industry test method referenced in the agency's test procedure. The agency also proposed adding water pressure, drain height, rack position, loading, rinse aid container, and soil preparation specifications to the test procedure.

Department of Transportation

No Air Hazard

Affirming earlier agency determinations, the Federal Aviation Administration issued a determination August 15 that the proposed Cape Wind project of 130 turbines poses no hazard for air navigation. A federal appeals court ruled last October that the agency had failed to follow its own procedures in reviewing potential hazards and ordered it to reconsider its findings. The Cape Wind project has entered its financing stage, but opponents of the projects have pledged to appeal the decision.

Environmental Protection Agency

Impacts of Generator Exemptions

Associations issued comments to the Environmental Protection Agency last week saying that the agency has not considered the environmental and public health effects of the mercury and air toxics standard that would allow backup, reciprocating internal combustion engines to run 50 of the 100 hours annually for nonemergency use to meet peak power demand until April 2017 without being subject to emissions limits, giving sources time to address reliability issues as power plants come into compliance with the standards. The National Association of Clean Air Agencies charged that the rule would increase operation of diesel-fired engines and emissions of air toxics, particulate matter, and other pollutants. The Northeast States for Coordinated Air Use Management said that the agency has not released important pieces of information, including the number of engines and their locations, when they would run, and the proposed rule's impact on states that are trying to meet air quality standards.

Governors Request RFS Delay

Citing the impact of this year's drought on corn prices, the governors of Arkansas, Delaware, Maryland, and North Carolina sent letters August 9, 13, and 14 asking the Environmental Protection Agency to waive the requirement for petroleum refiners to blend ethanol into gasoline for one year. The governors contend that ethanol production and the drought are driving up feed prices for livestock and poultry producers.

Coal Ash Management Deadline Sought

Headwaters Resources Inc. and Boral Material Technologies Inc. and a coalition of environmental groups filed motions for summary judgment August 14 asking the U.S. District Court for the District of Columbia to set a deadline for the Environmental Protection Agency to issue a final rule on coal ash management in three or six months, respectively. Both claimed that the agency violated Section 2002(b) of the Resource Conservation and Recovery Act by failing to review and revise regulations on the residue for coal-fired power plants.

Cross-State Budget Revisions Challenged

The Utility Air Regulatory Group, ARIPPA, the Environmental Committee of the Florida Electric Power Coordinating Group Inc., the National Rural Electric Cooperative Association, Entergy Corp., Southwestern Public Service Co., and Southern Co. filed petitions for review in the U.S. Court of Appeals for the District of Columbia Circuit last week challenging an Environmental Protection Agency final rule that revises emissions budgets for 13 states under the Cross-State Air Pollution Rule. The rule is being challenged in the D.C. Circuit, and the court has stayed the regulation while legal challenges continue; a decision is expected soon.

E15 Challenge Dismissed

The U.S. Court of Appeals for the District of Columbia ruled August 17 that food producers, petroleum producers and suppliers, and engine and automobile manufacturers challenging the Environmental Protection Agency's decision to grant

two partial waivers under the Clean Air Act to allow the use of gasoline containing up to 15 percent ethanol lack standing to do so. The court determined, 2-1, that none of the industry groups could demonstrate that they were harmed by the rule.

Government Accountability Office

EPA Regs Could Raise Rate and Reliability Concerns

The Government Accountability Office released a report August 16 finding that Environmental Protection Agency rules impacting coal, including the Cross-State Air Pollution Rule, the Mercury and Air Toxics Standard, Clean Water Act regulations addressing cooling water intake structures, and Resource Conservation and Recovery Act regulations on the disposal of coal ash, could potentially raise electricity prices in some regions. The report, *EPA Regulations and Electricity: Better Monitoring by Agencies Could Strengthen Efforts to Address Potential Challenges*, admits that it is unclear how utilities plan to respond to the rules, but says that the actions may not cause widespread reliability concerns, but rather contribute to reliability challenges in some regions, even with current tools that address price and reliability issues. The Environmental Protection Agency and Department of Energy agreed with GAO's recommendation to jointly monitor industry's progress on regulatory compliance, but the Federal Energy Regulatory Commission disagreed.

Nuclear Regulatory Commission

Geology, Nuclear Energy Relationship

Speaking at a forum held by IHS The Energy Daily August 14, Nuclear Regulatory Commission chairman Allison Macfarlane said that one of her primary goals at the agency will be to study the connections between geology and nuclear energy. She also said that the commission will focus on the back end of the nuclear fuel cycle, which results in radioactive spent fuel, but that her primary goal is to ensure that existing reactors and nuclear facilities continue to operate safely.

States

More Allowances Needed in CA

At an informal hearing of the state Senate Select Committee on California Job Creation and Retention in Sacramento August 14, California glass manufacturers, food producers, and other companies called on the California Air Resources Board to provide more free emissions allowances than currently planned to ease the economic burdens that will come with the program. Representatives said they also wanted state regulators to recognize their voluntary early action to reduce emissions. The state will distribute 90 percent of the allowances for free in 2013 and 2014, with free allowances declining in later years.

MA Biomass Program Eligibility Criteria

The Massachusetts Department of Energy Resources issued final rules August 17

setting eligibility requirements for biomass facilities to receive financial incentives through the state's renewable energy program. The final adopted regulations, which take effect immediately, make woody biomass eligible for renewable energy credits under the state's Renewable Energy Portfolio Standard Class 1. Several environmental organizations praised the newly adopted biomass regulations. The new rules also stipulate that particularly inefficient facilities are no longer eligible for ratepayer-funded incentives.

NY Governor Signs Solar Energy Tax Break Bills

Governor Andrew Cuomo (D-NY) signed a package of bills August 17 offering tax breaks for solar energy systems installed at residential, commercial, and industrial properties. One bill (S. 3203), which takes effect January 1, offers state and local sales tax exemptions for the installation and purchase of solar energy systems for commercial properties. A second bill (A. 34), which took effect immediately, offers a state tax credit of up to \$5000 to homeowners who lease solar energy equipment or purchase solar power. A third measure (A. 10620) extends the real property tax abatement for solar equipment installed at residential, commercial, and industrial properties through 2014. The tax abatement gives eligible taxpayers a 2.5 percent break on the cost of solar equipment.

International

Japan to Toughen Vehicle Standards

Japan's Ministry of the Environment announced August 15 that it will soon introduce stricter vehicle emission standards and that it has acquiesced to international pressure to adopt nonproprietary methods for testing emissions and fuel economy. The emission limit changes will focus on NOx from motorcycles and mopeds, diesel-powered motor vehicles, and diesel-powered specialty vehicles.

EU Shipping Rule Results in SO2 Reduction

The European Commission announced August 14 that an EU rule restricting the amount of sulfur in fuel used by ships at berth led to almost immediate improvements in harbor air quality when it became effective in 2010. According to a study published in the journal *Atmospheric Environment* by the Commission's Joint Research Center, air quality measurements carried out before the rule went into effect demonstrated SO2 pollution reductions of two-thirds. The European Parliament and EU Council agreed in May to further restrictions on sulfur marine fuels, implementing International Maritime Organization limits that come into force in 2015 and 2020.

Rapid Asian Urbanization Stresses Environment

The Asian Development Bank issued a report August 15 urging the country to take more adequate steps to pave the way for green, resource-friendly cities as it faces rapid urbanization. The annual publication, *Key Indicators for Asia and the Pacific 2012*, provided data and analysis of social, economic, financial, environmental, and

Millennium Development Goal progress for its 48 regional members, and included a chapter addressing the region's rapid urbanization and necessary environmentally sustainable measures.

Chinese Reforms Necessary to Reduce Pollution

The Asian Development Bank released a report August 15 urging China to adopt comprehensive fiscal, economic, and legal reforms if it hopes to achieve ambitious pollution reduction targets. The report, *Toward an Environmentally Sustainable Future*, is the second Chinese analysis by the bank; the first was released in 2007.

ADB to Help Chinese CCS

The Asian Development Bank announced August 14 that it will help China develop a detailed plan for a staged demonstration and deployment of carbon capture and storage systems to mitigate climate change. The project will launch at least two large-scale CCS demonstration projects by 2016 with the capacity to capture 2 MMT per year. The bank will also support an assessment of the potential role of oxy-fuel combustion CO₂ capture, and will provide \$2.2 million from the Carbon Capture and Storage Fund under the Clean Energy Financing Partnership Facility for the projects.

Chinese Rare Earth Rules

China's Ministry of Industry and Information Technology released new rules for rare earth producers August 6 that could reduce production capacity by 20 percent as smaller players in the industry are forced out because of increasingly stringent requirements. The new rules, which went into effect July 26, place minimum production requirements on certain types of rare earth mining.

Shanghai ETS

The municipal government of Shanghai released implementation guidelines last week for a pilot carbon emissions trading scheme, making it the first of seven jurisdictions in China to do so. The municipality is expected to start emissions trading in 2013, along with Beijing, Tianjin, and Shenzhen, with full operation by 2015. Chongqing, Hubei, and Guangdong are likely to follow suit by the end of 2015. The national government has set a goal to reduce carbon intensity 17 percent by 2015 from 2010 levels, and between 40 and 45 percent by 2020 from 2005 levels.

Chinese Steel Emission Limits

China's Ministry of Environmental Protection recently announced that the nation's steel, iron, and coking industries will face new limits on water and air pollutant emissions of SO₂, NO_x, ammonia, chemical oxygen demand, and coarse and fine particulate matter, with new facilities complying by October 1, and existing facilities facing a 2015 deadline. The standards are part of an effort to reduce environmental impacts and direct industry restructuring.

Chinese Renewable Energy Plan

China's National Energy Administration announced its Renewable Energy Development Plan on August 8, which would have the country produce 9.5 percent of its energy from clean sources, including wind, solar, biomass, hydropower, geothermal, ocean-sourced, and nuclear power, by 2015. The administration has set a target of deriving 15 percent of the country's energy from non-fossil fuel sources by 2020. The new plans target power capacities for 2015 and 2020 as follows: grid-connected wind power at 100 GW for 2015 and 200 GW for 2020; grid-connected solar capacity at 21 GW by 2015 and 50 GW by 2020; biomass power capacity at 13 GW in 2015 and 30 GW by 2020; hydropower capacity at 260 GW by 2015; pumped hydropower storage capacity at 30 GW by 2015; geothermal, tidal, and other ocean power capacity at about 170 MW by 2015; and nuclear power capacity at about 40 GW by 2015.

Chinese Vehicle Fuel Economy Targets

The Innovation Center for Energy and Transportation released a report July 25 finding that China will face difficulty meeting its vehicle fuel economy targets unless it addresses imported models' higher rates of energy consumption. The report, *China Passenger Vehicle Corporate Average Fuel Consumption (CAFC) Trend Report 2011*, suggested that the Chinese government make greater efforts to enforce fuel economy standards, particularly for imported vehicles and foreign brands produced in in the country. China's automotive industry development plan aims for new-vehicle fuel economy to improve to 34.1 mpg by 2015 and 47 mpg by 2020. The Ministry of Industry and Information Technology's Corporate Average Fuel Consumption management regulations are currently being discussed with auto industry representatives, and finalized regulations may be released toward the end of the year.

Miscellaneous

Solid Waste Conference

Panelists at the August 16 Solid Waste Association of North America's WASTECON 2012 said that reusing the ash generated from waste-to-energy facilities could help offset the economic costs that frequently discourage communities from building the plants. Storage demand for ash materials and developing technologies could help to offset costs, but significant obstacles, including the cost of land and environmental regulations, remain. Panelists also charged that economic markets and public demand for the recovery of materials, rather than government regulation, will drive innovation in the field.

NW Coal Terminal Shelved

Short line railroad operator RailAmerica Inc. confirmed August 15 that it is shelving a proposal to build a terminal to ship up to 5 MMT of Rocky Mountain coal a year through the Pacific Northwest to Asia. The proposed terminal at Grays Harbor would have had the smallest capacity of six proposed projects in the area to ship American coal to Asia. If all six were to be developed, U.S. coal exports would more than double at maximum output; the country exported 107.3 MST of coal last year.

Partial RFS Waiver Has Moderate Price Impact

Purdue University economists announced August 16 that a partial waiver of the federal renewable fuel standard could slightly reduce corn prices, but not enough to make a significant difference for livestock producers facing higher feed costs. A partial waiver provides flexibility to refiners and could reduce corn prices by as much as \$1.30 per bushel, which are currently above \$8 per bushel because of the intense drought. The study, *Potential Impacts of a Partial Waiver of the Ethanol Blending Rules*, echoes one from an Iowa State University economist suggesting that corn prices might fall as much as five percent with a total RFS waiver.

Marine Protections Sought

Sixty academics, advocates, and citizens concerned about ocean health released an open letter to President Obama and Governor Mitt Romney August 14 urging them to support policies that protect the marine environment. The group calls on the two to support international agreements to restore the health of marine fish and wildlife, to reduce marine pollution, and to develop a national ocean policy that will coordinate federal, state, and regional efforts. The Obama administration is developing a National Ocean Policy to coordinate uses and protections of the coastal marine environment.

Natural Disaster Risk Analysis

Maplecroft released a study recently finding that countries with emerging economies are less prepared to handle natural disasters than developed countries, thus posing an increased risk to global supply chains over the next decade. Citing data from the Intergovernmental Panel on Climate Change indicating that by 2100 rises in global surface temperatures and changes to precipitation patterns are likely to result in more droughts and cyclones, increased flood risk, and higher sea levels, the report concluded that countries experiencing rapid economic growth will produce a larger share of global output over the next ten years while facing greater exposure to natural disaster and little knowledge of how to deal with them.

Recycling Analysis Tool

The Environmental Research and Education Foundation released a new data analysis tool August 13 for recycling that combines specific waste collection statistics and geographic information to assist communities in evaluating the effectiveness of their waste management systems. The foundation claims that the tool could help communities better manage their financial resources by directing recycling education programs to high-need areas.

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