



# 2010 Outlook for U.S. Energy and Environmental Policy

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**Webinar**

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# About Van Ness Feldman



- 80 lawyers and policy professionals focused exclusively on energy, environmental, and infrastructure policy and regulation.
- Internationally-recognized electricity, natural gas, renewables, climate change, hydropower, water resources expertise.
- Value: senior-level practitioners working efficiently and collaboratively at highly competitive rates.
- Client-responsive, creative approach. West Coast presence.
- Strong bipartisan relationships. Unparalleled understanding of regulatory framework and ongoing policy developments.
- Connected with leading trade associations, industry groups, NGOs, think tanks that are also advocating on these issues.
- Van Ness Feldman's Climate Change practice is ranked by *Chambers* and *Environmental Finance*.

# Speaker Bios.



Kyle Danish advises a range of clients on environmental matters, with a special focus on corporate climate strategy, emissions trading-related transactions, and regulation under the Clean Air Act. Kyle was the only U.S. attorney recognized in the first band of worldwide climate change attorneys in *Chambers Global 2009*, and one of only three attorneys listed in the first band of national climate change lawyers in *Chambers USA 2009*.



Curt Rich heads Van Ness Feldman's Public Policy practice group and is co-chair of the firm's Cleantech practice. He represents companies, trade associations and local governments before Congress and federal agencies on issues related to tax policy, energy, the environment, natural resources and appropriations. Curt served as Legislative Counsel to U.S. Senator Max Baucus (D-MT) for five years.



Ben McMakin is co-chair of the firm's Cleantech practice. He uses his comprehensive knowledge of Congress and the legislative process to advance client interests on an array of issues including appropriations, cleantech, energy, transportation, defense and homeland security, and technology. Ben spent 17 years as a senior political and legislative advisor to members of the Washington and Oregon congressional delegations from 1988-2005.

# Agenda for today's webinar

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- I. Climate Change – Kyle Danish
- II. Energy Policy – Curt Rich

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# Climate Change

# Climate Change Outlook: Overview



- Report from Copenhagen
- Outlook for Congress
- Outlook for EPA
- Other initiatives
- Preparing for 2010

# Report from Copenhagen



- Diminished expectations at start of meeting
- Chaotic conference
- Last night negotiations among US, China, India, Brazil, and South America yield Copenhagen Accord
- Parties “take note” of the Copenhagen Accord
- Other decisions from the parties (CDM reforms, REDD+)

# Key Elements of the Accord



## ■ Mitigation Commitments

- Commitments expected from all but least-developed countries – but not legally binding
- Commitments must be inscribed in schedule by Jan. 31

## ■ Verification

- Actions supported by international funding are subject to “international verification”
- Unsupported actions subject to “international consultations and analysis”

## ■ Funding

- Goal: USD 100B by 2020; fast start of USD 30B by 2012

## ■ Many uncertainties

- Long-term status of Kyoto Protocol
- Accord contemplates further negotiations

# Next Steps



- January 31 recording of commitments?
- Major Economies Forum on Climate Change (March)
- G-20 Meeting (June)
- Mexico City (November-December)

# Take-Aways



- Copenhagen as the “molting” of international climate change regime
  - New expectations for major developing countries
- We can't keep meeting this way
  - Need to make progress in fora other than the United Nations (Major Economies Forum, G-20)
- Effect on US climate change debate
  - Effect on *likelihood* of legislation: Neutral?
    - Neither a collapse, nor a breakthrough
  - Effect on *form* of legislation
    - Need to monitor further discussions on REDD, CDM reforms

# Congress: Drivers *for* Legislation



- New “tripartisan” leadership and engagement
  - Kerry, Graham, Lieberman
- Shadow of EPA regulation
- Greater engagement by Obama Administration
- Other drivers
  - State activity
  - Lawsuits

# Congress: Drivers *Against* Legislation



- Election year concerns
- Health care fatigue
- Double-digit unemployment
- Concerns about policy designs
  - New discomfort with markets
  - Complexity
  - Mired in battles about how to distribute allowance value

# Possible Outcomes



- Economy-wide cap-and-trade program
  - Lame duck session?
- “Plan B” climate change legislation
  - Example: Sectoral hybrid
    - Power sector :
      - Cap-and-trade
    - Manufacturing sector
      - Cap-and-trade or performance standards
    - Transportation sector:
      - Vehicle standards + low carbon fuel standard
    - Residential and commercial sectors
      - Efficiency and other performance standards
- Energy-only
  - Plus other pieces . . . ?
- No legislation in 2010 / EPA regulation

# The EPA Regulatory Train



1. 2007 Supreme Court decision
2. Obama Administration agreement with states and automakers to establish GHG standards for new motor vehicles
3. EPA promulgates endangerment finding
4. EPA will promulgate motor vehicle standards in March

– *GHGs become “subject to regulation”* –

Triggers automatic application of:

- Prevention of significant deterioration (PSD) program and Title V program
  - New or modified “major emitting facilities” must obtain permits, install “Best Available Control Technology”
- EPA has proposed “subject to regulation” date is effective date of motor vehicle standards

# EPA's Tailoring Rule



- EPA seeks to limit application of PSD and Title V programs to large sources
  - Statutory threshold: stationary sources with potential to emit 100-250 tons
  - Tailoring rule proposal: 25,000 tons (for 5 years)
  - Legal rationales:
    - “Administrative necessity”
    - Need to avoid “absurd results”
- Issues
  - State permitting agencies may cannot quickly revise rules
  - Even with higher threshold, permitting bottlenecks
  - Legal rationales are vulnerable

# Congress and EPA: Derail or Delay?



- Senator Murkowski (R-AK) intends to act
  - Support from Sen. Graham (R-SC)
  - Vehicle: debt ceiling bill (Jan. 20)
- Spectrum of possible actions
  - Derail all regulation
    - Eliminate EPA authority regulate to GHGs (Example: Rep. Pomeroy)
  - Delay stationary source regulation
    - Postpone “subject to regulation” date, allowing time for Congress to develop comprehensive legislation
    - Codify Tailoring Rule until Congress develops alternative?

# And meanwhile . . .



## ■ In the states

### ■ California

- ABA 32 law establishes cap by 2012
- CARB developing regulations

### ■ Regional Greenhouse Gas Initiative continues

- Commitment to develop low carbon fuel standard

### ■ Western Climate Initiative

## ■ In the courts

- 2<sup>nd</sup> Circuit and 5<sup>th</sup> Circuit decisions have allowed nuisance suits to go forward

# Strategizing for 2010



## ■ Legislation

- Analyze implications of different scenarios
  - Will company face allowance requirements of performance standards?
  - How does company fare under different approaches to allocations?
  - How does company fare if the trading market is smaller, more restricted?
- Engage
  - Very fluid situation, openness to new ideas
  - Even if legislation does not pass this year, designs will take root

## ■ Regulation

- Analyze whether company is subject to permitting requirements, impact on planning (including reporting rule)
- Analyze how EPA will address issues such as BACT, state permitting requirements

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# Energy Policy

# Jobs Legislation



- Jobs for Main Street Act (passed House of Representatives on December 17, 2009)
  - Extension of federal health care benefits
  - \$28 billion in funding for state and local governments
  - \$37 billion in transportation spending
  - Restored \$2 billion to the DOE Loan Guarantee Program
  - \$4 billion in school renovation grants
  - Extension of unemployment benefits



## Jobs Legislation (cont.)

- Senate working in legislation that is focused on funding for:
  - small businesses
  - public services
  - infrastructure projects
  - energy efficiency programs
    - “Cash for Caulkers”

# Tax Legislation



## ■ Energy Tax Credits Expiring in 2010

- 45 cent per gallon ethanol tax credit
- 30% investment tax credit for alternative fuel refueling pumps
- Tax credit for alternative fuel vehicles
- Tax credit for energy efficient clothes dryers, dishwashers and refrigerators
- Homeowner tax credit for energy efficient property (windows and insulation)
- Grants in lieu of tax credits for renewable electricity facilities
- Natural gas distribution lines treated as 15-year property

# Tax Legislation (cont.)



- Energy Tax Credits Expiring in 2009
  - \$1.00 per gallon biodiesel tax credit
  - Suspension of 100%-of-net-income limitation on percentage depletion for oil and gas from marginal wells
  - Special rule for sales or dispositions to implement FERC or State electric restructuring policy
  - Accelerated depreciation for business property on an Indian reservation

# Tax Legislation (cont.)



- Energy Stimulus Tax Provisions Sun Setting
  - Renewable Energy Property Manufacturing Tax Credit

# Energy Legislation



- S. 1462, American Clean Energy Leadership Act
  - Clean Energy Deployment Administration (“Green Bank”)
  - Federal Renewable Electricity and Energy Efficiency Standard (15% by 2021)
  - National transmission grid planning and process (with Federal backstop siting authority)
  - establish a national interconnection standard for small power production facilities (15 kW or less)
  - Expedited permitting for renewable projects on public lands
  - New financing mechanisms and increased federal support for energy efficient manufacturing
  - New energy efficiency standards for lights and commercial furnaces
  - Rebate program to promote energy efficient motors
  - New energy efficiency targets and model codes for homes and commercial buildings
  - Federal Advisory Commission on nuclear waste management
  - OCS oil and gas inventory
  - Oil and Gas leases in the Gulf of Mexico
  - Increased federal financing for the Alaska Natural Gas Pipeline

# Agency Funding



- Department of Energy - Energy Efficiency and Renewable Energy
  - 2007 – \$1.474 billion
  - 2008 – \$1.722 billion
  - 2009 – \$1.928 billion
  - 2009 – Stimulus spending: \$16.8 billion
  - 2010 – \$2.242 billion

# Agency Funding (cont.)



## ■ Department of Energy – Fossil Energy Research and Development

- 2007 – \$592 million
- 2008 – \$578 million
- 2009 – \$727 million
- 2009 – Stimulus spending: \$3.4 billion
- 2010 – \$672 million

# DOE Loan Guarantee Program



- *EPA Act Section 1703 Program* – DOE Loan guarantees for nuclear, coal and new or significantly improved pre-commercial energy efficiency, renewable energy, and advanced transmission and distribution technologies.
- *AARA Section 1705 Program* – DOE Loan guarantees available to fund commercial and pre-commercial technologies that reduce greenhouse gas emissions. These include incremental hydropower, upgrading electric power transmission systems, and biofuel projects performing at the pilot or demonstration scale. Eligible projects must commence construction no later than September 30, 2011.

# FY 2010 Department of Defense Appropriations Bill



- Improvements to the DOE Loan Guarantee Program:
  - \$2 billion increase in the 1705 LGP budget (restoration of the money that was stripped and used for Cash for Clunkers)
  - allows Section 1703 borrowers to pay for the cost of loan guarantees through a combination of appropriations and payments from the borrower
  - gives DOE Secretary the discretion to waive third party credit ratings for projects that cost less than \$100 million
  - expanded hiring authority for the DOE LGP Office
  - allows for entities to file multiple applications for loan guarantees
  - expanded eligibility for energy efficiency loan guarantees to include projects to retrofit residential, commercial and industrial buildings, facilities and equipment.

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