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Climate Change Policy Update Week of January 19-23, 2009

Commentary: *Speaker Pelosi pledged to pass climate change legislation out of the House by December; this after Chairman Waxman pledged to pass legislation through his Energy & Commerce Committee before the Memorial Day recess . . . Key agency heads were confirmed by the Senate this past week . . . The House Energy & Commerce Committee is taking steps to leave its mark on the House stimulus bill, establishing substantial new funding for energy efficiency and clean energy projects. The Committee approved an amendment that would require states to allow utilities to recover from ratepayers for their investments in energy efficiency . . . The past week saw a trio of new scientific reports on climate change impacts.*

Executive Branch

- **President Obama Calls for Action on Climate in Inaugural Address.** During his first address to the nation after being sworn into office, President Obama called on the U.S. to “roll back the specter of a warming planet,” adding that “each day brings further evidence that the ways we use energy strengthen our adversaries and threaten our planet.” President Obama also vowed that the U.S. will “harness the sun and the winds and the soil to fuel our cars and run our factories.”
- **Key Agency Heads Confirmed by Senate.** The full Senate voted this week to confirm nominees to key positions in agencies. The full Senate voted on January 20 to confirm Energy Secretary Steven Chu, Interior Secretary Ken Salazar, and Agriculture Secretary Tom Vilsack. The nomination of Lisa Jackson to become EPA Administrator was held up for one day after Sen. John Barrasso (R-WY) requested more information about Carol Browner’s role as a special aide to President Obama on energy and climate change issues. Ms. Jackson’s nomination to lead EPA, along with Nancy Sutley’s nomination as the chair of the White House Council on Environmental Quality, were approved by the full Senate on January 21. The Senate also confirmed Sen. Hillary Clinton (D-NY) as Secretary of State after a short delay due to concerns raised by Republicans regarding foreign donations to former President Bill Clinton’s foundation.
- **Environmental Group Lawsuit Seeks to Block EPA Guidance on CO₂ Emissions from Power Plants.** The Sierra Club, joined by the Environmental Defense Fund and the Natural Resources Defense Council, filed a lawsuit seeking to block EPA from implementing a guidance memorandum issued by former EPA Administrator Stephen Johnson asserting that CO₂ is not a pollutant already “subject to regulation” under the Clean Air Act (CAA) and that EPA regional offices therefore are not required to set CO₂ emission standards when issuing permits to coal-fired power plants under the Prevention of Significant Deterioration (PSD) program. The memorandum was issued in response to an EPA Environmental Appeals Board (Board) decision ordering EPA to reconsider an earlier determination that CO₂ is not a regulated pollutant under the PSD program. The Board’s decision further recommended that the Agency undertake this reconsideration in the context of “an action of nationwide scope,” rather than merely in the context of the particular permit proceeding. The Sierra Club *et al.* lawsuit argues that the Johnson

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memorandum proposes a new, binding interpretation of the CAA without following the requirements of the Administrative Procedure Act or the Appeals Board decision.

Congress

- **House Committees Approve Portions of Stimulus Legislation under Their Jurisdiction.** The House Energy and Commerce Committee approved a part of the \$825 billion American Recovery and Reinvestment Act of 2009 by a vote of 34-17 this week. A small section of the proposed legislation was referred to the Committee for debate and amendment. The Committee-approved version includes funding for renewable energy, transmission, smart grid and energy efficiency projects. The Committee approved an amendment offered as part of Chairman Henry Waxman's (D-CA) Chairman's Mark (indicating some substantive changes from the previously released draft made available to the public prior to the Committee mark up) that will require states that accept energy efficiency grants from the federal government to ensure that utilities recover the revenue lost as consumers use less energy. The controversial "decoupling" measure is intended to allow utilities to invest in and encourage energy efficiency without major revenue losses. States accepting federal energy grants also would be required to adopt more stringent building codes. Other sections of Chairman Waxman's changes increase the amount of federal matching grants for smart grid demonstration projects and allow the Department of Energy (DOE) to prioritize weatherization assistance funding for the most cost-effective projects.

The Committee also adopted an amendment to the stimulus proposal's \$8 billion temporary loan guarantee program, clarifying that "renewable energy systems that generate electricity," as well as projects to upgrade transmission technology or capacity, would be eligible for such loans if construction begins by September 30, 2011. Another amendment offered by Rep. Fred Upton (R-MI) will require the DOE to study the extent to which legal challenges are delaying the construction of the transmission capacity necessary to bring renewable power to market. The Committee approved an amendment from Rep. Tammy Baldwin (D-WI) that would make up to \$500 million of the temporary loan guarantees available for advanced biofuel projects that reduce lifecycle GHG emissions, compared to other transportation fuels. The Committee also approved language from Rep. John Shadegg (R-AZ) that would make "incremental hydropower" projects eligible for funding under the loan guarantee. Controversy surrounds language added to the Chairman's Mark defining the only smart grid technology to receive stimulus funding as "internet-based", thereby seeming to pick one technology over many others in the market and leapfrogging an effort previously required by Congress to define appropriate interoperability standards and protocols.

In the House Ways and Means Committee, members voted 24-13 in favor of a \$20 billion renewable energy and energy efficiency tax package as part of a larger \$275 billion package of business and individual tax breaks. The tax portion of the stimulus bill includes a provision funding up to 30 percent of the cost of eligible wind, solar, and other renewable projects placed in service in 2009 or 2010, as well as an alternative 30 percent investment tax credit for wind, geothermal, biomass, and other technologies. The bill also provides \$2.4 billion in energy conservation bonds to assist state and local governments in encouraging GHG emission reductions; \$4.3 billion of extended or expanded residential energy efficiency tax credits; and increased tax credits for residential renewable energy projects.

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According to House Majority Leader Steny Hoyer (D-MD), the full House of Representatives will vote on the complete economic stimulus bill on Wednesday, January 28. Democratic leaders in Congress aim to send a complete legislative package to President Obama before the Presidents Day recess begins on February 14.

- **Senate Finance Committee Proposal Released.** The proposed stimulus legislation released by the Senate Finance Committee, called “The American Recovery and Reinvestment Plan”, includes tax provisions that would provide \$275 billion of tax relief for individuals, businesses, and state and local governments, as well as reinvestment in renewable energy, economic recovery tools, and other recovery relief. Included in the renewable energy title are provisions that would provide a long-term extension of the renewable energy production tax credit plus an option for facilities to claim the renewable energy investment tax credit instead of the production credit. In addition, the proposal would authorize \$1.6 billion in clean energy bonds to provide financing for wind, closed-loop biomass, open-loop biomass, geothermal, small irrigation, hydropower, landfill gas, marine renewables and trash combustion facilities. An additional \$2.4 billion is authorized for energy conservation bonds to promote GHG reduction initiatives at the state and local levels. For residential buildings, the stimulus package contains tax credits for energy efficiency upgrades and for investments in residential renewable energy technology such as solar, wind, and geothermal heat pump technology. The Senate also is expected to begin mark-up on its own version of an economic stimulus package Tuesday, although the draft proposal prepared by the Senate Appropriations Committee in parallel to the one released by the House may not be made generally available prior to the markup. In addition, unlike the House consideration this week in the Energy and Commerce Committee, the only markups of Senate proposals will take place in the Finance Committee, in the case of the tax issues, and the Appropriations Committee, in the case of the programmatic funding proposals

States and Cities

- **California Seeks Reconsideration of Request for GHG Regulation Waiver.** The California Air Resources Board (CARB), the state air regulatory body, sent a letter to EPA officially requesting reconsideration of CARB’s request for a Clean Air Act waiver to implement the state’s GHG emission standards for new motor vehicles. The Clean Air Act preempts states from adopting their own emission standards for motor vehicles, but also establishes a mechanism by which California may request a waiver, which must be granted by EPA if there are “compelling and extraordinary conditions” that necessitate state-specific standards. If California is granted a waiver to establish standards, then other states may adopt the California standards. In December 2007, the Bush Administration EPA denied CARB’s original request for a waiver, asserting that it failed to meet the statutory requirements. The CARB letter argues that the Bush EPA misapplied the facts in denying the waiver. The new EPA Administrator, Lisa Jackson, stated during her confirmation hearing that she would review the state’s request immediately upon her confirmation by the Senate and is expected to grant the waiver. Thirteen states have adopted California’s standards, but cannot enforce them unless and until the waiver is granted.
- **CARB Promulgates Early Action Rule Aimed at Automotive Refrigerants.** CARB adopted an early action regulation aimed at reducing GHG emissions associated with vehicle air conditioning systems. The new regulations address containers used to recharge the air conditioning systems with hydrofluorocarbons (HFCs), which are highly potent GHGs. The rule

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will require the containers to have a self-sealing valve, creates a container deposit and return program, requires reclamation of HFC residue in the returned containers, and mandates recycling of the emptied containers. The regulation is a part of a “discrete early actions” program required by A.B. 32, the state’s GHG reduction law.

- **Oregon, Washington Adopt California Vehicle Labeling Law.** Oregon and Washington became the first states to adopt California’s vehicle GHG emission labeling law. The California law requires all new passenger vehicles to be labeled with a sticker showing its rank on GHG and smog emissions relative to similar types of vehicles. The California law became effective January 1, while the Oregon and Washington rules will be implemented in mid-February.

Studies and Reports

- **Climate Change Effects Now Seen at Both Poles.** Researchers using satellite records and weather station data to reconstruct Antarctica’s climate over the past half-century have concluded that the continent is warming at a rate comparable to the rest of the world, contrary to previous reports based on smaller datasets. The study, published in the latest edition of *Nature*, also found that some of the recent cooling observed over East Antarctica appears to be the result of ozone depletion, which has strengthened westerly winds that isolate the continent from warmer air streams further north. In addition, a new U.S. Geological Survey report cites the loss of Arctic summer sea ice, rising temperatures, warming permafrost, dwindling reindeer herds, and northern plant migration as evidence that climate change is changing the Arctic faster than predicted by climate models. The study predicts that warming trends in the Arctic will continue, and may push the region past thresholds of warming observed over the past several million years, possibly triggering large and fast climate changes such as melting ice sheets. The report is available at <http://climatescience.gov/Library/sap/sap1-2/final-report/sap1-2-final-report-all.pdf>.

Rising Temperatures Affecting Western Forests. A study published in the latest edition of *Science* found that, over the past twenty to thirty years, the death rate for trees in the oldest American forests in the West has doubled, apparently due to climate-related changes in the water cycle. As the region has warmed, snowpack has decreased and the spring melt has advanced, creating a longer summer drought. In addition to water stress, increases in insect and pathogen prevalence due to warmer temperatures may also be affecting the death rate. Because new trees are not sprouting fast enough to replace the dying trees, the loss of older trees is expected to lead to sparser forests with smaller trees. The changes in tree composition could result in forests becoming a net source of carbon dioxide to the atmosphere rather than a sink. The changed forests will also be less habitable for certain species, such as the spotted owl, and will be more vulnerable to wildfires.

- **EPA Report Finds Mid-Atlantic Region at Risk from Sea-level Rise.** The U.S. Mid-Atlantic region would be particularly vulnerable to the sea-level rise that would result from icesheet melting and the thermal expansion of ocean water, according to a new EPA report. The area has a high population concentration along the coast and would likely experience submerged lowlands, erosion of beaches and barrier islands that protect the coastline, wetland inundation, intensified coastal flooding, and increased salinity of estuaries and freshwater aquifers. The EPA report is available at <http://www.epa.gov/climatechange/effects/coastal/sap4-1.html>.

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International

- **Transport Ministers Issue Declaration Recognizing Need for “Urgent” Climate Action.** Following the three-day Ministerial Conference on Global Environment and Energy in Transport (MEET), transport ministers from 21 major emitting nations issued a joint ministerial declaration affirming “the urgent need for action” on global climate change. The declaration expressed support for GHG reduction measures from the international shipping, aviation and land transport sectors. The declaration called on signatories to create integrated and comprehensive national transport strategies that address land, shipping, aviation, fuels, and vehicles; develop and deploy new technologies; share best practices and promote the transfer of existing GHG-reducing technologies; and improve environmental and energy data related to transportation.
- **Norway Announces Global CCS Summit.** Norway will host a global summit on carbon capture and sequestration (CCS) in May of this year. Announced by Prime Minister Jens Stoltenberg, the conference will focus on a number of CCS issues, including safety, finance, regulation, and emissions mitigation potential.

The Climate Policy Update is intended as a general summary of major climate change-related policy developments that we judge to be of interest to a broad range of our clients and friends. We welcome your comments and suggestions. Coverage in, and selection of topics for, the Update is not intended to reflect the position or opinion of Van Ness Feldman or any of its clients on any issue. This document has been prepared by Van Ness Feldman for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.

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