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## Climate Change Policy Update Week of January 26-30, 2009

*Commentary: As expected President Obama has directed EPA to reconsider the denial of the Clean Air Act waiver to California; reversal of the denial would allow California and thirteen other states to implement GHG emission standards for new vehicles. However, the President also directed the Department of Transportation to work on finalizing new fuel economy standards. Will the Administration attempt to coordinate these actions in order to avoid a “patchwork” outcome? . . . Stimulus packages continue to move forward in both the House and Senate with substantial new funding for energy initiatives. Controversial areas: “decoupling” provisions to incentivize energy efficiency investments by utilities, and substituting cash for tax credits for renewable energy projects . . . Sen. John Kerry (D-MA) is taking steps to establish a “working group” of Senators from key committees to work jointly on climate change legislation. How will this group interact with the so-called “Group of 16” mostly Midwestern and Southern Democratic Senators who organized themselves after consideration of the Boxer Manager’s Amendment last year? . . . Chairman Boxer’s office has announced that she will publish “principles” for cap-and-trade legislation next week.*

### Executive Branch

- **Todd Stern Named as Special Climate Envoy.** In her first week as Secretary of State, Hillary Clinton has named Todd Stern to serve as the top U.S. negotiator on climate change issues. Secretary Clinton said that Stern will act as a principal advisor on international climate policy and strategy and “will participate in all energy-related policy discussions that—across our government—can have an impact on carbon emissions, and will be looking for opportunities to form working alliances.” Stern served as staff secretary in the Clinton White House and then coordinated President Clinton’s initiative on global climate change. He was a White House representative at the climate negotiations in Kyoto, Japan, and Buenos Aires, Argentina. Stern will be leaving the Washington law firm of Wilmer Cutler Pickering Hale and Dorr and his position as a senior fellow at the Center for American Progress.
- **Obama Revisits California Vehicle Waiver.** President Barack Obama has directed the Environmental Protection Agency (EPA) to reconsider the decision, made under the Bush administration, to deny California a waiver under the Clean Air Act to allow regulation of GHG emissions from passenger vehicles. The reconsideration will involve a public notice-and-comment period. If the waiver is granted, California and a group of other states collectively representing half of the U.S. vehicle market would be able to move ahead with GHG emission standards for new motor vehicles. The California regulations would reduce GHG emissions from new passenger cars and light trucks by 30 percent by 2016 and raise average fuel economy standards to the equivalent of 35 mpg. President Obama also directed the Department of Transportation to meet an April 1 deadline to establish new federal fuel economy rules that would take effect for the 2011 model year. Auto-state senators were quick to connect these actions to federal climate change legislation. “I think that ultimately this gets addressed in the energy bill /

If you have questions about topics covered in this Update, please contact Kyle Danish, head of the Climate Change and Emissions Trading Practice, at [kwd@vnf.com](mailto:kwd@vnf.com)

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cap and trade,” said Sen. Debbie Stabenow (D-MI), observing that revenues from allowance auctions could be used to help auto manufacturers retool their plants to meet tighter vehicle emission standards. Sen. Bob Corker (R-TN) stated that auto makers will want a single federal standard to meet, which “just adds a constituent base for a national cap-and-trade program.”

## Congress

- **House Passes Stimulus Package.** The House of Representatives passed an \$819 billion stimulus package without a single Republican vote. The measure includes nearly \$70 billion for clean energy initiatives, including \$4.5 billion for improvements to the electric grid and \$6.2 billion to weatherize buildings. The package is now being considered by the Senate.
  - The House version includes a controversial provision making energy grants available states provided that the state’s governor ensures that state regulatory authorities establish policies to decouple a utility’s fixed cost recovery from the amount of electricity sold, giving utilities an incentive to implement energy efficiency measures. The Senate is considering a similar provision, which would make available \$2.1 billion in energy efficiency and renewable energy grants. Both the National Association of Regulatory Utility Commissioners and the Industrial Energy Consumers of America have argued that such decoupling measures may disincent energy efficiency improvements by consumers themselves because they still end up paying for energy not used.
  - The House package also included language allowing renewable energy developers to receive cash in lieu of tax credits under a new Energy Department grant program, a measure the wind and solar industry representatives have said is crucial to attracting investment during the current economic downturn when investors have little taxable income to offset with credits. The measure faces strong opposition in the Senate.
  - The Senate package currently includes a revision to the carbon capture and sequestration tax credit created as a part of last year’s bailout of the financial sector. Companies can currently claim a \$10-per-metric-ton credit for capturing CO<sub>2</sub> and using it for enhanced oil recovery. The proposed revision, put forward by Sen. Thomas Carper (D-DE), would require companies to demonstrate that the CO<sub>2</sub> is permanently stored underground.
- **Gore Presses Senators to Act Quickly.** Former Vice-President Al Gore testified before the Senate Foreign Relations Committee, urging senators to pass cap-and-trade legislation in 2009 in advance of the December international climate change policy meeting in Copenhagen. That meeting is a presumptive deadline under the U.N. climate change negotiations for reaching agreement on a treaty to succeed the Kyoto Protocol, which expires in 2012. Gore also argued that in light of recent research, the appropriate goal is to reduce CO<sub>2</sub> levels to 350 parts per million (ppm), as opposed to the 450 ppm originally thought to be a safe threshold by the Intergovernmental Panel on Climate Change. “The United States is the only nation that can lead the world,” Gore said, “and this is the one challenge that could completely end human civilization.”
- **Kerry Forms Cap-and-Trade Working Group.** In order to generate support for passage of a cap-and-trade bill, Senate Foreign Relations Committee Chair John Kerry (D-MA) is creating a

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“working group” on climate change that will include key committee leaders and Republicans. Senate Environment and Public Works Committee Chair Barbara Boxer (D-CA) and Energy and Natural Resources Committee Chair Jeff Bingaman (D-NM) are both members, as is Sen. Joseph Lieberman (D-CT). Sen. Kerry stated that enactment of a cap-and-trade bill would “give us leverage to influence other countries’ behavior” in the international negotiations.

## States and Cities

- **Midwestern Regional Trading Program Releases Preliminary Design Recommendations.** An advisory group to the Midwestern Greenhouse Gas Reduction Accord (Accord) has released preliminary design recommendations for the regional cap-and-trade program. The recommendations include proposed emission reduction targets of 15-25 percent below 2005 levels by 2020, and 60-80 percent below by 2050. The recommendations would regulate all six major GHGs and would impose three-year compliance requirements on electricity generators and electricity importers, industrial combustion sources, and possibly transportation fuels, with regulation of heating fuels phased in over time. Members of the Accord include Illinois, Iowa, Kansas Michigan, Minnesota, Wisconsin and the Canadian province of Manitoba. Indiana, Ohio, South Dakota, and Ontario are involved as observers.
- **Illinois Passes Carbon Standard for New Coal Plants.** In one of his final acts before his impeachment on January 29, 2009, Illinois Governor Rod Blagojevich (D) signed into law legislation that creates a CO<sub>2</sub> emission standard for new coal-fired power plants. The law creates gradually more restrictive standards for CO<sub>2</sub> emissions, requiring that any new coal plant constructed in the state capture at least 50 percent of its CO<sub>2</sub> emissions during the first years of implementation and either sequester the CO<sub>2</sub> in a geologic formation or use it for enhanced oil recovery. The standard then increases to 70 percent for plants beginning operations after 2015, and to 90 percent for plants coming online after 2017. In addition to the CO<sub>2</sub> standard for coal-fired power plants, the law: (i) mandates that electric utilities and retail electricity suppliers purchase specific percentages of power from plants meeting the standard, starting at 5 percent in the early years and rising to 25 percent by 2025; (ii) expands the state’s renewable portfolio standard for utilities to also cover merchant and wholesale electricity suppliers; and (iii) significantly lowers limits on emissions of non-GHG air pollutants from new coal-fired power plants.

## Industry

- **El Paso Plans “Carbon-Neutral” Natural Gas Pipeline.** El Paso Corp. (El Paso) asked the Federal Energy Regulatory Commission for approval to construct and operate a 675-mile, 42-inch diameter interstate pipe that initially would transport up to 1.5 Bcf/d from Rockies basins to Nevada, California and Pacific Northwest markets. The company is designing the pipeline to showcase state-of-the-art practices for mitigating GHG emissions, including: (i) applying internal pipeline coating to improve hydraulic efficiency; (ii) using electric compression at the head station; (iii) implementing best management practices to reduce fugitive methane emissions; (iv) and using the U.S. Green Building Council Leadership in Energy and Environmental Design (LEED) criteria for buildings. In addition, El Paso will be offsetting 50,000 tons of emissions through a reforestation project. In other news, the California Climate Action Registry (CCAR) announced that it had approved and registered El Paso’s calculation of its corporate GHG

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footprint, making El Paso the first natural gas company to earn CCAR approval of its emissions inventory.

- **Indeck Lawsuit Challenges NY Agencies' Authority to Implement RGGI Regulations.** Indeck Energy, an independent power producer in upstate New York, has named New York Governor David Patterson (D) and several state agencies in a lawsuit challenging those agencies' authority to promulgate regulations implementing the Regional Greenhouse Gas Initiative (RGGI). Indeck argues that the agencies lack authority simply to implement through executive action, but rather require new authority specifically granted by both the state and the U.S. Congress. In commenting on the lawsuit, a representative of the New York Department of Environmental Conservation, which was named in the suit, argued that the state agencies have sufficient authority under existing laws.

## Studies and Reports

- **Climate Impacts May Be Irreversible for a Millennium.** Scientists at the National Oceanic and Atmospheric Administration have published new research indicating that climate change impacts such as warming temperatures, regional drought conditions, and rising sea levels will continue for a thousand years even after anthropogenic GHG emissions stop. Large amounts of heat and CO<sub>2</sub> cycle between the ocean and the atmosphere, and the ocean acts as a major sink for both. Even after all anthropogenic GHG emissions halt, approximately 40 percent of the added CO<sub>2</sub> will remain in the atmosphere for a thousand years or more, and the ocean will absorb less heat. Both effects will sustain some warming impacts. The full report, published in the Proceedings of the National Academy of Sciences, is available at <http://www.pnas.org/content/early/2009/01/28/0812721106.full.pdf+html>. An unrelated study found that marine dead zones linked to climate change—oxygen poor areas of ocean where few organisms can survive—will also last for a millennium or more. Dead zones are created when microorganisms and shellfish die off in large numbers, generating bacterial growth that uses up all of the available oxygen. The study was published in the latest edition of *Nature Geoscience*.
- **McKinsey Study Finds Emissions Cuts Manageable.** A study by the consulting firm McKinsey & Co. found that a serious focus on emission reductions in the near-term could cut emission levels sufficiently by 2030 to keep average climate warming below 2 degrees Celsius, a threshold that should avoid dangerous impacts according to the Intergovernmental Panel on Climate Change. A ten-year wait to begin abatement, however, would make this target impossible to meet. In particular, the report identified energy efficiency, low-carbon energy sources, and terrestrial carbon sequestration as major sources of low-cost (or even profitable) emission reductions. The global investment costs were projected at less than 1 percent of the global gross domestic product. The study did not analyze secondary economic costs and benefits, such as jobs lost or gained due to changes in energy production. The full report is available at [http://www.mckinsey.com/client/service/ccsi/pathways\\_low\\_carbon\\_economy.asp](http://www.mckinsey.com/client/service/ccsi/pathways_low_carbon_economy.asp).

## International

- **EU Policy Paper Proposes Negotiating Positions for 15<sup>th</sup> COP in December.** The European Union (EU) Commission (Commission) released a policy paper outlining proposed EU negotiating positions for the U.N. negotiating sessions scheduled for December in Copenhagen.

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The focus of the sessions, which are the 15<sup>th</sup> Conference of the Parties to the United Nations Framework Convention on Climate Change (COP-15), will be the development of a successor treaty to the Kyoto Protocol, which expires in 2012. In the paper, the Commission states that it will push for treaty text that: (i) obligates all developed nations to participate in an integrated GHG cap-and-trade system that will reduce emissions to 30 percent below 1990 levels by 2015 and (ii) provides funding for climate change mitigation of up to \$231.5 billion by 2020. The Commission will seek binding targets from all 30 members of the Organization for Economic Cooperation and Development (OECD) by 2015, with targets for all major emitters by 2020. The EU will also seek to have all developing economies create a plan by 2011 to reduce their emissions by 15-30 percent below business-as-usual through a new mechanism called the “technical support and assessment panel.” The new mechanism would include a review of each developing country plan in 2016. In addition, the EU plan calls for reformation of the Clean Development Mechanism (CDM) through such measures as a phase-out by 2020 of the use of CDM credits by major emerging economies, such as China, and the creation of an international financing fund to be funded by developing nations based on their GHG emissions. The Commission policy paper is available at

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/34&format=HTML&aged=0&language=EN&guiLanguage=en>.

- **Venezuela Backs Brazil in Calling for Exclusion of CCS from the CDM.** In a paper submitted to the United Nations, Venezuela argued that carbon capture and sequestration (CCS) technology should not be allowed to generate credits under the CDM because the technology is not sufficiently developed. Brazil had previously called for exclusion of the technology due to problems of leakage, long-term liability, and permanence. The EU, Japan, Norway and China have stated their support for allowing CCS to generate credits under the CDM. The issue will likely be addressed during the treaty negotiations in Copenhagen in December.

*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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