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Climate Change Policy Update Week of February 17-20, 2009

Commentary: *Just Deserets? EPA Administrator Lisa Jackson said the agency would reconsider (but would not, at this point, stay the effectiveness of) the Deseret memo issued by her immediate predecessor. The memo asserted that new or modified power plants are not subject to CO₂ emissions regulation under the Prevention of Significant Deterioration program under the Clean Air Act. This could be the opening gambit in EPA's exercise of regulatory authority over GHG emissions. It raises a question, however: what would be "best available control technology (BACT)" for a fossil fuel-fired power plant? . . . The Senate and the House are exploring different paths through energy and climate change legislation. The Senate seems prepared to move sequentially – with the Energy and Natural Resources Committee working through an energy bill first. In the House, the Energy and Commerce Committee plans to consider both subjects in the same piece of legislation. However, Chairman Rangel of the Ways & Means Committee appears ready to challenge Chairman Waxman for jurisdictional sovereignty, possibly presaging serious consideration of a carbon tax in the House of Representatives.*

Executive Branch

- **Obama Celebrates Clean Energy in Stimulus.** President Obama signed the stimulus package into law in Colorado at an event focused on the impact of the legislation on renewable energy and smart grid development. "Because we know we can't power America's future on energy that's controlled by foreign dictators, we are taking a big step down the road to energy independence and laying the groundwork for a new, green energy economy that can create countless well-paying jobs," President Obama said. President Obama also announced a U.S.-Canada Clean Energy Dialogue after meeting with Canadian Prime Minister Stephen Harper. White House officials said that the senior-level discussions would enable cross-border collaboration on energy, science, and technology issues.
- **EPA Reconsidering CO₂ Regulation of Power Plants.** EPA Administrator Lisa Jackson announced that the agency is giving "vigorous review" to a December 2008 memo by outgoing Administrator Stephen Johnson which announced that the EPA would not regulate CO₂ emissions from new power plants under the Clean Air Act. Under the prevention of significant deterioration (PSD) program, new and modified power plants, as well as other major sources, are required to install the "best available control technology" if they increase emissions of pollutants "subject to regulation" in areas that currently meet national air quality standards. Administrator Johnson determined that CO₂ was not "subject to regulation" under the PSD program. EPA will open the matter for public comment, but the agency did not stay the effectiveness of the Johnson memo.
- **DOE Creates Stimulus Distribution Organization.** Energy Secretary Steven Chu has created a "special organization" within the Department of Energy (DOE) to distribute the \$40 billion in the

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stimulus bill slated for energy projects. The effort will be lead by Matt Rogers, formerly a director at McKinsey & Co., and the agency intends to spend 70% of the money by the end of 2010. Chu also stated that DOE's goal is to start cutting checks under its loan guarantee program for clean energy technology by the beginning of May, and he reported that the loan-guarantee applications will be reduced from approximately 1,000 pages to about 50. DOE will also begin considering applications on a rolling basis, and will use experience gleaned from processing past loan guarantees to identify and fast track those applications that are likely to succeed. Chu further said that, for a project for which a commercial bank is providing 20-30% of the financing, the due diligence performed by the bank might be sufficient to meet the program's requirements. Within the DOE's Office of Energy Efficiency and Renewable Energy (EERE), two staffers have been tapped to speed distribution of stimulus funds. Well-respected aide to Deputy Assistant Secretary Jacques Beaudry-Losique, Joan Glickman, will handle the renewable side of the house and Gil Sperling, once staff to House Energy Subcommittee Chair Ed Markey (D-MA) and appointed by the last Administration as weatherization chief in its closing months, on the efficiency side of EERE.

- **FERC Approves New Transmission Financing Mechanism; Loses “Backstop Authority” Case.** FERC has issued an order allowing companies to pre-subscribe transmission capacity to an “anchor” generation customer before holding an open season to allocate initial capacity. The measure is designed to provide greater flexibility for transmission developers attempting to finance grid extensions to reach remote renewable energy sources. Acting Chairman Jon Wellinghoff asserted that “merchant transmission projects can play a seminal role in expanding competitive generation alternatives . . . [and] may be particularly well suited to addressing the unique challenges associated with such location-constrained resources.” However, FERC's efforts to expand the electricity grid to reach renewable energy resources also experienced a setback in the courts this week. The Fourth Circuit ruled that the Commission does not have the authority under the 2005 Energy Policy Act to order “national interest” transmission projects to go forward if rejected by state commissioners, provided that the states turn down projects on reasonable grounds.
- **Carbon Storage Project Breaks Ground.** Drilling began at an Energy Department carbon sequestration demonstration project in Illinois that could store 1 million metric tons of CO₂ by 2012. The Mount Simon formation, which stretches underneath Illinois, Indiana, and Kentucky, could eventually store more than 100 billion tons of CO₂. Geologists are optimistic about the storage capacity of the formation because there are three layers of impermeable rock between the sandstone where the CO₂ would be stored and the surface.

Congress

- **Senate Turning to Energy Bill.** Senate Majority Leader Harry Reid (D-NV) announced that the Senate will begin consideration of energy legislation after the Presidents' Day recess and will move legislation through the Senate Energy and Natural Resources Committee by March 6th. Sen. Reid said that the measure will include a national renewable electricity standard and energy efficiency but that climate change legislation “will come later.” In contrast, Representative Henry Waxman (D-CA), Chairman of the House Energy and Commerce Committee, has said that he might prepare a comprehensive energy and climate package targeted for passage by Memorial Day. Senator Jeff Bingaman (D-NM), chair of the Senate Energy and Natural Resources

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Committee, has said that he intends to move the Senate energy legislation through the Committee with bipartisan support. The Committee will host a large number of energy related hearings over the next few weeks in preparation.

- **Rangel Intends To Engage Climate Legislation.** Representative Charles Rangel (D-NY), Chairman of the Ways and Means Committee, has announced a committee hearing to discuss the scientific objectives of a climate bill. Chairman Rangel stated that the development of climate change legislation “will be a priority” for his committee, and that the committee “must define the environmental objectives that we hope to achieve with climate change legislation before we can design such legislation. These objectives must be based on science.” Although the House Energy and Commerce Committee is generally viewed as the most likely venue for climate legislation, the Ways and Means Committee has been given primary jurisdiction over carbon tax proposals as well as a few cap-and-trade bills in the previous Congress. Representative Rangel has not announced whether he favors a carbon tax or a cap-and-trade program.

States and Cities

- **Wyoming Senate Approves Three Underground Carbon Storage Bills.** The Wyoming Senate approved three bills aimed at expanding the state’s regulatory structure for the underground storage of CO₂. The three bills, similar versions of which have already passed the state House, will not go to a conference committee before being sent to the Governor. The first bill would grant resource mining or drilling rights precedence over underground storage rights. The second would clarify that whoever sequesters CO₂ underground remains legally responsible for the sequestered gases. The third bill would grant the Wyoming Oil and Gas Conservation Commission responsibility for issuing permits related to underground CO₂ storage.

Studies and Reports

- **2009 Critical For Commercial CCS.** A new study by Emerging Energy Research surveyed the pace and funding of large scale carbon capture and sequestration (CCS) projects worldwide. The study concluded that developments in 2009 will signal the time frame for commercial viability of CCS, with major policy decisions expected through the European Union’s (EU) continued implementation of its emissions trading regime, U.S. climate legislation development, and international talks on a successor agreement to the Kyoto Protocol. Governments have already designated more than \$20 billion for large demonstration projects, mostly in the U.S., Europe, Canada, and Australia, which could support more than 30 projects. If this money does flow to projects and they are successful, the report concludes that CCS will be “well positioned” to scale up after 2016. The report also found that long-term storage potential will require the use of saline aquifers, and will likely involve and benefit the major players in the oil and gas industry. The report is available at <http://www.emerging-energy.com/user/marketstudies.aspx?catid=2>.
- **Wind/Solar Paper IDs Renewable Transmission Obstacles.** The American Wind Energy Association and the Solar Energy Industries Association issued a report entitled “Green Power Superhighways,” which outlines the barriers to expanding the electricity grid to reach remote renewable resources. The report calls for both major investment in new transmission – with the costs allocated across all consumers in states served by the transmission network – and comprehensive regional transmission plans to identify where new transmission lines or increased

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capacity are needed. The report recommends that FERC be granted clear authority to site new transmission lines that are needed to move renewable energy or prevent blackouts. It also points out that modifying power system operations to allow intermittent renewable energy sources to offset each other will improve the overall efficiency and economic performance of the grid, as well as moderate the challenge of managing intermittent energy sources. The report is available at <http://www.awea.org/GreenPowerSuperhighways.pdf>.

- **UNEP Report Calls for Urgent Action.** The United Nations Environment Program (UNEP) has released its Year Book 2009 in which it calls on governments to adopt an “increased sense of urgency” in the face of “approaching critical thresholds and tipping points” for the global environment. The report notes that the ability of critical natural systems (“sinks”) to store carbon may be peaking. Recent studies have indicated that the uptake of CO₂ by the oceans declined by 10 million tons in 2007. Forests are showing increased stress under rising temperatures, with photosynthesis (and therefore carbon storage) stopping earlier each fall. Warming in the arctic, which is amplified relative to warming in other regions, will thaw the permafrost and lead to releases of methane, a potent greenhouse gas (GHG). Researcher Chris Field of Stanford University and the Carnegie Institute for Science echoed this message in presenting new research at the annual meeting of the American Association for the Advancement of Science, also highlighting the increased risk of wildfires and associated carbon releases. Field is a member of the Intergovernmental Panel on Climate Change (IPCC), and noted that recent research indicates that previous IPCC reports underestimated the potential severity of climate change over the next century. The UNEP report is available at http://www.unep.org/publications/UNEP-eBooks/UNEP_YearBook2009_ebook.pdf.
- **Reports Says Nuclear Necessary to Cut Carbon.** A report by the Electric Power Research Institute and the Idaho National Laboratory finds that expanding nuclear energy production in the U.S. will be critical for the nation to be able reduce GHG emissions to 1990 levels by 2020, and 80% below that level by 2050, as called for by President Obama. According to the report, meeting those targets would require the United States to maintain existing light water reactors, build advanced light water reactors, and ensure safe, long-term spent fuel management. The report calls for more research and development in reactor and advanced fuel cycle technologies. It also calls for increasing a nuclear plant’s allowed lifespan to 80 years. Building the new capacity, the report asserts, is also likely to require expansions in relevant manufacturing and skilled labor capacities.

International

- **Major Emitters Meeting Achieves Little Progress.** An informal meeting of major GHG emitting countries resulted in little progress on resolving issues related to the development of a successor treaty to the Kyoto Protocol. The Seventh Informal Meeting on Further Actions against Climate Change was held in Tokyo, Japan. Representatives from 22 nations, including the United States, China, India, Australia and major European Union countries, participated. The greatest obstacle to progress was differences between developed nations and developing nations, with developing nations calling for developed nations to accept drastic emission limits and developed nations pushing for developing countries, which have no emission reduction obligations under the Kyoto Protocol, to accept emission limits in a post-Kyoto treaty.

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- **Japan Submits New Proposal for Post-Kyoto Treaty.** Japan delivered to the United Nations Framework Convention on Climate Change a new proposal for addressing climate change after the expiration of the Kyoto Protocol in 2012. The Japanese proposal reiterated the nation's support for a sectoral approach to capping GHG emissions, urged the creation of a "knowledge network" intended to facilitate information sharing between nations, and supported an increased focus on mitigation and adaptation measures.

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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