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Climate Change Policy Update Week of March 2-6, 2009

Commentary: *In international news, the EU Environment Ministers reaffirmed their call for a mid-term emissions target for developed countries of 25-40 percent below 1990 levels by 2020. However, State Department Climate Envoy Todd Stern made clear that the United States would not support such a proposal . . . Senate Majority Leader Reid and House Speaker Pelosi now have the same basic game plan: Develop legislation that combine cap-and-trade with energy policy, including a renewable electricity standard and transmission reform . . . The House Subcommittee on Energy and Environment held a hearing on offsets in cap-and-trade legislation. The discussion suggested that, for the Democrats, the issue is not “whether” but “how.”*

Executive Branch

- **Climate Envoy Dismisses EU-Proposed Midterm Targets.** State Department climate change envoy Todd Stern said that he opposes a European proposal for developed nations to reduce greenhouse gas (GHG) emissions by 25-40 percent below 1990 levels over the next decade. Stern argued that such reductions were not scientifically necessary and that he did not want to bring Congress a “dead-on-arrival agreement. We tried that. It didn’t do the world a lot of good.” Stern also said it would be optimal if Congress could pass cap-and-trade legislation before the next major round of international negotiations in December, but acknowledged that this was “an extremely tall order.” Stern confirmed that President Obama would continue to engage with leaders of major economic powers through a forum distinct from the U.N.-led climate change discussions, an initiative begun by the prior administration. (For further details on the EU-proposed targets, see the discussion under “International” below).
- **Chu Responds to CCS, Nuclear Waste Controversies.** Energy Secretary Steven Chu said that DOE is taking a “fresh look” at FutureGen, a federal-industry collaboration to build a coal-fired power plant with carbon capture and sequestration (CCS). FutureGen was abandoned by the Bush Administration because of cost increases. Chu also said he wants to coordinate with other international CCS technology development initiatives in order to increase the efficiency of technology development and testing. In response to GOP criticism of the abandonment of the Yucca Mountain nuclear waste repository, Chu commented that the Obama Administration was considering distributing the waste to multiple repositories.
- **President Announces Science Advisor Pick.** President Obama announced that Sherburne “Shere” Abbott will be his nominee for associate director of environment at the White House Office of Science and Technology. Abbott is currently serving as director for the Center for Science and Practice of Sustainability at the University of Texas at Austin. Abbot previously worked at the American Association for the Advancement of Science and at the National Academies’ National Research Council, and has consulted widely on sustainable development issues.

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- **Jackson Considering Environmental Justice and Climate Change.** In determining whether GHG emissions from vehicles endanger public health and welfare, as required by the Supreme Court in *Massachusetts v. EPA*, EPA Administrator Lisa Jackson said she will consider the effects of climate change on disadvantaged individuals and communities, especially those disproportionately impacted by other sources of pollution. An affirmative endangerment finding would trigger CO₂ regulation under the Clean Air Act.
- **OMB Director Orszag Defends Obama Cap-and-Trade Plan Before House.** During testimony in support of President Obama's proposed budget before the House Budget Committee, Office of Management and Budget (OMB) Director Peter Orszag defended the President's plan for a 100% auction of carbon allowances. Orszag stated that a free allocation of emission allowances would amount to "corporate welfare," which the recipients would use to increase profits rather than pass savings on to consumers. By contrast, a full auction would generate significant revenues which could be used to "cushion" impacts on consumers and invest in energy efficiency improvements. Commenting on the Obama Administration's position on nuclear power, Orszag acknowledged that nuclear power has lower GHG emissions than coal-fired power plants and stated that "discussion would occur" on the role of nuclear power as climate change legislation is crafted.

Congress

- **House and Senate to Combine Energy and Climate Legislation.** Both House Speaker Nancy Pelosi (D-CA) and Senate Majority Leader Harry Reid (D-NV) announced that they intend to produce a single energy and climate change bill in each legislative chamber this year, integrating cap-and-trade legislation with a renewable electricity standard and transmission grid reform. Legislative drafting efforts are moving forward:
 - Sen. Reid introduced The Clean Renewable Energy and Economic Development Act this week. The transmission legislation would create renewable energy zones in areas with significant generation potential and give FERC the authority to site transmission lines to transport electricity from those zones to load centers if state and regional transmission development efforts stall. The "green" transmission lines built using the federal backstop authority would be required to devote 75 percent of their capacity to renewable energy, or as much as possible while also preserving grid stability. FERC would also have the authority to spread costs of transmission development across rate payers in the absence of a local cost allocation plan, and the agency would be given full control over review of environmental impacts of "green" transmission lines on federal lands.
 - House Energy and Commerce Chairman Henry Waxman (D-CA) said he hopes to have a draft of climate change legislation this month, which staff have begun writing. Rep. Ed Markey, Chairman of the Energy and Environment Subcommittee of the House Energy and Commerce Committee, said he believes the Federal Energy Regulatory Commission will be the proper agency to oversee the new carbon market.
 - On the Senate side, Energy and Natural Resources Chairman Jeff Bingaman (D-NM) said he is "optimistic" that energy legislation will be reported out of committee within a

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month, and plans to circulate draft legislation to provide financial support for clean energy projects “as early as next week.”

- Rep. John Larson (D-CT), who opposes the cap-and-trade framework, reintroduced his carbon tax bill. The legislation proposes an upstream \$15 per metric ton of carbon tax to ratchet up by \$10 each year until U.S. emissions are 80% below 2005 levels. Revenues generated by the tax would be dedicated to reducing payroll taxes, investing in clean energy initiatives, and providing “transition assistance” to carbon-intensive industries.
- **Congress Hearing Plenty on Climate Change.** A number of Congressional committees held hearings on climate change and related issues this week, including:
 - The Subcommittee on Energy and Environment of the House Committee on Energy and Commerce convened a hearing on the use of offsets within a cap-and-trade program. Although a number of Republican Representatives indicated skepticism about offsets, in general Subcommittee members expressed support for an environmentally rigorous offsets program as a method of reducing emissions while producing cost-containment, ancillary environmental benefits, and opportunities for their constituents. Subcommittee Chairman Ed Markey (D-MA) and other members showed interest in establishing a scientific advisory board to advise the EPA in developing an offsets program.
 - The Senate Energy and Natural Resources Committee heard from DOE Secretary Steven Chu on reform to DOE’s R&D programs. Chu described the challenge as bridging the gap between basic science research by government and universities and technology deployment, and said his goal is to build research networks within government, the U.S., and internationally to integrate research efforts. The Committee published a draft of legislation to expand R&D and science funding authorizations for DOE, available at http://energy.senate.gov/public/index.cfm?FuseAction=IssueItems.View&IssueItem_ID=cd38563f-445e-4c75-9a70-94324136c99b.
 - The National Parks, Forests and Public Lands Subcommittee of the House Natural Resources Committee held a hearing on natural resource management in the context of climate change, including the possibility of reform to the National Environmental Policy Act and using public lands to mitigate climate change. Barton Thompson, director of the Woods Institute for the Environment at Stanford University, advised incorporating climate change considerations into resource management plans.

States and Cities

- **New York Governor Patterson To Consider Increase of Free Distribution of RGGI Allowances.** New York Governor David Patterson (D) will reconsider State Department of Environmental Conservation regulations that mandate the auction of most of the state’s annual allocation of 64.3 million Regional Greenhouse Gas Initiative (RGGI) CO₂ emission allowances. Under those regulations, the state currently auctions 62.8 million allowances and distributes the remaining 1.5 million allowances for free to regulated entities in the energy sector. Intended to reduce compliance costs for the energy sector, the Governor will consider amending the regulations to increase the number of allowances distributed for free, although the exact amount

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of the proposed increase has not been announced. The change comes in response to complaints about compliance costs from regulated utilities that, due to long-term power purchase agreements that do not account for the cost of CO₂ emission allowances, are unable to pass through the cost of allowances. Indeck Energy, an independent power producer in upstate New York that operates under such an agreement, recently brought a lawsuit against Gov. Patterson and several state agencies challenging those agencies' authority to promulgate regulations implementing RGGI. RGGI is a regional GHG cap-and-trade program comprised of ten northeastern states.

- **Maryland Senate Passes GHG Targets.** The Maryland Senate passed legislation that would cap the state's GHG emissions at 25 percent below 2006 levels by 2025. The bill, the GHG Reduction Act, would give the Maryland Department of Environment until 2012 to draft regulations to meet the target, although it exempts the state's manufacturing sector from emission restrictions. The Maryland House must now pass the legislation before it can be sent to Governor Martin O'Malley (D), who considers the legislation a priority for this legislative session. Maryland is currently a member of RGGI.
- **California Air Resources Board Issues Rules Limiting Fluorinated Gases.** In an effort to meet the GHG emission targets imposed by California's A.B. 32 legislation, the California Air Resources Board issued two measures aimed at reducing emissions of fluorinated gases, a family of potent GHGs. The regulations control the emissions rather than the production of the gases. The first rule sets performance-based fluorinated gas emission standards for semiconductor manufacturers that use fluorinated gases in amounts above a specific threshold. The rule, which supplements existing voluntary reduction programs for semiconductor manufacturers, will be phased in between 2012-2014. The second rule will phase out the use of sulfur hexafluorocarbons (SF₆) in non-utility, non-semiconductor applications. Fluorinated gases include sulfur hexafluoride (SF₆), nitrogen trifluoride, perfluorocarbons, and hydrofluorocarbons, among others. SF₆ is the most potent of the six major GHGs, with each ton having a climate impact (or global warming potential) equal to 23,900 tons of CO₂. The global warming potentials of other fluorinated gases range between 6,500-17,200 CO₂-equivalent tons. The proposed regulations are available at <http://www.arb.ca.gov/regact/2009/semi2009/semi2009.htm>.
- **California Delivers Climate Recommendations to U.S. EPA.** California Environmental Protection Agency Secretary Linda Adams delivered to U.S. Environmental Protection Agency (EPA) Administrator Lisa Jackson a letter recommending design options for a federal climate program. In the letter, Secretary Adams recommended that a future federal program preserve state programs that are in place prior to implementation of the federal program, permit use of federal allowances for compliance with state program obligations, allow states to retire federal allowances, link to emission trading programs outside North America, accept international offset credits, distribute the majority of allowances through auction, and set GHG emission caps at between 50 and 85 percent below 2000 levels by 2050. The letter also recommended that EPA use The Climate Registry to register, track and retire emission allowances. The Climate Registry is a voluntary GHG registry whose members include 40 U.S. states, all 10 Canadian provinces, and 6 Mexican states.
- **Wyoming Governor Signs Carbon Sequestration Bills.** Wyoming Governor Dave Freudenthal (D) signed into law two bills that will regulate carbon capture and sequestration (CCS) activities in the state. The first bill grants resource mining or drilling rights precedence over underground

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storage rights. The second bill states that whoever sequesters CO₂ underground remains legally responsible for the sequestered gases. The two bills follow a bill passed last year that gave land owners rights to underground storage space.

- **Utah House Approves Resolution Seeking Withdrawal From WCI.** The Utah House passed a non-binding resolution urging Governor Jon Huntsman (R) to withdraw the state from the Western Climate Initiative (WCI), a regional GHG cap-and-trade program. The resolution cited the lack of legislative consultation or public input, as well as economic concerns, as reasons for opposing participation in the WCI. WCI members include Arizona, California, Montana, New Mexico, Oregon, Utah and Washington and the Canadian provinces of British Columbia, Manitoba, Quebec and Ontario. The unicameral measure will not be voted on by the state Senate and Gov. Huntsman has stated he will not withdraw Utah from the WCI.

Industry

- **Utilities Disclose RGGI Compliance Costs.** Mirant Corp., which owns generating stations in Maryland, Massachusetts, and New York, revealed that its plants would emit approximately 16.6 million tons of CO₂ in 2009. At an expected allowance price of \$3.48, Mirant forecasted a total Regional Greenhouse Gas Initiative (RGGI) compliance cost of \$43 million in 2009. By contrast, Calpine Corp. announced that RGGI would have a neutral or even positive financial impact, since its combined-cycle gas-fired generators in Maine, New York and New Jersey emit CO₂ at less than half the rate of traditional coal-fired power plants.
- **Secondary RGGI Allowance Market Growing Quickly.** Potomac Economics, RGGI's independent market monitor, reported that RGGI futures trading has grown 113% since September 2008. An average of 330,000 futures contracts were traded daily in January. Over three quarters of RGGI options between August 15, 2008 and January 30, 2009 took the form of "puts," suggesting that most options traders expected allowance prices to decline over time. In addition, the report found no evidence of anti-competitive conduct during the first few months of secondary market trading and noted increased market stability over recent months. The next RGGI allowance auction is scheduled to take place March 18, 2009.
- **Duke CEO, Rural Electric Cooperatives Critique Pres. Obama's Proposed 100 Percent Auction.** Duke Energy CEO Jim Rogers stated that President Obama's proposal to auction 100 percent of emission allowances in a future federal cap-and-trade program would constitute a "cap-and-tax" program whose financial burden would fall disproportionately on Midwestern states that depend on coal as a power source. Rogers estimated that electricity rates would increase by as much as 40 percent if utilities had to operate under such a system. Citing the Clean Air Act's sulfur dioxide trading program, Rogers recommended that no more than 20% of allowances in a federal climate program be auctioned. Similar criticisms were raised in a letter from the National Rural Electric Cooperatives Association to President Obama, claiming that cooperative customers would see a rate increase of 15% under the proposed plan.
- **Global Economy Hurting Investment in Renewables, Energy Efficiency, and Carbon Sequestration.** A report by the British firm New Energy Finance estimated that global investment in renewable energy, energy efficiency, and carbon sequestration projects totaled \$150 billion in both 2007 and 2008, a dramatic increase from the \$34 billion invested in these

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“cleantech” industries in 2004. However, the report found that investment growth in cleantech industries has stalled, and forecasted that investment levels would stay constant at about \$150 billion per year until at least 2011. The report, titled “Global Futures 2009,” predicted that investment growth in the cleantech sector would resume after 2011, and reach \$350 billion in 2020.

Studies and Reports

- **U.S. Emissions Up 1.4% in 2007.** A draft annual report issued by the EPA found that U.S. GHG emissions increased by 17.1% between 1990 and 2007, and increased 1.4% in 2007 alone. The EPA attributed the 2007 numbers to a colder winter and a warmer summer than in 2006 as well as to a decrease in the availability of hydropower generation. Fossil fuel combustion was the source of 94.4% of U.S. CO₂ emissions in 2007. The draft report is available at <http://www.epa.gov/climatechange/emissions/usinventoryreport.html>.
- **Study Says President’s Cap-and-Trade Program Will Not Raise Taxes.** According to a report by the Center on Budget and Policy Priorities, claims that President Obama’s proposed cap-and-trade program is a tax increase for consumers are misleading. Because most of the revenues from the auction of emissions allowances would be returned to consumers to offset the increases in energy costs under the President’s plan, no significant tax increase would occur. The study is available at <http://www.cbpp.org/3-3-09climate.htm>.
- **Corn Ethanol Benefits Delayed.** A new study published in the journal *Ecological Applications* found that when land under a conservation program is plowed to grow corn for ethanol production, the carbon releases from the soil that result may offset carbon gains from biofuel production for at least half a century. Cellulosic ethanol was projected to produce the greatest sequestration gains—although conventional corn production can release 30-50% of the carbon stored in the soil, plants used for cellulosic ethanol could increase soil carbon levels by 30-50%, because they do not require annual plowing and planting. The authors concluded that climate change policies should not encourage the conversion of CRP or other set-aside lands to corn ethanol production, and that setting aside agricultural lands for conservation may be a more cost-effective means of sequestering carbon than using that land to produce corn-based ethanol for at least 100 years. The study is available at <http://www.esajournals.org/doi/pdf/10.1890/08-0645.1>.

International

- **EU Seeks 30 Percent Reduction from 1990 Emission Levels by 2020 for Developed Countries.** Meeting at the EU Council in Brussels, Belgium, EU environment ministers called on developed nations to adopt by mid-2009 an emission-reduction target of 30 percent from 1990 levels by 2020. The ministers urged the early acceptance of mid-term targets as part of preparations for the Conference of the Parties to United Nations Framework Convention on Climate Change, which will be held in Copenhagen, Denmark this December. The ministers’ recommendations sought commitments for €175 billion (\$221 billion) in climate change mitigation funding annually by 2020 from developed nations as a group. The EU ministers also called on developing countries to adopt “low carbon development plans” by the end of 2011.

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- **Indian Post-Kyoto Climate Position Calls for Focus on Historic Emissions.** India's Special Envoy for Climate Change Shyam Saran, the country's lead climate change negotiator, released a document detailing the country's positions for a post-Kyoto Protocol. The document said that the treaty should take into account historical emissions. In addition, the document noted that the nation will greatly resist a treaty that calls for binding emission caps for developing nations.

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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