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Climate Change Policy Update Week of March 9-13, 2009

Commentary: April marks the two-year anniversary of the Supreme Court's decision in Massachusetts v. EPA, and it appears that the EPA will mark the milestone by issuing the long anticipated "endangerment" finding for greenhouse gas emissions. We have this news from a widely-leaked agency presentation. The Agency apparently will pursue a deliberate path – first making the endangerment finding, and then following with proposed rules with respect to major sources of emissions, such as power plants and motor vehicles. However, it is not clear what discretion EPA has under the Clean Air Act to target sources selectively. Many commentators have argued that the finding necessarily will trigger a cascade of permitting requirements, including for relatively small facilities . . . Questions of process continue to cloud Senate efforts to move climate change legislation. A trial balloon idea of attaching a cap-and-trade program to the budget reconciliation process was brought down to earth by 29 Senatorial darts. The Majority Leader's proposal to move climate change together with energy also is looking increasingly deflated.

Executive Branch

- **Obama Administration Names New Personnel.** President Obama nominated Kristina Johnson, an electrical engineer and Johns Hopkins University provost, to serve as the Department of Energy's (DOE) Undersecretary for Energy. Johnson, who served on a climate change task force at Johns Hopkins, would oversee DOE's Office of Energy Efficiency and Renewable Energy, the Office of Fossil Energy, and other programs. The Administration also nominated Gina McCarthy, current Director of the Connecticut Department of Environmental Protection, to serve as the Environmental Protection Agency's (EPA) Assistant Administrator for Air and Radiation, the top official for implementing regulations under the Clean Air Act (CAA). A Republican, McCarthy was deeply involved in implementing Connecticut's participation in the Regional Greenhouse Gas Initiative (RGGI), a cap-and-trade program applicable to the power sector in ten Northeastern states. At the White House, Van Jones, a "green jobs" advocate and founder of the Oakland, CA nonprofit Green For All, began serving this week as President Obama's Special Advisor for Green Jobs, Enterprise and Innovation within the Council on Environmental Quality. Lastly, John Holdren and Jane Lubchenco – President Obama's nominees for director of the Office of Science and Technology Policy and the National Oceanic and Atmospheric Administration, respectively – were both unanimously approved by the Senate Commerce Committee this week.
- **EPA's GHG Endangerment Finding Likely to Omit Small Sources.** A draft EPA presentation suggests that the agency will soon make a limited Clean Air Act finding that only GHG emissions from large stationary and mobile sources endanger the public health and welfare. This "endangerment finding" would be a necessary precursor to EPA regulation of GHGs under the

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Clean Air Act, and would respond to the Supreme Court's remand order in the 2007 case of *Massachusetts v. EPA*. By restricting its scope to large sources, the endangerment finding could avoid the legal and practical problems posed by CAA requirements that "new source review" and operating permits apply to sources emitting as little as 100-250 tons of air pollutants per year. According to the document, the finding will be released for public comment by April 16, 2009 and will be accompanied by a "technical support document" addressing the environmental justice and human health implications of climate change impacts such as heat waves, impaired air quality and natural disasters. The draft presentation is available at http://www.eenews.net/public/25/10053/features/documents/2009/03/10/document_gw_01.pdf.

- **EPA Issues Proposed GHG Registry Rule.** EPA released a proposed rule to require mandatory, annual GHG emissions reports from industrial facilities that emit more than 25,000 tons of carbon dioxide-equivalent per year. When finalized, the rule will apply to approximately 13,000 facilities accounting for 85-90 percent of GHG emissions nationwide, including factories, refineries, landfills and about 50 large livestock operations. Manufacturers of mobile sources (vehicles and engines) would also be required to report emissions attributable to their products. The rule does not require third-party verification of the emission reports. Reporting would begin in 2011 for the 2010 calendar year, with an expected compliance cost of \$160 million in the first year. The omnibus spending bill signed this week requires EPA to finalize the rule by June 26 of this year. The rulemaking documents are available at <http://www.epa.gov/climatechange/emissions/ghgrulemaking.html>.
- **Omnibus Requires EPA Action on Waiver by June.** The omnibus spending bill financing government operations through September 2009, signed by President Obama this week, requires EPA to act on California's petition to implement its own vehicle GHG standards by June 30, 2009. Under the CAA, California is prohibited from enforcing its vehicle GHG standards (which have been preliminarily adopted by 14 other states) without a waiver from EPA. EPA denied the waiver request last year, but indicated in February that it would reconsider the waiver.
- **Interior Secretary Orders Designation of "Renewable Energy Zones."** Noting that the Department of the Interior has yet to act on over 220 applications to build solar and wind projects, Secretary of the Interior Ken Salazar announced the creation of an energy and climate change task force to designate and develop renewable energy zones on public lands. Salazar ordered the Department to prioritize siting, permitting and environmental review of renewable energy projects and transmission lines. Salazar also said he expects Interior to finalize a rule on offshore permitting of wind farms by the end of the year. According to a study cited by the Secretary, the offshore waters of the U.S. have a wind generating potential of more than 1,900 GW.
- **Deputy Interior Nominee Says ESA a Poor Mechanism for GHG Regulation.** At his confirmation hearing for the position of Deputy Secretary of the Interior, nominee David Hayes agreed that the Endangered Species Act (ESA) "is not well suited to dealing with climate change, which is a global phenomenon." The question arose in the context of Interior's recent consideration of whether federal agencies contemplating action with an impact on climate change would have to consult with the Fish & Wildlife Service first, since climate change is adversely affecting the habitat of polar bears and other threatened and endangered species. Hayes said the Secretary of Interior favors a "commonsense" implementation of the ESA.

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- **Presidential Memorandum on Use of Science in Policy Decisions.** Citing the need for reliable scientific advice to address climate change and energy efficiency, President Obama directed his Office of Science and Technology Policy on March 9 to develop a strategy for protecting the integrity of scientific information in policymaking. Issues to be addressed include the hiring of qualified scientific professionals, the use of peer review and other quality control methods, the public release of scientific information, and the adoption of “whistleblower” protections for personnel who identify government abuses of scientific process.

Congress

- **Senate Transmission Bills Differ on Key Details.** Senator Jeff Bingaman (D-NM) has circulated a draft transmission siting and planning bill. In contrast with the bill introduced a week earlier by Senate Majority Leader Harry Reid (D-NV), the Bingaman proposal would not designate renewable energy zones or establish new transmission line capacity solely to transport renewable energy, but rather directs consideration of a variety of criteria—including access to renewables, reliability, and reducing electric congestion—in planning transmission investments. The Bingaman bill would, however, allow developers of high-priority, high-voltage transmission projects to apply to FERC for a certificate of approval, bypassing any local and regional approval processes. Both bills would grant FERC authority over transmission planning and cost allocation if planning efforts by states and other stakeholders fail. The Bingaman draft is available at http://energy.senate.gov/public/index.cfm?FuseAction=IssueItems.View&IssueItem_ID=6a7e4b50-e86d-452b-b0eb-630b2c7c10d1.
- **Senate Approves, and President Signs, Omnibus Spending Bill.** The \$410 billion 2009 spending bill contains significant funding for energy and environmental programs, including \$1.93 billion for renewable energy and efficiency programs, and a funding increase of \$217 million for the Clean Coal Power Initiative. The legislation also empowers the Obama Administration to withdraw new endangered species rules put in force by the Bush Administration in January, including a rule prohibiting the regulation of GHGs in order to protect polar bears suffering from warming arctic temperatures and ice loss. The bill is available at http://appropriations.house.gov/FY2009_consolidated.shtml.
- **Energy and Commerce Turns to CCS.** The Energy and Environment Subcommittee of the House Energy and Commerce Committee held a hearing on carbon capture and storage (CCS) this week. Subcommittee member Rep. Rick Boucher (D-VA) plans to reintroduce legislation that would create a fund to support commercial-scale CCS deployment.
- **No Consensus on Senate Climate Change Strategy.** The debate over using the budget reconciliation process to pass climate change legislation ratcheted up this week. The budget requires only 51 votes to pass, but Budget Committee Chairman Sen. Kent Conrad (D-ND) observed that parliamentary rules against including extraneous matters would make it very difficult to incorporate a major climate program. Although Majority Leader Reid indicated that he is still considering it, 29 senators have signed a draft letter to Sen. Conrad and Budget Committee ranking member Sen. Judd Gregg (R-NH) opposing use of the budget process for climate change legislation. It is also unclear whether the Senate will combine climate change and energy legislation, as Sen. Reid had indicated last week. Senator Boxer (D-CA) said no decision

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has been made as to timing or vehicle, and a number of senators have expressed concerns about amalgamating the measures.

- **Congress Already Allocating Allowance Auction Funds.** The Clean Low-Emissions Affordable New Transportation Equity Act (CLEAN TEA) would use the revenue from auctioning 10% of the allowances in a yet-to-be-created cap-and-trade program to fund transportation projects that would reduce GHG emissions. Sens. Thomas Carper (D-DE) and Arlen Specter (R-PA) introduced legislation in the Senate following the introduction of H.R. 1329 by Rep. Earl Blumenauer (D-OR).

States and Cities

- **California Legislator Introduces Renewable Energy “Feed-In Tariff” Legislation.** California state Senator Fran Pavley (D) introduced legislation intended to promote the development of renewable energy generation projects in the state through a “feed-in tariff” on renewable electricity. The legislation would provide economic incentives for the development of renewable energy generation capacity by requiring utilities to purchase renewable electricity at specific, above-market rates. Such tariffs have been implemented by a number of European countries. Sen. Pavley previously authored the 2002 bill establishing California’s vehicle GHG emission standards (A.B. 1493) and co-authored the state’s landmark 2006 climate change legislation (A.B. 32).

Industry

- **Clean Energy Industry Revenues Grew in 2008.** The worldwide revenues of renewable energy and clean technology companies grew to \$116 billion in 2008, a 53% increase over the previous year, according to market analyst Clean Edge Inc. The wind power sector alone accounted for \$51 billion in revenues, compared to \$29.6 billion for the solar industry. Together, the wind and solar sectors created 600,000 jobs last year. Clean Edge predicted that the revenues of the cleantech sector will grow to \$325 billion in revenues and create 2.7 million jobs by 2018. The report is available at <http://www.cleantech.com/reports/reports-trends2009.php>.
- **RGGI Likely to Have Excess Supply of Allowances in 2009.** Point Carbon reported that the carbon dioxide emissions of facilities covered by RGGI fell by a surprising 8.9% in 2008. Emissions increased slightly in Vermont, Maine, New Hampshire, and Rhode Island, but declined by 5 to 17% in the other six RGGI states. The reduction was attributed to a combination of high oil prices, a sluggish economy, warmer weather and state energy efficiency programs. As a result, the RGGI cap-and-trade system is expected to have an excess supply of 31.8 million allowances. Created in 2005, RGGI is a regional cap-and-trade program for carbon dioxide emissions from the power sector in 10 Northeastern states.
- **New Voluntary Climate Disclosure Framework for Automotive Sector.** The Institutional Investors Group on Climate Change, Ceres, and the Investor Group on Climate Change have released a template for automobile manufacturers to voluntarily disclose business risks and strategies related to climate change. Drafted by investment professionals and industry representatives, the framework calls for companies to reveal: 1) long-term strategies for reducing vehicle GHG emissions and improving fuel economy and 2) data on sales mix, CO₂ emissions,

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and status of efforts to develop clean vehicles. The sponsors are working to integrate this framework with existing disclosure protocols developed by the Carbon Disclosure Project and the Global Reporting Initiative. The template is available at <http://www.iigcc.org/docs/PDF/Public/AutoDisclosureFramework.pdf>.

- **S&P Creates New “Carbon Efficient Index.”** Standard & Poor’s (S&P), the sponsor of the S&P 500 index, launched a new index consisting of the 400 firms in the S&P 500 with a below-average ratio of greenhouse gas emissions to revenues. Firms in the new index had an average carbon footprint 48% smaller than that of the S&P 500 as a whole.

Studies and Reports

- **Recent Research Shows Climate Impacts Underestimated.** New research indicates that sea levels will likely rise between .5 and 1 meter by 2100, double the predictions of the 2007 fourth assessment report by the U.N. Intergovernmental Panel on Climate Change. Previous models failed to capture the significance of glacial ice slipping into the ocean and the importance of ice loss in Antarctica. The research was presented at the International Scientific Congress on Climate Change, and is available at <http://www.iop.org/EJ/toc/1755-1315/6/1>. Another report, by the U.K.’s Hadley Centre, predicts that rising temperatures, not deforestation, could destroy the Amazon rainforest. A 2 degree rise in global temperatures (at the low end of predicted increases) would kill 20-40% of rainforest trees, while a 4 degree rise would kill 85% of the trees. The article has been submitted to the *Nature Geoscience* journal.
- **Reports on Renewables Optimistic.** A report by the German Aerospace Center, commissioned by Greenpeace and the European Renewable Energy Council, projects that the U.S. can reduce CO₂ emissions by 85% below 1990 levels by 2050 through energy efficiency improvements and increased use of renewables, while eliminating use of coal and nuclear. The report is available at <http://www.greenpeace.org/usa/press-center/reports4/energy-r-evolution-a-sustain>. According to another line of research by Peter Lund of the Laboratory of Advanced Energy Systems at the Helsinki University of Technology, renewable energy sources could supply 40% of the world’s electricity demand by 2050—if they receive significant political and financial support. With \$256 to \$385 billion in investment, Lund projects that wind energy could be profitable in ten to fifteen years. Solar energy would require even more investment, and take longer to achieve profitability.
- **Climate Change Polls in Conflict.** A Gallup poll released this week found that 41% of Americans believe that the seriousness of climate change is exaggerated in the media, an increase fueled by rising skepticism in Republicans and independent voters, but only those over the age of 30. Sixty-nine percent of those under 30 believe that media coverage of climate change is accurate. Sixty percent describe worrying about climate change, a slight decrease from last year and less than the percentages for other environmental issues. The poll is available at: <http://www.gallup.com/poll/116590/Increased-Number-Think-Global-Warming-Exaggerated.aspx>. A Zogby poll of likely voters, however, found that 58% of Americans agree with President Obama’s call for “a market-based cap on carbon pollution”, including 73% of political moderates, 55% of self-described Independents, 68% of voters aged 18-24, 88% of African-Americans, and 61% of Hispanics. The poll results are described at: <http://www.zogby.com/news/ReadNews.cfm?ID=1683>.

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International

- **EU Parliament Resolution Urges Aggressive Negotiating Position.** The European Union (EU) Parliament passed easily a resolution calling for the EU to adopt an aggressive negotiating position at international talks on a successor treaty to the Kyoto Protocol this December in Copenhagen, Denmark. The resolution calls on the EU to push for developed nations to commit to a 40 percent reduction in GHG emissions from 1990 levels by 2020 that would be achieved entirely from domestic sources and not from the use of offset credits purchased from developing nations. The resolution also seeks to incorporate into the climate treaty regular reviews designed to update emissions targets based on the latest science. The non-binding resolution is part of the EU's internal debate over its negotiating position on the post-Kyoto treaty and comes a week after the lead U.S. climate negotiator responded to an EU proposal for midterm targets by stating his opposition to including any mid-term targets in the treaty.
- **EU, Japan Sign Joint Climate Agreement.** European and Japanese officials signed an agreement to jointly develop nine projects aimed at countering climate change. The agreement aims to commercialize technologies related to solar power generation, power storage, and CCS.
- **Australia Releases Draft Cap-and-Trade Legislation.** The Australian government released legislation that would make binding the nation's previously-announced GHG emission targets through a cap-and-trade program. The bill would cap the nation's GHG emissions at 5-15 percent below 2000 levels by 2020 (depending on the result of international negotiations on a successor treaty to the Kyoto Protocol this December) and 60 percent below by 2050. As currently written, the Carbon Pollution Reduction Scheme Bill would cap emissions in five-year intervals beginning in 2010, accept for compliance purposes emissions allowances issued through the domestic cap-and-trade program or the Kyoto Protocol's Clean Development Mechanism, distribute most allowances by auction, allow unlimited banking and limited borrowing of allowances, and impose a price ceiling during the first five-year implementation period. While Australian Prime Minister Kevin Rudd supports the legislation, his Australian Labor Party does not have a majority and will require the support of other legislators to pass the bill.

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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