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Climate Change Policy Update Week of March 16-20, 2009

Commentary: *The path to a climate change bill in the Senate remains murky. Plans are made and unmade. Majority Leader Reid's initial suggestion that the Senate simultaneously work on energy and climate change legislation appears to have been put aside. Chairman Boxer's trial balloon about pursuing cap-and-trade as part of the budget reconciliation process (which is immune to filibusters) attracted a quick letter opposition from 33 Senators, include 8 Democrats . . . While efforts in the House of Representatives are largely focused on the Energy & Commerce Committee, other committees are asserting their interest. Ways & Means held a hearing on trade and competitiveness issues associated with climate change. The Agriculture Committee distributed a questionnaire seeking comment on policy design surrounding offsets and market oversight . . . Governors and their representatives are actively participating in the design of the Western Climate Initiative, but it is not clear whether the state legislatures are going to go along for the ride. This week, legislators in New Mexico and Washington sent signals of reluctance – or possibly outright rejection . . . China suggested that nations that import its goods be responsible for the emissions associated with manufacturing the goods. European Union officials demurred, noting that China is unlikely to allow the EU or other foreign governments to regulate Chinese factories any time soon.*

Executive Branch

- **President Obama Continues Appointments.** Pres. Obama has nominated Cynthia Giles to serve as Assistant Administrator for Enforcement at the Environmental Protection Agency (EPA). Currently director of the Conservation Law Foundation's Rhode Island Advocacy Center, Giles was known as a strong advocate for Rhode Island's participation in the Regional Greenhouse Gas Initiative (RGGI) and adoption of California's vehicle greenhouse gas (GHG) emission standards. Pres. Obama also announced the nomination of Michelle DePass, a program officer at the Ford Foundation, for Assistant Administrator for International Affairs at EPA. At the Department of Energy (DOE), Scott Blake Harris has been nominated as General Counsel. If confirmed, Harris would help shape the Department's clean energy financing programs. Also last week, Senate committees voted to send the nominations of David Hayes and Gary Gensler, the President's choices for Deputy Secretary of Department of the Interior and Commodity Futures Trading Commission Chairman respectively, to the full Senate for approval. In addition, the Senate confirmed the nominations of Jane Lubchenco as Director of the National Oceanic and Atmospheric Administration, and John Holdren as Director of the White House Office of Science and Technology Policy. President Obama has nominated Jon Wellinghoff to be Chairman of the Federal Energy Regulatory Commission (FERC). Wellinghoff, who helped draft Nevada's renewable electricity standard, is currently the acting Chairman of FERC. Suedeen Kelly of New Mexico was also renominated to a second term.

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- **White House Aide Says Cap-and-Trade Revenue Could Exceed Estimates.** In a closed session with Senate Finance Committee staff, the Deputy Director of Pres. Obama's National Economic Council, Jason Furman, stated that revenues from a Federal cap-and-trade program for GHGs could be as high as two to three times the administration's public estimate. The President's budget requested for fiscal year 2010 projected that a cap-and-trade program would raise \$645.7 billion between 2012 and 2019.
- **Energy Secretary Supports "Carbon Tariff."** In testimony to the House Science and Technology Committee, Secretary of Energy Steven Chu floated the concept of a "carbon tariff" as "just one proposal" for eliminating the competitive disadvantage that U.S. manufacturers might face if the United States implements a cap-and-trade program while major trading partners—such as China—do not. Chu's remarks follow comments this week by Li Gao, a Chinese environmental official, criticizing carbon tariffs.
- **New Fuel Economy Standards Will Not Preempt State GHG Programs.** Signaling a reversal of Bush administration policy, the National Highway Traffic Safety Administration (NHTSA) announced that the final version of forthcoming Corporate Average Fuel Economy (CAFE) standards for model year 2011 would not preempt the vehicle GHG standards for which California and other states have requested an EPA waiver under the Clean Air Act. A preliminary version of the NHTSA rule issued last year stated that the CAFE standards would preclude the states from implementing their own GHG standards, even if a waiver for such standards under Clean Air Act was granted by EPA. The NHTSA announcement said it would "reconsider" its new position for purposes of developing CAFE standards for model years 2012 and after.
- **FERC and Interior Agree on Jurisdiction Over Offshore Renewable Energy.** Interior Secretary Ken Salazar informed the Senate Energy and Natural Resources Committee that the FERC and the Minerals Management Service (MMS) have resolved a long-standing jurisdictional conflict over the regulation of offshore renewable energy projects. The agencies will sign a memorandum of understanding (MOU) which gives FERC primary responsibility for licensing ocean, wave, and tidal power projects, with the "active involvement" of the Interior Department. The agencies will also cooperate to promulgate offshore alternative energy rules governing the siting and permitting of these hydropower projects. MMS will retain jurisdiction over leases for offshore wind development.
- **EPA Panel Examining Price-Anderson Liability Regime for CCS Projects.** EPA's Environmental Financial Advisory Board, which is preparing recommendations for the agency on a legal framework for carbon capture and sequestration (CCS) projects, indicated that it is considering the 1957 Price-Anderson Act as a guide. That statute created a "three-tiered" system of limited liability for nuclear accidents, under which the facility owner is responsible for obtaining the maximum liability insurance available in the market; the industry as a whole is required to provide a limited fund (currently over \$10 billion) to pay claims in excess of the facility insurance policy; and the Federal government issued a nonbinding promise to compensate all remaining claims. A working paper released by the Board observed that the Price-Anderson law provided a needed incentive for growth in the nuclear industry, and could do the same for CCS projects.

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- **USGS Releases Carbon Sequestration Assessment Methodology.** As required by the Energy Independence and Security Act of 2007, the U.S. Geological Survey (USGS) has released a methodology for estimating the carbon sequestration capacity of geological formations. The USGS methodology borrows from the agency's National Oil and Gas Assessment procedures. USGS estimates of storage potential will exclude saline formations and oil and gas reservoirs having a total capacity of less than 2 million cubic meters (approximately the volume of emissions released by a small industrial plant in one year), as well as formations located at a depth of less than 3,000 feet or greater than 13,000 feet. Coal deposits that could later be opened for mining are also omitted under the USGS methodology. The methodology is available at <http://pubs.usgs.gov/of/2009/1035/ofr2009-1035.pdf>

Congress

- **Congressional Leaders Discuss Climate Strategy.** Key Congressional leaders in the effort to produce cap-and-trade legislation—Senate Environment and Public Works Committee Chairman Barbara Boxer (D-CA), House Energy and Commerce Committee Chairman Henry Waxman (D-CA), Energy and Commerce Subcommittee on Energy and Environment Chairman Edward Markey (D-MA), and Senate Foreign Relations Committee Chairman John Kerry—reportedly all met this week to discuss strategy for moving a climate bill. Sen. Boxer has also met with the White House, EPA, and DOE, and said she believes “a strategy is developing to see how this bill comes together.” A group of moderate Senate Democrats representing manufacturing states, who expressed serious concerns about previous climate change legislative proposals, has also met recently. Group member Sen. Debbie Stabenow (D-MI) described the group's interactions with the Congressional climate leadership as “very collaborative”.

Senator Boxer continues to discuss the possibility of using the budget reconciliation process—which requires only a simple majority for passage and is therefore immune from the filibuster process—to move some portion of the climate change legislative program. However, 33 senators are now on the record in opposition to this approach, including eight Democrats. The membership of the Blue Dog Democratic coalition in the House has also opposed the fast track option. Senator Boxer emphasized that, at a minimum, it is critical to include the Obama Administration's projections of emission auction revenues in the Senate budget resolution, as a signal of Congress' firm commitment to pass cap-and-trade legislation.

- **Bipartisan Bill Would Create Flex-Fuel Fleet.** The Open Fuel Standard Act (H.R. 1476), introduced by Reps. Eliot Engel (D-NY), Steve Israel (D-NY), Roscoe Bartlett (R-MD), and Bob Inglis (R-SC), would require half of new U.S. automobiles to accept E85 or M85 in 2012, and 80% by 2015. E85 is a blend of 85% ethanol and 15% gasoline; M85 is a blend of 85% methanol and 15% gasoline. The bill requirements parallel those of legislation introduced last summer by Sen. Joe Lieberman (I-CT), Sen. Sam Brownback (R-KS), and then-Senator Ken Salazar (D-CO). Salazar is now Secretary of the Interior.
- **Senate Energy Leadership Tackles Efficiency Standards.** Senate Energy and Natural Resources Committee Chairman Jeff Bingaman (D-NM) and Ranking Member Lisa Murkowski (R-AK) co-sponsored legislation to accelerate the Department of Energy's program for setting efficiency standards for home and industrial equipment and to improve the administration of the Energy Star appliance labeling program, which is run by DOE and EPA. The bill also sets new

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efficiency standards for portable light fixtures. The “Appliance Standards Improvement Act” will likely be attached to a larger energy bill currently being drafted. Committee staff announced this week that the energy legislation is also likely to include provisions to significantly improve the energy efficiency of new homes and buildings. Text of the efficiency bill is available at http://energy.senate.gov/public/index.cfm?FuseAction=IssueItems.View&IssueItem_ID=3bb8eae7-36fd-483e-85cc-a478c0fa4524.

- **Rep. Van Hollen Proposes Revolving Efficiency Fund.** Rep. Chris Van Hollen (D-MD) has introduced legislation to provide zero-interest loans to homeowners to make energy-efficiency improvements. The loans would be repaid through property taxes, and repayment schedules would ensure that energy cost savings from the efficiency measures would exceed loan payments. The National Energy Home Savings Revolving Fund Act is available at <http://vanhollen.house.gov/HoR/MD08/Newsroom/Press+Release+by+Date/2009/3-17-09+Van+Hollen+Introduces+the+National+Home+Energy+Savings+Revolving+Fund+Act.htm>.
- **Rep. Inglis Circulates Carbon Tax Bill.** Rep. Bob Inglis (R-SC), ranking member of the House Science and Technology Subcommittee on Energy and Environment, has released a draft carbon emissions tax bill as an alternative to the cap-and-trade bills being drafted in Congress. Inglis argues that the market cannot be trusted with a carbon allowance trading scheme. The “Raise Wages, Cut Carbon Act of 2009” would place a tax on fossil fuels based on their carbon content, beginning at \$15 per ton of CO₂ in 2010 and rising to \$100 (inflation-adjusted) per ton by 2042. The legislation would place a similar tax on imported goods. Tax revenues would be used to cut payroll taxes and increase Social Security payments. The bill is available at http://inglis.house.gov/issues.asp?content=sections/issues/rnct_homepage.

States and Cities

- **Washington Senate Approves Bill Requiring Study of GHG Reduction Options.** The Washington state Senate approved a bill that would require the state to conduct a one-year study of options for reducing GHG emissions, which includes a review of alternatives to cap-and-trade. The bill is intended as an alternative to a proposal by Governor Christine Gregoire (D) for the state to participate in the Western Climate Initiative (WCI) and could have the effect of delaying or preventing the state’s participation in the regional GHG cap-and-trade program. The bill must now be passed by the state House before it is sent to the Governor. Under its 2008 GHG emission targets, the state aims to reduce its emissions to 1990 levels by 2020 and 50 percent below 1990 levels by 2050. The WCI is a regional cap-and-trade program comprised of seven western states and four Canadian provinces.
- **New Mexico WCI Implementing Legislation Fails.** Legislation that would implement the GHG cap-and-trade program being developed by the Western Climate Initiative failed in the New Mexico legislature. The legislation, which was introduced in the state House but did not go to a vote before the end of the legislative session this week, would have authorized the state Environmental Improvement Board to implement the cap-and-trade program for power plants. No further action will be taken on the bill until the legislature reconvenes in January 2010.
- **North Dakota Carbon Sequestration Bill Goes to Governor.** The North Dakota House passed a bill that would establish a statutory framework for carbon sequestration activities in the state.

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In addition to addressing public safety and liability issues, the bill would authorize the North Dakota Industrial Commission to draft and implement regulations for issuing permits related to sequestration activities in the state. The legislation has already passed the state Senate and goes to Governor John Hoeven (R) to become law.

- **CARB Begins Early Action Credit Rulemaking Process.** The California Air Resources Board (CARB), the state agency charged with implementing California's A.B. 32 climate change law, began the rulemaking process for crediting "early action" GHG reductions. In the "Recognition of Early Action in a Cap-and-Trade System" rulemaking, CARB will determine which types of projects are eligible for early action credits, and will likely include a cutoff date; projects commenced before the cutoff date will not receive credits. CARB is not expected to finalize the rule until late 2010.
- **State Utility Regulators Urge Free Allowance Allocation for Transmission Companies.** In a letter to Office of Management and Budget Director Peter Orszag, the National Association of Regulatory Utility Commissioners (NARUC) urged the Obama Administration to allocate free allowances to regulated local distribution companies (LDC). The NARUC letter was in response to President Obama's Fiscal Year 2010 budget, which did not include any allocation, but rather proposed auctioning 100 percent of the allowances and directing the revenues to a broad-based tax cut and funding for low carbon technology. In seeking the free allowances, NARUC argued that the free allocation of allowances to LDC's would be an appropriate transitional measure that would ensure reliability and technology development, while avoiding the problems associated with the free allocation of allowances to unregulated entities.
- **Pittsburgh Implements Nation's First City-Wide GHG Reduction Program.** Pittsburgh, Pennsylvania has created the nation's first city-wide program intended to generate broad participation in meeting the city's GHG emission reduction goal. The "Black and Gold City Goes Green" campaign will encourage city residents, businesses, universities and governments to take one small action each month to reduce emissions. The program will promote actions such as exchanging incandescent light bulbs for compact fluorescent bulbs, reducing water heater temperature, maintaining tire pressure and driving the speed limit. Pittsburgh aims to reduce its GHG emissions to 20 percent below 2003 levels by 2023.

Industry

- **Insurance Regulators Require Climate Risk Reporting.** The National Association of Insurance Commissioners (Association) unanimously agreed to require regulated insurance companies to complete an annual "climate risk survey." Under the proposed rule, which state insurance commissioners are encouraged—but not required—to enforce, insurance companies with annual revenues of \$500 million or greater will have to report on their efforts to persuade customers to reduce GHG emissions, as well as their internal processes for assessing the financial risk of natural disasters associated with climate change. The Association's climate change task force will begin monitoring compliance with the rule over the next year.
- **Voluntary Offset Registry Launches Standard for Forest Projects.** The American Carbon Registry, a voluntary carbon registry owned by Winrock International, has released new standards for quantifying, monitoring and reporting emission reductions from afforestation, reforestation

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and forest management projects. The standard incorporates the California Climate Action Registry's requirement that project sponsors provide "buffer" credits as insurance against reversals in claimed reductions from offset projects. However, in contrast to the CCAR, project sponsors can obtain these buffer credits from other offset projects.

- **Moody's Finds Federal Climate Regulation Poses Long-Term Credit Risks for Utilities.** A report by the credit rating agency Moody's predicted that Federal legislation to address climate change would pass in the next 12 to 18 months, creating long-term credit risks particularly for coal-dependent electric utilities. The report found that transmission and generation cooperatives, and regulated investor-owned utilities, will be best-positioned to pass cost increases due to GHG regulation to their customers, and thus enjoy the greatest protection from long-term credit risks. Assuming an economy-wide cap-and-trade program with allowances trading at \$20 per ton of carbon dioxide, the report predicted that power prices would rise about 15 to 30%. In the near-term, Moody's expects the credit implications of GHG regulations to be neutral, since any U.S. cap-and-trade program would have a long lead time before beginning to affect firm balance sheets.

Studies and Reports

- **Scientists Estimate Substantial Probabilities for Climate Tipping Points.** Forty-three climate experts were asked to assess the probability that global average temperature changes would trigger major changes in the climate system. The results, weighted by self-assessed expertise levels, suggest that a 2-4 degree rise in average global temperatures relative to year 2000 levels by 2200 would have a 16% or greater likelihood of triggering at least one major climate change. A temperature rise of more than 4 degrees would increase the probability of reaching a tipping point to 56%. The tipping points evaluated included major changes in ocean circulation, Greenland or West Antarctic Ice Sheet disintegration, a dieback of the Amazon rainforest, and a shift to a more permanent El Niño regime. The study, which will be published in the Proceedings of the National Academy of Sciences, is available at <http://www.pnas.org>.

International

- **China Disclaims Responsibility for Export Emissions.** Chinese climate officials suggested that, under any successor treaty to the Kyoto Protocol, China should not be responsible for GHG emissions resulting from the production of goods for export to developed nations. Noting that 15-25 percent of Chinese emissions are related to goods produced for export, the Chinese officials said that the importing nations should be responsible for those emissions. Responding to the Chinese statements, EU officials noted that such a proposal would be unworkable because China is unlikely to grant the importing nations authority to regulate emitting sources in Chinese territory.
- **Australia, New Zealand To Evaluate Joint Carbon Market.** Australia and New Zealand established a joint working group that will evaluate the potential for creating a joint carbon market. The working group will review options for harmonizing emission reduction programs in two countries, focusing on rules related to price caps, import and export of emission credits, allowance allocation methodologies, administrative issues, sectoral coverage and point of regulation.

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- **Japan Establishes \$5 Billion Environmental Lending Facility.** The Japanese Ministry of Finance established a lending facility that will support GHG emission-reducing infrastructure projects in developing nations. Called the Leading Investment to Future Environment (LIFE) Initiative, the lending facility will provide \$5 billion over the next two years to support a variety of emission reducing projects including: renewable power generation; energy efficiency programs; and transportation system construction. The facility will use funds provided by the Japanese Bank for International Cooperation, as well as a number of multilateral lending institutions and the private sector.

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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