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Climate Change Policy Update Week of February 1-5, 2010

Commentary: *President Obama and Sen Lindsey Graham (R-SC) exhorted Senators to pass comprehensive climate and energy legislation in 2010 . . . Senators Carper (D-DE) and Alexander (R-TN) introduced a bill that would regulate power plant emissions of sulfur dioxide, nitrogen oxides, and mercury. Senator Graham co-sponsored and said he envisioned eventually appending the bill to a greenhouse gas program . . . EPA finalized a renewable fuels standard that allows for a broader range of corn-based ethanol fuels to qualify as “renewable” than its original 2009 proposal . . . Reps. Collin Peterson (D-MN), Ike Skelton (D-MO), and Jo Ann Emerson (R-MO) introduced legislation that would amend the Clean Air Act to exclude greenhouse gases from the category of “air pollutants,” which would prevent EPA from regulating GHG emissions under the Act . . . In response to a request from Sen. Voinovich (R-OH), EPA issued a new modeling analysis of the Waxman-Markey bill . . . The Department of Defense Quadrennial Defense Review highlighted climate change as a security threat . . . 55 countries, representing 78% of global greenhouse gas emissions, have now offered emission mitigation commitments under the Copenhagen Accord.*

Executive Branch

- **President Obama Speaks on Future of Climate Legislation.** President Obama commented on the prospects for climate change legislation in several appearances this week, signaling that the Administration has renewed its focus on the issue. At a summit with Senate Democrats on February 3, the President urged members not to take “the easy way out” by passing a bill that only contains tax credits for clean energy but does not place a price on greenhouse gas (GHG) emissions. The President also complimented Sens. John Kerry (D-MA), Joseph Lieberman (I-CT), and Lindsey Graham (R-SC) for their efforts to reach a “tripartisan” compromise bill that would muster the 60 votes needed to break an expected Republican filibuster of climate change legislation. Earlier this week in Nashua, New Hampshire, the President acknowledged that emission caps were “the most controversial aspects of the energy debate” in Congress and said “we may be able to separate” the GHG and energy provisions of climate change legislation in the Senate. However, the President also criticized an energy-only bill as akin to doing “the fun stuff before we do the hard stuff.”
- **EPA Finalizes RFS.** The Environmental Protection Agency (EPA) issued a long-awaited final rule implementing the revised Renewable Fuel Standard (RFS) provisions of the Energy Independence and Security Act of 2007. Under the new RFS, refiners and importers of transportation fuel will be required to purchase target quantities of renewable fuels, including separate sub-targets for cellulosic ethanol, biomass-based diesel and “advanced biofuels.” The

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new RFS takes effect this year and will initially require that renewable fuels account for 8.25% of the nation's fuel supply, a proportion that is scheduled to increase through 2022. However, the agency also reduced the target volume of cellulosic ethanol from the 100 million gallons provided in the statute to just 6.5 million gallons, citing insufficient supplies. To qualify as "renewable," fuels are required to meet minimum lifecycle GHG improvements over gasoline as specified in Section 211 of the Clean Air Act. For purposes of the 2010 RFS, EPA determined that ethanol produced from corn starch at highly efficient natural gas facilities would satisfy the lifecycle GHG criteria for renewable fuels, even after taking into account the indirect impacts on global land use that result from diverting a portion of the food supply to fuel production. This determination was a departure from EPA's original proposal, released in spring 2009, in which the agency suggested that these indirect impacts would cause corn ethanol from new facilities to be disqualified from the RFS. The 2009 proposal sparked a firestorm of criticism from Congressmen representing rural districts. The new regulation is available at: <http://www.epa.gov/oms/renewablefuels/rfs2-regs.pdf>.

- **Working Group on EPA GHG Regulations Releases Inconclusive Phase I Report.** The Climate Change Work Group, a subcommittee of EPA's Clean Air Act Advisory Committee (CAAAC), presented the first phase of a report on recommendations for applying the pollution control requirements of the Clean Air Act to GHG emissions from large power plants and industrial facilities. The Prevention of Significant Deterioration (PSD) provisions of the Clean Air Act obligate new and modified pollution sources to obtain preconstruction permits that require "best available control technologies" (BACT) for regulated pollutants. GHGs are expected to become regulated pollutants once EPA issues new motor vehicle GHG standards, due in March of this year. The work group did not make specific determinations of what technologies would qualify as BACT for sources subject to the PSD program. However, the work group did recommend that EPA expand its online BACT database to include GHG control technologies, and made suggestions to EPA and state regulators on factors to be considered in making BACT decisions. The group also agreed that energy efficiency should be considered as a BACT strategy and that the current approach to case-by-case determination of BACT can be extended to GHGs. Critical issues on which the working group was not able to reach consensus included the acceptability of allowing BACT to include offsetting energy efficiency or emissions reductions at facilities other than the source being permitted; the use of off-site carbon sequestration; the use of fuel-switching as BACT; and the possibility of imposing firm cost ceilings on BACT. The report suggested that these issues may be addressed in a "Phase II" report. The work group, which was formed in October 2009, includes representatives of state clean air agencies, environmental organizations, and major industries. More information on the work group, and a list of its members, is available at: <http://www.epa.gov/oar/caaac/climatechangewg.html>.
- **Administration's Proposed FY2011 Budget Omits Cap-and-Trade Revenues, Boosts Climate-Related Funding.** Unlike last year's proposal, the Obama Administration's proposed budget for fiscal year 2011 does not include detailed projections of anticipated revenues and expenditures related to a nationwide cap-and-trade program. Instead, the budget includes a placeholder for cap-and-trade revenues and indicates that any such program would be deficit neutral. In addition, the budget provides significant additional funding for EPA's climate change regulatory efforts even as the agency's overall budget would be reduced by \$278 million. Among the line items provided in the budget are \$21 million for implementation of EPA's new GHG reporting rule, and \$25 million in grant funding to assist states in implementing new PSD and

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Title V permitting requirements for GHG sources. The Administration also requested \$7 million to support development of New Source Performance Standards for industrial sources– a Clean Air Act program that the Administration has not yet proposed to apply to GHGs. The proposed budget is available at: <http://www.whitehouse.gov/omb/budget/fy2011/assets/budget.pdf>.

- **EPA Revises Waxman-Markey Allowance Price Estimates.** Responding to a request from Sen. George Voinovich (R-OH), the EPA published a supplemental economic analysis of the Waxman-Markey climate change bill that included 13 additional scenarios. The analysis found that the availability of international offset credits for compliance with the cap-and-trade program is critical to controlling prices; in a scenario where no international offset credits are available, the agency found that allowance prices would range from \$9 to \$45 per ton CO₂-equivalent in 2012 and between \$13 and \$67 per ton by 2020. By comparison, the agency’s “core scenario” – which reflects what the agency views as moderate assumptions regarding technology deployment and offsets availability – predicted an emissions price of \$20 per ton by 2020. Other assumptions considered by EPA in the supplemental analysis include scenarios in which there is no development of nuclear power; no availability of carbon capture and sequestration technology; and no increased use of biomass. In a cover letter accompanying the analysis, EPA Administrator Lisa Jackson said that the agency did not include those scenarios in its previous analysis because “we were not aware then – and are still not aware – of information suggesting a reasonable possibility that they would occur.” The letter and analysis are available at: <http://www.epa.gov/climatechange/economics/economicanalyses.html>.
- **Climate Change Highlighted as Security Concern in Quadrennial Defense Review.** The latest Quadrennial Defense Review issued by the Department of Defense (DOD) includes a discussion of the security implications of climate change – a first for the Review, which was first issued in 1996. The analysis, which was required in the 2008 National Defense Authorization Act, found that natural disasters related to climate change would increase demand for humanitarian and security assistance provided by the U.S. military, and called climate change an “accelerant of instability or conflict, placing a burden to respond on civilian institutions and militaries around the world.” Climate change could have significant geopolitical impacts, the report notes, by contributing to poverty; increasing food and water scarcity; expanding the spread of disease; weakening fragile governments; triggering mass migration; and accelerating instability or conflict. In addition, the review noted previous intelligence analyses finding that about 30 military installations are already facing risk from elevated sea levels. The Quadrennial Defense Review is available at: <http://www.defense.gov/QDR/QDR%20as%20of%2029JAN10%201600.pdf>.

Congress

- **Graham Rejects Energy-Only Bill, Co-Sponsors Carper 3P Clean Air Act Amendments.** Sen. Lindsey Graham (R-SC), a leader in the effort to create a compromise climate-energy package, rejected calls for passage of what he termed a “half-assed” energy-only bill in 2010. Sen. Graham also said that Senate negotiations include consideration of a cap-and-trade system for certain sectors of the economy with a carbon fee on other sectors. He and Sens. John Kerry (D-MA) and Joe Lieberman (I-CT) have circulated language on offshore drilling, natural gas, and carbon capture and storage, Sen. Graham told reporters. Sen. Graham also co-sponsored the 3P bill introduced by Sens. Tom Carper (D-DE) and Lamar Alexander (R-TN) this week, which

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would regulate mercury, NO_x, and SO₂, and said that he would like to eventually incorporate the 3P bill into the climate-energy bill. Senate Finance Committee Chair Max Baucus (D-MT), who has said that his committee will mark up portions of the energy-climate legislation, told reporters there was no schedule for doing so.

- **Reps Introduce Bill To Block EPA and Provide Agriculture With Legislative Responses to Recent Controversies.** Reps. Collin Peterson (D-MN), Ike Skelton (D-MO), and Jo Ann Emerson (R-MO) introduced legislation that would amend the Clean Air Act to exclude GHGs from the category of “air pollutants,” preventing EPA from regulating GHG emissions under the Act. In addition, the bill would prohibit EPA from considering GHG emissions from international land use change when calculating the emissions intensity of biofuel production. The legislation also provides a definition of renewable biomass for use under the Renewable Fuel Standard that would allow use of material from federal forests and conservation areas.

Judicial

- **Industry Associations File Constitutional Challenge to California LCFS.** The National Petrochemical & Refiners Association, the American Trucking Association, the Center for North American Energy Security, and the Consumer Energy Alliance have filed a complaint in the United States District Court for the Eastern District of California in a bid to overturn the State of California’s low-carbon fuel standard (LCFS). Claiming that the LCFS will discourage sales of fuels produced out-of-state, such as gasoline refined from tar sands, the complaint alleges that the LCFS imposes an unreasonable burden on interstate commerce in violation of the Commerce Clause of the U.S. Constitution. Mary Nichols, Chairman of the California Air Resources Board, called the suit “shameful” and defended the LCFS as a “critical tool to help us break our dependence on fossil fuels.” The LCFS, which is intended to reduce the lifecycle GHG emissions of transportation fuels sold in California by 10 percent by 2020, went into effect on January 12 of this year. The complaint is available at: http://www.npra.org/files/020210_LCFS_Complaint_Filed.pdf.

Industry and NGOs

- **EPSA Prefers Comprehensive Bill to Utility-Only Cap-and-Trade.** With interest in alternative approaches to climate change legislation growing in the Senate, the Electric Power Supply Association (EPSA) – a trade association of independent power generators and marketers – continues its support for an economy-wide climate and energy bill. The association’s CEO, John Shelk, said in an interview last week that EPSA members had discussed the possibility of both an “energy-only” bill and a cap-and-trade program focused on the utility sector, but still preferred comprehensive legislation that “would address both climate and energy.” However, Shelk also said that EPSA would not “openly oppose” other alternatives being discussed.
- **RES Alliance for Jobs Claims Significant Employment Impact From RES.** A report prepared by Navigant Consulting for the RES Alliance for Jobs claims that an aggressive renewable energy standard (RES) would create 274,000 jobs in the manufacturing, construction, and engineering sectors. The report analyzed a RES that would mandate that 25% of the nation’s electricity be generated from renewable sources by 2025. According to the report, the wind power industry would add 116,000 jobs under such an RES; the solar industry would generate

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50,000 jobs; and increases in biomass use would result in 60,000 new jobs. The report also warned that without an RES, the renewable energy industry would encounter “flat job growth and long-term stagnation while the biomass industry could collapse altogether.” The RES Alliance for Jobs is a coalition of 26 renewable energy companies and business associations. The report is available at: <http://www.res-alliance.org/public/RESAllianceNavigantJobsStudy.pdf>.

Studies and Reports

- **Study Finds \$49/Ton Health Co-Benefits from GHG Reductions.** A review of previous analyses of the air quality improvements associated with reductions in GHG emissions found that the associated positive impacts on human health are worth an average of \$49 for each ton of CO₂ emissions reduced. The highest value co-benefits were found in developing countries, ranging as high as \$196/ton CO₂. The study, which was published in Environmental Research Letters, is available at: <http://stacks.iop.org/ERL/5/014007>.

International

- **UN Releases Copenhagen Accord Emission Targets.** The United Nations (UN) published the emission targets of 55 nations that submitted proposals in advance of the January 31 deadline established by the Copenhagen Accord (Accord). The list of submitting countries, which includes most major developed nations as well as major emitting developing nations such as Brazil, India, China and South Africa, accounts for approximately 78 percent of global GHG emissions. The UN also announced that over 100 additional nations have declared their official support for the Accord. Developed nation targets will be attached to the Accord as Appendix 1, while the nationally appropriate mitigation actions of developing nations will be provided in Appendix 2. Proposals provided to the UN relating to the Copenhagen Accord are available at: <http://unfccc.int/home/items/5262.php>.
- **IMF Announces \$100 Billion Green Fund.** The International Monetary Fund Managing Director Dominique Strauss-Kahn has proposed a \$100 billion “Green Fund” to provide financing for low carbon development in developing nations. While only a broad outline of the fund’s structure was announced, the IMF will provide further details on the fund in a report that will be issued in the near future.

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.

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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