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Climate Change Policy Update Week of February 15-19, 2010

Commentary: *President Obama announced the Administration's first major loan guarantee for construction of a nuclear power facility. The \$8.3 billion guarantee will support two facilities planned by Southern Company . . . Sen. Lindsey Graham (R-SC) circulated a draft "clean electricity standard," a variant on the renewable electricity standard that extends the crediting circle to nuclear energy and coal-fired plants with carbon capture and sequestration . . . Sixteen lawsuits have been filed for review of EPA's endangerment finding, including petitions filed by the states of Alabama, Texas and Virginia . . . The White House Council for Environmental Quality issued guidelines for review of climate change impacts under the National Environmental Policy Act . . . In a statement reaffirmed its emissions mitigation commitment under the Copenhagen Accord, China characterized the Accord as a "principled consensus" . . . BP, ConocoPhillips and Caterpillar left the ranks of the U.S. Climate Action Partnership. BP and ConocoPhillips cited frustration over the treatment of the transportation sector and natural gas producers in recent proposed legislation.*

Executive Branch

- **President Obama Announces Nuclear Loan Guarantee, Touts GHG Advantages of Nuclear Power.** Announcing that the Department of Energy (DOE) would award its first \$8.3 billion in loan guarantees to support the construction of two new nuclear reactors in Georgia, President Obama voiced strong support for the role of nuclear power in reducing greenhouse gas (GHG) emissions. "Whether it's nuclear energy, or solar or wind energy," the President said, "if we fail to invest in the technologies of tomorrow, then we're going to be importing those technologies instead of exporting them . . . To meet our growing energy needs and prevent the worst consequences of climate change, we'll need to increase our supply of nuclear power. It's that simple." The loan guarantees will cover 70% of the cost of the new facilities, which would be the first nuclear reactors to be built in the United States since the 1970s.
- **Climate Envoy Says US Copenhagen Commitment Not Contingent on China.** U.S. Special Envoy for Climate Change Todd Stern said that the United States would uphold its commitment to reduce GHG emissions under the Copenhagen Accord regardless of whether China, India, and other major developing countries ultimately associate themselves with the agreement. However, Stern added that global GHG emissions could only be reduced by about 40% by 2050 if developing countries do not undertake significant GHG mitigation actions of their own. In its official statement associating itself with the Accord, the United States set forth a GHG emission target of approximately 17%

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below 2005 levels by 2020, depending on climate change legislation passed by Congress. About 70 countries had submitted similar emission targets or mitigation actions as of February 17.

- **CEQ Issues Proposed NEPA Guidance Requiring Consideration of GHGs.** The White House Council on Environmental Quality (CEQ), which administers regulations governing environmental impact statements for major federal actions under the National Environmental Policy Act of 1969, issued proposed guidance requiring such reviews to consider GHG emissions. If finalized, the guidance would require quantitative analysis to be carried out for any proposed federal action reasonably anticipated to result in an increase in emissions of at least 25,000 metric tons CO₂-equivalent per year. That analysis would include projections of cumulative emissions over the lifetime of the action; analysis of measures to reduce GHG emissions from the activity; and qualitative discussion of the link between the emissions and climate change. The guidance would not require environmental impact reviews to identify specific climatic impacts that might result from the federal action. Although the guidance would not apply to federal land or resource management decisions, it could have broad application to federal permitting decisions for major facilities such as power plants and landfills (but not decisions made by the Environmental Protection Agency under the Clean Air Act, which are exempted from NEPA). The CEQ will take comments on the proposed guidance for the next 90 days. The guidance is available at <http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100218-nepa-consideration-effects-ghg-draft-guidance.pdf>.

Congress

- **Graham Circulates Draft Clean Electricity Standard.** Senator Lindsey Graham (R-SC) has released a draft bill to create a federal “clean electricity standard.” Under the bill, the government would distribute credits for clean energy generation and energy efficiency improvements. Utilities would be required to hold earned or purchased credits equivalent to an increasing percentage of their energy generation, beginning at 13% in 2012 and rising to 30% by 2030 and 50% by 2050. Coal plants that capture and sequester at least 65% of their GHG emissions and new nuclear plants would both qualify as clean energy sources. Utilities could use the energy efficiency credits to meet at most 25% of their compliance obligation. The draft bill also includes a placeholder for loan guarantees to build an additional 60 nuclear plants. Sen. Graham is working with Sens. John Kerry (D-MA) and Joe Lieberman (I-CT) to draft a compromise climate-energy bill. Sen. Graham’s spokesperson said that neither Sen. Kerry nor Sen. Lieberman had agreed to support the clean electricity standard bill.
- **Senators Ask EPA to Address Clean Air Act GHG Regulation Concerns.** Eight Democratic Senators wrote to EPA Administrator Lisa Jackson to express their concerns about the effects of GHG regulation under the Clean Air Act on U.S. businesses and jobs. The letter asks that EPA respond to eight questions, addressing topics such: as the timing of regulation; EPA’s proposed Tailoring Rule that would limit the scope of GHG regulation to larger emission sources; cost and competitiveness impacts on U.S. industry and businesses; and what would constitute “best available control technology” for coal and natural gas fueled power plants. The letter was signed by Sens. Jay Rockefeller (WV), Mark Begich (AK), Sherrod Brown (OH), Carl Levin (MI), Bob Casey (PA), Robert Byrd (WV), Claire McCaskill (MO), and Max Baucus (MT). The letter is available at <http://rockefeller.senate.gov/press/Letter%20to%20Lisa%20Jackson%202-19-10.pdf>.

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Judicial

- **Total Number of Endangerment Finding Lawsuits Climbs to 16.** With the statutory time period for filing legal challenges to EPA's endangerment finding expiring February 16, the total number of petitions for review reached sixteen. Three states – Alabama, Texas, and Virginia – filed for review, as did the American Farm Bureau; the U.S. Chamber of Commerce; the Competitive Enterprise Institute; the Utility Air Regulatory Group; and a variety of other industry associations and private companies. A spokesman for EPA described the process leading up to the endangerment finding as “exhaustive” and “transparent,” and called the petitioners “defenders of the status quo [who] are now turning to the courts in an attempt to stall progress.” The endangerment finding, which was finalized December 7, concluded that GHG emissions from motor vehicles contribute to an endangerment to public health and welfare. The finding is a prerequisite to regulation of GHG emissions under the Clean Air Act. EPA issued the endangerment finding in response to the U.S. Supreme Court's 2007 *Massachusetts v. EPA* decision.

States and Cities

- **Alabama, Texas and Virginia Challenge EPA Endangerment Finding.** The three states joined a number of industry groups and conservative think tanks in filing petitions with EPA seeking review of the agency's finding that CO₂ emissions endanger the public health and welfare. (For further information on other petitioners, see the *Judicial* section above.) In the petitions, the states argue that the endangerment finding would result in excessively burdensome regulations that would harm the states' economies.
- **Western Leaders Commit to Cooperate on Climate Initiatives.** Meeting in Vancouver, British Columbia, California Governor Arnold Schwarzenegger, Oregon Secretary of State Kate Brown, Washington Governor Christine Gregoire, and Gordon Campbell, Premier of the Canadian province of British Columbia, agreed to two actions plans aimed at addressing climate change and clean energy issues. The first action plan establishes several initiatives intended to spur the development of low-carbon energy resources and promote green transportation. The second action plan creates programs that will address climate change impacts and adaptation.
- **California Legislation Would Stop Cap-and-Trade Implementation, Bar Secondary Allowance Trading.** During a special legislative session, state Senator Bob Dutton (R) introduced a jobs creation package that included provisions directing the California Air Resources Board to stop the development of the state-wide GHG cap-and-trade program mandated by AB 32, the state's landmark climate change statute. The latest in a series of Republican challenges to the cap-and-trade program, the proposal is unlikely to be passed out of the Democrat-controlled legislature. Another California Senator, Rod Wright (D), introduced legislation that would limit emission allowance trading under the state's proposed cap-and-trade program to entities that are subject to a GHG emissions limit. The proposed trading limitation is intended to prevent market manipulation and reduce compliance costs for regulated entities, but critics counter that the legislation would lead to higher allowance prices and increased volatility.

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- **California Board to Consider Withdrawing Adoption of Voluntary CAR Protocols; New Review for Compliance Use.** California's air quality regulator, the Air Resources Board, will consider a staff recommendation that the Board withdraw its adoption of the Climate Action Reserve's (CAR) voluntary offsets protocols at a meeting on February 25. The protocols would then undergo a formal environmental review process in order to be accepted for use in the state's cap-and-trade program. Linda Adams, state secretary for environmental protection and chair of CAR's board, described the action as "procedural" and said she is "very confident" that the protocols will be approved for compliance use. Three of the voluntary protocols that had been adopted involved forestry projects and the fourth addressed methane digester projects.

Industry and NGOs

- **BP, ConocoPhillips, and Caterpillar Depart USCAP.** Three major companies – BP, ConocoPhillips, and Caterpillar – announced that they would not renew their memberships in the U.S. Climate Action Partnership (USCAP), an influential business-environmentalist coalition that played a major role in shaping the Waxman-Markey climate change bill. Both BP and ConocoPhillips cited their dissatisfaction with the bill's treatment of the transportation sector as a reason to pursue their own legislative efforts separate from USCAP. A Caterpillar representative said the company "has issues with current legislation . . . but that is not a reflection of USCAP, it's a reflection of Congress." Officials from BP and ConocoPhillips emphasized their frustration with the treatment of the oil and gas sectors under recent bills. ConocoPhillips Chairman and CEO Jim Mulva asserted in a statement: "House climate legislation and Senate proposals to date have disadvantaged the transportation sector and its consumers, left domestic refineries unfairly penalized versus international competition, and ignored the critical role that natural gas can play in reducing GHG emissions. We believe greater attention and resources need to be dedicated to reversing these missed opportunities, and our actions today are part of that effort." In a statement responding to the announcements, USCAP said that the organization's membership changes periodically and that AES, Alstom, and Honeywell had all joined the organization in recent months.

Studies and Reports

- **Pew Report Values Climate Losses from Arctic Warming in Trillions.** The Pew Environment Group released an analysis of economic losses due to the acceleration of climate change caused by the loss of sea ice, snowmelt, and permafrost thawing in the Arctic. Sea ice and snow reflect light and heat (creating a cooling effect) and permafrost stores vast quantities of methane, a potent GHG. The report estimates that the climate related damages will be in the range of \$2.4 to \$24.1 trillion by 2050 (depending upon the social cost of carbon estimate used) and up to \$91.3 trillion by 2100. The report is available at http://www.pewtrusts.org/our_work_report_detail.aspx?id=57161.
- **NREL Releases U.S. Wind Capacity Estimate.** The National Renewable Energy Laboratory, working with the consulting group AWS Truwind, released state-by-state estimates of U.S. wind capacity. The estimate concludes that the U.S. has the capacity to generate nearly 37,000,000 gigawatt-hours annually from onshore wind (or over 10,000 gigawatts), more than nine times current total U.S. energy consumption. The wind resource numbers are available at http://www.windpoweringamerica.gov/filter_detail.asp?itemid=2542.

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International

- **UN Creates Climate Finance Advisory Group.** United Nations Secretary-General Ban Ki-Moon launched the Advisory Group on Climate Change Financing to oversee issues related to the funding of climate change mitigation and adaptation efforts in developing nations. The group is charged with creating a plan to raise and distribute as much as \$100 billion annually by 2020. The \$100 billion target was established by the Copenhagen Accord. The group will be composed evenly of developed and developing nations, with the Prime Minister Gordon Brown of the United Kingdom and Meles Zenawi of Ethiopia named as the first co-chairman of the group.
- **China Clarifies Copenhagen Accord Position, But Leaves Uncertainty.** Chinese Premier Wen Jiabao provided to the United Nations a letter restating the Chinese position with regard to the Copenhagen Accord. In the letter, Premier Jiabao reiterated his nation's commitment to reduce its GHG emissions intensity per unit of gross domestic product by 45 percent by 2020. China originally proposed the GHG intensity target in a submission to the United Nations in late January. The letter refers to the Copenhagen Accord as only a "principled consensus", thus calling into question the durability of China's commitment to the Accord.
- **Mexico Signs Climate Cooperation Agreements with France, Norway.** Mexico has signed separate climate change cooperation agreements with France and Norway. Under the agreement with France, the French Development Agency will provide Mexico with \$255 million in loans to address climate change in the agriculture, energy, housing and transportation sectors. The agreement with Norway will have the two nations undertake joint projects aimed at reducing emission from deforestation and degradation (REDD).
- **UNCCC Chief De Boer Announces Resignation Effective July 1, 2010.** Yvo De Boer, Executive Secretary of the United Nations Framework Convention on Climate Change, announced that he will resign from his post on July 1, 2010. A successor was not immediately named but some observers expect that the next person to fill the position likely would be from a developing nation.

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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