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## Climate Change Policy Update Week of February 22-26, 2010

**Commentary:** *Senators Kerry, Graham, and Lieberman floated a trial balloon this week, suggesting that they will be releasing draft legislation in March and that it will depart from the economy-wide cap-and-trade model in favor of an approach that uses different policy designs for different sectors . . . In an exchange of letters with Sen. Rockefeller and a group of other Senate Democratic moderates, EPA Administrator Lisa Jackson outlined a new plan for delayed implementation of the Prevention of Significant Deterioration program. It now looks as though Senator Rockefeller will seek to codify that plan, or a plan with further regulatory deferrals, in legislation. One question is whether this new framework will be sufficient to give wavering Senate Democrats a basis for voting against the Murkowski disapproval resolution . . . California and a group of other states sent a letter to Majority Leader Reid warning that passage of the Murkowski disapproval resolution would scuttle an agreement between the Obama Administration, automakers, and the states – the result would be a patchwork of state vehicle standards . . . State Department Climate Envoy Todd Stern said that the goal for Cancún is a binding international agreement.*

### Executive Branch

- **President Obama Discusses Climate Legislation With Business Roundtable.** Addressing a gathering of approximately 100 business executives belonging to the Business Roundtable, President Barack Obama emphasized that climate change legislation would provide businesses with much-needed regulatory certainty and improve the competitiveness of the American economy. “The only certainty of the status quo,” said the President, “is that the price and supply of oil will become increasingly volatile [and] that the use of fossil fuels will wreak havoc on weather patterns and air quality.” The President also said that the Administration would work with the business community to help industries that face “significant potential transition costs” from the shift to clean energy sources. In addition, the President insisted that he would continue to pursue comprehensive legislation combining clean energy initiatives with regulation of GHG emissions, rather than separate bills.
- **EPA Suggests Slower Implementation of PSD for GHGs.** Responding to a letter from Sen. Jay Rockefeller (D-WV) and other centrist Democratic Senators, Environmental Protection Agency (EPA) Administrator Lisa Jackson indicated for the first time that the agency would defer its deployment of new Prevention of Significant Deterioration (PSD) requirements under the Clean Air Act. The PSD program requires new and modified facilities to obtain preconstruction permits, and install “best available control technology,” for all pollutants subject to Clean Air Act regulation – which will include greenhouse gases (GHGs) once EPA finalizes

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vehicle GHG emission standards in March of this year. Last September, EPA issued a proposed “tailoring rule” that would modify the emission thresholds that ordinarily trigger PSD and Title V requirements under the Clean Air Act. In the letter, Jackson stated that PSD requirements for GHGs would not take effect until 2011 and initially would apply only to facilities that are already required to obtain PSD permits as a result of their non-GHG emissions. Beginning in mid-2011, the PSD requirements would apply to facilities that emit “substantially” more than 25,000 metric tons CO<sub>2</sub>-equivalent per year. This marks a significant departure from the proposed tailoring rule, which would have subjected all new and modified sources emitting more than 25,000 metric tons CO<sub>2</sub>-equivalent per year to the PSD program. The tailoring rule is expected to be finalized this spring. Administrator Jackson’s letter is available at [http://epa.gov/oar/pdfs/LPJ\\_letter.pdf](http://epa.gov/oar/pdfs/LPJ_letter.pdf).

- **NHTSA/States Warn That Murkowski Resolution Endangers Vehicle GHG Agreement.** The National Highway Traffic Safety Administration (NHTSA) sent a letter to Sen. Dianne Feinstein (D-CA) warning that any attempt by Congress to block EPA regulation of GHGs under the Clean Air Act would also have the effect of undermining new vehicle fuel economy and GHG standards that NHTSA is jointly promulgating with EPA. The standards in question were proposed in September 2009, pursuant to a landmark agreement between major automakers, the state of California, and the Obama Administration. Under the agreement, NHTSA and EPA were to issue coordinated fuel economy and vehicle GHG standards that would increase the average fuel economy of the national vehicle fleet to 35.5 miles per gallon by 2016. According to NHTSA, a resolution introduced by Sen. Lisa Murkowski (R-AK) to nullify the basis for EPA regulation of GHGs would also derail NHTSA’s standards, since those standards were designed in conjunction with the forthcoming EPA standards. The agency said that “at this late date, it is unlikely NHTSA would have sufficient time to decouple its rulemaking from the joint rulemaking effort in time to meet the [statutory] April 1 deadline.” In addition, NHTSA raised the possibility that the underlying fuel economy agreement might collapse, prompting California and other states to proceed with their own GHG standards, “thus creating confusion, encouraging renewed litigation, and driving up the cost of compliance to automobile manufacturers and consumers alike.” The letter is available at <http://media.washingtonpost.com/wp-srv/special/climate-change/documents/post-carbon/NelsonLetter022510.pdf>. This likelihood of state action was confirmed in a letter from California and other states to Senate Majority Leader Harry Reid (D-NV). In the letter, the states suggested that if Sen. Murkowski’s proposed resolution prevents EPA from finalizing the regulations, the states would implement the original California standards, resulting in the “patchwork” of regulations that the agreement was intended to avoid. Other states signing the letter include Connecticut, Maine, Massachusetts, New Mexico, New York, Oregon, Rhode Island, and Washington. The text of the letter is available at [http://carboncontrolnews.com/iwpfile.html?file=feb10%2Fccn02242010\\_state-letter.pdf](http://carboncontrolnews.com/iwpfile.html?file=feb10%2Fccn02242010_state-letter.pdf).
- **EPA to Propose GHG Standards for Heavy Duty Vehicles in June.** EPA’s regulation tracking website indicates that the agency will propose the first GHG standards for heavy duty vehicles, such as trucks and buses, in June of this year. The new standards would follow close on the heels of EPA’s GHG standards for light duty passenger vehicles and trucks, which are expected to be finalized in March.
- **U.S. to Seek Binding Agreement at Cancún Summit.** According to a letter sent by the U.S. Department of State to the secretariat of the United Nations Framework Convention on Climate Change (UNFCCC), the U.S. will push to conclude a binding international agreement on climate

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change at this year's summit in Cancún, Mexico. The U.S. also expressed its intent to incorporate elements of the Copenhagen Accord reached late last year into the agreement, and suggested that bilateral and regional meetings leading up to Cancún would likely be more productive than plenary interim conferences, such as the summit to be held in Bonn, Germany later this year. The letter is available at [http://unfccc.int/files/meetings/ad\\_hoc\\_working\\_groups/application/pdf/usawp2010\\_lca.pdf](http://unfccc.int/files/meetings/ad_hoc_working_groups/application/pdf/usawp2010_lca.pdf).

## Congress

- **Kerry, Graham, & Lieberman to Propose New GHG Framework.** The Washington Post reported that Senators Lindsey Graham (R-SC), John Kerry (D-MA), and Joe Lieberman (I-CT) plan to propose separate treatment for the power, industrial, and transportation sectors in their climate legislation. Power plants would be subject to an emissions cap of increasing stringency, and industrial facilities would be exempt from the cap for several years. Motor fuel might be subject to a carbon tax, with the proceeds dedicated to electrifying the transportation sector. Senate Majority Leader Harry Reid (D-NV) has told Sen. Kerry that he and the others working on a compromise climate-energy package need to produce a bill as soon as possible to have a chance of passing the legislation this year. Sen. Kerry told reporters that the biggest unresolved issues are the method of pricing emissions and allowance allocation, and that it is likely the bill will include an allowance "price collar" similar to the allowance price volatility control mechanism in the Kerry-Boxer bill. Some key moderate senators, however, are not bullish on the prospects for a 2010 bill. Sen. Max Baucus (D-MT) told reporters that "If you actually read the tea leaves . . . it looks like it's not getting a head of steam." Sen. Carl Levin (D-MI) similarly described the prospects of a 2010 bill as unlikely.
- **Rockefeller Drafting Legislation to Delay EPA Regulation.** After receiving EPA Administrator Jackson's letter outlining the Agency's plan for regulating GHG emissions under the Clean Air Act (discussed above), Sen. Jay Rockefeller (D-WV) issued a statement communicating his appreciation for EPA's efforts to delay regulation but also his conclusion that it was not sufficient. Sen. Rockefeller said that he believes Congress should enact legislation that would "set in stone" a regulatory delay to give Congress sufficient time to develop a comprehensive energy and climate bill. The other Senators who signed Sen. Rockefeller's original letter to EPA have not indicated whether they would support the suggested legislation.

## States and Cities

- **California Adopts Federal Standards in Conformity with Vehicle Emissions Agreement.** Fulfilling its commitment under the agreement with automakers and the Obama Administration, the California Air Resources Board passed new rules amending its passenger vehicle regulations to allow vehicle manufacturers to meet the state's vehicle GHG emission standards for 2012-2016 by demonstrating compliance with the pending federal standard for those same years. However, as discussed above, California joined other states in sending a letter to Senate Majority Leader Reid warning that passage of Sen. Murkowski's disapproval resolution would eliminate the basis for the agreement, likely forcing California and other states to enforce their own state standards.
- **California Adopts SF<sub>6</sub> Emission Limit For Electrical Equipment.** The California Air Resources Board has passed a rule that will limit the amount of sulfur hexafluoride (SF<sub>6</sub>) emitted

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from electric transmission and distribution equipment. The rule, which goes into effect in 2012, will initially require electrical equipment owners to limit their SF<sub>6</sub> emissions to 10 percent of their total capacity. The emission limits will become gradually more stringent through 2020, when the limit will be 1 percent of total capacity.

## Industry and NGOs

- **Gore Dismisses Attacks on Climate Science, Says Senate Action Crucial to International Climate Efforts.** Former Vice President Al Gore penned an op-ed in Sunday's New York Times that addressed the status of climate change policy in the United States and the recent controversy surrounding several factual errors in the Intergovernmental Panel on Climate Change (IPCC) Fourth Assessment Report. Writing that he “genuinely wish[ed] that the climate crisis were an illusion,” Gore maintained that the “overwhelming consensus on global warming remains unchanged” after the IPCC revelations and that “the scientific enterprise will never be completely free of mistakes.” Gore also criticized the federal government for “failing miserably” to slow or reduce GHG emissions, saying that the “world community was paralyzed” at last December’s Copenhagen climate change negotiations because the Senate had failed to pass cap-and-trade legislation. Noting that the House of Representatives has already passed climate change legislation and that Senators John Kerry (D-MA), Lindsey Graham (R-SC), and Joe Lieberman (I-CT) are expected to unveil a draft Senate bill later this week, Gore wrote that “the pathway to success is still open . . . .”
- **APPA Supports Emission-Based Allocation, Murkowski Resolution.** The legislative committee of the American Public Power Association (APPA), an association of publicly owned electric utilities, approved a resolution last week on the contentious issue of how allowances should be allocated in a future cap-and-trade system. APPA’s resolution stated that “all, or substantially all” allowances should be distributed among utilities on the basis of past GHG emissions. This resolution was opposed by certain members of the APPA, mostly located on the West Coast, who would be disadvantaged by such a system due to their investments in renewable energy. The approach also departs from the “50-50-50” compromise proposed by the Edison Electric Institute, in which half of the allowances allocated to the power sector would be allocated on the basis of past emissions and half on the basis of retail sales. In addition, the APPA approved a separate letter supporting a resolution introduced by Sen. Lisa Murkowski (R-AK) to nullify EPA’s recent finding that GHG emissions endanger public health and welfare. That finding, finalized in December 2009, is the legal predicate for regulation of GHG emissions from mobile and stationary sources under the Clean Air Act.
- **CBD Files Petition to Establish Water Quality Criteria for Black Carbon.** On February 22, the Center for Biological Diversity (CBD) petitioned EPA to exercise its authority under the Clean Water Act to establish water quality standards (or “criteria”) for the pollutant known as black carbon. Black carbon, which consists of fine sooty particulates resulting from incomplete combustion of fossil fuels, has been identified by some scientists as the second largest contributor to global warming after carbon dioxide. CBD’s petition requests that EPA set criteria for deposits of black carbon on sea ice and glaciers that “do not deviate measurably from preindustrial levels.” If EPA grants the petition, states would be required to either establish their own criteria or adopt EPA’s criteria. In addition, states would be required to regulate the total quantity of black carbon that could be added to U.S. waters from all combined sources. The petition is available at

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[http://www.biologicaldiversity.org/programs/climate\\_law\\_institute/global\\_warming\\_what\\_how\\_why/black\\_carbon/pdfs/EPA\\_CWA\\_Black\\_Carbon\\_Petition\\_2-22-10.pdf](http://www.biologicaldiversity.org/programs/climate_law_institute/global_warming_what_how_why/black_carbon/pdfs/EPA_CWA_Black_Carbon_Petition_2-22-10.pdf).

## Studies and Reports

- **Hurricane Strength, Damages Predicted to Increase While Frequency Decreases.** Ten climate scientists at the World Meteorological Institute published a consensus prediction that the annual number of hurricanes will decline by 6-34 percent due to climate change. Though fewer in number, individual storms are projected to contain more rain and a 2-11 percent increase in intensity, which could increase the damages associated with any given hurricane by up to 60 percent. The study abstract is available at <http://www.nature.com/ngeo/journal/v3/n3/abs/ngeo779.html>.
- **Study Projects Sizable Savings for Households from Energy Efficiency Investments.** A state-by-state analysis by The Consumer Federation of America of energy efficiency potential and the effects of aggressive policies to promote efficiency concluded that energy consumption could be reduced 20-30 percent over the next twenty years at low cost. The study estimates that aggressive federal energy efficiency policies achieving these levels of consumption reductions would save households an average of \$200-\$300 a year, even if all of the costs of the efficiency improvements were borne by households. The authors conclude that savings from energy efficiency could cushion households from costs associated from climate change policies in other sectors. The study is available at <http://admin.consumerfed.org/elements/www.consumerfed.org/File/ConsumerImpactfinal.pdf>.

## International

- **UNFCCC Plans Extra Negotiating Session for April in Bonn, German.** The 11 member countries of the Bureau of the Conference of the Parties to the UNFCCC agreed to add an additional session the climate change negotiation schedule for this year. The United Nations will host the additional climate change negotiating session April 9-11 in Bonn, Germany. In addition to Cancún, Mexico, the existing negotiating schedule includes meetings May 31-June 11 in Bonn and November 29-December 10 in Cancún, Mexico.

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](mailto: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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