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

Commentary: The Kerry-Graham-Lieberman team floated some elements of their plan: cap-and-trade for the power sector only, with a possible phase-in for industrial facilities, and a potential gasoline tax, with major oil companies advocating that the tax be payable at the pump. The Senators' plan drew mixed reactions from key moderates. It is not clear when legislative language will emerge . . . EPA Administrator Lisa Jackson offered to further tailor the Tailoring Rule, but coal state legislators Senator Jay Rockefeller (D-WV) and Rick Boucher (D-VA) want to let out the seams a bit more. Will the Rockefeller and Boucher "delay" bills provide enough cover for moderate Democrats to reject the Murkowski "derail" bill? . . . The Fifth Circuit is going to revisit *en banc* the *Comer* decision, which rejected a motion to dismiss a lawsuit by Katrina plaintiffs against numerous energy producers and energy-intensive manufacturers . . . Research published in *Science* estimates that approximately 7.7 million tons of methane are being released annually from the seabed of the East Siberian Arctic Shelf, an amount equivalent to prior estimates of methane emissions from all the world's oceans.

Executive Branch

- **EPA Administrator Offers Additional Details on "Tailoring" of Clean Air Act Programs.** At a hearing of the Senate Interior and Environment Appropriations Subcommittee, Environmental Protection Agency (EPA) Administrator Lisa Jackson offered additional details on the agency's forthcoming "Tailoring Rule" for the implementation of the Prevention of Significant Deterioration (PSD) and Title V permitting requirements for greenhouse gases (GHGs). Jackson said that EPA would likely not impose PSD or Title V requirements on any facilities emitting less than 75,000 metric tons CO₂-equivalent (CO₂-eq) per year for "at least" two years, and that the emissions threshold would probably drop to 50,000 metric tons CO₂-eq thereafter. In the form proposed last September, the Tailoring Rule would have imposed PSD permitting requirements on new stationary sources with the potential to emit at least 25,000 metric tons CO₂-eq per year, and modified sources whose annual emissions increased by 10,000 to 25,000 metric tons CO₂-eq. EPA's legal authority to adopt the Tailoring Rule has been questioned because these emission thresholds are many times greater than the 100 to 250 ton thresholds provided in the Clean Air Act for the PSD and Title V programs. Bills introduced this week in the Senate and the House would delay EPA's timetable (see discussion in the "Congress" section below).
- **EPA Submits Reconsideration of "Johnson Memo" to OMB.** According to the trade press, EPA has completed work on a rulemaking that would determine the date upon which GHG regulation under the PSD and Title V programs of the Clean Air Act would commence. The rule, which reconsiders a 2008 interpretive memorandum issued by former EPA Administrator Stephen Johnson (the "Johnson Memo"), has been transmitted to the White House Office of Management and Budget (OMB) for final review. Under the proposed form of the rule issued last September, GHGs would be considered "subject to regulation" under the Clean Air Act upon the effective date of EPA's forthcoming tailpipe GHG emission standards for motor vehicles. Those emission standards are expected to be released this month. Bills introduced this week in

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the Senate and House would alter EPA's GHG regulatory timetable (see discussion in the "Congress" section below).

- **Interagency Group Proposes Social Cost of Carbon Estimates for Regulatory Analyses.** An interagency working group convened by the Obama Administration – composed of OMB, the Council of Economic Advisors, the Council on Environmental Quality, and other agencies – has proposed various estimates for the economic cost to society associated with continued GHG emissions. The estimates are intended to be used in the cost-benefit analyses required under Executive Order 12866 for all federal regulatory actions. The estimates ranged from approximately \$5 to \$35 per metric ton CO₂ for the year 2010, and from approximately \$10 to \$50 per metric ton CO₂ for the year 2030; much of the variation was due to disagreement over the appropriate discount rate to be applied to future damages anticipated from climate change. A report describing the analysis undertaken by the working group is available at: http://www2.eere.energy.gov/buildings/appliance_standards/commercial/pdfs/sem_finalrule_appendix15a.pdf.
- **Chu: Administration Open to Incremental Approach to Climate Legislation.** Speaking at an Energy Innovation Summit hosted by the Department of Energy, Energy Secretary Steven Chu said that the Obama Administration would entertain the concept of incremental climate change legislation that would first cap GHG emissions in the power sector before extending to other sources. Sens. John Kerry (D-MA), Lindsey Graham (R-SC), and Joe Lieberman (I-CT) are reported to be considering such an approach in the "tripartisan" proposal they are currently working on (see further discussion below). "Nobody is ruling anything out at this moment," said Chu.

Congress

- **Rockefeller Introduces Bill to Delay EPA.** Sen. Jay Rockefeller (D-WV) introduced legislation to prohibit for two years (beyond enactment) any EPA action related to GHG permitting requirements for stationary sources or new source performance standards under Clean Air Act Section 111. This timetable would be different than that outlined by Administrator Jackson in recent remarks; she indicated the agency's preference to have the PSD and Title V programs apply starting in 2011 (see discussion above in the "Administration" section.) The Rockefeller bill would specifically allow EPA's pending GHG motor vehicle standards and reporting registry to proceed. Sen. Robert Byrd (D-WV) said he does not plan to co-sponsor the bill. Representatives Nick Rahall (D-WV), Alan Mollohan (D-WV), and Rick Boucher (D-VA) introduced a companion bill in the House. Sen. Rockefeller said that he is supportive of efforts to pass comprehensive energy-climate legislation, because putting a price on carbon will encourage Wall Street to invest in clean coal technologies. "I have to have a bill for coal to survive. If you don't do anything, natural gas eats coal alive."
- **Swing Vote Senators Offer Mixed Reactions to New Approach.** Senators John Kerry (D-MA), Lindsey Graham (R-SC), and Joe Lieberman (I-CT), attempting to produce a draft energy-climate proposal by as early as next week, held meetings with a number of moderate Senators.
 - Sen. Mary Landrieu (D-LA) said: "I'm definitely more open to this approach as opposed to the previous approach and as opposed to doing nothing. I think doing nothing is a terrible

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- mistake. It's a terrible mistake not just for the environment, but it's a terrible mistake for the economy. Because there are billions of dollars in private capital sitting on the sidelines waiting for the referee to blow the whistle . . . if no whistle is ever blown and no rules are ever published, that money can't create jobs."
- Senators Debbie Stabenow (D-MI) and Sherrod Brown (D-OH) both indicated that the bill was moving in the right direction, with Sen. Brown advocating a delay in capping the manufacturing sector and border adjustments to protect competitiveness, and Sen. Stabenow advocating a price collar on allowances.
 - Sen. Max Baucus (D-MT) said "It's positive, it's refreshing, it's new thinking, it's potential."
 - Sen. George Voinovich (R-OH) said "I think the environment for a large cap and trade or whatever you want to call it is not there today."
 - Sen. Lisa Murkowski (R-AK), who did not attend a meeting, said that she will not consider voting for the bill unless it includes drilling in the Arctic National Wildlife Refuge – but Senators Lieberman and Graham told reporters that ANWR drilling was not in their bill.
- **Liberal Senators Ask for Performance Standards on Coal.** Thirteen Senators wrote to Majority Leader Harry Reid (D-NV) and Senators Graham, Kerry, and Lieberman advocating the inclusion of performance standards for coal-fired power plants in climate legislation, or the preservation of EPA's authority to issue such standards under the Clean Air Act. The Senators asserted that such standards are needed to ensure that older, inefficient coal plants do not crowd out cleaner generation sources in the electricity market. The letter was signed by Senators Robert Menendez (D-NJ), Benjamin Cardin (D-MD), Kirsten Gillibrand (D-NY), Frank Lautenberg (D-NJ), Patrick Leahy (D-VT), Chris Dodd (D-CT), Jeff Merkley (D-OR), Jack Reed (D-RI), Bernie Sanders (I-VT), Sheldon Whitehouse (D-RI), Barbara Boxer (D-CA), Ron Wyden (D-OR), and Al Franken (D-MN).
 - **New Senate Bills Introduced on Energy Efficiency, Wind.** Senators Tom Carper (D-DE), Olympia Snowe (R-ME), Sherrod Brown (D-OH), and Susan Collins (R-ME) introduced legislation (S. 3062) to extend production tax credits for offshore wind projects until 2020. Senate Energy and Natural Resources Committee Chairman Jeff Bingaman (D-NM), ranking member Sen. Lisa Murkowski (R-AK), and Sen. Robert Menendez (D-NJ) introduced the National Energy Efficiency Enhancement Act of 2010 (S. 3059). The bill would establish national energy efficiency standards for a number of energy-intensive products such as air conditioners, furnaces, outdoor lighting, and heat pumps. The bill will be considered by the committee on March 10th along with other bills related to energy efficiency. On March 11th, the committee will consider a draft "Home Star" bill which would provide rebates for up to half the cost of energy-efficient retrofits by homeowners, up to \$8,000.

Judicial

- **Fifth Circuit to Rehear Katrina Global Warming Damages Case.** The United States Court of Appeals for the Fifth Circuit has decided to hold an *en banc* rehearing in the case of *Comer v. Murphy Oil Co.* The case was brought by survivors of Hurricane Katrina who allege that the

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various companies named as defendants contributed to global warming, making the 2005 hurricane more destructive than it otherwise would have been. The defendants are major energy companies and energy-intensive manufacturers. After the plaintiffs' case was dismissed at the district court level as a non-justiciable "political question," a three judge panel of the Fifth Circuit reversed and held that the plaintiffs could proceed to trial on the legal theory of public nuisance. That October 2009 decision has now been vacated, setting the stage for reconsideration of the case by the full panel of judges on the Fifth Circuit.

Industry and NGOs

- **Some Utility Representatives Support Cap on Power Sector First.** Representatives of several large utilities have expressed a willingness to consider climate change legislation – such as the proposal being developed by Sens. Kerry, Graham and Lieberman – that would impose an emissions cap on the power sector before addressing emissions from other sectors of the economy. Tony Earley, chairman and CEO of DTE Energy and chairman of the Edison Electric Institute, said at an energy conference in Washington, D.C. that a power sector-first approach “could be a workable solution” as long as it was “part of a comprehensive package that would make it absolutely clear that everyone is going to have to bear some of this burden.” Ralph Izzo, chairman and CEO of Public Service Enterprise Group, also said that the approach “makes enormous sense” but that the industry would expect concessions – such as a large free allocation of emission allowances – in exchange for its “willingness to volunteer” for an emissions cap.
- **APPA Reaffirms Opposition to EPA GHG Regulation.** The American Public Power Association (APPA) responded to a letter from Reps. Henry Waxman (D-CA) and Ed Markey (D-MA) criticizing the group's support for a resolution introduced by Sen. Lisa Murkowski to block EPA's regulation of GHGs under the Clean Air Act. In the letter, APPA said that it “does not dispute the science of climate change” and has consistently supported a legislative solution to the issue since 2007. APPA reiterated its opposition to EPA regulation of GHGs from stationary sources under the Clean Air Act, however, arguing that EPA has discretion to avoid promulgating the emission standards for motor vehicles that would trigger GHG requirements for power plants and industrial sources under the PSD and Title V programs of the Act. APPA also contended that the National Highway Traffic Safety Administration (NHTSA) could proceed to implement more stringent fuel economy regulations even if the Murkowski resolution blocked further EPA GHG regulation. The APPA is a national association of 2,009 publicly owned electric utilities.
- **Business Coalition Favoring Climate Legislation Announces Rapid Growth.** American Businesses for Clean Energy (ABCE), a business coalition that supports climate change and clean energy legislation, announced that its membership had grown from just 20 companies four months ago to 2,469 companies in 41 states. Deutsche Bank Asset Management, Calpine Corp., and Warner Music Group are recent additions to the group. Although ABCE officially supports legislation that would put a price on GHG emissions, it has not endorsed any specific policy positions or legislative proposals.
- **Offsets Coalition Opposes Cantwell Bill.** The Coalition for Emission Reduction Projects (CERP) wrote to Senator Maria Cantwell (D-WA) to communicate opposition to the Senator's Carbon Limits and Energy for America's Renewal Act as less efficient and less environmentally effective than other approaches. The group wrote: “Unlike every major climate change

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legislative proposal offered to date, the CLEAR Act does not use a market-based approach under which regulated entities can invest in offset projects to lower their costs, and the costs ultimately borne by consumers. Without an offset program, the CLEAR Act cannot put a price on carbon throughout the economy and cannot use the market to find and finance the most cost-effective emission reduction opportunities.” CERP members include Duke Energy, AEP, El Paso, Element Markets, Blue Source, PG&E, John Deere, and Noble Carbon Credits.

Studies and Reports

- **Methane Leaking from Seabed.** Research published in *Science* estimates that approximately 7.7 million tons of methane – a GHG that is 21 times more potent than carbon dioxide – are being released annually from the seabed of the East Siberian Arctic Shelf, an amount equivalent to prior estimates of methane emissions from all the world’s oceans. Methane hydrates form in areas of high pressure and low temperature in the seabed, and can trap more methane as gas in deeper sediment, but changes in pressure or temperature can destabilize the hydrates and trigger methane releases. The researchers observe that the venting of a small fraction of the methane stored in this area of seabed could trigger abrupt climate warming, and the permafrost no longer appears to be sufficiently stable to prevent leakage. The abstract of this article is available at: <http://www.sciencemag.org/cgi/content/abstract/sci:327/5970/1246>.
- **MIT Report Finds Border Measures Costly, Ineffective.** A new modeling effort by researchers at the Massachusetts Institute for Technology (MIT) found that border adjustment measures to address the “leakage” of carbon-intensive production to countries without carbon controls would reduce leakage by up to 60% by 2025 if imposed by all countries with carbon controls. The measures, however, would achieve only modest reductions in global GHG emissions (.6%) and would significantly reduce economic welfare. They also found that equivalent reductions in emissions could be achieved by very small emission fees or efficiency improvements in the nations targeted by border adjustments, with negligible welfare effects. The report is available at: http://globalchange.mit.edu/files/document/MITJPSPGC_Rpt184.pdf.

International

- **Climate Negotiators Hold Informal Meeting in Japan.** Climate negotiators from 30 nations met in Tokyo, Japan for the 8th Informal Meeting on Further Actions against Climate Change. The two-day meeting was hosted by representatives from Brazil and Japan and included representatives from China, the European Union, India, Mexico, South Africa, and the U.S. Negotiators made little progress on the major issues standing in the way of the development of a successor treaty to the Kyoto Protocol, but did agree to accelerate treaty negotiations and that informal meetings between nations could be an important factor in crafting an agreement.
- **U.S., Brazil Sign MOU to Cooperate on Climate Change Issues.** U.S. Secretary of State Hilary Clinton and Brazilian Foreign Minister Celso Amorim signed a memorandum of understanding (MOU) for the two nations to cooperate on climate change issues. The MOU launches a climate change policy dialogue between the two countries that will focus on implementation of the Copenhagen Accord, clean energy technology research and development, climate change scientific research, GHG emission reduction strategies, adaptation, and capacity

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building. One of the major areas of GHG emission reductions will be reducing emissions from deforestation and degradation (REDD).

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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