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Climate Change Policy Update Week of March 8-12, 2010

Commentary: *President Obama met with a bipartisan group of moderate Senators to survey their asks for climate change legislation . . . Senator Murkowski is mulling whether Senator Rockefeller's bill delaying EPA regulation of stationary sources under the Clean Air Act by two years is sufficient for her to set aside her disapproval resolution (which would remove EPA's regulatory authority under the Clean Air Act altogether). The Chamber of Commerce and twenty governors want her to stick to her guns . . . But who needs the Clean Air Act if you have the Clean Water Act? In a settlement with the Center for Biological Diversity, EPA agreed to take certain actions to address the effect of greenhouse gas emissions on ocean acidification . . . China and India formally endorsed the Copenhagen Accord . . . Will there be a split in the circuits on tort lawsuits based on climate change? The Fifth Circuit has decided to rehear the Comer decision, but the Second Circuit has decided to put its pen down on the Connecticut v. AEP decision.*

Executive Branch

- **Obama Meets With 14 Key Senators on Climate Change Legislation.** President Barack Obama convened a bipartisan group of 14 key Senators at the White House to discuss prospects for passing climate change and clean energy legislation this year. At the meeting, the President pledged to make concessions on oil and gas exploration and support for nuclear power in exchange for the Senators' support for a binding greenhouse gas (GHG) emissions cap. The group of Senators comprised seven Democrats, six Republicans, and one independent, including: Sen. Maria Cantwell (D-WA); Debbie Stabenow (D-MI), Susan Collins (R-ME); Jay Rockefeller (D-WV); Sherrod Brown (D-OH); Richard Lugar (D-IN); George LeMieux (R-FL); Joe Lieberman (I-CT); John Kerry (D-MA); Lindsey Graham (R-SC); Jeff Bingaman (D-NM); Barbara Boxer (D-CA); Judd Gregg (R-NH); and Lisa Murkowski (R-AK). Also present were the Administration's top energy and environmental officials, including Director of the White House Office of Energy and Climate Change Policy Carol Browner, Energy Secretary Steven Chu, and Environmental Protection Agency (EPA) Administrator Lisa Jackson.
- **OMB Clears Extensions of Reporting Rules, Begins Review of Vehicle GHG Standards.** The White House Office of Management and Budget (OMB), which assesses major regulations proposed by EPA and other federal agencies, has completed its review of three proposed additions to EPA's rule requiring mandatory monitoring and reporting of GHG emissions across the economy. The three source categories that would be newly subject to the reporting rule include fugitive and vented emissions from oil and gas facilities; geologic sequestration sites; and sources of

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fluorinated GHGs. OMB's completion of its review suggests that the proposed rule will be released shortly. In a separate but related development, OMB has also begun its review of the final version of EPA's first-ever tailpipe GHG standards for passenger cars and light duty trucks, which are expected to be promulgated by the end of the month. These standards, proposed in a joint rulemaking with the National Highway Traffic Safety Administration (NHTSA) in September 2009, would fulfill an agreement negotiated last spring between the Obama Administration, the major automakers, and the State of California.

- **Ex-Im Bank Issues New Climate Change Strategy.** The government's official export credit agency, the Export-Import Bank of the United States (Ex-Im Bank), finalized a sweeping new climate change policy at its annual meeting last week. The policy includes a loan guarantee program for renewable energy projects, which is expected to support \$250 million in financing each year; a due diligence process for highly carbon-intensive projects, including a requirement that projects generating between 700 and 850 lbs CO₂ per MW adopt "best appropriate technology" for GHGs; and a mechanism for tracking and reporting GHG emissions resulting from projects financed by Ex-Im Bank. The policy was implemented pursuant to a settlement reached in 2009 with Friends of the Earth, Greenpeace, and several cities, which had filed a suit claiming that the National Environmental Policy Act (NEPA) obligated the Ex-Im Bank to evaluate the GHG impacts of its financing activities. Critics of the new policy charged that the policy does little to address emissions from Ex-Im Bank's oil and gas portfolio, and does not terminate the agency's support for coal power plants and other carbon-intensive projects. Ex-Im Bank provides direct loans, loan guarantees, and export credit insurance to support U.S. exports in high-risk markets, mostly to developing countries.
- **IRS Declares SGIG to be Non-Taxable.** In a ruling intended to resolve a tax issue delaying and perhaps jeopardizing the Department of Energy's (DOE) Smart Grid Investment Grants (SGIG) program, the Internal Revenue Service (IRS) determined that the grants would be non-taxable to corporations that receive them. The ruling conferred "safe harbor" status under Section 118(a) of the Internal Revenue Code to the \$3.4 billion in funds awarded through the SGIG last October. However, the "safe harbor" status does *not* apply to partnerships receiving SGIG funds. The IRS' ruling did not clarify the tax treatment of grants from a separate but related program, Smart Grid Demonstration Grants, which were awarded last November in a total amount of \$620 million.
- **Presidential Nominations.** The President nominated Cheryl LaFleur, a former executive vice president at National Grid USA, to fill the last remaining vacancy on the five-member Federal Energy Regulatory Commission (FERC). In addition, the President announced that he would nominate current FERC Commissioner Philip Moeller to serve a second term.

Congress

- **Murkowski Delaying Disapproval Vote.** Sen. Lisa Murkowski (R-AK) told reporters that her resolution of disapproval of EPA's finding that GHGs endanger public health and welfare is "on hold." If the Congress were to pass the Murkowski resolution and President Obama signed it, EPA would be prohibited from promulgating the "disapproved" regulation until expressly authorized by Congress. Sen. Murkowski said that she is waiting to see if Sen. Rockefeller is "serious about moving" his separate bill to delay EPA regulation of stationary sources of GHG emissions by two years. Sen. Murkowski also wrote to EPA Administrator Lisa Jackson

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requesting: information on the number of stationary GHG emission sources that would be regulated under the Clean Air Act at different points in time under EPA's planned implementation schedule; clarification on the full range of anticipated economic and employment impacts of the regulation; and an analysis of the potential for the "leakage" of carbon-intensive production and related jobs to other countries due to GHG regulation. In addition, five Democratic members of the House of Representatives wrote to President Obama to ask that his Administration "take immediate steps to halt" plans to regulate GHG emissions at stationary sources, and to let Congress develop a national climate policy.

- **Levin Details Climate Asks.** Senator Carl Levin (D-MI) wrote to Sen. John Kerry (D-MA) to outline his requests for the comprehensive energy-climate legislation under development. Sen. Levin said the bill should include preemption of EPA's authority to regulate GHG emissions from stationary sources, a "realistic and firm" price collar on allowance prices, and an allocation of allowances to electric utilities based wholly on emissions (not partly on sales, as in the Waxman-Markey bill). Sen. Levin also argued that industrial sources of GHGs should be exempted from regulation for at least a decade and should receive free allowances to cover the costs associated with direct and indirect emissions. Senator Kerry told reporters that he, Sen. Lindsey Graham (R-SC), and Sen. Joe Lieberman (I-CT) plan to issue by the Easter recess either a date for the draft's release or an outline or draft of the legislative text of their bill. Although the trio has not announced what mechanism they will use to price carbon, Sen. Lieberman told reporters: "[W]e don't use the phrase 'cap-and-trade' anymore. We'll have 'pollution reduction targets.'"
- **Lugar Drafting "Practical" Energy Bill.** Sen. Richard Lugar (R-IN) announced that he is drafting an energy bill with "practical steps that save money and that everyone can support." The bill will include a national building efficiency performance standard; incentive programs (including low-interest loans) for efficiency retrofits of homes and commercial buildings; efficiency standards for appliances and lighting; a clean energy standard (allowing use of nuclear and coal with carbon capture and storage for compliance); federal support for clean energy projects; and an early retirement program for inefficient coal plants.

Judicial

- **Second Circuit Denies Rehearing of *Connecticut v. AEP*.** The United States Court of Appeals for the Second Circuit declined on March 5 to rehear its landmark September 2009 decision in *Connecticut v. AEP*, in which the court held that a group of state and private plaintiffs could proceed with a federal common law suit premised on alleged harm resulting from climate change. The defendants in the suit, which included five of the nation's largest coal-burning utilities, had petitioned the Second Circuit to rehear the case *en banc*. The Second Circuit's action means that the defendants now have 90 days from the date of the denial of rehearing to file a petition for certiorari (review) with the United States Supreme Court. In addition, the decision sets the stage for a possible split with the Fifth Circuit Court of Appeals, which decided the previous week to hold *en banc* rehearing of *Comer v. Murphy Oil Co.*, a case brought by survivors of Hurricane Katrina making common law claims for climate change-related damages. The Fifth Circuit's decision is widely believed to augur a dismissal of the *Comer* plaintiffs' claims.
- **EPA Settlement Promises Scrutiny of Ocean Acidification under CWA.** EPA reached a settlement with the Center for Biological Diversity in which the agency promised for the first

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time to consider using its authority under Section 303(d) of the Clean Water Act (CWA) to address ocean acidification caused by CO₂ emissions. Under the settlement, EPA agreed to sign a Federal Register notice by March 15, 2010 that will seek comment on (a) approaches for states to determine if waters are threatened by ocean acidification; (b) how states might aid in monitoring ocean acidification and related impacts; and (c) the development of “total maximum daily load” (TMDL) pollution limits for waters affected by ocean acidification. The agency also agreed to complete a memorandum by November 15, 2010, that reflects these comments and explains how the agency will proceed under Section 303(d) of the CWA. The settlement does not obligate EPA to issue regulations pertaining to ocean acidification.

- **Wal-Mart Settles CEQA Suit by Committing to GHG Mitigation.** In a potentially pathbreaking settlement, Wal-Mart committed to reduce GHG emissions at two new stores in California by installing solar panel arrays, purchasing high-efficiency equipment and lighting, and launching a comprehensive recycling program. The settlement resolves claims brought by the Center for Biological Diversity and other environmental organizations under the California Environmental Quality Act (CEQA), an environmental review statute that requires state and local agencies to assess the environmental impacts of projects they initiate, finance or authorize, and to undertake feasible mitigation measures to reduce those impacts. The settlement could serve as a template for the resolution of future disputes under CEQA, as well as analogous environmental review statutes that are in force in fifteen other states.

States and Cities

- **20 Governors Support Congressional Efforts to Prevent EPA GHG Regulation.** A group of 20 state governors sent a letter to Congressional leaders stating their support for efforts to prevent EPA from implementing GHG regulations under the Clean Air Act. In the letter, the 18 Republican and 2 Democratic governors argued that GHG policies should be developed by elected representatives and, in reference to a recent proposal by Senate Democrat Jay Rockefeller, suggested that a mere delay in EPA GHG regulations would be insufficient to prevent job loss and economic harm that might result from such regulations.
- **Counties Seek Greater Involvement in Climate Policy.** The National Association of Counties (NAC) passed a resolution supporting participation by counties in the development of climate legislation. Due to conflicts between different county constituencies, the NAC resolution did not specifically include a position on federal cap-and-trade legislation.

Industry and NGOs

- **AARP Announces Support for Cantwell-Collins Bill.** AARP, the influential advocacy organization for senior citizens, announced that it supports the “cap-and-dividend” climate change bill cosponsored by Senators Maria Cantwell (D-WA) and Susan Collins (R-ME) (also known as the Carbon Limits and Energy for America’s Renewal (CLEAR) Act, or S.2877). Under the Cantwell-Collins bill, an emissions cap would be placed on “upstream” suppliers of fossil fuels. All allowances would be auctioned, rather than distributed for free, with 75% of auction proceeds rebated to consumers through a per-capita dividend. AARP said the Cantwell-Collins bill “offers a uniquely pro-consumer approach for addressing climate change on an economy-wide basis.” While AARP does not have an official position on climate change science,

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the organization's "primary interest" in supporting the legislation is "protecting consumers from having to pay a disproportionate or excessive share of the cost of any approach Congress determines will best limit carbon emissions and encourage alternative electric generation."

- **Chamber, Trade Groups Support Murkowski Resolution.** The U.S. Chamber of Commerce and almost 100 other industry and trade associations sent a letter to all members of the Senate supporting Sen. Lisa Murkowski's "disapproval resolution" that would permanently block EPA regulation of GHG emissions. Introduced in January, the Murkowski resolution (S.J. Res. 26) would nullify EPA's December 2009 finding that GHG emissions from motor vehicles contribute to an endangerment to public health and welfare, thereby undermining the legal predicate for EPA's forthcoming motor vehicle GHG standards and its plans for regulation of GHGs from stationary sources. In support of the resolution, the letter cited industry concerns over EPA's soon-to-be-finalized "tailoring rule" exempting smaller GHG sources from Prevention of Significant Deterioration (PSD) and Title V regulation, as well as fears that EPA would eventually regulate small GHG sources under the Clean Air Act (as the letter acknowledges, EPA has stated it has no intention of regulating such sources). The letter is available at <http://www.uschamber.com/issues/letters/2010/100310epa.htm>.
- **Greenpeace Activists Protest Murkowski Resolution at Senate Offices.** Activists from the environmental organization Greenpeace unfurled a banner criticizing Sen. Murkowski at the entrance to the Hart Senate Office Building on Capitol Hill, where the Senator's office is located. In a reference to a Greenpeace website called "PolluterHarmony," the banner depicted hearts together with Murkowski's picture and the names of several energy companies, along with the phrase "happily matched since 2004." Greenpeace said it wished to call attention both to the Murkowski resolution and the Senator's recent demand that climate change legislation being developed in the Senate include opening the Arctic National Wildlife Refuge (ANWR) to oil exploration. The activists responsible for placing the banner were arrested.
- **IEA and WCBSD Members Issue Statement on Transition to Low-GHG Economy.** The International Energy Agency (IEA) and a group of Chief Technology Officers from 30 members of the World Business Council for Sustainable Development (WCBSD) issued a joint statement on steps that should be taken to assist the global economy transition to less GHG-intensive energy sources. The group declared that "business is ready and willing to support governments to increase international collaboration and best practice sharing to accelerate energy technology research, development, demonstration, and deployment." The statement committed IEA and WCBSD to "work with the wider business community" on developing technology "road maps" for low-carbon energy sources; increasing investment in low-carbon energy in developing countries; sharing best practices on overcoming barriers to clean energy technology deployment; and gathering and publishing data on investment in clean energy research, development and deployment. The statement is available at http://iea.org/files/CTO_statement.pdf.

Studies and Reports

- **CCS Could Boost Domestic Oil; Halve Imports.** A study released by Advanced Resources International (ARI) concluded that federal constraints on CO₂ emissions on stationary sources could generate sufficient volumes of CO₂ to boost U.S. oil production by 3-3.6 million barrels a day (if all captured CO₂ is used for enhanced oil recovery (EOR)). The increase in domestic

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production would reduce annual crude oil imports by 43-52% by 2030, keep more than \$700 billion in the U.S. economy between 2009 and 2030 by improving the trade balance, and increase state and federal tax revenues by \$190-210 billion. States with major oil basins with EOR potential in the lower 48 include California, Montana, North Dakota, Colorado, Utah, Wyoming, New Mexico, Texas, Oklahoma, Kansas, Louisiana, Alabama, Mississippi, Michigan, Illinois, Pennsylvania, and West Virginia. The report was paid for by the Natural Resources Defense Council, and is available at <http://www.adv-res.com/pdf/ARI%20CCS-CO2-EOR%20whitepaper%20FINAL%203-10-10.pdf>.

International

- **China, India Formally Endorse Copenhagen Accord.** China and India became the last two major emitters to formally endorse the Copenhagen Accord (Accord) when both submitted letters to the United Nations. While both nations met the Accord's January 31 deadline for submitting national climate action plans, neither nation had previously acknowledged the Accord.
- **EU Commission Eyes South Africa in 2011 for Binding Climate Treaty.** The European Union Commission released a strategy paper – titled “International Climate Policy Post-Copenhagen: Acting Now to Reinvigorate Global Action on Climate Change” – that is intended to provide a way forward for international climate change negotiations over the next two years. Setting its sights on South Africa in 2011 as the target for the development of a post-2012 climate change treaty, the roadmap calls for the integration of Accord emission pledges into the United Nations process; the implementation of the fast-start climate change adaptation fund included in the Accord; and the resolution of certain problems with the existing Kyoto Protocol structure.
- **UN Names InterAcademy Council to Conduct Independent Review of IPCC.** The United Nations has authorized the Dutch-based InterAcademy Council, a coalition of 15 national science academies, to conduct an independent review of the UN's Intergovernmental Panel on Climate Change (IPCC). The IPCC is tasked with assessing the scientific basis for anthropogenic climate change. The review, instituted in response to errors contained in the IPCC's most recent climate change assessment report, will evaluate all aspects the IPCC's assessment report process and is scheduled to be completed by August of this year.

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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