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**DEWEY & LEBOEUF**

## U.S. Climate Change Newsletter

### Editor's Note

Since our last issue, Senators Kerry (D-MA) and Lieberman (I-CT) released a discussion draft of their long-awaited climate change legislation, called the American Power Act ("APA"). Lawyers at Dewey & LeBoeuf have prepared a comprehensive summary of the bill, including a chart which compares the APA to H.R. 2454, which was passed by the House of Representatives in June 2009, and the Kerry-Boxer bill introduced in the Senate in November 2009. The summary is available [here](#).

At the time of the the APA's release, the US Senate still was deadlocked over financial industry reform, and prioritization of environment and energy issues was focused on the potential consequences of offshore drilling. Soon after financial industry reform had passed both chambers of Congress, President Obama called on the Senate to pass comprehensive energy legislation that would address offshore drilling risks and place

a price on carbon dioxide emissions, vowing to help find the votes necessary for passage. Majority Leader Reid (D-NV) subsequently directed his Senate colleagues to combine the legislative response to the risks associated with offshore drilling with a comprehensive clean energy bill that would be debated on the floor of the Senate before the August recess.

What exactly will be included in the "comprehensive clean energy bill" remains subject to debate. Senator Schumer (D-NY) suggested on June 7th that the APA likely would be brought onto the Senate floor as an amendment to the American Clean Energy Leadership Act (S. 1462), which was originally approved by the Senate Energy and Natural Resources Committee in June 2009 (and recently amended by the same committee on May 6, 2010). Many observers, including certain environmental groups, believe that the approach suggested by Senator Schumer would render the climate change provisions of the American Power Act an expendable part of the overall energy reform debate.

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## Federal Legislation

### **American Power Act**

On May 12, Senators Kerry (D-MA) and Lieberman (I-CT) released a discussion draft of the “American Power Act” – their highly anticipated comprehensive federal energy and climate change legislation. Although the effort was originally billed a “tri-partisan” effort, Senator Graham (R-SC) pulled his support of the bill due to unrelated political wrangling related to the timing of immigration reform. The legislation aims to cut emissions of carbon dioxide and other greenhouse gases (“GHGs”) by 17 percent below 2005 levels by 2020 and more than 80 percent by 2050. The bill would set a price on carbon emissions for large polluters such as coal-fired power plants. Rates initially would range from \$12 per ton of carbon emissions to \$25 per ton, depending on market prices. Restrictions would not take effect until 2013 for power plants and transportation fuels, and 2016 for manufacturers. Allowances would be granted to local electricity companies, which would be required to use them to help ratepayers. In addition, a separate consumer relief provision would provide rebates to

eligible families. Senators Kerry and Lieberman said the bill would exempt farms and most small and medium-sized businesses, concentrating efforts on the largest polluters. Notably, as a result of the recent (and ongoing) oil spill in the Gulf Coast, the bill also contains a provision that will allow neighboring states to veto offshore drilling leases. See the above-referenced client alert for additional detail on the proposal.

### **Lugar Practical Energy and Climate Plan**

Senator Lugar (R-IN) is expected to introduce an energy bill as an alternative to the American Power Act. The outline of the bill, which originally was released in March and was slightly revised in May, focuses on the adoption of flexible standards, rather than a cap-and-trade program, to reduce GHG emissions, including but not limited to motor vehicle efficiency standards, additional incentives for biofuels, incentives to increase domestic oil production, building efficiency standards, “clean energy” standards for electric utilities (i.e., 30 percent of US electricity from renewables, clean coal with carbon sequestration, and nuclear power by 2030, rising to 50 percent by 2050),

a voluntary retirement program for aging coal-fired power plants (16 percent of the entire fleet), and \$36 billion in loan guarantees for new nuclear power.

### **Murkowski Resolution**

The Senate resolution introduced by Senator Murkowski (R-AK) in February 2010 to prevent the U.S. Environmental Protection Agency’s (“EPA”) from regulating GHG emissions under the Clean Air Act will be put to a vote on June 10. Under Congressional Review Act rules, passage of S.J. Res. 26 would require only 51 votes, and the measure cannot be amended or filibustered. Even if the resolution does pass, a companion resolution (H.J. Res. 77) also would have to pass in the House of Representatives. President Obama ultimately would have the ability to veto the resolution if passed by Congress.

### **Carper/Casey Proposal**

Senators Carper (D-DE) and Casey (D-PA) are expected to introduce an alternative to the Murkowski resolution and a bill proposed by Senator Rockefeller (D-WV) that would restrict EPA’s authority to issue permits to major sources

of GHG emissions until January 1, 2012. While the details of a potential Carper/Casey proposal remain unclear, it is expected that EPA's authority would be limited to regulating sources emitting greater than 50,000 tons of GHG per year.

## Regulation

### Permitting of Major Sources of GHGs

On June 3, 2010, the EPA published its final Tailoring Rule requiring new stationary sources of air pollutants that emit at least 100,000 tons of GHGs per year and for existing source modifications increasing net emissions by 75,000 tons per year to undergo New Source Review (including a best available control technology determination). The final rule regulates GHG emissions from large sources in phases, requiring major sources such as power plants, refineries and large industrial establishments to obtain New Source Review and Title V Clean Air Act permits, while exempting smaller businesses emitting less than 50,000 tons per year CO<sub>2</sub>e until April 30, 2016 at the earliest. To address sources emitting equal to or greater

than 50,000 tons per year CO<sub>2</sub>e, the EPA intends to issue a supplemental notice of proposed rulemaking in 2011.

### Carbon Capture and Storage

On May 6, Energy Secretary Chu spoke at the first public meeting of the Interagency Task Force on Carbon Capture and Storage. President Obama has directed the task force, co-chaired by the U.S. Department of Energy and EPA, to develop by August 2010 a plan for deploying carbon capture and storage in the next ten years. The goal is to establish five to ten commercial demonstration projects by 2016.

### GHG Reporting Rule

On April 30, the EPA sent a draft final rule to the White House Office of Management and Budget for interagency review that would impose emissions reporting requirements on four industrial sectors not already included under the GHG Reporting Rule, including: industrial landfills; wastewater treatment plants at industrial facilities; underground coal mines; and magnesium production facilities.

### Climate Change Disclosure

According to the nonprofit organization Conference Board, the Securities & Exchange Commission's ("SEC") recently issued guidance on climate change disclosures most significantly affects corporations by directing them to develop an understanding of how climate change will affect their business and forcing them to address "spotty" disclosures of climate change issues. According to the sustainable investor group Ceres, only a quarter of S&P 500 companies addressed climate change in filings made between 1995 and 2008, with only five percent of companies discussing their strategy for managing risks associated with climate change.

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## Litigation

On June 3, several companies and a number of House Republicans joined in a suit brought by the Southeastern Legal Foundation challenging the EPA's recently published Tailoring Rule (discussed above). The case is *Southeastern Legal Foundation v. EPA*, D.C. Cir., No. 10-1131 (June 3, 2010).

On June 1, industry groups filed challenges to the EPA's final reconsideration of the Johnson Memorandum, which was published April 2, 2010 (*U.S. Chamber of Commerce v. EPA*, D.C. Cir., No. 10-1123; *National Association of Manufacturers v. EPA*, D.C. Cir., No. 10-1127). To coincide with the date on which light-duty vehicles and engines would become subject to GHG emissions standards, EPA established January 2, 2011, as the date on which GHGs would become "subject to regulation" under the Clean Air Act. This, in turn, would trigger Clean Air Act permitting requirements (New Source Review and Title V) for new and modified major stationary sources of GHGs.

On May 28, in the case *Comer v. Murphy Oil USA/Nationwide Mutual Insurance* (No. 07-60756 5th Cir.), an eight-member panel of the U.S. Court of Appeals for the 5th Circuit held that the court lacked a quorum, meaning the court could not rehear the case en banc or reinstate the panel's previously vacated decision to overturn the district court. This determination reinstates the district court's decision that the plaintiffs lacked standing for a lawsuit because the ties between emissions, global warming and the severity of Hurricane Katrina were too tenuous. The plaintiffs in *Comer* will have 90 days to file a petition for Supreme Court review.

On May 7, a coalition of industry groups challenged EPA's final Light-Duty Vehicle GHG Emissions Standards, which will limit GHG emissions from model year 2012-2016 cars and light trucks (*Coalition for Responsible Regulation v. EPA*, D.C. Cir., No. 10-1092). Although the petition for review filed by the coalition provides little detail on the basis for the challenge, the lawsuit is likely motivated by concerns about the vehicle emissions limits triggering Clean Air Act permitting requirements

(New Source Review and Title V) for new and modified major stationary sources of GHGs.

## State Developments

On May 17, 2010, the New Mexico Environmental Improvement Board proposed a preliminary review draft rule that would establish a statewide cap-and-trade program to reduce GHG emissions. The program would restrict emissions from sources emitting more than 25,000 metric tons of GHG per year, effective January 1, 2011. The Board received public comment on the preliminary review draft through May 28.

On May 3, the California Jobs Initiative announced that it had collected more than 800,000 signatures in support of its proposed ballot initiative to block the implementation of California's climate change law, A.B. 32. The group filed its petitions with California Secretary of State Debra Bowen, who must then determine whether the collected signatures are authentic. If a sufficient number of signatures is verified, California voters will have an opportunity to decide the fate of A.B. 32 in November.

## Renewables/Clean Energy

On May 6, the Senate Energy and Natural Resources Committee approved a package of nine amendments to the American Clean Energy Leadership Act (S. 1462) (“ACELA”). The amendments would, among other things, introduce new energy efficiency standards and provide for an initiative to boost wind energy development. ACELA, initially introduced by Senator Bingaman (D-NM) in June 2009, is still expected to be paired with Senate climate legislation as the companion to the Waxman-Markey climate and energy legislation passed last year by the House of Representatives.

On May 6, Senator Lautenberg (D-NJ) introduced the Cleanfields Act of 2010 (S. 3374), which would provide utilities with over \$50 million in incentives to build renewable energy facilities on brownfields sites rather than building on undeveloped green and open spaces. Incentives include grants for “inventory, assessment, planning,

and remediation of brownfields.” The bill was subsequently approved on May 20 by the Senate Committee on Environment and Public Works.

Resources for the Future, an energy and environmental think tank, issued a background paper on shale gas finding that with a federal GHG cap-and-trade system in place, among other appropriate low-carbon policies, natural gas has significant potential to be the bridge fuel to a low-carbon economy. Without adequate carbon policy, however, the paper concludes that natural gas would be expected to foster increased energy consumption and displace the development of nuclear and renewable resources. The paper also concludes that using a renewable portfolio standard in conjunction with market-based carbon reduction programs could reduce the use of natural gas and ultimately increase the cost of reducing GHG emissions.

On June 8, the U.S. Department of the Interior entered into a memorandum of understanding with ten eastern state governors regarding the development of offshore wind. Under the agreement, the newly formed “Atlantic Offshore Wind Energy Consortium” will spearhead an action plan for promoting offshore energy, which will include recommendations, prioritized goals and specific steps to expedite development. Interior Secretary Salazar also announced the creation of a Bureau of Ocean Energy Management, dedicated to oversight of renewable energy in the Atlantic. With 1000 gigawatts of offshore wind energy potential, the east coast has long been considered particularly fertile ground for renewable energy development.

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