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ENERGY AND ENVIRONMENT UPDATE **February 12, 2012**

Energy and Climate Debate

Multi-year, comprehensive highway and transit reauthorization legislation will dominate both chambers this week as debate is scheduled in both the House and Senate. The Senate has been working on a two-year, \$109 billion reauthorization bill, the Moving Ahead for Progress in the 21st Century Act (S. 1813), since February 9, when the body voted 85-11 to cut off debate on the motion and proceed to the bill, that Majority Leader Reid would like to see passed before Congress adjourns for the Presidents' Day recess. On February 7, the Senate Finance Committee approved the bill's tax portion while the week before the Senate Banking Committee adopted the transit and public transportation provisions, both of which will be offered as amendments to S. 1813.

The House version, the \$260 billion American Energy and Infrastructure Jobs Financing Act (H.R. 7), will be taken up this week, with debate beginning as early as the middle of the week. The bill, with a five-year timeframe, would extend the Highway Trust Fund's authority, in addition to motor fuels and transportation taxes that in-turn feed that fund. In place of the guaranteed transfer of 2.86 cents per gallon of each of the federal motor fuel and gas taxes earmarked for transit programs, there would be a one-time transfer of \$40 billion from the general fund.

Meanwhile, the payroll tax extension continues to languish amid political fighting, but as the February 29 expiration deadline nears, leadership in both houses will be pressing for a tidy conclusion to the conference on H.R. 3630, which would provide a 10-month extension. Some conferees have self-imposed a February 14 or 15 deadline for compromise so that the legislation might reach the floor before the cut expires. The bill, which includes a 2 percentage point payroll tax holiday, unemployment insurance benefits, and the prevention of Medicare physician payment cuts, however, is still not paid for, and that remains the primary hold-up.

As the general debate on the payroll tax extension rages, executives from wind, geothermal, hydropower, and biomass industries are asking Congress to extend the federal production tax credit through 2016 as part of that package. Industry leaders contend that failing to extend the tax credit in the first quarter of 2012 will force many manufacturers to close and put renewable energy projects at risk. The next opportunity would likely be during the lame duck session at the end of the year, but by then, industries may have already abandoned projects and put manufacturers out of business. Representatives Dave Reichert (R-WA) and Earl Blumenauer (D-OR) introduced legislation (H.R. 3307) in November that would extend the tax credit for four years. Senators John Kerry (D-MA) and Jeff Bingaman (D-NM) offered an amendment to the Senate transportation bill that would extend the wind production tax credit through

2013 as well as the 1603 program. Additionally, Senator Debbie Stabenow (D-MI) filed an amendment expanding the 48C Advanced Energy Manufacturing Tax Credit.

President Obama's 2013 budget request will be delivered to Congress on Monday, February 13, and clean energy programs are likely to be funded a bit differently than in previous years.

Due to increased scrutiny over Department of Energy funding, especially in the wake of the Solyndra bankruptcy, increases in funding for wind and solar power programs through the agency are unlikely. At the same time, energy and defense spending policy experts believe that funding will go up for alternative energy in the Defense Department. Targeted areas for funding increases may include programs to replace traditional jet fuel with biofuels, supply troops on the front lines with solar-powered electronic equipment, build hybrid engine tanks and aircraft carriers, and increase renewable energy use on military bases.

Congress

Mercury Rule Closure Estimates Challenged

Republicans on the House Energy and Commerce Committee accused the Environmental Protection Agency February 8 of misleading the public when it determined that new mercury and air toxics standards for power plants would force the retirement of 4.7 GW of coal-fired generation. Two companies' planned closures surpass the agency estimates: American Electric Power would retire 6 GW and FirstEnergy Corp. has announced the closure of 3.3 GW in order to comply with the mercury standards. The rule is scheduled to be published February 16 with compliance beginning in the spring of 2015 or 2016.

Subpoena over Solyndra Threatened

Fourteen Republicans on the House Energy and Commerce Committee sent a letter February 9 pressing the Obama administration to make available five advisers to provide updated testimony on loan guarantees for Solyndra. The five administration officials are Kevin Carroll, energy branch chief for the Office of Management and Budget; OMB Branch chief Kelly Colyar; OMB program examiner Fouad Saad; Deputy Assistant to the President for Energy and Climate Change Heather Zichal; and Aditya Kumar, deputy assistant to the vice president. The letter also called on the White House to provide documents by February 21 that have been requested by the committee since November.

Clean Air Act Review Planned

The House Energy and Commerce Subcommittee on Energy and Power announced February 9 that it will launch a series of forums on whether broad changes are needed to the Clean Air Act. The Act has not been substantially revised since Congress passed the Clean Air Act Amendments of 1990, and Republicans have called for changes to give more weight to the costs of environmental rules and industry more say in the development of regulations. Chairman Ed Whitfield (R-KY) hopes to convene the forums by the end of April. The House Appropriations Subcommittee on Interior, Environment, and Related Agencies has scheduled a February 29 hearing on the EPA's budget request.

Li-Ion Battery Transport Restrictions Approved

The Senate approved a Federal Aviation Administration reauthorization bill (H.R. 658, 75-20) February 6 containing a provision to restrict federal regulations on the air transport of lithium batteries. The four-year FAA reauthorization package includes a provision that would restrict the Pipeline and Hazardous Materials Safety Administration from issuing or enforcing any regulation or requirement that is more stringent than international standards on the air transportation of lithium metal batteries and lithium ion batteries. President Obama is expected to sign the measure into law before February 17.

House Committee Approves Ethanol Study Legislation

The House Science, Space, and Technology Committee approved legislation February 7 that would require the Environmental Protection Agency to further study the impacts of higher ethanol blends in gasoline on vehicles and the environment. The legislation (H.R. 3199) would block the agency's ability to implement two partial Clean Air Act waivers allowing ethanol concentrations of up to 15 percent in gasoline until the study is completed. Prior to the waivers, the ceiling for ethanol was 10 percent. The

National Academies would be given 18 months to analyze the impact of gasoline containing 15 or 20 percent ethanol on engine performance, pollution emissions, pollution controls, and fuel storage tanks and pipes. The legislation has little chance of passage in the Senate.

LCV Marks Issued

The League of Conservation Voters issued its 2011 National Environmental Scorecard February 7, giving a score of 10 or lower out of a possible 100 on key environmental votes to more than 100 Republican House members. The scorecard is based on 35 House votes in 2011. The league also awarded two dozen Democratic House members and 31 senators a score of 100. Thirteen Republican senators were awarded a score of zero out of 100 for their votes.

FERC Keystone Authority Legislation Approved

The House Energy and Commerce Committee approved February 7 legislation (H.R. 3548) that would shift permitting authority of the Keystone XL pipeline from the State Department to the Federal Energy Regulatory Commission. The bill would require FERC to issue a construction permit within 30 days after receiving a new application from TransCanada. House leaders are discussing attaching the measure to a highway reauthorization bill (H.R. 7) that may be on the floor this week or to the payroll tax cut extension still in conference.

Rare Earths Caucus

Representative Hank Johnson's (D-GA) office announced February 7 that he will co-chair the House Rare Earths Caucus along with Congressman Mike Coffman (R-CO). The Rare Earth Caucus is comprised of members of the House committed to securing U.S. supply of rare earth elements. Currently, China accounts for 97 percent of global rare earth element production and in recent years has restricted rare earth element exports.

Bingaman CES Plans

Senate Energy and Natural Resources Committee Chairman Jeff Bingaman (D-NM) said February 10 that he hopes to introduce a clean energy standard as early as this week but admitted that he does not believe the proposal will become law during this Congress. Senator Bingaman said he plans to hold a hearing on the proposal, which President Obama called for during the last two State of the Union addresses, soon after its introduction. The measure calls for 80 percent of the country's electricity to come from clean sources by 2035.

Legislation Introduced

Congressmen Ed Markey (D-CA), Henry Waxman (D-CA), Steve Cohen (D-TN), Gerry Connolly (D-VA), and Peter Welch (D-VT) introduced legislation (H.R. 3900) February 3 to ensure that oil transported through the Keystone XL pipeline is used to reduce domestic dependence on Middle Eastern oil. Though TransCanada has entered into long-term contracts with refineries to export the fuel to Latin America, Europe, and elsewhere, the legislation would require that the fuel be sold in the U.S.

Senators Ben Cardin (D-MD) and Olympia Snowe (R-ME) introduced the Creating American Prosperity through Preservation Act of 2012 February 6 to increase the historic tax credit from 20 percent to 30 percent for smaller projects. The measure is intended to encourage job growth and development in rural areas, as the credit has created 2 million jobs in the last 30 years, and it also provides incentives to promote energy efficiency and operating cost-savings for developers to use energy-efficient technology.

The same day, Senator Bob Casey (D-PA) introduced legislation (S. 2070) to create and extend incentives for using natural gas as a vehicle fuel. The Natural Gas Energy and Alternative Rewards Act would create a rebate of up to \$15,000 for buying public transit or school buses that run on alternative fuels and extend tax credits for using alternative fuels or building refueling stations through 2016.

On February 7, Congressman Peter DeFazio (D-OR) introduced legislation (H.R. 3913) to amend the Natural Gas Act with respect to application of the right to exercise eminent domain in construction of pipelines for the exploration of natural gas.

Also on Tuesday, Representative Don Young (R-AK) introduced legislation (H.R. 3973) to facilitate the development of energy on Indian lands by reducing Federal regulations that impede tribal development.

Congressman John Barrow (D-GA) introduced legislation (H.R. 3997) February 9 to amend the Internal Revenue Code of 1986 to extend the deduction for expensing of environmental remediation costs.

The same day, Representative Connie Mack (R-FL) was joined by 54 of his colleagues in introducing legislation (H.R. 4000) to approve the Keystone XL pipeline. The Energizing America through Employment Act allows immediate construction of the pipeline outside of Nebraska, leaving the governor with the authority to determine the route within the state.

Upcoming Hearings

The Senate Energy and Natural Resources Committee will receive testimony on the Department of Energy's budget request for fiscal year 2013 on February 16. Energy Secretary Steven Chu will be the witness.

The House Appropriations Subcommittee on Interior, Environment, and Related Agencies will hold a hearing on proposed fiscal year 2013 appropriations for departments, agencies, and programs under its jurisdiction February 16 and 17.

The Senate Indian Affairs Committee will hold a hearing February 16 on energy development on Indian lands. The Indian and Alaska Native Affairs Subcommittee of the House Natural Resources Committee will hold a hearing on related legislation the previous day.

On February 15, the House Natural Resources Committee will hold a hearing examining Department of the Interior spending, with testimony from Secretary of the Interior Ken Salazar scheduled.

On February 17, the House Appropriations Subcommittee on Agriculture will hold a hearing on the Agriculture Department's budget with testimony from Secretary Tom Vilsack scheduled.

Administration

E-Waste Export Investigation

The U.S. International Trade Commission announced an investigation February 2 into the current market, characteristics, and practices in the electronic waste export industry. The commission will conduct surveys with companies exporting e-waste to other regions of the world and will use other existing information to draft the report. An interagency group of officials from the White House Council on Environmental Quality, the Commerce Department, the Office of the U.S. Trade Representative, and other federal agencies drafted the electronic stewardship last year, calling for electronics purchased through government contracts to meet energy efficiency standards, requiring federal agencies to use certified recyclers, and pushing for an increase in manufacturer collection programs in contracts. The Commission will hold a public hearing May 15.

Allison Review Completed

The White House released the full independent review of the Department of Energy's loan and loan guarantee energy programs February 10. The report concludes that the federal government could lose \$3 billion in Department of Energy loans for green energy programs, significantly less than the \$10 billion Congress allotted. Herb Allison, the former Treasury Department official who oversaw the Troubled Asset Relief Program, headed the investigation and called on the Energy Department to establish an early warning system to identify problems with the loans, improve management of the loan program, develop objectives and standards of performance for managing the portfolio during the construction phase of projects and beyond, and name a risk officer who would lead a risk management unit charged with monitoring the loans.

Green Investment Fair

The White House will host a renewable energy investment fair March 13 featuring Energy Secretary Steven Chu and high profile green investors. Invitations have been sent out to 79 major U.S. companies, including Google, ExxonMobil, Coca Cola, Ford, Starbucks, Target, Verizon, and Walt Disney, for a workshop designed to spark more private investment during a time when Congress is struggling to extend federal incentives.

ITC on Wind Trade Case

On February 10, the U.S. International Trade Commission voted 5-0 finding a reasonable indication that the US wind industry, represented by the Wind Tower Trade Coalition, is being adversely affected by dumped wind towers from China and Vietnam. The vote allows the investigation to proceed to the next stage, where the exact impact of the dumping will be quantified and assessed. Broadwind Towers Inc., DMI Industries, Katana Summit LLC, and Trinity Structural Towers Inc. make up the coalition, and this marks the second consecutive ruling by the ITC in the renewable energy sector, the other being in a case involving crystalline silicon photovoltaic solar panels, where the panel found evidence of dumping.

Department of Energy

\$120 Million for Battery and Storage Hub

The Department of Energy announced February 7 its plans to launch a new energy innovation hub for advanced research on batteries and energy storage, with an investment of up to \$120 million over five years. The Batteries and Energy Storage Hub will focus on accelerating research and development of electrochemical energy storage for transportation and the electric grid, and will be funded at up to \$20 million in FY2012 and managed by the Basic Energy Sciences Program in the agency's Office of Science. Letters of Intent are due March 1, with full applications due at the end of May, and an award will be selected this summer.

\$12 Million through SunShot

Energy Secretary Steven Chu announced over \$12 million February 8 to hasten solar energy innovation from the lab to the marketplace through the agency's SunShot Incubator Program. The funding will accelerate domestic innovation in solar energy and manufacturing by supporting advancements in hardware reductions in soft costs, and the development of pilot manufacturing and production projects. Applications are due April 9.

DOE to Assist with Boiler MACT Compliance

Speaking at a conference co-sponsored by the National Association of State Energy Officials and the Association of State Energy Research and Technology Transfer Institutions February 9, Department of Energy Deputy Assistant Secretary for Energy Efficiency Kathleen Hogan said that the agency is preparing to help facilities comply with the new Environmental Protection Agency's Boiler MACT rule, which recently issued new air toxics standards for boilers, process heaters, and certain incinerators.

NREL Solar Comparison

The National Renewable Energy Laboratory published a presentation February 7 finding that Chinese solar producers hold no significant cost advantage over the United States counterparts when trans-oceanic shipping costs are factored into the equation. The analysis estimates that China currently holds a roughly one percent cost advantage over U.S. manufacturers of photovoltaic solar panels and modules, but when trans-ocean shipping costs for the Chinese equipment are factored into overall costs, U.S. manufacturers gain a five percent advantage selling into domestic markets.

Department of Interior

Fracking Regs

The Bureau of Land Management is preparing draft regulations for hydraulic fracturing that would require oil and gas companies to disclose details of chemical additives, test the integrity of wells, and provide more information on water use and waste management. The bureau is currently developing regulations

that would apply to drilling on federal lands, and the requirements will have provisions for protecting trade secrets.

Department of State

No Improper Influence Found

The State Department's inspector general found February 9 that TransCanada Corp. did not improperly influence the selection of a third-party contractor to conduct the environmental review of the proposed Keystone XL pipeline. At the same time, however, the report, *Special Review of the Keystone XL Pipeline Permit Process*, recommends that the agency alter its contractor-selection process to minimize applicant influence. The agency conducted the special review in response to an October letter led by Senator Bernie Sanders (I-VT) and Representative Steve Cohen (D-TN).

Environmental Protection Agency

GHG Permitting Rule Revisions to OMB

The Environmental Protection Agency sent February 6 a proposed rule on revisions to its greenhouse gas permitting program to the White House Office of Management and Budget for review. The proposed rule is expected to solicit comments on the third step of the greenhouse gas tailoring rule. The agency will propose phasing in its prevention of significant deterioration and Title V GHG permitting programs for additional emissions sources and potentially setting lower permitting thresholds in 2016. The EPA anticipates proposing the rule in March.

Increases to Emissions Budgets Finalized

The Environmental Protection Agency released a final rule February 7 to increase emissions budgets in ten states under the Cross-State Air Pollution Rule to reduce pollution that crosses state lines. The agency simultaneously issued a direct final rule with further revisions to emissions budgets in 13 states. The final and direct final rules to not make changes to the underlying cross-state rule, and, combined, the two rules would increase allowable emissions under the program by 2 percent. The rule requires 28 states to reduce NO_x and SO₂ from power plants to help downwind areas meet air quality standards for ozone and fine particulate matter.

Mercury Standards Prompt Plant Closures

FirstEnergy Corp. announced February 8 that it will close three coal-fired power plants in West Virginia, citing the Environmental Protection Agency's mercury and air toxics standards and other environmental regulations. The soon-to-be retired plants include the Albright Power Station, which opened in 1952 the Willow Island Power Station, which started generating electricity in 1949; and the Rivesville Power Station, which went online in 1943. The plants represent roughly 3 percent of FirstEnergy's total regulated and competitive generating portfolio.

Oral Arguments Scheduled

The U.S. Court of Appeals for the District of Columbia issued a schedule for oral arguments February 8 in several lawsuits challenging the Environmental Protection Agency's greenhouse gas regulations. The court will hear arguments February 28-29 in challenges to the agency's finding that greenhouse gas emissions endanger the public and environment and should be regulated (endangerment finding), its rule restricting greenhouse gas emissions from motor vehicles (light-duty vehicle GHG emissions standards), and a regulation limiting greenhouse gas permitting to the largest stationary sources (tailoring rule). The rules are being challenged by several industry groups and some states, which contend that the agency's regulations violate the Clean Air Act and should be vacated.

Coalition of States Files Soot Suit

On February 10, New York, California, Connecticut, Delaware, Maryland, Massachusetts, New Mexico, Oregon, Rhode Island, Vermont, and Washington sought an injunction requiring the Environmental Protection Agency to immediately revise national ambient air quality standards for fine particulate matter after the agency missed an October 2011 deadline for completing a five-year review of the rule.

EPA Semiannual Regulatory Agenda Forthcoming

On February 13, the Environmental Protection Agency will publish its semiannual regulatory agenda in the Federal Register, outlining plans for issuing proposed and final rules, both those already finished or those currently being formulated or revised.

Continuing Legal Challenges to CSAPR

On February 9, the labor and industry plaintiffs challenging the Environmental Protection Agency's Cross-State Air Pollution Rule in the U.S. Court of Appeals for the District of Columbia Circuit filed a brief arguing that the rule disregarded the actual "significant contribution" of a state to downwind air quality impairment, while separately, states and local governments also challenging the rule filed briefs claiming that the agency inappropriately usurped state power while implementing the rule. CSAPR was designed to help downwind states reduce particulate matter in the air by requiring 28 upwind states to reduce the amounts of nitrogen oxides and sulfur dioxide crossing state lines. The rule was supposed to take effect on January 1, 2012, but the court stayed the rule while the legal challenges of the forty-five consolidated plaintiffs play out under an expedited briefing schedule that will culminate in oral arguments April 13.

Truck Makers Challenge Navistar-specific Rule

On February 7 and 8, Mack Trucks Inc., Volvo Group North America LLC, Daimler Trucks North America LLC, and Detroit Diesel Corp. filed petitions for review in the U.S. Court of Appeals for the District of Columbia Circuit challenging the Environmental Protection Agency's interim final rule that specifically allows Navistar Inc. to pay nonconformance penalties in order to continue producing heavy-duty, 2012 and 2013 model-year diesel engines that exceed nitrogen oxides limits. The plaintiffs use liquid, urea-based selective catalyst reduction technology, whereas Navistar uses exhaust gas recirculation technology to control nitrogen oxides emissions from its engines. EPA is allowed to accept nonconformance payments from a manufacturer if three conditions exist; the standard has become more difficult to meet; significant work is required to comply; and technological reasons account for nonconformance. The agency will accept comments on the rule until April 14.

Government Accountability Office

Diesel Information Lacking

The Government Accountability Office announced February 7 that federal agencies lack the information necessary to assess the effectiveness of federal efforts to reduce mobile diesel emissions. The agency found that few programs collect performance information on their diesel emissions reduction activities, and is asking the Environmental Protection Agency and Departments of Energy and Transportation to develop a strategy for their grant and loan programs on diesel emissions reductions activities.

Nuclear Regulatory Commission

Nuke License Approved

The Nuclear Regulatory Commission voted 4-1 February 9 to approve a license for Southern Company to build two new nuclear reactors, the first license in three decades. Chairman Gregory Jaczko casted the dissenting vote, saying that he could not support issuing the license unless Southern Co. agreed to a binding commitment as part of the license agreement to implement safety reforms that will be required in response to last year's Japanese nuclear crisis. The license will be the first of its kind, combining construction and operating, under new procedures.

States

MA Agreement Prohibits Plant's Coal Usage

The owner of the Salem Harbor Power Station, one of the oldest and most heavily polluting power plants in Massachusetts, agreed February 3 to not use coal at any new generating units at the plant after the current facility closes in 2014. The agreement by Dominion Energy New England also contains language dismissing allegations brought by the Conservation Law Foundation and HealthLink that the company was in violation of the Clean Air Act. The consent decree, filed in the U.S. District Court for the District of Massachusetts, also requires the company to provide \$275,000 for supplemental environmental projects

designed to reduce air pollution in communities adjacent to the Salem Harbor Plant and reduce demand for electricity in the region. The agreement follows a May announcement that the company planned to cease operations at the plant because of environmental regulations and market conditions.

NM Cap and Trade Repealed

New Mexico's Environmental Improvement Board repealed 5-0 February 6 CO2 cap and trade rules passed in 2010 by the same panel under the administration of former Governor Bill Richardson (D). The board's unanimous vote, with two abstentions, scraps cap and trade rules issued by the board under the New Mexico Air Quality Control Act.

International

Rio+20 Energy and Pricing Goals

Speaking at a seminar about a report, *Resilient People, Resilient Planet: A Future Worth Choosing*, February 6, the European Union's Climate Action Commissioner Connie Hedegaard said that the Rio+20 sustainable development conference should result in clear decisions on renewable energy and on the pricing of goods and services so that they accurately reflect the pollution they cause. Commissioner Hedegaard highlighted two of the report's 56 recommendations as key, one that calls for a decision to ensure universal access to affordable sustainable energy by 2030, and another that recommends that price signals that value sustainability should be established, and governments should commit to introducing some form of carbon pricing by 2030.

EU Airline Rule Could Be Altered

Jos Delbeke, director general of the European Commission's climate department said February 7 that the International Civil Aviation Organization has a last chance to forestall the full inclusion of airlines in the European Union's Emissions Trading System for greenhouse gases if it can agree on concrete emissions cutting measures within six to eight months. Countries opposed to their operators' inclusion in the system will meet in Moscow February 21. The Civil Aviation Administration of China issued a directive February 6 suggesting that the country not comply with the EU regulations. The International Air Transport Association said the next day that they believe that the EU has become more willing to explore a global agreement to reduce emissions through the ICAO rather than proceeding unilaterally, especially in light of the fact that at least 43 countries have publicly stated their opposition to the requirement.