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Preemption and Alteration of EPA and State Authority to Regulate Greenhouse Gases in the Kerry-Lieberman Bill

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The recently-released discussion draft of the Kerry-Lieberman bill (KL), officially titled the American Power Act, contains numerous provisions that affect the role of states in addressing climate change as well as the Environmental Protection Agency's (EPA) authority under the Clean Air Act (CAA). Preemption has been the subject of intense debate and speculation since the passage of the Waxman-Markey climate bill (WM) in June 2009, and commentators have questioned whether KL's preemption measures would (and should) have the effect of "a scalpel or a sledgehammer" on existing state and EPA authority. The following paper contributes to the discussion by summarizing KL's preemption and alteration of state climate change regulatory authority and EPA authority to regulate GHG emissions under the Clean Air Act.

I. Overview

Subtitle D of Title II of KL, entitled "Ensuring Regulatory Predictability for Greenhouse Gases," is the principal section that addresses preemption of existing Clean Air Act authority. A "miscellaneous" Subtitle F of the same title in KL addresses preemption of state cap and trade programs.

With respect to addition and amendments to the Clean Air Act, two key additions are the inclusion of a new Title VII and Title VIII of the Act. As will be discussed below, the new Title VII of the Clean Air Act, entitled "Greenhouse Gas Pollution Reduction and Investment Program," is the centerpiece of the climate portion of the KL bill. The new Title VIII of the Clean Air Act, entitled "Greenhouse Gas Standards," addresses new and existing coal-fired power plants as well as black carbon emissions.

As the following discussion shows, KL's preemption of state and Clean Air Act authority is very similar to, although a bit broader than, preemption provisions under WM. KL preempts the same CAA authority as WM, but adds ocean acidification as a reason for which EPA may not regulate GHGs under the specified CAA provisions. Additionally, KL does not time limit its preemption of state cap-and-trade programs as WM does, although KL does make an effort to consult with and award early action among the states. As for additions and amendments to the Clean Air Act, KL gives substantial new authority to EPA under the new Title VII and Title VIII and amendments to Title VI. At the same time, KL, like WM, fails to grant meaningful new CAA authority in important areas such as black carbon mitigation and retirement of existing coal-fired power plants.

In sum, KL preempts or effectively disables:

1. State cap-and-trade programs
2. Regional programs based on state cap-and-trade-programs, such as the Regional Greenhouse Gas Initiative (RGGI) and the Western Climate Initiative (WCI)

(although certain allowances issued under these programs could be transferred into the federal system)

3. Promulgation of National Ambient Air Quality Standards for GHGs
4. Use of Prevention of Significant Deterioration (PSD), Hazardous Air Pollutants, International Air Pollutants, and Title V programs to regulate GHGs
 - a. EPA's PSD and Title V Greenhouse Gas Tailoring Rule is consequently rendered almost entirely irrelevant. KL's amendment to PSD means that PSD will not apply to a facility on the basis of that facility's emissions of GHGs, so the threshold set by the Tailoring Rule will not matter. The Tailoring Rule may still have some limited effect with respect to Title V. The KL language amending Title V indicates that a facility that *only* emits GHGs will not be required to obtain an operating permit, but a facility that emits another air pollutant covered by the CAA in addition to GHGs may be required to address those GHGs in its Title V operating permit.
5. Establishment of New Source Performance Standards for GHG emissions from a capped source unless EPA finds the standard appropriate to address non-climate change-related effects.

KL does not preempt:

1. State regulation of GHGs through means other than cap-and-trade
2. Limited applications of NSPS. EPA may use NSPS for uncapped sources, but before 2020, it may not apply NSPS to an uncapped source that qualifies as an offset project. Additionally, KL provides for development of performance standards for new coal-fired power plants under the new Title VIII of the CAA.
3. EPA's recently finalized Light-Duty Vehicle Greenhouse Gas Emissions Standards.

KL creates several new Clean Air Act programs to regulate GHGs, primarily through a federal cap-and-trade system and including a phase-down of the consumption and importation of hydrofluorocarbons.

KL calls for amendment to the existing Mandatory GHG Reporting Rule.

II. Preemption of the Clean Air Act

KL's EPA preemption provisions are found in Subtitle D, "Ensuring Regulatory Predictability for Greenhouse Gases," of Title II, which begins on page 619 of the discussion draft. This subtitle preempts EPA from regulating GHGs under certain sections of the CAA because of their contribution to climate change, and in some cases, to ocean acidification. KL's preemption provisions are very similar to WM's preemption provision, although slightly more broad due to the inclusion of ocean acidification as a reason precluding EPA action

- Criteria Pollutants. Section 2301 prevents the EPA Administrator from adding a GHG to the list of criteria pollutants under CAA § 108(a) on the basis of that GHG's effect on climate change or ocean acidification. This will effectively prevent EPA from regulating greenhouse gases under Title I of the CAA by preventing EPA from setting a National Ambient Air Quality Standard (NAAQS) for greenhouse gases. As discussed below, other sections of the subtitle exempt GHGs from specific Title I programs, such as New Source Performance Standards (NSPS) and New Source Review (NSR). Waxman-Markey contains a similar amendment, in the new § 831 it adds to the CAA, with the

exception that WM mentions only “global climate change” and does not mention ocean acidification.

- New Source Performance Standards (NSPS). Section 2302 amends CAA § 111 in two ways to prevent EPA from establishing standards of performance for stationary sources of GHGs. First, EPA is barred from establishing a standard of performance for capped GHG emissions from a capped source unless EPA finds that the standards are appropriate because of non-climate change-related effects of the GHG. Second, before January 1, 2020, EPA may not promulgate a NSPS for a GHG that applies to an uncapped stationary source that qualifies as an eligible offset project under § 734 of the newly-amended Clean Air Act.

WM contains similar language in the new § 811 it adds to the CAA, barring standards of performance for capped GHG emissions from a capped source for effects relating to climate change. Rather than barring performance standards for uncapped GHGs from eligible offset projects, however, WM directs EPA to publish an inventory of source categories that emit over a certain threshold of uncapped GHGs and to promulgate § 111 standards of performance for the uncapped GHG emissions from these listed sources.

- Hazardous Air Pollutants. Section 2303 amends CAA § 112 to prevent EPA from adding a GHG to the list of hazardous air pollutants on the basis of that GHG’s effect on climate change or ocean acidification. Waxman-Markey contains a similar amendment in the new § 833 it adds to the CAA, with the exception that WM mentions only “global climate change” and does not mention ocean acidification.
- International Air Pollution. Some have suggested the possibility of using CAA § 115 to address the problem of GHG emissions causing international climate change. KL § 2304 removes this possibility by amending §115 to make it inapplicable to any air pollutant with respect to that pollutant’s contribution to climate change or ocean acidification. WM contains a similar amendment in the new § 832 it adds to the CAA, with the exception that WM mentions only “global warming” and does not mention ocean acidification.
- Prevention of Significant Deterioration (PSD). Section 2306 amends CAA § 169 to state that any facility that is initially permitted or modified after January 1, 2009 does not qualify as a “major emitting facility,” and therefore is not subject to the New Source Review procedures for PSD solely on the basis of emissions of any GHG. WM contains a similar amendment in the new § 834 it adds to the CAA.
- Title V. Section 2307 amends CAA § 502 to state that no stationary source will be required to apply for or operate pursuant to a Title V operating permit solely on the basis of GHG emissions that are regulated under the CAA due to the impact of the GHG on climate change. WM contains a similar amendment, in the new § 835 it adds to the CAA.

III. Preemption of State Authority

KL’s preemption of state authority to regulate GHG emissions is wider than the preemption measures found in WM, but is still limited. KL § 2305 amends the “Retention of State Authority” section of the CAA, § 116, to include new CAA § 806(c) as an included exception to the CAA’s general reservation of authority to the states to take action on air pollution beyond the programs created by the CAA.

The new § 806 is found in Subtitle F, a miscellaneous section, at page 665 of the discussion draft. The new § 806(c) prohibits states from operating cap and trade programs for GHGs, effective January 1 of the first calendar year for which the EPA Administrator issues allowances in the federal cap and trade scheme created by KL. This limitation has no expiration, but a cap and trade program is the only type of regulatory program the states may not use. Waxman-Markey similarly preempts state cap and trade programs, in a new § 861 of the Clean Air Act, but only during the period 2012-17.

As a concession to states that have already created or joined cap and trade programs, KL contains several measures that provide for state input in creation of the federal cap and trade system and for exchange of state allowances for federal allowances. KL's new CAA § 730, found at page 366 of the discussion draft, requires the EPA to consult with states in the Regional Greenhouse Gas Initiative (RGGI), Western Climate Initiative (WCI), Mid-West Governors Accord, and representatives of other states, in promulgating the regulations to set up the federal cap and trade regime. WM does not contain an analogous provision, but WM § 713(b)(1)(E) requires the EPA Administrator to take into account best practices from mandatory state and multistate programs in setting up the cap and trade regulatory regime.

Allowances issued by California or for RGGI or WCI may be exchanged for federal allowances under KL's new CAA § 786, found at page 510 of the discussion draft. This section requires the EPA Administrator to promulgate regulations describing how the allowances can be exchanged. State allowances issued before the later of December 31, 2012 and January 1 of the first calendar year for which federal allowances are issued may be exchanged. The allowances are deducted from the auction pool in § 781. The state allowance exchange provision in WM is § 790, which is more complicated than its KL analogue. These federal allowances are deducted from the pool of allowances auctioned under § 782(d) for the benefit of low-income consumers.

KL contains an additional bonus provision for California and RGGI and WCI states in § 788, found at page 512. Certain allowances, which are set aside in § 781(e), will be awarded to states under EPA regulations promulgated under this section. One percent of allowances in 2013-15 are set aside for this purpose. One third of those are allocated under § 788(b), which provides for exchange of allowances for state offset credits held by entities or individuals and issued before January 1, 2009. The remaining two thirds are allocated under § 788(e), which provides for exchange of federal allowances for state allowances. WM contains provisions for exchange for both state allowances and state offsets, but differs slightly in operation. There is no splitting of the federal allowances between state allowances and offset credits like there is in KL, and the exchanges are allocated 1 percent of allowances in the year 2012 only, under § 782(t).

IV. Amendments to the Clean Air Act

The following part discusses KL's amendments and additions to the Clean Air Act. Where existing Clean Air Act sections, such as Title II on mobile sources, are not mentioned, it can be assumed that they stand in their current form.

A. Addition of Clean Air Act Title VII, "Greenhouse Gas Pollution Reduction and Investment Program"

The new Title VII of the Clean Air Act is introduced in Title II "Greenhouse Gas Pollution Reduction" of KL, and the majority of the Title VII provisions, §§ 701-798, are set

forth in Title II, which begins on page 262 of the discussion draft. Below we provide an overview of the new Clean Air Act titles to give a broad sense of the newly-established mandates and programs. We also identify other sections of KL, outside of Title II, that add provisions to Title VII of the Clean Air Act.

Title VII of the Clean Air Act consists of seven parts:

- Part A on “Greenhouse Gas Pollution Reduction Targets” (§§ 701-705)
- Part B on “Designation and Registration of Greenhouse Gases” (§§ 711-714)
- Part C on “Program Rules” (§§ 721-730)
- Part D on “Offset Credit Program for Domestic Emission Reductions” (§§ 731-742)
- Part E on “Offset Credit Program for International Emission Reductions” (§§ 751-763)
- Part F on “Ensuring Real Reductions in Industrial Emissions” (§§ 771-778)¹
- Part G on “Disposition of Allowances” (§§781-798)

Together, these parts comprise the crux of the bill’s GHG control measures, including the cap-and-trade program and accompanying domestic and international offsets.

Part A identifies the economy-wide goals of reducing GHG emissions by 4.75% below 2005 levels by 2013, 17% by 2020, 42% by 2030, and 83% by 2050. EPA is required to submit a scientific review and report to Congress every four years, beginning in 2013, that includes an analysis of the status of worldwide GHG reduction efforts and the technological feasibility of achieving additional GHG reductions.

Part B establishes a list of seven anthropogenic GHGs subject to Title VII, adding nitrogen trifluoride to the six standard GHGs subject to the Kyoto Protocol and identified in EPA’s endangerment finding (carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride). The EPA is authorized to initiate rulemaking to designate additional GHGs and may also be petitioned to designate an additional GHG. The EPA is prohibited from designating a gas already regulated under Title VI of the Clean Air Act (addressing stratospheric ozone protection) as an anthropogenic GHG under Title VII. It is worth noting that KL’s designation of GHGs for regulation under the new Title VII of the Clean Air Act does not affect or amend the requirement for endangerment findings under existing titles of the Act.

Section 713 in Part B directs EPA to revise, no later than 18 months after enactment of KL, existing GHG reporting regulations as needed to ensure that the federal GHG registry complies with certain requirements. These requirements are lengthy and many overlap with existing requirements of EPA’s Mandatory GHG Reporting Rule, but others, such as the requirement to include information on biomass-related emissions and to report electricity sold or delivered to industrial sources in energy-intensive industries or to refineries, appear to be new. Section 713 also defines the “reporting entity” broadly enough to give EPA wide discretion to determine which GHG-emitting entities need to comply with the reporting requirements.

Part C sets up a trading program, including authorizations for EPA to establish emission allowances and specifications for trading, banking and borrowing, penalties for noncompliance, and cost containment measures. EPA is directed to promulgate regulations to implement Title VII no later than two years after enactment of KL. Notably, with respect to Title V operating permits for stationary sources, a provision discussed under the preemption section (§ 2307) prohibits Title V operating permits from being applied to stationary sources solely for GHG

¹ Unlike the other Parts, the bulk of Part F is not introduced in Title II of KL and is instead introduced under Title IV which addresses “Job Protection and Growth.”

emissions. Section 727 in Part C then clarifies that for Title V entities that are covered by the GHG cap, the Title V permits are the means by which to implement these entities' obligations under the Title VII cap. This effectively streamlines compliance procedures for Title V stationary sources that emit GHGs and are subject to Title VII.

Parts D and E address domestic and international offsets, respectively. EPA shares responsibility with the Department of Agriculture to establish both a domestic and international offset program that ensures additional, measurable, verifiable, and enforceable offsets.

Part F of the new Clean Air Act Title VII (§§ 771-778), which creates a program to ensure "real reductions in industrial emissions" (i.e. prevent carbon leakage), is introduced in Title IV of KL, a section that addresses job protection and growth. The program consists of two components. The first, the "Emission Allowance Rebate Program," rebates emission allowances to eligible domestic industrial sectors to compensate those sectors for the GHG emission costs incurred under Title VII of the Clean Air Act. EPA is authorized to determine which industrial sectors are eligible for rebates through a rulemaking based on an assessment of the sector's (1) energy or GHG intensity and (2) trade intensity.

The second component of Part F, "Promoting International Reductions in Industrial Emissions," authorizes the President to establish an International Reserve Allowance Program for eligible domestic industrial sectors if a multilateral international climate agreement has not entered into force by 2020. EPA is charged with promulgating regulations implementing the International Reserve Allowance Program, which effectively operates as a carbon tariff and would require imports of covered goods related to eligible domestic industrial sectors to purchase international allowances from the reserve.

Part G establishes quarterly allowance auctions and authorizes EPA, in consultation with the Secretary of the Treasury and other relevant agencies, to promulgate regulations governing the auctions. It also includes provisions (§§ 786, 788), discussed above, that address emission allowances established by states and provide for recognition of early action on offsets.

Some provisions of Part G are introduced in other titles of KL. Sections 782-784, for instance, are introduced in Title III, "Consumer Protection," and address low-carbon electricity, heating, and energy efficiency for consumer protection. Sections 782 and 783 require EPA to distribute allowances through 2029 to electricity local distribution companies and natural gas local distribution companies, respectively, for the exclusive benefit of retail ratepayers. Section 784 requires EPA to distribute emission allowances among states through 2029 for the exclusive benefit of consumers of home heating oil or propane for residential or commercial uses. Title I of KL on "Domestic Clean Energy Development" also introduces § 785 of the Clean Air Act, which allocates emission allowances to the Highway Trust Fund for use in promoting "the safety, effectiveness, and efficiency of transportation in the United States."

Two other provisions of Title VII relating to carbon capture and sequestration (CCS) (§§ 789 and 794) are introduced in Title I, Subtitle C on coal. Section 789 directs the Comptroller General to conduct a study on the state of CCS technology and deployment and submit recommendations to Congress, EPA, and the Department of Energy on how to address barriers to deployment. Section 794 directs EPA to promulgate regulations that would distribute emission allowances in such a way as to incentivize commercial deployment of CCS in electric power generation and industrial operations.

B. Addition of Clean Air Act Title VIII, “Greenhouse Gas Standards”

The new Title VIII of the Clean Air Act, which consists of §§ 800-809, includes an assortment of provisions that address coal-fired power plants, mobile sources, and black carbon, among other things.

Sections 800-802 address coal-fired power plants and are first introduced in Title I, Subtitle C of KL in a section on “Performance standards for coal-fired power plants.” The bill establishes a compliance date for performance standards that is the earlier of January 1, 2020 or 4 years after the date on which EPA finds that aggregate commercial operation of CCS in the United States total at least 10 gigawatts of capacity (with at least 3 gigawatts from electric generating units) capturing and sequestering at least 12 million tons of CO₂ per year. As of the compliance date, new coal-fired power plants initially permitted between 2009 and 2019 must achieve at least 50% reduction in emissions, and new coal-fired power plants initially permitted after 2020 must achieve at least 65% reduction in emissions.

With respect to the transition and retirement of existing coal-fired power plants, § 802 of the new Title VIII provides for as-yet-unspecified depreciation and investment tax credits to encourage replacements or retrofits of existing coal-fired power plants. Additionally, this section establishes a task force comprised of representatives from EPA, the Department of Energy, the Department of the Treasury, state public utility commissions, other relevant federal, state, and local agencies, the electricity generating sector, and nongovernmental organizations. The task force is directed to submit to Congress within one year after enactment of KL a study and consensus recommendations on the following issues:

- (1) existing programs established by state and federal environmental laws that apply to electricity generating units and the effect of such programs on the retirement or transition of existing coal-fired power plants,
- (2) regulatory and financial incentives for early retirement or transition of existing coal-fired power plants, including:
 - a. exemption from performance standards for existing sources under § 111(d) of the Clean Air Act, from regulation under § 112 of the Clean Air Act for hazardous pollutants, or from the definition of “major emitting facility” under § 169(1) of the Clean Air Act for existing electric generating units that commit to ceasing operations within a certain (as yet unspecified) period of time, and the effects of such exemptions on lowering GHG emissions from electricity generation
 - b. consideration of the effect of federal regulations currently under development to control conventional air pollutants and the possibility of streamlining existing state and federal programs identified in (1) above in light of such prospective federal regulations,
 - c. financial incentives to encourage early retirements of existing coal-fired power plants
- (3) the effect on energy sector employment of the incentives identified above.

EPA, the Department of Energy and the Secretary of the Treasury are then directed to publish responses to the task force report, including any proposed changes to regulations or guidance to implement recommendations.

This provision has drawn the negative attention of environmental and public health advocates who fear that the task force would allow the electric power industry to lobby for changes and exemptions to federal and state air regulations. Indeed, the consideration of

exemptions from existing regulations and avoidance of federal regulations under development is troubling, but several considerations should mediate the outcry regarding this provision. First, nongovernmental organizations are included in the task force along with agencies at all levels of government. In theory, then, any push by the electric power industry to avoid regulations would face pushback from other members of the task force. Second, the task force is directed to include any “consensus recommendations” in its report, a requirement that prevents any one lobby from unilaterally promoting its own recommendations. Third, this provision merely calls for a study and report – any regulations implementing measures pursuant to the report are still subject to standard notice and comment rulemaking procedures.

Other sections of Title VIII address transportation efficiency and mobile sources. Section 803, “Greenhouse gas emission reductions through transportation efficiency,” added in Subtitle E of Title I on “Clean Transportation,” directs EPA, in consultation with the Secretary of Transportation, to promulgate regulations to establish transportation-related GHG emission reduction goals and standardized emission models and methods for use by states and metropolitan planning organizations in achieving the goals. Section 804, “Greenhouse gas emission standards for mobile sources, added in Title IV on “Job protection and growth,” directs EPA to promulgate emission standards for new heavy-duty motor vehicles and engines as well as new nonroad engines and vehicles.

Section 805, introduced in Title II, Subtitle C on “Achieving Fast Mitigation,” addresses black carbon mitigation. It directs EPA to propose black carbon regulations under existing Clean Air Act authority or to issue a finding that existing regulations already adequately regulate black carbon emissions. EPA is given no new authority to address black carbon.

The remaining provisions of Title VIII, §§ 806-809, are classified under a “Miscellaneous” subtitle in Title II of KL. Section 806, discussed above, preempts state cap and trade programs. The other provisions direct EPA to work with the Departments of Agriculture and Interior to use existing data sources to provide an annual accounting of greenhouse gases from the forestry sector (§ 807), directs these three agencies to conduct a study and report to Congress on the impacts of renewable biomass use (§ 808), and calls for a National Academy of Sciences Report reviewing the definition of renewable biomass (§ 809).

C. Amendment to Clean Air Act Title VI on “Stratospheric Ozone Protection”

Title II, Subtitle C of KL, entitled “Achieving Fast Mitigation,” includes a provision that adds a new § 619 to Title VI of the Clean Air Act. This section establishes an initial list of hydrofluorocarbons (HFCs) to which EPA is authorized to add additional HFCs. EPA is directed to promulgate regulations that would phase down both consumption of these listed substances and importation of products containing the listed substances. To reduce consumption, EPA is directed to establish a cap and trade program for the listed substances that would permit trading of HFC consumption allowances. The program would begin in 2013 with a cap of 87.5% of the current baseline and would decline annually, until it remains at 15% of the current baseline by 2033 and after. WM contains a substantially similar provision.