

September 21, 2007

## Climate Change Policy Update Week of September 17-21, 2007

### **Top News Item of the Week**

*This week, publicly-traded companies faced inquiries from two different angles regarding disclosure of risks and opportunities related to climate change. New York Attorney General Andrew Cuomo subpoenaed five companies under a state law that allows investigation of “fraudulent practices” related to investments, seeking information on financial, regulatory, and litigation risks associated with construction of new coal-fired power plants. A coalition of environmental and investor groups, as well as public officials (including Attorney General Cuomo), also petitioned the SEC to clarify that existing laws require publicly-traded companies to disclose information in annual filings regarding the risks and opportunities they face from climate change. More information on these items is available under the **Industry** and **States** headings below.*

### **Noteworthy Upcoming Events**

*Three very important international climate-related events happen next week. On September 24, the United Nations (UN) General Assembly will hold its first ever meeting on climate change. The debates and discussions begun next week will help to frame the international response to the post-2012 climate negotiations in Bali. On Wednesday, the Clinton Global Initiative also will address climate change, with commitments for action by hundreds of international heads of state, corporate, foundation, and financial community leaders. On Thursday and Friday, President Bush will convene a meeting of world leaders to discuss the future of global GHG regulation.*

*A Brookings Institution forum held on September 21 to preview these events featured Yvo de Boer, Executive Secretary of the UN Framework Convention on Climate Change, Dr. Harlan Watson, senior climate negotiator for the U.S. Department of State, and David Sandalow, chair of the Energy & Climate Working Group at the Clinton Global Initiative. The first two speakers emphasized that adaptation to climate change would figure prominently in the upcoming discussions.*

*Also next week, the world’s emission traders meet in Washington, D.C. at the first-ever meeting of the International Emissions Trading Association (IETA) in the United States.*

### **Congress**

- **Boucher to Release Climate Change Position Papers.** House Energy and Commerce Subcommittee on Energy and Air Quality Chairman Rick Boucher (D-VA) said that he is planning to release the first in a series of position papers on his upcoming cap-and-trade legislation by early next week. He said that the next several weeks will include a public comment process on the drafts before the formal introduction of legislation. He also said that his legislation will support the free distribution of emission allowances, to ease the burden on

September 21, 2007

industry as it adjusts to new climate change policy. He noted that he hopes to have a subcommittee mark up on a climate bill this year, but acknowledged other priorities could delay that activity.

- **EPA Accused of Being Non-Compliant with Supreme Court Ruling Due to Permitting Decision.** House Oversight and Government Reform Committee Chairman Henry Waxman (D-CA) sent a letter to Environmental Protection Agency (EPA) Administrator Stephen Johnson this week stating that the agency is not in compliance with the April Supreme Court ruling that the Clean Air Act gives the agency authority to regulate greenhouse gases. The letter was written in response to a recent decision by EPA to approve a permit for the construction of a new coal-fired plant in Utah without CO<sub>2</sub> emission controls. In the letter, Rep. Waxman said that his Committee is investigating the permit decision and strongly urged the agency to consider greenhouse gas regulation when it decides upon three additional pending power plant permit applications.
- **Lieberman-Warner Cap-and-Trade Legislation To Be Introduced Shortly.** In a speech before the Progressive Policy Institute this week, Sen. Joseph Lieberman (I-CT) said that he and Sen. John Warner (R-VA) are on track to introduce a formal cap-and-trade climate change bill by the end of September or early October. The two Senators are currently reviewing the feedback they received from their July policy outline. The initial outline requires electric utilities, major industrial manufacturers, and petroleum refiners to limit their greenhouse gas emissions to 2005 levels beginning in 2012. Those entities would subsequently be required to reduce their emissions by 10 percent below by 2020, ramping up to a 70 percent reduction in 2050. Sen. Lieberman also said that he was meeting with Environment and Public Works Subcommittee members to work out legislative language that would ensure the bill's movement to the full committee.
- **Staff-Level Meetings on Energy Bill Begin.** House and Senate committee staff began formally meeting this week to walk through the House and Senate energy bills (H.R. 3221 and H.R. 6, respectively). The meetings mark the initial steps of an energy conference, which cannot move into high gear until conferees for the House and Senate are named and they have resolved procedural issues about the legislation.
- Selected Committee Hearings From the Past Week:
  - House Select Committee on Energy Independence and Global Warming held a hearing on renewable electricity standards (September 20, 2007).

## Administration

- **EPA Considering Coal-to-Liquids in Upcoming Vehicle GHG Rule.** The director of EPA's Office of Transportation and Air Quality announced at a Clean Air Act Advisory Committee (CAAAC) meeting that the agency is considering including coal-based liquid fuel in an upcoming proposed rule to increase the amount of alternative fuels used in automobiles.

September 21, 2007

The vehicle/fuels rulemaking responds to the Supreme Court's holding in *Massachusetts v. EPA* that EPA has the authority to regulate CO<sub>2</sub>. EPA also intends to require reductions in CO<sub>2</sub> emissions from vehicles through the same rule. Another agency official said at the CAAAC meeting that the standards will be similar in form to Corporate Average Fuel Economy (CAFE) standards but issued under EPA's authority under the Clean Air Act. Neither official said whether the forthcoming rule would require increases in CAFE. EPA plans to propose the rule by the end of this year and have final standards in place by the end of 2008.

- **EPA May Regulate CO<sub>2</sub> Emissions Under NSR Program.** An EPA air official told CAAAC members that the agency is likely to turn to a rule regulating CO<sub>2</sub> emissions from stationary sources after the agency completes the proposal on vehicle/fuel GHG emissions (referenced above). The official said that once EPA regulates emissions of a pollutant from one type of emission source, it also must consider regulating that pollutant from all other sources. According to the EPA official, the rule would be issued under the New Source Review (NSR) program, which requires new and modified stationary sources to install state-of-the-art emissions control technology. Any such rule already faces significant difficulties, including the establishment of a threshold for triggering NSR and determining what constitutes best available control technology (BACT) and lowest achievable emission rate (LAER).

## Courts

- **Federal Court Dismisses Nuisance Lawsuit Against Automakers.** The U.S. District Court for the Northern District of California dismissed a lawsuit filed by the state of California against six auto manufacturers claiming that vehicle GHG emissions constituted a public nuisance. The court ruled that a decision in the case would require policy determinations best reserved for the legislative and executive branches and would impermissibly affect interstate commerce and foreign policy. A federal district court in New York City dismissed a similar nuisance lawsuit against large utilities in 2005.

## Industry

- **Groups Petition SEC to Require Climate Change Disclosures.** A coalition of environmental groups and public pension fund managers petitioned the Securities and Exchange Commission (SEC) to determine whether publicly traded companies provide enough information on the risks and benefits they face from climate change. The petition called on the SEC to clarify that companies must disclose material information related to climate change, such as physical and financial risks and opportunities, as part of their filings under existing laws. New York Attorney General Andrew Cuomo also joined the SEC petition. (Another action by Attorney General Cuomo seeking similar information is discussed below.)

September 21, 2007

## States

- **New York AG Issues Subpoenas Over Climate Risk Disclosures.** New York Attorney General Andrew Cuomo subpoenaed five companies, claiming that they must disclose to investors the CO<sub>2</sub> emissions from planned coal-fired power plants. AES Corp., Dominion Resources Inc., Dynegy Inc., Xcel Energy Inc., and Peabody Energy Corp. received subpoenas asking for information on the increased financial, regulatory, and litigation risks associated with construction of new coal-fired power plants. The letters accompanying the subpoenas indicated that a response is required by October 9, 2007. The Attorney General cited New York's Martin Act, a securities law that allows investigation of any "fraudulent practice" related to investments, as his authority for issuing the subpoenas. (See the preceding item regarding a petition to the SEC by environmental groups and several state Attorneys General over climate risks.)
- **California Emission Reporting, Verification Rules Criticized by Electricity Industry.** The California Energy Commission (CEC) and California Public Utilities Commission (CPUC) approved rules that would require retail electricity providers and power marketers to report and verify their GHG emissions. The California Air Resources Board (CARB) will now consider whether to adopt the rules, which industry says could inaccurately attribute emissions to facilities. The rules include "default emission factors" that are intended to account for GHG emissions from various types of electricity generation but which the industry says do not reflect actual emissions. Industry officials have argued that default emission factors should not be applied to facilities with known and verifiable emissions.
- **Arizona Governor Directs DEQ to Adopt California Vehicle CO<sub>2</sub> Standards.** Arizona Gov. Janet Napolitano bypassed the state legislature and directed the state Department of Environmental Quality to develop rules to adopt California's vehicle CO<sub>2</sub> emission standards. The governor had waited to recommend adoption of the California standards until a decision was issued in the Vermont litigation over that state's adoption of the CO<sub>2</sub> standards (which occurred on September 12). Gov. Napolitano has the authority under state law to require adoption of the standards without the involvement of the state legislature. Adoption of the vehicle standards will become part of a plan to reduce statewide GHG emission to 2000 levels by 2020.
- **Alaska Governor Creates Climate Advisory Group.** Alaska Gov. Sarah Palin signed an administrative order creating a sub-cabinet level climate change advisory group to issue recommendations on addressing effects of climate change in the state. Gov. Palin also signed up Alaska as an observer to the Western Governors' Climate Initiative and the advisory group will determine the level of the state's participation in this and other climate change initiatives.
- **Agreement Reached Over GHG Emissions from Harvard Real Estate Project.** Massachusetts Secretary of Energy and Environmental Affairs Ian Bowles announced an

September 21, 2007

agreement with Harvard University over plans to build a 589,000-square foot science complex. Approval of the plans is dependent on specific conditions, including a commitment to use building technologies that will reduce energy use by 50 percent below standards set by the American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE). The state also signed a certificate covering development of Harvard's entire Allston, MA campus that will require energy use of 30 percent below ASHRAE standards, compliance with sustainable development principles, and stormwater and wastewater requirements.

## International

- **Groups Seek Judicial Review of Canadian GHG Reduction Program.** Canadian environmental groups filed a request for judicial review of the Canadian federal government's plan to reduce GHG emissions, arguing that it does not comply with the country's obligations under the Kyoto Protocol. The groups claim that the plan will cause Canada to fall short of its commitments under the Kyoto Protocol and is therefore in violation of a law passed by Parliament holding the government responsible for reaching the GHG reduction targets.
- **CDM Board Allows Coal-Fired Plants to Earn Kyoto Credits.** The Clean Development Mechanism (CDM) executive board approved a measure that would allow coal-fired power plants to earn CDM credits by investing in GHG reduction projects in developing countries. The board said that the decision was an acknowledgement that much of the world relies heavily on coal and will continue to do so in the future.
- **EC Proposes Program to Assist Least Developed Nations with Climate Adaptation.** The European Commission (EC) published proposals to establish a Global Climate Change Alliance that would assist developing nations with measures to adapt to climate change. The proposal would provide a total of €50 million in funding from 2008-2010 to help the least developed nations and small island states develop and implement adaptation measures; reduce CO<sub>2</sub> emissions related to deforestation; promote involvement in carbon trading programs; prepare for natural disasters; and integrate climate change adaptation measures into poverty reduction plans.

*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. 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.*

© 2007 Van Ness Feldman, P.C. All Rights Reserved.