

April 6, 2009

## Climate Change Policy Update Week of March 30-April 3, 2009

**Commentary:** *The Waxman-Markey draft arrived this week, outlining a Federal cap-and-trade program, renewable electricity standard, energy efficiency standard, and a range of other policies and programs. What the draft did not include was a system for distributing allowances, thereby leaving a multi-billion dollar question mark lingering over the proposal. The bill is summarized below, and in greater detail at <http://www.vnf.com/news-policyupdates-347.html>. Van Ness Feldman is also preparing a detailed analysis for clients. Now begins a period of accelerated deliberations. Waxman and Markey plan a subcommittee mark-up during the week of April 27<sup>th</sup>, and a full committee mark-up during the week of May 11.*

### Executive Branch

- **Presidential Nominations and Appointments.** The nomination of Tom Strickland, President Obama's nominee for Assistant Secretary for Fish, Wildlife, and Parks at the Department of the Interior, advanced in the Senate last week after receiving approval from the Committee on Environment and Public Works, and the Committee on Energy and Natural Resources.
- **Initial White House Reaction to the Waxman-Markey Discussion Draft.** Following the release of the Waxman-Markey discussion draft of climate change and clean energy legislation, a White House spokesman said that "it is clear that Chairman Waxman's legislation would advance" the President's goals of creating clean energy jobs, reducing the nation's dependence on imported oil, and making the economy more competitive. The Administration is still reviewing the details of the 648-page draft. (For further information on the discussion draft, see "**Waxman/Markey Draft Climate Bill Released**" below.)
- **President Calls for "Cash for Clunkers" Program.** During a speech announcing his plans to restructure the American automobile industry, President Obama called for Congress to provide cash incentives for consumers to trade in older, inefficient automobiles for newer and more efficient models. The President noted that similar policies have been credited for recent increases in European car sales, with both economic and environmental benefits. Sens. Dianne Feinstein (D-CA), Charles Schumer (D-NY), and Olympia Snowe (R-ME) endorsed the President's plan. Dubbed "cash for clunkers," a version of the program was originally part of the stimulus package enacted in February. However, that provision was removed before passage.
- **EPA Nominee Voices Strong Support for Climate Regulation.** In confirmation hearings before the Senate Environment and Public Works Committee, Gina McCarthy – President Obama's nominee for Assistant EPA Administrator for Air and Radiation – called Federal leadership on climate change her "deliverable." McCarthy affirmed that climate change would be a top priority for the agency, while also pledging to take into account the economic impacts of greenhouse gas (GHG) regulation. McCarthy called coal a "vital" national resource and said she would seek technologies to maintain its role as an energy source while reducing its GHG impact.

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](mailto:kwd@vnf.com)

April 6, 2009

- **NOAA Administrator Argues for Adaptation Research.** Dr. Jane Lubchenco, the newly-confirmed Administrator of the National Oceanic and Atmospheric Administration, called last week for Federal and state governments to research impacts of climate change that are now inevitable, as well as measures that could help society adapt to the consequences. Noting that disasters such as the recent floods in North Dakota would become more frequent in a warming world, the Administrator renewed her call for the establishment of a National Climate Service within NOAA to conduct regional and national climate modeling.

## Congress

- **Waxman/Markey Draft Climate Bill Released.** The House Energy and Commerce Committee released its long-anticipated draft climate change bill this week. The American Clean Energy and Security Act of 2009 (ACES) contains a cap-and-trade program as well as provisions to promote energy efficiency and clean energy technologies—including a renewable energy mandate that reaches 25% in 2025. The draft also includes a title aimed at protecting industry, consumers, and workers from adverse economic effects associated with the transition to a low-carbon economy. A more detailed description is available at: <http://www.vnf.com/news-policyupdates-347.html>. The cap-and-trade program includes the following notable design features:
  - The overall emissions cap declines more rapidly than President Obama’s proposal, requiring emissions to be 20% below 2005 levels by 2020 (as compared to 14%). By 2050, the draft would cap emissions at 83% below 2005 levels.
  - The allocation of allowances, both how many and to whom, is yet to be determined—although the draft does include a placeholder for allowance allocation. The distribution of any revenues from allowance auctions is also undetermined in the draft. Programs in the current draft that would be subject to appropriations, such as low-carbon technology incentives and a “rebate” system for trade-sensitive industries, could receive allowances or revenue from allowance sales in a future version of the bill. (Another noteworthy omission from the draft is transmission siting authority for the Federal Energy Regulatory Commission to enable the transmission of remote renewable energy.)
  - The draft imposes an overall 2 billion ton limit on the use of offset credits (generated by emission reduction or sequestration projects in uncapped sectors) and offset usage limits for each capped entity (beginning at approximately 30% of compliance obligations and increasing over time). The draft also requires capped entities to turn in 1.25 offset allowances in lieu of each emission allowance. The draft includes additional limits on the use of international offsets, including an agreement with certain terms between the U.S. and the offset project host country.
  - State cap-and-trade programs are preempted between 2012 and 2017, but states remain free to implement other GHG emission control measures.
  - U.S. industries that would be strongly affected by carbon controls and are highly exposed to international competition would receive rebates, phased out after 2020. Should the rebates fail to sufficiently address competitiveness concerns, the bill authorizes the

April 6, 2009

President to initiate a requirement that importers from countries without comparable carbon controls surrender allowances representing the emission impacts of goods.

Energy and Commerce Committee Chairman Henry Waxman (D-CA) and Energy and Environment Subcommittee Chairman Ed Markey (D-MA) plan to hold hearings on the discussion draft at the end of April, with Subcommittee mark-up the week of April 27<sup>th</sup> and full Committee mark-up to follow the week of May 11<sup>th</sup>. Senator Barbara Boxer (D-CA), Chairman of the Senate Environment and Public Works Committee, said that she could hold back on developing climate change legislation in the Senate while energy legislation is drafted and address the climate legislation from the House during conference negotiations. Chairman Boxer has refused to commit to any specific strategy to pass climate legislation in the Senate, but commented that she has multiple versions of a bill in draft form.

- **Legislators Respond to the Waxman-Markey Draft.** Democratic House leadership expressed support for the discussion draft. House Speaker Nancy Pelosi (D-CA) called the draft a “strong starting point for landmark legislation to launch a clean energy economy,” while Majority Leader Steny Hoyer (D-MD) issued a statement endorsing the bill’s provisions on offset credits for international deforestation reduction projects. In addition, Rep. Lloyd Doggett (D-TX), a senior member of the House Committee on Ways and Means, said he was pleased with the bill, but hoped that a future version would require a full auction of all allowances (an issue not addressed in the draft). (For further information on the discussion draft, see “**Waxman/Markey Draft Climate Bill Released**” above.)
- **Senate Budget Amendments Constrain Climate Legislation Pathways.** The Senate passed an amendment to the fiscal 2010 budget resolution from Sen. Barbara Boxer (D-CA) stating that revenue generated by a federal cap-and-trade program should be used to help alleviate the associated cost increases for consumers. The Senate then passed an amendment by Sen. John Thune (R-SD), which stated that any climate change bill passed by Congress in 2009 would not raise either energy or gasoline prices. The Senate also passed an amendment by Sen. Mike Johanns (R-NE) that would prevent Congress from using revenues generated by a cap-and-trade program to offset other Federal spending if climate legislation is passed using the budget reconciliation process, which requires only 51 votes for passage. The Johanns amendment comes very close to eliminating the possibility of using budget reconciliation to pass climate legislation.
- **Van Hollen Introduces Cap-and-Dividend Act.** Rep. Chris Van Hollen (D-MD) introduced aggressive climate change legislation that would reduce U.S. emissions to 25% below 2005 levels by 2020. The bill would auction 100% of emission allowances, and distribute the proceeds to every U.S. resident with a Social Security number by check each month.
- **Dorgan and Voinovich Introduce Energy, Transmission Siting Bill.** Sens. Byron Dorgan (D-ND) and George Voinovich (R-OH) introduced a bill that would give the Federal Energy Regulatory Commission siting authority for electric transmission lines to enable the transmission of remote renewable energy to load centers and to support an electric- and alternative-fuel vehicle transportation system. The National Energy Security Act of 2009 includes tax incentives for renewable energy generation and alternative fuels and fueling stations, as well as a loan guarantee program for purchasers of large numbers of automobile batteries. The legislation also authorizes additional funding for the Alaska Natural Gas Pipeline. It is not clear how the legislation will

April 6, 2009

interact with the comprehensive energy bill being marked up by the Senate Energy and Natural Resources Committee. This week, the Committee approved a package of energy efficiency, research, and worker training provisions, with the more controversial measures to follow.

## Judicial

- **Center for Biological Diversity Challenges New CAFE Standards.** The Center for Biological Diversity, which in 2007 succeeded in overturning the National Highway Traffic Safety Administration's (NHTSA) fuel economy standards for light trucks, has filed suit in the Ninth Circuit Court of Appeals to block NHTSA's new Corporate Average Fuel Economy (CAFE) standards for model year 2011 vehicles. The complaint claims that the final standards, which are slightly weaker than the draft standards issued by the Bush Administration, do not represent "maximum feasible" fuel economy as required by NHTSA's enabling statute.

## States and Cities

- **California Issues Comprehensive Report on State-wide Warming Impacts.** The California Climate Action Team, a governmental advisory group composed of the heads of various state agencies, issued a draft of its second biennial science assessment report that forecasts the impacts of climate change on the state through the year 2100. The report, which compiles 37 scientific studies by 16 state agencies, predicts dire consequences for the state. The studies cover a range of subjects including water infrastructure, agricultural yields, health, wildfires, and electricity consumption. Among the predicted impacts are \$100 billion worth of property due to rising sea levels, mostly in the San Francisco Bay Area; reductions in irrigated areas that range between 14 and 28% in different regions; a 16.3 percent reduction in agricultural revenues, a 58 percent or greater increase in wildfires by 2085, and a 55 percent increase in electricity consumption by 2100. The authors note that "extreme events from heat waves, flood, droughts, wildfires, and bad air quality are likely to become more frequent in the future and pose serious challenges." The report is available at [http://www.climatechange.ca.gov/climate\\_action\\_team/reports/index.html](http://www.climatechange.ca.gov/climate_action_team/reports/index.html).
- **Maryland House Passes Emission Targets.** The Maryland House of Representatives passed legislation that would cap the state's GHG emissions at 25 percent below 2006 levels by 2025. Called the Greenhouse Gas Reduction Act, the bill would give the state Department of Environment until 2012 to draft regulations to meet the target. The bill, versions of which had been defeated previously, gained passage through a number of changes from the prior versions, including the addition of a provision that exempts the state's manufacturing sector from emission restrictions until 2016. A Senate version of the bill passed earlier this month with some differences and the two chambers are expected to resolve those differences quickly in an effort to send the bill to Governor Martin O'Malley (D) before the General Assembly adjourns on April 13. Maryland is already subject to an emissions cap on its power sector as a member of the Regional Greenhouse Gas Initiative (RGGI).

## Industry

- **25 x 25 Alliance Releases Climate Policy Recommendations.** The 25 x 25 Alliance, a coalition of agriculture and forestry interests, released a set of guiding principles for national climate

April 6, 2009

change policy just a day Reps. Waxman and Markey issued their draft of a comprehensive climate and energy bill. The group recommended that agriculture and forestry operations remain outside an emissions cap, and be allowed to generate “early action” offset credits prior to the start of a cap-and-trade program. The group also called for the U.S. Department of Agriculture (USDA) to take part in crafting regulations governing the approval and verification of agriculture and forestry offset projects. Bart Ruth, chairman of the group’s policy committee, estimated that the agriculture and forestry sectors could reduce nationwide GHG emissions by 25%.

- **Industry Associations, Environmental Groups Offer Mixed Reaction to Waxman-Markey.** The U.S. Climate Action Partnership (USCAP), a coalition of environmental organizations and major corporations whose policy recommendations influenced the discussion draft, praised the Waxman-Markey discussion draft for providing “a solid foundation to create a climate strategy that both protects our economy and achieves the nation’s environmental goals.” USCAP also expressed disappointment that the draft did not address the crucial issue of allowance allocation. The draft legislation received some praise from the Alliance for American Manufacturing (Alliance), which expressed approval of the draft’s provision that would offer “rebates” to trade-sensitive industries, reinforced by a system of special allowances to account for GHG emissions attributable to imports. However, the National Association of Manufacturers critiqued the bill’s emission reduction targets as impossible to achieve, and said the draft offered inadequate incentives to develop new technologies. The American Gas Association focused criticism on the Energy Efficiency Resource Standard, claiming that the provision would penalize natural gas distribution companies for the energy consumption of their customers. As for reactions from the environmental community, both the Sierra Club and the Natural Resources Defense Council issued statements praising the draft as strong step toward effective GHG regulation. Fred Krupp, President of Environmental Defense Fund, stated that the draft “focused on exactly the right issues to quickly build consensus” and praised Chairmen Waxman and Markey for “moving forward boldly and deliberately with their proposal.” (For further information on the discussion draft, see “**Waxman/Markey Draft Climate Bill Released**” above.)
- **Ceres Report Finds Insurance Industry is Responding to Climate Risks.** A new study of 246 insurance companies in 29 countries, commissioned by Ceres and authored by a scientist at the Lawrence Berkeley National Laboratory, reports that the insurance industry is offering a growing range of services to mitigate the financial risks of climate change and encourage emission reductions. Specific activities noted in the report include the development of insurance policies that cover risks associated with CCS projects; encourage “green” construction and renovation practices; reward automobile owners for driving less or owning fuel-efficient vehicles; and offer liability coverage to protect company boards in the event of climate-related litigation. The study is available at <http://www.ceres.org/Document.Doc?id=417>.

## Studies and Reports

- **CO<sub>2</sub> Sequestered by Underground Water.** A study published in *Nature* found that water was the dominant carbon sink in nine natural gas fields that were filled with gas thousands or millions of years ago during volcanic eruptions. The researchers concluded that CO<sub>2</sub> storage by porous rocks, demonstrated in earlier studies, was a minor sequestration mechanism in natural gas fields and suggested focusing on the storage and mobility of CO<sub>2</sub> in water in the context of carbon capture and sequestration (CCS).

April 6, 2009

- **Report Questions Effects of Corn-Based Ethanol.** A report prepared by more than 75 scientists from around the world finds that the synthetic nitrogen fertilizer used in corn production will increase emissions of nitrous oxide, a potent GHG, and that increased corn production to produce ethanol therefore would worsen global warming. The report also warns that corn-based ethanol production will decrease the land available for food production and worsen water pollution from fertilizer runoff. The report found that the production of biofuels from plants such as sugarcane and rapeseed would decrease GHG emissions relative to fossil fuels, and recommends the use of marginal lands and waste products to produce cellulosic biofuels. The report is available at <http://cip.cornell.edu/biofuels/>.

## International

- **Negotiators at UNFCCC Bonn Meeting Consider Regulation of Additional Gases.** At the latest United Nations-sponsored talks on a successor treaty to the Kyoto Protocol, negotiators considered adding a dozen potent greenhouse gases to the list of gases regulated by the international climate change regime. Most of the chemicals are not yet in widespread commercial use, although one, nitrogen trifluoride (NF<sub>3</sub>), is used widely during the production of semiconductors, LCD televisions, and solar energy generation equipment. NF<sub>3</sub> is a unique GHG in that the vast majority of the gas is consumed through its use. The Kyoto Protocol, which expires at the end of 2012, regulates six of the most common greenhouse gases - carbon dioxide, methane, nitrous oxide, perfluorocarbons, hydrofluorocarbons, and sulfur hexafluoride.
- **G-20 Summit Produces Renewed Commitment to Achieving Climate Treaty by Year-End.** At a one-day summit on the global economic crisis, leaders from the G-20 nations reaffirmed their pledge to respond to the “threat of irreversible climate change” by agreeing to a successor treaty to the Kyoto Protocol at negotiations in Copenhagen, Denmark this December. The pledge was part of a communiqué announcing a six-point global economic recovery plan. In addition to the commitment to a climate treaty, the leaders also committed to build “an inclusive, green, and sustainable [economic] recovery.” The joint pledge marks the first time that all major countries have committed to reaching a binding agreement at Copenhagen.
- **Small Island States Propose Aggressive Emissions Targets.** The Alliance of Small Island States (ASIS), a 43-member group of island nations threatened by rising sea levels, submitted to the United Nations a proposal calling for developed nations to commit to reducing emission to 40 percent below 1990 levels by 2020 and 95 percent below by 2050. The strict targets exceed levels previously proposed, going well beyond the European Union’s (EU) suggested target of a 20 percent reduction of 20 percent below 1990 levels by 2020. The ASIS target is aimed at limiting global mean temperature increase to less than 1.5 degrees Celsius; ASIS asserts that, with higher temperatures, their nations would suffer significant impacts from sea level increases.
- **Senior Legislators From 13 Nations Participate in Climate Change Commission.** Lawmakers from around the world met in Washington, D.C. for the first meeting of the International Commission on Climate Change and Energy Security (Commission). The Commission meeting focused on key political trade-offs that would be essential to achieving a binding climate change treaty by the end of this year. Among the prominent U.S. legislators at the meeting were Reps. Henry Waxman (D-CA) and Ed Markey (D-MA), who recently released a comprehensive discussion draft of domestic energy and climate change legislation. Participants

April 6, 2009

at the meeting represented the G-8 (Canada, France, Germany, Italy, Japan, the United Kingdom, the U.S., and Russia) and five major emerging nations (Brazil, China, India, Mexico, and South Africa). The meeting was sponsored by the Global Legislators Organization (GLOBE), an international forum for legislators. (For further information on the discussion draft, see “**Waxman/Markey Draft Climate Bill Released**” above.)

- **European Commission Action Plan Calls for Focus on Adaptation.** The European Commission, one of three EU governing bodies, issued an action plan that seeks to integrate adaptation to climate change into major EU policies. The plan, titled “Adapting to Climate Change: Towards a European Framework for Action”, focused on four “pillars”: improving knowledge, modifying policies to account for climate change, identifying financing sources, and aiding the poorest nations in their response to climate change. Specific actions called for in the plan include increased cooperation among EU member states; the establishment, by Sept. 1, 2009, of an Impact and Adaptation Steering Group; the development by 2011 of adaptation models and prediction tools; and the preparation of cost-benefit analyses of adaptation measures.
- **US-China Talks Will Address Climate.** U.S. Treasury Secretary Tim Geithner and Secretary of State Hillary Clinton announced that the Strategic and Economic Dialogue between the U.S. and China will cover climate change and climate change-related issues. The talks, a series of high-level bilateral discussions, are being conducted under a ten-year cooperation framework entered into by U.S. President Barack Obama and Chinese President Hu Jintao. As part of the climate change discussion, the talks will address energy policy and low-carbon technology cooperation.
- **Canada Announces Vehicle GHG Regulations by End of 2009.** Canadian Environment Minister Jim Prentice announced that Canada will promulgate rules regulating GHG emissions from new vehicles before the end of 2009. The rules will require car fleets to meet the recently issued U.S. fuel economy standards for the 2011 model year. The rules are aimed at harmonizing Canadian regulations with those of the United States and helping Canada achieve its goal of reducing its GHG emissions 20 percent from 2006 levels by 2020. Canadian officials said they will work closely with their U.S. counterparts to develop the new rules.
- **German Ministries Finalize Framework for Trial CCS Projects.** The German Environment and Economic Ministers reached agreement on legislation that would provide a regulatory and technical framework for trial CCS projects. One of the more controversial provisions in the draft legislation would hold German-based utilities liable for sequestered CO<sub>2</sub> until 30 years after the plant that produced the gas ceases operation. The legislation must be approved by the German Parliament before it can become law. Germany received €180 million to develop CCS technologies under a recent EU economic stimulus package.

*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.*

© 2009 Van Ness Feldman, P.C. All Rights Reserved.