

May 18, 2009

## Climate Change Policy Update Week of May 11 - May 15, 2009

**Commentary:** *Chairmen Waxman and Markey reached an agreement with moderate Democrats last week and released a new, 1,000 page version of the American Clean Energy and Security Act (ACES). The compromise ACES incorporates a more lenient mid-term emissions cap, a moderated renewable electricity standard, allocation of transitional allowances to industry, and some liberalization of offset requirements. The compromises clear the way for a mark-up this week in the full Energy and Commerce Committee. In light of their agreement, it will be interesting to see what amendments to that agreement will pass. The Republicans, for their part, have worked up hundreds of amendments . . . The Senate Energy and Natural Resources Committee reached agreement on a transmission siting bill, working to clear away controversial amendments from the left and the right . . . EPA Administrator Lisa Jackson asserted that the agency has the authority to confine its regulatory attentions to large sources of greenhouse gas emissions only – but, in any event, continues to prefer a legislated program.*

### Executive Branch

- **Presidential Nominations and Appointments.**

- President Obama nominated Ignacia Moreno, currently counsel for environmental programs at General Electric, to serve as Assistant Attorney General for the Department of Justice's Environment and Natural Resources Division (ENRD). During the Clinton Administration, Moreno served as special assistant and principal counsel to the Assistant Attorney General of ENRD.
- President Obama appointed Gregory Jaczko to serve as Chairman of the Nuclear Regulatory Commission (NRC). A former advisor to Senate Majority Leader Harry Reid (D-NV), Jaczko has been a Commissioner of the NRC since 2005.
- Interior Secretary Ken Salazar appointed Robert Stanton to serve as Deputy Assistant Secretary of the Interior for Policy, Management, and Budget. Stanton directed the National Park Service during President Clinton's second term.
- The Senate confirmed three of President Obama's nominees for key Environmental Protection Agency (EPA) positions: Mathy Stanislaus, for Assistant Administrator for Solid Waste & Emergency Response; Cynthia Giles, for Assistant Administrator for Enforcement & Compliance Assurance; and Michelle DePass, for Assistant Administrator for International Affairs.

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)

- The Senate Committee on Energy and Natural Resources approved the nominations of Daniel Poneman, for Deputy Secretary of Energy; David Sandalow, for Assistant Secretary of Energy for Policy and International Affairs; Rhea Suh, for Assistant Secretary of Interior for Policy, Management & Budget; and Michael Connor, for Commissioner of the Bureau of Reclamation.
  - By a vote of 57-39, the Senate failed to invoke cloture on the nomination of David Hayes for Deputy Secretary of the Interior. A procedural “hold” placed by Sen. Bob Bennett (R-UT) has prevented Hayes’ nomination from proceeding to a vote of the full Senate.
  - Sen. Jon Kyl (R-AZ) has placed a “hold” on four nominees: Kristina Johnson for Under Secretary of Energy; Ines Triay for Assistant Secretary of Energy for Environmental Management; Steven Koonin, for Under Secretary of Energy for Science; and Scott Blake Harris, for General Counsel of the Department of Energy (DOE). According to Sen. Kyl, the holds are intended to spur the Senate to consider a bill that would transfer federal lands to a copper mining company in exchange for bird habitat and wetlands.
- **EPA Administrator Says GHG Regulations Will Address Sources Exceeding 25K TPY.** In testimony before a Senate Appropriations subcommittee, EPA Administrator Lisa Jackson stated that the Clean Air Act provided sufficient flexibility for the agency to address large sources of greenhouse gas (GHG) emissions first. Jackson said that the agency viewed sources emitting more than 25,000 tons CO<sub>2</sub>-equivalent per year as its first priority for enforcement, since that is the emissions threshold that EPA proposed on April 10, 2009 in its draft GHG reporting rule. Jackson also reiterated the Administration’s position that a legislative approach to regulating GHGs would be preferable to EPA action under the current Clean Air Act. Responding to concerns over the treatment of coal-fired power plants under EPA GHG regulations, Jackson said: “There cannot be a global warming program that is predicated on the assumption that coal is gone.”
  - **SBA Memorandum Discloses Dissent on Endangerment Finding.** Republican lawmakers and industry organizations criticized the basis for EPA’s proposed “endangerment finding” concerning GHGs, citing a deliberative document provided to the Office of Management and Budget (OMB) during the White House review of the proposed finding. Produced by the Small Business Administration’s (SBA) Office of Advocacy and published in EPA’s public docket on April 24, the undated document questioned EPA’s treatment of scientific uncertainty and called for EPA to consider the economic impacts of regulating GHGs in its analysis of the public health and welfare impacts of climate change. The document also argued that EPA should have considered the possibility of human adaptation efforts – such as migration from newly uninhabitable areas to cooler climes, the deployment of public “cooling centers,” and new medicines to treat ailments resulting from elevated ozone concentrations – as evidence weighing against endangerment. OMB Director Peter Orszag characterized the document as just one of many agency submissions received during its review, and reaffirmed OMB’s ultimate conclusion that the finding was “carefully rooted in both law and science.” Released on April 17, the endangerment finding would - if finalized - require EPA to issue tailpipe standards for GHG emissions from vehicles, and could serve as a precursor for broader regulation of GHG emissions under the Clean Air Act.
  - **DOE Willing to Fund Ten Additional CCS Demonstration Projects.** In testimony before the Senate Committee on Energy and Natural Resources, DOE’s Acting Assistant Secretary for Fossil Energy, Victor Der, stated that DOE would be interested in funding an additional ten large-

scale carbon capture and sequestration (CCS) projects to increase the department's "knowledge base" on the technology. Der said that DOE is already supporting approximately 19 CCS projects. However, Der did not offer an endorsement of S.1013, a bill (discussed below) that would provide long-term liability protection and federal funding for ten additional CCS demonstration projects. Der added that DOE had not considered how fees for long-term liability protection for such projects should be calculated or assessed.

- **CFTC Convenes GHG Markets Committee.** The Commodity Futures Trading Commission (CFTC), one of the agencies that may play a role in regulating an eventual U.S. market for derivative contracts based on GHG allowances and offset credits, held the first meeting of its new Energy and Environment Markets Advisory Committee. The eleven members of the committee include representatives of energy companies, financial institutions, allowance trading associations, citizens' organizations, and academia. Topics discussed at the inaugural meeting included regulatory challenges associated with the European Trading Scheme, the Chicago Climate Exchange, and the northeast Regional Greenhouse Gas Initiative. The most recent draft of the Waxman-Markey climate change legislation would assign the Federal Energy Regulatory Commission (FERC) responsibility for regulating the cash market for GHG allowances, but is silent as to which agency would regulate GHG-related derivatives.
- **NOAA Provides Overview of Requested Climate Programs for FY2010.** Following the release of the White House's detailed budget request for fiscal year (FY) 2010, the National Oceanic and Atmospheric Administration (NOAA) provided an overview of climate change research programs for which it requested funding. NOAA proposed to launch three new programs to investigate ocean acidification (\$5.5 million), develop advance warning systems for abrupt climate change (\$2.6 million), and create a "portal" to share information about climate modeling (\$2.5 million). In addition, the agency requested \$12.9 million for a National Integrated Drought Information System and \$4.5 million to support a network of climate observation stations.

## Congress

- **Energy & Commerce Committee to Mark-Up ACES.** After weeks of intense negotiations, Reps. Harry Waxman (D-CA) and Ed Markey (D-MA) reached compromise with a number of other Democrats on the Energy & Commerce Committee – including Rep. Rick Boucher (D-VA) – on key provisions of the American Clean Energy and Security Act (ACES). Mark-up will begin on May 18<sup>th</sup>. A spokesman for House Speaker Nancy Pelosi (D-CA) said that other committees, including the Ways and Means Committee, will write additional sections of the climate bill. The new version of ACES includes:
  - A cap on emissions from covered sources at 97% of 2005 emissions from those sources starting in 2012, tightening to 17% below 2005 levels by 2020 and 83% below by 2050.
  - A renewable electricity and energy efficiency standard requiring utilities selling more than 4 million MW hours of electricity to obtain 15% of their electricity from renewable energy sources and annual electricity savings of 5% from energy efficiency improvements by 2020. If a state governor determines that the state's utilities cannot meet the 15% renewable mandate, the governor may decrease it to 12% and increase the energy efficiency improvement mandate to 8%. In measuring renewable production, distributed generation projects such as rooftop solar "count" as 3 MW for each MW produced.

- Local electric distribution companies would receive 30% of emission allowances through 2025, and local natural gas distribution companies would receive an additional 9%. The companies would be required to pass through the benefits to their customers. Merchant coal-fired power plants would receive approximately 5% of allowances. All of these distributions would be phased out between 2026 and 2030.
- Energy-intensive, trade-exposed industries will receive 15% of allowances in 2014, and will receive allowance amounts through 2025 that decline with the emissions cap. The automobile industry will receive 3% of allowances from 2012 through 2017 and 1% of allowances through 2025 to support development of clean vehicles. Oil refineries will receive 2% of allowances through 2026.
- 15% of allowances would be auctioned and the proceeds distributed to help low-income consumers with rising energy costs. Beginning in 2026, any unallocated allowances will be auctioned and the proceeds returned to consumers on a per capita basis.
- Elimination of the 20% devaluation of credits from domestic offset projects (emission reductions achieved in uncapped sectors) seen in the original draft, and a provision allowing greater use of international offsets if domestic offsets are not available in sufficient quantity. The new version also includes a provision expanding the opportunity for early offset projects registered in non-government registries to receive federal offset credits if registered under rigorous environmental methodologies approved by the EPA.

It is now likely that a somewhat revised version of ACES will be brought to the Committee by Chairman Waxman but as this update goes to print it has not yet been made available. Technical amendments as well as some new proposals designed to attract Committee votes are expected to be included in the new version of the legislation. A summary of the new draft is available at [http://energycommerce.house.gov/Press\\_111/20090515/hr2454\\_summary.pdf](http://energycommerce.house.gov/Press_111/20090515/hr2454_summary.pdf).

- **Republicans Push Alternatives to Cap-and-Trade.** Republican members of the Energy and Commerce Committee have said they plan to offer over 200 amendments (some reports put that number at up to 450) to the ACES legislation. Republican House members (joined by a small number of Democrats) are also putting forward alternatives.
  - The Republican leadership of the Energy and Commerce Committee has floated an alternative to ACES. According to the outline of their proposal, the bill would prevent EPA from regulating GHGs under the Clean Air Act, pre-empt state authority to regulate GHG emissions, allow oil drilling in the Arctic National Wildlife Refuge, expand offshore oil and gas development, require utilities to obtain a percentage of their electricity from relatively efficient or low-carbon sources, require completion of the nuclear waste repository at Yucca Mountain in Nevada, and establish performance standards for new power plants. The standards would impose a modest GHG intensity per megawatt limit that would ratchet up over time. The draft is available at [http://republicans.energycommerce.house.gov/Media/file/News/BARTON\\_011\\_xml.pdf](http://republicans.energycommerce.house.gov/Media/file/News/BARTON_011_xml.pdf).
  - Reps. Bob Inglis (R-SC), Jeff Flake (R-AZ), and Daniel Lipinski (D-IL) introduced the Raise Wages, Cut Carbon Act of 2009, a bill that would place a \$15/metric ton of carbon tax beginning in 2010, rising to \$100/ton by 2040. The revenue would be used to lower payroll taxes and increase Social Security benefits.

- Rep. Rob Bishop (R-UT) introduced the American Energy Innovation Act, which would promote the development of solar, wind, nuclear, hydropower, and biomass technologies, provide a tax credit for investment in coal-to-liquid fuels projects, open the outer continental shelf to increased oil production, and prevent EPA from promulgating CO<sub>2</sub> regulations.
  
- **Senate Committee Finishes Amended Transmission Bill.** The Energy and Natural Resources Committee marked-up Chairman Jeff Bingaman’s (D-NM) transmission siting bill, which would support the development of “high priority” electricity transmission lines, in part by giving FERC backstop siting and cost allocation authority if states refuse or fail to act on a transmission proposal. The Committee adopted a contentious (and potentially very constraining) amendment offered by Sen. Bob Corker (R-TN) requiring FERC to demonstrate that the utility customers paying for line construction are receiving “measurable economic and reliability benefits” that are “reasonably proportionate” to the costs. Senator Bingaman and others intend to try to strip the amendment on the floor of the Senate. The Committee rejected an amendment from Sen. John Barrasso (R-WY) that would have advised FERC to site lines on public land whenever possible. To expedite the bill’s passage, Sen. Maria Cantwell withheld a controversial amendment to establish a GHG emissions intensity standard for electricity generating units connecting to the new lines. The Committee also reviewed S. 1013, bipartisan legislation that would create a federal indemnity program for up to 10 early carbon capture and sequestration (CCS) projects. The bill, which Sen. Bingaman hopes to mark-up next week, would also empower the Secretaries of Agriculture and Interior to authorize demonstration CCS projects on federal lands.
  
- **Climate Bills Proliferate on Democratic Side.** Both Senators and Representatives introduced energy and climate related bills, many hoping to integrate their proposed legislation with efforts to move energy and climate legislation through Congress. Late breaking word from the Energy and Commerce Committee leadership suggested a revised version of ACES might be offered as the markup vehicle. Some of the proposals listed below might be included in the new version:
  - Rep. Bart Stupak (D-MI) has floated a new version of his Prevent Unfair Manipulation of Prices Act (first introduced in 2006), which would strengthen federal oversight over energy futures and give the Commodity Futures Trading Commission regulatory authority over futures markets for all greenhouse gases, emissions, offsets, and financial products derived from carbon credits. The bill would also set aggregate position limits on energy contracts for traders in all markets and require swaps to be cleared through a designated clearinghouse. Rep. Stupak said he hopes to attach the bill to ACES as it moves to votes before the Energy and Commerce Committee the week of May 18.
  
  - House Majority Leader Steny Hoyer (D-MD) introduced two transmission bills. One proposal would authorize the Energy Department to fund the expansion of advanced electrical cables (which lose less energy than traditional cables) with loan guarantee funds from the economic stimulus bill or funds from the Department of Energy’s loan guarantee program. The other bill would accelerate depreciation for the use of advanced cables and provide an investment tax credit for the cables and related infrastructure.
  
  - Rep. Lois Capps (D-CA) introduced legislation that would direct the Secretary of Health and Human Services to create a national strategy for addressing the public health effects of climate change.

- A highway and transit spending bill floated by Senators Jay Rockefeller (D-WV) and Frank Lautenberg (D-NJ) aims to reduce transportation-generated greenhouse gas emissions by 40% by 2030, in part through a reduction in vehicle-miles traveled and an increase in mass transit use.
- A draft bill to create a National Climate Service within the National Oceanic and Atmospheric Administration was unanimously approved by the Energy and Environment Subcommittee of the House Science and Technology Committee.

## Judiciary

- **Environmental Organization Sues EPA Over Ocean Acidification.** The Center for Biological Diversity (CBD) filed suit against EPA in the United States District Court for the Western District of Washington, alleging that the agency wrongly failed to designate the increasingly acidic coastal waters off Washington State as “impaired” under the Clean Water Act. Washington water quality standards generally provide that a change in pH of more than 0.2 will cause a waterway to merit “impaired” status. According to CBD, global emissions of carbon dioxide have caused pH off the Washington coastline to decrease by more than this threshold since 2000. Separately, CBD has petitioned EPA to strengthen federal water quality standards in light of mounting evidence of widespread ocean acidification.

## States and Cities

- **WCI Releases Draft GHG Reporting Rule.** The Western Climate Initiative released the final draft of its proposed mandatory GHG reporting rule. The rule would apply to any facility in a member state that produced more than 10,000 metric tons of CO<sub>2</sub>-equivalent GHGs per year. The rule includes a provision that would govern GHG emissions resulting from imported electricity. The WCI is a regional cap-and-trade program whose members include seven western states and four Canadian provinces.
- **Business Groups Challenge California Climate Law.** A number of groups representing business and taxpayer interests have filed a suit challenging the California Air Resources Board’s (CARB) implementation of the state’s AB 32 climate change law. In their suit, the groups allege that CARB has violated the Public Records Act by failing to fully disclose expenses related to administration of the two-year old act. The suit is the first of what is expected to be many lawsuits to challenge the California GHG regulations.
- **Maryland Passes Emissions Target.** Maryland Governor Martin O’Malley signed into law a bill that requires the state to reduce its GHG emissions 25% from 2006 levels by 2020. Part of a larger energy package, the GHG provisions authorize the Maryland Department of Environment to create a plan for achieving that target.

## Industry

- **Early Industry Reaction to Revised Waxman-Markey Renewable Energy Standard Mixed.** Trade associations for renewable energy industries reacted with dismay to early reports that the revised Waxman-Markey draft climate change legislation included a less aggressive Renewable Energy Standard (see above). The American Wind Energy Association expressed disappointment in the revised standard and said that the original standard would have created 100,000 additional

jobs in renewable energy. The Biomass Power Association agreed that the new standard is too low and could lead to “a business as usual scenario which doesn’t really increase the amount of energy coming from biomass.” However, the compromise standard was welcomed by the Electric Power Supply Association, which represents wholesale power generators. The President of the Edison Electric Institute called the new standard a “challenging” and “formidable” requirement.

- **Regulators, Gas Industry Dispute Waxman-Markey Efficiency Measures.** The American Gas Association (AGA) entered the debate over the Waxman-Markey draft climate change legislation, sending a letter to House Committee on Energy & Commerce members advocating a free distribution of 12% of GHG allowances to local gas distribution companies. The AGA also called for the federal government to oversee state-level energy efficiency programs, and to ensure that the costs of those programs are recovered through energy rate increases. The National Association of Regulatory Utility Commissioners sent a letter in response arguing that the AGA proposal would undermine innovative state programs to conserve energy.
- **Recession Harming Investment in Clean Technologies.** The accounting and consulting firm Ernst & Young reported a 63% decline in U.S. venture capital investment in clean technologies over the last year, attributed largely to the ongoing global recession. The electric generation sector received only \$56 million of venture capital funding in the first quarter of 2009, a 73% drop from the same period in 2008. However, investment in battery technologies and fuel cells increased by 50%, to \$114 million.

## Studies and Reports

- **Climate Change Potentially World’s Greatest Health Threat.** A new report by climatologists and medical professionals published in *The Lancet* states that the negative effects of climate change have the potential to pose the gravest threat to human health in the 21<sup>st</sup> Century. The researchers predicted that vector-borne diseases will increase their range and death rates, but that the indirect effects of climate change on water, food security, shelter, migration, and extreme climate events will have the greatest negative health effects. The report is available at <http://www.thelancet.com/climate-change>.
- **DOE Releases Carbon Storage Estimates.** According to a preliminary estimate published by the Department of Energy, 126 to 375 billion metric tons of CO<sub>2</sub> could be stored beneath federal lands. Most of the storage is west of the Mississippi, and in saline formations. The report is available at [http://www.netl.doe.gov/publications/press/2009/09027-DOE\\_Publishes\\_Federal\\_Lands\\_Study.html](http://www.netl.doe.gov/publications/press/2009/09027-DOE_Publishes_Federal_Lands_Study.html).

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