

June 15, 2009

Climate Change Policy Update Week of June 8-12, 2009

Commentary: Reports suggest that Speaker Pelosi may bring the ACES bill to the floor of the House of Representatives during the week of June 22. This implies that none of the eight committees to which the bill was referred will hold a public mark-up, but rather that the Democrats are working behind closed doors to reach agreement on a procedural method (perhaps a new version of the legislation or an amendment) that would add new matters from the various other Committees with shared or additional jurisdiction on the issues and address at least some of the remaining concerns of Members and stakeholders. A new version would also allow for the inevitable “technical” corrections. Something to watch for: a possible enhanced role for the U.S. Department of Agriculture in certifying domestic agriculture and forestry offsets . . . House Republicans are advocating for 100 new nuclear power plants . . . The Department of Energy has resurrected the FutureGen project in a slightly less ambitious form . . . The CFTC Chairman predicts that there will be a \$2 trillion carbon market. The Congressional Budget Office also weighs in, estimating that the ACES will generate a \$15/ton allowance price, rising to \$26/ton by 2019. The CBO assigns a key cost-saving role for offsets, but expects that it only will be possible to use quantities well below the 2 billion ton ceiling . . . Chairman Boxer insists that she wants to mark up climate change legislation in the Environment and Public Works Committee before the August recess. She also noted the lead role of Senator Debbie Stabenow (D-MI) on offsets, and apparently expressed enthusiasm for the direction Sen. Stabenow is headed on the role for the U.S. Department of Agriculture in the offset programs . . . International negotiations are underway in Bonn, and U.S.-China talks were productive but did not yield a concrete outcome.

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

Executive Branch

- **Presidential Nominations and Appointments.**
 - President Obama nominated John Norris, currently Agriculture Secretary Tom Vilsack’s chief of staff, to serve as one of the five Commissioners of the Federal Energy Regulatory Commission (FERC). If confirmed, Norris would fill the only vacant position on the leadership of the Commission.
 - Warren F. Miller, Jr. was nominated to serve as Assistant Secretary of Energy for Nuclear Energy. Miller is currently a professor of nuclear engineering at Texas A&M University.
 - Sam Hamilton was nominated to serve as Director of the Fish and Wildlife Service. A biologist who has worked at the Service for thirty years, Hamilton now directs the agency’s Southeast regional office.
 - Bob Abbey, a private consultant with extensive experience in federal and state public lands management, has been nominated to serve as Director of the Bureau of Land Management.
 - The Senate Energy and Natural Resources Committee approved the nominations of Catherine Zoi, for Assistant Secretary of Energy for Energy Efficiency and Renewable

June 15, 2009

Energy; Willian Brinkman, for Director of the Office of Science at the Department of Energy; and Anne Castle, for Assistant Secretary of the Interior for Water and Science.

- **DOE Reaches Agreement to Resume FutureGen Project.** Energy Secretary Steven Chu announced last week that the Department of Energy has reached an agreement with the FutureGen Alliance to resume the FutureGen Project, which was abandoned by the Bush Administration in January 2008 due to mounting costs. The FutureGen Project is a joint venture between DOE and a private consortium that has the goal of building a commercial-scale coal-fired power plant with carbon capture and sequestration (CCS) technology in Mattoon, Illinois. Under the new agreement, DOE will contribute nearly \$1.1 billion in funding and the FutureGen Alliance will provide \$400 to 600 million. The FutureGen partners also decided to design the plant to have emissions similar to that of a gas-fired facility, rather than the “near-zero” emissions originally envisioned. Site studies and preliminary design work are expected to resume in 2009 and continue until early 2010, at which point the FutureGen partners will determine whether to proceed with construction of the plant.
- **CFTC Commissioner Predicts \$2 Trillion GHG Market.** Bart Chilton, one of the Commissioners of the Commodity Futures Trading Commission (CFTC) and the chair of the agency’s Energy and Environmental Markets Advisory Committee, predicted last week that the U.S. market for GHG allowances and offset credits could reach \$2 trillion in value within five years if Congress passes a climate bill in 2009. Chilton based his estimate on the growth of global GHG markets since 2002, and historical data showing that futures and options markets for commodities are often 10 to 30 times as large as the market for physical delivery. The Commissioner also backed a bill introduced by Sen. Bernie Sanders (I-VT), which would vest CFTC with emergency powers to curb excessive speculation in energy markets. Under the American Energy and Security Act of 2009 (H.R. 2454), CFTC would be the “default” regulatory agency for markets in derivative contracts based on GHG allowances.

Congress

- **Democrats Herd Cap-and-Trade Votes.** Rep. Henry Waxman (D-CA), Chairman of the Energy and Commerce Committee and sponsor of the American Clean Energy and Security Act (ACES), and other Committee members who support the bill have been meeting with other House Democrats to try to shore up support in advance of a floor vote. The bill has been criticized for both being too aggressive and not aggressive enough, and critics had hoped to make changes to the bill via one of the eight other Committees with jurisdiction over parts of the legislation. The Foreign Affairs and Education and Labor Committees have decided against a mark-up and have discharged the bill. Environmental and religious groups wrote to Ways and Means Committee Chairman Charles Rangel (D-NY) to urge him to incorporate a 100% auction of emission allowances in the legislation. Agriculture groups and lawmakers from farm communities are advocating for greater USDA involvement in overseeing agricultural “offsets” – projects to reduce emissions in uncapped sectors – and for greater certainty that agricultural offset projects will be included in the offsets program. Although members of the Ways and Means and Agriculture Committees had earlier communicated interest in engaging with the climate bill, Representatives signaled this week that they might make adjustments to the legislation via an amendment or new version that would be approved for consideration before the full House of Representatives rather than hold mark-ups in the Committees to which the ACES legislation has

June 15, 2009

been referred. Rep. Waxman told reporters this week that he still wants to have a floor vote on the bill before the July 4th recess.

- **Boxer Wants Climate Change Mark-Up By August Recess.** Environment and Public Works Committee Chairman Sen. Barbara Boxer (D-CA) said this week that she hopes to mark-up climate change legislation before the Senate's month-long August recess, and plans to have several hearings before introducing a bill and beginning the mark-up. Sen. Boxer also noted that she has been working with Sen. Debbie Stabenow (D-MI) on agricultural issues and offsets.
- **Senate Committee Support for Offshore Drilling May Hinder Floor Success.** The Senate Energy and Natural Resources Committee, marking up comprehensive energy legislation, voted to accept an amendment to allow oil and gas leasing as close as 45 miles to Florida's gulf coast and closer in other areas. Committee members who opposed the amendment, such as Sen. Maria Cantwell (D-WA), argued that the amendment would cost the energy bill support on the Senate floor. The Committee also completed work on carbon capture and sequestration (CCS) legislation, which would authorize \$100 million over the next decade to fund as many as 10 commercial-scale carbon capture and sequestration (CCS) projects. The proposal allows the DOE to indemnify the private sector participants in the collaborations from liability, although the protection was limited to \$12 billion by an amendment.
- **House Passes Clunkers Bill.** The House of Representatives passed the "cash for clunkers" bill sponsored by Rep. Betty Sutton (D-OH) that would provide vouchers of up to \$4,500 to individuals who purchase fuel-efficient vehicles to replace an inefficient vehicle. The bill has been attached to a supplemental bill containing Pentagon funding for the wars in Iraq and Afghanistan (a so-called "must pass" bill) that could be approved by Congress within days.
- **House Committees Consider Green Buildings, Efficiency, Transmission Siting.** The Housing and Community Opportunity Subcommittee of the House Financial Services Committee held a hearing on H.R. 2336, legislation introduced by Rep. Ed Perlmutter (D-CO) that would provide incentives for energy efficiency improvements in homes and commercial buildings. The bill passed the House last September as part of an omnibus energy security bill, but languished in the Senate. The Energy and Environment Subcommittee of the Energy and Commerce Committee held a hearing on proposals to reform electricity transmission line siting processes to improve grid reliability and the transmission of electricity from renewable generation. ACES does not address transmission siting because the Committee failed to achieve sufficient consensus on issues such as federal backstop authority for siting and cost allocation for new transmission lines.
- **House Republicans Release Competing Energy Plan.** Republican members of the House have released The American Energy Act, which would establish a goal of building 100 new nuclear reactors over the next two decades, authorize new funding for solar energy and other low-carbon energy sources (including permanent tax credits), and expand domestic oil and natural gas production. The proposal is available at <http://www.gop.gov/energy>.

Judicial

- **Environmental Organizations Sue Over CARB's Implementation of AB 32.** Communities for a Better Environment, California Communities Against Toxics, the Center for Race, Poverty,

June 15, 2009

and the Environment, and other organizations filed suit against the California Air Resources Board (CARB) in San Francisco County Superior Court last week, challenging the agency's "Scoping Plan" to implement California's climate change statute, AB 32. The plaintiffs alleged a number of deficiencies in the Scoping Plan, including that it: neglects to require maximum feasible and cost-effective reductions in GHG emissions; overlooks significant emission reduction opportunities at agricultural and industrial operations; and contains inadequate provisions for monitoring and enforcing emission reductions in a regional cap-and-trade system.

States and Cities

- **Midwestern Cap-and-Trade Program Advisors Release Final Recommendations.** While reiterating its position that a federal cap-and-trade program is preferable, the advisory group for the Midwestern Greenhouse Gas Reduction Accord (MGGRA) published its final design recommendations for the regional cap-and-trade program. The recommendations call for emissions caps to be set at 18-20 percent below 2005 levels by 2020, and 80 percent below 2005 levels by 2050. Rather than distribute allowances through auction, the group recommends that the program employ a combination of free allocation, a fixed fee per allowance, and direct allocations to specific programs. MGGRA signatories include six Midwestern states and one Canadian province.
- **Boulder Council Votes to Increase Carbon Tax.** In its second vote on the issue, the City Council of Boulder, Colorado approved an increase in the city's carbon tax. Under the proposal, the tax would increase from \$11 to \$21 per year for residential energy consumers, and \$43 to \$94 per year for commercial energy users. The rate increase must pass a third vote in July before it can go take effect on August 6 of this year. Revenues from the tax support programs designed to help the city meet its GHG emission target of 7 percent below 1990 levels by 2012.

Industry

- **Airline Association Agrees to Cap Emissions by 2020.** The International Air Transportation Association (IATA), a trade association of 230 airlines, committed to halt the growth of the industry's global GHG emissions by 2020 and reduce emissions by 50 percent by 2050. IATA said it expected to meet this goal by utilizing biofuels, investing in efficient technologies, and implementing economic measures such as allowance trading. The association also called on the International Civil Aviation Organization to establish binding emission standards for new aircraft. In a related development, a group of airlines including Virgin Atlantic and Air France joined the U.K.-based environmental organization The Climate Group to call for an aviation-specific cap-and-trade program to be negotiated at this December's global climate talks in Copenhagen. Aviation currently accounts for 2 percent of global carbon dioxide emissions.
- **Fuel Producers Testify at Public Hearing on RFS.** The Renewable Fuels Association (RFA) renewed its criticisms of EPA's proposed Renewable Fuels Standard (RFS) at the agency's first public hearing on the matter last week. RFA particularly focused on the agency's proposed method for calculating the "lifecycle" GHG emissions of biofuels, which would take into account not only direct emissions from the production process but also indirect emissions resulting from land-use change in other countries. RFA argued that indirect emissions calculations are too uncertain to serve as the basis for a regulation, and that the RFS should evaluate biofuels against

June 15, 2009

the full lifecycle GHG emissions of petroleum fuels. The RFS, which the agency was required to promulgate in the Energy Independence and Security Act of 2007, would require 36 billion gallons of renewable fuels to be blended with the nation's gasoline supply by 2022. Only fuels meeting EPA's lifecycle GHG criteria would qualify for the blending mandate.

- **AGA Presses for 33 Percent Larger Allowance Allocation in H.R. 2454.** The American Gas Association (AGA), which represents natural gas local distribution companies (LDCs) that would become subject to an allowance surrender obligation under H.R. 2454, submitted comments to the House Energy and Environment Subcommittee last week on the bill's allowance allocation provisions. The AGA's key request was that the share of allowances distributed for free to LDCs be increased from 9 percent in 2016 to 12 percent. AGA claimed that the larger allowance share would more accurately reflect the gas LDC sector's share of emissions from capped sectors, once small industrial consumers are considered.

Studies and Reports

- **U.N. Documents Climate Change-Induced Migration.** A report by U.N. researchers has documented evidence of climate change-induced migration based on data from 24 countries. The report concludes that climate change impacts such as desertification, storm intensity increases along coastlines, and rising sea levels could displace hundreds of millions of people globally by 2050. The report is available at http://www.care.org/newsroom/articles/2009/06/Climate-change-report-drives-migration-20090610.asp?s_src=170920500000&s_subsrc=. Also, the U.N. Environment Program released a report on the capacity for ecosystems to mitigate climate change by sequestering emissions. The report is available at <http://www.grida.no/publications/rr/natural-fix>.
- **CBO Analysis of ACES Projects Minor Budget Windfall.** A cost analysis of ACES by the Congressional Budget Office concluded that the legislation would provide a \$24.4 billion net gain for the U.S. Treasury. The CBO estimates that the cost of an allowance would be \$15 in 2011 and would rise to \$26 by 2019. The report also predicts that capped entities would purchase 230 million domestic and 190 million international offset credits in 2012 and 300 million domestic and 425 million international credits in 2020. According to the CBO's projections, the use of offsets would reduce allowance prices by \$35 (69 percent) in 2012, and eliminating barriers to offset use would lower allowance prices further. The report is available at <http://www.cbo.gov/doc.cfm?index=10262>.
- **OECD, IEA Release Report on Sectoral Mitigation Options in Developing Countries.** A joint "expert" working group of the Organization for Economic Cooperation and Development (OECD) and the International Energy Agency (IEA) released an analysis of sectoral approaches to achieving emission reductions in developing countries. The report considers the use of GHG emission intensity of goods, fixed emission goals, and technology-based sectoral objectives, with the goal of leveraging the carbon market to produce low-cost yet verifiable emission reductions in specific sectors of developing countries. The report is available at http://www.oecd.org/document/44/0,3343,en_2649_34361_1904108_1_1_1_1,00.html.

June 15, 2009

International

- **UN-Sponsored Climate Negotiations Continue in Bonn.** Negotiators from 182 countries continued their 12-day negotiations on a successor treaty to the Kyoto Protocol in Bonn, Germany. The negotiations, formally called the 30th Session of the Subsidiary Bodies to the United Nations Framework Convention on Climate Change, are using a dual-track format, with negotiators in each track developing a separate treaty text. Together, the two texts will form the basis for future negotiations. One track, conducted by the United Nation's Ad-hoc Working Group on the Kyoto Protocol, has made little progress and, in an effort to break the stalemate, has directed the chairman of the working group to produce a draft text. The other track, under the auspices of the Ad-hoc Working Group on Long-term Cooperative Action, has made more substantial progress with negotiations complete on the adaptation and technology sections.
- **Japan Announces Emissions Targets.** Japanese Prime Minister Taro Aso announced that Japan will pledge to reduce its GHG emission 15 percent from 2005 levels by 2020 and 60-80 percent below 2005 levels by 2050. The 2020 target equates to an 8 percent emission reduction from 1990, an amount slightly above Japan's 6 percent below 1990 by 2012 target under the Kyoto Protocol. The Japanese target would not include provisions that would permit international emissions trading.
- **US, China Hold Bilateral Climate Talks.** The United States and China conducted bilateral talks aimed at forging an agreement on climate change. While the talks did not achieve that ultimate goal, participants generally described the outcome as positive. However, following the conclusion of the talks, Chinese Foreign Minister Qin Gang declared that China would be unwilling to agree to binding GHG emission targets.

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.