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Climate Change Policy Update Week of July 6-10, 2009

Commentary: *Chairman Boxer retreated from her accelerated timetable for marking up a cap-and-trade bill in the Senate Environment & Public Works Committee. Her new deadline is early September. Majority Leader Reid has told five other Committee chairmen also to finish their work by the end of September, at which point he has pledged to work to bring a single bill to the floor and have it passed in time for the Copenhagen meetings . . . Hearings this week in the Senate suggested that border measures for uncapped countries will be a major issue. Senators with economically-stressed industries in their states are emphasizing the importance of such measures. President Obama and some other Senators are expressing concerns about the consistency of such measures with WTO obligations and about the potential for international trade conflicts. China has made its views clear . . . The G-8 and the Major Economies Meeting produced agreement on a long-term temperature goal, but failed to generate an agreement on a division of labor between developed and developing countries . . . In the context of a PSD permit proceeding for a new coal-fired power plant, EPA requested that the applicant consider IGCC; however, it is not clear that EPA could require IGCC as BACT at this point.*

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

- **Administration Officials Support Climate Legislation in Senate Hearing.** In the Senate Committee on Environment and Public Works' first hearing in preparation for mark-up of climate legislation, four Obama Administration officials testified in favor of a strong climate bill: Energy Secretary Steven Chu, EPA Administrator Lisa Jackson, Agriculture Secretary Tom Vilsack, and Interior Secretary Ken Salazar. Commenting that "denial of the climate change problem will not change our destiny," Chu said that projected impacts of climate change include melting of the Arctic ice cap, rising sea levels and an increase of 10 degrees Fahrenheit in global surface temperatures. Vilsack advocated a role for agriculture and forestry offset credits in future climate legislation, stating that such programs would furnish a "significant building block to revitalizing rural America." Jackson testified that the President and public opinion both strongly favor the enactment of climate legislation in order to reduce the Nation's dependence on imported oil and promote economic growth. Lastly, Salazar emphasized opportunities for renewable electricity generation and biological sequestration on Federal lands, as well as Department of Interior efforts to plan for and adapt to the impacts of climate change on natural resources.
- **EPA Grants California Waiver for Vehicle GHG Standards.** On June 30th, the EPA granted California a waiver under Section 209 of the Clean Air Act allowing the state to enforce its standards for greenhouse gas (GHG) emissions from vehicles beginning with

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model year 2009. The state originally requested a waiver in 2005, which was denied by the Bush Administration in 2008. Thirteen other states have proposed to adopt California's standards, and may do so now that the waiver has been issued. Under a landmark agreement announced by the Obama Administration in May, California has agreed to refrain from enforcing its standards for model years 2012 through 2016, and will instead defer to a single national set of comparably stringent GHG and fuel economy standards that the Administration intends to propose later this year. The waiver can be accessed at <http://edocket.access.gpo.gov/2009/pdf/E9-15943.pdf>.

- **EPA Requests that PSD Applicant Consider IGCC Technology.** EPA signaled a potential shift in policy by requesting that the developer of a coal-fired power plant in Kansas consider installing integrated gasification combined cycle (IGCC) technology as part of its Clean Air Act permitting process. Under the Clean Air Act, major new polluting facilities must obtain Prevention of Significant Deterioration (PSD) preconstruction permits that reflect Best Available Control Technology (BACT) for regulated pollutants. To date, EPA has not required that PSD applicants implement BACT for GHGs. Furthermore, the Agency issued guidance during the Bush Administration stating that IGCC would not constitute BACT for new coal-fired power plants. However, in a similar permit proceeding for a coal-fired plant being developed by Desert Rock Energy Corporation, EPA requested remand of a PSD permit on June 29th to consider whether IGCC technology should be required as BACT.
- **Update on Administration Nominations and Appointments.**
 - The Senate Committee on Environment and Public Works approved the President's nomination of Paul Anastas for Assistant Administrator of EPA for Research and Development, and Colin Scott Fulton for General Counsel of EPA.
 - The Senate Committee on Environment and Public Works held confirmation hearings for Robert Perciasepe, President Obama's nominee for Deputy Administrator of EPA.
 - The Senate Committee on Commerce, Science and Transportation held confirmation hearings for Polly Trottenberg, who was nominated to serve as Assistant Secretary of Transportation for Transportation Policy (a position with oversight of, among other issues, Corporate Average Fuel Economy standards).
 - Sen. Saxby Chambliss (R-GA) placed a procedural "hold" on the nomination of Cass Sunstein for Administrator of the Office of Information and Regulatory Affairs within the White House Office of Management and Budget, citing Sunstein's views on the Second Amendment and animal welfare.

Congress

- **Senate Ramps Up Hearings; Slows Down Legislation.** Senate Environment and Public Works Committee Chairman Barbara Boxer (D-CA) has relaxed her schedule for moving climate change legislation through the Committee, saying that because the Senate is focused on health care she will likely not release her legislation for another two months (rather than within a few days). She now plans on marking up a bill in September (rather than before the August recess). Majority Leader Harry Reid (D-NV) has given six

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committees until September 28th to complete work on climate change legislation, 10 days later than his previous deadline; however, he has also said that the Senate will secure final passage of comprehensive energy and climate change legislation before the international climate talks end in Copenhagen this December. Majority Leader Reid told reporters that the American Clean Energy and Security Act (ACES, H.R. 2454) – passed by the House on June 26th – would not pass the Senate, and that the Senate would be drafting its own bill. Majority Leader Reid expects contributions from the following committees Environment & Public Works (chaired by Boxer); Finance (chaired by Sen. Max Baucus, D-MT); Commerce, Science, and Transportation (chaired by Sen. John “Jay” Rockefeller, D-WV); Foreign Relations (chaired by Sen. John Kerry, D-MA); Agriculture (chaired by Sen. Tom Harkin, D-IA); and Energy and Natural Resources (chaired by Sen. Jeff Bingaman, D-NM). Key committees continued hearings and a number of Senators discussed their goals for climate legislation:

- The Foreign Relations Committee held a hearing on the European Union’s climate program and efforts to address competitiveness concerns. Committee Chairman John Kerry (D-MA) told reporters that lawmakers working on the bill have decided to revise language in the House climate change bill requiring the President to impose emission allowance requirements on certain imported goods from countries without carbon regulations commensurate with the U.S. program. However, Sens. Sherrod Brown (D-OH), Debbie Stabenow (D-MI), and Carl Levin (D-MI) spoke out in favor of the trade sanctions as important protections for U.S. manufacturing.
- At a Finance Committee hearing on climate legislation and international trade, witnesses representing the Government Accountability Office and the Pew Center on Global Climate Change as well as an international trade lawyer argued that a carbon-related border tariff would be excessively complicated, insufficiently helpful to U.S. industry, and likely to inspire retaliatory trade measures. Finance Committee Chairman Max Baucus (D-MT) announced that his committee will hold a mark-up of climate legislation.
- Sens. Dianne Feinstein (D-CA) and Olympia Snowe (R-ME) introduced legislation (S. 1399) that would give the Commodity Futures Trading Commission (CFTC) exclusive oversight over carbon markets and would regulate over-the-counter carbon swaps. ACES gave the Federal Energy Regulatory Commission jurisdiction over the cash carbon markets and the CFTC jurisdiction over carbon derivative markets.
- The Environment and Public Works Committee held a climate change hearing featuring top administration officials (discussed above) as well as Braddock, PA Mayor John Fetterman, Mississippi Governor Haley Barbour, and witnesses from the Dow Chemical Company and the Natural Resources Defense Council.
- Agriculture Committee Chairman Tom Harkin (D-IA), said he intends to hold a mark-up in his Committee, and said that he would like the Senate legislation to replicate the farm-friendly measures inserted into ACES by House Agriculture Committee Chairman Collin Peterson (D-MN). Sen. Harkin is also hoping to make it easier for farmers to obtain carbon credits for land enrolled in farm bill conservation programs, increase the amount of ethanol that can be blended into gasoline from 10 to 15 percent, and secure more allowance allocations for farmers.

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- The Housing, Transportation and Community Development Subcommittee of the Banking, Housing and Urban Affairs Committee held a hearing on the role of transportation policy in GHG mitigation efforts.
- **Ads Target Climate Bill Supporters.** Democrats from manufacturing and agricultural districts who voted in support of the ACES bill recently passed by the House have been targeted by both National Republican Congressional Committee-funded ads attacking the vote and ads funded by liberal groups commending the votes.
- **House Passes Agriculture Appropriations Bill With Rural Renewable Energy Funds.** The House passed the fiscal year 2010 agriculture spending bill, which maintains farm bill conservation programs and fully funds the Rural Energy for America Program, which provides loans and grants for landowners and small business owners to support development of renewable energy generation projects and energy efficiency improvements.
- **Senate Vote Counting Begins.** The Washington Post reported that advocates of Senate climate legislation admit that they may be as many as 15 votes shy of the 60 needed to secure passage. An analysis by the political polling website FiveThirtyEight.com predicts that there are 52 Senators with greater than 50 percent odds of voting for the bill, and 62-66 total votes in play. To predict votes, the analysis used factors such as lobbying contributions, state per capita carbon emissions, and ideology, and singled out Democratic Senators Evan Bayh (IN), Blanche Lincoln (AR), Mark Pryor (AR), Mary Landrieu (LA), Byron Dorgan (ND), Robert Byrd (WV), Kent Conrad (ND), and Ben Nelson (NE) as more likely than not to vote against climate legislation.

Judicial

- **Georgia Court of Appeals Reverses Ruling Imposing CO₂ Limits for Coal Plant.** In the case of *Longleaf Energy Associates v. Friends of the Chattahoochee*, No. A09A0387 (Ga. Ct. App. July 7, 2009), a Georgia Court of Appeals unanimously reversed a Superior Court decision that invalidated a Clean Air Act permit for a 1,200 MW coal-fired power plant for failing to require GHG pollution controls. The lower court had concluded that GHGs were pollutants “subject to regulation” under the Clean Air Act because of the Supreme Court’s decision in *Massachusetts v. EPA*, and that facilities seeking Prevention of Significant Deterioration (PSD) preconstruction permits therefore would be subject to the Best Available Control Technology requirement for GHGs. The Court of Appeals disagreed, finding that neither *Massachusetts* nor the Clean Air Act required mandatory GHG controls to be incorporated into PSD permits. The Court also opined that the Superior Court’s ruling would “impose far-reaching economic hardships on the state” and “preempt ongoing congressional and EPA efforts to formulate a CO₂ emissions policy for all the states.” Two plaintiffs in the case, Sierra Club and Friends of the Chattahoochee, plan to appeal the ruling to the Georgia Supreme Court.

States and Cities

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- **States Awarded Stimulus Funds for Energy Projects.** The U.S. Department of Energy (DOE) has awarded \$153 million in stimulus funds to Arkansas, Georgia, Kentucky, Mississippi, Montana, New York, and the U.S. Virgin Islands for energy projects. The states will spend the funds on projects to improve the energy efficiency of public buildings and for loans and grants to renewable energy developers. DOE also awarded \$288 million to Arkansas, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, and New Hampshire for programs improving the energy efficiency of private homes.
- **Los Angeles to Terminate Use of Coal-Generated Power by 2020.** The mayor of Los Angeles, California, has introduced a plan to end the Los Angeles Department of Water and Power's (LADWP) use of coal-generated electricity by 2020. Under the plan, the city will secure 40 percent of the power currently derived from coal from renewable resources, including wind and solar, and 60 percent from natural gas, nuclear, and hydropower. As a result of this announcement, plans for a proposed coal-fired power plant in Utah were cancelled, as LADWP was to be its biggest power purchaser.
- **Ohio Legislature Discourages National Cap-and-Trade Program.** Ohio state legislators have adopted a non-binding resolution to discourage Congress from implementing a national cap-and-trade program. The legislators instead favor individual state renewable energy portfolio standards, arguing that a cap-and-trade program limiting emissions is too costly for constituents. Ohio adopted energy portfolio standards last year which require that 25 percent of the state's power be produced by renewable or low-carbon sources by 2025.

Industry

- **ConocoPhillips Contradicts USCAP, Opposes ACES.** Oil and gas giant ConocoPhillips voiced opposition to the House climate bill, breaking ranks with its fellow members of the U.S. Climate Action Partnership, an industry-environmentalist coalition which developed many of the policy recommendations incorporated into the legislation. ConocoPhillips objected to the allocation of allowances provided to the petroleum sector, which is small relative to natural gas and electricity; the exclusion of petroleum refineries from allowances distributed to trade-sensitive industries; and the formula used to distribute allowances among refiners. ConocoPhillips is the second member of USCAP to object to ACES; Caterpillar announced its opposition the day that the bill was passed, citing the tariff provisions of ACES.
- **Electric Utilities Begin Lobbying Senate for Modifications to ACES.** The President of the Edison Electric Institute (EEI), the trade association for investor-owned electric utilities, sent an open letter to all Senators calling for further adjustments to ACES once the Senate begins deliberations on a climate bill in the fall. Key measures requested in the letter included decreasing the stringency of the near and medium-term emissions targets for 2012 and 2020; including a "price collar" that would establish both a minimum and maximum price for allowances; extending the "phase-out" period for allocations to the electric sector through 2040; relaxing of quantitative restrictions on the use of offset credits; and eliminating the 20 percent discount that ACES would place on

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the value of international offset credits. The letter is available at <http://www.eei.org/whatwedo/PublicPolicyAdvocacy/TFB%20Documents/090708KuhnSenateClimate.pdf>.

- **Recession, Kyoto Allowance Surpluses Fueling Surge in Global GHG Trading.** A mid-year market report by carbon market analyst Point Carbon observed that the value of global trading in GHG allowances totaled \$65 billion in the first half of 2009, a 22 percent increase over the same period last year. The increase in market value occurred despite a decline in the average price of allowances, reflecting a sharp upturn in trading volumes. Point Carbon attributed the increase in trading activity to surplus allowances held by firms in the European Trading Scheme; the firms have begun to sell those allowances in an effort to raise revenue. Trading has also increased due to sales of the Kyoto allowances known as Assigned Amount Units (AAU), many of which were held by Russia. Sales of surplus AAUs accounted for 2 percent of the global GHG market in the first six months of 2009, a 75 percent increase over last year.

Studies and Reports

- **GAO and WTO Release Reports on Climate-Related Trade Measures.** The Government Accountability Office (GAO) released a report analyzing options for protecting trade-exposed, energy-intensive industries in the context of domestic carbon controls. The report notes that carbon-based border tariffs could trigger retaliatory actions by other countries, and that a reduction in U.S. demand for oil could reduce international oil prices and increase oil consumption (and GHG emission production) by other countries. The report is available at <http://www.gao.gov/>. A World Trade Organization (WTO) report suggests that the imposition of appropriately tailored border tariffs based on climate change concerns may be legal under international trade rules, but that the distribution of free allowances to industry could constitute illegal subsidies. The report is available at <http://www.wto.org/>.
- **Report Argues Competitive Electricity Markets Needed for Climate Goals.** A report by Navigant Consulting argues that competitive wholesale and retail electricity markets will be critical to the success of a market-based climate program by transmitting accurate information about the financial risk and reward of low-carbon investments. The report was commissioned by the COMPETE Coalition, which represents electricity customers, retail suppliers, power marketers, generators, and professional service companies who support competitive electricity markets. The report is available at http://navigantconsulting.com/industries/energy/renewable_energy.

International

- **Major Economies Agree – in Part – On Climate Goals.** At the Group of Eight (G-8) Summit in Italy, the United States and the other coalition members agreed to reduce their GHG emissions by 80 percent by 2050 and said that worldwide emissions should fall by 50 percent by that date. A group of 17 of the world's major economies – known as the Major Economies Forum (MEF), which includes China, Russia, Brazil and India and

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- collectively produces approximately 80 percent of global GHG emissions – also met and announced a “Shared Vision” for keeping global temperatures from rising more than 2 degrees Celsius above pre-industrial levels. The MEF could not reach a consensus on a specific global emissions reduction target, in large part because of disagreements about the level of emissions reductions developing countries should make, short-term reduction goals for developed countries, and the extent to which industrialized nations would fund technology transfer to, and climate change adaptation efforts in, poorer states.
- **Canada to Establish U.S.-Compatible Cap-and-Trade Scheme.** Canada’s Environment Minister told reporters that Canada will adopt a national cap-and-trade program that is “commensurate” with that of the United States and thereby avoid punitive trade tariffs proposed in ACES.
 - **China Objects to Trade Sanctions.** In response to the passage of ACES, Chinese Vice Foreign Minister He Yafei told reporters that China was “firmly against” provisions in ACES that would impose trade sanctions on countries that do not impose carbon caps comparable to the U.S. program. Yafei called the trade measures an attempt to “advance trade protectionism under the pretext of climate change”.

Erratum: The Issue Alert *House Passes Climate Change and Clean Energy Bill*, issued on June 30th, erroneously reported that Caterpillar had dropped out of the U.S. Climate Action Partnership (USCAP), a CEO-driven coalition of businesses and environmental organizations that has put forward a policy platform for addressing climate change. Although Caterpillar has criticized ACES and does not support the House-passed bill, the company remains a member of USCAP.

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.

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