

August 24, 2009

Climate Change Policy Update Weeks of August 10-21, 2009

Commentary: EPA Administrator Jackson acknowledged this week that finalizing the GHG emission standards for motor vehicles will trigger obligations under the Clean Air Act for the Agency to impose permitting and technology requirements on stationary sources of GHG emissions. Under the plain language of the Clean Air Act, such requirements potentially would extend to tens of thousands of relatively small facilities. The Agency may seek to redefine this threshold in a future proposed rule for regulation of large sources of emissions . . . The recent Bonn negotiations produced little progress, leaving much on the table to be resolved before Copenhagen . . . The CFTC is flexing its carbon market oversight muscles, proposing to deepen its regulation of the Chicago Climate Exchange. In other market oversight news, the International Emissions Trading Association – an association that includes not only financials, but also energy companies and manufacturers – told Senators that limiting allowance trading only to “covered entities” would hinder the carbon market, making it less efficient and more costly.

Executive Branch

- **EPA: Vehicle GHG Regulations Will Trigger Stationary Source Requirements.** For the first time, Environmental Protection Agency (EPA) Administrator Lisa Jackson acknowledged that the agency’s pending rulemaking on GHG emission standards for passenger vehicles will also trigger an obligation under the Clean Air Act for the agency to regulate greenhouse gases (GHGs) under the Act’s Prevention of Significant Deterioration (PSD) program for stationary sources. The PSD program requires major stationary sources that are being newly constructed or undergoing significant modifications to obtain preconstruction permits that incorporate “Best Available Control Technology” requirements for any pollutant “subject to regulation” under the Act. Since 2007, environmental organizations have brought legal challenges to PSD permits premised on the theory that GHGs are already “subject to regulation” due to certain carbon dioxide (CO₂) monitoring requirements for power plants set forth in the Act. In a 2008 memorandum now under review by the EPA, then-Administrator Stephen Johnson concluded that these monitoring requirements did not rise to the level of regulation; he acknowledged, however, that certain regulation of GHG emissions could trigger the PSD requirements. Administrator Jackson’s statement, which appeared in a letter responding to an environmental organization’s petition concerning a PSD permit for a Kentucky power plant, indicated that EPA’s forthcoming rule “would control the emissions of greenhouse gases within the meaning of the Johnson memo.” Under the plain language of the Clean Air Act, PSD requirements would apply to facilities with levels of emissions that are, for GHGs, quite low. Therefore, EPA could be faced with the issue of having to regulate numerous, relatively small facilities.
- **EPA Submits Final GHG Reporting Rule to OMB.** The White House Office of Management and Budget (OMB) has received the final text of an EPA regulation that would institute

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August 24, 2009

mandatory reporting of GHG emissions from power plants, industrial facilities, and other sources. OMB is required to review and approve the regulation before the agency publishes the final rule and makes it legally effective. The rule, which was issued in proposed form in March 2009 pursuant to a directive in EPA's 2008 appropriation, would require approximately 13,000 major GHG sources around the United States to monitor and report GHG emissions to EPA on an annual basis beginning in 2011. The rule does not require that facilities control or reduce GHG emissions.

- **CFTC Proposes Regulation of CCX Futures Contracts.** In the first concrete move by a federal agency towards regulation of GHG emission markets, the Commodity Futures Trading Commission (CFTC) issued a Notice of Intent to determine whether the agency should exercise new regulatory authority over futures contracts for voluntary GHG emission reductions listed on the Chicago Climate Exchange (CCX). Until recently, most non-agricultural and financial commodities were considered exempt from regulation under the Commodity Exchange Act. However, the 2008 Farm Bill provided CFTC with authority to regulate derivative contracts that influence commodity prices or have a "price discovery function." CFTC's proposal is the second exercise of this new authority since the Farm Bill was enacted. If CFTC finds that the CCX contracts have a "price discovery function," federal law would subject those contracts to new requirements, including position limits, audits, reporting obligations for large traders, and CFTC emergency authority. The Notice of Intent is available at: <http://www.cftc.gov/stellent/groups/public/@newsroom/documents/file/ccxspdc081709.pdf>.

Congress

- **Boxer Requests Biofuel Impact Study.** Senator Barbara Boxer (D-CA), Chairman of the Environment and Public Works Committee, has asked the Government Accountability Office (GAO) to assess the environmental and other impacts of biofuels, including the fuels' lifecycle GHG emissions, in advance of the release of Sen. Boxer's draft climate change bill on September 8th. The environmental impacts of biofuel production proved highly controversial during the consideration of the Waxman-Markey climate bill in the House. A late amendment to the Waxman-Markey bill, advanced by Agriculture Committee Chairman Collin Peterson (D-MN), would limit EPA consideration of indirect GHG emissions from biofuel production. The Peterson amendment would prohibit EPA from considering any emissions from international land use changes triggered by the use of domestic agricultural land to produce biofuels rather than food crops. The prohibition would last for five years, with future methodologies to be based on a National Academy of Sciences study and agreed to by the EPA Administrator and the Secretary of Agriculture.
- **Key Fence Sitters Signal Priorities, Intentions.** Indiana Senators Richard Lugar (R) and Evan Bayh (D) are generally considered possible but difficult votes for climate change legislation. Sen. Bayh said his top priority is ensuring that China and India adopt comparable carbon controls to the U.S. program, and that he will also focus on protecting energy-intensive industries and electricity consumers from electricity cost increases. Sen. Lugar said he worried that the House-passed bill included compromises that would weaken the legislation's effectiveness in controlling global warming, and noted that he had received thousands of constituent letters opposing the bill. Senator Arlen Specter (D-PA), another swing vote, committed to voting to end a filibuster on a climate bill – a 60 vote procedural hurdle which, if removed, would then allow a vote requiring

August 24, 2009

only a majority to pass the bill. Sen. Sherrod Brown (D-OH) made a similar comment last month. Senators Byron Dorgan (D-ND) and Blanche Lincoln (D-AR) have expressed support for passing an energy bill without a cap-and-trade component this year. Swing vote senators are being targeted through ads and rallies in their home states by rival campaigns launched by pro-passage environmental and labor groups and by an anti-passage coalition called Energy Citizens. The Energy Citizens coalition includes the American Petroleum Institute and the National Association of Manufacturers.

- **Sanders, Merkley Introduce Thermal Energy Bill.** Senators Bernard Sanders (I-VT) and Jeff Merkley (D-OR) introduced a bill that would dedicate 2% of emission allowances under a cap-and-trade program to fund the deployment of district energy and combined-heat-and-power technologies. Combined heat and power (CHP) systems capture and use waste heat generated in the production of thermal energy or electricity, which significantly improves the fuel efficiency of a power plant. District energy systems, many of which already are combined with CHP, produce steam, hot water, and/or chilled water at a central location for distribution to nearby buildings for space heating, hot water heating, and air conditioning. Highly efficient district energy systems provide electricity and thermal energy to hundreds of colleges, universities, municipalities, hospitals, military bases, utilities, and airports throughout the United States.

Judicial

- **EPA Files Consent Decree Reducing GHG Emissions at OH Coal Plant.** EPA and the Department of Justice (DOJ) jointly announced that they had agreed with Ohio Edison on a proposed consent decree that would resolve Clean Air Act violations at a coal-fired power plant in Ohio. Under the proposed decree, Ohio Edison agreed to modify the power plant by 2012 to utilize 80% biomass and 20% low-sulfur coal, a measure that will reduce GHG emissions at the plant by 1.3 million tons per year. The decree would also resolve the excess sulfur dioxide and nitrogen oxide emissions that gave rise to the initial complaint in the dispute, which began in 1999 as an enforcement action under the New Source Review provisions of the Clean Air Act. According to DOJ, the proposed decree – which would modify an existing decree issued in 2005 in the same dispute – is the first such decree under the Clean Air Act to reduce GHG emissions at a power plant.

Industry

- **IETA Opposes Proposals to Exclude Financial Institutions From GHG Trading.** Henry Derwent, the CEO of the International Emissions Trading Association (IETA), released a statement defending the role of the financial sector in future GHG trading programs, amid reports that leading Senators such as Byron Dorgan (D-ND) and Maria Cantwell (D-WA) have proposed limiting GHG trading in the anticipated Senate climate change bill only to entities with obligations to surrender emissions – thereby excluding banks and other financial institutions from holding and trading allowances and offset credits. Senator Dorgan has said that such measures are necessary to prevent excessive “speculation.” IETA’s communiqué stated that “recent comments from members of Congress ...have gone too far,” and noted that the financial sector will be expected to provide much of the capital needed to finance investments in low-GHG energy sources and technologies. The statement predicted that excluding banks from GHG trading would remove an important source of liquidity from the market, and limit the ability of

August 24, 2009

regulated companies to use financial markets to hedge financial risks arising from compliance with a cap-and-trade program. IETA's 170 members include commercial and investment banks, exchanges, energy companies, GHG traders, and other stakeholders. The IETA statement is available at: <http://www.ieta.org/ieta/www/pages/getfile.php?docID=3323>.

- **Biotechnology Industry Lobbies Senate for Allowance Allocation.** In a conference call with reporters, the Biotechnology Industry Organization (BIO) announced that it will be seeking an allocation of free "bonus" allowances, eligibility for offset credits, and eligibility for carbon sequestration incentive allowances as the Senate prepares to take up climate change legislation in the fall. BIO, which represents refiners of biofuels as well as companies that produce plastics and other polymers from renewable biomass, argued that these measures are necessary to encourage the production of fuels and materials from non-fossil fuel sources. The version of the American Clean Energy and Security Act of 2009 passed by the House in late June did not specifically recognize the bio-based product sector through allowance, offset, or other incentive programs.

Studies and Reports

- **Poll Shows Strong Support for Waxman-Markey.** A new Zogby poll of likely voters found that 71% support the Waxman-Markey bill passed by the House in June (73 percent of Independents, 89 percent of Democrats, and 45 percent of Republicans), while 45 percent believe Congress should do more to address global warming. The poll also found that 68 percent of likely voters believe a new American energy policy will not result in job losses, while a slight majority believe a new energy policy could result in new jobs. When presented with arguments for and against the bill, including concerns about energy price increases, 54 percent were still in favor of immediate passage. In describing the bill, the poll referenced a "global warming plan" rather than using the phrase "cap-and-trade". The poll results are available at <http://www.zogby.com/news/ReadNews.cfm?ID=1730>.
- **Climate Change - Poverty Links Revealed.** A new study published by World Bank and Purdue University researchers used, for the first time, a comprehensive economic model to investigate the interaction between poverty and intensified droughts caused by climate change. The researchers found that poverty rates would rise in 11 of the 16 developing countries examined due to the effects of climate change-triggered droughts. According to the study, the urban poor would be particularly vulnerable to increases in food costs caused by droughts, as the rural poor will be somewhat buffered by increases in crop prices. The study is available at stacks.iop.org/ERL/4/034004.

International

- **Bonn Climate Talks Achieve Little Progress.** International negotiators meeting in Bonn, Germany from August 10-14 made little progress toward development of the final text of a successor treaty to the Kyoto Protocol. The informal talks, called the Intersessional Informal Consultations, were intended to pare down the extensive areas of text in the draft treaty that currently are bracketed, and therefore not resolved. The most contentious issues in the current negotiations are the role of developing nations in reducing emissions, financing for various emissions reduction mechanisms, and intellectual property rights for green technologies. At the end of the negotiation session, Yvo De Boer, Director General of the United Nation Framework

August 24, 2009

on Climate Change, stressed that the pace of the negotiations must increase if negotiators are to finalize a new climate treaty of the December negotiations in Copenhagen, Denmark. The next round of talks takes place Sept. 28-Oct. 9 in Bangkok, Thailand.

- **North American Leaders Issue Climate Declaration.** Following the conclusion of the annual North American Leaders Summit (Summit), held this year in Guadalajara, Mexico, U.S. President Barack Obama, Canadian Prime Minister Stephen Harper and Mexican President Felipe Calderon announced a new trilateral climate declaration. Under the declaration, the nations will work together to reduce GHG emissions, develop new low-carbon energy technologies, and pursue low-carbon growth. The declaration's goals will be pursued under the framework of a "Trilateral Working Plan" that will deliver annual progress reports at the Summit.

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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