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Climate Change Policy Update Week of August 24-28, 2009

Commentary: EPA now has some significant GHG rules winding their way through the Administration, including the new vehicle emission standard rule, the reporting rule and the endangerment finding. A number of sources also are talking about a possible rule aimed at large sources of GHG emissions . . . While Senate-watchers are on the lookout for a draft Boxer bill to be circulated on September 8 or 9, other efforts are also underway. Senators Feinstein and Snowe have been working on carbon market oversight, Senator Stabenow is working on domestic offsets, Senator Cantwell has an alternate climate change proposal, and Senator Kerry has province over all things international. Also, it remains to be seen how allowance distribution will be handled and by whom . . . Another development worth noting is the issuance by a committee of the Chinese National People's Congress, the Chinese legislative body, of a non-binding resolution calling for the control of GHG emissions.

Executive Branch

- **EPA and NHTSA Submit Proposed Vehicle GHG / Fuel Economy Rule to OMB.** The Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA) have finished preparing the text of proposed regulations that would govern tailpipe GHG emissions and fuel economy for passenger cars and trucks in model years 2012-2016. The agencies submitted the proposed regulations to the White House Office of Management and Budget (OMB), marking a new phase in an unusual joint rulemaking that arose from the Obama Administration's landmark May 2009 agreement on fuel economy and GHG emission standards. In that agreement, the Administration pledged to develop new standards that would increase the average fuel economy of the U.S. vehicle fleet to 35.5 miles per gallon by 2016, and achieve an average GHG emissions rate of 250 grams per mile.
- **EPA Proposes Revision to Pending Rule on Carbon Injection Wells.** EPA announced that it is considering an important revision to its proposed rulemaking on standards for carbon sequestration sites, first unveiled in July 2008. The original text of the proposed rule prohibited any carbon sequestration above drinking water aquifers and in shallow surface formations. EPA's suggested revision would create a waiver process to allow carbon dioxide injection in coal seams and basalts, as well as near aquifers, where the well operator can demonstrate that the injection will not contaminate local water supplies. The agency will take public comment on the proposal for a 45-day period following publication of the rule in the Federal Register.
- **White House Budget Continues to Contemplate Full Auction of Allowances.** The "Mid-Session Review" of the White House budget, released by OMB last week, continues to assume large-scale auctions of allowances in the ten-year budget forecast. The Mid-Session Review projected that the government would raise \$627 billion in revenue from 2012 through 2019 as a result of allowance sales under an anticipated GHG cap-and-trade program. This is inconsistent

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with the allocation of allowances in the Waxman-Markey climate change bill passed by the House at the end of June. That bill would transfer over half of the GHG allowances to various industry sectors and public programs during the initial years of the cap-and-trade regime. The assumption is also out of step with the current conventional political wisdom that leans more in the direction taken in the Waxman-Markey bill than toward a larger percentage of allowances subject to auction.

Congress

- **Senators Take Climate Tours.** Senators Mark Begich (D-AK), Debbie Stabenow (D-MI), Barbara Boxer (D-CA), Bernie Sanders (I-VT), and Frank Lautenberg (D-NJ) will visit Alaska during the August recess to observe the effects of climate change on the State's forests, wetlands, glaciers, and shorelines, and on the welfare of Eskimo communities. All five senators sit on committees expected to play a role in drafting climate legislation, and Sens. Begich and Stabenow are considered swing votes. Senators John McCain (R-AZ) and Mark Udall (D-CO) took a tour of U.S. national parks, and observed climate change impacts in the parks.

States and Cities

- **WCI Releases Draft Competitiveness Principles.** The Western Climate Initiative's (WCI) Cap Setting and Allowance Distribution Committee released for public comment a set of draft competitiveness principles. The three principles contained in the "Draft Statement of Principles on Competitiveness" are intended to mitigate job losses and emissions leakage associated with the regulation of carbon-intensive industries under the regional cap-and-trade program. The WCI is comprised of seven Western states and four Canadian provinces.
- **Virginia Governor Downplays Prospect of Cap-and-Trade for Southern States.** At the annual meeting of the Southern Governors Association, Virginia Governor Tim Kaine (D), who is also Chairman of the Democratic National Committee, rejected the possibility of a regional emission trading program for Southern states. In recent years, the Southern governors had begun preliminary discussions on the development of such a program. While his view is not dispositive, according to Gov. Kaine the push for a national cap-and-trade program at the federal level means there is no longer any need for the Southern states to develop a regional program.

Industry

- **Chamber of Commerce Renews Petition on Endangerment Finding, Threatens Suit.** The U.S. Chamber of Commerce (Chamber) – the nation's largest business association – filed a 21-page petition with EPA requesting that the agency conduct a formal trial-type evidentiary hearing to determine whether GHGs endanger public health and welfare within the meaning of the Clean Air Act. The agency is currently in the process of finalizing a proposed "endangerment finding" released in April of this year. That finding, which was prompted by the Supreme Court's landmark ruling in the case of *Massachusetts v. EPA*, is a legal prerequisite for EPA to proceed with tailpipe emission standards for GHGs under the Clean Air Act. Once finalized, the endangerment finding may have the effect of triggering other Clean Air Act provisions applicable to stationary sources as well. The Chamber of Commerce petition argues that the significant economic impact of the endangerment finding justifies a formal hearing process as opposed to

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ordinary notice-and-comment rulemaking. The Chamber threatened to bring suit in federal court if EPA denies its petition, which is similar to a previous petition the Chamber filed on June 23, 2009. The petition is available at <http://www.uschamber.com/assets/env/uscocpetendangerment.pdf>.

Studies and Reports

- **Energy Efficiency Investments in South Could Displace New Coal.** A meta-review of existing research by researchers from the Georgia Institute of Technology found that the adoption of policies to reduce energy consumption and aggressively deploy energy efficient technologies in 16 Southern states and the District of Columbia could reduce energy consumption by 9 percent and eliminate the need to build new power plants in the region through 2020. The report is available at <http://www.spp.gatech.edu/faculty/workingpapers/wp51.pdf>.
- **Antarctica Glacier Melt Accelerating.** Research soon to be published in the journal *Geophysical Research Letters* indicates that the Pine Island Glacier in the southwest corner of Antarctica is thinning at a rate four times faster than the rate observed ten years ago, likely due to warmer ocean temperatures. The melting is also occurring further inland. Revised estimates of the melt rate indicate that the main section of the glacier will be gone in 110 years, six times sooner than previously thought. The glacier contains enough ice (nearly 10% of the Antarctica ice mass) to nearly double estimates of likely sea level rise by 2100 from the Intergovernmental Panel on Climate Change.

International

- **African Union's Draft Climate Proposal Seeks United Delegation, \$67 Billion in Funding.** The African Union's Group of Experts on Climate Change issued a concept paper outlining the draft position of the African Union for the international negotiations on a successor treaty to the Kyoto Protocol later this year. The concept paper would have all members of the African Union send a single unified delegation to the December negotiations in Copenhagen and proposes that developed nations to commit approximately \$67 billion each year to funding climate change mitigation efforts in Africa. The paper also calls on developed nations to reduce their GHG emissions from 1990 levels by at least 40 percent by 2020 and 95 percent by 2050.
- **China Passes Non-Binding Climate Resolution.** The Standing Committee of the National People's Congress, the Chinese legislative body, passed a non-binding resolution calling on the national government to reduce GHG emissions and improve energy efficiency. The resolution, which is the first by the Chinese legislature, is non-binding on the Communist Party but is reported to have some political impact.

CORRECTION: Last week's update reported on a notice of intent (NOI) issued by the Commodity Futures Trading Commission (CFTC) to determine whether the CCX Carbon Financial Instrument (CFI) has a "price discovery function" and therefore should be regulated by the CFTC. The CFI is the unit of trade under the voluntary cap-and-trade program administered by CCX and a cash contract, not a futures contract as we reported.

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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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