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## Climate Change Policy Update Week of September 7-11, 2009

**Commentary:** *State Department Climate Envoy Todd Stern told a House climate change hearing that the U.S. likely would not accept any emission reduction commitments in Copenhagen more stringent than the Waxman-Markey cap for 2020 . . . The return of members of Congress after the summer district work period brought a minor flurry of activity, including from coal-state Senators organized by Senators Carper and Lieberman. Their draft legislative language addresses carbon capture and sequestration, regulation of geological storage sites, and performance standards for coal-fired power plants. It also would preclude any performance standards for methane emissions from coal mines and landfills . . . USCAP and another grouping of corporations called for Senate action before the end of the year. However, the likelihood of action on the full Senate floor this year seems to diminish with each passing day. The remaining legislative days of 2009 appear likely to be taken up with health care and appropriations . . . Nevertheless, the Senate Energy and Natural Resources Committee is planning a robust schedule of hearings. Expect a hearing scheduled for September 15 to be a forum on the “price collar” mechanism, a concept for which there is a growing chorus of supporters.*

### Executive Branch

- **U.S. Climate Envoy Discusses Likely Administration Position at Copenhagen.** Testifying before the House Select Committee on Energy Independence and Global Warming, Special Envoy for Climate Change Todd Stern discussed the Obama Administration’s likely stance at this December’s international climate change negotiations in Copenhagen, Denmark. Calling the climate change bill passed by the House in June a “huge advance,” Stern said that the U.S. was not likely to agree to a global emission reduction target that exceeds the bill’s domestic greenhouse gas (GHGs) emission target of a 17% reduction below 2005 levels by 2020. According to Stern, the Administration continues to view steeper emission reductions as unrealistic over the near-term. Stern also urged the Senate to pass its own climate change bill before the negotiations begin, stating that such action would give the U.S. “credibility and leverage” in persuading developing countries to undertake similar emission reduction commitments. The Copenhagen negotiations are intended to lead to a successor agreement to the Kyoto Protocol, whose mandatory emission reduction period ends in 2012.
- **EPA Transmits Proposed Reconsideration of “Johnson Memo” to OMB.** The White House Office of Management and Budget (OMB) is reviewing an Environmental Protection Agency (EPA) proposal to reconsider the agency’s existing position – articulated in December 2008 in a document known as the “Johnson Memo” – that Clean Air Act Prevention of Significant Deterioration (PSD) permits need not address carbon dioxide. That memorandum was issued after the Agency’s Environmental Appeals Board remanded a PSD permit with instructions for the Agency to consider whether GHGs are pollutants “subject to regulation” under the Clean Air Act, and therefore require technology-specific control standards under the PSD program. It is not

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)

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yet clear how EPA's latest proposal will modify the Johnson Memo. However, EPA has recently indicated its view that the anticipated promulgation of vehicle GHG emission standards in early 2010 will also cause GHGs to become subject to PSD regulation because the standards will make GHGs "subject to regulation."

- **Update on Executive Branch Nominations and Appointments.**
  - The Senate voted to confirm Cass Sunstein as Director of OMB's Office of Information and Regulatory Affairs, and Gary Guzy as Deputy Director of the White House Council on Environmental Quality.
  - The Senate Judiciary Committee held confirmation hearings for Ignacia Moreno, who has been nominated to serve as Assistant Attorney General for Environment and Natural Resources at the Department of Justice.
  - President Obama nominated Scott O'Malia, the minority clerk for the House Appropriations Subcommittee on Energy and Water Development, to fill a vacant Republican seat on the five-member Commodity Futures Trading Commission (CFTC).
  - Steven Schoenfeld was appointed as Director of CFTC's Market Oversight Division, which is expected to assume a leading role in regulating markets for GHG allowances and offsets if Congress passes cap-and-trade legislation.

## Congress

- **Fate of Senate Climate Bill Remains Uncertain.** Although the news from Congress as they returned from their summer district work period signaled new developments on climate change legislation, it remains uncertain when or whether the full Senate will consider a bill this year.
  - A spokesman for Majority Leader Harry Reid (D-NV) told reporters that the Majority Leader is "not going to get into deadlines" for committee action on climate legislation.
  - Environment and Public Works Committee Chairman Barbara Boxer (D-CA) said that her draft climate bill would be marked up in committee "shortly after" its introduction later in September, with floor action sometime after that. Chairman Boxer also said that her draft bill will include a nuclear title.
  - Senator Blanche Lincoln (D-AR), who has been critical of the House climate bill and supportive of moving forward with an energy-only bill, has assumed chairmanship of the powerful Agriculture, Nutrition, and Forestry Committee in the leadership transition following Senator Ed Kennedy's death. Chairman Lincoln said she did not expect to hold a mark-up on climate change legislation.
  - Sens. Tom Carper (D-DE), Amy Klobuchar (D-MN), Joe Lieberman (I-CT) and coal state Sens. Robert Byrd (D-WV), Max Baucus (D-MT), Mark Warner (D-VA), Arlen Specter (D-PA), and Bob Casey (D-PA) have floated draft legislation to promote commercial deployment of carbon capture and sequestration (CCS) technologies through emission allowance distribution. The legislation also proposes revised performance standards for new coal-fired power plants and would exempt methane collection projects at coal mines and landfills from greenhouse gas performance standards (and makes those projects eligible offset project types). The proposal includes placeholders for provisions

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- on CCS liability and the creation of a program to provide \$1 billion annually for ten years to support early deployment of CCS. Sen. Sherrod Brown (D-OH) told reporters that a group of manufacturing-state senators are also close to revealing an agreement on protecting domestic carbon-intensive industries. Another group, made up of members of both parties, has been discussing nuclear energy development and is also close to releasing recommendations, according to Sen. Joe Lieberman (I-CT).
- Senator Debbie Stabenow (D-MI) said that she is planning to release detailed legislation on offsets, which are projects to reduce or sequester emissions outside of the capped sectors of the economy, and that the Agriculture Committee might not hold a formal mark-up of her proposal.
- **Climate Hearings Resume.** Despite the strong focus on health care legislation in the Senate, committees have resumed hearings on climate change.
    - The Senate Agriculture, Nutrition, and Forestry Committee held a hearing on carbon markets and producer groups at which producers called for the agriculture sector to be exempted from an emissions cap and for Department of Agriculture involvement in oversight of agricultural offsets. The chairman of the CFTC, Gary Gensler, advocated for a comprehensive regulatory framework that would encompass all forms of emission trading under a cap-and-trade program, and for a central registry recording trading in real time. Gensler said he did not support requiring all carbon futures and derivatives trading to be conducted through standardized contracts on regulated exchanges, as customized over-the-counter deals would be needed by industry to hedge risks. Gensler expressed his belief that the agency could adequately police excess volatility, speculation, and manipulation in the markets for GHG allowances and offset credits – if provided additional resources.
    - The Senate Energy and Natural Resources Committee will hold a hearing on September 15th on the costs and price volatility in the energy sector that may be associated with emission allowance trading under a cap-and-trade program. Academics Joseph Mason, who has criticized cap-and-trade programs as likely to benefit large investment firms more than the environment, and Michael Wara, who is critical of offsets, will both testify, along with representatives of the Pew Center on Global Climate Change, the Bipartisan Policy Center, and the Congressional Research Service. On September 17th, the Committee will hold a hearing on energy and related economic effects of climate change legislation with witnesses from the Congressional Budget Office, the Energy Information Administration, the Congressional Research Service, and EPA.
  - **House Passes Hybrid Trucks, Wind Power Research Bills.** The House passed legislation authorizing the appropriation of funds to support research on hybrid heavy-duty vehicles (H.R. 445) and wind energy (H.R. 3165). In the Senate, a similar bill supporting hybrid vehicle research has been referred to the Committee on Energy and Natural Resources. In addition, Rep. Tammy Baldwin (D-WI) introduced a bill (H.R. 3543) that would direct the EPA to establish a carbon labeling program for consumer products.

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## Judicial

- **U.S. Chamber of Commerce, NADA File Petition for Review of CA Vehicle Waiver.** In a potentially significant challenge to California's efforts to implement state-level GHG emission standards for vehicles, the U.S. Chamber of Commerce and the National Automobile Dealers Association (NADA) filed a petition for review of EPA's July decision to grant a "preemption waiver" for the California standards. The EPA waiver came on the heels of a landmark agreement between major automakers, the state of California, and the federal government. Under that agreement, California agreed not to enforce its own standards through model year 2016 if the federal government issues new federal GHG emission standards that increase the fuel economy of the national vehicle fleet to 35.5 miles per gallon by 2016. The automakers that were party to this agreement did not join the petition for review. The petition, which was filed in the U.S. Court of Appeals for the District of Columbia Circuit, did not include a statement of the legal basis for the appeal; the Court of Appeals ordered the petitioners to provide a statement of issues to be presented by October 13. The NADA, in particular, has been battered by the crisis in the automobile industry. Many members of the organization have been hard hit by the decisions of manufacturers to terminate dealer relationships and believe that the Administration has not provided adequate assistance to their sector. Their involvement in the petition for review may be a vehicle for reasserting what has been, in the past, an influential role by automobile dealers in the disposition of most issues related to the auto industry.

## Industry

- **Industry Sending Mixed Messages on Cap-and-Trade.** The Senate received a flurry of climate legislation-related communications upon its return to D.C.
  - A group of companies including Dell, DuPont; FPL Group; Google; Hewlett-Packard Development Co.; Johnson and Johnson; Levi Strauss & Co.; Nike; and PG&E Corp. wrote Senators to urge action to cap GHG emissions before the end of 2009.
  - The U.S. Climate Action Partnership (USCAP), a coalition of major businesses and environmental organizations, released a statement arguing that the health of the U.S. economy and its future competitiveness are at stake in the climate debate, and that Congress should pass clean energy and cap-and-trade legislation by the end of the year.
  - A letter signed by the Solid Waste Association of North America (whose members operate over half of U.S. landfills), as well as by companies that would be capped under a cap-and-trade program, offset project developers, and other companies and associations asked the Senate not to impose performance standards on uncapped methane sources (as the House bill does) but rather to use a market-based offset program to drive emission reductions from those sources and provide cost containment.
  - A dozen Midwestern electric utility companies sent a letter to the Senate criticizing the allowance reserve cost containment mechanism in the House climate bill as inadequate. The companies recommended a price collar, which would impose firm maximum and minimum prices on auctions of GHG allowances, as an alternative.

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## Studies and Reports

- **Geoengineering May Be Last Resort.** A report by the Royal Society, the United Kingdom's national academy of science, concludes that potentially dangerous geoengineering – large-scale interventions in the climate system – may be necessary if nations fail to curb GHG emissions. The study concluded that carbon dioxide removal techniques are preferable but slow and not yet affordable, and that solar reflection techniques (such as using a giant space mirror to deflect sunlight or planting highly reflective crops) are more affordable but fail to address the root of the problem or ocean acidification. The report is available at <http://royalsociety.org/news.asp?id=8734>.
- **Climate Change A Key National Security Risk, Says Report.** A report released by the American Security Project, a bipartisan think tank, projects that climate change will enhance regional tensions and increase the risk of conflict, destabilizing already vulnerable regions and forcing U.S. interventions that will stretch U.S. military and humanitarian resources. According to the study, the areas mostly likely to experience increased instability are in South Asia, North Africa, sub-Saharan Africa, and Central America. The report is available at [http://www.secureamericanfuture.org/resources/ClimateSecurityIndex\\_lowres.pdf](http://www.secureamericanfuture.org/resources/ClimateSecurityIndex_lowres.pdf).

## International

- **EU Commission Blueprint Proposes \$72.8B in Climate Financing Annually.** The European Union (EU) Commission released a financing blueprint that contains proposals for funding climate change mitigation and adaptation efforts in developing nations. The blueprint, titled “Stepping Up International Climate Finance: A European Blueprint for the Copenhagen Deal”, proposes that developed nations and emerging economies provide up to \$72.8 billion annually by 2020 to assist developing nations with mitigation and adaptation efforts. The EU would be responsible for \$21.8 billion of the funding. The blueprint would allocate funding responsibilities based on participating countries' relative wealth and GHG emissions. EU leaders will review the proposal in October, when they will decide whether to endorse the proposal. Financing is a major issue for developing nations going into the December negotiations on a post-Kyoto climate treaty in Copenhagen.

*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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