

September 28, 2009

Climate Change Policy Update Week of September 21-25, 2009

Commentary: *The Kerry-Boxer draft climate change legislation is due out on September 30 . . . We have not had much climate change news out of the judicial branch lately, but this week brought a big story. A panel consisting of two Republican appointees on the 2nd Circuit allowed a tort-based lawsuit to go forward against five of the Nation's largest power companies. This decision potentially could open the door to similar lawsuits – at least until a GHG regulatory program of some sort occupies the field . . . In the meantime, the EPA GHG proposals continued to move through the Executive Branch pipeline – while Senate Democrats turned away Republican efforts to attach appropriations riders that would defund the agency's initiatives . . . China and India made news at this past week's U.N. gathering on climate change by offering modest opening gambits on emission commitments . . . As the noise machine begins to build again on climate change science, major companies will face pressure to take sides. This week, major utilities (and US Climate Action Partnership members) PG&E and PNM dropped out of the U.S. Chamber of Commerce, citing the Chamber's request for a formal EPA hearing on whether GHG emissions really endanger public health and welfare.*

Executive Branch

- **EPA Finalizes GHG Reporting Rule.** The Environmental Protection Agency (EPA) finalized a major rule requiring power plants, large industrial facilities, and motor vehicle manufacturers to monitor and report their greenhouse gas (GHG) emissions on an annual basis. The final version of the rule contained several significant changes from the proposed text. Among these changes were the omission of approximately twelve stationary source categories from the rule; a provision allowing reporting entities to discontinue reporting if their emissions fall below a defined threshold over a period of three to five years; and a provision allowing firms to use “best available” data to calculate GHG emissions during the first three months of the program. Proposed in March 2009, the reporting rule would apply to most stationary sources emitting at least 25,000 tons CO₂-equivalent per year – a threshold that would cover approximately 10,000 facilities around the country, representing about 85% of U.S. emissions. Emissions monitoring would begin on January 1, 2010, with the first emission reports due March 31, 2011. The final rule is available at: <http://www.epa.gov/climatechange/emissions/ghgrulemaking.html>.
- **Two EPA Rulemakings on GHGs Clear OMB Review.** The White House Office of Management and Budget (OMB) has completed its review of two significant proposed EPA rulemakings concerning GHG emissions from stationary sources, suggesting that the release of the two proposals is imminent. The first rulemaking, known as the “tailoring rule,” would limit the applicability of the Clean Air Act (CAA) Prevention of Significant Deterioration (PSD) pre-construction permitting program to new or modified sources emitting at least 25,000 tons CO₂-

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September 28, 2009

equivalent per year. The agency's authority to promulgate such a rule has been questioned, since the terms of the CAA impose PSD requirements on sources emitting as little as 100 tons of pollutant per year. The second rulemaking is a reconsideration of an EPA memorandum issued in December 2008, known as the "Johnson Memo," which determined that PSD requirements would not apply to GHG emissions until GHGs become subject to mandatory emission controls under the CAA.

- **FWS Unveils Strategic Plan for Responding to Climate Change.** The federal agency charged with administering the Endangered Species Act, the U.S. Fish and Wildlife Service (FWS), issued a strategic plan for responding to the impacts of climate change on resources under the agency's oversight. Under the plan, the agency would establish a National Biological Inventory and Monitoring Partnership to work with the Interior Department to develop data on the impact of climate change on wildlife. The agency would also develop scientific tools to identify the species most vulnerable to climate change; craft a national 50-year adaptation strategy for fish and wildlife; and expand carbon sequestration activities on FWS-managed lands.
- **Update on Presidential Nominations and Appointments.**
 - Sudeen Kelly, one of the five Commissioners of the Federal Energy Regulatory Commission, announced that she would decline President Obama's nomination to serve for a new term. Commissioner Kelly said she would remain at FERC until the Senate confirms her replacement.
 - The Senate Judiciary Committee unanimously approved the nomination of Ignacia Moreno to serve as Assistant Attorney General for Environment and Natural Resources at the Department of Justice.

Congress

- **Sens. Boxer, Kerry on Schedule for September 30 Release of Draft Climate Bill.** Senators Barbara Boxer (D-CA), Chairman of the Environment and Public Works Committee, and John Kerry (D-MA), Chairman of the Committee on Foreign Relations, reaffirmed their plans to publicly release the draft text of comprehensive climate change legislation on September 30th. According to the Senators, the bill will build on the Waxman-Markey climate change legislation passed this summer by the House of Representatives. Sen. Boxer said that the Environment and Public Works Committee would proceed to hearings and a markup of the draft legislation very soon after its release. In contrast, Sen. Kerry stated that he would incorporate into the draft bill before its release provisions relevant to the jurisdiction of the Foreign Relations Committee, but would not bring the bill before the Committee for a markup. In comments on the expected Boxer-Kerry draft, Sen. Max Baucus, Chairman of the Committee on Finance, said that his committee would mark up sections of the bill that address international trade and emission allowance allocations, while Senator Blanche Lincoln (D-AR), Chairman of the Agriculture Committee, suggested that her committee would likely offer its input on the bill without conducting a formal Committee markup of the text.
- **Senate Passes \$32.1B Interior-EPA Appropriations Bill.** The Senate approved by a vote of 77-21 an appropriations bill to fund EPA and the Department of Interior for the 2010 fiscal year.

September 28, 2009

The \$32.1 billion provided by the bill is \$200 million below that approved by the House, but represents a \$4.5 billion increase over the agencies' fiscal 2009 budget.

In passing the bill, the Senate accepted and defeated a number of amendments, called riders, aimed at controlling the use funds authorized by the bill. The Senate accepted as part of a manager's amendment to the bill a rider proposed by Sen. Tom. Carper (D-DE) that will require EPA to study the environmental, economic, and health impacts of black carbon (otherwise known as soot). In addition to causing a number of health problems, black carbon is the second largest source of global GHG emissions after CO₂. Defeated riders included a proposal by Sen. David Vitter (R-LA) to prohibit EPA from using funds provided by the spending bill to regulate CO₂ emissions until China and India make binding commitments under an international agreement to reduce their GHG emissions by a specific percentage; another amendment by Sen. Vitter intended to prevent EPA from finalizing or implementing its proposed GHG endangerment finding (see further discussion below) until after it analyzes the employment impacts of the finding; and a proposal by Sen. Lisa Murkowski (R-AK) to force EPA to delay for one year any regulations aimed at controlling GHG emissions from stationary sources. Sen. Tom Harkin (D-IA) withdrew a rider that would have prevented EPA from considering international indirect land-use changes in determining lifecycle GHG emissions of biofuels under the national Renewable Fuels Standard (RFS). Sen. Harkin withdrew the rider at the request of EPA Administrator Lisa Jackson, after she: (1) informed him that the rider would delay implementation of the RFS, and (2) committed to have EPA factor the uncertainties associated with international land use change emissions into the lifecycle analysis required by the RFS legislation.

- **Sens. Barrasso, Inhofe Call on EPA to Delay Endangerment Finding.** Senators John Barrasso (R-WY) and James Inhofe (R-OK) sent to EPA Administrator Lisa Jackson a letter requesting that the Agency delay finalizing its proposed endangerment finding until the Agency releases to the public "the process EPA used to determine the credibility and relevance of scientific data and studies that support its proposed endangerment finding." Pursuant to the United States Supreme Court's April 2, 2007 *Massachusetts v. EPA* decision, EPA has submitted to the White House Office of Management and Budget a proposed rule finding that the current and projected concentrations of six key greenhouse gases emissions in the atmosphere threaten the public health and welfare, and, thus, should be regulated under the Clean Air Act. The Barrasso/Inhofe letter is available at http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=48c46515-d8ed-4edd-b5e0-2de255875552.

Judicial

- **Second Circuit Reinstates Public Nuisance Case.** The United States Court of Appeals for the Second Circuit has reinstated a suit against six of the nation's largest electric utilities, claiming that their emissions of greenhouse gases (GHGs) from coal-fired generating plants are causing harmful climate change and should be enjoined as a public nuisance under federal common law. The case was filed by a coalition of State and local governments and private land trusts. The court's 139-page decision was issued Sept. 21, 2009 in *Connecticut v. American Electric Power Corp. et al.*, Nos. 05-5104-cv, 05-5119-cv (2d Cir. 2009). The key holdings of the case were that: (1) the plaintiffs' common law claims do not present a "political question"; (2) the plaintiffs have standing to bring their claims; (3) plaintiffs properly stated claims under the

September 28, 2009

federal common law of nuisance; (4) plaintiffs' claims were not "displaced" by federal statutes; and (5) the Tennessee Valley Authority (TVA)'s quasi-governmental status did not immunize it from this suit. The opinion is available at [http://www.globalclimatelaw.com/uploads/file/05-5104-cv_opn\(1\).pdf](http://www.globalclimatelaw.com/uploads/file/05-5104-cv_opn(1).pdf). A Van Ness Feldman issue alert describing the decision is available at <http://www.vnf.com/news-alerts-390.html>.

States and Cities

- **California Regulatory Agency Passes Climate Change Fee.** The California Air Resources Board (CARB), the air regulatory agency charged with implementing the state's AB 32 climate change legislation, voted to impose a climate change fee on entities covered by AB 32 regulations. The new fee is intended to cover the agency's administrative costs associated with implementation of the statute. Initially set at 15.5 cents per ton of GHGs emitted in the fiscal year 2010-2011, CARB estimates that the fee will generate \$63.1 million during that year.
- **California Utilities Commission Approves Expansive Efficiency Program.** The California Public Utilities Commission (CPUC) voted to approve an energy efficiency program that authorizes the state's investor-owned utilities to spend \$3.1 billion on efficiency initiatives between 2010 and 2012. The program will fund 12 major statewide efficiency initiatives, as well as a number of utility-specific projects. The CPUC estimates that the program will avoid 3 million tons of GHG emissions, create 15,000-18,000 jobs, and save nearly 7,000 gigawatt-hours of electricity.

Industry

- **500 Firms Sign "Copenhagen Communiqué" Calling for Global GHG Protocol.** Executives of 500 firms from 50 countries – including global enterprises such as General Electric, Starbucks, and Royal Dutch Shell – issued a document called the "Copenhagen Communiqué" intended to influence delegates to the United Nations Climate Change summit (see further discussion below). The document called on world leaders to reach an agreement on binding global GHG emission reductions at this December's upcoming climate negotiations in Copenhagen, Denmark, and further asserted that such an agreement should be sufficient to maintain global temperature increases at less than 2 degrees Celsius over pre-industrial levels. The Communiqué also called for linking of national and regional GHG markets, and urged that "additional, predictable, stable, and adequate" adaptation funding be provided to developing countries. The Communiqué is available at <http://www.copenhagencommuniqué.com>.
- **PG&E and PNM Resources Quit Chamber of Commerce Over Climate Policy Differences.** An influential business lobby, the U.S. Chamber of Commerce (Chamber), lost two prominent members last week when the utilities Pacific Gas & Electric (PG&E) and PNM Resources, Inc. announced they would not renew their memberships. PG&E said its decision stemmed from "fundamental differences" with the Chamber over climate change policy, specifically the Chamber's recent petition to EPA demanding a formal on-the-record hearing to determine whether GHGs endanger public health and welfare, a finding necessary for certain regulation under the Clean Air Act. PNM Resources said climate change is "the most pressing environmental and economic issue of our time," and that "we have decided that we can be most

September 28, 2009

productive by working with organizations that share our view on the need for thoughtful, reasonable climate change legislation and want to push that agenda forward in Congress.”

Studies and Reports

- **U.N. Study of Latest Climate Science Suggests Dramatic Warming.** The United Nations Environment Programme (UNEP) published a new “compendium” of 400 recent climate change studies, which found that global GHG emissions are outstripping even the Intergovernmental Panel on Climate Change’s (IPCC) “worst-case” scenarios, and that temperatures are rising more quickly than previously predicted in the IPCC’s 2007 report. According to the UNEP study, the most advanced climate models are now showing that current atmospheric concentrations of GHGs have already committed the world to a probable warming of 2.4 degrees Celsius over pre-industrial levels during the 21st century. That prediction exceeds the 2 degrees of warming that is generally accepted as the maximum level of warming allowable before the more catastrophic effects of climate change materialize. The study also reported on a variety of current and predicted climate change impacts, among them a finding that California’s coastal waters are undergoing acidification decades before most models predicted this would occur. The study is available at <http://www.unep.org/compendium2009/PDF/compendium2009.pdf>.
- **British Antarctic Survey Finds Glaciers Melting Rapidly.** According to a study by the British Antarctic Survey published in the journal *Nature*, ice sheets in Greenland and on Antarctica’s western edge and peninsula are melting more quickly than previously estimated. Based on some 50 million observations taken by NASA satellites, the study found that some Antarctic glaciers have been thinning at a rate of 30 feet per year since 2003. The study also found widespread evidence of a phenomenon known as “dynamic thinning,” in which initial melting around the edges of a glacier causes the ice to become unmoored from bedrock and melt at an accelerating rate. The lead author of the study, Hamish Pritchard, noted that this same feedback phenomenon explained the rapid melting of glaciers at the end of the last ice age – a process that led to dramatic sea level rise.

International

- **Major Emitters Meeting Produces Some Movement, No Significant Breakthroughs.** The Major Economies Forum on Energy and Climate concluded its meeting in Washington, D.C., without any significant breakthroughs on the major issues facing international climate change negotiators. At the talks, representatives from the United States, European Union, Brazil, China, India and Indonesia discussed climate change adaptation; development and deployment of low-carbon technologies in developing nations; GHG emission measurement, reporting and verification; and the nature of emission reduction commitments by developed nations.
- **U.N. Climate Summit Includes Preliminary 2020 GHG Intensity Pledge From China.** Over 100 world leaders met at the United Nations in New York City for the first-ever United Nations Summit on Climate Change. The summit consisted of speeches from world leaders and roundtable talks on climate-related issues. The most significant event at the summit was a commitment by Chinese President Hu Jintao that his nation would decrease its GHG emissions intensity (GHG emission per unit of gross domestic product) by “a notable margin” below 2005

September 28, 2009

levels by 2020. The Chinese leader also said that China would seek to achieve a goal of obtaining fifteen percent of its energy from renewable sources by 2020.

- **G-20 Leaders Set November Deadline for Climate Financing Proposals.** Meeting in Pittsburgh, Pennsylvania, leaders of the Group of 20 (G-20) nations set a November 6 deadline for finance ministers to submit climate change financing proposals. The proposals will cover a range of mechanisms intended to assist developing nations in financing climate change mitigation and adaptation efforts and will be considered at the December negotiations on a successor treaty to the Kyoto Protocol. The G-20 leaders also adopted a commitment to phase-out fossil fuel subsidies over the medium term. G-20 members include the United States and the nations of the European Union, along with other major developed and developing economies.
- **India Willing to Accept Non-Binding Reduction Goal.** Indian Minister of Environment and Forests Jairam Ramesh announced that India would be willing to accept a non-binding GHG emission reduction goal. While not likely to significantly alter India's emissions reductions actions or its negotiating stance on a successor treaty to the Kyoto Protocol, observers expect that the announcement could improve India's negotiating position at the December climate change negotiations 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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