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## Climate Change Policy Update Week of September 28 - October 2, 2009

**Commentary:** *The Kerry-Boxer ship launched this week. As expected, it incorporated a tighter emissions cap for 2020 than the Waxman-Markey bill. Other noteworthy differences include a somewhat more robust strategic allowance reserve, but not the price collar sought by some in industry and the think tank community. On offsets, the bill giveth on domestic offsets (delaying certain performance standards that would have precluded certain projects) and taketh away on international offsets (lowering the ceiling on use by a hefty 50 percent). Much of the detail on allowance allocations remains to be resolved. Will such resolution take place in the Finance Committee? Natural gas interests got a kind of “cash for coal clunkers” program, but with no source of cash. The bill, introduced as S. 1733, now heads to the Senate Environment and Public Works Committee for consideration . . . Lest anyone forget what is at stake, the EPA celebrated Kerry-Boxer day by releasing its proposed “tailoring rule” for Prevention of Significant Deterioration regulation of major sources of GHG emissions. As expected, the proposed rule would target only facilities with emissions of 25,000 mtCO<sub>2e</sub> year or above.*

### Executive Branch

- **EPA Proposes “Tailoring Rule” For Application of PSD to GHGs.** The Environmental Protection Agency (EPA) issued a proposed rule to guide the application of the Clean Air Act (CAA) Prevention of Significant Deterioration (PSD) program to large emitters of greenhouse gases (GHGs). The PSD program requires new or modified major facilities to obtain pre-construction permits and install “best available control technology” for all pollutants “subject to regulation” under the Clean Air Act. Under EPA’s proposed rule, known as the “tailoring rule,” PSD will apply to new facilities with annual emissions of at least 25,000 tons CO<sub>2</sub>-equivalent of six GHGs, and to modifications at existing facilities that result in an increase in emissions of between 10,000 and 25,000 tons CO<sub>2</sub>-equivalent per year. According to EPA, this threshold would cover facilities responsible for approximately 70 percent of the nation’s GHG emissions from stationary sources, while excluding small businesses and farms. The proposed rule would also establish a 25,000 tons CO<sub>2</sub>-e threshold for the CAA Title V operating permits program. Because the CAA applies emission thresholds of 100 to 250 tons per year for these programs, EPA’s authority to issue the “tailoring rule” has been questioned. The agency has cited doctrines of “administrative necessity” and the need to avoid “absurd results” as a basis for departing from the plain language of the statute. The proposed rule is available at <http://www.epa.gov/nsr/documents/GHGTailoringProposal.pdf>.

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- **EPA Proposes Affirming “Johnson Memo” Concerning Applicability of PSD to GHGs.** In a proceeding related to the above-described “tailoring rule,” EPA issued a proposed rule reconsidering the agency’s past conclusion as to what type of agency action would make GHGs “subject to regulation” under the CAA, and thus trigger the applicability of PSD requirements. A controversial memorandum issued by EPA Administrator Stephen Johnson in December 2008, known as the “Johnson Memorandum,” concluded that only an EPA regulation requiring GHG emission controls or limitations would cause GHGs to be considered “subject to regulation” for purposes of the PSD program. At the time the Johnson Memorandum was issued, carbon dioxide emissions from power plants were subject to certain monitoring requirements, but not controls or limitations; EPA is on track to finalize its first-ever limits on GHG emissions in the form of standards for new passenger vehicles. EPA’s proposed reconsideration of the Johnson Memorandum notes several possible interpretations of the phrase “subject to regulation,” and indicates that the agency’s preference is to affirm the reasoning and conclusions of the Johnson Memorandum. The proposed rule is available at <http://www.epa.gov/NSR/documents/JohnsonMemoReconsiderationFR.pdf>.
- **Browner Says Climate Bill Not Likely Before Copenhagen.** Carol Browner, the Director of the White House Office of Energy and Climate Change Policy, stated at a conference in Washington, D.C. that it was “not likely” that the President would be able to sign comprehensive climate change legislation before attending this December’s climate change summit in Copenhagen. Noting that it was still possible that a climate change bill could be reported out of committee by the time of the summit, Browner said “We will go to Copenhagen with whatever we have.” Browner also rejected a proposal by conservative Senate Democrats that the Senate act first on energy legislation and defer deliberation on a climate bill, saying “We think we need to get the whole thing done at the same time.”
- **Pentagon to Consider Climate Change in Upcoming Quadrennial Review.** The Department of Defense’s (DOD) next Quadrennial Defense Review, to be completed in February 2010, will analyze the impact of climate change on national security for the first time, according to DOD officials. This analysis will apparently focus on the indirect impacts of climate change on the stability of other countries, along with consideration of DOD’s role in mitigating and adapting to climate change.
- **CIA Establishes Office to Coordinate Research on Climate Change.** The Central Intelligence Agency announced that it would create a Center on Climate Change and National Security to provide research and analytical support for U.S. policymakers on issues relating to the impact of climate change on global political, economic, and social stability. The Center is also expected to engage in outreach with universities and think tanks, and coordinate declassification of imagery and other data for use by scientists.

## Congress

- **Sens. Kerry, Boxer Release Long Awaited Climate Change Bill.** Senator John Kerry (D-MA), Chairman of the Foreign Relations Committee, and Senator Barbara Boxer (D-CA), Chairman of the Committee on Environment and Public Works (Committee), have referred to the Committee S. 1733, a climate change bill titled the Clean Energy Jobs and American Power Act (“CEJAP” or “Kerry-Boxer bill”). The primary element of the CEJAP bill is an economy-wide GHG cap-and-

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trade program, which is supported by a range of programs aimed at promoting low-carbon technologies, energy efficiency, adaptation, and worker and consumer benefits. The role played by Senator Kerry as the primary author of the new bill is a long anticipated but admittedly new “wrinkle” in the climate politics of the Senate – and relates to practical political considerations within the Senate as well as showcasing Kerry’s new status as the senior Senator from Massachusetts and his increasing legislative prominence following the death of Senator Ted Kennedy.

While the comprehensive energy and climate change legislation is based on the American Clean Energy and Security Act (“Waxman-Markey bill”) passed by the House of Representatives in June of this year, the Kerry-Boxer bill differs in several key respects from the House-passed bill. The cap-and-trade portion of the bill would establish GHG emission reduction targets of a 3% reduction below 2005 levels by 2012; a 20% reduction by 2020; a 42% reduction by 2030; and a 83% reduction by 2050. The 2020 target is more stringent than the 17 percent reduction from 2005 levels required by the Waxman-Markey bill.

The coverage of the emission trading program, which would apply to both upstream suppliers of fossil fuels and downstream emitters of GHGs, is identical to that of the House-passed bill. While provisions allocating emission allowances remain incomplete, Sen. Boxer stated following the release of the bill that she would like the bill to follow Waxman-Markey by allocating the majority of allowances to consumer assistance. Like Waxman-Markey, the Kerry-Boxer bill would provide 2 billion offset credits, generated from emission reductions outside of the capped sectors, with which covered entities may meet their compliance obligations. However, in a departure from the earlier bill, CEJAP would require that 75 percent of those offset credits come from domestic sources, with international offset limited to the remaining 25 percent.

Other significant differences from the Waxman-Markey bill include a deferral of New Source Performance Standards for uncapped sources of GHG emissions; an incentive program to reward electric generators with below-average GHG emissions; a larger “strategic reserve” with a predictable minimum price; and changes to the deployment program for carbon capture and sequestration technologies.

The text of the 821 page bill is available at <http://kerry.senate.gov/cleanenergyjobsandamericanpower/pdf/bill.pdf>. A Van Ness Feldman Issue Alert on the Kerry-Boxer bill is available at <http://www.vnf.com/news-alerts-394.html>. The firm is also preparing a more detailed analysis for clients.

## States and Cities

- **California Makes Promised Modification to Vehicle GHG Emission Standards.** In accordance with an agreement struck earlier this year with automobile manufacturers and the Obama Administration, the California Air Resources Board (CARB) made changes to its vehicle GHG emission regulations that will provide automobile manufacturers additional flexibility in meeting the requirements. Under the modified regulations, automobile manufacturers will be allowed to count sales of vehicles in states that have adopted California’s standards toward their requirements under California’s fleet average GHG regulations. The manufacturers will also be

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allowed to demonstrate compliance with California's standards using federal Corporate Average Fuel Economy (CAFE) program emission test data.

## Industry

- **LPPC Calls for Price Collar, Deferral of Cap-and-Trade Program.** The Large Public Power Council, a national association of the 23 of the largest publicly owned entities supplying electric power, sent a letter to Senators Barbara Boxer (D-CA) and John Kerry (D-MA) last week urging the two leaders to adopt various policies in their climate legislation. Among the policies advocated by LPPC is a "price collar" mechanism that would address volatility in allowance prices by imposing a predictable maximum and minimum price for allowances. LPPC also urged the Senators to defer the first allowance surrender obligations until at least four years after enactment of a climate bill, noting that the Clean Air Act's sulfur dioxide trading program did not become binding until four years after its enactment into law.
- **Two More U.S. Chamber of Commerce Members Dissent on Climate Change Stance.** Following the widely publicized decision of Pacific Gas & Electric ("PG&E") and PNM Resources to withdraw from the U.S. Chamber of Commerce (Chamber) over the organization's position on climate change, two other high profile members have expressed similar dissent. Exelon Corp. – a major utility that, like PG&E and PNM Resources, is a member of the US Climate Action Partnership – declined to renew its membership, citing the Chamber's "stridency" against climate legislation. Similarly, Nike Inc. decided to step down from its position on the board of the Chamber, stating that "on the issue of climate change the Chamber has not represented the diversity of perspectives held by the board of directors."

## Studies and Reports

- **World Bank Study Finds Climate Adaptation Could Cost Up to \$100 Billion a Year.** A new study by the World Bank, entitled *The Costs to Developing Countries of Adapting to Climate Change*, concluded that developing countries would require an average of \$75-100 billion in assistance per year to adapt to climate change through 2050. The lower cost estimate assumes a pattern of warming with lower rainfall, while the higher cost estimate reflects a "wetter" climate change scenario. The assistance will be needed to cope with the infrastructural damage, drought, disease, and declining agricultural output expected to accompany global warming. According to the report, East Asian and Pacific countries will face the highest costs of adaptation. The study is available at <http://siteresources.worldbank.org/INTCC/Resources/EACCRReport0928Final.pdf>.
- **UK Met Office Predicts Catastrophic Warming by 2070s.** A new study carried out by the United Kingdom's Met Office Hadley Centre has predicted that global average surface temperatures could increase by over 4 degrees Celsius over preindustrial levels by the 2070s, and perhaps as early as 2060. The study takes into account an observed decrease in the capacity of "natural sinks," such as forests and oceans, to remove and store carbon dioxide from the Earth's atmosphere. The study also utilizes the worst-case estimates used by the Intergovernmental Panel on Climate Change in its emission planning scenarios; in recent years, global GHG emissions have surpassed even that worst case scenario. A two degree Celsius increase in global average temperatures is generally accepted as the maximum level of warming allowable before the more catastrophic effects of climate change materialize.

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## International

- **UN Climate Talks Face Numerous Challenges in Bangkok.** In Bangkok, Thailand, negotiators from nearly 180 countries are debating the text of a future climate change treaty. Working from an almost 200 page negotiating text at the Bangkok talks, negotiators must resolve numerous issues before the final treaty text can be developed. The focus areas for the two-week long climate change meetings are adaptation; developed country emission targets; nationally appropriate mitigation actions by developing nations; finance, technology transfer, and a governance structure to administer this support. The Bangkok talks are the last negotiating session prior to the December meeting in Copenhagen, Denmark at which nations can develop the text for a successor treaty to the Kyoto Protocol.

**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).**

*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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