

October 19, 2009

Climate Change Policy Update Week of October 12-16, 2009

Commentary: *The half page co-authored by Sen. Kerry in last week's New York Times threatens to eclipse the 821 pages he co-authored with Chairman Boxer . . . Sen. Graham is doing the rounds in his new role as climate centrist, meeting with the World Business Council for Sustainable Development and the Pew Center Business Environmental Leadership Council . . . Finally, a path to 60 votes for . . . off-shore drilling. So far, environmental groups are embracing the new duo without getting into some of the details of their manifesto . . . The U.S. District Court for Northern California decided not to embrace the climate change jurisprudence of the Second Circuit. The court dismissed the Kivalina climate tort case, holding that the lawsuit raised a "political question," and that the plaintiffs failed to demonstrate causation sufficiently to meet standing requirements . . . Seventy-seven percent of Americans do not associate the concept of "cap-and-trade" legislation with an environmental issue.*

Executive Branch

- **President Obama Acknowledges Kerry-Graham Manifesto.** At a "town hall" session in New Orleans, President Obama said the White House would turn its attention to climate and energy legislation after the Senate completes its work on health care legislation. The President also indicated he was receptive to the general outlines of a bipartisan compromise on climate change legislation proposed by Senators John Kerry (D-MA) and Lindsey Graham (R-SC) in a *New York Times* op-ed last week. Referring to two pillars of that proposal – expanded exploration of oil and natural gas on the Outer Continental Shelf, and greater public incentives for nuclear power – the President said he is "in favor of finding environmentally sound ways to tap our oil and our natural gas" and that "there's no reason why technologically we can't employ nuclear energy in a safe and effective way."
- **Secretary Chu Calls for Commercial CCS Deployment in 8-10 Years.** In a letter to energy ministers gathered at the Carbon Sequestration Leadership Forum, Energy Secretary Steven Chu called for an eight to ten year timetable for "widespread, affordable" deployment of carbon capture and sequestration (CCS) technology. Chu also stated that an "aggressive global effort," mobilizing both public and private sector resources, would be necessary to achieve this goal. According to the letter, the Obama Administration has already committed to invest more than \$4 billion in CCS research, development, and deployment, to be matched by about \$7 billion in private funds. The letter is available at http://www.netl.doe.gov/publications/press/2009/ccs_letter_s1.pdf.

About Van Ness Feldman

With 80 professionals in Washington, DC and Seattle, WA, Van Ness Feldman focuses on law and policy relating to:

- Electricity & Energy Efficiency
- Environment
- Climate Change & Emissions Trading
- Renewable Energy, Cleantech, & Biofuels
- Coal & CCS
- Natural Gas
- Nuclear Energy
- Hydropower
- Infrastructure Development
- Indian Law
- Oil & Products Pipelines
- Public Lands & Natural Resources
- Transportation

Learn more at www.vnf.com.

October 19, 2009

- **EPA Releases Bush-Era Endangerment Finding.** Responding to a Freedom of Information Act request, EPA released a long-withheld 29-page document prepared by the agency under the Bush Administration, concluding that GHG emissions from motor vehicles endanger public welfare. Prepared in December 2007, the document was the agency's draft response to the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). The Bush Administration refused to approve the document or authorize its release, although Congressional investigators have since provided excerpts from the report to the press. The conclusions of the document presaged EPA's proposed endangerment finding released earlier this year, but – unlike that proposed finding – found that GHGs pose a danger only to public welfare, and not to public health. The document is available at http://solveclimate.com/sites/default/files/2007_Draft_Proposed_Endangerment_Finding.pdf.

Congress

- **Kerry, Graham Op-ed Chatter Continues.** In response to questions about Sunday's *New York Times* op-ed by Senator John Kerry (D-MA) and Senator Lindsey Graham (R-SC) on the key components of successful climate change legislation, possible swing voters such as Sen. Lisa Murkowski (R-AK), John McCain (R-AZ), and Sherrod Brown (D-OH) said they will need to see more details before supporting the framework. Sen. Murkowski, however, made favorable comments about the proposals outlined in the article. Sen. Kerry told reporters that the ideas might not be assembled into a Kerry-Graham bill, but rather be integrated through a leadership effort or another bill.
- **Senate (But Not EPW) Holds Climate Hearings.** The Foreign Relations Committee held a hearing on the effects of climate change on drought, rising sea levels, and food security in impoverished and unstable nations. The Energy and Natural Resources Committee held a hearing on the economic effects of climate change legislation, featuring representatives from the Congressional Budget Office, the Energy Information Administration, the Environmental Protection Agency, and the Congressional Research Service. The witnesses testified that long-term cost projections were speculative, and that the costs of the Waxman-Markey cap-and-trade bill would depend upon the availability (and price) of international offsets and the economy's response to the technological challenges posed by the legislation. The Energy and Natural Resources Committee is scheduled to hear testimony on the effects of allowance allocation on energy prices and energy consumers on October 21st.
- **Boxer Announces Hearing Timeline.** Environment and Public Works Committee Chairman Barbara Boxer (D-CA) said that hearings on the Kerry-Boxer climate bill will start on October 27th, featuring administration officials such as Energy Secretary Steven Chu and EPA Administrator Lisa Jackson, and continue on the 28th and 29th. Mark-up could begin on November 2nd or 9th. Sen. Boxer said that her understanding is that EPA will finish analyzing the costs of the bill before the hearings begin.

Judicial

- **District Court Dismisses Public Nuisance Suit Brought by Eskimo Village.** The United States District Court for the Northern District of California dismissed a common law suit filed by the

October 19, 2009

Native Village of Kivalina and the City of Kivalina, Alaska against twenty-four major oil energy companies and utilities, captioned *Native Village of Kivalina v. ExxonMobil Corp.*, No. C 08-1138 (N.D. Cal. Sept. 30, 2009). The plaintiffs alleged that the defendants' GHG emissions contribute to climate change, and constitute a public nuisance under federal common law. According to the complaint, which was filed in February 2008, climate change has caused the protective barrier of sea ice around the village to disintegrate, exposing the village to storm surges and erosion that are making the area uninhabitable. The plaintiffs sought \$95 to \$400 million in compensation for the cost of relocating the village. Explicitly departing from the reasoning of the Second Circuit Court of Appeals in a recent public nuisance case, *Connecticut v. AEP*, the *Kivalina* court held that the complaint presented a "political question" that could only be decided by the legislative branch of government, and that the plaintiffs lacked standing to sue because they had failed to establish that defendants' activities had caused the harms alleged. The opinion is available at <http://www.shopfloor.org/wp-content/uploads/kivalina-order-granting-motions-to-dismiss.pdf>.

- **Seventeen States Intervene in Dispute Over EPA GHG Waiver.** The attorneys general of New York and sixteen other states filed a motion to intervene on the side of EPA in the case of *Chamber of Commerce v. EPA*, No. 09-1237, now pending before the United States Court of Appeals for the District of Columbia Circuit. The suit was brought by the U.S. Chamber of Commerce and the National Association of Manufacturers in early 2009, and challenges EPA's decision to grant a Clean Air Act "waiver" to the state of California that would allow the state to implement its own GHG emission standards for motor vehicles. Under an agreement struck by the Obama Administration, California, and major automakers in May 2009, California committed to refrain from enforcing its own standards against vehicles in model years 2012-2016.

States and Cities

- **California Gov. Signs Feed-In Tariff and NF₃ Bills, Renewables Siting MOU.** Continuing the state's flurry of activity on climate, California Governor Arnold Schwarzenegger signed several bills and a memorandum of understanding (MOU) aimed at reducing the state's GHG emissions. The feed-in tariff bill, S.B. 32, mandates that each investor-owned utility in the state purchase all renewable energy below 3 megawatts (MW) that is generated in its service territory, up to a statewide cap of 750 MW. The second bill, S.B. 104, adds nitrogen trifluoride (NF₃) to the state's list of regulated GHGs and authorizes the California Air Resources Board (CARB) to regulate its use. NF₃ is a potent GHG primarily used in the manufacture of solar panels, microprocessors, and flat-screen televisions. When commercially available controls are in place, NF₃ is destroyed in use and emissions are reduced to levels that are virtually non-detectable. Lastly, Gov. Schwarzenegger signed an MOU with the U.S. Department of Interior to streamline the federal and state permitting processes for siting renewable energy projects in the state.

Industry and NGOs

- **Greenpeace Publication Questions Forestry Offsets.** A new Greenpeace publication takes a critical look at the 1997 Noel Kempff Climate Action Project in Bolivia and argues that emission reductions achieved through forest offset projects are not sufficiently reliable to be included in a market-based cap-and-trade program due to questions of quantification, additionality, leakage,

October 19, 2009

permanence, and community benefits. The publication is available at <http://www.greenpeace.org/usa/news/carbon-scam>.

Studies and Reports

- **Research Shows Large Chinese CCS Capacity.** New research by collaborators at the Department of Energy's Pacific Northwest National Laboratory and the Chinese Academy of Sciences' Institute of Rock and Soil Mechanics found that 90% of China's major stationary sources of CO₂ emissions are located within 100 miles of a potential sequestration site, and that 85% of the sources are within 50 miles of a site. The researchers projected that China's geologic storage reservoirs could meet projected domestic demand for CO₂ storage for more than 100 years, and estimated the costs of transporting, storing, and monitoring the gas at between \$2 and \$8/ton. The final report will be released in November, and more information is available at <http://www.pnl.gov/news/release.aspx?id=448>.
- **Public Hazy on "Cap-and-Trade."** A new poll found that 77% of Americans do not know that cap-and-trade legislation is related to an environmental issue, with only 15% of Democrats, 29% of Independents, and 27% of Republicans making the correct association. The poll was conducted by the Pew Research Center for the People and the Press and is available at <http://pewresearch.org/pubs/1378/political-news-iq-quiz>.

International

- **International Aviation Body Settles for Annual Fuel Efficiency Goal.** Following a three-day meeting of its 190 member nations, the United Nation's International Civil Aviation Organization (ICAO) issued a declaration calling for a two percent annual improvement in the airline sector's fuel efficiency. The ICAO declaration recognized that achievement of the goal would be insufficient to reduce the aviation sector's contribution to global GHG emissions. Mirroring the dissension found in the main track of the international climate change negotiations, the lack of progress at the ICAO meeting largely resulted from differences between developed and developing nations.

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.

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.

© 2009 Van Ness Feldman, P.C. All Rights Reserved.

For more information

With 80 professionals in Washington, DC and Seattle, WA, Van Ness Feldman is recognized as a leading law and policy firm in the areas of traditional and renewable energy regulation and project development, climate change regulation and greenhouse gas emissions trading, environmental and natural resources regulation, and infrastructure development. Van Ness Feldman's Climate Change practice has received top recognition by *Chambers USA* and *Chambers Global*.