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## Climate Change Policy Update Week of October 19-23, 2009

**Commentary:** *Sen. Barbara Boxer released a new version of the Kerry-Boxer comprehensive climate and energy bill. This “Chairman’s Mark”, which introduces allowance allocations to the original S. 1733, will serve as the basis for EPW mark ups, which are expected to begin in the next few weeks . . . For the past two or so years, we have waited for decisions on a set of pending motions to dismiss in three climate change tort lawsuits. Now, they are coming fast and furious, and the defendants have so far prevailed in one of the three. In the other two cases, the plaintiffs now will have to meet evidentiary burdens on causation, etc . . . The governments of China and India signed an agreement to cooperate on international and domestic climate change policy and mitigation strategies.*

### Executive Branch

- **President Obama Sees “Growing Consensus” on Climate Change Legislation.** In a brief speech at an energy-themed event at the Massachusetts Institute of Technology, President Barack Obama said that “consensus is growing” on Capitol Hill in favor of climate change and clean energy legislation. Stating that climate change “should not be a partisan issue,” the President criticized “those who make cynical claims that contradict the overwhelming scientific evidence when it comes to climate change, claims whose only purpose is to delay the change we know is necessary.” The President also credited Sen. John Kerry (D-MA) for his efforts to win the support of Republicans, such as Sen. Lindsey Graham (D-SC), on climate change legislation and complimented Rep. Ed Markey (D-MA) for his work to get a bill past the U.S. House of Representatives.
- **Administration Officials Ask Business Community for Climate Bill Support.** The White House convened its second “Clean Energy Economy Forum” to urge representatives of major businesses for support in lobbying Congress to enact climate change and clean energy legislation. Secretary of Energy Steven Chu, Secretary of Commerce Gary Locke, and Administrator of the National Oceanic and Atmospheric Administration Jane Lubchenco spoke to an audience that included representatives of the Electric Power Research Institute and the Chicago Climate Exchange. Secretary Chu said “We need the voice of the other side of the business community” and exhorted the business leaders “to use whatever means you can . . . to speak up and let your views be known.”

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- **EPA Claims 26 Million Ton Reduction in International Methane Emissions.** The Environmental Protection Agency (EPA) reported that its Methane to Markets Partnership program, which provides funding for international methane emission reduction projects, achieved a reduction of 26 million metric tons CO<sub>2</sub>-equivalent in 2008. As of 2008, the program has involved a U.S. investment of \$39 million, leveraging an additional \$277 million in contributions from public and private sector partners in the program.
- **Presidential Appointments.**
  - The Senate confirmed the nomination of Arun Majumdar to serve as Director of the Advanced Research Projects Agency-Energy, within the Department of Energy.

## Congress

- **Senator Boxer Unveils “Chairman’s Mark” of Climate Change and Energy Legislation.** Sen. Barbara Boxer (D-CA), Chairman of the Senate Committee on Environment and Public Works (EPW), released a new 925-page version of the Kerry-Boxer comprehensive climate and energy bill, also known as S. 1733 or the “Clean Energy Jobs and American Power Act of 2009.” This “Chairman’s Mark” will serve as the basis for EPW mark ups, which are expected to begin in the next few weeks. The Chairman’s Mark introduces some significant changes to the original language of S. 1733, most notably by specifying precise allocations of allowances for industry sectors, consumers, and various climate and clean energy programs. In general, the Chairman’s Mark sets aside a greater quantity of allowances than the Waxman-Markey bill for deficit reduction and a cost-containment pool known as the “strategic reserve,” and thus leaves slightly fewer allowances available for free distribution. The Chairman’s Mark also changes the incentive program for carbon capture and sequestration (CCS) projects to allow certain recipients to claim incentive “bonus allowances” in advance, before actually sequestering any CO<sub>2</sub>; allows small petroleum refineries to defer compliance with the cap-and-trade program until 2015; and provides new allowance allocations for public transportation grants and transportation emission reduction programs.

Simultaneously with the release of the Chairman’s Mark, EPA released its initial economic analysis of the Chairman’s Mark. EPA’s analysis does not contain new modeling results tailored to S. 1733, but instead identifies aspects of S. 1733 that differ significantly from the Waxman-Markey bill and analyzes the likely effect of those changes on the economic impacts that EPA projected for the Waxman-Markey bill. The analysis noted that several features of the bill - such as the more stringent emissions target for 2020, the deferral of emission performance standards until 2020 (and the corresponding increase in the supply of domestic offset credits), the larger strategic reserve pool - both would increase and decrease the price of allowances, and could even cancel each other out. EPA concluded that the impact of S. 1733 on household consumption would be similar to the Waxman-Markey bill, which EPA predicted would reduce household consumption by less than 1% in 2050 relative to a “business-as-usual” scenario. EPA’s analysis did not take into account any economic benefits that would accrue from mitigating climate change.

- **Sen. Boxer Releases Hearing Schedule.** Senate Environment and Public Works Committee Chairman Barbara Boxer (D-CA) released the schedule for hearings on the Kerry-Boxer cap-and-

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trade bill. The hearings will begin on October 27<sup>th</sup> with Administration witnesses and continue on October 28<sup>th</sup> and 29<sup>th</sup> with panels on jobs and opportunities, national security, utilities, adaptation, transportation, and the clean energy economy. For witness lists, see <http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Home>.

- **Sen. Murkowski Signals Possible Climate Bill Support.** In a C-SPAN interview, Sen. Lisa Murkowski (R-AK) said she would “keep my mind open” about her vote on a cap-and-trade bill, provided the legislation contains sufficiently robust provisions supporting domestic oil and gas development and nuclear energy. However, at Wednesday’s Energy and Natural Resources Committee hearing on allowance allocation, Sen. Murkowski agreed with Sens. Bob Corker (R-TN) and Byron Dorgan (D-ND) that the Committee’s energy bill should be voted on without creating a comprehensive energy and cap-and-trade bill. Sen. Murkowski also expressed skepticism about the allowance distributions in the Waxman-Markey bill, describing them as “decades-long earmarks.” Sen. Corker said that he could support a climate bill if it returned 100% of allowance value to taxpayers.
- **Nuclear Streamlining Talks Continue.** Sen. Joseph Lieberman (I-CT), who has been involved in efforts to craft nuclear energy provisions to be added to climate legislation, told reporters that the Senators are considering streamlining the Nuclear Regulatory Commission’s licensing process for new nuclear plants locating at already-approved sites and plants built according to a standardized, approved design. In addition, Sen. Lieberman said that additional incentives for nuclear plant construction could be provided through a combination of loan guarantees and tax credits.
- **House Committee Considers Climate Adaptation.** The House Select Committee on Energy Independence and Global Warming held a hearing on adaptation to climate impacts. Witness John Stephenson of the Government Accountability Office (GAO) discussed the GAO’s report on Climate Change Adaptation and told Committee members that government officials lack funds, site-specific climate impacts data, and clarity about roles and responsibilities for adaptation efforts. The report suggests that federal efforts could increase awareness about climate change impacts and available adaptation strategies among government officials and the public by providing better impacts data, and developing a national adaptation strategy. Stephenson’s testimony is available at <http://www.gao.gov/new.items/d10175t.pdf>, and the GAO report is available at <http://www.gao.gov/new.items/d10175t.pdf>.
- **House Passes Solar Bill.** The House of Representatives passed H.R. 3585, a bill to authorize \$2.25 billion for solar energy research and development projects. No companion legislation has been introduced in the Senate.
- **Sens. Hutchinson & Bond Release Carbon Tax Publication.** Sens. Kay Bailey Hutchinson (R-TX) and Kit Bond (R-MO), joined by a farmer and a trucker, released a publication arguing that the Waxman-Markey legislation is a \$2 trillion gas tax and a \$1.3 trillion diesel tax that will harm American families and businesses. They also contend that the Kerry-Boxer bill will constitute an even higher gas tax. The publication, which is supported by the American Highway Users Alliance, the American Trucking Association, the American Farm Bureau, and the National Black Chamber of Commerce, is available at <http://hutchison.senate.gov/pr102109a.html>.

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## Judicial

- **Following Second Circuit, Fifth Circuit Finds Private Plaintiffs Have Standing in Climate Tort Action.** The United States Court of Appeals for the Fifth Circuit has ruled that private plaintiffs have standing to bring suit in federal court to claim damages from major GHG emitters for financial harm they allege resulted from climate change. The decision in *Comer v. Murphy Oil*, No. 07-60756 (5<sup>th</sup> Cir. Oct. 16, 2009), follows close on the heels of the Second Circuit Court of Appeals' September 21 decision in *Connecticut v. AEP*, finding that the state and private plaintiffs may bring federal common law nuisance claims against the defendants, which are major emitters of GHGs. In *Comer*, the plaintiffs are property owners along the Mississippi Gulf coast who argue that defendants' GHG emissions contribute to global warming, thereby exacerbating the ferocity of Hurricane Katrina and causing excess damage to their property. Reversing the lower court's conclusion that the case presented a "political question" over which federal courts have no jurisdiction, the Fifth Circuit found that the plaintiffs had sufficiently pleaded the key elements of standing: an "injury in fact"; a "fairly traceable" link between the defendants' actions and the alleged injury; and the ability of the court to redress the alleged injuries. However, the Fifth Circuit rejected additional claims brought by the plaintiffs – alleging that defendants unjustly profited by deliberately misleading the public and policymakers about the dangers of climate change – as presenting "a generalized grievance that is more properly dealt with by the representative branches and common to all consumers of petrochemicals and the American public." The opinion is available at <http://www.ca5.uscourts.gov/opinions/pub/07/07-60756-CV0.wpd.pdf>.

## Industry and NGOs

- **NGSA Issues Recommendations for Climate Change Bill.** The Natural Gas Supply Association (NGSA), a trade association of producers and marketers of natural gas, sent a letter to Senate Majority Leader Harry Reid (D-NV) with six recommendations for modifications to the Kerry-Boxer climate change bill introduced in September, S. 1733. The letter warned that contemplated allocations of free allowances to "high-carbon emitters" (specifically, coal-fired generators and coal-dependent utilities) would "mask the true price of carbon for decades to come" and discourage investments in cleaner sources of energy. As an alternative, the letter recommended that allowances be provided as an incentive for retirement of old, carbon-intensive generating facilities and increased reliance on natural gas for power generation. NGSA also called for research and development funding and allowance allocations to benefit carbon capture and sequestration projects at gas-fired sources, and research into high efficiency natural gas turbines.
- **Business Roundtable Calls for Nuclear, Expanded Drilling in Climate Bill.** In a white paper titled "Unfinished Business: the Missing Elements of a Sustainable Energy and Climate Policy," the Business Roundtable called for climate change and energy legislation to include measures that, in its view, would enhance U.S. energy security. Particular policies advocated in the report include expansion of nuclear power and replacement of nuclear generating units whose decommissioning is imminent; expanded domestic oil and gas exploration; research and development funding, regulatory guidance, and incentives for carbon capture and sequestration (CCS) technology; and the enhancement of energy efficiency in the residential and commercial sectors through revised building codes and improvements to existing buildings. The Business

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Roundtable is an association of U.S. chief executive officers whose members include American Electric Power, Boeing, Caterpillar, and other major corporations. A link to the report is available at

[http://www.businessroundtable.org/news/press\\_release\\_unfinished\\_business\\_missing\\_elements\\_sustainable\\_energy\\_and\\_climate\\_policy](http://www.businessroundtable.org/news/press_release_unfinished_business_missing_elements_sustainable_energy_and_climate_policy).

## Studies and Reports

- **NAS Issues Report on “Hidden” Costs of Energy Production.** The National Academy of Sciences released a study identifying and, in certain cases, quantifying, the “hidden” costs of energy production on health, grain crops and timber, buildings, and recreation that are not reflected in fossil fuel or electricity prices. The study found that the unaccounted-for 2005 costs totaled \$62 billion from coal-fired electricity generation and \$56 billion from motor vehicles. The study also identifies a range of values for damages from climate change, concluding that the damages caused by each ton of CO<sub>2</sub> would increase by 50-80% by 2030 due to climate impacts. The report is available at [http://www.nap.edu/catalog.php?record\\_id=12794#](http://www.nap.edu/catalog.php?record_id=12794#).
- **Biomass “Accounting Error” Study Released.** A study published in *Science* found that the treatment of all biomass as “carbon neutral” under the Kyoto Protocol and climate legislation may lead to increases in net emissions by failing to account for changes in emissions from land use when biomass is harvested or grown. As an example, the study cites the clearing of established forests to burn wood or grow energy crops, which is treated as a reduction in emissions while causing a large release of carbon. In response to the study, the Environmental Defense Fund announced that it was launching a working group to work towards a consensus approach for biomass carbon accounting. The study’s abstract is available at <http://www.sciencemag.org/cgi/content/short/326/5952/527>.

## International

- **EU Ministers Finalize Common Negotiating Position for December Climate Talks.** Environment Ministers from the 27 member nations of the European Union finalized the EU’s negotiating position for the December climate change talks in Copenhagen, Denmark. The EU common position calls for developed nations to reduce their emissions by 80 to 95 percent from 1990 levels by 2050; for developing nations to achieve a reduction of “in the order of” 30 percent from 1990 levels by 2020; and for a 20 percent and 10 percent reduction from the shipping and aviation sectors, respectively, by 2020. In addition, European Commission President Jose Manuel Barroso announced that the Commission will appoint an EU “Climate Action Commissioner”. The Commissioner will seek the implementation of strong climate change-related policies within the EU and abroad.
- **Major Economies Forum Cites Progress on Climate Financing.** In a communiqué issued following a two-day meeting in London, the 17 members of the Major Economies Forum on Energy and Climate Change announced progress on international climate financing. The release called for increased financing for reducing emissions from deforestation and forest degradation; noted the members’ agreement that an emission reduction plan should not be a precondition for the receipt of climate financing by developing nations; and called for the periodic submission of GHG emission inventories by all but the least developed countries.

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- **China, India Sign Climate Cooperation Agreement.** Indian Environment Minister Jairam Ramesh and Chinese Vice-Chairman and National Development and Reform Commission Minister Xie Zhenhua signed an agreement that commits the two nations to cooperate on climate change adaptation and mitigation. Under the India-China Partnership for Combating Climate Change, India and China agreed to hold regular ministerial level discussion; create a working group to address issues of international and domestic climate change policy; and expand cooperation on climate change and low-carbon technology research, education, and training.

**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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