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Climate Change Policy Update Week of October 26-30, 2009

Commentary: *Chairman Boxer said the mark-up of S.1733 will start on Tuesday. Over the weekend, Chairman Boxer released an amended version of S.1733 for mark-up, now being referred to as the Manager's Amendment . . . Republican members of the EPW Committee have threatened to boycott the mark-up by depriving the EPW Committee of a quorum, citing the lack of new EPA economic modeling on the Kerry-Boxer bill . . . An arcane budgeting rule in the Senate is unsettling the Kerry-Boxer deliberations. The Congressional Budget Office has determined that budget neutrality under the Senate rules requires a hold-back of more allowances than in the House. Kerry and Boxer applied this extra hold-back as a haircut across everyone's allowance allocation in their bill. This CBO haircut, plus some new allocations, resulted in an approximately 15% reduction in each allocation, which has some entities calling it more of a scalping than a haircut . . . A major emerging issue with the Kerry-Boxer bill is its absence of any preclusion of continued authority for EPA to regulate GHG emissions under the Clean Air Act. It may be a bargaining chip, but it appears that the bargaining could become vigorous. EPA Administrator, Lisa Jackson testified in an EPW hearing that it could be useful for the Agency to retain some GHG regulatory authority.*

Executive Branch

- **Administration Officials Testify in Support of Kerry-Boxer.** On the opening day of hearings before the Senate Committee on Environment and Public Works on the Kerry-Boxer climate change bill (S.1733), three high-level Obama Administration officials offered positive remarks about the legislation. Energy Secretary Steven Chu called the cap-and-trade program at the heart of S.1733 “the most important element of this bill” because it would provide a more stable investment environment for clean energy than traditional “on-again, off-again” tax credits. Environmental Protection Agency (EPA) Administrator Lisa Jackson testified on the agency’s economic analysis of S.1733, stating that the bill would “transform” the nation’s energy system and economy at a cost of less than fifty cents per day per household in 2020. Jackson also supported retaining EPA’s Clean Air Act authority to regulate GHGs under the bill, arguing that the agency could address uncapped emissions and environmental justice concerns. Interior Secretary Ken Salazar, Federal Energy Regulatory Commission Chairman Jon Wellinghoff, and Transportation Secretary Ray LaHood also offered testimony. None of the officials present offered a formal Administration endorsement of the bill.
- **DOE Awards \$3.4 Billion for “Smart Grid” Projects.** The Department of Energy (DOE) announced the winners of \$3.4 billion in competitive grant funding for projects to modernize the transmission grid to accommodate

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higher levels of renewable energy, and install meters and devices that help utilities, consumers and third party suppliers track and minimize energy use. In all, DOE selected one hundred projects; DOE projected that the grants will be matched by another \$4.7 billion in private funds. The projects are expected to result in the installation of 18 million “smart meters”; 200,000 “smart transformers” that will improve the reliability of the grid; and 850 “phasors” that will allow the grid to incorporate intermittent renewable energy sources. Funding for this program was provided in the economic stimulus package passed by Congress in February of this year.

- **EPA Proposes Reform of Climate Leaders Program.** As part of a review of all its voluntary environmental programs, EPA issued a proposal to place more stringent requirements on participants in the agency’s “Climate Leaders” program. Approximately 200 companies now take part in Climate Leaders, under which EPA provides technical support to firms to prepare greenhouse gas (GHG) inventories and emission reduction goals. Under EPA’s proposal, companies would be required to set targets for absolute levels of GHG emissions (as opposed to goals for GHG emissions per unit of output); establish short-term and long-term emission targets; and publicize their yearly progress. The agency’s technical support activities would shift to assisting with emission reduction activities, rather than the preparation of emission inventories. In addition, the agency is taking comment on whether the program should mandate independent third party verification of GHG emission performance. The proposal is available at: http://www.epa.gov/stateply/documents/draftrecommendations_climate_leaders_26-Oct-09.pdf.
- **White House Hosts Meeting With Business Leaders on Climate Change.** Over one hundred business executives gathered at the White House last week for the third such summit this month on the economic and environmental case for climate change legislation. Energy Secretary Chu and Carol Browner, Director of the White House Office of Energy and Climate Change Policy Director, both gave presentations to the group.
- **Presidential Nominations and Appointments.**
 - Janet McCabe has been appointed to serve as Deputy Assistant Administrator for Air and Radiation at EPA. McCabe is currently the executive director of the organization Improving Kids’ Environment.

Congress

- **Boxer Holds Hearings; Promises Tuesday Mark-Up.** The Senate Environment and Public Works Committee heard testimony from twenty-seven witnesses on the Kerry-Boxer climate bill in a series of hearings last week. Committee Chairman Barbara Boxer (D-CA) said that mark-up will begin on Tuesday, although Committee Republicans are planning to boycott the mark-up until EPA has done a full modeling analysis of the bill rather than relying on modeling of similar provisions in the Waxman-Markey bill. Committee member Sen. Baucus, a key vote for final bill passage, said that he had “serious reservations” about the bill’s 2020 emission reduction target and the bill’s failure to preempt EPA’s authority to regulate GHGs under the Clean Air Act; however, he also said that compromise is possible and that “there’s a sweet spot for this bill.” Sen. Arlen Specter (D-PA) also noted his concern with the preservation of EPA authority. Responding to Sens. Baucus and Specter’s concerns, EPA Administrator Lisa Jackson testified in favor of retaining EPA Clean Air Act authority, arguing that the Agency could address uncapped

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emissions and environmental justice concerns. Former Senator John Warner (R-VA) told the Committee that President Obama should offer a framework for the climate bill to move the Senate process forward.

- **Graham Makes Wish List.** Sen. Lindsey Graham (R-SC), who co-authored a N.Y. Times op-ed earlier this month with Sen. John Kerry (D-MA) outlining key compromise areas for a successful climate change bill, gave reporters more details on specific provisions he favors. Sen. Graham said he would like a climate bill to treat nuclear energy like wind or solar energy under a renewable electricity standard, dedicate additional loan guarantees for the nuclear industry, and create an inventory of offshore energy sources. He suggested that revenues from offshore drilling could be used to offset compliance costs associated with the cap-and-trade program, and stated that the bill should include a cap on emissions. Sen. Graham also proposed forming a “working group” of senators “to find a pathway forward,” so that by Copenhagen, “we have a process that you all would understand, and the world would understand, that could lead to a new dynamic that could lead to a breakthrough.”
- **Midwest Senators Seek New Allowance Allocation Formula.** Sens. Tom Harkin (D-IA) and Charles Grassley (R-IA) are asking fellow Senators to sign a letter opposing the allowance allocation formula for utilities in the House and Kerry-Boxer climate bills. The “50/50” formula, proposed by the investor-owned utility trade association the Electric Edison Institute, would allocate allowances based half upon GHG emissions and half on energy sales. The Senators argue that the formula benefits low-emission utilities at the expense of coal-dependent utilities, many of which are in the Midwest. The letter will be sent to Sens. John Kerry (D-MA) and Barbara Boxer (D-CA).
- **Adaptation Bill Introduced.** Sens. Jeff Bingaman (D-NM), Max Baucus (D-MT), Sheldon Whitehouse (D-RI), and Tom Udall (D-NM) introduced S.1933, a bill composed of excerpts of the Kerry-Boxer bill dealing with adaptation (with minor text changes), to bring attention to the issue. The bill would authorize a fund to help states adapt to climate change effects and direct federal agencies to develop a national strategy on adaptation for climate change impacts.
- **Energy Committee Examines Emission Reducing Potential of Natural Gas.** The Senate Energy and Natural Resources Committee held a hearing to consider the role of natural gas in reducing GHG emissions. Various witnesses from the natural gas industry – including officials from TransCanada, BP, and Calpine – supported incentives for natural gas use in S.1733 (the Kerry-Boxer bill). According to BP America Chairman Lamar McKay, allocations of free allowances to coal-using entities in S.1733 discourage utilities from switching from coal to less carbon-intensive natural gas. To encourage fuel-switching, McKay recommended that S.1733 provide financial incentives for the retirement of older, inefficient coal-fired power plants. Richard Newell, Administrator of the Energy Information Administration, testified that the price of allowances would have to reach \$30 in order to encourage fuel-switching from coal to natural gas, even assuming natural gas remains at the relatively low price of \$5 per million BTUs. A representative of Dow Chemical Co., a large user of natural gas, told Committee members that natural gas will already be favored as a less GHG intensive fossil fuel under a cap-and-trade program and that further incentives risk generating natural gas price hikes that would cost manufacturing jobs.

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- **Conferees Adopt “Cow Tax” Amendment.** Representatives of the Senate and the House engaged in conference negotiations on the appropriations bill funding the EPA for FY 2010 approved an amendment that would prohibit the EPA from requiring Clean Air Act permits for GHG emissions emitted by livestock. Congress subsequently passed the conference report. EPA Administrator Lisa Jackson has repeatedly stated that the EPA had no intention of imposing such limits.

States and Cities

- **California Officials Urge Closing of GHG Standards “Loophole.”** At a hearing on the national greenhouse gas and fuel economy standards for vehicles proposed by EPA and the National Highway Traffic Safety Administration, California regulatory officials urged the Federal agencies to incorporate “upstream” emissions associated with the electricity used by plug-in hybrids, electric vehicles, and other advanced vehicle technologies. The proposed rule would treat such vehicles as producing zero GHG emissions per mile. State officials from New York, Massachusetts, New Jersey, and California have supported the proposed rule as a whole, which will require model-year 2016 cars and light trucks to achieve an average of 35.5 mpg, and will impose a nationwide CO₂ emissions standard of 250 grams per mile.

Industry and NGOs

- **Trade Association Issues Proposals on Nuclear Incentives.** The Nuclear Energy Institute (NEI) proposed a suite of policies intended to support increased deployment of nuclear generation as part of the Senate’s pending climate change legislation. To reach the industry’s goal of building 45 new nuclear plants by 2030, NEI recommended that the bill authorize the government to issue an additional \$100 billion in loan guarantees to back new construction; extend the production tax credits for nuclear reactors to 2025; allow nuclear plant developers to claim a thirty percent investment tax credit in lieu of the production tax credit; and streamline the licensing process at the Nuclear Regulatory Commission.
http://www.nei.org/filefolder/2009_Nuclear_Policy_Initiatives.pdf
- **Coalition Targets Merchant Coal Allocations.** In a letter to the Senate Committee on Environment and Public Works, four organizations – the American Public Power Association, the National Rural Electric Cooperative Association, the National Association of State Utility Consumer Advocates, and the National Association of Regulatory Utility Commissioners – attacked the allocation of free allowances to independent “merchant coal” power plants in the current text of S.1733. The letter stated that merchant coal generators would not use the allowances to keep electricity prices low, but would instead raise prices to reflect the opportunity cost of using the allowances for compliance purposes instead of selling them. Unlike regulated electric utilities, merchant coal generators would not be obligated to pass on the value of the allowances to consumers under S.1733.

Studies and Reports

- **Study Finds Behavioral Changes Could Cut U.S. Emissions by 7%.** Researchers examined 17 types of household actions that could reduce energy consumption using readily available technologies with low cost or positive returns on investment, and the likelihood of their adoption

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by non-users. The study estimates that use of the most effective interventions to encourage behavioral change could lead to a 20% reduction in direct household emissions within 10 years, equivalent to a 7.4% reduction in total U.S. GHG emissions. The study is available at <http://www.pnas.org/content/early/2009/10/23/0908738106.abstract?sid=b93b6b08-2f6e-4732-9e9d-d33f4905ab46>.

- **Recession Dampening Electricity Demand.** A new 2009 peak power demand forecast by the North American Electric Reliability Corp. (NERC), which oversees bulk power system reliability in North America, is 4% below the forecast made in 2008. NERC found that the recession is responsible for 80% of the reduced energy demand, with the remainder attributed to increases in energy efficiency and demand response programs. Ongoing “demand side resources” account for approximately 40,000 MW (4% of the peaking resource portfolio); these resources offset peak demand growth that otherwise would occur. The report also found that the lag in siting new transmission projects is slowing the growth of renewable energy production and could lead to power shortages in the next five years. The report predicts that natural gas will become the dominant fuel source for peak capacity generation in North America in 2011, displacing coal. The assessment is available at http://www.nerc.com/files/2009_LTRA.pdf.

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.

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