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Climate Change Policy Update Week of November 9-13, 2009

Commentary: *At an APEC breakfast in Singapore, President Obama and other world leaders lowered expectations for the Copenhagen climate change summit by agreeing to negotiate a short “politically binding agreement” first, and deferring a legally binding treaty until mid to late 2010 . . . First, health care legislation and then ~~climate change~~ financial reform? With increasing concern about the economy and jobs, the Administration and Congressional leadership may feel pressure to tackle reform of the banking system and financial markets before moving on to greenhouse gas emissions. In addition, a new regulatory regime for financial markets could be necessary to make Senators comfortable with the “trade” part of cap-and-trade. This approach, however, could mean that climate change legislation would move next year – if it moves at all in 2010. (How much of the EPA regulatory program would be in place by then?) . . . More mixed messages on timing: Sen. Baucus told reporters that the Finance Committee’s deliberations will extend into next year. However, Senators Kerry, Graham, and Lieberman will create an “outline” for a Senate bill that can be passed around in Copenhagen . . . Fourteen coal-state Senators – the kind of Senators likely needed to get from, ahem, 46 to 60 – have taken aim at the EEI compromise allocation for the power sector, foreshadowing a protracted battle over allowance allocations . . . Eighteen companies sent a letter to the Senate emphasizing the importance of international offsets.*

Executive Branch

- **Obama, Other World Leaders Agree Copenhagen Summit Will Not Yield Binding Agreement.** At a side meeting of the Asia Pacific Economic Cooperation forum, President Barack Obama and eighteen other leaders whose governments will be participating in the upcoming Copenhagen climate change summit – including Prime Minister Lars Rasmussen of Denmark – agreed not to attempt to reach a fully developed, legally binding treaty at the conference. Instead, the leaders will negotiate a five-to-eight page “politically binding agreement” and defer action on other contested issues to a second summit. Prime Minister Rasmussen suggested that the political agreement should cover emission targets and financial assistance for developing countries, paving the way for a full agreement to be reached at a global climate change conference scheduled for next December in Mexico City. Michael Froman, President Obama’s deputy national security adviser for international economic affairs, explained that “there was an assessment by the leaders that it was unrealistic to expect a full, internationally legally binding agreement to be negotiated between now and when Copenhagen starts in twenty-two days.”
- **Final Endangerment Finding Undergoing White House Review.** The Environmental Protection Agency (EPA) is close to completing its determination as to whether greenhouse gas (GHG) emissions from motor vehicles “cause or contribute” to endangering public health or welfare through their impacts on climate change. EPA sent the finding to the White House Office of Management and Budget (OMB) last week for final review, indicating

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that the document will soon be publicly released and made legally effective. First proposed in April, the endangerment finding is expected to apply to six GHGs – carbon dioxide, nitrous oxide, methane, perfluorocarbons, hydrofluorocarbons, and sulfur hexafluoride – and would serve as a legal predicate for EPA’s forthcoming GHG emission standards for passenger cars and light duty trucks. The finding is the agency’s response to the Supreme Court decision in *Massachusetts v. EPA* (2007), which held that GHGs are “air pollutants” under the Clean Air Act and reversed EPA’s refusal on policy grounds to regulate GHG emissions from automobiles.

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- **EPA to Expand GHG Reporting Rule to New Sectors in 2010.** EPA’s first rule requiring the reporting of GHG emissions from facilities in an array of economic sectors will expand in 2010 to cover new industries, according to the agency. Sectors that may be required to report for the first time under the revised rule include ethanol production, industrial landfills, wastewater treatment, coal suppliers, underground coal mines, food processing, electronics manufacturing, fluorinated GHG production, magnesium production, and oil and gas systems. Some of these sectors would have borne reporting obligations under the proposed form of the GHG reporting rule, released in April of this year, but were omitted from the final rule published in October. EPA said it plans to finalize the new reporting requirements in 2010, with sufficient lead time for GHG emissions monitoring to begin by January 1, 2011.
- **Army Corps Issues Policy Requiring Plans for Rising Sea Levels.** A new policy issued by the Army Corps of Engineers – which builds and maintains dams, levees, and other water infrastructure around the country – requires project engineers to account for climate change-related sea-level rise in their design plans. Each project will be evaluated under one of three possible sea-level rise scenarios. The policy could affect the Army Corps’ assessment of the economic viability of its projects, especially in coastal areas, and applies to currently planned projects as well as newly proposed projects.

Congress

- **Kerry, Graham, and Lieberman to Have “Framework” Before Copenhagen.** Senator John Kerry (D-MA) told reporters that he is hoping that his efforts with Sen. Lindsey Graham (R-SC) and Joe Lieberman (I-CT) to craft a compromise climate change legislative package will produce a “sort of framework, or outline” of where the three negotiators may be heading. Sen. Kerry explained that such a framework could be brought to Copenhagen for the international negotiations, and form the basis for a final Senate bill by the early part of next year. Although Sen. Lieberman said the framework will not be “whole” without an allowance allocation scheme from the Finance Committee, Finance Chairman Sen. Max Baucus (D-MT) said he cannot

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promise to take up climate legislation this year. Sen. Graham, who has come under fire for his involvement in the efforts, published an op-ed in a local South Carolina newspaper arguing that South Carolina could be a leader in the green energy economy.

- **Senators Urge New Allocation Formula.** In an effort spear-headed by Senator Tom Harkin (D-IA), fourteen Senators from the Midwest and coal-dependent states signed a letter urging the chairmen of key committees to revise the formula that distributes allowances to electric local distribution companies. The formula in the Waxman-Markey and the Kerry-Boxer bills bases allowance allocation for the power sector in part on emissions and in part on sales; the letter urges a formula based entirely on emissions in order to give regions with higher emissions more transition assistance. The letter was signed by Democrats Michael Bennet (CO), Mark Udall (CO), Byron Dorgan (ND), Kent Conrad (ND), Al Franken (MN), Amy Klobuchar (MN), Herb Kohl (WI), Russ Feingold (WI), Roland Burris (IL), Carl Levin (MI), Debbie Stabenow (MI), Sherrod Brown (OH), and Robert Byrd (WV).
- **Peterson Vote Uncertain.** House Agriculture Committee Chairman Collin Peterson (D-MN), who successfully advocated for a number of farm-friendly amendments to the Waxman-Markey bill and then voted for the bill's passage, told reporters he might not vote in support of a conference bill. He said his vote will depend upon the bill's contents, but that achieving final passage of a climate bill is not a priority for him.

Industry

- **Chamber of Commerce Criticizes Push for Binding Targets at Copenhagen.** The U.S. Chamber of Commerce issued a position paper last week claiming that it would be impractical for developed and developing countries to agree on binding GHG emission targets at the upcoming climate change summit in Copenhagen, given persistent disagreements over issues such as the level of targets and financial assistance for developing countries. The report advocated an alternative approach in which countries would propose individual plans or policies, rather than agree on specific emissions targets. In addition, the report called for a climate change treaty to focus on providing research funding and support for the deployment of clean energy technologies, and eliminating barriers to trade in these technologies. The white paper is available at: http://www.energyxxi.org/reports/15347_Copenhagen.pdf.
- **Industry Urges Senate to Protect International Offsets.** A group of eighteen U.S. companies from a variety of sectors and regions wrote to Senators Kerry, Graham, and Lieberman to urge lawmakers to minimize legislative barriers to the use of international offsets within a cap-and-trade program. Organized by the Coalition for Emission Reduction Projects (CERP), the letter argues that allowing the purchase of low-cost emission reductions in developing countries will cut the costs of a cap-and-trade program almost in half, protecting U.S. jobs and competitiveness. Signatories included Alpha Natural Resources, American Electric Power, the Dow Chemical Company, DuPont, the International Paper Company, and Southern Company. Van Ness Feldman serves as counsel to CERP. The letter is available at www.uscerp.org.

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Studies and Reports

- **Study Finds Agriculture Benefits Under Cap-and-Trade.** According to an analysis by the Bio-based Energy Analysis Group at the University of Tennessee, the domestic agriculture and forestry sectors would earn up to \$13 billion annually in additional revenues under a Renewable Fuels Standard and a cap-and-trade program that allowed a variety of agricultural offset project types. The revenue would more than compensate for projected increases in input costs. Eight of the nine crops studied were projected to have increased revenues; rice net returns would fall by 0.1%. The analysis also considered regulation by EPA in lieu of a cap-and-trade program, and found that net farm income would be reduced relative to baseline projections. The study was funded by The Energy Foundation. It is available at www.25x25.org.
- **CRS Compares House, Senate Climate Bills.** The Congressional Research Service issued a report detailing the key differences between the cap-and-trade provisions of H.R. 2454, passed by the House in June, and S. 1733, reported out of the Environment and Public Works Committee on November 5th. The report observes that: (1) the Senate bill's emissions cap is more stringent between 2017 and 2029; (2) allowance allocations are structured differently; (3) fewer international offsets are allowed in the Senate bill; (4) the House bill contains detailed carbon market regulatory provisions while the Senate bill has a placeholder; (5) the House bill includes competitiveness provisions while the Senate bill has a placeholder; and (6) the bills limit the EPA's power to act under the Clean Air Act in different ways. The report is available at http://assets.opencrs.com/rpts/R40896_20091105.pdf.

International

- **Montreal Protocol Negotiations End Without HFC Agreement.** The 21st Meeting of the Parties to the Montreal Protocol ended without an agreement to control emissions of hydrofluorocarbons (HFCs). The 190 member nations agreed in principle on the need to reduce HFC emissions, but differed on whether the issue should be addressed through the Montreal Protocol, which is focused on reducing emissions of ozone-depleting substances, or the Kyoto Protocol.
- **Brazil Agrees to Target of 40 Percent Below BAU By 2020.** In a turnabout from its previous position, Brazilian Environment Minister Carlos Minc announced that Brazil has agreed to accept a voluntary midterm GHG emission target of 40 percent below the country's projected business-as-usual (BAU) emission levels by 2020. The majority of the emission reduction required to meet the 2020 goal, which is equal to capping Brazil's emission at 2005 levels, are expected to result from reductions in Amazon deforestation.
- **IEA Issues Proposal for "450 Scenario".** The International Energy Agency (IEA) released a plan for a three-phase climate change framework aimed at holding global concentrations of GHGs to 450 parts per million, as part of the IEA's annual *World Energy Outlook* publication. Under the three phases of the "450 Scenario," developed nations would accept emission targets in the near-term, and large emerging economies would be subject to targets beginning in 2020. Other developing nations would not be required to take on mandatory targets. The 450 Scenario would incorporate a cap-and-trade system, sectoral agreements and national GHG emission

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reduction measures. The IEA will present the plan to the climate change negotiators at the international climate negotiations in Copenhagen, Denmark this December. A summary of the 450 Scenario is available at http://www.iea.org/press/pressdetail.asp?PRESS_REL_ID=294.

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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