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## Climate Change Policy Update Weeks of November 23 - December 4, 2009

**Commentary:** *Just in time for the start at Copenhagen, the EPA is issuing its finding under the Clean Air Act that greenhouse gas emissions endanger public health and welfare. The “endangerment finding” is a triggering event under the Clean Air Act, setting the agency on a course for regulation that it will seek to “tailor” and otherwise manage throughout 2010 . . . President Obama now is going to Copenhagen for the finale on December 18. The announcement suggests that the Administration has determined that a good deal is in the works, and that the President’s pledge of a “provisional” emissions target will pay off . . . China and India announced non-binding intensity-based emission targets this week . . . The ultimate judges of what constitutes success in Copenhagen could be Senate moderates. Nine of them sent a letter to the President this week outlining their criteria for success, including meaningful and verifiable commitments from major developing economies . . . Republicans have jumped on the “Climategate” emails, calling for an investigation; Administration officials downplayed the controversy . . . The California Air Resources Board released draft regulations for the state’s cap-and-trade program. The draft did not outline a proposed system for distributing allowances.*

### Executive Branch

- **President Obama Announces Emission Reduction Commitment for Copenhagen.** President Barack Obama announced prior to the Thanksgiving holiday that the United States would make a “provisional” pledge at the upcoming climate change summit in Copenhagen to reduce its greenhouse gas (GHG) emissions “in the range of” 17 percent below 2005 levels by 2020. The President also announced he would speak at the negotiations on December 9, the first time since 1992 that an American President has personally attended a climate change summit. Subsequently, the White House announced that the President would attend instead on December 18 to join the closing of the conference, which suggested to many observers that the Administration is confident of achieving a noteworthy deal. Other top Administration officials will also be in Copenhagen for the summit, including: Lisa Jackson, Administrator of the Environmental Protection Agency (EPA); Carol Browner, Director of the White House Office on Energy and Climate Change; Nancy Sutley, Chairwoman of the Council on Environmental Quality; Steven Chu, Secretary of Energy; Tom Vilsack, Secretary of Agriculture; and Ken Salazar, Secretary of the Interior. The State Department has explained that the “provisional” 17 percent target, which matches the target in the House-passed Waxman-Markey bill, is conditioned on finalizing a domestic policy with a corresponding emission target (likely through legislation) and obtaining an acceptable international agreement.

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- **Administration Officials Downplay E-mail Controversy.** In testimony before the House Select Committee on Energy Independence and Global Warming, White House Office of Science and Technology Director John Holdren and Jane Lubchenco, Administrator of the National Oceanic and Atmospheric Administration, downplayed the significance of the recent unauthorized release of over 1,000 e-mails and several thousand documents stored on the computers of climate scientists at the University of East Anglia's Climate Research Unit. While cautioning that the documents have yet to be fully analyzed, Holdren said: "There is, and there will remain after the dust settles in this current controversy, a very strong scientific consensus on the key characteristics of the problem [of climate change]." Lubchenco stated that "the e-mails do nothing to undermine the strong scientific consensus and independent scientific analysis of thousands of scientists around the world that tell us the Earth is warming, and the warming is largely a result of human activities." EPA Administrator Lisa Jackson separately testified to the Senate Committee on Environment and Public Works that the e-mails do not undermine the scientific consensus on anthropogenic climate change. Republican legislators, however, have requested an investigation. (For further information, see "*Republican Congressmen Ask for EPA Investigation into Climate Science*" below.)

## Congress

- **Nine Senators Send Obama "Principles" for Copenhagen.** Nine moderate Democratic Senators wrote to President Obama to outline principles they believe should guide the President in international climate talks in Copenhagen. The principles include a global agreement on emission reduction goals to stabilize global temperatures at 2 degrees Celcius above pre-industrial levels; ambitious, verifiable actions by all major economies; aid for the most vulnerable populations; action to address concerns about competitiveness and the migration of emission-intensive industry to countries without emission controls; incentives to encourage developing nations to act; and incentives for U.S. companies to invest in international emission reductions.
- **Compromise Effort Finds Support from White House, Republicans.** Senator Lindsey Graham (R-SC), who is working with Senators John Kerry (D-MA) and Joe Lieberman (I-CT) to create a compromise climate package, discussed the effort with President Obama. Sen. Graham reported that President Obama expressed support for the compromise efforts, including openness to nuclear power, clean coal, and offshore drilling "in a responsible way." Sen. Kerry told reporters that he has "definite" Republican votes for the compromise legislation, but did not say who or how many. Kerry also announced that he will speak in "general terms" about the proposal when he attends the international talks in Copenhagen, although a formal outline may not be released.
- **Sen. Kerry Releases International Climate Bill.** Senator Kerry introduced the International Climate Change Investment Act of 2009, S. 2835. The bill would create programs to fund efforts to reduce deforestation, deploy clean energy technologies, and increase adaptation capacity in developing countries.
- **Republican Congressmen Ask for EPA Investigation into Climate Science.** Representatives Darrell Issa (R-CA), John Barrasso (R-WY), F. James Sensenbrenner (R-WI), and David Vitter (R-LA) wrote to EPA Administrator Lisa Jackson asking that the EPA investigate the

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implications for climate change science of the recent disclosure of e-mails from scientists at the Climate Research Unit of the University of East Anglia. The e-mails discussed efforts to prevent certain research from being considered by the Intergovernmental Panel on Climate Change and to “hide” declining temperature trends from tree ring data that were contradicted by rising thermometer measurements. The Congressmen requested that EPA withdraw its proposed regulations for controlling GHG under the Clean Air Act until it can demonstrate that the science behind the EPA’s finding that GHG emissions endanger public health or welfare has not been compromised. Senator James Inhofe (R-OK), ranking minority member of the Senate Environment and Public Works Committee, asked Committee Chairman Barbara Boxer (D-CA) to hold hearings on whether there was a concerted effort to manipulate climate science, and Chairman Boxer said that she is looking into the controversy.

- **House Subcommittee Considers Agricultural Economics and Climate Legislation.** The Subcommittee on Conservation, Credit, Energy, and Research of the House Committee on Agriculture held two hearings, the first considering the economic impacts of climate change on the farm sector and the second considering the costs and benefits of agricultural offsets. Rep. Tim Walz (D-MN) said that not enough attention was being paid to the threat climate change poses to agriculture through weather changes, pests, and disease. Professor John Antle of Montana State University testified that studies of climate change impacts have likely underestimated the impacts of climate change on agriculture and the food industry because of data and modeling limitations. The chief USDA economist testified that the expected impact of higher prices associated with carbon controls would be more than offset by projected higher commodity prices and offsets revenue. The witnesses’ testimony is available at <http://agriculture.house.gov/hearings/statements.html>.
- **Energy Committee Considers Non-Cap Policy Options.** The Senate Energy and Natural Resources Committee held a hearing to consider policy options for reducing greenhouse gas emissions. Witnesses discussed the pros and cons of a carbon tax, limits on power plants, and a cap-and-trade system. Republican Senators Lisa Murkowski (AK) and Bob Corker (TN) both spoke favorably of a carbon tax.
- **Sen. Byrd Tells Coal Industry to “Speak the Truth.”** Senator Robert Byrd (D-WV) released an op-ed calling for an “open and honest dialogue” about coal’s future. Sen. Byrd observed that there is no alternative energy supply that could replace coal immediately for baseload power generation, but he argued that coal’s future depends upon “change and innovation.” He also said that to deny the science of climate change was to “stick our heads in the sand,” and that West Virginia would benefit by staying at the table and collaborating with federal regulators and legislators on climate issues and mountaintop removal mining. “The truth is that some form of climate legislation will likely become public policy because most American voters want a healthier environment,” he concluded.

## Judicial

- **EPA Petitioned to Further Regulate GHGs Under Clean Air Act.** In a move that could potentially ignite a new legal dispute over EPA regulation of GHGs using existing Clean Air Act authority, the Center for Biological Diversity and 350.org have petitioned EPA to designate GHGs as criteria air pollutants under Section 108 of the Act. Section 108 requires EPA to make

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such a designation for any pollutant that the agency determines: poses a danger to public health and welfare; is emitted from numerous and diverse sources; and for which the agency plans to issue air quality standards. If GHGs were designated under this provision, EPA would be required to establish a national target concentration that protects public health and welfare. The petition recommends that such a target be set at 350 parts per million of carbon dioxide (CO<sub>2</sub>). States also would be required to promulgate implementation plans to achieve the target concentration – a goal widely considered impossible, since no state’s emissions are significant enough to affect global CO<sub>2</sub> concentrations. EPA has previously resisted the notion of regulating GHGs under Section 108, and is expected to shelve or deny the petition. The petition is available at <http://www.openmarket.org/wp-content/uploads/2009/12/cbd-350org-petition.pdf>.

- **EPA Permit Settlement Includes First Enforceable Limits on CO<sub>2</sub>, N<sub>2</sub>O.** The Sierra Club, the Idaho Conservation League, and Southeast Idaho Energy Inc. have reached a potentially precedent-setting agreement on the terms of a Clean Air Act permit for an Idaho fertilizer plant, which will include the first legally enforceable limits on GHGs to be included in such a permit. Under the agreement, the coal-fired facility will reduce emissions of CO<sub>2</sub> by 58% within the first five years of operation by either implementing carbon capture and sequestration or purchasing offset credits. In addition, the facility will reduce emissions of nitrous oxide (N<sub>2</sub>O). The measures will mitigate the plant’s emissions to the level that would result from operating the facility on natural gas. The permit is available at [http://www.deq.idaho.gov/air/permits\\_forms/ptc\\_final/se\\_idaho\\_energy\\_power\\_county\\_ptc\\_1109\\_permit.pdf](http://www.deq.idaho.gov/air/permits_forms/ptc_final/se_idaho_energy_power_county_ptc_1109_permit.pdf).

## States and Cities

- **California Air Agency Releases Draft Cap-and-Trade Regulations.** The California Air Resources Board (CARB), the agency charged with implementing the state’s landmark 2006 A.B. 32 climate change legislation, released for public review and comment the draft regulations for a cap-and-trade program. The draft provides for a multi-sector trading system designed to reduce the state’s emission to 1990 levels by 2020 through a series of three-year compliance periods. Beginning in 2012, the program would apply to electricity generators and importers, oil refineries, industrial facilities and hydrogen plants that emit over 25,000 or more metric tons of CO<sub>2</sub>-equivalent GHGs. This coverage threshold would apply to over 600 of the state’s largest stationary GHG emission sources. Coverage of transportation fuels and commercial and industrial natural gas use would begin in 2015. The draft regulations limit the use of offsets by covered entities to 4 percent of their compliance obligation. Several key design issues remain unresolved, including the amount of emissions allowances that will be auctioned versus feely allocated, the use of auction proceeds, the types of projects eligible to generate offset credits, and whether and how price collars will be used to control allowances prices. The public comment period on the draft regulations closes January 11, 2010 and CARB is scheduled to release a final rule by late 2010.
- **California Agency Issues Adaption Report.** The California Natural Resources Agency published a report that outlines a 12-part climate change adaptation strategy for the state. The report foresees significant impacts on the state from unmitigated climate change, including the possibility of a 7-degree rise in temperature and threats to nearly \$4 trillion in coastal real estate and the Sierra Nevada snow pack, a vital source of water supply for the state. Among the report’s

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recommendations are the creation of a state climate adaptation panel; state-wide water conservation measures; development of additional water reservoirs to combat projected water shortages; and more extensive use of the California Environmental Quality Act to reduce GHG emissions from infrastructure projects.

- **WCI Finalizes White Paper on Complementary Policies.** Officials from the Western Climate Initiative (WCI) released the final draft of a complementary policies white paper. The white paper describes policies that are intended to complement the WCI's planned regional GHG cap-and-trade program. Policies recommended in the white paper include a low carbon fuel standard, landfill methane reduction measures, emissions performance standards for electric generators, energy efficiency initiatives, and regulation of high global warming potential gases.

## Industry and NGOs

- **Institutional Investors Petition SEC to Compel Disclosure of Climate Risk.** A group of twenty institutional investors that collectively manage over \$1 trillion in assets petitioned the Securities and Exchange Commission (SEC) to require publicly traded companies to disclose financial risks posed by climate change and climate change regulation. Investors joining the petition included the California Public Employees Retirement System (CalPERS), as well as chief financial officers from Connecticut, Florida, Maryland, New York, North Carolina, and Oregon. The petition seeks disclosure of a variety of climate change-related risks, including potential damage to physical assets; costs of compliance with potential regulations; and reputational harm from failure to mitigate emissions. Although the SEC now requires companies to disclose all "material" financial risks, the agency has not provided specific guidance on the disclosure of climate change-related risks. The petition, which supplements an earlier petition filed in 2007, is available at <http://www.ceres.org/Document.Doc?id=509>.

## Studies and Reports

- **Non-Profit Offsets Group Release Clean Development Mechanism Assessment.** The Offsets Quality Initiative, a coalition of six nonprofit organizations, issued a policy brief providing an assessment of the Kyoto Protocol's Clean Development Mechanism (CDM). The CDM, one of three flexibility mechanisms in the Kyoto Protocol, allows developed nations to fund emission reduction projects in developing nations and apply the resulting credits toward their emission targets under the treaty. The OQI assessment gave the CDM a passing grade but found that certain reforms would provide for improvements in offset quality. The primary focus of the report's recommendations was on streamlining and standardization of additionality tools and restructuring of the program's third-party verification system.
- **Study Finds "Carbon Budget" Running Out.** An analysis by PriceWaterhouseCoopers found that to keep atmospheric carbon concentrations below 450 ppm, the world economy must decarbonize between 2008 and 2020 four times faster than the decarbonization rate achieved since 2000. This translates into the G20 countries cutting carbon intensity levels by approximately 35% by 2020 and 85% by 2050. The report is available at <http://www.pwc.com/gx/en/low-carbon-economy-index/download.jhtml>.

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## International

- **Countdown to Copenhagen Sees Flurry of Last Minute Proposals, Commitments.** In the run up to the international climate change negotiations in Copenhagen, Denmark, participating nations issued an array of new proposals likely to impact the negotiations. The United States announced a provisional pledge to reduce GHG emissions to 17 percent below 2005 levels. (For further information, see “*President Obama Announces Emission Reduction Commitment for Copenhagen*” above.) The U.S. also proposed a climate change mitigation and adaptation fund that would provide \$7-10 billion per year to developing nations. China and India both committed to 2020 GHG intensity targets, with China offering a 40-45 percent reduction from 2005 and India pledging a 20-25 reduction from the same levels. Both targets would be non-binding, but the two nations said they would adhere to the commitments regardless of the outcome at Copenhagen. The G77, a group of developing nations, asserted that any post-2012 treaty reached at Copenhagen should be an extension of the existing Kyoto Protocol. While not committing to the continuation of the Kyoto Protocol, the EU expressed its support for a single, legally-binding treaty that would bring together the two-tracks of negotiations that are currently part of the negotiating structure. Similar to the U.S. climate fund proposal, U.K. Prime Minister Gordon Brown and French President Nicolas Sarkozy proposed a \$10 billion adaptation fund for developing nations.
- **U.S., India Sign Clean Energy and Climate Adaptation MOUs.** U.S. President Barack Obama and Indian Prime Minister Manmohan Singh signed a series of memoranda of understanding (MOUs) under which the two nations will cooperate to develop low-carbon energy technologies, and implement climate change adaptation measures. Among the initiatives created by the MOUs are a public-private Indo-U.S. Clean Energy Research and Deployment Initiative, a joint venture between the U.S. Environmental Protection Agency and the Indian Environment Ministry to improve environmental enforcement, and a collaboration between the U.S. National Oceanic and Atmospheric Administration and the Indian Ministry of Earth Sciences to improve forecasts of major Indian weather events.

**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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