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Climate Change Policy Update Week of December 7-11, 2009

Commentary: *Copenhagen negotiators are scrambling to narrow the issues in time for the arrival of the heads of state this coming week. The United States is still seeking harder commitments from major developing countries, supported by robust monitoring, review and verification procedures . . . Day 1 of Copenhagen also saw EPA's release of the final endangerment finding, the predicate for EPA regulation of GHG emissions under the Clean Air Act . . . In the Senate, two competing visions of legislation emerged this week. Senators Kerry, Graham, and Lieberman sent a letter to the President outlining a "work in progress," that appears to consist of a cap-and-trade program with inducements for oil and gas production, nuclear power, and clean coal. Another bipartisan team, Senators Cantwell and Collins, released their "cap-and-dividend" bill, which sets forth a program shorn of allocations, offsets, and traders.*

Executive Branch

- **U.S. Climate Envoy Objects to Proposed Copenhagen Agreements.** Todd Stern, the U.S. State Department Special Envoy for Climate Change and the lead U.S. negotiator at the ongoing climate change summit in Copenhagen, criticized two proposals for a political agreement that were separately drafted by the Long Term Cooperative Action Group (LTCAG) and the Association of Small Island States (AOSIS). Stern said the LTCAG agreement – which would require developed countries to reduce greenhouse gas (GHG) emissions by 25 to 40 percent below 1990 levels by 2020 – made “constructive steps,” but said that certain provisions were not “acceptable as a starting point” to the United States because they would not impose significant commitments on China, India, and other large emerging economies. As for the AOSIS proposal, Stern said that the document’s goal of limiting global temperature increases to 1.5 degrees Celsius is “not in the realm of what we can get done with right now.”
- **EPA Issues Final Endangerment Finding for GHGs.** On the opening day of the climate change negotiations in Copenhagen, the Environmental Protection Agency (EPA) finalized findings that greenhouse gas (GHG) emissions endanger public health and welfare through their impact on climate change, and that motor vehicles “cause or contribute” to dangerous GHG pollution. The finding, which responds to the Supreme Court’s 2007 decision in *Massachusetts v. EPA*, legally obligates EPA to issue GHG standards for motor vehicles under the Clean Air Act and thus marks a significant milestone in EPA’s ongoing effort to use existing legal authority to regulate GHGs. In the document, EPA addressed recent

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revelations that some raw climate temperature records had been destroyed, noting that other well-preserved data sets support the agency's findings. EPA also rejected the U.S. Chamber of Commerce's recent petition asking the agency to hold a formal trial-type hearing on the endangerment finding, on the grounds that a formal hearing was not required by the Clean Air Act. Speaking in Copenhagen, EPA Administrator Lisa Jackson said that the agency had not accelerated its process in order to release the endangerment finding at the same time the Copenhagen summit commenced. Jackson also reiterated the Administration's longstanding position that climate change legislation would be superior to EPA regulation under existing Clean Air Act programs. The endangerment finding is available at:

<http://www.epa.gov/climatechange/endangerment/downloads/FinalFindings.pdf>.

- **DOE Awards Almost \$1 Billion for CCS Projects.** The Department of Energy (DOE) announced that it would award \$979 million to three carbon capture and sequestration (CCS) projects. The winning projects include an American Electric Power plant in West Virginia; a Southern Company plant in Alabama; and a Summit Energy plant in Texas. The funding will leverage an additional \$2.2 billion in private investment and is intended to help the plants install and operate technology that will capture 90% of their GHG emissions within eight to ten years.
- **Department of Commerce Expedites Cleantech Patents.** The Patent and Trademark Office (PTO) of the Department of Commerce announced a "Green Tech Pilot Program" to expedite the processing of patent applications for GHG reduction, renewable energy, and energy efficiency technologies. Currently, patents are processed in the order they are filed, and take an average of 40 months to issue. The initiative is expected to reduce that processing time by about 12 months.

Congress

- **Compromise Framework Released as a "Work in Progress."** Senators John Kerry (D-MA), Joseph Lieberman (I-CT), and Lindsey Graham (R-SC), who are seeking to lead an effort to create a climate change legislative package that can pass the Senate, sent a "basic framework" to President Obama. Described as a starting point, the document's "principles and guidelines" include:
 - a "near term" target of a 17% emission reduction below 2005 levels;
 - transition assistance to companies and consumers;
 - increasing domestic oil and gas production and maintaining domestic refining capacity;
 - facilitating the financing and licensing of nuclear reactors and developing clean coal technology; and
 - creating domestic clean energy manufacturing jobs and wealth for domestic forestry and agriculture via emission reduction offset projects.

Sen. Kerry said the blueprint sends a message to negotiators in Copenhagen that "the United States Senate is committed to addressing this challenge, and the majority leader has committed to doing so early next spring." Senator Graham told reporters, however, that: "I need the nuclear power industry to say that this bill gets us to where we want to go. I need the coal companies to say that clean coal provisions will not only not put us out of business, but actually increase the value of coal in America. And I'm going to need the oil and gas industry to say that the oil and gas drilling provisions are meaningful, will add to our inventory and make us more energy independent, and it's good business."

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- **Sens. Cantwell and Collins Release Bipartisan “Cap-and-dividend” Bill.** Senators Maria Cantwell (D-WA) and Susan Collins (R-ME) introduced the Carbon Limits and Energy For America’s Renewal (CLEAR) Act. The legislation would cap the amount of fossil carbon sold to commerce in the U.S. by requiring upstream producers or importers of fossil carbon (*i.e.*, coal mines, natural gas producers, oil producers and importers) to surrender “carbon shares”. Shares would be sold at monthly uniform price auctions. Trading of shares would be open only to the capped entities and would be highly regulated. The bill prescribes that, by 2020, U.S. GHG emissions must be 20% below 2005 emission levels and 83% below 2005 levels by 2050. Prices of carbon shares are to be fixed within a gradually increasing price collar. Seventy-five percent of the auction proceeds would be distributed to lawful residents of the U.S. in the form of dividends. The other 25 percent would go to various uses, including emission reduction projects and international assistance. The President would be authorized to change the number of carbon shares available for an auction, subject to passage of a joint resolution of approval by Congress, to respond to a number of specified factors. Entities that import energy intensive goods would be assessed a fee for the carbon used in their manufacture, commensurate with carbon share values, if (i) the export country does not have comparable carbon limits and (ii) domestic producers would be disadvantaged economically without the fees. The text of the bill is available at: <http://cantwell.senate.gov/issues/CLEAR%20Act%20-%20Leg%20Text.pdf>.
- **Conferees Reject Amendment to Block EPA GHG Action.** House and Senate conferees working on the omnibus spending bill blocked an amendment from Rep. Todd Tiahrt (R-KS) that would block funding in the bill for Clean Air Act regulations based on EPA’s finding that GHG emissions endanger public health and welfare. The omnibus measure, which has been passed by the House, includes \$2 billion for programs that focus on climate change research; over half of the money would go to NASA and the National Academy of Sciences for space-based climate measurements. The appropriations bill also includes funding for an audit of the tax code to identify provisions that have the largest effects on GHG emissions.
- **Begich and Snowe Introduce Offshore Renewables Bill.** Senators Mark Begich (D-AK) and Olympia Snowe (R-ME) introduced the Renewable Energy Research Bill (S. 2852). The legislation would direct the National Oceanic and Atmospheric Administration to create a research program to generate renewable energy environmental research and to collect, analyze, and distribute relevant data (such as time series wind data) to aid development of offshore renewable energy production.
- **Hearings:**
 - The Senate Energy and Natural Resources Committee heard testimony on the role of grid-scale energy storage in meeting energy and climate goals. Witnesses included Jon Wellinghoff, Chairman of the Federal Energy Regulatory Commission, and Steven Kroonin, Undersecretary for Science at the Department of Energy.
 - The Energy Subcommittee of the Senate Energy and Natural Resources Committee heard testimony from Kristina Johnson, Under Secretary of Energy, on nine energy bills under consideration by Congress. Among other things, the bills would provide funding for research and development of solar energy, biofuels, wind, advanced vehicle technologies, and technologies to remove carbon dioxide from the air.

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States and Cities

- **CARB Approves Rule to Reduce GHG Emissions from Commercial Refrigeration Systems.** The California Air Resources Board adopted a new rule that will reduce emissions of high global warming potential GHGs from commercial refrigeration systems. The rule will cover approximately 26,000 facilities statewide and will apply to emissions of chlorofluorocarbons (CFCs), Hydrochlorofluorocarbons (HCFCs), and hydrofluorocarbons (HFCs). The rule, which goes into effect in 2012, will reduce emissions through a combination of facility registration, monitoring and repair, system retrofit and retirement, and recordkeeping and reporting.

Industry and NGOs

- **Coalition Calls on Leading Senators to Dedicate Allowances to Energy Efficiency.** A group of 300 organizations, including the American Council for an Energy-Efficient Economy and the Union of Concerned Scientists, sent a letter to Senators John Kerry (D-MA), Joe Lieberman (I-CT), and Lindsey Graham (R-SC) asking that the senators ensure that their evolving cap-and-trade proposal to require utilities to dedicate at least one-third of their allowance allocations to energy efficiency programs. The letter claimed that such a provision would raise approximately \$100 billion for energy efficiency investments, lowering consumer energy bills by \$300 billion. The letter also predicted that such a program would create 1 million jobs by 2020 in the construction and energy services sectors. The letter is available at: http://cdn.publicinterestnetwork.org/assets/ec7b4234fd1e853174752492feee16ff/One-Third-for-Electric-Efficiency_Sign-on-Letter-to-Kerry-Lieberman-Graham_FINAL.pdf.
- **CEI Threatens Suit Over Endangerment Finding.** The Competitive Enterprise Institute (CEI), a conservative advocacy organization, promised to file a lawsuit challenging what it characterized as EPA's "economy-crushing" endangerment finding. According to CEI, the lawsuit would claim that EPA's finding "ignored major scientific issues" and overlooked the controversy surrounding the unauthorized release of e-mails from the University of East Anglia's Climate Research Unit.

Studies and Reports

- **Poll Finds Support for Climate Bill With Job Link.** According to a poll conducted by Ipsos Public Affairs, 69% of Americans would support cap-and-trade legislation that cost them \$10 a month if it created a significant number of green U.S. jobs. 60% would still support the legislation if it cost \$25 a month. 70% said they believed climate change is real, and 61% believe that it is caused by the burning of fossil fuels. According to a separate poll by Rasmussen Reports, 41% of Americans agree with the EPA's finding that GHG emissions endanger public health and welfare; 41% disagreed and 18% were unsure.

International

- **International Climate Negotiations Begin in Copenhagen.** The international negotiations on a new climate change treaty began in Copenhagen, Denmark with representatives of nearly 200 nations in attendance. The dual-track negotiations have made a slow start in their first week, with

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negotiators as yet unable to resolve the many issues that have impeded progress leading up to the Copenhagen meetings. Delegates have introduced several draft texts but none has gained significant traction. Among the most significant drafts are a proposal by a group of small island states, which called for the new treaty to take the form of a stringent, successor version of the Kyoto Protocol; a treaty draft by the Danish government – that was leaked to the press – calling for emission targets for both developed and developing nations, while excluding only the least developed nations. In keeping with the recent history of the negotiations, delegates continue to disagree on an array of issues, including appropriate mitigation commitments for developed and major developing countries, the amount of climate change mitigation and adaptation financing, the legal form of a new agreement, and reforms to the existing market mechanisms in the Kyoto Protocol.

- **Japan, Indonesia Sign Climate Agreement.** Japan and Indonesia signed a climate agreement under which Japan will provide \$426 million in climate-related aid to Indonesia. The aid will take the form of a low-interest loan aimed at helping Indonesia reduce its GHG emissions. Indonesia is the world's third largest GHG emitter after China and the United States. The country's emissions come primarily from deforestation.

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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