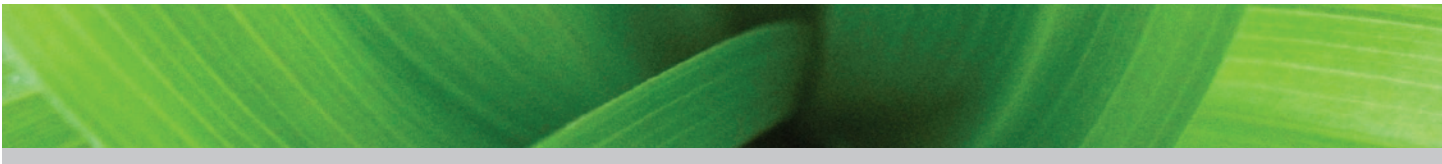


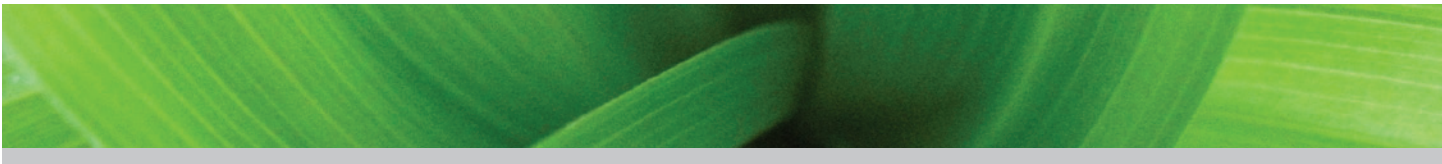
Top 10 U.S. Climate Law and Policy Events of 2009

Happy New Year! This is the season of top-ten lists, so Van Ness Feldman is doing its first-ever Top Ten U.S. Climate Change Law and Policy Developments of 2009 in lieu of the Weekly Climate Change Policy Update. In our view, these developments – which appear in roughly chronological order – were the key milestones of a momentous year in U.S. climate change policy.

- *Waxman-Markey Passes.* On June 26th, the House of Representatives voted 219 to 212 to pass H.R. 2454, the American Clean Energy and Security Act (ACES), marking the first time a body of the U.S. Congress has passed legislation to regulate greenhouse gas (GHG) emissions. The bill would cap GHG emissions from covered sources at 3% below 2005 levels in 2012, 17% below 2005 levels in 2020, and 83% below 2005 levels in 2050. Reps. Henry Waxman (D-CA) and Edward Markey (D-MA) proved willing to negotiate – at least a bit – on pretty much everything except the cap. Critical to passage was the power sector allowance allocation, and some 11th hour accommodations for the agriculture sector. (See June 30, 2009 Issue Alert, “House Passes Climate Change and Clean Energy Bill” at: <http://www.vnf.com/news-alerts-374.html>)
- *It's the Economy . . .* The ailing economy had a strong impact on U.S. climate politics in 2009. Double-digit unemployment dampened enthusiasm for climate legislation among Senate moderates in Midwestern states. Sagging jobs numbers also shaped policy preferences, i.e., for allocation to coal-reliant ratepayers, border measures to protect carbon-intensive industries, and greater use of offsets. It also replaced “climate change” and “cap-and-trade” with “green jobs” and “clean energy economy” in the lingua politico. Furthermore, the turmoil in commodity and mortgage markets that preceded the recession cast a shadow over the concept of “cap-and-trade” and pushed banking and financial markets reform ahead of climate change on the Senate legislative agenda.
- *Natural Gas, Natural Gas Everywhere.* In 2009, we learned that domestic reserves of natural gas are much more substantial than previously believed. These discoveries amplified talk of natural gas as a “bridge fuel,” which could ease the transition of the economy into carbon constraints. It also brought the natural gas industry roaring into the climate change legislative debate, introducing new players and policy proposals into the arena.
- *Kerry-Boxer Limpes out of EPW Committee.* Environment and Public Works Committee Chairman Barbara Boxer (D-CA) brought a somewhat more stringent version of the Waxman-Markey bill before her Committee. However, Republican members of the Committee decried the use of revised modeling from the Waxman-Markey bill in the Environmental Protection Agency’s cost analysis. They boycotted the mark-up (which prevented consideration of any amendments), and then declared the EPW-Democrats-endorsed bill dead on arrival. Many Democrats seemed to agree. (See November 6, 2009 Issue Alert, “Democrats Report Kerry-Boxer Cap-and-Trade Bill from Senate EPW Committee; Sen. Stabenow Introduces Offsets Bill” at: <http://www.vnf.com/news-alerts-410.html>)



- *Kerry, Graham, and Lieberman Grab for Leadership Mantle.* On October 11th, Senators Lindsey Graham (R-SC) and John Kerry (D-MA) published an op-ed in the *New York Times* listing five ingredients needed for a successful Senate climate bill. Joined by Senator Joe Lieberman (I-CT), this bipartisan trio has set out to construct a bill and build alliances that can garner 60 votes in the Senate. They have thus far released little beyond the initial list: a market-based system, investment in nuclear power, incentives for carbon capture and sequestration, domestic oil and gas exploration, and border measures to protect U.S. industry.
- *Torts Anyone?* The Senate may have struggled to focus on climate change, but the courts have not. In *Comer v. Murphy Oil*, the 5th Circuit ruled that private plaintiffs can sue major GHG emitters for damages based on financial harms allegedly resulting from climate change. (See October 26, 2009 Issue Alert, “Fifth Circuit Reinstates State Class Action Lawsuit Seeking Global Climate Damages” at: <http://www.vnf.com/news-alerts-402.html>). In *Connecticut v. AEP*, the 2nd Circuit held that state governments and private land trusts could proceed with a suit under the federal law of public nuisance to obtain an injunction limiting the GHG emissions of the nation’s largest electric utilities. (See September 24, 2009 Issue Alert, “Second Circuit Reinstates Lawsuit Claiming GHG Emissions from Six Utilities Constitute Nuisance Under Federal Common Law” at: <http://www.vnf.com/news-alerts-390.html>). To be sure, the plaintiffs still have many hurdles yet to clear before winning a verdict (and one significant district court decision, in *Kivalina v. Exxon Mobil*, went against the plaintiffs). However, these two circuit court decisions sent a message that is still reverberating in the offices of corporate counsel: the doors of the courts are open for climate change litigation.
- *EPA Releases Regulatory Tiger, Attempts to Hold Tail.* EPA took a series of actions in 2009, including proposing and finalizing a finding that climate change endangers the public health and welfare, which put the agency on course to regulate GHG emissions under the Clean Air Act. The endangerment finding marked a long-delayed response to the Supreme Court’s landmark 2007 decision in *Massachusetts v. EPA*, and obligated the agency to impose tailpipe GHG standards on motor vehicles – standards the agency proposed in September 2009 as part of a groundbreaking agreement with major automobile manufacturers and the State of California. At the same time, with its proposed “Tailoring Rule,” EPA sought to dramatically reduce the number of stationary GHG sources that would be regulated under other provisions of the Clean Air Act. For the Obama Administration, the ideal outcome would be achieving some reductions from large emitters while lighting a fire under Congressional efforts to develop comprehensive legislation. But the Tailoring Rule could unravel in the courts – saddling millions of small sources with carbon regulation and creating an administrative nightmare. EPA’s actions might not be enough to prod Congress, or could be too much and create a backlash. (See December 9, 2009 Issue Alert, “EPA Finalizes Endangerment Finding for Greenhouse Gases” at: <http://www.vnf.com/news-alerts-418.html>; September 21, 2009 Weekly Climate Change Policy Update at: <http://www.vnf.com/news-alerts-389.html>; and October 5, 2009 Weekly Climate Change Policy Update at: <http://www.vnf.com/news-alerts-395.html>).
- *States: Still Here.* In December, California loudly cleared its throat and reminded everyone that, even if the federal climate policy stalls, the state is still on course to implement a comprehensive greenhouse gas regulatory program. The California Air Resources Board released draft regulations on November 24th to carry out the state’s A.B. 32 law. The draft regulations can be found at: <http://www.arb.ca.gov/cc/capandtrade/meetings/121409/pdr.pdf>. And the member states of the Regional Greenhouse Gas Initiative,



plus Pennsylvania, rang in the New Year by committing to enact a low-carbon fuel standard to address transportation-related emissions in the Northeast.

- *Cantwell and Collins Introduce Alternative.* December also saw the introduction of the Carbon Limits and Energy for America's Renewal (CLEAR) Act, co-sponsored by Senators Maria Cantwell (D-WA) and Susan Collins (R-ME). Allowances would be distributed entirely through an auction; the bill would return 75% of the revenues to taxpayers in the form of dividends. Only regulated entities could participate in trading. There would be no offsets, but there would be a price collar. The CLEAR Act appears to be responsive to concerns that other initiatives have been too complicated, politicized, and vulnerable to the whims of a marketplace. However, what does the bill do to address the concerns of Midwestern Senators that their states will bear a disproportionate cost burden from greenhouse gas regulation? And would the bill be able to pass without significant allocations of allowance revenue to key constituencies such as electric utilities and energy-intensive manufacturers, or new incentives for nuclear power and off-shore drilling? The answers to these questions remain unclear.
- *Copenhagen Discord.* The good news from Copenhagen: first-time emission reduction commitments from major developing countries, a package of financial assistance for least-developed countries, and significant progress on rules of the road for activities to reduce emissions from deforestation and degradation. The very bad news: China played hard ball, beating back independent international verification of its emission reductions (a must-have for some Senate moderates). Without Congressional passage of climate legislation, the Obama Administration came with a weak hand – but nonetheless played a critical role in wresting an accord from the wrangling factions. For many observers, the Copenhagen talks revealed the weaknesses of 193-nation talks as a forum for constructing an international climate change regime. The Copenhagen Accord can be found at: http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_cph_auv.pdf.

FOR ADDITIONAL INFORMATION

With 80 professionals in Washington, DC and Seattle, WA, Van Ness Feldman is recognized as a leading law and policy firm in the areas of traditional and renewable energy regulation and project development, climate change regulation and greenhouse gas emissions trading, environmental and natural resources regulation, and infrastructure development. Van Ness Feldman's Climate Change practice has received top recognition by *Chambers USA* and *Chambers Global*. 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.

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