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Climate Change Policy Update Weeks of Dec. 21, 2009 - Jan. 08, 2010

Commentary: *The interplay between EPA regulation and Congressional action is dominating the start of the year. With its Tailoring Rule, the Agency is hoping to limit the reach of pending stationary source regulation to large sources only – and maybe create just enough industry agitation to inspire a legislated regulatory program. But EPA’s effort could easily unravel and lead to a backlash. The Tailoring Rule rests on vulnerable legal grounds, and even if it stands, state agencies may not be able to implement it, leading to the kind of permitting bottleneck the Agency is seeking to avoid. Under that scenario, the Agency certainly might inspire a Congressional reaction, but not the kind it is seeking . . . Now comes Senator Lisa Murkowski (R-AK). She has made clear her intention to address the EPA regulatory train, and Senator Lindsey Graham (R-SC) has offered his support. Accordingly, two central Republican votes are engaged on the issue. However, what Senator Murkowski wants to do – and via what legislative vehicle – are not yet clear. Her options range across a broad spectrum. She could follow the approach of Rep. Pomeroy by seeking to derail EPA’s authority to regulate Clean Air Act regulation entirely. However, the probability such a bill or amendment would be enacted is exceedingly remote. Alternatively, Senator Murkowski could delay rather than derail. She could make a bid to postpone the effective date of stationary source regulation, and codify the Tailoring Rule. This approach would allow time for Congressional action – or, failing that, make it possible for EPA and the states to put in place a tailored regulatory program.*

Executive Branch

- **Obama: Disappointment with Copenhagen is “Justified.”** In an interview with PBS before the holidays, President Obama said that “people are justified in being disappointed about the outcome” of December’s international climate change summit in Copenhagen, which the President acknowledged did not result in an agreement on binding greenhouse gas (GHG) emission reduction targets. However, the President emphasized that the agreement did include a commitment by fast-growing developing countries to reduce their emissions, and that this outcome was better than a “complete collapse . . . in which nothing at all got done and would have been a huge backward step.”
- **CEQ to Issue Guidance on Inclusion of GHGs in NEPA Analyses.** In a letter to Senators James Inhofe (R-OK) and John Barrasso (R-WY), White House Council on Environmental Quality (CEQ) Chairman Nancy Sutley announced that the CEQ is preparing to issue guidance to federal agencies on the incorporation of climate change considerations into environmental impact analyses. Such analyses are required for all major federal actions under the National

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Environmental Policy Act of 1969, which is administered by CEQ. Sutley's letter stated that "NEPA compels Federal agencies to consider environmental effects before undertaking significant actions or policies" and that "CEQ sees no basis for excluding greenhouse gases from that consideration." NEPA does not require actual mitigation or avoidance of environmental impacts, a point also emphasized in the letter.

- **EPA Agrees to Prepare GOP-Requested Climate Bill Analysis.** Settling a dispute that had held up the confirmation of a key nominee, the Environmental Protection Agency (EPA) agreed that it would model additional scenarios utilizing more pessimistic assumptions in its next economic analysis of cap-and-trade legislation pending before the Senate. The request for the new modeling scenarios had been spearheaded by Sen. George Voinovich (R-OH), who sent a letter to EPA on Nov. 3 demanding that the agency model the costs of the legislation assuming no availability of international offsets and delayed development of nuclear power plants, biomass, and carbon capture and sequestration (CCS). Sen. Voinovich also asked the agency to model the impact of US climate policy on global GHG emissions and concentrations. In response to the agency's concessions, Sen. Voinovich agreed to release a procedural hold on Robert Perciasepe, President Obama's nominee for Deputy EPA Administrator.
- **Update on Administration Appointments and Personnel.** The Senate confirmed Robert Perciasepe as Deputy Administrator of EPA, and John Norris as a Commissioner of the Federal Energy Regulatory Commission.

Congress

- **Pomeroy Attempts to Block EPA GHG Regulation.** Rep. Earl Pomeroy (D-ND) has introduced the Save Our Energy Jobs Act (H.R. 4396), a bill that would define "air pollutants" under the Clean Air Act to exclude the major greenhouse gases – CO₂, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. The bill's findings state that the EPA should not have the authority to regulate GHG emissions unless explicitly authorized by Congress to do so.
- **Murkowski Will Have Amendment Opportunity on January 20.** The Senate leadership has reached an agreement that will allow Senator Lisa Murkowski (R-AK) to offer an amendment later this month to a bill increasing the statutory limit on the public debt. Sen. Murkowski has said that she wants to address EPA's regulation of GHG emissions under the Clean Air Act. According to her spokesman, Sen. Murkowski has not decided whether to offer an amendment that would prohibit EPA from regulating GHG emissions for a year or to try to legislatively veto EPA's finding that GHG emissions endanger public health and welfare. Others speculate that the amendment could seek to limit the reach of EPA's endangerment finding.
- **Congress Divided on Climate Bill Prospects.** Senator Jeff Bingaman (D-NM) told reporters that Congress is unlikely to pass a climate bill this year, but that EPA regulation of GHG emissions could goad Congress to act. Rep. Henry Waxman (D-CA) said he believes that final passage of a bill is likely this year based on conversations with key players in the Senate. Speaking at a climate change conference in Columbia, South Carolina, Sen. Lindsey Graham (R-SC) reiterated his commitment to work on a bipartisan climate change bill. The Lexington County Republican Party subsequently censured Sen. Graham for his efforts, contending that cap-

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and-trade legislation is in direct contradiction with the Republican principle of free markets. Sen. Graham described his Lexington County opponents as “fringe elements.”

- **Republicans Request Agriculture Sector Impact Modeling Revisions.** On December 17th, Sen. Saxby Chambliss (R-GA) and Rep. Frank Lucas (R-OK), ranking members of the Senate and House Agriculture Committees, wrote to USDA Secretary Tom Vilsack in response to Sec. Vilsack’s comments questioning projections of afforestation of agricultural land under a cap-and-trade bill by the FASOM model, which has been used in EPA’s analysis of climate legislation. The Congressmen asked Sec. Vilsack to consult with EPA and report to the House and Senate Agriculture Committees on the problems with the economic model. The Congressmen also wrote to EPA Administrator Lisa Jackson to ask that EPA correct any flaws in the model and perform “a more current and complete analysis” of the House and Senate climate bills, and brief the respective Agriculture Committees on the results. Sen. Vilsack said that USDA will work with EPA to revise the model and adjust EPA’s economic analysis of H.R. 2454.

Judicial

- **New York Settles Constitutional Challenge to RGGI.** New York State has reached an agreement with three companies that challenged the state’s participation in the Regional Greenhouse Gas Initiative (RGGI), a regional cap-and-trade program limited to CO₂ emissions from the power sector in ten Northeastern states. Under the agreement, the plaintiffs – Indeck Energy Services, Brooklyn Navy Yard Cogeneration Partners, and Selkirk Cogen Partners – agreed to abandon their claims in exchange for a commitment by Con Edison to reimburse the plaintiffs for allowance expenses. As part of the deal, the New York State Energy Research and Development Authority will compensate Con Edison by investing in smart grid projects and other infrastructure that will benefit ratepayers. The settlement allows New York State to proceed with plans to spend the \$181 million the state has collected thus far through RGGI allowance auctions, which had been frozen as a result of the lawsuit.
- **Numerous Groups File for Review of EPA GHG Rules.** EPA’s two most recent GHG rules have drawn a number of legal challenges in the Court of Appeals for the District of Columbia Circuit. The American Chemistry Council, American Petroleum Institute, the Fertilizer Institute, the Energy Recovery Council, and the Environmental Defense Fund have all filed petitions for review of the agency’s rule requiring monitoring and reporting of GHG emissions from power plants and most large industrial facilities. At the same time, the agency’s finding that GHG emissions endanger the public health and welfare – a precursor to regulation of GHGs under the Clean Air Act – has been challenged by a variety of agriculture, mining, and energy interests, including the Coalition for Responsible Regulation, Massey Energy Company, and Alpha Natural Resources. More petitions for review of the endangerment finding are likely to be filed before the February 16, 2010 deadline.

States and Cities

- **Eastern States Sign Low Carbon Fuel MOU.** Governors from the 10 Regional Greenhouse Gas Initiative (RGGI) states plus one RGGI observer state signed a memorandum of understanding (MOU) to develop a low-carbon fuel standard for the transportation sector. Under the MOU, the states will cooperate to analyze low-carbon fuel options and to establish goals for

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the carbon intensity of transportation fuels. The states will also consider establishing similar low-carbon fuel standards for industrial processes, building heating, and electricity generation.

Industry and NGOs

- **Conservation Groups Oppose Inclusion of Public Lands in Offsets Program.** The Natural Resources Defense Council, Wilderness Society, Sierra Club, Earthjustice, Defenders of Wildlife, and the National Center for Conservation Science and Policy sent a joint letter to Interior Secretary Ken Salazar and Agriculture Secretary Tom Vilsack rejecting the notion of permitting offset projects on public lands as part of a national cap-and-trade program. Administration officials expressed interest in such a proposal last fall, but did not endorse the concept. According to the groups, allowing offsets on public lands would undermine the market for offsets on private lands, depress the price of offsets generally, and create potential liability for public lands agencies. The letter also questioned whether such projects would be permanent and additional, and whether they would hinder the mixed-use objectives and management flexibility of public lands. The letter is available at <http://wilderness.org/content/pr-climate-20100106>.

Studies and Reports

- **RFF Study Finds LDC Allocation Inefficient.** An analysis by researchers at Resources for the Future compared two approaches to using allowance allocations to moderate impacts on electricity consumers: (1) giving local electricity distribution companies (LDCs) free allowances and requiring them to distribute the allowance value to ratepayers; and (2) auctioning allowances and recycling revenues to households through a per capita dividend. The study found that, compared to the per capita dividend approach, the LDC approach could raise allowance prices by as much as 29 percent and increase the average annual consumer loss per household by \$157, with the extent of the loss determined by how LDCs passed the value onto their customers. The analysis also concluded that the same distributional goals could be achieved at less cost by using a per capita dividend combined with a targeted allowance allocation to LDCs for residential customers. The study is available at <http://www.rff.org/RFF/Documents/RFF-DP-09-43.pdf>.
- **CRS Study Critical of REDD Provisions.** A Congressional Research Service analysis of provisions in the House and Senate climate bills related to Reducing Emissions from Deforestation and Forest Degradation (REDD) in developing countries criticized the provisions as lacking penalties for failing to achieve targeted emission reductions and not sufficiently elucidating important terms and criteria. The study also notes concerns with the use of offsets in the context of REDD. The study is available at <http://opencrs.com/document/R40990/>.
- **Study Suggests Higher Climate Sensitivity.** A new model of CO₂ effects on global temperatures suggests that during the sustained warming period 4.5 million years ago, CO₂ levels were similar to current levels but average global temperatures were between 2 and 3 degrees Celsius higher. The study was based on climate records derived from ancient sediment collected from the ocean floor, and designed to examine long-term feedbacks to atmospheric GHG concentration changes. According to lead author Mark Pagani, the evidence suggests that Earth will experience a couple of degrees of continued warming even if current CO₂ levels are held steady. The study is available at <http://www.nature.com/ngeo/journal/v3/n1/abs/ngeo724.html>.

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International

- **Group of Copenhagen Accord Adopters Grows to 49.** In response to a request sent to all 193 nations that attended December's international climate change meetings in Copenhagen, Denmark, 49 nations have communicated to the United Nations that they have adopted the Copenhagen Accord. The list of adopters primarily includes developed nations and major developing nations China and India. A small number of lesser developed nations, including Bolivia, Cuba, Tuvalu, Sudan and Venezuela, have rejected the accord due its perceived lack of stringency and the exclusive nature of its development.
- **Bolivia to Host Alternative Climate Change Summit.** Bolivian President Evo Morales announced that Bolivia will host an alternative climate change summit in April. The summit will gather heads of state, scientists and others prior to the next Conference of the Parties to the Kyoto Protocol in Mexico at the end of the year. President Morales said that the summit is a response to the failure of the United Nations-sponsored climate change meetings in Copenhagen and will work towards creating an international court for environmental crimes and spotlighting industrialized nations' "climate debt" to poor countries. Bolivia is a member of the "ALBA" alliance, which also includes Cuba, Ecuador, Nicaragua, and Venezuela. During COP-15, the ALBA opposed the Copenhagen Accord, and generally called for deep and binding emission reduction commitments from major economies and substantial financial assistance to developing countries.
- **Brazil Commits to 39 Percent Reduction from Projected 2020 Emissions by 2020.** Brazilian President Luiz Inacio Lula da Silva signed a law that commits Brazil to reduce its GHG emissions 39 percent from 2020 projections by 2020. The majority of the emission reductions will be achieved through reductions in deforestation, with other significant reductions coming from the agriculture sector.

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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