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Climate Change Policy Update Week of June 14-18, 2010

Commentary: *The President is bringing together a small bipartisan group of Senators this week to further discuss energy/climate legislation . . . In comments over the weekend, Chief of Staff Rahm Emanuel expressed interest in seeing a power-sector-only cap-and-trade bill. Sen. Lieberman may oblige . . . Last week's meeting of the Senate Democratic Caucus was long on presentation, but short on decision. They will meet again this week to attempt to reach consensus on a course of action. Majority Leader Reid wants to bring a bill(s) to the floor of Senate starting the week of July 12 . . . According to EPA, the Kerry-Lieberman bill would cost U.S. households an average of \$79 to \$146 per year, or 22 to 40 cents per day. . . . The Majority Leader reportedly has committed floor time for Sen. Rockefeller's bill that would impose a two-year suspension on any EPA Clean Air Act regulation of GHG emissions from stationary sources.*

Executive Branch

- **White House to Host Meeting With Senators on Climate and Energy Policy; Chief of Staff Indicates Potential Support for Utility-Only Cap-and-Trade Program.** The White House continued efforts to reach out to the public and to key Senators to chart a path forward for climate change and clean energy legislation in this Congress:
 - Following his first Oval Office address on June 15, which focused primarily on the federal government's response to the BP oil spill, the President placed calls to Sens. John Kerry (D-MA) and Richard Lugar (R-IN). The White House also announced plans for the President to meet with a bipartisan group of Senators on June 23 to discuss the legislation. According to a report in *Politico*, Sens. Kerry, Lugar, Joseph Lieberman (I-CT), Debbie Stabenow (D-MI), Judd Gregg (R-NH), Lisa Murkowski (R-AK), Maria Cantwell (D-WA), and Jeff Bingaman (D-NM) are expected to attend. White House Press Secretary Robert Gibbs said that "the President's direction on energy is very similar to the direction that is in the Kerry-Lieberman bill, and the President feels strongly that including a component to deal with climate is important in comprehensive energy reform."
 - In an interview with the *Wall Street Journal*, White House Chief of Staff Rahm Emanuel said that this Wednesday's meeting would include a discussion of a "wide range of ideas" and said that the notion of enacting a narrowly focused cap-and-trade program that would only include electric utilities would be "welcomed."

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- President Obama's first Oval Office address reaffirmed his support for clean energy legislation, and commended the House of Representatives for passing a "strong and comprehensive energy and climate bill" last year, but also said he was "happy to look at other ideas and approaches from either party so long as they seriously tackle our addiction to fossil fuels." The President's speech did not discuss the issue of climate change or endorse any specific policy mechanisms. The text of the President's remarks is available at <http://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill>.
- **DOE to Provide Over \$600 Million in Grants for CCS Projects.** In an effort to test large-scale carbon capture and sequestration (CCS) at industrial facilities, the Department of Energy (DOE) awarded \$612 million in grants for three demonstration projects at an ethanol plant, a methanol plant, and an oil refinery facility. The grants were funded through the American Recovery and Reinvestment Act, and will be matched by \$368 million in private funds. Leucadia Energy LLC and Denbury Onshore LLC will use \$260 million for a new methanol plant in Lake Charles, LA; Air Products & Chemicals Inc. and Denbury Onshore LLC will use a \$253 million grant to capture CO₂ from a Valero Energy Corp. refinery in Port Arthur, TX; and Archer Daniels Midland Corp. will use a \$99 million grant to capture CO₂ from an existing ethanol plant in Illinois. The Texas and Illinois projects are expected to become operational in late 2012, and the Louisiana project is planned to come online in 2014.

Congress

- **Democrats Still Mulling Energy and Climate Approach.** At a Democratic caucus meeting, Senators heard about competing approaches to energy and climate legislation from: Sen. Jeff Bingaman (D-N.M.), whose bill creates a national renewable energy standard but does not cap greenhouse gas (GHG) emissions; Sen. Maria Cantwell (D-WA), who favors a "cap-and-dividend" approach; Sens. John Kerry (D-MA) and Joe Lieberman (I-CT), who have proposed comprehensive energy-climate legislation covering electricity generation, industrial sources, and transportation fuels; and Sen. Barbara Boxer (D-CA), who co-authored an earlier comprehensive climate-energy bill with Sen. Kerry. The caucus did not have much time to discuss the competing proposals because the presentations took up the allotted time, but will gather again next week. Majority Leader Harry Reid (D-NV) said the meeting showed that "the Democratic caucus is ready to work" on "clean energy legislation." "[P]ricing carbon is part of the discussion," he told reporters after the meeting, though he would not say what would be in the legislation. "There's not a unanimous consensus on the need to price carbon," said Sen. Tom Carper (D-DE) after emerging from the meeting. "There's a unanimous consensus on the need to move us towards energy independence, away from fossil fuels, away from petroleum." Maj. Leader Reid plans to bring an energy bill to the Senate floor after the July 4 recess – potentially during the week of July 12.
- **EPA "Time-Out" Bill to Get Floor Vote Soon.** Senator Jay Rockefeller (D-WV) has been promised a vote on his bill (S. 3072), which would bar the Environmental Protection Agency (EPA) from regulating GHG emissions from stationary sources under the Clean Air Act for two years. In a statement, Sen. Rockefeller said: "The Senate should be focusing on the immediate issues before us – to suspend EPA action on greenhouse gas emissions, push clean coal technologies, and tackle the Gulf oil spill. We need to set aside controversial and more far-reaching climate proposals and work right now on energy legislation that protects our economy,

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protects West Virginia and improves our environment.” The bill is available at <http://hdl.loc.gov/loc.uscongress/legislation.111s3072>.

- **Congressmen, Industry Stakeholders Express Concern Over Lack of Biomass Exclusion in Tailoring Rule.** In a pair of letters to EPA Administrator Lisa Jackson, 63 lawmakers and over 150 biomass-related businesses and trade associations expressed concern over EPA’s coverage of biomass combustion emissions from the Clean Air Act (CAA) Prevention of Significant Deterioration and Title V permitting programs in the recently finalized Tailoring Rule. Both letters noted past precedents recognizing the carbon neutrality of biomass, including the Department of Energy greenhouse gas accounting protocols; EPA’s mandatory greenhouse gas reporting rule; the studies of the Intergovernmental Panel on Climate Change; and Congressional treatment of biomass as a renewable energy source in recent legislation. The Congressional letter also noted that the draft version of the Tailoring Rule implied a biomass exclusion, citing EPA’s Inventory of U.S. Greenhouse Gas Emissions and Sinks, which excludes emissions of “biogenic origin.” Both letters requested that EPA stay CAA regulation of biomass combustion emissions while an EPA joint review of the GHG benefits of bioenergy with the U.S. Department of Agriculture (USDA) is still pending. The Congressional letter also requested that EPA reconsider its treatment of biomass under the Tailoring Rule and explain in detail its plans for reviewing bioenergy GHG benefits in conjunction with the USDA.

Judicial

- **D.C. Circuit Holds Challenges to Endangerment Finding in Abeyance Until August.** The United States Court of Appeals for the District of Columbia Circuit decided on June 16 to grant an unopposed motion by the Environmental Protection Agency (EPA) to hold several pending challenges to the agency’s “endangerment finding” in abeyance until August 16, 2010 at the latest. EPA requested the deferral so that it could first address several administrative petitions for reconsideration of the endangerment finding. The abeyance will last until August 16, 2010 or fourteen days after EPA issues a decision on several pending requests for the agency to reconsider the finding – whichever date arrives first. In the same decision, the D.C. Circuit also denied a request by the petitioners to reopen the record for the case and adduce additional evidence. Finalized in December 2009, the endangerment finding concluded that GHG emissions from motor vehicles contribute to an endangerment of public health and welfare through their impact on climate change. Under the Clean Air Act, the finding is a legal precursor to regulation of GHG emissions from motor vehicles.
- **Environmental Groups Seek EPA Regulation of Nonroad Vehicle Emissions.** The Center for Biological Diversity, the Center for Food Safety, Friends of the Earth, the International Center for Technology Assessment, and Oceana brought suit in the United States District Court for the District of Columbia to compel EPA to regulate GHG emissions from aircraft, ships, and nonroad engines under the Clean Air Act. These nonroad sources represent 24 percent of U.S. mobile emissions and 10 percent of overall U.S. emissions. The groups seek a determination by EPA that those sources cause or contribute to an endangerment of public health and welfare. Between 2007 and 2008, three petitions were filed with EPA requesting similar action; however, the agency has yet to take action on those petitions. The complaint is available at http://www.earthjustice.org/library/legal_docs/mobile-source-ghg-petitions-complaint-10-06-11-final.pdf.

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States and Cities

- **Ontario and Quebec Commit to Continue Development of WCI Trading Program.** After passing enabling legislation last year, the Canadian provinces of Ontario and Quebec agreed to continue the process of implementing a cap-and-trade program under the Western Climate Initiative. The provinces committed to developing regulations for the regional trading program and working with other WCI participants to create the infrastructure and administrative capabilities necessary to support the program. The decision, made by the Cabinets of the two provinces during a joint session, follows statements in recent months by several U.S. state participants in WCI indicating that they are unlikely to participate during the program's first compliance period.

Industry and NGOs

- **ACEEE Finds Kerry-Lieberman Bill Omits Significant GHG Reduction Opportunities.** The American Council for an Energy Efficient Economy (ACEEE), a prominent advocacy organization for energy efficiency policies, issued a report concluding that the Kerry-Lieberman climate change and energy bill could achieve far greater GHG emission reductions with enhanced energy efficiency provisions. The report includes the results of an "enhanced" modeling scenario in which the bill would include, among other things: a requirement that electric utilities meet 10 percent of their demand through energy efficiency savings; a requirement that electric and natural gas utilities invest one-third of their allocated allowances in energy efficiency programs; a revolving loan fund for energy efficiency, which would be funded with one-third of the allowances otherwise allocated to energy-intensive trade-exposed industries; and increased allowance allocations for state renewable energy and energy efficiency programs. This combination of enhancements to the Kerry-Lieberman bill would by 2030, the report argues, result in household savings of \$448 per year, create a net increase of 360,000 jobs, and cut GHG emissions by 1.1 billion tons of CO₂e per year, with minimal impact on gross domestic product. The report is available at <http://aceee.org/pubs/e103.htm>.
- **AAM Attacks Transportation Sector Provisions of Lugar Bill.** A major association of automakers, the Alliance of Automobile Manufacturers (AAM), issued a statement attacking provisions in Sen. Richard Lugar's (R-IN) recently-released energy bill that would incentivize purchases of fuel efficient automobiles and require 4 percent annual improvements in Corporate Average Fuel Economy (CAFE) standards. AAM said that the fuel economy provisions would derail a joint EPA-National Highway Traffic Safety Administration process for establishing coordinated fuel economy and GHG standards for motor vehicles. AAM also argued that the bill's proposed system of vehicle surcharges for fuel-inefficient vehicles would unfairly penalize drivers who depend on heavy duty vehicles.

Studies and Reports

- **EPA Analyzes Cost and Impact of the American Power Act.** An analysis released by the Environmental Protection Agency determined that the American Power Act (APA), the Kerry-Lieberman bill, would cost U.S. households an average of \$79 to \$146 per year, or 22 to 40 cents per day. EPA projected that carbon allowance prices would be \$16-\$17 per ton in 2013 and \$23-

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\$24 per ton in 2020. The report also found that the estimated costs and effects of the APA are very similar to those of the American Clean Energy and Security Act of 2009 (H.R. 2454), passed by the House of Representatives in June of 2009. EPA concluded that the APA provided slightly more price certainty due to its cost containment provisions, but at a slightly higher overall cost. EPA also determined that generous offset usage limits and offset supply have a strong effect on overall cost impacts for both bills. For an overview of the APA, see May 13, 2010 Issue Alert at: <http://www.vnf.com/news-alerts-462.html>. A copy of the EPA report is located at http://www.epa.gov/climatechange/economics/pdfs/EPA_APA_Analysis_6-14-10.pdf.

- **IEA Reports on CCS in Preparation for G8 Conference.** The International Energy Agency (IEA) reports that better cooperation between industry and government and a broadly-supported international agreement on a global response to climate change will be necessary to achieve a 2008 Group of Eight (G8) goal of broad carbon capture and storage (CCS) deployment by 2020. The report also surveys 80 CCS projects in various states of development around the world, and finds that 100 CCS projects must be deployed by 2020 in addition to other mitigation efforts to avoid a significant increase in global average temperatures. Approximately half of the projects must be in developing countries, according to the report, requiring close cooperation between developed and developing nations. A copy of the IEA report is located at http://www.iea.org/papers/2010/ccs_g8.pdf.
- **OECD Calls 2009 UN Climate Summit GHG Emissions Targets Insufficient.** The Organization for Economic Cooperation and Development (“OECD”) issued a paper on the cost and effectiveness of the GHG emission reduction targets associated with the Copenhagen Accord. The report found that the pledges would reverse the trend of growing emissions by 2020, but are not aggressive enough to put the world on a pathway to limit average global temperature rise to 2°C. That target has been identified by the Intergovernmental Panel on Climate Change as necessary to reduce the risk of catastrophic climate change. The OECD report also finds that linking the emission reductions programs of different countries and use of offsets would significantly reduce costs. The costs of emission reductions are also small compared to projected economic growth, according to the report, and “substantially less than most estimates of the costs of inaction.” A copy of the OECD report is located at <http://www.oecd.org/dataoecd/6/5/45441364.pdf>.

International

- **NGO Alleges Gaming of CDM.** CDM Watch, an NGO collaboration that scrutinizes the Clean Development Mechanism (CDM), has alleged that certain facilities that manufacture a refrigerant called HCFC-22 have kept production at levels higher than business-as-usual solely to earn more credits for the associated destruction of a by-product called HFC-23, a very powerful greenhouse gas. HFC-23 destruction CDM projects at nineteen facilities have generated nearly half of the CDM credits issued since the establishment of the mechanism, although such projects have been giving way to renewable energy projects and other types of projects for some time. No new HFC-23 destruction projects are expected, and according to *Point Carbon*, the crediting period for most already-registered projects will expire around 2012. However, some projects may seek renewal of their crediting period. CDM Watch has asked the CDM Executive Board, which is meeting between June 21-25, to lower the cap on crediting for new or renewed projects substantially. Under the Waxman-Markey and Kerry-Lieberman bills, it would not be possible to

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use any credits from HFC-23 destruction projects for compliance in a U.S. cap-and-trade system. The CDM Watch submission to the CDM Executive Board is available at <http://www.cdm-watch.org/?p=979>.

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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