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## Climate Change Policy Update Week of June 28 - July 2, 2010

**Commentary:** *In last Tuesday's meeting with a bipartisan collection of Senators, President Obama pushed for legislation with a carbon price, but did not endorse any particular bill or design . . . Republican Senators Alexander and Murkowski (previous supporters of legislation with a carbon price) stood firmly against an emissions cap. Senator Snowe, on the other hand, called for a utility-sector-only cap-and-trade program . . . Senator Bingaman announced he had a draft for such a bill under construction – but expressed doubt about its chances for success this year. Will we see a Bingaman-Snowe bill? . . . EPA will reconsider how GHG emissions from biomass are treated for purposes of the “tailored” Prevention of Significant Deterioration program . . . A group of major investors and technology companies wants assurances that any Senate energy/climate bill include provisions establishing a “Clean Energy Deployment Administration (CEDA) to finance innovative clean energy projects.*

### Executive Branch

- **At White House Meeting, Obama Supports Pricing Carbon.** At a 90-minute meeting at the White House on Tuesday, President Obama told a bipartisan group of about 20 Senators that he wanted Senate energy and climate legislation to place a price on carbon emissions. “The President reiterated his position that putting a price on carbon . . . is the right policy,” White House spokesman Robert Gibbs said after the meeting, calling it the best way to transition to a clean energy economy. However, Obama declined to endorse a specific approach to pricing carbon. Senators at the meeting included Majority Leader Harry Reid (D-NV), John Kerry (D-MA), Joe Lieberman (I-CT), Max Baucus (D-MT), Mark Begich (D-AK), Barbara Boxer (D-CA), Sherrod Brown (D-OH), Maria Cantwell (D-WA), Tom Carper (D-DE), Jeff Merkley (D-OR), Byron Dorgan (D-ND), Blanche Lincoln (D-AR), Lamar Alexander (R-TN), Susan Collins (R-ME), Judd Gregg (R-NH), Richard Lugar (R-IN), Lisa Murkowski (R-AK), Olympia Snowe (R-ME), and George Voinovich (R-OH). Senator Lindsey Graham (R-SC) did not attend, citing conflicting hearings with Gen. David Petraeus, the newly designated head of the military campaign in Afghanistan, and Supreme Court nominee Elena Kagan. For comments from the attending Senators, see “Senators Talk Utility-Only After Obama Meeting; Snowe Signals Potential Support” below.
- **EPA Finalizes Expansion of GHG Reporting Program, Proposes Confidentiality Rule.** Environmental Protection Agency (EPA) Administrator Lisa Jackson signed a final rule expanding the scope of EPA's mandatory greenhouse gas (GHG) reporting program to cover four new source categories. Underground coal mines, landfills, industrial wastewater, and magnesium

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production sites will be required to collect GHG emissions data as of January 1, 2011, and submit their first annual reports in March 2012. EPA originally proposed requiring reporting of GHG emissions from these sectors in March 2009, but refrained from including those requirements when it finalized the GHG reporting rule in October 2009. The final rule also announced that EPA would not include suppliers of coal in the reporting program, although EPA had proposed to do so in March 2009. In addition, EPA made a final decision not to provide distinct subparts for food processing and ethanol production, based on its determination that emissions from these sectors were already covered by existing subparts of the reporting rule. [*Erratum: The June 28, 2010 edition of the Climate Change Policy Update described this rulemaking as consisting of four separate final rules. The decisions described above were ultimately released as a single final rule.*] The final rule is available at [http://www.epa.gov/climatechange/emissions/downloads10/STF\\_Preamble-rule.pdf](http://www.epa.gov/climatechange/emissions/downloads10/STF_Preamble-rule.pdf).

EPA also announced a proposed rule that would make public all non-confidential data reported under the GHG reporting program. Non-confidential data would include the location and amount of GHG emissions, inputs to emissions equations, and emissions calculation methodology. Information not subject to disclosure would include production data not relevant to emissions calculations and some process-specific and vendor data. Owing to the large number of reporting facilities, EPA would not, as it customarily does under the Clean Air Act, make confidentiality determinations on a case-by-case basis. The proposed rule is available at [http://www.epa.gov/climatechange/emissions/downloads10/CBI\\_Preamble-rule.pdf](http://www.epa.gov/climatechange/emissions/downloads10/CBI_Preamble-rule.pdf).

- **EPA Will Address Biomass Regulation Under Tailoring Rule by July 2011.** Gina McCarthy, EPA's Assistant Administrator for Air and Radiation, stated that EPA will soon request public comment on how GHG emissions from biomass should be regulated under the Prevention of Significant Deterioration and Title V programs of the Clean Air Act. The agency's recently-finalized "Tailoring Rule" does not distinguish between biomass GHG emissions and other GHG emissions for purposes of determining whether stationary sources exceed emission thresholds under these CAA permitting programs. McCarthy says EPA will address the issue by July 2011, stating that Tailoring Rule requirements will not take effect for biomass combustion facilities until that date.

## Congress

- **Senators Talk Utility-Only After Obama Meeting; Snowe Signals Potential Support.** The Senators who attended the White House meeting on energy and climate legislation with President Obama (see description above) gave different assessments of the meeting and next steps:
  - Senator Olympia Snowe (R-ME) supported a utility-only cap-and-trade bill, telling reporters: "We have an established history with the power sector, and it gives us certainty that the business community is looking for uniformly across the nation, and it could be in the models that have already been out there, represented by Maine and the Northeastern states. . . . [The Regional Greenhouse Gas Initiative] could be a template for that approach, and possibly that is a way in which to build valid consensus on the question of pricing carbon in the future. It's also a way, frankly, to replace the EPA regulations. I mean, 'cause that's an imminent threat across the board."

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- Senator John Kerry (D-MA), who has been working since the fall on an economy-wide energy-climate bill with Senator Joseph Lieberman (I-CT) and others, said: “All of us have to compromise. We are willing to compromise further. We are prepared to scale back the reach of our legislation.”
  - Sen. Lieberman similarly signaled that he was open to a utility-only approach: “We don’t think it’s as effective as our bill in terms of reducing pollution, breaking dependence, and creating jobs. But it would be a big step forward. And I think, in the end, we want to get started.”
  - Sen. Judd Gregg (R-NH) said that he doubted he would support a utility-only bill, even if it had support from other Republican Senators. “Let’s do what we can do, which is a good, strong energy bill, which will have a big impact on climate if it’s done correctly,” he told reporters.
  - Sen. Jay Rockefeller (D-WV) said he is unlikely to support a utility-only bill, but had not seen any language. “Obviously, that targets West Virginia,” Sen. Rockefeller stated. “I don’t think you’re going to get sixty votes.”
  - Sen. Lamar Alexander (R-TN) said that Republicans remained united in their opposition to proposals to curb GHG emissions. “As long as we take a national energy tax off the table, there’s no reason we can’t have clean energy legislation,” he told reporters.
  - Sen. Lisa Murkowski (R-AK) stated: “A cap-and-trade proposal, a national energy tax, will not sell.”
  - Sen. Tom Carper (D-DE) said he “sensed a willingness to address carbon dioxide with respect to utilities. The question is, do we get started, or do we wait until next year to do something?”
- **Bingaman Has Utility-Only Bill Draft.** Energy and Natural Resources Committee Chairman Jeff Bingaman (D-NM) told reporters that he had “done some work” on a bill that would cap emissions from energy utilities, but was not sure how much further he would go with the draft. He said that his bill has “significant differences” from the economy-wide GHG mitigation bill developed by Senators Kerry and Lieberman with Senator Lindsey Graham (R-SC). Sen. Bingaman also told reporters that he was “dubious” that there were enough votes to pass a utility-only cap on emissions; he also expressed doubt that a lame duck session to combine the American Clean Energy and Security Act passed by the House with a less comprehensive yet-to-be-passed bill from the Senate would succeed.

## Judicial

- **New Challenges Filed to EPA GHG Rulemakings.** Gerdau Ameristeel Inc. and the American Iron and Steel Institute filed two separate petitions in the U.S. Court of Appeals for the District of Columbia Circuit requesting review of EPA’s recently finalized Tailoring Rule. The deadline for filing petitions for review of the Tailoring Rule is August 2, 2010. In addition, the Competitive Enterprise Institute and the Ohio Coal Association filed separate petitions for review of EPA’s first-ever GHG emission standards for motor vehicles, which were finalized April 1. The deadline for filing challenges to that rulemaking expires July 6, 2010.

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## States and Cities

- **California Bill Restricting GHG Trading is Blocked.** A California bill intended to limit the trading of GHG allowance credits has stalled in the state Assembly Natural Resources Committee, despite previously passing through the state Senate. Assembly member Wes Chesboro, chairman of the Natural Resources Committee, did not hold a vote on the measure during a June 28 hearing and said that the bill would not pass out of committee. Bill SB 1033, sponsored by Senator Rod Wright, would have given the California Air Resource Board (CARB) sole authority to distribute or sell GHG allowances and would only have allowed sales of allowances to entities regulated by the state's developing cap-and-trade program. The bill would also have limited trading of allowances to regulated entities only.

## Industry and NGOs

- **WWF Releases Evaluation of Third-Party Project Validation Under CDM.** The World Wildlife Fund and the German environmental consultancy Öko-Institute e.V. released a report evaluating the performance of five independent "Designated Operational Entities" (DOEs) responsible for determining the eligibility of offset projects proposed to be registered with the Clean Development Mechanism (CDM) of the Kyoto Protocol. DOEs also are responsible for verifying emission reductions achieved by registered projects. The report reviewed approximately 900 proposed CDM projects that had been positively validated by the DOEs to determine which were subsequently approved by the CDM's Executive Board. Of those projects, the report found that 36% were approved by the Executive Board without changes; 57% were ordered to be re-submitted with modifications; and 7% were rejected for CDM registration. The report attributed the high proportion of resubmissions to increased project scrutiny by the Executive Board; lack of clear guidance from the Executive Board; and problems with the technical capacity of the DOEs themselves. The report recommended that the Executive Board: develop online training tools and qualification exams for DOE personnel; develop more objective criteria to evaluate the additionality of CDM projects; enhance the transparency of project accreditations and reviews; and establish more stringent performance metrics and disciplinary procedures for DOEs. The report is available at [http://www.oeko.de/publications/reports\\_studies/dok/659.php](http://www.oeko.de/publications/reports_studies/dok/659.php).
- **Investors Send Letter to President Advocating Inclusion of CEDA in Energy Bill.** A group of approximately forty investors, entrepreneurs, and CEOs – including Google, Inc. – sent a letter to President Obama arguing that any Senate climate and energy bill should include the establishment of a Clean Energy Deployment Administration (CEDA) to finance innovative clean energy projects. The proposal was included in the energy bill introduced by Sen. Jeff Bingaman (D-NM) and reported from the Senate Energy and Natural Resources Committee in June 2009. The CEDA also is an element of the Waxman-Markey bill (the American Clean Energy & Security Act), which passed the House in June 2009. The letter states that: "to create high-paying jobs now, we need to enact the Senate's version of CEDA now. Venture capital funds and other private investors are ready to invest in clean energy entrepreneurial companies today if they know that the government is poised to help finance the scale-up of these companies' technologies when they are ready to build their first commercial facilities tomorrow."

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## Studies and Reports

- **Penn State Clears Professor Mann of Research Misconduct.** In its final report, a Pennsylvania State University (PSU) Investigatory Committee unanimously cleared PSU professor and climatologist Michael Mann of committing any research misconduct. PSU decided to examine Mann's work after he was connected to last fall's "Climategate" controversy, during which documents obtained from the University of East Anglia's (UEA) Climatic Research Unit – including documents prepared by Mann – were alleged to show data manipulation and suppression of climate research. In a February report, the Investigatory Committee cleared Mann of charges of falsifying data; withholding or destroying e-mails or data related to the 2007 report of the Intergovernmental Panel on Climate Change; and misusing "privileged or confidential information available to him in his capacity as a scholar." However, the Committee also decided to investigate further whether his research seriously deviated from accepted practices within the academic community. The final report cleared him of the final charge. Mann has been cleared of any wrongdoing in other investigations by the UEA and the U.K. Parliament committee, but still faces a civil investigative demand by Virginia's Attorney General, Ken Cucinelli (R-VA), which seeks to compel the University of Virginia to turn over information relating to research Mann conducted while a professor there. The PSU Investigatory Committee's final report is available at [http://live.psu.edu/fullimg/userpics/10026/Final\\_Investigation\\_Report.pdf](http://live.psu.edu/fullimg/userpics/10026/Final_Investigation_Report.pdf).
- **IEA Calls for Two to Five Times More R&D Funds in Order to Halve Emissions by 2050.** The International Energy Agency (IEA) released a report entitled *Energy Technology Perspectives 2010*, which assessed the policy and financial steps needed to achieve the Intergovernmental Panel on Climate Change (IPCC) target of reducing GHG emissions by 50 percent below 2000 levels by 2050. The IPCC has asserted that such reductions would be needed to limit global temperature rise to between 2.0 and 2.4°C. The IEA report concluded that achieving the 50 percent emission reduction target will require:
  - An increase in public sector research and development funding to two to five times beyond current levels to develop (what are, at this point, relatively costly) technologies with longer-term emission reduction capacities;
  - Full commercialization of a portfolio of low-carbon energy technologies through R&D and deployment funding; stable, technology-specific incentives such as feed-in tariffs; technology neutral support such as a carbon price; and the mitigation of market barriers by revising efficiency standards and building codes;
  - \$46 trillion in investment over the next 40 years (which would be more than offset by \$112 trillion in resultant fuel savings; if future fuel savings are discounted by 10 percent, the net savings would be \$8 billion).

The report further notes that if emissions do not peak by 2020, achieving the target will be much more costly. Information about the report is available at <http://www.iea.org/techno/etp/index.asp>.

- **Study Analyzes Utility Emissions Profiles.** A report commissioned by Ceres, the Natural Resources Defense Council, and three utilities analyzed the distribution of CO<sub>2</sub> and other emissions amongst the 100 largest electric power producers in the United States. The utilities in the study accounted for 85 percent of the U.S. power sector's generation capacity and 89 percent of its CO<sub>2</sub> emissions in 2008. According to the report, the utilities' CO<sub>2</sub> emissions declined 2.1

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percent in 2007, but had increased by 30 percent since 1990. The report also found that five coal-fired power producers produced almost 25 percent of the electric power sector's CO<sub>2</sub> emissions in 2008. However, these five utilities were not amongst the most carbon-intensive power producers of the group, which tended to be smaller power producers. The data in the report indicate that among major electric utilities in the U.S., the most carbon-intensive include NiSource, Alliant Energy, Wisconsin Energy, and Hoosier Energy; the least carbon-intensive include several federal and municipal hydroelectricity producers, Pacific Gas & Electric, Exelon, and the New York Power Authority. The study is available at <http://www.nrdc.org/air/pollution/benchmarking/2008/benchmark2008.pdf>, and a sortable list of the studied utilities is available at <http://www.nrdc.org/air/pollution/benchmarking/db/rank.asp?t=e&s=7&d=0>.

*Harold Bulger and Van Smith, Summer Associates at the firm, contributed to this Update.*

**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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