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Climate Change Policy Update Week of July 6-9, 2010

Commentary: *Majority Leader Reid will meet this week with the committee chairmen that can lay claim to pieces of the energy/climate equation: Bingaman, Kerry, Rockefeller, Baucus, and Lincoln. The aim will be to settle on a package to bring to the Senate. Item A on the menu will be oil spill liability provisions. The other options could include such items as: the Bingaman renewable energy standard; a “low-carbon” or “diverse energy standard”, which could include nuclear power or natural gas as permissible forms of compliance; and various versions of carbon pricing. The carbon pricing options now include “utilities-only,” “utilities-first [industrials later]” and now we have “utilities-plus” – a not quite economy-wide, but still plus-sized cap-and-trade program that would encompass utilities and large industrial sources of emissions, such as steel and cement plants . . . Environmentalists and liberal Democrats have expressed dissatisfaction with the Bingaman renewable energy standard, and are gearing up to oppose any curbs on EPA authority that are de-linked from carbon pricing . . . Industry and NGOs are taking up sides on EPA’s Tailoring Rule generally, and on the rule’s treatment of biomass specifically . . . Another report cleared the “Climategate” scientists of any wrongdoing . . . Before the full Conference of the Parties in late November in Cancún, the UN climate change negotiations will squeeze in an October meeting in China.*

Executive Branch

- **EPA Partially Withdraws RFS Technology Mandate.** The Environmental Protection Agency (EPA) announced that it would withdraw certain technical amendments to its renewable fuel standard (RFS) after receiving adverse comments. The withdrawn amendments, which were made to the RFS in the form of a direct final rule published May 10, 2010, were criticized for creating ambiguity as to whether certain renewable fuel producers that were exempt from reducing lifecycle greenhouse gas (GHG) emissions under the 2007 RFS would lose their exemption if they were to expand their facilities beyond 105 percent of baseline capacity. By potentially imposing expensive technology upgrades on biorefineries that invest in increased capacity, the alleged ambiguity could have discouraged biorefineries from increasing production. The withdrawal notice is available at <http://edocket.access.gpo.gov/2010/pdf/2010-15881.pdf>.
- **DOE Funds 10 CCS Efficiency Projects.** The U.S. Dept. of Energy (DOE) announced that it will award ten grants totaling \$67 million over the next three years to carbon capture and sequestration (CCS) projects designed to reduce the “energy penalty” associated with post-combustion capture of CO₂. The announcement follows a June award of over \$600 million for CCS projects at industrial plants and supports the Obama administration’s goal of bringing five to ten

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commercial CCS demonstration projects on line by 2016. The selected projects aim to reduce the added costs to electricity of CCS to less than 30 percent for new pulverized coal plants and 10 percent for new advanced gasification plants.

- **EPA Publishes Proposed Data Confidentiality Rule.** EPA published a proposed rule in the *Federal Register* that would establish which kinds of data collected under EPA's mandatory GHG reporting rule will be treated confidentially. Comments on the proposed rule must be received by September 7, 2010; if requested, a public hearing will be held on July 22, 2010. Under the proposed rule for direct emitters, the location and amount of GHG emissions, inputs to emissions equations, emissions calculation methodologies, and information for periods with missing data must be publicly disclosed. For fossil fuel and GHG suppliers, however, most required data would be treated confidentially, including emission factors, amount and composition of materials received, and customer and vendor identifying information. The proposed rule is available at <http://edocket.access.gpo.gov/2010/pdf/2010-16317.pdf>.

Congress

- **Senators Considering "Utility Plus" Bill.** According to Senate aides quoted by *BNA*, Senators John Kerry (D-MA) and Joseph Lieberman (I-CT) are in conversation with Senators Jeff Bingaman (D-NM) and Olympia Snowe (R-ME) about crafting an energy-climate bill that would cap emissions from utilities and large industrial sources such as steel and cement manufacturers, but not cover the transportation sector. Sen. Kerry told reporters that Sen. Snowe and others had committed to working on a scaled down energy-climate bill.

Judicial

- **Industry and States File 18 New Lawsuits Challenging GHG Fuel Economy Rule.** On the last day of the period for filing petitions for review of the joint GHG emission and fuel economy standards recently promulgated by EPA and the Dept. of Transportation, 18 new petitions were filed – bringing the total number of challenges to the joint rulemaking to 25. The joint rulemaking – the keystone of a May 2009 agreement between the Obama Administration, the State of California, and the major automakers – will affect vehicles in model years 2012 through 2016. Petitioners filing new challenges included the Energy Intensive Manufacturers' Working Group on Greenhouse Gas Regulation; the Portland Cement Association; the U.S. Chamber of Commerce; the Utility Air Regulatory Group; the National Mining Association; Peabody Energy Co.; the American Farm Bureau Federation; the Coalition for Responsible Regulation; the National Association of Manufacturers; the American Chemistry Council; the American Forest and Paper Association; and the Clean Air Implementation Project. The states of Texas, Alabama, Nebraska, North Dakota, South Carolina, South Dakota and Virginia also filed a joint petition.
- **Environmentalists Support EPA on Decision to Regulate Biomass GHGs.** Four environmental groups represented by the Clean Air Task Force and the Southern Environmental Law Center filed a motion to intervene on behalf of EPA in a lawsuit challenging the agency's decision under the Tailoring Rule to treat biomass emissions like other GHG emissions for purposes of Prevention of Significant Deterioration (PSD) and Title V permitting under the Clean Air Act. EPA recently indicated it would solicit comments this fall on potential exemption of certain biomass emissions from regulation under the Tailoring Rule. The Natural Resources

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Defense Council, the Environmental Defense Fund, and the Sierra Club have already filed a similar motion to intervene in the proceeding. The motion is available at http://www.southernenvironment.org/uploads/fck/file/Climate%20Change/Tailoring%20Rule_%207_7_10_Motion%20to%20Intervene.pdf.

Industry and NGOs

- **Manufacturing Coalition Asks for New EPA Cost Analysis of Cap-and Trade.** Several trade associations representing energy-intensive, trade-exposed (EITE) industries sent a letter to Senators John Kerry (D-MA) and Joe Lieberman (I-CT) claiming that a recent EPA cost analysis of the two senators' cap-and-trade climate legislation relied upon "significantly flawed assumptions" and drew "faulty conclusions." The Aluminum Association, American Chemistry Council, American Forest & Paper Association, American Iron and Steel Institute, Portland Cement Association, and Fertilizer Institute claimed in the letter that EPA's analysis ignored the disproportionate impact of the House's climate legislation on price of electricity produced by coal-fired utilities and overestimated the ability of EITE industries to reduce significantly their energy intensity. The letter requested a new EPA analysis addressing these shortcomings.
- **Environmentalists Ask for Administration Leadership on Climate Legislation.** In a letter to President Barack Obama, major environmental groups urged the Administration to become more involved in the process of passing climate legislation in the Senate, and to aim for passage of a bill before the August recess. The letter specifically requested that the Administration work with key Senators to produce a bill "that responds to the catastrophe in the gulf, cuts oil use, and limits carbon pollution while maintaining current health and other key legal protections." Groups signing the letter included the Alliance for Climate Protection, the BlueGreen Alliance, the Center for American Progress Action Fund, Environment America, the Environmental Defense Fund, the League of Conservation Voters, the National Wildlife Federation, the Natural Resources Defense Council, and the Union of Concerned Scientists. The letter is available at <http://green.blogs.nytimes.com/2010/07/02/activists-beg-obama-to-step-up-climate-push/>.
- **NAM, ACC Petition EPA for Reconsideration of Tailoring Rule.** Two major industry associations – the National Association of Manufacturers (NAM) and the American Chemistry Council (ACC) – filed petitions with EPA requesting that the agency reconsider or rescind its recently-finalized Tailoring Rule, which established a phased-in implementation process for the application of the Clean Air Act's PSD and Title V permitting requirements to GHG emissions. Both petitions argue that EPA wrongfully declined to adopt an interpretation of the Clean Air Act that would have narrowed the scope of PSD permitting for stationary sources of GHGs, and made it unnecessary for EPA to "tailor" the Clean Air Act's PSD emission thresholds to GHGs. According to the petitioners' argument, EPA should have concluded that PSD permitting is only required for major sources of pollutants for which air quality criteria – *i.e.*, National Ambient Air Quality Standards (NAAQS) – have already been established under the CAA. Since EPA has not announced plans to establish NAAQS for GHGs, the petitioners' approach would exclude from PSD permitting all sources that are not already required to obtain such permits as a result of their emissions of pollutants for which there are NAAQS. The NAM petition is available at http://www.nam.org/~media/08BC270F7B3A4E9498F4142084843460/Petition_for_EPA_to_Reconsider_PSD_Regulations.pdf.

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Studies and Reports

- **CBO Analysis Finds \$19 Billion Deficit Reduction From Kerry-Lieberman Climate-Energy Bill.** According to an analysis by the Congressional Budget Office (CBO), the American Power Act (APA), sponsored by Senators John Kerry (D-MA) and Joseph Lieberman (I-CT), would generate \$751 billion in government revenues and direct spending of \$732 billion between 2011 and 2020, resulting in a \$19 billion deficit reduction. An overview of the APA is available at <http://www.vnf.com/news-alerts-462.html>. CBO found that revenues would largely derive from auctions of GHG allowances, and that \$602.7 billion of the bill's direct spending would be in the form of free allocations of emission allowances to energy intensive manufacturers, electric utilities, and other industries, to help reduce compliance costs. The report treats free distribution of allowances as the equivalent of distribution of cash grants. The report notes that the greatest source of uncertainty affecting the projections is allowance prices, which CBO projects to be approximately \$14 per ton CO₂-e in 2020 and \$25 by 2020. The CBO analysis is available at <http://www.cbo.gov/ftpdocs/115xx/doc11565/AmericanPowerActKerryLtr.pdf>.
- **Report Clears British "Climategate" Scientists of Wrongdoing.** An independent British committee chaired by Sir Muir Russell exonerated climate scientists from the University of East Anglia's Climatic Research Unit (CRU) from charges of manipulating climate data or publications. Last fall, a large number of e-mails from the scientists were hacked and published, along with allegations that the scientists had manipulated or suppressed data in order to refute the theories of climate change skeptics. The report concluded that there was no reason to doubt the rigor or honesty of the scientists or their work, but criticized the scientists for not being open enough when responding to requests that they disclose raw data and computer codes. Allegations that the scientists had destroyed or dismissed data were also found to be unfounded. This was the third major probe to clear the scientists of wrongdoing. The report is available at <http://www.guardian.co.uk/environment/2010/jul/07/findings-muir-russell-review>.

International

- **October Climate Change Negotiations Scheduled For Tianjin, China.** Tianjin, China will host a major round of negotiations under the United Nations Framework Convention on Climate Change (UNFCCC) this October. The meetings will precede the Conference of the Parties to the UNFCCC that begins Nov. 29 in Cancun, Mexico. The week-long Tianjin negotiating session is expected to last one week and to cover issues related to the Ad-hoc Working Group on Long-term Cooperative Action and the Kyoto Protocol.

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.

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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