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## Climate Change Policy Update Week of July 12-16, 2010

**Commentary:** *Our understanding is that staff for Sens. Kerry, Lieberman, Snowe, and Bingaman are now in the same room trying to work out the climate portion of an energy-climate bill. Staff for Sens. Stabenow and Brown staff also are involved. A key issue is how to address the cost concerns of energy-intensive industrials; the utility-only design leaves fewer allowances for this purpose. In addition, some utilities want the legislation to address non-GHG regulations expected to affect the sector in the next few years. This idea has set off alarm bells with environmental groups . . . Sens. Voinovich and Rockefeller have introduced a bill that would establish tax credits and other incentives for the development of carbon capture and sequestration projects . . . Under review at the White House Office of Management and Budget is an EPA proposal to take over permitting for state agencies that cannot quickly modify their regulations to accommodate the Tailoring Rule . . . EPA also has asked for public comment on how it should account (if at all) for emissions from biomass combustion under the Tailoring Rule . . . A new UNFCCC draft treaty provided little evidence of progress in resolving differences.*

### Executive Branch

- **CEQ Proposes Guidance for Federal Agencies on Measurement of GHG Emissions.** As part of its implementation of Executive Order 13154, which directs federal agencies to set greenhouse gas (GHG) emission reduction targets for the next decade, the White House Council on Environmental Quality (CEQ) proposed guidance establishing government-wide requirements for the calculation and reporting of GHG emissions. The proposed guidance specifies which GHGs are covered by the accounting and reporting program; defines the scope of federal agency activities covered by the guidelines; identifies which types of emissions may be exempt from federal GHG reduction targets; and describes accounting of emissions and sequestration from biogenic sources, land use, and agriculture. Under the proposed guidance, CO<sub>2</sub> emissions from biofuels and biomass would not be subject to the federal emission reduction mandate, and federal agencies would be prohibited from using offset projects to meet emission reduction targets established under Executive Order 13154. Comments on the guidance are due by August 16, 2010. The guidance is available at <http://www.whitehouse.gov/sites/default/files/microsites/ceq/Draft-GHG-Accounting-and-Reporting-Guidance-6-30-10.pdf>.
- **EPA Submits Federal Implementation Plan for GHG Permitting to OMB.** The Environmental Protection Agency (EPA) has prepared a proposed Federal Implementation Plan (FIP) to serve as a “backstop” in states that lack the authority to timely implement Clean Air Act permitting of GHG emissions from stationary sources under the agency’s recently-finalized “Tailoring Rule.” The

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proposal was submitted last week to the White House Office of Management and Budget (OMB) for review – indicating that it may be nearing public release. The Tailoring Rule, which was published in the *Federal Register* on June 3, sets forth a phased-in timetable and emission thresholds for implementing Prevention of Significant Deterioration (PSD) and Title V permitting requirements for GHG sources. That timetable calls for permitting of GHG emissions under these programs to begin on January 2, 2011. In the Tailoring Rule, EPA acknowledged that some states may not have legal authority to implement the new emission thresholds and permitting requirements by that date. A FIP, which has been used by EPA for non-GHG pollutants in the past, is intended to provide a federal framework for permitting in such states until appropriate state implementation plans can be developed.

- **EPA Issues Call for Information on Treatment of Biomass Emissions Under Tailoring Rule.** EPA published a Call for Information in the July 15, 2010 edition of the *Federal Register*, requesting that the public submit a variety of information on biogenic fuels and GHG emissions in order to inform its treatment of such emissions for purposes of PSD and Title V permitting under the Tailoring Rule. EPA has faced criticism from the biomass industry and some members of Congress for not exempting emissions from biomass combustion from regulation under the Tailoring Rule. EPA describes its Call for Information as a “first step” in addressing the issue, and claims it did not have sufficient information on the carbon neutrality of biomass energy when the Tailoring Rule was finalized. The announcement requests public submissions of comments and technical data relating to a variety of matters, including: how biogenic fuels should be evaluated under Best Available Control Technology (BACT) assessments; methods for assessing the GHG life cycle of biogenic fuels; and the validity of Intergovernmental Panel on Climate Change approaches with regards to GHG accounting for biogenic emissions. Responses are due to the agency by September 13, 2010. The Call for Information is available at <http://edocket.access.gpo.gov/2010/pdf/2010-17266.pdf>.
- **Appointments: Lew Nominated for OMB Director.** President Obama nominated Jacob Lew, who currently serves as Deputy Secretary of State for Management and Resources, to replace Peter Orszag as Director of the OMB. Lew was a member of Van Ness Feldman from 1988 to 1993.

## Congress

- **Senators Drafting Utility-Only and Utility-Plus Bills.** Sens. John Kerry (D-MA) and Joseph Lieberman (I-CT) as well as Sen. Jeff Bingaman (D-NM) are drafting new energy-climate bills that would cap emissions from utilities and potentially some industrial sources; the bills would stop short of the economy-wide coverage that characterized previous Senate proposals.
  - Sens. Kerry and Lieberman are drafting a new version of their energy-climate bill, the American Power Act (APA), which would cap emissions from utilities and a limited group of industrial sources. According to an early draft of the modified bill, utilities would be required to reduce their emissions by 4.75 percent by 2013; 17 percent by 2020; 42 percent by 2030; and 83 percent by 2050, with reductions measured from 2005 emission levels. The draft legislation would allow capped entities to use domestic and international offset credits to meet a portion of their compliance obligation, provide assistance to those disproportionately affected by energy price increases, and support the

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commercial deployment of carbon capture and sequestration (CCS) technologies. Additionally, the draft bill would prevent the EPA from regulating GHGs as criteria pollutants, hazardous air pollutants, and international air pollutants, and would block EPA from setting New Source Performance Standards for utilities covered under the cap based on their GHG emissions.

- According to a circulated version of Sen. Bingaman's draft bill (which apparently dates from April), the legislation would cut electric utility emissions 17 percent by 2020 from 2005 levels, and by more than 40 percent by 2030. Placeholder language in the draft provides that if the President finds, in 2015 or later, that the five major developing country trading partners of the U.S. have taken comparable action to reduce GHG emissions, then the cap would be extended to include industrial sources. Utilities would receive a free allocation of half of the emission allowances they would need to comply with the cap in 2012. The free allocation would decline over time to 35 percent in 2015, 20 percent in 2018, 10 percent in 2020, and 0 percent in 2022 and thereafter. Placeholder language would also allow industrial sources to "opt in" to the program before an affirmative Presidential determination and to receive free allowances. The draft bill would create a domestic offset program and contains placeholder language indicating consideration of creation of an international offset program, and would allow entities to use offsets to meet an unspecified portion of their compliance obligation. The bill contains a hard price collar, which allows regulated entities to submit payment equal to the allowance price ceiling (rather than an allowance or offset credit) to cover emissions. The Bingaman draft would also preempt regulation of industrial sources under the Clean Air Act until 2018 and preempt coverage of GHG emissions from regulated entities by state cap-and-trade programs through 2017.
- **Rockefeller, Voinovich Bill Seeks to Fund CCS Technologies.** Sens. Jay Rockefeller (D-WV) and George Voinovich (R-OH) have introduced new legislation aimed at supporting large-scale (over 100 MW) carbon capture and sequestration (CCS) projects. The "Carbon Capture and Sequestration Deployment Act of 2010" (S. 3589) would:
  - Create a 10-year, \$20 billion program to accelerate the commercial availability of CCS technologies by funding projects by utilities, universities, research laboratories and agencies, and non-profits. The program would be funded through a charge on utilities based on sale of fossil fuel-generated electricity;
  - Increase DOE's loan guarantee program by \$20 billion to support construction or retrofits of commercial scale facilities using CCS technology and construction of CO<sub>2</sub> pipelines;
  - Provide a number of tax credits to support CCS, including a 10-year tax credit based on the amount of CO<sub>2</sub> captured and stored for CCS operations in place prior to 2019, a tax credit equal to 30 percent of the incremental cost of construction of a CCS system for qualifying projects, and a tax credit that would reward early adopters of CCS and those that capture at higher rates;
  - Amend the Clean Air Act to require retrofit capture and storage of at least 50 percent of the CO<sub>2</sub> emissions at new plants permitted after the bill's enactment but before 2020, provided certain specified commercial availability tests are met, and exempt those sources from New Source Performance Standards for CO<sub>2</sub>;

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- Establish a trust fund paid for by assessments on CCS project operators that would pay any damage claims involving closed CCS storage sites and indemnify the owners and operators, except for claims arising out of reckless or intentional misconduct by project operators; and
- For 10 “first mover” CCS projects, provide for indemnification against liability arising from the injection of CO<sub>2</sub> into a storage facility.

## Industry and NGOs

- **Utilities, Environmentalists Divided Over Whether Climate Bill Should Include Concessions on Non-GHG Pollutant Regulations.** Last week, public debate surfaced among representatives of utilities and environmental organizations over whether an emerging “utilities-only” Senate climate change bill should include changes to Clean Air Act regulation of non-GHG pollutants in order to win support from utilities. In an interview with *E&E*, a spokesman for the Edison Electric Institute (EEI), a leading association of investor-owned utilities, said “you’ve got to provide some sort of relief on the other pollutants” if utilities come to accept a sector-wide emissions cap. However, a representative of Duke Energy told the press that the company does not view provisions on non-GHG pollutants as a required element of the bill. Environmental and public health organizations have registered strong opposition to such proposals; on July 14, thirty-one organizations – including the Environmental Defense Fund, Natural Resources Defense Council, Earthjustice, and the Union of Concerned Scientists – sent a letter to all Senators opposing the inclusion of any Clean Air Act exemptions or delays for non-GHG pollutants as part of a climate change and energy bill.
- **California Agricultural Associations, Environmental Organizations Agree on Legislative Principles for National Climate Change Program.** The California Roundtable on Agriculture and the Environment – which includes the Environmental Defense Fund, the Natural Resources Defense Council, the California Farm Bureau Federation, and other California agricultural associations – agreed on a set of six legislative principles for national climate change policy. The principles call for the following: agricultural producers should be allowed to participate in offset credit markets on a voluntary basis, in a system that is “fully compatible” with California’s own global warming statute, A.B. 32; the U.S. Department of Agriculture (USDA) and EPA should collaborate in the development of technical standards and protocols for agricultural offset projects; there should be no limitations on the types of agricultural projects that are eligible for offsets, provided that environmental integrity criteria are met after taking into account life cycle GHG emissions; and there should be no restrictions on agricultural offset projects receiving multiple financial incentives for other environmental services, such as habitat conservation or renewable energy production. The principles are available at [http://foodsystemalliance.org/uploads/CRAE\\_Climate\\_Principles.pdf](http://foodsystemalliance.org/uploads/CRAE_Climate_Principles.pdf).

## Studies and Reports

- **CBO Publishes Report on Biofuel Tax Credits.** The Congressional Budget Office (CBO) has released an evaluation of the costs and benefits associated with federal biofuel tax credits. According to the report, entitled “Using Biofuel Tax Credits to Achieve Energy and Environmental Policy Goals,” approximately 11 billion gallons of biofuels were produced and sold in the U.S. in 2009, 98% of which was corn-based ethanol. The report found that biofuel tax

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credits cost approximately \$6 billion in total, and that it costs taxpayers \$1.78 to reduce gasoline consumption by 1 gallon using corn ethanol, \$3 per gallon using cellulosic ethanol, and \$2.55 per gallon using biodiesel. The report also concluded that the associated reduction in GHG emissions from biofuel use cost \$750 per ton of CO<sub>2</sub>e for corn ethanol, \$275/ton for cellulosic ethanol, and \$300/ton for biodiesel. These estimates do not include calculation of any increases in GHG emissions caused by land-use change triggered by the use of agricultural land for production of feedstock for the biofuels. The report is available at <http://cboblog.cbo.gov/?p=1161>.

## International

- **India, Switzerland to Host Meetings before Cancún Summit; October Meeting in China Unlikely.** Switzerland and India will host talks focusing on issues of importance to developing countries in advance of the 16<sup>th</sup> Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC), which will be held in Cancún, Mexico from Nov. 29–Dec. 10. Switzerland and Mexico will invite 30 countries to the Sept. 1-3 meeting in Geneva to discuss long-term financing of climate change mitigation and adaptation measures. India will host a two-day meeting in November to discuss the impact of intellectual property rights (IPR) on the deployment of green technologies in developing countries. Developing countries are concerned they will be unable to use green technologies from developed economies to combat climate change because of IPR restrictions. Tianjin, China is now unlikely to be the location for an anticipated October meeting due to scheduling conflicts for the Tianjin facilities.
- **New UNFCCC Treaty Draft Released.** The UNFCCC has released the second official draft of a treaty that would restrict GHG emissions after the Kyoto Protocol period ends in 2012. The new draft contains a large number of “bracketed terms,” indicating points of substantive dispute that would need to be resolved through negotiation. Among the major unresolved points are the emission reduction commitments from developed nations, significant portions of the text related to the “nationally appropriate mitigation actions” of developing nations, and the amount of funding to be provided by developed nations to developing nations for climate change mitigation and adaptation programs. The draft text is available at <http://unfccc.int/resource/docs/2010/awglca11/eng/08.pdf>.

*Harold Bulger, Van Smith and Doug Rhorer, 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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