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Climate Change Policy Update Week of August 2-6, 2010

Commentary: *Majority Leader Reid delayed Senate floor votes on his scaled-back oil spill/energy legislation due to what might be termed a "lack of enthusiasm" . . . However, post-August recess consideration of energy/climate legislation is still possible accompanied by the emergence of significant new policy formulations for efficiency and transportation-related GHG reduction options . . . Jousting accelerates in the courts and states about obligations to reduce GHG emissions in the absence of Congressional action . . . US Climate Envoy Todd Stern affirms the GHG reduction commitments of the US under the Copenhagen Accords, and international climate negotiators discuss extending the Kyoto Protocol for two years.*

Executive Branch

- **Stern: US Copenhagen Commitments Not Affected by Impasse on Climate Legislation.** U.S. Special Envoy for Climate Change Todd Stern stated in an interview with *Climate Wire* that the Obama Administration was “not backing away” from its conditional commitment to reduce greenhouse gas (GHG) emissions, despite the failure of the Senate to take up climate change legislation before the August Congressional recess. Stern said that the legislative impasse “will certainly affect the atmospherics” of ongoing climate change negotiations, “but the fundamentals of [the negotiations] aren’t different.” Stern also said that the President “has made it perfectly clear that he’s committed to energy and climate legislation, and we will press on.” Earlier this year, the United States formally associated itself with the Copenhagen Accord by committing to achieve a 17 percent reduction in U.S. greenhouse gas (GHG) emissions relative to 2005 levels by 2020, and an 80 percent reduction by 2050.
- **DOE Commits \$1 Billion to Restructured FutureGen 2.0 Project.** The U.S. Department of Energy (DOE) announced that \$1 billion of funds appropriated in the American Recovery and Reinvestment Act (ARRA) would be used to support a restructured FutureGen carbon capture and sequestration (CCS) project. Although the original FutureGen project envisioned the construction of a new integrated gasification combined cycle facility, the revamped proposal contemplates a repowering of an existing 200 MW coal-fired facility in Meredosia, Illinois using an oxy-fuel technology. The newly designed project will continue to use the original Mattoon, Illinois geologic storage site to sequester the CO₂. According to DOE, the project funding recipients will be the FutureGen Industrial Alliance (the industry consortium organized to carry

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out the original project), Ameren, Babcock & Wilcox, and oxygen supplier Air Liquide. Senator Richard Durbin (D-IL) joined in the announcement. DOE expects construction to begin in 2012, with a target completion date of 2015. The timing of the new project announcement may have been affected by the requirement to spend ARRA funds prior to the end of September 2010.

Congress

- **Reid Delays Vote on Energy-Oil Spill Bill; Broader Bill Possible.** Senate Majority Leader Harry Reid (D-NV) delayed a vote on the energy and oil spill response legislation until the Senate returns from recess in September. Maj. Leader Reid told reporters “there’s a chance” that Senate leadership will bring a broader bill to the floor in September, with a renewable electricity standard and/or a cap on GHG emissions. Senator John Kerry (D-MA) has continued to work on a scaled-down climate bill, and told reporters that he hopes it could be brought to the floor in September or in a lame duck session. Five additional senators—Sens. Barbara Boxer (D-CA), Ben Cardin (D-MD), Robert Menendez (D-NJ), Barbara Mikulski (D-MD), and Daniel Akaka (D-HI)—signed a version of the letter sent to Maj. Leader Reid last week urging him to include an RES in the energy bill brought to the floor. A total of 32 senators have now signed the letter.
- **Kerry Introduces Clean Energy Tax Bill.** Senator John Kerry (D-MA) released the Clean Energy Technology Leadership Act of 2010 (S. 3738). The legislation would provide or modify tax credits for solar energy, fuel cell power plants, advanced energy storage systems, energy efficient appliance manufacturing, domestic energy production from alternative energy technologies, energy efficient home construction and modification, natural gas fueled vehicles, production of vehicles fueled by compressed or liquefied natural gas, biodiesel and renewable diesel usage, and qualified energy R&D (related to energy storage, renewable energy, conservation, transmission, and carbon capture and sequestration). The bill would also extend the authorization for new clean renewable energy bond issuance by \$3.5 billion. In remarks on the Senate floor, Sen. Kerry said that the bill is not a substitute for comprehensive energy and climate legislation, but “the events of the last several weeks have made it clear that there is no bipartisan support for a strong energy and climate bill,” and “in the interim, we should act on areas where there is potential agreement.”
- **Senate Energy Committee Passes Six Bills.** The Senate Energy and Natural Resources Committee passed six energy-related bills. The bills would promote research in heavy duty plug-in hybrid vehicles and efficient gas turbines used for power generation, support the purchase of Energy Star-qualified manufactured homes, promote energy efficient supply chains, provide incentives for the installation of solar energy systems, and address cyber security issues.

Judicial

- **Utilities Appeal *Connecticut v. AEP* to Supreme Court.** Four of the nation’s largest coal-burning electric utilities – American Electric Power, Duke Energy Corp., Southern Co., and Xcel Energy Inc. – have filed a petition for a writ of certiorari with the Supreme Court, asking that the Court reverse the Second Circuit Court of Appeals’ September 2009 decision in *Connecticut v. AEP*. A fifth defendant, the Tennessee Valley Authority (TVA), did not join the petition. Filed in 2004, the lawsuit was brought by eight state attorneys general, the City of New York, and three private land trusts who allege that the utilities’ GHG emissions constitute a “public nuisance”

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under federal common law, and seek injunctive relief to limit and gradually abate emissions from the defendants' facilities. The plaintiffs' case was dismissed in district court on the grounds that it presented a "political question," but was subsequently reinstated by the Second Circuit's opinion. The petition for certiorari argues that the plaintiffs lack standing because they cannot trace their injuries directly to the activities of the defendant utilities; that federal common law has been "displaced" with respect to GHG-related torts by regulation under the Clean Air Act; and that the case presents political questions that are committed to the elected branches of government. Responses to the petition are currently due September 3, 2010. The Court's decision to grant or deny certiorari is likely to come in mid-October or in November, depending on whether the states and land-owners seek an additional 30 days to file. Such extensions are usually granted.

States and Cities

- **Florida, Texas Respond to EPA on Implementation of Tailoring Rule.** The Texas Attorney General and the Chairman of the Texas Commission on Environmental Quality issued a defiant protest in response to EPA's request that state authorities notify the agency of their plans to implement a phase-in of PSD and Title V requirements for GHG sources pursuant to the Tailoring Rule. In their letter to EPA, the Texas officials characterized EPA's request as a demand for a "loyalty oath" and said that "Texas has neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gas emissions." Furthermore, the officials argued that EPA's request violates the federal and state constitutions and statutes. Separately, the state of Florida responded to EPA's request by notifying the agency that it would not be able to implement the Tailoring Rule by January 2, 2011, and that a Federal Implementation Plan (FIP) administered by EPA would therefore be necessary to ensure the Tailoring Rule is carried out. The Texas officials' letter is available at http://willdawson.net/texas_letter.pdf.
- **CARB Issues White Paper on Offsets.** The California Air Resources Board (CARB), the state agency entrusted with administering California's statute requiring regulation of the state's GHG emissions (AB 32), has issued a brief white paper in response to comments received after several June workshops on offsets and cost-containment under the state's emerging cap-and-trade system. The white paper notes that CARB is considering adopting modified versions of the forestry, manure management digester, ozone depleting substances, and urban forestry protocols issued by the Climate Action Reserve (CAR). Furthermore, CARB is developing a process to allow offset credits generated by existing projects under the four CAR protocols to be used for compliance in the California cap-and-trade system. The paper also states that the start date for eligible projects is "under consideration." The program's final offset requirements will be issued along with other regulations for the cap-and-trade program by January 1, 2011. The white paper is available at http://www.arb.ca.gov/cc/capandtrade/meetings/062210/offset_program_update.pdf.

Industry & NGOs

- **PCAP Issues "Plan B" for Administration Action on Climate Change.** The Presidential Climate Action Project (PCAP), a committee of prominent environmental advocates including former White House "green jobs" czar Van Jones and former Sen. Gary Hart (D-CO), issued a

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report with policy recommendations for the Administration that can be implemented in the absence of climate change legislation. Entitled *Plan B: Near-Term Presidential Actions for Energy & Environmental Leadership*, the report identifies the pending transportation re-authorization bill as a major opportunity for the Administration to achieve legislative progress on climate change by encouraging investments in public transportation, transit-oriented development, and reductions in vehicle miles traveled. In addition, the report recommends that the Administration reduce subsidies for fossil fuels by altering royalty rates and lease schedules for mineral extraction on Federal lands. Other policies recommended in the report include: incorporating conditions into Federal grants and loans that reward state governments with proactive climate change policies; finalizing more aggressive fuel economy and GHG emission standards for vehicles; and establishing industry-specific GHG performance standards that encourage energy efficiency investments. The PCAP report is available at http://www.climateactionproject.com/plan2010/PCAP-Report_August2010.pdf.

- **Business Organizations Urge Senate to Revisit Climate Change Legislation.** A coalition of business organizations claiming to represent over 5,000 businesses – including American Business for Clean Energy, American Sustainable Business Council, Environmental Entrepreneurs, Small Business Majority, We Can Lead, and Women’s Business Development Center – sent a joint letter to Senate leadership asking that clean energy and climate legislation be put “back on the agenda.” The letter argues that the Senate’s failure to take up climate change legislation is costing the country opportunities to spur investment and create employment in clean energy industries, and claims that American investment in clean energy falls behind the rest of the world by \$260 million each day. According to the letter, “A comprehensive clean energy and climate plan that includes a price on carbon will deliver long-term price signals that business leaders need to unleash capital and innovation, while creating millions of new American jobs.” The letter is available at <http://wecanlead.org/letter0802.pdf>.
- **IECA Proposes GHG Regulation and Energy Efficiency Policies.** The Industrial Energy Consumers of America (IECA) released a report claiming that a package of amendments to the Clean Air Act and financial incentives for energy efficiency investments could reduce energy-related GHG emissions by 13 percent by 2020 relative to baseline conditions. Elements of the package include significant tax credits for capital investments in energy conservation and GHG reductions; immediate expensing of “high-risk” research and development projects related to GHG reductions and energy efficiency; low-cost public loans for efficiency and GHG reduction investments; enhanced building efficiency standards; “early action” crediting of GHG reduction projects that can be applied towards future GHG regulation; and preemption of EPA and state regulation of GHG emissions under the Clean Air Act. The study is available at <http://www.ieca-us.com/documents/IECAEconomicImpactStudyFullReportVFinal.pdf>.

Studies and Reports

- **GAO Finds Developing Country Emissions Inventories Inferior.** A report issued by the Government Accountability Office found that 2009 GHG emission inventories from Annex I nations such as Australia, Russia, Japan, and the United States were of comparable and high quality. Reports from certain non-Annex I nations, such as Brazil, China, India, Indonesia, Malaysia, Mexico, and South Korea, met the reporting guidelines but were dated, less comparable, and lower quality, which the report found could pose problems in the context of

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future international climate change agreements. Barriers to improving non-Annex 1 country inventories identified by the report include limited incentives related to inventory quality, less stringent reporting guidelines, financial and other resource constraints, and lack of relevant data. The report is available at <http://www.gao.gov/products/GAO-10-818>.

- **Public Support for GHG Emission Limits Holds Firm.** The latest Society for Human Resource Management/National Journal Congressional Connection Poll, conducted with the Pew Research Center, found that 65 percent of Americans support limiting GHG emissions, with 28 percent opposing limits. This is consistent with the results of the Congressional Connection Poll conducted in early June. In addition, 78 percent of respondents supported requiring utilities to produce more energy from renewable sources. 72 percent favored expanding domestic coal, oil, and natural gas production, and 56 percent expressed support for incentives for nuclear power development. The poll results are available at <http://congressionalconnection.nationaljournal.com/2010/08/support-for-addressing-climate.php>.
- **Stanford Reports Solar Breakthrough.** Researchers at Stanford University published the results of laboratory tests in *Nature Materials* indicating that the efficiency of solar power generation can be doubled or tripled by improving semiconductors. The researchers coated semiconductors with cesium, permitting parabolic solar dishes operating at very high temperatures to retain more of the heat generated by sunlight to produce energy. An abstract of the research is available at <http://www.nature.com/nmat/journal/vaop/ncurrent/full/nmat2814.html>.

International

- **Ecuador Signs UNDP Agreement to Preserve Rainforest.** Ecuador announced a formal agreement with the United Nations Development Program (UNDP) to create an international trust fund to protect the Yasuni National Park. Under the agreement, if developed countries pay \$3.6 billion into the trust fund over 10 years, Ecuador will forego development of an estimated 900 million barrels of crude oil in reserves beneath the rainforest in the park. Initial donor countries have pledged \$1.5 billion to the fund. The agreement will prevent 440 million metric tons of CO₂ from reaching the atmosphere and protect a United Nations Educational, Scientific, and Cultural Organization (UNESCO)-designated Biosphere Reserve commonly described as one of the most biologically diverse ecosystems in the world.
- **Climate Negotiators Considering Extending Kyoto.** Delegations from nearly 200 countries gathered in Bonn, Germany are considering a series of proposals outlined in a new U.N. Framework Convention on Climate Change report, including the option of extending the Kyoto Protocol commitments for two years beyond the 2012 end of the initial commitment period. Negotiators have not yet made substantial progress on a new set of commitments under Kyoto or a replacement treaty.
- **CDM Board Rejects 22 Projects.** The Executive Board of the Clean Development Mechanism, the program allowing Kyoto Protocol participants to earn credit for investing in emission reductions in developing countries, has denied approval to 22 proposed offset projects. Nineteen of the rejected projects were proposed renewable energy developments in China. The Executive Board decided that most of these projects would have gone forward even in the absence of carbon

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finance, and were therefore non-additional. The Executive Board also approved the registration of 20 projects.

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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