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Climate Change Policy Update Week of August 23-27, 2010

Commentary: *Environmental NGOs expressed dismay when the U.S. Department of Justice (DOJ) – representing the Tennessee Valley Authority, a governmental entity – sided with industry in a brief to the Supreme Court on the Second Circuit’s decision in the Connecticut v. AEP case. In its brief, DOJ defended the primacy of the Executive Branch over the Judicial Branch on the issue of climate change, arguing that the regulatory regime under construction by the Environmental Protection Agency is adequate to “occupy the field,” thereby precluding a lawsuit-based pathway for activists and states. In support of its arguments, DOJ pointed to a number of final rules (the endangerment finding, motor vehicle regulations, the Tailoring Rule) and noted that EPA is “evaluating whether and how to add greenhouse gases to the new source performance standards that apply to power plants.” . . . The World Resources Institute (WRI), working with 60 companies, just finished road-testing new standards for calculating life-cycle greenhouse gas (GHG) emissions from products and supply chains. The WRI standards for voluntary emissions reporting have had broad influence on many large corporations. Such work could inform new EPA regulatory efforts based on life-cycle emissions. In addition, in the absence of a comprehensive national regulatory program, the life-cycle standards could form a new benchmark that NGOs and others can use to pressure large companies to undertake voluntary supply-chain emission reductions efforts, which can have ripple effects on many other companies.*

Executive Branch

- **EPA Postpones Hearing on Takeover of State GHG Permitting Programs Until Sept. 14.** The U.S. Environmental Protection Agency (EPA) pushed back until September 14, 2010 a hearing on the Agency’s proposal to take over the GHG Prevention of Significant Deterioration (PSD) permitting programs for states that are unable or unwilling to comply with the permitting regulations by certain deadlines. The Agency delayed the hearing because its proposal on the issue had not yet been published in the Federal Register as of the original hearing date, although it has since been published. In the proposal, EPA provides details on a Federal Implementation Plan to that would go into effect in states that do not begin enforcement of GHG PSD permitting requirements for new and modified stationary sources by January 2, 2011.
- **DOJ Brief to Supreme Court Urges Rejection of Second Circuit Nuisance Decision.** In a brief filed with the Supreme Court, DOJ argued on behalf of the Tennessee Valley Authority that the Court should reject the decision by the U.S. Court of Appeals for the Second Circuit (Second Circuit) in *American Electric Power, Co. v. Connecticut*. The Second Circuit decision held that a collection of

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states, environmental groups and New York City could proceed with a lawsuit based on nuisance claims against several large coal-fired utilities. The Second Circuit had rejected utility arguments that, as a result of the Supreme Court decision in *Massachusetts v. EPA*, EPA “occupied the field” of GHG regulation, thereby precluding tort-based remedies for climate damages in the federal courts. In its brief, DOJ argued that the Supreme Court should vacate the lower court’s decision and remand it for further proceedings because EPA has taken several significant steps toward regulating CO₂ since the Second Circuit’s decision was issued. The brief cited as examples of EPA actions on the issue the recent Tailoring rule, the finalized vehicle GHG emission regulations, the endangerment finding and the 2009 GHG reporting rule. DOJ’s brief came in response to a petition filed earlier this month by the defendants in the case – American Electric Power, Co., Duke Energy Corp., Southern Co., and Xcel Energy, Inc. – seeking the Supreme Court’s review of the Second Circuit decision.

States and Cities

- **Environmental Groups Give Notice of Intent to Sue Washington State Over Lack of GHG Controls at Five Refineries.** Two environmental groups, the Washington Environmental Council and the Cascade Chapter of the Sierra Club, submitted to Washington’s Department of Ecology and a pair of local air regulatory agencies a notice of intent to sue over the agencies’ failure to implement GHG regulations for five refineries in the state. A 2009 state executive order defines GHGs as “air contaminants”, thereby making them subject to regulation under the Washington State Clean Air Act. The executive order, issued by Governor Christine Gregoire (D), was intended to establish a state GHG regulatory program, but the program has been suspended by lawsuits alleging that the order violates the state’s Constitution.

Industry and NGOs

- **WRI Announces Completion of Testing On Life-Cycle GHG Emission Standards.** The World Resources Institute (WRI) announced that 60 U.S. and foreign companies have finished a six-month test of new standards designed to measure the life-cycle GHG emissions from products and supply chains. The standards, titled the “Product Life Cycle Accounting and Reporting Standard” and the “Scope 3 Accounting and Reporting Standard,” are part of the Greenhouse Gas Protocol Initiative (“Initiative”) by WRI and the World Business Council on Sustainable Development. Companies from a range of sectors participated in the testing. WRI said that it will revise the standards based on feedback provided by the companies and release a new version for public comment later this year. WRI expects to publish the final standards in Spring 2011. The Initiative is an international accounting tool for quantifying and managing GHG emissions that forms the basis for a number of international GHG standards around the world, including those developed by The Climate Registry and the International Standards Organization, as well as the GHG inventories of a wide-range of corporations.
- **California Apollo Alliance Issues Pro-AB 32 Policy Program.** The California Apollo Alliance, a coalition of California business, labor, environmental, and community organizations, has issued a strategy for creating clean energy jobs in California entitled the “California Apollo Program”. The paper supports the full implementation of AB 32, the state law that requires controls on the state’s GHG emissions. Proposition 23, which will be on the ballot this fall,

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would suspend implementation of AB 32 until the state's unemployment rate drops to 5.5 percent for a full year. The California Apollo Program has been endorsed by 39 organizations and companies, including the California Labor Federation, Applied Materials, Natural Resources Defense Council, and the Institute for Economic and Racial Justice, and is available at <http://apolloalliance.org/programs/caap/>.

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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