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## Climate Change Policy Update Week of April 7-11, 2008

**Commentary:** *The Lieberman-Warner bill is now scheduled to be brought to the Senate floor on June 2 . . . A manager's amendment to the bill is likely to include enhanced provisions for oversight of the emissions trading market, including a possible role for the Commodity Futures Trading Commission . . . A "cost containment" compromise could be in the works. Staff for the National Commission on Energy Policy and the Nicholas Institute published a memo with the general outlines of an approach in which there would be both an allowance price ceiling and price floor in the early years of the program, with the additional allowances coming from a reserve drawn from the allocations in the outer years of the program. The US Climate Action Partnership also weighed in on the topic . . . No breakthroughs from the Bangkok meeting, suggesting the "Road Map" from Bali will have some twists and turns.*

### Congress

- **Lieberman-Warner Bill Will Be Brought to the Senate Floor on June 2.** Senate leaders announced this week that the Lieberman-Warner bill will be considered on the floor of the Senate on June 2. Senator Boxer, Chair of the Senate Environment and Public Works Committee, has previously said that she would pull the bill from the floor if amendments were offered that would weaken the legislation. The bill's supporters are working to get the 60 votes needed to invoke cloture and ensure a final vote on the bill after the amendment process.
- **Senators to Make Lieberman-Warner Bill Budget-Neutral.** In an April 10 cost estimate sent to Joseph Lieberman (I-CT), John Warner (R-VA), and Barbara Boxer (D-CA), the Congressional Budget Office (CBO) said that the Lieberman-Warner bill would result in a net revenue loss. In its analysis of the bill, the CBO treated the bill's allowance distribution provisions as a distribution of government assets; therefore, the CBO also found that any free distribution of the allowance value to various entities would be a loss to the government. In response, the Senators outlined an amendment that would increase the amount of allowances auctioned (instead of freely allocated) in the early years of the cap-and-trade program, with the additional revenue set aside to ensure that the bill is budget neutral. The amendment would increase funds raised through the cap-and-trade bill by \$1.21 trillion over the 10 years leading up to 2018, which would more than offset the \$1.13 trillion that would be distributed to various entities under the bill.
- **Plans for Increased Oversight of U.S. Carbon Market.** Senator Lieberman (I-CT) has said that the climate change bill will include a new provision that clearly defines federal oversight for the new U.S. carbon market. The new provision could incorporate the Commodity Futures Trading Commission into the new carbon market oversight system. The current version of the bill creates two organizations to manage the new carbon market. The Climate Change Credit Corporation is a five-member group that would manage allowance auctions and distribution revenues from such auctions. The seven-member Carbon Market Efficiency Board would monitor the market for unexpected price fluctuations.

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)

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- **Senate Adopts Amendment to Extend Renewable Energy Tax Credits.** As part of housing legislation, Senators Maria Cantwell (D-WA) and John Ensign (R-NV) offered an amendment, which was adopted, that extends \$6 billion in expiring tax credits for wind, solar and other renewable energy projects. Unlike recently House-passed legislation which offset the cost of extending renewable energy tax credits, this amendment did not include revenue-raising provisions to offset the costs.
- **Energy and Commerce Committee Heavyweights Disagree on EPA's Role in Regulating GHGs.** At a House Energy and Commerce Air Quality Subcommittee hearing, full Committee Chair John Dingell (D-MI) lamented the implications of the U.S. Supreme Court's decision in *Massachusetts v. EPA*, which held that EPA has the authority to regulate GHG emissions using existing programs under the Clean Air Act (CAA). Chairman Dingell said EPA may have the authority to establish an emissions cap-and-trade program under the Clean Air Act, but using programs such as New Source Review (NSR) or National Ambient Air Quality Standards (NAAQS) to regulate GHG emissions would create a "glorious mess." Chairman Dingell also pointed out that regulating GHGs under the CAA could lead to a huge increase in the number of sources subject to NSR requirements to obtain permits for plant modernizations and install pollution controls. Robert Meyers, Principal Deputy Assistant EPA Administrator for Air and Radiation, testified that including GHGs under New Source Review could greatly increase the number of plants subject to the requirements, but that EPA is working on a possible option to issue general or blanket permits for small stationary sources. The Committee's Ranking Minority Member, Joe Barton (R-TX), said that the Energy and Commerce Committee never intended that the Clean Air Act apply to GHGs when the legislation was amended in 1990. Rep. Henry Waxman (D-CA) disagreed, stating that the CAA provides useful tools to reduce emissions.

During the hearing, Meyers was asked about internal agency discussions regarding EPA's authority to control GHG emissions under the CAA using a cap-and-trade program. Meyers noted that, in 2005, EPA established a cap-and-trade program to control mercury emissions from power plants. Even though the rule was overturned by the U.S. Court of Appeals for the District of Columbia Circuit, Mr. Meyers explained that the court did not conclude that EPA could not establish an emissions trading program for other air pollutants.

## States and Cities

- **California Considers Offsets to Reduce Impact of GHG Regulations on Industry.** In California's on-going debate over the state's pending GHG emission reduction regulations, California officials are looking at offsets as a means of reducing the impact of the regulations on industry. Though generally discussed as a part of a cap-and-trade system, California officials are reviewing the use of offsets for industry sectors that may be regulated by traditional command-and-control regulation rather than a market-based system. State officials noted while the state's efforts to implement A.B. 32, its 2006 climate change law, are primarily focused on a cap-and-trade program, the regulations will likely include direct command-and-control regulation of at least some sectors of the state economy.
- **California Agency Establishes Clean Energy Technology Development Fund.** California's Public Utilities Commission (CPUC) passed a rule to establish the "California Institute for Climate Solutions" (Institute) to accelerate development and deployment of GHG emission

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reduction technologies. The rule will allocate \$60 million annually for the Institute to target university and private research and development in the electric and natural gas sectors.

- **WCI Offset Committee Recommends Linking to Regional, International Carbon Markets.** Advisors to the Western Climate Initiative (WCI) issued a report recommending that the regional cap-and-trade program link to other carbon markets around the world to achieve GHG reductions. The report does not specify which international markets to which the regional program should link. The WCI report recommended that regulators begin to develop registries and carbon credit accounting systems to ensure the environmental integrity of the trading system. The seven states and two Canadian provinces of the WCI have committed to developing rules for a regional cap-and-trade program by August of this year.
- **Washington State Passes Climate Change Adaptation Bill.** Washington state Governor Christine Gregoire (D) signed legislation designed to assist local governments throughout the state in their efforts to adapt to the impacts of climate change. The bill adds climate change to the list of goals guiding local planning and development under the state's Growth Management Act and directs the state Department of Community, Trade and Economic Development to provide local governments with information on the options available for responding to climate change and reducing GHG emissions.
- **Kansas Legislature Makes Second Attempt to Override State Agency's Power Plant Permit Denial.** After Kansas Governor Kathleen Sebelius (D) vetoed similar legislation last week, the Kansas state legislature has introduced a second bill intended to override the Kansas Department of Health and Environment's (DHE) October denial of air quality permits for two 700-MW coal-fired power plants based on their potential GHG emissions. The new legislation, which includes additional environmental concessions that were not a part of the previous bill, has passed the Kansas House one vote short of a veto-proof margin and now heads to the Senate. Gov. Sebelius has again vowed to veto the legislation.
- **Oregon Agency Proposes Mandatory GHG Reporting Rule.** The Oregon Department of Environmental Quality has proposed new regulations that would require over 700 industrial GHG emitters to report their emissions beginning next year. The regulations would apply to all facilities that need Title V permits under the federal Clean Air Act, such as coal-fired power plants and other major industrial emitters, to smaller sources that are covered by the Oregon state Clean Air Act, and to other emitters that emit greater than 2,500 tons of CO<sub>2</sub> per year. The proposed regulations, which will be open for public comment until May 16, do not cover transportation sector emissions.

## Non-Governmental Organizations

- **"Safety Valve" Compromise for U.S. Climate Legislation Discussed by Nonprofits.** Staff members of two nonprofit groups that are active in the development of climate legislation have proposed an alternative approach to cost containment of emission allowance prices in a carbon market. Staff of the National Commission on Energy Policy, a proponent of a "safety valve," which puts an upper ceiling on the price of emission allowances under climate change legislation, and the Nicholas Institute at Duke University, a proponent of a government oversight board (Carbon Market Efficiency Board), discussed the idea in a memorandum to congressional offices.

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The concept, which has not been formally endorsed by either group, would begin with a defined allowance reserve, which would be funded from future allowances and could be borrowed from automatically when allowance prices exceed a certain price. After a specified time or at the exhaustion of the initial reserve, a governmental Carbon Market Efficiency Board would control access to the reserve. The concept also includes establishment of a floor price for emission allowances. The proponents of this cost containment approach suggest that it could be used to “provide greater emissions certainty than a pure safety-valve and greater cost-certainty than the mechanisms contained in the current Lieberman-Warner legislation.”

## Studies and Reports

- **Report Indicates that EU Power Companies Could Receive up to \$112 Billion in Windfall Profits through 2012 from Emissions Trading Scheme.** The World Wildlife Foundation (WWF) released a report, *EU ETS Phase II: The Potential and Scale of Windfall Profits in the Power Sector*, which asserts that the utility sectors in five countries, United Kingdom, Germany, Spain, Italy, and Poland, could reap between \$36-112 billion in profits during the second period of the EU emissions trading scheme (ETS). The report concluded that such “windfall profits” are available because companies in deregulated, wholesale markets are able to pass through the cost of allowances in their prices, but still receive free allowance allocations under the EU ETS. The report is available at [http://assets.panda.org/downloads/point\\_carbon\\_wwf\\_windfall\\_profits\\_mar08\\_final\\_report\\_1.pdf](http://assets.panda.org/downloads/point_carbon_wwf_windfall_profits_mar08_final_report_1.pdf)

## International

- **British Columbia Considers GHG Emissions Cap.** The Legislative Assembly of British Columbia considered a bill that would place a cap on GHG emissions in the Canadian province. The “Greenhouse Gas Reduction (Cap and Trade) Act” was introduced as part of the province’s efforts as a member of the Western Climate Initiative (WCI). If passed, regulations implementing the legislation are expected to be in place by this fall; the WCI is scheduled to set a regional cap in September.
- **Australia Signs Bilateral Climate Agreement with UK, Joins ICAP.** Australia signed a bilateral agreement with the UK under which the two countries will collaborate on addressing climate change. The agreement focuses on reducing GHG emissions through technological innovation, in particular by promoting energy efficiency and developing carbon capture and sequestration technology. The two nations will also work together in preparation for the continuing international negotiations on a follow-up agreement to the Kyoto Protocol. As part of the bilateral agreement, Australia joined the International Carbon Action Partnership, an association of governments focused on sharing best practices for GHG emissions trading systems and establishing links between new and existing trading programs.
- **Bangkok Meeting Outlines Agenda for Future Climate Talks.** Climate negotiators from over 160 countries met in Bangkok, Thailand last week to continue discussions regarding a post-Kyoto Protocol convention. The agenda anticipates the next round of climate talks under the United Nations Framework Convention of Climate Change, which are scheduled to take place in Bonn, Germany in June. The major issues included in the agenda were consideration of expanded

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controls on ozone-depleting GHGs that were not included in the Montreal Protocol and a recommendation that future negotiations involve discussion of sectoral emissions targets.

*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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