

July 14, 2008

Climate Change Policy Update Week of July 7 - July 11, 2008

Commentary: *At nearly 600 pages, the Bush Administration's Advanced Notice of Proposed Rulemaking (ANOPR) is a long read, but easily summarized: this Administration will not make an "endangerment" finding with respect to CO₂ emissions, and will not embark on the development of CO₂ regulations. Furthermore, the 70 page preface to the ANOPR makes the point that the Clean Air Act is a problematic vehicle for addressing the issue; the preface effectively invites Congress to come up with a better approach. . . . This week marked a milestone on the Bali roadmap, which is supposed to end up in Copenhagen in December 2009 with a successor to the Kyoto Protocol. In short, the governments are now putting numbers on the table. At meetings in Japan, the G8 proposed a collective goal of reducing GHG emissions 50 percent by 2050. The G8 did not specify collective mid-term limits, nor individual national limits, but suggested that industrialized countries might shoulder a relatively greater part of the collective burden. Some major developing countries came back with their own proposals for this G8 share: 25-40 percent below 1990 levels by 2020, and 85-90 percent by 2050. There were no agreements, but, by putting specific numbers on the table, the governments have moved the international negotiations into a new phase . . . Sen. Jeff Bingaman (D-NM) outlined ten principles for future climate change legislation this week. Previously, a group of ten Senators sent a letter to Sen. Barbra Boxer (D-CA) sharing their views on how to go forward. One can read these manifestos together as a kind of moderate Democrat roadmap for the next bill in the Senate.*

Congress

- **Sen. Bingaman Outlines Principles for Climate Legislation.** In a speech this week, Sen. Jeff Bingaman (D-NM) outlined a set of ten principles for design of future climate change legislation. Last year, Sen. Bingaman co-sponsored the "Low Carbon Economy Act of 2007" (S. 1766). Among the policy design principles outlined by Sen. Bingaman were that any future legislative program should focus exclusively on reducing greenhouse gas (GHG) emissions, and forgo carve-outs and incentives aimed at other policies and interests. He also said that the program should avoid excessive complexity, which Sen. Bingaman asserted was a particular flaw of the Lieberman-Warner bill. Sen. Bingaman also asserted that any future program must include measures to protect against excessive costs or volatility in allowance prices, including a ceiling on allowance prices; his Bingaman-Specter bill included such a "safety valve" mechanism. Sen. Bingaman further stated that all revenue generated from the auction of emission allowances should be invested in programs to encourage research, development, and deployment of advanced technologies; he added that investment in such technologies is necessary even before passage of climate legislation. Finally, touching on one of the more controversial questions facing climate policy, Sen. Bingaman asserted there should be only one national cap-and-trade program, and therefore, once a federal program is established, that program should preempt any state or regional cap-and-trade programs. A press release on the principles is available at: <http://energy.senate.gov/public/>.
- **House Energy & Air Quality Subcommittee Holds a Hearing on CCS Legislation.** The Carbon Capture and Storage Early

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

July 14, 2008

Deployment Act (H.R. 6258), introduced by Subcommittee Chairman Rick Boucher (D-VA) in June, is intended to speed the deployment of carbon capture and storage (CCS) technology for fossil fuel-fired utilities. At the hearing, Full Committee Ranking Member Joe Barton (R-TX) expressed his support for the bill, but some Democratic committee members expressed concern that funding the deployment of CCS technology would be ineffective without a price on carbon that would encourage utilities to use the new technology. Michael Goo, the Natural Resources Defense Council's legislative director for climate issues, testified that Congress should focus on passing a mandatory cap on GHG emissions, which would provide greater revenues for the deployment of CCS technology. Michael Morris, President and CEO of American Electric Power, testified that any solution for curbing GHG emissions will require widespread deployment of CCS technology. Mr. Morris said he understands the argument that mandatory caps on emissions would be likely to provide funding to encourage carbon capture, but noted passage of such legislation is at least a year away – and that funding flows from such legislation would take a number of additional years to materialize. He asserted that sources and funding for CCS are needed on a more immediate timeframe.

- **House Passes Bill to Study Effect of Climate Change on Oceans.** The bill (H.R. 4174) expands federal research efforts on the effects of climate change on oceans. In addition, the bill would create a new interagency committee to coordinate and expand federal research on ocean acidification and marine ecosystems. H.R. 4174 also authorizes \$55 million in funding for the National Oceanic and Atmospheric Administration over the next four years and \$41 million for the National Science Foundation.

Administration

- **EPA Releases ANOPR on Options for Regulating CO₂; Administrator Avoids “Endangerment” Finding and Disavows EPA Regulation.** EPA released its long-awaited Advance Notice of Proposed Rulemaking (ANOPR) on July 11, in which the agency requests comment on a variety of options for regulating GHG emissions under the Clean Air Act (CAA). In a preface to the ANOPR, EPA Administrator Stephen Johnson states that regulation of GHGs under the CAA “could result in an unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land.” The preface also includes a letter from the White House Office of Management and Budget (OMB) to Administrator Johnson, explaining that the complexity and significance of the issues raised by the ANOPR made it impossible to reach a consensus during the interagency review of the document. The letter from OMB contains copies of letters from the Secretaries of Agriculture, Commerce, Transportation, and Energy, as well as the Chairman of the Council on Environmental Quality, the Director of the Office of Science and Technology Policy, the Chairman of the Council of Economic Advisors, and the Chief Counsel for Advocacy at the Small Business Administration, each of which identifies serious concerns with the ANOPR and agrees that the CAA is “a deeply flawed and unsuitable vehicle for reducing” GHG emissions. In sum, OMB states that “trying to address greenhouse gas emissions through the existing provisions of the Clean Air Act will not only harm the U.S. economy, but will fail to provide an effective response to the global challenge of climate change.” The remaining 500 pages of the document, in which EPA examines the existing CAA authorities and programs under which CO₂ could be regulated, highlight the myriad issues that the agency would need to resolve if it were to develop standards to govern CO₂.

July 14, 2008

The Bush Administration has not made a formal determination that CO₂ emissions “endanger public health or welfare” under the CAA in the document. Such an “endangerment finding” would have triggered obligations under the CAA for the agency to promulgate regulations for a wide variety of sources of such emissions. The ANOPR also includes an assessment by the Department of Energy that CCS could not be broadly deployed until 2025.

The ANOPR responds to the 2007 Supreme Court decision in *Massachusetts v. EPA*, in which the Court held that CO₂ is a “pollutant” under the Clean Air Act, and directed EPA to make an endangerment finding for CO₂ or explain why such a finding is not warranted. A number of newspapers, including *The Washington Post* and *The New York Times*, have reported that EPA staff made the endangerment finding in December 2007, but that the White House refused to accept the finding, which led the agency to develop the ANOPR as an alternative. News sources also have reported that the OMB and the White House pressured EPA into removing sections of the ANOPR that suggested that the benefits of regulating CO₂ emissions would exceed the costs. The deadline for submitting comments on the various options presented by the agency will be 120 days after the document is published in the *Federal Register*.

- **EPA to Issue Proposed Rule to Regulate Geologic Sequestration of CO₂.** EPA announced that the agency was close to proposing a rule to regulate underground injection of CO₂ to ensure the safety of underground drinking water sources. The EPA plans to create a permit system under the Safe Drinking Water Act for geologic sequestration.
- **With G8, President Bush Agrees to Cut Global GHG Emissions by Half by 2050.** At this past week’s Group of Eight summit, President Bush joined the United States to a proposal to cut global GHG emissions in half by 2050. The G-8 also expressed their support for carbon capture and sequestration (CCS) technology in reducing GHG emissions and called for the funding of 20 large-scale CCS demonstration projects by 2010 with broad deployment by 2020. See *International*, below, for more information on the G8 Summit.

States and Cities

- **California Legislators Call on Pres. Bush to Grant CAA Waiver.** California’s House and Senate passed a resolution (Joint Assembly Resolution 53) requesting that President Bush grant the state a waiver under the federal CAA to implement the state’s vehicle CO₂ emissions regulations. The California legislators argue in the resolution that California’s regulations would reduce CO₂ emissions twice as much as pending federal fuel economy regulations. California has challenged EPA Administrator Stephen Johnson’s December denial of California’s petition for a CAA waiver. Under the CAA, California must receive a waiver from EPA before it can implement its own vehicle GHG regulations.
- **Lawsuit Challenges Montana Power Plant Permit for Failure to Address CO₂.** Two environmental groups filed a petition in a Montana state court challenging a CAA prevention of significant deterioration (PSD) permit issued to a coal-fired power plant by the Montana Department of Environmental Quality (DEQ). The environmental groups argue that the permit issued to Southern Montana Electric Generation and Transmission’s Highwood Generating Station violates the CAA because it fails to require best available control technology (BACT) for

July 14, 2008

CO₂. The lawsuit is one of several recent lawsuits challenging permits granted by state permitting authorities to coal-fired power plants for failing to address CO₂ emissions. Earlier this month, a state court in Georgia invalidated a state-issued permit on such grounds.

- **Connecticut Governor Announces Plan to Reduce RGGI Costs for Consumers.** Connecticut Governor Jodi Rell (R) announced a plan to amend the state's regulations implementing the Regional Greenhouse Gas Initiative (RGGI) to reduce the cap-and-trade program's impact on consumers. The governor's plan would use funds generated through allowance auctions to make payments to consumers if allowance prices exceed \$5 per ton. RGGI is a regional cap-and-trade program made up of ten northeastern states.
- **Massachusetts Enacts Green Energy Legislation.** Massachusetts passed legislation that will increase the state's use of renewable energy, as well as energy efficiency and conservation measures. The Green Communities Act will require utilities within the state to obtain, by 2020, 15 percent of their electricity from renewable sources built no later than 1998. The Act will also require utilities to meet 25 percent of their electricity demand from energy efficiency and conservation programs.

Studies and Reports

- **Survey Finds Global Carbon Market Worth €38 Billion in First Half of 2008.** A survey conducted by Point Carbon found that, at the mid-year point, the global carbon market was worth approximately €38 billion (US\$59 billion), nearly equivalent to the €40 billion (US\$64 billion) worth of carbon credits and emission allowances traded in all of 2007. Point Carbon found that while part of the increase was due a higher average carbon price of €20.61 (US\$32.77), compared to €13.36 (US\$21.24) last year, the volume of credits and allowances traded also increased significantly.

Industry

- **RTOs, ISOs Call for Investment in Electricity Grid to Address Expected Impacts from GHG Regulation.** At a one-day conference sponsored by the Federal Energy Regulatory Commission (FERC), operators of Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) said that an improved electricity transmission system is necessary to ensure that the grid is able to respond to any impacts of future GHG regulation. Specifically, Southwest Power Pool CEO Nick Brown and Midwest ISO CEO Graham Edwards said that a variety of generation options should be pursued and an improved electricity grid would provide the flexibility needed to bring cleaner sources online in the future.

International

- **G8 Members Propose 50 Percent Emission Reduction in Climate Treaty.** At the end of a three-day summit in Toyako, Japan, the Group of Eight (G8) countries issued a statement in which they proposed that parties to the United Nations Framework Convention on Climate Change (UNFCCC) should "consider and adopt" an international agreement with the goal of reducing global GHG emissions at least 50 percent by 2050 from an unspecified base year. The G8 communiqué stated that the "50 by 50" goal should be met "consistent with the principle of

July 14, 2008

common but differentiated responsibilities”; this principle typically is interpreted to imply that industrialized countries should bear a greater portion of the burden. The agreement further called for G8 nations to implement economy-wide mid-term goals, but did not include specific mid-term emission targets. The G8 statement also included a commitment to provide \$10 billion annually to developing countries to promote deployment of clean energy technologies. G8 member countries include Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the United States. As discussed immediately below, the G8 did not win support for its proposal from key developing countries.

- **Major Economies Do Not Agree on G8’s “50 by 50” Proposal, but Commit to Pursue Long-Term Reduction Goal.** At the Major Economies Meeting on Energy Security and Climate Change, which took place in Japan immediately following the G8 Summit, the G8 nations and eight other major emitting nations agreed to pursue a long-term emission reduction goal – but did not agree on the G8’s “50 by 50” proposal. The sixteen nations issued a declaration of support for “a shared vision” that includes “a long-term global goal for emissions reductions” achieved through steps that are “ambitious, realistic, and achievable.” In addition, five major developing countries participating in the talks, China, India, Brazil, Mexico, and South Africa (collectively the “G5”), issued a separate statement calling for greater reductions from G8 members, particularly in the near- to mid-term. The G5 statement asserted that the “50 by 50” target would be insufficient to stabilize atmospheric GHG concentrations at relatively safe levels and urged the G8 to reduce emissions to 25-40 percent below 1990 levels by 2020, and 85-90 percent by 2050.
- **Alberta Establishes C\$4 Billion Climate Fund.** In effort to meet an emission reduction target adopted in January, the Canadian province of Alberta created a C\$4 billion (US\$3.9 billion) fund aimed at reducing GHG emissions by developing CCS technology and promoting energy efficient public transportation. The fund will use C\$2 billion (US\$1.95 billion) to invest in the province’s first large-scale CSS projects. The remaining C\$2 billion will fund improvement and expansion of local and regional public transportation systems. Under the January climate change plan, Alberta seeks to reduce its GHG emissions to 50 percent below 2005 levels by 2050.

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.

© 2008 Van Ness Feldman, P.C. All Rights Reserved.