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ENERGY AND ENVIRONMENT UPDATE

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Fall's Regulatory Forecast

As Congress returns from the August recess, and the Senate decides which, if any, energy policies will come up for a vote before the end of the year, the Obama Administration continues to move forward with its plans to regulate greenhouse gas emissions under the Clean Air Act beginning January 2, 2011.

The Environmental Protection Agency (EPA) is moving closer to a decision on whether to establish emissions limits for Greenhouse gasses (GHGs) through new source performance standards, which establish uniform rules for specific industrial sectors. The potential rules are one of the reasons the Justice Department asked the Supreme Court August 24th to overturn a lower court decision that allows plaintiffs to sue GHG emitters under federal nuisance law. Though the EPA is scheduled to begin enforcing prevention-of-significant-deterioration requirements for GHGs January 2nd, the EPA is expected to seriously examine expanding its regulation of GHGs beyond the Clean Air Act's Prevention of Signification Deterioration (PSD) program, which requires new and modified stationary sources to limit emissions using best available control technology. New source performance standards, on the other hand, apply to all new and modified facilities in a specified industrial sector, which could mean that for some sectors, plants not covered by PSD rules would be subject to the NSP standards. NSP standards would establish a floor for the emissions control requirements in each sector, and the PSD program would be able to require additional controls beyond a basic level.

Beginning next year, projects that increase heat-trapping emissions substantially will require a Clean Air Act permit. In early August, the EPA issued two rules that set the stage for next year's requirements. First, following the White House Office of Management and Budget's review earlier in the week, the Environmental Protection Agency proposed a rule August 12th to require 13 states to modify their regulations to enable them to enforce GHG emissions permitting requirements at new and modifying stationary sources. The states would be required to submit to the EPA revisions to their state implementation plans that enable them to enforce the requirements. At the same time, the agency announced a second proposal to establish a Federal Implementation Plan that would apply in states that have laws or regulations that prevent them from enforcing permitting requirements beginning in January of next year.

Additionally, the agency is scheduled to propose revisions to NSP standards for several industrial sectors, including electric power plants, in the next eight months, which would give the Administration opportunities to propose GHG emission standards for those sectors.

The EPA is also expected to issue guidance to states this fall about what constitutes best available control technology for regulated sources, and to issue draft GHG emission standards for heavy-duty trucks and buses.

As the EPA continues to push forward, industry groups, various states, and two environmental groups have filed lawsuits against the EPA's actions, and when it returns, the Senate may vote on Senator John Rockefeller's (D-WV) plan to delay the EPA from regulating greenhouse gases under the Clean Air Act by

two years. Even if the measure fails, it is also possible that appropriators could include a one-year delay as a rider to upcoming legislation.

Another quick note on possible Congressional actions: Senate Majority Leader Harry Reid said August 31st that he is considering adding a renewable electricity standard to a small energy bill that may have to wait for consideration until after the midterm elections. Should such a standard be included, it is likely be similar to the 15% standard (4% from energy efficiency) found in the Senate Energy Committee's legislation (S. 1462). Other pieces that might be included in such a package are an expansion of the Advanced Energy Manufacturing Tax Credit, an extension of the 1603 Grants in Lieu of Tax Credits program, funding for the HomeStar energy efficiency program, creation of a green bank, and perhaps some offshore drilling regulation reform. Possible payfors for a green jobs tax package could include \$35 billion in revenue from upper-income taxpayers, a vehicle for which would be the extension of the Bush Administration's middle class tax cuts. Majority Leader Reid cited some growing Republican support for the renewable electricity standard as one way to move forward with legislation this year, and after Senator Lisa Murkowski (R-AK) conceded her primary race August 31st to Joe Miller, the Senate Energy Committee is going to look much different next Congress. The next most senior Republican on the panel is Senator Richard Burr (R-NC).

Congress

Upcoming Hearings

The Senate will be in recess until September 13th and the House will be in recess until September 14th.

Administration

New Ideas to Increase Growth

Following a meeting with his economic team August 30th, President Obama announced that he will soon propose new ideas to spur economic growth in the United States, revolving around tax cuts and investments in clean energy and infrastructure.

200,000 Homes Weatherized

Vice President Joe Biden announced August 26th that 200,000 homes have been weatherized thus far as a result of the Recovery Act. As a result, more than 200,000 low-income families have saved money on energy bills while conserving energy and thousands of jobs have been created under the Department of Energy's Weatherization Assistance Program. With the program upgrading homes at its optimal rate, roughly 25,000 homes per month, it is on track to meet its goal of weatherizing 600,000 homes using \$5 billion in Recovery Act funding. She also said that the Department will reduce its direct GHG emissions 34% by 2020 and its indirect emissions 13.5% by then.

Research Shifts to Mitigation and Adaptation

As the U.S. Global Change Research Program prepares its congressionally mandated National Climate Assessment, it is shifting its focus from the effects of climate change to research on adapting and mitigating those changes. The Global Change Research Act of 1990 requires that the program, an effort involving 13 agencies and led by the White House Office of Science and Technology Policy, issue findings to Congress and the President every four years. The next report is due by June 2013.

Department of Defense

DOD Plans Energy Use Reductions

At the annual meeting of the Environmental Council of the States August 29th, Department of Defense official Maureen Sullivan said that the agency aims to reduce its energy use by 30% between 2003 and 2015, its water consumption by 26% between 2007 and 2020, and to obtain 25% of its energy from renewable sources by 2025. Additionally, under the new plan, all new buildings and 15% of existing large buildings will be required to meet new green standards.

Department of Energy

DOE to Host Biomass Webinars

The Department of Energy's Biomass Program will host a webinar on September 8th entitled "The Promise and Challenge of Algae as a Renewable Source of Biofuels." The web conference marks the first in the Program's webinar series that will examine several of the program's activities and feature discussions relevant to the development of renewable fuels, power, and products from biomass resources.

DOE Announces Smart Meter Installations

The Department of Energy announced August 31st that two million smart meters have been installed across the United States as a result of Recovery Act funding that is speeding the modernization of the domestic electrical grid. An analysis by the Electric Power Research Institute estimates that smart grid technologies could reduce electricity use by more than 4% each year by 2030, resulting in savings of over \$20.4 billion.

DOE Facilitates Hydropower Modernization

On August 27th, the Department of Energy initiated a hydropower facility modernization project at the Cheoah Dam in North Carolina that will produce over 28% more power from existing water resources. The project, funded with \$12.9 million in Recovery Act funding and \$110 million in private dollars, will supply power to Alcoa Inc.'s primary aluminum production factory, and in so doing will save 40 hydropower operation jobs and 1,600 aluminum production jobs and create an additional 70 jobs during construction.

Department of Treasury

IRS Awards Coal and Gasification Credits

The Internal Revenue Service issued an announcement September 1st to disclose the results of the 2009-2010 allocation round under the qualifying advanced coal project program of tax code Section 48A and the qualifying gasification project program of Section 48B. The IRS certified \$1,009,436,000 in credits for qualifying projects under Phase II of the advanced coal program.

Clean Renewable Energy Bond Applications Open

The IRS issued a solicitation September 1st for applications from cooperative electrical companies for previously unallocated authority to issue new clean renewable energy bonds under Section 54C of the tax code. Applications are due November 1, 2010.

Environmental Protection Agency

Reporting Comment Period Extended

The Environmental Protection Agency announced August 27th that it would extend the comment period on a supplemental proposed rule to keep confidential some GHG emissions data submitted by facilities under reporting requirements. Additional comments on the confidential business information proposal are due September 7th.

EPA and DOT Propose Fuel Economy Grades

The EPA and the Department of Transportation announced a proposed rule August 30th that would give cars and light trucks letter grades based on their fuel economy and GHG emissions as part of revisions to the fuel economy labeling system. At the same time, the agencies proposed fuel economy ratings for electric vehicles and plug-in hybrids expressed in equivalent MPG based on electricity usage.

EPA Rejects Texas NSR Revisions

On August 31st, the EPA rejected proposed revisions by Texas to its clean air permitting program for new source review because it found that the revisions do not meet Clean Air Act requirements. Texas had proposed that it comply with old eight-hour and current one-hour standards for ozone, and also had proposed a new definition of best available control technology. EPA rejected both of these proposals, along with additional revisions affecting major new source review with or without plantwide applicability

limitation provisions and the state's pollution control project standard permit revisions. Several days prior, industry officials urged other states, especially Virginia, Indiana, and Arizona, to follow Texas in its refusal to implement the agency's tailoring rule.

Court Overturns EPA Emissions Rule

The U.S. Court of Appeals for the District of Columbia Circuit ruled August 27th that portions of EPA's cap-and-trade program for reducing ozone-depleting substances illegally invalidated emissions transfers within companies under EPA rules from the Bush Administration, thus siding with industry in the case *Arkema Inc., v. EPA*. EPA's stance on inter-pollutant trading is significant because it could be used in a climate cap and trade program.

Personnel

The Senate Homeland Security and Governmental Affairs Committee will hold a confirmation hearing September 16th to examine Jack Lew as the new director of the White House's Office of Management and Budget. The Senate Budget Committee is also expected to hold a confirmation hearing soon after Congress returns from the August recess.

The Obama Administration announced September 1st the appointment of Gwen Keyes Fleming as the Environmental Protection Agency's Region 4 Administrator. The region covers Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, Tennessee, and six tribal nations.

Miscellaneous

Florida Considers Taxability Issues

The Florida Department of Revenue recently issued guidance on the application of sales tax to incentives provided by a utility to encourage its customers to purchase energy-efficient gas appliances. The DOR advised that deductions from the purchase price of an application at the time of sale qualified as a discount and that sales tax should be computed on the net price after the deduction.

Massachusetts Court Rejects Power Lines Challenge

Affirming a May 2009 decision by the State Energy Facility Siting Board, the Massachusetts Supreme Judicial Court ruled (4-2) August 31st that the construction and operation of transmission lines imperative for construction of a 130-turbine wind farm in the Nantucket Sound may proceed over the objections of opponents.

California Issues GHG Reduction Advice

The California Air Pollution Control Officers Association released a document August 31st to assist local governments in developing measures to reduce GHG emissions. The report, *Quantifying Greenhouse Gas Mitigation Measures*, outlines measures that can make homes and buildings more energy-efficient, promote the use of renewable energy, foster compact communities, increase public transit, reduce traffic congestion, conserve water, and reduce waste.

Japan Unveils Cap-and-Trade Draft

Japan's Ministry of the Environment unveiled a draft cap-and-trade scheme August 31st to reduce GHG emissions with a goal to have the measure enacted into law in 2011. A similar scheme failed to pass the previous Diet due to industry objections.

Colorado Signs FERC Agreement

Colorado and the Federal Energy Regulatory Commission signed a memorandum of understanding August 25th to ease the development of small-scale hydropower projects. Federal studies have identified several hundred potential hydropower projects of less than 5 MW in Colorado with a combined capacity of more than 1,400 MW, but lengthy permitting processes have allowed only 24 projects to receive an exemption permit from the Federal Energy Regulatory Commission (FERC) in the past 30 years. Colorado will develop a pilot program to test options for simplifying and streamlining procedures for

authorizing conduit exemptions, and will hold quarterly teleconferences with FERC to discuss the pilot program and share data.

Los Angeles Pollution Limits Upheld

On August 26th the U.S. District Court for the Central District of California upheld a program by the Port of Los Angeles to limit the air pollution from trucks that move goods to and from the port, in part through provisions that ban the use of independent owner-operators. The Port is in its first year of a program to reduce truck emissions 70% and by 2012 will reduce emissions 80%. Representative Jerry Nadler (D-NY) was joined by 67 colleagues in introducing legislation (H.R. 5967) July 29th that would amend the Federal Motor Carrier Act to allow ports to enact and enforce clean truck programs and implement environmental programs above current federal requirements.

CEC Backs Mojave Solar License

The California Energy Commission licensed the state's first solar power facility in 20 years August 25, granting Beacon Solar LLC permission to build its proposed 250 MW plant at a site on the western edge of the Mojave Desert. The state's 20% renewable portfolio standard and its climate change program are driving the push to bring solar plants online quickly.

Dutch Begin Climate Financing Commitment Monitoring

The environment ministry of the Netherlands unveiled a website September 3rd that will track contributions made by industrialized countries to a \$30 billion fast start financing mechanism to assist developing countries in addressing the challenges of climate change. Industrialized nations pledged at the Copenhagen climate negotiations last year to provide \$30 billion in initial funding for the Copenhagen Green Climate Fund that will support adaptation and mitigation efforts in developing countries from 2010-2012 and increase to \$100 billion per year by 2020.

Labor Supports Utilities in Emissions Case

A labor group supported by several unions, including the United Mine Workers of America, the International Brotherhood of Teamsters, and the International Brotherhood of Electrical Workers, asked the Supreme Court September 1st to grant review of a decision by a federal appeals court allowing several states to sue American Electric Power Co. and other utilities in federal court for the GHG emissions.

California Climate Policy Delay Debated

With the California general election just a few weeks away, the battle to preserve the state's ability to implement the Global Warming Solutions Act of 2006 (A.B. 32) is strengthening. Records on the California Secretary of State's website show proponents of Proposition 23, which asks voters to suspend A.B. 32 programs, including a GHG emissions cap-and-trade program, until after the state's unemployment rate falls to at least 5.5% for four consecutive quarters, have raised over \$8.2 million, mostly from out of state energy companies. A July poll from the Public Policy Institute of California showed two-thirds of California voters support A.B. 32.