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In This Issue

What a difference a Congress makes. Little more than a year ago, members of the 111th Congress had their choice of proposals designed to reduce greenhouse gas ("GHG") emissions, ranging from cap-and-trade programs to renewable energy standards to taxes on GHG emission. While the House of Representatives passed a bill that would have established a cap-and-trade program, the Senate could not agree on a proposal, and so no law was ever enacted. In the current 112th Congress, GHG legislation is more of a punch line than a proposal, with most recent efforts focused on how to deny the Environmental Protection Agency ("EPA") the ability to regulate GHG emissions under the Clean Air Act. Given the federal government's unwillingness, or inability, to clarify a position on GHG emissions regulations, the states and the courts have stepped into the void. Recently, the United States Supreme Court heard arguments in American Electric Power v. Connecticut, *a case brought by six states, New York City and several land trusts, arguing that fossil fuel-powered power plants are contributing to a public nuisance by releasing GHGs into the air. While the Court has not yet ruled on the matter, the tenor of the oral arguments suggest that a majority of the Justices believe that federal and state governments, and not federal district court judges, are best suited to reach decisions regarding the regulation of GHGs. If that is in fact the Court's ruling, GHG emitters will be looking to state and federal regulators for guidance. EPA has already issued regulations requiring permits for GHG emissions in excess of certain thresholds, but there are also several state and regional initiatives that major GHG emitters need to be aware of. This edition of the Climate Change Update includes an article surveying the current state of U.S. regional and state initiatives employing market mechanisms for reducing GHG emissions. Also included in this edition is an article on international efforts to reduce GHG emissions from deforestation and forest degradation in developing countries, an effort in which many developed nations, including the United States, have agreed to participate. So while the United States Congress continues what seems like an endless debate on the causes of climate change and how, or whether, to address it, the states and the international community continue to develop and test programs to address what many outside the U.S. agree is a serious global threat.*

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US Carbon Markets: Mostly Cloudy with a Chance of Regulation

By Benton B. Bodamer

As the recent budgetary battles on Capitol Hill demonstrated, the future of federal regulation of greenhouse gas ("GHG") emissions remains uncertain. As both parties positioned themselves for a show-down over spending, Democrats and Republicans voted for various measures that would have denied the Environmental Protection Agency ("EPA") funds to regulate GHGs under the Clean Air Act, and while none of those measures passed, the bipartisan support for such measures all but ensures that there will be future efforts in Congress to limit the role of the EPA in this regard.[1] With significant challenges facing the federal regulation of GHG emissions, existing and emerging state and regional regulatory efforts are attempting to fill the void, but even these initiatives are increasingly clouded by the same political storm that hangs over Washington.

California Cap-and-Trade

Five years ago, then-Governor Arnold Schwarzenegger signed into law the Global Warming Solutions Act of 2006 ("AB 32"), mandating a reduction of statewide GHG emissions to 1990 levels by 2020. Since then, however, the implementation of AB 32 has faced some challenges. First, a 2010 ballot measure sought and failed to repeal the law, suggesting a willingness by many Californians to accept the need to reduce GHG emissions. On December 17, 2010, the California Air Resources Board ("CARB") released proposed rules for implementation of a comprehensive cap-and-trade program, designed to meet the goals of AB 32.[2] Most recently, though, on March 17, 2011, a California Superior Court judge enjoined implementation of CARB's proposed cap-and-trade program until CARB can demonstrate adequate consideration of alternative methods to reduce GHG emissions.[3] Absent rapid compliance with the order (or a successful appeal), CARB's planned implementation of AB 32, scheduled to begin on January 1, 2012, could be further delayed.

Notwithstanding these challenges, AB 32 is California law, and CARB legally is required to take steps to meet the GHG reductions mandated by the statute.[4] Therefore, it currently is not a question of if, but when, California will regulate GHG emissions. What remains unclear is what form that regulation will take. The current program, which might very well still be implemented at the beginning of next year, caps emissions at 2012 levels, with the cap decreasing steadily overtime to reach 1990 levels by 2020. Emitters would be required to surrender allocated or purchased compliance instruments for all GHG emissions during a given compliance period. As currently contemplated, the program's first three-year compliance period would apply to: (i) in-state generators of more than 25,000 metric tons of carbon dioxide equivalent ("$MtCO_2e$"); (ii) first deliverers of imported electricity; (iii) in-state large industrial sources of more than 25,000 $MtCO_2e$; and (iv) commercial suppliers of carbon dioxide as an industrial gas. Starting with the second three-year compliance period, which would begin in 2015, the program would be expanded to apply to fuel distributors (including local natural gas distribution companies, refiners and importers of liquefied petroleum gas). Implementation of AB 32 could have significant implications for the national trend toward regulation of GHGs. Although no specific plan for linkage to other markets is currently specified in CARB's proposed cap-and-trade system, California already is a signatory to or member of various memoranda of under-standing and similar efforts to establish a larger North American cap-and-trade system,[5] and CARB recently announced linkage talks with the European Union Emissions Trading Scheme ("EU ETS"), Europe's implementation of the Kyoto Protocol. EU ETS is the world's largest GHG cap-and-trade system, and CARB's proposed system would create the second largest. The international impact of linking the two systems could be significant, creating a potential financial catalyst for even more participants.

Political Shootout in New Mexico

Similar to the situation in California, the proposed cap-and-trade program in New Mexico also appears under attack. In the waning weeks of former governor Bill Richardson's administration, in 2010, the New Mexico Environmental Improvement Board ("EIB") ushered through rules that, if left intact, would implement a state-wide cap-and-trade system in that state, effective January 1, 2012.[6] Even before her inauguration, current Governor Susana Martinez made clear that

reversal of EIB's cap-and-trade rule was a top priority. The day she took office on January 1, 2011, Governor Martinez issued her first executive order, a warning shot that suspended publication of all pending rules and regulations for 90 days, and thereby halted implementation of EIB's cap-and-trade rule.[7] Three days later she replaced the entire EIB with new appointees. The New Mexico Supreme Court disagreed with Governor Martinez's claimed authority to stall publication of approved EIB rules and issued a writ requiring publication to make the rules effective.[8] Three Republican-sponsored bills introduced in New Mexico to overturn EIB's regulations have since disappeared into either the Democratically-controlled Senate Judiciary Committee or the House Energy and Natural Resources Committee, where neither party has a majority.[9] As such, it appears that New Mexico's proposed cap-and-trade program is on track to be implemented, but Governor Martinez's ability to reopen the final rules by initiating a new EIB review process makes the final implementation far from certain.

Western Climate Initiative

In addition to state-level efforts, California and New Mexico are both party to the Western Climate Initiative ("WCI"), a regional collaboration among certain U.S. states and international participants to reduce GHG emissions, invest in clean-energy technology and reduce dependence on imported oil.[10] The WCI's stated goals include establishing an international regional cap-and-trade system among partners, but participation by each partner is contingent on implementation by such partner of a local cap-and-trade system. In practice, however, any initiative is only as strong as the convictions of its members, and, to date, only two U.S. WCI partners – California and New Mexico – have actually attempted implementation. In its recently released proposed regulations, CARB only listed four WCI partners (New Mexico, British Columbia, Ontario and Québec) as candidates for possible linkage to the California cap-and-trade system before commencement in 2012, hinting that most other WCI members have not taken steps toward implementation and are unlikely to do so any time soon.[11]

Regional Greenhouse Gas Initiative

As WCI struggles toward implementation, the Regional Greenhouse Gas Initiative ("RGGI") provides a meaningful example of the growing pains faced by even the most limited compliance market. RGGI is a binding agreement by certain Northeastern and neighboring states to participate in a regional cap-and-trade system, and has administered a related GHG market since 2008, regulating emissions by fossil-fired electricity producers with a capacity of 25 megawatts or more and generating millions in auction revenues for member states.[12] Under RGGI, a certain percentage of allowances is granted to emitters, and remaining compliance obligations are met by purchasing one or a combination of: (i) allowances sold in RGGI-run quarterly auctions;[13] (ii) offsets;[14] or (iii) a combination of allowances and/or offsets from other emitters. A state-selected percentage of between 25% and 80% of state proceeds from the auctions is required to be reinvested in energy efficiency initiatives in the member states. Based on advances in efficiency, lower future energy costs could, in theory, make RGGI a net benefit to consumers, despite the possibility of regulated emitters passing on their compliance costs as higher electricity rates to consumers.

The long-term success of RGGI is far from certain. At least three states (New Hampshire, New York and New Jersey) have re-appropriated large percentages of their respective RGGI proceeds to their general funds to balance out budget constraints, in part ignoring RGGI's underlying intent of fostering investment in energy efficiency projects. According to RGGI numbers, however, RGGI participating states are generally investing up to 80% of auction proceeds in energy programs, including 52% for energy efficiency efforts.[15] Although possible future members include four current observers (Pennsylvania and Canadian provinces New Brunswick, Ontario, and Québec), the legislatures or governors of at least four current member states (Delaware, New Hampshire, New Jersey and Maine) recently have discussed withdrawal from the system, citing, among other concerns, perceived high costs to local energy producers.[16] From a market efficiency standpoint, auctioned allowances for current compliance periods have sold at the auction floor price for several consecutive quarters, suggesting an over-issuance of allowances and any re-assessment of allowances would not be implemented until 2012.

Despite the possibility of additional domestic GHG compliance markets, and even the possibility of a consolidated North American compliance market or a broader

international compliance market,[17] the future of state and regional compliance markets is far from certain. Given the slow progress of RGGI and the political and judicial challenges to California and New Mexico's proposed cap-and-trade systems, the progress of regional GHG regulatory efforts in the U.S. appears tepid at best.

Future of Voluntary Markets Also Unclear

Mandatory cap-and-trade programs are not the only ones facing challenges: the flagship voluntary cap-and-trade system in the U.S. is already defunct. Beginning in 2003, the Chicago Climate Exchange ("CCX") accepted participants for its voluntary cap-and-trade compliance program, pursuant to which members contractually self-imposed a GHG emissions cap.[18] Although many joined CCX, the price of CCX credits tumbled over time from a high of around $7.40 per $MtCO_2e$ to the final trading position of around $0.05 - $0.10 per $MtCO_2e$. Possible steps leading to the market's demise could have included: (i) critical reception of CCX's credit methodologies; (ii) the apparent non-transferability of CCX allowances into the then-contemplated federal legislative proposals; and (iii) the eventual failure of federal legislative efforts in their entirety. When it became clear that no federal scheme would be signed into law, CCX's parent company, Climate Exchange PLC, was ultimately sold to Intercontinental Exchange, though little of the deal's value was attributed to the CCX assets. Despite the "death" of the CCX cap-and-trade program, CCX announced a new voluntary offset registry earlier this year, pursuant to which CCX will issue offsets based on its existing CCX protocols. The new program is entirely voluntary and not compliance-based, meaning CCX continues to exist, but no longer operates an ongoing cap-and-trade compliance program.

Voluntary Offset Markets: Buyer Beware

Emission reduction assets sold in voluntary markets (generally referred to as "offsets") also have implications in existing and proposed compliance markets, but the differences between largely unregulated methodologies mean that buyers of offsets face a wide diversity in asset quality.[19] As discussed below, although some voluntary offsets have the potential to meet cap-and-trade compliance obligations under existing or potential future U.S. compliance markets, most do not. The participants purchasing offsets in voluntary markets vary widely and include, among others, unregulated businesses and individuals seeking to offset their carbon footprints (or act as brokers for those hoping to do so), and entities hedging against future regulation. Generation of offsets is usually based on a verification standard designed to incentivize GHG emission-reducing activities. Depending on the methodology for verification, potential examples of offset-worthy projects include new wind facilities, waste-to-energy projects, hydroelectric generation plants, high-efficiency cooking stoves and even sustained forestry or re-forestation initiatives. Voluntary offset standards usually include requirements that emission reductions generated by qualifying projects be all or some combination of: real, additional, permanent, verifiable, enforceable and quantifiable.[20]

Various third-party auditing firms employ differing methodologies for verification.[21] Some offsets are barely worth the paper (or electronic medium) on which they are printed. Other offsets meet such a high standard that they are coveted both by those buying credits in the voluntary markets and also those seeking to meet obligations under a compliance regime, such as CARB's proposed cap-and-trade system. The offsets generated and sold by Climate Action Reserve are a timely example of the latter concept. Climate Action Reserve has established 10 different protocols to generate an offset instrument the group calls a Climate Reserve Tonne ("CRT").[22] Based on CARB's current offset proposals, CRTs from four of Climate Action Reserve's approved protocols could count toward compliance with California's cap-and-trade system,[23] meaning that early adopters that developed or purchased CRTs as far back as 2005 might already hold compliance instruments for the California cap-and-trade system, if it is implemented.[24]

Purchasers currently can acquire offsets through exchanges, in over-the-counter trades with carbon brokers, or directly from the actual project developers of emission reductions. Given the proliferation of standards and lack of clear regulatory oversight, the general theme in voluntary markets remains *caveat emptor*.

Conclusion

The U.S. is currently host to a nebulous array of disparate and politically contentious state and regional GHG regulatory efforts, many of which lack any significant traction. The future of federal

regulatory efforts remains just as unclear. As markets for the purchase and sale of GHG emission reduction assets continue to evolve, the extinction of some markets and the consolidation of other markets have already begun. U.S. emitters must stay tuned to the proverbial carbon forecasts as the political storm concerning the regulation of GHG emissions continues to cloud the skies over Capitol Hill and beyond.

1 The EPA's regulatory authority to regulate GHGs is being challenged on a number of fronts. For a previous analysis of these cases, please see the February 2010 *Climate Change Update*, available here.

2 For a brief overview of the original CARB proposal, please see the December 2010 *Climate Change Update*, available here.

2 Association of Irritated Residents v. Cal. Air Res. Bd., No. CFP-09-509562 (Cal. Super. Ct. March 17, 2011).

4 Similarly, the EPA's current actions to regulate GHGs were a specific response to the U.S. Supreme Court's ruling in Massachusetts v. EPA (127 S. Ct. 1438 (2007)), wherein the EPA was essentially forced to either regulate GHGs or make a determination that GHG emissions did not contribute to climate change.

5 See discussion below under "Western Climate Initiative."

6 For a more detailed discussion of the proposed New Mexico system, please see the December 2010 *Climate Change Update*, available here.

7 Exec. Order No. 2011-001.

8 *New Energy Economy, Inc. v. Martinez*, No. 32,806; 32,811 (2011-NMSC-006).

9 S.B. 91, 50th Leg., 1st Sess. (N.M. 2011) (currently in Senate Judiciary Committee); S.B. 190 50th Leg., 1st Sess. (N.M. 2011) (currently in Senate Judiciary Committee); and H.B. 579, 50th Leg., 1st Sess. (N.M. 2011) (failed to obtain "do pass" motion from House Energy and Natural Resources Committee on March 14, 2011).

10 Current WCI partners are Arizona, California, Montana, New Mexico, Oregon, Utah, Washington, and Canadian provinces British Columbia, Manitoba, Ontario and Québec. Six Mexican states, six more U.S. states and four more Canadian provinces are also WCI observers.

11 The Midwestern Greenhouse Gas Reduction Accord, a Midwestern parallel to the West Coast efforts of the WCI to establish a regional cap-and-trade system, has met with similar inaction by its participants and many member states have seen recent legislation attempting to preemptively prohibit GHG regulatory efforts. Midwestern GHG Reduction Accord participating states and province are Illinois, Iowa, Kansas, Manitoba, Michigan, Minnesota and Wisconsin; Indiana, Ohio and South Dakota are observers. With many newly elected Republican governors in these states, no participant or observer has taken or is likely to take meaningful legislative or regulatory steps toward implementation.

12 Current RGGI states are Connecticut, Delaware, Massachusetts, Maryland, Maine, New Hampshire, New Jersey, New York, Rhode Island and Vermont. As of the March 9, 2011 quarterly auction, RGGI states had received cumulative proceeds in excess of $860 million. A summary of all RGGI auction results is available here.

13 Proceeds of RGGI auctions are allocated to member states based on various factors including *pro rata* emissions.

14 See discussion below under "Voluntary Offset Markets."

15 RGGI's claimed uses of auction proceeds are available here.

16 *See, e.g.*, New Hampshire's H.B. 519, 2011 Reg. Sess. (N.H. 2011).

17 EU ETS already regulates certain U.S.-based companies with a large enough European presence, and eventually could require U.S. airlines to comply in certain contexts with the EU ETS.

18 Weil, Gotshal & Manges LLP was a voluntary participant in the former cap-and-trade program under CCX.

19 Weil, Gotshal & Manges LLP advises not-for-profit E+Co and its subsidiary E+Carbon, Inc. on an ongoing *pro bono* basis in the development, purchase and third-party sale of GHG emission reductions.

20 In other words, offsets are typically generated by projects that (i) would not have happened absent potential offset revenue; and (ii) will result in actual, permanent emissions reductions below a specified baseline, as verified and quantified through ongoing third-party audits. CARB's proposed regulations reflect these standards.

21 Examples include the Gold Standard, the Voluntary Carbon Standard, the Climate Community & Biodiversity Standards, Climate Action Reserve, the Environmental Resources Fund and the CCX standards.

22 A description of all Climate Action Reserve protocols is available here.

23 California Environmental Protection Agency Air Resources Board, Proposed Regulation to Implement the California Cap-and-Trade Program, Part I, Vol. I, Staff Report: Initial Statement of Reasons, at III-21, available here.

24 Similarly, offsets complying with the Kyoto Protocol's Clean Development Mechanism are already permitted for compliance in the EU ETS and could ultimately be allowed for RGGI compliance as well if certain market triggers are met (though this currently seems unlikely).

International Attempts to Reduce Emissions Through REDD Continue

By Jesse Zigmund

As United Nations Framework Convention on Climate Change ("UNFCCC") talks continued last week in Bangkok in an attempt to seek an international agreement on reducing greenhouse gas ("GHG") emissions, it is worth revisiting one of the more notable achievements to come out of the 16th UNFCCC Conference of the Parties ("COP 16") that took place in Cancún, Mexico at the end of 2010. There, in an agreement known as the REDD+ Agreement, the parties agreed to reduce GHG emissions from deforestation and forest degradation in developing countries. Although the COP 16 agreement is long on aspirations and short on details, we examine how the REDD+ aspect of the agreement advances the development of a framework for participating nations to mitigate climate change through proper forest management.

The Impact of Deforestation and Forest Degradation on Climate Change

The world's forests act like a giant sponge that absorb carbon through photosynthesis by plant life and organic matter in forest soil. The Intergovernmental Panel on Climate Change ("IPCC") estimated in 2007 that world forests held 3,300 metric tons of carbon dioxide equivalent ("$MtCO_2e$") of GHGs in 2003, which was down substantially from the 5,800 $MtCO_2e$ of carbon estimated to be sequestered by global forests in 1990.[1] The IPCC contends that deforestation (primarily from logging and converting forest to agriculture) and forest degradation (decreasing the density of forests) are significant contributors to this loss. The loss of forest reduces Earth's capacity to absorb GHGs, and results in releases of GHGs. This is because, as vegetation dies, whether naturally or through deforestation, it releases GHGs. In fact, the IPCC estimates that over 17% of global GHG emissions are caused by deforestation and decay of biomass.[2] Consequently, reducing GHG releases through forest destruction and even expanding forest stocks, can have a significant impact on mitigating climate change.

Brief History of REDD/REDD+

COP 16 was the latest in a series of steps to combat climate change by focusing on reducing emissions from deforestation and forest degradation ("REDD"). The first REDD initiatives were introduced at the UNFCCC's 11th Conference of Parties in Montreal in 2005, where the parties agreed to investigate the impact that deforestation had on global GHG levels. Then, at the UNFCCC's 13th Conference of Parties, which took place in Bali in December 2007 ("COP 13"), the UNFCCC adopted the Bali Action Plan, which introduced the REDD+ program, the "+" symbolizing the commitment of parties to include the role of conservation, sustainable management of forests and enhancement of forest carbon stocks. The ultimate goal of REDD+ is the realization of verifiable GHG emissions reductions through responsible forest management and rewarding countries and other stakeholders with payments for those reductions. Approximately 130 REDD+ projects have been registered since the adoption of the Bali Action Plan at COP 13, primarily in countries in Africa, Asia and South America, according to ONF International, an environmental consulting firm.

Progress on REDD+ continued at the UNFCCC's 15th Conference of Parties in Copenhagen in December 2009, with the adoption of the Copenhagen Accord. The Accord, while not legally binding upon UNFCC member countries, continued to develop the parameters regarding the implementation and financing of REDD+ projects. In particular, the Accord included a pledge on behalf of developed countries to provide $30 billion of financing through 2012 in order to initiate immediate action to mitigate climate change, including through the implementation of REDD+ programs. Thus far, over $5 billion has been committed from developed countries, most notably from France, Germany, The Netherlands, Norway, the United Kingdom and the United States.

COP 16

The COP 16 REDD+ agreement most directly builds upon the Copenhagen Accord, calling for nations to reduce emissions from deforestation and forest degradation, as well as to conserve and enhance forest carbon stocks, and manage sustainable forests. In addition, COP 16 made progress on several of the issues surrounding REDD+. Specifically, COP 16 calls on developing countries to implement a strategy to develop REDD+ programs at a national level; establishes reference levels in order to determine how much GHG emissions will be averted by avoiding deforestation and

degradation; develops systems to monitor and report REDD+ activities; and develops safeguards to ensure the rights of indigenous people, forest governance, conservation and diversity, amongst others.

Developed countries also reaffirmed their pledge to provide $30 billion of financing though 2012 for REDD+ programs and established the Green Climate Fund in which developed country Parties commit to a goal of mobilizing $100 billion per year by 2020 to address the needs of developing countries in developing and implementing climate change mitigation programs. The Green Climate Fund will be governed by a board of 40 delegates, who were announced last week, and who will design and oversee the fund, including who controls the funding awards.

The Devil is in the Details

While all parties to the UNFCCC agree that something must be done about deforestation and forest degradation, REDD+ will succeed only if the UN can resolve several serious issues, including how to ensure that adequate monitoring, reporting and verifications measures are in place in order to properly determine the amount of carbon emissions that have been reduced through REDD+. In addition, there is intense debate over how to ensure that adequate measures are in place to protect the legal and financial interests of all stakeholders in a REDD+ project, including indigenous people.

There also is considerable uncertainty concerning the source of funding for REDD+ initiatives. To date, the public sector has provided the funding of REDD+ preparation and pilot programs in the form of grants. But from the outset of REDD+ discussions, developed countries have considered the private sector a likely and, perhaps, crucial source of funding. Some have called for the creation of "Forest Carbon Credits" that could be sold by developing countries on carbon exchanges like the European Carbon Exchange ("ECX"), which acts as a trading market for GHG emission permits created by participating European countries under the Kyoto Protocol. Forest Carbon Credits are envisioned to work in the same manner as carbon credits created under the Clean Development Mechanism regime that are eligible for trading on the ECX.[3]

Significant issues must be resolved before serious consideration can be given to private trading of Forest Carbon Credits. At COP 16, the European Union made clear that it considered it premature to discuss trading Forest Carbon Credits in private capital markets.[4] With the Kyoto Protocol expiring in 2012 and uncertainty about what will follow in the wake of the U.S. Congress' failure to enact climate change legislation under the Obama administration, carbon markets themselves may not evolve in the direction proponents hope for.

COP 17

Despite the progress made at COP 16 regarding REDD+ programs, it is uncertain whether the parties to the UNFCCC will be able to set aside political differences and overcome technical difficulties in order to successfully implement a global REDD+ program. Moreover, some members of the UNFCCC fear that the small steps taken by COP programs, such as REDD+, are drawing attention from the urgency of climate change and from reaching an agreement on a successor to the Kyoto Protocol, which is set to expire in 2012. As delegates and ministers return to their respective capitals to plug the holes left by COP 16, the global climate change community will be eagerly watching the developments leading up to COP 17 in Durban, South Africa, set to take place in December 2011.

1 Working Group III Report "Mitigation and Climate Change" (IPCC 2007).

2 "Climate Change 2007 Synthesis Report: Report for Policymakers" (IPCC 2007).

3 Clean Development Mechanism credits are credits created under the UNFCCC's Clean Development Mechanism, which permits verified GHG emission mitigation activities to generate carbon credits that permit a buyer to emit GHGs in the same manner as a GHG emissions permit does.

4 "The risk is if you do it in the wrong way that you risk undermining the whole carbon market," Statement by EU climate commissioner Connie Hedegaard (Reuters December 6, 2010). http://uk.reuters.com/article/idUKTRE6B41YB20101206.

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