

Environmental Law

Global Climate Change Legislation: Prepare for What Lies Ahead

By Steven Senior and Stephen Smithson

While some skeptics still consider global climate change a theory, New Jersey Governor Jon Corzine and the state legislature have determined its effects may be catastrophic. They have proposed far-reaching goals to reduce emissions of greenhouse gases (“GHG”) that are considered a cause of global climate change and have started enacting legislation to achieve those goals. Despite the current impasse on the issue between Congress and President Bush’s administration, both candidates for president support use of a national market-based cap-and-trade program to reduce GHG emissions nationally over time. As a result, new laws and regulation of GHG are virtually certain to come, and soon. The questions, then, for environmental counsel are: (1) What will be the scope of the laws? (2) Who will they apply to? and (3) How should our clients prepare now? In broad strokes, this article will address each of these questions.

Background

GHG include (in order of relative atmospheric abundance) water vapor, carbon dioxide (“CO₂”), methane (“CH₄”), nitrous oxide (“N₂O”), ozone and chlorofluorocarbons (“CFCs”), as

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well as numerous other less prevalent gases. Policy-makers, however, generally have focused their legislative and regulatory proposals on CO₂, CH₄, N₂O, sulfur hexafluoride (“SF₆”), hydrofluorocarbons (“HFCs”) and perfluorocarbons (“PFCs”), which we refer to in this article as the carbon dioxide equivalent (“CO₂e”) gases. Carbon dioxide equivalency refers to the number of tons of CO₂ gas emissions that has the same global warming potential as a ton of a particular CO₂e gas.

New Jersey Initiatives

On July 6, 2007, New Jersey enacted its first legislation to regulate emissions of the CO₂e gases (and, potentially, other GHG), the Global Warming Response Act, N.J.S.A. 26:2C-37 et seq. The act requires the New Jersey Department of Environmental Protection (“NJDEP”) to develop regulations to monitor statewide CO₂e gas emissions, to identify all significant sources of those emissions, and to require reporting of those emissions from entities deemed to be significant sources. Furthermore, it requires the NJDEP, in conjunction with other state agencies, to make policy recommendations as to how New Jersey can achieve the following two goals: (1) by 2020, reduce CO₂e gas emissions to the 1990 level; and (2) by 2050, reduce emissions to 80 percent below the 2006 level. In 2008 and 2010, NJDEP is to recommend specific legislative and regulatory actions to achieve these goals.

In February, New Jersey circulat-

ed its draft “New Jersey Greenhouse Gas Inventory and Reference Case Projections 1990-2020,” required by the Global Warming Response Act. The report quantifies New Jersey’s 1990 and 2005 CO₂e gas emissions at 127.8 million metric tons (“MMt”) and 145.1 MMt, respectively. Based on the act’s mandates, those emissions translate into maximum CO₂e gas emissions in 2020 of 127.8 MMt and in 2050 of 116.1 MMt. These represent significant reductions because the baseline case projects — if there were no emissions reductions mandated — 2020 emissions at 164.3 MMt CO₂e. Thus, the act calls for a reduction of CO₂e emissions by about 22.3 percent from the baseline projection by 2020.

The draft report identifies the primary sources of CO₂e gas emissions, which in order of contribution are power production, building occupancies and transportation. The Regional Greenhouse Gas Initiative or “RGGI” targets power production. Nationally, or perhaps as a result of California vehicle emission standards, transportation may be the next target for reductions through mandatory increases in gas consumption fuel efficiency. In New Jersey, however, an analysis of CO₂e gas emissions sources suggests that the state also will likely need to target emissions sources beyond power plans and heavy industry and it may target building occupancies (homes, offices and other workspaces).

As NJDEP was working on its draft report, the state on January 13, enacted the “RGGI Act”, N.J.S.A. 26:2C-45 et

seq. RGGI is a cooperative effort by 11 of the Northeastern and Mid-Atlantic states, including New Jersey, to reduce CO₂ emissions from electric power plants through multi-state cap and trade program with a market-based emissions trading system.

Under the RGGI act, all facilities that have the capacity to generate at least 25 megawatts of electrical output (with some limited, specified exceptions) must obtain "allowances" for emissions of CO₂, the total number of which will be capped by the NJDEP consistent with RGGI. Allowances will be auctioned pursuant to a process being developed by the NJDEP and the RGGI states. The first auction may be held this year. The total number of allowances available to the market will be reduced in successive auctions. Allowances may be purchased by entities that do not emit GHG, potentially reducing further the available allowances and hastening emissions reductions. In subsequent auctions, the sale of offset credits is excepted by entities that have reduced GHG emissions other than electric generation facilities.

The monies collected from the RGGI Act auctions will be used for a variety of public purposes designed to help achieve the goals. For instance, 60 percent of the state GHG goals. For instance, 60 percent of the money will be redistributed by the New Jersey Economic Development Authority to high-impact electrical end-users, such as commercial and industrial facilities, to support investment in energy-efficiency technologies. Another 20 percent will be distributed to the low- and moderate-income residential consumers to reduce their electrical costs. Consequently, while the cost of electricity may rise with the implementation of RGGI, the monies collected are intended to be used to offset the impact to those likely to be most affected by rising energy costs.

Finally, the RGGI Act addresses integration of New Jersey's program into future federal cap-and-trade program. There is concern that the RGGI program could be pre-empted. However, the early signs are that federal legislation will provide some

credit for CO₂e emission reductions from early adopters.

In addition to RGGI, other elements of New Jersey's plan to achieve its GHG goals include the state Draft Energy Master Plan (April 2008) and other energy initiatives such as the Renewable Portfolio Standard administered by the Board of Public Utilities, encouraging electricity generated from renewable sources, such as wind, solar and biofuels.

Federal Initiatives

At the federal level, there likely to be little meaningful process on climate change policy or regulation until a new administration takes office in 2009. Nevertheless, there are two important legislative proposals in Congress at the time of this writing. The first is the Boxer-Lieberman-Warner amendment (S.3036) to the Climate Security Act, on which the Senate recently failed to reach cloture. The second is Congressman Markey's Investing in Climate Action and Protection Act, or iCAP (H.R. 6186). iCAP is more aggressive, addressing up to 94 percent of U.S. emissions, requiring an 85 percent reduction of emissions by 2050, and auctioning 94 percent of the allowances by 2012. iCAP also would return half of all auction proceeds to households earning up to \$110,000 to compensate for increases in energy costs. iCAP is reportedly the favored bill within the environmental community.

Whatever final form federal climate change legislation may take, we can anticipate many of its key elements. A market-based cap-and-trade program for GHG emissions is likely to be enacted, although differences remain over the degree of emissions reduction over time and the extent to which allowances should be auctioned or distributed without cost. Industries subject to emissions limits will include power plants and large industrial facilities, producers or importers of petroleum or coal-based fuels and CO₂e gases, and natural gas distributors. Other industries will be affected through performance standards, incentives and participation in carbon trading markets.

The current bills also address measures

to contain the cost of a cap-and-trade program, including use of offsets, banking and borrowing of allowances, and government oversight of the carbon trading market; and funding to ease the transition for consumers, workers and affected industries, to encourage new energy technologies, and to support mass transit, wildlife conservation and adaptation projects. S.3036 includes an "early action program" to recognize GHG emission reductions from actions taken by covered entities since 1994, including entities subject to RGGI Incentives for green buildings, energy efficient consumer products advanced technology vehicles, biofuels and a low-carbon fuel standard also are addressed.

The uncertainty and debate over whether to enact federal climate change legislation is over, with winners and losers in a new cap-and-trade program to be determined by the next administration and Congress.

What To Do Now

In New Jersey — with the notable exception of electrical generation facilities — your clients still have time to prepare for the paradigm shift accompanying climate change legislation. Here are some ideas to consider.

First, clients should determine whether they have any appreciable CO₂e emissions. If so, they should inventory them and start to think about ways to reduce them. This thinking should extend well beyond the traditional smokestack — look at sources of electricity, raw products for manufacturing, other energy-intensive supplies, etc. If a supplier has to change its operations to comply with climate change legislation, will that change affect your clients' businesses? Many companies are ahead of the curve when it comes to GHG inventories and these early considerations.

Second, consider whether their facilities can be retrofitted to comport with "green building" construction standards, such as LEED (Leadership in Energy and Environmental Design) or Green Globes. If so, they should consider whether the cost-savings from the reduced energy consumption merit making a change now.

Alternatively, they can wait until RGGI funding or offsets may be available to help pay for a green building conversion. If they are engaged in new construction, they should evaluate the benefits of building "green." It is illustrative to consider that the European Union is, in part, achieving its Kyoto Protocol obligations by making green building mandatory. While we view green building as voluntary in the United States, that may not remain the

case. NJDEP's draft GHG report, and also the Draft Energy Master Plan, suggests that building occupancies could be a primary target for regulation.

Third, if they do choose to reduce their CO₂e emissions in advance of federal legislation, they should consider obtaining third-party certification of the reductions. While there is no guarantee that early reductions will be credited in a federal scheme, it appears likely that some credit

will be provided that, presumably, could be banked or traded.

The debate over global warming may not end soon, but meaningful climate change regulation is likely to be here before you know it. Early adopters have a head start on many New Jersey businesses. Other clients still have time, however, to prepare and take advantage of the new opportunities that will arise. ■