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ENVIRONMENTAL ADVISORY

Start Holding Your Breath: CO₂ Regulations Are On The Way (April 21, 2009)

For those of you who thought you'd never see the day when baby's breath would be deemed a toxic pollutant, it's now official. In a series of moves reflecting President Obama's oft-stated promise to curb "greenhouse gas" (GHG) emissions, EPA has recently announced several regulatory initiatives to address releases of carbon dioxide (CO₂) and other chemical substances.

By way of background, if you believe that the current ado over man-made global warming is largely unsubstantiated and hysterical, you're not alone. Only 34% of the American public thinks that global warming is an "important" concern, and when asked to rank twenty current issues, global warming came up last. (The economy was first.) Nonetheless, the idea that human activities are contributing to global warming has gained such a foothold among certain political dispositions that it was inevitable that those factions would seek to capitalize on the Obama presidency to advance their environmental agenda.

*(Interestingly, the term "global warming" has now been replaced with "climate change." One supposes that the substitution was required when someone realized we're into a nearly 10-year long global **cooling** trend. And, "climate change" has much greater explanatory force—indeed, as a concept it seems to be capable of explaining essentially everything: high temperatures, low temperatures, floods, droughts, storms, below-normal snowfall, above-normal snowfall, and so on.)*

GHG Measurement and Reporting

On March 10, 2009, EPA proposed the first national system for reporting of carbon dioxide and other GHG emissions. Measurement and reporting is one of the necessary first steps to regulation of such emissions, probably through a cap and trade system. The second step (classifying CO₂ as a "pollutant") is discussed below.

A number of states had already taken the lead on regulating GHGs, with approximately 17 states having developed or in the process of developing their own programs, as well as two major confederations of states having initiated their own cap-and-trade programs (the Western Climate Initiative and the Regional Greenhouse Gas Initiative). As a result, one important development to watch will be how EPA's proposed rules supplant, if at all, the various state programs.

EPA's regulations require that suppliers of fossil fuels or industrial greenhouse gases, manufacturers of vehicles and engines, and facilities that emit more than 25,000 metric tons per year of CO₂ or CO₂-equivalents submit annual reports to EPA. The rule requires regulated entities to begin collecting data on January 1, 2010, and to begin reporting in 2011.

EPA's proposed reporting rule is open for public comment for 60 days and EPA will be conducting two public hearings in April, one in Arlington, Virginia, and one in Sacramento, California. Additional information about the reporting rule is available on EPA's website: <http://www.epa.gov/climatechange/emissions/ghgrulemaking.html>.

GHG “Endangerment Finding”

In the second prong of the regulatory initiative, on April 17, 2009, EPA released a proposed finding that GHG emissions cause or contribute to air “pollution” that endangers public health and welfare. The endangerment finding is necessary for EPA to regulate GHGs under the Clean Air Act, which is an option that EPA was forced to consider as a result of a recent Supreme Court decision.

This proposed “endangerment” finding is also open for public comment for a period of 60 days, with two public hearings scheduled in May, one in Seattle, Washington, and one in Arlington, Virginia. Again, further information about the endangerment finding is available on EPA’s website:

<http://epa.gov/climatechange/endangerment/downloads/GHGEndangermentProposal.pdf>.

Economics and Politics

There is sound economic theory supporting the view that “internalizing” the cost of pollution is a proper and efficient response to the fact that polluters do not bear the full weight of the costs they impose on others. Indeed, cap-and-trade programs, such as that associated with SO₂ (acid rain) emissions are widely heralded as having led to huge decreases in pollution at a tiny fraction of the cost of command-and-control alternatives.

There are several ways to impose such costs on polluters, with cap-and-trade and pollution taxes being the most common. Both systems have advantages and disadvantages, although most policy makers seem to be lately more inclined towards cap-and-trade systems. Under a cap-and-trade system, the government sets a limit on the total amount of permissible emissions. These emission allowances are then bought and sold on the market, with companies either buying the right to emit pollution or paying the cost to reduce pollution. Those who can most efficiently reduce their emissions will do so rather than paying to buy emission rights. Pollution is reduced first and to the greatest degree by those who can do so the most economically. Hence,

the system is normally more economically efficient than any system of centralized dictates.

To be efficient, though, whatever the system used, the costs imposed on pollution must be roughly proportional to the costs imposed on others. Imposing a cost that is too high may have just as serious adverse effects on society as allowing the polluters to bear no costs whatsoever. In addition, some have wondered whether the Clean Air Act, which regulates air pollutants in the conventional sense, is even the right legal framework for addressing GHGs

It is on these issues that any kind of GHG regulation can expect some degree of political opposition. Either form of GHG regulation is either expressly or impliedly a tax, and given the state of the economy any imposition of substantial new taxes will be seen as at least bad timing. Indeed, some commentators have suggested that EPA’s endangerment finding was intended to force Congress to take authority away from EPA and enact a new statute specifically designed to regulate GHGs. The Waxman-Dingell bill is one of the leading contenders for just such a measure.

Whatever one thinks of the whole climate change debate, it is now inevitable that, one way or another, we are entering a world of carbon constraints. The implications of this will be widespread: new emissions standards for vehicles (which will really be fuel efficiency standards), limitations on power producers and industries, and controls on “upstream” suppliers of various materials (such as natural gas) where regulating the actual emitters (such as individual households) is impractical or politically unpalatable.

All of this will need to be worked out politically and in that respect it is undeniable that CO₂ will produce a lot of hot air.

For further information about the regulation of greenhouse gases, feel free to contact any of the attorneys at Kazmarek, Geiger & Laseter LLP.

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