

Regulatory Risks: the Coming of GHG Regulation for Industrial and Utility Sources



TCR Climate Policy Forum

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Regulatory risks relating to GHG emissions

- The “Endangerment Finding” (on remand from S.Ct.)
- The “Tailoring Rule.”
- The Mandatory Reporting Rule (directed by Congress)
- Overview of climate bills’ potential applicability.
- Compliance options – other than paying the government.

EPA's Endangerment Finding

- EPA's endangerment finding – the response to the remand order of Mass v. EPA
 - Proposed finding, on April 17, 2009
 - The “Endangerment Finding”
 - The “Cause or Contribute Finding”
 - Findings issued December 7, 2009 closely track the proposed findings, again two findings made
 - Petitions for Reconsideration, advancing six arguments:
 - Mass v. EPA allows EPA to decline regulation if properly supported
 - Tailoring Rule preamble recognizes absurdity of GHG regulation, at least under Title I
 - NHTSA opines that endangerment finding is not necessary to regulate GHGs
 - Climate data is flawed
 - EPA unlawfully relied on international research
 - Request stay of finding and further regulation pending reconsideration

The “Tailoring Rule”

- Action to control GHGs emitted by “major” stationary sources, both existing, modified and new.
- “Major” defined in Clean Air Act as :
 - > 100 tpy for operating sources [for Title V permits]
 - > 250 tpy for most new and modified sources [for unclassified areas or “PSD” areas]
- Proposed rule – used 25,000 tCO₂e as “major definition”
 - State agencies (and industry) complained of administrative burden
- EPA opted to go with phased, step wise implementation
 - Step 1: effective January 1, 2011, for sources already “major” for another pollutant, add-in controls and monitoring for GHG sources over 75,000 tpy CO₂e;
 - Step 2: effective July 1, 2011, PSD permit and operating permit required for sources with GHGs over
 - 100,000 tpy CO₂e for new source
 - Modification increasing emissions by 75,000 tpy CO₂e
 - Step 3: commitment to rulemaking and further study
- How will EPA and States apply “net emission increase” concept for CO₂e?
 - Practical effect of the “dual threshold” definition

The Mandatory Reporting Rule

- FY 2008 Consolidated Appropriations Act required EPA to develop “mandatory reporting” of GHG emissions above “appropriate thresholds for all sectors”:
 - Adopted September 22;
 - Published October 30.
- While EPA directed to avoid duplication of existing reporting methods [e.g. TCR], rule runs to over 700 pages on EPA web-site “Covered facilities” and “sectors must”:
 - Monitor GHG emissions using EPA approved methods;
 - Certify the accuracy of all results;
 - Make annual reports to EPA, beginning with data collected 1/1/2010.
- 25 sectors covered, and 12 sectors deferred – for a little while.
- The rule reads as a set up for legislative applicability for climate change requirements.
 - Only MMR covered sources not expressly listed in Congressional bills: MSW and MMS;
 - MMR deferred sources which are expressly listed: ethanol, fluorinated GHG and SF6 production, food processing, magnesium production, oil and natural gas systems, geologic sequestration.
- If Congress doesn’t do it, can see where EPA is headed – anticipating legislation.

What Will Congress Do?

- House passed comprehensive energy and climate legislation: Waxman-Markey bill
- What will Senate vote upon?
 - Energy only, or is climate change included?
- What will the Conference do, and what will Administration seek?
 - Energy only, or will climate be included?
 - How will the international card be handled?

Evaluating “Compliance Options”

- What do you do, if you are required to report – and it looks like you will be regulated?
- The options:
 - get the most free allotments you can from Congress;
 - reduce emissions;
 - develop offsets – either early reductions on-site or acquire off-site reductions;
 - buy allotments – likely the most expensive option.
- Reduce
 - “once in, always in”?
 - EPA interpretation of ambiguity in MRR is encouraging;
 - If nothing else, reduce “footprint” and exposure depending on “price of carbon”.
- Allotments
 - What did your sector get in the legislation, and what is your share?
 - Buy at US auction.
- Early action credits [on-site] and Offsets [off –site regardless of when]:
 - How you can determine the value of “early action”?
 - Much more clear now than for prior “volunteers.”
 - Don’t overlook potential NOx reduction co-benefits.

Offsets: From Early or “Voluntary” Action

- Potential sources of offsets
 - “Voluntary” registries
 - “Early action” registries – “pre-compliance”
 - EPA or Ag administered programs
 - Where are the existing “voluntary” programs headed?
- Potential users of offsets as a risk management strategy
 - Potential competition for scarce quality offsets
 - Offsets a key price control strategy
 - Capped sources, should climate change cap be imposed
 - “Cap and trade” bills
 - “Cap and dividend” bill
 - As mitigation measures under NEPA (“additional” measures encouraged)
 - “Corporate Social Responsibility” and Sustainability programs

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