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Environmental Alert

Federal efforts to reduce greenhouse-gas emissions

This is the first in a series of advisories on proposed federal action to control greenhouse-gas emissions

EPA Issues Proposed Endangerment Finding for Greenhouse Gases

On April 17, 2009, the Obama administration's Environmental Protection Agency ("EPA") issued two proposed findings regarding the following greenhouse gases ("GHGs"): carbon dioxide; methane; nitrous oxide; hydrofluorocarbons; perfluorocarbons; and sulfur hexafluoride. The first proposed finding, which is referred to as the "endangerment finding," states that the existing and projected mix of these six GHGs "in the atmosphere threaten the public health and welfare of current and future generations." And the second proposed finding, referred to as the "cause or contributing finding," states that emissions "from new motor vehicles and motor vehicle engines contribute to the atmospheric concentrations of these [GHGs] and hence to the threat of climate change." For the purpose of this article, these findings will be referred to collectively as the "proposed endangerment finding."

A public comment period is open on the proposed endangerment finding until June 23, 2009. If, after the comment period, the finding becomes final, it could lead to the most expansive environmental regulation in the U.S. to date.

Genesis and Scope of Endangerment Finding

In April 2007, the U.S. Supreme Court, in *Massachusetts v. EPA*, directed the EPA to make this endangerment finding. Unlike its predecessor, the Obama administration has pressed the agency to comply with the April 2007 ruling.

As a practical matter, the proposed endangerment finding could permit EPA regulation, under the Clean Air Act ("CAA"), of the six selected GHGs. This would obviously impact the auto and petroleum industries. Also, the proposed endangerment finding could pave the way for similar regulation over power plants, cement plants and various factories.

Little is known in terms of how quickly the EPA would seek to implement regulatory action if and when the endangerment finding becomes final. Many believe that EPA action, which could come in the form of piecemeal regulation, would result in a tangle of regulatory requirements for businesses big and small.

EPA Regulation or Congressional Action

Concern over this potential regulatory nightmare may provide the Obama administration with the leverage it needs to press Congress to agree on legislation specifically tailored to GHGs. Environmentalists, policy makers, the EPA, and even industry, prefer the idea of GHG legislation instead of EPA regulation. Specifically, Republicans and moderate Democrats from Midwestern and coal-producing states have openly voiced their opinion favoring congressional action over EPA regulation. The legislative process would allow for open debate on the issue, as opposed to unilateral action by the EPA. And congressional action is less subject to litigation. Also, it is harder for succeeding administrations to overturn congressional action – making legislation an attractive option for the Obama administration.

Seizing upon this momentum, House Democrats last month introduced a 648-page draft bill on energy and climate change, also known as the American Clean Energy and Security Act of 2009.

Expected Measures to Curtail Emissions

Any legislation crafted to control GHG emissions would likely stretch beyond motor vehicle emissions and include industries by imposing a cap-and-trade program or a direct tax on emissions. Such legislation would potentially target the manufacturing sector, the cement industry, and power-generating facilities, such as coal-fired plants. The current administration clearly favors the cap-and-trade approach. Early indications are that a future cap-and-trade program would start by auctioning 100 percent of the emission allowances, and applying the revenues to clean-energy programs. The premise of a cap-and-trade program is simple: GHG emitters must surrender allowances or be subject to penalties. In theory, it would encourage industries to invest in research and development geared toward cutting back on GHG emissions. Operating costs, however, would increase, which would eventually spill over to consumers.

Most Democrats appear to be on board with cap-and-trade, as evidenced by the inclusion of such a program in the recently introduced draft energy and climate change bill in the House. But Republicans and moderate Democrats from those same regions that favor legislation over EPA regulation are not keen on the idea. Regardless of its distinction from a direct tax, they view cap-and-trade as an indirect tax on the targeted industries. Such resistance may find traction in view of the current recession.

GHG Tracking: A Precursor for Action Aimed at Lowering GHG Emissions

Whether through regulation or legislation: the Obama administration will seek to reduce this country's GHG emissions. This is evidenced under the EPA's recent announcement to initiate proposed rule making to track the amount of GHGs produced by "major sources in the United States." This proposed rule, which is distinct from the proposed endangerment finding, would target approximately 13,000 facilities that are responsible for emitting 85 to 90 percent of the country's GHGs. Large emitters, such as power plants and manufacturing facilities, would be put to task under this rule.

As envisioned, beginning in 2011, owners of the targeted facilities would be required to prepare and submit annual reports "logging" their GHG emissions. These facilities, except for vehicle and engine manufacturers, would be required to submit their first annual emission-logging reports in 2011 for the calendar year 2010. Vehicle and engine manufacturers, however, would not be entirely off the hook, as existing CAA provisions permit similar tracking. Failure to comply with this rule would constitute a violation under the CAA, resulting in up to $27,500 in penalties per violation per day. The EPA estimates the expected cost to the private sector for the first annual reporting period to be $160 million. Subsequent years would result in a $127 million cost to the private sector.

This proposed GHG tracking is likely a precursor to EPA regulation or congressional action aimed at lowering GHG emissions. Regardless of its ultimate purpose, GHG tracking requirements will increase operating costs for significant industrial players in the United States. And additional spikes in operating costs will follow with the anticipated EPA regulation or federal legislation.

Subsequent advisories will follow in conjunction with developments on anticipated federal action to reduce GHG emissions. For more information, please contact Carl J. Pernicone via e-mail at carl.pernicone@wilsonelser.com or by phone in our New York office at 212. 490.3000, Michael J. Naughton at michael.naughton@wilsonelser.com or by phone in our New Jersey office at 973.624.0800, or Robert D. Sullivan Jr. at robert.sullivan@wilsonelser.com or by phone in our White Plains office at 914.323.7000.

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