PUBLICATION

The U.S. Government is Attacking Climate Change – And Business is in the Cross Hairs

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In addition to the complex web of ongoing international discussions, state and regional moves, and voluntary programs, the final months of 2009 are proving to be the season for federal action on climate change. This activity is taking place within all three branches of the United States Government: executive, legislative, and judicial.

Executive/Administrative

After the Supreme Court in 2007 held that greenhouse gases could be regulated under the authority of the Clean Air Act, and with the arrival of the Obama Administration this year, the Environmental Protection Agency (EPA) has now swung into action in a big way on climate change without waiting for Congress to pass new legislation.

1. EPA Issues Greenhouse Gas Reporting Rule: On September 22, 2009, EPA signed its final rule on the Mandatory Reporting of Greenhouse Gases. The rule does not require any control of greenhouse gases, but rather requires certain facilities to monitor and report their emissions of greenhouse gases to EPA. EPA's stated purpose in issuing the regulation is to collect accurate and timely data on the emission of these gases in order to inform future policy decisions.

   The final rule generally applies to fossil fuel suppliers, direct greenhouse gas emitters, and manufacturers of heavy-duty and off-road vehicles and engines. The categories of facilities subject to the rule include:

   - Suppliers of Coal-based Liquid Fuels
   - Suppliers of Petroleum Products
   - Suppliers of Natural Gas and Natural Gas Liquids
   - Suppliers of Industrial GHGs
   - Suppliers of Carbon Dioxide (CO2)
   - General Stationary Fuel Combustion Sources
   - Electricity Generation
   - Adipic Acid Production
   - Aluminum Production
   - Ammonia Manufacturing
   - Cement Production
   - Ferroalloy Production
   - Glass Production
   - HCFC-22 Production and HFC-23 Destruction
   - Hydrogen Production
   - Iron and Steel Production
   - Lead Production
   - Lime Manufacturing
   - Miscellaneous Uses of Carbonates
   - Nitric Acid Production
   - Petrochemical Production
   - Petroleum Refineries
   - Phosphoric Acid Production
   - Pulp and Paper Manufacturing
   - Silicon Carbide Production
   - Soda Ash Manufacturing
   - Titanium Dioxide Production
   - Zinc Production
   - Municipal Solid Waste Landfills
   - Livestock facilities that have manure management systems
   - Vehicles and engines outside of light-duty sector manufacturing

The reporting requirements are generally applicable to large facilities emitting 25,000 metric tons of carbon dioxide equivalent or more per year. EPA anticipates that 85% of total U.S. greenhouse gas emissions will be covered by the rule, with approximately 10,000 facilities required to monitor and report. Certain other stationary-source categories like coal mining, electronics manufacturing, and wastewater treatment were held out of this final rule pending further study. Sources may stop reporting if their emissions drop and stay below 25,000 tons for five consecutive years, or below 15,000 tons for three consecutive years.

The rule will require the monitoring and reporting of emissions of carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride, and other fluorinated gases such as nitrogen trifluoride and hydrofluorinated ethers. The rule mandates that covered facilities begin monitoring for greenhouse gases on January 1, 2010. The first reports must be submitted to EPA on March 31, 2011, providing data on emissions for the year 2010. In general, EPA will require annual reporting thereafter. Issues emerging already include use of "best available data" and possible extension requests.

2. EPA Proposes Greenhouse Gas Regulation Rule: On the heels of the final rule requiring data-gathering and reporting, EPA on September 30, 2009 issued a proposed rule that would, when finalized, limit greenhouse gas emissions from major new stationary sources. This proposed regulation would apply to certain facilities that emit more than 25,000 tons of carbon dioxide equivalent per year. (By contrast, regulated "criteria pollutants" generally make a source "major" when emitted at 100 tons, or 250 tons or more per year.) New plants, or those making major modifications, would be required to install best available control technology (BACT) for limiting such emissions. As with the existing prevention of significant deterioration (PSD) construction permit and Title V operating permit programs, existing plants would not have to upgrade their pollution-control systems unless and until they undertook major modifications.

   This proposed rule would apply to six gases: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. By EPA's estimates, thousands of existing Title V permitees would need to have their permits amended to incorporate greenhouse gases, but only about 400 facilities per year would be subject to PSD review, including those that are new or are modified significantly. BACT is normally determined by EPA on a case-by-case basis, and no precise guidance is given for what might constitute BACT for carbon dioxide.

   No doubt this new "tailoring" regulation will continue to be vigorously commented on over the next month and altered in the months or years between proposal and final promulgation. Concerns remain about whether the Clean Air Act's language may require that such a rule also ensnare, either now or eventually, small businesses and many other types of ordinary facilities emitting over 250 tons but less than 25,000 tons of regulated greenhouse gases per year. The legal basis for EPA changing a statutory provision such as the 250-ton threshold for regulating major sources of regulated pollutants has been questioned and is the subject of additional analyses and findings, and there are separate actions toward deeming carbon dioxide to be a regulated Clean Air Act pollutant. It should also be noted that a previously proposed EPA rule on greenhouse gas emission controls for cars and light trucks is expected to be finalized in March 2010.

Legislative

EPA's recent movement on climate change may well be considered a jab at Congress as well: if you do not like the idea of our trying to regulate greenhouse gases under the existing authority and mechanisms of the Clean Air Act, then create and enact something better, and sooner rather than later.

In late June 2009, the U.S. House of Representatives passed H.R. 2454. For the first time, legislation called for greenhouse gas emission reductions and establishment of a cap-and-trade markets and allowances program of control.

Not coincidentally on September 30, 2009, the same day as EPA's issuance of the proposed rule described above, Senators Boxer and Kerry introduced in the Senate their version of a bill (S. 1733) that would establish a national greenhouse gas cap-and-trade program. This 821-page document weighs in on most of the key structural and policy issues such as pace of emission reductions, distribution of emission allowances, administration of offset credits, and so on. No doubt extensive negotiation and revision lie ahead both within the Senate and overall; and certainly one cannot predict the exact shape of a final bill, nor when or even if such legislation will emerge as law from Congress. Nonetheless it is instructive to compare the two bills on several primary points, while many other complexities and layers of detail also require close study in both measures.

	Senate	House
Goals:	20% cut from 2005 levels by 2020, 83% cut by 2050.	17% cut from 2005 levels by 2020, 83% cut by 2050.
Offsets:	Limit of 2 billion tons annually, up to ¼ to be international; oversight by DOJ and advisory board.	Limit of 2 billion tons annually, up to ½ to be international; oversight by EPA and advisory board.
Allowances:	Does not specify distribution among industries; upon certain price triggers, reserved allowances may be released in later years.	Specifies free distribution percentages including to electric power generators, renewables and efficiency investments, and low-income consumers; upon certain price triggers, reserved allowances may be released in later years.
Market:	FERC and GAO with roles; possible future single oversight agency.	FERC, CFTC, and GAO each to exercise various regulatory functions.
Clean Air Act:	Silent.	Exempts new greenhouse gas emissions sources from CAA new source review by EPA.
Nuclear:	Includes funding for training, science, research and development.	Mostly silent (at least for now).

Please consult these bills themselves, or with us, for more detailed information on this federal legislative activity.

Judicial

Litigation arising from climate change concerns has also been increasing in the last months. The U.S. Second Circuit Court of Appeals has ruled that a court can hear a common law nuisance claim based on greenhouse gas emissions from power plants and utility sources, given that neither EPA nor Congress has yet preempted such actions. The Second Circuit as well as the Fifth Circuit have recently rejected arguments by defendants that states or groups acting as plaintiffs lack standing to bring such claims against emitting industries and fossil fuel providers. The Fifth Circuit's October 16, 2009 holding even allows private Mississippi plaintiffs seeking to proceed as a class action to try for monetary damages and not just for injunctive relief as in the Second Circuit case. By contrast, on a more positive note for business, one federal district court in California has just decided that it could not consider a new case because climate change falls within the "political question doctrine" and is best addressed broadly by the other branches of government. Finally, aside from challenging air permits and other administrative decisions on the basis of climate change, certain organizations have been making arguments under the Endangered Species Act as another indirect avenue to push toward emission limits, regulation, and reductions. Such claims challenge government decisions and the operations of certain industries that allegedly contribute to climate change which then may cause adverse impacts to certain protected species. Such litigation and expanding judicial pronouncements further complicate the picture on climate change and increase the pressure on Congress to enact a new comprehensive regime for managing and reducing greenhouse gases.

Conclusion

No matter where you fall on the spectrum of opinions about climate change – debating its existence, its causes, its expected effects, and the best ways to influence it – major movement is taking place at the national level. Affected companies must be prepared and ready to position themselves not only to meet new requirements, but also to take advantage of new business opportunities. No doubt many industries are already ahead of the curve in this ever-changing field, but many are not and may only now be seeking to come to grips with what these initiatives mean for them in practical, real-world terms.

Certain facilities, if not already doing so for self-assessment or voluntary disclosure purposes, will have to create plans and start monitoring and counting carbon dioxide and other covered greenhouse gas emissions approximately two months from now (January 1, 2010) under the new final EPA reporting rule. Considering strategies to revise your operations in order to avoid burdensome new requirements should also be in the forefront of business planning and preparation. There are also opportunities now, individually or collectively, to comment on proposed EPA rules and changes and to attempt to influence the content of proposed legislation before Congress. Finally, increased vigilance on compliance and increased readiness to assert a vigorous defense are important for those facing the reality of or potential for litigation directed at them by plaintiffs impatient for administrative or legislative solutions to their liking and wanting to push the courts more actively into the arena of climate change policymaking.

For a more in-depth analysis or for general information on the various aspects of the climate change issue and how it affects you, please contact any of Baker Donelson's environmental attorneys.