

Articles

EPA Moving Ahead with Regulation of Greenhouse Gases

Max Williamson, Sid Sethy and Paul Bohannon
September 25, 2009

EPA and the Obama Administration are pushing forward with a suite of four unprecedented Clean Air Act rules that will impose limits on greenhouse gases on industry, manufacturing and vehicles for the first time ever, creating new regulatory obligations for U.S. businesses starting at the end of this year.

Among these, EPA recently released its “Mandatory Reporting of Greenhouse Gases” rule, which will require some 13,000 U.S. facilities to report greenhouse gases in combustion or process emissions (including carbon dioxide, methane and nitrous oxide) over 25,000 tons annually. The rule covers emissions starting January 1, 2010, and requires certification of the emissions inventory and penalties for failing to report.

The White House is also working on an EPA rule that ostensibly spares small sources of greenhouse gases from federal Clean Air Act regulation, but will open the door to rapid regulation of power plants, paper mills, chemical plants, cement kilns, industrial boilers and myriad other industrial sources. The “Prevention of Significant Deterioration/Title V Greenhouse Gas Tailoring Rule” (Tailoring Rule) would establish a threshold of 25,000 tons per year for regulation as a major source under the Clean Air Act, but will make regulation of larger sources more viable politically.

Together with EPA’s currently proposed “Endangerment Finding” and anticipated motor vehicle emissions rules, EPA is strongly signaling its intention to move quickly to regulate larger emissions sources. Businesses that emit greenhouse gases, including any facilities that use fossil fuels for heat, power or electricity, must begin preparing in earnest for a “low-carbon” future under a strict federal regulatory regime unless Congress intervenes.

Background

Although the Obama Administration has indicated that it prefers cap-and-trade over traditional command-and-control measures as an approach to climate change, in absence of Congressional action, EPA is under a 2007 Supreme Court mandate¹ to move ahead with regulation of carbon dioxide and other greenhouse gases under the existing Clean Air Act, and the White House has made clear that it intends to do so. EPA has now proposed or drafted four critical climate change rules that could result in mandatory regulation as early as next year.

Mandatory Greenhouse Gas Reporting. EPA has now finalized its mandatory carbon reporting rule that would establish the first comprehensive national system for reporting industrial emissions of carbon dioxide and other greenhouse gases.² Under the proposed rule, suppliers of fossil fuels or industrial greenhouse gases, manufacturers of vehicles and engines, and all industrial or manufacturing facilities that emit 25,000 or more metric tons per year of CO₂ (or its equivalent “global warming potential” for other greenhouse gases such as methane, nitrous oxide, or fluorinated refrigerants) will be required to submit annual reports to EPA and certify to accuracy and completeness. Monitoring of direct emissions is scheduled to begin in January 2010—fewer than 4 months from now—with the first annual report due March 2011; motor vehicle and engine manufacturers would begin reporting for model year 2011. The gases covered by the proposed rule are carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFC), perfluorocarbons (PFC), sulfur hexafluoride (SF₆), and other fluorinated gases including nitrogen trifluoride (NF₃) and hydrofluorinated ethers (HFE). Although the rule will likely be challenged by various interest groups, it is unlikely that a court will stay implementation even if litigation is brought.

CAFE & Tailpipe Emission Standards. In May 2009, the Obama Administration announced a plan to integrate federal fuel economy standards (under the Energy Policy and Conservation Act, called CAFE standards) with federal vehicle emissions standards (under the Clean Air Act) and to coordinate those standards with California’s proposed limits on vehicle greenhouse gas emissions that have been adopted by 14 other states. The federal EPA and DOT have sent draft rules to the White House that would impose new CAFE standards for passenger vehicles and light-duty trucks for Model Years 2012-2016 and also impose, for the first time, federal tailpipe emission standards for greenhouse gases. The Obama

Articles

Administration recently released details of the proposed draft rules.³ The new CAFE standards would be pushed to an average of 35.5 miles per gallon by 2016, four years ahead of the schedule laid out by Congress in 2007 legislation. The CO₂ limit would require an average of 250 grams per mile per vehicle in 2016. The rules are anticipated to be finalized by March 2010 to meet the statutory requirement that CAFE standards be completed 18 months prior to the first applicable model year (*i.e.*, October 1, 2012).

Endangerment Finding. In April 2009, EPA proposed an “endangerment finding” under Section 202 of the Clean Air Act concluding that man-made global warming threatens the environment and public health.⁴ EPA is expected to finalize the endangerment finding in the next several months in order to pave the way for the CAFE and tailpipe emissions standards, discussed above. An endangerment finding will open the door (some would say Pandora’s box) to emissions controls and other technology limiting greenhouse emissions at new and many existing industrial sources.

Reporting Threshold Through the Tailoring Rule. Although the Tailoring Rule is not yet public, it is our understanding that the rule will designate facilities with greenhouse gas emissions over 25,000 tons per year as major sources under the Clean Air Act. This threshold is expected to impact 13,000 facilities from all sectors of the economy that account for close to 90% of U.S. emissions. As a result, smaller sources of emissions will stay out of the ambit of the rule, thus avoiding politically troublesome backlash from the small business community. However, EPA’s action will lead to the imposition of technology requirements, such as Best Available Control Technology (BACT), on many larger emissions sources. The details of the regulatory program will be the subject of future agency rulemaking procedures.

Conclusion

EPA’s current spate of rulemaking clearly indicates that the Obama Administration, through its Energy Czar, Carol Browner, and EPA Administrator, Lisa Jackson, are moving inexorably to regulate global warming emissions from industrial sources under the Clean Air Act.

Andrews Kurth LLP’s Environmental and Climate Change and Carbon Markets practices offer extensive experience with air quality permitting at the federal, state and local level, as well as legislative and regulatory advocacy, compliance counseling, and litigation in rulemaking and enforcement proceedings. We provide straight talk on global climate change, emerging greenhouse gas emissions regulatory regimes in North America and internationally, carbon market transactions, and quantification, reporting, and corporate disclosure issues associated with carbon markets and greenhouse gas emissions.

-
1. *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007).
 2. *Mandatory Reporting of Greenhouse Gases: Final Rule*, ___ Fed. Reg. ___ (issued Sept. 22, 2009) (final rule); *Mandatory Reporting of Greenhouse Gases: Proposed Rule*, 74 Fed. Reg. 16,448 (Apr.10, 2009) (proposed rule).
 3. *Notice of Upcoming Joint Rulemaking to Establish Vehicle GHG Emissions and CAFE Standards* (Sept. 15, 2009).
 4. *Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, Proposed Rule, 74 Fed. Reg. 18,886 (Apr. 24, 2009) (proposed rule).