

Looking Ahead: The Future of Federal Climate Change Law

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The recent election will bring in a new administration in January—one that has signaled that federal action to address climate change is on the horizon. While running for office, President-Elect Barack Obama proposed bold efforts with respect to climate change. The struggling economy, however, has created some uncertainty about the pace and content of any future program. Some see the economy as an impediment to significant movement on climate change, while others view a cap-and-trade program for greenhouse gas (GHG) emissions, as President-Elect Obama has proposed, as a key revenue-generating component for broader energy and economic initiatives. Regardless of one's view of the relationship between the economy and the regulation of GHG emissions, regulatory and statutory programs to address climate change will be among the most rapidly changing and critically important components of energy and environmental law in the near future.

The outline for upcoming debates on federal climate change law can be seen in the proposals by President-Elect Obama, recent draft legislation in Congress, and activity at the United States Environmental Protection Agency (EPA). Each of these approaches, which are summarized below, reflects the complexity of climate change and demonstrates a goal of regulating GHG emissions from a variety of sources and a desire to promote technological innovation to address climate change.

Key Components of President-Elect Obama's Energy and Climate Change Policies

While running for office, President-Elect Obama's energy and climate change programs emphasized the following key legislative initiatives:

- **Cap-and-Trade Program:** An economy-wide cap-and-trade program would be established to reduce GHG emissions 80% below 1990 levels by 2050. All GHG allowances would be auctioned to generate revenue for investment in the development of lower-emission energy supplies, the creation of clean technology jobs, adaptation planning, and consumer relief.
- **Energy Efficiency and Renewable Energy Standards:** The Obama administration would set national goals for reducing electricity demand (15% reduction from projected 2020 levels) and improving national building efficiency in the next decade (by 50% for new buildings, 25% for existing). A renewable portfolio standard would require 10% of electricity consumed in the United States to come from renewable sources by 2012, and 25% by 2025.
- **Generation and New Technology:** The Obama administration would invest \$150 billion over 10 years to develop and deploy clean technology and create "green" jobs. In addition, the Department

of Energy would enter into public-private partnerships to develop five commercial-scale coal-fired power plants with carbon capture and sequestration. Incentives for other means of carbon sequestration also would be developed. Issues concerning security of nuclear fuel and waste and nuclear waste storage would need to be addressed before increasing nuclear generation.

- **Motor Vehicles:** The Obama administration would invest in advanced battery technology and biofuels, provide a \$7,000 tax credit for the purchase of advanced technology vehicles, and make every new car a flex-fuel vehicle by 2012. A national low-carbon fuel standard would be developed, requiring all fuel suppliers to reduce the carbon content of their fuel by 5% by 2015, and by 10% by 2020. The Corporate Average Fuel Economy (CAFE) standards would also be increased by 4%.
- **International:** The Obama administration would engage in the ongoing United Nations Framework Convention on Climate Change negotiations, which have a goal of completing a new international climate change agreement by December 2009. It has been reported that President-Elect Obama or one of his top advisors will attend the next round of climate talks in Poland, scheduled for December 2008. In addition, a technology-transfer program would be created to provide American technology to the developing world.
- **Energy Czar:** Several news organizations have reported that there is discussion of creating a high-profile administration post to help coordinate policymaking related to climate change and energy issues.

Dingell-Boucher Draft Legislation

While the new president's early legislative initiatives will receive significant attention, members of Congress will be offering their own new proposals as well. Most recently, Rep. John Dingell (D-MI), chairman of the House Committee on Energy and Commerce, and Rep. Rick Boucher (D-VA), chairman of the Subcommittee on Energy and Air Quality, released a comprehensive climate change bill "discussion draft" (the Draft) on October 7, 2008. The Draft signals the intention of Representatives Dingell and Boucher and others to address climate change legislation early in 2009. The salient parts of the Draft are as follows:

- **Cap-and-Trade Program:** The Draft would amend the Clean Air Act (the Act) to establish an economy-wide cap-and-trade program to reduce GHG emissions. The program is less aggressive than that proposed by President-Elect Obama, reducing covered emissions to 6% below 2005 levels by 2020, 44% below 2005 levels by 2030, and 80% below 2005 levels by 2050.
 - **Scope:** The program applies to business sectors accounting for approximately 88% of U.S. GHG emissions, including fossil fuel-fired electric generating units, large local gas-distribution companies, and entities that produce or import—for sale or distribution—more than 25,000 CO₂ equivalent tons per year of fossil fuel-based CO₂, nitrous oxide, perfluorocarbons, sulfur hexafluoride, nitrogen trifluoride, fluorinated greenhouse gas, or any combination of the listed greenhouse gases. EPA would establish industry-specific performance standards for sources of GHG emissions that are not covered by the program. The Draft instructs EPA to use its New Source Performance Standards authority to regulate additional categories of sources not regulated under the general scope of the cap-and-trade program (with a goal of bringing total GHG industrial sector coverage to 95%). In response to concerns that regulation of GHG emissions under the Act would inappropriately increase the number of facilities regulated by the Act's other programs, the Draft provides that New Source Review will not apply to GHG emissions and that Title V

permits will not be required solely because a source is subject to regulation under the new GHG provisions.

- **Distribution of Allowances:** The Draft presents four options for distributing GHG emission allowances. Three of the options feature varying degrees of no-cost allocations of allowances; the fourth features the purchase of all allowances through an auction. Proceeds from the sale of allowances would be dedicated to energy efficiency programs, “green” jobs training, adaptation, and rebates for low-income customers. EPA would retain some allowances for distribution to projects related to renewable energy, carbon capture and sequestration, smart grids, clean vehicles, and clean fuels. EPA would also set aside some allowances in a “strategic reserve” to be auctioned at set minimum prices to control program costs.
- **Emission Offsets:** During the first five years of the program, sources of GHG emissions could use offsets to satisfy 5% of their compliance obligation. As the cap on GHG emissions tightens, a greater percentage of offsets can be used. International emission allowances and offsets may also be used.
- **Market Oversight:** The Draft proposes to amend the Federal Power Act by assigning carbon market oversight responsibilities, including prevention of fraud and manipulation, to the Federal Energy Regulatory Commission and a new Office of Carbon Market Oversight.
- **State Preemption:** The Draft explicitly preempts state, local, and regional cap-and-trade programs for GHG emissions.
- **Imported Goods:** The Draft establishes a separate allowance program for importers of goods to the United States that requires the surrender of allowances when bringing goods into the United States from a country that has not taken “comparable action” to limit GHG emissions. The quantity of allowances required to be surrendered will depend in part on the GHG intensity rate for the product being imported.
- **Motor Vehicles:** The Draft presents the following three options for federal regulation of GHG emissions from motor vehicles: (i) EPA establishes GHG emission standards for new motor vehicles under Section 202 of the Act, (ii) EPA establishes GHG standards “fully consistent” with the CAFE standards, or (iii) EPA is prevented from setting GHG emission standards for vehicles or engines that are already subject to a CAFE standard. The Draft also presents the following two options regarding state regulation of GHGs from motor vehicles: (i) grant California’s application for a waiver of preemption and thereby allow the state to regulate GHGs from motor vehicles; and (ii) expressly preempt any state from regulating GHG emissions from motor vehicles subject to CAFE standards or EPA GHG regulations.

Advance Notice of Proposed Rulemaking

On July 11, 2008, EPA released its draft Advance Notice of Proposed Rulemaking (ANPR) requesting public comment on whether and how the agency should regulate GHG emissions under the Act. The ANPR is EPA’s initial response to *Massachusetts v. EPA*, in which the Supreme Court ruled that EPA had the statutory authority to regulate carbon dioxide under the Act.

The voluminous document begins with a preface from EPA Administrator Stephen Johnson explaining why the Act is “ill-suited for the task of regulating global greenhouse gasses.” This conclusion is echoed

in comments on the ANPR by numerous other federal agencies. Key areas of discussion in the ANPR include (i) climate science and an analysis of a potential endangerment finding, (ii) an overview of EPA's authority under the Act; (iii) potential regulation of mobile sources, (iv) potential regulation of stationary sources, and (v) potential regulation under stratospheric ozone authority. Among other things, the agency requested comment on cap-and-trade mechanisms and technology-driven performance standards for both stationary and mobile sources of GHG emissions.

One common theme in the ANPR is that regulation of GHG emissions under any of the statutory provisions of the Act would trigger applicability for a massive number of emissions sources under different programs within the Act. This could result in additional compliance obligations for a large number of sources and increased complexity in permitting those sources. The pace and ultimate content of this regulatory effort will depend on the Obama administration.

Morgan Lewis Can Help

Morgan Lewis's energy and environmental attorneys are working with utilities and other companies on renewable energy projects, "clean" technologies, emissions trading, and other strategies to manage greenhouse gas emissions and sustainability. Morgan Lewis's attorneys closely track legislation, regulatory actions, and litigation involving greenhouse gas emissions to assist clients in navigating these rapidly changing areas of the law.

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