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NJ Initiatives In Absence Of Federal GHG Laws

Law360, New York (February 23, 2009) -- In two documents published by the New Jersey Department of Environmental Protection (NJDEP) in the fourth quarter of 2008, New Jersey outlined its plan for achieving drastic reductions in the release of greenhouse gases during the next 40 years.

And, in a January 2009 rule proposal, NJDEP outlined a program for monitoring Green House Gas (GHG) emissions from New Jersey sources.

In the Bush administration's final year, there was much discussion of an impending federal regulatory solution to the national global warming problem.

However, no legislation emerged from the 110th Congress. The swearing in of President Barack Obama has refocused the nation's attention on climate change, as Mr. Obama made this issue a corner stone of his environmental policy and U.S. Environmental Protection Agency Administrator Lisa Jackson has named this issue as one of the priorities of her administration.

However, the recent financial crisis facing the nation and the world has raised concerns that global warming will take a back seat at the federal level to more pressing economic issues at least for the foreseeable future.

Thus, states have moved to regulate GHG emissions in the absence of federal regulation.

New Jersey's Global Warming Response Act requires statewide reductions in GHG to 1990 levels by 2020 and to 80 percent of 2006 levels by 2050. The act requires NJDEP to prepare a report recommending the actions necessary to achieve these reduction goals.

NJDEP issued its draft report in December 2008. The report identifies three key areas necessary to achieve the 2020 emissions reduction goal: (1) Regional Greenhouse Gas

Initiative; (2) Implementation of a Low Emission Vehicle Program; and (3) implementation of the New Jersey Energy Master Plan.

Regional Greenhouse Gas Initiative

RGGI is a cooperative effort by 10 Northeast and Mid-Atlantic states to design and operate a regional cap-and-trade program covering carbon dioxide (CO₂) emissions from power plants in the region.

Participating states include Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Vermont.

The first two auctions were deemed successful, as the total number of tradeable allowances were sold at auctions held in September and December 2008. The clearing price in December was \$3.38 per allowance. The money raised by the auction will be invested by the States in climate friendly initiatives.

Low Emissions Vehicle Program

In January 2006, New Jersey adopted rules to implement the California Low Emission Vehicle (LEV) program in 2009. These rules implement the Air Pollution Control Act provisions at NJSA, 26:2C-8.15, which require the department to promulgate rules to implement the California LEV program in New Jersey.

The New Jersey program, effective Jan. 1, 2009, contains three components: vehicle emission standards, fleetwide emission requirements, and a Zero Emission Vehicle (ZEV) sales requirement.

The rules will require automakers to reduce fleet-wide greenhouse gas emissions from the vehicles they sell in New Jersey 30 percent by 2016.

The effectiveness of the New Jersey LEV hinges on California obtaining a waiver from EPA under the Clean Air Act for its program, which is more stringent than national standards adopted by EPA.

In December 2007, EPA denied California's waiver request. California filed a petition for review of this final EPA action with the United States Ninth Circuit Court of Appeals.

Seventeen states have intervened to support California's petition. President Obama has ordered EPA to reevaluate its denial of the California waiver petition.

Until EPA reverses its prior decision and grants the waiver, or the Ninth Circuit reverses the EPA's pending decision to deny the waiver, the New Jersey LEV program will remain unenforceable.

This LEV program remains an important part of New Jersey's plan to reduce GHG emissions, as mobile sources are estimated to account for 36 percent of New Jersey's 2004 GHG emissions.

NJ Energy Master Plan

Adopted in October 2008, the plan focuses on renewable energy and energy efficiency measures in order to increase energy security, decrease consumer costs, and reduce greenhouse gas emissions.

Specific goals include maximizing energy efficiency and conservation through utility-driven programs, reducing peak demand through incentives and the use of advanced metering technology, developing and modernizing electricity infrastructure, and increasing investment for research and job training in the energy sector.

The plan will reduce energy consumption 20 percent, and require generation of renewable electricity in excess of 22.5 percent, by 2020.

Impacts of the proposed recommendations will include: (1) increased cost of electricity; (2) need for more energy efficiency; (3) investment in alternative green sources of energy (wind, solar, geothermal); (4) increased waste recycling; and (5) increased transportation costs.

Potential "winners" under the plan include the most energy efficient companies, companies that successfully invest in clean tech, green building and adapt their production to reduce peak energy demands and GHG emissions. Potential "losers" under the plan include everyone else.

Stakeholders Comments

In a series of six meetings held in December 2008 and January 2009, the NJDEP solicited comments on the draft Report and Plan from the stakeholder community.

For many, these meetings were an opportunity to express the concern that the proposed recommendations will not be enough to achieve 2020 goals (let alone the far more ambitious 2050 goals).

Additional suggestions include: (1) reduction in state road expansion; (2) increase in highway tolls; (3) increase in state gas tax; and (4) dramatic reduction in "green field" construction.

Business owners voiced a major concern that these recommended changes will have a negative impact on New Jersey's economy (at precisely the wrong time), especially in the construction and transportation sectors.

Specifically, the anticipated increased cost of manufacture, construction and transportation will leave an already staggering state economy unable to compete with states that have not (and will not until forced) adopt similar GHG emission reduction measures.

NJDEP Proposed Rules for Monitoring and Reporting GHG Emissions

On Jan. 20, 2009, NJDEP proposed for notice and comment, amendments to the Air Pollution Control rules and the Worker and Community Right-To-Know rules that would impose on certain entities monitoring and reporting requirements for GHGs other than carbon dioxide.

The emissions to be monitored and reported would be for refrigerants such as hydrofluorocarbons and perfluorocarbons, as well as methane, nitrous oxide, sulfur hexafluoride and ethers and halogenated ethers.

NJDEP anticipates that the facilities most likely to be impacted would be: facilities that use chillers, such as large buildings, offices, hotels and shopping centers; large retail food refrigeration facilities, such as supermarkets and restaurants; cold storage warehouses, such as those used to store meat and other perishable goods; industrial processing facilities, such as chemical and pharmaceutical facilities; landfills; and wastewater treatment facilities.

The proposed rules would impose reporting requirements under the Air Pollution Control Act regulations, beginning with the Emission Statement for reporting year 2009, for any facilities that store or emit the newly regulated GHGs in quantities greater than certain thresholds.

They also would impose under the Worker and Community Right-To-Know Act regulations, reporting requirements for any covered facility that stores 50 pounds or more of the newly regulated GHGs, or is a prime supplier of fossil fuel, a gas public utility or a natural gas pipeline operator.

Conclusion

All of this activity will be affected by whatever federal regulatory program eventually emerges from the Obama Administration.

Rep. Henry Waxman, D-Calif., and Sen. Barbara Boxer, D-Calif., have promised a vigorous federal program that will likely result in the creation of a national greenhouse gas emissions cap-and-trade system.

However, until then, the nation's efforts to fight global climate change will reside in the states, and the tension between reducing GHG emissions while maintaining and improving New Jersey's and the nation's economy will continue. Stay tuned.

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