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The Regional Greenhouse Gas Initiative: Will It Survive Federal Regulation of Greenhouse Gases?

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At the same time that leaders from the nine states comprising the Regional Greenhouse Gas Initiative (RGGI) are touting the anticipated benefits of their decision to significantly reduce RGGI's cap on carbon dioxide emissions from fossil fuel–fired power plants in their states, the US Environmental Protection Agency (EPA) is developing standards to limit greenhouse gas emissions from power plants nationwide. A big question for the RGGI states is whether, under federal regulations applicable to existing power plants, their early investment in a regional cap-and-trade program will pay off.

Recent Amendments Reduce the Cap in the Nation's First Cap-and-Trade Program

Since 2008, the RGGI states (Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont) have been subject to an overall cap on carbon dioxide emissions from power plants with a capacity of 25 megawatts (MW) or greater. According to RGGI, the 25 MW threshold captures 98% of all carbon dioxide emissions from power plants in the participating states. Each state is allocated a share of the overall annual emissions cap and then auctions the allowances that generators must acquire for each ton of carbon dioxide they generate. In addition, regulated entities may trade allowance.

In 2012, the states undertook a comprehensive review of the RGGI program, which resulted in substantial changes to the Model Rule, used by each of the states to develop statutes and regulations implementing the RGGI cap-and-trade program. Among the agreed-upon changes was a substantial reduction of the overall cap: for 2014, the annual cap on carbon dioxide emissions from power plants in the RGGI states is 91 million tons, which represents a nearly 75 million ton reduction from the 2013 cap. Those are the numbers making headlines, but, since the total emissions across the RGGI region in 2012 were approximately 91 million, the states effectively adjusted the cap to align with current conditions. Still, the states also committed to reduce the cap by 2.5% per year between 2015 and 2020.

The states also agreed to reserve several million allowances that would become available if, due to cap reductions, the auction price of an allowance rises above a defined threshold, for example $4 in 2014 rising to $10 in 2017 and an additional 2.5% each subsequent year. For reference, the price of an allowance in the most recent auction by California's cap-and-trade program was over $11.

Yet, leaders from the RGGI states have been keeping their eyes on EPA too, because regulatory actions expected at the federal level over next two years could significantly change the rules in the RGGI states.

Upcoming Rules to Limit Greenhouse Gas Emissions from New and Existing Power Plants

In September 2013, EPA revised its proposed rules to control carbon dioxide emissions from new power plants, as the latest in a chain of events tracing back to the Supreme Court's 2007 decision in *Massachusetts v. EPA*. That chain includes EPA's determination that greenhouse gas emissions present a risk to public health and welfare and that tailpipe emissions from motor vehicles were expected to contribute to those risks. Subsequently, EPA issued rules, in conjunction with the Department of Transportation, restricting tailpipe emissions from motor vehicles. That action, according to EPA, required additional measures to regulate greenhouse gas emissions from a host of major sources, including new fossil fuel–fired power plants (and refineries). Toward that end, EPA's September 2013 proposal includes national standards for new power plants, known as New Source Performance Standards (NSPS).

The NSPS won't apply to existing facilities currently regulated under RGGI, but, once EPA issues the final NSPS, all states — not just those participating in RGGI — will be required to regulate emissions from existing in-state sources. And they'll be required to do so in conformance with guidelines developed by EPA pursuant to Section 111(d) of the Clean Air Act. President Obama has ordered EPA to finalize those guidelines by June 1, 2015; by June 30, 2016, states will be required to submit implementation plans for EPA approval. Those plans must include restrictions at least as stringent as those contained in EPA's 111(d) guidelines, or they can be more stringent.

How EPA's 111(d) Guidelines Could Impact RGGI

The best-case scenario for the RGGI states is that EPA will expressly endorse the RGGI cap-and-trade system as a means of satisfying EPA's 111(d) guidelines. And the RGGI states have reason to be optimistic: in President Obama's June 25, 2013 memorandum to EPA, he ordered that 111(d) guidelines ensure—"to the greatest extent possible"—the use of market-based instruments and regulatory flexibility. If EPA makes room for RGGI, the outcome might be that even more states join the RGGI program rather than create their own compliance mechanisms from scratch.

But some of RGGI's key features — for example, a focus on system-wide (vs. facility-based) reductions and its embrace of consumer-side energy-efficiency measures — could get in the way. In particular, those features may make it more difficult for states to show that they've set standards of performance based on the "best system of emission reduction" as required by 111(d). Other aspects of RGGI — for example, offset and allowance cost controls — also could complicate EPA's efforts to set emissions reductions standards for each state.

The RGGI states aren't sitting idly by, though. In December 2013, executives from the RGGI states jointly submitted comments to EPA that, in sum, advised EPA to develop 111(d) guidelines that would allow states to comply with 111(d) by participating in RGGI's cap-and-trade scheme. For instance, the RGGI states explained that a regional approach to emissions reductions is consistent with the regional nature of the electricity grid and would allow the most efficient generators to meet consumer demand. While the effect could be that emissions increase in one state, the RGGI states claim that increase would be offset by a decrease in emissions from less efficient sources elsewhere.

The commenters also advocated for an approach that would credit the RGGI states for the investments they've already made. They argue that EPA should not require every state to reduce its emissions by a certain percentage where the RGGI states have already made substantial reductions and, therefore, additional reductions would be more difficult and more costly to achieve.

There's almost no chance that EPA's 111(d) guidelines would lead to the near-term demise of RGGI, in large part because the states have grown accustomed to the significant funds they raise through allowance auctions (reportedly, $115 million from the most recent auction and $1.5 billion overall). Given those benefits, and because 111(d) permits states to impose requirements that are more stringent than EPA's guidelines, the RGGI states likely would layer their cap-and-trade system on top of whatever EPA would require. Thus, RGGI's advocacy is aimed at maximizing the benefit of its early investments and avoiding the burden of additional regulatory efforts rather than saving RGGI.

What to Look for Next

EPA is required to propose draft 111(d) standards by June 1, 2014. Before then, states, the regulated community, and other stakeholders will be engaged by EPA to evaluate the agency's options for developing the draft standards. In the meantime, litigation over EPA's efforts to regulate greenhouse gases will continue. In what is likely to be the most high-profile case, the US Supreme Court has agreed to consider whether EPA correctly determined that its regulation of tailpipe emissions of greenhouse gases triggered other permitting requirements under the Clean Air Act, including NSPS and, therefore, 111(d) rules. So, it's possible that the impact of federal regulation on RGGI will depend more on judicial decisions than regulatory ones.

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