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Regional Climate Program Moves Ahead as Pre-emption Threat Looms

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Special to the Legal

With Wall Street's turmoil as a backdrop, a fledgling mid-Atlantic regional market in carbon took an important step forward. On Sept. 25, the Regional Greenhouse Gas Initiative, or RGGI, conducted its first auction of carbon dioxide emission allowances.

RGGI is the first mandatory cap-and-trade program in the United States for CO_2, the most significant greenhouse gas emitted by human activities. Through RGGI, 10 Northeastern and mid-Atlantic states (Connecticut, Delaware, Massachusetts, Maryland, Maine, New Hampshire, New Jersey, New York, Rhode Island and Vermont) implemented a cap-and-trade program designed to cap at their 2009 levels the CO_2 emissions of the states' fossil fuel fired power plants rated as greater than 25 megawatts in size. After capping the emissions, the program then lowers the cap by 2.5 percent annually for four years for an eventual reduction of 10 percent below 2009 levels by 2019.

While RGGI is still a long way from its emission reduction goal, the CO_2 auction Sept. 25 marked an important milestone in the program's already lengthy regulatory history. The participating states' efforts began in 2003, and a memorandum of understanding among the states was signed in 2005, formally establishing the program. Because state departments of environmental protection generally have authority to regulate "air pollutants" or "air contaminants," to establish the requisite regulatory authority for RGGI several states had to promulgate rulemakings

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designating CO_2 as a pollutant or contaminant. Passage of authorizing legislation was also required to establish legislative approval of the states' involvement in the RGGI program. Finally, the states jointly drafted a model rule detailing the programmatic elements of RGGI, and have subsequently worked to adopt their own versions of that model regulation.

The regulatory and legislative measures set the stage for the September auction by capping the participating states' annual CO_2 emissions at 188 million tons for the years 2009 to 2014, and allocating allowances among the states. In the auction, six RGGI states (Connecticut, Maine, Maryland, Massachusetts, Rhode Island and Vermont) offered more than 12 million CO_2 allowances for sale with each allowance permitting the holder to emit one ton of CO_2. The remaining states did not have the final regulatory measures in place to participate in the auction. The allowances can be used by their holder to demonstrate compliance with any individual participating state's RGGI requirements.

All 12 million of the offered allowances, in lot sizes of 1,000 allowances, were sold at a clearing price of $3.07 per allowance, significantly exceeding the reserve price of $1.86 per allowance. Fifty-nine participants from the energy, financial and environmental sectors took part in the auction, making bids for more than 51 million allowances, four times the available pool of allowances. While the details of who purchased what allowances have not been released, the majority of allowances were reportedly purchased by electricity generators. The $38.5 million raised by the initial auction will be distributed to the six participating states, which have indicated that they will invest the funds in energy efficiency, renewable energy technologies and programs to benefit energy consumers.

The next auction is scheduled for Dec. 17 and will include all 10 participating RGGI states, offering more than 31 million CO_2 allowances. Following the December auction, auctions are planned quarterly for the three-year period from Jan. 1, 2009, to Dec. 31, 2011. If those auctions maintain the September auctions' allowance price, RGGI will evolve into at least a $600 million annual program.

Despite the success of the initial RGGI CO_2 auction, the future of the program is far from certain. Cost concerns led Massachusetts and Rhode Island to temporarily withdraw from RGGI before later rejoining the program. Ongoing programmatic concerns include the program's ambiguity in regard to the regulation of new sources of greenhouse gas emissions, as well as the potential for the program to drive power production to non-participating regional states such as

Pennsylvania. But the greatest threat to RGGI's future lies in the possibility of federal pre-emption.

The Supremacy Clause of Article VI of the U.S. Constitution provides Congress with the power to pre-empt state law. Pre-emption can be found where Congress expressly declares the pre-emption of state law, where Congress intends to occupy the entirety of a particular regulatory field, or where a state law conflicts with federal law. Without any significant federal action on climate change to date, none of the categories of pre-emption has yet been raised in a significant litigation threat to RGGI. There are, however, numerous pieces of federal climate legislation that could alter the pre-emption analysis.

In the U.S. Senate, Sens. Joseph Lieberman and John Warner introduced a bill this year, S. 2191, that would set a cap on greenhouse gas emissions and reduce those emissions 70 percent by 2050. That bill was defeated June 6, but Senate leaders have expressed optimism regarding hopes for future climate legislation. In the U.S. House, two separate bills, H.R. 6186 and H.R. 6316, were introduced in June, also establishing cap and trade programs for greenhouse gas emissions. H.R. 6186 would reduce greenhouse gas emissions from the energy, industrial and transportation sectors by 85 percent below 2005 levels by 2050, while H.R. 6316 would reduce emissions 95 percent below 2005 levels by 2050. If passed, any of the pending bills could lead to litigation alleging RGGI's pre-emption due to Congress' occupation of the field of greenhouse gas emission trading.

The most direct threat to RGGI's future comes from a bill introduced in draft form Oct. 7 by the chairman of the U.S. House Energy and Commerce Committee, John Dingell. Like the other bills, Dingell's legislation would establish a cap-and-trade program for greenhouse gas emissions, in this case reducing the emissions 80 percent below current levels by 2050. More importantly, the draft legislation would also specifically bar state and regional efforts such as RGGI from developing their own emission caps, stating "no state, local, or regional authority may adopt or enforce a program that caps the amount of greenhouse gases that may be emitted or sold." If passed in its current form, the Dingell legislation would thus clearly pre-empt programs such as RGGI.

In the end, depending on congressional action, RGGI may amount to no more than a model for a national power section cap-and-trade program to reduce greenhouse gas emissions. In the meantime, RGGI is moving forward from a successful initial auction with all eyes on a significantly larger auction at the end of the year. •