Virginia is One Step Closer to State Regulation of Carbon Emissions

04.01.2019

In January of 2018, the Virginia State Air Pollution Control Board ("Air Board") published a proposed rule to establish a CO2 emissions cap and trade program in Virginia (the "Original Proposal"). The regulations set an initial state-wide target for CO2 emissions from electric generating facilities, allocated emission allowances to those facilities and required those allowances to be consigned to the Regional Greenhouse Gas Initiative ("RGGI") for auction. After receiving comments on the Original Proposal, the Virginia Department of Environmental Quality ("DEQ") reconsidered the rule in light of those comments and new information received from RGGI and an outside consultant.

In February 2019, the Air Board re-proposed the CO2 emissions cap and trade program (the "Re-proposal"). The Re-proposal substantively changes the Original Proposal. Most notably, the Re-proposal lowers Virginia's state-wide CO2 emissions tonnage cap from 33/34 million tons per year to 28 million tons per year. The annual allowance budget in the Re-Proposal declines by 3% per year from the 28 million tons of allowances through 2030.

The Re-proposal narrows the industrial exemption in several ways, all of which will have significant, negative repercussions for existing manufacturers and for future manufacturers that are considering Virginia for a site. The Original Proposal excluded from regulation any facility that uses fossil-fuel to generate electricity and heat primarily for use at the facility.

The Re-proposal also amends the definition of "fossil fuel-fired" such that a source that combusts more than 5% (as opposed to 10%) fossil fuel annually is deemed to be "fossil fuel-fired." This change places units that combust primarily non-fossil fuel in danger of losing the exemption by combusting just a small amount of fossil fuel. Significantly, the Re-proposal limits application of the exemption only to facilities existing prior to January 1, 2019. New facilities, including those constructed by industry new to Virginia, will be subject to the CO2 cap and trade program.

The change in the definition of "fossil fuel-fired" and grandfathering only existing facilities will force a subset of industrial sources to comply with the rule without being allocated allowances to offset CO2 emissions. These sources must purchase all necessary allowances from the RGGI market, as opposed to utility sources which will be allocated almost all necessary allowances.

Potential cost impacts of the Re-proposal are the subject of substantial disagreement. The cost analysis adopted by DEQ predicts no rate increases. In contrast, a cost analysis performed by the State Corporation Commission ("SCC") concludes that the total cost to Dominion Energy from 2020 to 2030 will be $5.9 billion if Virginia joins as a member of RGGI. These costs equate to an increase in residential rates of $7 to $12 a month. The varying assumptions in the two cost analyses cause the differences in the estimates. For example, renewables will not necessarily offset generation from Virginia fossil fuel units. Renewables and fossil fuel units are two different types of generation and are not interchangeable when used in the assumptions. DEQ assumes that natural gas prices will decrease below the very low current prices, something that may not happen. Finally, the analyses are based on estimates of Virginia's future electricity demand, and those estimates may not be accurate.

Democratic Governor Northam has repeatedly shown a commitment to reduction of CO_2 emissions in the Commonwealth through trading. On March 14, 2019, the Governor vetoed House Bill 2611, which would have prohibited the Commonwealth from entering into a regional program to reduce carbon dioxide air pollution. In a press release, the Governor stated that "allowing energy producers to comply with regulation through credit trading would lessen costs to producers and consumers while generating revenue that could be spent to make Virginia more resilient to extreme weather events, sea level rise, and flooding."

Comments on the Re-proposal were due on March 6, 2019. DEQ will release a summary of the comments submitted on the Re-proposal in the coming weeks. The Air Board is expected to meet in April to consider a final rule. If the Re-Proposal is promulgated as a final rule, Virginia would be linked with RGGI in 2020.

Re-proposed Regulation for Emissions Trading Programs (Rev. C17), 35 Va. Reg. 1404 (Feb. 4, 2019).

Governor Northam Vetoes Legislation Limiting Commonwealth's Ability to Combat Power Plant Pollution, Press Release from Governor's Office, March 14, 2019.

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