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EPA Power Plant Rule Raises Questions About Expansion of RGGI Participant States

The Environmental Protection Agency's proposal to set carbon dioxide standards for power plants has raised the question of whether additional states will join the Regional Greenhouse Gas Initiative (RGGI) as a way to comply with the federal rule.

The EPA mentioned RGGI by name almost 50 times in its proposed rule, holding out the cap-and-trade program as a potential model for other states.

''We would welcome any new members who want to join RGGI,'' David P. Littell, the RGGI treasurer, told Bloomberg BNA.

He said RGGI is getting ''active inquiries'' from other states and utilities in other states, but declined to specify which states have shown an interest. ''We're answering any questions that we get,'' said Littell, who is a commissioner with the Maine Public Utilities Commission.

The public debate since the rule was proposed June 2 has centered on three states—New Jersey, Pennsylvania and Virginia. The situation in each state is unique and there are numerous obstacles, not the least of which are political, standing in the way of them joining RGGI.

Moreover, a legal analysis presented in testimony to the House Science, Space and Technology Committee raised legal and constitutional questions about whether RGGI, as currently structured, will meet the EPA's requirements.

Still, growing support exists among environmental groups, Democrats and others, who say it makes good economic and environmental sense for other states to join RGGI. They argue that, because RGGI has been up and running since 2008, the program would be close to a ''plug-and-play'' option for states to comply with the rule.

''I think the greatest determinant of whether a state will join (or stay in) a regional emissions trading program like RGGI is the politics of the state, rather than whether it would objectively benefit under the forthcoming EPA rules,'' Michael B. Gerrard, director of the Center for Climate Change Law at Columbia Law School, told Bloomberg BNA in an e-mail.

''Climate change has become so politically polarized that most Republican governors, especially those with national ambitions, wouldn't touch such a program. If state legislative approval is also needed, a Republican house of the legislature could also be an obstacle,'' he said.

RGGI's Not a Model. Charles McConnell, executive director of the Energy & Environment Initiative at Rice University, rejects the notion that RGGI should be a model for other states.

McConnell, a former assistant secretary of energy who is critical of the EPA rule, told a congressional hearing July 30 that the nine RGGI states are a ''small subset'' of U.S. energy production that ''doesn't look anything like the rest of the country'' (147 DEN A-4, 7/31/14).

RGGI requires electricity generators of at least 25 megawatts to purchase one RGGI allowance to emit one short ton of carbon dioxide. Allowances are sold at auction, with proceeds used largely for energy efficiency and clean energy programs. The nine RGGI states are Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, Delaware and Maryland.

The EPA's proposed power plant standards would set for each state a carbon dioxide emissions rate that reflects the reductions that can be achieved from their unique mix of electricity generation. The EPA is proposing interim emissions rate targets to be met during the initial phase-in period between 2020 and 2029 and a final goal to take effect in 2030.

The agency anticipates that its proposed rule would reduce carbon dioxide emissions from the existing fleet of power plants 30 percent below 2005 levels by 2030.

Pennsylvania Debate. The intersection of politics, climate change and RGGI is clear in Pennsylvania, where the issue has become part of this year's campaign for governor.

Tom Wolf, the Democratic candidate and current front-runner, favors joining RGGI. In a statement on his campaign website, he pledged to join RGGI and work with the initiative and its member states ''to set emission caps that are fair to Pennsylvania.''

Meanwhile, Mike Barley, campaign manager for Pennsylvania Gov. Tom Corbett (R), referred to RGGI in a June 11 news release as ''the coal-killing, liberal Regional Greenhouse Gas Initiative.''

According to Barley, Wolf has been ''flip-flopping'' on RGGI ''out of fear of losing the support of the 62,000

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Pennsylvanians whose jobs are supported by the Pennsylvania coal industry.''

The EPA rule will have a distinct impact on Pennsylvania because of its status as the nation's fourth-largest coal producer and as a major user of coal for generation, Patrick Henderson, Corbett's deputy chief of staff and energy executive, told Bloomberg BNA.

Pennsylvania ranks third in the nation in the amount of electricity generated, of which 40 percent is produced by coal-fired power plants and 30 percent is exported. Only Texas and California emit more carbon dioxide, according to the U.S. Energy Information Administration.

That sets Pennsylvania apart from the RGGI states, which are net importers of electricity, have no coal mining industry and, with the exception of Maryland, use little or no coal to generate electricity.

Henderson said, in light of those differences, Pennsylvania was wise not to join RGGI a decade ago. RGGI still might not be a good fit, he said, although he didn't rule out some other regional approach.

Kevin Sunday, government affairs manager for the Pennsylvania Chamber of Business & Industry, said RGGI was ''a bad deal for Pennsylvania'' because neighboring states effectively shifted carbon emissions to the state by importing electricity from Pennsylvania, rather than generating it within their own borders.

The state's options have changed, however, as it considers ways to comply with the proposed EPA rule, he said.

Joining RGGI is an option, Sunday told Bloomberg BNA. ''We're not sure it's the lowest cost option,'' he said.

Gov. Corbett White Paper. Sunday said the business community favors proposals outlined in a white paper the Corbett administration submitted to the EPA in April, which included a recommendation that the agency allow for collaboration among states and among power plant operators without mandating a cap-and-trade approach.

The need for legislative approval could be an impediment in the way of Pennsylvania joining RGGI, Christina Simeone, director of the PennFuture Energy Center for Enterprise & the Environment, told Bloomberg BNA.

Pennsylvania's 2009 Climate Change Action Plan, which includes an evaluation of the potential impacts of joining RGGI, says new legislation and new regulation based on the RGGI model rule would be required for the state to join.

In addition, the Pennsylvania House approved the Pennsylvania Greenhouse Gas Regulation Implementation Act (H.B. 2354) July 1, a measure that would establish a number of steps for the state Department of Environmental Protection (DEP) to follow in developing a state implementation plan (SIP) amendment to comply with the EPA's power plant rule.

The bill, which is in the Environmental Resources & Energy Committee in the Senate, would require that DEP hold at least four public hearings and consider partnerships with other states and investments in energy efficiency programs, energy storage technologies, transmission efficiency improvements, conservation programs, market-based energy trading programs and numerous other measures.

In addition, the bill would require the DEP to get legislative approval for the proposed SIP amendment prior to submitting it to the EPA.

''At this point, I think all options should be on the table,'' Simeone said. ''Pennsylvania's leaders should evaluate a broad range of compliance pathways and determine what will be the most cost-effective way to deliver the most benefits to the state.''

Reed Smith Analysis. The law firm Reed Smith LLP, in a June 10 client alert, said there are several reasons why Pennsylvania should join RGGI and several reasons why it should not.

'' If Pennsylvania joins RGGI—an existing system—it does not have to start from scratch for its SIP because the regulatory framework is, in effect, written,'' according to the alert from Reed Smith attorneys Jennifer A. Smokelin, Lawrence A. Demase and David W. Wagner.

''Moreover, expanding RGGI could lead to efficiencies and a lesser burden on each state that is in the initiative. Also, similar to any cap-and-trade, mass-based system, RGGI's 'cap-and-invest' system has the advantage of simplicity of enforcement in that compliance can be measured through the overall number of allowances a source has, as compared with their reported emissions.''

The alert also said RGGI is a more favorable approach for Pennsylvania than California's cap-and-trade program because it's limited to the power sector, RGGI may offer cost-effective compliance for electric generating units, and RGGI benefits the renewable energy sector because auction proceeds are used to fund clean energy and renewable energy programs.

The alert also said a ''grid-wide'' approach ''makes sense and cents,'' referring to the PJM regional transmission organization and the movement of wholesale energy across state lines.

''It makes sense that compliance is across state lines, allowing efficiencies to be gained by allowing a region to collectively achieve targets by locating cleaner generation where it is most cost-effective, and investing in energy efficiency anywhere within the region,'' the alert said.

There are several compelling reasons, however, why Pennsylvania shouldn't join RGGI, according to the Reed Smith alert. First, RGGI's cap may be too tight for Pennsylvania because it calls for reductions of 50 percent by 2020 from 2005 levels, compared to the EPA's proposed target of 26–30 percent by 2030.

The alert also said it's unclear how effective RGGI has been in reducing emissions and how much can be attributed to an economic slowdown and a shift from coal to natural gas-powered electric generation.

Reasons Why Pennsylvania Should Not Join. In addition, the Reed Smith alert said:

- Political hurdles make cap-and-trade ''the compliance mechanism that shall not be named,'' a reference to the fictional character Voldemort in J.K. Rowling's Harry Potter series.

- The proposed EPA rule's requirement that priority be given to low emitting and renewable energy could ''eviscerate'' any savings from joining RGGI because low-emitting and renewable power options often cost more per kilowatt hour.

- Pennsylvania may not have to make additional emissions reductions in the short term because of recent plant retirements, reduced use of coal-fired generation and more use of natural gas-fired plants.

''Even though about 40 percent of Pennsylvania's electricity comes from coal-fired power plants, and the state is also the fourth-leading producer of coal in the nation, Pennsylvania carbon emissions in 2016 are expected to be 20 percent to 25 percent lower than 2005 levels in the electric generation sector,'' the alert said, citing a recent statement from an official in the Pennsylvania DEP.

If Pennsylvania did join RGGI, it would virtually double the size of the cap-and-trade program because the state is such a large emitter of carbon dioxide. The impact would be mostly positive for other RGGI states, although it would present some challenges, according to William M. Shobe, director of the Center for Economic & Policy Studies at the University of Virginia.

Shobe said the addition of other states, particularly Pennsylvania, would greatly reduce the potential for ''leakage'' of emissions from the RGGI cap. Leakage is the term used to describe the purchase of electricity by electricity generators from non-RGGI sources to avoid having to purchase carbon dioxide allowances.

''The larger the group, the greater the advantage for all the states,'' Shobe told Bloomberg BNA. ''One effect of that is to lower everyone's cost of compliance.''

Shobe said the addition of Pennsylvania, however, could potentially trigger a number of changes in the market. For example, he said the cost of RGGI allowances could rise, which, in turn, would cause higher electricity costs. In addition, higher allowance prices would generate greater revenues for RGGI states.

''If it results in higher electricity rates, that's a political problem,'' Shobe said. ''The RGGI states would need to think about how they can compensate ratepayers.''

On the other hand, he said it's unclear whether the economic advantages of an expanded market could prevent price increases: ''We don't know the answer to that yet.''

New Jersey Continues RGGI Political Debate. New Jersey is another state where RGGI and the politics of climate change have collided head-on.

New Jersey Gov. Chris Christie (R) has remained steadfastly critical of RGGI since his May 2011 announcement that the state, one of RGGI's founding members, would withdraw from the program (134 DEN A-7, 7/14/14).

Majority Democrats in the General Assembly and environmental groups have been equally unwavering in their support for RGGI and persistent, but so far unsuccessful, in their efforts to reverse Christie's action.

In 2011, Christie said RGGI failed to provide economic incentives for power plants to make the investments necessary to reduce carbon emissions and ultimately amounted to nothing more than a tax on electricity with no environmental benefit.

He repeated that assessment when he vetoed bills requiring New Jersey to participate in the RGGI program that passed the Democrat-controlled legislature in 2011 and again in 2012. Neither measure garnered the two-thirds majority needed to override Christie's veto.

In 2013, New Jersey lawmakers sought to circumvent the governor by introducing legislation that would amend the state constitution to mandate participation in RGGI. That measure died in committee when the two-year legislative session ended in January.

RGGI supporters, however, claimed victory in March, when a New Jersey appeals court issued a ruling in favor of two environmental groups that had challenged the failure of state environmental regulators to formally repeal the emissions trading program rules after the state's 2011 withdrawal, a process that would have involved holding hearings and soliciting comments (58 DEN A-12, 3/26/14).

The court gave the state Department of Environmental Protection a choice: Amend the regulations to establish that they apply only when New Jersey is an active participant in a regional greenhouse gas reduction program or repeal them following formal rule-making procedures.

Amending the regulations would make it relatively simple for the state to rejoin RGGI. Instead, the DEP proposed to repeal the carbon dioxide budget trading program rules on July 7.

Senate President Steve Sweeney (D) followed up July 10 by introducing a measure (S.C.R. 125) declaring that the proposed repeal of the RGGI rules contradicts the intent of the 2007 legislation that directed the DEP to adopt the rules in the first place.

New Jersey's constitution allows state lawmakers to invalidate a regulation that is inconsistent with legislative intent by approving a concurrent resolution, giving the executive branch 30 days to amend or withdraw the proposed rule, and then passing a second resolution. S.C.R. 125 is the first step in the process of invalidating the repeal of the RGGI rules.

Legislation Advances as Business Opposes. The Senate president also sponsored a bill (S. 151) requiring New Jersey to join RGGI, which the state Senate approved June 23 by a less-than-veto–proof margin of 24–16. It will be considered next in the assembly.

New Jersey's business community opposes any move to rejoin RGGI, citing already high electricity rates driven in part by government-imposed taxes, fees and surcharges, some of which fund the state's Clean Energy Program and utility-sponsored energy-efficiency and renewable energy programs.

''The Regional Greenhouse Gas Initiative added to these high energy rates while resulting in no net environmental benefit because dirty air moves east to New Jersey from Pennsylvania and Ohio, neither of whom participates in RGGI,'' New Jersey Business & Industry Association Vice President Sara Bluhm told the Senate Environment & Energy Committee during its March 27 hearing on the bill.

"Requiring New Jersey to participate in RGGI will increase rates without helping the environment," Bluhm said.

Kenneth Kimmell, president of the Union of Concerned Scientists, told Bloomberg BNA that "it makes tremendous sense for New Jersey to rejoin RGGI."

"It just seems like a natural fit," said Kimmell, who is a former chairman of RGGI and former commissioner of the Massachusetts Department of Environmental Protection.

"They were already part of the program. Their electricity in multiple ways crosses the borders of states that are in RGGI," he said.

Kimmell published an open letter to Christie July 10, urging him to reconsider his decision. "When you pledged to get out of RGGI three years ago, you made a good point—the program wasn't working as well as it could because it offered too many allowances to the power plants and the price of the allowances was too low," he said in the letter. "But RGGI fixed that problem last year and now the program is firing on all cylinders."

Virginia Also a Possibility. The third state most often cited as a possibility of joining RGGI is Virginia.

A July 9 report from the Chesapeake Climate Action Network said the commonwealth could raise hundreds of millions of dollars to spend on flood protection by joining RGGI (132 DEN A-8, 7/10/14).

It said Virginia could generate up to $200 million annually by 2020 from RGGI auctions and then invest the funds into protecting low-lying communities such as Norfolk from rising tides, bigger storms and more frequent flooding associated with climate change.

Dawone Robinson, Virginia policy director for the organization, told Bloomberg BNA that the EPA rule gives Virginia "a wonderful opportunity to take this important step" of joining RGGI.

Shobe said Virginia would probably benefit economically from joining RGGI, but political challenges involving a Democratic governor and a Republican Legislature make predictions difficult.

Glen Besa, executive director of the Virginia chapter of the Sierra Club, told Bloomberg BNA that the commonwealth would be likely to join RGGI if the EPA implements the proposed rule. While its general assembly has rejected every bill introduced since 2007 that envisioned carbon trading, Besa said the EPA rule would alter lawmakers' political calculations enough to pass legislation that would commit Virginia to RGGI.

The Virginia Department of Environmental Quality is in the midst of holding listening sessions to get comments on how the state could comply with the new rule.

Changes Needed in RGGI Program. The nine RGGI states will have to make some changes in the program to comply with the EPA rule, regardless of whether any new states join. Supporters of RGGI said its overall structure could remain intact and any necessary changes would be largely technical in nature.

Gregory E. Sopkin, an attorney in the Denver office of Wilkinson, Barker, Knauer LLP, said it is questionable, however, whether RGGI as it is currently structured could submit a SIP that would meet the EPA's four general criteria.

In July 30 testimony before the House Science, Space and Technology Committee, Sopkin said RGGI's model rule and the state legislation implementing it is not enforceable "because the structure lacks an interstate enforcement mechanism and state laws by their very nature cannot result in extraterritorial enforcement."

Sopkin said RGGI itself is merely a nonprofit entity that provides technical and administrative support to member states.

"This calls into question EPA's ability to find that a multistate SIP premised upon a RGGI-like structure, i.e., a regional entity with mere 'technical assistance' authority and a consortium of state laws implemented and enforced at the state level, could be approved under EPA's 'general criteria' for SIP evaluation as set forth in the CO2 Emission Guidelines," Sopkin said in his prepared testimony.

"States would not be able to enforce the terms of the joint, multistate SIP vis-a-vis one another under a RGGI-like structure. This would likely render the SIP unenforceable, and thus not approvable by EPA, absent an interstate enforcement mechanism."

Constitutional Issues Raised. Sopkin also said there are constitutional issues under the Compact Clause of the U.S. Constitution that apply to agreements "directed to the formation of any unit that may increase states' political power encroaching on federal power."

"The multistate enforcement issues with RGGI lead to the conclusion that a contract, in the form of an interstate compact, would be necessary to implement an enforceable multistate SIP that would allow states to enforce rights against one another to achieve compliance with the multistate performance goal," Sopkin said.

But Seth Kaplan, vice president for policy and climate advocacy at the Boston-based Conservation Law Foundation, told Bloomberg BNA that Sopkin's legal analysis is "all wrong."

He said there is no constitutional issue regarding the Compact Clause because the U.S. Supreme Court has made it clear that states can enter into these types of agreements without getting approval from Congress.

He said RGGI states are likely to collaborate on a model rule revision that will meet EPA requirements and form the basis for individual state legislative or regulatory action.

"Every state will come up with their own compliance program," Kaplan said. "That compliance program would then become part of their SIP."

Rate-Based to Mass-Based. One of the biggest challenges for RGGI is converting the rate-based reductions in the EPA's proposed rule to the mass-based reductions that RGGI uses, according to RGGI Treasurer Littell.

The rate-based reductions set a limit on carbon dioxide emissions per megawatt hour, while the mass-based reductions set a limit on tons of carbon dioxide emissions per year.

Littell said EPA's technical support document is "not straightforward" and RGGI has a number of questions. RGGI is in the process of making the conversion, but "we don't have the answer to that yet," he said. "We certainly appreciate EPA recognizing that RGGI can comply. The actual bottom line numbers, we're still working on calculating."

RGGI can easily meet the EPA standards under its current structure, but will have to make a few changes in the program to ensure that the nine states fall under

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the EPA cap, according to a June 26 study by the Rockport, Maine–based environmental group ENE.

The study said EPA's rate-based standards will translate to a mass-based cap of 61.8 million short tons of carbon dioxide for the RGGI states by 2030. It said emissions in the nine RGGI states would be 54.6 million short tons of carbon dioxide by 2030, if RGGI makes the changes outlined in the study.

"The framework is well-established," Peter Shattuck, director of market initiatives for ENE, told Bloomberg BNA. "EPA even called out RGGI in the rule as an effective model."

Steps to RGGI Compliance. Shattuck, citing the ENE study, said RGGI states will have to take three steps to meet the EPA standards:

- extend the program's current cap from 2020 to 2030;
- adjust the annual 2.5 percent reduction in the cap so it is based on a baseline year, rather than on the prior year's cap; and
- modify provisions regarding the cost containment reserve (CCR), a mechanism designed to keep allowance prices from rising above a certain level.

The most complicated of the three steps recommended by the study is the adjustment to the cost containment reserve mechanism. Under the current RGGI structure, the CCR kicks in when the auction price for one carbon dioxide allowance reaches $4 in 2014, $6 in 2015, $8 in 2016 and $10 in 2017. The CCR price then rises by 2.5 percent annually.

The allowances are added to the overall emissions budget under RGGI, effectively raising the cap. According to ENE, the projected RGGI cap would just barely fall under the EPA target by 2030 if no changes are made and the full-cost containment reserve is used every year.

Instead, ENE recommends that RGGI use the mechanism contained in the California cap-and-trade program, which requires that the CCR be borrowed from future years rather than added to the cap.

Shobe, who helped design the original RGGI program, said the change ENE recommended may not be necessary. He said the CCR is unlikely to be used up every year. Moreover, he said, there may be fewer and less dramatic spikes in allowance prices if additional states join RGGI.

"I am not convinced that RGGI will have to pull all the cost containment reserve under the cap just to comply with the EPA SIP requirements," he said.

Another element in the RGGI structure that may require some changes involves so-called offsets, according to Shobe. Electricity generators currently are allowed to receive a certain number of allowances for offset projects such as methane capture that reduce carbon dioxide emissions or involve carbon sequestration.

He said RGGI should include offsets in a larger plan without making them an explicit part of the cap-and-trade program

"Offsets are probably expendable in order to make this program fit within EPA rules," he said. "It's not that big a deal."

RGGI as an Attractive Option. RGGI supporters say there are a number of reasons why other states should, and perhaps will, join the cap-and-trade program. They include:

- a "plug-and-play" structure that is already up and running,
- a regional approach that matches the flow of power among states in regional transmission organizations,
- the opportunity to generate funding for renewable and clean energy programs and the resulting economic benefits,
- an additional two years to comply under the proposed EPA rule and
- a structure for compliance with the EPA rule's accounting requirements.

A July 14 report from the Analysis Group said, "Market-based mechanisms offer unique opportunities to minimize costs while also reducing carbon dioxide emissions from existing power plants."

The report, which was released at a conference of the National Association of Regulatory Utility Commissioners, said programs such as RGGI and the California cap-and-trade program are likely to have modest impacts on consumers' electricity rates in the near term and could have long-term benefits such as lower electricity bills and net increases in economic output and jobs (135 DEN A-9, 7/15/14).

"Multistate, market-based mechanisms to control carbon dioxide emissions can respect the practicalities of electric system operations and can be seamless[ly] integrated into both traditionally regulated and competitive electric industry settings," the report said.

"Market-based mechanisms—like RGGI or California's cap-and-trade program—can also provide opportunities for states to capture the economic value of CO2 emission allowances and direct those revenues for public and social benefit."

Shobe said one of the key advantages of a cap-and-trade program is lower administrative costs for compliance. "Any other approach to the EPA rules is going to require lots and lots of monitoring and enforcement," he said. "Where's the money going to come from?"

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