

Source: Daily Environment Report: All Issues > 2008 > December > 12/08/2008 > News > Climate Change: Widespread Greenhouse Gas Requirements For Small Businesses Considered Unlikely

235 DEN A-5

Climate Change

Widespread Greenhouse Gas Requirements For Small Businesses Considered Unlikely

The possibility that the Environmental Protection Agency will apply Clean Air Act permitting requirements to hundreds of thousands of small businesses if it decides to regulate greenhouse gas emissions was dismissed as unlikely Dec. 4 at a forum on air pollution and climate change.

"I cannot imagine that there is any administrator in the world, or in any future administration, that's going to regulate office buildings or apartment buildings that have boilers," said Lorie Schmidt, Democratic counsel to the House Energy and Commerce Committee. "That's just not going to happen."

The forum was sponsored by the American Law Institute and the American Bar Association.

Business groups, as well as EPA itself, have raised concerns about a "regulatory cascade" that would result from a decision by the agency to regulate greenhouse gas emissions under the Clean Air Act.

The Bush administration opposes using the Clean Air Act to regulate greenhouse gases, but President-elect Obama's advisers have indicated that he will move quickly to apply the statute to greenhouse gases. Obama also said he will push Congress to pass comprehensive climate change legislation with an emissions cap-and-trade system (219 DEN A-1, 11/13/08).

Among the most wide-reaching potential effects would be the application of prevention of significant deterioration (PSD) requirements to greenhouse gas emissions. According to the U.S. Chamber of Commerce, this move would force more than 1 million small and medium-sized businesses for the first time to comply with Clean Air Act requirements. According to the chamber, the requirements also would apply to churches, schools, and hospitals (228 DEN A-7, 11/26/08).

This is because PSD applies to major air pollution sources. For most sources, the major source emissions threshold is 250 tons per year. Usually, only large sources emit more than 250 tons per year of major pollutants such as nitrogen oxides or sulfur dioxide.

Carbon dioxide is emitted in vastly greater amounts, so that even a medium-sized apartment building may emit thousands of tons per year.

Other potential consequences include forcing small businesses to obtain operating permits under Title V of the Clean Air Act.

'Deal-Breaker.'

Former EPA General Counsel Roger Martella, a partner at Sidley & Austin, said at the forum that the unintended consequences of regulating greenhouse gases under the Clean Air Act are "a deal-breaker" to invoking it.

Martella said that EPA maintains it would result in an "orders-of-magnitude increase" in the number of sources having to comply with the Clean Air Act.

"It's really hard to fathom how we move forward on power plants or anything else, because you can't get away from that problem despite the fact that very, very creative arguments have been proposed by EPA on how to get around it," Martella said. "At the end of the day, none of them are assured, and it leads to this chain of unintended consequences."

David Bookbinder, chief climate counsel for the Sierra Club, said industry is "hiding behind Dunkin' Donuts" to avoid having to comply with emissions reductions themselves. "Sources with literally 15 million tons a year are saying, 'No, no, no, don't regulate anything because you're going to have to regulate Dunkin' Donuts and we don't want that,'" Bookbinder said.

"If the EPA doesn't want to regulate, down below 10,000 tons, and business and industry doesn't want to regulate below 10,000 tons, and the enviros don't want to regulate below 10,000 tons, it's hard to imagine that people are going to come out of the woodwork and say you must regulate the nursing home," Bookbinder said. "This is fantasy."

"The argument that EPA shouldn't act because it will regulate all these sources over the 250 ton mark, I think is one of the most ridiculous arguments I've heard," Schmidt said. "I cannot imagine that any administrator would, once they regulate greenhouse gases, that they would set it up so that sources between 250 tons and 10,000 tons or whatever the right number is are going to be regulated. They have very creative lawyers."

Even if EPA were to lose in court and be forced to regulate small sources, "if we still don't have legislation, Congress will step in and fix it," Schmidt said.

Administrative Necessity.

William Harnett, director of the Air Quality Policy Division at EPA, told reporters that several approaches are open to EPA to avoid having to regulate small carbon dioxide sources.

"The best approach is administrative necessity," Harnett said. Under this approach, EPA would defer action on regulating small sources due to lack of resources and staff, both at EPA and in the states.

EPA would tell the courts that it could not implement all the controls right away. This would buy time for Congress to act and pass comprehensive legislation, Harnett said.

Another approach is the "absurd results" approach, Harnett said. EPA would argue that applying PSD or Title V requirements to small sources would be "literally absurd," and not a result intended by Congress. This would be "a little tougher" than the administrative necessity argument, Harnett said, but it would be more permanent.

By Steven D. Cook