WASHINGTON CONTINUES TO CONSIDER A CARBON TAX AND DEFENDS CLEAN AIR RULE

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Environment, Land and Natural Resources Alert

This is the first installment in the West Coast Carbon Policy Update — Three Part Series, which will examine carbon policies along the West Coast in Washington, Oregon, and California.

INTRODUCTION

While federal efforts to reduce greenhouse gas emissions (e.g., the Clean Power Plan and the Paris Agreement) may be rolled back under the Trump administration, states continue to take steps to reduce greenhouse gas ("GHG") emissions. In Washington, lawmakers continue to explore passing a carbon tax while the state's Clean Air Rule faces judicial scrutiny. Meanwhile, in Oregon, lawmakers are considering several bills, including a statewide cap-and-trade program and a carbon tax, to add a pricing component to climate regulations passed by the Oregon legislature in 2007 and the future of California's cap-and-trade program is uncertain. These state-led efforts create a patchwork of different climate regulations on the West Coast, which may present challenges to compliance — particularly for those entities that operate across the West.

WASHINGTON STATE

Washington voters recently rejected a ballot initiative to create a statewide carbon tax in 2016,[1] but lawmakers continue to push the concept in the Evergreen state. Governor Jay Inslee's 2017–2019 budget proposal calls for a carbon tax starting at $25 per ton starting May 1, 2018, which would generate $1.9 billion in its first year alone.[2] The governor's carbon tax proposal continues to move through the legislature.[3] Representative Joe Fitzgibbon (D-Burien) also introduced H.B. 1646, which "would impose a tax of $15 per metric ton on carbon emissions, adding an estimated 15 cents to the cost of a gallon of gas."[4]

One of the main criticisms of I-732 was that it was revenue neutral — all the funds generated by the tax would be returned to Washington residents and businesses. Governor Inslee and Rep. Fitzgibbon's proposals, however, recommend investing funds generated by the carbon tax in clean-energy projects and other state priorities, such as education. Proponents of Rep. Fitzgibbon's bill acknowledge that it is unlikely the legislature will pass a carbon tax this year and may consider placing the measure on the 2018 ballot.[5]

As the legislature debates a carbon tax, Washington's Department of Ecology continues to implement the Clean Air Rule (the "CAR") it issued last September, while preparing to defend the validity of the rule in court. The intent of the CAR is to establish emission standards to cap and reduce GHG emissions from in-state nonmobile sources, petroleum product producers and importers, and natural gas distributors. The CAR would cover two-thirds of all in-state GHG emissions, including both public and private sector parties.[6] Unlike California's

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program or Oregon's proposed legislation, the CAR is not a full cap-and-trade program. Instead, deemed a "cap-and-reduce" program, it allows covered sources to generate emission reduction units ("ERUs") if that source's reported emissions levels are lower than the unique GHG emissions reduction pathway set by the Department of Ecology. The source may then bank those ERUs or sell them. However, because this is not an allowance-based program similar to California's, there exists a very limited baseline of ERUs available for initial trading. Instead, compliance will be focused on actual reductions or purchase of carbon credits from programs outside of Washington. Notably, the CAR allows a delayed entry period for energy-intensive, trade-exposed entities. In addition, the CAR does not allow for bilateral trading of ERUs with other carbon trading programs.

Industry groups were quick to file lawsuits challenging the validity of the rule,[7] arguing that the CAR "violates the Constitution in part by discriminating against interstate commerce."[8] Furthermore, the lawsuit challenges the Department of Ecology's "authority to implement the rule without approval by the Legislature."[9] Oral argument is set for March 31, 2017, in the Thurston County Superior Court.

CONCLUSION

Carbon policy continues to evolve in Washington and along the West coast. Washington is pursuing carbon policies that differ from those under consideration in Oregon and California, including a carbon tax and a new "cap-and-reduce" approach to carbon emission reduction. We will continue to monitor and report on legal, policy, and industry developments driven by carbon pricing programs in Washington, and across the country.

NOTES:

[1] *See* Lewis Kamb, *Washington voters reject initiative to impose carbon tax on fossil fuels*, Seattle Times (Nov. 9. 2016), http://www.seattletimes.com/seattle-news/politics/carbon-emissions-tax-initiative-732/.

[2] *See Leading the Fight Against Carbon Pollution,* Governor Jay Inslee Policy Brief (December 2016), http://www.ofm.wa.gov/budget17/highlights/201719_policybrief_CarbonPollution.pdf.

[3] *See*, S.B. 5127, 65th Leg., Reg. Sess. (Wash. 2017) (passed out of Senate Committee on Ways & Means without recommendation, placed on second reading by Rules Committee for floor vote); H.B. 1555, 65th Leg., Reg. Sess. (Wash. 2017) (referred to House Finance Committee).

[4] Seattle Times staff, *Carbon-tax bill calls for higher gas prices in Washington*, Seattle Times (Jan. 26, 2017), http://www.seattletimes.com/seattle-news/politics/carbon-tax-bill-calls-for-higher-gas-prices-in-washington/.

[5] Hal Bernton, *Washington state alliance to push a reworked carbon-tax proposal*, Seattle Times (Nov. 12, 2016), http://www.seattletimes.com/seattle-news/environment/washington-state-alliance-to-push-a-reworked-carbon-tax-initiative/.

[6] Chapter 173-442 WAC, Clean Air Rule: Overview of Rulemaking, http://www.ecy.wa.gov/programs/air/rules/wac173442/1510ov.html (last visited February 13, 2017).

[7] *See* Ass'n of Wash. Bus. v. Wash. Dep't of Ecology, No. 16-2-03923-2 (Thurston Cnty Super. Ct. filed Sept. 29, 2016).

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[8] Amanda Reilly, *Companies sue over Wash. carbon rule*, E&E News (Sep. 29, 2016), http://www.eenews.net/eenewspm/stories/1060043644/search?keyword=%22companies+sue+over+Wash.+Carbon+rule%22 (subscription req'd).

[9] Press Release, Association of Washington Business, AWB Leads Coalition in Lawsuit over Clean Air Rule (Sep. 27, 2016), https://www.awb.org/press-releases/?id=1028.

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