



Steven F. Greenwald



Jeffrey P. Gray

Feds Must Deliver on Climate Change Legislation

By Steven F. Greenwald and Jeffrey P. Gray

For several years there has been widespread doubt about Washington's ability to move forward with a national program to address climate change and reduce greenhouse gas (GHG) emissions. At various times during the Bush administration, it appeared that legislation might be possible, but it always collapsed under the weight of partisan politics and competing special interests.

During this period, states that were either unwilling to wait for Congress to act or lacking confidence that Congress and the Bush administration could achieve the necessary consensus, began to take matters into their own hands. In 2003, nine Northeastern and Mid-Atlantic states began work on the Regional Greenhouse Gas Initiative—the first mandatory cap-and-trade program for CO₂ emissions. On the west coast, California passed AB 32, requiring the state to reduce GHG levels to 1990 levels by 2020. The state also helped form the Western Climate Initiative to address climate change issues on a regional basis. Today, more states are considering or already moving forward with their own climate change initiatives.

Against this backdrop, the election of President Obama raised hopes that a comprehensive national policy addressing climate change might become a reality. In June, this optimism increased as the House of Representatives passed the American Clean Energy and Security Act (ACES), a comprehensive national approach to reducing GHG emissions. The House's passage of ACES evidences the growing momentum behind federal action.

Meeting GHG emissions reduction goals will require long-range planning, but what standard should the industry be planning to meet?

Uncertainty Persists

Although support for federal action is increasing, uncertainty remains. The Senate still has to debate ACES, and past failures to advance federal climate change legislation raise the specter that a much-diluted bill—or no bill at all—will result.

In testimony before the House Energy and Commerce Committee, Jim Rogers, chairman, CEO, and president of Duke Energy, stated that Duke has plans to invest \$25 billion in infrastructure over a five-year period but that “regulatory uncertainty” was postponing such spending. Rogers testified that companies need to know “the rules of the road of climate change as soon as possible to ensure we are making the right investments.”

State regulators in California and other states have also

been scrambling to determine how ACES could impact ongoing implementation of existing state climate change laws. For instance, California is currently set to begin a cap-and-trade program in 2012. If approved in its current form, however, ACES would impose a moratorium on state cap-and-trade programs through 2017. Preliminary analysis shows California may be deprived of nearly 34 million tons in GHG emissions reductions if the ACES moratorium delays implementation of state cap-and-trade programs.

Push Forward or Wait and See?

With no certainty that ACES will be enacted in its current form, and no certainty about when any federal legislation will be adopted, state regulators and the energy industry are confronted with the near-impossible choice between continuing to move forward with existing plans that may prove inconsistent with future federal regulations or putting the brakes on current programs and waiting for the legislation to play itself out in Congress.

Continuing to move forward at the state and regional level provides an insurance policy should ACES stall in the Senate. However, does it make sense for the industry and regulators to invest additional time and resources in a state program that may need to be changed to make it consistent with new federal laws? Potential differences in the treatment of fundamental issues, such as how “offsets” should be used, highlights this dilemma. Meeting GHG emissions reduction goals will require long-range planning, but what standard should the industry be planning to meet?

On the other hand, given the lead time necessary to develop and implement a climate change program at the state or regional level, a more cautious wait-and-see approach puts near-term reductions in GHG emissions at risk.

A National Approach Is the Optimal Approach

Climate change is a global problem, the adverse effects of which are not limited by geography. Worldwide, CO₂ emissions are expected to increase by 1.8% annually through 2030. Effectively tackling this problem requires that action be taken beyond state and regional levels. A comprehensive national climate change policy is the next logical step in addressing global climate change issues.

The House's passage of ACES offers hope that the Obama administration will be more successful than its predecessor in responding to the challenges that climate change poses. Given the current optimism, further delay in adopting—or, worse, the inability to adopt—a national policy will necessarily inhibit industry, state, and regional initiatives to reduce GHG emissions. Thus, it is critical that federal legislation continues to proceed and reach timely closure. ■

—**Steven F. Greenwald** (stevegreenwald@dwt.com) leads Davis Wright Tremaine's Energy Practice Group. **Jeffrey P. Gray** (jeffgray@dwt.com) is a partner in the firm's Energy Practice Group.