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STATE ADMINISTRATIVE FEES EMERGE AS CLIMATE POLICY TOOL

by
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Much of the public attention over global warming and climate change recently has focused on proposals for the implementation of so-called “cap and trade” requirements, which would set collective limits on greenhouse gas (GHG) emissions and provide emitting facilities an opportunity to acquire and trade credits to achieve compliance with those limits. Cap and trade was the central theme of the recent Boxer Amendment to the proposed Lieberman-Warner Climate Security Act of 2006 (S.3036), which on June 6, 2008 was withdrawn from consideration by the full U.S. Senate. It also is the cornerstone of recommendations made by the California Air Resources Board (CARB) to implement the state’s Global Warming Solutions Act of 2006 (often referred to as AB 32), which is the first legislation in the country to set a jurisdiction-wide limit on GHG emissions across all major sectors of the economy. CARB’s recommendations are set out in its “Climate Change Draft Scoping Plan,” issued on June 26, 2008.

Somewhat less attention has been given to various proposals to impose direct carbon fees on GHG emissions administratively, both as a tool for achieving compliance with emission limits *and* as a way to generate government revenue. For example, while CARB’s June 2008 Scoping Plan did not include specific recommendations for the adoption of carbon fee schemes, it made clear that “fees *will* be part of the overall AB 32 program . . .” *See* CARB Scoping Plan at 41 (emphasis added). In describing the virtues of carbon fees, CARB was explicit in pointing out their revenue generation potential: “Fees could be widely applied to most emissions sources, likely generating billions of dollars per year in revenue that could be directed toward various purposes, including programs that achieve GHG emission reductions more directly. Every \$10 per ton, if placed on all emissions of GHGs in California, would result in more than \$4 billion per year through the life of the [AB 32] program.” *Id.*

A GHG fee program recently adopted by a local agency in the San Francisco Bay Area could be a preview of more expansive programs that may be adopted throughout California and elsewhere in the country. In May 2008, the Bay Area Air Quality Management District (BAAQMD, or the “District”) overwhelmingly approved a new GHG fee schedule for all facilities with stationary sources that are subject to a BAAQMD permit requirement. BAAQMD Rule 3-334, Schedule T. The BAAQMD has jurisdiction over all or a portion of nine Bay Area counties, which include the cities of San Francisco, San Jose and Oakland, California, and over 2,500 facilities (including electrical power plants, oil refineries and cement plants) will be affected by the new rule. The BAAQMD’s fee program went into effective on July 1, 2008.

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Under the new schedule, permitted facilities will be required to pay 4.4 cents per metric ton of carbon dioxide equivalents (CDEs), which include methane and a number of other substances (primarily hydrofluorocarbonated and perfluorocarbonated compounds) in addition to carbon dioxide itself. All BAAQMD permitted facilities are subject to the fee, without any exception or threshold for lesser amounts of GHG emissions. While District officials have stated that the fee will have a minimal impact on most businesses, the top ten GHG-emitting facilities are expected to pay more than \$820,000 on an annual basis.

BAAQMD officials have argued that the agency can impose GHG emission fees under provisions of state law that grant local air quality management districts the authority to assess permit fees to recover the cost of its air pollution programs. CAL. HEALTH & SAFETY CODE § 40701.5. Local air districts have primary responsibility for the control of air pollution from non-vehicular sources in California, and they specifically have authority to establish a permit system for stationary sources that emit air contaminants. The definition of “air contaminant” or “air pollutant” under California law is quite broad and encompasses “any discharge, release, or other propagation into the atmosphere,” including “carbon” discharges. Cal. HEALTH & SAFETY CODE § 39013. BAAQMD staff contends that GHG emissions clearly meet this definition. Approximately 45 percent of the District’s general fund operating budget is derived from fees related to emissions control and other program activities, and the revenue generated by the GHG fee ostensibly would be used to offset the costs of the District’s Climate Protection Program activities.

At the same time, some in the regulated community have argued that local GHG fee programs may conflict with AB 32. The legislation states that it is not intended to limit the existing authority of any district. CAL. HEALTH & SAFETY CODE § 38594. It also specifically provides, however, that CARB is “the state agency charged with monitoring and regulating sources of emissions of greenhouse gases that cause global warming in order to reduce emissions of greenhouse gases.” CAL. HEALTH & SAFETY CODE § 38510. In light of the central role assigned to CARB under AB 32, the Western States Petroleum Association (WSPA) has suggested that the BAAQMD fee program raises jurisdictional conflicts with the state climate change law. Because the oil refining companies it represents will bear much of the cost of the fee, WSPA has indicated that it may initiate a legal challenge based on a theory of state law preemption. At the time this update was prepared, however, no such legal action had been brought.

Implementation of the BAAQMD fee program, together with CARB’s recognition of the fiscal implications of carbon fees, could signal a proliferation of similar programs throughout the United States. Along with the direct costs of paying new fees or taxes to multiple state and local governments, companies with GHG-emitting facilities could face substantial indirect costs of determining the amount of fees payable in different jurisdictions with potentially conflicting fee calculation procedures and carbon equivalency factors. The prospect of these likely costs reinforces the importance of including appropriate language on the question of federal preemption in any new climate change legislation that undoubtedly will be brought before the next U.S. Congress.