

EMISSIONS TRADING AND CLIMATE CHANGE BULLETIN

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MADE-IN-CANADA CLEAN AIR ACT – STEPPING BACK FROM KYOTO?

BACKGROUND

On October 19, 2006 the minority Conservative federal government unveiled its plan for cutting air emissions in Canada. The proposed regulatory measures address the main human-induced sources of “air pollutants” (e.g., NO_x, SO_x) and greenhouse gases (“GHG”) and will be primarily set out in Canada’s Clean Air Act (the “Clean Air Act” or “Act”). Under the proposals, the Canadian federal Government will also implement certain amendments to the Canadian Environmental Protection Act, 1999 (“CEPA 1999”) and introduce regulations under the Energy Efficiency Act and the Motor Vehicle Fuel Consumption Standards Act.

While the new proposals outline a fairly comprehensive approach to combat air pollution and GHG emissions, the proposals has not been well received for a number of reasons including the extensive consultations that the federal government intends to undertake prior to implementation and the long term timelines for any meaningful action. The recent announcements also confirmed the concerns of many, that Canada will abandon its Kyoto commitments. Under the Kyoto Protocol, Canada’s GHG emissions target is a 6% reduction in GHG levels from 1990 during the first commitment period. The Conservative government has taken the position that Canada is unable to meet its commitments under the Protocol and that it would be unrealistic to even try.

This has been a fairly marked departure for Canada which has been in the past a leader in promoting the Kyoto Protocol. As recently as last summer Canada played in leadership role in the implementation of the Kyoto Protocol chairing in Montreal, the Conference of Parties (COP 11), the UN body which coordinates the negotiations between states with respect to the next commitment period under the Kyoto Protocol.

The federal proposals make no mention of the Kyoto Protocol and are largely focused on a domestic agenda. The proposals are concerned with taking action on air pollutants including GHGs in a number of areas: transportation, industrial sectors, commercial and consumer products and indoor air. There is an emphasis in the proposals on “harmonizing” Canadian emission standards with those in the US. and “aligning” the federal government’s actions with those of the US

Proposed Regulations and Consultative Process

In the next 12 months the federal Government will introduce regulations in a number of areas including:

- for on-road vehicles and engines and off-road engines to harmonize Canadian emission standards for on-road vehicles and engines and off-road engines with those of the U.S. Environmental Protection Agency;
- to reduce volatile organic compound (VOC) emissions from various consumer and commercial products. These proposed regulations will align with generally more stringent U.S. requirements;
- to align Canadian fuel, vehicle and engine air pollutant regulations with U.S. standards; and
- to regulate emissions of pollutants from ships, rail and aviation.

In addition, the federal Government also intends to regulate the fuel consumption of road motor vehicles after the expiry of the Memorandum of Understanding between the auto industry and the federal Government. New regulations will be developed to build on the voluntary commitment the auto industry made in 2005 that calls for a reduction of 5.3MT of GHGs by 2010. The regulations will not take effect until 2011.

The federal Government intends to engage in detailed consultations with industries and provinces in respect of all proposed regulations in three phases:

First phase: Set to begin in the fall of 2006, with respect to the development of industrial sector regulations. The intent is to have a regulatory approach set for short-term targets for limits on air pollutants and GHGs by spring 2007 which would take effect between 2010 and 2015.

Second phase: Beginning in summer 2007 and continuing until the end of 2008, the Government intends to consultations with the individual industrial sectors. The intent is to publish the first regulations in the spring of 2008 for comment.

Third phase: The proposed regulations for the first sectors will be finalized no later than the fall of 2008. All proposed regulations would be finalized no later than the end of 2010.

The federal Government believes that lengthy consultations are required to give industries time to develop the technology required to meet the new regulations targets.

REGULATORY APPROACH

The Federal government will consult on three possible approaches to regulations for the key industrial sectors: emission targets; compliance options and compliance assessment, monitoring and reporting.

Emission Targets

The Federal government will propose regulations to set emission targets for air emissions designed to reduce air pollutant and GHG emissions across Canada.

In the short-term (2010-2015) the federal Government intends to adopt a target-setting approach based on fixed caps for air pollutants. Emissions targets for air pollutants will be at least as rigorous as those in the U.S. In the same period a target-setting approach based on emissions intensity will be adopted for GHGs.

In the medium-term (2020-2025) the federal Government will continue to employ a fixed cap approach to target-setting for air pollutants. In the same period the Government will build upon the emissions intensity approach with intensity targets for GHGs that will lead to absolute reductions in emissions and support the establishment of a fixed cap on emissions during this period.

In the long-term (2050) the federal Government will continue to employ a fixed cap approach to target setting for air pollutants. In the same period the Government is committed to achieving an absolute reduction in GHG emissions between 45 and 65% from 2003 levels by 2050, and will ask the National Round Table Environment and the Economy for advice on the specific target to be selected and scenarios for how the target could be achieved.

The federal Government intends to consult widely on the following issues: the form of the targets, including emissions caps, emissions intensity, performance or technology-based targets; the most appropriate historical baseline where applicable; the approach to target-setting, e.g., how to establish sector-specific reduction targets, benchmark to international standards, etc.; how targets will apply to major new facilities, especially in sectors where technology is evolving rapidly; and if and how targets will differentiate between existing and new industrial facilities.

COMPLIANCE OPTIONS

The federal Government is considering a number of compliance options to provide industry with the flexibility to choose

the most cost-effective way to meet the emission targets including:

- self-supporting market mechanisms such as industry-led emissions trading systems (the Government will not purchase credits or otherwise participate in the emissions trading market);
- opt-in mechanisms that would enable entities not covered by regulation to voluntarily assume emissions targets;
- incentives that could see companies receive credit for investments in technology, such as CO₂ sequestration;
- mechanisms to recognize credit for early action; r
- domestic offsets in which verified emissions reductions outside the regulated system are recognized as eligible for compliance in the regulated system; and.
- the establishment of a technology investment fund into which industry and governments could contribute resources to support the development of transformative technologies for emissions reduction.

Compliance Assessment, Monitoring and Reporting

The federal proposals include a one-window regulatory compliance tool to ensure that industry is on track to meet regulatory obligations through a single, harmonized system for mandatory reporting of all air emissions and related information across Canada. This system will underpin the proposed regulations and any emissions trading regime.

CONCLUSION

Action is required in Canada on the GHG front whether within the framework of the Kyoto Protocol or outside of it. Canada has been rated as one of the highest emitters of GHG in the world on a per capita basis. Our emissions since 1993 have increased dramatically and have not abated. While the new proposal may be too little too late they are arguably a step in the right direction. If implemented, the federal proposals would allow the government to move toward a mandatory and nationally comprehensive compliance system. They have also added some certainty as to the federal Government's intentions in the area of GHGs and regional pollutants.

However, all three federal opposition parties have stated that they will not support the proposals, creating doubt regarding whether they will ever become law. At the end of October, the New Democratic Party tabled a private member's bill called the Climate Change Accountability Act ("NDP Act"), which if passed would set short and long-term GHG emission targets. The NDP Act would require the government set short-term targets within the next six months, implement them within a year, and update targets every five years. Further, the proposed NDP Act also aims to cut GHG emissions by 25 percent by 2020, and an 80 percent reduction of GHG emissions below 1990 levels by 2050. Given their minority position, the federal Conservatives may have little choice but to accede to the other parties demands to improve the current proposals. The worst case is that nothing at all happens pending a federal election and the imposition of a majority federal government.

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The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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