



Environment Energy & Emissions Trading Brief

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This issue of the Environment, Energy & Emissions Trading Brief contains an overview of the happenings at the 15th United Nations Climate Change Conference (COP15). David Thring discusses the Ontario Ministry of the Environment Greenhouse Gas Emissions Reporting Regulation (O. Reg. 452/09) in "Reporting of Greenhouse Gas Emissions." David Young looks into the Feed-in Tariff program in "Ontario's FIT Program Augurs a Shift in Energy Dependence." Keith Cameron covers the Kerry-Boxer Bill in "Kerry-Boxer Bill: Be Careful What You Wish For....," and Peter Wells discusses the reporting of GHG emissions in "Will Greenhouse Gas Emissions Reports Be Private? Only Time Will Tell."

The Long Road to a Kyoto Successor: COP15 – Goals and Hurdles

Nearly 200 countries are involved in the 15th United Nations Climate Change Conference ("COP15") taking place at Bella Center in Copenhagen from December 7 to 18, 2009. The goal of COP15 is to reach a new global agreement for fighting climate change, as a successor to the Kyoto Protocol is needed. However, this goal has met with many hurdles as each participant has varying ideas about what is required internationally and individually to make a Kyoto successor a reality.

Canada has participated in this convention since it started as the 1992 Earth Summit in Rio. This is the 15th conference held within the United Nations Framework Convention on Climate Change ("UNFCCC") framework. Canada's goal this year is to assist in the development of a new agreement that will focus on economic growth while protecting the environment. Prime Minister Stephen Harper, Jim Prentice, Minister of the Environment, and Michael Martin, Chief Negotiator and Ambassador for Climate Change, are representing Canada at COP15.

The Conservative government announced intentions to harmonize the Canadian plan to cut greenhouse gases with the legislation that is currently being debated in the U.S. Canada has vowed to do no more and no less than what the U.S. does. This stance is being debated in the court of public opinion. While this discussion continues, Mr. Harper's late agreement to attend, the government's support for the development of Alberta's tar sands and our rising emissions levels have added to the spotlight being put on Canada on the international stage.

Other hurdles facing participants at COP15 include deciding which nations should be making carbon cuts, which nations will pay for these changes, rules surrounding carbon trading and solutions regarding deforestation.

Yvo de Boer, executive secretary of the UNFCCC, has called for clarity in all of this. He stated in an interview with Environment & Energy Publishing ("E&E") that the four essentials to reaching an international agreement in Copenhagen are:

1. How much are the industrialized countries willing to reduce their emissions of greenhouse gases?
2. How much are major developing countries such as China and India willing to do to limit the growth of their emissions?
3. How is the help needed by developing countries to engage in reducing their emissions and adapting to the impacts of climate change going to be financed?

4. How is that money going to be managed?

Mr. de Boer and our clients are watching with interest to see how these four issues will be addressed.

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Reporting of Greenhouse Gas Emissions



David Thring

On December 1, 2009 the Ontario Ministry of the Environment enacted its Greenhouse Gas Emissions Reporting Regulation (O. Reg. 452/09) under the *Environmental Protection Act*. Effective January 1, 2010 operators of facilities in specified industries in Ontario emitting 25,000 tonnes or more per year of carbon dioxide equivalent (“CO₂e”) will be required to report their emissions on an annual basis.

The Regulation specifies 26 relevant industries, including cement manufacturing, electricity generation, glass production, steel manufacturing, petroleum refining, pulp and paper manufacturing, and various other industrial chemical and materials production facilities.

The Regulation is accompanied by a technical guideline that outlines mandatory standard quantification methods. Best alternative quantification methods may be used temporarily for reporting 2010 emissions. Third-party verification in accordance with ISO 14064 and 14065 requirements will be required for 2011 emissions and later years.

The purpose of the Regulation is to support the implementation in Ontario of a cap and trade system for emissions trading (also known as carbon trading). Ontario has announced that it will continue to work with the Canadian federal government and other provinces to harmonize emissions reporting requirements. Ontario will also continue to work with the other provinces and U.S. states that are members of the Western Climate Initiative (“WCI”) to harmonize emissions reporting requirements.

On September 22, 2009 the U.S. Environmental Protection Agency (“EPA”) issued its Final Mandatory Report-

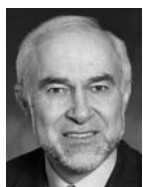
ing of Greenhouse Gases Rule. The rule will be effective December 29, 2009. The rule requires reporting of greenhouse gas emissions by operators of facilities in the U.S. that emit 25,000 tonnes or more per year of emissions. The Ontario and EPA reporting regimes are similar but, unlike the EPA rule, the Ontario Regulation does not apply to fuel suppliers.

Ontario has also announced that while small emitters (facilities emitting between 10,000 and 25,000 tonnes per year) are not currently required to report under the Regulation, the Ministry will develop a program to encourage voluntary reporting in anticipation of inclusion of these smaller emitters in the future in emerging North America-wide requirements, with which Ontario will likely align.

The Regulation represents a further step towards implementation of a cap and trade system in Ontario. Earlier this year, the Ontario government introduced Bill 185 which received third reading on December 3, 2009. Bill 185 creates a statutory framework under which the Ministry of the Environment may create and implement a cap and trade system. Ontario’s stated policy is that any such system will be harmonized to the requirements of a North America-wide system. In the U.S., in November, 2009, the Senate Committee on Environment and Public Works approved the *Kerry-Boxer Clean Energy Jobs and American Power Act*. That legislation is comprehensive and includes, among other things, provisions aimed at setting up an economy-wide cap and trade program in the U.S. for reducing greenhouse gas emissions. The U.S. legislation continues to face some obstacles in the U.S. Senate.

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Ontario's FIT Program Augurs a Shift in Energy Dependence



David Young

The cornerstone of Ontario's new "Green Energy" strategy is the Feed-in Tariff program or "FIT." In embracing FIT, Ontario is breaking ground in North America by providing a mechanism for individuals and organizations at all levels in the community and the marketplace to develop renewable energy-generating facilities without regard to the criteria of economic efficiency and cost-effectiveness, previously applied to approvals of traditional energy generation sources.

In enabling private parties to develop generation facilities and to "feed-in" power to the existing grid in return for a guaranteed long-term pricing structure (the "tariff"), the program will permit developers to receive an economic return on their investment. Through this mechanism, Ontario believes that it can materially enhance the capacity of renewable electricity generation in the province.

The key eligibility conditions for new generation projects to participate in the program are:

- (i) that the facility fall within one of the qualifying categories of renewable energy generation (essentially water, wind, solar and bio-energy);
- (ii) that the facility be located in Ontario; and
- (iii) that it use equipment that meets prescribed Ontario "domestic content" requirements (ranging from 25% for wind power in the first two years to 60% for solar after the initial two years).

As a key part of the FIT Program's infrastructure for widely distributed power generation, the government has established North America's first comprehensive pricing structure for renewable electricity production. The program provides a fixed framework for the government to contract with private parties for renewable energy generation, including standardized program rules, prices and contracts that will apply to anyone who is interested in developing a qualifying renewable energy project.

By moving away from the previously applied criteria for assessing the viability of generation projects (economic efficiency and cost-effectiveness), and adopting as the key criterion a project's overall environmental impact, the program essentially makes all renewable energy feasible. By ensuring that power transmitters and distributors provide priority access to their systems for renewable energy projects, the program ensures that a project will have a market for the power produced, provided that certain technical connectivity and economic viability conditions are met (such as availability of transmission facilities and the economic viability of any additional resources required to deliver the electricity to the grid).

To participate in the FIT Program, an applicant must invest in the generation facility as well as the connection and metering systems, bear certain on-going costs and risks of operation and enter into a "FIT Contract" with the Ontario Power Authority ("OPA") to sell the electricity into the system. Suppliers must comply with established regulatory instruments relating to the generation and distribution of power (amended to enable the FIT Program) including the Distribution System Code, the Transmission System Code and the Independent Electricity System Operator ("IESO") Market Rules.

A supplier will need to make contractual arrangements with either the local electricity distribution company ("LDC") (such as a municipal hydro corporation or Hydro One) or a transmitter connected directly to the province's high-voltage transmission system. In general, projects of 10 MW or less will connect to a distributor while those of greater than 10 MW will connect to the transmission system. Settlement of payments for the purchased electricity will be made by the LDC on behalf of the OPA for projects connected to the distribution system, and for projects connected directly to the transmission system, by the OPA and the IESO. In all cases, the purchaser of power and the party ultimately responsible for payment is the OPA.

A FIT Contract, in addition to obligating the OPA to pay for the electricity, will set out project-specific information, milestones to reach commercial operation and various rights

Ontario's FIT Program has the potential to develop within the province a sizable "home-grown" energy capacity while concurrently promoting Ontario-based design and manufacture of alternative energy systems.

and obligations of the supplier. Contract terms will be 20 years (40 years for water power). Under the contract, the OPA will own environmental attributes generated by the project, including carbon credits.

An important pre-condition to the acceptance of an application for a FIT Contract will be connection availability. In addition, under amendments to the *Environmental Protection Act*, a “Renewable Energy Approval” will be required to address facility location and other environmental conditions for many projects. For example, the Province is proposing standardized, mandatory setbacks for certain energy projects (such as wind) from the nearest residence.

A significant feature of the FIT Program is the incentive framework for projects undertaken by aboriginal and other community groups. Incentives in the form of “price adders” to the tariff as well as financial support to such groups are designed to encourage local partnerships to develop projects with aboriginal and community equity participation.

Finally, it should be noted that the program offers a means for very small (under 10 KW) renewable power generation facilities to be developed by individual homeowners and small businesses such as family farms. Under the “microFIT” stream,

a simplified application and contracting process is used. In all cases, microFIT participants will contract with the OPA for sale of the electricity and with their LDC (which in almost all cases will be their current power supplier) for delivery and payment settlement.

Detailed information for potential FIT and microFIT applicants is available on the OPA website at <http://fit.powerauthority.on.ca/>. This information includes the application form, the FIT and microFIT “Rules” and the forms of contract.

Ontario’s FIT Program, while not revolutionary (it largely follows an established European model), has the potential to create a significant shift in Ontario’s energy dependence paradigm. The program has the potential to develop within the province a sizable “home-grown” energy capacity while concurrently promoting Ontario-based design and manufacture of alternative energy systems. Whether this initiative achieves a rebalancing of the national energy equation will be interesting to observe.

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Kerry-Boxer Bill: Be Careful What You Wish For...



Keith Cameron

On October 1, 2009, the U.S. Senate released its version of an energy and climate change bill called the *Clean Energy Jobs and American Power Act*. This draft legislation, known as the “Kerry-Boxer Bill”

(after its Democrat sponsors: Senators John Kerry and Barbara Boxer) creates a cap and trade regime to reduce greenhouse gasses (“GHGs”) and attempts to prevent “carbon leakage.” Carbon leakage refers to an increase in foreign GHGs that is a result of domestic policy that pushes so-called dirty businesses off-shore.

Since current international agreements, such as the Kyoto Protocol, do not obligate such key countries as China, India, Mexico, South Korea and Brazil to

reduce GHGs whatsoever, the U.S. seems to be attempting to prevent carbon leakage by potentially implementing carbon tariffs (border measures). Effectively, a carbon tariff is a border tax that is slapped on imports from countries that do not adhere to consistent/ equivalent GHG reduction measures. Carbon tariffs are to protect U.S. industries/jobs from competition by foreign states that do not face similar GHG restrictions.

Section 765 of the Kerry-Boxer Bill states that, “[i]t is the sense of the Senate that this Act will contain a trade title that will include a *border measure* that is consistent with our international obligations and designed to work in conjunction with provisions that allocate allowances to energy-intensive and trade-exposed industries.” (emphasis added).

A carbon tax of any kind (applied domestically or by the U.S.) on Canadian-produced crude would either curtail development of the oil sands or push the export of Canadian crude to other markets, such as Asia.

This single provision in the Kerry-Boxer Bill is causing a rather large amount of consternation amongst major trading partners of the U.S. Raising such a barrier to trade will certainly be challenged at the World Trade Organization (“WTO”), under the General Agreement on Tariffs and Trade (“GATT”) and the North American Free Trade Agreement (“NAFTA”). However, this would not prevent retaliation measures from other countries. Indeed, emerging green industries, such as wind turbines and solar panels, need a vibrant and open economy to prosper.

Moreover, if such carbon tariffs are passed in the U.S., then Canada will be in a precarious position. Challenging carbon tariffs under the WTO and/or NAFTA is a potential long-term solution. However, winning such a case is not a guaranteed outcome, as the U.S. could claim that it can impose carbon tariffs (or subsidies) vis-à-vis Article XX of GATT and similarly under NAFTA provisions. In addition to challenging carbon tariffs under WTO and/or NAFTA, Canada could be forced to adopt a similar carbon tariff system to ensure that Canada would collect carbon tariff revenue that would otherwise have been diverted to the U.S. government. Taxing producers of GHGs, however, is not the simple answer to a complex global concern.

The U.S. remains Canada’s number one trading partner and the U.S. imports more crude oil from Canada than any other country. Canada is an ally; a stable and safe country to rely on for the importation of oil products. Indeed, Canada is said to have the world’s second largest known oil reserves and therefore can be relied on in the long-term by the U.S. Most of these oil reserves are located in the Alberta tar sands.

Effectively, a carbon tariff is a border tax that is slapped on imports from countries that do not adhere to consistent/equivalent GHG reduction measures.

Extracting and refining such a natural resource, however, is an energy-intensive process that releases a large amount of GHGs. A carbon tax of any kind (applied domestically or by the U.S.) on Canadian-produced crude would either curtail development of the oil sands or push the export of Canadian crude to other markets, such as Asia. Either way, it would force the U.S. to rely on other countries, such as Saudi Arabia, Iran, Russia and Venezuela to obtain enough crude to meet its needs. Relying on such foreign countries certainly does not enhance the energy security of the U.S.

If the Kerry-Boxer Bill ultimately imposes carbon tariffs in a vain attempt to reduce global GHGs, then the Bill’s objective to reduce GHGs may be reached – albeit inadvertently. GHG emissions will certainly drop because global production of goods and services will also decline due to the drop in global trade. George Santayana once observed, “[t]hose who do not remember the past are condemned to repeat it.” In the 1930s, industrialized countries waged massive trade wars. In order to protect domestic industries and jobs in response to the Great Depression, tariffs were implemented and quotas were imposed. The result of such protectionist measures, however, was that other countries kept raising their trade barriers even further; it created a spiralling effect, which stifled global trade and consequently deepened and prolonged the ongoing global economic depression. Is the U.S. creating the conditions for history to repeat itself?

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Will Greenhouse Gas Emissions Reports Be Private? Only Time Will Tell



Peter Wells

In a separate article we have described Ontario’s new regime for reporting emissions of greenhouse gases. One question that naturally arises is what is the government going to do with the data collected? The regulation does not specify any particular purpose or list of purposes, and

the Ministry in its press releases has described the reporting regime as supportive of the coming cap and trade system. However, to those familiar with the National Pollutant Release Inventory (“NPRI”) established under s. 50 of the *Canadian Environmental Protection Act, 1999*, the data to be reported for greenhouse gases looks very similar to the data to be reported

for substances specified under the NPRI. The data for the NPRI goes back to 1994, and can be searched online at http://www.ec.gc.ca/pdb/websol/querysite/query_e.cfm. Downloadable datasets are also available.

During the consultation process, the issue of whether the data would be publicly available was raised. The decision on O. Reg. 452/09, posted as 010-7889 on Ontario's Environmental Registry, provides the following summary with respect to comments received: "A number of comments received in writing and at the information sessions centered on the need to submit confidential business information and concerns over the protection of such information. The *Ontario Freedom of Information and Protection of Privacy Act* ("FIPPA") protects confidential commercial, technical, financial and other types of business information from disclosure. Confidential business information that is exempted from public disclosure under FIPPA will be protected during the implementation of the requirements. In addition, the data submission requirements in the draft regulation were reviewed and the submission requirements for data that are not essential for the design of a future cap and trade program or for a high level quality assessment of the reported emission have been removed from the final regulation. Most of the other information is required to be kept on site by the company for audit by the Ministry. This will help to reduce the reporting burden and the need to submit certain confidential business information."

Section 10 of FIPPA provides that every person has a right of access to a record or part of a record under the control of an institution, unless it falls within one of the exemptions provided for in sections 12 to 22 of the Act. Greenhouse gas reports are within the definition of a record, and the Ministry of the Environment is an institution under FIPPA. The exemption for third-party information provided for in section 17 of FIPPA provides that production of a record shall be refused where it "reveals a trade secret or scientific, technical, commercial, financial or labour relations information," provided that

While the Ministry of the Environment has not stated an intention to make the data collected available in a fashion similar to the data on the NPRI, the Regulation does provide a mechanism that would facilitate such publication.

disclosure would likely "prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization... result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied...result in undue loss or gain to any person, group, committee or financial institution or agency; or reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute." In light of the fact that NPRI data on emissions of hundreds of chemicals have been publicly available since 1994, it will likely be difficult to establish that publication of greenhouse gas emissions will *significantly* prejudice anyone's competitive position. It is also difficult to understand how these data could

assist in implementing a cap and trade system if the data were kept confidential.

While the Ministry of the Environment has not stated an intention to make the data collected available in a fashion similar to the data on the NPRI, the Regulation does provide a mechanism that would facilitate such publication. Section 20 of O. Reg. 452/09 provides that reports are to be submitted in a form provided by or approved by the Director. The Director is given authority to specify that the reports be submitted in electronic

form. Submission of reports in a standardized electronic form would facilitate an online database similar to the NPRI. In fact, in the decision referred to above, the Ministry made the following intriguing statement: "Ontario will continue to work with the federal government and other provinces to harmonize GHG reporting requirements and methods where feasible." It would not take any great effort to add the greenhouse gases listed in O. Reg. 452/09 to the list of reportable substances under the NPRI. Only time will tell.

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Tips to Make Your Business “Green”

We are often asked how a business can take steps to “Go Green.” Here are some tips:

- Position desks to capture the most sunlight possible. This will reduce the need for electric light. Try to schedule meetings during times of the day that natural light can be put to the best use.
- Ensure that your printer is set to print all documents double-sided.
- Turn off and unplug all electronics that are not in use.
- Install a drinking water filtration system to eliminate plastic water bottles.
- Send deliverables to customers electronically if possible. This will reduce shipping costs and will cut inventory costs as well by reducing the use of paper and CDs. This should include the sending and receiving of bills and invoices.
- Turn off your monitor when in the office but not using the computer.
- Start a recycling program at your office if one is not already in place.
- Collect and donate used electronics instead of throwing them away.
- To help eliminate the use of paper, build an Intranet to share internal documents and news.
- Use green and recycled products such as rechargeable batteries and energy-efficient light bulbs in the office where you can.
- Add plants to your office as a natural air filter.

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