



Your Pacific Northwest Law Firm®

Sustainability & Climate Change Reporter

Posted at 10:00 AM on November 18, 2010 by Mike Nesteroff

Washington State Suspension of Agency Rulemaking May Not Affect Proposed GHG Rules

Washington Governor Christine Gregoire issued an [Executive Order \(PDF\)](#) on November 17 suspending until December 31, 2011, state agencies' development and adoption of all "non-critical" regulations. The order is premised on providing a "stable and predictable regulatory and policy environment," but it's not at all clear what will constitute "non-critical" rules. Two proposed greenhouse gas emissions rules slated for adoption in December 2010 may not be affected because of exemptions described in an implementation memorandum.

The Governor's order refers to unprecedented economic times, which certainly is the case with the state's budget. Legislators are facing an anticipated \$4.8-billion budget shortfall in the next two years, which they will have to close through [cuts](#) only since voters turned down tax increase measures in the last election. And this is in addition to a \$9-billion gap in the last budget, which was balanced through \$4-billion in cuts and \$5-billion in one-time fixes.

What is "Non-Critical?"

The state finance director issued a November 16 implementation [memorandum \(PDF\)](#) to agency directors, statewide elected officials, presidents of higher education institutions and boards and commissions. The memo sets out the guidelines for what rules can be developed or adopted during the moratorium. According to the memo, all rule making proceedings are non-critical unless they are:

- required by federal or state law or required to maintain federally delegated or authorized programs;
- required by court order;
- necessary to manage budget shortfalls, maintain fund solvency, or for revenue generating activities;
- necessary to promote public health, safety and welfare or necessary to avoid an immediate threat to the state's natural resources; or

- beneficial to or requested or supported by the regulated entities, local governments or small businesses that it affects.

Other exemptions exist for:

- rules that are the subject of negotiated rule making;
- pilot rule making that involved substantial participation by interested parties before the development of the proposed rule;
- permanent rule making that has previously been covered by emergency rules; or
- expedited rules that relate only to internal government operations.

Impact on Pending GHG Regulations

The Washington Department of Ecology ("Ecology") has proposed at least two regulations concerning greenhouse gas emissions that could be affected by the executive order moratorium:

- [Greenhouse gas reporting rules](#), first proposed in October 2009 and revised in September 2010, would apply to Washington facilities that have annual emissions starting in 2012 greater than 10,000 metric tons of CO₂ equivalent .

Because state law requires Ecology to adopt the regulations, that might qualify the proposed rules as exempt under the November 16 memo. The authorizing statute, however, originally required rule adoption to start with 2009 emissions. For a variety of reasons, that did not happen, but when the legislature amended the statute earlier this year, it did not change the date requirement. Thus, it is unclear whether state law actually requires Ecology to adopt a reporting rule now.

- [Operating permit regulations](#) would establish when facilities that already have an air operating permit must begin reporting their GHG emissions and establish that facilities that do not currently require an air operating permit must apply for one before July 2012 if they have the potential to emit at least 100,000 metric tons per year of GHG. This rule is intended to match the federal Environmental Protection Agency's "[Tailoring Rule](#)," which raises the current very low threshold for air pollution sources that need a permit to a substantially higher level for GHG emissions.

The operating permit rules might be exempt from the Governor's suspension order because they are required by federal rules that take effect January 1, 2011. Unless the state rule is revised so that it is consistent with the federal rule, approximately 1,000 Washington businesses would need permits for GHG emissions, at a cost of between \$20,000 to \$135,000.

Before the Executive Order, Ecology had planned to adopt both rules in December. The agency's first statement after the Governor's order acknowledged that the range of circumstances for exemption are likely to be narrow, but signaled that rule making such as the proposed GHG rules may continue.

Much of Ecology's rule-making work is required by the state Legislature or is in response to changes in federal rules or legislation. Some of our draft rules under way simplify reporting requirements for businesses, synchronize state and federal rules, modernize cleanup standards, and ensure local government eligibility for federal construction dollars.

The moratorium doesn't extend to other regulatory work we do, such as permitting and policy guidance. In the spirit of the Governor's effort to help businesses and local governments, Ecology will put increased emphasis on providing technical assistance and helping the regulated community comply with permits and other existing regulations. We will also direct additional resources to enforcing existing laws and requirements.

Thus, while at first glance the Executive Order appears broad, the numerous exemptions and the specific circumstances involving Ecology's proposed GHG rules may not derail their planned adoption next month.

Lane Powell PC | Your Pacific Northwest Law Firm®

Seattle

1420 Fifth Avenue
Suite 4100
Seattle, WA 98101-2339
Phone:
206.223.7000

Fax:
206.223.7107

Portland

601 SW Second Avenue
Suite 2100
Portland, OR 97204-3158
Phone:
503.778.2100

Fax:
503.778.2200

Olympia

111 Market Street NE
Suite 360
Olympia, WA 98501
Phone:
360.754.6001

Fax:
360.754.1605

Anchorage

301 West Northern Lights Blvd.
Suite 301

Anchorage, AK 99503

Phone:

907.277.9511

Fax:

907.276.2631

London

Office 2.24

148 Leadenhall Street

London, EC3V 4QT, England

Phone:

020.7645.8240

Fax:

020.7645.8241