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Uncertainty Over GHG Rules May Fuel Noncompliance

By Jesse Greenspan

Law360, New York (June 09, 2010) -- These days, many companies are not quite sure how to deal with the U.S. Environmental Protection Agency's greenhouse gas reporting rule and its tailoring rule, which could cause headaches down the road as they struggle to meet obligations, experts say.

While large emitters already experienced with the EPA's permitting programs may have no problem complying, other companies that lack as many resources could have trouble getting up to speed on what they're supposed to do and when they're supposed to do it, according to Gail Suchman, special counsel at Strock & Strock & Lavan LLP.

"There are a lot of medium or smaller industries that I would venture to guess have no clue what they're doing and probably aren't doing anything," Suchman said.

Part of the problem is that a lot of companies don't even realize that the reporting rule, in particular, applies to them, said Jeffrey Fort, co-director of the climate change practice at Sonnenschein Nath & Rosenthal LLP.

The mandatory reporting of greenhouse gases rule, which was issued Oct. 30, required businesses that release more than 25,000 tons of greenhouse gases annually to start tracking their emissions on Jan. 1, 2010, and to make their first emissions report publicly available by March 31, 2011.

The program will apply to roughly 10,000 facilities — including aluminum production, electronic manufacturing, ethanol, food processing, steel, petroleum refinery, coal mining, pulp and paper manufacturing and municipal solid waste landfill — and will cover about 85 percent of the U.S.' greenhouse gas emissions, according to the EPA.

But while 25,000 tons may sound like a big number, it's roughly equivalent to a 50 million BTU per hour gas boiler, according to Fort.

"That's not a real big facility," Fort said.

For example, some entities like hospitals could be subject to the rule even though they do not have smokestacks or engage in industrial-type activities, he said.

The May 13 tailoring rule does not have this same problem because it only subjects large industrial facilities — such as power plants and oil refineries that increase their greenhouse gas emissions by at least 75,000 tons per year — to Clean Air Act regulations, while exempting small businesses such as farms and restaurants until at least April 2016.

But as of now, there is still a lot of confusion surrounding how the government will define best available control technologies for GHGs, the use of which would have to be demonstrated as part of any permit application, according to David M. Heger, an attorney in the environmental and climate change practice at Barnes & Thornburg LLP.

"I think that the tailoring rule ... creates some difficulties for companies going forward," Heger said.

"It's not like we have an add-on technology," Suchman said. "You can't just put a scrubber on."

Moreover, most companies don't know their annual greenhouse gas emissions, and will have to hire consultants and perhaps attorneys to help them figure out how to comply, according to experts.

In fact, a cottage industry of consultants and technical advisers has sprung up in response to these rules, said Stephen J. Humes, co-chair of the climate change and renewable energy practice at McCarter & English LLP.

"It does get very technical, which is why you would want some professional assistance if you don't have it already in your shop," Humes said.

While it is possible to measure greenhouse gas emissions directly, most companies don't because of the expense involved, he said.

Instead, they calculate their footprint mainly by looking at such things as the carbon content

of their fuel and the heating values of their combustion units, Humes said.

Though the EPA has tried to allow the use of estimates where possible, some companies will still have to install additional monitoring equipment if they want to meet the agency's new requirements, according to Heger.

"[This] is a cost they didn't expect to incur and would have preferred not to," he said.

Nevertheless, the burdens are manageable, and most companies know what they need to do to comply, even if they aren't happy about it, Humes said.

"If someone is failing to comply, it's more likely to be not so much ignorance as an inability or an unwillingness to comply with the requirements," he said.

Some companies may also be waiting to see how various legal battles over the rules play out, with the American Petroleum Institute, the National Petrochemical and Refiners Association, the American Chemistry Council, and other industry trade groups challenging the reporting rule in the U.S. Court of Appeals for the District of Columbia Circuit.

The groups maintain that the EPA acted arbitrarily and capriciously and exceeded its authority under the Clean Air Act.

Such ire has also been directed at the tailoring rule, with groups such as the National Association of Manufacturers contending that it will limit job growth and ultimately undermine economic recovery.

But even if the rules do go into effect, experts said, the EPA will likely not commence any enforcement actions related to the reporting or tailoring rule at least for the first couple of years.

"We're going to see a lot of efforts at voluntarily compelling compliance rather than enforcement litigation," Humes said.

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