EPA ISSUES MANDATORY REPORTING RULE TARGETING 85% OF US GHG EMISSIONS

By Grace Kurdian

While there is still debate as to whether or not Congress will pass climate change legislation before the end of the year, other branches of government are moving ahead on the climate change front. The U.S. Environmental Protection Agency ("EPA") issued its final mandatory greenhouse gas ("GHG") emissions reporting rule ("Reporting Rule") on September 22, 2009.1 The authority for this rulemaking stems from a directive in the fiscal year 2008 Consolidated Appropriations Act. The Reporting Rule targets approximately 85% of the total U.S. GHG emissions, by requiring monitoring and reporting by 10,000 facilities in 31 diverse sectors that go well beyond the power industry and extend beyond direct emitters.

Generally, upstream and downstream sources who emit 25,000 metric tons of carbon dioxide equivalent ("CO2e") per year (the equivalent of annual GHG emissions from the energy use of approximately 2,300 homes or 4,600 passenger vehicles) will be required to collect and report data at the facility level. However, certain suppliers of fossil fuels and industrial GHGs as well as vehicle and engine manufacturers are required to report at the corporate level. Vehicle and engine manufacturers (mobile sources) are required to use existing certification and test protocols.

Upstream sources include suppliers of the following products: coal-based liquid fuels, petroleum products, natural gas and natural gas liquids, industrial GHGs, and carbon dioxide. Upstream sources are required to report based on the GHG content of the fuels or gases they supply into the market, as opposed to the GHG emissions that would occur from the use of their products. Downstream sources include a broad range of entities, including but not limited to: general stationary fuel combustion sources, electricity generation, aluminum production, ammonia manufacturing, cement production, glass production, chemical producers, iron and steel production, lead production, lime manufacturing, petrochemical production and petroleum refineries, pulp and paper manufacturing, silicon carbide production, soda ash manufacturing, titanium dioxide production, zinc production, municipal solid waste landfills, and manure management. Downstream sources are required to report their CO2e emissions even if they do not exceed the generally applicable 25,000 metric ton threshold. Some entities that were originally among the covered sources in the proposed rule (issued in March) are no longer required to report, including for example, electronics manufacturers, manufacturers of light-duty vehicles and passenger trucks, food processors, industrial landfills, coal suppliers and underground coal mines, and wastewater treatment facilities.

Monitoring is to commence on January 1, 2010, with the first annual reports (reporting 2010 data) due by March 31, 2011.2 In order to assist in the transition to this program, from January through March 2010, facilities are allowed to use the best available data in lieu of the required monitoring methods. Entities are required to maintain their reporting records for 3 years.

There are incentives for facilities that reduce their emissions below certain levels. Specifically, the EPA has established triggers that allow entities to leave the monitoring and reporting program. After 5 consecutive years of reporting emissions below 25,000 metric tons CO2e per year, a facility may cease reporting. Similarly, if a facility reports emissions below 15,000 metric tons CO2e per year for 3 consecutive years, it may cease reporting. Finally, if the facility’s processes or operations that emit GHGs are shut down, the facility may cease reporting.

As for the cost, the EPA estimates that the cost to be incurred by the private sector for compliance with the Reporting Rules will be: $115 million for the first year and $72 million in annualized costs in later years.

Emissions data is not to be withheld as confidential business information, but instead will be publicly available. Note, however, that the EPA will have a separate notice and comment process in 2010 to address confidential treatment of data that facilities may consider confidential business information.
While covered facilities are required to report CO2e emissions data directly to the EPA, the Agency intends to coordinate with state and regional programs and voluntary reporting entities, such as the Climate Registry, with regard to sharing verified emissions data. The goal is to develop a data exchange standard in order to allow for the data to be shared and ease the reporting burden imposed on covered facilities. However, because the data reported in other GHG monitoring programs is different in form and scope than the data required by the EPA’s Reporting Rule, entities who are members of a voluntary reporting program or a state or regional compliance program need to carefully review the requirements of the EPA’s Reporting Rule, not assume that the same data and reports may be re-formatted to meet the Reporting Rule.

Although independent from other regulatory action recently taken by the EPA, the Reporting Rule, viewed in tandem with pronouncements such as the EPA’s Proposed Endangerment and Cause or Contribute Findings for GHG Under the Clean Air Act (issued in April 2009 and previously discussed at www.climatelawyers.com), further lays a foundation for the EPA to regulate GHG emissions using its existing authority, even if Congress does not pass comprehensive climate change legislation.

The bottom line is that many outside the power sector, who were never required to think about GHG emissions, are now required to ascertain whether the EPA’s recently announced GHG Reporting Rule applies, then monitor and report their emissions.

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