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The US And Canadian GHG Reporting Rules

Law360, New York (October 21, 2009) -- On Sept. 22, 2009, the U.S. Environmental Protection Agency Administrator issued its Final Rule for Mandatory Reporting of Greenhouse Gases.

Based on existing Clean Air Act authority, the rule requires large U.S. emissions sources and major U.S. fuel suppliers to monitor their greenhouse gas emissions and report the results to EPA.

Canada has had GHG reporting rules for some time, but there are a few key differences to keep in mind, particularly for companies that have operations or facilities in both countries.

The EPA's new rule does not control any greenhouse gas emissions, but provides information for designing and administering future control programs.

The information the EPA collects will also help businesses track their own emissions and compare them to similar U.S. facilities.

Sources and Gases Covered

The rule applies to carbon dioxide (CO2), methane (CH4), nitrous oxide (N2O), hydrofluorocarbons (HFC), perfluorocarbons (PFC), sulfur hexafluoride (SF6) and other fluorinated gases, including nitrogen trifluoride (NF3) and hydrofluorinated ethers (HFE). GHGs are measured in units known as carbon dioxide equivalents (CO2e).

Under the rule, any stationary source that emits more than 25,000 metric tons of GHGs annually, and any supplier of liquid or gaseous fuels in quantities which, when burned, would emit that amount of GHGs is required to report annually to the EPA on the type and volume of GHGs it directly or indirectly emits.

The rule also applies to some vehicle and aircraft engine manufacturers and a number of other specifically listed source types such as electric generating units, pulp and paper production, cement production, lime manufacturing, petroleum refining and municipal landfills.[1]

Most small businesses will fall below the 25,000 metric ton threshold and will not be required to report GHG emissions. However, the EPA estimates the rule will apply to approximately 10,000 facilities collectively responsible for 85 percent of U.S. GHG emissions.

Canada's Federal GHG Reporting Requirement

Canada introduced mandatory reporting of GHG emissions in 2004 under the Canadian Environmental Protection Act, 1999.

In Canada, an operator of a facility that emits at least 50,000 metric tons of carbon dioxide equivalent (CO2e) of specified GHGs in the year 2009 must report emissions. The reporting threshold was reduced this year from 100,000 metric tons of CO2e to 50,000 metric tons.

As with the EPA's rule, Canada's reporting requirement does not directly control GHG emission levels. However, penalties exist under the act if an operator fails to comply with the reporting requirement.

Canada's reporting requirement applies to a specified list of GHG emissions. As with the EPA rule, it excludes emissions from biomass from the calculations to determine whether a facility meets the threshold GHG emission level.

The specific information that must be reported is set out in the notice published in the July 11, 2009 edition of Canada Gazette and includes a requirement for an operator to report carbon dioxide, methane and nitrous oxide emissions by source category, which includes, for example, stationary fuel combustion emissions, industrial process emissions and waste emissions.

The deadline in Canada for reporting on GHGs emitted in 2009 is June 1, 2010.

Timing and Verification of Reporting

Under the EPA rule, reporters must begin collecting data on January 1, 2010. The first annual GHG report for GHGs emitted or products supplied during 2010 will be due March 31, 2011.

With some exceptions, GHG reporting is at the facility level and must follow reporting protocols prescribed by the EPA in some detail. The agency will specify the electronic format in which reports must be submitted.

Once subject to the reporting requirement, each reporter must continue to submit GHG reports annually; however, a reporter can stop reporting if its annual reports demonstrate its emissions are either less than 25,000 metric tons of CO2e per year for five consecutive years, or less than 15,000 metric tons of CO2e per year for three consecutive years.

Each reporter will self-certify its data and the EPA will review the reports by performing electronic data quality assurance checks and a range of other emission verification activities. No third-party verification will be required.

The EPA received many comments on the trade secret status of submitted data. The agency will conduct a separate rulemaking to address this issue.

The EPA's rule will not preempt any existing state or local reporting requirements, and the agency may establish additional reporting requirements in the future.

The EPA has developed an online applicability tool to assist potential reporters to assess whether they would be required to report, and to assist compliance if reporting is required. For these resources, visit EPA's Web site at: www.epa.gov/climatechange/emissions/ghgrulemaking.html

Deciding U.S. Climate Policy: Courts or Congress?

Almost simultaneous with the EPA's release of its reporting rule, the U.S. Court of Appeals for the Second Circuit opened the door broader than before to federal nuisance claims against GHG emissions.

In State of Connecticut, et al. v. American Electric Power Co., et al, No. 05-5104 and No. 05-5119 (Sept. 21, 2009), the court rejected a lower court finding that federal common law remedies for climate change presented "political questions" the courts could not decide.

The court also found that the plaintiff states had standing to raise such issues on behalf of their citizens, and remanded the case to the lower court to consider whether plaintiffs could show global warming as a "public nuisance," that is, "an unreasonable interference with a right common to the general public."

The court made clear that congressional or the EPA action could displace and preempt the court's authority. However, the opinion suggests that only a comprehensive statutory or administrative approach to the issue would constitute preemption.

Implications

The rule and the information it produces gives clues on how future mandatory GHG control programs will work. The 25,000 metric ton threshold for emissions reporting is

the same as the threshold for coverage by the cap and trade program contained in the Waxman-Markey bill that passed the House.

The monitoring and data quality requirements can reasonably be taken as the minimum monitoring and data quality procedures that EPA will consider acceptable for quantifying source emissions and deciding how many allowances a source must hold.

Conclusion

Both Canada and the U.S. are moving toward more stringent GHG reporting requirements. This movement will affect an increasing number of emitters in both countries.

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