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Environmental LAW

Emissions monitoring to begin Jan. 1

National climate protection regulation has taken its first major step toward reality.

On Sept. 22, the U. S. Environmental Protection Agency issued a final rule mandating reporting of greenhouse gas emissions from large sources.

In general, beginning Jan. 1, 2010, all facilities emitting 25,000 metric tons of GHGs must begin monitoring their emissions using methods prescribed by EPA. Reports of the data gathered for 2010 must be given to the EPA by March 31, 2011 and annually thereafter.

The EPA estimates the monitoring rules will apply to 10,000 facilities, which are estimated to be responsible for up to 85 percent of GHG emissions in the United States.

Before the ink was dry on the reporting regulations, the EPA released a proposed rule that will regulate GHG emissions from large sources under existing Clean Air Act permitting programs, primarily affecting the same sources that must begin monitoring emissions Jan. 1. They are the first significant federal regulations to address GHGs, and the first regulations that reach outside of the utility sector. Utilities in New York are subject to the Regional Greenhouse Gas Initiative cap and trade program administered at the state level.

The EPA's administrative moves occurred concurrently with renewed efforts in the U. S. Senate to establish a national GHG cap and trade program and with a surprising decision out of the Second Circuit Court of Appeals that opens the door to the courts to regulate GHGs. In *Connecticut v. American Electric Power Co. Inc.*, (Second Cir. Sept. 21), the court reversed a 2006 district court decision and allowed a suit claiming emissions of GHGs constitute a public nuisance to move forward.

At the state level, in addition to RGGI, the Department of Environmental Conservation has issued guidance encouraging assessment of potential GHG emissions as part of every environmental impact statement, and Gov. David A. Paterson's Executive Order No. 24 created a Climate Action Council, charged with formulating a state policy to achieve an 80 percent reduction from 1990 GHG emission levels by 2050.

The reporting requirements that must be implemented beginning Jan. 1 originated with Congress, which required the EPA to come up with a reporting rule for GHG emissions as part of the fiscal 2008 Consolidated Appropriations Act. The originally targeted adoption date was June 26, but the schedule slipped a bit when the proposal the EPA issued in March drew almost 17,000 written com-



ments.

The March proposal identified 42 categories of emission sources such as oil refineries, paper manufacturing, landfills, livestock manure management, etc., as well as a residual category for facilities with large, stationary fuel burning equipment. The EPA adopted regulations in the final rule covering 31 of the categories. The agency has deferred regulation of, among other sectors, electronics manufacturing and food processing. While the general reporting trigger is 25,000 metric tons, sources in 15 categories will have to report their emissions even if they do not exceed that threshold.

In addition to requiring reports from facilities with direct GHG emissions, the rule also applies to certain "upstream" sources, including producers of petroleum products and natural gas, and manufacturers of certain mobile sources such as heavy-duty trucks, motorcycles, airplanes and non-road engines. Vehicle owners, including fleet owners, are not required to monitor or report emissions.

EPA officials concede there is inherent double-reporting of emissions by including both upstream and downstream sources, but maintain the information will prove valuable in the development of climate change policy and programs.

Applicability and reporting are not determined at the company level; rather, consistent with other federal environmental regulations, the rule applies by "facility," which means properties under common ownership, adjacent, contiguous or separated solely by a public roadway. A company may have several such facilities and must report for each.

EPA officials believe the vast majority of commercial building owners will not be covered by the rule. To reduce the regulatory burden and data collection, the EPA aimed to exclude any facility with an aggregate maximum rated heat capacity of less than 30 mm Btu/hour (80 percent of commercial buildings with boilers have capacity of less than 10 mm Btu/hour).

The EPA has developed an online applicability tool to help facility owners determine whether they are required to report, available on the GHG reporting portion of EPA's Web site.

Contrary to early reports that the EPA planned to count agricultural GHG emissions on a cow-by-cow basis, the rule excludes emissions of methane from ruminant animals "via enteric fermentation." It does include certain manure management systems with emissions equivalent to 25,000 metric tons of GHGs.

For facilities required to monitor and report emissions, there is

a very brief window to obtain the monitoring equipment needed to comply with the rule. Monitoring must begin Jan. 1 and while facilities can begin with “best available monitoring,” by April 1, monitoring systems must be upgraded unless a facility obtains a specific extension, which by rule cannot extend beyond the end of 2010. EPA officials anticipate granting very few extensions.

The rule proposed in March included a once-in, always-in requirement that a facility required to report in year one would report every year regardless of changes in its emissions, but the final rule allows facilities to escape reporting after three to five years if emissions are below 25,000 tons or it stops emitting GHGs.

Similar to other Clean Air Act programs, reporting companies will be able to self-certify their emissions reports through a “designated representative.” The EPA will verify emission reports through audits and penalties are laid out for facilities that fail to report or misreport emissions.

Not including New York, 17 states have or are developing GHG reporting programs of their own. The EPA’s reporting rule does not preempt states from adopting their own programs, nor will the EPA delegate enforcement of the federal program to the states. In many

cases, companies will have concurrent and potentially conflicting reporting obligations to the EPA and state agencies. States with their own reporting programs in the Northeast include Massachusetts, Connecticut, Maine and New Jersey.

The reporting rule is detailed and complex, and runs to more than 700 pages. By and large, it has the same elements and structure as existing Clean Air Act regulations. But time to prepare is short: Jan. 1 literally is around the corner. Environmental managers should take advantage of the technical assistance the EPA has made available — information sheets, Webinars, telephone hotline and the “applicability tool” on its Web site — to determine whether they are one of the 10,000 facilities required to report emissions. If so, begin now to develop an implementation plan.

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