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New Senate Bill: Amending EPCRA To Include GHGs

Law360, New York (November 18, 2008) -- While Congress struggles to enact comprehensive climate change legislation, Senate Bill 1387 was recently approved by the Environment and Public Works Committee.

Senate Bill 1387 (the "Bill"), entitled the National Greenhouse Gas Registry Act, would make Greenhouse Gases (GHGs) subject to select provisions of the Emergency Planning and Community Right to Know Act ("EPCRA").

The Bill would build upon the 2008 Consolidated Appropriations Act enacted Dec. 26, 2007, Public Law No. 110-161, where Congress directed EPA to publish a reporting rule applicable to GHGs "above appropriate thresholds in all sectors of the economy" using its authority under the CAA.

Sections 114 and 208 of the CAA provide for data collection, measurement, and record keeping from stationary or mobile related sources. What thresholds are "appropriate," and the frequency of the reporting is up to EPA to decide.

The law also directs EPA "to include in its rule reporting of emissions resulting from upstream production and downstream sources." EPA was scheduled to publish a draft rule by September 2008 and a final rule no later than June 2009, although no rules have emerged yet.

The Bill is similar to other registry efforts. Section 703 of the House Committee on Energy and Commerce's "Climate Change Discussion Draft" released by Cong. Dingell and Boucher on Oct. 7, 2008 would establish a Greenhouse Gas Registry to be established by EPA within one year of that's bill's enactment.

The Discussion Draft draws support from the existing Climate Registry, which is a nonprofit organization that provides meaningful information to reduce greenhouse gas emissions managed by over 40 states and Indian tribes applying standards throughout North America for businesses and governments to calculate, verify and publicly report their carbon footprints in a single, unified registry.

The Bill is also similar to H.R. 6877, the "Greenhouse Gas Registry Act," introduced on September 11, 2008 by Representative Tammy Baldwin of Wisconsin. H.R. 6877 was referred to the House Committee on Energy and Commerce. The Bill's registry is also similar to the GHG registry requirements proposed in the Lieberman-Warner Climate Security Act, currently stalemated.

How The Bill Would Amend EPCRA To Include GHGs

The EPCRA is a stand-alone title within the Superfund Amendments and Reauthorization Act of 1986. EPCRA created an infrastructure for state and local government to plan for chemical emergencies.

The thrust of EPCRA is the publication of a registry of the release and use of certain toxic chemicals based on mandatory reporting by industry. The Bill proposes to amend EPCRA to include GHGs within some of its requirements.

The Bill requires EPA's Administrator to establish a threshold planning quantity of one metric ton for each GHG. It does not require the creation of new state emergency response commissions specifically for GHGs.

Under the Bill, "Affected Facilities" would submit annual reports describing their GHG emissions and emission baselines to the existing state emergency response commissions, consistent with the Bill's standards for data quality, and subject to third-party verification.

The state emergency response commissions would then provide the Affected Facilities' reports to EPA, which would make them publicly available in a national GHG registry on EPA's Web site.

The Bill's Effects On Business

Most electric utilities subject to the CAA's requirements are already required to report data similar to the data that the Bill would require. The Bill undoubtedly would entail some amount of new costs to industry to comply with its requirements, and pay for violations.

Furthermore, as has been the case with inclusion of a facility in the Toxic Release Inventory, a stigma would likely attach to facilities shown to be the largest emitters of GHGs.

Additionally, publicly traded businesses face the possibility that someday, they will have to disclose the material costs of compliance with laws such as the Bill, likely pursuant to a trio of SEC regulations. SEC regulations within Regulation S-K govern disclosure requirements of the Securities Act of 1933 and Securities Exchange Act of 1934.

To date, neither the SEC nor the courts have decided that these regulations require disclosure of a carbon footprint, however, a petition for rulemaking is pending with the SEC that would have it require companies to disclose information related to GHG emissions and planning.

A publicly traded company, Xcel Energy Inc., recently settled with New York's Attorney General such that it must disclose the same type of climate change information as would be required under the SEC regulations within Regulation S-K.

Indeed, it seems inevitable that consideration of carbon-footprint costs will be among the mandatory disclosures of publicly traded entities, especially as those costs increase.

Final Thoughts

The Senate Environment and Public Works Committee passed the Bill by a voice vote, to recommend that the Senate as a whole consider it. U.S. Sen. Amy Klobuchar, D-Minn., the Bill's sponsor stated that "I've been involved in public policy long enough to know that you can't fix a problem if you can't measure it accurately.

That vote goes a long way to making sure we have full and accurate information about the sources and amounts of greenhouse gas pollution.”

In contrast to the broad discretion that Public Law No. 110-161 affords EPA in choosing the appropriate thresholds, frequency of reporting and what sources must report, the Bill provides defined guidance on those variables.

Additionally, the approach the Bill takes in inserting GHGs into the existing framework of EPCRA could provide the type of legislative provenance necessary to garner Congressional approval.

The 2008 Consolidated Appropriations Act mentioned earlier has had other effects beyond just what sort of GHG registry may emerge.

The petitioners (Dine Care, Environmental Defense Fund, Grand Canyon Trust, Natural Resources Defense Council, San Juan Citizens Alliance, Sierra Club, and WildEarth Guardians) challenging EPA’s CAA Desert Rock Energy Company PSD permit filed a Supplemental Brief on Oct 2, 2008 in the case *In re Desert Rock Energy Company, LLC*), PSD Permit Number AZP 04-01) PSD Appeal Nos. 08-03, 08-04 before EPA’s Environmental Appeals Board demanding among other things that EPA include GHG emission controls in the permit.

One such argument is that under the 2008 Consolidated Appropriations Act that “EPA has a separate and distinct statutory obligation to regulate CO₂ – through mandatory emission monitoring requirements under the CAA – which also triggers BACT obligations for Desert Rock.”

It is quite unlikely that Congress intended this result, but those demanding that EPA agree that it has authority for GHG controls in permits are using every bit of support they can find.

--By Lee A. DeHihns III (pictured) and Megan Hey, Alston & Bird LLP.

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