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REPORTING

GREENHOUSE GAS PROGRAMS

Greenhouse gas reporting programs at the state and federal level are becoming increasingly important as their output can form the basis for future regulations. The authors of this BNA Insight look at two such programs in California and one from the EPA. Compliance is critical, they argue, as penalties can quickly mount and enforcement activity is likely to rise in the coming years.

Climate Change

Greenhouse Gas Reporting Rules: Current Headaches and Future Migraines

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Reporting regulations aren't sexy. They don't grab headlines. They aren't splashed across agency homepages. And, let's be honest, most of the general public doesn't even know that they exist. But they should.

Increasingly, reporting regulations—particularly greenhouse gas-related reporting regulations—are shaping the future of environmental law and are the cause of much consternation. Not only do these reports establish a baseline for future regulation, but they also come with hefty fines for noncompliance, missed deadlines and even minor inaccuracies.

This article focuses on three reporting regulations: the EPA's Greenhouse Gas Reporting Program (GHGRP or ''Reporting Rule''), California's Mandatory Greenhouse Gas Emissions Reporting Regulation

(MRR) and California's Low Carbon Fuel Standard (LCFS). The following sections highlight recent developments in each program and the hard-line approaches that agencies have taken with respect to each program. Despite the arduous reporting requirements, all regulated parties should invest time and resources to ensure accurate filings.

The Big Three: EPA and CARB Reporting Requirements

1. EPA's Greenhouse Gas Reporting Program. From a federal perspective, June 2014 may go down in history as the Month of Greenhouse Gas. At the month's start, President Barack Obama (and EPA Administrator Gina McCarthy) trumpeted a plan to slash carbon emissions from the nation's coal-fired power plants by 30 percent by 2030. At the month's end, the Supreme Court handed down its much-awaited opinion on the Tailoring Rule, rejecting EPA's rule but still allowing the agency to regulate GHG emissions from sources already subject to the PSD and Title V programs.

Spurred on by congressional gridlock, these programs could shape U.S. air policy for decades and transform the United States into a world leader for tackling carbon emissions.

To many, the recent spate of greenhouse gas regulation may seem cut from whole cloth. The GHGRP, however, was a necessary precursor to all these programs.

Announced in 2009, two years after the Supreme Court ruling in *Massachusetts v. EPA* (549 U.S. 497, 63 ERC 2057 (2007)), the GHGRP was one of the EPA's first forays into greenhouse gas regulation. In a nutshell, the 711-page GHGRP requires regulated parties, including direct greenhouse gas emitters, certain suppliers (e.g., fossil fuel or industrial gas suppliers), and vehicle or engine manufacturers, to report statistics about their operations or products. Under the GHGRP, these parties must measure their annual greenhouse gas emissions and submit self-certified reports to the EPA. Once received, the EPA verifies each report, resolves discrepancies and follows up with facilities to ensure the reports' accuracy.

Once in the reporting program, it's hard to escape. Reporting entities must retain their annual emissions report and other related records for three years in electronic or hard-copy format. Further, an entity may only cease to report if it meets one of the three exit criteria: (1) permanently close operations, (2) emit less than 25,000 metric tons of carbon dioxide equivalent (CO_2e) for five consecutive years, or (3) emit less than 15,000 metric tons of CO_2e for three consecutive years. As one would expect, if the entity exceeds the threshold for reporting after exiting the program, it must begin reporting again.

In 2013, after three years of successful reporting, the EPA amended the GHGRP. The amendments corrected technical errors, established confidentiality determinations for new or substantially revised data elements, and aligned the values for certain global warming potentials with the Intergovernmental Panel on Climate Change Fourth Assessment Report. Of these changes, the last arguably made the biggest impact. By adopting new values for global warming potentials, the EPA unilaterally changed the of CO_2e reported in prior reports and increased the number of entities subject to the GHGRP.

According to the EPA, these amendments clarified stakeholders' compliance obligations, improved the data's consistency for reporting GHG emissions pursuant to international commitments and ensured that data are comparable to the annual U.S. Greenhouse Gas Inventory. Many stakeholders, however, considered them yet another hurdle in complying with reporting requirements.

2. CARB's MRR Program. At the same time the EPA was developing the GHGRP, the California Air Resources Board (CARB) was developing its own reporting program. Established pursuant to the California Global Warming Solutions Act of 2006 (AB 32) and revised in 2010, 2012 and 2013, the MRR requires certain sources to report annual emissions of greenhouse gases, such as carbon dioxide, methane and hydrofluorocarbons. Regulated sources include cement plants, petroleum refineries, hydrogen plants, electricity generators and other facilities that emit at least 25,000 metric tons of carbon dioxide per calendar year from stationary combustion sources.

In theory, the MRR is straightforward; in practice, it can be anything but. Case in point: The CARB flow chart that is meant to simplify the process for determining whether the MRR applies to a specific facility contains six steps that trigger no less than four different sections of the rule.[1] And once a party has determined that it is a regulated facility, it must comply with complex, sector-specific calculation models detailed in various sections of the rule.

As part of this compliance, each facility must develop a GHG Inventory Program. This program advances accurate recordkeeping and ensures that emissions calculations are independently verifiable. In addition, the program streamlines the required third-party verification process and ensures submissions meet the criteria for CARB's online reporting tool. After reports have been submitted to CARB, a regulated facility must have an accredited third party verify and issue an opinion on the report. The third-party verifier must submit his or her opinion within six months of the initial report deadline.

Similar to the GHGRP, once a party becomes subject to the MRR, it takes several years to exit the program. To become exempt from reporting, most facilities that are not subject to the cap-and-trade regulation (17 Cal. Code Regs. § 95800 *et al*) must emit less than 20,000 metric tons of CO_2e per year for three consecutive years. The only exceptions are electricity generating and cogenerating facilities, which must emit less than 2,000 metric tons per year for three consecutive years to exit the program.

3. CARB's LCFS Program. Unlike the GHGRP and MRR, the LCFS targets greenhouse gases high up on the supply chain. Instead of requiring facilities to report their greenhouse gas emssions, the LCFS requires companies to report specific information pertaining to a fuel transaction, such as the transaction's quantity, the fu-

[1] *See* Air Resources Board, *Reporting Guidance for Determining Rule Applicability* (Feb. 7, 2014), *available at* http://www.arb.ca.gov/cc/reporting/ghg-rep/guidance/applicability.pdf.

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el's carbon intensity, and the parties involved. Once reported CARB uses the data to impose compliance costs on regulated parties, including parties in the transaction, which must surrender credits to offset any emissions its fuel generates in excess of an annual emissions cap.

To ensure that this whole system works, CARB needs accurate reporting from producers, importers and other parties along the supply chain. As such, CARB mandates quarterly reporting of these transactions through an online tool.

In its original form, the LCFS placed the reporting obligation on producers and importers of transportation fuels. As these parties sold fuel to different entities along the supply chain, they could transfer the reporting obligation to downstream entities.

Recently proposed amendments to the LCFS, however, will make the reporting requirements more onerous. These amendments require ''chain of custody reporting.'' Under this new system, regulated parties cannot rid themselves of the obligation to submit a quarterly report merely by transferring the compliance obligation to downstream purchasers. Stated differently, entities that take on compliance obligations but do not retain them still must report via the LCFS Reporting Tool. According to CARB, these amendments ensure that downstream entities receive all information needed to fulfill their reporting obligations and increases the traceability of LCFS fuel obligations.

In addition, these amendments will increase the record retention period from three to five years. The rationale for the increase is to provide CARB with more time to evaluate reporting discrepancies.

Enforcement Efforts: Present and Future. Although compliance with these programs takes time, effort, and resources, regulated entities must comply. Failure to do so can trigger huge penalties.

Of the three regulations discussed above, the MRR has seen the most enforcement action. In 2014 alone, CARB slapped several violators with daunting fines: a petroleum exploration company paid $328,500 for allegedly failing to report data about transfers of natural gas for 219 days; another refinery paid $364,500 for allegedly reporting inaccurate information and failing to correct the information for 243 days; and a natural gas utility paid $300,000 for allegedly submitting a report 320 days late.

From industry's perspective, perhaps the scariest aspect of these fines is that these penalties are fairly low compared with the amounts they could have been. The MRR provides that a violator is strictly liable for a penalty of up to $10,000 for each violation. Because each day a report remains inaccurate or late is a separate violation, penalties can compound in no time. For example, a report with a paperwork error that goes unnoticed for just one week could cost $70,000. Fortunately, CARB has been willing to negotiate and take mitigating factors into account when imposing fines. Still, these penalties dent the bottom line.

What's more, the coming years will see an increase in enforcement activity related to missed or erroneous reporting. At the moment, enforcement activities related to the GHGRP and LCFS remain limited. Currently, the EPA does not list enforcing the GHGRP (or, for that matter, any greenhouse gas program) as one of its seven ''National Enforcement Initiatives.'' And likewise, CARB seems more concerned with getting the LCFS program off the ground and fighting pending litigation rather than enforcement.

But that could change for both programs very soon. As the compliance assistance period fades into the past, parties could find themselves caught in the EPA's crosshairs. Although in the GHGRP's preamble it indicated it would not do so, the EPA can still seek up to $37,500 in administrative penalties per day per violation.

What's more, in April 2014, CARB unveiled an updated plan for penalties for noncompliance. Reaffirming its maxim that ''noncompliance always cost[s] more than compliance,'' CARB has indicated that penalties will have daily maximums of $35,000 for honest mistakes, $50,000 for careless or negligent mistakes and up to $250,000 for willful or intentional errors. That is the multiplier amount they will seek for every day from time of error until time of discovery and correction of error. Since one flawed report or missed deadline could cost up to $250,000 per day depending on the offender's intent, penalties could skyrocket.

Get It Right. In a big-data age in which corporations mine terabytes for consumer analytics, agencies have realized they can use reporting regulations to inform policy decisions, to substantiate rulemakings and to track progress. To be sure, this approach helps ensure that agencies create meaningful and effective regulation. At the same time, however, these agencies require regulated parties to comply with byzantine reporting rules on both a state and federal level.

Despite the complex rules, it is critical that regulated parties' reports are accurate and timely filed. Make no mistake: Agencies are increasingly scouring these reports. In the short term, one minor paperwork violation could damage the bottom line. In the long term, many minor paperwork violations could damage an entire industry. Indeed, the wrong data now could spur big headaches in the future.