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Expert Analysis

Greenhouse Gas Disclosure Requirements Are Proliferating

By
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While climate change legislation is mired in Congress, several units in the Obama administration have been using their existing statutory authority to adopt rules or guidance requiring extensive disclosures about greenhouse gases (GHGs) in a wide variety of contexts. Every registered public company, the operators of many industrial facilities, and those involved in significant federal actions are now or will soon be covered by one or more of these requirements.

GHG Reporting Rule

The U.S. Environmental Protection Agency (EPA) promulgated the final Mandatory Greenhouse Gas Reporting Rule on Oct. 30, 2009.[1] It was authorized by information-gathering provisions of the Clean Air Act[2] and by the FY2008 Consolidated Appropriations Act.[3] It applies to air pollution sources within any of a long list of industry categories. Certain kinds of sources automatically need to report; others must report only if they emit at least 25,000 metric tons per year of carbon dioxide equivalent. Suppliers of fossil fuels and certain industrial gases must also report.

Covered sources were to begin monitoring their emissions on Jan. 1, 2010, except that for three months (and 12 months under some circumstances) owners had some fexibility in the methods by which they determine their emissions. The EPA regulation has considerable sector-by-sector detail about the methods of monitoring and reporting.[4] The initial regulation covered 31 industry sectors. On March 23, 2010, EPA issued proposed rules that would add three more—the oil and natural gas sector; industries that emit fluorinated gases; and facilities that inject and store carbon dioxide underground for geologic sequestration or enhanced oil and gas recovery.

The first annual emissions monitoring reports are due March 31, 2011. Failure to monitor, to report, or to carry out the rule's other requirements are violations of the Clean Air Act, and the rule specifically provides that each day of violation constitutes a separate violation.[5]

> On Jan. 27, 2010, the Securities and Exchange Commission voted to adopt an interpretive guidance regarding disclosure related to climate change.

Once EPA receives the reports, it plans to compile them and publish lists of the largest GHG emitters, both nationwide and on a state-by-state basis, in much the same manner as EPA publishes the Toxic Release Inventory reports under the Emergency Planning and Community Right-to-Know Act. These lists garner considerable attention, and lead to the exertion of pressure on the companies that are highest on the list. They also help define the universe of entities that will be regulated in any congressional enactment on GHGs.

However, the Reporting Rule does not itself require emissions reductions. It is distinct from the Tailoring Rule, a proposed EPA regulation that would raise the numerical pollutant threshold for EPA permitting of stationary sources of GHGs.[6] The Tailoring Rule also proposed a 25,000 tpy (tons-per-year) threshold, though under congressional pressure EPA has indicated it may increase this level to 75,000 tpy until about 2013.

The American Clean Energy and Security Act (also known as the Waxman-Markey bill), which passed the House of Representatives in June 2009, would establish a program similar to the Reporting Rule, except that the reporting threshold would be 10,000 rather than 25,000 tpy, and it would require retrospective reporting when the data are available. The fate of this provision in any legislation that may emerge from the Senate is uncertain.

Several states are adopting their own GHG reporting requirements. For example, the New York State Department of Environmental Conservation (NYDEC) has proposed amendments to its Emission Verification regulation[7] to add GHGs to the list of pollutants that must be tested and reported.[8]

Securities Disclosure

On Jan. 27, 2010, the Securities and Exchange Commission voted to adopt an

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interpretive guidance regarding disclosure related to climate change.[9] This is quite a significant development for those who practice at the intersection of securities law and environmental law.

The guidance builds upon the SEC regulations that are familiar to lawyers in this area. Regulation S-K tells securities registrants to disclose certain environmental information. Item 101 of Regulation S-K requires a description of the business, including certain costs of complying with environmental laws. Item 103 mandates disclosure of material pending legal proceedings. Item 303 concerns management's discussion and analysis of financial condition and results of operations. Item 503(c) requires disclosure of risk factors. A large amount of experience has accumulated in making environmental disclosures under these items.

For several years it has been apparent that disclosure of climate risks was going to be required. In 2008 CERES, the Environmental Defense Fund and others formally petitioned the SEC to issue guidance on the topic. Also in 2008, New York Attorney General Andrew Cuomo launched an investigation into the climate disclosures of five electric Utility companies, and he has reached Settlements with three of them. Cautious lawyers were advising their clients to make disclosures.

The much-anticipated SEC guidance lists four ways that climate change may trigger disclosure:

- The first is the impact of actual and proposed climate legislation and regulations. Significantly, the guidance states, "management must evaluate whether the pending legislation or regulation is reasonably likely to be enacted. Unless management determines that it is not reasonably likely to be enacted, it must proceed on the assumption that the legislation or regulation will be enacted." The guidance also specifies that disclosure of proposed laws must include positive as well as negative consequences. For example, companies should disclose if they will be able to profit from the sale of allowances or offset credits. Disclosure is also required of the costs to comply with new regulatory limits, or increased or decreased demand for goods and Services.
- The second item is the business impact of treaties or international accords relating to climate change. For example, the current uncertain Status of the Kyoto Protocol after 2012 will affect some businesses with Operations in signatory countries.
- The third item involves the indirect consequences of regulation on business trends. Among the examples given by the SEC are decreased demand for goods that produce significant GHG emissions; increased demand for goods that result in lower emissions than competing products; increased competition to develop innovative new products; increased demand for generation and transmission of energy from alternative energy sources; and decreased demand for Services related to carbon-based energy sources, such as drilling Services. Also included in this category is the effect of climate regulation on a registrant's reputation. Here the SEC specifically refers to the public's perception of any publicly available data relating to its GHG emissions. (EPA's Reporting Rule will, of course, be a prime source of such data.)
- The fourth item goes to the physical impacts of climate change. The SEC lists several examples, including property damage to Operations along coastlines; effects of severe weather, such as hurri-canes or foods; increased insurance Claims; decreased agriculture production; and increased insurance premiums and deductibles.

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The SEC decision was by a vote of 3-2, with the three commissioners appointed by Democratic presidents voting in favor, and the two Republican appointees voting against.

The Center for Climate Change Law has posted a Climate Change Securities Disclosures Resource Center that provides links to Information that may be helpful in making the required disclosures.[10]

NEPA

A substantial body of case law has built up over the past decade establishing that climate change is an appropriate subject for analysis in environmental impact Statements (EISs) prepared under the National Environmental Policy Act (NEPA).[11] On Feb. 18, 2010, the Council on Environmental Quality (CEQ), the unit of the Executive Office of the President, issued a draft guidance on NEPA and climate change.[12] It calls for analysis both of the impact of the proposed action on GHG emissions, and the impact of climate change itself on the action.

This is the key sentence in the guidance: "if a proposed action would be reasonably anticipated to cause direct emissions of 25,000 metric tons or more of CO_2-equivalent GHG emissions on an annual basis, agencies should consider this as an indicator that a quantitative and qualitative assessment may be meaningful to decision makers and the public." This 25,000-ton figure, not coincidentally, is the same as the thresholds under the Reporting Rule and the proposed Tailoring Rule. Here it means that direct emissions above that level warrant a closer look—not that the n eed for an EIS is automatically triggered.

This level applies only to direct emissions, such as those from the smokestack. CEQ says that "[i]nassessing direct emissions, an agency should look at the conse-quences of actions over which it has control or authority." However, if the threshold is crossed, CEQ also calls for quantification of the indirect GHG emissions, and of cumulative

emissions over the life of the project. Measures to reduce GHG emissions, including mitigation measures and reasonable alternatives, should be discussed. Also covered is the quality of any mitigation proposed—its permanence, verifability, enforceability, and additionality.

CEQ proposes that alternatives analysis "should also consider applicable Federal, State or local goals for energy conservation and alternatives for reducing energy demand or GHG emissions associated with energy production." CEQ also specifies that "[a]mong the alternatives that may be considered for their ability to reduce or mitigate GHG emissions are enhanced energy efficiency, lower GHG-emitting technology, renewable energy, planning for carbon capture and sequestration, and capturing or beneficially using fugitive methane emissions."

The guidance cites some estab-lished protocols for calculating direct emissions from industrial facilities. However, it does not specify, for example, how an agency is to quantify the emissions resulting from highways, rail lines, and other transportation infrastructure.

With respect to the effects of climate change on the design of proposed actions and alternatives, CEQ says that "agencies should use the scoping process to set reasonable spatial and temporal boundaries for this assessment and focus on aspects of climate change that may lead to changes in the impacts, sustainability, vulnerability and design of the proposed action and alternative courses of action."

CEQ points out that "[c]limate change can affect the environment of a proposed action in a variety of ways. For instance, climate change can affect the integrity of a development or structure by exposing it to a greater risk of foods, storm surges, or higher temperature. Climate change can increase the vulnerability of a resource, ecosystem, or human community…. For example, an industrial process may draw cumulatively significant amounts of water from a stream that is dwindling because of a decreased snow pack in the mountains or add significant heat to a water body that is exposed to increasing atmospheric temperatures."

CEQ said, "[a]gencies can use the NEPA process to reduce vulnerability to climate change impacts, adapt to changes in our environment, and mitigate the impacts of Federal agency actions that are exacerbated by climate change."

On the same day that CEQ released the GHG guidance, it also issued guidance requiring more explicit disclosure and tracking of mitigation commitments. Thus, mitigation measures included in EISs may now become more enforceable.

One issue is explicitly left for another day. The guidance says that "[l]and management techniques, including changes in land use or land management strategies, lack any established Federal protocol for assessing their effect on atmospheric carbon release and sequestration at a landscape scale." CEQ has invited public comment on what protocols might be appropriate for NEPA analysis of proposed land and resource management actions, and on other aspects of the draft guidance, until May 24.

CEQ points out that consideration of climate change is not a new component of NEPA, but rather is "a potentially important factor to be considered within the existing NEPA framework."

Several states are ahead of CEQ in requiring climate disclosures in their own state-level environmental review laws.[13] For example, on July 15, 2009, NYDEC issued a policy on assessing energy use and GHG emissions in EISs,[14] and it is currently circulating to interested stakeholders (preparatory to a formal rulemaking) proposed revisions to the environmental assessment form that is used in determining whether an EIS is needed; the revised form includes discussion of GHGs. At the New York City level, the Mayor's Office of Environmental Coordination is revising the Technical Manual under City Environmental Quality Review to add discussion of climate change.

Conclusion

None of the rules described above imposes Substantive obligations to reduce GHG emissions. However, they can be seen as precursors and preparatory steps to the imposition of such obligations, either by Congress or by EPA. And regardless of whether such obligations are imposed, the Information these rules generate will be important tools for government agencies, environmental groups, and others to exert pressure on large GHG emitters, and will help governments and private companies identify and reduce their own emissions.

1. 74 Fed. Reg. 26260 (Oct. 30, 2009).
2. 42 U.S.C. §§7414, 7542.
3. Pub. L. No. 110-161, 121 Stat. 1844 (Dec. 26, 2007).
4. For a detailed discussion of the rule, see Mary Ellen Ternes, "EPA's Mandatory Greenhouse Gas Reporting Rule," LexisNexis Global Climate Change Special Pamphlet Series (Bradley M. Märten, ed.) (December 2009). The rule, preamble, EPA response to comments, public comments, and other documents can be accessed from http://www.law.columbia.edu/centers /climatechange/resources/epa#GHG_Reporting.
5. 40 CFR §98.8.
6. http://www.law.columbia.edu/centers/climatechange/resources/epa#Revised_ PSD.
7. 6 NYCRR pt 202.
8. http://www.dec.ny.gov/regulations/625 76.html.
9. The guidance appeared in the FederalRegister on Feb. 8, 2010. http://www.sec.gov/rules/interp/2010/33-9106fr.pdf.
10. http://www.law.columbia.edu/centers/climatechange/resources/securities.
11. This litigation is collected on the NEPA page of the Climate Change Litigation Chart, www.climatecasechart.com.
12. http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100218-nepa-consideration-effects-ghg-draft-guidance. pdf.
13. See Michael B. Gerrard, "Greenhouse Gases: Emerging Standards for Impact Review," NYLJ, March 27, 2009.
14. http://www.dec.ny.gov/docs/admin-istration_pdf/eisghgpolicypdf.