

Climate Change and Sustainability Law Report

March 2010

IMPLEMENTATION OF EPA'S GREENHOUSE GAS REPORTING RULE

The U.S. Environmental Protection Agency's (EPA) Greenhouse Gas Reporting Rule (GHG Rule) published in the October 30, 2009 *Federal Register* was effective on December 29, 2009 and is codified at 40 CFR Part 98. The GHG Rule does not impose any emission limitations or require the installation or operation of any emission control equipment. Rather, the GHG Rule requires subject facilities to monitor and report annual emissions of GHGs and to develop and maintain records. GHGs that are generally subject to annual reporting include:

- Carbon dioxide (CO₂)
- Nitrous oxide (N₂O)
- Hydrofluorocarbons (HFCs)
- Other fluorinated gases
- Methane (CH₄)
- Sulfur hexafluoride (SF₆)
- Perfluorocarbons (PFCs)
- Hydrofluorinated ethers (HFEs)

The GHG Rule generally applies to fossil fuel suppliers, industrial gas suppliers, manufacturers of heavy-duty and off-road vehicles and engines, and direct emitters of GHGs (*i.e.*, electricity production, glass production, iron and steel production, municipal solid waste landfills, among others). In addition, facilities with combustion sources having an aggregate heat input capacity of 30 million Btu/hour or greater, and emitting more than 25,000 metric tons of carbon dioxide equivalent (CO₂e) annually, will be subject to the GHG Rule. This particular category has the potential to apply to a wide range of GHG-emitting sources, and is the focus of this overview.

With respect to stationary fuel combustion sources, the GHG Rule will apply to an individual facility only if the aggregate maximum rated heat input capacity of all fuel combustion units (*e.g.*, boilers, combustion turbines, engines, incinerators, process heaters) at a facility is 30 million Btu/hour or more. Any facility which meets or exceeds the 30 million Btu/hour level should calculate CO₂, CH₄ and N₂O mass emissions from each stationary fuel combustion unit using one of the authorized methods or "Tiers" specified in the GHG Rule. These methods are complicated, but generally allow use of annual fuel consumption and/or other factors to calculate the emissions. Next, the annual emissions of each GHG must be converted to metric tons of CO₂e, and the emissions for all units at the facility totaled and compared to a 25,000 metric ton per year threshold.

Please note that this is a general description of the CO₂e calculation methodology, and that the GHG Rule contains detailed provisions that can vary depending on the kind of combustion source and the fuels that are combusted.

If a facility exceeds the reporting thresholds in the GHG Rule, reports are required annually. Facilities subject to the GHG Rule for only stationary fuel combustion sources can submit an abbreviated report for calendar year 2010. The first annual GHG report is due on March 31, 2011, for GHGs emitted during 2010.

The health care debate has slowed the prospect of federal climate change legislation. However, as indicated in this edition of Bond, Schoeneck & King's Climate Change and Sustainability Law Report, federal agencies and courts are addressing greenhouse gas emissions, and municipalities also have opportunities to mitigate greenhouse gas impacts in their communities.

MUNICIPAL CLIMATE CHANGE ACTION PLANNING

A climate change action plan is a tool to assist in identifying and evaluating laws and policies designed to reduce greenhouse gas emissions and mitigate climate change. By taking a proactive approach to climate change planning, municipalities can reduce energy costs, protect public health and improve their economy as well as the environment.

Municipalities can lessen their carbon footprint by cutting emissions from government operations and by enacting laws to reduce emissions from local residents, corporations and industries. Climate change action plans typically include strategies such as:

- Shifting development patterns to reduce both the amount and the distance people must drive to accomplish daily tasks
- Making government operations more energy efficient by using fleets of biodiesel vehicles, LED traffic lights and green buildings
- Encouraging community activism through ridesharing and recycling programs
- Promoting mixed use development characterized by compact, efficient buildings located near mass transit
- Establishing and preserving parks and other green spaces that act as carbon sinks, thus absorbing greenhouse gas emissions
- Supporting the use and proliferation of alternative energy sources

These objectives can frequently be achieved by exercising authority already delegated to municipalities to regulate land use and construction through zoning and building codes. Action plans may also include climate change adaptation strategies to address issues involving water resources, infrastructure and disaster preparedness.

A municipality will typically appoint and charge a task force to develop a climate change action plan. This task force should be comprised of stakeholders in the community who possess relevant expertise in areas ranging from engineering and science to economics and education. It should take an inventory of greenhouse gas emissions from sources within the municipality and work to secure support for the action plan among residents and businesses. The task force can then project future emissions and identify areas where the municipality can lessen its carbon footprint. Finally, the task force should seriously consider establishing a greenhouse gas emissions reduction goal.

The U.S. Environmental Protection Agency is one of many resources that provides technical assistance, tools, resources and guidance to municipalities on how to establish a climate change action plan. More information can be found at <http://www.dec.ny.gov/energy/50845.html>.

New York State has created the Climate Smart Communities program to encourage local actions that will reduce greenhouse gas emissions and alleviate risks associated with climate change such as flooding.

SAVE THE DATE: CLIMATE CHANGE ACTION PLANNING – A WORKSHOP FOR MUNICIPAL OFFICIALS

**May 13, 2010
Albany Law School
Albany, New York**

The New York State Bar Association's Environmental and Municipal Law Sections will hold a workshop for municipal officials regarding DEC's Climate Smart Communities Program, local land use and transportation planning, and technical and financial assistance for climate-oriented projects.

For more information, please contact Virginia Robbins at vrobbs@bsk.com.

DECISIONS BY THE SECOND AND FIFTH CIRCUITS OPEN THE DOOR FOR LAWSUITS THAT SEEK RELIEF FROM DAMAGES CAUSED BY CLIMATE CHANGE

The Second and Fifth Circuits for the United States Court of Appeals recently issued decisions that gave states, as well as private individuals, standing to sue power companies for harms allegedly caused by the companies' greenhouse gas emissions. In State of Connecticut, et al. v. American Electric Power, et al., a federal common law public nuisance lawsuit was brought by eight states, the City of New York and three land trusts against six large electric power companies. The plaintiffs claim that the defendants contribute to global warming by emitting 650 million tons of carbon dioxide into the air and that the resultant global warming is causing and will continue to cause serious harms affecting human health and natural resources. The plaintiffs further claim that the defendants' carbon dioxide emissions constitute a public nuisance and have requested that the defendants be forced to cap and then reduce their carbon dioxide emissions.

Similarly, in Comer, et al. v. Murphy Oil USA, et al., residents along the Mississippi Gulf Coast filed a class action lawsuit against several energy and chemical companies in which they alleged that the defendants' emissions of greenhouse gases contributed to global warming, and that the increase in global surface air and water temperatures in turn "caused a rise in sea levels and added to the ferocity of Hurricane Katrina, which combined to destroy the plaintiffs' private property, as well as public property useful to them." The plaintiffs sought compensatory and punitive damages based on Mississippi common-law actions of public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy.

In both cases, the District Courts dismissed the lawsuits, holding that the claims presented a "political question" that could more appropriately be addressed by another branch of government. In Comer, the District Court for the Southern District of Mississippi also held that the plaintiffs' lacked standing to bring their claims. However, in American Electric Power, the Second Circuit vacated the District Court's decision and held that there was no political question because well-settled principles of tort and public nuisance law provide appropriate guidance to the courts in assessing the plaintiffs' claims and because these issues had not yet been committed exclusively to federal government political branches by the United States Constitution, statutes, or regulations. The Second Circuit also held that the plaintiffs had standing to bring their claims because they alleged an injury-in-fact (namely, the increase in greenhouse gas emissions caused global temperatures to rise, which resulted in certain environmental consequences such as coastal erosion and flooding, thereby causing injury to property owned by the plaintiffs) and because their injuries were "fairly traceable" to the actions (the emissions) of defendants.

In Comer, the Fifth Circuit ultimately reached the same conclusions and reversed the decision of the District Court. While the Court dismissed the unjust enrichment, civil conspiracy, and fraudulent misrepresentation claims for lack of standing, the Court held that the plaintiffs had standing to bring the public and private nuisance, trespass, and negligence claims.

While it is not clear what effect these decisions will have on climate change litigation or regulation, there are two things to keep in mind going forward. First, these decisions appear to have opened the door to future nuisance litigation because the threshold for standing is relatively low. It appears that if plaintiffs can reasonably show that climate change has negatively impacted them or their property, they will not be barred from bringing a nuisance action against emitters of greenhouse gases.

Second, these decisions could increase support for climate change legislation, whether through a greenhouse gas cap-and-trade program or otherwise in order to create more certainty in this field of regulations. A legislative solution may be preferable to divergent standards issued by the courts.

The Fifth Circuit has granted rehearing in the Comer case; on March 5, 2010 the Second Circuit denied a petition for rehearing in the American Electric Power case.

MARCH 10, 2010 REGIONAL GREENHOUSE GAS INITIATIVE AUCTION – CARBON DIOXIDE ALLOWANCE PRICE \$2.07/TON

The seventh regional auction for CO₂ allowances occurred on March 10, 2010. Allowances were offered for purchase for the current compliance period (ending 2011) and the second compliance period (ending 2014). The clearing price was \$2.07 per ton for the 2009-2011 compliance period and \$1.86 per ton for the 2012-2014 compliance period. Since December 2008, New York revenues from the RGGI auctions total over \$213 million. \$90 million will be transferred to the State General Fund to assist in reducing the current budget deficit. The rest will be used to fund programs under a plan adopted by the New York State Energy Research and Development Authority, including a \$112 million allocation to the Green Jobs / Green New York program that will conduct workforce training, community outreach and establish a loan fund for residential and small commercial and not-for-profit customers for weatherization and energy efficiency improvements for their buildings.

SEC ISSUES GHG DISCLOSURE GUIDANCE

On February 2, 2010, the Securities and Exchange Commission (SEC) published guidance for public companies regarding the applicability of existing disclosure requirements to climate change. The SEC reminded companies that current and anticipated legislative and regulatory developments focused on climate change can impact operating and financial decisions. For example, public companies may be required to make capital expenditures for control equipment or allowance purchases. Physical impacts of climate change can also materially affect a public company's business and operations.

Current SEC rules and regulations directly establish, or have the potential to encompass, various environmental reporting obligations. These include portions of Items 101 (environmental compliance costs) and 103 (environmental litigation) of Regulation S-K, as well as Management's Discussion and Analysis of Financial Condition and Results of Operations (Item 303). Each of these existing disclosure rules may require disclosure regarding climate change impacts. As examples of specific topics that may require disclosure, the SEC highlighted the following:

- Impact of legislation and regulation
- International accords
- Indirect consequences of regulation or business trends
- Physical impacts of climate change

Public companies should evaluate whether their future disclosure documents should contain an expanded discussion of climate change and associated consequences. If voluntary disclosures regarding climate change are made in non-SEC filings (such as to the Climate Registry or Carbon Disclosure Project), companies should consider whether corresponding disclosures should be made in SEC documents. In sum, the SEC guidance is an important reminder to public companies of the expansive scope of existing disclosure requirements with respect to climate change.

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