

Climate Alert

Significant Climate Change-Related News and Updates from the LLB&L Climate Change Practice Team

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EPA Finalizes Greenhouse Gas Emissions Reporting Rule Effective January 1, 2010

On September 22, 2009, the United States Environmental Protection Agency (“EPA”) promulgated its long awaited final rule (“Rule”) that imposes a mandatory national system for monitoring and reporting greenhouse gas (“GHGs”) emissions.¹ The Rule enables EPA to collect comprehensive, economy-wide GHG emissions data that can be analyzed on both geographic and facility-specific levels.

Background

The 2008 Consolidated Appropriations Act required the reporting of GHG emissions by certain sources. EPA relied upon Section 114(a)(1) of the federal Clean Air Act (“CAA”) to implement the final Rule. That section of the CAA empowers EPA to require emitters to keep records, make reports, conduct monitoring, and to measure emissions related to their operations.

The Rule was initially proposed on March 10, 2009. During the 60-day public comment period EPA received nearly 17,000 written comments and met with over 4,000 people and 135 groups. While the final Rule is similar to the proposed rule, the comment process resulted in numerous departures from the proposed rule.

The final Rule only mandates monitoring and reporting for certain GHG sources; it does not cap or otherwise curb emissions. EPA intends to use the GHG emissions information that is collected under this Rule to evaluate and develop future climate change policies, including whether and how to regulate GHG emissions under the CAA. Information developed by the regulated community will be useful if Congress enacts a cap and trade or carbon tax program to control GHG emissions outside of the CAA’s existing structure. In all events, reliable and comprehensive emissions inventories will be an indispensable precursor to the design and implementation of any facility or corporate carbon emissions reduction program.

Reporting Requirements and Timing

Reporting in the final Rule remains largely unchanged from the proposed rule. Facilities

and sources must record and report their GHG emissions to EPA annually. Data collection begins on January 1, 2010 and the first reports are due on March 31, 2011. The required reports include a covered facility’s total annual GHG emissions from all source categories present at the facility, annual GHG emissions for each source category and supply category at the facility by type of GHG and by individual unit or process line, and certain activity information used by the facility to generate the emissions data (such as fuel use or feedstock inputs). The emissions will be measured in metric tons of CO₂ equivalent (“MTCO₂e”).

The final Rule departs from the proposed rule’s reporting requirements in several material ways. The proposed rule required regulated entities to retain and make available to EPA for a period of five-years certain records that support the information contained in their annual GHG emission reports. The final Rule reduces the record retention requirement to three-years. EPA reduced the record retention period to mitigate burdens associated with the volume of information at issue and to make the record retention policy consistent with that of other environmental regulatory reporting requirements.

More significantly, the final Rule departs from the proposed rule regarding the timeline to potentially exit the program. The proposed rule contemplated a “once-in/always-in” requirement, regardless of whether the covered facility or source continued to produce GHG emissions at the same rate. The final Rule provides three ways that a covered facility or source may cease reporting. A covered facility or source may cease reporting if it can demonstrate any one of the following:

- GHG emissions were less than 25,000 MTCO₂e per year for five consecutive years;
- GHG emissions were less than 15,000 MTCO₂e per year for three consecutive years; or
- The covered facility or source closes all GHG emitting processes and operations covered by the Rule.

In addition, the final Rule authorizes facilities to use best available monitoring methods rather than the monitoring methods prescribed by the proposed rule for any parameter between January 1, 2010 and March 31, 2010. This affords facility owners and operators time to implement monitoring systems or acquire monitoring equipment as needed. An owner or operator may extend this time period upon approval from EPA, but no later than December 31, 2010.

Also included in the final Rule is a provision allowing owners and operators to submit revisions to their reports within 45 days after finding an error, regardless of whether discovered by the owner/operator or EPA.

Covered Facilities and Sources

The final Rule generally leaves the structure of the proposed rule intact, but the final Rule departs from the proposed rule regarding what source categories must report their GHG emissions. EPA included a provision in the final Rule exempting research and development activities from the covered source categories. In addition, 11 other source categories from the proposed rule are not covered under the final Rule. EPA stated that reporting requirements for these categories will continue to be evaluated. Below is a list of the general source categories that are no longer subject to GHG reporting requirements under the final Rule:

- Electronics manufacturing;
- Ethanol production;
- Flourinated GHG production;
- Food processing;
- Magnesium production;
- Oil and natural gas systems;
- SF6 from electrical equipment;
- Underground coal mines;
- Industrial landfills;
- Wastewater treatment; and
- Suppliers of coal.

The following is a breakdown of facilities and sources that are covered by the final Rule, and the relevant applicability criteria:

- Facilities that contain certain listed source categories in any calendar year beginning in 2010 or later are required to report their GHG emissions for all sources in any source category, with no minimum threshold. The listed source categories for which no reporting threshold applies to the facility (except as may be specified in the definition of the source category itself) include, among others:
 - Electricity generating facilities subject to the Acid Rain Program, or which contain electric generating units that collectively emit 25,000 MTCO₂e/yr;
 - Aluminum production;
 - Cement production;
 - Petrochemical production;
 - Petroleum refineries;
 - Phosphoric acid production;
 - Municipal landfills that generate methane in amounts of 25,000 MTCO₂e/yr or more; and
 - Manure management systems that emit methane and nitrous oxide in amounts of 25,000 MTCO₂e/yr or more.
- Facilities that emit 25,000 MTCO₂e or more per year in combined emissions from stationary fuel combustion units, miscellaneous use of carbonates or certain additional listed sources beginning in 2010 or later are required to report their GHG emissions for all sources present at the facility. The additional listed sources include, among others:
 - Iron and steel production; and
 - Pulp and paper manufacturing.
- Facilities that meet all three of the following conditions in any calendar year beginning in 2010 are required to submit a GHG emissions report covering only emissions from stationary fuel combustion sources at the facility:
 - The facility does not contain any source designated under the two reporting conditions summarized above;
 - The aggregate maximum rated heat input capacity of the stationary fuel combustion sources at the facility is equal to or greater than 30 mmBtu/hr; and
 - The facility emits 25,000 MTCO₂e/yr or more.
- Finally, any supplier of the following products in any calendar year beginning in 2010 must submit a GHG emissions report covering all applicable products:
 - Coal-based liquid fuels;
 - Petroleum products;
 - Natural gas and Natural gas liquids;
 - Industrial GHGs; and
 - CO₂.

Mobile Sources

In addition to these stationary source categories, the final Rule also applies to mobile sources. Rather than requiring reporting by individual mobile sources or fleets, however, EPA is requiring the manufacturers of mobile sources and engines to report emissions from the vehicles and engines they produce. Because manufacturers cannot know the hours of operation for the engines they produce, the final Rule requires them to report in terms of an emission rate from their products for emissions of CO₂, CH₄, and N₂O.

The final Rule departed from the proposed rule in significant ways with respect to reporting by mobile sources. The proposed rule required reporting for CO₂, CH₄ and N₂O beginning with the 2011 model year. The final Rule staggers the onset of reporting requirements. It requires manufacturers of mobile sources to report CO₂ emissions for the 2011 model year, emissions of N₂O for the 2012 model year, and emissions of CH₄ for the 2013 model year. In addition, marine manufacturers and aircraft manufacturers are not required to report emissions for CH₄ or N₂O. Engine manufac-

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turers are only required to report N₂O if the engine they manufacture emits NO_x exhaust after treatment technology. All of these changes were in response to technical considerations raised in the comment period.

Significantly, EPA will not require reporting for manufacturers of light duty vehicles, light-duty trucks, and medium duty passenger vehicles. The final Rule applies only to manufacturers of the following vehicle and engine types:

- Highway heavy-duty engines and complete vehicles;
- Nonroad diesel engines and nonroad large spark-ignition engines;
- Nonroad small spark-ignition engines, marine spark-ignition engines, personal watercraft, highway motorcycles, and recreational engines and vehicles;
- Locomotive and marine diesel engines; and
- Jet and turboprop aircraft engines.

Commentary

With the issuance of the final Rule, EPA has taken the first concrete step toward GHG regulation, although it has stopped short of actually limiting GHG emissions. Such limitations may well be coming, possibly in the form of cap and trade, or through a more familiar command and control regime. EPA has already begun developing regulations in response to the *Massachusetts v. EPA* case, and may proceed to issue a proposed rule if Congress does not enact some form of climate change legislation or otherwise take action to preclude EPA from doing so.

With respect to the GHG emissions reporting final Rule, covered sources and facilities have just a few months to prepare to begin monitoring on January 1, 2010. Any sources that have not yet determined whether they are covered should seek assistance without delay. Those that are covered should immediately begin identifying equipment and consulting services necessary to develop a monitoring system, and consult with counsel and other environmental professionals to develop an overall GHG management strategy.

For assistance in complying with obligations and opportunities presented by the GHG emissions reporting final Rule, we encourage you to contact one of the listed authors, or any member of LLB&L's Climate Change Practice Team.

Endnotes

- 1 Greenhouse gasses covered by the Rule include carbon dioxide ("CO₂"), methane ("CH₄"), nitrous oxide ("N₂O"), hydrofluorocarbons ("HFC"), perfluorocarbons ("PFC"), sulfur hexafluoride ("SF₆"), and other fluorinated gases (nitrogen trifluoride and hydrofluorinated ethers).

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