

**EPA’S FINAL GREENHOUSE GAS REPORTING RULE:
A KEY PIECE OF THE EMERGING FEDERAL REGULATORY REGIME ON CLIMATE
CHANGE**

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The U.S. Environmental Protection Agency (“EPA”) on September 22, 2009 released final regulations that require a large number of facilities, manufacturers and product suppliers in the United States to keep track of and report to EPA their emissions of greenhouse gases (“GHGs”). EPA has estimated that these regulations (the “GHG Reporting Rule”) will apply to the sources of approximately 85% of all GHG emissions in the United States. The GHG Reporting Rule will be effective 60 days after publication in the Federal Register. The recordkeeping requirements will commence on January 1, 2010, with GHG emissions reports to be filed (for most covered facilities and operations) annually starting in 2011.

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Background of the GHG Reporting Rule

EPA under the Bush Administration declined to regulate carbon dioxide (the principal GHG) as an air pollutant under the Clean Air Act for a number of reasons, including uncertainties in climate science, the economic consequences of mandatory GHG emissions reductions and anticipated regulatory and logistical difficulties of such a GHG regulatory program. However, the U.S. Supreme Court held, in *Massachusetts v. U.S. Environmental Protection Agency*, 127 S. Ct. 1438 (2007), that EPA’s stated reasons for refusing to regulate carbon dioxide under the Clean Air Act were arbitrary and capricious. As a consequence, EPA is now required to make a regulatory finding as to whether carbon dioxide is an air pollutant which may be reasonably anticipated to endanger public health and welfare and which is therefore subject to regulation under the Clean Air Act. In April 2009, EPA issued a proposed endangerment finding to the effect that carbon dioxide and other GHGs endanger public health and the environment because of their contributions to global warming and climate change and are therefore air pollutants subject to regulation under the Clean Air Act. It is expected that EPA will issue this endangerment finding in final form early in 2010.

In addition, soon after the Supreme Court’s decision in *Massachusetts v. U.S. Environmental Protection Agency*, Congress included in the Fiscal Year 2008 Consolidated Appropriations Act, P.L. 110-161, 121 Stat. 1844, 2128 (2008) (signed into law by President George W. Bush on December 26, 2007), a requirement that EPA must “develop and publish a . . . rule . . . to require mandatory reporting of greenhouse gas emissions above appropriate thresholds in all sectors of the economy of the United States.” The House/Senate Conference Report that accompanied this legislation included an explanatory statement to the effect that EPA should issue this rule using EPA’s existing information-gathering authority under the Clean Air Act and that EPA should use its discretion to determine the appropriate emissions thresholds above which reporting is required and the frequency of reporting. Accordingly, EPA published the proposed GHG Reporting Rule in the *Federal Register* on April 10, 2009, and it released the final form of the GHG Reporting Rule on September 22, 2009. EPA has stated that it issued the final GHG Reporting Rule pursuant to its existing authority under the Clean Air Act, not under the Fiscal Year 2008 Consolidated Appropriations Act.

Purpose of the GHG Reporting Rule

EPA states that the purpose of the GHG Reporting Rule is to provide industry-specific GHG emissions data to EPA that can be used to evaluate the various programmatic and policy options for federal regulation and mandatory reduction of GHG emissions. These options may include a GHG “cap and trade” program that is a prominent feature in the proposed American Clean Energy and Security Act of 2009, H.R. 2454, that was passed by the U.S. House of Representatives by a narrow margin on June 26, 2009. Similar legislation is now being considered in the U.S. Senate. EPA has stated that the GHG emissions data collected by EPA under the GHG Reporting Rule will be useful to establish specific

regulatory programs to address and mitigate causes and risks of climate change associated with GHG emissions.

GHGs Subject to the GHG Reporting Rule

The GHGs that are subject to the proposed GHG Reporting Rule are carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, hydrofluorocarbons, perfluorocarbons and other fluorinated gases. By far the largest quantities of GHG emissions are from carbon dioxide, although some of the other GHGs have much more potent global warming potential than an equivalent volume of carbon dioxide. For regulatory purposes, EPA proposes to state the varying global warming potentials of the different GHGs as their “carbon dioxide equivalent.” The threshold volume of GHG emissions that will trigger the applicability of the GHG Reporting Rule to many specific facilities and operations will be stated as their volume of “carbon dioxide equivalent.”

Facilities and Parties Subject to the Reporting Requirements

The GHG inventory reporting requirements apply, with some exceptions, at the facility rather than the corporate level. “Facility” is defined as any physical property, plant, building, structure, source or stationary equipment located on one or more contiguous or adjacent properties in actual physical contact or separated solely by a public roadway or right of way and under common ownership or common control, that emits or may emit any GHG.

The reporting requirements apply broadly to the following five categories of facilities, suppliers and manufacturers:

1. Certain specific GHG source categories. Certain specific types of facilities are subject to the GHG Reporting Rule (in most cases without any volumetric threshold) including:
 - + Electric generating facilities that are subject to the Acid Rain Program or otherwise report carbon dioxide emissions year-round pursuant to 40 CFR Part 75¹
 - + Adipic acid production
 - + Aluminum production
 - + Ammonia manufacturing
 - + Cement production
 - + HCFC-22 production
 - + Certain HCFC-23 destruction processes
 - + Lime manufacturing
 - + Nitric acid production
 - + Petrochemical production
 - + Petroleum refineries
 - + Phosphoric acid production
 - + Silicon carbide production
 - + Soda ash production
 - + Titanium dioxide production
 - + Municipal landfills that generate methane in amounts equal to or greater than 25,000 metric tons of carbon dioxide equivalent per year
 - + Manure management systems with combined methane and nitrous oxide emissions in amounts equal to or greater than 25,000 metric tons of carbon dioxide equivalent per year

¹ There is a potential conflict in the GHG Reporting Rule as to its applicability to electric generating facilities. At 40 CFR 98.2(a)(1), which has the heading “Who must report?,” the GHG Reporting Rule provides that it applies to “electricity generation (units that report [carbon dioxide] emissions year-round through 40 CFR part 75).” However, 40 CFR 98.40(a), which has the heading “Definition of the source category” [Electricity Generation], the GHG Reporting Rule provides that “[t]he electricity generation source category comprises electricity generating units that are subject to the requirements of the Acid Rain Program and any other electricity generating units that are required to monitor and report to EPA [carbon dioxide] emissions year-round according to 40 CFR part 75.”

2. Certain additional stationary facilities with carbon dioxide equivalent emissions equal to or greater than 25,000 metric tons per year. Stationary facilities that emit 25,000 metric tons of carbon dioxide equivalent or more per year in combined emissions from stationary fuel combustion units, from miscellaneous use of carbonate and from all of the sources listed below will be subject to the GHG Reporting Rule:
- + Ferroalloy production
 - + Glass production
 - + Hydrogen production
 - + Iron and steel production
 - + Lead production
 - + Pulp and paper manufacturing
 - + Zinc production

Stationary facilities in this category will be required to report their GHG emissions from all covered sources.

3. Certain facilities with stationary fuel combustion sources. The GHG Reporting Rule includes a catch-all reporting category for facilities that do not contain any of the sources listed in paragraphs 1 and 2 above but that contain stationary fuel combustion sources if (i) the aggregate maximum rated heat input capacity of the stationary fuel combustion units is 30 mmBtu/hour or greater and (ii) the facility emits 25,000 metric tons or more of carbon dioxide equivalent from all stationary fuel combustion sources. If a stationary fuel combustion source exceeds the stated capacity of 30 mmBtu/hour, then the source will be required to calculate its actual GHG emissions in order to determine whether it is subject to the GHG Reporting Rule. For facilities in this paragraph 3, GHG emissions reports will be required only for emissions from the stationary fuel combustion sources. Note that while the 25,000 metric ton threshold will exclude individual homes and most office buildings, it may capture some large commercial buildings, hospitals, universities and similarly-sized facilities.
4. Certain suppliers of fossil fuels and industrial GHGs. The GHG Reporting Rule requires the following upstream suppliers of fossil fuels and industrial GHGs to report the potential GHG emissions from downstream use of their products:
- + Coal-to-liquid suppliers, including (A) all producers of coal-to-liquid products, (B) importers of an annual quantity of coal-to-liquid products equivalent to 25,000 metric tons or more of carbon dioxide equivalent, and (C) exporters of an annual quantity of coal-to-liquid products equivalent to 25,000 metric tons or more of carbon dioxide equivalent
 - + Petroleum product suppliers, including (A) all petroleum refineries that distill crude oil, (B) importers of an annual quantity of petroleum products equivalent to 25,000 metric tons or more of carbon dioxide equivalent, and (C) exporters of an annual quantity of petroleum products equivalent to 25,000 metric tons or more of carbon dioxide equivalent
 - + Natural gas and natural gas liquids suppliers, including (A) all natural gas fractionators and (B) all local natural gas distribution companies
 - + Industrial GHG suppliers, including (A) all producers of industrial GHGs, (B) importers of industrial GHGs with annual bulk imports of nitrous oxide, fluorinated GHGs and carbon dioxide that in combination are equivalent to 25,000 metric tons or more of carbon dioxide equivalent and (C) exporters of industrial GHGs with annual bulk exports of nitrous oxide, fluorinated GHGs and carbon dioxide that in combination are equivalent to 25,000 metric tons or more of carbon dioxide equivalent
 - + Carbon dioxide suppliers, including (A) all producers of carbon dioxide, (B) importers of carbon dioxide with annual bulk imports of nitrous oxide, fluorinated GHGs and carbon dioxide that in combination are equivalent to 25,000 metric tons or more of carbon dioxide equivalent, and (C) exporters of carbon dioxide with annual bulk exports of nitrous oxide, fluorinated GHGs and carbon dioxide that in combination are equivalent to 25,000 metric tons or more of carbon dioxide equivalent

5. Manufacturers of certain mobile sources (vehicles) and engines. Manufacturers of certain mobile sources (vehicles) and engines will be required to report emissions from the vehicles and engines they produce in terms of an emission rate for carbon dioxide, methane and nitrous oxide. Manufacturers of the following types of vehicles and engines are subject to this requirement:

- + Highway heavy-duty (engine and vehicle)
- + Nonroad diesel
- + Marine diesel (other than C3)
- + C3 marine
- + Locomotives
- + Small spark-ignition
- + Large spark-ignition
- + Marine spark-ignition
- + Snowmobiles
- + Highway motorcycles
- + Off highway motorcycles/ATVs
- + Aircraft

Generally, for these mobile sources, the reporting of carbon dioxide will commence for model year 2011; the reporting of methane will commence for model year 2012; and the reporting of nitrous oxide will commence for model year 2013.

The range of covered facilities and industries is broad. As noted above, EPA estimates that these facilities and industries account for approximately 85% of domestic GHG emissions. In the final GHG Reporting Rule, EPA has eliminated some categories of GHG emissions sources that were covered in the proposed GHG Reporting Rule, including electronics manufacturing, ethanol production, fluorinated GHG production, food processing, magnesium production, oil and natural gas systems, sulfur hexafluoride from electrical equipment, underground coal mines, industrial landfills, wastewater treatment and suppliers of coal. EPA has indicated that it is reviewing comments submitted on the proposed GHG Reporting Rule as applicable to those sources and may at a later date bring those sources within the scope of the GHG Reporting Rule.

Data Collection and Records Retention

The GHG Reporting Rule prescribes specific data collection methodologies for various types of GHG emissions sources. This accounts for the bulk of the lengthy GHG Reporting Rule because of the many different types of GHG emissions sources, many of which are industry-specific and each of which is subject to its own calculation methodology. However, because the GHG Reporting Rule is being promulgated so soon before the January 1, 2010 applicability date, EPA allows, for the first calendar quarter of 2010, the use of less stringent data collection techniques (“best available monitoring methods”), with the specifically prescribed data collection methodologies to be required after March 31, 2010. In many cases, facilities will have to install continuous GHG emissions monitoring devices as the required data collection methodology. EPA may, upon application by a particular source, grant extensions for cause up to December 31, 2010, but no extensions will be granted beyond December 31, 2010. In addition, GHG emissions sources that are in operation on January 1, 2010 and are subject to reporting requirements solely because of stationary fuel combustion will be eligible for abbreviated emissions reporting for calendar year 2010, but will be subject to plenary reporting for subsequent years.

The GHG Reporting Rule requires that all emissions data and related information be preserved for a minimum of three years. The proposed rule, by contrast, contained a five-year records retention requirement.

Reporting Frequency

Most facilities and industries subject to the GHG Reporting Rule will be required to submit reports to EPA annually, on March 1 of each year on account of GHG emissions from the previous calendar year. However, some covered facilities are already reporting their carbon dioxide emissions to EPA on a quarterly basis under EPA’s acid rain program. For these facilities, the GHG Reporting Rule retains their

quarterly reporting frequency and expands the reporting requirements to include all covered GHGs. For facilities subject to annual reporting, the GHG Reporting Rule requires the covered facilities and supply operations to commence recordkeeping on January 1, 2010 and to submit the first GHG emissions report on March 1, 2011 (for calendar year 2010).

Once a facility or supply operation is subject to the GHG Reporting Rule, it must continue to submit GHG emissions reports even if it falls below the GHG reporting thresholds in future years. However, in some cases, the facility may be exempted from future reporting if either (i) the emissions fall below 25,000 metric tons for five consecutive years or (ii) the emissions fall below 15,000 metric tons for three consecutive years. Facilities will also be exempt from future reporting if all of their GHG emissions sources are shut down on a long-term basis. Facilities that meet these criteria for cessation of reporting must notify EPA of their cessation of reporting and provide an explanation of the facts that entitle the facility to cease reporting. Facilities that fall below the reporting threshold in 2010 will be required to reevaluate the applicability of the GHG Reporting Rule in future years to determine whether operational changes (e.g., process modifications, fuel use, etc.) have affected their reporting status.

EPA has acknowledged that some GHG emissions sources may fall close to the 25,000 metric ton reporting threshold and may need to collect GHG emissions data to verify whether they are above or below the threshold. However, EPA has stated that it intends at a later date to publish guidance on streamlined ways for facilities to determine whether they are likely to be above or below the 25,000 metric ton threshold.

Verification and Enforcement

The GHG Reporting Rule does not require third-party verification of emissions but rather provides for self-certifications by the GHG emissions source with post-reporting audits by EPA. Violators are subject to civil and administrative penalties of up to \$37,500 per day per violation. In addition, under the Clean Air Act, EPA may seek injunctive relief and criminal penalties for knowing violations of the GHG Reporting Rule. The GHG Reporting Rule provides that a violation may include, without limitation, failure to report emissions, collect underlying data, calculate emissions based upon required methodology or carry out any required emissions monitoring or testing. Each day of non-compliance may be considered a separate violation.

Coordination with State GHG Regulations

EPA has specifically declined to have the GHG Reporting Rule preempt GHG reporting requirements under state law. EPA has indicated that many states have taken the lead on GHG regulatory programs, that various state programs have informed EPA's own policy decisions as to the scope of the GHG Reporting Rule and that various state GHG reporting programs have different purposes than the federal program. Accordingly, GHG emissions sources are required to comply with both federal and state GHG reporting requirements, to the extent applicable to them.

General Observations

Now that EPA has issued the GHG Reporting Rule in final form, companies may take note of some general observations about it as follows:

- + The scope of coverage of the proposed GHG Reporting Rule is broad. Many facilities and operations that have not previously been subject to these types of EPA air emissions reporting requirements will now be subject to them for the first time commencing on January 1, 2010. For many facilities and supply operations, there will be an institutional learning curve as in-house personnel become familiar with, and develop systems to comply with, the GHG recordkeeping and reporting requirements. Many companies may find it advantageous to engage outside consultants and advisors to assist them in determining compliance strategies or in determining whether they are subject to the GHG Reporting Rule at all.
- + Some GHG emissions sources may be surprised to find themselves subject to the GHG Reporting Rule. For example, many large office buildings, hospitals, universities or retail facilities could have furnaces and boilers exceeding the threshold Btu capacity (30 mmBtu/hour) and be subject to the

GHG Reporting Rule unless they calculate their actual carbon dioxide equivalent emissions to be below the 25,000 metric ton threshold.

- + GHG emissions data developed under the GHG Reporting Rule will probably facilitate a company's compliance with any federal GHG emissions reduction program that may be implemented in the future, whether a "cap and trade" program, a GHG permit program under the Clean Air Act or otherwise. Many companies may benefit from establishing procedures now not only to comply with the GHG Reporting Rule but also to be prepared to take affirmative action to reduce GHG emissions in the future as federal and state regulation of GHG emissions takes hold.
- + GHG emissions data could also be useful to a company to evaluate its overall energy costs and to design programs to reduce energy consumption and increase energy efficiencies. These strategies could drop to the bottom line of many companies as energy usage becomes more efficient and energy costs are reduced. GHG emissions information could be a key part of the metrics of any such economic analysis. Enhanced energy efficiencies may cause at least some facilities that would otherwise be above the volume thresholds under the GHG Reporting Rule to fall below those thresholds so as to be exempt from the reporting requirements altogether.
- + Companies should take note of the recent decision of the U.S. Court of Appeals for the Second Circuit in *State of Connecticut et al. v. American Electric Power Company Inc. et al.*, Docket Nos. 05-5104-cv, 05-5119-cv (September 21, 2009). In this decision the Second Circuit reinstated common law tort actions by several states and private parties against various electric utilities that had been dismissed by the U.S. District Court. The plaintiffs claim that the defendant utilities are liable for damages based on their emissions of GHGs that have contributed to climate change. In reversing the District Court decision, the Second Circuit has opened the door for common law claims against other sources of GHGs. GHG emissions data generated by the GHG Reporting Rule will be publicly available and might be used by plaintiffs to support common law tort claims against the reporting sources. This possibility may itself give companies incentive to reduce their GHG emissions, either to fall below the reporting threshold or to show a diligent effort to reduce emissions which might be relevant in a common law tort action.

Overall, companies that begin the process of implementing internal programs to keep track of and reduce GHG emissions at an early date will be better able to identify the specific challenges they face and ways to mitigate risks. Climate change assessments, and broader sustainability assessments, are best performed by a team comprised of attorneys, environmental consultants and in-house personnel to understand industry-specific and company-specific factors that allow the business to factor climate change requirements into both near-term and long-term planning.

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