

New EPA Greenhouse Gas Emissions Reporting Rules and Proposed Regulations

In the latter half of 2009, the Environmental Protection Agency (“EPA”) took several steps toward regulating emissions of greenhouse gases (“GHGs”) in the U.S. for the first time. In September 2009, the EPA announced new rules for the reporting of GHG emissions from large sources and suppliers (the “Reporting Rules”). In addition, the EPA announced two proposals to regulate and reduce emissions of GHGs.

The Reporting Rules require facilities that emit 25,000 metric tons or more per year of GHGs to submit annual reports to the EPA. The final rule was published in December 2009 and took effect on December 29, 2009.

The two proposed regulations address emissions of six GHGs: carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆). The first proposal, announced by the EPA in September 2009, is a “tailoring rule” focused on large facilities emitting over 25,000 tons of GHGs per year. Under the proposed tailoring rule, these facilities would be required to obtain permits to emit GHGs, and be subject to a new scheme that would require them to use the best practices and technologies available to reduce GHG emissions. The second proposal, announced by the EPA in December 2009 in conjunction with the Department of National Highway Traffic Safety Administration, consists of new emissions standards for light-duty vehicles. These new standards would require vehicles to meet a combined average emissions level of 250 grams of CO₂ per mile by model year 2016, or the equivalent of 35.5 miles per gallon fuel efficiency.

This Client Alert will provide a summary of the new Reporting Rules and special provisions of the rules for 2010. It will also provide a summary of the proposed regulations, issues raised by the regulatory schemes, and reactions among advocacy and industry groups.

Reporting Rules

In September 2009, the EPA issued the Final Mandatory Reporting of Greenhouse Gases Rule. In October 2009, the final rule was published in the *Federal Register* under Docket ID No. EPA-HQ-OAR-2008-0508-2278 and became effective December 29, 2009. The first reports under the rules are due to be submitted to the EPA in 2011.

Unlike the proposed regulations discussed below, the Reporting Rules do not require regulated facilities to obtain permits or to limit emissions. Rather, they require reporting of GHG emissions from large sources and suppliers in the U.S. The Reporting Rules are designed to collect data and inform future policy decisions.

The Reporting Rules require suppliers of fossil fuels or industrial GHGs, manufacturers of vehicles and engines, and any facilities that emit 25,000 metric tons or more per year of GHGs to submit annual

reports of their emissions to the EPA. The Reporting Rules cover many of the same GHGs as the regulatory proposals, such as carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. They also cover other fluorinated gases, including nitrogen trifluoride and hydrofluorinated ethers.

Given the threshold of 25,000 metric tons, the Reporting Rules will cover about 85% of the nation's GHG emissions and apply to approximately 10,000 facilities.

In general, all facilities and suppliers must have begun collecting data and complying with the Reporting Rules from January 1, 2010. However, due to a high number of questions and concerns from operators of facilities across the U.S., the EPA issued special provisions for 2010. First, facilities containing only general stationary fuel combustion sources may submit abbreviated reporting for the 2010 year. Second, suppliers and facilities who determine it is not reasonably feasible to acquire, install, or operate the required monitoring equipment by January 2010 may automatically use Best Available Monitoring Methods through March 31, 2010. These facilities must still estimate their emissions using the calculation procedures in the Reporting Rules. These facilities do not have to petition the EPA to use Best Available Monitoring Methods; they may simply do so through March 31. Third, most monitoring equipment must be calibrated to meet 5% accuracy requirements prior to April 1, 2010. Initial calibration may be postponed after April 1, 2010 if monitoring equipment has already been calibrated according to a method specified in an applicable subpart of the rule and the method is still active, or if the units operate continuously with infrequent outages and re-calibrating them would disrupt their operation. Finally, all facilities must adopt a monitoring plan by April 1, 2010. These plans do not need to be submitted to the EPA, but must be kept on-site.

New Proposed Regulations to Reduce Greenhouse Gases

Background

In 2007, the Supreme Court in *Massachusetts v. EPA* held that GHGs were air pollutants for purposes of the Clean Air Act. It further held that the EPA Administrator was required to determine whether emissions of GHGs were harmful to the public health and welfare. Pursuant to such a finding, the EPA would then be required to take steps to address the public health hazards. In December 2009, the Administrator signed two distinct findings regarding GHGs under Section 202(a) of the Clean Air Act ("CAA"). The first, the Endangerment Finding, concluded that GHGs in the atmosphere endanger the public health and welfare. The second, the Cause or Contribute Finding, concluded that emissions of GHGs from new motor vehicles contribute to the atmospheric concentrations of these GHGs, and hence to the threat of climate change. The Cause or Contribute Finding was for all CAA section 202(a) source categories, which allows the EPA Administrator to regulate emissions from "any class or classes of new motor vehicles or new motor vehicle engines."¹

Proposed Regulation Relating to Stationary Sources

The proposed tailoring rule would require large stationary facilities emitting over 25,000 tons of GHGs per year to obtain permits demonstrating that they are using the best practices and technology to minimize GHG emissions. To put the figure into perspective, 25,000 tons of GHG emissions per year is the equivalent of burning 131 rail cars of coal, or the annual energy use of 2,200 homes. The 25,000-ton

¹ Clean Air Act Section 202(a)(1).

threshold would include power plants, refineries and cement production facilities, among others, but would not include smaller facilities, such as farms and restaurants.

The regulation would fall under the existing Prevention of Significant Deterioration (“PSD”) portion of the New Source Review (“NSR”) and Title V operating permit programs. NSR is a pre-construction permitting program. It requires certain technology be in use to protect air quality. NSR was established through the Clean Air Act Amendments in 1990, which require that states develop operating permit programs, known as Title V permit programs. Title V requires every major industrial source of air pollution to obtain an operating permit, which is reviewed every five years. Title V permits include emissions limits, monitoring schemes and reporting rules.

The proposed tailoring rule would work with the five-year Title V permits. When the existing permits come up for review, the facilities would be required to include estimates of their GHG emissions in the applications. Based on each facility’s permit renewal application — or new permit application for facilities projecting over 25,000 tons of GHG emissions for the first time — PSD program administrators would determine technology controls on a case-by-case basis. This would be done to determine the best available control technology for each particular facility, hence the “tailoring” aspect of the proposal.

In addition to the 25,000-ton threshold, there would also be a “significance level” between 10,000 tons and 25,000 tons per year. Existing major sources of GHG emissions that make any modifications resulting in an increase of emissions above the significance level would also be required to obtain a PSD permit. The EPA has not yet decided on an appropriate significance level, and is requesting comment on this range of values.

Overall, the proposed regulatory scheme would ostensibly work as follows: facilities emitting 25,000 tons or more of GHGs per year would be required to obtain a PSD permit and would have to adjust their control technologies according to PSD’s case-by-case review; facilities projecting emissions of 25,000 tons or more per year would include this estimate on their Title V permit applications; and facilities that make modifications that would bring them above a yet-to-be-determined significance level (likely in the range of 10,000-25,000 tons per year) would also be required to obtain a PSD permit.

The initial phase of the PSD tailoring rule would last five years, followed by a one-year review to determine if the program is administratively feasible. It could take effect as early as 2011. According to the EPA, the greatest burden would fall on 400 power plants, particularly new ones and those undergoing substantial renovation.

Typically, a violation of a PSD permit condition would subject the stationary source to an EPA enforcement action. Enforcement actions can include penalties and/or corrective action, and can be initiated by the EPA, local permitting authorities, or even citizens.

Proposed Regulations Relating to Vehicle Emissions

The proposed vehicle emissions standards would apply for light-duty vehicles, model years 2012 through 2016. Light-duty vehicles include cars, trucks, minivans, and sport-utility vehicles (“SUVs”) with a gross vehicle weight less than 8,500 pounds. According to the EPA, light-duty vehicles account for about 40% of U.S. oil consumption. The proposal would require vehicles to meet a combined average emissions level of 250 grams of CO₂ per mile in model year 2016. Achieving this emissions level would require an average fuel efficiency of 35.5 miles per gallon. The standards would increase in stringency from 2012 to 2016. The proposal could take effect in the spring of 2011.

The standards are based on CO₂ emissions-footprint curves, where each vehicle has a different CO₂ compliance target depending on its footprint curve. The footprint curves are related to the size of the vehicle. For example, by model year 2016, a small/compact passenger car such as the Honda Fit would have an emissions target of 204 grams of CO₂ per mile, whereas a large pickup truck such as the Chevrolet Silverado would have an emissions target of 347 grams/mile. When all the emissions targets are averaged, the total emissions target is 250 grams/mile, which results in a fuel efficiency of 35.5 miles per gallon.

The EPA intends to propose a compliance program for the new emissions standards that would resemble CAA Tier 2 vehicle emissions standards and CAFE standards, making them familiar to manufacturers. Also, the EPA is proposing a series of early credits, alternative fuel credits, and additional credits for electric or hybrid vehicles.

Issues

Both proposals raise issues of administrability, cost, job retention or creation, and general market uncertainty.

Parties and arguments in favor of regulation

The primary goal of any new emissions regulatory scheme is to reduce air pollution and minimize the risk of global climate change. The Endangerment Finding cited global warming risks of heat waves, wildfires, degraded air quality, downpours, flooding, drought, sea level rise, storms, harm to water resources, ocean acidification, harm to agriculture, and harm to wildlife and ecosystems. In addition, the EPA argues that new standards would increase energy security by reducing the United States' dependence on foreign oil, increase fuel savings by requiring vehicles with higher gas mileage, and offer predictability for manufacturers through a permitting program. The vehicles included in the new emissions standards program alone account for almost 60% of all U.S. transportation-related GHGs. Likewise, with regard to stationary sources, the facilities included in the tailoring rule proposal are among the largest facilities and polluters, and not small businesses. Many of these large facilities are already subject to regulation or permitting requirements for emitting other pollutants.

Environmental advocacy groups support the proposals, including the Natural Resources Defense Council, the Sierra Club, and the Air Resources Board. Also, some manufacturers and manufacturing associations support the vehicle emissions standards, including Chrysler, Ford, Honda, Toyota, BMW, Daimler, GM, Mazda and Volkswagen. The EPA estimates that the average cost increase for a model year 2016 vehicle due to the proposal is about \$1,100. However, the EPA also estimates that fuel savings would offset the higher vehicle costs.

Parties and arguments against regulation

Industry groups have criticized the proposals for introducing uncertainty and potentially higher costs to the marketplace, as well as potential job loss, energy costs, and delays in economic recovery.

In general, industry groups against the regulatory proposals are against addressing global warming generally, and GHG emissions specifically, through EPA regulation. Many prefer legislation to limit carbon emissions, arguing that legislative solutions could be designed more strategically or implemented over a longer period of time, and therefore soften the impact on the economy and consumers. Environmental advocacy groups counter that legislative programs are more susceptible to political pressures, whereas agency regulation is less susceptible to pressure from industry groups.

With regard to the regulatory proposals themselves, industry groups, such as the American Iron and Steel Institute, argue that U.S. companies could face higher operating costs than international competitors. The stationary sources proposal is being criticized for failing to adequately evaluate the economic effects on small businesses. The 25,000-ton threshold would require at least 1,200 small-to-medium entities to obtain Clean Air Act operating permits for the first time, including manufacturers, paper mills, small coal mines, small municipal electric utilities, small rural electric cooperatives, auto service centers and other sources. The threshold is triggered by projected emissions instead of actual emissions, meaning there will be many medium-range sources triggering the new permit requirement at an added cost to the business entity. In fact, thousands of new permits would have to be filed by 2011 to allow some businesses to continue functioning normally.

Others argue that the EPA is operating outside the scope of its authority and are threatening to file lawsuits. The Competitive Enterprise Institute threatened to file suit over the Endangerment Finding, claiming the EPA ignored scientific issues around global climate modeling. The U.S. Chamber of Commerce says the Clean Air Act is not the appropriate vehicle for regulating climate change and is threatening suit. The National Petrochemical and Refiners Association is questioning the EPA's legal authority. Many of these groups would prefer a legislative approach. More specifically, some are seeking to enact legislation that would circumvent EPA regulation by substituting a market-based cap and trade system.

It remains to be seen whether the EPA's proposed rules will ultimately prevail or whether the lawsuits above would be able to prevent emissions regulations from taking effect. However, with federal cap and trade legislation currently stalled, the EPA's proposals ensure that regulating carbon emissions in the U.S. is not yet a dead issue.

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