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Legal Updates

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EPA Issues Final Greenhouse Gas Reporting Rule

On Sept. 22, 2009, EPA issued its final Mandatory Greenhouse Gas Reporting Rule, setting up a complex structure for companies in certain industries to report direct, and in some cases indirect, emissions of Greenhouse Gases (GHGs).

While the rule is generally similar to the proposal issued on April 10, 2009 (74 Fed. Reg. 16448).(For related discussion, see our March 12, 2009 news item.) EPA made a number of changes generally to provide greater flexibility to describe how it is applied to certain types of sources. The final rule will become effective 60 days from publication in the Federal Register, which should be next week.

The final rule retains the basic structure and requirement of the proposed rule. Specified sources in certain industries, sources which emit more than 25,000 tons per year of carbon dioxide equivalents from combustion either alone or in combination with other specified sources, must begin monitoring their GHG emissions in January 2010, and submit their first annual report on March 31, 2011.

Fuel production sources must report not only their own process emissions, but also emissions from all fuel they produce, import or export. Heavy duty engine manufacturers must also report their own process emissions, as well as emissions from the engines they produce. The rule defines each specialized source category and includes requirements for monitoring, data verification and reporting.

In response to comments, EPA modified their proposal in several significant ways. First, EPA changed its rigid "once in, always in" approach and established several thresholds by which facilities could eventually escape reporting requirements. These include reporting emissions less than 25,000 tons per year for five straight years, or less than 15,000 tons per year for three straight years, or by shutting down all GHG emitting sources at a facility. EPA further clarified that, in contrast to most other emission rules, GHG reporting was based purely on actual emissions and not the facility's potential to emit.

Second, in response to concerns that sources would have insufficient time to install the required monitoring systems by the initial monitoring start date of January 2010, EPA allowed sources limited flexibility to use best available monitoring methodologies from January through March of 2010. EPA intends to issue rules on criteria for determining best available monitoring methods. In a related discussion about data quality, EPA also provided further clarification on required QA/QC for internal measuring systems such as flow meters and reduced record retention requirements from five to three years.

Third, EPA deferred regulation of numerous sources based primarily on the lack of data or consensus on how these sources would monitor their GHG emissions. The deferred sources include electronics manufacturing, ethanol production, underground coal mines, oil and natural gas systems, food processing, industrial landfills, and waste water treatment facilities. In its preamble, EPA asserted that it would continue to develop requirements for these sources, but provided no time line on when rules would be issued.

EPA also deferred another key issue, the protection of confidential business information (CBI). Numerous companies expressed concerns that the monitoring methodologies required the disclosure of data such as throughput or raw material inputs, which companies generally maintain as significant trade secrets. EPA rules preclude protecting "emissions data" used

to document emissions reporting or compliance as CBI, thus threatening broad disclosure of the information supporting GHG reporting. In the final rule, EPA acknowledged the concern but said it would address the issue in rules it intended to promulgate shortly.

While the GHG reporting rule will be the first federal requirement imposed on industry with respect to GHG emissions, its implications for EPA's authority to adopt other GHG regulations is less clear. Its adoption shines no light on the question of the ability of the EPA to regulate GHG under the Clean Air Act (CAA), since the rule was adopted pursuant to specific authority in an appropriations act. Further, the rule will not in and of itself authorize control of GHG emissions through Title V air permits, since EPA specifically stated that the rule did not constitute an "applicable regulation" under the air permit programs.

At the same time, EPA trumpeted the rule's implications for the political process considering GHG controls. EPA noted that the data would inform its decisions on how or whether to use CAA authority to adopt New Source Performance Standards and "would inform future climate change policy decisions," a clear and unmistakable message that EPA is prepared to act through the CAA, if Congress does not adopt another program.

EPA sent another message when it claimed that the information would encourage companies to evaluate their GHG emissions, and that the publication of GHG emissions data would encourage greater awareness similar to other programs. This is a not-so-subtle reference to the Toxics Release Inventory program in which companies report the amount of specified toxic materials they emit. While these emissions are typically within legal and permitted limits, companies have chosen to voluntarily reduce emissions to avoid prominent positions on lists of large emitters. EPA clearly hopes that companies will voluntarily reduce GHG emissions in order to avoid similar notoriety.

In short, the rule marks a very significant step in the march toward regulation of GHG emissions, and in contrast to other such steps, imposes requirements that must be met within the next four months.

McGuireWoods LLP Clean Air Act Team

McGuireWoods LLP is a full service law firm with a specialty practices in Climate Change and Clean Air Act matters. For further information on EPA's proposed Endangerment Finding and its implications, please contact the authors or any member of our Clear Air Act team.

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