

ENVIRONMENTAL LAW ALERT

A bulletin of environmental legal developments for the environmental professional.

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EPA RELEASES PROPOSED GREENHOUSE GAS REPORTING RULE

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On March 10, 2009, the U.S. Environmental Protection Agency (“EPA” or “Agency”) published a republication Notice of Proposed Rulemaking (“NPRM”) which, if implemented as proposed, would require annual reporting of greenhouse gas (“GHG”) emissions from a broad range of facilities, impacting (according to EPA estimates) more than 13,000 facilities nationwide, including any facility that emits 25,000 metric tons or more of CO₂ equivalent (“CO_{2e}”) per year in combined emissions. Additionally, to gain information on GHG emissions from agricultural land management practices (*e.g.*, application of fertilizers), the NPRM would require all facilities to report the nitrogen content of any fertilizers that they produce as part of their annual GHG emissions report. According to EPA, the Agency proposed the NPRM under the authority of the Clean Air Act (“CAA”) and the FY2008 Consolidated Appropriations Act.

Once the NPRM is published in the *Federal Register*, interested parties will have 60 days to provide comment to EPA.

I. Facilities Subject to the NPRM for GHG Emissions Reporting

The NPRM applies to the following five categories of facilities:

1. Facilities containing any of the source categories listed in the proposed 40 C.F.R. Part 98, subparts B through JJ during calendar year 2010, including lime manufacturing, cement production, petroleum refineries, electric power systems, and soda ash production. EPA has prepared fact sheets for each source category (which can be found at <http://www.epa.gov/climatechange/emissions/ggrulemaking.html>);
2. Any facility that emits 25,000 metric tons CO_{2e} or more per year in combined emissions in any calendar year starting in 2010. Annual reports for this category would include all sources for which calculation methodologies are provided in the proposed 40 C.F.R. Part 98, subparts B through JJ;
3. Any facility, in any calendar year starting in 2010, which: (a) does not contain any source in any category listed in (1) and (2) above; (b) has an aggregate maximum rated heat input capacity of a stationary fuel combustion unit at the facility which is 30 mmBtu/hr or greater; and (c) emits 25,000 metric tons CO_{2e} or more per year from all stationary fuel combustion sources at the facility. For these facilities, the annual report would cover emissions only from stationary fuel combustion sources;
4. Any supplier of any of the following products (listed in the proposed 40 C.F.R. Part 98, subparts KK through PP): (a) coal; (b) coal-based liquid fuels; (c) petroleum products; (d) natural gas and natural gas liquids; (e) industrial GHGs (including producers, exporters and importers) with total bulk imports or total bulk exports that exceed 25,000 metric tons CO_{2e} per year; and
5. Manufacturers of mobile sources and engines.

Once subject to the NPRM, a facility would be required to continue annual reporting even if emissions fall below the reporting thresholds in subsequent years. Generally, reporting would be done at the facility level; however, for certain categories, including manufacturers of mobile sources and engines, reporting would be at the corporate level.

II. General Reporting Requirements under the NPRM

The NPRM would require reporting of annual emissions of all GHGs (including carbon dioxide,

methane, nitrous oxide, and fluorinated gases) as CO_{2e}, with data collection beginning January 1, 2010 and the first annual report due March 31, 2011. In addition to GHG reporting, facilities falling into one of the above-enumerated categories would be required to report activity data (*e.g.*, fuel use and feedstock inputs) used to generate the emissions data, and maintain related records for a period of five years. Annual reports would be submitted electronically, and certified by a designated facility representative. EPA seeks comments on how to integrate existing reporting requirements under the CAA with the proposed GHG reporting requirements in the NPRM.

Emissions from agricultural sources and other land uses would be exempt from reporting requirements under the NPRM. These include emissions from field burning of agricultural residues, composting (other than as part of a manure management system),¹ and agricultural soil management. However, as a surrogate for calculating GHG emissions from agricultural sources, EPA is proposing that industrial facilities reporting under the NPRM include in their annual GHG emissions reports the nitrogen content of any fertilizers that they produce. EPA is seeking comment on this approach to nitrogen reporting, including whether to include fertilizer wholesalers, distributors, and importers.

III. Costs and Enforcement under the NPRM

EPA estimates first-year compliance costs for private industry will amount to approximately \$160 million, with \$127 million for each subsequent year.

Facilities that fail to provide the annual reports under the NPRM could be subject to CAA administrative, civil and criminal penalties. *See* CAA §§ 113 & 203-205. This would include, among other penalties, injunctive relief requiring facility shut-down and administrative penalties up to \$32,500 per day of violation.

IV. Conclusion

The NPRM, if adopted as proposed, will impose substantial data collection and reporting obligations

on many facilities, including many industries not specifically listed as a category source but who nevertheless, because of energy needs, exceed the threshold emissions standard for 25,000 metric tons per year. Additionally, once the Agency starts down the path of regulating GHG in any way (even through reporting requirements), it risks facing a statutory mandate to implement regulations imposing requirements on large and small sources in all sectors of the economy. The costs associated with such compliance (and the related costs passed on to all energy consumers) could account for the Obama administration's 2010 budget proposal, which anticipates \$646 billion in "climate revenues" over the next decade, starting in 2012. In connection with these developments, the Securities and Exchange Commission could begin requiring companies to disclose to investors the potential liabilities that GHG regulations present to their earnings.

If you have any questions regarding the NPRM, please contact Chris Leason (by telephone at (602) 530-8059, or by email at chris.leason@gknet.com) or Rhett Larson (by telephone at (602) 530-8064, or by email at rhett.larson@gknet.com).

¹ A "manure management system" is defined as "a system that stabilizes or stores livestock manure, or does both."