

EPA Issues Mandatory Reporting of Greenhouse Gases Rule

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On September 22, the Administrator of the U.S. Environmental Protection Agency (EPA) issued the Mandatory Reporting of Greenhouse Gases (GHGs) Rule. EPA had proposed this rule on March 10 of this year and solicited comments from interested parties. The final rule imposes substantial requirements on various entities to measure and then report to EPA their greenhouse gas emissions. Facilities subject to the new regulations are required to begin collecting data on their GHG emissions in January 2010, with first reports due to be submitted to EPA by March 31, 2011. Two significant changes in the final rule include a mechanism for covered facilities to remove themselves from the program and a reduction in the number of industries immediately subject to the rule.

Coverage

According to EPA, the rule covers approximately 85% of GHG emissions in the United States. The principal GHGs are subject to the rule, including carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, hydrofluorocarbons, perfluorocarbons, and other fluorinated gases. The rule applies to upstream facilities (i.e., suppliers of fossil fuels and industrial gases) and to downstream facilities (i.e., facilities that combust fossil fuels or use industrial gases and that directly emit GHGs from their processes or fuel combustion), as well as to manufacturers of vehicles and engines.

Coverage of downstream facilities includes the following:

- Facilities with operations in one of 17 specified source categories (e.g., electric generating facilities subject to the Acid Rain Program, petroleum refineries, adipic acid production, aluminum production, petrochemical production, petroleum refineries, cement production)
- Facilities with operations in one of seven specified source categories (ferroalloy production, glass production, hydrogen production, iron and steel production, lead production, pulp and paper manufacturing, and zinc production) that emit 25,000 metric tons of carbon dioxide equivalent (CO₂e) per year from the combustion of fossil fuels and miscellaneous uses of carbonates in any calendar year starting in 2010
- Facilities that contain no designated source categories, but have an aggregate maximum rated heat input capacity of at least 30 mmBtu/hr and emit at least 25,000 metric tons of CO₂e per year from all stationary fuel combustion sources
 - These facilities may file an abbreviated report in 2010, covering stationary fuel combustion sources only.

Coverage of upstream facilities includes the following:

- Fossil fuel suppliers, including producers, importers, exporters, and distributors of coal-based liquid fuels, petroleum products, natural gas, and natural gas liquids
- Suppliers of industrial GHGs, including producers of industrial GHGs and importers and exporters of industrial GHGs with total bulk imports or exports equivalent to at least 25,000 metric tons of CO₂e per year
- Suppliers and producers of carbon dioxide

Vehicle and engine manufacturers subject to the rule include:

- Manufacturers of vehicles and engines outside of the light-duty sector, such as heavy-duty and off-road vehicles and engines

Significantly, EPA delayed applying the final rule to several industries that had originally been treated as covered source categories under the proposed rule. Industries not subject to the rule at this time are 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 delayed the application of the rule to allow the agency additional time to consider comments submitted on the draft rule and to consider its options for applying the rule to these source categories. Also explicitly excluded from the rule's coverage are research and development facilities. The final rule also does not apply to manufacturers of light-duty vehicles and passenger trucks.

Reporting

GHG emission reports are first due March 31, 2011 for calendar year 2010 emissions (except for vehicle and engine manufacturers, which must report for the 2011 model year). Reporting is generally done at the facility level on an annual basis. Suppliers of fossil fuels and industrial gases, however, must report at the corporate level. The reports must contain the aggregated CO₂e for specified source categories and supply categories. The reports must be certified as true and accurate by a designated representative of the owner or operator of the facility, with EPA verification of the reports. EPA has authority to take enforcement action for noncompliance with the rule's requirements. In separate public comments not part of the rule, EPA enforcement has emphasized its interest in pursuing enforcement actions targeted at reporting rule violations.

The final rule significantly departs from the proposed rule's "once in, always in" approach by providing a mechanism through which facilities that originally report may later be excused from the rule's reporting requirements. The final rule provides that a facility may be exempt from further reporting if it can demonstrate that reported GHG emissions are either less than 25,000 metric tons of CO₂e per year for five consecutive years, or less than 15,000 metric tons of CO₂e per year for three consecutive years, or the facility closes all GHG-emitting processes and operations covered by the rule. A facility will need to return to reporting if its GHG emissions subsequently increase to 25,000 metric tons of CO₂e in any year. Thus, even facilities that expect to be able to avoid reporting because their emissions fall just below the threshold levels may still need to implement careful monitoring practices.

Measurement

For units that already require continuous emissions monitoring systems (CEMS) under other federally enforceable programs (e.g., NSPS or SIPs), direct measurement of GHGs is required. Facilities that do not have units with CEMS installed can choose either to directly measure or to use facility-specific calculation methods. The facility-specific methods differ by source category, but include options such as using input data from fuel or raw material use. For the period January 1 through March 31, 2010, facilities may use “best available monitoring methods” where it is not reasonably feasible to acquire, install, and operate a required piece of monitoring equipment by January 1, 2010. Vehicle and engine manufacturers will use existing certification and test protocols that have been expanded to include GHGs.

Compliance

For some industries or facilities, this rule introduces substantial data collection requirements for the first time. For others, this rule represents an expansion of environmental data collection and reporting requirements to cover GHGs for the first time. For still other industries, the data collection requirements in the rule may overlap with, and fail to align with, existing GHG data collection programs and could result in reports of GHGs that may not be consistent with previously reported GHG data. The rule also includes data retention provisions, to allow later EPA review or audit.

We strongly encourage those companies for which this rule introduces new data collection requirements, to begin developing their data collection and reporting programs now. Data collection activities will be required as of 2010 and reported in March 2011. This preparatory work includes surveying current assets to identify covered facilities or products, developing data collection mechanisms with respect to such facilities, and developing auditing or other techniques to insure data accuracy and maintenance. Facilities that believe that they should not be subject to the reporting requirements because their emissions of GHGs are below the threshold or that believe that they can reduce their GHG emissions to remove themselves from the rule’s coverage must also ensure that their measurement and reporting systems are fully functional so that they can make a strong case, at the earliest possible time, to be excluded from coverage.

The regulations will be published in the *Federal Register* shortly, although copies of the rule, as well as additional EPA guidance documents, can be found at:

<http://www.epa.gov/climatechange/emissions/ghgrulemaking.html>.

EPA has indicated that it expects data reported under the rule to be publicly accessible. Thus, companies should also consider the possible uses of the data that they will report, and satisfy themselves regarding the data’s consistency with any prior public statements related to GHGs.

Morgan Lewis attorneys have had experience with a number of industries and their existing emissions reporting requirements, and can provide assistance in understanding the applicability, potential impact, and compliance requirements of the rule.

Related GHG Developments

The legal landscape regarding climate change is shifting rapidly. In addition to this mandatory GHG

reporting rule, EPA is developing regulatory programs that may cause CO₂ and other GHGs to be regulated under the Clean Air Act including the Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR) programs. Meanwhile, the House of Representatives passed a bill addressing climate change and the Senate is currently considering climate change legislation. Climate-change–motivated litigation is intensifying as environmental and citizen organizations increasingly challenge permits for operations that emit GHGs. Also, the U.S. Court of Appeals for the Second Circuit recently reinstated lawsuits against power plants in which the plaintiffs claim injury on account of GHG emissions.

Morgan Lewis lawyers are at the center of these issues. We help our clients navigate developing climate change requirements, and develop strategies to address the challenges they present.

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