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EPA's Proposed Rule on Climate Registry

On April 10, 2009, EPA published in the *Federal Register* (74 Fed. Reg. 16,448) its Notice of Proposed Rulemaking ("NOPR") to require fossil fuel suppliers, industrial gas suppliers, and fossil fuel emitters to monitor their emissions of Greenhouse Gases ("GHGs") and to report them to an EPA Greenhouse Gas Registry. The proposed rule does not cap or limit emissions of GHGs, but does require monitoring (or calculation) of such emissions and a report of such emissions to an EPA registry, in order to create a database of existing emissions to inform future climate change legislation. If this proposed rule is finalized along the lines proposed, it will apply to many of our clients and other municipal entities. Accordingly, this memo is intended to summarize those portions of the proposed rule (which is over one thousand pages in length) that are most likely to apply to municipal, cooperative, or tribal entities (whether or not they operate electric utilities).

While in many cases, the final rule may not have a large impact on what you do (it is designed to reflect, as much as possible, requirements already operating under existing federal, regional, and state reporting programs, both mandatory and voluntary), it is not hard to imagine the requirements here playing a significant role in establishing who will or will not be regulated under future climate change regulation. For example, the threshold level of emissions below which action will not be taken is a contentious issue in almost any regulatory scheme. The level at which data are collected, to be established here, may well impact the level at which future regulation is applied. EPA is, in essence, proposing where to make the cut between entities too small, too numerous, or too costly to regulate, and those who contribute larger amounts of GHGs. That level would, therefore, be of great interest to small emitters, who may be very close to the proposed threshold, or to those who believe the proposed threshold is too high or too low.

Comments on the proposed rule are due June 9, 2009. Feel free to contact us with any questions or if you wish to file comments.

Who Might Be Covered?

Categories of facilities that may be affected include:

- Facilities operating boilers, process heaters, incinerators, turbines, and internal combustion engines;
- Electric, gas, and sanitary services;
- Fossil fuel-fired electric generating units, including units owned by federal and municipal governments, and units located in Indian Country;
- Electric generating units fueled by Municipal Solid Waste;
- Methane-fired generating units;
- Pipeline transportation, storage, and distribution of natural gas—while the rule does not propose regulation of local natural gas distribution facilities, fugitive emissions from the pipeline transportation, compressors, and storage facilities are proposed to be regulated;
- Electric bulk power transmission and control facilities—sulfur hexafluoride is used as an electric insulator and interruptor in T&D equipment due to its dielectric strength and arc-quenching properties. It can escape through seals and also during installation, maintenance, and disposal of the equipment or of the dielectric material;
- Solid waste landfills (hazardous waste and construction/demolition landfills are not covered—the rule seeks comment on whether land-application units should be covered);
- Industrial sewage treatment facilities (municipal Publically Owned Treatment Works are not covered);
- Storage or supply of captured CO₂;
- State and local governments and mobile source fleet operators (see below);
- Operators of emergency or backup generation.

What Might Be Covered?

The rule proposes to cover the following GHGs, which are identified as potential contributors to global warming, and which are emitted by human activities in sufficient amounts to be regulated:

- Carbon dioxide (CO₂);
- Methane (CH₄);
- Nitrous oxide (N₂O);
- Sulfur hexafluoride (SF₆);
- Hydrofluorocarbons (HFCs);
- Perfluorochemicals (PFCs);
- Other fluorinated gases (*e.g.*, nitrogen trifluoride (NF₃) and hydro-fluorinated ethers (HFEs)).

While CO₂ is the gas emitted in the greatest quantities and the one that receives the most attention, the other gases are not insignificant and some are actually considerably more harmful to the atmosphere than CO₂. In order to treat the different gases on an equivalent basis, the proposed rule lists a figure representing the “Global Warming Potential” (GWP) of each regulated GHGs. If you multiply the GWP by the quantity of a particular gas that your facility emits, the resulting number is termed the Carbon Dioxide Equivalent (CO₂e) for that gas. This figure is important, because the aggregate CO₂e of all GHGs emitted by your facility determines whether or not your facility must monitor and report emissions. While there are no guarantees regarding future regulations, it is possible that facilities falling below the threshold will be deemed too small to be covered in any future programs to limit carbon production. The proposed rule sets the threshold figure at 25,000 metric tons of CO₂e or more per year.

EPA proposes to use the same definition of “facility” in this setting as that employed by many other EPA regulatory programs. Specifically “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 other public right-of-way and under common ownership or control, that emits or may emit any greenhouse gas.” This definition is especially important for municipal entities to understand, because it is not uncommon for several municipal functions to be collocated on

single or contiguous city properties. Accordingly, accurate reporting may require coordination among more than one city department located on contiguous or adjacent properties. Moreover, if one source of GHGs triggers the reporting threshold, other sources of GHGs on the same or adjacent city properties may have to be included in the reporting even if they would be exempt if they stood on their own. In short, be aware that the EPA's view of what constitutes a "facility" may differ from yours.

There are a number of existing mandatory and voluntary programs for reporting GHG emissions at the federal, state, and regional levels, and the registry is designed, so far as is possible, to work with those existing programs so as not to create new burdens. For example, if your facility has monitoring equipment for GHGs (such as a Continuous Emissions Monitoring System or CEMS), you are expected to use it (if it is the most accurate method for measuring emissions), but if you do not have such equipment, you do not have to buy it, and you may use other methodologies (generally calculations based on fuel input and quantity of product output and the characteristics of the unit). The proposed rule sets out very specific data requirements and details the performance of the calculations for each industry sector, and seeks comment on all of this. Generally, you must use the most accurate method for which you have the equipment and the data. Some simplified calculations are available for smaller fossil fuel-fired units.

What is Required?

Under the proposed rule, the following types of facilities must monitor their emissions, beginning on January 1, 2010, and report their emissions to the EPA registry for the year 2010 by March 31, 2010, and annually thereafter:

- Electricity generating facilities that are subject to the Acid Rain Program, or that contain electric generating units that collectively emit 25,000 metric tons of CO₂e or more per year;
- Electric power systems that include electrical equipment with a total nameplate capacity that exceeds 17,820 lbs of SF₆ or PFCs (equivalent to 25,000 metric tons of CO₂e per year);
- Municipal landfills (open or closed) that generate CH₄ in amounts equivalent to 25,000 metric tons of CO₂e or more per year, after accounting for destruction of landfill gases in any combustion device;

- Any facility that emits 25,000 metric tons of CO₂e or more per year in combined emissions from stationary fuel combustion units, miscellaneous use of carbonates, and all sources listed below that are located at the facility in any calendar year starting in 2010. The sources include electricity generation, industrial landfills, and wastewater;
- A facility that is not regulated under the provisions above, but which has a stationary fuel combustion unit rated at 30 mmBtu/hr or greater and emits over 25,000 metric tons of CO₂e from all stationary sources at the site (this does not include permitted portable or emergency generators, though EPA is taking comment on the issue of whether permits should be required). Facilities with units with an aggregated heat input capacity less than 30 mmBtu/hr may presume they are exempt from reporting, as the assumption is they would not reach 25,000 metric tons of CO₂e per year even if operated for 8,760 hours per year.

The reports would consist of your total emissions. To the extent that you determine your facility emissions using calculations rather than measuring devices, you would also be required to provide activity data (such as fuel use, etc.) that supports the calculations. EPA will protect competitively sensitive information to the extent that is possible. The reports will also contain signed certifications from the Designated Representative of the facility certifying, under penalty of law, that the information is true and accurate. You will be required to maintain records of your reports and the information supporting them for five years. Failure to comply could subject entities and Designated Representatives to administrative, civil, and criminal penalties, and injunctive relief. Civil and administrative penalties could be as high as \$32,500 per day.

Once a facility is required to report, it would continue to be subject to the reporting requirements even if its total emissions drop below the threshold in the future.

Potential Additional Coverage on Which Comments are Solicited

Electricity purchases: The NOPR does not propose to require facilities to report data on their electricity purchases, but it does solicit comment on whether such data should be collected to provide a better understanding of electricity use in major sectors of the economy.

Fleet operators, including state and local governments: The NOPR proposes to collect mobile source data from the manufacturers of vehicles, including cars, trucks, planes, etc., based on quantity produced, fuel efficiency standards, and

the results of testing. EPA is not presently proposing to seek travel activity data from fleet operators, but it is seeking comment on whether collection of such data might provide valuable insight into emissions from this sector of the economy, and whether additional data on top of what is collected under existing programs would be useful. Accordingly, state and local governments and other fleet operators may be covered in the future.

Permitted emergency or backup generators: The proposed rule does not apply to permitted emergency or backup generators, with the implication that it would apply to such generators if they are not permitted or not required to be permitted, and meet the threshold requirement. EPA is seeking comment on whether a permit should be required for such exemptions.

Please feel free to contact us with any questions about the proposed rule or about submitting comments to EPA.

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...or any other attorney at the firm with whom you usually work.

Survey

Please fill out our survey at:

[Survey](#)

Or send comments to: info@spiegelmc.com