

Tuesday, May 19, 2009

Environmental Update: June 9 Deadline Fast Approaching to Comment on EPA's Proposed Greenhouse Gas Reporting Rules

By Phillip F. Fargotstein and Scott H. Thomas

quick links

- [Environmental Practice](#)
- [Unsubscribe](#)
- [Acrobat Reader](#)

Action

Comments on EPA's proposed mandatory greenhouse gas (GHG) reporting rule are due by June 9, 2009. EPA has rejected requests for an extension of the comment period, citing the need to finalize a rule quickly to allow for data collection in 2010. The proposed rule can be found at 74 Fed. Reg. 16448 (April 10, 2009).

EPA estimates that approximately 13,000 facilities would be required to report under the proposal, representing 85-90 percent of total annual domestic greenhouse gas (GHG) emissions. No substantive requirements are yet being proposed, but the information reported will be utilized in formulating future GHG regulatory or tax proposals.

Background

The Consolidated Appropriations Act of 2008 (H.R. 2764) required EPA to propose a rule to require mandatory reporting of GHG emissions. The legislation directed EPA to issue a proposed rule by September 2008 and a final rule by June 2009. EPA also was directed to include emissions resulting from upstream production and downstream sources to the extent EPA deemed appropriate.

The 2009 Omnibus Budget Appropriations Act (H.R. 1105, signed on March 11) contains similar language, and requires a final rule to be published no later than June 26, 2009. EPA has admitted that it will not meet that deadline, but plans to issue a final rule later this year.

Summary of Proposal

The proposed rule requires covered facilities to estimate GHG emissions beginning in calendar year 2010, and to file annual reports of those emissions beginning March 31, 2011. With some exceptions, the emissions threshold that triggers reporting by individual facilities is 25,000 metric tons per year (tpy) of carbon dioxide (CO₂) or its equivalent.

In order to quantify GHG emissions from vehicles, suppliers of fossil fuels (petroleum products, natural gas, coal) and some industrial gases also will be required to file annual reports.

GHGs covered: Emissions of the following GHGs are to be reported under the proposal: (1) carbon dioxide; (2) methane; (3) nitrous oxide; (4) hydrofluorocarbons; (5) perfluorocarbons; (6) sulfur hexafluoride; and (7) other fluorinated gases (e.g., nitrogen trifluoride and hydrofluorinated ethers).

Phoenix
3003 N. Central Ave.
Suite 2600
Phoenix, AZ 85012
(602) 916-5000

Tucson
One S. Church Ave.
Suite 1000
Tucson, AZ 85701
(520) 879-6800

Nogales
420 W. Mariposa Rd.
Suite 200
Nogales, AZ 85621
(520) 281-3480

Las Vegas
300 S. Fourth St.
Suite 1400
Las Vegas, NV 89101
(702) 692-8000

Denver
1700 Lincoln St.
Suite 2900
Denver, CO 80203
(303) 291-3200

Facilities covered: Facilities that must report under the proposal are those falling into any of the following categories:

- Category 1 (“all in” source categories): The proposed rule identifies source categories where all facilities are required to report, regardless of whether they emit more than 25,000 tpy of CO₂ equivalent. Examples are cement production, petroleum refineries, and semiconductor manufacturers meeting certain production thresholds.
- Category 2: Any facility that emits 25,000 tpy of CO₂ equivalent emissions from any combination of stationary fuel combustion units (e.g., boilers, combustion turbines, engines, incinerators, and process heaters), the use of carbonate (e.g., calcium carbonate), and 16 specified source categories (including industrial landfills, wastewater treatment, pulp and paper manufacturing, electricity generation, and oil and natural gas systems).
- Category 3: Facilities that: (1) do not contain any of the source categories covered in categories 1 and 2; (2) contain stationary fuel combustion units with an aggregate maximum rated heat input capacity of 30 million BTU/hr or greater; and (3) emit 25,000 tpy of CO₂ equivalent or more from those stationary fuel combustion units
- Category 4: Suppliers of coal, coal-based liquid fuels, petroleum products, natural gas and natural gas liquids, industrial greenhouse gases (fluorinated GHGs or nitrous oxide), and carbon dioxide
- Category 5: Manufacturers of vehicles and engines, who will add estimated GHG emissions from the vehicles and engines that they produce to reports they already file under the Clean Air Act beginning with 2011 model years.

Mechanics of Reporting:

- Reports are due annually, with the first report due by March 31, 2011 (covering calendar year 2010). For vehicle and engine manufacturers, reports are due for the 2011 model year
- Reports must be filed electronically
- EPA will generally collect data at the facility level (as opposed to the corporate level). Some exceptions exist (e.g., vehicle and engine manufacturers, fossil fuel importers)
- Reporting must be in metric tons of CO₂ equivalent (i.e., amount of the GHG that has same global warming potential as a metric ton of CO₂)
- Each facility must have one and only one designated representative to certify and submit annual GHG reports. Designated representatives must be relatively senior and a responsible corporate officer
- Facilities must maintain records that serve as the basis for estimating emissions for 5 years
- A facility must keep reporting annually even if the facility later drops below emission levels that triggered reporting in the first place (this is often referred to as the “once in, always in” approach)
- Facilities must assume no capture of GHGs (i.e., 100% of the GHG generated reaches the atmosphere)
- EPA estimates that the cost of reporting under the proposed rule will be approximately \$160 million in the first year and \$127 million in subsequent years.
- Failures to report, to collect required data, to monitor as needed, to calculate emissions following the methods set forth in the rule, or to retain records for 5 years constitute violations of the Clean Air Act. Each day that the violation continues counts as a separate violation. Currently, civil and administrative penalties under the Clean Air Act can be imposed at a rate of up to \$37,500 per day, per violation.

Need to Know

Controversial Aspects: Aspects of the proposal likely to generate significant comment will likely include (but by no means be limited to): (1) the reasonableness of the “once in, always in” approach to reporting; (2) suggestions for more flexible enforcement provisions; (3) a desire to harmonize the rule’s reporting requirements with other reporting mechanisms that may already be in place (e.g., under the acid rain program); (4) a suggestion that reporting in the first year be allowed based on best available data, to allow affected entities time to install required equipment; and (5) concerns about the double-counting of emissions that EPA admits will occur due to the inclusion of both upstream production and downstream sources.

Complete list of source categories identified in proposal: A complete list of source categories covered by the rule can be found in the proposal at 74 Fed. Reg. 16448-16451 or online at http://www.epa.gov/climatechange/emissions/ghg_infosheets.html.

If you have questions about the proposed rule, please contact Phillip Fargotstein, 602-916-5453, pfargotstein@fclaw.com or Scott Thomas, 602-916-5427, sthomas@fclaw.com.

Phillip F. Fargotstein is a litigator with significant experience in environmental and toxic tort litigation, as well as medical malpractice defense. He helped draft the 1992 Arizona Comprehensive Air Quality Act and frequently represents industrial clients on air quality compliance, permitting, and enforcement issues and appeals. Mr. Fargotstein also defends business and property owners on underground storage tank, air quality, and Clean Water Act enforcement actions and cost recovery actions under the Underground Storage Tank Act, state and federal Superfund statutes, and state common law. He also advises clients and has spoken frequently on climate change issues and developing regulatory programs to address climate change. From 1984 to 2000 he also advised Marine Corps facilities in California and Arizona on environmental issues. He received his B.S. (1970) from the United States Naval Academy and his J.D. (1977) from Harvard University.

Scott H. Thomas practices environmental law with an emphasis on surface water and ground water quality issues (including NPDES permits, Section 404 dredge and fill permits, surface water quality standards, Arizona aquifer protection permits, and Safe Drinking Water Act issues). He also has experience in Superfund (and its Arizona equivalent, WQARF), solid and hazardous waste, underground storage tank, environmental due diligence, Endangered Species Act, climate change, and community right-to-know (EPCRA) matters. His practice focuses primarily on regulatory, compliance, administrative and legislative issues. He received his B.A. (1984) and his J.D. (1988) from the University of Virginia.



Phillip F. Fargotstein
Director
602.916.5453
pfargotstein@fclaw.com



Scott H. Thomas
Of Counsel
602.916.5427
sthomas@fclaw.com