

ENVIRONMENTAL ALERT

NEW GREENHOUSE GAS EMISSION FINDING AND REPORTING RULES

On April 17, 2009 U.S. EPA issued a finding that carbon dioxide and other greenhouse gas (GHG) emissions present a danger to human health and welfare, and the environment. This declaration follows closely on the heels of U.S. EPA's April 10, 2009 publication of a proposed rule mandating that all emitters of GHG¹, above a certain threshold, report the total sum of GHG emissions annually to U.S. EPA. U.S. EPA has estimated that over 13,000 facilities will be subject to these reporting obligations. U.S. EPA intends to use this information to guide future GHG emission limitations, the likelihood of which is greatly increased by endangerment finding.

Currently, less than half the states have state-based GHG reporting requirements. Even for facilities in those states, it should not be assumed that actions taken to comply with state requirements will be sufficient to meet federal standards.

Under the proposed federal rule, facilities emitting 25,000 or more metric tons of CO₂ or other GHGs per year must submit an annual report that details their GHG emissions. Carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, hydrofluorocarbons, perfluorochemicals and other fluorinated gases make up the list of GHG that must be included in the report. Certain sources will be required to submit an annual report even if they fall below the 25,000 metric ton threshold – i.e., those that fall into the categories of large manufacturing operations such as petroleum refineries, lime and cement producers.

Under the rule, the first annual report is due no later than March 31, 2011 for the 2010 calendar year. As such, the reporting requirement applies to emissions from January 1, 2010 forward – a date less than eight months away. Accordingly, every facility subject to this rule – or that recognizes that it may be subject to the rule - should commence work now to ensure that its emissions accounting system is complete and in place no later than December 31, 2009, so as to begin recording GHG emissions by January 1 of next year. It is important to note that a report is required for each facility, as opposed to each company.

Accuracy of reporting is critical because the proposed rule does not provide any allowances or estimations for missing data. Additionally, the GHG reports are expected to have a direct impact on the number of GHG credits or allowances that may ultimately be allocated to each facility under the anticipated future cap-and-trade program. Thus, accuracy is critical because current regulatory analysis suggests potentially significant adverse future impacts to an affected facility's GHG allocations and credit needs from an over- or under-counting of current GHG emissions.

Facilities, will likely face considerable challenges to accurately count and report their GHGs. For example, facilities will need to account for and distinguish between process emissions and combustion emissions. In the first instance, the accounting will be of direct emissions only, as indirect emissions (such as offsite electric generation) are currently excluded. Further, in establishing an effective carbon

¹ Including supplier of fossil fuel and industrial chemicals, manufactures of motor vehicles and engines, as well as large direct emitters of GHG.

emission accounting system, facilities may find it necessary to implement a “carbon balance method” using the equations described in the rule for each process to mass balance inputs and outputs, and respective weight fractions of carbon in each process to determine GHG emission rates. Alternatively, facilities may consider using a site-specific emission factors based on an extensive stack testing protocol (expected to be an expensive proposition).

In connection with these reporting obligations, the proposed rule contains many recordkeeping requirements. For example, each affected facility must maintain a list of all units, operations, processes, and activities for which GHG emissions were calculated; the data used to calculate the GHG emissions; documentation of the process used to collect the necessary data; the GHG emission calculation derivations and methods used; emission factors and their basis; and facility operating data.

Interested parties may submit comments to U.S. EPA on the proposed rule but must do so before the close of the public comment period on June 9, 2009. Given the magnitude and complexity of this effort, we are urging that potentially affected facilities commence development of their carbon accounting system as soon as possible in 2009. In the meantime, the Eckert Seamans Environmental Team will continue to closely monitor this and other climate change legislation and regulatory developments.

The Environmental Alert is intended to keep readers current on matters affecting environmental issues and is not intended to be legal advice. For information or assistance regarding any of the information noted above, please contact Scott R. Dismukes at 412.566.1998 or sdismukes@eckertseamans.com, David A. Rockman at 412.566.1999 or drockman@eckertseamans.com, Erin J. McDowell at 412.566.6070 or emcdowell@eckertseamans.com or any other attorney with whom you have been working.

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