
Climate Change—US Regulatory Developments

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The Environmental Protection Agency (EPA) is moving forward with two key climate change regulatory proposals, one to establish a mandatory greenhouse gas (GHG) reporting system and one to address the 2007 Supreme Court decision in *Massachusetts v. EPA* regarding the Agency's obligation to make an endangerment finding under Section 202(a) of the Clean Air Act with respect to GHGs.

Mandatory GHG Reporting Program

On March 10, 2009, EPA Administrator Lisa Jackson signed a proposed rule establishing a mandatory GHG reporting program under the Clean Air Act (CAA); the proposal is expected to appear in the Federal Register shortly. A prepublication copy of the proposed rule (which runs over 1,400 pages in length) is available [here](#).

The proposed rule, which builds on existing reporting programs and guidance documents, applies to facilities that emit one or more covered GHGs,¹ as well as suppliers of fossil fuels, manufacturers of motor vehicle and engines, and suppliers of industrial GHGs. EPA has set a general emissions-based threshold of 25,000 metric tons of carbon dioxide equivalent per year; however, for some listed source categories (e.g., electronics manufacturing facilities and fossil fuel suppliers) there are alternative thresholds.² EPA has estimated that the regulations would apply to slightly more than 13,000 facilities and cover 85-90% of GHGs emitted in the United States.

The proposal would require covered facilities to submit annual reports, by March 31 for the prior calendar year, beginning for reporting year 2010 (report due March 31, 2011). Reporting is to be done at the facility level, except for vehicle/engine manufacturers and certain fuel and industrial GHG suppliers where reporting can be done at the company level.

The proposed rule sets forth calculation and reporting methodologies that must be used by facilities in each covered source category. Facilities subject to the reporting requirements must submit a laundry list of information, including a standard set of information regarding facility emissions (on both an aggregate carbon dioxide equivalent and GHG-specific basis), as well as any additional information specified in the applicable subpart of the regulations. These reports are in addition to any other reports that may be required under applicable federal or state GHG or CAA programs.

The Agency is proposing a "self-certification with EPA verification" compliance scheme whereby each reporting facility would be required to submit a signed certification statement, to accompany each annual report, affirming that the report was prepared in compliance with the regulations (including use of the appropriate methodology) and certifying that the emissions data and all other information reported are true and accurate to the best knowledge and belief of the certifying official. The proposed rule would also require that each report include "...sufficient data and supplementary information to verify the reported GHG emissions." EPA would then use the supporting data and "other information" (e.g., comparison of data across similar facilities, or facility inspections) to verify that the reported emissions data are accurate and complete.

The proposed rule would subject companies to enforcement under Section 113 of the CAA for a variety of violations of the regulations, including failure to report GHG emissions, failure to collect data needed to calculate GHG emissions, failure to continuously monitor and test as required, failure to retain records needed to verify the amount of GHG emission and failure to calculate GHG emissions following the methodologies specified in the regulations. Importantly, the regulations specify that each day of a violation constitutes a separate violation, indicating that EPA intends that certain violations, such as failure to retain records, would accumulate on a daily basis.

Among the key issues for companies with facilities potentially covered by the reporting rule are:

- to what extent methodologies proposed in the rule for calculating GHG emissions are based on realistic emission or formulation factors;
- whether companies first need to acquire additional equipment (such as testing equipment or data collection software) or develop additional data/information in order to provide the required data and information;
- for those currently subject to a federal or state GHG reporting scheme, whether these calculation methodologies and/or reporting requirements are consistent with existing obligations or require the development of new, different processes; and
- the importance of having a mechanism in place to ensure that data generated for the preparation of these reports are consistent with data generated and reported to EPA or other regulatory agencies pursuant to other regulatory programs.

Publication of the proposal in the Federal Register will trigger a 60-day comment period; in addition, EPA will be holding at least two public hearings on the proposal in April—one in Washington DC and one in Sacramento, California. EPA has also published two-page "information sheets" for each source category [here](#).

Endangerment Finding

EPA is continuing to work on the issues raised by the Supreme Court in its April 2, 2007, decision in *Massachusetts v. EPA*, specifically whether GHGs emitted from new motor vehicles endanger public health or welfare. The issue arose after EPA denied a 1999 petition to regulate GHGs pursuant to Section 202(a) of the CAA. In its April 2007 decision, the Supreme Court rejected the Agency's rationale for denying the petition, finding that GHGs are CAA "air pollutants" and requiring that EPA

make an affirmative finding as to whether or not GHGs endanger public health or welfare (in the alternative, EPA could conclude that scientific uncertainty precludes the Agency from making a reasoned judgment on the endangerment issue).

In several statements since she was confirmed as EPA administrator, Lisa Jackson has indicated that the Agency would work diligently towards issuance of an endangerment finding. A leaked internal EPA document dated March 6, 2009, indicates that the endangerment finding has been "fast-tracked" with a goal of completing internal Agency review by March 16, completing interagency review by April 10, and publication of a proposed endangerment finding in the Federal Register by April 30. According to that document, the proposal will conclude that the collective group of six GHGs cause or contribute to air pollution that endangers public health and welfare.

If EPA does make a positive endangerment finding, it will be required to develop GHG emission standards for new motor vehicles under Section 202(a) of the CAA. Without diminishing the importance of this consequence in isolation, the ramifications of a positive endangerment finding extend far beyond the triggering of motor vehicle emission standard requirements.

For example, once EPA makes an endangerment finding, it is likely to be required to set National Ambient Air Quality Standards (NAAQS) for GHGs, as Title I of the CAA requires that EPA establish NAAQS for pollutants that may reasonably be anticipated to endanger public health or welfare. Further, an endangerment finding may trigger regulatory requirements to control GHG emissions under both the New Source Performance Standards (NSPS) and the Prevention of Significant Deterioration (PSD) programs.

For those companies that could potentially be impacted by statutory or regulatory programs aimed at reducing or controlling GHGs, the issue of whether these programs come from comprehensive federal legislation, from regulation under existing CAA authority, or from both, is critical. EPA has indicated on several occasions that if it were to make an endangerment finding, it would seek to ensure maximum coordination with federal legislative efforts and with the regulatory requirements that would flow from such a finding. The potential disruptive ramifications from a failure to do so require that the Agency fulfill this commitment.

Conclusion

The US has been expected to move forward with a GHG policy following last November's election. The pace and scope of EPA's plan to fulfill that expectation now is becoming clear. Many important questions must be addressed over the near term, and the coordination between EPA's plan and any future legislation will be critical. If you have questions about how these developments may affect your company, contact Ken Meade in WilmerHale's Environmental practice group, or your WilmerHale lawyer.

¹ Covered GHGs include carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, hydrofluorocarbons, perfluorochemicals and other fluorinated gases.

² The regulations would establish 41 separate source categories of facilities subject to the reporting requirements.

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