

EPA Finalizes GHG Reporting Rule

On September 22, 2009, EPA issued the final Mandatory Reporting of Greenhouse Gases (GHGs) Rule. The 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
- 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 first 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. In separate public comments not part of the rule, EPA enforcement

officials have emphasized their 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.

Those companies for which this rule introduces new data collection requirements should begin developing their data collection and reporting programs now. 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 ensure 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.

EPA Releases GHG PSD and Title V "Tailoring Rule" Proposal

On September 30, 2009, EPA released its proposal to "tailor" the major source applicability thresholds for greenhouse gas (GHG) emissions under the PSD and Title V programs, and to set a PSD significance level for GHG emissions. EPA expects to issue a light duty motor vehicle rule regulating GHG emissions in March 2010, which will result in GHG emissions becoming "regulated air pollutants" and trigger PSD and Title V applicability requirements for GHG emissions. Comments will be due on the proposal sixty days from the date it is published in the Federal Register.

EPA estimates that the permitting burdens would be staggering if the current PSD and Title V major source and PSD major modification thresholds were to apply to GHG emissions. EPA states that permitting authorities would receive approximately 40,000 PSD permit applications each year – currently, they receive approximately 300 – and they would be required to issue Title V permits for approximately 6 million sources – currently their Title V inventory is approximately 15,000 sources.

Relying on the legal doctrines of "absurd results" and "administrative necessity," the proposed rule would "phase in" the applicability thresholds for both the PSD and Title V programs for GHG sources. The first phase, which would last six years, would establish a temporary level for the PSD and Title V applicability thresholds at 25,000 tons per year (tpy), on a "carbon dioxide equivalent" (CO₂e) basis, and a temporary PSD significance level for GHG emissions of between 10,000 and 25,000 tpy CO₂e. EPA indicates that it would take other streamlining actions during the six-year period and within five years of adoption of the rule would conduct a study to assess issues related to administration of the two programs. EPA states that it would then conduct another rulemaking that would promulgate, as a second phase, revised applicability and significance thresholds and other streamlining techniques.

EPA reviews in detail its analysis to support its conclusion that it has the authority under the judicial doctrines of "absurd results" and "administrative necessity" to establish major source and major modification thresholds which are orders of magnitude above the statutory levels in the Act. Under the judicial doctrine of "absurd results," EPA asserts that a departure from a literal application of statutory provisions is authorized if it would produce a result that is inconsistent with other statutory provisions or Congressional intent, and in particular ones that would undermine Congressional purposes. The judicial doctrine of "administrative necessity" authorizes an agency to depart from statutory requirements if the agency can demonstrate that the statutory requirements, as written, are

impossible to administer. The agency must first attempt to mitigate administrative problems through techniques consistent with the statutory requirements and, if deviation from the statutory requirements is nevertheless necessary to allow administrability, the deviation must be limited as much as possible.

EPA emphasizes that the extraordinary increase in the scope of the permitting programs that would result from applying the statutory and regulatory PSD and Title V applicability thresholds to sources of GHG emissions, coupled with the resulting burdens on small sources and permitting authorities, were not contemplated by Congress in enacting the PSD and Title V programs. It would result in administrative strains that would lead to multi-year backlogs in issuance of PSD and Title V permits, which would undermine key purposes of the programs. Sources of all types – whether they emit GHGs or not -- would face long delays in obtaining PSD permits, which Congress intended to be issued expeditiously to allow construction and expansion of sources. Similarly, sources would face even longer delays in obtaining Title V permits, which Congress intended to promote enforceability. EPA concludes that these and other consequences of applying the statutory PSD and Title V applicability thresholds to GHG sources would provide the grounds for EPA to rely on the “absurd results” doctrine to establish different thresholds. EPA also states that the impossibility of administering the permit programs brings into play the “administrative necessity” doctrine to support its proposal.

EPA reviews a range of techniques that it will pursue to streamline the applicability of PSD and Title V during the five-year first phase under the proposal. Among the techniques it mentions are defining “potential to emit” to be closer to actual emissions, general permits, and presumptive best available control technology under the PSD program. It indicates that these techniques to improve administrability cannot be in place by March of 2010, when it expects the PSD and Title V requirements to be triggered for GHG emissions.

EPA Publishes Reconsideration Notice on GHG “Regulated Air Pollutant” Memorandum

On October 7, 2009, EPA published a notice requesting comment on its reconsideration of the December 18, 2008 memorandum issued by former Administrator Johnson under which he concluded that greenhouse gas (GHG) emissions are not “regulated air pollutants” under the Clean Air Act. 74 Fed. Reg. 51535. His interpretive memorandum indicated that GHGs would become regulated pollutants at the time that requirements are adopted to control GHG emissions. EPA states in the notice that its preferred interpretation of the term “regulated air pollutant” is that pollutants, including GHGs, would come within the definition of the term, when actual control requirements are established for sources regulated under the Act. EPA’s preferred interpretation then would effectively continue in place the Johnson memorandum interpretation. Comments on the reconsideration notice are due by December 7.

EPA also seeks comment on other possible interpretations of the term “regulated air pollutant.” These interpretations are: making PSD applicable to a pollutant on the basis of (1) adoption of an EPA regulation requiring monitoring or reporting of pollutants; (2) the inclusion of regulatory requirements for specific pollutants in an EPA-approved state implementation plan; (3) an EPA finding of endangerment; and (4) the grant of a section 209 waiver (under which California is authorized to establish vehicle standards that differ from federal requirements).

As a practical matter, it appears that the final action on the reconsideration of the Johnson memorandum will have little significance for GHGs as regulated air pollutants, because GHGs will become regulated air pollutants by virtue of adoption of light duty vehicle standards before or at the time of the final action on the reconsideration notice. As indicated in the PSD and Title V Tailoring Rule proposal released on

September 30, EPA intends to finalize the light duty motor vehicle rule by March 2010 and, at the same time, finalize the Tailoring Rule so that significantly higher major source and major modification applicability thresholds will be established for GHG emissions than are provided for under current law.

Second Circuit Rules That Climate Change Nuisance Action May Proceed Under “Federal Common Law”

On September 21, 2009, the U.S. Court of Appeals for the Second Circuit reinstated two lawsuits filed by eight states, New York City, and three environmental groups that allege that carbon dioxide emissions from six electric power generation companies contribute to climate change and constitute a public nuisance under federal common law. In *State of Connecticut, et al. v. American Electric Power Company Inc., et al.*, No. 05-5104, 05-5119 (Sept. 21, 2009), the appeals court vacated the district court decision that dismissed the lawsuits on the grounds that the plaintiffs’ public nuisance claims were non-justiciable under the political question doctrine. The ruling represents a novel and potentially far-reaching expansion of the law, and could spur new climate change claims and lawsuits.

Background

In 2004, California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, Wisconsin and New York City sued six electric power generation companies (including a company that provides management and professional services to its affiliated generation company) that own and operate fossil fuel-fired power plants in twenty states. Three land trusts also filed a parallel lawsuit against the companies, which was consolidated with the States’ action. The plaintiffs allege that the ongoing carbon dioxide emissions from the companies’ power plants contribute to global warming, and have

caused, and will continue to cause, serious harm to human health and the environment. Relying on the federal common law of public nuisance, the plaintiffs seek injunctive relief to compel the defendants to cap and reduce their carbon dioxide emissions.

In 2005, the district court dismissed the lawsuits, holding that the claims asserted in the complaints were barred under the political question doctrine. As the U.S. Supreme Court has explained, the political question doctrine “excludes from judicial review those controversies which revolve around policy choices and value determination constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.” The district court concluded that, before the court could adjudicate a climate change nuisance claim, the elected branches of government must make an “initial policy determination” on climate change and greenhouse gas (GHG) emissions, primarily because only the political branches of government are empowered to balance the relevant environmental, economic, and national security interests associated with climate change.

The Second Circuit’s Decision

On appeal, the Second Circuit held that the district court erred in dismissing the lawsuits under the political question doctrine. Acknowledging that a judicial decision imposing limits on GHG emissions may have political implications, the court nevertheless concluded that, given what it characterized as an absence of national policy on climate change and GHG emissions, a public nuisance suit could appropriately proceed. In support of its conclusion, the court noted that federal courts have often adjudicated public nuisance claims in the absence of policy actions by the political branches, including in the environmental context. Furthermore, the court stated that federal courts are well-equipped to assess complex scientific evidence and render a decision, even on an issue as novel and complex as climate change. In doing so, the court gave little weight to the role the Executive Branch plays in negotiating

international aspects of climate change controls or to the fact that Congress has so far declined to enact sweeping GHG emission limitations.

The Second Circuit also held that all of the plaintiffs have standing to maintain their public nuisance actions, and that the plaintiffs asserted a cognizable claim under the federal common law of nuisance. The Restatement (Second) of Torts, upon which the court relied to supply the legal framework to analyze the plaintiffs' claims, defines a public nuisance as the "unreasonable interference with a right common to the general public."

The court also rejected the defendants' argument that plaintiffs' common law public nuisance claim is "displaced" by the Clean Air Act and other environmental statutes that already address global climate change and carbon dioxide emissions. Instead, the court concluded that "neither Congress nor EPA has regulated greenhouse gas emissions from stationary sources in such a way as to 'speak directly'" to the plaintiffs' allegations. Nonetheless, in its lengthy discussion of the displacement standard, the court made it clear that plaintiffs' public nuisance claims may well be pre-empted in the future should either Congress decide to legislate or EPA decide to regulate carbon dioxide emissions. Although it did not indicate how extensive regulation would need to be in order to create such pre-emption, in the concluding paragraph to its 139-page decision, the court opined: "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that time comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by greenhouse gases."

Impact of the Second Circuit's Decision

Although the Second Circuit's decision directly addresses only the claims against the specific electric power generation companies named as defendants in the lawsuits, the decision may have far-reaching implications on the energy industry and regulated community in general. The court's

decision to allow climate change litigation to proceed based on a common law public nuisance theory may prompt environmental organizations and state and local public entities to pursue similar actions against additional fossil fuel-fired power generators and other GHG-emitting industries. To ultimately prevail, plaintiffs still have significant hurdles to overcome, such as showing causation between the emissions and their particular injuries and in justifying any particular set of limits. If they remain successful in getting past the threshold pleading stage and into discovery, however, the cost of defending against such claims will expand exponentially. So, while we are a long way from a final judgment on such claims, we can nevertheless expect the Second Circuit's decision to be frequently cited, and it will likely embolden at least some plaintiffs to file new, similar actions.

Additionally, the court's decision may also influence Congressional and agency debate on whether, and how, to act with respect to pending climate change legislative proposals. This decision will likely be cited by some as a further indication of the need for legislative action. In the absence of such legislative action, EPA may cite the court's statement that traditional regulation may pre-empt tort suits as a further justification for EPA's using its traditional Clean Air Act authorities to regulate greenhouse gases.

EPA Issues Interpretation Regarding Implications of SSM Court Decision

On July 22, 2009, EPA issued a letter setting forth its interpretation of the implications of the D.C. Circuit's decision vacating two provisions in EPA's Section 112 General Provisions Rule that govern emissions during periods of startup, shutdown and malfunction (SSM). The court's decision takes effect on October 6.

The letter states that "[t]he vacatur will immediately and directly affect only the subset of Section (d) rules that incorporate 40 C.F.R. sections 63.6(f)(1) and (h)(1) by reference, and

that contain no other regulatory text exempting or excusing compliance during SSM events. EPA attaches two tables that indicate the rules that will be affected and those that will not be affected. EPA states that rules that include "specific regulatory text that exempts or excuses compliance during SSM events, and such regulatory text is in addition to, or in lieu of, a cross-reference to 40 C.F.R. sections 63.6(f)(1) and (h)(1)" are not impacted by the decision.

EPA's letter reasonably interprets the court's decision. EPA indicates that it will give the highest priority to addressing those rules that will be immediately affected and as to which sources will have difficulty complying during periods of SSM.

Federal Court Issues Significant Decision on NSR Remedies

On May 29, 2009, the United States District Court in the Southern District of Indiana issued a significant opinion related to "remedies" available to the government after a violation is established regarding the Clean Air Act's New Source Review provisions. The case involved Cinergy Energy Corp. and certain utility modifications that had occurred, largely in the late 1980s and early 1990s, as well as certain other smaller alleged violations occurring in 2000 associated with a test burn of alternative fuel that resulted in excess particulate matter emissions. At the time of the most recent decision, the presiding judge (for some violations) and a jury (for others) had already concluded that the early projects violated NSR because the company had not secured at the time proper pre-construction permits. The court had also earlier concluded that for those violations (as opposed to the 2000 PM violations) the statute of limitations prevented the court from imposing civil penalties, i.e. a financial fine, because the government had waited too long to bring its suit. The court had also earlier concluded, however, that the statute of limitations did not prevent the court from ordering injunctive

relief, designed to "mitigate" or "remediate" for the excess emissions that occurred. Thus, the primary question before the trial court in its most recent decision was whether it would order injunctive relief and, if so, what.

At the government's urging, and over Cinergy's objection, the court did agree to order injunctive relief. In doing so, it went through the following analysis... First, the court considered competing testimony and reached a decision on what control technology Cinergy would have been required to install at the time, i.e. what was the best available control technology ("BACT") or Lowest Achievable Emissions Rate ("LAER"), in 1989-1990 for the emissions in question... In doing so, it heard from various government-sponsored and Cinergy-sponsored experts and made findings about which experts it credited and why, often accepting the government's view but sometimes accepting Cinergy's. Second, the court, again relying on testimony from the parties, computed the total emissions of various types (e.g. SOx and NOx) that actually occurred. Third, the court computed the emissions that would have occurred had BACT/LAER been installed. Finally, it compared the two in order to determine the amount of emissions that it felt had occurred that were in excess of what should have occurred.

Having made findings on the "excess emissions" levels, the court then considered whether those emissions had caused "irreparable harm" warranting further relief. The court concluded irreparable harm had occurred, pointing especially to expert testimony on the role that the excess SOx and NOx emissions had in contributing to secondary PM2.5 formation and, in turn, what the court described as the significant human health effect that PM2.5 would have had across six states. The court rejected Cinergy's claim that because Cinergy was in compliance with its acid rain program emissions obligations, no excess emissions occurred. The court also concluded the government had failed to prove its additional claims of injury due to acidic deposition impacts and mercury impacts.

As to the actual remedy, the court concluded that it would order three significant steps. First, it ordered certain of the units involved (the so-called Wabash Units) to completely shut down no later than September 30, 2009. This appeared to be, based on the testimony the court cited, about three years earlier than Cinergy was itself contemplating shutting down the units. Second, in the roughly five months it was given to shut down the units, the court ordered Cinergy to run those units at emissions levels no higher than the emissions levels occurring before the modifications that occurred in the late-1980s (the so-called “baseline”). Finally, it ordered Cinergy to surrender SO_x emissions allowances connected with the acid rain program in an amount equal to the SO_x emissions that will have occurred in the roughly sixteen months that will pass between the jury’s verdict finding a violation (May 2008) and the September 30, 2009 shut-down. The court indicated it believed these three steps were necessary to remediate the excess emissions that had occurred through the failure to install BACT/LAER. The court refused to order an immediate shut-down, indicating it was concerned about the effect this could have on serving certain load pockets during the peak-demand summer months in 2009. Finally, as to certain violations at other facilities and where the government had brought suit within the statute of limitations, the court ordered a fine of nearly \$700,000, computed based on the maximum daily CAA fine of \$27,500 per day, times the number of violation days. It also ordered the installation of emissions monitoring equipment at the subject facility.

This decision is significant for several reasons. First, because no NSR cases brought in connection with EPA’s NSR enforcement initiative until now had actually proceeded to a decision on remedy, there has been significant uncertainty about what a court would do if forced to consider remedy issues. Although other courts would not be required to follow the reasoning here, the opinion is likely to be heavily cited, especially on issues such as how to compute

“excess emissions” and the use of such “excess emissions” to configure remedies. In addition, the court was willing to itself determine questions such as what BACT/LAER would have been at the time, a highly technical subject. Finally, the court was willing to take the fairly bold step of ordering that units be shut down, albeit units that the company appeared to concede were likely to be shut down in future years rather than have emissions controls installed, well in advance of the company’s proposed time-line, and even in the face of some evidence that the shut-down might affect service reliability.