

## The Greenhouse Gas Reporting Rule: Are You Ready?

Law360, New York (October 04, 2010) -- Major emitters of greenhouse gases subject to the U.S. Environmental Protection Agency's GHG Reporting Rule are required to monitor and record their GHG emissions on a facility-by-facility basis as of Jan. 1, 2010.

For companies subject to the reporting rule, it is now past the halfway point to the March 31, 2011, deadline for the first annual GHG emissions report. At this juncture, covered facilities should take stock of their efforts to comply with their GHG reporting obligations and to prepare their first annual GHG report.

In doing so, facilities should focus on assessing: a) whether there are any gaps in their reporting scheme; b) if so, how to close those gaps between now and Dec. 31, 2010; c) whether they are on track to meet the stepped-up reporting requirements beginning Jan. 2, 2011; and d) the potential consequences if their annual GHG report is deficient.



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### Why Have a GHG Reporting Rule?

The EPA promulgated the GHG reporting rule with an eye toward improving the nationwide GHG inventory and providing baseline data for future restrictions on GHG emissions. Until recently, it was anticipated that GHG reporting data would be used to assist policy and legislative initiatives, most likely an economywide cap-and-trade program.

With the delay and uncertain future of comprehensive climate legislation in Congress, however, attention has turned to the EPA's proposals to regulate GHGs under the Clean Air Act. This new reality has arguably increased the importance of accurate GHG reporting, given that the EPA is now officially the only game in town.

Beginning January 2011, covered facilities will have to contend not only with stepped up GHG reporting requirements, but the prospect of the EPA's tailoring rule, which tailors GHG emission thresholds as the precursor to regulating GHGs under Title V, New Source Review and Prevention of Significant Deterioration regulatory schemes.

### Which Sources are Covered Under the GHG Reporting Rule?

As a practical matter, nearly all current Title V sources are subject to the rule. Certain producers of raw materials, such as petroleum refiners and producers of petrochemicals, aluminum and cement, must report GHG emissions from all source categories, irrespective of size.

Additional source categories — including nonproducing sources such as industrial wastewater treatment facilities and industrial waste landfills — were added in July 2010.[1] Companies that do not fit into these categories are generally required to report emissions from facilities that emit 25,000 metric tons of carbon dioxide or its equivalent per year (tpy CO<sub>2</sub>e).

Lastly, suppliers of refined petroleum products and other liquid fuels must report prospective GHG emissions from future combustion of these products if they are calculated to exceed 25,000 tpy CO<sub>2</sub>e.

The rule provides source-category-specific GHG calculation methods. And the EPA has provided an online GHG applicability tool to assist companies in determining which sources are covered.[2]

As a general rule of thumb, however, an industrial source using more than 460 million standard cubic feet of natural gas or more than 8,000 tons of coal per year is likely to emit more than 25,000 tpy CO<sub>2</sub>e.

### **What Should You Be Doing to Comply With the GHG Reporting Rule?**

The following is a list of some of the action items that should be accomplished prior to submitting the annual report:

- Formalization of a written agreement from the company that authorizes the designated representative to certify the annual GHG report on behalf of the company.
- Submission to the EPA of a complete certificate of representation designating the authorized representative to certify on behalf of the company.
- Creation of a written monitoring plan which includes identification of data gatherers and procedures for collecting and maintaining quality assurance data (maintained on site).

Depending on source category, specific monitoring and record-keeping requirements include:

- Fuel usage records to determine mass or volume of fuel used during 2010.
- For sources required to determine higher heating value or carbon content of fuels combusted, sampling and analysis of fuel, in accordance with approved methodology and frequency.
- For all reporting sources, use of appropriate data substitution calculations for missing data parameters.
- For higher-tier reporting, required calibrations of oil and gas flow meters.

### **What Happens If You Discover an Error in Your Annual Report?**

Fortunately, the reporting rule provides procedures for missing data, including missing records for fuel usage. The substitute data, however, must be the best available estimate of the parameter.

A recent amendment to the rule also grants covered facilities 45 days to submit amended annual GHG reports upon the self-discovery or notification by the EPA of a “substantive error,” defined as one that “impacts the quantity of GHGs reported or otherwise prevents the reported data from being validated or verified.”[3]

The net effect of this change in the rule is to ensure that clerical errors in the report will not negatively impact the certification.

### **Why Is It So Important to Submit a Correct Annual Report?**

Many observers have assumed that the EPA will take a lenient approach to enforcement of the GHG reporting rule requirements in the first year. The agency, however, has made no public concessions in this regard, and indeed has emphasized the importance of enforcement to the integrity of the reporting program.

Given the novelty of the new regime and short lead-time before the rule became effective, the EPA may ultimately be more forgiving than usual regarding mistakes that it perceives as being in good faith.

And the EPA has stated that it will provide “extensive” technical assistance to regulated entities.[4] However, the agency has also stressed that enforcement is “critical to achieving the EPA’s objective of collecting accurate GHG emissions data in a timely manner.”[5]

EPA Administrator Lisa Jackson has listed climate change as the EPA’s number one priority,[6] so it is anticipated that the agency will devote substantial resources to oversight and enforcement of the reporting requirements.

In addition, annual reports (such as annual compliance certifications under the CAA) must be certified as being “true, accurate and complete.” If history is any lesson, the EPA will likely be aggressive in pursuing any company that files a false report.[7]

Violations of the GHG reporting rule are considered violations of the CAA.[8] As in other contexts, the EPA expects covered facilities to have practices and procedures in place sufficient to verify the accuracy of the report, and the agency will rely upon them to determine whether the facility is in compliance with the reporting obligations.

Failure to provide an accurate certification can lead to a number of potential violations, 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 emissions and failure to calculate GHG emissions following the methodologies.”[9]

While the EPA declined to include in the final rule provisions for citizen suits and formal petitions to the agency, it encouraged public use of its “tips” website.[10] Given the high profile of climate change issues, watchdogs and whistleblowers may scour initial GHG monitoring reports and alert EPA to potential violations.

Moreover, the EPA has stated that it will verify calculation accuracy and completeness for all reports, perform electronic quality and consistency checks and, if necessary, conduct on-site audits.[11]

On the positive side, submission of an accurate and complete GHG monitoring report may benefit a company in several ways. First, facilities that have accurately monitored their GHG emissions for 2010 will have a head start in determining the impacts of the Tailoring Rule,[12] which takes effect Jan. 2, 2011 and mandates the following:

- Sources with existing Title V permits must incorporate GHG emissions provisions within the permit whenever they apply to renew, amend or add a permit.

- Sources already subject to PSD must apply those requirements to projects that increase GHG emissions by at least 75,000 tpy CO<sub>2</sub>e.
- Beginning in July 2011, new and existing sources not already subject to Title V and PSD will be regulated under those programs if they emit (or have the potential to emit) at least 100,000 tpy CO<sub>2</sub>e.
- Smaller sources will be phased in over the ensuing years.

Because the EPA has indicated that emissions calculation methodologies will carry over from one rule to the next,[13] accurate GHG reporting will assist facilities not only in determining which sources may be impacted by the tailoring rule, but also in assessing whether a modification triggers a Best Available Control Technology analysis for GHGs under the PSD program.

Second, accurate GHG monitoring reports may streamline the Title V annual certification process for qualifying sources. As the EPA notes in the final tailoring rule, for sources subject to both GHG reporting and Title V requirements, “the emissions description requirements in the Title V regulations will generally be satisfied by referencing information provided under the reporting rule.”[14]

Finally, there are possible intangible benefits to early compliance. If, as predicted, there will be increased scrutiny by the EPA and watchdogs during the early years of the program, accurate and careful attention to detail in reporting will prevent collateral effects associated with public statements or other bad publicity.

Conversely, inaccurate or incomplete reports may raise red flags and invite additional scrutiny from the EPA once binding GHG emissions provisions take effect in 2011.

## **Conclusion**

By assessing and making adjustments at this juncture, companies can avoid a GHG fire drill in early 2011 or, worse, the prospect of an EPA enforcement action and further scrutiny when mandatory emissions limits take effect next year.

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[1] 75 Fed. Reg. 39736.

[2] See [www.epa.gov/climatechange/emissions/GHG-calculator/index.html](http://www.epa.gov/climatechange/emissions/GHG-calculator/index.html) (last visited Sept. 24, 2010).

[3] 75 Fed. Reg. 48743, 48752.

[4] Id.

[5] ENV'T'L PROTECTION AGENCY, MANDATORY GREENHOUSE GAS REPORTING RULE: EPA'S RESPONSE TO PUBLIC COMMENTS, VOL. 8, COMPLIANCE AND ENFORCEMENT (2009) at 30.

[6] See, [blog.epa.gov/administrator/2010/01/12/seven-priorities-for-epas-future/](http://blog.epa.gov/administrator/2010/01/12/seven-priorities-for-epas-future/).

[7] See, e.g., *United States v. Shore Terminals LLC*, 09-cr-0395 (N.D. Cal.) (Defendant filed false Title V annual compliance certification regarding volatile organic compound emissions, paid \$2.5 million in penalties.); *United States v. McWane, Inc.*, 05-cr-00811 (D. Utah) (Defendant knowingly filed false emissions inventory reports that understated particulate matter emissions levels, paid \$3 million in penalties; general manager of facility received one-year prison sentence.).

[8] 40 C.F.R. § 98.8.

[9] *Id.* As with other sections of the CAA, "each day of a violation constitutes a separate violation." A company that submits a knowingly erroneous report may be subject to additional criminal penalties for making false statements to the government. 18 U.S.C. § 1001(a).

[10] 74 Fed. Reg. 56260, 56361.

[11] *Id.* at 56282; 40 C.F.R. § 98.3(f).

[12] Several plaintiffs challenging the Tailoring Rule have recently moved to stay EPA regulation of GHG emissions while their legal challenge is pending before the D.C. Circuit. If granted, this motion would delay indefinitely implementation of the regulations. See *Petitioners' Motion for Partial Stay of EPA's Greenhouse Gas Regulations*, *Coalition for Responsible Regulation Inc. v. EPA*, No. 10-1073 (D.C. Cir. Sept. 15, 2010).

[13] See, e.g., 75 Fed. Reg. 31514, 31522 (stating that whenever a source "perform[s] an emissions calculations involving CO<sub>2</sub>e for the purposes of determining the applicability of PSD or title V requirements, [it should] use the [global warming potential] values codified in the EPA's mandatory GHG reporting rule").

[14] 75 Fed. Reg. 31514, 31523, n.12.

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