

**GREENHOUSE GAS REGULATION**

PROCESS HEATING UP

**GHG**  
**Reporting**

by Tom Wood, Stoel Rives LLP (Portland)

**Unseasonal**  
**Heat****Introduction**

Autumn is commonly associated with a cooling-off period. However, this year the world of greenhouse gas regulation heated-up immensely in September due to a combination of a federal court decision and regulatory agencies' activities at both the state and national levels. This article outlines each of these developments, including near-immediate obligations for Oregon sources subject to the state greenhouse gas reporting program.

**Common Law**  
**Nuisance Case**  
**Reinstated****Federal Nuisance Decision**

Five years ago eight states, New York City and three land trusts made headlines when they sued six electric utilities alleging that their carbon dioxide (CO<sub>2</sub>) emissions constituted a federal common law nuisance. In "*Connecticut v. American Electric Power Company*" (*Connecticut*), the plaintiffs wanted to force the companies to cap and reduce their CO<sub>2</sub> emissions. The federal trial court dismissed the case, holding that the issue was a political question that had to be addressed through the political branches of government and not through the courts. On September 21st the US Second Circuit Court of Appeals reversed the trial court. While this decision enables the plaintiffs to resume their nuisance lawsuit against the utilities, it does not guarantee them victory as they will have significant evidentiary challenges to overcome at trial. In reinstating the suit, the Second Circuit touted the judiciary's ability to handle complex cases of this type and said that doing so would not interfere with the business of the other branches of government. However, the court repeatedly noted that the judiciary will be preempted from addressing carbon dioxide through nuisance law once Congress (i.e., the legislative branch) amends the federal Clean Air Act to regulate CO<sub>2</sub> or the executive branch moves to regulate CO<sub>2</sub> under existing US Environmental Protection Agency (EPA) authority.

**Decision Impacts**

The *Connecticut* decision potentially has significant — though likely short-lived — impacts on climate change litigation. One of the areas heavily debated in *Connecticut* was who has the ability to bring a federal nuisance claim such as that alleged in this case. The defendant companies recognized that states have the ability to bring federal common law nuisance claims. However, they argued that the potential contribution of carbon dioxide emissions to climate change was not the sort of issue for which a federal nuisance suit is available because, among other reasons, the impacts could not be traced to particular emission sources. The Second Circuit rejected this argument. The court also rejected arguments that private parties cannot bring federal common law nuisance suits related to climate change. The court recognized that the US Supreme Court had never addressed this question, but concluded that private parties should be able to proceed with federal nuisance claims related to climate change when they invoke an overriding federal interest or federalism concerns. This decision thus expands the scope of federal common law nuisance suits. However, the reasoning may not be accepted by western courts; the decision is only binding in those eastern states that make up the Second Circuit. Yet, while it is unclear how (or even if) this decision will be applied in other courtrooms, it clearly has relevance for the six electric utilities involved in *Connecticut*.

**Source**  
**Identification**  
**Issue****Policy Impacts**

Perhaps more important than its effect on jurisprudence is the effect this decision could have on Congress and EPA. The court noted that it was reasonable to assume that EPA has the authority to regulate greenhouse gas emissions if it first determines that they "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" (referred to as an "endangerment finding"). However, as the court noted, EPA has thus far only proposed to make such a finding and only in relation to mobile sources — not stationary sources such as factories and power plants. If and when EPA makes such findings, the agency must then develop a regulatory program. Until such time that a program is developed, the court held that the field is left open for federal common law nuisance suits. This holding will undoubtedly create increased support for taking the regulation of greenhouse gases out of the courts and back into the legislative or executive branches. However one regards the regulation of greenhouse gases, most people will agree that such regulations are better addressed through rule and/or statute than through decisions by judges who may well lack technical training and background in addressing air pollutants.

**Please Note:**

Your author serves on the Oregon DEQ Greenhouse Gas Reporting Advisory Committee and any comments regarding that program should be interpreted exclusively as the author's perspective and not as the views of the Advisory Committee.

**GHG Reporting**

**New Vehicle Standards**

EPA is poised to propose several rules that will commence the regulation of greenhouse gases for mobile and stationary sources. One of these rules is the greenhouse gas emission standard for passenger cars, light-duty trucks, and medium-duty passenger vehicles (model years 2012 through 2016). These light duty vehicle standards were been released on September 15th, but were not yet published in the Federal Register as this *Insider* went to print. This regulation of greenhouse gases for mobile sources could trigger the regulation of greenhouse gases for stationary sources. Thus, EPA is soon to propose a rule that will identify how to address greenhouse gases in the context of new source review. Ironically, these proposals will predate any EPA endangerment findings and the stationary source rules may go into effect prior to any stationary source endangerment finding. These new rules were not considered by the court as none of them had been finalized at the time of the decision. As these rules become finalized in the weeks and months ahead, the plaintiff's victory may prove short-lived. However, there is no question that the decision is likely to have a material impact on the debate regarding whether to proceed with greenhouse gas regulations.

**EPA Greenhouse Gas Reporting Program  
OBLIGATIONS COMMENCE ON JANUARY 1, 2010**

**New Reporting Rules**

As if in answer to the *Connecticut* decision, the next day (September 22nd) EPA signed final rules that will require sources nationwide to collect and report greenhouse gas emission data. The rules had not yet been published in the Federal Register. The program applies to those industrial facilities that directly emit 25,000 metric tons or more of greenhouse gases (carbon dioxide equivalent or CO<sub>2e</sub>), as well as manufacturers of vehicles and engines, fossil fuel suppliers, and industrial greenhouse gas suppliers. The EPA reporting program is estimated apply to capture data from approximately 10,000 reporters representing approximately 85 percent of the greenhouse gas (GHG) emissions that occur in the country.

**Involved Sectors**

Although the scope of the final rule is very broad, there are several key sectors that are excluded at this time. EPA's action appears a bit rushed. It may be coincidence that the reporting rule was signed the day before President Obama spoke to the United Nations committing the United States to strong climate change policy, though your author is inclined to think otherwise. As a result of its accelerated action, EPA was unable to complete all portions of the rule and chose to exempt eleven sectors from reporting at this time.

**Source Categories in the Final Rule\***

<b>Upstream Sources</b>	<ul style="list-style-type: none"> <li>• Suppliers of Coal-based Liquid Fuels</li> <li>• Suppliers of Petroleum Products</li> <li>• Suppliers of Natural Gas and Natural Gas Liquids</li> <li>• Suppliers of Industrial GHGs</li> <li>• Suppliers of Carbon Dioxide (CO<sub>2</sub>)</li> </ul>
<b>Downstream Sources</b>	<ul style="list-style-type: none"> <li>• General Stationary Fuel Combustion Sources</li> <li>• Electricity Generation</li> <li>• Adipic Acid Production</li> <li>• Aluminum Production</li> <li>• Ammonia Manufacturing</li> <li>• Cement Production</li> <li>• Ferroalloy Production</li> <li>• Glass Production</li> <li>• HCFC-22 Production and HFC-23 Destruction</li> <li>• Hydrogen Production</li> <li>• Iron and Steel Production</li> <li>• Lead Production</li> <li>• Lime Manufacturing</li> <li>• Miscellaneous Uses of Carbonates</li> <li>• Nitric Acid Production</li> <li>• Petrochemical Production</li> <li>• Petroleum Refineries</li> <li>• Phosphoric Acid Production</li> <li>• Pulp and Paper Manufacturing</li> <li>• Silicon Carbide Production</li> <li>• Soda Ash Manufacturing</li> <li>• Titanium Dioxide Production</li> <li>• Zinc Production</li> <li>• Municipal Solid Waste Landfills</li> <li>• Manure Management</li> </ul>
<b>Mobile Sources</b>	<ul style="list-style-type: none"> <li>• Vehicles and engines outside of the light-duty sector (light-duty in NPRM to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Fuel Economy Standards)</li> </ul>

**\* EPA DELAYED INCLUSION OF THE FOLLOWING SOURCE CATEGORIES:**

Electronics Manufacturing, Ethanol Production, Fluorinated GHG Production, Food Processing, Magnesium Production, Oil and Natural Gas Systems, Sulfur Hexafluoride (SF<sub>6</sub>) from Electrical Equipment, Underground Coal Mines, Industrial Landfills, Wastewater Treatment, Suppliers of Coal

Source: EPA, 2009

## GHG Reporting

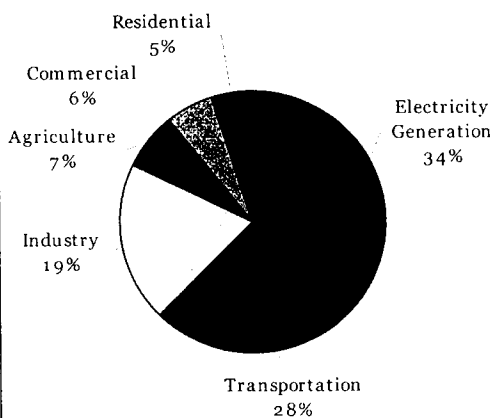
### Measuring v. Monitoring

#### Federal Requirements

A major component of the rule is a set of very detailed reporting protocols describing exactly how each source type must monitor and report its emissions.

For sources subject to the program, the immediate question is what must you do and when. The short answer is a lot and very quickly. Recordkeeping obligations commence on January 1, 2010 with the first report due on March 31, 2011 (for 2010 emissions). EPA distinguishes between “measuring devices” and “monitoring devices.” Measuring devices must be installed by March 31, 2010. Of note is the fact that absent alternative requirements specific to the device or sector, each measuring device must be calibrated to an accuracy of five percent. Mandatory minimum recalibration requirements are also included in the rule. Fuel billing meters are exempted from the calibration requirements, provided that the fuel supplier and any unit combusting the fuel do not have any common owners and are not owned by subsidiaries or affiliates of the same company. Some larger emitting source categories must install continuous emission monitors for tracking emissions of CO<sub>2</sub> or other greenhouse gas. Those sources generally have until the end of 2010 to install the monitors.

#### U.S. GHG Emissions (2007)



Source: Inventories of U.S. Greenhouse Gas Emissions and Sinks: 1990-2007 (April 2009)

Reporting under the EPA program will take place at the individual facility level for industrial facilities. Some regional and state GHG reporting programs (e.g., The Climate Registry, Washington State after 2012) require reporting entity-wide. However, EPA chose to not follow this pathway and instead require reporting on an individual plant basis. Facilities will report their emissions electronically. In determining whether a facility must report, it must first determine whether it includes one of the designated source categories. If so, then the facility will be subject to reporting. If not, it must determine whether its emissions will equal or exceed the 25,000 metric ton CO<sub>2e</sub> applicability threshold. In making this initial applicability determination for general combustion devices, CO<sub>2</sub> attributable to the combustion of biomass (but not methane or nitrous oxide) can be ignored. However, if subject to reporting, all emissions (i.e., including biomass derived) must be reported. When submitting any report, it must be certified by a Designated Representative established for the facility. One highlight of the rule, at least for facility owners nervous about the program costs, is that GHG emission reports will be verified by EPA, i.e., third party verification is not being required.

### Rule Review Recommended

The regulation section of the rulemaking (as opposed to the preamble) is 711 pages long in the signature copy. While this will be fewer pages in the Federal Register due to the miniscule type and three column format, this is still a very long and detailed rule. Any source potentially subject to the rule, and even those below the reporting thresholds, needs to perform a comprehensive legal review to ensure that it is positioned to meet its compliance obligations by year's end.

#### Oregon's Mandatory Reporting Program

Just as the federal GHG reporting rule was signed, Oregon moved into additional implementation stages of its state GHG reporting rule found in OAR 340, Division 215. The federal reporting rule was clear that it does not preempt state reporting programs. However, everybody's hope is that the programs can at least function in unison. Oregon's GHG reporting rule currently applies to stationary sources holding an air permit that both are listed on one of the state designated source categories and have GHG emissions (CO<sub>2e</sub>) of 2,500 metric tons per year or more. DEQ estimates that this currently includes approximately 143 sources. The Oregon Department of Environmental Quality (DEQ) reporting program has been in effect all year (see Fitzgerald, *Insider* #426.427; Article, *Insider* #441; and Wood, *Insider* #448) with reporting sources having to file a state GHG report in 2010 characterizing their 2009 emissions. These sources were only just recently told what they were expected to do to calculate emissions. In early September, DEQ placed out for public review (as opposed public notice and comment rulemaking) the emissions protocols generated last summer by the Western Climate Initiative (“WCI”)— the regional GHG program, see Futornick *Insiders* #422/423 & #424/425; Article, *Insider* #426/427; Duncan, *Insider* #430 and Futornick/Kranz, *Insider* #431). These protocols assume that certain information has been collected by sources and mandates specific procedures. Any source

#### EPA Mandatory GHG Reporting “Webinars”

EPA will host a number of web-based training sessions for people involved with reporting under the Mandatory Reporting of Greenhouse Gases Rule. Individuals interested must register in advance.

##### Schedule: General Provisions Training

- Webinar: September 28, 2009, 6:30 – 8:30pm PDT
- Webinar: September 30, 2009, 4:00 – 6:00pm PDT
- Webinar: October 6, 2009, 6:30 – 8:30 pm PDT
- Webinar: October 13, 2009, 6:30 – 8:30 pm PDT
- Webinar: October 20, 2009, 6:30 – 8:30 pm PDT
- Webinar: October 27, 2009, 6:30 – 8:30 pm PDT

##### Schedule: Detailed Training

This webinar training session will provide detailed information on such topics as applicability, estimating emissions, reporting, and recordkeeping requirements under the rule, as well as guidance for stationary fuel combustion facilities.

- Webinar: October 5, 2009, 6:30 – 8:30 pm PDT
- Webinar: October 8, 2009, 6:30 – 8:30 pm PDT
- Webinar: October 15, 2009, 6:30 – 8:30 pm PDT
- Webinar: October 19, 2009, 6:30 – 8:30 pm PDT
- Webinar: October 29, 2009, 6:30 – 8:30 pm PDT

##### For info:

EPA website: [www.epa.gov/climatechange/emissions/training.html](http://www.epa.gov/climatechange/emissions/training.html)

**GHG Reporting**

**October 9 Deadline**

**Protocol Questions**

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lacking any of the required information or systems identified in a protocol must, according to DEQ's webpage, seek permission from the DEQ for use of the alternate variable (i.e., monitoring parameter). "Variables" or "monitoring parameters" are the data collected. These data are then used with specified emission factors and methodology to calculate emissions. DEQ's webpage states that it will not allow the use of alternative emission factors or methodologies. Therefore, it is critical that sources review these protocols carefully and seek permission before October 9. Few sources have fully understood that this seemingly optional "comment" period is not an opportunity to comment on the protocols in a meaningful fashion, but, rather, is actually being characterized by DEQ as a source's sole opportunity to seek permission for a minor (and temporary) variation in the data inputs required by the protocols.

It is possible that DEQ will not maintain its commitment to the protocols it has on its webpage. As discussed above, EPA has mandatory reporting and recordkeeping protocols that accompany its rule. Sources subject to that rule must start complying with those requirements almost immediately upon the rule taking effect. It makes little sense to have those sources start to comply with the state protocols only to have to start implementing the different federal protocols. In fairness to DEQ, nobody anticipated that the federal reporting rules would come out as quickly as they did and there was a long overdue need to get protocols in the hands of reporting entities. However, now that the federal protocols are finalized and available, it seems imminently reasonable for DEQ to move away from the state (i.e., WCI-based) protocols. Stay tuned to see how DEQ addresses this complication.

In contrast to the federal reporting program, which imposes no reporting fee, DEQ is anticipating that it will need to collect approximately \$330,000 in fee income annually to populate and maintain the database needed to house the state greenhouse gas data. How these fees will be divided among the reporting sources is currently being discussed in DEQ's Greenhouse Gas Reporting Advisory Committee. Expect an interim fee to be implemented as an emergency rule in 2010, followed by a formal rulemaking effort.

**FOR ADDITIONAL INFORMATION:** TOM WOOD, Stoel Rives, 503/ 294-9396 or email: trwood@stoel.com.

**EPA WEBSITE:** Information about the EPA greenhouse gas reporting rule can be found at:

[www.epa.gov/climatechange/emissions/ghgrulemaking.html](http://www.epa.gov/climatechange/emissions/ghgrulemaking.html)

**DEQ WEBSITE:** Information about the DEQ reporting protocols can be found at:

[www.deq.state.or.us/aq/climate/reporting.htm](http://www.deq.state.or.us/aq/climate/reporting.htm)

**Tentative timeline for updates to Oregon's greenhouse gas reporting program**

