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Environmental & Safety Report

Proposed Rule Governing Reporting of Carbon Dioxide and Other Greenhouse Gasses (GHG)

On March 10, the EPA issued a pre-publication copy of a proposed rule governing reporting of carbon dioxide and other greenhouse gasses (GHG). The proposed rule will require large facilities in certain industry categories to provide annual reports of GHG emissions. The rule will allow facilities to either measure emissions or to use facility-specific calculation methods to determine GHG emissions. The EPA estimates that the rule will affect 13,000 facilities representing 85 to 90 percent of GHG emitted in the United States. The specific industry segments identified by the EPA as being impacted by the proposed rule include but are not limited to fuel combustion sources, electricity generation, ethanol, food processing, iron and steel, pulp and paper, waste water treatment facilities, manure management, natural gas, and landfills (see *http://www.epa.gov/climatechange/emissions/ghg_infosheets.html* for a complete list).

Since many of our clients will be subject to the emissions reporting rule, we have begun analyzing the impact of the proposed rule on the industry segments for which we routinely provide advice and counsel. We will provide an in-depth analysis of the proposed rule, including information on what areas may warrant comments, in the near future. Comments on the proposed rule will be due within 60 days of publication in the Federal Register, which has not yet occurred.

Alternative Energy Incentive Provisions and Environmental Appropriations of the American Recovery and Reinvestment Act of 2009

The American Recovery and Reinvestment Act of 2009 (Act), which became effective on February 17, 2009, contains numerous alternative energy incentive provisions and environmental appropriations. Notable provisions affecting companies are summarized below.

Alternative Energy Incentive Provisions

Energy Credits (Sections 45 and 48)[1]

The Act revises Section 45, which provides for renewable electricity production credits (Renewable Energy Credit), by extending the placed-in-service deadline to December 31, 2012 for qualified wind facilities and to December 31, 2013 for all other facilities (e.g., closed-loop biomass; open-loop biomass; geothermal; small irrigation; hydropower; landfill gas; waste-to-energy; and marine renewable facilities). The Act also revises Section 48, which provides for energy credits (Energy Credit), to eliminate the credit cap on small wind energy property and to remove the provision that reduces the basis of the property for purposes of claiming the credit if the property is financed by subsidized energy financing or private activity bonds. In addition, a taxpayer who places in service a facility that qualifies for the Renewable Energy Credit may elect, instead, to claim the Energy Credit.

The Act also provides for grants of up to 30% (but only 10% for microturbines, combined heat and power systems, and geothermal heat pumps) of the basis for energy property placed in service in 2009 or 2010 that would qualify for the Renewable Energy Credit or Energy Credit. If a taxpayer elects to take the grant, then the basis of the energy property must be reduced by 50% of the grant amount, and the taxpayer would be ineligible for either the Renewable Energy Credit or Energy Credit.

Qualifying Advanced Energy Product Credit (New)

The Act adds a new 30% qualified advanced energy production credit for investment in qualified property used in qualified advanced energy manufacturing projects which re-equip, expand, or establish facilities that manufacture clean technology, including renewable energy systems, electric grids to support the transmission and storage of renewable energy, energy efficiency, renewable fuel blending, carbon capture and sequestration, and other projects designed to reduce greenhouse gases. The Act requires the Treasury Department to establish a certification program within 180 days of enactment and allows the Treasury Department to allocate up to $2.3 billion in alternative energy investment credits.

Increased Limitations on New Clean Renewable Energy Bonds (New CREBs) and Qualified Energy Conservation Bonds (QECBs); New Private Activity Bond Exception (Sections 54C and 54D)

The Act increases the national limitations for New CREBs[2] to $1.6 billion (from $800 million) and for QECBs[3] to $3.2 billion (from $800 million). New CREBs and QECBs are both tax credit bonds.[4] The Act also adds, as a new exception to the definition of the private activity bond, any bond issued for the purpose of providing loans, grants, or other repayment mechanisms for capital expenditures to implement green community programs.

Residential Energy-Efficient Credit (Section 25D)

Under pre-Act law, Section 25D provided for a credit equal to 30% of the "qualified solar electric property expenditures," "qualified solar water heating property expenditures," and "qualified fuel cell property expenditures," subject to caps between $500 and $4,000.

The Act eliminates these caps for solar, geothermal, and wind property and eliminates the reduction in credits for property using subsidized energy financing.

Alternative Refueling Property Credit (Section 30C)

Pre-Act law provided for a 30% credit for "qualified alternative fuel vehicle refueling property,"[5] capped at $30,000 for businesses and $1,000 for individuals. The Act increases the credit to 50% in 2009 and 2010 for property other than hydrogen refueling property and also increases the caps to $50,000 ($200,000 for hydrogen refueling property) for businesses and $2,000 for individuals.

Carbon Dioxide Sequestration (Section 45Q)

The Act provides tax credits for qualifying carbon dioxide sequestration facilities (those which capture at least 500,000 metric tons of carbon dioxide a year) in the amount of $20 per ton of carbon dioxide captured and transported from an industrial source to permanent geological storage and $10 per ton for carbon dioxide captured and transported from an industrial facility to another facility to be used in enhanced oil recovery.

Plug-In Electric Drive Motor Vehicles (Section 30D)

Pre-Act law provided that the first 250,000 plug-in electric vehicles sold in the United States qualified for a base $2,500 tax credit that increased with battery capacity, with the credit limits ranging from $7,500 to $15,000 (depending on vehicle weight).

The Act expands the number of vehicles eligible for the credit to 200,000 vehicles per manufacturer (as well as allows partial credits for up to a year after this limit is reached) and limits the credit to $7,500 (regardless of vehicle weight). The Act also adds a new 10% credit (up to $2,500) for low-speed vehicles, motorcycles, and three-wheeled vehicles that would otherwise qualify for the pre-Act credit and a new 10% credit (up to $4,000) for plug-in vehicle conversion. Finally, as a result of the Act, these credits are now allowed against the Alternative Minimum Tax (AMT).

Environmental Appropriations

Among the Act's over $700 billion in spending is over $7 billion in appropriations for environmental programs. Below is a summary of those provisions.

Brownfield Redevelopment Grants

The Act appropriates $100 million for the EPA's Brownfield redevelopment grant program. Grants from this program are awarded to local governments, businesses, and other stakeholders that need funding to turn undeveloped, environmentally contaminated property into productive economic use. The EPA is currently evaluating about 700 pending applications for Brownfield funding and anticipates announcing the winners in mid-April. In allocating these new funds, the EPA hopes to identify high performing past recipients of Brownfield redevelopment funding that need additional funding. Previously, organizations receiving Brownfield funding were required to provide 20 percent of the cost of cleanup. The Act, however, eliminates this cost-share provision.

Leaking Underground Storage Tank Funds

The Act allocates $200 million to the EPA for enforcement and cleanup of petroleum leaks from underground storage tanks. The Congressional Committee on Appropriations estimates that this money will fund the cleanup of about 1,600 sites. The cleanup of underground tanks is usually administered by the states, so the EPA will allocate most of this money directly to the states. How the states use the money after that will depend on the specifics of their individual programs for cleaning up underground tanks. In many instances, the states will award the funds as grants to organizations undertaking cleanup efforts. According to the EPA, when the organization responsible for an underground tank cannot be identified, or is otherwise unable to participate in cleanup, the state may need to use the federal appropriations to complete a tank removal or cleanup itself.

Appropriations for Superfund Sites

Superfund Hazardous Waste Cleanup will receive $600 million under the Act to cleanup of hazardous and toxic waste sites. These funds may be used to accelerate the EPA's cleanup efforts at the more than 600 sites with ongoing construction, but the funds may also be used to start construction efforts at some of the other 1,255 sites on the EPA's National Priority List.

National and State Diesel Emission Reduction Program

The Act will provide $156 million in funding to the National Clean Diesel Funding Assistance Program. This program will award competitive grants to support the implementation of diesel emission reduction programs. Among those programs endorsed by the EPA include programs that add exhaust controls to vehicles, upgrade engines, adopt idle reduction technologies, or replace older vehicles with ones that use cleaner fuels. Government agencies, nonprofits, and "entities whose principle purpose is the promotion of transportation or air quality" are eligible for grants under this program. The EPA recently announced that it intends to open up the application process for these funds on March 17 and close the process 40 days thereafter.

In addition to the national program, the Act also provides $80 million to state diesel emission reduction programs. These programs vary somewhat between the states, but are similar to the national program. The state of Illinois, for example, will use its portion of the $80 million to fund its Illinois Clean Diesel Grant Program. Illinois's program provides grant money to local governments and environmental organizations with projects that reduce diesel emissions by retrofitting school buses, replace diesel engines and vehicles, or adopt anti-idling programs.

Wastewater Infrastructure Program

The Act allots $4 billion to the Clean Water State Revolving Fund. Money from this fund is first allocated to the states then awarded to local governments, cities, and sanitary districts. Depending on the state, the funds may be awarded as either low-interest loans, zero-interest loans, or, in some cases, grants. To illustrate, the Illinois Environmental and Protection Agency (IEPA) has been allocated about $179 million from the Clean Water State Revolving Fund and will administer the money through its Water Pollution Control Loan Program (WPCLP). According to the IEPA, funds from the WPCLP can be used to (1) construct new wastewater collection and treatment facilities, or upgrade and expand existing facilities; (2) replace, rehabilitate, or extend collection systems and interceptors; or (3) separate combined sewers or upgrades to combined systems to eliminate overflows, surcharging, or flooding. The deadline for applying for funds varies among the states but is likely to be very soon or has already passed. The deadline in Illinois for submitting an initial request is March 31, 2009.

Drinking Water Infrastructure Program

The Act allots $2 billion to the Drinking Water State Revolving Fund. Like the Clean Water State Revolving Fund, money from the Drinking Water Fund is first allocated to the states then awarded to local governments, cities, water districts, and, in some cases, privately held water distribution facilities. Depending on the state, the funds may be awarded as either low-interest loans, zero-interest loans, or grants. The IEPA has been allocated about $80 million from this fund and will administer the money through the Public Water State Loan Program (PWSLP). Funds from the PWSLP can be used to (1) upgrade or replace existing facilities to bring them into compliance with the Safe Drinking Water Act and the State Environmental Protection Act; (2) construct new distribution or treatment systems; (3) replace wells; or (4) renovate treatment and distribution facilities that are either outdated or are inadequate to meet service area needs. The deadline for applying for funds varies between the states, but in Illinois the deadline is March 31, 2009.

Even if an organization has already applied for Drinking Water or Wastewater Funds, some state agencies encourage the organization to re-file an application to "assure [its] project stays on the priority list." Also, if an organization has already submitted a project plan under a state program, some state agencies ask that the organization contract the state project manager assigned to the project to "identify potential planning deficiencies and signal [the organization's] desire to move forward."

For more information on these provisions and how they may affect your organization, please contact the Seyfarth Shaw attorney with whom you work or any attorney on our website (*www.seyfarth.com*).

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[1] "Section" refers to a section of the Internal Revenue Code of 1986 as amended.

[2] The Energy Tax Incentives Act of 2005 enacted Section 54C, which permits state and local governments, cooperative electric companies, clean renewable bond lenders, and Indian tribal governments to issue CREBs to finance certain renewable energy and clean coal facilities.

[3] The Energy Improvement and Extension Act of 2008 enacted Section 54D, which provided for $800 million in QECBs to state and local governments for the funding of initiatives designed to reduce greenhouse emissions.

[4] Tax credit bonds differ from tax-exempt bonds principally because the holder of a tax credit bond is able to claim a tax credit on the interest paid on such bond, and which thereby allows issuers to issue such bonds at lower interest rates than would be the case for non-tax credit bonds. In the case of a tax credit bond that is a "qualified tax credit bond" – that is, New CREBs, QECBs, QSCBs, QZABs, and qualified forestry conservation bonds that meet the requirements of Sections 54A(d)(2) through (6)) – the amount of the credit with respect to any credit allowance date is 25% of the annual credit determined with respect to such bond with the "annual credit" being equal to the product of (A) the applicable credit rate, multiplied by (B) the outstanding face amount of the bond.

[5] In general, "qualified alternative fuel vehicle refueling property" means any property (other than a building or its structural components) used to store or dispense an alternative fuel into the fuel tank of a motor vehicle propelled by the fuel, but only if the storage or dispensing is at the point where the fuel is delivered into that tank.

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