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AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.



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June 9, 2009

U.S. Environmental Protection Agency
EPA Docket Center (EPA/DC)
Mailcode 3102T
Attention Docket ID No. EPA-HQ-OAR-2008-0508
1200 Pennsylvania Avenue, NW
Washington, DC 20460

**RE: EPA-HQ-OAR-2008-0508: Mandatory Reporting of Greenhouse Gas Emissions,
Proposed Rule, 74 Fed. Reg. 16448 (April 10, 2009)**

Dear Sir/Madam:

The Associated General Contractors of America (AGC) submits these comments in response to the U.S. Environmental Protection Agency's (EPA) proposed rulemaking that would require mandatory reporting of greenhouse gases (GHGs) from all sectors of the economy. AGC members own and/or operate facilities that could exceed the proposed reporting thresholds (e.g., office buildings, large stationary equipment, and materials processing plants) and are dependent on other potentially regulated facility owners for new work and for materials. As such, the proposed reporting rule, and any future control requirements, could directly affect AGC members' daily operations, their ability to secure future construction work, and the costs of materials, equipment, and fuel used in their construction projects.

I. ABOUT AGC OF AMERICA AND THE CONSTRUCTION INDUSTRY'S CONTRIBUTION TO THE U.S. ECONOMY

AGC of America is the nation's largest and most diverse trade association in the construction industry. The association represents more than 33,000 member companies in 96 chapters throughout the United States. AGC members include more than 7,500 of America's leading general construction contractors, 12,500 specialty contractors, and 13,000 material suppliers and service providers to the construction industry. AGC members are engaged in the construction of commercial buildings, factories and other industrial facilities, warehouses, highways, bridges, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, and multi-family housing projects, and in-site preparation and utilities installation for housing developments.

The construction industry, residential and nonresidential, is not itself a significant source of greenhouse gas emissions. According to EPA estimates, the equipment used in construction and mining (combined estimate) generated 0.95 percent of U.S. greenhouse gas emissions in 2007.¹

The construction industry makes a disproportionately large contribution to the economy; it is a significant source of jobs and a major purchaser of U.S. manufactured products. Construction spending totaled \$1.14 trillion (8.2 percent of gross domestic product (GDP)) in 2007; nonresidential spending amounted to \$638 billion—or 56 percent of total construction.² In 2005, there were 778,000 construction firms with 6.8 million paid employees. Despite its enormous size, the construction industry primarily is made up of small businesses. In 2005, 92 percent of construction firms had fewer than 20 employees. Only 1 percent had 100 or more. The average employment was less than nine employees per firm. More than two million additional construction firms had no paid employees—mainly self-employed individuals but also partnerships and holding companies.³ Shipments of construction materials and supplies in 2007 totaled \$518 billion—more than 10 percent of all U.S. manufacturing shipments. Construction machinery shipments totaled \$28 billion—8 percent of all machinery shipments.⁴

It is important to note that the construction industry has experienced significant declines over the past year. In fact, the construction sector has seen the largest decline in employment relative to the rest of the economy. Construction employment fell in 276 of the nation's largest 299 metro areas from April 2008 to April 2009. Overall construction unemployment was at 18.7 percent in April 2009 while the overall unemployment rate was 8.6 percent, not seasonally adjusted.

II. GENERAL CONCERNS

Congress required EPA to develop a GHG reporting rule pursuant to its existing authority under §§ 114(a)(1) and 208 of the Clean Air Act in the Consolidated Appropriations Act of 2008, Public Law 110-161, 121 Stat. 1844, 2128 (2008). Although EPA relies on the Clean Air Act, it notes that the GHG reporting rule's issuance does not indicate that EPA has made a final decision to regulate emissions of GHGs. Rather, a mandatory GHG reporting program would be used to assist in the development of climate policy.

AGC appreciates the value of obtaining good data on GHG emissions from various sources. Accurate emissions data is key to guide and inform any future policy decisions regarding the need for EPA (or Congress) to control GHG emissions. However, AGC has many concerns with the proposed rule—particularly the economic burden to businesses nationwide of broadly applied

¹ U.S. EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990 – 2007, EPA 430-R-09-004, April 2009.

² Bureau of Economic Analysis at <http://www.bea.gov>; and the U.S. Census Bureau at <http://www.census.gov>.

³ The Associated General Contractors of America (AGC), *Construction Economics*, at http://www.agc.org/cs/industry_topics/construction_economics; and the U.S. Census Bureau at <http://www.census.gov>.

⁴ The U.S. Census Bureau at <http://www.census.gov>.

and far-reaching reporting requirements. As a threshold matter, AGC is concerned about the short timeframe for the business community to provide comment, the poor timing of the proposed rule in light of several legislative initiatives that may “change the game” within a short period of time, the role of the states and potential for dual reporting requirements, the proposed schedule for reporting, the number of the facilities potentially covered, the proposed “once in, always in” reporting policy, and the extreme penalties for noncompliance. AGC also urges EPA to exempt residential buildings (including multi-family dwellings) and non-residential commercial buildings (including houses of worship, schools, hospitals, shopping malls, and office buildings) from the reporting requirements.

A. 60 Days Is Insufficient Time for Industry Comment

If finalized, EPA’s proposal would “require reporting of greenhouse gas emissions from all sectors of the economy” in very short order. The proposal identifies several differing reporting requirements by source category and/or threshold of emissions. AGC members have not been given enough time to determine if, or to what extent, the proposed rule may impact their businesses. As a general rule, most facilities have never before measured their GHG emissions. Accordingly, most facilities (1) do not know whether they fall within the proposed reporting threshold, (2) do not know how to prepare GHG inventory baselines and collect emissions data, and (3) do not know how to perform audits and verification; all required under the rule. Moreover, EPA has requested comment on multiple options associated with varying reporting thresholds, schedules for reporting, means/methods of reporting, the duration of the program, and data verification approaches. EPA also has questioned whether to include reporting requirements for in-use fleets and purchased electricity.

EPA has already stressed the time-sensitive nature of this rulemaking (FY08 Appropriations Act requires EPA to issue a final rule by June 26, 2009) and the “urgent need to finalize it to allow for 2010 data collection.” If EPA continues to deny industry’s request to extend the comment period for the current proposed rule, then AGC suggests that EPA—at the very least—provide a second opportunity for public outreach and comment on a version of the rule that includes less unknowns and more certainty. AGC needs a more complete rulemaking package to fairly and accurately assess how the proposed rule would impact its members, to provide more valuable comment to EPA, and to more effectively prepare members to meet the new requirements. EPA should remain mindful of that the Data Quality Act and the agency’s own Information Quality Guidelines require all information that EPA disseminates to meet strict standards pertaining to quality, objectivity, utility and integrity.

B. EPA Should Harmonize Reporting Requirements with New Climate Legislation

At the same time EPA is soliciting comment on its proposed reporting rule for greenhouse gases, the U.S. Congress is actively pursuing greenhouse gas controls through legislation. In fact, EPA

maintains that its reporting rule will inform and support future requirements for controls of such emissions. EPA was not charged with developing an ongoing reporting program that will address all emissions from all sources; and the agency has discretion in determining what sectors must report, the emissions threshold that would trigger such reporting (must include large emitters), and for how long regulated facilities must report.

AGC urges EPA to collect only the data needed to fulfill its obligation under the appropriations bill (H.R. 2764, Public Law No. 110-161) and wait until after Congress finalizes climate legislation to establish a full EPA reporting program. This will allow EPA to ensure that its reporting requirements are, in fact, needed (i.e., that reporting is not part of any new legislation), and that EPA's program addresses and supports Congressional efforts.

C. Role of the States

A significant issue for EPA in designing the new reporting program will be the extent to which it tries to harmonize its program with reporting regimes being developed by states or by voluntary registration programs such as the Climate Registry.

A number of states have already or are currently in the process of developing mandatory reporting schemes to support their GHG reduction efforts. The preamble to the proposed rule discusses the role of the states. 74 Fed. Reg. 16595. EPA acknowledges the different ways states may play a role: in the interaction between state and local air pollution control agencies and the sources that are required to report, and the fact that many states already have reporting programs, some of which are "broader in scope or more aggressive in implementation" than the proposed rule. While EPA foresees a role for state and local agencies in educating facilities and ensuring compliance, it does not propose to delegate to the states the authority to implement and enforce the proposed rule. This will create dual reporting requirements. At a minimum, EPA must work with states to harmonize data management to ease the burden on reporters to state and federal systems. EPA must also make the data collected available to states and other interested parties. As more states develop reporting programs, any differences in program design have the potential to become a serious challenge for businesses operating in multiple states.

The proposal also acknowledges the role that the Climate Registry plays in standardizing GHG accounting and reporting rules across multiple jurisdictions and providing businesses with a means of publicly recording their emissions in a single consistent and comparable report. According to EPA, the Climate Registry "would provide States support in reporting tools, database management and serve as the ultimate repository for data reported under state programs, after the States have verified the data." AGC urges EPA to go even farther and to consider using the protocols being developed by the Climate Registry as a model for its federal program.

D. Reporting Schedule Does Not Allow Sufficient Time for Facilities To Determine Whether They Must Report and To Establish a Procedure for Compliance

Under the proposal, a regulated facility owner or operator must collect emissions data, calculate GHG emissions, and follow quality assurance, missing data, and recordkeeping reporting requirements. The proposed rule would require such measurement and monitoring to begin January 1, 2010—a date just slightly more than six months from the date comments are due on the proposed rule. Facilities covered by the rule would need to submit their first annual report by March 31, 2011 for the calendar year 2010.

This timeframe does not provide adequate time for outreach and education to small businesses—as well as the potentially affected homeowners and owners of commercial buildings—to help them determine whether their facilities are covered by the rule and to establish a framework for monitoring and reporting. Facilities may need to hire consultants, purchase new equipment, develop standard operating procedures, and train employees. At the same time the facilities are learning how to comply, they also could face huge penalties for non-compliance. The proposed rule states “facilities that fail to report GHG emissions according to the requirements of the proposed rule could potentially be subject to enforcement action by EPA under CAA [Clean Air Act] sections 113 and 203-205,” which could lead to fines of up to \$32,500 per day (see section G below).

AGC suggests that EPA extend the effective date by a year and use a phased-in approach wherein small businesses (i.e., small emitters) are given more time to prepare for implementation of the reporting requirements. Likewise, the proposed rule states EPA intends to provide compliance assistance materials tailored to the needs of various sectors. The agency itself requires additional time to develop compliance assistance materials, gather input from the numerous affected industry groups, and distribute the materials to the newly-regulated businesses.

E. The Proposed Reporting Threshold More Than Doubles the Number of Affected Facilities (and the Cost) with Only a Negligible Increase in Emissions Reported

In the proposed rule, EPA has identified three thresholds above which facilities would be required to report GHG emissions from stationary fuel combustion sources on an annual basis: 10,000, 25,000, and 100,000 metric tons per year of carbon dioxide equivalent (metric tpy CO₂e). EPA also has stated its preferred option is to require reporting at the 25,000 metric tpy CO₂e threshold.

AGC suggests EPA set the reporting threshold at 100,000 metric tpy CO₂e, because the two lower options EPA has proposed would drastically increase the number of facilities required to report and the associated costs of reporting without a significant increase in the percent of emissions reported. EPA’s own analysis for “Downstream Facility and Emissions Coverage”

shows that the number of affected facilities doubles at the 25,000 metric tpy CO₂e level (13,205 facilities) as opposed to the 100,000 metric tpy CO₂e level (6,598 facilities), whereas the percentage of emissions reported at the 25,000 metric tpy CO₂e level increases by only 2.5 percent. In addition, the facilities that emit 100,000 metric tpy CO₂e would likely already have experience and systems in place to monitor and measure air emissions. This threshold would require less outreach, compliance assistance resources, enforcement, and financial and staff resources from EPA; and the reduced number of affected facilities would allow for a smoother implementation of the reporting program.

Should EPA set the reporting threshold at 25,000 metric tpy CO₂e level, thousands of small emitters (likely, small businesses) could be required to report—and would need to do so within a very short timeframe. In addition, the 25,000 metric tpy CO₂e threshold is set so low that many other businesses—uncertain about the amount of emissions from their facilities—would have to shoulder the expense of measuring their emissions to determine whether they are required to report and also to gain the security of having those data available should their emissions level ever come into question. EPA estimates that “approximately 30,000 facilities would have to assess whether or not they had to report....” Again, these facilities would need to make this determination within a very short timeframe. Setting the reporting threshold at 100,000 metric tpy CO₂e would decrease the emissions data reported by only 2.5 percent, yet it would release approximately 6,600 facilities from the burden of reporting and countless thousands of other facilities from the obligation and expense to measure solely to demonstrate non-applicability.

F. Source Category and “Once in, Always in” Provisions Discourage Voluntary Reductions in Emissions and Increase Compliance Burden

In the proposed rule, EPA has identified specific source categories wherein all of the facilities that have that particular source of emissions within their boundaries would be subject to the proposed rule, regardless of the amount of annual emissions. These source categories include large operations such as petroleum refineries, power plants, Portland cement plants, landfills, etc. Once subject to the rule, facilities will be required to continue reporting annually, even if in future years they reduce their emissions to below the reporting thresholds.

AGC suggests that the continuous reporting requirement—regardless of the amount of emissions—for all facilities within a specific source category and those facilities that no longer have annual emissions within the reporting threshold discourages voluntary reductions in emissions and increases the compliance burden for those facilities which are on the margins of reporting. Facilities that do not emit the threshold amount of metric tpy CO₂e should not be required to report. EPA should establish a provision by which facilities that maintain emissions below the threshold for a determined amount of time would then no longer need to submit annual reports, even if they fall within one of the specific source categories. The “once-in, always in” provision increases the compliance burden on those facilities that, if following the established threshold of emissions, normally would not have to report.

G. Extreme Penalties for Non-Compliance with Reporting Requirements

The proposed rule establishes a strict enforcement policy under the Clean Air Act. According to the proposed rule—

“Facilities that fail to report GHG emissions according to the requirements of the proposed rule could potentially be subject to enforcement action by EPA under CAA sections 113 and 203-205. The CAA provides for several levels of enforcement that include administrative, civil, and criminal penalties. The CAA allows for injunctive relief to compel compliance and civil and administrative penalties of up to \$32,500 per day.”

The proposed rule goes on to reference deviations (e.g., failure to collect data, to report data, failure to continuously test and monitor) that could ultimately be considered a violation. The proposed rule does not limit EPA to those deviations listed in the proposed rule.

AGC urges EPA to recognize the large number of small facilities that may be impacted by the proposed rule and the inexperience they may have with meeting reporting requirements. Even facilities that are familiar with reporting under separate programs occasionally have errors and deviations. EPA should allow for a learning curve for the new requirements and establish an enforcement strategy that includes several options such as warning letters, citations, and “right to cure” provisions. EPA could push back the reporting dates for some facilities based on low levels of emissions. AGC encourages EPA implement a flexible enforcement policy, especially if EPA decides to require reporting from small emitters, such as homes and commercial buildings. Due to the short period of time EPA is allowing before the proposed rule is finalized and goes into effect, it is entirely reasonable to expect that many facilities will not know whether they are required to report emissions and/or have not coordinated the steps necessary to assess their emissions level. In addition, EPA noted that it plans to produce several sector-specific compliance assistance tools, but the agency did not commit to having these available in time to prepare the newly regulated businesses.

H. EPA Should Exempt Residential and Non-Residential Commercial Buildings from the Reporting Requirements

According to the proposed rule, if the facility does not contain any of the source categories that require reporting, then it will need to determine and report if it emits 25,000 metric tpy CO₂e or more from stationary combustion sources in any calendar year beginning in 2010. These sources typically include boilers, process heaters, engines in stationary equipment, etc. If the maximum rated heat input capacity for all stationary fuel combustion equipment is less than 30 million British thermal units (mmBtu) per hour, then EPA presumes the facility emits less than 25,000 metric tpy CO₂e and the facility does not have to calculate or report emissions. EPA estimates that individual home owners would not be required to report under the proposal. The average annual household emissions in the U.S. are about 11.3 metric tpy CO₂e. EPA also estimates that

between 75 to 80 percent of commercial buildings would not be required to report as their equipment typically have a maximum rated heat input capacity of less than 10 mmBtu.

Based on EPA's own estimates that very few of these buildings will fall within the threshold for reporting, AGC suggests that EPA exempt residential and non-residential commercial buildings (including houses of worship, schools, hospitals, shopping malls, and office buildings) from the reporting requirements. This exemption would protect homeowners and thousands of small business operators, non-profit organizations, and public service providers from the cost of determining their applicability in the program and maintaining compliance under the threat of penalties that could involve jail time for human errors made in the reporting. AGC urges EPA to consider the many initiatives underway at the federal, state, and local levels that encourage (and at times mandate) energy efficient and "green" buildings—initiatives that are reducing the GHG emissions associated with residential and non-residential buildings. In fact, the green building market continues to grow, even in this current economic downturn.

III. ADDITIONAL COMMENTS

In addition to the general concerns above, AGC would like to submit the following statements in support of EPA's preferred options on several provisions.

- AGC supports EPA's proposed approach to verification. No third-party verification would be required for reported data. EPA would assume the responsibility to verify such information; however each facility would retain copies of all reports for five years for historical and verification purposes. As part of this record-retention requirement, the facility owner or operator might be required to retain a written quality assurance performance plan. AGC supports this approach. Third-party verification would drive up the costs of compliance. AGC agrees that self-certification, in keeping with EPA's quality assurance guidelines, is the preferred option.
- AGC supports EPA's decision not to collect fleet-wide, in-use emissions data (e.g., vehicle miles traveled) from fleet operators. Vehicle miles traveled do not produce viable estimates of emissions as much is dependent on make and model of the vehicle, maintenance, and traffic congestion. The administrative burden of such a program would be cost-prohibitive, especially as emissions from vehicles are accounted for elsewhere in the proposed rule by manufacturers and fuel suppliers.
- AGC supports EPA's preferred option not to include purchased electricity as a category of GHG emissions that requires reporting. The proposed rule already requires emissions data from the power generation source category. If EPA requires reporting of emissions from purchased electricity by the facilities, then the emissions will be double counted.

IV CONCLUSION

In conclusion, AGC urges the agency to take the necessary steps to protect small businesses and small emitters from the onerous and expensive requirements associated with monitoring, measuring, and reporting emissions. EPA's own analysis shows little gain in the data collected against the percentage of GHG emissions by including these small emitters. AGC also asks the agency to provide additional time to assess the impact of the rule on industry stakeholders and additional time (or a phased in approach) before the agency requires facility reporting, especially in light of the extreme penalties for noncompliance. The additional time will provide associations, like AGC, with the opportunity to work with the agency to educate the affected business community and prepare it for the new requirements.

Sincerely,

A handwritten signature in cursive script that reads "Melinda Tomaino".

Melinda L. Tomaino
Director, Green Construction