

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN CHEMISTRY COUNCIL,)	
)	
Petitioner,)	
v.)	No. 09-1325
U.S. ENVIRONMENTAL PROTECTION)	
AGENCY,)	
)	
Respondent.)	

SETTLEMENT AGREEMENT

WHEREAS the American Chemistry Council in No. 09-1325 (referred to as "Petitioner") filed in the Court of Appeals for the D.C. Circuit a petition for review captioned above that challenges the regulation titled "Mandatory Reporting of Greenhouse Gases," 74 Fed. Reg. 56,260 (Oct. 30, 2009) ("GHG Reporting Rule"), which was promulgated under the Clean Air Act by the Environmental Protection Agency ("EPA");

WHEREAS No. 09-1325 has been consolidated with other petitions challenging the GHG Reporting Rule, with No. 09-1325 designated as the lead petition;

WHEREAS EPA intends to undertake a rulemaking to make certain amendments to portions of the GHG Reporting Rule that may resolve the concerns raised by Petitioners in their petition for review;

WHEREAS the EPA and American Chemistry Council (collectively the "Parties") wish to implement this Settlement Agreement ("Agreement") to avoid protracted and costly litigation and to preserve judicial resources;

NOW, THEREFORE, the Parties, intending to be bound by this Agreement, hereby stipulate and agree as follows:

1. Promptly after execution of this Agreement, the Parties will notify the Court that they have reached a settlement, subject to required notice provisions described in paragraph 6 below, and will request that No. 09-1325 be severed from the other consolidated cases and be held in abeyance pending finalization and completion of the terms of their settlement, with EPA to file status reports on 120-day intervals.

2. EPA shall as expeditiously as practicable publish a notice of proposed rulemaking on the issue of whether the GHG Reporting Rule should be amended by the inclusion of proposed amendments of the same substance as set forth in Attachment A to this Agreement.

3. If and when EPA promulgates in final form an amendment to the GHG Reporting Rule that include changes that are substantially the same substance as set forth in Attachment A to this Agreement, then Petitioner shall promptly file a stipulation of dismissal with prejudice of No. 09-1329, or in the event not all such changes are made, a stipulation of dismissal with prejudice of No. 09-1325 for the issues that correspond to such changes that were made, with the creation of a new docket for those issues that were not resolved. Such stipulation of dismissal shall be in accordance with Rule 42 of the Federal Rules of Appellate Procedure, with each party to bear its own costs and attorneys' fees. In addition, Petitioner shall not challenge the validity of the portion of the final rule adopting such amendments of substantially the same substance as set forth in

Attachment A in any court or administrative proceeding, and the right to raise such challenge is waived, provided that Petitioner reserves any rights it may have to challenge in any court or administrative proceeding any portion of such final rule that is not of substantially the same substance as set forth in Attachment A to this Agreement.

4. For purposes of this Agreement, EPA and Petitioner recognize that the publication of new or modified regulations in the proposed or final rule that addresses other matters or provisions than set forth in Attachment A or that in the proposed or final rule are otherwise substantially more detailed, extensive and comprehensive than that set forth in Attachment A would not on that basis alone cause the final changes referenced in paragraphs 2 and 3 above not to be the same substance or substantially the same substance as set forth in Attachment A.

5. If EPA does not take action in accordance with the terms of this agreement then Petitioner's sole remedy under this Agreement regarding the rules under review in these cases shall be the right to request that the Court lift the stay of proceedings and establish a schedule for briefing and oral argument.

6. EPA and Petitioner agree and acknowledge that before this Agreement is final, EPA must provide notice in the Federal Register and an opportunity for comment pursuant to Clean Air Act section 113(g), 42 U.S.C. § 7413(g). EPA shall submit said notice of this Agreement to the Federal Register for publication as expeditiously as possible. After this Agreement has undergone an opportunity for notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any such written comments in

determining whether to withdraw or withhold her consent to the Agreement, in accordance with section 113(g) of the Clean Air Act. This Agreement shall become final on the date that EPA provides written notice of such finality to Petitioner.

7. Nothing in the terms of this Agreement shall be construed to limit or modify the discretion accorded EPA by the Clean Air Act or by general principles of administrative law.

8. Any obligations of EPA to obligate or expend funds under this Agreement are subject to the availability of appropriations in accordance with the Anti-Deficiency Act, 31 U.S.C. § 1341. This Settlement Agreement shall not be construed to require the United States to obligate or pay funds in contravention of said Anti-Deficiency Act, 31 U.S.C. § 1341.

9. Except as provided in this Settlement Agreement, none of the parties hereto waives or relinquishes any legal rights, claims or defenses it may have.

10. The undersigned representatives of each party certify that they are fully authorized by the party that they represent to bind that respective party to the terms of this Agreement.

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Dated: _____

Dated: _____

ATTACHMENT A

(b) To produce a fluorinated GHG means to manufacture a fluorinated GHG from any raw material or feedstock chemical. Producing a fluorinated GHG includes the manufacture of a fluorinated GHG as an isolated intermediate for use in a process that will result in its transformation either at or outside of the production facility. Producing a fluorinated GHG also includes the creation of a fluorinated GHG (with the exception of HFC-23) that is captured and shipped off site for any reason, including destruction. Producing a fluorinated GHG does not include the reuse or recycling of a fluorinated GHG, the creation of HFC-23 during the production of HCFC-22, the creation of intermediates that are created and transformed in a single process with no storage of the intermediates, or the creation of ~~by-products~~ fluorinated GHGs that are released or destroyed at the production facility before the production measurement at 98.414(a).

40 C.F.R. § 98.410(b)

(a) The mass of fluorinated GHGs or nitrous oxide coming out of the production process shall be measured using flowmeters, weigh scales, or a combination of volumetric and

density measurements with an accuracy and precision of one percent of full scale or better. —If the measured mass includes more than one fluorinated GHG, the concentrations of each of the fluorinated GHGs, other than low-concentration constituents, shall be measured as set forth in paragraph (n) of this section. For each fluorinated GHG, the mean of the concentrations of that fluorinated GHG (mass fraction) measured under paragraph (n) of this section shall be multiplied by the mass measurement to obtain the mass of that fluorinated GHG coming out of the production process.

40 C.F.R. § 98.414(a)

(h) ~~The~~ You must measure the mass of each fluorinated GHGs—GHG that is fed into the destruction device shall be measured using and that was previously produced as defined at 98.410(b). Such fluorinated GHGs include but are not limited to quantities that are shipped to the facility by another facility for destruction and quantities that are returned to the facility for reclamation but are found to be irretrievably contaminated and are therefore destroyed. You must use flowmeters, weigh scales, or a combination of volumetric and density measurements with an accuracy and precision of one percent of full scale or better. If the measured mass includes more than trace

concentrations of materials other than the fluorinated GHG being destroyed, you must estimate the concentrations of fluorinated GHG being destroyed shall be estimated considering current or previous representative concentration measurements and other relevant process information. ~~This~~ You must multiply this concentration (mass fraction) shall be multiplied by the mass measurement to obtain the mass of the fluorinated GHG destroyed.

40 C.F.R. § 98.414(h)

~~(j) You must estimate the share of the mass of fluorinated GHGs in paragraph (h) of this section that is comprised of fluorinated GHGs that are not included in the mass produced in §98.413(a) because they are removed from the production process as by products or other wastes.~~

40 C.F.R. § 98.414(j)

(n) If the mass coming out of the production process includes more than one fluorinated GHG, you shall measure the concentrations of all of the fluorinated GHGs, other than low-concentration constituents, as follows:

(i) Analytical Methods. Use a quality-assured analytical measurement technology capable of detecting the analyte of interest at the concentration of interest and use a procedure validated with the analyte of interest at the concentration of

interest. Where standards for the analyte are not available, a chemically similar surrogate may be used. Acceptable analytical measurement technologies include but are not limited to gas chromatography (GC) with an appropriate detector, infrared (IR), fourier transform infrared (FTIR), and nuclear magnetic resonance (NMR). Acceptable methods include EPA Method 18 in Appendix A-1 of 40 CFR part 60, EPA Method 320 in Appendix A of 40 CFR part 63, the Draft EPA DRE Protocol, ASTM D6348-03 (incorporated by reference in §98.7), or other analytical methods validated using EPA Method 301 or some other scientifically sound validation protocol. The validation protocol may include analytical technology manufacturer specifications or recommendations.

(ii) Documentation in GHG Monitoring Plan. Describe the analytical method(s) used under paragraph (n)(i) in the site GHG Monitoring Plan as required under §98.3(g)(5) of this part. At a minimum, include in the description of the method a description of the analytical measurement equipment and procedures, quantitative estimates of the method's accuracy and precision for the analytes of interest at the concentrations of interest, as well as a description of how these accuracies and precisions were estimated, including the validation protocol used.

(iii) Frequency of measurement. Perform the measurements at least once by [insert date 60 days after publication of this rule] if the fluorinated GHG product is being produced on [insert date of publication of this rule]. Perform the measurements within 60 days of commencing production of any fluorinated GHG product that was not being produced on [insert date of publication of this rule]. Repeat the measurements if an operational or process change occurs that could change the identities or significantly change the concentrations of the fluorinated GHG constituents of the fluorinated GHG product. Complete the repeat measurements within 60 days of the operational or process change.

(iv) Measure all product grades. Where a fluorinated GHG is produced at more than one purity level (e.g., pharmaceutical grade and refrigerant grade), perform the measurements for each purity level.

(v) Number of samples. Analyze a minimum of three samples of the fluorinated GHG product that have been drawn under conditions that are representative of the process producing the fluorinated GHG product. If the relative standard deviation of the measured concentrations of any of the fluorinated GHG constituents (other than low-concentration constituents) is greater than or equal to 15 percent, draw and analyze enough

additional samples to achieve a total of at least six samples of the fluorinated GHG product.

40 C.F.R. § 98.414(n)

(o) All analytical equipment used to determine the concentration of fluorinated GHGs, including but not limited to gas chromatographs and associated detectors, IR, FTIR and NMR devices, shall be calibrated at a frequency needed to support the type of analysis specified in the site GHG Monitoring Plan as required under §98.414(n) and §98.3(g)(5) of this part.

Quality assurance samples at the concentrations of concern shall be used for the calibration. Such quality assurance samples shall consist of or be prepared from certified standards of the analytes of concern where available; if not available, calibration shall be performed by a method specified in the GHG Monitoring Plan.

40 C.F.R. § 98.414(o)

(p) Isolated intermediates that are produced and transformed at the same facility are exempt from the monitoring requirements of this section.

40 C.F.R. § 98.414(p)

(q) Low-concentration constituents are exempt from the monitoring and QA/QC requirements of this section.

40 C.F.R. § 98.414(q)

(3) Mass in metric tons of each fluorinated GHG that is destroyed at that facility, except fluorinated GHGs not included in the calculation of mass and that was previously produced in §as defined at 98.413(a) because they are removed from the production process as by products or other wastes. 410(b).

Quantities to be reported under this paragraph (a)(3) of this section ~~could include,~~ but are not limited to quantities that are shipped to the facility by another facility for example, destruction and quantities that are returned to the facility for reclamation but are found to be irretrievably contaminated and are therefore destroyed.

(4) ~~Mass in metric tons of each fluorinated GHG that is destroyed at that facility except GHGs not included in the calculation of mass produced in §98.413(a) because they are removed from the production process as byproducts or other wastes.~~ (Reserved)

* * *

(11) Mass in metric tons of each fluorinated GHG that is fed into the destruction device and that was previously produced as defined at 98.410(b). Quantities to be reported under this

paragraph (a) (11) of this section include but are not limited to quantities that are shipped to the facility by another facility for destruction and quantities that are returned to the facility for reclamation but are found to be irretrievably contaminated and are therefore destroyed.

40 C.F.R. § 98.416(a) (3), (4) & (11)

(c) AEEach bulk importer of fluorinated GHGs or nitrous oxide shall submit an annual report that summarizes ~~their~~its imports at the corporate level, except for shipments including less than ~~250 metric tons~~twenty-five kilograms of CO₂fluorinated GHGs or nitrous oxide, transshipments, and heels that meet the conditions set forth at §98.417(e). The report shall contain the following information for each import:

(1) Total mass in metric tons of nitrous oxide and each fluorinated GHG imported in bulk, including each fluorinated GHG constituent of the fluorinated GHG product that makes up between 0.5 percent and 100 percent of the product by mass.

40 C.F.R. § 98.416(c) (1)

(d) AEEach bulk exporter of fluorinated GHGs or nitrous oxide shall submit an annual report that summarizes ~~their~~its exports at the corporate level, except for shipments including less than ~~250 metric tons~~twenty-five kilograms of CO₂fluorinated

GHGs or nitrous oxide, transshipments, and heels. The report shall contain the following information for each export: * *

*

40 C.F.R. § 98.416(d)

(f) By March 31, 2011, all fluorinated GHG production facilities shall submit a one-time report that includes the concentration of each fluorinated GHG constituent in each fluorinated GHG product as measured under 98.414(n). If the facility commences production of a fluorinated GHG product that was not included in the initial report or performs a repeat measurement under 98.414(n) that shows that the identities or concentrations of the fluorinated GHG constituents of a fluorinated GHG product have changed, then the new or changed concentrations, as well as the date of the change, must be reflected in a revision to the report. The revised report must be submitted to EPA by the March 31st that immediately follows the measurement under 98.414(n).

40 C.F.R. § 98.416(f)

(g) Isolated intermediates that are produced and transformed at the same facility are exempt from the reporting requirements of this section.

40 C.F.R. § 98.416(g)

(h) Low-concentration constituents are exempt from the reporting requirements of this section.

40 C.F.R. § 98.416(h)

(a) In addition to the data required by §98.3(g), the fluorinated GHG production facility shall retain the following records: * * *

(2) Records documenting the initial and periodic calibration of the ~~gas chromatographs~~not analytical equipment (including but not limited to GC, IR, FTIR, or NMR), weigh scales, flowmeters, and volumetric and density measures used to measure the quantities reported under this subpart, including the industry standards or manufacturer directions used for calibration pursuant to §98.414(~~j~~m) and (~~k~~o).

40 C.F.R. § 98.417(a)

(f) Isolated intermediates that are produced and transformed at the same facility are exempt from the recordkeeping requirements of this section.

40 C.F.R. § 98.417(f)

(g) Low-concentration constituents are exempt from the recordkeeping requirements of this section.

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Except as provided below, all of the terms used in this subpart have the same meaning given in the Clean Air Act and subpart A of this part. If a conflict exists between a definition provided in this subpart and a definition provided in subpart A, the definition in this subpart shall take precedence for the reporting requirements in this subpart.

Isolated intermediate means a product of a process that is stored before subsequent processing. An isolated intermediate is usually a product of chemical synthesis. Storage of an isolated intermediate marks the end of a process. Storage occurs at any time the intermediate is placed in equipment used solely for storage.

Low-concentration constituent means, for purposes of fluorinated GHG production and export, a fluorinated GHG constituent of a fluorinated GHG product that occurs in the product in concentrations below 0.1 percent by mass. For purposes of fluorinated GHG import, low-concentration constituent means a fluorinated GHG constituent of a fluorinated GHG product that occurs in the product in concentrations below 0.5 percent by mass. Low-concentration constituents do not include fluorinated GHGs that are deliberately combined with the

product (e.g., to affect the performance characteristics of the product).

40 C.F.R. § 98.418