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Air and Radiation Docket and Information Center
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460
By Regular Mail and Electronic Mail to a-and-r-Docket@epa.gov

Re: Regulating Greenhouse Gases Under the Clean Air Act
Docket ID: EPA-HQ-OAR-2008-0318

We are writing to urge EPA not to make an endangerment finding with respect to greenhouse gas (GHG) emissions under §202 of the Clean Air Act (CAA). A positive finding of endangerment would require EPA to establish first-ever GHG emission standards for new motor vehicles.

Thanks to EPA's Advanced Notice of Proposed Rulemaking (ANPR),[1] several congressional testimonies by attorney Peter Glaser,[2] and the U.S. Chamber of Commerce's compliance burden report,[3] it is now clear that setting GHG emission standards under CAA §202 would trigger a regulatory cascade throughout the Act, imposing potentially crushing burdens on regulated entities and the economy.

For example, any building or facility that has the potential to emit 250 tons per year of carbon dioxide (CO_2) would become a "major stationary source" under the Act's Prevention of Significant Deterioration (PSD) pre-construction permitting program. Obtaining a PSD permit is costly and time-consuming. In 2007, each PSD permit on average cost $125,120 and 866 burden hours for sources to obtain plus $23,280 and 301 hours for state or local agencies to process.[4] As the U.S. Chamber Study shows, 1.2 million previously unregulated buildings and facilities actually emit at least 250 tons per year of CO_2. All would be vulnerable to new PSD regulation, monitoring, controls, and penalties if EPA establishes GHG emission standards for new motor vehicles.[5]

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[1] EPA, Regulating Greenhouse Gas Emissions Under the Clean Air Act, Advanced Notice of Proposed Rulemaking, *Federal Register*, Vol. 73, No. 147, July 30, 2008. Hereafter cited as ANPR.

[2] See especially Peter Glaser, "Strengths and Weaknesses of Regulating Greenhouse Gas Emissions Under Existing Clean Air Act Authorities," Testimony before Subcommittee on Energy and Air Quality of the House Committee on Energy and Commerce, April 10, 2008; "Responses to Questions of the Select Committee on Global Warming," September 4, 2008.

[3] Mark and Portia Mills, *A Regulatory Burden: The Compliance Dimension of Regulating CO2 as a Pollutant*, U.S. Chamber of Commerce, September 2008.

[4] Carrie Wheeler, Operating Permits Group, Air Quality Division, Office of Air Quality Planning and Standards, Office of Air and Radiation, U.S. EPA, *Information Collection Request for Prevention of Significant Deterioration and Non-Attainment New Source Review* (40CFR Parts 51 and 52).

[5] Using Department of Energy and Census Bureau fuel purchase data, the U.S. Chamber report estimates that at least one million large- to mid-size commercial office million buildings, nearly 200,000 manufacturing operations, and about 17,000 large farms emit at least 250 tons per year of CO_2.

The ANPR acknowledges that even a ten-fold increase in PSD permitting from 200-300 permits per year to 2,000-3,000 permits "could overwhelm permitting authorities" and subject firms to "new costs, uncertainty, and delay in obtaining their permits to construct."[6] Yet if firms seek to modify only 3 percent of the 1.2 million previously unregulated buildings and facilities that would qualify as major stationary sources of CO_2, state and local agencies would have to process 40,000 PSD permits per year. The costs, delays, and uncertainties produced by this administrative quagmire would bring economic development and new construction to a screeching halt.[7]

As the ANPR also acknowledges, hundreds of thousands of previously unregulated entities could face pointless paperwork burdens under the Title V permitting program.[8] Millions of small sources down to the household level could face onerous yet inscrutable technology requirements under the Hazardous Air Pollutant (HAP) program.[9]

An endangerment finding under §202 could also compel EPA to establish National Ambient Air Quality Standards (NAAQS) for GHGs.[10] NAAQS specify how many parts per million of a targeted pollutant are permissible in the ambient air. Both plaintiffs in *Massachusetts*[11] and all the endangerment petitions filed since *Massachusetts* assert that *current* GHG concentrations *already harm* public health and welfare.[12] Thus, EPA could be compelled to establish NAAQS for GHGs *below* current atmospheric levels. Yet the Kyoto Protocol would barely slow the increase in GHG concentrations.[13] Even outright de-industrialization of the United States might not be enough to lower atmospheric concentrations. Regulating GHGs under the NAAQS program—a likely consequence of an endangerment finding—could turn the CAA into the equivalent of an economic suicide pact. As the ANPR acknowledges, EPA is forbidden to consider compliance costs when establishing NAAQS.[14]

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[6] ANPR 44507, 44502.

[7] To obtain 40,000 permits, sources would have to spend $5 billion. (In addition, permit holders would have to install "best available control technology" or BACT, which could also be very costly.) To process 40,000 permits, state and local agencies would have to spend $931.2 million. That is more than four times the $227.5 million Congress appropriated in 2008 for state, local, and tribal air quality management assistance grants, according to the U.S. Chamber.

[8] The ANPR (44511) estimates that 550,000 entities have the potential to emit 100 tons per year (TPY) of a CAA-regulated pollutant, the threshold for regulation under Title V. The real number is likely much larger. Again, the U.S. Chamber estimates that 1.2 million entities actually emit 250 TPY of CO_2. Millions of entities likely have a potential to emit 100 TPY of CO_2.

[9] The threshold for regulation under CAA §112 is a potential to emit 10 tons of any single HAP or 25 tons of any combination of HAPs. The ANPR (44495) says that "a large single-family residence could exceed this threshold if all appliances consumed natural gas."

[10] ANPR 44477.

[11] "Petitioners injuries are not 'some day' injuries, as respondents contend…; they are injuries in the here and now." Petitioners' Final Reply Brief, *Massachusetts v EPA*, November 16, 2006, p. 2.

[12] Since the *Massachusetts* decision, litigation groups have filed endangerment petitions to regulate GHGs from non-road engines, construction equipment, coal power plants, petroleum refineries, marine vessels, and aircraft. All assert present harm (ANPR 44399, 44458-61).

[13] T.M.L. Wigley. 1998. The Kyoto Protocol: CO2, CH4, and climate implications. *Geophysical Research Letters*, Volume 25, Issue 13, pp. 2285-2288.

[14] ANPR 44478.

A NAAQS set below current atmospheric levels would also compel EPA to regulate "major" stationary sources of CO_2 under the Non-Attainment New Source Review (NNSR) pre-construction permitting program. Before any firm could build a facility with a potential to emit 100 tons per year of CO_2 (a new McDonalds, for example), it would have to comply with Lowest Achievable Emissions Rate (LAER) standards, which are very stringent.[15] Moreover, under NNSR, firms must offset any emission increases from a new or modified source by reducing emissions from an existing source.[16] Roughly speaking, nothing could be built or modified anywhere in the United States unless something else is shut down.

The ANPR proposes various options for EPA to avoid the irrational burdens of GHG regulation under the CAA. All of these involve EPA more or less brazenly re-writing the statute. Two egregious examples deserve mention. In one place, the ANPR suggests that EPA could set the threshold for PSD regulation of "major" sources at 10,000, 25,000, or even 100,000 tons per year, even though the statute says 250 tons per year.[17] In another place, the ANPR suggests that EPA could avoid the obligation to establish NAAQS for GHGs by simply not "planning" to produce the requisite analysis (known as a "criteria document"). This transparent attempt to read mandatory language as discretionary[18] would arguably gut the NAAQS program, often described as the Act's "cornerstone."

We think it speaks volumes about the validity of the Court majority's reasoning in *Massachusetts* that the only way EPA could regulate GHGs under the CAA without risking administrative chaos and economic devastation is to assume legislative powers and amend the statute.

When *Massachusetts* was being litigated, plaintiffs claimed that the case posed no risks to the U.S. economy. GHG emission standards for new motor vehicles could have the effect of tightening new-car fuel economy standards, they acknowledged. But, they noted, §202 requires EPA to consider compliance costs and the lead times automakers need to commercialize new technologies. Thus, plaintiffs said, concerns voiced by the business community and others about slippery slopes and potentially devastating economic impacts were alarmist. Such assurances now ring hollow. As should now be clear even to the plaintiffs, the CAA is a deeply flawed, inappropriate, even destructive instrument for establishing climate policy.

The Court majority in *Massachusetts* went astray when they interpreted CAA §302(g) to define "air pollutant" as anything "emitted" into the ambient air. Since fossil fuel combustion emits CO_2, and since the CAA authorizes EPA to regulate "air pollutants," the majority concluded that EPA has authority to regulate CO_2 emissions.

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[15] Whereas EPA must consider compliance costs when establishing Best Available Control Technology (BACT) standards, it may not consider costs when establishing LAER standards.
[16] ANPR 44498.
[17] ANPR 44504.
[18] The Second Circuit Court of Appeals ruled against this very tactic in *NRDC v Train*, 545 F.2d 320, November 10, 1976.

But §302(g) does not say that anything emitted per se is an "air pollutant." Rather, it says that any emitted "air pollution agent" is an air pollutant. An "air pollution agent" is something that causes or contributes to air pollution. Because CO_2 does not dirty, foul, or otherwise pollute the air, it is not an "air pollution agent"; hence, not an air pollutant. Under the majority's reading of §302(g), even clean air is an "air pollutant" if is "emitted." That is absurd.

The real issue in *Massachusetts* was not whether the CAA definition of "air pollutant" can be massaged to justify regulating GHGs from one source category (new motor vehicles) under one provision (§202), but whether Congress intended for EPA to regulate GHGs from *all sectors and industries* under the CAA *as a whole*. In short, did Congress intend for EPA to regulate GHGs under the "cornerstone" of the CAA—the NAAQS program—and its statutory adjuncts: PSD, LAER, and Title V?

The Court majority in *Massachusetts* said that EPA does not have to make an endangerment finding if the agency provides a "reasonable explanation" why it cannot or will not make such a determination.[19]

The reasonable explanation is that an endangerment finding would have statutory consequences no Congress would ever approve. Congress never intended for §202, which deals solely with a subset of mobile sources, to jump-start an unprecedented expansion of stationary source regulation, impose a de facto moratorium on new construction, or bog down environmental agencies in a morass of paperwork. Yet applying PSD to GHGs could produce all those undesirable consequences; and PSD would apply to GHGs the moment EPA regulates GHG emissions from new motor vehicles.

Further, Congress never intended for §202, which requires EPA to consider compliance costs when setting tailpipe emission standards, to leverage money-is-no-object regulation under the NAAQS program. Yet an endangerment finding—the prerequisite to establishing GHG standards for new motor vehicles—could compel EPA to initiate the most expensive NAAQS rulemaking in history.

Few if any Supreme Court Justices would openly and directly order EPA to implement a Super-Kyoto program through either the NAAQS, PSD, LAER, and Title V programs, or the HAP program, for a very simple reason. No public official wants to take responsibility for damaging the economy. Had the real issue been squarely before the Court, we believe *Massachusetts* would have been decided differently.

We therefore urge EPA not to initiate a destructive regulatory cascade of which the Court majority was apparently unaware and which Congress has never approved.

[19] Massachusetts v EPA 127 S. Ct. (2007)

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