

**Testimony of Peter Glaser  
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**Before the Subcommittee on Energy and Power  
of the House Energy and Commerce Committee**

**Hearing on “H.R.\_\_\_\_, The Energy Tax Prevention Act of 2011”**

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## **Summary of Testimony of Peter Glaser**

The purpose of my testimony is to present a legal perspective on the issue of regulation by the Environmental Protection Agency (EPA) of greenhouse gases (GHGs) under the Clean Air Act (CAA). In my opinion, the CAA is a poor vehicle for regulating GHGs and may result in high costs for little environmental benefit.

The main problem with regulating GHG emissions under the CAA is that the statute was not designed for that purpose and, as a result, EPA's regulatory aims for GHGs do not comfortably fit within the programs set forth in the CAA. This is demonstrated by the "creative" ways in which EPA has gone about implementing GHG regulation, including, in EPA's phrase, "tailoring" numerical regulatory thresholds set forth in the statute.

Moreover, evidently relying on its view of what the statute does and doesn't require, EPA has not done an overall comprehensive assessment of the cumulative costs and benefits of all of the GHG regulation it has in mind. Thus, the nation is proceeding with GHG regulation under the CAA – and indeed EPA's five-year strategic plan identifies taking action on climate change and air quality as its number one goal – without any assessment of whether the benefits of regulation exceed the costs.

In finding that GHGs fit within the "capacious" definition of the CAA term "air pollutant," the Supreme Court relied on a provision that was included in the 1970 version of the CAA long before concern developed as to the effect of GHG emissions on climate change. Congress has thus never intentionally authorized EPA to regulate GHGs under the CAA. With EPA proceeding with GHG regulation, Congress must now decide whether such regulation represents wise public policy.

My name is Peter Glaser. I am a partner and Chair of the Climate Change practice team at the law firm of Troutman Sanders LLP. My testimony addresses why the Clean Air Act (CAA) is such a poor vehicle for addressing greenhouse gas (GHG) emissions. My purpose today is to provide the Committee with a legal perspective on GHG regulation under the CAA. My recommendation is that Congress should amend the CAA so that Environmental Protection Agency (EPA) is not authorized to regulate GHGs for climate change purposes. Concerns about GHG emissions and climate change should be addressed through a different path.<sup>1</sup>

Let me emphasize at the outset that I am not representing any of my clients in my testimony and I am not being compensated by any of them for this testimony. The views I express here are my own and do not necessarily reflect those of the clients I work with.

## I. Introduction

As the Committee knows, EPA began regulating GHGs in 2010. EPA has taken the position that its regulation flows from the Supreme Court decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), a case that began with a petition to EPA to regulate GHG emissions from new motor vehicles. *Massachusetts* found that GHGs are within what the Court termed the CAA's "capacious" definition of "air pollutant" as any substance or matter emitted to the air.<sup>2</sup>

According to the Court, however, the fact that GHGs are "air pollutants" does not require EPA to regulate GHG emissions. The Court said that CAA air pollutants may only be regulated if EPA makes an "endangerment finding" – a finding (in the specific context of the *Massachusetts* case) that GHGs emitted by new motor vehicles "cause, or

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<sup>1</sup> I do not, however, object to preservation of the regulatory authority set forth in the draft bill.

<sup>2</sup> 549 U.S. at 532.

contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” The Court remanded the case to EPA to do one of three things: find endangerment, find no endangerment, or determine that EPA is justified in making neither finding based on factors set forth in the CAA.

Following the remand, EPA issued its endangerment finding<sup>3</sup> and promulgated regulations limiting GHG emissions from new motor vehicles.<sup>4</sup> The Agency also took the position that its regulation of GHG emissions from motor vehicles, automatically and as a matter of law, made GHGs “subject to regulation” under the Prevention of Significant Deterioration (PSD) preconstruction permit program and the Title V operating permit program. As a result, according to EPA, new and modified *stationary* facilities that potentially emit GHGs above a certain amount are required to obtain these permits and become subject to GHG control requirements. EPA adopted two further rules, known as the PSD Interpretive Rule<sup>5</sup> and the Tailoring Rule,<sup>6</sup> discussed in more detail below, under which this stationary source regulation commenced as of January 2, 2011.

EPA has additional GHG regulation in the works. It has proposed GHG regulations for medium and heavy-duty vehicles.<sup>7</sup> It is examining more GHG regulations for light-duty vehicles commencing in model year 2017. It recently asked for comment on settlement agreements under which it will promulgate New Source Performance

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<sup>3</sup> *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule*, 74 Fed. Reg. 66496 (Dec. 15, 2009).

<sup>4</sup> *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 75 Fed. Reg. 25,324 (May 7, 2010).

<sup>5</sup> *Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program*, 74 Fed. Reg. 51,535, 51,545-46 (Oct. 7, 2009).

<sup>6</sup> *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 74 Fed. Reg. 55,292, 55,344/2 (Oct. 27, 2009).

<sup>7</sup> *Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles*, 75 Fed. Reg. 74152 (Nov. 30, 2010).

Standards (NSPS) for GHG emissions from petroleum refineries and fossil fuel powerplants, and signaled that it intends to promulgate GHG NSPS for other categories of facilities.<sup>8</sup> And it has pending before it and is considering petitions to regulate a large variety of mobile and stationary facilities.

EPA's first round of regulation – the endangerment finding, its light-duty vehicle rule, the PSD Interpretive Rule, and the Tailoring Rule – are all now on appeal before the D.C. Circuit.<sup>9</sup> The Court will determine, among other issues, whether EPA was legally required to regulate GHG emissions and, if so, whether it was legally required to do so for stationary as opposed to mobile sources. However, in the nature of lawsuits, final disposition of the case, including ultimately a Supreme Court decision, may not occur for several years.

That leaves it in Congress' hands to determine whether EPA should continue on its GHG regulatory path or whether Congress should decide on some different approach. Regardless of whether EPA is correct in its interpretation of its legal obligations, plainly the Agency believes it has a mandate from Congress to proceed with the GHG regulations it has adopted and plans to adopt. If Congress does not believe that it has given EPA that mandate, or if Congress does not believe that regulating GHGs is a wise course of action, now is the time for Congress to do something about it before the regulatory program becomes too advanced. My own view, as discussed below, is that Congress should adopt legislation prohibiting EPA from regulating GHGs under the CAA because regulating GHGs under that statute is likely to do more harm than good.

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<sup>8</sup> *Notice of Proposed Settlement Agreement; Request for Public Comment*, 75 Fed. Reg. 82390 (Dec. 30, 2010), *Proposed Settlement Agreement, Clean Air Act Citizen Suit*, 75 Fed. Reg. 82392 (Dec. 30, 2010).

<sup>9</sup> *Coalition for Responsible Regulation v. EPA*, No. 09-1322 (D.C. Cir.), *Coalition for Responsible Regulation v. EPA*, No. 10-1073 (D.C. Cir.), *Coalition for Responsible Regulation v. EPA*, No. 10-1092 (D.C. Cir.).

## **II. The CAA Was Not Designed to Regulate GHG Emissions**

GHGs are not like other emissions that the CAA was designed to regulate. The CAA was designed to regulate emissions that have a local or regional impact within the United States. Because of this local or regional impact, the controls required by the CAA can eliminate, and indeed in most circumstances are required to eliminate, that impact.

### **A. CAA Programs**

The National Ambient Air Quality Standards (NAAQS) program, which has been referred to as the “cornerstone” of the CAA, authorizes EPA to define safe levels in the air of the most ubiquitous air emissions and establishes a process of designating areas of the country as being either in attainment or nonattainment of those levels. The level of air quality necessary to protect public health and welfare is termed the NAAQS. States are then required to prepare state implementation plans (SIPs) in order to attain those NAAQS.

Many CAA programs are designed around the goal of bringing the entire country into attainment with the NAAQS and making sure areas of the country that have better air quality than the NAAQS do not experience a significant deterioration of that air quality. Thus, the New Source Review (NSR) permitting program requires preconstruction permits for sources that potentially emit air pollutants above certain statutorily defined thresholds. Oversimplifying somewhat, new and modified facilities located in attainment areas must obtain PSD permits requiring them to undertake Best Available Control Technology (BACT) for the relevant pollutants. New and modified facilities located in nonattainment areas are required to obtain NSR nonattainment permits requiring them,

among other things, to install controls that will achieve the more stringent Lowest Achievable Emission Rate (LAER) standard.

Similarly, the NSPS program under section 111 of the CAA was largely designed as a tool for implementing the NAAQS program or to otherwise eliminate local or regional air pollution. Under the program, the Administrator establishes a list of categories of facilities that “in his judgment...cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” The Administrator then establishes NSPS that, based on a number of factors, represent the “best demonstrated technology” for reducing such pollution. Like the NSR permit program, these standards apply to new and modified facilities. In certain situations, as I will discuss, the NSPS program can also apply to existing facilities whether or not they modify.

The NSPS program is often said to work in tandem with the PSD program in establishing a “floor” for what type of controls a facility seeking a permit must install. BACT or LAER must at least be as strict as the NSPS. However, if at the time the developer submits its permit application, technology has moved forward since the NSPS was established, then the developer may be required as BACT or LAER to meet a more stringent standard.

Certain CAA programs do not apply to NAAQS pollutants but are limited to other forms of pollution that are emitted by fewer sources. Yet these programs also are aimed at local or regional air pollution. For instance, the Hazardous Air Pollutants (HAPs) program requires the Administrator to make a list categories of sources that emit especially dangerous air pollutants and then promulgate very stringent Maximum

Achievable Control Technology (MACT) standards that new, modified and existing facilities must meet.

**B. GHGs Are Different**

GHGs, however, are not like any of the pollutants that EPA has previously regulated under these and other CAA programs. GHGs mix in the global atmosphere so that atmospheric concentrations globally are uniform. As a result, a ton of carbon dioxide (CO<sub>2</sub>) emitted in Washington, D.C., has the same effect on atmospheric CO<sub>2</sub> concentrations as a ton emitted in Beijing.

Because of the unique nature of GHGs, none of the CAA programs are capable of materially affecting atmospheric GHG concentrations or the danger to public health and welfare that EPA is concerned results from GHG emissions. GHG are emitted by a very large number of sources worldwide, and the United States is no longer the leading global emitter. Over time, as the developing world continues to develop, U.S. share of global emissions will diminish. Keep in mind that, notwithstanding the pace of global development, approximately three billion people still lack access to reliable supplies of electricity. Given the phenomenal pace of development in what used to be referred to as the Third World, coal has become by far the fastest growing global fuel. Try as we might, we cannot use the CAA to significantly reduce global atmospheric GHG concentrations.<sup>10</sup>

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<sup>10</sup> The only real instance where the CAA has been used to address a global atmospheric issue like GHGs is stratospheric ozone stemming from concern about thinning of the stratospheric ozone layer. But for stratospheric ozone, the country did not try to address the problem as EPA is doing here, by trying to utilize poorly fitting existing CAA programs. Instead, Congress itself legislated a program as a part of implementation of the Montreal Protocol, an international treaty, and added that program as Title VI of the CAA.

EPA's first GHG regulation is a case in point. Last year, EPA promulgated GHG standards for light-duty motor vehicles for model years 2012-16. By EPA's own analysis, those standards will, by 2100, reduce global temperature by 0.006 to 0.015 [degrees] C and sea level rise by 0.06 – 0.14 cm by 2100.<sup>11</sup>

It is, of course, true that the Supreme Court found that GHGs fit the broad definition of "air pollutant" under the CAA. But that does not mean that regulating GHGs represents wise public policy. The definition of "air pollutant" on which the Supreme Court relied was a part of the 1970 version of the CAA, which was adopted before concern developed as to the potential climatological effects of global atmospheric GHG concentrations. Whether or not GHGs technically fit the CAA definition of "air pollutant," the fact is that the statute was not designed with GHGs in mind and that GHGs do not comfortably fit within the CAA's framework.

### **III. EPA as the Regulator of Everything?**

GHGs, and particularly carbon dioxide, are unlike other substances regulated under the CAA in another equally important sense. Carbon dioxide is the inevitable byproduct of combusting fossil fuel (oxidizing carbon) for energy. Eighty-five percent of the nation's energy is produced from fossil fuel. About 50 percent of the nation's electricity comes from coal.

Given the central role of fossil fuel energy in the nation's life, EPA authority to impose GHG regulation means that EPA has authority over the American economy in a way that no other environmental statute gives it. This is reflected in the petitions pending before EPA to regulate GHG emissions from so many types of sources. But the issue is

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<sup>11</sup>Regulatory Impact Analysis, Final Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, at 7-124.

broader than that because virtually every business and every household uses electricity and is therefore indirectly responsible for the production of CO<sub>2</sub> emissions. To produce fewer CO<sub>2</sub> emissions, we must utilize less fossil fuel energy and that will have a direct and potentially serious impact on most Americans. There are obviously reasons why the nation chooses to use fossil fuels, and if regulation forces a lesser use of fossil fuels, there will obviously be consequences.

I make this point not because I intend to debate here the wisdom of using more or less fossil fuel. My point, however, is to pose the question as to what part of government is best suited to make the decision as to the types of energy we should use. And my own view is that given the almost accidental way in which the nation has backed into EPA regulation of GHGs – where after decades of congressional debate and international negotiations we have ended up with EPA regulation as a result of a court decision construing a statute enacted before GHGs became a concern and ill-suited to the issue – EPA is not the right vehicle. Only a governmental institution with oversight over the entire economy, including but not limited to the environment, should make the economy-wide decisions that are necessary in controlling GHGs. That institution is Congress.

A case in point in this regard is the electric utility industry. EPA has said that it intends to utilize all of its regulatory authority over the utility industry, both as to GHGs and non-GHGs, to “transform” that industry.<sup>12</sup> Maybe the utility industry needs transforming, maybe it doesn’t. But given that electricity is the life’s blood of modern life, and that anything that interferes with a reliable supply of electricity could have grave

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<sup>12</sup> Remarks of Gina McCarthy, EPA Assistant Administrator for Air and Radiation, at EUCI Conference in Phoenix, Arizona, January 31, 2011. *See also Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone*, 75 Fed. Reg. 45210, 45227 (Aug. 2, 2010) (EPA seeking through a variety of rulemakings to “creat[e] a clean, efficient, and completely modern power sector.”)

consequences, the question is whether EPA is the right body to determine whether or not the utility industry should be transformed. Again, I would suggest that the right body to make that decision is Congress.

#### **IV. No Weighing of Costs and Benefits**

As EPA embarks on CAA regulation under the CAA, it is curious that the Agency has not undertaken a study of the overall costs and benefits of that regulation. Since EPA regulation of GHGs is one of the most momentous and controversial decisions the Agency has made in its forty-year history, it would be supposed that the Agency would not embark on this regulatory course without having first thoroughly weighed the costs and consequences of regulation and exposed its conclusions to public scrutiny. It has not. Thus, as the nation proceeds further and further down the path of EPA GHG regulation, no overall analysis has been done as to whether such regulation represents wise public policy.

EPA GHG regulation, of course, did not spring to life on its own. It was a conscious decision the Agency made. EPA may have felt that, following the *Massachusetts* decision and given EPA's view of climate science, it was bound to make an endangerment finding and regulate. But the Court in *Massachusetts* explicitly stated that EPA had has "significant latitude as to the manner, timing, [and]content" of any GHG regulation it might undertake.<sup>13</sup> EPA thus had time, as a matter of good government, to fully assess the costs and benefits of the regulation it was about to enter into.

Keep in mind that the GHG regulation that EPA has undertaken so far is only the first step in an increasing series of planned regulations. In keeping with the Agency's

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<sup>13</sup> 549 U.S. at 533.

view that climate change represents one of the most serious threats facing mankind, EPA's recently adopted FY 2011-2015 Strategic Plan listed as its first goal "Taking Action on Climate Change and Improving Air Quality." According to EPA, the purpose of adopting strategic plan goals is to identify "the measurable environmental and human health outcomes the public can expect over the next five years and describe[] how we intend to achieve those results."<sup>14</sup> Thus, EPA presumably has a five-year plan of GHG regulation, and it has identified or intends to identify the outcomes of this plan and how those outcomes will be achieved. Nevertheless, it has chosen to proceed with regulation in what appears to be an ad hoc, rule-by-rule basis without any comprehensive assessment of the costs and benefits of the overall plan.

EPA's failure to perform this kind of comprehensive study and to expose the results to public scrutiny before regulation commenced would seem to contradict the President's recent Executive Order 13563. That Executive Order restated and reaffirmed the principles set forth in Executive Order 12866 of September 30, 1993, which was promulgated during the Clinton Administration. Included in these principles is the mandate for EPA to assess the cumulative impact of its regulations rather than to assess each regulation in isolation. Executive Order 13563 explicitly quotes the cumulative impact requirement from Executive Order 12866: "As stated in that Executive Order and to the extent permitted by law, each agency must, among other things...tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, *the costs of cumulative regulations*...." (Emphasis supplied.)

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<sup>14</sup> <http://www.epa.gov/planandbudget/>.

No doubt, EPA would say that, where required, the Agency will perform cost-benefit analyses in individual rulemakings. Thus, EPA studied the costs and impacts of motor vehicle regulation on the motor vehicle industry during the Light-Duty Vehicle Rule rulemaking proceeding, and it will undoubtedly study the costs and benefits of regulating GHGs from specific sectors of the economy under the NSPS program when it undertakes individual sector-specific NSPS rulemakings for those sectors. But these individual rulemaking studies do not substitute for the comprehensive study that EPA should have undertaken before taking the first steps in implementing its overall program of GHG regulation.

The detrimental consequences of EPA's decision to limit cost-benefit analysis to individual rulemaking proceedings is shown by EPA's continuing failure to assess the impacts of regulating stationary source GHG emissions under the PSD Title V programs even though this regulatory program began on January 2, 2011. During the rulemaking processes that led to the Endangerment Finding, the Light-Duty Vehicle Rule, the PSD Interpretive Rule and the Tailoring Rule, the Agency was asked to study the effect of these regulations on stationary sources. A large cross-section of business told EPA that since EPA took the position that regulating vehicle GHG emissions under the CAA would automatically trigger PSD and Title V regulation of stationary sources, then EPA should assess the costs and benefits of such stationary source regulation. Although EPA assessed the cost and benefits of regulating GHG emissions from vehicles, it refused to do so for GHG emissions from stationary sources.

EPA had two reasons for refusing to do the study. First, it said that it was not required to do the study because it was not directly regulating stationary source GHG

emissions. Instead, it characterized its actions as (a) regulating motor vehicle emissions and (b) relieving small stationary source GHG-emitters from regulatory burdens that they would have to bear under the PSD and Title V programs absent the Tailoring Rule. Second, it said that the BACT controls that will be imposed in permitting are unknown at this point and thus EPA has no way of knowing in advance what those requirements will be.<sup>15</sup>

Putting aside EPA's position that it was not legally required to assess the costs and benefits of triggering GHG regulation of stationary sources, a position that is being challenged in the current litigation, EPA's response begs the question of why EPA did not think that good public policy demanded that a full and broad study be undertaken before GHG regulation commenced. Although EPA cannot anticipate exactly what form of BACT controls will be required under the PSD program, EPA could establish ranges of possible regulation and perform an assessment on that basis. EPA, moreover, has a good deal of control over how states implement GHG regulation under the PSD program. In any event, the result of EPA's decision not to do a study is that the industrial, manufacturing and electric generation sectors of the U.S. economy are now subject to GHG regulation as a result of decisions EPA made, yet EPA did not assess the costs and benefits of that decision.

In sum, the fact that we have regulated before studying the wisdom of regulation further highlights the weakness of the CAA as a vehicle for regulating GHGs. Undoubtedly, EPA believes it is fulfilling all of its statutory mandates and that no study is legally required. And, for the sake of argument, perhaps EPA will prevail in the pending

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<sup>15</sup> Prevention of Significant Deterioration and Title V GHG Tailoring Rule: EPA's Response to Public Comments at 6.3

litigation on this issue. But that does not take away from how surprising it is that the nation would proceed with GHG regulation under the CAA without any demonstration that the benefits exceed the costs. If EPA is right that it can proceed with GHG regulation without first having studied the cumulative cost of all of the regulations it has in mind now and in the future, then that is an additional reason why the CAA is not the right device for addressing GHGs.

**V. EPA’s Extraordinary Efforts to “Tailor” the PSD and Title V Programs to Fit GHGs**

The difficulty of fitting GHG regulation within the structure of CAA programs is shown in EPA’s first stationary source regulatory effort. EPA, in its own words, had to “tailor” the CAA to fit the regulation it imposed, and it relied on a series of highly creative legal interpretations to do so. Whether or not EPA’s legal theories survive in court, the fact that the Agency had to resort to such creativity further suggests that the statute is a poor vehicle for regulating GHGs.

**A. The Tailoring Rule Itself**

As noted, EPA takes the view that by regulating GHG emissions from new motor vehicles, GHGs automatically became “subject to regulation” under the PSD preconstruction permit program and the Title V operating permit program. As a result, according to the Agency new and modified facilities that potentially emit GHGs above certain thresholds cannot begin construction without first obtaining a PSD permit setting forth BACT standards for the facility’s GHG emissions, and such facilities cannot operate without a Title V permit.

The PSD and Title V programs, however, are unsuited for regulating GHG emissions for a number of reasons, not least of which is that the statutory thresholds for

regulation are far too low. Under the PSD program, a new facility must obtain a permit if it potentially emits above 100 or 250 tons per year (tpy) of a pollutant depending on the type of facility. Additionally, under PSD, a facility that potentially emits above those levels that undertakes a modification that potentially increases emissions of the pollutant by much lower amounts (for GHGs the level is any increase) must obtain a permit. Under the Title V program, a facility must have a permit if it potentially emits more than 100 tpy of a pollutant. These levels are set forth in the statute and are appropriate for traditional types of pollution because those levels represent a meaningful amount of pollution and are emitted by a relatively small number of facilities.

For GHGs, these levels are completely inappropriate, as EPA itself found. According to EPA, more than 6 million buildings or facilities emit at least 100 tpy of GHGs.<sup>16</sup> This is because most buildings in the United States are heated with oil or natural gas and therefore emit CO<sub>2</sub>. Thus, applying the PSD and Title V statutory thresholds to GHGs would result in regulation of a very large number and variety of buildings and facilities, including many office and apartment buildings; hotels; enclosed malls; large retail stores and warehouses; colleges, school buildings, hospitals and large assisted living facilities;<sup>17</sup> large houses of worship; product pipelines; food processing facilities; large heated agricultural facilities; indoor sports arenas and other large public assembly buildings; breweries, wineries, and restaurants; a variety of mom and pop stores; and many others.

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<sup>16</sup> Tailoring Rule, 75 Fed Reg. at 31536.

<sup>17</sup> States may exempt non-profit health or education institutions from the PSD program. Absent such exemption, even non-profit hospitals, nursing homes, assisted living facilities and school buildings would be subject to PSD regulation.

EPA itself called this potential regulatory result “absurd” and said it would lead to a grid-locking of the permit system as permitting authorities would be swamped with permit applications and permitting would come to a halt for both large and small sources. Without permits, facilities cannot construct or modify, with potentially devastating economic consequences. Moreover, all of this pain would be for very little benefit, as these small sources emit such low levels of GHGs.

As a result of this potentially catastrophic situation, EPA issued a remarkable rule called the Tailoring Rule. Under the Tailoring Rule, EPA essentially replaced the thresholds that Congress itself established with much higher thresholds. Step one of the Tailoring Rule began on January 1, 2011. In this first step, facilities that would be subject to the PSD program because of their non-GHG emissions are required to undertake BACT for their GHG emissions if those facilities potentially increase GHG emissions by at least 75,000 tpy. Step two begins on July 1, 2011. In this second step, new facilities whose GHG emissions potentially exceed 100,000 tpy, and existing facilities that undertake a modification that will increase GHG emissions by at least 75,000 tpy, must obtain a PSD permit setting forth BACT for GHGs.

EPA will initiate a rulemaking this year to be concluded by July 1, 2012 under which EPA will lower the emissions threshold in a step three. EPA says the step three threshold will not be below 50,000 tpy, although EPA says it will do a study of whether there will be a fourth step beginning no earlier than May 1, 2016 where the thresholds will be lowered even more.

There has been a great deal of discussion about whether EPA has legal authority to “tailor” numerical thresholds established by Congress in this fashion, and ultimately

the matter will be decided in court. One interesting facet of the debate is that although EPA's justification for tailoring the thresholds is that it needs time to phase in compliance with the thresholds given the huge number of affected facilities, EPA says it may never implement the statutory thresholds and may stop the phase-in at some higher number. Indeed, by April 30, 2016, more than five years after regulation began, EPA's phase in will only be at 50,000 tpy, which is very far from the statutory 100/250 tpy levels.

At the very least, EPA's attempt to "tailor" the statute to GHGs creates significant legal doubt, and this doubt creates negative consequences in at least two areas. First, if EPA's legal interpretation is wrong, EPA will have created a situation where potentially a very large number of small sources will be subject to immediate permitting requirements. Indeed, risk exists that sources could be found to have violated the CAA by having undertaken construction without having first obtained a permit. In a similar vein, risk exists that where proposed construction of a small GHG-emitting source, for instance a big-box store, has created public controversy, a "NIMBY" lawsuit could be brought to stop the project based on its failure to obtain a PSD permit. The Tailoring Rule would not necessarily prevent a state or federal trial court from enforcing the CAA statutory thresholds.

Second, there is great uncertainty in the regulated community about whether it can rely on the Tailoring Rule. Given EPA's creative interpretation of the statute, this uncertainty is far greater than the typical uncertainty that is created when a regulation is enacted and then challenged in court. Uncertainty is not conducive to the stable regulatory environment that business needs to make new capital investments.

**B. State Implementation of the Tailoring Rule**

Tailoring the statutory thresholds was not the only legal impediment to regulating GHGs under the PSD and Title V programs for which EPA needed a creative solution. Of equal concern was the fact that most PSD and Title V permits are issued by states. In 43 states, these permit programs are promulgated under both state and federal law. The state authorizes the programs under state law, the program is then submitted to EPA in a SIP, and EPA approves the SIP as being in compliance with federal law.

**1. The Two State Law Problems**

Regulating GHG emissions under the PSD and Title V programs created two state law problems. First, EPA found that the laws of 13 states did not authorize them to regulate GHG emissions. This means that, despite EPA having decided that GHGs must be regulated under the PSD and Title V programs, these 13 states were barred by their own state law from issuing permits for GHG emissions or issuing permits that required controls on GHG emissions. Given EPA's legal interpretation of the CAA (one that is not shared by many business groups), EPA concluded that states must change their laws to regulate GHG emissions or face a construction ban for facilities that potentially emit above the Tailoring Rule thresholds. In EPA's view, unless these states changed their laws, facilities potentially emitting GHGs above the Tailoring Rule thresholds could not undertake construction without a PSD permit setting forth GHG BACT controls, but the state would not have authority to issue such a permit.

The second state law problem EPA confronted is that those states that could regulate GHG emissions were required by their laws to do so at the CAA 100/250 tpy level. These states, which represented a majority of all states, have laws providing for

regulation of “air pollutants” or pollutants that are “subject to regulation” at the 100/250 tpy level. These states interpreted their laws as automatically providing for regulation of GHGs when EPA made GHGs subject to regulation under the CAA. However, under these state laws, GHGs would be regulated at the same thresholds as other pollutants. As a result, unless these thresholds were changed, numerous small sources would become subject to regulation, which was the “absurd result” that the Tailoring Rule was designed to prevent.

## **2. EPA’s Solution**

EPA treated these two state law problems in similar but separate ways. EPA required the 13 states to change their laws to authorize GHG regulation by issuing a “SIP Call” (a mandate that the states change their laws and submit a new SIP to EPA with the changed laws).<sup>18</sup> In contrast, EPA did not require states to increase their permitting thresholds to the Tailoring Rule levels, but it strongly encouraged them to do so given the large number of sources that would become regulated if they didn’t.

EPA, however, was late in deciding exactly how it wanted to proceed as to these two state law problems. It did not initiate regulatory procedures for implementation of these state law changes until its proposed SIP Call was published in the Federal Register in September 2010. As a result, the process of changing all of these state laws got compressed into a very short period of time. Although EPA had been asked from a number of quarters to delay the January 2, 2011 commencement of GHG regulation, EPA refused to do so.

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<sup>18</sup> *Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call*, 75 Fed. Reg. 77698 (Dec. 13, 2010).

Thus, beginning in the Fall of 2010, EPA set loose a regulatory stampede under which both EPA and states scrambled to complete the numerous necessary rulemakings necessary for GHG regulation to commence on January 2, 2011 under both state and federal law. EPA completed no less than seven GHG rulemakings in December of 2010, six of them totaling more than 500 pages, on the day before the Christmas Eve holiday which were published in the Federal Register on December 29 and December 30.<sup>19</sup> States galloped through numerous rulemakings, some of them having to invoke emergency authority (yet no health emergency existed) to complete the necessary rulemakings—to change thresholds for the PSD and Title V programs and/or to authorize GHG regulation.

### **3. Creative Legal Interpretations**

EPA could not have acted on this highly expedited timeline without further creative interpretation of its statutory obligations. Two areas stand out.

#### **a. “Voluntary” Early SIP Submittals**

First, for the 13 states whose laws did not authorize GHG regulation, EPA did not even propose the GHG SIP Call until early September 2011, and it did not finalize the SIP Call until December 1, 2011, and the rule was not published in the Federal Register

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<sup>19</sup> *Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Failure to Submit State Implementation Plan Revisions Required for Greenhouse Gases*, 75 Fed. Reg. 81874 (Dec. 29, 2010), *Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan*, 75 Fed. Reg. 82246 (Dec. 30, 2010), *Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program; Proposed Rule*, 75 Fed. Reg. 82365 (Dec. 30, 2010), *Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program; Interim Final Rule*, 75 Fed. Reg. 82430 (Dec. 30, 2010), *Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule*, 75 Fed. Reg. 82536 (Dec. 30, 2010), *Action to Ensure Authority to Implement Title V Permitting Programs Under the Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 82254 (Dec. 30, 2010).

until December 14, 2010. The CAA requires that states be given up to three years (in the view of a number of business organizations) or at least up to 18 months (in EPA's view) to respond to the SIP Call. EPA gave the 13 states one year, but EPA also told these states that if they took the whole year there would be a construction ban in those states for facilities potentially emitting above the Tailoring Rule thresholds as of January 2, 2011. EPA further told the 13 states that, to avoid the construction ban, they could "voluntarily" tell EPA they wished to elect an "early" SIP submittal deadline of December 22 or sooner. This early deadline was a fiction; both the state and EPA would know that states could not meet that deadline. But the fiction allowed EPA to declare that states had "voluntarily" elected an early deadline, the state had then missed it, and therefore EPA was justified in imposing a Federal Implementation Plan (FIP) by January 2, 2011. Under the FIP, the states would retain control of their PSD permit programs for non-GHG emissions but EPA would take over permitting for GHG emissions. This creates the prospect that a facility that emits both GHG and non-GHGs will require two PSD permit approvals, one from the state on the non-GHG emissions and one from EPA for the GHG emissions. There are a host of unresolved issues as to how this permitting will work.

Given the compressed schedule, 7 states, some of them under protest, acquiesced in the "voluntary" early SIP submittal deadline and therefore became subject to FIPs on January 2, 2011. These states are Arizona, Arkansas, Florida, Idaho, Kansas, Oregon and Wyoming.<sup>20</sup> Five states did not elect early SIP submittal deadlines, but told EPA they expected to change their laws by the first part of 2011. These states are California

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<sup>20</sup> *Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan*, 75 Fed. Reg. 82246 (Dec. 30, 2010).

(Sacramento and the AQMD), Connecticut, Kentucky (most of the state), Nebraska and Nevada (Clark County).<sup>21</sup>

Texas refused to elect an early SIP submittal deadline and protested EPA's authority to impose GHG regulation on such a compressed schedule or on any schedule at all. EPA, without notice-and-comment, published an "interim final rule" on December 30, 2011 imposing a FIP on Texas anyway.<sup>22</sup> In the end, all 13 of these states were forced by EPA into quick action; none were given the benefit of the full time normally accorded in a SIP Call.

The validity of how EPA acted in this regard will undoubtedly be tested in court. But giving states the "option" of "voluntarily" waiving their right to adequate time to respond to the SIP Call under pressure of a construction ban is a remarkable interpretation of EPA's statutory responsibilities.

**b. Retroactive, Pre-Approval of SIP Changes**

The second creative EPA interpretation in this process derives pertains to the law changes states needed to make to increase their regulatory thresholds. Although EPA did not issue a SIP Call requiring states to change their state law thresholds, states changing their thresholds still had to submit those changes in the form of a revised SIP to EPA and the Agency had to approve those changes through notice-and-comment rulemaking. Unless EPA approved the changed thresholds, the pre-existing and much lower state

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<sup>21</sup> *Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Failure to Submit State Implementation Plan Revisions Required for Greenhouse Gases*, 75 Fed. Reg. 81874 (Dec. 29, 2010).

<sup>22</sup> *Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program; Interim Final Rule*, 75 Fed. Reg. 82430 (Dec. 30, 2010).

thresholds, which were set forth in each state's pre-existing EPA-approved SIP, would still be applicable in the states as a matter of federal law.

Not enough time remained in 2010, however, for all of the states to make the needed law changes, much less for the changes to be approved by EPA through notice-and-comment rulemaking.

To address this situation, EPA adopted two more extraordinary rules, one for the PSD program and one for the Title V program.<sup>23</sup> These rules, both issued on December 30, 2010, are intended to pre-approve the changes the states are making to their state law regulatory thresholds. They are both based on the fact that, before EPA ever regulated GHGs, and in some cases more than a decade ago, EPA approved state PSD and Title V SIPs. In the two new rules, EPA says it is retroactively "limiting" its prior approval of these pre-existing SIPs so that the approvals do not cover state PSD thresholds as applied to GHG emissions above the Tailoring Rule thresholds. In this way, EPA's pre-existing approval of the SIPs (a) will be deemed to apply regulation of non-GHG emissions at the statutory thresholds, but (b) will be deemed not to apply to the state regulation of GHGs below the Tailoring Rule levels. Hence, even before the states change their thresholds for GHGs and before EPA approves those changed thresholds, EPA will have withdrawn its approval for the lower thresholds and those lower thresholds would not be enforceable under federal law.

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<sup>23</sup> *Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule*, 75 Fed. Reg. 82536 (Dec. 30, 2010), *Action to Ensure Authority to Implement Title V Permitting Programs Under the Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 82254 (Dec. 30, 2010). For convenience, I am referring to state Title V operating permit programs as being contained in SIPs in the same way state PSD programs are. There are differences, but not for the subject matter here.

EPA's primary justification for these new regulations is "error correction." EPA postulates that it made an error years ago before it had even thought about GHG regulation in not anticipating that one day it would regulate GHGs where it would be required to "tailor" the statutory thresholds.

The validity of this rationale is questionable, to say the least, and will undoubtedly be litigated in Court. EPA's action is unquestionably a sharp departure from normal practice in which *first* states submit SIP revisions and *then* EPA approves the SIP revision through notice-and-comment rulemaking. But the main point I wish to make here is the fact that EPA had to go to such lengths to implement regulation by January 2, 2011 again shows how poorly suited the CAA is to regulate GHGs.

**C. Did Any of This Cause Any Damage?**

EPA apparently questions whether all of this furious regulatory activity and resulting regulatory uncertainty actually resulted in any harm to the economy at large. A number of factors appear to be missing from EPA's analysis in this regard.

First, EPA's view seems to be that so long as EPA and the states got all of the regulations in place by the end of the year, they had done their job. But this view evinces little understanding of the need for business for lead time to understand and prepare for regulation. Business by and large could only sit and watch while this extraordinary regulatory scramble unfolded to see where it all ended up. When the dust settles, business will assess the nature of the new regulatory landscape and proceed accordingly. But the events of 2010 were not conducive to creating the stable regulatory environment business needs for the future.

Second, the continuing reliance on, at best, creative legal interpretations in order to implement its program on a highly expedited time table deepens business uncertainty even more. From the “tailoring” of statutory deadlines, to the fiction of an “early SIP submittal” deadline for states under threat of a construction ban, to the promulgation of rules premised on the correction of the supposed error of having failed many years ago to anticipate that EPA would some day regulate GHGs at the Tailoring Rule levels, EPA has acted in a way that leaves business wondering what the end result will be once the courts have spoken.

Third, EPA has left a number of states unhappy at the pace of EPA regulation that they are expected to implement. Although EPA has tried to portray itself as cooperating with states, and although states have done their best to cooperate with EPA in order to prevent a construction ban and/or the absurd result of too many sources becoming regulated, many states—and not just Texas—have protested. I attach a paper entitled “What States are Saying About EPA GHG Regulation,” that shows some of the concerns that have been expressed.

Fourth, EPA was late in getting guidance issued for the substantive requirements business would be required to meet in order to obtain a PSD permit for GHG emissions. Early in the year, EPA stated that it would begin rolling out sectoral white papers and guidance for GHG emissions in the Summer.<sup>24</sup> These were not issued until November. The guidance were issued so late in the year that EPA did not have enough time to take any comment before the guidance was finalized, it provided for only an extremely short comment period, including the Thanksgiving weekend, and it limited comments to the

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<sup>24</sup> Presentation to the Clean Air Act Advisory Committee, entitled “Update on Prevention of Significant Deterioration Guidance for Greenhouse Gases,” Anna Marie Wood, Acting Director Air Quality Policy Division, OAQPS, U.S. EPA, May 27, 2010.

essentially minor correction of technical errors. The late issuance of the guidance limited business' ability to understand and plan for the new requirements.

Finally, although EPA would place the burden on the public of showing how its rush to regulate in 2010 created harm, I think the burden should be on EPA to explain how the furious regulatory pace helped business recover from the recession and create jobs. Given that EPA has not provided any assessment of the benefit to the environment of beginning stationary source GHG regulation in 2011, and indeed specifically decided it would not study the costs and benefits of GHG regulation, EPA should explain why it was necessary to create all of this uncertainty.

#### **VI. Can EPA Avoid a GHG NAAQS?**

Regulation of GHGs under the NAAQS program would appear to be unthinkable. In the endangerment finding, EPA found that the current level of GHGs in the atmosphere are elevated as a result of anthropogenic emissions and that this elevated level poses a danger to human health at current atmospheric concentrations. This implies that if EPA were to establish a NAAQS for GHGs, EPA would have to establish a "primary" NAAQS to protect health as well as a secondary NAAQS to protect welfare and that both would have to be established at levels below current atmospheric concentrations. As a result, the entire country would become a nonattainment area for a primary and secondary GHG NAAQS.

Under the CAA, states that have nonattainment areas for a primary NAAQS must adopt SIPs that will bring the nonattainment area into attainment within five years, with the possibility of one five-year extension. The SIP must contain highly stringent control measures, including a requirement that any entity constructing a new or modified facility

that emits a regulated pollutant above the applicable threshold level must install stringent Lowest Achievable Emission Rate technology and obtain offsets. Severe sanctions result if the state does not comply with these requirements.

Because of the global nature of GHG emissions, however, states can do nothing to meaningfully affect ambient GHG concentrations within their borders. Thus, if EPA establishes a GHG NAAQS, severe consequences will result, yet states would be powerless to comply with the statutory mandate to bring their state into attainment.

Although GHG regulation under the NAAQS program plainly does not fit, such regulation may be required given EPA's Endangerment Finding. Indeed, the only legal precedent on point seems to favor the legal necessity of such regulation. EPA is required to promulgate a NAAQS for an air pollutant if three conditions are met: (1) the pollutant must, in the Administrator's judgment, "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare," which is a finding the Administrator has already essentially made; (2) the pollutant must be emitted "from numerous or diverse mobile or stationary sources," which would seem to be obvious, at least for CO<sub>2</sub>; and (3) the pollutant must be one "for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section."

In *NRDC v. Train*, 545 F.2d 320 (2nd Cir. 1978), the Court found that the last factor above did not give EPA discretion to avoid setting a NAAQS for a pollutant where the first two factors above are met. The decision thus seems to suggest that EPA might have difficulty avoiding a mandate that it establish a GHG NAAQS.

EPA has stated that *NRDC v. Train* may no longer be good law, although EPA's reasoning in this regard is open to interpretation.<sup>25</sup> Nevertheless, in 2009, two environmental groups petitioned EPA to establish a NAAQS for GHGs.<sup>26</sup> The petition is similar to the petition that ultimately led to *Massachusetts v. EPA* in that the agency was asked to undertake a rulemaking under which GHGs would be regulated under a specific CAA program. At some point, EPA will either deny the petition (presumably it won't grant it), in which case the environmental group will sue and try to force EPA to regulate, or, if EPA continues not to act on the petition, the environmental group will sue EPA to force it to take action. Either way the threat of NAAQS regulation hangs over EPA implementation of GHG regulation under the CAA.

#### **VII. EPA's Consent Decree Agreeing to Undertake GHG Regulation under the NSPS Program**

On December 30, 2011, EPA published notices in the Federal Register that it intends to regulate GHGs from petroleum refineries and fossil fuel powerplants under the NSPS program.<sup>27</sup> The NSPS rules will apply to new and modified facilities, and critically, EPA is also committing to invoke a little-used provision of the CAA – section 111(d) – to establish performance standards for existing facilities whether or not they modify. This is potentially a highly significant decision as fossil fuel powerplants and petroleum refineries obviously represent a large percentage of facilities that produce the energy the country uses.

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<sup>25</sup> *Regulating Greenhouse Gas Emissions under the Clean Air Act, Advance Notice of Proposed Rulemaking*, 73 Fed. Reg. 44353, 44477 n. 229 (July 30, 2008).

<sup>26</sup> Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act, Center for Biological Diversity and 350.org (Dec. 2, 2009).

<sup>27</sup> *Notice of Proposed Settlement Agreement; Request for Public Comment*, 75 Fed. Reg. 82390 (Dec. 30, 2010), *Proposed Settlement Agreement, Clean Air Act Citizen Suit*, 75 Fed. Reg. 82392 (Dec. 30, 2010).

I would like to point out two issues regarding EPA's commitment to undertake this regulation in settlement agreements. I do this not only to comment on how EPA is proposing to proceed with GHG regulation, but to highlight the fundamental problems that result when the CAA becomes the chosen vehicle for addressing GHG emissions.

**A. Timing of Regulation**

The first issue is the short rulemaking timelines to which EPA is committing. This issue is particularly concerning in light of a recent experience EPA had with the consent decree it entered into governing its so-called "boiler MACT" regulations. In the boiler MACT consent decree, EPA had committed to promulgating final MACT standards for commercial and industrial boilers by January 21, 2011. However, based on what EPA said was "new data" received during the rulemaking process, the Agency decided to significantly revise its proposal. EPA decided that the changes were so significant that it should repropose the rule in order to give the public a chance to comment on what was essentially a different rule from the proposal on which EPA originally took comment. Accordingly, it asked the court to give it until April 13, 2012 to issue a final rule, an extension of 15 months.<sup>28</sup>

The Court, however, only gave EPA a one-month extension. To meet this deadline, EPA was forced to send over a regulatory proposal to the Office of Management and Budget for review the day after the Court decision was issued. The Agency thus is in the position of having to issue a final rule which the Agency may not

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<sup>28</sup> See EPA's Memorandum in Support of Motion to Amend Order of March 31, 2006 (Dec. 7, 2010) in *Sierra Club v. Jackson*, No. 1:01CV01537 (D.D.C).

have adopted if it had had more time and that, in any event, it doesn't think has been subject to sufficient public comment.<sup>29</sup>

EPA may now be going down this same path with NSPS regulation. The settlement agreements that EPA is entering into for NSPS regulation requires the power plant standards to be proposed on July 26, 2011 and finalized on May 26, 2012, and the refinery standards to be proposed on December 15, 2011 and finalized on November 15, 2012. This does not leave enough time for EPA to finish these rulemakings in case, as occurred with the boiler MACT rule, EPA receives information that causes EPA to rethink the rule in fundamental respects.

Indeed, the need for EPA to have adequate time to finalize a rulemaking is greater in setting NSPS than in setting MACT standards, and this is particularly true because EPA is committing to promulgate NSPS for the virtually the entire fleet of existing fossil fuel powerplants and petroleum refineries as well as new units. The types of information EPA can consider in a MACT proceeding are relatively limited; economic impacts of regulation are not relevant except in certain situations. That is not the case, however, with NSPS standards.

According to the U.S. Court of Appeals for the D.C. Circuit , “[t]he language of section 111 [governing the NSPS program] . . . gives EPA authority . . . to weigh cost, energy, and environmental impacts in the broadest sense at the national and regional levels and over time as opposed to simply at the plant level in the immediate present.”<sup>30</sup>

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<sup>29</sup> See EPA January 21, 2011 news release entitled, EPA Announces Next Steps on Emissions Standards for Boilers, Certain Incinerators.

<sup>30</sup> *Sierra Club v. Costle*, 657 F.2d 298, 330 (D.C. Cir. 1981).

The Court stated that “section 111 of the Clean Air Act, properly construed, requires the functional equivalent of a NEPA impact statement.”<sup>31</sup>

Moreover, in 1980, in a case involving the limestone industry, the Court noted the “rigorous standard of review under section 111” applied by reviewing courts.<sup>32</sup> The Court stated that the “sheer massiveness of impact of the urgent regulations,” considered in that and other cases had “prompted the courts to require the agencies to develop a more complete record and a more clearly articulated review for arbitrariness and caprice” than had been applied in previous cases.<sup>33</sup>

If massiveness of regulatory impact was a concern in a limestone industry case, that concern would be magnified many times in promulgating GHG standards of performance for petroleum refineries and fossil fuel powerplants. A plethora of issues would be relevant in setting GHG standards for these facilities, with EPA weighing the cost, energy and, and environmental impacts of GHG regulation “in the broadest sense at the national and regional levels and over time” as if it were preparing an Environmental Impact Statement. A large number of parties would be interested given the overweening importance of the issues.

Thus, an EPA rulemaking to establish NSPS for petroleum refineries and powerplants would be highly complex, controversial and time-consuming. EPA may, therefore, have great difficulty finalizing a standard on the timetable that it is now committing to. But the teaching of the boiler MACT court decision is that it will be very difficult to modify the consent decree if needed.

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<sup>31</sup> *Id.* at 331, quoting *Portland Cement*, 486 F.2d at 384.

<sup>32</sup> *National Lime*, 627 F.2d at 429.

<sup>33</sup> *Id.* at 451 n.126.

**B. Commitment to Regulate GHG Emissions from Existing Units**

EPA's undertaking in the consent decrees to regulate GHG emissions from existing sources commits EPA to regulate using authority under Section 110(d) of the CAA that it has rarely exercised in the past. Our research discloses only nine instances in the history of the NSPS program where EPA has elected to adopt standards under section 111(d). Given this sparse history, there is no reason why EPA should commit in a legally binding settlement agreement to adopt such standards at any particular time. EPA may or may not want to establish such standards in the future, but since it is not legally compelled to do so at this time it should not commit to such regulation in a settlement agreement.

Under section 111(d), EPA establishes guidelines requiring states to adopt standards which the states then submit to EPA for approval. These state standards do not necessarily become effective on approval by EPA. EPA has discretion to provide for a period of lead time to allow sources to prepare to comply. Although the settlement agreements do not specify when compliance will be required, Gina McCarthy, Assistant Administrator for Air and Radiation, in remarks made in announcing the settlement agreements, referred to the possibility that existing units would be required to comply by 2015-16. Thus, probably around that time period, EPA through the states will be requiring that a large percentage of the facilities in the United States that produce energy will be required in some currently unknown fashion to reduce GHG emissions.

EPA's commitment to NSPS regulation of GHG emissions from existing facilities is a further example of why a comprehensive study of the costs and benefits of GHG regulation under the CAA is so vital. By entering into the settlement agreements, EPA

will have committed to issue regulations for the facilities that produce most of the energy that America uses without knowing whether the benefits will exceed the costs. No doubt EPA would respond that it will assess the costs and benefits of GHG regulation under the NSPS program once it begins rulemaking, but such a response would miss the point. The study should be undertaken before EPA commits to regulate, not after. Otherwise, EPA does not know whether it should regulate at all, or whether it should regulate as quickly as the timeline to which it has committed. And certainly the public is deprived of the ability to convince EPA in comments either not to regulate or not to regulate at this time.

#### **VIII. Excuse Not To Address GHGs At All?**

As a final matter, the point is often made that many who oppose GHG regulation under the CAA also oppose GHG cap-and-trade legislation, and therefore must be against addressing GHG emissions at all. Speaking for myself, that is not the case. Although for purposes of my testimony, I am agnostic about whether the world can or should reduce GHG emissions, or whether some form of cap-and-trade legislation may or may not be a good idea, I can wholeheartedly say that using the CAA to regulate GHGs is a decidedly bad idea even if one believes that the world should reduce GHG emissions. The statute is antiquated, has not been materially amended in 20 years, is complicated beyond all reason, and by and large favors inefficient top-down, command-and-control regulation that is especially unsuited for GHGs. Most of EPA's struggles to apply CAA programs to GHG regulation that I have described above reflect – and indeed prove – the unsuitability of those programs for the intended purpose.

In the end, the world is going to develop, and the world is going to use a great deal of fossil fuels and produce a great deal of GHG emissions. It should not be a surprise therefore that the fastest growing fuel in the world is coal.

Recognizing that the world is going to use immense and increasing amounts of fossil fuels for the foreseeable future is the beginning of wisdom in attempting to address GHG emissions. Putting our economy at a competitive disadvantage through the imposition of command-and-control GHG regulations under the CAA will only diminish the nation's ability to create jobs and economic wealth while doing little to affect the overall upward trend in global GHG emissions. Instead, the focus must be on new technological development, with government and industry working together to supply the needed breakthroughs. Achieving the goal of continuing to steadily reduce over time all air emissions is possible, but that goal cannot be achieved for GHGs within the strictures of the CAA.

## **IX. Conclusion**

For all of the reasons I have discussed, I believe that GHG regulation under the CAA creates significant legal and policy difficulties. Congress should address concerns as to GHGs in a different fashion.

I appreciate the opportunity to submit these comments.

## **WHAT STATES ARE SAYING ABOUT EPA GREENHOUSE GAS REGULATION**

- Arizona: “EPA has now put Arizona, and other permitting authorities, in a difficult position by giving us very little time to evaluate and incorporate the ‘tailoring’ regulations into state law.... Completing the rulemaking and SIP approval process in time to avoid EPA’s January 2011 construction ban deadline would be nearly impossible. Furthermore, the lawsuits that have been filed challenging the PSD and Title V GHG Rule make it difficult to justify expending any time on the rule.”
- Arkansas: “Arkansas does ‘not object’ to the earlier [SIP revision submittal] deadline, but only out of necessity, not out of reasonableness. Rationalizing reasonableness on the basis of a state ‘not objecting’ in this instance is hollow pretense. [Arkansas] disagrees with EPA’s rationale of ‘not objecting’ as conferring reasonableness on this deadline, and strongly urges against viewing stringent, shortened deadlines such as this as ‘reasonable’ in the future.”
- Georgia: “[W]e have major concerns with EPA’s strategy for regulating GHGs at stationary sources and with the EPA GHG guidance document. The timing that EPA has provided is not adequate and major disruptions to projects that have already been permitted, or have permit applications pending, are likely.”
- Illinois: “The cumulative efforts of Illinois EPA to address the Tailoring Rule is placing an enormous resource drain on our already stressed resources and involves the pulling of personnel from their normal day-to-day activities to assist in planning and implementation of the Tailoring Rule.”
- Kentucky: “The pretense of the need to complete the SIP Call by the implementation date of January 2, 2011 is necessitated solely by EPA’s circumvention of the normal SIP Call process, which would otherwise allow for a reasonable time frame to comply with the SIP Call process without adverse consequences ... the quick implementation of this rule will place a very heavy burden on our agency at a time when many critical issues face us and we are straining under unprecedented budgetary and staffing shortages.”
- Louisiana: “[G]lobal climate change is an issue that is best addressed through comprehensive federal legislation, rather than unilateral agency regulation, and [Louisiana] emphasizes that it does not support the manner through which EPA has chosen to regulate greenhouse gases under the Clean Air Act.”
- Missouri: “EPA’s timeline requiring Missouri to issue permits addressing GHGs beginning in January 2011 is aggressive. The controversial nature of regulating GHGs coupled with probable changes to permitting requirements make the task of informing and educating our stakeholders, legislators, and Department staff about the new requirements difficult in such a short period of time.”

- South Carolina: “The GHG Permitting Guidance needs to be modified to provide clarity to the permitting authorities, not add more confusion.... Given the timeframe for implementation (January 2011), it is imperative that the EPA provides straightforward, defensible and timely guidance on permitting GHG emissions.”
- Texas: “EPA actions magnify the inappropriateness of regulating GHG under the [Clean Air Act] and are a further attempt to alter the literal interpretation of the Act. The proposals by EPA are an attempt to write policy that should be contemplated by Congress. EPA’s actions exceed its administrative authority to execute the laws that Congress has written.”
- West Virginia: “EPA has adamantly pursued a course that places states, which are generally the primary permitting authority, in a completely untenable position. If states ignore GHG entirely, EPA will find the permitting programs deficient. If states acknowledge GHG but fail to adopt EPA's ‘tailoring’ approach, the states would be completely overwhelmed by the number of needed permits, effectively stopping the permit process. If states adopt EPA’s approach through whatever mechanism they can, many will be compromising their own principles and ideals of good policy while the permit programs remain open to litigation.”
- Wyoming: “[We] have serious concerns about EPA’s implementation timelines. Given that there are dozens of petitions concerning not only the Tailoring Rule but also the foundation for that rule, there is a high likelihood that any permitting strategy imposed on the states at this juncture is premature.”