



EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

CHAIRMAN

July 10, 2008

Honorable Susan E. Dudley
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, DC 20503

Re: Environmental Protection Agency Draft Advance Notice of Proposed Rulemaking

Dear Administrator Dudley,

Thank you for the opportunity to provide comments on the Environmental Protection Agency's Draft Advance Notice of Proposed Rulemaking "Regulating Greenhouse Gases Under the Clean Air Act" produced by agency staff for interagency review. Regrettably, the staff draft and supporting technical documents run several hundred pages in length and we have had a limited period of time to consider the material. Therefore, we are able to provide only a few preliminary and highly general comments, focusing on important areas of inquiry that the draft either does not address or does not adequately address as a basis for seeking public comment during the advanced notice of proposed rulemaking stage. In the short time provided, we have not been able to work through specific questions and issues with the Agency, and therefore are not able to support or otherwise endorse the draft document in its present form.

Overarching Comment

In his Rose Garden speech on April 16, 2008, President Bush announced a new national goal for reducing greenhouse gas emissions and outlined the new federal mandates, incentives, and other programs now in place that will help us achieve the goal. Acknowledging that further policies for the power generation sector would be necessary to fully achieve the goal, the President outlined the right way and the wrong way to proceed with any new policies. The EPA staff draft ANPR demonstrates why unaccountable new regulation under the existing Clean Air Act is the wrong way to accomplish our goals.

The staff draft does not provide a full and meaningful discussion of the broader policy and economic context in which it is considering, in the event of an endangerment finding, triggering the prospect of essentially automatic and immediate regulation over a vast range of community and business activity and an equally vast range of potential discretionary regulations with respect to the same and additional activities. In *Massachusetts v. EPA*, the Supreme Court reaffirmed that "EPA no doubt has significant latitude as to the manner, timing, content and coordination of its regulations with those of other agencies." 127 S.Ct. 1438,1462 (2007) The staff draft, however, is long on "manner" and "content," and short on "timing," "coordination," and any meaningful sense of context. It myopically focuses on the Clean Air Act and ignores or understates major intended and unintended consequences that would flow from misapplying decades-old regulatory tools applicable to local and regional pollution that were never designed to address greenhouse gas emissions and the global nature of these emissions.

The staff draft employs a kitchen sink approach to the innumerable ways in which EPA would use the Clean Air Act to automatically or discretionarily regulate an unprecedented range of activities giving rise to greenhouse gas emissions. Yet the staff draft provides little or no discussion of the extent to which new EPA regulations would duplicate, contradict, or effectively countermand the numerous mandates, incentives, and public private partnerships that are already underway and producing real results in addressing greenhouse gas emissions. This concern is particularly acute to the extent EPA action would effectively override the deliberate, bi-partisan decisions of elected federal and state legislatures on certain policies, as well as overriding some of EPA's own successful programs.

For example, less than one year ago, the U.S. Congress passed the Energy Independence and Security Act of 2007 (EISA) which prescribes new mandatory programs and specifies targets for vehicle fuel efficiency, renewable fuels, lighting efficiency, appliance efficiency, and federal government vehicle and building operations. The Department of Transportation, in consultation with other agencies, including EPA, has already proposed an aggressive path to greater vehicle fuel efficiency in accordance with Congress' direction. EPA itself is already working to implement new renewable fuel requirements. And the Department of Energy is working on a new round of appliance efficiency standards and, in accordance with new EISA requirements, is embarking on a new round of standard-setting. These and other EISA requirements will prevent billions of tons of greenhouse gas emissions from entering the atmosphere. In order to better inform and guide appropriate public comment, EPA's ANPR should provide a full discussion of these authorities and a preliminary analysis of how they intersect with and obviate duplicative or contradictory approaches under the Clean Air Act.

In addition to the EISA mandates, the potential for duplication, conflict, and misplaced prioritization and methods can arise in a number of other contexts, including:

- The parties to the Montreal Protocol recently adopted a proposal advance by the United States and a number of other countries to accelerate the phaseout of HCFCs—producing emission reductions that could exceed those of the Kyoto Protocol. A statutory framework for such emissions is already in place.
- A significant number of states have already enacted renewable portfolio standards carefully tailored to each state's unique energy system and capacity.
- The Department of Energy has produced new model building energy efficiency codes, tailored to different geographic regions and circumstances, and is working constructively with states and localities interested in adopting the relevant model code.
- Through the Energy Policy Act of 2005 and other legislation, Congress has chosen to use an incentive-based, rather than mandatory approach to addressing energy security and greenhouse gas emissions in certain sectors through a broad range and billions of dollars of subsidies for commercial deployment of cleaner, more efficient technologies, including nuclear power, more efficient coal power, renewable power (wind, solar, biomass, etc.), bio-fuels, and highly fuel efficient vehicles. And more than 40 billion dollars in loan guarantee authority is being made available this year alone for nuclear power plants, large scale renewable power, carbon capture and storage, and other large scale opportunities to avoid, reduce, or capture greenhouse gas emissions.
- Through its multi-billion dollar conservation programs, the Department of Agriculture is directly subsidizing farmers and other landowners to compete for funding for projects

that will help biologically sequester carbon dioxide emissions. The Department is also providing substantial incentives for biofuel and biomass production facilities.

- DOE's Climate Vision partnership, EPA's Climate Leaders Partnership, and numerous subject specific partnerships such as EPA's Natural Gas Star and the EPA/DOE Energy Star programs are successfully establishing and meeting targets for greenhouse gas mitigation through public-private commitments and programs that are producing measurable results.

These programs, and the numerous others comprising the federal government's comprehensive climate change strategy, should be the starting point for any discussion as to whether further legislation, let alone regulation should be considered. EPA's ANPR should provide a full discussion of these authorities and a preliminary analysis of how they intersect with and obviate duplicative or contradictory approaches under the Clean Air Act in order to better inform and guide appropriate public comment.

Endangerment Finding

EPA should include in the ANPR and the docket the material, analysis, and final agency determinations that formed the basis for the agency's original denial of the petition for rulemaking as to mobile sources of pollution and should take public comment on the implications of that analysis in the agency's decision as to whether it can or should make an endangerment finding at this time. In *Massachusetts v. EPA*, the Supreme Court did not address the substantive merits of EPA's original analysis ("We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding.") 127 S.Ct. at 1463. Instead, the court took issue with EPA reaching a "judgment" not to proceed with regulation without basing the reasons for its decision on the text of the Clean Air Act. The court held "only that EPA must ground its reasons for action or inaction in the statute"—in this case, running the analysis through the prism of the endangerment provisions of the Clean Air Act. (*Id.*) Doing so would seem to be the most immediate and essential response to the Court's remand. In this regard, however, the staff draft omits major elements and in some instances appears to be inconsistent with elements of the prior final agency determinations, signed by the EPA Administrator, concerning the state of the science, which are clearly relevant to the question of endangerment and which were not addressed one way or the other by the court.

EPA should take comment on the issues raised in the recent remarks by the Director of the Office of Science and Technology Policy concerning the current and future capability of the science with respect to predictions and projections of negative and positive climate impacts on a national, regional, and local scale. "Reflections on the Science and Policy of Energy and Climate Change," American Geophysical Union Fall Meeting, December 10, 2007. Any endangerment finding in the context of greenhouse gas emissions must draw from the emerging science of climate impacts. The Director's remarks provide helpful context for how to think through such issues and should be included in the docket.

EPA should take comment on the appropriate scope of activity that should be considered in making an endangerment decision in the context of greenhouse gas emissions. The remand from the Court focused on the issue of endangerment with respect to the relative contribution of

emissions from new motor vehicles to associated health or welfare impacts. Yet, the staff draft suggests an unprecedented approach of aggregating emissions of all greenhouse gases from all sources as the basis of an endangerment determination.

EPA should take comment on the extent to which it should subtract from the emissions projections for a source, reductions that are substantially likely to occur as a result of existing mandatory and incentive-based policies. For example, with respect to mobile sources, the 2007 EISA contains new mandates for vehicle fuel efficiency and for renewable fuel, supported by substantial federal budgets incentives that will substantially reduce the greenhouse gas portfolio of such mobile sources.

EPA should also take comment on the extent to which its emissions projections for a source category should account for the problem of carbon leakage, occasioned by the current lack of meaningful and predictable international participation in greenhouse gas mitigation efforts. The IPCC has projected that most of the future increase in emissions will be produced by the major developing countries, whose cumulative emissions will also exceed those of the developed world relatively soon. Accordingly, EPA's assumptions about the relative benefits of reducing greenhouse gas emissions at a certain cost here in the U.S. would need to be offset by reasonable assumptions about 1) the growth in emissions in countries that are not taking comparable steps and 2) the prospect that increased costs in the U.S. will drive a certain amount of production and associated emissions to other countries not taking comparable steps, thereby increasing emissions in those countries. EPA provided relevant analysis when it modeled the impact of S. 2191 earlier this year and found that the economy-wide emissions reductions that would be required by that bill (approx. 70% reductions by covered entities) would have resulted in a miniscule 1-2% change in global greenhouse gas concentrations at a cost of trillions of dollars. The S.2191 analysis and other relevant analysis should be included in the docket.

Regulatory Content

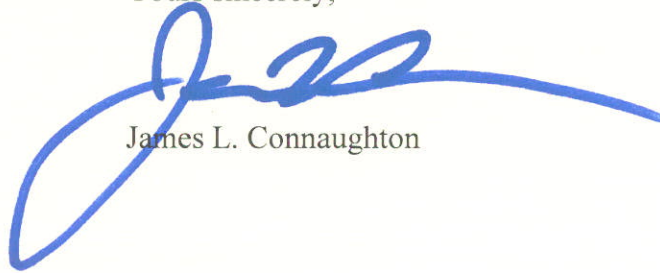
EPA should provide for public comment a much more complete technical, institutional, and economic analysis of the far reaching consequences that will arise from the automatic application of existing regulations that would occur in the event EPA makes an endangerment finding. The existing regulations as to conventional pollutants were never designed for the unique global characteristics and environmental aspects of greenhouse gas emissions. Also, the existing regulations were designed and implemented gradually over the course of more than thirty years, during which time states were able to build the capacity to implement, monitor and enforce an increasingly complex set of regulations, and entities subject to regulations were able to transition their activities to new levels of performance over time. In the event of an endangerment finding with respect to greenhouse gases, however, the cumulative impact of more than thirty years of regulation will immediately be imposed on the states and currently regulated entities in one fell swoop.

To complicate matters, the staff draft downplays the significance of the fact that applying regulations designed for relatively concentrated pollutants to relatively unconcentrated and voluminous emissions such as carbon dioxide will subject tens or even hundreds of thousands of community and business enterprises to Clean Air Act regulation for the first time. The administrative implications and costs of this alone would be daunting for federal and state

budgets and staff. But the novel, case-by-case application of old regulations to an entirely new set of circumstances and parties foreshadows unrelenting confusion, conflicts over compliance, and a decades-long litigation windfall for attorneys, consultants, and activists, as communities and the courts strive to sort it all out.

Another issue that requires a full and complete analysis is the potential for the unintended consequences of conflicting efforts with respect to possible automatic regulation of substances for which we have existing obligations under the Montreal Protocol. For example, the successful acceleration of the phaseout of HCFCs in developed and developing countries depends on the accessibility of HFCs substitutes with zero-ozone depleting potential but are greenhouse gases. Any additional regulation on HFCs as a greenhouse gas could lead to a delay in the transition away from ozone-depleting compounds, which could increase risk to human health and undermine the significant domestic and global progress in protecting the ozone layer. EPA should give careful consideration and solicit comment on the potential for this consequence.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'J. Connaughton', with a long horizontal flourish extending to the right.

James L. Connaughton