



State of Ohio Environmental Protection Agency

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Air and Radiation Docket and Information Center
Environmental Protection Agency
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1200 Pennsylvania Ave.,
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**RE: Comments on Regulating GHG emissions under the Clean Air Act ANPR –
Docket ID No. EPA-HQ-OAR-2008- 0318.**

Dear Administrator Johnson,

Thank you for the opportunity to comment on the Advance Notice of Proposed Rulemaking for regulating greenhouse (GHG) emissions under the Clean Air Act, published in the 73 Federal Register (page 44354) on July 30, 2008. Ohio EPA has reviewed the package and presents the attached comments on the proposal.

If you have any questions on the submittal, please contact Robert Hodanbosi at 614-644-2270.

Sincerely,

Chris Korleski
Director

Ted Strickland, Governor
Lee Fisher, Lieutenant Governor
Chris Korleski, Director

Ohio EPA Comments on
U.S. EPA Advance Notice of Proposed Rulemaking
On Greenhouse Gas Emissions

I. Background

On July 30, 2008, U.S. EPA published an Advance Notice of Proposed Rulemaking (ANPR) on Greenhouse Gas (GHG) Emissions. The ANPR is in part a response to the U.S. Supreme Court decision in *Massachusetts vs. U.S. EPA* on April 2, 2007, ruling that GHGs are “air pollutants” under the Clean Air Act (CAA) and that U.S. EPA has the authority to regulate GHGs under CAA Section 202. U.S. EPA has been requested to respond to the Supreme Court’s decision and the Administrator has yet to make a formal determination as to whether GHG emissions contribute to “air pollution which may reasonably be anticipated to endanger public health or welfare.” (also known as the “endangerment finding”). The ANPR describes the science of and human influence on climate change and the consequences of regulating GHGs as an “air pollutant” under Section 202 of the Clean Air Act.

II. General Comments

Climate change and the effect of GHG emissions on the climate are issues that simply must be addressed. Federal climate change legislation is critical to accomplish the goal of substantially reducing GHG emissions. While there are a number of important state and regional initiatives underway, only strong federal legislation will position the United States to provide global leadership on this issue. Ohio EPA believes that if national legislation does not come swiftly on such an important issue, the cost to reduce GHGs and mitigate the impacts will continue to increase and states will continue a piecemeal regulatory approach, burdening businesses to comply with different regulatory schemes across the United States.

Ohio EPA strongly believes that the best method to reduce GHG emissions is to pass federal legislation authorizing a federal GHG cap and trade program rather than relying on the Clean Air Act as the regulatory mechanism to reduce GHG emissions. We have a number of reasons why we believe a national cap and trade program would be the best method for regulating GHG emissions and that the current Clean Air Act is not suitable for this immense responsibility.

- A federal cap and trade program offers sources more flexibility in reducing emissions irrespective of geographic location while obtaining the same benefits because of the long temporal and spatial pollutant characteristics inherent to GHGs
- A federal GHG cap and trade program allows the market to determine the lowest cost of emission reductions, allowing sources to choose the most cost-effective approach for reducing GHG emissions.

- A federal GHG cap and trade program will force development of new technologies; federal investment in clean energy will help ensure that the technology is developed in the United States.
- A market-based cap and trade system should be based on historical emissions and provide substantial allocations to the states and industries that are going to bear the burden of additional control costs.
- In absence of GHG cap and trade federal legislation, a more traditional “command and control” regulatory approach under the CAA would be complex, less flexible and more costly. (For more details see headings below.)

The states simply are not in a position to have primary responsibility for the mitigation of GHGs. The current Clean Air Act has not been designed to address an issue of this type and magnitude. Section 101 of the CAA incorporates the Congressional findings and declaration of purpose for the Clean Air Act. Paragraph (a)(3) of Section 101 of the Clean Air Act specifically speaks to this point:

“[T]hat air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments”

In order to reduce GHGs there will need to be a fundamental shift in how our country continues to develop in contrast to how it has developed over the past 200 plus years. Much of our national industrial base has developed through the use of fossil fuels, the main source of GHG emissions from the country. Ohio EPA believes that the magnitude and scope of GHG regulation should entail a comprehensive and complete legislative package that institutes a broad set of measures to reduce GHGs on a national basis. The current Clean Air Act does not contain all of the necessary tools to significantly reduce GHGs since the Clean Air Act was not designed to address an issue of this magnitude. Further, although some states have taken a lead to reduce GHGs in their individual state, the states do not have the ability to enter into international agreements necessary to effectively mitigate the effect of greenhouse gases.

III. Endangerment Finding

The Supreme Court charged U.S. EPA to make a formal endangerment finding for GHG emissions from new motor vehicles. The Section 202(a) endangerment test asks two distinct questions:

- 1) Whether the air pollution at issue may reasonably be anticipated to endanger public health or welfare, and
- 2) Whether emissions from new motor vehicles cause or contribute to that air pollution.

Based on the information presented in the ANPR, it is apparent that GHGs from new motor vehicles sources could easily meet the two-part endangerment test under Section 202(a) of the Clean Air Act. The ANPR alone presents overwhelming scientific evidence that anthropogenic GHGs contribute to the effects of climate change. There is additional evidence that humans are causing climate change from the release of GHGs from new motor vehicles into the atmosphere that may reasonably be anticipated to endanger public health or welfare. Secondly, 2006 mobile source emissions contributed 28% of the total U.S. GHG emissions based on U.S. EPA standard accounting methodology. But although U.S. EPA may have enough scientific evidence to a positive endangerment finding, as a practical matter we do not feel that the Clean Air Act is the suitable tool to regulate GHGs.

U.S. EPA points out that a finding of endangerment under one section of the CAA would not by itself constitute a complete finding of endangerment under any other section of the CAA. Precedent setting would depend on: the basis for the finding, the pollutant at hand (e.g., pollutants considered as a group or as individual pollutants), the statutory tests in each CAA section, and the underlying facts. However, a positive or negative endangerment finding for GHG emissions under one provision of the CAA could have a significant and direct impact on decisions under other CAA sections containing similar endangerment language.

Trying to force GHG regulations into the CAA framework will do nothing to promote the comprehensive regulation of GHG emissions with the practicality and cost-effective flexibility needed for such a significant task. Given our concerns that an endangerment finding could percolate throughout the CAA into other sections, we believe it is of the utmost importance to swiftly undertake a comprehensive, nationwide legislative package that institutes a broad set of measures to reduce GHGs on a national basis. We encourage Congress to swiftly authorize a federal GHG cap and trade program with the understanding that GHGs are air pollutants but should be regulated under a separate legislative authority (e.g., not the current CAA) that is constructed specifically for the intrinsic pollutant characteristics of GHG emissions and reduction strategies.

IV. Clean Air Act Transition

If an endangerment finding is made, U.S. EPA could propose to use the CAA as a “place holder” prior to Congress developing a more comprehensive approach. We do not support this approach because once the CAA is opened to the “endangerment finding test” for GHGs then all of the other CAA sections must be examined. The intent of the CAA was to regulate criteria pollutants subject to local and regional impacts; even a transitional phase would impose too many procedural and legal problems to be considered as an effective option. Unless U.S. EPA can avoid some of the undesirable spillover effects of regulating GHG as an air pollutant under Section 202(a) of the CAA, U.S. EPA should refrain from making an endangerment determination unless and until the full scope of the CAA regulatory impacts are known.

V. Mobile Sources – Title II of CAA

It is our opinion that the framework of Title II of the CAA could provide enough flexibility to regulate GHGs from mobile sources. The Clean Air Act provides for the regulation of various pollutants from a wide-range of mobile sources including railroads, heavy duty vehicles, planes, and, of course, automobiles and light-duty trucks. Emission standards under Title II are “technology” forced with the level of emission reduction premised on the availability and feasibility of technological advances. U.S. EPA also has discretion to consider and weigh the cost of compliance, lead time for compliance, safety and other impacts on consumers. But the unanswered question is, will the regulation of GHGs from mobile sources under the current CAA allow for the effective regulation of GHGs from all sources.

GHGs should be regulated under a separate authority through GHG legislation so that spillover impacts of regulating GHGs in other section of the CAA can be avoided. In the event that U.S. EPA does regulate GHGs as an air pollutant under Title II of the CAA, the current Title II regulations should complement a broader cap and trade program by implementing performance standards in concert with a nationwide federal cap and trade program. Trading should be allowed between mobile sources and sources in other sectors of the economy under this program. It would be necessary to implement this strategy with legislation that not only creates a federal GHG cap and trade program as the centerpiece, but also provides incentives for the development and commercialization of low/no GHG mobile source technologies and establishes a flexible compliance program allowing emissions averaging, banking and borrowing. Also, high level coordination with the U.S. Department of Transportation will be needed to devise a consistent effort in implementing Corporate Average Fuel Economy (CAFE) standards for automobiles and light duty trucks.

VI. CAA Spillover Effects from a GHG Emissions Positive Endangerment Finding

A number of other sections under the CAA could ultimately be affected if GHGs are determined to be an air pollutant and U.S. EPA makes a positive endangerment finding under Section 202(a). Below are our comments on specific sections of the CAA. The common theme throughout these specific comments is that 1) the CAA was not constructed to regulate GHGs, 2) regulating GHGs would impose severe coordination problems for State SIPs, modeling, permitting, etc., and 3) the best method is a comprehensive approach including a centerpiece federal GHG cap and trade legislation.

A. Use of NAAQS for GHGs - Section 108

Ohio EPA recommends against setting a national ambient air quality standard (NAAQS) for GHG emissions. The NAAQS are designed to protect public health due to the inhalation effects of local and regional air pollutants. In the case of GHGs, such an adverse health effect is not present. GHGs’ inherent atmospheric properties have longer temporal and larger spatial parameters that impact the global climate. The way in which NAAQS are implemented today incorporate too confined a method to be

suitable for GHG emission reduction regulation. U.S. EPA must consider how a NAAQS level would be set given the broad and variable impacts GHG emissions have on climate change. Where would EPA set the level? Furthermore, the fixed timeframes in the Clean Air Act for states to achieve attainment do not lend themselves to the longer scale emission reduction programs for GHG. The entire country would be attainment or nonattainment depending on where the NAAQS is set. Since, in the case of GHG emissions, the majority of emissions come from sources outside the U.S. border, Ohio EPA would have limited ability to develop a state implementation plan to effectively take into account GHGs emitted from other countries. Rather than setting attainment or nonattainment timeframes, a federal GHG cap and trade program would be better suited to regulate GHGs when compared to NAAQS implementation.

B. New Source Performance Standards

It would be possible for U.S. EPA to begin to regulate GHGs through the New Source Performance Standards (NSPS). There are different source categories such as power plants that lend themselves to performance standards for GHGs. If U.S. EPA would chose to invoke the NSPS as an approach, it would be critical to set a standard that recognized the different levels of GHGs from different fuels. Although setting an NSPS for power plants may be a desirable first step, U.S. EPA must fully evaluate the ramifications that come with the NSPS promulgation (See CAA Section 111(d)). In addition, the NSPS provides a mechanism for reduced GHG emissions from new sources, but they do not provide a mechanism for the long term, comprehensive planning that is needed if the country intends to significantly reduce GHG emissions. Achieving a long-term approach would best be implemented under new legislation giving authority to regulate GHG emissions under a federal cap and trade program.

C. CAA Section 111(d)

Should EPA decide to regulate GHGs under the NSPS without a NAAQS or MACT, then Section 111(d) of the Clean Air Act would be triggered. This action would pull in existing sources into review for GHG emissions. The whole structure of Section 111(d) is a traditional command and control methodology for controlling emissions. Ohio EPA believes that a market-based federal cap and trade approach to GHGs would provide a more cost-effective means to obtain the emission reductions needed to effectively reduce GHGs. Ohio EPA does not believe that as a practical matter it is possible for U.S. EPA to develop a market-based cap and trade approach that satisfies 111(d) requirements.

D. MACT Requirements – Section 112

Section 112 is one of the three regulatory pathways under the CAA for stationary sources. It is designed for controlling hazardous air pollutant (HAP) emissions from these sources, including toxic pollutants. Based on the nature of this section, it would be unwise to list GHG as a hazardous air pollutant under Section 112.

First, as mentioned before, GHGs do not have the same inherent air pollutant characteristics as HAPs. GHGs are not toxic pollutants, and they do not need to be locally controlled at a low level to protect the health and welfare of the public. We do not think GHGs meet the criteria for incorporating them into the HAPs list. Secondly, given the structure and past implementation of Section 112, U.S. EPA would not have the authority to allow emissions trading among facilities or averaging across emitting equipment in different source categories regulated under this section. This fact is evident in the vacatur of the Clean Air Mercury Rule (CAMR). Third, the MACT statute limits consideration of cost in setting MACT standards. In all, the concepts embodied in the MACT provision reflect the exact opposite approach we think is best for regulating GHG emissions. Time and resources are better served at focusing on large sources of GHGs rather than trying to regulate millions of small sources. GHG emission sources should receive the most flexibility possible in choosing the least cost reduction available. Implementing a federal GHG cap and trade program for any sources falling under Section 112 would create a barrier to participating in such a cost-effective and flexible program. Additionally, the sources that fall under Section 112 would be unnecessarily regulated because they trigger the major source thresholds.

Under Section 112, many more stationary sources would be defined as a “major source” since the major source threshold is any stationary source that emits 10 tons per year or 25 tons per year of any combination of HAPs. Small apartment buildings, office buildings and large residential homes across the United States could easily trigger the “major source” threshold for GHGs with their natural gas use alone. This type of regulation would be administratively burdensome for a state or federal environmental agency to regulate and will not effectively or efficiently control or reduce GHGs. Any major source would then be subject to MACT, meaning that office buildings, apartment buildings and large residences would have to comply with a MACT for their natural gas boilers. This type of regulatory scenario is extremely undesirable and should not be used in GHG regulation.

VII. GHG Reporting Rule:

U.S. EPA should promulgate draft rules for GHG reporting requirements as soon as feasibly possible. Draft reporting rules were due in the fall of 2008 but have not been issued yet. Ohio EPA is anxious to measure Ohio’s GHG emission sources using a bottom-up approach where companies and organizations quantify and report their emissions from individual sources according to uniform accounting procedures and would like to begin compiling an inventory using U.S. EPA’s rules as a reference. We do not believe that the requirement for reporting or monitoring of GHGs triggers the “regulated under the Act” provisions with all of the other impacts that are described in the ANPR.

VIII. Permitting

Ohio EPA is concerned that once GHG is declared a regulated pollutant, the consequence of that action on permitting can be dramatic. Ohio EPA has worked, and continues to work, to improve the timeliness of its permitting decisions. A system that would require a PSD permit at 250 tons per year of GHGs for a new source and potentially any amount for an existing “major” would cause regulatory chaos. Even if the “major modification” threshold was raised to 100 tons per year, as described in the ANPR, relatively small changes in operation would trigger PSD and all of the attendant requirements. Although U.S. EPA describes a mechanism that can reduce the number of affected sources, the legal support for such an approach may be susceptible to challenge. U.S. EPA must provide additional legal support and assurance that the regulation of GHGs as a “regulated pollutant” across the entire existing CAA framework will not overwhelm an already too complex system of permitting. If U.S. EPA proceeds with regulating GHGs under the current Clean Air Act, the federal government will need to either provide a long-term transition to GHG permitting or provide substantial resources to states to implement GHG permitting. Again, having a clear legislative mandate for the size of sources covered by permits enforces Ohio EPA’s belief that a separate legislative package is the only practical means to achieve an overall goal of reducing GHG emissions.

IX. Conclusion

Ohio EPA believes that the current Clean Air Act places the primary responsibility for reducing air pollution at the state level. For over 30 years, the handling of traditional pollutants has been successful with the state lead and federal oversight. Based on a comprehensive, section-by-section review of the ANPR, Ohio EPA has concluded that the current Clean Air Act is not adequately designed to address climate change and should not be the vehicle to address GHG emissions.

Rather, Ohio EPA believes that, in order to address climate change, Congress must enact comprehensive legislation that:

- Develops a market-based cap and trade program that covers all major source sectors and considers the economic impact on the most affected states.
- Provides for long-term goals to substantially reduce GHG emissions.
- Provides for national consistency to address an international issue.

End Comments