

# EPA Takes First Step in Greenhouse Gas Rulemaking

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Virtually every sector of the economy – from power plants to pretzel carts – will be directly affected by the Environmental Protection Agency’s (EPA) decision on how (if at all) to regulate greenhouse gas (GHG) emissions under the Clean Air Act. While final regulations will not be issued during the current administration, the foundation for action by future administrations is being built now. Regulating greenhouse gases under authority of the Clean Air Act is highly controversial, both inside and outside the administration – so controversial that the EPA has issued a “non-consensus” Advance Notice of Proposed Rulemaking (ANPR) on Greenhouse Gas Emission opening a 120-day comment period to the public.

At its core, the ANPR concludes that Congress, not the EPA, should be addressing the control of GHG emissions. The ANPR includes over 70 pages of comments, heavily critical of EPA, submitted by other government agencies. The Office of Management and Budget summarized these comments in a July 10, 2008, letter:

“The enclosed letter from the Secretaries of Agriculture, Commerce, Transportation, and Energy . . . and letters from the Chairman of the Council on Environmental Quality, the Director of the Office of Science and Technology Policy and the Chairman of the Council of Economic Advisors, and the Chief Counsel for Advocacy at the Small Business Administration identify important concerns. As reflected in these letters, there is strong disagreement with many of the legal, analytical, economic, science and policy interpretations in the draft; however, these letters do reflect agreement with you that the Clean Air Act is a deeply flawed and

unsuitable vehicle for reducing greenhouse gas emissions.”

As a result of these comments, the ANPR was issued as a non-consensus document and is not technically a statement of the administration’s policy. The release of the ANPR was in response to the 2007 U.S. Supreme Court decision in *Massachusetts v. EPA*, in which the court held that carbon dioxide is a “pollutant” under the Clean Air Act, and required the EPA to make an “endangerment finding” or provide an explanation of why such a finding is not appropriate. Although *Massachusetts v. EPA* addressed the greenhouse gas issue in the context of motor vehicle emissions, an endangerment filing would almost inevitably implicate many other sections of the Clean Air Act and would have, in the words of EPA administrator Stephen Johnson, “a profound effect on virtually every sector of the economy.”

Besides advocating for congressional intervention, the ANPR presents the EPA’s analysis of the various options for addressing GHG emissions through regulation. The comments filed by industry, environmental, governmental and other groups in response to the ANPR will form the foundation for the EPA’s future endeavors in this area. Comments are due on Nov. 28, 2008.

If you are interested in more information about the ANPR or would like assistance in preparing comments, please contact Philip J. Mause at (202) 842-8819 or [Phillip.Mause@dbr.com](mailto:Phillip.Mause@dbr.com), Mark Hammond at (215) 988-2994 or [Mark.Hammond@dbr.com](mailto:Mark.Hammond@dbr.com), or your regular Drinker Biddle contact.

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