NACAA
national association of clean air agencies

November 26, 2008

EPA Docket Center (2822T)
Docket ID No. EPA-HQ-OAR-2008-0318
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Sir/Madam:

The National Association of Clean Air Agencies (NACAA), an association of state and local air pollution control agencies in 53 states and territories and more than 165 metropolitan areas throughout the country, appreciates this opportunity to comment on the U.S. Environmental Protection Agency's (EPA's) Advance Notice of Proposed Rulemaking (ANPR) on Regulating Greenhouse Gas Emissions Under the Clean Air Act, as published in the *Federal Register* on July 30, 2008 (73 *Federal Register* 44354). Global warming is an urgent problem that the U.S. must address expeditiously using every appropriate greenhouse gas (GHG) emission reduction tool. NACAA urges strongly that the appropriate authorities under the Clean Air Act be deployed to address global warming.

Existing regulatory tools under the Act allow for the implementation of programs that can serve as a bridge to future climate legislation, will inform Congress as it considers this legislation and will complement the enacted law. There are several Clean Air Act authorities that NACAA believes firmly can be usefully and thoughtfully deployed: New Source Performance Standards, mobile source provisions and permitting requirements; we describe below how these tools can be used. In addition, states and localities have exercised leadership in combating global warming through local, state and regional action plans and initiatives. EPA and Congress should carefully examine these robust efforts and use them as guideposts when crafting a federal response to global warming. State and local leadership and innovation also demonstrate that states and localities should not be preempted, either by statute or regulation, from adopting and enforcing programs to reduce GHG emissions.

I. EPA Should Regulate GHG Emissions under the Clean Air Act

NACAA supports the enactment of a "mandatory economy-wide GHG emission reduction program with quantifiable and enforceable limits" that reduces U.S. GHG emissions "substantially below current levels in order to lessen

dangerous anthropogenic interference with the climate."[1] But NACAA also recognizes that it will take several years to draft and enact legislation and promulgate regulations implementing that legislation. Federal action using existing authority is needed now to address this urgent environmental problem.[2] In order to reduce emissions sufficiently and in a cost-effective manner to meet a concentration target in 2050, the U.S. needs to slow, stop and reverse growth in GHG emissions as quickly as possible.[3] In addition, EPA has a legal obligation to fulfill: the Supreme Court in *Massachusetts v. EPA* held that GHGs are air pollutants as defined under the Clean Air Act. EPA must respond to the court decision and cannot ignore its obligation to address how the regulation of GHG emissions fits into the Clean Air Act.

The Clean Air Act contains several appropriate tools for controlling emissions of air pollutants like GHGs (as we will elaborate further in sections below), and we commend EPA staff for the thorough and clear manner in which these many flexible and useful tools are described in the ANPR. The association thus strongly disagrees with the Administrator's comment that the Act is "ill-suited for the task of regulating" GHGs.[4] As noted above, it will be several years before a mandatory economy-wide GHG emissions reduction program can be up and running, so programs enacted under existing Clean Air Act authorities can serve as a bridge to this new legislation. The Act provides authority for several of the most effective near-term reduction strategies identified in the ANPR: establishing standards to reduce GHG emissions from vehicles and fuels (through mobile sources authorities); industrial equipment upgrades and process changes to improve energy efficiency (New Source Performance Standards (NSPS) and permitting); and reducing power plant emissions by increasing efficiency and promoting cleaner technologies (NSPS and permitting).[5] Implementation of GHG control measures under the Clean Air Act can also provide useful lessons to Congress as it crafts new legislation. In addition, the Act provides for complementary measures to reduce GHG emissions even after new legislation is passed: for example, emission reduction requirements can be imposed through the Act on sources not covered by the new legislation.

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[1] NACAA Global Warming Principles, adopted May 1, 2007, at p. 2, available at www.4cleanair.org/Documents/NACAAGlobalWarmingPrinciples050107FINAL.pdf.

[2] NACAA notes that EPA has used its existing authority under other laws to address global warming-related issues. EPA proposed regulations under the Safe Drinking Water Act to govern the underground injection of carbon dioxide into geological sites as a means of spurring the deployment of carbon capture and storage technology. 73 *Federal Register* 43491 (July 25, 2008).

[3] Unlike traditional air pollutants, GHG emissions are cumulative and long-lived, so emissions occurring now will have impacts decades later. Thus, to meet a concentration target in the near future, reductions must almost certainly begin very soon. In addition, when reducing GHG emissions, it is more cost-effective to require new equipment to meet more aggressive requirements, and thus preferably a GHG reduction program would incorporate time for capital stock to turn over – another reason to begin imposing requirements on new equipment as soon as possible.

[4] EPA's Advance Notice of Proposed Rulemaking on Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 *Federal Register* 44354, at 44355 (July 30, 2008) (hereinafter "EPA GHG ANPR").

[5] EPA GHG ANPR at 44405, where it cites a study by McKinsey & Co. that identified the top five "bottom-up" strategies for economically reducing GHG emissions between now and 2030.

II. The Scientific Evidence Clearly Demonstrates that GHGs Endanger Public Health and Welfare

Before EPA can make use of many of the regulatory tools in the Act,[6] the agency needs to make a finding that emissions of GHGs endanger public health and welfare:

> While no two endangerment tests are precisely the same, they generally call on the Administrator of EPA to exercise his or her judgment regarding whether a particular air pollutant or source category causes or contributes to air pollution which may reasonably be anticipated to endanger public health or welfare.[7]

EPA notes that endangerment findings are located in many sections of the Act, and a finding of endangerment under one section of the Act "would not by itself constitute a complete finding of endangerment under any other section" of the Act, but it could set a precedent.[8] EPA also goes to great lengths in the ANPR to outline the potential ramifications of regulating GHG emissions once an endangerment finding has been made. Nevertheless, EPA must make an endangerment finding on scientific considerations alone and not consider the policy implications of the finding (including whether it sets a precedent for other parts of the Act). The test in the statute is a scientific one, similar to that for setting National Ambient Air Quality Standards under section 109(b). And, in any event, such regulation under the Act is manageable, as we will explain further below, so EPA must not shy away from its obligation to make an endangerment finding on scientific grounds.

The evidence is overwhelming that GHG emissions endanger public health and welfare. Global warming affects human health, air quality, food production and agriculture, forestry, water resources, coastal resources, energy needs, infrastructure, and ecosystems and wildlife. These effects are occurring now and are projected to occur with greater severity in the future. Extensive scientific evidence documents these effects; however we will limit our discussion to the evidence presented by EPA.[9]

GHG emissions have already caused the planet to warm. The Intergovernmental Panel on Climate Change (IPCC) stated in 2007:

> Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level.[10]

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[6] An important exception is that EPA does not need to make an endangerment finding to set a GHG NSPS for the more than 60 stationary source categories and subcategories for which the agency has already set an NSPS. Id. at 44486.

[7] Id. at 44418.

[8] Id. at 44419.

[9] EPA, Technical Support Document for Endangerment Analysis for Greenhouse Gas Emissions Under the Clean Air Act, Sixth Order Draft (June 21, 2008) (hereinafter "EPA Endangerment Analysis TSD").

[10] EPA Endangerment Analysis TSD at 21.

The future also portends more global warming. The IPCC projects that continued GHG emissions at or above current rates will "cause further warming and induce many changes in the global climate system during the 21st century that would very likely [90 to 99 percent probability of occurrence] be larger than those observed during the 20th century."[11]

EPA's Endangerment Analysis Technical Support Document catalogues the numerous harmful effects to human health and welfare from current and projected global warming. We will not repeat all of them here but, for purposes of example, highlight the following:

- Climate change will increase the frequency and severity of heat waves and extreme weather events. Extreme weather events result in increased deaths, injuries, infectious diseases and stresses due to forced migrations. The increased frequency and severity of heat waves lead to more illness and death, particularly among the young, elderly and frail.[12]
- Climate change expands the range of vector-borne and tick-borne diseases.[13]
- The IPCC projects with virtual certainty declining air quality in cities due to warmer days and warmer nights. Ozone concentrations are expected to increase, exacerbating negative health impacts and impeding attainment efforts.[14]
- Climate change will increase the scarcity of water and affect its distribution. In the West, global warming will mean an earlier melting of the snow pack and less snow, and the snowpack is the primary source of water for much of the West in the summer. Global warming will also increase droughts in some areas and deluges in others.[15]
- Increased temperatures and longer growing seasons will elevate the risk of wildfires.[16]
- Global warming will cause a rise in sea level, resulting in loss of waterfront property and wetlands and saltwater intrusion.[17]
- Many species will go extinct as their habitat changes and they are not able to shift ranges quickly enough. Such extinctions have already occurred. Acidification of oceans will also hurt – if not imperil with extinction – oceanic species.[18]

In short, if EPA follows the scientific evidence as it should, there can be no outcome but an affirmative conclusion by the agency that GHG emissions endanger public health and welfare.

Once EPA makes the finding of public health and welfare endangerment, the agency should proceed promptly with regulatory action based on the thoughts and recommendations NACAA offers below.[19]

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[11] Id. at 42.
[12] Id. at 64-68.
[13] Id. at 64.
[14] Id. at 70-75.
[15] Id. at 86-91.
[16] Id. at 83.
[17] Id. at 92-96.
[18] Id. at 104-110.

III. The National Ambient Air Quality Standards Regulatory Path is Not the Best Tool for Addressing GHG Emissions

EPA identifies three pathways for regulating stationary source GHG emissions: 1) the National Ambient Air Quality Standards (NAAQS) and implementation plans (Clean Air Act sections 107-110 and related provisions); 2) performance standards for new and existing sources through NSPS (section 111); and 3) hazardous air pollutant standards for stationary sources (section 112).[20] Of these three, we believe that the NSPS program offers the best approach, and we provide a detailed explanation of our views in the next section. We do not believe that the hazardous air pollutant framework in section 112 is well-suited for GHGs so we do not provide further comment on this regulatory pathway. In this section we explain why we believe the NAAQS system is not the best tool for addressing GHGs.

Six so-called criteria pollutants are regulated via NAAQS: particulate matter (both coarse and fine), ground-level ozone, carbon monoxide, sulfur oxides, nitrogen oxides and lead. For these criteria pollutants, EPA is to set primary "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health," and a secondary standard that specifies "a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air."[21]

EPA, when it sets the NAAQS, specifies a concentration level in the ambient air that the agency finds is protective of public health, with an adequate margin of safety, and is protective of public welfare. Setting a NAAQS for GHGs presents several difficulties. For example, the negative impacts of GHGs are not due to the impact on human health and welfare from direct exposure to GHGs, but rather from the heat-trapping effects of GHGs once they are released into the atmosphere. In addition, it would be difficult to determine the appropriate level of a GHG NAAQS. The ultimate objective of the UN Framework Convention on Climate Change, which was ratified by the U.S. and 191 other countries, is to "achieve, in accordance with the relevant provisions of the Convention, stabilization of GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[22] However, there is yet no conclusive agreement on the specific numeric target or timetable for achieving

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[19] We make no comment at this time on whether an endangerment finding made for one portion of the Act leads inexorably to endangerment findings in other parts of the Act, or whether EPA could decide to make an endangerment finding in one part of the Act but not another.

[20] EPA GHG ANPR at 44476.

[21] Sections 109(b)(1) and (b)(2) of the Clean Air Act.

[22] UN Framework Convention on Climate Change, Article 2.

this objective (i.e., what concentration level and by what time).[23] EPA identifies other challenges in setting a level for a GHG NAAQS in the ANPR.[24]

In addition, the designation process under the NAAQS poses some practical challenges. With a GHG NAAQS, the entire U.S. would be designated either attainment or nonattainment because of the even distribution of GHGs in the atmosphere. Suppose EPA sets a GHG NAAQS at a level at which the entire U.S. is designated as attainment. How does this accord with the accepted international consensus that GHG emissions need to be reduced drastically in order to avoid dangerous climate change? If, on the other hand, EPA set the GHG NAAQS at a level at which the entire U.S. was designated as a nonattainment area, then the U.S. would need to attain as expeditiously as practicable but within no longer than five years, with the possibility of an extension to 10 years. Even if the U.S. were to emit *zero* GHG emissions over the next decade, absent efforts to drastically reduce GHG emissions worldwide, GHG concentrations in the atmosphere would not be stabilized in five or even 10 years. Thus we agree with the agency's statement in the ANPR that "the maximum 10-year horizon for attaining the primary NAAQS would be ill-suited for GHGs."[25]

These complexities that arise from setting a NAAQS for GHGs should not cause EPA to hesitate before using other provisions in the Clean Air Act to regulate GHGs. As EPA discusses in the GHG ANPR, EPA appears to have discretion not to promulgate a NAAQS even if the agency makes an endangerment finding for GHGs. Section 108(a)(1) establishes a three-prong test for listing air pollutants to be regulated by a NAAQS. It provides that EPA shall list each air pollutant:

> (A) emissions of which, in [the Administrator's] judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;
> (B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and
> (C) for which air quality criteria had not been issued before the date of enactment of the Clean Air Amendments of 1970, but for which [the Administrator] plans to issue air quality criteria under this section.[26]

The third part of the test appears to provide discretion to EPA to decide whether the NAAQS structure is appropriate for regulating a pollutant like GHGs, which primarily affect human health and welfare through their effects on the atmosphere and not because of any direct impacts through exposure (inhalation).[27] Even without a GHG NAAQS, EPA still has plenty of

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[23] There appears to be some agreement about a reduction target by 2050 – 60 to 80 percent below 1990 levels worldwide – but in the timeframe for attaining the NAAQS, which is five to 10 years hereout, there is no widely agreed upon reduction target or concentration target.

[24] EPA GHG ANPR at 44478-44479.

[25] Id. at 44481.

[26] Section 108(a)(1) as cited at EPA GHG ANPR at 44477.

[27] As EPA notes in the ANPR, there is a court decision that held that EPA does not have discretion under section 108(a)(1)(C) (*NRDC v. Train*, 545 F.2d 320 (2nd Cir. 1978), but this decision was reached prior to a Supreme Court case, *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), that held that where a statute is

tools under the Act for reducing GHG emissions, through the NSPS, mobile sources authorities and Prevention of Significant Deterioration (PSD) New Source Review (NSR). We next turn to the NSPS.

IV. EPA Should Promptly Pursue Regulation of Major Stationary Source Categories Using NSPS Stationary Source Regulation

Of the three regulatory pathways identified in the ANPR for regulating stationary sources under the Clean Air Act, NACAA sees the most value in using the NSPS authorities in section 111 for stationary source regulation.[28] NSPS covers new and modified sources in the source category covered by the NSPS upon issuance of the NSPS. For existing sources, EPA issues guidelines that states must adopt and impose on existing sources. States must submit plans to EPA within nine months on how they plan to regulate existing sources.[29] For sources where EPA has not issued a GHG NSPS or updated an existing NSPS to include GHGs, the requirement to apply Best Available Control Technology (BACT) is a backstop for major new or modified sources. Once GHGs become a regulated pollutant – including once EPA issues an NSPS for GHGs for *any* source – GHGs become regulated pollutants for *all* major sources, triggering PSD NSR requirements and Title V permitting requirements. (These requirements are addressed further below.)

The NSPS path offers EPA substantial flexibility. A GHG NSPS for a particular source category covers new and modified sources and, if there are no GHG NAAQS, also covers existing sources. EPA has discretion to define the source categories covered by the NSPS, the size of sources covered and the pollutants to include in an NSPS and to identify facilities within the source category to be covered. EPA also is given much discretion in setting the NSPS level (defined as best demonstrated technology), including consideration of costs.[30] Existing sources may have less stringent standards than new and modified sources and longer compliance deadlines.[31] EPA also has discretion on when it issues an NSPS for a new source category, though it is required to update an NSPS every eight years.

New Source Performance Standards offer additional benefits. Because these standards can be multi-pollutant, EPA should incorporate GHG and criteria pollutant emissions when the agency issues or updates the NSPS. New Source Performance Standards are usually numerical emission standards expressed as performance levels, but EPA could set efficiency standards or specify work practice standards.[32] Energy efficiency offers significant cost-effective

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ambiguous, a court should defer to the implementing agency's interpretation of that statute. EPA GHG ANPR at 44477.

[28] However NSPS regulations, even combined with the permitting provisions described below requiring Best Available Control Technology, are unlikely to achieve the substantial GHG emissions reductions necessary from stationary sources to avert dangerous climate change, as EPA recognizes. EPA GHG ANPR at 44490. For that reason, NACAA supports mandatory economy-wide GHG legislation in addition to the Clean Air Act.

[29] See EPA GHG ANPR at 44486-44488.

[30] Id. at 44486-44487.

[31] Id. at 44487.

[32] Id. at 44490-44491.

opportunities for reducing GHG emissions quickly in the near term, so aggressive efficiency standards should be strongly considered by the agency for any source category (though efficiency improvements alone should not be the only GHG emission reduction strategy considered by EPA).[33]

EPA seeks comment on the extent to which the agency could set a standard that would come into effect at a future date, based on technologies that EPA reasonably believes at the time of the rulemaking are adequately demonstrated to be available at that future date.[34] NACAA believes EPA has such authority. The U.S. Court of Appeals for the D.C. Circuit has interpreted the NSPS standard with regard to cement plants: "'[A]dequately demonstrated' does not require that any cement plant now in existence be able to meet the proposed standards. Section 111 looks toward what may be fairly projected for the regulated future, rather than the state of the art at present, since it is addressed to standards for new plants." *Portland Cement I*, 486 F. 2d 375 at 384 (D.C. Cir. 1973). The same court has also held that "Congress also meant for emerging technologies to be given consideration when EPA promulgates NSPS." *Sierra Club v. Costle*, 657 F. 2d 298 at 346 (D.C. Cir. 1981).

Thus, combined with BACT,[35] NSPS is probably the best tool in the Act for addressing stationary sources. Accordingly, NACAA makes the following recommendations relative to regulating GHG emissions from major stationary sources:

1. EPA should immediately issue and update NSPS for the categories of sources that emit the most GHGs, proceeding concurrently (and not sequentially) and without regard to whether an existing NSPS is due or not due to be updated:[36]
    - Carbon Dioxide (CO_2): power plants; pulp, paper and forest products industry; cement plants; iron and steel industry; and petroleum refineries; and
    - Methane: oil and gas exploration and transmission.
2. The NSPS should include both GHGs and relevant criteria pollutants to ensure that optimal benefits result.
3. The NSPS should be forward-looking and anticipate emerging technology. When EPA develops an NSPS, it should consider not only technologies that are currently available, but also those projected to be available by a later date. For example, carbon capture and geological sequestration (CCS) is not currently available

[33] EPA identifies some significant efficiency improvements that could be achieved by industrial boilers, electric utility boilers, petroleum refineries and iron and steel operations in its technical support document regarding stationary source regulation. EPA, Technical Support Document for the Advanced [sic] Notice of Proposed Rulemaking for Greenhouse Gases; Stationary Sources, Section VII, (June 5, 2008 Final Draft).

[34] EPA GHG ANPR at 44490.

[35] As noted above, once GHGs become a regulated pollutant – such as when EPA issues a GHG NSPS for any source category – Title V and PSD NSR requirements are triggered for *all* major sources.

[36] EPA is required to update an NSPS every eight years, but this should not stop EPA from updating an NSPS prior to the elapse of eight years to include GHGs. For example, EPA recently revised the electric generating unit (EGU) NSPS and is in the process of finalizing revisions to the petroleum refinery NSPS and the cement plant NSPS but the agency should not wait eight years to include GHGs in these NSPS.

nationwide, but EPA could consider setting a GHG NSPS tied to the use of CCS that would become effective at a date that is based on the projected availability of CCS.[37]

V. EPA Should Promptly Pursue the Regulation of Mobile Source-Related GHG Emissions under Title II of the Clean Air Act

Mobile Sources Are Prime Contributors to the U.S. GHG Emission Inventory

As EPA data confirm, all told, the mobile source sector is responsible for approximately 36 percent of total U.S. GHG emissions, taking into consideration upstream transportation fuel emissions (i.e., those associated with extraction, shipping, refining and distribution), as well as nonroad mobile sources (i.e., construction, farm and lawn and garden equipment) – a level which exceeds electricity generation, which accounts for 34 percent of total U.S. GHG emissions.[38] Given this significant contribution, it is imperative that a comprehensive regulatory strategy to reduce GHG emissions from the mobile sector be developed and implemented without delay. Moreover, as the ANPR suggests, the Clean Air Act provides EPA with ample tools and authority to do so.

The Clean Air Act Can and Should Be Used to Regulate GHG Emissions from Mobile Sources

Title II of the Clean Air Act provides EPA with broad statutory authority, and appropriate discretion, to address emissions from mobile sources and fuels. Over the past four decades, utilizing the tools embodied in the Act, EPA has successfully developed comprehensive and effective programs that have very successfully and cost effectively reduced criteria pollutant and precursor emissions from mobile sources and fuels. In addition, the Act's wise provision of authority to states to go beyond federal standards has also been used to garner further important reductions and evaluate potential strategies. NACAA firmly believes that these same authorities can be used by EPA and the states with equal success to address the significant, long-term challenges associated with reducing GHG emissions from mobile sources and fuels. Further, the association believes that the following key principles, among others, upon which EPA has based past rulemakings, are also applicable to the regulation of GHG emissions from mobile sources and fuels, and should be used by the agency to guide such efforts:

1. Develop and enforce GHG standards for all key vehicle, engine and equipment sub-sectors within the overall transportation sector, including GHG emission standards for cars and light trucks, heavy-duty vehicles, nonroad engines and equipment, locomotive and marine engines and aircraft, to ensure comprehensive GHG emission

[37] EPA requests comment on the use of trading to meet an NSPS. NACAA at this time expresses no views as to the legality of using trading under section 111. If such an approach is legal, EPA might consider allowing trading at a future date to make an NSPS that includes CCS more cost-effective, since some sources may be located far away from the geological site where carbon is to be injected. In other words, in the context of promoting the aggressive use of future GHG reduction technology, EPA might consider using trading to spur the deployment of the technology and also to reduce costs.

[38] EPA GHG ANPR at 44435.

reductions from the mobile sector and provide incentives for seeking the most cost-effective solutions.

2. Develop and enforce standards for all GHGs emitted by the transportation sector for which EPA makes an endangerment finding.
3. Develop and enforce standards for transportation fuels as part of a systems-based approach.
4. Establish GHG standards for transportation fuels that take into account the complete lifecycle of GHG emissions, including upstream processing.
5. Identify long-term national mobile source GHG emission targets based on scientific assessments of environmental need and base the stringency of standards for individual sub-sectors on technological feasibility, cost and fuel savings, taking into consideration the relationship of mobile source reductions to reductions in emissions from other sectors under any economy-wide program.
6. Allow for staggered rulemakings for various mobile source sub-sectors and fuels, starting with the largest GHG-contributing sub-sectors.
7. Adopt technology-forcing standards when appropriate; for long-term technology-forcing standards, provide for periodic technology reviews, if deemed necessary, to determine whether mid-course corrections may be needed.
8. Increase the rate of emission reduction targets over time, allowing for the development of innovative, cost-effective technological solutions.
9. Establish a flexible compliance program.
10. Design enforcement programs to ensure real-world compliance and reductions over the life of the vehicle/engine/equipment.
11. Provide flexibility so that mobile source control programs complement existing regulatory programs.

Actions to Reduce Mobile Source GHG Emissions Should Start Now

In order for the U.S. to achieve the substantial reductions in mobile source GHG emissions needed in the relevant timeframe (i.e., by 2050), implementation of additional control programs must begin now and be comprised of a comprehensive set of near-, mid- and long-term standards and strategies. Fortunately, the mobile source sector is ripe for GHG emission controls, and every potential option available should be pursued. In particular, NACAA recommends that EPA take the following actions.

First, EPA should rescind immediately the March 2008 decision to deny California's request for a waiver of federal preemption for its motor vehicle GHG emission standards and grant the waiver, thus allowing California and the other states that have adopted these standards to enforce the program and reap the associated benefits, which will begin to accrue almost immediately. California adopted its motor vehicle GHG emission standards in September 2005 after conducting extensive research and analysis. Using authorities provided under section 177 of the Clean Air Act, 14 states have since followed suit and several others, at least, are pursuing such action. The statutory criteria upon which EPA must base its decision regarding a waiver request have clearly been met. The technology for implementing this program is already available. Public support for this program is overwhelming, as was evidenced by the positive response to EPA's request for comments on California's waiver request.

In crafting the waiver and section 177 opt-in provisions of the Clean Air Act, Congress sought to embody vital states' rights. State and local clean air agencies need to preserve those rights to set the optimal mix of regulations to respond to the public health and welfare effects associated with climate change. EPA's denial of California's waiver request frustrates the balance of federal and state power that Congress intended. Reversing the decision to deny the waiver will send a strong message that the next Administration and EPA respect and value the federal-state-local partnership that will be necessary to combat global warming and acknowledge that state enforcement of the motor vehicle GHG emission standards will begin the process of demonstrating that our nation can address global warming and, at the same time, create jobs, enhance energy security, reduce our dependence on foreign oil and save money for the consumer. Furthermore, NACAA cannot overstate the critical importance of fully protecting states' rights under sections 209 and 177 of the Clean Air Act.

Second, EPA should, by mid-2009, propose federal GHG emission standards for light-duty vehicles (LDVs), which account for more than one-half (54 percent)[39] of all mobile source GHG emissions in the U.S. In setting such standards, EPA should rely on section 202(a)(1) of the Clean Air Act, with which the agency has a proven track record of success. Using this "traditional" approach[40] would allow for rulemaking based on the tried and true principles listed above, integrating such elements as setting technology-forcing standards; considering long-term environmental need, as well as costs, benefits, lead time, safety and energy impacts; and establishing standards that could take effect well into the future.

In fact, EPA has already conducted the technical research and analysis necessary to propose a rigorous national regulatory program for reducing GHG emissions from LDVs. The Technical Support Document that accompanied the ANPR includes a comprehensive body of work illustrating the agency's thoughtful deliberation of various approaches for such a program. Based on this work and the authorities provided in Title II of the Clean Air Act, the agency has all it needs to put in place now a comprehensive LDV GHG emission reduction program – based on known technologies and including standards that extend over the next 10 to 15 years (i.e., to 2020 and beyond) – that will put the industry on a regulatory path that will result in achievement of the necessary targets by 2050.

Third, EPA should continue to work actively toward phasing in regulations to control GHG emissions from additional mobile source sub-sectors. Among these sub-sectors, heavy-duty trucks are responsible for 18 percent of U.S. mobile source GHG emissions, aviation for 11 percent, nonroad engines for 8 percent, marine engines for 5 percent and rail for 3 percent.[41] Significant opportunities exist for reducing the GHG contribution from each of these sub-sectors and NACAA urges EPA to engage in aggressive efforts to capitalize on these opportunities.

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[39] Id. at 44435.

[40] See EPA GHG ANPR at 44441, Section VI.B.1.a, in which EPA describes the "Traditional Approach to Setting Light-Duty Vehicle GHG Standards."

[41] Id. at 44435.

Fourth, EPA should, under section 211 of the Clean Air Act, enact a national low-carbon fuel standard that accounts for all lifecycle emissions and indirect impacts of all mobile source fuels including petroleum, conventional and advanced bio-fuels, electricity and hydrogen to ensure continuous reductions in the overall GHGs emitted per each gallon-equivalent of fuel energy. In setting such a standard, EPA should consider regional variation in fuel availability and alternatives to gasoline, as well as efforts related to these issues being undertaken around the country. A national low-carbon fuel standard would be consistent with, and could eventually replace, the Renewable Fuel Standard (RFS) enacted by Congress in the Energy Independence and Security Act of 2007 (EISA).

Fifth, in addition to addressing vehicles, engines and fuels, EPA should also develop alternative approaches for integrating transportation and land-use planning. Strategies to reduce vehicle miles traveled (VMT) hold great promise for reducing GHG emissions. Examples of such strategies include pricing policies (e.g., pay-as-you-drive insurance, tolls, congestion pricing, commercial and municipal parking fees); transit, pedestrian and bike infrastructure; "complete streets"; land-use patterns that support reduced driving; employer initiatives to reduce commuting; managed parking; ridesharing; and residential trip reduction. In addition, EPA should advocate for funding and incentives for such strategies for the purpose of GHG emission reductions through the upcoming reauthorization of surface transportation legislation (the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users). Further, EPA and the U.S. Department of Transportation (DOT), as well as state and local governments, should put in place policies, procedures and requirements that ensure that a greater emphasis is placed on integrating VMT reduction strategies, and related funding, into comprehensive plans for reducing transportation-related GHG emissions.

To further ensure that the transportation and federal sectors contribute to the achievement of GHG reduction goals, NACAA recommends the incorporation of a process that would call for analysis and modeling of the emission impacts of large transportation and federal projects, as well as federal and state requirements for sponsoring agencies to identify and implement measures to avoid or mitigate any project-related GHG emissions over some *de minimis* level.

EPA Is Obligated to Address Mobile Source-Related GHG Emissions and Can Do So Without Conflicting with NHTSA's Fuel Efficiency Efforts

As EPA appropriately notes in the ANPR, "The goals of oil savings and GHG emissions reductions are often closely correlated, but they are not the same."[42] It is, therefore, imperative, that we address both of these important goals in and of themselves.

EISA, enacted in December 2007, replaces the statutory default passenger car fuel economy standard of 27.5 miles per gallon (mpg) with a mandate for the DOT's National Highway Traffic Safety Administration (NHTSA) to set separate passenger car and light-duty truck standards, beginning with model year (MY) 2011, that will result in a combined industry fleet-wide average of all cars sold in the U.S. in 2020 of 35 mpg. For MYs 2021 through 2030, the average fuel economy must be "the maximum feasible average fuel economy standard for

[42] Id. at 44442.

each fleet for that model year."[43] Further, EISA stipulates that NHTSA may not set a fuel economy standard for more than five model years in a single rulemaking. The energy law also increases the annual 7.5-billion-gallon (in 2012) RFS set under the Energy Policy Act of 2005[44] to 36 billion gallons per year (in 2022).

It is especially important to recognize that EISA's fuel economy and RFS standards can compliment, but are in no way a substitute for, a robust, comprehensive, long-term mobile source GHG emission reduction strategy. It is equally as important to recognize that regulating fuel economy is not the same as regulating GHG emissions from mobile sources. The two programs are decidedly different and achieve decidedly different goals. California's motor vehicle GHG emission standards, for example, regulate four GHGs, whereas the federal fuel economy program regulates fuel consumption and, therefore, leads to reductions in CO_2 only. Further, the environmental benefits of mobile sources standards designed to reduce GHGs are more substantial.

Not only can a comprehensive, long-term mobile source GHG reduction strategy be developed and implemented without conflicting with NHTSA's fuel economy regulatory efforts and, moreover, EPA is obligated to pursue such a strategy. In *Massachusetts v. EPA*, the U.S. Supreme Court found that EPA is required to regulate motor vehicle GHG emissions if the agency judges that such emissions contribute to climate change. The Court further found, "that DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public's 'health' and 'welfare,' 42 U.S.C. §7521(a)(1), a statutory obligation wholly independent of DOT's mandate to promote energy efficiency. See Energy Policy and Conservation Act, §2(5), 89 Stat. 874, 42 U.S.C. §6201(5). The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency."[45]

Therefore, EPA must move ahead now and take the lead in crafting a mobile source GHG emission reduction program. As it does so, it can work cooperatively with DOT NHTSA and share expertise that will facilitate the efforts of each respective agency to fulfill its obligations in a manner that will yield the most effective results. EPA's broad authority to set standards on a long-term basis – versus DOT NHTSA's much more limited authority to set fuel economy standards in increments of no more than five years – will allow for a focused and stable strategy that will yield substantial results. And, unlike fuel economy standards, mobile source GHG emission standards can ensure with certainty that the intended environmental benefits occur.

VI. EPA Should Adopt BACT Permitting for GHG Emission Reductions

The ANPR points out that regulating GHGs under the PSD program "has the potential to dramatically expand the number of sources required to obtain PSD permits, unless action is taken

[43] 121 STAT. 1492-1801, Public Law 110-140-Dec. 19, 2007, 110th Congress.
[44] 119 STAT. 594-1143, Public Law 109-58-Aug. 8, 2005, 109th Congress.
[45] *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007).

to limit the scope of the program."[46] It is therefore critically important that a strategy be devised that will harmonize the existing major source limits with the demands of regulating numerous new CO_2 sources. Ultimately, the major source limits must be resolved in the context of future climate legislation.

In the meantime, NACAA believes that EPA has the discretion to limit permitting requirements to large sources of GHG emissions. The association recommends that EPA not impose mandatory permitting requirements on smaller sources. Below we discuss these two issues in greater detail.

EPA Should Adopt a Threshold Level for Case-by-Case BACT Permitting for Large Sources of GHG Emissions

NACAA recommends that EPA adopt a threshold level for case-by-case BACT permitting of larger sources of GHG emissions. Facilities projected to emit GHGs at or above the threshold level should undergo BACT analysis and PSD permitting before construction and when making modifications. The association believes that a regulatory threshold within the range of 10,000 to 25,000 tons per year may be appropriate, but urges EPA to undertake further analysis to determine the proper level.

Using the BACT permitting provisions of the Clean Air Act can result in substantial and expeditious GHG emission reductions from major industrial facilities throughout the country. For example, electricity generation alone contributes about 34 percent of U.S. GHG emissions. As the Technical Support Document accompanying the ANPR discusses, a variety of measures could be used to reduce GHG emissions from electric generating units, including, among others, work practice standards for minimizing excess air or exhaust temperatures (thereby improving boiler efficiency), equipment standards, numerical efficiency standards, conservation measures, reduced or alternative fuel use and work practices and biomass requirements.[47] Other large sources of GHG emissions, including industrial boilers, refineries, Portland cement, iron and steel and petroleum production, can be addressed similarly. NACAA recommends that these (and other) sources emitting GHGs above the designated size threshold be subject to case-by-case permitting requirements under the Clean Air Act.

Moreover, NACAA concurs with EPA that Presumptive BACT for different source categories could significantly help states and local agencies with their permitting decisions. Accordingly, NACAA recommends that EPA promulgate Presumptive BACT guidelines for these source categories as expeditiously as practicable.

Permitting Requirements Should Not Be Mandatory for Smaller Sources

NACAA does not support the mandatory application of PSD and construction permitting to sources below the major source GHG emissions threshold level discussed above. Mandatory

[46] EPA GHG ANPR at 44505.

[47] EPA, Technical Support Document for the Advanced [sic] Notice of Proposed Rulemaking for Greenhouse Gases; Stationary Sources, Section VII (June 2008).

application of such permitting requirements would be inefficient to administer and of marginal value in reducing GHG emissions. We believe that EPA has ample flexibility to avoid this. Given the expertise of state and local clean air officials in implementing permitting programs, we stand ready to consult with EPA on how to implement this flexibility as the agency develops proposed regulations.

Sources Making Major Modifications Should Be Subject to PSD Permitting and BACT

When a source that is major for any regulated pollutant makes a major modification and increases its GHG emissions by a significant amount, it will become subject to PSD BACT permitting requirements for GHGs. Therefore, when GHGs become regulated pollutants under the Clean Air Act, EPA should promulgate a significance level proportional to the major source GHG emissions threshold level discussed above. Sources making major modifications and increasing GHG emissions should be subject to PSD permitting and BACT energy efficiency requirements.

Title V Permitting Should Apply to Sources of GHG Emissions As Applicable Requirements Are Incorporated Into Operating Permits

Title V permits must assure compliance with all federal "applicable requirements." As new or modified sources are permitted under the section 165 PSD BACT or section 111 NSPS provisions of the Clean Air Act, the relevant applicable GHG requirements – performance standards, GHG emissions reductions, monitoring, recordkeeping, reporting and the like – should be incorporated into the facility's Title V operating permit. Further, EPA should clarify that the major source threshold for Title V purposes will be based on the GHG emissions threshold discussed above. EPA should also clarify that, as a legal matter, GHGs will be "regulated pollutants" for purposes of Title V – as well as Title I – once an endangerment finding is made and mobile or other regulations adopted for these pollutants.

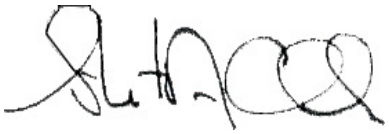
VII. State and Local Authorities to Regulate GHG Emissions Must Be Protected

Irrespective of what federal approaches – regulatory, statutory and/or policy – are taken to regulate GHG emissions from any source, under no circumstances should states and localities be preempted from taking the steps they deem necessary to reduce GHG emissions beyond federal program requirements. NACAA, therefore, urges that EPA place a high priority on partnering with state and local clean air agencies to preserve, encourage and support state and local actions.

VIII. Conclusion

Once again, NACAA thanks EPA for this opportunity to provide the association's thoughts and recommendations on the ANPR, in which the agency presents information relevant to and seeks comments on how to respond to the U.S. Supreme Court's decision in *Massachusetts v. EPA*. Once EPA officials have reviewed these comments, we would welcome the opportunity to discuss further our recommendations. We encourage EPA to work closely and cooperatively with its state and local co-regulators as it develops any GHG emission reduction programs and strategies. If you have any questions, please feel free to contact either of us or S. William Becker, Executive Director of NACAA.

Sincerely,



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