

November 28, 2008

Via electronic filing and overnight delivery
Air and Radiation Docket and Information Center
Environmental Protection Agency
Mailcode: 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

**Re: The American Council for Capital Formation's Comments on
Advance Notice of Proposed Rulemaking: Regulating Greenhouse
Gases under the Clean Air Act, 73 Fed. Reg. 44354 (July 30, 2008)**

Dear Sir or Madam:

The American Council for Capital Formation (ACCF) submits these comments in response to the Environmental Protection Agency's (EPA) Advance Notice of Proposed Rulemaking (ANPR) to explore the impacts and effectiveness of using various programs under the Clean Air Act (CAA) to regulate domestic emissions of Greenhouse Gases (GHGs), as published in the July 30, 2008 issue of the Federal Register, *73 Fed. Reg. 44354*. The ACCF represents a broad cross-section of the American business community, including the manufacturing and financial sectors, Fortune 500 companies and smaller firms, investors, and associations from all sectors of the economy. Our distinguished board of directors includes cabinet members of prior Democratic and Republican administrations, former members of Congress, prominent business leaders, and public finance and environmental policy experts.

The ACCF is celebrating over 30 years of leadership in advocating tax, regulatory, environmental, and trade policies to increase U.S. economic growth and environmental quality. The ACCF is concerned that any expansion of the EPA's authority under the CAA, especially one as far-sweeping as that discussed in the ANPR, will have negative consequences for U.S. economic growth, will slow economic recovery and result in fewer jobs for Americans.

As a general rule, the ACCF supports EPA regulations that are designed to provide real net benefits to environmental quality and the public health, including the health of all workers. Conversely, the ACCF opposes regulations that would impose overly burdensome compliance costs on the manufacturing, industrial, transportation and utility sectors and other institutions, especially with no clear goal for achieving improved environmental quality. Expanding the jurisdiction of the CAA to regulate domestic emissions of carbon and other GHGs will provide no net benefits to environmental quality while posing serious risks to our nation's competitiveness, and even hampering our ability to deploy the advanced technologies which will be necessary to deal effectively with the challenges posed by Greenhouse Gas (GHG) emissions.

The American Council for Capital Formation’s Comments on Advance Notice of Proposed Rulemaking: Regulating Greenhouse Gases under the Clean Air Act, 73 Fed. Reg. 44354 (July 30, 2008)

I. EPA SHOULD NOT PROMULGATE GREENHOUSE GAS REGULATIONS UNDER THE CLEAN AIR ACT BECAUSE OF THE ENORMOUS COMPLEXITIES AND IMPACTS POSED BY CONTROLS ON GREENHOUSE GASES

Regulation of GHGs under the CAA would lead to many unintended and adverse consequences throughout the U.S. The ACCF supports a forward-thinking strategy to address challenges posed by GHG emissions, provided that market barriers to cost-effective reductions are first removed, and that any commitments from the United States seeks to:

- Protect American jobs and consumers;
- Mirror comparable commitments from global trading partners and competitors;
- Are based on the best science available;
- Are cost-effective; an
- Are applied equally throughout the U.S. economy;
- And will inflict no harm on the U.S. economy.

The ACCF also supports a comprehensive federal climate policy that will pre-empt a patchwork of state and regional schemes to control emissions of GHGs. Implementing such a policy is not feasible within the context of a statute which was enacted more than 30 years ago and continues to be the source of litigation and regulatory uncertainty.

A. The Clean Air Act Was Not Crafted to Address GHG Emissions

The EPA’s action is a response to the 2007 Supreme Court decision in *Massachusetts v. EPA* that characterized certain GHGs as “air pollutants” under the CAA. The Court stopped short of requiring EPA regulation at that time. It instead remanded to EPA the issue of whether or not carbon emissions constitute an “endangerment” under the act, which in turn would trigger a variety of permitting and other programs to assess and regulate carbon emissions from sources ranging from manufacturing facilities to farms and automobiles. The EPA issued its ANPR in response to the court’s remand and will use the comment period as a means of collecting information that may lay the groundwork for a future rulemaking or federal legislation. The current ANPR—despite the fact that it lays out a framework which could impact the economic life of all Americans—is a response to court-ordered action which characterizes various attempts to modify and expand the CAA’s existing programs and lacks the advantages of a comprehensive debate offered by the legislative process.

Expanding existing CAA programs as outlined by the ANPR would impose significant adverse impacts on the economy with no measurable environmental outcomes. The various permitting programs, for example, that could be triggered by an expansion of regulatory authority would merely mandate emissions limits on specific sources, with no clear goal of actually reducing GHG concentrations in the environment in the United States or around the world.

By operating within the existing context of the CAA, the ANPR is structurally incapable of pre-empting state and regional climate change programs that would establish the necessary predictability and uniformity to comply with new requirements. The patchwork of state and regional regulations that would exist under CAA regulation would create more investment uncertainty and undermine regulatory effectiveness by failing to achieve tangible results. Under such an illogical scenario, manufacturers in different regions of the United States would be regulated in different ways not because their emissions or effects of their emissions are any different, but merely because of the policies of the state where they are located. Congress should bypass current provisions of the CAA and debate a national uniform approach to the global issue.

B. The Economic Consequences of GHG Controls Must Be Fully Assessed

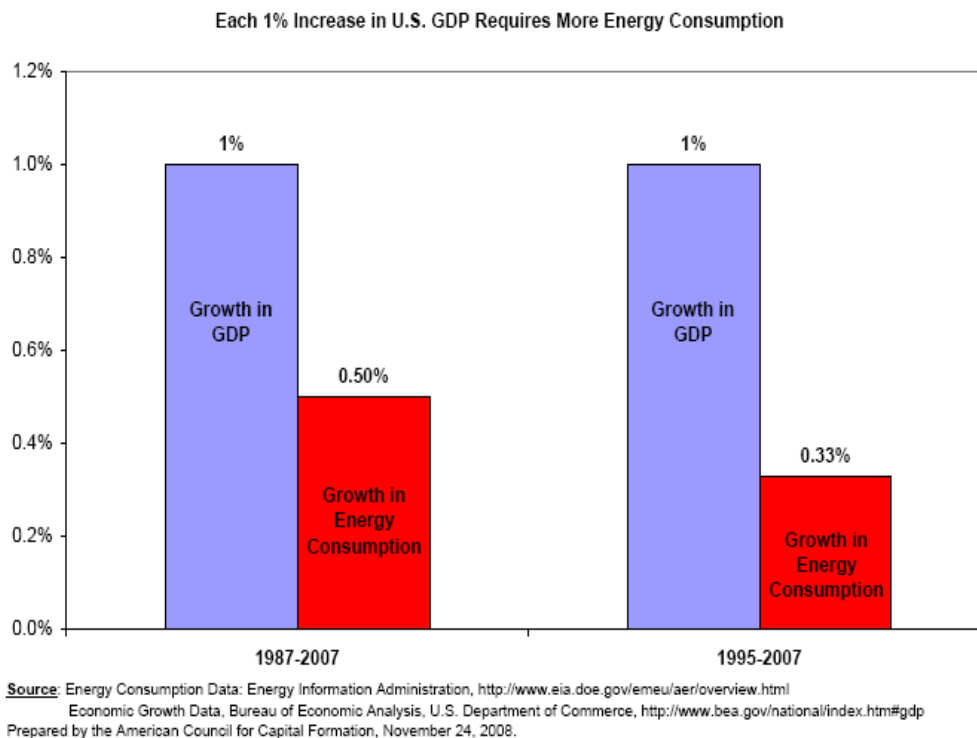
As described below, the Massachusetts decision provided EPA with discretion to determine the timing of any GHG regulations. As part of its discretion, EPA should not promulgate GHG regulations without fully understanding the economic impact of such regulations on the nation's manufacturing sector and economy.

The ACCF has analyzed the potential, adverse economic impacts of regulating carbon emissions in a manner that does not address the market penetration of the new and developing technologies that will be necessary to make meaningful reductions in domestic GHG emissions. In a partnership with the National Association of Manufacturers (NAM), the ACCF published a study analyzing the impacts of S. 2191, the Lieberman-Warner Climate Security Act of 2008, using the National Energy Modeling System (NEMS) model. This is the same model used by the Energy Information Administration (EIA) for its energy forecasting and policy analysis. The study concluded, among other things, that not allowing for sufficient deployment of low or zero carbon technology such as nuclear power generation and widespread commercial availability of carbon capture and sequestration (CCS) technology would result in job losses of up to 4.05 million by 2030, and a loss of up to \$669 billion in GDP per year by 2030. This drop in economic growth represents a decline of 2.7%, which is equivalent to the economic costs of the current housing and credit market crisis.

In light of the current economic downturn, U.S. policymakers and regulators need to be especially careful about enacting environmental policies that will raise costs across all sectors of the economy. One key factor that policymakers must take into account is that U.S. economic growth and energy use go hand in hand; each 1% increase in GDP is accompanied by a 0.3% increase in energy use (see chart below). If EPA regulates GHGs under the CAA, it will be more expensive to use energy, thus economic recovery will slow, relative to the baseline forecast. The ACCF may submit supplemental comments for the record on the economic effects of regulating GHGs under the CAA.

Climate change is a global problem and meaningful reductions in greenhouse gas emissions and reductions in global concentrations of GHGs will require the participation of developing and industrializing countries such as India, China, Brazil, Indonesia, and

others whose emissions are growing rapidly. It is important to realize that without international participation, U.S. sacrifices in terms of more costly production and transportation standards imposed on industry and households by EPA would exert a significant negative drag on U.S. economic recovery and also slow a global economic rebound.



In the context of the ANPR, the U.S. Chamber of Commerce released a study in September 2008, “A Regulatory Burden: The Compliance Dimension of Regulating CO₂ as a Pollutant” (Mills Study), which shows a dramatic potential expansion of the scope of the CAA jurisdiction posed by the ANPR. The Mills study analyzes data from the U.S. Census Bureau and EIA data to draw its conclusions. It shows, for example, that triggering existing emission thresholds for operating and preconstruction permits such as Title V and Prevention of Significant Deterioration (PSD), among others, would result in the regulation of approximately 200,000 manufacturing facilities nationwide. That number would increase to more than one million regulated entities economy-wide, according to the study. The report also states that any source or facility using more than \$70,000 per year of natural gas or oil “for stationary equipment” would easily fall within the purview of a PSD permit.

Despite the significant additional regulatory burdens imposed by the triggering of CAA permitting programs on the industrial sector, the ANPR is virtually silent on the

question of costs of such increased regulation, which is a significant drawback to such a potentially expansive regulatory program. Instead, the ANPR would unleash yet another patchwork of regulatory requirements, which would further add costs and simultaneously undercut regulatory effectiveness, thereby diminishing the prospect of achieving tangible environmental results, which the CAA actually requires.

C. Any Unilateral, Domestic Regulation Will Fail to Address a Global Issue

Climate change is a global challenge that cannot be solved by any one nation acting unilaterally pursuant to a statute designed to address local environmental quality. The CAA's permitting programs have historically focused on local emissions of criteria pollutants while not accounting for emissions from other countries. In fact, a dramatic expansion of clean air programs could actually result in increased global GHG emissions by forcing many energy-intense industries, such as steel, paper, chemicals, glass and cement, to shift operations to countries that have no mechanism for regulating carbon, or which use energy less efficiently. For example, industry in China emits 0.7 million metric tons of carbon(MMTC) per billion dollars of GDP, in contrast, the U.S. emits only 0.2 MMTC, greatly exacerbating the challenge of reducing GHGs. The ANPR does not take into account the potential for CAA regulation to actually worsen climate change by shifting industry to nations that are less energy efficient.

II. THE SUPREME COURT HAS GRANTED EPA DISCRETION TO DEFER AN ENDANGERMENT FINDING

Fortunately, the Supreme Court's decision in *Massachusetts v. EPA* preserves EPA's discretion to defer any action under the Clean Air Act until an appropriate time. While the opinion is oft-cited for the proposition that EPA must make a decision on whether and how to regulate GHGs, the Court, as already confirmed by two lower courts, clearly reserved the Agency's standard discretion to decide *when* to approach regulations. Rather than rush to judgment, EPA in properly exercising this deference must withhold an endangerment finding until this nation is prepared to act in a manner that avoids the piecemeal, ineffective, and costly methods proposed by the ANPR.

Indeed, the ANPR itself demonstrates that EPA is not presently prepared for the consequences of such an endangerment finding. The ANPR takes an overly narrow and simplistic approach of focusing only on energy efficiency controls it would mandate on specific GHG sources without a fuller understanding of the practical ramifications of taking such actions. For example, EPA does not dispute that regulating GHGs will increase the number of sources subject to permitting requirements by many orders of magnitude, imposing tremendous costs and delays on the economy and burdening the Agency with an insurmountable paperwork exercise. This alone conclusively demonstrates that GHG regulation under the Clean Air Act is unrealistic and cannot proceed.

III. EPA ACTION WOULD TRIGGER A VARIETY OF COUNTERPRODUCTIVE REGULATORY PROGRAMS

Importantly, using the CAA as a framework to address climate change is structurally flawed because efforts to mandate energy efficiency requirements for stationary sources will confront the brick wall of New Source Review. Such a situation places industry in an untenable situation, with EPA on the one hand requiring facilities to implement energy efficiency improvements yet on the other hand requiring a time consuming, costly, and litigious process that to date has been more effective at *halting* energy efficiency upgrades.

Among the three “stationary source pathways” the ANPR discusses for potential GHG regulation—Section 108, Section 111, and Section 112—the ACCF does not believe any option presents a feasible or realistic way to address GHGs. And while the ANPR suggests that it would be economically and technologically feasible specifically to invoke New Source Performance Standards for industry under Section 111, the ANPR’s proposal again is overly simplistic and ignores both the reality of the challenges confronting such an approach and the efforts by industry to realize energy efficiency for decades.

Similarly, the ANPR’s proposals to regulate mobile sources demonstrate the infeasibility of using existing Clean Air Act options. The highly technical proposals for various mobile sources aim to trump and second guess the expertise of the manufacturers in how highly complex machines can be redesigned and operated in the most efficient manner. Regulation under the Clean Air Act also risks subjecting industry to multiple and inconsistent regulatory regimes. The ANPR’s cost benefit analysis, required prior to any regulation under Title II of the Clean Air Act, is fundamentally flawed in several significant ways.

IV. FEDERAL COURTS OFTEN REJECT EPA-DRIVEN CAP-AND- TRADE PROGRAMS

Finally, any effort to implement an “alternative regulatory approach” such as a GHG trading system has been found to be problematic with the CAA. In this year alone, federal courts have rejected the EPA’s two most recent attempts to establish cap-and-trade programs as a mechanism for reducing emissions by vacating the Clean Air Mercury Rule (CAMR) and the Clean Air Interstate Rule (CAIR). The litigation surrounding emissions of SO₂, NO_x and mercury have cost industry billions of dollars, created a climate of business uncertainty and a regulatory void for addressing emission reductions. If EPA were to create a similar program for carbon emissions, the potential for regulatory uncertainty remains.

Recommendation

To be effective, policies to reduce global GHG emission growth must include both developed and developing countries. Policies which enhance technology

development and transfer are likely to be more widely accepted both in the U.S. and abroad than those that require sharp, near term reductions in per capita energy use. Extending the framework of programs like the Asia-Pacific Partnership on Clean Development and Climate to other major emitters will allow developed countries to focus their efforts where they will get the largest return, in terms of emission reductions for the least cost.

The ACCF urges EPA to weigh very carefully the impact of new GHG regulations on the U.S. economy. The ACCF and its members look forward to working with federal policy makers to offer their insights and technical expertise to develop programs that will accomplish real environmental objectives in an efficient and rational manner, based on new technologies and new ideas. Attempting to reduce GHGs by means a statute which has been amended over the past three decades and remains the source of persistent litigation and counter-regulation is unlikely to accomplish these objectives.