

EPA Issues Climate Change Advance Notice of Proposed Rulemaking; White House, EPA Administrator, Other Agencies Denounce Clean Air Act Climate Change Regulation

On July 11th, the Environmental Protection Agency (“EPA”) issued its long-awaited Advance Notice of Proposed Rulemaking (“ANPR”) seeking comments on potential EPA climate change regulation. The Supreme Court last year determined that greenhouse gases are “air pollutants” under the federal Clean Air Act which EPA must regulate if it finds that they endanger public health or welfare. The ANPR seeks comment on whether EPA should make this endangerment finding and on a myriad of other potential climate change regulations the agency may adopt across the economy. The ANPR, a lengthy document, consists of more than 250 single-spaced pages and many more pages of appendices.

In what may be an unprecedented action, the ANPR includes a “preface” in the front by EPA Administrator Stephen Johnson criticizing the use of the Clean Air Act as a vehicle for climate change regulation. In a press conference today, Johnson stated that “[i]f the nation is serious about regulating greenhouse gases, the Clean Air Act is the wrong tool.” Additionally, the White House strongly criticized the ANPR as a blueprint for climate change regulation, characterizing it as an EPA staff document and contrary to Administration policy. The White House was joined in that position in separate papers by the Secretaries of Agriculture, Commerce, Transportation and Energy, as well as the Chairman of the Council of Economic Advisors, the Chairman of the Council on Environmental Quality, the Director of the Office of Science and Technology Policy, the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget, and the Chief Counsel for Advocacy of the Small Business Administration Office of Advocacy.

Potential regulation identified in the ANPR includes one or more cap and trade programs and source-specific emission reduction requirements for mobile sources such as motor vehicles, trucks, boats, ships, airplanes, motor cycles, and locomotives; stationary sources such as electric generating stations, oil refineries, and cement plants; and a myriad of engines, such as lawn mowers and other garden equipment, factory equipment such as fork lifts, and a variety of construction and agricultural equipment.

One focus of the ANPR is the fact that EPA greenhouse gas regulation of any kind will trigger a requirement for any source emitting more than 250 tons per year to obtain an air quality permit to undertake new construction or for many modifications of existing facilities. A building of approximately 100,000 square feet heated with natural gas or oil would exceed that threshold. This would subject more than one million sources that have never previously been regulated by the Clean Air Act to air permitting requirements. The list of

potentially affected sources includes office, apartment and hotel buildings of about ten stories, hospitals, large assisted living facilities, large places of worship, school buildings, restaurants, large retail stores, breweries, distilleries, and many others. The ANPR seeks comment on ways to address this issue.

Comments on the ANPR are due 120 days following its publication in the Federal Register.

Court of Appeals Overturns Significant Portions of CAIR Rule

- The U.S. Court of Appeals for the D.C. Circuit today overturned significant portions of the Clean Air Interstate Rule ("CAIR"). CAIR set forth a regional cap-and-trade program in states primarily east of the Mississippi River to control sulfur dioxide and nitrogen oxide emissions from electric generating stations in order to promote attainment of ozone and fine particle air quality standards. Although the Court did not agree with all arguments made by all the parties that challenged the rule, the Court vacated the rule in its entirety and remanded it back to EPA for further action. With the D.C. Circuit having earlier vacated EPA's Clean Air Mercury Rule, which provided for a cap-and-trade program to control mercury emissions from electric generators, EPA's ability to use flexible market-based programs to address regional air pollution issues is now subject to considerable uncertainty.

Georgia Court Decides to Regulate CO₂ and Require IGCC for New Coal Plants

On Monday, June 30th, 2008, the Superior Court of Fulton County vacated the administrative decision that had upheld the air permit issued for LS Power/Dynegy's Longleaf generating facility by EPD, Georgia's state environmental agency. The court's decision contains two key substantive holdings that, if not reversed on appeal, will dramatically impact the air quality permitting process and will significantly increase the number and type of buildings and facilities that must obtain an air permit from EPD.

First, the court held that all air quality permits for the construction of new sources must contain CO₂ emission limitations to satisfy the requirement for installing the best available control technology. According to the court, the Longleaf permit should have contained CO₂ limits because "there is no question that CO₂ is 'subject to regulation under the [Clean Air Act].'" This holding is quite remarkable in that, although the judge relied on the Supreme Court's decision in Massachusetts v. EPA, the Supreme Court actually held that EPA must first find that CO₂ emissions pose a danger to public health or welfare before it may regulate CO₂, a determination that EPA has yet to

make. In fact, EPA has been sued by various groups for its failure to regulate CO₂.