

Email to: [a-and-rDocket@epa.gov](mailto:a-and-rDocket@epa.gov)

Air and Radiation Docket and Information Center  
US Environmental Protection Agency  
Mail Code 2822T  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

**Re: Regulating Greenhouse Gases Under the Clean Air Act:  
Responding to Massachusetts v. EPA  
Docket ID No. EPA-HQ-OAR-2008-0318**

These comments are submitted on behalf of the International Council of Shopping Centers on the potential impacts of several contemplated regulatory approaches discussed by EPA in its Advance Notice of Proposed Rulemaking (ANPR) entitled “Regulating Greenhouse Gas Emissions Under the Clean Air Act; Proposed Rule.” Founded in 1957, the International Council of Shopping Centers (ICSC) is the global trade association of the shopping center industry. ICSC’s approximately 75,000 members in the U.S., Canada and more than 80 other countries include shopping center owners, developers, managers, marketing specialists, investors, lenders, retailers and other professionals.

Although EPA is reacting to a narrowly focused Supreme Court case (Massachusetts v. EPA) that dealt solely with vehicle tailpipe emissions under Section 202 of the Clean Air Act, the resulting ANPR is overwhelmingly complex and requests comments from all sectors of the US economy on a bewildering array of technologies and operating practices, together with requests for input on legal theories and legislative intentions. EPA should be aware that numerous representatives of potentially impacted industries, confronted by the overwhelming scope of the ANPR, simply gave up on any effort to respond preferring instead to wait for a more narrowly focused proposal. Needless to say, institutional resources are scarce and despite a desire to engage the ANPR’s myriad questions more fully, ICSC must briefly focus on a handful of the provisions that would have the most direct impact on retail real estate. Nonetheless, ICSC is concerned that

under almost any of the multiple regulatory scenarios envisioned by EPA's ANPR the cost of operating any business will increase substantially in the United States – and in the United States alone. This will directly harm US economic competitiveness and result in a lowered standard of living. Yet by EPA's own admission in the ANPR, unilateral reductions in greenhouse gas (GHG) emissions in America will not produce measurable reductions in global concentrations of GHGs. It seems self-evident that EPA should seek specific Congressional authority and guidance prior to embarking on a quixotic climate change crusade.

Although the existing Clean Air Act may, in fact, be written with such broad language that it can theoretically authorize regulations restricting the emissions of carbon dioxide derived from the combustion of fossil fuels – choosing such a course would definitely strain EPA resources to the breaking point and would impose untold billions of dollars in costs on the US economy. Judging from the numerous caveats and future uncertainties mentioned by EPA in the ANPR, it is clear that EPA staff is aware of the serious problems likely to arise from regulating GHGs under the Clean Air Act. Nevertheless, it cannot be overstated: EPA should proceed with extreme caution, to say the very least.

For stationary sources in general, the ANPR contemplates numerous possible approaches for regulating GHGs under the Clean Air Act including National Ambient Air Quality Standards (or NAAQS), hazardous air pollutant standards under section 112, and performance standards for new and existing stationary sources under section 111. Within each proffered approach EPA further refines its focus on specific issues but the overall impression is one of uncertainty and ambiguity rather than confidence in the capability of the agency to implement any of the approaches outlined.

For example, the ANPR's own discussion of the problems with a NAAQS approach should dissuade anyone from endorsing the concept. NAAQS are intended to target local or regional emissions and, by reducing the local emissions, improve the local or regional air quality. Yet for GHGs, the ANPR admits that foreign sources (such as India and China) are such a significant influence on global levels that unilateral American

reductions would not reduce the measurements locally, regionally, or even nationally. Given the potentially draconian restrictions that would be triggered by a failure to achieve “attainment” of lowered levels of GHGs, application of the NAAQS approach either would lead to catastrophic economic impacts or to the playing of political games with the target levels of GHGs (in order to avoid pulling the NAAQS trigger). Of course, the fact that foreign sources (beyond the regulatory reach of the EPA) of GHGs exceed US emissions means that the same basic problem exists with *any* approach imposed under the Clean Air Act. In other words, in the absence of international action, the best EPA can strive for is a minor reduction in the rate of increase in global GHG measurements. That is an outcome (essentially, “guaranteed failure”) that was not contemplated by the original authors of the Clean Air Act or its subsequent amendments and calls into question the applicability and appropriateness of using the Clean Air Act to address concerns over climate change.

Similarly, applying section 112’s Hazardous Air Pollutant (or HAP) standards to GHGs would create an unworkable regulatory regime. HAP standards traditionally are applied to comparatively small amounts of annual emissions of toxic chemicals. This automatically raises the question of how EPA should determine the appropriate level of emissions? The definitions under Section 112 list “major source” as “any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants.” In addition, “Area Source” is defined as “any stationary source of hazardous air pollutants that is not a major source.” So it would appear that, at least theoretically, there is no lower limit to the coverage of section 112 should GHGs (and carbon dioxide, in particular) be listed as “hazardous.” However, EPA suggests that it has the authority, by rule, to exempt non-major sources from coverage. One would hope EPA would be able to do so. For even if the “higher” trigger of the 10 tons per year limit is imposed on any stationary sources (including retail shopping facilities which provide heat or hot water by means of a fossil fuel-fired boilers or even individual restaurants) these facilities will be required to obtain a permit to

continue to operate. The ANPR estimates 550,000 establishments could be encompassed by such a requirement – and the US Chamber of Commerce estimates over 1,000,000 would be covered. At one point the ANPR suggests that permit requirements for small sources would be relatively simple and inexpensive to administer but EPA greatly underestimates the cost in dollars and man-hours required for small sources to comply with the paperwork -- even if a streamlined “general permit” were to be created expressly for the purpose.

Given that this ANPR exercise is a response to EPA’s failure to regulate vehicle tailpipe emissions under section 202 of the Clean Air Act, it might be illuminating to consider the scope required for any effort to regulate vehicles. Based upon EPA’s Green Power Equivalency Calculator assumptions, the average two-car family emits over 10 tons of carbon dioxide (CO<sub>2</sub>) per year due to gasoline consumption alone. [5.46 metric tons CO<sub>2</sub>-Equivalent /vehicle/year] There are over 250 million registered passenger vehicles in the United States. In addition, most of the consumer goods sold in America are transported by trucks. The typical commercial truck travels much farther and emits more CO<sub>2</sub> each year than the average passenger vehicle. [By contrast, according to the EPA Clean Air Markets Division, in 2005 there were only 417 power plants in America whose primary source of fuel was coal.] Clearly, it would be more administratively efficient to regulate vehicle manufacturers, not individual vehicle owners. In the same vein, EPA should avoid taking any steps that might lead it to regulate (as under a permitting requirement) individual buildings or co-managed groups of buildings.

In addition, EPA would have to change its own descriptions of the purpose and impact of Section 112. According to the EPA website explanation of section 112: “Under the Clean Air Act Amendments of 1990, EPA is required to regulate large or ‘major’ industrial facilities that emit one or more of 188 listed hazardous air pollutants (air toxics). Air toxics are those pollutants that are known or suspected of causing cancer or other serious health effects, such as developmental effects or birth defects.” (emphasis added) The ANPR admits that GHGs are not toxic to humans. EPA has never before considered non-

toxic emissions to qualify under Section 112 – despite decades of regulatory opportunities to do so.

Should EPA independently decide (or litigation impose the decision upon it) to strive for such incredibly low levels of emissions, in the absence of technological breakthroughs an already wounded American economy could be devastated.

Other questions raised by the ANPR are cause for concern among ICSC members and commercial real estate owners and developers in general. The ANPR's discussion of Title I of the Clean Air Act's Prevention of Significant Deterioration (or PSD) program, as it applies to small-scale sources such as commercial property, highlights these concerns well. Unfortunately, specific answers cannot be provided to EPA's questions given the unique circumstances presented by each individual property. If EPA cannot successfully provide an exemption for small sources of GHGs under the existing language of the Clean Air Act it should seek such authority from Congress prior to the adoption of any regulatory scheme.

Toward the end of EPA's lengthy ANPR, it raises yet more questions as to how it might deal with small, stationary sources of GHG emissions. This broad category would likely include many retail real estate facilities. One suggestion contained in the ANPR is that as an alternative to direct, technological controls on small-source GHG emitters (because such technological controls do not exist and are unlikely to be economically feasible in the near future), EPA would allow "energy efficiency" to serve as a substitute.

It is unclear how EPA would measure or account for CO<sub>2</sub> emission reductions related to energy efficiency in commercial and residential buildings. For example, not all electricity is generated by CO<sub>2</sub> emitting processes. Thus, end-user energy consumption does not directly correspond to GHG emissions. Regional electric power sources and even time-of-day differences make "scoring" complex and difficult and potentially subject to imprecise national or regional averaging of emissions.

End users of electricity have no control, and scarcely any influence over the generating methods selected by electricity suppliers. The exception arises only when end users are able to select among “green power” providers through special contractual arrangements. Nationally, these opportunities are often more expensive and fairly limited in capacity. Increased competition over these scarce resources is likely to raise the cost even more in the future. Nonetheless, should EPA seek to impose regulatory authority under the Clean Air Act on commercial property electricity customers and their energy efficiency practices it would seem an appropriate measure for EPA to exempt “green power” customers from coverage of any proposed regulations and related permitting requirements.

Other complications exist within the retail real estate industry. Existing long-term leases and contractual obligations at multi-tenant shopping center or mall properties present a potential obstacle to rapid implementation of any EPA edicts on energy efficiency in commercial buildings. The distribution of duties and rights under existing leases and contracts cannot be overridden by new EPA regulations. This would essentially guarantee thousands of private lawsuits and expensive arbitration efforts over the ultimate allocation of the costs and benefits of any new energy efficiency investments required by EPA for multi-tenant commercial properties. EPA should fully take into account these long-standing business practices and their numerous variations before imposing new regulatory standards (such as Title V permitting) on existing buildings.

In addition, EPA’s Energy Star program is limited in its applicability to the retail real estate industry. While some formats are accommodated by Energy Star’s ratings benchmarks (such as individual grocery stores) others are not (such as shopping malls) despite years of cooperative effort by private sector partners working with Energy Star personnel.

The Clean Air Act’s “Stationary Source” definition does not contemplate application to *non-emitting* end users of electricity. And EPA concedes that, in the event GHG regulations were extended down to the level of individual buildings and complexes (such

as natural gas or fuel oil boilers at schools, hospitals, office buildings, apartment buildings and shopping centers), there are no known cost-effective technologies for reducing the GHG emissions from these facilities. Therefore, EPA assumes that “offsets” might be required through improvements in overall energy efficiency at each facility.

It is ICSC’s opinion that applying Clean Air Act regulations to electricity consumers would require the passage of specific legislative language to expand the Act’s coverage. In addition, enlisting the participation of commercial property owners (who are merely end users of electricity) in any mandatory energy efficiency program which had the effect of offsetting the actual GHG emissions of electricity generators, even if it could be shown to be more cost-effective than direct controls on emissions sources, could amount to a “netting” of emissions among sources. Under prior court rulings (*Asarco Inc. v. EPA*, 578 F. 2d 326 (D.C. Cir. 1978)) EPA was denied any authority to utilize netting of power between actual emissions sources. It seems unlikely that EPA would prevail in Court should it claim the authority to regulate “stationary sources” based upon such an expanded and distorted definition of “source.”

As part of its mandate, EPA must seek to avoid dissipating scarce governmental resources. Any examination of the ANPR’s regulatory scenarios makes it clear that critical shortages of resources (both within the Agency and in the economy at large) will become serious obstacles. Thus, it would be inappropriate for EPA to launch an essentially unlimited campaign against all sources of greenhouse gas emissions. An unwarranted desire to engage all divisions of the Agency in this crusade would diminish EPA’s concomitant duties under other, equally vital (and often more immediate) legislative and policy requirements. Thus, it is incumbent upon EPA first to seek Congressional guidance through legislative enactment for specific authority prior to imposing a vast regulatory scheme on the entire economy.

In conclusion, even assuming that EPA makes an endangerment finding that triggers some sort of regulatory action under the Clean Air Act, it would be inappropriate for EPA to attempt to make the leap across the vast chasm that separates tailpipe emission

standards (section 202) from minor stationary emissions sources without first seeking explicit Congressional authorization and specific approval for any related regulatory regime.

Respectfully Submitted,

Kent Jeffreys

Staff Vice President

Office of Global Public Policy

International Council of Shopping Centers

1399 New York Avenue, NW

Washington, DC 20005