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June 23, 2009

Environmental Protection Agency
EPA Docket Center (EPA/DC)
Mail Code 6102T
Attn: Docket ID #: EPA-HQ-OAR-2009-0171
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Proposed Endangerment and Cause and Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act - Docket ID# EPA-HQ-OAR-2009-0171

On behalf of the 1.2 million members of the NATIONAL ASSOCIATION OF REALTORS® (NAR), I am pleased to submit these comments regarding the proposed endangerment and cause and contribute findings for greenhouse gases under Section 202(a) of the Clean Air Act (CAA), as issued by the Environmental Protection Agency (EPA) and published in the *Federal Register* on April 24, 2009.

The proposal includes two distinct findings:

1. Atmospheric concentrations of greenhouse gases (GHGs) endanger public health and welfare within the meaning of section 202(a) of the Clean Air Act.

2. The combined GHG emissions from new motor vehicles and new motor vehicle engines are contributing to air pollution which is endangering public health and welfare under section 202(a) of the Clean Air Act.

For the reasons outlined below, NAR urges EPA not to move forward on an endangerment finding which, unless Congress intervenes, would begin a legal process under the Clean Air Act (CAA) that would lead inexorably to a proposed rule to regulate GHG emissions.

While EPA is attempting to limit the impact on the economy and prioritize the regulatory activity needed to reduce emissions from only the motor vehicle sector, the Clean Air Act itself is agnostic as to the source of GHG emissions. A finding of endangerment for motor vehicles under Section 202(a)(1), on its own, could trigger a regulatory cascade and force EPA to begin regulating other sources through other major CAA programs.

Regulating GHGs under the CAA could have significant economic impacts on all sectors of business in the United States, including real estate. It could require thousands of previously unregulated building owners to obtain costly and burdensome permits under the CAA to emit carbon dioxide (CO_2) and other GHGs.

Legal and Regulatory Background

EPA is responding to the U.S. Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007). In *Massachusetts*, the Court made two key findings: First, GHGs fall within the definition of "air pollutant" found in CAA section 301, thereby giving EPA authority to regulate greenhouse gases under the CAA; and second, EPA must determine that either:

(i) GHGs cause or contribute to air pollution which may be reasonably anticipated to endanger public health or welfare, as required by section 202(a)(1);
(ii) GHGs do not contribute to climate change; or
(iii) EPA cannot or will not exercise its discretion to make an endangerment finding and provide a reasonable explanation as to why that is the case.

This proposed endangerment finding by the EPA fulfills the mandate of the Court to determine that GHGs endanger public health and welfare and contribute to global climate change.

The most troubling aspect of CAA regulation of greenhouse gases is that, despite the assertions of EPA and others, EPA simply cannot regulate "a little." According to EPA, "while no two endangerment tests are precisely the same," they generally call for similar elements: whether the emissions cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.

Under the CAA's Prevention of Significant Deterioration (PSD) program, major sources of air pollutants with the potential to emit 100 tons per year (TPY), or *any other sources* with the *potential* to emit 250 TPY are required to obtain a PSD permit. "Potential to emit" is defined under the CAA as "the maximum capacity of a stationary source to emit a pollutant under its physical and operational design." These thresholds provide no further detail regarding the source of the air pollutant – if the source emits any quantity of a regulated air pollutant over the threshold, it will be regulated under the CAA.

Individual Commercial Buildings Are Likely To Be Regulated By The CAA

Under the CAA, should GHGs be regulated under the Act—even if the regulation is specifically not directed at stationary sources—no new or existing "major" stationary source of GHG can be built or modified (if the modification increases net emissions) without first obtaining a PSD permit. This would include commercial buildings for offices, shopping centers and multifamily homes, which account for 5.6% of GHG emissions according to the EPA.

As EPA has acknowledged in previous regulatory notices, tens of thousands of new commercial buildings – which translate into thousands each year – could face new requirements under Title V of the CAA. Of these, 24,000 would require a PSD permit to build. These estimates do not include existing buildings that would require a permit due to a modification that increases net emissions, or new buildings with the potential - not just the actual - emissions to trigger a new permit. Available data are presented in Table 1.

Table 1. EPA ESTIMATES BUILDINGS EXCEEDING PERMIT THRESHOLDS.

		No. of New Buildings	
CO2 Emissions Threshold	**No. of Existing Buildings**	**Cumulative**	**Annual**
A. Residential			
100 Tons Per Year	139,100	27,100	1,900
250 Tons Per Year	61,300	8,200	600
B. Commercial			
100 Tons Per Year	272,000	58,000	4,000
250 Tons Per Year	88,000	16,000	1,000

Source: EPA Staff, "Estimates of Facilities...," Tables 1 and 2 and Attachments (Doc ID EPA-HQ-OAR-2008-0318-0077).

Research conducted by the U.S. Chamber of Commerce suggests that the impact could be even greater than anticipated by the EPA. Using Department of Energy and Census Bureau data, the Chamber report estimates that 1.2 million buildings ***actually*** emit at least 250 TPY of CO_2.

As a result, promulgation of future regulation could require CO_2 permits for commercial office buildings, shopping malls, and multi-family buildings of 25 units or more. Many of these, according to the U.S. Chamber of Commerce, are previously unregulated, including:

a. 260,000 office buildings;
b. 150,000 warehouses;
c. 92,000 health care facilities;
d. 71,000 hotels and motels;
e. 51,000 food service facilities;
f. 37,000 churches and other places of worship; and
g. 17,000 farms

Though acknowledging the potential impacts, EPA has suggested a strategy to exclude most commercial buildings, but only if the agency "were successful in applying legal theories that justify deviating from statutory language." These kinds of statements are confusing and disconcerting to the real estate sector. Real estate markets succeed when all market participants have accurate, consistent and reliable information about the value, price and availability of properties. Unpredictability regarding the nature, scope and cost of regulations would adversely affect real estate markets throughout the country.

The analysis shown above is supported by EPA's more recent notice of proposed rulemaking specific to the reporting of greenhouse gas emissions (74 Fed. Reg. 16448 *et seq*. [April 10, 2009]). In its April 10 notice, the Agency confirmed there would be an "order of magnitude" increase in the number of regulated entities if it were to lower the regulatory threshold from a proposed level of 25,000 tons/year down to 1,000 tons (Id. at 16468). As the following table which presents the EPA data shows, the 1000-ton threshold would impose reporting costs on more than 9 times the number of facilities which are responsible for less than 10 percent of the emissions (61% rather than 54%).

Table: Lowering the CO2 regulatory threshold multiplies cost for little benefit.

Threshold (tons/yr)	Emissions covered	Facilities covered
1,000	61%	9.0%
10,000	58%	2.3%
25,000	54%	0.9%
100,000	51%	0.3%

Source: EPA, GHG Reporting NPRM (April 10, 2009), Table C-2.

The EPA has offered legal arguments which it believes would allow for PSD regulations at an emissions threshold above 250 tons a year, which is specified by statute. In the ANPRM, the Agency referenced a 1989 Supreme Court precedent in *U.S. v. Ron Pair Enterprises* that the literal application of the law need not apply if it would lead to an "absurd, futile, strange or indeterminate" result.

NAR agrees that it would be an "absurd" result of Massachusetts v. EPA, if EPA had to try and control emissions from tens of thousands of *de minimis* CO_2 emission sources, and appreciates that the EPA is proposing to limit the regulation to manageable number. But ultimately, it is up to the court to decide and the Agency is essentially asking permission to ignore actual statutory language which can be plainly read. No one appears to dispute that EPA will have to go to court to defend its arguments. According to one senator, a group (the Center for Biological Diversity) is prepared to sue for regulation of small sources. And it does not matter if this group eventually loses. Even so, it is industry that will have to pay the price as it spends years and the legal fees defending the novel legal interpretation of EPA's general counsel.

Moreover, these legal costs appear to be entirely avoidable. We are not aware specific deadline that has been set by the Supreme Court in Massachusetts v. EPA. Congress is poised to act on legislation that could affect CO2 regulations. House leaders are planning to bring H.R. 2454 to the floor possibly before July 4. That bill specifically preempts CO_2 regulations under the PSD program (section 331). By August, the Senate committees of jurisdiction are expected to report the major components of legislation.

There is bipartisan support in Congress for EPA not to regulate CO_2 emissions from smaller sources. The House provisions that preempt CO_2 regulations were inserted by the chairmen of the full and subcommittee of jurisdiction, and subsequently approved with the

support of a majority of democrats. On the other side of the aisle, the ranking members of House committees recently wrote the Administrator and asked her to extend the comment period on EPA's proposed finding that CO_2 endangers public health and welfare. They specifically referenced statutory language that once a pollutant is "subject to regulation under the act," the PSD requirements, to which tens of thousands would be subject, will be automatically be triggered.

By proposing a CO_2 reporting threshold above 250 tons, the EPA appears not only recognize consequences but also to be actively seeking to avoid the costly and unmanageable regulation of *de minimis* CO_2 sources. As its own analysis has now shown twice, lowering the threshold will significantly increase the number of regulated entities with only a small corresponding benefit to the environment. Expediting an endangerment finding, knowing all of this and that Congress could intervene, is not a wise use of taxpayer dollars. Further, the timing of an endangerment finding appears to be entirely within the Administrator's discretion as we are not aware of any specific court-imposed deadline.

Permitting Costs Would Be Expensive And Time-Consuming

Unless otherwise determined, the real estate sector must assume that regulations will be promulgated and that many previously unregulated structures and facilities will now be required to obtain permits to emit CO_2 when it becomes an air pollutant regulated under the CAA.

EPA estimates that it currently issues 200 to 300 PSD permits annually. If this number were to increase to between just 30,000 to 50,000, EPA and state agencies would require significant new resources to issue permits in a timely manner. Businesses forced to comply with PSD would be barred from construction for long periods of time, or simply not build or expand their facilities.

Increased Regulatory Costs Will Be Borne By The Consumer

If EPA proceeds with the current endangerment finding and begins to regulate CO_2 and other GHGs as air pollutants under the CAA, many previously unregulated commercial office and apartment buildings could be required to obtain a permit to emit these GHGs.

As a practical matter, obtaining these permits is expensive. The costs include legal, engineering and consulting fees, as well as permitting and administrative fees. Even more expensive will be costs of compliance, especially bringing older buildings up to the new energy efficiency codes, plus the cost of pollution controls and other efficiency measures the permitting agency may require. Even more disturbing from a cost-management perspective is the fact that cost is generally not a consideration in determining standards under the CAA.

In prior information collection requests, the EPA has estimated the time and cost to apply for Title V and PSD permits. This partial cost data is presented in Table 2. The typical applicant spends 866 hours and $85,000 in the PSD program and 340 hours and $46,000 under Title V. The data does not reflect the full set of EPA-estimated costs (see Table 2 footnotes) or the increase in costs due to, for example, development of air modeling software or processing thousands of new permits each year.

Table 2. EPA SURVEYS PROVIDE BURDEN ESTIMATES FOR NEW PERMITS.

Activity	Hours	Cost [$2007]
A. PSD		
Preparation & Planning	392	38,262
Data Collection & Analysis*	350	34,163
Permit Application	124	12,106
B. Title V		
Preparation & Planning	300	44,090
Permit Application**	40	1,562

*Note: Excludes the cost of hiring a contractor for pre-application air quality monitoring, assumed for 12% of permits.

**Note: Excludes the burden for developing periodic monitoring (assumed for 50% of permits) and public hearings (2%).

Source: EPA, Various Information Collection Supporting Statements (EPA-HQ-OAR-2004-0081-0015 and -0015-0016).

At a time when commercial real estate activity (as measured by vacancy rates and new construction) is still in a soft market position, the industry is ill prepared to absorb additional permitting fees and compliance costs. Tightening credit and slow economic growth raises concern for the health of the commercial real estate market. In such an environment, EPA must evaluate and consider the far-reaching economic implications of moving forward on any future regulations that might result from this endangerment finding.

EPA Should Provide Additional Information

Before EPA proposes any GHG emission regulations, additional information must be provided to accurately assess the full impact of any such rulemaking. We recommend that EPA provide the following additional information with a notice of proposed rulemaking.

Number of Regulated Buildings

In previous regulatory notices, EPA listed a number of "uncertainties" in its estimates of buildings emitting above GHG emissions thresholds, including:

- Potential to Emit (PTE). EPA accounted only for actual emissions from buildings, not their PTE as previously calculated for defining major sources. Since in practice, heating systems have thermostats, EPA reasons it need not calculate emissions at full capacity year around, as it does when defining other major sources. While we would prefer calculations closer to actual emissions, if courts do not agree with EPA's legal reasoning, the number affected could be closer to a million, according to the U.S. Chamber of Commerce. We cannot assume that EPA will prevail in court.

- Existing Building Modifications. Due to lack of data, EPA did not include the number of existing buildings with a modification triggering permitting in its analysis. The Agency also did not account for traditional (non-GHG) pollutants, which EPA states: "could substantially increase the number of modifications that would be subject to NSR PSD

requirements". If only 12% of the roughly 150,000 existing buildings (at 250 TPY) expand, EPA has the potential to process 100 times the current number of PSD permits.

- Non-CO2 Emissions. EPA did not consider GHG emissions other than CO_2 based on preliminary estimates that few would exceed a threshold based solely on non-CO_2 gases. CO_2 emissions from non-energy (i.e. process-related) sources were also omitted. EPA should consider all GHGs in its facility estimates.

EPA did not estimate the number of buildings affected by other CAA programs. According to the U.S. Department of Commerce, under section 112 alone, a building as small as 5,000 square feet could exceed a threshold of 20 TPY, translating to 54% of 2.4 million surveyed commercial buildings that use natural gas.

Cost Effectiveness of Regulatory Alternatives

EPA did not provide the requisite information to evaluate the full cost of regulating commercial buildings under the CAA. Only partial information for Title V and PSD permits was available. Still those numbers do not reflect the burden if EPA goes from issuing 200 permits a year or even 2,000 without additional funding. We approached several consulting firms only to learn there is no air modeling software or precedent for permitting office or apartment buildings.

EPA did not identify BACT for commercial or residential buildings although it presented some available technologies from an IPCC report (see p. 44406). Depending on technology, cost per building could range from hundreds (e.g., light bulbs or insulation) to hundreds of thousands of dollars (HVAC system re-designs) for each upgrade. If the least cost approach for a building owner is to switch fuels, EPA should consider the impact and any risk-benefit tradeoffs.

Affordability is also a factor that EPA should consider. Some building owners may pass on some costs to tenants, thereby harming all tenants, which will be a particular burden on low-income families.

EPA should provide the above information on the preferred alternative as well as any regulatory alternatives, including the no-rule option. For example, EPA identifies options to streamline the PSD program, ranging from issuing general permits and forgoing case-by-case BACT to new interpretations of PTE applicability calculations and expanding synthetic minor permits. We encourage EPA to continue exploring burden reducing measures. This information would help NAR provide more informed feedback on a proposed rule.

The International Context Of The Endangerment Finding

EPA should evaluate the full cost of a proposal relative to its effectiveness in a global context, and present the information in any future notice of proposed rulemaking. It is one thing for a sector to incur significant costs that are demonstrably justified by the environmental benefits. It is another when those costs are incurred without any corresponding reduction in overall emissions. By its global nature, an overall reduction in GHG emissions depends on the

cooperation and action of other countries. Climate change experts agree that the U.S., acting on its own to reduce CO_2 emissions, will have little or no impact on global CO_2 emissions.

The endangerment finding and the proposed regulations that will inevitably follow are all unilateral efforts on the part of the U.S. Unfortunately, these efforts (and the economic dislocation that will occur) will be futile if other nations who are significant contributors to global emissions of CO_2, such as China and India, choose not to act. Developing countries have stated unequivocally that, regardless of U.S. action, they will never voluntarily impose limits on their economic growth. From their perspective, it is morally wrong to deny their citizens what the rest of the developed world has enjoyed for decades.

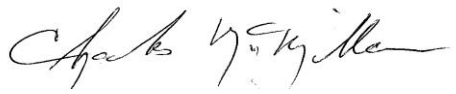
Conclusion

As stated in *Massachusetts v. EPA*, the EPA has wide latitude in how it decides to initiate actions to regulate GHGs. While the Endangerment Finding was the first step on this road, EPA now faces a choice: regulate now and place this country at a global competitive disadvantage; or wait until technology and markets are able to price the value of removing GHGs efficiently and voluntarily.

Regulating GHGs under the CAA is a sweeping and unprecedented regulatory encroachment with largely unknown and wide-ranging impacts across the U.S. economy. From the real estate perspective, based on EPA data, this regulation could involve expensive new requirements and tens of thousands of previously unregulated entities that would shake an already struggling commercial and multi-family real estate market. This scenario raises serious concerns about EPA's capacity to fully anticipate the impacts of this regulation and administer the permitting process in a timely manner.

NAR is not aware of any previous CAA rulemaking that could have such far reaching economic and societal implications and involve so many sectors across the entire U.S. economy. The CAA, a decades-old statute, is not an appropriate vehicle to address the global challenges of climate change. The elected members of Congress -- not EPA -- should determine how to meet those challenges. Therefore, NAR urges EPA not to move forward with this Endangerment Finding until such time as the nation's elected representatives have spoken.

Sincerely,



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