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**Re: Regulating Greenhouse Gases Under the Clean Air Act
Docket ID: EPA-HQ-OAR-2008-0318**

On behalf of the 1.2 million members of the NATIONAL ASSOCIATION OF REALTORS® (NAR), I am pleased to submit these comments regarding the Advance Notice of Proposed Rulemaking (ANPR) on Regulating Greenhouse Gases Under the Clean Air Act (CAA) issued by the Environmental Protection Agency (EPA) and published in the *Federal Register* on July 30, 2008.

For the reasons outlined below, NAR urges EPA not to move forward on a proposed rule that would regulate greenhouse gas emissions under the Clean Air Act (CAA). Regulating greenhouse gases (GHGs) under the CAA will result in a cascade of unintended consequences that 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 (CO₂) and other GHGs.

REALTORS® Are Stakeholders and Leaders in the Voluntary Reduction of GHGs

NAR members are involved in all aspects of the real estate industry: they sell single family homes, sell and lease apartments and condominiums in multi-family buildings, manage rental property, sell and lease commercial properties (such as office buildings, shopping centers, office parks and industrial facilities), and sell land for farming, ranching and development.

As a result of their deep involvement in the real estate sector, REALTORS® understand the impact these laws or regulations will have on the price and value of real estate located in their communities, as well as their own ability to conduct business.

In response to market pressures, NAR has already taken steps to educate its members and consumers about the benefits of reducing their carbon footprint and how increased energy efficiency and other green features will add value to a home.

- NAR Green Designation: NAR has recently created a “Green Designation” for all NAR members. The Green Designation program offers instruction on building techniques that are less environmentally damaging, marketing to "green" consumers, regulatory issues relating to environmental sustainability, potential cost savings for employing "green" features, and education on energy efficiency, air quality, and sustainable communities and land planning.
- Greening Multiple Listing Services: NAR is working with Multiple Listing Services (MLSs) across the country to incorporate “green” features into local and regional MLS databases, such as the home’s energy efficiency rating or whether there are Energy Star appliances included in the home.
- Realtor Building in Washington, DC: NAR built the first US Green Building Council LEED-Silver Certified privately owned commercial office building in Washington, DC. This building stands as a testament to NAR’s commitment to environmental sustainability in the built environment, and also demonstrates that going green and economic development are compatible and achievable goals.

Regulation would complicate on-going efforts and may even be counter-productive. For example, if EPA mandates what is already being done voluntarily, property owners could face unnecessary additional costs (e.g., paperwork) for green building upgrades. Regulation would act as a disincentive to “go green”. NAR is taking these pro-active steps to ensure our members are educated regarding the value that is added when buildings are energy efficient and environmentally sustainable. Through heavy-handed regulation, EPA risks further reducing the affordability of real property in one of the hardest hit markets in the recent financial crisis.

ANPR 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.

To date, EPA has not made a formal endangerment finding, nor is it under a firm deadline to do so. The Court stated in *Massachusetts* that “EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies.”

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.” 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 through various other major CAA programs. 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. EPA finds “similar” endangerment language in sections 108 (NAAQS), 111 (NSPS), 112 (HAPs), 115 (international air pollution), 211 (fuels), 213 (non-road engines and vehicles), 231 (aircraft) and 615 (ozone protection).

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.

EPA acknowledges that tens of thousands of new commercial buildings – which translate into thousands each year – could face new requirements under Title V. Of these, 24,000 would require a PSD permit to build. (See EPA Staff estimates, page 2). As EPA staff notes, these estimates do not include existing buildings that would require a modification to an existing permit, or new buildings with the potential - not just the actual - emissions to trigger a new permit (page 3 of EPA staff estimates). Available data are presented in Table 1.

Table 1. EPA ESTIMATES BUILDINGS EXCEEDING PERMIT THRESHOLDS.

CO2 Emissions Threshold	No. of Existing Buildings	No. of New 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 CO₂.

As a result, promulgation of this regulation could require CO₂ permits for commercial office buildings, shopping malls, multi-family buildings of 25 units or more, and, possibly, very large single family homes. Many of these, according to the U.S. Chamber of Commerce, are previously unregulated establishments, 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 then suggests 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.

Permitting Costs Would Be Expensive and Time-Consuming

Unless otherwise determined, the real estate sector must assume that these regulations will be promulgated in some form and that many previously unregulated structures and facilities will now be required to obtain permits to emit CO₂ when it becomes an air pollutant regulated under the CAA.

EPA estimates that it currently issues two to three hundred PSD permits annually. EPA does not process a larger number of these permits because, at present, few facilities emit enough of a regulated pollutant to cross the 100/250 TPY threshold. If this number were to increase to just thirty or fifty thousand, EPA and state agencies would require significant new resources to issue permits in an efficient and timely manner. Businesses forced to comply with PSD would be barred from construction for long periods of time, immediately placing economic development at risk. If the burden is too great, many businesses will simply not build or expand their facilities.

Moreover, once a source is classified as a major source for one pollutant, it is considered a major source for all other regulated pollutants under the CAA. As a result, the tens of thousands of facilities that are required to meet current PSD standards would have to install the Best Available Control Technology (BACT) not only for CO₂, but also potentially for nitrous oxide, particulate matter, lead, mercury, sulfur dioxide, and other pollutants prior to any new construction. All of these new requirements would overwhelm permitting authorities and result

in a regulatory burden that could hinder local and regional economies and sharply curtail real estate transactions during one of the sharpest market corrections in U.S. history.

Increased Regulatory Costs Will be Borne by the Consumer

If EPA proceeds with an endangerment finding and begins to regulate CO2 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 an expensive proposition. 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. In addition, the ANPR does not specify what might constitute BACT for commercial buildings. Even more disturbing from a cost-management perspective is the fact that cost is generally not a consideration in determining standards under the CAA.

Unfortunately, EPA did not provide with the notice the requisite cost information to comment on the full range of impacts. However, in prior information collection requests, the Agency 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 projected to weaken over the next six to nine months, and the multi-family and commercial real estate sector faces significant liquidity challenges, 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 with this proposed rule.

EPA Should Provide Additional Information

We applaud EPA for issuing an advanced notice that solicits public comments on regulating GHGs under the CAA. The information could improve the rulemaking. However, it is difficult to comment when critical information is not available, including the number of regulated buildings, cost effectiveness of regulatory alternatives, and small business impacts. We recommend that EPA provide the following additional information with a notice of proposed rulemaking.

Number of Regulated Buildings

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” (p. 4 of the EPA staff estimate). 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 CO2 based on preliminary estimates that few would exceed a threshold based solely on non-CO2 gases. CO2 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.

In addition, EPA should evaluate the full cost of a proposal relative to its effectiveness in a global context, and present the information in the 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, overall GHG emissions co-depend on the cooperation of other countries such as China and India. Affordability is also a factor that EPA should consider. Some building owners may pass on some costs to tenants, thereby harming 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.

Small Entity Impacts and Alternatives

In the ANPR, SBA's Office of Advocacy directed EPA to convene a Small Business Regulatory Fairness Act (SBREFA) panel under section 609 of the Regulatory Flexibility Act (see 5 USC 601 et seq.) if unable to certify no significant economic impact on a substantial number of small entities. SBA noted that EPA has already convened nine successful panels on rulemakings under the CAA including sections 112 (hazardous air pollutants) and 126 (involving federal implementation plans). By directly involving small entities at an early stage in the rulemaking, these panels offer EPA the benefit of real-world experience and facility-level resources in developing a rule. As a result,

“...the final rules reflect a better understanding of how the regulations would impact small business. Millions of dollars have been saved because poorly designed approaches and unintended consequences are filtered out of proposed regulations with the help of small entities and government officials. These changes are accomplished without compromising valuable protections for human health and the environment...” (SBA, see p. 44395).

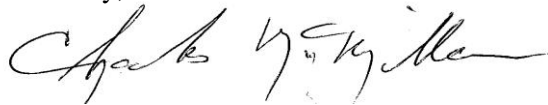
Because the ANPR involves CAA programs where small entities would be directly regulated by EPA, we urge EPA to convene a panel for the entire rulemaking. Even if the rule were limited to sections where only the states regulate, we believe a panel would help EPA to develop better data and explore significant alternatives to improve the rule and therefore, purely as a matter of policy, EPA should convene a SBREFA panel.

Conclusion

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 involving 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, and therefore, NAR urges EPA not to regulate GHGs from any source under the Act.

Sincerely,

A handwritten signature in cursive script, appearing to read "Charles McMillan".

Charles McMillan, CIPS, GRI
2009 President, National Association of REALTORS®