

**ATTORNEYS GENERAL OF THE STATES OF CALIFORNIA AND OREGON,
THE COMMONWEALTH OF MASSACHUSETTS, AND THE CORPORATION
COUNSEL FOR THE CITY OF NEW YORK**

July 28, 2008

VIA ELECTRONIC SUBMISSION

Air and Radiation Docket
U.S. EPA
Mail Code 6102T
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: *Docket ID Number EPA-HQ-OAR-2005-0031 - Comments on Proposed Rule*

To Whom It May Concern:

The Attorneys General of the States of California and Oregon, the Commonwealth of Massachusetts, and the Corporation Counsel for the City of New York, submit these comments on the United States Environmental Protection Agency's (EPA's) proposed rule amending the new source performance standards for steam generating units, published at 73 Fed. Reg. 33642 (June 12, 2008).¹ The proposed rule is another missed opportunity for EPA to propose new source performance standards for carbon dioxide emissions from steam generating units, especially electric utility steam generating units (colloquially, power plants). It has been well over a year since *Massachusetts v. EPA*, 549 U.S. ___, 127 S.Ct. 1438 (2007), confirmed that greenhouse gases (GHGs), including carbon dioxide, are air pollutants subject to regulation under the Clean Air Act. It has also been ten months since the United States Court of Appeals, District of Columbia Circuit remanded the petition of California, Massachusetts, Oregon, the City of New York, and several other states and the District of Columbia for review of EPA's failure to regulate carbon dioxide emissions from power plants. (*New York, et al. v. EPA*, No. 06-1322, Order dated Sept. 24, 2007 (D.C. Cir.)) The purpose of the remand was for EPA to conduct "further proceedings in light of *Massachusetts v. EPA*." (*Id.*)

While these events should have triggered EPA to propose new source performance standards for carbon dioxide emissions from power plants long ago, EPA's proposed rule ignores

¹"Standards of Performance for Fossil-Fuel-Fired Steam Generators for Which Construction is Commenced After August 17, 1971; Standards of Performance for Electric Utility Steam Generating Units for Which Construction is Commenced After September 18, 1978; Standards of Performance for Industrial-Commercial-Institutional Steam Generating Units; and Standards of Performance for Small Industrial-Commercial-Institutional Steam Generating Units; Proposed Rule." (73 Fed. Reg. 33642 (June 12, 2008).)

the issue. We protest EPA's failure to propose such standards in the proposed rule.

In 2006, EPA adopted regulations establishing revised new source performance standards for electric utility and other steam generating units under Section 111 of the Clean Air Act. (71 Fed. Reg. 9866 (Feb. 27, 2006).) The regulations did not include any carbon dioxide emission standards, despite comments from state and municipal governments and other interested parties that the regulations should. Power plants generating electricity are the largest sources of carbon dioxide emissions from fossil fuel combustion in the United States, emitting 41.3 percent, or 2,328.2 million metric tons, of the U.S. total from fossil fuel combustion in 2006. (EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2006*, Executive Summary ES-9 (2008).) Given this fact, and the established link between emissions of GHGs such as carbon dioxide and climate change, power plants are significant contributors to climate change in the United States and the rest of the world.

In response to the regulations, California, Massachusetts, Oregon, the City of New York, and several other states and the District of Columbia filed a petition for review in the United States Court of Appeals, District of Columbia Circuit. (D.C. Cir. No. 06-1148.) The petition challenged EPA's failure to adopt carbon dioxide emissions standards for power plants, among other issues. Several environmental groups also challenged the regulations on similar grounds in a separate action. (D.C. Cir. No. 06-1149.) The Coke Oven Environmental Task Force, an industry trade group, also challenged other aspects of the regulations in a third action. (D.C. Cir. No. 06-1131.)

After consolidating the three cases, the D.C. Circuit severed all GHG issues out of the cases, and consolidated those issues into *New York, et al. v. EPA*. (D.C. Cir. No. 06-1322.) On September 24, 2007, the D.C. Circuit remanded the *New York, et al. v. EPA* case to the agency, "for further proceedings in light of *Massachusetts v. EPA*." (Order in No. 06-1322 (Sept. 24, 2007).) In *Massachusetts v. EPA*, the Supreme Court rejected EPA's argument that EPA lacked authority under the Clean Air Act to regulate greenhouse gas emissions from new motor vehicles. (549 U.S. ___, 127 S.Ct. 1438 (2007).) Since EPA had made the same argument as to power plants, the D.C. Circuit remanded *New York, et al. v. EPA* to the agency for action consistent with the *Massachusetts v. EPA* decision.

Despite the remand, EPA has still proposed no new source performance standards for carbon dioxide emissions from power plants, and appears unlikely to do so any time soon. Instead, EPA issued the proposed rule, which completely ignores the issue. The proposed rule appears in large part to be the product of a settlement of the Coke Oven Environmental Task Force case. As noted above, that case included an industry trade group's challenge to the final rule challenged in *New York, et al. v. EPA*, but did not involve carbon dioxide emissions from steam generating units. That industry challenge to EPA's regulations has apparently been resolved, while state and municipal government and environmental group concerns about carbon dioxide emissions from power plants have not.

EPA's failure to address carbon dioxide emissions from steam generating units in its

latest proposed rule is part of the same strategy of delay that EPA has used since the Supreme Court's decision in *Massachusetts v. EPA*. In particular, EPA postponed any specific action by saying that it would issue an advance notice of proposed rulemaking (ANPR) that examines all potential regulation of GHG emissions under the Clean Air Act. But the ANPR, which EPA finally issued on July 11, 2008, does not propose any actual GHG regulation. Rather, it contains general background and discussion, and solicits public comment on dozens of questions and concerns about possible regulation, including regulation of GHGs from steam generating units. It does not in any way commit EPA to a path of regulation, and EPA Administrator Stephen Johnson prefaced its release with remarks that the Clean Air Act is "ill-suited for the task of regulating global greenhouse gases" and "the wrong tool for the job."

On June 16, 2008, the government petitioners in *New York, et al. v. EPA* sent the attached letter to Administrator Johnson protesting EPA's lack of progress in responding to the remand of that case. To date, Administrator Johnson has not responded.

The protest described in the attached letter to Administrator Johnson applies with equal force to EPA's proposed rule. The proposed rule reflects EPA's continued failure to respond to D.C. Circuit's remand in *New York, et al. v. EPA*. The Court's remand of that case for "further proceedings in light of *Massachusetts v. EPA*" was a directive that EPA take expeditious action to determine whether to regulate carbon dioxide emissions from power plants. But instead of taking expeditious action, EPA has ignored the issue in the proposed rule, and issued an ANPR that is merely a "preparatory step, antecedent to a potential future rulemaking. . . ." (*P & V Enterprises v. U.S. Army Corps of Engineers*, 516 F.3d 1021, 1026 (D.C. Cir. 2008).) After years of litigation over EPA's failure to promulgate new source performance standards for carbon dioxide emissions from power plants, it is unacceptable for EPA to revert to such a preparatory step.

Moreover, Administrator Johnson has already indicated that there is no real potential for EPA regulation of GHG emissions under the Clean Air Act during his leadership. He did so by prefacing the ANPR with his remarks that the Clean Air Act is "ill-suited for the task of regulating global greenhouse gases" and "the wrong tool for the job." Administrator Johnson's remarks reflect that he has already decided not to regulate GHGs under the Clean Air Act, and had done so even before he received the first public comment to the ANPR. This demonstrates that the ANPR process is a pro forma exercise, and a wholly deficient response to *Massachusetts v. EPA* and the remand in *New York, et al. v. EPA*.

EPA cannot seriously dispute the importance of regulating emissions of GHGs such as carbon dioxide from steam generating units, especially power plants. Even EPA's deficient ANPR includes more than enough information to conclude that power plants "cause[], or contribute[] significantly to," GHG emissions, and such air pollution "may reasonably be anticipated to endanger public health or welfare." (42 U.S.C. § 7411(b)(1).) The ANPR states that "[e]lectricity generators emitted 33.7% of all U.S. GHG emissions in 2006." (ANPR at 101 (July 11, 2008).) The ANPR also acknowledges that "[t]he scientific record shows there is compelling and robust evidence that observed climate change can be attributed to the heating

effect caused by global anthropogenic GHG emissions.” (*Id.* at 194.) In addition, the ANPR contains a long list of observed and projected adverse effects of global warming, including rising sea levels, more frequent and severe heat waves, increased flooding and erosion, increased fire risk, and declining air quality, among others. (*Id.* at 185-194.) Virtually all of these adverse effects pose human health risks, especially among sensitive populations “such as the elderly, young, asthmatics, the frail and the poor.” (*See id.* at 192.)

Moreover, Administrator Johnson’s assertion that the Clean Air Act is “ill-suited” for regulating GHG emissions is belied by the ANPR itself. In contrast to Administrator Johnson’s remarks prefacing the ANPR, the ANPR itself acknowledges that new source performance standards allow “significant flexibility in regulation,” and discusses at length how such standards could be used effectively to regulate GHGs. (ANPR at 424-452.) EPA’s acknowledgment of its ability to regulate GHGs using new source performance standards makes EPA’s failure to propose such standards for GHG emissions from power plants all the more improper.

Given the above, EPA is required to promulgate new source performance standards for carbon dioxide emissions from power plants. EPA’s failure to do so in the proposed rule, or anywhere else, violates both the Clean Air Act and the D.C. Circuit’s remand order in *New York, et al. v. EPA*. We request that EPA correct these violations immediately, by revising the proposed rule to include such new source performance standards.

Please contact California Deputy Attorney General Thomas G. Heller at (213) 897-2628 if you have any questions about this comment.

Sincerely,

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June 16, 2008

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Re: New York v. EPA (D.C. Cir. 06-1322) – Remand

Dear Administrator Johnson:

The undersigned government petitioners in New York v. EPA (D.C. Cir. 06-1322) (Government Petitioners) are writing today to protest the lack of progress by the Environmental Protection Agency (EPA) in responding to the D.C. Circuit's remand in the above-referenced case. In this action, the Government Petitioners challenged EPA's failure to promulgate New Source Performance Standards (NSPS) under the Clean Air Act (Act) for carbon dioxide emissions from power plants, which are the largest single source of greenhouse gas emissions in the United States. Following the Supreme Court's landmark ruling in Massachusetts v. EPA in April 2007, the D.C. Circuit remanded this action to EPA, yet EPA has taken no action. For the reasons set forth in this letter, the Government Petitioners respectfully submit that EPA must, at a minimum, expeditiously make an "endangerment determination" on the impact of global warming from power plants on public health and welfare, in order to comply with the remand order and section 111 of the Act.

Section 111(b)(1)(B) of the Act requires EPA to revise NSPS every eight years. By letter dated August 27, 2002, environmental groups demanded that EPA revise the NSPS for power plants and, specifically, consider promulgating standards for carbon dioxide emissions. They noted that the last eight-year review of power plant NSPS had occurred in 1979. The groups filed a complaint to compel EPA to conduct the required review. In February 2003, New York, Connecticut, Maine, Massachusetts, New Jersey, Rhode Island, and Washington also called on EPA to review the NSPS for power plants and, specifically, to add limitations for carbon dioxide. They notified EPA of their intent to sue unless the Agency revised the NSPS for power plants and, in the course of those revisions, determine whether they should include standards of

performance for carbon dioxide emissions. Regarding NSPS for carbon dioxide emissions, the notice explained that recent information confirms that:

1. Carbon dioxide emissions from power plants in the United States are significant contributors to global warming;
2. Global warming and other aspects of climate change will significantly endanger public health and welfare; and
3. Demonstrated, effective technology exists to significantly reduce carbon dioxide emissions from electric utility generating systems.

It included detailed scientific and legal support demonstrating that power plant carbon dioxide emissions meet all the conditions set forth in the Act for inclusion within an NSPS.

A consent decree in the action brought by environmental groups, entered on February 9, 2004, required EPA to review the NSPS for power plants. In the rulemaking that followed, several states, industry groups, and environmental groups reiterated that EPA should regulate carbon dioxide emissions under Section 111. See, e.g., Comment Submitted by New York Attorney General et al., EPA-HQ-OAR-2005-0031-0130; Comment Submitted by Environmental Defense et al., EPA-HQ-OAR-2005-0031-0108. EPA refused to establish an NSPS for carbon dioxide, relying solely on the assertion that “EPA . . . does not presently have the authority to set NSPS to regulate CO₂ or other greenhouse gases that contribute to global climate change.” See 71 Fed. Reg. 9,866, 9,869 (Feb. 27, 2006).

In April 2007, however, the Supreme Court conclusively rejected EPA’s purported lack of authority to regulate greenhouse gases in Massachusetts v. EPA, in its review of EPA’s parallel rulemaking under Section 202 of the Act. 127 S.Ct. 1438, 1459 (2007) (holding that the Act “authorizes EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a ‘judgment’ that such emissions contribute to climate change”).

Following the Supreme Court’s ruling, the United States Court of Appeals remanded this case to EPA, for proceedings “in light of” the Massachusetts v. EPA decision. The action that EPA has acknowledged it must now conduct under Section 202 parallels the action that it must take in the power plant rulemaking under Section 111. As EPA has recognized, the Massachusetts v. EPA decision required EPA to advance the rulemaking under Section 202 by making an endangerment determination, that is, a “determin[ation] . . . whether greenhouse gas emissions (GHG) from new motor vehicles cause or contribute to air pollution that endangers public health or welfare.” 72 Fed. Reg. 69,735, 69,934 (Dec. 10, 2007). The directly parallel action in this case—the action on remand that is consistent with Massachusetts v. EPA— is for EPA to determine whether power plants “cause[, or contribute] significantly to,” greenhouse gas emissions, and whether such “pollution . . . may reasonably be anticipated to endanger health and welfare.” See 42 U.S.C. § 7411(b)(1)(A); see also 42 U.S.C. § 7411(b)(1)(B) (revision of NSPS follows procedures for promulgation).

EPA has had more than a year since the Supreme Court decided Massachusetts v. EPA to make its endangerment determination. It is inexcusable that it has failed to do so. The endangerment inquiry under Section 111 includes two parts, respecting the health and welfare impacts of carbon dioxide emissions and the contribution of power plants to those emissions—neither of which raises obscure questions. The first has been the subject of extensive scientific study. It is public knowledge that EPA already has reached conclusions about these impacts, in connection with its examination of potential regulation under Section 202. Indeed, the Agency already has acknowledged that global warming from greenhouse gas emissions poses a danger to public health, including “likely increases in mortality and morbidity, especially among the elderly, young, and frail.” 73 Fed. Reg. 12,156, 12,167 (March 6, 2008); see also Climate Change Science Program, Scientific Assessment of the Effects of Global Change on the United States 8 (May 2008) (acknowledging that it is very likely that climate change is already affecting U.S. water resources, agriculture, land resources, biodiversity, and human health and will continue to have significant effects for decades). The second question, whether the contribution of power plant emissions to carbon dioxide pollution is “significant[],” cannot seriously be thought to be in question. Domestic power plant emissions account for approximately 41 percent of U.S. emissions¹ and slightly less than 10 percent of global emissions.² Whichever figure one looks at, domestic power plants’ contribution clearly is “significant[].” It is unreasonable for EPA to have delayed more than a year since the Massachusetts v. EPA decision without making an endangerment determination.

Through its announcement that it will include power plants in an advanced notice of proposed rulemaking (ANPRM) and by language used in its recent petroleum refineries rule, EPA has now suggested that it may not only further delay the endangerment determination in the Section 111 context, but in fact may refuse to do so at all.

Any decision by EPA to terminate the power plant rulemaking in favor of raising anew the question of power plant regulation in the proposed ANPRM would not be an adequate response to the court’s remand order in this case. An ANPRM is merely a proposal to prepare a proposal, which may in the future lead to regulations. See P & V Enterprises v. U.S. Army Corps of Engineers, 516 F.3d 1021, 1026 (D.C. Cir. 2008) (ANPRM is “a preparatory step, antecedent to a potential future rulemaking,” the primary goal of which is to “seek[] information to assist in deciding on the possibility of a future proposed rule”). It is not acceptable for EPA—more than five years after States asked that the power plant NSPS be revised to include standards for carbon dioxide and more than a year after Massachusetts v. EPA— to terminate the

¹ U.S. EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2005, Executive Summary ES-9 (2007).

² The ten percent figure is based on data showing the United States is responsible for approximately twenty-two percent of global emissions. Energy Information Administration, Emissions of Greenhouse Gases in the United States 2006 (Nov. 2007).

power plant rulemaking and return the question of power plant regulation to a pre-rulemaking step.

EPA's justification for the ANPRM approach, that all issues pertaining to regulation of greenhouse gas emissions are interconnected and so need to be studied together, has already been rejected. EPA asserted that theory almost five years ago in defending its decision not to regulate motor vehicles under Section 202. See 68 Fed. Reg. 52,922, 52,931 (Sept. 8, 2003) (arguing that "a sensible regulatory scheme would require that all significant sources and sinks of GHG emissions be considered in deciding how best to achieve any needed emissions reductions"). The Supreme Court held that this rationale does not excuse EPA's obligation to make an endangerment determination under Section 202. 127 S. Ct. at 1463 (asserted need for comprehensive approach does not provide "a reasoned justification for declining to form a scientific judgment" on whether motor vehicles contribute to greenhouse gas emissions that endanger health and welfare). The remand order in this case, which explicitly mandated that EPA act in light of the Massachusetts v. EPA decision, requires EPA to make an endangerment finding with respect to power plants or to explain why it believes that it lacks the scientific information necessary to make such a determination. EPA cannot avoid that obligation by repeating the error corrected by the Supreme Court's decision, withholding its scientific findings until it has completed study of all the regulatory implications of an eventual final decision to regulate power plants under Section 111.

With respect to the rationale for inaction offered in the recent refineries rule, EPA asserts an interpretation of Section 111 that acknowledges no limitations on EPA's discretion in deciding whether to regulate pollutants under Section 111. Indeed, the implication of the decision not to regulate refineries and the rationale offered for that decision is that, even where there is a consensus in the scientific community that a pollutant endangers health and welfare, as is the case with carbon dioxide emissions, EPA may refuse to regulate without even addressing endangerment in its decisionmaking. If applied in the power plant context, this interpretation would be inconsistent with the Supreme Court's decision in Massachusetts v. EPA, and correspondingly, contrary to the remand order in this case requiring the Agency to proceed with the NSPS rulemaking in light of that decision.

In conclusion, to meet its obligations under the remand order and Section 111, EPA must, at a minimum, make an endangerment determination forthwith or explain why it believes it lacks the information necessary to do so. We look forward to your prompt response so that we may evaluate our legal options regarding the remand. If you would like to discuss this matter, feel free to contact us through New York Assistant Attorney General Michael J. Myers, Environmental Protection Bureau, New York Office of Attorney General, The Capitol, Albany, NY 12224; (518) 402-2594 (ph); (518-473-2534 (fax); michael.myers@oag.state.ny.us.

Dated: June 16, 2008

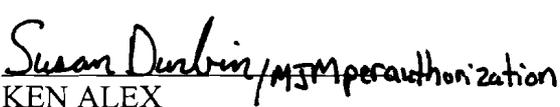
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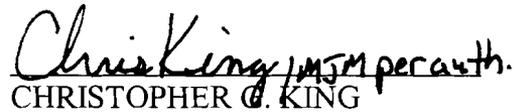

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