

EPA Publishes ANPR on Greenhouse Gas Emissions

On July 30, 2008 EPA published its draft Advance Notice of Proposed Rulemaking (ANPR) in response to *Massachusetts v. EPA*. 73 Fed. Reg. 44,354. The draft “ANPR” is a highly unusual, if not unprecedented, document that is 167 pages in the Federal Register. It begins with a preface from the Administrator explaining why the Clean Air Act is unsuited to regulating greenhouse gases (GHGs). This is followed by comments on the draft by numerous other federal agencies explaining why the Act is not appropriate for regulating GHGs. Among these is an OMB letter indicating that the draft ANPR does not reflect Administration policy.

After these dozens of pages of Administration explanation of why EPA’s review of the Act’s authority for regulating GHGs should not be a prelude to regulating GHGs, EPA’s review of the Act’s authority for potentially regulating GHGs begins. EPA’s discussion is an extraordinarily detailed review of the many Act provisions that could potentially be invoked to regulate GHGs. EPA’s review significantly understates the complexities, burdens and costs that would be associated with regulation of GHGs under the Act, although it does identify many of the challenges that would be faced under certain provisions. One common theme that runs through the document is that regulation of emissions under any of the statutory authorizations would trigger the applicability of NSR to the massive numbers of sources that have the potential to emit GHGs at the very low existing major source thresholds.

The ANPR includes sections that provide: 1) a discussion of climate science and related issues for

regulation; 2) an overview of EPA’s authority under the Act; 3) an analysis of a potential endangerment finding; 4) a discussion of potential regulation of mobile sources; 5) a discussion of potential regulation of stationary sources; and 6) a review of potential regulation under stratospheric ozone authority. Comments on the draft are due by November 28. Because of the breathtakingly comprehensive nature of the draft ANPR, this article will provide only a brief overview of its contents.

Administrator’s Preface

Administrator Johnson includes a preface to the ANPR warning of the “unprecedented expansion of EPA authority” that could result from regulating greenhouse gases under the Act. Johnson further states: “the ANPR demonstrates that the [Act], an outdated law originally enacted to control regional pollutants that cause direct health effects, is ill-suited for the task of regulating global [GHGs].”

Agency Comments

The comments from other federal agencies demonstrate great concern about much of the content of the draft ANPR. As noted above, the OMB comments that the “staff draft cannot be considered Administration policy or representative of the views of the Administration.” OMB goes on to state: “there is strong disagreement with many of the legal, analytical, economic, science and policy interpretations in the draft.” Among these disagreements is the perception that the ANPR suggests regulation of GHGs may be

workable under the Act, even if it is not preferable. They also indicate that the discussion appears to prejudge the issue of endangerment. The agencies are unanimous in their opinion that the Act should not be used to reduce GHGs.

Climate Science and Related Issues

EPA states that GHGs cause climatic warming and are present in significantly higher levels as a result of human activities. The Agency discusses general knowledge about GHGs, including emissions by economic sector. EPA notes that GHGs distribute evenly in the atmosphere and do not have local health impacts.

EPA also identifies market-oriented approaches as the preferable mechanism for regulating GHGs under the Act and lists potential statutory authority for such approaches. It discusses whether economy-wide or sector-based approaches would be preferable. Additionally, EPA touches on concerns over international competitiveness and leakage (i.e., reductions in U.S. emissions that may be negated by increases in other countries).

Clean Air Act Authority

The section on EPA's statutory authority discusses the interconnections among various Act provisions and the potential ways that regulation under one category could lead to regulation under other categories. It points to the similar endangerment language in a variety of sections, including §§ 108, 111, 112, 115, 202, 211, 213, 231 and 615. EPA seeks comment on whether an endangerment finding under § 202(a) would necessarily lead to similar findings elsewhere in the Act.

This section also outlines the potential impact of a decision to regulate mobile sources on the PSD program. According to EPA, it has historically interpreted the phrase "subject to regulation" for the PSD program to require actual control of emissions of a particular pollutant. EPA rejects that § 211(o) (the renewable fuel standard) affects

the regulatory status of GHGs under the Act. EPA also considers and asks for comment on whether air pollutants can be defined differently under different sections of the Act depending on context.

Endangerment Analysis

In this section, EPA presents its "work to date" on the endangerment analysis in response to *Massachusetts v. EPA*. The section first discusses the legal framework and interpretive history of the endangerment language, soliciting comment on the appropriate interpretation for a finding that a particular pollutant contributes to air pollution.

Next, EPA analyzes whether GHGs are reasonably anticipated to endanger public health or welfare. EPA says it is considering defining GHG "air pollution" to include the current and projected atmospheric concentration of the six primary GHGs. Other potential GHG chemicals, such as tropospheric ozone, CHCs, HCFCs, and halons, would likely not be included, as they are already addressed in the control of precursor emissions.

EPA states that there is "compelling and robust evidence that observed climate change can be attributed to the heating effect caused by global anthropogenic GHG emissions." The projected effects in the United States include an increase in precipitation events, heat waves, declining air quality, an increase in vector-borne diseases, an increase in agricultural yields, and sea level rise. The Agency solicits comments on both the scientific basis for an endangerment finding as well as the potential scope of such a finding – in particular, whether it should be based on public health or welfare.

Additionally, EPA asks for comments on the level of emissions where a source will be found to "cause or contribute" to air pollution. It illustrates this analysis by assessing the GHG emissions of source categories under section 202 as compared to other sectors.

Mobile Sources

EPA next presents a very lengthy analysis of its authority to regulate mobile sources and potential regulation of mobile sources. It also discusses the petitions it has received to regulate GHG emissions from a variety of mobile sources, such as marine engines and nonroad vehicles. This article will not review that section of the ANPR.

Stationary Sources

The stationary source section reviews the three major statutory authorizations under which stationary sources are regulated under the Act: NAAQSs (and required SIP and NSR requirements), section 111 performance standards, and section 112 regulation of HAPs. It also presents four options for designing a regulatory structure for GHGs: cap-and-trade, rate-based emissions trading, emissions fees, and a hybrid. EPA seeks comment on each Act authority regarding its flexibility, consideration of costs, accounting for international leakage, promotion of technology, prioritization of sectors, and interaction with traditional pollutant regulation. EPA also requests comment on whether limitations would be best addressed by regulation. The stationary source section is quite long, and thus this overview is very abbreviated.

NAAQS: EPA asks for comment on all aspects of potentially setting a NAAQS standard for GHGs. In particular, EPA seeks comment on: 1) whether GHGs must be listed and whether primary and/or secondary standards must be set under sections 108 and 109; 2) considerations in setting a NAAQS level; 3) whether GHGs should be regulated individually or as a group; and 4) how best to implement a coordinated national strategy under NAAQS.

EPA points out the poor fit of the NAAQS program for GHG regulation, particularly that the entire U.S. would be designated in or out of attainment, and that the SIP process is not designed to create uniform national controls. It also notes that cost cannot be considered in

setting primary and secondary NAAQSs and that the NAAQS framework greatly lacks flexibility in implementation.

Performance Standards EPA notes that regulation under section 111 allows for consideration of costs and provides discretion over the types of sources regulated, but that it also would trigger PSD permit requirements. The Agency includes descriptions of the GHG emissions of different sectors and control options for these sectors in a separate Stationary Source Technical Support Document (TSD). This document also discusses various approaches for potentially lowering the cost to achieve emissions reductions.

EPA seeks comment on how to structure source categories, including whether to create “super categories” covering major groupings of stationary source GHG emissions. It also seeks comment on whether it can prioritize among source categories under section 111 and defer action on particular classes. EPA states that it believes it could use emissions trading under section 111 but asks whether and to what extent this authority would be an appropriate means to regulate GHGs. EPA also asks for comment on: 1) the advantages and disadvantages of the different regulatory approaches identified in the ANPR and the TSD; 2) the ability to achieve reductions through efficiency improvements; and 3) the effects of section 111 on innovation.

HAPs: EPA points out that section 112 provides less discretion to EPA concerning the types of sources to regulate and is specific about when the Agency can consider cost. EPA seems to recognize the absence of evidence to have GHGs listed as HAPs. If GHGs were listed as HAPs, a very large number of new and existing sources would be regulated, including even smaller sources than under other Act authorities. EPA seeks comment on the appropriateness of using section 112 to regulate GHGs.

NSR/ PSD: The ANPR also discusses the implications of GHG regulation for the nonattainment NSR and PSD programs. It

mentions that promulgating a rule limiting GHG emissions from mobile sources would immediately trigger the requirements for BACT for new and modified major sources of GHGs under the PSD program. EPA also points out how low the 100 tpy and 250 tpy thresholds are for coverage. EPA estimates that the number of PSD permits would increase by more than a factor of ten under the statutory major source thresholds.

EPA also discusses and seeks comment on possible tailoring approaches for regulating GHGs through NSR, including: 1) reducing covered sources based on a “potential to emit” approach; 2) increasing the major source threshold and significance levels for GHGs; 3) phasing in the applicability of PSD permitting requirements for GHGs; 4) streamlining the implementation of BACT; and 5) issuing general permits for numerous similar sources.

Title V: EPA discusses the virtually unimaginable expansion of sources (estimated at 550,000 sources) that would be subject to obtaining a Title V permit if GHGs become a regulated pollutant. EPA discusses two possible justifications for tailoring approaches to address the massive workload that would result: 1) interpreting Title V contrary to its plain meaning to avoid the absurdity of the literal application of the statutory requirements; and 2) using the doctrine of administrative necessity to craft relief to narrow the sources covered and create exemptions. Such tailoring might include higher cutoffs for major sources, phasing in the Title V requirements, and using general permits.

Market-Oriented Regulation: EPA next presents four market-oriented regulatory approaches under section 111 and other authorities: cap-and-trade, rate-based emissions trading, emissions fees, and a hybrid approach. The Agency seeks comment on each of these policy approaches and discusses the authority it could potentially use to implement each approach.

Stratospheric Ozone

Last, EPA discusses and seeks comment on potential use of its authority under Title VI to regulate GHGs. □

D.C. Circuit Rejects Challenges to HON Residual Risk Rule

On Friday, June 6, 2008, the D.C. Circuit issued its decision on the challenges of the Natural Resources Defense Council and the Louisiana Environmental Action Network to EPA’s section 112(f) residual risk rulemaking for synthetic organic chemical (HON) facilities. Petitioners also challenged EPA’s technology review under section 112(d)(6). The court rejected each of the environmental groups’ challenges to the residual risk rulemaking and technology review. The panel acting on the challenges was made up of Senior Judge Silberman (who wrote the opinion) and Judges Griffith and Kavanaugh. *Nat. Res. Def. Council v. EPA*, 529 F.3d 1077 (D.C. Cir. 2008).

Section 112(f) Standards

The court first ruled on the environmental groups’ challenge that EPA must revise standards to reduce lifetime excess cancer risk to one-in-one million under section 112(f)(2)(A). After reviewing the statutory language, the court concluded that Congress did not set a “bright line” standard and that the statutory language was a “deliberately ambiguous compromise.” The court ruled that the residual risk standards are only required to “provide an ample margin of safety to protect public health.” Further it concluded that the one-in-one million statutory language only creates a trigger as to whether EPA must promulgate standards that meet the “ample margin of safety” criterion. The court further ruled that the language of the statute specifically referring to the pre-1990 *Benzene* rulemaking bolsters EPA’s conclusion that residual risk standards are not required to meet the one-in-one

million criterion. Under that rulemaking, EPA had ruled that the “ample margin of safety” standard was met if “as many people as possible faced excess lifetime cancer risk no greater than one-in-one million, and that no person faced a risk greater than 100-in-one million (one-in-ten thousand).” The court referred to the one-in-one million standard as “an aspirational goal.”

The court also rejected claims that EPA acted improperly by considering costs in setting the ample margin of safety in the residual risk standards. The court indicated that it recognized that the Supreme Court had refused to find an authorization to consider costs in ambiguous sections of the Act, but ruled that there had been a clear statement of intent to permit consideration of costs under section 112(f). Since Congress expressly incorporated EPA’s interpretation under the *Benzene* standard and EPA considered costs, among other factors, in setting the *Benzene* standard, Congress explicitly accepted consideration of costs in setting the ample margin of safety.

Section 112(d)(6) Technology Review

Next, the court considered the environmental groups’ argument that EPA was required to “completely recalculate the maximum achievable control technology -- in other words, to start from scratch in meeting its obligation to review, and revise as necessary (taking into account development in practices, processes, and control technologies)” MACT standards “no less often than every eight years.” The court ruled that the “review, and revise as necessary” language could not be “construed reasonably as imposing any such obligation.” The court stated that even if the Act imposed such an obligation, the environmental groups “have not identified any post-1994 technology innovations that EPA has overlooked.”

However, the court did express concern about whether the environmental groups’ assertion that EPA improperly considered costs in considering whether to revise the MACT standards had merit. EPA had stated in its notice of proposed

rulemaking that “leakless components” should not be considered in determining MACT, because of the high cost of replacing existing components. The court said that this could be “thought in tension with our cases” holding that EPA may not consider costs in setting MACT “floors,” but only in determining whether to require “beyond the floor” reductions in emissions. It found that EPA may have done just that in setting the initial floors, but pointed out that the period for challenging those standards has long since passed. The court said that the question was thus raised whether EPA’s reaffirmation of its cost-based reasoning in its technology review gives rise to a new opportunity for challenging the apparent defect in the initial floor determinations. The court found that it did not have to decide this question, because, in its final rule, EPA squarely found that there were no “significant developments in practices, processes, and control technologies” and the environmental groups “do not challenge this conclusion.” Accordingly, the court found that it was “irrelevant whether EPA considered costs in arriving at the initial MACT floor and reaffirmed that standard in the residual risk rulemaking.”

Other Issues

The court also addressed whether EPA erred in relying on data submitted by the American Chemistry Council rather than handling data collection itself, and arguments that the industry-supplied data was defective in several respects. After reviewing the environmental groups’ various claims, the court stated its disagreement with claims that the emissions data “was unreliable.” The court stated that the challenges “boil[ed] down to one simple point: EPA could have used *better* data in conducting its risk analysis.” The court ruled that this misstates the inquiry under the arbitrary and capricious standard, and that “the sole question before us is whether EPA has acted reasonably, not whether it has acted flawlessly.” Based upon the record, the court found that EPA had explained why it chose to rely on industry-supplied data and reasonably responded to the environmental groups’ objections to its data analysis.

The court noted that the environmental groups raised other issues regarding faulty data and EPA's failure to reduce risk to one-in-one million, but stated that it had rejected those arguments in earlier parts of its opinion and would not address them again. It noted that other arguments had also been made and they had been considered and found to be "without merit." □

EPA Issues Final PM2.5 NSR Implementation Rule

On May 16, 2008, EPA's final rule to implement the NSR program for the PM2.5 standard was published in the Federal Register. 73 Fed. Reg. 28,321. The rule finalizes the NSR provisions of the November 1, 2005 proposed rule, which included requirements and guidance for state and local air agencies to follow in developing SIPs. The final implementation rule for all elements of that proposal other than the NSR provisions was promulgated on April 25, 2007.

Summarized below are the key provisions of the final PM2.5 NSR implementation rule:

- In addition to applying to direct PM2.5 emissions, the rule provides that SO2 must be regulated as a precursor; NOx emissions are presumed to be regulated as a precursor; VOC emissions are presumed not to be regulated; and ammonia emissions also are presumed not to be regulated. In order to overcome the presumptions with respect to NOx, VOCs, and ammonia, state and local agencies must submit a demonstration to EPA justifying reversal of the presumption.
- For PSD, the major source threshold is 100 tons per year (tpy) for listed source categories and 250 tpy for other categories.
- For nonattainment areas, the NSR major source threshold is 100 tpy.
- The significant emissions rate is 10 tpy for direct PM2.5 emissions; 40 tpy for SO2 as a precursor; 40 tpy for NOx as a precursor, if regulated. For ammonia, the state or local agency would be required to propose a level to be included in its SIP.
- Condensable PM2.5 emissions will be considered to be included in direct PM2.5 emissions for major NSR applicability determinations after the end of the transition period, which is scheduled to end January 1, 2011. EPA can accelerate or delay this date for ending the transition period through rulemaking.
- The final rule does not establish PSD increments, significant impact levels (SILs) or significant monitoring concentrations (SMCs), which were proposed in a September 21, 2007 notice. 72 Fed. Reg. 54,112. A separate final rule will be issued for these elements of the PSD program.
- For sources subject to PSD, preconstruction monitoring will be required for all sources, but exemptions may be granted on a case-by-case basis. Once the SMC for PM2.5 is established, the reviewing agency will have the discretion to exempt a source from the preconstruction monitoring requirement if the projected PM2.5 ambient impact of the source is below the SMC for PM2.5 that EPA promulgates.
- For sources subject to nonattainment, NSR, offsets in a 1:1 ratio are required for direct PM2.5 emissions and precursors, if regulated.
- Interpollutant offsetting is allowed on a regional or statewide basis if provision is made in SIPs. EPA issues guidance with recommended regional hierarchies and trading ratios.
- For PSD, the rule provides that the requirements will be immediately applicable in "delegated" PSD jurisdictions; it authorizes

PM10 to continue to be used as a surrogate in states with approved PSD programs until they revise their SIPs to incorporate the PM2.5 requirements.

- For nonattainment NSR, the requirements will be immediately implementable either through an approved SIP or through Appendix S of 40 C.F.R. Part 51.
- Major NSR does not apply to precursors during the SIP development period in attainment areas.
- State and local minor NSR programs must include PM2.5 requirements for minor sources. □

District Court Interprets RMRR Exclusion Broadly

In the latest of a series of rulings in EPA's NSR enforcement action against Alabama Power ("AP"), an Alabama federal district court issued another decision on how the routine maintenance, repair and replacement ("RMRR") exclusion should be applied. *United States v. Alabama Power Company*, No. 2:01-cv-00152 (N.D. Ala., July 24, 2008). The issue was whether applicability of the exclusion should be based upon whether activities are "routine in the industry," or "routine at the unit." Confirming its prior ruling on the RMRR exclusion, the court held that the proper test is what is routine in the industry. It also held, however, that RMRR is determined based upon a multi-factor test and rejected AP's argument that if the work is routine in the industry this is dispositive. The court issued its earlier rulings prior to the *Duke Energy* Supreme Court decision, in which the high court held that emissions increases are not to be based on an hourly emissions test, as the Alabama court and the *Duke* lower courts had held.

EPA filed its enforcement action against AP in 1999, arguing that major replacement projects undertaken at five plants between 1985 and 1993

qualified as major modifications. AP countered that these changes fell under the RMRR exclusion. AP argued that the projects were routine in the industry and thus constituted RMRR, citing EPA's 1992 WEPCO rule preamble and a number of other prior EPA statements. The preamble stated that "the determination of whether the repair or replacement of a particular item of equipment is 'routine' under the NSR regulations, while made on a case-by-case basis, must be based on the evaluation of whether that type of equipment has been repaired or replaced by sources within the relevant industrial category."

The court first analyzed what level of deference was owed to EPA. It noted that where Congress has legislated a broad mandate or goal to agencies, courts will accept reasonable "gap filling" as legally binding. Changing interpretations by agencies, the court said, are also permissible so long as they create no unfair surprises to regulated entities. However, EPA's interpretations in the context of an enforcement action are entitled to less deference, and EPA's argument in this case sounded "in litigation strategy more than regulatory interpretation," so it was entitled to reduced deference.

The court next analyzed the appropriate method for applying the RMRR exclusion. The court agreed with the government that EPA's 1992 preamble was not dispositive. But the court also pointed to EPA's contradictory response to a request from Congressman Dingell, where the agency noted that it was likely that it would undertake very few enforcement actions based on utility replacement projects. It also noted that, based on EPA's 2002 final NSR rule discussing its approach to RMRR, "a facility could spend millions of dollars on equipment replacement or repair without triggering NSR."

The court found that there was general agreement that RMRR is a multi-factor test, but that the point of disagreement was over the frame of reference – whether it is the industrial category, or the particular unit. AP argued that a stipulation by EPA that the projects in question were of a type commonly performed within the industry was

dispositive, but the court disagreed. It found no authority that “the inquiry ends if the work is routine within the industry.”

After considering prior case law and EPA’s interpretations, the court found that: “Using a plant-specific test for activities that occurred as far back as 1985, when it was patently obvious what [AP] was doing, and the EPA said and did nothing by way of enforcement to require any of the work to be permitted, strikes the court as a ‘gotcha’ test.” While it agreed with EPA that the agency could change its interpretations as conditions changed, the court said it did “not believe EPA can, in an enforcement action filed in 1999, ignore what it said and did back in the 1970’s, 1980’s, and 1990’s up until the filing of this action.”

The court held that “RMRR will not be analyzed solely by reference to the industry, but judged under the multifactor *WEPCO* test, and the analysis shall be ‘with reference to the industry as a whole, not just the particular [AP] unit at issue.’” (citing *United States v. E. Ky. Power*, 498 F.Supp.2d 976, 993 (E.D.Ky. 2007)). The *WEPCO* factors are the nature and extent, purpose, frequency, and cost of the project. However, the court did not grant full summary judgment, finding a material factual dispute based upon application of the multifactor test. □