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**AGC of America**  
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA  
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**ELECTRONIC DELIVERY: GHG-Endangerment-Docket@epa.gov**

June 23, 2009

U.S. Environmental Protection Agency  
EPA Docket Center (EPA/DC), Mailcode 6102T  
Attention Docket ID No. EPA-HQ-OAR-2009-0171  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

**RE: EPA-HQ-OAR-2009-0171: Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, Proposed Rule, 74 Fed. Reg. 18886 (April 24, 2009)**

Dear Sir/Madam:

The Associated General Contractors of America (AGC) submits this letter in response to the U.S. Environmental Protection Agency's (EPA) proposed finding that carbon dioxide and other greenhouse gases in the atmosphere "endanger" public health and welfare and that greenhouse gas emissions from new motor vehicles and engines covered by Clean Air Act (CAA) Section 202 contribute to these so-called endangerment findings. AGC also takes this opportunity to re-submit its November 26, 2008, comment letter sent to the agency in response to EPA's 2008 advance notice of proposed rulemaking (ANPR) on regulating greenhouse gases under the CAA (EPA-HQ-OAR-2008-0318). (See Attachment 1.)

If finalized, an affirmative endangerment finding under CAA Section 202 would lead to widespread regulation of greenhouse gases under other sections of the CAA—initially covering new on-road vehicles but then expanding to all sectors of the economy, including off-road equipment, commercial buildings and other stationary sources. AGC members own and/or operate buildings and other facilities as well as large stationary and mobile equipment and vehicle fleets; and they are dependent on other businesses (which also are potentially impacted by an endangerment finding) for new work and for materials. As such, the proposed endangerment finding—and any future controls of greenhouse gas emissions from mobile or stationary sources—could have a direct negative effect on contractors' daily operations, ability to secure future construction work, and the costs of materials and equipment used in their projects.

**AGC urges EPA not to make an endangerment finding for greenhouse gases under the CAA. EPA can provide reasonable explanation as to why it will not exercise its discretion to determine whether greenhouse gases contribute to climate change. The Supreme Court in *Massachusetts v. EPA* did not go so far as to require EPA to make an endangerment**

**determination or to set a deadline by with EPA must issue its finding. It remanded the matter to EPA to reevaluate its decision not to regulate greenhouse gases and directed EPA to “ground its reasons for action or inaction in the [CAA].”**

**AGC continues to maintain that the CAA is the wrong tool to regulate greenhouse gas emissions. An endangerment finding would lead to a huge economic and regulatory burden. Furthermore, an endangerment finding is unnecessary in light of current legislative efforts to reduce these emissions.**

### **The Clean Air Act Is the Wrong Tool to Regulate Greenhouse Gases**

As indicated in the attached comment letter on the ANPR and countless other letters submitted by industry groups and government agencies alike, the CAA is the wrong tool to regulate greenhouse gas emissions. Following an affirmative endangerment finding (and if Congress does not act), EPA would nevertheless be forced by timelines under the CAA to propose emission standards for new motor vehicles under Section 202(a). There are several provisions in the Act that contain endangerment language similar to that found in Section 202. It follows that a finding of endangerment for greenhouse gases under one provision of the Act could thus have ramifications for findings of endangerment under other provisions of the Act. The agency cannot issue an endangerment finding for greenhouse gases and a finding that motor vehicles contribute to that endangerment without looking to the CAA to regulate those emissions and without considering the implications under other sections of the Act.

Even though EPA Administrator Lisa Jackson agrees that the Clean Air Act is the wrong instrument for regulating GHGs (stating in a press release EPA’s preference that Congress act so the agency need not act), the proposed endangerment finding contains language that supports not only the regulation of new motor vehicles but also other sources. The proposed endangerment finding states that the agency does not want to regulate sources other than new motor vehicles and engines (p18888); yet it also affirms that the Administrator can (and should) consider all sources of greenhouse gases (p18892) and that the Administrator is not to look only at the risks attributable to a single source or class of sources (p18890).

AGC finds no long-term comfort in the knowledge that EPA is currently upholding a recent EPA memorandum that exempts the use of the prevention of significant deterioration (PSD) permitting program for greenhouse gas emissions. (See footnote, p18905.) The proposed finding requests that comments related to that issue be sent when EPA reconsiders the memorandum. However, one cannot avoid the simple fact that an endangerment finding, and the resultant standards to address emissions from new motor vehicles, would regulate greenhouse gas emissions under the CAA and therefore leave the entire economy exposed to additional regulation under other provisions in the Act—*such as the prevention of significant deterioration*. As a general matter, under the PSD program, no new or existing “major” stationary sources of greenhouse gases could be built or modified if the construction would increase net emissions,

without first undergoing the PSD permitting process and installing best available control technology for each pollutant subject to regulation under the Act. The PSD program would impact many buildings including new schools, nursing homes, and hospitals. The effect this action could have on the economy is a threat that the agency should not ignore when considering whether to finalize the endangerment finding.

**An Endangerment Finding under the Clean Air Act Is Unnecessary**

AGC urges EPA to wait for Congressional action on greenhouse gases that would specifically address those emissions. In light of current developments in Congress, such as H.R. 2454, titled the “American Clean Energy and Security Act of 2009,” the agency and public can be confident that our legislators are debating and addressing greenhouse gas emissions. In addition to legislative efforts, voluntary and mandatory requirements exist at all levels of government to reduce greenhouse gas emissions through the advancement of green power, green jobs, green or high performing buildings, as well as energy efficient vehicles, equipment and appliances. Legislation and programs specifically tailored to address the unique aspects of greenhouse gases would be more effective at reducing those emissions with potentially less harm on the economy, making that a more suitable route for future controls than the CAA.

Sincerely,



Melinda L. Tomaino  
Director, Green Construction

**ATTACHMENT 1**

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***SUBMITTED VIA E-MAIL: [a-and-r-Docket@epa.gov](mailto:a-and-r-Docket@epa.gov)***

November 26, 2008

Air and Radiation Docket and Information Center  
U.S. Environmental Protection Agency  
Mail Code 2822T  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

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

Dear Sir or Madam:

The Associated General Contractors of America (AGC) submits these comments in response to the U.S. Environmental Protection Agency's Advance Notice of Proposed Rulemaking (ANPR) on regulating greenhouse gases under the Clean Air Act (CAA), which appeared in the *Federal Register* on July 30, 2008. As these comments make clear, the CAA is ill-suited for regulating greenhouse gas emissions, and EPA must not move forward with a proposed rule or any other regulation of greenhouse gas emissions under the CAA. Doing so could easily delay, if not halt, all future building and highway construction. New construction and renovation are vital to our economy and to future improvement of the environmental performance of our nation's infrastructure, and must be allowed to continue.

**I. About AGC of America and the Construction Industry's Contribution to the U.S. Economy**

AGC of America is the nation's largest and most diverse trade association in the construction industry. The association represents more than 33,000 member companies in 96 chapters throughout the United States. AGC members include more than 7,500 of America's leading general construction contractors, 12,500 specialty contractors, and 13,000 material suppliers and service providers to the construction industry. AGC members are engaged in the construction of commercial buildings, factories, warehouses, highways, bridges, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, and multi-family housing projects, and in-site preparation and utilities installation for housing developments. AGC members use a variety of light-duty and heavy-duty equipment and vehicles during the construction process. Their completed projects also affect greenhouse gas emissions. Should EPA decide to use the CAA to regulate such emissions, AGC members will be directly and indirectly affected.

The construction industry, residential and nonresidential, makes a disproportionately large contribution to the economy; it is a significant source of jobs and a major purchaser of U.S. manufactured products. For 11 straight quarters through mid-2008, investment in private nonresidential structures grew faster than gross domestic product (GDP). Construction spending totaled \$1.14 trillion (8.2 percent of GDP) in 2007; nonresidential spending amounted to \$638 billion—or 56 percent of total construction—and was up 16 percent from 2006.<sup>1</sup> In 2005, there were 778,000 construction firms with 6.8 million paid employees. Despite its enormous size, the construction industry primarily is made up of small businesses. In 2005, 92 percent of construction firms had fewer than 20 employees. Only 1 percent had 100 or more. The average employment was less than nine employees per firm. More than two million additional construction firms had no paid employees—mainly self-employed individuals but also partnerships and holding companies.<sup>2</sup> Shipments of construction materials and supplies in 2007 totaled \$518 billion—more than 10 percent of all U.S. manufacturing shipments. Construction machinery shipments totaled \$28 billion—8 percent of all machinery shipments.<sup>3</sup>

AGC and its members are committed to environmental protection, independently facilitating compliance with environmental laws and regulations and in partnership with EPA under the agency's Sector Strategies Program (launched in 2003 by the Office of Policy, Economics and Innovation (OPEI)). AGC serves as the construction industry's representative in the Sector Strategies Program, which seeks to find workable solutions to long-standing, industry-related environmental challenges.

## II. Background on the ANPR

EPA is acting under a directive from the U.S. Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007). In *Massachusetts*, the Court made two key findings: First, greenhouse gases fall within the capacious 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 either:

- (i) that 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) that greenhouse gases do not contribute to climate change; or
- (iii) provide a reasonable explanation as to why EPA cannot or will not exercise its discretion to make an endangerment finding.

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.” *Id.* at 1462. The matter is therefore before EPA on remand of *Massachusetts* and in the context of a

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<sup>1</sup> Bureau of Economic Analysis at <http://www.bea.gov>; and the U.S. Census Bureau at <http://www.census.gov>.

<sup>2</sup> The Associated General Contractors of America (AGC), *Construction Economics*, at [http://www.agc.org/cs/industry\\_topics/construction\\_economics](http://www.agc.org/cs/industry_topics/construction_economics); and the U.S. Census Bureau at <http://www.census.gov>.

<sup>3</sup> The U.S. Census Bureau at <http://www.census.gov>.

number of regulatory petitions and other requests made to EPA to regulate greenhouse gases. Because EPA has such latitude as to the matter, timing and content of its response to *Massachusetts*, the ANPR is a good vehicle for EPA to determine whether and how to make a final decision on the ultimate issue left open by the Court: whether greenhouse gas emissions from any class or classes of new motor vehicles or new motor vehicle engines endanger public health or welfare, or why EPA cannot, or will not, exercise its discretion to make an endangerment finding.

From a legal standpoint, EPA believes the CAA grants the agency with “broad authority to combat air pollution” from mobile sources such as cars, trucks, and construction equipment, as well as from a broad range of industrial, commercial, and other stationary sources. 73 Fed. Reg. at 44417. EPA ultimately concludes that regulation of new motor vehicles (specifically on-highway vehicles, including passenger cars, light trucks, heavy-duty trucks, buses and motorcycles) under CAA Section 202 may force greenhouse gas emissions rules under other CAA provisions with potentially far reaching implications for industry. EPA is therefore using the ANPR to outline, in great detail, the wide range of CAA programs it believes it can bring into play to control greenhouse gas emissions.

From a more practical standpoint, it is clear from the ANPR that EPA itself does not know how to apply the CAA to greenhouse gases. The ANPR contains roughly 400 open-ended legal and policy questions, ranging from the general (e.g., the best available science for an endangerment finding) to the specific (e.g., application of CAA Section 179 to attainment plan requirements).<sup>4</sup>

### **III. The Clean Air Act Regulatory Structures Set Forth by EPA in the ANPR, If Implemented, Would Cause Regulatory and Economic Chaos**

Regulating greenhouse gases under the CAA would likely trigger an avalanche of unintended regulatory requirements that could wreak economic havoc on all sectors of business and local communities throughout the United States. If EPA regulates any greenhouse gas emissions under any one provision of the Act, the agency would need to also address such emissions under many other sections of the Act that currently do not include such controls. Ultimately, businesses, as well as religious, healthcare, and educational establishments, would be forced to reconsider important decisions on whether to operate in the U.S. or to expand or make improvements to their facilities when needed. Such decisions impact the business of construction.

#### **A. An endangerment finding would trigger a broad range of unmanageable regulatory requirements.**

The most troubling aspect of an endangerment finding for motor vehicles under Section 202(a)(1) is that it could force EPA to broadly regulate the entire economy through various CAA programs. According to EPA, “[w]hile no two endangerment tests are precisely the same,” they

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<sup>4</sup> The 600-page ANPR is backed up by more than 11,450 pages of highly complex, technical materials EPA has placed in the ANPR public docket. These 11,450 pages of technical materials refer in turn to more than 6,613 pages of core references and scientific studies.

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.” 73 Fed. Reg. at 44419. EPA notes that “similar” endangerment language is found in sections 108 (NAAQS), 111 (NSPS), 112 (HAPs), 115 (international air pollution), 211 (fuels), 213 (nonroad engines and vehicles), 231 (aircraft) and 615 (ozone protection). *Id.*

The scope of the endangerment finding required by *Massachusetts* is relatively limited, and pertains only to the precise issue of whether greenhouse gas emissions from any class (or classes) of new motor vehicles or new motor vehicle engines meet the endangerment test, in EPA’s judgment. However, an endangerment finding limited to motor vehicles could trigger obligations to promulgate National Ambient Air Quality Standards (NAAQS), New Source Performance Standards (NSPS) and other requirements such as Prevention of Significant Deterioration (PSD) and Title V operating permits. A finding of endangerment for vehicles could easily lead to vast regulation of buildings and other stationary sources and affect hundreds of thousands of previously unregulated businesses. Each of these is discussed in greater detail below.

#### 1. *National Ambient Air Quality Standards (NAAQS)*

If EPA makes an endangerment finding for new motor vehicles, it could likely justify the establishment of new National Ambient Air Quality Standards (NAAQS) for greenhouse gases, which would have significant repercussions for AGC members.

NAAQS are predicated on a finding of endangerment under Section 108, but once EPA makes such a finding, it has no choice but to begin the NAAQS process. Section 108(a) obligates the EPA Administrator to issue such standards for pollutants (a) which may reasonably be anticipated to cause or contribute to air pollution that endangers public health or welfare; (b) which are emitted by “numerous or diverse mobile or stationary sources;” and (c) for which air quality criteria had not been issued prior to the date of enactment of the 1970 CAA, but for which EPA plans to issue air quality criteria. Prongs (b) and (c) of Section 108 are easily satisfied for carbon dioxide (CO<sub>2</sub>).<sup>5</sup>

If EPA defies logic and moves down the long road toward the development of a CO<sub>2</sub> NAAQS, AGC’s greatest concerns include the resultant State Implementation Plan (SIP) controls, the consequences of failing to demonstrate or attain adequate emission reduction targets, and transportation conformity requirements. In setting the NAAQS, EPA would not consider cost or

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<sup>5</sup> It has been argued by some that EPA may avoid issuing a Criteria Document even if it concedes endangerment, due to prong (c). However, the Second Circuit explicitly rejected this argument in *NRDC v. Train*, 545 F.2d 320 (2d Cir. 1976). In *Train*, EPA had conceded that lead endangers public health and welfare and is emitted by numerous or diverse sources, but EPA contended that it had discretion under prong (c) of Section 108 not to issue a Criteria Document. The Court rejected EPA’s statutory interpretation, ruling that the third factor applied only to pollutants included on the initial list of pollutants to be regulated under the NAAQS program, which EPA was required to promulgate within thirty days after December 31, 1970. For more discussion of *Train*, see Peter Glaser, Responses to Questions of the Select Committee on Energy Independence and Global Warming, September 4, 2008, at 11.



technical feasibility of controls for greenhouse gases, like CO<sub>2</sub>. What is more, the entire country may be in “nonattainment” given the nature of globally-circulating greenhouse gases. States would be required to find emission reductions from various sectors of industry including the building/transportation industry. States that fail to develop or to implement adequate SIPs would face possible sanctions including a ban on approval of new highway projects and a loss of highway funding, as well as a requirement for 2 to 1 offsets of existing pollution before new construction projects may be approved.

In addition, the federal government may only provide financial assistance, issue a permit or approve an activity in a nonattainment area to the extent it “conforms” with an approved SIP. With regard to transportation conformity, all transportation plans, programs and projects must conform to an approved SIP. Consequences of failing to demonstrate conformity include a freeze on transportation projects from moving forward in the region. A state in nonattainment of a CO<sub>2</sub> NAAQS might have a difficult time financing and constructing highway improvements.

The improvement and modernization of our building and transportation infrastructure are necessary for public and environmental safety. Setting NAAQS for greenhouse gases could seriously undermine such work. Ironically, building renovations/rebuilds and transportation improvement projects can help to reduce greenhouse gas emissions by improving the performance of our built structures and reducing bottlenecks and easing the burden on the nation’s highways from some of the transportation for commerce and trade.

EPA itself says that NAAQS for CO<sub>2</sub> would be extremely difficult to meet. In the ANPR, EPA admits it would likely have to assess air quality assessment on a national scale, meaning the entire U.S. would either be designated attainment or non-attainment. Whether the entire U.S. was (literally) in non-attainment would depend where the Administrator set the NAAQS.

## 2. *New Source Performance Standards (NSPS)*

New Source Performance Standards (NSPS) are also triggered by a finding of endangerment. NSPS would establish standards of performance for new or modified stationary sources that emit air pollutants. “Stationary source” is defined in Section 111 as “any building, structure, facility, or installation, which emits or may emit any air pollutant.” AGC of America is concerned that the NSPS would have an indirect negative impact on construction as it would likely increase the cost of operating a business within the U.S., setting local businesses at a global disadvantage, and encouraging businesses to move to countries with less onerous requirements.

It should be noted that NSPS apply outside of the NAAQS program. It is not necessary for greenhouse gases to become a NAAQS in order for the NSPS to apply. The NSPS also do not have any *de minimis* emissions triggering threshold. Therefore, if a source is listed in a category regulated by the NSPS and is not otherwise exempt from the rule, the NSPS apply to that source regardless of how much CO<sub>2</sub> the source emits.

CAA Section 111 states that EPA *shall* include a category of sources in the NSPS list if it endangers public health or welfare. One year after the source category is listed, EPA *shall* publish regulations establishing federal standards of performance for new sources within such category. Current NSPS categories include boilers, landfills, petroleum refineries and turbines; there are 70 categories and sub-categories in all. A “standard of performance” is defined in pertinent part as “a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction.” This standard is better known as “best demonstrated technology.”

Once EPA has established NSPS, states are required to submit to the agency a procedure for implementing and enforcing such standards for new or modified sources located in the state. In addition, EPA must promulgate regulations setting forth procedures for state establishment of standards for *existing* sources. This process is similar to the SIP process for NAAQS.

EPA theorizes in the ANPR that it could use a cap-and-trade program in lieu of plant-by-plant standards of performance. However, the D.C. Circuit’s decision vacating the Clean Air Interstate Rule (CAIR) calls into serious question, if not completely invalidates, EPA’s authority to create a cap-and-trade program on its own.

Therefore, it seems inevitable that an endangerment finding would force EPA to issue plant-by-plant standards of performance for CO<sub>2</sub>, and businesses would have to install best demonstrated technologies pursuant to NSPS. If greenhouse gases were regulated, the categories would be limitless.<sup>6</sup>

### 3. *Prevention of Significant Deterioration (PSD)*

Prevention of Significant Deterioration (PSD) is triggered the moment CO<sub>2</sub> becomes a “regulated pollutant” under the CAA. It happens instantaneously—sooner than a NAAQS or NSPS.<sup>7</sup> And it may have the greatest and most direct negative impact on the construction industry nationwide as it would jeopardize and delay plans to construct new facilities and to expand or improve existing facilities. The program requires a person intending to construct or modify a stationary source to obtain a special permit and to comply with certain other requirements before construction. AGC of America is concerned that regulatory burden would be so enormous, and the number of required PSD permits so staggering, that construction in cities throughout the nation would literally stop.

The PSD program applies to “each pollutant subject to regulation” under the Act. Therefore, if EPA regulates CO<sub>2</sub>—even if the regulation is for new motor vehicles or fuels and is specifically not directed at stationary sources—no new or existing “major” stationary source of CO<sub>2</sub> can be built or modified (if the modification increases net emissions) without first obtaining a PSD permit.

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<sup>6</sup> EPA does not specify in the ANPR just how many new categories it would create NSPS for, but does discuss the creation of various “super-categories” covering major groupings of stationary sources.

<sup>7</sup> A finding of endangerment alone would not trigger PSD. However, because so many provisions in the CAA are tied to endangerment, the moment regulation occurs through one of those programs, PSD applies.

Major sources are defined as either a source in one of 28 listed categories (mostly industrial manufacturers and energy producers) that emits at least 100 tons per year (tpy) of an air pollutant, or *any other source* with the potential to emit 250 tons-per-year (tpy) of an air pollutant.

According to a report released by the U.S. Chamber of Commerce entitled “A Regulatory Burden: The Compliance Dimension of Regulating CO<sub>2</sub> as a Pollutant,”<sup>8</sup> over one million businesses would be exposed to PSD for CO<sub>2</sub>. Many of these would be previously-unregulated establishments, such as:

- 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.

The PSD process is far from easy. Often it requires a determination of best available control technologies (BACT), performed on a case-by-case basis and with considerable cost and burden placed on the applicant. For sources covered for other pollutants, PSD can take months or even years, and can cost hundreds of thousands or even millions of dollars. State agencies would be crippled by the weight of these many new permit applications.

PSD is a preconstruction requirement, and applies to new construction or modifications. EPA estimates that it currently issues two to three hundred PSD permits annually. EPA does not process a large number of PSD 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 new PSD permits, EPA and state agencies would literally crumble under their own weight. And businesses forced to comply with PSD would be barred from construction for potentially long periods of time, immediately placing our economic development at risk. If the PSD burden is too great, many businesses will simply not undertake new construction projects or modifications.

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 newly regulated sources would have to install BACT not only for CO<sub>2</sub>, but also potentially for nitrous oxide, particulate matter, lead, mercury, sulfur dioxide, and other pollutants, prior to any new construction.

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<sup>8</sup> Available at <http://www.uschamber.com/environment>.

#### 4. *Title V*

Title V (operating permits) is triggered the moment CO<sub>2</sub> becomes a regulated pollutant under the CAA. Like NSPS, AGC of America is concerned that the requirements under Title V would have an indirect negative impact on construction as it would likely increase the cost of operating a business within the U.S., setting local businesses at a global disadvantage, and encouraging businesses to move to countries with less onerous requirements.

At a permitting level, Title V poses a problem similar to PSD, though the permit process itself is not nearly as onerous as PSD. However, Title V reaches an even broader segment of the economy, because it applies to all sources that emit over 100 tons per year of an air pollutant, regardless of source categories. And Title V includes a citizen suit provision that, if exploited, could have severe consequences because each permit application could be challenged by any citizen.

When a source becomes subject to Title V, it must apply for a permit within one year of the date it becomes subject. The permitting authority then uses this information to issue the source a permit to operate, as appropriate. A Title V source generally may not operate without a permit.

EPA estimates there are 15,000 to 16,000 Title V sources in the U.S. Because the threshold for Title V is 100-tpy across the board, well over 1.2 million new sources would be subject to Title V permitting.<sup>9</sup> EPA estimates in the ANPR that 550,000 new permits would be required under Title V, but gives no support for this calculation. EPA admits that “[t]he sheer volume of new permits would heavily strain the resources of state and local Title V programs.”

The Title V permitting authority must take final action on permit applications within 18 months of receipt. EPA has 45 days from receipt of a proposed permit to object to its issuance, and citizens have 60 days to petition EPA to object. It is therefore conceivable that activist groups could challenge every single Title V permit and bring nationwide operations to a screeching halt.

#### B. Many of the fuel and engine proposals in ANPR are unworkable and redundant.

The ANPR also discusses several requirements regarding fuel use and types, manufacturing of new equipment, and operating of equipment. Many of EPA’s suggested regulatory options would reshape business models and long-term planning for manufacturers, parts suppliers and vendors. EPA routinely suggests options such as engine redesign, fuel switching, new infrastructure, equipment and work practice standards, product redesign and aerodynamics, early retirement of equipment, and even sector-specific cap-and-trade programs. The construction process involves the use of light- and heavy-duty equipment for short periods of time; however, the contribution of the construction process to total U.S. greenhouse gas emissions is negligible,

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<sup>9</sup> The study by the U.S. Chamber estimates 1.2 million new buildings will be exposed to PSD, when the threshold is 100 tpy for 28 specific industries and 250 tpy for everyone else. Because the threshold for Title V is 100 tpy regardless of source category, the number of Title V permittees will be at least 1.2 million, and will very likely be much greater.

according to EPA's own estimates (see Section IV of these comments). AGC of America is concerned about the broad-reaching and uncertain effect that EPA's proposed regulatory options would have on the availability and performance of fuel and equipment as well as potential operating restrictions and early retirement of such equipment.

EPA has the authority to regulate emissions from off-road (also called "nonroad") engines and vehicles if EPA determines that pollutants from these sources "may endanger public health or welfare" (CAA Section 213). (Like the standards for motor vehicles, the emission standards for these engines and equipment would only apply to new engines or equipment.) Similarly, EPA may control fuels or fuel additives used in motor vehicles or off-road engines where the emissions products cause or contribute to air pollution that "may reasonably be anticipated to endanger public health or welfare" (CAA Section 211). However, AGC continues to point out that construction companies currently have no technological options available for limiting CO<sub>2</sub> emissions from construction equipment. Indeed, EPA does not regulate CO<sub>2</sub> emissions from new off-road engines. Likewise, EPA's voluntary diesel retrofit program—aimed at reducing emissions from in-use equipment—does not attempt to track CO<sub>2</sub> emissions; nor does that program identify whether EPA's "verified" after-treatment technologies would cut back on CO<sub>2</sub>.

Some of the options discussed in the ANPR are redundant with efforts already underway for light-duty vehicles such as the Energy Independence and Security Act (EISA), which requires new fuel economy standards for passenger cars and light trucks, and a series of rules proposed or implemented recently under the Corporate Average Fuel Economy (CAFE) program that aggressively seek to increase fuel efficiency and reduce emissions.

#### **IV. The Construction Industry Is Necessary To Make Environmental Improvements in the Nation's Infrastructure**

The construction industry is positioned to make needed improvements to the nation's infrastructure, reducing emissions from a host of other sectors, including but not limited to business and consumer services, manufacturing, power, and transportation.

By making improvements to existing and future commercial buildings and transportation-related infrastructure, contractors are an essential partner in the nation's efforts to reduce national CO<sub>2</sub> emissions related to those sources. In the U.S., the operation of the existing commercial building stock accounted for 17.9 percent of the total energy consumption and 33.1 percent of the total electricity consumption during 2002.<sup>10</sup> Accordingly, the operation of those buildings contributed 17.5 percent of the nation's total manmade CO<sub>2</sub> emissions for 2002.<sup>11</sup> Newer buildings and especially high-performing and/or "green" buildings are often designed to use less energy. Whether they involve new construction or major renovation, building projects offer a great opportunity for the nation to improve the energy efficiency of its buildings, thereby reducing CO<sub>2</sub> emissions. In 2002, transportation accounted for 27 percent of the total U.S. energy

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<sup>10</sup> Annual Energy Review 2002. Energy Information Administration (EIA), U.S. Department of Energy, October 2003.

<sup>11</sup> Emissions of Greenhouse Gases in the United States 2002. EIA, U.S. Department of Energy, October 2003.

consumption<sup>12</sup> and a corresponding 31 percent of total manmade CO<sub>2</sub> emissions.<sup>13</sup> Improvement projects to unclog traffic flow at 233 severe bottlenecks on the nation's highways would conserve more than 40 billion gallons of fuel and the CO<sub>2</sub> emissions at those locations would drop by 77 percent.<sup>14</sup> Likewise, the construction of new highway and transportation projects relieves traffic and freight congestion and provides communities with alternative transit options.

The construction industry is not itself a significant source of greenhouse gas emissions. According to the EPA estimates, equipment used in construction generates only 0.86 percent of U.S. greenhouse gas emissions, due to the combustion of fossil fuel.<sup>15</sup> In a recent draft report from EPA, the agency attempts to estimate the total energy use (electricity and equipment) for the construction industry (nonresidential and residential) and determined the amount was approximately 1.89 percent of U.S. greenhouse gas emissions in 2002.<sup>16</sup>

#### **V. EPA Must Exercise its Authority Not To Regulate Greenhouse Gases under the Clean Air Act**

EPA makes clear that, despite its own reservations about applying the CAA to greenhouse gases, it intends to proceed with actual regulations unless Congress steps in. In the introduction to the ANPR, EPA states:

[T]he ANPR illustrates the complexity and interconnections inherent in CAA regulation of GHGs. These complexities reflect that the CAA was not specifically designed to address GHGs and illustrate the opportunity for new legislation to reduce regulatory complexity. However, unless and until Congress acts, the existing CAA will be applied in its current form.

73 Fed. Reg. at 44,397 (emphasis added). However, the rest of the Executive Branch does not believe the CAA is the appropriate vehicle to regulate greenhouse gases. Presently, nine federal agencies have expressed their strong disapproval including the Council of Economic Advisers, Department of Agriculture, Department of Commerce, Department of Energy, Department of Transportation, Executive Office of the President Council on Environmental Policy, Executive Office of the President Office of Management and Budget, Office of Science and Technology Policy, Small Business Administration Office of Advocacy. The *Federal Register* notice that contains the ANPR also includes letters from these agencies that detail their serious concerns with using the CAA to regulate greenhouse gas emissions. Even EPA Administrator Stephen Johnson shares this view in his preamble to the ANPR. AGC of America encourages EPA to carefully consider the concerns already expressed by these federal agencies when weighing the

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<sup>12</sup> Annual Energy Review 2002. Energy Information Administration (EIA), U.S. Department of Energy, October 2003.

<sup>13</sup> U.S. EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2002, May 2004.

<sup>14</sup> Effective Relief for Highway Bottlenecks, American Highway Users Alliance, February 2004.

<sup>15</sup> U.S. EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990 – 2004, EPA 430-R-06-002, Annex Table A-104, April 2006.

<sup>16</sup> U.S. EPA, Working Draft: Quantifying Greenhouse Gas Emission from Key Industrial Sectors in the United States, May 2008. <http://www.epa.gov/sectors/pdf/greenhouse-report.pdf>

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decision to move forward with any action that involves using the CAA to regulate greenhouse gas emissions.

AGC of America firmly believes that the CAA is not the appropriate vehicle for the regulation of greenhouse gases. Regulation under the Act would cause great economic harm and jeopardize future environmental improvements.

Sincerely,

A handwritten signature in cursive script that reads "Melinda Tomaino".

Melinda L. Tomaino  
Director, Green Construction