

EPA Administrator Lisa Jackson, speaking at the California Governor's Global Climate Summit, has [announced](#) a proposed new Clean Air Act rule requiring new and modified stationary sources to install the best available control technology to control greenhouse gas emissions (GHGs). The text of the proposed new rule can be found [here](#).

According to a press release about the Jackson speech, the rule will be limited to sources that emit 25,000 or more tons of GHGs annually, which will mean that about 14,000 sources — including factories, refineries and manufacturing facilities — will be covered in total. The proposed rule is the direct result of [Massachusetts v. EPA](#), in which the U.S. Supreme Court held that the Clean Air Act provides the EPA with authority to regulate GHGs under the Act and that the EPA had failed to provide a sufficient rationale for failing to regulate greenhouse gas emissions. The EPA proposal to regulate GHGs from stationary sources (it has already issued proposed GHG standards for mobile sources) is likely to provoke both legislative and litigation responses. Legislatively, Senate Republicans [may attempt](#) to limit the EPA's authority to regulate GHGs under the Clean Air Act. The EPA action will almost certainly also add to the pressure Congress faces to enact comprehensive GHG legislation similar to the [Waxman-Markey bill](#) proposed by the House and the [Senate legislation](#) introduced today by Senators Boxer (D-CA) and Kerry (D-MA). Industry groups oppose using the CAA to regulate GHGs and many [support](#) federal legislation to enact a cap and trade program as an alternative.

Industry groups have also [already indicated](#) they will likely file suit to challenge regulations to control GHGs under the Clean Air Act. What is likely to be the basis for that challenge? At a minimum, it is unclear whether Jackson can set the threshold for regulation at 25,000 tons of GHGs. The [statutory provision](#) that authorizes the proposed rule calls for the regulation of sources that emit either 100 or more tons per year or 250 tons per year or more of any air pollutant depending on the type of source. If Jackson had set the threshold that low she would have swept into the EPA regulatory ambit tiny sources like churches and apartment buildings. Though her threshold makes sense from a regulatory perspective it will very likely be challenged as inconsistent with the Clean Air Act statutory language. For an interesting analysis of the statutory provisions at issue in the proposed rule see [here](#).

The proposed rule also raises interesting questions about what constitutes the best available technology for large sources of greenhouse gas emissions like coal-fired power plants. The technology has to be commercially available, something not yet true for, say, carbon capture and sequestration. So what is the best available control technology? Simply operating an efficient but coal-fired plant? Or switching to a cleaner burning fuel like natural gas? At least [some commentators](#) have argued that the EPA could use its existing authority to impose a cap and trade scheme on stationary sources, similar to the cap and trade

legislation Congress is now considering. A recent [Court of Appeals decision](#) striking down a cap and trade program to regulate nitrous oxide and sulfur dioxide emissions raises serious questions about whether the EPA could go the cap and trade route for greenhouse gas emissions. Whatever else the proposed rule means, litigation is a virtually certain result.