UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMMONWEALTH OF MASSACHUSETTS, et al.	)	
Petitioners,	)	
v.	)	Docket No. 03-1361 (& consolidated cases)
U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.	)	
Respondents.	)	

PETITION FOR WRIT OF MANDAMUS TO COMPEL COMPLIANCE WITH MANDATE

On April 2, 2007, the U.S. Supreme Court issued its landmark ruling in this case, holding that greenhouse gases are "air pollutants" that the Administrator of the Environmental Protection Agency (EPA) is authorized to regulate under Section 202 of the Clean Air Act. *Massachusetts v. EPA,* 549 U.S. ___, 127 S.Ct. 1438, 1459-62 (2007). The Court also struck down EPA's alternative policy grounds for denying a rulemaking petition for regulation of greenhouse gas emissions from new motor vehicles, and it ordered the case remanded for further proceedings consistent with its opinion. *Id.* at 1462-63. The Court's ruling requires the Administrator to review the pending rulemaking petition based on proper statutory factors. As discussed below, this means that the agency has to make a formal determination -- based solely on the science -- as to whether these emissions contribute to "air pollution which may reasonably be anticipated to endanger public health or welfare." *See* 42 U.S.C. 7521(a).

A full year later, the EPA Administrator has not complied with the Supreme Court's order and the mandate issued by this Court to effectuate that order. As EPA's own statements and a Congressional inquiry demonstrate: the Administrator publicly set a firm deadline for making the endangerment determination by the end of 2007; the agency has already completed all of its work on issues that, under the Supreme Court's decision, are relevant to that determination; the Administrator has in fact made an internal decision in favor of endangerment; and the Administrator has forwarded the full formal write-up of that determination to the White House Office of Management and Budget. The publication of the endangerment determination, however, is now being withheld. The Administrator has refused to give the petitioners or Congress a timetable for action, and he has explained his delay by reference to considerations that are not legally relevant under the Supreme Court's ruling.

For these reasons, pursuant to Rule 21 of the Federal Rules of Appellate Procedure, Petitioners request that this Court order the Administrator to comply with the terms of the Supreme Court's remand and this Court's mandate by issuing its determination on endangerment within sixty days.[1]

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[1] The parties joining this Petition for Mandamus are the Commonwealth of Massachusetts, the States of California, Connecticut, Illinois, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington, the District of Columbia, the City of New York, the Mayor and City Council of Baltimore, Center for Biological Diversity, Center for Food Safety, Conservation Law Foundation, Environmental Advocates, Environmental Defense Fund, Friends of the Earth, Greenpeace, International Center for Technological Assessment, Natural Resources Defense Council, Sierra Club, and U.S. Public Interest Research Group. In addition, the following states have joined as *amici curiae* to express their support for the petition: Arizona, Commonwealth of Pennsylvania Department of Environmental Protection, Delaware, Iowa, Maryland, and Minnesota. *See* Fed.R.App.P.29(a) (allowing states to file an amicus-curiae brief without the consent of the parties or leave or court).

FACTUAL BACKGROUND

In 1999, Petitioner International Center for Technology Assessment (ICTA) and others filed a rulemaking petition requesting EPA to regulate four greenhouse gases pursuant to Section 202 of the federal Clean Air Act. EPA put the petition out for public comment (66 Fed. Reg. 7486 (2001)) and received nearly 50,000 comments. Four years after it was submitted, EPA denied the petition.[2] 68 Fed. Reg. 52922 (September 8, 2003). EPA claimed first that it lacked authority to regulate greenhouse gases as "air pollutants" under the Clean Air Act. EPA also stated that it would not regulate those substances even if it had authority to do so, referencing several policy reasons why the agency preferred not to act. For example, EPA stated its view that adopting motor vehicle regulations under Section 202 would amount to an "inefficient, piecemeal approach," and it stated its preference for delaying regulatory action until more is understood about "the potential options for addressing" the problem. 68 Fed. Reg. at 52931.

Thirty parties, including twelve states, three cities, and fourteen environmental groups, challenged EPA's denial of the rulemaking petition. In a divided ruling, this Court allowed EPA's decision to stand. *Massachusetts v. EPA*, 450 F.3d 50 (D.C. Cir. 2005). On April 2, 2007, the Supreme Court reversed, ruling that EPA has authority to regulate greenhouse gases under the Clean Air Act. 127 S.Ct. at 1459-62. The Court also ruled that EPA had no authority to rely on policy reasons unrelated to the question of endangerment of public health or welfare. The Court reasoned that the policy reasons

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[2] EPA issued its decision only after the original petitioners filed an unreasonable delay case. *Ctr. for Technology Assessment v. Whitman*, No. 02-CV-2376 (D.D.C. filed Dec. 5, 2002).

EPA cited – such as the agency's desire to avoid "piecemeal" approaches – "have nothing to do with whether greenhouse gas emissions contribute to climate change." *Id.* at 1462-63. The Court also ruled that the Clean Air Act and the federal fuel economy law are "wholly independent" mandates, and rejected EPA's view that the latter law restricted the agency's authority to regulate motor vehicle emissions of carbon dioxide. *Id.* at 1462. Accordingly, the Court reversed the judgment of this Court and it remanded the case for further proceedings consistent with its opinion. *Id.* at 1463.

In its opinion, the Supreme Court specifically ruled that EPA could avoid regulating greenhouse gas emissions from motor vehicles "only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do." 127 S.Ct. at 1462. Thus, the Court made it clear that EPA has only three options on remand: (1) to make a positive endangerment determination and commence the standard setting process, (2) to make a negative endangerment determination by "determin[ing] that greenhouse gases do not contribute to climate change," or (3) to provide "a reasoned justification for declining to form a scientific judgment." *Id.* at 1462-63. With regard to the third option, the Court made clear that any such explanation would have to be grounded in the science only: "The statutory question is whether sufficient information exists to make an endangerment finding." *Id.* at 1463. "If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so." *Id.* Otherwise, it must make an affirmative or negative endangerment determination. On September 14, 2007, this Court issued its mandate vacating the EPA's 2003 ruling

and ordering the agency to take action consistent with the Supreme Court's decision. A copy of this Court's mandate is attached as Exhibit A.

In its opinion, the Supreme Court itself noted that there is little remaining scientific debate about the gravity and cause of the looming climate change crisis. For example, the Court stated:

> The harms associated with climate change are serious and well recognized. Indeed, the NRC Report itself -- which EPA regards as an "objective and independent assessment of the relevant science," 68 Fed.Reg. 52930 -- identifies a number of environmental changes that have already inflicted significant harms, including "the global retreat of mountain glaciers, reduction in snow-cover extent, the earlier spring melting of rivers and lakes, [and] the accelerated rate of rise of sea levels during the 20th century relative to the past few thousand years ...." NRC Report 16.

127 S.Ct. at 1455. *See also id.* at 1457 ("EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming.").

EPA Commitments and Actions After the Supreme Court's Decision

In response to the Court's ruling, President Bush on May 14, 2007, announced that he had directed the Administrator to issue standards to reduce emissions of greenhouse gases from motor vehicles under Section 202 of the Clean Air Act.[3] In a press briefing immediately after the President's announcement, the Administrator stated:

> On April 2, 2007, the U.S. Supreme Court decided in Massachusetts versus EPA that the Clean Air Act provided EPA the statutory authority to regulate greenhouse gas emissions from new vehicles if I determine in my judgment

[3] Statement of President Bush, May 14, 2007, *available at* http://www.whitehouse.gov/news/releases/2007/05/20070514-4.html (Attached as Ex. B). The President simultaneously directed EPA to issue regulations for the content of motor vehicle fuels, to reduce the amount of carbon dioxide released when those fuels are burned, under Section 211 of the Clean Air Act, 42 U.S.C. 7545. The fuel regulations were not subject to this litigation, and relief is sought only for the action due under Section 202 regarding motor vehicle emissions.

whether such emissions endanger public health and welfare under the Clean Air Act. Today the President has responded to the Supreme Court's landmark decision by calling on EPA and our federal partners to move forward and take the first regulatory step to craft a proposal to control greenhouse gas emissions from new motor vehicles.

* * *

[O]ur target for a draft proposal will be fall of this year. And as part of that proposal, we will address the endangerment finding as part of the proposal.

* * *

The proposal – the sequence, we develop a proposed rule-making; then we take public comment on that proposed rule-making, which I said we would – our goal is to have a proposal out this fall, fall of 2007. Then there would be a notice and comment; then we then review all of those comments, and then make a final decision, which would then be issued in the final regulation, which the President has asked for us to have it completed by the end of 2008.[4]

By stating that it was moving forward with proposed regulations under Section 202(a)(1), EPA acknowledged its view that endangerment was occurring and that any remaining scientific uncertainty on climate change was not so profound as to preclude the agency from making a judgment on endangerment. This follows because that section "condition[s] the exercise of EPA's authority on its formation of a 'judgment'" concerning the statutory endangerment standard. 127 S. Ct. at 1462.

Throughout the summer and fall, in public statements, in testimony under oath to Congressional committees, and in Federal Register notices, the EPA Administrator and his agency repeatedly reiterated the intention to issue an endangerment determination, as well as proposed standards, by the end of 2007. For example, at a hearing on November

[4] Briefing, May 14, 2007, *available at* http://www.whitehouse.gov/news/releases/2007/05/20070514-6.html, (attached as Ex. C).

8, 2007, before the House Committee on Oversight and Government Reform, the Administrator said:

> Of course, before the agency, given the Supreme Court decision in Massachusetts v. EPA, the focus is on mobile sources. So we are, as I have already mentioned, going to be proposing regulating CO2 greenhouse gases, from mobile sources by the end of this year.[5]

EPA reaffirmed its end-of-the-year schedule in a formal "regulatory plan" published on December 10, 2007: "[W]e have established a schedule to issue a notice of proposed rulemaking by the end of 2007 and a final rule by the end of October 2008." Unified Agenda, Environmental Protection Agency, 72 Fed. Reg. 69922, 69934 (Dec. 10, 2007). EPA cited the Supreme Court's ruling as the legal basis for its plan, and it characterized that ruling as requiring EPA to make an endangerment determination. *See id.* ("On April 2, 2007, the Supreme Court ruled that the EPA must determine, under Section 202(a) of the Clean Air Act, whether greenhouse gas emissions (GHG) from new motor vehicles cause or contribute to air pollution that endangers public health or welfare.").

An investigation conducted by the House Committee on Oversight and Government Reform has established that, consistent with its announced schedule, EPA had in fact completed its internal process of drafting an affirmative endangerment determination during fall 2007. Letter from Chairman Henry A. Waxman to EPA Administrator Stephen L. Johnson dated March 12, 2008, at 3-6 (attached as Ex. E). The House investigation concluded that the Administrator personally approved the affirmative determination and that, in early December of 2007, EPA transmitted a fully-drafted

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[5] Hearing on EPA Approval of New Power Plants: Failure to Address Global Warming, before the Committee on Oversight and Government Reform, House of Representatives, at 57 (Nov. 8, 2007), available at: http://oversight.house.gov/documents/20071115145634.pdf (attached as Ex. D).

Federal Register notice announcing the affirmative endangerment determination to the White House Office of Management and Budget where it now apparently sits. *Id.* at 5-6. In addition, the investigation found that EPA had completed an extensive scientific review document in support of the endangerment determination (*id.*, at 3-5), but that work regarding the endangerment determination stopped once the proposed determination was sent to the White House. *Id.* at 7.

Further evidence that the Administrator has in fact completed his scientific review and reached his conclusions regarding the adverse effects of greenhouse gas emissions is found in the Federal Register notice published on March 6, 2008, to explain the Administrator's action under Section 209 of the Clean Air Act denying California permission to implement its own greenhouse gas emission standards. 73 Fed. Reg. 12156 (March 6, 2008). In this notice, the Administrator endorsed the conclusion of the Intergovernmental Panel on Climate Change (IPCC) that global warming "is unequivocal and is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global sea level." 73 Fed. Reg. 12165/2, *citing* IPCC (2007) Summary for Policymakers. He also expressly concluded that greenhouse gas emissions, including from motor vehicles, are contributing to global warming. *Id.* at 12165 ("It is widely recognized that greenhouse gases have a climatic warming effect."); *id.* at 12162 (acknowledging the contribution of motor vehicle emissions to global greenhouse gas concentrations). The Administrator also catalogued the diverse dangers that such warming will pose to public health and welfare. For example, he specifically found that "[s]evere heat waves are projected to intensify in magnitude and duration over portions of the U.S. where these events already occur, with

likely increases in mortality and morbidity, especially among the elderly, young, and frail." *Id.* at 12167/2.[6] The Administrator made these findings after a full notice and comment process.[7]

Despite having transmitted its affirmative endangerment determination to OMB in early December, EPA never issued it. When the end of 2007 came and went, Petitioners wrote the EPA Administrator by letters dated January 23, 2008, noting that EPA had not met its promised deadline, and requesting that the Administrator inform Petitioners when he intended to act. *See e.g.*, Letter from Massachusetts Attorney General Martha Coakley, *et al.*, to Administrator Stephen Johnson dated January 23, 2008 (attached as Ex. F). In its responses to these letters, and in letters and testimony to Congress, EPA stated that "the Agency does not have a specific timeline for responding to the remand." Letter from Principal Deputy Administrator Robert J. Meyers to Massachusetts Attorney General Martha Coakley, dated February 27, 2008 (attached as Ex. G), at 1.

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[6] As but one additional example, EPA recognized that "[t]he IPCC projects with virtual certainty declining air quality in U.S. and other world cities due to warmer and fewer cold days and nights and/or warmer/more frequent hot days and nights over most land areas." *Id.*, *citing* IPCC (2007) Summary for Policymakers.

[7] Ultimately, the Administrator denied the California waiver, but only because he concluded that the harms from global warming being felt in California *are occurring across the country* and because vehicular greenhouse gas emissions *from all over the country* are contributing to those harms. *See id.* at 12162-69. On this basis, he concluded that California does not have "compelling and extraordinary conditions" as provided in Section 209(b) of the Clean Air Act. California and other Petitioners in this case are separately challenging EPA's denial of the waiver as inconsistent with the statute. *State of California v. U.S. Environmental Protection Agency*, Nos. 08-70011 and 08-70030 (9th Cir. filed Jan. 2, 2008).

In an attempt to explain the abrupt change of course, EPA pointed to the recent enactment of the Energy Independence and Security Act of 2007 (EISA), signed into law on December 19, 2007. *Id.* Specifically, EPA stated:

> Given the passage of EISA, and consistent with the Executive Order and the consultation provision in EISA, EPA is analyzing how to proceed on the issues before us on the remand, as well as how to proceed on any rulemaking that would regulate or substantially and predictably affect emissions of greenhouse gases from vehicles and engines.
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> As a result, at this time, the Agency does not have a specific timeline for responding to the remand. However, let me assure you that developing an overall strategy for addressing the serious challenge of global climate change is a priority for the Agency, and we are taking very seriously our responsibility to develop an effective, comprehensive strategy.

Id.

As is explained fully below, however, EISA specifically provides that nothing in the new energy law alters EPA's authority or duties under Section 202 of the Clean Air Act or under the Supreme Court's remand. In fact, at a Congressional hearing on EPA's delay in acting on the remand in this case, the EPA Administrator conceded this point: "EPA recognizes that the new energy law does not relieve us of our obligation to respond to the Supreme Court's decision in *Massachusetts v. EPA*." Statement of Stephen L. Johnson, Administrator, Before the House Select Committee on Energy Independence and Global Warming, March 13, 2008 (attached as Ex. H), at 4.

In this testimony, Administrator Johnson also put forth a second justification for putting the endangerment determination under Section 202 on hold. He explained that:

> We are formulating a response as part of our development of an overall approach to most effectively address GHG [greenhouse gas] emissions. A decision to control GHG emissions from motor vehicles would impact other Clean Air Act programs with potentially far reaching implications for many industrial sectors, so it is vitally important that we consider our approach to GHG control from this broader perspective.

Id. He added that EPA had begun a process of "developing an overall GHG approach," and he indicated that this process would take significant information gathering and regulatory analysis, and may be delayed even further by the need for research and development of new technologies for carbon capture and sequestration. *Id.* at 4-5. Administrator Johnson declined to say when EPA would act on the remand in this case, saying only that the agency was "continu[ing] to make progress in developing an approach." *Id.* at 5.

On March 27, 2008, Administrator Johnson sent a letter to Congress confirming that this "broader perspective" on endangerment would further delay action on the remand. *See* Letter from Administrator Stephen L. Johnson to Chairman Barbara Boxer et al. dated March 27, 2008 (attached as Ex. I), at 1. EPA's new plan is to issue an Advanced Notice of Proposed Rulemaking ("ANPRM") "later this spring" in order to invite public comment on "the broader ramifications" of regulating greenhouse gases in relation to "the many relevant sections of the Clean Air Act."[8] The ANPRM will also seek comment on the same "specific and quantifiable effects of greenhouse gases" that the agency, consistent with the IPCC's findings, previously found would have dramatic human health and welfare effects. *Id.* at 2; *see* 73 Fed. Reg. 12615 (2008). Only at an unspecified period of time after the public comment period has concluded does the agency intend to "consider how to best respond to the Supreme Court decision." *Id.*

[8] The Administrator concedes that in examining such questions, he "has gone beyond the specific mandate of the Court under section 202 of the Clean Air Act." Johnson March 27, 2008 letter, Ex. I, at 1.

ARGUMENT

I. This Court Has Jurisdiction to Enforce Its Mandate.

The Court has the power to grant relief enforcing the terms of its mandates in cases that have been remanded directly to an administrative agency, including the power to compel an unreasonably delayed agency response to the Court's mandate.[9] *Potomac Electric Power Company v. Interstate Commerce Comm'n*, 702 F.2d 1026, 1032-33 (D.C. Cir. 1983) (appellate court has jurisdiction to determine whether agency unreasonably delayed responding to Court's earlier mandate); *City of Cleveland v. Federal Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977) (appellate decision binds further action in litigation by agency subject to its authority, and the court "is amply armed to rectify any deviation"); *Atlantic City Elec. Co. v. FERC*, 329 F.3d 856, 858 (D.C. Cir. 2003) ("this Court has the power to enforce its mandates"). Although the issuance of a writ of mandamus "is an extraordinary remedy reserved for extraordinary circumstances[,] [a]n administrative agency's unreasonable delay presents such a circumstance because it signals the 'breakdown of regulatory processes.'" *In re American Rivers*, 372 F.3d 413, 418 (D.C. Cir. 2004) (citations omitted). Further, this Court has long recognized that it has an interest in seeing that "an unambiguous mandate is not blatantly disregarded by parties to a court proceeding." *Int'l Ladies Garment Union v. Donovan*, 733 F.2d 920, 922 (D.C. Cir. 1984).

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[9] The Court's jurisdiction arises from the All Writs Act, 28 U.S.C. 1651(a), which provides that "the Supreme Court and all courts established by an Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions." *See Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984); *see also Sierra Club v. Thomas*, 828 F.2d 783, 795-96 (D.C. Cir. 1987).

II. EPA Has Unreasonably Delayed Acting in Accordance with the Supreme Court's Ruling and this Court's Mandate.

This case presents a textbook example of unreasonable delay under *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 79-80 (D.C. Cir. 1984) ("*TRAC*"). Every potential justification for inaction recognized by *TRAC* is unavailable to the EPA Administrator in this case. The Administrator – and indeed the President – assigned this rulemaking the highest priority and set clear deadlines for action. The facts demonstrate unambiguously that the Administrator and his agency have completed all work legally relevant to the endangerment determination and that this work has resulted in the fully-documented preparation of a Federal Register notice of an affirmative determination. There is no basis to say that agency resources are inadequate or that an order to respond to the mandate would prevent EPA from carrying out other priorities. Each of the agency's new excuses for further delay runs directly counter to the Supreme Court's ruling. An order to act within 60 days is necessary and appropriate.

TRAC provides the standards in this Circuit for determining whether agency delay warrants mandamus relief:

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

In re American Rivers, 372 F.3d at 418 (*quoting TRAC*, 750 F.2d at 80); *see also In re Bluewater Network*, 234 F.3d 1305, 1315 (D.C. Cir. 2000). Analysis of these factors shows that EPA has unreasonably delayed issuing an endangerment determination in response to the Supreme Court's remand and this Court's mandate, and that mandamus relief is warranted.

A. EPA Has Not Acted Consistently with the "Rule of Reason."

No legitimate reasons justify EPA's failure to issue the endangerment determination it has already prepared. While courts have sometimes held that the complexity of the issues facing an agency, or the work and resources required to address these issues, justifies an agency's delay, *see Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987), those factors are unavailing in this case, where EPA has already completed all the work required to make its determination. As discussed above, several months ago EPA completed and submitted to the White House OMB a fully-documented Federal Register notice of an affirmative endangerment determination. *See* pp. 7-8, *supra*. Further, as discussed above, the EPA administrator, in his recent Notice denying California's waiver request, effectively presented the substance of an endangerment determination, acknowledging that greenhouse gas emissions, including from motor vehicles, contribute to global warming and cause significant public harm across the country. *See* pp. 8-9, *supra*.

In response to Petitioners' letters and in testimony and letters to Congress, EPA does not argue that any further scientific assessment is necessary before an endangerment determination can be made. Rather, the Administrator attempts to justify his delay by pointing to two policy factors just like those that the Supreme Court held to be irrelevant

to the endangerment determination: (1) the Department of Transportation's authority to regulate fuel economy, as exemplified in the recent enactment of the EISA; and (2) a desire to develop an "overall approach" to greenhouse gas regulation.

i) The Department of Transportation's Fuel Economy Authority and the Enactment of EISA Does Not Excuse EPA's Inaction.

The Supreme Court determined in *Massachusetts* that the Administrator's obligations under the Clean Air Act are "wholly independent" from the obligations of the DOT under the Energy Policy and Conservation Act (EPCA), the law providing for issuance of fuel economy standards. 127 S.Ct. at 1462. EISA, enacted in December 2007, tightened the fuel economy standards that DOT is required to set under EPCA. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (2007). EISA did not, however, alter EPA's authority or duties under Section 202 of the Clean Air Act or under the Supreme Court's remand, as the Administrator has already conceded.

In enacting the new legislation, Congress could not have been clearer that it was not modifying EPA's existing obligations under Section 202 of the Clean Air Act. *See id.* § 3, 121 Stat. 1492, 1498 ("Except to the extent expressly provided in this Act, or an amendment made by this Act, nothing in this Act or an amendment made by this Act supersedes, limits the authority provided or responsibility conferred by, or authorizes any violation of any provision of law (including a regulation), including any energy or environmental law or regulation."). Thus, the enactment of EISA provides EPA no excuse not to respond to this Court's mandate or to delay issuing the endangerment determination that it has already prepared. The Supreme Court's conclusion stands

unchanged: "[T]hat DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities." *Mass. v. EPA*, 127 S.Ct. at 1462.

ii) EPA May Not Delay its Endangerment Determination in Order to Develop an "Overall Approach" to Greenhouse Gas Emissions.

As noted above, EPA has now stated its intention to issue an ANPRM to examine a broad array of topics going far beyond the question posed by the Supreme Court's remand and – only at some unspecified time after that process has concluded – to "then consider how best to respond to the Supreme Court's decision." Johnson March 27, 2008 letter, Ex. I, at 2. The High Court's ruling was clear: "While the statute does condition the exercise of EPA's authority on its formation of a 'judgment,' 42 U.S.C. § 7521(a)(1), that judgment must relate to whether an air pollutant 'cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare,' *ibid.*" 127 S. Ct. at 1462. Thus, "[t]he statutory question is whether sufficient information exists to make an endangerment finding." *Id.* 1463.

As described in the March 27 letter, EPA's planned ANPRM will explore issues going well beyond the specific question the Supreme Court has defined -- in a ruling that binds EPA and this Court -- as "*[t]he* statutory question." 127 S. Ct. at 1463 (emphasis added). Thus, the planned ANPRM is not responsive to the Supreme Court's remand and this Court's order implementing that remand. EPA's new rationale for delay is disturbingly similar to those that EPA put forward in 2003 to justify its preference not to regulate, and that was expressly rejected by the Supreme Court. 68 Fed. Reg. at 52931 (Establishing motor vehicle greenhouse gas emissions standards now would "result in an inefficient, piecemeal approach to addressing the climate change issue.... 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 emission reductions.").

Under the Supreme Court's decision, these considerations have no bearing on the endangerment determination – a question that must be answered based on the science. Indeed, these are exactly the kinds of policy justifications for inaction that the Supreme Court expressly held invalid and irrelevant to the endangerment determination. *Massachusetts*, 127 S.Ct. at 1463 (rejecting EPA's argument that an aversion to "piecemeal" regulation warrants inaction on motor vehicle emissions.) The Supreme Court made clear that courts may not excuse agency inaction on the endangerment question on the basis of these extraneous policy considerations. *Id.* ("Although we have neither the expertise nor the authority to evaluate these policy judgments, it is evident they have nothing to do with whether greenhouse gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form a scientific judgment.") Thus, EPA simply is not free to delay issuing an endangerment determination on the grounds that the agency wants to develop an "overall approach" or to address how greenhouse gas regulation should be undertaken for sources other than motor vehicles. *See Sierra Club v. EPA*, 479 F.3d 875, 884 (D.C. Cir. 2007) ("If the Environmental Protection Agency disagrees with the Clean Air Act's requirements for setting emissions standards, it should take its concerns to Congress. If EPA disagrees with this court's interpretation of the Clean Air Act, it should seek rehearing en banc or file a petition for a writ of certiorari. *In the meantime, it must obey the Clean Air Act as written by Congress and interpreted by this court.*") (emphasis added).

Moreover, it bears emphasis that EPA plans an *advance* notice of proposed rulemaking, an approach that augurs years of delay in responding to the remand. As this Court has recently recognized, an ANPRM is a tool "seeking information to assist [the agency] in deciding on the *possibility* of a *future* proposed rule," -- that is, "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) (emphasis in original). Given the narrow scope of the question posed by the Supreme Court remand, EPA's completion of the work necessary to address that question, and the urgency of the global warming problem, the huge delay announced in EPA's March 27 letter is utterly unreasonable.[10]

Because EPA cannot show that any work or any complex decision-making remains to be done with regard to the endangerment decision, EPA's delay fails the "rule of reason." *See In re American Rivers*, 372 F.3d at 419 (finding agency delay unreasonable because "none of its reasons comports with the specific considerations outlined in *TRAC*" and because "a reasonable time for agency action is typically counted in weeks or months, not years.").

Finally, in assessing the reasonableness of EPA's ongoing delay, it is worth remembering that the rulemaking petition at issue was filed in 1999. While there is no specific statutory deadline for taking action under Section 202, the Supreme Court ruled that once having decided to respond to the petition, EPA is obligated to act on the basis of the proper statutory factors. Through a combination of agency inaction and invalid legal arguments, EPA has now already delayed action consistent with those statutory factors

[10] While EPA may be free to seek broad public comment on issues that go beyond the mandate, what the agency cannot do is to substitute that process for fulfilling its obligations under the mandate in a timely manner.

for almost a decade, with no end in sight. As this Court stated: "[W]e have seen it happen time and time again, ... action ... for the protection of public health all too easily becomes hostage to bureaucratic recalcitrance, factional infighting, and special interest politics. At some point, we must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough." *Public Citizen Health Research Group v. Brock*, 823 F.2d 626 (D.C. Cir. 1987).

B. Human Health and Welfare Are at Stake.

As discussed above, the EPA has already submitted to OMB a proposed determination that greenhouse gas emissions contribute to air pollution which may reasonably be anticipated to endanger public welfare. *See* pp. 7-8, *supra*. Further, in his denial of California's waiver request, the EPA Administrator concluded that greenhouse gas emissions, including from motor vehicles, contribute to global warming and are causing significant public harm. 73 Fed. Reg. at 12163-69. For example, the Administrator noted that, as a result of this greenhouse-gas-driven global warming, "[s]evere heat waves are projected to intensify in magnitude and duration over portions of the U.S. where these events already occur, with likely increases in mortality and morbidity, especially among the elderly, young, and frail." 73 Fed.Reg. 12167/2. It is clear that extremely significant human health and welfare concerns are at stake here.

C. Ordering Issuance of the Endangerment Determination Will Not Hamper Agency Activities of Higher or Competing Priority.

Issuance of the endangerment determination would constitute concrete progress in the regulation of greenhouse gas emissions under Section 202 of the Clean Air Act, and it would allow the Agency to focus on the type and manner of emission standards needed to achieve meaningful reductions from motor vehicles. Because EPA has already

completed all of the work necessary to issue the endangerment determination, an order directing the agency to issue the document within sixty days will not affect other agency activities of higher or competing priority. As shown above (*see* pp. 7-8, *supra*), EPA has submitted a fully-documented affirmative determination to OMB. Further, the Administrator himself had already placed the endangerment determination on a fixed schedule consistent with its self-evident importance. To meet that schedule, the Administrator "internally redirected $5.3 million in contract dollars and redeployed 53 employees" to work on the development of the endangerment determination and the emissions regulations. Letter from Administrator Stephen L. Johnson to Chair Dianne Feinstein dated March 3, 2008 (attached as Ex. J). Issuing the endangerment determination will therefore expend little or no additional agency resources and will constitute the first step in what the agency itself identified as one of its highest priorities. Finally, as the Supreme Court expressly noted, "[t]o the extent that [moving forward with regulation under Section 202] constrains agency discretion to pursue other priorities of the Administrator or the President, this is by congressional design." 127 S.Ct. at 1462.

D. Delay is Causing Significant Harm to the Public.

EPA's delay has serious consequences. Greenhouse gases continue to accumulate in the atmosphere at an alarming rate and the window of opportunity in which we can mitigate the dangers posed by climate change is rapidly closing. *See, e.g.,* IPCC Third Assessment Report (2001), Synthesis Report, Summary for Policymakers, at 19, 21 (explaining how significant reductions in greenhouse gas emissions are needed in the short term to stabilize atmospheric concentrations, and how a delay in implementing emission reductions will result in increased extent and magnitude of adverse impacts). Thus, delay is not only causing harm, it is reducing the effectiveness of any subsequent

regulatory efforts to address the problem.[11] *See Cutler v. Hayes*, 818 F.2d at 897-98 (in assessing whether delay is unreasonable, court "must also estimate the extent to which [the] delay may be undermining the statutory scheme, either by frustrating the statutory goal or by creating a situation in which the agency is losing its ability to effectively regulate at all") (internal quotations omitted). As then-EPA Administrator Christie Todd Whitman succinctly acknowledged over seven years ago: "If we fail to take the steps necessary to address the very real concern of global climate change, we put our people, our economies, and our way of life at risk."[12]

E. Although Petitioners Need Not Show Agency Impropriety to Make Out a Case for Mandamus, There is Ample Evidence that EPA Has Acted, and Continues to Act, Improperly.

Despite the Supreme Court's plain directive that EPA act in accordance with its statutory responsibilities, EPA continues to withhold action a year later. Moreover, this is not a case where a court has to make a difficult assessment about when an agency's inaction is sufficiently prolonged that it becomes actionable. Rather, this is a case where the agency has already prepared its affirmative determination of endangerment and where its continued delay is based on exactly the kinds of policy considerations that the Supreme Court held invalid. Thus, although Petitioners need not prove "impropriety

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[11] As a federal District Court recently found after trial, the planet may soon reach a "tipping point" on global warming, a point at which concentrations of carbon dioxide are so great that the consequences "will become dramatically more rapid and out of control." *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F.Supp.2d 295, 313-14 (D.Vt. 2007), *appeal pending,* Second Circuit Nos. 07-43-42-CV; 07-43-60-CV.

[12] Remarks delivered at the G8 Environmental Ministerial Meeting Working Session on Climate Change, Trieste, Italy (March 3, 2001), available at: http//yosemite1.epa.gov/administrator/speeches.nsf/b1ab9f485b098972852562e7004dc686/36bca0e3a69a0d8b85256a41005d2e63?OpenDocument.

lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed'" (*TRAC*, 750 F.2d at 80), such impropriety is manifest here.

III. Petitioners Have No Other Adequate Remedy.

Mandamus is proper only if "there is no other adequate remedy available to the plaintiff." *Northern States Power Co. v. DOE*, 128 F.3d 754, 758 (D.C. Cir. 1997) (citation omitted). Because EPA's error is its unreasonable delay in acting, there is no agency action to review and Petitioners' only avenue for relief is to seek a writ of mandamus.

IV. EPA Should Be Ordered to Issue Its Endangerment Determination Within 60 Days.

Given that EPA has already developed an endangerment determination, and sent it to OMB four months ago, the Court does not need to wrestle with the question of how much more time is needed for EPA to complete its task. Sixty days is more than enough time for EPA to issue a document it has already prepared.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court issue a writ of mandamus requiring EPA to issue within sixty days its determination on whether the air pollution to which greenhouse gas emissions from motor vehicles contribute "may reasonably be anticipated to endanger public health or welfare."

Respectfully submitted,

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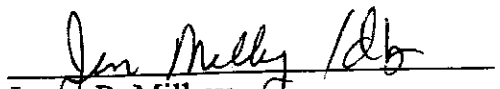

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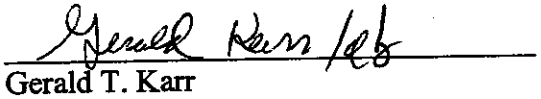

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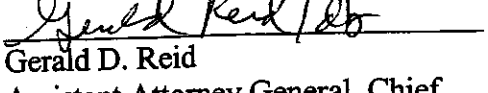

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EXHIBIT A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1361 **September Term, 2006**

Filed On:

Commonwealth of Massachusetts, et al.,
Petitioners

v.

Environmental Protection Agency,
Respondent

Alliance of Automobile Manufacturers, et al.,
Intervenors

Consolidated with 03-1362, 03-1363, 03-1364, 03-1365, 03-1366, 03-1367, 03-1368,

BEFORE: Sentelle, Randolph, and Tatel, Circuit Judges

JUDGMENT

It is **ORDERED and ADJUDGED** that, in light of the Supreme Court's opinion in Massachusetts v. EPA, 127 S. Ct. 1438 (2007), the EPA's denial of the International Center for Technology Assessment's rulemaking petition be vacated and Nos. 03-1361, 03-1362, 03-1363, and 03-1364 be remanded for further proceedings consistent with the Supreme Court's opinion. It is

FURTHER ORDERED AND ADJUDGED that petitions for review Nos. 03-1365, 03-1366, 03-1367, and 03-1368 be dismissed, in accordance with this court's opinion issued July 15, 2005.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Michael C. McGrail
Deputy Clerk

EXHIBIT B

greenhouse gas emissions from motor vehicles. So today, I'm directing the EPA and the Department of Transportation, Energy, and Agriculture to take the first steps toward regulations that would cut gasoline consumption and greenhouse gas emissions from motor vehicles, using my 20-in-10 plan as a starting point.

Developing these regulations will require coordination across many different areas of expertise. Today, I signed an executive order directing all our agencies represented here today to work together on this proposal. I've also asked them to listen to public input, to carefully consider safety, science, and available technologies, and evaluate the benefits and costs before they put forth the new regulation.

This is a complicated legal and technical matter, and it's going to take time to fully resolve. Yet it is important to move forward, so I have directed members of my administration to complete the process by the end of 2008. The steps I announced today are not a substitute for effective legislation. So my -- members of my Cabinet, as they begin the process toward new regulations, will work with the White House, to work with Congress, to pass the 20-in-10 bill.

When it comes to energy and the environment, the American people expect common sense, and they expect action. The policies I've laid out have got a lot of common sense to them. It makes sense to do what I proposed, and we're taking action, by taking the first steps toward rules that will make our economy stronger, our environment cleaner, and our nation more secure for generations to come.

Thank you for your attention.

END 1:27 P.M. EDT

Return to this article at:
http://www.whitehouse.gov/news/releases/2007/05/20070514-4.html

THE WHITE HOUSE
PRESIDENT
GEORGE W. BUSH

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For Immediate Release
Office of the Press Secretary
May 14, 2007

President Bush Discusses CAFE and Alternative Fuel Standards

Rose Garden

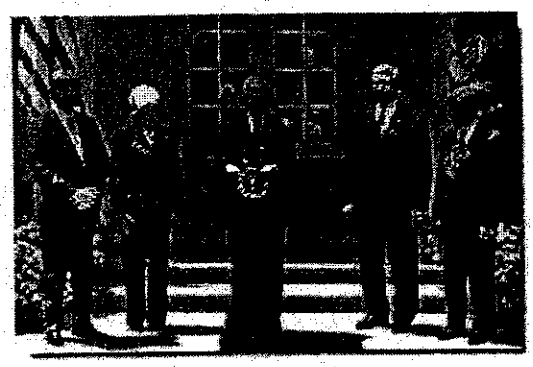
Fact Sheet: Twenty in Ten: Strengthening Energy Security and Addressing Climate Change
Executive Order: Cooperation Among Agencies in Protecting the Environment with Respect to Greenhouse Gas Emissions From Motor Vehicles, Nonroad Vehicles, and Nonroad Engines
In Focus: Energy

Video (Windows)
Presidential Remarks
Audio

1:21 P.M. EDT

THE PRESIDENT: Thank you all for coming. Good afternoon. I just finished a meeting with the Administrator of the Environmental Protection Agency, Secretaries of Transportation and Agriculture, and the Deputy Secretary of Energy. Thank you all for being here.

We discussed one of the most serious challenges facing our country: our nation's addiction to oil and its harmful impact on our environment. The problem is particularly acute in the transportation sector. Oil is the primary component of gasoline and diesel, and cars and trucks that run on these fuels emit air pollution and greenhouse gases.



Our dependence on oil creates a risk for our economy, because a supply disruption anywhere in the world could drive up American gas prices to even more painful levels. Our dependence on oil creates a threat to America's national security, because it leaves us more vulnerable to hostile regimes, and to terrorists who could attack oil infrastructure.

For all these reasons, America has a clear national interest in reducing our dependence on oil. Over the past six years, my administration has provided more than $12 billion for research into alternative sources of energy. I'd like to thank the Congress for its cooperation in appropriating these monies. We now have reached a pivotal moment where advances in technology are creating new ways to improve energy security, strengthen national security, and protect the environment.

To help achieve all these priorities, I set an ambitious goal in my State of the Union: to cut America's gasoline usage by 20 percent over the next 10 years. I call this goal 20-in-10, and I have said -- sent to Congress a proposal that would meet it in two steps: First, this proposal will set a mandatory fuel standard that requires 35 billion gallons of renewable and other alternative fuels by 2017. That's nearly five times the current target.

Second, the proposal would continue our efforts to increase fuel efficiency. My administration has twice increased fuel economy standards for light trucks. Together, these reforms would save billions of gallons of fuel and reduce net greenhouse gas emissions without compromising jobs or safety.

My proposal at the State of the Union will further improve standards for light trucks and take a similar approach to automobiles. With good legislation, we could save up to 8.5 billion gallons of gasoline per year by 2017, and further reduce greenhouse gas emissions from cars and trucks.

Last month, the Supreme Court ruled that the EPA must take action under the Clean Air Act regarding

EXHIBIT C

THE WHITE HOUSE
PRESIDENT
GEORGE W. BUSH

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For Immediate Release
Office of the Press Secretary
May 14, 2007

Briefing by Conference Call on the President's Announcement on CAFE and Alternative Fuel Standards

President Bush Discusses CAFE and Alternative Fuel Standards
Fact Sheet: Twenty in Ten: Strengthening Energy Security and Addressing Climate Change
In Focus: Energy

White House News

PARTICIPANTS:

Secretary Of Transportation Mary Peters
Secretary Of Agriculture Michael Johanns
Epa Administrator Stephen Johnson
Deputy Secretary Of Energy Clay Sell
Deputy Press Secretary Scott Stanzel

2:07 P.M. EDT

MR. STANZEL: Thank you all for joining us today. As you know, the President made an announcement just a short time ago about his directing the administration to take action to implement his 20-in-10 plan, to reduce our nation's addiction to oil. And as you know, in his State of the Union address, the President proposed this 20-in-10 plan, and this action today follows on that.

We are joined today by EPA Administrator Stephen Johnson, Secretary of Transportation Mary Peters, Secretary of Agriculture Mike Johanns, and Deputy Secretary of Energy Clay Sell. I'm going to turn it over momentarily to Administrator Johnson, who will talk a little bit about today's announcement. And then we'll have some brief comments from Secretary Peters, Secretary Johanns, and Deputy Secretary Sell about their involvement in this very important issue.

So with that, I'll turn it over to Administrator Johnson.

ADMINISTRATOR JOHNSON: Thanks very much. This is Steve Johnson, Administrator of the U.S. Environmental Protection Agency. And I also want to add my thanks to all of you for joining us on the call.

As was noted, earlier today President Bush signed an executive order directing EPA, the Department of Transportation, the Department of Energy and the Department of Agriculture to coordinate on the development of possible regulatory actions to address the emissions from mobile sources that contribute to global climate change. Following this direction, and put simply, the Bush administration is taking the first regulatory step to address greenhouse gas emissions from cars.

On April 2, 2007, the U.S. Supreme Court decided in Massachusetts versus EPA that the Clean Air Act provided EPA the statutory authority to regulate greenhouse gas emissions from new vehicles if I determine in my judgment whether such emissions endanger public health and welfare under the Clean Air Act. Today the President has responded to the Supreme Court's landmark decision by calling on EPA and our federal partners to move forward and take the first regulatory step to craft a proposal to control greenhouse gas emissions from new motor vehicles.

This rule-making will be complex and will require a sustained commitment from the administration to complete it in a timely fashion. While the President's 20-in-10 plan, which would increase the supply of renewable and

Ex. C

alternative fuel and reform the CAFE standards, will serve as a guide, we have not reached any conclusions about what the final regulation will look like. In most instances, by federal law, the Environmental Protection Agency must follow a specific process and take several steps before issuing a final regulation. This is a complex issue and EPA will ensure that any possible rule-making impacting emissions from all new mobile sources through the entire United States will adhere to the federal law.

We will solicit comments on a proposed rule from a broad array of stakeholders and other interested members of the public. Our ultimate decision must reflect a thorough consideration of public comments and an evaluation of how it fits within the scope of the Clean Air Act. Only after EPA has issued a proposal and considered public comments can it finalize a regulation. Today's announcement reflects our commitment to move forward expeditiously and responsibly.

While this is the first regulatory step, it builds on the Bush administration's unparalleled financial, international and domestic commitments to reducing global greenhouse gas emissions. Since 2001, EPA and the entire administration have invested more than $37 billion to study climate change science, promote energy-efficient and carbon-dioxide-reducing technologies, and fund tax incentive programs. As you all know, that's more money than any other country in the world has spent to address this global challenge.

Under the President's leadership, our nation is making significant progress in tackling greenhouse gas emissions. According to EPA data reported to the United Nations Framework Convention on Climate Change, U.S. greenhouse gas intensity declined by 1.9 percent in 2003, declined by 2.4 percent in 2004, and 2.4 percent again in 2005. Put another way, from 2004 to 2005, the U.S. economy has increased by 3.2 percent, while greenhouse gas emissions increased by 0.8 percent.

In another study, the International Energy Agency reported that from 2000 to 2004, U.S. emissions of carbon dioxide from fuel combustion grew by 1.7 percent, while our economy expanded by nearly 10 percent. Yet, during this time of growth, the United States actually reduced its carbon dioxide intensity by 7.2 percent.

Our aggressive and practical strategy is working. America is on track to meet the President's goal to reduce greenhouse gas intensity by 18 percent by 2012. By taking this first regulatory step to address greenhouse gas emissions from cars, we are maintaining America's unparalleled leadership in addressing global climate change while strengthening our energy security.

Thanks very much.

SECRETARY PETERS: Scott, thank you, and thanks to everyone who is on the call with us today. The President understands that each of our agencies bring significant knowledge, expertise and skill to bear when it comes to meeting his ambitious goal of 20-in-10. We have wide-ranging experience and significant technical knowledge at the Department of Transportation when it comes to setting fuel economic standards that require automakers to install fuel savings technology on every type of pickup truck, SUV, and minivan, regardless of their size or weight.

As a result, our repeated increases in the fuel economy standards for the light truck category of vehicles have set tough new mileage targets while encouraging consumer choice, maintaining vehicle safety, and of course, protecting jobs and the American economy.

We intend to share this experience as we work closely with EPA and the other agencies to meet the President's direction to evaluate regulatory solutions based on 20-in-10 and the framework that the President has provided. This will reduce greenhouse gas emissions and strengthen energy security.

Scott, thank you so much.

MR. STANZEL: Thank you, Secretary Peters.

Secretary Johanns.

SECRETARY JOHANNS: Scott, thank you. And to everyone on the call, we appreciate the opportunity to offer a few words on this presidential initiative.

The President has provided a very important blueprint to address energy security with his 20-in-10 proposal. And now, through a coordinated effort, the agencies are putting the building blocks in place.

For the United States Department of Agriculture, renewable energy is a top priority. The President's goal to achieve 20-in-10 has ignited what I would describe as a transformational period, nothing short of that, in American agriculture. He's articulated a definite vision and he has followed up on that in our case, in Agriculture's case, with a very aggressive Farm Bill proposal that will fit perfectly with what he talked about this afternoon.

We've already put forth a Farm Bill proposal that would increase funding for renewable energy by $1.6 billion. Without question, the President's proposals represent the most significant commitment to renewable energy that's ever been proposed in farm legislation. It's focused on cellulosic ethanol, which is where we believe the next step is in terms of ethanol development. And it's also one of the building blocks that will help us achieve 20-in-10.

The Farm Bill proposals would expand research into cellulosic ethanol, to improve biotechnology, and create a better crop for conversion to renewable energy and to improve that conversion process, making it more efficient and, therefore, more commercially viable.

These proposals also fit well with the President's announcement because they provide funding to support more than a billion dollars in guaranteed loans, to encourage the construction of the commercial-scale cellulosic plants.

I do want to mention finally that the United States Department of Agriculture has worked hand-in-hand with the Department of Energy to ensure our efforts are complementary, and to send a very strong signal to the marketplace that this administration supports renewable energy production, just as the President has indicated yet again today. There is no question that American agriculture has an important role to play in the renewable energy field and in achieving the 20-in-10 goal. The President has recognized that and embraced it through the Farm Bill proposals that we have put out.

MR. STANZEL. Thank you, Secretary Johanns. Now I'll turn it over to Deputy Secretary of Energy Clay Sell.

DEPUTY SECRETARY SELL: Good afternoon. Secretary Bodman is meeting in Paris today at the biannual meeting of the International Energy Agency, so I'm pleased to be here on his behalf.

Matters of energy security cannot be separated from our priorities for environmental stewardship. And it is our view at the Department of Energy, and I think it is the view held inside the administration, that technology and the development of technology is the key to addressing these two issues together. And as part of developing the technology, we also must focus on the policies that will help pull these technologies into the marketplace on a time frame that is relevant to address the problems at hand.

And so we have looked forward to working with the Congress on the President's legislative proposals in 20-in-10, and we now look forward to working with our colleagues inside the administration to pursuing this regulatory path, as well. Thanks.

Q This is a work that's just starting in progress. Can any of you assure us that there will be a CAFE element in the package when you complete it?

SECRETARY PETERS: I'll take that question from the Department of Transportation, and then defer it to Steve Johnson at EPA.

As you mentioned, we're just starting the process right now. So our first step will be to evaluate the impacts of the ruling and where we want to go with the 20-in-10, and then determine whether or not we move forward with a CAFE regulation. But it is our intent to implement the President's 20-in-10.

ADMINISTRATOR JOHNSON: As a very practical matter that there are two ways of controlling greenhouse gas emissions from new cars. One is the fuel, and our comments on the alternative fuel and renewable fuel; and the second is through efficiency of the automobile, or hence, CAFE.

So what is particularly noteworthy is the President's legislative plan of CAFE reform and alternative fuel supply is

very consistent with where -- a good starting point for us to be from a regulatory standpoint because it addresses the two areas where there's an opportunity to not only deal with greenhouse gas emissions, but also energy security.

Q Just wanted to ask about the time frame here. You mentioned that you're not going to rule out any action or lack thereof. The President today set a goal to wrap up work by the end of 2008. Just kind of clarify what exactly he's calling for and how the Clean Air Act might enter into here. The Clean Air Act was mentioned in the executive order, as well.

ADMINISTRATOR JOHNSON: The first step that we're taking to initiate a regulatory process is through the Clean Air Act, and that what the President has asked that we do as Cabinet members is to proceed so that we can have a final regulation in place by the end of 2008. The process that we go through for any rule-making, we develop the proposal; we issue it for notice and comment; then based upon those comments, then we make a final decision, which is then incorporated into the final rule.

So today's announcement is the first step in that regulatory process, and that is we are now going to be turning our attention to developing a proposal which will then go through notice and comment rule-making.

MR. STANZEL: And, Chris, I should note -- and I should note for everyone else on the call -- we did release the executive order. That's available at WhiteHouse.gov, as is a fact sheet about today's announcement.

Next question.

Q I also wanted to ask about the time element. You talk about operating in an expeditiously and a timely fashion, yet it's 17 months before you expect to get anything done. Congressman Markey has put out a release; it calls this yet another stall tactic by the President. How do you explain why it takes so long? What do you say to his comments that it's a stall tactic?

ADMINISTRATOR JOHNSON: Having been at the EPA for 26 years now, I can tell you that a rule-making process -- typically, a rule-making process at the agency takes between 18 and 24 months. And so you can do the calculation, but this is expediting a rule-making. This is very important that we expedite, but it's also very important that we have a close collaboration among particularly the Department of Transportation, Energy, Agriculture and ourselves, and do it right.

SECRETARY PETERS: If I could just add briefly, what the President's proposal does is weigh the balance of policy issues, which includes safety, sound science, technology, public input, cost and benefits, economic impact, and American jobs. And it's very important we consider all these factors as we go forward.

Q You've already got legislative proposals, I believe, out to do what you're saying you now want to accomplish through a rule-making. But you also still say that you're seeking legislation. So is this a two-track thing, you're trying to accomplish these things legislatively, and if you don't succeed legislatively, then you're saying you're going to implement them in a rule-making? And if you can implement them in a rule-making, why not just go ahead and do that and not seek the legislation anymore?

ADMINISTRATOR JOHNSON: We are -- it is, as you correctly pointed out, it is a dual track. We would prefer that legislation be enacted over regulation. The reason is, is that legislation provides certainty; it also insulates against lengthy litigation where nothing gets done while things are being litigated in a court system. So we prefer legislation. But due to the Supreme Court decision, we are also now moving forward on a regulatory path, as well.

Q In the Supreme Court ruling, Justice Stephens wrote: "Under the clear terms of the law, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change, or it provides some reasonable explanation why regulations are not needed." Does effectively your decision to start the regulatory process mean that you are choosing not to make the argument that greenhouse gases do not contribute to climate change, and effectively mean that the administration is formally accepting that greenhouse gases contribute to climate change?

ADMINISTRATOR JOHNSON: With today's announcement, what we are announcing is the first step in the

regulatory process of which we will, as part of our proposal, lay out our rationale that would include both whether it causes or contributes to climate change, as well as the issue of endangerment. That will all be laid out in our proposal.

So at this point, it's premature to speculate, but again, this is an important first step in beginning the regulatory process.

Q So if I could just follow up then. The administration, then, is not taking a position at this point on whether greenhouse gases contribute to climate change?

ADMINISTRATOR JOHNSON: Well, we as administration, have said that we know that emissions contribute to climate change and that this is a serious issue. That's why, as an administration, the President has -- and as a nation, we've invested $37 billion since 2001 to address both the science, technology, and even provided some tax incentives to help us move along.

So this is -- it's a serious issue, and it's an important issue, and that's why today is an important announcement, because we are taking the first step beginning the regulatory process.

Q Just -- you need to be clear on this point, though. Previously, the administration's position was not -- was that it was unclear whether carbon dioxide was a pollutant under the Clean Air Act. What you're saying is that although you're beginning this regulatory process, you are not accepting that contention yet that was in the Supreme Court ruling?

ADMINISTRATOR JOHNSON: No, that's not what I'm saying. The Supreme Court ruled that carbon dioxide is a pollutant. We accept the Supreme Court's decision, and we're now moving forward with the first step in the regulatory process. But it's just like any other pollutant that EPA regulates; that is to say, we have to put together what are rational -- what is our basis for regulating a pollutant, taking into consideration effects on people and the environment, in this case, including issues of safety, as well as the cost and benefits of moving forward with whatever approach that we decide to move forward with.

So, again, bottom line, this is an important first step in the regulatory in addressing greenhouse gas emissions from automobiles.

Q I think you just answered this question, but for Administrator Johnson, so will you do an endangerment finding before proposing a rule? And how soon would you like to at least propose the rule?

ADMINISTRATOR JOHNSON: Well, our target for a draft proposal will be fall of this year. And as part of that proposal, we will address the endangerment finding as part of the proposal.

Q I was wondering if you can tell me how you come up with that $37 billion number.

MR. STANZEL: Well, that goes back to all the climate research back to 2001. And I can hook you up with some experts at OMB that can walk you through all of the monies that have been spent. I don't have those figures -- the breakdown at my fingertips, but we can certainly get that to you, Steven.

Q Is that including tax incentives for alternative energy items?

MR. STANZEL: I would defer to the experts at OMB, and I can connect you with them.

Q Can I ask another question, then?

MR. STANZEL: Certainly, go ahead.

Q Wouldn't you be in violation of the Supreme Court ruling if you didn't go ahead and do this? I'm having a little trouble figuring out what the news is here, really.

ADMINISTRATOR JOHNSON: The Supreme Court – and I like to refer to the Scalia summary of the Supreme Court decision, even though he was dissenting. He, in essence, said, if I can paraphrase, that if the Administrator determines – if I were to determine that there is endangerment, then I would be required to regulate. That's option one.

Option two is, if I determine that there was not endangerment, then I would not be required to regulate. And then option three was, if there was some other reason and rational explanation for why it was not necessary to regulate, then that would be an option, as well.

So the Supreme Court did not direct us to regulate. It identified, as I said, three options which the Scalia summary is, I think, a handy reference for.

MR. STANZEL: Thank you, Steven. And I will contact you and we'll get you in touch with the OMB.

Next question.

Q I wanted to ask you, the President did speak today about the proposal he had sent to Congress, and he spoke about increased fuel efficiency. Yet you seem to be evading the question about whether CAFE standards will actually emerge from this work. Can you just flatly say whether you expect to see some new CAFE standards for automobiles by the end of 2008?

ADMINISTRATOR JOHNSON: Since we have to develop a proposal which goes to notice and comment rule-making, it would not be appropriate for me to say what the final rule or regulation will look like. What I did say is, there are two ways of controlling greenhouse gas emissions, at the same time improving energy efficiency. But under the Clean Air Act, our focus is on reducing greenhouse gas emissions. That's, one, through the efficiency of automobiles, and the second is the type of fuel that you put into those automobiles.

And so it just seemed logical that we would be pursuing both of those, certainly as part of our proposal. And, in fact, that's what we have announced today, because it's very much in line with what the President's legislative proposal is.

Q I have one more question regarding legislation. So under your reading of this law, there is basically nothing that you can't do without Congress -- that you need Congress's approval for? The EPA would be free to set up a class-based CAFE system without -- for past-year cars without having congressional approval?

ADMINISTRATOR JOHNSON: In fact, the Supreme Court in language – if I can quote to you from their opinion -- it says, "EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies." So there is significant latitude that we have.

Q And have you and Administrator Peters worked out how much of the work load on coming up with these standards will be split between your agencies?

ADMINISTRATOR JOHNSON: Well, through -- since this regulation will be done through -- principally through the Clean Air Act, then it is my responsibility, the agency's responsibility to oversee and actually develop the regulation. But it's also equally important, and it was important to the President, to make sure that we are coordinating and collaborating with our federal partners, particularly the Department of Transportation, Department of Energy, and Department of Agriculture – hence, the executive order.

Q Yes, Mr. Johnson, what are you -- sir, are you clear that you have the authority to do -- to increase the renewable fuel standard, or impose this alternative fuel standard without any further legislation?

ADMINISTRATOR JOHNSON: Yes.

Q – increasing the mandate?

ADMINISTRATOR JOHNSON: Yes.

Q That's under the Clean Air Act?

ADMINISTRATOR JOHNSON: Yes. There is -- Section 211 of the Clean Air Act focuses on fuels; Section 202 is on motor vehicles.

Q Well, I've got just one follow-up. Your intent is to issue a draft by this fall, and then a final proposed rule-making by the end of 2008?

ADMINISTRATOR JOHNSON: The correct term would be a final rule-making that would then be law and go into effect that people would be required to follow by the end of 2008.

Q Would it be imposed by the end of -- or just going to -- because you have a comment period, obviously, after you issue the final ruling.

ADMINISTRATOR JOHNSON: The proposal -- the sequence, we develop a proposed rule-making; then we take public comment on that proposed rule-making, which I said we would -- our goal is to have a proposal out this fall, fall of 2007. Then there would be a notice and comment; then we then review all of those comments, and then make a final decision, which would then be issued in the final regulation, which the President has asked for us to have it completed by the end of 2008.

The actual schedule of implementation and what the nature of the rule would be would all be part of that final regulation. Whether things go into effect immediately, or are sequenced over time, those are all the considerations that will go into both the proposal as well as ultimately the final regulation.

Q Okay, but this would be in effect by the time you leave -- the President leaves office, then.

ADMINISTRATOR JOHNSON: And I leave office, too. That's correct.

Q I know you said this is a first step. Do you envision going beyond where the Senate has proposed with the CAFE standard increasing to 35 miles per gallon by 2010?

ADMINISTRATOR JOHNSON: Again, this is a first step, and we have quite a bit of work to do, not the least of which is the public notice and comment process, to consider what options that we put on the table. So stay tuned.

Q And will you also address the California lawsuit about -- in these rules, or does this just address what the Supreme Court --

ADMINISTRATOR JOHNSON: This is the first step in addressing the Supreme Court and the President's desire to improve energy efficiency and address greenhouse gas emissions for motor vehicles. On a separate track is the petition from California. We're now in a comment period. There is a public meeting scheduled for Washington -- here in Washington, D.C. on May the 22nd. And then there is a public hearing scheduled in Sacramento for May the 30th. And that's where we are in the process.

MR. STANZEL: Thank you all. Operator, that's the number of questions that we have time for. I appreciate everyone joining us today. As I indicated, the executive order and a fact sheet has been released. They're available at WhiteHouse.gov. We appreciate your participation today.

Thank you all.

END 2:37 P.M. EDT

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Preliminary Transcript

HEARING ON EPA APPROVAL OF NEW POWER PLANTS: FAILURE TO ADDRESS GLOBAL WARMING POLLUTANTS

Thursday, November 8, 2007

House of Representatives,

Committee on Oversight

and Government Reform,

Washington, D.C.

"This is a preliminary transcript of a Committee Hearing. It has not yet been subject to a review process to ensure that the statements within are appropriately attributed to the witness or member of Congress who made them, to determine whether there are any inconsistencies between the statements within and what was actually said at the proceeding, or to make any other corrections to ensure the accuracy of the record."

Committee Hearings

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that is what I did.

Chairman WAXMAN. Okay, thanks.

Mr. JOHNSON. That is the extension of the comment period, to be clear.

Chairman WAXMAN. Mr. Sali, I think it is your turn next.

Mr. SALI. Thank you, Mr. Chairman.

If we were going to deal with all of the sources of carbon emission, greenhouse gases, what would do us the most good? Where could we make the most impact?

Mr. JOHNSON. Well, it is clear that one is, it is important that as we reflect on the Supreme Court decision and the complexity of the Supreme Court decision, as well as the complexity of technology and science, that we look at all of these issues. It is clear that electric generating units are the major source of carbon dioxide in the United States. Second is transportation. Then third, there are a variety of other sources.

Of course, before the agency, given the Supreme Court decision in Massachusetts v. EPA, the focus is on mobile sources. So we are, as I have already mentioned, going to be proposing regulating CO2, greenhouse gases, from mobile sources by the end of this year. And as we prepare that proposed regulation, we are also considering what the impacts of the Supreme Court decision and our action on mobile sources will have on these other, including stationary

EXHIBIT E

ONE HUNDRED TENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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March 12, 2008

The Honorable Stephen L. Johnson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Johnson:

Since December, the Committee has been examining the Administration's decision to reject California's effort to regulate greenhouse gas emissions from motor vehicles. During this investigation, the Committee has received new information on a related issue: it appears that EPA's own efforts to regulate greenhouse gas emissions from motor vehicles have also been stymied.

Multiple senior EPA officials have told the Committee on the record that after the Supreme Court's landmark decision in *Massachusetts v. EPA*, you assembled a team of 60 to 70 EPA officials to determine whether carbon dioxide emissions endanger health and welfare and, if so, to develop regulations reducing CO_2 emissions from motor vehicles. According to these officials, you agreed with your staff's proposal that CO_2 emissions from motor vehicles should be reduced and in December forwarded an endangerment finding to the White House and a proposed motor vehicle regulation to the Department of Transportation. The proposed regulation would have produced significantly more CO_2 reductions than the revised fuel economy standards enacted last year.

The senior EPA officials who spoke with the Committee did not know what transpired inside the White House or the Department of Transportation or what directions the White House may have given you. They do know, however, that since you sent the endangerment finding to the White House, "the work on the vehicle efforts has stopped." They reported to the Committee that the career officials assigned to the issue have ceased their efforts and have been "awaiting direction" since December.

These accounts raise serious questions. It appears that EPA's efforts to regulate CO_2 emissions have been effectively halted, which would appear to be a violation of the Supreme

Court's directive and an abdication of your responsibility to protect health and the environment from dangerous emissions of CO_2.

I hope you will cooperate with the Committee's investigation of this matter.

Background

In August 2003, the Bush Administration denied a petition to regulate CO_2 emissions from motor vehicles by deciding that CO_2 was not a pollutant under the Clean Air Act.[1] In April 2007, the U.S. Supreme Court overruled that determination in *Massachusetts v. EPA*. The Court wrote:

> Because greenhouse gases fit well within the Clean Air Act's capacious definition of "air pollutant," we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles.[2]

Under the Clean Air Act, whether EPA is required to regulate CO_2 turns on whether CO_2 causes, or contributes to, air pollution that "may reasonably be anticipated to endanger public health or welfare."[3] The Court remanded this question to EPA, explaining:

> If EPA makes a finding of endangerment, the Clean Air Act requires the agency to regulate emissions of the deleterious pollutant from new motor vehicles. ... Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.[4]

In May 2007, the President signed an executive order directing EPA and other federal agencies to develop regulations to address greenhouse gas emissions from motor vehicles.[5] The

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[1] U.S. Environmental Protection Agency, EPA Denies Petition to Regulate Greenhouse Gas Emissions from Motor Vehicles (Aug. 28, 2003) (online at http://yosemite.epa.gov/opa/admpress.nsf/fb36d84bf0a1390c8525701c005e4918/694c8f3b7c16ff6085256d900065fdad!OpenDocument).

[2] U.S. Supreme Court, *Massachusetts et al v. Environmental Protection Agency et al.* (Apr. 2, 2007) (online at http://www.supremecourtus.gov/opinions/06pdf/05-1120.pdf).

[3] *Id.*

[4] *Id.*

[5] White House Office of the Press Secretary, *Executive Order: Cooperation Among Agencies in Protecting the Environment with Respect to Greenhouse Gas Emissions From Motor*

President explicitly stated that this order was in response to *Massachusetts v. EPA*. President Bush said:

> Last month, the Supreme Court ruled that the EPA must take action under the Clean Air Act regarding greenhouse gas emissions from motor vehicles. So today, I'm directing the EPA and the Departments of Transportation, Energy, and Agriculture to take the first steps toward regulations that would cut gasoline consumption and greenhouse gas emissions from motor vehicles.[6]

You testified before the House Oversight and Government Reform Committee on November 8, 2007. At that hearing, you said EPA would release proposed regulations by the end of the year, stating:

> While the Supreme Court's decision in *Massachusetts v. EPA* makes clear that carbon dioxide and other greenhouse gases are pollutants under the Clean Air Act, it also makes clear that the agency must take certain steps and make certain findings before a pollutant becomes subject to regulation under the law. Those steps include making a finding that a pollutant endangers public health or welfare, and developing the regulations themselves. The EPA plans to address the issue of endangerment when we propose regulations on greenhouse gas emissions for motor vehicles and fuels later this year.[7]

You went on to state: "I have committed to members of Congress and to the President that we will have that proposed regulation out for public notice and comment beginning by the end of this year and to work toward a final rule by the end of next year."[8]

The Recommendations of EPA's Career Staff

After the President's May 2007 executive order, EPA assembled a large team of experienced career officials to work on the endangerment finding and the regulation of CO_2. Karl Simon, the Director of the Compliance and Innovative Strategies Division in EPA's Office of Transportation and Air Quality, was asked by Committee staff how many EPA officials were assigned to these tasks. He answered: "Sum total for the endangerment finding, the vehicle

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Vehicles, Nonroad Vehicles, and Nonroad Engines (May 14, 2007) (online at http://www.whitehouse.gov/news/releases/2007/05/20070514-1.html).

[6] White House Office of the Press Secretary, *President Bush Discusses CAFE and Alternative Fuel Standards* (May 14, 2007).

[7] House Oversight and Government Reform Committee, Testimony of Stephen Johnson, Administrator, *EPA Approval of New Power Plants: Failure to Address Global Warming Pollutants*, 110th Cong. (Nov. 8, 2008).

[8] *Id.*

portion and the fuel portion is somewhere on the order of 60 or 70."[9] In the Office of Transportation and Air Quality alone, 53 officials worked full-time on the effort from May through December 2007, according to Margo Oge, the Director of the Office of Transportation and Air Quality.[10] These staff resources were supplemented by outside contractor resources with a $5.3 million budget in FY 2007.[11]

The process the staff followed was exhaustive. To assess whether CO_2 endangers health and welfare, the Office of Atmospheric Programs prepared multiple drafts of a technical support document that generated "about 500 comments" from "internal EPA review, external Federal expert review and ... other interagency comments."[12] The agencies that reviewed this document included the National Oceanic and Atmospheric Administration, the National Aeronautics and Space Administration, the Department of Energy, and the White House Office of Science and Technology Policy.[13]

The career staff concluded that CO_2 emissions endanger both human health and welfare. According to Benjamin DeAngelo, EPA's Senior Analyst for Climate Change, the career staff reached this conclusion because "we thought that was most consistent with the underlying science."[14] On the issue of whether CO_2 emissions harm health, Brian McLean, the Director of the Office of Atmospheric Programs, told the Committee: "ultimately climate change can cause, through various direct and indirect effects — mostly indirect effects — consequences for public health."[15]

According to EPA staff, the proposal to regulate CO_2 emissions from motor vehicles was "about 300 pages" and had "extensive analysis about ... the costs and benefits."[16] This proposal was developed with close consultation with the National Highway Traffic Safety Administration. According to one EPA staff involved, it was a "collaborative effort" and "we worked quite

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[9] Transcript of Interview of Karl Simon, 155 (Jan. 30, 2008).

[10] Transcript of Interview of Karl Simon (Jan. 30, 2008); Transcript of Interview of Margo Oge (Feb. 7, 2008).

[11] Letter from Stephen Johnson, Administrator, U.S. EPA, to Chairman Henry A. Waxman, House Oversight and Government Reform Committee (Mar. 3, 2008).

[12] Transcript of Interview of Benjamin DeAngelo, 97 (Feb. 12, 2008).

[13] Transcript of Interview of Benjamin DeAngelo, 97 (Feb. 12, 2008).

[14] Transcript of Interview of Benjamin DeAngelo, 106 (Feb. 12, 2008).

[15] Transcript of Interview of Brian McLean, 50 (Feb. 5, 2008).

[16] Transcript of Interview of Margo Oge, 17 (Feb. 7, 2008).

extensively together on the tools we would use, the time frame under which we would operate, how we would construct the rulemaking."[17]

Ms. Oge, the Director of the Office of Transportation and Air Quality, told the Committee that there were also "2, 3 meetings a week" between "EPA political people, OMB, DOE, Ag, DOT on an ongoing basis."[18] Mr. McLean, the Director of the Office of Atmospheric Programs, confirmed this point, stating:

> I'm not aware of the content of any communication, but I'm aware that there were numerous meetings between people at EPA and people in other agencies. ... I believe OMB chaired a lot of those meetings.[19]

The proposal developed by the career EPA staff called for significant reductions in CO_2 emissions from motor vehicles. According to EPA officials, the agency's analysis showed that motor vehicles could achieve CO_2 emission reductions equal to a fleet fuel economy standard of 35 miles per gallon by 2018.[20] This nationwide standard is not as stringent as the California proposal, which called for achieving the equivalent of 35 miles per gallon by 2017 and achieving over 40 miles per gallon in 2020.[21] But it is significantly more stringent than the corporate average fuel economy (CAFE) standards in the recently passed Energy Independence and Security Act of 2007 (EISA), which do not require new motor vehicles to meet that 35 miles per gallon standard until 2020.[22]

Consideration by the EPA Administrator

Internal EPA documents indicate that you were scheduled to make decisions on the endangerment finding and the vehicle greenhouse gas rule as early as October 4, 2007. A

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[17] Transcript of Interview of Maureen Delaney (Feb. 11, 2008).

[18] Transcript of Interview of Margo Oge, 116 (Feb. 7, 2008).

[19] Transcript of Interview of Brian McLean, 15 (Feb. 5, 2008).

[20] Transcript of Interview of Karl Simon, 119-120 (Jan. 30, 2008).

[21] California Air Resources Board, Comparison of Greenhouse Gas Reductions Under CAFE Standards and ARB Regulations Adopted Pursuant to AB 1493, 7 (Jan. 2, 2008) (online at http://www.arb.ca.gov/cc/ccms/ab1493_v_cafe_study.pdf).

[22] Energy Independence and Security Act of 2007, Pub. L. No. 110-140, section 102.

"predecision GHG" meeting was scheduled with you on October 2, 2007.[23] A "decision GHG" meeting was scheduled with you on October 4, 2007.[24]

According to the EPA staff who spoke with the Committee, you were personally involved in the decisionmaking. One official said you asked for three briefings on the endangerment finding and read the technical support document "cover to cover."[25] Another official told the Committee that you may have participated in "five, maybe more" briefings.[26]

According to your staff, you supported their recommendations on two key points: (1) you agreed that CO_2 emissions endanger welfare and (2) you backed their proposal to reduce CO_2 emissions from motor vehicles. The main staff recommendation you rejected was the staff finding that CO_2 emissions also endangered human health. Five separate EPA officials told the Committee that you personally made the decision to exclude public health from the endangerment finding.[27]

After you endorsed the finding that CO_2 emissions endanger welfare, the proposed determination was submitted to the White House Office of Management and Budget. Dina Kruger, the Director of the Climate Change Division, told the Committee that the endangerment finding was transmitted to OMB "right around December 7 or 8."[28] Other EPA staff similarly recollected that the finding was sent to the White House "around December 6th"[29] or "around December 5th."[30] The transmittal of the endangerment finding to the White House was confirmed by the Director of the Office of Atmospheric Programs,[31] the Director of the Office of Policy Analysis and Review,[32] and the Director of the Office of Transportation and Air Quality.[33]

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[23] E-mail from Barbara Morris to Jim Ketcham Colwill et al. (Aug. 30, 2007) (bate stamped EPA 522).

[24] *Id.*

[25] Transcript of Interview of Benjamin DeAngelo, 94, 103 (Feb. 12, 2008).

[26] Transcript of Interview of Dina Washburn Kruger, 92 (Jan. 31, 2008).

[27] *See*, Transcript of Interview of Brian McLean, 68-69 (Feb. 5, 2008); Transcript of Interview of Robert David Brenner, 76 (Feb. 6, 2008); Transcript of Interview of Margo Oge, 120 (Feb. 7, 2008); Transcript of Interview of Maureen Delaney, 45-46 (Feb. 11, 2008); Transcript of Interview of Benjamin DeAngelo, 104 (Feb. 12, 2008).

[28] Transcript of Interview of Dina Washburn Kruger, 37 (Jan. 31, 2008).

[29] Transcript of Interview of Maureen Delaney, 88 (Feb. 11, 2008).

[30] Transcript of Interview of Benjamin DeAngelo, 108 (Feb. 12, 2008).

[31] Transcript of Interview of Brian McLean, 44-45 (Feb. 5, 2008).

[32] Transcript of Interview of Robert David Brenner, 74 (Feb. 6, 2008).

Around the same time, the proposal to reduce CO_2 emissions was transmitted to the Department of Transportation for review.[34] Ms. Oge, the Director of the Office of Transportation and Air Quality stated that the draft rule was sent to NHTSA "maybe the second week of December."[35]

Suspension of the EPA Regulatory Effort

The career EPA staff who the Committee interviewed did not know what communications you or other political appointees in the agency may have had with White House officials. But they did tell the Committee that after the White House received the endangerment finding and the Department of Transportation received the proposed motor vehicle regulation, work on the finding and regulation was stopped.

According to Mr. McLean, the Director of the Office of Atmospheric Programs, OMB has not engaged EPA in reviewing the endangerment finding.[36] This was confirmed by Ms. Kruger, the Director of the Climate Change Division, who stated that the agency has not worked on the endangerment finding "since coming back from the holidays."[37]

Ms. Oge, the Director of the Office of Transportation and Air Quality, provided a similar report regarding the proposal to reduce CO_2 emissions from motor vehicles. She told the Committee that the work on the vehicle CO_2 rule "stopped when we sent the document to the Department of Transportation."[38]

According to EPA staff, they have been informed that work has been discontinued so that EPA's activities can be reassessed in light of enactment of the Energy Independence and Security Act of 2007. One staffer stated that he believed there was a "desire to take a step back and to look at the rulemaking in light of the energy bill that had passed ... from the political level of EPA."[39] Another staffer stated that work discontinued on December 19, the day the Energy Independence and Security Act was signed, and that it was unclear "what would go forward following the new legislation."[40]

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[33] Transcript of Interview of Margo Oge, 105 (Feb. 7, 2008).

[34] Transcript of Interview of Karl Simon, 120 (Jan. 30, 2008).

[35] Transcript of Interview of Margo Oge, 105 (Feb. 7, 2008).

[36] Transcript of Interview of Brian McLean, 70 (Feb. 5, 2008).

[37] Transcript of Interview of Dina Washburn Kruger, 35 (Jan. 31, 2008).

[38] Transcript of Interview of Margo Oge, 105 (Feb. 7, 2008).

[39] Transcript of Interview of Benjamin DeAngelo, 89 (Feb. 12, 2008).

[40] Transcript of Interview of Maureen Delaney, 39-40 (Feb. 11, 2008).

There has, however, been no request to EPA staff to analyze whether passage of the law changes the analysis of the costs and benefits of the proposed EPA regulation. EPA staff informed the Committee that there was currently no "leadership direction"[41] and that staff "are awaiting direction."[42] According to Robert Brenner, the Director of the Office of Policy Analysis and Review:

> I have been in meetings where questions have been asked about what the likely schedule would be for the rules. But I have not heard any decisions on what a likely schedule would be, and I have not heard any specifics of work being done at this point on the rulemakings.[43]

As a legal matter, the passage of provisions in the Energy Independence and Security Act requiring the Department of Transportation to strengthen federal CAFE standards does not affect EPA's legal obligation to regulate CO_2 emissions. The Act included language to ensure that a change in CAFE requirements did not affect the Clean Air Act's provisions.[44] Moreover, the Supreme Court held in *Massachusetts v. EPA*:

> The fact that DOT's mandate to promote energy efficiency by setting mileage standards may overlap with EPA's environmental responsibilities in no way licenses EPA to shirk its duty to protect the public "health" and "welfare."[45]

Indeed, you have personally acknowledged that enactment of the Energy Independence and Security Act does not change the mandatory nature of EPA's responsibility. In January, you

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[41] Transcript of Interview of Maureen Delaney, 40 (Feb. 11, 2008).

[42] Transcript of Interview of Karl Simon, 121 (Jan. 30, 2008).

[43] Transcript of Interview of Robert David Brenner, 82 (Feb. 6, 2008).

[44] The Energy Independence and Security Act of 2007 states:

> SEC. 3. RELATIONSHIP TO OTHER LAW.
>
> Except to the extent expressly provided in this Act or an amendment made by this Act, nothing in this Act or an amendment made by this Act supersedes, limits the authority provided or responsibility conferred by, or authorizes any violation of any provision of law (including a regulation), including any energy or environmental law or regulation.

Pub. L. No. 110-140 (2007), Sec. 3.

[45] U.S. Supreme Court, *Massachusetts et al v. Environmental Protection Agency et al.* (Apr. 2, 2007) (online at http://www.supremecourtus.gov/opinions/06pdf/05-1120.pdf).

testified before the Senate that the Act does not "relieve me or the agency of its responsibilities under the Clean Air Act and under *Massachusetts v. EPA*."[46]

Conclusion

With your support, EPA made progress last year in responding to the Supreme Court decision in *Massachusetts v. EPA*. According to the statements of multiple career EPA officials, you approved a finding that CO_2 emissions endanger welfare and supported a proposal that would significantly curtail CO_2 emissions from motor vehicles. This proposal would apparently require CO_2 emission reductions equivalent to achieving a 35 miles per gallon CAFE standard by 2018.

It appears, however, that this effort was halted after the White House and the Department of Transportation received copies of your proposals. The Committee is seeking additional information regarding the circumstances that caused this delay.

To assist the Committee's investigation into this matter, I request that you provide the Committee with copies of the documents relating to the endangerment finding and the greenhouse gas vehicle rule, including copies of any communications with the White House and other federal agencies about these proposals.

As an initial step, I ask that you provide the following documents to the Committee by March 14, 2008:

- The technical support document prepared by the Office of Atmospheric Programs;
- The proposed endangerment finding that was transmitted to the White House Office of Management and Budget in December 2007; and
- The proposed vehicle greenhouse gas rule that was transmitted to NHTSA in December 2007.

The other responsive documents should be provided to the Committee by March 28, 2008.

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[46] Senate Committee on Environment and Public Works, *Oversight of EPA's Decision to Deny the California Waiver*, 110th Cong. (Jan. 24, 2008).

The Committee on Oversight and Government Reform is the principal oversight committee in the House of Representatives and has broad oversight jurisdiction as set forth in House Rule X. An attachment to this letter provides additional information about how to respond to the Committee's request.

If you have any questions concerning this request, please have your staff contact Greg Dotson or Jeff Baran of the Committee staff at (202) 225-4407.

Sincerely,

Henry A. Waxman
Chairman

Enclosure

cc: Tom Davis
Ranking Minority Member

EXHIBIT F

ATTORNEYS GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS AND
THE STATES OF ARIZONA, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, IOWA,
MAINE, MARYLAND, MINNESOTA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON,
RHODE ISLAND, VERMONT, AND WASHINGTON,
THE CITY SOLICITOR FOR THE CITY OF BALTIMORE,
AND THE CORPORATION COUNSEL FOR THE CITY OF NEW YORK

January 23, 2008

Stephen L. Johnson
Administrator
U.S. Environmental Protection Agency
United States Environmental Protection Agency 1101A
U.S. EPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: *Massachusetts v. EPA* remand

Dear Administrator Johnson:

We are writing today because of our concern about the progress of the administrative proceedings on remand from last year's U.S. Supreme Court ruling in *Massachusetts v. EPA*, 549 U.S. ___, 127 S.Ct. 1438 (2007). For the reasons set forth below, we believe that EPA is unreasonably delaying action on the remand, and we request a response by February 27, 2008, regarding the agency's specific intentions for moving that remand forward.

As you know, in *Massachusetts v. EPA,* we and other parties challenged EPA's refusal to regulate greenhouse gas emissions from motor vehicles pursuant to the federal Clean Air Act. The Court ruled that EPA had authority to regulate greenhouse gases under the Clean Air Act. 127 S.Ct. at 1459-62. The Court also ruled that EPA had relied on improper policy grounds in denying a rulemaking petition that had been filed under Section 202 of the Act, and it ordered the agency to revisit the rulemaking petition based on proper statutory factors. *Id.* at 1462-63. As EPA itself described the Court's mandate just last month:

> On April 2, 2007, the Supreme Court ruled that the EPA must determine, under Section 202(a) of the Clean Air Act, whether greenhouse gas emissions (GHG) from new motor vehicles cause or contribute to air pollution that endangers public health or welfare.

72 Fed. Reg. 69934 (December 10, 2007).

In response to the Court's ruling, you repeatedly indicated that the agency would be moving forward with regulation under Section 202 and other provisions of the Clean Air Act. *See e.g.,* Statement of Stephen L. Johnson, to House Select Committee on Energy Independence and Global Warming (June 8, 2007). In this manner, you acknowledged that the agency has concluded that the endangerment threshold has in fact been crossed. In order to keep the regulatory process on track, we urged you immediately to begin the formal process of making a determination of endangerment through publishing a formal notice to that effect. *See e.g.,* Testimony of Attorney General Martha Coakley to House Select Committee on Energy Independence and Global Warming (June 8, 2007). While you declined to take this step, you did on numerous occasions state that the agency would formally propose new regulations pursuant to the Clean Air Act, including under Section 202, by the end of 2007, with final regulations in place by the end of October 2008. Indeed, you reaffirmed that intent in a formal "regulatory plan" published on December 10, 2007. 72 Fed. Reg. 69934. Nevertheless, the end of 2007 has come and gone without any regulatory action by the agency and without any new commitment as to when the agency would act.

We are aware that Congress has enacted the Energy Independence and Security Act of 2007, which President Bush signed into law on December 19, 2007. That act tightened the fuel economy standards for motor vehicles under the Energy Policy and Conservation Act (EPCA). But such changes to EPCA do not affect EPA's authority or duties under Section 202 of the Clean Air Act or under the Supreme Court's remand. As the Supreme Court has emphasized, EPA's statutory obligation to protect public health and welfare is "wholly independent" from EPCA's "mandate to promote energy efficiency." 127 S.Ct. at 1462. Moreover, in enacting the new legislation, Congress could not have been clearer that it was not modifying EPA's existing obligations under other statutes. *See* P.L. 110-140, 2007 HR slip, § 3 ("Except to the extent expressly provided in this Act, or an amendment made by this Act, nothing in this Act or an amendment made by this Act supersedes, limits the authority provided or responsibility conferred by, or authorizes violation of any provision of law (including a regulation), including any energy or environmental law or regulation.").

The rulemaking petition at issue in *Massachusetts v. EPA* was filed in 1999, now almost a decade ago. EPA's failure to exercise its clear authority under the Clean Air Act and to act on the petition constitutes an abdication of its regulatory responsibility. We once again urge EPA immediately to begin the regulatory process by publishing formal notice of EPA's conclusion that greenhouse gas emissions from motor vehicles and other sources "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." *See* 42 U.S.C. 7521(a). There is no valid reason for EPA to continue to delay moving the regulatory process forward in this manner. We note, for example, that immediately beginning the formal process of making an endangerment determination will still allow the agency additional time to deliberate over regulatory design issues involved in actually setting the applicable emissions standards.

In sum, according to EPA's own schedule, it is past time for EPA to take action on the *Massachusetts v. EPA* remand, and we urge you to move forward at once. If EPA continues unreasonably to delay its actions on the remand, we intend to take action to enforce the D.C. Circuit's mandate. Please let us know in writing by February 27, 2008, specifically what EPA's plans are to comply with the mandate.

If you would like to discuss this further, feel free to contact us directly or to have your staff follow up with Massachusetts Assistant Attorney General James R. Milkey. His contact information is: James R. Milkey, Assistant Attorney General, Chief, Environmental Protection Division, Massachusetts Office of the Attorney General, One Ashburton Place, Boston, MA 02108; (617) 727-2200, ext. 2439 (ph); (617) 727-9665 (fax); jim.milkey@state.ma.us.

Thank you very much.

Very truly yours,

Martha Coakley
Massachusetts Attorney General

Terry Goddard
Arizona Attorney General

Edmund G. Brown Jr.
California Attorney General

Richard Blumenthal
Connecticut Attorney General

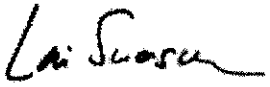
Joseph R. Biden, III
Delaware Attorney General

Lisa Madigan
Illinois Attorney General

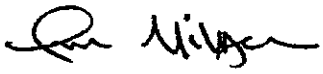
Tom Miller
Iowa Attorney General

G. Steven Rowe
Maine Attorney General

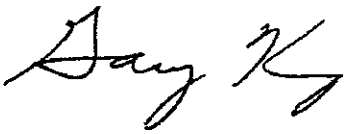
Douglas F. Gansler
Maryland Attorney General



Lori Swanson
Minnesota Attorney General



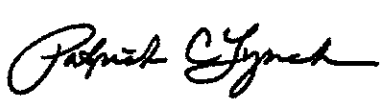
Anne Milgram
New Jersey Attorney General



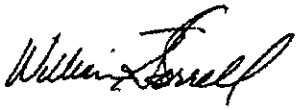
Gary King
New Mexico Attorney General

Andrew M. Cuomo
New York Attorney General

Hardy Myers
Oregon Attorney General



Patrick C. Lynch
Rhode Island Attorney General



William H. Sorrell
Vermont Attorney General

Rob McKenna
Washington Attorney General

George A. Nilson
Baltimore City Solicitor

Michael A. Cardozo
New York City Corporation Counsel

cc. Honorable Michael B. Mukasey
Attorney General

EXHIBIT G

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

February 27, 2008

OFFICE OF
AIR AND RADIATION

The Honorable Martha Coakley
Attorney General of Massachusetts
Boston, Massachusetts 02108

Dear Madame Attorney General:

Thank you for your letter of January 23, 2008, to Administrator Johnson regarding the U.S. Environmental Protection Agency's (EPA) response to the U.S. Supreme Court ruling in Massachusetts v. EPA, 549 U.S. ___, 127 S.Ct. 1438 (2007).

Since the President's announcement on May 14, 2007, and consistent with the Executive Order issued that day, EPA has spent a considerable amount of time analyzing and developing draft regulations to control greenhouse gas (GHG) emissions from the transportation sector. This effort has involved significant work not only on the issues involved in the remand of the rulemaking petition in the Massachusetts case (e.g., motor vehicles under section 202 of the Clean Air Act), but also on issues regarding the regulation of fuels under other sections of the Clean Air Act.

As you are aware, the Energy Independence and Security Act of 2007 (EISA) was signed into law on December 19 of last year. That law revised the renewable fuels provisions in section 211(o) of the Clean Air Act. It also affected the Department of Transportation's (DOT) authority for setting Corporate Average Fuel Efficiency (CAFE) standards, including providing for consultation with the Department of Energy and EPA. Given the passage of EISA, and consistent with the Executive Order and the consultation provision in EISA, EPA is analyzing how to proceed on the issues before us on the remand, as well as how to proceed on any rulemaking that would regulate or substantially and predictably affect emissions of greenhouse gases from vehicles and engines.

As a result, at this time, the Agency does not have a specific timeline for responding to the remand. However, let me assure you that developing an overall strategy for addressing the serious challenge of global climate change is a priority for the Agency, and we are taking very seriously our responsibility to develop an effective, comprehensive strategy.

Again, thank you for your letter. I appreciate the opportunity to be of service and trust the information provided is helpful.

Sincerely,

Robert J. Meyers
Principal Deputy Assistant Administrator

EXHIBIT H

STEPHEN L. JOHNSON
ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE SELECT COMMITTEE ON ENERGY INDEPENDENCE AND GLOBAL WARMING
U.S. HOUSE OF REPRESENTATIVES
MARCH 13, 2008

Mr. Chairman and members of the Committee, I appreciate the opportunity to discuss with you today the Environmental Protection Agency's response to several important developments concerning the federal government's efforts to address the serious issue of global climate change. Those developments include the Supreme Court's April 2, 2007 decision in *Massachusetts v. EPA,* the President's May 14, 2007 Executive Order on control of greenhouse gas emissions from motor vehicles, nonroad vehicles, and nonroad engines, and the December 19, 2007 enactment of the Energy Independence and Security Act (EISA). In response to those developments, EPA and the Departments of Transportation, Energy and Agriculture have been hard at work developing additional measures for reducing greenhouse gas (GHG) emissions in ways that help protect and enhance this nation's environment, economy and energy security.

Vehicle and fuel standards that reduce GHG emissions are key elements of a national approach for addressing the challenge of global climate change. Through his "Twenty in Ten" initiative, the President committed the United States to take the lead in reducing GHG emissions by pursuing new, quantifiable actions. Congress agreed by approving new fuel and vehicle fuel economy standards as part of EISA. These national standards recognize that climate change is a global problem and are part of the solution.

The changes brought about by EISA will prevent billions of metric tons of GHG emissions to the atmosphere.

Last summer, in response to the Supreme Court's decision in *Massachusetts v. EPA* and the President's Executive Order, EPA began work with DOE, USDA, and DOT to develop new regulations that would cut GHG emissions from motor vehicles and their fuels. This effort included the establishment of a number of technical staff teams, including one focused on the development of a vehicle rule, one on a fuels rule, and another on an endangerment determination.

EPA had planned to propose the GHG rules by the end of 2007, but this did not occur. A major factor contributing to this result was Congress' approval and the President's signature into law of EISA on December 19, 2007. In this regard, EISA amended Clean Air Act provisions requiring a Renewable Fuels Standard (RFS) that were first established in the Energy Policy Act of 2005. EISA also separately amended existing Energy Policy and Conservation Act (EPCA) provisions with regard to the Department of Transportation's authority to set Corporate Average Fuel Economy (CAFE) Standards.

With regard to the RFS, Congress amended Section 211(o) of the Clean Air Act to increase the RFS from 7.5 billion gallons in 2012 to 36 billion gallons in 2022. There are a number of significant differences between the RFS provisions of EISA and the fuels program EPA was developing under the President's Twenty-in-Ten plan. As a result,

substantial new analytical work is required, including new analyses related to renewable fuel lifecycle emissions, costs and benefits of EISA fuel volumes, and the environmental, economic, and energy security impacts of these fuel volumes. In addition, as a result of the legislation's inclusion of a regulatory deadline of December 2008 for many of the RFS provisions, EPA is currently in the process of developing necessary implementing regulations specific to the new law's requirements.

With regard to motor vehicle regulations, EISA did not amend Section 202 of the Clean Air Act, which contains EPA's general authority to regulate air emissions from motor vehicles and motor vehicle engines. However, EISA did substantially alter the Department of Transportation's authority to set mileages standards for cars and trucks under EPCA, which directly affects the emission of carbon dioxide from new motor vehicles. The legislation directs the Department to set CAFE standards that ultimately achieve fleet-wide average fuel economy of at least 35 miles per gallon by 2020. It also directs the Department to set the standards for five years at a time, and mandates the use of attribute-based standards.

This new statutory authority, which is now less than three months old, has required DOT to review the previous regulatory activities that it had undertaken pursuant to Executive Order 13432. Since the Executive Order requires close coordination between EPA and other Federal agencies and, since EISA itself requires consultation between EPA and DOT with regard to new CAFE standards affecting cars and trucks, it

is therefore incumbent on EPA to work with DOT on new standards which rely on the new law.

EPA recognizes that the new energy law does not relieve us of our obligation to respond to the Supreme Court's decision in *Massachusetts v. EPA*. We are formulating a response as part of our development of an overall approach to most effectively address GHG emissions. A decision to control GHG emissions from motor vehicles would impact other Clean Air Act programs with potentially far-reaching implications for many industrial sectors, so it is vitally important that we consider our approach to GHG control from this broader perspective.

In developing an overall GHG approach, we have come to appreciate the complexity and interrelationship of potential approaches to GHG regulation under the Clean Air Act, and the resulting importance of developing a sound, comprehensive approach. For example, as we gather information to identify the potential universe of affected facilities if GHGs are regulated under the Act, we recognize that thresholds used for Prevention of Significant Deterioration (PSD) determinations may greatly increase the number of facilities subject to the New Source Review permitting program. Using a 250-ton per year threshold, examples of facilities that could be newly subject to Clean Air Act permitting requirements include large apartment buildings, schools, hospitals and retail stores. In addition, for many combustion sources, some of the most effective mechanisms for mitigating GHGs, such as carbon capture and sequestration, need

significant study and development before they could be implemented in a regulatory approach.

EPA is making progress in evaluating the availability and potential use of various Clean Air Act authorities for GHG mitigation efforts, including the New Source Performance Standards (NSPS) program. The Agency is continuing to collect information to evaluate the scope of sources potentially affected; the flexibility, reasonableness, and effectiveness of potential options for regulation under each authority; and the potential implications of each decision, including the interrelationships between different parts of the Act. For example, we have compiled publicly available data on potential greenhouse gas emissions across industrial sectors and have evaluated the use of surrogate data to predict potential carbon dioxide emissions.

In view of these potential effects of Clean Air Act regulation, we are continuing to evaluate the availability and potential use of various CAA authorities for GHG mitigation, to determine the best overall approach for handling the challenge of global climate change for all sources, both mobile and stationary. While we continue to make progress in developing an approach, I cannot now commit to a certain date by which we will have a fully articulated approach in place or a response to the *Massachusetts* case completed.

As we go forward, I will keep the Committee apprised of EPA's response to the Supreme Court's opinion in *Massachusetts v. EPA* and the new energy law approved by Congress.

Thank you, Mr. Chairman and the members of the Committee for this opportunity. This concludes my prepared statement. I would be pleased to answer any questions that you may have.

EXHIBIT I

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

THE ADMINISTRATOR

March 27, 2008

The Honorable Barbara Boxer
Chairman
Committee on Environment
and Public Works
U. S. Senate
Washington, D.C. 20515

The Honorable James Inhofe
Ranking Member
Committee on Environment
and Public Works
U. S. Senate
Washington, D.C. 20515

Dear Chairman Boxer and Ranking Member Inhofe:

Knowing of your continued interest in the issues involving greenhouse gas emissions, I am writing to inform you of action I have taken today to move the Agency forward to examine these critical issues.

In the time since the Supreme Court's *Massachusetts v. EPA* decision I have benefited from extensive briefings by EPA staff as they worked to develop an initial response to that decision and I carefully considered how EPA should best move forward.

As we were working on this response, Congress passed and the President signed the Energy Independence and Security Act (EISA) which, among other things, expanded EPA's authority over renewable fuels and required the Department of Transportation to coordinate with EPA on its CAFE regulations. Thus, the EISA represents a statutory change that will have concrete effects upon the emissions of greenhouse gases though it does not change EPA's obligation to provide a response to the Supreme Court decision. In the weeks following the passage of this law, I considered a range of options for how to move forward.

In doing so, EPA has gone beyond the specific mandate of the Court under section 202 of the Clean Air Act and evaluated the broader ramifications of the decision throughout the Clean Air Act. This review has made it clear that implementing the Supreme Court's decision could affect many sources beyond just the cars and trucks considered by the Court, including schools, hospitals, factories, power plants, aircraft and ships. In fact, the Agency currently has many pending petitions, lawsuits, and deadlines that must be viewed in light of the Supreme Court's decision.

During this review, I considered the option of soliciting public input through an Advance Notice of Proposed Rulemaking (ANPR) as the Agency considers the specific effects of climate change and potential regulation of greenhouse gas emissions from stationary and mobile sources

under the Clean Air Act. I have concluded this is the best approach given the potential ramifications.

Such an approach makes sense because, as the Act is structured, any regulation of greenhouse gases – even from mobile sources – could automatically result in other regulations applying to stationary sources and extend to small sources including many not previously regulated under the Clean Air Act. Consequently, any individual decision on whether and how sources and gases should be regulated may dictate future regulatory actions to address climate change. My approach will allow EPA to solicit public input and relevant information regarding these interconnections and their possible regulatory requirements.

This approach gives the appropriate care and attention this complex issue demands. It will also allow us to use existing work. Rather than rushing to judgment on a single issue, this approach allows us to examine all the potential effects of a decision with the benefit of the public's insight. In short, this process will best serve the American public.

In the advance notice EPA will present and request comment on the best available science including specific and quantifiable effects of greenhouse gases relevant to making an endangerment finding and the implications of this finding with regard to the regulation of both mobile and stationary sources.

In addition, exploring the many relevant sections of the Clean Air Act, particularly those raised by groups requesting that we regulate greenhouse gases, we will highlight the complexity and interconnections within various sections of the Clean Air Act. EPA's advanced notice will also seek comment, relevant data, questions about and the implications of the possible regulation of stationary and mobile sources, particularly covering the various petitions, lawsuits and court deadlines before the Agency. These include the Agency response to the *Massachusetts v. EPA* decision, several mobile source petitions (on-road, non-road, marine, and aviation), and several stationary source rulemakings (petroleum refineries, Portland cement, and power plant and industrial boilers).

The advance notice will also raise potential issues in the New Source Review (NSR) program, including greenhouse gas thresholds and whether permitting authorities might need to define best available control technologies. If greenhouse gases were to become regulated under the NSR program, the number of Clean Air Act permits could increase significantly and the nature of the sources requiring permits could expand to include many smaller sources not previously regulated under the Clean Air Act. This notice will provide EPA an opportunity to hear from the public and from states on these issues.

In order to execute this plan, I have directed my staff to draft the ANPR to discuss and solicit public input on these interrelated issues. This advanced notice will be issued later this spring and will be followed by a public comment period. The Agency will then consider how to best respond to the Supreme Court decision and its implications under the Clean Air Act.

If you have additional questions or concerns, please contact me or EPA's Associate Administrator, Office of Congressional and Intergovernmental Relations, Chris Bliley, at 202-564-5200.

Respectfully,

Stephen L. Johnson

cc: Majority Leader Harry Reid
Minority Leader Mitch McConnell

EXHIBIT J

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 03 2008

THE ADMINISTRATOR

The Honorable Dianne Feinstein, Chair
Subcommittee on Interior, Environment,
and Related Agencies
Committee on Appropriations
United States Senate
Washington, D. C. 20510-6025

Dear Chairman Feinstein:

Thank you for your letter dated January 25, 2008, requesting information about the Environmental Protection Agency's (EPA) response to the U.S. Supreme Court's decision in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007). Following are responses to the questions submitted in your letter.

Question: Please provide a detailed update of the funds and staff time dedicated to the effort to evaluate whether greenhouse gases endanger public health and welfare to date. Please also provide a detailed update of the funds and staff time used to develop yet-to-be-publicized federal regulations that would limit the emissions of greenhouse gases.

Response: In FY 2007, in response to the Supreme Court's decision in *Massachusetts v. EPA* and the President's Executive Order 13432 issued May 14, 2007, EPA's Office of Air and Radiation (OAR) internally redirected $5.3 million in contract dollars and redeployed 53 staff members to begin work on an effort to develop new regulations that would cut greenhouse gas (GHG) emissions from motor vehicles and their fuels. This effort included the establishment of a number of technical staff teams, including one focused on the development of a vehicle rule, one on a fuels rule, another on an endangerment determination, and supporting teams conducting work on core analyses of the economics, costs, benefits, energy security, and environmental impacts of GHG rules. The payroll-related costs of this redirection of 53 staff members totaled approximately $1.4 million in FY 2007. This payroll cost, combined with the $5.3 million in contract resources, resulted in a total OAR allocation of approximately $6.7 million in FY 2007. All of the payroll dollars were expended in FY 2007. The contract dollars were for obligation in FY 2007 and supported OAR in FY 2007 and in FY 2008.

In response to your inquiry as to the funds and staff time dedicated to evaluate whether, in my judgment, emissions of GHGs cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare, approximately three to four staff members and approximately $50 thousand in contract dollars have supported EPA's efforts to date. The vast

majority of the FY 2007 dollars and FTE cited in the paragraph above were for the development of the draft proposed fuels and vehicle rules.

Going forward into FY 2008, the Agency continued work associated with the Executive Order, based on an expectation of completing final regulations in coordination with the Department of Transportation (DOT) by the end of calendar year 2008. EPA expected that during FY 2008 a significant amount of additional analyses would be required to support final rulemakings. OAR's FY 2008 resource plan developed prior to October 2007 called for the continued redirection of 53 staff members, and additional analytical work requiring $2.6 million in additional contract support. Thus, the EPA contract and payroll-related resources estimated in OAR's FY 2008 resource plan totaled approximately $9.3 million.[1] These estimates were developed prior to enactment of the Energy Independence and Security Act of 2007, P.L. 110-140.

Question: Please provide a detailed update of the funds and staff time you intend to utilize during FY 2008 to complete work on the endangerment finding and federal regulations that would limit the emissions of greenhouse gases.

Response: As indicated above, the Agency began FY 2008 by proceeding with its plan originally developed in response to the President's Statement of May 14, 2007. However, as a result of the passage of Energy Independence and Security Act of 2007 (EISA) on December, 19, 2007, the Agency is now in the process of considering the impact of EISA on our draft vehicle and fuel proposals, including its impact on our FY 2008 funding needs.

Work on the fuels proposal has continued. However, there are a number of significant differences between the renewable fuel standard (RFS) provisions of EISA and the fuels program EPA was developing under the President's 20-in-10 plan. As a result, substantial new analytical work will be required in FY 2008 on the renewable fuels rule. This includes new analyses related to renewable fuel lifecycle emissions, costs and benefits of EISA fuel volumes, and the environmental, economic, and energy security impacts of these fuel volumes. OAR's preliminary estimate is that this work will require at least $2.9 million in new contract funding in FY 2008. In addition, approximately 38 staff members and the associated payroll dollars will be required to support this new work.

The work that EPA will spend on any rule will depend on the nature of the coordination and consultation between EPA and the Department of Transportation.

Question: Please provide a detailed timeline demonstrating that EPA plans to respond to the U.S. Supreme Court remand expeditiously. Specifically, please include deadlines by which:

- EPA will issue the endangerment finding now at the Office of Management and Budget for review;

[1] The OAR resources noted here, and in other parts of the letter, represent the bulk of the Agency's resources devoted to these rulemaking efforts. Other offices at EPA that have supported these efforts include the Office of General Counsel, the Office of Research and Development, and the Office of the Administrator.

- EPA will publish drafts of any regulations necessary as a result of EPA's decision on the endangerment finding; and

- EPA will finalize regulations necessary as a result of your decision on the endangerment finding.

Response: Before the enactment of EISA, EPA was proceeding with work on all aspects of a possible regulation. Although EPA previously indicated that it planned to propose a greenhouse gas rulemaking by the end of 2007, this obviously did not occur. A major factor contributing to this result was the approval by Congress and the President's signature into law of EISA on December 19, 2007.

In this regard, EISA amended Clean Air Act provisions requiring a Renewable Fuels Standard (RFS) that were first established in the Energy Policy Act of 2005. EISA also separately amended existing Energy Policy and Conservation Act (EPCA) provisions with regard to the Department of Transportation's authority to set Corporate Average Fuel Economy (CAFE) Standards.

With regard to the RFS, Congress amended Section 211(o) of the Clean Air Act to increase the RFS from 7.5 billion gallons in 2012 to 36 billion gallons in 2022. The law makes numerous other significant changes. The net result of this enactment was to supplant much of the analysis that EPA had performed in conjunction with its federal partners in support of the greenhouse gas rulemaking effort relative to fuels. In addition, as a result of the legislation's inclusion of a regulatory deadline of December 2008 for many of the RFS provisions, EPA is currently in the process of developing necessary implementing regulations specific to the new law's requirements.

With regard to motor vehicle regulations, as I have testified before the Senate Environment and Public Works Committee, EISA did not amend Section 202 of the Clean Air Act, which contains EPA's general authority to regulate air emissions from motor vehicles and motor vehicle engines. However, it is abundantly clear that EISA did substantially alter the Department of Transportation's authority to set mileages standards for cars and trucks under EPCA, which directly affects the emission of GHGs from new motor vehicles. The legislation directs the Department to set CAFE standards to achieve at least a 35 miles per gallon standard by 2020, directs that rulemaking to focus on 5 year increments, and allows the broader use of attribute-based standards.

This new statutory authority, which is now less than two months old, has required DOT to review its previous regulatory activities that it had undertaken pursuant to Executive Order 13432. Since the Executive Order requires close coordination between EPA and other Federal agencies and, since EISA itself requires consultation between EPA and DOT with regard to new CAFE standards affecting cars and trucks, it is therefore incumbent on EPA to work with DOT on new standards which rely on the new law.

I am currently unable to provide you and the committee with the "detailed timeline" requested, though we are working to resolve the open issues as promptly as is feasible. I will,

however, endeavor to keep the Committee apprised of EPA's response both with regard to the Supreme Court's opinion in *Massachusetts v. EPA* and the new energy law approved by Congress.

I look forward to appearing before your Appropriations Subcommittee on March 4, 2008, to discuss the President's FY 2009 Budget Request.

Sincerely,

Stephen L. Johnson

No. 03-1361

U.S. Court of Appeals for the D.C. Circuit

Commonwealth of Massachusetts, *et al.*
Petitioners,
v.
United States Environmental Protection Agency,
Respondent.

CERTIFICATE OF SERVICE

I, David Bookbinder, a member of the Bar of this Court, hereby certify that on this 2d day of April, 2008, I have served the enclosed Petition for Mandamus for Enforcement of Mandate in the above proceeding on each party by mailing a copy, postage pre-paid, to each attorney listed below. We are also today sending an electronic copy of the document to each party or party's counsel for which an e-mail address appears below.

David Bookbinder
Sierra Club
408 C Street, NE
Washington D.C., 20002
(202) 548-4598

Jon M. Lipshultz
U.S. Department of Justice
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