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MASSACHUSETTS V. U.S. EPA, PART II: IMPLICATIONS OF THE SUPREME COURT DECISION

HEARING

BEFORE THE

SELECT COMMITTEE ON ENERGY INDEPENDENCE AND GLOBAL WARMING HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

MARCH 13, 2008

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HEARING ON MASSACHUSETTS v. U.S. EPA, PART II: IMPLICATIONS OF THE SUPREME COURT DECISION

THURSDAY, MARCH 13, 2008

HOUSE OF REPRESENTATIVES,
SELECT COMMITTEE ON ENERGY INDEPENDENCE
AND GLOBAL WARMING,
Washington, DC.

The Committee met, pursuant to call, at 9:30 a.m., in Room 1334 of the Longworth House Office Building, Hon. Edward Markey [chairman of the Committee] presiding.

Present: Representatives Markey, Inslee, Cleaver, Hall, Sensenbrenner, Walden, Sullivan and Blackburn.

Chairman MARKEY. Good morning, and welcome to the Select Committee on Energy Independence and Global Warming, and thank you all so much for being here today for our second hearing to focus on the afternoon of the landmark Supreme Court decision in Massachusetts v. EPA.

The Bush administration's approach to climate change policy has been to deny the science, delay the regulation, and dismiss the critics. The administration's denial of its own authority to regulate carbon dioxide as a pollutant under the Clean Air Act led to the Supreme Court's decision in Massachusetts v. EPA almost one year ago. The Supreme Court decision made a few things exceedingly clear.

Greenhouse gases are pollutants that can be regulated under the Clean Air Act. EPA's excuses for its failure to regulate greenhouse gas emissions from motor vehicles, including its excuse that the Department of Transportation sets fuel economy standard were all inadequate.

Under the Clean Air Act EPA must determine whether these emissions cause or contribute to air pollution, which may reasonably be anticipated to endanger public health or welfare, a determination often referred to as an endangerment finding.

And, finally, if the EPA does make a positive endangerment finding, it must regulate greenhouse gas emissions from motor vehicles.

In May of last year, the President directed EPA along with other agencies to prepare a regulatory response to the Supreme Court decision. In June the Select Committee held a hearing at which EPA Administrator Johnson appeared. He told us he was working on both the endangerment finding and the proposed regulations, and numerous statements made by him and other administration offi-

cials during the next six months indicated that the EPA was on track to issue a proposed rule by the end of last year and have final regulations in place by the end of this year.

Well, that did not happen. Instead, what we have learned from a steady stream of press reports and congressional hearings is that EPA, in fact, concluded that greenhouse gas emissions endanger public welfare and submitted its finding to OMB, the Office of Management and Budget, in December.

EPA, in fact, drafted greenhouse gas regulations for motor vehicles and submitted its draft to other agencies in December, and then according to numerous reports, EPA stopped all of its work in this area, except for its work to deny California, Massachusetts and more than a dozen other states the right to move forward with their own motor vehicle emissions standards.

And instead of cooperating with Congress, EPA has answered congressional inquiries for information with delays and denials that interfere with the work of this Committee and other Committees in the House.

In stark contrast to EPA's failure to lead, we have here today two witnesses who have been climate heroes in the State of Kansas. Unlike the EPA Administrator, who still cannot accept the scientific consensus and declare that greenhouse gas emissions are dangerous, Kansas used its own state authority to deny a permit for a new coal-fired power plant on just those grounds.

For its trouble, Governor Sebelius' administration has been subjected to an ad campaign comparing it to Vladimir Putin, Hugo Chavez, and Mahmoud Ahmadinejad, and the sponsor of the coal-fired plant, Sunflower Electric, has engaged in a full court press to change the law to its liking because it could not show that a new coal plant would not endanger public health or welfare.

Today the Committee seeks answers from Administrator Johnson. We are seeking documents we have been requesting for almost two months. We want an answer to when the last remaining environmental ministry head in the developed world will decide whether greenhouse gas emissions are dangerous. We will be looking for an answer to the question of when the federal government will begin to lead climate change policy by example instead of by doing everything possible to thwart the states who try to do their part to save the planet.

I think our witnesses today have an enormous responsibility. I thank them for testifying today, and I recognize now the Ranking Member, the gentleman from the State of Wisconsin, Mr. Sensenbrenner.

[The prepared statement of Mr. Markey follows:]



THE SELECT COMMITTEE ON
ENERGY INDEPENDENCE AND GLOBAL WARMING

Congressman Edward J. Markey (D-Ma), Chairman
Select Committee On Energy Independence And Climate Change
"*Massachusetts V. U.S. EPA Part II*: Implications Of The Supreme Court Verdict"
March 13, 2008

The Bush Administration's approach to climate change policy has been to deny the science, delay the regulation, and dismiss its critics. The Administration's denial of its own authority to regulate carbon dioxide as a pollutant under the Clean Air Act led to the Supreme Court's decision in *Massachusetts v. EPA* almost a year ago.

The Supreme Court decision made a few things exceedingly clear:

--Greenhouse gases are pollutants that can be regulated under the Clean Air Act.
--EPA's excuses for its failure to regulate greenhouse gas emissions from motor vehicles, including its excuse that the Department of Transportation sets fuel economy standards, were all inadequate.
--Under the Clean Air Act, EPA must determine whether these emissions cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare, a determination often referred to as an 'endangerment finding,' and
--If the EPA *does* make a positive endangerment finding, it must regulate greenhouse gas emissions from motor vehicles.

In May of last year, the President directed EPA, along with other agencies, to prepare a regulatory response to the Supreme Court decision. In June, the Select Committee held a hearing at which EPA Administrator Johnson appeared. He told us he was working on both the 'endangerment finding' and the proposed regulations, and numerous statements made by him and other Administration officials during the next 6 months indicated that the EPA was on track to issue a proposed rule by the end of last year, and have final regulations in place by the end of this year.

Well, that didn't happen. Instead, what we've learned from a steady stream of press reports and Congressional hearings is that:

--EPA in fact concluded that greenhouse gas emissions endanger public welfare, and submitted its finding to OMB in December.
--EPA in fact drafted greenhouse gas regulations for motor vehicles and submitted its draft to other agencies in December.
--And then, according to numerous reports, EPA stopped all of its work in this area – except for its work to deny California, Massachusetts, and more than a dozen other States the right to move forward with their own motor vehicle emissions standards.

And instead of cooperating with Congress, EPA has answered Congressional inquiries for information with delays and denials that interfere with the work of this Committee and other Committees of the House.

In stark contrast to EPA's failure to lead, we have here today two witnesses who have been climate heroes in the State of Kansas. Unlike the EPA Administrator, who still can't seem to accept the scientific consensus and declare

that greenhouse gas emissions are dangerous, Kansas used its own State authority to deny a permit for a new coal-fired power plant on just those grounds. For its trouble, Governor Sebelius's Administration has been subjected to an ad campaign comparing it to Vladimir Putin, Hugo Chavez and Mahmoud Ahmadinejad. And the sponsor of the coal-fired plant, Sunflower Electric, has engaged in a full court press to change the law to its liking because it could not show that its new coal plant would not endanger public health or welfare.

Today, the Committee seeks answers from Administrator Johnson. We are seeking documents we have been requesting for almost two months. We want an answer to when the last remaining Environmental Ministry head in the developed world will decide whether greenhouse gas emissions are dangerous. We will be looking for an answer to the question of when the federal government will begin to lead climate change policy by example, instead of doing everything possible to thwart States who try to do their part to save the planet.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

Global warming is a complicated and nuanced topic that needs smart and carefully devised solutions, and because the policies needed to achieve greenhouse gas reduction also stand to damage our economy, these policies must be both economically and politically feasible.

Left in the hands of regulators and the courts, greenhouse gas reductions could have serious consequences on our economy and our way of life, and I am afraid that the Massachusetts v. EPA Supreme Court decision runs the risk of putting this political question in the hands of unelected regulators.

Should the EPA determine it should regulate greenhouse gases through an endangerment finding, the effects could be far more reaching than anyone imagines. We are not just talking about new cars and ultimately power plants. As Peter Glazer of Troutman Sanders, LLP will testify today, this could include several types of buildings, including small factories, assisted living facilities, indoor sports centers, and even breweries. And where I come from, we do not like the sound of that.

By focusing on two laws, the Clean Air Act and the Endangered Species Act, the courts stand to extend the scope of these laws far beyond what they were intended to accomplish. Neither of these laws were written to deal with global warming, and using them in an effort to regulate greenhouse gases will result in a mishmash of policies that will have a heavy hand and an unpredictable impact on the economy.

Regulating greenhouse gas emissions through the Clean Air Act is particularly onerous, as anything that qualifies as a source like breweries and assisted living facilities I had mentioned above would have to receive the proper permits from the EPA for any type of expansion. This permitting process is expensive and time consuming and would come at a time when these expenses could create a heavy drag on the economy. There has to be a better way.

One of my principles in evaluating global warming policy is that it must advance technological progress. I am not sure how EPA regulations can accomplish this.

Additionally, I am confident that EPA regulation of domestic greenhouse gases would not be emulated by other countries, specifically China and India. By unilaterally enforcing greenhouse gas restrictions, the EPA could put the U.S. at a competitive disadvantage.

By using the Clean Air Act and other laws not intended to regulate greenhouse gases, activists are attempting to use the courts to push through heavy handed regulations that will result in significant trauma to our already slowing economy. I believe through technology we can find ways to control greenhouse gas emissions without causing that harm, and it is an alternate path that we must pursue.

I thank the Chair and yield back the balance of my time.

Chairman MARKEY. The gentleman's time has expired.

The Chair recognizes the gentleman from Washington State, Mr. Inslee, for an opening statement.

Mr. INSLEE. I am afraid waiting for the Bush administration to act on global warming makes waiting for Godot look like an action-

packed thriller. We are waiting with no action, but the planet is not.

The icecap in the Arctic that melted and lost one million square miles of the Arctic the size of six Californias did not wait for the Bush administration. The oceans that have 30 percent more acidity because of dissolved carbon dioxide, which may be a partial reason for the destruction of the salmon runs in the Pacific Ocean this year, is not waiting for the Bush administration. The far west, which is in the seventh or eighth year of a drought with consequence damage to the agricultural industry, is not waiting for the Bush administration.

And I just find it inexcusable, reading a quote from November 8, 2007, from EPA Administrator Johnson. "In addition, since the Supreme Court decision, we have announced that we are developing a proposed regulation to regulate greenhouse gas emissions from mobile sources. That is the first time in our nation's history, and 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 work toward a final rule by the end of next year."

The planet is not waiting, and just to know this is not some isolated example of the Bush administration intransigence on this, we had Secretary Bodman, just to know, Mr. Johnson, you are not alone in this; we had Secretary Bodman in front of our Commerce Committee a couple of weeks ago, and I asked him if he had read the IPC report, and our Secretary of Energy said no. And I asked him if he read the executive summary, and he said no. And I asked him if he had ever talked to the President of the United States. This is our Secretary of Energy, about how to fashion or whether to fashion a cap in trade system, and he said no.

You are not alone in abject failure dealing with this mortal threat to the planet Earth. You are on a team of failure, and I have to say it bluntly because that is the circumstance.

We do not have a lot of time here, and I just tell you that my constituents are most unhappy that the federal government is not following the law here.

Chairman MARKEY. The gentleman's time has expired.

The Chair recognizes the gentleman from Oregon, Mr. Walden.

Mr. WALDEN. Thank you very much, Mr. Chairman.

I want to welcome the EPA Administrator here today, and I appreciate the work that your agency is doing. I think we are all trying to figure out how to work our way through this process and do what is right for the planet without destroying our economy in the process and letting other major world polluters like China and India get a free ride.

I spent an hour in the former Speaker's office meeting with the lead negotiator for China who made it very clear that they expected us to do the heavy lift while they continue to pollute, while they continue to put new coal-fired plants on line, about one a week or one every ten days that are going to burn dirty coal, and they want to get away with that.

And I am not willing to sacrifice the economy for the people that I represent. I think there are things that we can and should be doing. I think Congress in the last energy bill took up the mantle

and helped move some of those things forward with conservation efforts, emphasis on renewable energy.

My district is home to a number of options for renewable energy. I want to know why we are not doing more to manage America's public forests better, why we allow the greenhouse gases to go up there when the fires come out. The Forest Service spends 47 percent of its budget fighting fire. Nine million acres went up last year. That's all emissions into the atmosphere. We are not properly managing America's forests, and anybody who has studied this issue knows the importance of health, green growing forests as carbon sequesters. We need to change forest policy as well.

Now, I know you do not have jurisdiction over that, but as we look at these issues, I think it is incredibly important to look broadly, not throw stones at each other, but say where can we work together to do the right thing for the planet, the right thing for the environment, and not self-destruct our economy.

Thank you, Mr. Chairman.

Chairman MARKEY. The gentleman's time has expired.

The Chair recognizes the gentleman from Missouri, Mr. Cleaver.

Mr. CLEAVER. Thank you, Mr. Chairman. Thank you, Ranking Member Sensenbrenner.

In particular, I would like to thank Administrator Stephen Johnson for returning to the Select Committee to update us on the EPA's endangerment findings. He indicated when he was here last summer that that update was proceeding. It is my hope and, I believe, the hope of this Committee and the need of this nation that Secretary Johnson will be able to give us an indication of what the EPA has discovered in their analysis and how it will affect future policy.

I recall that the Administrator acknowledged that global warming and greenhouse gas emissions are serious issues, and I am encouraged that Mr. Johnson and I agree on that issue.

However, I am awaiting a commitment by the EPA and the administration in general to do something to combat this reality. If the Environmental Protection Agency will do what it was created to do, it will protect the environment. The American people expect and deserve more from their government than what the administration is willing to give, even in the face of the scientific reality of climate change.

I look forward to and thank in advance our second panel for testifying before this Committee today, and for offering insight on the Supreme Court decision and on the future of U.S. energy policy and regulations. I anticipate that we can work together in forming the effective energy and environmental policy in order to protect our citizens and our planet.

The Supreme Court decision we discussed today was monumental, and I hope that we can build on this judgment on a national scale.

I thank all of our witnesses for being here today, and I look forward to becoming dialogical after your presentation.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Cleaver follows:]

U.S. Representative Emanuel Cleaver, II
5th District, Missouri
Statement for the Record
House Select Committee on Energy Independence and Global Warming Hearing
***"Massachusetts v. EPA* Part II: Implications of the Supreme Court Decision"**
Thursday, March 13, 2008

Chairman Markey, Ranking Member Sensenbrenner, other Members of the Select Committee, good morning. I would like to welcome our distinguished panel of witnesses to the hearing today.

In particular, I would like to thank Administrator Johnson for returning to the Select Committee to update us on the EPA's "endangerment findings" he indicated were in progress last summer. It is my hope, and the hope of the Committee, that Secretary Johnson will be able to give us an indication of what the EPA has discovered in their analysis, and how it will affect future policy. I recall that the Administrator acknowledged that "global warming and greenhouse gas emissions are serious issues." I am encouraged that Mr. Johnson and I agree on this issue. However, I am awaiting a commitment by the EPA and by the Administration in general to do something to combat this reality. If the Environmental Protection Agency will do what it was named to do, it will do just that – it will work to protect the environment. The American people expect more from their government than an Administration who is not willing to accept the scientific reality of climate change.

I would also like to thank our second panel for testifying before the Committee today, and for offering insight on the Supreme Court decision and on the future of energy policy and regulation in this country. I anticipate that we can work together in forming an effective energy and environmental policy in order to protect our citizens and our planet. The Supreme Court decision we discuss today was monumental, and I hope that we can build on this judgment on a national scale.

I thank all of our witnesses for their insight and their suggestions, and I appreciate them taking the time to visit with our committee this morning.

Thank you.

Chairman MARKEY. The gentleman's time has expired.

The Chair recognizes the gentle lady from Tennessee, Ms. Blackburn.

Ms. BLACKBURN. Thank you, Mr. Chairman, and thank you for the hearing today.

And I want to say welcome.

Chairman MARKEY. Is the gentlelady's microphone on?

Ms. BLACKBURN. Yes, sir, it is. Maybe I should use the voice that I use when I am trying to call the kids to the house, right? Speak a little lower.

Chairman MARKEY. That mother's voice is the most powerful voice ever created.

Ms. BLACKBURN. That mother's voice is always the most powerful voice on the face of the earth.

Chairman MARKEY. Maybe you should move over one microphone.

Ms. BLACKBURN. Okay.

Chairman MARKEY. I do not think they can hear you back there.

Ms. BLACKBURN. Let's see. That mic seems to be working a bit better.

We know that we are going to examine the implications of the Massachusetts v. EPA decision today, and I think that it is of particular interest to all of us about whether the EPA will regulate CO_2 as a pollutant under Section 202 and look at that as a pollutant that endangers the health of the American public.

If it does, then practically every business in every large facility is going to be subject to additional regulations. Many people know these are going to be heavy regulations and permitting requirements, and there is some anxiousness about that.

These facilities that we are discussing emit more than 250 tons of CO_2 per year, and under Section 202, they would have to obtain a prevention of significant deterioration permit and control technology requirements if they undertake any modifications that increases their CO_2 emissions, and I think, sir, you can understand why there is a bit of anxiousness around this.

And any facility would also need to obtain a PSD permit before it can be built and would have to comply with technology requirements.

These effects will go farther than the proposal by former President Bill Clinton, who said that we must not slow down the economy to reduce greenhouse gas emissions. So there is a little bit of head scratching and a little bit of uncertainty that is taking place.

We fear it could shut down the economy, but the U.S. currently faces several existing threats to its national security. Everyone is concerned about proliferation of weapons of mass destruction. They are concerned about terrorism. We hear about security every single day, and to drastically change our economy and devote significant time and resources to speculative dangers, such as CO_2 and climate change, is something that people are not certain they want to do right now.

If imminent threats are not addressed, the global warming issue will be moot. Mr. Chairman, even if the earth continues to warm and possibly cause events that threaten national security, the pre-

dicted outcomes are, at best, tentative, and the proposed solutions raise problems of their very own.

The EPA should resist any attempts to regulate CO_2 as a pollutant and instead should focus its resources on real, immediate, and measurable environmental dangers, not on ones that may or may not happen in the future.

I yield back.

Chairman MARKEY. The gentlelady's time has expired.

The Chair recognizes the gentleman from New York State, Mr. Hall.

Mr. HALL. Thank you, Mr. Chairman.

I would say that climate change is a real danger that is happening. It is obvious to me and my constituents. It is obvious to those who read the literature. It is obvious to the vast majority of scientists who have studied the issues, especially those who are not being employed by oil companies or others who benefit from the current energy policy that we have, and it is also, I think, you know, when you talk about national security, risks to our national security, probably the main one is the fact that we are spending billions of dollars a day to buy oil from unstable or despotic regimes in unstable parts of the world, and that's money that we do not have that we are borrowing from the Chinese and other countries thereby losing our sovereignty in the process because we cannot be honest with, for instance, the Chinese about Tibet or Darfur or North Korea, or they are arresting their own meditators in the park and taking them off to be reeducated, quote, unquote.

And at the same time we cannot be honest with the Saudis either about the madrasahs and the funding of Islamic young people who are then trained to hate or attack American, Israeli, or other interests in the West or in the Middle East.

And then as Tom Friedman writes in his column, we have to finance the other side of the War on Terror, too, by sending our troops and spending $12 billion, right at the moment fighting the wars that are currently in progress every month, and that is one of, I think, the main drivers of the economic problems we find ourselves in, as well as the environmental problems we find ourselves in. These are both threats to national security and to our economic security.

I contend the course that we are on now is unsustainable. I also believe that we can work together and ultimately will work together to find solutions that will actually create jobs rather than destroying jobs. That is what happened with the Clean Water Act, the Clean Air Act, with seatbelts, with the airbags, with all of the proposals that industry cried were going to kill their economic prospects and, instead, created whole new industries and new kinds of jobs in this country. And I look forward to our finding those solutions.

I thank the Chairman and yield back.

Chairman MARKEY. The gentleman's time has expired.

The Chair sees no other members who are seeking recognition for the purpose of making an opening statement. So we will turn to our first witness, who is Stephen Johnson, the Administrator of the Environmental Protection Agency.

We welcome you back to the Committee, sir. Whenever you are ready, please begin.

STATEMENT OF THE HONORABLE STEPHEN L. JOHNSON, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

Mr. JOHNSON. Thank you, and good morning, Mr. Chairman and members of the Committee. I appreciate the opportunity to discuss EPA's response to several important developments concerning the challenge of climate change.

Let me begin by saying I agree that climate change is a global challenge, and just as President Bush recognized during last September's major economies meeting, I believe the leading countries of the world are at a deciding moment when we must reduce greenhouse gas emissions instead of allowing the problem to grow.

I also agree that the United States must take the lead in reducing greenhouse gas emissions by pursuing new quantifiable actions. For example, the President committed the United States to reduce greenhouse gas emissions from motor vehicles as part of a national approach to address global climate change. And so I applaud Congress for answering the President's call to increase fuel and vehicle fuel economy standards as part of last December's Energy Independence and Security Act.

Also on the national level, EPA began to work with the Department of Energy, the Department of Agriculture, and the Department of Transportation last summer to develop regulations that would cut greenhouse gas emissions from motor vehicles and fuels, and due to the changes in the law created by the Energy Act, we are working to implement these new responsibilities.

As you know, the Energy Act increased the renewable fuel standard from 7.5 billion gallons by 2012 to 36 billion gallons by 2022. Since there are a number of significant differences between the provisions of the Energy Act and the Fuels Program EPA was developing under the President's Twenty in Ten Plan, EPA must perform substantially new analytical work. This work includes analysis of renewable fuel life cycle emissions, costs and benefits of Energy Act fuel volumes, and the environmental, economic, and energy security impacts of these fuel volumes.

The Energy Act did not change EPA's general authority to regulate air emissions from motor vehicles and from motor vehicle engines. However, it did alter the Department of Transportation's authority to set mileage standards for cars and trucks, which is the primary way emissions of CO_2 are reduced from new motor vehicles.

The energy bill directs the Department of Transportation to set CAFE standards that ultimately achieve a fleet-wide average fuel economy of at least 35 miles per gallon by 2020. This new statutory authority has required DOT to review the previous regulatory activities that it had undertaken pursuant to an executive order. Since both the executive order and the Energy Act require close coordination between EPA and other federal agencies, it is necessary for EPA to work with DOT on new standards to comply with the law.

The agency 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, and as we work to develop an overall approach to address greenhouse gas emissions, we appreciate that a decision regulating greenhouse gas emissions from any mobile source would impact other Clean Air Act programs and many industrial sources.

Therefore, it is vitally important that EPA consider our approach from this broader perspective. While I continue to consider an overall approach, EPA has begun implementing mandatory steps to address greenhouse gas emissions, which include the renewable fuel standard which significantly increases the volume of renewable fuels that has a lower greenhouse gas footprint than traditional fuels; collaboration with Department of Transportation as it sets the new CAFE standards of at least 35 miles per gallon; carbon sequestration storage regulations to insure our drinking water is protected as we reduce greenhouse gas emissions; and developing the greenhouse gas inventory as part of the omnibus appropriation legislation.

In addition, we are making progress in evaluating the availability and potential use of various Clean Air Act authorities for greenhouse gas and mitigation efforts. For example, we have compiled publicly available data on potential greenhouse gas emissions across industrial sectors. We have evaluated the use of surrogate data to predict potential carbon dioxide emissions.

In view of these potential effects of Clean Air Act regulation, EPA is continuing to evaluate the availability and potential use of various Clean Air Act authorities for greenhouse gas mitigation to determine the best overall approach for handling the challenge of global climate change for all sources, both mobile and stationary, and I will keep the Committee apprised of our progress.

Once again, thank you for the opportunity to testify this morning. Before I take questions, Mr. Chairman, I would ask that my full written statement be submitted for the record.

Chairman MARKEY. Without objection, so ordered.

Mr. JOHNSON. Thank you.

[The prepared statement of Mr. Johnson follows:]

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.

Chairman MARKEY. The Chair now recognizes himself for a round of questions.

Mr. Johnson, as you well know, the Committee invited you to testify at this hearing on January 15th, 2008, and in my letter of invitation, I asked you to provide the Committee prior to this hearing with a copy of the EPA's draft rule to regulate greenhouse gas emissions for motor vehicles. The Committee's letter noted that the rule had already cleared internal reviews and had been forwarded to the Department of Transportation for review in December of 2007.

By unanimous consent, I move that the Committee's correspondence with EPA be made part of the record of this hearing. Without objection, so ordered.

[The correspondence of the Committee follows:]

EDWARD J. MARKEY, MASSACHUSETTS
CHAIRMAN
EARL BLUMENAUER, OREGON
JAY INSLEE, WASHINGTON
JOHN B. LARSON, CONNECTICUT
HILDA L. SOLIS, CALIFORNIA
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F. JAMES SENSENBRENNER, JR., WISCONSIN
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Select Committee on
Energy Independence and Global Warming
U.S. House of Representatives

January 15, 2008

Stephen L. Johnson
Administrator, Environmental Protection Agency (EPA)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator Johnson:

I am writing to invite you to testify before the Select Committee on Energy Independence and Global Warming on February 7, 2008 in a room TBD regarding EPA's response to the Supreme Court's April 2007 decision in *Massachusetts v. EPA* and the President's May 14 Executive Order entitled "Cooperation Among Agencies in Protecting the Environment with Respect to Greenhouse Gas Emissions From Motor Vehicles, Nonroad Vehicles, and Nonroad Engines", as well as other developments related to the December 2007 passage of the Energy Bill.

As you know, the Supreme Court in *Massachusetts v. EPA* held that "Because greenhouse gases fit well within the Act's capacious definition of 'air pollutant,' EPA has statutory authority to regulate emission of such gases from new motor vehicles." The Court made clear that "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 . . . . The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency."

On May 14, 2007, President Bush responded to the Supreme Court decision by directing his Cabinet, with guidance in the form of an Executive Order, to undertake a coordinated effort to promulgate regulations to "protect the environment with respect to greenhouse gas emissions from motor vehicles, nonroad vehicles, and nonroad engines." You led the Cabinet's press conference announcing the Executive Order, making clear the EPA would be leading the regulatory efforts by stating that: "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." You also made clear, both in this press conference and in subsequent statements, that the Administration would issue a proposed rule in the fall of 2007.

It is my understanding that since the Executive Order was signed, EPA and the National Highway Traffic Safety Administration (NHTSA) have, in fact, spent a considerable amount of time coordinating with one another in order to respond to the regulatory directive set out by the President, and that such a proposal was drafted by EPA staff in order for it to be released in time to meet the fall 2007 target for doing so. In fact, a December 21, 2007 article in the LA Times indicated that "the proposed standard cleared all EPA internal reviews and was forwarded to the Department of Transportation" the week of December 10, 2007.

On December 19, 2007, the President signed the Energy Independence and Security Act of 2007, which directs EPA to ensure that the nation's fuel supply includes 36 billion gallons of renewable fuels by 2022, and directs NHTSA to ensure that the overall fuel economy of our car and light truck fleet is no less than 35 miles per gallon by 2020. Since the bill was signed into law, it is my understanding that all work on the EPA rulemaking in response to the Supreme Court's decision in *Massachusetts v. EPA* has ceased, raising questions as to whether EPA plans to abandon these efforts. Just recently, the press reported that White House Council on Environmental Quality Chairman James Connaughton indicated that the Administration was studying "the need for further regulations and additional policies on heat-trapping greenhouse gases from automobiles and industrial emitters following passage last month of a new fuel economy standard."

I am concerned that, despite the Supreme Court's determination that "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,'" EPA may be attempting to do just that in light of the passage of the Energy Independence and Security Act of 2007. Consequently, I request your appearance before the Select Committee to report on the status of the Agency's actions and plans in this sphere. Please ensure that your testimony includes responses to the following questions:

1. When will EPA release its conclusions regarding whether greenhouse gas emissions from automobiles contribute to pollution that may reasonably be anticipated to endanger public health or welfare? Has the EPA completed work on this portion of its response to *Massachusetts v. EPA*? If not, what remains to be done? If so, what are the reasons for the delay in its release? Has EPA concluded that passage of the Energy Independence and Security Act in any way impacts EPA's efforts or obligations regarding the "endangerment" determination, and if so, how?

2. When will EPA release the proposed vehicle and fuel regulations directed by the President in May 2007, under the guidance of the Executive Order? Has EPA completed work on this portion of its response to *Massachusetts v. EPA* and the May 2007 Executive Order? If not, what remains to be done? If so, what are the reasons for the delay in its release? Has EPA concluded that passage of the Energy Independence and Security Act of 2007 in any way impacts EPA's efforts or obligations in this area, and if so, how?

3. Assuming that EPA concludes that greenhouse gas emissions from automobiles contribute to pollution that may reasonably be anticipated to endanger public health or welfare, will EPA be announcing plans to develop regulations to reduce these emissions from stationary sources such as power plants or refineries? If so, when, and if not, why not? What is the status of EPA's consideration of these issues in the context of forthcoming new source performance standards for stationary sources or other relevant pending regulations?

I look forward to your testimony on this important matter. So that the Select Committee Members may adequately prepare for the hearing, please provide copies of the rulemaking documents referenced in the December 21, 2007 LA Times article that EPA forwarded to NHTSA by January 31, 2008. Thank you very much.

Sincerely,

Ed Markey

Edward J. Markey, Chairman
Select Committee on Energy Independence
& Global Warming

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

MAR 7 2008

OFFICE OF CONGRESSIONAL AND
INTERGOVERNMENTAL RELATIONS

The Honorable Edward J. Markey
Chairman
Select Committee on Energy Independence & Global Warming
U.S. House of Representatives
Washington, D.C. 20515-6143

Dear Mr. Chairman:

This is in response to your letter of January 15, 2008, in which you invited Environmental Protection Agency (EPA or Agency) Administrator Stephen L. Johnson to testify before the Select Committee regarding a number of issues identified in your letter, as well as requested that EPA provide you a copy of documents referenced in a December 21, 2007 *Los Angeles Times* article.

EPA respects your role as Chairman and is committed to accommodating to the extent possible the Select Committee's request for information to assist with its hearing. As the Administrator discussed with you recently, he plans to appear before the Select Committee at its March 13 hearing. His written testimony prepared in anticipation of the hearing will address issues raised by your letter. He also looks forward to responding to any questions you might have at the hearing.

Your letter also requested that EPA provide you with copies of documents mentioned in a December 21, 2007 *Los Angeles Times* article. We believe the *Los Angeles Times* may have been referencing a preliminary document regarding draft proposed vehicle regulations. Contrary to assertions in the article, the document is still in draft form, and has not been finalized. As a preliminary draft, the document you reference would constitute part of the deliberative process in the development of a regulatory action. Because EPA has not finalized any vehicles text, the document you reference does not reflect the final thinking of the Agency.

EPA is continuing to consider how best to proceed regarding any regulatory action that would affect emissions of greenhouse gases. While this process continues, EPA has an interest in ensuring that incomplete and/or inaccurate information is not disseminated and, more importantly, that candid discussions are encouraged. Disclosure of pre-decisional information could compromise the ongoing deliberative process, as well as result in needless public confusion about the status of EPA's efforts on this issue. Disclosure of information at this stage in the deliberative process could also raise questions about whether the Agency's actions were being taken in response to or

influenced by proceedings in a legislative or public forum rather than through the established administrative process. For these reasons, EPA does not believe it would be appropriate to share the document referenced in the *Los Angeles Times* article at this time.

If you would like to discuss other possible accommodations, or if you have questions in advance of the hearing, please contact me or have your staff call Anthony Reed in my office at (202) 564-3109.

Sincerely,



Christopher P. Bliley
Associate Administrator

EDWARD J. MARKEY, MASSACHUSETTS
CHAIRMAN
EARL BLUMENAUER, OREGON
JAY INSLEE, WASHINGTON
JOHN B. LARSON, CONNECTICUT
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MARSHA BLACKBURN, TENNESSEE

Select Committee on
Energy Independence and Global Warming
U.S. House of Representatives

March 7, 2008

The Honorable Stephen L. Johnson
Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator Johnson:

I am writing to reiterate the Committee's request for specific documents related to the EPA's response to the Supreme Court's decision in *Massachusetts v. EPA*. This request has been pending for some time and it will interfere with the work of the Committee if these documents are not provided prior to the Committee's hearing on March 13, 2008 to examine these very issues. It is deeply disturbing that after having received your personal commitment that these documents would be provided in advance of the hearing, your staff is now telling the Committee that in fact you do not plan to submit them voluntarily.

To review the background of this request:

1. On January 15, 2008, I sent you a letter requesting your testimony at a Select Committee hearing. That letter also requested a copy of EPA's proposed standard for regulation of greenhouse gas (GHG) emissions from motor vehicles. That document is of interest because, according to a December 21, 2007 article in the Los Angeles Times, it reported that "the proposed standard cleared all EPA internal reviews and was forwarded to the Department of Transportation" the week of December 10, 2007.

2. On the afternoon of January 28, 2008, I spoke with you directly and during that phone conversation you committed to (a) appear before the Select Committee, and (b) provide both the Agency's proposed green house gases regulations as well as its proposed "endangerment finding," which had been submitted to the White House Office of Management and Budget.

Given your personal commitments and the long-pending request, I find it troubling that last night my staff was informed that you do not plan to voluntarily comply with your commitment to provide the Committee with these documents. I wanted to be sure that you were personally aware of these developments and I expect you to reverse your staff's refusal to supply the requested documents so further action by the Committee is not necessary.

If the basis for withholding these documents is a claim of executive privilege, then please advise on when that determination was made and the process you went through to substantiate your claim. Let me be clear that this request is made in the context of the work of the Committee and pursuant to the Rules of the House and the authorities conferred under H. Res. 202, and as such any discussion of FOIA exemptions is inapposite.

Sincerely,

Ed Markey

Edward J. Markey

Chairman

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

MAR 1 1 2008

The Honorable Edward J. Markey
Chairman
Select Committee on Energy Independence & Global Warming
U.S. House of Representatives
Washington, D.C. 20515-6143

THE ADMINISTRATOR

Dear Mr. Chairman:

I am writing in response to your letter of March 7, 2008, in which you restated a request for copies of documents referenced in a December 21, 2007 *Los Angeles Times* article. Your letter also referenced our phone conversation of January 28, 2008, in which you asked for EPA's proposed "endangerment finding."

Because there appears to be a misunderstanding about our phone conversation, I would like to take this opportunity to reiterate what I said during that call, which is that EPA is committed to accommodating to the extent possible the Select Committee's request for information. Responding to Congressional requests is a priority at EPA, and I assured you my staff would process your request and respond accordingly.

In accordance with our conversation, my staff have now completed their assessment of your request and determined that the *Los Angeles Times* article may have been referencing a preliminary document regarding draft proposed vehicle regulations. As further explained in EPA's letter to the Select Committee on March 7, this document is in draft form and does not reflect the Agency's final thinking. As such, release of the document during these ongoing deliberations could have a detrimental impact on the Agency's deliberative process in the development of any regulatory action. Because of this potential harm, it would not be in the Agency's best interest to share the document at this time for the reasons more fully expressed in our March 7 letter. This is consistent with the Executive Branch's long-standing practice regarding requests for documents related to preliminary rulemaking activities. These same concerns pertain to release of EPA's draft endangerment proposal.

Although we are unable to provide the documents you requested, I am hopeful that my testimony at the March 13 hearing will satisfy the Select Committee's interest in obtaining information on the issues described in your January 15 letter. If you have any further questions, please contact me or have your staff call Anthony Reed of my staff at (202) 564-3109.

Sincerely,

Stephen L. Johnson
Administrator

Chairman MARKEY. On January 28th, we spoke by phone, and I reiterated my request for a copy of EPA's proposed rule. In addition, I requested that you provide me with a copy of EPA's proposed endangerment finding, which had been forwarded to OMB for review in December. You agreed to do so.

But late last week your staff informed Committee staff that you would not be providing those materials, and in a subsequent letter to the Committee, you indicated that you are asserting that these materials are, quote, predecisional and hence cannot be shared.

On March 7, the Committee sent you a letter stating, "If the basis for withholding these documents is a claim of executive privilege, then please advise on when that determination was made and the process you went through to substantiate your claim." You have yet to respond to that request.

My first question: will you commit to providing the Select Committee with copies of both the EPA's proposed rule to regulate greenhouse gas emissions for motor vehicles and its endangerment finding?

Mr. JOHNSON. Well, Mr. Chairman, as I indicated in my response of March 11th to the letters that you are referring to, I apologize that there was a misunderstanding, but the agency has a longstanding practice regarding requests for documents that are related to preliminary rulemaking, and the documents that you requested fall very much in that category.

Chairman MARKEY. Well, as you know, predecisional is a concept that comes out of the Freedom of Information Act, but the Committee did not request the documents under the Freedom of Information Act, but rather under House Resolution 202 and the rules of the House. So that concept on its own is simply inapplicable to a congressional request.

Are you asserting that these are subject to executive privilege?

Mr. JOHNSON. At this time, no, sir, we are not. I am not asserting that these are part of an executive privilege, no.

Chairman MARKEY. Do you have any reason to believe that President Bush saw the documents that you are refusing to supply to the Committee?

Mr. JOHNSON. I do not know whether he did or did not. As I have already indicated, it is true that the agency was working on draft regulations, and as part of those draft regulations included endangerment, and as has been the routine practice of the agency and certainly our historical practice, that as we address the Clean Air Act issue of endangerment, we accompany what our proposed regulations would be.

Chairman MARKEY. Do you have any——

Mr. JOHNSON. We are working on that, and the Energy Independence and Security Act changed what steps that we were taking.

Chairman MARKEY. Do you have any reason to believe that Vice President Chaney has seen these documents?

Mr. JOHNSON. I do not know who has or who has not seen these documents. I am aware of that we have prepared drafts. They were in preparation for the President's Twenty in Ten Plan, and the Energy Independence and Security Act answered the call of the Twen-

ty in Ten, and we as an agency began focusing our attention on implementing the new legislation that you passed.

And by the way, congratulations. As you well know, it has been 32 years since our nation has changed its CAFE standard, and for obviously energy security as well as environmental reasons, it is good that we are focusing our attention on renewable fuel.

Chairman MARKEY. And I appreciate that.

So it seems to me that you have presented the Committee with a very difficult decision to make. The Committee views very seriously your refusal to cooperate and your intent to interfere with the work of the Committee on this important issue. The House is in recess after tomorrow, but I want to let all members know that when we return, we will take up this issue with all of our available resources and all of the authorities, including extraordinary authority given to this Committee under the rules of the House.

This is a subject that the American public have a right to know about, have a right to the documents that deal with this very, very important issue, and it is going to be very important for us to clarify whether or not there is executive privilege which is being exerted here or it is merely the Freedom of Information Act, but in either instance, we intend on proceeding in a way that insures that the public has access to these very important documents.

My time for the first round has expired. Let me turn now and recognize the gentleman from Wisconsin, Mr. Sensenbrenner.

Mr. SENSENBRENNER. Well, Mr. Chairman, let me say that the escalation that you have just announced is, I think, extremely disappointing. We do have an obligation to find out how the public interest is being served and to do oversight over agencies of the Executive Branch, but I think there are ways of doing oversight where we can make the Executive Branch better without escalating the matter into something that may end up in a contempt citation and a reference to either the Justice Department or the United States District Court for the District of Columbia.

And I would hope that we would cool it and attempt to try to get to the bottom of this without a clash between the two branches of government on how far executive privilege goes and how far the constitutional responsibility for Congress to do oversight goes.

That being said, let's get back to the issue at hand. Mr. Johnson, would you agree that the inclusion of a number of major sources of greenhouse gas emission that are going to potentially fall under the new regulation of greenhouse gases could significantly impact economic development and good jobs in this country?

Mr. JOHNSON. Yes. Depending upon decisions that are made under the Clean Air Act could have significant economic consequences for our nation.

Mr. SENSENBRENNER. Now, under any law authorizing the EPA to take action, is there any provision to allow you to take into account the possible negative impact of an EPA decision on jobs or on the economy?

Mr. JOHNSON. Well, in some parts of the Clean Air Act specifically, we are, in fact, required to take costs and benefits into consideration. Other parts of the Clean Air Act, such as the National Ambient Air Quality Standard, Section 108 of the Clean Air Act, which I made the decision on ozone yesterday, prohibits me by law

from considering costs or implementation issues in setting a standard.

So it depends upon what part of the Clean Air Act that a pollutant is regulated.

Mr. SENSENBRENNER. Now, assuming we are dealing with the regulation of greenhouse gases under the part of the Clean Air Act that allows economic impact to be considered, as you are working through possible regulations relating to greenhouse gas emission, is it possible to include anti-backsliding provisions that would not impose new regulations until our competitors in the international globalized marketplace, like China and India, also do the same thing?

Mr. JOHNSON. Well, one, I do not believe our existing Clean Air Act provides that kind of authority, but that is a very important issue, a very important issue as we consider what we do nationally under the Clean Air Act and certainly as members of Congress, that you consider legislation.

The notion of it is sometimes referred to as leakage, in other words, those industries and things go to another country, the country that is not taking aggressive steps as the United States is in regulating greenhouse gases, and so since it is global climate change, we lose the businesses; we lose the economics; and the environment is not changed.

And so that leakage is a significant issue that we need to make sure we are aware of and deal with.

Mr. SENSENBRENNER. Do you think the Clean Air Act should be amended so that you can take into consideration the exodus of jobs as a result of the EPA taking action where, as our competitors in a globalized marketplace will not be taking similar action?

Mr. JOHNSON. Well, that is one of the issues that as I am taking a step forward and looking at the impacts of the Supreme Court decision and what it would mean of an endangerment finding and what that means on all parts of the Clean Air Act, that is one of the many issues that we are looking at, and whether the Clean Air Act is actually the best tool for addressing greenhouse gases or whether, in fact, we should——

Mr. SENSENBRENNER. My time is about up. Now, let me make the observation that the constructive way to go about dealing with these issues is to approach the entire issue of the philosophy that we can have a clean environment and a healthy economy providing good jobs to American workers at the same time. I believe that is what our committee should be working on rather than making threats and talking about contempt citations and reference to the Justice Department or the District Court for the District of Columbia.

I yield back the balance of my time.

Chairman MARKEY. The gentleman's time has expired.

The Chair recognizes the gentleman from Missouri, Mr. Cleaver.

Mr. CLEAVER. Mr. Johnson, do you believe that the United States now stands on moral high ground with regard to the issue of greenhouse gases? Are we in a position where we can discuss with India, China, some of the other Asian-Pacific countries the need for them to make dramatic changes in what they are doing, the enormous

number of coal-fired power plans that was mentioned earlier that are under construction in China?

So do we stand on moral high ground on the issue of reducing greenhouse gases?

Mr. JOHNSON. Mr. Cleaver, I honestly do, and I do for a number of reasons. One, as a nation, by the President's leadership and by members of Congress passing budgetary appropriations, we as a nation from 2001 to today have spent or are spending upwards of $45 billion on addressing climate change. That is both investing in technologies, investing in science, even providing tax incentives for these new technologies or for people to do the right thing.

There is no other nation in the world, no other nation in the world that is spending that kind of money and investing those kinds of tools.

In addition, we have set a goal. The President set a goal of 18 percent reduction by the year 2012. We are on track to not only meet that, but to beat that goal. In addition, when you look at the array of programs we have, I just went through in my oral testimony a host of mandatory programs from renewable fuel to new CAFE standards, which is the primary way that we can reduce CO_2 emissions from automobiles and light trucks.

Carbon sequestration is the great hope for many of our stationary sources. Well, in order for us to be able to do that, one, we need the technology, but second, from an EPA perspective we need to make sure that there is a regulatory framework in place to assure that when it is captured in a cost effective way it can be stored safely so that it will not harm the environment or people, and we have issued guidance so that pilot programs can go forward under the Department of Energy, and we are now drafting regulations which I expect to be available for public comment later this year.

And so we are taking aggressive steps, both mandatory as well as voluntary, and I hope everybody knows about our EnergyStar Program so that consumers can make the right choice, save themselves some money and also save the environment, but those are all just a short list of things that we are doing at EPA and what we are doing nationwide.

And, yes, more can be done, and that what is what we are debating now, and I think that is a healthy debate.

Mr. CLEAVER. I am asking you now to speculate. If that is unfair, I apologize in advance. But why do you think that leaders in the western world continuously admonish us to take the lead in reducing greenhouse gases?

Chairman Markey and I listened to Ms. Merkel in Germany make that statement, the new president in Australia make that statement, the members of the European Union make that statement, the members of parliament made that statement. Why do you think they are encouraging us to take the lead if we have this overwhelming picture, overwhelming number of programs and projects that the world should be able to see?

I mean, what is preventing them from seeing the leadership we are making?

Mr. JOHNSON. Well, I think that they now see and, in fact, support the President's efforts under the major economies effort to get

the major economies, including Germany, including the ones that you just mentioned, to work together.

Mr. CLEAVER. Well, we were just in Australia two months ago.

Mr. JOHNSON. Well, I was just going to say to work together to establish targets, goals in the future, mandatory targets in the future that would require all the nations to meet. But there are some fundamental pieces that need to be put in place, whether it is registries, making sure that we know how to actually and we are all measuring greenhouse gases in the same way.

We understand that each country is perhaps in a different economic, certainly in a different energy source. The United States, about 50 percent of our electricity comes from coal. We have an over 200-year supply of coal. So from an energy security and from an environmental standpoint, it is not to walk away from coal. It is to clean it up.

And of course, through the Department of Energy and others, investing in clean coal technologies, and that is going to be critical not only for energy security, but it is going to be critical for——

Mr. CLEAVER. That is a decade away.

Mr. JOHNSON [continuing]. Us addressing environmental problems.

Mr. CLEAVER. That is a decade away at least according to scientists.

Mr. JOHNSON. Well, and you raise a good point. We have been asked and as an agency we have done some detail analysis of a number of pieces of legislation. We are in the process of completing an analysis of legislation now, and through that analysis it shows that, one, there is no silver bullet to addressing, a short-term silver bullet.

Number two——

Mr. CLEAVER. My time is expiring, sir.

Mr. JOHNSON. I am sorry.

And, two, it is requiring significant investment in technologies and from nuclear to clean coal to others, solar and wind, are going to be the solutions to the problem.

Mr. CLEAVER. Thank you.

Chairman MARKEY. The gentleman's time has expired.

The Chair recognizes the gentleman from Oregon, Mr. Walden.

Mr. WALDEN. Thank you, Mr. Chairman. Thank you, and thank you for having this hearing.

Mr. Johnson, I wanted to ask a couple of questions. One involves the issue of carbon sequestration and storage. Is the technology available today anywhere in the world to actually sequester and store carbon safely underground?

Mr. JOHNSON. No.

Mr. WALDEN. What is your timeline that you see out there in terms of technological advancements to where we would have that technology available? What do your experts tell you?

Mr. JOHNSON. Well, the experts in the energy field say that to have commercially available cost effective technology we are at least a decade away, and I would defer to the experts. It is certainly not commercially and cost effectively available today.

Mr. WALDEN. And when we entered into cap and trade to reduce other pollutants out of the atmosphere, in America we created cap and trade originally.

Mr. JOHNSON. That is correct.

Mr. WALDEN. How many power plants were involved in that? Do you remember?

Mr. JOHNSON. I do not remember, but certainly our acid rain program and our cap and trade under our Clean Air Interstate Rule, which I signed, will result in a 70 percent reduction in SO_2 and a 60 percent reduction in NO_X. So it is a very effective program.

Mr. WALDEN. Is carbon dioxide a pollutant?

Mr. JOHNSON. The Supreme Court has determined that it is, and so we accept the Supreme Court's decision.

Mr. WALDEN. And if it is a pollutant, can you put a pollutant in the ground?

Mr. JOHNSON. Well, it is one of the important questions, and under our UIC program, under our water program, we believe that can be, but it needs to be done, obviously, in accordance with EPA law.

Mr. WALDEN. And who has the liability if that pollutant escapes the ground?

Mr. JOHNSON. Well, again, that is an important question that we are also addressing as part of our regulation.

Mr. WALDEN. Have you run any models or are you aware of any models that have been run through the Warner-Lieberman legislation regarding cap and trade costs for power production?

Mr. JOHNSON. We are finishing up that analysis in the next few weeks. We will be sharing that with you and look forward to giving a more detailed breakdown on that.

Mr. WALDEN. I would like to see that. I was told by a CEO of a major power company they have run their power costs through that model, and they go from 4.8 cents a kilowatt hour, as I recall the number, to 11.5 cents a kilowatt hour, which would be more than a doubling of the cost of electricity under that proposal.

These are issues as we address trying to reduce greenhouse gases, and you know, I brought a Prius here and over the weekend brought a Ford Escape Hybrid, traded in my other SUV. So I am trying to do my part, and it is not cheap, but it is, I think, the right thing to do.

But there are economic consequences here. There are pollution consequences here, and there are liability issues here that are very significant. When we were in Europe as part of a trip that Chairman Boucher organized, this issue of putting a pollutant underground without proper regulatory framework, the issue of liability if that pollutant were to escape into the atmosphere, and if you get credit for storing the carbon underground and it escapes, do you lose the credit? What is the mechanism down the road if that pollutant escapes?

All of those issues were issues that I know the Europeans are trying to deal with, and that is why I asked you those questions today. How are we dealing with those? Because you could quickly get a regulatory framework or a legal framework in place and yet not have the technology, not have the liability, not have the storage capacity in place to actually make that something we could imple-

ment, and we know the costs are going to be there in the economy; is that correct?

Mr. JOHNSON. Those are all very good observations and why it is so critical. While we have a serious issue of climate change, it is critical that we work our way through these because it can have significant economic consequences for our nation.

Mr. WALDEN. How did the energy bill that we passed and I supported that became law and the President signed affect your agency as you were working on these rules the Chairman has asked you to provide information on?

Mr. JOHNSON. Well, it significantly altered what approach that we were taking. For example, on the renewable fuels, we were looking at an open market system looking at a variety of ways of trying to measure the CO_2 emissions. Congress made a decision, and there are both a mandatory requirement on the total volume. There are specific mandatory requirements on types of biofuels, for example, and also made the decision that we will use a full lifecycle analysis, which the United States has never done before.

And so there are some significant issues, and we're fully supportive of renewable fuels, but the work that we've done, we've got to do a lot of rework to be able to put out an implementing regulation.

Mr. WALDEN. And I know my time has expired. I had one other line of questions. I will just submit them to your staff. If you can get back to me on that, I would appreciate it.

Mr. JOHNSON. Please, I would be happy to.

Mr. WALDEN. Thank you, Mr. Chairman.

Chairman MARKEY. The gentleman's time has expired. Over on the House floor at this moment a moment of silence is being observed on behalf of our troops wherever they are serving us in the world. I think it is appropriate for us for a minute to observe a moment of silence in prayer and thought about that.

[Pause.]

Chairman MARKEY. Thank you all very much.

The Chair will now recognize the gentleman from the State of New York, Mr. Hall.

Mr. HALL. Thank you, Mr. Chairman, and thank you, Administrator Johnson, for being here, and with great respect and meaning so in a good way.

Mr. JOHNSON. Thank you.

Mr. HALL. I am just curious. We have seen charts here at earlier hearings of the last 20 years' electricity demand in California, which is essentially flat, versus the increasing electricity demand in the rest of the United States. I am sure you have seen the same studies.

I am curious what your analysis, just a short version of what the reasons for that are.

Mr. JOHNSON. Well, it is clear that economic growth requires energy, and that as our nation continues to grow, as we want it to economically, that we need energy supplies. And given the energy security issues and a variety of issues, that poses problems for the United States.

And from an environmental standpoint, my area, we want to see and make sure that any future energy supplies are moving in the direction of clean energy supplies and making sure——

Mr. HALL. Excuse me. I only have limited time, but my question was about the past 20 years. I will just state my theory. California has had stricter energy regulation and more state incentives and perhaps more of a consciousness about efficiency, and they have managed to grow. They have flat screen TVs. They have high tech. They have industry. They are not a Third World country, and yet their electricity has gone a little bit up and down but basically been flat for the last 20 years, as the rest of the country has been on an incline, increased path.

State Air Resources Board and other regulations done on the state level, I think, have contributed to their keeping their own demand flat while allowing their economy to grow. Is that a wild theory?

Mr. JOHNSON. Well, I should not probably speculate on that, but what I can say is that from an environmental standpoint, while they have made progress in a number of the priority pollutants, unfortunately parts of California today have some of the worst air in the entire United States, and that is a challenge for the state and certainly it is a challenge for our nation.

Specifically, since I made my decision on reducing the health protective standard, that is, making it more protective on ozone yesterday, it makes it more of a challenge for those parts of our country, for example, California, to achieve this new health protective standard.

Mr. HALL. Sure, and it is a complicated question. I understand. In New York last year for the first time, we had several days in the summer when there was an air quality alert on the entire state, not just the cities where one might expect it, but open forest and farmland in upstate New York was looking at warnings for people with respiratory problems and elderly people and so on to stay indoors in farm and forest country upstate far from any development where you would not expect it.

I understand members of the administration have referred to the obligations for cooperation and rulemaking from the Energy Independence and Security Act as a reason why the action in response to the Supreme Court's ruling was delayed, but short of final regulations, EPA has not even made an endangerment determination.

Remedies aside, the IPCC, the Supreme Court and numerous others have recognized that greenhouse gases contribute to climate change, and the climate change presents a severe threat to our way of life.

The passage of legislation does not change those facts, and they seem like the only ones you would need to make this determination. So my question is why hasn't EPA taken this step.

Mr. JOHNSON. Well, as I have already testified, with the passage of the Energy Independence and Security Act, we have now focused our attention on implementing that legislation. As I said, for cars, the primary source of carbon dioxide, the way to reduce that carbon dioxide is through improved fuel economy, and of course, we now have a 35 mile per gallon standard. So we think that it is impor-

tant for us to work with the Department of Transportation to make that happen.

Mr. HALL. Yes. I am driving an American, Detroit built hybrid that is rated at 33 today, 12 years out from that 2020 goal. So I believe that we can exceed the two miles per gallon. This is an SUV, full-time four-by-four. It is not a teeny tin can. I believe we can exceed the margin, just as Texas exceeded the renewable electricity standard that President Bush signed into law when he was governor of Texas, and partly as a result, Texas is now the leader in the nation in wind power.

And when I heard T. Boone Pickens had said that he is more excited about wind now than he is about any oil field he ever discovered, I know things are really changing.

I want to encourage you and offer you all the help that I can. There is way more to talk about than there is, you know, time that I have. So I am afraid I have to yield back.

Mr. JOHNSON. I look forward to it.

Mr. HALL. But thank you again for being here, and I yield back, Mr. Chairman.

Mr. JOHNSON. Thank you.

Chairman MARKEY. The gentleman's time has expired.

The Chair recognizes the gentleman from Oklahoma, Mr. Sullivan.

Mr. SULLIVAN. Thank you, Mr. Chairman.

And I appreciate you being here today. A lot of people have asked the questions I was wanting to ask, but I just have a couple. When you go through this, and it is complicated, and it is tough, and you are looking at the regulatory regime, framework that you are looking to implement; is there any consideration about how those will impact the economy or jobs or anything like that? Is that done in your office?

Mr. JOHNSON. Well, ultimately if the agency makes a decision to regulate, again, depending upon what part of the Clean Air Act, as I said, that under the NAAQS, or National Ambient Air Quality Standards, I am prohibited by considering cost or implementation, and the standard that I set on ozone yesterday was just purely health based, requisite to protect public health with an adequate margin of safety.

Other parts of the Clean Air Act allow that, and that is one of the pieces, and I think it is so important, and that is why I have taken a step forward in looking at the entire Clean Air Act, because a decision on one part of the Clean Air Act could have lasting consequences and significant economic and unforeseen economic consequences.

For example, one part of the Clean Air Act that as it is described as significance levels, we do not have significance levels established for carbon dioxide. So the significance level would be zero. So that means any facility that would emit any carbon dioxide or any greenhouse gas, and remember there are six of them, would then trigger all of the regulatory framework of the Clean Air Act.

And I think as Administrator it is responsible; in fact, I think the public demands that I take a look at and understand before we rush to judgment on using the Clean Air Act tool and sorting

through important issues. I understand we have a responsibility in Mass. v. EPA to respond, but it is important for us to look at that.

In the meantime obviously I describe all of the significant things that we are doing to address greenhouse gases and also putting in place the necessary framework as we move forward as a nation.

Mr. SULLIVAN. That is good.

And I guess just one other. When Congressman Walden was talking about the carbon sequestration, which I think is interesting, and you did state that when it is used, it is several years away before that is developed in a way, that we do not even know where to store it. Where do you see as potential places to store it? Like what kind of formations in the earth or anything like that?

And also, could you address another application of carbon sequestration that would be in my state; you mentioned some pilot programs. We are going to do one on enhanced oil recovery, injecting it into old wells, and can you comment on how that all works, too?

Mr. JOHNSON. Well, yes. As a nation we have decades of experience and around the world a number of countries do as well have decades of experience of using CO_2 as enhanced oil recovery, and in looking at long-term storage, we are learning from that experience. And the type of formation is a hard rock formation that does not have, if you will, the leaks and crevices so that it would escape.

And so as we have looked at what are those kinds of formations, we have a pretty good idea, but there are still a number of issues that we have to sort through.

And the other part of it is that when you look at the world at large, let alone the United States, and certainly the rapidly developing economies that we are well aware of, we are literally talking about gigatons, gigatons of carbon dioxide that we are going to have to deal with, and you can translate those gigatons into, well, how many nuclear power plants would the world be required to build to address those gigatons or how many zero emission coal-fired power plants?

The numbers are staggering, and so as I said to Congressman Cleaver, unfortunately, there is no silver bullet. Clearly, in the long term it is technologies. It is investing in nuclear and solar and wind and hydroelectric and all of these sources, and taking incremental steps, the kind of incremental steps that we are taking.

Mr. SULLIVAN. Is there some CO_2 or carbon already injected in some formation that is being monitored now to see if it works? I mean, is that happening?

Mr. JOHNSON. Yes. In fact, we recently issued some guidance so that the Department of Energy can do—I am not sure of the number of pilots, whether it is six to 12, but certainly a number of pilots on the issue of carbon sequestration and storage, and so we have provided guidance to allow those pilot programs to proceed, and of course, on the liability issue that was issued, it is my understanding that as part of those pilots that government is helping on that issue of liability.

Mr. SULLIVAN. Thank you very much.

Chairman MARKEY. The gentleman's time has expired.

The Chair recognizes the gentleman from Washington State, Mr. Inslee.

Mr. INSLEE. Thank you.

I have been told that on November 8, 2007, you said, "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 the next year."

Did you say that?

Mr. JOHNSON. Yes, I did.

Mr. INSLEE. And were you just teasing at that time?

Mr. JOHNSON. Well, I don't necessarily appreciate the way that you characterized that, but, no, I was not.

Mr. INSLEE. So somebody got to you between you saying that and between now when you do not intend to have this done. Is that the situation?

Mr. JOHNSON. Well, actually you correctly noted that somebody got to me, and it was Congress and the President by passing the Energy Independence and Security Act.

Mr. INSLEE. So do you think the Supreme Court basically or you thought the Supreme Court is teasing then. You think they are teasing when they said you have got a legal obligation to do this whether or not Congress enacted something in the CAFE standard.

Do you think they are teasing?

Mr. JOHNSON. No. Again, when you pass and said, "Congratulations. It is good that Congress and the President signed the energy legislation," but it clearly changed the path that the agency was on.

Also, as I stated in my testimony, I recognize the agency still has an obligation to respond to the Supreme Court, and as I also stated in my testimony, it is that it is very evident that as one looks at the Clean Air Act, there are many interconnections, and a decision on one part of the Clean Air Act could have significant consequences both in how greenhouse gas is regulated as well as other unintended consequences, perhaps such as significant harm.

Mr. INSLEE. Well, I am sorry, but that just does not wash with my constituents, and I will tell you why. You are telling us that you intended to have a regulation and then Congress did one of the things that perhaps you could have regulated, and the fact that they had already checked off that box made it slower for you to do the regulation, the fact that we had already accomplished one of the steps regarded your ability to move forward?

That makes no sense whatsoever. If you have got five things you need to do and Congress already did the first one, it should not make you slower. It should make you faster, and you should have been back here and say, "Thanks, Congress. You did one of the things. You have accelerated my ability to get this regulation out."

Something happened here that you have just decided not to do this, and it is pretty clear, and I am disappointed by that because you are the fireman. You are the fireman, and the planet is on fire right now, and you do not pick up a hose. You do not pick up an ax. You do not pick up a water bucket. You do nothing. Your administration has done nothing about this before the Supreme Court decision or after the Supreme Court decision.

No, you could at least take some action, for instance, dealing with coal plants that are continuing to be built with no sequestration. You have not done that. You have not done anything. I mean

isn't that true? You have not issued any regulation at all, have you?

Mr. JOHNSON. Well, sir, I would respectfully disagree. As I said, I appreciate and applaud Congress for passing the legislation, but in doing so you require us to write regulations, and that is what I just testified. That is exactly what we are doing. We are writing regulation. We are writing a regulation to implement the renewable fuel standard.

We are writing a regulation to implement through the Department of Transportation, through the CAFE Program. We are working with them. You have required us through our omnibus appropriation to write and establish a greenhouse gas registry. We are doing that, and as I have also testified, that we recognize that carbon sequestration is important, is going to be a critical component as we look to the future of addressing greenhouse gases.

We have issued guidance so pilots can go forward. We are writing regulations. I have said that later this year you will see the draft regulations on that. So we are not idly sitting by, and that is just on the domestic front. I can talk more about the international.

Mr. INSLEE. Will you be writing regulation on a cap and trade system?

Mr. JOHNSON. We have made no decision as to what the next steps we are going to take with regard to Mass. v. EPA and the Supreme Court decision. That is an important question which we have not answered yet.

Mr. INSLEE. Well, I can tell you a no decision in March of 2008 is a decision. A no decision today is a decision by the Bush administration to finish its term without taking meaningful greenhouse gas action, and this was the last gasp effort or chance for this administration to salvage a positive legacy of its failures in seven years, a last chance, and you are letting it go by.

And history is going to record this administration and your term in office if you do not act on this as a failure and an existential threat to civilization on this planet. And I just hope maybe some day you personally wake up to that effect and march into the White House and say, "I am doing a reg. and I am going to get it done and it is going to go into effect," and if not, tender your resignation.

That is the responsible thing to do and you have not done it yet, and I hope you start to rethink your obligations.

Chairman MARKEY. The gentleman's time has expired.

We will go to a second round of questions, and the Chair will recognize himself.

When you last appeared before the Select Committee, you would not say whether or not you believed that greenhouse gas emissions cause or contribute to air pollution, which may reasonably be anticipated to endanger public health or welfare.

Nine months have gone by since you last appeared before the Select Committee. You put three or four full-time staff members on this question for several months. Your staff has told Congress that you reviewed all materials and agreed to forward a positive finding of endangerment to OMB in December.

Are you prepared to tell the Select Committee right here, right now, that greenhouse gas emissions cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare? Yes or no?

Mr. JOHNSON. The answer is no, and it would be inappropriate for me to prejudge a preliminary draft regulatory decision that has not gone through the appropriate process or been published for notice and comment.

Chairman MARKEY. So you are saying that you cannot even tell the Select Committee when you will be ready to make this determination, though you spent all of last summer and fall assuring Congress that it would be done by the end of the year.

Why can't you even give us a date?

Mr. JOHNSON. Well, the reason is, and I tried to be very clear today, is that was we move forward with evaluating endangerment, that it has implications for not only mobile sources, but it also has implications for stationary sources.

And I understand my responsibility to address the concerns by the Mass. v. EPA, but I also understand my responsibility to recognize potentially the widespread implication and impact of such a decision, and that is what I am evaluating.

Chairman MARKEY. Well, isn't it true that the only regulatory requirement, the publication of the endangerment finding triggers, is the requirement to regulate greenhouse gas emissions from motor vehicles?

Mr. JOHNSON. Again, what is before the agency is the issue of the Mass. v. EPA, and as part of that the very important question of endangerment and that there are significant implications as to how, if, what the endangerment finding is addressed given the intricacies and the interconnected of the Clean Air Act.

Chairman MARKEY. I understand what you are saying, but no stationary sources would be automatically or immediately subject to greenhouse gas regulations as a result of concluding that greenhouse gas emissions cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare; isn't that right?

Mr. JOHNSON. Well, that is actually one of the questions that I am looking at.

Chairman MARKEY. So let me continue to move forward then. The energy bill did not in any way alter your obligation to make the determination on whether greenhouse gas emissions cause or contribute to air pollution, which may reasonably be anticipated to endanger public health or welfare. In fact, the energy bill says, "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."

That includes the Clean Air Act, Mr. Johnson. So let me ask you again. Since you already completed your work on the endangerment finding and nothing in the energy bill impacts your responsibility to publish it or alters in any way the outcome of the simple question of whether greenhouse gas emissions cause or con-

tribute to air pollution, which may reasonably be anticipated to endanger public health or welfare; when will the EPA publish its endangerment finding?

Mr. JOHNSON. Well, as I have already stated, that in addressing the issue of endangerment, it was part of a regulatory package that was focused on addressing and implementing the President's Twenty and Ten Plan. So while it is true that the Energy Independent and Security Act did not alter certainly that portion of the Clean Air Act, what is true is that it did alter what regulatory steps the agency is now taking with regard to renewable fuels and the government is taking with regard to the CAFE standard, and so the issue of endangerment, which as I said historic practice is it accompanies the regulatory effort, we are now looking at what are the appropriate next steps.

Chairman MARKEY. Well, you recently denied California's request to implement its greenhouse gas regulations for motor vehicles because you said California had not demonstrated "a compelling and extraordinary need" for the regulations.

You did, however, say, again, "Warming of the climate system is unequivocal," and cited numerous adverse impacts of climate change, such as rising sea levels, which is the Massachusetts case that was ruled upon by the Supreme Court, heat waves, more intense hurricanes, and increased wildfires and insect outbreaks, and even said that some of these impacts could lead to increases in mortality.

Do you not believe that any of these factors you mentioned may reasonably be anticipated to endanger public health or welfare?

Mr. JOHNSON. Well, Mr. Chairman, as I clearly point out both in my testimony as well as in my California waiver decision, the greenhouse gas emissions and global climate change is just that. It is global, and it is a serious challenge.

I also very clearly point out in my decision document that the California waiver does not reflect and should not be construed as my judgment on endangerment.

Chairman MARKEY. Well, again, there is a profound difference of opinion between the Select Committee and the EPA over this question, your responsibilities, the urgency of the problem, and whether or not you are discharging your responsibilities pursuant to a Supreme Court decision in Massachusetts v. EPA, and we intend on pursuing this question vigorously in the weeks and months ahead.

Let me now turn once again and recognize the gentleman from Wisconsin, Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

Mr. Johnson, first of all, let me say I am very disappointed that this hearing has become overly adversarial. I think we are all in the business together to try to provide a healthy environment and to try to figure out a way that the regulations can be promulgated in a manner consistent with the law, as well as consistent with not only the Massachusetts v. EPA Supreme Court decision, but other decisions of the court.

Let me say that Congress bears a part of the culpability of the confusion that is being discussed here. First of all, the Clean Air Act has varying degrees and methods and modalities of regulation. You mentioned that yourself, where in some areas the Clean Air

Act has a different regulatory mode than in other areas of the Clean Air Act.

However, what is in the air is something that we all breathe, and as an Administrator, it is your job to figure out how to go through the maze that Congress has given you because the law was passed by Congress, and your job is only to administer the law.

The other thing is that the energy bill that was passed late last year, which I did not vote for, I think, has complicated the issue and has required you maybe not to go all the way back to square one in making this determination, but certainly has required a retooling to make sure that the regulations comply with the new law that Congress passed.

You know, it is kind of like you are ordering somebody to build a house for you and the house goes up and then you and your wife decide to have a whole lot of change orders. Well, you are not going to be able to move into the house as quickly as you wanted until the builder is able to accomplish the change orders which you have ordered and which you will pay for.

And then we get to the business of a cost-benefit analysis, which you alluded to in response to my earlier questions where in some cases you cannot look at the impact on jobs for Americans, and in other cases you have to do that.

So I can understand why there has been a delay in figuring out how all of this fits together and the fact that the rules changed at least slightly with the passage and signature by the President of the energy bill. Now, I do not think we in Congress should be berating Administrators for not getting things done on time. We have a pretty poor record of getting things done on time ourselves.

The appropriations bill, including the one that funded your agency, ended up passing months late, and last year was not the only time that it was done. So I guess I can say that the one question that I have and maybe it will calm the two colleagues sitting to my right down, and it probably will not, but do you see light at the end of the tunnel in getting these regulations out, even though maybe some in the Congress are trying to turn the lights out?

Mr. JOHNSON. I am very optimistic, and I do see light at the end of the tunnel, and I see light at the end of the tunnel that as we have committee meetings such as this, oversight hearings such as we have the debate, that people recognize that, yes, climate change is a serious challenge for our nation, and it is one that needs to be thought through, yes, expeditiously, but it needs to be thought through deliberately, and to make sure that as we consider tools such as the Clean Air Act or other tools, as Congress considers legislation, that we do so with all of the foreknowledge and experience so that we can make the best informed decisions so that we can address the issue, but do so in a way that does not hurt our economy, does not hurt our nation, and in fact, ends up helping the global challenge.

Mr. SENSENBRENNER. What can Congress do to keep the light at the end of the tunnel on?

Mr. JOHNSON. Well, I think certainly give me some time to think through under the Clean Air Act what is an appropriate approach. I know that there is a desire for me to rush to judgment. This is

a very complex issue, and it is a very difficult issue and one that has been debated since 1978.

Mr. SENSENBRENNER. My time is about up. If you would do things prematurely and you make a mistake, is there a danger that court will enjoin you from implementing a mistake and then we have a further delay?

Mr. JOHNSON. Well, in my 27 years at EPA, one of the things that I clearly note is that our agency is frequently subject to litigation, and I am a true believer that the air nor the water nor the land get any better or improve when we are sitting in a courtroom. So my preference is let's work together to address the problem. In my experience working collaboratively you can address the problem faster and even cheaper, and I think it ends up better for the nation.

Mr. SENSENBRENNER. Thank you, sir.

Chairman MARKEY. The gentleman's time has expired.

The Chair once again recognizes the gentleman from Washington State, Mr. Inslee.

Mr. INSLEE. Thank you.

Some of us believe that when a fellow has been in the White House since January, I think, 20th, 2001, it is not a rush to have expected some action to deal with the planetary emergency by March 2008, and I am trying to figure out why the Director of the Environmental Protection Agency is not acting as a fireman here, but in fact just as, frankly, sort of a defender of a bureaucracy that has not moved in seven years, and I am trying to figure that out. So I am going to ask you a couple of questions.

We had Dr. Pachauri of the International Panel on Climate Change here a couple of months ago. He sat just where you are sitting right now. He told us that 20 to 30 percent of the world's species could be extinct if we do not reduce our emissions by about 20 percent below 1990 levels by around 2020, a pretty stunning statement.

Have you read the IPCC report, the most recent IPCC report?

Mr. JOHNSON. Yes, I have.

Mr. INSLEE. And do you think Dr. Pachauri is right in that regard?

Mr. JOHNSON. Well, as part of the IPCC process, in fact, we have very well respected EPA scientists that participate, and so I believe that the IPCC report represents among the best available science that is available to the government.

Mr. INSLEE. And do you think we should be making policy decision on that basis?

Mr. JOHNSON. Well, I think that the IPCC reports are important data sources, scientific analyses on which the countries can use to help base their decision, but the good news is that, and certainly as the IPCC points out, that additional research needs to be done, and in fact, we are all doing that. Additional work needs to be done in emerging technologies. That is being done, and so all of those factors need to be taken into consideration as whether the United States or a rapidly developing economy decides what is the best approach for it in addressing this issue.

Mr. INSLEE. Isn't it true that under the path that your administration is now on we do not have a hope in the world of preventing

those dire consequences if we continue on the path that your agency is now on?

Mr. JOHNSON. Well, I would disagree with the characterization because we are on a path to improve the fuel economy standards since the first time in 32 years. That is the primary tool producing greenhouse gases from automobiles and light trucks. We are on a path to implement a significant, 36 billion gallon requirement for renewable fuels.

Mr. INSLEE. Are you on a path to achieve 20 percent reductions in CO_2 emissions below 1999 levels by 2020? Are you telling American taxpayers that your policies are going to achieve that?

Mr. JOHNSON. Well, the target that the President has set is an 18 percent greenhouse gas intensity reduction by the year 2012, and as a nation we are on track to meet or exceed that.

Mr. INSLEE. So your answer to my question is no then; is that right?

Mr. JOHNSON. Well, I do not know whether given the recent changes, what specific number that achieves, but what I can say with confidence is that the steps that we are taking as a nation——

Mr. INSLEE. That is disappointing that——

Mr. JOHNSON [continuing]. That we are taking as a nation actually move us in the direction that we all know we need to be——

Mr. INSLEE. It is disappointing——

Mr. JOHNSON [continuing]. And that is slowing down——

Mr. INSLEE. Excuse me, sir.

Mr. JOHNSON [continuing]. And stopping and then ultimately reversing greenhouse gas emissions.

Mr. INSLEE. It is disappointing that the Director of the Environmental Protection Agency cannot tell the citizens of this nation whether or not his policies are going to achieve that goal of 20 percent reductions below 1990 levels that the IPCC basically said we have got to have or have cataclysmic events.

And you are telling me that you cannot tell me whether your policy is going to achieve that or not? I can tell you and anybody who knows sixth grade arithmetic knows the answer to that, which is the answer is no.

Now, I am going to give you a moment to think about this just for a second, realize the path we are on, and tell me: is the answer yes or no, or you are just telling me the Director of the EPA does not know the answer to that? Which is that?

Mr. JOHNSON. Well, what I have told you repeatedly is that we are still sorting through what path we as a nation should be on, and that is the process that we are in right now, and I have also said that we have taken significant steps and again acknowledge the great work of Congress in passing this legislation that actually is directionally in that direction of reducing.

So at this point while we are trying to sort through what steps make sense for the nation, I cannot say what percentage we should or should not. Certainly that will be a part of the outcome. Certainly as you debate issues of legislation, that will be a significant issue that you are going to have to address as to what the target and what the requirements would be if you choose to proceed with legislation.

Mr. INSLEE. Well, that was a long "no," but I will take it.

Have you read the Six Degrees: Our Future on a Hotter Planet by Mark Lynas? Have you read that book?

Mr. JOHNSON. I have not.

Mr. INSLEE. I would commend it to you. If you read it and if you follow the science in it, I think you will conclude that your administration is woefully failing in its obligations to our grandkids.

Thanks.

Chairman MARKEY. The gentleman's time has expired.

The Chair recognizes the gentleman from Missouri, Mr. Cleaver.

Mr. CLEAVER. Thank you, Mr. Chairman.

Mr. Johnson, do you have any idea how many lawsuits on greenhouse gas emissions, permits and petitions there are facing the agency?

Mr. JOHNSON. I know that, for example, we have seven petitions that are pending before the agency that cover aircraft, ongoing marine vessels, non-road engines, for example, agriculture, farm construction, lawn and garden equipment, recreational vehicles, recreation and smaller commercial, marine vessels, locomotives. That is just on the mobile sources.

In addition, as I have said, we have the issues and implications on stationary sources.

Mr. CLEAVER. I want to get to that.

Mr. JOHNSON. There are, in fact, 90 stationary source categories ranging from grain elevators to utility boilers and a lot in between.

Mr. CLEAVER. I guess where I am going, you mentioned earlier about the CAFE standards.

Mr. JOHNSON. Yes.

Mr. CLEAVER. The truth of the matter is the CAFE standards that were approved in the energy bill was a result of work with the Chairman of this Committee, Mr. Dingell, and the Speaker of the House.

Mr. JOHNSON. Congratulations. That is great. That is a great success story.

Mr. CLEAVER. I agree. We did a great job, if I have to say so myself. However, it seems to me that that would have been the role of the EPA, to push the government, the Congress in the direction of higher CAFE standards, and as a result the EPA is serving as the tail light after the headlights have already flashed.

And so I cannot get past the issue of the United States have a high moral ground to talk to other nations about this issue.

You mentioned a lot of money that has been spent.

Mr. JOHNSON. Yes.

Mr. CLEAVER. And that beckons an ideological discussion because the administration says that when you throw a lot of money at a problem, particularly when we are talking about social issues, that it is wasteful, and so when you just talk about all of the money that is being spent, what is the difference between what you are saying about energy and what people say about our money we spend in HHS?

Mr. JOHNSON. Well, we are seeing the fruits of that investment, whether it is the science so that we can better understand climate change——

Mr. CLEAVER. But you do not believe in the science.

Mr. JOHNSON. Well, sir, I just have said over and over again that climate change, global climate change is a serious challenge.

Mr. CLEAVER. Does the White House believe that?

Mr. JOHNSON. Yes.

Mr. CLEAVER. Where can we find that?

Mr. JOHNSON. Actually I would be happy to provide for the record the President's statements that acknowledge that.

But let me just point out one thing to make it clear. EPA does not administer the CAFE standard.

Mr. CLEAVER. I understand.

Mr. JOHNSON. That is the responsibility of the Department of Transportation.

Mr. CLEAVER. Okay. I understand that. The point I was trying to make and perhaps poorly is that we need the EPA to be the headlight, and I am in disagreement with you that it is the headlight on these matters of environment.

Mr. JOHNSON. Well, sir, I like the headlight analogy because that is precisely what I am doing, is shining light on all of the aspects of the Clean Air Act, including the endangerment, in looking at what is the best approach, recognizing the science, recognizing multiple petitions, the Mass. v. EPA, and illuminating light as to what is the best direction that we as a nation should proceed with, given all of this.

I understand people want me to drive into that dark alley because they think it is the right alley.

Mr. CLEAVER. Yes.

Mr. JOHNSON. I really am shining a light on and looking at what is the best approach, and I am doing it deliberately, and I am doing it expeditiously, and I would ask for your indulgence to stay tuned.

Mr. CLEAVER. Well, I appreciate the analogy. In my real life, I am a preacher, and I like analogies, and that was pretty good.

Mr. JOHNSON. Thank you, sir. [Laughter.]

Mr. CLEAVER. The alleyway, the light in the alley.

What recommendations can we expect from the EPA as a Committee, as a Congress, that will move us toward reducing greenhouse gases?

Mr. JOHNSON. Well, I think several. One is, as I said, the steps that we are taking, the renewable fuel standard, that list of things, those mandatory responsibilities. You can expect that.

Second is you can expect to hear from me as I have looked at and I am looking at the Clean Air Act, what do I believe is the best approach for the nation, given all of those factors, and so you can expect to hear from me again on that.

And then lastly, you can expect from me to continue to work with you, members of Congress, as you sort through the very important issue of legislation. We are doing some of the world's most extensive scientific and economic analysis that has ever been done on the issue of climate change, and I look forward to my staff having the opportunity to share, such as the Warner-Lieberman bill, so that you can be very, very informed as you have this important debate on legislation.

Chairman MARKEY. The gentleman's time has expired.

Mr. CLEAVER. Thank you, Mr. Chairman.

Chairman MARKEY. I thank you.

And all time for questions by members of the Committee has expired. Mr. Johnson, you are a scientist with a unique charge. The planet is sick. There are no hospitals for sick planets.

The Congress has told you to do something about it. The Supreme Court has told you to do something about it. You have told this Committee that you do not want to, in fact, make a rush to judgment. The problem is that the planet is on a rush to ruin, a rush to catastrophe, even as you say that you do not want to make a rush to judgment.

This Committee is very concerned that you do not understand that there are no emergency rooms for planets. We have to engage in preventative health care for the planet. We will not be able to deal with the catastrophic consequences once they occur. We have to stop them from happening.

You have less than a year left to go, Mr. Administrator, to make the decisions that put the United States on a path of leadership rather than being the laggard in the world. The world is asking us to be the leader. Nothing in the energy bill, nothing in law prevents you from making these decisions.

We urge you to make those decisions. We hope that you do not waste these last ten months of your administration, but because of your testimony today and your lack of willingness to provide the documents which this Committee needs, we are going to continue to pursue very aggressively this subject because time is of the essence.

We are going to be asked in subsequent generations whether or not we tried, we really tried to prevent that catastrophe from occurring, and the least that we should be able to say is that we tried. Right now there is no evidence on this question of endangerment to the public health and welfare that the EPA is acting consistent with the urgent threat to our planet that is clear from all scientific evidence.

So we thank you for testifying before us today. We are going to be in frequent communication with you on this subject, which goes to the central issue of our generation: have we dealt with this urgent threat to the planet? That is how we are going to be viewed by history.

All other issues will be merely a footnote in history to the question of whether or not we dealt with this catastrophic threat to our planet. We urge you to act and to act soon on the issue.

And we thank you for being before our Committee today.

Mr. JOHNSON. Thank you, Mr. Chairman.

Chairman MARKEY. Now we are going to turn to our second panel. We welcome the second panel on this very important subject. We are notified that there are two roll calls on the House floor. So what we will do is we will begin by hearing testimony from our first witness on the second panel, and then we will take a brief recess and come back and complete the testimony.

Our first witness, Ms. Lisa Heinzerling is a professor at Georgetown University Law Center. She formerly served as Assistant Surgeon General for my home state, the Commonwealth of Massachusetts, where she specialized in environmental law and in which capacity she was the primary author of the successful Massachusetts v. EPA brief.

Welcome.

STATEMENT OF LISA HEINZERLING, ESQ., PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER; ACCOMPANIED BY DAVID BOOKBINDER, CHIEF CLIMATE COUNSEL, SIERRA CLUB; THE HONORABLE RODERICK BREMBY, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT; THE HONORABLE JOSH SVATY, MEMBER OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF KANSAS; PETER S. GLASER, PARTNER, TROUTMAN SANDERS

STATEMENT OF LISA HEINZERLING

Ms. HEINZERLING. Thank you very much.

Chairman MARKEY. And if you could move that microphone up a little bit closer.

Ms. HEINZERLING. Thank you.

In Massachusetts v. EPA, as we have already heard this morning, the Supreme Court held that the EPA has the authority to regulate greenhouse gases. The Supreme Court also held that any response to that——

Chairman MARKEY. Have you turned on the microphone down there?

Ms. HEINZERLING. The microphone button.

Chairman MARKEY. Ah, could you move that other microphone over, please? Thank you.

Mr. CLEAVER. The EPA broke it. [Laughter.]

Ms. HEINZERLING. Now, how is that? All right.

Chairman MARKEY. Thank you.

Ms. HEINZERLING. In Massachusetts v. EPA, the Supreme Court held that the EPA has the authority to regulate greenhouse gases. It also held that any response to the Supreme Court's decision and to that authority to regulate greenhouse gases must sound in the criteria of the statute itself, that is, cannot stray beyond the statutory criteria to other matters.

The Supreme Court also gave the EPA very limited options on remand from that decision. Utter inaction was not one of those options.

Chairman MARKEY. Again, could you move that microphone in a little bit closer, and maybe lower it a little bit. I think that might help.

Ms. HEINZERLING. Utter inaction was not one of those options.

Chairman MARKEY. Great.

Ms. HEINZERLING. Yet that is what we have gotten from EPA. Indeed, the reasoning from Mr. Johnson this morning was exactly the kind of reasoning that the Supreme Court rejected in Massachusetts v. EPA. There the EPA said that the problem of climate change was very big. It was very complicated. It might need a solution other than the Clean Air Act. The EPA was worried about the international context, and so on. These are the very kinds of reasons we heard from Administrator Johnson this morning. These are the very kinds of reasons the Supreme Court rejected almost a year ago.

The Supreme Court held, again, EPA must hue its reasoning to the language of the statute, not stray beyond that and cite other policy concerns in making its decision.

On endangerment, the Supreme Court made clear that EPA's job is to assess the science and to follow the science where it leads. This morning Mr. Johnson gave no justification for not doing that, for not making a finding that greenhouse gases may reasonably be anticipated to endanger public health or welfare.

He conceded, I think, that the energy bill signed in December 2007 does not affect authority under the Clean Air Act, as well he should. He also though suggested that that bill affects his decision on remand from Massachusetts v. EPA. Yet there is no explanation from Mr. Johnson as to why he may not at this moment, right now make a finding that greenhouse gases endanger public health and welfare.

And, indeed, there is no real explanation from Mr. Johnson as to why his February 29th decision denying California the authority to regulate greenhouse gases did not make such a finding. In that decision he claimed it was likely that greenhouse gases were endangering all sorts of different aspects of human health and welfare. The finding was very formal.

This morning he tells us it is not an endangerment finding. He may not avoid the consequences of his decision in February simply by giving it a label that he chooses.

It was surprising to me to hear Mr. Johnson say he did not want to prejudge the issue of endangerment when in February, I believe, that is exactly the decision he made. That is a judgment that greenhouse gases are endangering public health and welfare.

In addition, the consequences we have heard of regulating that Mr. Johnson referred to this morning are not part of the statutory framework for finding endangerment. They simply are not part of that statutory scheme. Science is what he is supposed to follow, not the consequences of a regulatory scheme.

And here I ask you simply to imagine you go to a doctor. The doctor tells you you have symptoms, has even told you on February 29th you are very, very ill, but he says some of the treatments, some of them, are very painful and expensive, and so he has decided he is not even going to tell you whether you are sick.

That would be a bad doctor. I believe that is not a way an agency should behave. The EPA is our environmental expert. Many entities, businesses, states, other agencies depend on EPA's judgment about whether greenhouse gases are endangering public health or welfare. That finding would also, I think, I hope, influence EPA's own attitude towards regulation and change it from one of obduracy to urgency.

They might change the attitude of EPA from asking how can we avoid doing too much to how can we find a way to do enough.

Thank you.

Chairman MARKEY. I will tell you what we are going to have to do right here. We will stop. We will come back to the other witnesses. We will give you a minute to summarize your opening statement, and then we will go to the second witness. We are going to take a brief recess.

Ms. HEINZERLING. Thank you.

[Recess.]

Mr. INSLEE [presiding]. There has been a putsch during the interim, and I have assumed the Chair. So I look forward to Ms. Heinzerling. If you will continue your address in maybe three minutes, if that would work for you. We hope that you can help us out.

Ms. HEINZERLING. Oddly enough, I actually had seen the time running and I had finished, but I had spoken very quickly. So if you do not mind I would just like to summarize the things I said.

Mr. INSLEE. Thank you, thank you.

Ms. HEINZERLING. Absolutely. So the first point I wanted to make was that EPA clearly had not learned from the decision in Massachusetts v. EPA; that the justifications we heard this morning for EPA's failure to act in response to that decision are the very kinds of justifications the Supreme Court rejected in that decision.

And so that I think that those justifications and those reasons are unlawful.

The second point that I would like to make is that EPA has every reason now, today, to issue a finding that greenhouse gases endanger public health and welfare. Arguably, as I mentioned before, EPA has already done so in its February 29th denial of California's ability to regulate greenhouse gases from automobiles. In that decision, EPA made very formal, very explicit, very confident findings about the effects of greenhouse gases on public health and welfare.

So, arguably, I believe that finding has already been made. EPA's labeling it as not an endangerment finding is not enough to save it.

Secondly, the finding, as we heard this morning, had already been prepared. Quite apart from the February 29th decision there has already been a positive endangerment finding prepared. They can simply mail it in. There is nothing else to be done.

Third, I think it would benefit many people, businesses, states, other entities, are awaiting work from EPA, formal, final word from EPA about endangerment, and I think it would give them certainty and predictability if EPA would make a decision on this matter.

Last, I believe a decision on this matter would affect EPA's regulatory attitude. As I mentioned in a metaphor with the doctor, the idea is that if you go to a doctor and the doctor says, "Well, we think you are sick, but we think the treatments might be painful and expensive. So we are not going to tell you what you have," that would be crazy. That would be a very bizarre statement on the part of the doctor.

I think that is essentially what EPA is saying to us, and that seems to be both unwise and, in light of Massachusetts v. EPA, unlawful.

I would like to ask that my written statement be admitted into the record.

[The prepared statement of Ms. Heinzerling follows:]

Testimony of

Lisa Heinzerling

Professor of Law
Georgetown University Law Center

Before the
Select Committee on
Energy Independence and Global Warming
U.S. House of Representatives

Hearing:
***Massachusetts v. U.S. EPA* Part II:**
Implications of the Supreme Court Decision

March 13, 2008

TESTIMONY OF

LISA HEINZERLING

PROFESSOR OF LAW
GEORGETOWN UNIVERSITY LAW CENTER

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

MARCH 13, 2008

Thank you for the opportunity to testify before you today. My name is Lisa Heinzerling. I am a Professor of Law at the Georgetown University Law Center. After law school at the University of Chicago, I clerked for Judge Richard Posner on the U.S. Court of Appeals for the Seventh Circuit and then for Justice William Brennan of the U.S. Supreme Court. I was an Assistant Attorney General in the Environmental Protection Division of the Massachusetts Attorney General's Office for three years before coming to Georgetown in 1993. My expertise is in environmental and administrative law. Perhaps most pertinent to today's hearing, I was the lead author of the winning briefs for Massachusetts and other petitioners in *Massachusetts v. EPA*.

I commend the Select Committee for convening this hearing on the implications of the Supreme Court's decision in *Massachusetts v. EPA* and the Administration's response to that decision to date. In this testimony, I discuss the following issues:

(1) EPA's obligations and authority under the Court's decision in *Massachusetts v. EPA*;

(2) the implications of the Energy Security and Independence Act of 2007 for EPA's obligations and authority under the Clean Air Act;

(3) EPA Administrator Stephen Johnson's recent formal statement on the causes and consequences of climate change;

(4) the implications of the latter statement for regulatory programs under the Clean Air Act; and

(5) the EPA Administrator's obligation to make a finding (if he is not deemed to have done so already) with respect to whether greenhouse gases are endangering public health or welfare.

I. EPA's Obligations and Authority Under *Massachusetts v. EPA*

In *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007), the Supreme Court held that greenhouse gases are "air pollutants" within the meaning of the Clean Air Act and that the Act gives EPA authority to regulate them. In addition, the Court held that EPA could not refuse to exercise this authority by citing policy considerations not enumerated in the statute or by referring generally to the scientific uncertainty remaining with respect to climate change.

Two aspects of the Supreme Court's decision are particularly relevant to this hearing. The first is the Court's directive to EPA about what the agency may and may not lawfully do on remand. The second is the Court's treatment of EPA's argument that the Energy Policy and Conservation Act ("EPCA") precludes EPA regulation of greenhouse gases from motor vehicles under the Clean Air Act.

The Court made several important observations about EPA's obligations on remand. First, it held that EPA *must* regulate greenhouse gases from motor vehicles if the agency finds that they may reasonably be anticipated to endanger public health or welfare. ("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." 127 S.Ct. at 1462.) Second, to avoid regulating greenhouse gases, EPA must make one of two findings. Either the agency must find that greenhouse gases may not reasonably be anticipated to endanger public health or welfare *or* it must conclude that there is not enough information to make a decision on endangerment. ("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.... 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.... The statutory question is whether sufficient information exists to make an endangerment finding." 127 S.Ct. at 1462-63.) The Court's decision in *Massachusetts v. EPA* thus directs EPA to follow the scientific evidence on climate change wherever it leads and to regulate greenhouse gas emissions from motor vehicles if that scientific evidence shows endangerment.

Another aspect of the Court's decision pertinent to this hearing is the Court's rejection of EPA's argument that EPCA demonstrated a Congressional intent to preclude regulation of greenhouse gases under the Clean Air Act. In concluding that it lacked authority to regulate greenhouse gases, EPA had explained:

> Even if [greenhouse gases] were air pollutants generally subject to regulation under the [Clean Air Act], Congress has not authorized the Agency to regulate CO_2 emissions from motor vehicles to the extent such standards would effectively regulate the fuel economy of passenger cars and light duty trucks... At present, the only practical way to reduce tailpipe emissions of CO_2 is to improve fuel economy.... *EPCA is the only statutory vehicle for regulating the fuel economy of cars and light duty trucks.*

68 Fed. Reg. 52922, 52929 (emphasis added). The Court rejected this argument:

> [T]hat DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public's 'health' and 'welfare,' 42 U.S.C. § 7521(a)(1), a statutory obligation wholly independent of DOT's mandate to promote energy efficiency. See Energy Policy and Conservation Act, § 2(5), 89 Stat. 874, 42 U.S.C. § 6201(5). The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations yet avoid inconsistency.

127 S.Ct. at 1462. The Court's one-paragraph dismissal of an argument that had occupied a central place in EPA's refusal to regulate greenhouse gas emissions speaks volumes: the Court simply did not buy the idea that fuel economy standards under EPCA and emissions standards under the Clean Air Act could not peacefully co-exist. Yet, as I next explain, that discredited argument appears to be enjoying a renaissance within the Administration.

II. EISA and the Clean Air Act

Hints abound that the Administration believes that Congress, through the passage of the Energy Independence and Security Act of 2007 ("EISA"), undid EPA's obligation to take action in response to *Massachusetts v. EPA*. In announcing his decision to deny California a waiver for its program regulating greenhouse gases from motor vehicles, for example, EPA Administrator Stephen Johnson stated that "the solution" to the problem of climate change "must" extend "far beyond the borders of the California" and pointedly cited the EISA in concluding that this legislation would "bring a much needed national approach to addressing global climate change." Letter from Stephen Johnson to Arnold Schwarzenegger (December 19, 2007), available at http://www.epa.gov/otaq/climate/20071219-slj.pdf. Similarly, in a letter to Sierra Club attorney David Bookbinder describing EPA's response to *Massachusetts v. EPA*, EPA's Principal Deputy Assistant Administrator, Robert J. Meyers, invoked EISA in noting that "EPA is analyzing how to proceed on the issues before us" on the remand from *Massachusetts v. EPA*, and declined to state any "specific timeline for responding to the remand." The implication of statements such as these is that EPA believes that the passage of EISA somehow affected its obligations on the remand. But EISA did no such thing.

As I have discussed, the Supreme Court held in *Massachusetts v. EPA* that fuel economy standards under the Energy Policy and Conservation Act (EPCA) and emissions standards under the Clean Air Act may comfortably co-exist. The portions of the EISA dealing with fuel economy are amendments to EPCA; they revise EPCA's existing standards for fuel economy. EISA, H.R. 6, § 102 (amending 49 U.S.C. § 32902). Just as the fuel economy standards existing at the time of *Massachusetts v. EPA* could exist side-by-side with emissions standards under the Clean Air Act, so too are the new fuel economy standards called for by EISA fully consistent with emissions standards under the Clean Air Act. The Court's opinion was not dependent on the particular content of the fuel economy standards themselves, but on the structure of the two statutes in general. That structure remains compatible with Clean Air Act regulation notwithstanding the passage of EISA.

Indeed, EISA itself makes clear that Congress had no intention of erasing or altering EPA's obligations under the Clean Air Act. Right up-

front, in section 3 of EISA, Congress provided: "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." EISA, H.R. 6, § 3. The import of this provision could not be plainer: EISA simply does not change EPA's existing obligations – including those obligations described by the Supreme Court in *Massachusetts v. EPA* – under the Clean Air Act. Any suggestion to the contrary ignores the express text of EISA.

EISA does not in any way change EPA's obligations on remand from *Massachusetts v. EPA*. EISA affects neither EPA's legal obligations with respect to determining whether greenhouse gases may reasonably be anticipated to endanger public health or welfare or the regulatory obligations that flow from such a determination. This conclusion follows both from the decision in *Massachusetts v. EPA* and from the explicit language of EISA.

III. EPA's Recent Endangerment Finding

On February 29, EPA Administrator Stephen Johnson issued the formal explanation of his previously announced decision to deny California a waiver for its program regulating greenhouse gas emissions from motor vehicles. Administrator Johnson concluded that California did not meet the Clean Air Act's requirement that, before a waiver may be granted, the State must have "compelling and extraordinary conditions." 73 Fed. Reg. 12156. He explained that California's problems relating to climate change were not "compelling and extraordinary" – not because they do not exist, but because *they are no worse than the very bad problems the rest of the country faces as a result of climate change.* 73 Fed. Reg. at 12163-12168. Thus, in the course of denying California's waiver, the EPA Administrator made explicit, for the first time, his view that greenhouse gases endanger public health and welfare.

Administrator Johnson's decision contains a long discussion of the effect of greenhouse gases on climate and the effect of climate change on public health and welfare. The EPA Administrator states that "warming of the climate system is unequivocal." 73 Fed. Reg. at 12165. He connects this warming to manmade greenhouse gases and describes the consequences of global warming for human health and welfare. For example: "[t]here is

strong evidence that global sea level gradually rose in the 20th century and is currently rising at an increased rate" (73 Fed. Reg. at 12165); "[b]y the end of the century, globally averaged sea level is projected to rise between 0.18 and 0.59 meters relative to around 1990" (73 Fed. Reg. at 12166); "[i]t is very likely that heat waves will become more intense, more frequent, and longer lasting..." (73 Fed. Reg. at 12166); "[i]t is likely that hurricanes will become more intense..." (73 Fed. Reg. at 12166; "...wildfire and insect oubreaks are increasing and are likely to intensify..." (73 Fed. Reg. at 12167).

These statements demonstrate that the Administrator has concluded that greenhouse gases are endangering, and may reasonably be anticipated to continue to endanger, public health and welfare. For one thing, the Administrator does not equivocate about existing problems relating to climate change or about the likelihood of future harms. His findings – including words such as "unequivocal" and "likely" – easily meet the Clean Air Act's standard of reasonable anticipation of endangerment. Indeed, the endangerment standard was amended in 1977 precisely in order to make clear that scientific certainty (or, to put it another way, "unequivocal" evidence) was not necessary for a finding of endangerment. *Massachusetts v. EPA*, 127 S.Ct. at 1447 n. 7. Moreover, Administrator Johnson's decision contains numerous examples of "observed" climate change due to greenhouse gases (73 Fed. Reg. at 12165-66); no "reasonable anticipation" is required when harm is already upon us.

In addition, the Administrator's description of the consequences of climate change relate directly to the key Clean Air Act concepts of public health and welfare. Hurricanes, wildfires, and the rest all clearly implicate health and welfare. In addition, regarding public health, the Administrator states, for example, that the increased magnitude and duration of severe heat waves will "likely" lead to "increases in mortality and morbidity, especially among the elderly, young and frail." 73 Fed. Reg. at 12167. He also observes that "[c]limate change is expected to lead to increases in ozone pollution, with associated risks in respiratory infection and aggravation of asthma," and that "[o]zone exposure also may contribute to premature death in people with heart and lung disease." 73 Fed. Reg. at 12167.[1] As for

[1] The latter statement is followed by a footnote which instructs: "But see discussion above." 73 Fed. Reg. at 12167 n. 65. The reference is mysterious; nothing in the Administrator's preceding discussion even relates

welfare, the Act broadly defines effects on "welfare" to include – though they are "not limited to" – "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being..." 42 U.S.C. § 7602(h). In addition to the heat waves, hurricanes, wildfires, and insect outbreaks already discussed, the Administrator also predicts "the spread of invasive species," the disruption of ecosystem services, and "significant adverse effects on certain vegetation" due to increased ozone pollution. 73 Fed. Reg. at 12167. Such findings indisputably pertain to "welfare" as defined in the Clean Air Act.

These formal conclusions – announced by the EPA Administrator himself, after notice and opportunity for public comment on the decision whether to grant a waiver for California's program (73 Fed. Reg. at 12157) – amount to a finding of "endangerment" as contemplated in numerous provisions of the Clean Air Act.

Although the EPA Administrator has stated that his formal factual findings do not amount to an "endangerment finding" under the Clean Air Act (73 Fed. Reg. at 12156 n.1), the Administrator may not avoid the legal and regulatory consequences of his factual findings simply by refusing to give them the label of "endangerment." EPA has long acknowledged, and courts have long agreed, that formal factual findings of the kind made by EPA in the waiver decision suffice to trigger regulatory obligations under the Clean Air Act.

In prior administrations, EPA did not even contest the idea that formal factual conclusions concerning the public health or welfare effects of a pollutant constituted an endangerment finding under the Clean Air Act. The regulation of lead provides an instructive example. Before regulating lead as a fuel additive under section 211 of the Clean Air Act, EPA first found that lead was endangering public health. 38 Fed. Reg. 33734. EPA was then faced with a lawsuit arguing that this endangerment finding required EPA to set air quality standards for lead under section 108 of the Clean Air Act. In that lawsuit, EPA conceded that lead had an adverse effect on public health and welfare within the meaning of section 108 of the Act. *NRDC v. Train*,

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to, much less calls into question, the Administrator's prediction regarding ozone exposure and premature mortality.

545 F.2d 320, 324 (2d Cir. 1976). EPA made no attempt to deny that a formal finding of lead's harmful effects made pursuant to one provision of the statute was decisive for purposes of a separate provision of the Act.

EPA's previous acknowledgment that a formal finding of danger to public health or welfare amounts to an endangerment finding with regulatory significance under the Clean Air Act is fully supported in the case law. In the lawsuit challenging the lead standard for fuel, industry argued that "the regulations were void because the Administrator had failed to couch his ultimate finding in the language of the statute itself." *Ethyl Corp. v. EPA*, 541 F.2d 1, 12 n. 15 (D.C. Cir. 1976) (en banc). Calling the argument "spurious," the court pointed out that "ultimate findings do not have to be expressed at all, let alone be expressed in the language of the statute." 541 F.2d at 12 n.15. In *Thomas v. State of New York*, 802 F.2d 1443 (D.C. Cir. 1986), the court faced the question whether two letters from the EPA Administrator to public officials, concluding that acid deposition from U.S. sources was endangering public welfare in Canada, sufficed as a finding that U.S. emissions were endangering public health or welfare in a foreign country within the meaning of section 115(a) of the Clean Air Act. The court said they no; rather, it concluded, the Administrator should have followed notice-and-comment procedures in issuing his findings. 802 F.2d at 1447.

Together, these authorities stand for two important propositions. First, the fact that Administrator Johnson did not label his conclusions an "endangerment finding" does not dilute their legal significance. Administrator Johnson used those conclusions as support for a momentous regulatory decision, that is, the decision denying California and other states the ability to enact programs to address greenhouse gases from motor vehicles. The Administrator may not disavow those conclusions in another legal setting simply because they are inconvenient in that other setting. Second, procedures matter. Administrator Johnson announced that climate change is upon us and that its consequences will be harmful, only after providing notice and an opportunity for public comment. He signed the announcement himself and published it in the Federal Register. Short of affixing a wax seal to the document, Johnson could not have made a more formal announcement about the causes and consequences of climate change than he did in denying California's waiver.

IV. The Regulatory Implications of the Endangerment Finding

The Clean Air Act directs EPA Administrator to regulate numerous sources of air pollution once he has found that an air pollutant emitted by them may reasonably be anticipated to endanger public health or welfare. In *Massachusetts v. EPA*, the Supreme Court explicitly held that regulation of motor vehicles under section 202 of the Clean Air Act must follow once the EPA Administrator makes such an endangerment finding. 127 S.Ct. at 1462. The same is true for many other sources of air pollution.

Section 111(b)(1)(A) of the Clean Air Act, for example, provides that EPA "shall" include on a list a category of stationary sources "if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7411(b)(1)(A). Section 111(b)(1)(B) requires the Administrator to regulate new sources included on this list. 42 U.S.C. 7411(b)(1)(B). Section 111(d) requires the Administrator, acting in concert with the States, to regulate existing sources included on this list. 42 U.S.C. 7411(d). There is little doubt that many categories of stationary sources – including, for example, power plants – emit greenhouse gases and thus "cause[]" air pollution which the Administrator has concluded endangers public health and welfare. Under section 111, the Administrator "shall" include these sources on a list and then "shall" regulate them. 42 U.S.C. 7411(b)(1)(A), 7411(b)(1)(B), 7411(d).

Regarding power plants specifically, in 2006, EPA refused to regulate greenhouse gases from electric utility and several other steam generating units under section 111 because, the agency explained, "it does not presently have the authority to regulate CO_2 or other greenhouse gases that contribute to global climate change." 71 Fed. Reg. 9866, 9869. After *Massachusetts v. EPA*, this reasoning is no longer legally valid. The D.C. Circuit has remanded a challenge to EPA's decision to the agency. In light of the reasoning set forth above, EPA must now regulate greenhouse gases from these sources.

Similarly, section 231(a)(2)(A) provides that the Administrator "shall" issue proposed standards for "the emission of any air pollutant from any class or classes of aircraft engines which in his judgment causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7571(a)(2)(A). Currently

pending before EPA are two petitions asking EPA to regulate greenhouse gas emissions from aircraft. (California filed one petition, which is available at http://cdn.sfgate.com/gate/pictures/2007/12/05/ga_aircraftpet6.pdf. Environmental groups filed another, available at http://cdn.sfgate.com/gate/pictures/2007/12/05/ga_aircraftghgpet.pdf.)

Provisions regarding the regulation of fuels (42 U.S.C. 7545(c)(1)(A)) and nonroad engines (42 U.S.C. 7547(a)(4)) provide somewhat more discretion to the Administrator because they state that he "may" rather than "shall" regulate after a finding of endangerment. Nevertheless, the Administrator will need to take into account his finding of endangerment in explaining his course of action under these provisions. Here, too, a petition to regulate greenhouse gases (in this case, from nonroad engines) awaits a response from EPA. (The petition is available at http://ag.ca.gov/cms_pdfs/press/N1474_Petition.pdf.) As the Supreme Court said in *Massachusetts v. EPA*, in responding to a petition for rulemaking, the agency's "reasons for action or inaction must conform to the authorizing statute," and EPA must offer a "reasoned explanation" for its decisions. 127 S.Ct. at 1462, 1463. Thus, the mere existence of some discretion on the part of EPA, suggested by the inclusion of the word "may" with respect to regulation of fuels and nonroad engines, does not dilute the agency's general obligation to follow statutory criteria and explain its decisions in reasoned terms.

V. EPA's Obligation to Make an Endangerment Determination

If, contrary to my belief, the EPA Administrator's formal factual findings about the causes and consequences of climate change do not amount to an endangerment finding triggering an obligation to regulate, then EPA must issue a decision as to whether endangerment exists in order to respond to the Supreme Court's decision in *Massachusetts v. EPA*. Almost a year ago, the Supreme Court directed the agency to provide a lawful explanation as to why it would or would not regulate greenhouse gases from motor vehicles. The agency's options, under the Court's decision, are limited. So far, however, the agency has not – again, assuming for the moment that EPA's findings on the causes and consequences of climate change do not constitute a finding of "endangerment" – exercised any of the lawful options presented by the Court. Utter inaction is not one of the options the Court permitted.

A little over a month after the Court issued its decision in *Massachusetts v. EPA*, the President issued an Executive Order directing EPA and the Departments of Transportation and Energy to undertake a coordinated effort to develop regulations to "protect the environment with respect to greenhouse gas emissions from motor vehicles, nonroad vehicles, and nonroad engines." Executive Order: Cooperation Among Agencies in Protecting the Environment with Respect to Greenhouse Gas Emissions From Motor Vehicles, Nonroad Vehicles, and Nonroad Engines (May 14, 2007), available at www.whitehouse.gov/news/releases/2007. At a press conference announcing the Executive Order, referring to the entire process of developing final regulations for motor vehicles, President Bush stated that he had "directed members of [his] administration to *complete the process by the end of 2008*." (A transcript of the press conference is available at http://www.whitehouse.gov/news/releases/2007/05/20070514-4.html.) Yet here it is, March of 2007, and EPA continues to insist not only that it has made no endangerment finding but that it need not provide a specific timeline for doing so.

It has been nine years since the International Center for Technology Assessment and other groups asked EPA to regulate greenhouse gases from motor vehicles due to the threat they posed to public health and welfare. In *Public Citizen Health Research Group v. Chao*, the petitioners had also waited nine years for an answer to their request that the Occupational Safety and Health Administration regulate workplace exposures to hexavalent chromium. The court observed: "*[I]n no reported case has a court reviewed a delay this long without compelling action.*" 314 F.3d 143, 152 (3d Cir. 2003) (emphasis added). Under any understanding of the obligations of an agency not to engage in "unreasonable delay," EPA has tarried too long.

Mr. INSLEE. Certainly, and we always hope for an attitude adjustment in this case.

Our next witness, Mr. David Bookbinder, who is Chief Climate Counsel for the Sierra Club. He is responsible for climate litigation, including the global warming legislation, and we want to commend the whole club and Mr. Bookbinder in some recent successes.

Mr. Bookbinder.

STATEMENT OF DAVID BOOKBINDER

Mr. BOOKBINDER. Thank you very much.

First, I am afraid I am going to start my testimony by correcting you. You had said that we had seen seven years of inaction from EPA on global warming and climate change. In fact, that is not quite correct because they, in addition to not acting on their own, they have affirmatively worked to block others from acting. So you cannot say they have been completely inactive.

Their rejection of California's request for a waiver of federal preemption so that California and 12 other states could finally begin the first program to regulate greenhouse gas emissions in the United States was an example of their blocking the efforts of other parties who want to address this problem.

When it comes to delay itself, they have delayed for the seven years of this administration and the Massachusetts case is a perfect example of this. The petition at the root of Massachusetts was filed in 1999. The administration refused to take any action on it until we sued them simply to get them to answer the petition. We did that in 2002. They answered it with a resounding no in 2003, and here we are five years later still trying to get an answer to the question are greenhouse gases reasonably anticipated to endanger public health or welfare, and by welfare, Congress wrote explicitly into the statute, "Do greenhouse gases endanger wildlife, plants, weather or climate?"

That is a no brainer. That is truly a no brainer, and as the only person who cannot seem to answer that question is Administrator Johnson, even though, as Professor Heinzerling has pointed out, the conclusions that EPA reached in rejecting California's waiver was, my God, climate change is going to hammer the entire United States.

Administrator Johnson summarized it as saying global climate change is a substantial and critical challenge for the environment. There is little question that the conditions brought about as a result of global climate change are serious, whether reviewing the issue as a global, national, or state specific issue. Nevertheless, he cannot figure out whether or not we are endangered by greenhouse gases.

The biggest problem we face in terms of regulation is that EPA says we cannot regulate any source, motor vehicles, power plants, anything until we have an endangerment finding, but as you heard Administrator Johnson say today, we are not going to do an endangerment finding because we might have to regulate people as a result.

We are in a perfect Catch-22 with these folks, and we need something to break this logjam. The latest bogeyman that they have raised is what is called the PSD program, the Prevention of Signifi-

cant deterioration. And we heard a lot of discussion about the 250 ton threshold, that if we have an endangerment finding, EPA is going to have to start regulating every source in the United States that emits more than 250 tons of carbon dioxide.

The short answer is no one wants that. The environmental community does not want it. The regulated community does not want it. Congress does not want it. No one wants it, and this is a completely empty threat that EPA is using as a transparent excuse to prevent themselves from regulating the significant sources of GHGs, of greenhouse gases of motor vehicles, power plants, industrial facilities and the like.

We have coming up in front of us the next regulatory deadline for EPA is they are under a consent decree, a court order to come up with standards for emissions from petroleum refineries, and petroleum refineries are one of the most significant sources of greenhouse gas emissions in the United States, and they must publish those standards by April 30th.

None of us are holding our breath as to what EPA is going to do. Clearly, those emissions contribute to the endangerment we all know that exists, but the only suspense is what new dodge will EPA come up with in order to avoid imposing such restrictions.

We saw in Massachusetts that EPA took a statute that says if something has an adverse effect on climate you have to regulate it and turn it around to say, well, Congress did not want us to regulate to protect the climate. In the waiver decision they took the words "compelling" and "extraordinary circumstances" and read it to mean unique in order to prevent California from regulating, and most recently in a case designed to stop regulation of greenhouse gases from new power plants, in a case called Bonanza, EPA is saying that Section 821 of the Clean Air Act is not actually part of the Clean Air Act. It is an endless litany of transparent excuses to avoid regulation.

We have ten more months of this administration. Hopefully something good will happen in that time.

Mr. INSLEE. We can only hope, and thanks for your criticism that I have been too gracious. That is the first time I have been accused of being too gracious to the administration.

Mr. BOOKBINDER. No one has accused me of that, and I would like to move my testimony to be formally admitted.

[The prepared statement of Mr. Bookbinder follows:]

TESTIMONY OF DAVID BOOKBINDER
Chief Climate Counsel
Sierra Club
Before the House Select Committee on
Energy Independence and Global Warming

Hearing on *Massachusetts v. U.S. EPA* Part II:
Implications of the Supreme Court Decision
March 13, 2008

Mr. Chairman, thank you for the opportunity to testify today as to some of the consequences of EPA's failure to comply with the Supreme Court's decision in *Massachusetts v. EPA*. My name is David Bookbinder, and I am the Chief Climate Counsel for Sierra Club. Sierra Club is a national non-profit organization, founded by John Muir in 1892, whose 1.1 million members and supporters are dedicated to exploring, enjoying, and protecting the planet.

I. *Massachusetts v. EPA* and the Endangerment Question

A. The *Massachusetts* Decision

Almost a year ago, on April 2, 2007, the Supreme Court handed down its landmark decision in *Massachusetts v. EPA*. At issue was a petition from a group of environmental organizations that asked EPA to regulate greenhouse gas emissions from motor vehicles, on the grounds that such emissions met the criteria laid out in Section 202(a) of the Clean Air Act, *i.e.*, that carbon dioxide and other greenhouse gases were "pollutants" that "may reasonably be anticipated to endanger public health or welfare."

Although submitted to EPA in 1999, the agency refused to take any action on this petition until EPA was sued in December of 2002 to compel the agency to answer it. As a result, in September of 2003 EPA denied the petition on three grounds: First, that the Clean Air Act did not give EPA any authority to regulate greenhouse gases; second, that even if EPA had such authority generally, it did not have it with respect to motor vehicle emissions; and third, even if it had this authority, it would not use it because it had better ways of dealing with climate change. We found this last justification particularly odd, as the Bush Administration's climate change policy has been to do absolutely nothing about it and, if possible, to stop anyone else from doing anything about it either.

A coalition of states, cities and environmental groups challenged this decision, and eventually we wound up in the Supreme Court. There, the Court categorically rejected EPA's claim that the Clean Air Act, which explicitly requires the agency to regulate any substance that adversely affects "weather" or "climate", did not give the agency the authority to regulate pollutants that cause climate change, and regardless of the source of the emissions. It also reminded

the agency that the Act did not allow EPA to avoid its responsibility to protect health and the environment in favor of its own preference of doing nothing.

As a result, the Court sent the petition back to EPA to perform one task: decide whether greenhouse gases are "reasonably anticipated to endanger public health or welfare." Because in the Clean Air Act Congress defined "welfare" to mean "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate", this may be restated as asking whether greenhouse gases are "reasonably anticipated to endanger public health or soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, or climate". This is the "endangerment finding" that is so eagerly anticipated.

The Supreme Court gave EPA three ways to answer this question: "Yes, greenhouse gases are reasonably anticipated to endanger public health or soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, or climate"; "No, greenhouse gases are not reasonably anticipated to endanger public health or soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, or climate"; or the agency could explain why it could not answer this question.

B. And the Answer Is . . .?

Although the Administration – from the President on down – promised swift action, almost a year later we are still awaiting an answer. On May 14, 2007, President Bush announced from the Rose Garden:

> 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 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.**[1]

In a press briefing immediately after this, Administrator Johnson 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 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.**[2]

On September 29, 2007, Administrator Johnson told an audience of representatives from 17 nations at the State Department:

> [T]he President has directed the federal government to take the first step towards regulations, using his "20 in 10" plan as a starting point. **We will issue a proposed rule regulating greenhouse gases later this year and are planning on issuing a final rule by the end of next year.**[3]

At a hearing on November 8, 2007, before the House Committee on Oversight and Government Reform, Administrator Johnson 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 CO_2, greenhouse gases, from mobile sources by the end of this year.**[4]

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[1] Statement of President Bush, May 14, 2007, *available at* http://www.whitehouse.gov/news/releases/2007/05/20070514-4.html (emphasis added).

[2] Briefing, May 14, 2007, *available at* http://www.whitehouse.gov/news/releases/2007/05/20070514-6.html (emphasis added).

[3] Administrator Stephen Johnson, Luncheon Address at the Major Economies Meeting, Washington, D.C., Sept. 27, 2007, *available at* http://yosemite.epa.gov/opa/admpress.nsf/a883dc3da7094f97852572a00065d7d8/1692a2d0944f40b9852573630063eab3!OpenDocument (emphasis added).

[4] Hearing on EPA Approval of New Power Plants: Failure To Address Global Warming Pollutants, before the Committee on Oversight and Government Reform, House of Representatives, at 38, 87 (Nov. 8, 2007), *available at* http://oversight.house.gov/documents/20071115145634.pdf.

Finally, EPA reaffirmed that schedule in a formal "regulatory plan" published in the Federal Register (72 Fed. Reg. 69934) on December 10, 2007.

Despite these statements, there was no draft endangerment finding or draft regulations by the end of 2007. Nor has there been any progress on this issue as we approach the end of the first quarter of 2008.

In fact -- and this should come as no surprise to anyone who is familiar with the Administration's approach to global warming -- EPA is now actually going backwards. In response to an inquiry from the *Massachusetts* petitioners as to when the agency would be complying with the Supreme Court's mandate, on February 27, EPA stated that the agency no longer "has a specific timeline for responding to the remand". Administrator Johnson then reiterated this position in a March 3 letter to Senator Feinstein.

EPA's latest rationale for doing nothing is the Energy Independence and Security Act of 2007 ("EISA"); passed last October, EPA claims that this law has so complicated matters that the agency cannot tell when it might get around to answering the endangerment question. However, as Professor Heinzerling has explained, this argument is nonsense; nothing in EISA in any way alters the question whether the pollutants that are causing global warming are "reasonably anticipated to endanger public health or soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, or climate." As a question, this one ranks right up there with "Who is buried in Grant's Tomb?"

Remarkably, outside of the context of an endangerment finding, EPA has no problem in describing – and quite graphically – the effects greenhouse gases are having, and will continue to have, on the United States. Just last week, EPA stated (73 Fed. Reg. 12156, 12167; footnotes omitted):

> The IPCC made the following conclusions with *very high confidence* regarding what are expected to be key impacts for North America: coastal communities and habitats will be increasingly stressed by climate change impacts interacting with development and pollution; climate change will constrain North America's over-allocated water resources, increasing competition among agricultural, municipal, industrial and ecological uses; climate change impacts on infrastructure and human health and safety in urban centers will be compounded by aging infrastructure, maladapted urban form and building stock, urban heat islands, air pollution, population growth and an aging population; and, disturbances such as wildfire and insect outbreaks are increasing and are likely to intensify in a warmer future with drier soils and longer growing seasons.

Severe heat waves are projected to intensify in magnitude and duration over the portions of the U.S. where these events already occur, with likely increases in mortality and morbidity, especially among the elderly, young and frail. Ranges of vector-borne and tick-borne diseases in North America may expand but with modulation by public health measures and other factors.

Climate change is also expected to facilitate the spread of invasive species and disrupt ecosystem services. Over the 21st century, changes in climate will also cause species to shift north and to higher elevations and fundamentally rearrange U.S. ecosystems. Differential capacities for range shifts and constraints from development, habitat fragmentation, invasive species, and broken ecological connections will alter ecosystem structure, function, and services.

The 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. Climate change is expected to lead to increases in ozone pollution, with associated risks in respiratory infection and aggravation of asthma. Ozone exposure also may contribute to premature death in people with heart and lung disease. In addition to human health effects, tropospheric ozone has significant adverse effects on certain vegetation. The directional effect of climate change on ambient particulate matter levels remains uncertain.

It should be noted that moderate climate change in the early decades of the century is projected to have some "positive" effects including an increase aggregate yields of rainfed agriculture by 5-20% in the U.S. Such effects, however, contain important variability among regions. Moreover, major challenges are projected for crops that are near the warm end of their suitable range or depend on highly utilized water resources. Recent studies indicate that climate change scenarios that include increased frequency of heat stress, droughts and flooding events reduce crop yields and livestock productivity beyond the impacts due to changes in mean variables alone. Climate variability and change also modify the risks of pest and pathogen outbreaks.

Following this rather grim recitation, EPA concluded:

As the previous section indicates, global climate change is a substantial and critical challenge for the environment. There is little question that the conditions brought about as a result of global

climate change are serious, whether reviewing the issue as a global, national or state-specific issue.

Despite these findings, for some reason EPA still cannot decide whether greenhouse gases are "reasonably anticipated to endanger public health or welfare." I caution this Committee, the Congress, the people of the United States, and indeed the whole world, not to hold their breath waiting for EPA to formally acknowledge the obvious.

II. The Impact of an Endangerment Finding on Pending Agency Actions

Professor Heinzerling has testified as to how an endangerment finding would affect various provisions of the Clean Air Act. I would like to describe how an endangerment finding would affect matters pending before the agency, followed by a look at how an endangerment finding might affect two specific provisions in the Act.

A. Greenhouse Gas Matters Pending Before EPA

While EPA fiddles, the number of petitions, rulemakings and other demands for agency action on this issue is growing daily. A few examples:

On October 3, 2007, four environmental groups pointed out that CO2 emissions from the world's marine vessels were greater than CO2 emissions from all but six countries, and petitioned EPA for regulation of greenhouse gas emissions from maritime sources under Section 213 of the Act on the grounds that these emissions "cause, or significantly contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." EPA has taken no action on this petition.

On December 4, 2007, the states of California, Connecticut, New Jersey, New Mexico and Pennsylvania, along with the District of Columbia and New York City, petitioned EPA under Section 231 of the Clean Air Act, seeking regulation of greenhouse gas emissions from aircraft. Section 231(a)(2)(A) requires EPA to promulgate emission standards for -- you guessed it – "any air pollutant from any class or classes of aircraft engines which . . . causes, or contributes to, air pollution which may reasonably anticipated to endanger public health or welfare." EPA has taken no action on this petition.

Nor is the Clean Air Act the only statute in play. On December 18, 2007, the Center for Biological Diversity petitioned EPA for revised water quality criteria for pH under Section 304 of the Clean Water Act. The petition noted that "Carbon dioxide pollution has already lowered average ocean pH by 0.11 units, with a pH change of 0.5 units projected by the end of the century under current emission trajectories", and warning that "Absent significant reductions in carbon dioxide emissions, ocean acidification will accelerate, likely ultimately leading to

the collapse of oceanic food webs and catastrophic impacts on the global environment." EPA has taken no action on this petition.

On January 28, 2008, six states – California, Connecticut, Massachusetts, New Jersey, Oregon and Pennsylvania – and several environmental groups petitioned EPA for regulation of greenhouse gas emissions from non-road vehicles and engines, also under Section 213 of the Act, and again on the basis that these emissions "cause, or significantly contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." EPA has taken no action on this petition.

Two other matters pending before the agency also speak volumes about EPA's climate policy.

The first concerns New Source Performance Standards for fossil-fuel fired power plants, facilities that account for approximately 40% of U.S. greenhouse gas emissions. Section 111 of the Act requires the agency to issue such standards for any category of sources which "causes or contributes significantly to, air pollution which is reasonably anticipated to endanger public health or welfare." In 2003, Sierra Club sued EPA to force it to review the NSPS for these power plants, which the Act requires the agency to review every 8 years (EPA had failed to conduct such a review, in some instances, for close to two decades). Under the ensuing consent decree, in 2005 the agency proposed revised emission standards for a variety of pollutants, but no standards for carbon dioxide. EPA's one-sentence response to comments noting this problem was that "it does not presently have the authority to regulate CO_2 or other greenhouse gases that contribute to global climate change." 71 Fed. Reg. 9866, 9869. After *Massachusetts*, of course, this reasoning is no longer valid . . . but again, almost a year later, we have heard nothing more from the agency.

Interestingly, EPA is under court order to promulgate final NSPS revisions for petroleum refineries by April 30, 2008, and in that rulemaking we have pointed out that the agency now has the legal authority it needs to address greenhouse gases and documented, yet again, why these emissions obviously meet the endangerment standard. Over the next six weeks the suspense will continue to build as to what new excuse EPA will offer as to why it will not regulate yet another significant sources of U.S. greenhouse gas emissions.

This brings me to the *Bonanza* case.

On August 30, 2007, EPA Region 8 issued a Clean Air Act permit for the proposed Bonanza coal-fired power plant in Uintah County, Utah. Although this plant would emit 1.8 million tons of CO2 a year, EPA did not impose any CO2 emissions limits. Sierra Club challenged this decision on the grounds that Section 165(a)(4) of the Act requires Best Available Control Technology ("BACT") "for each pollutant subject to regulation" under the Clean Air Act.

Massachusetts held that CO2 was a "pollutant", and in Section 821 of the Clean Air Act Amendments of 1990 Congress mandated that EPA "shall promulgate regulations within 18 months . . . to require all affected sources subject to Title IV of the Clean Air Act" to "monitor carbon dioxide emissions . . ." 42 U.S.C. § 7651k note; Pub. L. 101-549; 104 Stat. 2699. EPA then promulgated these regulations in 1993. 40 C.F.R. § 75.1 *et seq.*

Because carbon dioxide is thus clearly both a "pollutant" (per *Massachusetts*) and is "subject to regulation" (per Congressional command), it seemed obvious that the Bonanza permit must require a BACT limit for CO2. Obvious, except, of course, to EPA, which claimed that Congress did not mean the word "regulation" in Section 165(a)(4) to mean the same thing as the word "regulation" in Section 821. According to EPA, "regulation" in Section 165(a)(4) means "subject to actual emissions limits", and does not include the monitoring and reporting "regulations" required under Section 821. (That is EPA's lead argument; its back-up argument is that Section 821 of the 1990 Amendments is not actually part of the Clean Air Act; this matter is now before the agency's Environmental Appeals Board.)

B. Two Clean Air Act Regulatory Provisions: NAAQS and PSD

National Ambient Air Quality Standards

The first specific Clean Air Act provision that I would like to discuss in terms of an endangerment finding are the National Ambient Air Quality Standards ("NAAQS"). A NAAQS air quality standard is expressed in terms of the concentration of a pollutant in the air, and under Section 109(b) are set at levels "requisite to protect public health" and "the public welfare". For example, the current ozone NAAQS is 0.08 parts per million ("ppm")(averaged over 8 hours).

Because Section 108(a)(1)(A) requires EPA to set a NAAQS for "each air pollutant which . . . cause or contribute to air pollution which is reasonably anticipated to endanger public health or welfare", concerns have been raised about the difficultly of administering a CO2 NAAQS. However, it is possible that a CO2 NAAQS may be both unnecessary and not required by the Act.

The argument that a CO2 NAAQS is unnecessary is based on the fact that, given the significant climate change effects we are already experiencing, the NAAQS would presumably need to be set below current atmospheric concentrations of CO2 (approximately 383 ppm), and possibly close to the pre-industrial CO2 level of approximately 250 ppm. In other words, the argument is that this would all be an exercise in futility, as the entire planet is working toward a goal of holding CO2 concentrations at 450 – 550 ppm.

Alternatively, the argument has been made that the Act as currently written may not even require a NAAQS. Section 108(a)(1)(c) limits EPA's obligation to establish a NAAQS to those pollutants "for which [EPA] plans to issue air quality criteria", and thus appears to contemplate some discretion on EPA's part in whether to establish a NAAQS. In light of the circumstances described above, this may be an instance where such discretion would be justified. In any event, Sierra Club would support amending the Clean Air Act so as to make it clear that a CO2 NAAQS is not a necessary consequence of an endangerment finding.

Prevention of Significant Deterioration ("PSD")

The second specific Clean Air Act regulatory provision that I want to mention is the Prevention of Significant Deterioration ("PSD") requirements, found in Sections 165 and 169. Without getting into the minutiae of the PSD program, the regulated community has raised the concern that an endangerment finding would necessarily lead, under the PSD requirements, to regulation of all sources emitting more than 250 tons per year ("tpy") of CO2.

The short answer to this is that Sierra Club believes that imposing individual permitting requirements on CO2 sources emitting at that level is unnecessary, and that the appropriate regulatory threshold for such permitting is more likely to be in the range of 5,000 – 10,000 tpy.

There are at least two possible solutions to this problem. First would be amending Section 169 to clarify that while the 250 tpy limit applies to all other pollutants, a "major source" of CO2 is one that emits above a more appropriate regulatory threshold, possibly the 5,000 -10,000 tpy level.

A second possibility would be a regulatory program that maintained the 250 tpy threshold, but allowed for coverage of all sources below an individual permitting level (again, possibly 5-10,000 tpy) to be covered by a general permit, analogous to the sorts of general permits issued under Section 404(e) of the Clean Water Act. (Professor Heinzerling deserves credit for this idea.)

III. Conclusion

In *Massachusetts* EPA claimed that although it required the agency to regulate any substance that adversely affected "weather" or "climate", the Clean Air Act did not give EPA any authority to address climate change. The result: no federal emissions limits on any sources of greenhouse gases.

Three months ago, EPA claimed that California did not meet the criteria for implementing its own motor vehicle greenhouse gas standards, on the grounds that the Clean Air Act phrase "compelling and extraordinary" actually means "unique". The result: the thirteen states that have adopted these

standards (and the half dozen in the process of doing so) are prevented from limiting greenhouse gas emissions from the second-largest source in the U.S.

In the *Bonanza* case, EPA claims that Congress did not mean the word "regulation" in Section 165 of the Clean Air Act to mean the same thing as the word "regulation" in Section 821. The result: dozens of coal-fired power plants may be built without any CO2 emission controls.

EPA's consistent response to the terrible threat of climate change has been to twist the words of the Clean Air Act so as to justify the agency in both its own refusal to act and in preventing anyone else from doing so. In the end, the only reason that I can see for EPA's delay in answering the endangerment question is that it cannot figure out how to torture the statutory language into supporting a finding that greenhouse gases are not "reasonably anticipated to endanger public health or welfare."

Mr. INSLEE. Thank you.

Our next witness, Mr. Roderick Bremby, who is Secretary of the Kansas Department of Health and Environment. As Secretary, his primary goal is of improving health and environmental conditions for Kansans. He served prior to that as Associate Director of the Work Group on Health Promotion and Community Development at the University of Kansas and Assistant City Manager of Lawrence, Kansas.

There are some great things happening in your state. Thanks for joining us, Mr. Bremby.

STATEMENT OF THE HONORABLE RODERICK BREMBY

Mr. BREMBY. Thank you, Mr. Chairman.

We appreciate the opportunity to testify this morning.

Mr. INSLEE. If you want to pull that mic a little closer it will be helpful.

Mr. BREMBY. On the Supreme Court decision, Mass. v. EPA, and the decision related to my denial of Sunflower Electric Power Corporation's permit for an additional two 700 megawatt coal-fired generators. I also want to briefly address the legal and policy implications of the EPA's failure to regulate greenhouse gases.

Mass. v. EPA was very influential in our decision to deny the petition. The Supreme Court's finding that greenhouse gases are an air pollutant within the meaning of the federal Clean Air Act supports and confirms my own understanding that CO_2 constitutes air pollution within the meaning of the Kansas Air Quality Act.

Under the Kansas Air Quality Act, there are two specific provisions that provide for broad authority to protect the health of Kansas citizens and the environment. For example, under KSA 65–3008 and KSA 65–3012, it allows us to either modify, to approve, or to reject a petition after public hearing. Sixty-five, thirty, twelve requires information that the emission of air pollution presents a substantial endangerment to the health of persons or the environment. Endangerment may be a threatened or potential harm, as well as an actual harm.

So it is under that rubric then that we were able to strike the petition.

In Mass. v. EPA, the Court's recognition of the significant national and international information available on the deleterious impact of GHG on the environment and its conclusion that GHG CO_2 meets the broad definition of air pollutant under the Clean Air Act provided support for the position that I took that CO_2 also meets the similarly broad definition of air pollution under the Kansas Air Quality Act.

The EPA's failure to determine one way or the other whether GHGs cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare has impacted the State of Kansas' ability to enforce and maintain the authority stemming from state law to protect public health and environment from actual, threatened or potential harm from air pollution.

Unless and until the EPA acts, its failure to regulate GHG has significantly and adversely affected Kansas. Kansas legislature recently passed a bill that will serve to tether GHG emission control in our state directly to what the EPA will do or fail to do.

The Sunflower bill promulgates that I as Secretary cannot promulgate any rule, regulation, or issue in any order that takes any other action other than any provision of the Kansas Air Quality Act that is more stringent, restrictive, or expansive than required by the Clean Air Act or any rule or regulation adopted thereunder by the EPA. Our Governor Sebelius has expressed her intention to veto the bill, which passed with votes insufficient for an override, but that may change.

Given the unambiguous requirement in the CAA that CO_2 emissions be regulated and reduced, it would make sense from both a human health and business perspective for EPA to issue its regulations as quickly as possible.

The EPA's issuance of an endangerment finding or notice of any intent to promulgate federal rules and regs. would further support my decision to regulate CO_2 in Kansas, which was appealed to the Kansas Court of Appeals, the District Court of Finney County, Kansas, and the Office of Administrative Hearings in the State of Kansas.

The Supreme Court has taken up the appeals filed in the Court of Appeals on its own motion. The proceedings in the District Court and the Office of Administrative Appeals are stayed pending deposition of the appeals by the Supreme Court.

The EPA's notice of intent to regulate would support my exercising the authority granted to me by Kansas law, but it is not necessary to it. The EPA's decision to regulate GHG emissions would be critical to alleviating the so-called regulatory uncertainty, and thus economic uncertainty, I have been alleged to create by denying the Sunflower Electric permit.

In the absence of federal legislation in this area with the potential for enactment of the legislation currently pending in Kansas, it would be impossible for Kansas to protect the health of its citizens and the environment from the effects of CO_2.

So I thank you for the opportunity to present this morning. I ask that the written statement be added to the record, and I will stand for any questions that our legal staff would clear me to answer.

[The statement of Mr. Bremby follows:]

KANSAS
DEPARTMENT OF HEALTH
AND ENVIRONMENT

Kathleen Sebelius, Governor
Roderick L. Bremby, Secretary

www.kdheks.gov

Written Testimony of
Roderick L. Bremby
Secretary, Kansas Department of Health and Environment

House Select Committee on
Energy Independence and Global Warming
Hearing on "*Massachusetts v. U.S. EPA* Part II:
Implications of the Supreme Court Decision"

Thursday, March 13, 2008

Mr. Chairman and members of the Committee, I am Roderick L. Bremby, Secretary of the Kansas Department of Health and Environment. I appreciate the opportunity to testify on the U.S. Supreme Court's decision in *Massachusetts v. EPA*, No. 05-1120, slip op. (U.S., April 2, 2007), and how the decision related to my denial of the Sunflower Electric Power Corporation's (Sunflower Electric) permit for the addition of two 700-megawatt coal-fired generators. I will also address the legal and policy implications of EPA's failure to regulate greenhouse gas emissions.

The Kansas Department of Health and Environment (KDHE) is a cabinet-level administrative agency with the mission to improve the health of Kansans and the environmental condition of the state. This responsibility is exercised through the regulation of health and environmental entities in Kansas including childcare centers, food service businesses, hospitals, laboratories, feedlots, landfills, power plants, and various other industries with environmental impacts. The Kansas Department of Health and Environment also manages programs dedicated to providing disease surveillance and prevention efforts, bioterrorism planning, local and rural health assistance, health care and environmental protection information, and statewide health promotional campaigns.

In keeping with the agency mission and to secure its vision of "healthy Kansans living in safe and sustainable environments," in October 2007 I

made the decision to deny the permit request of Sunflower Electric, which if granted, would have allowed the emission of an estimated 11 million tons of carbon dioxide (CO_2) annually.

Basis for the Sunflower Electric Permit Decision

The *Massachusetts v. EPA* decision was highly influential in the State of Kansas' decision to deny the petition of Sunflower Electric to construct a coal-fired power plant. The Supreme Court's finding that greenhouse gases are an air pollutant within the meaning of the federal Clean Air Act supports and confirms my own determination that CO_2 constitutes air pollution within the meaning of the Kansas Air Quality Act.

Under the Kansas Air Quality Act, the Secretary of the Kansas Department of Health and Environment has broad authority to protect the health of Kansas citizens and the environment. The process for obtaining an air quality permit includes a technical review of a permit application as well as a comment period to solicit input on the proposed permit from the public. Upon consideration of the permit record as a whole and pursuant to the legal authority of K.S.A. 65-3008a(b) and K.S.A. 65-3012, the decision was made to deny the permit. The former statute provides that a decision on an air quality permit may be affirmed, modified or reversed after the public hearing. The latter statute allows the Secretary to take such action as necessary to protect the health of persons or the environment, notwithstanding a permit applicant's compliance with all other existing provisions of the Kansas Air Quality Act. Action under K.S.A. 65-3012 requires information that the emission of air pollution presents a substantial endangerment to the health of persons or to the environment. Endangerment may be a threatened or potential harm as well as an actual harm.

The U.S. Supreme Court's decision in *Massachusetts v. EPA* was a key consideration in making the Sunflower Electric decision. The Court's recognition of the significant national and international information available on the deleterious impact of greenhouse gases on the environment, and its conclusion that the greenhouse gas, CO_2, meets the broad definition of air pollutant under the Clean Air Act provided support for the position I took that CO_2 also meets the similarly broad definition of air pollution under the Kansas Air Quality Act. The Court's decision, the Kansas Attorney General Opinion supporting my interpretation of K.S.A. 65-3012, the reports of the

International Panel on Climate Change, and the extensive administrative record - including comments submitted at the public hearings held in regard to the Sunflower Electric permit application - all contributed to my conclusion that the CO_2 emissions from the proposed Sunflower Electric expansion would constitute a substantial endangerment to the citizens of Kansas and our environment.

Effect of EPA's Failure to Regulate Greenhouse Gases

EPA's failure to determine one way or the other whether greenhouse gases "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare" has impacted the State of Kansas' ability to enforce and maintain the authority stemming from state law to protect the public health and environment from actual, threatened or potential harm from air pollution.

Unless and until EPA acts, its failure to regulate greenhouse gases has significantly - and adversely - affected Kansans. The Kansas Legislature has recently passed a bill that will serve to tether greenhouse gas emission control in our state directly to what EPA will do ... or fail to do.
The "Sunflower Electric bill" (House Substitute for S.B. 327) provides that I, as Secretary of KDHE, may not promulgate any rule or regulation, or issue any order or take any other action under any provision of the Kansas Air Quality Act that is more "stringent, restrictive, or expansive" than required by the CAA or any rule or regulation adopted thereunder by EPA.
Governor Sebelius has expressed her intention to veto the Sunflower Electric bill, which passed with votes insufficient for an override, but that may change.

Until EPA takes action on regulating greenhouse gases, we in Kansas will be limited in our ability to aggressively address CO_2 emissions. Given the unambiguous requirement in the CAA that CO_2 emissions be regulated and reduced, it would make sense from both a human health and business perspective for EPA to issue its regulations as quickly as possible.

Impact of EPA Decision to Regulate GHG Emissions on Kansas Dispute

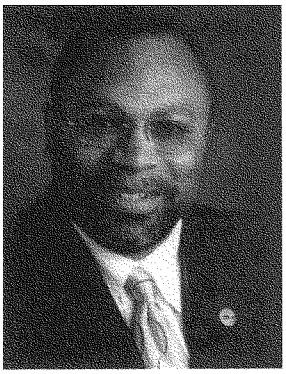
EPA's issuance of an endangerment finding or notice of any intent to promulgate federal regulations to control greenhouse gas emissions from stationary sources would further support my decision to regulate CO_2 emissions in Kansas, which was appealed to the Kansas Court of Appeals, the District Court of Finney County, Kansas, and the Office of Administrative Hearings of the State of Kansas. The Kansas Supreme Court has taken up the appeals filed in the Court of Appeals on its own motion, and the proceedings in the district court and office of administrative appeals are stayed, pending disposition of the appeals by the Supreme Court.

In denying Sunflower Electric's permit application, I found that its proposal to construct two new coal-fired power plant units poses a substantial endangerment to Kansans and our environment. That finding is well supported by the extensive administrative record, and I stand by it. EPA's issuance of an endangerment finding would support my determination, but is not necessary for it. Similarly, my authority to take action in regard to greenhouse gas emissions - and therefore deny Sunflower Electric's permit application - was based on the Kansas Air Quality Act. Therefore, EPA's notice of intent to regulate would support my exercising the authority granted to me by Kansas law, but is not necessary to it. However, EPA's decision to regulate GHG emissions would be critical to alleviating the so-called "regulatory uncertainty" and thus economic uncertainty I have been alleged to have created by denying the Sunflower Electric permit.

Conclusion

The most critical challenge facing the states is policy uncertainty at the federal level. In the absence of federal legislation or regulation in this area and with the potential for enactment of the legislation currently pending in Kansas, it would be impossible for Kansas to protect the health of its citizens and the environment from the effects of CO_2.

Thank you for the opportunity to present this testimony. I look forward to your questions.



Roderick L. Bremby
Secretary, Kansas Department of Health and Environment
Topeka, Kansas

Prior to his January 2003 appointment by Governor Kathleen Sebelius, Secretary Bremby served as a research assistant professor at the University of Kansas and as associate director of the Work Group on Health Promotion and Community Development. His work involved providing technical assistance, evaluation support and community research for community health initiatives. Secretary Bremby has been a consultant for a variety of organizations including, community coalitions, advocacy organizations, local government agencies, and the U.S. Agency for International Development (Strengthening Democracy in Uganda).

Secretary Bremby served 10 years as the assistant city manager in Lawrence, KS, where he was responsible for overseeing the budgeting process, police, fire and medical, public works, water, sewer, finance, information systems, and parks and recreation departments.

Secretary Bremby holds a master's degree in public administration from the University of Kansas, where he completed an undergraduate degree in psychology and communication studies. He also completed postgraduate study at the Brookings Institution, The Lyndon B. Johnson School of Public Affairs, and an executive development course at The Center for Creative Leadership. Secretary Bremby is a Kansas Health Foundation Fellow and a graduate of Leadership Forth Worth, Leadership Lawrence, and Leadership Kansas.

Mr. INSLEE. Thank you, and please pass on our commendation to your great governor for her great leadership in this field.

Ms. HEINZERLING. Thank you.

Mr. INSLEE. We really appreciate it. It helps us nationally.

Our next witness, Representative Joshua Svaty, who is a member of the Kansas House of Representatives, is a senior member of the Energy and Utilities Committee, and ranking minority member on agriculture and natural resources. He has also been appointed by the governor to her Kansas Energy Council planning a long-term future for the great state.

Mr. Svaty, thanks for coming up here.

STATEMENT OF THE HONORABLE JOSH SVATY

Mr. SVATY. Thank you. It is certainly a pleasure.

It does not sound like it is on. I have never been accused of being——

Mr. INSLEE. It is working.

Mr. SVATY. Okay. That is fine.

Anyhow, it is a pleasure. I do farm east of Ellsworth, Kansas, and I appreciate the opportunity to testify.

This is a very interesting issue for Kansas, and I wanted to respond to some of the comments that were made about the respective states and the potential economic impact with greenhouse gas controls that were made earlier this morning.

Kansas probably almost more so than any other state is acutely aware of the benefits of a fossil fuel economy. We have thin coal seams east of what is the geologic ridge known as the Nemaha line. We have the first oil well drilled west of the Mississippi. We also had the Hugoton gas field, which at the time of its discovery was the largest natural gas field in North America.

So we understand the benefits of a fossil fuel economy. That being said, I have seen a marked increase among my constituents and constituents across the State of Kansas that want to see an expanded generation portfolio. They also want us to begin a transition into more renewables and more clean energy technology as we move forward as a state.

What has happened then is when Secretary Bremby made his decision in October of last year, this issue has landed squarely in our lap, and I was somewhat amused by the comments of the Ranking Member this morning that said this political issue should not end up in the hands of unelected regulators and the unelected courts.

That is exactly the scenario we have in Kansas right now. We have it as a political issue, and I say for my own personal view, it has been an absolute mess.

Furthermore, I would also though venture to say ask anyone in this issue, both for and against those plants, and they would say the political process that this bill has undergone has not been clean and has not done justice to the democratic process itself.

We started out with a bill that would have included some low and easily reached limits on greenhouse gases. Those were immediately thrown out the minute we discovered it would be very difficult for a state as far as politically to determine those.

We then went to more of a budgetary process where they began adding in green things here, green things there to see if they could

find the right mix of votes. That process may work for the budget, but it does not work for long-term energy policy whether at the state or at the federal level.

So what has happened is the end bill that we have that now sits on the governor's desk is basically a bill that makes the legislature the de novo court for issuing permits. Issuing permits should be the job of the Kansas Department of Health and Environment, and as you are acutely aware as Congressmen, Congress or any legislature has a host of different opinions, and we should be the last place that would be actually issuing permits because it would be an even more uncertain process than the regulatory uncertainty that has been claimed at the state level.

Finally, I would also like to say that I was concerned when I heard the Environmental Protection Agency this morning say that they were disappointed that they could not consider cost, and that was also a concern that I heard echoed from members of this Committee.

I am just a farmer from central Kansas, but I thought the Environmental Protection Agency's job was to consider the environment first, both for the safety and health of the citizens of the United States and also for the sake of the natural resources for this country.

It is our job as legislators to then consider within the parameters that the Environmental Protection Agency sets how to find a course through this crisis so that we do not harm the economy. We allow businesses to expand and flourish within the State of Kansas and elsewhere, but we also find a solution to protect the citizens of the state.

That is what I have in mind to do, but without direction from the Environmental Protection Agency, without parameters, the theoretical collective genius that should be the legislature acting on the part of all of the citizens has no boundaries whatsoever and we end up all over the place, which is what you would see in the legislation that is currently making its way through the process in Kansas.

I would hope to see more direction from the Environmental Protection Agency. I think that it would have a very positive effect on the debate in Kansas and in other states that are having this debate simultaneously. It gives us direction. It gives us parameters. It gives us opportunities as legislators to work to find solutions for all interests involved.

I thank you for the time. I would also ask that my written comments be admitted.

[The statement of Mr. Svaty follows:]

Testimony of

Joshua Svaty

Member, Kansas House of Representatives

Farmer, rural Ellsworth County

Presented before the

Select Committee on Energy Independence

And Global Warming

A hearing on

The EPA's response to the Supreme Court's decision

Massachusetts v. EPA

March 13, 2008

Testimony of

Joshua Svaty

Member, Kansas House of Representatives

Farmer, rural Ellsworth County

March 13th, 2008

Thank you for the opportunity to testify before you today. I am Joshua Svaty, I live and farm in rural Ellsworth County, Kansas. In 2002 I successfully ran for the Kansas House of Representatives, district 108, and have been fortunate to continue serving in that capacity for the last six years. I am a senior member on the House Energy and Utilities Committee, I serve as the Ranking Minority Member of the House Agriculture and Natural Resources Committee, and I have also served as the Ranking Minority Member of the Joint Interim Committee on Energy and Natural Resources. In addition to my legislative duties, I also serve as a Governor's appointee on the Kansas Energy Council, a broad committee of public and private interests charged with crafting long-term energy policy for the state of Kansas. In that capacity I have served as the Chair of the Goals committee, and though I don't want to insult your intelligence I will point out the obvious; a committee that has a subcommittee to determine the full committee's goals is going to have trouble ever accomplishing much of anything.

I have been asked to deliver testimony broadly on the question of state policy in light of the EPA not setting a policy direction on Greenhouse Gas Emissions (GHGs). Specifically, I have been requested to provide my direct knowledge of legislative action in Kansas surrounding the recent decision by Kansas Department of Health and Environment (KDH&E) Secretary Bremby to deny in October of 2007 the air permits for two supercritical coal-fired generators located in Western Kansas. The questions posed to me are as follows:

1) Can you describe the current legislative developments in the Kansas State Legislature related to the Kansas Department of Health and Environment's denial of a petition to construct a coal-fired power plant submitted by Sunflower Electric?

2) Has EPA's failure to determine one way or the other whether GHG emissions "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare" impacted the State of Kansas' ability to enforce or maintain the

authority stemming from its state law to protect the public health and environment from actual, threatened, or potential harm from air pollution, and if so, how?

3) How would EPA's issuance of an endangerment finding or notice of any intent to promulgate federal regulations related to the control of greenhouse gas emissions from stationary sources impact the ongoing dispute surrounding the denial of Sunflower's permit?

My testimony will attempt to address all three of these questions. In brief, the Kansas House and Senate, after passing an agree to disagree in order to have action on a conference committee report that was not unanimously signed, have both passed Substitute for Senate Bill 327, the legislative response to the actions of Secretary Bremby in October of 2007. This legislation limits the Secretary's power by requiring him to consider only those substances currently regulated by EPA under the Federal Clean Air Act, and was passed by a veto-proof majority in the Senate but not in the House. After a thorough vetting by staff, it will be presented to the Governor most likely today or tomorrow, and the Governor has indicated that a veto is likely. Under Kansas law, legislation may sit on the Governor's desk for ten days, and should a veto occur on this measure an attempt to override is likely.

Background on the Kansas Legislature and Current Developments

Kansas has a citizen legislature. We meet ninety days a year, starting in early-January and running until early May. We are paid approximately 14,000 dollars a year with another few thousand dollars for lodging expenses incurred during the legislative session. This is probably similar to the state legislatures from your respective homes. The Kansas legislature, again bearing its duty like most other states, spends most of its time crafting policy for education and in more recent years has devoted much time addressing rapidly rising health care costs. We have also historically invested greatly into transportation and social services. In fact, in the last thirty years of the legislature there have only been two special sessions and both serve as indicators of the work that is typically central to the Kansas legislature: one special session, in the late eighties, was held to determine the upcoming decade-long comprehensive transportation plan, and the most recent was on school finance four years ago.

As a state, we have not, however, shied away from energy policy. Kansas has nationally recognized energy regulators and Utilities Committee Chairmen, and much of what the Utilities Committee has done in the past six years were intended to be progressive steps forward in an effort to position Kansas to be an energy leader among the states. We passed broad tax credits to encourage the development of new pipelines in the state; clean-coal and IGCC development in the state; and CWIP (construction while in progress) to allow investor-owned utilities to gain a

faster return when they are building certain new infrastructure in the state. While we all may have our own policy differences with some of the legislation, and while I certainly don't think we spent enough of our time talking about energy efficiency and conservation, I cannot fault my very qualified chairman of the House Energy and Utilities Committee for being inactive.

When the Kansas Attorney General gave the Secretary of Health and Environment the authority to deny the permit under K.S.A. 65-3012, the now infamous emergency provision, it set the stage for a debate on the Clean Air Act. When the permits were denied, initial responses from the supporters of the plants were that the Secretary abused his authority under K.S.A. 65-3012. Taken from a statement of legislative intent issued by members of the Kansas Senate upon passage of Sub for SB 327, "As a matter of fact, the Legislature has never intended K.S.A. 65-3012 to have any application in the air quality permitting process. Moreover, the Legislature has never intended to authorize the Secretary of Health and Environment to deny, modify or otherwise take adverse action on any air quality permit application based on anticipated emissions of any air contaminant or pollutant for which there are no established federal or state emission standards."

Unlike Congress, Kansas does not keep a Congressional Record. We have only skeletal committee minutes which make it difficult to ascertain legislative intent for something passed ten years ago, let alone forty-one. Kansas legislators should not be asked to determine the intent of a statute passed in 1967. Through due process, if legislative intent is a question for the court, then the court must make a determination. The Kansas Legislature, and I would suspect other legislatures, operates best when it can operate under the strong and living Federal acts and the necessary state statutes that accompany them. This is certainly true of the Federal Clean Air Act and its federal administrator, the Environmental Protection Agency (EPA).

The scenario existing in Kansas is one in which all roads of confusion lead to one source: the EPA. Though I cannot speak for Secretary Bremby and his decision to deny the air permits, from a legislative perspective the best course of action is one of caution because of the mixed signals coming from the Federal Government. Kansas already obtains 73 percent of its electric generation from conventional coal sources, and adding approximately eleven million tons of CO2 annually from the Holcomb expansion only gives Kansas a greater carbon footprint should the EPA or Congress ever move forward on controlling GHG emissions. This increased footprint makes efforts to reduce emissions or complying with new federal mandates more costly and burdensome on utility ratepayers.

Prior to this legislative session, four legislators, the House and Senate Utilities' committee chairs and ranking minority members, met to craft legislation with a two-fold purpose: one to help set direction for a comprehensive state energy plan and two to allow for the Sunflower Electric Cooperative Holcomb power plant expansion. In a bold move, the four legislators introduced groundbreaking legislation that would have placed an upper limit on carbon dioxide

emissions with a carbon tax on emissions above that level. This action was so roundly dispatched by the legislature that little has survived to the final bill that has reached the Governor's desk. Many legislators disliked the measure because it included both an emissions limit and a tax, others disliked the bill because the free limit (1520 tons per Megawatt hour) and the tax (three dollars per ton) did not go far enough. Furthermore, the bill contained a host of mitigation possibilities that amounted to a fait accompli for any company building a coal plant. I mention only one for effect – a company would be allowed one and a half times the amount of capacity for renewable energy on transmission lines built because of the plants. It is worth noting that nothing in the bill required wind power or other renewable energy sources to be constructed. This was a mitigation for simply having the capacity in place on lines that would have to be built anyhow.

As it stands now, the bill before the Governor contains some "green" elements, and their merit or lack thereof is not what I am here to discuss. The bill also continues to contain the one surviving element from the start – the language removing the KDH&E Secretary's authority to decide air permits. In particular,

> "The Secretary shall not in the exercise of powers and duties, except as provided below, promulgate any rule and regulation, or issue any order or take any other action under any provision of the Kansas air quality act or other provision of law, that is more stringent, restrictive or expansive than required by the federal clean air act, (42 U.S.C. 7401 *et seq.*) or any rule and regulation adopted by the United States environmental protection agency under the federal clean air act, as amended."

On the one hand, this language may be seen as a welcome acceptance of the EPA and its indecision regarding GHGs. However, perhaps the deeper interpretation demonstrates the necessity of an EPA that will act. The drafters of this language were intentionally waiting on the EPA to act. Those of us who did not support this language are also waiting for the EPA to act – to provide clarity and certainty. Regardless of where legislators, regulators, business, industry and citizens are on this issue, one thing is apparent – the EPA needs to act.

EPA and GHG emissions, authority of State law

It is no secret to members of this committee and the others testifying here today that *Massachusetts v. EPA* hinged on the plaintiff's ability to show an injury in fact. In Kansas, a debate about public health and welfare, especially welfare as it is statutorily defined, has either never taken place or has been so insignificant as to warrant little attention. In fact, the only testimony provided during the hearings on the bill pending in Kansas that came close to a discussion of public health and welfare was provided by a proponent of the bill. He was a private attorney that had worked previously for the EPA, and that previous arrangement suggested that he was an authority on what the EPA was going to do. In fact, (and I recognize

this as anecdotal, you may do with it as you please) I had to correct many of my fellow committee members because they were left with the impression that he was speaking for the EPA.

The issue in this particular case is that if the EPA does not determine one way or another the future of GHG emissions, and does not actively engage in the debate over whether or not GHGs endanger the public health and welfare, state-level debates similar to the one that occurring in Kansas are likely to become distractions to the central question of regulatory authority over issues that do in fact endanger the public health and welfare of citizens. As an example, the debate in Kansas has been only viscerally about the science of global warming and hardly at all on the impact on the public health and welfare. Few legislators spoke about the actual climate and weather effects of increased GHGs, and instead used the opportunity to speak about "regulatory certainty" in light of what they considered an arbitrary decision. The irony, in my opinion, is that in claiming regulatory certainty they were voting for a bill that removed the State of Kansas' ability to go above and beyond the federal government in air quality for the sake of its citizens. The regulatory authority so espoused by the proponents of the bill stemmed from the EPA, an administration that had been court-ordered to consider GHGs and was giving the state no indication of the direction it was going to take.

Contemporary court orders that reverse the action or inaction of the EPA (*New Jersey v. EPA)* continue to provide confusion for states when considered in light of the EPA position. Even the recent statements from the EPA denying California's right to apply standards higher than other states still gives states pause because the EPA makes strong allusions toward an endangerment finding. On the one hand, the EPA says that California cannot implement its standards for greenhouse gas emissions from cars. On the other hand, in making that case the EPA basically grants an endangerment finding. If that is the case, then what are we as states to believe? Our state authority is being given up in favor of a federal authority that is in my opinion less certain than what we have in Kansas. I do not mind following the authority of the federal government but even if what we have in Kansas right now is regulatory uncertainty we would be trading state uncertainty for federal uncertainty. With all due respect, I would rather trust the local government.

The strongest case to be made for direction from the EPA comes from a synthesis of these thoughts. As state legislatures we are by geography and design closer to our respective constituencies. When people want to see a change in the generation portfolio of their utilities, as many do now, they rightly come to their state and federal government to appeal for that change. As a regulated industry it is fitting and proper for government to have a role in this policy shift. Kansas, like other states, can legislate a shift in the generation portfolio, but only with an interesting twist: though as a legislature we do not have to wait for an injury-in-fact to mandate a shift in generation, we have understanding enough, even in a citizen legislature, to not mandate a generation shift without accepting the injury-in-fact. If as a state we acknowledge the harm from

GHGs, the logical way to address them is through regulation, which is problematic. For example, California can regulate air emissions and still attract industry by virtue of geography. Kansas, however, plays for industry among similar states on the high plains, and a state regulating carbon surrounded by states who do not is an economic death wish. Kansas has the political will and the legislative capability to begin exploring an expanded and diversified generation portfolio. The justification of this expansion, however, lies squarely at the federal level.

Endangerment Finding; Rules and Regulations

Had the EPA issued an endangerment finding or notice of intent to promulgate rules and regulations it would have and still could have a substantial effect on the debate in Kansas. When this issue arrived before the legislature, statements were made by House leadership that it was to be done at the earliest outset in the legislative process. Hearings on the bill were compressed into a week, leaving many citizens unable to testify, as a quick resolution to this complex situation was desired. It is understandable why a timely resolution was requested via the legislature as the Kansas Supreme Court, where a lawsuit is currently pending, will not grant a quick remedy. Meanwhile the strong march of public opposition continues to mount.

What has been lost in this issue was the democratic process. Citizens want to weigh in on the debate, but it has been pushed rapidly through the process. There can be many explanations for the rush, but there can be no denying that questions surrounding the EPA are central to the effort to move the legislation through as fast as possible. Though many Kansas legislators are not talking about endangerment findings for the public health and welfare, everyone is talking about the potential for movement on carbon at the federal level, and the energy and utility industry has a keen eye on the EPA. As with any good legislation, there are a host of reasons to take our time as it is being crafted. In fact, one of my stronger arguments was temperance and deliberate action once there was greater clarity and direction from the federal government. This is the free market after all – if the demand for power exists now it will exist next year, and as long as demand exists someone will step up with the financing to supply that power.

However, those of us that oppose the legislation were left with little strength in our argument to wait because we could not definitively say "The EPA will act soon, why don't we wait until they make a determination?" Had the federal government provided us a hint of movement we would have been able to justify a slower, more methodical approach to crafting an energy policy around the Secretary's decision. I betray my own bias for pointing out this problem in our process, but my argument could by applied to the cause of Sunflower Electric as well. Sunflower and anyone seeking redress through the legislative process will ultimately craft better public policy if the certainty from the federal level allows them to take their time through the legislative process at the state level.

Conclusions

Remarkably, though I have voted twice against a bill that would allow the two coal-fired power plants to be built in western Kansas, I am not against Sunflower Electric Cooperative constructing some amount of coal-fired generation at Holcomb for the baseload power needs of Kansans. I understand and appreciate the need to provide reliable, reasonably priced power to Kansas consumers and recognize that due to our state's generation mix, volatility in energy markets and lack of proven technology that coal-fired generation will help bridge us to the future. Though I look forward to the day when we can move from an extractive economy to a resilient energy economy, I understand the measured approach we must take. My chief concerns on this issue have stemmed from the manner in which this legislation has been pushed through the legislative process and the actual language contained in the bill. I am not long in tooth, nevertheless I have seen my share of political blitzkriegs and know that sometimes they are an inevitable part of the system. However, energy policy should warrant a full and deliberate debate which was not present on this matter. A patchwork bill has been hastily constructed and modified in an effort to obtain the votes necessary to override a gubernatorial veto. With any leadership from the EPA, this situation could have been avoided.

What is most pressing is the tremendous responsibility our Department of Health and Environment has in maintaining the safety and well-being of all the current and future citizens of the state of Kansas, as well as the abundance of natural resources present in our state. The language included in Sub for SB 327 is so strongly worded against KDHE that it is almost daring anyone to begin monitoring GHG emissions. It is my firmly held belief that this language would have been tempered by any sort of movement or endangerment finding on the part of the EPA.

States across our nation are engaged in similar debates, experiencing similar polarization, and further endangering our citizenry and potentially our climate. If EPA intends to act, sooner is better to give us all – utilities very much included – the regulatory certainty we crave. Until EPA does act, states will continue to experience this sort of race against the clock, with utilities seeking to site large coal plants prior to such action while citizens become ever more deeply divided, some crying foul on economic development terms, some crying foul on climate grounds, with citizen-legislators like myself stuck in the middle trying to make sense of the best course of action. Respectfully, I would plead with Congress and the EPA to make use of the science, the data, the public opinion measurement at your collective command, and act on behalf of all Americans, so that we can unite together to create a robust energy economy for the twenty-first century.

Chairman MARKEY [presiding]. Without objection, your written comments will be included in the record.

And our final witness is Mr. Peter Glaser, a partner at Troutman Sanders. Mr. Glaser specializes in environmental regulation and litigation, and you have been involved in the litigation of Massachusetts v. EPA.

We welcome you and whenever you are ready, please begin.

STATEMENT OF PETER S. GLASER

Mr. GLASER. Thank you very——

Chairman MARKEY. And, again, please move the microphone in closer and lower it a little bit so that it is closer to where the words are coming out of your mouth.

Mr. GLASER. Okay. How does that sound?

Chairman MARKEY. No, just move it in a little bit closer, please.

Mr. GLASER. That sounds okay? I can also raise my voice.

Chairman MARKEY. That will help. Thank you.

Mr. GLASER. Thank you very much, Mr. Chairman.

Let me begin by saying that the views that I am expressing here are my own and not necessarily those of any company or group that I currently——

Chairman MARKEY. Okay. Can you move the microphone over in front of your mouth if that is possible? Okay. Good. Thank you.

Mr. GLASER. So the views that I am expressing today are my own and not necessarily those of any company or group that I have represented or represent currently.

Let me begin by addressing the first issue that the Committee raised, which was the effect of EPA regulation of motor vehicle greenhouse gas emissions on stationary sources. The effect would be a very significant one and not just on large stationary sources. And this is no bogeyman. Unfortunately this is the way the Clean Air Act works.

If EPA promulgates motor vehicle regulations, carbon dioxide, and other greenhouse gases will become regulated Clean Air Act pollutants for purposes of the Clean Air Act prevention of significant deterioration or PSD Program. As a result, as I discuss in my written testimony, hundreds of thousands of small stationary sources, at least hundreds of thousands across the economy that have not been regulated in the past under the Clean Air Act will become subject to onerous PSD permitting requirements, and this could have extremely serious implications for capital investment across the economy as any building of approximately 100,000 square feet that is heated by oil or natural gas will be affected. That is about a ten-story office building, and in my testimony I enumerate some examples of the type of facilities that are likely to trigger that 100 to 250 ton per year trigger.

The Committee, in my view, should take no comfort from Mr. Bookbinder's suggestion that EPA could possibly avoid the PSD problems that I refer to by adopting what he refers to as a general permit program that would essentially exempt sources emitting below a 5,000 to 10,000 ton per year threshold.

And I am, frankly, very surprised at this proposal, given its source. The Sierra Club and others in the environmental community have spent the last several years vociferously attacking EPA

for in their view departing from plain statutory language in an attempt to develop creative and flexible regulatory mechanisms, and now they suggest that the administrator could exempt sources from explicit statutory language if they do not emit above a threshold that he considers to be "a more appropriate" one than the 100 to 250 ton per year threshold set forth in the statute.

I know exactly the arguments that the Sierra Club and others would raise against such a proposal if industry made it. In any event, the fact that he calls the suggestion merely a "possibility" reveals the uncertainty of whether the suggestion would pass legal muster.

From a business standpoint because legal uncertainty disincents capital investment, business would have difficulty relying on the proposal that he makes, if adopted by EPA. So any way you look at it, immediate Clean Air Act regulation of greenhouse gases, regulation that the Sierra Club is loudly calling for, is going to result in a potentially debilitating impediment to business activity, and I am not sure of how to get around it.

The Committee's second issue had to do with the effect of the recently enacted EISA. I think this issue is particularly relevant in light of the PSD impacts that I have enumerated. There has been a lot of discussion about why EPA did not issue its proposal at the end of last December, but given the enactment of the EISA and given the impacts under the PSD program that I have discussed above, EPA's decision to have a pause makes perfect sense.

The EISA addressed the President's Twenty in Ten agenda, and it will achieve significant reductions in motor vehicle greenhouse gas emissions. Congress required EPA to act within one year, and EPA must do so.

I would also say that as a legal matter, EPA is well within its legal authority to pause before formulating a response to Massachusetts. The Supreme Court did not establish a deadline for EPA action on remand. The Sierra Club and others did not even ask for one as far as I know, and to the contrary, the Court stated that EPA "has significant latitude" as to the timing of its regulations.

I appreciate the opportunity to make these remarks. I thank you, and ask that my written testimony be entered into the record.

[The prepared statement of Mr. Glaser follows:]

TESTIMONY OF PETER GLASER
ON THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO
THE SUPREME COURT'S DECISION IN *MASSACHUSETTS V. EPA*

HOUSE SELECT COMMITTEE ON
ENERGY INDEPENDENCE AND GLOBAL WARMING
March 13, 2008

I am Peter Glaser, a partner in the law firm of Troutman Sanders LLP. I have an active Clean Air Act (CAA) practice and have been involved in greenhouse gas (GHG) legal issues for more than a decade. I represented clients in all phases of the *Massachusetts v. EPA* litigation, including filing comments in the original 1999 rulemaking and amicus briefs before the Court of Appeals and the Supreme Court. I have written and spoken about the decision on a number of prior occasions.

I am not here before the Committee representing or advocating the position of any particular company or industry. I am not receiving remuneration from anyone for my testimony, and the views expressed in my testimony are my own and not necessarily those of any company or group that I currently represent or have represented.

In addition, I am not here to recommend any particular course of action by this Committee or Congress. I have been asked to offer my views as a practicing attorney on issues pertaining to the U.S. Environmental Protection Agency's (EPA) approach to addressing GHGs in the wake of the Supreme Court's decision in *Massachusetts v. EPA*.[1]

INTRODUCTION

Let me begin by saying that I think the Committee has identified two of the most critical issues confronting EPA as it considers its response on remand to *Massachusetts v. EPA*. First, what would be the impact on stationary sources if EPA regulates motor vehicle GHGs under the CAA. Second, what impact does last December's Energy Independence and Security Act

[1] 127 S. Ct. 1438 (2007).

(EISA) have on EPA's response to the Court's decision. These questions raise difficult issues, and the answers counsel caution and deliberation by EPA as it considers how to respond to the Court's remand.

First, EPA regulation of motor vehicle GHG emissions under the CAA will have a very significant effect on stationary sources, and not just on large stationary sources. If EPA promulgates motor vehicle GHG regulations, CO_2 and other GHGs will become regulated CAA pollutants for purposes of the CAA Prevention of Significant Deterioration (PSD) program. As explained in more detail below, if CO_2 becomes a regulated CAA pollutant, then (a) no new "major" stationary source of CO_2 emissions can be built without first obtaining a PSD permit and complying with CO_2 Best Available Control Technology (BACT) requirements and (b) no existing "major" stationary source can undertake a modification that increases its CO_2 emissions by *any* amount without first obtaining a PSD permit and complying with CO_2 BACT requirements.

As also explained below, because the emissions threshold for stationary sources to be considered "major" is so low, hundreds of thousands (if not millions) of relatively small GHG-emitters would be swept into the PSD program if GHGs become CAA-regulated pollutants. Buildings of about 100,000 square feet, if they are heated by oil or natural gas, would likely become subject to the program, as would relatively small users of natural gas such as commercial kitchens that use natural gas for cooking, or businesses that use CO_2 naturally as a component of its operations. A very large number and variety of buildings and facilities could therefore become subject to the program – including many office and apartment buildings; hotels; enclosed malls; large retail stores and warehouses; college buildings, hospitals and large

assisted-living facilities;[2] large houses of worship; product pipelines; food processing facilities; large heated agricultural facilities; indoor sports arenas and other large public assembly buildings; restaurants; soda manufacturers; bakers, breweries and wineries; and many others. None of these types of sources has ever been subject to PSD permitting requirements before because they emit so little traditional air pollution; but they would be if CO_2 becomes a regulated CAA pollutant.

The economic consequences of this outcome could be devastating, particularly as the economy slows, because PSD permitting is an incredibly costly, time-consuming and burdensome process. Just the administrative burden alone – putting aside any control technology requirements that would result from the permitting process – would create a significant and unprecedented roadblock to new investment for a host of previously unregulated buildings and facilities.

In light of these significant impacts on stationary sources, the Committee's second question – the effect of the EISA on potential EPA regulation in response to *Massachusetts v. EPA* – is particularly relevant. Much attention has been focused on whether or not EPA had planned to issue a motor vehicle GHG proposal at the end of last year. But given enactment of the EISA and given the PSD impacts discussed above, EPA's decision to pause before doing so made and continues to make perfect sense. The EISA will achieve the goals of the President's "20 in 10" agenda by dramatically reducing GHG emissions from motor vehicles, and it will do so, in large part, through the CAA and *explicitly without triggering PSD impacts.* Moreover, the EISA obligates EPA to issue implementing regulations within one year of the statute's enactment. EPA has appropriately decided to focus its resources on fulfilling this statutory

[2] States may exempt non-profit health or education institutions from the PSD program. Absent such exemption, even non-profit hospitals, nursing homes, assisted living facilities and school buildings of more than about 100,000 square feet would be subject to PSD regulation if CO2 is deemed to be a regulated CAA pollutant.

mandate. By giving precedence to implementing EISA, EPA can achieve the purpose for which the *Massachusetts* case was brought – reduction of motor vehicle GHG emissions – while it continues to consider how best to avoid the negative PSD impacts.

EPA's pause also makes sense because time is needed to implement the EISA, gauge its impact, and assess what additional regulation may, or may not, be effective. Given EISA's aggressive requirements, attempting to obtain further GHG reductions from motor vehicles may prove futile. On the other hand, if EPA were to press forward with some type of additional regulation of motor vehicle GHG emissions under the CAA, serious PSD consequences would ensue across the economy for a myriad of small sources. The result would be great pain for potentially little gain.

Moreover, EPA was and is well within its legal authority to pause before formulating a response to *Massachusetts v. EPA*. The Supreme Court did not establish a deadline for EPA action on remand. To the contrary, the Court stated that "EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies."[3]

In my view, EPA cannot be ready to pursue a rulemaking on remand of *Massachusetts* until and unless it gives detailed consideration to these issues. Indeed, the onus should be on advocates of an immediate response to *Massachusetts* to explain the risks and rewards of moving forward aggressively. During the briefing in *Massachusetts*, petitioners maintained that the case was limited to prospective regulation in the automotive sector and that the Court need not consider how a decision in petitioners' favor would reverberate throughout the CAA to other types of sources. But now that the case is back before EPA, the agency and stakeholders cannot act as if a decision to regulate motor vehicle GHG emissions has no impact on other CAA

[3] *Massachusetts*, 127 S. Ct. at 1462.

programs – or that Congress did not separately enact an aggressive program in the EISA to reduce motor vehicle GHG emissions under the CAA. The effect of these developments must be carefully considered.

IMPLICATIONS OF EPA MOTOR VEHICLE REGULATION ON STATIONARY SOURCES

A few words of background on the PSD program may be helpful. The PSD program was adopted by Congress in 1977 and applies in all areas of the country where existing ambient air quality is better than the National Ambient Air Quality Standards (NAAQS). Although the NAAQS sets a maximum allowable level of a pollutant in the ambient air, Congress decided that in existing clean air areas the air should stay cleaner than the NAAQS, and for that purpose adopted the PSD program.[4]

Under the PSD program, permits must be obtained before construction may begin on "major" new stationary sources of CAA-regulated air pollutants.[5] The CAA lists 28 specific types of stationary sources, such as power plants, refineries, steel mills, chemical plants, etc., that are "major," and subject to the PSD program, if they can emit at least 100 tons per year (tpy) of any regulated air pollutant.[6] Other, unlisted types of stationary sources do not trigger PSD permitting as "major" sources unless they can emit at least 250 tpy of any air pollutant.[7] The term "stationary source" is very broad. It includes "any building, structure, facility or installation" which emits or may emit a regulated pollutant.[8]

Also, once a facility is "major," a change to that facility is subject to preconstruction PSD permitting if the change causes a "significant" emissions increase. EPA's regulations

[4] *See* generally Clean Air Act, Title I, Part C, Subpart I, 42 U.S.C. §§ 7470-7479.
[5] 42 U.S.C. § 7475(a).
[6] 42 U.S.C. § 7479(1).
[7] *Id.*
[8] 40 C.F.R. § 52.21(b)(6).

numerically define a "significant" emission increase for a number of pollutants. For instance, an increase of particulate matter emissions of 25 tpy, or of sulfur dioxide or nitrogen oxides emissions of 40 tpy, is considered a "significant" increase. For pollutants for which EPA has not provided a numerical "significance" definition, such as CO_2, *any* emission increase is considered to be a "significant" increase.[9]

For a "major" source, the CAA requires BACT for each pollutant which is "subject to regulation" under the Act.[10] BACT is determined on a case-by-case basis as the maximum emission reduction achievable, taking into account energy, environmental, and economic impacts and other costs.[11]

The PSD program is largely implemented through a state-administered permitting system. Seven states administer the program through "delegated" authority from EPA; they essentially act as EPA's agent in administering EPA's PSD permit requirements. On the other hand, forty-three states administer their own PSD programs, for which EPA regulations prescribe the minimum CAA requirements. These states must first promulgate their own revised PSD regulations in their SIPs. Those revised SIPs must then be submitted to EPA for approval. In a few instances, such as a project being located on Native American lands, EPA itself directly administers the PSD permit system.

The 100/250 tpy threshold for PSD applicability was established by Congress based on emission levels of traditional pollutants, such as particulate matter, nitrogen oxides and sulfur dioxide. Emissions above this threshold were considered to be significant enough to trigger a need to regulate these pollutants. The PSD-triggering threshold was not set based on the premise that 100/250 tpy is a significant enough level of CO_2 emissions to justify regulation. CO_2 is not

[9] 40 C.F.R. §§ 52.21(b)(1)(ii), 52.21(b)(2), 52.21(b)(23).
[10] 42 U.S.C. § 7475(a)(4).
[11] 42 U.S.C. § 7479(3).

like traditional pollutants for a number of reasons, one of which is that 100 or 250 tpy are not a great deal of CO_2. Although the 100/250 tpy level for traditional pollutants generally limits PSD permit requirements to large stationary sources like coal-fired electric generators, chemical plants, refineries and the like, a 100/250 tpy threshold for CO_2 will subject a massive number of small facilities to PSD requirements. Yet that will be the result if EPA regulates motor vehicle GHG emissions and CO_2 and other GHGs thereby become regulated CAA air pollutants.

The PSD burden caused by a 100/250 tpy applicability threshold for CO_2 could be overwhelming for small and large businesses alike. New sources emitting more than 100/250 tpy of CO_2 could not be built without first obtaining a PSD permit after undergoing the BACT process. Existing sources that emit more than 100/250 tpy of CO_2 that wish to expand or modify their facilities in a way that would increase CO_2 emissions by *any* amount would likewise first have to obtain a PSD permit after undergoing the BACT process. PSD permitting is complicated, time-consuming and expensive. No small business requiring a moderate-sized building or facility heated with fossil fuel could operate subject to the PSD permit administrative burden.

The requirement that sources emitting more than 100/250 tpy of CO_2 apply BACT would also inject considerable, and perhaps fatal, uncertainty for businesses. No one can say at this time what BACT is for CO_2 because there is no precedent or guidance. BACT is determined through a case-by-case evaluation of control technology alternatives and involves a complicated weighing of economic, environmental, energy and other factors. BACT can even be no control measure if that weighing process fails to identify a technically and economically feasible technology for controlling the pollutant in question. But since BACT determinations for CO2 have no regulatory history at this time, and can vary by type of facility and from state-to-state,

businesses wishing to construct new sources or modify existing ones would have no basis for planning what the regulatory requirements will be.

The consequences of GHGs becoming CAA-regulated pollutants would also be experienced by state PSD-permitting agencies and by EPA. These agencies are wholly unprepared for the flood of PSD permit applications that would ensue. These permitting agencies would either have to reassign scarce resources from other environmental programs to handle the permitting burden, resulting in a decline in environmental regulation in these other areas, or PSD permitting would becomes so backlogged as to effectively create a permitting moratorium.

EPA recognizes this potentially catastrophic PSD implication for small sources if and when it adopts GHG regulations in response to *Massachusetts*. It may be considering ways to attempt to prevent very small sources of GHG emissions from becoming subject to PSD as a result of whatever motor vehicle CO_2 regulations the Agency adopts. Trade press has speculated on several possible alternatives, all of which pose significant legal issues.

Creative solutions by EPA would be welcome. On the other hand, courts have not always been hospitable to creative interpretations of the CAA that do not adhere closely to the statutory text. The 100/250 tpy threshold is statutory; EPA's ability to get around it seems doubtful. From a business standpoint, because legal uncertainty disincents capital investment, business will have difficulty relying on whatever alternative EPA might formulate (if it does) until the legal issues are resolved in court.

Moreover, putting aside the legal issues, if EPA ultimately adopts a mechanism limiting the effect of a decision to regulate GHGs on small sources, that mechanism may not be immediately effective in most states. As previously discussed, seven states essentially act as

EPA's agents in administering the PSD program, and the mechanism EPA adopts will immediately become effective in these states. However, the forty-three states that independently administer their own PSD programs under EPA supervision must likely undertake their own rulemakings to adopt EPA's mechanism or possibly a more stringent mechanism (one that subjects a broader range of CO_2 stationary sources to PSD regulation) in their SIP. A regulatory gap may therefore exist for sources in these states, after EPA has adopted its new mechanism. In these states, until the state also adopts a mechanism in its SIP and the state's SIP revision is approved by EPA, sources may continue to be subject to the state's current PSD regulations.

As can be seen, EPA regulation of motor vehicle GHG emissions will creates serious issues for a multitude of small sources. EPA must carefully consider these issues before it responds to the *Massachusetts v. EPA* remand.

EFFECT OF THE EISA ON EPA'S RESPONSE TO *MASSACHUSETTS v. EPA*

In *Massachusetts v. EPA*, the Supreme Court decided that GHGs qualify as CAA "air pollutants," but that decision in and of itself has no regulatory consequences. As the Court found, the CAA definition of "air pollutant" is "sweeping" and "embraces all airborne compounds of whatever stripe."[12] The Court held that an EPA obligation to regulate is triggered only if the agency finds that GHGs may reasonably be anticipated to endanger public health or welfare.

As stated in Justice Scalia's dissent, EPA now has three choices. It can make an endangerment finding and regulate. It can make a non-endangerment finding and not regulate. Or it can decline to do either.[13] As the Court said in the majority opinion, EPA can decline to regulate "if it determines that greenhouse gases do not contribute to climate change or if it

[12] *Massachusetts*, 127 S. Ct. at 1460.
[13] *Id.* at 1472.

provides some reasonable explanation as to why it cannot or will not exercise discretion to determine whether they do."[14] According to the Court, this discretion must be exercised "within defined statutory limits" and cannot "rest[] on reasoning divorced from statutory text."[15]

The Court did not establish a timetable for EPA to respond on remand. As noted, the Court stated that EPA has "significant latitude" as to the timing of regulatory action. Although EPA has been criticized for not yet having issued a regulatory proposal on remand, the remand from the Court of Appeals was not issued until September 14, 2007. Given the complexities and overwhelming importance of the issues involved, it should not be surprising that EPA has not yet issued a proposal. I don't think it can seriously be argued that EPA has violated any kind of legal duty by not yet having responded to the remand.

Evidently, many expected that EPA would issue a proposal last December. That expectation was based on regulatory activity taking place at EPA in response to the President's expressed desire to implement his "20 in 10" program, first announced in the 2007 State of the Union, by the end of 2008. But the President's "20 in 10" program was addressed by the EISA. That legislation required EPA to issue renewable fuels regulations in conformity with the statute within one-year of the statute's enactment. EPA has now turned its attention to meeting Congress' deadline, and that activity must take precedence over a response to the *Massachusetts* remand.

Indeed, the EISA represents an aggressive motor vehicle reduction program under the CAA and, as an outgrowth of the President's "20 in 10" agenda," likely resembles the program that EPA was considering late last year. The legislation establishes minimum renewable fuels standards for transportation fuels sold or introduced into commerce in the United States,

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[14] *Id.* at 1462.
[15] *Id.*

including minimum requirements for advanced biofuels, cellulosic biofuels and biomass-based diesel. All of these renewable fuels must meet standards for lifecycle GHG emission reductions. Under this mandate, the use of renewable fuels will increase by 500 percent, with fuel producers required to supply at least 36 billion gallons of renewable fuel in the year 2022. Significantly, the renewable fuel standard was enacted as an amendment of the CAA and will be implemented by EPA. In addition, the legislation creates a national mandatory fuel economy standard of 35 miles per gallon by 2020, which will save billions of gallons of fuel and increase efficiency by 40 percent. Together, these provisions will significantly reduce GHG emissions from the automotive sector.

In light of EISA, the immediate need to respond to the *Massachusetts v. EPA* remand has dissipated considerably. While the Administration may previously have believed that including a response to the *Massachusetts* case in its "20 in 10" implementing regulations made logical and legal sense, enactment of the EISA makes the *Massachusetts* remand less important both to the "20 in 10" program and to obtaining GHG emission reductions from the automotive sector through the CAA. Just implementing the EISA will be difficult enough – trying to do more at this time may be largely futile.

Of course, the EISA does not render *Massachusetts v. EPA* a legal nullity. At the appropriate time, EPA will have to respond. But even petitioners in *Massachusetts* recognize that EPA has considerable discretion to prioritize its own docket and decide what and when to regulate. In fact, as set forth in the following colloquy between Justice Ginsburg and James R. Milkey, Assistant Attorney General for the Commonwealth of Massachusetts, during the Supreme Court oral argument, petitioners took the view that EPA would be subject only to a

narrow legal challenge if it decided not to regulate motor vehicle GHG emissions *at all* because of more pressing docket priorities:

> Justice Ginsburg: But if you are right and then it went back and the EPA then said, well, an obvious reason also is constraint on our own resources, we have the authority to say what comes first, Congress – we couldn't possibly do everything that Congress has authorized us to do; so it's our decision, even though we have the authority to do this, we think that we should spend our resources on other things.
>
> Suppose they said that? You said they didn't say it this time around, but how far will you go if all that's going to happened is it goes back and then EPA says our resources are constrained and we're not going to spend the money?
>
> Mr. Milkey: Your Honor, while background administrative law principles provide EPA at leas some room to move, we think it's important that EPA say that. If they – it's a very different opinion if they say, we are not going to regular [sic: regulate] here because we just don't want to spend the resources on this problem and we want to look elsewhere.
>
> *If they want to say that, they can say that and the, if at all, there'd be a narrow arbitrary and capricious challenge on that.*[16]

If, as petitioners' counsel admitted, at most only a narrow legal standard would govern an EPA decision not to regulate because of more pressing regulatory priorities, then surely EPA cannot legally be forced into an immediate decision on remand of *Massachusetts.* This is particularly true given that EPA's reason for deferring immediate action on remand is because it is pursuing a CAA program to reduce motor vehicle GHG emissions, one that was just enacted by Congress and must by statute be implemented within one year. In sum, EPA has good reason to carefully deliberate how to respond to *Massachusetts*, and it is well within its legal authority in doing so.

[16] *Massachusetts v. EPA*, Oral Argument Transcript at 20-21 (November 29, 2006).

CONCLUSION

EPA has violated no legal duty by not having responded to the *Massachusetts* remand at this time. Given the EISA and given the PSD impacts of motor vehicle GHG regulation on stationary sources, EPA should take its time in carefully deliberating an appropriate response.

I appreciate the opportunity to provide this testimony.

Chairman MARKEY. Thank you, Mr. Glaser, very much. And we thank each and every one of you for your questions on this very distinguished panel. Thank you.

Mr. Johnson said that he is being asked to make a rush to judgment on this endangerment finding. Do any of you want to comment upon that in terms of your perspective of whether or not at this late date we are asking him to engage in a rush to judgment?

Ms. Heinzerling, would you like to comment on that, please?

Ms. HEINZERLING. I would like to comment on that. It has been nine years, as I said since EPA was petitioned to regulate greenhouse gases. EPA has spent billions we heard this morning on research on climate change. It has issued a very formal finding about the effects of climate change on public health and welfare.

The idea that this is a rush to judgment is bizarre to me. I was very surprised to hear that. They could make that finding today as I mentioned earlier. Today they could make that finding.

Chairman MARKEY. In your opinion, do you believe that this is no longer a scientific decision inside of the EPA, but now a political decision?

Ms. HEINZERLING. As I understand it, EPA had prepared a positive endangerment finding. As I have mentioned a couple of times, EPA in February issued a decision that very formally declared that climate change is upon us and that it is having harmful effects right now. And so I cannot imagine there would be a scientific reason why EPA has not issued this decision.

Chairman MARKEY. Let me go to Kansas here for a second. You know, maybe I am wrong, but I know that 5,400 new megawatts of wind were constructed in the United States last year. Let me summarize. Last year in the United States in electricity generation, 56 percent of all new electrical generation that was built in the United States in just 2007 was natural gas. Ten percent was coal, but 30 percent was wind, 30 percent in 2007.

Does Kansas have any wind? And would it be possible for the electric utility in Kansas to find some way of capturing the wind that last year led to 30 percent of all new electrical generation in the country being from wind?

Any of you wish to take it?

Mr. SVATY. Thank you. I would be happy to.

I, in fact, have the newest and largest wind project in the State of Kansas being built in my district. The Sunflower Electric, which, of course, wants to build the coal plan, was actually the first purchaser off of that plant. I will say in their defense they are buying wind to offset their natural gas.

That being said, we are not moving as fast as our neighbor Texas to the south. There is tremendous potential in western Kansas especially to move forward. I think also a lot of our concern from the coal plant perspective is that Kansas wants more generation from wind. We are not getting there, but the coal issue, 85 percent of the energy that was going to be produced from those two plants was going to Colorado and points west of us anyhow. It was not going to be used in the State of Kansas at all.

Chairman MARKEY. Mr. Bremby, would you like to comment on that?

And, by the way, congratulations on your heroic stand on this issue.

Mr. BREMBY. Thank you, Mr. Chairman.

Chairman MARKEY. I really do want to point that out.

Mr. BREMBY. Our governor took a leadership on wind energy production and worked with utility companies——

Chairman MARKEY. Could you speak up just a little bit?

Mr. BREMBY. Sure. And took the leadership position in working voluntarily with the energy companies. By the end of next year, we will be at 12 percent of electrical energy by wind in Kansas without any requirements whatsoever. We are on tap for 2020.

But fundamentally, Kansas has wind energy as a source. We are number three in the nation. It is available to us. We just need the right credits and incentives for this to happen.

One of the arguments that we have used in terms of or that I have heard been used in terms of supporting the decision on Sunflower, which we did not use because ours was solely based on health and environmental issues, was that by production of this new coal-fired facility, it would then absorb the energy market in the west part of the state to preclude wind energy from being relevant or capable or available.

So, yes, we can use more wind.

Chairman MARKEY. Great. Thank you very much.

And what do you think is going on in the minds of utilities in 2008, in Kansas, that wants to go to coal when wind is an industry that Texas and other states are now developing? Why wouldn't they just grasp it as the future?

You know, sometimes there is ancestral worship, and you feel that you have to bow down to the past even when the future not only is in front of you, but has engulfed you, you know, from Texas even to your own state. What is it about this utility, this misnamed Sunflower utility, that has them pursuing coal rather than wind?

Mr. SVATY. I do think part of it, and this would just not be in the case of Sunflower, but part of it might be ancestral worship. I also would say there are transmission constraints to putting a lot of wind onto the transmission grid. It does present some issues, although we as a state are trying to address the transmission constraint issues so that we have a better ability to have more wind.

But I would also say that this particular utility may be in the sort of financial straits in which it needs investment from an outside investor, which they have found in their Colorado tri-state investment, their generation and transmission company, and they want coal. They want that steady base load, and they also could not get it in their home State of Colorado. So they came to Kansas looking for an opportunity to have the cheap base load.

Chairman MARKEY. You are saying this is really a Colorado company setting Kansas policy to generate from coal and not from wind.

Mr. SVATY. I would not necessarily say that it was Colorado setting our policy, but Colorado and Colorado's needs for energy have certainly been central in our conversation in Topeka.

Chairman MARKEY. Okay, and I will take the last word there, Mr. Bremby.

Mr. BREMBY. Mr. Chairman, of the 1,400 megawatt facility or that this facility would produce, 15 percent would be for Kansas. The balance of that would go to Colorado and Oklahoma.

Chairman MARKEY. So Kansas is going to be asked to be an environmental sacrifice zone so that electricity can be generated to send to other states, even as wind is plentiful across the plains of Kansas.

Mr. BREMBY. Fifteen percent of the total megawatt produced, so about 220 megawatts, would be all that Kansas would have.

Chairman MARKEY. That is just unbelievable.

Okay. My time has expired. Let me turn and recognize the gentleman from Washington State, Mr. Inslee.

Mr. INSLEE. Thank you.

Mr. Glaser, I have listened to your testimony. I want to put it in sort of a metaphor if I can. If you went to a doctor and the doctor concluded that you have cancer and that treatment of that cancer may involve surgery, and that surgery may involve discomfort, would you want your doctor to wait seven years and not tell you that you had cancer in order to avoid the discussion of the surgery?

Mr. GLASER. Congressman, I am not sure how to respond to that analogy because I am not sure it is particularly apt here. EPA did, in fact, respond to the petition for rulemaking. It did take an action under the Clean Air Act. It is an action that was in good faith, and we know this because it split the courts. The D.C. Circuit confirmed the action two to one. The Supreme Court overturned the D.C. Circuit, but that was five to four. So this was a very close decision.

It has been sent back to the Environmental Protection Agency for further consideration. The remand, the actual legal document, was only received back at EPA in late September. So it has not really been a great deal of time since this case was back before the agency.

Mr. INSLEE. Well, I appreciate your challenging my metaphor, but let's talk about it. In fact, I think it is not a bad metaphor because there is a two-step process in dealing with global warming. First you have got to recognize you have the disease. Then second, you have got to figure out how to treat the disease.

Now, isn't it true that Ms. Heinzerling and Mr. Bookbinder are entirely correct that today the EPA has authority to issue a statement, a statement to Americans that is very important, that, in fact, these greenhouse gases endanger public health? Can't they do that today?

Mr. GLASER. Well, as the Supreme Court said, EPA has three choices. It can make an endangerment finding and regulate. It could determine no endangerment and not regulate, or it can explain why under the statute it declines to make that determination.

Mr. INSLEE. So you would agree with me today they can make a finding of endangerment today, and they can take a little more time to figure out what the response is, but today they can make a statement to America and to the world that the United States Government recognizes that these gases endanger human health.

Now, I will just take yes or no. I appreciate lawyers. I used to be one, but I will just take yes or no on that one. Can they or not?

Mr. GLASER. Well, they can make such a finding if, if after appropriate notice and comment rulemaking they make the appropriate findings. So I would not disagree with that. I would hope that they would not because when you speak about remedies for diseases, I really think the Clean Air Act is the wrong remedy for the particular global warming issue that we are talking about. It is a——

Mr. INSLEE. Well, I appreciate you to lobby Mr. Sensenbrenner——

Mr. GLASER [continuing]. Square peg for a round hole.

Mr. INSLEE. I would appreciate you lobbying Mr. Sensenbrenner for a cap in trade system, and I will give you a call when we need that.

Now, let me ask you. You said that you have this train of disaster, in fact. You apparently fear the cure more than the disease, as I listen to your testimony. You are not worried about the oceans becoming more acidic and destroying fish. You are not worried about, you know, rising sea levels. You are not worried about the melting of the ice in the polar icecap. What you are worried about is we might do something about this in a way that you consider untoward. That is what keeps you up at night.

I have different nightmares than you do apparently, but I want to understand if the EPA in response to an endangerment decision, in fact, say now we are going to change this to make it a 1,000 ton per year threshold rather than 250 ton, if they raise that to avoid some of the inconvenience that you have described, you are not going to sue them and say they do not have authority to do that, are you, on behalf of your clients?

Mr. GLASER. I would call it considerably more than an inconvenience to be subject to PSD permitting. The experience with PSD permitting is that it takes a year to 18 months from the day you file your permit, not including all of the time that it takes to prepare the permit, to get your permit issued.

Mr. INSLEE. Well, I appreciate that, but I want an answer to what you are going to do. If the EPA in order to reduce the inconvenience or harm or injury, whatever you want to call it, if they want to raise the threshold to 1,000 tons a year, you are not going to assume and tell them they do not have authority, are you?

Mr. GLASER. Here is what the problem is though. If I as a lawyer advising the client that wants to build an office building in downtown Washington, the client comes to me and he says, "Do I need a permit?" Now EPA has put out this regulation, but can we rely on this regulation? What do I do?

And my response is going to have to be I do not know because——

Mr. INSLEE. You are not going to assume and tell them that they have authority, are you?

Mr. GLASER. I personally would not bring that lawsuit.

Mr. INSLEE. Because you know exactly what is going to happen if there is an endangerment finding. One way or another there is likely to be some resolution of that issue that does not distort the U.S. economy, and the EPA is fully capable legally to do that themselves or Congress can do it. Now, don't you agree with that?

Mr. GLASER. I do not believe—well, let me put it this way. I am really uncertain about what EPA can do about this problem, and

I can tell you that this issue sends ripples of panic through the business community as they consider what could happen here if this kind of regulation is issued. That is what the problem is because——

Mr. INSLEE. Well, I can assure you——

Mr. GLASER [continuing]. It creates so much uncertainty.

Mr. INSLEE. I can assure you that if there is an endangerment finding, as they should be, I can assure you one case you will not be taking, and that is to challenge their ability to lighten up on this restriction.

Thank you very much.

Chairman MARKEY. Thank you very much.

The Chair will recognize himself for another round of questions.

You know, Sunflower Electric burning coal is like an oxymoron. It is a contradiction in terms, like jumbo shrimp or Salt Lake City nightlife. I mean, you know, there is no way a utility trying to burn coal in what has now become the wind era has the correct name, and I think that we should have a contest maybe nationally, you know, to rename the utility so that it reflects its dedication to fossil fuels rather than to sun power, you know, to wind power, to what the future holds out for Kansas and for every state and for every country in the world.

But it is a clearly misnamed utility, and I myself am going to try to find a new name for that utility and try to run it by you.

Yes, sir.

Mr. GLASER. Mr. Chairman, would it be okay if I just took a quick crack at why Sunflower might be considering resources other than just wind resources?

Chairman MARKEY. Why it might what?

Mr. GLASER. Why it might be considering electric generating resources other than just wind resources.

Chairman MARKEY. Sure. I would like to hear it, and why it is burning coal for 85 percent of its electrical generating capacity to go outside of the State of Kansas.

Mr. GLASER. Sure, sure, and I am not speaking for Sunflower here. I do not represent Sunflower. I am just speaking generally in the industry.

Wind is treat. Wind is going to be developed very rapidly, but wind, at east, will only generate 30 to 40 percent at best of the hours in a day, and wind disproportionately does not blow when it gets really hot and when electric generation is needed the most.

And so no utility can rely on wind exclusively. There has to be back-up or firming power behind wind for the times when the wind does not blow, and there have been some unfortunate experiences in the country, in the upper Midwest, in California, and recently in Texas where there have been extreme needs for electricity when the wind is not blowing.

Chairman MARKEY. You know, what I would say? I would recommend, Mr. Glaser, that you and perhaps Sunflower like travel to Denmark, travel to Germany and learn a little bit more about how wind can be effectively integrated into an electrical grid system without endangering reliability.

I do not think actually from the testimony that I am hearing that Sunflower has actually gone through that exercise right now. So I

think what your suggestion is is that you are trying to get inside the mind of this electric utility, this coal-burning electric utility and project what they are thinking, but I think the problem is that they are not thinking about the future.

If only ten percent of all new electricity in the United States in 2007 came from coal and 30 percent came from wind, I would argue, especially since we are talking about Kansas here, okay, that there has not been a full exploration of the potential, which wind can play in the electrical generating mix inside of that state.

And so I thank you for your attempt to mind read this utility, but I think this is one of those res ipsa loquitur situations where the thing speaks for itself. They are absolutely just taking an older corporate perspective rather than a newer, more innovative, and technology savvy perspective to try to deal with the actual assets that are inside of Kansas rather than having an agenda that actually does not even benefit it from an environmental perspective.

So I just want to be perfectly clear here on this issue of whether enactment of the energy bill alters any of EPA's obligations under the Clean Air Act or the Supreme Court decision. Does anything in the energy bill remove EPA's obligation to determine whether greenhouse gas emissions cause or contribute to air pollution, which may reasonably be anticipated to endanger public health or welfare?

Mr. Glaser.

Mr. GLASER. Oh, thank you.

No, actually I agree with Administrator Johnson that the bill does not as a matter of law affect, and I say this also in my testimony; that EPA still——

Chairman MARKEY. So that is a no.

Mr. GLASER [continuing]. Still has to address it.

Chairman MARKEY. Is there anything in the energy bill? That is all I asked. Is there anything in the energy bill that would——

Mr. GLASER. Well, the answer would be yes, with an explanation. The explanation is that although the energy bill as a matter of law does not prevent EPA from responding to the Massachusetts remand, it certainly affects how it will respond to the Massachusetts remand, and so I also agree with Administrator Johnson about why enactment of that legislation appropriately caused EPA to pause before going further.

Chairman MARKEY. All right. Ms. Heinzerling, you just heard Mr. Glaser's comments about restrictions which the energy bill might place upon the EPA in making its decision.

Ms. HEINZERLING. Yes. My answer would be no, and if I may explain my answer.

Chairman MARKEY. Please.

Ms. HEINZERLING. The answer is both. Massachusetts v. EPA made clear that fuel economy standards are different from standards under the Clean Air Act, that they may coexist peacefully.

Secondly, the energy bill itself explicitly says that nothing in that act, as you mentioned, undoes any authority or obligation under any other statute, and so that EPA's obligation to find endangerment and determine whether endangerment exists is completely left intact by the energy bill, and its obligation to set stand-

ards for greenhouse gases once endangerment is found is left intact by the energy bill.

Chairman MARKEY. Okay. Now, some of you have mentioned the potential implications of the endangerment finding or the motor vehicle regulations might have on other emitters of greenhouse gases, and particularly the potential implications of these proposals to the new source review program have been brought up. Some have said that it is possible that large apartment buildings, schools, hospitals, and other large retail buildings might be subject to Clean Air Act requirements known as prevention of significant deterioration as a consequence of EPA moving forward on the motor vehicle side.

So I have a few questions about this. Isn't it true that the only regulatory requirement the publication of the endangerment finding triggers is the requirement to regulate greenhouse gas emissions from motor vehicles? No stationary sources would be automatically or immediately subject to greenhouse gas regulations as a result of concluding that greenhouse gas emissions cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare; is that right Ms. Heinzerling?

Ms. HEINZERLING. I would add one qualification to that, which is that I believe that new sources under Section 111 become subject to regulation once endangerment is found. There is a bit of a step where the sources category has to be listed and then regulation follows.

And so I believe you are technically correct, but I would add that I think regulation would have to follow fairly expeditiously from an endangerment finding.

Chairman MARKEY. Okay. So is there at least a year to solve the problem? In other words, is there time between the endangerment determination, how it affects the automotive industry and then how it might affect other industries?

Would there be a time spacing that would allow for some comment and implementation of any sort?

Ms. HEINZERLING. Yes, absolutely.

Chairman MARKEY. Can you talk to that?

Ms. HEINZERLING. Yes. If EPA makes an endangerment finding, let's say, today, then EPA has to, as I say, I think regulate motor vehicles, decide about regulation about motor vehicles and in a couple of quick steps have to decide about stationary sources under Section 111 of the Clean Air Act.

But that step takes a little bit of time. That is standard within agencies, and indeed, I have been surprised to hear Mr. Johnson talk about how little discretion his administration and his agency have in enacting regulations once endangerment is found. Agencies enjoy a lot of discretion in figuring things out, taking a little bit of time.

So once endangerment was found, yes, there would be a time, a pause perhaps where the administration could settle on appropriate regulations.

Chairman MARKEY. Okay. So we know that the only regulation that would be automatically triggered by an endangerment finding is the one related to greenhouse gas emissions from motor vehicles, but some of you have cited various additional petitions and

rulemakings before the EPA that relate to greenhouse gas emissions. From a legal perspective, do you think that a positive endangerment finding makes it more difficult for EPA to deny, fail to act, or otherwise refuse to regulate other sources of greenhouse gas emissions under the Clean Air Act or even other statutes, such as the Clean Water act?

And if so, do you think that one of the reasons EPA might be stalling on releasing its already completed endangerment findings could be because of the potential for other regulatory or legal proceedings?

And do you believe that that is a valid reason for EPA to delay its response on Massachusetts v. EPA?

Ms. HEINZERLING. Yes, I believe that making an endangerment finding triggers other regulatory activities under the Clean Air Act, makes it more difficult to say no to the many petitions before EPA to regulate cars, aircraft, power plants, and so forth, and I believe that if EPA, as circumstances do suggest and as Mr. Johnson's own testimony suggests, EPA is stalling on the endangerment finding because it is afraid of the consequences of that finding, I believe that is illegal.

Chairman MARKEY. Okay. Great. Thank you.

My time has expired again. I yield again to the gentleman from Washington State, Mr. Inslee.

Mr. INSLEE. Thank you.

Ms. Heinzerling, Mr. Bookbinder, Mr. Glaser contested this metaphor I talked about of the two-stage process of the diagnosis of the disease and then the second stage of figuring out how to respond to it. I just want you to give a response.

Is that a fair metaphor to what is going on here? And does the EPA have the ability to diagnose the disease today?

Ms. HEINZERLING. Absolutely. I think it is a fair metaphor, and I think EPA should and could diagnose the disease today, and that talking about endangerment will help it to understand why some of the consequences if things are unacceptable that flow from regulation might be acceptable because inaction will be worse.

Mr. BOOKBINDER. Well, I am not surprised that Mr. Glaser's testimony seemed to focus on a possible solution that I and other people have advanced to this one particular problem. There will be others.

If we overcome this one, there will be further objections from industry and from EPA, but let's focus on this one problem of the PSD permitting procedures and the 250-ton limit. My testimony said we could have a regulatory program that could address this, that Congress could amend the act, and the first words out of Mr. Glaser's mouth were, "Here is why that cannot work. Here is why that is a problem."

It is clear to us that these are just once we fix the PSD problem, they will come up with another problem, and they will keep claiming there are problems until it is way too late. We need action, and the only reason that EPA is not doing the endangerment finding is quite explicitly that they are afraid of the consequences of them having to act and address greenhouse gases.

Mr. INSLEE. I think we should have confidence that should that happen Mr. Glaser will bring his considerable talents to bear to

help us find a resolution of that, one that I am confident that we could do.

And, by the way, Mr. Glaser, I wanted to commend a book, a questionable author but not a bad book, Apollo's Fire: Igniting America's Clean Energy Economy, that talks about the multiple solutions that are available. It gives a sense of optimism that we should share.

I just want to thank all of the witnesses, and I just tell you as one member, I have displayed a little maybe anger is the right word at the federal government's refusal to act on this, but the reason is that the science that is coming in is so disturbing, so alarming that it is totally irrational and irresponsible for the administration to fail to act in this regard.

And as a father, I am just telling you I am angry about this, and if I have displayed that, so be it because we have got to get off the dime and act here or the planet is in deep, deep trouble.

Thank you.

Chairman MARKEY. You know what I would like to do here at this point is to ask each of you to give us a one-minute summation.

You know, before we go to that, I want to go back to wind in Kansas, and I would like you, Mr. Bremby, to talk about this issue of whether or not wind can be generated and additional megawattage that still would not endanger the reliability of the Kansas electric grid. Could you give us some estimation as to what you think might be possible in that area?

Mr. BREMBY. I do not know the complete projection on megawattage for wind energy. Perhaps Representative Svaty is more aware than I am, but what we are aware of is that the capacity is there to——

Chairman MARKEY. Could you speak up just a little bit?

Mr. BREMBY [continuing]. Sure. To add a considerable amount to our energy opportunities.

We are also looking at new technology as you mentioned abroad. The EU under the supergrid scenario is looking at wind energy as a redundant source as well as for storage capability across the continent of Europe.

So there are new technologies related to wind. GE is looking at new turbines. It is an opportunity for us to grow a better green economy based upon where we are today.

So in terms of the capacity, Josh?

Chairman MARKEY. Representative Svaty.

Mr. SVATY. Thank you, Mr. Chairman.

The Southwest Power Pool, which is our regional transmission organization, is already preparing for thousands of new megawatts not only in Kansas, but in the whole region, which includes Oklahoma and other states. So we do have a great capacity.

If I could return briefly, I think one of the reasons Sunflower wants to go to coal is because it is currently cheapest because there is no value on carbon, and so as we talk about the EPA, I think the central question is if they determine that there is an injury, in fact, that carbon has a price on it, we create a market and suddenly coal is not the cheapest source of power anymore and they consistently return to coal. They begin to look at wind mixed with natural gas and other options.

The key question or the key issue I am hearing is I am asking for the EPA to make that determination. Find a way to determine some things that we have some sort of price or value placed on the deleterious substance.

Chairman MARKEY. Now, is Peabody Coal any part of this project at all?

Mr. SVATY. If I may, Mr. Chairman, I cannot speak directly, although I do think that they have invested money in advertising in the state. I am not sure if it was directly Peabody Coal, but they may have had some hand in the advertisement that was going on.

Chairman MARKEY. You know what I have to do is I have to learn more about Peabody Coal and what they are doing across the whole country and make a little bit of a project out of that. They seem to be making a project out of building coal-fired plants across the country even in places that could generate electricity from alternative sources.

And I think as a result, we should probably make a project out of what their project is and so that we can understand Peabody Coal, who they are, and what they are doing.

You know what I would like to ask right now is for each of you to give us your one-minute summation of what it is you want our committee to remember. We are going to do it in reverse order of the original speakers just to kind of be fair on this thing, and we will try to have more than one microphone at the next hearing in this room.

But we thank each of you and whenever you are ready, Mr. Glaser, please begin. One minute.

Mr. GLASER. Thank you.

Clean Air Act regulation of greenhouse gases is and has always been a bad idea. It is an inflexible act. If you regulate under one section, it has rippling effects under other sections. The main point that I would like to leave with the Committee is that the matter is not as simple as EPA going forward, making an endangerment finding, and regulating motor vehicle greenhouse gas emissions. EPA has appropriately figured out that if it does that, there is going to be a ripple effect under the PSD program.

This is not being somebody that just raises a whole bunch of negative issues. This creates tremendous uncertainty for business if that happens, and EPA has to think about this and has to figure out what to do in light of that issue.

And I would ask that the Committee take this issue with great seriousness because, as I said, it is causing great concern throughout the economy.

Thank you.

Chairman MARKEY. Thank you, Mr. Glaser, very much.

Representative Svaty.

Mr. SVATY. Thank you, Mr. Chairman.

The debate in the Kansas legislature has been not about public health and welfare, but it has, in fact, been about regulatory certainty. We as legislators can help the economic realm move forward and ease that burden, but we cannot move forward if we have not heard from the EPA or if we have received mixed signals from the EPA, and that is exactly what we are getting in Kansas right now.

If we had direction, if we had parameters and boundaries, we could find a way to soften the landing for the business community, but without that direction from the EPA, we have nothing to go on, and we end up running in multiple directions, which is exactly what we are doing in Kansas right now.

Direction from the EPA would be an extraordinary boost to state legislatures, and it would allow us to move forward to soften the landing for everyone and to help us move forward in the process.

Chairman MARKEY. And we thank you on that, and that is why obviously we are pressing on this endangerment finding. It just leads to calamitous consequences in places like Kansas because there is no official ruling on that question with regard to coal.

All right. Mr. Bremby.

Mr. BREMBY. Without the official ruling, it means that me and other regulators have to reflect this regulatory uncertainty within our own states. We cannot protect our citizens to the utmost of our capability.

I read something just recently that to regulate this carbon in some way would de-industrialize America, and nothing would be further from the truth. We know that we are going to need to transition to a low carbon economy. The EU has already said that they are going to lead the world. America needs to get out in front and lead the world on this issue, and it holds great promise for expanding the manufacturing sector that some of us thought had reached its peak in America.

So it is time for us to unleash the innovation that is possible through technology to regulate and to achieve a better energy future.

Chairman MARKEY. Thank you, Mr. Bremby, very much.

Mr. Bookbinder, I made a mistake in the questioning of the panel, and I did not come to you.

Mr. BOOKBINDER. That is quite all right.

Chairman MARKEY. No, but I did not come to you on a couple of the questions which I asked Ms. Heinzerling. So I would like to give you just a couple of additional minutes to comment on the issues that relate to what happens when an endangerment finding happens in terms of the rest of the regulatory process that it triggers.

Could you go through that?

Mr. BOOKBINDER. Well, it does two things. There are certain provisions of the act that would be triggered as Professor Heinzerling described. Section 111, the new source performance standards, also has mandatory language that once there is an endangerment finding, EPA shall go forth and begin to regulate those sources for that particular pollutant.

And in this case we have a petition sitting in front of the EPA asking for just those sorts of CO_2 emission controls on power plants, the source of 40 percent of U.S. greenhouse gas emissions. EPA has been sitting on that petition since well before Massachusetts. Back then they said we have no legal authority. Since then they clearly do have legal authority, and on that one there has been not a peep out of EPA.

Forget vehicles. Vehicles are half of what power plants are. Vehicles we also have other means of getting at them. Power plants,

EPA is completely sitting on its hands, and I think that is one of the reasons they do not want to make the endangerment finding. They would have to address that.

In addition to that, there are several provisions of the act that authorize EPA once an endangerment finding is made to then go forth and regulate. It is the difference between you shall and you may.

Other petitions are sitting out there asking for action under those sections for non-road vehicles, for airplanes, although airplanes may also be a "shall," but in essence, we are seeking regulation from virtually every major source of greenhouse gases in the United States because we have no alternative. We need to do something.

Now, ultimately we would prefer to have Congress come up with a comprehensive legislative solution, but until that time and perhaps in conjunction with that, we need EPA to begin the regulatory process, and what they are doing is just as in Massachusetts they tied their own hands by saying we have no legal authority, now they are tying their own hands by saying, "Well, we have not made an endangerment finding yet. So we cannot do anything."

So it is symptomatic of an agency that has refused steadfastly to do anything substantive or materially about climate change.

Chairman MARKEY. So you are saying then, Mr. Bookbinder, that once an endangerment finding is made, that CO_2 is CO_2.

Mr. BOOKBINDER. That is correct.

Chairman MARKEY. A rose is a rose by any other name, and so whether it is coming out of an exhaust pipe or coming out of a utility smokestack, that the effect of the decision would be the same, although the timing then on what to do about it or when to make a subsequent decision as to how to handle the utility issue would still be in question, but there would be no doubt that some action had to be taken.

Mr. BOOKBINDER. Well, you know, that is a very good question. I think there is no doubt for anyone who reads the plain words of the Clean Air Act, but I am willing to bet 20 bucks right here and now that if EPA comes out and says we have endangerment from CO_2 emissions from vehicles, it then says we have to go back and very carefully think for the next four years whether that same gas coming out of power plants at twice the rate also endangers.

I have no doubt that they will try that little game, but that is just the way this administration acts.

Chairman MARKEY. That would really make it difficult, don't you think, for just about every high school chemistry teacher to explain that to their students who are 16 in the class?

Mr. BOOKBINDER. It is not the first time that this EPA would have defied the science. Just yesterday we saw a wonderful example with the ozone NAAQS standards, when EPA set a new standard that lowered, tightened and made more protective the standard. It did not go as far as the unanimous recommendation of its own scientists. So we are quite used to this administration and this EPA defying reality.

Chairman MARKEY. Thank you so much.

And, Ms. Heinzerling, we will give you the final word.

Ms. HEINZERLING. EPA can and should make a finding on endangerment. It can and should do so today.

It is the height of irony for this administration to come before this Committee and to say that it is hesitant to make that finding because if it makes that finding, regulation under one provision of the Clean Air Act becomes imperative.

This is an administration that is second to none in avoiding regulatory obligations, in finding ways around statutory language, in finding exceptions, and so that I have absolutely every confidence that if they make an endangerment finding, they can find a way to make the PSD program work.

Chairman MARKEY. Thank you very, very much, and we thank each one of you.

Just going back to your point, Mr. Bookbinder, my fear is that what your apprehension is about how they might want to revisit the smokestack issue, the utility issue is of grave concern to me, and my hope is that the Bush EPA is not on the same timetable as the Catholic Church was in apologizing to Galileo. It took them until 1990 to finally admit that they had made a mistake in their censure of Galileo.

My fear is that the Bush administration is on that same timetable, and it is dealing with the scientific question of the endangerment of CO_2 and whether or not not just automobiles, vehicles, but also power plants and buildings are contributing to that problem.

And your testimony, each of you, today is helping us to telescope the time frame, to bring down the Galileo coefficient to a point where that decision is made before George Bush leaves office.

We thank each of you, and this hearing is adjourned.

[Whereupon, at 1:02 p.m., the Select Committee meeting was adjourned.]

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

OCT 2 8 2008

OFFICE OF CONGRESSIONAL AND
INTERGOVERNMENTAL RELATIONS

The Honorable Edward J. Markey
Chairman
Select Committee on Energy Independence
and Global Warming
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for the opportunity to respond to questions for the record, which we received on August 14, 2008, that followed the March 13, 2008 hearing before the Select Committee on Energy Independence and Global Warming. I hope this information will be useful to you and the members of the Committee.

If you have any further questions, please contact me or your staff may contact Cheryl Mackay in my office at 202-564-2023.

Sincerely,

Christopher P. Bliley
Associate Administrator

Enclosure

cc: Hon. F. James Sensenbrenner, Jr.
Ranking Member

Response to Questions for the Record
Hearing Before the Select Committee on Energy Independence and Global Warming
March 13, 2008
Administrator Stephen L. Johnson

1. If you were to include all of the possible stationary sources of GHG under a new ruling, what additional manpower and budget would EPA need to enforce such an action? Would these entities be in any way prepared to be regulated under such a program?

The structure and design of a GHG control program can have a significant effect on the agency resources necessary to implement it. Therefore, it is difficult to answer your question precisely. However, EPA did analyze the agency resources necessary to implement the version of S. 2191 ("America's Climate and Security Act") that was reported out of the full Senate Environment and Public Works Committee on December 5, 2007. That analysis gives a general indication of the resources necessary to implement a program of this scale. In the analysis, we assumed that 1) "Under Title I, affected facilities would report greenhouse gas (GHG) emissions directly to EPA, similar to the current Acid Rain Program"; 2) "EPA would conduct all monitoring and verification of GHG emission reports and GHG offset reports, similar to the current Acid Rain Program"; and 3) "Resources and administrative costs of the provisions in S. 2191 not directly delegated to the Administrator (e.g., the Climate Change Credit Corporation, the Carbon Market Efficiency Board, the energy efficiency standards, etc.) are not included in the resource estimate."

Based on our analysis, we estimated that EPA needs approximately 300-400 full-time equivalent employees (FTE) to implement S. 2191. Given the difficulty of predicting the extent of ongoing activities in the context of legislation like this, this preliminary estimate does not distinguish what portion of these FTE might be existing or new staff. The FTE mix would be similar to our current workforce—environmental specialists, engineers, and analysts.

2. Did the Supreme Court decision require the EPA to take action by a date certain?

No.

3. Does the EPA have any authority to assess the safety of automobiles as CAFE standards increase?

The Department of Transportation (National Highway Traffic Safety Administration) is charged by Congress under the Energy Policy and Conservation Act (as amended) with establishing CAFE standards, and can consider vehicle safety when setting those standards.

For emission standards EPA promulgates under Title II of the Clean Air Act, EPA has consistently taken safety into account in determining the stringency and timing of the standards we propose. In most cases, the Act specifically requires that EPA consider safety (along with other factors) in establishing emission standards: Section 202(a)(3)(i) for heavy duty vehicles and engines; Section 202(i) for the study leading to the Tier 2 light-duty vehicle and truck program; and Section 213(a)(3) for nonroad engines. EPA likewise may, and does, consider safety factors in promulgating standards under section 202(a)(1) of the Act. NRDC v. EPA, 655 F. 2d 318, 336 n. 31 (D.C. Cir. 1981).

For EPA rules where new technologies or technological approaches have raised specific safety concerns, EPA has initiated comprehensive studies and test programs to address the issues involved. For example, in support of the onboard vapor recovery rule, we put significant resources into a multi-year testing program to investigate concerns that had been raised about potential fire hazards. This work, done in consultation with the Department of Transportation (National Highway Traffic Safety Administration), confirmed that the safety concerns were not warranted. More recently, in response to concerns that introducing catalytic converters to small nonroad engines (like lawnmowers) could create fire risks, EPA led a test program in consultation with the Consumer Product Safety Commission. Over a period of about 2 years and with several hundred thousand dollars of investment, we tested a variety of engines equipped with catalytic converters, and released a comprehensive study showing that the new technologies could be effectively incorporated with no appreciable increase in fire risk. In general, in future EPA regulations, including any GHG emission regulations, addressing safety concerns will again be a key consideration for EPA.

4. Do you believe that the EPA's regulations on greenhouse gas emissions must be mandatory or could it be voluntary?

EPA is evaluating its options for addressing greenhouse gas emissions. The Advanced Notice of Proposed Rulemaking (ANPR) published on July 30, 2008, is an important part of that evaluation.

5. Just out of curiosity, the Clinton Administration didn't regulate GHG emissions under the CAA, despite the Cannon memo saying it had the authority to, did it?

That is correct.

6. What is the Bush Administration's greenhouse gas intensity goal?

The Administration believes that energy security and climate change are two of the important challenges of our time. In 2002, President Bush made a commitment to reduce the nation's greenhouse gas intensity by 18% by 2012. Since then, from 2002 to 2006, U.S. greenhouse gas intensity (i.e., total U.S. emissions divided by U.S. gross domestic product) has declined by 10.3% (EPA, April 2008, "Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2006"; and Department of Commerce's Bureau of Economic Analysis). The guiding principle of this effort is clear: we must lead the world to produce fewer greenhouse gas emissions, and we must do it in a way that does not undermine economic growth or prevent nations from delivering greater prosperity for their people.

Since 2001, the Administration has spent almost $45 billion on climate science, technology development, incentives, and international assistance. In May of 2007 President Bush launched an initiative to convene representatives of the world's major economies—the largest users of energy and largest producers of greenhouse gas emissions, from both developed and developing nations—to discuss how to strengthen the international approach to the urgent challenges of energy security and climate change. The first meeting was held in September 2007 in Washington, D.C. Recently, leaders from the world's major economies met on the sidelines of the G8 meeting to advance shared objectives of reducing greenhouse gas emissions, contribute to ongoing negotiations under the UN Framework Convention on Climate Change (UNFCCC), and identify actions to be taken immediately.

7. As a result of the President's Executive Order, what is the general nature of the regulations that are contemplated both on the alt fuels side and the fuel economy side? What will the process be?

Last year, in response to the Supreme Court's decision in Massachusetts v. EPA and the President's directive, and consistent with Executive Order 13432, EPA began work with DOE, USDA, and DOT to develop new regulations that would reduce GHG emissions from motor vehicles and their fuels. This effort took as its reference point the President's legislative "Twenty-in-Ten Plan" which had not advanced in Congress. EPA had worked closely with the Department of Transportation and other federal agencies to develop GHG rules for light-duty vehicles and motor vehicle fuels under the Clean Air Act during 2007, but did not propose these rules. A major factor contributing to the decision not to propose the rules then under development was Congress' approval and the President's signature into law of EISA on December 19, 2007, which responded to his "Twenty-in-Ten" challenge. EPA also did substantial work with regard to using its existing authority under the Clean Air Act to develop fuel standards to reduce the greenhouse gas emissions associated with fuel use. EISA amended Clean Air Act provisions requiring a Renewable Fuels Standard (RFS) that were first established in the Energy Policy Act of 2005 (EPAct 2005). Separately, EISA 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.

Much of EPA's work under the Executive Order on fuel regulation was supplanted by the new law's RFS provisions, which differ in significant ways from the fuels program EPA was developing. EPA is now undertaking the analysis and rule development necessary to implement the new RFS provisions. Meanwhile, EPA's RFS program under the authority of EPAct 2005, including the amended target for 2008 that was included in the EISA, is fully operational.

With regard to motor vehicle regulations, EISA substantially altered DOT's authority to set vehicle mileage standards. DOT has issued a proposed rule setting more stringent CAFE standards and has conducted a public comment period on its proposal. Most recently, EPA issued an Advanced Notice of Proposed Rulemaking (ANPR) requesting comment on regulating greenhouse gases under the Clean Air Act. This ANPR presents detailed results

from EPA's 2007 work on the motor vehicle greenhouse gas rule as well as updates to that work (although these updates do not reflect the effect of NHTSA's proposed rule setting more stringent CAFE standards) and requests input regarding the potential means by which the CAA could be used to address GHG emissions, including those from the transportation sector.

8. Can you tell us a little about programs that are already working on a voluntary basis to help curb energy use and greenhouse gas emissions, such as the Energy Star programs?

EPA manages a number of partnership programs that are having a significant impact in reducing greenhouse gas emissions. These programs are overcoming market barriers and help organizations and consumers make good decisions for the environment as well as their energy bills. In June 2008 EPA published "A Business Guide to U.S. EPA Climate Partnership Programs," http://www.epa.gov/partners2/Biz_guide_to_epa_climate_partnerships.pdf. This Guide describes the array of climate-related Agency programs. Some of these programs include:

ENERGY STAR. Begun in 1992, ENERGY STAR is a voluntary program jointly run by EPA and the Department of Energy designed to identify and promote energy-efficient products to reduce greenhouse gas emissions. Computers and monitors were the first labeled products. The program has grown tremendously over the last fifteen years to provide organizations of all sizes as well as consumers the tools and information they need to invest in energy efficiency where cost-effective. Through partnerships with more than 12,000 private and public sector organizations, EPA's key accomplishments include:

- The ENERGY STAR is a trustworthy label on over 50 product categories (and thousands of models) for the home and office;
- More than 2.5 billion ENERGY STAR products have been purchased by consumers;
- About 12 percent of new homes are being constructed to ENERGY STAR qualification standards nationally;
- About 12 percent of commercial buildings have been rated for energy efficiency with many undergoing targeted improvements and more than 4,000 commercial buildings have earned the ENERGY STAR for superior efficiency;

- 12 industrial sectors / subsectors are improving their efficiency through ENERGY STAR; and
- In 2007 alone, Americans with the help of ENERGY STAR, saved $16 billion on their energy bills and reduced greenhouse gas emissions equivalent to those of 27 million vehicles.

Over the past decade, ENERGY STAR has been a driving force behind the more widespread use of such technological innovations as efficient fluorescent lighting, power management systems for office equipment, and low standby energy use.

Climate Leaders. Climate Leaders, a corporate leadership program, has grown to include more than 200 organizations. About half of the partners have announced aggressive greenhouse gas reduction targets for the future. These goals represent a potential reduction in greenhouse gas emissions of more than 13 million metric tons over business-as-usual outcomes.

Green Power Partnership and Combined Heat and Power Partnership. More than 1,000 organizations are participating in EPA's Clean Energy Supply programs, which include the Green Power Partnership and Combined Heat and Power (CHP) Partnership. Through the end of 2007, they have purchased more than 11 billion kWh of green power and installed more than 4,450 megawatts (MW) of new, environmentally beneficial CHP capacity.

State and Local Programs. EPA continues to enhance its efforts to assist state and local governments in their pursuit of clean energy policies by expanding its state partnership and municipal network. It now includes 16 states and hundreds of local governments. EPA is also co-facilitating the National Action Plan on Energy Efficiency (Action Plan) with the U.S. Department of Energy (DOE). This effort recently released a Vision for 2025: Developing a Framework for Change, which offers a framework of state-specific policies and programs to enable the acquisition of all cost-effective energy efficiency measures by 2025. One hundred twenty organizations across 49 states have made commitments to advance energy efficiency through the Action Plan.

Asia Pacific Partnership on Clean Development and Climate: This is a voluntary partnership among six major Asia-Pacific nations (Australia, China, India, Japan, the Republic of Korea and the United States). It is designed to accelerate the development and deployment of cleaner, more efficient technologies to meet national pollution reduction,

energy security and climate change concerns in ways that promote economic development and reduce poverty. As of 2000, the six partner countries emitted about half of all global greenhouse gas emissions.

Methane and F-Gas Programs. EPA's methane (CH4) programs continue to help program participants reduce emissions of this potent greenhouse gas from landfills, agriculture, natural gas systems, and coal mines. In 2007, these programs avoided significant emissions of methane, exceeding their emissions reductions goals and maintaining national methane emissions well below 1990 levels. The partnerships that focus on fluorinated gases (F-gases) kept national emissions of these gases from industrial sources to well below 1990 levels, as well. Further, EPA has made important progress in the effort to reduce emissions from the use and maintenance of motor vehicle air conditioners.

Wood Smoke Programs. EPA manages programs that help to reduce wood smoke particulates and air toxics in local areas. The Great American Wood Stove Changeout Campaign provides information and incentives (e.g., rebates or discounts) to encourage the replacement of old technology wood stoves with EPA-certified appliances that burn over 70% cleaner and 50% more efficiently. The Outdoor Wood-Fired Hydronic Heater (OWHH) Program promotes the use of EPA-qualified models that are at least 70% cleaner and significantly more energy-efficient than pre-program models.

SmartWay Transport Partnership. More than 1,000 companies are actively participating in this program designed to reduce GHG emissions and save fuel from moving goods in the United States. These SmartWay companies combined are saving 600 million gallons of diesel fuel each year, reducing nearly 7 million tons of CO_2 emissions per year.

Performance Track. Facilities that are members of this partnership program have saved 310,000 tons of CO_2 emissions (2001 through 2006) in addition to reducing other air pollutants and hazardous waste.

9. How do you respond to reports that less energy intensive machines, such as washers and dryers, can prove to use more energy? (for example, with inadequate wash cycles)

Congress, in the Energy Policy and Conservation Act and subsequent legislation, has given the Department of Energy responsibility for establishing energy conservation standards for many consumer appliances and industrial equipment. The Department of Energy in its

rulemaking proceedings under EPCA does consider predicted energy use patterns, including the "rebound effect" – a phenomenon in which increased energy efficiency (and thus lower operating costs) may lead to higher usage. Thus, for example, a high-efficiency air conditioner will likely be run for more hours than would a low-efficiency model under the same conditions. The result of the rebound effect means that an increase in appliance efficiency can sometimes lead to a slightly-less-than proportionate decrease in real-world energy consumption. It is true that more efficient appliances have lower operating costs, and therefore may diminish, to some degree, consumers' responses to higher energy prices. In our experience, such effects are modest in scale and, in any event, are to a large degree offset by the greater utility that consumers enjoy by being able to afford using their appliances more intensively.

In conjunction with the Department of Energy, EPA has been successful advancing less energy intensive products in the market place through the ENERGY STAR program by adhering to the principle that these products must be cost effective to the consumer and perform the same or better than standard products. To that end, EPA and DOE have included a range of performance requirements along with the efficiency requirements in ENERGY STAR specifications for a number of products. ENERGY STAR qualified light bulbs, for example, must meet light quality and life requirements so that these important attributes are not traded off for increased efficiency.

10. Any new regulations regarding GHG emissions will need to take into account a broad range of issues. How long would the development of regulations, comparably complicated, normally take? Would you agree that the significant lasting impact of a new GHG regulation warrants a timeline that is sufficiently long enough, particularly due to the intricate nature of this regulation?

EPA recognizes that any regulations regarding GHG emissions will need to account for a broad range of issues. EPA's greenhouse gas ANPR identifies many issues for the public and requests comment on how the Clean Air Act, both in general and through specific sections, might be used to establish regulations for GHGs if requisite legal findings and requirements are met.

In the ANPR, we explored the possible development and implementation requirements under several Clean Air Act authorities. As we noted in this document, the length of time required to develop and implement comparable regulations is dependent on the statutory authority applied and the amount of flexibility provided in the statutory authority.

The ANPR is a first step in understanding the intricacies of GHG regulation and an initial effort to frame the discussion on the requirements for a comprehensive plan. As we noted in the ANPR, we recognize the development of a comprehensive plan for GHG regulation, assuming necessary tests for regulation are met, will take considerable effort. For this reason, we decided to release the ANPR and take public comment, as well as comment from other Federal Agencies, to more fully explore the potential interactions with and impacts on components of the Clean Air Act and other Federal statutes.

Also, as the ANPR makes clear and as EPA officials have testified, the Clean Air Act has some serious disadvantages when applied to GHGs, and we believe that new legislation would be better suited for this purpose. While it obviously takes considerable time to enact new legislation and then develop a regulatory program that implements it, new legislation also presents an opportunity to avoid many of the complex and cumbersome provisions of the Clean Air Act, and is likely to produce more desirable results faster.

11. Does the dramatic increase in voluntary GHG reductions by states and private corporations impact the necessity of a broad federal mandate? Has the EPA conducted a comprehensive study on the lasting impacts of the various programs private companies are voluntarily participating in?

The increase in voluntary GHG reductions is useful for several reasons. It often is a win-win activity, yielding both emissions reductions and cost-savings (e.g., in energy bills). It gives states, local governments, and private industry experience in measuring their emissions and emissions reductions and in identifying opportunities that may have been overlooked in the past. Finally, it will be useful in helping achieve our national goal of reducing GHG intensity by 18% from 2002 to 2012.

EPA and other federal agencies have done periodic assessments of the emissions impacts of our national climate change programs, including federal voluntary programs. For example, the latest U.S. "national communication" under the UN Framework Convention on

Climate Change (the Fourth U.S. Climate Action Report) provided historical and projected reductions for a wide range of federal climate programs managed by EPA, the Department of Energy, the Department of Agriculture, and other agencies (Table 4-2 of the Climate Action Report provides quantitative mitigation estimates by program for 2002, 2012, and 2020). We also provided selected results of state, NGO, and private sector programs in this report, although our focus has been on assessing the federal programs in detail. The report is online at http://www.state.gov/g/oes/rls/rpts/car/.

12. What is your reaction to Secretary Bremby's denial of Sunflower's permit to construct a new power plant?

It is my understanding that the decision of the Secretary of Kansas's Department of Health and the Environment to deny a PSD permit was based on a specific provision of Kansas state law that allows the Kansas Secretary to take any number of actions regarding air quality permits issued by that state. The Secretary relied on state law, not federal law, and thus that provision does not apply to federal permitting actions. With regard to federal permits, neither the Clean Air Act nor its federal implementing regulations contain a provision explicitly providing for general modification or denial of air permits, similar to that contained in Kansas law.

TESTIMONY OF DAVID BOOKBINDER
Chief Climate Counsel
Sierra Club
Before the House Select Committee on
Energy Independence and Global Warming

Hearing on *Massachusetts v. U.S. EPA* Part II:
Implications of the Supreme Court Decision
March 13, 2008

RESPONSE TO ADDITIONAL QUESTIONS
August 27, 2008

1) When you were arguing before the Court, was it your intention that CO2 regulation under Section 202 could trigger a massive expansion of stationary source regulation under the PSD program?

   Response: No.

2) Did you make the Court aware that the case could set the precedent for broader regulation of the economy?

   Response: No, because this issue was briefed extensively by other parties, *see, e.g.*, Brief of Respondent CO2 Litigation Group, pp. 24-31; Brief for the Federal Respondent, pp. 31-32.

3) Do you think that in 1970, when it enacted Section 202, Congress intended for EPA to regulate potentially hundreds of thousands of stationary sources for global warming purposes? If answer your answer is yes, why then did you argue to the Court that Mass v EPA was only about emissions from new tailpipes? If your answer is no, why then shouldn't we conclude that Congress also did not intend for EPA to regulate GHGs from mobile sources--since the consequence of EPA doing that is a massive expansion of stationary source regulation, that you admit Congress did not intend? Also, why then are you currently

petitioning EPA to apply PSD to CO2 from the Deseret power plant? What is your evidence that Congress intended for PSD to apply to CO2? If that was Congress's intent, would Congress have set the threshold for PSD regulation at 100/250 TPY?

Response: In 1970 the 91st Congress could not have intended to regulate any stationary sources for any pollutants under the PSD program, as the PSD provisions were only added to the Clean Air Act in 1977. The evidence that the 101st Congress intended PSD to apply to CO2 is that it included a provision in the 1990 Amendments (Section 821) ordering that EPA "shall promulgate regulations" requiring the monitoring and reporting of CO2 emissions from sources subject to Title IV of the Act. The 101st Congress did so knowing that the PSD provisions in Section 165(a)(4) mandated that any proposed facility be "subject to the best available control technology for each pollutant subject to regulation under this chapter." Finally, it was the 95th Congress that set the PSD threshold in 1977 at 100/250 TPY, not the 101st Congress in 1990.

4) The endangerment language in Section 202 is identical to that in Section 108. Would an endangerment finding under Section 202 set a precedent for litigation/regulation under the NAAQS program?

Response: No, for the reasons I gave in my original testimony (pp. 8-9), *viz.*

Because Section 108(a)(1)(A) requires EPA to set a NAAQS for "each air pollutant which . . . cause or contribute to air pollution which is reasonably anticipated to endanger public health or welfare", concerns have been raised about the difficultly of administering a CO2 NAAQS. However, it is possible that a CO2 NAAQS may be both unnecessary and not required by the Act.

The argument that a CO2 NAAQS is unnecessary is based on the fact that, given the significant climate change effects we are already experiencing, the NAAQS would presumably need to be set below current atmospheric concentrations of CO2 (approximately 383 ppm), and possibly close to the pre-industrial CO2 level of approximately 250 ppm. In other words, the argument is that this would all be an exercise in futility, as the entire planet is working toward a goal of holding CO2 concentrations at 450 – 550 ppm.

Alternatively, the argument has been made that the Act as currently written may not even require a NAAQS. Section 108(a)(1)(c) limits EPA's obligation to establish a NAAQS to those pollutants "for which [EPA] plans to issue air quality criteria", and thus appears to contemplate some discretion on EPA's part in whether to establish a NAAQS. In light of the circumstances described above, this may be an instance where such discretion would be justified. In any event, Sierra Club would support amending the Clean Air Act so as to make it clear that a CO2 NAAQS is not a necessary consequence of an endangerment finding.

5) Was it your intent in Mass v EPA to set the precedent for litigation/regulation under the NAAQS program? If not, why then in 2003, did three of the plaintiffs in Mass v EPA, including lead AG Tom Reilly of Mass, file a notice of intent to sue EPA for "failure" to initiate a NAAQS rulemaking for CO2?

Response: See my response to Question No. 4. I cannot speak as to why those three (out of the 28 plaintiffs in *Mass v. EPA)* filed that notice of intent.

6) Plaintiffs in Mass v EPA argued that current CO2 levels are already harming public health and welfare. What would it take to bring America into attainment with a CO2 NAAQS set below current atmospheric levels?

Response: As noted in my earlier testimony, and repeated above in response to Question 4, setting a NAAQS for CO2 would be an exercise in futility.

7) Section 202 says EPA must take compliance costs into account when setting tailpipe emission standards. However, the Court has ruled that EPA may not take compliance costs into account when setting NAAQS. Do you think that when Congress enacted Section 202 in 1970, it intended to leverage money-is-no-object regulation under the NAAQS program?

Response: I'm afraid I do not understand this question.

KANSAS
DEPARTMENT OF HEALTH
AND ENVIRONMENT

Kathleen Sebelius, Governor
Roderick L. Bremby, Secretary

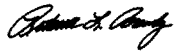
www.kdheks.gov

Aug. 22, 2008

Dear Select Committee on Energy Independence
& Global Warming:

Thank you for your inquiry. The questions posed by members of the committee are central to several appeals and lawsuits involving Sunflower Electric Power Corporation and the Kansas Department of Health and Environment that are currently pending before the Kansas State Office of Administrative Hearings and the Supreme Court of the State of Kansas. Therefore, I must respectfully decline to comment on the questions posed at this time. I would be glad to keep you apprised of the status of the litigation.

Sincerely,



Roderick L Bremby

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PETER GLASER
RESPONSES TO QUESTIONS
OF THE SELECT COMMITTEE ON ENERGY INDEPENDENCE
AND GLOBAL WARMING

September 4, 2008

1) Would you agree that including the potentially hundreds of thousands of new sources under a GHG regulation could effectively kill economic growth?

It could have a very significant retarding effect on economic growth.

(a) Large increase in regulated sources.

As stated in my testimony, regulating greenhouse gases (GHGs) under the Clean Air Act (CAA) will automatically trigger pre-construction permit requirements under the Prevention of Significant Deterioration (PSD) program for a very large number of buildings and facilities which emit GHGs and which have never before been regulated under this program. This is because many buildings and facilities emit at least 250 tons per year (tpy) of carbon dioxide (CO2), including many that do so simply because they are heated with natural gas or oil.

The U.S. Environmental Protection Agency (EPA) recognizes that regulating GHGs will make the PSD permit program applicable to a large number of sources that are not currently subject to that program. EPA recently issued an Advance Notice of Proposed Rulemaking entitled "Regulating Greenhouse Gas Emissions under the Clean Air Act," 73 Fed. Reg. 44,354 (July 30, 2008) (hereafter the "ANPR"), that analyzes GHG regulatory issues under the CAA, including the PSD program. According to the ANPR, the number of PSD permits required to be issued per year would likely, *at a minimum*, increase by an order of magnitude, from 200-300 permits per year to 2000-3000. *Id.* at 44,499.

The ANPR notes, however, that this 2000-3000 number is likely far too small because (a) it includes only permits for new major sources and not the likely much higher number of permits that will be required for modifications; (b) it is calculated based on a building or facility's actual emissions rather than its potential to emit (PTE) (this is an important distinction – for instance, given EPA's past interpretation of PTE, for purposes of determining whether a building heated with a fossil fuel-fired furnace produces emissions above the 250 tpy threshold, the building must assume that it runs its furnace at maximum capacity every hour of the year, even though it knows it will almost never do so, even during the winter); and (3) EPA's number only includes combustion sources, even though the agency knows that there are sources with significant amounts of GHG emissions from non-combustion sources. *Id.*

EPA's estimate that regulating GHGs would result in 2000-3000 PSD permit applications per year is based on a technical support document indicating that about 235,000 sources emit above the 250 tpy threshold. *See Estimates of Facilities that Emit CO2 in Excess of 100 and 250 tpy Thresholds*, EPA staff, May 2008. This document, however, concedes that this number is likely substantially understated for a number of reasons, included the reasons just stated above.

For instance, the document states that its 235,000 source estimate is based on the facilities' actual emissions rather than their PTE as required by the statute and "thus *excludes a potentially very large number of sources* that would be major if they operated at their full potential to emit (PTE)." *Id.* at 3 (emphasis supplied). The ANPR states that if PTE rather than actual emissions were used to determine the number of permit applications that would be received annually given GHG regulation, EPA's estimate of 2000-3000 permits per year "would likely be an order of magnitude higher." ANPR, 73 Fed. Reg. at 44,504.

The technical support document also states that EPA's estimate of the number of permits required given GHG regulation does not include permits resulting from modifications of existing sources which, if taken into account as required by the statute, "*could substantially increase the number of PSD permits.*" *Id.* at 4 (emphasis supplied). Moreover, the document excludes agricultural sources of CO2 emissions, even though large numbers of such sources would become subject to PSD if CO2 is regulated.

Other estimates that are not as limited as EPA's indicate that more than a million sources emit more than 250 tpy of CO2. Any modification of these buildings or facilities that "significantly" increases CO2 emissions (currently defined under EPA regulations as "any" increase in emissions) would require a pre-construction PSD permit. Similarly, new construction of these types of buildings and facilities would require a pre-construction PSD permit.

b. Impairment of new development.

Requiring pre-construction permits for large numbers of sources will reduce economic development. Even under present conditions, where CO2 is not regulated, the permitting process is complicated, costly and lengthy. The attached schematic, taken from the Washington Department of Ecology website, shows how complex the PSD process is.

Significantly increasing the number of sources that must undertake this complicated PSD permit process is likely to lead to regulatory gridlock. State and federal permitting agencies will not have the resources to handle the volume of permit applications that will be received. Delays will also result from legal and regulatory uncertainty as to permit requirements. As discussed in my testimony, a PSD permit obligates the source to install Best Available Control Technology (BACT) controls. Since BACT requirements have never been applied to CO2-emitting sources, no one knows what those requirements will be. BACT requirements are determined on a case-by-case basis, CAA §§ 165(a)(4) and 169(3), and may vary from state-to-state. I provide more detail on the BACT process in response to question 3 below. Thus, it may take a considerable amount of time until sufficient BACT determinations have been made for a developer to have comfort that it knows, as it develops plans for its new buildings or facilities, what types of BACT controls it must install.

Apart from BACT uncertainties, state and federal regulators have no experience administering the PSD program for the many categories of small sources that will become subject to the program if EPA regulates GHGs. It will take time for the regulators to develop appropriate policies and procedures, and no doubt they will learn as they go. Similarly, because most of the small sources that will become subject to the program have never had to comply with CAA requirements, they will face their own steep learning curve and will need to hire lawyers

and consultants to advise them. Indeed, some kind of educational outreach will be needed to inform these many small sources that they cannot begin construction on a new building or modify an existing one without first undertaking a study of their CO2 emissions and, if the applicable thresholds are exceeded, obtaining a permit.

The regulatory gridlock that will result from GHG regulation under the CAA will substantially impair construction activity. Because PSD permits are required *before* construction can begin, new construction of sources that emit above the 250 tpy threshold, and modifications of existing sources emitting above that threshold that result in a "significant' increase in emissions, could face very lengthy delays.

The ANPR recognizes the serious consequences that could result under the PSD program if it proceeds with GHG regulation:

> Absent higher major source cutoffs and significance levels, it would be necessary to formulate a strategy for dealing with the tenfold increase in required permits that EPA projects permitting authorities will experience if GHGs become regulated for PSD purposes. *Even with advance notice, an increase of this magnitude over a very short time could overwhelm permitting authorities.* They would likely need to fund and hire new permit writers, and staff would need to develop expertise necessary to identify sources, review permits, assess control technology options for a new group of pollutants (and for a mix of familiar and unfamiliar source categories), and carry out the various procedural requirements necessary to issue permits. Sources would also face transition issues. Many new source owners and operators would need to become familiar with the PSD regulations, control technology options, and procedural requirements for many different types of equipment. *If the transition were not effectively managed, an overwhelmed permit system would not be able to keep up with the demand for pre-construction permits, and construction could be delayed on a large number of projects under this scenario.*

73 Fed. Reg. at 44,507.

Notwithstanding EPA's frank discussion of the potential permit problems, I believe EPA understates the matter. As stated above, regulation of GHGs is likely to increase the number of sources subject to the PSD program by a considerably larger number than an order of magnitude. Moreover, as discussed below, I have less confidence than EPA that, even with the best of intentions and effort, "the transition" can be "effectively managed," or that a "transition" to a streamlined system that eliminates or minimizes the permit burden on small sources is even possible given legal requirements.

In short, regulating GHGs will significantly complicate development activity in the United States. This may be particularly true given the tremendous pressure that has been put on

EPA to immediately regulate GHGs under the CAA before the agency or state permitting agencies are ready to handle the large number of permit applications that will ensue.[1]

2) You use the term "catastrophic" for the PSD implication for small sources – who are those small sources?

Many types of buildings and facilities will be potentially subject to the PSD program if EPA regulates GHGs. These include: office buildings, apartment buildings, warehouse and storage buildings, educational buildings, health care buildings such as hospitals and assisted living facilities, hotels, restaurants, religious worship buildings, public assembly buildings, supermarkets, retail malls and large retail stores, product pipelines, food processing facilities, large heated agricultural facilities, public order and safety buildings, soda manufacturers, bakers, breweries, wineries, and many others.

In my testimony, I stated that any building that is about 100,000 square feet and heated with gas or oil likely emits more than 250 tpy of CO2. I evidently overstated this square footage number. According to the EPA, a residential building that is only approximately 68,000 square feet emits at least 250 tpy of CO2. *See Estimates of Facilities that Emit CO2 in Excess of 100 and 250 tpy Thresholds*, EPA staff, May 2008, at 5. This is based on the building's actual emissions. *Id.* Using PTE rather than actual emissions results in an even lower square footage number and consequently a larger number of buildings potentially subject to PSD regulation.

3) When you talk about these hundreds of thousands of new small stationary sources that could be named as major emitters for GHG, do you think that the people who own these sources would be at all prepared to deal with a GHG regulation? How would they be able to comply with such regulations and accompanying non-compliance penalties?

Small sources will have great difficulty complying with PSD requirements. Just determining BACT requirements typically involves a complicated five-step process, with most of the work performed by the regulated source:

1. *Identification of available pollution control options*. Applicants must determine all "air pollution technologies or techniques with a practical potential for application to the emissions unit and the regulated pollutant under evaluation." The search for available pollution control options is broad, and can extend to: technology vendors; federal, state, and local NSR permits; technology or emissions control practices required under other CAA programs; environmental consultants; technical journals and reports; and air pollution control seminars.

[1] I am potentially dramatically understating the effects of EPA GHG regulation on small sources. Although I focus on the PSD program, the ANPR discusses the possibility that sources could also be subject to GHG regulation under the Title V operating permit program and the Section 112 Hazardous Air Pollutants (HAPs) program. The statutory threshold for Title V regulation is 100 tpy and for HAPs regulation it is 10 tpy. Obviously, the number of affected sources if either of these programs is triggered will increase exponentially. The HAPs program also entails very stringent control requirements. Additionally, my answer to question 12 below touches on the issue of small source regulation if EPA establishes a GHG NAAQS and the entire nation is designated a nonattainment area. The effect of NAAQS nonattainment regulation on small sources and on economic development in general would be severe and warrants more detailed scrutiny than I have provided here.

2. *Elimination of technically infeasible options.* To determine whether a control technology is technically feasible, an evaluation must be made of its availability and applicability. A technology is "available" when it has been licensed and can be obtained through ordinary commercial channels, as opposed to a concept or experimental technology. A technology is "applicable" if its emissions control qualities or characteristics are physically or chemically compatible with the emissions stream being evaluated, taking into consideration the chemical and physical characteristics of the emissions stream.

3. *Ranking of remaining control technologies by control effectiveness.* Technologies not eliminated by Step 2 above are ranked, from best to worst, according to their emissions reduction potential. Manufacturing data, engineering estimates, and determinations for other permits should be considered in determining achievable emissions control. Data to be considered includes, but is not limited to: expected emission rate (e.g., tons per year); emissions performance level (e.g., pollutant removal efficiency); emissions per unit product (e.g., parts per million, lbs/mmBtu); expected emissions reduction (e.g., tons per year).

4. *Evaluation of the most effective controls (considering energy, environmental, and economic impacts) and documentation of the results.* The energy impact analysis is essentially a determination of the amount of energy that must be expended to obtain incremental emissions reductions. The economic analysis compares the costs of control options as an element of their efficiencies to various technologies. The environmental impact analysis includes consideration of secondary or collateral impacts from use of the technology (e.g., production of other pollutants; waste products or by-products that affect water or groundwater). Data to be considered here includes, but is not limited to, economic impacts of technology (e.g., total annualized costs, cost-effectiveness, incremental costs); environmental impacts resulting from application of technology (e.g., impacts on other media such as soil or water); and energy impacts (e.g., significant energy use or conservation).

5. *Making of the BACT selection.* The regulated source submits proposed BACT selections to the state permitting agency, which makes the final selection.

See EPA NEW SOURCE REVIEW WORKSHOP MANUAL (draft), at B.6 (1990). See also response to question 1 above.

Additionally, sources would face significant post-permit requirements, including monitoring, recordkeeping and reporting, to demonstrate continuous compliance with the permitted emission limits.

4) In your opinion, would the EPA be able to handle the workload entailed if all of these new stationary sources were included in GHG regulation?

As stated in my testimony, the PSD permit program is largely administered by state permitting agencies. The permit program is administered by EPA regional offices in some instances, most notably where a facility is located on Indian lands and there is no tribal permit

program. Indian country, like the rest of the nation, contains a much larger number of small sources compared to traditional major sources. Should those smaller sources in Indian country be subjected to PSD permitting for GHGs, EPA's regional offices could be inundated with permit applications. The regions are unequipped to handle this increased permit burden. See also answer to question 5 below.

5) In your opinion, could states handle the influx of new stationary sources to be regulated?

I don't believe that the states could handle the additional permitting burden. State permitting agencies, by and large, are underfunded and struggle to keep up with their current permitting burdens.

EPA is aware of the effect regulating GHGs would have on state PSD permitting authorities. As stated in the ANPR:

> The PSD program is designed to provide a detailed case-by-case review for the sources it covers, and that review is customized to account for the individual characteristics of each source and the air quality in the particular area where the source will be located. Although this case-by-case approach has effectively protected the environment from emissions increases of traditional criteria pollutants, *there have been significant and broad-based concerns about PSD implementation over the years due to the program's complexity and the costs, uncertainty, and construction delays that can sometimes result from the PSD permitting process.* Expanding the program by an order of magnitude through application of the 100/250-ton thresholds to GHGs, and requiring PSD permits for numerous smaller GHG sources and modifications not previously included in the program, would magnify these concerns. EPA is aware of *serious concerns being expressed by sources and permitting authorities* concerning the possible impacts of a PSD program for GHGs.

73 Fed. Reg. at 44,501 (emphasis supplied). Again, I think the ANPR understates the permitting difficulty by assuming that permit applications will increase only by an order of magnitude and not by an even higher number.

6) On page 4 of your testimony, you state that the Supreme Court did not establish a deadline for EPA action or[sic: on] remand. Did the Supreme Court say anything at all about time for action?

The Court said that "EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies." *Massachusetts v. EPA*, 127 S. Ct. 1438, 1462 (2007). Additionally, the U.S. Court of Appeals for the D.C. Circuit recently refused to rule that EPA had inordinately delayed its response on remand and to compel EPA to issue an endangerment finding and regulate GHGs. *See Massachusetts v. EPA*, No. 03-

1361 (D.C. Cir. June 26, 2008). As a result, the agency is not under any kind of legal compulsion to act quickly on the matter before it.

7) On page 8 of your testimony, you mention that the trade press has speculated on possible alternatives for preventing small sources from being subject to the PSD – can you tell us briefly what those might be and what their potential problems are?

It is no longer necessary to speculate because, in the ANPR, EPA asks for comments on a number of scenarios under which it might circumvent the regulatory threshold and prevent at least some small sources from becoming subject to the PSD program. First, EPA suggests several standards under which EPA could set a potentially much higher threshold than 250 tpy, including: (a) using a cost-benefit analysis to determine the optimal threshold for regulatory purposes (the ANPR states, however, that EPA does not have the information to set the standard in this fashion); (b) an "emissions scaling approach," which would "compare the emissions of other existing NSR pollutants for sources that are major and would calculate the corresponding GHG emissions that the same source would emit;" and (c) setting the standard based on what is considered to be a *de minimis* amount of CO2 emissions in terms of environmental impact (noting certain federal and state CO2 emission reporting thresholds of 10,000, 25,000 and 100,000 tpy). 73 Fed. Reg. at 44,505.

Second, EPA suggests that it might make the threshold applicable to the Carbon Equivalent (CE) of each GHG rather than to the GHG itself.

Third, it examines the possibility that it might redefine PTE for small GHG-emitting sources to limit the number of such sources subject to the PSD program.

I will examine each of these potential regulatory approaches below. Each is likely to raise legal questions.

a. Increasing the 250 tpy threshold may be difficult to justify legally.

The ANPR's suggestion that EPA could increase the 250 tpy threshold is the most problematic of all the strategies examined by the ANPR for limiting small source exposure to the PSD program. The threshold is statutory. *See* CAA § 169(1). The statutory language is mandatory and does not leave any room for EPA to exercise discretion or create exceptions. It is axiomatic that an agency does not have authority to substitute its own judgment for explicit requirements set forth by Congress. A court is unlikely to look favorably on an argument by EPA that the agency may, based on its own view of the appropriate regulatory threshold, transform the statutory 250 tpy threshold into a threshold of 10,000, 25,000 or 100,000 tpy (or, for that matter, any threshold above 250 tpy).

The ANPR suggests that EPA may have authority to increase the PSD threshold because the threshold may represent one of the "rare cases" in which the plain meaning of statutory language should not be conclusive and legislative history should control instead. 73 Fed. Reg. at 44,503, 506. The ANPR also suggests that EPA may have authority to increase the thresholds based on "administrative necessity." *Id.* at 44,503.

EPA's legal arguments would face difficulty. The most basic rule of statutory construction is that the language of the statute is the most persuasive indicator of congressional intent. In the very recent case of *Sierra Club v. EPA*, No. 07-1039 (D.C. Cir. August 19, 2008), both the majority and the dissent cite, as the majority said, "Justice Frankfurter's timeless advice on statutory interpretation: "'(1) Read the statute; (2) read the statute; (3) read the statute!'" *In re England*, 375 F.3d 1169, 1182 (D.C. Cir. 2004 (Roberts, J.) (quoting Henry J. Friendly, Benchmarks 2002 (1967))." Contrary to the ANPR discussion, legislative history never trumps statutory language; the "rare" doctrine that EPA cites applies only where the statutory term in question had a special meaning to Congress that differs from literal meaning but can be discerned from legislative history. That doctrine is unlikely to apply to the pre-construction permit program numerical threshold. What possible meaning could Congress have had for the number 250 other than 250?

The ANPR also appears to misinterpret the extent to which courts will allow an agency to depart from statutory requirements as a result of administrative necessity. In fact, the discussion from *Alabama Power Co. v. Costle*, 636 F.2d 323, 357-60 (D.C. Cir. 1979), that the ANPR cites would seem to contradict rather than support the ANPR's suggestion that EPA could increase the regulatory threshold based on administrative necessity. In *Alabama Power*, EPA adopted a rule similar to its suggestion here and based on the same rationale. It attempted to categorically exclude numerous small emitting sources from pre-construction permitting requirements based on EPA's judgment that "application to such sources of the full preconstruction review and permit process would not be cost-effective and would strain to the limits the agency's resources." *Alabama Power*, 636 F.2d at 356. According to EPA, "the costs to industry and permitting authorities entailed in reviewing" numerous small source PSD permit applications "would far outweigh the benefit of the 'relatively insignificant' reduction in emissions that would result." *Id.* The Court, however, *rejected* EPA's approach, holding that it "falls well beyond the agency's exemption authority." *Id.* The Court further noted that exemptions based on administrative necessity "are not favored" and that the "broad principle that frowns upon categorical administrative exemptions is strict." *Id.* at 358.

b. Applying the threshold to Carbon Equivalent raises a significant legal question.

EPA also examines the possibility that the 250 tpy statutory threshold could be circumvented by defining that threshold as applying to Carbon Equivalent, or CE, rather than to individual GHGs such as CO2. Under this approach, the threshold for CO2 would be 917 tpy, which the ANPR says is the CE of 250 tpy of CO2. The ANPR states that this approach would reduce the threshold for other GHGs that have higher radiative forcing properties; for instance, the threshold for methane would be 44 tpy. 73 Fed. Reg. at 44,505.

The ANPR is unclear about the legal rationale for its suggestion that it could substitute CE for CO2 or the other GHGs in determining the regulatory threshold. The threshold applies to "air pollutants," CAA § 169(1). That term is defined in CAA § 302(g) to mean "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material which is emitted into or otherwise enters the ambient air." In determining in *Massachusetts v. EPA*, 127 S.Ct. at 1460, that GHGs meet the CAA definition of "air pollutant," the Supreme Court relied

on the fact that "[c]arbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt 'physical [and] chemical' substance[s] which [are] emitted into...the ambient air." CE would not appear to meet the CAA "air pollutant" definition – unlike actual GHGs, CE is not a physical, chemical, biological or radioactive substance that is actually emitted into the ambient air. As a result, questions exist as to the validity of EPA's rationale as to why 250 tpy of CO2 can be transformed into 917 tpy for purposes of triggering the NSR pre-construction permit threshold.

c. Redefining PTE may not be workable and doesn't solve the problem.

The ANPR recognizes that, under EPA's current application of the PSD program, for purposes of determining whether a facility's emissions exceed the 250 tpy threshold, the facility must assume that it operates at maximum capacity every hour of the year (its potential to emit, or PTE). Thus, if CO2 is regulated under the CAA, a building heated with fossil fuels must calculate its emissions based on the assumption that the building will run its furnace and produce CO2 emissions all day year-round even though it is known that the furnace will only run during the winter and even then not all day. EPA suggests that this makes little sense and therefore suggests ways around its typical interpretation of a facility's PTE. 73 Fed. Reg. at 44,504.

One of EPA's suggested approaches is that the building could voluntarily limit the amount of time it operates its furnace or other GHG-producing equipment through a federally-enforceable permit limit. As the ANPR appears to recognize, however, this suggestion is unworkable and possibly illegal. Although sources would not be required to obtain major source PSD permits, they would be required to obtain "minor source" permits, and "the sheer volume of [such] permits and the process required for each one would severely strain permitting authority resources ... [and] some state and local agencies may lack the authority to establish minor source permit limits for non-NAAQS pollutants." *Id.*

Another approach suggested by the ANPR is that EPA could by rule limit PTE for various categories of small sources of GHG emissions. *Id.* This suggestion may have some promise, although there is only very limited precedent for adoption of such categorical limits on PTE. As with many of EPA's other proposals to avoid the 250 tpy threshold, the legal validity of EPA's PTE suggestion has not been tested in court and is therefore uncertain.

Most importantly, whatever success EPA might have in limiting PTE for small sources, limiting PTE will not prevent PSD regulatory gridlock. As stated above, EPA's estimate of 235,000 sources that would exceed the 250 tpy threshold was calculated based on these sources' actual emissions, not their PTE. EPA's estimate of an order of magnitude increase in the number of PSD permit applications – an increase that EPA said could result in extreme permitting problems absent some other way to limit the number of PSD permits or simplify the PSD process – similarly assumed the use of actual emissions rather than PTE. As also stated above, EPA's estimate of the number of new permit applications is low for a number of reasons, not just because of EPA's use of actual emissions rather than PTE. Thus, limiting PTE, if possible, is important, but it does not solve the problem created by regulating GHGs under the CAA.

8) At pages 8-9 of his testimony, Mr. Bookbinder presents two possible arguments as to why a CO2 NAAQS might be, in his words, "both unnecessary and not required by the Act." Do you agree?

I would note first that this is more than a theoretical question. Apart from the fact that the ANPR explores potential NAAQS regulation in depth, three northeastern states filed a lawsuit several years ago seeking to compel EPA to establish GHG NAAQS. The lawsuit was filed when the original rulemaking petition that led to the *Massachusetts v. EPA* court decision was still being considered by EPA, and it was withdrawn after EPA denied the rulemaking petition and the legal focus shifted to an appeal of that denial. In light of that lawsuit, the possibility cannot be discounted that, if EPA makes an endangerment finding, a party or parties (not necessarily these states) will seek to compel NAAQS regulation.

I do not agree with Mr. Bookbinder's analysis. Mr. Bookbinder first states that a CO2 NAAQS would be unnecessary because (a) the NAAQS would need to be set at a level below current atmospheric levels "given the significant climatic effects we are already experiencing" even though (b) international efforts are seeking to stabilize atmospheric levels at 450-550 ppm. He concludes from this that regulating GHGs under the NAAQS program would be an exercise in futility. While I agree that attempting to regulate GHGs under the NAAQS program would be pointless, that does not necessarily mean that NAAQS regulation would not be legally required if, as Mr. Bookbinder strenuously advocates, EPA makes an endangerment finding. Indeed, as I discuss below, if an endangerment finding is made, EPA may face substantial legal arguments that it is required under existing law to implement NAAQS regulation.

Second, Mr. Bookbinder suggests that NAAQS regulation may not be required under Section 108(a)(1)(c), even if EPA makes an endangerment finding. Some brief background is required on this point.

The process of establishing a NAAQS begins under CAA § 108 with EPA's publication of a "Criteria Document" describing the public health and welfare effects of the pollutant at issue. Section 108(a) obligates the EPA Administrator to issue such a document for pollutants (a) which may reasonably be anticipated to cause or contribute to air pollution that endangers public health or welfare; (b) which are emitted by "numerous or diverse mobile or stationary sources"; and (c) for which EPA "plans" to issue a Criteria Document after the date of enactment of the 1970 CAA. If EPA issues a Criteria Document, it is then obligated to issue a NAAQS and NAAQS regulation is triggered.

CO2 is unquestionably emitted by numerous or diverse mobile or stationary sources. Hence, if EPA makes an Endangerment Finding, it may only avoid issuing a Criteria Document and then a NAAQS if it has discretion to do so under the third § 108(a) criterion. Mr. Bookbinder suggests that EPA might be able to avoid issuing a CO2 Criteria Document and hence a CO2 NAAQS under this third criterion – in Mr. Bookbinder's view, EPA could simply not plan to issue a Criteria Document.

Mr. Bookbinder failed to point out, however, that in *NRDC v. Train*, 545 F.2d 320 (2d Cir. 1976), NRDC successfully advocated the exact opposite position that he posits now. In *Train*, EPA had conceded that lead endangers public health and welfare and is emitted by numerous or diverse sources, but EPA contended that it had discretion under the third § 108(a) factor not to issue a Criteria Document. The Court rejected EPA's statutory interpretation, ruling that the third factor applied only to pollutants included on the initial list of pollutants to be regulated under the NAAQS program, which EPA was required to promulgate within thirty days after December 31, 1970. According to the Court, the third factor does not apply to revisions of the initial list. For such revisions, the Court ruled that EPA's duty to establish a NAAQS is mandatory if the first two § 108(a) factors are met. Thus, under the reasoning of *Train*, CO2, which of course was not on the initial list, must be regulated under the NAAQS program if EPA makes an endangerment finding.

The ANPR also suggested the possibility that the third § 108(a) factor might provide discretion to EPA not to issue a CO2 NAAQS if EPA makes an endangerment finding. The ANPR suggested that *Train* might no longer be good law because it was decided before *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984), which is the seminal modern case setting forth the standards for judicial review of agency action. *Chevron*, however, has never been interpreted as automatically invalidating cases decided before it. Indeed, in another section of the ANPR, EPA relies heavily on *Alabama Power v. EPA*, 636 F.2d 323 (D.C. Cir. 1979), which was also decided before *Chevron*. Interestingly, Professor Heinzerling's testimony before this committee cited *Train* on another point, suggesting that she considers it to remain good law, *Chevron* notwithstanding.

If EPA were to decline to establish a CO2 NAAQS on the basis of the third factor of § 108(a), that decision would likely be reviewed in the D.C. Circuit. The D.C. Circuit is not bound by Second Circuit precedent, although Circuit Courts generally give weight to the decisions of other Circuit Courts. In any event, the fact that a federal court of appeals has considered and rejected the argument that Mr. Bookbinder put forth in his testimony means that the argument can't be conclusively relied on. If EPA makes an endangerment finding for CO2, a significant risk exists that it will face arguments that it is obligated to issue a CO2 Criteria Document and a CO2 NAAQS and that CO2 NAAQS regulation must be implemented.

9) At page 9 of his testimony, Mr. Bookbinder presents a possible way that EPA motor vehicle regulation would not have serious PSD impacts on numerous small stationary sources. Could you respond?

The first idea offered by Mr. Bookbinder is that Congress could amend CAA § 169. Congress, of course, is free to amend the law. My own view is that Congress should adopt legislation completely preventing regulation of GHGs under the CAA. The statute is wholly unsuited to the issue of GHGs and climate change.

The second idea offered by Mr. Bookbinder, which he credits to Professor Heinzerling, is that the PSD program should be implemented for small sources through a general permit program. This approach raises a number of legal issues and may not be possible at all.

First, general permitting has never been tested in court in a PSD context, and as the ANPR states, no explicit statutory authority exists for general PSD permits. 73 Fed. Reg. at 44,509. Thus, sources may have difficulty relying on general permitting absent judicial confirmation. Moreover, PSD permits may not be issued without a hearing. *See* CAA § 165(a)(2). Perhaps, a hearing in connection with adoption of the general permit program would satisfy this hearing requirement (*see* ANPR, 73 Fed. Reg. at 44,509-10), but again this would generate legal uncertainty.

Second, as stated above, PSD permits require sources to install BACT controls. The statutory definition of BACT requires that BACT be determined on a "case-by-case" basis, CAA §§ 165(a)(4) and 169(3), which facially would seem to argue against the general permitting approach. I don't know if the Heinzerling-Bookbinder proposal for general permits assumes a predetermination that small sources would not have to meet the BACT requirement. Obviously, the statute cannot simply be ignored. Perhaps the proposal assumes predetermined "presumptive" BACT requirements, which presumably would be different for different categories of small sources. As set forth in the ANPR, there is some very limited administrative precedent for presumptive BACT (73 Fed. Reg. at 44,508 n.278), but, again, this concept has not been tested in court and would entail significant legal risk. Moreover, determining presumptive BACT requirements for different categories of sources will generate controversy and consume time.

Third, if GHGs are regulated under the NAAQS program, the Bookbinder/Heinzerling proposal to simplify PSD permitting through a general permit program would face heightened, perhaps fatal, legal difficulties. One of the primary issues in GHG NAAQS regulation is the level at which to set the NAAQS. As stated above, Mr. Bookbinder testified to this Committee that the GHG NAAQS would have to be set at a level below current atmospheric concentrations, since, in his view, current concentrations are causing serious climatic impacts. If the NAAQS were set at a level below current atmospheric concentrations, the entire country would be in "nonattainment" of the NAAQS. In that event, the PSD program would no longer apply; instead major emitting sources of GHGs would be required to obtain Nonattainment New Source Review (NNSR) permits. CAA §§ 172(b)(6), 173.

The NNSR program would apply to the same universe of GHG sources as the PSD program but is considerably more restrictive. For instance, sources are required to obtain emission offsets, meaning that the many small sources that will be required to obtain pre-construction permits if GHGs are regulated will need to purchase offsets from third parties and/or create offsets by shutting down existing sources before commencing construction. The NNSR program also requires sources to undertake stringent Lowest Achievable Emission Rate (LAER) controls which, unlike BACT controls, are set without consideration of economic costs. It is difficult to envision how the general permitting process could accommodate the requirement that sources obtain offsets and that regulators confirm that they have done so. Indeed, it is very difficult to understand how application of offset and LAER requirements to numerous small sources could possibly be justified under any rational public policy.

Fourth, the timing of adoption of a general permit program would be critical. Unless the program is in place at the time that EPA first regulates GHGs under any CAA program, small sources, at that time, will be forced to comply with the full panoply of pre-construction permit

requirements. Easy adoption of a general permit program should not be assumed, given that it has not been done before in a PSD context and the controversy that will arise in attempting to define "presumptive BACT" limits for different categories of small sources. Thus, establishing a general PSD permitting program could take a great deal of time, particularly if, as expected, EPA and the public were simultaneously addressing a host of other GHG regulatory initiatives. Yet advocates of CAA regulation of GHGs demand immediate action, raising the prospect that EPA will proceed with GHG regulation before an effective general permitting program is in place.

Moreover, presumptive BACT and general permit requirements established by EPA would not be self-executing in most states. States acting under their own, "non-delegated" permit authority would have to adopt these new provisions into law, probably through rulemakings, possibly through legislation. This significantly raises the difficulty of having an effective general permitting program in place at the time that EPA proceeds with GHG regulation.

Finally, whatever success might be achieved through general permitting in streamlining the permit process, a very large number of small sources will still be subject to some permitting burden to which they are not currently subject. At a minimum, these sources will be required to retain lawyers and possibly consultants to help them understand the new requirements and file whatever paperwork is necessary to comply. This burden is not justified by any regulatory benefit, as I assume the Bookbinder/Heinzerling proposal would not require small sources to comply with BACT, LAER or other controls and therefore the program will not result in a reduction of GHG emissions. Even if some emission reductions were achieved through some kind of "presumptive BACT" requirements, the resulting benefit would be hard to justify in light of the regulatory inefficiencies. As the ANPR recognizes:

> Regarding the potentially large universe of smaller sources and modifications that could become newly subject to BACT, as described above, *there are large uncertainties about the potential benefits of applying BACT requirements to GHG emissions from such sources*. Individual emission reduction benefits from such sources would be smaller; however, the cumulative effect could theoretically be large because the requirement would cover many more sources. *However, unless there are ways to effectively streamline BACT determinations and permitting for smaller sources (as discussed below), BACT would not appear to be an efficient regulatory approach for many other types of sources*.
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> * * *
>
> While the program would provide a process for reviewing and potentially reducing GHG emissions through the BACT requirement as it has done for other pollutants, we are concerned that without significant tailoring (and possibly even with significant tailoring), application of the existing PSD permitting program to these new smaller sources would be a very inefficient way to address the challenges of climate change.

73 Fed. Reg. at 44,501 (emphasis supplied).

10) On pages 5-8 of her testimony, Professor Heinzerling presents an argument that EPA has already made a formal endangerment finding? Do you agree?

No. The matter is obviously before EPA on remand of *Massachusetts v. EPA* and in the context of a number of regulatory petitions and other requests that have been made to EPA to regulate GHGs. The ANPR initiated EPA action in response to the court decision and those petitions and requests. EPA will make – or not make – an endangerment finding in the context of the various regulatory programs that the agency has been asked to initiate, assuming it moves into rulemaking.

I would also note in this regard that, as stated above, a number of states, cities and environmental organizations (including NRDC and the Sierra Club) recently filed a mandamus action with the U.S. Court of Appeals for the D.C. Circuit in the *Massachusetts v. EPA* docket seeking to compel EPA to issue an endangerment finding. The Court declined to do so.

11) On pages 4-5 of her testimony, Professor Heinzerling argues that the EISA does not change EPA's obligations on remand of the *Massachusetts* case. Do you agree?

Although EISA does not affect EPA's legal obligation to respond to the Supreme Court remand, it unquestionably affects the character of what that response will be. The two principal ways of reducing motor vehicle GHG emissions are improved fuel economy and renewable fuels (depending on the renewable fuel used). EISA adopted significant new requirements in both areas. As a result, EISA is likely to affect considerably the type of response that EPA makes to the *Massachusetts* case.

12) On pages 8-9 of your testimony, you present two possible arguments as to why a CO2 NAAQS might be, in your words, "both unnecessary and not required by the Act." Do you agree?

I believe this question means to refer to pages 8-9 of Mr. Bookbinder's testimony. See my response to question 8 above.

13) At page 9 of his testimony, Mr. Bookbinder presents a possible way that EPA motor vehicle regulation would not have serious PSD impacts on numerous small stationary sources. Could you respond?

See my answer to question 9 above.

14) On pages 5-8 of her testimony, Professor Heinzerling presents an argument that EPA has already made a formal endangerment finding? Do you agree?

See my answer to question 10 above.

15) On pages 4-5 of her testimony, Professor Heinzerling argues that the EISA does not change EPA's obligations on remand of the *Massachusetts* case. Do you agree?

See my answer to question 11 above.

16) Do you know why utilities such as Sunflower Electric are pursuing coal-fueled electric generating stations?

All regions of the country face a critical need for new electric generation resources. Without significant new electric generation additions, insufficient resources will exist to meet minimum reserve requirements. If minimum reserve requirements are not met, failure of a power plant or transmission line or a surge in customer demand during a hot summer day could result in a blackout or brownout.

Many utilities need "baseload" electric generating resources, resources that are available around-the-clock every day. There are limited types of resources that provide baseload capacity. Coal and nuclear are the typical baseload capacity resources. Wind is not a baseload resource. Wind operates intermittently – when the wind blows. New wind generation using the latest wind technologies that are located in high-wind areas are expected to operate at a capacity factor of about 40 percent (or perhaps more in very windy areas), but wind will never be a baseload resource.

Natural gas has increasingly been looked to as a source of fuel for electric generation because natural gas plants can be built more quickly and have lower capital costs (but much higher fuel costs) than coal or nuclear power plants. A great deal of natural gas electric generation has been built in this country in the relatively recent past. Natural gas prices, however, have proven to be highly volatile and recently spiked to around $14.00/MMBtu. While natural gas prices have since retreated, they are still far higher than their historical range and subject to further spikes.

Reliance on natural gas for electric generation also creates issues in terms of energy independence policy. Until very recently, North American natural gas production had been flat or declining. While domestic natural gas drilling has recently risen, the increase results from the ability to access unconventional supplies, such as oil shale, given high prices. Whether this will be sustained if natural gas prices come down further may be debated. Longer term, the fact remains that the United States has only 3 percent of the world's proven natural gas reserves – with the Middle East and Russia holding by far the largest reserves. Attached is a figure that displays relative U.S. and world gas reserves. There is a great deal of activity underway domestically to build Liquefied Natural Gas (LNG) terminals in the U.S. in order to increase our ability to access the world LNG market. Competition in this market is fierce; the U.S. competes with the EU, Japan, China and India, all of which are significant importers of LNG, as well as other countries. Moreover, whether U.S. imports of overseas natural gas significantly increase or not, concerns exist that domestic natural gas pricing appears to be increasingly linked to world natural gas pricing, which in turn is increasingly linked to world oil pricing.

Given these factors, many utilities fear becoming overly reliant on natural gas for electric generation. Nuclear power is attracting renewed interest, but presents its own set of challenges and, for the time being, likely remains out-of-reach for smaller and mid-sized utilities.

As a result, in recent years, in order to meet looming electric generation capacity deficits, utilities have proposed to build a large number of new coal-fueled electric generating stations. While coal prices have risen along with other energy prices, coal remains much lower priced than natural gas. Moreover, the U.S. holds the largest coal reserves in the world; we have often been referred to as the Saudi Arabia of coal. Attached is a figure that displays relative U.S. and world coal reserves.

Sunflower Electric Power Corporation is an example of why many power generators have turned to coal. Some background on Sunflower may be useful in this regard.

Sunflower is not owned by investors. It is a company formed as a cooperative that has members rather than shareholders. Its members are companies that provide electricity to a combined 400,000 people in rural central and western Kansas. These six companies, in turn, are cooperatives owned by the 400,000 people to whom they supply electricity. Sunflower's role is to acquire the "bulk" electric generation and transmission resources needed by its six member cooperatives so that these member-cooperatives can supply electricity to their 400,000 member-customers. Sunflower's board of directors consists of representatives of its six owners, and those six owners' boards of directors are chosen by their owner-customers. There is no separate stockholder interest in Sunflower; under its democratic structure, it exists solely to provide reliable, low-cost electricity to consumers.

The electric consumers who purchase electricity from Sunflower's member-cooperatives suffer from the twin problem of relatively high retail electric rates and below-average incomes. The relatively high electric rates result from the very low population density in central and western Kansas and the corresponding large number of miles of transmission and distribution lines necessary to serve a low number of people. The retail rates are also relatively high because Sunflower owns natural gas generation. The recent spike in natural gas prices has significantly increased the cost of operating this generation. Unfortunately, income levels in rural areas tend to be below the national average, and this is true in the areas served by Sunflower's member-cooperatives. About 10.7 percent of the people served by Sunflower's members are below the federal poverty levels, and 16.5 percent are over 65 and therefore likely living on fixed incomes.

Given these factors, price became a significant driving force in Sunflower's decision of how best to continue to meet the electric needs of its members' customers. Sunflower had no pre-disposition towards building the coal-fueled Holcomb Expansion Project. The determination to build coal was based on the economic judgment that coal-fueled electricity would provide the lowest cost to the ultimate consumer.

17) Can utilities rely exclusively on wind and other renewables to meet their future electric expansion?

For the foreseeable future, utilities cannot rely exclusively on wind and other renewable resources to meet their future electric expansion needs.

As stated above, wind generation, which is the furthest developed renewable technology, is only an intermittent resource. Moreover, wind tends to be least available when electricity is needed most: during the hottest and coldest parts of the day and year. All utilities are required to have a certain amount of "dependable capacity" to meet reserve margin requirements. Because wind tends to be least available during periods of peak electricity usage, utilities are allowed to count only a fraction of a wind unit's actual operating capability in determining the extent to which the unit can be counted on in meeting reserve requirements. For instance, a 100 MW wind farm, even though it operates at a 40 percent capacity factor annually, might only be counted on to supply 10 or 15 MW of dependable capacity during the hottest summer months when electric usage is highest. Moreover, because of topography, wind and wind unit siting conditions are less favorable in some areas of the country, particularly in the East and Southeast, than others. As a result, while wind is undoubtedly an important part of the country's future electric generation portfolio, it cannot be relied on exclusively.

Hydroelectricity is another renewable resource. It presently supplies much more electricity in the United States than wind. No one, however, expects hydroelectric generation to expand significantly in the future. Indeed, many think a number of hydroelectric dams should be removed.

Other renewable resources show promise, particularly geothermal, biomass and solar. Like wind, these resources tend to be more available in some areas of the country than others. Moreover, the cost of these resources remains high, and other factors have limited their availability. Use of these resources will undoubtedly expand over time.

None of these resources are mutually exclusive of coal. Given rising electric demand, fossil resources, nuclear power and renewable resources must all be considered.

18) Do you know whether Sunflower Electric and Kansas in general are pursuing wind resources?

My understanding is that Kansas energy companies have come a long way in a relatively short period of time to utilize wind energy in their portfolios. Kansas energy companies are pursuing wind resources to the degree that such resources can be reliably and affordably incorporated into their individual electricity systems. Informal agreements exist between the Governor of Kansas and the individual CEOs of many of the electricity generators in Kansas. The Governor has asked that each Kansas electric company commit to own or acquire through a Power Purchase Agreement (PPA) wind resources in the amount of 10 percent by 2010 and 20 percent by 2020.

Sunflower and Midwest Energy, two Kansas participants in the Holcomb Expansion Project, are already committed through PPAs to the largest percentages of wind resources of any companies in Kansas. Midwest Energy receives energy amounting to 16 percent of its peak capacity requirements and Sunflower is at a 10 percent level now, with 12.5 percent by the end of 2008. Few utilities in the country actually possess such a large percentage of wind resources.

Sunflower participates through a 50-MW PPA in the Gray County Wind Farm, operated by FPL, and through a 75-MW PPA in the Smoky Hill Wind Farm, located in Lincoln County, Kansas. Midwest Energy likewise participates in the Smoky Hill wind farm. These large percentages of wind resources are particularly difficult to manage in the case of small companies that operate relatively small numbers of generating resources.

19) Is developing coal-fueled electricity incompatible with developing wind resources?

No. In fact, it would not surprise me if most utilities that are proposing coal projects are simultaneously proposing wind projects. Given critical needs for new electric resources, no one resource can be depended on to the exclusion of others.

In fact, coal and wind are highly compatible with each other because both tend to be located in rural areas at a distance from load centers. As a result, both depend on the availability of new transmission lines to bring the power to the customers. Coal projects that include the construction of transmission lines can therefore enable the construction of wind projects which might otherwise be stranded. According to the U.S. Department of Energy, the availability of transmission is the "number one barrier to expanded renewable energy development in the U.S."

The Holcomb Expansion Project is a case in point. The Project includes construction of high voltage transmission lines that can be accessed by wind projects. Wind-only transmission projects could be built (subject to Federal Energy Regulatory Commission legal requirements). But since wind projects will only put electricity into a transmission line for a relatively limited number of hours in the year, the cost of the transmission line per increment of energy transmitted through it will be relatively high. In the end, the long-desired interstate network system of transmission lines, similar to the interstate highway system, awaits the right mix of investment and users. The Holcomb Expansion Project fills a large part of the justification for much needed transmission lines to go forward.

20) Is it reasonable for Sunflower Electric to sell electricity from the proposed project out-of-state?

This question should not require a response. The electric system in the contiguous United States is built on three interstate grids: the Western Interconnect, the Eastern Interconnect, and the Electric Reliability Council of Texas. Power within the Western and Eastern Interconnects flows freely across state lines, as utilities frequently buy and sell power among themselves to strengthen the overall reliability of the system and to lower costs. A system of fifty individual and unconnected state systems would be unthinkable.

The Holcomb Expansion Project is an example of interstate operations benefiting multiple utilities in multiple states. The Project is sponsored not just by Sunflower but by two other generation and transmission cooperative companies which voluntarily chose to combine their resources and build a modern, affordable, and reliable electricity source. The project will serve the needs of consumer-owners of 67 different retail electric cooperatives located in parts of 8 states, including Texas, Colorado, Oklahoma, and Kansas. This pooling of resources and sharing of facilities is the backbone of the electricity system in most states. Economies of scale and the savings from sharing resources is the most economical way of providing electricity to consumers.

21) Is building new coal-fueled electric generation compatible with a carbon-constrained future?

Yes. A typical new coal-fueled electric generator is likely about 20 percent more efficient than the average existing coal generator, meaning it emits 20 percent less carbon dioxide per unit of electricity generated. Because of its improved efficiency, the new unit will have a lower operating cost than existing units. As a result, it will tend to displace existing units during non-peak periods when a surplus of generation will exist, resulting in lower carbon dioxide emissions. Additionally, over time, building new coal units will allow existing coal units to close at the end of their useful lives, again lowering carbon dioxide emissions. Moreover, coal units can be retrofitted with carbon capture technology when that technology becomes commercially viable.

This Committee should be especially sensitive to achieving the twin goals of energy independence and reduced carbon emissions. We are unlikely as a country to achieve energy independence if we foreclose usage of our most abundant domestic energy resource. But with new technology, coal can be a key component of both energy independence and reduced carbon emissions.

22) Do you know whether Sunflower Electric intends to include carbon-reducing measures as part of its project?

Yes. The Project will lower carbon dioxide emissions in a number of ways.

- As a new unit, it will be more efficient than existing units and, by displacing less efficient existing generation, it will lower overall system emissions. At the time the construction permit for the Project was rejected by the Kansas Department of Health and Environment, it was the third most efficient power plant proposed in the country.

- Part of the need for the project is to meet new electric demand resulting from new ethanol plants being located in western and central Kansas. One of the justifications for ethanol plants is lowering carbon dioxide emissions from transportation fuels. Similarly, the Sunflower Project will meet new electricity needs resulting from the electrification of manufacturing facilities previously powered by natural gas. Electrification often results in more efficient and therefore less carbon intensive utilization of energy.

- Sunflower has undertaken a first pilot phase of evaluating a process where exhaust gas from the existing Holcomb I plant is introduced into a specially designed chamber to allow single-cell algae to grow from the exposure to the moderately-rich CO_2 concentration in the gas stream. The commencement of the second (demonstration) phase of this project was to have proceeded from development fees arising from the issuance of a permit to construct the Holcomb Expansion Project. Given the denial of the permit, funds do not exist to proceed with the second phase.

- The Project's proposed transmission lines, as discussed earlier, will enable the transfer of wind energy from wind resource sites to load centers.

- In addition to algae production as a sink for CO2, Sunflower has sought to successfully integrate more efficient ethanol production, more efficient bio-diesel production, and other energy-conserving industrial applications on land nearby the power plant. Such integration will result in better use of precious water resources, better utilization of methane for a fuel, and improved process efficiencies that can arise from the integration of these processes at the design level.

23) What alternatives do utilities have for meeting electric demand if they cannot pursue coal-fueled electric generation?

See response to questions 16 and 17 above.

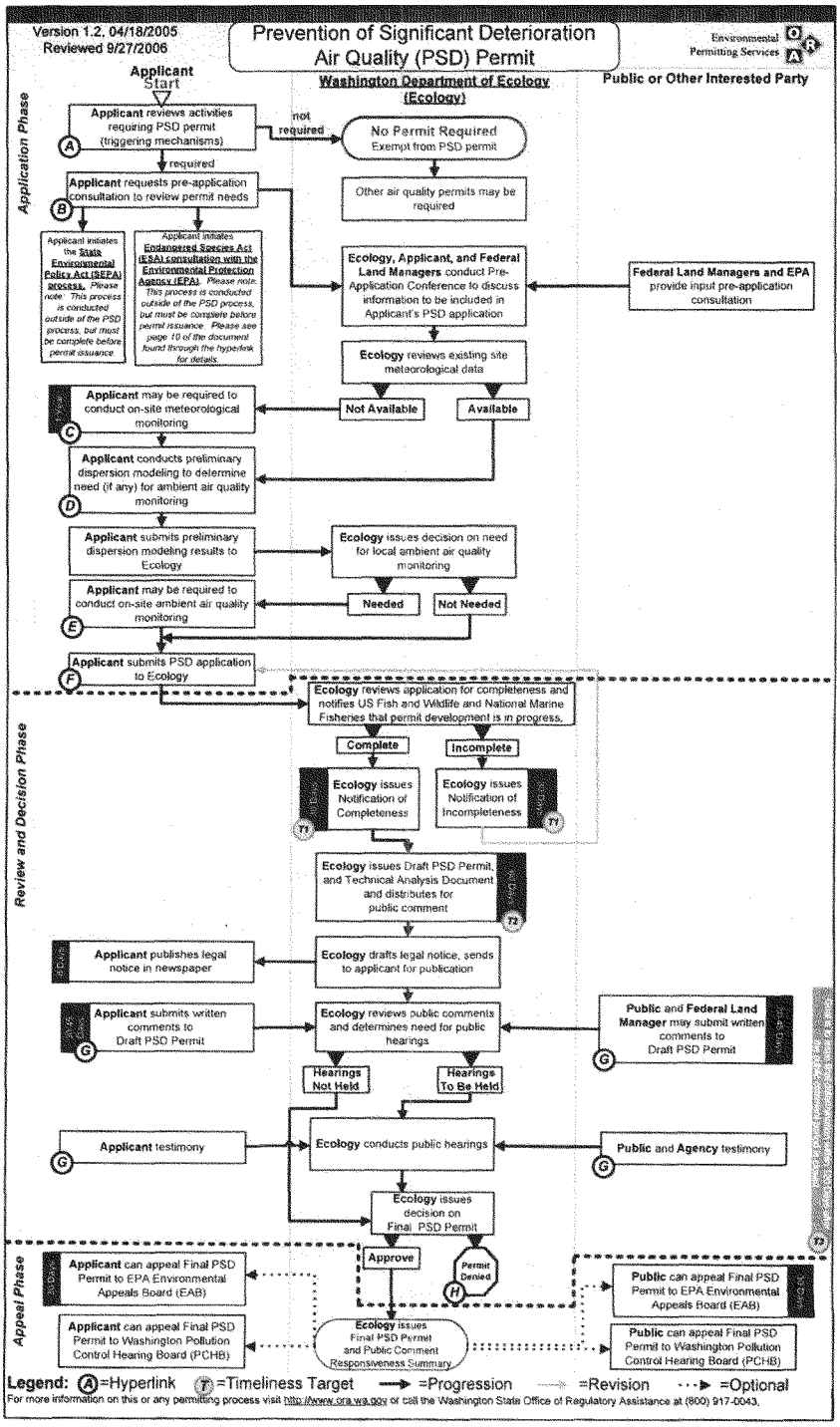
24) Is preventing the construction of coal-fueled resources compatible with the goal of energy independence?

See response to question 17 above. In particular, see the two attached figures, one showing proven world coal reserves by region and one showing proven natural gas reserves by region. The conclusion to be drawn from these figures for energy independence should be obvious.

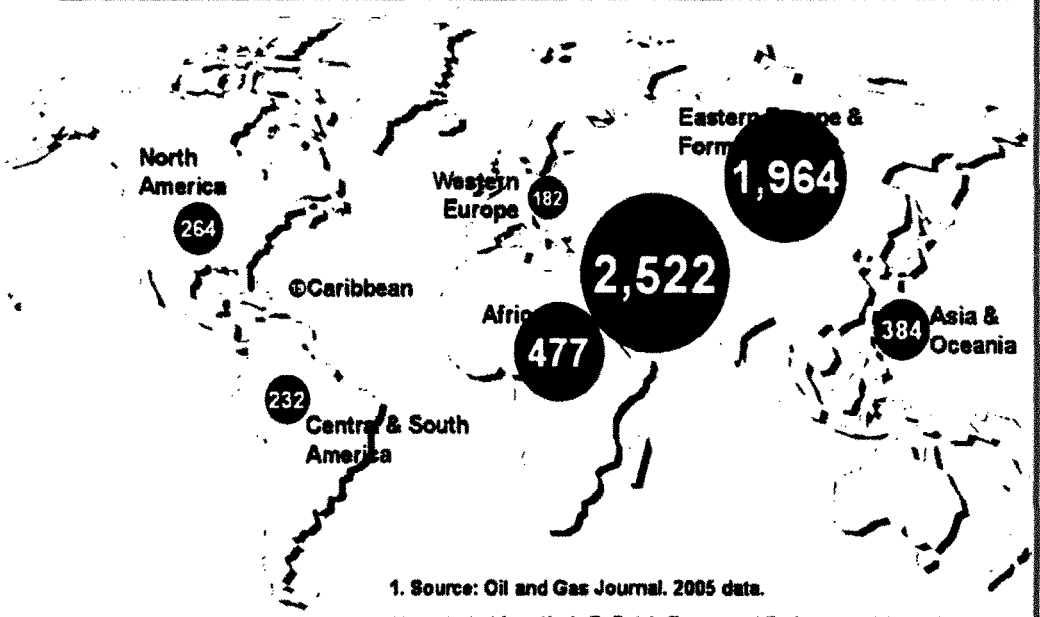
25) Does the *Massachusetts v. EPA* case constitute authority for the denial of Sunflower Electric's air quality permit by the Kansas Department of Health and the Environment (KDHE)?

No. *Massachusetts v. EPA* held that, under the federal CAA, greenhouse gases are "air pollutants" which EPA must regulate *if* it finds that they endanger public health or welfare. As discussed above, EPA is currently considering whether it will make such endangerment finding and regulate.

KDHE denied Sunflower's air quality permit not under federal law but under state law. KDHE ruled that state law provided authority for the agency to deny the permit. The issue is now before the Kansas state courts. *Massachusetts v. EPA* did not interpret Kansas law and cannot be relied on to say that KDHE's action was authorized under the law of that state.


Version 1.2, 04/18/2005
Reviewed 9/27/2006
Prevention of Significant Deterioration
Air Quality (PSD) Permit
Environmental Permitting Services
Applicant
Start
Washington Department of Ecology (Ecology)
Public or Other Interested Party
Application Phase
Applicant reviews activities requiring PSD permit (triggering mechanisms)
not required
No Permit Required
Exempt from PSD permit
required
Applicant requests pre-application consultation to review permit needs
Other air quality permits may be required
Applicant initiates the State Environmental Policy Act (SEPA) process. Please note: This process is conducted outside of the PSD process, but must be complete before permit issuance.
Applicant initiates Endangered Species Act (ESA) consultation with the Environmental Protection Agency (EPA). Please note: This process is conducted outside of the PSD process, but must be complete before permit issuance. Please see page 10 of the document found through the hyperlink for details.
Ecology, Applicant, and Federal Land Managers conduct Pre-Application Conference to discuss information to be included in Applicant's PSD application
Federal Land Managers and EPA provide input pre-application consultation
Ecology reviews existing site meteorological data
Not Available
Available
Applicant may be required to conduct on-site meteorological monitoring
Applicant conducts preliminary dispersion modeling to determine need (if any) for ambient air quality monitoring
Applicant submits preliminary dispersion modeling results to Ecology
Ecology issues decision on need for local ambient air quality monitoring
Needed
Not Needed
Applicant may be required to conduct on-site ambient air quality monitoring
Applicant submits PSD application to Ecology
Review and Decision Phase
Ecology reviews application for completeness and notifies US Fish and Wildlife and National Marine Fisheries that permit development is in progress.
Complete
Incomplete
Ecology issues Notification of Completeness
Ecology issues Notification of Incompleteness
Ecology issues Draft PSD Permit, and Technical Analysis Document and distributes for public comment
Applicant publishes legal notice in newspaper
Ecology drafts legal notice, sends to applicant for publication
Applicant submits written comments to Draft PSD Permit
Ecology reviews public comments and determines need for public hearings
Public and Federal Land Manager may submit written comments to Draft PSD Permit
Hearings Not Held
Hearings To Be Held
Applicant testimony
Ecology conducts public hearings
Public and Agency testimony
Ecology issues decision on Final PSD Permit
Appeal Phase
Approve
Permit Denied
Applicant can appeal Final PSD Permit to EPA Environmental Appeals Board (EAB)
Applicant can appeal Final PSD Permit to Washington Pollution Control Hearing Board (PCHB)
Ecology issues Final PSD Permit and Public Comment Responsiveness Summary
Public can appeal Final PSD Permit to EPA Environmental Appeals Board (EAB)
Public can appeal Final PSD Permit to Washington Pollution Control Hearing Board (PCHB)
Legend: A=Hyperlink T=Timeliness Target =Progression =Revision =Optional
For more information on this or any permitting process visit http://www.ora.wa.gov or call the Washington State Office of Regulatory Assistance at (800) 917-0043.

Proven World Gas Reserves: 6,044 Trillion Cubic Feet



1. Source: Oil and Gas Journal. 2005 data.

Map adapted from Kevin R. Petak, Energy and Environmental Analysis, Inc., *Oil and Gas Prices: Will They Stay Linked?*, presented at 2006 EIA Energy Outlook and Modeling Conference, Washington DC, March 27, 2006, http://www.eia.doe.gov/oiaf/aeo/conf/pdf/petak.pdf.

Reserves: Top 10

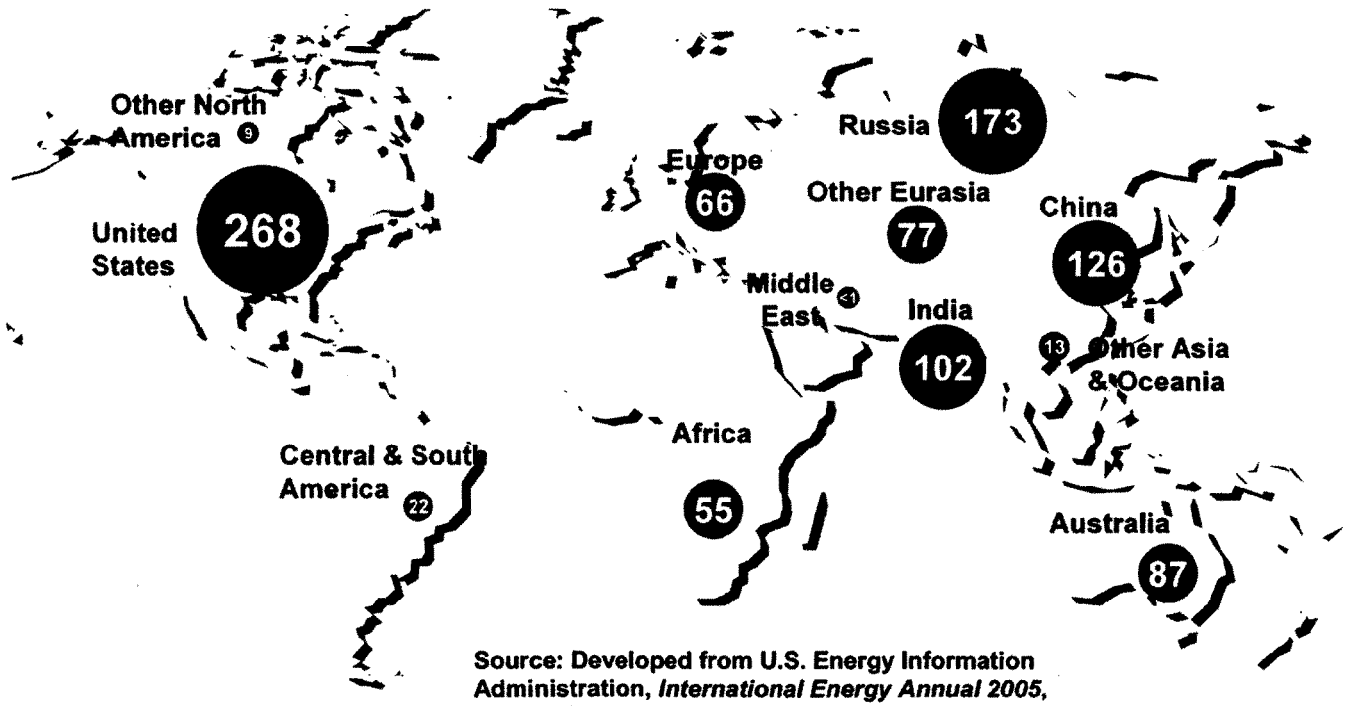
1. Russia
2. Iran
3. Qatar
4. Saudi Arabia
5. Abu Dhabi/UAE
6. *United States*
7. Nigeria
8. Algeria
9. Venezuela
10. Iraq

U.S. Share: ***3.2%***

Rest of Top 10: 75.4%

(Oil & Gas Journal, 2006 data)

World Estimated Recoverable Coal: 998 Billion Tons



Source: Developed from U.S. Energy Information Administration, *International Energy Annual 2005*, Table 8.2, http://www.eia.doe.gov/pub/international/iea2005/table82.xls