1250 Connecticut Ave, NW
Suite 250
Washington, DC 20036
(202) 261-6592

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Air and Radiation Docket and Information Center
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460
a-and-rDocket@epa.gov
Via Electronic Mail

Re: Regulating "greenhouse" Gases Under the Clean Air Act: Responding to *Massachusetts v. EPA*
Docket ID: EPA-HQ-OAR-2008-0318

Introduction

The Institute for Liberty (IFL), a non-profit 501C(4) advocacy organization based in Washington, DC, submits these comments in response to the Advance Notice of Proposed Rulemaking (ANPR) on Regulating "greenhouse" Gases Under the Clean Air Act (CAA) issued by the Environmental Protection Agency (EPA) and published in the *Federal Register* on July 30, 2008. These comments respond specifically to EPA's requests for information in the ANPR regarding its response to *Massachusetts v. EPA*, 549 U.S. 497, 127 S. Ct. 1438; 167 L. Ed. 2d 248 (2007), and whether EPA should attempt to determine whether "greenhouse" gas emissions from any class or classes of new motor vehicles or new motor vehicle engines cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare under CAA Section 202(a)(1). IFL focuses on the impact of regulation on the American economy, especially the impact on small business and entrepreneurship in America.

IFL's comments will demonstrate that EPA can make a reasonable statement as to why it cannot make a finding of endangerment under Section 202(a)(1). A finding of endangerment would trigger a regulatory cascade that would in turn impose an inescapable and unreasonable economic burden on both U.S. citizens and the federal government. The compliance costs for four CAA programs triggered by a finding of endangerment—National Ambient Air Quality Standards (NAAQS), New Source Performance Standards (NSPS), Prevention of Significant Deterioration (PSD) and Title V—would be financially and administratively unreasonable for millions of new regulated entities. Congress would have to quadruple amounts appropriated to EPA for state and local air quality grants just to administer the permit programs for CO_2. Construction in the U.S. could stop, millions of "greenhouse" gas-related citizen suits could

arise, and strict offset requirements could mean a permanent scaling down of industry in the U.S. Businesses forced to limit their emissions in the U.S. will simply move to other nations which have much less substantial environmental standards than the United States, and will continue to emit. The leakage of these emissions will virtually ensure that domestic "greenhouse" gas concentrations will not improve, since the standards in the developing world are much less stringent than in the U.S. Regulation of "greenhouse" gases under the CAA could therefore result in economic chaos with little, if any, actual benefit to the environment.

If EPA persists in believing that emissions of carbon dioxide impact the global climate, it can still focus attention on this issue while satisfying its obligations under *Massachusetts*, by choosing not to undertake a finding of endangerment for motor vehicles. Under *Massachusetts*, EPA may refuse to undertake an endangerment finding if it provides a reasonable explanation as to why it cannot or will not do so. The regulatory cascade described in these comments was not considered by EPA, the Supreme Court or Congress until now. The widespread economic devastation in the private sector, not to mention the unprecedented strain on federal and state agency resources, caused by the CAA's regulatory cascade is more than reasonable enough an explanation for declining to find endangerment. Moreover, many of the efforts EPA would take to address motor vehicle emissions have been superseded by the Energy Independence and Security Act (P.L.110-140), a law enacted after the Court decided *Massachusetts*.

By choosing not to undertake a finding of endangerment on these grounds, EPA can meet its *Massachusetts* obligations while also protecting the fragile American economy. Policy decisions relating to climate change should be made by Congress, not by EPA through regulations issued under decades-old, incompatible CAA programs.

Background: *Massachusetts v. EPA* allows EPA to decline to regulate so-called "greenhouse" gases on "reasonable" policy-based grounds.

Contrary to popular belief, *Massachusetts* does not *per se* mandate a finding of endangerment. In fact, it does quite the opposite.

The case began in 1999, when the International Center for Technology Assessment (ICTA) and 19 other groups filed a petition with EPA seeking regulation of "greenhouse" gases from new motor vehicles under Section 202(a)(1) of the CAA. That provision reads, in pertinent part:

> The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant ***from any class or classes of new motor vehicles or new motor vehicle engines***, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

42 U.S.C. § 7521(a)(1).

EPA denied the ICTA petition on August 8, 2003. EPA provided the following reasons for its denial:

1. Based on the legislative history of the CAA, as well as congressional action and Supreme Court precedent, EPA did not believe the CAA authorized regulation to address global climate change; and
2. Even if EPA does have statutory authority to regulate "greenhouse" gases, it would be unwise to do so because:
    a. CAA regulation of "greenhouse" gases emitted by light-duty vehicles would interfere with fuel economy standards issued by the Department of Transportation;
    b. There is significant scientific uncertainty over the cause, extent and effects of climate change; and
    c. Regulation would be inappropriate given the President's policies ongoing policies to address global climate change and would undermine international negotiations on the issue.

See generally Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (Sept. 8, 2003).

On appeal, the ICTA petitioners convinced the Court that the endangerment finding at issue would lead only to motor vehicle regulations under CAA Title II, and not to the trigger of other CAA programs (particularly those for stationary sources). For instance, the petitioners argued on brief in Massachusetts that the NAAQS program is an "entirely separate program from the mobile source program" contained in the CAA. Initial Brief: Appellant-Petitioner at 28, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120). As Section II of these comments makes clear, an endangerment finding under Title II will automatically trigger stationary source controls throughout the CAA. The petitioners in *Massachusetts* argue against this fact even today, despite unambiguous statutory language to the contrary.

The Court handed down *Massachusetts* on April 2, 2007. In a 5-4 decision, the Court held that (1) "greenhouse" gases fit well within the CAA's capacious definition of "air pollutant," and therefore EPA does have the statutory authority to regulate those emissions from new motor vehicles; and (2) because it has the authority to regulate, EPA must now confront the question of endangerment on remand.

It is at this point that the public's understanding of what the court said in *Massachusetts*, including EPA's own interpretation, sharply diverges from the actual words found in the opinion itself. In talking about endangerment, the Court held that EPA must do one of three things:

1. Find, based on the science, that "greenhouse" gas emissions from new motor vehicles or new motor vehicle engines contribute to air pollution that may reasonably be anticipated to endanger public health or welfare;
2. Find, based on the science, that "greenhouse" gas emissions from new motor vehicles or new motor vehicle engines *do not* contribute to air pollution that may reasonably be anticipated to endanger public health or welfare; or

3. Provide "some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether" "greenhouse" gas emissions from new motor vehicles or new motor vehicle engines endanger public health or welfare.

Massachusetts, 127 S. Ct. at 1462. It is this third option—on EPA's discretionary powers—that is consistently omitted from the discussion of EPA's obligations on remand from *Massachusetts*.

This option is clear: EPA is entitled under *Massachusetts* to refuse to confront an endangerment decision if it has an explanation that is reasonable. This explanation can be policy-based: the Court explicitly stated that it did not rule on "whether policy concerns can inform EPA's actions in the event that it makes such a finding." *Id.* at 1463. The only bar the Court set in *Massachusetts* for Option 3 was that it must amount to a "reasoned justification for declining to form a scientific judgment." *Id.*

Unfortunately, the authors of the ANPR attempt to force EPA into an endangerment determination by implying that policy-based explanations under "Option 3" must relate specifically to the scientific question of whether new motor vehicle emissions contribute to climate change. This is not the case.[1] In fact, when the Court examined EPA's policy-based reasons for denying the ICTA petition, it examined whether those reasons (a) had anything to do with whether "greenhouse" gas emissions contribute to climate change, or (b) whether they amounted to a reasoned justification for declining to form a scientific judgment. *See, e.g.*, *Massachusetts*, 127 S. Ct. at 1463. By dismissing EPA's reasons not to regulate, the Court simply found that EPA's explanations were not reasonable. It did not, however, foreclose the possibility that a reasonable explanation does exist.[2]

It is imperative that EPA decline to make an endangerment finding. To do so would impose an economic burden on the U.S. that would have dire consequences for both citizens and the federal government.

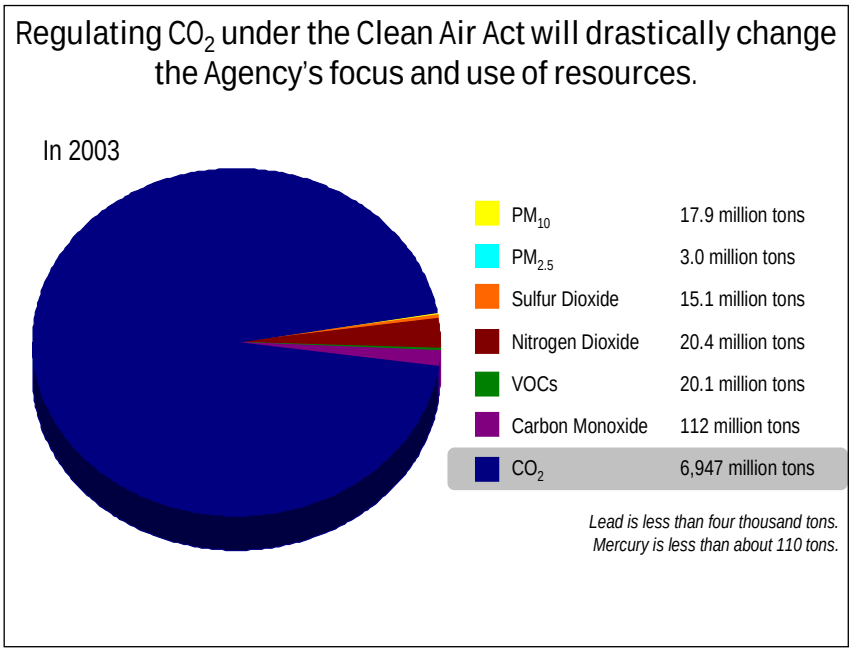
The regulatory cascade immediately triggered by a finding of endangerment for new motor vehicles under Section 202(a)(1) will, as a matter of law, result in the mandatory imposition of National Ambient Air Quality Standards (NAAQS), New Source Performance Standards (NSPS), and Title V permitting, as well as widespread exposure to the Prevention of Significant Deterioration (PSD) permit program. The practical effect of these programs is an inescapable and unreasonable economic burden on U.S. citizens charged with compliance and the federal and

[1] Proponents of this view point to Justice Scalia's dissent in *Massachusetts*, in which he argues that the majority's disposal of the three policy-based arguments made by EPA in denying the ICTA petition effectively narrows the universe of potential reasonable bases to one based on science. Aside from the fact that a dissent is not controlling law in American jurisprudence, this interpretation is not correct. The majority explicitly defers ruling on whether policy concerns can inform EPA's actions in the case of an endangerment finding, leaving Option 3 available to a reasonable policy-based explanation. *Id.* at 1463.

[2] Nor should EPA in any way think that it cannot, on remand from *Massachusetts*, deny the ICTA petition on other grounds. In *SEC v. Chenery Corp.*, 332 U.S. 194, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947), the Supreme Court held that an agency can take action on remand identical to the action reversed by the court if the agency can provide a different and legally permissible basis for the action. Again, if EPA can provide a reasonable explanation for declining to make an endangerment decision, it will not be overturned by the Supreme Court.

state governments tasked with implementation. The interlocking provisions of the CAA are not structured to deal with the unique qualities of "greenhouse" gases, and EPA lacks the power to stop the CAA regulatory cascade once it is unleashed.

The fundamental problem with using the CAA to control "greenhouse" gas emissions is that CO_2 has much different characteristics than any other emissions typically covered by the Act. For one thing, it is emitted in much greater quantities. According to data from the US Chamber of Commerce, as of 2003, there was roughly 19 times more CO_2 emitted than the six existing CAA criteria pollutants combined:



Because CO_2 is emitted in far greater quantities by a much wider range of sources, the thresholds for regulation built into various CAA sections (for instance, those dealing with PSD, Title V and Hazardous Air Pollutants) are so low that they will "catch" a much broader segment of the population than Congress could have intended when it wrote the CAA.[3]

CO_2 also differs from other CAA-covered gases in that it has a long atmospheric lifetime and is capable of long-range transport. CO_2 emissions from the U.S. transport to other nations, and CO_2 emissions from other nations (such as China and India) transport to the U.S.[4] Put another

[3] For instance, facilities that emit greater than 250 tons per year of CO_2 (or, in the case of 28 industrial categories, 100 tons per year) will be subject to PSD permitting. The U.S. Chamber performed a study, discussed later in these comments, that estimates over one million buildings will be exposed to PSD. An even greater number will be forced to obtain Title V operating permits, which has a 100 ton per year threshold. The number of regulated facilities balloons even further if CO_2 is designated a Hazardous Air Pollutant (HAP); the threshold for HAP regulation is 10 tons per year of a single pollutant or 25 tons per year of a combination of pollutants. Many homes easily cross the 10 tons per year threshold.

[4] EPA acknowledges in the ANPR that long-range transport of "greenhouse" gases is a serious problem, and suggests using CAA Section 179(B) as a means to address the issue. Section 179B requires EPA to approve a state implementation plan if the submitting state establishes that it would have met the relevant NAAQS but for emissions

way, even if the U.S. were to eliminate all of its "greenhouse" gas emissions today, our CO_2 levels would not be zero, and CO_2 concentration in the atmosphere would still increase.[5] For this reason, any action to address "greenhouse" gas emissions must be international in scope. The programs in the ANPR would be domestic-only, and ultimately will do very little to curb global "greenhouse" gas concentrations.

I believe that at the outset, it is important to lay out just who we are talking about here. When IFL talks about small business, we are generally not talking about businesses which fit into the larger end of the Small Business Administration's definitions for small business. Ninety percent of small businesses have fewer than 20 employees.

Clearly, we are talking about the truly small businesses—businesses whose priorities and abilities to handle regulatory challenges are greatly different from their larger counterparts. Being a small-business owner means, more times than not, you are responsible for everything (ordering inventory, hiring employees, and dealing with the mandates imposed upon your business by the federal, state and local governments). That is why government regulations, and the paperwork they generate, should be as simple as possible. The less time our members spend with "government overhead," the more they can spend growing their business, employing more people and growing America's economy.

Unreasonable government regulation, especially onerous paperwork burdens, continues to be a top concern for small businesses6. Regulatory costs per employee are highest for small firms, and small business owners consistently rank those costs as one of the most important issues that small business advocates ought to work to change. EPA should be well-aware of the most recent report commissioned by the Small Business Administration's Office of Advocacy, estimating the regulatory compliance costs for firms with fewer than 20 employees.

Five years ago, that cost averaged $6,975 per employee, per year, but now that figure has been updated. Not only updated, but updated now with a peer review process that lends even greater credence to the research. Unfortunately for small-business owners, however, the new data isn't good —the cost of regulation for small businesses has risen by nearly 10 percent, to $7,647 per employee, per year.7 This is due in no small measure to the continued growth of the regulatory state: according to the Competitive Enterprise Institute's Wayne Crews, the last two years have brought an average of approximately 4,000 new rules each year8

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emanating from outside the United States. However, Section 179B appears only to apply to NAAQS. Moreover, in a response to a petition for rulemaking the U.S. Chamber submitted in December 2006 requesting implementation of Section 179(B), EPA stated that it does not believe Section 179B provides material relief (i.e., place a state in attainment, mitigate certain nonattainment penalties) beyond the relief literally authorized by the statute.

[5] *See, e.g.*, presentation entitled "CO_2 Stabilization in a Heterogeneous World," Leon Clarke, et al. (July 13, 2007), available at http://www.uschamber.com/issues/index/environment/climate_change.htm.

6 In NFIB's publication, *Problems and Priorities*, paperwork ranked 8th out of 75 major problems faced by small business.

7 Crain, W. Mark, *The Impact of Regulatory Costs on Small Firms, 2005, http://www.sba.gov/advo/research/rs264.pdf*

8 4,101 final rules in 2004, 3,943 final rules in 2005. Crews, Clyde Wayne, *Ten Thousand Commandments, 2006 edition.*

This means that for an average small business with five employees, those costs now approach a total of $40,000 annually. For a business operating on a shoestring, such costs can be devastating.

But those numbers drop when you get above 20 employees—on average by as much as a full third. Why such a stark contrast? NFIB's Research Foundation has done numerous surveys on paperwork and regulatory compliance, and it has found that once a business gets somewhere between 20 and 35 employees, the business owner finds that it makes sense to hire his or her first regulatory professional. Usually, this is someone with expertise in labor regulations and human resources, as these are the rules with the most general application.

Also, as the business grows, measures taken to comply with federal regulations can have their cost spread around a larger pool of employees. These "economies of scale" reduce those per-employee costs as well.

However, until those businesses reach that magic number, it is generally the small business owner, that owner's spouse, or some trusted employee within the business who is responsible for ferreting out regulatory obligations and figuring out what needs to be done in order to be in compliance. Because these individuals do not have the prior regulatory experience or training, it takes far, far longer for them to become aware of their obligations under the law, and just what those obligations entail.

The Macroeconomic Costs, and the "Context" of Regulation

The average 5-employee firm cost of nearly $40,000 per year for regulations, the approximately $7,700 per employee per year cost, those are the microeconomic figures—what each individual small business faces. But the problem is truly staggering when one looks at the general regulatory state.

While the Office of Information and Regulatory Affairs reports a cost of $44 billion[9] for all major rules, this presents only a part of the regulatory snapshot. OIRA only reviews ***major*** rules, the dozen or so rules from a previous 10-year period whose annual cost is in excess of $100 million. But it's not the "major" rules which are most damaging. I have testified before on regulation being "death by a thousand pinpricks" for small business. What that statement means is that it's not one single rule that is the culprit, but the thousands of smaller rules with incremental impacts that present a slow-bleed for America's small business. Those rules add up to an annual regulatory cost of $1.14 ***trillion*** annually, according to Wayne Crews at CEI—an amount essentially equivalent to the entire federal budget!

Paperwork itself is a tremendous culprit. In the Office of Management and Budget's 2005 report on paperwork, the Information Collection Budget (ICB),[10] they denote an increase of the paperwork burden faced by all Americans of 441 ***million*** hours. Sadly enough, this represents an increase overall of only 5.5 percent![11]

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9 http://www.whitehouse.gov/omb/inforeg/2006_cb/2006_cb_final_report.pdf

10 http://www.whitehouse.gov/omb/inforeg/infocoll.html

11 ICB at i.

In terms of the paperwork burden imposed by regulations themselves, NFIB's Research Foundation has conducted in-depth studies of the problem being faced by small businesses. They concluded overall that the cost of paperwork averages roughly $50 per hour. In addition, the following conclusions were reached[12]:

1. The individual(s) completing and maintaining paperwork and records in a small business is dependent on the subject matter of the paperwork and the size of the firm. Owners most frequently handle paperwork and record-keeping related to licenses and permits (55 percent of firms), purchases (46 percent), and clients/customers (46 percent). They least frequently deal with financial (27 percent) and tax (12 percent) records. Three of four pay to have someone (another firm) outside handle their tax paperwork. Paid employees customarily do most of the paperwork and record-keeping in about 25 – 30 percent of firms. Employees are much more likely to do so in larger, small businesses than in the smallest ones regardless of subject matter (except tax). Unpaid family members do the paperwork in less than 10 percent of cases.

2. The cost of paperwork also varies by subject matter and firm size. The more paperwork and record-keeping that must be sent outside, the more expensive the paperwork and record-keeping. Owners of larger small firms pay higher average prices per hour because they are more likely to send their paperwork to outside professionals and because the value of their time on average is higher.

3. The estimated average per hour cost of paperwork and record-keeping for small businesses is $48.72. By subject matter the average per hour cost is: $74.24 for tax-related, $62.16 for financial, $47.96 for licenses and permits, $43.50 for government information requests, $42.95 for customers/clients, $40.75 for personnel, $39.27 for purchases, and $36.20 for maintenance (buildings, machines, or vehicles).

4. The typical small business employs a blend of electronic and paper record-keeping. Less than 10 percent use paper exclusively and a handful use only electronic means. The type of record most frequently completed and maintained on paper is licenses and permits.

5. No single difficulty creates the government paperwork problem. The most frequently cited problem is unclear and/or confusing instructions (29 percent). The second most frequently cited difficulty is the volume of paperwork (24 percent). Duplicate information requests (11 percent) place third, followed by maintenance of records that ordinarily would not be kept (10 percent) and requests for inaccessible or non-existent information (9 percent). Twenty (20) percent could not decide.

While the use of computers by small businesses and small-business owners has certainly helped reduce the burden of regulations, technology alone cannot solve the problem. More than filing forms and storing copies, paperwork requirements involve understanding what the government

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12 NFIB Research Foundation National Small Business Poll, Vol. 3, Issue 5, *Paperwork and Recordkeeping*, 12-03, http://www.nfib.com/PDFs/sbpoll/sbpoll12_2003.pdf

wants and how they want it, gathering the necessary information and organizing it properly, determining what to keep and for how long, etc. Then there is the cost. Even with the most efficient computer equipment, documentation is not cheap. People must organize and input the necessary data, and people are expensive.

According to research by the NFIB Research Foundation, 92 percent of small businesses use computers in some aspect of their business. Eighty-two percent of small businesses have internet access, and of those, 57 percent have high-speed internet access. Half of the businesses that use the internet use it to find out regulatory information, and the smaller of small businesses are more likely to use the internet to educate themselves. They use it for specific searches, and to sift through information.[13]

But taken in the context of the ICB, the costs continue to be startling. If you only look at the average costs our polling found, then at the most macro of economic levels, the cost of the ***increase*** in paperwork alone amounts to nearly $21.5 ***billion*** annually![14] The total cost of paperwork therefore is nearly half a ***trillion*** dollars (roughly $409 billion).[15]

Some people might argue that the increase in paperwork from the ICB is only 5.5 percent overall. But that only serves to mask the real issue: 441 million hours is an enormous amount of time—time that drags on everyday Americans and $21.5 billion is real money for real small businesses.

While some might quibble that this is only a marginal increase—one cannot deny that the baseline number is a huge one. A system that measures its paperwork burdens in the billions of hours is a system destined for collapse under all that weight. A system that hemorrhages money to the tune of a half-trillion dollars annually is going to eventually bleed itself dry.

Because regulations are created and expanded without regard to their context, this is simply going to continue. What is meant by context? Regulations are, essentially, created in a vacuum—generally without regard to overall regulatory burdens created by the agency, certainly without regard to pre-existing regulatory costs. Each regulation is measured and judged based on its own individual costs.

The problem is that taken individually, each incremental cost appears inconsequential. A new regulation by an agency might add 7.5 hours of training time per employee per quarter of a year, and taken alone, that might seem to be a harmless mandate. But let's assume for a moment that this agency already has regulatory requirements that cumulatively require 150 hours of time. Assuming a 7.5 hour work day, that's already 20 days of time that one agency's regulatory burden consumes. Another 30 hours of training per year amounts to another 4 days of time—a twenty percent increase.

Further, if we assume that a full-time equivalent's "work year" is roughly 250 days, we're talking nearly ten percent of an employee's time is being taken up for the mandates of one

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13 NFIB National Small Business Poll Volume 4, Issue 8, "Telecommunications," http://www.nfib.com/object/telecomm.html

14 $48.72 X 441 million hours equals $21,485,520,000

15 $48.72 X 8.2 billion hours equals $409,248,000,000

agency. But no small business is regulated by only one federal agency, of course. There could be EPA, OSHA, Transportation, Labor, etc. Assuming that each of these four agencies poses an average time burden of 24 days, that's 96 days that have now been lost to federal regulatory mandates – leaving 154 days for the business of the small business.

Time is one of a small business' most-precious, and most-finite resources. Every day, every hour is important. But because, by comparison, federal agencies have nothing but time, they have no compunction against taking an hour here, and an hour there. And like the Washington proverb, "a billion here, a billion there, pretty soon you're talking about real money," the hours that the federal government robs from these businesses does add up.

As these comments will show, a decision by EPA not to undertake the process for finding endangerment, on the basis that such a finding will trigger a regulatory cascade and economic chaos, constitutes a "reasonable explanation" as required by *Massachusetts*.

A. A finding of endangerment in Section 202(a)(1) would easily activate other sections of the CAA.

The Section 202(a)(1) endangerment language must not be viewed in isolation, because a finding of endangerment under that section will extend, with very little effort, to other sections of the CAA. Even EPA acknowledges that an endangerment finding cannot be limited to the mobile sector. The ANPR states:

> In developing a response to the *Massachusetts* decision, EPA conducted a thorough review of the CAA to identify and assess all of the Act's provisions that might be applied to GHG emissions. Although the *Massachusetts* decision addresses only CAA section 202(a)(1), which authorizes new motor vehicle emission standards, the Act contains a number of provisions that could conceivably be applied to GHG emissions. EPA's review of these provisions and their interconnections indicated that ***a decision to regulate GHGs under section 202(a) or another CAA provision could or would lead to regulation under other CAA provisions***.

73 Fed. Reg. at 44417 (emphasis added). EPA further acknowledges that, "[w]hile no two endangerment tests are precisely the same," 73 Fed. Reg. at 44419, they generally call for similar elements: whether the emissions cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare. EPA notes that "similar" endangerment language is found in sections 108 (NAAQS), 111 (NSPS), 112 (HAP), 115 (international air pollution), 211 (fuels), 213 (nonroad engines), 231 (aircraft) and 615 (ozone protection). *Id.*

EPA is correct that the damage from an endangerment finding under Section 202 will not be limited only to Section 202. However, EPA failed to make this argument in its August 8, 2003 denial of the ICTA petition. As a result, the petitioners in *Massachusetts* were able to convince the Supreme Court that the endangerment finding at issue in the case would be limited to mobile sources.[16]

[16] Specifically, the Petitioners in *Massachusetts* wrote in their brief: "Clearly, the Act endorses incremental responses to air pollution problems, rather than necessarily requiring all-encompassing solutions. EPA is free to

In the wake of the Court's decision in *Massachusetts*, EPA must now affirmatively confront the issue of the extension of the Section 202(a)(1) endangerment finding, and its impact on other provisions of the CAA. The resulting regulatory cascade mandates Option 3 of *Massachusetts*, whereby EPA must decline to form a scientific judgment relative to endangerment.

B. Extension of the Section 202(a)(1) endangerment finding beyond Section 202(a)(1) will result in mandatory NAAQS, NSPS, PSD and Title V.

A finding of endangerment will, as a matter of law, mandate the full implementation of four CAA provisions that will, in turn, create economic havoc for U.S. citizens and federal and state governments: (1) NAAQS, (2) NSPS, (3) PSD, and (4) Title V.

1. National Ambient Air Quality Standards (NAAQS)

a. Mandatory Trigger

NAAQS are predicated on a finding of endangerment under Section 108. In fact, under existing law, endangerment is the *only* real barrier to setting a NAAQS. Once that finding is made, EPA has no choice but to begin the NAAQS process.

The process of establishing a NAAQS begins under Section 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 air quality criteria had not been issued prior to the date of enactment of the 1970 CAA, but for which EPA plans to issue air quality criteria. 42 U.S.C. § 7408.

Prong (b) of Section 108 is easily satisfied for CO_2, particularly considering endangerment will have already been found at that point for mobile sources. Prong (c) of Section 108 is also easily satisfied, as that prong is virtually meaningless with respect to newly-designated pollutants: in *NRDC v. Train*, 545 F.2d 320 (2d Cir. 1976), the U.S. Court of Appeals for the Second Circuit held that prong (c) of Section 108 applies 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.[17]

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propose a comprehensive solution to the problem of climate change if it wishes to do so, but it is not free to reject the approach Congress explicitly set forth in section 202(a)(1)." Initial Brief: Appellant-Petitioner at 39, Massachusetts v. EPA, 549 U.S. 497 (2007) (No. 05-1120). Many of the groups aligned with the Petitioners in *Massachusetts* have made similar statements during the ANPR process; on September 23, 2008, David Bookbinder, Chief Climate Counsel for the Sierra Club, stated before the Senate Environment & Public Works Committee that (a) the endangerment finding can be limited to mobile sources, and (b) moreover, even if it were not, it is unlikely any potential plaintiffs would challenge PSD permits for the over 1 million buildings exposed to PSD for "greenhouse" gases.

[17] In *Train*, EPA conceded that lead endangers public health and welfare and is emitted by numerous or diverse sources, but EPA contended that it had discretion under prong (c) of Section 108 not to issue a Criteria Document. The Court rejected EPA's statutory interpretation, ruling that the third factor applied only to pollutants included on the initial list of pollutants to be regulated under the NAAQS program, which EPA was required to promulgate

The only activity standing in the way of a Criteria Document, then, is a finding of endangerment under Prong (a) of Section 108. This is a virtual certainty if EPA has already found endangerment for motor vehicles. If EPA has already made a finding under Section 202(a)(1) that "greenhouse" gas emissions from new motor vehicles endanger public health or welfare, all it will legitimately take is a petition for rulemaking to force EPA to make that same determination for Prong (a) of Section 108. Once all three prongs of Section 108 are satisfied, the publication of a Criteria Document is not optional; Section 108 states that EPA *shall* issue the document.

Once CO_2 is listed as a criteria pollutant under Section 108, NAAQS are inescapable. Section 109 states that EPA *shall* publish regulations prescribing NAAQS for every criteria pollutant, and Section 110 states that each state *shall* adopt and submit to EPA a plan for implementation, maintenance and enforcement of every NAAQS (called State Implementation Plans or SIPs).

b. Impact: The Sheer Scope of the Regulatory Cascade

EPA itself admits that NAAQS for CO_2 will be extremely difficult. In the ANPR, EPA admits it would likely have to assess air quality assessment on a national scale, meaning the entire U.S. would either be designated attainment or nonattainment. Whether the entire U.S. is (literally) in nonattainment will depend where the Administrator sets the NAAQS.

Section 109(b) of the CAA requires that NAAQS be "requisite to protect the public health." Moreover, when determining the level at which NAAQS should be set, EPA is precluded from considering the costs of implementation of the NAAQS. *Whitman v. American Trucking Ass'n*, 531 U.S. 457 (2001). It is not only therefore likely that NAAQS would be set at a level placing the entire nation in nonattainment, but is also likely that a NAAQS set anywhere but a level that places the entire nation in non-attainment would be construed as an arbitrary or capricious action.[18]

Once the entire country is designated nonattainment, every state will have to develop and submit a SIP that includes: Reasonably Available Control Measures (RACT); areas for interim progress toward attainment; an emissions inventory; NSR/PSD permits; and contingency measures to be implemented if the area does not meet the NAAQS by the attainment deadline. In addition, the federal government may only provide financial assistance, issue a permit or approve an activity in a nonattainment area to the extent it conforms with an approved SIP, and all transportation plans, programs and projects must conform to an approved SIP.

The purpose of a SIP for CO_2 would be to reduce CO_2 and ensure that levels of the gas in the state's ambient air satisfy the NAAQS. If a state fails to submit or implement a SIP, or if it

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within thirty days after December 31, 1970. For more discussion of *Train*, *see* Peter Glaser, Responses to Questions of the Select Committee on Energy Independence and Global Warming, September 4, 2008, at 11.

[18] It has been suggested by various *Massachusetts* petitioners that NAAQS would be set at 450-550 ppm, a level higher than present domestic concentrations, and that the U.S. would therefore be in attainment. However, it is difficult to believe a court would not find as arbitrary and capricious a decision by EPA to set NAAQS at a level for which Americans can *increase* their net emissions of a listed criteria pollutant. Moreover, if EPA sets the NAAQS above existing CO_2 levels, it would in essence be finding that no endangerment exists. Therefore, if EPA makes an endangerment finding, then EPA must set the NAAQS below existing CO_2 levels (and place the entire U.S. in nonattainment) in order to pass legal muster

submits a SIP that is unacceptable to EPA, EPA has the power to impose sanctions or other penalties on that state. Typical sanctions include cutting off federal highway funds and setting more stringent pollution offsets for certain emitters. For CO_2, this means a state in nonattainment will be able to build as many bicycle paths as it wishes, but will have a difficult time financing and constructing highway improvements.

Perhaps the most significant impact to a nation in nonattainment is the imposition of "Nonattainment New Source Review," or Nonattainment NSR. Nonattainment NSR applies to new major sources or major modifications at existing sources for pollutants where the area the source is located is not in attainment with the NAAQS.[19] "Major sources" are defined as either a source in one of 28 listed categories (mostly industrial manufacturers and energy producers) that emits at least 100 tons per year (tpy) of an air pollutant, or *any other source* with the potential to emit 250 tpy of an air pollutant. Although Nonattainment NSR requirements are customized for the nonattainment area, all Nonattainment NSR programs have to require (1) the installation of the lowest achievable emission rate (LAER), (2) emission offsets, and (3) opportunity for public involvement. According to EPA statistics, an average Nonattainment NSR permit will cost an industry applicant $62,640 and will carry a burden of 642 hours.[20]

Currently, only 519 buildings in the U.S. are forced to comply with Nonattainment NSR. **However, in its study, "A Regulatory Burden: The Compliance Dimension of Regulating CO_2 as a Pollutant,"[21] the U.S. Chamber estimates that the number of qualifying "major sources" *expands to over 1.2 million buildings when calculated for "greenhouse" gases.* Because NAAQS for "greenhouse" gases would place the entire nation in nonattainment, these 1.2 million buildings would not only have to incur the costs and paperwork burden of Nonattainment NSR for all new construction and modifications, but would also have to implement the extreme LAER technology standards and provide offsets for all new emissions. In other words, the practical effect of Nonattainment NSR for an entire nation in nonattainment is a permanent scaling-down of industry. Emission offsets are typically conducted with a ratio greater than a 1-to-1 basis, meaning anytime a new source is built, emissions equal to more than 1 times the emissions of the new source must be removed as an offset. The longer nonattainment drags on, the more businesses would be shut down.**

NAAQS for CO_2 could therefore easily result in a revolving door of punishment for state governments and their SIPs, for federal appropriators who cannot give money to states due to nonattainment constraints, for localities that have been redlined to new business, for state and local agencies forced to issue a limitless number of Nonattainment NSR permits, and for the millions of businesses forced to deal with those permits and other abnormally stringent control measures (such as LAER). Foreign emissions will continue to waft over to the United States from nations such as China and India, keeping the U.S. in nonattainment. Businesses could eventually choose to move to other, more environmentally-lenient nations which place less emphasis on environmental protection than U.S. businesses, thus harming our international

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[19] Nonattainment NSR takes the place of Prevention of Significant Deterioration (PSD) for buildings located in nonattainment areas. Nonattainment NSR, essentially, is a more burdensome version of PSD. The calculation of "major source" is the same for both Nonattainment NSR and PSD.

[20] Information Collection Request for Prevention of Significant Deterioration and Nonattainment New Source Review (40 CFR Part 51 and 52), Carrie Wheeler, Operating Permits Group, Air Quality Policy Division. Available at Docket No. EPA-HQ-OAR-2004-0081.

[21] *Available at* http://www.uschamber.com/environment.

competitiveness. To add insult to injury, the leakage of these emissions will only exacerbate domestic nonattainment problems: the sources of these emissions will simply move from the developing world to the U.S. and our global concentrations will remain the same or perhaps even rise. Because NAAQS compliance will be measured against average "greenhouse" gas concentrations, states in nonattainment will not be able to escape nonattainment, no matter what technologies they install and businesses they shut down. In short, NAAQS for CO_2 means a scaling-down of industry in the United States, possibly forever—with no real environmental benefit.

2. New Source Performance Standards (NSPS)

a. Mandatory Trigger

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

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

b. Impact

EPA theorizes in the ANPR that it could use a cap-and-trade program in lieu of plant-by-plant standards of performance. However, the D.C. Circuit's decision vacating the Clean Air Interstate Rule (CAIR) had not been issued prior to drafting of the ANPR.[22] The CAIR decision calls into serious question, if not completely invalidates, EPA's authority to create a cap-and-trade program on its own.

Therefore, it seems inevitable that an endangerment finding will force EPA to issue plant-by-plant standards of performance for CO_2, and businesses will have to install best demonstrated technologies pursuant to NSPS. If "greenhouse" gases were regulated, the categories would be limitless.[23] The federal government and states may be forced to create a new NSPS "police force" to handle all the new categories.

3. Prevention of Significant Deterioration (PSD)

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[22] *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008).

[23] EPA does not specify in the ANPR just how many new categories it would create NSPS for, but does describe the creation of various "super-categories" covering major groupings of stationary sources. It is not clear whether such super-categories would withstand judicial review.

a. Mandatory Trigger

PSD is triggered the moment CO_2 becomes a "regulated pollutant" under the CAA. It happens instantaneously—sooner, even, than a NAAQS or NSPS.[24] Under the CAA, should CO_2 be deemed regulated under the Act—even if the regulation is for vehicles or fuels and is specifically not directed at stationary sources—no new or existing "major" stationary source of CO_2 can be built or modified (if the modification increases net emissions) without first obtaining a PSD permit. Like Nonattainment NSR, "major sources" are defined as either a source in one of 28 listed categories (mostly industrial manufacturers and energy producers) that emits at least 100 tons per year (tpy) of an air pollutant, or *any other source* with the potential to emit 250 tpy of an air pollutant.

b. Impact

PSD for "greenhouse" gases would result in a complete moratorium on construction in the United States. According to a report released by the U.S. Chamber entitled "A Regulatory Burden: The Compliance Dimension of Regulating CO_2 as a Pollutant,"[25] which has been already added to the record for the ANPR and is attached to these comments, more than one million buildings in the United States will be exposed to PSD for CO_2. Many of these are previously-unregulated establishments, such as:

a. 260,000 office buildings;
b. 150,000 warehouses;
c. 92,000 health care facilities;
d. 71,000 hotels and motels;
e. 51,000 food service facilities;
f. 37,000 churches and other places of worship; and
g. 17,000 farms.

These 1.2 million newly-regulated establishments would now be forced to devote a significant amount of their resources to navigating the PSD maze before commencing construction projects. According to documents released by EPA less than one month following issuance of the ANPR, an average PSD permit costs $125,120 and imposes a burden of 866 hours on the applicant.[26] If only 40,000 of the 1.2 million buildings exposed to PSD for "greenhouse" gases opt for new construction or modifications in a given year, PSD compliance alone would cost over $5 billion and would require the devotion of 17,320 full-time employees![27] The PSD application requires a determination of best available control technologies (BACT), performed on a case-by-case basis

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[24] While we do not believe an endangerment finding alone would trigger PSD, because so many provisions in the CAA are tied to endangerment, the moment regulation occurs through one of those programs, PSD applies.
[25] http://www.uschamber.com/environment.
[26] Information Collection Request for Prevention of Significant Deterioration and Nonattainment New Source Review (40 CFR Part 51 and 52), Carrie Wheeler, Operating Permits Group, Air Quality Policy Division. Available at Docket No. EPA-HQ-OAR-2004-0081. IFL is disappointed that EPA chose not to include this highly-pertinent PSD cost and burden information in the ANPR itself. EPA staff gives the impression to the casual ANPR reader that PSD is a simple process. In reality, it is one of the most burdensome regulatory requirements many of the 1.2 million covered sources would have to encounter in their day-to-day operations.
[27] *Id.*

and with considerable cost and burden placed on the applicant. The existing BACT determination process under the CAA for covered pollutants typically involves a lengthy five-step process, with a great deal of the legwork handled by the regulated source.[28]

In all, PSD could cost these newly-regulated office buildings, warehouses, farms, churches, restaurants and other buildings a small fortune—and that is before factoring in the cost of installing BACT equipment. EPA estimates the cost and burden for the applicant to be distributed as follows:

Activity	**Hours**	**Cost**
Determination of Compliance Requirements	170	$16,592
Obtain Guidance on Data Needs	120	$11,712

[28] The existing BACT determination process under the CAA for covered pollutants typically involves a lengthy five-step process, with a great deal of the legwork handled by the regulated source:

i. *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 essentially limitless, 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.

ii. *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.

iii. *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); 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).

iv. *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).

v. *Making of the BACT selection*. The regulated source submits proposed BACT selections to the state permitting agency, which makes the final selection.

EPA NEW SOURCE REVIEW WORKSHOP MANUAL (draft), at B.6 (1990). Even more troubling is the fact that BACT is determined at the state level (and will thus vary from state to state), and BACT for CO_2 will be subject to a great deal of interpretation. Some states may decide that BACT requires energy efficiency measures, while others could conceivably decide that BACT for a coal-fired power plant requires replacement with a wind farm.

Preparation of BACT Analysis	102	$9,957
Air Quality Modeling	200	$19,521
Determination of Impact on Air Quality Related Values	100	$9,762
Post-Construction Air Quality Monitoring	50	$4,879
Preparation and Submittal of Permit Application	60	$5,858
Public Hearings	24	$2,343
Revisions to Permit	40	$3,904
Other Related Costs		$40,000
TOTAL	**866**	**$125,120**

Information Collection Request for Prevention of Significant Deterioration and Nonattainment New Source Review (40 CFR Part 51 and 52), Carrie Wheeler, Operating Permits Group, Air Quality Policy Division; *available at* Docket No. EPA-HQ-OAR-2004-0081.

The entire PSD process takes, on average, six to twelve months. In some instances, it can take years. Businesses forced to comply with PSD will be barred from construction for potentially long periods of time, immediately placing economic growth across the U.S. at risk. If the PSD burden is too great, many businesses will simply not undertake new construction projects or modifications.

Moreover, once a source is classified as a major source for one pollutant, it is considered a major source for all other regulated pollutants under the CAA. As a result, the tens of thousands of actual PSD sufferers may now have to install BACT not only for CO_2, but also potentially for nitrous oxide, particulate matter, lead, mercury, sulfur dioxide, and other pollutants prior to any new construction. Regulating these pollutants, likely in amounts far below the typical regulatory threshold would provide no environmental benefit. However, the regulatory burden is so enormous, and the number of required PSD permits so staggering, that construction in cities throughout the nation will literally stop the minute CO_2 is regulated under the CAA.

The increased number of PSD permits triggered by regulation of "greenhouse" gases will also cripple the state agencies forced to issue them. EPA estimates that state or local agencies tasked with processing PSD permit applications will spend 301 hours and $23,280 processing each permit. Overall, state agencies spent $6.5 million to process the 282 PSD permits currently issued. If this number were to balloon to even 40,000 permits—a completely reasonable number, given that 1.2 million entities will be exposed—the PSD program will cost state and local agencies $931.2 million, and would require 6,020 full-time employees to implement.

The almost $1 billion in administrative costs required to process 40,000 PSD permits would, by itself, throw EPA resources for the air program wildly out of kilter. In 2008, Congress appropriated *less than one-quarter of that*—only $227.5 million—for state, local and tribal assistance grants for air quality management. In fact, EPA spent only $971.7 million ***total*** on clean air and global climate programs in 2008. Issuance of 40,000 PSD permits for "greenhouse" gases would, in and of itself, match or exceed EPA's budget for its entire clean air program!

4. Title V

a. Mandatory Trigger

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

EPA estimates there are currently 15,000 to 16,000 Title V sources in the U.S. When a source becomes subject to Title V, it must apply for a permit within one year of the date it became subject. The permitting authority then uses this information to issue the source a permit to operate, as appropriate. The Title V permitting authority must take final action on permit applications within 18 months of receipt. EPA has 45 days from receipt of a proposed permit to object to its issuance, and *citizens have 60 days to petition EPA to object*. A Title V source generally may not operate without a permit.

Title V contains a self-funding mechanism requiring that permitting authorities collect permit fees adequate to support the costs of running a Title V program. Section 502 requires that these fees equate to no less than $25 per ton, with a maximum of 4000 tons used as the basis for the calculation. 42 U.S.C. § 7661a(b)(3)(B).

b. Impact

Because the threshold for Title V is 100 tpy across the board, the number of regulated Title V sources would balloon from 15,000-16,000 to well over 1.2 million. The U.S. Chamber estimates in its PSD study that 1.2 million new buildings will be exposed to PSD, but the threshold for that program is 100 tpy for 28 specific industries and 250 tpy for all other sources. Because the threshold for Title V is 100 tpy *across the board* and regardless of source category, the number of Title V permittees will be at least 1.2 million, and will very likely be much greater. EPA estimates in the ANPR that 550,000 new permits will be required under Title V, but gives no support whatsoever for this calculation. However, even at this lower number, EPA admits that "[t]he sheer volume of new permits would heavily strain the resources of state and local Title V programs."

Farms are not immune from Title V headaches. As the U.S. Department of Agriculture (USDA) states in its letter to Administrator Johnson that is part of the ANPR:

> If GHG emissions from agricultural sources are regulated under the CAA, numerous farming operations that currently are not subject to the costly and time-consuming Title V permitting process would, for the first time, become covered entities. Even very small agricultural operations would meet a 100-tons-per-year emissions threshold. For example, dairy facilities with over 25 cows, beef cattle operations of over 50 cattle, swine operations with over 200 hogs, and farms with over 500 acres of corn may need to get a Title V permit. It is neither efficient nor practical to require permitting and reporting of GHG emissions from farms of this size.

73 Fed. Reg. at 44,377. As USDA makes abundantly clear in the ANPR, farms differ from commercial and industrial emissions sources because agricultural emissions of "greenhouse" gases are diffuse and most often distributed across large open areas. As a result, these emissions are not easily calculated or controlled. Many of the emissions are the result of natural biological processes. Imposing the strict technology-forcing controls of the CAA on these farms and farmers could have disastrous results, particularly because, as USDA states: "technology does not currently exist to prevent the methane produced by enteric fermentation associated with the digestive processes in cows and the cultivation of rice crops; the nitrous oxide produced from the tillage of soils used to grow crops; and the carbon dioxide produced by soil and animal agricultural respiratory processes. The only means of controlling such emissions would be through limiting production, which would result in decreased food supply and radical changes in human diets." *Id.*

The self-funding mechanism in Title V also amounts to a *de facto* carbon tax on the 1.2 million or more entities subject to regulation. Even if permit fees are set at the minimum $25 per ton, this means entities that emit 100 tons per year of CO_2 will pay a $2500 annual carbon tax, while entities emitting over 4000 tons per year of CO_2 will pay a $100,000 annual carbon tax.

Finally, every Title V permit is subject to a 60-day window prior to issuance during which any U.S. citizen may challenge the permit via citizen suit. It is therefore conceivable—likely, even—that activist groups could challenge every single Title V permit and bring nationwide operations to a screeching halt. Activist groups sue EPA, the Department of Energy and the Department of Interior over 500 times annually on environmental matters. Certainly, the imposition of Title V for "greenhouse" gases will give NIMBY (Not In My Back Yard) plaintiffs one more piece of ammunition to prevent a business from operating and expanding.

C. <u>U.S. businesses and federal and state governments, will face almost immeasurable new constraints on their operations.</u>

The impact of NAAQS, NSPS, PSD and Title V on businesses and federal and state governments, which are triggered by a finding of endangerment for new motor vehicles under Section 202(a)(1), will arguably more significant than any other set of regulations ever put into place by EPA.

The average American business emitting 250 tons per year of CO_2—an office building, or a large restaurant, or even a farm—would be subject, at a minimum, to Title V. It would have to file a Title V permit application, pay an application fee/carbon tax of at least $6250, and defend against any potential citizen suits arising from its emissions of CO_2. If it chooses to undertake new construction or make a modification to its building, it would be required to obtain a PSD permit, which EPA estimates would cost $125,120, take 866 hours to complete, and require installation of BACT at considerable expense. Construction could not commence until the PSD permit is received.

At a maximum, this business emitting 250 tons per year of CO_2 would not only have to comply with Title V and PSD, but could also be required to install best available technologies to any new or existing equipment *regardless* of whether it undertakes new construction, pursuant to NSPS. It could also be subject to technology constraints pursuant to NAAQS nonattainment penalties on

its state, and could be forced to install LAER and offset new emissions at a rate greater than 1-to-1 by closing down existing operations.

EPA, and state governments tasked with implementing NAAQS, NSPS, PSD and Title V, would likely see their budgets balloon to unprecedented levels as millions of new businesses become regulated under the CAA and the entire country grapples with NAAQS nonattainment.[29] As explained earlier in these comments, if just 40,000 of the 1.2 million buildings exposed to PSD undertake new construction or modifications, state agencies would have to spend almost $1 billion and hire 6,020 more full-time employees to handle those PSD applications. This alone equals EPA's entire clean air and climate change budget. For states to handle these applications, they would require either a 400 % increase in state and local air quality management grants from the federal government or (if the grants do not occur) a substantial new tax to pay for the program and the new hires.

The PSD program on its own would impose a major strain on federal resources. When implemented in combination with NAAQS, NSPS and Title V, the costs to government become unmanageable. The Petitioners in *Massachusetts* concede in their brief that the economic chaos resulting from a finding of endangerment for motor vehicles qualifies as a reasonable explanation for declining to make such a finding. Specifically, the Petitioners wrote: "Nowhere did EPA assert that it was declining to regulate due to resource constraints, competing priorities, or an inability to determine whether the statutory standard of endangerment was met -- factors that might counsel chariness in judicial review." Reply Brief: Appellant-Petitioner at 19, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120).

EPA must set forth its reasonable basis for not finding endangerment now, because once the cascade starts, EPA cannot regulate its way out.

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[29] Worse yet, states will be forced to divert funds from other important programs and initiatives in order to meet the new federal mandates. The cost to states will reach billions of dollars, and the cost to the private sector could be in the trillions of dollars. As such, before proceeding with a proposed rule, EPA must prepare an analysis of the projected costs of these unfunded mandates.

The Unfunded Mandates Reform Act of 1995 (UMRA) is designed to promote informed decision-making by focusing congressional and administrative deliberations on the costs incurred by non-federal government entities and the private sector in order to comply with federal legislation and regulation. UMRA's stated purpose is "to end the imposition…of Federal mandates on State, local, and tribal governments without adequate Federal funding." (Sec. 2(2), Public Law 104-4; March 22, 1995.)

Specifically, UMRA requires each federal agency to assess the economic impacts of federal regulatory actions on State, local, and tribal governments and the private sector. As part of that requirement, federal agencies must prepare written statements before promulgating a rulemaking that includes any federal mandate that may result in sub-national expenditures exceeding $100 million in any one year. Further, before an agency promulgates a rule for which a written UMRA analysis is required, it *must* select the least costly, most cost-effective, or least burdensome regulatory alternative for achieving the rule's objectives – or explain why it is not. (UMRA, Sec. 205.)

The failure of an agency to conduct an unfunded mandates analysis or prepare a written statement to accompany the proposed rule is subject to judicial review. (UMRA, Sec. 401.) Consequently, if EPA fails to assess the economic impacts of its proposed rule, prepare a written statement, or select the least costly regulatory alternative (or explain why its not), then the rule can be challenged in court.

EPA (in the ANPR) and environmental groups (in legal briefs, sworn testimony and other statements) repeatedly attempt to justify a finding of endangerment under Section 202 by insisting that the CAA can be applied "piecemeal" and not through the mandatory regulatory cascade described in these comments. This conclusion is not correct. Once an endangerment finding is made, the regulatory cascade is immediately triggered, and NAAQS, NSPS, PSD and Title V are inevitable. EPA cannot simply let the cascade occur and then regulate its way out of the problem.

As a starting point, EPA should look no further than *Massachusetts* and this summer's decision vacating the Clean Air Interstate Rule (CAIR), *North Carolina v. EPA*. The overarching message in each of those cases is that EPA may not interpret the CAA to require anything more than what is written in the statute.

The Petitioners in *Massachusetts* argued in that case that the NAAQS program is an "entirely separate program from the mobile source program" contained in the CAA.[30] Initial Brief: Appellant-Petitioner at 28, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120). They have repeatedly attempted to convince judges and lawmakers that NAAQS can be avoided if the Administrator does not plan to issue a criteria document pursuant to CAA Section 108. However, as the *Train* case and Section II(B)(1) of these comments make clear, this argument is incorrect as a matter of law. Nothing short of legislative intervention can stop the NAAQS process once a finding of endangerment is made for motor vehicles under Section 202.

The same is true for NSPS. EPA, in the ANPR, argues it can modify its obligations to comply with NSPS by creating a cap-and-trade system. However, *North Carolina v. EPA* implies that EPA may not be authorized to create a cap-and-trade system by regulation at all.

EPA argues it can circumvent the PSD program through several regulatory options, such as: subjective interpretation of potential to emit; general permits; streamlined BACT; phase-in of applicability of PSD; and raising the threshold for exposure to the PSD program. Environmental groups play along, too: on September 23, 2008, David Bookbinder, Chief Climate Counsel for the Sierra Club (and a Petitioner in *Massachusetts*) told the Senate Environment and Public Works Committee that even if PSD were triggered, he did not expect that his organization or others would seek to enforce PSD program requirements on anything but the largest emitters. However, EPA has never, under any circumstances, attempted to use any of the aforementioned methods to limit applicability of PSD. Although convenient, it is hard to imagine that the judges who wrote *Massachusetts* and *North Carolina* would tolerate EPA's attempts to re-interpret the text of the CAA. At that point, the only thing standing in the way of widespread application of PSD is the word of Mr. Bookbinder that PSD would not exploited—a statement that should be

[30] Indeed, one of the main problems with *Massachusetts* and the resulting remand is that the Petitioners successfully convinced the Court that the endangerment finding and resulting regulation was confined to CAA regulation of motor vehicles under Section 202. As a result, the Court's opinion does not take into account the regulatory cascade described in these comments. For example, the Court distinguished *Massachusetts* from the Respondent's case in chief, *FDA v. Brown & Williamson Tobacco Corp*, 529 U.S. 120 (2000), on the ground that Section 202 "would lead to no such extreme measures. EPA would only *regulate* emissions, and even then, it would have to delay any action 'to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance,' § 7521(a)(2)." *Massachusetts*, 127 S. Ct. at 1461 (emphasis in original). While this is true for motor vehicle programs under Section 202—for which regulations can be delayed or limited to account for technological development—the same is not true for NAAQS, NSPS, or PSD.

viewed with informed skepticism, given that Sierra Club, NRDC and others are arguing in several pieces of active litigation, as well as a challenge to Delaware's SIP, that "greenhouse" gases are already regulated under the CAA and PSD already applies.

In the past year alone, environmental groups have actively pursued the trigger and enforcement of PSD for "greenhouse" gases in the following cases: *In re: Deseret Power* (before EPA's Environmental Appeals Board ("EAB"), PSD Appeal No. 07-03); *In re: Sevier Power Company Power Plant* (case before the Utah Air Quality Board, No. DAQE-AN 2529001-04, decided January 9, 2008); *In re: ConocoPhillips* (case before the EAB, PSD Appeal No. 07-02); *Desert Rock Energy and Diné Power Authority v. EPA* (case filed in S.D. Tex, No. 08-0872); *Environmental Defense Fund v. North Carolina Dept. of Env. & Nat. Res.* (case before the NC Office of Administrative Hearings, No. ____, filed March 27, 2008); and *In re: Christian County Generation, LLC* (case before the EAB, PSD Appeal No. 07-01, decided January 28, 2008). On November 14, 2008—the day after the EAB remanded the *Deseret Power* case back to EPA Region 8 for a determination of whether PSD has been triggered and CO_2 BACT is required—Mr. Bookbinder's organization, the Sierra Club, ran a front-page story on its website championing the decision, with a statement that "all new and proposed coal plants nationwide must go back and address their carbon dioxide emissions."[31]

EPA can adequately address tailpipe "greenhouse" gas emissions without a finding of endangerment.

One of the most overlooked facts in the climate debate is that the federal government spends $37 billion annually to address climate change. More specific to the ICTA petition and *Massachusetts*, Congress and the administration enacted a law 11 months ago that dealt specifically with reducing motor vehicle "greenhouse" gas emissions. EPA therefore has a strong case that climate change has been adequately addressed through Congressional action, making an endangerment finding unnecessary.

When the Supreme Court decided *Massachusetts*, several climate-focused laws had not yet been enacted, and several climate-related regulations and programs had not been fully implemented. Chief among these is the Energy Independence and Security Act of 2007 (P.L. 110-140) (EISA). One of the main purposes of the EISA was to address "greenhouse" gas emissions from vehicles. The EISA accomplished this in two ways: (1) downward revisions to corporate average fuel economy (CAFE) standards for cars and light trucks; and (2) a fivefold increase in the federal renewable fuels mandate, from 7.5 billion gallons to 36 billion gallons. These are the same two programs EPA reportedly set out to establish in the wake of *Massachusetts*, as a way of satisfying its obligations on remand.

In addition, the EISA contained dozens of low-emissions technology development provisions, continuing the trend created by the Energy Policy Act of 2005 (EPAct). Taken together, the EISA and EPAct contain more than 100 provisions to develop low- and zero-emissions energy sources and energy technologies, ranging from $25 billion in loans for advanced technology vehicles to wind, solar, hydrogen and algal biomass incentives. The U.S. Chamber has compiled a comprehensive list of these technology provisions; a copy is attached to the U.S. Chamber's comments.

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[31] *Available at* http://action.sierraclub.org/site/MessageViewer?em_id=78902.0.

The EISA and EPAct are just one part of the federal government's robust climate strategy. According to the Council for Environmental Quality (CEQ), the federal government has a budget of $37 billion to address climate change. This includes the following:

Partnerships

- Nuclear Power 2010
- Improved NRC Process for Nuclear Power
- Climate Vision (15 Industry Sectors)
- Climate Leaders (100+ Company Leaders
- Smartway Transportation Partnerships
- Energy Star and Natural Gas Star
- Federal Energy Management Programs

Mandates

- Federal Fuel Economy (CAFE)
  - ⇒ 35 miles per gallon fleet average by model year 2020
- Federal Renewable Fuels (RFS)
  - ⇒ 36 Billion Gallons by 2022
- Federal Appliance Efficiency
  - ⇒ 40 standards (15 from EPAct 2005)
- State Renewable Power (RPS)
  - ⇒ 24 states; 80% of generation
- Building Codes – Federal Facilities and States
  - ⇒ DOE model code 30% improvement

Incentives

- About $10 billion – EPAct 2005
- Clean Coal Investment Tax Credit ($1.6 billion + leveraging over $10 billion in private capital)
- Loan Guarantees (power and fuels)
- Up to $3400 Tax Credit for Efficient Vehicles
- Up to $4000 in Home Solar Incentives
- Biological Sequestration part of $40+ billion 2002 Farm Bill Conservation Programs

Technology

- Renewable Power: Advanced Solar and Wind
- Nuclear Power: Generation IV and Fusion
- Coal: Low Carbon Research; FutureGen; Regional Carbon Capture & Storage
- Fuels: Cellulosic Ethanol, Biodiesel, Hydrogen
- Vehicles: Plug-in Hybrids, Hydrogen Fuel Cell
- Zero Energy Home Research

See "Energy and Climate Policy," Hon. James L. Connaughton, Dec. 2007, *available at* http://www.huntonfiles.com/files/webupload/CCS_Energy_and_Climate_Policy_Connaughton.pdf.

All of these policies add up to a substantial climate program that costs the federal government a significant amount of money. More importantly, passage of the EISA itself partly satisfies the Court's remand of *Massachusetts*, and only adds to EPA's reasonable explanation not to undertake an endangerment finding under the *Massachusetts* Court's pending remand.

The CAA itself contemplates that other laws will be sufficient to address air pollution. Section 102(b) requires cooperation between EPA and all other federal departments and agencies. Section 102(b) states:

> **(b) Federal cooperation**
> The Administrator shall cooperate with and encourage cooperative activities by all Federal departments and agencies having functions relating to the prevention and control of air pollution, so as to assure the utilization in the Federal air pollution control program of all appropriate and available facilities and resources within the federal government.

42 U.S.C. § 7402(b).

Section 102(b) quite clearly contemplates that programs other than the CAA can and should be used to address air pollution. In the present case, both have occurred. The EISA creates several new laws, but it also amends the CAA: the increased renewable fuels mandate was accomplished through amendment of CAA Section 211(o), 42 U.S.C. § 7545(o).[32] In addition, the federal government has moved forward with the technology provisions contained in EPAct and the dozens of other programs listed above.

As explained above, the *Massachusetts* Petitioners were successful in convincing the Court that the endangerment finding was limited only to motor vehicles. As a result, the Court's opinion does not take into account the regulatory cascade described in the U.S. Chamber's comments. The Court's holding is based in part on the fact that "EPA ha[d] not identified any congressional action that conflicts in any way with the regulation of "greenhouse" gases from new motor vehicles." *Massachusetts*, 127 S. Ct. at 1461. However, the EISA, and the programs contained therein, *does* conflict with CAA regulation of "greenhouse" gases from new motor vehicles. In many ways, it takes the place of CAA regulation. EPA can therefore have its cake and eat it too: it can deny the ICTA petition on the economic grounds set forth in these comments (and avoid the economic chaos wrought by an endangerment finding) while also sufficiently addressing the issue of global climate change.

Conclusion

EPA can and should make a reasonable explanation not to undertake a finding of endangerment under Section 202(a)(1) because a finding of endangerment would trigger a regulatory cascade that would impose an inescapable and unreasonable economic burden on American small business, individual U.S. citizens and the federal government. The compliance costs for four

[32] To avoid the PSD consequences detailed in these comments, the drafters of the EISA's renewable fuels mandate included a provision stating that nothing in the EISA shall be construed as regulation of an air pollutant pursuant to the CAA.

CAA programs triggered by a finding of endangerment—National Ambient Air Quality Standards (NAAQS), New Source Performance Standards (NSPS), Prevention of Significant Deterioration (PSD) and Title V—would be unbearable for millions of new regulated entities. Federal appropriators would have to double, or perhaps even triple, both EPA's budget and the amounts of state and local air quality grants. Construction in the U.S. could stop, millions of "greenhouse" gas-related citizen suits could arise, and strict offset requirements could mean a permanent scaling down of industry in the millions of small businesses forced to limit their emissions in the U.S..

At a time when our fragile economy cannot take much more of a hit, regulation of "greenhouse" gases under the CAA will result in a mandatory scaling-down of society. EPA can only prevent this economic and regulatory chaos by denying the ICTA petition under "Option 3" of *Massachusetts*. Avoidance of an endangerment finding on the basis of this regulatory cascade is explicitly permitted under *Massachusetts*. The regulatory cascade described in these comments was not considered by EPA, the Supreme Court or Congress until now. The widespread economic devastation in the private sector, not to mention the unprecedented strain on federal and state agency resources, caused by the CAA's regulatory cascade is more than reasonable enough an explanation for declining to find endangerment. By choosing this course of action, EPA can meet its *Massachusetts* obligations while also protecting the fragile American economy.

Policy decisions relating to climate change should be made by Congress, not through regulations issued by EPA under decades-old, incompatible Clean Air Act programs. The Institute for Liberty strongly urges EPA to decline to regulate "greenhouse" gases under the Clean Air Act by virtue of the authority granted to it by the Supreme Court in *Massachusetts*.

We appreciate the opportunity to file these contacts. If you have any questions, please do not hesitate to contact Andrew Langer, President of the Institute for Liberty at (202) 261-6592.