ORAL REMARKS OF MARLO LEWIS
HEARING ON GREENHOUSE GAS REGULATION UNDER THE CLEAN AIR ACT
SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
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Thank you, Chairman Boxer and Ranking Member Inhofe, for giving me the opportunity to testify.

When *Massachusetts v EPA* was being litigated, plaintiffs denied that the case posed any risks to the economy. They derided all talk of slippery slopes and GDP losses as alarmist.

Yes, they said, an endangerment finding under Section 202 would require EPA to set new motor vehicle emission standards, and, yes, such standards could have the effect of tightening fuel economy regulation; but, they said, EPA would be constrained by Section 202's requirement to consider compliance costs. At worst, we'd all save money at the gas pump.

Well, such assurances now ring hollow. Thanks to several congressional testimonies by attorney Peter Glaser, the Advanced Notice of Proposed Rulemaking, and the recent U.S. Chamber study, it is now clear that the remedy sought by plaintiffs in *Massachusetts* could trigger economy-chilling regulation under the Prevention of Significant Deterioration (PSD) program and the National Ambient Air Quality Standards (NAAQS) program.

EPA could be compelled to make massive changes in U.S. environmental policy, energy systems, and economy—changes far more costly than any proposed in the Lieberman-Warner legislation, which this Chamber did not see fit to pass.

Even in regard to fuel economy, an endangerment finding could constrain EPA to regulate far beyond the point where Congress indicated it should stop. According to the ANPR, the fuel economy and renewable fuel standards Congress enacted in the 2007 Energy Independence and Security Act will provide only 25 percent of the transport sector's "proportional contribution" to meeting President Bush's climate goal of no emissions growth after 2025. Climate activists spurn Bush's goal as too weak. From the perspective of those who sued EPA in the *Massachusetts* case, EISA is an applecart that needs to be upset.

Both the ANPR and plaintiffs offer options to avoid or limit the potential PSD and NAAQS burdens arising from the *Massachusetts* case. These options involve questionable legal theories. For example, my colleague, Mr. Bookbinder, and his colleague, David Doniger would resuscitate a legal theory that Mr. Doniger's organization, the Natural Resources Defense Council, successfully sued to overturn in 1976, in the case of *NRDC v Train*. This is theory, propounded by then EPA Administrator Russell Train, that EPA can avoid initiating a NAAQS rulemaking just by not planning to do the paperwork.

The ANPR suggests EPA could invoke the doctrine of "administrative necessity" to justify limiting the number of stationary sources subject to PSD regulation. Ironically, the ANPR cites a 1979 case—*Alabama Power Co. v Costle*—in which the D.C. Circuit Court of Appeals shot down an EPA attempt to limit the number of PSD-regulated entities based on the administrative necessity doctrine. Recent cases overturning EPA's Clean Air Mercury Rule and Clean Air Interstate Rule suggest that EPA's ability to improvise around the law is quite limited.

Besides, these artful dodges are a reflection on the Clean Air Act as an instrument of climate policy. The purpose of the proposed simplifications is not to improve environmental protection, but to get around the law. At best, irrational burdens would be minimized but not avoided. States would have to incorporate EPA's administrative revisions in their SIPs and regulated entities would have to file new paperwork.

Congress did not intend for Section 202, which deals solely with motor vehicle emissions, to create an overwhelming roadblock to new investment in thousands of previously unregulated buildings and facilities. Nor did Congress intend for Section 202, which requires EPA to consider costs when setting tailpipe standards, to trigger the most expensive NAAQS rulemaking in history. Yet those policy disasters become real risks if EPA tries to pound the square peg of climate policy into the round hole of the Clean Air Act.

The Clean Air Act is a flawed, unsuitable, potentially destructive instrument for regulating greenhouse gases. If the issues raised in the ANPR had been squarely before the Justices back in April 2007, they might well have decided *Massachusetts* differently, and we would not even be having this hearing today.

Thank you, again. I would be happy to address any questions.