



Competitive Enterprise Institute

1899 L Street, NW • 12th Floor • Washington, DC 20036
202.331.1010 • www.cei.org

Advancing Liberty – From the Economy to Ecology

May 19, 2010

No. 167

Overturing EPA’s Endangerment Finding Is a Constitutional Imperative

By George Allen and Marlo Lewis*

The U.S. Environmental Protection Agency (EPA) is carrying out one of the biggest power grabs in American history. The agency has positioned itself to regulate fuel economy, set climate and energy policy for the nation, and amend the Clean Air Act—powers never delegated to it by Congress. It has done this by:

- Pulling its punches in the *Massachusetts v. EPA* Supreme Court case;
- Granting California a waiver to regulate greenhouse gas (GHG) emissions from motor vehicles; and
- Declaring greenhouse gas emissions a danger to public health and welfare, thus triggering a regulatory cascade through multiple provisions of the Clean Air Act, in a decision known as the “endangerment finding.”

To restore the constitutional separation of powers and democratic accountability, Congress must overturn EPA’s endangerment finding. S. J. Res. 26, a resolution of disapproval, introduced by Sen. Lisa Murkowski (R-Alaska), under the Congressional Review Act (CRA), provides an appropriate vehicle to accomplish that. (Enacted in 1996, the CRA provides an expedited procedure for Congress to veto a final agency action before it takes effect.)

The resolution, which would nullify the endangerment finding’s legal force and effect, is a referendum not on climate science, but on who shall make climate and energy policy—the people’s elected representatives or politically unaccountable bureaucrats, trial lawyers, and activist judges. Overturing the endangerment finding is a constitutional imperative.

As Senators prepare to debate the resolution, they should ponder four questions:

1. When did Congress authorize the Environmental Protection Agency to license California and other states to adopt their own fuel economy standards within their borders?

* George Allen is a former U.S. Senator and Governor of Virginia and Chairman of the American Energy Freedom Center. Marlo Lewis is a Senior Fellow at the Competitive Enterprise Institute.

2. When did Congress authorize EPA to act as a co-equal—or even senior—partner with the National Highway Traffic Safety Administration (NHTSA) in setting fuel economy standards for the auto industry?
3. When did Congress authorize EPA to control greenhouse gas emissions from stationary sources and to establish climate and energy policy for the nation?
4. Finally, when did Congress authorize EPA to “tailor”—that is, amend—the Clean Air Act (CAA) to avoid an administrative debacle of the agency’s own making?

The answers are *never, never, never, and never*. EPA is flouting federal law and the Constitution, which vests all lawmaking power in Congress.

Regulatory Avalanche in the Making. Congress may soon get its first real opportunity to roll back EPA’s overreach. The Senate is expected to vote on Sen. Murkowski’s resolution of disapproval,¹ which would nullify the legal force and effect of EPA’s endangerment finding,² by June 7. If allowed to stand, the endangerment finding will trigger a regulatory cascade through multiple provisions of the Clean Air Act. America could be shackled to a regulatory regime far more costly and intrusive than any climate bill Congress has ever debated, but without the people’s elected representatives ever getting a chance to vote on it.

By EPA’s own admission, the endangerment finding spawns “absurd results”—a red ink nightmare that undermines environmental protection, economic growth, and congressional intent.³ Here’s why.

The endangerment finding compels EPA to establish greenhouse gas emission standards for new motor vehicles. Once those standards go into effect, carbon dioxide (CO₂) becomes a “regulated air pollutant” and, thus, automatically subject to additional regulation under the Clean Air Act’s Prevention of Significant Deterioration (PSD) pre-construction permitting program and Title V operating permits program. Under the CAA, a firm must obtain a PSD permit before it can build or modify a facility classified as a “major stationary source” of regulated air pollutants, and obtain a Title V permit before it can operate that facility. The problem is that an immense number and variety of previously non-regulated entities—big box stores, office buildings, apartment complexes, small manufacturers, heated agricultural facilities, commercial kitchens, hospitals, churches, and schools—emit enough CO₂ to qualify as “major” sources.

EPA estimates that environmental agencies would have to process 41,000 PSD permit applications each year—a 140-fold increase over the current number—and 6.1 million Title V operating permits each year—a 404-fold increase.⁴ The sheer volume of permit applications would overwhelm agencies’ administrative resources. In effect, the permitting programs would crash under their own weight, causing construction activity to grind to a halt and forcing millions of firms to operate in legal limbo—in the midst of the worst economic downturn since the Great Depression.

To avert an administrative disaster of its own making, EPA proposes to “tailor” the PSD and Title V programs so that they exempt for six years all firms emitting less than 50,000 tons per year (TPY) of CO₂-equivalent greenhouse gases.⁵ But the Act plainly states that a source is

subject to PSD if it has a potential to emit 250 TPY of a regulated air pollutant⁶ and subject to Title V if it has a potential to emit 100 TPY.⁷ In reality, EPA proposes to amend the Clean Air Act—something only Congress has the power to do.

Even if courts uphold this blatant breach of the separation of powers, EPA still has the option to extend PSD and Title V requirements to smaller and smaller entities after 2016. Because these small business protections are temporary by design—and legally dubious—the Tailoring Rule leaves a cloud of regulatory uncertainty hanging over our economy.

The Tailoring Rule also offers zero protection from what is arguably the endangerment finding's most absurd result—the obligation to establish National Ambient Air Quality Standards (NAAQS), set below current atmospheric concentrations, for CO₂ and other greenhouse gases.⁸

Section 108 of the Clean Air Act obligates EPA to initiate a NAAQS rulemaking for “air pollution” from “numerous or diverse mobile or stationary sources” that may “reasonably be anticipated to endanger public health or welfare.” Carbon dioxide is emitted from numerous *and* diverse mobile *and* stationary sources, and EPA’s endangerment finding declares that the associated “air pollution” endangers public health and welfare.

What is more, EPA attributes endangerment to the “elevated concentration” of GHGs in the atmosphere.⁹ By “elevated,” EPA means *elevated above pre-industrial levels*. Substantively, EPA has already made the case for establishing NAAQS for CO₂ set below current atmospheric levels.

This is plainly absurd. Even a global depression lasting several decades would not be enough to lower CO₂ concentrations from today’s level—roughly 390 parts per million¹⁰—to 350 ppm, the new politically correct “stabilization” target advocated by NASA scientist James Hansen,¹¹ former Vice President Al Gore,¹² Intergovernmental Panel on Climate Change Chairman Rajendra Pachauri,¹³ the Center for Biological Diversity,¹⁴ and other prominent climate alarmists.¹⁵

Yet under the CAA, states are obligated to attain NAAQS within five years or at most 10 years.¹⁶ Note that EPA may not take implementation costs into account when setting national air quality standards.¹⁷ The endangerment finding thus sets the stage for environmental advocacy groups to transform the Act into a deindustrialization mandate—an economic suicide pact—through litigation. How will EPA defuse the NAAQS bomb? Will it propose another “tailoring” rule to amend the NAAQS attainment deadline from 10 years to 100 years? The Murkowski resolution would nip all this mischief in the bud.

What the Resolution Is and Isn't.

A strong case can be made that EPA’s endangerment finding is scientifically flawed.¹⁸ However, the Murkowski resolution is a referendum not on climate science, but on who shall make climate policy—lawmakers who must answer to the people at the ballot box or politically unaccountable bureaucrats, trial lawyers, and activist judges. The resolution would veto the “legal force

and effect” of the endangerment finding, not its scientific reasoning or conclusions. It is worth noting that Sen. Murkowski is neither a global warming skeptic nor opposed in principle to GHG regulation.¹⁹ Her position is simply that climate policy is too important to be made by non-elected bureaucrats.

If the endangerment finding were purely an assessment of the scientific literature, Congress would have no business voting on it. However, it is first and foremost a policy document. Moreover, it is the legal trigger and precedent for sweeping policy changes which Congress never approved.

The Strange Case of the Disappearing, Reappearing Patchwork. In a February 22, 2010, letter to Sen. Jay Rockefeller (D-W.V.),²⁰ EPA Administrator Lisa Jackson observes that overturning the endangerment finding would scuttle the joint EPA/NHTSA rulemaking setting both greenhouse gas limits and fuel economy standards.²¹ That, in turn, would undo the “historic agreement” whereby California and other states agreed to deem compliance with federal greenhouse gas and fuel economy standards as compliance with their own. That, Administrator Jackson warns, would leave California and other states free to enforce their own standards, creating a regulatory patchwork inimical to a healthy auto industry.

Jackson neglects to mention that the patchwork threat exists only because she, reversing Bush EPA Administrator Stephen Johnson’s decision to deny California that authority,²² granted California a waiver to implement its own GHG/fuel economy program in the first place.²³ Had Jackson reaffirmed Johnson’s denial, there would be no danger of a regulatory patchwork, hence no ostensible need for a pact between California and the federal government to “protect” the auto industry.

The peril of a regulatory patchwork was one of former EPA Administrator Johnson’s reasons for rejecting California’s request for the waiver.²⁴ In response, California Governor Arnold Schwarzenegger (R) and 12 other governors denied that waiving federal preemption would create a regulatory patchwork in a January 23, 2008, joint letter to Johnson.²⁵ David Doniger of the Natural Resources Defense Council, Connecticut Gov. M. Jodi Rell (R), Maryland Gov. Martin O’Malley (D), and Pennsylvania Gov. Edward G. Rendell (D) denied it when they testified before the Senate Environment and Public Works Committee.²⁶ Now, the Murkowski resolution’s opponents warn of a regulatory patchwork if the “historic agreement” were to unravel. Predictably, they do not confess to having changed their tune, nor acknowledge that Johnson was correct.

Unlawful, Incompatible Standards. Johnson correctly argued that the Clean Air Act’s waiver provision addresses the effects of California’s unique topography and meteorology on local air pollution, and hence has no valid application to emissions associated with global climate change. However, there is a more fundamental reason why his successor, Lisa Jackson, should have reaffirmed his decision. States cannot enact their own greenhouse gas emission and fuel economy standards without violating the 1975 Energy Policy and Conservation Act (EPCA), which states:

When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.²⁷

Note the broad language. States are prohibited from adopting or enforcing any law or regulation “related to” fuel economy standards. This means a state may not adopt a fuel economy standard by relabeling it as something else—such as “climate protection”—nor by commingling it with other measures—for example, controls on air-conditioner refrigerants based on their global-warming potentials.

Carbon dioxide makes up at least 94 percent of all greenhouse gas emissions from motor vehicles,²⁸ and there is no commercially proven technology to filter or capture CO₂ emissions from tailpipes. Consequently, the only way to achieve significant decreases in GHG emissions per mile is to decrease fuel consumption per mile. As EPA and NHTSA’s joint rule states, “there is a single pool of technologies” for reducing fuel consumption and, thereby, CO₂ emissions from motor vehicles.²⁹ The California Air Resource Board’s (CARB) motor vehicle GHG standards program is basically fuel economy by another name, and therefore is preempted by EPCA. Jackson had no authority to approve it.

Indeed, the standards for which California initially sought a waiver were not only different from, but also incompatible with federal standards, because they conflicted with fuel economy reforms Congress enacted in the 2007 Energy Independence and Security Act (EISA).³⁰ In EISA, Congress replaced the “flat-rate” standards of the original Corporate Average Fuel Economy (CAFE) program, which applies to an automaker’s entire fleet, with “attribute-based” standards that vary according to a vehicle’s “footprint”—the area formed by the wheel base multiplied by vehicle track width.

The original CAFE program had serious drawbacks, including an adverse impact on vehicle safety. The easiest way to comply with flat-rate standards is to make the average car lighter and smaller. Lighter vehicles have less mass to absorb collision forces. Smaller vehicles provide less space between the occupant and the point of collision. The National Academy of Sciences has estimated that CAFE contributed to an additional 1,300 to 2,600 fatalities and 13,000 to 26,000 serious injuries in 1993 (a typical year).³¹

Although California’s GHG standards are calibrated in grams CO₂-equivalent per mile rather than miles per gallon, they are “flat-rate” rather than “attribute-based.” Since the California standards substantially regulate fuel economy, they conflict in basic approach with the EISA reforms.

The “flat-rate” character of the initial CARB program is also what created the threat of an unworkable regulatory patchwork.³² Consumer preferences differ from state to state, so the same automaker typically sells a different mix of vehicles in each state. Only by sheer improbable accident would the average fuel economy (or grams CO₂/mile) of an automaker’s vehicles delivered for sale in one state be identical to that in other state. But under the initial CARB

program, each automaker would have to achieve the same average fuel economy (grams CO₂ per mile) in every state that adopted California's standards. If all 50 states adopt the California program, then each automaker would have to manage 50 separate fleets, reshuffling the mix in each state regardless of consumer preference. A more chaotic scheme would be hard to imagine.

As part of the "historic agreement," CARB agreed to amend its rules to allow manufacturers to demonstrate compliance with its fleet average GHG emission standard by "pooling" vehicles delivered for sale in all "California" states rather than having to demonstrate compliance on a state-by-state basis.³³ Although less disruptive than the initial CARB program, the modified CARB program is still inefficient, because it compels automakers to meet a different fuel economy standard in the "California" states and subjects them to a baker's dozen state-level compliance programs.

In hindsight, it is not hard to see why Jackson initiated a rulemaking to reconsider Johnson's denial of the California waiver. The patchwork threat enabled EPA to gain the auto industry's support for the joint GHG/fuel economy rule, which reduces³⁴ the patchwork by coordinating California's fuel economy program with the federal program. The joint rule, in turn, not only triggers a regulatory cascade that expands EPA's control over stationary sources, it also empowers EPA to determine federal fuel economy standards. Because of the tight correlation between miles per gallon and CO₂ emissions per mile, EPA can always increase the stringency of CAFE standards by increasing the stringency of its GHG emission standards. The "historic agreement" thus makes EPA the senior partner to NHTSA in setting CAFE standards, even though the CAA provides no authority to regulate fuel economy.

Congress should not allow EPA to hijack fuel economy regulation and determine climate and energy policy for the nation. Rather, Congress should uphold the Energy Policy and Conservation Act and reassert its authority under the Supremacy Clause of the Constitution. Other parties should consider litigation to overturn the waiver. U.S. automakers are too financially dependent on the Obama administration to consider mounting such a challenge, but the National Association of Auto Dealers and the U.S. Chamber of Commerce have already filed suit.³⁵

Dirty Deal. Rep. Darrell Issa (R-Calif.), ranking member of the House Oversight and Government Affairs Committee, spotlights another reason to nix the "historic agreement"—the White House negotiated it in violation of the Presidential Records Act (PRA).³⁶ Section 2203(a) of the PRA states:

Through the implementation of records management controls and other necessary actions, the President shall take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are *adequately documented* and that such records are maintained as Presidential records pursuant to the requirements of this section and other provisions of law.³⁷ [Emphasis added]

Far from documenting the negotiations culminating in the “historic agreement,” White House climate and energy Czar Carol Browner required participants to observe a “vow of silence” and forbade them to take notes, according to *The New York Times*. “We put nothing in writing, ever,” CARB Chairman Mary Nichols told the *Times*.³⁸ Issa is investigating whether the administration used unlawful secrecy and “the possibility of a taxpayer bailout of GM and Chrysler to secure their cooperation and support with new fuel economy standards.”³⁹ At a minimum, the Browner-led back-room negotiations make a mockery of EPA Administrator Jackson’s⁴⁰ and President Obama’s⁴¹ high-profile commitments to transparency and openness in environmental policymaking.

Overturing the Endangerment Finding Would Help America’s Auto Industry. The Alliance of Automobile Manufacturers—which represents 11 carmakers, including the Detroit Big Three—under pressure from Speaker Pelosi’s office,⁴² wrote to congressional leaders in March warning that if Congress overturns the endangerment finding and nixes the joint GHG/fuel economy rule, NHTSA will not be able to “de-couple” its portion quickly enough to meet the April 1, 2010, deadline for finalizing federal fuel economy regulations for the 2012 model year.⁴³ Although NHTSA met its deadline, overturning the endangerment finding would void the joint rule after the fact. How would that affect automakers’ design and innovation plans?

One possibility is that model year 2011 fuel economy standards would remain in place for an additional year. That would save the industry \$5.9 billion in incremental technology costs.⁴⁴ It would also reduce the CAFE death toll, because even “attribute-based” fuel-economy regulation induces some downsizing. EPA and NHTSA struggle to diminish the size-safety tradeoff in their joint rule. However, they include a “worst-case” scenario in which the new standards cause an additional 493 deaths in model year 2016.⁴⁵ Slowing the pace of fuel economy regulation would save lives.

Note also that retaining the model year 2011 standard for an additional year would have no adverse impact on public health and welfare, even if EPA’s endangerment finding were scientifically unassailable. Delay would make no perceptible difference in atmospheric CO₂ concentrations, average global temperature, weather patterns, or U.S. energy security.⁴⁶

Another possibility is that courts strike down the EPA/GHG parts of the joint rule, leaving the model year 2012 fuel economy standard in place. After all, only the GHG components of the rule depend on the endangerment finding. NHTSA has separate authority under EPCA/EISA to establish fuel economy standards for model years 2012-2016.

Either outcome would relieve the regulatory burden on America’s struggling auto industry. The industry could more easily comply with a single federal fuel economy standard than with the mixed federal-state-GHG-fuel economy regime it faces under the joint rule.

EPA’s Pattern of Self-Dealing. EPA issued its endangerment finding in response to the Supreme Court’s decision in *Massachusetts v. EPA*. Petitioners in the case—a dozen state attorneys general and numerous environmental groups—sought to compel EPA to determine whether greenhouse gas emissions from new motor vehicles endanger public health and welfare.

Petitioners argued that the case dealt solely with EPA’s authority to regulate new motor vehicles under CAA section 202, which, they claimed, is “entirely separate” from EPA’s authority to establish NAAQS under Title I.⁴⁷ They also emphasized that EPA must take compliance costs into account when setting motor vehicle emission standards, precluding “dire economic or political consequences.”⁴⁸

Beguiled by such assurances, the 5-4 majority concluded that an endangerment finding would not lead to “extreme measures”—that is, it would not lead to actions Congress could not have authorized.⁴⁹

Neither EPA nor counsel representing the agency ever challenged these assertions. But how could EPA, the acknowledged expert in the CAA, not understand the regulatory chain reaction that an endangerment finding would ignite?

In June 1998, technology analyst Mark P. Mills published a report warning that applying the CAA to CO₂ would compel EPA to regulate over one million small- to mid-sized businesses.⁵⁰ The Mills study was a response to then-EPA General Counsel Jonathan Z. Cannon’s April 1998 memorandum asserting EPA’s authority to regulate GHG emissions under the CAA.⁵¹ Petitioners cited the Cannon memorandum in support of their reading of the CAA.⁵² The Mills study was published by the Greening Earth Society, one of EPA’s “stakeholders.” EPA could not have been unaware of it.

EPA’s July 2008 Advanced Notice of Proposed Rulemaking⁵³ and October 2009 Tailoring Rule proposal amply confirm the basic thrust, if not the particular details, of the June 1998 Mills study. They leave no doubt that regulating GHGs under CAA section 202 would lead automatically to regulation under other provisions, produce absurd results, and expand EPA’s power far beyond any plausible congressional mandate. So why didn’t EPA say so when it really mattered?

The Greenhouse Briar Patch

Here, in simplest form, is the strong argument which EPA’s counsel neglected to make in *Massachusetts v. EPA*:

- EPA cannot regulate GHGs under CAA section 202 without regulating CO₂ under the Act as a whole, including PSD, Title V, and NAAQS.
- Applying the Act as a whole to CO₂ leads to absurd results—“extreme measures” that conflict with, and undermine, congressional intent.
- Therefore, Congress cannot reasonably be construed as having authorized EPA to regulate GHGs under CAA section 202.

Had the counsel for EPA presented this argument to the Court, the case might have had a very different outcome. But then EPA would not be in a position to dictate terms to the auto industry on fuel economy, and to the nation on climate and energy policy. To suggest that EPA only figured out after losing *Massachusetts v. EPA* what it stood to gain from defeat strains credulity.

Similarly, EPA could have used the strong argument to abstain from making an endangerment finding. As the Court said, “We need not and do not reach the question whether on remand EPA must make an endangerment finding....We hold only that EPA must ground its reasons for action or inaction in the statute.”⁵⁴ The statutory reasons are that EPA cannot make an endangerment finding without undertaking “extreme measures” such as the extension of permitting requirements to tens of thousands or even millions of previously unregulated sources, and that EPA can mitigate (although not avoid) such “absurd results” only by breaching the separation of powers and amending the statute.

Why didn’t EPA avail itself of the strong argument during the *Massachusetts v. EPA* case and during its deliberations on the endangerment finding? The only plausible explanation is that the agency wanted to be thrown in the greenhouse briar patch all along.

Conclusion. Let us review the steps by which EPA is amassing powers not delegated by Congress.

1. EPA pulls its punches in *Massachusetts v. EPA*, contributing to a 5-4 decision that authorizes the agency to find endangerment and regulate GHGs under CAA section 202.
2. EPA declines on remand to offer statutory reasons (“absurd results”) for not making an endangerment finding.
3. EPA’s reconsideration of former EPA Administrator Stephen Johnson’s denial of the waiver creates the threat of a patchwork of conflicting fuel-economy requirements across the country.
4. The patchwork threat enables the White House to broker a deal whereby EPA gets to take the lead from NHTSA in regulating fuel economy—a power not granted to EPA by the CAA.
5. The joint GHG/fuel economy regulation compels EPA to regulate CO₂ from stationary sources—another power Congress never delegated to EPA.
6. The stage is set for EPA to regulate fossil-energy production and use in all sectors—manufacturing, power generation, commercial, and residential—and, thus, to determine climate policy for the nation, even though Congress is still debating whether and how to regulate greenhouse gas emissions.
7. Because applying the CAA to CO₂ leads to “absurd results,” EPA gets to play lawmaker and amend the Act—yet another power never delegated by Congress.

The Murkowski resolution raises a simple but fundamental question: Who shall make the big decisions about the content and direction of public policy—the people’s elected representatives or politically unaccountable bureaucrats, trial lawyers, and activist judges?

Sen. Barbara Boxer (D-Calif.) criticized the resolution, stating that if the public has to wait for Congress to pass legislation to control GHG emissions, “that might not happen, in a year or two, or five or six or eight or 10.”⁵⁵ Yes, but that is representative democracy. And the democratic process is more valuable than any result that EPA might obtain by doing an end run around it. It is not too much to ask of U.S. senators that they understand and honor this fundamental precept of our constitutional system.

Notes

- ¹ S. J. Res. 26, available at <http://www.openmarket.org/wp-content/uploads/2010/01/murkowski-resolution-text.pdf>.
- ² Environmental Protection Agency, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 FR 66496-66546, December 15, 2009 (hereafter cited as Endangerment Finding), <http://www.masterresource.org/wp-content/uploads/2010/01/Final-endangerment-finding-as-published-in-FR2.pdf>.
- ³ Environmental Protection Agency, Prevention of Significant Deterioration Greenhouse Gas Tailoring Rule; Proposed Rule, 74 FR 55292-55365, October 27, 2009 (hereafter cited as Tailoring Rule), <http://www.masterresource.org/wp-content/uploads/2010/01/Tailoring-Rule-as-published-in-FR8.pdf>.
- ⁴ EPA, Tailoring Rule, pp. 55301, 55304.
- ⁵ EPA, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule, pre-publication version, May 13, 2010.
- ⁶ Clean Air Act §169.
- ⁷ Clean Air Act §501.
- ⁸ For a detailed discussion of the issues, see Nathan Richardson, Greenhouse Gas Regulation under the Clean Air Act: *Does Chevron v. NRDC Set the EPA Free?* Discussion Paper, Resources for the Future, December 2009, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1552138.
- ⁹ EPA, Endangerment Finding, p. 66516.
- ¹⁰ Earth System Research Laboratory, Trends in Atmospheric Carbon Dioxide, Mauna Loa, Hawaii, <http://www.esrl.noaa.gov/gmd/ccgg/trends/>.
- ¹¹ Hansen et al. Target Atmospheric CO₂: Where Should Humanity Aim? http://www.columbia.edu/~jeh1/2008/TargetCO2_20080407.pdf.
- ¹² Bill McKibben, “Gore embraces 350 target at Poznan,” Climate Progress, December 12, 2008, <http://climateprogress.org/2008/12/12/al-gore-350-ppm-co2-target-at-poznan/>.
- ¹³ “Rajendra Pachauri embraces 350 ppm, not as IPCC chair but as human being,” Climate Progress, August 25, 2009, <http://climateprogress.org/2009/08/25/ipcc-chair-rajendra-pachauri-350-ppm-bill-mckibben/>.
- ¹⁴ The Center for Biological Diversity, 350.Org, Petitioners, Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act, December 2, 2009, <http://www.openmarket.org/wp-content/uploads/2009/12/cbd-350org-petition.pdf>.
- ¹⁵ 350.Org is building an “international campaign” in more than 100 countries to reduce CO₂ levels to 350 ppm, according to the group’s website, <http://www.350.org>.
- ¹⁶ Clean Air Act §172.
- ¹⁷ *Whitman v. American Trucking Associations, Inc.* 531 U.S. 457, 465 (2001).
- ¹⁸ Peabody Energy Company, Petition for Reconsideration, Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, February 11, 2010, http://www.epa.gov/climatechange/endangerment/downloads/Petition_for_Reconsideration_Peabody_Energy_Company.pdf.
- ¹⁹ Sen. Lisa Murkowski, Floor Statement: Introduction of Disapproval Resolution, January 21, 2010, http://murkowski.senate.gov/public/?a=Files.Serve&File_id=46342a62-3e24-4f69-98fa-437d6f6f29db.
- ²⁰ Available at <http://www.openmarket.org/wp-content/uploads/2010/03/lisa-jackson-letter-to-jay-rockefeller-feb-22-2010.pdf>.
- ²¹ Environmental Protection Agency, National Highway Traffic Safety Administration, Light Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, April 1, 2010 (hereafter GHG/Fuel Economy Standards Rule), <http://www.epa.gov/otaq/climate/regulations/ldv-ghg-final-rule.pdf>.
- ²² Environmental Protection Agency, California State Motor Vehicle Pollution Control Standards, Notice of Decision Denying a Waiver of Clean Air Act Preemption of California’s 2009 and Subsequent Model Year Greenhouse Gas Standards for New Motor Vehicles, 73 FR 12156-12169, March 6, 2008, <http://edocket.access.gpo.gov/2008/pdf/E8-4350.pdf>.
- ²³ Environmental Protection Agency, California State Motor Vehicle Pollution Control Standards, Notice of Decision Granting a Waiver of Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles; Notice, 74 FR 32744-32784, July 8, 2009, <http://edocket.access.gpo.gov/2008/pdf/E8-4350.pdf>.

-
- ²⁴ Stephen Johnson, Letter to California Governor Arnold Schwarzenegger, December 19, 2007, <http://edocket.access.gpo.gov/2008/pdf/E8-4350.pdf>.
- ²⁵ The joint letter is available at <http://edocket.access.gpo.gov/2008/pdf/E8-4350.pdf>.
- ²⁶ Senate Committee on Environment and Public Works, hearing entitled “Oversight of EPA’s Decision to Deny the California Waiver,” January 28, 2008.
- ²⁷ 49 USC 32919.
- ²⁸ Environmental Protection Agency, Emission Facts: Greenhouse Gas Emissions from a Typical Passenger Vehicle, <http://www.epa.gov/OMS/climate/420f05004.htm>.
- ²⁹ EPA, NHTSA, GHG/Fuel Economy Standards Rule, p. 10.
- ³⁰ For a description of the EISA fuel economy reforms, see Brent D. Yacobucci and Robert Bamberger, Automobile and Light Truck Fuel Economy: The CAFE Standards, CRS Report for Congress, Updated May 7, 2008, <http://ncseonline.org/NLE/CRSreports/08Jun/RL33413.pdf>.
- ³¹ National Research Council, *Effectiveness and Impact for Corporate Average Fuel Economy (CAFE) Standards*, National Academies Press, 2002, p. 27, http://books.nap.edu/openbook.php?record_id=10172&page=27.
- ³² National Automobile Dealers Association, Patchwork Proven: Why A Single National Fuel Economy Standard Is Better For America Than A Patchwork Of State Regulations, January 2009, <http://www.nada.org/NR/rdonlyres/DBCC625E-2E8E-4291-8B23-B94C92AFF7C4/0/patchworkproven.pdf>.
- ³³ California Air Resources Board, Resolution 10-15, February 10, 2010, <http://www.arb.ca.gov/regact/2010/ghgpv10/res1015.pdf>.
- ³⁴ The “historic agreement” reduces rather than eliminates the patchwork. As noted above, automakers will have to meet a separate fuel economy standard within the “California” states and must answer to state-level GHG/fuel economy regulators. In addition, automakers will have to meet two federal standards—one for fuel economy, another for GHG emissions.
- ³⁵ Chamber of Commerce of the United States of America and National Automobile Dealers Association v. U.S. Environmental Protection Agency and Lisa Jackson, October 13, 2009, <http://www.masterresource.org/wp-content/uploads/2010/03/NADA-Chamber-of-Commerce-Oct-13-2009.pdf>.
- ³⁶ Rep. Darrel Issa, Letter to White House Counsel Robert Bauer, March 24, 2010, <http://www.masterresource.org/wp-content/uploads/2010/03/Issa-letters-requesting-info-historic-agreement-due-4-8.pdf>.
- ³⁷ Presidential Records Act, 44. U.S.C. Chapter 22, § 2203.
- ³⁸ Colin Sullivan, “Vow of silence key to White House-Calif. fuel economy talks,” *New York Times*, May 20, 2009, <http://www.nytimes.com/gwire/2009/05/20/20greenwire-vow-of-silence-key-to-white-house-calif-fuel-e-12208.html>.
- ³⁹ Rep. Darrel Issa, Letters to auto executives about vow of silence and other improprieties connected with ‘historic agreement,’ April 22, 2010, http://republicans.oversight.house.gov/images/stories/Letters/2010-04-22_DEI_Smith_to_Whitacre-GM_-_request_info_secret_negotiations_historic_agreement_due_4-301.pdf.
- ⁴⁰ Lisa Jackson, Transparency in EPA’s Operations, April 23, 2009, http://www.peer.org/docs/epa/09_10_08_EPA_All-Employees_Transparency_e-mail.pdf.
- ⁴¹ President Barack Obama, Speech to the National Academy of Sciences, April 27, 2009, http://www.realclearpolitics.com/articles/2009/04/27/obama_speech_academy_of_sciences_transcript_96221.html.
- ⁴² Ian Talley and Joshua Mitchell, “How Dem Leadership Presses Auto Industry on CO2 Proposal,” *The Wall Street Journal*, March 3, 2010, <http://www.nasdaq.com/aspx/company-news-story.aspx?storyid=201003041833dowjonesdjonline000748&title=house-dem-leadership-presses-auto-industry-on-co2-proposal>.
- ⁴³ Available at <http://www.masterresource.org/wp-content/uploads/2010/03/Auto-Alliance-letter-to-House-and-Senate-leaders-March-17-2010.pdf>.
- ⁴⁴ EPA, NHTSA, GHG/Fuel Economy Standards Rule, Table 4A.5-6.
- ⁴⁵ EPA, NHTSA, GHG/Fuel Economy Standards Rule, p. 144.
- ⁴⁶ Even if Congress were to enact a 43 mpg fuel economy standard – substantially more stringent than the 34.1 mpg standard for model year 2016 specified in the EPA/NHTSA joint rule – the net reduction in global temperature would be a hypothetical and undetectable 0.01°C in 2100. See John Christy, Letter to Lisa Jackson, March 10, 2009, http://www.openmarket.org/wp-content/uploads/2010/04/christyjr_epa_090311.pdf.

-
- ⁴⁷ Petitioners' Initial Brief, *Massachusetts v. EPA*, U.S. Supreme Court, August 31, 2006, p. 28, <http://www.abanet.org/publiced/preview/briefs/pdfs/06-07/05-1120petitioners.pdf>.
- ⁴⁸ *Ibid.*, pp. 19-20; Petitioners' Final Reply Brief, *Massachusetts v. EPA*, U.S. Court of Appeals for the District of Columbia, December 17, 2004, p. 7, <http://icta.org/doc/Petitioners%20Final%20Reply%20Brief%201.25.05.pdf>.
- ⁴⁹ *Massachusetts v. EPA*, 549 U.S. 497, 531, April 2, 2007.
- ⁵⁰ Mark P. Mills, *A Stunning Regulatory Burden: The EPA Designating CO₂ as an Air Pollutant*, Greening Earth Society, June 1998, http://www.openmarket.org/wp-content/uploads/2010/05/ges_report_mills_stunning-regulatory-burden1.pdf.
- ⁵¹ Jonathan Z. Cannon, EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources, April 10, 1998, <http://www.law.umaryland.edu/faculty/bpercival/casebook/documents/epaco2memo1.pdf>.
- ⁵² International Center for Technology Assessment, Petition for Rulemaking and Collateral Relief Seeking Regulation of Greenhouse Gas Emissions from New Motor Vehicles under §202 of the Clean Air Act, October 20, 1999, <http://www.icta.org/doc/ghgpet2.pdf>; Petitioners' Final Brief, *Massachusetts v. EPA*, October 12, 2004, pp. 11, 16, <http://www.icta.org/doc/Petitioners'%20Final%20Brief%201.25.05.pdf>; Petitioners' Brief, *Massachusetts v. EPA*, August 31, 2006, pp. 3, 19, <http://www.icta.org/doc/Petitioners'%20Final%20Brief%201.25.05.pdf>.
- ⁵³ Environmental Protection Agency, Advanced Notice of Proposed Rulemaking: Regulating Greenhouse Gas Emissions Under the Clean Air Act; Proposed Rule, 73 FR, July 30, 2008, <http://edocket.access.gpo.gov/2008/pdf/E8-16432.pdf>.
- ⁵⁴ *Massachusetts v. EPA* at 535.
- ⁵⁵ Juliet Eilperin, "Senators try to thwart EPA efforts to cut emissions," *The Washington Post*, January 22, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/21/AR2010012104512.html?nav=emailpage>.