April 15, 2009

The Honorable Lisa Jackson
Administrator
USEPA Ariel Rios Building (AR)
1200 Pennsylvania Avenue, N.W.
Washington, DC 20004

Dear Ms. Jackson:

We write to share our concerns about the endangerment finding for greenhouse gas (GHG) emissions that EPA plans to issue later this month as part of its response to *Massachusetts v. EPA*. The endangerment finding will set the stage for an economic train wreck and a constitutional crisis.

Train Wreck

That the endangerment finding will trigger a regulatory cascade threatening the economy is abundantly documented in EPA's July 2008 *Advanced Notice of Proposed Rulemaking* (ANPR) and numerous comments on it. The endangerment finding will compel EPA to establish GHG emission standards for new motor vehicles under CAA §202, which in turn will make carbon dioxide (CO_2) a pollutant "subject to regulation" under the Act's Prevention of Significant Deterioration (PSD) pre-construction permitting program. In addition, the finding will be precedential for the endangerment test that initiates a National Ambient Air Quality Standards (NAAQS) rulemaking.

No small business could operate under the PSD administrative burden, even apart from any technology investments the firm might have to make to qualify for a permit. An estimated 1.2 million previously unregulated entities (office buildings, big box stores, enclosed malls, hotels, apartment buildings, even commercial kitchens) would become "major stationary sources" for PSD purposes. All would be vulnerable to new regulation, monitoring, paperwork, penalties, and litigation, the moment they undertake to build new facilities or modify existing ones. The flood of PSD permit applications would overwhelm EPA and State agency administrative resources, subjecting "major" sources to additional costs, delays, and uncertainties. A more potent Anti-Stimulus package would be difficult to imagine.

Since EPA plans to find endangerment on both health and welfare grounds, the Agency could be compelled to establish "primary" (health-based) NAAQS for GHGs. Logically, the standard would be set below current atmospheric levels. Even very stringent emission limitations applied worldwide over a century would likely be insufficient to lower GHG concentrations. Yet the CAA requires EPA to ensure attainment of primary NAAQS within five or at most 10 years—and it forbids EPA to take costs into account. Regulate CO_2 under the NAAQS program and there is, in principle, no economic hardship that could not be imposed on the American people.

Constitutional Crisis

To contain the economic fallout from an endangerment finding, EPA, in the ANPR, essentially proposes to rewrite portions of the CAA. EPA, for example, would revise the statutory threshold for PSD regulation from a potential to emit 250 tons per year (TPY) of a regulated pollutant to 10,000, 25,000, or even 100,000 TPY. Under *Chevron v. NRDC*,

EPA has discretion to interpret the CAA where the statute is "silent or ambiguous with respect to the specific issue." But there is nothing ambiguous about 250 TPY. What this and other (though less blatant) examples in the ANPR reveal is that EPA cannot regulate CO_2 under the CAA *and* avoid a regulatory nightmare unless the Agency plays lawmaker and amends the Act—violating the separation of powers.

If, on the other hand, EPA allows the statutory logic of the CAA to unfold, America could easily end up with emission controls far more costly and intrusive than any cap-and-trade proposal Congress has rejected or declined to pass. We could get a Mega-Kyoto system without the people's elected representatives ever voting on it.

Rather than decry this peril to the economy and the polity, some Obama Administration officials and Members of Congress—and many activists—brandish the endangerment finding as a tool of legislative extortion. Their increasingly audible threat: "Enact the Waxman-Markey bill, or we'll unleash the CAA on the economy."

EPA Has a Choice

Obama Administration officials speak as if their hands were tied. That is incorrect. The Supreme Court said that EPA does not have to issue an endangerment finding if it can provide statutory reasons for not doing so. The statutory reasons should be obvious.

An endangerment finding would lead to destructive regulatory schemes that Congress never authorized. Significant uncertainty persists with regard to climate sensitivity—the core scientific issue. Despite the ongoing increase in air's CO_2 content, various measures of public health and welfare—life-expectancy, heat-related mortality, weather-related mortality, air quality, agricultural productivity—continue to improve. Endangerment of public health and welfare is not "reasonably anticipated."

Because EPA has a choice, the Obama Administration cannot truthfully say, "The Court made us do it." If EPA issues an endangerment finding, the Administration will bear responsibility for any increase in consumer energy costs, unemployment, and GDP losses resulting from CAA regulation of CO_2.

Sincerely,

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