

TESTIMONY OF MARLO LEWIS
ON GREENHOUSE GAS REGULATION UNDER THE CLEAN AIR ACT
SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
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My name is Marlo Lewis. I am a senior fellow at the Competitive Enterprise Institute, a free-market, non-profit public policy group. I have been active in the debate on carbon dioxide and the Clean Air Act for nearly a decade. For example, in the 106th Congress, I served as staff director for Rep. David McIntosh (R-IN) when he held the first congressional hearing on the issue and engaged EPA General Counsel Gary S. Guzy in a series of oversight letters examining and challenging the Clinton Administration's interpretation of EPA's authority with respect to carbon dioxide.

Let me cut to the chase. I believe we would not be here today if the Justices of the Supreme Court had known back in April 2007, when they decided *Massachusetts v EPA*, what has since become painfully clear: The Clean Air Act is a flawed, unsuitable, and potentially destructive instrument for reducing greenhouse gas emissions.

As EPA's July 2008 Advanced Notice of Proposed Rulemaking (ANPR) documents, because of the Act's multiple interconnections, setting greenhouse gas emission standards for new motor vehicles under Section 202 could trigger massive, economy-chilling regulation under the New Source Review/Prevention of Significant Deterioration (NSR/PSD) and National Ambient Air Quality Standards (NAAQS) programs.

Few Members of Congress would vote to regulate carbon dioxide under the PSD and NAAQS programs, especially in these perilous times of financial chaos and high energy prices. It is inconceivable that those who drafted and enacted the Clean Air Act

intended for it to undermine the economy and jeopardize environmental enforcement. Yet economic devastation and administrative paralysis are real risks if EPA attempts to pound the square peg of climate policy into the round hole of the Clean Air Act.

Is Massachusetts v EPA Good Law?

The proposition that the Clean Air Act authorizes EPA to regulate carbon dioxide emissions was always dubious, which is why four Justices dissented in *Massachusetts*. To begin with, when Congress wants EPA to regulate particular types of substances for particular purposes, it has no trouble making its intent clear. No one disputes whether EPA has authority to regulate ambient air pollutants, hazardous air pollutants, acid rain-forming substances, or ozone-depleting substances. A glance at the major titles of the Clean Air Act dispels any possible doubt about EPA's authority to control those substances. In stark contrast, there is no climate protection title in the Clean Air Act—nothing even remotely comparable to the NAAQS program, the hazardous air pollutant program, the acid rain control program, or the stratospheric ozone protection program.

Indeed, the Clean Air Act is virtually silent about global warming. The terms “greenhouse gas” and “greenhouse effect” appear nowhere in the Act. The terms “carbon dioxide” and “global warming potential” do appear, but only once, each time in the context of a non-regulatory provision, and in each instance followed by a caveat admonishing EPA not to infer authority for “pollution control requirements” (103g) or “additional regulation” (602e). These admonitions would be pointless if, as the Court majority held, authority to regulate carbon dioxide is already contained in the Act's most general provision—the definition of “air pollutant” (302g).

It may seem strange that the nation's most comprehensive environmental law says next to nothing about an issue widely regarded as the biggest environmental challenge in human history. Yet the Act's reticence in regard to global warming actually makes perfect sense, because climate policy remains an issue of intense, *unresolved* controversy.

Public concern about global warming, and congressional support for regulatory climate policy, are certainly much stronger today than in 1970 and 1977, when Congress enacted and amended Section 202 of the Clean Air Act. Yet as recently as June 2008, the Senate failed to pass legislation (the Lieberman-Warner bill) directing EPA to implement a nationwide greenhouse gas control program. The House has never even brought such a bill to floor.

We have been stuck in climate policy stalemate for some time. Vice President Al Gore negotiated the Kyoto Protocol, and President Clinton signed it, but they did not see fit to submit the treaty to the Senate for a debate and vote on ratification.

Going back even further, during deliberation on the 1990 Clean Air Act Amendments, the Senate rejected a committee proposal to establish carbon dioxide emission standards for new motor vehicles. Although the rejected proposal was much like the policy sought by petitioners in the *Massachusetts* case, the Court majority belittled this legislative history, arguing that "post-enactment congressional deliberations and actions" cannot curtail EPA's "pre-existing" authority under Section 202. Well, of course it can't. Nobody ever said that it could. The point, rather, is that it is silly to pretend that in 1970 or 1977—years before Al Gore held his first congressional hearing on global warming—Congress implicitly authorized EPA to adopt regulatory policies that lawmakers in future Congresses repeatedly tried but failed to enact.

EPA's regulatory practice over three decades also counsels against the view that Congress in 1970 or 1977 authorized EPA to regulate carbon dioxide emissions from new motor vehicles as "air pollution." Ponder for a moment the function of those mainstays of mobile emissions control, catalytic converters and oxygenate fuel additives. Since 1970, the overarching objective of EPA regulation of mobile sources was to ensure that automobile engines burn so cleanly that, ultimately, nothing comes out of the tailpipe except two greenhouse gases: carbon dioxide and water vapor.

To reach the conclusion that carbon dioxide is an "air pollutant" for regulatory purposes, the Court majority had to withhold *Chevron* deference from EPA's reasonable reading of Section 302g. This was in fact the lynchpin of the majority's entire argument. Obviously, if *anything* "emitted into" the ambient air is ipso facto an "air pollutant" for regulatory purposes, then carbon dioxide undeniably falls within EPA's regulatory reach. But the Court majority's interpretation of "air pollutant" is problematic. Section 302g is only two sentences long. Here it is, in full:

The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, or radioactive (including source material, special nuclear material, and by-product material) substance or matter, which is emitted into, or otherwise enters, the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent that the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.

As EPA read the first sentence, to be an “air pollutant,” a substance must not only be “emitted” into or “enter” the air (the necessary condition), it must also be an “air pollution agent” (the sufficient condition). In other words, the substance must *cause air pollution*—it must dirty, foul, or contaminate the air. In EPA’s interpretation, the term “air pollution agent” is a criterion for distinguishing “air pollutants” from non-pollutants. This reading jibes with plain English, as reflected in the very title of the law: *Clean Air Act*. Carbon dioxide does not degrade air quality. By treating the term “air pollution agent” as synonymous with “air pollutant,” the Court majority made the first sentence of 302g hopelessly circular (“an ‘air pollutant’ is an ‘air pollutant’”), with the bizarre result that oxygen, water vapor, and even, as Justice Scalia quipped, Frisbees become “air pollutants.”

But if the Court majority gave short shrift to “air pollution agent,” a key term in the first sentence, it totally ignored second sentence. The second sentence says that a “precursor” of a substance previously designated by EPA to be an air pollutant is also an air pollutant. This sentence would be utterly superfluous if, as the majority held, anything emitted into the air is ipso facto an “air pollutant,” because precursors are also emitted. Courts are not supposed to assume that lawmakers pad statutes with superfluous verbiage. Rather, they are supposed to make a good faith effort to determine the meaning and implications of each sentence of each provision bearing on the case. Ignoring half the provision in dispute without explanation is not kosher.

Admittedly, Section 302g is less than crystal clear. Nonetheless, EPA’s reading is a defensible one, and under *Chevron*, courts are supposed to defer to EPA’s interpretation of an ambiguous provision if that interpretation is a “permissible construction.” EPA’s

construction is certainly permissible—especially when both sentences of the definition are examined together.

If this seems like quibbles over minutia, then let’s look at the big picture. As the ANPR makes clear, setting carbon dioxide emission standards under Section 202 could trigger regulation under numerous provisions of the Act, including an order-of-magnitude expansion of stationary source regulation under the PSD program, and economy-wide regulation of both mobile and stationary sources under the NAAQS program. There is something crazy in the claim that a vague, two-sentence definition of “air pollutant”—the most abstract provision of a law enacted decades ago—mandates wholesale change in the nation’s environmental programs, energy systems, and economy.

Would setting carbon dioxide emission standards under 202 compel EPA to regulate tens of thousands of small businesses under the NSR/PSD program?

Attorney Peter Glaser raised this issue in several congressional testimonies.¹ Glaser pointed out that regulating carbon dioxide under any Clean Air Act provision, including Section 202, would also make carbon dioxide a pollutant “subject to regulation” under the Act’s NSR/PSD pre-construction permitting program. The ANPR amply confirms the accuracy of this analysis.²

¹ Testimony of Peter Glaser and John Cline, EPA’s Approach to Addressing Greenhouse Gases in the Wake of the Supreme Court’s Decision in *Massachusetts v. EPA*, House Committee on Oversight and Government Reform, November 8, 2007; Testimony of Peter Glaser, On the U.S. Environmental Protection Agency’s Response to the Supreme Court’s Decision in *Massachusetts v. EPA*, House Select Committee on Energy Independence and Global Warming, March 13, 2008; Testimony of Peter Glaser, Strengths and Weaknesses of Regulating Greenhouse Gas Emissions Under Existing Clean Air Act Authorities, Subcommittee on Energy and Air Quality of the House Committee on Energy and Commerce, April 10, 2008.

² EPA, Regulating Greenhouse Gas Emissions Under the Clean Air Act, Advanced Notice of Proposed Rulemaking, *Federal Register*, Vol. 3, No. 147, July 30, 2008, pp. 44355, 44418. Hereafter cited as ANPR.

Under the PSD program, a firm may not build a new “major” stationary source of a regulated pollutant, or modify an existing source (if the modification significantly increases emissions) unless the firm first obtains a PSD permit. A source is defined as “major” if it is one of 28 listed industrial categories and has the potential to emit at least 100 tons per year of the regulated pollutant, or is any other type of establishment and has the potential to emit at least 250 tons per year. Two hundred and fifty tons is a reasonable threshold for regulating smog- and soot-forming emissions, which in that quantity may affect local air quality. However, 250 tons is a miniscule amount of carbon dioxide—too little to have any discernible effect on global temperatures even if multiplied a million times over.

Moreover, whereas only large industrial concerns have the potential to emit 250 tons or more of ambient air pollutants like sulfur dioxide or nitrogen oxides, vast numbers of previously unregulated small entities have the potential to emit 250 tons per year of carbon dioxide. As Glaser explained, “A very large number and variety of buildings and facilities exceed this threshold—including many office and apartment buildings; hotels; enclosed malls; large retail stores and warehouses; colleges, hospitals and large assisted living facilities; large houses of worship; product pipelines; food processing facilities; large heated agricultural facilities; indoor sports arenas and other large public assembly buildings; and many others.”³ The ANPR confirms this assessment, as do the accompanying comments by the Department of Commerce and the Small Business Administration Office of Advocacy.⁴

³ Testimony of Peter Glaser, November 8, 2008, pp. 2-3.

⁴ ANPR, pp. 44375, 44497-44500.

To obtain a PSD permit, a regulated entity must install “best available control technology” (BACT), which can be very costly. But even apart from the technology controls, PSD permitting can be expensive and time-consuming, because BACT determinations are made on a case-by-case basis through a review “customized to account for the individual characteristics of each source.”⁵ In Glaser’s opinion, “No small business requiring a moderate-sized building or facility heated with fossil fuel could operate subject to the PSD permit administrative burden.” He cautions: “...just the administrative burden alone—putting aside any BACT or other requirements that would result from the permitting process—would create an overwhelming and unprecedented roadblock to new investment for a host of previously unregulated buildings and facilities.”⁶

The ANPR estimates that, if carbon dioxide becomes a regulated pollutant, the number of entities applying for PSD permits each year would increase by an “order of magnitude”—from about 200-300 permits annually to 2,000 to 3,000.⁷ This is likely an underestimate. To begin with, the ANPR assumes that many small entities will opt to enter into agreements with EPA to emit less than their full “potential to emit.”⁸ For example, an apartment building could pledge not to run its heating unit 24 hours a day during winter months—a promise easily kept. But this means many small firms would have to go through some sort of PSD permitting at least once in order to avoid further regulation.

⁵ ANPR, pp. 44497, 44501.

⁶ Glaser, Testimony, November 8, 2008, pp. 3, 12.

⁷ ANPR, p. 44499.

⁸ ANPR, p. 44501.

Even assuming many firms take this option, EPA's order-of-magnitude estimate is likely off by an order-of-magnitude. Last week, the U.S. Chamber issued a report by Mark and Portia Mills estimating the number of firms *actually emitting* 250 tons of carbon dioxide annually based on fuel purchase data. On average, the report finds, the 250-ton per year threshold is reached when a business uses about \$70,000 of oil or natural gas in stationary equipment. Based on U.S. Census and Energy Information data for energy consumption, the authors estimate that roughly 1.2 million businesses actually emit 250 tons of carbon dioxide per year. This number includes at least one million mid-sized to large commercial buildings, nearly 200,000 manufacturing operations, and about 20,000 farms. All these firms could become subject to new PSD regulation, monitoring, controls, and enforcement.⁹

Applying PSD to carbon dioxide has the potential to bring construction activities to a "screeching halt," as the U.S. Chamber wrote in a December 12, 2007 letter to Congress. In addition, applying PSD to carbon dioxide could flood EPA and its state counterparts with PSD permit applications. Environmental agencies could be forced to squander their administrative resources chasing inconsequential carbon dioxide reductions to the neglect of more critical, statutorily required Clean Air Act responsibilities. Alternatively, they might allow an enormous backlog of PSD applications to pile up, effectively suspending the program.

The ANPR proposes a number of fixes to avoid having to permit every firm seeking to build or modify a facility emitting 250 tons of carbon dioxide. One option is

⁹ Portia M. E. Mills and Mark P. Mills, *A Regulatory Burden: The Compliance Dimension of Regulating CO₂ as a Pollutant*, U.S. Chamber of Commerce, September 2008, p. 3.

simply to set the cutoff much higher—at 10,000, 25,000, or even 100,000 tons.¹⁰ Another approach is to classify compliance with federal energy efficiency standards as compliance with PSD. But these options flout the letter of the law and would likely be challenged in court.

EPA’s justification is an appeal to the doctrine of “absurd results and administrative necessity.” EPA explains:

The Supreme Court has stated that the plain meaning of legislation is not conclusive “in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters’ ...[in which case] the intention of the drafters, rather than the strict language controls.”¹¹

Surely, the drafters never intended for PSD to apply to tens of thousands of small firms, freeze construction activity, or bog down environmental agencies. But the ANPR totally misses the irony here. If the Court majority’s reading of the definition of “air pollutant” leads to absurd results demonstrably at odds with the intentions of the drafters, then maybe the fault lies with the majority’s interpretation.

In any event, betting on courts to uphold EPA rules that flout the plain language of the statute would be a crapshoot. Recent cases—the overturning of EPA’s Clean Air Mercury Rule in February and the overturning of EPA’s Clean Air Interstate Rule in July—suggest that D.C. Circuit Court of Appeals has little patience with rules that don’t strictly adhere to the statute. The court would likely take a dim view of far more blatant attempts to skirt the letter of the law.

¹⁰ ANPR, p. 44505.

¹¹ ANPR, p. 44503.

Would an endangerment finding under Section 202 compel EPA to set NAAQS for carbon dioxide and other greenhouse gases?

Before EPA can set vehicle emission standards under Section 202, it must first find that the emissions in question cause or contribute to air pollution that may reasonably be anticipated to endanger public health and welfare. As the ANPR notes, similar endangerment tests occur in other Clean Air Act provisions.¹² Consequently, an endangerment finding for carbon dioxide under Section 202 could compel or authorize EPA to regulate carbon dioxide under several provisions. The most important of these is Section 108, which governs the first phase of a NAAQS rulemaking.

A NAAQS is an allowable pollution concentration standard. It determines how many parts per million (or billion) of a targeted pollutant is permissible in the ambient air. Plaintiffs in *Massachusetts v EPA* argued that current carbon dioxide levels already harm public health and welfare.¹³ What would it take to actually reduce atmospheric carbon dioxide concentrations?

The Kyoto Protocol, even if faithfully and fully implemented by all industrial countries, including the United States, would barely slow the increase in atmospheric carbon dioxide concentrations.¹⁴ Many Kyotos would be required to stabilize carbon dioxide concentrations at some level, but actually reducing concentrations below today's levels may well be beyond human capability in this century. Even outright de-

¹² ANPR, 44418-44420, finds variations on Section 202's endangerment test in Sections 108 (ambient air quality), 111 (pollution from new sources), 115 (international air pollution), 211 (highway and non-road fuels), 213 (non-road engines and vehicles), 231 (aircraft), and 615 (adverse effects on the stratosphere).

¹³ "Petitioners injuries are not 'some day' injuries, as respondents contend...; they are injuries in the here and now." Petitioners' Final Reply Brief, *Massachusetts v EPA*, November 16, 2006, p. 2.

¹⁴ Tom Wigley. 1998. The Kyoto Protocol: CO₂, CH₄, and climate implications. *Geophysical Research Letters*, Volume 25, Issue 13, pp. 2285-2288.

industrialization of the United States might not be enough to lower atmospheric levels, especially if emerging economies like China and India continue to industrialize, and energy-related U.S. production, jobs, and emissions migrate to those places.

So complying with a NAAQS set below current atmospheric levels would be difficult to achieve even over the course of a century. However, as the ANPR explains, the Clean Air Act requires EPA to ensure that areas designated to be in “non-attainment” with a “primary” or health-based NAAQS come into attainment within five years. EPA has authority to extend the attainment deadline by up to another 5 years, but no later than 10 years after an area is designated as “non-attainment.”¹⁵ In this hypothetical situation, of course, the entire country would be one huge non-attainment area.

So if EPA makes an endangerment finding under Section 202, and this triggers the setting of a primary NAAQS, and EPA heeds plaintiffs’ argument that current atmospheric carbon dioxide concentrations endanger public health, then EPA would have to achieve in 10 years what may not be achievable in a century even if all nations adopt tough measures to reduce carbon dioxide emissions.

One consequence of the nation’s non-attainment with a NAAQS for carbon dioxide is that the U.S. Department of Transportation, pursuant to the Clean Air Act’s “transportation conformity” provisions, would have to stop funding all highway projects.¹⁶

Another consequence is that EPA would have to regulate major stationary sources of carbon dioxide under the non-attainment NSR pre-construction permitting program. This program is similar to the PSD program but differs in three key respects. First, the

¹⁵ ANPR, p. 44484.

¹⁶ ANPR, p. 44481.

cutoff for regulation is a potential to emit 100 tons for all sources, not 250 as would be the case for many stationary carbon dioxide sources under PSD. Second, before a firm can obtain a non-attainment NSR permit to build or modify a major stationary source, the facility must comply with Lowest Achievable Emissions Rate (LAER) standards, which are more stringent than BACT and do not allow EPA to consider cost when processing permit applications. Third, any emission increases from a new or modified source must be offset by reductions from an existing source in the same non-attainment area.¹⁷ Roughly speaking, nothing could be built or expanded anywhere in the United States unless something else is shut down.

In short, applying the NAAQS program to carbon dioxide—a not unlikely consequence of an EPA finding that carbon dioxide emissions from new motor vehicles endanger public health and welfare—could turn the Clean Air Act into something resembling an economic suicide pact. Set a primary NAAQ for carbon dioxide below current atmospheric levels, and there is virtually no economic sacrifice that could not be demanded of the American people. As the ANPR notes, under established legal interpretation, EPA is forbidden to take costs into account when setting NAAQS.¹⁸

The ANPR suggests—and some environmental groups argue—that an endangerment finding for carbon dioxide under Section 202 need not compel the agency to initiate a NAAQS rulemaking. Their argument goes as follows. Under Section 108, EPA has to initiate a NAAQS rulemaking only if the pollutant of concern meets three criteria: (1) Emissions of the pollutant are anticipated to endanger public health and welfare; (2) the pollutant is emitted by numerous or diverse stationary and mobile

¹⁷ ANPR, p. 44498.

¹⁸ ANPR, p. 44478.

sources; and (3) the Administrator plans to issue an air quality “criteria” document for the pollutant. Thus, it is alleged, all EPA needs to do to avoid the obligation to “list” carbon dioxide as an air pollutant to be regulated through NAAQS is simply not “plan” to issue a criteria document.¹⁹

This won’t wash. It is tantamount to saying that EPA can avoid the obligation to set NAAQS to control dangerous emissions from numerous and diverse mobile and stationary sources just by declining to do the paperwork!

EPA Administrator Russell Train tried to employ this dodge, claiming that EPA did not have to list lead as an ambient air pollutant, because he had no plans to issue a criteria document for lead. Train’s interpretation would gut Title I of the Clean Air Act, as the D.C. Circuit Court of Appeals explained:

If the EPA interpretation were accepted and listing were mandatory only for substances “for which (the Administrator) plans to issue air quality criteria...”, then the mandatory language of §108(a)(1)(A) would become mere surplusage. The determination to list a pollutant and to issue air quality criteria would remain discretionary with the Administrator, and the rigid deadlines of §108(a)(2), §109, and §110 for attaining air quality standards could be bypassed by him at will.²⁰

Both David Bookbinder of Sierra Club²¹ and David Doniger of NRDC²² have made this “third criterion” argument at previous congressional hearings. Yet, it was NRDC that

¹⁹ ANPR, p. 44477.

²⁰ *NRDC v Train*, 545 F.2d 320, November 10, 1976, paragraph 13.

²¹ Testimony of David Bookbinder, Before the House Select Committee on Global Warming, Hearing on Massachusetts v EPA Part II: Implications of the Supreme Court Decision, p. 9

²² Testimony of David Doniger, Subcommittee on Energy and Air Quality of the House Committee on Energy and Commerce, Strengths and Weaknesses of Regulating Greenhouse Gas Emissions Under Existing Clean Air Act Authorities, April 10, 2008, p. 18.

successfully sued EPA in 1976 to overturn Train's interpretation and compel EPA to regulate lead under the NAAQS program. Apparently, it is necessary to revive a discredited legal doctrine and argue that EPA's Section 108 obligations are discretionary in order to claim that regulating carbon dioxide under Section 202 poses no risk of imposing economy-crushing burdens under the NAAQS program.

The ANPR proposes another solution to the NAAQS peril, and it too is questionable. The ANPR says that EPA could issue a "secondary" NAAQS designed to protect "public welfare" from the known or anticipated adverse effects of carbon dioxide emissions but not a "primary" NAAQS designed to protect "public health" with an "adequate margin of safety." The advantage here is that a secondary NAAQS has no statutorily prescribed attainment date. EPA compares this approach to its regional haze program, which aims to achieve natural visibility conditions in the nation's parks and wilderness areas by 2064.²³ In contrast, the Clean Air Act would require states to attain a primary NAAQS for carbon dioxide in 10 years.

To present this option, the ANPR has to make the novel argument that the adverse health effects of climate change are "principally or exclusively welfare-related." According to the ANPR, "increased viability or altered geographical range of pests or diseases; increased frequency or severity of severe weather events including heat waves...are...indirect impacts resulting from these ecological and meteorological changes, which are effects on welfare."²⁴

There is some merit to this distinction, but court challenges are easily imaged. If the adverse health effects are what make the ecological and meteorological changes so

²³ ANPR, p. 44481.

²⁴ ANPR, p. 44478.

alarming, then litigants may demand that EPA regulate with a view to protecting public health, and not wait until 2064 for relief.

Furthermore, the analogy with regional haze is flawed, because sources of haze are mostly domestic and largely within the power of EPA and the states to control. In contrast, sources of carbon dioxide are global. As the ANPR admits, "...in the absence of substantial cuts in worldwide emissions, worldwide concentrations of GHGs would continue to increase despite any U.S. emission control efforts." In 2064, the United States might be no closer to attaining a secondary carbon dioxide NAAQS than it is today. Even a secondary NAAQS might not be attainable in many decades despite draconian measures whose costs greatly exceed benefits.

Another problem is that non-attainment of a secondary NAAQS would still trigger permitting and offset burdens under non-attainment NSR. EPA and its state counterparts could still face a red ink nightmare, and thousands of affected firms might have to mothball plans to build new facilities or renovate existing ones.

Conclusion

The ANPR leaves little doubt that the Clean Air Act was not designed or intended to serve as a vehicle for regulating carbon dioxide for climate change purposes.

Congress never intended for Section 202, which deals solely with motor vehicle emissions, to instigate a massive expansion of stationary source regulation, much less to depress the construction industry. Yet regulating carbon dioxide under Section 202 could compel EPA and its state counterparts to subject thousands of previously unregulated firms to new PSD regulation, monitoring, controls, and enforcement.

Congress did not intend for Section 202 to overwhelm the administrative resources of EPA and its state counterparts. Yet that could happen if EPA sets carbon dioxide emission standards for new motor vehicles, making carbon dioxide an air pollutant subject to regulation under PSD.

Congress did not intend for Section 202, which requires EPA to consider compliance costs when setting tailpipe emission standards, to leverage money-is-no-object regulation under the NAAQS program. Yet if EPA finds that carbon dioxide endangers public health under Section 202, the logic of Section 108, as interpreted by the D.C. Circuit Court of Appeals in *NRDC v Train*, could compel EPA to do just that.

Above all, Congress never intended for Section 202 to allow litigants and courts to set climate and energy policy for the nation.

President Bush has come under harsh criticism for publishing an ANPR rather than taking the first steps to regulate carbon dioxide under the Clean Air Act. However, it is doubtful that either a President McCain or a President Obama will want to take ownership of the “glorious mess” that EPA regulation of carbon dioxide under the Clean Air Act could create.

The ANPR reminds us of what should have been obvious from the start. Despite appearances, *Massachusetts v EPA* was not really about emission standards for new motor vehicles. Rather, the case was meant to tee up regulatory dominoes to bring about wholesale changes in U.S. environmental programs, energy systems, and the economy. However, changes of such magnitude should not depend on lawyerly disputations over the definition of “air pollutant.” Rather, such changes should only be made in full view of the public by the politically accountable branches of government.

Thank you for giving me the opportunity to testify. I would be happy to take questions.