

ONE HUNDRED ELEVENTH CONGRESS
Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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March 24, 2009

The Honorable Carol Browner
Assistant to the President for Energy and Climate Change
158 Eisenhower Executive Office Building
The White House
Washington D.C. 20502

Dear Ms. Browner,

I am writing to express serious concern over reports that the Environmental Protection Agency (EPA) has finalized an “endangerment finding” under Section 202 of the Clean Air Act (CAA) with respect to carbon dioxide (CO₂) and other greenhouse gasses (GHGs).¹ I am concerned because EPA’s push to issue an endangerment finding on an accelerated timetable is at odds with the Administration’s efforts to encourage a stable economic climate and encourage new investment. Such a finding would place thousands of American small businesses, already struggling in one of the toughest economic climates our generation has ever seen, in a legally uncertain position, further threatening their survival in this economy². Accordingly, in your position as Assistant to the President for Energy and Climate Change, I urge you to consider the fragility of our economy, and take the time necessary to fully consider and plan for the wide ranging implications that an endangerment finding could have.

As of Friday, March 21, 2009, the White House has been in possession of the endangerment finding and is now conducting a final review. As you are aware, once an endangerment finding has been made under any section of the Act, the CAA regulatory apparatus is set in motion, and cannot be stopped.³ Given the dramatic consequences of an endangerment finding for CO₂, it is inexcusable that the Administration would hastily issue a finding, with no accompanying regulations clarifying its impact. I sincerely hope that the Administration is not proceeding in such haste for the purpose of forcing Congress’s hand in the climate change debate, making climate change legislation imperative if we are to avoid serious damage to the already fragile economy.

¹ Jessica Leber, *EPA pushes climate endangerment finding forward*, CLIMATE WIRE, March 24, 2009, available at <http://www.eenews.net/climatewire/2009/03/24/3>.

² Letter from Congressman Darrell Issa, Ranking Member, House Committee on Oversight and Government Reform to The Honorable Lisa Jackson, Administrator, Environmental Protection Agency, March 12, 2009 [hereinafter *Letter*]

³ Letter from William Kovacs, Vice President, U.S. Chamber of Commerce to the Honorable Stephen Johnson, Administrator, Environmental Protection Agency, Oct. 10, 2008, (stating that, “PSD is triggered the moment CO₂ becomes a regulated pollutant under the CAA.”) (available at <http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&d=EPA-HQ-OAR-2008-0318-0402.1>)

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March 24, 2009
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In its public statements, EPA obfuscates the truth by maintaining that the document “*does not propose any requirements on any sources of greenhouse-gas emissions. The proposed finding does not impose any new regulatory burdens on any projects, let alone those funded under the American Relief and Recovery Act.*”⁴

According to Earthjustice, an environmental advocacy group, the decision could have immediate effects, impeding the construction and permitting of new energy projects.⁵ Nothing in the CAA limits the application of permitting requirements to energy sources, so it could be applied to thousands of small businesses, farms, churches, and schools, subjecting the owners to unknown civil liabilities if they fail to obtain necessary permits.⁶

Additionally, classifying CO₂ as a regulated pollutant will trigger obligations under the National Environmental Policy Act (NEPA), which requires federal agencies to prepare a detailed statement known as an Environmental Impact Statement (EIS) for any agency decision that will have an environmental impact, such as increasing the amount of CO₂ emitted into the atmosphere.⁷ The obligation to conduct NEPA analysis could slow down the distribution of federal dollars for “shovel ready” projects.

After the AIG fiasco, certainly the Administration understands the need for cultivating a predictable regulatory environment, and not one that shifts on a daily basis. Issuing an endangerment finding for CO₂ and other GHGs at this time would exacerbate legal uncertainty for thousands of businesses, large and small alike, and would impose onerous permitting requirements on new construction. I strongly urge you to take the time necessary to fully consider the implications of making an endangerment finding. Enhanced political leverage to influence the cap-and-trade debate on the Hill is not sufficient justification for letting this genie out of the bottle.

Moreover, I would appreciate a prompt response to the questions posed to EPA in my letter (attached), sent to EPA on March 12, 2009. If you have any questions concerning this or the previous letter, please contact Kristina Moore of the Committee staff at 202-225-5074.

Sincerely,



Darrell E. Issa
Ranking Member

cc: The Honorable Edolphus Towns, Chairman
The Honorable Lisa Jackson, Administrator, U.S. EPA

⁴ *Id.*

⁵ *Id.*

⁶ *Letter, supra*, note 2.

⁷ Noelle Straub, *NEPA Reviews Shouldn't Delay Stimulus Projects, Experts Say*, GREENWIRE, March 24, 2009, (quoting Horst Greczmiel, CEQ's associate director of NEPA oversight, who said, “many agency leaders will come to grips with NEPA for the first time when they see a report going to Congress saying their stimulus projects are not ready to proceed”)(available at <http://www.eenews.net/Greenwire/2009/03/24/2.>)

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March 12, 2009

The Honorable Lisa Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Administrator Jackson:

I am writing to express serious concern about recent media reports that the Environmental Protection Agency is finalizing an Endangerment Finding under Section 202 of the Clean Air Act to regulate Carbon Dioxide (CO₂) and other greenhouse gasses (GHGs). If finalized, an endangerment finding would have an immediate and negative impact on many sectors of the economy that are already struggling in these challenging times.

As you are aware, on July 30, 2008, EPA released an Advanced Notice of Proposed Rulemaking (ANPR) to solicit comments on possible regulation of Carbon Dioxide under the Clean Air Act (CAA). The 1,000 page document laid out a detailed plan for economy-wide emission regulation, covering dozens of mobile sources and many stationary sources, such as farms, churches, schools, and hospitals, to name a few. EPA solicited the public's input because, "*the potential regulation of greenhouse gases under any portion of the CAA could result in an **unprecedented expansion** of EPA authority that would **have profound effect on virtually every sector of the economy and touch every household in this land.***"¹ EPA received thousands of comment letters in response to this unprecedented solicitation.

According to a news article published in Greenwire, "*EPA Document Shows Endangerment Finding on Fast Track,*" the U.S. EPA is now on a schedule to complete Final Agency Review of an Endangerment Finding for CO₂ and other GHGs by March 18, 2009.² Moreover, it appears that EPA intends to issue an endangerment finding under

¹ Regulating Greenhouse Gas Emissions under the Clean Air Act, 73 Fed. Reg. 44,355 (July 30, 2008), (emphasis added).

² Darren Samuelsohn, *EPA Document Shows Endangerment Finding on Fast Track*, GREENWIRE, March 10, 2009, available at <http://www.eenews.net/Greenwire/2009/03/10/1>.

Section 202 of the CAA for both public health and welfare in the very near future.³ However, there is no indication that EPA intends to issue any accompanying regulations.

As you are aware, the CAA is very clear that once an endangerment finding occurs under any section of the Act, the newly labeled pollutant is subject to regulation under the entire Act, as a matter of law. The decision of whether to regulate is not left to the Administrator's discretion. The result is a regulatory dragnet that entangles even the smallest of entities. While appropriate for other criteria pollutants, the 250 tons per year (TPY) emissions threshold that triggers regulation is a relatively small amount of CO₂/GHG emissions. In fact, once EPA issues an endangerment finding, thousands of small businesses, farms, churches, and schools, could be regulated by EPA.

However, it is a certainty that the immediate result of issuing an endangerment finding is that thousands of American small businesses, already struggling in one of the toughest economic climates our generation has ever seen, will be thrown into a sea of legal uncertainty, further depressing their ability to stay viable. Literally hundreds of thousands of small businesses could be newly obligated to obtain a permit to emit CO₂ and other GHGs. Moreover, the issuance of an endangerment finding immediately exposes the owners of these small businesses to unknown civil liabilities if they fail to obtain the necessary permits.

Clearly, as scores of commentators discussed in their response to the ANPR, the ramifications of an affirmative endangerment finding for CO₂ or other GHGs to the American economy could be absolutely devastating.

As a result of the enormous ramifications that accompany an endangerment finding, along with the Administration's accelerated timeline to issue such a finding, I respectfully request that you provide detailed explanations to the following questions, no later than March, 18, 2009.

1. According to the briefing document, the Endangerment Determination will respond to key comments EPA received on the ANPR⁴.
 - a. How many pages of comments did EPA receive in response to the July 30, 2009 ANPR by the November 28, 2008 deadline?
 - b. How many of these comments, received by the deadline, were in favor of an endangerment determination? And how many were opposed?
 - c. Describe the process the agency employed in order to review such a large volume of comments.
 - d. Are all the comments publically available? If so, how long did it take EPA to make all comments, received by the November 28 deadline, publically available?
 - e. How did the Agency determine what "Key Comments" should be responded to?

³ Proposed Endangerment Finding for GHGs in Response to *Mass. v. EPA*, Guidance Option Selection Briefing, (March 6, 2009) [hereinafter, *Option Selection Slides*]

⁴ *Option Selection Slides* at 8.

2. How will EPA respond to the widespread concern that an endangerment finding 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)?
3. How will EPA respond to the widespread concern that an endangerment finding for new motor vehicles under Section 202(a)(1) will, as a matter of law, result in the mandatory imposition of New Source Performance Standards (NSPS)?
4. How will EPA respond to the widespread industry concern that an endangerment finding for new motor vehicles under Section 202(a)(1) will, as a matter of law, result in the mandatory imposition of Title V permitting, as well as the widespread exposure to the Prevention of Significant Deterioration (PSD) permit program to stationary sources?
 - a. An August 2008 EPA analysis of PSD/NRS permitting cost found that the average cost in 2007 for 282 permits was \$125,120 to the applicant and a burden of 866 hours. The additional cost to state and local agencies was \$23,280 and 301 hours per application.⁵ According to a recent study created for the U.S. Chamber of Commerce, at least one million mid-sized to large commercial buildings emit enough CO₂ per year to become EPA regulated stationary sources, subject to permitting requirements.⁶
 1. Describe how EPA plans to handle the dramatic increase in volume of PSD/NSR permits that will accompany a positive endangerment finding.
 2. Did EPA account for such a foreseeable increase in operating expenses in its 2010 Budget? If not, why not?
 3. How many additional staff does EPA plan to hire in order to process the spike in PSD/NSR permit requests?
 - b. Has EPA conducted an analysis of the expected cost to private entities that will have to comply with PSD/NSR permitting requirements? Please describe the analysis. If no such analysis has been conducted, please explain why not.
5. What is EPA's projected timeline for issuing CO₂/GHG regulations for mobile sources under Section 202 of the Clean Air Act?
6. What is EPA's projected timeline for issuing regulations or additional endangerment findings under other sections of the CAA?
7. According to the briefing document, there are no direct health effects associated with elevated CO₂/GHG ambient concentrations "the range of projected ambient

⁵ Information Collection Request for Prevention of Significant Deterioration and Nonattainment New Source Review (40 CFR Part 51 and 52). Carrie Weaver, Operating Permits Group (C504-03), Air Quality Policy Division, Office of Air Quality Planning Standards, Office of Air and Radiation, USEPA, p. 16-20.

⁶ "A Regulatory Burden: The Compliance Dimension of Regulating CO₂ as a Pollutant." Portia M.E. Mills and Mark P. Mills. September 2008, p.3.

concentrations of CO₂ and other GHGs will remain well below published thresholds for any direct adverse health effects, such as respiratory or toxic effects.”⁷

- a. Has EPA ever before found a pollutant to “endanger human health” under section 202 of the CAA solely on the basis of indirect health effects? Under any other section of the CAA?
 - b. Please list all relevant precedents EPA relied on to justify its decision to find endangerment on the basis of indirect health effects.
8. According to the briefing document, EPA “does not confine analysis to observed and projected effects attributable only to U.S. transportation GHG emissions.” However, the plain language of Section 202 of the CAA explicitly narrows the scope of the Administrator’s review to emissions from mobile sources.⁸ Please explain why EPA did not confine its analysis to the CO₂/ GHGs emitted by mobile sources.
9. The Office of Advocacy, within the Small Business Administration, indicated in its comment letter that if “EPA chooses to go forward with plans to use the CAA to address climate change, the Office of Advocacy will insist that the views of small entities be considered in the pre-proposal stage required by the Small Business Regulatory Enforcement Fairness Act (SBREFA).”⁹ Given the obligation to regulate once an endangerment determination has been made, has EPA conducted a Small Business Advocacy Review (SBAR) panel with the Office of Advocacy? If not, does EPA intend to participate in an SBAR panel before issuing an endangerment finding? Before issuing any other regulations controlling CO₂/GHGs?

If you have any questions concerning this letter, please contact Kristina Moore of the Committee Staff at 202-225-5074.

Sincerely,



Darrell E. Issa
Ranking Member

cc: Edolphus Towns, Chairman

⁷ Option Selection Slides at 14.

⁸ 42 U.S.C. section 202 (stating, “the Administrator shall by regulation prescribe... standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines... which cause or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”)

⁹ Letter to EPA Administrator Stephen Johnson by Thomas M. Sullivan, Chief Counsel for Advocacy, Small Business Administration Office of Advocacy. July 8, 2008.