



**THE SELECT COMMITTEE ON
ENERGY INDEPENDENCE AND GLOBAL WARMING**
The Honorable Edward J Markey

**Report of the Select Committee on Energy Independence
and Global Warming Majority Staff**

**Investigation of the Bush Administration's Response to *Massachusetts v. EPA*:
How Big Oil Persuaded the Bush Administration to Abandon Proposed
Regulations for Global Warming Pollution**

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EXECUTIVE SUMMARY

This investigative report for the first time details an as-yet undisclosed element of the Bush Administration's response to the Supreme Court's decision in *Massachusetts v. EPA*: In the fall of 2007, the highest levels of the Bush Administration decided for the first time to use the Clean Air Act to regulate emissions of greenhouse gases from stationary sources such as power plants, refineries, industrial boilers, and cement manufacturing plants – in addition to its proposal to regulate these emissions from motor vehicles. This plan was developed by EPA officials, approved by EPA Administrator Stephen Johnson, and ultimately endorsed by the office of President George W. Bush's Chief of Staff – with the concurrence of numerous heads of Cabinet departments and White House offices.

However, the proposals to regulate both motor vehicle and stationary source emissions in response to *Massachusetts v. EPA* were abandoned sometime between December 2007 and early 2008. At that time, the office of the Chief of Staff of President Bush reversed course in response to heavy lobbying by prominent oil industry representatives and at least one senior adviser to Vice President Dick Cheney, all of whom argued that regulations to reduce greenhouse gas emissions would tarnish the President's anti-regulatory legacy and therefore should be best left to the next President.

Specifically, an investigation by the Select Committee on Energy Independence and Global Warming, based on an on-the-record interview with a former high-ranking EPA official, confidential discussions with other EPA staff, and review of EPA documents obtained in response to a Select Committee subpoena, reveals the following:

- 1) President Bush's Deputy Chief of Staff Joel Kaplan and numerous heads of Cabinet agencies and White House offices endorsed (i) EPA's finding that greenhouse gas emissions endanger public welfare, and (ii) EPA's proposals that both vehicle and stationary source greenhouse gas emissions should be regulated under the Clean Air Act.** Through an extensive inter-agency process, EPA Administrator Johnson and other EPA officials consulted with numerous heads of Cabinet agencies and White House offices regarding EPA's proposal to find that greenhouse gas emissions endanger public welfare and to issue regulations under the Clean Air Act, for both vehicles and stationary sources. These discussions included direct meetings or other interactions with Secretary of Transportation Mary E. Peters, Secretary of Energy Samuel W. Bodman, Secretary of Commerce Carlos M. Gutierrez, Secretary of the Treasury Henry M. Paulson, Jr., Chairman of the White House Council of Economic Advisers Edward P. Lazear, Administrator Susan E. Dudley of the White House Office of Management and Budget's Office of Information and Regulatory Affairs, James L. Connaughton, Chairman of the White House Council on Environmental Quality, and Joel Kaplan, the White House Deputy Chief of Staff for Policy. EPA found that all of these officials agreed with EPA Administrator Johnson's conclusion that EPA had a scientific and legal obligation to make a positive endangerment finding that greenhouse gas emissions from motor vehicles endanger public welfare, and that greenhouse gas emissions from *both* mobile and stationary sources should be regulated using Clean Air Act Authority. White House Deputy Chief of Staff Kaplan personally approved EPA's plan to go forward with a positive endangerment finding, which would necessitate the regulation of greenhouse gas

regulations for motor vehicles and fuels, as well as trigger regulation of stationary source emissions under the Clean Air Act.

- 2) **There was widespread agreement within the Bush Administration that greenhouse gas emissions from motor vehicles endanger public welfare and should be regulated.** EPA Administrator Johnson agreed with the determinations of his scientific and legal staff that EPA had a scientific and legal obligation to make a positive finding that greenhouse gas emissions from motor vehicles endanger public welfare and to promulgate regulations to reduce these emissions using Clean Air Act authority. EPA Administrator Johnson approved and submitted to the White House a proposed positive endangerment finding and submitted to the Department of Transportation proposed regulations to reduce motor vehicle greenhouse gas emissions.
- 3) **EPA additionally concluded that greenhouse gas emissions from stationary sources such as power plants and refineries should also be regulated using Clean Air Act authority.** EPA Administrator Johnson agreed with the determinations of his scientific and legal staff that EPA also had a scientific and legal obligation to proceed with the regulation of greenhouse gas emissions from stationary sources such as power plants, refineries, industrial boilers, and cement manufacturing plants, also using Clean Air Act authority. EPA Administrator Johnson submitted to the White House and numerous other agencies a plan to regulate power plants, refineries, cement plants, industrial boilers, and other stationary sources of greenhouse gas emissions, and planned to issue proposed regulations in the spring of 2008.
- 4) **The oil industry argued against regulatory action, and had the support of the Office of Vice President Cheney.** In developing its proposals to make a positive endangerment finding and to regulate the greenhouse gas emissions from both vehicles and stationary sources, EPA consulted with a wide range of environmental and industry stakeholders. Environmental stakeholders and, interestingly, some electric utility representatives, including the Edison Electric Institute (which represents the nation's major investor-owned utilities), agreed that it would be best for EPA to proceed with regulation of both vehicles and stationary sources using Clean Air Act authority. But others, including oil industry representatives from ExxonMobil, the American Petroleum Institute, and the National Petrochemicals and Refiners Association, adopted a "not on my watch" approach – arguing that such regulations would tarnish President Bush's conservative anti-regulatory legacy, and should be delayed until the next President took office. Those arguments were echoed, within the White House, by Vice President Cheney's energy adviser, F. Chase Hutto III.
- 5) **Doing the oil industry's bidding, the Bush administration reversed course.** After passage of the Energy Independence and Security Act (EISA) in 2007, the arguments put forward by the oil industry representatives began to prevail in inter-agency and White House discussions on how to respond to the *Massachusetts v. EPA* decision. By March 2008, EPA announced that, instead of issuing proposals for a positive endangerment finding and regulations, it would move forward with a non-regulatory "Advance Notice of Proposed Rulemaking" (ANPR). By mid-April 2008, President Bush announced in a speech that "the Clean Air Act, the Endangered Species Act, and the National

Environmental Policy Act were never meant to regulate global climate change,” and went on to assert that Congress, not the Executive Branch, was responsible for deciding how to address greenhouse gas emissions. Appended to the EPA’s text of the ANPR released on July 11, 2008 were letters from a number of Cabinet secretaries and heads of White House offices – all of whom had previously supported regulation of both vehicles and stationary sources under the Clean Air Act — embracing the President’s and the oil industry’s views that the Clean Air Act was a flawed instrument unsuited for regulation of greenhouse gases. The issuance of the ANPR cemented the goal of “not on my watch” and assured that the Bush Administration would take no regulatory action on greenhouse gas emissions despite the Supreme Court’s decision in *Massachusetts v. EPA*.

BACKGROUND AND HISTORY

The April 2007 Supreme Court decision in *Massachusetts v. EPA*,¹ required EPA to determine whether greenhouse gas emissions from motor vehicles and fuels cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare (a so-called “endangerment finding”), and if so, to issue regulations addressing such emissions.

On May 14, 2007, President Bush directed EPA, along with other agencies, to prepare proposed rules in response to *Massachusetts v. EPA* by the end of 2007 and to finalize such rules by the end of 2008.² As Associate Deputy Administrator of the Environmental Protection Agency and chief adviser on climate to EPA Administrator Stephen L. Johnson, Mr. Jason Burnett played a key role in developing and coordinating EPA’s response to the President’s directive. The Select Committee recently held an on-the-record interview with Mr. Burnett.

After President Bush issued the May 14, 2007 Executive Order directing a regulatory response to *Massachusetts v. EPA*, EPA began an extensive process to assess whether greenhouse gas emissions from motor vehicles endangered public health or welfare and to develop, in close collaboration with the National Highway Traffic Safety Administration, proposed regulations to reduce such emissions.³

Throughout the next several months, EPA officials repeatedly confirmed the Administration’s commitment to publish proposed regulations by the end of 2007 – using the President’s “20 in 10” proposal to reduce U.S. oil consumption by 20 percent in 10 years by increasing fuel economy standards and the renewable fuel standard as a starting point. Examples of such statements include the following:

May 14, 2007: EPA Administrator Johnson: “While the President’s 20 in 10 plan, which would increase the supply of renewable and alternative fuel and reform the CAFE standards, will serve as a guide, we have not reached any conclusions about what the final regulation will look like.”⁴

July 22, 2007: EPA Administrator Johnson: “[I]n May, the President directed us to move ahead and take the first regulatory step to address greenhouse gas emissions from cars. We’re working across agencies to develop a proposed regulation under the Clean Air Act by the end of this year, with final rules due out by the end of next year.”⁵

November 8, 2007: EPA Administrator Johnson: “In addition, since the Supreme Court decision, we have announced that we are developing a proposed regulation to regulate greenhouse gas emissions from mobile sources. That is the first time in our Nation’s history, and

¹ 549 U.S. 497 (2007), available at <http://www.supremecourtus.gov/opinions/06pdf/05-1120.pdf>

² See <http://www.whitehouse.gov/news/releases/2007/05/20070514-4.html>

³ See, for example, “EPA Won’t Act on Emissions This Year,” *Washington Post*, July 11, 2008;

⁴ Remarks made during the press conference on the Executive Order on May 14, 2007.

⁵ See

<http://yosemite.epa.gov/opa/admpress.nsf/8d49f7ad4bbcf4ef852573590040b7f6/66b2f9fee31c05385257321004936a1!OpenDocument>

I have committed to members of Congress and to the President that we will have that proposed regulation out for public notice and comment beginning by the end of this year and to work toward a final rule by the end of next year.”⁶

⁶ See <http://oversight.house.gov/documents/20071115145634.pdf>

ANALYSIS

This investigative report draws from an extensive on-the-record interview with Mr. Burnett conducted by Select Committee counsel, from EPA documents made available only to the Select Committee after the issuance of a subpoena, from confidential discussions with EPA staff, and from publicly available documents and reports. The investigation reveals the following:

I. PRESIDENT BUSH'S DEPUTY CHIEF OF STAFF JOEL KAPLAN AND NUMEROUS HEADS OF CABINET AGENCIES AND WHITE HOUSE OFFICES ENDORSED EPA'S FINDING THAT GREENHOUSE GAS EMISSIONS ENDANGER PUBLIC WELFARE, AND EPA'S PROPOSAL THAT BOTH VEHICLE AND STATIONARY SOURCE GREENHOUSE GAS EMISSIONS SHOULD BE REGULATED UNDER THE CLEAN AIR ACT.

According to the Select Committee's investigation, senior officials and heads of numerous Cabinet agencies and White House offices participated extensively in the process leading to the EPA's formulation of its response to the *Massachusetts v. EPA* decision. This was true not only for the specific requirements of the Supreme Court decision that EPA determine whether greenhouse gas emissions from motor vehicles endanger public health or welfare and if so, how they should be regulated, but also for EPA's proposal to regulate greenhouse gas emissions from stationary sources including power plants, refineries, and cement manufacturing plants. Ultimately, these Cabinet agencies and White House offices concurred in EPA's decision to issue a positive endangerment finding and to regulate greenhouse gas emissions from both vehicles and stationary sources.

Among the specific points uncovered by the Select Committee's investigation:

- In November of 2007, EPA Administrator Johnson determined that greenhouse gas emissions from motor vehicles endanger public welfare, and received authorization from White House Deputy Chief of Staff Joel Kaplan (with the concurrence of other Cabinet departments and White House offices) to propose the endangerment finding and formally submit it to the White House Office of Management and Budget for review.⁷
- There was broad consensus throughout the highest levels of the Bush Administration that regulation of greenhouse gas emissions from stationary sources under the Clean Air Act was inevitable, and that the Clean Air Act could be effectively used to regulate both motor vehicles and the largest stationary sources, including power plants, refineries, utility and industrial boilers, and cement manufacturing plants.⁸
- In November 2007, EPA Administrator Johnson received authorization from White House Deputy Chief of Staff Kaplan to proceed with the formal submission of EPA's endangerment finding for greenhouse gas emissions from motor vehicles and fuels, which

⁷ Transcript of July 14, 2008 Select Committee interview with Jason Burnett (hereinafter "Burnett Interview Transcript"), pages 37-38.

⁸ Burnett Interview Transcript, pages 28-30.

would then require the regulatory proposal for reducing emissions from motor vehicles to also move forward.⁹

- During the same November 2007 timeframe, EPA Administrator Johnson also submitted to Susan Dudley (Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB)), James Connaughton (Chairman, White House Council on Environmental Quality (CEQ)), Amy Farrell (CEQ), and Keith Hennessey (Assistant to the President for Economic Policy and Director of the U.S. National Economic Council) a plan to regulate greenhouse gas emissions from 4-5 categories of stationary sources using Section 111 of the Clean Air Act.¹⁰ This occurred after EPA had already received agreement to move forward with the plan from numerous Cabinet agencies and White House offices (including but not limited to the Secretaries of Energy and Treasury, and heads of the White House Council of Economic Advisors, White House Council on Environmental Quality, and the Administrator of the Office of Information and Regulatory Affairs in the White House Office of Management and Budget). This plan indicated that EPA would propose regulations in the spring 2008 and finalize them by fall 2008.¹¹
- As Mr. Burnett put it, “it was the general belief of the political leadership of this administration that if they moved forward with the challenge, that they could put in place a sensible framework. And the general feeling was that it made sense to establish that mark and set that precedent for such an important decision.... This decision was and is a profound decision for the country, and had the attention of individuals at the very highest level.... There was a general belief that moving forward with a challenge and establishing a precedent in channeling regulation would serve the country better than leaving the challenge to the next administration.”¹²

⁹ Burnett Interview Transcript, page 37.

¹⁰ Burnett Interview Transcript, page 33.

¹¹ Burnett Interview Transcript, page 28.

¹² Burnett Interview Transcript, page 28-30.

II. THERE WAS WIDESPREAD AGREEMENT WITHIN THE BUSH ADMINISTRATION THAT GREENHOUSE GAS EMISSIONS FROM MOTOR VEHICLES ENDANGER PUBLIC WELFARE AND SHOULD BE REGULATED

The consensus that at one time existed within the Bush Administration that greenhouse gas emissions from motor vehicles endanger public welfare and should be regulated has been documented in part elsewhere. Additional insights into the process that developed this consensus have emerged from the Select Committee's investigation:

- From the time of the President's May 2007 Executive Order through the fall of 2007, there was broad support within the White House and the Administration for regulating greenhouse gas emissions from motor vehicles and fuels under the Clean Air Act as a means to achieve the President's goal of reducing U.S. dependence on imported oil. However, some senior White House officials, including Vice President Cheney's energy adviser F. Chase Hutto III and OMB General Counsel Jeffrey Rosen, opposed such regulations from the outset.¹³
- According to Mr. Burnett, "formulating a response to the *Massachusetts v. EPA* Supreme Court case was the highest priority for the agency, for the Administrator, during this period of time. And these briefings received very high level attention across the agency, across the relevant offices and the senior political and career leadership. That included the heads of the policy office, the air office, the general counsel's office, and others within – myself and others within the Administrator's office."¹⁴
- Moreover, Mr. Burnett characterized the view of the EPA as being one that recognized "that regulation would be required under the Clean Air Act unless Congress passes new legislation that supersedes or replaces the Clean Air Act authority. So we weren't so much asking ourselves whether regulation would be appropriate, but how regulation could best be developed, given that it was required by the Clean Air Act and the Supreme Court's interpretation of the Clean Air Act."¹⁵
- In November of 2007, after both an internal EPA process and an inter-agency process, EPA Administrator Johnson determined that greenhouse gas emissions from motor vehicles endanger public welfare. EPA Administrator Johnson received approval from White House Deputy Chief of Staff Kaplan, with the concurrence of other Cabinet departments and White House offices, to propose a positive endangerment finding and to formally submit the finding to OMB.¹⁶
- On December 5, 2007, Mr. Burnett submitted EPA's formal endangerment finding proposal via email to Susan Dudley at OMB. A draft of EPA's proposed regulations to

¹³ Burnett Interview Transcript, pages 56-57.

¹⁴ Burnett Interview Transcript, page 13.

¹⁵ Burnett Interview Transcript, page 14.

¹⁶ Burnett Interview Transcript, page 38.

reduce greenhouse gas emissions from motor vehicles was submitted to the Department of Transportation in the same December 2007 timeframe.¹⁷

After a lengthy negotiation with EPA and the White House Counsel's office following the April 3, 2008 issuance by the Select Committee of a bipartisan subpoena, both the December 2007 proposed endangerment finding and draft regulations were made available to Select Committee staff. For a summary of the conclusions contained within these documents, please see Appendix B.

¹⁷ See "EPA chief is said to have ignored staff", *LA Times*, December 21, 2007.

III. EPA ADDITIONALLY CONCLUDED THAT GREENHOUSE GAS EMISSIONS FROM STATIONARY SOURCES SUCH AS POWER PLANTS AND REFINERIES SHOULD ALSO BE REGULATED USING CLEAN AIR ACT AUTHORITY

In the wake of the *Massachusetts v. EPA* decision, it was widely recognized both inside EPA and beyond that, because of the complex interrelationship between various provisions of the Clean Air Act, making a positive endangerment finding for vehicles and fuels would likely trigger a series of regulatory consequences for greenhouse gas emissions from stationary sources, such as power plants and refineries.

Several stationary source provisions of the Clean Air Act include a requirement nearly identical to that in Sections 202(a) and 211 (which deal with vehicles and fuels, respectively) that prior to regulation, an “endangerment finding” must be made. Most important among these are Sections 108 and 109 (dealing with setting and enforcing National Ambient Air Quality Standards) and Section 111 (dealing with emissions standards for certain categories of stationary sources). Given the “endangerment finding” trigger for regulation under these other sections, EPA recognized that if it determined that greenhouse gas emissions from motor vehicles and fuels endangered public health or welfare, that finding would likely compel EPA ultimately to make such an endangerment finding for and regulate greenhouse gas emissions from stationary sources as well.

In addition, EPA recognized that any regulation of greenhouse gas emissions under the Clean Air Act could require EPA to regulate greenhouse gas emissions from a vast array of small sources, such as commercial and public buildings, under the Clean Air Act’s Prevention of Significant Deterioration, or “PSD,” provisions (Sections 165 and 169). That is so because, while the emissions threshold triggering regulation under the PSD program (100 or 250 tons per year, depending on the source category) captures only large sources for conventional pollutants like sulfur dioxide, it would capture many smaller sources for carbon dioxide emissions. (An overview of some of the relevant stationary source Clean Air Act provisions is provided in Appendix D.)

Meanwhile, EPA was also confronted after the *Massachusetts v. EPA* decision with looming court-ordered deadlines that would require the agency to decide whether to regulate greenhouse gas emissions from refineries, cement plants, and power plants. Specifically, EPA was required pursuant to court orders to issue new regulations, under Section 111 of the Clean Air Act, for petroleum refineries by April 30, 2008 and for Portland cement plants by May 31, 2008. In addition, EPA had, in 2006, issued Section 111 regulations for power plants that excluded any controls for carbon dioxide emissions on the grounds that carbon dioxide was not an “air pollutant” subject to regulation under the Clean Air Act.¹⁸ Several states and environmental groups had challenged these regulations in federal court. With the Supreme Court’s rejection of the Administration’s position in *Massachusetts v. EPA*, it was viewed as inevitable that the court would send the regulations back to EPA for reconsideration of its decision not to regulate power plant carbon dioxide emissions. (The court ultimately did just that

¹⁸ See Standards of Performance for Electric Utility Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units; Final Rule, 71 Fed. Reg. 9866, 9869 (Feb. 27, 2006).

in November 2007.)¹⁹ EPA would be forced either to regulate power plant emissions or to come up with a new rationale for refusing to do so.

According to the Select Committee's investigation:

- In order to address both the inevitable regulatory consequences of the Administration's plan to make a positive endangerment finding and issue vehicle and fuel regulations in response to *Massachusetts v. EPA* and the pending court-ordered deadlines discussed above, EPA officials began in summer 2007 to examine options for addressing stationary source greenhouse gas emissions under the Clean Air Act.
- EPA Administrator Johnson and senior EPA officials concluded that, notwithstanding some of the challenges associated with moving forward with regulation of stationary source emissions of greenhouse gases under the Clean Air Act, such regulation was legally required by the Act and was inevitable.²⁰
- Given the inevitability of regulation, EPA Administrator Johnson and senior EPA officials concluded that it would be best to "channel regulation into the sections of the Clean Air Act that had the most flexibility and therefore could be most – could be adapted to regulation of a new pollutant like greenhouse gases."²¹
- EPA officials saw two principal problems with moving forward with regulations. First, they wanted to avoid being forced to regulate greenhouse gas emissions under the National Ambient Air Quality Standards program discussed above, which was viewed as costly, burdensome, and legally complicated. Second, EPA wanted to avoid being forced to regulate greenhouse gas emissions from a vast array of small sources, like commercial and public buildings, under the Clean Air Act's PSD program, discussed above.²²
- To address these problems, EPA Administrator Johnson and senior EPA officials settled on a two-part plan for stationary sources.²³
- First, the agency would issue regulations under Section 111 of the Clean Air Act to control greenhouse gas emissions from 4-5 stationary source categories – including power plants, petroleum refineries, Portland cement manufacturing plants, industrial boilers, and possibly landfills. These regulations would, among other things, address the court-ordered deadlines discussed above. Proposed regulations would be issued in spring of 2008 and would be finalized by fall of 2008, before the end of the Bush Administration.

¹⁹ See *New York v. EPA*, No. 06-1322, Per Curiam Order dated September 24, 2007 (D.C. Circuit) (mandate issued Nov. 19, 2007).

²⁰ Burnett Interview Transcript, page 31.

²¹ Burnett Interview Transcript, page 14.

²² Burnett Interview Transcript, page 14, 24.

²³ Burnett Interview Transcript, page 20, 24.

- The proposed Section 111 regulations would only require the adoption of already existing technologies to reduce greenhouse gas emissions – mainly involving improvements in efficiency. The regulations would *not* be intended to force the development or implementation of any new emission control technologies, such as capture and sequestration of carbon dioxide emissions.²⁴
- The decision to propose regulations under Section 111 was consistent with senior EPA officials’ view that this was the most flexible of the relevant Clean Air Act provisions and the one best suited to addressing stationary source emissions of greenhouse gases. Moreover, these officials believed that, by “channeling” regulation towards Section 111, EPA would have a stronger legal basis for refusing to set and enforce National Ambient Air Quality Standards for greenhouse gases.²⁵
- The second part of EPA’s plan would be to issue regulations addressing the PSD program. Again, proposed regulations would be issued in spring of 2008 and would be finalized by fall 2008. EPA officials had developed several options, which could be pursued independently or in parallel to one another, for avoiding triggering PSD regulations for small sources of greenhouse gas emissions. Prominent among these was the option of pursuing a “phased-in” approach under which EPA would first develop PSD requirements for large stationary sources (like power plants and large industrial facilities) and delay such requirements for smaller sources, giving Congress time to pass legislation to address the problems presented by regulation of smaller sources.²⁶
- EPA also decided to limit its proposed endangerment finding for vehicles and fuels to a finding that greenhouse gas emissions endanger public *welfare* (i.e., the environment) – without addressing whether such emissions endanger public *health*. The reason for this decision was to limit the potential effects of the finding on stationary source regulation under other provisions of the Clean Air Act. Specifically, *if* EPA were ultimately forced to regulate greenhouse gas emissions under the National Ambient Air Quality Standards provisions, EPA would only have to set “primary” (health-based) air quality standards if it determined that greenhouse gases were found to endanger public health. By avoiding a public health endangerment finding, EPA could preserve the possibility of setting only “secondary” (welfare-based) National Ambient Air Quality Standards. The benefit of preserving this option, from EPA officials’ perspective, was that the Clean Air Act imposes no specific deadline for meeting a “secondary” (public welfare) standard, whereas it imposes a 10-year deadline for meeting a “primary” (public health) standard.²⁷

²⁴ Burnett Interview Transcript, pages 24-25.

²⁵ Burnett Interview Transcript, page 26.

²⁶ Burnett Interview Transcript, page 20.

²⁷ Burnett Interview Transcript, page 34, and private communications between Select Committee staff and EPA personnel. See also Regulating Greenhouse Gas Emissions under the Clean Air Act; Advanced Notice of Proposed Rulemaking, page 400 (“At the outset, it would appear to be an inescapable conclusion that the maximum 10-year horizon for attaining the primary NAAQS would be ill-suited to GHGs.”), available at <http://www.epa.gov/climatechange/anpr.html>

- There was consensus within EPA, including EPA Administrator Johnson and senior agency officials, that pursuing Clean Air Act regulation of greenhouse gas emissions according to the plan outlined above – while not without challenges – was workable and could effectively reduce these emissions.

IV. THE OIL INDUSTRY ARGUED AGAINST REGULATORY ACTION, AND HAD THE SUPPORT OF THE OFFICE OF VICE PRESIDENT CHENEY

According to the Select Committee's investigation, EPA engaged in extensive consultation with industry and environmental stakeholders in formulating EPA's response to the *Massachusetts v. EPA* decision.²⁸ While many stakeholders, including representatives of the electric utility industry, supported EPA regulation of stationary source greenhouse gas emission under the Clean Air Act, representatives of the oil industry opposed any regulatory action.

Specifically, the Select Committee's investigation reveals that:

- Many of the industry stakeholders agreed that Clean Air Act authority could be effectively used to regulate both motor vehicles and the largest stationary sources, including power plants, refineries, landfills, utility and industrial boilers and cement manufacturing facilities.²⁹
- Notably, the Edison Electric Institute – representing the nation's major investor-owned electric utilities – indicated that it supported EPA regulation of power plants and other stationary sources under Section 111 of the Clean Air Act, and offered to assist EPA in developing regulations by providing data and information.³⁰
- By contrast, several prominent oil industry representatives – including representatives of ExxonMobil, the American Petroleum Institute, and the National Petrochemicals and Refiners Association – argued against regulatory action under the Clean Air Act, on the grounds that “moving forward would harm President Bush's legacy by having on his legacy an increase in regulations.”³¹ In effect, these representatives of the oil industry consistently urged the Bush Administration to adopt a “not on my watch” approach to the regulation of greenhouse gas emissions.
- As noted above, the very same argument was echoed by individuals within the White House, including Vice President Cheney's energy adviser, F. Chase Hutto III, and OMB General Counsel Jeffrey Rosen. According to Mr. Burnett, “within the White House, the individuals in the Office of Management and Budget's general counsel's office were quite concerned about giving additional authority to EPA, even on the transportation side. And the Office of the Vice President also was concerned, both on the transportation side but more specifically on the stationary source side.... Over time and after the passage of the energy bill, the opposition to move forward came from higher up. But during the interagency decision-making process, they [senior White House officials, including Hutto and Rosen] were certainly central to the arguments for either not moving forward, keeping an option to not move forward, or in many cases unrealistically limiting the

²⁸ Burnett Interview Transcript, pages 58-59.

²⁹ Burnett Interview Transcript, page 58.

³⁰ Burnett Interview Transcript, page 59.

³¹ Burnett Interview Transcript, page 58.

ramifications of the Supreme Court case to just cars and trucks, or at least mobile sources.”³²

³² Burnett Interview Transcript, pages 56-57.

V. DOING THE OIL INDUSTRY'S BIDDING, THE BUSH ADMINISTRATION REVERSES COURSE

In December 2007, it became apparent that Congress was poised to enact the Energy Independence and Security Act (EISA), which was expected to increase fuel economy standards to at least 35 miles per gallon by 2020 and require the production of 36 billion gallons of renewable fuels by 2022.

At that point, according to the Select Committee's investigation, those within the Bush Administration who supported the oil industry's view that President Bush's legacy should not include the regulation of greenhouse gas emissions under the Clean Air Act began to undermine the preexisting consensus that regulations should be promulgated for both mobile and stationary sources.

For example, almost immediately after the December 5, 2007 email formally transmitting EPA's proposed positive endangerment finding was sent by Mr. Burnett to Susan Dudley at OMB, White House Deputy Chief of Staff Kaplan telephoned EPA Administrator Johnson and requested that the finding be retracted on the grounds that it was "sent in error." EPA Administrator Johnson refused to do so, and stated that it had not been sent in error, and in fact was prepared and submitted with the concurrence of Mr. Kaplan in the first place.³³ Kaplan then requested that Administrator Johnson retract the finding because the pending passage of EISA would render the finding moot. EPA Administrator Johnson again refused, stating that he would retract the endangerment finding if and when Congress altered EPA's authority under the Clean Air Act so as to render the finding moot.³⁴

In this same time frame, the White House began to urge Congress to eliminate EPA's authority to regulate greenhouse gas emissions, notably via the submission of Statements of Administration Policy that threatened to veto EISA.³⁵

On December 19, 2007, EISA was signed into law, requiring the National Highway Traffic Safety Administration to promulgate regulations to ensure that the car and light truck fleet achieve a fuel economy average of at least 35 mpg by 2020 and for EPA to promulgate regulations to require the development of 36 billion gallons of renewable fuels by 2022.

³³ Burnett Interview Transcript, page 39. See also "White House Tried to Silence EPA Proposal on Car Emissions", *Washington Post*, June 26, 2008

³⁴ Burnett Interview Transcript, page 40

³⁵ See, for example, the December 6 2007 Statement of Administration Policy on EISA, which states as part of the veto threat that "Unfortunately, H.R. 6 leaves ambiguous the role of the Environmental Protection Agency (EPA) in regulating vehicle fuel economy, and as a result would likely create substantial regulatory uncertainty, confusion, and duplication of efforts. The bill could also delay effective implementation of new fuel economy requirements due to inevitable litigation. The double regulation that would result from this failure to clearly identify the relative roles of EPA and DOT in national fuel economy regulations could greatly undermine our shared objective of rapidly reducing gasoline consumption. The bill needs to clarify one agency as the sole entity, after consultation with other affected agencies, to be responsible for a single national regulatory standard for both fuel economy and tailpipe greenhouse gas emissions from vehicles." In addition, the December 13, 2007 Statement of Administration Policy on EISA reiterates some of this language.

However, Congress included a provision in EISA expressly rejecting the White House's requests to remove EPA's Clean Air Act authority to regulate greenhouse gases from motor vehicles.

Shortly thereafter, Bush Administration officials began to publicly question the need for further EPA efforts to regulate greenhouse gases from motor vehicles, as well as to publicly describe what they believed to be adverse regulatory implications for other sections of the Clean Air Act related to the control of greenhouse gas emissions from stationary sources such as power plants or refineries, which could be triggered by a positive endangerment finding for vehicle emissions.

For example, in January 2008 White House Council on Environmental Quality Chairman James Connaughton said that the Administration was studying "the need for further regulations and additional policies on heat-trapping greenhouse gases from automobiles and industrial emitters following passage last month of a new fuel economy standard."³⁶

Then, on February 27, 2008, a press report indicated that "EPA Administrator Stephen Johnson says he is 'taking a step back' to analyze a slew of greenhouse gas (GHG) litigation, permits and petitions facing the agency in order to decide the best way to proceed given that taking one action under the Clean Air Act can impact a host of other provisions in the statute. Johnson also hedged on whether the agency will issue a long-awaited endangerment finding on the risks posed by GHG emissions, a possible retreat from his statement to the Senate environment committee last month that the agency was planning to issue the finding."³⁷

However, according to the Select Committee's investigation, in early 2008, EPA Administrator Johnson continued to advocate for regulatory action. "There was very high level discussion and back and forth between EPA and the White House as to whether the agency should move forward or whether the agency should leave the decision to the next administration. It was the agency's view and Administrator Johnson's view that the challenge was best addressed head-on by this administration."³⁸ Indeed, "it was the agency's judgment and Administrator Johnson's judgment that the country was best served by confronting the challenge and moving forward with a response."³⁹

By late February 2008, the White House made clear to EPA Administrator Johnson, via communications from the White House Chief of Staff's office (including Deputy Chief of Staff Kaplan), that the President had reversed course on his earlier commitment to proceed with a regulatory response to the *Massachusetts v. EPA* decision, and that the White House now agreed with the views espoused by the oil industry that these regulations should not be issued on President Bush's watch.⁴⁰

³⁶ See "White House weighing need for further GHG regs," *E&E News*, January 4, 2008.

³⁷ See "EPA chief defends Calif. waiver rejection despite staff support," *E&E Daily*, February 27, 2008.

³⁸ Burnett Interview Transcript, pages 40-41.

³⁹ Burnett Interview Transcript, page 40.

⁴⁰ Burnett Interview Transcript, page 42.

According to Mr. Burnett, “this decision [not to issue greenhouse gas regulations under the Clean Air Act] was made at the highest level within the administration. The concern was that while moving forward with the response would enable a more sensible response to the Supreme Court than if the administration left it to the courts or the next administration, the concern was over the President’s legacy and not wanting to have an increase in regulation, particularly regulation under the Clean Air Act, to be attributed to this administration and to President Bush’s legacy.”⁴¹

EPA was then directed by the White House “to move forward with an ANPR [Advance Notice of Proposed Rulemaking], and were told how the ANPR should be structured, and that the ANPR should not establish a path forward or a framework for regulation, but should emphasize the complexity of the challenge. . . . And it was clear that the desire to move forward with an ANPR was coming from the White House at the very highest level.”⁴²

On March 27, 2008, EPA Administrator Johnson sent a letter to Select Committee Chairman Edward J. Markey and Ranking Member F. James Sensenbrenner, Jr. informing them that EPA had decided to issue an ANPR later in the spring, which would “present and request comment on the best available science including specific and quantifiable effects of greenhouse gases relevant to making an endangerment finding and the implications of this finding with regard to the regulation of both mobile and stationary sources,” including the agency’s response to *Massachusetts v. EPA*. After reviewing the comments submitted in response to the ANPR, EPA would “then consider how to best respond to the Supreme Court decision and its implications under the Clean Air Act.” This letter suggested that the Bush Administration had selected a course that would postpone both the proposal and adoption of any regulations to reduce greenhouse gas emissions until after the President left office.

On April 2, 2008, this was confirmed at a Select Committee hearing when Robert Meyers, Principal Deputy Assistant Administrator of the EPA Office of Air and Radiation, testified in response to a question from Chairman Markey that a formal proposed endangerment finding or regulatory proposal would normally not be included in an ANPR, but would rather be included in a subsequent Notice of Proposed Rulemaking that would be issued after the ANPR responses were received and analyzed, which in turn could only occur after an extensive public comment period.

In an April 16, 2008 speech, President Bush publicly expressed his (newfound) opposition to regulation of greenhouse emissions under the Clean Air Act.⁴³ Specifically, President Bush stated:

“[T]he Clean Air Act, the Endangered Species Act, and the National Environmental Policy Act were never meant to regulate global climate change. For example, under a Supreme Court decision last year, the Clean Air Act could be applied to regulate greenhouse gas emissions from vehicles. If these laws are

⁴¹ Burnett Interview Transcript, pages 36-37.

⁴² Burnett Interview Transcript, pages 41-42.

⁴³ See <http://www.whitehouse.gov/news/releases/2008/04/20080416-6.html>

stretched beyond their original intent, they could override the programs Congress just adopted, and force the government to regulate more than just power plant emissions. They could also force the government to regulate smaller users and producers of energy from schools and stores to hospitals and apartment buildings. This would make the federal government act like a local planning and zoning board, and it would have crippling effects on our entire economy. Decisions with such far-reaching impact should not be left to unelected regulators and judges. Such decisions should be debated openly and made by the elected representatives of the people they affect. The American people deserve an honest assessment of the costs, benefits and feasibility of any proposed solution.”

In April and May 2008, EPA complied with court-ordered deadlines by promulgating a final rule for petroleum refinery emission standards and a proposed rule for cement manufacturing plants, both under Section 111 of the Clean Air Act. Both of these rules declined to control greenhouse gas emissions, arguing that EPA was not required to do so and that the agency would instead explore issues related to regulation of greenhouse gas emissions through a forthcoming ANPR.⁴⁴

According to the Select Committee’s investigation, on May 23, 2008, Mr. Burnett transmitted an informal draft of the EPA’s ANPR to OMB, and OMB personnel expressed concerns about the length of the document, and with the tone. Specifically, OMB officials “were concerned about the length of the document and, generally, the tone of the document in particular sections, concerned that it would leave the reader within the impression . . . that the Clean Air Act didn’t have challenges when in fact I think we all believed that the Clean Air Act is not the ideal authority to be using to address greenhouse gas emissions.”⁴⁵

By July 11, 2008, when the ANPR was released publicly, it demonstrated the Bush Administration’s complete about-face on regulation of greenhouse gas emissions under the Clean Air Act, as well as what can only be described as an oddly dysfunctional policy-making process. The document contains an introductory statement from EPA Administrator Johnson and letters from various Cabinet Secretaries and White House office heads – all of whom at one point had concurred with the view that the Clean Air Act could and should be used to regulate emissions from both motor vehicles and stationary sources such as power plants, refineries, industrial boilers, and cement manufacturing plants – that amplify and reiterate the views expressed by the President in his April 16 speech. For example:

- Susan E. Dudley, Administrator of OMB’s OIA: “The issues raised during interagency review are so significant that we have been unable to reach interagency consensus in a timely way, and as a result, this staff draft cannot be considered Administration policy or representative of the views of the Administration.... [T]he Clean Air Act is a deeply flawed and unsuitable vehicle for reducing greenhouse gas emissions. Interagency reviewers concluded upon reading the draft that trying to address greenhouse gas

⁴⁴ See Standards of Performance for Petroleum Refineries; Final Rule, 73 Fed. Reg. 35,838, 35,858 (June 24, 2008) (issued by EPA on April 30, 2008); Standards of Performance for Portland Cement Plants; Proposed Rule, 73 Fed. Reg. 34,072, 34,084 (June 16, 2008) (issued by EPA on May 31, 2008).

⁴⁵ Burnett Interview Transcript, page 49.

emissions through the existing provisions of the Clean Air Act will not only harm the U.S. economy, but will fail to provide an effective response to the global challenge of climate change.”

- EPA Administrator Stephen Johnson: “One point is clear: the potential regulation of greenhouse gases under any portion of the Clean Air Act could result in an unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land.... I believe the ANPR demonstrates the Clean Air Act, an outdated law originally enacted to control regional pollutants that cause direct health effects, is ill-suited for the task of regulating global greenhouse gases. Based on the analysis to date, pursuing this course of action would inevitably result in a very complicated, time-consuming and, likely, convoluted set of regulations. These rules would largely pre-empt or overlay existing programs that help control greenhouse gas emissions and would be relatively ineffective at reducing greenhouse gas concentrations given the potentially damaging effect on jobs and the U.S. economy.”
- Edward T. Schafer, Secretary, Department of Agriculture, Carlos M. Gutierrez, Secretary, Department of Commerce, Mary E. Peters, Secretary, Department of Transportation, Samuel W. Bodman, Secretary, Department of Energy: “[T]he Clean Air Act is fundamentally ill-suited to the effective regulation of GHG emissions.”
- Edward P. Lazear, Chairman, White House Council of Economic Advisors, John H. Marburger III, Director, White House Office of Science and Technology Policy: “First, the Clean Air Act would result in excessive regulation Second, the Clean Air Act may be inadequate Third, regulation of GHG through the Clean Air Act will prove inordinately burdensome Fourth, the Clean Air Act entails redundancy Finally, any GHG regulation imposed under the Clean Air Act is almost certain to fail.... We believe that the Clean Air Act is not the appropriate statutory framework for dealing with climate change. The Clean Air Act was never intended to address issues with the global complexity of GHG emissions.”

For a comparison of the July 11, 2008 ANPR with EPA’s proposed endangerment finding and proposed vehicle regulations from December 2007 and with a May 30, 2008 draft of the ANPR that was widely circulated outside EPA, please see Appendix C.

CONCLUSION

With the issuance of the non-regulatory ANPR on July 11, 2008, it is now clear that the Bush Administration will not pursue regulation of greenhouse gas emissions under the Clean Air Act. This is not an accident; rather, it is the direct result of the direction of President Bush's personal staff that his Administration take no meaningful action to address this serious environmental threat during his watch. This conclusion by President Bush's staff is opposite to the conclusion of EPA Administrator Johnson, made in agreement with the scientific and legal experts at EPA and with the concurrence of other Cabinet officials, (1) that EPA is legally obligated to find that greenhouse gas emissions endanger public welfare and to regulate such emissions from both vehicles and stationary sources, and (2) that such regulation is workable and can be effective in reducing greenhouse gas emissions.

In late 2007, that conclusion enjoyed broad support at the highest levels of the White House and numerous Cabinet-level agencies, and a plan was in place to go forward with both an endangerment finding and vehicle and stationary source regulations. That plan was abandoned, however, in accord with the arguments advocated by prominent oil industry representatives and espoused by senior officials in the office of Vice President Cheney and OMB. Clean Air Act regulations to control global warming pollution will not be part of President Bush's legacy and the issue of how to respond to *Massachusetts v. EPA* and global warming will instead be left to the next President.

APPENDIX A: TIMELINE OF EVENTS

A LANDMARK GLOBAL WARMING DECISION AT THE SUPREME COURT, AND THE BUSH ADMINISTRATION'S BEGINS TO RESPOND

April 2, 2007: The Supreme Court ruled in favor of the State of Massachusetts in *Massachusetts v. EPA*, finding that:⁴⁶

- Greenhouse gases *are* air pollutants that can be regulated under the Clean Air Act.
- EPA's excuses for refusing to regulate greenhouse gas emissions from motor vehicles were all inadequate.
- Under the Clean Air Act, EPA *must* determine whether these emissions cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare, a determination often referred to as an 'endangerment finding,' and
- If the EPA *does* make a positive endangerment finding, it *must* regulate greenhouse gas emissions from motor vehicles.

May 14, 2007: President Bush directed EPA, along with other agencies, to prepare a regulatory response to the Supreme Court decision, to publish the proposal by the end of 2007 and to complete it by the end of 2008.⁴⁷

June 2007: Jason Burnett returned to EPA as the Associate Deputy Administrator, with the responsibility for the coordination of the Agency's response to the *Massachusetts v. EPA* decision.

May – December 2007: EPA staff worked to develop both a *positive* endangerment finding and aggressive regulations to ensure that the fleet of cars and light trucks achieve the equivalent of 35 miles per gallon (mpg) by 2018.

Summer 2007: EPA commenced discussions on the implications of making a positive endangerment finding on the regulation of greenhouse gas emissions from stationary sources using Clean Air Act authority, including a discussion of which sections of the Clean Air Act were best suited to such regulations as well as on the advisability of moving forward with such a proposal. These discussion began as internal EPA discussions, but were eventually broadened to include other Cabinet agencies and White House offices.

July 22, 2007: EPA Administrator Johnson: "[I]n May, the President directed us to move ahead and take the first regulatory step to address greenhouse gas emissions from cars. We're working

⁴⁶ See *Massachusetts v. EPA*, 549 U.S. 497 (2007), available at <http://www.supremecourtus.gov/opinions/06pdf/05-1120.pdf>

⁴⁷ See <http://www.whitehouse.gov/news/releases/2007/05/20070514-4.html>

across agencies to develop a proposed regulation under the Clean Air Act by the end of this year, with final rules due out by the end of next year.”⁴⁸

November 8, 2007: EPA Administrator Johnson: “In addition, since the Supreme Court decision, we have announced that we are developing a proposed regulation to regulate greenhouse gas emissions from mobile sources. That is the first time in our Nation's history, and I have committed to members of Congress and to the President that we will have that proposed regulation out for public notice and comment beginning by the end of this year and to work toward a final rule by the end of next year.”⁴⁹

November, 2007: EPA Administrator Johnson received the concurrence of White House Deputy Chief of Staff Joel Kaplan to proceed with the formal submission of EPA’s endangerment finding, which would then require the regulatory proposal for reducing emissions from motor vehicles to also move forward.⁵⁰ During this timeframe, Administrator Johnson also submitted to Susan Dudley of OMB, James Connaughton of CEQ, Amy Farrell of CEQ, and Keith Hennessey, Assistant to the President for Economic Policy and Director of the U.S. National Economic Council⁵¹ after receiving the concurrence to proceed of numerous Cabinet Agencies and White House Offices (including but not limited to DOE, the Department of Treasury, White House Council of Economic Advisers, CEQ, and OMB), a plan to regulate greenhouse gas emissions from 4-5 categories of stationary sources using Section 111 of the Clean Air Act. This plan indicated that EPA would propose regulations in the spring 2008 and finalize them by fall 2008.⁵²

THE WHITE HOUSE BEGINS TO TRY TO STOP EPA’S EFFORTS

December 3, 2007: Director of the National Economic Council Al Hubbard sends a letter to House Speaker Nancy Pelosi on Congress’ pending completion of the Energy Independence and Security Act (EISA), stating that “Unfortunately, while assigning new requirements to the Department of Transportation, the proposed legislation leaves ambiguous EPA’s role in CAFE regulations, and likely creates substantial amounts of regulatory uncertainty and confusion. The failure to clearly identify the relative roles of the Environmental Protection Agency and the Department of Transportation in national fuel economy regulations could greatly undermine our shared objective of reducing gasoline consumption in the United States. Legislation should clarify that there should be consultation between the agencies, while clearly establishing a single national fuel economy standard.

⁴⁸ See

<http://yosemite.epa.gov/opa/admpress.nsf/8d49f7ad4bbcf4ef852573590040b7f6/66b2f9feee31c05385257321004936a1!OpenDocument>

⁴⁹ See <http://oversight.house.gov/documents/20071115145634.pdf>

⁵⁰ Burnett Interview Transcript, pages 37-38.

⁵¹ Burnett Interview Transcript, page 33.

⁵² Burnett Interview Transcript, page 28.

Early December 2007: The positive endangerment finding and vehicle regulations were approved by EPA Administrator Johnson. The endangerment finding was submitted by EPA to the OMB, and the draft vehicle regulations were submitted to NHTSA for review.⁵³

December 5, 2007: EPA Deputy Associate Administrator Jason Burnett submitted EPA's formal endangerment finding via email to Susan Dudley at OMB. Shortly after the email was sent, White House Deputy Chief of Staff Kaplan phoned EPA Administrator Johnson and requested that the finding be retracted, which Mr. Johnson refused to do.⁵⁴

December 6, 2007: OMB submitted a Statement of Administration Policy on EISA, stating as part of the veto threat that "Unfortunately, H.R. 6 leaves ambiguous the role of the Environmental Protection Agency (EPA) in regulating vehicle fuel economy, and as a result would likely create substantial regulatory uncertainty, confusion, and duplication of efforts. The bill could also delay effective implementation of new fuel economy requirements due to inevitable litigation. The double regulation that would result from this failure to clearly identify the relative roles of EPA and DOT in national fuel economy regulations could greatly undermine our shared objective of rapidly reducing gasoline consumption. The bill needs to clarify one agency as the sole entity, after consultation with other affected agencies, to be responsible for a single national regulatory standard for both fuel economy and tailpipe greenhouse gas emissions from vehicles."

December 13, 2007: OMB submitted a Statement of Administration Policy on EISA, stating as part of the veto threat that "the Administration compliments the Senate for giving the Department of Transportation (DOT) the authority to establish a new CAFE standard, which would both improve fuel economy and reduce tailpipe greenhouse gas emissions. The bill should clarify, however, that DOT should establish this single national regulatory standard, in consultation with the Environmental Protection Agency, and that neither agency should add additional layers of regulation."

December 19, 2007: EISA was signed into law, requiring NHTSA to promulgate regulations to ensure that the car and light truck fleet achieve a fuel economy average of at least 35 mpg by 2020. Congress included a provision in EISA expressly rejecting the White House requests to remove EPA's authority to regulate greenhouse gases from motor vehicles.

AND THEN, ALL WORK ON THE EPA REGULATORY EFFORTS STOPPED

January 2008: CEQ Chairman Connaughton said that the Administration was studying "the need for further regulations and additional policies on heat-trapping greenhouse gases from automobiles and industrial emitters following passage last month of a new fuel economy standard."⁵⁵

⁵³ Source – various press reports, depositions of EPA personnel to Congress, and Burnett Interview Transcript.

⁵⁴ Burnett Interview Transcript, page 39. See also "White House Tried to Silence EPA Proposal on Car Emissions", *Washington Post*, June 26, 2008.

⁵⁵ See "White House weighing need for further GHG regs," *E&E News*, January 4, 2008.

Late February 2008: It became clear to EPA Administrator Johnson, via communications with the White House Chief of Staff's office and in spite of his efforts to continue work, that the President had reversed course on his earlier commitment to proceed with a robust regulatory response to the *Massachusetts v. EPA* decision, and that the White House now agreed with the views espoused by the oil industry that these regulations should not be part of President Bush's legacy.⁵⁶

February 27, 2008: A press report indicated that "EPA Administrator Stephen Johnson says he is 'taking a step back' to analyze a slew of greenhouse gas (GHG) litigation, permits and petitions facing the agency in order to decide the best way to proceed given that taking one action under the Clean Air Act can impact a host of other provisions in the statute. Johnson also hedged on whether the agency will issue a long-awaited endangerment finding on the risks posed by GHG emissions, a possible retreat from his statement to the Senate environment committee last month that the agency was planning to issue the finding."⁵⁷

March 13, 2008: At a Select Committee hearing, EPA Administrator Johnson said "that it is very evident that as one looks at the Clean Air Act, there are many interconnections, and a decision on one part of the Clean Air Act could have significant consequences both in how greenhouse gas is regulated as well as other unintended consequences, perhaps such as significant harm."

March 27, 2008: EPA Administrator Johnson sent a letter to Select Committee Chairman Markey and Ranking Member James Sensenbrenner informing them that EPA had decided to issue an Advanced Notice of Proposed Rulemaking (ANPR) later in the spring which would "present and request comment on the best available science including specific and quantifiable effects of greenhouse gases relevant to making an endangerment finding and the implications of this finding with regard to the regulation of both mobile and stationary sources," including the agency's response to *Massachusetts v. EPA*. After reviewing the comments submitted in response to the ANPR, EPA "will then consider how to best respond to the Supreme Court decision and its implications under the Clean Air Act."

April 2, 2008: The Select Committee voted on a bipartisan, 12-0 basis to authorize the Chairman to issue a subpoena to EPA Administrator Johnson for the endangerment finding and greenhouse gas motor vehicle regulations prepared by EPA in its response to *Massachusetts v. EPA*. On the same day, at a Select Committee hearing, Robert Meyers of the EPA Office of Air and Radiation testified in response to a question that a formal endangerment finding or regulatory proposal would normally not be included in an ANPR, but would rather be included in a subsequent Notice of Proposed Rulemaking that would be issued after the ANPR responses were received and analyzed. This demonstrated the high probability that the Bush Administration would leave all regulatory decisions related to the response to *Massachusetts v. EPA* to the next President. The subpoena for the December 2007 documents was issued the following day.

⁵⁶ Burnett Interview Transcript, page 40-43.

⁵⁷ See "EPA chief defends Calif. waiver rejection despite staff support," *E&E Daily*, February 27, 2008.

April 16, 2008: President Bush said in a speech⁵⁸ that “the Clean Air Act, the Endangered Species Act, and the National Environmental Policy Act were never meant to regulate global climate change. For example, under a Supreme Court decision last year, the Clean Air Act could be applied to regulate greenhouse gas emissions from vehicles. If these laws are stretched beyond their original intent, they could override the programs Congress just adopted, and force the government to regulate more than just power plant emissions. They could also force the government to regulate smaller users and producers of energy from schools and stores to hospitals and apartment buildings. This would make the federal government act like a local planning and zoning board, and it would have crippling effects on our entire economy. Decisions with such far-reaching impact should not be left to unelected regulators and judges. Such decisions should be debated openly and made by the elected representatives of the people they affect. The American people deserve an honest assessment of the costs, benefits and feasibility of any proposed solution.”

March –July 2008: EPA staff worked to prepare the ANPR.

April – May 2008: EPA issues final regulations for petroleum refineries and proposed regulations for cement manufacturing plants, both declining to control greenhouse gas emissions from these sources under the Clean Air Act.

May 23, 2008: Jason Burnett transmitted an informal draft of the EPA’s ANPR to OMB.

May 30, 2008: A May 30, 2008 draft of the ANPR was obtained by many outside EPA, including the Select Committee. It did not propose either an endangerment finding or vehicle greenhouse gas regulations for motor vehicles, but did contain some of the analysis used to formulate EPA’s December 2007 endangerment finding and regulatory response to *Massachusetts v. EPA*.

June 9, 2008: Jason Burnett resigned from his position as Associate Deputy Administrator at EPA.

June 20, 2008: The Select Committee obtained access to the EPA’s December 2007 endangerment finding and regulatory response to *Massachusetts v. EPA* via an agreement reached with the White House and EPA.

June 24, 2008: Chairman Markey sent a letter to President Bush detailing the Select Committee staff’s review of the December 2007 documents and indicated that any “legal and scientific-based” ANPR released by EPA must include the key recommendations of those documents. “To do less would be a blatant denial of the overwhelming scientific evidence indicating that greenhouse gas emissions are dangerous, would overrule the scientific and legal recommendations of the EPA, and would further undercut your Administration’s credibility on matters related to climate change both here and in the rest of the world.”

July 11, 2008: The ANPR is released by EPA.

⁵⁸ See <http://www.whitehouse.gov/news/releases/2008/04/20080416-6.html>

July 14, 2008: Select Committee staff conducted an extensive interview with Mr. Jason Burnett.

APPENDIX B: A SUMMARY OF THE CONTENTS OF EPA'S ENDANGERMENT FINDING AND PROPOSED REGULATIONS TO REDUCE GREENHOUSE GAS EMISSIONS FROM MOTOR VEHICLES⁵⁹

- EPA Administrator Johnson determined – consistent with the views of his scientific and technical advisors – that man-made global warming is unequivocal, the evidence supporting an endangerment finding is both compelling and robust, and the EPA Administrator is required by law to take actions to prevent harm rather than waiting for harm to occur before acting.
- EPA determined that greenhouse gas emissions may reasonably be anticipated to endanger public welfare and that greenhouse gas emissions from motor vehicles and combustion of fuels for onroad and nonroad vehicles and engines do contribute to global warming and should be regulated by EPA under the Clean Air Act.
- EPA believes that dangers to public health or welfare associated with man-made global warming include an increase in the intensity and magnitude of severe heat waves, sea level rise leading to increased storm surge flooding and shoreline erosion, reduced availability of water in water-constrained areas of the country, increased wildfire and insect outbreaks, an increase in heavy precipitation events, an increase in regional ground-level ozone pollution, and changes in the range of vector-borne diseases.
- EPA concluded that the existence of some potential benefits associated with global warming (such as short-term increases in some agricultural yields) does not outweigh the preponderance of the evidence of risks and adverse impacts.
- EPA proposed that regulations to reduce greenhouse gas emissions from motor vehicles be implemented in order to achieve the equivalent of a 35 mpg car and light truck fleet average by 2018 (with the car fleet averaging 38.4 mpg by 2018 and the truck fleet averaging 31 mpg by 2017).
- These proposed standards were estimated to yield annual net societal benefits of almost \$55 billion by 2040. It bears emphasis that these benefits were calculated using Energy Information Administration's (EIA's) 2007 mid-range projected gasoline prices of \$2.03/gallon in 2017 to \$2.22/gallon in 2030. (These projections were the most recent data available at the time the materials were prepared.) EPA's analysis concluded that the benefits would be much higher using more realistic gasoline prices because higher gasoline price projections would increase the consumer savings associated with driving more efficient vehicles.
- The proposed standards were estimated to add 3-5% to the cost of purchasing a new vehicle, but even using \$2/gallon gasoline, these costs would be recouped in five years or less. The payback period would be much faster using more realistic gasoline prices.

⁵⁹ Based on Select Committee staff review of these documents.

- EPA also assumed that these proposed miles per gallon standards could be increased beyond 35 mpg in the final regulations, because gas prices are the most critical element in setting mpg levels, and projections of gas prices were expected to be increased by the EIA in its 2008 report. Higher gas prices significantly increase the consumer benefits of the more efficient vehicles as well as expand the number of fuel efficient technologies that would be economically practicable to incorporate, leading to more stringent standards.
- EPA found that gasoline savings, which are obviously determined by the projected price of gasoline, is by far the largest consumer benefit associated with the higher fuel efficiency standards. EPA's model did not take into account benefits from reductions in greenhouse gas emissions, so if these are included the benefits would be higher.
- When EPA used the EIA 2007 high gasoline price projections of \$2.75 in 2017 to \$3.20 in 2030 to calculate standards, it found that the car fleet could achieve a standard of 43.3 mpg by 2018 and light trucks could achieve a standard of 30.6 mpg by 2017.
- EPA developed its proposed standards in close consultation with NHTSA, found that they were compatible with the fuel economy standards set by NHTSA, and concluded that those gains could be achieved without undue adverse impacts on the auto industry, its workers or consumers.

**APPENDIX C: COMPARISON OF DOCUMENTS OBTAINED BY THE SELECT COMMITTEE
 DETAILING THE EPA’S RESPONSE TO THE MASSACHUSETTS V. EPA DECISION**

After the *Massachusetts v. EPA* decision, EPA engaged in a lengthy and laborious inter-agency process resulting in its conclusion that greenhouse gas emissions from motor vehicles do endanger public welfare as well as an aggressive regulatory framework to reduce those emissions.

What follows is a comparison of three versions of EPA’s analysis related to its specific response to *Massachusetts v. EPA*: The proposed endangerment finding and greenhouse gas motor vehicle regulations approved by EPA Administrator Johnson in December 2007, the May 30 2008 leaked draft ANPR that was submitted by EPA to OMB, and the final version of the July 11 2008 ANPR released by EPA. In addition, a timeline of events that led to the ANPR release is also included.

Other than the Bush Administration, only the Select Committee has had access to all of these documents.

This comparison demonstrates that EPA Administrator Johnson determined – consistent with the views of his scientific and technical advisors – that greenhouse gas emissions are dangerous and that motor vehicle emissions should be regulated by EPA, but that the Bush Administration ultimately refused to allow these steps to be taken. Moreover, each draft of the documents that ultimately were folded into the July 11, 2008 ANPR contained fewer recommendations, weaker conclusions and less extensive analysis such that the final, publicly released version says almost nothing whatsoever.

Topic	December 2007 documents submitted to OMB	May 30 2008 draft ANPR submitted to OMB	July 11 ANPR released by EPA
Draft regulatory proposal?	YES, for cars and light trucks	NO	NO
Endangerment finding made?	YES – greenhouse gas emissions from motor vehicles endanger public welfare.	NO, EPA asks for comment on whether science supports endangerment, and what the scope of the finding should be if it is made	NO – Invites comment on question of whether greenhouse gas emissions from motor vehicles of fuels endanger public health or welfare.
Scientific basis for endangerment included?	YES – Some benefits of climate change may exist, but these are said not to undermine the positive endangerment finding, which was based on all evidence for risks and adverse	Some, and reference to technical appendix. “Some elements of human health, society and the environment may benefit from climate change (e.g. Short-term increases in agricultural yields,	Similar to May 2008 draft

	impacts.	less cold-related mortality). We seek comment on how the potential for some benefits should be viewed against the full weight of evidence showing numerous risks and the potential for adverse impacts.”	
Are regulations to reduce greenhouse gas emissions from motor vehicles proposed?	YES	NO, but gives detailed consideration of how Clean Air Act could be used to develop such regulations, using analysis developed for the December 2007 documents.	NO, states that EPA has not made a determination on what sort of regulations would be appropriate, but includes some options based on May 2008 draft
Stringency of Proposed regulations	35 mpg by 2018 car and light truck average, and using a higher gas price led to 43.3 mpg for cars by 2018 of 30.6 mpg for light trucks by 2017.	N/A 35 mpg by 2018 car and light truck average cited as feasible but not proposed. Possible standards for higher gas price scenario were removed.	Similar to May 30 draft
Discussion of impact higher oil prices might have on stringency?	YES. All gasoline price estimates used were from EIA’s 2007 projections, and the 2007 high price projections (\$3.20/gallon in 2030) were used to calculate 43.3 mpg for cars in 2018 and 30.6 mpg in 2017 for light trucks. Expectation that final regulation would be based on EIA’s 2008 numbers.	YES, discussion updates gasoline price to reflect current prices of \$3.50/gallon Using higher gas price said to increase standards and dramatically increase consumer benefits to up to \$2 trillion in 2040, but results of stringency calculation on actual standards have been removed.	All analysis has been removed.
Discussion of options for regulation of stationary source greenhouse gas emissions	N/A – Supreme Court decision did not relate to stationary sources.	YES – broad and open discussion of potential options for regulating emissions from stationary sources like power plants, e.g. through performance standards for individual sources or market-based cap-and-trade systems	Similar to May 2008, but conclusions disavowed by introductory statements by EPA Administrator Johnson and other Bush Administration officials

APPENDIX D: SUMMARY OF RELEVANT STATIONARY SOURCE PROVISIONS OF THE CLEAN AIR ACT

Several stationary source provisions of the Clean Air Act include “endangerment” language very similar to that in Sections 202(a) and 211, which deal with vehicles and fuels, respectively. Most important among these are Sections 108 and 109 (dealing with setting and enforcing federal ambient air quality standards) and Section 111 (dealing with emissions standards for certain stationary source categories, like power plants). Most importantly:

- *National Ambient Air Quality Standards (NAAQS) – Sections 108 and 109:* Sections 108 and 109 of the Act require EPA to establish National Ambient Air Quality Standards – known as NAAQS – for so-called “criteria” air pollutants that (1) “cause or contribute to air pollutant which may reasonably be anticipated to endanger public health or welfare,” (2) are emitted by numerous or diverse sources, and (3) for which EPA “plans to issue” air quality criteria. EPA must establish two different types of air quality standards: “primary” standards meant to protect public health, which must be met within 10 years; and “secondary” standards meant to protect public welfare, for which there is no specific deadline. Under the NAAQS program, States are required to develop implementation plans to meet these standards. All areas of the country are classified as meeting (“attainment”) or not meeting the standards (“nonattainment”) and the Act sets forth a detailed set of regulatory requirements that apply to an area depending upon its status.
- *New Source Performance Standards (NSPS) – Section 111:* Section 111 requires EPA to regulate emissions from new emission sources within each category of sources (such as power plants, petroleum refineries, or cement plants) that the Agency determines “cause[s], or contribute[s] significantly to air pollution which may reasonably be anticipated to endanger public health or welfare.” EPA already regulates non-greenhouse gas pollutants from dozens of source categories under Section 111. This provision also requires the Agency to require States to develop standards for existing sources within the same categories, provided certain requirements are met. In setting standards under Section 111, EPA must require sources to reduce emissions by the level that can be achieved using the best demonstrated technology, but can take costs and other factors into account.

Given the “endangerment” language in these and other provisions of the Clean Air Act, EPA recognized that if it determined that greenhouse gas emissions from motor vehicles and fuels endangered public health or welfare, that finding would probably ultimately compel it to regulate greenhouse gas emissions from stationary sources as well.

In addition, the Agency recognized that *any* regulation of greenhouse gas emissions could trigger potentially burdensome regulation under the so-called Prevention of Significant Deterioration (“PSD”) provisions of the Clean Air Act (Sections 165 and 169). The PSD program is intended to prevent deterioration of air quality in areas of the country that are meeting federal ambient air quality standards. Under the PSD provisions, any new or modified “major source” must control emissions of any air pollutant that is “subject to regulation” under the Clean Air Act and must get a permit. The Act defines a “major source” to include certain listed sources like power plants as well as any other source that has the potential to emit 250 tons per year of an air pollutant.

That threshold makes sense for conventional air pollutants like sulfur dioxide, but would be very low for carbon dioxide. Thousands of sources that have not previously been subject to Clean Air Act regulation – including many commercial and public – would emit more carbon dioxide than this threshold amount.

EPA has taken the legal position that greenhouse gases are not “subject to regulation,” for purposes of the PSD program, until the Agency has actually taken regulatory action under some other section of the Act to control them. Environmental groups have successfully challenged that position in recent court cases, arguing that greenhouse gases are already “subject to regulation” under the Clean Air Act.⁶⁰ The Agency would no longer be able to make this argument once it issued any regulation controlling carbon dioxide or other greenhouse gases.

An extended discussion of these and related provisions can be found in Section VII of EPA’s July 11, 2008 Advanced Notice of Proposed Regulation (pages 383-551), available at <http://www.epa.gov/climatechange/anpr.html>.

⁶⁰ See Matthew L. Wald, “Georgia Judge Cites Carbon Dioxide in Denying Coal Plant Permit,” *New York Times*, July 1, 2008. See also *Friends of the Chattahoochee, Inc. v. Couch*, Ga. Sup. Ct. (Fulton County), No. 2008CV146398, Final Order dated June 30, 2008.