UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 2 2 2010

THE ADMINISTRATOR

The Honorable Sherrod C. Brown
United States Senate
Washington, D.C. 20510

Dear Senator Brown:

Thank you for your letter of February 19, 2010, concerning the Environmental Protection Agency's (EPA's) work to comply with the Supreme Court's decision in *Massachusetts v. EPA* while providing a manageable path forward for businesses and state governments. I share your goals of ensuring economic recovery at this critical time and of addressing greenhouse-gas emissions in sensible ways that are consistent with the call for comprehensive energy and climate legislation. My full response to your letter appears below and in the enclosed document.

Many of the comments and questions you offer are similar to ones that EPA received during recent public comment periods. As EPA staff works to respond to those comments, I am happy to share information with you here in order to answer the questions in your letter as completely as I can. The decision-making process has moved far enough along that I can make several central points based on modifications I expect to make in finalizing EPA's previous proposals:

- The United States Supreme Court held three years ago in *Massachusetts v. EPA* that greenhouse gases are air pollution and are subject to regulation under the Clean Air Act. EPA must follow the Supreme Court's holding, as you recognize in your letter.

- By April of this year, I expect to take actions to ensure that no stationary source will be required to get a Clean Air Act permit to cover its greenhouse gas emissions in calendar year 2010.

- Based on those anticipated actions, I expect that EPA will phase-in permit requirements and regulation of greenhouse gases for large stationary sources beginning in calendar year 2011. In the first half of 2011, only those facilities that already must apply for Clean Air Act permits as a result of their non-greenhouse gas emissions will need to address their greenhouse gas emissions in their permit applications.

- Further, I am expecting that greenhouse gas emissions from other large sources will phase in starting in the latter half of 2011. Between the latter half of 2011 and 2013, I expect that the threshold for permitting will be substantially higher than the 25,000-ton limit that EPA originally proposed. In any event, EPA does not intend to subject the smallest sources to Clean Air Act permitting for greenhouse-gas emissions any sooner than 2016.

- You asked in your letter what the result would be if Senator Lisa Murkowski's resolution of disapproval of EPA's endangerment finding were enacted. One result would be to prevent EPA from issuing its greenhouse gas standard for light-duty vehicles, because the endangerment finding is a legal prerequisite of that standard. The impacts of that result would be significant. In particular, it would undo an historic agreement among states, automakers, the federal government, and other stakeholders. California and at least thirteen other states that have adopted California's emissions standards likely would enforce those standards within their jurisdictions,[1] leaving the automobile industry without the explicit nationwide uniformity that it has described as important to its business.[2]

Background

Three years ago, the Supreme Court held in *Massachusetts v. EPA* that the term "air pollutant" in the Clean Air Act includes greenhouse gases.[3] The Court also held that the Act requires EPA to consider the science of climate change meaningfully in determining whether greenhouse-gas pollution endangers public health or welfare.[4] As a result of the Court's decision, EPA became obligated to treat greenhouse-gas emissions as air pollution under the Clean Air Act and to engage with the best available science in determining whether those emissions endanger Americans' health or welfare. After EPA staff conducted a comprehensive survey of the soundest available science and carefully reviewed hundreds of thousands of public comments, I determined last December that greenhouse-gas emissions do endanger Americans' health and welfare.[5]

As you know, I am not alone in having reached that conclusion. The U.S. Global Change Research Program, which consists of thirteen federal departments – including the National Science Foundation, the Department of Health and Human Services, and the Departments of Commerce, Agriculture, Defense, Energy, and the Interior – found last June that risks to human health will increase as a result of human-induced global warming.[6] The U.S. Senate itself has twice passed, on a bipartisan basis, a resolution finding that greenhouse-gas accumulation from human activity poses a substantial risk of increased frequency and severity of floods and droughts.[7]

EPA's endangerment finding obligates the agency, under Section 202(a) of the Clean Air Act, to issue greenhouse-gas emissions standards for motor vehicles.[8] EPA will begin to discharge that

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[1] http://www.epa.gov/otaq/climate/regulations/air-resources-board.pdf.
[2] *See Patchwork Proven*, National Automobile Dealers Association (January 2009).
[3] 549 U.S. 497, 528-29, 532-33 (2007).
[4] *Id.* at 534-35.
[5] 74 Fed. Reg. 66495, *et seq.* (December 15, 2009).
[6] http://downloads.globalchange.gov/usimpacts/pdfs/climate-impacts-report.pdf
[7] *See* Energy Policy Act of 2005; Energy Independence and Security Act of 2007.
[8] *See* Clean Air Act Section (202)(a)(1), 42 U.S.C. § 7521(a)(1).

duty late next month, by issuing greenhouse-gas emissions standards for Model Year 2012-2016 light-duty motor vehicles.[9]

At the same time that EPA issues its light-duty-vehicle emissions standard, the Department of Transportation will issue a rule raising the existing fuel-economy standards for the same vehicles.[10] Together, the EPA and DOT standards will reduce the lifetime oil consumption of the affected vehicles by 1.8 billion barrels while eliminating 950 million metric tons of greenhouse-gas pollution.[11] The government of California has agreed to recognize vehicles that comply with the EPA rule as complying with the state's greenhouse-gas emissions standard. As a result, the automakers will be able to operate with the nation-wide regulatory uniformity that they have sought.

The implementation of EPA's light-duty vehicle standard will make greenhouse-gas emissions subject to regulation under the Clean Air Act for the first time. Under the Act's text, air pollutants that are subject to regulation under the statute are subject to the Act's "prevention of significant deterioration" and operating-permit provisions for stationary sources.[12]

Mindful of that legal consequence, and in order to provide clarity for states and businesses, EPA has been working to complete two rulemakings. The agency has received many thoughtful comments on those two rulemakings – from citizens, States, localities, industry representatives, and environmental groups. The agency's upcoming actions will reflect and incorporate valuable information and constructive suggestions that EPA received during the public comment periods, and thus will improve substantially upon the agency's initial proposals.

The first action will conclude EPA's reconsideration of a memorandum that former EPA Administrator Stephen Johnson issued in 2008. I anticipate that the final action on reconsideration will explain that greenhouse-gas emissions will become "subject to regulation" under the Clean Air Act, such as to make them a part of the Act's stationary-source permitting programs, in January of 2011, when Model Year 2012 light-duty vehicles will need to comply with EPA's greenhouse-gas emissions standard. As a result of that final action, no facility will need to address greenhouse-gas emissions in Clean Air Act permitting before 2011.

The second action will promulgate what has become known as the tailoring rule. I describe that action in detail at the outset of this letter.

I have already described the impact of enactment of Senator Lisa Murkowski's resolution of disapproval of EPA's endangerment finding on the light-duty vehicle standard and the historic agreement among states, automakers, the federal government, and other stakeholders. Moreover, a vote to vitiate the greenhouse-gas endangerment finding would be viewed as a vote to reject the

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[9] *See* 74 Fed. Reg. 49453, *et seq.* (September 28, 2009).

[10] *See id.*

[11] http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/522d0a809f6b7f9c8525763200562534!OpenDocument

[12] *See, e.g.,* Clean Air Act Section 169(3), 42 U.S.C. § 7479(3) ("each pollutant subject to regulation under this chapter").

scientific work of the thirteen U.S. government departments that contribute to the U.S. Global Change Research Program. It also would be viewed by many as a vote to move the United States to a position behind that of China on the issue of climate change, and more in line with the position of Saudi Arabia.

Attached, please find responses to those of your questions that are not addressed above. Thank you again for your letter. I appreciate this opportunity to update you on EPA's work to comply with the Supreme Court's decision in *Massachusetts v. EPA* while providing a manageable path forward for businesses and state governments.

Sincerely,

Lisa P. Jackson

Enclosure

What is your assessment of the likelihood of the tailoring rule surviving already announced legal challenges?

EPA would not have issued its initial tailoring rule proposal if I did not believe that it was lawful. Oddly, certain advocacy organizations that purport to speak for businesses are the only ones who have threatened to challenge the tailoring rule in court. My assessment is that those challenges, if they are filed, will fail. If my assessment were otherwise, I would not promulgate the tailoring rule.

Currently, PSD regulations are applied to fewer than 400 facilities per year for pollutants such as ozone. How many facilities would be required to obtain permits under GHG regulation under the Clean Air Act?

None in 2010. For the first half of 2011, fewer than 400, because only facilities undergoing permitting for other pollutants would need to address greenhouse-gas emissions in permitting.

Large electric generators using domestically produced coal and natural gas are uncertain about potential "Best Available Control Technology" or "BACT" standards for carbon dioxide (CO_2). What does EPA expect coal and natural gas plant operators to do if there is no standard? What process will you use to determine such standards and the range of options for such facilities given the pre-commercial standing of current CO2 abatement technologies such as carbon capture and storage (CCS)?

EPA continues to review and analyze options for defining Best Available Control Technology (BACT) for greenhouse-gas emissions. The additional time that EPA will have before permitting requirements will take effect will enable the agency and stakeholders to consider this issue carefully and thoughtfully. EPA's goal will be to identify practical, achievable, and cost-effective strategies for minimizing emissions increases from new facilities and major modifications, recognizing the importance of those projects to the economy and job creation. The agency would of course apply the well-developed framework that exists for determining BACT for non-greenhouse-gas pollutants. One of the factors that is applied under that framework is the commercial availability of a given control technology. EPA is closely following efforts to make integrated systems for capturing, transporting, and storing CO_2 from coal-fueled electricity generating facilities commercially available. The agency would expect to carefully consider the state of development of this technology in considering options for BACT.

There is genuine concern from the domestic oil and gas industries, from entities operating at the wellhead to pipeline operators, processing plants, and refiners, that they will be severely disadvantaged in the world marketplace by stationary source regulations. Can you characterize how these regulations will translate into costs for these industries? Has your agency analyzed or will you consider the impacts on competitiveness that these costs could have on these industries?

The feasibility and commercial availability of a technology are certainly analyzed in any BACT process, and both feasibility and commercial availability are relevant to competitiveness.

Comprehensive clean energy legislation must ensure a robust US manufacturing base for clean energy production, invest in US research and development of new clean energy technologies, and mitigate costs to energy-intensive and trade-exposed industries. If EPA regulates GHGs for stationary sources, what are the direct and indirect cost implications for industrial sources of Clean Air Act prevention of significant deterioration (PSD) regulations? Has your agency analyzed or will you consider so-called "carbon leakage" and the competitiveness impacts of these costs on these industries? Will your agency public impact analyses on these critical issues prior to implementing the regulation?

EPA has evaluated the impacts of clean energy legislation on energy-intensive and trade-exposed industries as a part of our larger analysis of the Waxman-Markey bill (H.R. 2454) in June 2009. In addition, EPA participated in the Administration's interagency assessment of the implications of climate policy on U.S. competitiveness, titled "The Effects of H.R. 2454 on International Competitiveness and Emission Leakage in Energy-Intensive Trade-Exposed Industries" (December 2009). The report shows that under the allowance allocations made available in H.R. 2454 for the energy-intensive trade-exposed industries, the impact of comprehensive energy and climate legislation is effectively nil on the production costs for these industries. Even in the absence of the H.R. 2454 allowance allocations, these industries would bear only modest impacts on production costs (less than 3 percent increase) under an allowance price of $20 per ton. PSD costs would be only a small factor in the cost structure of the industry. Moreover, facilities in these sectors are already subject to PSD for other pollutants.

How would a resolution striking down the endangerment finding affect EPA's ability to provide resources or technical expertise intended to address and adapt to climate change effects, including, but not limited to: Efforts to analyze climate and weather variability and its effects on agriculture, fisheries, species habitats, and coastal development among communities along the Gulf Coast and elsewhere; research programs related to climate change effects on mountain snowpack throughout the Pacific Coast and Mountain West regions; and the infrastructure, energy, and socioeconomic implications of relocating Alaska communities due to historically unprecedented coastal erosion?

You raise a very significant question. EPA has not had time to determine the answer. EPA would certainly try to help those threatened communities even if Congress vitiated the endangerment finding. As of this writing, however, I cannot guarantee that enactment of such a resolution would have no negative impact on those efforts.