

² This Reply Brief is being submitted pursuant to Circuit Rule 21(c) at the oral invitation of the Court. The parties and state amici joining in this reply brief now also include the State of New Hampshire.

In *Massachusetts v. EPA*, the Supreme Court precisely delineated the range of EPA's options on remand. EPA must decide "whether an air pollutant 'cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare,'" 549 U.S. ___, 127 S. Ct. 1438, 1462 (2007), *quoting* 42 U.S.C. 7521(a)(1). Thus, "[t]he statutory question is whether sufficient information exists to make an endangerment finding." *Id.* at 1463. The Court limited EPA to three possible answers to that question: yes, no, or insufficient information. EPA's answer, the Court made clear, must be based solely on the science. *Id.* at 1462-63. *See* Pet. for Mand. at 3.

Nowhere does EPA argue that it cannot give a science-based answer to the endangerment question, or that it lacks sufficient scientific information to do so. That leaves only the option of an affirmative or a negative determination. EPA does not dispute that months ago it in fact completed its work on a free-standing, fully-documented, affirmative endangerment determination, including complete drafts of a Federal Register notice and a scientific support document. Nor does EPA dispute the conclusion of a House committee investigation that the Administrator in fact approved the affirmative determination last fall. *See* Pet. for Mand. at 7-8. All that remains to satisfy the Supreme Court's mandate is for the Administrator to sign that notice and send it to the Federal Register.

EPA cannot cite any reason cognizable under the Supreme Court's decision why it may withhold the completed endangerment determination until the agency is ready, at some undisclosed future date, to propose standards for motor vehicle greenhouse gas emissions. EPA's claim is especially hollow given that the agency has withdrawn its

rulemaking to propose such standards and has made plain its intent not to pursue them.³ The agency points to the Supreme Court's statement that "EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies." EPA Br. at 21 (*quoting* 127 S.Ct. at 1462). But as the Supreme Court made clear in the very next sentences – and as even EPA concedes (EPA Br. at 4, n.1) – that latitude comes into play only *after* making the endangerment determination:

But once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute. Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.

127 S.Ct. at 1462 (reference omitted). Having found that EPA responded to the rulemaking petition unlawfully, the Supreme Court has directed the agency to respond again in conformity with law, by making the science-based endangerment determination.

The passage quoted above also disposes of EPA's argument (EPA Br. at 13) that mandamus may not issue because the original petition asked for final standards, not just an endangerment determination. The Supreme Court, of course, was well aware of the content of the petition. The Court directed EPA to address the endangerment question, and that is the law of the case. Moreover, EPA concedes that an endangerment determination is "a necessary prerequisite to any such regulation under section 202(a)"

³ See Unified Agenda and Regulatory Plan, noticed at 73 Fed.Reg. 24759 (May 5, 2008), available at <http://www.reginfo.gov/public/do/eAgendaViewRule?ruleID=277756>, and attached as Ex. B. (stating that EPA's "Rulemaking to Address Greenhouse Gas Emissions from Motor Vehicles" was "withdrawn" on March 5, 2008 based on the agency's conclusions that there is no need to set emission standards).

(*id.*), and thus there is nothing inconsistent with the relief requested in 1999 and the relief requested in this motion.

Petitioners would have no objection, of course, to EPA's proposing Section 202 standards now, in concert with making the endangerment determination. But EPA has no right, under the Supreme Court's decision, to *delay* the endangerment determination to await the indeterminate day when the agency decides that regulation should be pursued and is ready to make a proposal.

EPA offers a list of policy questions that it wants to mull over before making the endangerment determination, including such questions "as more general issues associated with potential regulation of greenhouse gas emissions under the Clean Air Act" (EPA Br. at 10) and "potential issues in the New Source Review (NSR) program" (Meyers Decl. ¶31). EPA cites its preference for developing a "comprehensive" plan for dealing with greenhouse gases under all relevant parts of the Clean Air Act. EPA Br. at 19. This preference supposedly supports EPA's new plan to withhold its completed endangerment finding, to scrap the proposed motor vehicle emission standards rulemaking that it developed last year, and to issue an "advanced notice of proposed rulemaking" (ANPR) that "can be expected to consider the relationship among these various CAA authorities as well as how different approaches to making the endangerment determination may impact those authorities." EPA Br. at 11.

These policy questions are indistinguishable from those already explicitly rejected in *Massachusetts* because they "rest[] on reasoning divorced from the statutory text." 127 S.Ct. at 1462. They offend the Court's clear directive that the agency consider only the science in deciding the endangerment question that the Court directed EPA to resolve

on remand. Nowhere does EPA claim that the ANPR is necessary to answer the one question that the Supreme Court put to the agency: Are motor vehicle GHG emissions “reasonably anticipated to endanger public health or welfare”?

That an endangerment determination under Section 202 may have impacts under other provisions of the Clean Air Act is irrelevant to the question put to the agency by the Supreme Court. Equally irrelevant is the fact that petitions are pending before EPA seeking regulation of other sources of greenhouse gas emissions.

In short, these are the same excuses EPA put forward in its 2003 denial of the original petition: EPA refused to act under Section 202 because it did not want to pursue an “inefficient, piecemeal approach to addressing the climate change issue” and preferred a “sensible regulatory scheme” under the Act that would deal with all sources of greenhouse gases. 68 Fed. Reg. 52922, 52931 (Sept. 8, 2003). The Supreme Court rejected this excuse because it is irrelevant to the endangerment question. 127 S.Ct. at 1463. The desire to delay action on endangerment and issue a “comprehensive” ANPR is *déjà vu* all over again.

The promised ANPR would only move the regulatory process backwards, from square one to square zero. An ANPR is merely a tool for “seeking information to assist [the agency] in deciding on the *possibility* of a *future* proposed rule.” *P&V Enterprises v. U.S. Army Corps of Engineers*, 516 F.3d 1021, 1026 (D.C. Cir. 2008) (emphasis in original).

EPA also cites its preference to collect further comment on the science before making an endangerment determination, stating that the ANPR will “seek public comment on scientific issues pertinent to an endangerment finding.” EPA Br. at 18. But

interested parties will have an opportunity to comment on the endangerment determination before final regulations are issued. *See National Asphalt Pavement Ass'n v. Train*, 539 F.2d 775, 779 n.2 (D.C. Cir. 1976). So EPA's goal of ensuring even more public discussion of the science will be met during the comment opportunity that follows the endangerment determination.⁴

EPA makes one half-hearted attempt to come up with a new issue: whether to regulate the four vehicular greenhouse gases individually or as a group, weighting each in accordance with its "global warming potential." EPA Br. at 3. This is not a scientific question related to whether these pollutants endanger public health or welfare, but a subsequent question of precisely how they should be regulated. It can and should be addressed in the rulemaking after the endangerment determination.

EPA also argues that it needs to ponder the interaction of the federal fuel economy standards with motor vehicle carbon dioxide regulations. To be sure, the Supreme Court recognized EPA's latitude to "coordinat[e] its regulations with those of other agencies." 127 S.Ct. at 1462. But any such coordination is relevant only at the stage of drafting those regulations. It has nothing to do with the threshold endangerment issue. The Energy Independence and Security Act (EISA), enacted last December, expressly preserves EPA's authority to regulate motor vehicle greenhouse gases under the Clean Air Act. *See* Pet. for Mand. at 15-16. As EPA itself has acknowledged, EISA "does not relieve us of our obligation to respond to the Supreme Court's decision in *Massachusetts v. EPA*." Statement of Stephen L. Johnson, Administrator, Before the House Select Committee on Energy Independence and Global Warming, March 13, 2008

⁴ In addition, the rulemaking petition has already gone through a full notice and comment process that generated nearly 50,000 public comments. 68 Fed.Reg. at 52923.

(attached as Ex. H to the Pet. for Mand.), at 4. As the Supreme Court cautioned, the Department of Transportation's standard-setting role "in no way licenses EPA to shirk its environmental responsibilities," and Section 202(a)(1)'s mandate to protect public health and welfare is "a statutory obligation wholly independent of DOT's mandate to promote energy efficiency." 127 S.Ct. at 1462.

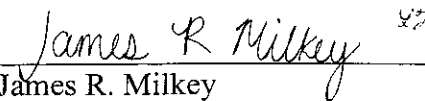
Conclusion

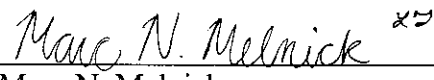
For the reasons set forth above and in the Petition for Mandamus, Petitioners respectfully request that this Court issue a writ of mandamus requiring the EPA Administrator to issue within 60 days his determination on whether greenhouse gas emissions from motor vehicles contribute to air pollution that may reasonably be anticipated to endanger public health or welfare.

RESPECTFULLY SUBMITTED,

MARTHA COAKLEY
MASSACHUSETTS.
ATTORNEY GENERAL

EDMUND G. BROWN JR.
CALIFORNIA ATTORNEY
GENERAL


James R. Milkey
Assistant Attorney General, Chief
Environmental Protection Division
William L. Pardee
Carol Iancu
Assistant Attorneys General
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200, ext. 2439


Marc N. Melnick
Nicholas Stern
Deputy Attorneys General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
(510) 622-2133

RICHARD BLUMENTHAL
CONNECTICUT ATTORNEY GENERAL

Kimberly P. Massicotte ²⁷
Kimberly P. Massicotte
Mathew I. Levine
Assistant Attorneys General
Connecticut Office of the Attorney General
55 Elm Street
Hartford, Connecticut 06106
860-808-5250

LISA MADIGAN
ILLINOIS ATTORNEY GENERAL

Gerald T. Karr ²⁷
Gerald T. Karr
Susan Hedman
Senior Assistant Attorneys General
Environmental Bureau
69 West Washington Street, Suite 1800
Chicago, Illinois 60602
(312) 814-3369


G. STEVEN ROWE
MAINE ATTORNEY GENERAL

Gerald D. Reid ²⁷
Gerald D. Reid
Assistant Attorney General, Chief
Natural Resources Division
6 State House Station
Augusta, ME 04333-0006
(207)626-8545

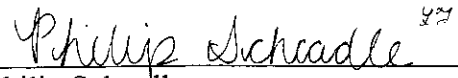
ANNE MILGRAM
NEW JERSEY ATTORNEY
GENERAL

Lisa Morelli ²⁷
Lisa Morelli
Jung W. Kim
Deputy Attorneys General
Environmental Enforcement Section
Richard J. Hughes Justice Complex
25 Market St., P.O. Box 093
Trenton, NJ 08625
(609) 292-6945

GARY K. KING
NEW MEXICO ATTORNEY GENERAL

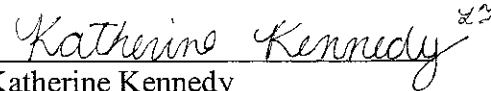

Stephen R. Farris
Assistant Attorney General, Director
Water, Environment, and Utilities Division
P.O. Box 1508
Santa Fe, NM 87504-1508
(505) 827-6601

HARDY MYERS
OREGON ATTORNEY GENERAL

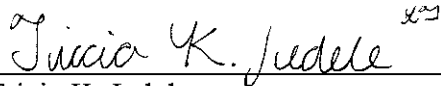

Philip Schradle
Special Counsel to the Attorney General
Paul S. Logan
Assistant Attorney General
1162 Court Street, N.E.
Salem, OR 97301
(503) 378-6002

ANDREW M. CUOMO
NEW YORK ATTORNEY GENERAL

BARBARA UNDERWOOD
Solicitor General
BENJAMIN GUTMAN
Assistant Solicitor General


Katherine Kennedy
Special Deputy Attorney General
Michael J. Myers
Morgan A. Costello
Assistant Attorneys General
Environmental Protection Bureau
The Capitol
Albany, New York 12224
(518) 402-2594

PATRICK C. LYNCH
RHODE ISLAND ATTORNEY
GENERAL


Tricia K. Jede
Special Assistant Attorney General
and Environmental Advocate
150 South Main Street
Providence, RI 02903
(401) 274-4400, ext. 2400

WILLIAM H. SORRELL
VERMONT ATTORNEY GENERAL

Kevin O. Leske ^{LS}
Kevin O. Leske
Assistant Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-6902

ROB MCKENNA
WASHINGTON
ATTORNEY GENERAL

Leslie R. Seffern ^{LS}
Leslie R. Seffern
Assistant Attorney General
Ecology Division
PO Box 40117
Olympia, WA
(360) 586-6770

PETER J. NICKLES
INTERIM D.C. ATTORNEY GENERAL

TODD S. KIM
Solicitor General

Donna M. Murasky ^{LS}
Donna M. Murasky
Deputy Solicitor General
Office of the Attorney General
for the District of Columbia
One Judiciary Square - Sixth Floor South
441 Fourth Street, N.W.
Washington, D.C. 20001
(202) 724-5667

MICHAEL A. CARDOZO
CORPORATION COUNSEL
CITY OF NEW YORK

John Hogrogian ^{LS}
John Hogrogian
Susan Kath
Scott Pasternack
Assistant Corporation Counsel
100 Church Street
New York, NY 10007
(212) 676-8517

GEORGE A. NILSON
BALTIMORE CITY SOLICITOR

William R. Phelan, Jr. ^{LS}
William R. Phelan, Jr.
Principal Counsel
Baltimore City Department of Law
100 Holliday Street
Baltimore, Maryland 21202
(410) 396-4094
Attorneys for Mayor and
City Council of Baltimore

TERRY GODDARD
ARIZONA ATTORNEY GENERAL

Tamara Huddleston ^{LS}
Tamara Huddleston
Joseph P. Mikitish
Assistant Attorneys General
Environmental Enforcement Section
1275 West Washington Avenue
Phoenix, AZ 85007
(602) 542-8553

JOSEPH R. BIDEN, III
DELAWARE ATTORNEY GENERAL

Valerie Satterfield Csizmadia²²
Valerie Satterfield Csizmadia
Deputy Attorney General
Delaware Department of Justice
102 W. Water Street, 3rd Floor
Dover, DE 19904
(302) 739-4636

THOMAS J. MILLER
IOWA ATTORNEY GENERAL

David R. Sheridan²²
David R. Sheridan
Assistant Attorney General
Environmental Law Division
Lucas State Office Bldg.
321 E. 12th Street, Ground Floor
Des Moines, IA 50319
Phone: (515) 281-5351

DOUGLAS F. GANSLER
MARYLAND ATTORNEY GENERAL

Kathy M. Kinsey²²
Kathy M. Kinsey
Assistant Attorney General
Maryland Department of the Environment
1800 Washington Boulevard, Suite 6048
Baltimore, Maryland 21230
(410) 537-3954

LORI SWANSON
MINNESOTA ATTORNEY GENERAL

Kathleen Winters²²
Kathleen Winters
Assistant Attorney General
Atty. Reg. No. 128089
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 215-8756

KELLY A. AYOTTE
NEW HAMPSHIRE ATTORNEY GENERAL

Maureen D. Smith²²
Maureen D. Smith
Senior Assistant Attorney General
Environmental Protection Bureau
Office of Attorney General
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3679

Susan Shunkman²²
Susan Shunkman
Chief Counsel
Commonwealth of Pennsylvania
Department of Environmental Protection
Rachel Carson Office Building, 9th Floor
P.O. Box 8464
Harrisburg, PA 17105
(717) 787-7060

David Bookbinder ^{LS}

David Bookbinder
408 C St NE
Washington, DC 20002
202-548-4598
fax: 202-547-6009
email: david.bookbinder@sierraclub.org

Attorney for Sierra Club, Center for Biological
Diversity, Conservation Law Foundation,
Friends of the Earth, and U.S Public Interest
Research Group

Howard Fox ^{LS}

Howard Fox
Earthjustice
1625 Massachusetts Avenue, NW
Washington, DC 20036
202-667-4500
email: hfox@earthjustice.org

Attorney for Sierra Club

David Doniger ^{LS}

David Doniger
Aaron Bloom
Natural Resources Defense Council
1200 New York Avenue
Washington, DC 20005
202-289-2403
fax: 202-289-1060
email: ddoniger@nrdc.org

Attorneys for Natural Resources Defense
Council

Joseph Mendelson III ^{LS}

Joseph Mendelson, III
Center for Technology Assessment
660 Pennsylvania Avenue, SE
Washington, DC 20003
202-547-9359
fax: 202-547-9429
email: joemend@icta.org

Attorney for Center for Technology
Assessment, Center for Food Safety,
Environmental Advocates and
Greenpeace

James B. Tripp ^{LS}

James B. Tripp
Environmental Defense Fund
257 Park Avenue South
17th Floor
New York, NY 10010
212-505-2100
email: jtripp@edf.org

Vickie Patton ^{LS}

Vickie Patton
Deputy General Counsel
Environmental Defense Fund
2334 North Broadway
Boulder, CO 80304
303-447-7215
email: vpattson@edf.org

Attorneys for Environmental Defense
Fund

No. 03-1361

U.S. Court of Appeals for the D.C. Circuit

Commonwealth of Massachusetts, *et al.*
Petitioners,

v.

United States Environmental Protection Agency,
Respondent.

CERTIFICATE OF SERVICE

I certify that on this 27th day of May, 2008, I served the enclosed Petitioners' Reply Brief in Support of Petition for Mandamus by first-class mail, postage pre-paid, on attorneys for each party at the addresses listed below. We are also today sending an electronic copy of the document to each party or party's counsel for which an e-mail address appears below.

David Bookbinder ²⁷
David Bookbinder
Sierra Club
408 C Street, NE
Washington DC, 20002
(202) 548-4598

Jon M. Lipshultz
U.S. Department of Justice
Environmental Defense Section
PO Box 23986
Washington, DC 20026-3986
Jon.Lipshultz@usdoj.gov

***Counsel for Respondent U.S.
Environmental Protection Agency***

Carol S. Holmes
Special Air Counsel
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, NW (MC 2344A)
Washington, DC 20460
Phone (202) 564-8709
holmes.carol@epamail.epa.gov

***Counsel for Respondent U.S.
Environmental Protection Agency***

Thomas L. Casey
Solicitor General
Alan F. Hoffman
Neil D. Gordon
Assistant Attorneys General
Environment, Natural Resources
and Agriculture Division
P.O. Box 30217
Lansing, MI 48909
(517) 373-1124
(517) 373-7540
hoffmanaf@michigan.gov
gordonnd@michigan.gov

Counsel for Respondent State of Michigan

Kent C. Sullivan
First Asst. Attorney General
Edward D. Burbach
Deputy Attorney General for Litigation
Karen W. Kornell
Assistant Attorney General, Chief
Jane E. Atwood
Assistant Attorney General
Natural Resources Division
P.O. Box 12548
Austin, TX 78711-2548
(512) 463-2012
jane.atwood@oag.state.tx.us

Counsel for Respondent State of Texas

Douglas Conde
Deputy Attorney General
1410 North Hilton
Boise, ID 83706
(208) 334-2400
douglas.conde@deq.idaho.gov

Counsel for Respondent State of Idaho

Lyle Witham
Assistant Attorney General
500 North 9th Street
Bismarck, ND 58501
(701) 328-3640
lwitham@state.nd.us

Counsel for Respondent State of North Dakota

Fred G. Nelson
Assistant Attorney General
160 East 300th South, 5th Floor
Post Office Box 140873
Salt Lake City, UT 84114-0873
(801) 366-0290
fnelson@utah.gov

Counsel for Respondent State of Utah

Lawrence E. Long
Attorney General
1302 E. Highway 14
Suite 1
Pierre, SD 57501
(605) 773-3215
Roxanne.giedd@state.sd.us

Counsel for Respondent State of South Dakota

Steven E. Mulder
Alaska Department of Law
1031 W. 4th Avenue; Suite 200
Anchorage, AK 99501
(907) 269-6011
steve_mulder@law.state.ak.us

Counsel for Respondent State of Alaska

David W. Davies
129 SW Tenth Avenue, 2nd Floor
Topeka, KS 66612-1597
(785) 296-2215
daviesd@ksag.org

Counsel for Respondent State of Kansas

David D. Cookson
Natalee J. Skillman
Assistant Attorneys General
2115 State Capitol
Lincoln, NE 68508
(402) 471-2682
dcookson@notes.state.ne.us
nskillma@notes.state.ne.us
tmatas@notes.state.ne.us
annette.kovar@ndeq.state.ne.us

Counsel for Respondent State of Nebraska

Teri Finfrock
Acting Senior Deputy Attorney General
Environmental Enforcement Section
Office of the Attorney General of Ohio
30 E. Broad Street, 25th Floor
Columbus, OH 43215
(614) 466-2766
dvitale@ag.state.oh.us
jkmcmamus@ag.state.oh.us

Counsel for Respondent State of Ohio

Theodore B. Olson
Miguel A. Estrada
Matthew D. McGill
Amir Cameron Tayrani
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

MMcGill@gibsondunn.com

Kenneth W. Starr
Stuart A.C. Drake
Andrew B. Clubok
Ashley C. Parrish
Lee Rudofsky
Kirkland and Ellis LLP
655 Fifteenth Street, N.W, Suite 1200
Washington, D.C. 20005
(202) 879-5000
lrudofsky@kirkland.com
aparrish@kirkland.com

William Albert Anderson, II
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006-3817
(202) 282-5986

***Counsel for Respondents the Alliance of
Automobile Manufacturers, Engine
Manufacturers Association, National
Automobile Dealers Association, and
Truck Manufacturers Association***

Norman W. Fichthorn
Lucinda Minton Langworthy
Allison D. Wood
Hunton & Williams, LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500
nfichthorn@hunton.com

***Counsel for Respondent Utility Air
Regulatory Group***

Russell S. Frye
FryeLaw PLLC
3050 K Street, N.W., Suite 400
Washington, DC 20007
(202) 572-8267
RFrye@fryelaw.com
collelir@api.org

***Counsel for Respondent CO₂ Litigation
Group***

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NEW SECTION: News About the Environment

White House Role Cited in EPA Reversal on Emissions

By Juliet Eilperin

Washington Post Staff Writer



Tuesday, May 20, 2008; Page A06

Environmental Protection Agency Administrator Stephen L. Johnson favored giving California some authority to regulate greenhouse gas emissions from cars and trucks last year before he consulted with the White House and reversed course, congressional investigators said yesterday.

THIS STORY

White House Role Cited in EPA Reversal on Emissions
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The five-month probe by the House Oversight and Government Reform Committee drew upon more than 27,000 pages of internal EPA documents and interviews with eight key agency officials, and it provides the most detailed look yet at the administration's mid-December decision.

California sought permission to implement rules aimed at cutting its vehicles' greenhouse gas emissions by 30 percent between 2009 and 2016. A total of 18 states -- representing 45 percent of the nation's auto market -- have either adopted or pledged to implement California's proposed tailpipe emissions rules, but the administration's refusal to grant a waiver under the Clean Air Act has blocked the rules from taking effect.

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According to the agency's documents and depositions by staff members, EPA officials unanimously endorsed granting California the waiver, and Johnson initially agreed. EPA Associate Deputy Administrator Jason Burnett testified under oath that Johnson "was very interested in a full grant of the waiver" in August and September of 2007 and later thought a partial grant of the waiver "was the best course of action."

Burnett told the panel he thought Johnson had told White House officials that he supported a partial waiver and said there was "White House input into the rationale" for the Dec. 19 letter announcing EPA's complete denial of the waiver.

Committee Chairman Henry Waxman (D-Calif.), who will hold a hearing on the matter today, said the probe showed that President Bush had crossed a line. "The president has broad authority, but he is not above the law," Waxman said.

But EPA spokesman Jonathan Shrader said the committee's report is "nothing new," because Johnson has consistently maintained that he considered various opinions when deciding how to rule.

"Administrator Johnson was presented with and reviewed a wide range of options and made his decision based on the facts and the law," Shrader wrote in an e-mail. "At the end of the day it was the Administrator's decision alone, and he stands by the decision."

The committee's revelations could provide fodder for the administration's critics, who are trying to obtain the waiver through legal and legislative means. More than a dozen states and a coalition of environmental groups are seeking to overturn the waiver denial in federal court, and congressional Democrats are pushing a bill that would reverse the decision through

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Ex. A

legislation. The Senate Environment and Public Works Committee will vote on the bill Wednesday.

Mary D. Nichols, who chairs the [California Air Resources Board](#), said in a statement: "While EPA fiddles and we burn, consumers are being denied the right to purchase cars that are cleaner and save money at the pump."

David Doniger, policy director at the climate center of the [Natural Resources Defense Council](#), an advocacy group, said his organization and other plaintiffs in the lawsuit will include the committee's findings in a brief they will submit to the [U.S. Court of Appeals](#) for the 9th Circuit.

"Seeing what really happened is going to help a court understand just how illegitimate and political EPA's decision really was," Doniger said.

It remains unclear how exactly senior Bush officials intervened in the decision. Burnett said he was instructed not to answer questions about the White House's involvement, and the White House maintains that Johnson was not influenced by his talks with White House officials.

"As Administrator Johnson said in his statement, he made an independent decision and his decision was based on the facts and the law," said Kristen Hellmer, spokeswoman for the White House Council on Environmental Quality.

Johnson did not comment on the House probe yesterday, but he told reporters at a meeting at Platts Energy Podium, a [McGraw-Hill](#)-sponsored presentation for reporters on energy issues, that "as a practical matter" it will be up to the next administration to determine whether carbon dioxide endangers public health because of its contribution to global warming.

"Carbon dioxide is a pollutant. I accept that," Johnson said.

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View Rule

EPA/AR

RIN: 2060-AO56

Publication ID: Spring 2008

Title: Rulemaking To Address Greenhouse Gas Emissions From Motor Vehicles

Abstract: This regulatory process was initiated at the direction of a Presidential Executive Order issued in May 2007. With passage of the Energy Independence and Security Act in December of 2007, the new law established specific legislative direction to several federal agencies that address similar programmatic controls. These new provisions are currently interpreted to supersede the need to complete this specific rulemaking. However, the new policy directives in EISA direct EPA to develop and implement a new renewable fuel standard program. The law provides specific volume mandates for the renewable fuels, establishes new standards for these fuels and a number of other new requirements in which the Agency must respond. A new action, Renewable Fuels Standard Program, (RIN 2060-AO81), has been established to develop and implement these new congressionally enacted standards. Further, Congress set new vehicle efficiency standards and although the EPA will participate in this process in a consultative role, the new authority and direction tasks NHTSA to develop and implement these new regulations.

Agency: Environmental Protection Agency(EPA)**Priority:** Economically Significant**RIN Status:** Previously published in the Unified Agenda**Agenda Stage of Rulemaking:** Completed Actions**Major:** Yes**Unfunded Mandates:** No**CFR Citation:** 40 CFR 86, 40 CFR 80 (To search for a specific CFR, visit the [Code of Federal Regulations](#).)**Legal Authority:** CAA 202, 206, 208, 211**Legal Deadline:** None**Timetable:**

Action	Date	FR Cite
Withdrawn	03/05/2008	

Additional Information: SAN No. 5164;**Regulatory Flexibility Analysis Required:** No**Government Levels Affected:** None**Small Entities Affected:** No**Federalism:** No**Included in the Regulatory Plan:** Yes**RIN Data Printed in the FR:** No**Agency Contact:**

Paul Argyropoulos

Environmental Protection Agency

Air and Radiation

6406I, 6401A,

Washington, DC 20460

Phone: 202 564-1123

Email: Argyropoulos.Paul@epamail.epa.gov

Robin Moran

Environmental Protection Agency

Air and Radiation

ASD,

Washington, DC 20460

Phone: 734 214-4781

Email: Moran.Robin@epamail.epa.gov
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