

**BEFORE THE UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

**CHAMBER OF COMMERCE OF THE  
UNITED STATES OF AMERICA**

**Petitioner**

EPA Docket #:  
EPA-HQ-OAR-2009-0171

**PETITION FOR RECONSIDERATION**  
**AND FOR STAY PENDING RECONSIDERATION**

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Pursuant to Clean Air Act Section 307(d)(7)(B); 42 U.S.C. § 7607(d)(7)(B); 5 U.S.C. § 553(e); 5 U.S.C. § 705; and Fed. R. App. P. 18(a)(1), the Chamber of Commerce of the United States of America (“Chamber”) respectfully petitions the United States Environmental Protection Agency to grant reconsideration, and a stay pending the completion of its reconsideration proceeding, in the following matter: *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, Docket Number EPA-HQ-OAR-2009-0171, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (“Endangerment Finding”). Given the important issues raised by this petition, the Chamber is willing to discuss with EPA an appropriate schedule and process for reconsideration with an EPA-ordered stay of the Endangerment Finding in place. EPA should contact the Chamber to initiate such a discussion. In the event the EPA has neither granted the petition nor contacted the Chamber to establish a mutually agreeable schedule for reconsideration by April 14, 2010, such inaction will be deemed a denial of the petition.

## **BACKGROUND**

The Chamber is a not-for-profit entity that constitutes the world’s largest business federation. The Chamber represents 300,000 direct members, and indirectly represents more than 3,000,000 businesses and professional

organizations, drawn from every size category, economic sector, and geographic region of the country. An important part of the Chamber's mission is to advocate the interests of its members in matters pending before the Executive Branch of government, including before the Environmental Protection Agency.

In furtherance of that mission, the Chamber has been closely monitoring the EPA proceedings leading to the Endangerment Finding, and filed comments with EPA in response to, among other proposals, EPA's proposed Endangerment Finding; its proposed "Tailoring Rule," *see Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 74 Fed. Reg. 55,292 (Oct. 27, 2009); and the joint rulemaking setting new fuel economy/GHG emission standards for new motor vehicles EPA is conducting with the Department of Transportation's National Highway Traffic Safety Administration ("NHTSA"), *see Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 74 Fed. Reg. 49,454 (Sept. 28, 2009) (Docket Number EPA-HQ-OAR-2009-0472) ("Auto Rule"). The Chamber has maintained an on-going dialogue with the Agency regarding these important issues that affect businesses throughout our nation.

The Endangerment Finding, Tailoring Rule, and Auto Rule proceedings are extraordinarily unusual and important. These proceedings seek to impose expensive controls on greenhouse gas emissions, using preexisting Clean Air Act

authority. But this preexisting statutory authority was neither designed, nor intended, nor “tailored” to regulate “pollutants” such as greenhouse gases that, because of rapid dispersion, are found in essentially equal concentrations throughout the globe and, to the extent they cause harms, cause them on a global scale. This ill-fit between pollution problem and Clean Air Act solution prompted EPA, in its proposed Tailoring Rule, to invoke the canon of construction directing that statutes be read to avoid absurd results. EPA should be commended for candidly focusing on the potential absurdity of applying all or part of the Act to GHG emissions. This petition identifies a ready escape hatch from the underlying problem, which EPA can and should employ to make a graceful exit from the looming prospect of triggering an absurd regulatory regime.

The petition takes as its point of departure two significant, authoritative legal interpretations put forward by Executive Branch agencies long after the comment period for the Endangerment Finding had closed on June 23, 2009. *First*, as noted above, the absurdity of seeking to regulate greenhouse gas emissions from stationary sources under the existing Clean Air Act was formally recognized and emphasized by EPA in the preamble to its Tailoring Rule proposal. That proposal was first published in the Federal Register on October 27, 2009, more than four months after the June 23, 2009, deadline for submitting comments in the Endangerment Docket.

*Second*, NHTSA recently proclaimed that it enjoys authority to regulate emissions from new motor vehicles, regardless of whether or not EPA enjoys similar authority under Title II of the Clean Air Act. EPA had worried that it might be best to regulate greenhouse gas emissions from new motor vehicles under the Clean Air Act because, in the absence of such action, some or all of those emissions might escape regulation. *See* Letter from Lisa Jackson, EPA, to Senator Jay Rockefeller IV, at 2 (Feb. 22, 2010) (“The impacts of [passage of a resolution disapproving the Endangerment Finding by Congress] would be significant. In particular, it would undo an historic agreement among states, automakers, the federal government, and other stakeholders [permitting GHG standards for new motor vehicles].”). Now, however, a February 19, 2010 letter to Senator Diane Feinstein from O. Kevin Vincent, Chief Counsel of the National Highway Traffic Safety Administration (“NHTSA”) within the U.S. Department of Transportation (“DOT”), has defused this concern. This NHTSA letter acknowledges that as a “legal matter” Congress disapproving the Endangerment Finding, thus preventing it from becoming effective, would “not directly impact NHTSA’s independent statutory authority to set fuel economy standards under the Energy Policy and Conservation Act (EPCA), as amended by the Energy Independence and Security Act of 2007 (EISA).” *See* Letter from O. Kevin Vincent, NHTSA, to Matthew B.

Nelson, Office of Senator Diane Feinstein, at 1 (Feb. 19, 2010). In other words NHTSA is able to go it alone without EPA employing its Clean Air Act authority.

The controls on greenhouse gas emissions now under consideration by the EPA would, if promulgated, constitute the most expensive regulatory program ever adopted in the United States. Against that backdrop, the recent authoritative acknowledgements from EPA and NHTSA — combined with the reality that new controls on greenhouse gas emissions threaten a still-recovering economy — provide ample grounds for EPA to reconsider its Endangerment Finding and stay that Finding pending completion of its reconsideration process.

## **ARGUMENT**

### **I. THE AGENCY SHOULD RECONSIDER ITS ENDANGERMENT FINDING.**

The new EPA and NHTSA legal interpretations are of central relevance to EPA's Endangerment Finding and constitute grounds for reconsideration arising after the close of the Endangerment Finding's public comment period on June 23, 2009. These twin developments negate the legal basis EPA had relied on to justify the Endangerment Finding.

#### **A. The Agency Has A Duty To Grant Reconsideration Where, As Here, The Grounds For Reconsideration Are Weighty And Have Arisen After A Rule Has Been Promulgated.**

Clean Air Act Section 307(d)(7)(B) sets out an approach for EPA to use in adjudicating reconsideration petitions, and states as follows:



If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.

*See* 42 U.S.C. § 7607(d)(7)(B).

In implementing this provision, the Agency may look to the court's decision in *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975), which is endorsed in the Act's legislative history. *See* H.R. Rep. 95-294, at 323 (May 12, 1977) (stating "the committee bill confirms the court's decision in *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975).").

*Oljato Tribe* sets forth a straightforward three-step process for EPA to follow in situations where petitions to reconsider Clean Air Act rules are filed:

(1) The person seeking revision of a standard of performance, or any other standard reviewable under Section 307, should petition EPA to revise the standard in question. The petition should be submitted together with supporting materials, or references to supporting materials. (2) EPA should respond to the petition and, if it denies the petition, set forth its reasons. (3) If the petition is denied, the petitioner may seek review of the denial in this court pursuant to Section 307.

*Id.* at 666.

This petition satisfies or sets the stage for each of the three *Oljato Tribe* steps in a reconsideration process. It satisfies the first step because it seeks the

withdrawal of the Endangerment Finding on specified legal grounds. EPA thus has a duty to respond under the second *Oljato Tribe* step, mindful that judicial review of any explanations it gives for denying the relief the Chamber requests may occur, under the third *Oljato Tribe* step, in the D.C. Circuit.

*Oljato Tribe* reemphasized a key point, first emphasized in the legislative history to the 1970 Clean Air Act Amendments; namely, that “new information” may “dictate a revision or modification of any promulgated standard or regulation established under the act.” *Id.* at 660 (quoting S. Rep. No. 91-1196, at 41-42 (1970)). Because critical new information may become available, as here, after a “regulation” has been “promulgated,” legal argument should be directed in the first instance on reconsideration to EPA, in order to build a record for later D.C. Circuit review. *See id.* at n.20.

Also notable is Section 307(d)(7)(B)’s treatment of petitions submitted “within the time specified for judicial review.” The function of that provision is to *require* that EPA seek public comment on reconsideration requests received by the Agency within the 60-day judicial-review window specified by the Act’s Section 307(b)(1). *See Kennecott Corp. v. EPA*, 684 F.2d 1007, 1019-20 (D.C. Cir. 1982). But Section 307(d)(7)(B)’s *mandatory* notice-and-comment obligation does not mean that other reconsideration and stay petitions, like this one, can be ignored. If that were true, Congress would not have looked to *Oljato Tribe* as a model, for in

that case the relevant reconsideration petition was filed long outside the review window. Instead, where, as here, the grounds for reconsideration arise after the close of the review period, the petition must still be considered, albeit with a discretionary (as opposed to mandatory) opportunity for further public comment.

The D.C. Circuit thus explained in *Oljato Tribe* that “the public’s right to petition the Administrator for revision of a standard of performance and the Administrator’s duty to respond substantively to such requests *exist completely independently of Section 307* and this court’s appellate jurisdiction.” 515 F.2d at 667 (emphasis added); *see also, e.g., PPG Indus., Inc. v. Costle*, 659 F.2d 1239, 1250 (D.C. Cir. 1981) (counseling that amendment or repeal of a Clean Air Act regulation could be sought under APA Section 553(e) in conjunction with Section 307(d)(7)(B) even well outside the 60-day review window); *Lead Indus. Ass’n, Inc. v. EPA*, 647 F.2d 1130, 1143, 1145 (D.C. Cir.) (petition for reconsideration filed outside 60-day review window resolved on merits by EPA and not deemed untimely by D.C. Circuit), *cert. denied*, 449 U.S. 1042 (1980); *see also, e.g.,* 63 Fed. Reg. 24,749 (May 5, 1998) (granting three-month EPA stay of emissions standard promulgated nearly four years earlier). Unless Clean Air Act Section 307(d)(7)(B)’s rulemaking reconsideration procedures are newly read wholly to displace the APA’s ordinary processes for repealing or amending rules, Clean Air Act reconsideration requests based on grounds newly arising after close of the

review window must still be entertained by the Agency — albeit under the appropriate standard of review and with greater discretion as to further public comment.

In sum, EPA enjoys legal discretion to consider and grant this petition for reconsideration, under both Section 307 and general administrative law principles. Of course, as *Oljato Tribe* recognized, the depth of EPA’s analysis may vary with the significance of the arguments presented to the Agency: “We are by no means demanding comprehensive responses to frivolous petitions, but nor are we sanctioning summary dismissals of meritorious claims.” *Id.* at 666 n.19. Where, as here, the issues on reconsideration are substantial, a summary denial of the petition would constitute an abuse of EPA’s discretion. Likewise, a claim that EPA lacks authority to entertain the petition at all would run afoul of *Prill v. NLRB*, 755 F.2d 941, 947-48 (D.C. Cir. 1985), and its progeny, because, by definition, EPA would have misread its statutory mandate. EPA may and must exercise the statutory reconsideration discretion it has been delegated.

**B. The Tailoring Rule Preamble And NHTSA Letter Have Combined To Undermine EPA’s Rationale For The Endangerment Finding.**

As demonstrated below, the Tailoring Rule and NHTSA legal interpretations, taken together, establish that the public health and welfare benefits EPA had expected will be either legally unavailable (in the case of stationary

source emissions) and/or legally duplicative and superfluous (in the case of reductions from new motor vehicles). Moreover, both events occurred months after the June 23, 2009, close of the Endangerment Finding comment period: the Tailoring Rule was proposed in the Federal Register on October 27, 2009 (signed September 30, 2009), and the NHTSA letter is dated February 19, 2010. Given the dictates of *Massachusetts v EPA*, 549 U.S. 497 (2007), combined with these post-comment-period legal interpretations, the reasons EPA gave for supporting the Endangerment Finding are no longer cogent.

**1. *Massachusetts Does Not Preclude EPA From Declining To Regulate.***

As emphasized in the Chamber's Tailoring Rule comments, the agency is at risk of misperceiving its options in the wake of *Massachusetts v. EPA*, 549 U.S. 497 (2007). According to the Agency, EPA must be prepared to say, either "yes," "no," or "the science is too uncertain" in answering the question whether public health and welfare are subject to endangerment from greenhouse gas emissions. *See* Auto Rule, 74 Fed. Reg. at 49,507 ("The Court held that the Administrator must determine whether or not emissions from new motor vehicles cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, or whether the science is too uncertain to make a reasoned decision."); *see also* Speech of EPA Administrator Lisa P. Jackson to the National Press Club, available at <http://yosemite.epa.gov/opa/admpress.nsf/8d49f7>

[ad4bbcf4ef852573590040b7f6/70ba33a218b8f22f852576e0006b2a53!OpenDocu](#)  
[ment](#) (Mar. 8, 2010) (referring incorrectly to “the Supreme Court’s 2007 decision that *EPA must use the Clean Air Act to reduce the proven threat of greenhouse gases.*”) (emphasis added).

In fact, other answers fitting within the *Massachusetts* holding are both possible, and preferable to these three alternatives. *Massachusetts*’s precise holding is that EPA’s reasons for denying a rulemaking petition submitted by the International Center for Technology Assessment were legally defective because the arguments advanced by the agency supporting that denial were not adequate. *Massachusetts* did not decide that the regulation of GHGs under the Act was legally required. *Massachusetts* did not address, much less decide, whether controls on greenhouse gases could be imposed throughout the Act, consistent with Congress’s intent, and without triggering absurd results. In particular, *Massachusetts* did not address whether Clean Air Act controls could lawfully be imposed on the small, stationary GHG emissions sources assertedly subject to the Act’s PSD and Title V programs. *Massachusetts* merely rejected the Agency rationale for inaction under review — a rationale that generally contended that GHGs are not “pollutants” for purposes of regulations promulgated under the Act’s section 202.

The *Massachusetts* Court made clear that, on remand, “EPA must ground its reasons for action *or inaction* in the statute.” 549 U.S. at 535 (emphasis supplied). Contrary to what the EPA has sometimes thought, *Massachusetts* does not paint the Agency into the confining corner of a false trilemma, or demand that the Agency shoehorn greenhouse gas emissions controls into the existing Clean Air Act. *Massachusetts* requires, not pre-ordained results, but the Agency’s conscientious adherence to the customary mode of interpretation required by *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). See *Massachusetts*, 549 U.S. at 527. In other words, the agency should consider all relevant statutory interpretive considerations, including relevant legislative history and any absurdities that result from applying the Act as written to small stationary sources.

**2. The Tailoring Rule Preamble Correctly Concludes That A *Chevron* Step One Analysis Establishes That Regulating Greenhouse Gas Emissions From Statutory Sources Would Produce Absurd Results.**

*Massachusetts* envisions that the Clean Air Act’s application to GHGs should be determined according to *Chevron*’s familiar two-step analytical framework. Under this framework, administrative agencies (and reviewing courts) must first assess the plain meaning of statutes using traditional tools of construction, including the canon that presumes Congress would not intend for its enactments to be carried to absurd extremes. Nonetheless, EPA thus far has

omitted consideration of the implications for its Endangerment Finding of its invocation of the absurdity canon in the Tailoring Rule.

A *Chevron* analysis begins with an application of “traditional tools” of statutory interpretation. *See Chevron*, 467 U.S. at 843 n.9 (“If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”); *Pharmaceutical Research & Mfrs. of Am. v. Thompson*, 251 F.3d 219, 224 (D.C. Cir. 2001) (at *Chevron* step one reviewing courts should employ all “traditional tools of statutory interpretation,” including “text, structure, purpose, and legislative history”); *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1287 (D.C. Cir. 2000) (at *Chevron* step one, reviewing courts must “exhaust[] traditional tools of statutory construction”).

Because the absurdity canon is a traditional, though comparatively infrequently used, tool of construction, *see, e.g., Rector, Etc., of Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892); *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1167 (11th Cir. 2003), *Massachusetts* requires EPA to carefully consider its implications for the Agency’s overall statutory interpretation. Employed to help ascertain the plain meaning of statutes, the absurdity canon is grounded in courts’ recognition that a Congress or other legislative body would not intend their enactments to be taken in application to literal but absurd extremes.



The absurdity canon thus provides that, in interpreting the words of a statute, courts have “some ‘scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute’ . . . .” *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978) (quoting *Commissioner v. Brown*, 380 U.S. 563, 571 (1965) (alteration in original)).

EPA’s Tailoring Rule preamble emphasizes rightly that “[a]pplying the PSD thresholds to sources of GHG emissions literally results in a PSD program that is so contrary to what Congress had in mind — and that in fact so undermines what Congress attempted to accomplish with the PSD requirements — that it should be avoided under the ‘absurd results’ doctrine.” 74 Fed. Reg. at 55,310. The preamble also states that for “Title V, the application of the absurd results doctrine parallels that of PSD.” The Tailoring Rule preamble thus explains that applying PSD and Title V to controls on GHG emissions would produce an absurd situation in which Clean Air Act permitting processes seize up and break down:

If PSD and title V requirements apply at the applicability levels provided under the CAA, State permitting authorities would be paralyzed by permit applications in numbers that are orders of magnitude greater than their current administrative resources could accommodate . . . .

Without this tailoring rule, permitting authorities would receive approximately 40,000 PSD permit applications each year — currently, they receive approximately 300 — and they would be required to issue title V permits for approximately some six million sources —

currently, their title V inventory is some 15,000 sources. These increases are measured in orders of magnitude . . . .

It is also worth noting here that, under a scenario where State or local permitting authorities do not have the resources to implement the title V or PSD programs for GHG sources at current CAA permitting applicability thresholds, EPA may withdraw its approval, in which case, EPA would become the permitting authority and the enormous resource requirements would shift to EPA to implement these programs.

*See id.* at 55,292, 55,295, 55,300-01 (emphasis added).

Although EPA itself has candidly catalogued some of the ways in which application of the PSD program to GHG emissions would be absurd, the case for the absurdity of applying the Act to GHG emissions goes even beyond the arguments appearing in the Tailoring Rule's preamble. Consider the following analysis.

1. Applying the Act's PSD requirements to GHG emissions would absurdly draw into the PSD program emissions of pollutants whose asserted harm to human health and welfare is not concentrated near particular emissions sources, but dispersed throughout the globe. The PSD program is designed to maintain compliance and prevent specific geographic areas from experiencing air-quality deterioration that produces non-compliance with the National Ambient Air Quality Standards ("NAAQS"), whereas Title V is designed to streamline compliance with the PSD program and other Clean Air Act requirements by stationary sources. The PSD program is based on the setting of localized PSD "increments." These

localized increments define the maximum increase in concentrations of a pollutant over a baseline that will be allowed in a given geographically defined, air-quality control area. *See* Clean Air Act Section 164(b)-(c), 42 U.S.C. § 7474(b)-(c). Both EPA and courts have acknowledged the centrality of these geographically defined air-quality increments to the PSD program:

We continue to believe that the PSD program is intended to allow the air quality *in each area of the country attaining the NAAQS, and with the same area classification*, to “deteriorate” by the same amount for each subject pollutant, regardless of the existing air quality when the increment is initially triggered *in a particular area*, as long as such growth allowed within the constraints of the increment does not cause adverse impacts on *site-specific AQRVs [air quality related values]* or other important values. In this way, the PSD increments avoid having a disproportionate impact on growth that might disadvantage *some communities . . . .*

*Environmental Def. v. EPA*, 489 F.3d 1320, 1331 (D.C. Cir. 2007) (emphasis added). Self-evidently, a regulatory regime focused on ambient concentrations on the basis of geographically defined increments cannot be applied without absurdity to pollutants having essentially the same global concentration no matter where within our nation’s states or counties a given measurement might be taken. *See* 74 Fed. Reg. at 55,298.

2. Applying the Act’s PSD requirements to GHG emissions would absurdly require hundreds of thousands of small emissions sources to put in place burdensome, expensive, individualized emissions controls, *see* 74 Fed. Reg. at 55,294, 55,321-22, contrary to the express intentions of Congress. For example,

Senator Muskie, one architect of the 1977 Clean Air Act Amendments, made clear that he believed that “houses, dairies, farms, highways, hospitals, schools, grocery stores, and other such sources” would be excluded from the operation of PSD program. 123 Cong. Rec. 18,021 (June 8, 1977). Legislative history, the consultation of which is another traditional tool of construction, thus confirms that the PSD program was intended to apply exclusively to larger sources, not smaller ones.

**3.** Applying the Act’s PSD requirements to GHG emissions would absurdly jeopardize economic growth. The Clean Air Act declares that one purpose of PSD program is “to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources.” Clean Air Act Section 160, 42 U.S.C. § 7470(3). But over-burdening state permitting processes to the point where permitting the machinery seizes up and breaks down will necessarily force proposed new and modified sources to wait months or years for the permits they need before they can proceed with growth-enhancing construction. *See* Tailoring Rule 74 Fed. Reg. at 55,304 (contending that application of the PSD program to GHG emissions would make it “impossible” for permitting authorities to review and dispose of permit applications within 12 months). The resulting impact on economic growth will be especially severe in the short run — that is, in

the midst of the most severe economic downturn in recent history — when the new GHG program is in its infancy and administrative bottleneck will be tight.

In short, EPA is on solid ground in recognizing the “absurdity” of applying the PSD program to GHG emissions. But the Agency is mistaken in pursuing the remedy proposed in the Tailoring Rule preamble; namely, EPA’s erasure of the statutorily prescribed emissions thresholds and the replacement of them with EPA-prescribed thresholds. As noted above, the Supreme Court’s decision in *Trans Alaska Pipeline* holds that absurd applications of statutes should be avoided by “adopting a *restricted* rather than a literal or usual meaning” of relevant statutory terms. 436 U.S. at 643 (emphasis added); *see also, e.g., Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510 (1989) (construing a Federal Rule of Evidence to avoid an absurdity by entirely excluding from the term “any defendant” all criminal defendants). The Supreme Court’s remedy for potential absurd applications of statutes is thus one of narrowly, permanently, and categorically construing a statutory term to avoid the problem.

In this instance, having recognized the potential for an absurd application of the Clean Air Act, EPA should have considered resolving the absurdity by giving a permanent, categorical, restrictive interpretation to one or more statutory terms. For example, EPA might have adopted a categorical, narrowing construction of “emissions” or “major emitting facility,” by construing those terms to exclude all

GHG emissions or emitting facilities. *See, e.g.*, 42 U.S.C. § 7475(a) (referring to “major emitting facility”); *id.* § 7475(a)(i) (referring to “emission limitations”). EPA also should have considered a resolution that determines that the Act simply cannot apply at all to GHG emissions without triggering one or more absurdities in its application. But what EPA should not have done is what it did here — overlook this important aspect of the issue and finalize an Endangerment Finding with no mention of the problem. The Tailoring Rule preamble, issued months after the close of the Endangerment Docket comment period, makes clear a critical omission in the Agency’s justification for the Endangerment Finding.

**3. The Recent NHTSA Letter Confirms That Clean Air Act Regulation Of New Motor Vehicle GHG Emission Is Not Necessary.**

The Chamber’s comments to the Agency respecting EPA’s proposed Auto Rule emphasized that the federal government must choose between two alternative regulatory approaches: seeking to regulate GHG emissions using NHTSA’s authority under the Energy Policy Conservation Act (“EPCA”) and the Energy Independence and Security Act of 2007 (“EISA”) or, alternatively, seeking to regulate such emissions on authority of Title II of the Clean Air Act. *See* Clean Air Act Sections 202-250, 42 U.S.C. § 7521-7590; *see also* Chamber Comments on the Auto Rule at 1-2 (Nov. 27, 2009) (incorporated herein by reference). The Chamber advised strongly against regulation under the Clean Air Act’s Title II on

grounds that such regulation would “provide an unparalleled set of new tools to NIMBY (Not In My Back Yard) activists bent on stopping construction and development.” *Id.* at 1. The Chamber’s comments also recognized the mutual interconnections between the Auto Rule, the Tailoring Rule, and the Endangerment Finding. *Id.* at 7 and n.28.

Now, significantly, the DOT and NHTSA have concluded in their February 19, 2010, letter that Section 202(a) standards are *not* necessary to regulating automotive GHG emissions. NHTSA, EPA’s sister agency, instead enjoys adequate legal authority under EPCA and EISA to regulate such emissions, independent from EPA’s authority under Clean Air Act Section 202(a). *See* O. Kevin Vincent Letter at 1. The Endangerment Finding cannot claim to generate the public health benefits asserted to flow from mobile source GHG emissions reductions.

This NHTSA legal conclusion is critical in light of EPA’s own conclusion that the Endangerment Finding, as such, does not impose requirements on regulated entities: “The endangerment finding itself does not exercise jurisdiction over any source, domestic or foreign. It is a judgment that is a precondition for exercising regulatory authority.” 74 Fed. Reg. at 66,521. According to this logic, the Endangerment Finding, standing alone, produces no current public health or welfare benefits. It will instead produce such benefits in the future, according to

EPA, but only if it effectively serves as a precondition for the regulation of GHG emissions from new motor vehicles, stationary emissions sources, or some other category of emission sources.

Based on this understanding of the Endangerment Finding, EPA has actually described the Tailoring Rule as a *deregulatory* measure — one that seeks to scale back absurd and unavoidable regulatory implications that flow as unintended consequences from EPA’s independent decision to regulate GHG emissions from automobiles. *See* 74 Fed. Reg. at 55,349. *See also id.* at 55,294 (“This proposal is *necessary* because EPA expects soon to promulgate regulations under the CAA to control GHG emissions from light-duty motor vehicles and, as a result, trigger PSD and title V applicability requirements for GHG emissions.”) (emphasis added); *id.* at 55,295 (“Under EPA’s current interpretation of PSD and title V applicability requirements, promulgation of this motor vehicle rule will trigger the applicability of PSD and title V requirements for stationary sources that emit GHGs.”).

With the release of the February 19, 2010, NHTSA letter, however, this rationale for EPA’s regulatory program can no longer bear scrutiny. If EPA affirmatively wishes to pursue an Endangerment Finding to regulate emissions from new motor vehicles, it must explain what it can add to a NHTSA-only rulemaking. If EPA affirmatively wishes to pursue an Endangerment Finding to



lay the necessary groundwork to regulate GHG emissions from stationary sources, or other emissions sources, then the Agency must clearly say so and explain how such regulation can occur without absurdity. What the Agency may *not* do is maintain its current stance — where it assures the public that it has *no choice* but to risk the imposition of absurd stationary source regulations, based on a presumed need for motor vehicle regulations that could be accomplished through NHTSA regulations alone.

**C. EPA Should Reconsider Its Endangerment Finding Based On The EPA's And NHTSA's Legal Conclusions.**

The *Oljato Tribe* decision discussed above notes that the asserted grounds for reconsideration must be grounds EPA has power to address. *See* 515 F.2d at 664 n.17. Here, the grounds counseling reconsideration fall squarely within EPA's statutory authority and either call into question the core rationale EPA has offered for the Endangerment Finding (in the case of the new NHTSA letter), or establish that EPA has failed to consider an important aspect of the problem before the Agency (in the case of EPA's Tailoring Rule absurdity conclusion). To be sure, some type of an Endangerment Finding might potentially remain a prerequisite to EPA regulation, if any were needed, of GHG emissions from certain types of emission sources. But up to this point EPA has not viewed the Endangerment Finding as an end in itself, EPA has instead justified it as a means to the end of new motor vehicle regulation.

As matters stand, serious questions of central relevance to the legality of the Endangerment Finding have been raised. EPA's and NHTSA's own conclusions establish that, while the Endangerment Finding might well be unnecessary to achieving any significant public health or welfare advantages, it also might lead directly to absurd consequences. With the Endangerment Finding poised to set in motion a cascade of costly regulatory impositions on thousands of businesses across the nation — and on the people they employ — EPA simply cannot ignore these legal questions. EPA should use this petition, as it must, as a vehicle to confront these issues and resolve them by reconsidering its Endangerment Finding.

## **II. THE AGENCY SHOULD STAY THE ENDANGERMENT FINDING PENDING THE RECONSIDERATION.**

Considering the relevant legal and factual developments that have occurred since EPA closed the comment period on the Endangerment Finding on June 23, 2009, justice demands that EPA grant a stay of the legal effectiveness of its Endangerment Finding. Granting such a stay will facilitate review with all deliberate speed of this petition for reconsideration, as well as any other reconsideration petitions pending before the Agency.

### **A. EPA Should Grant A Stay Pending Reconsideration Because “Justice So Requires.”**

The Administrative Procedure Act controls how EPA should consider and decide requests for administrative stays pending reconsideration: “When an

agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.” 5 U.S.C. § 705. Nothing in Clean Air Act Section 307(d)(7)(B) sets aside this APA standard. Accordingly, it would be an abuse of discretion for EPA not to postpone the effectiveness of its Clean Air Act rulemakings, including the Endangerment Finding, where, as here, the interests of justice require a stay. EPA has long recognized as much. *See Ohio: Approval and Promulgation of Implementation Plans*, 46 Fed. Reg. 8,581, 8,582 n.1 (Jan. 27, 1981) (signed Jan. 19, 1981 by Administrator Costle) (noting that EPA was applying APA Section 705 to petitions for reconsideration and a stay submitted pursuant to Clean Air Act Section 307(d)(7)(B)).

The only respect in which the Clean Air Act modifies the usual APA rules is that stays of rulemakings under the Clean Air Act can last no longer than three months. *See* Section 307(d)(7)(B). In considering and disapproving three additional EPA stays of a particular rulemaking granted *after* an initial three-month stay had expired, the D.C. Circuit concluded: “EPA had no authority to stay the effectiveness of a promulgated standard except for a single, three-month period authorized by section 307(d)(7)(B) of the CAA . . . .” *NRDC v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992). The outcome in *Reilly* is a reflection of the speed Congress sought to impose on Clean Air Act judicial review and reconsideration processes, including the fundamental principle that the pendency of a petition for

reconsideration does *not* affect a party's ability to simultaneously pursue judicial review. See H.R. Rep. 101-490, pt. 1 (May 17, 1990), (stating that "the filing of petitions for agency reconsideration does not render agency action nonfinal for purposes of judicial review").

Critically, APA Section 705 grants agencies authority to issue stays even absent showings of irreparable harm. Proving irreparable harm becomes an relevant consideration, if at all, only when a stay of an agency rule is requested *from a court*, as the full text of Section 705 makes clear:

When an agency finds that *justice so requires*, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary *to prevent irreparable injury*, the reviewing court . . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705 (emphasis added).

To date, EPA has not directed its attention in the context of the Endangerment Finding to either of the two centrally relevant legal interpretations discussed above. Justice thus requires that a stay be put in place while the Agency grapples with the important questions raised by these EPA and NHTSA interpretations and by this petition: Why does the final Endangerment Finding not acknowledge that it may well produce absurd results? Why does the Endangerment Finding not conclude that this looming absurdity constitutes

evidence that Congress did not intend for the Clean Air Act to be used to regulate GHG emissions? Moreover, if NHTSA's legal conclusion is correct, why does EPA's participation in a joint automobile rulemaking remain necessary? What precisely are the incremental public health or welfare benefits that will flow from that participation? Are those benefits worth the price of the absurdities that the finding will or may entail by triggering regulation elsewhere under the Clean Air Act? In order to answer these questions, and meet the demands of fairness and justice, a stay of the Endangerment Finding is in order.

**B. The Four Factors Courts Often Use To Analyze Stay Requests Also Weigh In Favor Of A Stay.**

Although the test not applicable to this request for an administrative stay, the Chamber notes that courts asked to stay agency decisions on direct review often employ the same four-factor test as is used to adjudicate requests for preliminary injunctions or stays pending appeal. *See Ohio v. NRC*, 812 F.2d 288, 290 (6th Cir. 1987) (holding that a motion for a § 705 stay should be judged by the same standard as a motion for a preliminary injunction); *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam). The leading D.C. Circuit cases in this line of judicial authority are *Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); and *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958). As stated in *WMATA v. Holiday Tours*, the four parts of the relevant test are as follows:

(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review. (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest?

559 F.2d 843 (quoting *Virginia Petroleum Jobbers Ass'n*, 259 F.2d at 925) (alteration in original). Again, this judicial test is not applicable to this request for an administrative stay, under APA Section 705. Nonetheless, it is instructive to note that each of the four *WMATA* factors militates strongly in favor of granting a stay pending reconsideration of the Chamber's petition.

**1. The Chamber Has Made A Strong Showing On The Merits.**

On the merits, and as discussed above, EPA has simply failed to square its Endangerment Finding with its Tailoring Rule preamble and NHTSA's legal authority letter. EPA's Endangerment Finding remains at present entirely divorced from (1) EPA's conclusion in the proposed Tailoring Rule that application of the PSD program could lead to absurd results; (2) EPA's conclusion that those absurd results are necessarily triggered by its decision to issue a Section 202(a) Endangerment Finding; and (3) the NHTSA letter's conclusion that an Endangerment Finding is not necessary for regulating GHG emissions from automobiles. *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1063 (D.C. Cir. 2001) (vacating EPA rule because the Agency "failed to explain" regulatory

classifications and left the reviewing court “to guess whether its decision was based on a consideration of the relevant factors”). This failure of explanation on foundational aspects of the Agency’s legal justification constitutes reversible error.

## **2. Business Will Be Irreparably Harmed If The Endangerment Finding Is Not Stayed.**

The Chamber has already submitted a study that, standing alone, proves that the legal effect of the Endangerment Finding will cause irreparable harm to the Nation’s businesses, States, and local governments. *See* Portia M. E. Mills and Mark P. Mills, *A Regulatory Burden: The Compliance Dimension of Regulating CO<sub>2</sub> as a Pollutant*, U.S. Chamber of Commerce, at 3 (Sept. 2008), (Appendix A). This study estimates that the PSD thresholds written into the statute would be reached, for example, by one-fifth of all food service facilities, one-third of health care facilities, half of those employed in the lodging industry, and even 10 percent of buildings used for religious worship. *See* Ben Lieberman, *Small Business Impact of the Endangerment Finding* (Jan. 20, 2010), available at <http://www.heritage.org/Research/Reports/2010/01/Small-Business-Impact-of-the-EPA-Endangerment-Finding> (last visited Mar. 15, 2010). All told, the Chamber estimates that over 1.2 million buildings in the U.S. would potentially become subject to PSD as a direct result of the Endangerment Finding.

This vast number of newly-regulated entities will have to wait six to twelve months, and will spend, on average, \$125,120 and 866 hours on paperwork for

PSD permits so that new construction or modifications to their buildings can begin. *See* EPA, Information Collection Request for Prevention of Significant Deterioration and Nonattainment New Source Review (40 C.F.R. pts. 51, 52) (Aug. 2008). Even if only 40,000 of the 1.2 million affected building owners choose to make modifications or seek permits for new construction, PSD compliance alone would cost over \$5 billion and would require diverting untold employee hours toward drafting, submitting, and otherwise obtaining permits. Moreover, the state and local agencies responsible for processing those 40,000 permits would be on the receiving end of this paperwork avalanche and be forced to spend an estimated \$931.2 million additional dollars. This near-\$1 billion in administrative costs would, by itself, overwhelm the federal government's current appropriations to aid States in implementing the Clean Air Act. In 2008, Congress appropriated less than one-quarter of that amount — some \$227.5 million — for state, local and tribal assistance grants for air quality management. In fact, in 2008, EPA spent only \$971.7 million on all of its clean air and global climate programs combined.

These economic threats are confirmed by, among other commenters, an Office of Management and Budget memorandum that states, candidly, that “[m]aking the decision to regulate CO<sub>2</sub> under the CAA for the first time is likely to have serious economic consequences for regulated entities throughout the U.S.



economy, including small businesses and small communities. Should EPA later extend this finding to stationary sources, small businesses and institutions would be subject to costly regulatory programs such as New Source Review.” Undated OMB Memorandum, posted to regulations.gov docket folder for the Endangerment Finding Rulemaking as Document Number EPA–HQ–OAR–2009–0171-0124, at 2 (posted Apr. 22, 2009) available at <http://www.regulations.gov/search/regs/home.html/#documentdetail?R=0900006480965abd>.

In response to these and similar projections, EPA has often contended that its Tailoring Rule will help ameliorate the dire economic consequences its actions would otherwise entail. But even assuming the Tailoring Rule provides some relief, this contention rests on assumptions that EPA has not adequately substantiated or explained, including that the Tailoring Rule can and will withstand judicial scrutiny in its current form; and that the Tailoring Rule is broad enough to protect businesses from misguided litigation brought by activist groups during the unavoidable, years-long interim periods in which the legal regime is being tested and sorted out. The Endangerment Finding will have multiple consequences — only some of which, at best, will be mitigated by the Tailoring Rule. Given the fundamental fact that, very few (if any) of the costs incurred by businesses because of assertions of unmeritorious environmental law claims are recoverable, the likelihood of irreparable harm is clear.

**3. No Party Will Be Appreciably Harmed If Automobile GHG Emissions Are Tackled Exclusively By NHTSA.**

Temporarily staying the legal effectiveness of the Endangerment Finding will have absolutely no impact on the public health or welfare and would not appreciably harm other parties to this or other litigation. Indeed, by EPA's reasoning, the Endangerment Finding in and of itself will have no regulatory *force*. Moreover, after NHTSA's letter, the Endangerment Finding also has little or no beneficial regulatory *effect* as an indispensable building block for other regulation.

To be sure, very recent press accounts have reported a public statement by one EPA official, asserting that the Endangerment Finding retains some independent advantages even in the wake of the NHTSA letter. These reports indicate that at a March 4, 2010, continuing legal education conference, Assistant EPA Administrator for Air and Radiation Gina McCarthy asserted at that, if mobile source GHG regulation were tackled solely by NHTSA, 40 percent of the emissions benefits would be lost as compared to those available from a joint NHTSA/EPA rulemaking. *See* Steven D. Cook, *CAFE Increase Without Greenhouse Gas Limits Would Forgo 40 Percent of Emission Cuts*, BNA DAILY REPORT FOR EXECUTIVES, 1 (Mar. 5, 2010). One report quoted Assistant Administrator McCarthy as saying that "reducing greenhouse gas emissions from vehicles is a matter of more than fuel efficiency," and that "[r]eductions also can be achieved through improvements to other systems in a vehicle, particularly air

conditioning.” *Id.* These statements, if accurately reported, are interesting and significant, but they do not militate in favor of continuing the effectiveness of the Endangerment Finding, pending reconsideration.

*First*, Ms. McCarthy’s statements appear to contradict joint pronouncements made by EPA and NHTSA in proposing GHG emissions rule. Those previous statements suggest that a NHTSA-only proceeding would be able to achieve a much greater share than 60 percent of the emissions benefits produced by a joint NHTSA/EPA proceeding. *See, e.g.*, 74 Fed. Reg. at 49,458, 49,459; *see also id.* at 49,461, 49,465.

*Second*, to the extent EPA maintains that it enjoys a significant advantage over a NHTSA proceeding because NHTSA cannot by law test cars for compliance with their air conditioners running, *see* 49 U.S.C. § 32904(c), that advantage cannot be large and, in any event, can be neutralized without discharging the blunderbuss of an Endangerment Finding. For instance, NHTSA and EPA could, without an Endangerment Finding, establish a voluntary program permitting manufacturers to opt into a voluntary GHG emissions regime of slightly increased stringency in return for the ability to use air-conditioning credits. EPA and NHTSA could readily model such a program on the Voluntary National Low Emissions Vehicle (“NLEV”) program cooperatively developed by EPA and car manufacturers in the 1990s. *See, e.g.*, 62 Fed. Reg. 31,192 (June 6, 1997).

In sum, given EPA's previous statements, together with the alternative options for regulation, it appears that only a miniscule sliver of GHG benefits (if any) might be lost if all non-voluntary controls on automobile GHG emissions are issued by NHTSA alone. But even if this assumption were incorrect, and even if some significant emissions benefit were at stake, the case for a stay would be all the stronger. In that event, the potential validity of Assistant Administrator McCarthy's statements would show just how far from the official agency record and explanation and legal justification EPA's true thinking has wandered. *See FCC v. Fox Telev. Stations, Inc.*, 129 S. Ct. 1800 (2009) (reaffirming the requirement that agencies must adequately explain changes in course); *see also Winter v. NRDC*, 129 S. Ct. 365, 374-76 (2008) (court errs if it grants an injunction where irreparable harm is merely a "possibility," but not where the party has shown that it is likely to succeed on the merits and likely to experience irreparable harm, and the balance of equities tips in its favor); *Davis v. PBGC*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009) (four traditional equitable factors must be balanced against one another). EPA must give the public notice and an opportunity to comment on its *current* rationale for regulation, or reversal of EPA's action remains likely. And EPA must share with the public any evidence supporting a significant shift from previous federal government positions. Until such explanation is given and such evidence is shared, EPA cannot rely in the equitable

balancing on unofficial accounts of harms to third parties, as a reason not to stay the effectiveness of its Endangerment Finding.

#### **4. The Public Interest Favors A Stay.**

A final, and in this case decisive, factor to be considered in passing on a court-ordered stay of an administrative order is whether public interest favors such a stay. *See Hamlin Testing Labs., Inc. v. Atomic Energy Comm'n*, 337 F.2d 221 (6th Cir. 1964); *Associated Secs. Corp. v. SEC*, 283 F.2d 773 (10th Cir. 1960). Here a stay would greatly promote EPA's deliberate, logically consistent, consideration of regulations across its interrelated front of GHG regulatory proposals. Even more important, a stay would avoid the economic harms the Endangerment Finding would otherwise inflict on persons not directly before the Agency in these proceedings.

As to practically each and every American citizen, the public interest militates strongly in favor of a stay.

## CONCLUSION

EPA should grant reconsideration of its Endangerment Finding and a stay pending completion of its reconsideration proceeding.

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Respectfully submitted,

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