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January 23, 2008

Stephen L. Johnson
Administrator
U.S. Environmental Protection Agency
United States Environmental Protection Agency 1101A
U.S. EPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Certified mail

Re: *Massachusetts v. EPA* remand

Dear Administrator Johnson:

As you know, on April 2, 2007, the Supreme Court reversed and remanded EPA's refusal to set standards for emissions of greenhouse gases from new motor vehicles pursuant to Section 202 of the Clean Air Act. *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007). After determining that greenhouse gases are "air pollutants" subject to regulation under Section 202, the Court reversed EPA's denial of a rulemaking petition from the International Center for Technology Assessment, which was filed in 1999. The Court remanded the case for EPA to make a fresh determination on the rulemaking petition and to make an endangerment determination.¹ As EPA described the Court's mandate last month:

On April 2, 2007, the Supreme Court ruled that the EPA must determine, under Section 202(a) of the Clean Air Act, whether greenhouse gas emissions (GHG)

¹ The Supreme Court remanded the case to the U.S. Court of Appeals for the District of Columbia Circuit, which in turn ordered that "EPA's denial of the International Center for Technology Assessment's rulemaking petition be vacated and Nos. 03-1361, 03-1362, 03-1363, and 03-1364 be remanded for further proceedings consistent with the Supreme Court's opinion."

from new motor vehicles cause or contribute to air pollution that endangers public health or welfare.²

On May 14, 2007, President Bush made the following statement in the White House Rose Garden:

Last month, the Supreme Court ruled that the EPA must take action under the Clean Air Act regarding greenhouse gas emissions from motor vehicles. So today, I'm directing the EPA and the Department of Transportation, Energy, and Agriculture to take the first steps toward regulations that would cut gasoline consumption and greenhouse gas emissions from motor vehicles, using my 20-in-10 plan as a starting point.

Developing these regulations will require coordination across many different areas of expertise. Today, I signed an executive order directing all our agencies represented here today to work together on this proposal. I've also asked them to listen to public input, to carefully consider safety, science, and available technologies, and evaluate the benefits and costs before they put forth the new regulation.

This is a complicated legal and technical matter, and it's going to take time to fully resolve. Yet it is important to move forward, so I have directed members of my administration to complete the process by the end of 2008.³

In a press briefing immediately after, you stated the following:

On April 2, 2007, the U.S. Supreme Court decided in *Massachusetts versus EPA* that the Clean Air Act provided EPA the statutory authority to regulate greenhouse gas emissions from new vehicles if I determine in my judgment whether such emissions endanger public health and welfare under the Clean Air Act. Today the President has responded to the Supreme Court's landmark decision by calling on EPA and our federal partners to move forward and take the first regulatory step to craft a proposal to control greenhouse gas emissions from new motor vehicles.

* * *

[O]ur target for a draft proposal will be fall of this year. And as part of that proposal, we will address the endangerment finding as part of the proposal.

* * *

² 72 Fed. Reg. 69934 (December 10, 2007).

³ Statement of President Bush, May 14, 2007, *available at* <http://www.whitehouse.gov/news/releases/2007/05/20070514-4.html>.

The proposal – the sequence, we develop a proposed rule-making; then we take public comment on that proposed rule-making, which I said we would – our goal is to have a proposal out this fall, fall of 2007. Then there would be a notice and comment; then we then review all of those comments, and then make a final decision, which would then be issued in the final regulation, which the President has asked for us to have it completed by the end of 2008.⁴

On September 29, 2007, you addressed the Major Economies Meeting on Energy Security and Climate Change, called by President Bush and held at the State Department. You told an audience consisting of representatives from 17 nations:

[T]he President has directed the federal government to take the first step towards regulations, using his “20 in 10” plan as a starting point. We will issue a proposed rule regulating greenhouse gases later this year and are planning on issuing a final rule by the end of next year.⁵

At a hearing on November 8, 2007, before the House Committee on Oversight and Government Reform, you said the following:

Of course, before the agency, given the Supreme Court decision in *Massachusetts v. EPA*, the focus is on mobile sources. So we are, as I have already mentioned, going to be proposing regulating CO₂, greenhouse gases, from mobile sources by the end of this year.

* * *

We intend to propose our regulation by the end of this year, and the President has asked that we have a final decision in place by the end of 2008 on mobile sources.⁶

EPA reaffirmed that schedule in a formal “regulatory plan” published on December 10, 2007.⁷

⁴ Briefing, May 14, 2007, *available at* <http://www.whitehouse.gov/news/releases/2007/05/20070514-6.html>.

⁵ Administrator Stephen Johnson, Luncheon Address at the Major Economies Meeting, Washington, D.C., Sept. 27, 2007, *available at* <http://yosemite.epa.gov/opa/admpress.nsf/a883dc3da7094f97852572a00065d7d8/1692a2d0944f40b9852573630063eab3!OpenDocument>.

⁶ Hearing on EPA Approval of New Power Plants: Failure To Address Global Warming Pollutants, before the Committee on Oversight and Government Reform, House of Representatives, at 38, 87 (Nov. 8, 2007), *available at* <http://oversight.house.gov/documents/20071115145634.pdf>.

⁷ 72 Fed. Reg. 69934.

Despite your repeated commitments to respond to the mandate of the Supreme Court by issuing a proposed regulation, including a proposed endangerment determination, under Section 202 of the Clean Air Act by the end of 2007, no such action has been taken.

There is no basis for EPA to argue that the Energy Independence and Security Act of 2007 changes EPA's obligations under the Clean Air Act or *Massachusetts v. EPA*. As the Supreme Court stated: "[T]hat DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public's "health" and "welfare," a statutory obligation wholly independent of DOT's mandate to promote energy efficiency." 127 S.Ct. at 1462 (citations omitted). Nothing in the EISA alters EPA's authority or duties under Section 202 of the Clean Air Act or under the Supreme Court's remand. See P.L. 110-140, 2007 HR slip, § 3 ("Except to the extent expressly provided in this Act, or an amendment made by this Act, nothing in this Act or an amendment made by this Act supersedes, limits the authority provided or responsibility conferred by, or authorizes violation of any provision of law (including a regulation), including any energy or environmental law or regulation.").

On behalf of the undersigned petitioners in *Massachusetts*, we therefore request that you inform us, not later than February 27, 2008, when you will issue the proposed regulation and endangerment finding.

Unless we receive a satisfactory written response by that date, we intend to take action to enforce the Supreme Court's remand and the D.C. Circuit's mandate.⁸

If you would like to discuss this matter, feel free to have your staff contact us.

Sincerely,

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⁸ To the extent it may be required, this letter also serves as formal notice pursuant to Section 304(a) & (b) of the Clean Air Act of our intent to bring an action to challenge EPA's unreasonable delay in acting on the pending rulemaking petition. Mr. Bookbinder serves as our designated contact for the purposes of this notice.

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cc. Attorney General Michael B. Mukasey