ORAL ARGUMENT NOT YET SCHEDULED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA **Petitioner,** **v.**	**No. 10-1030** **Consolidated with Nos. 09-1322, 10-1024 through 10-1026, 10-1035 through 10-1042, 10-1044 through 10-1046, and 10-1049**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND LISA P. JACKSON, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY **Respondent.**	

PETITIONER'S NON-BINDING STATEMENT OF ISSUES AND STATEMENT REGARDING APPENDIX

Pursuant to this Court's March 15, 2010 order, Petitioner, the Chamber of Commerce of the United States of America ("Chamber"), respectfully submits this Non-Binding Statement of Issues and Statement Regarding Appendix.

STATEMENT OF ISSUES

At issue in these consolidated cases is the following rulemaking promulgated by Respondent, the United States Environmental Protection Agency ("EPA"):

> *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, published at 74 Fed. Reg. 66,496 (Dec. 15, 2009) [hereafter "Endangerment Rule"].

For purposes of this Statement of Issues, the term "Endangerment Rule" refers to either or both (as appropriate) the (i) endangerment or (ii) cause and contribute findings made by EPA in the Endangerment Rule.

The Endangerment Rule is of unprecedented legal and economic significance. It already has set in motion what easily may become the most far-reaching, onerous, and costly set of regulations ever adopted by any federal agency in American history. Typically, a very brief list of issues is presented at the outset of a new case in this Court. This case, however, is far from typical. Here, the gravity of the legal issues, combined with the great number of errors made by EPA, prompts the Chamber to set out a more detailed list of issues than what is sometimes used. The Chamber also takes this step to assist all parties and to insure the requisite number of briefing pages are allocated to cover the legal and procedural issues summarized below, as well as the factual and record-intensive challenges to the Endangerment Rule that will be presented by other parties.

A. THE ENDANGERMENT RULE'S LEGAL ERRORS IN STATUTORY CONSTRUCTION OR CONSIDERATION OF THE BOUNDS OF STATUTORY AUTHORITY

1. Whether EPA erroneously assessed the emissions causing or contributing to endangerment: (a) by including GHG emissions from non-new, in-use vehicles; (b) by failing to account for greenhouse gas ("GHG") emissions reductions mandated by the Energy Independence and Security Act of 2007, Energy Independence and Security Act of 2007, P.L. 110-140, 121 Stat. 1492 ("EISA"), which amends the Energy Policy and Conservation Act of 1975, P.L. 94-163, 89 Stat. 871 ("EPCA"); or (c) by otherwise failing to properly take account of EPCA, EISA, or any other existing federal law mandating emission reductions.

2. Whether the Endangerment Rule adopts an unlawful and/or arbitrary and capricious "precautionary principle" or otherwise improperly found a present endangerment by, *inter alia*, ignoring its legal obligation to consider the issue of adaptation and mitigation. *See especially* 74 Fed. Reg. 66,512-14.

3. Whether EPA's recognition in the proposed Tailoring Rule, *see Prevention of Significant Deterioration* ["*PSD*"] *and Title V Greenhouse Gas Tailoring Rule, Proposed Rule*, 74 Fed. Reg. 55,292 (Oct. 27, 2009), that the application of the PSD and Title V programs to GHG emissions would be "absurd" was properly considered in the Endangerment Rule process, and if so, whether the ramifications of that "absurdity" preclude EPA from issuing the Endangerment Rule.

4. Whether the presumption against the extraterritorial application of United States statutes dictates that EPA acted contrary to the Clean Air Act by asserting the authority to regulate under Clean Air Act Section 202(a), 42 U.S.C. § 7521(a), based on non-United States or worldwide air pollution effects.

5. Whether EPA's Endangerment Rule misconstrued the important structural difference in the Clean Air Act between public health and public welfare effects.

6. Whether EPA misconstrued the Supreme Court's opinion in *Massachusetts v. EPA*, 549 U.S. 497 (2007), to require issuance of an Endangerment

Rule, or otherwise overlooked critical instructions given or limitations set in that decision.

B. LEGAL DEFICIENCIES IN EPA'S EXPLANATIONS FOR MAKING CHOICES CONCERNING THE SUBSTANCE OF OR PROCESS USED FOR THE ENDANGERMENT RULE

7. Whether EPA produced a defective explanation for, or substantively erred in changing course as compared to: (a) the position of numerous cabinet officials and other Executive Branch officials in 2008, as set forth in the Advance Notice of Proposed Rulemaking ("ANPRM"), 73 Fed. Reg. 44,354 (July 30, 2008); or (b) EPA's decision in *Control of Emissions from New Highway Vehicles and Engines*, 68 Fed. Reg. 52,922 (Sept. 8, 2003).

8. Whether EPA's decision to split the statutory issues involved in regulating GHGs under the Clean Air Act into a profusion of different rulemaking proceedings was arbitrary and capricious or contrary to law, including, but not limited to (a) Clean Air Act Section 202(a)'s requirement to consider the cost implications of regulatory decisions; (b) Clean Air Act Section 317, 42 U.S.C. § 7617; (c) Clean Air Act Section 321, 42 U.S.C. § 7621; or (d) the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612.

9. Whether the EPA Administrator failed to exercise independent judgment in issuing the Endangerment Rule, either (a) by relying on the outcome of a foreign political process or (b) by prejudging the scientific and policy issues involved in determinations made under Clean Air Act Section 202(a).

The issues above have been stated without prejudice to the Chamber's right to raise additional issues explaining how EPA has acted arbitrarily and capriciously or contrary to law. The Chamber recognizes that with multiple issues having been listed, these issues will need to be prioritized during the briefing process to make for an efficient presentation of the case to the Court. The Chamber also expects to work with other parties to avoid duplication in the briefing. It is important to note, however, that the Court will also want to allow for adequate briefing of both the

legal and procedural issues set forth above, and the factual and record-intensive challenges that others will present in this extraordinarily important litigation.

STATEMENT REGARDING DEFERRED APPENDIX

The Chamber states that it intends to use a deferred appendix under Federal Rule of Appellate Procedure 30(c) and D.C. Circuit Rule 30(c).

Respectfully submitted,

/s/ Robert R. Gasaway

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20063
(202) 463-5337

Robert R. Gasaway
William H. Burgess
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Suite 1200
Washington DC 20005
(202) 879-5000

Counsel for Petitioner
Chamber of Commerce of the United States of America

April 15, 2010

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2010, I electronically filed the foregoing with the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. As to non-CM/ECF users, I have caused a copy of the foregoing document to be filed on the following non-CM/ECF users via First-Class Mail, postage-prepaid:

Shannon Lee Goessling,
Southeastern Legal Foundation
6100 Lake Forrest Drive, N.W.
Suite 520
Atlanta, GA 30328

Harry Woodward MacDougald
Caldwell & Watson, LLP
5825 Glenridge Drive
Building 2, Suite 200
Atlanta, GA 30328

Neal John Cabral
McGuireWoods LLP
1050 Connecticut Avenue, NW
Suite 1200
Washington, DC 20036-5317

Scott Charles Oostdyk
McGuireWoods LLP
One James Center, 901 East Cary Street
Richmond, VA 23219-4030

Timothy Kenly Webster
Sidley Austin, LLP
1501 K Street, NW
Washington, DC 20005

Harry Moy Nq
American Petroleum Institute
1220 L Street, NW
Washington, DC 20005-4070

Michael R. Barr
Pillsbury Winthrop Shaw Pittman, LLP
50 Fremont Street
San Francisco, CA 94105-2228

Quentin Riegel
National Association of Manufacturers
1331 Pennsylvania Avenue, NW
North Tower - Suite 1500
Washington, DC 20004-1790

Troy King
Office of the Attorney General
500 Dexter Avenue
Montgomery, AL 36130

Robert Douglas Tambling
Attorney General's Office of State of Alabama
11 South Union Street
Montgomery, AL 36106-0152

Hans Frank Bader
Sam Kazman
Competitive Enterprise Institute
1001 Connecticut Avenue, NW
Suite 1250
Washington, DC 20036

Greg Abbott
Attorney General, State of Texas
PO Box 12548
General Litigation Division
Austin, TX 78711-2548

William Orr
c/o Dr. Bonner Cohen
1600 North Oak Street, #617
Arlington VA 22209

Gregory F. Zoeller
Attorney General, State of Indiana
302 W. Washington Street
IGC-South, Fifth Floor
Indianapolis IN 46204

Bill McCollum
Attorney General of Florida
The Capitol, PL-01
Tallahassee FL 32399-1050

Jack Conway
Attorney General, Commonwealth of Kentucky
Capitol Suite 118
Frankfort KY 40601

Gov. Haley Barbour for the State of Mississippi
P.O. Box 139
Jackson MS 39205-0139

W.A. Drew Edmondson
Attorney General, State of Oklahoma
313 NE 21st Street
Oklahoma City OK 73105

Henry D. McMaster
Attorney General, State of South Carolina
P.O. Box 11549
Columbia SC 29211

Mark L. Shurtleff
Attorney General, State of Utah
P.O. Box 142320
Salt Lake City UT 84114-2320

Christopher Gene King
New York City Law Department
100 Church Street
New York, NY 10007

David G. Bookbinder
Sierra Club
408 C Street, NE
Washington, DC 20002

Joseph P. Mikitish
Attorney General's Office of State of Arizona
1275 West Washington Street
Phoenix, AZ 85007-2926

Kimberly P. Massicotte
Attorney General's Office of State of Connecticut
55 Elm Street
Hartford, CT 06141-0120

Susan Jane Hedman
Office of the Illinois Attorney General
100 West Randolph Street
Chicago, IL 60601

Joseph Mendelson, III
National Wildlife Federation
901 E Street, NW
Suite 400
Washington, DC 20004

Mark J. Bennett
Atty. General’s Office, State of Hawaii
Dep’t of Agriculture
425 Queen Street
Honolulu HI 96813

John C. Bruning
Atty. General’s Office, State of Nebraska
2115 State Capitol
PO Box 98920
Lincoln NE 68509

Gerald D. Reid
Atty. General’s Office, State of Maine
6 State House Station
Augusta, ME 04333-0006

Kelvin Allen Brooks
Attorney General's Office of State of New Hampshire
33 Capitol Street
Concord, NH 03301-6397

Stephen Robert Farris
Attorney General's Office of State of New Mexico
PO Drawer 1508
Santa Fe, NM 87504

Valerie Melissa Satterfield
Atty. General's Office, State of Delaware
102 West Water Street - Third Floor
Dover, DE 19904

Charles E. James, Jr.
Office of the Attorney General
900 East Main Street
Richmond, VA 23219

Wayne Kevin Stenehjem,
Atty. General's Office of State of North Dakota
600 East Boulevard Avenue
Bismarck, ND 58505-2210

Jocelyn F. Olson
Atty. General's Office, State of Minnesota
445 Minnesota Street
1100 NCL Tower
St. Paul MN 55101-2128

Karen R. Harned
Nat'l Federation of Indep. Business
1201 F Street NW
Suite 200
Washington DC 20004

___/s William H. Burgess____