



**STATEMENT OF TEXAS ATTORNEY GENERAL GREG ABBOTT**

**Before the Energy & Power Subcommittee  
of the House Energy & Commerce Committee  
March 24, 2011**

Thank you, Mr. Chairman, for the opportunity to appear before this Subcommittee. My name is Greg Abbott, and I am the Attorney General of Texas. I am here today to discuss litigation the State of Texas has filed against the U.S. Environmental Protection Agency (“EPA”) and explain why the EPA’s regulation of greenhouse gases (“GHGs”) violates the Clean Air Act.

Although the EPA’s legally flawed pursuit of GHG regulations has forced Texas into a legal dispute against our federal partners, the last year of litigation stands in contrast to years of cooperative enforcement between Texas and the EPA.

For example, in 2009 we worked with the EPA to shut down a lead smelter in El Paso. Under a settlement negotiated by Texas, the EPA, and other States, ASARCO was required to pay more than \$1.8 billion for environmental remediation across the country—including more than \$100 million for clean-up in the State of Texas.<sup>1</sup>

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<sup>1</sup> Press Release, Attorney General Greg Abbott, ASARCO Pays \$52 Million to Fund Environmental Cleanup at Former El Paso Smelter (Dec. 10, 2009), available at <https://www.oag.state.tx.us/oagNews/release.php?id=3181>.

We also worked with the EPA to obtain the largest-ever air quality settlement with a refining company when we required San Antonio-based Valero to spend more than \$700 million upgrading its facilities.<sup>2</sup>

While Texas has a demonstrated record of enforcing environmental laws in conjunction *with* the EPA, we also have a record of doing so on our own—as we did when we obtained the largest-ever penalty under the Texas Clean Air Act in a case where Huntsman was required to pay more than \$9 million for unlawful emissions at its Port Arthur facility.<sup>3</sup>

In addition to enforcing existing environmental laws and holding polluters accountable, Texas also strives to prevent pollution before it occurs. And Texas is a success story on that front too.

According to the Texas Commission on Environmental Quality, ozone and nitrogen oxide emissions from industrial sources in Texas have been on a steady decline since 2000. Industrial ozone emissions are down 22 percent, and nitrogen oxide emissions have been reduced by 46 percent.<sup>4</sup> As Governor Perry explained in a letter to President Obama last spring, “Texas electricity generators have the 11th lowest NOx emission rates for all states.”<sup>5</sup>

But Texas is not only reducing the harmful pollutants that have long been subject to EPA regulation under the Clean Air Act, it also has a demonstrated record of reducing greenhouse gas emissions. As the State explained in the Petition for Reconsideration that we filed with the EPA, since 2004 no other state in the nation has reduced power-sector CO2 emissions more than

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<sup>2</sup> Press Release, Attorney General Greg Abbott, Attorney General Abbott Wins For Texas In Largest Environmental Settlement With A Refiner (June 16, 2005), *available at* <https://www.oag.state.tx.us/oagNews/release.php?id=1028>.

<sup>3</sup> Press Release, Attorney General Greg Abbott, Attorney General Abbott Lands Record Environmental Penalty From Huntsman (May 13, 2003), *available at* <https://www.oag.state.tx.us/oagNews/release.php?id=78>.

<sup>4</sup> Texas Ozone and NOx Emissions Trend Analysis, Texas Commission on Environmental Quality (Jan. 11, 2010), *available at* <http://www.tceq.state.tx.us/assets/public/implementation/air/success/2010.01.10-txOzoneNoxTrends.pdf>.

<sup>5</sup> Letter from Governor Rick Perry to President Barack Obama (May 28, 2008), *available at* <http://governor.state.tx.us/files/press-office/O-ObamaBarack201005280133.pdf>.

Texas.<sup>6</sup> Further, Texas has already installed more wind power than any other state—and all but four countries.<sup>7</sup> Thanks to the State’s efforts to foster renewable energy sources, Texas effectuated one of the two largest absolute declines in greenhouse gas emissions of any state in the nation.<sup>8</sup>

Texas remains committed to working with the EPA to improve air quality and hold polluters accountable. But Texas cannot support the EPA—and in fact must challenge it—when it pursues regulations that are contrary to the law and devastating to the economy. Such is the case when it comes to the EPA’s efforts to regulate greenhouse gases. In its zeal to regulate greenhouse gases, the EPA has ignored the plain language of the Clean Air Act, violated notice and comment requirements, and attempted to re-write congressionally enacted federal laws by administrative rule-making.

## **I. Texas’s Legal Challenges**

In order to understand why the Clean Air Act cannot legally be used to regulate carbon dioxide—and why Texas has challenged the EPA’s actions—it is important to first explain what the Clean Air Act does target. The Clean Air Act was designed to target toxic pollutants that directly poison or injure the human body. As Congressman Collin Peterson (D-MN) put it, the Clean Air Act “was meant to clean up the air, to get lead out of the air. It was not meant to fight global warming.”<sup>9</sup> According to Senator Mary Landrieu (D-LA), “the Clean Air Act was never intended to regulate greenhouse gases. It was designed to reduce the smog and acid rain that was

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<sup>6</sup> Petition for Reconsideration of the State of Texas at 5, *Endangerment Finding*, EPA Docket No. EPA-HQ-OAR-2009-0171 (Feb. 16, 2010).

<sup>7</sup> *Id.* at 5-6.

<sup>8</sup> *Id.*

<sup>9</sup> Press Release, Rep. Collin Peterson, Peterson Sponsors Legislation to Restrict EPA (Feb. 2, 2010), *available at* <http://collinpeterson.house.gov/press/111th/Peterson%20sponsors%20legislation%20to%20restrict%20the%20EPA.html>.

choking our cities in the 1970s and 1980s. That law, which I support, has worked fairly well. But greenhouse gases do not harm our lungs and pollute our air.”<sup>10</sup>

The Clean Air Act requires that pollution levels be measured at the state or local level, and it calls on the EPA—in partnership with the states—to set goals for reducing the amount of each regulated pollutant on the state or local level. Substances such as carbon monoxide and sulfur dioxide, which are poisonous when inhaled and can be effectively measured and reduced on a localized basis, are classic examples of substances the Clean Air Act targets. The Act provides that facilities that emit more than a certain threshold of a regulated pollutant are subject to permitting requirements. The threshold has the effect of exempting many small businesses and other small entities like farms, schools, and churches, while targeting major sources of pollution that have a major effect on air quality.

The fundamental problem underlying all the EPA’s GHG rules is that carbon dioxide simply does not fit with the pollution-reduction framework envisioned by the Clean Air Act. As Senator Landrieu put it, “to regulate carbon emissions with the Clean Air Act would be to jam a square peg into a round hole.”<sup>11</sup>

#### **A. The Endangerment Finding Violates the Clean Air Act.**

The EPA’s legal troubles begin with the endangerment finding, in which it concluded that six greenhouse gases emitted from new motor vehicles endanger public health. Contrary to what some have claimed, the Supreme Court’s decision in *Massachusetts v. EPA* did not require the EPA to regulate carbon dioxide or any other greenhouse gas. The Supreme Court ruled that

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<sup>10</sup> Press Release, Sen. Mary Landrieu, Landrieu Co-Sponsors Resolution to Halt EPA Efforts to Use Clean Air Act to Regulate Greenhouse Gases (Jan. 21, 2010), *available at* <http://landrieu.senate.gov/mediacenter/pressreleases/01-21-2010-2.cfm>.

<sup>11</sup> *Id.*

greenhouse gases are “air pollutants,” as that term is defined in the Act. But the Court’s opinion clearly states that the Court “need not and does not reach the question whether” carbon dioxide is the kind of air pollutant the EPA *must* regulate under the Clean Air Act.<sup>12</sup> The EPA, not the Supreme Court, decided to try to force the square peg of carbon dioxide into the round hole of the Clean Air Act.

The endangerment finding is legally flawed in several ways. First, the endangerment finding is arbitrary because the EPA did not define or apply any standards or criteria by which to judge endangerment to public health. Second, the endangerment finding includes two gases that are not emitted at all from motor vehicles, meaning that the EPA plainly lacked legal authority to make an endangerment finding for these gases under section 202 of the Clean Air Act.

**1. The Endangerment Finding Is Arbitrary Because it Does Not Identify or Apply Any Standards by Which to Judge the Endangerment Caused by GHG Emissions or Climate Change.**

The EPA cannot implement the Clean Air Act, or any other statute, in an arbitrary manner.<sup>13</sup> The EPA needed to define standards or thresholds by which to judge whether certain levels of greenhouse gas emissions endanger public health or welfare—or whether reductions in emissions as a result of regulation will benefit public health or welfare. Because the EPA failed to do this, the Endangerment Finding is arbitrary and therefore unlawful.

In its endangerment finding, the EPA did not state the amount of greenhouse gases that endanger public health or welfare, or the amount of greenhouse-gas-related climate change that constitutes a danger to public health. Similarly, the EPA has not established a method for measuring the

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<sup>12</sup> 549 U.S. 497, 534 (2007).

<sup>13</sup> 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (“The agency’s action . . . may be set aside if found to be “arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law.”).

effect of its regulations on reductions in greenhouse gas levels. The EPA seeks to regulate greenhouse gases, but it is unwilling or unable to determine the level at which those gases pose a danger to public health or the reductions needed to avoid a danger to public health. In essence, the EPA is saying: “Just trust us.” But we cannot. Because the truth is that—unlike with other gases regulated under the Clean Air Act—there is not a specific atmospheric level of carbon dioxide the EPA can identify as a dangerous level. And even with the strictest of regulations, the EPA cannot prevent greenhouse gases from permeating our air, because the greenhouse gases in our air are just as likely to come from China and India as they are to come from Houston or Dallas.

**2. The Endangerment Finding Included Gases Which Are Not Emitted by Motor Vehicles.**

Section 202 of the Clean Air Act only applies to mobile sources. The EPA can only make an endangerment finding under Section 202 for substances emitted from new motor vehicles.<sup>14</sup> But the EPA failed to abide by the CAA, because two of the six gases it deemed to endanger public health or welfare under section 202 are not emitted *at all* by new motor vehicles.<sup>15</sup> The endangerment finding thus contravenes the plain text of section 202, and accordingly, the EPA’s inclusion of two of the six gases in its endangerment finding violates the Clean Air Act.

**B. The Tailpipe Rule is Unlawful.**

The Clean Air Act requires the EPA, before issuing a rule, to give “appropriate consideration to the cost of compliance” with the rule.<sup>16</sup>

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<sup>14</sup> 42 U.S.C. § 7521(a)(1).

<sup>15</sup> The two gases are hydrofluorocarbons and hexafluoride.

<sup>16</sup> 42 U.S.C. § 7521(a)(2).

In promulgating the Tailpipe Rule—which requires motor vehicle manufacturers to comply with federal fuel economy standards—the EPA did not fully consider the costs associated with the rule. The EPA admitted that, under its interpretation of the Clean Air Act, the Tailpipe Rule would *require* the EPA to regulate stationary sources of greenhouse gases. In other words, the EPA views the Tailpipe Rule as a triggering mechanism for the EPA’s authority to regulate stationary sources. But when it promulgated the Tailpipe Rule, the EPA failed to consider costs associated with regulating emissions from stationary sources. This omission violates the Clean Air Act.

**C. The Timing Rule is Unlawful.**

The Timing Rule provides that the EPA’s regulation of greenhouse gases under the Tailpipe Rule automatically triggers regulation of stationary sources of greenhouse gases. According to the EPA, once it made a finding that greenhouse gases emitted by motor vehicles are dangerous, it had no choice but to regulate stationary sources of carbon dioxide.

Contrary to the EPA’s assertions, the Clean Air Act authorizes regulation of stationary sources of a pollutant only after the EPA has established a National Ambient Air Quality Standard (NAAQS”) for the pollutant. The problem for the EPA is that they have not established a NAAQS for carbon dioxide. In fact, it would be completely impracticable to do so because of the way carbon dioxide exists in the air.

The Clean Air Act was designed to reduce emissions of toxic air pollutants. Atmospheric levels of these pollutants can be meaningfully measured and reduced on a localized basis. Carbon dioxide, by contrast, is a non-toxic substance that exists throughout the atmosphere. Levels of carbon dioxide in the atmosphere cannot be meaningfully measured or reduced on a localized

basis. As the Union for Jobs and the Environment put it in comments on the EPA's proposed rules, "Due to the global nature and long atmospheric residence times of greenhouse gas emissions, individual states, regions or nations cannot effect meaningful change in atmospheric greenhouse gas concentrations."<sup>17</sup> In other words, it is impossible to achieve reduction-targets for atmospheric levels of carbon dioxide using the Clean Air Act, because emissions far outside Texas, for example, affect the concentration of carbon dioxide in Texas. The Timing Rule ignores this reality and improperly premises regulation of stationary sources on the Tailpipe Rule.

#### **D. The Tailoring Rule is Unlawful.**

Even the EPA concedes that regulation of GHGs produces results "inconsistent with congressional intent concerning the applicability of the [Clean Air Act]" by subjecting thousands of schools, churches, farms, small businesses, and other small facilities to Clean Air Act regulation.<sup>18</sup> These absurd results indicate that carbon dioxide and other greenhouse gases simply are not the kind of substance the Clean Air Act was designed to regulate. However, instead of acknowledging that reality, the EPA unilaterally changed the law by promulgating the Tailoring Rule.

The Clean Air Act requires stationary sources that emit above 100 or 250 tons per year (depending on the source) of a regulated pollutant to obtain permits. But the Act does not give the EPA discretion to change these congressionally established thresholds.

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<sup>17</sup> Comments of Union for Jobs and the Environment at 7, *Endangerment Finding*, Docket No. EPA-HQ-OAR-2009-0171 (June 23, 2009).

<sup>18</sup> Tailoring Rule, 75 Fed. Reg. 31,514, 31,541.

With the Tailoring Rule, however, the EPA unilaterally raised the statutory thresholds despite the lack of any legal authority to do so. In doing so, the EPA went beyond its role as regulator and usurped the role of legislator. Under the Tailoring Rule's new thresholds, permitting requirements kick in at either 75,000 or 100,000 tons per year—instead of the 100 or 250 tons mandated by the Act. Regardless of the desirability of these new thresholds as a policy matter, as a legal matter the EPA lacks the legal authority to amend the plain terms of the Clean Air Act, which is precisely what the Tailoring Rule does. Accordingly, the Tailoring Rule is patently illegal.

**E. The Sip Call Rule is Unlawful.**

The EPA issued the “SIP Call Rule” on September 2, 2010. The SIP Call Rule requires states to change their laws and regulations by December 2, 2011 to comply with the EPA's new stance on greenhouse gases. A SIP is the “state implementation plan” under which state regulators issue Clean Air Act permits for pollution sources in their state. Once a state's SIP has been approved—as Texas's was under the Clinton Administration in 1994—the state's permits are federally recognized and federally enforceable.

The Clean Air Act gives the EPA the power to require states to amend their permitting programs by issuing a SIP Call, but it also gives states up to three years to bring their regulatory schemes into compliance with major new federal mandates such as the EPA's new greenhouse gas regulations. This congressionally mandated timeframe allows states adequate time to conduct their internal law-making and rule-making procedures and provides time for robust public input through an open, transparent process at the state level. The EPA's timeframe, on the other hand,

violates the Clean Air Act by giving the states just fifteen months to comply, rather than the three years required by the Act.

In an effort to justify its illegal actions, the EPA improperly invoked a section of the Clean Air Act that allows the EPA to require adjustments to SIPs that fail to comply with pre-existing federal requirements. When a major new requirement such as greenhouse gas regulation comes into existence, however, the Clean Air Act entitles the states to a three-year transition period. The EPA's failure to provide the states with the full three years therefore violates the law.

**F. The FIP Rule is Unlawful.**

On August 2, 2010, Texas informed the EPA of its inability to comply with the EPA's demand that states amend their air quality laws and regulations to comport with the EPA's new stance on greenhouse gases. Approximately three months later, on October 28, 2010, Assistant EPA Administrator Regina McCarthy swore in a statement filed with the D.C. Circuit Court that, in light of the SIP Call deadline established by the EPA, the federal government could not take over Texas's air permitting responsibilities "until December 2, 2011 at the earliest." Despite this sworn statement, the EPA did a 180-degree turn on December 23, 2010, when it issued an "emergency" FIP Rule that purported to immediately federalize Texas's permitting regime—which meant the EPA would not recognize Texas permits and would instead require Texas-based stationary sources to obtain additional federal permits beginning January 2, 2011.

Absent an overriding emergency, the Administrative Procedure Act requires the EPA to solicit notice and comment from the public before issuing regulations. The notice and comment period allows for transparency and public participation in the rulemaking process. The FIP Rule, however, was issued without any notice and comment period at all, in direct violation of the law.

There was no emergency, as the EPA had over four months to react to Texas's August 2, 2010 letter. Instead, the EPA waited until the last minute to announce its intentions. No emergency existed, and as a result, a notice and comment period was required for the FIP Rule just as for any other rule. The EPA's failure to provide it dooms the FIP Rule.

Not only was this FIP Rule issued without the notice and comment required by the Administrative Procedure Act, it was promulgated just before the Christmas/New Year holidays, in an obvious attempt to minimize public scrutiny of the EPA's actions. The EPA had known for over four months that Texas was unable to comply with the SIP Call Rule, yet it waited until just before Christmas to announce—without public notice or comment—that a supposed “emergency” required it to seize control of air permitting in Texas just two weeks later, on January 2, 2011.

Thus, not only are the SIP Call and FIP Rules substantively flawed in that they were premised on the EPA's misuse of the Clean Air Act to regulate carbon dioxide, they are also procedurally deficient in ways that plainly ignore the “transparency, public participation, and collaboration” that President Obama has demanded of his Administration.<sup>19</sup> Government by “emergency” bureaucratic fiat—rather than by deliberative legislative process—is not only contrary to our constitutional order, it also undermines public confidence in the rule of law and in the integrity and fairness of our political system. As Senator Ben Nelson (D-NE) put it, “Just because somebody's frustrated with the pace of action in Congress doesn't mean the EPA should become a super-legislative body.”<sup>20</sup> It is elected members of Congress, not unelected and unaccountable

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<sup>19</sup> Barack Obama, Memorandum for Heads of Executive Departments and Agencies: Transparency and Open Government, *available at* [http://www.whitehouse.gov/the\\_press\\_office/TransparencyandOpenGovernment/](http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/).

<sup>20</sup> Press Release, Sen. Ben Nelson, Nelson Warns EPA Overreach Could Damage Nebraska's Economy (June 10, 2010), *available at* [http://bennelson.senate.gov/press/press\\_releases/061010-01.cfm](http://bennelson.senate.gov/press/press_releases/061010-01.cfm).

bureaucrats at the EPA, that must decide whether and how the federal government regulates carbon dioxide emissions.

## **II. Economic Impact of the EPA's Actions**

By bringing an end to the EPA's job-killing greenhouse gas regulations, Congress can remove a direct burden on the energy, manufacturing, and agricultural sectors, potentially saving thousands of jobs. As Senator Nelson aptly put it, we must protect all sectors "of our nation's economy from EPA overreach. . . . [F]armers, ranchers, business owners, cities, towns and hundreds of thousands of electricity consumers should not have their economic fortunes determined by unelected bureaucrats in Washington."<sup>21</sup>

The effects of these burdensome new costs will be felt in all sectors of our economy and in all parts of our society. As the National Black Chamber of Commerce warned, "Instead of alleviating our country's current 10% unemployment rate, heavy handed 'command and control' of carbon emissions would trigger further fallout. These and other costs would disproportionately burden lower-income and minority populations who already spend a large portion of their earnings on energy."<sup>22</sup> The Congress on Racial Equality gave the EPA similar advice about the impact the new regulations will have—not just on industry—but on every American: "By driving up energy costs, imposing major permitting and compliance costs on businesses, and micromanaging virtually every business, economic and personal decision, the proposed regulatory program would impose the equivalent of a massive tax hike – in the midst of our most severe economic crisis in decades – further harming families, especially poor, minority and

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<sup>21</sup> *Id.*

<sup>22</sup> Press Release, National Black Chamber of Commerce, Unemployment Statistics Reinforce Need to Drop Climate Change Bill. NBCC Study shows Bill would kill 2.5 Million US Jobs (Dec. 23, 2009), *available at* [www.nationalbcc.org](http://www.nationalbcc.org).

elderly households.”<sup>23</sup> At a time of high unemployment, low consumer confidence, and nagging economic uncertainty in this country, the Administration should be looking for ways to encourage investment and reduce the cost of doing business in America. Allowing unaccountable federal bureaucracies to unilaterally amend the law without Congress’ consent reduces confidence in our democratic system and in the rule of law, which in turn discourages new investment and economic growth.

In the words of our second president John Adams, ours is “a government of laws, not of men.” The public’s continued confidence that we are governed by legitimately enacted laws rather than by the political whims of powerful people is not only central to our constitutional form of government, it is vital to our nation’s future economic prosperity. If government is permitted to eschew transparency and accountability out of political expediency, the unavoidable result is public uncertainty about the rule of law. And uncertainty, particularly legal uncertainty, is the enemy of economic prosperity. We are blessed to live in a nation whose traditions of constitutionally limited government and respect for the rule of law provide an environment in which businesses and individuals can invest their resources confidently in the future. But we cannot take these blessings for granted. Most nations—both today and throughout human history—have not enjoyed them, and we will not enjoy them for long if we do not guard them jealously. By reining in a bureaucracy run-wild like the EPA, Congress can begin to restore the American people’s confidence in the rule of law and in the future of our nation’s economy.

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<sup>23</sup> Comments of Congress of Racial Equality at 2, *Advance Notice of Proposed Rulemaking: Regulating Greenhouse Gas Emissions under the Clean Air Act*, Docket ID: EPA-HQ-OAR-2008-0318 (November 25, 2008).