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SUPPLEMENTAL MEMORANDUM

February 7, 2011

To: Democratic Members of the Subcommittee on Energy and Power

Fr: Henry A. Waxman, Ranking Member, and Bobby L. Rush, Subcommittee Ranking Member

Re: Analysis of the Upton-Inhofe Energy Tax Prevention Act

On February 2, 2011, Chairman Fred Upton, Subcommittee Chairman Ed Whitfield, and Senator James Inhofe released a discussion draft of legislation to amend the Clean Air Act.[1] A legislative hearing to examine the proposal has been scheduled for February 9, 2011.[2] This memorandum provides a brief analysis of the effects of enacting this legislative proposal.

The discussion draft is entitled "The Energy Tax Prevention Act of 2011" and, according to its sponsors, has a primary purpose of stopping the Environmental Protection Agency (EPA) from "imposing a backdoor cap-and-trade tax."[3] However, EPA does not have taxing authority, nor has EPA proposed to establish a cap and trade program. In fact, EPA officials have recently stated that they will not establish a cap on carbon pollution.[4]

The Upton-Inhofe draft would broadly eliminate EPA's authority to address emissions of greenhouse gases and the danger of climate change. It would:

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[1] House Committee on Energy and Commerce, Press Release, *Upton, Whitfield, Inhofe Unveil Energy Tax Prevention Act to Protect America's Jobs & Families* (Feb. 7, 2011) (online at http://energycommerce.house.gov/news/PRArticle.aspx?NewsID=8178).

[2] *Id.*

[3] *Id.*

[4] *EPA Promises to Avoid Cap, But Some Utilities Want Trade*, E&E News (Feb. 4, 2011).

- Overturn the Supreme Court's opinion finding that EPA has the authority to regulate greenhouse gases under the Clean Air Act.

- Overturn EPA's scientific determination that greenhouse gases endanger human health and the environment.

- Prohibit EPA from requiring stationary sources to reduce greenhouse gas emissions.

- Prohibit EPA from requiring additional reductions of greenhouse gas emissions from motor vehicles and repeal California's authority to regulate greenhouse gas emissions from motor vehicles.

- Threaten implementation of the renewable fuel standard.

- Prohibit EPA from enforcing existing greenhouse gas reporting requirements.

- Prevent EPA from taking impacts on climate change into consideration when approving alternatives to ozone depleting substances under Title VI of the Clean Air Act and the Montreal Protocol.

- Create legal uncertainty about the status of the recent motor vehicle standards adopted by EPA.

- Call into question EPA's authority to implement voluntary programs to reduce greenhouse gas emissions.

- Create new litigation opportunities for opponents of regulation of conventional pollutants.

Upton-Inhofe Overturns *Massachusetts v. EPA*

The discussion draft overturns the landmark Supreme Court case *Massachusetts v. EPA*, which held that greenhouse gases, including carbon dioxide, are "air pollutants" under the Clean Air Act that EPA must regulate if they endanger public health or welfare.[5] The discussion draft adds a new section 330(b)(1)(B) to the Clean Air Act that provides that the term "'air pollutant' … does not include a greenhouse gas." Additionally, new section 330(b)(1)(A) would amend the Clean Air Act to state that EPA may not take action on carbon pollution or even "take into consideration" carbon pollution in the future regardless of the danger they pose to public health or welfare.

[5] *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

Upton-Inhofe Repeals EPA's Endangerment Finding

New section 330(b)(1)(B)(4) of the Clean Air Act would legislatively repeal EPA's scientific determination that greenhouse gases threaten public health and welfare, commonly known as the endangerment finding. This determination was made in 2009, when the EPA Administrator found that the current and projected concentrations of the six key greenhouse gases — carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6) — in the atmosphere threaten the public health and welfare of current and future generations.[6]

Legislatively repealing the scientific determination directly conflicts with the consensus of climate scientists and the world's most authoritative scientific organizations, including:

- The National Academy of Sciences, which reported in 2010: "Climate change is occurring, is caused largely by human activities, and poses significant risks for—and in many cases is already affecting—a broad range of human and natural systems."[7]

- The premier scientific institutions of all of the world's major economies (including the United States, the United Kingdom, France, Germany, Russia, Japan, China, Brazil, and India), which have warned that "[t]he need for urgent action to address climate change is now indisputable."[8]

- The American Association for the Advancement of Science, the American Geophysical Union, and the American Meteorological Society, along with 15 other leading scientific organizations, which have stated: "If we are to avoid the most severe impacts of climate change, emissions of greenhouse gases must be dramatically reduced."[9]

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[6] EPA, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009).

[7] National Research Council, Advancing the Science of Climate Change (2010) (online at http://www.nap.edu/catalog.php?record_id=12782).

[8] G8+5 Academies' joint statement: Climate change and the transformation of energy technologies for a low carbon future, Academia Brasileira de Ciéncias, Brazil, Indian National Science Academy, India, Academy of Science of South Africa, South Africa, Royal Society of Canada, Canada, Accademia Nazionale dei Lincei, Italy, Royal Society, United Kingdom, Chinese Academy of Sciences, China, Science Council of Japan, Japan, National Academy of Sciences, United States of America, Académie des Sciences, France, Academia Mexicana de Ciencias, Mexico, Deutsche Akademie der Naturforscher Leopoldina, Germany, Russian Academy of Sciences, Russia (online at http://www.nationalacademies.org/includes/G8+5energy-climate09.pdf).

[9] Letter to the U.S. Senate from the Presidents and Executive Directors of American Association for the Advancement of Science, American Chemical Society, American Geophysical Union, American Institute of Biological Sciences, American Meteorological Society, American Society of Agronomy, American Society of Plant Biologists, American Statistical Association, Association of Ecosystem Research Centers, Botanical Society of

- Thirteen federal departments and agencies, including NASA, the National Science Foundation, and the Department of Defense, which reported in 2009 that global warming is "unequivocal and primarily human-induced" and that "widespread climate-related impacts are occurring now and are expected to increase."[10]

- The Intergovernmental Panel on Climate Change (IPCC), which has reported: "Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice and rising global average sea level."[11]

The Committee on Energy and Commerce has heard from only one scientist in recent years who dismisses the need to act on climate change. That scientist is Dr. Patrick Michaels, who testified before the Committee on February 12, 2009.[12] The veracity of Dr. Michaels's testimony about his sources of funding has been called into question.[13]

America, Crop Science Society of America, Ecological Society of America, Natural Science Collections, Alliance Organization of Biological Field Stations, Society for Industrial and Applied Mathematics, Society of Systematic Biologists, Soil Science Society of America, University Corporation for Atmospheric Research (Oct. 21, 2009) (online at http://www.aaas.org/news/releases/2009/media/1021climate_letter.pdf).

[10] Global Climate Change Impacts in the United States, U.S. Global Change Research Program (2009) (online at http://globalchange.gov/publications/reports/scientific-assessments/us-impacts). These agencies participate in the U.S. Global Change Research Program (USGCRP). The USGCRP began as a presidential initiative in 1989 and was mandated by Congress in the Global Change Research Act of 1990 (P.L. 101-606), which called for "a comprehensive and integrated United States research program which will assist the Nation and the world to understand, assess, predict, and respond to human-induced and natural processes of global change."

[11] Climate Change 2007: Synthesis Report, Intergovernmental Panel on Climate Change (2007) (online at http://www.ipcc.ch/publications_and_data/ar4/syr/en/spm.html). The IPCC is the leading international body for the assessment of climate change. It was established in 1988 by the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP) to assess the "risk of human-induced climate change." The Panel is open to all members of the WMO and UNEP, and includes more than 2500 scientists from around the world.

[12] House Committee on Energy and Commerce Subcommittee on Energy and the Environment, Testimony of Dr. Patrick Michaels, *Hearings on the Climate Crisis: National Security, Public Health, and Economic Threats*, 111th Cong. (Feb. 12, 2009).

[13] Letter to Rep. Fred Upton, Chairman, Committee on Energy and Commerce, from Rep. Henry A. Waxman (Jan. 24, 2011) (online at http://democrats.energycommerce.house.gov/index.php?q=news/waxman-asks-upton-to-examine-dr-patrick-michaels-s-testimony).

Upton-Inhofe Prohibits EPA from Regulating Stationary Sources

New section 330(b)(1)(A) provides that EPA may not take action on carbon pollution or even "take into consideration" carbon pollution in the future. It states:

> The Administrator may not, under [the Clean Air Act], promulgate any regulation concerning, take action relating to, or take into consideration the emission of a greenhouse gas due to concerns regarding possible climate change.

This section has two primary effects on EPA authority to reduce emissions of greenhouse gasses from stationary sources. First, it prohibits EPA from requiring permits to address greenhouse gases under its "prevention of significant deterioration" (PSD) program. Second, it blocks EPA from setting minimum control requirements for major new and existing sources under the "new source performance standards" (NSPS) provisions.[14]

Impact on the PSD Program. Once EPA regulated greenhouse gases from motor vehicles, the PSD permit review requirement applied automatically beginning January 2, 2011. It requires that major new facilities or existing facilities making modifications that significantly increase emissions undergo a review of options to minimize increases in emissions. In May 2010, EPA finalized a "tailoring rule" to limit the permit review requirements to only the largest sources. Until June 30, 2011, only sources subject to PSD for other pollutants will be required to consider greenhouse gases in their permits. From July 1, 2011, to June 30, 2013, only new sources that emit at least 100,000 tons of greenhouse gases per year or existing sources seeking to increase pollution by at least 75,000 tons per year will be required to obtain PSD permits. EPA has committed to undertake an additional rulemaking that will be completed before July 1, 2012, which would consider whether to lower the threshold further, but would not consider any level below 50,000 tons per year.[15]

PSD permit review is done on a case-by-case basis, taking into account the design and function of the specific facility undergoing review. The review is carried out by the permitting authorities, which are typically state or local pollution control agencies. The process requires consideration of all options for limiting emissions, followed by the elimination of those options that are too costly or technically infeasible, and the selection of the remaining option that permitting authorities consider to be Best Available Control Technology (BACT).

In November 2010, EPA issued guidance to state agencies on implementing the review requirements for greenhouse gases.[16] The guidance emphasized that the well-established process

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[14] CAA section 111.

[15] U.S. Environmental Protection Agency, *Final Rule: Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, Fact Sheet* (online at: http://www.epa.gov/nsr/documents/20100413fs.pdf).

[16] U.S. Environmental Protection Agency, *PSD and Title V Permitting Guidance For Greenhouse Gases* (Nov. 2010) (online at http://www.epa.gov/nsr/ghgdocs/epa-hq-oar-2010-0841-0001.pdf).

and precedents used for other pollutants would also apply to greenhouse gases. The guidance also clarified what is likely to be required of sources. It stated that energy efficiency improvements should in most cases constitute BACT for greenhouse gases. The guidance suggested that carbon capture and sequestration would likely be eliminated as an option for BACT because of high costs. The guidance further stated that fuel switching that would fundamentally redefine a source (such as switching from coal to natural gas) would not need to be considered as an option.[17] In addition, EPA has announced that it intends to modify its policies to provide that certain permit applications that have been pending with the agency for a substantial period of time will not need to be modified to comply with subsequently applicable air quality requirements, including the greenhouse gas PSD requirements.[18]

Forty-nine states have taken actions to ensure that permit applications could go forward when the greenhouse gas review requirements went into effect on January 2, 2011.[19] Only Texas failed to take the necessary actions. To ensure that applicants in Texas could receive the necessary pre-construction permits, EPA issued an interim final rule on December 23, 2010, to partially disapprove Texas's permitting program and authorize EPA to issue permits with respect to greenhouse gases.[20]

The discussion draft would eliminate this requirement that large new or modified sources of greenhouse gases take, or even consider, any steps to minimize the pollution they will add to the atmosphere.

Impact on the NSPS Program. In December 2010, EPA announced a schedule to establish New Source Performance Standards (NSPS) for greenhouse gases for two categories of sources – fossil fuel-fired power plants and refineries – pursuant to two proposed settlement agreements. Under the agreements, EPA will propose standards for utilities and refineries in July 2011 and December 2011 and will finalize the standards in May 2012 and November 2012, respectively.[21]

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[17] U.S. Environmental Protection Agency, *Greenhouse Gas Permitting Guidance, Summary Slides* (Fall 2010) (online at: http://www.epa.gov/air/oaqps/eog/video/pdfs/GHGPermittingGuidance_Nov18&19Webinars-1.pdf).

[18] *See* Declaration of Regina McCarthy, *Avenal Power Center, LLC v. U.S. EPA* (Case No.: 1:10-cv-00383-RJL) (Jan. 31, 2011).

[19] National Association of Clean Air Agencies, *GHG Permitting Programs Ready to Go by January 2nd* (Oct. 28, 2010).

[20] U.S. Environmental Protection Agency, *Clean Air Act Permitting for Greenhouse Gas Emissions- Final Rules Fact Sheet* (online at: http://www.epa.gov/nsr/ghgdocs/20101223factsheet.pdf)

[21] U.S. Environmental Protection Agency, *Settlement Agreements To Address Greenhouse Gas Emissions From Electric Generating Units and Refineries, Fact Sheet* (online at: www.epa.gov/airquality/pdfs/settlementfactsheet.pdf).

Under an NSPS, EPA establishes performance standards for new facilities (and modified facilities that significantly increase emissions) reflecting best demonstrated technology taking costs into account. In practice, these standards are generally less stringent than limits based on best available control technology. In addition, states must submit plans to EPA to reduce emissions at existing facilities.[22] Under these provisions, states have the flexibility to apply less stringent standards or longer compliance schedules for various reasons including costs, remaining useful life of the facility, and physical impossibility.

EPA has already held five listening sessions to give stakeholders extensive opportunities to provide their views to the agency even prior to any NSPS proposal.[23] Nothing in EPA's history of issuing NSPS or its approach to date on greenhouse gases suggests that the agency plans to establish costly or onerous requirements for new sources under these provisions.

The discussion draft would eliminate this EPA authority to set minimum emissions standards for large fossil-fuel fired power plants and oil refineries, which are the first and second largest stationary sources of greenhouse gases respectively.

Upton-Inhofe Prohibits EPA and California from Establishing New Tailpipe Standards

The discussion draft changes the manner in which motor vehicles have been regulated in the United States for 40 years. The Clean Air Act authorizes two sets of standards to control tailpipe pollution from motor vehicles: (1) federal standards and (2) state standards established by California, which can also be adopted by other states. The discussion draft would terminate both federal and state authority to establish tailpipe standards for greenhouse gases after vehicle model year 2016.

Impact on EPA Authority. New section 330(b)(2)(A) prevents "further revision" of the 2010 greenhouse gas tailpipe standards. Those standards apply to vehicle model years 2012 to 2016. This national program for fuel economy and greenhouse gas emissions was supported by the automobile industry, the states, and environmental advocacy groups.[24] If the discussion draft is enacted, there will be no federal greenhouse gas tailpipe standards for cars and trucks after model year 2016.

EPA and the National Highway Traffic Safety Administration have recently evaluated scenarios representing 3%, 4%, 5%, and 6% annual increases in overall average stringency in tailpipe standards after model year 2016. These scenarios are roughly equivalent to 47 to 62

[22] CAA section 111(d).

[23] Webpage, U.S. Environmental Protection Agency, *Listening Sessions on Greenhouse Gas Standards for Fossil Fuel Fired Power Plants and Petroleum Refineries* (online at http://www.epa.gov/airquality/listen.html).

[24] U.S. Environmental Protection Agency, *Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards* (online at www.epa.gov/oms/climate/regulations.htm).

mpg in 2025, if all improvements were made using fuel economy-improving technology.[25] Under the discussion draft, EPA would lose its authority to adopt standards that promote these technologies.

Impact on California Authority. Section 209(b) of the Clean Air Act requires EPA to waive federal preemption for California motor vehicle standards if the agency determines that California's standards in the aggregate will be at least as protective of public health and welfare as federal standards. It also provides that other states have the option of electing to apply California's standards. In practice, this has allowed California to set vehicle standards that are more protective of public health than the federal standard and other states to follow California's example. However, section 3 of the discussion draft strips the EPA of authority to waive federal preemption, thereby blocking any state tailpipe standards for greenhouse gases for model year 2017 or later.

Upton-Inhofe Threatens the Renewable Fuel Standard

In order to promote renewable fuels and reduce greenhouse gas pollution, Congress has required EPA to issue regulations to ensure that transportation fuel sold in the United States contains certain volumes of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel. The volume of each type of fuel is established annually by EPA based in part on the availability of the fuel. Each of the categories of fuels must meet statutory requirements relating to their greenhouse gas emissions. For instance, advanced biofuels must have lifecycle greenhouse gas emissions that are at least 50% less than the emissions of conventional gasoline.[26] EPA has established a volume requirement for calendar year 2011, but not for future years.

New section 330(b)(1)(A) would appear to prevent EPA from establishing these required annual volumes in subsequent years because it prohibits EPA from taking actions related to greenhouse gases. EPA would also be prohibited from taking other actions under the program, such as approving new types of renewable fuels. Several specific facilities are currently seeking approval for their renewable fuels from EPA. This would create great uncertainty in the alternative fuels market and potentially remove one of the most significant drivers for alternative fuels development in the United States.

Upton-Inhofe Prohibits EPA from Enforcing Greenhouse Gas Reporting Requirements

In 1990, Congress amended the Clean Air Act to require power plants to report greenhouse gas emissions. This reporting requirement was extended to other large sources by Congress in 2007. New section 330(b)(1), however, would prohibit EPA from taking any action to enforce these reporting requirements.

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[25] EPA and NHTSA, Interim Joint Technical Assessment Report (Oct. 2010) (online at http://www.epa.gov/otaq/climate/regulations/420f10051.htm).

[26] CAA section 211(o)(1)(B)(i).

In addition, EPA prepares the inventory of U.S. greenhouse gas emissions, which is submitted by the United States pursuant to its treaty obligations under the U.N. Framework Convention on Climate Change. Section 330(b)(1) may prevent EPA from conducting this technical work and thus could impair the United States' ability to carry out its obligations under an international treaty, which was signed by President George H. W. Bush and ratified by the U.S. Senate.

Upton-Inhofe Undermines EPA Programs Related to Substitutes for Ozone-Depleting Chemicals

Under section 612 of the Clean Air Act, companies that wish to market a new substitute for ozone depleting substances must apply to EPA for approval. In determining whether to approve a substitute, EPA compares the overall risk to human health and the environment posed by the original substance with that of the potential substitute. The global warming potential of a substitute can be a significant factor in this analysis. In fact, a number of U.S. companies, including Dupont, Honeywell, and GE, have expended significant resources developing substitutes with very low global warming potential.

New section 330(b)(1) could block EPA from considering global warming impacts when approving substitutes. While section 330(b)(2)(C) excepts actions under Title VI, that exception does not apply to the extent that the action is based on "the potential or actual effect of a greenhouse gas on climate change." As a result, EPA would appear to be unable to consider such effects in deciding whether to approve applications for substitutes.

There are other ways in which the discussion draft interferes with the ozone-depletion provisions of the Clean Air Act. For the last two years, the United States, in partnership with Canada and Mexico, has advocated for an amendment to the Montreal Protocol that would control the global production of HFCs, which are substitutes for ozone-depleting chemicals that have high global warming potentials. New section 330(b)(1) would prevent EPA from implementing such a treaty amendment through the Clean Air Act. As a result, it would undermine the Administration's ability to pursue established treaty negotiating positions that dozens of countries now support.

Upton-Inhofe Creates Legal Uncertainty for the 2010 Motor Vehicle Standards

A summary of the discussion draft states that light-duty vehicle tailpipe standards for 2012-2016 are excepted from the prohibition on addressing greenhouse gases.[27] However, the language of the discussion draft may not effectuate this stated goal. As discussed above, section 330(d)(4)(A) repeals the endangerment finding. An endangerment finding is an essential precondition for light-duty tailpipe standards under section 202(a) of the Clean Air Act. While section 330(b)(2)(A) excepts the light-duty tailpipe standards from the prohibition in section 330(b)(1), the discussion draft does nothing to satisfy the requirement for an endangerment

[27] Section-by-Section Summary, Committee on Energy and Commerce Majority Staff (Feb. 2, 2011).

finding under section 202(a). Therefore, removal of the endangerment finding will provide opponents of the light-duty vehicle greenhouse gas rule a new potential legal argument that the rules are unlawful.

Upton-Inhofe Calls Voluntary Programs into Question

While section 330(b)(2)(B) excepts "research, development and demonstration programs" from the prohibition in section 330(b)(1), it does not specifically except nonregulatory strategies or voluntary programs. Moreover, EPA could be blocked from relying on section 103 of the Clean Air Act, which authorizes EPA activities with respect to "air pollution" and "air pollutants," as authority for these voluntary programs because new section 330(b)(1)(B) excludes greenhouse gases from the definition of "air pollutant." These provisions in the discussion draft call into question many successful voluntary programs, such as EPA's SmartWay program, which works with the trucking industry to reduce emissions, or EPA's participation in the Global Methane Initiative, an international effort to implement methane emissions reduction projects and technologies.

Upton-Inhofe Creates Litigation Opportunities for Opponents of Regulation of Conventional Pollutants

The discussion draft appears to create numerous new litigation opportunities over the regulation of conventional air pollutants due to legal ambiguities created by drafting peculiarities. For instance, although ozone is regulated for its conventional impacts on public health and welfare, it is also greenhouse gas. Under the Bush Administration, EPA considered the climate effects of ozone when establishing a national ambient air quality standard for ozone.[28] It is unclear what impact the discussion draft would have on many clean air actions that address conventional air pollutants like ozone that also have climate change impacts.

[28] EPA, Air Quality Criteria for Ozone and Related Photochemical Oxidants, Vol. I (Feb. 2006).