

FOR ACTION – AGENDA ITEM #7
• **API CLIMATE CHANGE STEERING GROUP**
NOVEMBER 10, 1999

ISSUE: Whether API should seek to coordinate a multi-industry, trade group response to petition for EPA rulemaking of four greenhouse gases under the Clean Air Act (“CAA”).

BACKGROUND: On October 20, twenty environmental groups filed a petition for rulemaking at EPA seeking new auto emission standards for four GHGs – carbon dioxide, methane, nitrous oxide and HFCs – under section 202 of the CAA. At a press conference held at the National Press Club, Friends of the Earth decried expanded federal highway construction legislation, stagnant CAFÉ standards and the market popularity of SUVs, branding the Ford Excursion “a monstrosity.” The National Environmental Trust was direct: “This petition is an effort to find another avenue to get action on global warming pollution now.” The groups threatened to initiate litigation in federal court to compel the requested regulatory actions if EPA fails to respond within 180 days.

An active, Inside-the-Beltway dialogue concerning EPA’s authority to regulate CO₂ under the CAA preceded the formal petition filing. Early in 1998, Administrator Browner claimed such authority existed, which was quickly followed by issuance of an EPA General Counsel memorandum reinforcing that view. This triggered a series of law firm memoranda contradicting EPA’s view that were published in the trade press and otherwise. Last month, Congressmen McIntosh and Calvert held a joint committee hearing on the question “Is CO₂ a Pollutant and Does EPA have the Power to Regulate It?” at which EPA’s current General Counsel, Gary Guzy, reiterated the Agency’s view.

DISCUSSION: Complementing their national advertising campaign, the Petitioners’ filing has received broad press coverage. As a legal matter, petitions for rulemaking to compel Agency action are infrequently initiated and represent aggressive attempts to achieve policy objectives. EPA’s General Counsel stated in his testimony last month that the Agency will “carry out the mandates of the Clean Air Act”, but that begs the question presented by the petition: whether the CAA *mandates* regulation of CO₂ and three other GHGs. Politically, in an election year in which the US National Assessment is set for release as part of the run-up to COP-6, the petition could provide impetus for EPA to act.

31 industry trade associations, including the GCC, have been invited to a meeting at API on November 30 to exchange information and discuss options for a joint response to EPA in order to demonstrate -- to the Administration and Congress -- the flawed legal basis for regulation as well as industry’s unity and resolve opposing the petition. If a broad joint response could be coordinated, plans for media and press coverage would be developed to assure meaningful political/opinion leader impact.

RECOMMENDATION: Endorse plan to coordinate joint industry response.



**American
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202-682-8000

BY FACSIMILE

Date: October 26, 1999

To: Julie Becker (Alliance of Automobile Manufacturers)
Jan Amundson/Mark Whitenton (NAM)
Robin Conrad/Bill Kovacs (US Chamber of Commerce)
Sharon Kneiss (American Forest & Paper Association)
Bruce Steiner (American Iron and Steel Institute)
Glenn Kelly (Global Climate Coalition)
Alan Schaeffer/Fern Abrams (American Trucking Association)
John Wetzel (American Association of Railroads)
Connie Holmes/Harold Quinn (National Mining Association)
Bob Strieter (Aluminum Association)
Ed Merlis (Air Transport Association)
Tom Parker (Chemical Manufacturers Association)
Maurice McBride/Bob Decaprio (NP & RA)
John Huber (PMAA)
Bill Fang/Paul Bailey (Edison Electric Institute)
Dennis Stolte/Adam Sharpe (American Farm Bureau Federation)
Joe Cox (Chamber of Shipping of America)
Tom Allegretti (American Waterways Operators)
Bill Fay (American Highway Users Association)
Martin Whitmer (American Road and Transportation Builders Association)
Tracy Norberg (Rubber Manufacturers Association)
Ivette Rivera (National Automobile Dealers Association)
Bob Stewart/Bob Moran (National Ocean Industries Association)
Glenn Keller (Engine Manufacturers Association)
Thomas Tate (Aerospace Industries Association of America)
David D'Onofrio (National Small Business United)
Andy O'Hare (American Portland Cement Alliance)
Gary Evans (National Rural Electric Cooperative Association)
Diane Bateman (The Fertilizer Institute)
Fred Palmer (Western Fuels Association)
Kevin Belford (American Gas Association)

From: Philip Cooney, API Climate Team (202) 682-8246
David Deal, Assistant General Counsel (202) 682-8261

Re: Information Exchange Meeting to Discuss Petition for EPA Rulemaking to Regulate Carbon Dioxide, Methane, Nitrous Oxide and HFCs (11/30/99)

As many of you know, on Wednesday of last week, twenty environmental organizations filed a joint petition with EPA to regulate the emissions of CO₂ and three other greenhouse gases under section 202 of the Clean Air Act. While section 202 is focused on new motor vehicle

emission standards, EPA's authority to regulate CO2 under other provisions of the Clean Air Act is plainly implicated by this petition. If EPA fails to act within 180 days, the petitioners have threatened to initiate litigation to compel EPA's exercise of regulatory authority, which they contend is mandatory under CAA section 202. If you have not already seen the petition itself or the "Executive Summary" of its claims, please call me for a copy.

In various press reports, these groups have made clear that their objective is to promote immediate regulatory control of greenhouse gas emissions in the United States, irrespective of the fate of the Kyoto Protocol. Kalee Kreider, of the National Environment Trust, characterized the petition as "the beginning of a process, one piece in a progressive strategy." Given that the Administration has not submitted the Kyoto Protocol to the Senate for ratification -- and has no plans to do so in the near future -- these groups are attempting to stretch current legal authority to advance its objectives.

We would like to invite you to attend a breakfast meeting at API to exchange information on this petition and to discuss preliminarily options for responding, on a joint or individual basis. The meeting will be held on Tuesday, November 30 at API in Room 1200. We will begin at 8 a.m. and end no later than 11 a.m. A continental breakfast will be served. Please let us know if you plan to attend by returning the attached Response Form, no later than Tuesday, November 23. We are developing an agenda, which we expect to circulate shortly before the meeting, and welcome any suggestions you may have.

Finally, please feel free to call me with any questions you may have regarding this meeting or the petition at (202) 682-8246.

MEETING RESPONSE FORM

_____ I plan to attend the meeting on November 30.

_____ I am not able to attend the meeting on November 30.

NAME: _____

ORGANIZATION: _____

PHONE: _____ FAX: _____

E-MAIL: _____

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Please return to Lisa Elly, (FAX: 202 682-8579), API Climate Team, no later than Tuesday, November 24.

**11/30 MEETING ATTENDEES; ROOM 1200; 8 – 11
PETITION TO REGULATE CO2 UNDER THE CLEAN AIR ACT;
PHIL COONEY – HOST**

1. Fern Abrams – Am. Trucking
2. Tony Anikeeff – Alliance of Auto Mfgs.
3. Mark Burtschi -- NAM
4. Joe Cox – Chamber of Shipping of America
5. Greg Dana – Alliance of Auto Mfgs.
6. John Dougherty – Engine Mfgs. Assn.
7. Gary Evans – Natl. Rural Electricity Coops. of America
8. Bill Fang – EEI
9. Peter Glaser – Shook, Hardy law firm
10. Keith Homan – Chamber of Commerce
11. Connie Holmes -- NMA
12. John Huber -- PMAA
13. Glenn Kelly – Global Climate Coalition
14. Bill Kovacs – Chamber of Commerce
15. Bob Klugiewicz – Aerospace Industries Assn. of America
16. Bill Lash – Western Fuels
17. Heather Miller – Air Transport Assn.
18. Bob Moran -- NOIA
19. Andy O’Hare – Am. Portland Cement
20. Fred Palmer – Western Fuels
21. Don Popeo – Western Fuels
22. Theresa Pugh – Am. Forest & Paper Assn.
23. Hal Quinn -- NMA
24. Alan Schaeffer – American Trucking
25. Adam Sharpe – Am. Farm Bureau Federation
26. Bruce Steiner – Am. Iron & Steel Inst.
27. Bob Strieter – Aluminum Assn.
28. John Wetzel – Am. Assn. of Railroads

API:

Phil Cooney

Dave Deal

Bill Frick

Russell Jones

Al Mannato

John Reese

Bill Frick Talking Points:

1. Welcome.

2. Purposes of Meeting:

A. to exchange information related to the recent petition for rulemaking to regulate CO₂ and 3 other greenhouse gases under the new automobile emission standards section of the Clean Air Act. As you know, petition was prepared and filed about a month ago by twenty groups, including our friends at Greenpeace, Friends of the Earth, Ozone Action, National Environmental Trust, and Public Citizen.

Phil Cooney will review some of the recent history concerning claims of EPA's existing legal authority to regulate GHG emissions. This petition – and the legal principle it puts to the Agency to resolve -- has obvious implications for all manufacturing industries, not just the auto manufacturers. If EPA agrees to exercise regulatory authority over greenhouse gases such as carbon dioxide or methane under section 202 of the Clean Air Act, that could lay the legal foundation for a NAAQS for those gases that could potentially – and seriously -- impact all of us.

B. To learn about the legal context of petitions for rulemaking and the preferred view of the extent of EPA's authority under the Clean Air Act – topics that will be covered by John Reese of API's OGC and Peter Glaser of the Shook, Hardy law firm. Peter prepared the legal memorandum in your materials concerning EPA's authority under the Clean Air Act and I appreciate his joining us today to review the highlights of his memo – and his testimony on the subject last month before two House subcommittees.

C. To consider the potential for a joint industry response to EPA on some of the points raised in the petition, including its assertions of legal authority and scientific certainty that global warming catastrophe is imminent.

3. Introductions – Before diving into these issues, I believe it would be helpful for us to go around the room and have everyone to introduce themselves. [Introductions]. If there are any trade groups who are not represented today, whom any of you believe would be interested in this

petition – and in participating in a joint industry response to it – please let Phil know.

4. Let's proceed with our agenda. Phil Cooney will begin by reviewing the materials at each of your places.

REPORT ON CO2/CAA PETITION

1. Proverbial one-page issue paper included in materials

Event: PFR filed by 20 – including FOE, Greenpeace, NET, Solar Industries Assn., Ozone Action, Public Citizen – to regulate 4 GHGs under CAA 202 (new auto emission stds.). **Claim:** 202 creates mandatory duty to regulate; **Threat:** if no EPA action w/in 180 days, sue in federal court to compel.

Press conference revealed political context: slamming Administration for not doing more on CC (highway funding, CAFÉ); NET: “This petition is an effort to find another avenue to get action on global warming pollution now.” same language of advertising campaign – part of coordinated strategy

2. Some legal context

Procedurally, no explicit procedures for handling PFR; agency must act w/in a “reasonable time” = more than 180 days plus 180 day notice of suit.

Practice: sometimes publish petitions in FR and solicit comments, sometimes not, in which case interested parties comment anyway. Our plan of action proposes to prepare joint industry comments to use in either case.

3. Legal Issue: Does EPA have authority to regulate CO2 and other GHGs under CAA?

- Recent History: Clinton at UN (6/97) (new ozone/PM NAAQS “also a positive first step in addressing GHGs”); Early 98 EPA Electricity restructuring Decisional Document surfaces, indicating CAA authority to regulate CO2, but probably not a cap and trade program; 2/98 Eizenstat testimony before Senate Foreign Rel.: only need new legislation for trading; otherwise, existing law sufficient authority to comply with KP; Browner 3/98 VA-HUD Approps. W/ Cong. DeLay. Cannon memo (4/98); dueling memos; Mc/Calvert joint cmttee hearing (10/6/99) – Guzy reinforces Agency view, but “no plans to do so at this time”; also no intention to implement KP.; McIntosh follow-up list of questions; Dingell letter to McIntosh.
- Early indication of EPA reaction to petition, *Detroit Press*: *unidentified* EPA source states they will not use authority b/c “it’s not the best way to attack the global warming problem.”

- No clear-cut, explicit answer in statute – although EPA argues the statute answers the question – that CO2 and other GHGs fit within very broad CAA 302 statutory definition of “pollutant” (“any air pollution agent or combination of such agents, including any physical, chemical, biological or radioactive substance or matter emitted into or otherwise entering the ambient air.”) – CO2 also listed as a “pollutant” subject to research under CAA103. EPA legal view would be accorded APA deference if challenged.
 - Glaser/NMA memo: argument by implication and inference (the following are all *indications of intent* not to regulate:
 - CAA references to CO2 and global warming arise in non-regulatory contexts – studies, research, etc.
 - CAA NAAQS regulates groundlevel and lower atmospheric pollutant concentrations, not global tropospheric concentrations;
 - Section by section analysis: not under CAA 111 (New source performance stds. for stationary sources) b/c CO2 does not endanger public health and welfare and there are no cost-effective systems of emission control; not under CAA112 (HAP) b/c CO2 is not toxic, nor specifically listed; not CAA115 (regulate US emissions endangering the health or welfare of a foreign country) b/c CO2 is not a windborne pollutant “deposited” upon a foreign country);
 - CAA Amendments of 1990 rejected part of Senate bill that would have authorized CO2 regulation;
 - Also rejected CO2 regulation in EPACT of 1992 – instead, authorized various studies/reports addressing climate change;
 - Adoption of FCCC based on understanding that it did not impose binding or mandatory restrictions on GHGs.
4. Joint industry comments to:
- Signal to congressional allies that we are still on the playing field – that there is industry unity and resolve to prevent EPA overreaching.
 - To lay groundwork for legislative relief, through appropriations or directly = Cong. McIntosh HR 2221 (int. 6.99) would prohibit any federal agency from “promulgating regulations to limit CO2 emissions unless a law is enacted specifically granting such authority.”

- To provide EPA a record on which to defend a decision denying the petition
- 31 trades invited, 18 accepted so far: NAM., CH., Autos, EEI, NMA, Alum., RR, Trucking, Aerospace, Cement, Ch. Of Shipping, Air Transport.