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***Hearing on Global Climate Change:
The Administration's Compliance with
Recent Statutory Requirements***

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Statement before the U.S. Senate,
Subcommittee on Energy Research,
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the U.S. House of Representatives,
Subcommittee on National Economic Growth,
Natural Resources and Regulatory Affairs
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366 Dirksen Senate Office Building

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Good afternoon Mr. Chairman, members of the subcommittees. My name is William H. Lash, III and I am Professor of Law, George Mason University, Arlington, Virginia and Distinguished Senior Fellow with the Center for the Study of American Business, Washington University, St. Louis, Missouri.¹ I am delighted to appear before the subcommittees to discuss the intent behind, and the probable violation by the EPA of the 1999 Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act limitation (popularly referred to as the Knollenberg Amendment.)

The Knollenberg Amendment prohibits implementation of the Kyoto Protocol prior to Senate ratification via regulation, rules, orders, or decrees by the executive branch. Recent EPA activities, however, have raised questions about the EPA's compliance with the limitations imposed by the Knollenberg Amendment. Some maintain the provision bars any regulation the main effect of which is to reduce greenhouse gases. Others, including the EPA, maintain that they may regulate carbon dioxide and other greenhouse gases under existing statutory authorities as long as the purpose of such regulation is not to implement the Kyoto Protocol. The question naturally arises as to how it

would be possible for Congress to distinguish between EPA regulations that only incidentally accomplish the purposes of the Kyoto Protocol and EPA regulations that are designed to implement the Protocol under the guise of other statutory programs.

The EPA position that regulations accomplishing the purposes of the Kyoto Protocol are not necessarily implementation of the Kyoto Protocol may be technically correct. However, EPA's position is tantamount to saying that as long as the agency acts under the color of existing authority, and does not truthfully report what it is doing, it is in compliance with the Knollenberg Amendment. It is as though EPA had said to Congress, "If we lie about what we are doing, you will never be able to prove it, because we'll always have a plausible alibi." What this means, of course, is that Congress is entitled to suspect EPA of implementing the Kyoto Protocol any and every time the agency proposes or issues any rule or regulation affecting CO₂.

Given the difficulty in drawing the line between regulations that accomplish some of the purposes of the Kyoto Protocol and regulations that implement the Kyoto Protocol, some observers conclude that the Knollenberg amendment is unenforceable. Violations of the law are so hard to prove that the EPA is left to police itself. In effect, the EPA would have to catch itself in the act of implementing the Kyoto Protocol and surrender itself to Congress. I think this interpretation goes too far. Congress would not have passed the Knollenberg Amendment just to enact a nullity. It could not possibly have intended to enact a prohibition that EPA could effortlessly evade just by lying about what it is doing. I believe that a review of the Act, the legislative history, and the agency's actions suggest, at a minimum, that EPA has flouted the spirit and intent of the Knollenberg Amendment.

Of particular importance in interpreting the Knollenberg Amendment is a colloquy between Rep. David McIntosh and Rep. Knollenberg subsequent to the Amendment's passage. In this exchange, Rep. McIntosh asks for a clarification of the VA/HUD limitation language: "[W]ould [the Knollenberg amendment] also prohibit the finalization of any rules, regulations, or orders implementing the Kyoto Protocol prior to Senate ratification, whether or not authorized by current law?" To this Rep. Knollenberg replies "Yes." Clearly, the author of the Amendment intended it to pre-

clude regulations implementing the Kyoto Protocol, even if those regulations were promulgated under the color of existing statutory authority.

However, in light of the fact that EPA chooses to interpret the Knollenberg Amendment as a practical nullity, Congress should seriously consider strengthening the Amendment to give it more teeth. For example, Congress should consider prohibiting EPA from proposing or issuing any rule that significantly constrains carbon dioxide emissions without first obtaining positive approval from Congress by means of an up-or-down vote. In addition, EPA should be required to report to Congress any proposed rule, regulation, decree, or order that may affect greenhouse gas emissions by more than some non-trivial amount. This information should be published in the Federal Register and combined into a yearly report.

CONGRESSIONAL ADMONITIONS TO EPA REGARDING KYOTO

On July 29, 1997, the United States Senate loudly and clearly by a 95-0 vote passed the Byrd-Hagel Resolution stating that the U.S. should not be a signatory to the Kyoto Protocol unless it included new specific scheduled commitments to limit or reduce greenhouse gas emissions for Developing Country Parties within the compliance period and would not result in serious harm to the economy of the United States.²

The Administration's outright defiance of the Senate's unanimously expressed advice, the large proposed funding increase for climate change programs in the FY 1999 budget, the series of EPA-sponsored "educational" events that were largely pro-Kyoto advocacy, and various actions that suggested an intent to regulate CO₂ provoked a strong Congressional reaction, resulting in the Knollenberg Amendment. The Conference report to the VA-HUD Appropriation Act recognized that funds may be expended to conduct bona fide educational activities and seminars by the Agency. However, during the House of Representatives debate, Rep. Knollenberg observed, "much of the EPA's past problems have stemmed from its inability to present information in an objective and balanced manner. If information is presented without allowing the airing of both sides, it ceases to be education, and becomes advocacy. There is a fine line between education and advocacy, and the EPA must recognize this distinction and refrain from crossing this line."³ Rep. Obey further ad-

monished: “And if the agency goes across the line into advocacy , it does so at its own peril.”⁴

The Conference Report gave the EPA additional guidance, stating, “To the extent future funding request may be submitted which would increase funding for climate change activities prior to Senate consideration of the Kyoto Protocol, the Administration must do a better job of explaining the components of the programs, their anticipated goals and objectives, the justification for any funding increases, a discussion of how successes will be measured, and a clear definition of how these programs are justified by goals and objectives independent of implementation of the Kyoto Protocol.” Throughout 1998 neither Congress nor the American people had any reliable way of knowing what EPA planned to do with the tax dollars appropriated for climate change programs. Other witnesses at today’s hearing will consider whether real transparency and accountability has been achieved.

REGULATION OF CO₂ UNDER THE CLEAN AIR ACT

Regulation and reduction of greenhouse gas emission are the keystone of the Kyoto Protocol. CO₂, a naturally occurring substance that we exhale every day is a so-called greenhouse gas that has not been subject to regulation by the EPA. However, in a legal memorandum dated April 10, 1998, EPA General Counsel Jonathan Z. Cannon advised the EPA Administrator that the Clean Air Act granted the EPA power to regulate emissions of carbon dioxide. The legal opinion stated that “CO₂ emissions are within the scope of EPA’s authority to regulate.”⁵

The EPA on April 15, 1999, announced that pursuant to the settlement of litigation with the Natural Resources Defense Council (NRDC), it would study control strategies for regulating CO₂ as an air pollutant. Rep. Sensenbrenner stated in a June 25, 1998 letter to EPA Administrator Carol Browner that the settlement agreement was in reality “ a step toward” implementation of the Kyoto Protocol. Rep Sensenbrenner noted that “Congress, in enacting section 112 of the Clean Air Act, did not list CO₂ as a hazardous air pollutant and I do not believe that EPA has amended that list to include CO₂.”⁶

The NRDC-EPA settlement agreement modifies an October 26, 1994 consent agreement. CO₂ was not even mentioned in the earlier agreement, which stems from a September 1992 lawsuit

predating both the Kyoto Protocol and the initial Conference of the Parties to the United Nations Framework Convention on Climate Change. Rep. Sensenbrenner therefore found it difficult to comprehend the relevance of the original consent decree to any emissions subject to the Convention or the Protocol, particularly since EPA never recognized CO₂ as a pollutant in 1994.⁷

The original 1994 settlement agreement stemmed from a complaint by the NRDC that the EPA had violated Section 112 of the Clean Air Act by failing to list and regulate as sources of hazardous pollution marine loading facilities and electric utility steam-generating units.⁸ Under the original settlement agreement, EPA agreed to undertake a Section 112(n)(1)(A) health effects study and report. This report would include the Agency's determination whether there is a need to regulate electric utility steam-generating units under Section 112. In the event that EPA determined that there was a need to regulate, EPA was obligated to promulgate regulations for the source category pursuant to a set timetable.

The modified settlement agreement, coming nearly four years after the original agreement, is a significant departure from the original. The new agreement would direct EPA to: "undertake on or before May 1, 1998, an analysis of the emission reductions of SO₂, NO_x, CO₂ and mercury (and the effect on mercury removal costs) that would be achieved through an array of strategies to control SO₂, NO_x, CO₂ and mercury, and shall be published such completed analysis on or before February 28, 1999."⁹

To repeat, CO₂ is not regulated as a pollutant under any provision of the Clean Air Act. So why does EPA propose to study, inter alia, strategies for regulating CO₂?

EPA Administrator Carol Browner, in an August 8, 1998 letter to Rep. Sensenbrenner, explained that "the proposed analysis is specifically intended to inform EPA's decisions under the Clean Air Act concerning regulation of mercury emissions from steam electric power plants." According to her, "in this exercise EPA will evaluate how much reduction in mercury would result (and at what costs) from various possible scenarios to control mercury. Those model runs would also estimate the reductions in other pollutants (NO_x, SO₂, and CO₂) that would result from these possible mercury control scenarios."¹⁰ She concluded, "it makes good common sense to undertake

the analysis called for in the proposed settlement agreement.”¹¹

I’d like to offer a different assessment. Given the fact that CO₂ is not regulated under any provision of the Clean Air Act, even studying the CO₂ effects of control strategies for regulating mercury is suspicious. However, examining control strategies for regulating CO₂ is completely inappropriate. This is not how to settle a lawsuit alleging EPA’s failure to list and regulate sources of mercury emissions. It is not how to protect the public from the environmental hazards posed by mercury emissions. It is, however, the way to lay the groundwork for regulation of CO₂ and implementation of the Kyoto Protocol.

Unsurprisingly, the EPA denies that the planned CO₂ analysis is a first step towards implementation of the Kyoto treaty. However, the NRDC, the plaintiff in the modified settlement agreement, makes a conflicting statement. According to Dan Lashoff of the NRDC, “It’s intended to look ahead to emissions reductions of carbon dioxide and other pollutants that may be required to achieve national objectives as established by the treaty.” Lashoff notes, “It’s only common sense to take action to reduce greenhouse gas pollution beginning as soon as possible.”¹²

Although the EPA states that it has no plans to list CO₂ as a hazardous air pollutant under section 112 of the Clean Air Act, the timing of the agreement — a mere five days after release of the EPA General Counsel’s CO₂ memorandum—hardly seems coincidental. Rather, we may suspect, the agency was attempting to ratify, through a consent agreement, its tortured interpretation of the Clean Air Act.

Would NRDC and EPA, plaintiff and defendant, work hand in glove to advance a shared regulatory agenda? Stranger things have happened. The agency and environmental activists are not in a true adversarial relationship. Indeed, the EPA is a major financial supporter of the NRDC. According to EPA Grants Information, the agency has contributed \$729,251 to the NRDC since 1995.¹³ The modified settlement agreement may be a facile device to support and further justify the earlier opinion by the EPA General Counsel in furtherance of a joint mission to implement Kyoto.

Congress has not delegated to EPA the authority to regulate CO₂ as a pollutant. In its zeal to “make good policy,” EPA attempted to usurp Congressional authority. This seems to have become

something of a habit. A recent opinion by the United States Courts of Appeals for the District of Columbia Circuit determined that EPA assumed “an unconstitutional delegation of legislative power” when promulgating the new NAAQS standards under the Clean Air.¹⁴

EPA’s attempt to “research” CO₂ regulation under the cover of a settlement agreement undermines the spirit of the Byrd-Hagel resolution. Additionally, it calls into question the candor of EPA other agency assurances and testimony that the Administration has no intention of implementing Kyoto prior to its ratification by the Senate.¹⁵

ADDITIONAL EPA EFFORTS TO IMPLEMENT KYOTO

Other suspicious EPA regulatory behavior is worth noting. On March 3, 1999, the EPA announced a Final Rule for “Protection of Stratospheric Ozone; Refrigerant Recycling; Substitute Refrigerants.”¹⁶ These new rules establish sales restrictions on HFC and PFC refrigerants and would ban the “manufacture in or import into” the U.S. of certain devices, including “self-chilling cans.” Not, however, because the chemicals used in the devices would deplete the ozone layer, but because of their supposed contribution to global warming. It is questionable whether the EPA has the legal authority to consider the greenhouse warming potential of a refrigerant as a basis for proscribing its use under Section 612 of the Clean Air Act.

EPA ADVOCACY EFFORTS TO PROMOTE KYOTO

The EPA’s climate change information activities, conferences and seminars exhibit persistent imbalance and definitely cross the fine line separating education from advocacy. The EPA’s conferences on climate change heavily promote and favor the message of Kyoto. From New York to Florida to New Mexico, EPA seminars have been consistently biased towards Kyoto. For example, an EPA report on the June 23, 1998 EPA Regional Conference on Global Warming featured a host of speakers from the agency, academia, industry, and state and local government. No speakers were present to offer an alternative to the Administration’s economic analysis or scientific assessment. Instead, taxpayers seeking more information on the issue of climate change and Kyoto were told by Bill White, Senior Advisor on Climate Change to EPA Administrator Carol Browner, that Kyoto

was an “important achievement in the best interest of the United States and the global environment.” Anthony Masiello, Mayor of Buffalo, New York warned attendees that “global warming could have negative impacts on many of our regions’ strengths, assets, and resources.” In a concluding plea for activism, EPA Regional Administrator Jeanne Fox stressed the importance of “educating” the public on global warming. She stated, “We need to help people understand that the road we’re heading down is one of great danger, and we must change that course.”¹⁷

More recently, an April 28, 1999 EPA conference in Kansas City, Missouri exhibited similar bias towards Kyoto, with just one lone speaker questioning the Administration’s views. That speaker was invited to participate at the last minute only because of the forceful intervention of Congresswoman Jo Ann Emerson, who complained in a letter to Carol Browner about the closed and one-sided nature of the agenda. One contrarian is better than none, but the event was still hugely unbalanced.

The difference between education and advocacy is balance and accuracy. Balance does not mean one dissenting voice out of fifteen. Granted, agencies do not exist to host debates about the merits of the Administration’s policies. However, when it comes to EPA and climate change policy, there has not even been the pretense of a hint of balance without external pressure.

EPA materials are similarly one-sided. EPA documents such as “Cool Facts About Global Warming” fail to provide even passing reference to the uncertainties and conflicts within the scientific community regarding climate change. Clearly the agency does not understand the difference between advocacy and education. Federal employees and taxpayer dollars are being used as part of a campaign to sway public sentiment in favor of a treaty that the Senate has preemptively rejected.

What should Congress do? First, investigate the materials and programs promoted by the EPA and distributed to the public on global warming. The General Accounting Office should undertake an investigation of these advocacy activities.

In summary, the EPA is in desperate need of monitoring. I strongly recommend that Congress review these taxpayer-funded programs to ensure balance, accuracy and to verify the amount of funds being spent. Congress should nip any attempts made by the administration to implement Kyoto via the backdoor by regulation of CO₂ or other actions in contempt of the Knollenberg Amendment.

Notes

1. My comments reflect my own views and are not necessarily the views of either George Mason University or Washington University.
2. S.Res. 98, 105th Cong. 1st Sess. 1997.
3. *Cong. Record*, July 29, 1998, H6575.
4. *Cong. Record*, July 23, 1998, H6222.
5. Jonathan Z. Cannon, Memorandum on EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources to Carol Browner, EPA Administrator, April 10, 1998.
6. Rep. F.J. Sensenbrenner, Jr., Letter to EPA Administrator, Carol Browner, June 25, 1998.
7. Rep. F.J. Sensenbrenner, Jr., Letter to EPA Administrator, Carol Browner, June 25, 1998.
8. Section 112 of the Clean Air Act directs the EPA to list, and regulate, sources of hazardous air pollutants. Hazardous air pollutants are those substances included on the list established in Section 112(b).
9. Proposed Settlement Agreement, paragraph 1.
10. EPA Response to June 25, 1998 Inquiry from Representative Sensenbrenner..
11. Letter from EPA Administrator Carol Browner to Rep. F.James Sensenbrenner, August 8, 1995.
12. Patrice Hill "GOP lawmakers try to block use of global-warming treaty; White House threatens to veto funding bill containing ban," *Washington Times*, July 8, 1998, pg A5.
13. See James Sheehan, "Cashing in on Global Warming," Competitive Enterprise Institute, June 1998.
14. *American Trucking Ass'ns, Inc v. United States EPA*, 1999 U.S. App. Lexis 9064 (1999.)
15. Testimony of Stuart Eizenstat, Undersecretary of State for Economic, Business and Agricultural Affairs before the Senate Foreign Relations Committee, February 11, 1998.
16. 64 FR 10374, March 3, 1999.
17. Report on the June 23, 1988 EPA Regional Conference sponsored by the EPA Office of Policy, Office of Economy and Environment.