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Attn: Docket ID No. EPA-HQ-OAR-2009-0171
Proposed Endangerment and Cause or
Contribute Findings for Greenhouse
Gases Under Section 202(a) of the Clean
Air Act; Proposed Rule
74 FR 18886 (April 24, 2009)

Ladies & gentlemen:

These comments are submitted on behalf of Unions for Jobs and the Environment (UJAE), a §501(c)(4) organization of twelve national and international labor unions.¹

¹ Member unions of UJAE are: Brotherhood of Locomotive Engineers; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Teamsters; Marine Engineers Beneficial Association; Sheet Metal Workers International Association; Transportation • Communications International Union; United Association of Journeymen and Apprentices in the Plumbing and Pipefitting Industry; United Food and Commercial Workers International Union; United Mine Workers of America; United Transportation Union; and Utility Workers of America. For further information about UJAE, *see*, www.ujae.org.

Background

UJAE's member unions represent more than 3.2 million workers in electric power, transportation, coal mining, construction and many other industries. UJAE members' jobs and economic wellbeing would be vitally affected by U.S. EPA's decisions on the regulation of greenhouse gas (GHG) emissions under the Clean Air Act (CAA or Act) and by related state and federal actions needed to implement any such regulations.

UJAE and its member unions have actively engaged in the global climate change policy debate due to its implications for jobs and job security relative to other nations' workforces. UJAE is accredited as a non-governmental organization (NGO) with formal observer status at the United Nations Framework Convention on Climate Change (FCCC). As an accredited observer to the UN FCCC process, UJAE has urged global action by developed and developing nations to address global climate change, recognizing that unilateral emission reductions by developed nations alone would exacerbate the loss of U.S. jobs while doing little to reduce long-term atmospheric concentrations of greenhouse gases.

UJAE also participated as *amicus curiae* in the Supreme Court case underlying this rulemaking, *Massachusetts v. EPA*, 127 S.Ct. 1437 (2007). We argued there that domestic and foreign policy considerations weighed against plaintiffs' petition to require EPA to regulate carbon dioxide (CO₂) emissions from automotive tailpipes:

If Petitioners were to succeed in using their underlying petition to force unilateral reductions in the US, without regard to foreign policy, the US would lose an important source of foreign policy leverage; namely, the ability to insist on commitments by other nations as a precondition for its own GHG reductions. *See Crosby*, 530 U.S. at 376 (finding that forbearance from domestic action constitutes foreign policy because without such forbearance "the President has less to offer and less economic and diplomatic leverage as a consequence"). Petitioners here seek to use this forum to compel EPA action that directly contradicts existing national policy. Such interference would come at a particularly sensitive time internationally. UNFCCC parties have not yet resolved the

pivotal issues of whether, when and how developing nations will be bound to emissions limitations.²

These concerns remain no less relevant today.³ The United States and other parties to the FCCC are actively engaged in negotiations pursuant to the December 2007 Bali Action Plan⁴ for a multinational replacement to the Kyoto Protocol, potentially involving emission reduction or limitation

² *Amicus Curiae* Brief of Unions for Jobs & the Environment, Massachusetts v. EPA (S. Ct. 2007) at 26-29 (citations omitted.)

³ We note that the Supreme Court's holdings in Massachusetts v. EPA did not specifically preclude EPA from consideration of the foreign policy implications of its decision whether to regulate automotive tailpipe emissions, but emphasized the narrow statutory requirement at issue and the broader foreign policy context of the global climate issue:

“Although we have neither the expertise nor the authority to evaluate these policy judgments, it is evident they have nothing to do with whether greenhouse gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form a scientific judgment. In particular, while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws. In the Global Climate Protection Act of 1987, Congress authorized the State Department—not EPA—to formulate United States foreign policy with reference to environmental matters relating to climate. See §1103(c), 101 Stat. 1409. EPA has made no showing that it issued the ruling in question here after consultation with the State Department. Congress did direct EPA to consult with other agencies in the formulation of its policies and rules, but the State Department is absent from that list. §1103(b).

Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time. See 68 Fed. Reg. 52930–52931. If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so. That EPA would prefer not to regulate greenhouse gases because of some residual uncertainty—which, contrary to JUSTICE SCALIA's apparent belief, post, at 5–8, is in fact all that it said, see 68 Fed. Reg. 52929 (“We do not believe . . . that it would be either effective or appropriate for EPA to establish [greenhouse gas] standards for motor vehicles at this time” (emphasis added))—is irrelevant. The statutory question is whether sufficient information exists to make an endangerment finding.

In short, EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore “arbitrary, capricious, . . . or otherwise not in accordance with law.” 42 U. S. C. §7607(d)(9)(A). We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding. Cf. *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–844 (1984). We hold only that EPA must ground its reasons for action or inaction in the statute.” 127 S. Ct. 1437, 1453 (emphasis added.)

⁴ UN FCCC Decision 1/COP13 (2007).

commitments by developed and developing nations. Any agreement emerging from the Copenhagen process will profoundly affect the course of global greenhouse gas emissions.

Summary of Comments

In this rulemaking, EPA proposes to establish that emissions of six greenhouse gases endanger public health and welfare for purposes of section 202 of the Clean Air Act. While the immediate objective of potential regulation under this rule is controlling emissions from motor vehicles, the endangerment finding would provide the basis for subsequent regulation of greenhouse gases from all sources subject to regulation under the Act.

UJAE does not take issue with the scientific assessments underlying the proposed endangerment finding. We further recognize that EPA, consistent with the decision in *Massachusetts*, is in position to make this finding notwithstanding the global nature of the climate change problem.

Our concerns about the current rulemaking focus mainly on EPA's subsequent course of regulation. Congress is actively pursuing development of national climate change legislation, which UJAE prefers as the means to address the far-reaching economic, energy, social and environmental objectives of climate change regulation. Congressional action on climate should not be distracted by an aggressive exercise of the agency's discretion to regulate greenhouse gases under *Massachusetts*.

The recent negotiation of national automotive tailpipe standards modeled on California's standards will provide adequate regulation of greenhouse gas emissions from this mobile source sector for the foreseeable future. These standards also can be integrated within the framework of national climate legislation now before Congress.

We note in this regard that the rulemaking does not propose a finding that the regulation of greenhouse gas emissions from new motor vehicles will serve to reduce or reverse the future course of global climate change. The proposal does not offer any schedule or regulatory path for the control of greenhouse gases from other emitting sectors.

UJAE agrees in principle with the central finding that EPA proposes to make in this rule, namely that greenhouse gas emissions from new motor vehicles can reasonably be anticipated to adversely affect public health and

welfare, and hence should be subject to regulation under the Act. We agree with EPA that the increase in global concentrations of greenhouse gases contributes to climate change, and that anthropogenic emissions from sources such as motor vehicles are contributing to increasing levels of global greenhouse gas concentrations.

We also concur with the Agency's recognition that greenhouse gases do not adversely impact public health or welfare in the same direct manner as criteria pollutants such as ozone and sulfur dioxide. The effects of increased greenhouse gas concentrations are primarily indirect, such as increased global sea levels and temperature, changes in regional precipitation patterns, and interaction with other pollutants such as ozone.

UJAE acknowledges the incorporation of the "precautionary principle" underlying the UN FCCC within the proposed endangerment finding. There remain areas of scientific uncertainty associated with the causes of climate change, including the roles of the oceans, atmosphere and natural emissions, and the extent to which anthropogenic emissions contribute to climate change. These uncertainties, however, do not appear sufficient to deny the need for prudent regulation of greenhouse gas emissions

Our central purpose in engaging EPA's potential future regulatory agenda for climate change is to ensure that the 111th Congress has adequate time to develop comprehensive national legislation that addresses our major concerns, including the minimization of job losses, provision of adequate incentives for the rapid commercial deployment of carbon capture and storage technologies on new and retrofit stationary sources, and the careful integration of emission reduction timetables with the anticipated commercial availability of such technologies.

EPA has pending issues potentially involving requirements for controlling CO₂ emissions from coal-based power plants, including the "Johnson Memo" and the voluntary remand of the petition for stationary source NSPS emission controls. UJAE urges the agency to avoid a rush to judgment on any of these matters in a manner that could conflict with Congress's ongoing climate change deliberations.

The UN FCCC process is now considering a number of options for long-term climate stabilization scenarios. The draft negotiating text of the Ad Hoc Working Group on Long-Term Cooperative Actions includes

comprehensive alternatives for the development of global targets and timetables for achieving the long-term objectives of the UN FCCC.

The Obama Administration is fully committed to the FCCC negotiation process. The U.S. would erode its ability to insist on commitments by other nations to control emissions if EPA embarked upon a piecemeal regulatory course to reduce greenhouse gases in advance of the FCCC negotiations in Copenhagen this December.

The Copenhagen negotiations will provide a critical opening for the development of new commitments by developing nations, pursuant to the Bali Action Plan adopted in December 2007 at COP-13. Congress is the appropriate forum for ratifying the terms of our potential commitments in any new global climate agreement, and, in all events, for defining a comprehensive greenhouse gas regulatory program reflecting an appropriate balance of social, economic, and environmental considerations.

To assist the agency in the planning and development of a “backstop” course of climate regulation – applicable only in the event that Congress fails to act in a timely manner – UJAE recommends that EPA convene a climate change advisory work group through the Clean Air Act Advisory Committee (CAAAC). A proposal for such a work group was discussed at the May 13th meeting of the CAAAC Subcommittee on Economic Incentives, and by the CAAAC on May 14th. This proposal is under advisement by EPA, and UJAE urges the agency to act favorably on it.

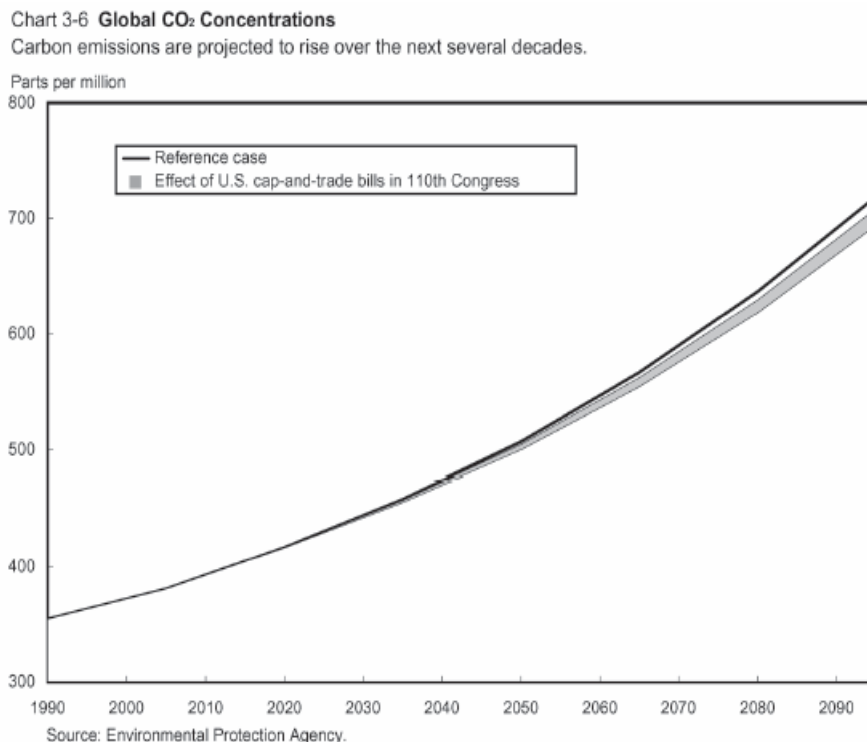
Endangerment in Context

EPA should be mindful, in the exercise of its authority subsequent to this rulemaking, both of the limited nature of any public health and welfare benefits associated with unilateral U.S. actions to reduce greenhouse emissions, and of the broader multinational negotiations now underway seeking to establish global threshold values for avoiding “dangerous anthropogenic interference” with climate under the UN FCCC.

UJAE members support enactment of national climate change legislation as the preferred vehicle for reducing U.S. GHG emissions in a manner that will not unduly sacrifice jobs, threaten national energy security, or impose undue costs on American workers and consumers. UJAE members actively supported enactment of climate legislation in the 110th Congress, and currently support the legislative process underway in the

House and Senate aimed at enacting national climate legislation in the 111th Congress.

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. The chart below illustrates EPA's analysis, published in the *2009 Economic Report of the President*, of the impacts of U.S. climate legislation on projected future global CO₂ concentration levels:



The global nature of GHG emissions was the catalyst for the 1992 negotiation and ratification of the Rio Framework Convention on Climate Change. The U.S. is among the 154 signatory nations to the Convention.⁵ The Convention's long-term objective is the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." FCCC Art. 2. It also acknowledges that the timeframe for achieving the goal should "enable economic development to proceed in a sustainable manner."

⁵ See Status of Ratification of the United Nations Framework Convention on Climate Change, U.N. Doc. FCCC/1996/INF.1, U.N. FCCC, March 1, 1996, at <http://unfccc.int/resource/docs/1996/sbsta/inf01.pdf>.

Id. To achieve this goal, the Convention assigns differing levels of commitments to “developed” and “developing” country parties based on their “common but differentiated responsibilities.” FCCC at Preamble.

This long-term stabilization target is, in effect, a global air quality standard for greenhouse gas emissions. Due to the global nature of GHGs, the U.S. cannot enforce an atmospheric concentration level as it does for conventional criteria air pollutants through National Ambient Air Quality Standards.

The UN FCCC process is now considering a number of options for long-term climate stabilization scenarios. The draft negotiating text of the Ad Hoc Working Group on Long-Term Cooperative Actions includes comprehensive alternatives for the development of global targets and timetables for achieving the long-term objectives of the UN FCCC:

12. The long-term global goal for emission reductions {shall}{should} be set

Option 1 - as a stabilization of GHG concentrations in the atmosphere at {400}{450 or lower}{not more than 450}{450} ppm carbon dioxide equivalent (CO₂ eq) and a temperature increase limited to 2 °C above the pre-industrial level. For this purpose, the Parties {shall}{should} collectively reduce global emissions by at least 50 per cent {from 1990} levels by 2050.

Option 2 - as a stabilization of GHG concentrations in the atmosphere well below 350 ppm CO₂ eq and a temperature increase limited to below 1.5 °C above the pre-industrial level. For this purpose, the Parties{shall}{should} collectively reduce global emissions by {81.71}{more than 85} per cent from 1990 levels by 2050.

Option 3 - as a global temperature increase limited to 2 °C above the pre-industrial level.

Option 4 - as a reduction in global average GHG emissions per capita to about 2 t CO₂.

Option 5 on the basis of -

Option 5.1

historical responsibility.

Option 5.2

emissions debt.

Option 5.3

per capita accumulative emission convergence.

Option 5.4

an equitable allocation of the global atmospheric resources.

13. Emission pathways towards the long-term global goal for emission reductions require that global GHG emissions peak {between 2010 and 2013}{by 2015}{by 2020 at the latest}{in the next 10.15 years}{in the next 10.20 years} and decrease thereafter.

14. To this end, {developed country Parties} {Parties included in Annex I to the Convention (Annex I Parties)} {developed country Parties included in Annex II to the Convention (Annex II Parties)}, as a group, {shall}{should} reduce their GHG emissions:

(a) {By at least 25-40}{By 25-40}{By more than 25-40}{In the order of 30}{By at least 40}{by 45}{by at least 45} per cent from 1990 levels by 2020, {with further reductions to be achieved through policies and measures that promote sustainable lifestyles};

(b) {And {by more than 95}{in the range of 75-85} per cent by 2050}.

15. Supported and enabled by technology, financing and capacity-building from developed country Parties, the GHG emissions of {developing country Parties}{Parties not included in Annex I to the Convention (non-Annex I Parties)}, as a group, {shall}{should}:

(a) {{Significantly deviate from the baseline by 2020} {Deviate in the order of 15-30 percent below the baseline by 2020}};

(b) {And be reduced by 25 per cent from 2000 levels by 2050}.

16. Option 1

The Parties shall periodically review the overall progress towards the ultimate objective of the Convention and actions related to mitigation, adaptation and means of implementation, in the light of {the best available scientific information}{an assessment of climate change and its impacts}{intergovernmental scientific} as well as relevant technical, social and economic information, and taking account of observed impacts and efforts made to adapt to climate change, including a comprehensive review not later than 2016, incorporating consideration of future emission reduction requirements and targets in the light of the Fifth Assessment Report of the IPCC.

17. Option 2 (*in the case of a long-term global goal as defined in para. 12, option 3, above*)

The long-term global goal for emission reductions {shall}{should} be updated to reflect progress in scientific knowledge. To allow for these

updates, the 2 °C goal {shall}{should} be broken down into partial targets: initially, a 0.2 °C temperature increase per decade over 10 decades. Every 10 years, the partial target {shall}{should} be evaluated, with a view to possibly redefining it, taking into account advances in scientific knowledge and the reduction of uncertainties.⁶

The Obama Administration is fully committed to the FCCC climate negotiation process. The U.S. would erode its ability to insist on commitments by other nations if EPA embarked upon a piecemeal regulatory course to reduce greenhouse gases in advance of the FCCC negotiations in Copenhagen this December.

The Copenhagen negotiations will provide a critical opening for the development of new commitments by developing nations, pursuant to the Bali Action Plan adopted in December 2007 at COP-13. Congress is the appropriate forum for ratifying the terms of our potential commitments in any new global climate agreement, and, in all events, for defining a comprehensive greenhouse gas regulatory program reflecting an appropriate balance of social, economic, and environmental considerations.

Deference to Congressional Action On Coal Plant NSPS Issues

EPA has pending issues potentially involving requirements for controlling CO₂ emissions from coal-based power plants, including reconsideration of the “Johnson Memo” interpreting New Source Review requirements following the Deseret permit decision,⁷ and the voluntary remand of the petition for stationary source NSPS emission controls.⁸ UJAE urges the agency to avoid a rush to judgment on any of these matters

⁶ UN FCCC/AWGLCA/2009/8, at 9-10.

⁷ See, http://epa.gov/nsr/documents/psd_interpretive_memo_12.18.08.pdf.

Environmental groups have petitioned EPA to reconsider the Johnson Memo and have filed a petition for review in the D.C. Circuit Court of Appeals. The State of California filed a challenge in the D.C. Circuit. On February 17, 2009, EPA Administrator Lisa Jackson advised the environmental petitioners that EPA was granting the petition for reconsideration and would solicit public comment on “the issues raised in the memorandum” along with “any issues raised in the opinion of the Environmental Appeals Board [in the Deseret PSD permit appeal], to the extent that they are not coextensive with the issues raised in the memorandum.” See, Letter from EPA Administrator Jackson to David Bookbinder, Sierra Club (Feb. 17, 2009) at 1. The D.C. Circuit litigation has been stayed pending EPA’s completion of its reconsideration of the Johnson Memo.

⁸ *New York v. EPA* (DC Cir., 06-1322).

in a manner that could conflict with Congress’s ongoing climate change deliberations.

The Waxman-Markey bill (HR 2454) contains a comprehensive, measured approach to the imposition of new CO₂ standards for coal-based power plants:

“SEC. 812. PERFORMANCE STANDARDS FOR NEW COAL-FIRED POWER PLANTS.

“(a) DEFINITIONS.—For purposes of this section:

“(1) COVERED EGU.—The term ‘covered EGU’ means a utility unit that is required to have a permit under section 503(a) and is authorized under

state or federal law to derive at least 30 percent of its annual heat input from coal, petroleum coke, or any combination of these fuels.

“(2) INITIALLY PERMITTED.—The term ‘initially permitted’ means that the owner or operator has received a Clean Air Act preconstruction approval or permit, for the covered EGU as a new (not a modified) source, but administrative review or appeal of such approval or permit has not been exhausted. A subsequent modification of any such approval or permits, ongoing administrative or court review, appeals, or challenges, or the existence or tolling of any time to pursue further review, appeals, or challenges shall not affect the date on which a covered EGU is considered to be initially permitted under this paragraph.

“(b) STANDARDS.—(1) A covered EGU that is initially permitted on or after January 1, 2020, shall achieve an emission limit that is a 65 percent reduction in emissions of the carbon dioxide produced by the unit, as measured on an annual basis, or meet such more stringent standard as the Administrator may establish pursuant to subsection (c). In determining compliance with this subsection, the Administrator shall assume an energy penalty of the carbon dioxide capture system of no greater than 15 percent.

“(2) A covered EGU that is initially permitted after January 1, 2009, and before January 1, 2020, shall, by the applicable compliance date established under this paragraph, shall achieve an emission limit that is a 50 percent reduction in emissions of the carbon dioxide produced by the unit, as measured on an annual basis. In determining compliance with this subsection, the Administrator shall assume an energy penalty of the carbon dioxide capture system of no greater than 15 percent. Compliance with the requirement set forth in this paragraph shall be required by the earliest of the following:

“(A) Four years after the date the Administrator issues a determination that there are in commercial operation in the United States electric generating units equipped with carbon capture and sequestration technology that, in the aggregate—

“(i) have a total of at least 4 gigawatts of nameplate generating capacity of which—

“(I) at least 3 gigawatts must be electric generating units; and
“(II) up to 1 gigawatt may be industrial applications, for which capture and sequestration of 3 million tons of carbon dioxide per year on an aggregate annualized basis shall be considered equivalent to 1 gigawatt;
“(ii) include at least 2 electric generating units, each with a nameplate generating capacity of 250 megawatts or greater, that inject carbon dioxide into geologic formations other than oil and gas fields; and
“(iii) are capturing and sequestering in the aggregate at least 12 million tons of carbon dioxide per year, calculated on an aggregate annualized basis.

“(B) January 1, 2025.

“(3) If the deadline for compliance with paragraph (2) is January 1, 2025, the Administrator may extend the deadline for compliance by a covered EGU by up to 18 months if the Administrator makes a determination, based on a showing by the owner or operator of the unit, that it will be technically infeasible for the unit to meet the standard by the deadline. The owner or operator must submit a request for such an extension by no later than January 1, 2022, and the Administrator shall provide for public notice and comment on the extension request.

“(c) REVIEW AND REVISION OF STANDARDS.—Not later than 2025 and at 5-year intervals thereafter, the Administrator shall review the standards for new covered EGUs under this section and shall, by rule, reduce the maximum carbon dioxide emission rate for new covered EGUs to a rate which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.”⁹

These phased standards implicitly recognize the early stage of development of carbon capture and storage (CCS) technologies – the principal technological means for reducing CO₂ emissions from stationary sources. As determined by the Advanced Coal Technology Working Group of EPA’s Clean Air Act Advisory Committee,¹⁰ and more recently pointed out by GAO,¹¹ CCS has not been commercially demonstrated on large coal-based boilers.

⁹ HR 2454 (111th Cong., 1st Sess.), Section 116.

¹⁰ Final Report of the Advanced Coal Technology Working Group of the EPA Clean Air Act Advisory Committee (January 2008).

¹¹ GAO, Federal Actions Will Greatly Affect the Viability of Carbon Capture and Storage As a Key Mitigation Option (September 2008):

Nationally-recognized studies and GAO’s contacts with a diverse group of industry representatives, nongovernmental organizations, and academic researchers show that key barriers to CCS deployment include (1) underdeveloped and costly CO₂ capture technology and (2) regulatory and legal uncertainties over CO₂ capture, injection, and storage. Key technological barriers include a lack of experience in capturing significant

The combination of emission standards for new coal-based plants and the financial incentives for CCS provided by other sections of HR 2454 offer a comprehensive approach for encouraging the early adoption of CCS technologies that is not readily available to EPA under current statutory authority. UJAE recommends that the agency defer to Congress for the development of such a comprehensive approach to the regulation of new stationary source CO2 emissions.

UJAE appreciates the opportunity to comment on these issues, and hopes that EPA will give due consideration to its recommendations.

Sincerely,

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amounts of CO2 from commercial-scale power plants and the significant cost of retrofitting existing plants that are the single largest source of CO2 emissions in the United States. Regulatory and legal uncertainties include questions about liability concerning CO2 leakage and ownership of CO2 once injected. According to the National Academy of Sciences and other knowledgeable authorities, another barrier is the absence of a national strategy to control CO2 emissions (emissions trading plan, CO2 emissions tax, or other mandatory control of CO2 emissions), without which the electric utility industry has little incentive to capture and store its CO2 emissions. Moreover, according to key agency officials, the absence of a national strategy to control CO2 emissions has also deterred their agencies from resolving other important practical issues, such as how sequestered CO2 will be transported from power plants to appropriate storage locations and how stored CO2 would be treated in a future CO2 emissions trading plan. *Id.*, at 2.