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TEXT:

-----Original Message-----

From: Marlo Lewis [mailto:mlewis@cei.org]

Sent: Thursday, April 24, 2003 2:50 PM

To: Marlo Lewis

Subject: CEI Comment on EPA's Draft Strategic Plan

April 17, 2003

Ms. Linda M. Combs

Chief Financial Officer

Office of the Chief Financial Officer

1200 Pennsylvania Ave. 2710A

Washington, DC 20460

Dear Ms. Combs:

Thank you for the opportunity to comment on the U.S. Environmental Protection Agency's (EPA's) March 5, 2003 Draft Strategic Plan. I am submitting these comments on behalf of the Competitive Enterprise Institute (CEI), a non-profit, free-market public policy group headquartered in Washington, D.C.

CEI is concerned that the section entitled "Goal 1: Clear Air" implies an expectation, intention, or plan to regulate carbon dioxide (CO2), even though Congress has never authorized EPA to undertake such regulation. We find this troubling. CO2 is the inescapable byproduct of the hydrocarbon fuels-coal, oil, natural gas-that supply 70 percent of U.S. electricity and 84 percent of all U.S. energy. Mandatory CO2 reduction policies like the Kyoto Protocol are energy rationing schemes-the regulatory equivalent of growth-chilling, regressive energy taxes.

Misleading terminology

Goal 1 of the Draft Strategic Plan creates the impression that CO2 emissions

are a form of "air pollution" that damage "air quality." Consider these passages:

\* Outdoor air pollution reduces visibility; damages crops, forests, and buildings; acidifies lakes and streams; contributes to the eutrophication of estuaries and the bioaccumulation of toxics in fish; diminishes the protective ozone layer in the upper atmosphere; contributes to the potential

for world climate change; and poses additional risks to Native Americans and others who subsist on plants, fish, and game. [Goal 1 - Page 1, emphases added]

\* Global air quality issues pose a daunting challenge. Releases of greenhouse gases (GHGs), with potentially far-reaching impacts on climate and sea level, will continue to increase worldwide. [Goal 1 - Page 11, emphases added]

Whatever one may opine about CO2's role in enhancing the natural greenhouse effect, CO2 is neither an "ambient" air pollutant like sulfur dioxide (SO2) and nitrogen oxides (NOX), nor a "hazardous" air pollutant like mercury (Hg). CO2 does not foul the air, impair visibility, contribute to respiratory illness, or bio-accumulate as a toxin in animal tissues.

Rather,

CO2 is plant food, and rising concentrations enhance the growth of most trees, crops, and other plant life-an environmental benefit. Furthermore, potential changes in global temperature, whether due to CO2 emissions or natural variability, are not attributes of "air quality," as that term is used either in the Clean Air Act or in common parlance.

It is therefore an abuse of terminology to describe CO2 emissions as "air pollution," or to label climate change an "air quality" issue. This is no mere semantic quibble. Promulgating regulations to control air pollution and

improve air quality is business-as-usual at EPA. Defining climate change as an "air quality" issue and CO2 emissions as "air pollution" can only bias public debate in favor of regulatory strategies like the Kyoto Protocol, Senator Jeffords's (I-VT) "Clean Power Act," and the McCain-Lieberman "Climate Stewardship Act"-policies the Bush Administration rightly opposes. However inadvertently, the Draft Strategic Plan adopts the same guilt-by-association rhetoric typical of so-called Four-"P" or multi-"pollutant" bills to regulate CO2 from power plants. If the public views CO2 emissions as "air pollution," then pro-Kyoto activists can more easily disguise their energy suppression agenda as a fight for clean air. Regulatory signals

Even more worrisome, Goal 1 includes two statements that signal an intention

to regulate CO2 emissions in the near future:

\* We will use regulatory, market-based, and voluntary programs to protect human health, the global environment, and ecosystems from the harmful effects of ozone depletion and climate change-restoring, fortifying, and safeguarding Earth's precious resources for future generations. [Goal 1 - Pages 1-2, emphases added]

\* Over the next several years, we will use a variety of tools to achieve our

objectives, including human capital strategies to maintain and secure expertise in atmospheric change assessments and analyses, voluntary and regulatory programs, market-based regulatory approaches, and public outreach. [Goal 1 - Page 15, emphases added]

EPA has no authority to regulate CO2. Especially at this time, the Agency should take great care not to imply that it has such power, because seven State attorneys general are threatening to sue Administrator Whitman unless she agrees to regulate CO2.

Clean Air Act: no authority to regulate CO2

CEI has written a 30-page rebuttal of the AGs' legal opinions (available at <<http://www.cei.org/gencon/025,03383.cfm>>). As that paper shows, the plain language, structure, and legislative history of the Clean Air Act (CAA) all demonstrate that Congress never delegated to EPA the power to regulate CO2. Following are a few highlights:

\* The CAA is not an amorphous mass of regulatory authority but a

structured

statute with distinct titles conferring distinct grants of authority to accomplish distinct objectives. There is an ambient air quality standards (NAAQS) program, a hazardous air pollutant program, a stratospheric ozone protection program, and so on. Nowhere does the Act even hint at establishing a climate protection program. There is no subchapter, section, or even subsection on global climate change. The terms "greenhouse gas" and "greenhouse effect" appear nowhere in the Act.

\* "Carbon dioxide" and "global warming" do not occur in any of the Act's regulatory provisions. "Carbon dioxide" appears only once-in Section 103(g).

That provision directs the Administrator to develop "non-regulatory strategies and technologies," and admonishes her not to infer authority for "pollution control requirements." Similarly, "global warming" occurs only once-in Section 602(e). That provision directs the Administrator to "publish" (i.e., research) the "global warming potential" of ozone-depleting substances, and admonishes her not to infer authority for "additional regulation under [the CAA]." In short, the CAA mentions "carbon dioxide" and "global warming" solely in the context of non-regulatory provisions, and each time cautions EPA not to jump to regulatory conclusions.

\* The NAAQS program, with its state-by-state implementation plans and county-by-county attainment and non-attainment designations, has no rational application to a global atmospheric phenomenon like the greenhouse effect. For example, if EPA set a NAAQS for CO2 above current atmospheric levels, the entire country would be in attainment, even if U.S. hydrocarbon consumption suddenly doubled. Conversely, if EPA set a NAAQS for CO2 below current atmospheric levels, the entire country would be out of attainment, even if all of the nation's power plants, factories, and cars were to shut down. Any attempt to fit CO2 into the NAAQS regulatory structure would be an absurd exercise in futility-powerful evidence that when Congress enacted and amended the NAAQS program, it did not intend for EPA to regulate CO2.

\* Congress has debated climate change issues for two decades. It has consistently rejected or declined to adopt legislative proposals to regulate CO2. For example, Sen. Jeffords has repeatedly introduced multi-"pollutant" bills since the 105th Congress-none has ever come to a vote on the Senate floor. When Congress has legislated in this area, it has authorized the executive branch to engage in research (e.g., the U.S. Global Climate Change Research Act), administer voluntary programs (e.g., Section 1605 of the Energy Policy Act), and conduct international negotiations.

\* The 1992 Rio Treaty remains the most authoritative expression of congressional intent on climate change policy, and its emission reduction goals are not legally binding. Rio is not self-executing, and Congress has not enacted implementing legislation to make Rio's voluntary goals mandatory. Indeed, Congress has passed measures opposing regulatory climate policies (e.g., the July 1997 Byrd-Hagel Resolution and the many iterations of the Knollenberg funding restriction).

Ignoring legislative history EPA evidently regards "ozone depletion" and "climate change" as related aspects of a single problem-"atmospheric change" (Goal 1 - Pages 1-2, 15). EPA may thus believe that it should have regulatory authority to address climate change as well as ozone depletion. Such thinking informed Sen. Max

Baucus's (D-MT) failed version of the 1990 CAA Amendments, S. 1630, which contained a Title VII on "Stratospheric Ozone and Global Climate Protection." Title VII would have made "global warming potential" a basis for regulating CFCs, halogens, and other "manufactured" ozone-depleting substances. It also would have established a new national goal: "to reduce to the maximum extent possible emissions of other gases [e.g., CO<sub>2</sub>] caused by human activities that are likely to affect adversely the global climate."

However, Title VII never made it into the 1990 CAA Amendments. House and Senate conferees considered and rejected (a) establishing CO<sub>2</sub> reduction as a

national goal and (b) linking global warming and ozone depletion for regulatory purposes. As the Supreme Court has stated: "Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language" [INS v. Cardozo-Fonseca, 480 U.S. 421, 442-43 (1983)].

Rep. John Dingell (D-MI), who chaired the House-Senate conference committee on the 1990 CAA Amendments, confirmed this reading of the legislative history in an October 5, 1999 letter to House Government Reform Subcommittee

Chairman David McIntosh (R-IN). Dingell concluded:

"Based on my review of this history and my recollection of the discussions, I would have difficulty concluding that the House-Senate conferees, who rejected the Senate regulatory provisions ... contemplated regulating greenhouse gas emissions or addressing global warming under the Clean Air Act."

#### Conclusion

As written, the Draft Strategic Plan implies that EPA will regulate CO<sub>2</sub> as part of its mission to control "air pollution" and improve "air quality." EPA has no authority to develop, propose, or implement such regulation. Moreover, regulating CO<sub>2</sub> would be contrary to the Bush Administration's well-known-and well-justified-opposition to Kyoto, Sen. Jeffords's "Clean Power Act," and the McCain-Lieberman "Climate Stewardship Act." Before EPA publishes the final version of its Strategic Plan, it should revise the flawed passages identified in this comment letter. The final version should not equate CO<sub>2</sub> emissions with air pollution, nor confuse the greenhouse effect with air quality. Most importantly, the final version should not affirm or imply that EPA expects, intends, or plans to regulate CO<sub>2</sub>.

Sincerely,

Marlo Lewis, Jr.

Senior Fellow

Competitive Enterprise Institute