ATLANTIC LEGAL FOUNDATION

2005 Palmer Avenue
Larchmont, NY 10538

1527 Stone Canyon Road
StoneBridge in Bel Air
Los Angeles, CA 90077

1701 Pennsylvania Avenue
NW, Suite 200
Washington, DC 20006

September 5, 2025

SUBMITTED VIA REGULATIONS.GOV

Administrator Lee Zeldin
EPA Docket Center
WJC West Building, Room 3334
1301 Constitution Avenue NW
Washington, DC 20004

RE: Proposed Rule Rescission – Reconsideration of 2009 Endangerment Finding and Greenhouse Gas Vehicle Standards, 90 Fed. Reg. 36,288 (Aug. 1, 2025), Docket No. EPA-HQ-OAR-2025-0194

Dear Administrator Zeldin:

INTRODUCTION

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, public interest law firm. Its mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state appellate courts and by submitting timely comments in regulatory and judicial proceedings impacting the broad public interest. See atlanticlegal.org.

Among the prominent professionals, including lawyers, scientists and business executives, serving on ALF's leadership team, Dr. Dennis K. McBride, President of the Institute of Regulatory Science, President Emeritus at the Potomac Institute for Policy Studies, adjunct professor at Georgetown University School of Medicine and Florida Tech College of Aeronautics, and former editor-in-chief for *Review of Policy Research*, is especially well informed from his experiences and research concerning issues underlying the subject Rule. He recently served as Director of the Office of the Secretary of Defense, Acquisition Innovation Research Center, a policy game-changing consortium of two dozen universities, including colleges of policy, business, law, science, engineering and technology.

The comments which follow supplement the comments submitted by the Texas Public Policy Foundation on August 1, 2025, and specifically offer the following regulatory science-based insights based on the valuable research and experience of Dr. McBride. We submit these specific comments in the broad public interest to concisely address the evolving definition of "endangerment" and the precautionary principle in carbon dioxide (CO2) emissions.

EXECUTIVE SUMMARY

These comments address the critical tension between administrative law and scientific evidence in the regulation of carbon dioxide (CO2). The Supreme Court's redefinition of "endangerment" in *Massachusetts v. EPA* broadened the term from a traditional focus on immediate, direct threats to include highly linked, long-term risks. This judicial reinterpretation, we submit, enabled what some observers might advocate as the precautionary principle in U.S. law, but it is actually much more. It compels regulatory action on speculative future harm without requiring a robust scientific consensus on immediate, direct health effects from ambient CO2 levels. The premise of this endangerment finding is challenged by scientific counterpoints, including the documented beneficial effects of increased CO2 on global vegetation. A particularly compelling counterargument is provided by U.S. Navy medical studies on submariners, who are chronically exposed to CO2 concentrations in an order of magnitude higher than projected atmospheric levels with no documented adverse health effects. This real-world evidence offers a critical empirical challenge to the scientific basis of the "endangerment" finding and highlights the profound shift in regulatory decision-making toward model-based risk assessment rather than direct, observable health impacts.

The ongoing debate surrounding the regulation of carbon dioxide (CO2) emissions, particularly in light of the current administration's reevaluation of its stance since 2009, highlights a critical tension between administrative law and the application of scientific evidence in policymaking. At the heart of this discussion is the Supreme Court's pivotal ruling in *Massachusetts v. EPA*, which fundamentally redefined the term "endangerment" under the Clean Air Act (CAA), 42 U.S.C. §17401 et seq.

THE JUDICIAL REINTERPRETATION OF "ENDANGERMENT"

In *Massachusetts v. EPA*, the Supreme Court, through judicial interpretation rather than a purely scientific finding, declared CO2 to be an "air pollutant" under the CAA. This determination was predicated on arguments that CO2 contributes significantly to global warming, which, in turn, could lead to increased global temperatures and ultimately, putatively, damage human health. This ruling led to the Environmental Protection Agency (EPA)'s subsequent "Endangerment Finding" in 2009, a prerequisite for regulating CO2 emissions from motor vehicles and other sources. Notably, the Court's interpretation broadened the scope of "endangerment" from its historical application, which typically described immediate and direct threats to wildlife or local air quality, to encompass highly linked, indirect, and long-term risks to human health. This expanded view posits that slight temperature increases over several decades could indirectly cause negative health outcomes for humans, shifting the focus to "upstream health issues." [1]

This redefinition, however, arguably overlooks several critical scientific considerations. It disregards the documented beneficial effects of increased atmospheric CO2, such as enhanced global vegetation and a potential reduction in cold-related mortality, which, from an epidemiological perspective, have been shown to exceed deaths attributed to heat in some contexts. Moreover, the claims of widespread direct human health harm from atmospheric CO2 are subject to significant scientific debate, wrong in focusing only on risks, and are challenged by available empirical data.

SCIENTIFIC EVIDENCE VS. REGULATORY PREMISE: THE CASE OF SUBMARINER HEALTH

A compelling counterpoint to the theoretical concerns about CO2's direct impact on human health at projected atmospheric levels comes from occupational health studies. Specifically, a U.S. Navy Medical Department report on the effects of chronic exposure to low levels of carbon dioxide by K.E. Schaefer, presents findings from studies of submariners. These individuals are exposed for extended periods—often months—to CO2 concentrations that are an order of magnitude higher than even the worst-case scenarios imagined for future atmospheric CO2 levels due to global warming. Upon careful contemporaneous and follow-up medical examinations, these studies consistently revealed no untoward health effects directly attributable to the inhalation of these elevated CO2 levels. These real-world observations directly contradict the premise of immediate or near-term human endangerment from CO2 inhalation, thereby providing crucial empirical data that challenge the scientific basis underpinning the "endangerment" finding. [2]

THE INFERRED DOCTRINE OF THE PRECAUTIONARY PRINCIPLE

The expansive interpretation of "endangerment" in *Massachusetts v. EPA* can be understood as the judiciary's implicit projection of the "precautionary principle" into U.S. administrative law. This principle, prevalent in international environmental policy, suggests that a lack of full scientific certainty should not serve as a justification for postponing measures to prevent serious or irreversible environmental degradation. By compelling regulatory action on a speculative and long-term risk, despite the absence of immediate, direct, and scientifically undisputed adverse health effects from ambient CO2 levels, the Court effectively shifted the burden of proof despite

the fact that the Mass EPA judicial doctrine breaks down when the premise that something is harmful has not been established via reliable scientific studies such that there is robust scientific consensus; a model (that extrapolates from primary studies / data, or at least should) cannot work when the data / inputs are flawed. This judicial maneuver begs for regulatory intervention based on potential future impacts rather than requiring robust scientific consensus on immediate and direct harm, thus profoundly altering the landscape for regulatory science and policy, particularly concerning complex, global environmental issues like climate change. The reliance on models predicting future harm, rather than direct, observable health impacts, exemplifies this shift towards a precautionary approach in regulatory decision-making within the American legal framework. [^3] And see the Clean Air Act, 42 U.S.C. § 7401 et seq., and the cases cited after [4] below confirming presumption.

REFERENCES

[1]: *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007). See also Columbia University, Sabin Center for Climate Change Law, "Massachusetts v. EPA," accessed [Current Date], https://climate.law.columbia.edu/content/massachusetts-v-epa [2]: Schaefer, K.E. "*The Toxic Effects of Chronic Exposure to Low Levels of Carbon Dioxide*." DTIC, ADA115053, 1982. This report is cited in various amicus curiae briefs, including those filed by the Atlantic Legal Foundation in re Massachusetts v. EPA. [^3]: See generally, Cross, Frank B. "Paradoxical Perils of the Precautionary Principle." Washington and Lee Law Review 53 (1996); 851-925; Kriebel, David, et al. "The Precautionary Principle in Environmental Science." Environmental Health Perspectives 109, no. 9 (2001): 871-76. [4]: *Am. Electric Power Co. v. Connecticut*, 564 U.S. 410, 422 (2011) ("AEP"));*Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 500 (1987); *City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021).

CONCLUSION

For the reasons expressed above and in general concurrence with the extensive analysis presented in the comments submitted on August 1st by the Texas Public Policy Foundation, ALF respectfully submits that the broad public interest would be better served by rescission of the subject Rule. Indeed, for the reasons stated, the need for rescission is compelling.

Respectfully Submitted,

Dr. Dennis K. McBride
President, Institute for
Regulatory Science
and Member, ALF's
Advisory Council

Hayward D. Fisk
Chairman & President
Atlantic Legal Foundation