

As Dan has [mentioned](#), there has been a bit of a dust-up over a document in EPA’s rulemaking docket relating to EPA’s recent finding that greenhouse gases pose an endangerment to public health and welfare. As Dan notes, the memo, apparently originating at the White House Office of Management and Budget (OMB), is harshly critical of the EPA’s endangerment finding, based largely on policy considerations that the Supreme Court has already ruled would be impermissible to rely on in making the endangerment finding. The memo also appears to be skeptical of mainstream climate science to a degree that is surprising. This document was reported on in the [Wall Street Journal](#), the [New York Times](#), and the [AP](#), among other media sources; [climate-skeptic blogs](#) and even a [Senator have asserted that it is a “smoking gun”](#) that reveals that the endangerment finding was not based on sound science. The use of the phrase “smoking gun” also implies that EPA was involved in a cover-up. But the insinuation that EPA has done anything wrong is demonstrably untrue.

The [document](#) is singularly odd: its [title listed on the public docket](#) is “First (1st) Round of Office of Management and Budget (OMB) Comments to USEPA on the Proposed Findings”; its source is listed on the docket as OMB; yet it is unsigned, and not on any agency letterhead; it contains the header “DELIBERATIVE—ATTORNEY CLIENT PRIVILEGE”; and it reads more like a set of anti-climate regulation talking points than a considered set of agency comments.

OMB director Peter Orszag has [explained that the document is a compilation of comments from various agencies](#), and does not express any official opinion of OMB or the White House. [According to Marc Ambinder at the Atlantic](#), at least one of the most incendiary of the comments came from a holdover from the previous administration at the Small Business Administration known for his anti-regulatory views. I find it bizarre that OMB would place in the rulemaking docket an unsigned memorandum that “compiles” various agencies’ comments without any cover note, attribution, or context in which to view the comments it synthesizes. Assuming this is indeed a “compilation” of comments from disparate sources, its value to EPA and others is greatly reduced if the source of each comment is unknown.

In truth, EPA was legally required to issue the endangerment finding. The U.S. Supreme Court’s decision in [Massachusetts v. EPA](#) required EPA to make the finding if it found that GHGs emitted from cars can reasonably be anticipated to endanger public health or welfare. And the overwhelming body of science supports the agency’s finding. Although some question whether the finding, which is the first step towards regulation of greenhouse gases under the federal Clean Air Act, is good policy, it’s the agency’s job to follow the law.

Grist.com’s David Roberts has [done a good job explaining how the story broke](#), and why this

isn't really an important news story (including the important fact that this document was in the online public docket - not a hidden “smoking gun”). And Professor Rena Steinzor has written an [insightful blog post](#) at the CPR blog about this story, focusing on the role of OMB in rulemaking, the relationship between EPA and OMB, and her view that new OMB Office of Information and Regulatory Policy-designate Cass Sunstein should take a far more hands-off approach to OMB's involvement in agency rulemaking.

I will add that interagency skepticism about climate regulation is old news, and is to be expected. These comments were made at much greater length last July, when the EPA issued an [“Advanced Notice of Proposed Rulemaking”](#) (ANPR) asking the world to comment on how the agency should go about regulating greenhouse gases under the Clean Air Act. In that notice, the agency published [detailed, critical comments from several agencies](#) (then headed, of course, by Bush appointees). (Disclosure: the UCLA Environmental Law Clinic, under my supervision, worked on comments on the ANPR on behalf of an environmental organization.) The inter-agency comments on the ANPR include all the criticisms in the recent OMB letter, and much, much more. There's no question that the EPA, and the world, know that some people believe the Clean Air Act is a poor tool for regulating greenhouse gases. Moreover, although personnel have largely changed at the top levels of federal agencies, even new leaders at agencies such as the Small Business Administration, the Department of Energy, and Department of Transportation may internally disagree with, or express skepticism about, future EPA approaches to GHG regulation, because they approach the issue from a different perspective. There is nothing inherently unhealthy about this, although I hope these agencies have the sense in the future to express their criticisms in a more constructive manner in the future, and to recognize the scientific and legal realities that underpin EPA's decisionmaking.

In any event, while the debate over whether and how EPA should regulate GHGs is several years old, it has in some sense barely begun. The endangerment finding is merely the first step in a long rulemaking process. I expect that the political gamesmanship and grandstanding around those regulatory actions will continue and escalate as EPA fulfills its legal mandates under *Mass v. EPA* and the Clean Air Act.