January 25, 2021

President Joseph R. Biden, Jr.
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Dear President Biden,

We write with gratitude for your determination to face squarely our nation’s fundamental challenges. The climate crisis, as you have recognized, is one of those challenges. At the same time, it is a great opportunity.

Specifically, here, we encourage you and your team to make full use of a powerful tool already at your disposal to accelerate the necessary decarbonization of our power, industrial, agricultural, and transportation systems. That is, you can, and should, direct EPA to make full use of existing statutory authority to impose a revenue-neutral carbon fee.

Janet Yellen, Pete Buttigieg, Amy Klobuchar, Andy Yang and many others who have studied the matter agree that a carbon fee-and-dividend is the simplest, socially-just and most economically efficient foundation for climate policy. Under that policy, the revenues from carbon fees would be recycled directly to households in the form of dividends so as to keep low and middle-income families whole and to enable them, at their discretion, to meet or respond to current, near and longer-term climate-related economic, social, and personal challenges and opportunities.¹

The proposed action and anticipated results, then, will be: (1) science driven, (2) economically beneficial to the nation (increasing GNP and thus tax revenues), (3) socially just (with anti-regressive effects that benefit low and middle-income people), and (4) a boon to infrastructure modernization and national competitiveness.

We have little doubt, moreover, that your action here would be well-received, as a carbon fee and dividend policy already is overwhelmingly supported among young people, economists, scientists, and citizen groups that have specifically studied the matter. These include 350+ college student government presidents from all 50 states – from MIT to Mississippi State to Stanford – red & blue, conservative & liberal – that have formed a bi-partisan coalition Students for Carbon Dividends.² They chose to follow the science, the recommendation of 3500+ economists,³ including Janet Yellen, all other living former Federal Reserve Chairs, and 28

¹ Including as to food security; savings in preparation for an increasingly uncertain future; home weatherization and efficiency improvement; housing relocation; health care costs; education and training; clean energy investment, etc. Wide discretion accorded household dividend utilization is appropriate in light of the encompassing nature of current and foreseeable climate change impacts.

² See www.s4cd.org.

³ See www.historyismade.org.
Nobel Prize winning economists, all of whom endorse a carbon fee-and-dividend policy as a critical centerpiece for US decarbonization.

A carbon fee starting at, say, $50/ton of CO₂, and rising $10/ton each year, is readily collected at the moderate number of sources of oil, gas and coal: domestic mines, wells and ports of entry. If this money is distributed uniformly⁴ to households, the net effect is strongly progressive. True, wealthy people retaining large carbon footprints will lose money, but they can afford it. But an estimated seventy percent of the public will come out ahead, their dividends exceeding increased costs. Further discussion of fee-and-dividend is available in a presentation by Dan Miller and Jim Hansen to the House Select Committee on the Climate Crisis (2019).⁵

It is conceivable that bi-partisan agreement in Congress for a far-reaching carbon fee-and-dividend might be secured this year, and Citizens Climate Lobby has been working very hard for that objective. However, both you and John Kerry, with your decades of legislative experience, can attest to how difficult this may be in the face of persisting fossil fuel interest opposition, on the one hand, and the impetus of many in Congress, on the other, to direct revenues toward favored projects.

Thus, we urge you to exercise your executive authority to direct EPA to impose such carbon fees under existing authority, with revenues returned to all residents, as discussed. While never exercised by the EPA, the Independent Offices Appropriation Act (IOAA), 31 U.S.C. §9701,⁶ provides that Agency with sufficient authority to impose such fees. Indeed, authority under the IOAA and other statutes is used by other agencies to impose fees on order of hundreds of billions a year for access to public resources they control, according to analyses by the GAO and OMB.

Under IOAA, the head of the EPA would “prescribe regulations establishing the charge” to be imposed on fossil fuel production. Those regulations would be subject to policies that you would prescribe so that imposed fees are “as uniform as practicable,” fair, and based on relevant factors including costs to the Government, the value to the polluter, and “the public policy or interest served.” 31 U.S.C. §9701(b).⁷

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⁴ This would be done electronically to debit cards or bank accounts; families or individuals must be registered with the IRS. U.S. fossil fuel use in 2019 was just over 5000 MtCO₂. At $50/ton the collected fee is $250B. U.S. population is about 330 million, with about 75 million of these being children under 18. With ½ share per child up to 2 children per family, there are about 285 million shares; thus the initial dividend would be about $875 per adult or about $2600 per year for a family with two or more children.


⁶ See E. Donald Elliott, EPA’s Existing Authority to Impose a Carbon “Tax” (2019) Environmental Law Institute. Available at https://digitalcommons.law.yale.edu/fss_papers/5368/. To be clear about his use of air-quotes around “tax,” Elliott stresses that “a charge for using the public’s air to dispose of carbon dioxide and other wastes is technically not a tax, but rather a “user fee”.” Id. Dan Galpern is available at your convenience to connect you and your team to former EPA General Counsel Don Elliott, and to other subject matter experts in this regard. For your convenience we attach Elliott’s 2019 paper.

⁷ See also OMB Circular No. A-25 Revised (July 8, 1993), https://obamawhitehouse.archives.gov/omb/circulars_a025/ (observing that the IOAA applies to “all Federal activities that convey special benefits to recipients beyond those accruing to the general public”).
We are available at your convenience to discuss these matters. Towards that end, we also copy John Kerry, Gina McCarthy, and Dana Remus.

Sincerely yours,

James E. Hansen
4273 Durham Road
Kintnersville, Pennsylvania 18930
917-648-1343
jimehansen@gmail.com

Daniel M. Galpern
2495 Hilyard St., Suite A
Eugene, Oregon 97405
541-968-7164
dan.galpern@gmail.com

Copies to:
Honorable John Kerry, U.S. Special Presidential Envoy for Climate
Honorable Gina McCarthy, White House National Climate Advisor
Dana Remus, White House General Counsel
EPA’s Existing Authority to Impose a Carbon “Tax”

by E. Donald Elliott

E. Donald Elliott is Florence Rogatz Visiting Professor of Law, Yale Law School, and formerly EPA Assistant Administrator and General Counsel, 1989-1991.

A number of bills have been introduced in recent years to put a price on carbon via a federal carbon tax.1 These proposals generally proceed from the implicit assumption that the federal government in general, and the U.S. Environmental Protection Agency (EPA) in particular, does not already have such authority. That is incorrect. Under a federal statute that has been on the books since 1952,2 EPA could impose a carbon “tax” any time an administration in power is willing to do so. That is because a charge for using the public’s air to dispose of carbon dioxide and other wastes is technically not a tax, but rather a “user fee.”3

The confusion stems from a 1990 legal opinion written by the present author when he was EPA General Counsel,4 which ironically was intended to increase EPA’s use of tradable permits and other economic incentives to regulate pollution. It is time to set the record straight that EPA does have existing authority to impose a reasonable user fee on releases of carbon dioxide and other greenhouse gases (GHGs), as well as other pollutants, any time that it has the political will to do so.

For many purposes, tradable permits are admittedly superior to emission fees for regulating environmental pollutants,5 and I have been a longtime advocate of tradable pollution rights. However, in some circumstances, charging fees for emitting pollution into the public’s air can be attractive. This is particularly true in view of our country’s structural deficit and national debt of $22.6 trillion and rising; a user fee on releasing carbon pollution into the atmosphere could raise billions of dollars annually for the U.S. Treasury,6 as opposed to giving away the right to pollute for free.7 In addition, the old adage “nothing is certain but death and taxes” captures the perception that fees paid to the government are likely to remain constant or go up, while the prices of permits fluctuate.8 That is crucial because to date, the problem of addressing climate change9 is dominated by substituting one type of lower-emitting

7. See Bruce A. Ackerman & Donald Elliott, Air Pollution “Rights,” N.Y. TIMES, Sept. 11, 1982, at 23: The EPA should, instead, sell polluters the right to dirty the air for a fixed period—just as the Government now auctions off oil and gas leases to the highest bidders. If polluters were forced to pay, they would clean up to avoid the cost—and breathers, not industry, would profit. The public would not stand for a multi-billion dollar give-away of public lands or water to industry. Why should the air be different?
9. This is not the place to debate the role that human activities play in causing climate change, or what priority should be given to addressing climate change in national policy. The point of this Comment is a narrower one: to
capital asset for another that is more carbon-intensive; uncertainty about the future price for releasing a ton of carbon into the air distorts decisions about everything from buying a new car to building a new power plant.

To those skeptics who say that the Donald Trump Administration would never impose a carbon charge, I have two responses: (1) they will not be in office forever; and (2) politics makes strange bedfellows. As the tide to ban or greatly restrict fossil fuel use rises, it will become increasingly attractive to the fossil fuel industry and its allies in government to keep fossil fuel use legal by taxing it, which essentially makes the government a partner. That is what happened with cigarettes.10

For example, the leading contender for the Democratic nomination for president in 2020, Joe Biden, recently proposed to ban fracking over 10 years.11 As someone who has advised five presidential campaigns on environmental issues, I doubt that Mr. Biden fully understood that this proposal amounts to a ban on most new oil wells in the United States, which is currently the world’s leading producer of petroleum, as about 70% of both oil and gas wells are currently “fracked.”12 But be that as it may, the mere fact that the leading Democratic presidential candidate, who is currently ahead of President Trump in the polls, is endorsing such a sweeping restriction on fossil fuel production suggests that a fee on releases of carbon to the atmosphere may quickly become an attractive “second-best” solution from the perspective of large fossil fuel producers. And everybody’s second-best alternative frequently gets enacted into legislation or promulgated as an administrative rule.13

Unlike a virtual ban on new drilling in the United States, a user fee on carbon would only have a marginal effect on the major producers of petroleum by making their product marginally more expensive versus substitutes, and it would allow for continued use in applications, such as jet fuel for air travel, for which petroleum currently has distinct advantages over available substitutes.

Unfortunately, since 1990, EPA has been laboring under the misimpression that it may not impose an emission charge without specific authorizing legislation from the U.S. Congress.14 This conclusion is based largely on a 1990 legal opinion by the present author, then serving as EPA General Counsel, which held that EPA could impose a tradable permit program by interpretation, but not a tax.15 As the Agency’s chief legal officer, EPA’s General Counsel is empowered to issue legal interpretations that are binding on the Agency’s program offices unless overturned by either a superior legal authority, such as the U.S. Department of Justice, the courts, or a subsequent EPA General Counsel. Unfortunately, my 1990 legal opinion has been reiterated and expanded by several generations of Office of General Counsel (OGC) lawyers, but the conclusion that EPA may impose trading programs but not fees by interpretation is wrong—or at least radically incomplete—and needs to be reexamined.

Ironically, the purpose of my 1990 legal memo to the Administrator and all the other Assistant Administrators running the program offices, including the air program, was to encourage EPA to use economic incentive systems more frequently under existing statutory authority. The opinion began by noting that many academics recommended increased use of economic incentive systems, and concluded that under the Agency’s broad Chevron authority, “if a statute does not explicitly preclude an incentive-based approach, EPA probably has the legal authority to use a system of economic incentives (such as marketable permits) as a mechanism for regulating pollution.” It then went on to review several precedents upholding EPA’s use of economic incentive systems where statutes were phrased in general terms, but ended with the cautionary note that “[i]t may be more difficult to regulate using fees, as opposed to tradable allocations, due to problems with the general doctrine that agencies may not use outside moneys to ‘supplement appropriations.'”

Unfortunately, that cautionary last sentence has been misinterpreted by subsequent generations of OGC lawyers as meaning that EPA may never impose emission fees, which is incorrect. What you call something often matters a lot in Washington, and, unfortunately, economists generally call Pigouvian emission fees “pollution taxes.”16 Under the key U.S. Supreme Court case in the area, National

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13. See generally E. Donald Elliott et al., Toward a Theory of StatutoryEvolution: The Federalization of Environmental Law, 1 J.L. ECON. & ORG. 313 (1985) (describing how the automobile industry switched from opposing federal regulation of its products to supporting federal regulation in an attempt to head off a rising tide of state regulation, including proposals to ban the internal combustion engine in California and Pennsylvania), available at http://digitalcommons.law.yale.edu/fss_papers/147/.

14. Adele Morris of the Brookings Institution has suggested that EPA might impose a fee on carbon emissions, but through the indirect approach of requiring the states to do so. See Brad Plumer, Could the EPA Push a Carbon Tax on Its Own? Maybe, Wash. Post, Nov. 15, 2013, https://www.washingtonpost.com/news/wonk/wp/2013/11/15/could-the-epa-push-a-carbon-tax-on-its-own-maybe-with-this-weird-trick/. However, the article goes on to state incorrectly that “[i]f [states] refuse, the EPA can’t impose taxes on its own.” Id.

15. Memorandum from E. Donald Elliott, supra note 4.

16. CONGRESSIONAL RESEARCH SERVICE, supra note 1, at 2.
A strong presumption exists against concluding that Congress has delegated its power to tax to an administrative agency.

But charges for disposing of polluting gases into the public’s air are not properly considered a tax, but rather a user fee. Under the Independent Offices Appropriation Act (IOAA), all agencies including EPA have been granted authority by Congress to charge user fees and keep the money to make their programs “self-sustaining” or rebate some of it to the Treasury if the money collected is more than they need, without offending the Anti-Deficiency Act. Under that latter statute, officers or employees of the United States may not obligate or expend in excess of appropriations, which was the concern mentioned in the final cautionary sentence in the legal opinion quoted in the Appendix.

The same Supreme Court case that holds that agencies may not impose taxes, *National Cable Television Ass’n,* also holds that under the IOAA, agencies do have authority delegated from Congress to impose user fees, as opposed to taxes. And that same statute also provides that the moneys that they collect as user fees are not an illegal supplementation of their appropriations, which was what concerned me in the last sentence of the legal opinion. Unfortunately, I was woefully ignorant of the IOAA and related jurisprudence when I wrote the 1990 legal opinion.

An extensive legal literature exists on the difference between taxes and user fees. According to the best academic review article on the subject, the essence of the distinction is that “[a] user fee is a price charged by a government agency for a service or product whose distribution it controls,” whereas a tax is intended to benefit the citizenry generally.

Justice William O. Douglas, writing for the Court in *National Cable Television Ass’n,* explained this key distinction this way: “A fee, however, is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. . . . A ‘fee’ connotes a benefit. . . .” The Office of Management and Budget’s (OMB’s) guidance on the IOAA states that it applies to “all Federal activities that convey special benefits to recipients beyond those accruing to the general public,” and that one of the “objectives” of charging user fees is to “promote efficient allocation of the Nation’s resources by establishing charges for special benefits provided to the recipient that are at least as great as costs to the Government of providing the special benefits. . . .

Numerous states and localities already impose user fees for disposing of wastes. Why should dumping waste into the air be any different than dumping it on land or into a river? In the context of air pollution, a user fee is appropriate because the government “controls . . . the distribution of the product or service” and it is allowing the polluter the special benefit of using the public’s air for waste disposal purposes; and the polluter is engaged in the voluntary act of polluting the air. To those who might object that polluting the air is a right, not a “special benefit” conferred by government, I would remind them that at least since the Supreme Court’s 2007 decision in *Massachusetts v. Environmental Protection Agency,* the federal government has had clear authority to restrict access to the air for purposes of disposing of GHGs; by allowing polluters to use the air

Cable Television Ass’n v. United States,* a strong presumption exists against concluding that Congress has delegated its power to tax to an administrative agency.

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for this purpose, the government is conferring a special benefit on them for which it is entitled to impose a user fee if it so chooses.

It is not unusual that resources are initially held in common with a right of free access by all comers, but government later gains legal authority to control access and charges user fees.31 For example, consider the electromagnetic spectrum: until the 1912 federal Radio Act,29 anyone could broadcast over the public's air; today, the Federal Communications Commission (FCC) charges user fees and auctions off spectrum use.30 It is long past time to recognize that, like governmental permission to broadcast over the public's air, governmental permission to pollute the public's air is a privilege granted by government, not a right.31

At what level should a user fee for polluting be set? Jasper Cummings, a tax practitioner at Alston & Bird, suggests that as a general matter a user fee should “reasonably approximate the payer’s fair share of the costs incurred by the government in providing the benefit.”32 Admittedly, a fee based on the “social cost of carbon,” an estimate of the full cost of pollution to society as a whole,33 would not “approximate the fair share of costs incurred by government” to provide the benefit conferred, which is governmental permission to produce a good or service in a way that releases pollution into the public's air. Ideally, a Pigouvian emission charge should approximate the harm to society as a whole from providing the benefit of cheap disposal to the polluter, not just cover the costs to the government.

However, under the IOAA, the cost to the government is not a mandatory requirement for the definition of a user fee under subsection (a), but rather only one of the factors to be considered among others in setting the amount of the user fee under subsection (b). The IOAA provides that user fees should be established taking into consideration not only “the costs to the Government,” but also based on “the value of the service or thing to the recipient” and “public policy or interest served.”34 The latter two statutory factors counsel in favor of “leveling the playing field” by charging polluters the full social costs for their use of the public’s air for disposal purposes, as opposed to their competitors who produce equivalent goods and services without, or at lower levels of, emissions.

If EPA wanted to be conservative and proceed step by step, it could begin by imposing a pollution charge based on an estimate of the incremental cost to the federal government attributable to the type of pollution in question. This could, for example, include additional Medicare costs and disaster relief efforts for hurricanes and other extreme events attributable to climate change as well as the costs of the air program. A rough precedent is provided by the Oil Pollution Act of 1990,35 which provides that the party responsible for an oil spill into waters of the United States must reimburse the federal government for its costs in responding to the spill, as well as state and local governments for the additional costs of public services resulting from the spill.36

Eventually, however, there is a good chance that a fee based on the full social costs of pollution to the public as a whole, not just the government, could be sustained as a user fee rather than a tax. Prof. Hugh D. Spitzer calls these kinds of user fees “burden offset charges,” and argues they are an attractive alternative to traditional regulation to internalize costs on those responsible for creating a problem that imposes costs on the public, including air pollution as well as garbage and wastewater.37

It is long past time that emission charges should take their rightful place in EPA's toolbox of instruments available to regulate pollution, including GHG pollution.

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34. 31 U.S.C. §9701(b).
36. Id. §2702(a)(1), (b)(2)(F).
July 13, 1990

MEMORANDUM

SUBJECT: Existing Authority to Use Economic Incentives To Regulate Pollution

FROM: E. Donald Elliott
Assistant Administrator
and General Counsel

TO: William X. Reilly
Administrator

As discussed at the roundtable of Assistant Administrators yesterday, there is a strong consensus among academics, among many in the Administration, and increasingly among environmentalists, in favor of expanding the use of economic incentives to regulate pollution.1 You have asked me to evaluate EPA's authority under existing laws to utilize economic incentives (such as tradeable allocations) to regulate pollution. In my opinion, many of our existing statutes give EPA substantial discretion to make use of market-based incentives to regulate pollution.

While the question of statutory authority must obviously be examined closely in the context of particular statutory language and legislative history, in general, if a statute does not explicitly preclude an incentive-based approach, EPA probably has the legal authority to use a system of economic incentives (such as marketable permits) as a mechanism for regulating pollution. In the 1984 landmark decision, Chevron v. Natural Resource Defense Council,2 the Supreme Court specifically upheld EPA's use of an incentive system, which was not specifically contemplated

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1 See, e.g., Administrative Conference of the United States, Providing Economic Incentives in Environmental Regulation (Arvil 23, 1990) [copy attached]; Ackerman & Stewart, Reforming Environmental Law: The Democratic Case for Market Incent; Colum. J. Envrir. L. 171 (1988) [review of literature] [copy attached]; See also Project '88 Harnessing Market For; Protect the Environment: Initiatives for the New Pre 1988) [table of contents attached].

by statute (the "bubble" concept under the Clean Air Act). The Court held that EPA could implement such an incentive-system provided that two tests were satisfied:

(1) the language and legislative history of the statute did not clearly preclude the approach, and -

(2) EPA advanced a reasonable explanation that the regulations would serve the statute's environmental objectives. Id at 863.

Extending the Chevron rationale, an 1989 opinion by the Justice Department's Office of Legal Counsel determined that general statutory language giving EPA regulatory authority "for the control of any substance" that may endanger public health by affecting the stratospheric ozone (Clean Air Act Sec. 157(b)) was broad enough to authorize EPA to allocate allowances to produce CFC's through auctions or fees. Consistent with the OLC opinion, EPA established a system of tradeable allowances for CFCs, which was not challenged in court.

Recently OGC has taken the position that regulations establishing trading and banking under the Clean Air Act's mobile sources program satisfied statutory requirements that emission standards be set at a level reflecting the "greatest" or "maximum" degree of emission reductions achievable (CAA Secs 202(a) (3) (A)(iii) and (B)), provided that greater environmental protection would be achieved by the incentive system than through traditional techniques.3 This interpretation has not yet been tested in court.

In sum, individual statutes differ and the programs should consult with the Office of General Counsel on a case-by-case basis. The case for using economic incentive approaches is probably strongest where statutes are written in general terms (e.g. TSCA). However, even where specific statutory language requires EPA to set technology-based standards, we often have authority to impose an economic-incentive system in addition to existing technology-based standards in order to provide incentives for pollution prevention and technological development. It may be more difficult to regulate using fees, as opposed to tradeable allocations, due to problems with the general doctrine that agencies may not use outside monéys to "supplement appropriations."

Attachments
cc: Assistant Administrators
    Associate General Counsels

3 Memorandum for Alan Raul, General Counsel, Office of Management and Budget from Douglas Kmiec, Assistant Attorney General, Office of Legal Counsel, April 14, 1989.