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April 4, 2008

The Honorable Stephen L. Johnson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Johnson:

Over the course of this Administration, the Environmental Protection Agency (EPA) has issued numerous rules and other decisions that have been overturned by the courts. The consequences of such losses are substantial delays in environmental protection, waste of government resources, and confusion and costs for regulated entities. I am writing to request information regarding the extent and effects of the agency's losses in federal court.

The courts have vacated or remanded many of EPA's highest profile and most controversial rules and decisions since 2001. These include EPA's rule on mercury emissions, EPA's rules on emissions from new or modified stationary sources of air pollution, EPA's refusal to regulate greenhouse gases from motor vehicles, and EPA's rule on water pollution discharges. The Supreme Court overturned two of these decisions, while the Court of Appeals for the District of Columbia Circuit overturned many others.

In many of these cases, the courts severely rebuked EPA for an apparently willful disregard of the plain language of the governing law. One example was the second rule promulgated during this Administration weakening the new source review regulations under the Clean Air Act, which loosened the requirements for when stationary sources are required to install pollution controls. In vacating the rule, the DC Circuit stated: "Only in a Humpty Dumpty world would Congress be required to use superfluous words while an agency could ignore an expansive word that Congress did use. We decline to adopt such a world-view."¹ In the recent decision overturning EPA's rule on mercury emissions from power plants, the DC Circuit stated that EPA's "explanation deploys the logic of the Queen of Hearts, substituting EPA's desires for the plain text of section 112(c)(9)."²

¹ *New York v. EPA*, 443 F.3d 880, 887 (D.C. Cir. 2006).

² *New Jersey v. EPA*, No. 05-1097, Slip Op., 15 (D.C. Cir. Feb. 8, 2008).

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I am concerned that these cases indicate that your agency is disregarding unambiguous statutory directives when the law requires action that differs from the Administration's policy preferences. In almost all cases, the EPA rules and decisions overturned by the courts benefited polluting industries at the expense of human health and the environment.

While the Administration's positions have been rejected by courts across a range of environmental laws, it appears that the Administration has lost a particularly large number of challenges to regulations promulgated under the Clean Air Act. To narrow the scope of my inquiry at this time and facilitate a quicker response from EPA, I am limiting the information requested below to challenges to actions under the Clean Air Act.

Please provide the information requested below:

1. Identify each of the final rules or other major decisions approved by the EPA Administrator since 2001 for which a petition for review was filed in the DC Circuit Court of Appeals.
2. For each of these rules or decisions, indicate whether the petitioner was an environmental organization, state, industry representative, or other.
3. For each of these rules or decisions, explain the status and outcome of the litigation. For each rule or decision where a court has ruled or where EPA has taken a voluntary remand, note whether the rule or decision was remanded or vacated in whole or in part, and for remands, whether the underlying rule or decision remained in effect pending EPA's response to the remand. Identify each decision to vacate or remand in whole or in part where the court relied in whole or in part on a Chevron step 1 finding that the plain language of the statute was unambiguous.
4. For each rule or decision where the rule or decision did not remain in effect and where the challenged rule or decision had been issued pursuant to a statutory or court-ordered deadline, identify such deadline or deadlines, identify the date EPA issued the challenged final rule or decision, identify the date on which EPA promulgated a new final rule or decision, if that has occurred, or the date on which EPA plans to issue a new final rule or decision, if EPA has identified such a date.
5. For each rule or decision largely or entirely remanded or vacated, identify the amount of agency resources in money and personnel (expressed as FTEs) expended to date to develop and defend the rule or decision that was challenged.

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Please provide your response by April 18, 2008. If you have any questions about this request, please have your staff contact Alexandra Teitz of the Committee staff at (202) 225-4407.

Sincerely,

A handwritten signature in black ink that reads "Henry A. Waxman". The signature is written in a cursive, slightly slanted style.

Henry A. Waxman
Chairman

cc: Tom Davis
Ranking Minority Member