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House of Representatives

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September 19, 2007

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

Dear Administrator Johnson:

Two weeks ago, in issuing a permit for a new coal-fired power plant, the Environmental Protection Agency took its first regulatory action directly related to global warming since the Supreme Court ruled in *Massachusetts v. EPA* that the Agency has authority to regulate greenhouse gases.¹ Remarkably, EPA refused to consider the global warming effects of the plant or to require any measures to mitigate that harm, contravening a Clean Air Act mandate and ignoring EPA's ample discretionary authority to act.

I urge you to reconsider your position in this and future permit decisions. These decisions will determine whether, over the next few years, we invest tens of billions of dollars in a new generation of highly polluting power plants that will drive substantial additional global warming, without considering and mitigating those effects.² As a matter of both public policy and the law, such a course would be indefensible.

I also ask that you cooperate in the Committee's investigation of EPA's decision-making process.

¹ See U.S. Environmental Protection Agency Region 8, *Final Air Pollution Control Prevention of Significant Deterioration (PSD) Permit to Construct, Permit No. PSD-OU-0002-04.00* (Aug. 30, 2007) (online at: <http://www.epa.gov/region8/air/permitting/30Aug07WCFUDeseretFinalPSDPermit.pdf>); *Massachusetts et al. v. Environmental Protection Agency et al.*, No. 05-1120, Slip Op. (U.S. April 2, 2007).

² See Department of Energy, *Tracking New Coal-Fired Power Plants* (May 1, 2007) (powerpoint) (online at: <http://www.netl.doe.gov/coal/refshelf/ncp.pdf>) (detailing \$145 billion in proposed investments between now and 2030).

Climate change poses a profound threat to the global environment. There is an overwhelming scientific consensus that greenhouse gases released by the burning of fossil fuels are warming our planet at an accelerated rate. The 2007 report of the Intergovernmental Panel on Climate Change confirmed that rising temperatures are rapidly altering our climate, transforming the face of the Earth and putting at risk the health and welfare of millions of people.³ It is widely acknowledged that dramatic cuts in greenhouse gas emissions are necessary.

Yet despite the urgent need to act, your agency is ignoring the threat of climate change in approving new coal-fired power plants, one of the dominant sources of the global warming gas carbon dioxide (CO₂). This is both illegal under the Clean Air Act and an enormous missed opportunity.

On August 30, 2007, EPA issued a permit to Deseret Power for the construction of a 110-megawatt coal-fired power unit at the Bonanza Power Plant in Uintah County, Utah.⁴ The Deseret Bonanza permit decision presented EPA with its first opportunity since the Supreme Court ruling to address the global warming harm from a major new stationary source of greenhouse gases. While relatively small, this unit has the potential to emit up to 90 million tons of CO₂ over an estimated 50-year lifetime.⁵ As the permitting authority for this plant, EPA had to decide whether to issue the permit and whether to require carbon dioxide pollution controls or other mitigating measures under the permit.

Rather than requiring reductions in CO₂ emissions, however, EPA used the permit decision to enunciate a tortured new legal theory for why the agency does not have authority to regulate CO₂ emissions from coal-fired power plants and why it need not require new plants to use cleaner technology.

The Clean Air Act both mandates that EPA address global warming pollution in permitting decisions for new major sources of air pollution and provides EPA additional

³ Intergovernmental Panel on Climate Change, *Climate Change 2007: The Physical Science Basis, Summary for Policymakers*, 10 (Feb. 5, 2007) (online at <http://www.ipcc.ch/SPM2feb07.pdf>).

⁴ U.S. Environmental Protection Agency Region 8, *Final Air Pollution Control Prevention of Significant Deterioration (PSD) Permit to Construct, Permit No. PSD-OU-0002-04.00* (Aug. 30, 2007) (online at: <http://www.epa.gov/region8/air/permitting/30Aug07WCFUDeseretFinalPSDPermit.pdf>).

⁵ Based on estimated annual emissions of 1.8 million tons of carbon dioxide, calculated by Western Resource Advocates et al. See Western Resource Advocates et al., *Draft PSD Permit for Major Modifications to the Bonanza Power Plant in Utah*, 2 (comments on draft permit).

sweeping discretionary authority to do so. Section 165(a)(4) of the Act requires EPA to include in permits for proposed major sources an emission limit reflecting the best available control technology (BACT) “for each pollutant subject to regulation” under the Act.⁶ The Supreme Court ruled in *Massachusetts v. EPA* that greenhouse gases are “air pollutants” under the Clean Air Act, that EPA has the authority to regulate emissions of such air pollutants, and that EPA must regulate greenhouse gases under section 202, which addresses emissions from motor vehicles.⁷ Existing EPA regulations under section 821 of the Clean Air Act Amendments of 1990 require utilities to report CO₂ emissions.

Yet despite these authorities, EPA ruled in the permit decision that CO₂ is not “subject to regulation” under the Act and thus that EPA cannot require the plant to apply the best available control technology to reduce greenhouse gases. According to EPA, CO₂ cannot be considered “subject to regulation” because CO₂ is not yet regulated by “a statutory or regulatory provision that requires actual control of emissions.”⁸ In essence, the EPA argument is that because EPA has not regulated CO₂ emissions in the past, the agency cannot regulate CO₂ emissions now.

This is a bootstrap argument that conflicts with the plain language of the statute and blatantly misconstrues the Supreme Court’s recent holding. According to the Supreme Court, “[u]nder the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.”⁹ While the Supreme Court holding addressed only section 202 of the Act, the same principle applies to regulation of new coal-fired power plants.

EPA’s decision also discounts a second Clean Air Act mandate to address global warming in permit decisions in what is referred to as the “collateral impacts analysis.” Section 165(a)(4) and section 169(3) together require EPA to “tak[e] into account energy, environmental, and economic impacts and other costs” in selecting the control technology that will be required

⁶ CAA §165(a)(4).

⁷ *Massachusetts v. EPA* at 30. The court stated that EPA would not be required to regulate if the Agency “determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.” *Id.* However, the existence and basic physics of climate change, which have been accepted by the Administration, preclude EPA from adopting either of these positions.

⁸ U.S. Environmental Protection Agency Region 8, *Response to Public Comments on Draft Air Pollution Control Prevention of Significant Deterioration (PSD) Permit to Construct, Permit No. PSD-OU-0002-04.00*, 6 (Aug. 30, 2007) (hereinafter EPA, *Response to Comments*).

⁹ *Massachusetts v. EPA* at 30.

in the permit for the pollutants at issue.¹⁰ Even if EPA were not required to set numeric limits for CO₂ emissions in the permit, this language requires EPA to consider environmental impacts, such as global warming, in selecting the required controls for other pollutants. Nevertheless, based on the claim that considering such effects would not change the outcome, EPA determined that it is not “necessary” under the Clean Air Act for EPA to “consider[] the environmental impact of CO₂ and other GHG emissions” in setting the pollution control requirements in the permit.¹¹

Additionally, EPA’s decision ignored other provisions of the Clean Air Act that give the agency discretion to act. In addition to the collateral impacts analysis authorized by sections 165(a)(4) and 169(3), section 165 of the Act provides EPA extensive authority in permitting decisions to consider and require alternatives to the project being proposed. Section 165(a)(2) authorizes the permitting authority (which is either EPA or the state) to consider “the air quality impact of [the pollution] source, alternatives thereto, control technology requirements, and other appropriate considerations.”¹² This empowers EPA to address CO₂ emissions from proposed facilities by considering options and alternatives, including:

- Specific energy efficiency, conservation or demand-side-management activities to reduce energy consumption;
- Development of renewable energy sources;
- Use of a less CO₂-intensive fuel (such as natural gas instead of coal);
- Construction of smaller sources;
- Capture and disposal of CO₂;
- Cofiring with biomass;
- Construction of facilities using more efficient combustion technology; and/or
- Purchase of CO₂ offsets.

Yet in the permit decision, EPA provides no justification for failing to consider global warming effects and mitigation under its discretionary authority.¹³

¹⁰ CAA §169(3).

¹¹ U.S. EPA, *Response to Comments*, *supra* note 7 at 9.

¹² CAA §165(a)(2). *See also In re Prairies State*, PSD Appeal 05-05, 12 E.A.D. __ (Aug. 24, 2006) (Environmental Appeals Board finds that the permitting authority has broad authority to identify and consider alternatives to the proposed source).

¹³ EPA briefly considered and rejected the use of one type of control technology for greenhouse gases under this authority, but failed to consider any other alternatives or justify such lack of consideration. U.S. EPA, *Response to Comments*, *supra* note 7 at 19-20.

EPA is now considering permit applications for three other proposed coal-fired power plants: the Desert Rock facility on Navajo land in New Mexico; the White Pine facility in Nevada; and the Carlson coal plant in New York.¹⁴ The Desert Rock and White Pine plants would each have a generating capacity of approximately 1500 megawatts and would each produce ten times more global warming pollution than the approved Deseret Bonanza facility.¹⁵ These plants represent billions of dollars of investment in new infrastructure. Once built, they will emit over a billion tons of CO₂ over their lifetimes. Permits for dozens of other coal-fired power plants will be considered by state permitting authorities pursuant to EPA guidance. It makes no sense to rush to authorize these projects without considering and minimizing their global warming impacts.

The permitting decisions for Desert Rock, White Pine, Carlson, and other proposed coal-fired power plants are critical to the fight against global warming. I urge you (1) to reconsider the position laid out in the Deseret permit approval and (2) to commit not to approve any new projects until you have considered the impact of, and options for reducing, greenhouse gas emissions from these plants. If you decline to do so, I request a detailed explanation of the policy, legal, and technical grounds for such a position.

In addition, I request your cooperation in the Committee's investigation into the process that led to the Deseret Power decision. First, I ask that you provide the Committee on Oversight and Government Reform copies of all documents relating to communications between EPA and any other federal agency or the White House that relate to (1) the Deseret Power application or (2) the consideration of greenhouse gas emissions when making permitting decisions for new coal or gas-fired power plants.

¹⁴ See U.S. EPA Region 9: Air Programs, *Desert Rock Clean Air Act Proposed PSD Permit* (online at: <http://www.epa.gov/region09/air/permit/desertrock/appl-info.html>) (website); State of Nevada, Nevada Division of Environmental Protection, Bureau of Air Pollution Control (online at: <http://ndep.nv.gov/bapc/lis.html>) (website with White Pine permitting documents) (facility is being permitted by the State of Nevada under a partial delegation agreement that allows for EPA review and comment); Jamestown Board of Public Utilities, *United States Environmental Protection Agency Grants Preliminary Approval for BPU Clean Coal Project: Draft Federal Air Permit Issued for Comment* (May 3, 2007) (online at: http://www.jamestownbpu.com/whatsNew/air_permit_epa_final_50307.pdf).

¹⁵ See Desert Rock, *Carbon Dioxide Facts* (2007) (online at: http://www.desertrockenergyproject.com/carbon_facts.htm) (website); Bureau of Land Management, *Notice of Intent To Prepare an Environmental Impact Statement (EIS) for the Proposed White Pine Energy Station, a Coal-Fired, Water-Cooled, Electric Power Plant, and Associated Ancillary Facilities in White Pine County, Nevada and a Notice of Public Meetings*, 69 Fed. Reg. 47954 (Aug. 6, 2004).

Second, I ask you to respond to the following questions:

1. In refusing to consider global warming impacts in this permit decision, EPA stated that it is “working diligently to develop an overall strategy for addressing the emissions of CO₂ and other [greenhouse gases] under the Clean Air Act.”¹⁶ Will EPA’s “overall strategy” include issuing regulations, in the near term, to control greenhouse gas emissions from stationary sources (as well as mobile sources), as the Clean Air Act requires?
 - a. If EPA is not committed to including regulations for stationary source emissions in this “overall strategy,” why did EPA mention such a strategy in the context of a permitting decision for a stationary source?
 - b. If EPA will soon issue regulations for greenhouse gases from stationary sources, why is EPA rushing to permit sources in advance of such regulations without considering the sources’ global warming impacts?
2. EPA also stated that “we believe that any action EPA might consider taking with respect to regulation of CO₂ or other [greenhouse gases] in PSD [prevention of significant deterioration] permits or other contexts should be addressed through notice and comment rulemaking”¹⁷ Is EPA currently working on a notice and comment rulemaking to address greenhouse gases in the context of PSD permits or other actions related to stationary sources? If not, why not, given the statement above?
3. Since permit decisions are made pursuant to a notice and comment process, why would EPA not use this mechanism to address greenhouse gas emissions from major new sources, at least on an interim basis while an “overall policy” is being developed?

Please provide your response by no later than October 3, 2007. If you are not able to provide the documents the Committee has requested by that date, please provide the Committee by that date a firm schedule for producing the documents.

The Committee on Oversight and Government Reform is the principal oversight committee in the House of Representatives and has broad oversight jurisdiction as set forth in House Rule X. An attachment to this letter provides additional information about how to respond to the Committee's request.

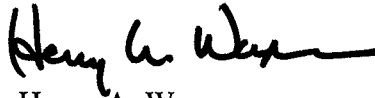
¹⁶ U.S. EPA, *Response to Comments*, *supra* note 7 at 5, 6.

¹⁷ *Id.* at 6.

The Honorable Stephen L. Johnson
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If you have any questions concerning this request, please have your staff contact
Alexandra Teitz of the Committee staff at (202) 225-4407.

Sincerely,

A handwritten signature in black ink, appearing to read "Henry A. Waxman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Henry A. Waxman
Chairman

Enclosure

cc: Tom Davis
Ranking Minority Member