BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

IN THE MATTER OF:	)	
	)	
POWER HOLDINGS OF ILLINOIS, LLC	)	PSD APPEAL NO. 09-04
	)	
PERMIT NO. 081801AAF	)	

RESPONSE TO PETITION FOR REVIEW

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The State Of Illinois ("Illinois"), by and through Illinois Attorney General Lisa Madigan, hereby files this Response ("Response") to the SIERRA CLUB's ("Petitioner") Petition for Review ("Petition") of the above-referenced Clean Air Act permit issued to Power Holdings of Illinois, LLC ("Power Holdings") by the Illinois Environmental Protection Agency ("IEPA"). Illinois respectfully requests that the Environmental Appeals Board ("Board") deny the Petition for Review for the reasons set forth within this Response.

I.
INTRODUCTION

The Petition challenges the Construction Permit/Prevention of Significant Deterioration ("PSD") Approval issued on October 26, 2009, to Power Holdings of Illinois, LLC ("Power Holdings"), pursuant to § 165 of the Clean Air Act (42 U.S.C. §7475) and §39.5(f) of the Illinois Environmental Protection Act (415 ILCS 5/39.5(f)(2008).

A. Relevant Case History

On October 18, 2007, Power Holdings submitted an application to the IEPA seeking a permit for the construction of a synthetic natural gas ("SNG") plant located near Waltonville, in Jefferson County, Illinois. The proposed project is designed to gasify Illinois Basin coal to create pipeline quality gas that would be sold to natural gas suppliers.

After preliminary review of the application, IEPA prepared a draft permit for public notice and comment. Public notice was placed in the Mount Vernon Register-News on January 17, 2009, with subsequent notices published on January 24, 2009 and January 31, 2009. A public hearing was held at the Knights of Columbus Hall, 130 South Eighth Street, Du Bois, Illinois on the evening of March 3, 2009 to receive comments and address questions from the public on the permit application and draft permit. *See generally*, Petitioner's Exhibit 3(Transcript

of the Public Hearing). The written comment period was scheduled to remain open until April 2, 2009. However, this was extended with the comment period closing on May 4, 2009.

IEPA issued a state Construction Permit and PSD Approval (hereinafter "PSD Approval"), Permit No. 081801AAF to Power Holdings on October 26, 2009. *See Pet. Ex. 1.* The permit authorizes Power Holdings to construct a facility to produce SNG by gasification of coal, including six gasifiers, two gas processing trains (including synthesis gas clean up units and methanation units), two sulfuric acid plants, two steam superheaters, a cooling tower, an auxiliary boiler, feedstock storage and handling, and other ancillary operations.

Petitioner filed a Petition for Review with the Board on or about November 25, 2009. The Petitioner challenges the Illinois EPA's permitting determination on grounds relating to the PSD approval.

B. Statutory Background

The federal PSD program under the Clean Air Act ("CAA") principally regulates proposed new major sources and major modifications to existing sources in areas of the Nation that are deemed attainment or unclassifiable with respect to the National Ambient Air Quality Standards ("NAAQS"). *See,* 42 U.S.C. §7470 *et seq*. Among other things, the PSD regulations require a pre-construction review of such proposed projects to ensure that resulting emissions are not responsible for a violation of the NAAQS or applicable PSD ambient air quality increments, 40 C.F.R. §52.21(k), and a demonstration that subject sources will employ the Best Available Control Technology ("BACT") to minimize emissions for all PSD pollutants emitted in major or significant amounts. *See,* 40 C.F.R. §52.21(j).

IEPA administers the PSD program for the State of Illinois, pursuant to a delegation agreement with the USEPA/Region V. *See,* 46 Fed. Reg. 9,580 (January 29, 1981). For purposes related to this petition, IEPA is a delegated state permitting authority that "stands in the

shoes" of the Administrator of the USEPA when implementing the federal PSD program. *See,* 46 Fed. Reg. 9,580 (January 29, 1981); *In re Zion Energy, LLC*, 9 E.A.D. 701, 701-702, fn.1 (EAB, 2001). A PSD permit issued by the Illinois EPA is subject to review by the EAB in accordance with 40 C.F.R. §124.19. *Id.*

In taking action on the PSD Approval, IEPA determined that Power Holding's proposed plant is a major source for sulfur dioxide ("SO2"), nitrous oxides ("NO_x"), particular matter ("PM"), carbon monoxide ("CO"), and sulfuric acid mist, as potential emissions for each pollutant from the proposed facility exceed the significance threshold for that pollutant.

II
STANDARD OF REVIEW

The Board's review of final PSD permit decisions is governed by the procedural requirements of 40 C.F.R. Part 124. Review is warranted where the permit decision involves a "finding of fact or conclusion of law which is clearly erroneous" or where it involves "an exercise of discretion or an important policy considerations." 40 C.F.R. §124.19(a)(1) and (2). In construing these requirements, the Board has consistently recognized that its review authority is exercised "sparingly" and that the scope of such review is carefully circumscribed. See, 45 Fed. Reg. 33,290, 33,412 (May 19,1980); *accord, In re Knauf Fiber Glass,* 8 E.A.D. 121, 127,(EAB, February 4, 1999); *n re Zion Energy, LLC,* 9 E.A.D. 701 (EAB, March 27, 2001 (EAB, March 27, 2001).

It is a long-standing Board policy to favor final adjudication of most permitting decisions at the Regional or appropriate state level. *See, In re MCN Oil & Gas Company,* UIC Appeal No 02-03, slip op. at 6 (EAB, September. 4, 2002) 2002 WL 31030985. In the absence of clear error or other compelling reason warranting review, the Board defers to the Regional or delegated state permitting authorities. *In re Metcalf Energy Center,* PSD Appeals Nos. 01-07 and 01-08,

slip op. at 12 (EAB, August 10, 2001). Nowhere is the Board's deference more evident than in matters that are "quintessentially technical" in nature. *Id.; In re Three Mountain Power, LLC,* 10 E.A.D. 39 (EAB, May 30, 2001).

A petitioner is obligated to "explain why the permitting authority's response to those objections is clearly erroneous or otherwise merits review." *In re Zion Energy, LLC*, 9 E.A.D. 701 (EAB, March 27, 2001), citing *In re Knauf Fiber Glass, GmbH, supra.* A petitioner cannot simply repeat or restate the arguments presented during the public notice period but must, instead, supply information or technical grounds in its petition that demonstrate the merits of administrative review. *See, In re Steel Dynamics, Inc.,* 9 E.A.D. 165 (EAB June 22, 2000), *citing In re Maui Electric Company,* 8 E.A.D. 1 (EAB, September 10, 1998).

The Board also requires that a petitioner, in identifying its objections to a permit, make its allegations both "specific and substantiated," especially where the objection involves the "technical judgments" of the permit authority. *See, In re Avon Custom Mixing Services, Inc.,* 10 E.A.D. 700 (EAB, August 27, 2002). This burden ensures that the issues and/or arguments on appeal are well defined and actually represent a "bona fide" disagreement between the petitioner and the permit authority. If expert opinions or data are in conflict, the Board examines the record of the proceeding to determine whether the permit authority has adequately considered the issue and whether its decision is "rational in light of all the information in the record, including the conflicting opinions and data." *In re Three Mountain Power, LLC,* PSD Appeal No. 01-05, slip. op. at 17 (EAB, May 30, 2001), *citing*, *In re Steel Dynamics, Inc.,* 9 E.A.D. 165 (EAB June 22, 2000)

III.
ARGUMENT

A. Provisions for Flaring Minimization Were Set Forth in the Draft Permit and Were Available for Public review and Comment

As set forth above, the CAA and the PSD regulations require, among other things, that new major stationary sources and major modifications of such sources employ BACT to minimize emissions of regulated pollutants. CAA §165 (a)(4), 42 U.S.C. §7475(a)(4); 40 C.F.R. §52.21(j)(2). The PSD regulations define BACT in part as follows:

> "Best Available Control Technology" means an emissions limitation...based on the maximum degree of reduction for each pollutant subject to regulation under the CAA which would be emitted from any proposed major stationary source... which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for the source...

40 C.F.R. §52.21(b)(12). Under the rules governing the PSD permitting process, the permit applicant is responsible for proposing emission limitations that constitute BACT for each regulated pollutant and for providing information on the control alternatives that can be used to achieve it. 40 C.F.R. §52.21(n)(1)(iii). The ultimate BACT decision is made by the permit-issuing authority. *In Re RockGen Energy Center* 8 E.A.D. 536, 541 (EAB 1999).

Illinois EPA during the permitting of Power Holdings proposed facility, in addition to addressing emissions during normal operations, also addressed emissions that would be generated during startup, shutdown and malfunction. These particular emissions are vented to a flare. As a threshold matter, the permit prohibits the flaring of off-specification gas resulting during normal operations. Thereafter Illinois EPA had to establish BACT for these limited flaring events. The permit sets out work practices and secondary emission limits as BACT for flaring during these limited events. (*See Pet. Ex. 1, pgs. 14-15*). It is expected that the required BACT consisting in part of work practices for startup, shutdown and malfunction will assure that

appropriate measures are taken to minimize emissions. (*See Pet. Ex. 1, pgs. 14-15*) For this purpose the permit issued to Power Holdings established certain basic measures that must be used to minimize emissions. It also established a general approach to minimization of emissions through formal operating and maintenance procedures and flare minimization planning, which may be refined based on actual operating experience at the plant. (*See Pet. Ex. 1, pgs 19-23*). The flaring minimization planning is an enhancement to the secondary BACT emission limits contained in the permit

Petitioner argues that because the "Flare Minimization Plans", which represent a portion of BACT for gas flaring during startup, shutdown and malfunction, were not part of the public participation process and because these plans may be subject to later revision, clear error was committed by the Illinois EPA. (*See Pet. Petition for Review, pg. 2*). For the following reasons this argument must fail.

The Flare Minimization Plan requires Power Holdings to further reduce flaring and the associated emissions once the plant begins operations. This is done by analyzing the cause of the flaring events that do occur and taking further steps to eliminate or reduce them. (*See Pet. Ex. 1, pgs. 19-23*). These causes cannot be determined prior to operations. It is only once a flaring event occurs that the applicant can make a determination as to the cause and then take the steps necessary to minimize these types of events in the future.

Additionally, the permit contains numerous emissions limitations that apply continuously to Power Holdings operations. The Flaring Minimization Planning has no impact on these requirements. These BACT emissions limits were fully considered during the public comment process and Petitioner's proposition that the Flaring Minimization Planning was not must fail.

In further support, a review of the permit reveals that a great portion of the permit is devoted to the flaring issue. (*See Pet. Ex. 1, pgs. 12-32*). In fact the permit conditions relating to flaring are quite extensive and have the goal of further limiting emissions during startup, shutdown and malfunctions. This is accomplished by the requirement in the permit that "Root Cause Analysis" be conducted for each flaring event. (*See Pet. Ex. 1, pg. 21*).

Petitioner, for support of its argument cites the *RockGen* case, in which the Board rejected a proposal to allow a permittee to violate the BACT limits in the permitee's PSD permit during start up and shut down. (*See RockGen, 8 E.A.D. 536, 551*). However, unlike the *RockGen* case, the instant case does not involve an exception to BACT limits set in the PSD permit. Instead, Power Holdings' flare minimization plans would be used to ensure compliance with the secondary BACT limits[1] established in the Power Holdings PSD permitting process for periods of startup, shutdown and malfunction. (*See Pet. Ex. 1, pgs 13-14 & 23-24*). The Permit prohibits Power Holdings from exceeding these limits and, sets forth additional design and operational requirements to ensure compliance and limit flaring events. (*See Pet. Ex. 1, pgs. 13-14*).

The provisions for flaring were set forth in the draft permit which was available for review and public comment. These provisions were based on regulations adopted by the Bay Area Air Quality Maintenance District ("BAAQMD") for flaring at existing refineries in the San Francisco Bay Area, Regulation 12, Miscellaneous Standards of Performance, Rule 12: Flares at Petroleum Refineries. These rules address operating facilities to identify and implement

[1] Secondary BACT limits that apply only during SSM events (which are less stringent than those applicable during normal operation) may be included in a PSD permit where, as here, they are in compliance with all applicable requirements, including NAAQS and PSD provisions, and are properly justified as BACT. *See In re Indeck-Elwood, LLC,* PSD Appeal No. 03-04, (Sept. 27, 2006), Slip Op. at 71, fn100 (citations omitted.)

measures to further reduce flaring. The BAAQMD regulations apply in an ongoing basis; similarly the flare minimization planning would apply to this proposed plant in an ongoing basis.

The requirement that the applicant engage in such flare minimization planning does not relieve the applicant from meeting requirements for flaring that were properly addressed during the processing of the applicant's permit. In fact the draft permit dedicates an inordinate space to ensuring that flaring will be properly conducted. (*See Pet. Ex. 1, pgs 14-16 & 29-30*). Most significantly, other than the portion of startup before coal is introduced into the gasifiers, flaring of process steam is not allowed during normal operation of the gasification process. (*See Pet. Ex. 1, pg. 14*). The permit also sets limits on overall emissions from flaring accompanied by requirements for monitoring and recordkeeping to verify compliance with those limits. (*See Pet. Ex. 1, pg. 15*).

The conditions addressed in three matters cited by the Petitioner, *RockGen, We Energies and Hyperion Energy Center*, simply are not analogous to the situation here. In those matters, the plans under consideration were plans to be developed pursuant to the permit to serve in place of otherwise applicable standards. That plainly is not the case with the Power Holdings Permit. Flare Minimization Planning is an activity that cannot be conducted at this time. For the initial preparation of a Flare Minimization Plan to occur there must be a detailed design of the plant and this has not yet occurred. In addition, the Plan addresses operation and maintenance procedures, which also cannot be prepared until after the detailed design is prepared. As routine flaring is not allowed by the permit, the focus of the Flaring Minimization Planning is to track and address flaring events that could not be foreseen and addressed during the construction and development of the proposed plant. It is inherent that such events will be identified by their actual occurrence and then addressed on an event specific basis.

Likewise, the Clean Water Act cases cited by the Petitioner, (*See Pet. Petition for Review, pgs. 6-7*), which Petitioner asserts require substantive plans to be included in the permit and available for public comment, do not apply. The Power Holdings permit which was available for comment ensures that emission limits will be met by the secondary BACT limits. This is the substantive planning that is required. There are limits in the permit, the limits cannot be exceeded even during startup, shutdown and malfunction.

Petitioner further argues that the Flaring Minimization Planning is required to be part of the permit proceedings base on 40 C.F.R. Part 124. However the sections cited to by Petitioner simply do not support this argument. The Illinois EPA in its Responsiveness Summary correctly pointed out that the section cited by the Petitioner does not require the particular information Petitioner asserts that it does. (*See Pet. Ex. 7, pg. 21*). Further, Petitioner never asserts that the information that is required under this Part was not available for public comment.

Petitioner's Petition for Review has failed to meet the standard of review, and the Board should deny review of this issue.

B. Synthetic Natural Gas Properly Considered and Allowed for Firing the Superheaters

The Petitioner's second basis for seeking review of the permit issued by the Illinois EPA is that the Illinois EPA committed clear error by failing to address the emissions associated with the production of synthetic natural gas ("SNG") before firing the superheaters with that SNG. In other words, that plant-wide emissions will be lower if the superheaters are fired by natural gas rather than by SNG. This argument is akin to a "lifecycle" emissions argument. Again, Petitioner has failed to meet its burden and review on this issue should be denied. The basis for that denial is as follows.

When evaluating a petition for review of a PSD permit, the Board first considers whether the petitioner has met the threshold pleading requirements, including preservation of issues for review. *See* 40 C.F.R.§ 124.19; *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000) (*Knauf II*). Among other things, in order to demonstrate that an issue has been preserved for appeal, a petitioner must show "that any issues being raised were raised during the public comment period." 40 C.F.R. §§ 124.13, 124.19(a); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 249 (EAB 1999). Moreover, this burden rests squarely with the petitioner — "It is not incumbent upon the Board to scour the record to determine whether an issue was properly raised below." *Encogen*, 8 E.A.D. at 250 n.10. As a threshold matter, Petitioner did not properly raise the "lifecyle" emissions argument during the public comment period. Accordingly, the Board lacks jurisdiction to consider Petitioner's review on this issue and review should be denied as Petitioner did not properly raise the "lifecyle" emissions argument during the public comment period.

If the Board does consider this issue, review should still be denied on the following basis. The Permit explicitly limits fuel for the superheaters to natural gas or SNG. (*See Pet. Ex. 1, pg. 34 and Pet. Ex. 7. Pg.* 30). As set out in the Responsiveness Summary, the SNG will be cleaned during the gasification process so that chemically it is equivalent to natural gas. (*See Pet. Ex. 7, pg. 30*). Therefore, whether the plant is using natural gas or SNG to fire the superheaters, there should be no difference in the emissions. The composition of SNG will be purer than natural gas, having lower levels of ethane, propane and other organic constituents that are present as trace amounts in natural "natural gas". (*See Pet. Ex. 7, pg. 30, ftn. 59).* This is because SNG is produced by a chemical process rather than being a naturally occurring material, so that a majority of the fuel component will be methane. (*Id. at pg. 30, ftn. 59*). In addition to treating

natural gas and SNG as practically fungible, the issued permit [in contrast to the draft permit] does not allow use of any synthesis gas as fuel in the superheaters. This offers recognition that the Illinois EPA actually considered Petitioner's comments, and further illustrates that while there are differences in the composition of emissions, especially with respect to sulfur content, between cleaned synthesis gas and SNG/natural gas, there is no significant difference in the composition of emissions between SNG and natural gas. In fact, SNG would be expected to have lower emissions.

Petitioner's emphasis on the difference between natural gas and SNG emissions now posed in the petition lacks validity, if only because there will be no discernable reduction in emissions generated from the source by the use of natural gas. In fact, Petitioner offers no technical or analytical support for its argument. Further, Petitioner failed to show that the Illinois EPA's response to its comment, that there is no distinction between SNG and natural gas, is clearly erroneous. Any SNG that would be diverted from use in the superheaters and replaced by natural gas would simply be sold as product, rather than not being generated at all. Even without that practical consideration, the purported difference in fuel choices with respect to emissions is, on its face, statistically insignificant and therefore supports, rather than diminishes, the conclusion that they should be treated as indistinguishable.

Further, Petitioner never raised this "lifecycle" emissions argument during the public comment period. Petitioner makes this argument without the support of legal precedent. As it is now being raised for the first time it should not be considered. *See* 40 C.F.R.§ 124.19; *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000) (*Knauf II*).

Petitioner's Petition for Review has failed to meet the standard of review, and the Board should deny review of this issue.

C. Greenhouse gas emission limits are not yet required in PSD permits.

If there were any lingering questions as to whether greenhouse gas emission limits were required in PSD permits when the Power Holdings permit was issued late last year, those questions have now been answered by the US EPA Administrator. Last month, the Administrator stated unequivocally:

> . . . EPA will phase in permit requirements and regulation of greenhouse gases for large stationary sources *beginning in calendar year 2011*. In the first half of 2011, only those facilities that already must apply for Clean Air Act permits as a result of their non-greenhouse gas emissions will need to address their greenhouse gas emissions in their permit applications.

Letter, dated February 22, 2010, from US EPA Administrator Lisa Jackson to Senator Jay Rockefeller, appended as Exhibit 1.

1. IEPA did not err by failing to include BACT limits for carbon dioxide and methane in the Power Holdings permit.

In light of the Administrator's recent definitive statements about the status of greenhouse gas controls for stationary sources, it is clear that Petitioner is mistaken when it asserts that IEPA erred by failing to include emission limits for carbon dioxide and methane in the Power Holdings PSD permit. US EPA does not plan to start phasing in limits for greenhouse gases such as carbon dioxide and methane in Clean Air Act permits for *any* stationery sources until 2011. Although large stationary sources (like Power Holdings) will be the first facilities required to address greenhouse gas emissions in their Clean Air Act permits, the Administrator's letter makes clear that they will not be required to do so until next year.

As noted in IEPA's Responsiveness Summary, the Administrator's *Louisville Gas & Electric* order[2] had already confirmed -- prior to issuance of the letter -- that greenhouse gas emissions are not currently regulated under the Clean Air Act. IEPA Responsiveness Summary[3], at p. 65, citing *Order Responding to Issues Raised in April 28, 2008 and March 2, 2006 Petitions, and Denying in Part and Granting in Part Requests for Objection to Permit,* Petition No. IV-2008-3, *In the Matter of: Louisville Gas & Electric, Trimble County, Kentucky Title V/PSD Permit)*[4] *("Louisville Gas & Electric") pp. 15-16.* Further, the broad and unambiguous statements in the Administrator's letter demonstrate that the Board cannot sustain Petitioner's assertion that *Louisville Gas & Electric* should be read narrowly, to providing an opening to argue that greenhouse gases are currently "subject to regulation" under the Clean Air Act through the New Source Performance Standard ("NSPS") for landfills, EPA's approval of the Delaware State Implementation Plan, and/or through EPA's grant of the California Cars Waiver. The Administrator's letter leaves no room for arguments that BACT limits for carbon dioxide and methane are required in the Power Holdings permit based on any of these grounds.

2. **IEPA did not err by failing to apply 35 Ill. Admin. Code § 201.141 to limit carbon dioxide and methane emissions from the Power Holdings facility.**

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[2] The *Louisville Gas & Electric* order concludes that PSD regulation of carbon dioxide is not required, based on the Board's holding that there is "no evidence of a Congressional intent to compel EPA to apply BACT to pollutants that are subject only to monitoring and reporting requirements," *In re: Deseret Power Electric Cooperative,* 14 E.A.D. ___, 63, PSD Appeal No 07-03 (EAB, November 13, 2008) , and *"EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Determination (PSD) Permit Program"* 73 Fed. Reg. 80,300 (December 31, 2008).

[3] *Pet. Ex. 7.*

[4] *Pet. Ex. 15.*

The Board should also reject Petitioner's assertion that the "emission standard" in 35 Ill. Admin. Code § 201.141 should be applied to limit carbon dioxide and methane emissions from the Power Holdings facility. (*See Pet. Petition for Review, pgs. 11-17*). This rule provides:

> No person shall cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as, either alone or in combination with contaminants from other sources, to cause or tend to cause air pollution in Illinois, or so as to violate the provisions of this Chapter, or so as to prevent the attainment or maintenance of any applicable ambient air quality standard.

35 Ill. Admin. Code § 201.141.

Petitioner claims that this rule requires a limit on carbon dioxide and methane emissions in the Power Holdings air permit because the rule is part of Illinois' federally-approved State Implementation Plan ("SIP") and because IEPA is required, by 42 U.S.C. § 7475(a)(3) and 40 C.F.R. § 52.21(j)(1), to ensure compliance with all emission standards contained in the federally-approved SIP. (*See Pet. Petition for Review, pgs. 11-17*). This claim cannot be reconciled with the plain fact that the US EPA Administrator has expressly stated that the regulation of greenhouse gas emissions from stationary sources in Clean Air Act permits will not commence until next year. (*See Pet. Ex. 1, pg.* 1)In the PSD context, where IEPA "stands in the shoes" of the USEPA Administrator, IEPA does not err by declining to interpret a rule in Illinois' federally-approved SIP in a manner that is contrary to the USEPA Administrator's clearly-articulated policy. *See,* 46 Fed. Reg. 9,580 (January 29, 1981); *In re Zion Energy, LLC*, 9 E.A.D. 701, 701-702, fn.1

For the reasons set forth herein, the State of Illinois respectfully requests that the Board deny review of all avenues of appeal sought by the Petitioner or, in the alternative, order such relief that is deemed just and appropriate.

IV.
CONCLUSION

For the reasons set forth herein, the Illinois EPA respectfully requests that the Board deny review of all avenues of appeal sought by the Petitioner or, in the alternative, order such relief that is deemed just and appropriate.

Respectfully submitted,

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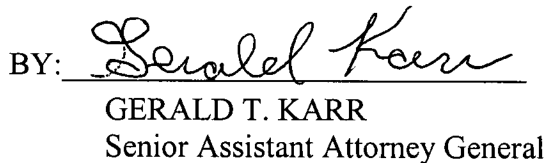
BY: 
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EXHIBIT 1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 22 2010

THE ADMINISTRATOR

The Honorable Jay D. Rockefeller IV
United States Senate
Washington, D.C. 20510

Dear Senator Rockefeller:

Thank you for your letter of February 19, 2010, concerning the Environmental Protection Agency's (EPA's) work to comply with the Supreme Court's decision in *Massachusetts v. EPA* while providing a manageable path forward for businesses and state governments. I share your goals of ensuring economic recovery at this critical time and of addressing greenhouse-gas emissions in sensible ways that are consistent with the call for comprehensive energy and climate legislation. My full response to your letter appears below and in the enclosed document.

Many of the comments and questions you offer are similar to ones that EPA received during recent public comment periods. As EPA staff works to respond to those comments, I am happy to share information with you here in order to answer the questions in your letter as completely as I can. The decision-making process has moved far enough along that I can make several central points based on modifications I expect to make in finalizing EPA's previous proposals:

- The United States Supreme Court held three years ago in *Massachusetts v. EPA* that greenhouse gases are air pollution and are subject to regulation under the Clean Air Act. EPA must follow the Supreme Court's holding, as you recognize in your letter.

- By April of this year, I expect to take actions to ensure that no stationary source will be required to get a Clean Air Act permit to cover its greenhouse gas emissions in calendar year 2010.

- Based on those anticipated actions, I expect that EPA will phase-in permit requirements and regulation of greenhouse gases for large stationary sources beginning in calendar year 2011. In the first half of 2011, only those facilities that already must apply for Clean Air Act permits as a result of their non-greenhouse gas emissions will need to address their greenhouse gas emissions in their permit applications.

- Further, I am expecting that greenhouse gas emissions from other large sources will phase in starting in the latter half of 2011. Between the latter half of 2011 and 2013, I expect that the threshold for permitting will be substantially higher than the 25,000-ton limit that EPA originally proposed. In any event, EPA does not intend to subject the smallest sources to Clean Air Act permitting for greenhouse-gas emissions any sooner than 2016.

- You asked in your letter what the result would be if Senator Lisa Murkowski's resolution of disapproval of EPA's endangerment finding were enacted. One result would be to prevent EPA from issuing its greenhouse gas standard for light-duty vehicles, because the endangerment finding is a legal prerequisite of that standard. The impacts of that result would be significant. In particular, it would undo an historic agreement among states, automakers, the federal government, and other stakeholders. California and at least thirteen other states that have adopted California's emissions standards likely would enforce those standards within their jurisdictions,[1] leaving the automobile industry without the explicit nationwide uniformity that it has described as important to its business.[2]

Background

Three years ago, the Supreme Court held in *Massachusetts v. EPA* that the term "air pollutant" in the Clean Air Act includes greenhouse gases.[3] The Court also held that the Act requires EPA to consider the science of climate change meaningfully in determining whether greenhouse-gas pollution endangers public health or welfare.[4] As a result of the Court's decision, EPA became obligated to treat greenhouse-gas emissions as air pollution under the Clean Air Act and to engage with the best available science in determining whether those emissions endanger Americans' health or welfare. After EPA staff conducted a comprehensive survey of the soundest available science and carefully reviewed hundreds of thousands of public comments, I determined last December that greenhouse-gas emissions do endanger Americans' health and welfare.[5]

As you know, I am not alone in having reached that conclusion. The U.S. Global Change Research Program, which consists of thirteen federal departments – including the National Science Foundation, the Department of Health and Human Services, and the Departments of Commerce, Agriculture, Defense, Energy, and the Interior – found last June that risks to human health will increase as a result of human-induced global warming.[6] The U.S. Senate itself has twice passed, on a bipartisan basis, a resolution finding that greenhouse-gas accumulation from human activity poses a substantial risk of increased frequency and severity of floods and droughts.[7]

EPA's endangerment finding obligates the agency, under Section 202(a) of the Clean Air Act, to issue greenhouse-gas emissions standards for motor vehicles.[8] EPA will begin to discharge that

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[1] http://www.epa.gov/otaq/climate/regulations/air-resources-board.pdf.
[2] *See Patchwork Proven*, National Automobile Dealers Association (January 2009).
[3] 549 U.S. 497, 528-29, 532-33 (2007).
[4] *Id.* at 534-35.
[5] 74 Fed. Reg. 66495, *et seq.* (December 15, 2009).
[6] http://downloads.globalchange.gov/usimpacts/pdfs/climate-impacts-report.pdf
[7] *See* Energy Policy Act of 2005; Energy Independence and Security Act of 2007.
[8] *See* Clean Air Act Section (202)(a)(1), 42 U.S.C. § 7521(a)(1).

duty late next month, by issuing greenhouse-gas emissions standards for Model Year 2012-2016 light-duty motor vehicles.[9]

At the same time that EPA issues its light-duty-vehicle emissions standard, the Department of Transportation will issue a rule raising the existing fuel-economy standards for the same vehicles.[10] Together, the EPA and DOT standards will reduce the lifetime oil consumption of the affected vehicles by 1.8 billion barrels while eliminating 950 million metric tons of greenhouse-gas pollution.[11] The government of California has agreed to recognize vehicles that comply with the EPA rule as complying with the state's greenhouse-gas emissions standard. As a result, the automakers will be able to operate with the nation-wide regulatory uniformity that they have sought.

The implementation of EPA's light-duty vehicle standard will make greenhouse-gas emissions subject to regulation under the Clean Air Act for the first time. Under the Act's text, air pollutants that are subject to regulation under the statute are subject to the Act's "prevention of significant deterioration" and operating-permit provisions for stationary sources.[12]

Mindful of that legal consequence, and in order to provide clarity for states and businesses, EPA has been working to complete two rulemakings. The agency has received many thoughtful comments on those two rulemakings – from citizens, States, localities, industry representatives, and environmental groups. The agency's upcoming actions will reflect and incorporate valuable information and constructive suggestions that EPA received during the public comment periods, and thus will improve substantially upon the agency's initial proposals.

The first action will conclude EPA's reconsideration of a memorandum that former EPA Administrator Stephen Johnson issued in 2008. I anticipate that the final action on reconsideration will explain that greenhouse-gas emissions will become "subject to regulation" under the Clean Air Act, such as to make them a part of the Act's stationary-source permitting programs, in January of 2011, when Model Year 2012 light-duty vehicles will need to comply with EPA's greenhouse-gas emissions standard. As a result of that final action, no facility will need to address greenhouse-gas emissions in Clean Air Act permitting before 2011.

The second action will promulgate what has become known as the tailoring rule. I describe that action in detail at the outset of this letter.

I have already described the impact of enactment of Senator Lisa Murkowski's resolution of disapproval of EPA's endangerment finding on the light-duty vehicle standard and the historic agreement among states, automakers, the federal government, and other stakeholders. Moreover, a vote to vitiate the greenhouse-gas endangerment finding would be viewed as a vote to reject the

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[9] *See* 74 Fed. Reg. 49453, *et seq.* (September 28, 2009).
[10] *See id.*
[11] http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/522d0a809f6b7f9c85257632005625341OpenDocument
[12] *See, e.g.*, Clean Air Act Section 169(3), 42 U.S.C. § 7479(3) ("each pollutant subject to regulation under this chapter").

scientific work of the thirteen U.S. government departments that contribute to the U.S. Global Change Research Program. It also would be viewed by many as a vote to move the United States to a position behind that of China on the issue of climate change, and more in line with the position of Saudi Arabia.

Attached, please find responses to those of your questions that are not addressed above. Thank you again for your letter. I appreciate this opportunity to update you on EPA's work to comply with the Supreme Court's decision in *Massachusetts v. EPA* while providing a manageable path forward for businesses and state governments.

Sincerely,

Lisa P. Jackson

Enclosure

What is your assessment of the likelihood of the tailoring rule surviving already announced legal challenges?

EPA would not have issued its initial tailoring rule proposal if I did not believe that it was lawful. Oddly, certain advocacy organizations that purport to speak for businesses are the only ones who have threatened to challenge the tailoring rule in court. My assessment is that those challenges, if they are filed, will fail. If my assessment were otherwise, I would not promulgate the tailoring rule.

Currently, PSD regulations are applied to fewer than 400 facilities per year for pollutants such as ozone. How many facilities would be required to obtain permits under GHG regulation under the Clean Air Act?

None in 2010. For the first half of 2011, fewer than 400, because only facilities undergoing permitting for other pollutants would need to address greenhouse-gas emissions in permitting.

Large electric generators using domestically produced coal and natural gas are uncertain about potential "Best Available Control Technology" or "BACT" standards for carbon dioxide (CO_2). What does EPA expect coal and natural gas plant operators to do if there is no standard? What process will you use to determine such standards and the range of options for such facilities given the pre-commercial standing of current CO2 abatement technologies such as carbon capture and storage (CCS)?

EPA continues to review and analyze options for defining Best Available Control Technology (BACT) for greenhouse-gas emissions. The additional time that EPA will have before permitting requirements will take effect will enable the agency and stakeholders to consider this issue carefully and thoughtfully. EPA's goal will be to identify practical, achievable, and cost-effective strategies for minimizing emissions increases from new facilities and major modifications, recognizing the importance of those projects to the economy and job creation. The agency would of course apply the well-developed framework that exists for determining BACT for non-greenhouse-gas pollutants. One of the factors that is applied under that framework is the commercial availability of a given control technology. EPA is closely following efforts to make integrated systems for capturing, transporting, and storing CO_2 from coal-fueled electricity generating facilities commercially available. The agency would expect to carefully consider the state of development of this technology in considering options for BACT.

There is genuine concern from the domestic oil and gas industries, from entities operating at the wellhead to pipeline operators, processing plants, and refiners, that they will be severely disadvantaged in the world marketplace by stationary source regulations. Can you characterize how these regulations will translate into costs for these industries? Has your agency analyzed or will you consider the impacts on competitiveness that these costs could have on these industries?

The feasibility and commercial availability of a technology are certainly analyzed in any BACT process, and both feasibility and commercial availability are relevant to competitiveness.

Comprehensive clean energy legislation must ensure a robust US manufacturing base for clean energy production, invest in US research and development of new clean energy technologies, and mitigate costs to energy-intensive and trade-exposed industries. If EPA regulates GHGs for stationary sources, what are the direct and indirect cost implications for industrial sources of Clean Air Act prevention of significant deterioration (PSD) regulations? Has your agency analyzed or will you consider so-called "carbon leakage" and the competitiveness impacts of these costs on these industries? Will your agency public impact analyses on these critical issues prior to implementing the regulation?

EPA has evaluated the impacts of clean energy legislation on energy-intensive and trade-exposed industries as a part of our larger analysis of the Waxman-Markey bill (H.R. 2454) in June 2009. In addition, EPA participated in the Administration's interagency assessment of the implications of climate policy on U.S. competitiveness, titled "The Effects of H.R. 2454 on International Competitiveness and Emission Leakage in Energy-Intensive Trade-Exposed Industries" (December 2009). The report shows that under the allowance allocations made available in H.R. 2454 for the energy-intensive trade-exposed industries, the impact of comprehensive energy and climate legislation is effectively nil on the production costs for these industries. Even in the absence of the H.R. 2454 allowance allocations, these industries would bear only modest impacts on production costs (less than 3 percent increase) under an allowance price of $20 per ton. PSD costs would be only a small factor in the cost structure of the industry. Moreover, facilities in these sectors are already subject to PSD for other pollutants.

How would a resolution striking down the endangerment finding affect EPA's ability to provide resources or technical expertise intended to address and adapt to climate change effects, including, but not limited to: Efforts to analyze climate and weather variability and its effects on agriculture, fisheries, species habitats, and coastal development among communities along the Gulf Coast and elsewhere; research programs related to climate change effects on mountain snowpack throughout the Pacific Coast and Mountain West regions; and the infrastructure, energy, and socioeconomic implications of relocating Alaska communities due to historically unprecedented coastal erosion?

You raise a very significant question. EPA has not had time to determine the answer. EPA would certainly try to help those threatened communities even if Congress vitiated the endangerment finding. As of this writing, however, I cannot guarantee that enactment of such a resolution would have no negative impact on those efforts.