Desert Rock Energy Co., PSD Appeal 08-03
Conservation Petitioners' Exhibits

EXHIBIT 21

H. R. 2764

One Hundred Tenth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Thursday, the fourth day of January, two thousand and seven

An Act

Making appropriations for the Department of State, foreign operations, and related programs for the fiscal year ending September 30, 2008, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Consolidated Appropriations Act, 2008".

SEC. 2. TABLE OF CONTENTS.

The table of contents of this Act is as follows:

Sec. 1. Short title.
Sec. 2. Table of contents.
Sec. 3. References.
Sec. 4. Explanatory statement.
Sec. 5. Emergency designations.
Sec. 6. Statement of appropriations.

DIVISION A—AGRICULTURE, RURAL DEVELOPMENT, FOOD AND DRUG ADMINISTRATION, AND RELATED AGENCIES APPROPRIATIONS ACT, 2008

Title I—Agricultural Programs
Title II—Conservation Programs
Title III—Rural Development Programs
Title IV—Domestic Food Programs
Title V—Foreign Assistance and Related Programs
Title VI—Related Agencies and Food and Drug Administration
Title VII—General Provisions

DIVISION B—COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES APPROPRIATIONS ACT, 2008

Title I—Department of Commerce
Title II—Department of Justice
Title III—Science
Title IV—Related Agencies
Title V—General Provisions
Title VI—Rescissions

DIVISION C—ENERGY AND WATER DEVELOPMENT AND RELATED AGENCIES APPROPRIATIONS ACT, 2008

Title I—Department of Defense—Civil: Department of the Army
Title II—Department of the Interior
Title III—Department of Energy
Title IV—Independent Agencies
Title V—General Provisions

DIVISION D—FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS ACT, 2008

Title I—Department of the Treasury
Title II—Executive Office of the President and Funds Appropriated to the President
Title III—The Judiciary

The Administrator of the Environmental Protection Agency is authorized to collect and obligate pesticide registration service fees in accordance with section 33 of the Federal Insecticide, Fungicide, and Rodenticide Act (as added by subsection (f)(2) of the Pesticide Registration Improvement Act of 2003), as amended.

None of the funds provided in this Act may be used, directly or through grants, to pay or to provide reimbursement for payment of the salary of a consultant (whether retained by the Federal Government or a grantee) at more than the daily equivalent of the rate paid for level IV of the Executive Schedule, unless specifically authorized by law.

From unobligated balances to carry out projects and activities authorized under section 206(a) of the Federal Water Pollution Control Act, $5,000,000 are hereby rescinded.

None of the funds made available by this Act may be used in contravention of, or to delay the implementation of, Executive Order No. 12898 of February 11, 1994 (59 Fed. Reg. 7629; relating to Federal actions to address environmental justice in minority populations and low-income populations).

Of the funds provided in the Environmental Programs and Management account, not less than $3,500,000 shall be provided for activities to develop and publish a draft rule not later than 9 months after the date of enactment of this Act, and a final rule not later than 18 months after the date of enactment of this Act, to require mandatory reporting of greenhouse gas emissions above appropriate thresholds in all sectors of the economy of the United States.

TITLE III

RELATED AGENCIES

DEPARTMENT OF AGRICULTURE

FOREST SERVICE

FOREST AND RANGELAND RESEARCH

For necessary expenses of forest and rangeland research as authorized by law, $290,457,000, to remain available until expended: *Provided,* That of the funds provided, $61,329,000 is for the forest inventory and analysis program.

STATE AND PRIVATE FORESTRY

For necessary expenses of cooperating with and providing technical and financial assistance to States, territories, possessions, and others, and for forest health management, including treatments of pests, pathogens, and invasive or noxious plants and for restoring and rehabilitating forests damaged by pests or invasive plants, cooperative forestry, and education and land conservation activities and conducting an international program as authorized, $266,974,000, to remain available until expended, as authorized by law; of which $7,500,000 is for the International Program; and of which $53,146,000 is to be derived from the Land and Water Conservation Fund.

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EXHIBIT 22

[House Appropriations Committee Print]

Consolidated Appropriations Act, 2008
(H.R. 2764; Public Law 110–161)

DIVISION F—DEPARTMENT OF THE INTERIOR, ENVIRONMENT, AND RELATED AGENCIES APPROPRIATIONS ACT, 2008

1. The Agency is directed to report on the short term results and long term assessment plans to reduce lab support costs Agency-wide.

2. The general reduction to this account, as proposed by the House, is not included.

3. It is imperative that EPA issue its decision on the December, 2005 waiver application submitted by the State of California to enact vehicle emission standards to reduce greenhouse gases by 30 percent in 2016 by no later than December 31, 2007. The Committees on Appropriations are dismayed that the EPA Administrator has unreasonably delayed his decision on the petition and forced the State of California to file suit in order to compel a decision. If no decision is made by that date, the Agency is directed to provide a report detailing why there is further delay, as proposed by the House.

Further, the Committees on Appropriations are concerned by reports that officials at other Federal agencies, including the Department of Transportation and the White House Office of Environmental Quality, may have engaged in inappropriate lobbying efforts to deny the waiver. The decision on California's waiver petition must be made on the petition's legal and technical merits and the approval process must not be politicized in any way.

CLIMATE CHANGE COMMISSION

The amended bill does not include the House proposal to fund a new Climate Change Commission.

ENVIRONMENTAL PROGRAMS AND MANAGEMENT

The amended bill provides $2,364,854,000 for Environmental Programs and Management, instead of $2,370,582,000 as proposed by the House and $2,384,121,000 as proposed by the Senate. The table at the end of this Division allocates the total for this account by program area. The Agency is further directed to allocate the funds as follows:

Air Toxics and Quality: $700,000 to restore the Sunwise program to prior year levels.

Brownfields: $527,000 above the request to restore the Smart Growth program to prior year levels.

Climate Protection Program: $49,000,000 for the Energy Star program;

$4,436,000 for the Methane to Markets program;

$3,500,000 within the Federal Support Air Quality Management program for the Agency to use its existing authority under the Clean Air Act to develop and publish a rule requiring mandatory reporting of greenhouse gas emissions above appropriate thresholds in all sectors of the economy. Bill language to this effect is provided in the administrative provisions section. The Agency is directed to publish a draft rule no later than nine months after the date of enactment of this Act, and a final rule no later than 18 months after the date of enactment of this Act. The Agency is further directed to include in its rule reporting of emissions resulting from upstream production and downstream sources, to the extent that the Administrator deems it appropriate. The Administrator shall determine appropriate thresholds of emissions above which reporting is

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EXHIBIT 23

SIERRA CLUB
FOUNDED 1892

September 11, 2008

Via Federal Express

Ms. Erika Durr, Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
~~Colorado Building~~
1341 G Street N.W. Suite 600
Washington D.C. 20005

Re: Deseret Power Electric Cooperative, PSD Permit Number OU-000204.00,
PSD Appeal No. 07-03

Dear Ms. Durr:

Enclosed for filing is one original of the Response of Petitioner Sierra Club to EPA's Supplemental Brief for the above-referenced PSD Appeal Case. If you have any questions about this filing or if I can be of any further assistance please call me at 415-977-5725.

Sincerely,

Joanne Spalding

Enclosures

cc. Counsel of Record

85 Second Street, Second Floor San Francisco, CA 94105-3441 TEL: (415) 977-5772 FAX: (415) 977-5793 www.sierraclub.org

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

In the matter of:)	PSD Appeal No. 07-03
)	
DESERET POWER ELECTRIC)	
COOPERATIVE (BONANZA))	
)	
PSD Permit Number OU-000204.00)	
)	

RESPONSE OF PETITIONER SIERRA CLUB TO EPA'S SUPPLEMENTAL BRIEF

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INTRODUCTION

After oral argument in this case, the Board asked EPA for a supplemental brief to explain two things. First, given EPA's position that Section 821 of the 1990 Amendments is not part of the Clean Air Act, what authority does EPA have to enforce section 821 requirements, and what actions has EPA taken to enforce those requirements? Second, is a facility that emits the requisite amount of CO_2 a "major emitting facility" subject to the PSD requirements of Section 165?

II. EPA's Enforcement History Confirms that Section 821 is Part of the Clean Air Act.

In the course of adopting regulations implementing section 821, EPA consistently took the position that it is part of the Clean Air Act. *See* Petitioner's Opening Br. at 34-35. The documents that EPA has provided with its supplemental brief demonstrate that EPA treated section 821 as part of the Act in its enforcement proceedings as well. These documents confirm that section 821 is both part of the Clean Air Act and enforceable under the Act.

A. EPA Has, Without Exception, Enforced Violations of Section 821 as Violations of the Clean Air Act.

Not surprisingly, EPA has consistently enforced the CO_2 monitoring, reporting and recordkeeping obligations imposed by section 821 and EPA's own Part 75 regulations through the enforcement provisions of the Clean Air Act. *See In the Matter of IES Utilities*, No. VII-95-CAA-111, EPA Supp. Br. Ex. 1 at 3-21; *In the Matter of Indiana Municipal Power Agency*, No. CAA-05-2000-0016, *id.* at 22-46; *In the Matter of City of Detroit*, No. CAA-05-2004-0027, *id.* at 47-61; *United*

States v. Block Island Power Co., CA-98-045 (D.R.I.), *id.* at 62-118; *Sierra Club v. Public Service Co. of Colorado*, No. 93-B-1749 (D. Colo.), *id.* at 119-168. In each of these cases in which EPA has enforced section 821, it has used Section 113 of the Clean Air Act to do so. *See IES Utilities*, EPA Supp. Br. Ex. 1 at 3-7, 16; *Indiana Municipal Power*, *id.* at 22-25, 37; *City of Detroit*, *id.* at 48-49; *Block Island Power*, *id.* at 62-63, 86; *Public Service Co. of Colo.*, *id.* at 126.

In three of those cases, EPA has assessed civil administrative penalties. *See IES Utilities*, EPA Supp. Br. Ex. 1 at 16-18; *Indiana Municipal Power*, *id.* at 38-39; *City of Detroit*, *id.* at 56. Section 113(d)(1)(B) provides that EPA may assess such penalties of up to $25,000 per day of violation when EPA determines that someone:

> (B) has violated or is violating any other requirement or prohibition of this subchapter or subchapter III, IV–A, V, or VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, order, waiver, permit, or plan promulgated, issued, or approved under this chapter, or for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter);

42 U.S.C. § 7413(d)(1)(B). Thus, in those three cases, EPA alleged that violations of section 821 and the implementing regulations were violations of various parts "of this chapter", i.e., the Clean Air Act, and then imposed hundreds of thousands of dollars in penalties for those violations.

EPA also enforced section 821 under section 113(b)(2), wherein the Administrator is authorized "to commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day for each violation, or both":

> (2) Whenever such person has violated, or is in violation of, any other requirement or prohibition of this subchapter, section 7603 of this title, subchapter IV–A, subchapter V, or subchapter VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, order, waiver or permit promulgated, issued, or approved under this chapter, or for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter).

42 U.S.C. § 7413(b)(2). *See Block Island Power*, EPA Supp. Br., Ex. 1 at 62-63, 86. Thus, consistent with its practice in the administrative penalty cases, in at least one instance of violations of section 821, EPA duly invoked federal court jurisdiction for violations "of this chapter." *Id.*

Finally, in one case, EPA also invoked its right under § 304(c)(2) to intervene in an ongoing citizen suit; in turn, that suit was brought under § 304(a)(1)(A) for violations of "an emission standard or limitation under this chapter." *See Public Service Co.,* EPA Supp. Br. Ex. 1 at 122.

At least five times – and at least twice in federal court – EPA has contended that section 821 is a provision of the Clean Air Act and/or that violations of section 821 are violations of the Clean Air Act. EPA's consistent enforcement history confirms that section 821 is indeed part of the Clean Air Act, that its CO_2 monitoring and reporting requirements are enforceable under the Act, and that CO_2 is therefore regulated under the Act.

B. The CO_2 Monitoring Requirements of Section 821 Are Enforceable Under Sections 113 and 304 Through Title V Permits.

While EPA's supplemental filing supplied documents showing that EPA has enforced section 821 requirements, the agency did not explain how these

CO_2 monitoring requirements are incorporated into facility operating permits issued under Title V of the Clean Air Act, providing an avenue for enforcement.

Title V permits must contain terms and conditions that require compliance with section 821 requirements. Section 502(b) of the Act mandated that EPA promulgate regulations establishing permit program requirements that would assure compliance "with each applicable standard, regulation or requirement under this chapter." 42 U.S.C. § 7661a(b)(5); *see also* 42 U.S.C. § 7661c(a). Accordingly, the regulations in 40 C.F.R. Part 71, which govern the Federal Operating Permit Program, require that Title V permits include all "applicable requirements." *See* 40 C.F.R. §§ 71.1(b), 71.3(c)(1), 71.7(a)(1)(iv). Applicable requirements include "[a]ny standard or other requirement of . . . 40 CFR parts 72 through 78." 40 C.F.R. § 71.2. Because the regulations implementing the CO_2 monitoring requirements imposed by section 821 are contained in 40 C.F.R. Part 75, those requirements constitute "applicable requirements" to be included in Title V permits. *See* 40 C.F.R. §§ 75.1, 75.10(a)(3); *see also* 40 C.F.R. § 72.2 (defining a continuous emission monitoring system for CO_2 emissions). The regulations implementing section 821 are thereby incorporated into Title V permits issued under the Clean Air Act.

The Title V regulations further provide:

> Violations of any applicable requirement; any permit term or condition . . . or any regulation or order issued by the permitting authority pursuant to this part are *violations of the Act and are subject to full federal enforcement authorities under the Act.*

40 C.F.R. § 71.12 (emphasis added); *see also* 40 C.F.R. § 75.5(a) (providing that a violation of CO_2 monitoring and reporting requirements is a violation of the

Clean Air Act). The CO_2 monitoring requirements are therefore enforceable under both sections 113 and 304.

While EPA's supplemental filing offers some information on the section 113 enforcement mechanism, it does not explain enforceability under the citizen suit provision. Section 304 allows citizens to commence a civil action against any person alleged "to be in violation of (A) an emission standard or limitation under this chapter." 42 U.S.C. § 7604(a)(1). For purposes of section 304, "emission standard or limitation under this chapter" includes:

> (4) any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter or under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operation
>
> which is in effect under this chapter . . . or under an applicable implementation plan.

42 U.S.C. § 7604(f). Thus citizens may file suit under the Clean Air Act to enforce compliance with terms of Title V permits. Moreover, regulations adopted under the Clean Air Act create duties under the Act enforceable through citizen suits, particularly regulations like those in 40 C.F.R. Part 75, which indicate on their face that they were issued pursuant to the Act. *See Sierra Club. v. Leavitt*, 355 F. Supp. 2d 544, 553-57 (D.D.C. 2005); 40 C.F.R. § 75.1.

C. EPA's Tortuous Attempts to Rationalize Its Enforcement Actions Demonstrate that Section 821 Must Be Part of the Clean Air Act.

At oral argument, EPA's counsel opined that enforcement of the CO_2 monitoring provisions under section 113 of the Act would be inconsistent with the interpretation that section 821 is not part of the Act. Transcript of Oral Argument

of May 29, 2008, at 81-82. Faced with the Board's request for information on past enforcement of section 821, EPA now acknowledges that it has indeed been enforcing CO_2 monitoring requirements under section 113.

EPA has its hands full trying to explain how its prior enforcement actions square with its new view that section 821 is not part of the Clean Air Act, especially in light of its recognition that no alternative authority to enforce section 821 exists. *See* EPA Supp. Br. at 23. First, EPA has to explain away another whole series of instances in which the agency has said both that section 821 is part of the Act and that violations of section 821 are violations of the Act. Next, it devises two alternative theories to explain why enforcing section 821 via the Clean Air Act is not inconsistent with its theory that section 821 is not part of the Act. Finally, EPA struggles to explain its rationale for why enforcement via the Act does not make CO_2 "regulated" under the Act.

EPA's arguments that section 821 is not part of the Clean Air Act were convoluted enough before; now the agency has tied itself in knots Houdini could not escape. EPA concedes that even while exacting both administrative and civil penalties for violations of section 821 (under authority it only possesses through section 113), it "has not previously articulated the precise mechanism through which" these requirements are actually legally enforceable. EPA Supp. Br. at 9. EPA now purports to view this as a case where "mistakes were made": "EPA's pleadings in these enforcement actions generally exhibited the same imprecision found in EPA's references to the section 821 CO_2 requirements in the preamble and regulatory text promulgating the CO_2 requirements in the Part 75

regulations." EPA Supp. Br. at 21. "Imprecision" indeed. For example, EPA's supposedly "mistaken" habit of referring to section 821 "of the Act" (*e.g.*, *Indiana Municipal Power*, EPA Supp. Br. Ex. 1. at 23 ¶ 5, 37 ¶2) carried over when EPA said the same thing to the Supreme Court. 2006 WL 3043970 at 26-27. Apparently, EPA now considers its repeated references to "violations" of the Act to have been similarly "imprecise."

According to EPA, none of this matters, because even though section 821 is not part of the Act, it is nevertheless enforceable via Clean Air Act provisions. Yet those provisions explicitly apply solely to violations of the Act. EPA asks the Board to condone flawed theories that conflict with both the statute and the agency's prior statements and practices, which the agency never publicly articulated until it was asked to justify its refusal to apply BACT to CO_2 emissions in proceedings before this Board. The Board should reject EPA's belated and inadequate justifications.

i. The Incorporation Theory Is Not Viable.

The first theory EPA posits is that the reference to section 412(e) in section 821 means that 821 and the implementing regulations "are enforceable using mechanisms identical to those contained in sections 412(e) and 113 of the Clean Air Act, by virtue of the incorporation of the language from sections 113, 304 and other provisions of the CAA into section 821". EPA Supp. Br. at 12. Incredibly, EPA envisions a virtual statute that lies entirely outside of the Clean Air Act but consists of provisions identical to only a subset of Clean Air Act provisions, some of which are not even identified.

EPA cites two cases to support its theory that the section 821 language that "the provisions of [Section 412(e)] shall apply for purposes of this section in the same manner and to the same extent as such provision applies to . . . section [412]" means that "section 821 can be interpreted to incorporate by reference the general prohibition against lack of monitoring contained in CAA § 412(e) and all of the relevant language contained in CAA §§ 113, 304, and other provisions of the Clean Air Act that would be necessary to enforce that prohibition." EPA Supp. Br. at 19. Neither of these cases is even relevant, as each dealt with whether there was an exception *to statutory language making an express and wholesale adoption of another statute.* Here (assuming that section 821 remains adrift in the statutory ether), we have the exact opposite question: can reference to *a single provision* in "another" statute serve to incorporate assorted different provisions of that other statute that are not referenced and are not reasonably identifiable from the statutory language? In other words, does section 821's reference to section 412(e) magically "incorporate" not only CAA sections 113 ("Federal Enforcement") and 304 ("Citizen Suits"), but also "any other" provisions of the Act "necessary" for enforcement? Of course, the statutory language and structure provide no basis whatsoever for this EPA maneuver, and EPA itself is silent as to what "other" provisions it is referring to, leaving this Board and the regulated community to guess what those might be. EPA is not only imagining a virtual, shadow statute; it cannot even identify the content of that fabrication.

The first case that EPA cites in support of this open-ended incorporation by reference is *Director, Office of Workers' Compensation Programs v. Peabody*

Coal Co., 554 F.2d 310 (7th Cir. 1977). According to EPA, in *Peabody* "[t]he court found that, despite references to only specific provisions of the LHWCA, Congress intended to incorporate the entire compensation scheme of the LHWCA into the FCMHSA." EPA Supp. Br. at 14-15. EPA has it completely backwards: the FCMHSA explicitly incorporated *the entire* LHCWA, *except* certain specific provisions. Section 422(a) of the FCMHSA stated that "the provisions of Public Law 803, 69th Congress [the LHWCA] * * * *other than* the provisions contained in sections 1,2, 3, . . . [etc]. shall * * * be applicable to each operator of a coal mine." 554 F.2d at 319, n. 11, 12 (emphasis added). Since the relevant section of the LHWCA (§18(b)) was not on the "excluded" list, the Seventh Circuit found it was therefore incorporated into the FCMHSA. *Id.* at 327-328. EPA apparently equates the language making "the provisions of" an entire statute "applicable to" the claims at issue in *Peabody* with the specific reference in section 821 applying "the provisions of [section 412(e)]". The court's ruling in *Peabody,* rooted in a specific congressional directive, does not support an interpretation of section 821 as a freestanding statute that incorporates a specifically referenced provision of the Clean Air Act along with any other provisions of that statute that EPA asserts are needed to create its shadow enforcement scheme.

The same flaw underlies EPA's reliance on *United States v. Navistar International Transportation Corp.*, 152 F.3d 702 (7th Cir. 1998). The issue in *Navistar* was whether an action under a state statute that expressly adopted CERCLA's liability provisions should be governed by the CERCLA statute of

limitations or the state's "residual" statute of limitations, *i.e.,* the period applicable in the absence of any specified period. As the Seventh Circuit pointed out:

> We think it likely, *given the wholesale adoption of federal CERCLA law* necessary to effectuate the Indiana statute as it is written, that if Indiana had decided to employ a statute of limitations other than that contained in CERCLA, it would have done so explicitly.

Id. at 714 (emphasis added). Another significant distinction between *Navistar* and the instant case is that *Navistar* addresses incorporation of a federal statute into an entirely separate state statute. Similarly, the *Peabody* decision involves two entirely distinct federal statutes. The logic of those cases does not apply to two provisions — section 412 and section 821 – enacted together in the very same statute.

EPA's position unravels even more when it admits that its theory of incorporation might not work with regard to enforcement of section 821 under section 113(c), the Clean Air Act's criminal enforcement provision. EPA Supp. Br. at 13, n. 4. Even though EPA repeatedly states that the reference to 412(e) by definition includes section 113, it concedes that criminal enforcement may not be available under that theory. *Id.* This omission would mean that, contrary to clear congressional intent evident in the plain language of the statute, the provisions of section 412(e) would not "apply for purposes of [section 821] in the same manner and to the same extent as such provision applies to the monitoring and data referred to in section [412]." 42 U.S.C. § 7651k note. EPA's incorporation theory conflicts yet again with the plain language of the statute.

ii. The Expanding Statute Theory Conflicts with the Text of the Clean Air Act.

Recognizing difficulties with its incorporation theory, EPA offers an alternative. It posits that the phrase "in the same manner and to the same extent" and the reference to section 412(e) found in section 821 have the effect of expanding the reach of sections 412, 113 and whatever additional but unspecified provisions of the Clean Air Act might be necessary to enforce the prohibition. EPA Supp. Br. at 19. This alternative theory has the advantage of explaining EPA's use of section 113 to enforce section 821 requirements. Moreover, it would mean that section 821 is at least enforceable under the Act and therefore regulated under the Act even if it is not part of the Act. *See* Petitioner's Reply Br. at 18. Yet EPA's theory of an elastic Clean Air Act creates undue complications because it would mean that a provision that is allegedly not part of the Act nevertheless has the effect of changing the scope of the Clean Air Act.

Under this theory, section 113 would apply to violations of some completely separate statute that has not even been incorporated into the Clean Air Act by reference, notwithstanding the fact that section 113 by its terms applies only to violations of various provisions of "this chapter" or to plans, permits or regulations adopted pursuant to the Clean Air Act. *See, e.g.,* 42 U.S.C. §§ 7413(a)(3), (b)(2), (c)(1), (d)(1)(B).

The same logic would apply to section 304, which EPA notably omitted from its discussion of expanding Clean Air Act enforcement authority. Yet if the provisions of section 412(e) are to "apply for purposes of [section 821] in the

same manner and to the same extent as such provision applies to the monitoring and data referred to in section [412]," 42 U.S.C. § 7651k note, they must be comparably enforceable via citizen suits. EPA's reading would allow citizens to enforce (and federal courts to exercise jurisdiction over) legal requirements that lie entirely outside of the Clean Air Act. Under section 304, however, citizen suits are limited to requirements imposed "under this chapter" (i.e. under the Clean Air Act), including implementation plans and permits issued pursuant to the Act. *See* 42 U.S.C. §§ 7604(a) & (f).

Similarly, EPA's theory would expand section 412(e) to apply to a separate statute even though it explicitly applies only to noncompliance "with the requirements of this section, and any regulations implementing this section." 42 U.S.C. § 7651k(e). Of course, if section 821—which Congress intentionally codified as a note to section 412, *see* 104 Stat. 2699—is in fact part of the Clean Air Act and indeed part of section 412, then no uncomfortable stretching of Clean Air Act provisions is required.

iii. EPA Cannot Justify Its Flawed Theories Based On Congressional Intent.

According to EPA, Congress intended that section 821 not be part of the Act, but nevertheless intended to have section 821 be enforced via at least three sections of the Act (§§ 113, 304 and 412(e), except maybe not section 113(c)) and possibly some other parts of the Act, but EPA fails to specify what those might be. Following this convoluted analysis, EPA concludes that enforcement of section 821 and the Part 75 regulations via sections 412(e), 113, 304 (and "any

other specific provisions of the CAA necessary") does not make CO_2 "regulated under the Act":

> However, enforcement of the CO_2 monitoring requirements under either of these readings of section 821 of the Public Law does not make carbon dioxide regulated "under the Act," because such a result would be inconsistent with the clear Congressional intent to exclude the requirements of Section 821 of Public Law 101-549 from the Clean Air Act.

EPA Supp. Br. at 24. In other words, enforcing the CO_2 requirements in section 821 via the enforcement mechanisms of the Clean Air Act does not make CO_2 "regulated" under the Clean Air Act because EPA asserts that Congress did want to regulate CO_2 under the Act.

Thus EPA's entire argument rests on circular reasoning that requires this Board to ignore the statutory language and structure; it assumes the conclusion, namely that Congress intended to exclude section 821 requirements from the Clean Air Act. But that conclusion is wrong. Congress enacted section 821 as a part of the Clean Air Act Amendments, applied those requirements to sources identified by their status under the Clean Air Act (those subject to Title IV), required monitoring of CO_2 emissions according to the same timetable as in section 412 of the Act, and made section 821 requirements enforceable under the Clean Air Act by mandating that the "prohibition" provisions of section 412(e) apply to violations of section 821. 42 U.S.C. § 7651k note. While Respondents and their amici have made much of the fact that section 821 refers to "the Clean Air Act" rather than "this Act", that language choice is needed to distinguish the Clean Air Act from the Clean Air Act Amendments of 1990, both of which are referenced in section 821. It does not imply that section 821 is not part of the

Clean Air Act. Moreover, codification as a note to the Act is not an indication of an intent to exclude it from the Act. *See* 104 Stat. 2699. Rather, it is simply a logical way to relate two provisions that have different purposes but the same implementation and enforcement mechanisms. The language and structure of the statute as a whole indicate that Congress intended section 821 to be part of the Clean Air Act.

iv. EPA's New Interpretation Would Impermissibly Revise Existing Agency Interpretations of the Clean Air Act and EPA Regulations.

Even if EPA's reading of the Clean Air Act to exclude Section 821 from the statute were credible, the position is not one that EPA may freely take. EPA has interpreted section 821 as part of the Clean Air Act and violations of section 821 requirements as violations of the Act in published rules. *See, e.g.,* 40 C.F.R. §§ 75.1, 75.5; *see also* 40 C.F.R. § 71.12. The agency has repeatedly affirmed that interpretation in enforcement proceedings. *See* Section I.A *supra*. The agency cannot change that interpretation by fiat in this proceeding. Adopting the view that Section 821 is not part of the Act would substantively amend and revise EPA's authoritative interpretation of the statute and existing Clean Air Act enforcement regulations, rules that were created through notice and comment procedures. Under the doctrine laid out by the D.C. Circuit in *Paralyzed Veterans of America v. D.C. Arena L.P.,* 117 F.3d 579 (D.C. Cir. 1997), if the agency wishes to adopt the position it has taken in this case, it is required to do so first through notice and comment rulemaking.

In *Paralyzed Veterans*, the D.C. Circuit held that once an agency issues an "authoritative interpretation" of its own regulations, the agency cannot freely amend that interpretation without first offering proper opportunities for notice and comment:

> Under the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to "*repeals*" or "*amendments*." *See* 5 U.S.C. § 551(5). To allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements. That is surely why the Supreme Court has noted (in dicta) that APA rulemaking is required where an interpretation "adopt[s] a new position inconsistent with ... existing regulations."

Id. at 586 (quoting *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, ___, 115 S.Ct. 1232, 1239 (1995)). As EPA concedes, its new interpretation could render section 821 requirements unenforceable under the criminal enforcement provisions of the Clean Air Act. EPA Supp. Br. at 13 n.4. It could also have the effect of limiting or eliminating citizen enforcement. Indeed, taking the view that the regulations implementing section 821 requirements are not "under the Act" and that violations of those regulations are not "violations of the Act" could even preclude EPA enforcement of these regulations under the administrative and civil enforcement provisions of the Act, which by their terms apply only to violations of the Act. *See* 42 U.S.C. §§ 7413(a)(3), (b) & (d). The agency is not entitled to adopt that interpretation at all because it is contrary to the plain language of section 821, but it certainly cannot do so without undertaking notice and comment rulemaking. *See, e.g., Environmental Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005)(vacating EPA monitoring rule under *Paralyzed Veterans* due to EPA failure to allow for notice and comment).

D. EPA's Position on Section 821 Has, and Continues to Be, Dependent on Where EPA Appears in the Caption

EPA would have this Board believe that all of the agency's extensive history of treating Section 821 as a part of the Clean Air Act was simply a matter of inattention. EPA implies that this question simply had never arisen before, and now, having been brought to the agency's attention for the first time, it has allowed EPA the opportunity to carefully examine the Act and explain how and why Section 821 is some sort of free-floating provision in the statutory ether.

On the contrary, it is clear that EPA has been aware of this claimed "ambiguity" for more than a decade, and has intentionally and consistently interpreted section 821 as part of the Act in promulgating and enforcing the Part 75 regulations. It is only when section 821's status may be used against agency policy that EPA both reverses its position – as it has done at least once before – and makes the disingenuous claim that it never considered this issue previously.

In the original briefing before this Board, amici Utah and Western Non-Governmental Organizations cited *New York v. Browner*, 1998 WL 213708 (N.D.N.Y. April 21, 1998). In *Browner,* the plaintiff alleged EPA failure to comply with the requirements of section 404 of the 1990 Amendments that – just like section 821 – was codified as a note to part of Title IV; this as a note to section 401. 42 U.S.C. 7651, note. EPA's response to amici's argument was that, "there is no indication that the court was asked to address the specific question of whether section 404(2) of the 1990 CAA Amendments was a part of the Act." EPA Br., March 21, 2008, at 50, n.18.

But there is more to the story. In fact, in its motion for summary judgment (which EPA has courteously provided to Sierra Club during this briefing process), EPA specifically reserved the right to appeal "the additional jurisdictional argument that Plaintiffs' suit may not be brought under the citizen suit provision of the CAA because Section 404 was never incorporated into the CAA." Memorandum in Support of EPA's Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, July 27, 1998 (relevant excerpts annexed hereto as Exhibit A), at 7, n.1.

Thus ten years ago EPA was explicitly taking the position – in a federal court filing, no less – that some provisions of the 1990 Amendments codified as notes to Title IV were not incorporated into, or considered requirements of, the Clean Air Act for purposes of judicial review. So on the one hand, when EPA is the defendant, and is seeking to avoid responsibilities imposed by such notes, they are **not** part of the Clean Air Act. On the other hand, when EPA is the plaintiff and is seeking to enforce those provisions – in at least those five enforcement cases, and perhaps others – then they **are** part of the Clean Air Act.

EPA cannot have it both ways, and in the case of section 821, the agency has adopted a definitive position that the provision is indeed part of, and enforceable under, the Clean Air Act. The language and structure of the statute support that interpretation, and EPA must abide by it.

II. The Board Need Not Reach the Definition of "Major Emitting Facility"

Because the Bonanza facility is indisputably a "major emitting facility" under section 169(1) of the Act, 42 U.S.C. § 7479(1), the regulations interpreting

that provision are not before the Board in this case. While the issues related to the Board's second question in its Request for Further Briefing are thought-provoking, the Sierra Club respectfully suggests that the Board need not reach them.

The Sierra Club believes that the Supreme Court's decision in *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007), does indeed require EPA to completely rethink its approach to regulation of greenhouse gases under the Clean Air Act, *see* Petitioner's Opening Br. at 6-10, but this case does not require the Board to invalidate any existing regulation. On the contrary, because CO_2 is regulated under the Clean Air Act, the Board need merely apply the existing EPA regulation mandating a BACT analysis for "any pollutant . . . subject to regulation under the Act." 40 C.F.R. § 52.21(b)(50)(iv). To the extent that the agency determines it necessary to deal with issues related to new sources that are now subject to PSD requirements solely as a result of CO_2 emissions, those issue are best addressed by this Board in a case that squarely raises those issues or by the policymaking entities within the agency. *See* Advance Notice of Proposed Rulemaking, Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44354 (July 30, 2008).

Because the "major emitting facility" definition is not at issue here, the Sierra Club respectfully declines to offer a detailed response to EPA's brief on this issue. That does not mean, however, that the Sierra Club concurs in EPA's analysis. On the contrary, EPA's argument fails to carry the heavy burden required to show that the statute should be interpreted contrary to its plain

meaning, and similarly fails to show that the doctrine of administrative necessity justifies its interpretation of the statute. *See Alabama Power v. Costle*, 636 F.2d 323, 356-61 (D.C. Cir. 1979). Most importantly, EPA's efforts to limit the impact of the *Massachusetts v. EPA* decision ignore the sweeping language of that decision. *See* Petitioner's Opening Br. at 6-10.

To the extent that the EPA's interpretation of section 169(1) and the potential impact of *Massachusetts v. EPA* on that interpretation informs the Board's decision in this case, it would be valuable to consider the Supreme Court's admonition to interpret the broad language of the Clean Air Act to give full effect to the congressional intent to address changed circumstances and scientific developments. 127 S.Ct. at 1462. EPA has already narrowed the reach of the PSD program by interpreting it to apply to only sources of regulated air pollutants. In light of the statutory language, to further narrow its scope by interpreting "regulated" to mean "subject to actual control of emissions" would contravene both the language of the Act and the direction of the Supreme Court.

CONCLUSION

The documents submitted by EPA in response to the Board's request for further briefing demonstrate that the CO_2 monitoring requirements of section 821 are both part of the Clean Air Act and enforceable under the Act. CO_2 is clearly regulated under the Clean Air Act, and the Bonanza PSD permit must therefore include a BACT emissions limit. The Sierra Club respectfully requests that the Board remand to permit with instructions to include a CO_2 BACT limit.

Respectfully submitted,

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Dated: September 11, 2008

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response of Petitioner Sierra Club to EPA's Supplemental Brief were served by United States First Class Mail on the following persons this 11th of September, 2008:

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EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK Plaintiff, v. CAROL M. BROWNER, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and the ENVIRONMENTAL PROTECTION AGENCY, Defendants.	)	Civil Action No. 97-1028 (TJM; RWS)

MEMORANDUM OF LAW IN SUPPORT
OF EPA'S CROSS-MOTION FOR SUMMARY JUDGMENT
AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

ARGUMENT

The Court should enter judgment in EPA's favor for the following reasons. First, EPA fulfilled its nondiscretionary duty under section 404 of the 1990 CAA Amendments when it issued its Acid Deposition Report that included the requisite consideration of possible acid deposition standards. Second, to the extent EPA had a duty to provide a description of possible deposition standards, that duty was clearly met because the Report itself actually describes the nature and numerical value of such standards. Finally, to the extent Plaintiffs' challenge is to the substance of the Report, such a challenge cannot be maintained in the context of a mandatory duty suit.[4]

I. EPA FULFILLED ITS NONDISCRETIONARY DUTY UNDER SECTION 404 OF THE CLEAN AIR AMENDMENTS OF 1990 WHEN IT ISSUED ITS ACID DEPOSITION REPORT.

A. EPA Fulfilled Its Mandatory Duty Under Section 404 Of The Clean Air Act Amendments Of 1990 Because It Considered The Topics Enumerated In The Statute.

1. Mandatory Duty Claims Are Very Narrowly Defined By Statute.

Plaintiffs' filed this action under CAA section 304. 42 U.S.C. § 7604(a)(2). Under section 304 (a)(2) of the CAA, a citizen can sue only to compel action where the EPA

---

[4] Before reaching the merits of this case, EPA expressly reserves the right to appeal jurisdiction on the grounds contained in its Motion to Dismiss as well as any other jurisdictional grounds. This includes the additional jurisdictional argument that Plaintiffs' suit may not be brought under the citizen suit provision of the CAA because section 404 was never incorporated into the CAA. The CAA citizen suit provision explicitly limits suits to those brought against the Administrator "under this chapter." CAA section 304(a)(2). Because section 404 was never incorporated into the CAA, it is not a part of "this chapter" for purposes of review. This is also the case for suits brought pursuant to the CAA judicial review provisions which limits claims to "final action taken, by the Administrator under this chapter." See CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1).

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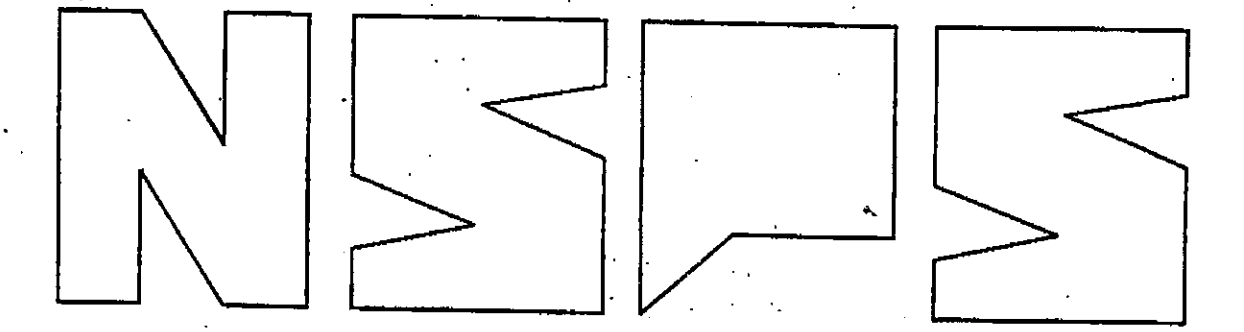
EXHIBIT 24

United States Environmental Protection Agency
Office of Air Quality Planning and Standards Research Triangle Park NC 27711
EPA-450/3-90-011a
March 1991
Air

EPA

Air Emissions from Municipal Solid Waste Landfills - Background Information for Proposed Standards and Guidelines



2. HEALTH AND WELFARE EFFECTS OF AIR EMISSIONS FROM MUNICIPAL SOLID WASTE LANDFILLS

2.1 INTRODUCTION

This chapter presents a summary of the potential adverse health and welfare effects of air emissions from municipal solid waste (MSW) landfills. The five major effects of MSW landfill air emissions are (1) human health and vegetation effects caused by ozone formed from nonmethane organic compound (NMOC) emissions, (2) carcinogenicity and other possible noncancer health effects associated with specific MSW landfill emission constituents, (3) global warming effects from methane emissions, (4) explosion hazards, and (5) odor nuisance. In addition, soils and vegetation on or near the landfills are adversely affected by MSW landfill emissions migrating through the soil. The above effects are briefly summarized below and in Table 2-1.

A variety of different NMOCs have been detected in air emissions from MSW landfills. In the atmosphere, NMOCs can contribute to formation of ozone through a series of photochemical reactions. The ozone formed through these reactions can exert adverse effects on human health and on vegetation. The effects ozone exerts on both human health and vegetation are discussed in greater detail in Section 2.2.

There are potential acute and chronic health hazards associated with several chemical species in MSW landfill emissions. The potential cancer risks associated with exposure to MSW landfill emissions have been considered by EPA (see Section 2.3). There are also other chronic noncancer health effects associated with some of the individual chemicals found in MSW landfill air emissions. Qualitative descriptions of both the cancer and noncancer health effects are also included in Section 2.3.

The landfill gas that is generated from the decomposition of municipal solid waste in a landfill consists of approximately 50 percent methane and 50 percent carbon dioxide, and less than 1 percent NMOCs. The methane emissions are of concern for two reasons: 1) methane, one of the "greenhouse gases", contributes to the phenomenon of global warming

TABLE 2-1. SUMMARY OF THE HEALTH AND WELFARE EFFECTS ASSOCIATED WITH MSW LANDFILL EMISSIONS AND COMPONENTS

Component	Health and welfare effects
Ozone	Alterations in pulmonary function, aggravation of pre-existing respiratory disease, damage to lung structure; foliar injury, such as stippling or flecking, reduced growth, decreased yield
Toxics	Leukemia, aplastic anemia, multiple myeloma, cytogenic changes, damage to liver, lung, kidney, central nervous system, possible embryotoxicity, brain, liver and lung cancer, possible teratogenicity
Methane	Death, burns, dismemberment due to explosions and fires; property damage; contribution to phenomenon of global warming; MSW landfill emissions migrating through the soil on or near the landfill inhibits revegetation, causing deep root death
Odor	Odor nuisance, leading to annoyance, irritability, tension, reduction in outdoor activities, reduction in property values, decreased commercial investment leading to decreased sales, tax revenue

(Section 2.4); and 2) the accumulation of methane gas in structures both within and beyond the landfill boundary has resulted in explosions, fires, and subsequent loss of property (Section 2.5).

Pollutants that exert effects on human welfare are pollutants that affect the quality of life, cause damage to structures, or result in a loss of vegetation. The welfare effects of concern associated with MSW landfill air emissions include, in addition to destruction of property by explosions, emanation of odors and effects on soil and vegetation. Although odor perception is extremely variable and subjective, sociological studies have shown extreme annoyance and emotional disturbances in individuals residing in areas where objectionable odors are present. Property values may decrease and economic disadvantages may result in communities in or near a source of perceived malodorous emissions such as those from MSW landfills. Section 2.6 discusses odor generation by MSW landfills and some of the studies and surveys that have been done about the problem of odor nuisance. Also, revegetation of uncontrolled landfills after closure is often unsuccessful because the landfill gases affect plant root structure. This effect is discussed in Section 2.7.

2.2 EFFECTS ON HUMAN HEALTH AND VEGETATION CAUSED BY AMBIENT OZONE FORMED FROM NONMETHANE ORGANIC EMISSIONS

2.2.1 Health Effects Associated with Exposure to Ozone

Ozone and other oxidants found in ambient air are formed as the result of atmospheric physical and chemical processes involving two classes of precursor pollutants, NMOCs and nitrogen oxides (NO_x). NMOCs are constituents of the air emissions from MSW landfills. Therefore, emissions of NMOCs from landfills also contribute to ozone formation. The effects of ozone on human health are well documented. There are several different mechanisms through which ozone can exert adverse effects on human health. Ozone can penetrate into different regions of the respiratory tract and be absorbed through the respiratory system. Indirect effects of ozone are those such as adverse effects on the pulmonary system resulting from chemical interactions of ozone as it progresses through the system. Finally there may be adverse effects on other body organs and tissues caused indirectly by reactions of ozone in the lungs.[1]

2.4 METHANE EMISSIONS CONTRIBUTING TO GLOBAL WARMING

Greenhouse gases serve to trap heat from the sun and maintain the earth's climate. Methane and other greenhouse gases such as carbon dioxide and nitrous oxide occur naturally in the atmosphere. They serve as a thermal blanket allowing solar radiation to pass through the atmosphere while absorbing some of the infrared radiation emitted back from the earth's surface. The absorption of radiation warms the atmosphere and provides the present climate. The earth would be approximately 30 degrees colder without the presence of greenhouse gases. The atmospheric temperature will increase if the concentrations of greenhouse gases are increased.[55-57]

Anaerobic decomposition of municipal solid waste in landfills results in the decomposition of municipal solid waste in landfills results in the generation of methane and carbon dioxide. An estimate of the amount of methane and carbon dioxide from MSW landfills is provided in Chapter 3. Methane is more potent than CO_2 due to its radiative characteristics and other effects methane has on atmosphere chemistry. Molecule-for-molecule methane traps 20-30 times more infrared energy in the atmosphere. Therefore even a small increase in the methane concentration in the atmosphere is a concern to scientists trying to predict the warming of the climate.[58-60]

There is considerable uncertainty with regard not only to the timing but also to the ultimate magnitude of any global warming. However, there is currently strong scientific agreement that the increasing emissions of greenhouse gases such as methane will lead to temperature increases. Within EPA and the international scientific community efforts are underway to reduce these uncertainties, estimate the cost of mitigation, and identify possible control options. Reduction of methane emissions from MSW landfills is one of many options available to reduce possible global warming.

2.5 EXPLOSION HAZARDS

2.5.1 Health Effects Associated with the Explosivity Of Municipal Solid Waste Landfill Air Emissions

Decomposition of the waste in MSW landfill air emissions produces the explosive methane gas. If the methane accumulates in structures on or off-site, explosions or fires can result. MSW landfill air emissions have

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EXHIBIT 25

THE WHITE HOUSE
PRESIDENT
GEORGE W. BUSH

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For Immediate Release
Office of the Press Secretary
May 14, 2007

President Bush Discusses CAFE and Alternative Fuel Standards

Rose Garden

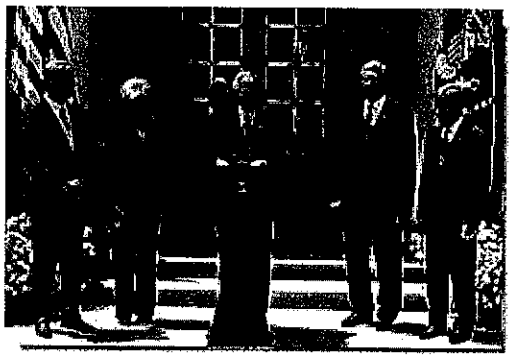
Fact Sheet: Twenty in Ten: Strengthening Energy Security and Addressing Climate Change
Executive Order: Cooperation Among Agencies in Protecting the Environment with Respect to Greenhouse Gas Emissions From Motor Vehicles, Nonroad Vehicles, and Nonroad Engines
In Focus: Energy

Video (Windows)
Presidential Remarks
Audio

1:21 P.M. EDT

THE PRESIDENT: Thank you all for coming. Good afternoon. I just finished a meeting with the Administrator of the Environmental Protection Agency, Secretaries of Transportation and Agriculture, and the Deputy Secretary of Energy. Thank you all for being here.

We discussed one of the most serious challenges facing our country: our nation's addiction to oil and its harmful impact on our environment. The problem is particularly acute in the transportation sector. Oil is the primary component of gasoline and diesel, and cars and trucks that run on these fuels emit air pollution and greenhouse gases.



Our dependence on oil creates a risk for our economy, because a supply disruption anywhere in the world could drive up American gas prices to even more painful levels. Our dependence on oil creates a threat to America's national security, because it leaves us more vulnerable to hostile regimes, and to terrorists who could attack oil infrastructure.

For all these reasons, America has a clear national interest in reducing our dependence on oil. Over the past six years, my administration has provided more than $12 billion for research into alternative sources of energy. I'd like to thank the Congress for its cooperation in appropriating these monies. We now have reached a pivotal moment where advances in technology are creating new ways to improve energy security, strengthen national security, and protect the environment.

To help achieve all these priorities, I set an ambitious goal in my State of the Union: to cut America's gasoline usage by 20 percent over the next 10 years. I call this goal 20-in-10, and I have said -- sent to Congress a proposal that would meet it in two steps: First, this proposal will set a mandatory fuel standard that requires 35 billion gallons of renewable and other

alternative fuels by 2017. That's nearly five times the current target.

Second, the proposal would continue our efforts to increase fuel efficiency. My administration has twice increased fuel economy standards for light trucks. Together, these reforms would save billions of gallons of fuel and reduce net greenhouse gas emissions without compromising jobs or safety.

My proposal at the State of the Union will further improve standards for light trucks and take a similar approach to automobiles. With good legislation, we could save up to 8.5 billion gallons of gasoline per year by 2017, and further reduce greenhouse gas emissions from cars and trucks.

Last month, the Supreme Court ruled that the EPA must take action under the Clean Air Act regarding greenhouse gas emissions from motor vehicles. So today, I'm directing the EPA and the Department of Transportation, Energy, and Agriculture to take the first steps toward regulations that would cut gasoline consumption and greenhouse gas emissions from motor vehicles, using my 20-in-10 plan as a starting point.

Developing these regulations will require coordination across many different areas of expertise. Today, I signed an executive order directing all our agencies represented here today to work together on this proposal. I've also asked them to listen to public input, to carefully consider safety, science, and available technologies, and evaluate the benefits and costs before they put forth the new regulation.

This is a complicated legal and technical matter, and it's going to take time to fully resolve. Yet it is important to move forward, so I have directed members of my administration to complete the process by the end of 2008. The steps I announced today are not a substitute for effective legislation. So my -- members of my Cabinet, as they begin the process toward new regulations, will work with the White House, to work with Congress, to pass the 20-in-10 bill.

When it comes to energy and the environment, the American people expect common sense, and they expect action. The policies I've laid out have got a lot of common sense to them. It makes sense to do what I proposed, and we're taking action, by taking the first steps toward rules that will make our economy stronger, our environment cleaner, and our nation more secure for generations to come.

Thank you for your attention.

END 1:27 P.M. EDT

Return to this article at:
http://www.whitehouse.gov/news/releases/2007/05/20070514-4.html

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Conservation Petitioners' Exhibits

EXHIBIT 26

THE WHITE HOUSE
PRESIDENT
GEORGE W. BUSH

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For Immediate Release
Office of the Press Secretary
May 14, 2007

Briefing by Conference Call on the President's Announcement on CAFE and Alternative Fuel Standards

President Bush Discusses CAFE and Alternative Fuel Standards
Fact Sheet: Twenty in Ten: Strengthening Energy Security and Addressing Climate Change
In Focus: Energy

White House News

PARTICIPANTS:

Secretary Of Transportation Mary Peters
Secretary Of Agriculture Michael Johanns
Epa Administrator Stephen Johnson
Deputy Secretary Of Energy Clay Sell
Deputy Press Secretary Scott Stanzel

2:07 P.M. EDT

MR. STANZEL: Thank you all for joining us today. As you know, the President made an announcement just a short time ago about his directing the administration to take action to implement his 20-in-10 plan, to reduce our nation's addiction to oil. And as you know, in his State of the Union address, the President proposed this 20-in-10 plan, and this action today follows on that.

We are joined today by EPA Administrator Stephen Johnson, Secretary of Transportation Mary Peters, Secretary of Agriculture Mike Johanns, and Deputy Secretary of Energy Clay Sell. I'm going to turn it over momentarily to Administrator Johnson, who will talk a little bit about today's announcement. And then we'll have some brief comments from Secretary Peters, Secretary Johanns, and Deputy Secretary Sell about their involvement in this very important issue.

So with that, I'll turn it over to Administrator Johnson.

ADMINISTRATOR JOHNSON: Thanks very much. This is Steve Johnson, Administrator of the U.S. Environmental Protection Agency. And I also want to add my thanks to all of you for joining us on the call.

As was noted, earlier today President Bush signed an executive order directing EPA, the Department of Transportation, the Department of Energy and the Department of Agriculture to coordinate on the development of possible regulatory actions to address the emissions from mobile sources that contribute to global climate change. Following this direction, and put simply, the Bush administration is taking the first regulatory step to address greenhouse gas

emissions from cars.

On April 2, 2007, the U.S. Supreme Court decided in Massachusetts versus EPA that the Clean Air Act provided EPA the statutory authority to regulate greenhouse gas emissions from new vehicles if I determine in my judgment whether such emissions endanger public health and welfare under the Clean Air Act. Today the President has responded to the Supreme Court's landmark decision by calling on EPA and our federal partners to move forward and take the first regulatory step to craft a proposal to control greenhouse gas emissions from new motor vehicles.

This rule-making will be complex and will require a sustained commitment from the administration to complete it in a timely fashion. While the President's 20-in-10 plan, which would increase the supply of renewable and alternative fuel and reform the CAFE standards, will serve as a guide, we have not reached any conclusions about what the final regulation will look like. In most instances, by federal law, the Environmental Protection Agency must follow a specific process and take several steps before issuing a final regulation. This is a complex issue and EPA will ensure that any possible rule-making impacting emissions from all new mobile sources through the entire United States will adhere to the federal law.

We will solicit comments on a proposed rule from a broad array of stakeholders and other interested members of the public. Our ultimate decision must reflect a thorough consideration of public comments and an evaluation of how it fits within the scope of the Clean Air Act. Only after EPA has issued a proposal and considered public comments can it finalize a regulation. Today's announcement reflects our commitment to move forward expeditiously and responsibly.

While this is the first regulatory step, it builds on the Bush administration's unparalleled financial, international and domestic commitments to reducing global greenhouse gas emissions. Since 2001, EPA and the entire administration have invested more than $37 billion to study climate change science, promote energy-efficient and carbon-dioxide-reducing technologies, and fund tax incentive programs. As you all know, that's more money than any other country in the world has spent to address this global challenge.

Under the President's leadership, our nation is making significant progress in tackling greenhouse gas emissions. According to EPA data reported to the United Nations Framework Convention on Climate Change, U.S. greenhouse gas intensity declined by 1.9 percent in 2003, declined by 2.4 percent in 2004, and 2.4 percent again in 2005. Put another way, from 2004 to 2005, the U.S. economy has increased by 3.2 percent, while greenhouse gas emissions increased by 0.8 percent.

In another study, the International Energy Agency reported that from 2000 to 2004, U.S. emissions of carbon dioxide from fuel combustion grew by 1.7 percent, while our economy expanded by nearly 10 percent. Yet, during this time of growth, the United States actually reduced its carbon dioxide intensity by 7.2 percent.

Our aggressive and practical strategy is working. America is on track to meet the President's goal to reduce greenhouse gas intensity by 18 percent by 2012. By taking this first regulatory step to address greenhouse gas emissions from cars, we are maintaining America's unparalleled leadership in addressing global climate change while strengthening our energy security.

Thanks very much.

SECRETARY PETERS: Scott, thank you, and thanks to everyone who is on the call with us today. The President understands that each of our agencies bring significant knowledge, expertise and skill to bear when it comes to meeting his ambitious goal of 20-in-10. We have wide-ranging experience and significant technical knowledge at the Department of Transportation when it comes to setting fuel economic standards that require automakers to install fuel savings technology on every type of pickup truck, SUV, and minivan, regardless of their size or weight.

As a result, our repeated increases in the fuel economy standards for the light truck category of vehicles have set tough new mileage targets while encouraging consumer choice, maintaining vehicle safety, and of course, protecting jobs and the American economy.

We intend to share this experience as we work closely with EPA and the other agencies to meet the President's direction to evaluate regulatory solutions based on 20-in-10 and the framework that the President has provided. This will reduce greenhouse gas emissions and strengthen energy security.

Scott, thank you so much.

MR. STANZEL: Thank you, Secretary Peters.

Secretary Johanns.

SECRETARY JOHANNS: Scott, thank you. And to everyone on the call, we appreciate the opportunity to offer a few words on this presidential initiative.

The President has provided a very important blueprint to address energy security with his 20-in-10 proposal. And now, through a coordinated effort, the agencies are putting the building blocks in place.

For the United States Department of Agriculture, renewable energy is a top priority. The President's goal to achieve 20-in-10 has ignited what I would describe as a transformational period, nothing short of that, in American agriculture. He's articulated a definite vision and he has followed up on that in our case, in Agriculture's case, with a very aggressive Farm Bill proposal that will fit perfectly with what he talked about this afternoon.

We've already put forth a Farm Bill proposal that would increase funding for renewable energy by $1.6 billion. Without question, the President's proposals represent the most significant commitment to renewable energy that's ever been proposed in farm legislation. It's focused on cellulosic ethanol, which is where we believe the next step is in terms of ethanol development. And it's also one of the building blocks that will help us achieve 20-in-10.

The Farm Bill proposals would expand research into cellulosic ethanol, to improve biotechnology, and create a better crop for conversion to renewable energy and to improve that conversion process, making it more efficient and, therefore, more commercially viable.

These proposals also fit well with the President's announcement because they provide funding to support more than a billion dollars in guaranteed loans, to encourage the construction of the

commercial-scale cellulosic plants.

I do want to mention finally that the United States Department of Agriculture has worked hand-in-hand with the Department of Energy to ensure our efforts are complementary, and to send a very strong signal to the marketplace that this administration supports renewable energy production, just as the President has indicated yet again today. There is no question that American agriculture has an important role to play in the renewable energy field and in achieving the 20-in-10 goal. The President has recognized that and embraced it through the Farm Bill proposals that we have put out.

MR. STANZEL. Thank you, Secretary Johanns. Now I'll turn it over to Deputy Secretary of Energy Clay Sell.

DEPUTY SECRETARY SELL: Good afternoon. Secretary Bodman is meeting in Paris today at the biannual meeting of the International Energy Agency, so I'm pleased to be here on his behalf.

Matters of energy security cannot be separated from our priorities for environmental stewardship. And it is our view at the Department of Energy, and I think it is the view held inside the administration, that technology and the development of technology is the key to addressing these two issues together. And as part of developing the technology, we also must focus on the policies that will help pull these technologies into the marketplace on a time frame that is relevant to address the problems at hand.

And so we have looked forward to working with the Congress on the President's legislative proposals in 20-in-10, and we now look forward to working with our colleagues inside the administration to pursuing this regulatory path, as well. Thanks.

Q This is a work that's just starting in progress. Can any of you assure us that there will be a CAFE element in the package when you complete it?

SECRETARY PETERS: I'll take that question from the Department of Transportation, and then defer it to Steve Johnson at EPA.

As you mentioned, we're just starting the process right now. So our first step will be to evaluate the impacts of the ruling and where we want to go with the 20-in-10, and then determine whether or not we move forward with a CAFE regulation. But it is our intent to implement the President's 20-in-10.

ADMINISTRATOR JOHNSON: As a very practical matter that there are two ways of controlling greenhouse gas emissions from new cars. One is the fuel, and our comments on the alternative fuel and renewable fuel; and the second is through efficiency of the automobile, or hence, CAFE.

So what is particularly noteworthy is the President's legislative plan of CAFE reform and alternative fuel supply is very consistent with where -- a good starting point for us to be from a regulatory standpoint because it addresses the two areas where there's an opportunity to not only deal with greenhouse gas emissions, but also energy security.

Q Just wanted to ask about the time frame here. You mentioned that you're not going to rule

out any action or lack thereof. The President today set a goal to wrap up work by the end of 2008. Just kind of clarify what exactly he's calling for and how the Clean Air Act might enter into here. The Clean Air Act was mentioned in the executive order, as well.

ADMINISTRATOR JOHNSON: The first step that we're taking to initiate a regulatory process is through the Clean Air Act, and that what the President has asked that we do as Cabinet members is to proceed so that we can have a final regulation in place by the end of 2008. The process that we go through for any rule-making, we develop the proposal; we issue it for notice and comment; then based upon those comments, then we make a final decision, which is then incorporated into the final rule.

So today's announcement is the first step in that regulatory process, and that is we are now going to be turning our attention to developing a proposal which will then go through notice and comment rule-making.

MR. STANZEL: And, Chris, I should note -- and I should note for everyone else on the call -- we did release the executive order. That's available at WhiteHouse.gov, as is a fact sheet about today's announcement.

Next question.

Q I also wanted to ask about the time element. You talk about operating in an expeditiously and a timely fashion, yet it's 17 months before you expect to get anything done. Congressman Markey has put out a release; it calls this yet another stall tactic by the President. How do you explain why it takes so long? What do you say to his comments that it's a stall tactic?

ADMINISTRATOR JOHNSON: Having been at the EPA for 26 years now, I can tell you that a rule-making process -- typically, a rule-making process at the agency takes between 18 and 24 months. And so you can do the calculation, but this is expediting a rule-making. This is very important that we expedite, but it's also very important that we have a close collaboration among particularly the Department of Transportation, Energy, Agriculture and ourselves, and do it right.

SECRETARY PETERS: If I could just add briefly, what the President's proposal does is weigh the balance of policy issues, which includes safety, sound science, technology, public input, cost and benefits, economic impact, and American jobs. And it's very important we consider all these factors as we go forward.

Q You've already got legislative proposals, I believe, out to do what you're saying you now want to accomplish through a rule-making. But you also still say that you're seeking legislation. So is this a two-track thing, you're trying to accomplish these things legislatively, and if you don't succeed legislatively, then you're saying you're going to implement them in a rule-making? And if you can implement them in a rule-making, why not just go ahead and do that and not seek the legislation anymore?

ADMINISTRATOR JOHNSON: We are -- it is, as you correctly pointed out, it is a dual track. We would prefer that legislation be enacted over regulation. The reason is, is that legislation provides certainty; it also insulates against lengthy litigation where nothing gets done while things are being litigated in a court system. So we prefer legislation. But due to the Supreme Court decision, we are also now moving forward on a regulatory path, as well.

Q In the Supreme Court ruling, Justice Stephens wrote: "Under the clear terms of the law, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change, or it provides some reasonable explanation why regulations are not needed." Does effectively your decision to start the regulatory process mean that you are choosing not to make the argument that greenhouse gases do not contribute to climate change, and effectively mean that the administration is formally accepting that greenhouse gases contribute to climate change?

ADMINISTRATOR JOHNSON: With today's announcement, what we are announcing is the first step in the regulatory process of which we will, as part of our proposal, lay out our rationale that would include both whether it causes or contributes to climate change, as well as the issue of endangerment. That will all be laid out in our proposal.

So at this point, it's premature to speculate, but again, this is an important first step in beginning the regulatory process.

Q So if I could just follow up then. The administration, then, is not taking a position at this point on whether greenhouse gases contribute to climate change?

ADMINISTRATOR JOHNSON: Well, we as administration, have said that we know that emissions contribute to climate change and that this is a serious issue. That's why, as an administration, the President has -- and as a nation, we've invested $37 billion since 2001 to address both the science, technology, and even provided some tax incentives to help us move along.

So this is -- it's a serious issue, and it's an important issue, and that's why today is an important announcement, because we are taking the first step beginning the regulatory process.

Q Just -- you need to be clear on this point, though. Previously, the administration's position was not -- was that it was unclear whether carbon dioxide was a pollutant under the Clean Air Act. What you're saying is that although you're beginning this regulatory process, you are not accepting that contention yet that was in the Supreme Court ruling?

ADMINISTRATOR JOHNSON: No, that's not what I'm saying. The Supreme Court ruled that carbon dioxide is a pollutant. We accept the Supreme Court's decision, and we're now moving forward with the first step in the regulatory process. But it's just like any other pollutant that EPA regulates; that is to say, we have to put together what are rational -- what is our basis for regulating a pollutant, taking into consideration effects on people and the environment, in this case, including issues of safety, as well as the cost and benefits of moving forward with whatever approach that we decide to move forward with.

So, again, bottom line, this is an important first step in the regulatory in addressing greenhouse gas emissions from automobiles.

Q I think you just answered this question, but for Administrator Johnson, so will you do an endangerment finding before proposing a rule? And how soon would you like to at least propose the rule?

ADMINISTRATOR JOHNSON: Well, our target for a draft proposal will be fall of this year. And

as part of that proposal, we will address the endangerment finding as part of the proposal.

Q I was wondering if you can tell me how you come up with that $37 billion number.

MR. STANZEL: Well, that goes back to all the climate research back to 2001. And I can hook you up with some experts at OMB that can walk you through all of the monies that have been spent. I don't have those figures -- the breakdown at my fingertips, but we can certainly get that to you, Steven.

Q Is that including tax incentives for alternative energy items?

MR. STANZEL: I would defer to the experts at OMB, and I can connect you with them.

Q Can I ask another question, then?

MR. STANZEL: Certainly, go ahead.

Q Wouldn't you be in violation of the Supreme Court ruling if you didn't go ahead and do this? I'm having a little trouble figuring out what the news is here, really.

ADMINISTRATOR JOHNSON: The Supreme Court -- and I like to refer to the Scalia summary of the Supreme Court decision, even though he was dissenting. He, in essence, said, if I can paraphrase, that if the Administrator determines -- if I were to determine that there is endangerment, then I would be required to regulate. That's option one.

Option two is, if I determine that there was not endangerment, then I would not be required to regulate. And then option three was, if there was some other reason and rational explanation for why it was not necessary to regulate, then that would be an option, as well.

So the Supreme Court did not direct us to regulate. It identified, as I said, three options which the Scalia summary is, I think, a handy reference for.

MR. STANZEL: Thank you, Steven. And I will contact you and we'll get you in touch with the OMB.

Next question.

Q I wanted to ask you, the President did speak today about the proposal he had sent to Congress, and he spoke about increased fuel efficiency. Yet you seem to be evading the question about whether CAFE standards will actually emerge from this work. Can you just flatly say whether you expect to see some new CAFE standards for automobiles by the end of 2008?

ADMINISTRATOR JOHNSON: Since we have to develop a proposal which goes to notice and comment rule-making, it would not be appropriate for me to say what the final rule or regulation will look like. What I did say is, there are two ways of controlling greenhouse gas emissions, at the same time improving energy efficiency. But under the Clean Air Act, our focus is on reducing greenhouse gas emissions. That's, one, through the efficiency of automobiles, and the second is the type of fuel that you put into those automobiles.

And so it just seemed logical that we would be pursuing both of those, certainly as part of our proposal. And, in fact, that's what we have announced today, because it's very much in line with what the President's legislative proposal is.

Q I have one more question regarding legislation. So under your reading of this law, there is basically nothing that you can't do without Congress -- that you need Congress's approval for? The EPA would be free to set up a class-based CAFE system without -- for past-year cars without having congressional approval?

ADMINISTRATOR JOHNSON: In fact, the Supreme Court in language -- if I can quote to you from their opinion -- it says, "EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies." So there is significant latitude that we have.

Q And have you and Administrator Peters worked out how much of the work load on coming up with these standards will be split between your agencies?

ADMINISTRATOR JOHNSON: Well, through -- since this regulation will be done through -- principally through the Clean Air Act, then it is my responsibility, the agency's responsibility to oversee and actually develop the regulation. But it's also equally important, and it was important to the President, to make sure that we are coordinating and collaborating with our federal partners, particularly the Department of Transportation, Department of Energy, and Department of Agriculture -- hence, the executive order.

Q Yes, Mr. Johnson, what are you -- sir, are you clear that you have the authority to do -- to increase the renewable fuel standard, or impose this alternative fuel standard without any further legislation?

ADMINISTRATOR JOHNSON: Yes.

Q -- increasing the mandate?

ADMINISTRATOR JOHNSON: Yes.

Q That's under the Clean Air Act?

ADMINISTRATOR JOHNSON: Yes. There is -- Section 211 of the Clean Air Act focuses on fuels; Section 202 is on motor vehicles.

Q Well, I've got just one follow-up. Your intent is to issue a draft by this fall, and then a final proposed rule-making by the end of 2008?

ADMINISTRATOR JOHNSON: The correct term would be a final rule-making that would then be law and go into effect that people would be required to follow by the end of 2008.

Q Would it be imposed by the end of -- or just going to -- because you have a comment period, obviously, after you issue the final ruling.

ADMINISTRATOR JOHNSON: The proposal -- the sequence, we develop a proposed rule-making; then we take public comment on that proposed rule-making, which I said we would --

our goal is to have a proposal out this fall, fall of 2007. Then there would be a notice and comment; then we then review all of those comments, and then make a final decision, which would then be issued in the final regulation, which the President has asked for us to have it completed by the end of 2008.

The actual schedule of implementation and what the nature of the rule would be would all be part of that final regulation. Whether things go into effect immediately, or are sequenced over time, those are all the considerations that will go into both the proposal as well as ultimately the final regulation.

Q Okay, but this would be in effect by the time you leave -- the President leaves office, then.

ADMINISTRATOR JOHNSON: And I leave office, too. That's correct.

Q I know you said this is a first step. Do you envision going beyond where the Senate has proposed with the CAFE standard increasing to 35 miles per gallon by 2010?

ADMINISTRATOR JOHNSON: Again, this is a first step, and we have quite a bit of work to do, not the least of which is the public notice and comment process, to consider what options that we put on the table. So stay tuned.

Q And will you also address the California lawsuit about -- in these rules, or does this just address what the Supreme Court --

ADMINISTRATOR JOHNSON: This is the first step in addressing the Supreme Court and the President's desire to improve energy efficiency and address greenhouse gas emissions for motor vehicles. On a separate track is the petition from California. We're now in a comment period. There is a public meeting scheduled for Washington -- here in Washington, D.C. on May the 22nd. And then there is a public hearing scheduled in Sacramento for May the 30th. And that's where we are in the process.

MR. STANZEL: Thank you all. Operator, that's the number of questions that we have time for. I appreciate everyone joining us today. As I indicated, the executive order and a fact sheet has been released. They're available at WhiteHouse.gov. We appreciate your participation today.

Thank you all.

END 2:37 P.M. EDT

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Preliminary Transcript

HEARING ON EPA APPROVAL OF NEW POWER PLANTS: FAILURE TO ADDRESS GLOBAL WARMING POLLUTANTS

Thursday, November 8, 2007

House of Representatives,

Committee on Oversight

and Government Reform,

Washington, D.C.

"This is a preliminary transcript of a Committee Hearing. It has not yet been subject to a review process to ensure that the statements within are appropriately attributed to the witness or member of Congress who made them, to determine whether there are any inconsistencies between the statements within and what was actually said at the proceeding, or to make any other corrections to ensure the accuracy of the record."

Committee Hearings

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political advisors edited Government scientific reports to instill uncertainty about scientific conclusions and you still have not regulated CO2 emissions.

If you were serious about addressing climate change, you wouldn't allow these new power plants to be built with no CO2 controls. You would understand what an enormous threat these plants are and require them to use state of the art pollution controls like coal gasification and carbon capture. What do you say to that?

Mr. JOHNSON. Mr. Chairman, as a Nation we have devoted $37 billion to investment in science, technology and even tax incnetives. That is more than any other country in the world. With regard to EPA, in addition to our partnership programs, just a few weeks ago I announced that we are drafting regulations to regulate, to set up a regulatory framework for carbon sequestration storage, particularly the storage, as part of our underground control program, which is a necessary step as we move forward with capture and storage of carbon dioxide.

In addition, since the Supreme Court decision, we have announced that we are developing a proposed regulation to regulate greenhouse gas emissions from mobile sources. That is the first time in our Nation's history, and I have committed to members of Congress and to the President that we will have that proposed regulation out for public notice and