

BEFORE THE ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC

In re Desert Rock Energy Company, LLC)
PSD Permit Number AZP 04-01) PSD Appeal Nos. 83-03, 83-04
_____))
_____)

**NOTICE OF ERRATA AND SUBMISSION OF EXHIBIT TO
PETITIONERS' SUPPLEMENTAL BRIEF**

Petitioners Dine Care, Environmental Defense Fund, Grand Canyon Trust, Natural Resources Defense Council, San Juan Citizens Alliance, Sierra Club, and WildEarth Guardians just determined that their Supplemental Brief filed October 2, 2008 inadvertently refers to two separate documents as Exhibit 30 – a February 14, 2008 letter from Henry Waxman to James M. Andrew, Administrator, Rural Development Utilities Program, U.S. Department of Agriculture (Supp. Brief at 120), and a March 12, 2008 letter from Henry Waxman to Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency (Supp. Brief at 61). The February 14, 2008 letter was attached as Exhibit 30. The March 12, 2008 letter was not submitted with the brief. Please accept this Errata attaching to the Supplemental Brief as Exhibit 60, the March 12, 2008 letter, and replacing the reference to Exhibit 30 on page 61 of the Supplemental Brief with a reference to Exhibit 60. Counsel apologizes for any inconvenience caused by this error.

Respectfully submitted, this 21st day of November, 2008:

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The undersigned hereby certifies that on November 21, 2008 he caused a copy of the foregoing to be served by mail on:

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EXHIBIT 60

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March 12, 2008

The Honorable Stephen L. Johnson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
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Dear Administrator Johnson:

Since December, the Committee has been examining the Administration's decision to reject California's effort to regulate greenhouse gas emissions from motor vehicles. During this investigation, the Committee has received new information on a related issue: it appears that EPA's own efforts to regulate greenhouse gas emissions from motor vehicles have also been stymied.

Multiple senior EPA officials have told the Committee on the record that after the Supreme Court's landmark decision in *Massachusetts v. EPA*, you assembled a team of 60 to 70 EPA officials to determine whether carbon dioxide emissions endanger health and welfare and, if so, to develop regulations reducing CO₂ emissions from motor vehicles. According to these officials, you agreed with your staff's proposal that CO₂ emissions from motor vehicles should be reduced and in December forwarded an endangerment finding to the White House and a proposed motor vehicle regulation to the Department of Transportation. The proposed regulation would have produced significantly more CO₂ reductions than the revised fuel economy standards enacted last year.

The senior EPA officials who spoke with the Committee did not know what transpired inside the White House or the Department of Transportation or what directions the White House may have given you. They do know, however, that since you sent the endangerment finding to the White House, "the work on the vehicle efforts has stopped." They reported to the Committee that the career officials assigned to the issue have ceased their efforts and have been "awaiting direction" since December.

These accounts raise serious questions. It appears that EPA's efforts to regulate CO₂ emissions have been effectively halted, which would appear to be a violation of the Supreme

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Court's directive and an abdication of your responsibility to protect health and the environment from dangerous emissions of CO₂.

I hope you will cooperate with the Committee's investigation of this matter.

Background

In August 2003, the Bush Administration denied a petition to regulate CO₂ emissions from motor vehicles by deciding that CO₂ was not a pollutant under the Clean Air Act.¹ In April 2007, the U.S. Supreme Court overruled that determination in *Massachusetts v. EPA*. The Court wrote:

Because greenhouse gases fit well within the Clean Air Act's capacious definition of "air pollutant," we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles.²

Under the Clean Air Act, whether EPA is required to regulate CO₂ turns on whether CO₂ causes, or contributes to, air pollution that "may reasonably be anticipated to endanger public health or welfare."³ The Court remanded this question to EPA, explaining:

If EPA makes a finding of endangerment, the Clean Air Act requires the agency to regulate emissions of the deleterious pollutant from new motor vehicles. ... Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.⁴

In May 2007, the President signed an executive order directing EPA and other federal agencies to develop regulations to address greenhouse gas emissions from motor vehicles.⁵ The

¹ U.S. Environmental Protection Agency, EPA Denies Petition to Regulate Greenhouse Gas Emissions from Motor Vehicles (Aug. 28, 2003) (online at <http://yosemite.epa.gov/opa/admpress.nsf/fb36d84bf0a1390c8525701c005e4918/694c8f3b7c16ff6085256d900065fdad!OpenDocument>).

² U.S. Supreme Court, *Massachusetts et al v. Environmental Protection Agency et al.* (Apr. 2, 2007) (online at <http://www.supremecourt.us/gov/opinions/06pdf/05-1120.pdf>).

³ *Id.*

⁴ *Id.*

⁵ White House Office of the Press Secretary, *Executive Order: Cooperation Among Agencies in Protecting the Environment with Respect to Greenhouse Gas Emissions From Motor*

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President explicitly stated that this order was in response to *Massachusetts v. EPA*. President Bush said:

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 Departments of Transportation, Energy, and Agriculture to take the first steps toward regulations that would cut gasoline consumption and greenhouse gas emissions from motor vehicles.⁶

You testified before the House Oversight and Government Reform Committee on November 8, 2007. At that hearing, you said EPA would release proposed regulations by the end of the year, stating:

While the Supreme Court's decision in *Massachusetts v. EPA* makes clear that carbon dioxide and other greenhouse gases are pollutants under the Clean Air Act, it also makes clear that the agency must take certain steps and make certain findings before a pollutant becomes subject to regulation under the law. Those steps include making a finding that a pollutant endangers public health or welfare, and developing the regulations themselves. The EPA plans to address the issue of endangerment when we propose regulations on greenhouse gas emissions for motor vehicles and fuels later this year.⁷

You went on to state: "I have committed to members of Congress and to the President that we will have that proposed regulation out for public notice and comment beginning by the end of this year and to work toward a final rule by the end of next year."⁸

The Recommendations of EPA's Career Staff

After the President's May 2007 executive order, EPA assembled a large team of experienced career officials to work on the endangerment finding and the regulation of CO₂. Karl Simon, the Director of the Compliance and Innovative Strategies Division in EPA's Office of Transportation and Air Quality, was asked by Committee staff how many EPA officials were assigned to these tasks. He answered: "Sum total for the endangerment finding, the vehicle

Vehicles, Nonroad Vehicles, and Nonroad Engines (May 14, 2007) (online at <http://www.whitehouse.gov/news/releases/2007/05/20070514-1.html>).

⁶ White House Office of the Press Secretary, *President Bush Discusses CAFE and Alternative Fuel Standards* (May 14, 2007).

⁷ House Oversight and Government Reform Committee, Testimony of Stephen Johnson, Administrator, *EPA Approval of New Power Plants: Failure to Address Global Warming Pollutants*, 110th Cong. (Nov. 8, 2008).

⁸ *Id.*

portion and the fuel portion is somewhere on the order of 60 or 70.”⁹ In the Office of Transportation and Air Quality alone, 53 officials worked full-time on the effort from May through December 2007, according to Margo Oge, the Director of the Office of Transportation and Air Quality.¹⁰ These staff resources were supplemented by outside contractor resources with a \$5.3 million budget in FY 2007.¹¹

The process the staff followed was exhaustive. To assess whether CO₂ endangers health and welfare, the Office of Atmospheric Programs prepared multiple drafts of a technical support document that generated “about 500 comments” from “internal EPA review, external Federal expert review and ... other interagency comments.”¹² The agencies that reviewed this document included the National Oceanic and Atmospheric Administration, the National Aeronautics and Space Administration, the Department of Energy, and the White House Office of Science and Technology Policy.¹³

The career staff concluded that CO₂ emissions endanger both human health and welfare. According to Benjamin DeAngelo, EPA’s Senior Analyst for Climate Change, the career staff reached this conclusion because “we thought that was most consistent with the underlying science.”¹⁴ On the issue of whether CO₂ emissions harm health, Brian McLean, the Director of the Office of Atmospheric Programs, told the Committee: “ultimately climate change can cause, through various direct and indirect effects — mostly indirect effects — consequences for public health.”¹⁵

According to EPA staff, the proposal to regulate CO₂ emissions from motor vehicles was “about 300 pages” and had “extensive analysis about ... the costs and benefits.”¹⁶ This proposal was developed with close consultation with the National Highway Traffic Safety Administration. According to one EPA staff involved, it was a “collaborative effort” and “we worked quite

⁹ Transcript of Interview of Karl Simon, 155 (Jan. 30, 2008).

¹⁰ Transcript of Interview of Karl Simon (Jan. 30, 2008); Transcript of Interview of Margo Oge (Feb. 7, 2008).

¹¹ Letter from Stephen Johnson, Administrator, U.S. EPA, to Chairman Henry A. Waxman, House Oversight and Government Reform Committee (Mar. 3, 2008).

¹² Transcript of Interview of Benjamin DeAngelo, 97 (Feb. 12, 2008).

¹³ Transcript of Interview of Benjamin DeAngelo, 97 (Feb. 12, 2008).

¹⁴ Transcript of Interview of Benjamin DeAngelo, 106 (Feb. 12, 2008).

¹⁵ Transcript of Interview of Brian McLean, 50 (Feb. 5, 2008).

¹⁶ Transcript of Interview of Margo Oge, 17 (Feb. 7, 2008).

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extensively together on the tools we would use, the time frame under which we would operate, how we would construct the rulemaking.”¹⁷

Ms. Oge, the Director of the Office of Transportation and Air Quality, told the Committee that there were also “2, 3 meetings a week” between “EPA political people, OMB, DOE, Ag, DOT on an ongoing basis.”¹⁸ Mr. McLean, the Director of the Office of Atmospheric Programs, confirmed this point, stating:

I’m not aware of the content of any communication, but I’m aware that there were numerous meetings between people at EPA and people in other agencies. ... I believe OMB chaired a lot of those meetings.¹⁹

The proposal developed by the career EPA staff called for significant reductions in CO₂ emissions from motor vehicles. According to EPA officials, the agency’s analysis showed that motor vehicles could achieve CO₂ emission reductions equal to a fleet fuel economy standard of 35 miles per gallon by 2018.²⁰ This nationwide standard is not as stringent as the California proposal, which called for achieving the equivalent of 35 miles per gallon by 2017 and achieving over 40 miles per gallon in 2020.²¹ But it is significantly more stringent than the corporate average fuel economy (CAFE) standards in the recently passed Energy Independence and Security Act of 2007 (EISA), which do not require new motor vehicles to meet that 35 miles per gallon standard until 2020.²²

Consideration by the EPA Administrator

Internal EPA documents indicate that you were scheduled to make decisions on the endangerment finding and the vehicle greenhouse gas rule as early as October 4, 2007. A

¹⁷ Transcript of Interview of Maureen Delaney (Feb. 11, 2008).

¹⁸ Transcript of Interview of Margo Oge, 116 (Feb. 7, 2008).

¹⁹ Transcript of Interview of Brian McLean, 15 (Feb. 5, 2008).

²⁰ Transcript of Interview of Karl Simon, 119-120 (Jan. 30, 2008).

²¹ California Air Resources Board, Comparison of Greenhouse Gas Reductions Under CAFE Standards and ARB Regulations Adopted Pursuant to AB 1493, 7 (Jan. 2, 2008) (online at http://www.arb.ca.gov/cc/ccms/ab1493_v_cafe_study.pdf).

²² Energy Independence and Security Act of 2007, Pub. L. No. 110-140, section 102.

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“predecision GHG” meeting was scheduled with you on October 2, 2007.²³ A “decision GHG” meeting was scheduled with you on October 4, 2007.²⁴

According to the EPA staff who spoke with the Committee, you were personally involved in the decisionmaking. One official said you asked for three briefings on the endangerment finding and read the technical support document “cover to cover.”²⁵ Another official told the Committee that you may have participated in “five, maybe more” briefings.²⁶

According to your staff, you supported their recommendations on two key points: (1) you agreed that CO₂ emissions endanger welfare and (2) you backed their proposal to reduce CO₂ emissions from motor vehicles. The main staff recommendation you rejected was the staff finding that CO₂ emissions also endangered human health. Five separate EPA officials told the Committee that you personally made the decision to exclude public health from the endangerment finding.²⁷

After you endorsed the finding that CO₂ emissions endanger welfare, the proposed determination was submitted to the White House Office of Management and Budget. Dina Kruger, the Director of the Climate Change Division, told the Committee that the endangerment finding was transmitted to OMB “right around December 7 or 8.”²⁸ Other EPA staff similarly recollected that the finding was sent to the White House “around December 6th”²⁹ or “around December 5th.”³⁰ The transmittal of the endangerment finding to the White House was confirmed by the Director of the Office of Atmospheric Programs,³¹ the Director of the Office of Policy Analysis and Review,³² and the Director of the Office of Transportation and Air Quality.³³

²³ E-mail from Barbara Morris to Jim Ketcham Colwill et al. (Aug. 30, 2007) (bate stamped EPA 522).

²⁴ *Id.*

²⁵ Transcript of Interview of Benjamin DeAngelo, 94, 103 (Feb. 12, 2008).

²⁶ Transcript of Interview of Dina Washburn Kruger, 92 (Jan. 31, 2008).

²⁷ *See*, Transcript of Interview of Brian McLean, 68-69 (Feb. 5, 2008); Transcript of Interview of Robert David Brenner, 76 (Feb. 6, 2008); Transcript of Interview of Margo Oge, 120 (Feb. 7, 2008); Transcript of Interview of Maureen Delaney, 45-46 (Feb. 11, 2008); Transcript of Interview of Benjamin DeAngelo, 104 (Feb. 12, 2008).

²⁸ Transcript of Interview of Dina Washburn Kruger, 37 (Jan. 31, 2008).

²⁹ Transcript of Interview of Maureen Delaney, 88 (Feb. 11, 2008).

³⁰ Transcript of Interview of Benjamin DeAngelo, 108 (Feb. 12, 2008).

³¹ Transcript of Interview of Brian McLean, 44-45 (Feb. 5, 2008).

³² Transcript of Interview of Robert David Brenner, 74 (Feb. 6, 2008).

Around the same time, the proposal to reduce CO₂ emissions was transmitted to the Department of Transportation for review.³⁴ Ms. Oge, the Director of the Office of Transportation and Air Quality stated that the draft rule was sent to NHTSA “maybe the second week of December.”³⁵

Suspension of the EPA Regulatory Effort

The career EPA staff who the Committee interviewed did not know what communications you or other political appointees in the agency may have had with White House officials. But they did tell the Committee that after the White House received the endangerment finding and the Department of Transportation received the proposed motor vehicle regulation, work on the finding and regulation was stopped.

According to Mr. McLean, the Director of the Office of Atmospheric Programs, OMB has not engaged EPA in reviewing the endangerment finding.³⁶ This was confirmed by Ms. Kruger, the Director of the Climate Change Division, who stated that the agency has not worked on the endangerment finding “since coming back from the holidays.”³⁷

Ms. Oge, the Director of the Office of Transportation and Air Quality, provided a similar report regarding the proposal to reduce CO₂ emissions from motor vehicles. She told the Committee that the work on the vehicle CO₂ rule “stopped when we sent the document to the Department of Transportation.”³⁸

According to EPA staff, they have been informed that work has been discontinued so that EPA’s activities can be reassessed in light of enactment of the Energy Independence and Security Act of 2007. One staffer stated that he believed there was a “desire to take a step back and to look at the rulemaking in light of the energy bill that had passed ... from the political level of EPA.”³⁹ Another staffer stated that work discontinued on December 19, the day the Energy Independence and Security Act was signed, and that it was unclear “what would go forward following the new legislation.”⁴⁰

³³ Transcript of Interview of Margo Oge, 105 (Feb. 7, 2008).

³⁴ Transcript of Interview of Karl Simon, 120 (Jan. 30, 2008).

³⁵ Transcript of Interview of Margo Oge, 105 (Feb. 7, 2008).

³⁶ Transcript of Interview of Brian McLean, 70 (Feb. 5, 2008).

³⁷ Transcript of Interview of Dina Washburn Kruger, 35 (Jan. 31, 2008).

³⁸ Transcript of Interview of Margo Oge, 105 (Feb. 7, 2008).

³⁹ Transcript of Interview of Benjamin DeAngelo, 89 (Feb. 12, 2008).

⁴⁰ Transcript of Interview of Maureen Delaney, 39-40 (Feb. 11, 2008).

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There has, however, been no request to EPA staff to analyze whether passage of the law changes the analysis of the costs and benefits of the proposed EPA regulation. EPA staff informed the Committee that there was currently no "leadership direction"⁴¹ and that staff "are awaiting direction."⁴² According to Robert Brenner, the Director of the Office of Policy Analysis and Review:

I have been in meetings where questions have been asked about what the likely schedule would be for the rules. But I have not heard any decisions on what a likely schedule would be, and I have not heard any specifics of work being done at this point on the rulemakings.⁴³

As a legal matter, the passage of provisions in the Energy Independence and Security Act requiring the Department of Transportation to strengthen federal CAFE standards does not affect EPA's legal obligation to regulate CO₂ emissions. The Act included language to ensure that a change in CAFE requirements did not affect the Clean Air Act's provisions.⁴⁴ Moreover, the Supreme Court held in *Massachusetts v. EPA*:

The fact that DOT's mandate to promote energy efficiency by setting mileage standards may overlap with EPA's environmental responsibilities in no way licenses EPA to shirk its duty to protect the public "health" and "welfare."⁴⁵

Indeed, you have personally acknowledged that enactment of the Energy Independence and Security Act does not change the mandatory nature of EPA's responsibility. In January, you

⁴¹ Transcript of Interview of Maureen Delaney, 40 (Feb. 11, 2008).

⁴² Transcript of Interview of Karl Simon, 121 (Jan. 30, 2008).

⁴³ Transcript of Interview of Robert David Brenner, 82 (Feb. 6, 2008).

⁴⁴ The Energy Independence and Security Act of 2007 states:

SEC. 3. RELATIONSHIP TO OTHER LAW.

Except to the extent expressly provided in this Act or an amendment made by this Act, nothing in this Act or an amendment made by this Act supersedes, limits the authority provided or responsibility conferred by, or authorizes any violation of any provision of law (including a regulation), including any energy or environmental law or regulation.

Pub. L. No. 110-140 (2007), Sec. 3.

⁴⁵ U.S. Supreme Court, *Massachusetts et al v. Environmental Protection Agency et al.* (Apr. 2, 2007) (online at <http://www.supremecourtus.gov/opinions/06pdf/05-1120.pdf>).

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testified before the Senate that the Act does not “relieve me or the agency of its responsibilities under the Clean Air Act and under *Massachusetts v. EPA*.”⁴⁶

Conclusion

With your support, EPA made progress last year in responding to the Supreme Court decision in *Massachusetts v. EPA*. According to the statements of multiple career EPA officials, you approved a finding that CO₂ emissions endanger welfare and supported a proposal that would significantly curtail CO₂ emissions from motor vehicles. This proposal would apparently require CO₂ emission reductions equivalent to achieving a 35 miles per gallon CAFE standard by 2018.

It appears, however, that this effort was halted after the White House and the Department of Transportation received copies of your proposals. The Committee is seeking additional information regarding the circumstances that caused this delay.

To assist the Committee’s investigation into this matter, I request that you provide the Committee with copies of the documents relating to the endangerment finding and the greenhouse gas vehicle rule, including copies of any communications with the White House and other federal agencies about these proposals.

As an initial step, I ask that you provide the following documents to the Committee by March 14, 2008:

- The technical support document prepared by the Office of Atmospheric Programs;
- The proposed endangerment finding that was transmitted to the White House Office of Management and Budget in December 2007; and
- The proposed vehicle greenhouse gas rule that was transmitted to NHTSA in December 2007.

The other responsive documents should be provided to the Committee by March 28, 2008.

⁴⁶ Senate Committee on Environment and Public Works, *Oversight of EPA’s Decision to Deny the California Waiver*, 110th Cong. (Jan. 24, 2008).

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

If you have any questions concerning this request, please have your staff contact Greg Dotson or Jeff Baran of the Committee staff at (202) 225-4407.

Sincerely,



Henry A. Waxman
Chairman

Enclosure .

cc: Tom Davis
Ranking Minority Member