Clean Air Task Force • Clean Air Watch • Clean Water Action • Conservation Law Foundation • Environment America • Environmental Defense • National Audubon Society National Environmental Trust • National Wildlife Federation Natural Resources Defense Council • Ocean Conservancy • Sierra Club Union of Concerned Scientists

November 19, 2007

The Honorable Stephen L. Johnson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., NW
Mail Code: 1101A
Washington, D.C. 20460

Dear Mr. Administrator:

Thank you for meeting with us and other leaders of the nation's largest environmental organizations on October 26th. Our organizations represent millions of people concerned about the accelerating global warming crisis. This letter summarizes for the docket the points we made in our meeting. We also incorporate by reference as part of our submission for the docket the documents referenced in this letter.

You will soon make EPA's first regulatory decisions on cutting the pollution that drives global warming. These decisions are a test of EPA's professionalism and independence. They will also be the first indicator of whether this administration is prepared to follow through on the President's pledge to take action, made at the Major Economies Meeting in September.

In our meeting we discussed three matters. The first two are on the mobile source side: the California waiver, and the 20-in-10 rulemaking for vehicles and fuels. The third issue pertains to coal-fired power plants and the prevention of significant deterioration (PSD) permit process.

California Waiver

The California waiver, more than anything else, will be your legacy as Administrator. As you know, the California standards start in model year 2009 and ramp up to nearly a 30 percent reduction in global warming pollution by model year 2016. Sixteen other states – the list is still growing – have adopted or are adopting the California standards. Together, these states account for more than 40% of new vehicle sales and nearly one-half of the U.S. population. They are poised to transform the vehicle market in this country and the world.

The Clean Air Act provides that California's regulations and its determination that they comply with Section 209 are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on those who oppose the waiver. In our judgment, California has fully supported the need for and feasibility of its global warming standards. As you know, the U.S. District Court in Vermont recently ruled, after hearing all of the automobile industry's witnesses and evidence in a 16-day trial, that the industry had failed to prove its case. Recognizing California's leadership role, EPA has issued California waivers nearly 50 times. The Congressional Research Service concluded that California has a "strong case" for its request. See CRS, Report to Congress, *California's Waiver Request to Control Greenhouse Gases Under the Clean Air Act* (Aug. 20, 2007, updated Oct. 1, 2007), http://www.ncseonline.org/NLE/CRSreports/07Oct/RL34099.pdf. Further, the administrative docket for the waiver contains extensive documentation of the compelling and extraordinary conditions California confronts as a result of global warming and its cascade of adverse impacts on human health, tropospheric ozone, agriculture, water supply and distribution, wildfires and other extraordinary effects. It is time for EPA to issue the waiver and allow California to lead as Congress intended.

The Supreme Court has held that there is no conflict between the Clean Air Act and the Energy Policy and Conservation Act (EPCA), which establish "wholly independent" mandates. The automakers' preemption arguments were laid to rest by the District Court in Vermont, which found that Congress intended California to serve as a laboratory to develop innovative and stringent regulations of motor vehicle emissions of air pollutants, including now CO2. Further, the Court found as a matter of law that, under the terms of EPCA itself (Section 32902(f)), a California standard that receives the EPA waiver under Clean Air Act Section 209(b) is a federal standard. For these reasons, the Court concluded that the EPCA preemption does not apply to the California rule that is the subject of the waiver request. In addition, quite aside from these compelling legal rulings, the Court found, as a matter of fact, that the California rule is materially different from a federal fuel economy standard and that the manufacturers had failed to prove their claims regarding technological infeasibility, cost or safety.

As a final point on the waiver, we discussed at the October 26th meeting the fact that the White House has already taken credit for the California emission standards in the U.S. Climate Action Report issued in July with White House clearance and sent broadly around the world. *See* http://www.state.gov/g/oes/rls/rpts/car/. On pages 52 and 53, the Climate Action Report says that states are taking "a variety of steps that contribute to the [administration's] overall GHG intensity reduction goal." Among the contributing state actions specifically listed in Table IV-1 is California "Vehicle GHG emission standards." The table lists the 11 states that (at the time) had adopted them. *See* http://www.state.gov/documents/organization/89641.pdf. Now that the White House has embraced and taken credit for the California standards, it should be straightforward for you to grant California's waiver without delay.

Granting the waiver as the Administration heads to Bali next month would be an important signal that the U.S. is now prepared to take action to address global warming pollution.

20-in-10

The so-called 20-in-10 rulemaking is also an extraordinarily important opportunity.

After the Supreme Court rejected the administration's former view that greenhouse gases are not "air pollutants," the President gave EPA the assignment to issue the vehicle and fuel rules under the Clean Air Act, in order to meet the 20-in-10 target. The 20-in-10 target, as you know, is based on raising fuel economy by 4% per year over 10 years, and on ramping up to 35 billion gallons of renewable and alternative fuels in that period. The President reaffirmed his commitment to this initiative in his September speech to the Major Economies Meeting.

You have the President's mandate to curb global warming pollution. The President set the yardstick in his State of the Union message. In May, after the Supreme Court decision rejected the administration's former view that greenhouse gases are not "air pollutants," the President gave EPA the assignment to issue the vehicle and fuel rules under the Clean Air Act, in order to meet the 20-in-10 target. Those who want less are undercutting the President.

Endangerment finding: The first step in this rulemaking is a determination regarding endangerment to public health and welfare. We strongly urge you to include an endangerment finding for all of the man-made greenhouse gases recognized by the Intergovernmental Panel on Climate Change, including all four of the pollutants that come from motor vehicles (carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons). We also emphasize the need to ground the endangerment finding on danger to both public health and public welfare. A narrower finding will only compound the controversy over the White House's censorship of the CDC testimony on public health impacts of climate change. There is no basis to hold back a public health endangerment finding. There are numerous direct and indirect health impacts from global warming – increasing ozone smog, heat deaths, the spread of infectious disease, injuries and death from severe weather, such as more severe hurricanes.

There also is no basis to ignore the global public health and welfare benefits from U.S. action to curb global warming pollution. We urge you to resist any pressures to stop the assessment of benefits at the water's edge – to ignore the harm done in other countries by America's global warming pollution. There is nothing in the Clean Air Act that either compels or allows this.

Vehicle and Fuel Standards: As the Supreme Court confirmed, the Clean Air Act gives you authority to curb air pollutants that contribute to global warming. This means you must propose standards for all four greenhouse gases emitted by automobiles. These standards can be expressed as combined basket of greenhouse gases, measured in terms of carbon dioxide equivalent. You do not have authority to issue standards expressed in terms of miles per gallon. The petition pending before you (and sent back to you by the Supreme Court) asks for regulation of all four global warming pollutants coming from vehicles – not just CO_2, and certainly not a miles per gallon standard. The Supreme Court rejected the notion that EPA's standards must be the same as DOT's. You must regulate in the metric of the Clean Air Act – air pollution. And you are not limited to levels that DOT has set or might set in the future. While consultation with other agencies is to be expected, under the Clean Air Act this is your decision, not theirs.

The California record, the NAS report, the Vermont decision all demonstrate the achievability of a 4% annual reduction in vehicle greenhouse gas emissions. And unlike many other EPA rules,

this one promises direct consumer savings in addition to value of environmental benefits. At today's gas prices, the fuel savings from standards that improve at 4%/year will be worth thousands of dollars and will more than offset the increase in vehicle purchase prices. As California has shown, if you lease a car or buy it with a loan, your total monthly payments for the car and its fuel go *down* under these standards.

For fuels, the metric also needs to be air pollution, specifically the combined basket of greenhouse gases (GHGs) measured as CO_2 equivalent, not an energy measure like BTUs. It may have been legally acceptable to set the recent renewable fuels rule in the metric of BTUs, but that will not work under the Clean Air Act's long-standing Section 211(c) authority that applies to this rule. Substantively, your rule needs to account for the life-cycle GHG emissions of all motor vehicle fuels, both conventional as well as renewable and alternative fuels. You cannot ignore the large upstream global warming pollution from coal-to-liquids, tar sands, or oil shale. A standard that looks only at the tailpipe emissions would create perverse results that you could not explain to the public or defend legally. A global warming standard that becomes a Trojan horse for coal-to-liquids would be a sham. Nor can you ignore the upstream emissions from biofuels. A strong fuels performance standard anchored in science-based, verifiable accounting of GHG emissions impacts on a full fuel cycle basis, with appropriate land-use and environmental safeguards, would be the best approach for simultaneously carrying out your obligations under the Clean Air Act while stimulating the market for new fuels that will meet the President's "20 in 10" goals for reducing petroleum use.

Power Plants

Dozens of proposed new coal-fired power plants are now going through the PSD permitting process, and as you know, Section 165(a)(4) of the Act requires "best available control technology" (BACT) for "each pollutant subject to regulation" under the Act. See also CAA § 169(3), 42 U.S.C. § 7479(3).

There appears to be agreement that once EPA regulates CO_2 and other greenhouse gases under Section 202 and 211, they will be "pollutant[s] subject to regulation." But that will not be until the end of 2008. It would be an environmental tragedy to let dozens of new coal plants get PSD permits "under the wire" when everyone realizes CO_2 and other global warming pollutants will and must be regulated.

We believe that after *Massachusetts v. EPA*, CO_2 is already "subject to regulation" and subject to BACT. EPA regulations have required monitoring and reporting of CO_2 emissions since 1993 under Section 821 of the 1990 Clean Air Act amendments. 40 C.F.R. § 75.10(3)(i). The monitoring requirements established to assure compliance with the acid rain program are, of course, regulations. Failure to comply with monitoring requirements may result in significant civil penalties. The Supreme Court in *Massachusetts v. EPA* recognized the importance of collaboration and research, enabled by monitoring and reporting, for any "thoughtful regulatory effort." *Massachusetts*, 127 S. Ct. 1438, 1461 (2007).

Greenhouse gases such as CO_2 and methane are also regulated as a component of landfill gases. EPA has promulgated emission guidelines and standards of performance for "municipal solid

waste landfill emissions." 40 CFR §§ 60.33c, 60.752. Landfill emissions are defined as "gas generated by the decomposition of organic waste deposited in an MSW landfill or derived from the evolution of organic compounds in the waste." 40 CFR § 60.751. The pollutants regulated by these standards, "MSW landfill emissions, or LFG, is composed of methane, CO_2, and NMOC." Air Emissions from Municipal Solid Waste Landfills – Background Information for Final Standards and Guidelines, EPA-453/R-94-021, December 1995, available at http://www.epa.gov/ttn/atw/landfill/landflpg.html. Thus, CO_2 and methane are regulated through the landfill emission regulations at 40 C.F.R. Part 60 Subparts Cc, WWW. See also 56 Fed. Reg. 24468 (May 30, 1991) ("Today's notice designates air emissions from MSW landfills, hereafter referred to as "MSW landfill emissions," as the air pollutant to be controlled"). It is manifest that BACT is already required for CO_2 and other greenhouse gas emissions from these plants.

EPA also recently found that there are in fact available methods, systems and techniques to control carbon dioxide and other greenhouse gases. In its June 22, 2007 letter on the White Pine Energy Station Project, EPA directed the BLM to "discuss carbon capture and sequestration and other means of capturing and storing carbon dioxide as a component of the proposed alternatives." *See* Letter from EPA Region IX to Jeffrey A Weeks, Bureau of Land Management (June 22, 2007). In submitting these comments to the BLM, EPA fulfilled its delegated responsibility under section 309 of the Clean Air Act to review and comment on a major federal agency action. 42 U.S.C. § 7609. Thus, EPA has in fact determined that there are available technologies that should be considered for the control of carbon dioxide emissions.

EPA is taking the position, however, that a BACT limit for global warming pollution is not yet required because Congress supposedly did not intend to include the Section 821 regulations or other requirements in the phrase "subject to regulation" in Section 165. This argument is absurd on its face. The Section 821 monitoring and reporting regulations are just that – regulations issued under this Act.

The only effect of this argument is to create a loophole for any coal-fired plant that gets its PSD permit issued before the end of next year. That is a bad legal result and a bad policy result that you have the power to avoid.

Conclusion

These are your legacy decisions. We look forward to working with you and will be there with our support if the agency makes the right decisions to protect public health and the environment.

Sincerely,

Kevin Knobloch, President
Union of Concerned Scientists
Green Group Chair

Frances Beinecke, President
Natural Resources Defense Council
Green Group Vice Chair

Armond Cohen, Executive Director

Frank O'Donnell, President

Clean Air Task Force

Clean Air Watch

John DeCock, President
Clean Water Action

Phillip Warburg, President
Conservation Law Foundation

Margie Alt, Executive Director
Environment America

Fred Krupp, President
Environmental Defense

John Flicker, President
National Audubon Society

Phillip Clapp, President
National Environmental Trust

Larry Schweiger, President & CEO
National Wildlife Federation

Vikki Spruill, President
The Ocean Conservancy

Carl Pope, Executive Director
Sierra Club