ONE HUNDRED TENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6143

MAJORITY (202) 225–5051
FACSIMILE (202) 225–4784
MINORITY (202) 225–5074

www.oversight.house.gov

October 21, 2008

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

Dear Administrator Johnson:

On April 4, 2008, and August 3, 2008, I wrote to you raising concerns about the numerous rules issued by EPA under the Bush Administration that have been overturned by the courts. The agency's general counsel and the Principal Deputy Assistant Administrator for Air and Radiation responded on April 18, 2008, and October 3, 2008, respectively, detailing the extent and some of the costs of this Administration's court losses under the Clean Air Act. These responses reveal that EPA has lost all or part of two-thirds of the Clean Air Act cases decided by the D.C. Circuit Court of Appeals. In a majority of these cases, the courts severely rebuked EPA for an apparently willful disregard of the plain language of the governing law. The rules overturned by the court cost taxpayers $53 million in direct expenditures, plus the equivalent of a year of work by 210 federal employees.

I understand that the Administration is contemplating issuing at least one more rule with severe legal deficiencies. This rule, which represents the Administration's third attempt to weaken pollution control requirements for new and modified power plants, would almost certainly be overturned in court. Routinely making decisions that do not stand up to judicial scrutiny is a terrible waste of taxpayer dollars and government resources. Such losses also produce substantial delays in human health and environmental protection, undermine EPA's credibility with the courts, and impose confusion and costs on states and regulated entities. For these reasons, I urge you not to issue this rule and thus avoid further exacerbating the serious harms this Administration has caused through its reckless disregard of legal constraints on its rulemaking authority.

To better understand the scope and effect of EPA's losses, I wrote you on April 4, 2008, to obtain the full list of final rules and major decisions under the Clean Air Act approved by EPA Administrators since 2001 that had been challenged in the D.C. Circuit Court of Appeals. I requested that you identify the disposition of each of those cases, as well as identifying each

EPA loss in which the court found that the plain language of the statute was unambiguous. I also asked for information about the delays in environmental protections and the waste of agency resources resulting from court losses.

EPA responded on April 18, 2008. The response from then-General Counsel Roger Martella addressed my requests for information on the disposition of the cases and delays in rulemaking, but did not provide any information regarding the agency resources expended to develop and defend rules subsequently overturned by the courts. In a letter dated August 13, 2008, I reiterated and expanded my request for information about the resulting delays and waste of resources. EPA provided the additional information I requested on October 3, 2008.

In both responses, EPA attempted to downplay the significance of the agency's losses in court. Mr. Martella disputed that recent high profile losses were representative of EPA's overall track record in court, and he defended the professionalism, dedication, and talent of EPA's attorneys in the Office of General Counsel.

I share Mr. Martella's assessment of the dedication and capabilities of EPA's attorneys. My concern is not that EPA attorneys are failing to provide sound legal counsel regarding the requirements of the law. My concern is that you and other EPA Administrators under this Administration have acted contrary to that counsel on all too many occasions.

One clear example of this conduct was revealed by this Committee's investigation of your decision to reject California's request for a waiver allowing California to require cleaner cars. The Office of General Counsel strongly warned you that rejecting California's request carried high legal risk, but you, and apparently other Administration officials, did not follow that advice.[1]

Another example of such conduct is a rulemaking addressing toxic air pollution from plywood manufacturing, which relied on a novel legal theory to exempt certain manufacturers from statutory requirements to reduce emissions. The *Los Angeles Times* reported that the legal theory EPA's rule relied upon was developed by attorneys representing the regulated industry and that this theory was adopted by EPA political appointees over the objections of EPA career attorneys.[2] A confidential legal memo from an EPA attorney stated that the proposal "results in

---

[1] *See* House Committee on Oversight and Government Reform, *Memorandum from Majority Staff to Members of the Committee on Oversight and Government Reform Re EPA's Denial of the California Waiver*)May 19, 2008) (online at: www. oversight.house.gov/ documents/20080519131253.pdf).

[2] *EPA Relied on Industry for Plywood Plant Pollution Rule*, Los Angeles Times (May 21, 2004).

a regulatory approach equivalent to the one Congress specifically rejected" in the Clean Air Act.[3] The memo concluded that "EPA would have a difficult time articulating any rational basis to defend such a ... scheme."[4] The D.C. Circuit agreed and vacated the rule, stating "[b]ecause EPA's interpretation ... is contrary to the plain language of the statute, EPA's interpretation fails at *Chevron* step one."[5]

In these decisions, EPA's career attorneys warned that policy approaches under consideration by political decisionmakers in EPA had a high risk of being overturned in court. Nevertheless, EPA Administrators chose to disregard that advice and are responsible for the resulting court losses.

Mr. Martella also attempted to downplay concerns about EPA's "track record" in court under this Administration, suggesting that criticisms are based on a "small handful of cases" that are not representative of EPA's overall record. The information supplied by Mr. Martella undermines his own argument, however.

The D.C. Circuit and, in one case, the Supreme Court, have ruled in 27 Clean Air Act cases since 2001 on decisions issued by EPA during the Bush Administration. In 11 of these cases, the court rejected EPA's decision in its entirety, remanding or vacating the entire underlying rule. In another seven cases, the court rejected portions of EPA's decision. Thus, out of 27 decisions, the court upheld only nine in full, and rejected 18 in whole or in part. Moreover, the court did not rule in an additional five cases where EPA took a voluntary remand in whole or in part (in these cases EPA agreed to vacate or reconsider all or part of the challenged rules after being sued).

In summary, EPA has lost all or part of two-thirds of the Clean Air Act cases decided by the D.C. Circuit Court of Appeals, and EPA has lost or abandoned 23 major air pollution decisions made by this Administration in whole or in part due to legal insufficiency.[6] These rules and decisions include most of the Administration's highest profile actions related to air pollution, such as: EPA's rejection of a petition to regulate greenhouse gases from vehicles; EPA's rule to allow emissions of toxic mercury from power plants without applying pollution control technology to each plant; EPA's Clean Air Interstate Rule ("CAIR") to reduce emissions of nitrogen oxides and sulfur dioxide from power plants through emissions trading; and EPA's rule to weaken the new source review requirements for power plants.

---

[3] *Id.*

[4] *Id.*

[5] *NRDC v. EPA*, 489 F.3d, 1364, 1373 (D.C. Cir. 2007).

[6] EPA's second response references 18 losses in whole "or significant part." EPA's tally does not include two pending cases in which EPA took a partial voluntary remand and four cases in which the court vacated or remanded portions of the challenged rules.

Not only has EPA lost a large number of cases, EPA has also lost many of these cases very badly. In a majority of these cases, the court found that EPA's position was barred by the plain language of the governing law (termed a "*Chevron* step one" determination). If a court finds the plain language of the governing statute ambiguous, a court gives the agency responsible for implementing the statute deference in interpreting the language. In such a case, the court would only overturn EPA's decision if it were based on an arbitrary or capricious interpretation of the statute. But in a *Chevron* step one decision, the court gives the agency's interpretation no deference because it finds the plain language of the statute unambiguous. Losing a case on these grounds is the legal equivalent of a shut-out.

Of the 18 cases that EPA lost in whole or in part, the court rejected 13 of EPA's decisions as contrary to the plain language of the Clean Air Act in whole or in part. On these issues, the court found that EPA's decision was based on an interpretation of the statute that was simply barred by the plain language of the Clean Air Act.

The record for decisions that you made personally is similar to the overall record for EPA under this Administration. To date, the court has reviewed 12 decisions you made, while an additional 29 lawsuits on your decisions are pending. Of your decisions already reviewed by the court, the court has vacated or remanded four in their entirety, as well as portions of an additional two. Of your six decisions overruled by the court in whole or in part, the court rejected five as partially or entirely contrary to the plain language of the statute.

Numerous losses based on the plain language of the statute are particularly troubling for several reasons. First, these losses should be avoidable. Interpretations that run counter to the plain language of the statute are easily identified as likely to be overturned in court. Repeated losses on plain language grounds suggest a reckless determination to pursue the Administration's policy objectives regardless of legal limits.

Second, while an agency may decide that taking a legal risk is justified on occasion, there are tremendous costs to a governing approach that is founded on a cavalier treatment of the law. One harm is that over time, multiple losses stemming from an agency's disregard for the plain language of the statute may seriously undermine the agency's credibility with the court. Given the dismissive tone the court has taken in a number of these decisions, it appears likely that EPA has in fact already suffered this damage.[7] In its most recent Clean Air Act decision vacating a

---

[7] *See, e.g.,* the court's references to *Alice in Wonderland* in the decisions overturning the second rule promulgated during this Administration weakening the new source review regulations under the Clean Air Act and the rule on mercury emissions from power plants. *New York v. EPA*, 443 F.3d 880,887 (D.C. Cir. 2006) ("Only in a Humpty Dumpty world would Congress be required to use superfluous words while an agency could ignore an expansive word that Congress did use. We decline to adopt such a world-view."); *New Jersey v. EPA*, No. 05-

rule that barred states from including certain monitoring requirements in air permits, the court referenced "Justice Frankfurter's timeless advice on statutory interpretation: '(1) Read the statute; (2) read the statute; (3) read the statute!'"[8]

A former EPA General Counsel under President H.W. Bush, E. Don Elliot, recently pointed to the court's increasing lack of confidence in the agency as a factor in EPA's loss of the CAIR rule, which would have significantly reduced smog and particulate air pollution. According to a press account, "Elliot agreed that EPA has indeed 'lost a lot of credibility before the D.C. Circuit, and we are unfortunately witnessing the repercussions of that.' Elliot said it will be difficult for EPA to regain the deference it historically had before the key appellate court that reviews all the agency's major rules."[9]

While Mr. Martella's response dismissed concerns about EPA's track record in court, it appears that the Office of General Counsel actually recognizes this as a serious problem and is attempting to address it. Mr. Martella noted that one year ago he established an "office-wide initiative focused on enhancing the defensibility of the Agency's decisions and strengthening the Agency's record in the courtroom." Since these activities are at the core of the Office of General Counsel's mission, it is striking that the General Counsel saw the need for a special initiative to bolster them.

In addition to the agency's loss of credibility with the court, the harms from numerous court losses include waste of federal government resources, delay of health and environmental protections, waste of state government resources, and costs to regulated parties.

Each of these rules represents years of work by EPA staff and federal contractors, and the costs of developing and defending individual rules ranges from hundreds of thousands to millions of taxpayer dollars. The data provided by EPA indicate that for rules overturned or voluntarily remanded entirely or in significant part, EPA had expended staff resources equivalent to 210 full time staff working for a full year. In addition, EPA paid outside contractors over $53 million for work on these rules. These estimates do not include the time that Department of Justice attorneys spent trying to defend these rules. This is a profligate waste of taxpayer dollars

---

1097, Slip Op., 15 (D.C. Cir. Feb. 8, 2008) (the court stated that EPA's "explanation deploys the logic of the Queen of Hearts, substituting EPA's desires for the plain text of section 112(c)(9)").

[8] *Sierra Club v. EPA, No. 04-1243, __ F.3d __ (D.C. Cir. 2008)* (slip op. at 10), *citing In re England*, 375 F.3d 1169, 1182 (D.C. Cir. 2004) (Roberts, J.) (quoting Henry J. Friendly, *Benchmarks* 202 (1967)).

[9] *Activists Weigh Rehearing Petition To Challenge Court's CAIR Vacatur*, Inside EPA (July 23, 2008).

and scarce government resources that are desperately needed to tackle pressing environmental problems.

Moreover, the wasted taxpayer dollars in many cases are only a fraction of the full cost of these court losses. Delays in environmental protection impose major burdens on human health and the environment across the nation. Many of these rules, such as the mercury rule, the decision on greenhouse gases, and other air toxics rules were rejected because EPA's decision failed to meet the Clean Air Act requirements to provide adequate public health and environmental protections. The public and the environment are still waiting for these protections, and they are suffering substantial harms to health and welfare in the interim.

These court losses also have a lasting impact, as this Administration appears frequently unwilling or unable to issue new rules responding to the court decisions. In response to my request, EPA provided information regarding the timing of EPA's response to 19 overturned or voluntarily remanded rules.[10] Of these, EPA has finalized two rulemakings. For three other rules, no additional regulatory action is needed. EPA has identified deadlines for responding to only two other decisions. The agency plans to finalize a rule to implement national ambient air quality standards for ozone in December 2009, twelve years after the standards were adopted. EPA plans to finalize standards for toxic air emissions from the polyvinyl chloride industry in 2010, ten years after the statutory deadline for the rule. For the other ten rules, EPA cannot identify any date by which it plans to respond.

These rules would address emissions of mercury, other toxic air pollutants, nitrogen oxides, ozone, and global warming pollution. They include emissions standards for toxic mercury emissions from power plants and the CAIR rule to address emissions of sulfur dioxide and nitrogen oxides from power plants, which harm human health and produce acid rain. The CAIR rule, for example, was projected to avoid 13,000 premature deaths annually in 2010, growing to 17,000 premature deaths avoided annually beginning in 2015.[11]

Losing EPA rules in court also imposes substantial costs on the states that implement federal Clean Air Act requirements. These costs were compellingly detailed in a May 16, 2008, letter from Leo M. Drozdoff, the Administrator of the Nevada Division of Environmental Protection in the Department of Conservation and Natural Resources, to Chairman Waxman. Administrator Drozdoff stated:

---

[10] EPA's April 18, 2008 response addressed the timing of one additional rule not included in EPA's October 3, 2008 response.

[11] U.S. EPA, *Congressional Staff Briefing Clean Air Interstate Rule* (July 24, 2008); U.S. EPA, *Clean Air Interstate Rule Regulatory Impact Analysis* (March 2005) (www.epa.gov/cair/pdfs/finaltech08.pdf).

> In requesting information from EPA on the extent and effects of the agency's losses in federal court, we ask that you consider multiplying that number by at least 100 to include the costs incurred by all of the state and local regulatory agencies that have been required to adopt these new federal regulations and develop state implementation plans as required under the various acts. In addition to the money, time and other resources devoted to programs that have eventually been scrapped, many of the states and local governments and various multi-state environmental organizations have also spent an inordinate amount of time and money to sue EPA over regulations and programs that clearly had no basis in federal law. Most troubling to us is the fact that all of this was occurring during a period of funding decreases, increased costs and tightening budgets – a period when states and local agencies, as the agencies responsible for implementing environmental programs, could have been spending those resources addressing real environmental issues.

Administrator Drozdoff noted that implementing just the mercury rule took his agency two-and-a-half years and thousands of man-hours. He also pointed out that the court losses "have impacted EPA's ability to provide the states and local governments with a number of guidance documents, finalized rulemakings and approved State Implementation Plans (SIPs) needed to implement current federal programs, ... [that] we should have had years and in some cases more than a decade ago." He added:

> Adding to the resource drain, and perhaps an even more important concern, is the impact that these misinterpretations and subsequent lawsuits have had on our relationship with EPA. These court rulings have damaged EPA's credibility. We are now spending an unprecedented amount of time and legal resources reviewing and questioning their decisions, interpretations and motives, doing our own evaluation and when we disagree, resorting to legal action. ... In addition, the current atmosphere of mistrust and conflict is having, and has had, a corrosive effect on our working relationship.

In addition, court losses create tremendous uncertainty for regulated industry, and in some cases leave companies that had complied with the requirements with stranded investments. Perhaps the most dramatic example of this is the market chaos and financial losses that are occurring in the wake of the loss of the CAIR rule. Upon the issuance of the court's decision, prices for SO2 allowances dropped from $300/ton to $100/ton and prices for NOx allowances dropped from $5,000/ton to $1,000/ton.[12] Companies that had made investments in allowances or in control equipment that they expected to finance in part with revenues from the sale of allowances are facing large losses.[13] One electric utility, PPL, notified the SEC that it may have

---

[12] U.S. EPA, *Congressional Staff Briefing Clean Air Interstate Rule*, at 22-23 (July 24, 2008).

[13] *See CAIR Ruling Forces Industry Financial Losses over Emissions Credits*, Clean Air Report (July 24, 2008).

to write off the loss in value of emissions allowances held by the company that were worth $100 million prior to the court's decision.[14]

In light of this record of court losses and the resulting damage, it seems obvious that EPA should carefully examine all pending regulatory proposals for high legal risk and avoid finalizing additional high risk decisions. Unfortunately, there has been no indication thus far that this Administration will reform its approach.

In fact, I am gravely concerned that you may in the next few weeks issue what would arguably be among the least legally defensible of all the Administration's air rules to date. EPA has a final rule pending that is the Bush Administration's third attempt to weaken the new source review requirements to install modern pollution control technology when power plants upgrade and increase emissions of dangerous air pollutants. The D.C. Circuit rejected portions of EPA's first attempt and vacated EPA's second attempt in its entirety.[15] EPA's third proposal is inconsistent with a ruling already issued by the D.C. Circuit and is contrary to the government's own legal positions taken in Clean Air Act enforcement cases.[16] The technical justification for the proposal relies in large part on the CAIR rule that has recently been vacated.[17] EPA has not issued a supplemental proposal to provide a new technical justification absent the CAIR rule and allow for public comment on such a justification, as is required by law. Absent such a proposal, the rule would be fatally flawed on procedural grounds, in addition to its extremely serious substantive legal vulnerabilities. There is no indication, however, that EPA has any intention to issue such a proposal.

---

[14] William H. Spence, Executive Vice President and Chief Operating Officer, PPL Corp., *Testimony of PPL Corporation, Senate Committee on Environment and Public Works, Subcommittee on Clean Air and Nuclear Safety, U.S. Senate* (July 29, 2008); *CAIR Ruling Forces Industry Financial Losses over Emissions Credits*, Clean Air Report (July 24, 2008).

[15] *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005); *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006).

[16] *See* U.S. EPA, *Supplemental Notice of Proposed Rulemaking for Prevention of Significant Deterioration and Nonattainment New Source Review: Emission Increases for Electric Generating Units: Proposed Rule,* 72 Fed. Reg. 26202 (May 8, 2007); *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005); U.S. EPA, *Memorandum from Adam M. Kushner, Director, Air Enforcement Division, Office of Enforcement and Compliance Assurance to William Harnett, Director, IPTID, Office of Air Quality, Planning and Standards, Air Enforcement Division's Comments on the Draft New Source Review Clean Air Interstate Rule (August 24, 2005 draft)* (Aug. 25, 2005).

[17] *See* U.S. EPA, *Supplemental Notice of Proposed Rulemaking for Prevention of Significant Deterioration and Nonattainment New Source Review: Emission Increases for Electric Generating Units: Proposed Rule,* 72 Fed. Reg. at 26208 (May 8, 2007).

In issuing another rule with extraordinarily high legal risk, you would be deliberately inviting the harms I have highlighted: waste of taxpayer resources, further damage to EPA's credibility in court and ability to defend future rules, burdens on states, and uncertainty for industry. The rule itself would harm public health and the environment by weakening existing protections and allowing more air pollution from power plants until, as is extremely likely, it was vacated by a court.

I request that you inform me by October 27, 2008, of your intentions regarding this legally reckless and harmful rule. I also urge you to refrain, during the remainder of your tenure as Administrator, from issuing any other rules that your attorneys have identified as high legal risk.

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

Sincerely,

Henry A. Waxman
Chairman

cc: Tom Davis
Ranking Minority Member