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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
Minority (202) 225-5074

January 16, 2007

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

Dear Administrator Johnson:

I am writing in regard to the U.S. Environmental Protection Agency's (EPA) handling of the air permit application for the BHP Billiton liquefied natural gas (LNG) floating storage and regasification project off the coast of Ventura County, California.

Specifically, it has come to my attention that EPA has reversed its interpretation of the governing laws and regulations in examining the air permit application for this project. At least three times, EPA explained clearly, as part of the public record, that this project would be permitted according the air quality permitting requirements of the Ventura County Air Pollution Control District. As you may know, as part of these requirements, a project would need to obtain emission reduction credits within Ventura District to offset the increased emissions from a new facility.

On April 5, 2004, EPA wrote to BHP Billiton in order to provide their preliminary conclusions that the project's applicable onshore area was Ventura District, and that the offset requirements of the Ventura District NSR rule would apply.¹

Although BHP Billiton subsequently argued that Ventura District's rules should not apply to their project, on June 10, 2004, EPA confirmed to the Coast Guard that BHP's arguments had "not changed our position on applicability of the District rules to the proposed deepwater port, and we plan to followup with BHP on our request to provide air emission

¹ Letter from Gerardo C. Rios, Chief, Permits Office, Air Division, Region IX, U.S. EPA, to Steve R. Mcheen, Project Manager, BHP Billiton LNG International Inc. (Apr. 5, 2004).

offsets.”² EPA conveyed their analysis to BHP Billiton on June 29, 2004, confirming that “our position regarding the applicability of the District rules has not changed.”³

On December 21, 2004, EPA provided comments on the Draft Environmental Impact Statement (EIS) for the BHP Billiton project. EPA commented that although the EIS noted that Ventura District’s requirements applied, the EIS “should also state that the Applicant has committed to obtain the necessary [offsets] within a time frame consistent with the project permitting schedule.”⁴

On February 23, 2005, BHP Billiton again argued to EPA that the project should not be covered by Ventura District rules, and instead should be treated as though the project were being constructed in the Channel Islands.⁵

On June 29, 2005, EPA reversed its position in a letter to the U.S. Coast Guard, stating “Based on our further analysis of the Deepwater Port Act and the District rules, we have concluded offsets are not required for sources constructed in the area where BHP plans to site its” project.⁶ Unfortunately, EPA’s letter did not provide an explanation of the analysis that led to this reversal, nor has it, to my knowledge, ever publicly released the analytical and legal basis for the change in its position. Subsequently, there were press reports that the decision was made for political, rather than legal or environmental reasons. For instance, the *Los Angeles Times* reported:

EPA records show that for two years, the agency strenuously argued that BHP acquire offsets for its project. But securing offsets is costly, difficult to achieve and leads to delays, so the company resisted.

² Letter from Gerardo C. Rios, Chief, Permits Office, Air Division, Region IX, U.S. EPA, to Commander Mark Prescott, Acting Chief, Office of Operating and Environmental Standards Commandant, U.S. Coast Guard, Department of Homeland Security (June 10, 2004).

³ Letter from Gerardo C. Rios, Chief, Permits Office, Air Division, Region IX, U.S. EPA, to Steve R. Meheen, Project Manager, BHP Billiton LNG International Inc. (June 29, 2004).

⁴ Letter from Enrique Manzanilla, Director, Cross Media Division, Region IX, U.S. EPA, to Lieutenant Ken Kusano, U.S. Coast Guard (Dec. 21, 2004).

⁵ Letter from Thomas R. Wood, Stoel Rives, to Amy Zimpfer, Associate Director, Air Division, Region IX, U.S. EPA (Feb. 23, 2005).

⁶ Letter from Amy Zimpfer, Associate Director, Air Division, Region IX, U.S. EPA, to Commander Mark Prescott, Deepwater Ports Standards Division, U.S. Coast Guard, Department of Homeland Security (June 29, 2005).

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The EPA reversed itself and granted a waiver after the company contacted the White House Task Force on Energy Project Streamlining. Bush created the task force in 2001 to accelerate energy projects. BHP spent \$1.8 million in California lobbying for its project last year — the seventh highest expenditure among special-interest groups, according to the secretary of state.

"I have never seen an energy project in the state with this much lawyering and lobbying in 25 years," said V. John White, air quality lobbyist for the Sierra Club.⁷

The *Times* article further reported:

sources in the EPA's San Francisco office said officials in the agency's Washington headquarters often overrule the regional office on pollution permits. "More and more of our decisions on permits are overhauled by headquarters, and that's different than the way we've done things before," said one EPA official.⁸

As the primary oversight body in the House, the Committee on Oversight and Government Reform has the authority and responsibility to investigate allegations of unusual and potentially suspect agency actions. For this reason, I am requesting that you provide the Committee the analysis referenced in EPA's June 29, 2005, letter that provides the factual and legal basis for EPA's reversal on this project. I also request copies of any communications between EPA headquarters and the regional office that discuss the reversal of EPA's position.

I respectfully request that you provide a copy of the analysis by January 23, 2007, and copies of the communications by February 13, 2007. Should any questions arise, please contact Greg Dotson, of my Committee staff, at (202) 225-4407.

Sincerely,



Henry A. Waxman
Chairman

Cc: Rep. Tom Davis
Ranking Minority Member

⁷ *Offshore Terminal's Onshore Effect Debated*, Los Angeles Times (Sept. 3, 2006).

⁸ *Id.*

HENRY A. WAXMAN, CALIFORNIA,
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March 5, 2007

TOM DAVIS, VIRGINIA,
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BILL SALI, IDAHO

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

Dear Administrator Johnson:

Documents the Committee has received raise new questions about how the U.S. Environmental Protection Agency (EPA) is handling the air permit application for BHP Billiton liquefied natural gas (LNG) floating storage and re-gasification project off the coast of Ventura County, California. But unfortunately, EPA's decision to withhold potentially important documents from the Committee is impeding Congress' investigation into these issues.

The key issue regarding the offshore LNG project is whether the project should be permitted according to the air quality permitting requirements of the Ventura County Air Pollution Control District. As part of these requirements, the project would need to obtain emission reduction credits within Ventura District to offset the increased emissions from a new facility. In a series of letters in 2004 from EPA regional office in California, EPA repeatedly asserted that the project would be subject to Ventura District requirements, including the offset requirements.¹

However, on June 29, 2005, EPA reversed its position in a letter to the U.S. Coast Guard. This letter stated: "Based on our further analysis of the Deepwater Port Act and the District

¹ See, e.g., Letter from Gerardo C. Rios, Chief, Permits Office, Air Division, Region IX, U.S. EPA, to Steve R. Meheen, Project Manager, BHP Billiton LNG International Inc. (April 5, 2004); Letter from Gerardo C. Rios, Chief, Permits Office, Air Division, Region IX, U.S. EPA, to Commander Mark Prescott, Acting Chief, Office of Operating and Environmental Standards Commandant, U.S. Coast Guard, Department of Homeland Security (June 10, 2004); Letter from Gerardo C. Rios, Chief, Permits Office, Air Division, Region IX, U.S. EPA, to Steve R. Meheen, Project Manager, BHP Billiton LNG International Inc. (June 29, 2004); Letter from Enrique Manzanilla, Director, Cross Media Division, Region IX, U.S. EPA, to Lieutenant Ken Kusano, U.S. Coast Guard (December 21, 2004).

rules, we have concluded offsets are not required for sources constructed in the area" where BHP plans to site its project.²

On January 16, 2007, the Committee requested that EPA provide the analysis referenced in its June 29, 2005, letter upon which the reversal was based. On January 27, 2007, EPA responded to this request.³ However, EPA provided no analysis that justified the reversal of EPA's position. Nor does the agency now claim that such an analysis even exists.

In short, while EPA assured the public that its decision was based on sound analysis, EPA has been unable to produce documents that support this claim.

EPA's January 27, 2007, letter does offer some rationales for the reversal. These rationales include: (1) natural gas is "extremely important to California and the Nation," (2) the project sponsor, BHP, offered to make some environmental commitments,⁴ (3) there are unidentified and unexplained "unique issues posed by the first west coast Deepwater Port application," and (4) the proposed facility is located in an undesignated area of the ocean. But these rationales are vague and not based upon "further analysis of the Deepwater Port Act and the District rules" as EPA has claimed.

Moreover, some documents provided by the agency raise additional questions about how this decision was reached.⁵ First, the documents reveal that EPA Assistant Administrator for Air and Radiation Jeff Holmstead personally intervened in the decision about the permit. According to the documents, Mr. Holmstead met with BHP on March 16, 2005.⁶ Mr. Holmstead then telephoned EPA's Region 9 office to discuss the BHP project.⁷ Subsequently, a conference call with Mr. Holmstead and various EPA regional staff was scheduled for April 27, 2005.⁸

² Letter from Amy Zimpfer, Associate Director, Air Division, Region 9, U.S. EPA, to Commander Mark Prescott, Deepwater Ports Standards Division, U.S. Coast Guard, Department of Homeland Security (June 29, 2005).

³ Letter from Wayne Nastri, Regional Administrator, Region 9, U.S. EPA, to Rep. Henry A. Waxman, Chairman, House Oversight and Government Reform Committee (January 26, 2007).

⁴ The exact terms of these commitments appear to remain under development.

⁵ Letter from Stephanie Daigle, Associate Administrator, Office of Congressional and Intergovernmental Relations, U.S. EPA, to Rep. Henry A. Waxman, Chairman, House Oversight and Government Reform Committee (Feb. 15, 2007).

⁶ Email from Rhonda White, U.S. EPA, to Amy Zimpfer, Region 9, U.S. EPA (April 5, 2005).

⁷ Email from Deborah Jordan, Director, Air Division, Region 9, U.S. EPA, to Don Zinger, U.S. EPA (April 21, 2005).

⁸ Email from Abigail Gaudario, Region 9, U.S. EPA, to Jennifer Chicconi, Region 9, U.S. EPA, and Deborah Jordan, Director, Air Division, Region 9, U.S. EPA (April 27, 2005).

Second, the documents show that at the time Mr. Holmstead was intervening in the decision, the career staff continued to insist that the project should be subject to the Ventura District rules, including the offset requirements. Upon learning of the upcoming conference call with Mr. Holmstead, Senior Counsel for Region 9, Kara Christenson, sent an email to EPA's Office of General Counsel in Washington, DC. The email was sent on April 20, 2005, one week before the scheduled conference call. In the email, Ms. Christenson wrote:

We believe offsets are required, but the applicant, BHP, disagrees and has some unusual regulatory interpretations. We think the agency should have some OGC [Office of General Counsel] input before any significant decisions are made.⁹

An email sent a day later from the Director of the Air Division in Region 9 stated: "the issue of applicability of nonattainment new source review to the proposed LNG facilities" has been a matter of "significant coordination among Regions, and OAR [the Office of Air and Radiation] and OGC [the Office of General Counsel] have been involved as well."¹⁰ A day after the scheduled conference call, a briefing document was prepared by Region 9 for EPA General Counsel Ann Klee that explained the Region's position on the project. In a section entitled "Key Determinations," the document states: "Ventura SIP New Source Review (NSR) regulations apply."¹¹

Based on the information provided to the Committee, it appears that (1) career officials at EPA opposed the permit decision reversal; (2) a senior EPA political official intervened in the permit decision after meeting with the company seeking the permit; and (3) the analysis that EPA cited to justify reversing the career officials does not appear to exist.

Unfortunately, the Committee's efforts to examine this unusual permitting situation are now being stymied by EPA's refusal to provide responsive documents to the Committee. According to EPA, the agency has identified 20 responsive documents but is only providing the Committee with eight documents in full and portions of five others. Some of the documents that EPA is refusing to provide appear to intensify, rather than diminish, concerns about EPA's handling of this process. For example, one email dated April 20, 2005, from Margaret Alkon, EPA Assistant Regional Counsel in Region 9, references an attachment that describes the

⁹ Email from Kara Christenson, Senior Counsel, U.S. EPA, Region 9, to Richard Ossias, Office of General Counsel, U.S. EPA (April 20, 2005).

¹⁰ Email from Deborah Jordan, Director, Air Division, Region 9, U.S. EPA, to Don Zinger, U.S. EPA (April 21, 2005).

¹¹ EPA Region 9, LNG in Region 9 Overview and Proposed Deepwater Ports, Briefing for Ann Klee, General Counsel (April 28, 2005).

The Honorable Stephen Johnson
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problems with BHP's mitigation plan.¹² However, the attachment has not been provided to the Committee.

In its February 15, 2007, response, EPA did offer to allow Committee staff to review the withheld documents in EPA offices. This is not a workable proposal. However, in an effort to accommodate the agency, I invite EPA to bring the documents to the Committee offices where staff can review them to determine if their production to the Committee will be necessary. Any such review should occur before March 16, 2007.

Additionally, I ask that you provide by that date, or bring to the Committee to review with the other documents, the July 7, 2004, letter from the U.S. EPA Administrator's Office to the White House Task Force on Energy Project Streamlining, which is referenced in one EPA document provided to the Committee.¹³

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Henry A. Waxman".

Henry A. Waxman
Chairman

¹² Email from Margaret Alkon, Assistant Regional Counsel, U.S. EPA, Region 9, to Richard Ossias, Office of General Counsel, U.S. EPA (April 20, 2005).

¹³ See EPA Region 9, LNG in Region 9 Overview and Proposed Deepwater Ports, Briefing for Ann Klee, General Counsel (April 28, 2005).

Congress of the United States

Washington, DC 20515

March 9, 2007

The Honorable Stephen L. Johnson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Ariel Rios Building
Washington, DC 20460

Dear Administrator Johnson,

As members of Congress who sit on committees with oversight jurisdiction over the Environmental Protection Agency and the Clean Air Act (CAA), we are writing to you regarding the Agency's actions in the permitting process of the BHP Billiton Cabrillo Deepwater Port Project (Cabrillo Project).

We are deeply concerned about the abrupt reversal in June 2005 of EPA's position regarding the Deepwater Port Act (DPA) and its relationship with the CAA. For two years, in both letters and in comments on the Cabrillo Project's Environmental Impact Statement, EPA had stated that the project was required to obtain a CAA permit and to comply with certain key state and local air pollution requirements, including the requirement the facility offset its emissions to avoid damaging air quality. Then, after lobbying from BHP Billiton and the participation of at least one EPA political appointee from Washington, the agency reversed itself and took the position that many of these requirements do not apply, and no CAA offsets are necessary for the project. We are troubled that this reversal indicates a significant change in the decision making process and legal interpretations at EPA.

As you are no doubt well aware, the air quality of Southern California suffers from high levels of pollution. Emissions from the Cabrillo facility will contribute to the further degradation of air quality in the area and, consequently, further impair the health of Californians. The Agency's new interpretation of the DPA and the CAA allows the Cabrillo Project to proceed to construction without a CAA emissions offset. Such an interpretation may lead to the degradation of air quality and allow emissions in violation of the CAA, and runs contrary to EPA's mission to preserve and protect the environment for all Americans. The provisions of the DPA meant to preserve state control appear to have been ignored. *See* 33 CFR 148.737. Furthermore, the Agency's inconsistent application of Ventura County Air Pollution Control District rules is confusing and troubling.

In order to clarify the Agency's position and ascertain how that position was established, we write today to request documents related to the Project. In particular, we seek the following from EPA Headquarters and Regional offices:

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- 1.) All EPA records¹ containing or pertaining to communications between BHP or their agents and EPA regarding air permits or requirements for the Cabrillo Project.
- 2.) All EPA records containing internal discussions of BHP air permits or requirements, and the potential application of any CAA provisions to the project.
- 3.) All EPA records regarding the Agency's interpretation of the DPA as it relates to the CAA and state air quality regulations.
- 4.) All EPA records containing or pertaining to communications between the White House (including but not limited to OMB) and EPA regarding the Cabrillo Project or interpretation of the DPA.
- 5.) All EPA records containing or pertaining to communications between EPA and other federal and state agencies or departments regarding the Cabrillo Project or interpretation of the DPA or CAA as it may affect this project, including but not limited to any communications with the Department of Energy or the Department of the Interior.

We respectfully request that you provide these documents as soon as possible, but no later than April 13, 2007. If you have any questions regarding this request please contact Erik Olson or Mary Frances Repko with the Senate Environment and Public Works Committee staff, at (202) 224-8832, or Jonathan Levenshus of the Office of Congresswoman Capps, at (202) 225-3601.

Sincerely,



Barbara Boxer
U.S. Senate



Lois Capps
Member of Congress

¹ The term "record" in this letter includes but is not limited to to any and all electronic or hard copy records, including correspondence, emails, notes, memos, minutes, phone logs, or other forms of records in the possession of the agency.