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COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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March 5, 2007

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

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[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]

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[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

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[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).

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,

Henry A. Waxman
Chairman

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[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).

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Responding to Oversight Committee Document Requests

In responding to the document request from the Committee on Oversight and Government Reform, please apply the instructions and definitions set forth below.

Instructions

1. In complying with the request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy, or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Records, documents, data, or information called for by this request should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization, or individual denoted in this request has been, or is currently, known by any other name than that herein denoted, the request should be read also to include them under that alternative identification.

3. Each document produced should be produced in a form that renders the document capable of being copied.

4. When you produce documents, you should identify to which paragraph in the Committee's request the documents respond.

5. Documents produced in response to this request should be produced together with copies of file labels, dividers or identifying markers with which they were associated when this request was issued. To the extent that documents were not stored with file labels, dividers, or identifying markers, they should be organized into separate folders by subject matter prior to production.

6. Each folder and box should be numbered, and a description of the contents of each folder and box, including the request number to which the documents are responsive, should be provided in an accompanying index.

7. It is not a proper basis to refuse to produce a document that any other person or entity also possesses a non-identical or identical copy of the same document.

8. If any of the requested information is stored in machine-readable or electronic form (such as on a computer server, hard drive, CD, DVD, memory stick, or computer backup tape), you should consult with Committee staff to determine the appropriate format in which to produce the information.

9. If compliance with the request cannot be made in full, compliance should be made to the extent possible and should include an explanation of why full compliance is not possible.

10. In the event that a responsive document is withheld on any basis, you should provide the following information concerning the document: (a) the reason the document is not being produced; (b) the type of document; (c) the general subject matter; (d) the date, author, and addressee; and (e) the relationship of the author and addressee to each other.

11. If any document responsive to this request was, but no longer is, in your possession, custody, or control, you should identify the document (stating its date, author, subject and recipients) and explain the circumstances by which the document ceased to be in your possession, custody, or control.

12. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.

13. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data, or information not produced because it has not been located or discovered by the return date should be produced immediately upon location or discovery subsequent thereto.

14. All documents should be bates-stamped sequentially and produced sequentially.

15. Two sets of documents should be delivered, one set to the majority staff and one set to the minority staff. When documents are produced to the Committee, one production set should be delivered to the majority staff in Room 2157 of the Rayburn House Office Building and one to the minority staff in Room B350A in the Rayburn House Office Building.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records notes, letters, notices,

confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone calls, meetings or other communications, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, voice mails, microfiche, microfilm, videotape, recordings and motion pictures), and electronic and mechanical records or representations of any kind (including, without limitation, tapes, cassettes, disks, computer server files, computer hard drive files, CDs, DVDs, memory sticks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, telexes, discussions, releases, personal delivery, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request? any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" means natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, and other units thereof.

5. The terms "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is in any manner whatsoever pertinent to that subject.