Before the Environmental Protection Agency

Supplemental Comments of the Natural Resources Defense Council on Standards of Performance for Electric Utility Steam Generating Units for Which Construction is Commenced After September 18, 1978; Standards of Performance for Industrial-Commercial-Institutional Steam Generating Units; and Standards of Performance for Small Industrial-Commercial-Institutional Steam Generating Units

70 Fed. Reg. 9706 (Feb. 28, 2005)

Attn: Docket No. OAR 2005-0031

Submitted by:

David Doniger
NATURAL RESOURCES DEFENSE COUNCIL
1200 New York Avenue, NW
Suite 400
Washington, DC 20009
(202) 289-6868

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Corrected Copy

The Natural Resources Defense Council files these supplemental comments on behalf of its more than 1.2 million members and online activists. These supplemental comments address three matters:

(1) comments made by the U.S. delegation at the Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC) in Montreal on November 29 and December 7, 2005;

(2) new publications on global warming by the National Academy of Sciences (NAS) and by the 11 national science academies of Brazil, Canada, China, France, Germany, India, Italy, Japan, Russia, the United Kingdom, and the United States; and

(3) the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005).

Each of these comments reinforces EPA's legal duty to establish standards of performance for emissions of carbon dioxide (CO_2) for the source categories covered by this rulemaking, including both new and existing electric power generation units, under Clean Air Act §111(b) and (d).

In each instance the grounds for these comments arose after the close of the comment period for this rulemaking, and as explained below each ground and comment are of central relevance to the outcome of the rule. *See* Clean Air Act §307(d)(7)(B), 42 U.S.C. §7607(d)(7)(B). Since these comments are being filed more than a month before the final regulatory decision is due, NRDC expects that EPA will add them to the docket and will consider and respond to them in making its final decision. *See Sierra Club v. EPA*, 657 F.2d 298 (D.C. Cir. 1981). *See also Fox Television v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002). As a result, there should be no need for NRDC to re-file these comments as a petition for reconsideration, though NRDC will do so if EPA does not consider them fully in its final decision.

I. Statements by the U.S. Delegation at the Montreal Climate Change Meetings Deprive EPA of Any Rational Basis for Arguing That Domestic Regulation of CO_2 Would Undercut U.S. Diplomatic Objectives

At the recent international climate change meetings in Montreal – the 11th Conference of the Parties to the UNFCCC and 1st Meeting of the Parties to the Kyoto Protocol, Nov. 28-Dec. 10, 2005 – the two senior members of the U.S. delegation expressly disclaimed any intention of the Executive Branch to participate in negotiations towards binding limits on any country's emissions of greenhouse gases. These statements deprive EPA of any rational basis for one argument previously offered to justify the refusal to regulate CO_2 or other greenhouse gases under the Clean Air Act.

In September 2003, EPA denied a petition for regulation of motor vehicle emissions of greenhouse gases under Clean Air Act §202, 42 U.S.C. §7501.[1] One of the "back-up" rationales given by the agency for not regulating was as follows:

> Unilateral EPA regulation of motor vehicle GHG emissions could also weaken U.S. efforts to persuade key developing countries to reduce the GHG intensity of their economies. Considering the large populations and growing economies of some developing countries, increases in their GHG emissions could quickly overwhelm the effects of GHG reduction measures in developed countries. Any potential benefit of EPA regulation could be lost to the extent other nations decided to let their emissions significantly increase in view of U.S. emission reductions.[2]

This argument harkens back to the current administration's reasons given in 2001 for rejecting the Kyoto Protocol: that the Protocol placed a binding limit on U.S. emissions but not on emissions of developing countries. Following this line of reasoning, the September 2003 notice rejected "[u]nilateral EPA regulation" because it supposedly would weaken the U.S.'s diplomatic leverage to obtain limits on developing country emissions.

NRDC and others have already shown that this argument is inconsistent with U.S. obligations under the UNFCCC, a treaty ratified by the Senate and to which the U.S. is a party. In that treaty the U.S. expressly agreed to "adopt national policies and take corresponding measures" that "will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions. . . ." UNFCCC at Art. IV ¶2(a). In other words, rather than trying to leverage action by developing countries by *holding back* domestic action, the policy that the U.S. adopted when it became a party to the UNFCCC is to leverage developing country action by *leading by example.*

Even if *arguendo* the EPA's dubious line of reasoning had ever had some rational basis, it is completely lacking in rationality now, because the administration has expressly stated at the most recent UNFCCC meetings that *it is <u>not</u> current U.S. policy to seek any binding limits on developing country emissions.* As a result, a refusal to regulate U.S. CO_2 emissions can no longer be defended as serving a U.S. diplomatic objective of leveraging limits on developing country emissions. Quite simply, unilateral regulation of domestic emissions cannot weaken U.S. diplomatic leverage regarding an objective the administration does not seek to achieve.

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[1] 68 *Fed. Reg.* 52,922 (Sept. 8, 2003). EPA's principal argument for denial was the claim that the Clean Air Act does not authorize regulation of greenhouse gases. We and other commenters have thoroughly addressed this erroneous "no-authority" claim in the prior comments of Environmental Defense *et al.* and the State of New York. We note that the issue was not resolved in *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), *rehearing en banc denied* 2005 WL 3243041 (D.C. Cir., Dec. 2, 2005). The impact of that case is discussed in Section III of these comments.

[2] 68 *Fed. Reg.* at 52,931/1

The U.S. delegation in Montreal was plain as day about the administration's current policy and diplomatic objectives. On November 29, 2005, Dr. Harlan L. Watson, Senior Climate Negotiator and Special Representative and Alternate Head of the U.S. Delegation, said as follows:

> I want to address the issue that received much attention here in Montreal -- to a so-called "post-2012 process." Kyoto Parties are legally obligated to commence discussions here in Montreal on a second commitment period, which for them would presumably begin in 2013. We respect that obligation and expect that they will meet their commitment to do so. *However, the United States is opposed to any such discussions under the Framework Convention.*
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> . . .
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> **[**F]ormalized discussions under the Framework Convention -- which is the current proposal by some Parties -- are in fact negotiations. The U.S. position remains consistent. *We see no change in current conditions that would result in a negotiated agreement consistent with the U.S. approach.*
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> The United States seeks to focus attention on progress toward the shared objectives of the Framework Convention rather than to detour positive approaches toward a new round of negotiations based upon the Kyoto process. *We are not a party to the Kyoto Protocol and we do not support any such approach under the Convention for future commitments.*[3]

On December 7, Dr. Paula Dobriansky, Under Secretary of State for Democracy and Global Affairs and Head of the U.S. Delegation, reiterated these points, saying: "It is our belief that progress cannot be made through these formalized discussions. . . . [W]e also believe firmly that negotiations will not reap progress, as I indicated, because there are differing perspectives."[4]

Thus, U.S. policy under this administration is to oppose negotiations over binding limits on greenhouse gas emissions – whether under the UNFCCC, the Kyoto Protocol, or any other forum – even if those negotiations include limits for developing countries. In this policy context, there is no basis for any claim that domestic regulation could rationally be withheld in order to gain diplomatic leverage.

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[3] COP 11/MOP 1 Press Conference, Dr. Harlan L. Watson, Senior Climate Negotiator and Special Representative and Alternate Head of the U.S. Delegation, Montreal, Canada (Nov.29, 2005) (emphasis added), http://www.state.gov/g/oes/rls/rm/57449.htm (attached as Appendix A).

[4] Press Briefing by the Delegation of the United States COP 11/MOP 1, Dr. Paula Dobriansky, Under Secretary of State for Democracy and Global Affairs and Head of the U.S. Delegation, Remarks to the Conference of Parties to the UN Framework Convention on Climate Change, Montreal, Canada (Dec. 7, 2005), http://www.state.gov/g/rls/rm/2005/57867.htm (attached as Appendix B).

EPA might respond that the administration still seeks to *encourage* developing countries to limit the rate of increase in their emissions (in the administration's lingo, to reduce the "emissions intensity" of their economic growth). But the administration has chosen to pursue this objective entirely by voluntary means and by encouragement – by bilateral agreements promoting sustainable development and technology cooperation. The administration has specifically ruled out any effort to negotiate mandatory or binding limits on the emissions of other countries, or of the U.S., regardless whether framed as a fixed tonnage limit or as a limit on the rate of emissions growth. The administration asserts that *voluntary* U.S. domestic action plays a role in encouraging other countries to take voluntary actions to reduce the rate of their emissions growth. Given that proposition, there can be no rationale basis for a claim that domestic *regulatory* action would not also encourage voluntary action by other countries. Rather, it is easy to see that *any* action to reduce domestic emissions – whether voluntary or mandatory – would assist the U.S. diplomatic objective of encouraging other countries to take voluntary action.

The bottom line here is that there is no rational basis for an argument that regulating domestic power plant CO_2 emissions under Clean Air Act Section 111(b) and (d) would in any way undercut current U.S. foreign policy and diplomatic objectives.

II. Recent National Academy of Sciences Publications Contradict EPA's "Spin" on the 2001 NAS Report

Scientific data strongly demonstrate that global warming is occurring, is caused by anthropogenic emissions, and can be mitigated by reductions in those emissions. While there will always be a residual of uncertainties on matters of detail, these conclusions are well-established, and a wide variety of adverse consequences are considered to be either "likely" or "very likely," in the lexicon of the Intergovernmental Panel on Climate Change and the 2002 U.S. Climate Action Report. Prior comments submitted by Environmental Defense *et al.* and New York State have cited the main scientific reports – including official reports of the U.S. government – and other scientific data that support these conclusions. As a result, there is no rational basis remaining for the proposition that global warming science is too uncertain to support regulatory limits on emissions of CO_2 and other greenhouse gases.

In the September 2003 petition denial, referenced above, EPA focused solely on a 2001 report of the National Research Council of the National Academy of Sciences (NRC)[5] and disregarded all other scientific reports and data submitted for that record. The agency *said*: "We rely in this decision on NRC's objective and independent assessment of the relevant science."[6] In fact, however, EPA ignored the main findings of the report and cherry-picked from it isolated statements regarding scientific uncertainties.

[5] NRC, Climate Change Science: An Analysis of Some Key Questions (2001), *available at* http://www.nap.edu/catalog/10139.html.
[6] 68 *Fed. Reg.* at 52,930/1.

The agency's "spin" on the NRC report drew a sharp rebuke from Judge Tatel in *Massachusetts v. EPA.* (We will address the meaning of the *Massachusetts* case for the NSPS decision in Section III of these comments.) Judge Tatel concisely summarized the main conclusions of the NRC report, starting with its opening conclusion that: "Greenhouse gases are accumulating in Earth's atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise." 415 F.3d at 62-64. He then dissected EPA's "uncertainty" analysis first on legal grounds, showing that the agency failed to apply the correct standard – "may reasonably be anticipated to endanger" – as set forth in *Ethyl Corp. v. EPA*, 541 F.2d 1 (1976) and other cases. 415 F.3d at 75-76, 78-79. Tatel wrote that the Clean Air Act "nowhere calls for proof. It nowhere calls for 'unequivocal' evidence. Instead, it calls for the Administrator to determine whether GHGs 'contribute to air pollution which *may reasonably be anticipated* to endanger' welfare." 415 F.3d at 77. He continued:

> EPA never suggests that the uncertainties identified by the NRC Report prevent it from determining that GHGs "may reasonably be anticipated to endanger" welfare. In other words, just as EPA failed in [*Natural Resources Defense Council v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (*en banc*)] to explain its chosen emissions level in light of the statutory standard, so the agency has failed here to explain its refusal to find endangerment in light of the statutory standard.
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> EPA's silence on this point is telling. *Indeed, looking at the NRC Report as a whole, I doubt EPA could credibly conclude that it needs more research to determine whether GHG-caused global warming "may reasonably be anticipated to endanger" welfare.*
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> *I have grave difficulty seeing how EPA, while treating the NRC Report as an "objective and independent assessment of the relevant science," 68 Fed. Reg. at 52,930, could possibly fail to conclude that global warming "may reasonably be anticipated to endanger public health or welfare,"* 42 U.S.C. § 7521(a)(1), with effects on welfare including "effects on soil, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being," *id.* § 7602(h).

415 F.3d at 77, 80 (emphasis added).

In addition to Judge Tatel's critique, the National Academy of Sciences itself has subsequently rejected, in unmistakable terms, EPA's tortured reading of the 2001 NRC report. In *Understanding and Responding to Climate Change: Highlights of National Academies Reports*, published in October 2005, the NAS stated:

> *Despite remaining unanswered questions, the scientific understanding of climate change is now sufficiently clear to justify taking steps to reduce the amount of greenhouse gases in the atmosphere.* Because carbon dioxide and some other greenhouse gases can remain in the atmosphere for many decades, centuries, or longer, the climate change impacts from concentrations today will likely continue well beyond the 21st century and could potentially accelerate. *Failure to implement significant reductions in net greenhouse gases will make the job much harder in the future—both in terms of stabilizing their atmospheric abundances and in terms of experiencing more significant impacts.*[7]

Similarly, in June 2005, the national science academies of 11 nations – Brazil, Canada, China, France, Germany, India, Italy, Japan, Russia, the United Kingdom, and the United States – issued the *Joint Science Academies' Statement: Global Response to Climate Change*.[8] The joint statement (from the top science academies of both developed and developing countries) says:

> **Climate change is real**
> *There will always be uncertainty in understanding a system as complex as the world's climate. However there is now strong evidence that significant global warming is occurring.* The evidence comes from direct measurements of rising surface air temperatures and subsurface ocean temperatures and from phenomena such as increases in average global sea levels, retreating glaciers, and changes to many physical and biological systems. *It is likely that most of the warming in recent decades can be attributed to human activities (IPCC 2001). This warming has already led to changes in the Earth's climate.*
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> . . .
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> **Reduce the causes of climate change**
> *The scientific understanding of climate change is now sufficiently clear to justify nations taking prompt action.* It is vital that all nations identify cost-effective steps that they can take now, to contribute to substantial and long-term reduction in net global greenhouse gas emissions. *Action taken now to reduce significantly the build-up of greenhouse gases in the atmosphere will lessen the magnitude and rate of climate change.* As the United Nations Framework Convention on Climate Change (UNFCCC) recognises, *a lack of full scientific certainty about some aspects of climate change is not a reason for delaying an immediate response that will, at a reasonable cost, prevent dangerous anthropogenic interference with the climate system.*

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[7] National Academy of Sciences, *Understanding and Responding to Climate Change: Highlights of National Academies Reports*, p.16 (October 2005), *available at* http://dels.nas.edu/dels/rpt_briefs/climate-change-final.pdf (emphasis added) (attached as Appendix C).

[8] *Joint Science Academies' Statement: Global Response to Climate Change* (June 2005), *available at* http://nationalacademies.org/onpi/06072005.pdf (attached as Appendix D).

. . .

> Carbon dioxide can remain in the atmosphere for many decades. Even with possible lowered emission rates we will be experiencing the impacts of climate change throughout the 21st century and beyond. *Failure to implement significant reductions in net greenhouse gas emissions now, will make the job much harder in the future.*

Joint Science Academies' Statement at 1 (emphasis added, footnotes omitted). The 11 academies also expressly stated: "We recognise the international scientific consensus of the Intergovernmental Panel on Climate Change (IPCC)." *Id., fn.2.*

Given these two recent scientific pronouncements, the EPA's 2003 spin on the 2001 NRC report is no longer even remotely tenable. The scientific consensus is clear: despite an inevitable residual of uncertainties in the details, the scientific understanding of the causes and risks of global warming is strong enough to command that governments undertake significant emission reductions now.

III. The Impact of *Massachusetts v. EPA*

Comments filed earlier in this rulemaking preceded the decision of the D.C. Circuit Court of Appeals in *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), *rehearing en banc denied* 2005 WL 3243041 (D.C. Cir., Dec. 2, 2005) (attached as Appendices E and F). The prior section has already discussed aspects of Judge Tatel's opinion in this case. A few words are necessary concerning the overall decision and the status of the legal issues involved – including the question of Clean Air Act authority to regulate emissions of CO_2 and other greenhouse gases.

The *Massachusetts* panel produced a 2-1 vote against a challenge to EPA's refusal to issue greenhouse gas emission standards for motor vehicles. But the panel produced three opinions, no two of which agree on any of the key Clean Air Act issues. Judge Sentelle voted against the petition because he felt no one had standing to sue over global warming, although the other two judges (Randolph and Tatel) agreed that the state and environmental petitioners did have standing. Judge Randolph assumed for the sake of argument that EPA has legal authority to regulate greenhouse gases, but wrote that he would defer to EPA's "policy" reasons for not doing so. In his dissent from the denial of rehearing, Judge Tatel correctly noted that "the panel's decision denying the petitions has no precedential effect – the panel never considered the first question and Judge Randolph's views on the second are his alone." 2005 WL 3243041 at 2.

Only Judge Tatel addressed EPA's "no authority" argument on the merits, and he concluded that the Clean Air Act *does* authorize regulation of greenhouse gases that adversely affect the climate. Rather than quote from Judge Tatel's opinion, we incorporate it by reference in its entirety. As matters now stand, the only judicial opinion addressing EPA's argument on the merits has found that argument meritless.

Thus, EPA's claim that it lacks Clean Air Act authority to regulate greenhouse gases has yet not been definitively adjudicated and remains open to challenge in this proceeding.