

Comments on EPA’s Proposed Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electricity Generating Units Docket EPA-HQ-OAR-2013-0495 RIN 2060-AQ91

The Energy and Environmental Law Institute (E&E Legal) & The Free Market Environmental Law Clinic (FMELC)

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SUMMARY OF COMMENTS:

COMMENT: *The public record reveals the proposed rule is materially based on involvement by individual(s) having an “unalterably closed mind” (predetermined), and on improper participation and influence by certain parties, with whom senior, involved Agency officials also have conflicts.*

COMMENT: *EPA’s rulemaking record is presumptively incomplete: extensive senior use of private email accounts, failure to obtain records and to report possible removal or loss, creating a presumption of record removal or loss.*

COMMENT: *EPA’s rulemaking record is presumptively incomplete: it has engaged in/ permitted wholesale destruction of an entire class of correspondence to and from senior officials involved in this rulemaking, failed to obtain records and to report possible removal or loss, creating a presumption of record removal or loss.*

COMMENT: *EPA’s proposed rule represents a naked transfer of wealth from one sector of the electric generation industry to others in that industry, and so is unconstitutional as a substantive due process violation of the Fifth Amendment; it is in violation of the due process requirement of the Fifth Amendment, in the form of a violation of equal protection. The sole rationale for EPA’s rule is something upon which there is “consensus” that the proposed rule will have no impact (climate), which EPA ignores relying instead on the work of others, committing multiple logical fallacies including appeal to authority, appeal to belief, appeal to consequences of a belief, and ignoring a common cause. The Agency’s failure to proffer reasons for its regulation that could survive even rational basis review condemns the proposed rule to unconstitutional status.*

Introduction – Rulemaking and a Tainted Record

The statute governing rulemaking under the Clean Air Act (CAA) reads in pertinent part, “The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.”¹ The law further states that a rule can be invalidated if it is “found to be— (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or (D) without observance of procedure required by law....”²

The arbitrary and capricious standard, as it applies to the CAA, has been explained more thoroughly by the 11th Circuit Court of Appeals in *Louisiana-Pacific Corp. v. United States EPA* which, citing to the U.S. Supreme Court, held that “[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”³ In another case relevant to this rulemaking, in *Association of Nat’l Advertisers, Inc. v. FTC*, the DC Circuit Court of Appeals explained that “An agency member may be disqualified from such a proceeding only

¹ 42 U.S.C. § 7607 (d)(6)(c).

² 42 U.S.C. § 7607 (d)(9).

³ *Louisiana-Pacific Corp. v. United States EPA*, 281 Fed. Appx. 877, 878 (11th Cir. 2008) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

when there is a clear and convincing showing that he has an unalterably closed mind on matters critical to the disposition of the rulemaking.”⁴

The result of the applicable precedent is that a rule cannot stand if an agency has based a rule on information not on the record, or otherwise against the law or Constitution, if they have based their decision on something Congress could not have anticipated, or if it is materially based on involvement by an individual having an “unalterably closed mind.” Commenters possess, and cite in this Comment, substantial reason to believe this proposed rule is based on information not in the record -- at minimum, the Agency’s record plainly is *presumptively* deficient, for reasons explained herein -- is arbitrary, capricious, and an abuse of discretion and otherwise not in accordance with the law, that it may have violated the due process and equal protection rights of various interested parties, was promulgated with material participation by officials who had conflicts of interest and whose minds were unalterably made up, and has failed to observe legally required procedure. The result is that this rulemaking is invalid.

At minimum it must be stayed until the any presumption of the record’s integrity is reasonably restored; more appropriately, these myriad deficiencies require the Agency proceed anew, with no conflicts and a complete record. Depending on the violation of the rule-making requirements, these remedies range from staying the rule until a reasonable and credible effort is completed to assess, obtain and restore missing information, to restarting the process, with a complete record and legitimate opportunity for all parties to comment as the law provides, with no predetermination, undue influence or omissions, and different decision making personnel who

⁴ *Association of Nat’l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1154 (D.C. Cir. 1979).

are not predetermined and do not have conflicts of interests, who have not conducted, without docketing, possibly relevant correspondence on email accounts outside of the control of or potential review by any other Agency employee and who have not destroyed possibly relevant and necessarily docketed text message transcripts. Barring that, this proposed rule is not in accordance with the law.

Evidence supporting these conclusions include improper collusion between the Environmental Protection Agency (EPA) and interested parties to advance a shared, predetermined goal, conflicts of interests amongst senior EPA officials playing material roles in this proposed rulemaking, and failure to obtain and preserve possible relevant records or notify the National Archivist of the possible removal or loss of records thereby precluding the prospect of docketing possibly necessary records. This evidence began with statements on the public record and has now expanded to include correspondence obtained under the Freedom of Information Act (FOIA). Indeed, conflicts, collusion and predetermination aside, the demonstrated improper record keeping by EPA leaves an incomplete record on which to review this rulemaking. Regardless, by this Comment E&E Legal and the FMELC show a more complete picture of what the EPA did in arriving at this proposed regulation, why, and to what intended effect.

As explained in the sections below, although the EPA has the authority to regulate, it cannot regulate the way it has; the process has been irrevocably tainted and cannot properly proceed absent substantial, credible remedial steps.

Because of the breadth and extent of the violations we identify, we ask that the EPA withdraw this rule. Should the Agency conclude through an unbiased procedure that regulation in this area remains necessary and appropriate, the process must be conducted anew with untainted officials and new inputs, giving all interested parties the same opportunity to have their views considered in a fair and open process, untainted by predetermined outcomes from conflicted individuals whose minds are unalterably closed, and with a record properly reconstituted to include all proper correspondence, lawfully conducted and preserved.

Further, EPA's proposed rule to control greenhouse gases under the Clean Air Act's New Source Performance Standards is unconstitutional as a substantive due process violation of the Fifth Amendment because it constitutes a naked transfer of wealth from one sector of the electric generation industry to other electric generation entities of that industry. Combined with evidence that this major regulatory initiative offers no economic, climatic, or systematic benefit, the president's vow to "finally make [renewable energy] profitable" and "bankrupt" its competitor, this provides a disturbing picture of use of the state's police power of the sort that courts have recently found unacceptable. *See, St. Joseph Abbey v. Castille*, No. 90-345 slip on. at 11 (5th Cir. March 20, 2013) (5th Circuit Court of Appeals has held these kinds of "naked transfers of wealth" unconstitutional under the Equal Protection and Due Process clauses of the US Constitution).

The proposed rule is also unconstitutional as a due process violation of the Fifth Amendment, in the form of a violation of equal protection, because the rule is intended to increase the cost of electricity to those least able to pay that cost, because EPA knows of this inequality, because EPA knows the targets of that inequality are minorities whose rights our laws

seek to specifically protect, EPA knows this regulation will not affect the harms it is supposed to remedy.

The Record Concerning the Rule for New Stationary Power Sources Is Irrevocably Tainted

The authority for administrative agencies to regulate is provided by Congress. Congress clearly gave EPA authority to regulate under the Clean Air Act, but to be valid any regulatory process must adhere to the prescribed procedure, as described in the introduction and considering constitutional constraints and their manifestation in the Administrative Procedure Act (APA), or in identical constraints rising from the CAA itself. Due to these restraints, if the record is tainted, either by officials who sought a predetermined outcome or had conflict of interest, officials who improperly colluded behind the scenes thereby granting certain parties a uniquely influential role in the process (inherently to the detriment of other parties), or if the record is incomplete or presumptively so, due to widespread recordkeeping abuses and even wholesale destruction of an entire class of correspondence, then the rulemaking is invalid. This rulemaking record is tainted and/or deficient for just those reasons, such that substantive remedies are necessary for it to proceed, or it must be started anew to possibly obtain a valid rule.

Context for this Rulemaking and these Comments

Debate over appropriate pollution controls, especially concerning the greenhouse gas carbon dioxide (CO₂), has been long and increasingly complicated. This is in part due to Congress rejecting the idea each time it was expressly placed before them, the instant rule making flowing from a court decision granting the Agency the authority nonetheless, reliance on unverified and demonstrably unskilled computer model projections for related rules, and

observations belying those models' validity. Additional complications include the acknowledged lack of possible impact on the nominal issue driving the rule making (climate change),⁵ and the demonstrated economic implications of such regulatory requirements in countries that have led this experiment and have been cited by the Administration as our model for following it (Europe⁶). There are also increased concerns over reliability implications involving the electricity production and delivery system.⁷ Finally there is the President of the United States

⁵ All computer model projections upon which EPA basis its rule, related rules, and otherwise agree on this, which also was admitted by former EPA Administrator Lisa Jackson before the Senate Environment and Public Works Committee, *i.e.*, "U.S. action alone will not impact world CO2 levels." *Jackson Confirms EPA Chart Showing No Effect on Climate Without China, India*, Senate Committee on Environment and Public Works, July 7, 2009. Available at: http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=564ed42f-802a-23ad-4570-3399477b1393. Last retrieved: 2/21/2014.

⁶ For the most recent update on the administration's longest-standing supposed model, Germany, see most recent pronouncements by, *e.g.*, Commission for Research and Innovation (EFI), Information Handling Services (IHS), summarized at Walter Russell Meade, "Germany's Energiewende: A Path to Economic Self-Destruction", *The American Interest*, February 27, 2014, <http://www.the-american-interest.com/blog/2014/02/27/germanys-energiewende-a-path-to-economic-self-destruction/>. Last retrieved 3/7/14. *See also* "Germany's Energy Poverty: How Electricity Became a Luxury Good," *Spiegel Online*, 09/04/2013, <http://www.spiegel.de/international/germany/high-costs-and-errors-of-german-transition-to-renewable-energy-a-920288.html>, Last retrieved: 3/5/2014.

⁷ No studies appear to have been conducted on the impacts of the instant rule effectively regulating coal-fired power plants out of existence, though for impacts of the companion effort, to shutter existing plants — the impact of accelerated closures being relevant to a measure ensuring these will not be replaced, either — *see e.g.*, American Electric Power, "AEP Notifies Reliability Organizations Of Planned Plant Retirements", <https://www.aep.com/newsroom/newsreleases/?id=1754>; *see also*, U.S. Energy Information Administration, "AEO2014 projects more coal-fired power plant retirements by 2016 than have been scheduled", <http://www.eia.gov/todayinenergy/detail.cfm?id=15031> . Last retrieved 3/7/14.

saying, serially, that his objective was to finally make a politically selected industry profitable,⁸ after having previously pledged to “bankrupt” its viable, main competitor.⁹

Add to this documentary affirmation of what seem to be uniquely close working relationships on this project between an Agency staffed at senior levels with former lawyers and activists for environmentalist pressure groups sharing this agenda, and those groups. This paints a picture of ideologically aligned parties “stitching up” a shared agenda item to the exclusion of other parties’ legitimate opportunity to impact or at minimum be heard in the process.

Finally, we have learned of widespread abuses with regard to preserving federal records, on prohibited computer systems outside of the control of or potential review by any other Agency employee, outside of possible scrutiny, certainly outside of the instant record, where presumptively many of which should have been docketed. These are records not provided to the Agency by multiple senior employees as required, not obtained by the Agency as required, and

⁸ Before a joint session of Congress, President Obama stated that “we need to ultimately make clean, renewable energy the profitable kind of energy.” Remarks of President Obama - As Prepared for Delivery Address to Joint Session of Congress, 2/24/2009. Available at: http://www.whitehouse.gov/the_press_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress. Last retrieved 2/21/2014. On the eve of the vote on the “Cap and Trade” bill, he reiterated it, “The list goes on and on, but the point is this: This legislation will finally make clean energy the profitable kind of energy.” A Historic Energy Bill, Address by President Barack Obama, June 29, 2009. Available at: <http://www.whitehouse.gov/blog/A-Historic-Energy-Bill>. Last retrieved 2/21/2014. In his first speech before the United Nations General Assembly, he reaffirmed “We will move forward with investments to transform our energy economy, while providing incentives to make clean energy the profitable kind of energy.” Obama's Speech to the United Nations General Assembly, September 23, 2009, Available at: <http://www.nytimes.com/2009/09/24/us/politics/24prexy.text.html?pagewanted=all>. Last retrieved 2/21/2014. In his 2013 State of the Union Address he explicitly stated that the purpose was to, “Speed the transition to more sustainable sources of energy.”Remarks by the President in the State of the Union Address, February 12, 2013. Available at: <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>, last retrieved 1/31/2014.

⁹ In a videotaped interview with the *San Francisco Chronicle*, then-candidate Obama said that “If someone wants to build a new coal-fired power plant they can, but it will bankrupt them because they will be charged a huge sum for all the greenhouse gas that’s being emitted.” Available at: <http://www.youtube.com/watch?v=DpTlhyMa-Nw>. Last retrieved 1/31/2014.

the possible (inescapable) loss of records not reported to the National Archivist as also required. This is combined with similar, recent knowledge that the Agency allowed senior employees to destroy the Agency's sole copies of an entire class of records provided as an alternative to electronic mail — text messaging transcripts — a demonstrably egregious practice: EPA would never proceed with this rule making were it recently revealed that the Agency allowed certain senior employees materially involved with it to destroy each and every copy of thousands of the Agency's emails, legally indistinct from text message transcripts.

In this context, we must pay particular heed to following required procedures and ensuring that that has occurred and whether it was proper or not. We suggest this proposed rule is not a legitimate use of the state's police powers, properly executed.

COMMENT 1

SUMMARY OF COMMENT 1: *The public record reveals the proposed rule is materially based on involvement by individual(s) having an “unalterably closed mind” (predetermined), and on improper participation and influence by certain parties, with whom senior, involved Agency officials also have conflicts.*

The Early Days of the New Administration – The Johnson Memo and “Endangerment”

The instant rule making flows from EPA's “endangerment” finding, which is not per se an issue in the current rulemaking but which is directly relevant to it. After the United States Supreme Court ruled 5-4 that EPA has the authority to establish regulatory standards for greenhouse gasses as “pollutants” under the CAA,¹⁰ then-Administrator Steve Johnson produced the “Johnson Memo” addressing how the EPA would treat carbon dioxide. Neither *Massachusetts v. EPA* nor the Johnson Memo interpreting the Agency's response to that opinion

¹⁰ *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007).

required CO2 to be considered when granting “Prevention of Significant Deterioration” permits to new or upgraded power plants.¹¹ However, emails obtained under the Freedom of Information Act (FOIA) show that Johnson’s successor as administrator, Lisa Jackson, came to office intending to reconsider the Johnson memo, with a path toward an “endangerment” finding that would allow the EPA to limit carbon.¹² Although Jackson assumed her position having already reached this conclusion and upon assuming her position had her team immediately commit this to writing, she also instructed her team to “downplay” that they were even considering doing that going forward, because the media, apparently having gotten wind of this, were inquiring (according to EPA emails these outlets were the New York Times [John Broder], Washington Post, Associated Press [“Dana” (likely Cappiello), and Greenwire).¹³ EPA officials informed the White House of these calls.¹⁴ EPA decided to state that “The Administrator is reviewing the matter as she committed to do during her confirmation process.”¹⁵

These emails which we have obtained begin less than 3 weeks after President Obama’s inauguration and document that the new officials at the EPA had already made up their minds.

¹¹ Robin Bravender, “EPA Sends 'Johnson Memo' Reconsideration on CO2 Emissions to White House”, *New York Times*, March 5, 2010. Available at: www.nytimes.com/gwire/2010/03/05/05greenwire-epa-sends-johnson-memo-reconsideration-on-co2-51429.html, Last retrieved 2/28/2014.

¹² Fact Sheet -- Reconsideration of Former Administrator Johnson Interpretive Memo on Definition of Pollutants Covered Under the Clean Air Act, Available at: epa.gov/nsr/fs20090930guidance.html, last retrieved, 2/28/2014.

¹³ Email, From: Richard Windsor (Lisa Jackson’s false-identity email account), To: David Cohen, cc: Allyn Brooks-LaSure, Subject: Re: Post has checked in, 2/09/2009.

¹⁴ Email, From: David Cohen, To: Richard Windsor (Lisa Jackson), cc: Lisa Heinzerling, David McIntosh, Subject: wh press-office conference call today, 02/09/2009.

¹⁵ Email, From: David Cohen To: Roxanne Smith, Allyn LaSure, Richard Windsor (Lisa Jackson) Subject: roxanne: here’s the quote for post, 2/09/2009.

By February 8, 2009, Administrator Jackson was planning on warning power plants that she was intent on regulating their CO2 emissions, and apparently denying a permit based on as yet unchanged regulations.¹⁶ Only one day later, a memo was given to Jackson¹⁷ by the attorney who successfully argued *Massachusetts v. EPA*, one part of her years of work demanding that EPA adopt rules including the instant matter. She was brought in to the administration immediately and set to work on this matter (apparently until “reinforcements have arrived”, whom she [rightly] thought would be more appropriate to execute the plan she had drafted (“I hope and believe the moment has come to give someone else the opportunity to address these matters.”)¹⁸), sealing the endangerment finding. Already the senior team expressly discussed “the endangerment finding” as de facto a *fait accompli*¹⁹ though officially they had not gone through the process to reach that finding; this was not announced as having been (just) decided upon until Ms. Jackson headed to the Copenhagen “Kyoto” negotiations on December 9, 2009, ensuring a politically managed hero’s welcome but improperly presenting the finding as the product of regulatory inquiry and deliberation.²⁰

¹⁶ Email, From: Lisa Heinzerling, To: “Richard Windsor” (Lisa Jackson), cc: David McIntosh, Subject: PDS: recommendation for tomorrow, 2/08/2009 (partially redacted).

¹⁷ Email, From: Lisa Heinzerling, To: Richard Windsor (Lisa Jackson), Subject: PSD memo to regions, 02/09/2014.

¹⁸ Email, From: Lisa Heinzerling, To: Lisa Jackson, Eric Wachter, Robert Goulding, David McIntosh, Bob Sussman, Allyn LaSure, Subject: pending items, 02/10/2009.

¹⁹ Email, From: David Cohen, To: Richard Windsor (Lisa Jackson), cc: Lisa Heinzerling, David McIntosh, Subject: wh press-office conference call today, 02/09/2009.

²⁰ Action Jackson: U.S. EPA Boss Gets Warm Welcome in Copenhagen, By: Keith Johnson, The Wall Street Journal, 12/09/2009, Available at: <http://blogs.wsj.com/environmentalcapital/2009/12/09/action-jackson-us-epa-boss-gets-warm-welcome-in-copenhagen>, Last retrieved: 03/05/2012.

In furtherance of this, to ensure that the fact did not become known, EPA's senior management team then in place were already striving internally to deftly manage the press's interest in the prospect, specifically by "downplay[ing]" it and seeking to avoid any coverage of, or need to elaborate upon, this predetermination/decision;²¹ emails indicate that their biggest concern was the prospect of a Senate political leader, Majority Leader Harry Reid, speaking too openly about this decision which, developed with White House aide Carol Browner, was known to a small circle outside of EPA's political management team then in place.²² Further discerning their precise thinking is difficult since many of these emails are heavily redacted; however, as seemingly scripted, 10 months later the EPA issued the endangerment finding it had determined de facto in the very first days of the current EPA administration and which led to the current proposed rule (EPA's argument is that the endangerment finding compelled this rule).²³

The predetermination, which the record also shows was subsequently put into form in collusion with environmental pressure groups, was the product of officials with unalterably

²¹ Email, From: Richard Windsor (Lisa Jackson), To: David Cohen Allyn, Brooks-Lasure, Subject: Post has checked in, 2/09/2009 (and accompanying thread from); Email, From: David Cohen, To: Richard Windsor (Lisa Jackson), cc: Lisa Heinzerling, David McIntosh, Subject: wh press-office conference call today, 2/09/2009; Email, From: Lisa Heinzerling, To: Allyn LaSure, David Cohen, David McIntosh, Subject: Fw: no quote from Administrator Jackson..., 02/09/2009; Email, From: David Cohen To: Roxanne Smith, Allyn LaSure, Richard Windsor (Lisa Jackson) Subject: roxanne: here's the quote for post, 2/09/2009.

²² Email, From: David McIntosh, To: Lisa Heinzerling, Allyn LaSure, David Cohen, Subject: no quote from Administrator Jackson..., 02/09/2009 (partially redacted); Email, From: Lisa Heinzerling, To: Richard Windsor (Lisa Jackson), Subject: Fw: no quote from Administrator Jackson..., 02/09/2009 (partially redacted); Email, From: Richard Windsor (Lisa Jackson), To: Lisa Heinzerling, David McIntosh, Allyn, Brooks-Lasure (non-official account) Subject: Fw: no quote from Administrator Jackson..., 02/09/2009.

²³ 40 CFR Chapter I Endangerment and Clause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, Available at: http://www.epa.gov/climatechange/Downloads/endangerment/Federal_Register-EPA-HQ-OAR-2009-0171-Dec.15-09.pdf. Last retrieved: 2/21/2014.

closed minds — here is our answer, now get us there —and to the exclusion of the prescribed opportunity for public input. Where we stand today was predetermined from the beginning.

This documentary record demonstrates there was predetermination to achieve a certain outcome — the “endangerment” finding as premise for regulating power plants’ GHG emissions. Since the rule at hand is the direct and intended result of this predetermination, before any actual deliberation that nominally underpinned the December 2009 “endangerment” finding, this is evidence of an “unalterably closed mind” on the instant proposed rule from the very beginning.²⁴ The Agency pursued a predetermined outcome arrived upon before the rulemaking started. This predetermination was in fact the rationale for undertaking the regulatory exercise we are now involved with but which was illusory since the Agency intended from the start to propose this rule, regardless of the evidence. There plainly was no realistic chance of achieving any other outcome.

Further Evidence of EPA Predetermination, and Misleading the Public on this Rulemaking, in Close Collaboration with Green Pressure Groups

The EPA’s stance on regulating power plant GHG emissions, as stated by EPA Administrator Gina McCarthy, is that under the new round of rulemaking including the current NSPS rule, coal will still be viable,²⁵ a stance one would expect her to assert given that this must

²⁴ Email, From: Lisa Heinzerling, To: Richard Windsor (Lisa Jackson), Subject: information regarding PSD & GHG, 02/10/2014.

²⁵ Lindsay Morris, “Coal to Remain Viable, says EPA's McCarthy at COAL-GEN Keynote” Power Engineering, Aug 15, 2012. Available at: <http://www.power-eng.com/articles/2012/08/coal-to-remain-viable-says-epas-mccarthy-at-coal-gen-keynote.html>, last retrieved 1/31/2014.

be the case under the law.²⁶ Likewise, Janet McCabe, then a senior aide in (and now the proposed nominee to lead) the Office of Air and Radiation, said in a hearing before the House Energy and Commerce Committee that “We are not saying you can’t build a new coal plant in America,” and that there will be a “clear regulatory path” for new coal plants to be constructed.²⁷ Like efforts to rewrite the vow to “bankrupt” coal-fired power plants, this runs contrary to the proposed rule and is directly contrary to express assertions of the president and vice-president when campaigning for office (Joe Biden also stated, “‘No coal plants here in America,’ he said. ‘Build them, if they’re going to build them, over there. Make them clean.’”²⁸).

Many in the industry as well as the instant rule’s critics argue, however, that these regulations don’t seek to make coal cleaner, but to “bankrupt” the industry altogether as then-candidate Obama vowed. House Energy and Commerce Committee Chairman Fred Upton (R-MI) characterizes the record as indicating that “The EPA is holding the coal industry to impossible standards.”²⁹ Indeed, this rule as originally proposed was pulled due to it obviously

²⁶ See: 42 U.S.C. § 7479 (3).

²⁷ “EPA assailed on power plant regulations”, E2 Wire The Hill's Energy and Environmental Blog, November 14, 2013. Available at: <http://thehill.com/blogs/e2-wire/e2-wire/190269-epa-assailed-on-power-plant-carbon-regs>, last retrieved 1/31/2014.

²⁸ Ben Smith, “Biden: No coal plants here in America”, Politico, September 23, 2008, http://www.politico.com/blogs/bensmith/0908/Biden_No_coal_plants_here_in_America.html?showall. Retrieved 3/8/14.

²⁹ Id.

requiring fuel-switching, impossibly characterizing a gas turbine as the best available emission reduction technology for a coal plant.³⁰

The Sierra Club's "Beyond Coal" campaign has a stated objective that is perfectly aligned with that result as well as with then-candidate Obama's vow, put into practice immediately by his EPA political appointees and manifesting itself in the instant proposed rule. Featured prominently on their website, the Sierra Club states that it is its goal "to prevent new coal plants from being built," to "Retire one-third of the nation's more than 500 coal plants by 2020," and to "Keep coal in the ground."³¹ It is the principal objective of the environmentalist pressure group industry, and by chance we have obtained records documenting the Agency's improperly close collaboration with Sierra Club, as that industry's lead point of contact and advocate, on this shared agenda. However, this agenda is explicitly contrary to the stated public goals of the EPA as it pursues the instant rulemaking.

It is noteworthy that every member of the EPA's senior leadership who has not made his or her career in the EPA or state level environmental agencies has a history of employment with

³⁰ EPA Releases Revised Proposal for Electric Generating Unit New Source Performance Standards for Carbon Dioxide Emissions, Sidney Austin LLP, 09/20/2013, Available at: <http://www.sidley.com/files/News/d5421595-8af9-4839-8080-001196831e60/Presentation/NewsAttachment/0f1ed401-88af-4756-9f1a-010ff5011461/9.20.2013%20Environmental%20Update.pdf>, Last retrieved: 3/5/2014.

³¹ "About Us", Beyond Coal website. Available at <http://content.sierraclub.org/coal/about-the-campaign>, last retrieved 1/31/2014. This goal is not limited to Sierra Club. Recently, 17 assorted environmental pressure groups wrote a letter to President Obama, criticizing his use of the term "all of the above" with relation to energy policy in the 2014 State of the Union address, instead, preferring the end of all fossil fuels. Letter to President Barack Obama, January 16, 2014, from American Rivers, Clean Water Action, Defenders of Wildlife, Earthjustice, Energy Action Coalition, Environment America, Environmental Defense Fund, Friends of the Earth, League of Conservation Voters, National Audubon Society, National Wildlife Federation, Native American Rights Fund, Natural Resources Defense Council, Oceana, Physicians for Social Responsibility, Population Connection, Sierra Club, Voices for Progress. Available at: http://action.sierraclub.org/site/DocServer/All_of_the_Above_letter_Jan_16_FINAL_corrected.pdf?docID=14881, last retrieved 1/31/2014.

environmental pressure groups, including most of the groups that expressly urged the executive branch to use all means potentially at its disposal to eliminate coal, and ultimately all hydrocarbon or “fossil” fuels. The emails cited herein and obtained via FOIA requests show clearly that people who spend years or decades trying to do something as activists, then migrate into government, do not arrive at the issues anew, but come in to perform the same objective but *as* government. Indeed -- as most obviously manifested in EPA bringing in *Massachusetts v. EPA* advocate Lisa Heinzerling nominally to explore whether or not the Agency should do what she had committed years of her professional life demanding it do -- these activists are brought in precisely because of these predispositions and histories. The courts have recognized that, at some level, this is to be expected, but that when “a clear and convincing showing that he has an unalterably closed mind on matters critical to the disposition of the rulemaking,” is shown, they should be disqualified.³²

EPA paid the equivalent of lip-service to the obvious, formal (associational) conflicts of interest with these same groups -- such that, *e.g.*, a former Sierra Club activist would liaise with Natural Resources Defense Council, and vice versa, yet still with former allies and colleagues with whom they worked together on the issues such as Sierra’s John Coequyt working with former NRDC official Michael Goo to stop “Zombie” coal plants from being resurrected,³³ or serially corresponding with Coequyt on plants the greens’ and EPA’s campaign are forcing off-

³² *Association of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1154 (D.C. Cir. 1979).

³³ Email, From: John Coequyt, To: Michael Goo, Alex Barron, Subject: Zombies, 4/29/2011.

line.³⁴ Agency correspondence reveals EPA officials with a predetermined bias colluding on this rule making — and the efforts that EPA says compelled this rule making — with outside groups that have the same predetermined bias, achieving a predetermined outcome. Problematically for this proposed rulemaking, this outcome is the stated objective of the environmental pressure groups, and contrary to the stated (legally required) position of the EPA.

What’s more, the closed mind of these officials creates a situation where they “entirely failed to consider an important aspect of the problem.”³⁵ Ostensibly, all of these regulations are in pursuit of mitigating climate change by limiting man’s contribution of CO2 emissions to the global CO2 budget,³⁶ which we are told by some defenders is the most “urgent” problem that we face.³⁷ However, as noted in FN 5, *supra*, under no scenario will this actually lead to lower global levels of CO2 let alone a detectable climatic impact, which is also the consensus view of even the “global treaty” Kyoto, perfectly implemented for 100 years. Even as EPA and its third-party allies proceeded with this rulemaking despite knowing it would have no impact on the asserted problem being addressed -- climate change -- they completely ignored the economic

³⁴ See Email, From: John Coequyt, To: Alex Barron, Joseph Goffman, Michael Goo, Subject: Fwd: [International-Coal] 1,200 MW White Stallion Coal Plant CANCELLED, 02/15/2013.

³⁵ *Louisiana-Pacific Corp. v. United States EPA*, 281 Fed. Appx. 877, 878 (11th Cir. 2008) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

³⁶ See, What EPA is Doing, Available at: <http://www2.epa.gov/carbon-pollution-standards/what-epa-doing>. Last retrieved 3/4/2014.

³⁷ See, Oral Arguments of Solicitor General Donald Verilli, *Utility Air Regulatory Group v. EPA*, heard Monday, 02/24/2014, “And there really is an urgency here, you know, that's part of what's driving EPA in this situation, of course, is understanding that this is an urgent environmental problem.” Available at: http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-1146_nk5h.pdf, last retrieved: 03/06/2014.

problems caused by this regulation which by law must be considered.³⁸ The rule represented a shared vision, a political and/or ideological one (to end the use of coal in America) but most certainly was not a rule making intended to mitigate climate change. This altered and improper purpose likely explains the Agency's decision to not consider the balance of interests. Rather, the Agency managers who had come to EPA had already decided this proposed rule was something that they were going to put in place, before they ever entered federal service. Incorporating by reference our discussion here and in Comment4 of the president's stated objective of propping up an economically failed but political selected industry. That these failings of the rulemaking were not considered is further evidence of predetermination, of course; it had been decided, *here is our answer, now get us there*.

The president on whose behalf this rule is promulgated has plainly stated the objectives of this rule and related rules that EPA insists it is compelled to issue as a result of the endangerment finding, which are to "bankrupt" coal-fired power plants and "finally make [renewables] profitable". He has either consistently misstated the objectives or he consistently told the truth about them. We believe it is the latter, and his effort to use the instant rule to "bankrupt" coal is in fact problematic for the instant rulemaking, for reasons asserted elsewhere in this Comment.

Regardless, that this objective not grounded in the *urgency of a climate crisis* was known to EPA officials, who nonetheless proceeded in spite of relevant evidence that these regulations would not accomplish their stated goal and would have serious economic consequences, because

³⁸ See: 42 U.S.C. § 7479 (3), which reads in part, that when mandating new technology, "economic impacts and other costs," must be taken into account.

the real goal was to bring about the economic viability of politically favored industries and the end of politically disfavored industries. It amounts to nothing but a massive transfer of wealth from one industry to another.³⁹ This, along with other factors, such as their conflicts of interests, lead to a predetermined, arbitrary outcome that was not based on the facts on record or the law, but personal bias and for reasons not on the record or that Congress could not have considered in passing the CAA.

Conflicted Individuals Leads to a Predetermined Outcome

The current and recent leadership at the EPA is rife with conflicts of interests, mainly from former employees of environmental pressure groups that lobby the EPA on a nearly continuous basis. This fact is well known by senior EPA officials. In one email, Bob Perciasepe, the Deputy Administrator of the EPA, forwarded an article that he found “Worth noting,”⁴⁰ entitled “EPA Probes for Conflicts of Interest Should Start In Their Own Building, Tallahassee.”⁴¹ The article noted that there were 13 high-level EPA officials, including 6 of 10

³⁹ See, Comment 3.

⁴⁰ Email, From: Bob Perciasepe, To: Brendan Gilfillan, Subject: Fw: Article, 05/21/2012.

⁴¹ “EPA Probes for Conflicts of Interest Should Start In Their Own Building”, May 17, 2012, Available at: <http://www.freemarketamerica.org/media-2/press-releases/58-epa-probes-for-conflicts-of-interest-should-start-in-their-own-building.html>, Last retrieved 2/12/2014.

regional administrators, who had previously worked for the various “green” groups that were constantly lobbying these officials in their new positions at the EPA.⁴²

Most of the officials listed remain in their jobs, others have been promoted within the EPA or the broader Obama Administration in some cases, such as Michael Goo who was moved to the Department of Energy to work on similar issues.⁴³ Nonetheless, Goo, the Senior Advisor for Policy, was heavily involved in rulemaking on greenhouse gasses.⁴⁴ Being a former Chief Operating Officer of the National Audubon Society, and before that with a previous stint at the EPA,⁴⁵ Perciasepe himself was on the list. EPA’s Joe Goffman, who these emails show was EPA’s “Air” outreach and liaison to Sierra Club — and acknowledged he pushed Sierra requests

⁴² The officials listed, an illustrative but non-exclusive universe, are: Nancy Stoner, Interim Assistant Administrator of Water, Formerly Worked for: Natural Resources Defense Council. Glenn Paulson, Chief Scientist, Formerly Worked for: Natural Resources Defense Council. Michael L. Goo, Associate Administrator for the Office of Policy, Formerly Worked for: Natural Resources Defense Council. Bob Perciasepe, Deputy Administrator, Formerly Worked for: National Audubon Society. Cynthia Giles, Assistant Administrator for Enforcement & Compliance, Formerly Worked for: The Conservation Law Foundation's Advocacy Center. Michelle J. DePass, Asst. Administrator for the Office of International and Tribal Affairs, Formerly Worked for: The New York City Environmental Justice Alliance. Mathy Stanislaus, Assistant Administrator for Solid Waste Formerly Served on the Board of: NYC Environmental Justice Alliance. Curt Spalding, Region 1 Director Formerly Worked for: "Save the Bay" and "Narragansett Bay Keeper". Judith A. Enck, Region 2 Director Formerly Worked for: New York PIRG and Environmental Advocates of New York. Susan Hedman, Region 5 Director. Formerly Worked for: Environmental Law and Policy Center and Center for Global Change. Karl Brooks, Region 7 Director, Formerly Worked for: Idaho Conservation League. James B. Martin – Region 8 Director, Formerly Worked for: Environmental Defense Fund. Jared Blumenfeld – Region 9 Director, Formerly Worked for: Sierra Club Legal Defense Fund, the NRDC and International Fund for Animal Welfare.

⁴³ Robin Bravender, Katherine Ling, “Cool kids' jump to Moniz's new policy shop”, E&E News, November 12, 2013. Available at: <http://www.eenews.net/stories/1059990330>, Last retrieved 2/19/2012.

⁴⁴ See, e.g.: Email, From: John Coequyt, To: Michael Goo, Lorie Schmidt, Shannon Kenny, Alex Barron, Subject: NSPS green group letter, 9/20/2011. From: Lena Moffitt, To: Alex Barron, Subject: Have a second talk NSPS? 7/29/2011. Email, From: John Coequyt, To: Joseph Goffman, Rohan Patel, Michael Goo, Jonathan Lubetsky, Subject: FYI. GA Power Plant Development, 04/10/2012. Email, From: John Coequyt, To: Michael Goo, Subject: Fwd: new source brief, 7/23/2012. Email, From: Michael Goo, To: Alex Barron, Subject: Fw: new source brief, 7/24/2012.

⁴⁵ See: Open Secrets – Robert Perciasepe, at: http://www.opensecrets.org/revolving/rev_summary.php?id=24591, Last retrieved 2/19/2014.

regarding “New Source Performance Standards for GHG emissions” outside of “normal channels”⁴⁶, is a veteran of more than a dozen years with the Environmental Defense Fund (and was “a member of the board of directors of the Environmental Resources Trust, a not-for-profit organization” affiliated with EDF and Audubon and lobbyist C. Boyden Gray, “to create innovative market-based projects and transactions that yield environmental benefits.”⁴⁷).

Conflicts of interest and special treatment for Sierra Club permeate the entirety of EPA’s rule making team, and the instant rulemaking.

EPA’s failure to recuse from all advisory and decision-making activities those individuals with clear conflicts of interest, *e.g.*, former EDF counsel Goffman and NRDC counsel Goo to liaise with Sierra Club, impeaches any pretense of impartiality by EPA in the proposal of this rule. Commenters argue that EPA has failed to respect conflict of interest prohibitions such that the instant proposed rule is invalid and must be conducted free of such conflicts.

This list alone doesn’t capture all of the known conflicts within EPA’s senior policy circle. Al Armendariz, the former Region 6 Administrator — an EPA official involved in EPA’s regulation of greenhouse gases at issue here,⁴⁸ who resigned after a video surfaced of him saying his philosophy was to “crucify” energy companies,⁴⁹ has readily admitted that he had a conflict

⁴⁶ Email, From: Joseph Goffman, To Patricia Embrey and four others including Rob Brenner, Subject: Fw: New Source Performance Standards for GHG emissions, 9/26/2010.

⁴⁷ Goffman Bio, <http://nicholas.duke.edu/cgc/seminars/goffman-1.pdf>, last accessed 3/7/14. http://www.sourcewatch.org/index.php?title=Environmental_Resources_Trust.

⁴⁸ *See e.g.*, Meeting Email, From Janet McCabe, Subject: GHG discussion, “Required: Al Armendariz”, “Where: Environmental Defense Fund”. 12/13/2010.

⁴⁹ Darren Samuelsohn and Erica Martinson, “Armendariz exits EPA quickly after 'crucify' video”, Politico, April 30, 2012. Available at: <http://www.politico.com/news/stories/0412/75760.html>, Last retrieved 2/3/2014.

of interest with the Sierra Club,⁵⁰ certain officials of which he prominently listed on his resume.⁵¹ Other emails confirm this fact was known by others in the EPA as well, although his input in this situation was redacted.⁵² Likewise, Armendariz prominently lists himself as a “technical advisor” to WildEarth Guardians while he was a Professor at Southern Methodist University.⁵³

Nonetheless, emails affirm a practice of conflicts being ignored, with Armendariz improperly involved in high-level meetings with the Sierra Club,⁵⁴ and in continuous contact and frequently meeting with former client Jeremy Nichols of WildEarth Guardians.⁵⁵ It is clear both by numerous allusions in the emails, as well as Nichols’ position as the Director of the Climate and Energy Program at WildEarth Guardians,⁵⁶ that discussing energy issues related to this rulemaking was on the agenda. In Armendariz’s case, it was a complete revolving door. Once

⁵⁰ Email, From: Al Armendariz, To: Bub Sussman, CC: Larry Starfield, Bob Perciasepe, Janet McCabe, Gina McCarthy, Subject: Re: Summit Power 11/14/2010.

⁵¹ See: Appendix B, Armendariz Resume.

⁵² Email, From: Al Armendariz, To: Lawrence Starfield, cc: Suzanne Murray, Layla Mansur, Subject: Re: IMPORTANT - new Complaint for infrastructure SIPs for 1997 8-hor ozone NAAQS - information needed for CD, 11/04/2010 (partially redacted).

⁵³ Armendariz Resume.

⁵⁴ Email, From: Janet McCabe, Subject: GHG discussion, 12/13/2013.

⁵⁵ Email, From: Al Armendariz, To: Jeremy Nichols, 12/8/2009. From: Jeremy Nichols, To: Al Armendariz 12/8/2009. Email, From: Jeremy Nichols, To: Alarmendariz, Subject: Re: Congrats, 7/13/2010. Email, From: Al Armendariz, To: Jeremy Nichols, 2/13/2010. Email, From: Jeremy Nichols, To: Al Armendariz, cc: Joyce Runyan, Subject: Congrats, 7/13/2010. Email, From: Al Armendariz, To: Jeremy Nichols, Subject: Re: Congrats 7/23/2010. Email, From: Al Armendariz, To: Jeremy Nichols, 7/24/2010. Email, From: Jeremy Nichols, To: Al Armendariz, Subject: Re: change of plan, 7/24/2010, this list is not exhaustive, but just a sample of emails discussing meetings and discussions.

⁵⁶ Meet our Staff, WildEarth Guardians, Available at: http://www.wildearthguardians.org/site/PageServer?pagename=about_staff#.UxDE6YWimSo, Last Retrieved 2/28/2014.

exposure of his carrying on with the green-group approach at EPA led to inevitable resignation,⁵⁷ he simply moved over to Sierra Club. Yet before his new job with the Sierra Club was publicly announced, the Sierra Club called Arvin Ganesan, the Deputy Chief of Staff for Policy at the EPA, and informed him that Armendariz “has accepted a job with the Sierra Club and will run their anti-coal campaign in the Texas region.”⁵⁸ Ganesan then explained in an email that “Sierra Club will NOT be making this announcement Friday afternoon, but this has the potential to spill out before then.”⁵⁹ Additionally, Alex Barron’s emails also reveal he was obviously an activist at EPA, colluding with Sierra Club (see Barron email correspondence cited herein).

In other words, the potential for predetermination on the exact policy established in the proposed rule, pre-existing collusion and a conflict of interest was ignored by high-level EPA officials, treating it more like a PR problem than an actual procedural violation of the law. We incorporate by reference our prior comments regarding the problems that possible expectations of these past-and-likely-future employers pose for EPA officials involved in policy discussions.

These conflicts of interest point to an improperly close and collusive relationship, recognizing no distinction between the Agency and green pressure groups other than one’s ability to formally publish rules in the Federal Register. This relationship, and the movement of personnel back and forth between green pressure groups and EPA supports the conclusion that

⁵⁷ Darren Samuelsohn and Erica Martinson, “Armendariz exits EPA quickly after 'crucify' video”, *Politico*, April 30, 2012. Available at: <http://www.politico.com/news/stories/0412/75760.html>, Last retrieved 2/3/2014.

⁵⁸ Email, From: Arvin Ganesan, To: Richard Windsor (Lisa Jackson), Gina McCarthy, Bob Perciasepe, Diane Thompson, Brendan Gilfillan, Bob Sussman, Laura Vaught, Subject: Al Armendariz 6/27/2012.

⁵⁹ *Id.*

senior EPA officials had their minds made up before they came to EPA and demonstrate no personal indication of having changed their outlook, or being open to doing so. The President's goal is to promulgate regulations to kill coal, not merely make it cleaner in a constantly changing definition of "clean". By clear imputation, that, too, is the goal of the EPA presidential appointees. There is no evidence that crafting a rule that would allow coal to be technologically and economically viable, as is the stated position both of the EPA and is required by law,⁶⁰ ever crossed their minds. There is evidence, however, including that cited in this Comment that the opposite was their intended purpose. People with these conflicts of interest demonstrate a clear pattern of improper collusion, improper influence, and a lack of real opportunity for others to have input or equal opportunity to comment in the rulemaking process. The minds of the officials were "unalterably made up," for reasons not on the record, and were made for reasons not involving anything Congress could have foreseen when writing the CAA, nor anything Congress intended to be considered when rulemaking under CAA. This predetermination on the part of the decision-makers makes their decision arbitrary and capricious, which should invalidate the rulemaking.

Improper Collusion Ensures Improper Outcome

EPA/Sierra Collusion to End Coal

Even more important than the conflicts of interests tainting the process are the actions taken by EPA officials regarding these regulations. Emails obtained by E&E Legal and FMELC as well as the Competitive Enterprise Institute show that officials closely aligned with outside environmental pressure groups, especially the Sierra Club, colluded with members of these

⁶⁰ See: 42 U.S.C. § 7479 (3).

groups to achieve a predetermined outcome, namely, the end of the coal industry brought about by EPA regulation.

Consider one illustrative email between Assistant Administrator for Policy Michael Goo and Senior Advisor in the Office of Policy Alex Barron that demonstrates their knowledge of regulations they were working on — and working on closely with Sierra Club — would not allow for coal to be viable. The comments by EPA are redacted in full but we still see Goo forwarding to Barron an email with an article suggesting that EPA’s rule will “wipe out coal”.⁶¹ The brief, entire comment from Barron is redacted as “deliberative process”, indicating that EPA is deliberating whether its rule will kill coal. Regardless, we can see what the operative assumption is between these EPA officials working on the rule and their Sierra Club partners in a similar correspondence from the director of the Sierra Club’s “Beyond Coal” campaign, John Coequyt.

In response to an article written about then Assistant Administrator McCarthy’s statement that coal would remain viable, Coequyt simply forwarded the email to Goo, and Barron. With his forwarded article, he included only the commentary: “Pants on fire.”⁶²

That phrase, “Pants on fire” (as in, *Liar, liar...*) is the well-known assessment assigned by self-appointed fact-checkers “Politifact”, that a “statement is not accurate and makes a ridiculous claim.”⁶³ In other words, it is understood that the rule they were working on collaboratively —

⁶¹ Email, From: Alex Barron, To: Michael Goo, Subject: Re: Will EPA's greenhouse regs wipe out coal? 3/28/2012 (partially redacted).

⁶² Email, From: John Coequyt, To: Michael Goo, Alex Barron, Subject Fwd:[CLEAN-STRATEGY] Coal to Remain Viable, says EPA’s McCarthy at COAL-GEN Keynote, 8/16/2012 4:33pm.

⁶³ <http://www.politifact.com/>.

as other emails show, with Sierra having unique influence unmatched by any other party — is one they know will not leave coal viable, that Ms. McCarthy is misstating for the public what they know in private to be the outcome. And again, they would know this, as they worked collaboratively to ensure the standard was aimed at keeping targeted coal plants from coming on line: “Attached is a list of plants that the companies said were shelved because of uncertainty around GHG regulations. If a standard is set that these plants could meet, there is not a small chance that the company could decide to revive the proposal.”⁶⁴ Coequyt had some reason to believe he could be persistent on this.⁶⁵ This was successful, as his EPA partner Barron shared his concerns and disseminated this email to other important EPA officials with whom it drew follow-up action. For example, Michael Goo’s assistant followed up specifically seeking a copy and certain information in the attachment.⁶⁶

The fear that some plants might still be able to open remained one of Coequyt’s chief concerns, regularly communicated to top EPA officials regarding the issue. Later on in 2011, Coequyt emailed Barron bragging of the numbers of coal plants they had stopped. “Here is the official word from the Beyond Coal Campaign. You can cite us for internal use for sure. 153

⁶⁴ Email, From: John Coequyt, To: Michael Goo, Alex Barron, Subject: Zombie’s[sic] 4/29/2011 02:35PM.

⁶⁵ Email, From: John Coequyt, To: Alex Barron, Subject: Check this out, 8/17/2011. Email, From: John Coequyt, To: Alex Barron, Subject: Numbers. 9/07/2011. Email, From: John Coequyt, To: Alex Barron, Subject: Check this out, 8/17/2011. From: John Coequyt, To: Alex Barron, Subject: You are looking at this, right? 9/07/2011..

⁶⁶ Email, From Robin Kime, To: Verma Irving, Subject: May I please have 1 copy of this email and tab 1 of the attachments, 3 hole punched? Thanks!, 4/29/2011, forwarding Coequyt’s “Zombie’s” email/spreadsheet.

defeated/26 progressing.”⁶⁷ He goes on to predict 70% of the remaining plants would be stopped as well.⁶⁸ Particularly staggering in this observation is that he encourages this statistic to be used for “internal use.” This confirms that Coequyt and Barron shared the same goal, as they understood so did others in the EPA, of eliminating coal plants, regardless of any reasonable environmental standards any plant might meet, but that they didn’t want the public to know that. This was not an isolated instance. Coequyt had a particularly collaborative working relationship with Goo and Barron, meeting with them on a nearly continuous basis, as revealed by the

⁶⁷ Email, From: Alex Barron, To: Shannon Kenny, Paul Balsarak, Al McGartland, David A. Evans, Subject: Fw: Zombie’s [sic]. 4/29/2011, 07:51pm. Al McGartland is the Office Director for the National Center for Environmental Economics (NCEE) at the EPA, Shannon Kenny is the Acting Principal Deputy Associate Administrator at the EPA, Paul Balsarak is a Policy Analyst at the EPA, and David A. Evans, an economist at the NCEE. This suggests that he was informing economists and policy analysts of Coequyt’s fear that some plants might be economically viable if they wrote the rule “wrong,” and wanted to ensure this didn’t happen.

⁶⁸ Id.

emails.⁶⁹ They worked to minimize the record of these dealings, moving off-site to the Starbucks at the J.W. Marriott hotel across the street from EPA, avoiding the need to sign Coequyt into the Agency's logs.⁷⁰

While the closest relationships were obviously between Coequyt, Barron and Goo, they were not exclusive. Coequyt had close relationships with other top EPA officials and communicated with them on various other plant closures and other issues.⁷¹ Others included on these emails are members of organizations with whom certain EPA officials, such as Goo, have

⁶⁹ Email, From: John Coequyt, To: Michael Goo, Subject: Re: John, 3/31/2011. Email, From: Michael Goo, To: John Coequyt, Subject: John, March 31, 2011, 3/31/2011. Email, From: John Coequyt, To: Alex Barron, Subject: Do you have a phone number? 04/01/2011. Email, From: Alex Barron, To: John Coequyt, Subject: Re: Do you have a phone number? 4/1/2011. Email, From: John Coequyt, To: Alex Barron, Subject: Can we chat today, 8/17/2011. Email, From: John Coequyt, To: Alex Barron, Subject: Re: Do you have 5mn to chat after 2pm? 5/29/2012. Email, From: Alex Barron, To: John Coequyt, To: Alex Barron, Subject: Do you have 5mn to chat after 2pm? 5/29/2012. Email, From: John Coequyt, To: Alex Barron, Subject: Do you have 5mn to chat after 2pm? 5/29/2012. Email, From: John Coequyt, To: Alex Barron, Subject: You have a minute to chat this afternoon? 6/22/2012. Email, From: Michael Goo, To: Alex Barron, Subject: General Discussion 3513A, Required: Alex Barron, John Coequyt, 08/30/2012. Email, From: John Coequyt, To: Alex Barron, Subject: Can we talk today? 6/01/2012. Email, From: Arvin Ganesan, To: Michael Goo, Subject: Fw:fw: Thursday, 10/10/2011. From: John Coequyt, To: Michael Goo, Subject: Accepted: General Discussion, 8/29/2012. Email, From: John Coequyt, To: Michael Goo, Subject: Accepted: Meeting w/Coequyt See Notes, 5/15/2012. Email, From: Michael Goo, To: John Coequyt, Subject: Re: Meeting Request for Next Week, 5/12/2012. Email, From: John Coequyt, To: Michael Goo, Subject: Meeting Request for Next Week, 05/11/2012. Email, From: Michael Goo, To: Alex Barron, John Coequyt, Subject: Update: Meeting w/Coequyt & Joanne - See Notes, 5/14/2012. Email, From: John Coequyt, To: Alex Barron, Subject: I have a quick question if you have a minute, 07/05/2012. Email, From: John Coequyt, To: Michael Goo, Subject: Lunch friday with Walke and I? 8/21/2012. Email, From: Michael Goo, To: John Coequyt, Subject: Re: Lunch friday with Walke and I? 8/21/2012. Email, From: Robin Kime, To: John Coequyt, Subject: Fw: Michael, 8/29/2012. Email, From: Robin Kime, To: John Coequyt, Subject: Re: Michael, 8/29/2012. Email, From: Robin Kime, To: John Coequyt, Subject: Michael, 8/29/2012. Email, From: John Coequyt, To: Robin Kime, Subject: Re: Michael, 8/29/2013. Email, From: Robin Kime, To: John Coequyt, Subject: Re: Michael, 08/29/2012. Email, From: John Coequyt To: Robin Kime, Subject: Re: Michael, 08/29/2012. Email, From: John Coequyt, To: Alex Barron, Subject: Can we chat? 9/24/2012.

⁷⁰ Email, From: Robin Kime To: John Coequyt Subject Re: Michael, 8/29/12; Email, From: Michael Goo, To: Alex Barron, John Coequyt, Subject: Udpate: Meeting w/Coequyt & Joanne- See Notes, 5/14/12.

⁷¹From: John Coequyt, To: Michael Goo, Arvin Ganesan, Alex Barron, Joseph Goffman, Joel Beauvais, Subject: Fwd: Update on White Stallion plant ("transitional source"), 11/29/2012. Email: From: Joseph Goffman, Subject: Meeting with Sierra Club, Required: Joanne Spalding, John Coequyt, Kevin Culligan, Optional Amit Srivasta, 8/30/2012..

conflicts of interests.⁷² Coequyt updated top EPA officials on Sierra Club PR efforts to influence reporting on various issues, and the media results from hearings they both worked on.⁷³ EPA officials responded by helping “amplify” Sierra’s message via social media by forwarding a Sierra advocacy effort that was turned into a Time magazine article.⁷⁴ (Sierra Club’s president emailed this to Jackson at her personal, Verizon email account, from which she forwarded it to EPA for amplification).

EPA colluding with these green pressure groups on public advocacy efforts aligned with supporting their shared agenda was not unusual. Deputy Administrator Bob Perciasepe arranged to coordinate with two dozen groups including Sierra to help them continue to have greater influence in the process but specifically to aid the groups’ and EPA’s shared regulatory agenda (“the purpose is to create a photo-op and narrative beat for the comment gathering efforts on the issue. Groups will use materials from the event to communicate with supporters and recruit additional comment signers via newsletter, emails and social media”)⁷⁵; Gina McCarthy specifically requested officials reach out to groups “we normally work with when we have a

⁷² Email, From: John Coequyt, To: Michael Goo, Alex Barron, David McIntosh, Arvin Ganesan, Lorie Schmidt, Joel Beauvais, Subject: (Blank) 4/13/2011. Email, From: John Coequyt, To: Michael Goo, Arvin Ganesan, Joseph Goffman, Alexandra Teitz, Alex Barron, Lorie Schmidt, Jonathan Lubetsky, Shannon Kenny, Subject: Fwd: Big Day in DC - EPA Hearing Summary and Thank You! 5/25/2012.

⁷³ Email, From: Elena Saxonhouse, To: David Doniger, Joanne Spalding, Megan Ceronsky, Ann Weeks, John Coequyt, Subject: Update on White Stallion plant ("transitional source") 11/29/2012. From: John Coequyt, To: Michael Goo, Subject: Fwd: Should someone from SC listen to this? I cannot. Fwd: [CLEAN] Webinar: NRDC Presents: Closing the Power Plan Carbon Pollution Loophole, 12/14/2012

⁷⁴ Email, From: Lisa Jackson, To: Alisha Johnson, Brendan Gilfillan, Michael Moats, Seth Oster, Adora Andy, David McIntosh, Michael Goo, Gina McCarthy, Subject: Fw: TIME's Bryan Walsh on his Sierra Club-sponsored mercury test, 4/14/2011.

⁷⁵ Email, From: Bob Perciasepe, Subject: Deputy administrator's Meeting with Enviro - receipt of 500,000 communications.

message developed,”⁷⁶ showing again there was no clear line between the EPA and the Sierra Club for many top EPA officials. They worked together on a near continuous basis and shared the same agenda, namely, the end of the coal industry as promised by the president, while a candidate, to “finally make” electricity industry sectors that cannot compete with coal “profitable”.

EPA/Sierra Collusion on Rules and Permits

The evidence as shown in the emails demonstrates that not only has the Sierra Club been in close coordination with the coal issue in general, prior to this rulemaking, but has been in close contact with these same individuals concerning the NSPS rule specifically numerous times.⁷⁷ This includes meeting with top officials, giving them reports and studies not on the record⁷⁸ and ensuring they had access directly to top EPA officials, namely McCarthy and Perciasepe, concerning the NSPS rule.⁷⁹ They also worked together toward the same ends.

⁷⁶ Email, From: Gina McCarthy, To: Beth Craig, cc: Don Zinger, Steve Page, Subject: Fw: Oil Burning, 4/29/2010.

⁷⁷ Email, From: John Coequyt, To: Michael Goo, Lorie Schmidt, Shannon Kenny, Alex Barron, Subject: NSPS green group letter, 9/20/2011. From: Lena Moffitt, To: Alex Barron, Subject: Have a second talk NSPS? 7/29/2011. Email, From: John Coequyt, To: Joseph Goffman, Rohan Patel, Michael Goo, Jonathan Lubetsky, Subject: FYI. GA Power Plant Development, 04/10/2012. Email, From: Steve Page, To: Gina McCarthy cc: Peter Tsirigotis, Subject: Re: NSPS, 4/27/2010. Email, From: Gina McCarthy, To: Steve Page, Peter Tsirigotis, cc: Janet McCabe, Joseph Goffman, Subject: NSPS, 4/27/2010.

⁷⁸ Email, From: John Coequyt, To: Michael Goo, Subject: Fwd: new source brief, 7/23/2012. Email, From: Michael Goo, To: Alex Barron, Subject: Fw: new source brief, 7/24/2012. Email, From: Steve Page, To: Gina McCarthy cc: Peter Tsirigotis, Subject: Re: NSPS, 4/27/2010. Email, From: Gina McCarthy, To: Steve Page, Peter Tsirigotis, cc: Janet McCabe, Joseph Goffman, Subject: NSPS, 4/27/2010.

⁷⁹ Email, From: John Coequyt, To: Michael Goo, Subject: NSPS Meeting with Green Group and Gina, 1/13/2012. Email, From: Cynthia Browne, To: Gina McCarthy, cc: Amit Srivastava, Don Zinger, Julia Miller, Subject: Dinner, Sierra Club 5/31/2011. Email, From: Cynthia Browne, To: Gina McCarthy, cc: Amit Srivastava, Don Zinger, Julia Miller, Subject: Dinner, Sierra Club 5/31/2011. Email, From: Steven Page, To: Gina McCarthy, Subject: Accepted: Meeting with Sierra Club, EDF, and NRDC.

McCarthy sought a specific summary of Sierra's arguments why GHG are already regulated under the Clean Air, to help her prepare an answer to a petition to block a permit for an existing coal-fired power plant,⁸⁰ just as she did for granting a permit EPA needed because the plant was to use the CCS technology that EPA depends upon claiming is viable for purposes of the instant rule.⁸¹

Sierra's Coequyt provided EPA staff suggested reading material on NSPS, which Goo accepted and indicated he would consider, and then forwarded to Alex Barron for his consideration.⁸² Coequyt made sure Goo, Barron and two other EPA contacts received copies of *e.g.*, "NSPS green group letter."⁸³ Coequyt felt comfortable enough with Michael Goo, and felt there was no light between his position and EPA policy official Goo's that he was comfortable enough to ask Goo either to be his stand-in at a "NSPS Meeting with Green Group and Gina", or ensure the meeting did not occur without the participation of one of Sierra Club's key contacts in the Agency working on this rule; if the latter, this plainly is because of the single shared agenda

⁸⁰ Email, From: Beth Craig, To: Patricia Embrey and Jeffrey Clark, Subject: Clean Air Act Title V Petition - Big Stone. 8/05/2009. Craig wrote, "Is it possible to put together a short summary of the arguments that the Sierra Club made on why GHG are currently regulated under the CAA? Gina would like to get a copy. It is the Issue#3 section of the attached", which summary was prepared and Craig then forwarded (attachment not provided by EPA), "Gina, As requested."

⁸¹ *See e.g.*, Email, From: Gina McCarthy, To: Rob Brenner, Subject: Fw: Draft Permit for Summit Power, 10/27/2010.

⁸² *See e.g.*, Email thread involving From Michael Goo and John Coequyt Subject: "new source brief", 7/23/2012; forwarded by Goo to Barron 7/24/2012.

⁸³ *See e.g.*, Email, From: John Coequyt, To: Michael Goo, Lorie Schmidt, Shannon Kenny, Alex Barron, Subject: NSPS green group letter", Email, From: John Coequyt, To: Michael Goo, Subject: Letter. 1/09/2012 (attachment not provided by EPA). *See also, e.g.*, Email, From: John Coequyt, To: Michael Goo, Subject: Letter. 1/09/2012 (attachment not provided by EPA).

between Sierra Club and an EPA official materially involved in this rulemaking/former NRDC activist who had closely worked in that capacity with Sierra Club on these issues.⁸⁴

This was typical of senior EPA officials involved in this proposed rule. Gina McCarthy⁸⁵ and Robert Sussman⁸⁶ reciprocated this closeness, seeking direct input from Sierra on various issues, including on “power plants” and various power plant permitting issues (something that rightly ought to be closer to a quasi-judicial proceeding than a rulemaking). During the same period as the green groups were closely meeting with EPA officials on NSPS, Bob Perciasepe met with “the head of the Sierra Club” when EPA Administrator Jackson “suggested Mike [Brune] get in touch,” which he did through John Coequyt and his former colleague, now close contact in EPA Michael Goo.⁸⁷ Other emails fully redact discussion of conversations with Sierra

⁸⁴ Email, From: John Coequyt, To: Michael Goo, Subject: NSPS Meeting with Green Group and Gina. 1/13/2012.

⁸⁵ Email, From: Gina McCarthy, To: Bob Perciasepe, Subject: Re: Sierra Club, 02/09/2011, heavily redacted as “deliberative process”, but including *e.g.*, “Yes we should call. Let’s discuss in morning and one of us will call” (Perciasepe in response to redacted McCarthy assertions/question); numerous others also show McCarthy working with the groups, from emails arranging meetings to dinner at the Metropolitan Club to hosting meet-and-greet events for their officials to saying she is in regular personal contact with them.

⁸⁶ See FN 81. *See also*, Email, From: Beth Craig, To: Bob Sussman, Subject: Re: Power Plant Information, 3/23/2009. “Dear Bob, Attached for your review is follow up information from our meeting with the Sierra Club on power plant permitting...Looking forward to having a discussion about this document and next steps” (attachment not produced by EPA). Meeting Email, From: Bob Sussman, To: Beth Craig, Bruce Nilles, David Bookbinder, Richard Ossias, Steve Page, Subject: Coal Plant Permits. 2/27/2009 (meeting on 3/02/2009); Email, From: Bob Sussman, To: Adam Kushner, Beth Craig, Steve Page, Richard Ossias, Bill Harnett, Subject: Re: David Bookbinder— Cliffside Plant. 4/06/2009 (relating a conversation with Sierra’s Bookbinder but redacting almost the entirety of the substance as “deliberative process”).

⁸⁷ Email, From: Michael Goo, To: Bob Perciasepe, Teri Porterfield,, Subject: Fw: Meeting with Bob Perciasepe. 12/06/2012.

representatives.⁸⁸ Likewise, on related issues concerning other NAAQS, numerous emails, heavily redacted, suggest that any concern from the Sierra Club prompted fear amongst more junior EPA officials.⁸⁹ We cannot know ultimately what was decided, because most of what is inside this chain of emails is heavily redacted, leaving the record incomplete.

EPA/Green Group Collusion on Public Hearings

One of the clearest indicators of improper collusion is how the Sierra Club and other related green pressure groups and various EPA officials colluded to choose which places to hold public hearings on regulations in an attempt to get the most favorable audience possible for their agenda. Vicki Patton of the Environmental Defense Fund (EDF) emailed James Martin,⁹⁰ a former Senior Attorney with EDF for eight years who moved his practice in-house to the current EPA as Region 8 Administrator (Rocky Mountain West),⁹¹ being the one to inform this senior EPA official of new greenhouse gas rules being proposed the next day and seeking out his input on where EPA and apparently EDF should decide to hold the required field hearings.⁹² Patton

⁸⁸ See e.g., Email thread, including Richard Wayland, Mike Thrift, Janet McCabe, Kevin McLean, Michael Ling, Sara Schneeberg, Scott Mathies, 6/06/2012, “Had an interesting discussion with Josh Stebbins of Sierra Club just now”, with all substance of two pages of relating the details redacted as “deliberative process.”

⁸⁹ Email, From: Mike Thrift, To: Sarah Schneeberg, cc: Janet McCabe, Kevin McLean, Michael Ling, Scott Mathias, Richard Wayland, Subject: Re: Fw: April 12, 2012 Letter. 06/06/2012.

⁹⁰ Notably, she contacted Martin on his private account, the use of which later lead to Martin’s resignation. See: Press Release: Vitter: EPA Lied about Region 8 Administrator's Email Use, Senate Committee on Environment and Public Works. Available at: http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=4ba862dc-c7d0-158a-c18b-c30d33b30168, last retrieved 2/3/2014.

⁹¹ See: James Martin – LinkedIn, Available at: <http://www.linkedin.com/pub/james-martin/16/9ab/360>, Last retrieved 3/4/2014.

⁹² Email, From: Vicki Patton, To: James Martin, Subject: Re: Questions on NSPS for GHGs, Date: March 25, 2012.

telling Martin this information before he hears about it from his actual superiors at the EPA demonstrates a very high level of access for groups like the EDF, further demonstrating that there was no clear distinction between the two and that Martin's mind was unalterably made up. His position was that of his former colleagues, not the official position of the EPA. Patton's suggestion to Martin was to engage the "public" in hearings where the participation would be heavily skewed to pro-EPA activism.⁹³

Patton's suggestion was too much even for Martin, who realized that San Francisco has no coal plants and Seattle only has one that is being phased out, noting that "Choosing either may create opportunities for the industry to claim EPA is tilting the playing field."⁹⁴ This properly noted that the claim could be made, if not the implications for a fair and proper public hearing. His and his former green-group associates' minds were unalterably made up and joined to promote the shared, desired outcome. They chose Denver to avoid the perception, although Martin also asks EDF, who he expects to show up in force, to "play up the RPS (Renewable Portfolio Standards) and CACJ (Clean Air Clean Jobs) here, too."

This isn't the only instance of the EPA coordinating with green pressure groups in order to script the statutorily required hearings together, on this and directly relevant matters. The Sierra Club emailed Joseph Goffman, asking where the EPA was planning on holding public

⁹³ Id.

⁹⁴ Email, From: James Martin, To: Vickie Patton, Subject:Re: Question on NSPS for GHG's 3/25/2012.

hearings.⁹⁵ When Goffman replied that they hadn't decided yet,⁹⁶ Coequyt suggested Seattle, Denver, Minneapolis, Boston, Philadelphia and Virginia.⁹⁷ The email was then forwarded to other EPA officials for their consideration.⁹⁸

Ultimately, EPA held a hearing in Philadelphia, where the EPA also ensured that Sierra Club and the American Lung Association had booths and held a press conference in support of their agenda.⁹⁹ Sierra Club worked to stack the deck, bringing in buses from Boston and Pittsburgh to the hearing,¹⁰⁰ and there were also people brought in from what the emails describe as “enviro groups” from Michigan and Wisconsin, as well as coordinated attendance with other groups such as the NAACP, and faith groups and industry leaders, and Sierra Club let the EPA know it was doing it.¹⁰¹ In yet another public event, the EPA tried to coordinate with Sierra Club to move an event from DC to Texas, because “She noted *they have* a ‘lot of people in TX who

⁹⁵ Email, From: John Coequyt, To: Joseph Goffman, Subject:EPA Hearings for Carbon Protection Rule, 03/28/2012.

⁹⁶ Email, From: Joseph Goffman, To: John Coequyt, Subject:Re: EPA Hearings for Carbon Protection Rule, 03/29/2012.

⁹⁷ Email, From: John Coequyt, To: Joseph Goffman, Subject:Re: EPA Hearings for Carbon Protection Rule. 03/29/2012.

⁹⁸ Email, From: Joseph Goffman, To: Jenny Noonan, Subject:Fw: EPA Hearings for Carbon Protection Rule, 03/29/2012.

⁹⁹ Email, From: Steve Page, To: Gina McCarthy, Subject: Philly Public Hearing, 5/11/2011.

¹⁰⁰ Email, From: Jan Cortelyou-Lee, To: Alison Davis, Steve Page, Peter Tsirigotis, Jeffrey Clark, Jenny Noonan, Sarah Terry, Robert J Wayland, Bill Maxwell, Jackie Ashley, Kelly Rimer, Subject: Re: Chicago toxics hearing summary, 05/25/2011.

¹⁰¹ Email, From: Alison Davis, To: Steve Page, Peter Tsirigotis, Jeffrey Clark, Jenny Noonan, Jan Cortelyou-Lee, Sara Terry, Robert J Wayland, Bill Maxwell, Jackie Ashley, Kelly Rimer, Subject: Chicago toxics hearing summary 05/24/2014.

are concerned”” about the revisions (emphasis added).¹⁰² There is much more discussion of this issue, but unfortunately, the email is heavily redacted, tellingly invoking the “deliberative process” exemption for their coordination with Sierra Club as EPA does in many emails.

This series of emails demonstrate that high-level EPA officials and green groups colluded to the same end, namely, achieving the same goal. There was no suggestion that their goals might be different or that a truly fair hearing was necessary or desirable. Having real input from people affected by the regulations is precisely the opposite of what they are looking for; it is just more of former activists talking to their old friends at the various environmental pressure groups, a charade of real input put on by officials who had already unalterably made up their minds.

EPA/Sierra Collusion on Rule Comments

Emails also show that EPA officials not only are predetermined in their outcome, but actively work to give the Sierra Club a leg up in comment records beyond what others in the public would be granted.¹⁰³ In one notable exchange, Marie Bergen a regional Sierra Club employee, forwarded a petition on carbon rules to John Coequyt, who in turn forwarded them to Alex Barron and Jonathan Lubetsky at the EPA, asking if the petition could be included, even though “many of which were signed before the comment period officially opened. They wanted to make sure you all included them in your tally of supporters.”¹⁰⁴ It was kicked around to

¹⁰² Email, From: Sam Napolitano, To: Joseph Goffman, Subject: Sierra Club Request for a CSAPR Technical Corrections Proposal Hearing in TX. 10/18/2011 (partially redacted).

¹⁰³ Email, From: Marie Bergen, To: John Coequyt, Subject: Carbon Rule Comments for EPA from Change.org, 6/13/2012.

¹⁰⁴ Email, From: John Coquyt, To: Jonathan Lubetsky, Subject: Fwd: Carbon Rule Comments for EPA from Change.org, 06/20/2012.

various officials until it was submitted for comment.¹⁰⁵ This habit of including comments from the Sierra Club that were submitted before the comment period opens has continued on this rulemaking as well. A recent search of the record so far on the NSPS rule reveals 41 comments from Sierra Club members that were written before the current rulemaking was opened in November, 2013,¹⁰⁶ but are nonetheless included on the record.¹⁰⁷

Other examples exist of EPA officials acting unilaterally to ensure Sierra input was part of another rulemaking targeting coal-fired power, again showing favoritism and potentially violating the law beyond merely including comments before the period was open. Stephanie Kodish of the Clean Air Counsel emailed a report on behalf of Sierra Club and other green groups¹⁰⁸ to Gina McCarthy, Janet McCabe, and Phil Lorang at the EPA concerning a reduction in “regional haze” — a controversial effort by EPA usurping authorities granted the states under

¹⁰⁵ Email, From: Kevin Culligan, To: Alex Barron, Subject: Re:Fw: Carbon Rule Comments for EPA from change.org, 06/20/2012.

¹⁰⁶ Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, Available at: <http://www.regulations.gov/#!docketDetail;D=EPA-HQ-OAR-2013-0495>, Last retrieved 3/3/2014.

¹⁰⁷ See, Comments submitted by Sierra Club email system: W. Elton, submitted on 10/01/2013; Charles Walker, 10/31/2013; Dr. Lawrence Thomas, 10/13/2013; Ms. Betty Shore, 10/29/2013; Mr. James Mast, 10/30/2013; Ms. Robin Thompson, 10/29/2013; Joshua Rushhaupt, Sierra Club Rocky Mountain Chapter Director, 10/30/2013; Ms. Cynthia Patrick, 10/27/2013; Mrs. Margaret Weimer, 10/28/2013; Mrs. GB Tefft, 10/27/2013; Wendy Scott, 10/30/2013; Thomas van Thiel, 10/18/2013; Mr. Ned Flaherty, 10/27/2013; Mr. Richard Kiefer, 10/18/2013; Susan Matteson, 10/18/2013; Ms. Deborah Miller, 10/12/2013; Mr. Edwin Hurwitz, 10/18/2013; Ms. Shoshana Blank, 10/25/2013; Mr. Ned Flaherty, 10/07/2013; Mr. George Costich, 10/22/2013; Ms. Savanah Dominguez, 10/10/2013; Mr. James Franzen, 10/24/2013; Mr. Curt Bessette, 10/22/2013; Mr. Philip Gasper, 10/24/2013; Ms. Susan Kallman, 10/23/2013; Mrs. Dawn Olney, 10/11/2013; Mr. Steve Delapp, 10/22/2013; Mr. Tom Howell, 10/22/2013; Mr. Brendon Bass, 10/23/2013; Mr. Robert Hyer, 10/22/2013; Ms. Susan Westervelt, 10/7/2013; Ms. Marcia Geyer, 10/21/2013; Mr. Charles Carreon, 10/22/2013; Mr. Mark Va, 10/22/2013; Mr. Jake Hodie, 10/21/2013; Ms. Carol Stark, 10/22/2013; Mr. Edson Udson, 10/22/2013; Mr. Rudy Perpich, 10/22/2013; Mrs. Dorothy Funk, 10/24/2013; Mr. JP Smith, 10/22/2013; Dr. Kenneth Reiszner, 10/22/2013.

¹⁰⁸ Email, From: Stephanie Kodish, To: Gina McCarthy, Janet McCabe, Phil Lorang, Subject: Cleaning up the Haze Report, 1/31/2012.

the Clean Air Act. Nearly three weeks later, Janet McCabe asked other EPA employees if it was going into the record for the BART rulemaking.¹⁰⁹ Phil Lorang replied that he didn't see it on the docket, but "It is on Martha's To Do list to get it into the docket if Stephanie does not submit it directly."¹¹⁰ The EPA being willing to submit comments for the "Public Docket,"¹¹¹ when those same groups do not do so themselves clearly calls into question just how "Public" that docket or process really is, but regardless further illustrates that EPA sees little distinction between it and its pressure group allies.

This not only shows a predetermined outcome on the minds of EPA officials, but also favoritism that would violate both equal protection and due process rights of groups who were not able to get comments in on the record that were submitted before the comment period opened, or such collaboration.

EPA/Sierra Collaboration to Shield EPA Regulation from Congressional Review

The Sierra Club and the EPA also colluded to protect jointly favored regulations from the process established by law for congressional review. The Sierra Club's Federal Representative, Lyndsay Moseley, specifically contacted David McIntosh, Associate Administrator for Congressional and Intergovernmental Relations, to discover if "the Industrial Boiler Air Toxics rule is vulnerable to a CRA (Congressional Review Act) threat, or if the Cement air toxics rule is the only air toxics rule that's vulnerable. We had previously heard that EPA planned to report this

¹⁰⁹ Email, From: Janet McCabe, To: Phil Lorang, Anna Wood, Subject: Fw: Cleaning up the Haze Report, 2/19/2012.

¹¹⁰ Email, From: Phil Lorang, To: Janet McCabe, Anna Wood, Martha Keating, Subject: Re: Fw: Cleaning up the Haze Report, 2/19/2012.

¹¹¹ Id.

rule to Congress when it was published in the federal register.”¹¹² Numerous EPA officials were responsive to their request, viewing Congress’s role as overseeing the rulemaking progress as a “threat” as well.

Since the effects of the Congressional Review Act have proved to be quite mild, mostly just allowing for expedited review and making it easier to bring up certain votes in Congress, it is clear that the parties feared sunlight.¹¹³ Their collusion on a shared agenda, and on which there is strong evidence the Agency’s agenda differs from its public stance, was threatened by increased public scrutiny.

REMEDY: The ultimate issue at the heart of this Comment is, at what point does ignoring conflicts of interest, overemphasizing the role of predetermined advocates to the effective ignorance of sources not already in agreement with a predetermined outcome, colluding with certain groups at the express expense of others invalidate a rulemaking? E&E Legal and the FMELC believe that the evidence presented, *supra*, requires the EPA to start over and begin any similar rulemaking anew.

Transparency, thoroughness, and equal opportunity to participate are not only the hallmarks of good government, but also are part of the law. The EPA has failed to live up to these legal standards. It must abandon this rulemaking and start over, if it so desires, using

¹¹² Email, From: Lyndsay Moseley, From: David McIntosh, Subject: Has EPA officially reported the Boiler air toxics rule to Congress? 4/20/2011.

¹¹³ While it does allow for some expedited proceedings, repealing any regulation still requires a vote in both houses of Congress and a signature by the President, so the regulations were in no danger of being repealed. As one scholar put it, “Those familiar with administrative law scratch their heads when they hear how little the CRA accomplishes.” *The Mysteries of the Congressional Review Act*, 122 Harv. L. Rev. 2162, 2166 (2009).

officials who are not conflicted, who do not have a predetermined outcome, and who are not colluding with their previous employers and otherwise with ideologically aligned advocates. Coming from those groups does not disqualify participation in rulemaking, but continuing to operate as part of those groups does. The public deserves to have confidence that the EPA is truly looking out for the public interest as the law requires, as opposed to looking only toward a shared, predetermined goal of certain activists and conflicted individuals in government. Because of this, the EPA must abandon the current NSPS rulemaking and start over in accordance with the law.

COMMENT 2

EPA's rulemaking record is presumptively incomplete: extensive senior use of private email accounts, failure to obtain records and to report possible removal or loss, creating a presumption of record removal or loss.

SUMMARY OF COMMENT 2: The public record so far reflects nearly twenty senior EPA appointees have been using private email accounts to conduct official correspondence, and not copying, or forwarding them to EPA; further, EPA has not obtained these records after being informed of the widespread nature of the practice; also, despite actual knowledge EPA has failed in its obligation to notify the National Archivist of possible record loss as is required when they learn of this. As a result, the public have no idea what relevant communications that were (many, if not all, deliberately) taken off-line are missing and that should have been docketed. The Agency should acknowledge its record for this proposed rulemaking is presumptively incomplete, and stay the rulemaking until a proper review is conducted to determine just how extensive was the use of non-official email accounts by officials materially involved in the

rulemaking, after credibly assessing through interviews, declarations and forensic review the possible resulting loss of federal records and deficiency of this record.

In addition, EPA must satisfy all obligations to fully inform the National Archivist and assist with all prescribed Archivist and Agency steps in response to that required reporting, make efforts to retrieve metadata from telephony carriers and/or NSA, and otherwise diligently work to ensure the record is as close to being assuredly complete as is possible.

This practice leaves parties who discover it, and otherwise the public, unable to assert what is missing. Viewed another way, the widespread nature of these offenses is such that this leaves a record that is not available for proper review. The Agency that failed in its obligations, not the public, should bear the cost of these failures. The presumption should be that the record is impermissibly flawed. Until these concerns are addressed and problems corrected the record is deficient and this is an improper rule making for failure of procedural due process.

BACKGROUND: The public record now includes a widespread pattern of federal government employees using private email accounts for work-related correspondence. This was first revealed among White House staff who sought to avoid creating a record of meetings with lobbyists, “hundreds of times”, arranging via unofficial email accounts to meet off-site thereby also avoiding signing the lobbyists in to the White House visitor logs.¹¹⁴ Specifically, “Multiple

¹¹⁴ Eric Lichtblau, “Across From White House, Coffee With Lobbyists,” *New York Times*, June 24, 2010, <http://www.nytimes.com/2010/06/25/us/politics/25caribou.html?pagewanted=all>. See also, Josh Gerstein, “President Obama’s muddy transparency record,” *Politico*, February 5, 2012, at http://www.politico.com/news/stories/0312/73606_Page3.html; Timothy P. Carney, “Obama Transparency Fail: Offsite meetings for the purpose of circumventing the Presidential Records Act,” *Washington Examiner*, February 24, 2011, <http://washingtonexaminer.com/politics/beltway-confidential/2011/02/obama-transparency-fail-offsite-meetings-purpose-circumventing>; Chris Frates, “White House meets lobbyists off campus,” *Politico*, http://www.politico.com/news/stories/0211/50081_Page3.html.

high ranking officials have used non-EPA email accounts to conduct official agency business. Use of non-official, or personal email accounts expressly violates internal EPA policy that forbids the use of non-official e-mail accounts to conduct official agency business.” Senate Committee on Environment and Public Works, Minority Report, [*A Call for Sunshine: EPA’s FOIA and Federal Records Failures Uncovered*](#) (Sept. 9, 2013), at 4.

Regardless of intent, this practice evades but does not, as a legal matter, defeat federal record-keeping and other transparency requirements relevant to this proposed rulemaking found in, *inter alia*, the APA, CAA, Federal Records Act, or FOIA. Nor does it defeat the necessity of all relevant and related communications associated with the proposed rule being docketed in the rulemaking record.

With the arguable exception of the Department of Energy, which used 14 separate private accounts in administering the troubled Loan Guarantee Program, nowhere has this practice been more widely exposed than at EPA.¹¹⁵ See [*Letter from Hon. Bob Perciasepe, Acting Adm’r, U.S. Env’tl. Prot. Agency, to all employees of the U.S. Env’tl. Prot. Agency*](#) (Apr. 8, 2013) and related

¹¹⁵ Exposed examples include former EPA Region 8 Administrator James Martin’s ME.com account (*see Competitive Enterprise Institute v. EPA*, D.D.C., 12-cv-1497 (FOIA 08-FOI-00203-12) (*see also* FOIA EPA FOIA-R8-2014-000358)); Region 9 Administrator Jared Blumenfeld’s Comcast.net account (*see CEI v. EPA*, D.D.C. 13-cv-627 (voluntarily dismissed on EPA’s promise of producing responsive records, under (FOIA EPA-R9-2013-007631)); Lisa Jackson’s false-identity email account in the name of “Richard Windsor” (*see CEI v. EPA*, D.D.C. 12-cv-1617), and Region 2 Administrator Judith Enck’s AOL account (EPA-R2-2014-001585). In addition to those three EPA regional administrators and former Administrator Jackson, *see also*, “the Committee has learned that at least these individuals were using private email accounts: ... Bob Perciasepe, Deputy Administrator;... Michelle DePass, Assistant Administrator for International and Tribal Affairs; Mathy Stanislaus, Assistant Administrator for the Office of Solid Waste and Emergency Response; M. Allyn Brooks-LaSure, Deputy Associate Administrator for Public Affairs; Brendan Gilfillan, Deputy Press Secretary; Bob Sussman, former Senior Policy Counsel; David Cohen, Spokesman; Robert Goulding, former Director of Operations; Michael Moats, former Chief Speechwriter; Seth Oster, former Associate Administrator for the Office of External Affairs and Environmental Education; Larry Elworth, former Chief Agricultural Advisor; Tseming Yang, former Deputy General Counsel; Diane Thompson, former Chief of Staff.” [*Eye on the EPA: Less Than Thorough - Flaws in Recent EPA OIG Investigations: OIG Ignores Leads on EPA’s Email Follies*](#), Senate Committee on Environment and Public Works, Minority (Feb. 13, 2014).

April 8, 2013 Memorandum from Bob Perciasepe, Acting Administrator, to the Honorable David Vitter, Ranking Member, Senate Committee on Environment and Public Works, at 1-2 (admitting that “the use of private, non-official email by EPA employees while conducting work-related activities has occurred,” despite “guidance to employees . . . not to use personal email for official business, except for emergencies”).¹¹⁶ Notably, Perciasepe used not one but two non-official accounts for EPA-related correspondence, including one controlled by the pressure group Audubon Society.

Except for FOIA requests specifically targeting these private accounts after their use had been exposed, these accounts have not been searched for FOIA or congressional oversight requests, or *e.g.*, records that must be docketed in this rulemaking. *See e.g., Landmark Legal Foundation v. EPA*, No. 12-1726, 2013 WL 4083285 (D.D.C. Aug. 14, 2013), 2013 WL 4083285, *5.¹¹⁷ *See also*, “The Committee has uncovered substantial evidence that calls into question the integrity of EPA’s system for identifying and preserving federal records...These [email and record preservation] practices have the potential to undermine the Agency’s ability to preserve records

¹¹⁶ It has since been demonstrated that when EPA’s Office of Inspector General inquired into these practices, it improperly narrowed its inquiry so as to avoid checking employee claims that turned out not to be true. It thereby “provided cover for inappropriate behavior of EPA officials”, with “flaws in the investigative methodology that raises [sic] questions about the integrity of the OIG’s conclusions, which appears to have exonerated certain EPA officials”, who did indeed use private accounts for EPA work despite denying it. [*Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env’t & Pub. Works, to Hon. Arthur A. Elkins, Jr., U.S. Env’tl. Prot. Agency*](#) (Feb. 20, 2014), at 1.

¹¹⁷ Summary judgment precluded due to inadequate search where “EPA did not search the *personal* email accounts of the Administrator, the Deputy Administrator, or the Chief of Staff,” but rather only searched only “accounts *that were in its possession and control*,” despite the existence of “evidence that upper-level EPA officials conducted official business from their personal email accounts.” (italics in original); *id.* at *8, noting that “the possibility that unsearched personal email accounts may have been used for official business raises the possibility that leaders in the EPA may have purposefully attempted to skirt disclosure under the FOIA.”

under the [Federal Records Act] and to appropriately respond to FOIA requests.” *A Call for Sunshine* at 8.

In short, the relevant legal principle applicable to this behavior is that using private assets to perform public business, while impermissible, does not succeed in making that any less the public’s business; not forwarding the emails, in further violation of the law, does not exempt records from the law and therefore is not a useful means of evading or exempting records from transparency laws; EPA not obtaining the records as required, or not informing the National Archivist after learning of the possible removal or loss of records, does not unburden it from any attendant legal obligation to ensure a sufficient record of its activities; not docketing such records does not relieve EPA of its obligation to ensure the rulemaking record is complete.

Correspondence moved “off-line” from the official, required channels are still potential agency records and/or federal records, and possible candidates for inclusion in the rulemaking record.

LEGAL OBLIGATIONS VIOLATED AND RELEVANT TO THE SUFFICIENCY OF

THIS RULEMAKING RECORD: When federal employees correspond on work-related issues on non-official accounts, they are required to copy their office. EPA officials involved in producing this proposed regulation were and remain required to copy the Agency on all such correspondence using a non-EPA account.¹¹⁸ This is because all correspondence made or

¹¹⁸ See e.g., Environmental Protection Agency, *What Is a Federal Record?*, <http://www.epa.gov/records/tools/toolkits/procedures/part2.htm>. See, e.g., *Frequent Questions about E-Mail and Records*, United States Environmental Protection Agency (“**Can I use a non-EPA account to send or receive EPA e-mail?** No, do not use any outside e-mail system to conduct official Agency business. If, during an emergency, you use a non-EPA e-mail system, you are responsible for ensuring that any e-mail records and attachments are saved in your office's recordkeeping system.”) (emphasis in original) (available at www.epa.gov/records/faqs/email.htm).

received by federal officials in connection with the transaction of public business is in fact potentially a “record”. These records are also subject to required docketing in relevant rulemaking records. Such correspondence is covered by the Freedom of Information Act (FOIA), the Federal Records Act (44 U.S.C 3301 et seq.), and are contemplated by the Clean Air Act and Administrative Procedure Act.¹¹⁹ They are also covered by congressional oversight requests seeking “all records” or “all electronic records” regarding some subject matter.

An email’s record status is not dictated by the account on which it is created or received. Specifically with regard to private email accounts, “Agencies are also required to address the use of external e-mail systems that are not controlled by the agency (such as private e-mail accounts on commercial systems such as Gmail, Hotmail, .Mac, etc.)”, and when used during working hours or for work-related purposes “agencies must ensure that federal records sent or received on such systems are preserved in the appropriate recordkeeping system and that reasonable steps are taken to capture available transmission and receipt data needed by the agency for recordkeeping purposes.” Government Accountability Office, *Federal Records: National Archives and Selected Agencies Need to Strengthen E-Mail Management*, GAO-08-742, June 2008, <http://www.gao.gov/assets/280/276561.pdf>, p. 37.

¹¹⁹ See also e.g., Government Accountability Office, “Federal Records: National Archives and Selected Agencies Need to Strengthen E-Mail Management,” GAO-08-742, June 2008, <http://www.gao.gov/assets/280/276561.pdf>, at p. 37; *Frequent Questions about E-Mail and Records*, United States Environmental Protection Agency.

Agencies are clear about this in policy.¹²⁰ Consider the White House Office of Science and Technology Policy. After being informed that one of its officials was using non-official email for official business (just as we now know he was), Director John Holdren affirmed the law and policy in equally clear terms, reminding employees in a memo to all staff that work-related email must be copied to the agency, stating in pertinent part:

In the course of responding to the recent FOIA request, OSTP learned that an employee had, in a number of instances, inadvertently failed to forward to his OSTP email account work-related emails received on his personal account. The employee has since taken corrective action by forwarding these additional emails from his personal account to his OSTP account so that all of the work-related emails are properly preserved in his OSTP account.

If you receive communications relating to your work at OSTP on any personal email account, you must promptly forward any such emails to your OSTP account, even if you do not reply to such email. Any replies should be made from your OSTP account. In this way, all correspondence related to government business—both incoming and outgoing—will be captured automatically in compliance with the [Federal Records Act].¹²¹

¹²⁰ See FN 118 (EPA). Also, DOE acknowledges that fulfillment of these requirements, which originate in the Federal Records Act of 1950 44 U.S.C. 3101 *et seq.*, the E-Government Act of 2002 and other legislation means that DOE must “Capture and manage records created or received via social media platforms, including websites and portals, or from personal email used for Department business”, and “Ensure that departing Federal employees identify and transfer any records in their custody to an appropriate custodian, or the person assuming responsibility for the work.” See “Your Records Management Responsibilities”, U.S. Department of Energy, Office of IT Planning, Architecture, and E-Government, Office of the Chief Information Officer, July 2010, available at http://energy.gov/sites/prod/files/cioprod/documents/Your_Records_Management_Responsibilities_2_.pdf. See also, DOE Order 243.1A, Records Management Program, http://energy.gov/sites/prod/files/o243%201a_Final_11-7-11.pdf, replacing similar requirements found in DOE Order 243.1, Records Management Program, 2-3-06. See *e.g.*, September 11, 2012 *Letter* from Morgan Wright, U.S. Department of Energy, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, and September 11, 2012 *Letter* from Eric J. Fygi, Deputy General Counsel, U.S. Department of Energy, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, affirming that DoE officials’ work-related emails conducted on non-official accounts potential status as agency records and which therefore must be produced by the employee to the employee’s agency.

¹²¹ Memo from OSTP Director John Holdren to all OSTP staff, *Subject: Reminder: Compliance with the Federal Records Act and the President’s Ethics Pledge*, May 10, 2010, available at <http://assets.fiercemarkets.com/public/sites/govit/ostp-employees.pdf> (herein, “Holdren memo”).

The obligation is not solely the individual's but extends to employer agencies, which must obtain copies when they have knowledge of such correspondence or the use of such accounts for work-related correspondence. These obligations are continuing ones. Despite that, individuals who make the choice to move off-line have been shown to habitually also choose to not copy the Agency as required for proper retention and preservation according to the rules,¹²² these obligations are irresistible when the practice is later discovered, as is the case involving individuals materially involved with this rulemaking.

It is a violation of the U.S. Code to willfully and unlawfully conceal, remove, mutilate, obliterate, or destroy any record, proceeding, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any public officer of the United States, or attempt or act with intent to do so.¹²³

The importance of complying with these laws is found in examining the employee's decision to use a non-official account, which reflects an intention and at minimum a knowledge that this correspondence is being conducted outside permitted channels that are required so as to bring the correspondence under the Agency's control for possible review by FOIA requesters, congressional oversight, media, or litigants. As one U.S. consultant notes in this context, "If you

¹²² See Press Release and [Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Technology](#), to Hon. Arthur A. Elkins, Jr., Reg'l Adm'r, Inspector General, U.S. Evtl. Prot. Agency (Feb. 7, 2013), *Vitter, Issa & Smith Expose EPA's Attempt to Hide Emails, Call for Further Investigation*. See also Press Release and [Letter from David Vitter, Ranking Member, Senate Committee on Environment and Public Works and U.S. House Committee on Oversight and Government Reform Chairman Darrell Issa](#) to Bob Perciasepe, Acting Administrator, Senate Committee on Environment and Public Works (Minority), *In Light of New Information, Vitter, Issa Continue Investigation into Inappropriate Record Keeping Practices at EPA* (May 13, 2013).

¹²³ 18 USC § 2071 - Concealment, removal, or mutilation generally.

work for a government agency ... sending official information on your personal account would place it outside of the controls in place to protect and retain email communications. Doing so is not only a compliance violation, but also gives the appearance of a willful and intentional attempt to circumvent the system and covertly hide your communications.”¹²⁴

This widespread practice of creating work-related correspondence generally unknown and inaccessible to other employees of the employer agency -- for FOIA, congressional oversight or discovery requests -- leaves possible and even presumptive agency records solely under the control of private parties, also potentially violating other laws.

When the non-official account being used is not the employee’s private account but on the computer system of, and thereby under the control of, a third party such as a former employer, these accounts’ use is further problematic. This account controlled by a third party is the means by which a still-relevant set of individuals knows to correspond, and do still

¹²⁴ Tony Bradley, “Mixing Business and Personal Email: Is It a Good Idea?,” About.com Network Security, September 19, 2008, <http://netsecurity.about.com/od/newsandeditoria2/a/palinemail.htm>. *See also* 44 U.S.C. Sections 3105, 3106, which prohibit the actual, pending or threatened, removal, defacing, alteration or destruction of documents, including documents or records of a Federal Agency and set forth procedures in these events. *See also*, 18 USC § 2071 - Concealment, removal, or mutilation generally.

correspond with the individual who is now a government employee, making most or all such correspondence now a potential federal record.¹²⁵

The current EPA that developed this rule is disproportionately populated by former environmentalist group lawyers and activists, whom these groups knew to contact at a non-EPA email and, as the public record shows, continued to do so.

We have already seen that these individuals not only previously used to work for these groups but likely plan to again (see, *e.g.*, former Region 6 administrator Al Armendariz, who left EPA to “accept[] a job with the Sierra Club and... run their anti-coal campaign,” in the words of one email among EPA officials who were given a heads-up telephone call from Sierra Club to inform them as Sierra was not publicizing it at that time).¹²⁶ It is reasonable to believe that

¹²⁵ It appears that the only definition of “record” in the U.S. Code is that in the Federal Records Act. 44 U.S.C. § 3301.” *What is an “Agency Record?”*, U.S. Department of Justice FOIA Update Vol. II, No. 1, 1980, http://www.justice.gov/oip/foia_updates/Vol_II_1/page3.htm. That definition of “records” for purposes of proper maintenance and destruction “includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, *regardless of physical form or characteristics, made or received* by an agency of the United States Government under Federal law or *in connection with the transaction of public business and preserved or appropriate for preservation by that agency* or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them” (emphasis added).

The Federal Records Act establishes that a record is a document that reflects the operations of government at some substantive level. In the FOIA context, the D.C. Circuit noted that, at bottom, “the question is whether the employee’s creation of the documents can be attributed to the agency for the purposes of FOIA.” *Consumer Fed’n of America v. Dep’t of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006).

When the Agency employee who came to EPA from a related field still uses an email account used to correspond with green-group allies or others whose correspondence relates to EPA the correspondence turns from presumptively private to presumptively a possible agency record for review. *See also, e.g.*, Wright and Fygi letters to Chmn. Darrell E. Issa, noted, *supra*.

¹²⁶ Sierra Club called Arvin Ganesan, Deputy Chief of Staff for Policy at EPA, to inform him that Armendariz “has accepted a job with the Sierra Club and will run their anti-coal campaign in the Texas region” but that “Sierra Club will NOT be making this announcement Friday afternoon, but this has the potential to spill out before then.” Email, From: Arvin Ganesan, To: Richard Windsor (Lisa Jackson), Gina McCarthy, Bob Perciasepe, Diane Thompson, Brendan Gilfillan, Bob Sussman, Laura Vaught, Subject: Al Armendariz. 6/27/2012.

missing emails involve discussions of future activities on behalf of the outside groups, and or those groups' expectations regarding the proposed rulemaking.

Further, there are instances where current senior officials intimately involved with the instant rulemaking maintaining email accounts on the computer servers of former-employer environmentalist pressure groups -- for example, EPA Air official Janet McCabe, intimately involved in developing this proposed rule, continued to use her email account with the group Improving Kids Environment, Inc. (mccabe@ikecoalition.org). This constitutes a conflict of interest by these officials, but regardless all correspondence on that account during their federal employment was possibly a federal record, which the third-party group has no right to control.

Other problems particular to this practice include providing other parties direct access to and control over public records and potentially over sensitive information, in which they might have a unique interest. Of course this also allows for destruction of those possible records with no safeguard that federal records are not lost as a result.

Therefore, work-related emails sent and received on non-official accounts have been removed from defendant federal agencies since the agencies lack access to or control of records which should by law be in their possession.

These rules apply without regard to whether the Agency employee initiated the correspondence, received it, replied to it, or otherwise, regardless of a correspondence's provenance.

In addition to its obligation to enforce law and policy requiring it obtain all relevant correspondence and docket it as appropriate, EPA has the obligation to report the discovery of this practice to the National Archivist. Specifically, the head of any Federal agency has an

obligation to notify the Archivist of the United States whenever “any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is the head come[s] to his attention.” 44 U.S.C.A. § 3106.¹²⁷

The head of any Federal agency has a further obligation to “initiate action through the Attorney General for the recovery of records he knows or has reason to believe have been unlawfully removed from his agency.” *Id.*

These duties are not discretionary, on the part of either the employee or the Agency.

The public record is also clear that EPA did not contemporaneously obtain copies of all of such email, or docket it as appropriate, despite being informed in recent months as it was developing the instant proposed rule, of the widespread nature of the practice of using private email accounts for EPA-related work. *See e.g.*, Senate Committee on Environment and Public Works, Minority Report, [*A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered*](#) (Sept. 9, 2013); *see also*, *Eye on the EPA*, FN 115, *supra*.

Also, National Archives and Records Administration (NARA) regulations state, “Agencies that allow employees to send and receive official electronic mail messages using a system not operated by the agency must ensure that Federal records sent or received on such systems are preserved in the appropriate agency recordkeeping system.”¹²⁸ EPA plainly allowed it, *de facto*, regardless of its policies prohibiting it, *de jure*.

¹²⁷ *See Armstrong v. Bush*, 924 F.2d 282, 295 (D.C. Cir. 1991) (“the FRA requires the agency head and Archivist to take enforcement action” in response to destruction of records; “On the basis of such clear statutory language mandating that the agency head and Archivist seek redress for the unlawful removal or destruction of records, we hold that the agency head's and Archivist's enforcement actions are subject to judicial review.”).

¹²⁸ 36 C.F.R. § 1236.22(a), “What are the additional requirements for managing electronic mail records?”, <http://www.archives.gov/about/regulations/part-1236.html>.

In the face of increasing revelations about senior employees turning to private email accounts to conduct official business and otherwise engage in work-related correspondence, and more broadly circumventing the requirements of statutory and regulatory record-creating and record-keeping regimes, EPA arbitrarily and capriciously refused to comply with these obligations.¹²⁹ Despite being specifically placed on notice of these violations EPA has not satisfied this obligation, and undertaken no prescribed remedial steps that may bring the record possibly into conformity with the law.

Commenters and EPA are aware of this practice by numerous appointees and other employees materially involved in this proposed rulemaking and as a result must undertake all required and other reasonable steps to attempt to ensure the integrity of its rulemaking record.

The widespread nature of the practice as has been proved is such that the Agency's record in this rulemaking must be deemed presumptively deficient until remedial steps are completed.

EPA failed in its obligation to establish safeguards against the removal or loss of records and making requirements and penalties known to agency officials and employees (44 U.S.C. 3105); it has failed in its obligation to notify the National Archivist of any actual, impending, or threatened unlawful destruction of records and assist in their recovery (44 U.S.C. 3105).

¹²⁹ The Government Accountability Office (GAO), addressing current electronic record practices, wrote in late 2010 that “almost 80 percent of agencies were at moderate or high risk of improper destruction of records; that is, the risk that permanent records will be lost or destroyed before they can be transferred to NARA [National Archives Records Administrator] for archiving or that other records will be lost while they are still needed for government operations or legal obligations.” “Report to the Ranking Member, Committee on Finance, U.S. Senate: NATIONAL ARCHIVES AND RECORDS ADMINISTRATION. Oversight and Management Improvements Initiated, but More Action Needed,” GAO-11-15, October 2010, <http://www.gao.gov/assets/320/310933.pdf>, at 18.

“The Archivist referred to these results as ‘alarming’ and ‘worrisome’; in a subsequent oversight hearing, the director of NARA’s Modern Records Program testified that the findings were ‘troubling’ and ‘unacceptable.’” *Id.*, at p. 19.

EPA's failure to obtain and preserve work-related emails on non-official accounts has caused the removal of those federal records from the appropriate federal agency, also such that the Agency's record in this rulemaking must be deemed presumptively deficient until remedial steps are completed.

Ultimately, this ties into the additional reasons why the agency must hold off on the proposed rule set forth elsewhere in this Comment, including the bias/inalterably closed mind and *ex parte* communications issue. The records which the widespread nature of this practice indicates must reasonably be presumed to be missing may well have been made missing intentionally -- just as correspondence to or from a non-official email account coupled with the failure to properly forward such correspondence to an official email account is presumptively an intentional act. An unavoidable consequence is that EPA staff involved with crafting the proposed rulemaking were ignoring evidence, and/or improperly communicating.

It is solely because of the decisions by EPA officials to engage in this practice, to not copy the Agency, compounded by the Agency's refusal to obtain the records, and to report the possible loss to the National Archivist, that the public does not know the extent of this and until the record is complete presumptions of partiality ought to weigh against those who deliberately kept things out of the record.

This rulemaking should be stayed until remedial steps are taken to ensure the integrity of this rulemaking record.

REMEDY: Corrective action is required, as a matter of law, to bring the Agency's record into compliance, at minimum making a good faith effort to determine what is missing from the record in the instant rulemaking and to restore it as possible while assessing the meaning of the restored

record for the rule making and of the remaining deficiency. Therefore, this proposed regulation and others that these appointees played a material role in developing must be stayed until all prescribed actions and all remedial steps required by law are fulfilled.

EPA must cease its refusal to obtain the described records, and its refusal to report the possible loss of agency records to the National Archivist. Other remedial steps include obtaining declarations by other employees materially involved with this rulemaking regarding their use at any time of a non-EPA email account for EPA-related correspondence; declarations by EPA staff materially involved in this rulemaking who have been found to have used non-official email accounts for work-related correspondence regarding the extent of this use relating to this rulemaking, the completeness of their production to EPA (after it occurs) of the related correspondence and any relevant facts regarding possible loss of such correspondence;¹³⁰ these productions must be reviewed for correspondence that should be or should have been considered for placement in this record; forensic review of relevant hard drives and accounts for

¹³⁰ We recall the case *Landmark Legal Foundation v. Environmental Protection Agency*, (D.D.C. 00-2338), which revealed that then-EPA Administrator Carol Browner ordered the hard drive in her computer and that of her assistant to be erased. Memorandum Opinion, July 24, 2003. *See, e.g.*, John Solomon, "EPA Head Browner Asked for Computer Files to Be Deleted", Associated Press, June 29, 2001, <http://www.mail-archive.com/ctrl@listserv.aol.com/msg70823.html>.

It is undeniable that agencies are increasingly called to search an employee's private accounts and equipment, including, for example, involving EPA Regional Administrators, but only after this was discovered by private parties. For example, the public record affirms that former administrator Lisa Jackson, who the record also shows was intimately involved with developing the suite of greenhouse gas regulations and regulating power plants on the basis of their GHG emissions (see Comment 1, *supra*), used her private email account with Verizon to conduct certain related correspondence with, e.g., green pressure group allies. EPA was required to maintain these correspondence; it failed to do so, but the public record also shows that the NSA maintained at minimum metadata from Verizon telephony and data accounts. With one agency having provided a backstop for the violations of another, EPA must now obtain all relevant information regarding Ms. Jackson's EPA-related correspondence (and text messaging, as well as EPA officials' text messaging activity while EPA used Verizon services, see *infra*) prior to proceeding with this rulemaking. See also 44 U.S.C. 3101 *et seq.*, the E-Government Act of 2002 and other legislation) and regulation (36 C.F.R. Subchapter B, Records Management, and all applicable NARA-mandated guidance), and reflected in United States Government Accountability Office, GAO-11-15.

completeness of the record; obtaining from NSA all relevant metadata or data that the Agency was required to obtain or preserve but did not; informing the National Archivist of the possible loss of federal records, and all prescribed steps that follow.

COMMENT 3

EPA's rulemaking record is presumptively incomplete: it has engaged in/permitted wholesale destruction of an entire class of correspondence to and from senior officials involved in this rulemaking, failed to obtain records and to report possible removal or loss, creating a presumption of record removal or loss.

SUMMARY OF COMMENT:

The public record so far reflects that at least the past two EPA administrators, Lisa Jackson and Gina McCarthy (as Assistant Administrator for Air and Radiation) were provided text messaging capability on their EPA-assigned phones/personal data (or digital) assistants (PDAs).

Both of them (and presumably other senior EPA officials) used this capability for EPA-related correspondence, and destroyed such correspondence, which we know amounted to several thousands of records and have reason to believe runs into the tens of thousands; further, they were permitted to do so even though EPA was not preserving a copy or imposing any safeguard to ensure some record was maintained as a precaution as is done with the alternative to text messaging, electronic mail. As such, these officials and, it is reasonable to conclude, others destroyed the Agency's sole copy of an entire class of correspondence, some of which is likely to contain information that should properly be included in the rule making record which must be deemed presumptively incomplete.

Further, EPA has not sought to obtain copies of the destroyed correspondence by, for example, obtaining all metadata either from its own records, from its telephony carrier(s), or

from the National Security Agency which possesses a copy of all metadata during the period EPA used Verizon (which it did, until fairly recently, including during a period while the instant rulemaking proposal was being crafted), for the purpose of seeking copies from text correspondents using known EPA-assigned phone numbers. Further, despite actual knowledge EPA has failed in its obligation to notify the National Archivist of possible record loss as is required when they learn of this.

As a result, the public have no idea what relevant communications that were (many, if not all, deliberately) taken off-line are missing that should have been docketed. The Agency should acknowledge its record for this proposed rulemaking is presumptively incomplete, and stay the rulemaking until a proper review is conducted to determine just how extensive was the use of text messaging by officials materially involved in the rulemaking, after credibly assessing through interviews, declarations and forensic review the possible resulting loss of federal records and deficiency of this record.

In addition, EPA must satisfy all obligations to fully inform the National Archivist and assist with all prescribed Archivist and Agency steps in response to that required reporting, make efforts to retrieve metadata from telephony carriers and/or NSA,¹³¹ and otherwise diligently work to ensure the record is as close to being assuredly complete as is possible.

¹³¹ EPA used Verizon for its telephony services during periods critical to the instant rulemaking record. Further, the public record affirms that former administrator Lisa Jackson, who the record also shows was intimately involved with developing the suite of greenhouse gas regulations and regulating power plants on the basis of their GHG emissions (see discussion in Comment 1, *supra*), used her private email account with Verizon to conduct certain related correspondence with, e.g., green pressure group allies. EPA was required to maintain these metadata; it failed to do so, but the public record also shows that the NSA maintained at minimum metadata from Verizon telephony and data accounts. With one agency having provided a backstop for the violations of another, EPA must now obtain all relevant information regarding Ms. Jackson's EPA-related correspondence (and text messaging, as well as EPA officials' text messaging activity while EPA used Verizon services) prior to proceeding with this rulemaking.

This practice leaves Commenters and otherwise the public unable to assert what is missing, much less comment on the content and/or meaning of those documents. Viewed another way, the widespread nature of these offenses is such that this leaves a record that is not available for proper review. The Agency that failed in its obligations, not the public, should bear the cost of these failures. The presumption should be that the record is impermissibly flawed. Until these concerns are addressed and problems corrected the record is deficient and this is an improper rule making.¹³²

BACKGROUND: The public record now includes EPA acknowledgement that Ms. McCarthy sent/received many thousands of text messages using her EPA-provided PDA, none of which EPA preserved. (This information was produced in response to a FOIA request by the Competitive Enterprise Institute (CEI), HQ-2013-006937, seeking phone bills related to Ms. McCarthy's text messages. EPA has not, to Commenters' knowledge, obtained any billing information regarding Ms. Jackson's account(s)).

¹³² We incorporate all prior discussion regarding Agency obligations to obtain and preserve correspondence, and possible records, and report possible removal or loss of records as if stated herein. This discussion focuses on the specifics of a similar circumstance of EPA failing to preserve, and allowing at minimum the past two administrators to destroy the Agency's sole copies of all of many thousands of their text message transcripts, and likely other officials involved in producing this proposed rulemaking. Text messaging is provided as an alternative to email, is legally indistinct from email, but EPA has managed text message transcripts in a way it would surely never contemplate managing email for the same reasons it should not be permitted to advance work without recreating text messaging by senior officials.

Instead, however, EPA has put in place a system permitting the officials to destroy the agency's sole copy of this entire class of correspondence, with no check to ensure no record loss.

The simplest test for determining the acceptability of proceeding with the instant proposed rulemaking absent such an accounting, in the face of this knowledge, is to reverse the more commonly assumed form of correspondence, emailing, and text message transcripts. EPA does not and cannot permit employees to destroy the Agency's sole copy of all emails, and then allow a rulemaking that those employees materially participated in without a forensic reconstruction and attestations about possible record loss?

Text messaging is provided to certain EPA officials as an alternative medium of communication to email, both means which are provided specifically for the purpose of enabling performance of official functions. For example, in a discrete May 27, 2010 text message that CEI became aware of, former EPA Administrator Lisa Jackson used her text messaging function to discuss a potential green-jobs opportunity for a “cotton absorbent company” whose CEO she apparently met at a “Climate Rally” in her capacity as EPA administrator.¹³³ But when CEI sought those very text messages referenced in an email obtained under FOIA and addressed to Jackson in her capacity as “Administrator Jackson,” EPA issued a “no-records” response.¹³⁴ This reflected that the texts, which like email are “created” when sent or received, were destroyed by EPA. These text messages, as described in Jackson’s own email thread, occurred in the context of EPA’s involvement in the clean-up efforts surrounding the Deepwater Horizon drilling platform explosion and oil leak in the Gulf of Mexico, and the company in question sought to promote its purportedly environmentally-friendly products to the EPA for use in conjunction with the cleanup.

Although the text messages’ occurrence was memorialized in Administrator Jackson’s own email addressing the subject, which is how CEI learned of this particular exemplar used to pressure-test EPA’s handling of Jackson’s texts with a readily satisfied FOIA request, an email

¹³³ See Email from EPA Administrator Lisa Jackson using her EPA “Richard Windsor” account to Aaron Dickerson, 6/4/2010 3:36 PM, enclosing email from Michael Martin to Aaron Dickerson, May 27, 2010, at 18:43:30 (“Administrator Jackson and I had txt’d this am about” a green-jobs opportunity for a “cotton absorbent company” Jackson had met at “the Climate Rally”). This email can be found in *Freedom of Information Act Request HQ-FOI-01268-12*, Fourth Release (04/15/13), Part C, on the 22nd of 508 pages in that document, which is currently available at www.epa.gov/epafoia/docs/Release-4-Part-C.pdf (visited 10/2/ 2013). It is one of the releases of documents in response to a FOIA request that is currently found on EPA’s *Frequently Requested Records* page, available at www.epa.gov/epafoia/frequent.html.

¹³⁴ This FOIA request sought “copies of all EPA-related text messages sent and/or received by Lisa P. Jackson on May 27, 2010.” EPA-HQ-2013-009235.

that EPA produced as being work-related, on September 18, 2013, EPA issued a “no-records” response, reflecting the correspondence’s destruction by EPA.

EPA has indicated in response to these two FOIA requests that while, like email text messages can be federal records, unlike email, not one of the thousands of text messages requested under FOIA were in fact preserved, despite many having a facial relationship to EPA’s work (e.g., the above-described Jackson correspondence, or dozens sent between McCarthy and EPA senior officials). EPA asserts that this is because such communications are “unrecord material not subject to the Federal Records Act,”¹³⁵ and that it is EPA’s position to allow Agency officials to destroy their correspondence, which represents the Agency’s sole copy of such correspondence.

EPA made the same assertion in response to the Jackson-text FOIA request.¹³⁶ In its September 18, 2013 “no records” letter, Eric E. Wachter, the Director of EPA’s Office of the Executive Secretariat, did not deny that Jackson exchanged such messages, but excused EPA’s

¹³⁵ See September 18, 2013 letter from Eric E. Wachter, Director, EPA Office of the Executive Secretariat, to Christopher C. Horner, CEI, at 1 (“no records exist” responsive to request HQ-2013-009235 for “copies of all EPA-related text messages sent and/or received by Lisa P. Jackson on May 27, 2010”; EPA claims that “not all documents created by government employees are subject to preservation under the Federal Records Act. As with all electronic communication, EPA employees are required to determine whether text messages are record material and to preserve as appropriate. The text messages described in the example you provide certainly suggest unrecord material not subject to the Federal Records Act. Records Act. Under 44 U.S.C. unrecord material not subject to the Federal Records Act. Records Act. Secretariat, to Christopher C. Horner, CEI, at 1 form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them.”

Under 44 U.S.C. unrecord material not subject to the Federal Records Act. Records Act. Secretariat, to Christopher C. Horner, CEI, at 1 form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them.”

Problems for this non-explanation include that EPA states this in the context of a FOIA request, though EPA acknowledges on its website that “[t]he definition of a record under the Freedom of Information Act (FOIA) is broader than the definition under the Federal Records Act.” See, e.g., Environmental Protection Agency, *What Is a Federal Record?*, <http://www.epa.gov/records/tools/toolkits/procedures/part2.htm>.

¹³⁶ See September 18, 2013 letter from Eric E. Wachter, Director, EPA Office of the Executive Secretariat, to Christopher C. Horner, at 1 (“no records exist” responsive to request HQ-2013-009235 for “copies of all EPA-related text messages sent and/or received by Lisa P. Jackson on May 27, 2010” for this reason).

failure to produce them with the assertion that “not all documents created by government employees are subject to preservation under the Federal Records Act. As with all electronic communication, EPA employees are required to determine whether text messages are record material and to preserve as appropriate. The text messages described in the example you provide certainly suggest unrecord material not subject to the Federal Records Act.”

Wachter did not explain what constitutes “unrecord material,” or why he used this peculiar phrase defined nowhere in any statute, regulation, or dictionary. Assuming that “unrecord material” means documents not covered by federal records laws, he did not explain how EPA-related communications could possibly *not* be subject to such laws (like the Federal Records Act and FOIA, which has the broadest definition of record among relevant laws) when for example, they are addressed to senior EPA officials like Jackson in their official capacity; are exchanged with such officials using EPA-supplied devices for creating and transmitting records; and address a subject whose discussion, in email form, was preserved and produced under FOIA as an agency “record.” He also did not address the obvious question he begged of how an entire class of records, which he acknowledges in theory can be records, is being destroyed because in practice all are “unrecord material.”

Mr. Wachter was acting as a high-ranking agency official in charge of EPA FOIA and record-keeping policies and practices when asserting this position that a class of records which, when the substantively same correspondence is transmitted via a legally equivalent medium (email), are in great part being preserved but are not preserved and instead are destroyed when transmitted by the alternative to email EPA provides, text messaging, as “unrecord material.” Wachter heads the office that is in charge of “processing Freedom of Information (‘FOIA’)

requests for the Office of the Administrator; maintaining the records of the Administrator and Deputy Administrator; managing the Administrator's and Deputy Administrator's executive correspondence; and administering the EPA's electronic correspondence tracking system."¹³⁷

After CEI sued over the McCarthy text matter, EPA provided that organization with a "no records" response stating that it has been unable to locate any such texts.¹³⁸ It did so even though Ms. McCarthy sent or received many thousands of such text messages over the covered period, as CEI subsequently learned, such that on the basis of information later obtained¹³⁹ the statistical probability that Ms. McCarthy did not text on any of those eighteen dates is virtually zero.¹⁴⁰ CEI subsequently learned that EPA did not preserve text messages from those eighteen dates *or otherwise*.¹⁴¹ CEI dismissed that suit without prejudice in light of the claim that no

¹³⁷ See *Search Declaration of Eric E. Wachter*, at ¶2, in *CEI v. EPA*, No. 12-1617 (D.D.C. filed, 8/21/2013) (docket doc. # 24-4).

¹³⁸ See, e.g., *Answer in Competitive Enterprise Institute v. Environmental Protection Agency*, D.D.C. No. 13-779 (filed 7/19/2013) at se *Institute v. Environmental Protection Agency*, Assistant Administrator Gina McCarthy), ¶21 (conceding that EPA provides such officials "with personal digital assistants that have text messaging capability"), ¶¶14, 33 (EPA currently unable to locate such records); Email from Michelle Lo, counsel for EPA, to Chris Horner (counsel for CEI and Commenters) and Hans Bader (counsel for CEI), at 9/9/2013 3:46 PM (admitting that "Ms. McCarthy uses text messaging," but arguing that "they were not required to be preserved by the Agency."); Email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 8/1/2013 7:25 PM (conceding that "Ms. McCarthy used the texting function on her EPA phone," and that "none of her texts over the period encompassing the 18 specific dates at issue in CEI's FOIA request (July 9, 2009, to June 29, 2012) were preserved").

¹³⁹ See document sent by EPA attached to July 26, 2013 email to Chris Horner, with PDF file bearing the title "counsel attached to July 26, 2013 email to Chris Horner, with response to FOIA Request HQ-2013-006937, which sought certain text-related phone bills and invoices. That document provided certain metadata showing 5,392 text messages sent or received by Ms. McCarthy during billing periods from July 2009 to July 2012.

¹⁴⁰ See document sent by EPA attached to July 26, 2013 email Aug. 20 Horner email, with PDF file bearing the title "counsel attached to Aug. 20 Horner email, with PDF file bearing the title IA Request HQ-2013-006937 (submitted, June 3, 2013). CEI staff estimated the odds of this actually occurring as one in 7.9 sextillion. See <http://cei.org/news-releases/odds-epa-not-destroying-gina-mccarthy-text-messages-1-79-sextillion> (calculation available at www.scribd.com/doc/157256436/McCarthy-Texting-Probability)

¹⁴¹ See, e.g., email from Michelle Lo, FN 138.

responsive documents remained. It was only later that CEI obtained the information showing that in fact EPA was not preserving, and instead was destroying, all such correspondence. That practice is at issue in this Comment, and is highly relevant to why the proposed rulemaking is improper and must be stayed until remedial steps described herein are fulfilled.

LEGAL OBLIGATIONS VIOLATED AND RELEVANT TO THE SUFFICIENCY OF

THIS RULEMAKING RECORD: EPA provides certain employees with PDAs and text messaging capability as an alternative to email for official or otherwise work-related internal or external communications.

Text messaging correspondence may be Agency records, are subject to FOIA, and must be maintained and produced as such, under the Federal Records Act and FOIA. *See, e.g.,* National Archives, *Frequently Asked Questions About Instant Messaging*, <http://www.archives.gov/records-mgmt/initiatives/im-faq.html> (Instant Messaging (IM) content can “qualify as a Federal Record,” since IM “allows users” to “exchange text messages,” which are “machine readable materials” and thus within the “statutory definition of records”); *Frequent Questions about E-Mail and Records*, <http://www.epa.gov/records/faqs/email.htm>; *Frequent Questions about Mobile and Portable Devices, and Records*, www.epa.gov/records/faqs/pda.htm; *Memo to All Staff, “Transparency at EPA,”* by Acting Administrator Bob Perciasepe, dated April 8, 2013 (noting that EPA has recognized a problem with such instant messaging, as well as emails).¹⁴²

¹⁴² *See also* April 11, 2008 memorandum from John B. Ellis, EPA, to Paul Wester, National Archives and Records Administration, at 4 (reporting discovery of record-keeping problems), available at http://www.epw.senate.gov/public/files/2008_EPA_Archives_Memo_HILITED.pdf; *Records and ECMS Briefing, EPA Incoming Political Appointees 2009*, http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=60afa4b3-3e5d-4e6f-b81e-64998f0d3c67.

Former EPA Administrator Jackson and current EPA Administrator McCarthy had a duty under the Federal Records Act (FRA) not to destroy text messages, and to take remedial action once such destruction occurred. For example, under the FRA, each agency head

shall notify the Archivist [the head of the National Archives and Records Administration] of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is the head that shall come to his attention, and with the assistance of the Archivist shall initiate action through the Attorney General for the recovery of records he knows or has reason to believe have been unlawfully removed from his agency, or from another Federal agency whose records have been transferred to his legal custody.¹⁴³

EPA has responded to such information by informing the Archivist, in the past, when learning of similar destruction of emails.¹⁴⁴

However, neither Jackson nor McCarthy has taken any such action, despite having the duty to do so in their capacity as head of the agency (indeed, according to EPA they are the officials who destroyed their own correspondence). Nor has EPA. Nor has EPA ever notified the Archivist of the destruction or loss of the records, or prescribed responses undertaken. Nor has EPA taken other remedial actions, as is required to comply with its duty under the FRA to “establish safeguards against the removal or loss of records he determines to be necessary and required by regulations of the Archivist”¹⁴⁵ and “make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency....”¹⁴⁶

¹⁴³ 44 U.S.C. § 3106.

¹⁴⁴ See April 11, 2008 April 11, 2008 “Ellis memo”, FN 142, at 1-3.

¹⁴⁵ Id.

¹⁴⁶ 44 U.S.C. § 3101.

devices provided by the agency.¹⁴⁹ Like emails, their transmission and content are of significant public interest and relevant to rulemaking records, especially due to EPA's recurrent failure to produce text message transcripts in response to FOIA and congressional oversight requests for specified "records" and "electronic records" in particular.

EPA's practice of allowing employees to unilaterally and immediately destroy the Agency's sole copies of an entire class of records is unlawful, regardless of what the medium of communication is. "While the agency undoubtedly does have some discretion to decide if a particular document satisfies the statutory definition of a record," the Federal Records Act does not "allow the agency by fiat to declare 'inappropriate for preservation' an entire set of" electronic or "email documents" generated by high-ranking officials like Gina McCarthy over a

¹⁴⁹ See *Frequent Questions about Mobile and Portable Devices, and Records*, www.epa.gov/records/faqs/pda.htm ("Common Agency records maintained on Mobile Devices include e-mail . . . and any other information related to your work at EPA. . . Records created on your Mobile Device should be transferred to your office's recordkeeping system on a regular basis. . . **Is the information on my Mobile Device subject to FOIA . . . ?** Yes, information on your Mobile Device may be requested under FOIA or in response to litigation. **My Mobile Device was not provided by the Agency. Do these rules still apply to me?** Yes, if you have Agency records on a personally-owned Mobile Device, they still need to be captured in an approved recordkeeping system.");

36 C.F.R. 1236.22 ("electronic mail records" covered; "Agencies that allow employees to send and receive official electronic mail messages using a system not operated by the agency must ensure that Federal records sent or received on such systems are preserved"); see also, *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1284, 1288 (D.C. Cir. 1993) ("electronic communications systems contain preservable records" covered by the Federal Records Act," and "do produce federal records"); *Id.* at 1288 ("agencies have an obligation . . . to undertake periodic [compliance] reviews to assure that" record preservation procedures "are being adhered to," requirements that "apply to all electronic systems used by agency employees to create electronic records, not just . . . to 'official' agency electronic records systems . . . defendant agencies must undertake some periodic review of their employees' electronic recordkeeping practices."); *Landmark Legal Foundation v. EPA*, 2013 WL 4083285, *5 (D.D.C. Aug. 14, 2013) (denying EPA summary judgment in FOIA case where EPA did not search the individual "email accounts of the Administrator, the Deputy Administrator, or the Chief of Staff,"; noting "the possibility. . . that leaders in the EPA may have purposefully attempted to skirt disclosure under the FOIA.").

¹⁵⁰ See *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1283 (D.C. Cir. 1993).

multi-year period.¹⁵⁰ More relevant, it leaves the record of this rulemaking presumptively deficient and insufficient to support the proposed rule.

EPA has failed to preserve these documents despite previously being warned by the courts to stop deleting and destroying electronically-stored information and other documents. *See, e.g., Union Pac. R.R. Co. v. U.S. Env'tl. Prot. Agency*, 2010 WL 2560455 (D. Neb. June 24, 2010) (granting temporary restraining order against EPA, enjoining the EPA from deleting or destroying any potentially relevant electronically-stored information, and also ordering EPA to identify, collect, and preserve such information relevant to company's FOIA request as well as designate an expert on electronically-stored information to "insure the enforcement" of the temporary restraining order, in light of evidence that "the EPA has engaged in a practice of deleting relevant emails in response to Union Pacific's FOIA request"; eight emails indicated EPA official instructed employees to destroy documents and delete emails relevant to company's FOIA request).¹⁵¹

Since all of the text messages at issue were sent or received by the EPA's current administrator and her predecessor, and it is reasonable to surmise that other officials have been engaging in and being permitted to engage in this practice, what records may possibly have been lost is relevant to and determinative of the instant rulemaking.

¹⁵¹ *See also Landmark Legal Foundation v. E.P.A.* 2013 WL 4083285 (D.D.C. Aug. 14, 2013) (judge denied EPA summary judgment based on "2013 WL 4083285 (D.D.C. Aug. 14, 2013) (judge denied EPA summary judgment based in part on "the potential spoliation of records that should have been searched" (*id.* at *8 n.7); *Union Pacific R. Co. v. U.S. E.P.A.*, 2010 WL 3455240 (D. Neb. Aug. 26, 2010) (granting preliminary injunction against EPA).

Despite the above, and in the face of revelations about organized and systemic abuses by senior federal employees to hide from the public their activities, particularly their electronic communications,¹⁵² EPA has failed to preserve these documents (as required by the Federal Records Act), much less to produce them in response to FOIA requests or Congress in response to oversight requests or -- most relevant -- review them for consideration for docketing in the instant rulemaking.

EPA has failed to preserve these documents despite previously being warned by the courts to stop erasing and failing to preserve documents. Plaintiff asserts on information and belief that EPA has also failed to notify the National Archivist as required when it learns of such potential loss of records; as Ms. McCarthy was the responsible officer as well as the party destroying her own correspondence, EPA has been aware of this practice for several years but it also has been specifically otherwise informed by virtue of the FOIA proceedings cited, *supra*.

¹⁵² *S See, e.g., Stephen Dinan, EPA Officials Lied About Email Use, Senator Says*, Washington Times, March 11, 2013, at A4 (“Mr. Martin and Ms. Jackson both resigned last month, after Mr. Vitter and Rep. Darrell E. Issa, California Republican and chairman of the House oversight committee, began an investigation into the emails”); *U.S. Senator David Vitter Hearing Statement Summary: Nomination Hearing for Ms. Gina McCarthy to Lead U.S. Environmental Protection Agency Before the Senate Committee on Environment and Public Works*, U.S. Federal News, April 11, 2013 (“EPA Region 8 Administrator James Martin resigned after lying to a federal court, and after EPA lied that he was not using his private email account to conduct official business in violation of the Federal Records Act and the Freedom of Information Act”); Stephen Dinan, *Do Text Messages from Feds Belong on Record? EPA’s Chief’s Case Opens Legal Battle*, Washington Times, April 30, 2011, at A1 (discussing how CEI’s Christopher Horner “exposed former EPA chief Lisa P. Jackson’s private email account” and those of other EPA officials; and how “several congressional committees looking into the EPA also discovered other agency officials using personal emails to conduct government business - a violation of the Freedom of Information Act”; “The EPA’s internal auditor also is looking into how well the agency is complying with the law.”); Dinan, *EPA Staff to Retrain on Open Records; Memo Suggests Breach of Policy*, Wash. Times, Apr. 9, 2013, at A4 (“The Environmental Protection Agency . . . acknowledged that it needs to do better at storing instant-message communications, after the agency came under severe fire from members of Congress who say it appears to have broken those [open-government] laws” in an apparent “admission that the agency has fallen short on its obligations.”); Dinan, *Suit Says EPA Balks at Release of Records; Seeks Evidence of Hidden Messages*, Wash. Times, Apr. 2, 2013, at A1 (“EPA officials were using private email addresses to conduct official business”; “James Martin, who at the time was administrator of EPA’s Region 8, used his personal email account to collaborate with the Environmental Defense Fund about where hearings on agency greenhouse gas rules could be held for maximum effect.”).

EPA has not disavowed or repudiated its position justifying the destruction of such agency documents. EPA has instead defended the practice as appropriate, and efforts to compel the Agency to cease the practice as intrusive. It clearly therefore has done nothing to ensure the integrity of the instant rulemaking record as regards such correspondence.

The deletion by the EPA Administrator and Assistant Administrator of all text messages, including texts that were substantively similar to *e.g.*, an email that was preserved and produced as a record under FOIA, caused the destruction of federal records.

We repeat our prior assertions, *supra*, regarding responsibilities of the head of any Federal agency to notify and undertake certain prescribed steps and otherwise to behave reasonably toward recovering records and ensuring the integrity of the instant rulemaking record, particularly when she possesses actual knowledge of certain practices.

Neither Administrator McCarthy nor Administrator Jackson ever notified the Archivist or the Attorney General regarding the destruction of the federal records.

EPA has failed to preserve not only the text messages, but also all metadata about them. For example, according to EPA, it is aware that its arrangement with its telephone carrier no longer preserves the telephone numbers to which text messages were sent or from where they were received.¹⁵³ This makes it impossible to cross-check an official's, *e.g.*, McCarthy's, claims

¹⁵³ See Email from DoJ counsel for EPA Mark Nebeker to Chris Horner, counsel for CEI, in *Competitive Enterprise Institute v. Environmental Protection Agency*, D.D.C. Civil Action No. 13-1074 (FOIA request HQ-2013-006937 and seeking McCarthy's text-message metadata information from phone bills, which is also being destroyed), at 9/12/2013 1:54 PM (admitting that "Although phone calls are delineated by each number called and the airtime and charges, that is not true for text messages. It is my understanding the Agency does not receive a record from Verizon (or, in this case, its predecessor, AT&T) of individual text messages made by its employees, including Ms. McCarthy."). In a subsequent email EPA OGC's Cindy Anderson asserted that with AT&T, a very limited amount of metadata had been preserved, from April 2011 to November 2011. See Email from Cindy Anderson of EPA to Chris Horner, September 17, 2013 9:17 AM.

that each and every among the thousands of text messages on her EPA phone were all personal and not one was work-related.

Accordingly, this rulemaking must be stayed until all prescribed actions and all remedial steps required by law are fulfilled.

REMEDY: Corrective action is required, as a matter of law, to bring the Agency's larger record into compliance and to at minimum make a good faith effort to determine what is missing from the record in the instant rulemaking and restore it as possible while assessing the meaning of the remaining deficiency. First, this proposed regulation and others that these appointees played a material role in developing must be stayed until all prescribed actions and all remedial steps required by law are fulfilled.

EPA must cease its refusal to obtain the described records, and its refusal to report the possible loss of agency records to the National Archivist. Other remedial steps include obtaining declarations by other employees materially involved with this rulemaking regarding their use at any time of text messaging for EPA-related correspondence; declarations by EPA staff materially involved in this rulemaking who have been found to have used texting for work-related correspondence regarding the extent of this use relating to this rulemaking, the completeness of their production to EPA (after it occurs) of the related correspondence and any relevant facts regarding possible loss of such correspondence; these productions must be reviewed for correspondence that should be or should have been considered for placement in this record; forensic review of relevant data repositories or equipment and accounts for completeness of the record; obtaining from NSA all relevant metadata or data that the Agency was required to

obtain or preserve but did not; informing the National Archivist of the possible loss of federal records, and all prescribed steps that follow.

COMMENT 4

SUMMARY OF COMMENT 4: *EPA's proposed rule represents a naked transfer of wealth from one sector of the electric generation industry to other electric generation entities of that industry, and so is unconstitutional as a substantive due process violation of the Fifth Amendment; it is in violation of the due process requirement of the Fifth Amendment, in the form of a violation of equal protection. The sole rationale for EPA's rule is something upon which there is "consensus" that the proposed rule will have no impact, which EPA ignores relying instead on the work of others, committing multiple logical fallacies including appeal to authority, appeal to belief, appeal to consequences of a belief, and ignoring a common cause. The Agency's failure to proffer reasons for its regulation that could survive even rational basis review condemns the proposed rule to unconstitutional status.*

SUMMARY OF COMMENT: EPA's proposed rule to control greenhouse gases under the Clean Air Act's New Source Performance Standards is unconstitutional as a substantive due process violation of the Fifth Amendment as a naked transfer of wealth from one sector of the electric generation industry to other electric generation entities of that industry, and as a due process violation of the Fifth Amendment, in the form of a violation of equal rights, because the rule is intended to increase the cost of electricity to those least able to pay that cost, EPA knows of this inequality, EPA knows the targets of that inequality are protected minorities, and because the value of carbon to society is greater than the cost to society; and thus, EPA acts with the intent to injure protected minorities. The sole rationale for EPA's rule the intent to protect the public from the effects of catastrophic climate change which EPA asserts will arise from increases of carbon dioxide, something upon which the proposed rule will have no impact. EPA relies exclusively on the work of others, committing multiple logical fallacies including appeal to authority, appeal to belief, appeal to consequences of a belief, and ignoring a common cause.

This Comment details how a rational basis review and the Agency's failure to proffer reasons for its regulation that are within the zone of reasonableness condemns the proposed rule to an unconstitutional status.

COMMENT: EPA's proposed rule to control greenhouse gases under the Clean Air Act's New Source Performance Standards is unconstitutional as a substantive due process violation of the Fifth Amendment because it constitutes a naked transfer of wealth from one sector of the electric generation industry to other electric generation entities of that industry, and also because EPA knows and indeed intends this. Further, the proposed rule is unconstitutional as a due process violation of the Fifth Amendment, in the form of a violation of equal protection, because the rule is intended to increase the cost of electricity to those least able to pay that cost, because EPA knows of this inequality, because EPA knows the targets of that inequality are protected minorities, and because the value to society of carbon-based (hydrocarbon, particularly the targeted coal-based) energy production is greater than the cost to the society; and thus, EPA acts with the intent to (knowledge that its actions will) injure protected minorities.

The proposed rule constitutes both a facial violation and an as-applied violation of the due process clause of the Fifth Amendment. Based on EPA's own description of its rule, there is no set of circumstances under which the rule would be valid, and thus is a facial violation of due process. In addition, the rule deprives specific individuals of their constitutional rights. This rule does not withstand a substantive due process challenge because there is no legitimate state interest that the court could rationally conclude is served by the rule (see discussion, *supra*, of the understood absence of positive economic, reliability or climate impacts from the instant

rulemaking). EPA is unable to defend against a substantive due process challenge because it has no plausible governmental interest sufficient to pass constitutional muster. Through this comment we warn EPA that a rational basis review is by no means toothless and the Agency's failure to proffer reasons for its regulation that are rational condemns the proposed rule to its unconstitutional status.

The sole rationale for EPA's rule is the intent to protect the public from the effects of catastrophic climate change which EPA asserts will arise from increases of carbon dioxide. EPA offers no more than its reliance on the work of others, committing multiple logical fallacies. These include, appeal to authority, appeal to belief, appeal to consequences of a belief, and ignoring a common cause.

Ultimately, EPA bases its illogics on computer output from models that arrive at their projections by assuming a significant relationship between carbon dioxide and global temperature, more significant than observations justify when one seeks to validate the models.

Models are only as good as their assumptions. As the New York Times' Nicholas Wade wrote, "If the brightest minds on Wall Street got suckered by group-think into believing house prices would never fall, what other policies founded on consensus wisdom could be waiting to come unraveled? Global warming, you say? You mean it might be harder to model climate change 20 years ahead than house prices 5 years ahead?"¹⁵⁴

Modeling is modeling, not reality, and reality continues to prove climate modeling upon which EPA relies is not fit for EPA's purpose. Comparing models with observations demonstrate

¹⁵⁴ Nicholas Wade, "Researcher Condemns Conformity Among His Peers", New York Times, July 23, 2009, available at http://tierneylab.blogs.nytimes.com/2009/07/23/researcher-condemns-conformity-among-his-peers/?_php=true&_type=blogs&_r=0. Last accessed March 7, 2014.

that the modeling results do not match historical data. The only way to change this is to curve-fit, after the fact, which has to date still left the models failing going forward, when tested again under observations. Post facto matching with history may always be done but until simulations come into something resembling agreement with current real world observations it is the simulations which are unreliable, and not fit for EPA's purpose in this instance.

The reason for this is clear, and the evidence supporting this reason continues to mount: the IPCC that EPA relies upon has accepted the demonstrated overestimation of climate sensitivity. Indeed it appears that it has masked its knowledge of this overstatement.¹⁵⁵

In so doing, EPA alleges several events it claims the rule will help prevent. These include the prediction that seas will rise faster, that this sea rise will cause "geopolitical hotspots," including mass migrations (presumably of people) and the need to increase security in the Arctic, apparently of the northern coast of Alaska where there is no significant economic activity and no projections of any. And the prediction that warming could lead to increases in heavy rainfall and decreases in crop yields – a prediction that fails to take account of the positive value of carbon dioxide on crop growth and the benefit of more rain, especially in the arid west and southwest of the United States.

EPA also accepts the prediction that increased temperatures, but not increased rainfall, will cause more wildfires, and eventually cause the mass extinction of the human race. EPA further relying on the alarmism of predictions that the oceans will become more acidic, despite that the oceans are not acidic in the first place and that there is no evidence that they ever will be

¹⁵⁵ See e.g., Nicholas Lewis, Marcel Crok, with Judith Curry, "A Sensitive Matter: How the IPCC buried evidence Showing Good News About Global Warming," Global warming Policy Foundation (UK), March 2014, available at <http://www.thegwpc.org/sensitive-matter-ipcc-hid-good-news-global-warming/>.

acidic (as opposed to *e.g.*, less alarming if accurate projection of becoming less alkaline). In simpler terms, EPA relies on predictions that increased carbon dioxide in the atmosphere will increase global temperatures in a manner that endangers human health and the environment.

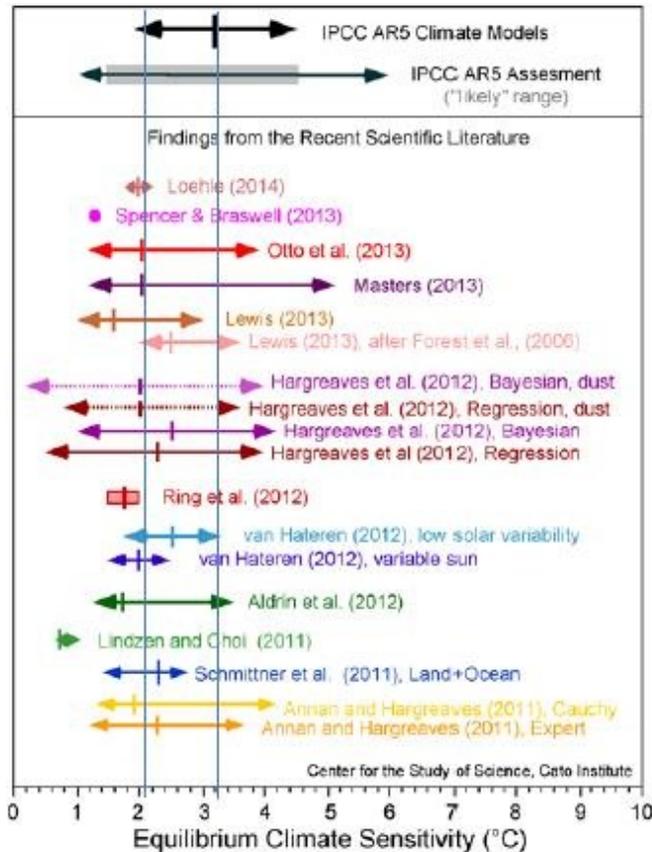
EPA claims it has taken into account recent scientific advances and that none of them undermine their 2009 Endangerment Finding. They demonstrably have not taken such advances in understanding into account, and this is particularly true for the most important single assumption they have made – that carbon dioxide will significantly drive global temperature increases, the sole driving force behind the predictions of the parade of horrors upon which EPA relies. Note especially, EPA did not conduct any original analysis. It simply relied upon others and their predictive models.

EPA institutionally refuses to take into consideration the fast moving advances in understanding the reality of a much lower climate sensitivity (than the models it entirely relies upon incorporate) to carbon dioxide, generally defined as the earth's average surface temperature from a doubling of the atmospheric carbon dioxide content.

Specifically, for example, regarding the key issue of climate sensitivity around which most of the models' deficiencies tend to revolve, EPA has not incorporated information from: Loehle, C., 2014, "A minimal model for estimating climate sensitivity," *Ecological Modelling*, 276, 80-84; or, Spencer, R.W., and W. D. Braswell, 2013, "The role of ENSO in global ocean temperature changes during 1955-2011 simulated with a 1D climate model," *Asia-Pacific Journal of Atmospheric Sciences*, doi:10.1007/s13143-014-0011-z. Nor has EPA assessed the emerging facts that show their reliance on the IPCC AR5 climate models' climate sensitivity is grossly in error as documented in 18 peer-reviewed studies. The upper 95% confidence interval

of eight of the studies is at or below the climate sensitivity assumed in the IPCC AR5 models.

Twelve of the studies estimate the climate sensitivity below the lower 95% confidence interval of the IPCC AR5 models, and all 18 studies estimate climate sensitivity significantly below the mean value used by the IPCC AR5 models.



Any model is an abstraction from and simplification of the real world. Whenever the methodology is challenged, however, the Agency must explain the assumptions and methodology used in preparing the model and provide a complete analytic defense. This EPA has not done and cannot do, much less in a manner that would satisfy the scientific and analytical principles of the Data Quality Act and its implementing guidances. Nor may EPA rely on an appeal to authority or any other logical fallacy it has otherwise used.

EPA's reliance on the models of the IPCC AR5 report also impeaches all of its alarmist conclusions because the lynchpin of them all are the IPCC AR5 assumptions of climate sensitivity. That failure to use and apply current scientific knowledge, and EPA's refusal to eliminate reliance on the IPCC AR5 models is a fatal error that destroys the sole underlying basis for its regulatory proposal. This failure places the basis for the regulatory action outside the zone of reasonableness necessary to justify the regulation. When examining the mischief against which the regulation is aimed, where there is no mischief of the kind EPA assumes, EPA cannot reasonably or rationally intend to address the mischief at which the Clean Air Act or the proposed regulation is aimed.

Based on its own statements, EPA does not actually intend to control the mischief of climate change through its proposed rules. EPA admits the regulatory effort is entirely nugatory, stating "even in the absence of this rule, (i) existing and anticipated economic conditions mean that few, if any, solid fossil fuel-fired EGUs will be built in the foreseeable future; and (ii) electricity generators are expected to choose new generation technologies (primarily natural gas combined cycle) that would meet the proposed standards. Therefore, based on the analysis presented in Chapter 5 of the RIA, the EPA projects that this proposed rule will result in negligible CO₂ emission changes, quantified benefits, and costs by 2022." Thus, the proposed rule is unnecessary to prevent any assumed climate change calamities, and therefore, EPA cannot have the intent to do so. If EPA promulgates the rule, it must be on the basis of some other intent and the other intentions fall afoul of the Constitution.

EPA's presumption is that electricity generators will "primarily" choose to use electricity generation based on natural gas, but this presumption ignores the 30 states that have renewable

energy mandates that require non-hydrocarbon generation (*see*, E&E Legal’s “Interactive RPS Profile Map” available at: http://eelegal.org/?page_id=1820 and included into this regulatory record by reference); also, EPA ignores the fact that those mandates cost more (*see e.g.*, “The Hidden Cost of Wind Energy”, E&E Legal Institute 2012, available at: <http://eelegal.org/wp-content/uploads/2013/09/Hidden-Cost.pdf>; and “The High Cost of Renewable-Electricity Mandates” Manhattan Institute 2012, available at http://www.manhattan-institute.org/html/eper_10.htm, and the extensive bibliography in the Manhattan Institute report, both reports and all bibliographic entries included into this regulatory record by reference.) This comment places EPA on record as knowing both.

EPA also ignores the requirement for diversity in generation that all state public utility commissions demand for base-load electricity generation. This need for diversity has recently been seen as essential in Texas when cold weather forced the loss of natural gas generation, causing significant loss of power across the state. Because coal is significantly less expensive than other (non-natural gas) alternatives, it remains a valuable generation source for decades to come.

Estimates of the social cost of carbon that take negative values (*i.e.*, because on net carbon creates more benefits than costs) document the relative value of using coal to generate electricity and demonstrate that the benefits of coal outweigh any reasonably estimated harm to public health and the environment, as discussed above. *See also*, Idso, Craig, “The Positive Externalities of Carbon Dioxide”, Center for the Study of Carbon Dioxide and Global Change (2013) available at <http://tinyurl.com/qeh2xzf>, and *see*, Patrick Michaels and Chip Knappenberger (Center for the Study of Science, Cato Institute). “Comment on ‘Technical

Support Document, Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866’,” January 27, 2014, available at http://object.cato.org/sites/cato.org/files/pubs/pdf/omb_scc_comments_michaels_knappenberger.pdf

Further, EPA fully recognizes that increased regulatory costs fall more heavily on minorities, on women and especially mothers who are single parents, and on the elderly, and if they did not before receiving this comment, they do now. *See, e.g.* Joe R. Feagin and Clarece B. Feagin, *Discrimination American Style: Institutional Racism and Sexism*. Malabar, FL: Robert E. Krieger (1986); and Christopher Bates Doob, *Racism: An American Cauldron*. New York: Harper Collins, 1993 (included in the record through this Comment and by reference). EPA acknowledges its responsibilities with regard to equal protection of citizens. *See*, Vermont Law School Professor Tseming Yang’s “The Form and Substance of Environmental Justice: The Challenge of Title VI of the Civil Rights Act of 1964 for Environmental Regulation,” *Boston College Environmental Law Review* (Feb. 2001).

These considerations were ignored for the reason that impacting climate — which occurs under no scenario of this rule — was not the objective. Indeed, research shows that such regulations will create massive job losses and a major loss of GDP.¹⁵⁶ These impacts -- both those flowing directly from the higher electricity rates and those flowing indirectly therefrom, and flowing directly or indirectly instead from the “industrial policy”¹⁵⁷ which the proposed rule

¹⁵⁶ A recent study by The Heritage Foundation finds that phasing out coal will “(D)ecrease the aggregate gross domestic product by \$2.23 trillion,” over the period studied, and will cost a loss of nearly 600,000 jobs within 10 years, amongst other negative economic effects. *See*: EPA’s Climate Regulations Will Harm American Manufacturing, Issue Brief #4158 on Energy and Environment, By: Nicholas Loris and Filip Jolevsky, Available at: <http://www.heritage.org/research/reports/2014/03/epas-climate-regulations-will-harm-american-manufacturing>, Last retrieved: 3/4/2014.

¹⁵⁷ Industrial Policy, By: Richard B. McKenzie, The Concise Encyclopedia of Economics, Available at: <http://www.econlib.org/library/Enc1/IndustrialPolicy.html>, last retrieved: 03/06/2014.

represents -- have human and environmental consequences, also not considered. The only rational reason for declining to consider this is that this outcome is the objective, which is to say, it was not attained by consideration but predetermined. This is particularly troublesome given the failure of the regulation to achieve its stated goal, by the admission of senior EPA officials.

In the face of no climatic impact and only deleterious economic and reliability impacts, and given the president's statements as candidate and in major speeches as president, we must accept that the true objective of the rule is industrial policy (politically selecting which industries go "bankrupt" and which are "finally profitable") if invoking the "urgency"¹⁵⁸ of a projected "climate crisis."

For example, we take President Obama at his word. Before a joint session of Congress, President Obama again stated the agenda and objectives these rule manifest -- specifically speaking to legislation, proposed to more cleanly enact the objectives without attendant uncertainty of whether the regulations were grounded in the Clean Air Act (a path undertaken simultaneously with this regulation, as the above-cited February 2009 EPA emails affirm): "to ultimately make clean, renewable energy the profitable kind of energy."¹⁵⁹

¹⁵⁸ Remarks of President Obama - As Prepared for Delivery Address to Joint Session of Congress, 2/24/2009. Available at: http://www.whitehouse.gov/the_press_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress. Last retrieved 2/21/2014.

¹⁵⁹ Speech to the United Nations General Assembly, September 23, 2009, Available at: <http://www.nytimes.com/2009/09/24/us/politics/24prexy.text.html?pagewanted=all>. Last retrieved 2/21/2014.

He also stated in, *e.g.*, his 2013 State of the Union Address explicitly stated that the purpose was to, “speed the transition to more sustainable sources of energy.”¹⁶⁰ On the eve of the vote on the “Cap and Trade” bill, he reiterated it again, “The list goes on and on, but the point is this: This legislation will finally make clean energy the profitable kind of energy.”¹⁶¹ He has reiterated these statements several times in what were major policy speeches, not merely offerings of political red meat.

The president on whose behalf this rule is promulgated has either consistently misstated the objective or consistently told the truth. We believe it is the latter, and that intended outcome is problematic for the instant rulemaking, for reasons asserted elsewhere in this Comment.

Because EPA admits it does not and cannot intend to reduce atmospheric carbon dioxide emissions, let alone impact the global climate, and admits its regulations impose greater harm on minorities, women and the elderly through the economic impacts of higher cost electricity and the loss of benefits associated with carbon use, this proposal can only exhibit an intent to harm minorities, women and the elderly, there being no other intent regarding public health manifest from the rule.

The proposed rule is a naked preference for non-coal electricity generation, a naked transfer of wealth from the coal industry to natural gas and renewable energy generators, and one

¹⁶⁰ Remarks by the President in the State of the Union Address, February 12, 2013. Available at: <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>, last retrieved 1/31/2014. In his first speech before the United Nations General Assembly, he reiterated this point yet again: “We will move forward with investments to transform our energy economy, while providing incentives to make clean energy the profitable kind of energy,” A Historic Energy Bill, Address by President Barack Obama, June 29, 2009. Available at: <http://www.whitehouse.gov/blog/A-Historic-Energy-Bill>. Last retrieved 2/21/2014.

¹⁶¹ A Historic Energy Bill, Address by President Barack Obama, June 29, 2009. Available at: <http://www.whitehouse.gov/blog/A-Historic-Energy-Bill>. Last retrieved 2/21/2014.

lacking in a rational basis and outside the zone of reasonableness. Both the irrationality of the proposal and the intent to limit equal protection to minorities, women and the elderly constitute substantive are both facially and as-applied violation of the due process clause of the Fifth Amendment, harming the society at large and members of the Energy & Environment Legal Institute, the proposed rule is unconstitutional.

OTHER RELEVANT HISTORY ON PREDETERMINATION: As the emails dating from the current administration's earliest days attest, EPA and officials involved with this rule making have a long-standing pattern of behavior of predetermination on this issue. The Agency's own policies on regulatory analysis require the analysis to be done prior to selection of a regulatory proposal. In simpler terms, EPA should examine the facts, evaluate the facts, and conduct analysis of the relative impact of alternative policies before deciding what alternative to propose. In still briefer terms, science and analysis are supposed to precede decision-making. Often, however, EPA has demonstrated a pattern of conducting analysis in a manner intended to support an alternative already selected for use.

Al McGartland, an EPA senior executive who managed the economic analysis division in EPA's Office of Policy (the office headed by the aforementioned Lisa Heinzerling), has a history of manipulating analysis in a way that supports preexisting decisions. Before becoming an EPA employee, as a contractor he was directed to examine the benefits of controlling lead in drinking water. We state on information and belief that, rather than follow the directions of the Chief of the Economic, Legislative and Policy Analysis staff, to whom he reported, he instead improperly manipulated information on the effect of regulatory alternatives in a manner grossly overestimating the benefits, in support of an alternative specifically favored by senior

management officials. On the basis of these actions his firm's contract was not renewed. Senior Agency officials found a place for him in the Office of Policy and eventually promoted him to a senior position, as he regularly produced studies supporting preordained outcomes.

EPA's endangerment finding — which EPA says compelled the instant rule making — fell prey to a variant of this bureaucratic pathology. The EPA endangerment finding on greenhouse gases (GHGs) did not rely on any analysis done within EPA. Worse, the only analysis done was prevented from being considered during the policy formulation period. Specifically, John Davidson and Alan Carlin closely followed the science on climate change. When the proposed endangerment finding was sent to all EPA offices for internal review and comment Dr. Carlin prepared extensive comments on behalf of the Office of Policy. Carlin's comments (see, http://cei.org/cei_files/fm/active/0/DOC062509-004.pdf) were the only original analysis of the endangerment of GHGs done by an EPA employee. Instead of conducting original analysis of the dangers of GHGs, EPA simply relied upon the current IPCC report. Dr. Carlin's analysis significantly undercut the IPCC report and raised serious questions regarding whether GHGs did, in fact, endanger human health or the environment. McGartland was not at that point in a position to manipulate the analysis in a way that would support the pre-ordained policy alternative; he did however attempt to prevent Dr. Carlin's analysis from becoming part of the regulatory records. See, http://cei.org/cei_files/fm/active/0/Endangerment%20Comments%206-23-09.pdf. Particularly telling in this sad tale is that McGartland admitted in his communications to Dr. Carlin that the decision on endangerment had been made prior to conclusion of the analysis, evaluation and review process within the agency (much less before commencement of the public comment period).

The depth of the willingness to disregard competent analysis at EPA in the endangerment finding has not previously been made public. Dr. Carlin sought advice from another EPA employee regarding his comments and how best to deal with the problem, especially in light of the direct order to not discuss his findings with anyone else. He was advised of his whistleblower rights. He decided to blow the whistle by giving a copy of his analysis to an EPA employee who was not on the endangerment finding work group. That employee sent the report to the entire work group and their senior management, indicating that it must be considered during the development of the endangerment finding. One member of the work group then contacted that EPA employee asking the question, “why should we accept Carlin’s analysis in place of the IPCC report?” He was told that the report needs to be in the public record and the criticisms in the report need to be summarized for decision makers in a manner that allows them to examine the underlying facts in a manner free from bias.

The outcome of the matter Carlin sought to correct was as pre-determined as the GHG endangerment finding that EPA says compelled the instant rule and, as emails cited in this Comment affirm, as predetermined as this rulemaking. EPA never did any analysis of underlying scientific issues other than that done by Dr. Carlin and dismissed his comments without consideration or response to them. They had made their decision prior to any analysis and, as McGartland made clear, to buck that decision would only redound negatively on McGartland.

The emails discussed in this comment demonstrate the same bureaucratic pathology as occurred during the development of the endangerment finding and involve many of the same EPA managers.

REMEDY: In the face of substantive due process violations under the Fifth Amendment, including violation of the rights of protected classes of individuals, EPA cannot promulgate the rule as written. It must alter the rule to identify the mischief it intends to address and show that the rule intends to and will in fact address that mischief. Because the Agency admits it cannot do that, it must withdraw the proposal in its entirety.

Appendix A

Emails Cited In Comment

Re: Post has checked in 

David Cohen to: Richard Windsor

02/09/2009 02:46 PM

From: David Cohen/DC/USEPA/US
To: Richard Windsor/DC/USEPA/US@EPA,

Thanks!

Richard Windsor

----- Original Message -----

From: Richard Windsor
Sent: 02/09/2009 02:46 PM EST
To: David Cohen
Cc: "Allyn Brooks-Lasure" <[redacted]>
Subject: Re: Post ha
Gave Allyn a quote. Downplay - [redacted]

David Cohen

----- Original Message -----

From: David Cohen
Sent: 02/09/2009 02:35 PM EST
To: Richard Windsor; Allyn LaSure
Subject: Post has checked in
On if we'll pull johnson memo psd. Desset rock



Re: wh press-office conference call today

Richard Windsor to: David Cohen
Bcc: "Allyn Brooks-Lasure"

02/09/2009 11:10 AM

From: Richard Windsor/DC/USEPA/US
To: David Cohen/DC/USEPA/US@EPA,
Bcc: "Allyn Brooks-Lasure"

David,

Let me know if you are uncomfortable with any of this. Lj
David Cohen

----- Original Message -----

From: David Cohen

Sent: 02/09/2009 10:52 AM EST

To: Richard Windsor

Cc: Lisa Heinzerling; David McIntosh

Subject: wh press-office conference call today

the call just ended with me informing ben labot that we'd just received an interview request from john broder of the ny times asking for either you or lisa h.. the specific subject he wants to discuss is status and plans regarding the endangerment finding.

ben said he was aware that broder is working on a piece "springing from mass. vs. epa."

where we left things is that after he confers with his people there (some of whom also have received interview requests), he'll get back to us about how to move forward.

broder apparently has a deadline of wednesday.

roxanne: here's the quote for post

David Cohen to: Roxanne Smith

02/09/2009 03:46 PM

Cc: Allyn LaSure

Bcc: Richard Windsor

From: David Cohen/DC/USEPA/US

To: Roxanne Smith/DC/USEPA/US@EPA,

Cc: Allyn LaSure/DC/USEPA/US@EPA

Bcc: Richard Windsor/DC/USEPA/US

"The Administrator is reviewing the matter as she committed to do during her confirmation process."



Fw: PSD: recommendation for tomorrow
Richard Windsor to: Lisa Jackson

02/09/2009 07:32 AM

From: Richard Windsor/DC/USEPA/US
To: "Lisa Jackson" <...>

Lisa Heinzerling

----- Original Message -----

From: Lisa Heinzerling
Sent: 02/08/2009 02:21 PM EST
To: Richard Windsor
Cc: David McIntosh
Subject: PSD: recommendation for tomorrow

Lisa,

You have expressed a desire to signal to regional offices that you will be reconsidering the Johnson interpretive memo on PSD and that they should take this into account in making decisions about permits for coal-fired power plants.

I believe the first signal to this effect should come tomorrow. A decision on one or more plants in Nevada may come as early as Tuesday, and a signal from you tomorrow would send an appropriate message of forbearance regarding such decisions.

Lisa

PSD memo to regions

Lisa Heinzerling To: Richard Windsor

02/09/2009 06:25 PM

From: Lisa Heinzerling/DC/USEPA/US
To: Richard Windsor/DC/USEPA/US@EPA,

Lisa,

Here is a first stab at the memo you asked me to write to the regions on PSD and GHGs.

I'd like to discuss this memo and the larger PSD strategy at the morning meeting tomorrow.

Thanks.

Best,
Lisa



PSD memo to regional offices.doc

Fw: pending items

Lisa Heinzerling to: Richard Windsor

02/10/2009 08:21 AM

From: Lisa Heinzerling/DC/USEPA/US
To: Richard Windsor/DC/USEPA/US@EPA

Just realized I sent this to your personal account. Here it is again. Thanks.

— Forwarded by Lisa Heinzerling/DC/USEPA/US on 02/10/2009 08:21 AM —

Lisa
Heinzerling/DC/USEPA/US
02/10/2009 08:16 AM

To: [REDACTED] Eric Wachter/DC/USEPA/US,
Robert Goulding/DC/USEPA/US, David
McIntosh/DC/USEPA/US, Bob Sussman/DC/USEPA/US,
Allyn LaSure/DC/USEPA/US
cc
Subject: pending items

Lisa,

I am attaching a memo describing items and issues which are pending and require attention. As I say in the memo, now that reinforcements have arrived and are arriving, I hope and believe the moment has come to give someone else the opportunity to address these matters.

At this morning's meeting, I will give you both a hard copy of this memo and copies of items (lists, emails, one-pagers) relevant to the items mentioned in the memo.

I realize the items are described in somewhat abbreviated form. I am happy, obviously, to discuss the matters in more detail with whoever takes them over.

Thanks.

Best,
Lisa



memo to EPA on pending items to address.doc



Re: no quote from Administrator Jackson ...

Richard Windsor to: Lisa Heinzerling, David McIntosh
"Allyn Brooks-Lasure"

02/09/2009 05:11 PM

From: Richard Windsor/DC/USEPA/US
To: Lisa Heinzerling/DC/USEPA/US@EPA, "David McIntosh" <mcintosh.david@epa.gov>, "Allyn Brooks-Lasure" <...>

Lisa Heinzerling

----- Original Message -----

From: Lisa Heinzerling
Sent: 02/09/2009 05:04 PM EST
To: Richard Windsor
Subject: Fw: no quote from Administrator Jackson...

If the scenario plays out as Dave M. is suggesting it could, below, then I recommend following his advice

----- Forwarded by Lisa Heinzerling/DC/USEPA/US on 02/09/2009 05:03 PM -----



**David
McIntosh/DC/USEPA/US**
02/09/2009 04:59 PM

To: Lisa Heinzerling/DC/USEPA/US@EPA, Allyn
LaSure/DC/USEPA/US@EPA, David
Cohen/DC/USEPA/US@EPA

cc

Subject: Re: no quote from Administrator Jackson...

One thing we should prepare for is the possibility that Senate Majority Leader Reid might, notwithstanding the lack of a quote from EPA, simply tell the Nevada press that the Johnson PSD memo is under active review at EPA and is not a closed matter.

Lisa Heinzerling on PSD today if press calls, we don't have an... 02/09/2009 11:19:14 AM

From: Lisa Heinzerling/DC/USEPA/US
To: Allyn LaSure/DC/USEPA/US@EPA, David Cohen/DC/USEPA/US@EPA, David
McIntosh/DC/USEPA/US@EPA
Date: 02/09/2009 11:19 AM
Subject: no quote from Administrator Jackson...

.... on PSD today

if press calls, we don't have anything to say other than what we would normally say when press calls

information regarding PSD & GHGs

From: Lisa Heinzerling [mailto:lisah@epa.gov] Sent: Monday, February 09, 2009 12:30 PM
To: Richard Windsor

02/10/2009 12:30 PM

Subject: Robert Goulding, Eric Wachter, David McIntosh, Allyn Brooks-LaSure

From: Lisa Heinzerling/DC/USEPA/US

To: Richard Windsor/DC/USEPA/US@EPA,

CC: Robert Goulding/DC/USEPA/US@EPA; Eric Wachter/DC/USEPA/US@EPA; David
McIntosh/DC/USEPA/US@EPA; Allyn Brooks-LaSure/DC/USEPA/US@EPA

In answer to Carol Browner's request for information on PSD permitting as it relates to GHGs:

There are a total of 47 facilities as to which the issue of regulating GHGs in the PSD process has arisen. Thirty-one of these are coal-fired power plants. The others are a mix (power plants using various fuels other than coal, one steel plant, refineries, a coal-fired boiler). Of the 31 coal-fired power plants, 18 are new facilities. The states in which the new plants would be sited are: New York, West Virginia, Kentucky, Mississippi, South Carolina, Georgia, Illinois, Michigan, Ohio, Arizona, Texas, Montana, Utah, Wyoming, New Mexico, and Nevada. The developers of one of the Nevada coal plants announced yesterday that it was dropping its plan to build the plant.

John Coequyt
<John.Coequyt@sierracub.org
>

04/29/2011 02:35 PM

To: Michael Goo, Alex Barron
cc
bcc
Subject: Zombie's

Michael and Alex:

Attached is a list of plants that the companies said were shelved because of uncertainty around GHG regulations. If a standard is set that these plants could meet, there is a not small chance that they company could decide to revive the proposal.

John Coequyt
Sierra Club
DL: 202.675.7916



C: 202.669.7060 Defeated Plants - GHG - 2011.xls

John Coequyt
<john.coequyt@sierraclub.org>

02/15/2013 01:43 PM

To: Alex Barron, Joseph Goffman, Michael Goo
cc
bcc
Subject: Fwd: [International-Coal] 1,200 MW White Stallion Coal Plant CANCELLED

FYI

View this press release online:

<http://content.sierraclub.org/press-releases/2013/02/white-stallion-coal-proposal-cancelled>

FOR IMMEDIATE RELEASE:

February 15, 2013

CONTACT:

Jenna Garland, Sierra Club. [404-607-1262](tel:(404)607-1262) x322

Eva Malina, No Coal Coalition. [979-240-4416](tel:(979)240-4416)

Allison Sliva, No Coal Coalition. [713-922-5639](tel:(713)922-5639)

White Stallion Coal Proposal Cancelled *Local Advocates & Environmental Groups Declare Victory*

BAY CITY, TX – After years of grassroots challenges, White Stallion Energy Center developers have chosen to suspend the proposed plant. When the project was first announced, local residents joined together to question the air pollution, water consumption, and accuracy of the developers' promises. More and more Matagorda County residents joined together to oppose the plant, along with business owners, land owners, members of the medical community, and local elected officials. The Sierra Club, Public Citizen, SEED Coalition, Environmental Integrity Project, and Environmental Defense Fund join the No Coal Coalition in celebrating the cancellation of the White Stallion Energy Center.

"The White Stallion developers came to Matagorda County, thinking they could lure us into supporting a project that would suck up our water, pump mercury into our bay, and pollute our air. Brave residents asked tough questions, and realized the White Stallion plant would harm our community and our economy. This plant is cancelled because we organized to protect our families and Matagorda County," said Eva Malina, president of the No Coal Coalition, the local organization fighting the plant. "I think they thought that since we were a small rural

Bob
Perciasepe/DC/USEPA/US
05/21/2012 09:52 AM

To: Brendan Gilfillan
cc
bcc
Subject: Fw: Article

Worth noting.

Bob Perciasepe
Deputy Administrator

(o) +1 202 564 4711
(c) +1 202 [REDACTED]

Conflicts

----- Forwarded by Bob Perciasepe/DC/USEPA/US on 05/21/2012 09:51 AM -----

From: "Robert 'Mike' McGhee" <rmcghee2@bellsouth.net>
To: Nancy Stoner/DC/USEPA/US@EPA, Bob Perciasepe/DC/USEPA/US@EPA
Date: 05/21/2012 08:24 AM
Subject: Article

EPA Probes for Conflicts of Interest Should Start In Their Own Building

(Tallahassee, FL – May 17, 2012) Prompted by a petition from two environmental interest groups, the EPA is searching for conflicts of interest among Florida's environmental officials.

"If EPA is on the hunt for conflicts of interest they can start in their own building," said Ryan Houck, executive director of Free Market Florida. "Many of EPA's top brass have extensive ties to environmental litigation groups with a clear financial interest in the outcome of major permitting battles. Somehow, I doubt the Florida Clean Water Network or PEER will be calling for their firing."

Many of EPA's top regulators are former staffers for major environmental litigants, which frequently bring suit against the agency over permitting issues. These environmental interest groups have a direct financial stake in the outcome of litigation with the EPA, which includes their ability to request attorney's fees through the Equal Access to Justice Act. Recently, EPA has drawn fire for its "sue-and-settle" formula—a process by which environmental groups bring suit against the EPA in order to trigger a rulemaking process that results in new regulations.

"The EPA has ceased to be an impartial referee on permitting matters," said Houck. "They've strapped on pads and are on the field playing for environmental extremists. It's exactly what you'd expect from a system wherein environmental interest groups serve as de facto farm teams for EPA. It's just laughable that environmental litigants are now pointing the finger at others."

A brief list of senior EPA officials who have formerly worked at environmental interest groups that often sue the EPA:

Nancy Stoner, Interim Assistant Administrator of Water

Formerly Worked for: Natural Resources Defense Council

Glenn Paulson, Chief Scientist
Formerly Worked for: Natural Resources Defense Council

Michael L. Goo, Associate Administrator for the Office of Policy
Formerly Worked for: Natural Resources Defense Council

Bob Perciasepe, Deputy Administrator
Formerly Worked for: National Audubon Society

Cynthia Giles, Assistant Administrator for Enforcement & Compliance
Formerly Worked for: The Conservation Law Foundation's Advocacy Center

Michelle J. DePass, Asst. Administrator for the Office of International and Tribal Affairs
Formerly Worked for: The New York City Environmental Justice Alliance

Mathy Stanislaus, Assistant Administrator for Solid Waste
Formerly Served on the Board of: NYC Environmental Justice Alliance

Curt Spalding – Region 1 Director
Formerly Worked for: "Save the Bay" and "Narragansett Bay Keeper"

Judith A. Enck – Region 2 Director
Formerly Worked for: New York PIRG and Environmental Advocates of New York

Susan Hedman – Region 5 Director
Formerly Worked for: Environmental Law and Policy Center and Center for Global Change

Karl Brooks – Region 7 Director
Formerly Worked for: Idaho Conservation League

James B. Martin – Region 8 Director
Formerly Worked for: Environmental Defense Fund

Jared Blumenfeld – Region 9 Director
Formerly Worked for: Sierra Club Legal Defense Fund, the NRDC and International Fund for Animal Welfare

Free Market Florida is a free market watchdog group affiliated with the newly launched Free Market America. The organization emerged from a coalition of business and civic leaders which, in 2010, led the successful "Vote No on 4" campaign, garnering 67 percent of the vote.



- wide.1.png

John Coequyt
<John.Coequyt@sierraclub.org
>

09/20/2011 09:37 AM

To Michael Goo, Lorie Schmidt, Shannon Kenny, Alex Barron
cc
bcc
Subject NSPS green group letter.

FYI.

John Coequyt
202.669.7060

Lena Moffitt
<Lena.Moffitt@sierraclub.org>
07/29/2011 04:24 PM

To: Alex Barron
cc
bcc
Subject: Have a second to talk NSPS?

Wanted to check in with you to see where things stand. We've been a bit out of the loop over here with John on vacation. I'll be at my desk till 5 if you have a minute.

Lena Moffitt
Washington Representative
Sierra Club
(202) 675-2396 (w)
(505) 480-1551 (c)

John Coequyt
<john.coequyt@sierraclub.org>

04/10/2012 04:11 PM

To: Joseph Goffman, Rohan Patel, Michael Goo, Jonathan Lubetsky

cc

bcc

Subject: FYI. GA Power Plant Development

Hey guys:

I just wanted to give you all heads up on a development in GA that is at the intersection of MATS and NSPS. Our local folks think that the developer is expecting a check when this plant gets its permit and after the NSPS came out he reversed course and worked to settle the lawsuit ASAP. We do not expect the plant to proceed past the permit stage. The developer is not doing press because he can't answer questions about financing and when he expects to begin construction.

http://action.sierraclub.org/site/MessageViewer?em_id=294e06.0

Proposed Ben Hill Coal Plant Cancelled

Power4Georgians in Tenuous Position on Plant Washington After Legal Agreement

Atlanta, GA – Clean air advocates and environmental groups won a victory today when Power4Georgians (P4G), the only company trying to develop expensive new coal plants in Georgia, agreed to cancel the proposed Ben Hill coal-fired power plant. The company also agreed to comply with critical new safeguards against mercury pollution and invest \$5 million in energy efficiency and renewable projects. The Sierra Club, the Fall Line Alliance for a Clean Environment (FACE), Southern Alliance for Clean Energy (SACE), and the Ogeechee Riverkeeper, represented by the Southern Environmental Law Center and GreenLaw, successfully challenged the permit for Plant Washington issued by the Georgia Department of Environmental Protection, and the settlement agreement is pending approval by each group. If built, Power4Georgians' Plant Washington will have to meet the much more protective emission standards for mercury and other air toxins.

"Before we challenged the permit, Plant Washington was going to send forty times more mercury into our air and water each year, endangering our most vulnerable citizens," said Colleen Kiernan, Director of the Georgia Chapter of the Sierra Club. "We knew the law was on our side, we challenged Power4Georgians, and now Georgia's air, water, and people will be protected."

Michael Goo/DC/USEPA/US
07/23/2012 06:23 PM

To "John Coequyt"
cc
bcc
Subject Re: Fwd: new source brief

No. lwt me do so

----- Original Message -----
From: John Coequyt [john.coequyt@sierraclub.org]
Sent: 07/23/2012 01:09 PM AST
To: Michael Goo
Subject: Fwd: new source brief

Did you read this?

----- Forwarded message -----
From: John Coequyt <john.coequyt@sierraclub.org>
Date: Mon, Jul 23, 2012 at 1:07 PM
Subject: Fwd: new source brief
To: Paul Billings <Paul.Billings@lung.org>

This appears to answer our questions.

----- Forwarded message -----
From: Sanjay Narayan <sanjay.narayan@sierraclub.org>
Date: Mon, May 21, 2012 at 2:16 PM
Subject: Re: new source brief
To: John Coequyt <john.coequyt@sierraclub.org>

On Mon, May 21, 2012 at 11:15 AM, Sanjay Narayan
<sanjay.narayan@sierraclub.org> wrote:

>
>
>
> --
> Sanjay Narayan
> Senior Managing Attorney
> Sierra Club Environmental Law Program
> 85 Second St., 2d Floor
> San Francisco, CA 94015
> (415) 977-5769
>
>

--

Goffman goes around "normal channels" for Sierra's GHG NSPS push

Patricia
Embrey/DC/USEPA/US
09/27/2010 07:29 AM

To: Joseph Goffman
cc: Brenner.Rob, Embrey.Patricia, Jim Ketcham-Colwill, Peter Tsirigotis, South.Pete, Elliott Zenick
bcc:

Subject: Re: Fw: New Source Performance Standards for GHG emissions – Response to Sierra Club et al.

Avi had asked us to work on some bullets responding to the September 15 letter. That is a work in progress (b) (5) dp

Joseph Goffman This may already be on its way to bein... 09/26/2010 10:34:51 PM

From: Joseph Goffman/DC/USEPA/US
To: Embrey.Patricia@epa.gov, Peter Tsirigotis/RTP/USEPA/US@EPA, South.Pete@epa.gov, Jim Ketcham-Colwill/DC/USEPA/US@EPA
Cc: Brenner.Rob@epa.gov
Date: 09/26/2010 10:34 PM
Subject: Fw: New Source Performance Standards for GHG emissions – Response to Sierra Club et al.

This may already be on its way to being handled in the normal channels for responding to correspondence (and, as a result, you may have seen this before). (b) (5) dp, (b) (5) aop

Thanks.

Joseph Goffman
Senior Counsel to the Assistant Administrator
Office of Air and Radiation
US Environmental Protection Agency
202 564 3201

----- Forwarded by Joseph Goffman/DC/USEPA/US on 09/26/2010 10:25 PM -----

From: Gina McCarthy/DC/USEPA/US
To: Joseph Goffman/DC/USEPA/US@EPA, Janet McCabe/DC/USEPA/US@EPA, Tsirigotis.Peter@EPA.GOV
Date: 09/15/2010 07:20 PM
Subject: Fw: New Source Performance Standards for GHG emissions – Response to Sierra Club et al.

fyi

----- Forwarded by Gina McCarthy/DC/USEPA/US on 09/15/2010 07:20 PM -----

From: Russell Frye <rfrye@fryelaw.com>
To: mccarthy.gina@epa.gov
Date: 09/15/2010 05:46 PM
Subject: Fw: New Source Performance Standards for GHG emissions – Response to Sierra Club et al.

Forwarding email to Hon. Lisa Jackson:

Dear Administrator Jackson:

The attached letter, from 9 national trade associations and business organizations, should have been hand-delive

Janet McCabe/DC/USEPA/US To
Sent by: Addie Johnson cc
12/13/2010 08:02 AM bcc
Subject: GHG discussion

Meeting

Date 12/13/2010
Time 10:00:00 AM to 11:00:00 AM
Chair Janet McCabe
Invitees
Required AJ Armendariz
Optional
FYI
Location

Lots of back and forth on this. Here is the final schedule and travel information.

When: 10:00 - 12:30 CST Monday, 12/13

Where:

Environmental Defense Fund
44 East Avenue, Suite 304
Austin, Texas 78701
512-478-5161

Agenda Shared with Organizations :

10:00 - 11:00: GHG discussion with Janet McCabe, OAR
11:00 - 11:30: Update and discussion on "de-flex process"
11:30 - 12:30: TCEQ Air Permitting Programs

There was some discussion about meeting with other entities later that day as a group. Instead, AJ will be doing some solo intergovernmental meetings in the afternoon.

Call-in information: EDF is going to set up video conferencing, but they need some kind of technical info from us to set up the calls. Please send me the name and number for whomever EDF should call to coordinate the video call.

Participant Organizations: EDF, Public Citizen, EIP, Sierra Club, Air Alliance Houston, UT Environmental Law Clinic

I may receive some additional input from the organizations about specific agenda topics. If so, I'll forward it along to the group.

Please call me if you have any lingering questions.

Layla

AJ Armendariz

Hi Team, Hey Adam, There is interest in the e...

11/23/2010 07:41:53 PM

From: AJ Armendariz/R6/USEPA/US
To: Lawrence Starfield/R6/USEPA/US@EPA, Carl Edlund/R6/USEPA/US@EPA, John Blevins/R6/USEPA/US@EPA, Suzanne Murray/R6/USEPA/US@EPA, David Gray/R6/USEPA/US@EPA, Layla Mansuri/R6/USEPA/US@EPA, Adam Kushner/DC/USEPA/US@EPA

Al Armendariz/R6/USEPA/US

11/14/2010 08:17 PM

To Bob Sussman

cc "Larry Starfield", "Bob Perciasepe", "Janet McCabe", "Gina
McCarthy"

bcc

Subject Re: Summit Power

Bob,

Since I am conflicted from direct discussions with Sierra Club on specific party matters, Larry has taken the lead on discussions with them on Summit.

His careful and thoughtful approach undoubtedly contributed to this outcome.

It'll be nice to someday see a full-scale CCS unit up and running.

Thanks Larry.

Al

Al Armendariz
Regional Administrator
U.S. EPA
Region 6
armendariz.al@epa.gov
office: 214-665-2100
Lawrence Starfield

----- Original Message -----

From: Lawrence Starfield
Sent: 11/14/2010 08:09 PM EST
To: Al Armendariz; Bob Sussman
Subject: Summit Power

Al and Bob,

I just learned that Sierra Club voted "not" to contest Summit Power's permit with CCS. So the project should go forward with its permit issued before the end of the calendar year.

I think this is a good result.

Larry

Sent by EPA Wireless E-Mail Services

From: Suzanne Murray
To: Al Armendariz
Subject: Re: IMPORTANT - new Complaint for infrastructure SIPs for 1997 8-hour ozone NAAQS - information needed for CD negotiation
Date: 11/04/2010 06:37 PM

:)
Suzanne Murray, Regional Counsel, R6
▼ Al Armendariz

----- Original Message -----
From: Al Armendariz
Sent: 11/04/2010 07:19 PM EDT
To: Lawrence Starfield
Cc: "Suzanne Murray" <murray.suzanne@epa.gov>; "Layla Mansuri" <mansuri.layla@epa.gov>
Subject: Re: IMPORTANT - new Complaint for infrastructure SIPs for 1997 8-hour ozone NAAQS - information needed for CD

[REDACTED]

:)

Al Armendariz
Regional Administrator
U.S. EPA
Region 6
armendariz.al@epa.gov
office: 214-665-2100

▼ Lawrence Starfield

----- Original Message -----
From: Lawrence Starfield
Sent: 11/04/2010 06:11 PM CDT
To: Al Armendariz
Subject: Fw: IMPORTANT - new Complaint for infrastructure SIPs for 1997 8-hour ozone NAAQS - information needed for CD negotiation
Al,

Although you're recused from this new case, I thought you ought to be aware of it. This could be yet another major workload for our air team.

Larry

----- Forwarded by Lawrence Starfield/R6/USEPA/US on 11/04/2010 06:11 PM -----

Fw: IMPORTANT - new Complaint for infrastructure SIPs for 1997 8-hour ozone NAAQS - information needed for CD negotiation

Thomas to: Lawrence Starfield, Carl Edlund
Diggs

11/04/2010
06:02 PM

From: [Jeremy Nichols](#)
To: [Al Armendariz/R6/USEPA/US@EPA](#)
Subject: Re: Congrats
Date: 07/23/2010 10:54 AM

Hi Al -

Yep, looking forward to it. My plane gets into Love Field a little before 10:30, so I'll shoot to head straight to your office. We should be able to fit in a good discussion and some good Mexican food. Talk to you then.

Jeremy

On Fri, Jul 23, 2010 at 9:16 AM, <Armendariz.Al@epamail.epa.gov> wrote:

Hi Jeremy,

How are things? I wanted to check on our plans for meeting up week from Monday, on Aug 2nd. Are we still on for lunch? If so, what if we meet at my office at 10:30, we can talk shop and catch up, and then walk over to a Mexican place nearby. I have to be back by 12 noon.

Best,

Al

Al Armendariz
Regional Administrator
U.S. EPA
Region 6
armendariz.al@epa.gov
mobile: 972-467-5506

From: Jeremy Nichols [jnichols@wildearthguardians.org]
Sent: 07/13/2010 12:43 PM CST
To: Al Armendariz
Cc: Joyce Runyan
Subject: Re: Congrats

Lunch on the 2nd would be perfect. You name the time and place and I'll make plans to be there. Looking forward to it.

Jeremy

On Tue, Jul 13, 2010 at 12:01 PM, <Armendariz.Al@epamail.epa.gov> wrote:

Hi,

It would be great for us to catch up and have lunch or dinner or something.

Would lunch on 2nd be OK?

Al

Al Armendariz

Regional Administrator
U.S. EPA
Region 6
armendariz.al@epa.gov
mobile: 972-467-5506

From: Jeremy Nichols [jnichols@wildearthguardians.org]
Sent: 07/13/2010 11:58 AM CST
To: Al Armendariz
Subject: Re: Congrats

Hi Al -

Just as a heads up, I am going to be in the DFW area for the August 2nd meeting on the oil and gas air regulatory review and update. Haven't firmed up plans yet, but it's probably going to be a quick trip so I can be back in Denver for the August 3rd meeting on this issue.

Hope you're doing well.

Jeremy

On Tue, Dec 8, 2009 at 10:41 PM, Jeremy Nichols
<jnichols@wildearthguardians.org> wrote:
Hi Al -

It is really great to hear from you, best to reach me at 303-437-7663. Let's talk soon. Take care, glad to hear things are going well, albeit overwhelming.

Jeremy

On Tue, Dec 8, 2009 at 9:30 PM, <Armendariz.Al@epamail.epa.gov> wrote:

Hello Jeremy,
Congratulations! You hope you are extremely proud of hitting this milestone. I was in a meeting today with Gina and I reiterated the importance of these sources to myself as well as the regions in the northeast.

Could you send me the best phone number to reach you for a private chat during daytime hours? I've been on board exactly 1 week, and my life is already crazy. But if I can grab a free 15 minutes sometime soon I'd like to call and talk politics.

Congrats again. You (and the others) make my and Gina's and all the other agency leader's jobs easier. Keep it up.

Al

From: [Jeremy Nichols](#)
To: [Al Armendariz/R6/USEPA/US@EPA](#)
Subject: Re: change of plans
Date: 07/24/2010 03:04 PM

Hi Al -

No worries, let's shoot for meeting after the first session, I think that would work better for my schedule. I'll see you at the afternoon session. Thanks, Al.

Jeremy

On Sat, Jul 24, 2010 at 10:07 AM, <Armendariz.Al@epamail.epa.gov> wrote:
Hi Jeremy,

Change of plans. I was originally going to participate in the evening portion of the oil/gas MACT public meeting (6 to 10 pm), but I think it would be best for me to be there at the afternoon session (12 to 4pm).

From my office to Arlington city hall is about 30 minutes, so I'll probably have to leave my office at 11 or so.

Not sure what your plans are, but if you wish, we could leave the public meeting at 4 pm, and go somewhere nearby for an early dinner and to talk? Or maybe we could meet in Arlington a little early before the meeting.

Either way would be fine for me.

Al

-----Al Armendariz/R6/USEPA/US wrote: -----

To: "Jeremy Nichols" <jnichols@wildearthguardians.org>
From: Al Armendariz/R6/USEPA/US
Date: 07/23/2010 10:16AM
Subject: Re: Congrats

Hi Jeremy,

How are things? I wanted to check on our plans for meeting up week from Monday, on Aug 2nd. Are we still on for lunch? If so, what if we meet at my office at 10:30, we can talk shop and catch up, and then walk over to a Mexican place nearby. I have to be back by 12 noon.

Best,

Al

Al Armendariz
Regional Administrator

U.S. EPA
Region 6
armendariz.al@epa.gov
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U.S. EPA
Region 6
armendariz.al@epa.gov
mobile: 972-467-5506

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To: Al Armendariz
Subject: Re: Congrats

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Congrats again. You (and the others) make my and Gina's and all the other agency leader's jobs easier. Keep it up.

Al

--

Jeremy Nichols
Climate and Energy Program Director
WildEarth Guardians
1536 Wynkoop, Suite 301 - Denver, CO 80202
303-573-4898 x 1303
www.wildearthguardians.org

From: [Lay'a Mansuri](#)
To: [Joyce Ryan](#)
Cc: [Al Armendariz](#)
Subject: Addition to Al's calendar - Friday 4 pm
Date: 09/29/2010 05:43 PM

Joyce,

Please put a call on Al's calendar for Friday at 4 CST.

We are calling Jeremy Nicols with WildEarth Guardians.

It will just be me and Al on the call. We are calling 303-437-7663.

Thanks,
Layla

Arvin Ganesan/DC/USEPA/US

06/28/2012 09:23 AM

To: Richard Windsor, "Gina McCarthy", Bob Perciasepe, Diane Thompson, Brendan Gilfillan, Bob Sussman, Laura Vaught
cc: "Janet Woodka"
bcc:
Subject: Re: Al Armendariz

+ janet

Janet, should have included you.

Sent from my Blackberry Wireless Device
Richard Windsor

----- Original Message -----

From: Richard Windsor
Sent: 06/27/2012 03:50 PM EDT
To: Arvin Ganesan; "Gina McCarthy" <mccarthy.gina@epa.gov>; Bob Perciasepe; Diane Thompson; Brendan Gilfillan; Bob Sussman; Laura Vaught
Subject: Re: Al Armendariz

K. Tx.

Arvin Ganesan

Richard Windsor

----- Original Message -----

From: Arvin Ganesan
Sent: 06/27/2012 03:38 PM EDT
To: Richard Windsor; mccarthy.gina@epa.gov; Bob Perciasepe; Diane Thompson; Brendan Gilfillan; Bob Sussman; Laura Vaught
Subject: Al Armendariz

FYI - I just got a call from the Sierra Club. Al has accepted a job with the Sierra Club, and will run their anti-coal campaign in the Texas region. Sierra Club will NOT be making this announcement Friday afternoon, but this has the potential to spill out before then.

Thanks
Arvin

Alex Barron/DC/USEPA/US
03/28/2012 07:47 AM

To: Michael Goo
cc
bcc
Subject: Re: Will EPA's greenhouse regs wipe out coal?

Will EPA's greenhouse...

A

From: Michael Goo
Sent: 03/28/2012 06:43 AM EDT
To: barron.alex@epa.gov
Subject: Fw: Will EPA's greenhouse regs wipe out coal?

So there it is "small amounts of generation in 2030."

From: POLITICO Pro [politicoemail@politicopro.com]
Sent: 03/28/2012 06:19 AM AST
To: Michael Goo
Subject: Will EPA's greenhouse regs wipe out coal?

Will EPA's greenhouse regs wipe out coal?

By Erica Martinson
3/28/12 6:16 AM EDT

Nothing to see here, the EPA said Tuesday as it downplayed the impact of its proposed climate change regulations for new power plants.

The agency says it's just riding the wave of the energy market, where natural gas is already pulling market share from coal. And the EPA is banking on gas's low price to mollify an otherwise rough transition for the nation's energy market into an era of reduced greenhouse gas pollution.

But opponents say the rule will strike a death blow to the coal industry.

The rule requires new coal-fired power plants to capture and sequester their carbon dioxide emissions, cutting CO2 emissions to the level of a combined-cycle natural gas-fired power plant.

Unlike natural gas, carbon capture and sequestration is quite costly.

The rule will chart a path to a cleaner and more diverse energy system, said Environmental Defense Fund attorney Megan Ceronsky. It also "sends an incredibly strong message," she said.

John Coequyt
<john.coequyt@sierraclub.org>

08/16/2012 04:33 PM

To: Michael Goo, Alex Barron

cc

bcc

Subject: Fwd: [CLEAN-STRATEGY] Coal to Remain Viable, says EPA's McCarthy at COAL-GEN Keynote

Pants on fire.

John Coequyt
Cell. 202.669.7060
Direct. 202.675.7916

Begin forwarded message:

From: Lyndsay Moseley <Lyndsay.Moseley@hug.org>
Date: August 16, 2012 2:57:09 PM CDT
To: "clean-strategy@lists.usclimatenetwork.org" <clean-strategy@lists.usclimatenetwork.org>
Subject: [CLEAN-STRATEGY] Coal to Remain Viable, says EPA's McCarthy at COAL-GEN Keynote
Reply-To: Lyndsay Moseley <Lyndsay.Moseley@hug.org>

FYI

Coal to Remain Viable, says EPA's McCarthy at COAL-GEN Keynote

Louisville, Ky.
Aug 15, 2012
By Lyndsay Moseley
Associate Editor

"Coal will continue to provide more of America's electricity than any other fuel source, producing nearly 40 percent of generation in 2035," said Gina McCarthy during the keynote session of COAL-GEN in Louisville, Ky. on Aug. 15. McCarthy, assistant administrator for the Environmental Protection Agency's (EPA's) Office of Air and Radiation, remained positive about the future of coal as it transforms into a cleaner source of generation in order to comply with several proposed or finalized EPA regulations.

The other keynote speakers who spoke on the future of coal generation were John Voyles Jr., vice president of transmission and generation, Louisville Gas & Electric; Pierre Gauthier, president & CEO, Alstom U.S. and Canada; and Greg Graves, president & CEO, Burns & McDonnell Engineering Co.

The Electric Power Research Institute estimates that the coal-fired power industry will invest \$275 billion in retrofits through 2035. The need for upgrades is driven by several EPA regulations, including the Mercury and Air Toxics Standard (MATS), the Cross State Air Pollution Rule (CSAPR) and the proposed New Source Performance Standard for greenhouse gases.

The potential greenhouse gas standard has been met with heated debate among power generators, who would have to install carbon capture and storage (CCS) technology in order to reach compliance. The EPA has received over 2 million comments from the industry as a result of the proposed rule-making, McCarthy said.

"While it's a significant economic lift, (the proposed standard) will provide investment for new technologies," McCarthy said. "CCS is technologically viable."

However, Gauthier said that technology to comply with the proposed carbon limit "is not waiting in the wings.

John Coequyt
<John.Coequyt@sierraclub.org
>

08/17/2011 04:51 PM

To: Alex Barron

cc

bcc

Subject: Check this out

<http://www.sierraclub.org/environment/coal/law/coal-plaintiffs.aspx>

John Coequyt
Sierra Club
DL: 202.675.7916
C: 202.669.7060

Alex Barron/DC/USEPA/US
09/07/2011 02:28 PM

To: John Coequyt
cc
bcc
Subject: Re: Numbers

Do you know the percentage for plants that already have a permit?

John Coequyt Those were not for "permitted plants", b... 09/07/2011 01:32:43 PM

From: John Coequyt <John.Coequyt@sierraclub.org>
To: Alex Barron/DC/USEPA/US@EPA
Date: 09/07/2011 01:32 PM
Subject: Re: Numbers

Those were not for "permitted plants", but we are very worried that as many as a third of the ones that are in the permitting process - but for which construction has not commenced - will get built, e.g. up to 15-20 additional coal plants.

John Coequyt
Sierra Club
DL: 202.675.7916
C: 202.669.7060

-----Barron.Alex@epamail.epa.gov wrote: -----
To: John Coequyt <John.Coequyt@sierraclub.org>
From: Barron.Alex@epamail.epa.gov
Date: 09/07/2011 01:10PM
Subject: Re: Numbers

Is this for permitted facilities?

From: John Coequyt <John.Coequyt@sierraclub.org>
To: Alex Barron/DC/USEPA/US@EPA
Date: 09/07/2011 01:09 PM
Subject: Numbers

Here is the official word from the Beyond Coal Campaign. You can cite us for internal use for sure.

153 defeated / 26 progressing (under construction or construction complete). We are projecting at least 70 percent success rate on the remaining 69 projects (likely higher)

John Coequyt
Sierra Club
DL: 202.675.7916
C: 202.669.7060

John Coequyt
<John.Coequyt@sierraclub.org
>

09/07/2011 12:04 PM

To: Alex Barron

cc

bcc

Subject: You are looking at this, right?

<http://www.sierraclub.org/environmentallaw/coal/plantlist.aspx>

John Coequyt
Sierra Club
DL: 202.675.7916
C: 202.669.7060

EPA takes no treatment list of plants by Kallis

Robin Kime/DC/USEPA/US

To: Verna Irving

04/29/2011 03:51 PM

cc

bcc

Subject: May I please have 1 copy of this email and tab 1 of the attachments, 3 hole punched? Thanks!

----- Forwarded by Robin Kime/DC/USEPA/US on 04/29/2011 03:50 PM -----

From: John Coequyt <John.Coequyt@sierraclub.org>
To: Michael Goo/DC/USEPA/US@EPA, Alex Barron/DC/USEPA/US@EPA
Date: 04/29/2011 02:35 PM
Subject: Zombie's

Michael and Alex:

Attached is a list of plants that the companies said were shelved because of uncertainty around GHG regulations. If a standard is set that these plants could meet, there is a not small chance that they company could decide to revive the proposal.

John Coequyt
Sierra Club
DL: 202.675.7916



C: 202.669.7060 Defeated Plants - GHG - 2011.xls

Alex Barron/DC/USEPA/US
04/29/2011 07:51 PM

To: Shannon Kenny, Paul Baiserak, Al McGartland, DavidA
Evans
cc
bcc
Subject: Fw: Zombie's

----- Forwarded by Alex Barron/DC/USEPA/US on 04/29/2011 03:44 PM -----

From: John Coequyt <John.Coequyt@sierraclub.org>
To: Michael Goo/DC/USEPA/US@EPA, Alex Barron/DC/USEPA/US@EPA
Date: 04/29/2011 02:35 PM
Subject: Zombie's

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John Coequyt
Sierra Club
DL: 202.675.7916



C: 202.669.7060 Defeated Plants - GHG - 2011.xls

John Coequyt
<John.Coequyt@sierraclub.org>

To: Michael Goo
cc: "jcoequyt@sierraclub.org"

03/31/2011 07:12 PM

bcc

Subject: Re: John

I talked to Michael about pushing the meeting to 4.30. We could probably actually do 4:45, but early next week would be a lot better. Can you ask him what he wants to do? It is hard to get all the experts and attorneys lined up quickly.

John Coequyt
202.669.7060

On Mar 31, 2011, at 4:07 PM, GooMichael@epamail.epa.gov wrote:

Hi I am Michael's scheduling person. Michael has a mtg. w/John @ 3pm on Friday.

What's the name of your organization and do you know why (topic) they are mtg.

----->
Calendar
Entry Type
----->

*Other EPA
parties involved
closely w/Steve
+ NSPS, collaboratively*

----->
----->

-----+-----

| John

|
|
|
|
| Fri 04/01/2011 3:00 PM - 4:00 PM

John Coequyt
<John.Coequyt@sierraclub.org
>

04/01/2011 05:01 PM

To: Alex Barron

cc

bcc

Subject: Do you have a phone number?

John Coequyt
Sierra Club
DL: 202.675.7916
C: 202.669.7060

Alex Barron/DC/USEPA/US
04/01/2011 06:04 PM

To John Coequyt
cc
bcc
Subject Re: Do you have a phone number?

202-564-3304



John Coequyt

John Coequyt Sierra Club

04/01/2011 04:59:35 PM

From: John Coequyt <John.Coequyt@sierraclub.org>
To: Alex Barron/DC/USEPA/US@EPA
Date: 04/01/2011 04:59 PM
Subject: Do you have a phone number?

John Coequyt
Sierra Club
DL: 202.675.7916
C: 202.669.7060

John Coequyt
<John.Coequyt@sierraclub.org
>

08/17/2011 11:35 AM

To Alex Barron
cc

bcc

Subject Can we chat today

John Coequyt
Sierra Club
DL: 202.675.7916
C: 202.669.7060

John Coequyt
<john.coequyt@sierraclub.org>
>

05/29/2012 07:46 PM

To: Alex Barron

cc

bcc

Subject: Re: Do you have 5mn to chat after 2pm?

No worries.

John Coequyt
Cell. 202.669.7060
Direct. 202.675.7916

On May 29, 2012, at 7:17 PM, Alex Barron <Barron.Alex@epamail.epa.gov> wrote:

> Sorry. Crazy day.

>

> A

>

>

> ----- Original Message -----

> From: John Coequyt [john.coequyt@sierraclub.org]

> Sent: 05/29/2012 11:25 AM AST

> To: Alex Barron

> Subject: Do you have 5mn to chat after 2pm?

>

>

>

> --

> John Coequyt

> Sierra Club

> 202-669-7060

"John Coequyt"
<john.coequyt@sierraclub.org
>

08/29/2012 05:15 PM

Please respond to
John Coequyt
<john.coequyt@sierraclub.org>

To: Joseph Goffman

cc

bcc

Subject: Accepted: Meeting with Sierra Club

John Coequyt
<john.coequyt@sierraclub.org
>

06/22/2012 09:55 AM

To Alex Barron

cc

bcc

Subject You have a minute to chat this afternoon?

--

John Coequyt
Sierra Club
202-669-7060

Michael Goo/DC/USEPA/US
Sent by: Robin Kime

08/30/2012 11:31 AM

To: Alex Barron

cc

bcc

Subject: General Discussion- 3513A

Meeting

Date 08/30/2012

Time 01:30:00 PM to 02:15:00 PM

Chair Michael Goo

Invitees

Required Alex Barron; john.coequyt

Optional

FYI

Location

POC:

john.coequyt@sierraclub.org

John Coequyt

Sierra Club

C: (202) 669-7060

O: (202) 675-7916

Robin Kime/DC/USEPA/US
08/30/2012 11:36 AM

To: Alex Barron
cc:
bcc:
Subject: General Discussion- 3513A

Hi

Can you join Michael for this meeting with John? Give it about 30 minutes and start calling him on his cell to discuss this?

----- Forwarded by Robin Kime/DC/USEPA/US on 08/30/2012 11:35 AM -----

General Discussion- 3513A

Thu 08/30/2012 1:30 PM - 2:15
PM

From: Alex Barron/DC/USEPA/US
To: Robin Kime/DC/USEPA/US

No Location Information

Required:	Alex Barron/DC/USEPA/US@EPA, john.coequyt@sierraclub.org
-----------	--

Description

POC:

~~John Coequet~~
John Coequet
Sierra Club
C: (202) 659-7060
O: (202) 675-7916

Personal Notes

John Coequyt
<john.coequyt@sierraclub.org>

To: Alex Barron

cc

06/01/2012 12:16 PM

bcc

Subject: Can we talk today?

Just wanted to give you an update on SO2 NAAQS meeting.

--

John Coequyt
Sierra Club
202-669-7060

Arvin Ganesan/DC/USEPA/US

To: Michael Goo

10/10/2011 07:36 AM

cc

bcc

Subject: FW: Fw: Thursday

Sent with Good (www.good.com)

----- Forwarded by Arvin Ganesan/DC/USEPA/US on 10/10/2011 07:36:16 AM -----

----- Original Message -----

From: Scott Fulton/DC/USEPA/US

To: Gina McCarthy/DC/USEPA/US@EPA, McCabe.Janet@epamail.epa.gov, "Avi Garbow" <garbow.avi@epa.gov>, Ganesan.Arvin@epamail.epa.gov, "Patricia Embrey" <Embrey.Patricia@epamail.epa.gov>

Cc: "Carla Veney" <veney.carla@epa.gov>

Sent on: 10/09/2011 10:16:34 PM

Subject: Fw: Thursday

Hi Folks - looks like we should hold Thurs at 1:00 for our session with Sierra Club. We'll want to premeet before hand. I'll set up. Gina - do you figure you will participate. or will Janet?

Cheers,

Scott

From: Sanjay Narayan [Sanjay.Narayan@sierraclub.org]

Sent: 10/08/2011 03:21 PM MST

To: Scott Fulton

Subject: Thursday

John Coequyt's schedule allows him to attend Thursday, but he would prefer 1 p.m. rather than 2. Would the schedules on your side be able to accommodate that shift?

Sanjay Narayan
Senior Staff Attorney
Sierra Club Environmental Law Program
85 Second St., Second Floor
San Francisco CA 94105
Tel: 415.977.5769
Fax: 415.977.5793

Joseph
Goffman/DC/USEPA/US
Sent by: Cynthia Browne

To
cc
bcc
Subject Meeting with Sierra Club

08/29/2012 02:02 PM

Meeting

Date 08/30/2012

Time 02:30:00 PM to 03:15:00 PM

Chair Joseph Goffman

Invitees

Required joanne.spalding; John.Coequyt; Kevin Culligan

Optional Amit Srivastava

FYI

Location ARN-OAR-Room 5428

Thanks Cynthia. We will have 3 people there:

Joanne Spalding

John Coequyt

Bruce Buckheit

Joanne Spalding
415-977-5725 (o)
510-612-4062 (c)
Cynthia.

Thanks very much for arranging this meeting. We are available for a meeting at any time on August 29 and 30. If those dates no longer work, we can arrange to meet on the morning of August 31.

Best,

Joanne

--

For more information,
please contact the person
responsible for the
meeting.
If you have any questions,
please contact the person
responsible for the
meeting.

"John Coequyt"
<john.coequyt@sierraclub.org
>

08/29/2012 02:26 PM

Please respond to
John Coequyt
<john.coequyt@sierraclub.org>

To Michael Goo

cc

bcc

Subject Accepted: General Discussion

"John Coequyt"
<john.coequyt@sierraciub.org
>

05/15/2012 07:13 AM

Please respond to
John Coequyt
<john.coequyt@sierraciub.org>

To Michael Goo

cc

bcc

Subject Accepted: Meeting w/Coequyt See Notes

Michael Goo/DC/USEPA/US
05/12/2012 12:45 AM

To "John Coequyt"
cc
bcc
Subject Re: Meeting Request for Next Week

Yep. Tuesday 2 to 3 or after 5. And then there is time on thursday too.

From: John Coequyt [john.coequyt@sierraclub.org]
Sent: 05/11/2012 11:19 AM AST
To: Michael Goo
Subject: Meeting Request for Next Week

Michael:

Could Joanne and I come and chat with you and maybe Alex next week? Joanne is in town Tuesday until Thursday afternoon. Let me know what works for you. I think she would prefer to avoid Wednesday.

--

John Coequyt
Sierra Club
202-669-7060

Michael Goo/DC/USEPA/US
Sent by: Robin Kime

05/14/2012 12:51 PM

To Alex Barron, john.coequyt

cc

bcc

Subject Update: Meeting w/Coequyt & Joanne- See Notes

Location: J.W. Marriott

John Coequyt
Sierra Club
669-7060

John Coequyt
<john.coequyt@sierraclub.org
>

05/29/2012 11:25 AM

To: Alex Barron
cc
bcc
Subject: Do you have 5mn to chat after 2pm?

--

John Coequyt
Sierra Club
202-669-7060

John Coequyt
<john.coequyt@sierraclub.org>

07/05/2012 11:52 AM

To: Alex Barron

cc

bcc

Subject: I have a quick question if you have a minute

--

John Coequyt
Sierra Club
202-669-7060

John Coequyt
<john.coequyt@sierraclub.org
>

08/21/2012 04:33 PM

To Michael Goo
cc
bcc
Subject Lunch friday with Walke and i?

--

John Coequyt
Sierra Club
202-669-7060

Michael Goo/DC/USEPA/US
08/21/2012 04:50 PM

To "John Coequet"
cc
bcc
Subject Re: Lunch friday with Walke and i?

I've got lunch with Melanie. How bout tommerrow or thursday?

----- Original Message -----
From: John Coequet [john.coequet@sierraclub.org]
Sent: 08/21/2012 04:33 PM AST
To: Michael Goo
Subject: Lunch friday with Walke and i?

--
John Coequet
Sierra Club
202-689-7060

Robin Kime/DC/USEPA/US

08/29/2012 02:01 PM

To john.coequyt

cc

bcc kime.robin

Subject Fw: Michael

Just checking in to find out your preferred meeting spot, thanks.

----- Forwarded by Robin Kime/DC/USEPA/US on 08/29/2012 02:01 PM -----

From: Robin Kime/DC/USEPA/US
To: John Coequyt <john.coequyt@sierraclub.org>
Date: 08/29/2012 10:22 AM
Subject: Re: Michael

Thanks, do you want to come to Michael's office or meet at Starbucks in the Marriott (or elsewhere)?

John Coequyt I think 1:30 makes sense for us. On We...

08/29/2012 10:16:47 AM

From: John Coequyt <john.coequyt@sierraclub.org>
To: Robin Kime/DC/USEPA/US@EPA
Date: 08/29/2012 10:16 AM
Subject: Re: Michael

I think 1:30 makes sense for us.

On Wed, Aug 29, 2012 at 10:10 AM, Robin Kime <Robin.Kime@epa.gov> wrote:
Oh my, me too....I though you all were having lunch with Joel at 12:30... seems I have that wrong (this is an embarrassing mistake to make, my apologies).

Starting fresh- if you'd like to meet with Michael tomorrow, he can be free at 11:00 - before your 11:30 or at 12:00 or 1:30 or 2:00.

Any chance this helps? again, my apologies for the confusion.

John Coequyt ---08/29/2012 10:06:35 AM---Thanks Robin I am a little confused. Are you inviting us to lunch with Michael and asking us to a m

From: John Coequyt <john.coequyt@sierraclub.org>
To: Robin Kime/DC/USEPA/US@EPA
Date: 08/29/2012 10:06 AM
Subject: Re: Michael

Thanks Robin I am a little confused. Are you inviting us to lunch with Michael and asking us to a meeting with him at another

time? We

have a meeting with the Air office at 11:30.

On Wed, Aug 29, 2012 at 9:56 AM, Robin Kime <Kime.Robin@epamail.epa.gov> wrote:

> Hi,

>

> You'll see Michael for lunch tomorrow at 12:30. In terms of meeting

> separately - can 12:00, 1:30, or 2:00 work? Just let me know if I can help

> connect you both tomorrow.

>

> - Robin

>

>

> Robin W. Kime

> Office of the Administrator/Office of Policy

> Phone (202) 564-6587

> Fax (202) 561-1688

--

John Coequyt

Sierra Club

C: (202) 669-7060

O: (202) 675-7916

--

John Coequyt

Sierra Club

C: (202) 669-7060

O: (202) 675-7916

John Coequyt
<john.coequyt@sierraclub.org
>

09/24/2012 11:11 AM

To Alex Barron

cc

bcc

Subject Can we chat?

I have a modeling question for you.

Also, your voice mail is out of date. I assume you are back from your vacation.

--

John Coequyt
Sierra Club
O: (202) 669-7060
O: (202) 675-7916

John Coequyt
<john.coequyt@sierraclub.org
>

11/16/2012 02:34 PM

To Alex Barron

cc

bcc

Subject Can you give me a call when you have a minute?

I have a couple quick questions.

--

John Coequyt
Sierra Club
C: (202) 669-7060
O: (202) 675-7916

John Coequyt
<john.coequyt@sierraclub.org
>

01/09/2013 04:19 PM

To Michael Goo

cc

bcc

Subject Should we meet soon on SO2?

--

John Coequyt
Sierra Club
C: (202) 669-7060
O: (202) 675-7916

John Coequyt
<john.coequyt@sierraclub.org>

02/08/2013 01:42 PM

To Michael Goo

cc

bcc

Subject Your back, we should chat.

--

John Coequyt

Sierra Club

C: (202) 669-7060

O: (202) 675-7916

John Coequyt
<John.Coequyt@sierraclub.org
>

04/13/2011 11:04 AM

To: Michael Goo, Alex Barron, David McIntosh, Arvin Ganesan,
loriejschmidt, joel.beauvais

cc

bcc

Subject

FYI. This turned out well...

<http://www.time.com/time/health/article/0,8599,2064935,00.html?xid=twotbut>

GOING GREEN

How My Mercury Level Hit Double the Safety Limit

By [Bryan Walsh](#) Tuesday, Apr. 12, 2011

A couple of weeks ago I took a pair of scissors and clipped a thatch of hair from the back of my head. I did not do this lightly — much like petroleum, my hair is an increasingly scarce resource, and I'm doing my best to conserve it. But I was taking part in a Sierra Club-sponsored test for mercury contamination in people, and levels of the toxic metal can be detected through the hair. So I taped the small sample I could spare inside an envelope and sent it off to the University of Georgia, which was doing the actual testing. And then I pretty much forgot about it.

So I was more than a bit surprised when an express letter arrived at my home from the University of Georgia a few days later, with a message from Lisa Liguori, the scientist who runs the testing lab there. It turned out that my mercury levels were more than twice the government-recommended safety limit. I wasn't exactly a walking thermometer, but I had a surprising amount of the stuff in my blood and body. ([See the World's Top 10 Environmental Disasters](#))

Fortunately, for a man, mercury contamination isn't considered a significant health risk — and my levels are still well below the point at which harm would likely occur in any case. But women who are pregnant or want to get pregnant, as well as very young children are a different story: those groups are more vulnerable to mercury contamination. The reason is that mercury is a neurotoxin that impairs brain development in young children, either directly, or through a pregnant or nursing mother. According to the Environmental Protection Agency (EPA), as many as 1 in 12 American women have enough mercury in their bodies to put a baby at risk, which means as many as 300,000 infants a year may be at increased danger of learning disabilities associated with in utero exposure to mercury. "For kids that young, their brains are developing and vulnerable to this," Liguori told me.

John Coequyt
<john.coequyt@sierraclub.org>

05/25/2012 10:56 AM

To: Michael Goo, Arvin Ganesan, Joseph Goffman, Alexandra Teitz, Alex Barron, Lorie Schmidt, Jonathan Lubetsky, Shannon Kenny

cc

bcc

Subject: Fwd: Big Day in DC – EPA Hearing Summary and Thank You!

FYI. Here is the news from the hearings.

John Coequyt
Cell. 202.669.7060
Direct. 202.675.7916

Begin forwarded message:

From: Lauren Randall <lauren.randall@sierraclub.org>
Date: May 25, 2012 10:38:10 AM EDT
To: mawo@sayyourenvironment.org
Cc: Phillip Ellis <phillip.ellis@sierraclub.org>. Eitan Bencuya <Eitan.Bencuya@sierraclub.org>. Anneli Berube <anneli.berube@sierraclub.org>. Tom Valtin <tom.valtin@sierraclub.org>. Rachele Huennekens <rachele.huennekens@sierraclub.org>. Allison Chin <4achin@gmail.com>. John Coequyt <john.coequyt@sierraclub.org>. Tiffany Gibson <Tiffany.Gibson@sierraclub.org>. Eileen Levandoski <eileen.levandoski@sierraclub.org>. Melissa Stephens <melissa.stephens@sierraclub.org>. Bob Bingaman <Bob.Bingaman@sierraclub.org>. Melinda Pierce <Melinda.Pierce@sierraclub.org>. Christine Guhl <christine.guhl@sierraclub.org>. Glen Besa <Glen.Besa@sierraclub.org>. Kate Pollard <kate.pollard@sierraclub.org>. Nicole Ghio <Nicole.Ghio@sierraclub.org>. Oliver Bernstein <oliver.bernstein@sierraclub.org>. Seth Long <seth.long@sierraclub.org>. Marie Bergen <marie.bergen@sierraclub.org>. Mary Anne Hitt <maryanne.hitt@sierraclub.org>. Lawson LeGate <Lawson.Legate@sierraclub.org>. Claire Gardner <clairegardner2009@gmail.com>. Gwyn Jones <gwyn.jones@sierraclub.org>. Michelle Rosier <michelle.rosier@sierraclub.org>. Randy Downs <Randy.Downs@sierraclub.org>. Taylor Kelly <t.kellyt@gmail.com>. Jessica Hodge <jessica.hodge@sierraclub.org>
Subject: Re: Big Day in DC — EPA Hearing Summary and Thank You!

Well done, everyone! Here are the clips I've seen come through so far:

Politico's Morning Energy, [*Carbon: the focus of EPA hearings*](#)

E&E, [*Advocates weigh in on proposed emissions rules at EPA public hearings*](#)

John Coequyt
<john.coequyt@sierraclub.org>
>
12/14/2012 02:15 PM

To: Michael Goo
cc
bcc
Subject: Fwd: Should someone from SC listen to this? I cannot. Fwd: [CLEAN] Webinar: NRDC Presents: Closing the Power Plan Carbon Pollution Loophole, 12.17.2012

----- Forwarded message -----

From: Mary Anne Hitt <maryanne.hitt@sierraclub.org>
Date: Fri, Dec 14, 2012 at 10:25 AM
Subject: Should someone from SC listen to this? I cannot. Fwd: [CLEAN] Webinar: NRDC Presents: Closing the Power Plan Carbon Pollution Loophole, 12.17.2012
To: Melinda Pierce <Melinda.Pierce@sierraclub.org>, John Coequyt <John.Coequyt@sierraclub.org>

----- Forwarded message -----

From: JP Leous <jleous@climatenetwork.org>
Date: Fri, Dec 14, 2012 at 10:18 AM
Subject: [CLEAN] Webinar: NRDC Presents: Closing the Power Plan Carbon Pollution Loophole, 12.17.2012
To: CLEAN listserv <clean@lists.usclimatenetwork.org>, uscan-talk <uscan-talk@lists.usclimatenetwork.org>, Clean-strategy <clean-strategy@lists.usclimatenetwork.org>

Hi all. Just a friendly reminder to not miss this great event and RSVP today!

Bob Perciasepe/DC/USEPA/US
Sent by: Teri Porterfield
04/23/2012 05:34 PM

To
cc
bcc
Subject: Deputy Administrator's Meeting with Enviros - receipt of 500,000 comments

Meeting

Date: 04/24/2012
Time: 12:30:00 PM to 01:00:00 PM
Chair: Bob Perciasepe
Invitees
Required: Dru Ealons
Optional
FYI: Denise Anderson; Nena Shaw
Location: Outside Ariel Rios

At 12:30 you are scheduled to meet - approx 24 individuals representing environmental groups (Sierra Club, League of Conservation Voters, EDF, NRDC, Enviro America, National Wildlife Federation) who will gather outside Ariel Rios and deliver 500,000 comments (roughly 12-15 flash drives loaded with spreadsheets, cover letters, etc) supporting strong industrial carbon pollution standards applicable to the rule: Standards for GHG Emissions for New Stationary Sources....

As each group hands over their comments, they would like to take a photo with you (individually) with the Ariel Rios building in the background - there will also be large photo shot with everyone. The purpose is to create a photo-op and narrative beat for the comment-gathering efforts on the issue. Groups will use materials from the event to communicate with supporters and recruit additional comment-signers via newsletters, emails and social media. POC: Dru Ealons - she will come get you.

Hi Teri,

Attached are the details. Let me know if you need anything else.

Best,

Dru

Bob P comment delivery event - Speaker Request Form.docx

Dru Ealons
Director
Office of Public Engagement
Office of the Administrator
US Environmental Protection Agency
202.564.7818 (direct)
202.573.3063 (cell)
ealons.dru@epa.gov

Gina McCarthy/DCAUSEPAUS

To: "Bob Craig"
cc: "Don Zinger", "Steve Page"
bcc:

04/29/2010 02:00 PM

Subject: Fw: Oil Burning

Both - can you ask Alan to have the HCC connect with AIA (Paul's initials below) per Bob P's request. We should probably reach out to all agencies we normally work with when we have a message developed.

M.O.

From: Bob Percinscpe
Sent: 04/29/2010 01:48 PM EDT
To: Gina McCarthy
Subject: Fw: Oil Burning

Gina,

This from Paul.
I told him you would follow up.
Bob Percinscpe
Office of the Administrator
(o)202 364 4711
(c) [REDACTED]

*A: r
Cover*

From: Paul Billings (PBillings@lanpusa.org)
Sent: 04/29/2010 01:45 PM AST
To: Bob Percinscpe
Subject: Oil Burning

Thanks for sharing the information with me last night.
If asked, here is what we are saying to the media and the public:

- The American Lung Association is deeply concerned about the health threats presented by air emissions from the Gulf Coast oil spill and subsequent burning.
- These emissions could lead to adverse health effects, especially for children, older adults, and people with chronic lung disease, heart diseases and diabetes. However, it can even harm healthy adults. Health effects can include coughing, wheezing and shortness of breath, as well as more serious effects that could be life-threatening, such as asthma attacks and heart attacks.
- We offer the following guidance to Gulf Coast residents to protect your lung health:
 - o Identify how local authorities will notify you during a disaster and how you will get information, whether through local radio, TV or NOAA Weather Radio stations or channels.
 - o Children, older adults and individuals with lung disease or other chronic conditions are particularly at risk. If you or a family member are in one of these groups, be sure to prepare with your doctor or health care provider steps you can take if the air quality worsens in your area. Check with your doctor or healthcare provider if you are experiencing breathing

Steve Page/RTP/USEPA/US
04/27/2010 08:14 AM

To: Gina McCarthy
cc: Peter Tsigotis
bcc:
Subject: Re: NSPS

We will get you an updated list this morning
Gina McCarthy

----- Original Message -----

From: Gina McCarthy
Sent: 04/27/2010 07:58 AM EDT
To: Page.Steve@Epa.GOV; Tsigotis.Peter@EPA.GOV
Cc: Janet McCabe; Joseph Goffman
Subject: NSPS

Janet, Joe and I are mtg with the Administrator et al at 4:00 to talk more BACT and NSPS. I can't seem to put my hands on a short list of the NSPS petitions and court actions that involve GHGs, along with timelines. Do you have a list like that? If you do, can we work with Patricia to update this so I can characterize appropriately the legal issues and ost recent conversations with Sierra Club and others now that GHGs will be regulated in January?

OAR Invitations

Sent by: Cynthia Browne

05/31/2011 02:31 PM

To Gina McCarthy

cc Amit Srivastava, Don Zinger, Julia Miller

bcc

Subject Dinner, Sierra Club

Meeting

Date 06/09/2011

Time 07:30:00 PM to 09:00:00 PM

Chair OAR Invitations

Invitees

Required Gina McCarthy

Optional Amit Srivastava; Don Zinger; Julia Miller

FYI

Location Metropolitan Club, 1700 H Street,
NW, Washington, DC

Steve Page/RTP/USEPA/US
Sent by: Lala Alston

10/02/2012 02:14 PM

To: Gina McCarthy

cc

bcc

Subject: Accepted: Meeting with Sierra Club, EDF, and NRDC

[attachment "GHG issues in Big Stone.doc" deleted by Gina McCarthy/DC/USEPA/US]

Beth Craig Dear Patricia, Is it possible for you all to... 08/05/2009 08:39:09 AM

From: Beth Craig/DC/USEPA/US
To: Patricia Embrey/DC/USEPA/US@EPA
Cc: Jeffrey Clark/RTP/USEPA/US@EPA
Date: 08/05/2009 08:39 AM

Subject: Fw: Clean Air Act Title V Petition - Big Stone

Dear Patricia,

Is it possible for you all to put together a short summary of the arguments that the Sierra Club made on why GHG are currently regulated under the CAA? Gina would like to get a copy. It is the Issue#3|section of the attached.

Thanks, Beth

----- Forwarded by Beth Craig/DC/USEPA/US on 08/05/2009 08:36 AM -----

From: Carol Rushin/R8/USEPA/US
To: Steve Tuber/P2/R8/USEPA/US@EPA, Debrah Thomas/P2/R8/USEPA/US@EPA, videtich.callie@epa.gov, Robert Ward/RC/R8/USEPA/US@EPA, ornstein.peter@epa.gov
Cc: Beth Craig, gaydosh.mike@epa.gov
Date: 08/04/2009 08:41 AM
Subject: Fw: Clean Air Act Title V Petition - Big Stone

Carol Rushin
Acting Regional Administrator
USEPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202-1129
Phone: 303.312.6308
FAX: 303.312.6882

----- Forwarded by Carol Rushin/R8/USEPA/US on 08/04/2009 08:40 AM -----

George Hays
<georgehays@mindspring.com>
08/03/2009 08:37 PM

To: LisaP Jackson/DC/USEPA/US@EPA, Carol Rushin/R8/USEPA/US@EPA, DENRINTERNET@state.sd.us, TGraumann@otpc.com, cwmadsen@bgpw.com
cc: "Thomas Welk" <tjwelk@bgpw.com>, Callie Videtich/P2/R8/USEPA/US@EPA, Christopher Ajayi/R8/USEPA/US@EPA, Sara Laumann/RC/R8/USEPA/US@EPA, Brian.Gustafson@state.sd.us, Roxanne.Giedd@state.sd.us, Carl Daly/R8/USEPA/US@EPA
Subject: Clean Air Act Title V Petition - Big Stone

Rob Brenner/DC/USEPA/US
10/27/2010 09:25 PM

To: Gina McCarthy
cc
bcc

Subject: Re: Fw: Draft Permit for Summit Power

I'll find out—I'm assuming you want someone from their national office. If you want someone from Texas, just send me back a note.

Gina McCarthy Rob - Who is the Sierra Club person th... 10/27/2010 09:07:29 PM

From: Gina McCarthy/DC/USEPA/US
To: Brenner.Rob@EPA.GOV
Date: 10/27/2010 09:07 PM
Subject: Fw: Draft Permit for Summit Power

Rob - Who is the Sierra Club person that I need to speak with to get a sense of what they think of the Summit proposal?

----- Forwarded by Gina McCarthy/DC/USEPA/US on 10/27/2010 09:05 PM -----

From: Anna Wood/DC/USEPA/US
To: Gina McCarthy/DC/USEPA/US@EPA
Cc: Janet McCabe/DC/USEPA/US@EPA, Steve Page/RTP/USEPA/US@EPA
Date: 10/27/2010 06:48 PM
Subject: Re: Draft Permit for Summit Power

Hi Gina, to follow-up on your earlier request below, we checked in with Region 6 on the referenced permit. Please note the following:

The initial PSD permit application was submitted to Texas in April 2010. In talking with Region 6, the Region expects the draft PSD permit package from Texas within 30 days, which starts the PSD public comment period. A public hearing and permit appeal to the TCEQ is uncertain, but possible. Once the permit has gone through TCEQ's contested case hearing process (which would include any contested case hearing proceedings that goes to their administrative law judges) the permit would be final upon approval by the a majority of the commissioners. The permit is then subject to appeal in the state court and could be overturned by the State court system. With the upcoming required public notice and participation process required under Texas law, R 6 does not expect the Texas PSD permit to be issued and in effect before Jan. 2.

The Region also intends to carefully review the modeling when submitted. The proposed source is close to I-20. A potential issue is NO2 one-hour standard modeling, we will not know until we get the modeling.

Texas is a SIP approved program. As a result and as noted above, permit appeals go through the Texas administrative/court process for contested PSD permits instead of the EAB. We talked with Kristi Smith of OGC and she said the effective date of the Texas permit is a matter of state law.

(b) (5) DP

The Region has heard very little on the environmental group front with respect to opposition to this facility.

(b) (5) DP

We researched the permit on the Sierra Club's web site and it does not express outright opposition to the project and seems to suggest that unlike other projects underway in Texas (e.g. Tenaska) the Summit project is notable for including IGCC and CCS. We've cut and pasted the information on the Sierra Club web site for your convenience. Based upon where we understand Clean Air Task Force and Environmental Defense to be on these types of projects, we would not expect them to oppose the Summit Project.

Please let me know if you need anything else on this, thanks. Anna

- **Summit Power Seeks Approval for IGCC Coal Plant with 90% Carbon Capture**

Pushing the envelope further on coal plants, Summit Texas Clean Energy, LLC, a unit of Summit Power based in Washington State, has submitted its application for an air quality and Prevention of Significant Deterioration (PSD) permit to the Texas Commission on Environmental Quality (TCEQ). According to its application, the proposed 400 MW coal plant would be located at the former Penwell FutureGEN site in Ector County, and would utilize both Integrated Gasification Combined Cycle (IGCC) technology as well as a carbon dioxide capture and sequestration system to capture at least 90 percent of its carbon dioxide emissions. The resulting captured carbon dioxide would be sold under contract and injected underground for Enhanced Oil Recovery (EOR). In addition to electricity and carbon dioxide, the proposed facility would also produce urea to be sold for fertilizer production.

While another company, Tenaska, has also submitted an application to TCEQ that includes a promise to capture the majority of its carbon dioxide emissions, the Summit application is notable for including both IGCC technology and carbon capture. IGCC technology is a process whereby the coal – in this case Powder River Basin sub-bituminous coal – is first turned into a gas before being combusted to produce steam for electricity. As such, emissions are generally closer to those associated with a natural gas combined cycle plant than a traditional coal plant. More recently, NRG announced that it had received money through the ARRA – federal stimulus – to also design an “advanced” coal demonstration plant with carbon capture technology in Texas.

The Lone Star Chapter of the Sierra Club is currently seeking a contested case hearing on the Tenaska plant due to a variety of concerns about its emissions, water use and lack of enforceability on its CO2 capture numbers, and is currently reviewing the Summit application. Generally, Sierra Club has opposed all new applications for coal or petroleum coke plants in Texas due to concerns over criteria air pollutant emissions, global warming gases, water use, and the impacts of extraction and transportation of coal.

Proposed Emission Limits

The majority of the proposed emissions associated with the plant involve the coal mill drying process, the gasifier flares associated with start-up and the actual combustion turbine and duct burner once the synthetic gas produced is burned. In addition, a significant amount of emissions – about 200 tons per year of particulate matter – is associated with the urea granulation stack. Thus, while much cleaner than a traditional coal plant,

John Coequyt
<john.coequyt@sierraclub.org
>

01/09/2012 05:33 PM

To Michael Goo

cc

bcc

Subject Letter

--

John Coequyt
Sierra Club
202-669-7060

Gina McCarthy/DC/USEPA/AJS

To: Bob Perciasepe

02/09/2011 09:10 PM

cc

bcc

Subject: Re: Sierra Club

Sure

Bob Perciasepe

----- Original Message -----

From: Bob Perciasepe

Sent: 02/09/2011 09:09 PM EST

To: Gina McCarthy; "Bob Perciasepe" <perciasepe.bob@epa.gov>

Subject: Re: Sierra Club

Yes we should call. Let's discuss in morning and one of us will call.

Bob Perciasepe

Deputy Administrator

(o)202 564 4711

(c)

Gina McCarthy

----- Original Message -----

From: Gina McCarthy

Sent: 02/09/2011 09:05 PM EST

To: "Bob Perciasepe" <perciasepe.bob@epa.gov>

Subject: Sierra Club

Bob - (b) (5) dp



Bob Sussman/DC/USEPA/US
03/24/2009 12:26 PM

To: Beth Craig
cc: Steve Page
bcc:
Subject: Re: Power Plant Information

Thanks Beth. yes, we should definitely have a follow-up discussion.

Robert M. Sussman
Senior Policy Counsel to the Administrator
Office of the Administrator
US Environmental Protection Agency

Beth Craig Dear Bob, Attached for your review is f... 03/23/2009 04:39:44 PM

From: Beth Craig/DC/USEPA/US
To: Bob Sussman/DC/USEPA/US@EPA
Cc: page.steve
Date: 03/23/2009 04:39 PM
Subject: Power Plant Information

Dear Bob,

Attached for your review is follow up information from our meeting with the Sierra Club on power plant permitting. We have attached background information on the process which has been used in the past to comment on permits. We also provided a short summary description on each of the permits.

Looking forward to having a discussion about this document and next steps. Thanks, Beth

[attachment "power plants march 23rd.doc" deleted by Bob Sussman/DC/USEPA/US]

Bob Sussman/DCAUSEPAUS
Sent by: Georgia Bednar

To: Beth Craig, bruce.nilles, david.bookbinder, Richard Ossias,
Steve Page

02/27/2009 11:04 AM

cc
bcc

Subject: Coal Plant Permits

Meeting

Date: 03/02/2009

Time: 04:00:00 PM to 04:45:00 PM

Chair: Bob Sussman

Invitees

Required: Beth Craig; bruce.nilles; david.bookbinder; Richard Ossias; Steve Page
Optional:

FYI

Location: 3407 ARN

Meeting: Coal Plant Permits

Time: 4 - 5 PM (ET)

Date: Monday, March 2, 2009

Location: 3407 ARN

EPA Attendees:

Bob Sussman

Steve Page

Richard Ossias

Sierra Club Attendees:

David Bookbinder

Bruce Nilles

Bob Sussman/DC/USEPA/US
04/06/2009 09:07 AM

To: Adam Kushner, Beth Craig, Steve Page, Richard Ossias, Bill Hamett
cc: Lisa Heinzerling
bcc:
Subject: Re: David Bookbinder-- Cliffside Plant

Great
Adam Kushner

----- Original Message -----

From: Adam Kushner
Sent: 04/05/2009 11:45 AM EDT
To: Bob Sussman; Beth Craig; Steve Page; Richard Ossias; Bill Hamett
Cc: Lisa Heinzerling
Subject: Re: David Bookbinder-- Cliffside Plant

Bob: (b) (5) DP, (b)(5) ACP

[REDACTED]

Adam

Adam Kushner
Director
Office of Civil Enforcement USEPA
202-564-7979

Sent by EPA Wireless E-Mail Services
Bob Sussman

----- Original Message -----

From: Bob Sussman
Sent: 04/03/2009 06:05 PM EDT
To: Beth Craig; Steve Page; Richard Ossias; Adam Kushner; Bill Hamett
Cc: Lisa Heinzerling
Subject: David Bookbinder-- Cliffside Plant

I had a brief conversation today with David Bookbinder of the Sierra Club, who was meeting with us on another matter (b) (5) DP

[REDACTED]

Are we engaged in looking at the Cliffside permits? Might we want to take a look at the MACT applicability analysis because it could set a precedent for mercury controls at other new plants?

Robert M. Sussman
Senior Policy Counsel to the Administrator
Office of the Administrator
US Environmental Protection Agency

Michael Goo/DC/USEPA/US

12/06/2012 06:53 AM

To "Bob Perciasepe", "Teri Porterfield"

cc

bcc

Subject Fw: Meeting with Bob Perciasepe

Hi Bob and Teri. As I mentioned to Bob, I'm passing along this request from the head of the Sierra Club to meet with Bob. My understanding is that the Administrator suggested Mike Brune get in touch. If it doesn't work out this time, I believe Mike Brune comes to town pretty frequently. Teri I will reply to the Sierra Club rep (John Coequyt) and Cc you so you are directly in touch with him. His contact info is below. Thanks very much.

From: John Coequyt [john.coequyt@sierraclub.org]

Sent: 12/05/2012 10:27 AM EST

To: Michael Goo

Subject: Meeting with Bob Perciasepe

Michael:

I am trying to set up a meeting between Mike Brune (Sierra Club ED) and Bob Perciasepe Friday the 14th between 9 and 11:30. I know it's a short window and if it doesn't work we will just try next time. Can you help get this request to the right person.

--

John Coequyt

Sierra Club

C: (202) 669-7060

O: (202) 675-7916

Richard
Wayland/RTP/USEPA/US
06/06/2012 05:28 PM

To: Mike Thrift
cc: Janet McCabe, Kevin McLean, Michael Ling, Sara
Schneeberg, Scott Mathias
bcc:
Subject: Re: Fw: April 12, 2012 Letter

Mike,

(b) (5) DP

Chet
Richard A. "Chet" Wayland
Director, Air Quality Assessment Division
U.S. EPA Office of Air Quality Planning & Standards
Mail Code C304-02, RTP, NC 27711
Phone: (919) 541-4603, Cell: (919) 606-0543

Mike Thrift Had an interesting discussion with Josh... 06/06/2012 03:39:49 PM

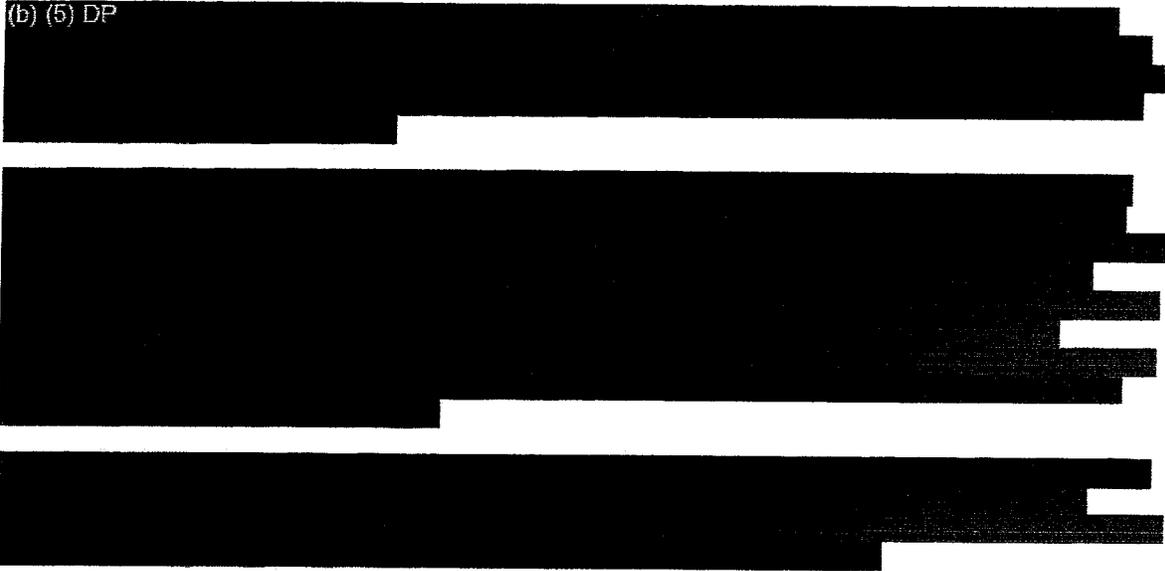
From: Mike Thrift/DC/USEPA/US
To: Sara Schneeberg/DC/USEPA/US@EPA
Cc: Janet McCabe/DC/USEPA/US@EPA, Kevin McLean/DC/USEPA/US@EPA, Michael
Ling/RTP/USEPA/US@EPA, Scott Mathias/RTP/USEPA/US@EPA, Richard
Wayland/RTP/USEPA/US@EPA
Date: 06/06/2012 03:39 PM
Subject: Re: Fw: April 12, 2012 Letter

Had an interesting discussion with Josh Stebbins of Sierra Club just now.

(b) (5) DP

[Redacted content]

(b) (5) DP



-----Sara Schneeberg/DC/USEPA/US wrote: -----

To: Mike Thrift/DC/USEPA/US@EPA

From: Sara Schneeberg/DC/USEPA/US

Date: 06/06/2012 10:10AM

Cc: Janet McCabe/DC/USEPA/US@EPA, Kevin McLean/DC/USEPA/US@EPA, Michael
Ling/RTP/USEPA/US@EPA, Scott Mathias/RTP/USEPA/US@EPA

Subject: Re: Fw: April 12, 2012 Letter

(b) (5) DP



Sara Schneeberg
USEPA Office of General Counsel
Phone: 202/564-5592
Fax: 202/564-5603

Mike Thrift--06/06/2012 08:58:56 AM--Uh oh. Instructions? The April 12 letter does not seem to be binding or final, as it doesn't impos

From: Mike Thrift/DC/USEPA/US

To: Kevin McLean/DC/USEPA/US@EPA, Sara Schneeberg/DC/USEPA/US@EPA, Scott
Mathias/RTP/USEPA/US@EPA, Michael Ling/RTP/USEPA/US@EPA, Janet
McCabe/DC/USEPA/US@EPA

Date: 06/06/2012 08:58 AM

Subject: Fw: April 12, 2012 Letter

(b) (5) DP, (b)(5) ACP

Mike Thrift
U.S. Environmental Protection Agency
Office of General Counsel (2344-A)
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

-----Forwarded by Mike Thrift/DC/USEPA/US on 06/06/2012 08:55AM -----

To: Mike Thrift/DC/USEPA/US@EPA
From: Josh Stebbins <josh.stebbins@sierraclub.org>
Date: 06/05/2012 04:11PM
Cc: rukeiley <rukeiley@igc.org>, Zachary Fabish <zachary.fabish@sierraclub.org>
Subject: April 12, 2012 Letter

Mike -

I hope you are well.

Would you have time tomorrow for a quick discussion about the April 12, 2012 SO2 NAAQS implementation letter? As I mentioned at the SO2 NAAQS stakeholder meeting, NGOs would like to review with EPA whether EPA considers the letter a binding, or a final, agency action. This is something that we could perhaps resolve easily.

Thank you

Josh

--

Joshua Stebbins
Managing Attorney
Sierra Club
50 F Street, NW, Eighth Floor
Washington, DC 20001
202 675 6273
202 547 6009

Arvin Ganesan/DC/USEPA/US

06/28/2012 09:23 AM

To: Richard Windsor, "Gina McCarthy", Bob Perciasepe, Diane Thompson, Brendan Gilfillan, Bob Sussman, Laura Vaught
cc: "Janet Woodka"
bcc:
Subject: Re: Al Armendariz

+ janet

Janet, should have included you.

Sent from my Blackberry Wireless Device
Richard Windsor

----- Original Message -----

From: Richard Windsor
Sent: 06/27/2012 03:50 PM EDT
To: Arvin Ganesan; "Gina McCarthy" <mccarthy.gina@epa.gov>; Bob Perciasepe; Diane Thompson; Brendan Gilfillan; Bob Sussman; Laura Vaught
Subject: Re: Al Armendariz

K. Tx.

Arvin Ganesan

Response to Al Armendariz

----- Original Message -----

From: Arvin Ganesan
Sent: 06/27/2012 03:38 PM EDT
To: Richard Windsor; mccarthy.gina@epa.gov; Bob Perciasepe; Diane Thompson; Brendan Gilfillan; Bob Sussman; Laura Vaught
Subject: Al Armendariz

FYI - I just got a call from the Sierra Club. Al has accepted a job with the Sierra Club, and will run their anti-coal campaign in the Texas region. Sierra Club will NOT be making this announcement Friday afternoon, but this has the potential to spill out before then.

Thanks
Arvin



Fwd: Question on NSPS for GHGs
James Martin to: Jim Martin

02/01/2013 01:45 PM

History: This message has been forwarded.

Begin forwarded message:

From: James Martin <jamesbmartin@me.com>
Date: March 25, 2012 3:51:31 PM
To: Vickie Patton <vpatton@edf.org>
Subject: Re: Question on NSPS for GHGs

Good question. San Fran and Seattle would be friendlier forums but CA has no coal plants and WA is phasing out its one plant. Choosing either may create opportunities for the industry to claim EPA is tilting the playing field. Denver would not have that problem plus it is centrally located and pretty easy to get to. So I would have started out by suggesting the other two but end up proposing Denver.

Plus you could play up the RPS and CACJ here, too. The gas industry has way more presence here, too. One last point in its favor - it will make Roy Palmer nervous!

For what it's worth.

Jim

Sent from my iPhone

On Mar 25, 2012, at 3:19 PM, Vickie Patton <vpatton@edf.org> wrote:

Confidential

Hi Jim, EPA may propose NSPS for greenhouse gases for new power plants within next few days (if President decides to go forward with this). There are discussions about potential public hearing venues in the West and some have asked for our confidential input. What do you think makes sense - Denver, Seattle or San Francisco?

This e-mail and any attachments may contain confidential and privileged information. If this was not the intended recipient, please notify the sender immediately by return e-mail. Delete this e-mail and do not disseminate or use of this information by a person other than the intended recipient is unauthorized and may be illegal.

Jenny
Noonan/RTP/USEPA/US
03/30/2012 03:45 PM

To: Joseph Goffman
cc
bcc
Subject: Re: Fw: EPA Hearings for Carbon Protection Rule

Thanks.

Jenny Noonan
Policy Analysis and Communications
EPA's Office of Air Quality Planning and Standards
919/541-0193 (w)
919/358-9562 (e)

Joseph Goffman Suggestions from the Sierra Club. Jos... 03/29/2012 12:59:07 PM

From: Joseph Goffman/DC/USEPA/US
To: Jenny Noonan/RTP/USEPA/US@EPA
Date: 03/29/2012 12:59 PM
Subject: Fw: EPA Hearings for Carbon Protection Rule

Suggestions from the Sierra Club.

Joseph Goffman
Senior Counsel to the Assistant Administrator
Office of Air and Radiation
US Environmental Protection Agency
202 564 3201

----- Forwarded by Joseph Goffman/DC/USEPA/US on 03/29/2012 12:58 PM -----

From: John Coequyt <john.coequyt@sierraclub.org>
To: Joseph Goffman/DC/USEPA/US@EPA
Date: 03/29/2012 12:57 PM
Subject: Re: EPA Hearings for Carbon Protection Rule

Here is our list FYI.

Seattle, Denver, Minneapolis, Boston, Philly, and Virginia

On Thu, Mar 29, 2012 at 10:38 AM, Joseph Goffman <Goffman.Joseph@epamail.epa.gov> wrote:

Haven't chosen cities yet, so please call if you want to discuss. Thanks.

From: John Coequyt [john.coequyt@sierraclub.org]
Sent: 03/28/2012 02:22 PM AST
To: Joseph Goffman
Subject: EPA Hearings for Carbon Protection Rule

Joe:

Do you happen to know where there might be hearings. We have ideas if you are still thinking about it. Who is in charge of this kind of decision?

--

John Coequyt
Sierra Club

202-669-7060

--

John Coequyt
Sierra Club
202-669-7060

Steve Page/RTP/USEPA/US
05/11/2011 12:00 PM

To Gina McCarthy
cc
bcc
Subject Philly Public Hearing

Gina,

This is the info you requested. Attached is a signup sheet.

On Tuesday, May 24th, the Office of Air will hold a public hearing on the proposed Power Plant Mercury and Air Toxics Standards in Philadelphia, Pa. We will hold the hearing at the Westin Philadelphia at Liberty Place (99 South 17th Street) in the Georgian Room. It will begin at 9 am and continue through 8 pm or later to assure that we hear from all interested speakers. Breaks are planned from 12:30 – 2 pm and 5 – 6:30 pm.

As of May 11th, we have 58 speakers registered to testify.

We also expect the Sierra Club, and American Lung Association to set up information tables outside of the hearing room. They will likely also host a press event.


Philadelphia Public Hearing 051011.doc

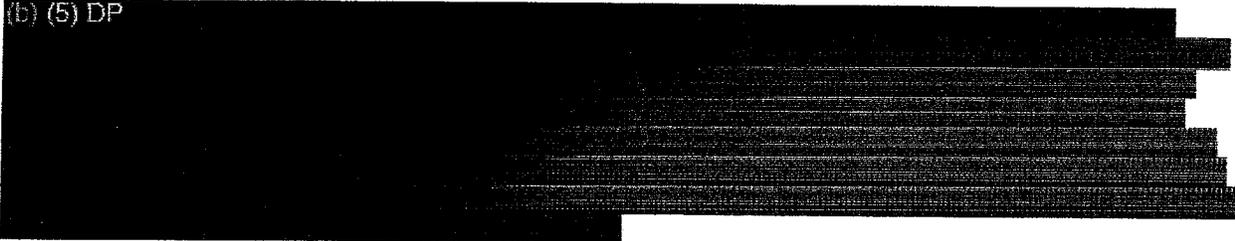
Collaborate
on 'hearings'
(PR)
push

Sam
Napolitano/DC/USEPA/US
10/18/2011 05:34 PM

To Joseph Goffman
cc
bcc
Subject Sierra Club Request for a CSAPR Technical Corrections
Proposal Hearing in TX

Elena Saxon-House from the Sierra Club (based in San Francisco) called Gabrielle Stevens today leaving a VM. She asked if anyone had yet requested a public hearing (they have and its now set for L St on October 28th). She asked if EPA would consider holding the public hearing in a different location from DC, for instance TX. She noted that they have a "lot of people in TX who are concerned" about the revisions.

(b) (5) DP



Notably we received requests to hold the hearing in Washington, per the FR notice, and we are aware that several speakers have made travel plans to be here (e.g., Florida), so at this time we are only planning to hold the hearing here.

Had checked in with Sarah and she thought I should check in with you on this.

John Coequyt
<john.coequyt@siemaclub.org>

06/20/2012 02:38 PM

To: Alex Barron

cc

bcc

Subject: Re: Fwd: Carbon Rule Comments for EPA from Change.org

Thanks for your help

On Wed, Jun 20, 2012 at 2:37 PM, Alex Barron <Barron.Alex@epamail.epa.gov> wrote:
You may also want to talk to someone at the docket office:

[202-566-174](tel:202-566-174)

==

They are the
pros and
masters of
such details.

More info is
at:

<http://www.epa.gov/air/docket.html>

John Coequyt ---06/20/2012 01:41:48 PM---Jonathan and Alex: Can you help out here. Attached are the petition's from Change.Org, many

From: John Coequyt <john.coequyt@siemaclub.org>
To: Jonathan Lubetsky/DC/USEPA/US@EPA, Alex Barron/DC/USEPA/US@EPA
Date: 06/20/2012 01:41 PM
Subject: Fwd: Carbon Rule Comments for EPA from Change.org

Jonathan and Alex:

Can you help out here. Attached are the petition's from Change.Org, many of which were signed before the comment period officially opened. They want to make sure you all include them in your tally of supporters. Who do I need to give these to.

----- Forwarded message -----

From: Marie Bergen <marie.bergen@siemaclub.org>
Date: Wed, Jun 13, 2012 at 4:45 PM
Subject: Carbon Rule Comments for EPA from Change.org

Alex Barron/DC/USEPA/US

To: Kevin Culligan

06/20/2012 02:19 PM

cc

bcc

Subject: Re: How to submit comments -

These are apparently large csv files with lots of names so they are hoping for a human to talk to about the best format, etc.

A

Kevin Culligan

[http://epa.gov/carbonpollutionstandard/...](http://epa.gov/carbonpollutionstandard/)

06/20/2012 01:54:18 PM

From: Kevin Culligan/DC/USEPA/US
To: Alex Barron/DC/USEPA/US@EPA
Date: 06/20/2012 01:54 PM
Subject: How to submit comments -

<http://epa.gov/carbonpollutionstandard/pdfs/howtocomment.pdf>

Alex Barron

Would be handy. Thx. From: Kevin Cull...

06/20/2012 01:51:42 PM

From: Alex Barron/DC/USEPA/US
To: Kevin Culligan/DC/USEPA/US@EPA
Date: 06/20/2012 01:51 PM
Subject: Re: Fw: Carbon Rule Comments for EPA from Change.org

Would be handy. Thx.

Kevin Culligan

I assume you are telling them they need...

06/20/2012 01:51:00 PM

From: Kevin Culligan/DC/USEPA/US
To: Alex Barron/DC/USEPA/US@EPA
Date: 06/20/2012 01:51 PM
Subject: Re: Fw: Carbon Rule Comments for EPA from Change.org

I assume you are telling them they need to submit them to the docket? Can get you the info if you need it.

Alex Barron

fyi ---- Forwarded by Alex Barron/DC/...

06/20/2012 01:45:27 PM

From: Alex Barron/DC/USEPA/US
To: Kevin Culligan/DC/USEPA/US@EPA
Date: 06/20/2012 01:45 PM
Subject: Fw: Carbon Rule Comments for EPA from Change.org

fyi

----- Forwarded by Alex Barron/DC/USEPA/US on 06/20/2012 01:44 PM -----

From: John Coequyt <john.coequyt@sierraciub.org>
To: Jonathan Lubetsky/DC/USEPA/US@EPA, Alex Barron/DC/USEPA/US@EPA
Date: 06/20/2012 01:41 PM
Subject: Fwd: Carbon Rule Comments for EPA from Change.org

Jonathan and Alex:

Alex Barron/DC/USEPA/US
06/20/2012 02:10 PM

To: John Coequyt
cc: Jonathan Lubetsky
bcc:
Subject: Re: Fwd: Carbon Rule Comments for EPA from Change.org

Does this contain what you need?

<http://epa.gov/carbonpollutionstandard/pdfs/howtocomment.pdf>

John Coequyt Jonathan and Alex: Can you help out h... 06/20/2012 01:41:48 PM

From: John Coequyt <john.coequyt@sierraclub.org>
To: Jonathan Lubetsky/DC/USEPA/US@EPA, Alex Barron/DC/USEPA/US@EPA
Date: 06/20/2012 01:41 PM
Subject: Fwd: Carbon Rule Comments for EPA from Change.org

Jonathan and Alex:

Can you help out here. Attached are the petition's from Change.Org, many of which were signed before the comment period officially opened. They want to make sure you all include them in your tally of supporters. Who do I need to give these to.

----- Forwarded message -----

From: Marie Bergen <marie.bergen@sierraclub.org>
Date: Wed, Jun 13, 2012 at 4:45 PM
Subject: Carbon Rule Comments for EPA from Change.org
To: John Coequyt <john.coequyt@sierraclub.org>

Hey John,

Here are the comments to send to the EPA on Carbon. Please let me know if you receive them.

Thanks!

Marie Bergen
Executive Director, Midwest, Ohio Chapter
Sierra Club
[419-9775673](tel:419-9775673)

--
John Coequyt
Sierra Club
[303-452-7650](tel:303-452-7650)

Fall 05
(Folios w/
1/2 at PHS)

To: John Coequyt <john.coequyt@sierraclub.org>

Hey John.

Here are the comments to send to the EPA on Carbon. Please let me know if you receive them.

Thanks!

--

Alex Barron
Regional Director, George Washington
Sierra Club
[202-9773676](tel:202-9773676)

--

John Coequyt

Sierra Club

[202-669-7060](tel:202-669-7060)

[attachment "2012-06-05_changeorg_signatures96028_Tell the EPA- Set limits for Big Coal and corporate polluters.csv" deleted by Alex Barron/DC/USEPA/US] [attachment "2012-06-05_changeorg_signatures124289_Tell the EPA- Put limits on life-threatening carbon pollution.csv" deleted by Alex Barron/DC/USEPA/US]

--

John Coequyt

Sierra Club

202-669-7060

Phil Lorang/RTP/USEPA/US
02/19/2012 03:15 PM

To Janet McCabe
cc Anna Wood, Martha Keating
bcc
Subject Re: Fw: Cleaning up the Haze Report

I don't see it in the docket yet, but I do know it is on Martha's To Do list to get it into the docket if Stephanie does not submit it directly. There are about 200 public comments in the docket so far, although some may be duplicates posted in error.

Phil Lorang, Senior Policy Advisor
Air Quality Policy Division, OAQPS, EPA
919-541-5463

Janet McCabe From: Janet McCabe/DC/USEPA/US T... 02/19/2012 02:37:04 PM

From: Janet McCabe/DC/USEPA/US
To: Phil Lorang/RTP/USEPA/US@EPA, Anna Wood/RTP/USEPA/US@EPA
Date: 02/19/2012 02:37 PM
Subject: Fw: Cleaning up the Haze Report

Phil--I assume this is going in the docket for the Better than BART rulemaking? It lays out the group's comments on the better than BART rule...

Janet McCabe
Principal Deputy Assistant Administrator
Office of Air and Radiation, USEPA
Room 5426K, 1200 Pennsylvania Avenue NW
Washington, DC 20460
202-564-3206
mccabe.janet@epa.gov

-----Forwarded by Janet McCabe/DC/USEPA/US on 02/19/2012 02:34PM -----
To: Gina McCarthy/DC/USEPA/US@EPA, Janet McCabe/DC/USEPA/US@EPA, Phil Lorang/RTP/USEPA/US@EPA
From: Stephanie Kodish <skodish@npca.org>
Date: 01/31/2012 09:35AM
Subject: Cleaning up the Haze Report

(See attached file: Cleaning up the Haze Report.pdf)

Dear Gina, Janet, Phil:

Attached please find the report, "Cleaning up the Haze: Protecting People and America's Treasured Places." It is being released today by the Appalachian Mountain Club, Clean Air Task Force, Earthjustice, Midwest Environmental Defense Center, Minnesota Center for Environmental Advocacy, National Parks

To: Joel Beauvais/DC/USEPA/US@EPA, Shannon Kenny/DC/USEPA/US@EPA, "Nicole Owens" <Owens.Nicole@epamail.epa.gov>, "Alexander Cristofaro" <Cristofaro.Alexander@epamail.epa.gov>
Date: 04/21/2011 10:01 AM
Subject: Re: Has EPA officially reported the Boiler air toxics rule to Congress?

Alex and nicole- can you help?

A

Joel Beauvais

----- Original Message -----

From: Joel Beauvais
Sent: 04/21/2011 09:57 AM EDT
To: Shannon Kenny; Alex Barron
Subject: Fw: Has EPA officially reported the Boiler air toxics rule to Congress?

Is OP the office responsible for reporting final rules to Congress? Do you guys know the answer to this question?

----- Forwarded by Joel Beauvais/DC/USEPA/US on 04/21/2011 09:56 AM -----

From: David McIntosh/DC/USEPA/US
To: Joel Beauvais/DC/USEPA/US@EPA, Janet McCabe/DC/USEPA/US@EPA
Cc: Lorie Schmidt/DC/USEPA/US@EPA
Date: 04/21/2011 09:43 AM
Subject: Fw: Has EPA officially reported the Boiler air toxics rule to Congress?

Hi Joel and Janet. Do we have a specific date when, it is EPA's position, the Agency reported the final boiler air toxics rule to Congress for Congressional Review Act purposes?

----- Forwarded by David McIntosh/DC/USEPA/US on 04/21/2011 09:42 AM -----

From: Lyndsay Moseley <Lyndsay.Moseley@sierraclub.org>
To: David McIntosh/DC/USEPA/US@EPA
Date: 04/20/2011 05:28 PM
Subject: Has EPA officially reported the Boiler air toxics rule to Congress?

Hi David:

I'm trying to track down whether the Industrial Boiler air toxics rule is vulnerable to a CRA threat, or if the Cement air toxics rule is the only air toxics rule that's vulnerable. We had previously heard that EPA planned to report the rule to Congress when it was published in the federal register. Can you confirm if/when the rule was reported to Congress? Thank you in advance for your assistance.

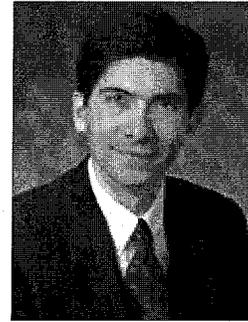
Lyndsay Moseley
Federal Policy Representative
Sierra Club
408 C St. NE
Washington, DC 20002
tel: 202-546-4581
fax: 202-547-6009

Appendix B

Al Armendariz Resume

ALFREDO "AL" ARMENDARIZ

Research Associate Professor
Southern Methodist University
PO Box 750340
Dallas, TX 75275
mobile: 972-365-8370
aja@engr.smu.edu
<http://lyle.smu.edu/~aja/index.html>



EDUCATION

Massachusetts Institute of Technology - Chemical Engineering	S.B. 1993
University of Florida - Environmental Engineering	M.E. 1995
University of North Carolina at Chapel Hill, School of Public Health - Environmental Engineering	Ph.D. 2002

PROFESSIONAL EXPERIENCE

2008-present, Research Associate Professor, Department of Environmental and Civil Engineering, Southern Methodist University, Dallas, TX.

2002-2008, Assistant Professor, Department of Environmental and Civil Engineering, Southern Methodist University, Dallas, TX.

2002, Environmental Scientist, Multimedia Planning and Permitting Division, Environmental Protection Agency, Region 6, Dallas, TX.

1995-1998, Chemical Engineer, Radian Corporation - now URS Corp., Morrisville, NC. Permitting and air quality compliance work for natural gas utilities (Columbia Gas), pulp and paper mills (International Paper), and wood products companies (Masonite Corporation).

1992-1993, Research Assistant, MIT Center for Global Change Science, Laboratory for Atmospheric Chemistry, Cambridge, MA.

PUBLIC HEALTH COMMUNITY SERVICE

Member of the advisory board of the Texas office of the Environmental Defense Fund (EDF).

- working closely with EDF staff to study the local and regional air quality impacts from oil and gas development in the Dallas-Fort Worth area.

Technical advisor to citizen groups working on air quality issues in Texas and Colorado.

- Rocky Mountain Clean Air Action and WildEarth Guardians (Denver, CO) – cement kiln emissions, ozone smog, regional haze.
- Downwinders at Risk (Midlothian, TX) – cement kiln emissions, ozone smog, air toxics.

Summer instructor in the "ExxonMobil Green Team" program for high school students, coordinated by the Volunteer Center of North Texas.

Invited testimony to the Texas State Legislature, 80th and 81st Legislative Sessions, Senate, Natural Resources, Senate Transportation, and House Environmental Regulation Committees, 2007 - 2009.

COMMUNITY SERVICE REFERENCES

Tom "Smitty" Smith
Public Citizen
Austin, Texas
512-797-8468

Cherelle Blazer
Environmental Defense Fund (EDF)
Dallas, Texas
214-604-0425

Ramon Alvarez, Ph.D.
Environmental Defense Fund (EDF)
Austin, Texas
512-788-2246

Jeremy Nichols
WildEarth Guardians
Denver, Colorado
720-563-9306

Neil Carmen, Ph.D.
Sierra Club
Austin, Texas
512-472-1767

Jim Schermbeck
Downwinders at Risk
Midlothian, Texas
806-787-6567

EPA/STATE REFERENCES

Al Linero, P.E.
Special Projects Administrator
Florida Department of Environmental
Protection
Tallahassee, Florida
850-921-9523

Jacky Rosati, Ph.D.
National Homeland Security Research
Center
Environmental Protection Agency
RTP, North Carolina
919-541-9429

Bonnie Braganza, P.E.
Air Quality Permitting
Environmental Protection Agency
– Region 6
Dallas, Texas
214-665-7340

Greg Pashia
Office of Solid Waste and Emergency
Response – Tribal Programs
Environmental Protection Agency
Dallas, Texas
214-665-8439

PERSONAL REFERENCES

Rep. Lon Burnam – Texas State Representative, District 90, Fort Worth, Texas. I worked closely with Representative Burnam and his staff during 2009 legislative session to craft bills that would reduce emissions from oil & gas development and cement kilns, as well as improve state computer databases of air emissions. 512-463-0740.

Dean Geoffrey Orsak – School of Engineering, SMU, Dallas, Texas. I have known Geoffrey Orsak since joining the faculty in 2002, and we've had a close working relationship since he became in Dean of Engineering in 2004. 972-333-0226.

Chris Wanken – Former special assistant to Gene Sperling in the National Economic Council in the Clinton White House – personal friends since 2004 when we worked together on voter mobilization efforts in the Dallas area. 214-770-9087

HONORS AND AWARDS

Teaching Awards: Outstanding Graduate Faculty, Department of Environmental and Civil Engineering, 2003-2004, 2004-2005, 2006-2007.

Teaching Award: Outstanding Undergraduate Faculty, Department of Environmental and Civil Engineering, 2003-2004.

Royster Society Fellowship (UNC)

National Institute of Environmental Health Sciences Pre-doctoral Traineeship (UNC)

Camp Dresser & McKee Graduate Fellowship (UF)

Florida Section AWMA Scholarship (UF)

National Merit Hispanic Scholar (MIT)

Honor Societies:

Delta Omega (public health)

Tau Beta Pi (engineering)

Phi Kappa Phi (general academic)

PUBLICATIONS AND PRESENTATIONS

Kim J., Kim K., Armendariz A.J., Al-Sheikhly M. "Electron Beam Irradiation for Mercury Oxidation and Mercury Emissions Control." under review by the *ASCE Journal of Environmental Engineering*.

Kim J., Lim Y., Son Y., Armendariz A.J. "Isoprene emission rates from deciduous trees in Korea and their potential importance to air quality." under review by *Chemosphere*.

Kim J., Armendariz A.J., Kim K., Al-Sheikhly M. "Mercury Oxidation with Electron Beam Irradiation," Proceedings of the Power Plant Air Pollutant Control MEGA Symposium, Baltimore, MD, August 25-28, 2008.

Armendariz A., Garcia A., Alvarez R., McMillan M., Feldman H. "Attainment Strategies for the New Ozone Standard," Proceedings of the Air and Waste Management Association's Annual Conference and Exhibition, Portland, OR, June 24-26, 2008.

A. Farnoud, Armendariz A. "Diesel Exhaust Treatment Using an Electrostatic Precipitator," Proceedings of the Air and Waste Management Association's Annual Conference and Exhibition, Portland, OR, June 24-26, 2008.

Armendariz A.J., Farnoud A, Huang C. "Using Electrostatic Precipitation to Control Diesel Exhaust Particulate Emissions," Proceedings of the 12th Mine Ventilation Symposium, Reno, NV, June 9-11, 2008.

Armendariz A., K. Gowda, G. Carney, "Evaluation of a Technique for Detection of Petroleum Hydrocarbons in Soils", *Journal of Environmental Engineering* 134(2), 145-149, 2008.

Farnoud A., A. Armendariz, "Fundamental Electrical Properties of a Small-Scale Electrostatic Precipitator," Proceedings of the American Association for Aerosol Research Annual Conference, Reno, Nevada, September 24-28, 2007.

Farnoud A., A. Armendariz, "A Compact System for the Generation & Sampling of Diesel Particulate Matter," Proceedings of the American Association for Aerosol Research Annual Conference, Reno, Nevada, September 24-28, 2007.

Farnoud A., A. Armendariz, " Electrostatic Control of Particulate Emissions from Diesel-Powered Machinery," Proceedings of the American Association for Aerosol Research Annual Conference, Reno, Nevada, September 24-28, 2007.

Farnoud A., A. Armendariz, "Design and Performance of a Small-Scale Electrostatic Precipitator for Diesel Particulate Control," Proceedings of the Annual Conference of the Air and Waste Management Association, Pittsburgh, PA, June 26-29, 2007.

Farnoud A., A. Armendariz, "A Compact System for the Generation and Sampling of Diesel Exhaust Particulate," Proceedings of the Annual Conference of the Air and Waste Management Association, Pittsburgh, PA, June 26-29, 2007.

Armendariz A. "Apparatus and Methods for Performing Ozone HVAC Filtration." Provisional Patent Application # 300814-US20Prov, 2007.

Armendariz A., K. Gowda, G. Carney, "A Technique for Hydrocarbon Soil Assessments in Katrina Impacted Areas and in other Large Site Characterization Programs", Proceedings of the Annual Conference of the Air and Waste Management Association, New Orleans, June 20-23, 2006.

Dorsey N. and A. Armendariz, "Control of Microbial Growth in Metalworking Fluids," Proceedings of the American Association for Aerosol Research Annual Conference, Austin, Texas, October 17-21, 2005.

Armendariz A. "A Novel Technique for Determining Hydrocarbon Contamination in Soils," U.S. Environmental Protection Agency, Region 6, Environmental Research Seminar, Dallas, Texas, invited talk, 2004.

Armendariz A., D. Leith, M. Boundy, R. Goodman, L. Smith, G. Carlton, "Sampling and analysis of aircraft engine cold start particles and demonstration of an electrostatic personal particle sampler", *American Industrial Hygiene Association Journal* 64: 777-784, 2003.

Armendariz A., and D. Leith, "A personal sampler for aircraft engine cold start particles: laboratory development and testing", *American Industrial Hygiene Association Journal* 64: 755-762, 2003.

Armendariz A. and D. Leith, "Concentration measurement and counting efficiency for the aerodynamic particle sizer 3320", *Journal of Aerosol Science* 33: 133-148, 2002.

Armendariz A. and D. Leith, "Concentration measurement and counting efficiency for the aerodynamic particle sizer 3320," Proceedings of the American Association for Aerosol Research Annual Conference, Portland, Oregon, 2001.

Armendariz A., D. Leith, M. Boundy, "Testing an electrostatic sampler for semi-volatile particles: field tests," Proceedings of the American Association for Aerosol Research Annual Conference, St. Louis, Missouri, 2000.

Armendariz A., D. Leith, M. Boundy, "Sampling and analysis of jet engine start-up aerosol," Proceedings of the American Industrial Hygiene Conference and Exposition, Orlando, Florida, 2000.

Armendariz A., D. Leith, M. Boundy, "Testing an electrostatic sampler for semi-volatile particles: laboratory tests." Proceedings of the American Association for Aerosol Research, Annual Conference, St. Louis, Missouri, 2000.

Armendariz A., J. LaPointe, "Effect of fluid properties on measurement error in the API Aerosizer," American Association for Aerosol Research, Annual Conference, Cincinnati, Ohio, poster presentation, 1998.

Armendariz A., E. Allen, J. Kim, "Biogenic hydrocarbon emissions: development of a sampling technique and potential impacts on ambient air quality," Florida Environmental Expo, Tampa, Florida, poster presentation, 1994.

FUNDED RESEARCH PROPOSALS

[under evaluation] City of Dallas, Sanitation Department, "Air Quality Compliance Assurance and Emission Reduction Techniques for Cell 6A at the McCommas Bluff Landfill." \$51,000, December 2008-November 2009, co-PI.

Eight Northern Indian Pueblos Council of New Mexico, Environmental Department. "Detection of Petroleum Hydrocarbons in Contaminated Soils," \$56,809, May 2009 – April 2010, PI.

Environmental Defense Fund (EDF), "Emissions Inventory for Oil and Gas Production Activities in the Barnett Shale Area and Opportunities for Cost-Effective Emissions Reductions." July 2008 – September 2008, PI

National Science Foundation, Major Research Instrumentation, "Acquisition of a Volumetric, 3-Component Particle Displacement and Velocity Measurement System for Mechanical and Environmental Engineering Measurements," \$196,490, August 2008 – July 2010, co-PI.

Centers for Disease Control and Prevention (CDC) / National Institute for Occupational Safety and Health (NIOSH), "Control of Workplace Diesel Exhaust Particulate," \$101,050, August 2007 - July 2008, PI.

Centers for Disease Control and Prevention (CDC) / National Institute for Occupational Safety and Health (NIOSH), "Control of Workplace Diesel Exhaust Particulate," \$98,865, August 2006 - July 2007, PI.

Centers for Disease Control and Prevention (CDC) / National Institute for Occupational Safety and Health (NIOSH), "Control of Workplace Diesel Exhaust Particulate," \$99,117, August 2005 - July 2006, PI.

Office of Environmental Services of the Cherokee Nation of Oklahoma, via a grant from the Environmental Protection Agency (EPA), "Development of a Field Test for Detecting Hydrocarbons in Soils," \$45,000, June 2004 - June 2005, PI.

MEMBERSHIP IN SCIENTIFIC AND PROFESSIONAL SOCIETIES

American Association for the Advancement of Science

Air and Waste Management Association

American Industrial Hygiene Association

American Association for Aerosol Research

JOURNAL, PROPOSAL, TEXTBOOK REVIEWING

U.S. Department of Agriculture, State Research, Education, and Extension Service, Proposal Reviewer, 2009.

National Science Foundation Graduate Research Fellowship Program, Panelist, 2007, 2009.

Journal of the Air and Waste Management Association, Peer Reviewer, 2006, 2007, 2008, 2009.

Environmental Science and Technology, Peer Reviewer, 2007.

Visualizing Weather and Climate, 2008 (textbook), Book Reviewer, John Wiley and Sons, publishers.

Weather and Climate, 2007 (textbook), Book Reviewer, John Wiley and Sons, publishers.

Understanding Weather and Climate, 2007 (textbook), Book Reviewer, Prentice Hall, publishers.

U.S. Civilian Research and Development Foundation, Proposal Reviewer, 2006.

UNIVERSITY COMMITTEES AND SERVICE

Instructor for Fundamentals of Engineering Exam (EIT) Mathematics Review, 2006-2009,

Faculty sponsor of SMU student chapter of Texas Society of Professional Engineers and volunteer for TSPE's annual "Mathcounts" competition in Dallas, 2005-2009.

Engineering Dean's Research Development Council, 2004, 2005, 2006, 2007.

Faculty search committee - Environmental Engineering, 2006, 2007.

Faculty search committee - ENCE Department Chair, 2002, 2003.

Faculty search committee - Transportation Engineering, 2003, 2004.

Faculty search committee - Geotechnical Engineering, 2002.

Coordinated successful proposal to start Ph.D. program in ENCE department, 2003, 2004.

Faculty participant in Mustang Corral, 2003.

Interviewer for President's Scholars Program, 2002, 2006.

Engineering Computer and Programming Committee, member, 2003, 2004.

Presentation to the Math, Science and Technology Readiness Institute Summer Camps, 2005.

RESEARCH ADVISOR TO GRADUATE STUDENTS

Chenbo Huang (former M.S. student – graduated December 2008)

Ali Farnoud (former Ph.D. student - graduated May 2008)

Whitney Boger (former M.S. student - graduated August 2007)

Kushala M.C. Gowda (former M.S. student - graduated May 2005)

Nancy Dorsey (former M.S. student – graduated August 2004)

PROFESSIONAL SOCIETY ACTIVITIES

Air and Waste Management Association, 2008 Annual Conference, "Attainment Strategies for the New Ozone Standard" - organizer and panel session chair.

American Association for Aerosol Research, conference session chair, October 2005.

American Association for Aerosol Research, Chair - Control Technology Working Group, 2004-2005.

American Association for Aerosol Research, Vice-Chair - Control Technology Working Group, 2003-2004.

American Association for Aerosol Research, conference session co-chair, October 2002.