UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

LANDMARK LEGAL FOUNDATION
19415 Deerfield Ave, Ste. 312
Leesburg, VA 20176

Plaintiff,

vs.

ENVIRONMENTAL PROTECTION AGENCY
1301 Constitution Ave, NW
Washington, DC 20004

Defendant.

Case No. 1:12-cv-01726 (RCL)

NOTICE OF FILING
DEPOSITION EXHIBITS

Plaintiff Landmark Legal Foundation ("Landmark") respectfully files the attached exhibits as marked during the course of depositions taken pursuant to the Court's August 14, 2014 Discovery Order.

On January 28, 2015, during oral hearing on Plaintiff's Motion for Spoliation Sanctions, the Court requested that Plaintiff file a copy of all marked deposition exhibits. Defendant Environmental Protection Agency has not objection to this filing.

Landmark provides below an index of marked deposition exhibits, with a title of the exhibit and a brief descriptor of the document. To the extent these exhibits are already in the record, Landmark provides reference to where the exhibit appears and the exhibit's PACER identification number.

During the course of discovery, Plaintiff erroneously marked two exhibits as "Exhibit #53." These two exhibits are identified below as Exhibit #53 and Exhibit #53A but both appear in the record as "Exhibit 53."

Plaintiff also provides an additional cross-listing of deposition exhibits attached to its Memorandum In Support of Motion for Sanctions. To the extent these exhibits are already in the record, Landmark provides reference to where the exhibit appears and the exhibit's PACER identification number.

Deposition Number	Title of Exhibit	Descriptor of Exhibit
Deposition Exhibit #1:	EPA Prod1_0353	Attached as Exhibit 17 to Plaintiff's Memorandum In Support of Motion for Sanctions (PACER Doc. 46-18). "ACTION REQUIRED – New FOIA Request (HQ-FOIA-01861-12)"
Deposition Exhibit #3	EPA Prod1_0382	Email from Aaron Dickerson to Jonathan Newton.
Deposition Exhibit #4	"Please respond to lisapjackson@verizon.net	Attached as Exhibit 24 to Plaintiff's Memorandum In Support of Motion for Sanctions (PACER Doc. 46-27). Email sent from Lisa P. Jackson's Verizon account.
Deposition Exhibit #5	01268-EPA-3911	Email from Aaron Dickerson to Richard Windsor.
Deposition Exhibit #8	EPA Prod1_0335	Attached as Exhibit 23 to Plaintiff's Memorandum In Support of Motion for Sanctions (PACER Doc. 46-26). EPA emails, 9 pages.
Deposition Exhibit #17	EPA Prod1_0068	Email from Jonathan Newton to Eric Wachter.
Deposition Exhibit # 19	EPA Prod1_0239	Attached as Exhibit 15 to Plaintiff's

		Memorandum In Support of Motion for Sanctions (PACER Doc. 46-16). Email from Jonathan Newton to Kevin Miller.
Deposition Exhibit #21	EPA Prod1_0403	Attached as Exhibit 16 to Plaintiff's Memorandum In Support of Motion for Sanctions (PACER Doc. 46-17). Email from Jonathan Newton to Sabrina Hamilton.
Deposition Exhibit #25	EPA-32	Exhibit 2 to Plaintiff's Opposition to Defendant's Motion for Summary Judgment (PACER Doc. 31-2).
Deposition Exhibit #26	FOIA#FOI-01268	Email forwarding news article, "EPA Considers Risks of Gas Extraction."
Deposition Exhibit #27	EPA@Work	EPA memo transparency.
Deposition Exhibit #28	EPA-169	Series of emails from Cynthia Giles to Bob Sussman.
Deposition Exhibit #30	Landmark FOIA request	Attached as Exhibit 1 to Plaintiff's Complaint (PACER Doc. 1-3). Plaintiff's Aug. 17, 2012 FOIA request.
Deposition Exhibit #32	Declaration of Eric E. Wachter	Exhibit 1 to Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction (PACER Doc. 16-1).
Deposition Exhibit #33	Declaration of Eric E. Wachter	Exhibit 1 to Defendant's Motion for Summary Judgment (PACER Doc. 30-1).
Deposition Exhibit #34	Release 5-HQ-FOI-01268-12	Email from Richard Windsor to Alison Taylor.
Deposition Exhibit #35	Release 3-HQ-FOI-01268-12	Email from Richard Windsor to David McIntosh, "Lisa At Home".
Deposition Exhibit #36	Release 3-HQ-FOI-01268-12	Email from Richard Windsor to "Lisa At Home."
Deposition Exhibit #37	Supplemental Declaration	Exhibit 7 to Defendant's Reply to

	Of Eric E. Wachter	Plaintiff's Response to Defendant's Motion for Summary Judgment (PACER Doc. 35-7).
Deposition Exhibit #39	Memorandum Opinion	Memorandum Opinion denying Plaintiff's Motion for Preliminary Injunction (PACER Doc. 19).
Deposition Exhibit #40	Defendant's Response To Plaintiff's First Set Of Interrogatories	Attached as Exhibit 9 to Plaintiff's Memorandum In Support of Motion for Sanctions (PACER Doc. 46-10).
Deposition Exhibit #41	Defendant's Response To Plaintiff's Second Set Of Interrogatories	Attached as Exhibit 11 to Plaintiff's Memorandum In Support of Motion for Sanctions (PACER Doc. 46-12).
Deposition Exhibit #42	Michael O'Neill	Email from Heather Graham Oliver to Richard P. Hutchison and Michael J. O'Neill.
Deposition Exhibit #46	Reply Memorandum	Reply Memorandum In Further Support of Defendant's Motion for Summary Judgment (PACER Doc. 35).
Deposition Exhibit #48	Correspondence Management System	CMS Document.
Deposition Exhibit #53	EPA Prod1_0396	Attached as Exhibit 5 to Plaintiff's Memorandum In support of Motion for Sanctions (PACER Doc. 46-6). Email from Jennifer Hammit to Eric Wachter, Jonathan Newton.
Deposition Exhibit #54	EPA Prod1_0504	Attached Exhibit 19 to Plaintiff's Memorandum In Support of Motion for Sanctions (PACER Doc. 46-20). Email from Jonathan Newton to Nena Shaw.
Deposition Exhibit #55	Records and ECMS Briefing	Briefing for Incoming EPA Political Appointees 2009.
Deposition Exhibit #56	Memorandum Opinion	Memorandum Opinion denying Defendant's Motion for Summary Judgment (PACER Doc. 39).

Deposition Exhibit #57	Jan Goldman-Carter Email	Email from National Wildlife Federation official to EPA officials.
Deposition Exhibit #58	May 14, 2013 Supplemental Release	Email from Bob Perciasepe to Gina McCarthy.
Deposition Exhibit #60	Washington Post Article	December 15, 2013 news article.
Deposition Exhibit #61	Pace Environmental Law Review	Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House.
Deposition Exhibit #62	ACA Publication	Length of Rule Reviews by the Office of Information and Regulatory Affairs.
Deposition Exhibit #63	CEI v. EPA (Case No. 1:12-cv-01617)	Plaintiff's Memorandum In Opposition To Defendant's Motion For Summary Judgment.
Deposition Exhibit #63A	RegBlog	Inside Baseball: The Nature of OIRA's Work.
Deposition Exhibit #85	The Daily Caller	April 10, 2013 news article.
Deposition Exhibit #86	The New York Times	Nov. 16, 2011 news article.

Plaintiff presents below a listing of deposition exhibits attached as those exhibits are attached to its **Memorandum In Support of Motion for Sanctions**. PACER document identification numbers are contained in parenthesis.

Exhibit 5 (PACER Doc. 46-6)	Deposition Exhibit #53
Exhibit 15 (PACER Doc. 46-16)	Deposition Exhibit #19
Exhibit 16 (PACER Doc. 46-17)	Deposition Exhibit #21
Exhibit 17 (PACER Doc. 46-18)	Deposition Exhibit #1
Exhibit 19 (PACER Doc. 46-20)	Deposition Exhibit #54

Exhibit 23 (PACER Doc. 46-26)	Deposition Exhibit #8
Exhibit 24 (PACER Doc. 46-27)	Deposition Exhibit #4

Respectfully submitted,

DATED: January 29, 2015

Landmark Legal Foundation

s/ Michael J. O'Neill

Michael J. O'Neill #478669
Mark R. Levin
Landmark Legal Foundation
19415 Deerfield Ave
Suite 312
Leesburg, VA 20176
703-554-6100
703-554-6119 (facsimile)
mike@landmarklegal.org

Richard P. Hutchison
Landmark Legal Foundation
3100 Broadway, Suite 1210
Kansas City, MO 64111
816-931-5559
816-931-1115 (facsimile)
rpetehutch@aol.com

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and accurate copy of the foregoing Memorandum of Points and Authorities In Support of Plaintiff's Preliminary Injunction was filed electronically with the Court by using the CM/ECF system on this 29th day of January, 2015. Parties that are registered CM/ECF users will be served by the District Court's CM/ECF system.

/s/ Michael J. O'Neill
Michael J. O'Neill
Attorney for Plaintiff

EPA PROD1_0353

Re: Fw: ACTION REQUIRED - New FOIA Request (HQ-FOI-01861-12) (Update and FAQ)
Aaron Dickerson to: Jonathan Newton 11/16/2012 04:06 PM

Hi Jonathan

I searched the Richard Windsor account as well as verbally spoke with the Administrator and did not find any responsive documents. Thanks.

FOIA Hey Aaron and Nena, Sorry for the delay, this sh... 11/14/2012 03:21:33 PM

From: FOIA
To: Aaron Dickerson/DC/USEPA/US@EPA, Nena Shaw/DC/USEPA/US@EPA
Cc: Eric Wachter/DC/USEPA/US@EPA
Date: 11/14/2012 03:21 PM
Subject: Fw: ACTION REQUIRED - New FOIA Request (HQ-FOI-01861-12) (Update and FAQ)
Sent by: Jonathan Newton

Hey Aaron and Nena,

Sorry for the delay, this should have gone to both of you since the request requires a search of both the Administrator's and the Deputy's email accounts.

There is a collection database; however, after much discussion we decided against an automated search. A few search terms have been suggested, but the list is not exhaustive. The requestor gave a long description in their request so even though universal search terms may be difficult to establish, it is the type of memo/policy that someone should remember.

Feel free to give me a call so I can address the questions you probably have.

Thanks,
Jonathan
(202) 566-1981

—— Forwarded by Jonathan Newton/DC/USEPA/US on 11/14/2012 02:59 PM ——

From: FOIA
To: Marna McDermott/DC/USEPA/US@EPA
Date: 10/31/2012 11:24 AM
Subject: Fw: ACTION REQUIRED - New FOIA Request (HQ-FOI-01861-12) (Update and FAQ)
Sent by: Jonathan Newton

—— Forwarded by Jonathan Newton/DC/USEPA/US on 10/31/2012 11:23 AM ——

From: FOIA
To: Sabrina Hamilton/DC/USEPA/US@EPA, Karen Johnson/DC/USEPA/US@EPA, Diane Salahuddin/DC/USEPA/US@EPA, Zelma Taylor/DC/USEPA/US@EPA, Maya Lee/DC/USEPA/US@EPA, Linda Person/DC/USEPA/US@EPA, Barbara Bruce/DC/USEPA/US@EPA, Shushona Hyson/OIG/USEPA/US@EPA, Vanessa Fleeton/DC/USEPA/US@EPA, Abbie Agner/DC/USEPA/US@EPA, Wanda McLendon/DC/USEPA/US@EPA, Diane Jones-Coleman/DC/USEPA/US@EPA
Cc: NancyE Morley/DC/USEPA/US@EPA, Robin Kime/DC/USEPA/US@EPA, Eric Wachter/DC/USEPA/US@EPA, Brian Hope/DC/USEPA/US@EPA, Fredrick No/DC/USEPA/US@EPA, Jennifer Hammitt/DC/USEPA/US@EPA
Date: 10/25/2012 06:04 PM
Subject: Fw: ACTION REQUIRED - New FOIA Request (HQ-FOI-01861-12) (Update and FAQ)

DEPOSITION
EXHIBIT NUMBER Dickerson 1
DATE 2.11.14 REPORTER ML
ART MILLER & ASSOCIATES

EPA PROD1_0354

Sent by: Jonathan Newton

Thanks to those that have already responded to this request. We received a few questions about the search request (below) that was circulated on Tuesday. Here are some of the responses in case others have the same concerns:

- The message below is merely a template used by the Office of the Administrator to initiate a search for records (other AAships will have different formats).
- October 30th is an internal deadline for the records search. If you cannot meet the deadline, please let us know and submit your records as soon as possible.
- Any records proposed for release will be reviewed by both AO and OGC.
- There will not be an "automated search" for this request. However, potential key words for a manual search could include: "draft or proposed" within the same sentence as "rule, regulation or policy." Those suggestions are not meant to be exhaustive. The original request elaborates upon the records that are sought.

Note: Here is a link to a collection database for this request; records can be copied into this database. ===> <=== Although you will receive a confirmation that records have been copied, you may not be able to view those records inside the database.

Please feel free to call or email if you have additional questions. Thanks again!
Jonathan

Jonathan V. Newton, Esq.
U.S. EPA, Office of the Executive Secretariat
1200 Pennsylvania Avenue, NW (MC 1105A)
Washington, D.C. 20460
(202) 566-1981

---- Forwarded by Jonathan Newton/DC/USEPA/US on 10/25/2012 03:30 PM ----

From: FOIA
To: Sabrina Hamilton/DC/USEPA/US@EPA, Karen Johnson/DC/USEPA/US@EPA, Diane Salahuddin/DC/USEPA/US@EPA, Zelma Taylor/DC/USEPA/US@EPA, Maya Lee/DC/USEPA/US@EPA, Linda Person/DC/USEPA/US@EPA, Barbara Bruce/DC/USEPA/US@EPA, Shushona Hyson/OIG/USEPA/US@EPA, Vanessa Fleeton/DC/USEPA/US@EPA, Abbie Agner/DC/USEPA/US@EPA, Wanda McLendon/DC/USEPA/US@EPA, Diane Jones-Coleman/DC/USEPA/US@EPA
Cc: NancyE Morley/DC/USEPA/US@EPA, Robin Kime/DC/USEPA/US@EPA, Eric Wachter/DC/USEPA/US@EPA, Brian Hope/DC/USEPA/US@EPA, Fredrick No/DC/USEPA/US@EPA, Jennifer Hammitt/DC/USEPA/US@EPA
Date: 10/23/2012 01:35 PM
Subject: ACTION REQUIRED - New FOIA Request (HQ-FOI-01861-12)
Sent by: Jonathan Newton

Due Date: October 30, 2012

Requestor:

- Landmark Legal Foundation

Request Number:

- HQ-FOI- 01861-12 (EPA-HQ-2012-001269)

EPA PROD1_0355

Request Description:

- Records relating to proposed rules or regulations that have not been finalized by EPA between January 1, 2012 and August 17, 2012.
- Records reflecting an order, direction or suggestion, that regulations (or comments on regulations) should be delayed until after November 2012.
- Note: This request has been modified. The search only applies to Assistant Administrators, Deputy Assistant Administrators and Chiefs of Staff in EPA Headquarters.
- The search will also include the Associate Administrator and Deputy Associate Administrator(s) for the Office of Policy.
- [attachment "HQ-FOI-01861-12 (120821) Request Letter.pdf" deleted by Aaron Dickerson/DC/USEPA/US]

Instructions:

- FOIA Coordinators, please forward this notice to the principals and/or assistants within your AA-ship who will complete this search.

If you have responsive records:

- For billing purposes, document the amount of time you spend searching for records and your grade or hourly wage.
- Note: Whenever possible, records should be submitted electronically. Before printing, contact the AO FOIA Coordinators for options on electronic submission.

If you do not have responsive records:

- Respond to this message or send an e-mail to FOIA@epa.gov confirming that you searched for but found no responsive records.

If you have any questions about this request respond to this e-mail or contact Jonathan Newton at (202) 566-1981, or Fredrick No at (202) 564-2793.

EPA PROD1_0382

Dickerson, Aaron

From: Newton, Jonathan
Sent: Tuesday, April 30, 2013 10:03 AM
To: Dickerson, Aaron
Subject: FW: HQ-FOI-01861-12 Secondary Account No Records Response
Attachments: HQ-FOI-01861-12 Landmark - Aaron Response.pdf

Hey Aaron,

Did Eric touch base with you about this search?

From: Newton, Jonathan
Sent: Monday, April 29, 2013 4:33 PM
To: Wachter, Eric; Hammitt, Jennifer; Miller, Kevin
Subject: HQ-FOI-01861-12 Secondary Account No Records Response

Attached

Jonathan V. Newton, Attorney-Advisor
U.S. EPA, Office of the Executive Secretariat
1200 Pennsylvania Avenue, NW (MC 1105A)
Washington, D.C. 20460
(202) 566-1981

DEPOSITION
EXHIBIT NUMBER Dickerson 3
DATE 2-11-14 REPORTER MC
ART MILLER & ASSOCIATES

[redacted]
04/14/2011 12:45 PM
Please respond to
lisapjackson@verizon.net

To: sha Johnson; Brendan Gilfillan, Michael Moats, Seth Oster; Adora Andy, David McIntosh, Michael Goo, Gina McCarthy
cc:
bcc:
Subject: Fw: TIME's Bryan Walsh on his Sierra Club-sponsored mercury test.

DEPOSITION
EXHIBIT NUMBER Dickerson 4
DATE
REPORTER
ART MILLER & ASSOCIATES

This is cool amplification. Can we tweet this? Tx.

Sent from my Verizon Wireless BlackBerry

From: Michael Brune <Michael.Brune@sierraclub.org>
Date: Wed, 13 Apr 2011 19:13:27 -0700
To: [redacted]
Subject: Fw: TIME's Bryan Walsh on his Sierra Club-sponsored mercury test
Greetings from Puerto Rico! Thought you might like this...

Michael Brune
Executive Director
Sierra Club
415-977-5562

Follow on Facebook and Twitter
www.sierraclub.org

---- Forwarded by Michael Brune/Sierraclub on 04/13/2011 07:11 PM ----

From: David Graham-Casa <david.grahamcasa@sierraclub.org>
To: "#Coal" <#Coal@sierraclub.org>, "#Communications-All" <#Communications-All@sierraclub.org>
Date: 04/12/2011 05:08 PM
Subject: TIME's Bryan Walsh on his Sierra Club-sponsored mercury test.
Sent by: david.grahamcasa@apps.sierraclub.org

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

GOING GREEN

How My Mercury Level Hit Double the Safety Limit

[redacted]
04/14/2011 12:45 PM
Please respond to
[redacted]

To: Alisha Johnson, Brendan Gilfillan, Michael Moats, Seth Oster, Adora Andy, David McIntosh, Michael Goo, Gina McCarthy
cc:
bcc:
Subject: Fw: TIME's Bryan Walsh on his Sierra Club-sponsored mercury test

This is cool amplification. Can we tweet this? Tx.

Sent from my Verizon Wireless BlackBerry

From: Michael Brune <Michael.Brune@sierraclub.org>
Date: Wed, 13 Apr 2011 19:13:27 -0700
To: <lisapjackson@verizon.net>
Subject: Fw: TIME's Bryan Walsh on his Sierra Club-sponsored mercury test

Greetings from Puerto Rico! Thought you might like this:...

Michael Brune
Executive Director
Sierra Club
415-977-5562

Follow on Facebook and Twitter
www.sierraclub.org

---- Forwarded by Michael Brune/Sierraclub on 04/13/2011 07:11 PM ----

From: David Graham-Caso <david.grahamcaso@sierraclub.org>
To: "#Coal" <#Coal@sierraclub.org>, "#Communications-All" <#Communications-All@sierraclub.org>
Date: 04/12/2011 05:08 PM
Subject: TIME's Bryan Walsh on his Sierra Club-sponsored mercury test
Sent by: david.grahamcaso@apps.sierraclub.org

01268-EPA-3911

Aaron Dickerson/DC/USEPA/US
06/04/2010 03:36 PM

To Richard Windsor
cc
bcc
Subject Fw: High Performance Cotton Based Absorbents for Oil Spill Clean-Up

Michael Martin sent this email last week, but i never received it.

---- Forwarded by Aaron Dickerson/DC/USEPA/US on 06/04/2010 03:29 PM ----

From: Michael Martin <mm@musicmatters.net>
To: Aaron Dickerson/DC/USEPA/US@EPA
Date: 06/04/2010 03:23 PM
Subject: FW: High Performance Cotton Based Absorbents for Oil Spill Clean-Up

Hi Aaron,

Here is the email I left you a message about today.

Thanks so much for your help in getting this to the correct decision makers on this Gulf Oil Spill.

Please let me know if you received this.

THANKS!

M

Michael Martin
Founder and CEO

Michael Martin • Chief Effect Officer • EFFECT Partners™, Inc. • 4208 Park Glen Road, Minneapolis, Minnesota 55416 •
www.effectpartners.com • w. 952.426.7800
Effect Marketing • Strategy and Field Execution • MusicMatters™

Reduce. Reuse. Recycle. Respond. Please think twice before printing this email.--

---- Forwarded Message
From: michael martin <mm@musicmatters.net>
Date: Thu, 27 May 2010 18:43:30 -0500
To: <Dickerson.Aaron@epamail.epa.gov>

DEPOSITION
EXHIBIT NUMBER Dickerson 5
DATE 2.11.14 REPORTER mc
ART MILLER & ASSOCIATES

Cc: (b) (5) Deliberative berative <(b) (5) Deliberative berative
Conversation: High Performance Cotton Based Absorbents for Oil Spill Clean-Up
Subject: FW: High Performance Cotton Based Absorbents for Oil Spill Clean-Up

Aaron,

How are you doing? Surviving the spill?

Administrator Jackson and I had txt'd this am about a potentially important connect for the Gulf Oil Spill clean-up efforts. The country's leading cotton absorbent company (greener, more cost effective, not made out of fossil fuels, us produced, green job creator, small family company) is owned by a good friend. I believe I had introduced Lisa to him at the Climate Rally.

Anyway, they have a great solution to the clean-up problem and they cannot get through to any decision makers.

Lisa asked me to send info about this.

See below.

If someone from the EPA clean up effort can take a moment to look at this, I think it would be highly beneficial to your efforts.

Thanks so much for your help. Call with questions!

All the best,

PS: I am hoping this email made it to Lisa..when I was sending emails in Feb and March, my emails to her would bounce back. We changed providers on our end and so I hope this one works!

Michael Martin
Founder and CEO

Effect

Michael Martin • Chief Effect Officer • EFFECT Partners™, Inc. • 4208 Park Glen Road, Minneapolis, Minnesota 55416 •
www.effectpartners.com • w. 952.426.7800
Effect Marketing • Strategy and Field Execution • MusicMatters™

Reduce. Reuse. Recycle. Respond. Please think twice before printing this email.

---- Forwarded Message
From: "Tom Sellars (I)" <tsellars@sellarswipers.com>
Date: Thu, 27 May 2010 17:33:49 -0500

To: michael martin <mm@musicmatters.net>
Cc: John Sellars <JSellars@sellarswipers.com>
Subject: High Performance Cotton Based Absorbents for Oil Spill Clean-Up

Mike,

Thanks for making the introduction of our company and our high absorbency natural cotton absorbents. Our booms and pads can really help clean up the spill, and do it in a more environmentally sensitive manner than the oil based absorbents currently being used.

My brother John Sellars (414-788-0434), our President, just got back this afternoon from his second trip to the gulf and he has been unable to connect with the appropriate people at BP. Attached is an independent article from a professor on why cotton is superior, a product sheet on our cotton booms and a brief company presentation. The highlights of our spill clean up products (absorbents, wipes, towels) are:

- **Environmentally Superior**: Absorbent booms and pads made from cotton, a natural and renewable resource. All other manufacturers currently use booms with meltblown polypropylene, a synthetic oil-based absorbent which consumes more oil to fight the spill. Our wipes and towels are made with post-consumer waste. We also make the only EPA compliant shop towels.
- **Superior Performance:** Cotton is over 100% more absorbent than synthetic oil based absorbents. Our booms utilize 40% less material and absorb 30% more than competing synthetic filled booms.
- **Competitively Priced:** Our booms and pads are priced competitively against synthetic booms even though they offer superior performance. Our wipes and towels also offer high performance at competitive prices.

We certainly want to do what we can to help clean up this environmental tragedy. Please facilitate an introduction to the decision maker at BP. We are committed to help. We are in the process of making capital investments and hiring people in order to respond with more manufacturing capacity than all of the other synthetic suppliers.

John Sellars can be reached on cell at 414-788-0434 or by email at jsellars@sellarswipers.com. I can be reached on cell at 414-732-6106.

Tom Sellars
Chairman & CEO
Sellars

------ End of Forwarded Message

------ End of Forwarded Message Cotton Superior Absorbency- Nonwovens Article.ppt Sellars Cotton Absorbents.ppt

Sellars Presentation.ppt

1

EPA PROD1_0335

From: Hammitt, Jennifer
To: Wachter, Eric; Newton, Jonathan; Miller, Kevin; Heather.Graham-Oliver@usdoi.gov
Subject: Finalizing Landmark Brief and Declaration

When: Monday, April 29, 2013 2:00 PM-2:30 PM. (UTC-05:00) Eastern Time (US & Canada)

~~*~*~*~*~*~*~*~*~*

Kevin, please meet in my office and I will conference in OEX. I can then call Heather at 2:00.

Attorney Client Privileged, Attorney Work Product

Thank you everyone for the help on this -- we are near the finish line!

DEPOSITION
EXHIBIT NUMBER 8
DATE 5/12/14 REPORTER CTC
ART MILLER & ASSOCIATES

EPA PROD1_0348

2

From: Newton, Jonathan
To: Hammitt, Jennifer
Date: Monday, April 29, 2013 12:47:00 PM
Attachments: HQ-FOI-01861-12 (121005) Agreement to Narrow Scope.pdf

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Jonathan V. Newton, Attorney-Advisor
U.S. EPA, Office of the Executive Secretariat
1200 Pennsylvania Avenue, NW (MC 1105A)
Washington, D.C. 20460
(202) 566-1981

EPA PROD1_0352

3

From:	Newton, Jonathan
To:	Wachter, Eric; Hammitt, Jennifer; Miller, Kevin
Subject:	HQ-FOI-01861-12 Secondary Account No Records Response
Date:	Monday, April 29, 2013 4:32:00 PM
Attachments:	HQ-FOI-01861-12 Landmark - Aaron Response.pdf

Attached

Jonathan V. Newton, Attorney-Advisor
U.S. EPA, Office of the Executive Secretariat
1200 Pennsylvania Avenue, NW (MC 1105A)
Washington, D.C. 20460
(202) 566-1981

4

EPA PROD1_0356

From:	Hammitt, Jennifer
To:	Heather.Graham-Oliver@usdoj.gov
Subject:	FW: HQ-FOI-01861-12 Secondary Account No Records Response
Date:	Monday, April 29, 2013 4:48:56 PM
Attachments:	HQ-FOI-01861-12 Landmark - Aaron Response.pdf

Attorney Client Privileged, Attorney Work Product

Jennifer Hammitt
U.S. Environmental Protection Agency
Office of General Counsel, General Law Office
1200 Pennsylvania Ave N.W., MC 2377A
Washington, D.C. 20460
(202) 564-5097

From: Newton, Jonathan
Sent: Monday, April 29, 2013 4:32 PM
To: Wachter, Eric; Hammitt, Jennifer; Miller, Kevin
Subject: HQ-FOI-01861-12 Secondary Account No Records Response

Attached

Jonathan V. Newton, Attorney-Advisor
U.S. EPA, Office of the Executive Secretariat
1200 Pennsylvania Avenue, NW (MC 1105A)
Washington, D.C. 20460
(202) 566-1981

5

EPA PROD1_0367

From: Graham-Oliver, Heather (USADC)
To: Hammitt, Jennifer
Subject: Re: HQ-FOI-01861-12 Secondary Account No Records Response
Date: Monday, April 29, 2013 5:34:12 PM

Jennifer:

Attorney Client Privileged, Attorney Work Product

Thanks,

Heather

On Apr 29, 2013, at 4:49 PM, "Hammitt, Jennifer" <Hammitt.Jennifer@epa.gov<mailto:Hammitt.Jennifer@epa.gov>> wrote:

Attorney Client Privileged, Attorney Work Product

Jennifer Hammitt

U.S. Environmental Protection Agency

Office of General Counsel, General Law Office

1200 Pennsylvania Ave N.W., MC 2377A

Washington, D.C. 20460

(202) 564-5097[X]

From: Newton, Jonathan
Sent: Monday, April 29, 2013 4:32 PM
To: Wachter, Eric; Hammitt, Jennifer; Miller, Kevin
Subject: HQ-FOI-01861-12 Secondary Account No Records Response

Attached

Jonathan V. Newton, Attorney-Advisor
U.S. EPA, Office of the Executive Secretariat
1200 Pennsylvania Avenue, NW (MC 1105A)
Washington, D.C. 20460
(202) 566-1981[X]

<HQ-FOI-01861-12 Landmark - Aaron Response.pdf>

EPA PROD1_0360

6

From:	Hammitt, Jennifer
To:	Dickerson, Aaron; Miller, Kevin
Cc:	Wachter, Eric
Subject:	Urgent: Discussion of Search for Landmark FOIA HQ-FOI-01861-12
Importance:	High

When: Tuesday, April 30, 2013 9:30 AM-10:00 AM. (UTC-05:00) Eastern Time (US & Canada)

~~*~*~*~*~*~*~*~*~*~*

7

EPA PROD1_0363

From:	Hammitt, Jennifer
To:	Miller, Kevin; Heather.Graham-Oliver@usdoj.gov
Subject:	Landmark Search Options
Start:	Tuesday, April 30, 2013 10:00:00 AM
End:	Tuesday, April 30, 2013 10:30:00 AM

When: Tuesday, April 30, 2013 10:00 AM-10:30 AM. (UTC-05:00) Eastern Time (US & Canada)

~~*~*~*~*~*~*~*~*~*

Heather, we will call your office at 10. Thanks.

8

EPA PROD1_0386

From: Hammitt, Jennifer
To: Miller, Kevin
Subject: DRAFT: Landmark Request for an Extension of Time
Date: Tuesday, April 30, 2013 10:29:22 AM

Attorney Client Privileged, Attorney Work Product [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Jennifer Hammitt
U.S. Environmental Protection Agency
Office of General Counsel, General Law Office
1200 Pennsylvania Ave N.W., MC 2377A
Washington, D.C. 20460
(202) 564-5097

9

EPA PROD1_0401

From:	Hammitt, Jennifer
To:	Newton, Jonathan; Wachter, Eric
Cc:	Miller, Kevin
Subject:	Landmark Case -- Next Steps (RE: Search String for Landmark FOIA using Notes Syntax)
Date:	Tuesday, April 30, 2013 2:10:14 PM
Importance:	High

Thanks Jonathan, I appreciate the follow-up.

At this point, it is what it is. Can we get those documetns into the DB ASAP so that we can start de-duping, etc.? Once we have a final # of unreviewed documents we can plan for review. We will have to do the review as quickly as possible.

Attorney Client Privileged, Attorney Work Product

Please let me know when the documents are in the database and when you have confirmed with the other offices that there are no more outliers. Thank you for your help on this.

Jennifer Hammitt

EPA PROD1_0068

From:	Jonathan Newton
To:	Eric Wachter; Brian Hope
Cc:	Fredrick No
Subject:	Update on HQ-FOI-01861-12 (Landmark Legal Foundation)
Date:	09/27/2012 02:40 PM
Attachments:	HQ-FOI-01861-12 (120821) Request Letter.pdf

I was waiting to hear back from OP, but apparently it was elevated out of my hands. It went from Alex Barron to Michael Goo to Laura Vaught, then to Scott Fulton directly. However, I understand that Scott is out of the office for a few weeks.

I spoke to Robin Kime and Mindy Kairis (Special Assistant, OGC) to get something out today since is the deadline for response. Attorney Client Privileged [redacted]

Landmark was granted a fee waiver so fees are not an issue.

Jonathan V. Newton, Esq.
U.S. EPA, Office of the Executive Secretariat
1200 Pennsylvania Avenue, NW (MC 1105A)
Washington, D.C. 20460
(202) 566-1981

DEPOSITION
EXHIBIT NUMBER 17
DATE 8/26/14 REPORTER CTC
ART MILLER & ASSOCIATES

EPA PROD1_0239

From: Jonathan Newton
To: Kevin Miller; Mindy Kairis
Cc: Eric Wachter; Brian Hope; Fredrick No
Subject: Fw: FOIA Request Number HQ-FOI-01861-12
Date: 10/09/2012 10:08 AM

FYI:

Landmark agreed to limit the scope of HQ-FOI-01861-12 to AA's, DA's, and COS in EPA Headquarters.

Jonathan V. Newton, Esq.
U.S. EPA, Office of the Executive Secretariat
1200 Pennsylvania Avenue, NW (MC 1105A)
Washington, D.C. 20460
(202) 566-1981

----- Forwarded by Jonathan Newton/DC/USEPA/US on 10/09/2012 10:02 AM -----

From: "matt" <matt@landmarklegal.org>
To: Jonathan Newton/DC/USEPA/US@EPA
Date: 10/05/2012 04:06 PM
Subject: RE: FOIA Request Number HQ-FOI-01861-12

Dear Mr. Newton:

Landmark will agree to limit the scope of the search to senior officials in EPA HQ with the understanding that Landmark does not waive the right to expand the scope to the original request if warranted by responsive records.

Moreover, Landmark does not waive any rights to its pending administrative appeal regarding the EPA's denial of Landmark's request for expedited processing or to any additional remedy available pursuant to the FOIA or EPA's FOIA regulations.

Sincerely,

Matthew C. Forys
Landmark Legal Foundation
19415 Deerfield Ave
Suite 312
Leesburg, VA 20176
703-554-6104

DEPOSITION
EXHIBIT NUMBER 19
DATE 2/12/14 REPORTER ETO
ART MILLER & ASSOCIATES

EPA PROD1_0251

From: Jonathan Newton
To: Robin Kime; NancyE Morley
Subject: Fw: FOIA Request Number HQ-FOI-01861-12
Date: 10/09/2012 10:21 AM

Forgot to include you on the message . . . just getting back from vacation; brain is a little slow. :-)

----- Forwarded by Jonathan Newton/DC/USEPA/US on 10/09/2012 10:20 AM -----

From: Jonathan Newton/DC/USEPA/US
To: Kevin Miller/DC/USEPA/US@EPA, Mindy Kairis/DC/USEPA/US@EPA
Cc: Eric Wachter/DC/USEPA/US@EPA, Brian Hope/DC/USEPA/US@EPA, Fredrick No/DC/USEPA/US@EPA
Date: 10/09/2012 10:08 AM
Subject: Fw: FOIA Request Number HQ-FOI-01861-12

FYI:

Landmark agreed to limit the scope of HQ-FOI-01861-12 to AA's, DA's, and COS in EPA Headquarters.

Jonathan V. Newton, Esq.
U.S. EPA, Office of the Executive Secretariat
1200 Pennsylvania Avenue, NW (MC 1105A)
Washington, D.C. 20460
(202) 566-1981

----- Forwarded by Jonathan Newton/DC/USEPA/US on 10/09/2012 10:02 AM -----

From: "matt" <matt@landmarklegal.org>
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Date: 10/05/2012 04:06 PM
Subject: RE: FOIA Request Number HQ-FOI-01861-12

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Moreover, Landmark does not waive any rights to its pending administrative appeal regarding the EPA's denial of Landmark's request for expedited processing or to any additional remedy available pursuant to the FOIA or EPA's FOIA regulations.

Sincerely,

EPA PROD1_0403

From:	FOIA
Sent By:	Jonathan Newton
To:	Sabrina Hamilton; Karen Johnson; Diane Salahuddin; Zelma Taylor; Maya Lee; Linda Person; Barbara Bruce; Shushona Hyson; Vanessa Fleeton; Abbie Agner; Wanda McLendon; Diane Jones-Coleman
Cc:	NancyE Morley; Robin Kime; Eric Wachter; Brian Hope; Fredrick No; Jennifer Hammitt
Subject:	ACTION REQUIRED - New FOIA Request (HQ-FOI-01861-12)
Date:	10/23/2012 01:35 PM
Importance:	High
Attachments:	HQ-FOI-01861-12 (120821) Request Letter.pdf

Due Date: October 30, 2012

DEPOSITION
EXHIBIT NUMBER Dickerson 21
DATE REPORTER ML
ART MILLER & ASSOCIATES

Requestor:

- Landmark Legal Foundation

Request Number:

- HQ-FOI- 01861-12 (EPA-HQ-2012-001269)

Request Description:

- Records relating to proposed rules or regulations that have not been finalized by EPA between January 1, 2012 and August 17, 2012.
- Records reflecting an order, direction or suggestion, that regulations (or comments on regulations) should be delayed until after November 2012.
- **Note: This request has been modified.** The search only applies to Assistant Administrators, Deputy Assistant Administrators and Chiefs of Staff in EPA Headquarters .
- The search will also include the Associate Administrator and Deputy Associate Administrator(s) for the Office of Policy.

Instructions:

- FOIA Coordinators, please forward this notice to the principals and/or assistants within your AA-ship who will complete this search.

If you have responsive records:

- For billing purposes, document the amount of time you spend searching for records and your grade or hourly wage.
- **Note:** Whenever possible, records should be submitted electronically. Before printing, contact the AO FOIA Coordinators for options on electronic submission.

If you do not have responsive records:

- Respond to this message or send an e-mail to FOIA@epa.gov confirming that you searched for but found no responsive records.

If you have any questions about this request respond to this e-mail or contact Jonathan Newton at (202) 566-1981, or Fredrick No at (202) 564-2793.

EPA-32

Jim Jones/DC/USEPA/US
02/02/2012 06:24 AM

To Steven Bradbury
cc
bcc
Subject Fw: Fwd: Rozol

Maybe we can catch up this am on this. Jim
to ----------\Sent by EPA Wireless E-Mail Services.

----- Original Message -----
From: Bob Perciasepe [bob@perciasepe.org]
Sent: 02/02/2012 05:42 AM EST
To: Jim Jones
Cc: Teri Porterfield
Subject: Fwd: Rozol

I am getting "incoming"
Let's discuss.

Bob P

---------- Forwarded message ----------
From: "Rutledge, Brian" <brutledge@audubon.org>
Date: Mon, 30 Jan 2012 10:18:21 -0800
Subject: Rozol
To: "bob[redacted].org" <bob@[redacted].org>

Bob:
As soon as I can find your EPA email address I will send this there as well.
This is the pesticide, for prairie dogs, that we have previously discussed.
Apparently there is an open comment period now through the 17th of February.
The Prairie Dog and Black-footed Ferret has approached me seeking my
involvement and I am hopeful that you could facilitate a meeting with
yourself and the appropriate players on the EPA staff.
The letter included in the attached file will be our submission in
this comment period.
Thanks,
B

Brian A Rutledge

VP Rocky Mountain Region

105 W. Mountain Avenue

Ft. Collins, Colorado 80524

970-416-6931(office)

307-262-1061 (cell)

DEPOSITION
EXHIBIT NUMBER Perciasepe 25
DATE 2-21-14 REPORTER ML
ART MILLER & ASSOCIATES

970-482-4719 (CO)

brutledge@audubon.org

--
Sent from my mobile device

Vyas annual report 2010.pdf Eco Risk on Rozol for BTPD.pdf

Prairie Dogs Pesticides and Protected Species golden.pdf RED for rodenticide cluster.pdf Rozol ad and coupon.pdf

Rozol and Kaput Info.doc ROZOL letter.doc

Attachments (approx. 460 pages) will be produced upon request

FOIA #HQ-FOI-01268-12 (Note: Emails to/from "Richard Windsor" are to/from EPA Administrator Lisa P. Jackson)

Bob Perciasepe
<bob@perciasepe.org>
07/24/2010 12:57 PM

To Bob Sussman, Richard Windsor, Seth Oster
cc
bcc
Subject Fracking PA Hearing in NYT

July 23, 2010

E.P.A. Considers Risks of Gas Extraction

By TOM ZELLER Jr.

CANONSBURG, Pa. — The streams of people came to the public meeting here armed with stories of yellowed and foul-smelling well water, deformed livestock, poisoned fish and itchy skin. One resident invoked the 1968 zombie thriller "Night of the Living Dead," which, as it happens, was filmed just an hour away from this southwestern corner of Pennsylvania.

The culprit, these people argued, was hydraulic fracturing, a method of extracting natural gas that involves blasting underground rock with a cocktail of water, sand and chemicals.

Gas companies countered that the horror stories described in Pennsylvania and at other meetings held recently in Texas and Colorado are either fictions or not the companies' fault. More regulation, the industry warned, would kill jobs and stifle production of gas, which the companies consider a clean-burning fuel the nation desperately needs.

Just as the Gulf of Mexico is the battleground for the future of offshore oil drilling, Pennsylvania is at the center of the battle over hydraulic fracturing, or fracking, which promises to open up huge swaths of land for natural gas extraction, but whose environmental risks are still uncertain. Natural gas accounts for roughly a quarter of all energy used in the United States, and that fraction is expected to grow as the nation weans itself from dirtier sources like coal and oil.

The Environmental Protection Agency has been on a listening tour, soliciting advice from all sides on how to shape a forthcoming $1.9 million study of hydraulic fracturing's effect on groundwater.

With the steep environmental costs of fossil fuel extraction apparent on beaches from Texas to Florida — and revelations that industry shortcuts and regulatory negligence may have contributed to the BP catastrophe in the gulf — gas prospectors are finding a cold reception for their assertions that their drilling practices are safe.

"The industry has argued there are no documented cases of hydraulic fracturing contaminating groundwater," said Dencil Backus, a resident of nearby Mt. Pleasant Township, at Thursday night's hearing. "Our experience in southwestern Pennsylvania suggests that this cannot possibly be true."

Matt Pitzarella, a spokesman for Range Resources, a Texas-based natural gas producer, acknowledged that the gulf spill had increased public concern about any sort of drilling activity.

DEPOSITION
EXHIBIT NUMBER Perciasepe 26
DATE 2-21-14 REPORTER ML
ART MILLER & ASSOCIATES

"However, when people can review the facts, void of the strong emotions the gulf elicits, they can see the stark contrast between high-risk, deep offshore oil drilling and much safer, much lower risk onshore natural gas development," he said by e-mail.

In this part of the country, the potentially enormous natural gas play of the Marcellus Shale has many residents lining up to lease their land to gas prospectors. Estimates vary on the precise size of the Marcellus Shale, which stretches from West Virginia across much of Pennsylvania and eastern Ohio and into the Southern Tier of New York. But by any estimate, the gas deposit is huge — perhaps as much as 500 trillion cubic feet. (New York State uses a little over 1.1 trillion cubic feet of natural gas each year.)

An industry-financed study published this week suggested that as much as $6 billion in government revenue and up to 280,000 jobs could be at stake in the Marcellus Shale region.

Fracking has been around for decades, and it is an increasingly prominent tool in the effort to unlock previously unreachable gas reserves. The oil and gas industry estimates that 90 percent of the more than 450,000 operating gas wells in the United States rely on hydraulic fracturing.

Roughly 99.5 percent of the fluids typically used in fracking, the industry says, are just water and sand, with trace amounts of chemical thickeners, lubricants and other compounds added to help the process along. The cocktail is injected thousands of feet below the water table and, the industry argues, can't possibly be responsible for growing complaints of spoiled streams and wells. But critics say that the relationship between fracking fluids and groundwater contamination has never been thoroughly studied — and that proving a link has been made more difficult by oil and gas companies that have jealously guarded as trade secrets the exact chemical ingredients used at each well.

Several other concerns linger over fracking, as well as other aspects of gas drilling — including the design and integrity of well casings and the transport and potential spilling of chemicals and the millions of gallons of water required for just one fracking job.

The recent string of accidents in the oil and gas industries — including the gulf spill and a blowout last month at a gas field in Clearfield County, Pa., that spewed gas and wastewater for 16 hours — has unnerved residents and regulators.

"There is extraordinary economic potential associated with the development of Marcellus Shale resources," said Representative Joe Sestak, Democrat of Pennsylvania, in a statement Friday announcing $1 million for a federal study of water use impacts in the Delaware Water Basin. However, "there is also great risk." He said, "One way to ensure proper development is to understand the potential impacts."

Amy Mall, a senior policy analyst with the Natural Resources Defense Council, said the scrutiny was long overdue. "I think it's all helping to shine a spotlight on this entire industry," she said. "Corners are sometimes cut, and regulations simply aren't strong enough."

Fears of fracking's impact on water supplies prompted regulators overseeing the Delaware Water

Basin to curtail gas exploration until the effects could be more closely studied. New York State lawmakers are contemplating a moratorium.

At the national level, in addition to the E.P.A. study, a Congressional investigation of gas drilling and fracturing, led by House Energy and Commerce Committee, intensified last week with demands sent to several companies for details on their operations — particularly how they handled the slurry of water and chemicals that flowed back from deep within a well.

A renewed, if unlikely, push is also under way to pass federal legislation that would undo an exemption introduced under the Bush administration that critics say freed hydraulic fracturing from regulation under the Safe Drinking Water Act.

Last month, Wyoming introduced some of the nation's toughest rules governing fracturing, including provisions that require companies to disclose the ingredients in their fracturing fluids to state regulators — though specifically not to the public.

Gas drillers, responding to the increased scrutiny and eyeing the expansive and lucrative new gas plays in Appalachia, are redoubling their efforts to stave off federal oversight, in some cases by softening their rigid positions on fracking-fluid disclosure. Last week, Range Resources went so far as to announce its intent to disclose the contents of its fracking fluids to Pennsylvania regulators and to publish them on the company's Web site.

"We should have done this a long time ago," said Mr. Pitzarella, the Range spokesman. "There are probably no health risks with the concentrations that we're utilizing. But if someone has that concern, then it's real and you have to address it."

Environmental groups welcomed that, but said that clear and broad federal jurisdiction would still be needed.

"Any one accident might not be on the scale of the Deepwater Horizon disaster," said Ms. Mall. "But accidents are happening all the time, and there's no regime in place that broadly protects the health of communities and the surrounding environment where drilling is being done."

That was a common theme at the meeting Thursday night.

"I can take you right now to my neighbors who have lost their water supplies," Mr. Backus said to the handful of E.P.A. regulators on hand. "I can take you also to places where spills have killed fish and other aquatic life."

"Corporations have no conscience," he added. "The E.P.A. must give them that conscience."

Visit the Agency's Intranet for More Information. | All

EPA@work

This message is being sent to all EPA Employees. Please do not reply to this mass mailing.

Dear Colleagues,

EPA's firm commitment to transparency and openness in conducting the public's business has been steadfast since the first days of the Administration. We have attained several important milestones since then and others are on the path ahead. I am writing to reaffirm our commitment to transparency, to update you on accomplishments and tasks still outstanding, and to ask each of you to play your critical role in this effort.

Accomplishments

President Obama's January 21, 2009 "Transparency and Open Government" memorandum directed Federal agencies to "disclose information rapidly... [and] harness new technologies." Former Administrator Lisa P. Jackson affirmed our Agency's commitment to that directive in her April 23, 2009 email to all EPA employees. We have since developed powerful new tools to enable disclosure and give us opportunities to greatly advance the efficiency, effectiveness, and ease of meeting our transparency obligations.

The email, calendaring, and contacts features of My Workplace in *Microsoft Office 365* include a much more robust email search function than we previously had available to us. This new tool set will enhance our management of our Freedom of Information Act (FOIA) responsibilities as will *FOIA online*. This multi-agency FOIA request processing system and integrated online FOIA repository went live in October 2012 and coupled with e-discovery tools like "Encase" is making a difference. In the area of rulemaking process, EPA has developed and currently manages for the Federal government the *regulations.gov* platform, an open government landmark that assists public notice and comment and access to the docket for proposed and final rules, as well as being the shared services platform for FOIA online.

Tasks Ahead

While information management tools are an important response to the President's directive, we need robust and responsive policies to use these tools effectively and reach the desired goals of openness and transparency. For FOIA specifically, key recommendations of the cross-Agency workgroup on FOIA established in June 2010 call on EPA to develop updated policies and procedures, training, and accountability steps along with needed tools. While we have focused on enhancing technology which was a key recommendation, I am now tasking the Office of Environmental Information, with assistance as needed from other offices, to begin reporting quarterly to me on the implementation of the rest of the workgroup's FOIA recommendations.

The Agency has employees whose work responsibilities include managing, coordinating and responding to FOIA requests but we all have the responsibility to know and be aware of our FOIA obligations so that

DEPOSITION
EXHIBIT NUMBER Percuasepe 27
DATE 2-21-14 REPORTER ML
ART MILLER & ASSOCIATES

we can respond appropriately and fully when requested. Therefore, OEI will be developing a mandatory FOIA training module for all EPA employees during FY 2014.

Complementing FOIA, and essential to its success, is records management which is a daily responsibility of every EPA employee. Maintaining records consistent with our statutory and regulatory obligations is a central tenet for doing the public's business in an open and transparent manner. To meet this obligation, we will revise our Agency-wide records training to recognize the new features available with My Workplace, and will in 2013 re-establish the requirement for all EPA employees to take this training.

Finally, the Inspector General currently is conducting an audit of the agency's records management practices and procedures. We have suggested they place focus on electronic records including email and instant messaging. While we have made progress in these areas, we are committed to addressing any concerns or weaknesses that are identified in this audit and to working collaboratively to strengthen our records management system and policies.

Each of these steps will take us further down the path to which we are committed: performing our work in an open and transparent manner that is in keeping with the trust the American public has put in us.

Sincerely,

Bob Perciasepe
Acting Administrator

EPA-169

Cynthia
Giles-AA/DC/USEPA/US
08/01/2012 03:56 PM

To Bob Sussman
cc
bcc
Subject Fw: OIRA Chat - burden reduction and Rules Pending (RFG and Diesel to)

(b)(5)Deliberative

Cynthia
—— Forwarded by Cynthia Giles-AA/DC/USEPA/US on 08/01/2012 03:55 PM ——

From: Bob Perciasepe/DC/USEPA/US
To: Cynthia Giles-AA/DC/USEPA/US@EPA
Cc: Bob Sussman/DC/USEPA/US@EPA, Diane Thompson/DC/USEPA/US@EPA, Gina McCarthy/DC/USEPA/US@EPA, Nena Shaw/DC/USEPA/US@EPA
Date: 08/01/2012 12:16 PM
Subject: Re: OIRA Chat - burden reduction and Rules Pending (RFG and Diesel to)

(b)(5)Deliberative
Thank

Bob Perciasepe
Deputy Administrator

(o) +1 202 564 4711
(c) +1 202 368 8193

Cynthia Giles-AA On NPDES rule, have had virtually no 08/01/2012 10:32:16 AM

From: Cynthia Giles-AA/DC/USEPA/US
To: Bob Sussman/DC/USEPA/US@EPA
Cc: Bob Perciasepe/DC/USEPA/US@EPA, Diane Thompson/DC/USEPA/US@EPA, Gina McCarthy/DC/USEPA/US@EPA, Nena Shaw/DC/USEPA/US@EPA
Date: 08/01/2012 10:32 AM
Subject: Re: OIRA Chat - burden reduction and Rules Pending (RFG and Diesel to)

(b)(5)Deliberative

Cynthia

Bob Sussman I'll be having the regular weekly call wit 08/01/2012 09:43:23 AM

From: Bob Sussman/DC/USEPA/US
To: Bob Perciasepe/DC/USEPA/US@EPA
Cc: Cynthia Giles-AA/DC/USEPA/US@EPA, Diane Thompson/DC/USEPA/US@EPA, Gina

DEPOSITION
EXHIBIT NUMBER Perciasepe 28
DATE 2-21-14 REPORTER ML
ART MILLER & ASSOCIATES

McCarthy/DC/USEPA/US@EPA, Nena Shaw/DC/USEPA/US@EPA
Date: 08/01/2012 09:43 AM
Subject: Re: OIRA Chat - burden reduction and Rules Pending (RFG and Diesel to)

I'll be having the regular weekly call with Dom tomorrow. Since Michael is out, it will just be me.

(b)(5) Deliberative

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

Bob Perciasepe I visited with Cass today to review our 07/31/2012 09:51:43 PM

From: Bob Perciasepe/DC/USEPA/US
To: Diane Thompson/DC/USEPA/US, Bob Sussman/DC/USEPA/US, Cynthia Giles-AA/DC/USEPA/US, Gina McCarthy/DC/USEPA/US
Cc: Nena Shaw/DC/USEPA/US
Date: 07/31/2012 09:51 PM
Subject: OIRA Chat - burden reduction and Rules Pending (RFG and Diesel to)

(b)(5) Deliberative

(b)(5) Deliberative

Bob Perciasepe
Deputy Administrator
(o) 202 564 4711
(c) 202 368 8193

EPA-21

Michael Goo/DC/USEPA/US
01/18/2012 06:30 PM

To Cynthia Giles-AA
cc Bob Perciasepe, Richard Windsor
bcc
Subject Re: Mtg with Cass Sunstein

[redacted]

Cynthia Giles-AA (b)(5) Deliberative 01/18/2012 04:59:54 PM

From: Cynthia Giles-AA/DC/USEPA/US
To: Richard Windsor/DC/USEPA/US@EPA
Cc: Bob Perciasepe/DC/USEPA/US@EPA, Michael Goo/DC/USEPA/US@EPA
Date: 01/18/2012 04:59 PM
Subject: Mtg with Cass Sunstein

[redacted]

Cynthia

EPA-21

Michael Goo/DC/USEPA/US
01/18/2012 06:30 PM

To Cynthia Giles-AA
cc Bob Perciasepe, Richard Windsor
bcc
Subject Re: Mtg with Cass Sunstein

(b)(5) Deliberative

Cynthia Giles-AA (b)(5) Deliberative 01/18/2012 04:59:54 PM

From: Cynthia Giles-AA/DC/USEPA/US
To: Richard Windsor/DC/USEPA/US@EPA
Cc: Bob Perciasepe/DC/USEPA/US@EPA, Michael Goo/DC/USEPA/US@EPA
Date: 01/18/2012 04:59 PM
Subject: Mtg with Cass Sunstein

(b)(5) Deliberative

Cynthia

EPA-459

Bob Sussman/DC/USEPA/US
Sent by: Donald Maddox

05/14/2012 01:27 PM

To
cc
bcc
Subject Pre-Brief re: OMB staff briefing on Boiler/NHSM package

Meeting

Date 05/16/2012
Time 08:30:00 AM to 09:00:00 AM
Chair Bob Sussman
Invitees
Required Arvin Ganesan; Bob Perciasepe; Gina McCarthy; Mathy Stanislaus; Michael Goo
Optional Ann Campbell; Robin Kime
FYI
Location ARN 3309

Attached are the materials for the 8:30 AM pre-brief meeting tomorrow concerning the Boiler/CISWI rules

---

Linda M. Chappell, Ph.D.
Special Assistant, Office of the Administrator
United States Environmental Protection Agency
Mailing Address: 1200 Pennsylvania Avenue, N.W., Mail Code: 1101A, Washington, D.C. 20460
Tel: 202-564-2234 / Mobile: 202-734-8292/ Fax: 202-564-1490 / chappell.linda@epa.gov

(b)(5) Deliberative

LANDMARK
LEGAL FOUNDATION
THE RONALD REAGAN LEGAL CENTER

August 17, 2012

Via Express Mail and Electronic Mail

National Freedom of Information Officer
U.S. Environmental Protection Agency
1301 Constitution Ave., NW
Room 6416 West
Washington, DC 20004
hq.foia@epa.gov

Re: Proposed Rules, Summer/Fall 2012

To Whom It May Concern:

This is a Freedom of Information Act Request pursuant to 5 U.S.C. Section 552 *et seq.* relating to published reports that the Environmental Protection Agency ("EPA") is intentionally delaying the issuance of controversial new regulations until after the November elections. Reports also indicate that the Obama Administration "is seeking to issue regulations before the Nov. 8 elections that may bolster its messaging." (Exhibit A, "EPA Positioned To Stay Under Radar Through 2012 Election Season," InsideEPA.com, July 17, 012, available at http://insideepa.com/Inside-EPA-General/Inside-EPA-Public-Content/insider-special-July-17-2012/menu-id-565.html) The charges have come from multiple sources and suggest several troubling possibilities: the Obama Administration is improperly politicizing EPA activities, EPA officials are attempting to shield their true policy goals from the public, and/or EPA officials themselves are putting partisan interests above the public welfare.

For example, the Bozeman Daily Chronicle reports that "a growing number of regulations are being delayed at federal agencies or at the White House" including EPA regulations. (Exhibit B, "As the Election Nears, New Regs Facing Delays," Bozeman Daily Chronicle, July 31, 2012, p. A4.) Politico.com reports that, "Even some Democrats say the White House has responded to political reality in slowing down environmental regulations." In fact, more EPA-generated rules were held up in the review stage of the White House's Office of Information and Regulatory Affairs (OIRA) than any other department or agency. (Exhibit C, Jonathan Allen and Erica Martinson,"EPA Wears the Bulls-Eye," Politico.com, June 20, 2012, available at http://www.politico.com/news/stories/0612/77626.html) Politico.com also writes that "Some say [Obama] truly believes in regulatory restraint during tough economic times. Others see a crass political calculation at play: Don't give Romney any more ammunition before the election - and then open the floodgates after the polls close." (Exhibit D, Darren Samuelsohn

Headquarters: 3100 Broadway • Suite 1210 • Kansas City, Missouri 64111 • (816) 931-5559 • FAX (816) 931-1115
Virginia Office: 19415 Deerfield Avenue • Suite 312 • Leesburg, Virginia 20176 • (703) 554-6100 • FAX (703) 554-6119

DEPOSITION
EXHIBIT NUMBER Dickson 30
DATE
REPORTER ML
ART MILLER & ASSOCIATES

and Jonathan Allen, "President Obama's Administration Slow-walks New Rules, Politico.com, July 12, 2012, available at http://www.politico.com/news/stories/0712/78419.html)

Accordingly, this FOIA request seeks information relating to any EPA rule or regulation for which public notice has not been made, but which is contemplated or under consideration for public notice between January 1, 2012 and the date of this request.

Given the timeliness of this matter and the public interest in the unprecedented privacy concerns raised, Landmark Legal Foundation ("Landmark") respectfully requests that this records request be given expedited processing. Moreover, as Landmark is a tax exempt organization with a long record of widely disseminating public records through various media outlets as part of its public education program, Landmark requests the waiver of all fees and costs associated with this request.

I. Records Requested

Landmark seeks disclosure of the following records[1] **from January 1, 2012 to August 17, 2012** relating to:

1. Any and all records identifying the names of individuals, groups and/or organizations outside the EPA with which the EPA, EPA employees, EPA contractors and/or EPA consultants have had communications of any kind relating to all proposed rules or regulations that have not been finalized by the EPA between January 1, 2012 and August 17, 2012. For the purposes of this request, "communications of any kind" does not include public comments or other records available on the rulemaking docket.

2. Any and all records indicating an order, direction or suggestion that the issuance of regulations, the announcements of regulations and/or public comment of regulations should be slowed or delayed until after November 2012 or the presidential elections of 2012.

II. Fee Waiver and Expedited Processing

Landmark seeks a fee waiver and expedited processing of this request.

A. Fee Waiver

Environmental Protection Agency ("EPA") regulations state:

> Records responsive to a request will be furnished without charge or at a charge reduced below that established under [40 CFR 2.107(c)] when a FOI Office determines, based on all available information, that disclosure of the requested

[1] The term "records" as used herein includes all records or communications preserved in electronic, written, or printed form, included but not limited to correspondence, documents, data, photographs, video recordings in any format, audio recordings in any format, faxes, files, guidance, guidelines, evaluations, instructions, analyses, technical manuals, technical specifications, training manuals, or studies.

information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. 40 CFR 2.107(l)(1) (2011).

EPA regulations further provide that four factors will be considered when determining whether a requester has satisfied the first requirement, i.e., whether the FOIA production is in the public interest.

(i) Whether the subject of the requested records concerns "the operations or activities of the government";

(ii) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;

(iii) The contribution to an understanding of the subject by the public is likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding."

(iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. 40 CFR 2.107(l)(2)(i)-(iv) (2011).

EPA regulations further dictate that the Agency employ the following factors when determining whether a requester has satisfied the second requirement, i.e., whether the FOIA production is or is not in the requester's commercial interest.

(i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure;

(ii) The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, which disclosure is "primarily in the commercial interest of the requester." A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. 40 CFR 2.107(l)(3)(i)-(ii) (2011).

Landmark satisfies each of these factors.

1. Release of Requested Records is in the Public Interest.

The FOIA requires the Agency to waive fees when disclosure of the requested record is in the public interest. 5 U.S.C. § 552(a)(4)(A)(iii), Long v. BATF, 964 F. Supp.494, 498

(D.D.C. 1997). Further, "the amended statute 'is to be liberally construed in favor of waivers for noncommercial requesters.'" McClellan Ecological Seepage Situation v. Carucci 835 F.2d 1282, 1284 (9th Cir. 1987), quoting 132 Cong. Rec. SS-14298 (Sept. 30, 1986) (statement of Sen. Leahy). Senator Leahy went on to explain that the 1986 amendment's purpose was "to remove the roadblocks and technicalities which have been used by various federal agencies to deny waiver or reduction of fees under FOIA." 132 Cong. Rec. S-16496 (Oct. 15, 1986).

As stated above, the EPA has set forth four factors to determine whether a release of requested records is in the public interest. Landmark satisfies each of these factors.

a. Whether the subject of the requested records concerns "the operation or activities of the government."

Landmark seeks EPA records related to the EPA's communications with external groups and individuals, including executive branch officials, over proposed rules or regulations. Proposing rules and regulations and the process leading up to such proposals are government activities. Clearly, the requested information concerns the operations or activities of the government.

b. Whether the disclosure is "likely to contribute to an understanding of government operation or activities."

The disclosure of the EPA records sought will contribute to the public's knowledge of EPA's regulatory process. Although comments are sought from the public about new regulations, not all communications relating to the process are readily available to the public. The release of records showing communications between the EPA and outside groups and individuals, including executive branch officials, would help shed light on government activities that aren't conducted in public view. This would undoubtedly contribute to an understanding of government operation or activities.

c. Whether the disclosure of the requested information will contribute to "public understanding."

The disclosure of the requested information will contribute to the public understanding of the EPA operations as a result of Landmark's long record of educating the public with information gathered through FOIA requests.

Upon receipt of this information, Landmark will promptly analyze and disseminate the requested material. Landmark will take several steps, among others, to ensure that the public has access to the information, thus ensuring that the information will contribute to the "public understanding" of the EPA's conduct and operations:

1. Landmark will post responsive information on its web site (www.landmarklegal.org), which is accessed regularly by thousands of individuals and makes the information available to potentially millions of citizens;

2. Landmark will utilize its extensive contacts in radio broadcasting to ensure proper public dissemination of requested records;

3. Landmark will include the information in its newsletter, which is distributed to thousands of individuals, groups, and the media;

4. Landmark will disseminate the information via its widespread distribution technology, which reaches hundreds of media outlets, reporters, editorial writers, commentators and public policy organizations;

5. Landmark staff will use the information to publish articles in print media, many of which are widely circulated. Landmark has successfully published such numerous articles in the past;

6. Landmark will issue press releases to specific media outlets; and

7. Landmark staff will appear on television and radio programs.[2]

Landmark has a proven record of ensuring that information it receives pursuant to FOIA requests garners widespread attention in print, electronic and broadcast media. Landmark's investigations have been cited by the Associated Press, The Wall Street Journal, The Washington Post, The Washington Times, and Fox News Channel.

d. Whether disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

The disclosure of EPA information, including documents, electronic mail, audits, reviews and reports, will contribute significantly to the public understanding of government operations or activities. The possibility that individuals within the EPA consider political ramifications during the rulemaking process and alter their schedule according to the electoral calendar would significantly contribute to the public understanding of government operations or activities. Indeed, if individuals within the EPA discuss these considerations with outside groups or receive instructions to alter their regulatory timetable, the general public would have great interest in such information and would have a significantly greater understanding of the EPA's true activities. Disclosure could demonstrate that the EPA is attempting to shield its true policy intentions from public view during the election season- the time when many Americans are most focused on policy issues such as environmental regulation. Disclosure of such records will allow Landmark to determine if the EPA seeks to protect the public wellbeing first and foremost.

Landmark clearly satisfies each of these four factors. Consequently, disclosure of the requested materials is in the public interest.

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[2] See Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1314 (D.C. Cir. 2003). Here, the Court determined that an entity who provided "nine ways in which it communicates collected information to the public" sufficiently justified how disclosure would contribute to the public's understanding as to the activities of the federal government.

2. **Disclosure of Requested Material is Not in Landmark's Commercial Interest.**

In order for a fee waiver to be granted, the disclosure of the requested material must not be in the commercial interest of the requester. The EPA sets forth a two-part test in determining whether the requester has a commercial interest in the records release: (1) The Agency determines whether the requester has a commercial interest that would be furthered by the requested disclosure; (2) If the Agency determines the requester has a commercial interest, the Agency will engage in a balancing test to determine whether the identified commercial interest outweighs the public interest in disclosure. 40 CFR 2.107(l)(3)(i)-(ii) (2011).

Thus, in order to trigger the second part of the commercial interest test, a requester must have a commercial interest in the records release.

Landmark does not have any commercial interest in the release of the requested records. Obtaining, analyzing, and disseminating this information is consistent with Landmark's mission to educate the public concerning the activities of federal agencies. Landmark has no commercial interest of any kind, nor can it as a 501(c)(3) public interest non-profit organization. Since Landmark satisfies the first part of the commercial interest test, the balancing of the requester's commercial interest against the identified public interest is inapplicable.

B. **Landmark's Request Should Receive Expedited Processing.**

In order to receive expedited process, a FOIA request must show a "compelling need" by either: (1) establishing that the failure to obtain the records quickly could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or (2) if you are a person primarily engaged in disseminating information, by demonstrating that an urgency to inform the public that actual or alleged Federal Government activity. 40 CFR 2.104 (e)(i)-(ii) (2011).

1. **There is a Compelling Need For Public Disclosure of the Requested Records.**

There is a compelling need for the immediate release of the information requested. With respect to entities "primarily engaged in disseminating information," a compelling need is demonstrated by an "urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. Section 552(a)(6)(E)(v)(II). Among the factors to be considered as to whether there is a compelling need are "(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity." ACLU, 321 F.Supp.2d at 29.

The requested records related directly to several matters of tremendous public interest and debate as shown by the attached exhibits, including the delay of the rulemaking process because of an upcoming election. This delay raises the possibility that the Obama Administration has improperly politicized the EPA, the possibility that the EPA's leadership is

intentionally concealing its regulatory activity from an unwary public, and/or the possibility that the EPA's leadership is putting the partisan interests of a particular candidate above the safety of the general public by delaying controversial regulations. Each one of these issues is a matter for immediate and full disclosure.

There are many significant public interests implicated in the possibility that the EPA's activities have been politicized. The health and wellbeing of the public as well as the economic wellbeing of the country are at stake with improper environmental regulation. Delay puts these at risk and prevents the American public from being able to engage in timely, thoughtful debate over the extent of regulation and the management of the EPA. Furthermore, these issues regarding EPA's regulatory activities (the EPA's fulfillment of its responsibilities to inform the public and submit to appropriate congressional oversight, and the possibility that the EPA has put partisan interests above the health and wellbeing of the general public) should be considered by the American public before voting in this year's presidential and congressional elections. In short, Landmark meets the factors for a compelling need.

2. Landmark is Primarily Engaged in Disseminating Information.

As part of its mission as a tax-exempt, public interest law firm, Landmark investigates, litigates and *publicizes* instances of improper and/or illegal government activity. As stated above, Landmark will take various steps to disseminate responsive information to the public. Specifically, Landmark will post information on its web site; include the information in its newsletters; disseminate information via various widespread distribution technologies; publish articles in large circulation print media; and issue press releases to a wide range of media outlets.

Moreover, Landmark's work is regularly reported on in national print, broadcast and electronic media outlets, including the *Washington Post*, *Washington Times*, *The New York Times*, *Wall Street Journal*, and many other national publications. Landmark's work is often discussed on national radio talk shows including *The Rush Limbaugh Show*, and *The Sean Hannity Show*. Landmark's president is a nationally syndicated talk show host, and while not in any way affiliated with Landmark, the Foundation's activities are regularly discussed on the program, which is heard by millions of Americans throughout the country. Landmark's only purpose in seeking this information, furthermore, is to disseminate such information to the public.

Landmark has thousands of supporters throughout the United States who are regularly informed through newsletters and other correspondence of the Foundation's activities. Landmark exists only through the donations received from the general public and does not accept any government funds. Accordingly, Landmark must disseminate information about its activities to the general public in order to function.

In Elec. Privacy Info. Ctr. v. DOD, 241 F. Supp. 2d 5 (D.D.C. 2003), the D.C. District Court found that a public interest group was "primarily engaged in disseminating information" for purposes of the FOIA. The court reasoned that he group "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience." Elec. Privacy Info. Ctr. v. DOD, 241 F. Supp. 2d

5, 11 (D.D.C. 2003)(citing National Sec. Archive v. U.S. Dep't of Defense, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

As noted on Landmark's website, "Among Landmark Legal Foundation's primary activities is to disseminate to the public information about the conduct of governmental agencies and public officials that runs afoul of constitutional limits or ethical standards." Landmark gathers information of potential interest to the public, especially those with a conservative viewpoint, analyzes the information, and then creates a report or summary of that information which it distributes to Landmark's audience through newsletters, reports, and its webpage. Landmark's audience includes its supporters, including official advisors, news media, visitors to its website and the general public when Landmark officials discuss the information in print, television and radio.

If Landmark's FOIA Request is not expedited, the potential exists for spoliation of evidence that could demonstrate improper Agency conduct. Expediting Landmark's Request will allow Landmark – and the public – to understand an issue of national interest.

Please note, Landmark has previously been involved in extensive litigation arising from a governmental agency's failure to properly produce documents in accordance with its obligations under the FOIA. See Landmark Legal Foundation v. Environmental Protection Agency, 272 F.Supp.2d 70 (D.D.C. 2003). In that case, the EPA destroyed records in violation of a preliminary injunction and failed to properly circulate Landmark's Request to relevant departments within the Agency. Consequently, the Agency was found in civil contempt of court. Landmark fully expects the EPA to fully comply with the legal mandates set forth in the FOIA.

Furthermore, please provide assurances that EPA officials are taking steps to prevent destruction of repositories of information that may hold records responsive to this request. Additionally, be aware that any actions taken in contravention of the Agency's responsibilities will be raised if this request becomes the subject of litigation.

III. Conclusion

If you intend to deny this request in whole or in part, Landmark requests that you provide specific and substantive justifications with full citation to applicable exemptions and supporting case law.

Please also note, while Landmark realizes that the EPA considers requests for fee waivers and expedited processing on a case-by-case basis, the EPA has granted Landmark's requests in the past. Moreover, Landmark has successfully litigated the issue of whether it qualifies for a fee waiver in federal court.

For the reasons stated above, Landmark asks that the EPA grant Landmark's fee waiver and grant its request for expedited consideration. You may contact Matthew Forys at (703) 554-6100 if you have any questions. Please deliver responsive records to Mr. Forys's attention at the following address:

Matthew Forys
Landmark Legal Foundation
19415 Deerfield Ave.
Suite 312
Leesburg, VA 20176

Certification

Pursuant to Agency regulations and as required by law, I certify, to the best of my knowledge, that the above facts are true and correct.

Mark R. Levin
President
Landmark Legal Foundation

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LANDMARK LEGAL FOUNDATION 19415 Deerfield Lane, Ste. 312 Leesburg, VA 20176 Plaintiff, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, Defendant.	Case No. 1:12-cv01726 (RCL)

DECLARATION OF ERIC E. WACHTER

1. I, Eric E. Wachter, Director of the Office of the Executive Secretariat ("OEX") within the Office of the Administrator of the U.S. Environmental Protection Agency ("EPA" or "Agency"), declare that the following statements are true and correct to the best of my knowledge and belief and that they are based upon my personal knowledge and on information supplied to me by employees under my supervision and employees in other EPA offices.

2. I have served as the OEX director since June 2009. My 20-person office has four business lines: processing Freedom of Information Act ("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. During my time as OEX director I served as vice chair of the Council of Federal Executive Secretariats in 2011 and as chair of the Council in 2012.

DEPOSITION
EXHIBIT NUMBER 32
DATE 2/12/14 REPORTER CJC
ART MILLER & ASSOCIATES

3. I make this declaration in support of the EPA's Opposition to Landmark Legal Foundation's ("Plaintiff" or "Landmark") Motion for Preliminary Injunction. Documents responsive to Plaintiff's FOIA request originate in multiple Agency offices in EPA headquarters. However, due to the complexity and scope of the request, the EPA's Office of the Executive Secretariat is coordinating and supervising the Agency's response. I am personally familiar with Plaintiff's FOIA request, and I am overseeing the response to the request in my supervisory position as Director of the Office of the Executive Secretariat.

Landmark Legal Foundation's FOIA request

4. On August 20, 2012, the EPA received a FOIA request from Matthew C. Forys with the Landmark Legal Foundation. This FOIA request was dated August 17, 2012. A true and correct copy of this FOIA request, stamped "Received August 20, 2012," is attached to this declaration as Exhibit A.

5. In its August 17, 2012, FOIA request, Plaintiff sought:

- Any and all records identifying the names of individuals, groups, and/or organizations outside the EPA with which the EPA, EPA employees, EPA contractors and / or EPA consultants have had communications of any kind relating to all proposed rules and regulations that have not been finalized by the EPA between January 1, 2012 [sic] and August 17, 2012. For purposes of this request, 'communications of any kind' does not include public comments or other records available on the rulemaking docket; and
- Any and all records indicating an order, direction, or suggestion that the issuance of regulations, the announcements of regulations and/or public comment of regulations should be slowed or delayed until after November 2012 or the presidential elections of 2012.

Plaintiff also sought expedited processing and a waiver of all fees associated with processing this request. On August 21, 2012, the EPA's National FOIA Office sent a letter to Plaintiff acknowledging receipt of this request and providing the request's tracking number, HQ-FOI-01861-12. The request was then assigned to the Office of the Executive Secretariat.

6. My office was notified on August 29, 2012, that the EPA's National FOIA Officer sent a letter to Plaintiff, granting the request for a fee waiver but denying the request for expedited processing. The letter stated that the EPA would respond to this request as expeditiously as possible. A true and correct copy of this letter is attached to this declaration as Exhibit B. Plaintiff then filed an administrative appeal, dated September 14, 2012, and received by the Office of General Counsel on September 19, 2012, challenging the denial of its request for expediting processing.

7. After several days of internal discussion regarding the breadth of the EPA's rulemaking process and the volume of records generated by that process, on September 27, 2012, Jonathan V. Newton, an attorney under my supervision in the Office of the Executive Secretariat contacted Plaintiff by telephone to discuss the complexity of this request and options for narrowing the scope. This discussion was necessary because the request, as written, could potentially apply to more than 17,000 EPA employees, located in the Office of the Administrator, the 12 other EPA headquarters program offices and each of the EPA's regional offices.

8. On September 28, 2012, Mr. Newton attempted, without success, to follow up with Plaintiff regarding the request. By exchange of email with Mr. Newton on October 5, 2012, Mr. Forys, on behalf of Plaintiff, agreed to narrow the scope of the request to "senior officials" in the EPA's headquarters offices, with senior officials being identified as program administrators, Deputy Administrators and chiefs of staff.

9. On October 19, 2012, my office was notified that the EPA's Office of General Counsel had denied Landmark's appeal for expedited processing by letter dated October 18, 2012. A true and correct copy of this letter is attached to this declaration as Exhibit C.

The EPA's Processing of Plaintiff's FOIA Request

10. The Office of the Executive Secretariat processes approximately 120 FOIA requests for the Office of the Administrator every year and coordinates many requests for the entire Agency. The requests processed by my office are generally complex, involving large volumes of records, records from multiple geographic areas, cross-cutting programmatic issues, interagency coordination issues and involve a variety of FOIA exemptions that are reviewed for discretionary release to provide the greatest amount of disclosure possible. My office employs two full-time employees to process FOIA requests and generally follows a "first-in, first-out" policy when responding to FOIA requests. When requests are narrowed and the complexity reduced, we are often able to process those requests more quickly and respond to them before they become first in the queue. This is accomplished without delaying the processing of older requests.

11. Plaintiff's FOIA request, as narrowed by agreement, is a priority for my office. As noted above, the request entails the search and collection of records from each of the program offices in the EPA's headquarters. As of December 14, 2012, my office has collected approximately 1,600 pages of responsive records. My office, through Assistant United States Attorney Heather Graham-Oliver, has informed the Plaintiff that we anticipate completing our response to this request on or before January 31, 2013. My office is still collecting responsive records but anticipates completing the collection, processing and review of those records by the projected response date.

12. Our preliminary review of the documents collected indicates that many of the documents contain peripheral references to rules or rulemaking, but are ultimately non-responsive to Plaintiff's request. This preliminary review also identified records from other

Executive Branch agencies with which the EPA is required to consult before finalizing any release determination. Similarly, there are records from multiple EPA program offices; OEX routinely consults with the individual offices that provide responsive records on the review and potential release of records related to their program. Portions of the collected records may also be subject to FOIA exemptions; these portions must be properly identified, then further reviewed for discretionary release, and redacted when appropriate.

Plaintiff's Motion for a Preliminary Injunction

13. On December 13, 2012, my office was informed that Plaintiff had filed a Motion for a Preliminary Injunction, seeking disclosure of what Plaintiff asserts to be a subset of records responsive to their overall FOIA request. My office received a copy of the motion for a preliminary injunction on December 13, 2012. Upon review I find that meeting the requested December 24, 2012, production date for information related to the "Reconsideration of Certain New Source and Startup/Shutdown Issues: National Emission Standards for Hazardous Air Pollutants from Coal- and Oil- fired Electric Utility Steam Generating Units and Standards of Performance for Fossil Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units" would be extremely difficult within the allocated time because of the complexities of the request and the pre-existing Agency priorities that would be affected.

14. Many of the records identified would originate from the Office of Air and Radiation ("OAR"), giving them heightened interest in the review of these records. However, OAR staff is currently responding to contemporaneous court-ordered deadlines to complete tasks related to the issuance of new rules. Completing a separate review for only records related to the

specific rule cited by Plaintiff would adversely affect OAR's compliance with existing court deadlines, unnecessarily duplicate efforts, increase FOIA processing time and disrupt the EPA's ability to meet the January 31, 2013, deadline for completion of Plaintiff's FOIA request.

Preservation of Responsive Records

15. On October 23, 2012, certain EPA staff, including OEX staff, was sent a litigation hold notice issued by an Attorney-Advisor in the EPA's Office of General Counsel, advising that all information responsive to this FOIA request must be preserved. The hold notice was sent through the Encase Litigation Hold Module, which is the electronic tool that EPA now uses to issue all litigation holds. I certified that I read and understood the meaning and scope of the litigation hold notice, and that I will comply to the best of my ability with the EPA's obligation to preserve information relevant to this FOIA litigation. My staff has been instructed to comply with all preservation obligations for relevant information concerning this FOIA request and FOIA litigation.

16. My staff and I are also aware of our obligation to preserve records under the Federal Records Act as well as the obligation to preserve information that is responsive to a FOIA request. Additionally, my staff and I are familiar with and understand the EPA's Interim Policy, "Preservation of Separated Personnel's Electronically Stored Information Subject to Litigation Holds."

17. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Eric E. Wachter

Executed this 19th day of December 2012.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LANDMARK LEGAL FOUNDATION 19415 Deerfield Lane, Ste. 312 Leesburg, VA 20176 Plaintiff, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, Defendant.	)	Case No. 1:12-cv01726 (RCL)

Declaration of Eric E. Wachter

1. I, Eric E. Wachter, director of the Office of the Executive Secretariat ("OEX") within the Office of the Administrator of the U.S. Environmental Protection Agency ("EPA" or "Agency"), declare that the following statements are true and correct to the best of my knowledge and belief and that they are based upon my personal knowledge and on information supplied to me by employees under my supervision and employees in other EPA offices.

2. I have served as the OEX director since June 2009. My 20-person office has four business lines: processing Freedom of Information Act ("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. During my time as OEX director I served as vice chair of the Council of Federal Executive Secretariats in 2011 and as chair of the Council in 2012.

DEPOSITION
EXHIBIT NUMBER 33
DATE 2/17/15 REPORTER
ART MILLER & ASSOCIATES

3. The Office of the Executive Secretariat processes approximately 120 FOIA requests for the Office of the Administrator every year and coordinates many requests for the entire Agency. The requests processed by my office generally are complex, involving large volumes of records, records from multiple geographic areas, cross-cutting programmatic issues, interagency coordination issues, and involve a variety of FOIA exemptions that are reviewed for discretionary release to provide the greatest amount of disclosure possible. My office employs two full-time employees to process FOIA requests and generally follows a first-in, first-out policy when responding to FOIA requests. When requests are narrowed and the complexity reduced, we are often able to process those requests more quickly and respond to them before they become first in the queue.

4. My statements in this declaration are based on information provided to me by employees under my supervision, information obtained by me in the performance of my official duties and my personal examination of withheld documents. I am personally familiar with Plaintiff's FOIA request, and I was responsible for overseeing the response to the request in my supervisory position as director of the Office of the Executive Secretariat (OEX). Documents responsive to Plaintiff's FOIA request originate in multiple Agency offices in EPA headquarters. However, due to the complexity and scope of the request, the EPA's Office of the Executive Secretariat coordinated and supervised the Agency's response to this request. This declaration will explain the steps taken to process Plaintiff Landmark Legal Foundation's FOIA Request HQ-FOI-01861-12 and to provide an explanation of the EPA's decision to withhold or redact certain information responsive to the request. I make this declaration in support of the EPA's Motion for Summary Judgment in the above-captioned litigation.

I. FOIA REQUEST BY THE PLAINTIFF LANDMARK LEGAL FOUNDATION

5. On August 20, 2012, the EPA received a FOIA request from Matthew C. Forys with the Landmark Legal Foundation. This FOIA request was dated August 17, 2012. A true and correct copy of this FOIA request, stamped "Received August 20, 2012," is attached to this declaration as Exhibit A.

6. In its August 17, 2012, FOIA request, Plaintiff sought:

- Any and all records identifying the names of individuals, groups, and/or organizations outside the EPA with which the EPA, EPA employees, EPA contractors and/or EPA consultants have had communications of any kind relating to all proposed rules and regulations that have not been finalized by the EPA between January 1, 2012 [sic] and August 17, 2012. For purposes of this request, 'communications of any kind' does not include public comments or other records available on the rulemaking docket; and
- Any and all records indicating an order, direction, or suggestion that the issuance of regulations, the announcements of regulations and/or public comment of regulations should be slowed or delayed until after November 2012 or the presidential elections of 2012.

Plaintiff also sought expedited processing and a waiver of all fees associated with processing this request. On August 21, 2012, the EPA's National FOIA Office sent a letter to Plaintiff acknowledging receipt of this request and providing the request's tracking number, HQ-FOI-01861-12. The request was then assigned to OEX.

7. My office was notified on August 29, 2012, that the EPA's National FOIA Officer sent a letter to Plaintiff, granting the request for a fee waiver but denying the request for expedited processing. The letter stated that the EPA would respond to this request as expeditiously as possible. A true and correct copy of this letter is attached to this declaration as Exhibit B. Plaintiff then filed an administrative appeal, dated September 14, 2012, and received by the Office of General Counsel on September 19, 2012, challenging the denial of its request for expediting processing.

8. After several days of internal discussion regarding the breadth of the EPA's rulemaking process and the volume of records generated by that process, on September 27, 2012, my staff contacted Plaintiff by telephone to discuss the complexity of this request and options for narrowing the scope. This discussion was necessary because without some degree of narrowing it would not be reasonably possible to process Plaintiff's FOIA request as written.

9. On September 28, 2012, my staff attempted, without success, to follow up with Plaintiff regarding the request. By exchange of email on October 5, 2012, Mr. Forys, on behalf of Plaintiff, agreed to narrow the scope of the request to "senior officials" in the EPA's headquarters offices, with senior officials being identified as program administrators, Deputy Administrators and chiefs of staff in EPA's headquarters offices. A true and correct copy of this October 5, 2012, email exchange memorializing our agreement with the Plaintiff as to the scope of this request is attached to this declaration as Exhibit C.

10. On October 19, 2012, my office was notified that the EPA's Office of General Counsel had denied Landmark's appeal for expedited processing by letter dated October 18, 2012. A true and correct copy of this letter is attached to this Declaration as Exhibit D.

II. EPA'S SEARCH AND RESPONSE TO PLAINTIFF'S REQUEST

EPA's Initial Search for Responsive Records

11. This request was narrowed by agreement as described in Paragraph 8 to assistant administrators, deputy assistant administrators, and chiefs of staff in EPA headquarters offices, as well as to the associate administrator and deputy associate administrator in EPA's Office of Policy ("OP"). My office initiated a search for records, as narrowed by agreement, on October 23, 2012, by electronic mail. The initial search request went to the Office of the Administrator (OA) and to the Office of Policy in the Office of the Administrator (OP) as well as to the FOIA

Coordinators in each of the EPA headquarters offices: the Office of Administration and Resources Management (OARM), the Office of Air and Radiation (OAR), the Office of the Chief Financial Officer (OCFO), the Office of Chemical Safety and Pollution Prevention (OCSPP), the Office of Enforcement and Compliance Assurance (OECA), the Office of Environmental Information (OEI), the Office of General Counsel (OGC), the Office of International and Tribal Affairs (OITA), the Office of Research and Development (ORD), the Office of Solid Waste and Emergency Response (OSWER), and the Office of Water (OW).

12. An electronic mail message initiating the search was sent to the designated FOIA Coordinators for each of the EPA's headquarters offices. The FOIA Coordinators are responsible for directing FOIA requests to the individuals in the program offices who are likely to have responsive records. The message to the FOIA Coordinators described Plaintiff's request in the "Request Description" as follows:

Request Description:

•Records relating to proposed rules or regulations that have not been finalized by the EPA between January 1, 2012 and August 17, 2012.
•Records reflecting an order, direction or suggestion, that regulations (or comments on regulations) should be delayed until after November 2012.
•**Note: This request has been modified.** The search only applies to assistant administrators, deputy assistant administrators and chiefs of staff in EPA headquarters.
The search will also include the associate administrator and deputy associate administrator(s) for the Office of Policy.

On October 25, 2012, my staff sent an additional communication to the FOIA Coordinators marked as an "Update and FAQ" regarding the search request. In this communication OEX provided a link to a records collection database and instructed individuals to upload potentially responsive information into the database. My staff instructed individuals to search based on the overall request as well as by key words, instructing that:

- There will not be an "automated search" for this request. However, potential key words for a manual search could include: "draft or proposed" within the same sentence as "rule, regulation or policy." Those suggestions are not meant to be exhaustive. The original request elaborates upon the records that are sought.

Due to the broad and unfocused nature of the request, the decision was made to instruct offices to search based on the request rather than strictly by key words. This was because precise key words could not be readily developed that would be narrowly tailored to find documents responsive to the plaintiff's request, as the request was not focused on a particular topic, rule, particular third party, or other issue amenable to a search limited by key words. Each headquarters office was individually responsible for uploading their responsive documents to the collection database. My staff and OGC staff were able to track who had uploaded documents into the records collection database after the documents were uploaded.

EPA's Initial Collection of Responsive Records

13. *Collection of Responsive Records.* As described in Paragraphs 10 and 11 above, my office initiated the search for records responsive to this request. The individual headquarters offices within the Agency were responsible for collecting and uploading responsive documents into the database, as instructed by my office in October 2012 and as described in paragraph 11. In January 2013, EPA's Office of General Counsel (OGC) contacted my office to inquire regarding the status of the collection and processing in this case. My staff and OGC staff then contacted assigned individuals in the Office of Air and Radiation, the Office of Water, and the Office of Chemical Safety and Pollution Prevention who had not yet completed their search and collection of responsive records to remind them of the upcoming production deadline.

14. It is my understanding that, on February 19, 2013, this Court ordered the EPA to produce the initial set of responsive documents on February 7, 2013, and the complete set of documents on February 27, 2013.

15. The initial document collection was closed on January 25, 2013. At that point my office had either received a no-records response or had coordinated the collection of documents from the immediate office of the Office of the Administrator, and from Assistant Administrators, Deputy Assistant Administrators, and Chiefs of Staff in the EPA's Office of Water (OW), Office of Air and Radiation (OAR), Office of Solid Waste and Emergency Response (OSWER), Office of Chemical Safety and Pollution Prevention (OSCPP), Office of Enforcement and Compliance Assurance (OECA), and Office of General Counsel, as well as documents from the associate administrator and deputy associate administrator in EPA's Office of Policy. My office determined that the remaining headquarters offices that had not yet provided a response (OARM, OEI, ORD, OCFO, and OITA) were not likely to have responsive records as those offices do not ordinarily engage in the Agency's rulemaking activities.

EPA's Processing of Potentially Responsive Records

16. *Processing Responsive Records.* As of January 25, 2013, the EPA had completed its search for records responsive to this FOIA request and identified more than 4,600 potentially responsive documents. OEX staff and OGC staff then reviewed and processed these documents for responsiveness to Plaintiff's FOIA request and for any applicable privileges. Records were deemed to be responsive to the Plaintiff's FOIA request if they either 1) memorialized a meeting, communication with, or contact with an outside party related to a rule that was proposed, but not finalized, during the time frame identified by Plaintiff (not including standard interagency review of proposed rules or formal comments on rulemaking dockets) or 2) internal or external records from any party that discussed or memorialized discussions of delaying a rulemaking until after the election of 2012 or after November 2012 for political reasons.

17. *Segregating Non-Exempt Material.* OEX staff and OGC staff also evaluated each record responsive to this FOIA request for segregability of non-exempt material. The staff determined that where a record was withheld in its entirety, no meaningful portion could reasonably be released. The staff members performed redactions where non-exempt material could be reasonably segregated and released non-exempt portions.

EPA's Supplemental Search for and Collection of Potentially Responsive Records

18. In April 2013 my office was informed that the Court had ordered the EPA to submit a Motion for Summary Judgment, *Vaughn* index and Declaration in this matter by April 30, 2013. My staff and OGC staff began working diligently to prepare our pleadings, including a complete *Vaughn* index and description of each redaction and withholding applied by the Agency.

19. In the course of finalizing the materials for this April 30, 2013, deadline, my office determined that the search for documents from the former Administrator, the Deputy Administrator, and the Chief of Staff in the Office of the Administrator may have been insufficient. In the interest of a complete and adequate response to Plaintiff's request, the EPA determined that another search would be required of the accounts of the former Administrator, Deputy Administrator, and Chief of Staff in the Office of the Administrator. The EPA immediately notified plaintiff and the Court of this deficiency and that there would be a number of additional documents that may potentially be responsive to the Plaintiff's request.

20. To start this supplemental search, staff in the Office of the Administrator were instructed by electronic mail to immediately complete a new search of the accounts of the former Administrator, Deputy Administrator, and Chief of Staff using the keywords "draft or proposed" within the same sentence as "rule, regulation, or guidance" for the time period of January 1,

2012, to August 21, 2012. This very broad and inclusive search was to verify that all documents related to a draft or proposed rule were collected so that they could be reviewed by my staff and OGC staff to determine which of these documents were actually responsive to plaintiff's request.

21. In addition to the 4,600 documents that were initially identified as potentially responsive, approximately 4,500 additional documents were found in the Office of the Administrator during the time period of April 30, 2013 to May 3, 2013 from the files of the former Administrator, Deputy Administrator, and Chief of Staff. These additional potentially responsive documents were documents that contained the broad key words "draft or proposed" within the same sentence as "rule, regulation, or, guidance." OEX staff and OGC staff then reviewed and processed these documents for responsiveness to Plaintiff's FOIA request and for any applicable privileges. Records were deemed to be responsive to the Plaintiff's FOIA request if they either 1) memorialized a meeting, communication with, or contact with an outside party related to a rule that was proposed, but not finalized, during the time frame identified by Plaintiff (not including standard interagency review of proposed rules or formal comments on rulemaking dockets) or 2) internal or external records from any party that discussed or memorialized discussions of delaying a rulemaking until after the election of 2012 or after November 2012 for political reasons. With the addition of these 4,500 additional documents, more than 9,100 potentially responsive documents from across the agency were reviewed and processed by my staff and OGC staff to process Plaintiff's FOIA request.

22. *Segregating non-exempt material.* OEX staff and OGC staff also evaluated each additional record responsive to this FOIA request for segregability of non-exempt material. The staff determined that where a record was withheld in its entirety, no meaningful portion could

reasonably be released. The staff members performed redactions where non-exempt material could be reasonably segregated and released non-exempt portions.

EPA's Production of Responsive Records

23. *EPA's February 7, 2013, production:* In accordance with the Court's order the EPA produced the first set of responsive records to the Plaintiff on February 7, 2013. The February 7, 2013, production to the Plaintiff consisted of three files. The first file consisted of 1,122 pages of responsive documents to be released in full. The documents designated to be released in full included letters, correspondence, or contacts with the EPA and outside parties not subject to any exemption, internal information not subject to any exemption, as well as some internal and potentially deliberative information that the EPA had determined was subject to discretionary release. The second file consisted of 970 pages of documents that were released with redactions. The basis for the redaction was provided on the face of the record as well as in the Index of Withheld Information provided to Plaintiff. The third file was the 64-page Index of Withheld Information, which identified the withheld and redacted documents by number with the Exemption applied to the document. Approximately 32 documents, totaling approximately 200 pages, were not provided in this release and were designated for consultation and review with the White House and other executive branch offices.

24. *Consultation with the White House and Executive Branch offices.* Pursuant to 40 C.F.R. § 2.103(d), the EPA initiated a consultative process with the White House for 32 records. The EPA consulted with the White House and its offices, including the Council on Environmental Quality, the Executive Office of the President, and the Office of Management and Budget. The consultative process with these Executive Branch entities was substantially completed by February 27, 2013.

25. *EPA's February 27, 2013, production.* The EPA's second production of responsive documents was on February 27, 2013. The EPA provided Plaintiff with a CD containing five files. The five files consisted of 1) the documents already released to Landmark in full on February 7; 2) the documents already released to Landmark on February 7 with redactions applied; 3) a supplemental production file that included the documents that had been designated in the February 7 Index as "other agency review" as well as some additional documents that were inadvertently omitted from the last production; 4) an index of documents where some or all information was withheld; and 5) an separate index of just those documents withheld in full. Documents marked in the Index as "other agency review" had any redacted material and the basis for the redaction provided to Landmark on the face of the document.

26. *Discovery of an additional document requiring White House consultation and review (EPA-269).* During the processing of the EPA's February 27, 2013, response, the EPA located a small number of documents in the database that did not yet have responsiveness coded or exemptions applied. The EPA notified Plaintiff of the existence of these additional documents on February 27, 2013, and anticipated that review would be complete on March 15, 2013. My staff and agency counsel reviewed these documents and determined that the majority of these documents were nonresponsive to Plaintiff's request. However, one document, numbered EPA-269, was deemed to be responsive. This document required additional time for the EPA to consult with the Executive Office of the President before release. This document was released with redactions to Plaintiff via electronic mail on March 19, 2013.

27. *EPA's March 14, 2013, production.* On March 13, 2013, The EPA received an inquiry through counsel from Plaintiff regarding documents EPA-246 through EPA-269. Upon receipt of this inquiry the EPA staff involved in the processing of the documents re-reviewed and

re-processed the EPA's February 27, 2013, response in order to ensure that the manually applied numbering was intact and that all non-exempt and partially exempt documents had been provided to Plaintiff. The EPA then re-produced its response on March 14, 2013. The EPA determined that documents EPA-247 through EPA-264 had been included in the February 27, 2013, production and informed Plaintiff of the page numbers where those documents could be located. The EPA also determined that document EPA-265 may have been inadvertently withheld and added it to the file "Supplemental Docs Release_Update March 14." Document EPA-266 was determined to be nonresponsive and was not included in any production. The EPA confirmed that documents EPA-267 and EPA-268 had been included in the February 27, 2013, production but re-produced those files, as well as the other previously released files, to ensure that the manual numbering was present on all produced files. The EPA also informed Plaintiff of the page numbers where documents EPA-265, EPA-267, and EPA-268 could be located in the "Supplemental Docs Release_Update March 14" file. Finally, the EPA informed Plaintiff that document EPA-269 was undergoing further consultation and review. Document EPA-269 was produced to Plaintiff on March 19, 2013.

28. *Release of the Secondary Email Account of Administrator Jackson.* Since the widespread use of email has become commonplace, EPA Administrators have been assigned two email accounts: a public account and a secondary account. The email address for Administrator Jackson's public account was posted on the EPA's website and was used by hundreds of thousands of Americans to send messages to the Administrator. This account was maintained and monitored by staff, and the emails were processed as official correspondence as appropriate. The secondary account was an everyday, working email account of the Administrator to communicate with staff and other government officials. This secondary email account was used

for practical purposes. Given the large volume of emails sent to the public account – more than 1.5 million in fiscal year 2012, for instance – the secondary email account was necessary for effective management and communication between the Administrator and colleagues.

Consistent with the EPA's past practice, the name on this account had been redacted in the February and March releases under Exemption 6 and marked *Administrator* to clearly identify the records as being to or from the Administrator. This was because the Administrator had a significant personal privacy interest in preventing the burden of unsolicited emails and harassment. However, Administrator Jackson's departure from the Agency obviated the need to withhold the name on her secondary email account. Therefore the EPA agreed to release the name of the secondary email account of Administrator Jackson. Landmark also requested, and the EPA agreed to provide, approximately 460 pages of attachments to documents EPA-32 and EPA-33 that the EPA had indicated would be produced upon request. The EPA agreed to provide an updated release package to Landmark with the redactions removed from the secondary email account by April 12, 2013. However, despite multiple communications, the EPA was unable to reach agreement with the Plaintiff to narrow the scope of any remaining issues.

29. *The EPA's April 12, 2013, supplemental production.* On April 12, 2013, the EPA released a disc containing three PDF files to Landmark. The files were: 1) a file titled "Compiled Documents Released in Full," which contained 1,134 pages in 123 documents and were released in full to Landmark Legal Foundation; 2) a file titled "Compiled Documents Release with Redactions," which contained 1,678 pages in 196 documents and were numbered and released with some FOIA-exempt information segregated and redacted and the exemption noted on the face of the document; and 3) a file titled "Compiled Index of Withholdings," which contained a complete list, by number, of those documents that were determined to contain FOIA-

exempt content. As the EPA explained to Plaintiff in its April 12, 2013, letter accompanying the final release, some documents that were previously redacted were now being released in full with the redaction removed from the secondary email account of former Administrator Lisa P. Jackson. There was no longer a privacy interest to be maintained in this account because Ms. Jackson had departed from the Agency. Those documents were provided in the "Compiled Documents Release with Redactions" file and included documents EPA-60, EPA-69, EPA-133, EPA-153, EPA-156, EPA-162, EPA-164, EPA-173, EPA-176, and EPA-177. Sixty (60) documents, totaling approximately 208 pages, were withheld in full as noted on the final "Compiled Index of Withholdings." The EPA's April 12, 2013, letter to Plaintiff accompanying the April 12, 2013 production in HQ-FOI-01861-12 is attached as Exhibit E.

30. *The EPA's May 15, 2013, Supplemental Production.* As described in paragraphs 17 through 21 above, as part of the EPA's preparation of its Motion for Summary Judgment in this case, the EPA determined that an additional search for documents from the former Administrator, Deputy Administrator, and Chief of Staff in the Office of the Administrator would be necessary to ensure a complete and adequate production to Plaintiff. This additional search yielded approximately 365 additional responsive documents to Plaintiff's FOIA request. Approximately 101 additional documents, totaling approximately 800 pages, were released in full to Plaintiff on May 15, 2013. Approximately 181 additional documents, totaling approximately 1,350 pages, were released with some FOIA-exempt information redacted and the exemption noted on the face of the document. Approximately 73 additional documents were withheld in full.

III. EPA'S VAUGHN INDEX AND APPLICATION OF EXEMPTIONS

31. *Final Numbers of Withheld Records as of May 15, 2013.* As of May 15, 2013, the EPA located approximately 734 documents responsive to Plaintiff's request. Of those documents, approximately 1,934 pages in 224 documents were released in full to Landmark Legal Foundation. Approximately 3,022 pages in 377 documents were numbered and released with some FOIA-exempt information segregated and redacted and the exemption noted on the face of the document. Approximately 133 documents were withheld in full under one or more FOIA exemptions as described in the attached *Vaughn* index at Exhibit F.

32. *FOIA Exemptions Asserted.* Documents were withheld in full or in part under Exemptions 5 and 6 of the FOIA. Some documents or portions of the documents were withheld under multiple exemptions. Pursuant to the Court's April 3, 2013, Order, a complete *Vaughn* index of withheld records and the exemptions claimed with justification for each withholding is attached to this declaration as Exhibit F.

33. ***Exemption 5 Deliberative Process Privilege.*** The EPA withheld approximately 399 documents, in full or in part, from disclosure under FOIA Exemption 5's deliberative process privilege. The documents withheld under Exemption 5's deliberative process privilege comprise email chain discussions, draft versions of documents, briefing materials, and internal briefing memoranda that pertain to myriad EPA decision-making processes related to rulemaking and proposed rules. The attached *Vaughn* index provides a detailed description of each document or portion of a document withheld under Exemption 5's deliberative process privilege.

34. Document EPA-57 provides an example of Agency deliberation from staff to superiors regarding policy priorities and responses to outside parties on rulemaking activities. Documents EPA-63, EPA-64, and EPA-65 are example of internal Agency briefing documents

and internal planning documents related to Agency rulemakings. Documents EPA-193, EPA-194, EPA-195, and EPA-196 are representative examples of conversations and deliberations that discuss EPA policy and decision making regarding a particular proposed rule.

35. ***Exemption 5 Attorney-Client Privilege.*** The EPA withheld 56 documents in full or in part from disclosure under Exemption 5 of the FOIA's attorney-client privilege. The withheld documents or portions of documents are comprised of communications between EPA attorneys and their clients relating to a legal matter, such as legal issues related to the legal implications of the EPA's response to external parties or legal issues raised by policy proposals regarding rules and rulemaking letters regarding various rulemakings, for which the client office sought legal advice. The documents also contain facts divulged by the clients to their attorneys in the course of seeking legal advice.

36. Document EPA-188 provides an example of the attorney-client discussions that occurred during the process of responding to outside parties regarding the EPA's proposed rules. The meeting invitation that initiates the email communication originates with Susmita Dubey, a staff attorney in the EPA's Air and Radiation Law Office, Office of General Counsel, and incorporates communications with clients, including senior officials, in the EPA's Office of Air and Radiation and Office of Solid Waste and Emergency Response. These emails and the meeting invitation represent a communication between attorneys in the EPA's Office of General Counsel and clients in the EPA's Office of Air and Office of Solid Waste and Emergency Response related to a letter received from an industry representative by the EPA and the EPA's proposed response to this letter. Documents EPA-198, EPA-199, and EPA-201 provide examples of internal analysis by EPA staff and EPA attorneys of the legal and policy issues potentially raised by the a particular rule and contain legal advice from EPA attorneys to senior

officials in EPA and discussion of options related to the rule as well as policy advice and analysis from EPA staff.

37. *Exemption 6.* The EPA withheld portions of 179 documents under Exemption 6, including: personal email addresses and cell phone numbers; personal medical information related to the health of an employee or family member; and an employee's use of leave of a nonmedical nature. The EPA initially withheld the secondary email address of the former Administrator Lisa P. Jackson under Exemption 6 but removed the redactions from that secondary email address as part of the April 12, 2013, production. The EPA continues to withhold the email addresses of staff members within the Executive Office of the President and other White House offices under Exemption 6.

38. EPA-74 and EPA-75 provide two examples of how the EPA withheld official email addresses of the Executive Office of the President under Exemption 6. The Executive Office of the President's staff members have a significant personal interest in preventing the burden of unsolicited emails and harassment. The email addresses are used for internal messages to and from the Executive Office of the President to prevent unsolicited communications. Since the owners' names are already disclosed, public disclosure of these email addresses would not shed light on the performance of the employees' official duties. Generally, when the EPA withheld email addresses under Exemption 6, the Agency also provided the email owner's name in the redaction or the redaction directly followed the owner's name, as shown by EPA-74. Thus, there is no confusion as to who received or sent the email communications.

39. The EPA also withheld conference-call numbers and access codes under Exemption 6. The public release of these telephone numbers and access codes would potentially allow uninvited third parties to listen to internal calls while possibly learning private information

about authorized participants on the conference call. Additionally, the participants have a personal privacy interest in ensuring that no uninvited person is listening in on the call. There is little to no public interest in having access to this telephone number and access code. Furthermore, the withheld information does not shed light on the EPA's performance of its statutory duties. Therefore, the harm to individuals as a result of the disclosure clearly outweighs the public interest in such disclosure. The EPA made every effort to release all segregable material. In many cases, such as EPA-43, the remainder of the document is released in full with only the conference call line and access code redacted.

40. *EPA's Review of Documents for Segregability:* As indicated in the EPA's *Vaughn* Index, the EPA performed a document-by-document and line-by-line review of documents for any reasonably segregable information. There is no additional segregable factual information that could be released without revealing protected information. To the extent any of this withheld information contains facts, the facts reflect Agency deliberations. Documents EPA-1, EPA-11, EPA-13, and EPA-15, among the many documents that the EPA partially released in this case, provide examples of the EPA's efforts to redact and segregate protected content from information that was subject to release.

Pursuant to 28 U.S.C. § 1746, I hereby affirm under penalty of perjury that the forgoing declaration is true and correct.

Executed this 15th day of May, 2013.

Eric E. Wachter
Director, Office of the Executive Secretariat
Office of the Administrator
U.S. Environmental Protection Agency

01268-EPA-3170

Richard Windsor/DC/USEPA/US
12/11/2009 06:33 AM

To "Taylor, Alison (SC US)"
cc "Lisa At Home", "Heidi Ellis"
bcc
Subject Re: Barbara Kux

Heidi,

Can you work to confirm thos mtg? Allision - no offense at all. My home email is above. Lj

----- Original Message -----
From: "Taylor, Alison (SC US)" [Alison.Taylor@siemens.com]
Sent: 12/10/2009 06:12 PM PST
To: Richard Windsor
Subject: Re: Barbara Kux

Thanks much. It will be great to see you and Barbara will be thrilled. We have no request; we think you're a rock star. We can say that quickly! Shall I confirm 2:30 with Diane or someone else?
I won't use this email, but I'm not sure I've got your personal email. I hope I didn't offend!
Best,
Alison

----- Original Message -----
From: Windsor.Richard@epamail.epa.gov <Windsor.Richard@epamail.epa.gov>
To: Taylor, Alison (SC US)
Cc: Ellis.Heidi@epamail.epa.gov <Ellis.Heidi@epamail.epa.gov>
Sent: Thu Dec 10 16:31:56 2009
Subject: Re: Barbara Kux

Hey Alison,

How about a half hour at 2:30 pm on the 14th? That's all I have I think. Lisa

|---------->
| From: |
|---------->

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|"Taylor, Alison (SC US)" <Alison.Taylor@siemens.com>
|

>----------
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|---------->
| To: |

EXHIBIT NUMBER DEPOSITION
DATE
REPORTER
ART MILLER & ASSOCIATES

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  |Richard Windsor/DC/USEPA/US@EPA
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>-----------------------------------------------------------------------------
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|------------>
| Date:      |
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>-----------------------------------------------------------------------------
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  |12/08/2009 06:55 PM
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>-----------------------------------------------------------------------------
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|------------>
| Subject:   |
|------------>

>-----------------------------------------------------------------------------
-------------------------------------------------------|
  |Barbara Kux
|

>-----------------------------------------------------------------------------
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Hi Lisa-
I know that this request has been made to Diane (at least I'm told so), but I have not yet heard whether you might be able to spare a few minutes to meet with Siemens' global sustainabiliy officer (who is my boss) Barbara Kux. She will be in DC on December 14th and can be available any time between noon and 6pm, and she will be in Copenhagen and can meet at various times on the 16th, especially first thing in the morning. She'd like to meet you and to express her support for your good work on climate. I'll be with her on the 14th, and in Copenhagen also (I'm in Copenhagen from the 15th-19th).

I know this is a very busy time for you, and I have explained this to her. She's a big fan.
If it's a possibility in either DC or Denmark, she (and I) would be thrilled! Otherwise, I hope you're well and I look forward to running into you somewhere-

Alison

All emails sent by "Richard Windsor" were sent by EPA Administrator Lisa Jackson

Alison Taylor
Vice President
Sustainability-Americas
Siemens Corporation
601 Pennsylvania Avenue, NW
Suite 1100, North Building
Washington, DC 20004
202-434-4810

01268-EPA-4271

Richard Windsor/DC/USEPA/US
10/26/2010 08:14 AM

To David McIntosh, "Lisa At Home", Seth Oster
cc
bcc
Subject Re: Fw: Google Alert - EPA Lisa jackson

Can I add - "Red my lips" to the front of that?
David McIntosh

----- Original Message -----
From: David McIntosh
Sent: 10/26/2010 08:07 AM EDT
To: (b)(6) Privacy Richard Windsor; Seth Oster
Subject: Re: Fw: Google Alert - EPA Lisa jackson

(b)(5) Deliberative

(b) (6) See last story below. Sent via BlackBe... 10/26/2010 07:06:56 AM

From: (b)(6) Privacy
To: David McIntosh/DC/USEPA/US@EPA, Gina McCarthy/DC/USEPA/US@EPA, Bob Sussman/DC/USEPA/US@EPA, Bob Perciasepe/DC/USEPA/US@EPA, Diane Thompson/DC/USEPA/US@EPA, Joseph Goffman/DC/USEPA/US@EPA, Seth Oster/DC/USEPA/US@EPA, Brendan Gilfillan/DC/USEPA/US@EPA
Date: 10/26/2010 07:06 AM
Subject: Fw: Google Alert - EPA Lisa jackson

See last story below.

Sent via BlackBerry by AT&T

From: Google Alerts <googlealerts-noreply@google.com>
Date: Tue, 26 Oct 2010 10:41:02 +0000
To: <(b)(6) Privacy
Subject: Google Alert - EPA Lisa jackson

Blogs 4 new results for **EPA Lisa jackson**

EPA Administrator Names Executive Director for New Gulf Coast ...
By lmallc
He will play an instrumental role in fulfilling our commitment to a full and lasting restoration of this area," said **EPA** Administrator **Lisa P. Jackson**. "John's longtime experience with these issues and this region, along with his proven ...
Lynn Miller Associates - http://lmallc.wordpress.com/

New Executive Director for New Gulf Coast Ecosystem Restoration ...
By Editor

DEPOSITION
EXHIBIT NUMBER Dickerson-35
DATE REPORTER ML
ART MILLER & ASSOCIATES

October 26, 2010, WASHINGTON (Coal Geology)– U.S. Environmental Protection Agency (**EPA**) Administrator **Lisa** P. **Jackson** has named John H. Hankinson, Jr. to be the executive director of the newly established Gulf Coast Ecosystem ...
Coal Geology - http://coalgeology.com/

FloridaEnvironments.com: **EPA** taps Florida's Hankinson as director ...
By Bruce Ritchie
EPA Administrator **Lisa Jackson**, a New Orleans native, was named as chair of the task force, which will hold its first meeting in Pensacola on Nov. 8. Hankinson is chairman of Audubon of Florida and served as regional **EPA** administrator ...
FloridaEnvironments.com - http://bruceritchie.blogspot.com/

AFP Releases Paper Detailing How **EPA** Could Force Cap-and-Trade ...
By James Valvo
AFP is releasing the paper amidst a spate of **EPA** actions to move GHG regulations under the Clean Air Act. **EPA** Administrator **Lisa Jackson** remains resolute about regulating large stationary sources beginning in January 2011, ...
Americans for Prosperity: National feed - http://americansforprosperity.org/?p=1264

Tip: Use quotes ("like this") around a set of words in your query to match them exactly. Learn more.

Remove this alert.
Create another alert.
Manage your alerts.

01268-EPA-2509

Richard Windsor/DC/USEPA/US
06/02/2009 05:23 PM

To "Lisa At Home"
cc
bcc
Subject Fw: Google Alert - lisa jackson epa

From: Google Alerts [googlealerts-noreply@google.com]
Sent: 06/02/2009 09:17 PM GMT
To: Richard Windsor
Subject: Google Alert - lisa jackson epa

Google Blogs Alert for: **lisa jackson epa**

EPA will push clean diesel grant money in Ohio on Wednesday
By admin
WASHINGTON – **EPA** Guardian **Lisa** A. **Jackson** generosity refuse suture information conferences angry Ohio humans officials paper Columbus wood Cincinnati other Wednesday, June BAKSHEESH write interpret grants fan these American Refreshment ...
carsnet.net - http://carsnet.net/

Top Air Pollution Official Finally Confirmed: Scientific American
ranking member of the Senate Environment and Public Works Committee, offered his support for McCarthy's confirmation and said he expected **EPA** Administrator **Lisa Jackson** to support legislative efforts to limit the scope of **EPA** climate ...
Scientific American - Technology - http://www.scientificamerican.com/

Controversial Coal Mining Method Gets Obama's OK « Chrisy58's Weblog
By chrisy58
And **EPA** Administrator **Lisa Jackson** said this year that the agency had "considerable concern" about the projects. She pledged that her agency would "use the best science and follow the letter of the law in ensuring we are protecting our ...
Chrisy58's Weblog - http://chrisy58.wordpress.com/

This as-it-happens Google Alert is brought to you by Google.

Remove this alert.
Create another alert.
Manage your alerts.

DEPOSITION
EXHIBIT NUMBER Dickerson 36
DATE
REPORTER ML
ART MILLER & ASSOCIATES

All emails sent by "Richard Windsor" were sent by EPA Administrator Lisa Jackson

01268-EPA-2515

Arvin Ganesan/DC/USEPA/US

06/05/2009 06:56 PM

To Richard Windsor
cc
bcc
Subject coal ash

FYI - [redacted] (b) (5) Deliberative [redacted]

ARVIN R. GANESAN
Deputy Associate Administrator for Congressional Affairs
United States Environmental Protection Agency
Ganesan.Arvin@epa.gov
(p) 202.564.5200
(f) 202.501.1519

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LANDMARK LEGAL FOUNDATION 19415 Deerfield Lane, Ste. 312 Leesburg, VA 20176 Plaintiff, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, Defendant.	)	Case No. 1:12-cv01726 (RCL)

Supplemental Declaration of Eric E. Wachter

1. I, Eric E. Wachter, Director of the Office of the Executive Secretariat ("OEX") within the Office of the Administrator of the U.S. Environmental Protection Agency (the "EPA" or "Agency"), declare that the following statements are true and correct to the best of my knowledge and belief and that they are based upon my personal knowledge and on information supplied to me by employees under my supervision and employees in other EPA offices.

2. I have served as the OEX director since June 2009. My 20-person office has four business lines: processing Freedom of Information Act ("FOIA") requests for the Office of the Administrator; maintaining the records of the Administrator and Deputy Administrator;

DEPOSITION
EXHIBIT NUMBER 37
DATE 2/12/14 REPORTER CTC
ART MILLER & ASSOCIATES

managing the Administrator's and Deputy Administrator's executive correspondence; and administering the EPA's electronic correspondence tracking system. During my time as OEX director I served as vice chair of the Council of Federal Executive Secretariats in 2011 and as chair of the Council in 2012.

3. On May 15, 2013, I executed a declaration in support of the EPA's Motion for Summary Judgment in the above-captioned FOIA case filed by Plaintiff, Landmark Legal Foundation. I have reviewed Plaintiff's Opposition to Defendant's Motion for Summary Judgment and make this supplemental declaration in further support of the EPA's Motion for Summary Judgment. The purpose of this supplemental declaration is to provide additional information regarding the EPA's interpretation of the scope of Plaintiff's FOIA request, EPA's approach in searching for responsive records, and to provide additional information relevant to the EPA's decisions to withhold certain documents or portions of documents responsive to the FOIA request.

4. My statements in this supplemental declaration are based on information provided to me by employees under my supervision at the time, information obtained by me in performance of my official duties, and my personal examination of withheld documents.

I. THE EPA'S SEARCH PROCESS

5. On August 20, 2012, the EPA received a FOIA request from Matthew C. Forys with the Landmark Legal Foundation. This FOIA request was dated August 17, 2012.

6. In its August 17, 2012, FOIA request, Plaintiff sought:

- Any and all records identifying the names of individuals, groups, and/or organizations outside the EPA with which the EPA, EPA employees, EPA contractors and / or EPA consultants have had communications of any kind relating to all proposed rules and regulations that have not been finalized by the EPA between January 1, 2012 [sic] and August 17, 2012. For purposes of this

request, 'communications of any kind' does not include public comments or other records available on the rulemaking docket; and

- Any and all records indicating an order, direction, or suggestion that the issuance of regulations, the announcements of regulations and/or public comment of regulations should be slowed or delayed until after November 2012 or the presidential elections of 2012.

Plaintiff also sought expedited processing and a waiver of all fees associated with processing this request. On August 21, 2012, the EPA's National FOIA Office sent a letter to Plaintiff acknowledging receipt of this request and providing the request's tracking number, HQ-FOI-01861-12. The request was then assigned to the Office of the Executive Secretariat.

7. My office was notified on August 29, 2012, that the EPA's National FOIA Officer sent a letter to Plaintiff granting the request for a fee waiver but denying the request for expedited processing. The letter stated that the EPA would respond to this request as expeditiously as possible. A true and correct copy of this letter is attached to this declaration as Exhibit A. Plaintiff then filed an administrative appeal, dated September 14, 2012, and received by the Office of General Counsel on September 19, 2012, challenging the denial of its request for expediting processing.

8. After several days of internal discussion regarding the breadth of the EPA's rulemaking process and the volume of records generated by that process, Jonathan V. Newton, an attorney under my supervision in the Office of the Executive Secretariat, contacted Plaintiff on September 27, 2012, by telephone to discuss the complexity of this request and options for narrowing the scope. This discussion was necessary because the request, as written, could potentially apply to more than 17,000 EPA employees, located in the Office of the Administrator, the 12 other EPA Headquarters program offices, and each of the EPA's Regional Offices.

9. On September 28, 2012, Mr. Newton attempted, without success, to follow up with Plaintiff regarding the request. By exchange of email with Mr. Newton on October 5, 2012, Mr. Forys, on behalf of Plaintiff, agreed to narrow the scope of the request to "senior officials" in the EPA's Headquarters offices, with senior officials being identified as program administrators, deputy administrators and chiefs of staff in the EPA's Headquarters offices. My office interpreted the narrowed scope of this FOIA request to include the Administrator, Deputy Administrator, and Chief of Staff in the Office of the Administrator. The Administrator, Deputy Administrator, and Chief of Staff in the Office of the Administrator were included under the definition of "program administrators, deputy administrators, and Chiefs of Staff."

10. *Structure and Organization of the EPA Headquarters Offices.* The EPA Headquarters is divided into 13 offices. These offices are the Office of the Administrator (OA), the Office of Administration and Resources Management (OARM), the Office of Air and Radiation (OAR), the Office of the Chief Financial Officer (OCFO), the Office of Chemical Safety and Pollution Prevention (OCSPP), the Office of Enforcement and Compliance Assurance (OECA), the Office of Environmental Information (OEI), the Office of General Counsel (OGC), the Office of International and Tribal Affairs (OITA), the Office of Research and Development (ORD), the Office of Solid Waste and Emergency Response (OSWER), and the Office of Water (OW) as well as the Office of the Inspector General (OIG). Each Office, with the exceptions of the Office of the Administrator, the Office of General Counsel, the Office of the Chief Financial Officer, and the Office of the Inspector General, is headed by an "Assistant Administrator" and Deputy Assistant Administrators. The Office of General Counsel is headed by the General Counsel. The Office of the Chief Financial Officer is headed by the Chief Financial Officer. The Office of the Inspector General is headed by the Inspector General. The Office of the

Administrator is headed by the Administrator and Deputy Administrator. The Office of the Inspector General processes FOIA requests made to the OIG independently and separately from the process for Headquarters offices and regional offices in the Agency.

11. Offices within the EPA Headquarters are habitually referred to across the Agency as "program offices." For purposes of this Declaration, "program offices" refers to Headquarters offices other than the Office of the Administrator and the Office of the Inspector General. The offices of the senior officials within each program office are referred to as the "immediate offices" for that program. The offices of senior officials such as the Administrator and Deputy Administrator in the Office of the Administrator are referred to as the "Immediate Office" of the Office of the Administrator.

12. *Role of the FOIA Coordinators.* The Agency has eleven FOIA offices, one for Headquarters and one for each of the EPA's 10 regional offices. The FOIA process officially begins when a request is received in the Headquarters FOIA office or in one of the Agency's 10 regional FOIA Offices. The Headquarters FOIA Office or Regional FOIA Office will assign the request to the primary FOIA Coordinator in the program or regional office believed to most likely house responsive records. FOIA Coordinators route requests to the appropriate program office or subject matter expert within the program; track FOIA requests for timeliness; monitor the quality of the responses; and provide guidance to program personnel including overdue reports, in collaboration with the National FOIA Officer (NFO). Each HQ Program Office has a lead FOIA coordinator, who works under the general direction of the NFO. Jonathan Newton is the FOIA Coordinator for the Office of the Administrator and is responsible for coordinating searches for responsive records from the Office of the Administrator.

13. *Role of the Office of the Executive Secretariat ("OEX") as Lead Office.* My office (OEX) was assigned by the NFO as the lead office for coordinating the response to Plaintiff's request. My office began processing Plaintiff's FOIA request, as narrowed by agreement, on October 23, 2012. As noted above, the request entailed the search and collection of records from each of the 12 program offices (excluding the OIG) in the EPA's Headquarters. Jonathan Newton, an employee under my supervision in the Office of the Executive Secretariat and the FOIA Coordinator for the Office of the Administrator, was responsible for initiating the collection and review of documents from across the Agency to respond to Plaintiff's request.

14. *The EPA's Search for Responsive Records.* In order to begin the search for records, my office determined that responsive documents may be located within the Immediate Office of the Office of the Administrator. My office also determined that responsive documents may be located outside of the Immediate Office of the Office of the Administrator in the offices of the Assistant Administrators, Deputy Assistant Administrators, and Chiefs of Staff in EPA Headquarters offices, as well as in the offices of the Associate Administrator and Deputy Associate Administrator in the EPA's Office of Policy ("OP"). The OP is the primary EPA office that works to support Agency priorities and enhance decisionmaking through analytic skills, management support, and special expertise in four areas: regulatory policy and management, environmental economics, strategic environmental management, and sustainable communities. The search for responsive documents also included the General Counsel and Deputy General Counsels in the EPA's Office of General Counsel ("OGC"). The OGC is the chief legal advisor to EPA, providing legal support for developing and defending the Agency's rules, adjudications, and policies and advising as to legislation.

15. On October 23, 2012, an electronic mail message initiating the search was sent by Mr. Newton in OEX to the designated FOIA Coordinators for each of the EPA's headquarters offices, with the exception of the Office of the Administrator. As described in Paragraph 12, the FOIA Coordinators are responsible for directing FOIA requests to the individuals in the program offices who are likely to have responsive records. As previously stated, Mr. Newton in my office is the FOIA Coordinator for the Office of the Administrator and was responsible for coordinating the search for responsive documents from the Office of the Administrator. The message to the program office FOIA Coordinators described Plaintiff's request in the "Request Description" as follows:

Request Description:

•Records relating to proposed rules or regulations that have not been finalized by the EPA between January 1, 2012 and August 17, 2012.
•Records reflecting an order, direction or suggestion, that regulations (or comments on regulations) should be delayed until after November 2012.
•**Note: This request has been modified.** The search only applies to assistant administrators, deputy assistant administrators and chiefs of staff in EPA headquarters.
The search will also include the associate administrator and deputy associate administrator(s) for the Office of Policy.

Because this communication was sent by the FOIA Coordinator in the Office of the Administrator to FOIA Coordinators in program offices outside of the immediate office of the Office of the Administrator, it did not refer to the Administrator, Deputy Administrator, and Chief of Staff of the Office of the Administrator. However, Mr. Newton communicated with staff in the Office of the Administrator regarding this FOIA request through a separate email communication. *See* Paragraph 17.

16. In order to process and collect responsive documents, technical staff in the Office of the Administrator created an electronic database using the agency's Lotus Notes software for individuals to use to upload responsive electronic records. On October 25, 2012, my staff sent

an additional communication to the FOIA Coordinators marked as an "Update and FAQ" regarding the search request. In this communication OEX provided a link to a records collection database and instructed individuals to upload potentially responsive information into the database. My staff instructed individuals to search based on the overall request as well as by key words, instructing:

- There will not be an "automated search" for this request. However, potential key words for a manual search could include: "draft or proposed" within the same sentence as "rule, regulation or policy." Those suggestions are not meant to be exhaustive. The original request elaborates upon the records that are sought.

Due to the broad and unfocused nature of the request, the decision was made to instruct offices to search based on the request rather than strictly by key words. This was because precise key words could not be readily developed that would be narrowly tailored to find documents responsive to the plaintiff's request, as the request was not focused on a particular topic, rule, particular third party, or other issue amenable to a search limited by key words. Each headquarters office was individually responsible for uploading their responsive documents to the collection database.

17. *Initial request for responsive documents from the Office of the Administrator:* On November 14, 2012, Mr. Newton sent an email to Aaron Dickerson and Nena Shaw in the Office of the Administrator, forwarding the instructions that were sent to the FOIA coordinators for the other program offices on October 23, 2012, and the link to the collection database. This email communication instructed Mr. Dickerson and Ms. Shaw to search for records responsive to the request from the email accounts of the Administrator and Deputy Administrator, respectively, and to upload any responsive records into the collection database.

18. As I stated in my May 15, 2013, Declaration, the initial document collection was closed on January 25, 2013. At that point my office had either received a no-records response or

had coordinated the collection of documents from the Immediate Office of the Office of the Administrator and from Assistant Administrators, Deputy Assistant Administrators, and Chiefs of Staff in the EPA's Office of Water (OW), Office of Air and Radiation (OAR), Office of Solid Waste and Emergency Response (OSWER), Office of Chemical Safety and Pollution Prevention (OSCPP), Office of Enforcement and Compliance Assurance (OECA), and Office of General Counsel, as well as documents from the associate administrator and deputy associate administrator in the EPA's Office of Policy.

19. *Initial Processing of Responsive Records.* As of January 25, 2013, the EPA had completed its initial search for records responsive to this FOIA request and identified more than 4,600 potentially responsive documents. OEX staff and OGC staff then reviewed and processed these documents for responsiveness to Plaintiff's FOIA request and for any applicable privileges. Records were deemed to be responsive to the Plaintiff's FOIA request if they either 1) memorialized a meeting, communication with, or contact with an outside party related to a rule that was proposed, but not finalized, during the time frame identified by Plaintiff (not including standard interagency review of proposed rules or formal comments on rulemaking dockets) or 2) internal or external records from any party that discussed or memorialized discussions of delaying a rulemaking until after the election of 2012 or after November 2012 for political reasons.

20. *Segregating Non-Exempt Material.* OEX staff and OGC staff also evaluated each record responsive to this FOIA request for segregability of non-exempt material. The staff determined that where a record was withheld in its entirety, no meaningful portion could reasonably be released. The staff members performed redactions where non-exempt material could be reasonably segregated and released non-exempt portions.

21. *The EPA's Supplemental Search for and Collection of Potentially Responsive Records from the Immediate Office of the Office of the Administrator.* As part of finalizing the documents for the Court's April 30, 2013, filing deadline, my office carefully reviewed the document search that was performed between October 23, 2012, and January 25, 2013. In the course of this review, on April 29, 2013, my office determined that the search for documents from the former Administrator, the Deputy Administrator, and the Chief of Staff in the Office of the Administrator may have been insufficient. In the interest of a complete and adequate response to Plaintiff's request, the EPA determined that another search would be required of the accounts of the former Administrator, Deputy Administrator, and Chief of Staff in the Office of the Administrator. The EPA immediately notified plaintiff and the Court of this deficiency and that there would be a number of additional documents that may potentially be responsive to the Plaintiff's request.

22. To start this supplemental search, staff in the Office of the Administrator were instructed by electronic mail to immediately complete a new search of the accounts of the former Administrator, the Deputy Administrator, and the Chief of Staff using the keywords "draft or proposed" within the same sentence as "rule, regulation, or guidance" for the time period of January 1, 2012, to August 21, 2012. This very broad and inclusive search was to verify that all documents related to a draft or proposed rule were collected so that they could be reviewed by my staff and OGC staff to determine which of these documents were actually responsive to plaintiff's request.

23. In addition to the 4,600 documents that were initially identified as potentially responsive, approximately 4,500 additional documents were found during searches in the Office of the Administrator conducted April 30, 2013, to May 3, 2013, from the files of the former

Administrator, the Deputy Administrator, and the Chief of Staff. These additional potentially responsive documents contained the broad key words "draft or proposed" within the same sentence as "rule, regulation, or, guidance." OEX staff and OGC staff then reviewed and processed these documents for responsiveness to Plaintiff's FOIA request and for any applicable privileges. Records were deemed to be responsive to the Plaintiff's FOIA request if they either 1) memorialized a meeting, communication with, or contact with an outside party related to a rule that was proposed, but not finalized, during the time frame identified by Plaintiff (not including standard interagency review of proposed rules or formal comments on rulemaking dockets) or 2) internal or external records from any party that discussed or memorialized discussions of delaying a rulemaking until after the election of 2012 or after November 2012 for political reasons. With the addition of these 4,500 additional documents, more than 9,100 potentially responsive documents from across the agency were reviewed and processed by my staff and OGC staff to process Plaintiff's FOIA request.

24. *Segregating non-exempt material.* OEX staff and OGC staff also evaluated each additional record responsive to this FOIA request for segregability of non-exempt material. The staff determined that where a record was withheld in its entirety, no meaningful portion could reasonably be released. The staff members performed redactions where non-exempt material could be reasonably segregated and released non-exempt portions.

25. *Filing System and Files Subject to Search.* As stated above and in my May 15, 2013, Declaration in support of the EPA's Motion for Summary Judgment, my staff provided a link to a Lotus Notes records collection database and instructed individuals to upload potentially responsive information into the database. My staff instructed individuals to search based on the overall request, which was for records of "communications of any kind relating to all proposed

rules and regulations that have not been finalized by the EPA between January 1, 2012 [sic] and August 17, 2012" and for "records indicating an order, direction, or suggestion that the issuance of regulations, the announcements of regulations and/or public comment of regulations should be slowed or delayed until after November 2012 or the presidential elections of 2012." Each program office was individually responsible for uploading their responsive documents to the collection database.

Documents uploaded into the database for processing and review as of May 15, 2013, included the following:

a. *Internal Lotus Notes Email System.* During the time period of January 2012 to August 2012, which is the time period specified in Plaintiff's FOIA request, the EPA used Lotus Notes as its exclusive email application throughout the Agency. The Lotus Notes email application allows users to search for responsive records in all folders contained in mail servers and archived servers, and then upload the potentially responsive records into collection databases.

b. *Lotus Notes Email Messages Received from Outside Parties or Non-Agency Accounts.* Messages received from outside parties or outside email accounts to EPA email accounts during the time period of this request are contained in these EPA mail servers and archived servers. Responsive communications with outside parties were searched for and located as part of the search for records responsive to this request. The EPA provided responsive records to Plaintiff containing communications with outside parties. Exhibit B contains examples of records of communications to and from outside parties with the EPA. Many of these documents were released in full to Plaintiff and were therefore not numbered or referenced on the EPA's *Vaughn* Index. Document EPA – 32, containing an unsolicited email communication received by Deputy Administrator Bob Perciasepe, is another example of an email communication from an outside

account. This communication was forwarded to Mr. Perciasepe's executive assistant, Teri Porterfield, and was located in the EPA's Lotus Notes email system as part of EPA's search for responsive records.

c. *Lotus Notes Email Records from the Secondary Account of Former Administrator Lisa P. Jackson.* As I stated in my May 15, 2013, Declaration, since the widespread use of email has become commonplace, EPA Administrators have been assigned two email accounts: a primary account and a secondary account. The email address for Administrator Jackson's primary account was posted on the EPA's website and was used by hundreds of thousands of Americans to send messages to the Administrator. This account was maintained and monitored by staff, and the emails were processed as official correspondence as appropriate. The secondary account was an everyday, working email account of the Administrator to communicate with staff and other government officials. This secondary email account was used for practical purposes. Given the large volume of emails sent to the primary account – more than 1.5 million in fiscal year 2012, for instance – the secondary email account was necessary for effective management and communication between the Administrator and colleagues.

In accordance with the EPA's practice for responding to FOIA requests for documents from the email account of the Administrator, the EPA searched this secondary account and provided responsive records from this secondary account. My office is aware of no other secondary EPA email accounts of senior officials within the Agency during the time period of Plaintiff's request.

d. *Calendar Entries memorializing meetings with outside parties.* Calendar entries on the EPA's official calendars are also contained in the Lotus Notes application. EPA provided records of calendar entries memorializing meetings with outside parties related to rules that were

proposed but not finalized during the time period covered by Plaintiff's FOIA request. Exhibit C contains examples of these calendar entries that were provided to Plaintiff.

e. *Electronic Attachments to Email Files.* Many of the documents uploaded into the database contained attachments to email files in the form of Microsoft Word documents, Adobe Acrobat .PDF form documents, and Microsoft Excel spreadsheets. These attachments were also reviewed for responsiveness to Plaintiff's FOIA request and for any applicable exemptions. Many responsive records contained attachments that included memoranda, internal planning documents, drafts of correspondence, and final correspondence related to rules proposed but not finalized during the time period of Plaintiff's request.

f. *Correspondence stored in the EPA's Correspondence Management System ("CMS") and contained in "Daily Reading Files."* The EPA also provided outside correspondence that was received by the EPA and reviewed by the executive correspondence team in OEX. The executive correspondence team processes correspondence for the Administrator and Deputy Administrator and is responsible for managing and tracking correspondence in CMS. EPA senior managers, including the Administrator and Deputy Administrator, do not directly review all correspondence they receive. Instead, staff on the OEX correspondence team prepares "Daily Reading Files" of correspondence for senior managers to review. My office determined that these Daily Reading Files prepared by staff were the records likely to have information responsive to the narrowed scope of Plaintiff's request. The EPA provided the pages and correspondence from Daily Reading Files responsive to Plaintiff's request. Exhibit D provides examples of these Daily Reading Files, which include responsive correspondence from the CMS system.

26. *Locations likely to have responsive records.* My office determined that the records described above constitute the records likely to contain responsive information to Plaintiff's request for records of "communications of any kind relating to all proposed rules and regulations that have not been finalized by the EPA between January 1, 2012 [sic] and August 17, 2012" and for "records indicating an order, direction, or suggestion that the issuance of regulations, the announcements of regulations and/or public comment of regulations should be slowed or delayed until after November 2012 or the presidential elections of 2012." Therefore, as of May 15, 2013, my office determined that all locations reasonably likely to contain responsive records had been searched.

II. VAUGHN INDEX AND WITHHELD DOCUMENTS

27. *Deliberative Process Privilege and Exemption 5.* The EPA withheld approximately 399 documents, in full or in part, from disclosure under FOIA Exemption 5 and the deliberative process privilege. The documents withheld under the deliberative process privilege and FOIA Exemption 5 comprise email chain discussions, draft versions of documents, briefing materials, and internal briefing memoranda that pertain to myriad EPA decision-making processes related to rulemaking and proposed rules. The attached *Vaughn* index provides a detailed description of each document or portion of a document withheld under the deliberative process privilege and FOIA Exemption 5.

28. *Providing Details of Each Sample Vaughn Record.* In completing the sample *Vaughn* index, the EPA ensured that each of its 399 records provided sufficient detail for each particular record without releasing the deliberative content. *See* Vaughn Index, Exhibit A to EPA Motion for Summary Judgment.

29. *Pre-decisional Intra- and Inter-agency Records.* As demonstrated in the October 7 Declaration and the EPA's sample *Vaughn* index, all records withheld under the deliberative process privilege and Exemption 5 of FOIA were created prior to the finalization of Agency decisions and comprised of intra- or interagency records. *See* Vaughn Index. The withheld records were prepared in connection with developing Agency rulemaking actions that, by the terms of Plaintiff's FOIA request, were not final at the time that the records were prepared. Therefore these records are pre-decisional intra- and interagency records generally developed as part of the Agency's decision-making process related to proposed rules and proposed rulemaking. Specifically, with regard to document EPA-421, the document discusses potential issues with the application of a rule known as the greenhouse gas tailoring rule to a facility and lays out several pre-decisional options for consideration related to the potential application of this rule.

30. *The EPA's Use of Exemption 6 for Email Addresses from the Executive Office of the President.* Exhibit E, containing documents EPA-296, EPA-297, EPA-298, EPA-299 and EPA-301, provides examples of how EPA withheld official email addresses of the Executive Office of the President under Exemption 6. The Executive Office of the President's staff members have a significant personal interest in preventing the burden of unsolicited emails and harassment. The email addresses are used for internal messages to and from the Executive Office of the President to prevent unsolicited communications. Since the owners' names are already disclosed, public disclosure of these email addresses would not shed light on the performance of the employees' official duties. As Exhibit E demonstrates, when EPA withheld email addresses under Exemption 6, the Agency also provided the email owner's name in the

redaction or the redaction directly followed the owner's name. Thus, there is no confusion as to who received or sent the email communications.

III. THE EPA'S PRESERVATION OF RESPONSIVE RECORDS

31. On October 23, 2012, certain EPA staff, including OEX staff, was sent a litigation hold notice issued by an Attorney-Advisor in the EPA's Office of General Counsel advising that all information responsive to this FOIA request must be preserved. The hold notice was sent through the Encase Litigation Hold Module, which is the electronic tool that EPA now uses to issue all litigation holds. I certified that I read and understood the meaning and scope of the litigation hold notice, and that I would comply to the best of my ability with the EPA's obligation to preserve information relevant to this FOIA litigation. I have also instructed my staff to comply with all preservation obligations for relevant information concerning this FOIA request and FOIA litigation.

32. My staff and I are also aware of our obligation to preserve records under the Federal Records Act as well as the obligation to preserve information that is responsive to a FOIA request. Additionally, my staff and I are familiar with and understand the EPA's Interim Policy, "Preservation of Separated Personnel's Electronically Stored Information Subject to Litigation Holds." My staff and I understand that this obligation includes an obligation to preserve the records from individuals who have since separated from the Agency, including any secondary EPA email accounts used by those individuals during their tenure at the Agency. A true and correct copy of this policy is attached as Exhibit F.

33. Following Administrator Jackson's departure, Office of the Administrator staff retained and searched her records, including the secondary email account, as part of the supplemental search for records from the former Administrator, the Deputy Administrator, and

the Chief of Staff. To the best of my knowledge no records were or have been deleted from these accounts following the former Administrator's departure from the Agency.

Pursuant to 28 U.S.C. § 1746, I hereby affirm under penalty of perjury that the forgoing declaration is true and correct.

Executed in the District of Columbia this 24th day of July, 2013.

Eric E. Wachter
Director, Office of the Executive Secretariat
Office of the Administrator
U.S. Environmental Protection Agency

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LANDMARK LEGAL FOUNDATION	)	
Plaintiff,	)	
v.	)	**Civil No. 12-1726 (RCL)**
ENVIRONMENTAL PROTECTION AGENCY	)	
Defendant.	)	

MEMORANDUM OPINION

Plaintiff Landmark Legal Foundation ("Landmark") has moved for a preliminary injunction compelling defendant Environmental Protection Agency ("EPA") to preserve certain records, expedite processing of Landmark's Freedom of Information Act ("FOIA") request, and produce certain records by 5 p.m. on December 24, 2012. Upon consideration of Landmark's Motion [14] for Preliminary Injunction and Request for Expedited Consideration, EPA's Opposition [16], Landmark's Reply [17], the entire record in this case, and the applicable law, the Court will DENY the Motion for Preliminary Injunction.

A brief description of the Court's reasoning follows and a separate Order consistent with this Opinion shall issue this date.

I. BACKGROUND

On August 17, 2012, Landmark, a "national public interest law firm," submitted a FOIA request to the EPA requesting records regarding any EPA rule or regulation for which public notice has not been made, but which was contemplated or under consideration for public notice

DEPOSITION
EXHIBIT NUMBER Dicherson 39
DATE 2.11.14 REPORTER MC
ART MILLER & ASSOCIATES

between January 1, 2012 and August 17, 2012.[1] Compl. ¶ 10, ECF No. 1. The genesis of the FOIA request was Landmark's suspicion, based on news reports, that the EPA may have intentionally delayed a "controversial" regulation until after the November 2012 presidential election. Compl. ¶ 6. Landmark expressed concern about the possibility that "a) the Obama Administration is improperly politicizing EPA activities; b) EPA officials are attempting to shield their true policy goals from the public; and/or c) EPA officials themselves are putting partisan interests above the public welfare." Compl. ¶ 9.

The EPA acknowledged receipt of the FOIA request but denied Landmark's request for expedited processing. Compl. ¶ 13. Landmark administratively appealed, and EPA denied the appeal because Landmark had not shown it was "primarily engaged in disseminating information to the public" as required by FOIA for expedited processing. Letter from Kevin M. Miller, Assistant Gen. Counsel, U.S. Envtl. Prot. Agency, to Mark Levin, Landmark Legal Found. (Oct. 18, 2012), ECF No. 1-6. The EPA also stated that Landmark would not meet the "urgency" requirement for expedited processing. *Id.* Landmark subsequently filed this suit.

Landmark's Complaint sought orders directing EPA to preserve all records potentially responsive to Plaintiff's FOIA request; declaring that the EPA wrongfully denied Landmark's expedited processing request, that it must immediately conduct an expedited search and produce all responsive records; and declaring that Landmark is an entity "primarily engaged in

[1] Specifically, the request sought: "1. Any and all records identifying the names of individual, groups and/or organizations outside the EPA with which the EPA, EPA employees, EPA contractors and/or EPA consultants have had communications of any kind relating to all proposed rules or regulations that have not been finalized by the EPA between January 1, 2012 and August 17, 2012. For the purposes of this request, 'communications of any kind' does not include public comments or other records available on the rulemaking docket. 2. Any and all records indicating an order, direction or suggestion that the issuance of regulations, the announcements of regulations and/or public comment of regulations should be slowed or delayed until after November 2012 or the presidential elections of 2012." Letter from Mark R. Levin, President, Landmark Legal Found., to Nat'l Freedom of Info. Officer, U.S. Envtl Prot. Agency (Aug. 17, 2012), ECF No. 1-3, hereinafter [Pl.'s FOIA Request]. This request was subsequently limited to communications by senior EPA officials.

disseminating information" for purposes of expedited processing under FOIA. Compl. 5. Finally Landmark requested attorneys' fees and costs. *Id.*

In late November, the EPA notified Landmark that it intended to produce all documents responsive to the request on or before January 31, 2013. Hutchison Aff. ¶ 7, ECF No. 14-4.

Also in late November, the EPA issued a proposed rule[2]—Reconsideration of Certain New Source and Startup/Shutdown Issues ("November proposed rule")[3]—which Landmark characterizes as "extremely politically controversial" and "'expected to be one of the most costly rules ever issued by EPA.'" Pl.'s Stmt. P. & A. in Supp. of Pl.'s Mot. for Prelim. Inj. 4, ECF No. 14-1 [hereinafter Pl.'s Stmt. P. & A.]. Landmark argues that the rule was originally finalized on February 16, 2012, but that EPA later announced it would reconsider the rule; thus, Landmark argues that communications regarding this rule fall within the FOIA request. *Id.*

Landmark now seeks a preliminary injunction ordering production of records related to this proposed rule by 5 p.m. on December 24, 2012. Pl.'s Stmt. P. & A. 1. Landmark also seeks an order compelling expedited processing of all additional records responsive to Landmark's FOIA request, and compelling EPA to preserve all responsive information, and directing the EPA Administrator to ensure that any order of this Court is carried out.[4] Pl.'s Stmt. P. & A. 2.

II. DISCUSSION

A. Preliminary Injunction Requiring Expedited Processing

[2] Landmark mistakenly characterizes the rule as a Final Rule, likely because the rule was inadvertently published in the final rule section of the Federal Register. A correction was issued on December 5, 2012 and the EPA extended the public period from December 31, 2012 to January 7, 2013. *See* 77 FR 73968.

[3] The full title of the rule is: Reconsideration of Certain New Source and Startup/Shutdown Issues: National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units. 77 FR 71323.

[4] Landmark does not provide any argument or support for its request that the EPA Administrator be directed to ensure any Court order is carried out. Given that the Court declines to issue a preliminary injunction, there is no need for the Court to further address this aspect of Landmark's motion.

The Court may grant preliminary injunctive relief when the movant demonstrates:

> (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction is not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction.

Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1066 (D.C. Cir. 1998)

Preliminary injunctive relief is an extraordinary form of judicial relief and courts should thus grant it sparingly. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). Additionally, any preliminary injunctive relief should be carefully circumscribed to remedy the harm shown. *Nat'l Treasury Employees Union v. Yeutter*, 918 F.2d 968, 977 (D.C. Cir. 1990) (citation omitted).

The circuits split on whether courts should balance the four preliminary injunction factors on a sliding scale, as they have traditionally done, or whether each factor must now be established independently. The D.C. Circuit has not yet resolved this question for courts in our circuit;[5] however, the debate is academic here since Landmark's claim fails under even the more forgiving sliding scale test.

1. Landmark Has Not Shown Substantial Likelihood of Success on the Merits

Landmark argues that the standard for evaluating the likelihood of success on the merits turns not on whether the requester will *receive* any documents, but whether plaintiff is entitled to full processing of its FOIA request. Pl.'s Stmt. P. & A. 5 (citing *Wash. Post v. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61, 67 (D.D.C. 2006)). However, Landmark seeks expedited processing of its request for documents regarding the November 2012 proposed rule as well as

[5] *See Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) (noting disagreement among the circuits and among judges on the D.C. Circuit regarding how to evaluate the factors but concluding that "[w]e need not wade into this circuit split today" because an injunction would not be appropriate under either test); *but see In re Navy Chaplaincy*, 697 F.3d 1171, 1178 (D.C. Cir. 2012) ("We review the district court's ultimate decision to deny injunctive relief, as well as its *weighing* of the preliminary injunction factors, for abuse of discretion." (emphasis added)).

other proposed rules considered but not finalized between January 1 and August 17, 2012; thus, the question with respect to these two claims is whether Landmark is entitled to *expedited* processing and not just whether it is entitled to a response.

Courts review agency decisions denying expedited processing de novo. 5 U.S.C. § 6(E)(iii), *id.* § 4(B). Additionally, "judicial review shall be based on the record before the agency *at the time of the determination*." *Id.* § 6(E)(iii) (emphasis added).

As a preliminary matter, the Court believes that Landmark's request for expedited processing may be moot. If it is, this alone would prevent Landmark from showing a likelihood of success. Expedited processing requires only that an agency process the request "as soon as practicable." The statute does not assign any particular time frame to release of the records sought. This Court has previously noted that an award of expedited processing only moves the plaintiff's request "to the front of the agency's processing queue, as provided by FOIA, and require[s] that they be processed 'as soon as practicable.'" *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 259–60 (D.D.C. 2005). Since the EPA has already stated that Landmark's request is "at the top of the FOIA processing queue" and that it intends to process the request on or before January 31, 2013, the Court questions whether an order compelling expedited processing would afford any additional relief to Landmark. *See* Def.'s Opp'n 4 (citing Wachter Decl. ¶ 11).[6]

However, because courts have equitable powers to order agencies to act within a particular time frame, for example, by December 24, and because a formal grant of "expedited processing" might ensure that the EPA keeps Landmark at the top of the queue, the Court will analyze Landmark's claim on the merits.

[6] The Court does not suggest that the entire FOIA suit is moot given that Landmark may still challenge the adequacy of the EPA's search, its invocation of any exemptions, etc.

a. Expedited Processing "Compelling Need" Standard

To obtain expedited processing, Landmark must show a "compelling need." 5 U.S.C. § 552(a)(6)(E)(i). Such a need is established if either: (1) failure to obtain expedited processing would pose an "imminent threat to the life or physical safety of an individual"; or (2) the requester is "primarily engaged in disseminating information" *and* shows an "urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v)(ii); *see also* 6 C.F.R. § 5.5(d)(1)(ii). Only the second category is at issue here.

The FOIA expedited processing provision was added in 1996 by the Electronic Freedom of Information Act Amendments, Pub. L. 104-231, § 8, 110 Stat. 3048, 3051–52. The D.C. Circuit, in examining the legislative history of these amendments, has noted that "'the specified categories for compelling need are intended to be narrowly applied.'" *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001) (quoting H.R. Rep. No. 104-795, at 26 (1996)). The Circuit reiterated Congress' concern for agencies' "'finite resources'" and the possibility that overuse of the expedited process would unfairly disadvantage other requesters. *Id.*

i. Landmark Has Not Shown it is a "Person Primarily Engaged in Disseminating Information"

Scant caselaw defines who qualifies as a person primarily engaged in information dissemination. Courts regularly find that reporters and members of the media qualify, and EPA regulations implicitly assume they meet the definition. *See* 40 C.F.R. § 2.104(e)(3). However, given Congressional and D.C. Circuit direction that the category be narrowly construed, this Court must be cautious in deeming non-media organizations as persons primarily engaged in information dissemination.[7] As noted in the legislative history, the category

[7] This is particularly the case at the preliminary injunction stage where the movant has the burden of showing a substantial likelihood of success on the merits and where the sought-after remedy is to be granted "sparingly."

> should not include individuals who are engaged only *incidentally* in the dissemination of information. The standard of 'primarily engaged' requires that information dissemination be the *main activity* of the requestor, although it need not be their sole occupation. A requestor who only *incidentally* engages in information dissemination . . . would not satisfy this requirement.

H. R. Rep. No. 104-795, at 26 (emphasis added).

For this reason, at least one court denied expedited processing to another group engaged in both litigation and information dissemination. In *Am. Civil Liberties Union of N. Cal. v. Dep't of Justice*, the court refused to hold that the ACLU was engaged *primarily* in information dissemination despite the fact that it sent a bi-monthly newsletter to 40,000 people, maintained a website, and issued right-to-know documents, press releases, brochures, and pamphlets on civil liberties. No. 04-4447 PJH, 2005 WL 588354 (N.D. Cal. Mar. 11, 2005) ("[I]nformation dissemination must be *the* main activity of the requester-though it need not be his/her/its sole occupation. . . . [W]hile dissemination of information may be *a* main activity of ACLU-NC, there is no showing that it is *the* main activity.").

While this Court has found at least one non-media entity to be "primarily engaged" in information dissemination, that case is distinguishable. In *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005), the Court found that plaintiff's "mission [was] to serve as the site of record for relevant and up-to-the minute civil rights news and information." Here, Landmark has only stated that "*as part of* its mission as a tax-exempt, public interest law firm, Landmark *investigates, litigates*, and publicizes instances of improper and/or illegal government activity" and that "[*a*]*mong* [its] primary activities is to disseminate to the public about the conduct of governmental agencies." Letter information obtained through the [FOIA]." Pl.'s FOIA Request 7–8; *see also* Hutchison Aff. ¶¶ 4–5. This is not sufficient to show that Landmark is primarily, and not just incidentally, engaged in information dissemination and thus the Court cannot now find that Landmark meets this prong of the compelling need test.

A contrary reading of the statutory requirement would allow nearly any organization with a website, newsletter, or other information distribution channel to qualify as primarily engaged in disseminating information.

ii. Urgency to Inform

Because Landmark is not an entity primarily engaged in disseminating information, it cannot show a compelling need. However, even if Landmark were to demonstrate that it is "primarily engaged in disseminating information," the Court is not convinced that Landmark can show an "urgency to inform."

In evaluating whether there is an urgency to inform, courts consider at least three factors: "(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity." *Al-Fayed*, 254 F.3d at 310. "The public's right to know, although a significant and important value, would not by itself be sufficient to satisfy this standard." *Id.* (quoting H.R. Rep. No. 104-795, at 26 (1996)).

First, as already stated, the Court reviews de novo an agency's denial of expedited processing. By statute, judicial review is based on the record before the agency *at the time of* the determination. At the time of the EPA's denial of Landmark's request, Landmark argued that the urgency to inform arose from the fact that the records related to matters of tremendous public interest, that the "health and wellbeing of the public and economic wellbeing of the country are at stake with improper environmental regulation," and that the EPA's potential delay in rulemaking should be considered by the American public before voting in the elections. Landmark's first justifications (that the matters are of public interest and concern the health and economic wellbeing of the public) are not sufficient to satisfy the standard. The interest in

disclosing information before the presidential election comes much closer to meeting the urgency requirement. However, given the breadth of issues at play in a presidential election, such a justification would likely sweep almost any FOIA request into the ambit of "urgency" since FOIA requests are regularly designed to elicit information about how the government is performing its work. Thus, although the Court need not decide the issue, the Court doubts that such an argument meets the urgency standard.

In its preliminary injunction motion, Landmark raises new justifications, based on the November 2012 proposed rule, to support the urgency of its request. Landmark could not have raised these justifications with the agency before issuance of the rule. Because the FOIA statute only allows judicial review of agency decisions based on the record before the agency, these justifications are likely irrelevant for purposes of de novo review. Nevertheless, because FOIA does not limit a Court's equitable powers, the Court will now consider Landmark's arguments.

Landmark's request for records related to delay of the agency rule certainly comes closest to meeting the urgency standard. The proposed rule has a comment period ending before Landmark is set to receive a response to its FOIA request. However, Landmark has not shown *why* this creates the level of exigency needed to demonstrate "urgency to inform." For example, Landmark states that a "delay in producing responsive records could affect legal challenges to finalized regulations." Pl.'s Stmt. P. & A. 6. However, Landmark does not explain why this would be the case. For example, Landmark does not state whether any legal challenges are contemplated. Moreover, it is unclear how a delay of just over one month will impair Landmark's ability to launch any future legal challenges to finalized regulations.

It is true that the content of Landmark's comments in response to the EPA proposed rule *may* be affected by a delay in receipt of FOIA materials. However, Landmark states that it seeks

information regarding politically motivated delays in publishing the rule. Thus, the failure to obtain this information should not impact Landmark's ability to comment on the substance of the rule and the merits of any proposed changed. Moreover, nothing prevents Landmark from filing comments (citing already-public information) expressing concern that the delay in issuance of the rule may have been politically motivated.

Given the foregoing, the Court finds that Landmark has not shown a substantial likelihood of success on the merits. First, Landmark has likely already received the relief it seeks given that the agency has placed its request first in line.

2. Irreparable Injury

Landmark has not shown that it will suffer irreparable injury if the Court does not order the release of records before December 24, 2012.

Courts in this circuit have acknowledged that "FOIA was created to foster public awareness, and failure to process FOIA requests in a timely fashion is 'tantamount to denial.'" *See, e.g.*, *Wash. Post*, 459 F. Supp. 2d at 74 (quoting H.R. Rep. No. 93-876, at 6 (1974)); *see also Payne Enters. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988) (recognizing that "stale information is of little value"). However, where the plaintiff has not met the requirements for expedited processing, and where the agency has stated that it will complete processing of the request by the end of next month, the Court finds it difficult to conclude that denial of a preliminary injunction motion will result in irreparable harm.

If the EPA did, for political reasons, delay a controversial proposed rule until after the presidential election, the Court fails to see how receiving this information in January will irreparably harm Landmark. Landmark could at that time choose to publicize the information in whatever forum it choose and could launch legal challenges, if applicable, to the rule itself.

Landmark may also still submit public comments to the proposed rule. While the Court acknowledges that its comments will not include information it might receive from the FOIA request, the Court is not convinced that this would result in irreparable harm. This is especially true given that, *even if* the Court were to order production of records, many of these could fall under exemptions to the FOIA and thus be withheld or redacted. Agencies may invoke one of nine FOIA exemptions to withhold information from disclosure. These exemptions are to be narrowly construed and agencies must release any non-exempt, segregable information and have the burden to justify withholding. Nevertheless, there is no guarantee, even if the Court were to issue a preliminary injunction that the records Landmark seeks would be disclosed. For example, after a preliminary review of documents already collected, the EPA noted that portions of the collected records may be subject to FOIA exemptions and must be identified, further reviewed, and redacted where appropriate. *See* Wachter Decl. ¶ 12.

3. No Substantial Injury to Other Interested Parties

Landmark fares best on this prong of the preliminary injunction analysis. However, this is insufficient to overcome its failure on the other prongs. Here, the EPA argues that the search for and production of responsive records will be extremely difficult within the allocated time, for example, because of other court-imposed deadlines. Wachter Decl. ¶ 14. It will also divert resources from other statutory and regulatory obligations. Finally, the EPA suggests that a rushed production could result in the "inadvertent and improper disclosure of potentially sensitive attorney–client communications and deliberative information." Def.'s Opp'n 19.

The Court agrees that the administrative burden on the agency to complete this request in just three days (including two weekend days) would be significant. The Court is not convinced,

however, that this constitutes a "substantial injury" for purposes of a preliminary injunction analysis, particularly when the agency is already bound to respond to the request.

Again, however, the lack of a substantial injury on this prong does not overcome Landmark's failure to demonstrate that it is substantially likely to succeed on the merits and that it will suffer irreparable injury without an injunction.

4. Furthering of Public Interest

The public interest clearly favors agency processing of FOIA requests as quickly as possible. However, the question here is the extent to which the public interest is furthered by ordering the release of information within the next three days in the case of the November 2012 proposed rule request and requiring "expedited processing" for the remainder of Landmark's request.

The EPA has already stated that Landmark's request is "at the top of the FOIA processing queue," and that it "anticipates completing the response to this request on or before January 31, 2012." Def.'s Opp'n 4 (citing Wachter Decl. ¶ 11, Hutchison Aff. ¶ 7). Landmark has not shown that any increased public interest in disclosure of these documents within the next three days is significant enough to overcome its failure on the other prongs.

B. Preliminary Injunction Compelling Preservation of Responsive Information

1. Landmark Has Not Shown Likelihood of Success on Merits

This Court sanctioned the EPA in 2003 for destroying records potentially responsive to a FOIA request by Landmark. However, that case does not demonstrate the need for an order compelling preservation of records here.

First, there is no indication that the EPA has or will destroy any records related to this request. The 2003 sanctions were levied when the agency, during the 2000–2001 change in

Presidential administrations, destroyed records in direct contravention of a court order. Here, while there may be some staff turnover at the EPA as the Obama administration enters its second term, there will be no actual change in Presidential administrations. What's more, in contrast to any indication of destruction of records, the EPA has already indicated that it has begun the process of collecting records and that it has already collected approximately 1,600 pages of responsive records.[8] Wachter Decl. ¶ 11.

Second, the mere "potential of destruction" is not sufficient to demonstrate the need for such an order. Such a possibility for destruction of records exists with regard to any FOIA request, yet courts do not routinely issue orders compelling preservation.

Third, the EPA is already barred from destroying many records which would be responsive, for example, under the Federal Records Act.

Finally, the EPA "has taken affirmative steps to preserve information responsive to the request, including issuance of a litigation hold." Opp'n 18; Wachter Decl. ¶ 15. The individual overseeing the EPA response to this request has stated that he "will comply to the best of [his] ability with the EPA's obligation to preserve information relevant to this FOIA litigation" and that his staff has been instructed to comply with preservation obligations. Wachter Decl. ¶ 15.

Thus, there seems little likelihood for the need of an order compelling preservation. In its Reply, Landmark raises a new concern, namely that news reports suggest that the EPA Office of Inspector General is investigating records management practices at the EPA and the EPA Administrator's use of an "alias" email address at the EPA. Pl.'s Reply 1–2, ECF No. 17. While this raises some potential concerns, the Court cannot base a decision to compel preservation on a

[8] It is unclear if the EPA suggests that there are 1600 pages of responsive documents or "potentially" responsive documents. After stating that they have collected 1600 pages of responsive documents, Mr. Wachter states that a preliminary review suggests that many of the documents contain peripheral references to rules or rulemaking, but are ultimately nonresponsive to Plaintiff's request. Wachter Decl. ¶ 12.

single news article. However, the Court notes that as developments occur, it may reconsider the necessity of an order compelling preservation of records.

2. Irreparable Injury

While Landmark would be irreparably harmed by the destruction of responsive records, as already discussed, there is no indication that the EPA will destroy responsive records. Thus Landmark has not shown that it will suffer irreparable harm from the Court's refusal to enter a preliminary injunction.

3. Substantial Injury to Other Interested Parties

There would be no substantial injury to other interested parties from an order compelling the preservation of documents. However, because Landmark has not met the first two preliminary injunction factors, its success on the third has little impact.

4. Furthering of Public Interest

Again, were there a danger that the EPA might destroy responsive records, the public interest would certainly be furthered by an order compelling preservation. However, Landmark has not shown any indication that the EPA may destroy records. Moreover, the EPA has submitted a sworn declaration from the employee overseeing the response to this FOIA request in which he states that there is a litigation hold requiring the preservation of records and that he will comply, to the best of his ability, with the obligation to preserve records. Moreover, his staff has been instructed to comply as well.

III. CONCLUSION

For the reasons outlined above, the Court finds that Landmark has not met its burden to show that a preliminary injunction is needed. Specifically, it has not shown that it is likely to succeed on the merits in demonstrating that it meets the compelling need standard for expedited

processing of its FOIA requests. Moreover, it has not shown that it will suffer irreparable harm from a denial of a preliminary injunction to order production on these requests or that the public interest will be significantly furthered by release of the requested information in three days rather than next month. Landmark also has not shown that the Court should issue an order compelling the EPA to preserve any responsive records. The EPA has already begun to respond to this request, has submitted a sworn statement attesting that it will preserve records, and has shown no indication that it might destroy any responsive records. The Court may revisit this issue as events require, but will not grant such a motion today.

Signed by Royce C. Lamberth, Chief Judge, on December 21, 2012.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LANDMARK LEGAL FOUNDATION 19415 Deerfield Lane, Ste. 312 Leesburg, VA 20176 Plaintiff, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, Defendant.	)	Case No. 1:12-cv01726 (RCL)

DEFENDANT EPA'S RESPONSE TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

I. PRELIMINARY STATEMENT

The information supplied in these responses is that which is currently available to the attorneys for Defendant, unless privileged, and Defendant United States Environmental Protection Agency ("EPA" or "Defendant") therefore reserves the right to supplement or modify the information contained in these responses should any additional or differing information become available through Defendant's continued work on this case. As additional information is located that is responsive to the interrogatories, Defendant reserves the right to assert such privileges and objections to discovery as appear appropriate.

DEPOSITION
EXHIBIT NUMBER Dickerson 40
DATE REPORTER ML
ART MILLER & ASSOCIATES

II. GENERAL OBJECTIONS

Defendant responds to Plaintiff's request for production of documents subject to the accompanying objections and also admits these responses to the interrogatories subject to, without intending to waive, and expressly preserving: (a) any objections as to the competency, relevancy, materiality, and admissibility of any of the responses; and (b) the right to object to other discovery procedures involving and related to the subject matter of the interrogatories to which Defendant responds herein. Defendant objects to Plaintiff's interrogatories to the extent that they could be read to seek attorney work product, trial preparation material, or communications protected by the attorney client privilege or any applicable privilege.

III. RESPONSES AND/OR OBJECTIONS

Interrogatory Number 1. Identify all individuals who participated in or who had knowledge of the narrowing of Landmark's FOIA request, describing with particularity the participation and knowledge of each individual.

Objection: Insofar as it can be read to seek information identifying all agency individuals who were aware of, read, or had access to Plaintiff's narrowed FOIA request, Defendant objects to this request as overly broad, burdensome, and outside of the scope of the Court's August 14, 2013, Order. Without waiving these objections, the following response is provided.

Response: Jonathan V. Newton, Attorney-Advisor and FOIA Coordinator in the Office of the Executive Secretariat ("OEX") for EPA's Office of the Administrator, was principally responsible for the negotiations regarding the narrowing of Plaintiff's FOIA request. Mr. Newton communicated with Matthew Forys, representative for Plaintiff, to discuss the scope of Plaintiff's FOIA request and established the narrowed scope of the request in communication with Mr. Forys. Mr. Eric Wachter, as Director of OEX, had knowledge of the need to clarify and

narrow Landmark's very broad request. Mr. Wachter and Mr. Newton also received the advice of attorneys with EPA's Office of General Counsel regarding the breadth and scope of the FOIA request as written.

Interrogatory Number 2. Identify all individuals who participated in or had knowledge of the "identification" of "senior officials" as "program administrators, Deputy Administrators and chiefs of staff," describing with particularity the participation and knowledge of each such individual."

Objection: Defendant objects to this request as being overly broad and burdensome insofar as it can be read to seek information identifying all agency individuals who were aware of, read, or had access to Plaintiff's narrowed FOIA request. Without waiving this objection, the following response is provided.

Response: Jonathan V. Newton for the EPA and Matthew Forys for the plaintiff are the two individuals that had direct knowledge of the identification of senior officials as program administrators, Deputy Administrators and chiefs of staff. Mr. Newton discussed the scope of the request with Mr. Forys and expressed concern about the volume of records the request would generate. Since EPA was (is) a regulatory agency, the request as initially stated could require a search of almost every EPA employee in every EPA Region and program office. By email dated October 5, Mr. Newton made the following suggestion to Mr. Forys:

> In order to make this request more manageable, would you consider narrowing the search to senior officials in EPA HQ (i.e., Program Administrators, Deputy Administrators and Chiefs of Staff)? These individuals are likely to be involved in policy decisions of the nature referenced in your request.

To which Mr. Forys replied by email:

> Landmark will agree to limit the scope of the search to senior officials in EPA HQ with the understanding that Landmark does not waive the right to expand the scope to the original request if warranted by responsive records.

No other individuals at the EPA were involved in reaching this agreement. EPA is producing the email communications memorializing this agreement in response to Plaintiff's Request for Production of Documents. EPA refers Plaintiff to Documents EPA PROD1_0237 – EPA PROD1_0238. Mr. Eric Wachter, as Director of OEX, had knowledge of the need to clarify and narrow Landmark's very broad request. Mr. Wachter and Mr. Newton also received the advice of attorneys with EPA's Office of General Counsel regarding the breadth and scope of the FOIA request as written.

Interrogatory Number 3: Identify all sources of information, oral and written, relied upon or reviewed by Eric E. Wachter for paragraph 8 of his Initial Declaration.

Objection: Defendant objects to this request as being vague, overly broad, burdensome, and beyond the scope of the Court's August 14, 2013 Order. Specifically, this interrogatory seeks information from prior to the mutually-agreed upon narrowing of the scope of Landmark's request, and therefore goes beyond the Court's discovery order regarding the interpretation of Plaintiff's narrowed request and the search for records responsive to the Plaintiff's narrowed request.

Response: Paragraph 8 of the Initial Declaration of Eric E. Wachter states:

> After several days of internal discussion regarding the breadth of the EPA's rulemaking process and the volume of records generated by that process, on September 27, 2012, my staff contacted Plaintiff by telephone to discuss the complexity of this request and options for narrowing the scope. This discussion was necessary because without some degree of narrowing it would not be reasonably possible to process Plaintiffs FOIA request as written.

Eric Wachter, in his capacity as Director of OEX, received this information through regularly scheduled updates with Jonathan Newton regarding the status of FOIA processing in the Office of the Administrator. Mr. Wachter and Mr. Newton received the advice of attorneys with EPA's Office of General Counsel regarding the breadth and scope of the FOIA request as written. Mr. Newton also discussed the breadth of EPA's rulemaking process with Robin Kime in EPA's Office of Policy in the Office of the Administrator. EPA refers Plaintiff to Documents EPA PROD1_0067 - EPA PROD1_0322 (Responses to Requests for Production of Documents 2 and 3) for records related to the internal discussions of the breadth and scope of EPA's rulemaking activities.

Interrogatory 4. Describe with particularity the "determination" made by EPA that an additional search for documents from the former Administrator, Deputy Administrator, and Chief of Staff in the Office of the Administrator would be necessary to ensure a complete and adequate production to Plaintiff; who made it, why it was made, and when it was made on the basis of what sources of information, oral and written. See paragraph 30 of the Wachter Declaration.

Objection: Defendant objects to this request to the extent that it seeks attorney work product and/or communications protected by the attorney-client privilege. Without waiving these objections, the following response is provided.

Response: As part of finalizing the pleadings for the Court's April 30, 2013, filing deadline in this case, Mr. Wachter and Mr. Newton in OEX carefully reviewed the document search that was performed between October 23, 2012, and January 25, 2013. On April 29, 2013, as part of this preparation and review of the initial search for responsive records, Mr. Wachter and Mr.

Newton, in consultation with and under the advice of EPA attorneys and Department of Justice attorneys, determined that an additional search for responsive records should be conducted of the Office of the Administrator for records from the former Administrator Lisa P. Jackson, Deputy Administrator Bob Perciasepe, and former Chief of Staff Diane Thompson.

This determination was made because on November 16, 2012, a "no records" response was sent via email from Aaron Dickerson, Staff Assistant in the Immediate Office of the Office of the Administrator, and received by Jonathan V. Newton in the Office of the Executive Secretariat. EPA refers Plaintiff to the email communication dated November 16, 2012, from Mr. Dickerson to Mr. Newton which EPA is producing in response to Plaintiff's Requests for Documents, EPA PROD1_0486 – EPA PROD1_0492. However, because documents previously collected, reviewed, and produced from EPA program offices in response to Plaintiff's FOIA request indicated that there may be responsive records from the Administrator and Deputy Administrator, the Office of the Executive Secretariat conducted an additional search of the records of the Administrator, Deputy Administrator, and Chief of Staff in a good faith effort to ensure a complete and adequate production. This additional search yielded approximately 365 additional documents that were responsive to Plaintiff's request, many of which had been previously produced. The documents were provided to plaintiff in a good faith effort to ensure a complete and adequate production.

The non-privileged email communications memorializing these conversations and communications with the attorney-client privileged and attorney work product privileged information redacted will be provided to Plaintiff as part of EPA's response to Plaintiff's Request for Production of Documents. EPA refers Plaintiff to documents EPA PROD1_0323 – EPA PROD1_0402 (Responses to Requests for Production of Documents 4 and 5).

Interrogatory 5. Identify all inquires or communication from any person, whether any such person was inside or outside the Agency or inside or outside the U.S. Government, with respect to the scope of the Landmark FOIA request, at any time before or after modification. See paragraph 12 of the Wachter Declaration.

Objection: Defendant objects to this request as being vague, overly broad, burdensome, and outside of the scope of the Court's August 14, 2013, Order. In addition, Defendant objects to this request to the extent that it could be read to seek attorney work product or communications protected by the attorney-client privilege. Without waiving these objections, the following response is provided.

Response: See Responses to Interrogatories 1, 2, 3 and Documents EPA PROD1_0067 - EPA PROD1_0322 (Responses to Requests for Production of Documents 2 and 3).

Interrogatory 6. Identify all details "regarding the content of the November 14 message" to Aaron Dickerson and Nena Shaw, including its content. See Memorandum Opinion at 5.

Objection: Defendant objects to this request as being vague. Without waiving this objection, the following response is provided.

Response: Defendant EPA refers Plaintiff to the email communication with the subject line "Fw: ACTION REQUIRED - New FOIA Request (HQ-FOI-01861-12) (Update and FAQ)," dated November 14, 2012, from Jonathan Newton (CC-ing Eric Wachter) to Aaron Dickerson and Nena Shaw, which EPA is producing in response to Plaintiff's Requests for Documents. See Document EPA PROD1_0459 – EPA PROD1_0461. The document speaks for itself and is the best evidence of its content.

Interrogatory 7. Address in detail EPA's response to "Landmark's allegation that official business was being conducted from the personal email accounts." See Memorandum Opinion at 9.

Objection: Defendant objects to this request as being vague, overly broad and one that is requesting a general statement on the subject. Without waiving this objection, the following response is provided.

Response: The EPA has an official policy on the use of personal email accounts for Agency business. EPA refers Plaintiff to EPA's Interim Records Management Policy, CIO Policy CIO-2155.2 (June 28, 2013), Section 6, which states:

> Official Agency business should first and foremost be done on official EPA information systems (i.e., email, instant messaging (IM), computer work stations, shared service solutions, etc.). When, due to extraordinary circumstances, this does not occur, the creator must ensure that any use of a non-governmental system does not affect the preservation of Federal records for Federal Records Act purposes, or the ability to identify and process those records, if requested, under the Freedom of Information Act (FOIA) or for other official business (e.g., litigation, Congressional oversight requests.). In this very rare occasion, staff should forward email (or "cc" email) or electronic file(s) to their EPA email account in order for records to be captured in an approved EPA records management system. Once the electronic files have been captured in an approved EPA records management system, they should be removed from non-EPA information systems, unless there is a specific obligation to maintain the files on all systems on which they appear. Additionally, emails forwarding a news article or web link from a personal email account into EPA's system and emails forwarding a document to a personal email account to enable printing or viewing both create a copy of the email in EPA's email system. Users can properly preserve the copy of the email that is on EPA's system to meet their preservation requirements. [Document EPA PROD1_0001 – EPA PROD1_0009].

In addition, EPA refers Plaintiff to the National Archives and Records Administration ("NARA") Bulletin 2013-03 (September 9, 2013), Section 5, which states:

> While agency employees should not generally use personal email accounts to conduct official agency business, there may be times when agencies authorize the

use of personal email accounts, such as in emergency situations when Federal accounts are not accessible or when an employee is initially contacted through a personal account. In these situations, agency employees must ensure that all Federal records sent or received on personal email systems are captured and managed in accordance with agency recordkeeping practices. Agency policies and procedures must also ensure compliance with other statutes and obligations, such as FOIA and discovery. [Document EPA PROD1_0010 – EPA PROD1_0013].

Finally, EPA has conducted Agency-wide training for all Agency staff on records management and records responsibilities, including responsibilities related to the use of personal email accounts. EPA refers Plaintiff to Documents EPA PROD1_0014 – EPA PROD1_0025 for the content of this training.

Interrogatory 8. Identify all searches of non-governmental electronic communication channels including email accounts of EPA officials responsive to Landmark's FOIA request, or any other FOIA request during the time period relevant to Landmark's request.

Objection: Defendant objects to this request as being vague, overly burdensome, and overly broad. Defendant also objects that it seeks information beyond that authorized by the Court's August 14, 2013, Order. Without waiving this objection, the following response is being provided.

Response: To conduct the search for records responsive to Plaintiff's request, the Office of the Executive Secretariat provided a link to a Lotus Notes records collection database and instructed individuals to upload potentially responsive information into the database. EPA staff instructed individuals to search based on the overall request, which was for records of "communications of any kind relating to all proposed rules and regulations that have not been finalized by the EPA between January 1, 2012 [sic] and August 17, 2012," and for "records indicating an order, direction, or suggestion that the issuance of regulations, the announcements

of regulations and/or public comment of regulations should be slowed or delayed until after November 2012 or the presidential elections of 2012." Each program office was individually responsible for collecting and uploading the responsive documents from the officials in each office to the collection database. No specifications were given nor limitations imposed on the repositories to be searched. EPA refers Plaintiff to Documents EPA PROD1_0403 – EPA PROD1_0428 and EPA PROD1_0433 – EPA PROD1_0458 for the content of the search instructions.

The information that the Office of the Executive Secretariat received in response to this request was described in detail in Paragraph 25 of the Supplemental Declaration. The information located included the documents identified in EPA's FOIA production as EPA-434, EPA-32, and EPA-33, which are documents containing the personal email addresses of the Administrator and/or Deputy Administrator.

Interrogatory 9. Identify all personal email accounts of the Administrator, Deputy Administrator, and Chief of Staff to the Administrator that were not searched and explain why the accounts were not searched for responsive records.

Objection: Defendant objects to this request as vague and overly broad. Without waiving this objection, the following response is being provided.

Response: See Responses to Interrogatories 7 and 8. To conduct the search for records responsive to Plaintiff's request, the Office of the Executive Secretariat provided a link to a Lotus Notes records collection database and instructed program office staff to upload potentially responsive information into the database. EPA staff instructed offices to search based on the overall request, which was for records of "communications of any kind relating to all proposed

rules and regulations that have not been finalized by the EPA between January 1, 2012 [sic] and August 17, 2012," and for "records indicating an order, direction, or suggestion that the issuance of regulations, the announcements of regulations and/or public comment of regulations should be slowed or delayed until after November 2012 or the presidential elections of 2012." EPA refers Plaintiff to Documents EPA PROD1_0403 – EPA PROD1_0428 and EPA PROD1_0433 – EPA PROD1_0458 for the content of the search instructions. Each program office was individually responsible for collecting and uploading the responsive documents from the officials in each office to the collection database. No specifications were given nor limitations imposed on the repositories to be searched.

Interrogatory 10. Identify all searches of repositories of records for any mode of private communication other than email (including but not limited to text messaging, instant mail (IM), and any other electronic communication) used by the Administrator, Deputy Administrator, and Chief of Staff to the Administrator between January 1, 2012, and August 17, 2012.

Objection: Defendant objects to this request as vague and overly broad, as well as beyond the scope of the Court's August 14, 2013 Order. Without waiving this objection, the following response is being provided.

Response: See Responses to Interrogatories 7, 8, and 9. To conduct the search for records responsive to Plaintiff's request, the Office of the Executive Secretariat provided a link to a Lotus Notes records collection database and instructed individuals to upload potentially responsive information into the database. EPA staff instructed individuals to search based on the overall request, which was for records of "communications of any kind relating to all proposed rules and regulations that have not been finalized by the EPA between January 1, 2012 [sic] and

August 17, 2012," and for "records indicating an order, direction, or suggestion that the issuance of regulations, the announcements of regulations and/or public comment of regulations should be slowed or delayed until after November 2012 or the presidential elections of 2012." EPA refers Plaintiff to Documents EPA PROD1_0403 – EPA PROD1_0428 and EPA PROD1_0433 – EPA PROD1_0458 for the content of the search instructions. Each program office was individually responsible for collecting and uploading the responsive documents from the officials in each office. No specifications were given nor limitations imposed on the repositories to be searched.

Interrogatory 11. Identify all actions taken and communications made in response to the concerns stated by the Court in its Memorandum Opinion.

Objection: This request is vague, overly broad, unduly burdensome and potentially outside of the scope of the Court's August 14, 2013, Order. Without waiving this objection, the following response is being provided.

Response: See Responses to Interrogatories 4, 16, and 17; Initial Declaration of Eric Wachter ("Initial Declaration"); and Paragraphs 21-22, 25, and 31-33 of the Supplemental Declaration of Eric Wachter ("Supplemental Declaration"). EPA refers Plaintiff to EPA's Interim Records Management Policy, CIO Policy CIO-2155.2 (June 28, 2013), Document EPA PROD1_0001 – EPA PROD1_0009; and EPA's Interim Policy on the Preservation of Separated Personnel's Electronically Stored Information Subject to Litigation Holds, CIO Policy CIO-2156.0 (December 10, 2012), Document EPA PROD1_0026 – EPA PROD1_0031.

Interrogatory 12. Identify any person who, orally, in writing, or by any action whatsoever, interpreted Landmark's FOIA request, at any time and based upon any modification, as not including the Administrator, Deputy Administrator, and Chief of Staff.

Objection: Defendant objects to this request as being vague and overly broad. Without waiving this objection, the following response is provided.

Response: None. See Responses to Interrogatories 2, 6; Paragraphs 9 and 17 of the Supplemental Declaration of Eric Wachter ("Supplemental Declaration").

Interrogatory 13. Identify whether and to what extent the EPA Administrator, Deputy Administrator, and Chief of Staff utilized non-governmental electronic communication channels including email accounts to conduct official business.

Objection: Defendant objects to this request as being vague and overly broad. Without waiving this objection, the following response is being provided.

Response: See Responses to Interrogatories 7, 8, 9 and 16, 17

In general, it was the practice of Deputy Administrator Bob Perciasepe to only use his epa.gov account (perciasepe.bob@epa.gov) to conduct EPA business in the time period from January 1, 2012, to August 31, 2012. On those rare occasions where Mr. Perciasepe would receive or send an EPA-related message on a non epa.gov account, it was his practice to forward the message to EPA systems by copying either his EPA email account or the EPA email account of his assistant, Teri Porterfield, during the relevant time period or sending it directly to another employee's epa.gov account. His assistant is responsible for managing his records and correspondence. Documents EPA-32 and EPA-33 that were produced as responsive to Plaintiff's

FOIA request came from the Deputy Administrator's personal account to Teri Porterfield's EPA email account at porterfield.teri@epa.gov.

Defendant EPA also refers Plaintiff to the Statement of former Administrator Lisa P. Jackson before the United States' House of Representatives Committee on Oversight and Government Reform on September 10, 2013, as part of the Committee's Hearing *"Preventing Violations of Federal Transparency Laws,"* September 10, 2013. In her statement, former Administrator Jackson described her use of personal email accounts as follows:

> I'd like to address personal e-mail. When I was confirmed as Administrator, like most people, I had a personal e-mail account. We public officials are, after all, also private citizens. I maintained a personal email account for personal matters. Every public official has to use her best judgment in ensuring appropriate use of personal e-mails. My practice was to forward any email that I deemed pertaining to government business into an official EPA.gov email account so that it could be captured for record-keeping purposes.

Statement of Lisa P. Jackson, Former Administrator of the EPA before the House Committee on Oversight and Government Reform, at 2 (Sept. 10, 2013). This statement is publically available at http://oversight.house.gov/hearing/preventing-violations-of-federal-transparency-laws/. A copy is also being provided to Plaintiff in response to Plaintiff's Requests for Documents at EPA PROD1_0032 – EPA PROD1_0034.

The EPA has an official policy on the use of personal email accounts for Agency business. EPA refers Plaintiff to EPA's Interim Records Management Policy, CIO Policy CIO-2155.2 (June 28, 2013), Section 6, which states:

> Official Agency business should first and foremost be done on official EPA information systems (i.e., email, instant messaging (IM), computer work stations, shared service solutions, etc.). When, due to extraordinary circumstances, this does not occur, the creator must ensure that any use of a non-governmental system does not affect the preservation of Federal records for Federal Records Act purposes, or the ability to identify and process those records, if requested, under the Freedom of Information Act (FOIA) or for other official business (e.g., litigation, Congressional oversight requests.). In this very rare occasion, staff

> should forward email (or "cc" email) or electronic file(s) to their EPA email account in order for records to be captured in an approved EPA records management system. Once the electronic files have been captured in an approved EPA records management system, they should be removed from non-EPA information systems, unless there is a specific obligation to maintain the files on all systems on which they appear. Additionally, emails forwarding a news article or web link from a personal email account into EPA's system and emails forwarding a document to a personal email account to enable printing or viewing both create a copy of the email in EPA's email system. Users can properly preserve the copy of the email that is on EPA's system to meet their preservation requirements. [Document EPA PROD1_0001 – EPA PROD1_0009].

The EPA refers also refers Plaintiff to the National Archives and Records Administration ("NARA") Bulletin 2013-03 (September 9, 2013), Section 5, which states:

> While agency employees should not generally use personal email accounts to conduct official agency business, there may be times when agencies authorize the use of personal email accounts, such as in emergency situations when Federal accounts are not accessible or when an employee is initially contacted through a personal account. In these situations, agency employees must ensure that all Federal records sent or received on personal email systems are captured and managed in accordance with agency recordkeeping practices. Agency policies and procedures must also ensure compliance with other statutes and obligations, such as FOIA and discovery. [Document EPA PROD1_0010 – EPA PROD1_0013].

Interrogatory 14. Explain the use of "Note: This request has been modified" in the Request Description in the email described in paragraph 12 of the Wachter Declaration.

Response: See Responses to Interrogatories 1, 2, 3; Initial Declaration of Eric Wachter at Paragraph 12; Supplemental Declaration of Eric Wachter at Paragraphs 15-16.

As stated in EPA's Declarations and in EPA's Response to Interrogatory 2, on October 5, 2012, Plaintiff's original FOIA request was narrowed in scope to "senior officials" in EPA Headquarters by agreement with Plaintiff. EPA refers Plaintiff to Documents EPA PROD1_0237 – EPA PROD1_0238 for the content of this agreement. Jonathan V. Newton, Attorney-Advisor and FOIA Coordinator in the Office of the Executive Secretariat for EPA's Office of the

Administrator, was responsible for initiating the search for records responsive to Plaintiff's request. To initiate the search for responsive records, an electronic mail message was drafted by and sent by Mr. Newton in OEX to the designated FOIA Coordinators for each of the EPA's headquarters offices, with the exception of the Office of the Administrator. The original FOIA request from Landmark Legal Foundation was attached to this email message for reference; however, the original FOIA request from Landmark Legal Foundation had been modified in scope by agreement with Plaintiff.

This email message instructed the FOIA Coordinators in the program offices that the request had been modified, so that the search for records would apply to only "assistant administrators, deputy assistant administrators, and chiefs of staff in EPA headquarters." This email communication specifically states "assistant administrators, deputy assistant administrators, and chiefs of staff in EPA headquarters;" however, as explained in the Supplemental Declaration of Eric Wachter, this is the same as "program administrators, deputy administrators, and chiefs of staff." Mr. Newton, the originator of the email communication, was also the FOIA Coordinator in the Office of the Administrator and initiated a search of the Office of the Administrator as well. Defendant EPA refers Plaintiff to Documents EPA PROD1_0403 – EPA PROD1_0428 and EPA PROD1_0433 – EPA PROD1_0458 for the content of the search instructions and the original scope of Plaintiff's request.

Interrogatory 15. Identify all FOIA searches that have interpreted the phrase "assistant administrators, deputy assistant administrators, and chiefs of staff in EPA headquarters" to include the Administrator, or the Deputy Administrator, or the Chief of Staff in the Office of the Administrator.

Objection: Defendant objects to this request as being vague, unduly burdensome, and overly broad to the extent that it seeks information beyond that authorized by the Court's August 14, 2013, Order. Without waiving this objection, the following response is being provided.

Response: See Responses to Interrogatories 2, 6, 12, 14.

By exchange of email with Mr. Newton on October 5, 2012, Mr. Forys, on behalf of Plaintiff, agreed to narrow the scope of the request to "senior officials" in the EPA's Headquarters offices, with senior officials being identified as program administrators, deputy administrators and chiefs of staff in the EPA's Headquarters offices. EPA refers Plaintiff to Documents EPA PROD1_0237 – EPA PROD1_0238 for the content of this agreement. However, EPA interpreted the narrowed scope of this FOIA request to include the Administrator, Deputy Administrator, and Chief of Staff in the Office of the Administrator. The Administrator, Deputy Administrator, and Chief of Staff in the Office of the Administrator were included under the definition of "program administrators, deputy assistant administrators, and Chiefs of Staff." Defendant EPA refers Plaintiff to the email communication with the subject line "Fw: ACTION REQUIRED - New FOIA Request (HQ-FOI-01861-12) (Update and FAQ)," dated November 14, 2012, from Jonathan Newton (CC-ing Eric Wachter) to Aaron Dickerson and Nena Shaw, which EPA is producing in response to Plaintiff's Requests for Documents. See Document EPA PROD1_0459 – EPA PROD1_0461.

The EPA received nearly 10,000 FOIA requests in FY 2012 and cannot provide specific information about how each request is processed. In this instance Plaintiff was given a written opportunity to modify its request and agreed to this interpretation.

Interrogatory 16. Identify all steps taken by Defendant or counsel or third parties to identify and secure from loss or destruction all sources of information potentially responsive to Landmark's FOIA request, including all sources in which personal email accounts or other modes of private communication or electronically stored information may reside or may have resided.

Objection: Defendant objects to this request as being vague and overly broad to the extent that it seeks information beyond that authorized by the Court's August 14, 2013, Order. In addition, Defendant objects to this request to the extent that it could be read to seek attorney work product or communications protected by the attorney-client privilege. Without waiving these objections, the following response is provided.

Response: See Paragraphs 31-33 of the Supplemental Declaration of Eric Wachter ("Supplemental Declaration") and Response to Interrogatory 11. EPA refers Plaintiff to EPA's Interim Records Management Policy, CIO Policy CIO-2155.2 (June 28, 2013), Document EPA PROD1_0001 – EPA PROD1_0009; and EPA's Interim Policy on the Preservation of Separated Personnel's Electronically Stored Information Subject to Litigation Holds, CIO Policy CIO-2156.0 (December 10, 2012), Document EPA PROD1_0026 – EPA PROD1_0031. Plaintiff is also referred to the Statement of Lisa P. Jackson, former Administrator of the EPA before the House Committee on Oversight and Government Reform, at 2 (Sept. 10, 2013). This statement is publically available at http://oversight.house.gov/hearing/preventing-violations-of-federal-transparency-laws/. A copy is also being provided to Plaintiff in response to Plaintiff's Requests for Documents at EPA PROD1_0032 – EPA PROD1_0034.

The EPA's Office of General Counsel issued two litigation hold notices advising that all information responsive to this FOIA request must be preserved. EPA PROD1_0539 – EPA

PROD1_0562. The first notice was issued on October 23, 2012, and was sent to numerous EPA program office staff, including Jonathan Newton, Eric Wachter, Aaron Dickerson, and Nena Shaw. The second notice, an update of the first notice, was issued on August 20, 2013, and was sent to numerous EPA program office staff, including Jonathan Newton, Eric Wachter, Aaron Dickerson, and Nena Shaw. Mr. Wachter testified that he had read and understood the meaning and scope of the litigation hold notice, and that he would comply to the best of his ability with the EPA's obligation to preserve information relevant to this FOIA litigation. He also instructed his staff to comply with all preservation obligations for relevant information concerning this FOIA request and FOIA litigation. Mr. Wachter and his staff are also aware of the obligation to preserve records under the Federal Records Act as well as the obligation to preserve information that is responsive to a FOIA request. Additionally, Mr. Wachter and his staff are familiar with and understand the EPA's Interim Policy, "Preservation of Separated Personnel's Electronically Stored Information Subject to Litigation Holds." EPA staff understands that this obligation includes an obligation to preserve the records from individuals who have since separated from the Agency, including any secondary EPA email accounts [or other accounts] used by those individuals during their tenure at the Agency.

EPA's Office of General Counsel has notified counsel for former Administrator Jackson and directly notified former Chief of Staff Diane Thompson of the Court's decision in this matter and informed them of the Agency's litigation hold in this matter. These communications will be provided to Plaintiff in Response to Plaintiff's Requests for Documents at EPA PROD1_0563 – EPA PROD1_0581. The Department of Justice has informed EPA that they have also contacted the attorney for former Administrator Jackson regarding this matter.

Following Administrator Jackson's departure, Office of the Administrator staff retained and searched her records, including the secondary email account, as part of the supplemental search for records from the former Administrator, the Deputy Administrator, and the Chief of Staff. Mr. Wachter testified that to the best of his knowledge no records were or had been deleted from these accounts following the former Administrator's departure from the Agency.

Interrogatory 17. Identify all steps taken by EPA and the United States Department of Justice to obtain documents or electronically stored information potentially responsive to Landmark's FOIA request that may be in the possession of former EPA officials or other third-parties, including, but not limited to identifying all third parties with who[m] the Administrator, Deputy Administrator, or Chief of Staff to the Administrator communicated electronically.

Objection: Defendant objects to this request as being vague, overly burdensome, and overly broad to the extent that it seeks information beyond that authorized by the Court's August 14, 2013, Order. In particular, Defendant objects to the request for identification of "all third parties with who the Administrator, Deputy Administrator, or Chief of Staff to the Administrator communicated electronically" as overly broad and burdensome. In addition, Defendant objects to this request to the extent that it could be read to seek attorney work product or communications protected by the attorney-client privilege. Without waiving these objections, the following response is provided.

Response: See Response to Interrogatories 7, 13, 16.

In general, it was the practice of Deputy Administrator Bob Perciasepe to only use his epa.gov account (perciasepe.bob@epa.gov) to conduct EPA business in the time period from January 1, 2012, to August 31, 2012. On those rare occasions where Mr. Perciasepe would

receive or send an EPA-related message on a non epa.gov account, it was his practice to forward the message to EPA systems by copying either his EPA email account or the EPA email account of his assistant, Teri Porterfield, during the relevant time period or sending it directly to another employee's epa.gov account. His assistant is responsible for managing his records and correspondence. Documents EPA-32 and EPA-33 that were produced as responsive to Plaintiff's FOIA request came from the Deputy Administrator's personal account to Teri Porterfield's EPA email account at porterfield.teri@epa.gov.

Defendant EPA also refers Plaintiff to the Statement of former Administrator Lisa P. Jackson before the United States' House of Representatives Committee on Oversight and Government Reform on September 10, 2013, as part of the Committee's Hearing *"Preventing Violations of Federal Transparency Laws,"* September 10, 2013. In her statement, former Administrator Jackson described her use of personal email accounts as follows:

> I'd like to address personal e-mail. When I was confirmed as Administrator, like most people, I had a personal e-mail account. We public officials are, after all, also private citizens. I maintained a personal email account for personal matters. Every public official has to use her best judgment in ensuring appropriate use of personal e-mails. My practice was to forward any email that I deemed pertaining to government business into an official EPA.gov email account so that it could be captured for record-keeping purposes.

Statement of Lisa P. Jackson, Former Administrator of the EPA before the House Committee on Oversight and Government Reform, at 2 (Sept. 10, 2013). This statement is publically available at http://oversight.house.gov/hearing/preventing-violations-of-federal-transparency-laws/. A copy is also being provided to Plaintiff in response to Plaintiff's Requests for Documents at EPA PROD1_0032 – EPA PROD1_0034.

On May 31, 2013, at the time of her separation from the Agency, former Chief of Staff Diane Thompson signed and certified EPA Forms 3110 and 1340-8, "Employee Separation

Checklist" and "Senior Agency Officials and Political Appointees Separation or Transfer Records Checklist" to certify that all Federal records had been provided to EPA. These documents are being provided to Plaintiff in response to Plaintiff's Requests for Documents at EPA PROD1_0035 – EPA PROD1_0038.

EPA's Office of General Counsel has notified counsel for former Administrator Jackson and directly notified former Chief of Staff Diane Thompson of the Court's decision in this matter and informed them of the Agency's litigation hold in this matter. These communications will be provided to Plaintiff in Response to Plaintiff's Requests for Documents at EPA PROD1_0563 – EPA PROD1_0581. The Department of Justice has informed EPA that they have also contacted the attorney for former Administrator Jackson regarding this matter.

Interrogatory 18. Identify all investigations undertaken of EPA's response to Landmark's FOIA request.

Objection: Defendant objects to this request as vague and overly broad. In addition, Defendant objects to the term "investigation." The EPA searches for records in response to FOIA requests and produces responsive non-exempt material.

Response: The EPA is not aware of any "investigations" undertaken of EPA's response to Landmark's FOIA request. On the general issue of Agency email practices, the EPA refers Plaintiff to EPA's Office of the Inspector General Report, *Congressionally Requested Inquiry into the EPA's Use of Private and Alias Email Accounts*, September 26, 2013.

In its report, the Office of the Inspector General stated:

> We found no evidence that the EPA used, promoted or encouraged the use of private "non-governmental" email accounts to circumvent records management responsibilities or reprimanded, counseled or took administrative actions against personnel for using private email or alias accounts for conducting official

> government business. EPA senior officials said they were aware of the agency records\ management policies and, based only on discussions with these senior officials, the OIG found no evidence that these individuals had used private email to circumvent federal recordkeeping responsibilities.

This Report is publically available at http://www.epa.gov/oig/reports/2013/20130926-13-P-0433.pdf. A copy of this Report will is being provided to Plaintiff in response to Plaintiff's Request for Documents at EPA PROD1_0039 – EPA PROD1_0066.

Interrogatory 19. Identify all records responsive to Landmark's FOIA request withheld in part or in full by EPA that contain a personal email address of the Administrator, Deputy Administrator, or the Chief of Staff to the Administrator, describing with particularity the sender, all recipients, the subject matter and content of each.

Response: EPA refers Plaintiff to EPA's detailed *Vaughn* index, filed with EPA's Motion for Summary Judgment, for descriptions of the sender, all recipients, the subject matter, and the content of each of the documents identified below:

EPA-434. Personal email address of former Administrator Lisa P. Jackson withheld under Exemption 6. All other information in EPA-434 was released to Plaintiff.

EPA-32 and EPA-33. Unsolicited outside comment on rule sent to personal email address of Deputy Administrator Bob Perciasepe. The personal email address was withheld under Exemption 6. All other information in EPA-32 and EPA-33 was released to Plaintiff.

As to Objections:

RONALD C. MACHEN JR., D.C. Bar #447889
United States Attorney
for the District of Columbia

DANIEL F. VANHORN, D.C. Bar #924092
Chief, Civil Division

By: /s/
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Of counsel:
Jennifer Hammitt, Esq.
Office of General Counsel
U.S. Environmental Protection Agency

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Defendant EPA's Responses to Plaintiffs' First Set of Interrogatories has been made by transmitting them electronically on this 4th day of November 2013 to:

Michael J. O'Neill, Esq.
Landmark Legal Foundation
19415 Deerfield Avenue
Suite 312
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mike@landmarklegal.org

R. Peter Hutchinson, Esq.
Landmark Legal Foundation
3100 Broadway, Suite 1210
Kansas City, Missouri 64111
rpetehutch@aol.com

/s/

Heather Graham-Oliver

VERIFICATION SHEET

I, Eric E. Wachter, Director of the Office of the Executive Secretariat of the U.S. Environmental Protection Agency, declare under penalty of perjury under the laws of the United States that the Defendant's Answers to the Plaintiff's First Set of Interrogatories are true and correct based upon my knowledge, information and belief and based upon records maintained by the Agency.

Eric E. Wachter, Director
Office of the Executive Secretariat
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, D.C. 20460

11/4/13
Date

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LANDMARK LEGAL FOUNDATION 19415 Deerfield Lane, Ste. 312 Leesburg, VA 20176 Plaintiff, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, Defendant.	)	Case No. 1:12-cv01726 (RCL)

DEFENDANT EPA'S RESPONSE TO PLAINTIFF'S SECOND SET OF INTERROGATORIES

I. PRELIMINARY STATEMENT

The information supplied in these responses is that which is currently available to the attorneys for Defendant, unless privileged, and Defendant United States Environmental Protection Agency ("EPA" or "Defendant") therefore reserves the right to supplement or modify the information contained in these responses should any additional or differing information become available through Defendant's continued work on this case. As additional information is located that is responsive to the interrogatories, Defendant reserves the right to assert such privileges and objections to discovery as appear appropriate.

DEPOSITION
EXHIBIT NUMBER Dickerson 41
DATE 2.11.14 REPORTER MC
ART MILLER & ASSOCIATES

II. GENERAL OBJECTIONS

Defendant responds to Plaintiff's interrogatories subject to the accompanying objections and also admits these responses to the interrogatories subject to, without intending to waive, and expressly preserving: (a) any objections as to the competency, relevancy, materiality, and admissibility of any of the responses; and (b) the right to object to other discovery procedures involving and related to the subject matter of the interrogatories to which Defendant responds herein. Defendant objects to Plaintiff's interrogatories to the extent that they could be read to seek attorney work product, trial preparation material, or communications protected by the attorney client privilege or any applicable privilege.

III. RESPONSES AND/OR OBJECTIONS

Interrogatory Number 1. Explain with particularity why the original search for responsive records from the former Administrator, Deputy Administrator, and Administrator's chief of staff was not adequate and why the subsequent search was sufficient, including a full explanation of Mr. Aaron Dickerson's statement in his November 16, 2012, email to Jonathan Newton stating that he had "verbally spoke[n] with the Administrator" and did not find any responsive documents.

Objection: Defendant objects to this request as redundant, overly broad, burdensome, and outside of the scope of the Court's August 14, 2013, Order. Without waiving these objections, the following response is provided.

Response: Please see EPA's Responses to Plaintiff's First Set of Interrogatories, in particular, EPA's Response to Interrogatory 4, and the Supplemental Declaration of Eric E. Wachter at ¶21 - ¶23.

This determination that the initial search for responsive records from the former Administrator, Deputy Administrator, and chief of staff may have been insufficient was made because on November 16, 2012, a "no records" response had been received via email by Jonathan V. Newton in the Office of the Executive Secretariat from Aaron Dickerson, Staff Assistant, in the Immediate Office of the Office of the Administrator. EPA refers Plaintiff to the email communication dated November 16, 2012, from Mr. Dickerson to Mr. Newton which EPA provided at EPA PROD1_0489 – EPA PROD1_0495, produced as part of EPA's Response to Plaintiff's First Request for Production of Documents.

Because the search request stated that it was partly the type of memo/policy someone should remember, Mr. Dickerson also asked the former Administrator if she remembered any records that might be responsive. This initial search resulted in the "no records" response on November 16, 2012. However, when the search for records was carefully reviewed as part of finalizing the pleadings for the Court's April 30, 2013, filing deadline in this case, EPA noticed that documents previously collected, reviewed, and produced from EPA program offices indicated that there may be responsive records from the Administrator and Deputy Administrator. Therefore the Office of the Executive Secretariat conducted an additional search of the records of the Administrator, Deputy Administrator, and Chief of Staff in a good faith effort to ensure a complete and adequate production. This additional search, using very broad keywords, identified more than 4500 potentially responsive records which ultimately yielded approximately 365 additional documents that were responsive to Plaintiff's request, many of which had been previously produced. This second search was described in the Supplemental Declaration of Eric E. Wachter at ¶21-23. The documents were provided to plaintiff in a good faith effort to ensure a complete and adequate production.

The non-privileged email communications memorializing these conversations and communications with the attorney-client privileged and attorney work product privileged information redacted have been provided to Plaintiff as part of EPA's response to Plaintiff's First Request for Production of Documents. EPA refers Plaintiff to documents EPA PROD1_0323 – EPA PROD1_0405 (Responses to Requests for Production of Documents 4 and 5) produced as part of EPA's Response to Plaintiff's First Request for Production of Documents.

Interrogatory Number 2. In order to evaluate whether the inadequacy of the original search was a systemic problem or a circumstance unique to Plaintiff's FOIA request, detail all steps taken in any other request processed by EPA to rectify the inadequacy of searches for responsive records, which was discovered as a result of EPA's failure to conduct an adequate search in response to Plaintiff's FOIA request.

Objection: As stated in our communication to you on November 20, 2013, EPA objects to this interrogatory in full as impermissibly vague, overbroad, burdensome, and well beyond the scope of the Court's August 14, 2013, Order granting limited discovery on two specific issues related to EPA's processing of the FOIA request at issue in this litigation.

Interrogatory Number 3: Explain with particularity whether or not former Administrator Jackson signed and certified EPA Forms 3110 and 1340-8, "Employee Separation Checklist" and "Senior Officials and Political Appointees Separation or Transfer Records Checklist." If not, explain why not and whether any other similar checklists or forms were completed or not completed, but required to be completed, by or on behalf of the former Administrator.

Objection: Defendant objects to this request as beyond the scope of the Court's August 14, 2013, Order insofar as it neither addresses whether EPA initially excluded the Administrator, Deputy Administrator, and chief of staff from the initial search for records nor the extent to which personal email accounts may have been used for Agency business.

Response: EPA is unable to locate a signed copy of Forms 3110 and 1340-8, "Employee Separation Checklist" and "Senior Officials and Political Appointees Separation or Transfer Records Checklist," for former Administrator Jackson. Because of miscommunication between EPA's Office of Human Resources and EPA's Office of Executive Services, the forms were never prepared for Administrator Jackson as part of the separation process. Hence, to the best of my knowledge, Ms. Jackson was never asked to sign these forms in advance of her departure from the Agency, nor was she informed that she was expected to sign them.

Form 3110 "Employee Separation Checklist" is essentially irrelevant for purposes of this litigation. EPA form 1340-8 indicates, in part, that the senior official has turned over all federal records prior to departure from the Agency. With this in mind, EPA has taken steps to contact Barry Coburn, Counsel for Lisa P. Jackson, to inform Ms. Jackson of this oversight and to request her cooperation in confirming that all EPA records have been provided to EPA. This communication is provided to Plaintiff at EPA PROD2_0075.

Interrogatory 4. To the extent Defendant asserts any privilege to documents sought in Plaintiff's Second Request for Production of Documents, identify the date of all meetings, conferences, communications between Defendant and any third party, including but not limited to former Administrator Jackson and her legal counsel, and describe all documents which you claim relate to the assertion of privilege, including any purported joint interest agreement.

Provide the topics of discussion and a full explanation of the content of this meeting, conference, or communication.

Objection: Defendant objects to this request as being confusing, vague, overly burdensome, and overly broad. Defendant also objects that it seeks information beyond that authorized by the Court's August 14, 2013, Order. Finally, Defendant objects to this request to the extent that it can be read to seek attorney work product and/or communications protected by the attorney-client privilege. Without waiving these objections, the following response is provided.

Response: No privilege is being asserted on documents sought in Plaintiff's Second Request for Production of Documents, except for those documents that were claimed as privileged in response to Plaintiff's First Request for Production of Documents as noted on the Privilege Log and referenced herein as part of EPA's Responses to Plaintiff's Second Set of Interrogatories. No privilege has been or is being asserted on communications between EPA and any third party, with the exception of EPA's attorneys at the Department of Justice, as indicated by the Privilege Log.

As to Objections:

RONALD C. MACHEN JR., D.C. Bar #447889
United States Attorney
for the District of Columbia

DANIEL F. VANHORN, D.C. Bar #924092
Chief, Civil Division

By: /s/
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Of counsel:
Jennifer Hammitt, Esq.
Office of General Counsel
U.S. Environmental Protection Agency

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Defendant EPA's Responses to Plaintiffs' First Set of Interrogatories has been made by transmitting them electronically on this 2nd day of December 2013 to:

Michael J. O'Neill, Esq.
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/s/

Heather Graham-Oliver

VERIFICATION SHEET

I, Eric E. Wachter, Director of the Office of the Executive Secretariat of the U.S. Environmental Protection Agency, declare under penalty of perjury under the laws of the United States that the Defendant's Answers to the Plaintiff's First Set of Interrogatories are true and correct based upon my knowledge, information and belief and based upon records maintained by the Agency.

Eric E. Wachter, Director
Office of the Executive Secretariat
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, D.C. 20460

Date 12/2/13

Michael O'Neill

From: Graham-Oliver, Heather (USADC) <Heather.Graham-Oliver@usdoj.gov>
Sent: Tuesday, April 30, 2013 2:03 PM
To: 'Rpetehutch' (rpetehutch@aol.com); mike@landmarklegal.org
Subject: Landmark v. EPA (FOIA)

Gentlemen:

I am contacting you to inform you that EPA will be requesting a short extension of time to file its motion for summary judgment in the FOIA litigation related to EPA's response to your request HQ-FOI-01861-12, and to request your consent to this brief extension with the court.

During the course of preparing EPA's motion for summary judgment, EPA has determined that there are a number of additional documents that may potentially be responsive to your request which have not yet been reviewed by the agency. In order to ensure that EPA has responded completely and fully to your request, it would request an additional two weeks to review these additional documents for responsiveness and privilege. EPA will provide Landmark with any releasable responsive documents, if any, and would request to file its motion with the Court on May 15, 2013.

It is our hope to work out a timeline that will be amenable to both parties. Please let me know if you are willing to consent to this short extension of time to prepare a complete response.

Heather Graham-Oliver
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DEPOSITION
EXHIBIT NUMBER 42
DATE 2/12/14 REPORTER CPC
ART MILLER & ASSOCIATES

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LANDMARK LEGAL FOUNDATION Plaintiff, v. ENVIRONMENTAL PROTECTION AGENCY, Defendant.	)	Civil Action No. 12-1726 (RCL)

REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Defendant, United States Environmental Protection Agency (EPA), by and through counsel, hereby Replies to Plaintiff's Opposition to Defendants' Motion for Summary Judgment. Plaintiff brought this action pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, requesting (1) records identifying communications with outside groups and individuals relating to proposed rules that had not been finalized by the EPA between January 1, 2012 and August 17, 2012; and (2) records indicating that the issuance of regulations were slowed or delayed until after November 2012 or the presidential elections of 2012. See Exhibit 1, Plf's Complaint. To respond to this request, the EPA undertook a comprehensive search and processed over 9,100 potentially responsive documents.

DEPOSITION
EXHIBIT NUMBER 46
DATE 2/12/14 REPORTER CTC
ART MILLER & ASSOCIATES

ARGUMENT

I. EPA CONDUCTED A THOROUGH SEARCH REASONABLY CALCULATED TO UNCOVER ALL RECORDS RESPONSIVE TO PLAINTIFF'S FOIA REQUEST

As the Wachter Declarations establish, the EPA's search method was reasonably calculated to uncover all records in the relevant component offices that were responsive to Plaintiff's FOIA request. Notwithstanding, Plaintiff questions the adequacy of EPA's search of the Administrator's office, the description of EPA's record systems, and the application of FOIA Exemptions 5 and 6. These allegations are without merit and should not preclude the Agency's success on its motion for summary judgment. As demonstrated below, the EPA satisfied its obligation to conduct an adequate search for records responsive to Plaintiff's FOIA request and properly withheld portions of responsive records pursuant to FOIA Exemptions 5, and 6.

A. The EPA Searched All Program Offices Reasonably Likely to Have Responsive Records

Under the FOIA, an agency must undertake a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (internal quotation marks omitted); *see Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) ("[T]he agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested."). A search is not inadequate merely because it failed to "uncover[] every document extant." *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1201 (D.C. Cir. 1991); *see Judicial Watch v. Rossotti*, 285 F. Supp. 2d 17, 26 (D.D.C. 2003) ("[p]erfection is not the standard by which the reasonableness of a FOIA search is measured"). Rather, a search is inadequate only if

the agency fails to "show, with reasonable detail, that the search method . . . was reasonably calculated to uncover all relevant documents." *Oglesby*, 920 F.2d at 68.

Once an agency demonstrates the adequacy of its search, the agency's position can be rebutted "only by showing that the agency's search was not made in good faith." *Maynard v. C.I.A.*, 986 F.2d 547, 560 (1st Cir. 1993). In the instant case, the Plaintiff has no basis to assert bad faith with respect to the EPA's search or to imply that documents were destroyed. A supplemental search of the Administrator's Office revealed 4,500 additional documents to be reviewed and processed by EPA. Supplemental Declaration of Eric E. Wachter, (Exhibit G) ¶ 23. "It is hardly a sign of bad faith to acknowledge an error, particularly where, as here, the defendant promptly takes steps to correct the error." Sheffield v. Holder, No. 12-1008, 2013 WL 3216059 (D.D.C. June 27, 2013).

Furthermore, the EPA has issued a preservation notice for records related to this case, and Mr. Wachter has testified that he understands and has instructed his staff to comply with the preservation notice, thus militating against any potential destruction or spoliation of records. Exhibit (Exh.) G ¶ 31-33. Finally, the EPA issued an agency-wide policy requiring the maintenance and preservation of electronically stored information subject to litigation holds, which would include the information from the former Administrator responsive to this request. *Id.* at 32. Thus Plaintiff's assertions of potential document destruction are merely hypothetical. Hypothetical assertions are insufficient to raise a material question of fact with respect to the adequacy of an agency's search. *Oglesby*, 920 F.2d at 67 n.13.

"Agency affidavits enjoy a presumption of good faith that withstands purely speculative claims about the existence and discoverability of other documents." *Chamberlain v. U.S. Dep't of Justice*, 957 F. Supp. 292, 294 (D.D.C. 1997), *aff'd*, 124 F.3d 1309 (D.C. Cir. 1997). In

addition, the Wachter declarations identify the search methodology that was used, the files searched, the scope of the search and the personnel who conducted the search, unlike the declaration in *People for the American Way Foundation v. National Park Service*, 503 F. Supp. 2d 284, 294 (D.D.C. 2007), which "neither identified what search terms were used, nor . . . why the scope of defendant's search was limited to the files or personnel listed," and the declaration in *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 91-92 (D.D.C. 2009), which simply stated which searches were performed. As both of the Wachter Declarations establish, the EPA's search method was reasonably calculated to uncover all agency records in the relevant program offices that were responsive to Plaintiff's FOIA request.

Plaintiff next alleges that the EPA's interpretation of the narrowing of scope represents "bad faith." But this allegation is also contrary to the facts on the record. Because of the broad nature of the Plaintiff's request, the EPA contacted Plaintiff's counsel to discuss the complexity of the request and options for narrowing its scope. Exh. G ¶ 8. This discussion was thought to be necessary because the request, as written, could apply to more than 17,000 EPA employees, located at headquarters and at the regional offices. *Id.* On October 5, 2012, the parties agreed via email that the request would be narrowed to "senior officials" in the EPA's Headquarters offices, with senior officials being identified as Program Administrators, Deputy Administrators and Chiefs of Staff in the EPA's Headquarters offices. Although the wording of the narrowed scope of the request did not explicitly state the Office of the Administrator, EPA has always interpreted the narrowed scope of the request to include the Administrator, Deputy Administrator, and Chief of Staff in the Office of the Administrator. *Id*, at ¶ 9. EPA did not omit those offices from its initial search. *Id.;* Initial Declaration of Eric Wachter at ¶ 11. The Administrator, Deputy Administrator and Chief of Staff in the Office of the Administrator were

all included under the definition of "Program Administrators, Deputy Administrators and Chiefs of Staff." *Id.*

Plaintiff's mere assertions are not sufficient evidence of bad faith. *Wolf v. CIA*, 569 F. Supp. 2d 1, 10 (D.D.C. 2008). Plaintiff has failed to establish that the Agency acted in bad faith with regard to the interpretation of the scope of the request and the search for records responsive to its request.

The EPA's Search for Responsive Records.

EPA determined that responsive documents may be located within the immediate office of the Office of the Administrator.[1] It also determined that responsive documents may be located in the offices of the Assistant Administrators, Deputy Assistant Administrators, and Chiefs of Staff in the EPA Headquarters offices, as well as in the offices of the Associate Administrator and Deputy Associate Administrator in the EPA's Office of Policy ("OP"). Exh. G ¶ 14. The OP is the primary EPA office that works to support Agency priorities and enhance decision making through analytic skills, management support, and special expertise in four areas: regulatory policy and management, environmental economics, strategic environmental management, and sustainable communities. *Id.* The search for responsive documents also included the General Counsel and Deputy General Counsels in the EPA's Office of General Counsel ("OGC"). The OGC provides legal support for developing and defending the Agency's rules, adjudications, and policies and advising as to legislation. *Id.* Five of the headquarters' program offices were not likely to have responsive documents as those offices do not ordinarily engage in the Agency's rulemaking activities. *See* Initial Declaration of Eric Wachter, ¶15,

[1] Offices within the EPA Headquarters are referred to as "program offices." "Program offices" refer to headquarters offices other than the Office of the Administrator and the Office of the Inspector General. The offices of the senior officials within each program office are referred to as the "immediate offices" for that program. The offices of senior officials such as the Administrator and Deputy Administrator in the Office of the Administrator are referred to as the "Immediate office" of the Office of the Administrator. Exh. G, ¶11.

attached to Def's MSJ.[2] *See Citizens For Responsibility and Ethics in Washington v. Nat'l Indian Gaming Comm'n*, 467 F. Supp. 2d 40, 54-55 (D.D.C. 2006) (concluding that agency logically did not search a particular division given that the files in that division would not have been responsive to the FOIA request at issue). Plaintiff did not challenge this conclusion.

On October 23, 2012 an electronic mail message was sent by the Office of the Executive Secretariat (OEX) to the designated FOIA Coordinators for each of the EPA's headquarters offices, with the exception of the Office of the Administrator, in order to initiate the search. Exh. G, ¶15. The electronic mail message was not sent to the office of the Administrator because the individual within OEX who was responsible for sending the email was also the designated FOIA Coordinator for the Office of the Administrator and is responsible for coordinating searches for responsive records from the Office of the Administrator. Exh. G, ¶ 12, 15. However, On November 14, 2012, the Office of the Administrator was contacted directly to initiate the search for documents responsive to this request. Exh. G, ¶ 17.

FOIA Coordinators route requests to the appropriate program office or subject matter expert within the program; track FOIA requests for timeliness; direct FOIA requests to the individuals in the program offices who are likely to have responsive records; monitor the quality of the responses; and provide guidance to program personnel. Exh. G, ¶ 12. Each Headquarters' Program Office has a lead FOIA coordinator, who works under the general direction of the National FOIA Officer (NFO). *Id.*

In order to process and collect responsive documents, technical staff in OEX created an electronic database using the agency's Lotus Notes software for individuals to use to upload

[2] Those offices that were not likely to have responsive documents are: the Office of Administration and Resources management (OARM), the Office of Environmental Information (OEI), the Office of Research and Development (ORD), the Office of the Chief Financial Officer (OCFO), and the Office of International and Tribal Affairs (OITA). Initial Declaration of Eric Wachter, ¶ 15, attached to Def's MSJ.

responsive electronic records. On October 25, 2012, OEX provided a link to a records collection database and instructed individuals to upload potentially responsive information into the database. OEX instructed individuals to search based on the overall request as well as by key words. Exh. G, ¶ 16.

Due to the broad and unfocused nature of the request, program offices were instructed to search based on the request rather than strictly by key words. This was because precise key words could not be readily developed that would be narrowly tailored to find documents responsive to the plaintiff's request, as the request was not focused on a particular topic, rule, third party, or other issue amenable to a search limited by key words. Each headquarters office was individually responsible for uploading their responsive documents to the collection database. Exh. G, ¶ 16.

Initial Request for Responsive Documents - Office of the Administrator

On November 14, 2012, Aaron Dickerson and Nena Shaw in the Office of the Administrator were sent both the instructions that were sent to the FOIA coordinators for the other program offices and the link to the collection database. This communication instructed Mr. Dickerson and Ms. Shaw to search for records responsive to the request from the email accounts of the Administrator and Deputy Administrator and to upload any responsive records into the collection database. Exh. G, ¶ 17.

As of January 25, 2013, the EPA had completed its initial search for records responsive to this FOIA request and identified more than 4,600 potentially responsive documents. OEX staff and OGC staff then reviewed and processed these documents for responsiveness to Plaintiff's FOIA request and for any applicable privileges. Records were deemed to be responsive to the Plaintiff's FOIA request if they either 1) memorialized a meeting,

communication with, or contact with an outside party related to a rule that was proposed, but not finalized, during the time frame identified by Plaintiff (not including standard interagency review of proposed rules or formal comments on rulemaking dockets) or 2) internal or external records from any party that discussed or memorialized discussions of delaying a rulemaking until after the election of 2012 or after November 2012 for political reasons. Exh. G, ¶ 19. Thereafter, OEX staff and OGC staff evaluated each record determined to be responsive to this FOIA request for segregability of non-exempt material. Exh. G, ¶ 20.

As part of finalizing the documents to meet the Court's April 30, 2013 filing deadline, OEX carefully reviewed the document search that was performed between October 23, 2012 and January 25, 2013. In the course of this review, on April 29, 2013, OEX determined that the search for documents from the former Administrator, the Deputy Administrator, and the Chief of Staff in the Office of the Administrator may have been insufficient. In the interest of a complete and adequate response to Plaintiff's request, EPA determined that another search would be required of the accounts of the former Administrator, Deputy Administrator, and Chief of Staff in the Office of the Administrator. The EPA immediately notified plaintiff and the Court of this deficiency and the fact that there would be a number of additional documents that may potentially be responsive to the Plaintiff's request. Exh. G, ¶ 21.

Staff in the Office of the Administrator were instructed by electronic mail to immediately complete a new search of the accounts of the former Administrator, Deputy Administrator, and Chief of Staff using the keywords "draft or proposed" within the same sentence as "rule, regulation, or guidance" for the time period of January 1, 2012, to August 21, 2012. This very broad and over-inclusive search was to verify that all documents related to a draft or proposed

rule were collected so that they could be reviewed by OEX and OGC staff to determine which of these documents were actually responsive to plaintiff's request. Exh. G, ¶ 22.

In addition to the 4,600 documents that were initially identified as potentially responsive, approximately 4,500 additional documents were found during the time period of April 30, 2013 to May 3, 2013, in the Office of the Administrator from the files of the former Administrator, Deputy Administrator, and Chief of Staff. These additional potentially responsive documents were documents that contained the broad key words "draft or proposed" within the same sentence as "rule, regulation, or, guidance." OEX staff and OGC staff then reviewed and processed these documents for responsiveness to Plaintiff's FOIA request and for any applicable exemptions. With the addition of these 4,500 additional documents, more than 9,100 potentially responsive documents from across the agency were reviewed and processed by OEX and OGC staff in order to process Plaintiff's FOIA request. Exh. G, ¶ 23. OEX staff and OGC staff also evaluated each additional record responsive to this FOIA request for segregability of non-exempt material. Exh. G, ¶ 24.

Filing System and Files Subject to Search.

OEX instructed individuals to search based on the overall request, which was for records of "communications of any kind relating to all proposed rules and regulations that have not been finalized by the EPA between January 1, 2012 and August 17, 2012" and for "records indicating an order, direction, or suggestion that the issuance of regulations, the announcements of regulations and/or public comment of regulations should be slowed or delayed until after November 2012 or the presidential elections of 2012." Each headquarters office was individually responsible for uploading their responsive documents to the collection database. Exh. G, ¶ 25.

Documents uploaded into the database for processing and review as of May 15, 2013 included the following:

a. *Internal Lotus Notes Email System.* During the time period of January 2012 to August 2012, which is the time period specified in Plaintiff's FOIA request, the EPA used Lotus Notes as its exclusive email application throughout the Agency. The Lotus Notes email application allows users to search for responsive records in all folders contained in mail servers and archived servers, and then upload the potentially responsive records into collection databases. *Id.*

b. *Lotus Notes Email Messages Received from Outside Parties or Non-Agency Accounts.* Messages received from outside parties or outside email accounts to EPA email accounts during the time period of this request are contained in these EPA mail servers and archived servers. Responsive communications with outside parties were searched for and located as part of the search for records responsive to this request. The EPA provided responsive records to Plaintiff containing communications with outside parties. Exhibit B attached to Exhibit G – Wachter Supp. Decl., contains examples of records of communications to and from outside parties with the EPA. Many of these documents were released in full to Plaintiff and were therefore not numbered or referenced on the EPA's *Vaughn* Index. Document EPA – 32, containing an unsolicited email communication received by then-Deputy Administrator Bob Perciasepe, is another example of an email communication from an outside account. This communication was forwarded to Mr. Perciasepe's executive assistant, Teri Porterfield, and was located in the EPA's Lotus Notes email system as part of EPA's search for responsive records. *Id.*

c. *Lotus Notes Email Records from the Secondary Account of Former Administrator Lisa P. Jackson.* Because the widespread use of email has become commonplace, EPA Administrators have been assigned two email accounts: a primary account and a secondary

account. The email address for Administrator Jackson's primary account was posted on the EPA's website and was used by hundreds of thousands of Americans to send messages to the Administrator. This account was maintained and monitored by staff, and the emails were processed as official correspondence as appropriate. The secondary account was an everyday, working email account of the Administrator to communicate with staff and other government officials. This secondary email account was used for practical purposes. Given the large volume of emails sent to the primary account – more than 1.5 million in fiscal year 2012, for instance – the secondary email account was necessary for effective management and communication between the Administrator and colleagues. *Id.*

In accordance with the EPA's practice for responding to FOIA requests for documents from the email account of the Administrator, the EPA searched this secondary account and provided responsive records from this secondary account. OEX is aware of no other secondary EPA email accounts of senior officials within the Agency during the time period of Plaintiff's request. *Id.*

d. *Calendar Entries memorializing meetings with outside parties.* Calendar entries on the EPA's official calendars are also contained in the Lotus Notes application. EPA provided records of calendar entries memorializing meetings with outside parties related to rules that were proposed but not finalized during the time period covered by Plaintiff's FOIA request. Exhibit C, attached to Exhibit G – Wachter Supp. Decl., contains examples of these calendar entries that were provided to Plaintiff. *Id.*

e. *Electronic Attachments to Email Files.* Many of the documents uploaded into the database contained attachments to email files in the form of Microsoft Word documents, Adobe Acrobat .PDF form documents, and Microsoft Excel spreadsheets. These attachments were also

reviewed for responsiveness to Plaintiff's FOIA request and for any applicable exemptions. Many responsive records contained attachments which included memoranda, internal planning documents, drafts of correspondence, and final correspondence related to rules proposed but not finalized during the time period of Plaintiff's request. *Id.*

f. *Correspondence from the EPA's Correspondence Management System ("CMS") contained in "Daily Reading Files."* The EPA also provided outside correspondence that was received by the EPA and reviewed by senior managers from the EPA's Correspondence Management System ("CMS"). EPA senior managers, including the Administrator and Deputy Administrator, do not directly review correspondence received in the CMS. Instead, staff in OEX prepare "Daily Reading Files" of correspondence for senior managers to review. OEX determined that these "Daily Reading Files" prepared by staff were the records likely to have information responsive to the narrowed scope of Plaintiff's request. The EPA provided the pages and correspondence from Daily Reading Files responsive to Plaintiff's request. Exhibit D attached to Exhibit G- Wachter Supp. Decl., provides examples of these Daily Reading Files, which include responsive correspondence from the CMS system. *Id.*

The records described above constitute the records likely to contain responsive information to Plaintiff's request for records of "communications of any kind relating to all proposed rules and regulations that have not been finalized by the EPA between January 1, 2012 and August 17, 2012" and for "records indicating an order, direction, or suggestion that the issuance of regulations, the announcements of regulations and/or public comment of regulations should be slowed or delayed until after November 2012 or the presidential elections of 2012." Therefore, as of May 15, 2013, EPA had determined that all locations reasonably likely to contain responsive records had been searched. Exh. G, ¶ 26.

Despite the Agency's explanation of its search for responsive records, Plaintiff further cites to inadmissible hearsay in the form of news articles and blog postings to allege that its "concerns" regarding the adequacy of the search prove that the search was inadequate. These concerns are premised on the use of a secondary email account by former Administrator Lisa Jackson and the presence of an email communication from an outside party to the personal email account of an agency official. Pl. Response to MSJ at 17-18. As EPA has explained in detail, the EPA searched the secondary account of former Administrator Jackson and provided responsive records from this secondary account. The agency also searched for and produced responsive documents from outside parties and accounts that were in its possession and control. Supp. Declaration at P. 25(b) and attached Exhibit B.

As the Wachter Declarations and attached exhibits demonstrate, the agency searched for all records responsive to Plaintiff's request that were in its custody and control, and thus met its obligations to conduct a reasonable search for responsive records under FOIA.

II. THE EPA'S WITHHOLDINGS WERE APPROPRIATE

A. EPA Properly Withheld Predecisional Deliberations

As a threshold matter, Plaintiff argues that the Wachter Declaration and the *Vaughn* indices insufficiently justify the bases for the EPA's application of Exemption 5 deliberative process privilege because they purportedly lack detail as to the basis for withholding for each particular document. Courts have repeatedly held that the purpose of a *Vaughn* index is to permit "a meaningful *de novo* review of the agency's claim of an exemption," and as long as an agency satisfies its burden, there is no requirement that it provide an index on which each record is separately listed. *Brown v. F.B.I.*, 675 F. Supp. 2d 122, 130 (D.D.C. 2009); *Voinche v. FBI*,

412 F. Supp. 2d 60, 65 (D.D.C. 2006) (citing *Gallant v. NLRB*, 26 F.3d 168, 172-73 (D.C. Cir. 1994)).

Here, the level of detail that the EPA provided on each of the withheld documents stands in sharp contrast to the declaration which "completely lack[ed] any detail regarding any particular record" and was rejected in *Cuban v. Securities & Exchange Comm'n*, 744 F. Supp. 2d 60, 77 (D.D.C. 2010), *vacated in part on reconsideration*, 795 F. Supp. 2d 43, 52-53 (D.D.C. 2011). Further, EPA's *Vaughn* index provided detailed descriptions of each of the documents withheld in full or in part, and the basis for withholding.

The EPA withheld approximately 399 documents, in full or in part, from disclosure under FOIA Exemption 5 and the deliberative process privilege. The documents withheld under the deliberative process privilege and FOIA Exemption 5 comprise email chain discussions, draft versions of documents, briefing materials, and internal briefing memoranda that pertain to a myriad of EPA decision-making processes related to rulemaking and proposed rules. The *Vaughn* index provides a detailed description of each document or portion of a document withheld under the deliberative process privilege and FOIA Exemption 5. Exh. G, ¶ 27; *See Vaughn* Index, Exhibit A to EPA Motion for Summary Judgment.

All records withheld under the deliberative process privilege and Exemption 5 of FOIA were created prior to the finalization of Agency decisions and comprised of intra- or interagency records. *See* Exh G ¶ 29 and *Vaughn* Index. The withheld records were prepared in connection with developing Agency rulemaking actions that, by the terms of Plaintiff's FOIA request, were not final at the time that the records were prepared. Therefore these records are pre-decisional intra- and interagency records generally developed as part of the Agency's decision-making process related to proposed rules and proposed rulemaking. Specifically, with regard to

document EPA-421, the document discusses potential issues with the application of a rule known as the greenhouse gas tailoring rule to a facility and lays out several pre-decisional options for consideration related to the potential application of this rule. Exh. G, ¶ 29. A similar level of detail regarding pre-decisional deliberations is provided throughout the Agency's *Vaughn* index. Therefore the Agency's use of Exemption 5 should be upheld.

B. EPA Properly Withheld Information Pursuant to Exemption (b)(6)

The Plaintiff complains that EPA is withholding email addresses of employees within the Executive Office of the president. Exhibit E, attached hereto, sets forth documents EPA-296, EPA-297, EPA-298, EPA-299 and EPA-301, as examples of how EPA withheld official email addresses of the Executive Office of the President under Exemption 6. Exemption 6 requires the agency to balance the individual's right to privacy against the public's interest in disclosure. *See Dep't of Air Force v. Rose,* 425 U.S. 352, 372 (1976); *Reedy v. NLRB*, 927 F.2d 1249, 1251 (D.C. Cir. 1991). "The privacy interest protected by Exemption 6, 'encompass[es] the individual's control of information concerning his or her person.'" *U.S. Dep't of Defense v. FLRA*, 510 U.S. 487, 500 (1994) (quoting *U.S. Dep't of Justice v. Reporters Comm.*, 489 U.S. 749, 763 (1989)). In contrast, "the only relevant public interest in the [Exemption 6] balancing analysis [is] the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" Id. at 497 (quoting *Reporters Comm.*, 489 U.S. at 773). It is the requester's obligation to identify a cognizable public interest. Absent the requester's identification of a public interest, "the balancing requirement does not come into play." *Griffin v. Exec. Office for US. Attorneys*, 774 F. Supp. 2d 322, 327 (D.D.C. 2011) (citing *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 175 (2004)). Thus, "[i]n the absence of any public

interest in disclosure, any countervailing interest in privacy defeats a FOIA request." *Oguaju v. United States*, 288 F.3d at 451 (citing *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989) ("[S]omething ... outweighs nothing every time")).

The staff members of the Executive Office of the President have a significant personal interest in preventing unsolicited emails and harassment. The email addresses are used for internal messages to and from the Executive Office of the President to prevent unsolicited communications. Since the owners' names are already disclosed, public disclosure of these email addresses would not shed light on the performance of the employees' official duties. As Exhibit E demonstrates, when EPA withheld email addresses under Exemption 6, the Agency also provided the email owner's name in the redaction or the redaction directly followed the owner's name. Exh. G, ¶ 30. On the other hand, Plaintiff has failed to put forth any public interest whatsoever in releasing this type of information. Accordingly, Defendant's Motion for Summary Judgment as to Exemption 6 should be granted.

III. DISCOVERY IN FOIA CASES IS ONLY APPROPRIATE UPON A SHOWING OF BAD FAITH REGARDING THE AGENCY'S DECLARATION.

Discovery in civil actions is governed by the Federal Rules of Civil Procedure, along with the Court's Local Rules. In this Court, the Local Rules explicitly exempt FOIA actions from the otherwise automatic opening of discovery. *See* LCVR 16.3(b)(9) (exempting FOIA actions from both pretrial conference and discovery planning requirement); 26.2(a)(9) (exempting FOIA actions from initial disclosure requirements of Rule 26(a)(1)).

> Local Rule 26.2(a) makes express that discovery may not occur in these excluded cases except by court order or by consent of the parties:
> Except in categories of proceedings exempted from initial disclosures under Rule 26(a)(1)(E), F.R.Civ.P., or when authorized under these rules or by order or agreement of the parties, a party *may not seek discovery* from any sources before the parties have conferred as required by Rule 26(f), F.R.Civ.P.

LCVR 26.2(a) (emphasis added). None of the exceptions in this provision apply here and, because the parties have not had the Rule 26(f) conference, the Local Rules provide that Plaintiff may not seek discovery at this time.

The commentary to Local Civil Rule 16.3(b) explains that FOIA actions were included in the list of exempted actions because "they are actions that typically do not require discovery . . . A significant portion of the nation's FOIA actions are pending in this court." Thus, it is clear that the Court consciously designed the Local Civil Rules to operate this way in FOIA cases.

In addition, district courts traditionally rely on summary judgment motions to resolve FOIA claims. *See, e.g., Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir 2007). In doing so, the courts generally accord the agency's declarations substantial weight as long as they are made in good faith, reasonably detailed, and not contradicted by other competent evidence in the record. *See, e.g., Assassination Archives & Research Ctr. v. CIA*, 178 F. Supp. 2d 1, 8 (D.D.C. 2001), *aff'd*, 334 F.3d 55 (D.C. Cir. 2003).

As explained by this Court, it is also well established that discovery is rare in FOIA cases:

> "Discovery is generally unavailable in FOIA actions." *Wheeler v. CIA*, 271 F. Supp. 2d 132, 139 (D.D.C.2003) (citing *Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 25 (D.D.C. 2000)). Discovery "should be denied where an agency's declarations are reasonably detailed, submitted in good faith and the court is satisfied that no factual dispute remains." *Schrecker v. Dep't of Justice*, 217 F. Supp. 2d 29, 35 (D.D.C. 2002), cited with approval by *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006). Where an agency's declarations are deficient, "courts generally will request that an agency supplement its supporting declarations" rather than order discovery. *Hall*, 2000 U.S. Dist. LEXIS at *19. "Discovery may be appropriate when the plaintiff can raise sufficient question as to the agency's good faith in processing or in its search." *Exp.-Imp. Bank*, 108 F. Supp. 2d at 25 (citing *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2nd Cir. 1994)). However, the presumption of good faith that applies to agency affidavits is not "rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (quoting *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981)).

Wolf v. CIA, 569 F. Supp. 2d 1, 9-10 (D.D.C. 2008).

Accordingly, well established FOIA case law provides numerous reasons why the Court should block discovery at this point: First, the typical remedy for insufficient declarations is to order the agency to supplement the declaration, rather than permit discovery. Second, Plaintiff has made nothing remotely close to a showing of bad faith on behalf of the agency. In fact, Plaintiff admits that the Court should grant it limited discovery to "determine whether EPA has acted in bad faith. . ." Plf's Opposition at p. 2. This falls far short of the showing that is necessary for the Court to allow discovery. Discovery to pursue an unsupported allegation, suspicion or a hunch is unwarranted. *Physicians Comm. for Responsible Med. v. Glickman,* 117 F. Supp. 2d 1, 4 (D.D.C. 2008).

Moreover, Plaintiff inexplicably asserts that EPA demonstrated bad faith in implementing "an agreement to narrow the scope of [the] search to EPA's senior officials in the Washington D.C. headquarters. While any reasonable search would . . .include the two most senior political officials." The Plaintiff then proceeds to speculate about spoliation of records during the five months that elapsed before those files were searched for responsive records. Plf's Opp., at p. 2, 14. These arguments are groundless.

First, the argument is factually groundless because the agency has always interpreted the narrowed scope of the request to include the Administrator, Deputy Administrator and Chief of Staff in the Office of the Administrator. Exh. G, ¶ 9. EPA did not omit those offices from its initial search. *Id., see also,* Initial Declaration of Eric Wachter attached to Def's MSJ at ¶ 11. Second, following Administrator Jackson's departure, the Office of the Administrator immediately retained and subsequently searched her records, including the secondary email account, as part of the supplemental search for records from the former Administrator, the

Deputy Administrator, and the Chief of Staff. No records were or have been deleted from these accounts during this five month period. Exh. G., ¶ 33.

Plaintiff essentially seeks to engage in a fishing expedition that runs contrary to the "general rule" that "discovery in FOIA actions is rare and should be denied where an agency's declarations are reasonably detailed, submitted in good faith and the court is satisfied that no factual dispute remains." *Shrecker v. United States Dep't of Justice*, 217 F. Supp. 2d 29, 39 (D.D.C. 2002). Discovery should not be permitted when it "would only afford . . . [the plaintiff] an opportunity to pursue a bare hope of falling upon something that might impugn the affidavits." *Miltary Audit Project v. Casey*, 656 F.2d 724, 751-52 (D.C. Cir. 1981). There is nothing about this case that distinguishes it from the long line of cases establishing that discovery is inappropriate under these circumstances. Accordingly, the Court should grant EPA's request for summary judgment and deny Plaintiff's request for discovery.

CONCLUSION

WHEREFORE, for all the reasons set forth above, the Defendant respectfully requests the Court to grant its motion for summary judgment and enter judgment in its favor.

Dated: July 24, 2013

Respectfully submitted,

RONALD C. MACHEN JR. DC BAR #447-889
United States Attorney
For the District of Columbia

DANIEL F. VAN HORN, D.C. BAR # 924092
Chief, Civil Division

Case 1:12-cv-01726-RCL Document 35 Filed 07/24/13 Page 20 of 24

By: /s/

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Of Counsel:

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1200 Pennsylvania Ave. N.W.
Washington, D.C. 20210

Case 1:12-cv-01726-RCL Document 35 Filed 07/24/13 Page 21 of 24

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LANDMARK LEGAL FOUNDATION Plaintiff, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, Defendant.	)	Case No. 12-1726 (RCL)

DEFENDANT'S REPLY TO PLAINTIFF'S
STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

Defendant, the United States Environmental Protection Agency (EPA), hereby submits this reply to Plaintiff's Statement of Material Facts Not in Genuine Dispute. As set forth below, Plaintiff fails to create any genuine issue of material fact.

1. Admitted in part and disputed in part. The EPA admits that Landmark agreed to limit EPA's search for responsive records to senior officials in EPA headquarters. The EPA does not assert that Landmark agreed to limit the scope of the FOIA request to "assistant administrators, deputy assistant administrators, and chiefs of staff in EPA headquarters offices as well as to the associate administrator and deputy associate administrator in EPA's Office of Policy." As explained by Eric Wachter, Director of the Office of the Executive Secretariat, the EPA did not limit the scope of the search to these offices. *See* Supp. Wachter Decl. at ¶¶9, 15. The EPA searched the records of the Administrator, Deputy Administrator, and Chief of Staff. Supp. Wachter Decl., Exh. G at ¶¶17, 21 – 24.

2. Not disputed. The EPA searched the records of the Administrator, Deputy Administrator, and Chief of Staff in response to this request. Supp. Wachter Decl., Exh. G at ¶¶17, 21 – 24.

3. Disputed. EPA sent an initial request for responsive documents from the Office of the Administrator as part of the initial search. Supp. Decl. at 17. Mr. Wachter has provided testimony under penalty of perjury regarding the instructions to search the Office of the Administrator. Supp. Wachter Decl., Exh. G at ¶17.

4. Disputed. EPA sent an initial request for responsive documents from the Office of the Administrator as part of the initial search. Supp. Decl., Exh. G at 17. Mr. Wachter has provided testimony under penalty of perjury regarding the instructions to search the Office of the Administrator. Supp. Wachter Decl., Exh. G at ¶17. In the interest of a complete and adequate response to Plaintiff's request, the EPA determined that another search would be required of the accounts of the former Administrator, Deputy Administrator, and Chief of Staff in the Office of the Administrator and conducted a supplemental search. Supp. Wachter Decl., Exh. G at ¶¶21 – 24.

5 - 6. Not disputed. Document EPA–32 contains an unsolicited email communication received by then-Deputy Administrator Bob Perciasepe. This communication was forwarded to Mr. Perciasepe's executive assistant, Teri Porterfield, and was located in the EPA's Lotus Notes email system as part of EPA's search for responsive records. Supp. Wachter Decl., Exh. G at ¶25(c).

7. Disputed. Plaintiff's statement that " [t]he declaration submitted by Eric E. Wachter does not indicate that any EPA official searched his/her personal email accounts for responsive records" is immaterial and does not raise a genuine issue of material fact in dispute.

Mr. Wachter has provided testimony under penalty of perjury regarding EPA's search for responsive records. Wachter Decl. at ¶¶11 – 13; Supp. Wachter Decl., Exh. G at ¶¶14 – 26.

8. Disputed. Plaintiff's statement that "declaration submitted by Eric E. Wachter does not indicate what filing system EPA employs, what files exist, what files were actually searched, or if searched, by whom" does not raise a genuine issue of material fact in dispute. Mr. Wachter has provided testimony under penalty of perjury regarding EPA's search for responsive records, EPA's filing system, and files subject to search. Wachter Decl. at ¶¶11 – 13; Supp. Wachter Decl., Exh. G at ¶¶14 – 25. Mr. Wachter has also testified that as of May 15, 2013, his office has determined that all locations reasonably likely to contain responsive records have been searched. Supp. Wachter Decl., Exh. G at ¶26.

9. Disputed. Plaintiff's bare assertion that "EPA appears to have limited its search for responsive records to email exchanges between EPA officials and attachments to these emails" does not raise a genuine issue of material fact in dispute. Mr. Wachter has provided testimony under penalty of perjury regarding EPA's search for responsive records, EPA's filing system, and files subject to search. Wachter Decl. at ¶¶11 – 13; Supp. Wachter Decl., Exh. G at ¶¶14 – 25. Mr. Wachter has also testified that as of May 15, 2013, his office has determined that all locations reasonably likely to contain responsive records have been searched. Supp. Wachter Decl., Exh. G at ¶26.

Date: July 24, 2013

Respectfully submitted,

RONALD C. MACHEN JR., D.C. Bar #447889
United States Attorney
for the District of Columbia

Case 1:12-cv-01726-RCL Document 35 Filed 07/24/13 Page 24 of 24

DANIEL F. VAN HORN, D.C. BAR # 924092
Chief, Civil Division

By: By /s/
Heather Graham-Oliver
Assistant United States Attorney
555 4th Street, N.W.
Washington, D.C. 20530
Tel: (202) 514-5134 Fax: (202) 514-8780

Of counsel:
Jennifer Hammitt, Esq.
Office of General Counsel
U.S. Environmental Protection Agency

May 14, 2013 Supplemental Release - HQ-FOI-01861-12 All emails sent by "Richard Windsor" were sent by EPA Administrator Lisa Jackson

Correspondence Management System

Control Number: AX-12-000-7596
Printing Date: May 01, 2012 03:31:46

Citizen Information

Citizen/Originator: Springer, Jarron B.
Organization: Tennessee Grocers & Convenience Store Association
Address: 1838 Elm Pike, Nashville, TN 37210-3726

Constituent: N/A
Committee: N/A **Sub-Committee:** N/A

Control Information

Control Number:	AX-12-000-7596	**Alternate Number:**	N/A
Status:	Pending	**Closed Date:**	N/A
Due Date:	May 15, 2012	**# of Extensions:**	0
Letter Date:	Apr 23, 2012	**Received Date:**	Apr 30, 2012
Addressee:	AD-Administrator	**Addressee Org:**	EPA
Contact Type:	LTR (Letter)	**Priority Code:**	Normal
Signature:	DX-Direct Reply	**Signature Date:**	N/A

File Code: 404-141-02-01_141_b Controlled and Major Corr. Record copy of the offices of Division Directors and other personnel.
Subject: Daily Reading File- Concern with EPA limited use of second-generation rodenticides
Instructions: DX-Respond directly to this citizen's questions, statements, or concerns
Instruction Note: N/A
General Notes: N/A
CC: OEAEE - Office of External Affairs and Environmental Education
OP - Office of Policy
R4 - Region 4 -- Immediate Office

DEPOSITION
EXHIBIT NUMBER 48
DATE 2/12/14 REPORTER CTC
ART MILLER & ASSOCIATES

Lead Information

Lead Author: N/A

Lead Assignments:

Assigner	Office	Assignee	Assigned Date	Due Date	Complete Date
	OEX	OCSPP	May 1, 2012	May 15, 2012	N/A
	Instruction: DX-Respond directly to this citizen's questions, statements, or concerns				

Supporting Information

Supporting Author: N/A

Supporting Assignments:

Assigner	Office	Assignee	Assigned Date
No Record Found			

History

Action By	Office	Action	Date

May 14, 2013 Supplemental Release - HQ-FOI-01861-12 All emails sent by "Richard Windsor" were sent by EPA Administrator Lisa Jackson

RECEIVED
APR 30 2012
OFFICE OF THE
EXECUTIVE SECRETARIAT

Lisa Jackson
Administrator
USEPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, DC 20460

Administrator Jackson,

As President of the Tennessee Grocers and Convenience Store Association, I write to convey our concern with the EPA's proposal to limit the use of second-generation rodenticides only to professional exterminators, thus leaving them no longer available to everyday consumers and small business people.

Our concerns are two-fold. First, many of our grocers and convenience store owners require a high degree of flexibility in their operations to address issues related to food and customer safety. Should any situations arise where they need quick access to effective and affordable rodenticides, this proposed regulation would – to a large degree – eliminate the owners' abilities to quickly address those needs, and impose on them the additional costs of hiring a professional applicator to apply some of the same products our members and consumers have had ready access to for many years.

Second, many of our members offer these products for sale, and their customers rely on the access to these products that our members provide. This proposal would eliminate that aspect of our ability to serve the community.

The Tennessee Grocers & Convenience Store Association is the only food trade association that represents all segments of Tennessee's food market. TGCSA's retail membership consists of over 1,500 grocery and convenience store locations statewide. The TGCSA membership also consists of over 40 wholesalers and distributors along with 200 suppliers and manufacturers.

Considering this, I write to express our opposition to this proposal to cancel consumer and small business uses of second-generation rodenticides.

Sincerely,

Jarron B. Springer
President

cc: The Honorable Lamar Alexander, United State Senate
The Honorable Bob Corker, United States Senate
The Honorable Phil Roe, United States House of Representatives
The Honorable John Duncan, United States House of Representatives

1838 Elm Hill Pike Suite 136 • Nashville, Tennessee 37210-3726
Telephone 615-889-0136 • Toll free 1-800-238-8742 • Fax 615-889-2877
www.tngrocer.org

EPA PROD1_0396

From: Hammitt, Jennifer
To: Wachter, Eric; Newton, Jonathan
Subject: Search String for Landmark FOIA using Notes Syntax
Date: Tuesday, April 30, 2013 1:15:24 PM

Just so that everyone has it when checking the Bob P. account (Jonathan may already know this):

The search string should be (draft OR proposed) SENTENCE (rule OR regulation OR policy)

The date range is between January 1, 2012 and August 21, 2012 -- this should be adjusted in the search box. I can come to Amir and help if needed, thanks.

Jennifer Hammitt
U.S. Environmental Protection Agency
Office of General Counsel, General Law Office
1200 Pennsylvania Ave N.W., MC 2377A
Washington, D.C. 20460
(202) 564-5097

DEPOSITION
EXHIBIT NUMBER Dickerson 53
DATE 2.11.14 REPORTER ML
ART MILLER & ASSOCIATES

EPA PROD1_0504

From: Jonathan Newton
To: Nena Shaw
Subject: Fw: Landmark (HQ-FOI-01861-12)
Date: 01/17/2013 05:09 PM
Attachments: HQ-FOI-01861-12 (120821) Request Letter.pdf
HQ-FOI-01861-12 (120821) Request Letter.pdf

Hey Nena, we will really need this search completed. We are on a court deadline to close this request by the end of the month and there are several levels of review that must occur before that happens. In summary, the request is for:

- Records relating to proposed rules or regulations that have not been finalized by EPA between January 1, 2012 and August 17, 2012.
- Records reflecting an order, direction or suggestion, that regulations (or comments on regulations) should be delayed until after November 2012.
- Here is a link to the collection database =====>
- Here is a copy of the request.

Jonathan V. Newton, Esq.
U.S. EPA, Office of the Executive Secretariat
1200 Pennsylvania Avenue, NW (MC 1105A)
Washington, D.C. 20460
(202) 566-1981

----- Forwarded by Jonathan Newton/DC/USEPA/US on 01/17/2013 05:05 PM -----

From: Jonathan Newton/DC/USEPA/US
To: Nena Shaw/DC/USEPA/US@EPA
Date: 12/19/2012 04:58 PM
Subject: Re: Landmark

Pasted below . . .

Jonathan V. Newton, Esq.
U.S. EPA, Office of the Executive Secretariat
1200 Pennsylvania Avenue, NW (MC 1105A)
Washington, D.C. 20460
(202) 566-1981

Nena Shaw---12/19/2012 04:35:50 PM---Jonathan - Did you say something to me about a "Landmark" FOIA? I am not finding it. I did, howeve

From: Nena Shaw/DC/USEPA/US
To: Jonathan Newton/DC/USEPA/US@EPA
Date: 12/19/2012 04:35 PM
Subject: Landmark

Jonathan - Did you say something to me about a "Landmark" FOIA? I am not finding it. I did, however, do the Deputy's Dimock FOIA. I am having trouble doing mine, but will likely get it done tomorrow.

Thanks. Nena

Nena Shaw
Special Assistant
Office of the Administrator
202-564-5106 (W)

DEPOSITION
EXHIBIT NUMBER 54
DATE 2/12/14 REPORTER CTL
ART MILLER & ASSOCIATES

----- Forwarded by Jonathan Newton/DC/USEPA/US on 12/19/2012 04:57 PM -----

From: FOIA
To: Nena Shaw/DC/USEPA/US@EPA
Date: 12/12/2012 05:12 PM
Subject: Fw: ACTION REQUIRED - New FOIA Request (HQ-FOI-01861-12) (Update and FAQ)
Sent by: Jonathan Newton

EPA PROD1_0505

This is the Landmark request

----- Forwarded by Jonathan Newton/DC/USEPA/US on 12/12/2012 05:11 PM -----

From: FOIA
To: Aaron Dickerson/DC/USEPA/US@EPA, Nena Shaw/DC/USEPA/US@EPA
Cc: Eric Wachter/DC/USEPA/US@EPA
Date: 11/14/2012 03:21 PM
Subject: Fw: ACTION REQUIRED - New FOIA Request (HQ-FOI-01861-12) (Update and FAQ)
Sent by: Jonathan Newton

Hey Aaron and Nena,

Sorry for the delay, this should have gone to both of you since the request requires a search of both the Administrator's and the Deputy's email accounts.

There is a collection database; however, after much discussion we decided against an automated search. A few search terms have been suggested, but the list is not exhaustive. The requestor gave a long description in their request so even though universal search terms may be difficult to establish, it is the type of memo/policy that someone should remember.

Feel free to give me a call so I can address the questions you probably have.

Thanks,
Jonathan
(202) 566-1981

----- Forwarded by Jonathan Newton/DC/USEPA/US on 11/14/2012 02:59 PM -----

From: FOIA
To: Marna McDermott/DC/USEPA/US@EPA
Date: 10/31/2012 11:24 AM
Subject: Fw: ACTION REQUIRED - New FOIA Request (HQ-FOI-01861-12) (Update and FAQ)
Sent by: Jonathan Newton

----- Forwarded by Jonathan Newton/DC/USEPA/US on 10/31/2012 11:23 AM -----

From: FOIA
To: Sabrina Hamilton/DC/USEPA/US@EPA, Karen Johnson/DC/USEPA/US@EPA, Diane Salahuddin/DC/USEPA/US@EPA, Zelma Taylor/DC/USEPA/US@EPA, Maya Lee/DC/USEPA/US@EPA, Linda Person/DC/USEPA/US@EPA, Barbara Bruce/DC/USEPA/US@EPA, Shushona Hyson/OIG/USEPA/US@EPA, Vanessa Fleeton/DC/USEPA/US@EPA, Abbie Agner/DC/USEPA/US@EPA, Wanda McLendon/DC/USEPA/US@EPA, Diane Jones-Coleman/DC/USEPA/US@EPA
Cc: NancyE Morley/DC/USEPA/US@EPA, Robin Kime/DC/USEPA/US@EPA, Eric Wachter/DC/USEPA/US@EPA, Brian Hope/DC/USEPA/US@EPA, Fredrick No/DC/USEPA/US@EPA, Jennifer Hammitt/DC/USEPA/US@EPA
Date: 10/25/2012 06:04 PM
Subject: Fw: ACTION REQUIRED - New FOIA Request (HQ-FOI-01861-12) (Update and FAQ)
Sent by: Jonathan Newton

Thanks to those that have already responded to this request. We received a few questions about the search request (below) that was circulated on Tuesday. Here are some of the responses in case others have the same concerns:

- The message below is merely a template used by the Office of the Administrator to initiate a search for records (other AAships will have different formats).
- October 30th is an internal deadline for the records search. If you cannot meet the deadline, please let us know and submit your records as soon as possible.
- Any records proposed for release will be reviewed by both AO and OGC.
- There will not be an "automated search" for this request. However, potential key words for a manual search could include: "draft or proposed" within the same sentence as "rule, regulation or policy." Those suggestions are not meant to be exhaustive. The original request elaborates upon the records that are sought.

Note: Here is a link to a **collection database for this request**; records can be copied into this database. ===> <=== Although you will receive a confirmation that records have been copied, you may not be able to view those records inside the database.

Please feel free to call or email if you have additional questions. Thanks again!
Jonathan

Jonathan V. Newton, Esq.

Records and ECMS Briefing

EPA
Incoming Political Appointees
2009

ECMS
Managing Government Records

DEPOSITION
EXHIBIT NUMBER 55
DATE 1/13/14 REPORTER CR
ART MILLER & ASSOCIATES

Benefits of records management

Managing EPA records as information assets in support of the Agency's mission:

- ensures statutory / regulatory compliance
- preserves corporate memory
- promotes information sharing
- assists better decision making
- enables efficient access / retrieval
- safeguards vital / sensitive information
- minimizes litigation risks
- reduces operating costs

ECMS

Statutes, Regs & Policy

The head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities. (44 U.S.C. 31; 36 CFR 12B)

This responsibility is delegated. (EPA 2161; EPA 1200)

- Chief Information Officer > Agency Records Officer
- Assistant and Regional Administrators > Records Liaison Officers
- All EPA employees

All EPA employees are responsible for…

- creating records that document their activities
- filing records for safe storage and efficient retrieval
- disposing of records according to Agency schedules

ECMS

www.epa.gov/records/what/

Records are . . .

"...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 U.S. 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 the data in them." (44 U.S.C. 3301, Definition of Records)

ECMS

Importance of Senior Official's Records

- Records of EPA Senior Officials are especially important because they document Agency policy and important decisions.

- Many records of Senior Officials are considered "permanent" – i.e. subject to preservation by the National Archives.

ECMS

Records of senior officials include...

- Calendars, schedules, and logs of daily activities
- Controlled and major correspondence
- Directives and policy guidance documents
- Program development files
- Reports to Congress or the President
- Speeches and testimony

ECMS

www.epa.gov/records/tools/RM_for_Senior_Officials.pdf

A records schedule is...

an EPA policy that provides specific, mandatory instructions for records:

- when they must be closed
- how long they must be retained
- their final disposition

ECMS

www.epa.gov/records/faqs/schedules.htm

A recordkeeping system is...

a set of tools and procedures for managing records throughout their lifecycle

- Manual: print and file in a paper system; manage by hand
- Automated: capture electronically in the Enterprise Content Management System (ECMS)

ECMS

www.epa.gov/records/faqs/rks.htm

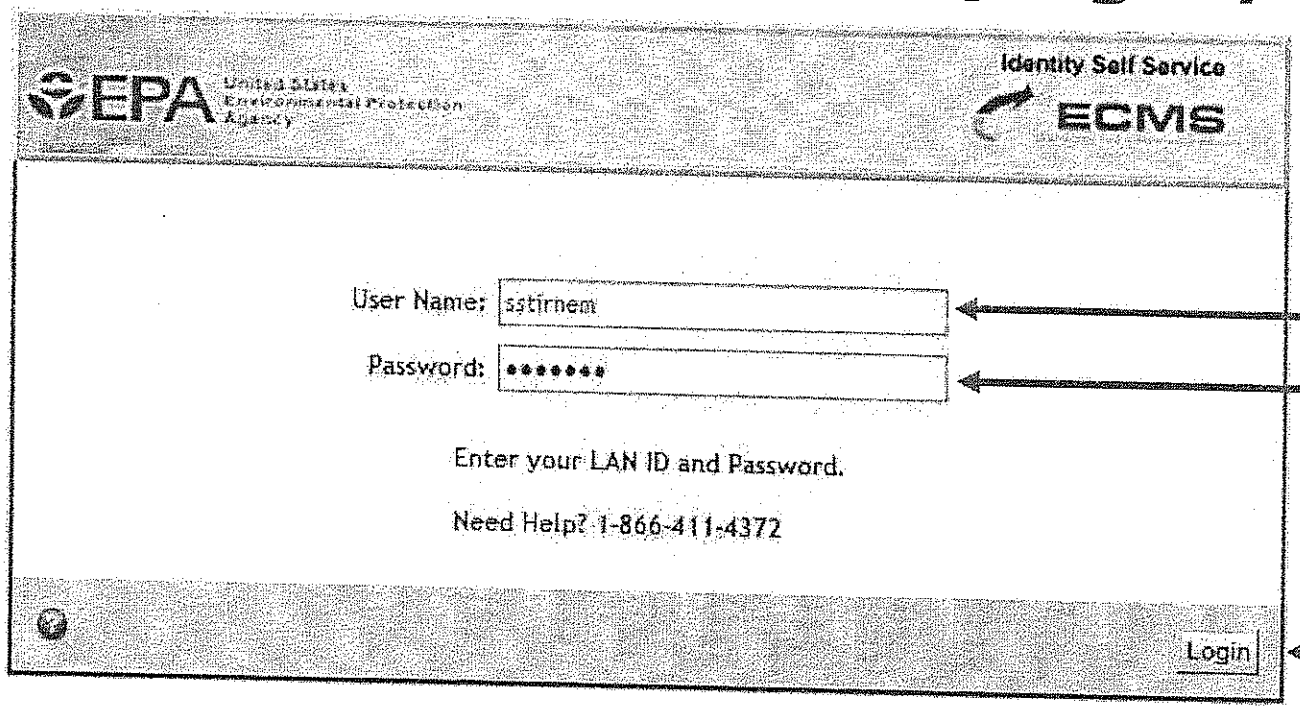
Legal Considerations

- Do not use any outside e-mail account to conduct official Agency business
- Records you create or receive during your tenure belong to EPA exclusively
- Departing officials and employees may not remove extra copies of records or other work material without prior approval
- There may be criminal penalties for unauthorized removal or destruction of records
- Documents you create or receive may also need to be maintained pursuant to the Freedom of Information Act (FOIA), litigation or other legal requirements

ECMS

Register in ECMS

Go to: **https://ecms.epa.gov/iss**



1. Enter your LAN ID
2. Enter your LAN password
3. Click "Login"

ECMS

Register in ECMS

ECMS Identity Self Service LAN ID: sstirnem User Name: Stirneman, Scott Primary Group:

ECMS Access Request

Enter your EPA e-mail address. (lastname.firstname@epa.gov)

* stirneman.scott@epa.gov

Check here, if you are currently on detail.

Select your primary organization, beginning with the Program or Region ("Level 1").

If you are in the immediate office for a level, do not select any lower levels.

* Level 1 Office of Environmental Information

Level 2 Office of Information Collection

Level 3 Collection Strategies Division

Level 4 Records and Content Management Branch

* Supervisor Constance Downs

Confirm that your Supervisor is correct before submitting.

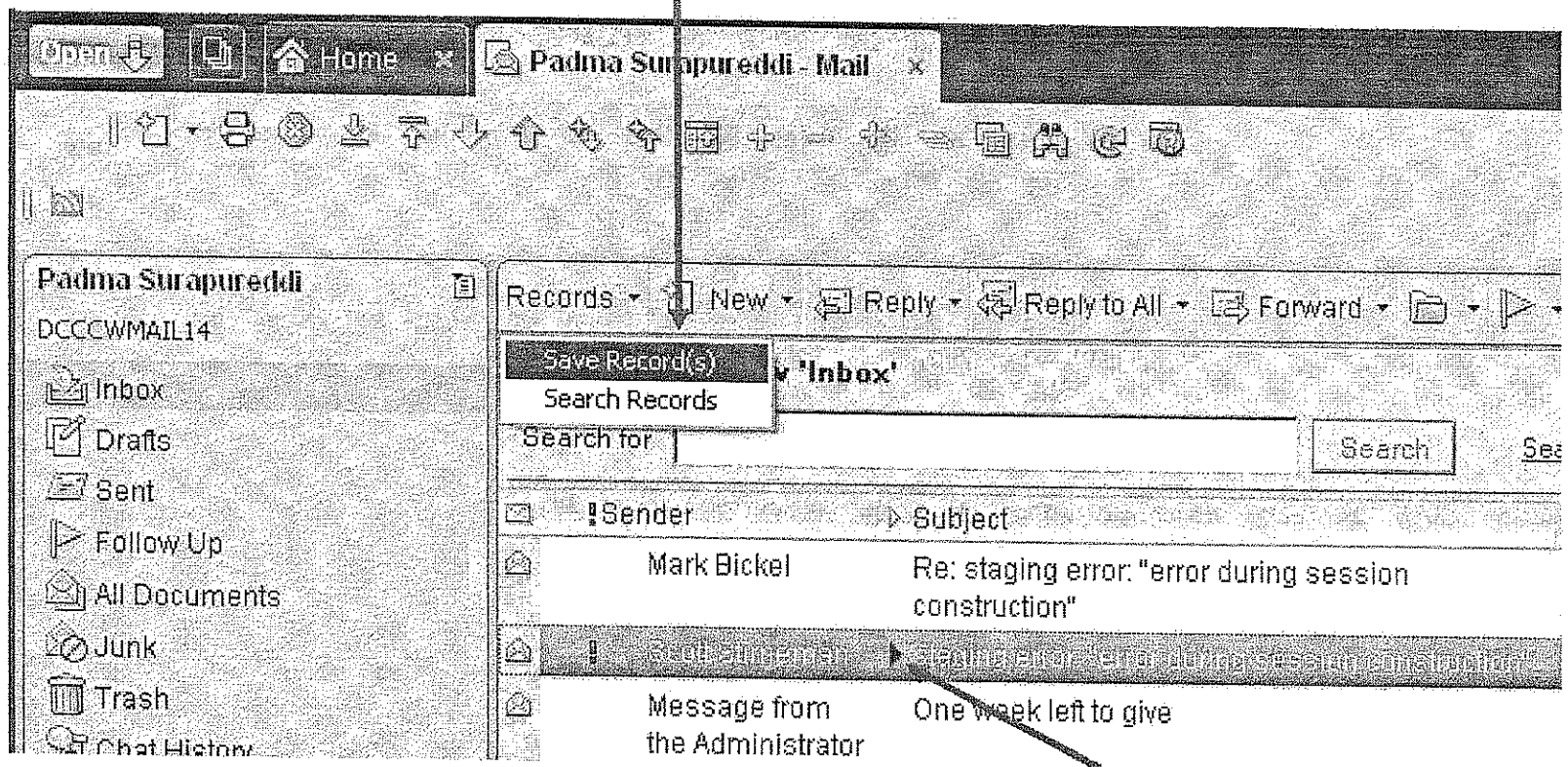
Submit Reset Cancel

If you encounter any problems, please contact the EPA Call Center: 1-866-411-4372

1. Enter your EPA e-mail
2. Select your organization down to the level at which you work
3. Confirm your supervisor
4. Click "Submit"

Save E-mail Records

2. Select "Save Record(s)"



1. Select the e-mail you want to save

ECMS

Save E-mail Records

ECMS E-Mail Records

Help Desk: 1-866-411-4372

Version 2.0.0

Select Group: Records and Content Management Branch

Favorite Folders

Sort Folders

ECMS - Governance - Metadata (301-093 006b)

ECMS - Communications - Outreach materials (301-093 006b)

ECMS - Governance - Technical (301-093 006b)

ECMS - Meetings - Business (301-093 006b)

ECMS - Projects - Email Records (301-093 006b)

ECMS - Strategy (301-093 006b)

Select the correct folder to save your record in

Find Folder(s) | Remove Folder(s)

Selected Folder Path

File Plan

301-093 Program Monitoring

006 Program Management Files

b Other than senior officials (301-093 006b)

ECMS - Strategy (301-093 006b)

Add more metadata, as needed

Assign Attributes

Keywords: Use commas to separate keywords

Sensitivity: None

Extended: None

1 Record(s) to be Saved

Duplic.	Subject	Form	Encrpyted
No	Re: Fw: location of new build on the FTP...	Memo	No

Remove Record(s)

Identify Non-EPA E-mail Addresses

Email Address	Name	Organization

Click "Save"

Save | Cancel

Customize Favorites

ECMS E-Mail Records

Help Desk: 1-866-411-4372

Version 2.0.0

Select Group: Records and Content Management Branch

Favorite Folders

Sort Folders

ECMS - Governance - Metadata (301-093 006b)

ECMS - Communications - Outreach materials (301-093 006b)

ECMS - Governance - Technical (301-093 006b)

ECMS - Meetings - Business (301-093 006b)

ECMS - Projects - Email Records (301-093 006b)

ECMS - Strategy (301-093 006b)

Click the "Find Folder(s)" button to view your file plan

Find Folder(s) | Remove Folder(s)

Selected Folder Path

File Plan

Assign Attributes

Keywords: Use commas to separate keywords

Sensitivity: None

Extended: None

1 Record(s) to be Saved

Duplic...	Subject	Form	Encrypted
No	Re: Fw: location of new build on the FTP...	Memo	No

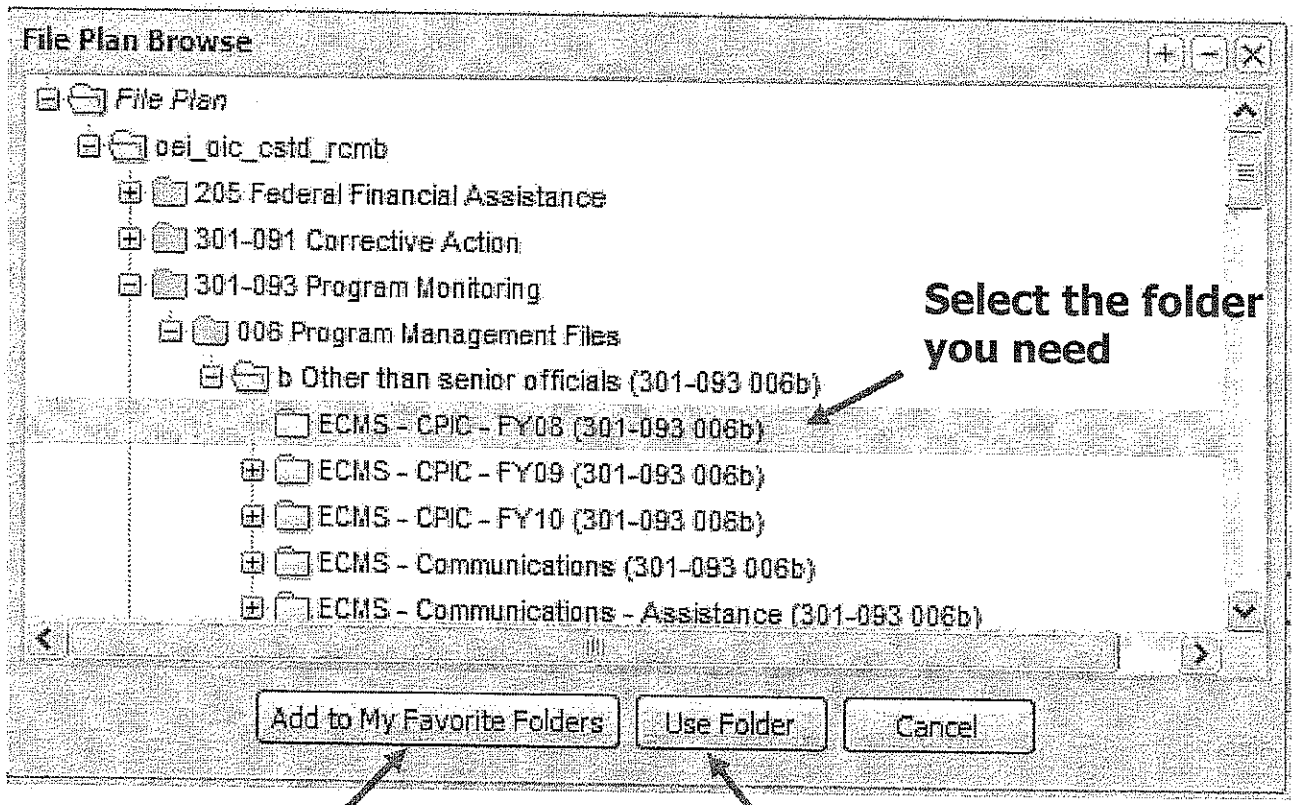
Remove Record(s)

Identify Non-EPA E-mail Addresses

Email Address	Name	Organization

Save | Cancel

Customize Favorites



Select the folder you need

Click the "Add to My Favorite Folders" button

Or, click the "Use Folder" button to use a folder without adding it to your favorites area

ECMS

Contacts

John Ellis
Agency Records Officer
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LANDMARK LEGAL FOUNDATION,	)	
Plaintiff,	)	
v.	)	**Civil Case No. 12-1726**
ENVIRONMENTAL PROTECTION AGENCY,	)	
Defendant.	)	

MEMORANDUM OPINION

The Environmental Protection Agency ("EPA") has moved for summary judgment as to the Landmark Legal Foundation's ("Landmark") Freedom of Information Act ("FOIA") claim. *See* Def.'s Mot., ECF No. 30. Landmark opposes the motion and seeks limited discovery regarding the adequacy of EPA's search for documents responsive to its FOIA request. The Court will deny EPA's motion, and will grant Landmark's request for limited discovery.

I. BACKGROUND[1]

A. Landmark's FOIA Request

"On August 17, 2012, Landmark, a 'national public interest law firm,' submitted a FOIA request to the EPA requesting records regarding any EPA rule or regulation for which public notice has not been made, but which was contemplated or under consideration for public notice between January 1, 2012 and August 17, 2012." *Landmark Legal Found. v. EPA*, 910 F. Supp. 2d 270, 272 (D.D.C. 2012) (citations omitted). Specifically, Landmark asked EPA to disclose

[1] Additional background for this case is provided in this Court's previous opinion, *Landmark Legal Found. v. EPA*, 910 F. Supp. 2d 270, 272-74 (D.D.C. 2012).

DEPOSITION
EXHIBIT NUMBER 56
DATE
REPORTER ML
ART MILLER & ASSOCIATES

1. Any and all records identifying the names of individual, groups and/or organizations outside the EPA with which the EPA, EPA employees, EPA contractors and/or EPA consultants have had communications of any kind relating to all proposed rules or regulations that have not been finalized by the EPA between January 1, 2012 and August 17, 2012. . . .

2. Any and all records indicating an order, direction or suggestion that the issuance of regulations, the announcements of regulations and/or public comment of regulations should be slowed or delayed until after November 2012 or the presidential elections of 2012.

Letter from Mark R. Levin, President, Landmark Legal Found., to Nat'l Freedom of Info. Officer, U.S. Envtl. Prot. Agency 2 [hereinafter "Pl.'s FOIA Request"], Aug. 17, 2012, Def.'s Ex. A, ECF No. 30-2. "The genesis of the FOIA request was Landmark's suspicion, based on news reports, that the EPA may have intentionally delayed a 'controversial' regulation until after the November 2012 presidential election." *Landmark Legal Found.*, 910 F. Supp. 2d at 272–73. This concern appears on the face of Landmark's FOIA request, which asserts the possibility that "the Obama Administration is improperly politicizing EPA activities, EPA officials are attempting to shield their true policy goals from the public, and/or EPA officials themselves are putting partisan interests above the public welfare." Pl.'s FOIA Request 1.

B. Landmark's Agreement To Narrow the Scope of the Request

Following some discussion between the parties,[2] the EPA's Office of the Executive Secretariat[3] sent an email to Landmark's Assistant General Counsel which included the following query: "In order to make this request more manageable, would you consider narrowing

[2] Landmark's Assistant General Counsel, Matthew Forys, states that, prior to the e-mail exchange detailed in the text above, he "received a telephone call from . . . Jonathan V. Newton . . . from the EPA's Office of the Executive Secretariat" who "wanted to discuss [the] FOIA request because the EPA believed it was overly broad." Decl. Matthew Forys ¶ 3, ECF No. 31-1. During the conversation, Mr. Forys states that he told Mr. Newton that "generally Landmark was interested in outside pressure on the EPA from the White House or other agency to delay regulations." *Id.* Mr. Forys also details an additional phone conversation that preceded the e-mail exchange. *Id.* ¶ 4. Eric E. Wachter, director of the EPA's Office of the Executive Secretariat confirms that at least one such conversation occurred. Wachter Decl. ¶¶ 8-9.

[3] The Office of the Executive Secretariat processes FOIA requests for the Office of the Administrator and coordinates many requests for the entire agency. Wachter Decl. ¶¶ 2-3.

the search to senior officials in EPA HQ (ie., Program Administrators, Deputy Administrators and Chiefs of Staff)?" Email from Jonathan Newton (EPA) to Matthew C. Forys (Landmark), Oct. 5, 2012, Pl.'s Ex. A, ECF No. 31-1. Landmark's response stated that it "will agree to limit the scope of the search to senior officials in EPA HQ with the understanding that Landmark does not waive the right to expand the scope to the original request if warranted by responsive records." Email from Matthew C. Forys (Landmark) to Jonathan Newton (EPA), Oct. 5, 2012, Pl.'s Ex. A, ECF No. 31-1.

EPA appears to be inconsistent as to whether it understood the term "senior officials" in this narrowing agreement to exclude the Administrator and/or other top leaders in the agency from the scope of the FOIA request. EPA's opening brief asserts that both parties "agreed to narrow the scope of the request to 'senior officials' in each of the EPA's headquarters offices, with 'senior officials' being identified as Program Administrators, Deputy Administrators and Chiefs of Staff in EPA's headquarters offices as well as the Associate Administrator and Deputy Associate Administrator in EPA's Office of Policy." Def.'s Mem. 4–5. This statement seems to suggest that the EPA interpreted the FOIA request as excluding the Administrator. The initial declaration of Eric Wachter, the director of the EPA's Office of the Executive Secretariat, seems to confirm this interpretation. Wachter Decl. ¶¶ 9 & 11, ECF No. 30-1 ("This request was narrowed by agreement . . . to assistant administrators, deputy assistant administrators, and chiefs of staff in EPA headquarters offices, as well as to the associate administrator and deputy associate administrator in EPA's Office of Policy."). But in subsequent filings, EPA states that it "does *not* assert that Landmark agreed to limit the scope of the FOIA request to assistant administrators, deputy assistant administrators, and chiefs of staff in EPA headquarters offices as well as to the associate administrator and deputy associate administrator in EPA's Office of

Policy," Def.'s Reply to Pl.'s Statement of Material Facts ¶ 1, ECF No. 35, and that it "has *always* interpreted the narrowed scope of the request to include the Administrator, Deputy Administrator, and Chief of Staff in the Office of the Administrator." Def.'s Reply 4. A parallel adjustment is also found in Mr. Wachter's supplemental declaration, which states that his office "interpreted the narrowed scope of this FOIA request to include the Administrator, Deputy Administrator, and Chief of Staff in the Office of the Administrator," who were "included under the definition of 'program administrators, deputy administrators, and Chiefs of Staff.'" Wachter Supp. Decl. ¶ 9, ECF No. 35-7.

C. EPA's Initial and "Final" Disclosures

Between February and April of 2013, EPA conducted a search for responsive documents and made disclosures to Landmark, culminating in a "final" disclosure on April 12, 2013. Def.'s Statement of Material Facts ¶ 15, ECF No. 30. This final disclosure included 1,134 pages in 123 documents released in full, 1,678 pages in 196 documents with redactions, and an index of documents withheld under FOIA exemptions. *Id.* ¶ 15.

Again, EPA appears to be inconsistent as to when and how the FOIA request was communicated to the Office of the Administrator, and provides limited details of what was actually communicated. In his initial declaration, Mr. Wachter explains that his "office initiated a search for records, as narrowed by agreement . . . by electronic mail" and that this "initial search request went to the Office of the Administrator" on October 23, 2012. Wachter Decl. ¶ 11; *see also* Def.'s Mem. 5. Mr. Wachter's initial declaration states that this initial request for records was sent to the designated FOIA coordinators for "each of the EPA's headquarters offices," including the Office of the Administrator. *Id.* at 12. The email included the following: "**Note: This request has been modified.** <u>The search only applies to assistant administrators,</u>

deputy assistant administrators and chiefs of staff in EPA headquarters." *Id.* (emphases in original). This instruction appears to indicate that the Administrator and Deputy Administrator were outside of the scope of the request.

However, in a subsequent filing, the EPA states that this October 23 email was "*not* sent to the office of the Administrator," Def.'s Reply 6 (emphasis added); *see also* Wachter Supp. Decl. ¶ 15, explaining that "the individual . . . who was responsible for sending the email was also the designated FOIA Coordinator for the Office of the Administrator and is responsible for coordinating searches for responsive records from [that office]." Def.'s Reply 6. As Mr. Wachter explains in his supplemental declaration, this individual, Mr. Newton, "communicated with staff in the Office of the Administrator regarding this FOIA request *through a separate email communication*." Wachter Supp. Decl. ¶ 15 (emphasis added); *see also* Def.'s Reply 6–7. On November 14, several weeks after Mr. Newton sent the initial email to the FOIA coordinators in other offices, he "sent an email to Aaron Dickerson and Nena Shaw in the Office of the Administrator, forwarding the instructions that were sent to the FOIA coordinators for the other program offices on October 23, 2012 . . . ." Wachter Supp. Decl. ¶ 17; *see also* Def.'s Reply 7. Mr. Wachter also states that the email instructed the recipients to "search for records responsive to the request from the email accounts of the Administrator and Deputy Administrator, respectively . . . ." Wachter Supp. Decl. ¶ 17. EPA does not provide this email, and does not provide any further details regarding the content of the November 14 message.

D. EPA's Supplemental Search and Disclosures

Shortly after making this "final" disclosure, EPA apparently "determined that an additional search for documents from the former Administrator, Deputy Administrator, and Chief of Staff in the Office of the Administrator would be necessary to ensure a complete and

adequate production to Plaintiff." Def.'s Statement ¶ 16. EPA explains this determination in vague terms: "In the course of finalizing the materials for the Motion for Summary Judgment, it was determined that the search for documents from the former Administrator, the Deputy Administrator, and the Chief of Staff in the Office of the Administrator may have been insufficient." Def.'s Mem. 7. Mr. Wachter's declaration explains the reversal in similarly vague terms: "In the course of finalizing the materials for [the summary judgment motion] my office determined that the search for documents from the former Administrator, the Deputy Administrator, and the Chief of Staff in the Office of the Administrator *may have been insufficient*." Wachter Decl. ¶ 19 (emphasis added).

As a result of this additional search, on May 15, 2013, EPA disclosed 800 additional pages in 101 additional documents in full, and roughly 1,400 additional pages in 181 additional documents with redactions. Def.'s Statement ¶¶ 16–17. As Landmark notes, these newly disclosed records "essentially doubled the number of records responsive to [the FOIA] request." Pl.'s Opp'n 7.

E. Non-Search of EPA Leaders' *Personal* Email Accounts

Disclosed documents include emails sent between EPA accounts, including both the primary and secondary accounts of the former Administrator,[4] as well as emails between EPA

[4] EPA explains the use of "primary" and "secondary" email accounts:

> Because the widespread use of email has become commonplace, EPA Administrators have been assigned two email accounts: a primary account and a secondary account. The email address for Administrator Jackson's primary account was posted on EPA's website and was used by hundreds of thousands of Americans to send messages to the Administrator. This account was maintained and monitored by staff, and the emails were processed as official correspondence as appropriate. The secondary account was an everyday, working email account of the Administrator to communicate with staff and other government officials. This secondary email account was used for practical purposes. Given the large volume of emails sent to the primary account—more than 1.5 million in fiscal year 2012, for instance—the secondary email account was necessary for effective management and communication between the Administrator and colleagues.

accounts and outside accounts, but not emails between the personal accounts of EPA leaders and non-EPA accounts. *See* Def.'s Reply 9–12.

II. LEGAL STANDARD

A. Summary Judgment

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment must be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

B. The FOIA

The FOIA, 5 U.S.C. § 552, requires federal agencies to make certain records publicly available. The FOIA also provides exemptions from the disclosure requirement which are to be "narrowly construed." *FBI v. Abramson*, 456 U.S. 615, 630 (1982). FOIA actions are typically and appropriately resolved on summary judgment. *See Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 527 (D.C. Cir. 2011).

C. Adequacy of Search Under the FOIA

To prevail on summary judgment in a FOIA action, a defending agency "must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents." *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007). "The question is not whether there might exist any other documents possibly responsive to the request, but rather

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> . . . [T]he EPA searched this secondary account and provided responsive records from this secondary account. [The Office of the Executive Secretariat] is aware of no other secondary EPA email accounts of senior officials within the Agency during the time period of Plaintiff's request.

Def.'s Reply 11. There was initially some dispute regarding the redaction of the secondary email address, but this dispute was resolved when the EPA removed the redactions as part of their April 12, 2013 production. Def.'s Mem. 15. EPA explains that "Administrator Jackson's departure from the Agency obviated the need to withhold the name on her secondary email account." *Id.*

The "secondary" email accounts issue is distinct from Landmark's allegations regarding the use of private email accounts.

whether the search for those documents was adequate." *Steinberg v. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994) (internal quotations and citations omitted). "The court applies a reasonableness test to determine the adequacy of a search methodology, consistent with congressional intent tilting the scale in favor of disclosure." *Morley*, 508 F.3d at 1114 (internal quotations and citations omitted). This "reasonableness" inquiry is necessarily "dependent upon the circumstances of the case." *Davis v. Dep't of Justice*, 460 F.3d 92, 103 (D.C. Cir. 2006) (internal quotations and citations omitted).

The agency has the initial burden to demonstrate the adequacy of its search, which it may meet by providing declarations or affidavits that are "relatively detailed[,] . . . nonconclusory and submitted in good faith." *Weisberg v. Dep't of Justice,* 705 F.2d 1344, 1351 (D.C. Cir. 1983) (internal quotations and citations omitted). These declarations are "accorded a presumption of good faith which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *Negley v. FBI*, 169 F. App'x 591, 594 (D.C. Cir. 2006) (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)). Summary judgment is improper where "agency affidavits . . . do not provide information specific enough to enable [the requester] to challenge the procedures utilized." *Weisberg*, 627 F.2d at 371.

III. ANALYSIS

A. Genuine Issues of Material Fact Regarding the Adequacy of EPA's Search Preclude Summary Judgment

Landmark argues that there are numerous outstanding issues of material fact precluding summary judgment as to the adequacy of EPA's search for records responsive to its FOIA request. The Court finds that two issues require factual development before it could find an adequate search has been conducted.

1. Exclusion of Possibly Relevant Personal Emails

EPA did not search the *personal* email accounts of the Administrator, the Deputy Administrator, or the Chief of Staff. Landmark points to one disclosed record—an email originating from the personal email account of then-Deputy Administrator Robert Perciasepe—as evidence that upper-level EPA officials conducted official business from their personal email accounts.[5] Pl.'s Opp'n 17. Landmark also points to several press reports and a Congressional Investigation into whether EPA officials "regularly use private communication accounts to conduct official government business" "reportedly in part to avoid FOIA obligations." Pl.'s Opp'n 18.

Landmark raised this issue with EPA in a meeting on March 21, 2013, Pl.'s Opp'n 17–18, emphasized it again in their opposition brief, *id.*, and again in the Surreply, Pl.'s Surreply 4, ECF No. 36-1. EPA never addresses Landmark's allegation that official business was being conducted from the personal email accounts. Instead, it states only that it "searched for and produced responsive documents from outside parties and accounts *that were in its possession and control.*" *See* Def.'s Reply 13.

Landmark's allegations regarding the "existence and discoverability of other documents" are not "purely speculative," and are therefore sufficient to rebut the presumption of good faith that attaches to the agency's declarations. *See Negley*, 169 F. App'x at 594 (quoting *SafeCard*, 926 F.2d at1200). The allegations are supported by one concrete example of a personal email being used for official purposes, and made against the background of several similar allegations raised in the media and by Congress. In response, EPA's silence speaks volumes; its failure to deny the allegations that personal accounts were being used to conduct official business leaves

[5] The email was sent from Mr. Perciasepe's personal email account to an official EPA account.

open the possibility that they were. Because any search in response to Landmark's request that left out these possibly key sources would not be "reasonably calculated to uncover all relevant documents," *Morley*, 508 F.3d at 1114, the Court finds that there is an outstanding issue of material fact precluding summary judgment as to the adequacy of the EPA's search.

2. Possible Deliberate Exclusion of the Administrator

The factual record before the Court also admits the possibility that the agency initially sought to exclude the Administrator and/or others from the FOIA request. The record before the Court provides a murky picture of how and when the FOIA request was communicated to the Office of the Administrator. On the eve of filing a summary judgment motion, weeks after issuing its purportedly "final" disclosures in this matter, EPA apparently determined that these disclosures were inadequate, and subsequently disclosed additional records from the Administrator, her deputy, and her chief of staff, which had not previously been searched, and which roughly doubled the volume of total disclosures. Def.'s Statement ¶ 16. EPA provides no explanation for this error, how it was caught, or by whom, much less any description of what led to the error in the first instance.

One explanation, suggested by Landmark, is that the EPA initially interpreted Landmark's FOIA request as excluding the Administrator and possibly also the Deputy Administrator and/or the Chief of Staff. Between its opening brief and its reply in this motion, EPA appears to have changed its story both as to whether it initially interpreted Landmark's request in this fashion, *compare* Def.'s Mem. 4–5, *and* Wachter Decl. ¶¶ 9 & 11, *with* Def.'s Reply to Pl.'s Statement of Material Facts ¶ 1, Def.'s Reply 4, *and* Wachter Supp. Decl. ¶ 9, as well as to the nature and timing of its initial communication of the FOIA request to the Administrator's staff, *Compare* Def.'s Mem. 5, *and* Wachter Decl. ¶ 11, *with* Def.'s Reply 6, *and*

Wachter Supp. Decl. ¶ 15. Even in its revised account, EPA states that the later communication of the FOIA request to the Administrator's staff included the "instructions that were sent to the FOIA coordinators for the other program offices on October 23, 2012 . . . " Wachter Supp. Decl. ¶ 17, which the EPA has separately explained included instructions excluding the Administrator and the Deputy Administrator. *See* Wachter Decl. ¶ 12 (quoting the following restrictive language from the email: "The search only applies to assistant administrators, deputy assistant administrators and chiefs of staff in EPA headquarters.").

The record leaves open the possibility that, one way or another, the agency engaged in bad faith conduct by excluding the top politically appointed leaders of the EPA from Landmark's FOIA request at least initially. Landmark's Assistant General Counsel agreed to narrow the search to "*senior officials* in EPA HQ" in response to EPA's email which included the following parenthetical after that term "(ie., Program Administrators, Deputy Administrators and Chiefs of Staff)." *See* Emails between Jonathan Newton (EPA) and Matthew C. Forys (Landmark) (emphasis added). Even if there were some textual ambiguity in this exchange as to whether Landmark was thereby agreeing to exclude the Administrator from its FOIA request, the context of Landmark's FOIA request easily precludes such a reading. On the face of its FOIA request, Landmark explains that it is interested in learning whether "the Obama Administration is improperly politicizing EPA activities, EPA officials are attempting to shield their true policy goals from the public, and/or EPA officials themselves are putting partisan interests above the public welfare." Pl.'s FOIA Request 1. Landmark also apparently raised similar points—regarding its interest in uncovering possible political manipulation of the agency in an election year—in a phone conversation with EPA that preceded and led to this email exchange. *See* Forys Decl. ¶¶ 3–4; *see also* Wachter Decl. ¶¶ 8–9. In this context, no reasonable interpreter

could read Landmark's email agreeing to narrow its request to "senior officials at EPA HQ" as an agreement to exclude the Administrator—the top political appointee in the agency.[6] The possibility that EPA engaged in such an apparently bad faith interpretation, raised by Landmark's allegations and supported by EPA's inconsistent filings, precludes this Court from entering summary judgment in their favor as to the adequacy of the search. Because the agency's briefings and affidavits "do not provide information specific enough to enable [the requester] to challenge the procedures utilized," summary judgment as to the adequacy of the search is not justified. *Weisberg*, 627 F.2d at 371.

B. Limited Discovery is Warranted

Having found outstanding issues of material fact preventing summary judgment, the Court must now determine the proper resolution. Landmark asks the Court to "order EPA to submit to discovery in order to afford [it] the opportunity to determine the circumstances surrounding EPA's improper limitation of the scope of its search for responsive records—including whether EPA employees have acted in bad faith; and to determine the actual scope of EPA's search for responsive records." Pl.'s Opp'n 22; *see also id.* at 3 ("Landmark ought to be allowed discovery in order to determine the scope of EPA's record systems and the adequacy of EPA's fulfillment of its obligation to comply with its search obligations.").

"Discovery is the exception, not the rule, in FOIA cases." U.S. Dep't of Justice, Guide to the Freedom of Information Act 810 (2009 Ed.); *see also Thomas v. FDA,* 587 F. Supp. 2d 114, 115 (D.D.C. 2008) (Huvelle, J.) (noting that "discovery is an extraordinary procedure in a FOIA action"). "Discovery in FOIA is rare and should be denied where an agency's declarations are reasonably detailed, submitted in good faith and the court is satisfied that no factual dispute remains." *Baker & Hostetler LLP v. Dep't of Commerce,* 473 F.3d 312, 318 (D.C. Cir. 2006)

[6] EPA all but concedes this point by apparently backing away from the argument.

(parenthetically quoting *Schrecker v. Dep't of Justice*, 217 F. Supp. 2d 29, 35 (D.D.C. 2002)). Where an agency's declarations are insufficient to support a finding that its search was adequate, courts "generally will request that an agency supplement its supporting declarations rather than order discovery." *Wolf v. CIA*, 569 F. Supp. 2d 1, 10 (D.D.C. 2008) (Leon, J.) (internal citations and quotations omitted); *see e.g.*, *COMPTEL v. FCC*, 910 F. Supp. 2d 100, 114 (D.D.C. 2012) (Lamberth, C.J.) (finding agency declarations insufficient to demonstrate adequacy of the search, and requiring it to submit a "revised declaration which more fully describes its search").

"The major exception to this limited scope of discovery is when the plaintiff raises a sufficient question as to the agency's good faith in processing documents; in such instances, discovery has been permitted." U.S. Dep't of Justice, Guide to the Freedom of Information Act 812 (2009 Ed.) (collecting cases); *see, e.g., Citizens for Responsibility & Ethics in Washington v. Dep't of Justice,* 05-cv-2078, 2006 WL 1518964 (D.D.C. June 1, 2006) (Sullivan, J.) (finding discovery warranted in a FOIA action where the government had engaged in extreme delay); *but see Safecard,* 926 F.2d at 1200 (noting that affidavits submitted by an agency are "accorded a presumption of good faith, which cannot be rebutted by purely speculative claims"). For instance, "when there is evidence of some wrongdoing such as . . . a material conflict in agency affidavits, limited discovery has been allowed." *Citizens For Responsibility & Ethics in Washington v. Nat'l Indian Gaming Comm'n*, 467 F. Supp. 2d 40, 56 (D.D.C. 2006) (Collyer, J.) (citing *Long v. U.S. Dep't of Justice*, 10 F. Supp. 2d 205 (N.D.N.Y. 1998)).

In light of these principles, the Court finds that limited discovery is appropriate here. The two outstanding issues of fact precluding summary judgment both point to issues that may indicate bad faith on the part of the agency. 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.[7] The possibility that the agency purposefully excluded the top leaders of the EPA from the search, at least initially, suggests an unreasonable and bad faith reading of Landmark's FOIA request and subsequent agreement to narrow its scope. Moreover, as reviewed above, the EPA's briefing and affidavits on the facts and circumstances surrounding the second point contain numerous inconsistencies and reversals which undermine confidence in their truthfulness.

Accordingly, Landmark shall conduct discovery which shall be limited to the following issues:

1) Whether and to what extent the EPA Administrator, Deputy Administrator, and/or Chief of Staff utilized personal email accounts to conduct official business during the relevant time period.

2) Whether the EPA initially excluded the Administrator, Deputy Administrator, and/or Chief of Staff from Landmark's FOIA request.[8]

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[7] The Court takes note of the further possibility, raised by Landmark, of "the potential spoliation of records that should have been searched prior to [the former Administrator's] departure, particularly those records that may have been found on her personal electronic devices," which may or may not be out of EPA's reach now. Pl.'s Opp'n 16. The possibility of spoliation is not without precedent. The EPA itself was previously found in contempt of this Court for destruction of a previous Administrator's computer hard drive in violation of an order. *Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 70 (D.D.C. 2003). Although the administrator was not personally liable, since no one had told her about the order, the agency was. *Id.*

[8] Landmark also argues that discovery is warranted to determine "whether sanctions pursuant to 5 U.S.C. 552(a)(4)(F) ought to be applied against any EPA employee." *Id.*

Subsection 552(a)(4)(F) of the FOIA creates an internal agency disciplinary system, triggered by the issuance of a "written finding" by courts, for agency personnel who act "arbitrarily or capriciously" in responding to a FOIA request. The subsection provides:

> Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

5 U.S.C. 552(a)(4)(F). As the provision makes clear, such "written findings" may only be issued after a court has both ordered the production of improperly withheld records and imposed attorneys' fees against the United States. Attorneys' fees may be awarded in FOIA actions where the complainant has "substantially prevailed" by obtaining

IV. CONCLUSION

EPA's motion for summary judgment is DENIED. An Order shall issue with this opinion.

Signed by Royce C. Lamberth, U.S. District Judge, on August 14, 2013.

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relief through either "a judicial order, or an enforceable written agreement or consent decree" or "a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." 552(a)(4)(E).

Because the Court finds that discovery is warranted to address the adequacy of the search along the two fronts listed above, it need not address whether discovery is separately warranted to pursue the possibility that an EPA agent acted "arbitrarily or capriciously" under 552(a)(4)(F). It leaves the question of whether to issue "written findings" pursuant to this section for another day when the factual record is more fully developed.

Jan Goldman-Carter
<goldmancarterj@nwf.org>
01/27/2012 01:57 PM

To Nancy Stoner, "joellen.darcy@us.army.mil", "rock.salt@us.army.mil", "Gaffney-Smith, Margaret E", Gregory Peck, LisaP Jackson, "perciasepe.rober@epa.gov"
cc
bcc
Subject FW: Field and Stream Piece on Wetlands Regulation by Bob Marshall...

Please see the Field and Stream piece below urging action on the "waters of the U.S." rule. As you can see, this piece has already been shared with CEQ, White House, Department of Agriculture, and Department of Interior officials, as well as the sportsmen-conservation group leadership.

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From: Eric Washburn [mailto:ewashburn□bwstrategies.com]
Sent: Friday, January 27, 2012 12:43 PM
To: Whit Fosburgh; George Cooper; johntomke□aol.com; dhall□ducks.org; pschmidt□ducks.org; David Hoskins; Chris Wood; Jan Goldman-Carter; Adam Kolton; Gary Taylor; Ron Regan; Steve Moyer; Boots, Michael J.; Jensen, Jay; Carson, Jon; Shafroth, William; Bonnie, Robert; Ashe, D M; Robert Bendick; Christy Plumer; Glenn Prickett; Patel, Rohan
Subject: Field and Stream Piece on Wetlands Regulation by Bob Marshall...

Clean Water Finding Few Friends in Washington

January 25, 2012

DEPOSITION
EXHIBIT NUMBER Perciasepe 57
DATE 2-21-14 REPORTER ML
ART MILLER & ASSOCIATES

Clean Water Finding Few Friends in Washington

by Bob Marshall

When it comes to wetlands protections, it's hard for sportsmen to find any heroes in Washington these days. We have a House majority that spent last year shouting its opposition to restoring protections to 20 million acres of vital wetlands stripped by the Supreme Court, and vows to continue that assault this election cycle. And we have a president who makes a lot of noise about helping--but then doesn't follow through.

So as Congress returns to work this month, sportsmen's conservation groups find themselves fighting on two fronts in the battle to restore protections to those temporary and isolated wetlands. Here's the situation:

When the GOP blocked attempts to correct those court rulings with the proposed Clean Water Restoration Act, conservationists were cheered when the Obama Administration stepped in last spring sending its agencies a proposed new wetland "guidance"--spelling out which wetlands they could protect. This wouldn't put protections back on everything, but it would help.

The next step would be the start of a legally required "rule-making process"--a series of hearings in which the administration laid out how the agencies could go about protecting those wetlands outlined in the guidance.

One year later nothing has happened.

That proposed guidance has never been made official--even after an extended comment period (which, by the way, wasn't legally required). And the rule-making process has never started.

So now we're entering an election cycle, one that promises to be especially nasty with some on the GOP side already (and incorrectly) blaming regulations for the high unemployment rate. Sportsmen's groups expects the going to be especially tough.

The real fear is that the Obama Administration and congress people who had been acting as friends before the campaigns start will back off if they see supporting protection could cost them votes. You can expect the well-financed special interests opposed to these protections--the U.S. Chamber of Commerce, energy sectors and agriculture--to pour money into the issue trying to convince voters--and the candidates seeking their support--to oppose the regulations.

"The push back on this has been enormous," said Steve Kline, working the issue for the Theodore Roosevelt Conservation Partnership. "We don't expect any let up this year. We're really facing a deadline if the administration doesn't get moving on this."

Sportsmen can help by firing off letters and emails to their congressional reps--as well as the administration. You can find out how at www.contactingthecongress.org.

********** ATTACHMENT NOT DELIVERED
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This Email message contained an attachment named
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EPA-403

Bob Perciasepe/DC/USEPA/US
04/12/2012 06:03 AM

To Gina McCarthy
cc Joseph Goffman
bcc
Subject RE: THURSDAY: API and ANGA outline final recommendations on EPA'semissions rules for hydraulic fracturing

There wasn't anything attached, do we have any outline of what they are saying so we are better prepared.

Bob Perciasepe
Deputy Administrator
(o) 202 564 4711
(c) (b) (6) Privacy

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

From : Gina McCarthy/DC/USEPA/US
To : Richard Windsor/DC/USEPA/US@EPA, "Bob Perciasepe" <perciasepe.bob@epa.gov>, "Brendan Gilfillan" <gilfillan.brendan@epa.gov>, "Janet Woodka" <Woodka.Janet@epamail.epa.gov>, "Diane Thompson" <Thompson.Diane@EPA.GOV>
Cc :
Sent on : 04/12/2012 12:24:58 AM
Subject : Fw: THURSDAY: API and ANGA outline final recommendations on EPA'semissions rules for hydraulic fracturing

Just an FYI. They are really making a strong play on this rule.
Joseph Goffman

----- Original Message -----
From: Joseph Goffman
Sent: 04/11/2012 10:42 PM EDT
To: Gina McCarthy; Peter Tsirigotis; Steve Page; John Millett; Andrea Drinkard
Subject: THURSDAY: API and ANGA outline final recommendations on EPA'semissions rules for hydraulic fracturing
THURSDAY: API and ANGA outline final recommendations on EPA's emissions rules for hydraulic fracturing

MEDIA ADVISORY:

API and ANGA outline final recommendations on EPA's emissions rules for hydraulic fracturing

Press conference call on Thursday, April 12, 2012, at 10:30 am ET

Please join a press conference call with the American Petroleum Institute (API) and America's Natural Gas Alliance (ANGA) to discuss EPA's upcoming oil and natural gas emissions rule (NSPS). The groups will discuss the industry's continuing efforts to reduce emissions and

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outline their concerns and recommendations with the proposed rule, which is scheduled to be finalized next week.

There will be a question and answer session for reporters.

What: Press call on EPA's oil and natural gas emissions rule

Who: Howard Feldman, API director of regulatory and scientific affairs
Sara Banaszak, ANGA chief economist and vice president

When: Thursday, April 12, 2012

10:30 am ET

Phone: (800) 374-2418
Code: 713 90 590

Please RSVP by emailing back to carrollc@api.org<mailto:carrollc@api.org> or by calling API media relations at 202-682-8114.

Thank you,

Carlton

Carlton Carroll
Media Relations Representative

American Petroleum Institute
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Washington, DC 20005
202.682.8127 (desk)
202.682.8114 (office)
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[cid:image001.jpg@01CD17E9.E7F38F10]

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[cid:image003.png@01CD17E9.E7F38F10]
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1 of 2 DOCUMENTS

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December 15, 2013 Sunday 8:13 PM EST

SECTION: A section; Pg. A01

LENGTH: 1540 words

HEADLINE: Policies delayed before election

BYLINE: Juliet Eilperin

BODY:

The White House systematically delayed enacting a series of rules on the environment, worker safety and health care to prevent them from becoming points of contention before the 2012 election, according to documents and interviews with current and former administration officials.

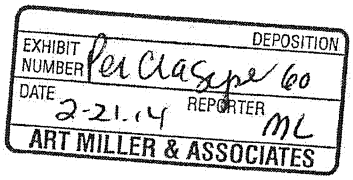
Some agency officials were instructed to hold off submitting proposals to the White House for up to a year to ensure that they would not be issued before voters went to the polls, the current and former officials said.

The delays meant that rules were postponed or never issued. The stalled regulations included crucial elements of the Affordable Care Act, which bodies of water deserved federal protection, pollution controls for industrial boilers and limits on dangerous silica exposure in the workplace.

The Obama administration has repeatedly said that any delays until after the election were coincidental and that such decisions were made without regard to politics. But seven current and former administration officials told The Washington Post that the motives behind many of the delays were clearly political, as Obama's top aides focused on avoiding controversy before his reelection.

The number and scope of delays under Obama went well beyond those of his predecessors, who helped shape rules but did not have the same formalized controls, said current and former officials who spoke on the condition of anonymity because of the sensitivity of the topic.

Those findings are bolstered by a new report from the Administrative Conference of the United States (ACUS), an



independent agency that advises the federal government on regulatory issues. The report is based on anonymous interviews with more than a dozen senior agency officials who worked with the Office of Information and Regulatory Affairs (OIRA), which oversees the implementation of federal rules.

The report said internal reviews of proposed regulatory changes "took longer in 2011 and 2012 because of concerns about the agencies issuing costly or controversial rules prior to the November 2012 election."

Emily Cain, spokeswoman for the Office of Management and Budget, said in a statement that the administration's "approach to regulatory review is consistent with long-standing precedent across previous administrations and fully adheres" to federal rules.

Administration officials noted that they issued a number of controversial rules during Obama's first term, including limits on mercury emissions for power plants and Medicaid eligibility criteria under the Affordable Care Act.

"OMB works as expeditiously as possible to review rules, but when it comes to complex rules with significant potential impact, we take the time needed to get them right," Cain said.

But Ronald White, who directs regulatory policy at the advocacy group Center for Effective Government, said the "overt manipulation of the regulatory review process by a small White House office" raises questions about how the government writes regulations. He said the amount of time it took the White House to review proposed rules was "particularly egregious over the past two years."

Previous White House operations have weighed in on major rules before they were officially submitted for review. But Jeffrey Holmstead, who headed the EPA's Office of Air and Radiation in the George W. Bush administration, said the effort was not as extensive as the Obama administration's approach.

"There was no formalized process by which you had to get permission to send them over," Holmstead said, referring to rules being submitted to the White House.

The recent decision to bring on Democratic strategist John Podesta as a senior White House adviser is likely to accelerate the number of new rules and executive orders, given Podesta's long-standing support for using executive action to achieve the president's goals despite congressional opposition.

Sen. Richard Blumenthal (D-Conn.), who chairs the Judiciary subcommittee on oversight, federal rights and agency action, said he's concerned about the real-world impact of the postponements in the first term.

"Legal protection delayed is protection denied," Blumenthal said. "I've spoken to officials at the top rungs of the White House power structure and at OIRA and we're going to hold their feet to the fire, and we're going to make sure they're held accountable in a series of hearings."

The officials interviewed for the ACUS report, whose names were withheld from publication by the study authors, said that starting in 2012 they had to meet with an OIRA desk officer before submitting each significant rule for formal review. They called the sessions "Mother-may-I" meetings, according to the study.

The accounts were echoed by four Obama administration political appointees and three career officials interviewed by The Post.

At the Environmental Protection Agency, for example, a former official said that only two managers had the authority to request a major rule in 2012: then-Administrator Lisa P. Jackson and Deputy Administrator Bob Perciasepe. Perciasepe and OIRA's director at the time, Cass Sunstein, would have "weekly and sometimes semi-weekly discussions" to discuss rules that affected the economy, one said, because they had political consequences, the person said.

"As we entered the run-up to the election, the word went out the White House was not anxious to review new rules," the former official said.

Sunstein, who has returned to his post as a Harvard Law School professor, declined to comment.

Several significant EPA proposals were withheld as a result of those meetings, officials said, including a proposal requiring cleaner gasoline and lower-pollution vehicles that had won the support of automakers but angered the oil industry.

That regulation, which would reduce the amount of sulfur in U.S. gasoline by two-thirds and impose fleetwide pollution limits on new vehicles by 2017, was ready in December 2011, said three officials familiar with the proposal. But agency officials were told to wait a year to submit it for review because critics could use it to suggest that the administration was raising gas prices, they said. The EPA issued the proposed rule in March.

Other EPA regulations that were delayed beyond the 2012 election included rules on coal ash disposal, water pollution rules for streams and wetlands, air emissions from industrial boilers and cement kilns, and carbon dioxide limits for existing power plants.

Ross Eisenberg, who serves as vice president of energy and resources policy at the National Association for Manufacturers and has criticized several EPA regulations, noted that in the past year the administration moved ahead with proposals such as the rules on greenhouse gas emissions and boilers.

"The agenda certainly did slow down, but it doesn't change," he said.

The administration also was slow to handle rules pertaining to its health-care law. Several key regulations did not come out until after the 2012 election, including one defining what constitutes "essential health benefits" under a health plan and which Americans could qualify for federal subsidies if they opted to enroll in a state or a federal marketplace plan.

The latter focused on what constitutes "affordable." The Treasury Department proposed a regulation in August 2011 saying an employer plan was affordable as long as the premium for an individual was no more than 9.5 percent of the taxpayer's household income. Several groups - including labor unions - argued that the proposal did not take into account that the premium for a family plan might be much higher than that standard.

Unions represent a vital part of the Democratic coalition, in part because they help mobilize voters during elections.

The Treasury Department held the proposal back while finalizing all the other tax-credit rules on May 23, 2012. Department officials later told those working on the regulation that it could not be published before the election, according to a government official familiar with the decision who spoke on the condition of anonymity because of its sensitive nature. The department made the rule on Feb. 1.

OMB has reduced the length of time that rules are pending this year. The agency has cut the number of rules that were under review for more than 200 days by more than half.

But while the administration is pressing ahead, activists say the delays took a toll. Peg Seminario, director of safety and health for the AFL-CIO, points to an update of the nation's silica standards proposed Sept. 12 after a long delay. The rule, which would prevent an estimated 688 deaths and 1,585 silica-related illnesses each year, won't be finalized until 2016.

Jon Devine, a senior lawyer in the Natural Resources Defense Council's water program, said small streams and wetlands remain vulnerable because of the administration's foot-dragging. The EPA recently withdrew a proposal to outline what kind of water bodies deserve federal protection that had been pending since February 2012 and announced

it would issue a legally binding rule instead.

"What's disappointing is it leaves waters subject to the existing, weak state of affairs until they get the rule over the final hurdle," Devine said.

juliet.eilperin@washpost.com

LOAD-DATE: December 17, 2013

Pace Environmental Law Review (forthcoming)
Draft June 12, 2013

Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*

Lisa Heinzerling**

I will be discussing the relationship between the Environmental Protection Agency (EPA) and the White House. I will focus specifically on the role that the Office of Information and Regulatory Affairs (OIRA), within the Office of Management and Budget (OMB), plays in reviewing the EPA's regulatory output.

As I will explain, OIRA's actual practice in reviewing agency rules departs considerably from the structure created by the executive order governing OIRA's process of regulatory review.[1] The distribution of decision-making authority is ad hoc and chaotic rather than predictable and ordered; the rules reviewed are mostly not economically significant but rather, in many cases, are merely of special interest to OIRA staffers; rules fail OIRA review for a variety of reasons, some extra-legal and some simply mysterious; there are no longer any meaningful deadlines for OIRA review; and OIRA does not follow – or allow agencies to follow – most of the transparency requirements of the relevant executive order.[2]

Describing the OIRA process as it actually operates today goes a long way toward previewing the substantive problems with it. The process is utterly opaque. It rests on assertions of decision-making authority that are inconsistent with the statutes the agencies administer. The process diffuses power to such an extent – acceding, depending on the situation, to the views of other Cabinet officers, career staff in other agencies, White House economic offices, members of Congress, the White House Chief of Staff, OIRA career staff, and many more – that at the end of the day no one is accountable for the results it demands (or blocks, in the case of the many rules stalled during the OIRA process). And, through it all, environmental

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* This essay is an expanded version of remarks delivered on March 12, 2013, as the Lloyd K. Garrison Lecture on Environmental Law at Pace Law School.

** Professor of Law, Georgetown University Law Center. The author was Senior Climate Policy Counsel to EPA Administrator Lisa P. Jackson from January to July 2009, and Associate Administrator of the Office of Policy from July 2009 to December 2010. This essay is based on public documents and the author's experience in those positions.

[1] EO 12866, issued by President Clinton in 1993, continues – in principle – to govern the mechanics of OIRA review. President Obama issued his own executive order, EO 13563, on OIRA review in 2011, but that order reaffirmed EO 12866 and did not by its terms change the *process* of OIRA review (such as deadlines and disclosure requirements) in any respect.

[2] See Part II, infra.

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rules take a particular beating, from the number of such rules reviewed to the scrutiny they receive to the changes they suffer in the course of the process.[3]

These problems are significant, and they deserve serious attention. Although I discuss these problems at the end of this paper, my main project in this paper is descriptive. Misunderstandings of the OIRA process abound. Too often these misunderstandings are perpetuated by, or not contradicted by, the very personnel who have been involved in the process. Indeed, after I finished a stint as the head of the EPA office responsible for acting as the primary EPA liaison to OIRA, I did not write at any length about my experiences with OIRA review. Partly out of continuing loyalty to the administration that had made my time in government possible, partly out of respect for the sensitivity of interactions between high-level government officers, and partly out of a sense of sheer futility,[4] I had resolved to move on to other topics. But when accounts of OIRA's role in the Obama administration began to emerge from other quarters,[5] and when these accounts, in many respects, did not jibe with my own experience, I decided to resurface and to describe the OIRA process from my perspective. Hence the account that follows.

I. The History of White House Review

It will be useful first to give a brief history of White House review of agencies' regulatory actions. Some form of centralized review of agency action has been with us for decades. Such review took place episodically in the Nixon, Ford, and Carter administrations.[6] But it was in the presidency of Ronald Reagan that the practice of regulatory review began to take on the shape it has today.

A. 12,291

In one of his earliest acts as President, Ronald Reagan issued an executive order – Executive Order 12,291 – that gave centralized review more systematized form in two respects.[7] First, EO 12,291 put a specific office – OMB[8] – in charge of

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[3] See Part III, infra.

[4] Lisa Heinzerling, Towards Engaged Scholarship, at 19-20, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2225283.

[5] See Cass R. Sunstein, Simpler: The Future of Government (2013); Cass R. Sunstein, Cass R. Sunstein, The Office of Information and Regulatory Affairs: Myths and Realities, Harv. L. Rev. (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2192639.

[6] See, e.g., Oliver A. Houck, President X and the New (Approved) Decisionmaking, 36 Am. U. L. Rev. 535, 536-37 (1986) (describing "rather modest and unintrusive" efforts by the White House to control agencies during the 1970s). For a detailed discussion, see Rena Steinzor, The Case for Abolishing Centralized White House Regulatory Review, 1 Mich. J. Envtl. & Admin. L. 209, 239-42 (2012).

[7] E.O. 12291, 46 Fed. Reg. 13193 (Feb. 17, 1981).

reviewing agency actions.[9] Second, it adopted cost-benefit analysis as the governing framework for this review.[10]

Before President Reagan issued EO 12,291, the Office of Legal Counsel (OLC) reviewed the order for legal soundness.[11] Notably, OLC's opinion confirming the order's legality rested on the premise that the centralized reviewers (OMB and a newly created Task Force on Regulatory Relief) would only supervise, and not displace, the exercise of discretion given to the agencies by statute. OLC wrote: "[T]he fact that the President has both constitutional and implied statutory authority to supervise decisionmaking by executive agencies ... suggest[s] ... that supervision is more readily justified when it *does not purport wholly to displace, but only to guide and limit*, discretion which Congress has allocated to a particular subordinate official. A wholesale displacement might be held inconsistent with the statute vesting authority in the relevant official.... The order *does not empower* the [OMB] Director or the Task Force to *displace* the relevant agencies in discharging their statutory functions or in assessing and weighing the costs and benefits of proposed actions."[12]

OLC's opinion does not state that an order displacing the agencies' discretion would certainly be illegal. But it does interpret EO 12,291 not to permit such displacement and it does suggest a potential legal problem with such displacement. Reading only EO 12,291 and the OLC's opinion on it, one would conclude that agencies retained the decision-making discretion they were given by the statutes they are charged with administering.

In practice, though, it was not that simple. During the Reagan years, critics charged that OIRA did indeed displace – and not merely supervise – agencies' decision-making discretion.[13] In addition, OIRA's process of review frequently

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[8] Within OMB, OIRA was the office responsible for regulatory review. OMB, Report to Congress on the Costs and Benefits of Federal Regulations, Chapter I.2.c (1997), available at http://www.whitehouse.gov/omb/inforeg_chap1. From here on out in this article, I will refer to "OMB" only where I mean to distinguish OMB from OIRA or where (as in the Office of Legal Counsel opinion I am about to discuss) another party has referred to OMB rather than to OIRA.

[9] EO 12291, § 3.

[10] EO 12291, § 2(b)-(c).

[11] Proposed Executive Order Entitled "Federal Regulation," 5 Op. OLC 59 (Feb. 13, 1981).

[12] 5 Op. OLC at 62-63 (emphasis added).

[13] See, e.g., Robert V. Percival, Who's in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?, 79 Ford. L. Rev. 2487, 2502-05 (2011). Percival cites a wealth of sources on this point. Id. at 2504, n. 127. Beyond OIRA, Reagan's appointees to the environmental agencies also were quite willing to take deregulatory actions on their own initiative. See Philip Weinberg, Masquerade

delayed agency rules for extended periods.[14] The process also at times degenerated into one in which OIRA served as a conduit for the views of industry on particular regulatory actions.[15] This feature of the process was especially troubling insofar as the process was opaque. Only in 1986 did OIRA begin to make public the documents shared by outside parties with OIRA during its review.[16] Even so, the bulk of the process – which agency actions went to OIRA, what happened to them while they were there, who made the decisions – was closed off to the public.[17] Moreover, the cost-benefit lens through which OIRA viewed agency rules proved to skew against some kinds of rules, in particular environmental rules, since so many of the benefits of environmental rules are difficult or impossible to quantify and monetize, and since so many of these benefits occur in the future and yet the settled practice of cost-benefit analysis is to steeply discount future consequences.[18]

Such critiques dogged the OIRA review process under EO 12,291 through the Reagan years and into the presidency of George H.W. Bush.[19] By the time Bill Clinton came into office in 1993, many were hoping for change.[20] Within months of taking office, President Clinton responded with a new executive order on regulatory review, EO 12,866.[21]

B. 12,866

Although EO 12,866 preserved the status quo in that it continued to require centralized White House review of agency actions under a cost-benefit framework, it also reformed several specific features of this review that had proved troublesome. Taking on the issue of displacement, an early passage in EO 12,866 "reaffirm[ed] the

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for Privilege: Deregulation Undermining Environmental Protection, 45 Wash. & Lee L. Rev. 1321 (1988).

[14] See, e.g., Harold H. Bruff, Presidential Management of Agency Rulemaking, 57 Geo. Wash. L. Rev. 533, 565-68 (1989).

[15] See, e.g., Claudia O'Brien, White House Review of Regulations under the Clean Air Act Amendments of 1990, 8 J. Envtl. L. & Lit. 51, 58-80 (1993).

[16] Bruff, 57 Geo. Wash. L. Rev. at 583 (citing OMB, Memorandum for the Heads of Departments and Agencies Subject to Executive Order Nos. 12,291 and 12,498, Subject: Additional Procedures Concerning OIRA Reviews Under Executive Order Nos. 12,291 and 12,498 (June 13, 1986)).

[17] See, e.g., Alan B. Morrison, OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation, 99 Harv. L. Rev. 1059, 1067-68 (1986).

[18] See, e.g., Thomas O. McGarity, Regulatory Analysis and Regulatory Reform, 65 Tex. L. Rev. 1243, 1293-97 (1987).

[19] See, e.g., Richard L. Revesz & Michael A. Livermore, Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health 189 (2008).

[20] Richard H. Pildes & Cass R. Sunstein, Reinventing the Regulatory State, 62 U. Chi. L. Rev. 1, 6 (1995).

[21] EO 12866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (Oct. 4, 1993).

primacy of Federal agencies in the regulatory decision-making process."[22] At the same time, however, the order for the first time explicitly stated that if a conflict arose between OIRA and an agency over a particular matter, one that could not be resolved by the OMB Director and the agency head, it would be the President (or the Vice-President acting on the President's behalf) who would settle the dispute – and make the "decision with respect to the matter."[23] EO 12,866 also provided a specific framework for elevating decisions beyond OMB and the agency head: the Vice-President (then Al Gore) was to make recommendations to the President on how to resolve the conflict.[24] EO 12,866 thus gestured toward the primacy of the agencies while simultaneously – for the first time in such an order – explicitly providing that the President would decide the hardest cases and laying out the process to follow when conflicts arose.[25]

Addressing the problem of delay, EO 12,866 set out specific time limits on OIRA review. Advance notices of proposed rulemaking, notices of inquiry, and "other preliminary regulatory actions prior to a Notice of Proposed Rulemaking" were to be reviewed within 10 days.[26] Regulatory actions previously reviewed by OIRA were to be reviewed within 45 days if "there has been no material change in the facts and circumstances upon which the regulatory action is based."[27] "[A]ll other regulatory actions" were to be reviewed within 90 days.[28] EO 12,866 also provided that the review process could be extended "(1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head."[29] This provision allowing extensions seems, with its use of the word "and" rather than "or," to contemplate a process whereby both the OMB Director and the agency head would need to agree on the extension. Together, the new deadlines, precisely defined and tailored to specific circumstances, clearly were designed to end OIRA review that dragged on intolerably long or even indefinitely.

In addition, EO 12,866 limited the range of rules OIRA could review. Only "significant" regulatory actions were to be reviewed.[30] Economically significant actions – those having annual costs of $100 million or more[31] – were to be accompanied by extensive cost-benefit analysis.[32] Beyond annual costs, other features that might make a regulatory action significant (and thus subject to OIRA

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[22] EO 12866, preamble.
[23] EO 12866, § 7.
[24] EO 12866, § 7.
[25] Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2288-90 (2001).
[26] EO 12866, § 6(b)(2)(A).
[27] EO 12866, § 6(b)(2)(B).
[28] EO 12866, § 6(b)(2)(B).
[29] EO 12866, § 6(b)(2)(C).
[30] EO 12866, § 6(a)(3)(B).
[31] EO 12866, § 3(f)(1).
[32] EO 12866, § 6(a)(3)(C).

review) were serious inconsistencies with another agency's plans,[33] material effects on budgetary impacts of various programs,[34] and the presence of "novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order."[35] The OIRA Administrator was given the final say as to which regulatory actions qualify as significant and thus must be reviewed by OIRA.[36]

EO 12,866 also took on the problem of OIRA acting as a conduit for industry views. The order required disclosure of all contacts with outside parties during the period of OIRA review.[37] The order limited the conditions under which outside views could be relayed to OIRA by requiring that only the Administrator of OIRA or "a particular designee" could receive oral communications by persons outside the executive branch regarding the substance of a regulatory action under review.[38] The order also provided that in the case of elevation to the President or Vice-President, any communications by outside parties, directed at the President's advisors or their staffs or the staff of the Vice-President, would be in writing and would become part of the public docket.[39] If the communication was not in writing, the advisors or staff members were to "inform the outside party that the matter is under review and that any comments should be submitted in writing."[40]

In other ways as well, EO 12,866 aimed to make OIRA review far more transparent than it had been. In fact, the order requires transparency throughout the OIRA process. If an agency plans a regulatory action that OIRA thinks is inconsistent with the President's policies or priorities, OIRA must tell the agency so, in writing.[41] If a regulatory action is under review, OIRA must provide information – in a "publicly available log" – about the status of that action.[42] If a dispute arises between OIRA and an agency over whether a particular rule should issue, and one of these parties requests resolution of the dispute by the President or Vice-President, OIRA must note – in a "publicly available log" – who requested elevation and when.[43] If OIRA returns a rule to an agency "for further consideration of some or all of its provisions," the Administrator of OIRA must provide a "written explanation" for this return.[44] If a regulatory proposal changes between the time it goes to OIRA and the time it emerges from OIRA, the agency must identify those changes ("in a

[33] EO 12866, § 3(f)(2).
[34] EO 12866, § 3(f)(3).
[35] EO 12866, § 3(f)(4).
[36] EO 12866, § 6(b)(3)(B).
[37] EO 12866, § 6(b)(4)(B)(iii), (C)(ii)-(iii).
[38] EO 12866, § 6(b)(4)(A).
[39] EO 12866, § 7.
[40] EO 12866, § 7.
[41] EO 12866, § 4(c)(5).
[42] EO 12866, § 6(b)(4)(C)(i).
[43] EO 12866, § 6(b)(4)(C)(i).
[44] EO 12866, § 6(b)(3).

complete, clear, and simple manner").[45] If OIRA insists on changes to the regulatory proposal during its review, the agency must identify those changes for the public ("in plain, understandable language").[46]

If followed (an important qualification, as we will see), these disclosure requirements would allow the public to know, often in real time, what actions are under review at OIRA, what the status of those actions is, and what the consequences of the review have been for any particular agency action.

A final refinement of EO 12,866 was the explicit inclusion, in the prescribed cost-benefit framework, of "qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider" and of benefits such as "distributive impacts ... and equity" and "the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias."[47]

Even with these changes, not everyone was thrilled with EO 12,866. Some were disappointed that OIRA and cost-benefit analysis would continue to play a large role in determining regulatory policy.[48] Others had long fretted that little would change if the culture – and personnel – at OIRA did not change.[49] Still others continued to worry about displacement of agency discretion; they thought that statutes giving authority and discretion to agencies did not allow the White House to direct the agencies to make particular decisions on particular matters.[50]

Nevertheless, it seems fair to say – certainly in retrospect – that the Clinton years were relatively quiet ones for OIRA review. The process did not seem to involve the kinds of delays and secrecy prevalent in the Reagan-Bush years.[51] The one known case of a high-level elevation of an issue to the President – involving EPA's National Ambient Air Quality Standards for particulate matter and ozone –

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[45] EO 12866, § 6(a)(3)(E)(ii).
[46] EO 12866, § 6(a)(3)(E)(iii).
[47] EO 12866, §§ 1(a), 6(a)(e)(C)(i).
[48] Including this author: Lisa Heinzerling, Environmental Law and the Present Future, 87 Geo. L.J. 2025, 2027-28 (1999).
[49] Alan B. Morrison, OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation, 99 Harv. L. Rev. 1059, 1067-68 (1986); Erik D. Olson, The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291, 4 Va. J. Nat. Resources L. 1, 55-73 (1984).
[50] Cynthia R. Farina, The Consent of the Governed: Against Simple Rules for a Complex World, 72 Chi.-Kent L. Rev. 987 (1997); Peter L. Strauss, Presidential Rulemaking, 72 Chi.-Kent L. Rev. 965 (1997).
[51] Robert V. Percival, Presidential Management of the Administrative State: The Not-So-Unitary Executive, 51 Duke L.J. 963, 996-98 (2001).

resulted in a decision allowing the agency to proceed with the rules.[52] While the OIRA process has never been free from controversy, the Clinton years were probably the least contentious.[53]

The period of relative quiet did not last. Upon assuming office in 2001, President George W. Bush, like his predecessors, sought to put his own stamp on regulatory policy through the OIRA process. Interestingly, however, he did not do this by issuing a significant new executive order. He did issue two executive orders on regulatory review, but they were (as these things go) relatively minor. One, EO 13,258, replaced the Vice-President-driven elevation process with a process staffed with the President's "advisors."[54] Another, EO 13,422, strengthened language requiring agencies to find a market failure before regulating and also directed OIRA to review significant agency guidance (that is, agency statements of policy or interpretation that do not have the legal effect of rules).[55] EO 13,422 generated criticism within the health, safety, and environmental community because of its tilt toward the superiority of private markets and its assertion of authority to review agency guidance.[56] But EO 12,866 also remained in place.

Rather than prescribing a whole new framework for regulatory review, President Bush chose an intellectually forceful and politically shrewd academic, John Graham, to head OIRA.[57] One of Graham's first acts as OIRA Administrator was to issue a memorandum on OIRA disclosure to OIRA staff. Acknowledging that transparency was essential to the legitimacy of the process,[58] Graham moved to

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[52] John H. Cushman Jr., Clinton Sharply Tightens Air Pollution Regulations Despite Concern Over Costs, NY Times (June 26, 1997).

[53] For details, see Steinzor, Abolishing Centralized Regulatory review, at 245-47. Note, however, that in their important article reporting on the views of the OIRA process from those inside the EPA during the Bush I and Clinton years, Lisa Schulz Bressman and Michael Vandenbergh did not find substantial differences in the responses of EPA personnel to questions about White House involvement in rulemaking during these different administrations. Lisa Schultz Bressman & Michael P. Vandenbergh, Inside the Administrative State: A Critical Look at the Practice of Presidential Control, 105 Mich. L. Rev. 47, 49 (2006).

[54] EO 13258, Amending Executive Order 12866 on Regulatory Planning and Review, 67 Fed. Reg. 9385 (Feb. 28, 2002).

[55] EO 13422, Further Amendment to Executive Order 12866 on Regulatory Planning and Review, 72 Fed. Reg. 2763 (Jan. 23, 2007).

[56] See, e.g., OMB Watch, A Failure to Govern: Bush's Attack on the Regulatory Process (2007), available at dev.ombwatch.org/files/regs/PDFs/FailuretoGovern.pdf.

[57] A sense of the reaction Dr. Graham's appointment inspired in environmental circles can be found in Steve Weinberg, Mr. Bottom Line, OnEarth (Spring 2003), available at http://www.nrdc.org/onearth/03spr/graham1.asp.

[58] John D. Graham, OIRA Disclosure Memo-B (Oct. 18, 2001) ("I believe that the transparency of OIRA's regulatory review process is critical to our ability to improve

increase transparency in several ways. He directed that documents related to OIRA review be made available online.[59] He required that notices of meetings and other communications with outside parties be made available online.[60] He returned rules to agencies with a written and public explanation of why they were being returned.[61] Each of these actions increased the public's access to information about what happened when rules went to OIRA.

Another of Graham's innovations, however, turned in the opposite direction. Graham began to insist that agencies involve OIRA early on in their deliberative processes.[62] This early intervention ensured both that rules would not arrive at OIRA fully baked, with little for OIRA to do but accept or reject them. It also meant that many of OIRA's early efforts would leave no public trail. The latter point requires a note of explanation. OIRA has always, so far as I know, taken the position that only when a regulatory action is sent to OIRA through official channels – which include a computer system used for the purpose of facilitating the transfer of rules between the agencies and OIRA – do the transparency requirements of EO 12,866 kick in. If an agency briefs OIRA on a rule prior to formally sending it to OIRA, or consults with OIRA before doing so, or even sends a full-fledged rule package to OIRA outside formal channels, none of this, or any of its consequences, will appear in the public record assembled for formal OIRA review. Thus Graham's emphasis on early, informal intervention had the potential to significantly undermine the transparency achieved by his initiatives on disclosure.

One episode from the Bush years, which occurred after Graham left office, well illustrates OIRA's power to secretly alter an agency's course. Shortly after the Supreme Court held, in *Massachusetts v. EPA*,[63] that the Clean Air Act empowers EPA to regulate greenhouse gases, President Bush held a press conference in the Rose Garden and directed EPA and the Department of Transportation to develop rules for cars that would comply with the Court's decision.[64] EPA would, at the same time, prepare a finding as to whether greenhouse gases endangered public health or welfare and thus triggered regulatory obligations under the Clean Air Act.[65] The agencies went quickly to work, and within seven months EPA had prepared a draft

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the nation's regulatory system. Only if it is clear how the OMB review process works and what it does will Congress and the public understand our role and the reasons behind our decisions."), available at http://www.whitehouse.gov/omb/inforeg_oira_disclosure_memo-b.

[59] Id.

[60] Id.

[61] These return letters are available at http://www.reginfo.gov/public/do/eoReturnLetters.

[62] John D. Graham et al., Managing the Regulatory State: The Experience of the Bush Administration, 33 Ford. Urb. L.J. 101, 119-21 (2005).

[63] 549 U.S. 497 (2007).

[64] Lisa Heinzerling, Climate Change at EPA, 64 Fla. L. Rev. 1, 2 (2012).

[65] Heinzerling, 64 Fla. L. Rev. at 2.

endangerment finding and the agencies together had prepared rules to regulate greenhouse gases from cars. The agencies sent the rules to OIRA for review.[66] Then things went off the rails.

As I have mentioned, OIRA uses a computer system – known as "ROCIS" – to manage regulatory submissions from agencies. (Even for Washington, the name of the system is exceptionally acronymic: the acronym "ROCIS" contains within it two additional acronyms.[67]) When an agency sends an action to OIRA for review, it submits the package to ROCIS.[68] From its end, OIRA then – in theory – uploads the package from ROCIS. When OIRA uploads the package, it is accepted for review. At that moment, the clock starts to tick on OIRA's review and the public disclosure requirements kick in. If OIRA does not upload the package, however, it is as if it was never sent to OIRA; no clock begins ticking, and the package does not appear on OIRA's website listing rules under review. This is what happened to the draft endangerment finding and the proposed rules on cars: OIRA simply declined to upload them into ROCIS. A presidential promise, months of work, compliance with a Supreme Court ruling – all went out the window with OIRA's simple refusal to be in receiving mode when the agencies sent the package over to OIRA.[69] The endangerment finding and the rules on cars languished at the agencies until the Obama administration came into office.

The effect on EPA of OIRA's declination of this regulatory package is hard to overstate. EPA had become accustomed, through sheer necessity, to OIRA's interventions in the rulemaking process. But, so far as I know, OIRA had never before simply declined to accept a fully formed regulatory package. Over a year later, by the time I arrived at EPA as the Administrator's climate advisor, agency personnel were still reeling from OIRA's action. During my time at EPA, when OIRA would delay uploading a package to ROCIS for any reason, worry would spread through the offices involved with the package that perhaps OIRA would – as it had with the endangerment finding and the cars rules – just not upload the documents, and it would be as if they had never been sent, or indeed as if they had never been written.

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[66] Heinzerling, 64 Fla. L. Rev. at 2-3.

[67] "ROCIS" stands for "RISC (Regulatory Information Service Center) and OIRA Consolidated Information System."

[68] OIRA Regulatory System, Records Management System and Records Management Center, whitehouse.gov/omb/gils_oira-gils.

[69] Felicity Berringer, White House Refused to Open Pollutants E-Mail, N.Y. Times (June 25, 2008); Juliet Eilperin & R. Jeffrey Smith, EPA Won't Act on Emissions This Year; Instead of New Rules, More Comment Sought, Wash. Post (July 22, 2008). As Eilperin and Smith report, it was not clear exactly who within the White House ordered that the regulatory package be declined.

The refusal to open the documents on endangerment and cars caused a furor in the environmental community once it became known.[70] It emerged as a primary example of how OIRA should not operate.[71] To critics, the incident bespoke disrespect for agency process and even for the rule of law. Many hoped such a thing would not happen again.

The assertiveness and opacity of OIRA during the George W. Bush administration led many to hope that when Barack Obama came into office, things would change for the better. And indeed, one of President Obama's first acts was to issue an executive order revoking the Bush-era executive orders on regulatory review.[72] As noted, the major substantive innovation of these orders was the assertion of OIRA authority to review agency guidance; thus, one of the major effects of the revocation of the Bush-era orders should have been to keep OIRA from reviewing agency guidance.

But this was not to be. In a little-noticed memorandum issued less than two months later, OIRA Director Peter Orszag essentially revoked President Obama's revocation of the executive order on guidance.[73] Orszag announced that OIRA would, despite Obama's order, continue to review agency guidance, since it had done so for many years.[74] The President's revocation of the Bush-era executive orders had received enthusiastic attention from progressive groups.[75] Perhaps not surprisingly, the OMB Director's memorandum revoking the major substantive part of the President's executive order – issued quietly, without a press release –

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[70] Here is Jon Stewart's hilarious take on the episode: http://www.thedailyshow.com/watch/wed-june-25-2008/be-patient-this-gets-amazing---epa-e-mail.

[71] White House disses Supreme Court, kills $2 trillion savings, http://thinkprogress.org/climate/2008/07/01/202838/white-house-mocks-supreme-court-kills-2-trillion-savings/ (also discussing OMB intervention in EPA's later-issued Advance Notice of Proposed Rulemaking regarding greenhouse gases).

[72] EO 13497, Revoking Executive Orders 13258 and 13422 Concerning Regulatory Planning and Review (Jan. 30, 2009), available at http://www.whitehouse.gov/the-press-office/revocation-certain-executive-orders-concerning-regulatory-planning-and-review.

[73] Peter R. Orszag, Memorandum for the Heads and Acting Heads of Executive Departments and Agencies (Mar. 4, 2009), available at ault/files/omb/assets/memoranda_fy2009/m09-13.pdf.

[74] Id.

[75] See, e.g., Obama Begins Regulatory Reform, http://www.foreffectivegov.org/node/9689; Revoking EO 13422: An Important First Step Toward Fixing the Regulatory System, http://www.progressivereform.org/printPage.cfm?idBlog=417B6671-1E0B-E803-CA4ED11FA8E0030C.

received almost no attention.[76] In fact, so stealthy was the replacement of Obama's order with Orszag's memorandum that, even months later, I found myself having to explain to EPA personnel why they still needed to send agency guidance to OIRA for review. Quite understandably, they had read Barack Obama's executive order rather than Peter Orszag's memo.

In another gesture of potential change, in January 2009 President Obama also issued a presidential memorandum directing the Director of OMB to consult with representatives of regulatory agencies and to make recommendations to the President for a new executive order on regulatory review.[77] The memorandum noted that much had been learned since 1993, when EO 12,866 was issued, about both the substance of regulation ("what works and what does not") and about "how to improve the process of regulatory review."[78] "In this time of fundamental transformation," President Obama declared, "that process – and the principles governing regulation in general – should be revisited."[79] The President also laid out specific topics he wanted covered in OMB's recommendations:

> [T]he recommendations should offer suggestions for the relationship between OIRA and the agencies; provide guidance on disclosure and transparency; encourage public participation in agency regulatory processes; offer suggestions on the role of cost-benefit analysis; address the role of distributional considerations, fairness, and concern for the interests of future generations; identify methods of ensuring that regulatory review does not produce undue delay; clarify the role of the behavioral sciences in formulating regulatory policy; and identify the best tools for achieving public goals through the regulatory process.[80]

President Obama directed OMB to produce the recommendations within 100 days.[81] The President also directed OMB to consult with the representatives of regulatory agencies, "as appropriate," in formulating recommendations for a new executive order.[82] From my time at EPA, I know that agencies did indeed submit comments to OMB. Notably, OMB never made the agencies' comments public; thus we do not know what the agencies said to OMB about regulatory review and how to improve the process. OMB also asked the public for comments on regulatory review and how

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[76] No press statement appears on the White House website devoted to such items: http://www.whitehouse.gov/briefing-room/Statements-and-Releases/2009/03.
[77] Presidential Memorandum of January 30, 2009 – Regulatory Review, 74 Fed. Reg. 5977, available at http://www.reginfo.gov/public/jsp/EO/fedRegReview/POTUS_Memo_on_Regulatory_Review.pdf.
[78] Id. at 5977.
[79] Id. at 5977.
[80] Id. at 5977.
[81] Id. at 5977.
[82] 74 Fed. Reg. at 5977.

to reform it.[83] Public comments (183 of them)[84] came in by the end of March, 2009.[85]

And there the matter sat. Agency personnel, buoyed by the possibility of reform of a secretive, intrusive, and time-consuming process, eagerly anticipated the new executive order. Outside groups interested in health, safety, and environmental protection cheered the prospect of changes to a system that had worked disproportionately against rules in their domain. But nothing happened for almost two years, and in that time OIRA continued to assert its customary control over agency regulatory decisions.

C. 13,563

In January 2011, a new executive order on regulatory review finally emerged.[86] The single most notable fact about the new order, EO 13,563, is how not-new it was; much of the order simply repeats, verbatim, the language of EO 12,866.

Another striking fact about the order is how weakly responsive it is to President Obama's own directives in his presidential memorandum of January 2009: EO 13,563 does not say a word about "the relationship between OIRA and the agencies" or "methods of ensuring that regulatory review does not produce undue delay." On "disclosure and transparency," the order says nothing about disclosure and transparency related to OIRA, but focuses only on the agencies and here simply advises them to place materials online and in an open format wherever possible.[87] On "public participation in agency regulatory processes," the order advises the agencies to seek out the public's views prior to proposing rules (something agencies already routinely did).[88] On "the role of cost-benefit analysis," the order adds nothing to EO 12,866 except for a new allowance for "human dignity" in the calculations of regulatory benefits.[89] As for "the role of distributional considerations, fairness, and concern for the interests of future generations," the order adds only the word "fairness" to EO 12,866's already-existing references to

[83] OMB, Federal Regulatory Review, 74 Fed. Reg. 8819 (Feb. 26, 2009) (inviting public comment on how to improve the process of regulatory review and principles governing regulation).
[84] Steinzor, Abolishing Centralized Regulatory review, at256.
[85] OMB, Federal Regulatory Review, Extension of request for comments, 74 Fed. Reg. 11383 (Mar. 17, 2009) (extending public comment period to March 31, 2009). A summary of the comments from 170 different individuals and organizations can be found at http://www.foreffectivegov.org/node/9913.
[86] EO 13563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 18, 2011).
[87] EO 13563, § 2(b).
[88] EO 13563, § 2(c).
[89] EO 13563, § 1(c).

distributive impacts and equity.[90] And as for clarifying "the role of the behavioral sciences in formulating regulatory policy" and identifying "the best tools for achieving public goals through the regulatory process," the only new item in the new executive order was a reference to "appropriate default rules."[91]

President Obama's new executive order on regulatory review, in short, was neither very new nor very specific. Any hope that President Obama would use the new executive order as an occasion to fundamentally reshape the relationship between the White House and the agencies, or to loosen the grip of cost-benefit analysis on regulatory policy, was dashed. Yet the very vagueness of the executive order also created a large space within which OIRA could fashion a kind of common law of regulatory review. OIRA eagerly inhabited that space.

II. The Common Law of 13,563

The common law of EO 13,563 determines the most important features of the current process of regulatory review: who is the decision maker, what is reviewed, why particular actions fail regulatory review, when actions emerge from review, and what is disclosed about the process. If one has read EOs 12,866 and 13,563, which in theory govern this process, surprises are in store once we look at the way the process actually operates.

A. Who Decides?

Recall that EO 12,866 puts OIRA initially in charge of the process of regulatory review. But if, according to EO 12,866, a dispute arises between OIRA and the action agency, the dispute is to be resolved through a highly specified process that involves recommendations from the Vice-President and an ultimate decision by the President or by the Vice-President acting on his behalf.[92] (Recall that the Bush-era executive order replacing the role of the Vice-President with that of presidential "advisors" was revoked by President Obama during his first days in office.[93])

This is not how regulatory review works today. In my two years at EPA, I do not recall ever hearing of Vice-Presidential involvement in a regulatory matter. Moreover, the OIRA process in the Obama administration was not structured to funnel disputes between OIRA and the agencies to Vice-President Biden for his recommendations. It was far messier and more ill-defined than that. From my perspective, it was often hard to tell who exactly was in charge of making the ultimate decision on an important regulatory matter.

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[90] EO 13563, § 1(c).
[91] EO 13563, § 4.
[92] EO 12866, § 7.
[93] EO 13497.

A recent account of the OIRA process by former OIRA Administrator Cass Sunstein helps to explain this confusion as to some regulatory matters, but leaves a puzzle as to others.[94] Sunstein states that OIRA's primary role in the regulatory process is as an "information-aggregator" – compiling information from many actors in the executive branch and using that information to help get at the right regulatory result.[95] Observing that the White House is a "they," not an "it,"[96] Sunstein emphasizes the role of other White House offices and officials, beyond OIRA, in shaping regulatory policy.[97] Sunstein lists almost a dozen White House offices that, he says, play a significant role.[98] Beyond the White House, Sunstein asserts that agencies other than the agency proposing a particular regulatory action also have a large influence on regulatory policy.[99] Sometimes it is another Cabinet secretary who might have such influence;[100] often, Sunstein says, it is career staff at another agency.[101] Sometimes it is the Chief of Staff of the White House who plays the major role;[102] sometimes it is a member of Congress.[103] Sunstein extols the virtues of this system, arguing that the aggregation of input from all of these different sources produces better regulatory results.[104] Of course, Sunstein's description also explains why it was often hard, from EPA's perspective, to know who was calling the shots; perhaps it was Rahm Emanuel, the White House Chief of Staff from 2009 to 2010, or perhaps it was Tom Vilsack, the Secretary of Agriculture, or perhaps it was a career staffer at the Department of Energy. The confusion was deepened by OIRA's insistence that, once a matter was under review, all communications run through OIRA;[105] at one point in my tenure at EPA, it was even suggested that a conversation between members of the President's cabinet on a matter under review would be inappropriate if OIRA were not included.

Sunstein's account of the OIRA process at least helps me to understand why we were all so confused about exactly what the process was.

In another respect, though, Sunstein's account in the *Harvard Law Review* is puzzling rather than clarifying. From my vantage point at EPA, it certainly often

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[94] Sunstein, Myths and Realities, Harv. L. Rev. (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2192639. Page number references in subsequent cites to this article (hereinafter "Myths and Realities") are from the SSRN posting.
[95] Id. at 1, 3, 35.
[96] Id. at 3, 16, 20.
[97] Id. at 8, 12, 17, 19, 20, 28, 33-34.
[98] Id. at 17.
[99] Id. at 3-4, 5-6, 10, 17, 32.
[100] Id. at 14-15, 21.
[101] Id. at 4, 5-6.
[102] Id. at 19, 34.
[103] Id. at 15, 21.
[104] Id. at 3-4, 6, 32-34.
[105] Id. at 22.

appeared that OIRA – not other White House offices, not other agencies – was calling the shots. OIRA decided what to review, offered line-by-line edits of regulatory proposals, convened meetings with outside parties, mediated disputes among the agencies, decided whether an agency's cost-benefit analysis was up to snuff, and more. It often appeared, from the agency's perspective, that other White House offices were brought in to bolster, not to question, OIRA's position on regulatory matters.[106] I was not in the White House, and so I cannot confirm that the latter impression was correct. But I can say that Sunstein's account does not jibe with my own perceptions of OIRA's power relative to EPA or to other executive branch actors.

In his new book on his time in the government, however, Sunstein paints a somewhat different picture of the role of OIRA during his tenure. Sunstein's book, "Simpler: The Future of Government," makes clear just how much power he wielded as the Administrator of OIRA. Referring to OIRA as "the cockpit of the regulatory state,[107] Sunstein informs us that, as OIRA Administrator, he had the power to "say no to members of the president's Cabinet";[108] to deposit "highly touted rules, beloved by regulators, onto the shit list";[109] to make sure that some rules "never saw the light of day";[110] to impose cost-benefit analysis "wherever the law allowed";[111] and to transform cost-benefit analysis from an analytical tool into a "rule of decision," meaning that "[a]gencies could not go forward" if their rules flunked OIRA's cost-benefit test.[112] This account – in which OIRA plays a central and often decisive role in determining which rules move and which don't – is much more consistent with my own experience at EPA than is Sunstein's account of OIRA as a kind of neutral "information-aggregator."

Beyond Sunstein's account, the relative power of EPA within the OIRA process is also well illustrated by considering the increase in influence that EPA personnel enjoy when they go on detail to offices within the White House. Many White House offices depend on agency detailees to help do their work. The Council of Economic Advisors and the Council on Environmental Quality nearly always have one or more detailees from EPA. These detailees, in my experience, participate actively in the OIRA process – and, often, not by pressing for EPA's rules but instead by offering critiques of EPA's work. The detailees appear to have far more power when they are housed in a White House office than they do at EPA, often because their expertise – frequently it is economics – is more central to the White House

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[106] This impression is consistent with EPA officials' accounts of White House involvement in rulemaking during the Bush I and Clinton years. Bressman & Vandenbergh, Inside the Administrative State, 105 Mich. L. Rev. at 68-69.
[107] Sunstein, Simpler, at 3.
[108] Id. at 3.
[109] Id. at 6.
[110] Id. at 7.
[111] Id. at 8.
[112] Id. at 161.

process than it is to EPA's regulatory frameworks. Going on detail to the White House increases the power of EPA personnel not because they somehow become more expert when they go to the White House, but because the White House privileges their particular expertise over other kinds of expertise. Going on detail to the White House also increases the power of agency personnel for another, very simple reason: the White House has the final say on agency rules.

The role of agency detailees in the OIRA process makes it hard to make sense of Sunstein's portrait of OIRA as an "information-aggregator." If, as I have said, an appreciable number of the people doing the work in the White House are actually employees on detail from the agencies whose work is being reviewed, what sense does it make to say that the OIRA review process increases the total amount of information gathered during a rulemaking process or that it increases the likelihood that a rule will get it right? The same agency personnel participating in the White House process have virtually identical counterparts, making the same kinds of observations, in their home agencies; yet these personnel have a power in the White House that they do not enjoy in their home agencies. More than an information-aggregator, then, OIRA is an information-sorter; economic information rises to the top, other information shakes out below.

Also relevant to the question of who is calling the shots in the OIRA process is the kind of rules OIRA reviews. Most of the rules OIRA reviews are not economically significant;[113] that is, they do not pass EO 12,866's economic-significance threshold of $100 million in annual costs.[114] Many of the rules do not have obvious interagency dimensions. Many are continuing iterations of longstanding regulatory programs. In these cases, when the rules got into trouble in the OIRA process, it often did not appear that there was any appreciable interagency pushback on the rules or any White House resistance outside OIRA. Often, indeed, it appeared that OIRA career staff simply trumped EPA career staff when it came to rules that were neither insignificant enough, from OIRA's perspective, to pass up the opportunity for review, nor significant enough, from EPA's perspective, to elevate the issue beyond OIRA.[115]

In these ways, the "common law" of regulatory review under President Obama manages to muddy the seemingly simple question: who runs EPA? Long gone, it appears, is the carefully articulated power structure of EO 12,866, with its process for elevating issues and for deciding them once elevated. In its place, a free-for-all of regulatory power has emerged, with no one clearly in charge. The lack of a

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[113] From January 20, 2009, to April 8, 2013, OIRA reviewed a total of 2514 regulatory actions, of which only 477 were economically significant. http://www.reginfo.gov/public/do/eoCountsSearch. For EPA, the numbers were 340 total rules, 66 of which were economically significant.

[114] EO 12866, § 3(f)(1).

[115] For a similar account of the Bush I and Clinton years, see Bressman & Vandenbergh, Inside the Administrative State, 105 Mich. L. Rev. at 68.

clear power structure is, perhaps unintentionally, best captured by Sunstein's incongruent accounts of his own role in the process: was he the regulatory czar, or an information-aggregator? It depends on which account you read.

B. What Is Reviewed?

One domain in which OIRA's powerful role is quite clear, however, is in the decisions about which regulatory actions OIRA will review. EO 12,866 states that OIRA may review not only economically significant actions, but also actions with a significant potential for interagency conflict or inconsistency and actions that raise "novel legal or policy issues."[116] In fact, most of the rules OIRA reviews are not economically significant. In the Obama administration so far, some 80 percent of the EPA rules that have been reviewed were not economically significant.[117] Moreover, many of the rules under review lack any obvious interagency dimension. So how does OIRA come to review them?

While I was at EPA, we had a routinized process for determining what went to OIRA. Every three months or so, the Assistant Administrators of the program offices (air, water, solid waste and emergency response, chemical safety and pollution prevention) and I met with representatives from OIRA to go over the regulatory actions EPA planned to announce in the coming months. We offered our own opinion as to whether any given item warranted OIRA review. But the bottom line was that it was not our decision to make. If OIRA wanted to review something, OIRA reviewed it.[118] Sometimes, the reason for review was a little baffling, along the lines of: we've always reviewed this kind of action, so we'd like to review this one, too. The explanation was baffling because the longstanding practice of review sometimes came straight from a prior administration with seemingly different perspectives on the role of regulation and government; the same OIRA career personnel who had "always" reviewed those kinds of actions were insisting that they should still review them, even after a change in personnel at the very top – and even though, strangely, they were often asserting such power of review under the EO provision that covered "*novel*" legal or policy issues. On occasion, EPA was able to persuade OIRA not to review a regulatory action that OIRA was inclined to review; but this was the exception, not the rule.

It is thus quite perplexing to read recent accounts of the OIRA process that argue that agencies can avoid OIRA review altogether through quite obvious and simple stratagems.[119] Agencies can, it is argued, separate regulatory actions into

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[116] EO 12866, § 3(f)(4).
[117] Numbers are available at http://www.reginfo.gov/public/do/eoCountsSearch.
[118] This is OIRA's prerogative. See EO 12866, § 6(b)(3)(B).
[119] Jennifer Nou, Agency Self-Insulation under Presidential Review, Harv. L. Rev. (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208058## (page numbers in

different packages so that no one action is economically significant;[120] they can low-ball their estimates of regulatory costs to come in under the threshold for economic significance;[121] they can slip a policy out as guidance rather than as a rule;[122] they can do low-quality cost-benefit analysis to make OIRA review more difficult;[123] they can even, we are told, spring a rule on the world without warning to OIRA.[124]

From the perspective of EPA at least, this is not a plausible account. Most of the EPA rules OIRA reviews are not economically significant, so fussing around to make a rule or package of rules not economically significant won't help to avoid OIRA review. OIRA, in any event, lavishes skeptical attention on EPA's estimates of regulatory costs. Moreover, as discussed above, OIRA continues to review agency guidance,[125] so denominating an action as guidance will not avoid OIRA review. And in my experience, OIRA personnel keep an eagle eye on EPA – on its public announcements, website, etc. – to make sure EPA does not sneak something past it. From OIRA's perspective, the system appears to work: EPA receives more sustained attention from OIRA than any other federal agency. Most often, EPA is the agency with the largest number of rules under review at OIRA.[126]

On the issue of which regulatory actions go to OIRA, therefore, the express terms of EO 12,866 again recede and a common law emerges. OIRA reviews pretty much anything it wants to review, and fits anything it must into the catch-all category, "novel legal or policy issues."

C. Why Do Rules Fail?

One of the most vexing questions concerning regulatory review has to do with the basis on which regulatory actions fail this review. When a regulatory action goes to OIRA for review, it goes fully formed, reflecting the agency's best judgment about the proper path in the relevant circumstances. EPA rules go to OIRA after an extensive period of internal development and review.[127] In many

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subsequent references to this article are from SSRN posting); Note, OIRA Avoidance, 124 Harv. L. Rev. 994 (2011).

[120] Nou, at 36.

[121] Nou, at 36.

[122] Nou, at 28-32.

[123] Nou, at 37-40.

[124] Note, OIRA Avoidance, at 1005.

[125] Peter R. Orszag, Memorandum for the Heads and Acting Heads of Executive Departments and Agencies (Mar. 4, 2009), available at ault/files/omb/assets/memoranda_fy2009/m09-13.pdf.

[126] Lists of rules under formal review at OIRA can be found at www.reginfo.gov.

[127] EPA has a robust internal process for developing rules, described in Office of Policy, EPA's Action Development Process: Guidance for EPA Staff on Developing Quality Actions (March 2011),

cases, the rules have been under development for years, with dozens or more agency personnel working on them. In the case of the most significant rules, they have gone to the Administrator herself for initial selection of options and later for final review.[128] It is a matter of some consequence, then, when OIRA does not allow such rules to issue, or requires substantial changes before they may issue.

One reason why OIRA might disapprove of an agency's planned action is that it disagrees with the agency's interpretation of the statute the agency is charged with administering. Notably, neither EO 12,866 nor EO 13,563 gives OIRA the authority to second-guess agencies' interpretations of the statutes they administer. Indeed, both executive orders explicitly state that nothing in them permits a departure from existing law.[129] Yet, in a post-*Chevron* world, that disclaimer means less than it seems. If a statute is ambiguous – or if OIRA believes that a statute is ambiguous – then perhaps OIRA has room to press an agency to change its interpretation of a statute it administers, without running afoul of the EOs' injunction to follow existing law. After *Chevron*, "existing law" is up for grabs so long as existing law is ambiguous.[130]

President Obama's OIRA has aggressively moved into the space created by *Chevron*. As a law professor, Cass Sunstein had promoted "cost-benefit default principles," according to which statutes are interpreted to allow cost-benefit analysis so long as they do not clearly forbid it;[131] as OIRA Administrator, Sunstein moved to lock these default principles into place.[132] With respect to EPA rules, OIRA actively pressed EPA to interpret its governing statutes to allow cost-benefit analysis, even where EPA had a long history of interpreting them not to allow it. Pressure like this appears to have borne public fruit when EPA announced its long-awaited proposal for addressing the ecological impacts of cooling water intake structures under the Clean Water Act. In its preamble discussing the rule, EPA noted that it was adopting an interpretation of the relevant provision of the Clean

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http://yosemite.epa.gov/sab/sabproduct.nsf/5088B3878A90053E8525788E005EC8D8/$File/adp03-00-11.pdf.

[128] EPA's Action Development Process specifies the criteria for determining which regulatory actions are "Tier 1" rules and thus must receive substantial input from the Administrator at important stages in the rulemaking process. EPA's Action Development Process, at 22-27, available at http://yosemite.epa.gov/sab/sabproduct.nsf/5088B3878A90053E8525788E005EC8D8/$File/adp03-00-11.pdf.

[129] EO 12866, § 9; EO 13563, § 7(b)(i), (c).

[130] Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

[131] Cass R. Sunstein, Cost-Benefit Default Principles, 99 Mich. L. Rev. 1651 (2001).

[132] Sunstein, Simpler, at 8 .

Water Act that would allow cost-benefit analysis, citing EO 13,563 as authority for this interpretation.[133]

I have argued elsewhere that agencies should not get deference under *Chevron* when an interpretation is foist upon them by OIRA; OIRA is not charged by Congress with interpreting the statutes the agencies administer, and OIRA does not have the expertise of the relevant agencies.[134] But whatever one thinks about the legal consequences of an OIRA-driven agency interpretation, one must take note of the large degree of influence wielded by OIRA when one of the powers it asserts is to embed cost-benefit default principles into the regulatory process.

To understand the boldness of OIRA's power grab, it helps to consider a bit of history. In 1994, eyeing the first Republican takeover of the House of Representatives in forty years, Newt Gingrich proposed an aggressive series of legislative reforms, bundled together as the "Contract With America."[135] Among the most contentious of the proposals was the "supermandate": a requirement that all rules protecting human health, safety, or the environment pass a cost-benefit test.[136] Critics of what President Bill Clinton dubbed the "Contract On America"[137] feared that applying a cost-benefit test to health, safety, and environmental rules would often spell their doom, as these rules produce benefits — in human health, in longer life, in cleaner air and water and land — that are hard to quantify and even harder to monetize.[138] President Clinton vetoed bills to fund the government in part because they contained the supermandate,[139] leading to the government shutdowns of 1995 and likely contributing to Clinton's political renewal.

Thanks to Sunstein, though, the supermandate is back. By pressing agencies to adopt cost-benefit analysis as a decision-making framework wherever the law allows it, Sunstein's OIRA has, by executive fiat rather than legislative enactment, imposed a cost-benefit supermandate wherever the law is ambiguous (which, of

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[133] National Permit Discharge Elimination System – Cooling Water Intake Structures at Existing Facilities and Phase I Facilities, Proposed Rule, 76 Fed. Reg. 22173, 22185, 22196, 22207, 22212 (Apr. 20, 2011).

[134] Lisa Heinzerling, Statutory Interpretation in the Era of OIRA, 33 Ford. Urb. L.J. 1097 (2006).

[135] See, e.g., Katherine Q. Seelye, The 1994 Campaign: The Republicans; With Fiery Words, Gingrich Builds His Kingdom, N.Y. Times, at A1 (Oct. 27, 1994).

[136] See, e.g., Thomas O. McGarity, The APA at Fifty: The Expanded Debate Over the Future of the Regulatory State, 63 U. Chi. L. Rev. 1463, 1494 (1996).

[137] See, e.g., Adam Clymer, The Clinton Record: Congress; The President and Congress: A Partnership of Self-Interest, N.Y. Times, at A1 (Oct. 2, 1996).

[138] See, e.g., Todd S. Purdum, Clinton Says G.O.P. Rule Cutting Would Cost Lives, at A14 (Feb. 22, 1995).

[139] See, e.g., R.W. Apple Jr., In This Fight, Polls Guide All the Moves, N.Y. Times, at A1 (Nov. 15, 1995).

course, it often is). Presumably, then, one way that rules can fail the OIRA process is if they do not hew to OIRA's new supermandate.

Another way rules can fail the OIRA review process is to fail cost-benefit analysis. One way to fail is never to try. An important but little-remarked aspect of the relationship between EPA and OIRA is that OIRA's cost-benefit sieve leads EPA personnel to be deeply wary of developing rules that have very high costs in relation to their quantified and monetized benefits. Indeed, Sunstein himself suggests this may be one consequence of OIRA's cost-benefit test.[140] From the moment EPA begins even to think about proposing a rule that OIRA will likely want to see, EPA personnel wonder whether OIRA will accept it; this mindset narrows the range of rules EPA might otherwise consider.

If EPA does decide to propose a rule that has much higher costs than benefits, that rule may not make it past OIRA. Among environmental rules, non-air rules fare the worst in a cost-benefit framework. Rules governing air pollution often produce relatively (or even very) high benefits in relation to costs on account of reductions in particulate matter. Indeed, according to OMB, in the last decade clean air rules have produced a majority of the total monetized benefits conferred by all of the major regulations in the federal government.[141] Rules on water pollution, toxics, and hazardous waste contamination do not have a single category of benefits – like reductions in human mortality due to reductions in particulate matter – that makes it possible for them to clear the cost-benefit hurdle. These programs fare poorly in OIRA's process of review. EPA's proposal to regulate coal ash changed markedly while at OIRA, and has not seen the light of day since it was proposed.[142] EPA initiatives on toxics have stalled at OIRA for years.[143] Likewise, rules on water pollution appear permanently stuck.[144] While Sunstein reports that cost-benefit analysis is not a major reason why rules get stuck at OIRA,[145] it is hard to escape speculating that cost-benefit analysis must be one factor in the trouble these categories of rules have run into at OIRA. Indeed, Sunstein also says that rules that fail cost-benefit will in fact likely fail OIRA review.[146]

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[140] Sunstein, Myths and Realities, at 26.

[141] OMB, Draft 2012 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities, at 15, available at http://www.whitehouse.gov/sites/default/files/omb/oira/draft_2012_cost_benefit_report.pdf.

[142] Center for Effective Government, White House Misadventures in Coal Ash Rule (May 18, 2010), http://www.foreffectivegov.org/node/11001.

[143] www.reginfo.gov, "Regulations Under EO 12866 Review" (showing chemicals rules that have been at OIRA for one to three years).

[144] www.reginfo.gov, "Regulations Under EO 12866 Review" (showing water rules that have been at OIRA for over a year).

[145] Sunstein, Myths and Realities, at 29-30.

[146] Sunstein, Simpler, at 161.

Sunstein asserts that EO 13,563 adds qualitative texture to the generally quantitative thrust of cost-benefit analysis.[147] In particular, he notes, EO 13,563 introduced "dignity" into the cost-benefit equation.[148] Sunstein cites the Department of Justice's rule on prison rape as an instance in which "dignity" made a difference in the regulatory process.[149] In its cost-benefit analysis of its rule aiming to reduce the incidence of prison rape, DOJ noted that it was very hard to quantify and monetize the benefits of reducing rape.[150] Nevertheless, DOJ said, reducing rape would promote human dignity, and this was a positive feature of its rule on prison rape.[151]

But I would venture to guess that the only reason DOJ was doing a cost-benefit analysis of rape prevention was that OIRA insisted on it. The only reason DOJ needed to reach to justify preventing rape was that OIRA's cost-benefit vision did not easily digest, in economic terms, a human indignity like rape.[152] To argue, as Sunstein does, that the inclusion of "dignity" in EO 13,563 somehow made it possible to issue DOJ's rule on prison rape is to get things very backwards.

One of the most problematic features of cost-benefit analysis, especially for future-oriented regulatory programs like those involving the environment, is its treatment of future consequences. In calling for recommendations on a new executive order, President Obama explicitly asked the OMB Director to address "concern for the interests of future generations."[153] This concern did not make it into the actual executive order, and indeed, the record of the Obama administration has been disappointing in this domain. The Obama administration's signature effort in this area – the estimation of the "social cost of carbon"[154] – used higher discount rates than OIRA's own cost-benefit guidance to agencies allows when a regulatory policy has significant intergenerational effects. The Obama administration approved a "central" value for the discount rate to be used in calculating the social cost of carbon of 3 percent and a upper value of 5 percent[155] – yet OIRA's own guidance allows agencies to use discount rates of 1 to 3 percent where

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[147] Sunstein, Myths and Realities, at 27.
[148] Sunstein, Myths and Realities, at 27.
[149] Sunstein, Myths and Realities, at 27.
[150] Prison Rape Elimination Act, Regulatory Impact Assessment, Department of Justice Final Rule, at 3 (May 17, 2012), available at http://www.ojp.usdoj.gov/programs/pdfs/prea_ria.pdf.
[151] PREA RIA at 5.
[152] Lisa Heinzerling, Cost-Benefit Jumps the Shark, http://gulcfac.typepad.com/georgetown_university_law/2012/06/cost-benefit-jumps-the-shark.html (June 2012).
[153] Presidential Memorandum of January 30, 2009, Regulatory Review.
[154] Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866, available at http://www.epa.gov/oms/climate/regulations/scc-tsd.pdf.
[155] Id. at 3.

intergenerational effects are significant.[156] Increasing the discount rate means decreasing the worth of future generations.[157] In approving a high range of discount rates for climate consequences, the Obama administration took a step backward, not forward, in the incorporation of future generations' interests in cost-benefit analysis.

We have seen that rules might fail OIRA review because they do not have a positive enough cost-benefit profile, and that President Obama's executive order on regulatory review has not appreciably helped rules get over this hurdle. Another reason why rules might fail OIRA review is that they simply fail "on the merits." This is, in fact, Sunstein's explanation of why EPA's final rule revising the ozone standard failed: the decision to return the rule to EPA was, Sunstein asserts, "unquestionably correct"[158] and "made on the merits."[159] He does not explain what this means – on the merits, considering cost-benefit analysis? on the merits, considering the scientific evidence? on the merits, considering EPA's other priorities and activities? – but he does insist that the rejection of EPA's rule on ozone was "not motivated by politics."[160]

Whatever view Sunstein takes of the "merits" of the ozone rule, it is hard to understand why the President rejected it and why Sunstein thinks that decision was "unquestionably correct." If, by the "merits," Sunstein means that the rule failed a cost-benefit test, that claim would be legally irrelevant. Neither EPA nor the White House was allowed to use cost-benefit analysis to pass judgment on the rule: the Supreme Court has held (unanimously) that EPA may not consider costs in setting the National Ambient Air Quality Standards.[161] The President's letter to Administrator Jackson emphasized "regulatory burdens," "regulatory uncertainty," and the economic downturn in explaining the return of the rule to EPA;[162] if these considerations were indeed the basis for the President's decision, the decision was unlawful.

Perhaps Sunstein means that the ozone rule failed on the scientific merits. Certainly, OIRA has played an active role in adjusting EPA's discussions of technical matters in its NAAQS decisions. In a report prepared for the Administrative Conference of the United States, Professor Wendy Wagner has carefully documented

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[156] http://www.whitehouse.gov/omb/circulars_a004_a-4/.
[157] Lisa Heinzerling, Discounting Our Future, 34 Land & Water L. Rev. 39 (1999).
[158] Sunstein, Simpler, at 7.
[159] Sunstein, Simpler, at 27.
[160] Sunstein, Simpler, at 27. For a very different take on this episode, see John M. Broder, Re-election Strategy Is Tied to a Shift on Smog, N.Y. Times (Nov. 16, 2011).
[161] Whitman v. American Trucking Associations, 531 U.S. 457 (2001).
[162] Statement by the President on the Ozone National Ambient Air Quality Standards (September 2, 2011), available at http://www.whitehouse.gov/the-press-office/2011/09/02/statement-president-ozone-national-ambient-air-quality-standards.

just how often OIRA intrudes upon EPA's technical analysis in the domain of the NAAQS.[163] But OIRA does not have the scientific expertise necessary to make judgments about where the NAAQS should be set. Nor, it should be added, does the President. Moreover, the scientific shakiness of the decision to direct EPA to withdraw the ozone standard emerged clearly at oral argument on the EPA standard left in place by President Obama's decision. At argument, the panel of D.C. Circuit judges sharply questioned the government's lawyers as to the scientific merits of the Bush-era ozone standard, left standing after EPA withdrew its revised standard.[164] They seemed very skeptical that the Bush-era standard was stringent enough.[165] Given the lack of relevant expertise on the part of OIRA and the President, and given the hard time EPA had defending the Bush-era standard in court, it is hard to imagine that when Sunstein says Obama's decision to reject EPA's revised standard was correct "on the merits," Sunstein means that the directive to withdraw the revised standard was scientifically correct.

A final possibility is that Sunstein believes that the ozone decision was correct on the merits because it reflected good governance. The President's letter to Administrator Jackson emphasized the importance of regulatory certainty and observed that EPA was already in the process of reviewing the ozone standard in light of the very latest scientific evidence.[166] So perhaps Sunstein means that the decision to reject the standard was correct because EPA should just have waited for the new five-year review of the ozone standard, rather than reconsidering the Bush-era standard and replacing it with a revised standard based on the same evidence EPA had considered in the Bush administration.

The trouble with this potential explanation is that, by the time President Obama ordered the standard pulled, EPA had been working on the reconsidered ozone standard for 2-1/2 years, with the full knowledge and acquiescence of the White House. Work on the reconsidered standard was consistent with Rahm Emanuel's memorandum to agencies, written within a week of President Obama's inauguration, directing them to review new and pending regulatory actions begun in the Bush administration, [167] and with the President's own March 2009

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[163] "Science in Regulation: A Study of Agency Decisionmaking Approaches" (Feb. 18, 2013), available at http://www.acus.gov/sites/default/files/documents/Science%20in%20Regulation_Final%20Report_2_18_13_0.pdf.

[164] Robin Bravender, Obama ozone decision blindsides enviros – and his own EPA, available at http://www.politico.com/news/stories/0911/62586.html.

[165] Lawrence Hurley, Court sympathetic to enviros' challenge to Bush-era ozone standards, Greenwire (Nov. 16, 2012), available at http://eenews.net/public/Greenwire/2012/11/16/2.

[166] Statement by the President on Ozone, supra note 162.

[167] EPA, National Ambient Air Quality Standards for Ozone, Proposed rule, 75 Fed. Reg. 2938, 2943 (Jan. 19, 2010); Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4435 (Jan. 26, 2009).

memorandum on scientific integrity.[168] The Bush-era ozone standard was widely regarded as one of the biggest environmental defaults of the Bush administration relating to the environment; many thought the standard of 0.075 parts per million was scientifically unsound. Thus, in September 2009, EPA announced that it would reconsider the Bush-era ozone standard.[169] In January 2010, EPA proposed revising that standard.[170] EPA held three public hearings and took public comment on the proposed standard in 2010.[171] The proposal went through OIRA.[172] The *upper end* of the range the agency proposed to consider was 0.070 parts per million of ozone.[173] In other words, no part of the range EPA proposed for the revision encompassed the Bush-era standard.

It would be bizarre to say that stopping a decision that everyone knew about, 2-1/2 years into the process, was justified on the ground that stopping it was a good way to govern. It was the opposite: it was a bad way to govern. It wasted tremendous agency resources and valuable time; it put the agency back at square one in figuring out how to manage the ozone problem under the Bush-era standard; it sent a wave of distrust and disbelief through agency ranks and outside supporters of the agency; and it put the government in the untenable position of defending the Bush-era standard left in place. Unleashing chaos cannot be what Sunstein means when he says that the ozone decision was correct "on the merits"; but that was the decision's effect.

Under the common law of 13,563, then, rules can fail for a variety of reasons: they can reflect an OIRA-disapproved understanding of the role of cost-benefit analysis under the relevant laws; they can fail a cost-benefit test; or they can be bad ideas on some unspecified theory of the "merits." Perhaps these are some of the reasons so many EPA rules seem permanently stuck at OIRA, as I next discuss.

D. When Does Review End (and Begin)?

The common law of 13,563 also determines the timelines under which OIRA operates. As discussed above, EO 13,563 explicitly reaffirms EO 12,866, which is the

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[168] EPA, National Ambient Air Quality Standards for Ozone, Proposed rule, 75 Fed. Reg. 2938, 2943 (Jan. 19, 2010); Memorandum for the Heads of Executive Departments and Agencies (Mar. 9, 2009), available at http://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-3-9-09.

[169] http://www.epa.gov/glo/pdfs/O3_Reconsideration_FACT%20SHEET_091609.pdf.

[170] EPA, National Ambient Air Quality Standards for Ozone, Proposed rule, 75 Fed. Reg. 2938 (Jan. 19, 2010).

[171] http://www.epa.gov/glo/actions.html.

[172] http://www.reginfo.gov/public/do/eoHistReviewSearch (proposed rule went to OIRA on Oct. 21, 2009, and review was completed on Jan. 6, 2010).

[173] Id. at 2997.

executive order that sets forth timelines for OIRA review: 10 days for pre-rule actions, 45 days for final rules on subjects already reviewed and little changed, 90 days for everything else.[174] EO 12,866 also, as I have said, seems clearly to contemplate one 30-day extension if the OMB Director and the agency head agree to it.[175]

This is not the way the OIRA process now works. Many, many rules linger at OIRA long past the 90- or 120-day deadline.[176] Many pre-rule actions stay long past 10 days.[177] Some rules have been at OIRA for *years*.[178]

Sunstein explains that, in fact, the prevailing understanding of EO 12,866 holds that an agency head may, on her own, request an indefinite extension of OIRA review.[179] This would mean that neither the requirement that the OMB Director agree "in writing" to the extension nor the requirement that the extension be once, for 30 days only, holds under the present understanding of EO 12,866. This would, in turn, mean that if an agency head asks for an extension, there actually is no deadline for completing OIRA review.

This remodeling of EO 12,866's structure on the timelines for review is news in and of itself. Many outside observers believe that there is in fact a deadline for OIRA review.[180] OIRA itself encourages this (mis)understanding by displaying 90 days as a timing benchmark on its regulatory dashboard. [181]

But it is worse than that. It is worse because the way that agency heads come to request extended review, in my experience, is that OIRA calls an official at the agency and *asks the agency to ask for an extension*. It is clear, in such a phone call, that the agency is not to decline to ask for such an extension. Thus, not only is there no deadline for OIRA review, but OIRA itself controls the agency's "requests" for extensions. In this way, it comes to pass that rules can remain at OIRA for years.

Quite apart from not knowing when OIRA review ends, it is also sometimes hard for the public to know when OIRA review begins. It has been widely reported that OIRA has lately been in the habit of not allowing agencies to send rules for

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[174] EO 12866, § 6(b)(2)(A), (B).
[175] EO 12866, § 6(b)(2)(C).
[176] www.reginfo.gov.
[177] www.reginfo.gov.
[178] www.reginfo.gov.
[179] Sunstein, Myths and Realities, at 10 n. 37.
[180] See, e.g., Printers to Obama: please regulate our cleaning rags, http://thehill.com/blogs/regwatch/pending-regs/296827-printers-to-obama-please-regulate-our-cleaning-rags ("Laws stipulate that the agency then has 90 days to review the drafts before returning them to agencies for correction or publication...").
[181] http://www.reginfo.gov/public/.

review until OIRA has cleared them for review – a kind of pre-clearance procedure uncomfortably reminiscent of the Bush-era failure of OIRA to be in receiving mode when the endangerment finding and rules on cars went over for review.[182]

Some documents on publicly available websites corroborate these reports. EPA maintains a website, the Regulatory Development and Retrospective Review Tracker ("Reg DaRRT"), that is supposed to track important moments in the development of EPA rules.[183] Inspired by the Bush-era fiasco of the un-uploaded package on endangerment and cars, EPA designed a timeline with two dates relevant to OIRA review: one noting the date when EPA sends a regulatory package to OIRA, and one noting the date when OIRA "receives" the package.[184] A space of a day or two between these two dates might mean nothing; it might mean that the package went over late in the day, for example, and no one was around to upload it at OIRA. But a space of anything more than that may signal that OIRA has lapsed into non-receiving mode. Thus, for example, looking at the Reg DaRRT entry on EPA's rule requiring electronic reporting by Clean Water Act permittees, one can see that the rule went to OIRA on December 22, 2011, but was not received by OIRA until January 20, 2012.[185] It would be unusual to have this long a space between sending and receipt unless OIRA had identified some problem with the package.

Comparing EO 12,866 documents on regulations.gov to OIRA's own posted review dates can also be illuminating. On regulations.gov, one can see that EPA sent a rule relating to renewable fuels to OIRA on November 20, 2012[186] – but OIRA itself reports that it received this rule on January 30, 2013.[187] Some regulatory actions seem caught forever in email limbo between EPA and OIRA. A Notice of Data Availability on coal ash, for example, appears to have been sent to OIRA on March 12, 2012[188] – but the notice did not appear on OIRA's log of items under review until April 13, 2013.[189] Needless to say, even if OIRA did indeed respect the EO 12,866 deadlines once items are accepted by it for review, these deadlines would mean little if OIRA simply does not accept certain regulatory actions for review or only accepts them long after they have been sent.

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[182] See text at note 69, supra.

[183] Found here: http://www.gao.gov/assets/120/110801.pdf.

[184] See, among many others, entry for Formaldehyde Standards for Composite Wood Products, http://yosemite.epa.gov/opei/rulegate.nsf/byRIN/2070-AJ92?opendocument (showing date sent to OMB for review and date received by OMB).

[185] http://yosemite.epa.gov/opei/rulegate.nsf/byRIN/2020-AA47?opendocument.

[186] http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2012-0621-0003.

[187] Entry on RFS Renewable Identification Number (RIN) Quality Assurance Program, http://www.reginfo.gov/public/do/eoHistReviewSearch.

[188] http://yosemite.epa.gov/opei/rulegate.nsf/byRIN/2050-AE81?opendocument.

[189] www.reginfo.gov.

To sum up, on the matter of deadlines, OIRA has broken entirely free from the constraints of EO 12,866. The 10-day, 45-day, and 90-day time limits on OIRA review perhaps survive as benchmarks, but nothing more. To maintain the fiction that deadlines still exist, OIRA extends review indefinitely at the "request" of agency heads – but these requests, in my experience, often are instigated by OIRA itself. To make matters worse, OIRA has fudged its own failure to meet the deadlines imposed by EO 12,866 by simply not "receiving" some regulatory packages until long after they are sent.

E. What Are We Told?

The last facet of the common law of EO 13,563 compounds the problems created by OIRA's other innovations to the regulatory review process prescribed in EO 12,866: OIRA follows, and allows the agencies to follow, almost none of the disclosure requirements of EO 12,866. OIRA also nowhere has written down the elements of its common law of regulatory review. This is why we are left to speculate about who is in charge of regulatory review. This is why so many people think OIRA reviews only really big and important rules, and perhaps why some believe that agencies can easily evade OIRA review altogether. This is why outsiders think there actually are deadlines for OIRA review and also think OIRA's website contains a full listing of items under OIRA scrutiny. The misconceptions about OIRA review would not be possible if OIRA either actually met the disclosure requirements of EO 12,866 or were more forthcoming about the many alterations it has made to the process described in the executive order.

OIRA does not explain in writing to agencies that items on their regulatory agenda do not fit with the President's agenda.[190] OIRA does not keep a publicly available log explaining when and by whom disputes between OIRA and the agencies were elevated. Indeed, when the first elevation of an EPA rule occurred in President Obama's first term, I drafted a brief memo for the EPA's docket explaining that elevation had occurred and noting the outcome. OIRA told me in no uncertain terms that the memo must not be made public. Moreover, except in one instance – President Obama's direction to then-EPA Administrator Lisa Jackson to withdraw the final rule setting a new air quality standard for ozone – OIRA has not returned rules to agencies with a written explanation about why they have not passed OIRA review.[191] Instead, as discussed above, OIRA simply hangs onto the rules indefinitely, and they wither quietly on the vine. This is how it comes to pass that a

[190] The next several paragraphs are drawn from Lisa Heinzerling, Who Will Run the EPA?, Yale J. Reg. (April 2013), http://jreg.commons.yale.edu/who-will-run-the-epa/.

[191] The website on regulatory review shows only one return letter (on ozone) issued during the Obama administration. OIRA Return Letters, Office of Info. And Regulatory Affairs, http://www.reginfo.gov/public/do/eoReturnLetters (last visited Mar. 25, 2013).

list of chemicals of concern or a workplace rule on crystalline silica lingers at OIRA for years.

Some agencies do post "before" and "after" versions of rules that have gone to OIRA. These redlined documents often feature hundreds of changes. There is nothing here like the "complete, clear, and simple manner" of disclosure contemplated by the Executive Order. There is also often no document that explains which changes were made at OIRA's behest. Where, as Sunstein explains, changes might come from OIRA, from another White House office, from another Cabinet head, or from a career staffer in a separate agency, the failure to follow the Executive Order's rules on transparency means that no one is ultimately accountable for the changes that occur. Who is responsible, for example, for the hundreds of technical changes made to the EPA's scientific analyses of air quality rules?[192] We simply do not know.

Here, too, OIRA is the stumbling block when it comes to transparency. Agencies know full well that they are not to be too transparent. OIRA reprimanded the EPA when the EPA accidentally posted interagency comments on its proposal to regulate coal ash impoundments.[193] But why shouldn't the public know who is responsible for changing the rules? In fact, without knowing the expertise and affiliation of the kibitzers, it is hard to evaluate their comments.

The problems go deeper still. OIRA maintains a "Regulatory Review Dashboard" that contains a good deal of information about rules under review, how long they have been under review, and so on.[194] It is spiffy and informative, but woefully incomplete. Some rules go to OIRA "informally" and do not appear on the Dashboard at that time. Some rules go to OIRA and appear on the Dashboard only weeks after the agency has sent them.[195] Some rules are done, from the agency's

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[192] Wendy Wagner has painstakingly documented such changes in a study prepared for the Administrative Conference of the United States. Wendy Wagner, Science in Regulation: A Study of Agency Decisionmaking Approaches (2013), available at http://www.acus.gov/sites/default/files/documents/Science%20in%20Regulation_Final%20Report_2_18_13_0.pdf.

[193] See Cent. For Effective Gov't, Changes to Coal Ash Proposal Place Utility's Concerns Above Public Health (2010) (recounting the same episode), available at http://www.foreffectivegov.org/node/11041.

[194] Regulatory Review Dashboard, http://www.reginfo.gov.

[195] For example, compare the EPA's report of when it sent its rule on electronic reporting regarding water pollution permits to OIRA, Dec. 22, 2011, to its report on when OIRA "received" the rule, Jan. 20, 2012. See NPDES Electronic Reporting Rule, U.S. Envtl. Prot. Agency, http://yosemite.epa.gov/opei/rulegate.nsf/byRIN/2020-AA47?opendocument (listing dates for "NPRM: Sent to OMB for Regulatory Review" and "NPRM: Received by OMB"). See also Search Results for NPRM Review Status, Regulatory Review Dashboard, http://www.reginfo.gov/ (search "RIN" for "2020-

perspective, but the White House prevents their transmittal to OIRA.[196] The truth is, the Dashboard purports to be, but is not, a full picture of the items under review at any given time. Thus it misleads at the same time it informs.

So far I have explained the ways in which OIRA review, as practiced today, departs from the executive order it purports to be following, EO 12,866. I have suggested, along the way, reasons to think OIRA's practice may not be ideal. Now, I turn to the normative perspective in earnest, and explain why I believe OIRA's process of regulatory review is deeply problematic along several different dimensions.[197]

III. The Problems With OIRA

In this paper, I have focused mainly on a descriptive account of the OIRA review process as it exists today. I believe this descriptive account is essential because there is so much misunderstanding about how OIRA actually operates. But this paper would be incomplete without a discussion of the normative problems created by OIRA's current practices. Other scholars have covered these problems well;[198] for this article, I rest with a relatively brief discussion.

I lead off with the last topic I covered in discussing the common law of EO 13,563: transparency. The opacity of the OIRA process has two large problems. The first is that opacity in government in general is a problem. It prevents people from understanding the way their government operates, how they can intervene and at what points, what the government is up to, who is making important decisions, why the government has made those decisions. The problems with opacity are, in fact, what led President Clinton to include disclosure requirements in EO 12,866 in the first place.[199]

AA47" and search "Agency for Environmental Protection Agency) (showing OMB's received date to be Jan. 20, 2012).

[196] Juliet Eilperin, Obama Administration Slows Environmental Rules as it Weighs Political Cost, Wash. Post, Feb. 12, 2012, (stating that the White House had not given EPA permission to send a rule on cars and trucks to OMB).

[197] For a compelling argument that OIRA review is so problematic that it should be scrapped altogether, see Steinzor, Abolishing Centralized Regulatory Review.

[198] Indispensable articles in this literature, spanning a long period, include Steinzor, Abolishing Centralized Regulatory Review; Bressman & Vandenbergh, Inside the Administrative State, 105 Mich. L. Rev. 47; Thomas O. McGarity, Presidential Control of Regulatory Agency Decisionmaking, 36 Am. U. L. Rev. 443 (1987); Percival, Presidential Management of the Administrative State, 51 Duke L.J. 963 ; Morrison, OMB Interference with Agency Rulemaking, 99 Harv. L. Rev. 1059 ; Olson, The Quiet Shift of Power, 4 Va. J. Nat. Resources L. 1.

[199] See, e.g., Steven Croley, White House Review of Agency Rulemaking: An Empirical Investigation, 70 U. Chi. L. Rev. 821, 878 (2003).

Another problem with opacity in the OIRA process is that transparency is promised but not delivered. Opacity about transparency is the worst kind of opacity; people think a lack of information on a subject means there is nothing relevant to report, when in fact it might mean they are just not being told. Thus it is especially troubling, given the gaps in transparency I have described, that Sunstein continues to tout the transparency of the OIRA process.[200] If believed, this claim would lull people into thinking they have all the information they might need or want about this process. But they do not. Moreover, to claim transparency but offer mostly opacity is especially bad in an administration that has made openness in government one of its signature initiatives.

A second problem with OIRA review as it is now conducted is the one flagged by OLC in 1981 when it reviewed EO 12,291. OLC cautioned, as I have said, that displacement of discretion by White House personnel might run afoul of the laws lodging discretion within a particular agency or with a particular official at a particular agency.[201] Since that time, the academic literature on this issue has burgeoned, with many scholars on both sides of the political divide arguing that certainly the President has the authority to order political appointees within the agencies to make particular decisions. Perhaps most famously, then-professor Elena Kagan argued that statutes that give discretion to particular agencies or to particular officials within particular agencies are best read as implicit delegations of authority to the President to dictate specific regulatory outcomes.[202] Other scholars have followed Kagan's lead and argued that it is nonsensical to read much of anything into Congress's particular choices about who is to make particular regulatory decisions.[203] What sense would it make, they ask, for Congress to give the President the authority to designate Superfund sites but not to give him directive authority over the setting of the NAAQS?[204] Some statutes give authority to the President, many others to agencies, and there appears to be no rhyme or reason in these choices.[205]

But if having rhyme or reason is a prerequisite for respecting Congress's choices, we have a lot of work to do unraveling its handiwork. Congress also has given USDA authority over meat but not cheese,[206] it has given FDA authority over

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[200] Sunstein, Myths and Realities, at 16.

[201] Proposed Executive Order Entitled "Federal Regulation," 5 Op. OLC 59, 62-63 (Feb. 13, 1981).

[202] Kagan, Presidential Administration, 114 Harv. L. Rev. at 2288-90.

[203] Nina A. Mendelson, Another Word on the President's Statutory Authority Over Agency Action, 79 Ford. L. Rev. 2455 (2011).

[204] Mendelson, 79 Ford. at 2466.

[205] Mendelson, 79 Ford. at 2466-68.

[206] GAO, Testimony Before the Subcommittee on Civil Service and Agency Organization, Committee on Government Reform, House of Representatives, Federal Food Safety and Security System: Fundamental Restructuring Is Needed to Address

eggs but not egg products,[207] it has given EPA authority over open waters but it requires EPA to share its authority over wetlands with the Army Corps of Engineers,[208] it has given DOT authority over fuel economy standards but not tailpipe standards for greenhouse gases.[209] The law is filled with delegations of authority that do not make obvious sense. But no one argues that FDA could just take over USDA's meat inspections, or that EPA could take over the Army Corps' functions with respect to wetlands. Even more tellingly, few other than those who believe in a strongly unitary executive believe that the President can simply ignore Congress's choices about whether the head of an agency can be removed for any reason or must only be removed for cause.[210] Yet it makes little sense, as far as I can tell, to have an independent SEC but a dependent EPA, or to have an independent FTC but a dependent CPSC. Why should we think nothing of ignoring Congress's instructions as to who within the executive branch should make particular decisions, but then cling tightly to its instructions about how to remove particular officials?

To delve fully into these issues would take me beyond the scope of this paper. My basic point is that it is not at all obvious that a delegation to a specific agency to make a specific decision delegates authority to the President to make that decision himself. It is even less obvious that such a delegation gives decision-making authority to OIRA career staff, other agencies' career staff, Cabinet members outside the relevant agency, the White House Chief of Staff, and others, apart from the President. Even if one believed that the President himself has decision-making power, Sunstein's account of the way the OIRA process actually works shows that it is almost never the President himself who is making the relevant calls. It is OIRA career staff and other agencies' career staff and other Cabinet officials and the Council of Economic Advisors and the White House Chief of Staff and a cast of many others.[211] To suggest that all of these players somehow can appropriately partake of the President's own power is ludicrous. It would be to suggest that the entire executive branch is "the President."

Thus, as in 1981, there remains a significant legal issue whether OIRA may exercise decision-making authority – not just oversight – with respect to regulatory decisions lodged by statute in particular agencies.

Fragmentation and Overlap, 3, 21 (March 30, 2004), available at http://www.gao.gov/assets/120/110801.pdf.

[207] 21 U.S.C. 331 § 331; 21 U.S.C. § 1031. For a critique of the resulting regulatory patchwork, see Note, Reforming the Food Safety System: What If Consolidation Isn't Enough?, 120 Harv. L. Rev. 1345, 1357-59 (2007).

[208] 33 U.S.C. § 1344.

[209] Massachusetts v. EPA, 549 U.S. 497, 532 (2007).

[210] See, e.g., Kagan, at 2326-27.

[211] Sunstein, Myths and Realities, at 18-21; see also Bressman & Vandenbergh, Inside the Administrative State, at 68 (counting 19 different White House offices involved in OIRA review).

A third large problem with OIRA review as it is now conducted is that it lacks accountability. No one knows who is really in charge. Sunstein's account of the process has only deepened the impression that the process is chaotic and unpredictable, lacking clear lines of authority and producing outcomes that have no clear author. The precise process set out in EO 12,866 for resolving disputes between the action agency and OIRA has given way to a blurry struggle for power in a process that remains opaque and mysterious even to the closest participants in it. Chaos, opacity, mystery: these are not the hallmarks of accountability. Since OIRA review is founded in part on a perceived need for greater accountability in the regulatory domain, the absence of accountability in this process undercuts the very reason for that review.

The accountability deficit is worsened by officials' insistence that, despite all that I have shown here, it really is the agencies who are in charge of regulatory policy. Sunstein reports that "[a]gencies decline to accept changes with which they disagree" and that "[w]hen changes are made, the agency assents to them."[212] "It is true, of course," Sunstein allows, "that OIRA has a good deal of formal authority under Executive Orders 12866 and 13563. That authority matters. But in important cases, the agency convinces OIRA and others, on the merits, that its position is indisputably correct, or that it is reasonable enough even if not indisputably correct. And in important cases, the agency concludes that the views suggested by OIRA, and pressed by interagency reviewers, are clearly correct, or that they are reasonable enough even if not clearly correct."[213] I do not know why Sunstein believes that agencies come to understand that OIRA's positions are "clearly correct"; I believe, instead, that they often come to understand simply that OIRA is clearly in charge. But the continuing assertion that agencies accept OIRA's views, even welcome them, further dilutes accountability for the regulatory decisions in question.

Last but not least, the current process of OIRA review hits environmental protection especially hard. EPA most often leads the federal pack in terms of the number of its rules under review at any given time. Most of the EPA rules OIRA reviews are not economically significant. As of May 7, 2013, 15 of the 22 EPA rules under review had been there for over a year. As shown in redlined versions of EPA rules showing changes during OIRA review, OIRA devotes extreme attention – and sometimes little deference – to EPA's technical judgments.[214] Whole categories of rules protecting the environment fare poorly in the cost-benefit analysis OIRA demands.[215] Perhaps it is not surprising that a centralized structure first developed in the Nixon years to undercut protections under the new federal environmental

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[212] Sunstein, Myths and Realities, at 10.
[213] Sunstein, Myths and Realities, at 33 (footnote omitted).
[214] See text at note 163 & n. 192, supra.
[215] See text at notes 142-44, supra.

laws would still, in 2013, save its strongest fire for these same protections. But it is a shame that so little has changed.

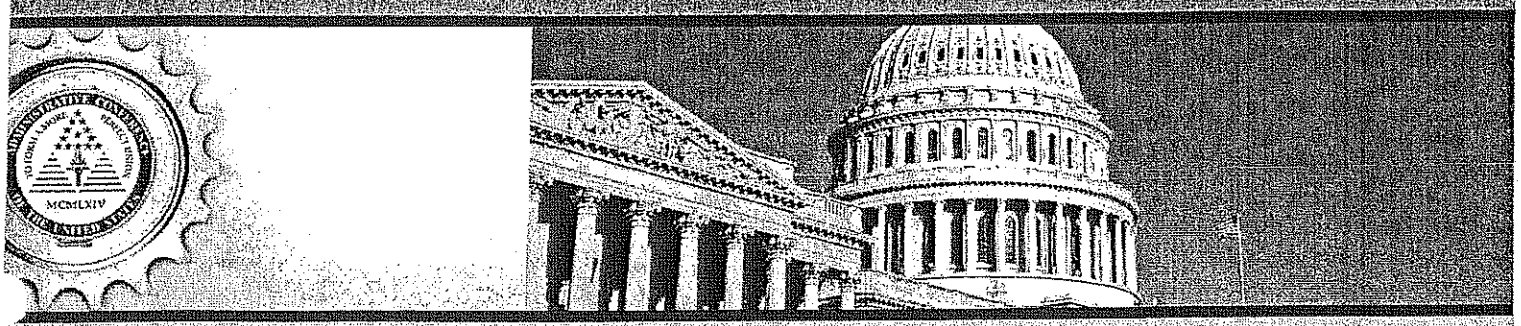
Solving at least some of these problems with OIRA review would be simple: OIRA could just follow the rules laid down in EO 12,866. If OIRA followed EO 12,866's requirements for transparency, a good number of the issues surrounding OIRA's opacity would disappear. If OIRA followed the spirit of 12,866 and 13,563 insofar as they do not envision OIRA changing the laws under which agencies operate, the problem of OIRA interfering with the agencies' best judgments about the appropriate interpretations of the statutes they administer would go away. If OIRA followed the process EO 12,866 requires for elevation and dispute resolution at the highest levels, and if OIRA followed the disclosure requirements pertaining to such matters, some of the concerns about accountability would be mitigated. If OIRA kept to EO 12,866's deadlines, at least indefinite delay would not be one of the intrusions it visits upon the agencies. If OIRA sent return letters to agencies when it rejected rules, explaining in writing why it rejected them, there would exist a focal point for substantive discussion and accountability would be enhanced. Much can be done to improve things, in other words, simply by following the executive order President Obama himself has reaffirmed.

Other problems would be trickier to resolve. There would remain the overarching legal issue of whether it is fair to assume that statutes giving decision-making authority to executive agencies also give decision-making authority to the President (or his aides in OIRA and the larger White House). If the cast of thousands Sunstein describes still played a role in regulatory review, there would remain a serious accountability deficit. And, so long as the culture at OIRA does not change and so long as cost-benefit is the decision tool of choice, environmental protection will suffer.

Conclusion

I hope that the descriptive account I have provided here, aimed at correcting the misimpressions that have grown up around OIRA review, will help to renew the debate over the role of OIRA and the larger White House in agency rulemaking.

Length of Rule Reviews by the Office of Information and Regulatory Affairs



Curtis W. Copeland

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This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees.

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I. Executive Summary

Pursuant to requirements in Executive Order 12866, issued by President Clinton in September 1993 and still in effect, the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) reviews hundreds of significant proposed and final rules before they are published in the *Federal Register*. The executive order states that OIRA's reviews should be completed within 90 days, but says reviews may be extended by the Director of OMB for 30 days and at the request of the agency head. From 1994 through 2011, the average amount of time it took to complete a review was 50 days, and the highest average review time in any year was 62 days.

However, in 2012, the average time for OIRA to complete reviews increased to 79 days, and in the first half of 2013, the average review time was 140 days – nearly three times the average for the period from 1994 through 2011. (*Note*: An increase in average review time for completed reviews in one year may reflect the closure of lengthy reviews that primarily occurred in previous years.) Some agencies were more affected by these increases in OIRA average review times than others, but by the first half of 2013, at least 17 departments and agencies had average review times of more than 90 days (up from only two departments in 2011). From 1994 through 2011, an average of fewer than 10 completed reviews per year (less than 2%) took more than six months; however, in the first half of 2013, 63 reviews (nearly 30%) took more than six months, and 27 (nearly 13%) took more than one year. Further, these statistics may understate the extent of the delays. According to senior employees in 11 departments and agencies (who were interviewed for this report anonymously and without indication of agency affiliation), OIRA has increasingly used "informal reviews" of rules prior to their formal submission, has required agencies to get OIRA approval before submitting rules, and has in some cases delayed recording the receipt of rules until some time after they were submitted by the agencies. (*Note*: The author discussed this report with OIRA officials, and the report reflects those discussions.)

These senior agency employees provided a variety of perspectives as to why they believe OIRA review times had increased: (1) concerns by some in the Executive Office of the President (EOP) about the issuance of potentially costly or otherwise controversial rules during an election year, (2) lengthy data or analytical requests from OIRA desk officers and a perceived lack of management of those desk officers, (3) a broadened definition of what constitutes a "significant" regulatory action, (4) lengthy coordinative reviews by other agencies and offices within the EOP, (5) the absence of any review time limit when OIRA directs the agencies to request review extensions, (6) a reluctance by OIRA to use return letters, and (7) OIRA staffing issues. Some of these observations appear to be long-standing criticisms (e.g., agency concerns about desk officers), and OIRA and the agencies are likely to have very different perspectives regarding when additional analysis is needed and which rules should be considered "significant."

Although it is tempting to recommend that a strict time limit on the length of OIRA reviews be established, such a cap may not always be advisable, and may not be necessary. Previous efforts have shown that OIRA can constrain the length of its reviews when OIRA leadership makes review timeliness a priority. The data indicate that OIRA has reduced its backlog of long-term reviews and has improved review times in recent months, although those review times have still not returned to historic norms. This report recommends that (1) the OIRA administrator continue these recent efforts and announce specific steps to return timeliness to at least historic norms, (2) OIRA return regulatory actions to the issuing agency as soon as practicable after 120 days, (3) the review "clock" start whenever OIRA begins to review agency approved drafts of rules, (4) submitting agencies respond to OIRA's comments as soon as possible, (5) non-submitting

agencies and offices provide their comments to OIRA as soon as possible, (6) agencies make the final decision as to when their significant rules should be sent to OIRA, and (7) OIRA staffing be increased.

II. Introduction

The Office of Information and Regulatory Affairs (OIRA) is one of several statutory offices within the Office of Management and Budget (OMB), which is located within the Executive Office of the President (EOP). OIRA is headed by an administrator who is appointed by the President, subject to Senate confirmation.[1] For more than 30 years, OIRA has reviewed the substance of hundreds of proposed and final rules each year on behalf of the President before they are published in the *Federal Register*.[2] These reviews are currently authorized by Executive Order (EO) 12866, which was issued by President Clinton on September 30, 1993.[3] Under the executive order, covered agencies (Cabinet departments and independent agencies, but not independent regulatory agencies)[4] must submit their "significant" proposed and final regulatory actions to OIRA for review.[5] OIRA can conclude review on the rules with or without change, return them to the agencies for reconsideration, or take other actions. As a result of these reviews, OIRA can play a significant—if not determinative—role in the rulemaking process for most federal agencies.

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[1] The other statutory offices, which are collectively referred to as the "management" side of OMB, include the Office of Federal Financial Management, the Office of Federal Procurement Policy, and the Office of Electronic Government and Information Technology. OMB's resource management offices, which review agencies' budget submissions, are sometimes collectively referred to as OMB's "budget" side.

[2] The Administrative Procedure Act of 1946 (5 U.S.C. § 551 et seq.) generally requires that, before a rulemaking becomes law, agencies publish a notice of proposed rulemaking in the *Federal Register*, permit the public to comment on the proposed rule, and then publish a final rule addressing the comments provided.

[3] Executive Order 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, October 4, 1993. For a copy of this executive order, see http://www.whitehouse.gov/omb/inforeg/eo12866.pdf. As noted later in this report, EO 13563 reaffirmed the authorization for OIRA reviews.

[4] As used in this report, the term "independent regulatory agencies" refers to agencies established to be independent of the President, including the Federal Communications Commission, the Securities and Exchange Commission, and the Consumer Product Safety Commission. The term "independent agencies" refers to agencies that are independent of Cabinet departments but not independent regulatory agencies (e.g., the Environmental Protection Agency and the Office of Personnel Management). For a more detailed discussion of types of agencies, see David E. Lewis and Jennifer L. Selin, *Sourcebook of United States Executive Agencies*, First Edition, December 2012, prepared for the Administrative Conference of the United States, available at http://www.acus.gov/sites/default/files/documents/Sourcebook-2012-Final_12-Dec_Online.pdf.

[5] Section 3(e) of EO 12866 defines a "regulatory action" as any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking." Because nearly 90% of all regulatory actions are draft proposed or final rules, this report sometimes uses "rules" as a shortened version of "regulatory actions." Section 3(f) of EO 12866 defines a "significant" regulatory action as one that satisfies any of four conditions: "(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order." Rules fitting the first of these conditions are often referred to as "economically significant" regulatory actions.

Section 6(b)(2) of EO 12866 requires OIRA to either waive review or notify the agency in writing of the results of its review within certain time frames—(1) within 10 working days of submission for any preliminary actions prior to a notice of proposed rulemaking (e.g., a notice of inquiry or an advance notice of proposed rulemaking), or (2) within 90 calendar days of submission for all other regulatory actions (or 45 days if OIRA had previously reviewed the material, and there has been no material change in the facts and circumstances on which the rule is based). The executive order also states that the review process "may be extended (1) once by no more than 30 calendar days upon the written approval of the Director [of OMB] and (2) at the request of the agency head."[6] In October 1993 guidance on the implementation of the executive order, the OIRA administrator noted the "strict time limits" set forth in the executive order, and said "we must work closely together to ensure that requests for clarification or information are responded to promptly."[7]

Although concerns have sometimes been expressed about the length of its reviews of agency rules, OIRA has historically completed most of its reviews well within the time limits in the executive order. More recently, however, broader concerns about the timeliness of large numbers of OIRA reviews have arisen.[8] For example:

- During her April 9, 2013, confirmation hearing for the position of OMB director, Sylvia Burwell was asked by Senator Tammy Baldwin about the slow pace of rule reviews at OIRA. Specifically, Senator Baldwin said a number of rules had been "sitting at OMB" for long periods of time "with little information about where or why the process seems to have ground to a halt." Ms. Burwell said it was important to understand "why the rules are there, the ones that have been there for an extended period of time; is it related to complexity or is it related to other issues?" She also said it was important for the agencies and OMB to communicate about any factors that might slow down the rulemaking process.[9]
- Less than two months later, during his confirmation hearing for the position of OIRA administrator, Howard Shelanski was asked by Senator Carl Levin about the "chronic" delays of rules at OIRA, delays that Senator Levin said "fundamentally undermine the agencies' ability to effectively execute the responsibilities that those agencies have."[10] Mr. Shelanski said he shared Senator Levin's concerns about the timeliness of OIRA reviews, and said speeding up the review process would be "one of my highest priorities" should he be confirmed as administrator. However, he said not having been at OIRA, he

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[6] Section (6)(b)(2)(C). As discussed later in this report, OIRA views these two provisions as separate. The OMB Director may request a 30 day extension, or the agency head may request an extension that is not limited to 30 days.

[7] To view this guidance, see http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/eo12866_implementation_guidance.pdf.

[8] For earlier concerns, see Rena Steinzor, Michael Patoka, and James Goodwin, Center for Progressive Reform, *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment*, White Paper #1111, November 2011, hereafter "CPR report," available at http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf; and Center for Effective Government, "Worker Safety Rule Under Review at OIRA for Over a Year: A Tale of Rulemaking Delay," February 22, 2012, available at http://www.foreffectivegov.org/node/11984. See also Amit Narang, Public Citizen, *The Perils of OIRA Regulatory Review: Reforms Needed to Address Rampant Delays and Secrecy*, June 12, 2013, available at http://www.citizen.org/documents/oira-delays-regulatory-reform-report.pdf.

[9] To view this confirmation hearing, see http://www.hsgac.senate.gov/hearings/nomination-of-sylvia-m-burwell-to-be-director-office-of-management-and-budget.

[10] Sean Reilly, "Nominee Promises Speedier Regulation Review," *Federal Times*, June 12, 2013, available at http://www.federaltimes.com/article/20130612/DEPARTMENTS06/306120013/Nominee-promises-speedier-regulation-review. To view this confirmation hearing, see http://www.hsgac.senate.gov/hearings/nomination-of-howard-a-shelanski.

could not comment on what might have led to extended review of any particular rule, or what might have led to the large number of lengthy reviews.

- On May 7, 2013, Senator Richard Blumenthal sent a letter to the Director of OMB regarding several regulatory proposals that had been "seriously delayed" at OIRA.[11] Senator Blumenthal noted that 84 regulatory actions had been at OIRA for more than 90 days, and said he was particularly troubled by certain regulatory actions that had been under review "for an unacceptable amount of time"– one from the Occupational Safety and Health Administration (OSHA) within the Department of Labor (DOL) for 813 days and the other from the Department of Transportation (DOT) for 538 days. When OIRA reviews go beyond 90 days, he said "the public should be informed of the delay, the justification and the amount of time the Administration estimates it will take to complete review."

- On June 4, 2013, four Senators and two Representatives sent a letter to OMB Director Burwell noting that dozens of rules submitted to OIRA by the Environmental Protection Agency (EPA), DOL, and the Department of Energy (DOE) had been under review at OIRA for much longer than 90 days, and some for more than a year. The letter noted that the OMB Director had committed during her confirmation hearing to address regulatory review delays at OIRA, and urged her to take action.[12]

- On June 12, 2013, the *New York Times* published an article describing the extent of rule delays at OIRA, focusing on several DOE energy efficiency standards that had been under review for almost two years.[13] The article said that the slowdown was caused by a combination of factors, including "high-level vacancies and election-year politics."

- On June 30, 2013, the *New York Times* published an editorial noting the number of rules that had been under review at OIRA for some time, and suggested that the backlog "has more to do with politics than economics."[14] It went on to say that in 2012, "a presidential election year in which Republicans hammered the administration for its allegedly 'job killing' regulations, the number of rules receiving final approval hit a historic low (in data going back to 1993), while the time OIRA took to vet proposals hit new highs."

- On August 1, 2013, the Senate Judiciary Committee's Subcommittee on Oversight, Federal Rights, and Agency Action held a hearing on "Justice Delayed: The Human Cost of Regulatory Paralysis," at which several of the witnesses mentioned rules that had been under review at OIRA for extended periods of time.[15]

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[11] See http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-urges-end-to-regulation-delay-endangering-workers-and-children for a copy of this letter. See also Charles S. Clark, "Senator Pressures OMB on Delayed Safety Regulations," *Government Executive Magazine*, May 9, 2013.

[12] To view a copy of this letter, see http://www.whitehouse.senate.gov/news/release/omb-delays-undermining-administrations-agenda-on-environment-energy-and-public-health.

[13] John M. Broder, "Regulatory Nominee Vows to Speed Up Energy Reviews," *New York Times*, June 12, 2013, available at http://www.nytimes.com/2013/06/13/us/politics/environmental-rules-delayed-as-white-house-slows-reviews.html?pagewanted=all.

[14] New York Times Editorial Board, "Stuck in Purgatory," *New York Times*, June 30, 2013, available at http://www.nytimes.com/2013/07/01/opinion/stuck-in-purgatory.html?_r=0.

[15] See http://www.judiciary.senate.gov/hearings/hearing.cfm?id=46c0474f3ba43037db5917ce8f963f2b for further information about this hearing.

OIRA review is an important part of the federal rulemaking process. However, these developments suggest that delays of OIRA reviews have become an issue of concern, and may have become an impediment to timely rulemaking.

A. Objectives, Scope, and Methodology

The primary objective of this report is to determine the degree to which OIRA reviews in recent years have adhered to the time limits described in EO 12866, or have exceed historical norms. If OIRA review times in those years are not consistent with those time limits or exceed historical norms, the report will attempt to determine why this has happened, and will attempt to identify actions that can be taken to prevent a recurrence of such delays in the future.

To address these objectives, the report will (1) provide background information on OIRA and the requirements that its regulatory reviews be conducted within certain time limits, (2) provide data from OIRA's public database[16] on recent and historical review times, and (3) provide information derived from interviews with senior agency employees and other interested parties on what they believe to be the causes of any delay in OIRA review, and any actions that can be taken to prevent such lengthy reviews in the future. The report will not address other issues related to OIRA's regulatory review activities (e.g., other transparency issues, the proper role for OIRA, or whether OIRA reviews should be extended to independent regulatory agencies).

Agency staff members interviewed for this report were primarily senior employees responsible for interactions with OIRA regarding all or a large range of their agencies' rules. A total of 14 senior employees were interviewed, representing 11 cabinet departments and agencies that have experienced delays in the reviews of their rules by OIRA. To allow these employees to comment as candidly as possible, they were allowed to provide their views anonymously, and were assured that the names of their agencies would not be disclosed. This report does not seek to capture the extent to which their views are representative of the agencies for which they work, or of other agencies.

Current OIRA officials were contacted at the start of this project, but they declined to provide their perspectives as to the reasons for the lengthy reviews concluded in 2012 and 2013. The author discussed the reasons for the lengthy reviews with former OIRA officials in the Obama Administration, but they required that the discussions be off the record. To provide reactions to the senior agency employees' comments, the author obtained comments (both on and off the record) from two former OIRA administrators – Sally Katzen (administrator from 1993 until 1998) and Susan Dudley (administrator from 2007 until 2009) – and from Michael Fitzpatrick (former associate administrator during the Obama Administration and senior advisor to the administrator during the Clinton Administration). At the end of the project, the author and representatives from the Administrative Conference of the United States (ACUS) discussed the report with current and former OIRA officials, and this report reflects those discussions. Former OIRA administrator Cass Sunstein (September 2009 until August 2012) declined to participate in the study, but some of his relevant articles have been incorporated into this study.

[16] See www.reginfo.gov/public/jsp/EO/eoDashboard.jsp.

III. Background

Some type of presidential review of rulemaking has occurred since the 1960s,[17] and the appropriate role of the President and his representatives in the rulemaking process has long been the subject of academic debate.[18] Although some have argued that the current system should be limited or eliminated entirely,[19] others have suggested that presidential review be strengthened and expanded.[20] Currently, though, it is clear that presidential review has become an important component of the regulatory process and some form of review is virtually certain to remain in place for the foreseeable future.

Indeed, many have recognized the need for and benefits of presidential review of rulemaking. For example, more than 30 years ago, the U.S. Court of Appeals for the District of Columbia Circuit said the following:

> The court recognizes the basic need of the President and his White House staff to monitor the consistency of agency regulations with Administration policy. He and his advisors surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution, after all, is not shared—it rests exclusively with the President.[21]

In 1987, the National Academy of Public Administration (NAPA) characterized regulatory management as an "essential element of presidential management."[22] ACUS said in 1988 that presidential review of rules "can improve the coordination of agency actions and resolve conflicts among agency rules and assist in the implementation of national priorities,"[23] and later

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[17] See Jim Tozzi, "OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding," *Administrative Law Review*, volume 63 (2011, Special Edition), pp. 37-69, available at http://www.thecre.com/pdf/20111211_ALR_Tozzi_Final.pdf.

[18] Some assert that the President should be able to make the final decision regarding the substance of agency rules, while others argue that the President cannot dictate the substance of rules that Congress has entrusted to the agencies. For a sample of this literature, see Robert Percival, "Presidential Management of the Administrative State: The Not-So Unitary Executive," *Duke Law Journal*, volume 51 (December 2001), pp. 963-1013; Peter L. Strauss, "Overseer, or 'The Decider'?: The President in Administrative Law," *George Washington University Law Review*, volume 75 (2007), pp. 696-760; Thomas O. Sargentich, "The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration," *Administrative Law Review*, volume 59 (2007), pp. 1-36; Michael A. Livermore and Richard L. Revesz, "Regulatory Review, Capture, and Agency Inaction," *Georgetown Law Journal*, volume 101 (2012-2013), pp. 1337-1398; and Alan B. Morrison, "Commentary: OMB Interference with Agency Rulemaking," *Harvard Law Review*, volume 99 (1986), pp. 1059-1074.

[19] In 2009, as part of the Obama Administration's reconsideration of EO 12866, several individuals and organizations suggested that OIRA's role be limited. See Ralph Lindeman, "Advocate Groups Want Reduced OIRA Role in OMB's Regulatory Review Revision Process," *BNA Daily Report for Executives*, April 2, 2009, p. A-13. In 2011, Rena Steinzor of the University of Maryland School of Law and the President of the Center for Progressive Reform recommended that the President terminate centralized review of individual rules. See Rena Steinzor, "The Case for Abolishing Centralized White House Regulatory Review," *Michigan Journal of Environmental & Administrative Law*, volume 11 (2011), pp. 209-285.

[20] See, for example, Richard Williams, "Recommendations for OIRA Reform,", March 10, 2009, available at http://mercatus.org/publication/recommendations-oira-reform; and John Morrall III, "Reinvigorating, Strengthening, and Extending OIRA's Powers," testimony before the Subcommittee on Regulatory Reform, Commercial, and Antitrust Law, September 30, 2013, available at http://mercatus.org/publication/reinvigorating-strengthening-and-extending-oiras-powers.

[21] *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

[22] National Academy of Public Administration, *Presidential Management of Rulemaking in Regulatory Agencies*, January 1987, p. vii. Hereafter, "NAPA, 1987."

[23] Administrative Conference of the United States, *Presidential Review of Agency Rulemaking*, Conference Recommendation 88-9 (1988), available at http://www.acus.gov/recommendation/presidential-review-agency-

characterized such reviews as "beneficial and necessary."[24] Also, some view OIRA as having a cross-agency perspective that can bring to bear a wider range of concerns than any specific regulatory agency.[25] In a June 2001 article in *Harvard Law Review*, Elena Kagan characterized the emergence of enhanced methods of presidential control over the regulatory state—what she termed the "presidentialization of administration"—as "the most important development in the last two decades in administrative process."[26] In 2003, the General Accounting Office (GAO, now the Government Accountability Office) said that OIRA reviews on behalf of the President "have become an established and important part of the federal rulemaking process."[27]

A. OIRA and Executive Order 12291

OIRA was created within OMB by Section 3503 of the Paperwork Reduction Act (PRA) of 1980 (44 U.S.C. Chapter 35). The PRA gave OIRA substantive responsibilities in many areas, but the bulk of the office's day-to-day activities under the act were initially focused on reviewing and approving agencies' proposed information collection requests.

OIRA's regulatory review responsibilities were first established in February 1981 by President Reagan through Executive Order 12291.[28] The executive order authorized the director of OMB to review any draft proposed or final rule or regulatory impact analysis from a covered agency (Cabinet departments and independent agencies, but not independent regulatory agencies). "Major" proposed rules (e.g., those expected to have a $100 million effect on the economy) were required to be submitted to OMB at least 60 days prior to publication, and major final rules were to be submitted at least 30 days before they were published.[29] Non-major rules were to be submitted 10 days before publication. The executive order indicated that OMB's review should

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rulemaking.

[24] Administrative Conference of the United States, *Improving the Environment for Agency Rulemaking*, Conference Recommendation 93-4 (1993), available at http://www.acus.gov/recommendation/improving-environment-agency-rulemaking.

[25] See, for example, Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (Cambridge, Mass.: Harvard University Press, 1993), pp.10–11, who stated that "tunnel vision" by regulatory agencies can prevent them from seeing the larger cost-benefit picture.

[26] Elena Kagan, "Presidential Administration," *Harvard Law Review*, volume 114 (June 2001), pp. 2245-2385. In the academic debate about presidential power and rulemaking, Kagan took the position that the President can (and should) ultimately determine the substance of agency rules, but not if Congress has specifically prohibited or limited presidential intervention.

[27] U.S. General Accounting Office, Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews, GAO-03-929, September 22, 2003, p. 110.

[28] Executive Order 12291, "Federal Regulation," 46 *Federal Register* 13193, February 19, 1981. Although the executive order did not specifically mention OIRA, shortly after its issuance the Reagan Administration decided to integrate OMB's regulatory review responsibilities under the executive order with the responsibilities given to OMB (and ultimately to OIRA) by the PRA. For a description of the effects of this order, see Erik D. Olson, "The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12291," *Virginia Journal of Natural Resources Law*, volume 4 (Fall 1984), pp. 1-80. In 1985, President Reagan extended OIRA's influence over rulemaking even further by issuing Executive Order 12498, which required the same agencies to submit a "regulatory program" to OMB for review each year that covered all of their significant regulatory actions underway or planned. See Executive Order 12498, "Regulatory Planning Process," 50 *Federal Register* 1036, January 8, 1985.

[28] Section 8(a)(2) of EO 12291.

[29] However, if an agency published a final rule without a prior proposed rule, the final rule was to be submitted at least 60 days prior to publication.

be completed within those time periods, but allowed the director to extend the review period whenever necessary.[30] The agencies were generally required to refrain from publishing any final rules until they had responded to OIRA's comments, and agencies published rules without OIRA approval at their peril.[31]

OIRA's regulatory review authorities were not unlimited, however. EO 12291 authorized OMB to take action only "to the extent permitted by law," and stated that the review procedures prescribed in the order did not apply to "any regulation for which consideration or reconsideration under the terms of this Order would conflict with deadlines imposed by statute or by judicial order."[32] Although Subsection 3(f) of the executive order prohibited agencies from publishing proposed rules until OMB review was concluded, it also specified that nothing in the subsection "shall be construed as displacing the agencies' responsibilities delegated by law."[33] In its February 13, 1981, opinion supporting the legality of EO 12291, the Office of Legal Counsel within the Department of Justice said "the President's exercise of supervisory powers must conform to legislation enacted by Congress."[34] Therefore, "[i]n issuing directives to govern the Executive Branch, the President may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress."

OIRA's initial regulatory reviews under EO 12291 were highly controversial, with some of the concerns raised by Members of Congress and others focusing on the effect that the reviews had on the time required for agencies to issue rules.[35] In 1983, GAO concluded that the expansion of OIRA's responsibilities under EO 12291 had adversely affected the office's ability to carry out its statutory PRA responsibilities, and recommended that Congress consider amending the act to prohibit OIRA from carrying out other activities such as regulatory review.[36]

As discussed in **Appendix A** of this report, delays in the issuance of a statutorily required EPA regulation eventually led to a 1986 decision by the D.C. District Court that was critical of OIRA review delays.[37] That same year, the House of Representatives voted to cut off all funds to OIRA, in part because the office was accused of "sitting on regulations" and operating in secret.[38] In an

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[30] After describing the 60, 30, and 10-day review periods, Section 3 of EO 12291 states that OMB "shall be deemed to have concluded review" within those periods unless it advises an agency that it intends to comment on the rule or the regulatory impact analysis, in which case the agency is to "refrain from publishing" the rule or the analysis.

[31] For example, when EPA issued a regulation over the objections of OIRA during the Reagan Administration, an EPA official said that an OIRA official told him "there was a price to pay for doing what we had done and we hadn't begun to pay." Mary Thornton, "OMB Pressured EPA, Ex-Aide Says," *Washington Post*, September 28, 1983, p. A-1.

[32] Section 8(a)(2) of EO 12291.

[33] Section 3(f)(3) of EO 12291.

[34] Memorandum from U.S. Department of Justice, Office of Legal Counsel, "Proposed Executive Order on Federal Regulation" (February 13, 1981), reprinted in *Role of OMB in Regulation*, Hearings before the Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, 97th Cong., 1st Sess. (1981). See http://thecre.com/pdf/DJMemoReaganEO12291PDF.pdf for a copy of this memorandum.

[35] Other concerns focused on the appropriate role of the President in carrying out statutory requirements that Congress placed on departments and agencies. See U.S. Congress, House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, *Role of OMB in Regulation*, 97th Cong., 1st sess., June 18, 1981 (Washington: GPO, 1981). See also Morton Rosenberg, "Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12291," *Michigan Law Review*, volume 80 (Dec. 1981), pp. 193-247.

[36] U.S. General Accounting Office, *Implementing the Paperwork Reduction Act: Some Progress, But Many Problems Remain*, GAO/GGD-83-35, April 20, 1983.

[37] *Environmental Defense Fund v. Thomas* (627 F. Supp. 566, D.D.C. 1986).

[38] Judith Havemann, "'Defunding' OMB's Rule Reviewers," *Washington Post*, July 18, 1986, p. A17; and Judith Havemann, "New Senate Difficulty Besets Regulatory Review Office," *Washington Post*, August 16, 1986, p. A8. See also Morton Rosenberg, "Regulatory Management at OMB," in *Office of Management and Budget: Evolving Roles and Future Issues*, Committee Print, 99th Cong., 2nd Sess., S. Prt. 99-134, February 1986, pp. 185-233.

effort to head off that legislation, the OIRA administrator issued a June 1986 memorandum to the heads of covered departments and agencies describing new procedures to improve the transparency of the review process.[39] For example, the memorandum said that OIRA would provide information to the public on meetings with outside parties, and on the dates it began and completed reviews of proposed and final rules.

In 1987, a NAPA report on presidential management of agency rulemaking summarized many of the criticisms of the OIRA review process, as well as the positions of its proponents. Although the report recommended that presidential management of the rulemaking process be accepted and continue, it also concluded that the "clearest impact of the regulatory management process has apparently been in slowing down rulemaking activities."[40] NAPA also said that OIRA "should avoid excessive delays in the review process," and "should not seek to defeat rules through a kind of pocket veto, by simply refusing to act on regulations it does not like."[41] On the other hand, the report also said that agencies should not try to shift the blame to OIRA to "disguise their own rulemaking problems."[42]

In 1988, ACUS generally supported presidential review of agency rulemaking, but also said that presidential review "does not displace responsibilities placed in the agency by law nor authorize the use of factors not otherwise permitted by law."[43] With regard to the timeliness of reviews, ACUS recommended that the process "should be completed in a timely fashion by the reviewing office and, when so required, by the agencies, with due regard to applicable administrative, executive, judicial and statutory deadlines." Similarly, in 1993, ACUS said the reviewing or oversight entity in presidential reviews of rulemaking "should avoid, to the extent possible, extensive delays in the rulemaking process," and recommended that presidential review "not unduly delay or constrain rulemaking."[44]

In 1989, the Section of Administrative Law and Regulatory Affairs of the American Bar Association (ABA) approved a resolution endorsing the 1988 ACUS recommendations on OIRA timeliness. In 1990, the Section issued a report to the ABA House of Delegates that described delays in OIRA reviews as "the most important unresolved process problem involving the regulatory review program."[45] The report described (among other things) the "protracted review and negotiations" that some rules endured, and recommended the following:

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[39] Judith Havemann, "No 'Shade-Drawn' Dealings for OMB," *Washington Post*, June 17, 1986, p. A21. To view a copy of this memorandum, see Memorandum from Wendy L. Gramm, OIRA Administrator, to Heads of Departments and Agencies Subject to Executive Order Nos. 12,291 and 12,498 on Additional Procedures Concerning OIRA Reviews Under Executive Order Nos. 12,291 and 12,498 [Revised] (June 13, 1986), reprinted in U.S. Office of Management and Budget, *Regulatory Program of the United States Government*, April 1, 1992 – March 31, 1993, at 585 (1993).

[40] National Academy of Public Administration, *Presidential Management of Rulemaking in Regulatory Agencies*, p. 7.

[41] Ibid., p. 40.

[42] Ibid.

[43] Administrative Conference of the United States, *Presidential Review of Agency Rulemaking*, Conference Recommendation 88-9 (1988), available at http://www.acus.gov/recommendation/presidential-review-agency-rulemaking.

[44] Administrative Conference of the United States, *Improving the Environment for Agency Rulemaking*, Conference Recommendation 93-4 (1993), available at http://www.acus.gov/recommendation/improving-environment-agency-rulemaking.

[45] American Bar Association, Section of Administrative Law and Regulatory Practice, "Delay in Presidential Review of Agency Regulations," February 1990 (hereafter referred to as the "ABA Section report"), available at http://www.americanbar.org/content/dam/aba/directories/policy/1990_my_101c.authcheckdam.pdf. The report was submitted by Paul R. Verkuil, who was then Chair of the Section, and who is now the Chairman of ACUS. As noted later in this report, in 1990, the average review time for all rules was 28 days, and the average review time for major rules was 57 days.

> Within 60 days of receipt by OIRA of a proposed or final rule under Executive Order No, 12,291, unless the Director of OMB or the Administrator of OIRA by writing extends review for another 30 days, OIRA will either complete its review and so advise the agency, or it will return the rule to the agency for reconsideration. Whenever a rule is returned to any agency for reconsideration, OIRA shall inform the head of the agency in writing of its views as to why the rule is not consistent with the regulatory policies of the President.

The report stated that the OIRA administrator at the time (S. Jay Plager) viewed the recommendation as constructive and potentially helpful to the regulatory review process. The ABA House of Delegates subsequently adopted the report's recommendation without any revisions.

B. Executive Order 12866

In September 1993, President Clinton issued Executive Order 12866 on "Regulatory Planning and Review," which revoked EO 12291.[46] EO 12866 is still in effect, and continued the general framework of presidential review of rulemaking that was established by EO 12291. For example, it requires covered agencies (again, Cabinet departments and independent agencies but not independent regulatory agencies) to submit certain proposed and final rules to OMB before publishing them in the *Federal Register*. The order also requires agencies to prepare cost-benefit analyses for their "economically significant" rules (essentially the same as "major" rules under EO 12291).[47] Like the previous executive order, EO 12866 makes it clear that the requirements for review by OIRA are only permissible "to the extent permitted by law."[48]

EO 12866 does, however, differ from EO 12291 in several important respects. For example, it established a somewhat new regulatory philosophy and a new set of rulemaking principles,[49] and limited OIRA's reviews to "significant" rules, reducing the number of draft proposed and final rules examined by OIRA from between 2,000 and 3,000 per year to between 500 and about 700 rules per year. EO 12866 also established transparency requirements that included but went beyond those that had been put in place by the previously mentioned June 1986 memorandum. For example, Section 6(b)(2) of EO 12866 requires OIRA to either waive review or notify the agency in writing of the results of its review within certain time frames—(1) within 10 working days of submission for any preliminary actions prior to a notice of proposed rulemaking (e.g., a notice of inquiry or an advance notice of proposed rulemaking), or (2) within 90 calendar days of submission for all other regulatory actions (or 45 days if OIRA had previously reviewed the material, and there has been no material change in the facts and circumstances on which the rule

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[46] EO 12866 also revoked EO 12498 on regulatory planning.

[47] The definitions of "major" and "economically significant" rules are similar, and most "economically significant" rules are also considered "major." Some rules may be considered "major" that are not "economically significant" (e.g., rules that would have a significant adverse effect on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets). See p. 5 of OMB guidance on the Congressional Review Act, available at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m99-13.pdf.

[48] The phrase "to the extent permitted by law" is used five times in EO 12866 in the context of required actions by both OIRA and regulatory agencies.

[49] For example, one of the stated objectives of EO 12866 is "to reaffirm the primacy of Federal agencies in the regulatory decision-making process," which was widely viewed as leaving greater control of the rulemaking process with regulatory agencies and taking away authority from OIRA. Also, the requirement that the benefits of a regulation "justify" its costs was a noticeably lower threshold than the requirement in EO 12291 that the benefits "outweigh" the costs.

is based). The executive order also states that the "review process may be extended (1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head."[50]

EO 12866 states that coordinated review of agency rulemaking by OIRA is necessary to ensure that regulations are consistent with the law, other agencies' actions, and "the President's priorities."[51] It also states that OIRA is the "repository of expertise concerning regulatory issues, including . . . the President's regulatory priorities."[52] Therefore, OIRA can be viewed as the President's personal representative in the rulemaking process.[53] Some observers have suggested that advocating the President's priorities may sometimes take precedence over other responsibilities of the office.[54]

1. Subsequent Executive Orders

The Obama Administration has issued two executive orders on rulemaking that supplement, but do not change, the requirements in EO 12866. On January 18, 2011, President Obama issued Executive Order 13563 on "Improving Regulation and Regulatory Review."[55] The executive order is described as "supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in EO 12866 of September 30, 1993." It reiterates many of the principles in the 1993 executive order (e.g., that benefits should "justify" costs, and that agencies should select the regulatory alternative that maximizes net benefits). The primary new element was a requirement that agencies develop a plan for the retrospective review of their existing regulations to determine if any should be modified, streamlined, expanded, or repealed. On July 11, 2011, President Obama issued Executive Order 13579 requesting, but not requiring, independent regulatory agencies to follow the principles in EO 13563, and to develop plans for the review of their existing rules.[56]

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[50] Section 6(b)(2)(C) of EO 12866.

[51] Section 6(b) of EO 12866.

[52] Section 2(b) of EO 12866. In fact, the term "President's priorities" is mentioned 10 times in the executive order.

[53] For example, former OIRA administrator John Graham said, the office's actions "necessarily reflect Presidential priorities." John D. Graham, "Presidential Management of the Regulatory State," speech at the Weidenbaum Center Forum, National Press Club, Washington, DC, December 17, 2001. Similarly, former OIRA administrator Sally Katzen said that "OIRA is part of the Executive Office of the President, and the President is the office's chief client." GAO-03-929, op. cit., p. 40.

[54] For example, former OIRA administrator Susan Dudley wrote in 2011 that when OIRA's role as expert evaluator of agency regulatory proposals conflict with its role as defender of the President's priorities, "the President's preferences will generally prevail." See Susan E. Dudley, "Observations on OIRA's Thirtieth Anniversary," *Administrative Law Review*, volume 63, Special Edition (2011), pp. 113-129, at 116. She also noted that these dual roles are often not in conflict.

[55] Executive Order 13563, "Improving Regulation and Regulatory Review," 76 *Federal Register* 3821, January 21, 2011.

[56] Executive Order 13579, "Regulation and Independent Regulatory Agencies," 76 *Federal Register* 41587, July 14, 2011.

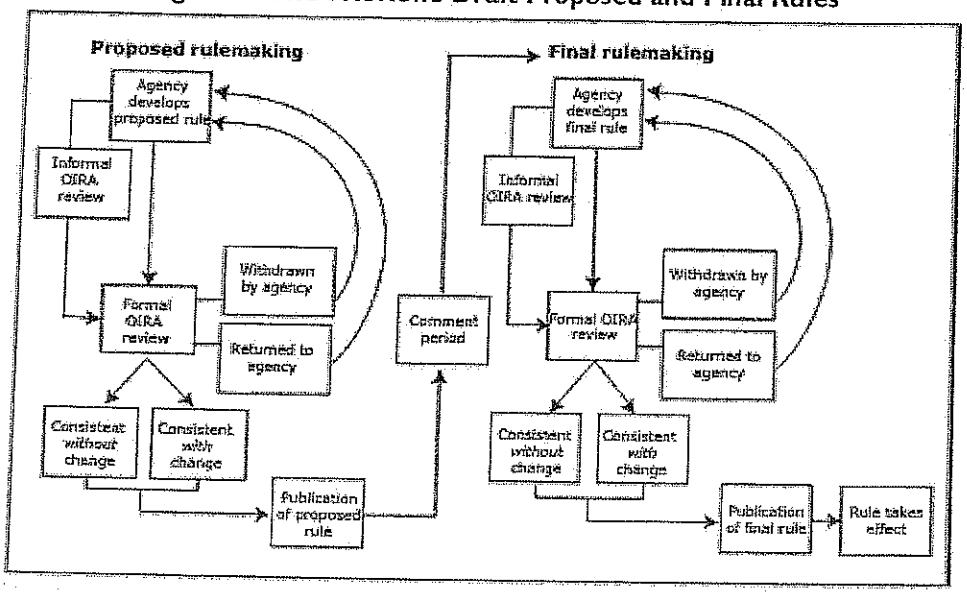
2. OIRA Review Process

The OIRA review process was described in detail in a 2003 GAO report that the author of this report helped prepare,[57] and that then-OIRA administrator John Graham subsequently described as accurate.[58] The review process varies somewhat depending on the nature of the rule (e.g., whether the rule is "economically significant" or contains a collection of information, and the number of other agencies that the rule could affect). Although all significant rules go through the formal review process, some of those rules are also reviewed informally before being formally submitted to OIRA.

a) Formal Reviews

As **Figure 1** below shows, OIRA reviews agencies' draft rules at both the proposed and final stages of rulemaking. In each phase, the review process starts when the rulemaking agency develops the rule and then formally submits a regulatory review package to OIRA through an online submission system. After submission, the review package is forwarded to the appropriate desk officer.

Figure 1: OIRA Reviews Draft Proposed and Final Rules



Source: GAO-03-929, p. 30.

If the draft rule contains a collection of information covered by the PRA, the desk officer would also review it for compliance with that act. If the draft rule is "economically significant" (e.g.,

[57] GAO-03-929.

[58] Ibid., p. 216. In comments on the report, Graham said it provided "an excellent overview of the regulatory review process." He later asked for 40 copies of the report and provided them to OIRA staff.

expected to have an annual impact on the economy of at least $100 million), the executive order requires agencies to prepare an economic analysis describing, among other things, the alternatives that the agency considered and the costs and benefits of those alternatives.[59] For those economically significant rules, OIRA desk officers review the economic analyses applying the principles of OMB Circular A-4, which provides the office's guidance on how to prepare regulatory analyses under the executive order.[60] OIRA may also circulate a draft rule to other parts of the EOP (e.g., the Office of Science and Technology Policy or the Council on Environmental Quality) or other agencies (e.g., DOE or DOT for certain EPA rules). An attachment to a September 2001 memorandum to the President's Management Council described the general principles and procedures that OIRA reportedly uses in the implementation of EO 12866.[61]

There is usually some type of communication during the review process (often via e-mail or telephone) between the OIRA desk officer and the rulemaking agency regarding specific issues in the draft rule. Briefings and meetings are sometimes held between OIRA and the agency during the review process, with OIRA branch chiefs, the deputy administrator, the associate administrator, or the administrator involved in some of these meetings. The OIRA desk officers may also consult with the resource management officers on the budget side of OMB as part of their reviews. If the draft rule is considered economically significant, the desk officer would also consult with an OIRA economist to help review the required economic analysis. For other rules the desk officer might consult with other OIRA staff on issues involving statistics and surveys, information technology and systems, or privacy issues, for example.

At the end of the review period, OIRA either returns the draft rule to the agency for "further consideration" or OIRA concludes that the rule is consistent with the executive order. OIRA codes the rule in its database as "consistent with change" if there had been any changes to the rule, regardless of the source or extent of the change. OIRA codes rules in its database as "consistent without change" only if they are exactly the same at the end of the review period as the original submission. As shown in **Appendix B** of this report, in every calendar year since 2008 (including the first half of 2013), between 70% and 80% of OIRA reviews have been coded "consistent with change," and between 11% and 18% of reviews are coded "consistent without change." In some cases (usually about 5% to 7% of reviews each year), agencies withdraw their rules from OIRA and the rules may or may not be subsequently submitted.

After OIRA concludes its review of a draft proposed rule as "consistent" with the executive order (with or without change), the agency may then publish a notice of proposed rulemaking in the *Federal Register*, obtain comments during the specified comment period, review the comments received, and make any changes to the rule that it believes are necessary to respond to those comments.[62] If the draft is a final rule, the agency may publish the rule and the rule will generally take effect either at that point or at some later date specified by the agency.

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[59] Section 3(f) of the executive order also defines an economically significant rule as adversely affecting "in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities."

[60] For a copy of this guidance, see http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf.

[61] For a copy of this September 2001 memorandum, see http://www.whitehouse.gov/omb/inforeg_oira_review_process/.

[62] Although the Administrative Procedure Act does not establish a minimum time frame for public comments, Section 6(a) of EO 12866 states that this comment period should, in most cases, be at least 60 days for significant rules reviewed by OIRA. ACUS has also recommended a 60-day comment period for significant rules, and at least 30 days for other rules. See ACUS recommendation 2011-2, August 9, 2011, available at http://acus.gov/sites/default/files/documents/Recommendation%202011-2%20%28Rulemaking%20Comments%29.pdf.

The executive order does not permit OIRA to "approve" or "disapprove" a draft rule; rather, OIRA either concludes review with a finding that the rule is "consistent" with the executive order (with or without change), or returns it to the agency for further consideration. Section 7 of EO 12866 states that, to the extent permitted by law, unresolved disagreements between or among agency heads or between OMB and any agency "shall be resolved by the President, or by the Vice President acting at the request of the President, with the relevant agency head (and, as appropriate, other interested government officials."

b) Informal Reviews

Figure 1 also shows that, for some rules, there is an additional phase of "informal review" before the rule is officially submitted to OIRA. In its December 2001 report on the costs and benefits of federal regulations, OIRA stated that the office's original review process "was designed as an end-of-the-pipeline check against poorly conceived regulations."[63] OIRA also said, however, that by the time an agency formally submits a rule to OIRA for review there may be "strong institutional momentum" behind the proposal and, as a result, the agency may be reluctant to address certain issues that OIRA analysts might raise. Therefore, OIRA indicated "there is value in promoting a role for OIRA's analytic perspective earlier in the process, before the agency becomes too entrenched." OIRA went on to state the following:

> A common yet informal practice is for agencies to share preliminary drafts of rules and/or analyses with OIRA desk officers prior to formal decision making at the agency. This practice is useful for agencies since they have the opportunity to educate OIRA desk officers in a more patient way, before the formal 90-day review clock at OMB begins to tick. The practice is also useful for OIRA analysts because they have the opportunity to flag serious problems early enough to facilitate correction before the agency's position is irreversible.

GAO reported that OIRA could not informally review each of the hundreds of significant proposed and final rules that are submitted to the office each year. Informal reviews were said to be most likely when there is a statutory or legal deadline for a rule or when the rule is extremely large and requires discussion with not only OMB but also other federal agencies. OIRA representatives interviewed by GAO indicated that EPA, DOT, and the Departments of Agriculture (USDA) and Health and Human Services (HHS) often issued those types of rules, and therefore were more likely to have certain rules reviewed informally before formal submission.[64]

OIRA has informally reviewed some draft rules since its regulatory review function was established in 1981. Early in the George W. Bush Administration, GAO reported that OIRA had increased its use of informal reviews. For example, in its March 2002 draft report to Congress on the costs and benefits of federal regulation, OIRA said "agencies are beginning to invite OIRA staff into earlier phases of regulatory development in order to prevent returns late in the rulemaking process. It is at these early stages where OIRA's analytic approach can most improve on the quality of regulatory analyses and the substance of rules."[65] Separately, in 2002, the OIRA

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[63] Office of Management and Budget, *Making Sense of Regulation: 2001 Report to Congress on the Cost and Benefits of Regulations and Unfunded Mandates on State, Local and Tribal Entities*, Dec. 2001, available at http://www.whitehouse.gov/omb/inforeg/costbenefitreport.pdf.

[64] GAO-03-929, op. cit., p. 36.

[65] Office of Management and Budget, "Draft Report to Congress on the Costs and Benefits of Federal Regulations," 67 *Federal Register* 15018, March 28, 2002, available at

administrator said "an increasing number of agencies are becoming more receptive to early discussions with OMB, at least on highly significant rulemakings."[66]

The OIRA administrator also indicated that agencies' "receptivity" to informal reviews could be enhanced by the possibility of a returned rule. For example, in 2002 he said that OIRA was trying "to create an incentive for agencies to come to us when they know they have something that in the final analysis is going to be something we're going to be looking at carefully. And I think that agencies that wait until the last minute and then come to us—well, in a sense, they're rolling the dice."[67]

3. Return Letters

For each regulatory action returned to the agency for reconsideration, Section 6(b)(3) of EO 12866 requires the OIRA administrator to "provide the issuing agency a written explanation for such return, setting forth the pertinent provision of this Executive order on which OIRA is relying. If the agency head disagrees with some or all of the bases for the return, the agency head shall so inform the Administrator of OIRA in writing." The September 2001 memorandum to the President's Management Council states that "a return does not necessarily imply that either OIRA or OMB is opposed to the draft rule. Rather, the return letter will explain why OIRA believes that the rulemaking would benefit from further consideration by the agency."[68]

According to OIRA's public database,[69] of the more than 4,000 significant rules that OIRA reviewed from 1994 through 2000, OIRA returned only seven rules to the agencies—three in 1995 and four in 1997. OIRA administrators during that period told GAO in 2003 that they viewed the use of return letters as evidence of the failure of the collaborative review process, since OIRA and the agencies were part of the same presidential administration.[70]

In contrast, during 2001 and 2002, OIRA returned a total of 23 rules to the agencies, with the letters commonly indicating that OIRA did so because of concerns about the agencies' analyses (e.g., whether the agencies had considered all reasonable alternatives or had selected the alternative that would yield the greatest net benefits).[71] Some of these return letters appear to have also been precipitated by concerns about adherence to the 90-day limit on OIRA reviews. For example, in a September 14, 2001, return letter to DOT, the OIRA administrator said "(s)ince the resolution of the concerns will take some additional time, I am returning the two rules to the Department for your reconsideration."[72] The return letters for these and other rules were sent to the agencies shortly after the applicable 90-day OIRA review periods had ended.

After 2002, however, the number of returned rules dropped considerably. Two rules were returned in 2003, and a total of two rules were returned between 2004 and 2006. OIRA officials attributed the decline in return letters to the improved quality of agencies' regulatory submissions after the

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http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/cbreport.pdf.

[66] Dr. John D. Graham, remarks prepared for the American Hospital Association, July 17, 2002. For a copy of this speech, see http://www.whitehouse.gov/omb/inforeg/graham_ama071702.html.

[67] Rebecca Adams, "Regulating the Rulemakers: John Graham at OIRA," *CQ Weekly*, Feb. 23, 2002, pp. 520-526.

[68] See http://www.whitehouse.gov/omb/inforeg_oira_review_process/.

[69] See http://www.reginfo.gov/public/do/eoCountsSearch.

[70] GAO-03-929, pp. 42-43.

[71] To view copies of OIRA's return letters since 2001, see http://www.reginfo.gov/public/do/eoReturnLetters.

[72] See http://www.reginfo.gov/public/return/boeing737_return_letter.html.

initial flurry of returns. As **Appendix C** of this report indicates, OIRA issued a total of nine return letters involving 13 rules from January 2003 through June 2013, the most recent being in 2011. Two of the return letters during this period (one in June 2003 and the other in February 2004) involved the same DOT rule. In four of the nine return letters for this period (involving six of the rules), OIRA indicated that the rules were being returned to permit the agency additional time for analysis. For example, in the January 6, 2009, return letter for three Small Business Administration (SBA) rules, OIRA said the agency had proposed to undertake further analysis, and the rules were being returned "to provide the time needed to conduct that analysis."[73] All three rules had been under review at OIRA for slightly more than 90 days.

OIRA has also issued "review" letters to agencies at various stages of the rulemaking process, and may be issued at the administrator's discretion. According to OIRA, a review letter following the issuance of a proposed rule "may urge the agency to perform additional regulatory analysis or consider other alternatives prior to finalizing the rule," and a letter following the issuance of a final rule "may offer implementation advice or explain OMB's dispute resolution process."[74]

4. Extensions of Reviews

As noted earlier in this report, Section 6(b)(2)(C) of EO 12866 states that the formal review process "may be extended (1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head." Given the wording of this provision, it is ambiguous as to how it should be interpreted – i.e., whether both the OMB Director and the agency head would have to agree on an extension, and (if agency requests for extension may be made without the involvement of OMB) whether agency-requested extensions are limited to 30 days.

OIRA considers the two extension provisions in the executive order to be unrelated, with *either* the OMB Director or the agency head able to request extensions, and *only* extensions initiated by the OMB Director subject to the 30-day limit. According to a "Frequently Asked Questions" page on the OIRA website:

> The period for OIRA review is limited by Executive Order 12866 to 90 days. There is no minimum period for review. Under the Executive Order, the review period may be extended indefinitely by the head of the rulemaking agency; alternatively, the OMB Director may extend the review period on a one-time basis for no more than 30 days.[75]

OMB has indicated since shortly after EO 12866 was issued that the two extension options are separate. For example, in its May 1994 report on the implementation of the executive order during its first six months, OMB said "The Order allows the review period to be extended upon written approval of the Director of OMB *or* at the request of the agency head."[76] (Emphasis added.) Former OIRA officials have also evidenced this interpretation of the extension provisions in public statements. For example, in a 2013 article on OIRA "myths and realities," former OIRA administrator Cass Sunstein said that when agencies and OIRA do not agree on how to proceed

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[73] See http://www.reginfo.gov/public/return/20090106131254697.pdf.

[74] This description may be found at http://www.reginfo.gov/public/jsp/EO/letters.jsp. See http://www.reginfo.gov/public/jsp/EO/postReviewLetters.jsp for copies of these review letters.

[75] See http://www.reginfo.gov/public/jsp/Utilities/faq.jsp.

[76] Office of Management and Budget, "Report on Executive Order 12866, Regulatory Planning and Review," 59 *Federal Register* 24276, May 10, 1994, at 24282.

during the 90-day review period, "agencies generally request extensions, which can be quite lengthy."[77] He also said the extension provision in the executive order

> might be taken to be ambiguous because of the use of the word "and" rather than "or," suggesting the possibility that both conditions must be met; but it has long been understood that the agency head may request an extension of any length, including an indefinite one.[78]

Other observers have viewed the two provisions in EO 12866 as related, with both OMB and the agency head having to agree to an extension, and with the total review time limited to 120 days. For example, during the June 2013 confirmation hearing for then-OIRA nominee Howard Shelanski, Senator Levin said "OIRA has 90 days to review a draft proposed or final rule. There is one 30-day extension that is available."[79] Also, in a forthcoming article for the *Pace Environmental Law Review*, Lisa Heinzerling of Georgetown University Law School, who worked at EPA for two years from 2009 through 2010, noted that the extension provision in EO 12866 "seems, with its use of the word 'and' rather than 'or,' to contemplate a process whereby both the OMB Director and the agency head would need to agree on an extension."[80] She also said the provision "seems to contemplate one 30-day extension if the OMB Director and the agency head agree to it."[81]

Sally Katzen, OIRA administrator during most of the Clinton Administration and one of the authors of EO 12866, told the author of this report that the extension provision in the executive order was not particularly well drafted, but was intended to be read to allow for unlimited agency-requested extensions. However, she said that when she was OIRA administrator, she required desk officers to put rules with agency-requested extensions on "the top of their pile," and told them that such rules should get the "highest priority" once the agency responds to OIRA comments. She said her office was diligent in expediting review in such cases, and OIRA did not take advantage of the unlimited nature of the review extensions.

OIRA's interpretation of the extension provision has an effect on other responsibilities described in the executive order. As noted previously, Section 8 of EO 12866 prohibits an agency from publishing a reviewed rule, except to the extent required by law, until OIRA has waived review or has completed its review without any requests for further considerations, or until "the applicable time period in section 6(b)(2) expires without OIRA having notified the agency that it is returning the regulatory action for further consideration." If the "applicable time period" for an agency-requested extension is "unlimited," then the prohibition on an agency publishing its rule is also unlimited.

Also, if OMB-requested extensions are limited to 30 days, but agency-requested extensions are of unlimited duration, it is to OIRA's advantage if the agency makes the request. Previous reports

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[77] See Cass R. Sunstein, "Commentary: The Office of Information and Regulatory Affairs: Myths and Realities," *Harvard Law Review*, volume 126 (2013), pp. 1838- 1878, at p, 1848. Hereafter referred to as "Sunstein."

[78] Ibid., p. 10, note 37.

[79] See http://www.hsgac.senate.gov/hearings/nomination-of-howard-a-shelanski to view this hearing. Senator Levin's comments are at 51:45 of this hearing. Also, in a November 2011 report, the Center for Progressive Reform stated that EO 12866 limited OIRA reviews to 90 days, but allowed for a "one-time extension of 30 days (with the approval of OIRA's director *and* at the request of the agency head)." (Emphasis in the original.) See Rena Steinzor, Michael Patoka, and James Goodwin, Center for Progressive Reform, *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment*, White Paper #1111, November 2011, hereafter "CPR report," available at http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf.

[80] Lisa Heinzerling, "Inside EPA: A Former Insider's Reflections on the Relationship between the Obama EPA and the Obama White House" *Pace Environmental Law Review*, forthcoming, draft as of June 12, 2013, p. 5, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2262337.

[81] Ibid., p. 27. Heinzerling notes, however, "This is not the way the OIRA process works now."

suggest that at least some agency requests for extensions may actually originate with OIRA, not with the agency submitting the request. For example, GAO said in its 2003 report that OIRA sometimes asked agencies to request extensions (citing agency officials and a former OIRA administrator).[82] More recently, Lisa Heinzerling stated that, based on her experience at EPA in 2009 and 2010:

> [T]he way that agency heads come to request extended review...is that OIRA calls an official at the agency and *asks the agency to ask for an extension.* [Emphasis in original.] It is clear, in such a phone call, that the agency is not to decline to ask for such an extension. Thus, not only is there no deadline for OIRA review, but OIRA itself controls the agency's "requests" for extensions. In this way, it comes to pass that rules can remain at OIRA for years.[83]

Regardless of how this part of EO 12866 is interpreted, and even if no review extensions are requested, there are no clear consequences in the executive order if OIRA fails to meet the deadlines for review. Section 6(b)(2) of the executive order states "OIRA shall waive review or notify the agency in writing of the results" within the specified review periods, but does not indicate what would happen if OIRA did not take those actions. Also, EO 12866 states that it "is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person."[84]

IV. Timeliness of OIRA Regulatory Reviews

The timeliness of at least some of OIRA's regulatory reviews has been a concern virtually since the office began those reviews under EO 12291 in early 1981. This section of the report describes some of those concerns, and provides data regarding the length of reviews under both EO 12291 and EO 12866.

A. EO 12291 Reviews

As noted earlier in this report, under EO12291, covered agencies submitted virtually all of their regulatory actions for review. OIRA was generally expected to complete its reviews of major proposed rules within 60 days, and major final rules within 30 days (unless the final rule was being issued without a notice of proposed rulemaking). Non-major proposed and final rules were to be reviewed within 10 days. However, any review could be extended indefinitely if OIRA indicated to the agencies that it had concerns about a rule. In a June 1981 hearing on "The Role of OMB in Regulation," then-OIRA administrator James Miller, III, testified that of the initial 881 rules submitted to OIRA under EO 12291, the average review period was nine days, and reviews were extended in only 4% of the rules, which he said "reflects the admonitions of the Vice

[82] GAO-03-929, p. 45.

[83] Lisa Heinzerling, "Inside EPA," op cit.

[84] Section 10 of EO 12866.

President and the Director that we respond expeditiously to agency submissions and not create 'another layer of bureaucracy and red tape.'"[85]

Table 1 below shows the length of OIRA reviews starting in 1981 and ending in 1992 (the last full year of EO 12291). The data indicate that, on average, OIRA reviewed major rules within 60 days in most years, but generally did not complete review of non-major rules within an average of 10 days. Average review times for non-major rules were often much less than for major rules. Nevertheless, for certain rules, the OIRA reviews extended far beyond the limits in the executive order, and these lengthy review times were of such concern that in May 1986, Senator Carl Levin and Senator David Durenberger proposed limiting the length of OIRA's reviews to 30 days. OIRA administrator Miller objected to this proposal, saying "In many situations, issues raised by a regulatory proposal are sufficiently complex that no serious review could be conducted in a 30-day or even a 60-day period."[86]

Table 1: Average Length of OIRA Reviews Under EO 12291

Calendar Year	Major Rules		Non-Major Rules		All Rules	
	Number of Rules	*Average Days in Review*	*Number of Rules*	*Average Days in Review*	*Number of Rules*	*Average Days in Review*
1981	60	12	2,732	9	2,792	9
1982	79	28	2,558	12	2,637	12
1983	63	28	2,420	15	2,483	16
1984	60	31	2,052	22	2,112	22
1985	59	65	2,154	27	2,213	28
1986	74	30	1,936	24	2,010	24
1987	70	44	2,245	25	2,315	25
1988	82	51	2,277	32	2,359	32
1989	79	64	2,141	28	2,220	29
1990	82	57	2,055	27	2,137	28
1991	142	39	2,381	29	2,523	29
1992	121	44	2,164	39	2,285	39

Source: OIRA database, available at www.reginfo.gov.

Note: The data include primarily draft proposed and final rules, but also include some notices and guidance documents. For ease of description, the term "rule" is used in this and other tables.

[85] Testimony of James C. Miller, III, OIRA Administrator, before the Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, "The Role of OMB in Regulation," June 18, 1981, Serial no. 97-70, p. 49.

[86] Judith Havemann, "Lawmakers Want to Dethrone OMB Rule Reviewers," *Washington Post*, May 22, 1986, p. A17.

B. EO 12866 Reviews

The initial 90-day review time limit established by EO 12866 in 1993 is longer than the average review times that the agencies experienced under EO 12291, but was intended to curb certain long reviews that agencies were experiencing for certain rules.[87] In a May 1994 report on the initial implementation of EO 12866, OMB said that the executive order "establishes strict time limits on OIRA review in most cases" and that the office had "made a concerted effort to meet not only the letter of this requirement, but its spirit as well."[88] Of the 578 rules that were received and reviewed by OIRA in the first six months under EO 12866, OMB reported that only three reviews were extended beyond the 90-day limit, each was extended at the request of the agency, and the reviews were all completed within three weeks after the extension was requested.

However, within a few years, the timeliness of OIRA reviews again became an issue. In September 1997, then-OIRA administrator Sally Katzen testified that "when two or more agencies are at loggerheads over a regulatory issue, it may well take more than 90, or even 120, days to obtain needed data and analyses, to conduct the appropriate evaluation, and to arrange for the policy officials in the interested agencies to come to agreement."[89] For that and other reasons she opposed draft legislation that would have imposed a statutory time limit on OIRA reviews. John Spotilla, OIRA administrator at the end of the Clinton Administration, also told GAO in 2003 that he considered it more important to "get the rule right" rather than rigidly adhere to a 90-day time limitation.

During each of the calendar years 1999, 2000, and 2001, more than 100 OIRA reviews exceeded the 90-day review limit (115, 159, and 149 reviews, respectively).[90] An OIRA representative told GAO in 2003 that virtually all of the extensions of the review periods in each of these years were done at the request of the agency issuing the rule. However, as noted earlier in this report, employees from one agency and a former OIRA administrator told GAO that OIRA sometimes asked agencies to request review extensions.

During calendar year 2002, however, only nine OIRA reviews lasted longer than 90 days – a dramatic decline in the number of extended reviews that is directly traceable to a change in policy by the then-new OIRA administrator John Graham. In July 2002, Graham said "agencies have sometimes been forced to wait 6 months, a year, or even longer to get an answer from OMB. We have changed that practice. I have instructed my staff that no rule will stay longer than 90 days at OMB without my personal authorization."[91] He went on to say, "We believe that since agency staff often toil for years in development of a regulatory proposal, they and the public deserve a rigorous yet prompt review from OMB." According to OIRA's December 2002 report on the costs and benefits of regulations, the office regarded the 90-day review limit as "a performance indicator for a strong regulatory gatekeeper."[92] OIRA representatives confirmed to GAO in 2003

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[87] OMB stated in its first report on the implementation of EO 12866 that the review deadlines were put in place "to eliminate unwarranted delays in the regulatory review process." See Office of Management and Budget, "Report on Executive Order 12866, Regulatory Planning and Review," 59 *Federal Register* 24276, May 10, 1994, at 24282.

[88] Office of Management and Budget, "Report on Executive Order 12866, Regulatory Planning and Review," 59 *Federal Register* 24276, May 10, 1994, at p. 24277.

[89] Cited in GAO-03-929, p. 46.

[90] Ibid, p. 45.

[91] John D. Graham, "Stimulating Smarter Regulation: OMB's Role," Remarks prepared for the American Hospital Association, July 17, 2002, available at http://georgewbush-whitehouse.archives.gov/omb/inforeg/graham_ama071702.html.

[92] Office of Management and Budget, *Stimulating Smarter Regulation*, p. 19, available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2002_report_to_congress.pdf.

that close adherence to the 90-day "clock" was a new practice and said that OIRA management tracked all rules that have been under formal review for more than 60 days. They also said that a benefit of stricter adherence to the 90- day review limit was that it forced officials to make decisions sooner, thereby moving the review along more quickly.[93]

Officials from several rulemaking agencies told GAO in 2003 that OIRA staff seemed much more focused on the 90-day review clock than during the previous administration. Officials in other agencies also told GAO that rules were sometimes returned or withdrawn at OIRA's request when time was running out on the 90-day clock and more time was needed to resolve issues "off the clock" or during a separate 90-day period. However, representatives of OIRA told GAO that they did not request that agencies withdraw rules, and emphasized that it was the agencies—not OIRA—that ultimately made withdrawal decisions. They also said agencies sometimes withdrew rules from OIRA as a negotiating strategy.[94]

C. The Length of OIRA Regulatory Reviews (1994 – 2013)

There are at least three ways to depict the timeliness of OIRA reviews – by showing (1) the average number of days it takes for OIRA to complete its reviews of agencies' rules (both overall and by agency within particular years), (2) the number and percentage of completed OIRA reviews each year that exceed certain time frames (e.g., 90 days or one year), and (3) how long ongoing reviews have lasted. Each approach has certain advantages and disadvantages. The following sections discuss each of those metrics.

1. Average Review Times

The average amount of time it takes OIRA to review significant rules overall or within a particular agency provides a convenient way to compare OIRA's performance over time and across agencies within a particular year. Both OIRA and others have used average review times for decades to gauge the office's performance.[95] However, such averages can also conceal large differences in the review periods for individual rules. For example, if an agency sends 10 rules to OIRA for review in a particular year, and OIRA completes review of eight of them in 10 days, but takes 200 days to review the other two, the average review time for all 10 rules is 48 days. Also, average review times only include completed reviews; they do not include reviews that are continuing at the end of the year or other time period. Finally, because average review times are recorded only when reviews are completed, lengthy reviews recorded in one year may have primarily occurred during a previous year.

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[93] GAO-03-929, p. 47.

[94] Ibid.

[95] For example, as noted earlier in this report, then-OIRA administrator James Miller, III, testified in June 1981 about the relatively short average length of reviews. See Testimony of James C. Miller, III, OIRA Administrator, before the Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, "The Role of OMB in Regulation," June 18, 1981, Serial no. 97-70, p. 49. Also, in its first report on the implementation of EO 12866, OIRA reported average review times overall and for particular agencies. See Office of Management and Budget, "Report on Executive Order 12866, Regulatory Planning and Review," 59 *Federal Register* 24276, May 10, 1994, at 24287.

Table 2 below shows, for each year from calendar year 1994 (the first full year under EO 12866) through the first half of calendar year 2013, the average number of days it took OIRA to complete review for (1) economically significant rules (e.g., those expected to have a $100 million annual effect on the economy), (2) other types of significant rules, and (3) all significant rules. The data indicate that the average review time for all significant rules varied somewhat from 1994 through 2011, but never exceeded 62 days. Then, in 2012, the average length of completed OIRA reviews increased to 79 days, and then jumped to 140 days during the first half of 2013 – nearly three times the average review time for the 18-year period from 1994 through 2011 (50 days). The data also show that overall, and in 2012 and 2013 in particular, economically significant rules generally took *less* time for OIRA to review on average than non-economically significant rules.[96] Nevertheless, during the first half of 2013, the average amount of time it took OIRA to complete review of both types of rules exceeded 90 days.

Table 2: Average EO 12866 Review Times Rose Sharply in 2012 and 2013

Calendar Year	Economically Significant Rules		Other Significant Rules		All Significant Rules	
	Number of Reviews	*Average Days in Review*	*Number of Reviews*	*Average Days in Review*	*Number of Reviews*	*Average Days in Review*
1994	134	33	697	30	831	31
1995	74	41	546	35	620	35
1996	74	39	433	42	507	42
1997	81	47	424	54	505	53
1998	73	33	414	50	487	48
1999	86	51	501	53	587	53
2000	92	60	490	62	582	62
2001	111	46	589	60	700	58
2002	100	44	569	46	669	46
2003	101	42	614	50	715	49
2004	85	35	541	55	626	53
2005	82	39	529	59	611	57
2006	71	34	529	59	600	56
2007	85	49	504	64	589	61
2008	135	53	538	63	673	61
2009	125	33	470	40	595	39
2010	138	48	552	51	690	51
2011	117	51	623	60	740	58

[96] There are a variety of possible reasons why this could be the case. For example, economically significant rules may be more likely to have statutory or judicial deadlines, and therefore may be more likely to be informally reviewed prior to formal submission. According to former OIRA Administrator Susan Dudley, desk officers may perform a type of "triage" in which non-economically significant rules may be set aside while they focus on the larger, more important rules first.

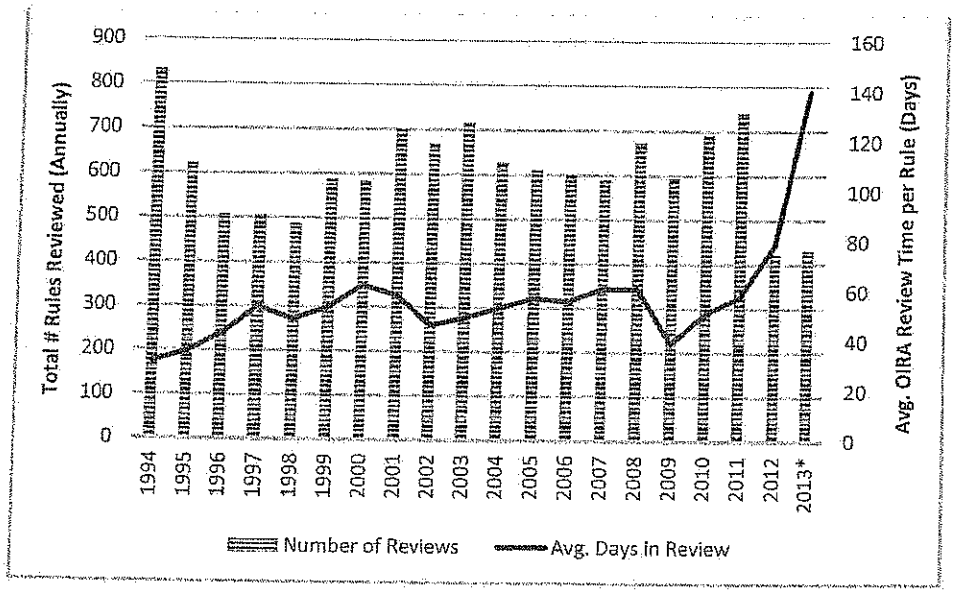
2012	*83*	*69*	*341*	*81*	*424*	*79*
*2013**	*50*	*93*	*162*	*154*	*212*	*140*

Source: OIRA database, available at www.reginfo.gov.

Note: The data include primarily draft proposed and final rules, but also include some notices and guidance documents. For ease of description, the term "rule" is used in this and other tables. 2013 data are as of June 30, 2013.

Note also that the number of completed reviews dropped significantly between 2011 and 2012 (from 740 reviews in 2011 to 424 reviews in 2012, a more than 40% decline).[97] As **Table 2** and **Figure 2** below indicate, the 424 reviews completed during 2012 were fewer than any year since EO 12866 was issued in 1993, and 33% lower than the average of the previous 18 years (629 reviews per year). The pace of completed reviews during the first half of 2013 (212 reviews in 6 months), if continued for the rest of the year, would produce about the same number of reviews in 2013 as in 2012 (424 reviews).

Figure 2: Average OIRA Review Time Has Increased Recently While Number of Completed Reviews Has Declined



Source: OIRA database, available at www.reginfo.gov. The data on average review time for 2013 are as of June 30, and the number of reviews for the full year were projected from the rate in the first half of the year.

[97] As detailed in **Appendix D** of this report, the number of final rules issued in 2012 was also a record low, and the pace of rulemaking in the first half of 2013 was even lower.

a) Average Review Times by Agency

Focusing only on calendar years 2011, 2012, and 2013, the data in **Table 3** below indicate that the average review times varied substantially by agency within each year, and by year within individual agencies. The average review times for certain agencies (USDA, DOE, DOL, DOT, the Department of Housing and Urban Development (HUD), and EPA) substantially exceeded the average review time for all agencies in at least two of the three years.[98] For other agencies (the Departments of Commerce (DOC), Defense (DOD), Education, and Homeland Security (DHS), and the Federal Acquisition Regulation (FAR)), their average review times were substantially less than the average for all agencies in at least two of the three years.[99] Overall, though, the number of agencies with average review times greater than 90 days rose from two agencies in 2011, to seven agencies in 2012, to 17 agencies in the first half of 2013. Every agency experienced an increase in OIRA review time between 2011 and 2013, and in some cases the increases were substantial. For example, average review times for draft rules from the Department of State went from 55 days in 2011 to 281 days during the first half of 2013. In some cases, the increases appeared to be driven by long reviews of a small number of rules. For example, the average review time for rules from the Department of Justice (DOJ) went from 45 days in 2011 to 239 days in the first half of 2013, but OIRA completed review of only two DOJ rules in the first half of 2013, and a single long review of more than 400 days affected the average.

Table 3: Average EO 12866 Review Times Varied by Department/Agency

Department/ Agency	Calendar Year 2011		Calendar Year 2012		Calendar Year 2013 (through 6/30)	
	Number of Reviews	Average Days in Review	Number of Reviews	Average Days in Review	Number of Reviews	Average Days in Review
USDA	52	75	30	112	14	146
DOC	32	33	33	53	16	147
DOD	53	42	19	55	7	99
Education	16	37	13	42	7	52
DOE	15	100	7	131	4	247
HHS	127	54	81	55	44	106
DHS	23	42	21	80	12	47
HUD	23	65	8	136	7	224
DOI	13	37	17	67	9	136
DOJ	25	45	12	77	2	239
DOL	32	106	10	110	13	117

[98] Review times were considered to be substantially higher if they were more than 25% higher than the average of all agencies that year. Therefore, review times were considered substantially higher if they were above 72.5 days in 2011, 99 days in 2012, and 175 days in 2013.

[99] Review times were considered to be substantially lower if they were more than 25% lower than the average of all agencies that year. Therefore, review times were considered substantially lower if they were below 43.5 days in 2011, 59 days in 2012, and 105 days in 2013.

State	27	55	17	85	11	281
DOT	39	73	21	131	10	144
Treasury	22	52	13	52	2	298
VA	13	56	7	79	2	215
EPA	97	73	53	104	24	181
FAR	39	36	11	32	5	123
NASA	5	60	5	38	0	-
OPM	24	55	14	65	7	86
SBA	19	48	16	105	4	104
SSA	17	60	8	63	8	110
Other agencies	27	50	8	126	4	171
Total	740	58	424	79	212	140

Source: OIRA database, available at www.reginfo.gov.

Note: Table includes all departments and agencies with at least five OIRA reviews in any year. "Other agencies" include the Agency for International Development, the Equal Employment Opportunity Commission, the General Services Administration, the Office of Government Ethics, and the Pension Benefit Guarantee Corporation. Acronyms not previously introduce are DOI (the Department of the Interior), VA (the Department of Veterans Affairs), NASA (the National Aeronautics and Space Administration), OPM (the Office of Personnel Management), and SSA (the Social Security Administration).

b) Longest Reviews Completed During First Half of 2013

Appendix E of this report lists the 27 longest reviews completed by OIRA during the first half of calendar year 2013 (all of which took at least one year), with information on the department and/or agency issuing the rule, its title and Regulation Identifier Number (RIN),[100] the date the rule was received by OIRA, the date review was completed, and the number of calendar days the rule had been under review. Most of these reviews were concluded because OIRA considered the rule "consistent with change" (meaning that some part of the rule changed while it was under review at OIRA), but eight rules were listed as "withdrawn" by the agencies (the Food and Drug Administration (FDA) rule on "Premarket Approval for Two Class III Preamendment Devices," the National Highway Traffic Safety Administration (NHTSA) rule on "Rearview Mirrors," and six rules submitted by the Departments of Commerce and State regarding the U.S. Munitions List).

The table also indicates that the 140-day average review time during the first half of 2013 included a number of reviews that took much more than 140 days, and some took nearly two years to complete. Even individual agency averages include rules well above those averages. For

[100] The RIN is a unique eight-digit code assigned by the Regulatory Information Service Center (RISC), and allows the public to track a regulatory action throughout its life cycle. In April 2010, OIRA administrator Cass Sunstein issued a memorandum to the President's Management Council stating that agencies should use the RIN on all relevant documents throughout the "lifecycle" of a rulemaking. For a copy of that memorandum, see http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/IncreasingOpenness_04072010.pdf. RISC compiles the Unified Agenda for OIRA, and provides information about federal regulatory activity to the President, other parts of the EOP, Congress, agency managers, and the pubic.

example, the State Department had the highest average review time during the first half of 2013 (281 days, more than any agency with 10 or more completed reviews), but that average included four rules with review times of nearly 500 days.

2. Completed Reviews Exceeding 90 Days/Six Months/One Year

Table 4 below shows, for calendar years 1994 through the first half of 2013, the number of completed OIRA reviews in each year that lasted more than 90 days but less than six months, more than six months but less than one year, and more than one year. Providing the data on review times this way avoids the problem with "average" times (extremely high review times may be balanced out by extremely low ones), but still allows comparisons of OIRA's performance across time. However, because the data are recorded only when reviews end, lengthy reviews that are completed in one year may have actually begun during a previous year. In some cases, the significant majority of time under review was during a previous year.

The data in **Table 4** indicate that 27 reviews were completed during the first six months of 2013 that lasted more than a year – more than three times the highest previous full year (2008, in which there were eight reviews that lasted more than a year). If the same number of reviews lasting more than one year is completed during the second half of 2013, the projected number for the full year (54 reviews) would be more than twice the cumulative number for the 18-year period from 1994 through 2011 (25 reviews).

Table 4: Record Numbers of Completed OIRA Reviews Took More Than Six Months in 2012 and First Half of 2013

Year	Number of OIRA Reviews Completed in			Total Number of Reviews
	91 Days to Six Months	Six Months to One Year	More Than One Year	
1994	20	2	0	831
1995	40	1	0	620
1996	55	6	0	507
1997	87	12	0	505
1998	78	7	0	487
1999	100	12	3	587
2000	133	21	5	582
2001	120	28	1	700
2002	9	0	0	669
2003	10	1	0	715
2004	34	2	0	626
2005	25	12	0	611
2006	43	8	2	600
2007	56	8	2	589

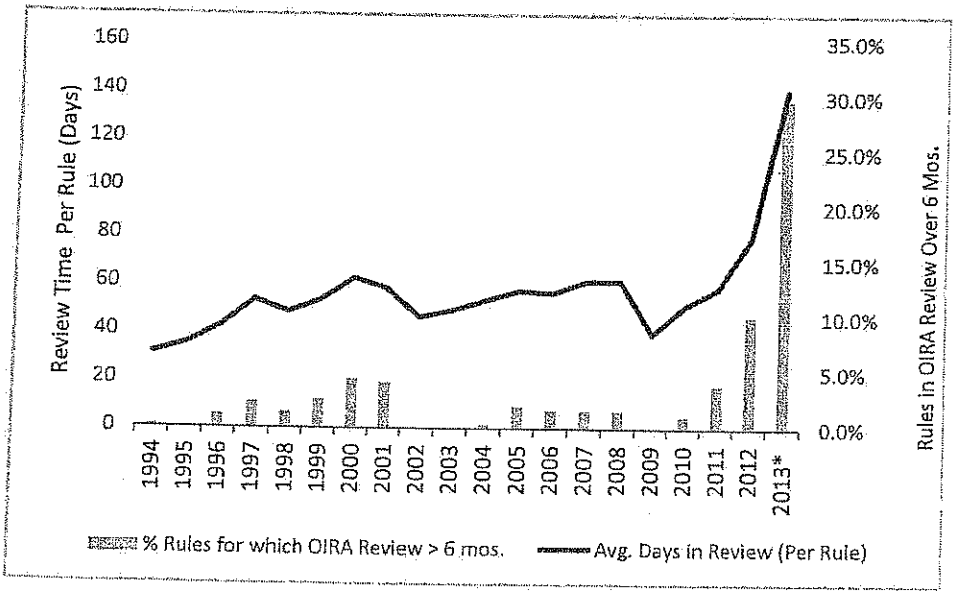
2008	50	3	8	673
2009	27	0	0	595
2010	60	8	0	690
2011	87	25	4	740
2012	**90**	**39**	**4**	***424***
2013*	**30**	**36**	**27**	***212***

Source: OIRA database, available at www.reginfo.gov.

Note: The data for 2013 are as of June 30, 2013.

Also, the 36 completed reviews during the first half of 2013 that lasted between six months and a year were exceeded only by the 39 such reviews completed in all of 2012. Taken together, the 63 reviews completed during the first half of 2013 that lasted more than six months (36 from six months to a year, plus 27 that took more than one year) represented 29.7% of the 212 reviews completed during that period. In comparison, during the 18-year period from 1994 through 2011, an average of 1.6% of reviews exceeded six months (181 of 11,327 reviews). Therefore, the rate of reviews lasting more than six months for the first half of 2013 was more than 18 times greater than the rate during the period from 1994 through 2011. **Figure 3** below illustrates this issue.

Figure 3: Both Average Review Time and Percentage of Completed Reviews Lasting More Than Six Months Have Increased

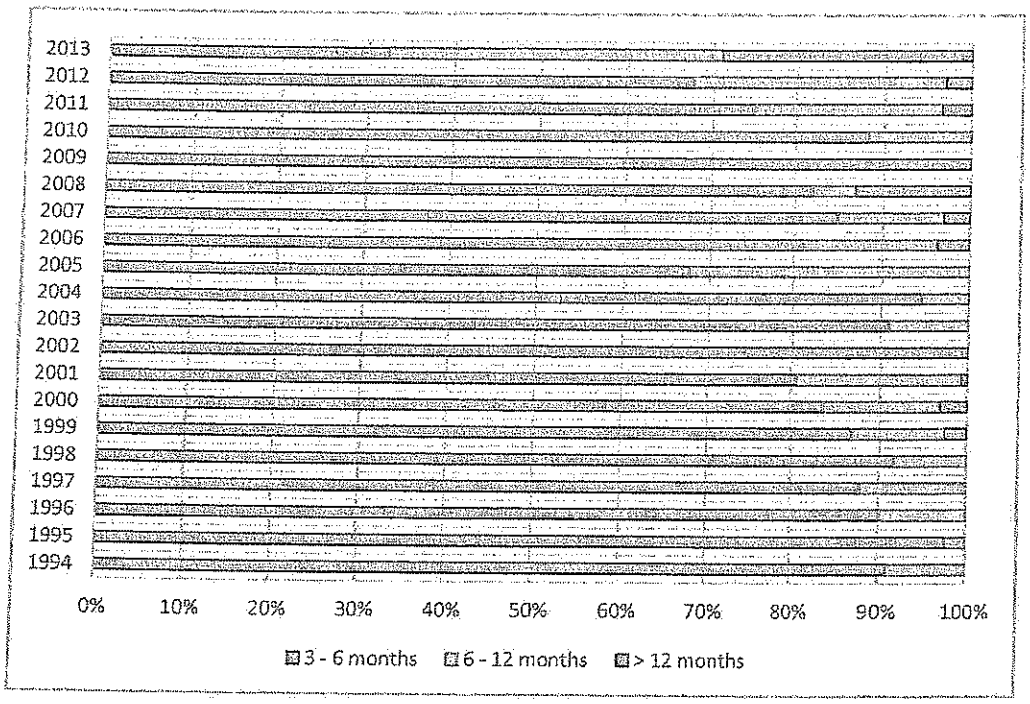


Source: OIRA database, available at www.reginfo.gov. Data for 2013 are as of June 30, 2013.

As **Table 4** illustrates, in every year there were OIRA reviews that took more than 90 days (although the number of such extended reviews varied substantially). **Figure 4** below shows the difference in the composition of those extended reviews. In some years (e.g., 1994 through 1996, 2002 through 2004, and 2009), 90% or more of the extended reviews took less than six months to

complete. Until 2012, there was only one year in which more than 30% of the extended reviews took more than six months (and then, all of the reviews were completed within one year). However, in 2012, more than 30% of the extended reviews took more than six months, and some of those reviews took more than a year. In the first half of 2013, nearly 70% of the extended reviews took more than six months, and nearly 30% took more than a year.

Figure 4: Extended Reviews in 2013 Included More Reviews Over Six Months



Source: OIRA database, available at www.reginfo.gov. Data for 2013 are as of June 30, 2013.

3. Ongoing OIRA Reviews Exceeding One Year

All of the data in the previous sections of this report were for regulatory actions that had *completed* the OIRA review process; the data did not include any actions for which review was *continuing* as of the end of the applicable time periods. The amount of time continuing reviews have been at OIRA may be a good indication of the future for other measures of OIRA timeliness. For example, although the average review time for reviews completed during the first half of 2013 was a record 140 days, if a large number of rules with even longer review times were still under review and if those reviews are completed by the end of the year, the average review times for all of 2013 could go even higher. (The completion of those reviews would, of course, be a positive development, even though they are likely to result in an increase in the average length of completed reviews.)

As of June 30, 2013, a total of 141 rules were under review at OIRA, of which 74 (52%) had been under review for more than 90 days. Thirty-eight of those 74 rules had been under review at

OIRA for more than a year, including 23 since at least 2011 and three since 2010. (See **Appendix F** of this report for a list of the 38 rules by agency, along with their RINS, date received by OIRA, and number of days under OIRA review as of June 30, 2013.) The 38 rules under review for more than a year included:

- 12 rules from EPA, including two since 2010 and six since 2011;
- eight rules from DOE, including five since 2011;
- six rules from DOL, including five since 2011;
- four rules from DOI;
- two rules from DOT, including one since 2010 and one since 2011; and
- two rules from HHS, both since 2011.

Four other departments and agencies (USDA, State, VA, and AID) each had one rule under review at OIRA for more than a year. Two rules (one from EPA and one from DOT) had been under review for 1,000 days or more. The rules under review for more than a year as of June 30, 2013, covered a variety of topics, and included (1) six DOE energy efficiency or conservation standards, (2) three DOL/OSHA rules on occupational exposure to silica, electrical protective equipment, and reporting occupational injuries and illnesses; (3) DOT rules on the transportation of lithium batteries and flight crewmember mentoring; and (4) EPA rules on metal mining reporting requirements, a "chemicals of concern" list, and clean water protection guidance.

Some observers assert that by delaying these and other rules, OIRA has also delayed the benefits that the rules were intended to provide.[101] In September 2013 testimony before the House Judiciary Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law, OIRA administrator Howard Shelanski said that while ensuring the quality of analysis required in relevant executive orders is the first priority of OIRA review, "unnecessary delays in review are harmful to everyone: to those who are denied the benefits of regulation, to those wishing to comment on proposed rules and influence policy, and to those who must plan for any changes the regulations require of them."[102]

D. Recent Improvements in Timeliness of OIRA Reviews

There are clear indications that OIRA has reduced the backlog of lengthy reviews during calendar year 2013, and has improved the pace of its reviews. As **Table 5** and **Figure 5** below indicate, the number of ongoing OIRA reviews lasting more than 90 days dropped by nearly 40% between the first of the year and mid-September 2013, and the number of one-year reviews was cut nearly in half between March 2013 and mid-September. The number of reviews lasting more than six months dropped most precipitously, from 83 in January 2013 to 38 in mid-September (a nearly

[101] For example, at an FDA public meetings on September 19-20, 2013, Sandra Eskin, director of food safety at The Pew Charitable Trusts, noted several food safety rules that were required by the Food Safety Modernization Act in January 2011 had not been issued, and said the "longer it takes these rules to be put in place, the more people will needlessly be put at risk and the less confidence consumers will have in the safety of the food supply." One of the rules discussed at the public meetings was a proposed rule on the "Foreign Supplier Verification Program" (RIN: 0910-AG64), which had been under review at OIRA from November 28, 2011, until July 26, 2013. For more information on these FDA meetings, see http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm364950.htm. A copy of Ms. Eskin's testimony is available from the author.

[102] See http://judiciary.house.gov/hearings/113th/hear_09302013.html to view a copy of this testimony.

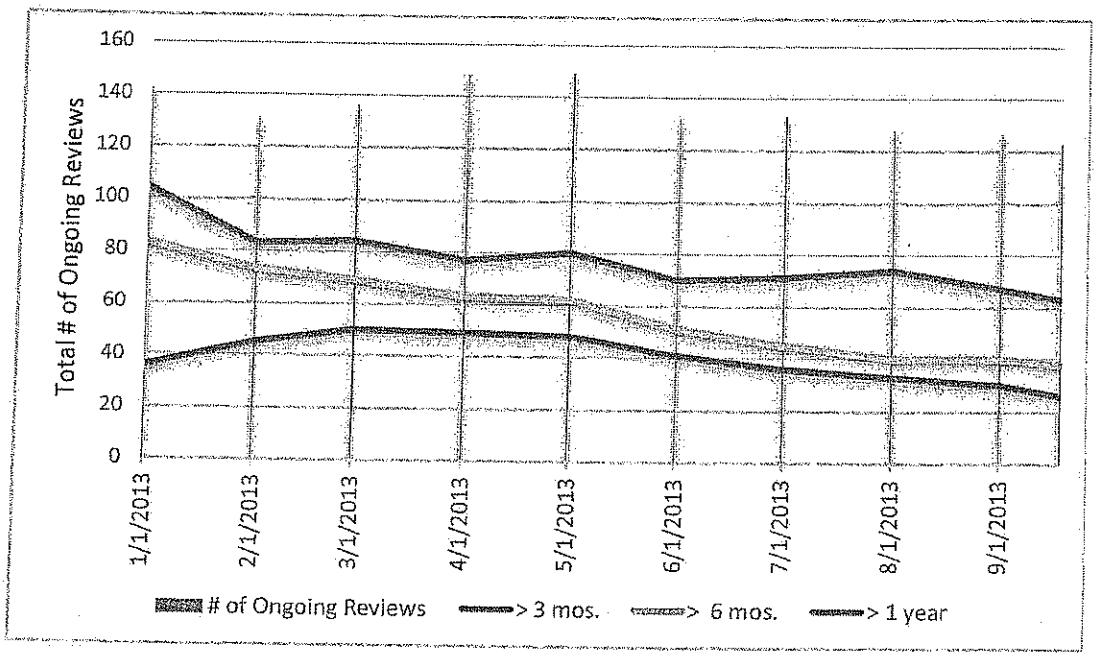
55% reduction). While these reductions in the number of lengthy ongoing reviews should be recognized and indicates a commitment at OIRA to reduce the backlog, the fact remains that as of September 18, 2013, 38 agency rules had been under review at OIRA for more than six months (more than 30% of the total number of ongoing reviews), and 26 of those rules had been under review for more than a year.

Table 5: Number of Lengthy Ongoing Reviews Has Declined in 2013

Date	Total Number of Ongoing Reviews	Number of Ongoing Reviews Lasting		
		More Than 90 Days	More than Six Months	More Than One Year
01/01/2013	142	104	83	36
02/01/2013	131	83	73	45
03/01/2013	136	84	69	50
04/01/2013	148	77	63	49
05/01/2013	149	80	62	48
06/01/2013	132	70	51	41
07/01/2013	133	71	45	36
08/01/2013	128	74	40	33
09/01/2013	127	67	40	30
09/18/2013	123	63	38	26

Source: OIRA database, available at www.reginfo.gov.

Figure 5: Number of Extended Ongoing Reviews Has Declined During 2013



Source: Regulatory Information Service Center.

Also, of the 38 rules that had been under review for more than a year as of June 30, 2013, OIRA had concluded review of 14 of the rules by September 18, 2013. (See **Appendix F** to identify these rules.) However, by making progress and closing these lengthy reviews, the average length of OIRA's completed reviews in 2013 increased from 140 days on June 30, 2013, to 147 days on September 18, 2013.

As noted earlier in this report, nearly 44% of the reviews completed during the first half of 2013 took more than 90 days, and nearly 30% took more than six months. However, many of those rules had been submitted to OIRA more than a year earlier, and OIRA's efforts to complete those reviews caused the percentage of lengthy completed reviews to increase. As **Table 6** below indicates, just looking at the review times for the 150 rules that were submitted between September 1, 2012, and February 28, 2013,[103] the review times are quite different. As of September 13, 2013, 32% of the reviews took more than 90 days, and 10% took more than six months. Although OIRA has clearly improved its performance (e.g., cutting reviews lasting more than six months from 30% to 10%), the review times for rules submitted during this period are still not as good as historic norms. From 1994 through 2011, an average of only 10.7% of the more than 11,000 completed reviews took more than 90 days, and only 1.6% of those reviews took more than six months.

Table 6: Percentage of Reviews Completed in More than Six Months Has Declined for Recent Submissions

Period	Percentage of Reviews Completed in	
	More than 90 days	More than Six Months
Reviews of rules submitted from 09/01/2012 through 02/28/2013 (150 reviews)	32.0%	10.6%
Reviews completed between 01/01/2013 and 06/30/2013 (212 reviews)	43.9%	29.7%
Average for reviews completed from 1994 through 2011 (11,327 reviews)	10.7%	1.6%

Source: OIRA database, available at www.reginfo.gov.

Note: Data for reviews submitted between September 1, 2012, and February 28, 2013, are as of September 13, 2013.

E. Actual Review Times May Be Longer Than Data Indicate

Although the data on OIRA review times discussed thus far are informative, they may not reflect the full amount of time that rules had been under review by OIRA. The data are from OIRA's public database and reflect the amount of time that the rules were under *formal review*. They do not include any time that the rules might have spent being reviewed *informally* by OIRA prior to

[103] This six-month time frame was selected to be as recent as possible while still allowing for the possibility of reviews lasting six months from the end date.

formal review. Interviews with senior agency employees for this report indicated that in recent years, many rules were informally reviewed by OIRA for weeks or months prior to formal submission. The interviews also indicated that at least some of the agencies have had to obtain permission from OIRA to submit their rules for formal review, and that some rules were not logged into the OIRA database as having been formally "received" until well after they were submitted by the agency. As a result, the actual amount of time that a number of recent rules were reviewed by OIRA is probably longer than the record amounts of time that are reflected in the public data.

As noted previously, this report draws on interviews with a limited number of senior agency employees that were speaking anonymously. The report does not seek to capture the extent to which their views are representative of the agencies for which they work, or the extent to which they reflect an agency's typical experience with OIRA. On the other hand, these senior employees were responsible for their departments and agencies' interactions with OIRA regarding all or a large range of their agencies' rules, and all of those departments and agencies experienced significant delays for many of their rules.

1. Informal Reviews

As GAO stated in its 2003 report on OIRA, although there was an increased emphasis during the first years of the George W. Bush Administration on adhering to the 90-day formal review period, "the formal review period itself may be somewhat of an artificial construct if OIRA and the agency had been substantively discussing the rule and/or exchanging drafts of the rule before formal submission."[104] GAO provided the following examples:

> On December 10, 2001, EPA formally submitted a draft rule to OIRA on proposed nonconformance penalties for heavy-duty diesel engines. OIRA's database indicates that it completed its review 10 days later on December 20, 2001. However, public documents indicate that EPA and OIRA met with outside parties in early October 2001 and mid-November 2001 to discuss the rule, and that EPA informally submitted a version of the draft rule and its economic analysis to OIRA in late October 2001—weeks before the 10-day formal review period began.... OIRA records indicate that the formal review period for an EPA Clean Water Act rule in which OIRA made significant changes was even shorter—1 day.[105]

As noted earlier in this report, informal reviews during previous administrations generally occurred when there was a statutory or legal deadline for a rule, or when a rule was extremely large and required discussion with other federal agencies and offices.

Most of the senior agency employees interviewed for this report indicated that OIRA had increased its use of informal reviews of rules in recent years. Employees in one agency said they must informally send OIRA a draft of *every* significant rule before formally submitting the rule for review. Other agency employees said OIRA does not informally review every rule from their agencies, but has done more informal reviews in recent years than in previous years. One agency employee said informal reviews used to ease the path for formal review, but said rules can now be under formal review at OIRA for hundreds of days even if they were previously reviewed informally. Because these informal reviews and other activities occur "off the clock," he said the information on review times available in OIRA's public database for some rules was misleading.

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[104] GAO-03-929, p. 47.

[105] Ibid.

For example, he said that when the database indicates that an economically significant rule was reviewed by OIRA in one or two days, it is a clear indication that the rule was reviewed informally before it was formally submitted. In confirmation of this point, several of the agency employees provided examples of significant or economically significant rules that OIRA's database indicated had been reviewed in less than two days, but that had informally reviewed by OIRA prior to formal submission – sometimes for weeks or months.

Sometimes, the senior agency employees indicated that informal review was required before OIRA would agree to accept a rule for formal review. One employee said that after informal OIRA reviews, the draft proposed rules often came back heavily edited. He said the desk officer would inform the agency that the delineated changes would need to be made before OIRA would allow the rule to be submitted for formal review. On other occasions, the agencies indicated that informal review had led to certain rules *not* being submitted to OIRA. For example, one employee said that after certain rules were reviewed informally, the OIRA desk officer told the agency that the rules would not be approved if submitted in their current form.

However, three senior agency employees said that OIRA did not informally review drafts of their agencies' rules before they were formally submitted to OIRA. One agency employee said informal reviews of her agency's rules were common during the George W. Bush Administration, but said her agency's leadership decided shortly after the start of the current administration not to agree to informal reviews because they were not transparent, resulted in misleading data regarding the length of time that rules were under review, and resulted in the agency not being able to document all of the changes that were made at OIRA's suggestion or recommendation.[106] Another agency employee said her agency stopped sending draft rules to OIRA prior to formal submission in early 2013 because the agency considered such informal reviews non-transparent. For example, if the review is done informally, she said the public never knows to ask questions about the changes made during such reviews. Although OIRA does not informally review their rules, all three agency employees said their agencies must obtain OIRA's permission to submit their rules for formal review.

During 2012 and 2013, OIRA completed review of several economically significant proposed and final rules on the same day that they were received,[107] and OIRA completed review of several other economically significant rules within two days of when they were received.[108] The agency employees said documentation of informal reviews was usually not included in the rulemaking dockets, so it is not possible to examine those dockets and verify that the informal reviews occurred or determine how long they lasted. However, OIRA documents its meetings with outside parties on rules,[109] and begins to do so when the agency begins informal review.[110]

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[106] After a rule has been published, Section 6(a)(3)(E) of EO 12866 requires agencies to disclose "those changes in the regulatory action that were made at the suggestion or recommendation of OIRA." OIRA has interpreted this provision to require disclosure of only those changes suggested or recommended by OIRA during formal review. Some agencies also have statutory requirements to disclose changes made during OIRA review.

[107] Four such rules were reviewed by OIRA in the first half of 2013, three of which were submitted by the Centers for Medicare and Medicaid Services (CMS) within HHS: (1) the proposed rule on "Medicare Advantage (MA) and Prescription Drug Benefit Programs: Medical Loss Ratio Requirements (CMS-4173-P)," (received by OIRA and completed on February 14, 2013); (2) the proposed rule on "Prospective Payment System for Inpatient Rehabilitation Facilities for FY 2014 (CMS-1448-P)," (received and completed on April 30, 2013); and (3) the final rule on "Medicare Advantage (MA) and Prescription Drug Benefit Programs: Medical Loss Ratio Requirements (CMS-4173-F)" (received and completed on May 16, 2013). The other rule was a DOL interim final rule on "Wage Methodology for the Temporary Non-agricultural Employment H-2B Program (received and completed on April 19, 2013).

[108] Two such rules reviewed by OIRA during the first half of 2013 were a CMS proposed rule on "Patient Status and Parts A and B Rebilling in Hospitals (CMS-1455-P) (received on March 12, 2013, and completed on March 13, 2013); and a CMS interim final rule on "Pre-Existing Condition Insurance Plan; High Risk Pool (CMS-9995-F)," (received on May 15, 2013 and completed on May 17, 2013).

[109] Section 6(b((4)(B) of EO 12866 requires that a representative from the agency issuing the rule be invited to any

Examination of OIRA's meeting records indicates that several economically significant rules with short formal review periods appear to have been under informal review before they were formally submitted to OIRA. For example:

- The OIRA database indicates that OIRA began formal review of a United States Coast Guard economically significant rule on "Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters" (RIN 1625-AA32) on February 24, 2012, and concluded its review the same day. However, the OIRA meeting log shows that OIRA met with outside parties regarding this rule on seven different dates between January 4, 2012, and February 8, 2012 – meetings that began more than seven weeks before the start of formal review.[111]

- The OIRA database indicates that OIRA began its review of a Centers for Medicare and Medicaid Services (CMS) economically significant rule on "Revisions to Payment Policies Under the Physician Fee Schedule and Part B for CY 2013 (CMS-1590-P) (RIN 0938-AR11) on July 2, 2012, and concluded its review within one week, on July 9, 2012. However, the OIRA meeting log shows that OIRA met with outside parties regarding this rule on June 21, 2012 – two weeks before the rule was formally submitted for review.[112]

Communication between OIRA and agencies prior to the submission of draft rules for review can clearly be beneficial. However, if OIRA is informally reviewing and commenting on complete drafts of rules for extended periods of time before the rules are formally submitted, then the formal review period becomes what GAO called an "artificial construct,"[113] and the data provided to the public on the length of the formal review period become misleading. Lengthy informal reviews of large numbers of rules are non-transparent and can distort agency and governmentwide statistics, understating how long rules are actually under review by OIRA.

Sally Katzen said that pre-submission consultation between OIRA and the agencies is very helpful in both drafting rules and in easing formal review, and that such consultations should continue. She said few complete drafts of rules were reviewed informally prior to formal submission during her tenure as OIRA administrator. If OIRA has recently done so as a matter of course for all or most draft regulatory actions, she said the OIRA review "clock" should probably start whenever OIRA receives a finished work product with sign-off from appropriate senior agency officials.

One former OIRA official said that informal review was relatively infrequent during the first few years of the Obama Administration, and that some agencies (without objection from OIRA) had firm policies against informal reviews. When an informal review did occur, he said it was usually agreed to by the agency because the agency was going to be unable to accommodate anything but the shortest formal OIRA review period, often because of statutory or judicial deadlines,

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meeting between OIRA personnel and persons not employed by the Executive Branch of the federal government regarding the substance of a regulatory action under OIRA review.

[110] See http://www.whitehouse.gov/omb/oira_meetings/ for the OIRA meeting log. OIRA began documenting these meetings during informal review in October 2001. (It had previously done so only during formal review periods.) OIRA considers a rule under informal review when OIRA has "started a substantive discussion with the agency concerning the provisions of a draft rule or OIRA has received the rule in draft." For a copy of this disclosure policy, see http://www.whitehouse.gov/omb/inforeg_oira_disclosure_memo-b.

[111] In addition to the outside parties and representatives from OIRA, OMB, DHS, and the Coast Guard, the meetings also included representatives from the White House Council of Economic Advisors and the Council on Environmental Quality.

[112] In addition to the outside parties and the OMB and agency representatives, also at the meeting was a representative from the White House Domestic Policy Council.

[113] GAO-03-929, op. cit., p. 47.

significant remaining work at the agency on the rulemaking, or other policy imperatives. In these instances, he said informal reviews served as a valuable substitute for OIRA formal reviews.

2. Obtaining OIRA's Permission to Submit Rules

There have also been indications that during recent years, agencies have been required to receive permission from OIRA to submit rules to the office for review. For example, Lisa Heinzerling said in her 2013 article that it had been "widely reported that OIRA has lately been in the habit of not allowing agencies to send rules for review until OIRA has cleared them for review."[114]

In interviews for this report, several senior agency employees said that there had always been some type of pre-submission meeting with OIRA at a general level as to what rules or groups of rules their agencies would be submitting for review in the coming months, and a priority list was often developed. Then, they said, the agency would enter each rule into the OIRA data system whenever the agency believed it was ready to be submitted for review. Starting in 2012, however, these employees said they have had to meet with and/or brief the OIRA desk officer before submitting each significant rule for formal review (which were sometimes referred to by the agency employees interviewed for this report as "Mother-may-I" meetings), and have had to obtain OIRA's approval before submitting each rule.

One senior agency employee said that as part of the regulatory planning process, his agency develops deadlines for its significant rules (with 90 days worked in for OIRA review at both the proposed and final rule stages), showing (among other things) the date when the rules are scheduled to be submitted to OIRA. A week or two before that date, he said he calls the OIRA desk officer to set up a briefing on each rule, and to get permission to submit the rule. After the briefing, he said the desk officer then obtains permission from OIRA management to tell the agency that it can submit the rule.

Another senior agency employee characterized these pre-submission meetings as one of the most significant hold-ups in the agency's rule development process.[115] She said the meetings began in 2012, and the attendees included OIRA officials and/or staff above the desk officer. She also said that even if the agency is given approval to issue the rule during these meetings, the agency was still required to call the desk officer to get final approval just before submitting their rules – even for rules with statutory or judicial deadlines. She said some rules had been sitting in her office for more than a year that OIRA would not permit the agency to upload. Another agency employee said that after pre-submission briefings, her agency was not allowed to formally submit the related rules until all of OIRA's recommended changes were made. In one case, she said the agency was forced to wait for months before submitting the rule. Other agency employees described similar instances of not being able to submit certain rules for review.

Another agency employee said OIRA receives a pre-submission briefing on just about every rule the agency plans to issue, not just on the rules the agency considers significant under the executive order. She said the agency is required to prepare a brief summary of each rule and related issues, and OIRA then determines which rules require a draft to be submitted for informal review, and which ones can be submitted to OIRA for formal review. She said career employees in her office who had served in multiple presidential administrations told her that they had never

[114] Heinzerling, op. cit., pp. 27-28.

[115] These meetings are not, however, a factor in the length of OIRA's formal reviews, since any time spent in these meetings would occur before rules are formally submitted to OIRA.

previously had to receive OIRA approval before submitting every rule. On the other hand, one agency employee indicated this requirement has changed in recent months, and the agency now holds monthly meetings with OIRA and provides the office with a list of rules that it expects to be submitted within the following month, with the list rank ordered in terms of which rules are most important to be issued.

OIRA and rulemaking agencies clearly must work together to ensure that rules are developed, reviewed, and published in an orderly fashion. Also, as described in more detail later in this report, OIRA's capacity to review and comment on rules is not unlimited, and the office's authorized staffing levels in recent years have been well below the levels authorized between 2002 and 2005. Therefore, it is reasonable to expect that the agencies and OIRA would have periodic discussions about how many rules would be submitted for review, and when those submissions would occur. Section 4 of EO 12866 requires that all executive branch agencies "prepare an agenda of all regulations under development or review,"[116] and the semiannual *Unified Agenda of Federal Regulatory and Deregulatory Actions*[117] has been used to satisfy that and other planning requirements.[118] In advance of the publication of the *Unified Agenda*, OIRA sends a memorandum to the agencies regarding the content and timing of agency submissions.[119] OIRA also typically has other conversations with agencies about their rulemaking plans.

However, the pre-submission meetings and other actions that the senior agency employees described appear to be qualitatively different than simply conversations regarding the timing of rules submissions, and do not appear to have occurred (at least on the scale described by these officials) in previous administrations. The preamble to the executive order states that one its objectives is to "reaffirm the primacy of Federal agencies in the regulatory decision-making process," and says that the regulatory process shall be conducted "with due regard to the discretion that has been entrusted to Federal agencies." Furthermore, EO 12866 does not indicate that OIRA is authorized to prevent an agency from submitting a rule that both the agency and OIRA agree is significant. If OIRA is refusing to permit certain rules to be submitted for review, or is requiring that agencies make changes to their rules in order to receive OIRA's permission for them to be submitted, then the balance of power between the agencies and OIRA described in EO 12866 appears to have changed dramatically. At a minimum, such actions are not transparent, can make it difficult for agencies to plan the issuance of their proposed and final rules, and can result in an understatement of the actual length of OIRA's review process.

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[116] Although most of the requirements in the executive order do not apply to independent regulatory agencies, this section includes these agencies. Section 4 also requires other regulatory planning mechanisms, including (1) an annual meeting between the Vice President, agency heads, and other advisors to coordinate regulatory efforts; and (2) a regulatory plan prepared by each agency and submitted to OIRA and published in the Unified Agenda each October describing the most significant regulatory efforts that the agency expects to issue that year or later.

[117] The Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda) arguably provides federal agencies with the most systematic, government-wide method to alert the public about their upcoming rules. To view the current Unified Agenda, see http://www.reginfo.gov/public/do/eAgendaMain.

[118] The Regulatory Flexibility Act (5 U.S.C. § 602) requires that all agencies publish semiannual regulatory agendas in the Federal Register describing regulatory actions that they are developing that may have a significant economic impact on a substantial number of small entities. Section 4 of EO 12866 also requires other regulatory planning mechanisms, including (1) an annual meeting between the Vice President, agency heads, and other advisors to coordinate regulatory efforts; and (2) a regulatory plan prepared by each agency and submitted to OIRA and published in the Unified Agenda each October describing the most significant regulatory efforts that the agency expects to issue that year or later.

[119] See http://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/spring-2013-agenda-data-call.pdf for a copy of the March 2013 memorandum.

3. Delay in OIRA Logging in Formal Submissions

There are also some indications that delays have occurred between the date that agencies formally submit certain rules to OIRA for review and the date those rules are logged into OIRA's data system as having been "received." While apparently not as widespread as informal reviews and pre-submission briefings, several of the senior agency employees interviewed for this report indicated that at least some of their rules had been delayed in this manner within the past year or two, with the length of the delay highly variable. For example, although one employee said it might take as much as a week for OIRA to officially "receive" a rule after it is sent, employees in another agency said the agency had sent one rule to OIRA more than a year ago and it still had not shown up in the OIRA data system. Another agency employee characterized the delays as "a lot more than a day or two," and several indicated that OIRA's public database did not accurately reflect the real amount of time that OIRA reviewed their agencies' rules. A senior agency employee at another agency said that some rules submitted to OIRA in 2012 did not show up in the OIRA data system as "received" for months after the rules were submitted. In previous years, he said, the lag between "submitted" and "received" was usually no more than a day or two.

There are also some indications that this problem may be getting better. One agency employee said delays in OIRA logging in rules were commonplace in early to mid-2012, but said they were less common now. Another employee said that although some rules from her agency had been logged in a week or more after they were sent, OIRA seemed to be getting better at logging them in quickly.

A few departments and agencies have established websites that show the dates that all or at least certain rules were sent to OIRA, and some also show the dates that they are received by OIRA.[120] For example, EPA's "DaRRT" tracking system indicates when certain "priority" rules are sent to OIRA, and when OIRA officially "receives" them. The system indicates that most EPA rules are logged into the OIRA system within a few days of being submitted, but some rules have taken longer. For example, the agency's "NPDES Electronic Reporting Rule" (2020-AA47) was sent to OIRA on December 22, 2011, but was not "received" by OIRA until nearly a month later, on January 20, 2012.[121] Another rule, EPA's "Water Quality Standards Regulatory Clarifications" (2040-AF16), was reportedly sent to OIRA on November 15, 2011, but not logged in as "received" until 15 days later, on November 30, 2011.[122]

One former OIRA official said that in his experience, delays in the "receipt" of rules by OIRA were most often the result of disagreements between the agencies and OIRA about whether their rulemaking packages were complete and contained all of the necessary components in a form that was ready for OIRA review. For example, he said packages might be missing required economic analyses or have incomplete regulatory or preamble text, and therefore would not be logged in as "received" until those elements were provided.

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[120] DOT has a website that shows the date rules are sent to OIRA (see http://www.dot.gov/regulations/report-on-significant-rulemakings), but to determine the date the rules are received, viewers must go to OIRA's database at www.reginfo.gov.

[121] See http://yosemite.epa.gov/opei/rulegate.nsf/(LookupRIN)/2020-AA47. The OIRA database also indicates that the rule was not received at OIRA until January 20, 2012.

[122] See http://yosemite.epa.gov/opei/rulegate.nsf/(LookupRIN)/2040-AF16.

V. Perspectives on Causes of Lengthy OIRA Reviews

The senior agency employees interviewed for this report were each initially asked what they believed caused the increase in formal OIRA review times during 2012 and 2013. Although their answers were somewhat different, all of the interviews reflected one or more of the following themes: (1) concerns by some in the EOP about the issuance of potentially costly or otherwise controversial rules during an election year, (2) concerns about lengthy data or analytical requests from OIRA desk officers and the management of those desk officers, (3) a broadened definition of what constitutes a "significant" regulatory action, (4) lengthy coordinative reviews by other agencies and offices within the EOP, (5) the absence of any review time limit when OIRA directs the agencies to request review extensions, (6) a reluctance by OIRA to use return letters, and (7) OIRA staffing issues. The following sections discuss these themes, and (in some sections) the views of two previous OIRA administrators interviewed for this report – Sally Katzen (OIRA administrator during most of the Clinton Administration, and one of the authors of EO 12866) and Susan Dudley (OIRA administrator at the end of the George W. Bush Administration). Although all of the issues raised by the agency employees were viewed as causing delays, some appear to be longstanding issues, and may be a function of the very different perspectives of the agencies and OIRA.

A. Concerns About Controversial Rules

Several of the senior agency employees indicated that OIRA reviews took longer in 2011 and 2012 because of concerns about the agencies issuing costly or controversial rules prior to the November 2012 election. The employees said their agencies were instructed that such rules were not to be issued unless deemed absolutely necessary (e.g., a judicial deadline) or if it could be shown they were not controversial (e.g., clear net benefits). They said those instructions were not in writing, but shortly after their agency's political leaders went to meetings with certain EOP officials, agency staff were told that all sensitive rules would have to be pre-approved by OIRA before being sent to OIRA for review. When any such rules were submitted to OIRA, they said the reviews were often delayed. Several of the agency employees were quick to point out that they did not believe these delays were OIRA's fault; OIRA appeared to be simply carrying out the instructions of those in other parts of the EOP.

Some of the senior agency employees also indicated that sensitivity to rulemaking issues often increased during election years, and that political leaders in the EOP have always had an influence on agency rulemaking. One employee said that during previous administrations, the deputy secretary would take the department's regulatory plan to meetings with OIRA and other EOP officials, and they would decide which rules would go forward and which ones were not worth the amount of political capital that would have to be expended. However, the employee said that political sensitivities about rulemaking reached new heights during 2012, and some rules that had been completely uncontroversial in the past were delayed for weeks at OIRA because one or more officials in other parts of the EOP were unfamiliar with the underlying issues.

Several of the agency employees indicated that OIRA and other parts of the EOP had much more influence over agencies than in previous years, and had essentially set the agenda for agency

actions without the involvement of the agency. For example, one agency employee said the agency's OIRA desk officer told him that OIRA had developed a list of priorities for the agency, but also said that he (the desk officer) was not allowed to share it with the agency.

In his 2013 article on OIRA, former administrator Cass Sunstein wrote that consideration of politics is "not a significant part of OIRA's own role," but said political issues "might be taken into account by other offices," such as the White House Office of Legislative Affairs and the White House Office of Intergovernmental Affairs. He also said the following:

> In addition, others in the White House — including the Office of the Chief of Staff — will be alert to a wide range of considerations, including the relationship between potential rulemakings and the President's overall priorities, goals, agenda, and schedule. It is important to emphasize that with respect to the Administration as a whole, the Office of the Chief of Staff has an important role insofar as it works to advise on and help coordinate executive branch activity with close reference to the President's own commitments. All executive offices, including OIRA, work under the President and are subject to his supervision, to the extent permitted by law. Insofar as the President and his closest advisers are clear on their priorities, OIRA will of course be made aware of their views and act accordingly.[123]

Sally Katzen said in *every* election year, regardless of the administration, there is "heightened sensitivity" as to which proposed and final rules will be issued, and a subtle or not-so-subtle message goes out to political leaders in the agencies not to issue rules that would create problems. That message may come from the President himself, or it may come from someone speaking on behalf of the President. She said that while previous administrations were able to get the rulemaking agencies to either not submit or withdraw problematic rules (sometimes with the threat of a return letter), the current administration does not appear to have done so. Because the agencies suspected they were unlikely to receive a return letter from OIRA, and because they may not want the blame or the legal liability for not issuing certain rules, some rules remained under review at OIRA for extended periods of time.

Susan Dudley said that if OIRA has to get approval from the White House or other EOP offices for more and more rules, the rules that are not considered priorities are waiting at those offices, and no one at OIRA has the authority to finish the review without their approval. The 1990 ABA report made somewhat the same point, saying that based on the first few months of the George H.W. Bush Administration:

> the difficulty in obtaining senior White House attention to rules is inherent in the structure of the Presidency. Regulatory issues must compete with other policy problems calling for Presidential action; they are not so critical as to command a specific allocation of staff and resources dedicated exclusively to their resolution. Particularly critical regulatory issues...will continue to obtain attention of top-level decisionmakers. But repeated efforts show that the White House staff will not have the time to devote to anything less than the most significant regulatory items.[124]

B. OIRA Desk Officers and Management

Many of the senior agency employees interviewed said that OIRA reviews have taken longer than usual during the last two years because the OIRA desk officers often made extensive requests for

[123] Sunstein, op. cit., pp. 1873-1874.

[124] ABA Section of Administrative Law, op. cit., p. 2.

additional information, analysis, and documents. For example, one agency employee said several of her agency's rules each took more than a year to clear OIRA review, even though the bulk of the review had been completed during the first 90 days. For the next nine months or more, she said the OIRA desk officer kept asking for more analysis of what she considered to be relatively minor issues, and for copies of publicly available documents (e.g., comments on the proposed rule, which were available to anyone at regulations.gov). Another employee said the agency's desk officer reviewed the public comments on a proposed rule, saw one comment, and then wanted to have a meeting to discuss how the agency should respond to that one comment—which the employee believed unnecessarily lengthened the review.

Other senior agency employees indicated there had been a significant increase in economic analysis requirements from OIRA desk officers that had substantially increased review times. One such employee said his agency had to prepare uncertainty analyses for rules that had never required them in the past, and had to monetize regulatory benefits to a level that had not been previously required – both of which required a tremendous amount of time and effort. Another agency employee said the desk officer sometimes required his agency to study issues that would not change anything in the rule, and to rewrite text in a final rule that had received no comments in the proposed rule. He said that even though both business and labor groups told OIRA that one rule that had been under review for more than a year should be issued, the desk officer just kept asking for more information, and raising issues that had been addressed in hearings and in public comments on the proposed rule.

Other senior agency employees indicated that the desk officers often delayed regulatory actions that they did not believe required additional scrutiny. For example, two such employees in one agency said that their desk officer told them in 2012 that a short, non-economically significant advanced notice of proposed rulemaking that was just asking preliminary questions of the public would not be released. They also said that one draft final rule had been under review at OIRA for more than a year, even though the rule simply responded to public comments on an interim final rule that had been in place for more than a year, and the final rule did not alter the original interim rule.

Other senior agency employees indicated that the kinds of questions the OIRA desk officers asked frequently appeared to be outside the scope of the rule under review. One such employee said it often seemed that the desk officer was just curious about some aspect of the general policy, even though the rule was not directed at that aspect, and said the agency had to spend significant amounts of time and resources to satisfy the desk officer's curiosity. She said that after reviewing the desk officer's comments on one recent rule, she thought the questions were interesting, but also concluded that the answers would have no impact on the rule being reviewed. An employee from another agency said it was common for the desk officer to ask questions that appeared to have little to do with the rule being reviewed, and said one rule had been under review at OIRA for more than a year because the desk officer wanted the agency to ask the public a number of questions about issues that happened to be of interest to him.

Many of the senior agency employees interviewed also said they did not believe OIRA management had done enough during the past two years to control the desk officers, and to give them strategic direction. One such employee said that the desk officers would continue to ask for more analysis until someone at a high enough level in OIRA finally told them to stop. He also said that it did not appear that anyone in OIRA management had established clear priorities regarding the rules that desk officers should focus on and the types of analyses they should require. An employee in another agency said that during the Clinton and George W. Bush Administrations, OIRA leadership and the desk officers appeared to take the 90-day review limit more seriously, and when one of the agency's rules got close to that limit, the desk officer often indicated that OIRA management was paying close attention. During 2012 and early 2013, he

said there were no such indications of concern by the desk officers about time limits. Another employee speculated that some of the perceived management problems might have been caused by turnover during 2012 of the administrator, associate administrator, deputy administrator, and some branch chiefs.

Agency complaints about OIRA desk officers and the management of the desk officers are long-standing issues, and many of these same kinds of concerns were expressed in the National Academy of Public Administration's 1987 report on regulatory review. For example, the report stated that "Virtually every agency official has complained that OMB attention is often focused on 'nit-picking,' on relatively minor provisions of proposed regulations, on choice of wording, and on other differences that do not seem to have much importance."[125] The report also quoted OIRA critics as saying that "agencies are forced to go to inordinate lengths to justify their plans and proposed rulemaking, and that the process requires an excessive investment of resources, primarily in staff time, at both the OMB and agency levels."[126] The 1987 NAPA report also stated that agency officials "complained that OMB does not have much of an internal process to check the zealousness of the young desk officers," and said one official complained that there was "a management problem at OMB – they don't pay enough attention to what is important versus not important; they try to look at everything but they can't do that with the resources they have."[127]

OIRA and rulemaking agencies come at the regulatory review process from very different perspectives. While agencies may view certain questions as excessive and overly intrusive, OIRA desk officers may view those same questions as necessary to determine whether a rule is consistent with the underlying statute, the principles in EO 12866, and the President's priorities. Also, what agency officials and employees may view as a lack of management and control of the desk officers may actually be OIRA management support for the desk officers' positions.

Also, OIRA has historically taken on the personality, management style, and priorities of the administrator. If the administrator makes timeliness a priority (as John Graham did in 2001), then the number of lengthy reviews is likely to go down. Conversely, if the message communicated to OIRA staff is that timeliness is not as important as other things (e.g., additional analysis), then review times may increase. Section 1(c) of EO 13563 requires agencies to "quantify anticipated present and future benefits and costs as accurately as possible." Therefore, some of the desk officers' requirements may have been done to implement that and other requirements in the executive order, or at the direction of OIRA management. More generally, if OIRA was instructed by political leaders in other parts of the EOP to ensure that potentially controversial rules are not released, then requirements by the desk officers that rulemaking agencies provide extensive amounts of data and analysis may simply have been the mechanisms by which those instructions were carried out.

Sally Katzen said that, based on her experience as OIRA administrator, rulemaking agencies and OIRA each bring important but very different perspectives and talents to the rulemaking process. The agencies have expertise concerning the programmatic areas covered by the rules, while OIRA considers the broader effects of the rules on the economy and the President's priorities. It often takes time and talent to bring the two sets of perspectives together. She said OIRA desk officers may request addition work by the agencies because the data or analysis supporting a regulatory proposal is insufficient, or because certain issues have not received sufficient attention. When that happens, it is understandable that the agencies may resist those suggestions. Agencies often focus on their statutory mandates, and by the time a draft rule is submitted to OIRA for review, the agency is usually invested in what it has produced. Delays in the review process may come

[125] NAPA report, op. cit., p. 38.

[126] Ibid., p. 37.

[127] Ibid., pp. 38-39.

from the agencies' efforts to resist OIRA suggestions for improvement—not just because of OIRA's actions.

A former OIRA official said he was highly skeptical that OIRA desk officers suddenly and dramatically changed their approach to reviews in recent years. Instead, he said, the desk officers were simply part of a regulatory and interagency review process that had become more cautious in 2012 for reasons emanating from the highest levels of the administration. He pointed out that the OIRA desk officers in 2012 were basically the same desk officers who had cleared rules in an average of 50 days during the first three years of the Obama Administration. He also said that while the general caution about rulemaking during 2012 may have manifested in more thorough reviews, many of the complaints by agency officials seem to be the same complaints about OIRA review that were made during the previous two decades when OIRA review also averaged about 50 days.

C. Definition of "Significant"

Several senior agency employees indicated that EO 12866 reviews have taken longer in recent years because OIRA has adopted an expanded definition of what constitutes a "significant regulatory action" under EO 12866, with desk officers asking to be briefed on and to review rules that previously had not previously been considered "significant." One such employee said it was now extremely difficult to have a rule declared non-significant, and another employee said the presumption seems to be that all rules are significant. She also said her agency is often required to prepare some type of economic analysis demonstrating that certain rules are not significant (and therefore do not have to be formally submitted to OIRA). She said she has been interacting with OIRA for more than 10 years, and this type of analysis had never been required until the last year or two.

A senior employee in another agency pointed out that under the executive order, OIRA has 10 working days to respond to the agency's determination that a regulatory action is not significant.[128] If OIRA does not respond within that period, the rule is not subject to review. In the past, he said the OIRA desk officers would generally accept the agency's determination regarding the significance of rules. As a courtesy, just before sending non-significant rules to the *Federal Register*, he said he would send the desk officer an e-mail, and the desk officer would summarily agree. However, within the past two years, he said the desk officer receiving the e-mail would often tell the agency not to publish the rule, and would have to check with others in OIRA and elsewhere before agreeing that the rule was not significant. For other rules, the agency would have to submit documents and have a conference call with the desk officer to reach agreement on the significance of the rule. As a result, he said both the agency and OIRA now spend a lot of time and effort doing things they did not do previously.

Another agency employee also said the broadened definition of a "significant regulatory action" has resulted in OIRA spending less time on the rules that traditionally would have been classified as "significant." An employee in another agency said that although OIRA had always used the "novel legal or policy issues" element in the executive order's definition of "significant" to review certain rules, OIRA has invoked that provision more frequently in recent years, and reviewed a number of regulatory actions that would not previously have been characterized as significant. Yet another senior employee said OIRA sometimes agreed that a draft proposed rule

[128] Section 6(a)(3)(A).

was not significant, but then wanted to revisit that determination when the draft final rule was being developed. She said revisiting significance determinations makes it difficult for the agency to plan the development of regulations, and sometimes results in the agency making changes to non-significant rules just to keep them out of OIRA's review process.

As noted earlier in this report, Section 3(f) of EO 12866 defines a "significant regulatory action" as one that is "likely to result in a rule that may" (among other things) "create a serious inconsistency or otherwise interfere with an action taken or planned by another agency," or that may "raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order." OIRA represents the President in the rulemaking process, and the agencies (although headed by presidential appointees and cognizant of presidential priorities) are likely to view the rule more from the vantage point of their statutory responsibilities. Because of their potentially differing perspectives, rulemaking agencies and OIRA may legitimately reach very different conclusions regarding whether a draft rule is "likely" to result in a rule that "may" create a "serious inconsistency" with another agency's draft or existing rule, or whether a draft rule may "raise novel legal or policy issues."

Also, Section 6(a)(3) of EO 12866 states that agencies are to provide OIRA with their initial determinations regarding which rules are significant, but OIRA is permitted to notify agencies that it has determined that it believes other rules meet the definition of "significant" in the executive order. It goes on to state that agencies are to provide to OIRA "those matters identified as, *or determined by the Administrator of OIRA to be*, a significant regulatory action." (Emphasis added.) Therefore, even if OIRA has been using an expanded definition of a "significant regulatory action," it appears that OIRA is permitted to make the final determination of such matters.

D. Reviews by Other Agencies or Offices

In his 2013 article on OIRA, former administrator Cass Sunstein said that what is often mischaracterized as "OIRA review" is actually an interagency process in which OIRA acts as an "information aggregator," and a "conveyer and a convener."[129] He said shortly after a rule is submitted to OIRA, the desk officer generally circulates the rule to "a wide range of offices and departments, both within the Executive Office of the President and outside of it." [130] Sunstein said the list of agencies consulted depends on the nature of the rule, and noted that "the White House itself is emphatically a 'they,' not an 'it.'" Within the EOP, he said frequent recipients of regulatory actions include: the Council of Economic Advisers, the Council on Environmental Quality, the Domestic Policy Council, the National Economic Council, the National Security Council, the Office of Legislative Affairs, the Office of Management and Budget, the Office of Science and Technology Policy, the Office of the Vice President, the United States Trade Representative, and the White House Counsel.[131] Sunstein also said that "when the review process is lengthy or complicated, it is often because of continuing discussions by participants" in the interagency review process.[132]

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[129] Sunstein, op. cit., pp. 1840-1841.

[130] Ibid., p. 1854.

[131] Ibid., pp. 1854-1855.

[132] Ibid., p. 1844. See also p. 1842.

Several senior agency employees interviewed for this report indicated that OIRA reviews had gotten longer in recent years because of an increase in the number of agencies and organizations that are involved in the interagency review process. One senior employee indicated that because so many people want to have a say in the development of his agency's rules, rules can get stuck at any point, and no one is willing to give up influence to streamline the process. As a result, he said the OIRA review process is slower because the desk officers must get approval from each agency and organization before OIRA releases the rule.

Two senior employees in another agency said that in the past, OIRA primarily checked with the OMB budget officer for the agency, and there was relatively limited interagency review and coordination. Now, they said, the desk officer sends the rule to anyone who might have an interest, waits for comments (usually a week or two weeks), and then sends it to anyone else in the EOP who might have an interest. The employees said that anyone in the review process appears to have veto power over the rules. Another agency employee said that desk officers sometimes do not send the agency's draft rules out for comment until weeks after they are submitted to OIRA.

Another agency employee said that the length of interagency reviews is sometimes driven by extensive coordination with the White House or other parts of the EOP, and is sometimes driven by the reviews from other rulemaking agencies. She also said some rules involve setting highly technical standards that do not lend themselves to meaningful interagency reviews because most of the experts on that subject work within the agency that developed the rule. Even though interagency reviews of such rules are unlikely to result in any substantive changes, OIRA still sends them out to multiple agencies.

A senior employee in another agency said that when delays are caused by interagency reviews, it is almost always because of reviews within the EOP. He said drafts of rules are sent to other cabinet departments and other agencies, and they usually provide their comments quickly. When there are conference calls to discuss issues arising from the interagency reviews, he said it is almost always just parts of the EOP on the line, not other rulemaking agencies.

Delays in OIRA reviews caused by the interagency coordination process are not a new development. Susan Dudley said that most of the eight reviews in 2008 that took more than a year were because of concerns expressed during interagency reviews – which she nevertheless described as a legitimate and important part of OIRA's role, and which can improve the quality of regulations. She also said that when she became OIRA administrator, even though she had worked in OIRA previously, it was an "eye-opener" to see how the West Wing works, and the number of people who were interested in the issues addressed by draft regulations. She said the political appointees in the White House realize that regulations are an important policy tool, and they all want to be involved. By the time the OIRA administrator gets confirmed in an administration (which is usually one of the last positions to be confirmed), she said the White House offices are somewhat used to playing a decisional role in regulations, and it can be difficult for the OIRA administrator to take control. Also, as noted earlier in this report, unless a rule is considered a priority, Dudley said it may be delayed at the White House or other parts of the EOP until OIRA is given the authority to proceed with the rule. Nevertheless, the interviews indicate that these delays from interagency reviews have become much more significant in recent years.

Sally Katzen said that, in her experience, agencies only grudgingly accept the concept of inter-agency review and see little value in it unless and until another agency proposes something that affects its own jurisdiction. She noted that the issues affecting the nation are rarely the responsibility of only one agency, and OIRA plays a much-needed role in identifying and reconciling potential conflicts. To the extent that other offices within the EOP have played a

larger role in interagency review during the current administration, she described that as the President's choice as the elected head of the Executive Branch.

A former OIRA official cautioned that it is important not to confuse longer OIRA review times due to a fundamental change in the interagency review process (which he does not think occurred) with a high level of caution about rulemaking during 2012 that was translating through the same interagency review process that has been used successfully for two decades. He said it was not his experience during this administration that interagency participants (including White House and other EOP offices) were more or less active than they were during prior administrations. He also pointed out that the interagency review is the most fundamental, value-added, and inclusive aspect of the executive order process, and does more to yield sound regulatory decisions than any other part of the process.

E. Extensions and Deadlines

As noted earlier in this report, OIRA interprets the extension provision in Section 6(b)(2)(C) of EO 12866 to mean that agency-initiated requests can be of an unlimited duration. Most of the senior agency employees interviewed for this report were aware of OIRA's interpretation, but generally disagreed. One employee said he read the provision to be that both OIRA and the agency had to request the extension, and that the total review period should be limited to 120 days. He said his agency sometimes limits its requested extensions to 30 days, but does so knowing that OIRA views the agency-requested extensions as unlimited. The agency employees also indicated that virtually all agency requests for extensions of review were actually made because OIRA suggested that they do so.

Several of the agency employees also indicated that within the past year, OIRA has sometimes not suggested that agencies request an extension, and has simply kept certain rules beyond the 90-day deadline in the executive order. They also said that many of the rules with the notation "Review Extended" in OIRA's public data system were not the subject of an extension request from either the agency or OIRA. A senior employee in one agency said he once notified the OIRA desk officer that the 90-day review limit was approaching, and the desk officer indicated that the deadline was not important. Another employee said that although OIRA interprets the executive order's extension provision differently than most of the agencies, no agency is going to publish a rule before review is completed, and the order's time limits are not legally enforceable.

As also noted earlier in this report, former OIRA administrator Sally Katzen said the extension provision in the executive order should be read as allowing agency-requested review extensions to be of unlimited duration. However, she also said that OIRA should not take advantage of this period, and desk officers should make such extended reviews a top priority. She noted that during her tenure at OIRA, some agencies attempted to "play games" with the 90-day review period, waiting until just before the end of the period to respond to OIRA comments, thereby putting the pressure on OIRA to clear the rules. Katzen said that there may need to be a reconsideration of the way the 90-day clock operates, perhaps with the clock stopping when OIRA was waiting for the agency to respond to comments.

One former OIRA official noted that, in the normal order, extensions can be critical because they reflect a widespread consensus among senior agency and White House officials that significant issues remain to be resolved in the rulemaking. In many cases, the issuing agency itself acknowledges that more work needs to be done, and views the extension as appropriate. In other cases, the agency often views an extension as preferable to the alternative of withdrawal or a

return letter. He added that the issuing agency is headed by a Cabinet official who can press their case with the President and senior officials at OIRA or the White House.

One agency employee admitted that in the past, particularly when there was a statutory or judicial deadline, his agency would try and "jam" OIRA by intentionally responding to OIRA comments late in the 90-day review process. However, he also indicated that this was not an effective long-term strategy, as doing so would poison the agency's working relationship with OIRA. And now, he said, with OIRA ignoring the 90-day review period entirely, such tactics would not work at all. He also said the problem with having the review clock stop when OIRA sends its comments to the agency is a logistical one, keeping track of when OIRA's part of the review stops and the agency's part begins. Also, for rules with statutory or judicial deadlines, he said stopping and starting the "clock" is irrelevant because the court will not care whose fault it is, and the rulemaking agency responsible for the statutory or judicial deadline will get the blame.

Given the somewhat ambiguous wording of the extension provision in Section 6(b)(2)(C) of EO 12866, reasonable people can disagree as to whether agency-requested extensions of OIRA's review can be of an unlimited length. Although OIRA has always interpreted the provision to mean that agency-requested extensions are not limited, OIRA has not previously held on to substantial numbers of rules for hundreds of days. It seems clear that for reviews to go beyond 90 days, either OIRA or the rulemaking agencies must request an extension. Holding on to rules for hundreds of days without an extension (as several agencies indicated OIRA has done during the past year) appear to be violations of the executive order's requirements. On the other hand, EO 12866 does not establish any penalty for such violations, and the executive order's review time limits are not enforceable through the courts.

F. Withdrawals and Returns

Several senior agency employees said that OIRA not only suggests that agencies request extensions of reviews, but sometimes also suggests that they withdraw rules from review. They pointed out that unlike returns (which the executive order requires be accompanied by a written explanation, which OIRA posts on its website), withdrawals can be done without disclosing the reason. Withdrawals may also be a way for OIRA to manage its workload. One agency employee said that during pre-submission meetings with the agency, OIRA would sometimes offer to allow the agency to submit a rule if it would agree to withdraw one.

One employee said OIRA had suggested that his agency withdraw two rules (both of which had been at OIRA for more than a year), but his agency has so far refused to do so. He said one rule was not withdrawn because of concerns about how certain interest groups who favor the rule would react, and OIRA ultimately agreed to hold on to the rule for the agency. He said the other rule was developed after an emergency, and was related to a group of other rules that were still being developed. OIRA said it would not clear the rule under review until it could determine whether other rules in the "suite" were consistent. He said the agency would not withdraw the rule because of concerns that it might not be accepted again by OIRA, so the rule continues to be shown as under review at OIRA.

Though there has historically been a stigma associated with an agency's receiving a return letter, many of the senior agency employees indicated that they would prefer a return letter to the significant delays in the review process that they have experienced of late. One agency employee

said his agency's general counsel once asked him why OIRA did not just return rules to the agency that had been under review for hundreds of days, noting that a return letter could be used to counter the views of some that OIRA is not actively reviewing agencies' rules. Another agency employee pointed out that there is no penalty in the executive order if OIRA does not waive review or issue a return letter after 90 or 120 days, and said he believed that OIRA should either approve the rule or return it to the agency. An employee in another agency said he would welcome a return letter from OIRA telling the public on the record why the issuance of the rule has been delayed.

Susan Dudley said that in her experience, withdrawals are not as simple as OIRA telling the agency to request a withdrawal. If a review goes beyond 90 days, she said OIRA sometimes will draft a return letter spelling out the reasons the rule fails to meet the executive order's requirements, show it to the agency, and because the agency does not want the public to know of its perceived failings, most of the time the agency will voluntarily withdraw a rule. She said when she was OIRA administrator, she "drafted more return letters than were sent," and agencies often withdrew their rules. She also said one of the reasons that the review periods have been as long as they have been recently may be that "there is no credible threat of a return letter," so agencies have no incentive to withdraw their rules. She said it is in the agency's interest to leave rules at OIRA, because if the media or stakeholders call and ask where a particular rule is, the agency can simply point out that the rule is under review at OIRA. She said she considers a return letter a "model of transparency."

Sally Katzen said that during her tenure as OIRA administrator, she considered return letters to be "pernicious and a public slap" at the agencies, to be avoided whenever possible. However, she also said that greater use of return letters that clearly state OIRA's concerns may be a better alternative than the current situation in which rules just sit at OIRA for hundreds of days.[133] Ideally, she said, the agencies and OIRA should have honest conversations and negotiations about the content of their rules, and avoid both return letters *and* extended reviews.

G. OIRA Staffing Issues

Several senior agency employees indicated that OIRA reviews might have taken longer than usual in recent years because OIRA staffing levels had been reduced within the past few years, and as a result, OIRA was less able to turn around rules quickly. One such employee said that OIRA staff are diligent people, and they have to work extremely hard to keep up with all of the requirements placed on them by statute and executive order, and by the White House demands. An employee in another agency said he understood OIRA staff was at an all-time low, and he believed the number of desk officers should be doubled to match the current workload. Such an increase, he said, could pay huge dividends in improving regulatory review.

Some of the agency employees also indicated that there had also been a decline in the number of experienced OIRA staff. They said that many of the OIRA staff who had served in previous administrations and who had extensive experience reviewing agency rules had retired, been promoted, or otherwise moved on in the last few years, and the staff who have replaced them at

[133] Similarly, in an interview with the Bureau of National Affairs, Ms. Katzen noted that some recent regulations had been withdrawn from OIRA, which she said "is preferable to using OIRA as a parking lot." Cheryl Bolen, "OIRA Backlog of Lengthy Rule Reviews Reduced by 50 Percent Since January," *BNA Daily Report for Executives*, October 1, 2013, p. AA-1.

OIRA have less experience with the program, the industry, or the history of regulation in the areas at issue.

Several agency employees expressed the opinion that OIRA's staffing difficulty is at least partially a result of an increased workload caused by classifying more rules as "significant regulatory actions," increasing the use of pre-submission reviews, and issuing lengthy requests for more information and analysis. They indicated that if OIRA would reduce these kinds of actions, the staffing difficulties could also be reduced.

OIRA does not have a specific line item in the federal budget, so its funding and staffing is part of OMB's appropriation. OIRA's staffing authorization levels are delineated in the annual congressional budget submissions submitted for the EOP as a whole. When OIRA was created in 1981, the office had a full-time equivalent (FTE) authorization of 90 staff members.[134] By 1992 (the last full year under EO 12291), the number of FTEs allocated to OIRA had declined to 60, and by 1997 (after EO 12866 was implemented, and OIRA reviews were limited to "significant" rules), OIRA's staffing authorization fell to 47 FTEs.[135] OIRA noted in its December 2002 report on the costs and benefits of regulations that the decline in OIRA staffing during this period was more pronounced than the decline in OMB as a whole, and occurred at a time when OIRA was given several new statutory responsibilities (e.g., concerning unfunded mandates, small business, regulatory accounting, and information policy) and when regulatory agencies' staffing and budgetary levels were increasing.[136] OIRA staffing authorizations began to increase in 2001, and by 2002 stood at 55 FTEs. Some observers at the time believed that OIRA's staffing should be increased even further, arguing that a relatively small amount of additional resources for OIRA could yield substantial benefits.[137]

As shown in **Table 7** below, OIRA's staffing authorization has fluctuated somewhat in recent years, and other than in FY2010, has not been above 46 FTE positions since 2006. From 2001 through 2010, OIRA's staffing authorization has been between 9.3% and 11.3% of the staffing authorizations for OMB as a whole. Since 2010, however, OIRA staffing has often fallen somewhat below those levels. The OIRA staffing estimate for FY2014 is 44 FTE positions – 8.7% of the estimated staffing level for OMB as a whole in that year (506 FTE positions).

Table 7: OMB and OIRA FTE Staffing Authorizations: FY 2001 through FY2014

Fiscal Year	FTE Staffing Authorization		OIRA Staffing as Percentage of OMB Staffing
	OMB	OIRA	
2001	502	49	9.8%
2002	512	55	10.7%
2003	491	55	11.2%
2004	497	56	11.3%
2005	484	54	11.2%

[134] Not all OIRA staff are involved in regulatory reviews. Some are administrative staff, and some are involved in the office's information technology and statistical policy activities.

[135] GAO-03-929, op. cit., p. 60.

[136] See http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2002_report_to_congress.pdf, p. 30.

[137] See, for example, Robert W. Hahn and Robert E. Litan, *Why Congress Should Increase Funding for OMB Review of Regulations*, AEI-Brookings Joint Center for Regulatory Studies, Policy Matter 03-33, October 2003.

2006	466	50	10.7%
2007	475	46	9.7%
2008	475	46	9.7%
2009	497	46	9.3%
2010	532	50	9.4%
2011	513	46	9.0%
2012	507	46	9.1%
2013	495	44	8.9%
2014	506	44	8.7%

Source: EOP congressional budget submissions for FY 2011 through FY 2014 are available at http://www.whitehouse.gov/administration/eop. Other years available from the author.

Note: Data for FY2001 through FY2012 are actual. Data for FY2013 are for the continuing resolution. Data for FY2014 are estimated.

The above data are FTE staffing authorizations; the actual number of staff on board at OIRA may be less than these authorized levels. In his 2013 article on OIRA, former administrator Cass Sunstein said "It would be possible to wonder whether OIRA has sufficient personnel for its many functions, and the staff does work extremely hard." [138] Testifying at a House Small Business Committee hearing on July 24, 2013, OIRA administrator Shelanski said "All of OIRA and OMB is at bare-bones level of staffing because we're not filling vacancies." [139] He also said the office had lost some capacity because of furloughs brought about by sequestration. During testimony before the House Judiciary Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law, former OIRA administrator Sally Katzen said OIRA staff were each furloughed eight days during the summer of 2013.[140]

VI. Conclusions and Recommendations

For more than 30 years, OIRA has played a central role in the federal rulemaking process for most agencies, and it clearly can have a major influence on the rules that it reviews. OIRA is located within the Executive Office of the President and is the President's direct representative in the rulemaking process. The office is uniquely positioned both within OMB (with its budgetary influence) and within the federal rulemaking process (reviewing and commenting on significant rules just before they are published in the *Federal Register*) to enable it to exert maximum influence. Therefore, it is extremely important that OIRA's role in the rulemaking process be carried out in as effective and efficient manner as possible.

The preamble to EO 12866 describes the objectives of the executive order as follows:

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[138] Sunstein, op. cit., footnote 26.

[139] Charles S. Clark, "Sequestration, Furloughs Slow Down Review of Federal Regs," *Government Executive*, July 25, 2013, available at http://www.govexec.com/oversight/2013/07/sequestration-furloughs-slow-down-review-federal-regs/67436/.

[140] See http://judiciary.house.gov/hearings/113th/hear_09302013.html to view this hearing.

> to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public.

However, the data on OIRA review times and the interviews with senior agency employees paint a picture of a review process between 2011 and 2013 that strayed from what was envisioned when EO 12866 was issued in 1993. For example, during the first six months of 2013:

- The average length of completed OIRA reviews (140 days) was nearly three times the average from 1994 through 2011 (50 days) (which also indicated that OIRA was finally closing some extraordinarily lengthy reviews).
- The number of agencies with average review times exceeding 90 days (17 agencies) was more than eight times higher than in 2011 (two agencies).
- The number of completed reviews lasting more than one year (27) was nearly 18 times the average of the previous 19 years (1.5 per year). The average length of those 27 reviews was 483 days.
- The percentage of completed reviews lasting more than six months (29.7%) was more than 18 times greater than the average for the period from 1994 through 2011 (1.6%).
- As of June 30, 2013, reviews of 38 rules had been ongoing at OIRA for more than a year, and six had been under review for more than two years.

Allowing OIRA reviews to go on for hundreds of days or even multiple years does not "enhance planning and coordination," or "restore the integrity and legitimacy of regulatory review." If, as the agency employees indicated, OIRA is requiring agencies to obtain OIRA's permission to submit rules for review and ignoring the deadlines in the executive order, those actions do not "reaffirm the primacy of Federal agencies in the regulatory decision-making process." If OIRA is conducting informal reviews of draft rules "off the clock" for weeks or months prior to the formal reviews depicted in OIRA's public database, that does not "make the process more accessible or open to the public."[141]

Some of the perspectives offered by agency employees regarding what they believe to be the causes of the lengthy OIRA reviews during the past two years seem to be perennial issues of concern. More than 25 years ago (as documented by the National Academy of Public Administration in its 1987 report on OIRA), agency officials complained about "'nit-picking' on relatively minor issues" by OIRA desk officers, and on a "management problem" in that OIRA was not focusing on the most important issues. Also, some elements of the definition of a "significant regulatory action" are subject to interpretation, and OIRA may understandably view certain rules as meeting the definition that agencies do not. Ultimately, it appears that the executive order permits OIRA to make the final determination as to the significance of agency regulatory actions.

Furthermore, if the lengthy reviews in recent years were a consequence of concerns about controversial rules prior to the November 2012 election, OIRA desk officers may have just been carrying out instructions from OIRA management or other officials in the EOP (as several senior agency employees believed to be the case). OIRA represents the President's interests in the rulemaking process as conveyed by the political leadership of the White House and other parts of the EOP. As Cass Sunstein wrote in his article on OIRA, the Office of the Chief of Staff and others in the White House are alert to the implications that draft rules may have on the President's

[141] Quotes are from the preamble to EO 12866.

priorities, and OIRA "will of course be made aware of their views and act accordingly."[142] However, as Sunstein also pointed out, EO 12866 makes it clear that OIRA may act only "to the extent permitted by law." Therefore, while it may be appropriate for OIRA desk officers to extend the length of reviews in response to direction from political leaders within the EOP, such actions cannot be done contrary to other legal requirements (e.g., statutory deadlines requiring the issuance of rules by a certain date).[143] Ideally, any such extensions of OIRA review would be done in as transparent a manner as possible.

A. Is A Strict Review Limit the Answer?

In the wake of the unprecedented length of OIRA reviews in recent years, and to prevent a reoccurrence of such delays in the future, the temptation is to simply recommend that strict deadlines be established governing the length of OIRA reviews – just as the ABA Section of Administrative Law and Regulatory Practice did in 1990, when the average review times were substantially less than they are now. The time limits on OIRA's review in EO 12866 were put there for a reason – because OIRA had been previously accused of "sitting on" agencies rules for extended periods of time. OMB stated in its first report on the implementation of EO 12866 that the review deadlines were established "to eliminate unwarranted delays in the regulatory review process."[144] However, the senior agency employees interviewed for this report indicated that OIRA has suggested that the agencies request unlimited reviews, or has ignored those time limits altogether – actions that do not seem consistent with the reason the time limits were established. As a result, dozens of OIRA reviews have gone on for hundreds of days.

To correct this situation and establish clear limits on length of OIRA reviews, the President could amend the extension provision in EO 12866 and specifically state that neither OIRA nor agency-requested extensions can exceed 30 days. Or, OIRA could simply revise its "Frequently Asked Questions" page and change its official interpretation of the extension provision. Either approach could end the currently conflicting interpretations of the extension provision, eliminate the surreptitious process of OIRA "suggesting" agency requests for extensions, and establish an agreed-upon length of OIRA reviews – 90 days, with a one-time extension of up to 30 days.

However, a strict limit on the length of OIRA reviews may not always be advisable, and may not be necessary to solve the problem of lengthy reviews during the past two years. The data in **Table 4** of this report illustrate that in most of the years between 1994 and 2010, between 20 and 70 reviews (about 3% to 10% of the total each year) took longer than 90 days, and some of those reviews required more than the 120 days. Some of the significant rules that agencies submit to OIRA each year are extremely complex, and may understandably require more than 120 days for OIRA and the agencies to reach agreement on certain issues. Therefore, one could argue that an inflexible "hard cap" on the length of OIRA reviews may not be in the best interest of either the agencies or OIRA (since the rule would likely just be returned to the agency or withdrawn and resubmitted shortly thereafter, starting a new review "clock" at zero). A hard cap could also make it more likely that OIRA would refuse to accept a rule for review until it was sure that the

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[142] Cass Sunstein, "Myths and Realities," op. cit., pp. 1873-1874.

[143] Although a number of the lengthy reviews discussed in this report involved rules with statutory or judicial deadlines, there are no clear indications that OIRA reviews caused the submitting agency to miss the deadlines.

[144] See Office of Management and Budget, "Report on Executive Order 12866, Regulatory Planning and Review," 59 *Federal Register* 24276, May 10, 1994, at 24282.

review could be completed within the time allotted, and could also result in regulatory reviews being done in other parts of the EOP that are less transparent than OIRA.

Also, for nearly 20 years, OIRA has interpreted EO 12866 as allowing unlimited agency-requested extensions, but it was only during the last few years that the length of OIRA reviews has greatly exceeded historic norms. For example, as **Table 4** earlier in this report shows:

- From 1994 through 2010, an average of about 8 reviews per year (about 1.6% of all completed reviews) took more than six months. However, in 2012 there were 43 such reviews, and in just the first half of 2013 there were 63 completed reviews lasting more than six months (nearly 30% of the reviews during the period).
- From 1994 through 2012, an average of about 1.5 reviews per year took more than one year to complete. However, during just the first half of 2013 there were 27 such completed reviews, and as of June 30, 2013, another 32 reviews of one year or more were still awaiting completion at OIRA.

In some years (including as recently as 2009) there were no OIRA reviews that took more than six months. In 12 of the 17 years between 1994 and 2010 (including 2010) there were fewer than 10 six-month reviews. In any of those years, OIRA could have gotten the agencies to request dozens of unlimited extensions, but OIRA did not do so. Therefore, it does not seem that OIRA's interpretation of the executive order's extension provision, by itself, is the cause of the numerous lengthy reviews that have occurred recently.

B. Making Timeliness A Priority

Instead, it appears that OIRA can constrain the length of its reviews if and when OIRA leadership makes timeliness a priority. For example, in 2000 there were 159 reviews that lasted more than 90 days, including 26 that lasted more than six months. In 2001, there were 149 reviews that lasted more than 90 days, including 29 that lasted more than six months. After John Graham became OIRA administrator in July 2001, he made reducing the number of lengthy reviews a priority, and instructed his staff that no rule would stay at OIRA for more than 90 days without his personal authorization, and said both rulemaking agencies and the public "deserve a rigorous yet prompt review from OMB." [145] Also, OIRA said that it regarded the 90-day review limit as "a performance indicator for a strong regulatory gatekeeper."[146] As a result of this initiative, the number of OIRA reviews that exceeded 90 days fell by more than 90%, from 149 in 2001 to nine in 2002. None of the 2002 reviews lasted more than six months. The next year (2003), only 10 OIRA reviews took more than 90 days, and only one of those reviews took more than six months. Administrator Graham's initiative clearly made a difference.

OIRA appears to have recently undertaken a similar initiative and has taken steps to improve the timeliness of its regulatory reviews. During his confirmation hearing in June 2013, current OIRA administrator Howard Shelanski said that speeding up the review process would be "one of my highest priorities."[147] In testimony before the House Judiciary Committee's Subcommittee on

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[145] John D. Graham, "Stimulating Smarter Regulation: OMB's Role," Remarks prepared for the American Hospital Association, July 17, 2002, available at http://georgewbush-whitehouse.archives.gov/omb/inforeg/graham_ama071702.html.

[146] Office of Management and Budget, *Stimulating Smarter Regulation*, p. 19, available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2002_report_to_congress.pdf.

[147] Sean Reilly, "Nominee Promises Speedier Regulation Review," *Federal Times*, June 12, 2013, available at http://www.federaltimes.com/article/20130612/DEPARTMENTS06/306120013/Nominee-promises-speedier-regulation-review. To view this confirmation hearing, see http://www.hsgac.senate.gov/hearings/nomination-of-

Regulatory Reform, Commercial and Antitrust Law in September 2013, administrator Shelanski described unnecessary delays in review as "harmful to everyone," and noted the progress that had been made to reduce the number of ongoing lengthy reviews even before he took office.[148]

OIRA's efforts have already had an effect. For example, the number of ongoing reviews lasting more than one year was cut from 50 reviews in January 2013 to 27 reviews in mid-September 2013. Of the 38 reviews that, as of June 30, 2013, had been under review for more than a year, 14 of the reviews had been completed by mid-September. Only 10% of the reviews of rules submitted between September 2012 and February 2013 took more than six months to complete, compared to nearly 30% for reviews completed during the first six months of 2013 (regardless of when they were submitted). However, OIRA still appears to have work to do in order to return the timeliness of its reviews to historical norms. From 1994 through 2011, an average of only 1.6% of all reviews took more than six months.

Although it is unlikely that every OIRA review will be completed within 90 days or even 120 days, a realistic goal would be to return OIRA review times to at least their historic averages (measured in terms of both average review times, and the number of reviews lasting more than 90 days). OIRA should publicly announce this initiative, and the specific steps it intends to take to improve the timeliness of its reviews. It may be understandably difficult for OIRA to do so in the short term, however, as clearing out the existing backlog of reviews is likely to take considerable amounts of time and effort. After a sufficient period of time (e.g., one year), and periodically thereafter, OIRA should report to the public on the results of this initiative (e.g., on its website, or in its annual reports to Congress).

The timeliness improvement initiative could take any number of forms (e.g., making review timeliness a performance indicator for OIRA as a whole, or by making timeliness an indicator of individual desk officer performance). As part of this initiative, the new OIRA administrator could take certain steps that one or more of his predecessors have taken to improve timeliness (e.g., require his personal approval for any review to go beyond 90 or 120 days, have OIRA management track all rules under review for more than 60 days, and/or require desk officers to make extended reviews their top priority once agencies have responded to OIRA suggestions). Submitting and reviewing agencies also have a role to play in improving review timeliness, and can take steps on their own or in concert with OIRA to ensure that reviews are done as quickly as possible. (See the recommendations to these agencies later in this report.) The OIRA administrator may want to set goals for these agencies as part of the timeliness initiative.

Recommendation 1: The OIRA administrator should continue the current initiative to improve OIRA review times, and announce specific steps the office plans to take to ensure that the measures of timeliness return to at least historic averages. After one year, and periodically thereafter, OIRA should report to the public on the results of this initiative.

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howard-a-shelanski.

[148] See http://judiciary.house.gov/hearings/113th/09302013/Shelanski%20testimony.pdf to view a copy of this testimony.

C. Return Letters and Review Letters

When agency employees were asked what they believed would prevent a recurrence of the large number of lengthy OIRA reviews their agencies have experienced in recent years, several suggested that OIRA simply adhere to the requirements stated in EO 12866. Specifically, they said that if OIRA cannot complete its review of an agency rule within certain time limits (e.g., 90 days or 120 days), OIRA should either waive review or return the rule to the agency with a public explanation of its concerns.

In addition to improving review timeliness, return letters can help improve the transparency of OIRA reviews and, more generally, the transparency of the rulemaking process. On January 21, 2009, the President issued a memorandum on "Open Government and Transparency" stating that transparency "promotes accountability and provides information for citizens about what their Government is doing."[149] Implementing the President's memorandum, OMB's December 2009 Open Government Directive specifically instructs the OIRA administrator to "review existing OMB policies…to identify impediments to open government and to the use of new technologies and, where necessary, issue clarifying guidance and/or propose revisions to such policies, to promote greater openness in government."[150] When many rules have been under review at OIRA for extended periods of time, greater use of return letters that describe the nature of OIRA's concerns can help promote such openness.

As indicated above, a strict 90-day or 120-day limit on the length of OIRA reviews may not be advisable or necessary. Some flexibility may be needed to allow certain reviews to extend beyond those limits without triggering a return letter (e.g., when OIRA and the agency are close to agreement, or when interagency reviews are taking somewhat longer than normal). However, it is difficult to envision a scenario in which OIRA reviews should last more than six months without the rulemaking agency and the public being informed about the nature of OIRA's or other agencies' concerns, or any other reason for the extended nature of the review (e.g., the agency not responding to OIRA's suggestions or recommendations promptly). Several agency employees interviewed for this report indicated that while return letters are not the review outcome they would prefer, a return letter would be better than the current situation in which their rules remain "under review" at OIRA for unlimited amounts of time.

Another alternative could be increased use of OIRA "review letters." According to OIRA's website, review letters are issued at the administrator's discretion, and may occur at various stages of the rulemaking process.[151] Some such letters have been issued after the conclusion of OIRA's review, but could also be issued during that process. As Senator Blumenthal said in his May 2013 letter to the OMB Director, when OIRA reviews go beyond a certain point, "the public should be informed of the delay, the justification and the amount of time the Administration estimates it will take to complete review."[152] If OIRA determines that a return letter would not be in the best interest of either the agency or the rulemaking process, it could publish a review letter on its website explaining why the rule has remained under review at OIRA past the 90- or 120-day deadlines in the executive order.

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[149] See http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment.

[150] See http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf.

[151] See http://www.reginfo.gov/public/jsp/EO/letters.jsp. To view copies of review letters that have been sent, see http://www.reginfo.gov/public/jsp/EO/postReviewLetters.jsp.

[152] See http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-urges-end-to-regulation-delay-endangering-workers-and-children for a copy of this letter.

In its 1990 report to the ABA House of Delegates, the Section of Administrative Law and Regulatory Practice said that EO 12291 suggested that if OIRA concluded that a rule was inconsistent with the President's policy preferences, it should return those rules to the agencies with a written explanation. In practice, however, the report said OIRA was "hesitant" to use this authority because a "written OIRA explanation of the deficiencies in a rule was thought poisonous to further working relationships."[153]

> As a result, the pattern for controversial rules has been that OIRA would neither formally return the submission nor clear it, and OIRA and the agency would negotiate in an attempt to resolve their policy differences. Absent a statutory or judicial deadline for issuance of the rule, there was no action forcing event, and the negotiations could (and did) drag on for lengthy periods. These periods of extended, but unexplained, delay created suspicions about OMB's motives in the minds of persons skeptical of the process or who had a preview.

The ABA Section report said two solutions were required: (1) establish "reasonable time deadlines" for different categories of rules, with OIRA "required to complete its review within those deadlines;"[154] and (2) require OIRA to state its objections to rules in writing. The ABA report said more regular use of return letters would reduce the stigma associated with them, and also said the following:

> Requiring OIRA to respond within manageable but prompt deadlines will have several salutary effects. First, OIRA will have incentives to focus its review on the most significant and most problematic rules, thus avoiding the problem of excessive White House micromanagement of agency rulemaking. Second, policy problems will be identified and raised for consideration within OMB promptly. Third, inter-agency regulatory disputes can be elevated to the political level more quickly than is now possible, for consideration by the agency heads, the White House staff, or the President as appropriate. If White House dispute resolution procedures are not available, the interested agencies will know promptly and can seek other solutions. Finally, early passback of OIRA views will permit the agency head to make a timely decision whether to proceed with the rule, despite indications of conflict with Administration policy, or whether to conduct further discussions with other interested officials to seek to resolve those problems.[155]

The following recommendation is both more flexible and more generous than the ABA recommendation in its treatment of deadlines and return letters. Nevertheless, adherence to the recommendation could have many of the same salutary effects that were outlined by the ABA 23 years ago.

Recommendation 2: To improve the timeliness and transparency of OIRA reviews, if OIRA is unable to complete its examination of an agency's regulatory action within 120 days after the date it began its review, OIRA should return the regulatory action to the agency as soon as practicable, with a letter explaining the reasons for the return. The return letter should be posted on OIRA's website. Alternatively, OIRA may want to consider using review letters to explain to the public why certain rules have remained under review at OIRA past the review deadlines in the executive order.

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[153] ABA Section report, op. cit., p. 2.

[154] Specifically, the report said OIRA would be required to either complete its review and return the rule to the agency for reconsideration, or its review "would be deemed complete and the agency could proceed with the rule."

[155] ABA Section report, op. cit., p. 4.

D. Informal Reviews and Transparency

OIRA has always consulted with agencies prior to the formal submission of certain rules, and such consultations can be mutually beneficial. Agencies can obtain an additional perspective during the rule-development process, and discussing the rule with OIRA can smooth the path for formal review. OIRA can benefit by understanding the agency's decision-making process before the rule is formally submitted, and may be able to have more influence on an agency's actions before its positions become too entrenched. During the Clinton Administration, agencies occasionally shared a draft of the entire rule with OIRA as part of those consultations. During the George W. Bush Administration, the rate of these "informal reviews" of rules (i.e., consultations involving the review of the text of draft rules) increased. Senior agency employees interviewed for this report indicated that informal reviews have become even more common during the Obama Administration – so much so, that in some departments and agencies, the employees indicated that all or most of their recent rules were reviewed informally before being formally submitted.

For some rules, the bulk of the OIRA review process appears to occur before formal submission. As a result, the review times provided on OIRA's public database become not just non-transparent but misleading, and the formal review period becomes what GAO in 2003 called an "artificial construct." Several agency employees interviewed for this report referred to informal reviews as a "shadow" review process, and said OIRA's practice of reviewing draft rules "off the clock" gives the public a false impression of how long OIRA reviews really take.

One of the transparency provisions of EO 12866 requires OIRA to publicly disclose meetings, letters, and other communications with outside parties "regarding a regulatory action under review."[156] For the first eight years of the executive order, OIRA only disclosed communications that occurred during formal review. In October 2001, then-OIRA administrator John Graham changed the policy and considered a rule to be "under review" for purposes of this disclosure requirement if OIRA had started a "substantive discussion with the agency concerning the provisions of a draft rule or OIRA has received the rule in draft." In its 2001 report on the costs and benefits of federal regulations, OIRA said the change in the disclosure practice was needed "to protect the integrity of OIRA and the administrative record." Therefore, OIRA said communications during informal reviews would be treated as covered by the executive order "as soon as a rulemaking has proceeded to a point where OIRA desk officers have received from agencies copies of preliminary draft regulatory text or analysis."[157]

A similar change may be needed to improve OIRA review transparency and to protect the integrity of public information about the length of those reviews. The OIRA administrator could change the way the review period under EO 12866 is measured, starting the review "clock" whenever OIRA begins to review and comment on drafts of agency rules. Because OIRA and agency staff should be able to discuss matters related to an upcoming regulatory review without starting the review period, a draft rule starting the clock for OIRA review should be far enough along in the agency's rule-development process to represent the agency's considered position – not just a working draft of a rule developed at the staff level without input from political appointees. As part of this policy change, OIRA may want to explore other ways to measure the length of OIRA reviews and provide greater transparency (e.g., separately measuring the amount

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[156] Section 6(b)(4)(B) of EO 12866.

[157] Office of Management and Budget, Office of Information and Regulatory Affairs, Making Sense of Regulation: 2001 Report to Congress on the Costs and Benefits of Regulation, p. 44, available at http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/costbenefitreport.pdf.

of time it takes for OIRA to provide comments to the agency, and the time it takes for the agency to respond to those comments).

Recommendation 3: Communication between rulemaking agencies and OIRA before formal submission of a rule to OIRA for review should be encouraged, and should not count as part of the OIRA review period. However, as soon as OIRA has received a draft rule for review that represents that agency's considered opinion (with appropriate input from political appointees), the "clock" recording the length of OIRA's reviews should begin.

E. Submitting Agencies

Improving the timeliness of OIRA reviews will also require action by the agencies that submit their rules to OIRA – particularly if OIRA institutes changes designed to adhere more closely to the deadlines delineated in EO 12866. Previous OIRA administrators and some of the agency employees interviewed for this report said that agencies have sometimes tried to "jam" OIRA by delaying their responses to OIRA comments until late in the 90-day review period, or until just before certain statutory or judicial deadlines. In order to meet those deadlines, OIRA would presumably have to quickly agree to the agency's proposed revisions. This tactic is unlikely to work when OIRA reviews are effectively of unlimited duration, but it may be viewed as an effective strategy as OIRA begins to improve the timeliness of its reviews. As the National Academy of Public Administration said in 1987, rulemaking agencies should not try to shift the blame to OIRA to "disguise their own rulemaking problems."[158]

As part of its overall timeliness initiative, OIRA should provide comments to submitting agencies as soon as possible after the rule is submitted, thereby allowing sufficient time for the agencies to consider and respond to those comments, and for the agencies to reach agreement with OIRA on any issues of contention before the expiration of the 90- or 120-day review period. Submitting agencies, for their part, should respond to OIRA's comments as quickly as possible, and not attempt to "game the system" by responding to OIRA late in the review period or just before statutory or judicial deadlines. Doing so could result in an OIRA return letter exposing the tactic, which would further delay the date that the rule would ultimately be promulgated. As the OIRA administrator said the agencies in her October 1993 guidance on the recently-issued EO 12866, "we must work closely together to ensure that requests for clarification or information are responded to promptly."[159]

Recommendation 4: OIRA should provide comments to agencies on rules submitted for review as soon as possible after the review period begins. Agencies should respond to OIRA's comments as soon as possible after receiving those comments.

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[158] NAPA, 1987, p. 40.

[159] To view this guidance, see http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/eo12866_implementation_guidance.pdf.

F. Non-Submitting Agencies and Offices

In addition to OIRA and the agencies submitting their rules for review, the other key players in the OIRA review process are the non-submitting agencies and offices that are involved in interagency coordination and reviews. Former administrator Cass Sunstein noted in his 2013 article that OIRA review is at least in part an interagency process in which OIRA acts as an information aggregator, and that process is often the cause of lengthy reviews. Several of the agency employees interviewed for this report identified this interagency review process as one of the reasons why so many recent rules have been under review at OIRA for extended periods of time. Some of the agency employees interviewed for this report said they believed that OIRA did not always send draft rules to the non-submitting agencies and offices early in the review process, or provide for concurrent review by all such agencies and offices.

Reviews of draft rules by other agencies and by other offices within the EOP can be extremely important, and can ensure that draft rules do not conflict with existing and forthcoming rules of other agencies, and are consistent with the President's priorities. As part of its overall timeliness initiative, OIRA should provide the draft rules or summaries to non-submitting agencies and offices as soon as possible after the rule is submitted. These interagency reviews could also be concurrent with (and not sequential to) OIRA's own initial reviews. Non-submitting agencies and offices, for their part, should provide OIRA with comments on the draft rules as quickly as possible, or should indicate that they have no comments.

The senior agency employees interviewed for this report also indicated that they believed OIRA has recently been sending draft rules to more non-submitting agencies and offices than ever before, particularly more offices within the EOP. Although OIRA should not solicit the views of more non-submitting agencies and offices than are necessary, the number of such solicitations will likely vary with the significance and the political sensitivity of the rule. Therefore, this report will not recommend that the number of parties involved be limited to a specific number.

Recommendation 5: OIRA should send draft rules or summaries of the rules submitted for review to all of the non-submitting agencies and offices promptly after the start of the review process. The non-submitting agencies and offices should provide any comments to OIRA promptly after receiving the draft rules or summaries.

G. Submission of Significant Rules to OIRA

The report indicated that OIRA has always met with rulemaking agencies periodically to determine which significant rules are likely to be submitted in the coming months, and to be sure that the agencies and OIRA agreed on priorities. Such meetings, which may serve as a supplement to the twice-yearly process used to compile the *Unified Agenda of Regulatory and Deregulatory Actions*, can be extremely helpful in ensuring that the agencies' upcoming rulemaking actions are known and understood, and that the agencies understand the President's priorities.

However, most of the senior agency employees interviewed for this report indicated that OIRA has recently required them to obtain the office's approval before submitting each significant rule for review, and that the agencies have not been permitted to submit certain significant rules. This

development seems inconsistent with the statement in EO 12866 that it is intended to "reaffirm the primacy of Federal agencies in the regulatory decision-making process," and that the regulatory process is to be conducted "with due regard to the discretion that has been entrusted to the Federal agencies." The executive order established a process by which the agencies and OIRA determine which rules are significant, but with OIRA making the final determination. And OIRA can certainly counsel agencies as to the advisability of submitting particular significant rules for review. However, for rules that both OIRA and the agencies agree are significant (or that OIRA determines to be significant), the agencies themselves should ultimately make the determination as to whether, and if so, when the rules will be submitted to OIRA for review.

Recommendation 6: OIRA and the agencies should be encouraged to discuss which significant rules should be submitted for review, and when they should be submitted. However, for rules that both OIRA and the agencies agree are significant (or that OIRA determines to be significant), the agencies should make the final determination as to whether, and if so, when the rules will be submitted to OIRA for review.

H. OIRA Staffing

As noted earlier in this report, OIRA had a staff ceiling of about 90 FTEs when its regulatory review function was established in 1981, but that number diminished to about 47 by FY1997 (when OIRA was reviewing fewer rules under EO 12866). OIRA's staff ceiling increased to 51 FTEs in FY2001, and stood at 55 FTEs in FY2003. By FY2009, however, OIRA's staffing authorization had fallen to 46 FTEs, and was projected to be at 44 FTEs by FY2014. Actual staffing is reportedly already below that level. In 2012, former OIRA administrator John Graham was quoted as saying "I do not know how many more OIRA staffers are needed but they definitely need more than their diminished current size."[160]

Although the reduction in OIRA's staffing during the past 10 years (both in terms of its overall numbers and the loss of certain experienced staff) may have been one of the causes of the recent increase in the length of OIRA reviews, is not clear what level of staffing is needed to permit OIRA to improve the timeliness of its reviews. OIRA may be able to review rules somewhat more quickly by improving the efficiency of its operations, and by eliminating any non-essential functions. However, all other things being equal, some increase in OIRA staffing may be needed. No one expects a return to the 90 FTEs that OIRA had more than 30 years ago, but a return in staffing authorizations to the levels it had five or ten years ago (when OIRA's authorization was between about 9% and 11% of that of OMB as a whole) would seem appropriate.

Another alternative would be for OIRA to have rulemaking agencies detail staff to OIRA for short periods of time. Doing so could not only improve OIRA's capacity for reviews, but could also provide other benefits. The detailed agency staff could gain an appreciation of OIRA's role in the rulemaking process, and could provide OIRA staff with a perspective of that process from the vantage point of rulemaking agencies. Procedures would have to be put in place to ensure that detailees do not work on rules from their sponsoring agencies.

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[160] Andrew Zajac, "Regulators surge in numbers while overseers shrink," *Washington Post*, June 24, 2012, available at http://articles.washingtonpost.com/2012-06-24/business/35461319_1_regulators-federal-agencies-current-administrator. While some have questioned whether there has been a "surge" in the number of regulators, the diminished size of OIRA has not been questioned.

Recommendation 7: OIRA's staffing authorizations should be increased to a level adequate to ensure that OIRA can conduct its reviews in a timely manner. In addition, or as an alternative, staff from rulemaking agencies could be detailed to OIRA for short periods of time, under appropriate guidance.

Appendix A. Selected Cases Addressing OIRA Delays and Statutory Deadlines

The following discussion is not meant to be a comprehensive treatment of court cases involving OIRA, or even just of cases that mention the length of OIRA reviews in the context of statutory deadlines for the issuance of rules. Rather, the cases discussed below illustrate that during periods covering both EO 12291 and EO 12866, courts have indicated that statutory deadlines take precedence over any perceived need for the rules to be reviewed by OIRA.

Environmental Defense Fund v. Thomas

Section 3004(w) of the Resource Conservation and Recovery Act (RCRA) required EPA to issue final permitting standards for hazardous waste in underground tanks by March 1, 1985. EPA submitted the rule to OIRA for review on March 4, 1985, and (because it was not a major rule) expected that the office would complete its review within 10 days. However, on March 25, 1985, OIRA notified EPA that it was extending its review, and requested that EPA gather additional information. At a meeting on April 16, 1985, OIRA reportedly described the four changes it wanted EPA to make to the proposed rule. Plaintiffs filed the lawsuit on May 30, 1985, seeking an order directing EPA to issue the rule by a date certain and an injunction against OIRA to prevent similar types of delays in the future. OIRA cleared the proposed rule for publication on June 12, 1985, and it was published in the *Federal Register* on June 26, 1985.[161]

In its January 1986 decision, *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566 (D.D.C. 1986), the district court stated that it was "clear that OMB did contribute to the delay in the promulgation of the regulations by insisting on certain changes."[162] Documents reportedly indicated that EPA was prepared to announce the proposed rule as early as March 31, 1985, but OIRA had delayed the agency from doing so for three months. The court said:

> [T]he use of EO 12291 to create delays and to impose substantive changes raises some constitutional concerns. Congress enacts environmental legislation after years of study and deliberation, and then delegates to the expert judgment of the EPA Administrator the authority to issue regulations carrying out the aims of the law. Under EO 12291, if used improperly, OMB could withhold approval until the acceptance of certain content in the promulgation of any new EPA regulation, thereby encroaching upon the independence and expertise of EPA. Further, unsuccessful executive lobbying on Capitol Hill can still be pursued administratively by delaying the enactment of regulations beyond the date of a statutory deadline.

The court also noted that the delay of this rule was not the only instance in which OIRA had delayed the issuance of EPA rules that were to be issued pursuant to certain deadlines.

> Through answers to interrogatories, plaintiffs show that EPA submitted 169 regulations to OMB which were subject to statutory or judicial deadlines, and on 86 occasions OMB extended its review beyond the time periods outlined in EO 12291. OMB's propensity to extend review has become so great that EPA keeps a running record of the number of its

[161] 50 *Federal Register* 26444.

[162] To view a copy of this decision, see http://elr.info/sites/default/files/litigation/16.20250.htm.

> rulemaking actions under extended review by OMB and the resulting delays. The average delay per regulation is 91 days; total delays were more than 311 weeks. Apparently Section 8(a)(2) of EO 12291 is simply ignored.

After noting that the report by the House Committee on Energy and Commerce on the legislation containing the statutory requirement stated that EPA's ability to meet the deadlines in the bill "shall not be impaired in any way whatsoever by Executive Order 12291," the court declared that

> OMB has no authority to use its regulatory review under EO 12291 to delay promulgation of EPA regulations arising from the 1984 Amendments of the RCRA beyond the date of a statutory deadline. Thus, if a deadline already has expired, OMB has no authority to delay regulations subject to the deadline in order to review them under the executive order. If the deadline is about to expire, OMB may review the regulations only until the time at which OMB review will result in the deadline being missed. [163]

Paralyzed Veterans of America

In an August 2010 decision by the United States Court of Appeals, Federal Circuit, the Court concluded that the Department of Veterans Affairs was required to issue a final rule establishing presumptions of service connection for three diseases that the Secretary had determined to be associated with exposure to herbicides in the Vietnam War.[164] The department indicated that it had drafted the final rule, but could not issue it until after OIRA completed its review. In its decision, the Court said the following:

> The Secretary's argument that delay is required under Executive Order 12,866, until OMB reviews and clears the regulation is also unpersuasive. The Executive Order makes clear that OMB review cannot interfere with a clear directive of Congress regarding the timing of issuance. First, Section 6(a)(3)(D) of the Executive Order provides that when, as here, regulatory action is governed by a statutory-imposed deadline, the agency should attempt to permit sufficient time for OMB review, but only "to the extent practicable." Section 9 further provides that "[n]othing in this order shall be construed as displacing the agencies' responsibilities, as authorized by law." In addition, the Executive Order states in Section 8 that while publication of a rule is not ordinarily allowed until after OMB review, it is allowed when "required by law." By creating a deadline such as this, Congress has effectively altered the agency's discretion and "required by law" that the final rule be published notwithstanding the deadlines that appear in the Executive Order for action by OMB.

OIRA cleared the rule shortly after the Court's determination, and the department published the rule less than a week later.[165]

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[163] For more information on this case, see Robert V. Percival, "Rediscovering the Limits of the Regulatory Review Authority of the Office of Management and Budget," *Environmental Law Reporter*, volume 17 (1987), pp. 10017-10023. To view a copy of the article, see http://elr.info/sites/default/files/articles/17.10017.htm#op_1_fn_25. Mr. Percival was lead attorney for the NRDC in the case.

[164] In re Paralyzed Veterans of America, National Veterans Legal Services Program, Non-Commissioned Officers Association, and United Spinal Association/Vetsfirst, Petitioners, Misc. No. 949, August 2, 2010.

[165] U.S. Department of Veterans Affairs, "Diseases Associated With Exposure to Certain Herbicide Agents (Hairy Cell Leukemia and Other Chronic B-Cell Leukemias, Parkinson's Disease, and Ischemic Heart Disease)," 75 *Federal Register* 53202, August 31, 2010. OIRA formally received the draft final rule on July 8, 2010, and completed review on August 25, 2010. OIRA had reviewed the proposed rule for more than 90 days earlier in the year.

Appendix B: Results of OIRA Reviews

OIRA can conclude its review of a draft rule by coding the rule (1) "consistent with change" (meaning some element of the rule changed during review, and as a result it is now consistent with Executive Order 12866), (2) "consistent without change" (meaning the rule was unchanged during review and is consistent with the executive order), (3) withdrawn, (4) returned to the agency for reconsideration, or (5) some other code (e.g., improperly sent, emergency rules, and statutory or judicial deadline). "Consistent with change" does not necessarily mean that the rule changed because of a suggestion by OIRA (the agency may have made the change at its own initiative), and does not mean that the change was substantive (e.g., the change may have corrected a legal citation or a spelling error). As the table below indicates, "consistent with change" has been the most commonly used code since 1996, and it has been even more frequently used in recent years. Starting in 2010, more than three-quarters of all reviews have been coded "consistent with change."

Most Recent Completed OIRA Reviews Are Coded "Consistent With Change"

Year	Number of Reviews	Percentage of Reviews Coded:				
		Consistent with Change	Consistent Without Change	Withdrawn	Returned	Other
1994	831	37.3	53.4	4.3	0.2	4.9
1995	620	39.0	53.1	5.2	0.5	2.3
1996	507	51.5	41.4	5.1	0.0	2.0
1997	505	56.0	37.4	5.1	0.8	0.6
1998	487	59.3	36.1	3.1	0.0	1.4
1999	587	62.2	31.5	3.1	0.0	3.2
2000	582	60.4	34.3	3.9	0.0	1.4
2001	700	45.6	28.1	22.0	2.6	1.7
2002	669	54.3	31.7	7.6	0.7	5.6
2003	715	60.3	30.1	6.9	0.3	2.2
2004	626	62.7	29.8	6.5	0.2	0.8
2005	611	65.4	27.0	6.6	0.2	1.0
2006	600	69.2	26.5	3.7	0.0	0.7
2007	589	72.3	21.1	6.3	0.2	0.2
2008	673	69.8	23.5	5.6	0.3	0.8
2009	595	71.6	17.1	10.4	0.5	0.4
2010	690	78.7	14.1	5.7	0.0	1.6
2011	740	76.8	11.6	6.2	0.4	5.0
2012	424	77.1	13.0	5.9	0.0	4.0
2013	212	78.3	11.8	7.5	0.0	2.4

Source: OIRA database at www.reginfo.gov.

Note: "Other" includes rules that were sent improperly, emergency rules, and rules with a statutory or judicial deadline. Numbers may not total to 100.0 due to rounding. Data for 2013 are through June 30.

Appendix C: Return Letters

As the table below indicates, OIRA has issued a total of nine return letters since 2002. The table indicates the date of the return letter, the department or agency involved, the title of the rule, and the stated reason for the return.

OIRA Return Letters Since 2002

Date	Department/ Agency	Title of Rule	Reason for Return
06/13/2003	DOT	Regulations To Be Followed by All Departments, Agencies, and Shippers Having Responsibility to Provide a Preference for U.S. Flag Vessels in the Shipment of Cargoes on Ocean Vessels	Analysis does not address concerns raised by other agencies. Returned to "provide additional time to address these unresolved concerns."
08/22/2003	DOT	Hazardous Materials: Transportation of Lithium Batteries	Regulatory Flexibility Analysis needed to support certification.
02/11/2004	DOT	Regulations to be Followed by All Departments, Agencies, and Shippers Having Responsibility to Provide a Preference for U.S. Flag Vessels in the Shipment of Cargoes on Ocean Vessels	Analysis does not address concerns raised by other agencies. Returned "to provide additional time to address these unresolved concerns."
12/09/2005	OFHEO	Corporate Governance – Prohibition on Indemnification Payments	Analysis does not consider all alternatives and does not consider consequences of the rule.
10/30/2007	DOC	Amendment 12 to the Coastal Pelagic Species Fishery Management Plan	Additional analysis needed; returned to allow agency staff time to do so.
07/03/2008	EPA	Pesticide Container Recycling	Costs exceed benefits, and no alternatives considered.
08/13/2008	DHS	Coastwise Transportation of Passengers	No evidence of need, no statement of costs and benefits, no discussion of alternatives.
01/06/2009	SBA	Size Standard Rules on Accommodations and Food Service Industries, Other Services Industries, and Retail Trade Industries (three rules)	Agency proposed further analysis; returned to provide time needed for that analysis.
09/02/2011	EPA	Reconsideration of the 2008 Ozone Primary and Secondary National Ambient Air Quality Standards (three rules)	President does not support; not mandatory, may not be based on current science, and other actions taken.

Source: OIRA website, at http://www.reginfo.gov/public/do/eoReturnLetters. Information is as of June 30, 2013.

Note: "OFHEO" is the Office of Federal Housing Enterprise Oversight, which is now part of the Federal Housing Finance Agency.

Appendix D: Number of Final Rules Issued

Since shortly after the Congressional Review Act (5 U.S.C. §§801-808) was enacted in March 1996, GAO has maintained a database showing the number of "major" final rules, "significant or substantive" final rules,[166] and total final rules that were published each year in the *Federal Register*.[167] The table below shows those data for each full year from 1997 through 2012, and for the first half of 2013. From 1997 through 2011, federal agencies published an average of 3,206 final rules per year, with the highest number published in 1998 (4,388 rules), and the lowest number in 2007 (2,947 rules). In 2012, federal agencies published only 2,638 final rules – the lowest number since GAO began keeping data in 1997, and a drop of 1,229 rules (32%) from the previous year's total. The pace of final rulemaking during the first half of 2013, if continued for the remainder of the year, suggests that a new record low may be established in 2013 (about 1,600 final rules), which would be about half of the average number of final rules published per year during the 15-year period from 1997 through 2011.

Number of Final Rules Published Declined in 2012 and the First Half of 2013

Calendar Year	Major Rules	Significant or substantive Rules	Total Final Rules
1997	61	1,489	3,930
1998	76	1,433	4,388
1999	51	982	4,336
2000	76	1,069	4,079
2001	69	897	3,423
2002	50	1,003	3,559
2003	50	1,007	3,744
2004	65	977	3,661
2005	56	907	3,301
2006	56	979	3,065
2007	61	910	2,947
2008	94	1,063	3,085
2009	83	926	3,472
2010	100	1,023	3,261
2011	80	1,039	3,867
2012	**68**	**853**	**2,638**
2013 (as of 06/30/3013)	**31**	**330**	**802**

[166] The "significant or substantive" category includes rules considered "significant" under EO 12866, as well as rules that are "substantive" but not significant. According to the Unified Agenda, "substantive" includes rules that are more than "routine and frequent" or "informational/administrative," but that do not rise to the level of "significant." GAO does not provide data on the number of only significant rules.

[167] See http://gao.gov/legal/congressact/fedrule.html.

Source: GAO rules database, available at http://www.gao.gov/legal/congressact/fedrule.html. Data were based on the date the rules were published in the *Federal Register*, and were collected on July 30, 2013.

The number of "significant or substantive" final rules published also fell to a new low in 2012 (853 rules), down 186 rules (18%) from the previous year, and down about the same percentage from the average of the previous 15 years (1,047 rules), but only slightly below the previous low of 897 significant or substantive rules published in 2001. The pace of significant or substantive rulemaking during the first half of 2013 (330 rules), if continued for the rest of the year, would also establish a new record low (about 660 rules), which would be about 37% below the average number of significant or substantive final rules published during the 15-year period from 1997 through 2011.

Notably, however, the 68 "major" final rules published during 2012 was not a record low for this period (50 major rules were published in both 2002 and 2003), and was about average for the 15-year period from 1997 through 2011 (69 rules). The pace of major rulemaking during the first half of 2013 (31 rules), if continued for the rest of the year, would not represent a record low (about 62 rules), and would be only slightly below the average number of major rules published during the 15-year period from 1997 through 2011. Examination of the major final rules published in 2012 and 2013 reveals that many of them were issued in response to rulemaking provisions in the Patient Protection and Affordable Care Act (P.L. 111-148) and Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203).[168] Also, as the Congressional Research Service reported in 2011, many rules are considered "major" "because they involve the transfer of federal funds [e.g., grants, food stamps, Medicare or Medicaid funds, special pay for members of the military, and crop payments], not because of the agencies' estimates of regulatory costs or benefits.[169]

[168] For descriptions of the rulemaking authorities in these acts, see CRS Report RL41180, *Regulations Pursuant to the Patient Protection and Affordable Care Act (P.L. 111-148)*, April 13, 2010, by Curtis W. Copeland, available at http://www.ropesgray.com/files/upload/RegulationsPursuanttothePPACA.pdf; and CRS Report R41472, *Rulemaking Requirements and Authorities in the Dodd-Frank Wall Street Reform and Consumer Protection Act*, November 3, 2010, by Curtis W. Copeland, available at http://www.llsdc.org/attachments/files/255/CRS-R41472.pdf.

[169] CRS Report R41651, *REINS Act: Number and Types of "Major Rules" in Recent Years*, February 24, 2011, , p. 25, by Curtis W. Copeland and Maeve P. Carey, available at http://www.speaker.gov/sites/speaker.house.gov/files/UploadedFiles/110830_crs_majorrules.pdf.

Appendix E: Longest Reviews Completed in 2013

The table below shows the 27 longest reviews completed by OIRA during the first half of calendar year 2013 (i.e., January 1, 2013 through June 30, 2013) by department and agency. All of the reviews took at least one year to complete.

Longest Reviews Completed During First Half of 2013

Department/ Agency	Title of Draft Rule (RIN)	Date Received by OIRA	Date OIRA Review Completed	Days Under OIRA Review
USDA/Food and Nutrition Service	Supplemental Nutrition Assistance Program: Nutrition Education and Obesity Prevention Grant (0584-AE07)	02/16/2012	03/25/2013	404
DOC/Bureau of Industry and Security	Revisions to the Export Administration Regulations: Control of Firearms and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (0694-AF47)	01/04/2012	05/17/2013	499
DOC/BIS	Revisions to the Export Administration Regulations: Control of Ammunition and Ordinance the President Determines No Longer Warrant Control Under the United States Munitions List (0694-AF49)	01/04/2012	05/17/2013	499
DOC/BIS	Revisions to the Export Administration Regulations: Control of Guns and Armament and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (0694-AF48)	01/04/2012	05/17/2013	499
DOE/Energy Efficiency and Renewable Energy (EE)	Federal Building Standards Rule—Update—90.1-2010 (1904-AC60)	12/19/2011	06/27/2013	556
HHS/Food and Drug Administration (FDA)	Laser Products; Amendment to Performance Standard (0910-AF87)	05/24/2011	05/31/2013	739
HHS/CMS	Requirements for Long-Term Care Facilities: Hospice Services (CMS-3140-F) (0938-AP32)	12/02/2011	06/12/2013	558
HHS/FDA	Hazard Analysis and Risk-Based Preventive Controls (0910-AG36)	11/22/2011	01/04/2013	410
HHS/FDA	Produce Safety Regulation (0910-AG35)	12/09/2011	01/04/2013	393
HHS/FDA	Effective Date of Requirement for Premarket Approval for Two Class	12/28/2011	01/17/2013	387

	III (0910-AG78)			
HHS/Administration for Children and Families (ACF)	Child Care and Development Fund Reforms to Support Child Development and Working Families (0970-AC53)	01/23/2012	05/15/2013	478
DOI/National Park Service (NPS)	Demonstrations, Public Assembly and Distribution of Printed Material (1024-AD91)	01/05/2012	05/23/2013	504
DOJ/Federal Bureau of Investigation	Proposed Changes to NICS Intended To Promote Public Safety, To Enhance the Efficiency of NICS Operations, and To Resolve Difficulties Created by Unforeseen Processing Conflicts Within the System (1110-AA27)	12/08/2011	01/16/2013	406
DOL/Office of Federal Contract Compliance Programs	Notice of Proposed Rescission, Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation (1250-ZA00)	01/17/2012	02/25/2013	405
State	Exchange Visitor Program – Teachers (1400-AC60)	12/15/2011	04/04/2013	477
State	Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category II (1400-AD05)	01/05/2012	05/17/2013	498
State	Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category III (1400-AD04)	01/05/2012	05/17/2013	498
State	Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category I (1400-AC90)	01/05/2012	05/17/2013	498
DOT/National Highway Traffic Safety Administration	Federal Motor Vehicle Safety Standard No. 111, Rearview Mirrors (2127-AK43)	11/16/2011	06/20/2013	583
Treasury/ Departmental Offices	Garnishment of Accounts Containing Federal Benefit Payments (1505-AC20)	12/05/2011	04/23/2013	506
EPA/Air and Radiation (AR)	Protective Action Guidance for Radiological Incidents (2060-ZA19)	07/22/2011	03/29/2013	617
EPA/AR	Notice of Availability for Federal Guidance Report No. 14: Radiation Protection Guidance for Diagnostic and Interventional X-Ray Procedures (2060-ZA20)	11/04/2011	03/21/2013	503
EPA/Office of Chemical Safety and Pollution Prevention	Pesticides; Data Requirements for Antimicrobials (2070-AD30)	10/03/2011	03/13/2013	527

(OCSPP)				
EPA/Solid Waste and Emergency Response (SWER)	Modifications to RCRA Rules Associated With Solvent-Contaminated Industrial Wipes (2050-AE51)	04/23/2012	06/24/2013	428
EPA/OCSPP	Formaldehyde; Third-Party Certification Framework for the Formaldehyde Standards for Composite Wood Products (2070-AJ44)	05/05/2012	05/20/2013	381
EPA/OCSPP	Formaldehyde Emissions Standards for Composite Wood Products (2070-AJ92)	05/05/2012	05/20/2013	381
Pension Benefit Guarantee Corporation	Reportable Events; Pension Protection Act of 2006 (1212-AB06)	01/26/2012	03/07/2013	406

Source: OIRA database, available at www.reginfo.gov.

Note: Days under OIRA review calculations do not include the last day of the review period, as the review was completed on that day.

Appendix F: Ongoing One-Year Reviews

The table below provides a list of the 38 rules that, as of June 30, 2013, had been under review at OIRA for at least one year by department and agency. The table shows the department and agency that submitted the rule, RIN numbers, the date the rule was received by OIRA, and the number of days under OIRA review as of June 30, 2013. As of September 18, 2013, OIRA had concluded review of 14 of these 38 rules, and those rules are identified by an asterisk (*) in the "Days Elapsed" column of the table. Ten of the closed reviews were concluded as "consistent with change," but four rules were withdrawn from review.

Rules Under Review at OIRA for More Than One Year (as of June 30, 2013)

Department/ Agency	Title of Draft Rule (RIN)	Date Received by OIRA	Days Elapsed Since Receipt (as of 06/30/2013)
USDA/Animal and Plant Health Inspection Service	Animal Welfare: Marine Mammals; Nonconsensus Language, and Interactive Programs (0579-AB24)	02/27/2012	489
DOE/Energy Efficiency and Renewable Energy (EE)	Energy Efficiency and Sustainable Design Standards for New Federal Buildings, Solar Hot Water Requirements, Water Efficiencies, and Green Building Ratings (1904-AC13)	08/18/2011	683
DOE/EE	Fossil Fuel Energy Consumption Reduction for New Construction and Major Renovations of Federal Buildings (1904-AB96)	08/31/2011	*670
DOE/EE	Energy Conservation Standards for Walk-In Coolers and Walk-In Freezers (1904-AB86)	09/23/2011	647
DOE/Office of General Counsel	Convention on Supplementary Compensation for Nuclear Damage Contingent Cost Allocation (1990-AA39)	10/18/2011	622
DOE/EE	Energy Efficiency Standards for Manufactured Housing (1904-AC11)	12/21/2011	558
DOE/EE	Energy Efficiency Standards for Metal Halide Lamp Fixtures (1904-AC00)	02/17/2012	*500
DOE/EE	Energy Conservation Standards for ER, BR, and Small Diameter Incandescent Reflector Lamps (1904-AC15)	02/17/2012	500
DOE/EE	Energy Conservation Standards for Commercial Refrigeration Equipment (1904-AC19)	02/17/2012	*500
HHS/Food and Drug Administration (FDA)	Foreign Supplier Verification Program (0910-AG64)	11/28/2011	*581
HHS/FDA	Current Good Manufacturing Practice and Hazard Analysis and Risk-Benefit Preventive Controls for Food for Animals (0910-AG10)	12/05/2011	574

DOI/Bureau of Land Management (BLM)	Coal Management: Lease Modifications; Lease and Logical Mining Unit Diligence; Advance Royalties; Royalty Rates; Bonds (1004-AD93)	01/26/2012	*522
DOI/Office of Natural Resources Revenue (ONRR)	Reporting and Paying Royalties on Federal Leases on Takes or Entitlement Basis (1012-AA02)	03/06/2012	*482
DOI/BLM	Waste Mine Methane Capture, Sale, or Destruction (1004-AE23)	05/03/2012	424
DOI/National Park Service (NPS)	Native American Graves Protection Act--Disposition of Unclaimed Cultural Items on Federal and Indian Lands (1024-AE00)	05/03/2012	424
DOL/Occupational Safety and Health Administration (OSHA)	Occupational Exposure to Crystalline Silica (1218-AB70)	02/14/2011	*868
DOL/Employment and Training Administration	Equal Employment Opportunity in Apprenticeship and Training, Amendment of Regulations (1205-AB59)	05/24/2011	769
DOL/Mine Safety and Health Administration (MSHA)	Proximity Detection Systems for Mobile Machines in Underground Mines (1219-AB78)	09/16/2011	654
DOL/OSHA	Occupational Injury and Illness Recording and Reporting Requirements--Modernizing OSHA's Reporting System (1218-AC49)	1218-AC49	587
DOL/MSHA	Criteria and Procedures for Proposed Assessment of Civil Penalties (1219-AB72)	12/02/2011	577
DOL/OSHA	Electric Power Transmission and Distribution; Electrical Protective Equipment (1218-AB67)	06/27/2012	369
State	National Security Information Regulations (1400-AC75)	03/23/2012	*465
DOT/Pipeline and Hazardous Materials Safety Administration	Hazardous Materials: Revisions to Requirements for the Transportation of Lithium Batteries (2137-AE44)	10/05/2010	1,000
DOT/Federal Aviation Administration	Flight Crewmember Mentoring, Leadership, and Professional Development (HR 5900) (2120-AJ87)	05/19/2011	774
VA	Service-Disabled Veteran-Owned and Veteran-Owned Small Business Acquisition Program (2900-AO23)	01/20/2012	528
EPA/Office of Chemical Safety and Pollution Prevention (OCSPP)	Chemicals of Concern List (2070-AJ70)	05/12/2010	*1,146
EPA/OCSPP	Nanoscale Materials; Reporting Under TSCA Section 8(a) (2070-AJ54)	11/22/2010	952
EPA/Office of Environmental	Modification of Toxics Release Inventory (TRI) Reporting Requirements Primarily	05/13/2011	780

Information	Associated With Metal Mining (2025-AA11)		
EPA/Office of Water e	National Pollutant Discharge Elimination System (NPDES): Use of Sufficiently Sensitive Test Methods for Permit Applications and Reporting (2040-AC84)	08/08/2011	693
EPA/Air and Radiation (AR) 4	Withdrawal of Prior Determination That Compliance w/CAIR or the NOx SIP Call Constitutes Reasonably Available Control Technology or Measures (2060-AQ07)	11/14/2011	595
EPA/Office of Water 2	Water Quality Standards Regulatory Clarifications (2040-AF16)	11/30/2011	*579
EPA/OCSPP 6	Chemical Substances and Mixtures Used in Oil and Gas Exploration or Production; TSCA Section 21 Petition; Agency Response (2070-ZA17)	12/14/2011	*565
EPA/OCSPP 5	CBI: PMN Amendments Claiming Chemical and Microorganism Identity as Confidential in Data From Health and Safety Studies Submitted Under TSCA Prior to the Commencement of Manufacture (2070-AJ87)	12/27/2011	*552
EPA/Office of Enforcement and Compliance Assurance d	NPDES Electronic Reporting Rule (2020-AA47)	01/20/2012	*528
EPA/Office of Water 3	Clean Water Protection Guidance (2040-ZA11)	02/21/2012	*496
EPA/Office of Water 7	2012 Implementation Guidance on FAFO Regulations: CAFOs that Discharge (Pork Producer Guidance) (2040-ZA16)	03/06/2012	482
EPA/Office of Water 1	Revisions to the Nov. 22, 2002 Memorandum "Establishing TMDL Wasteload Allocations (WLAs) for Stormwater Sources and NPDES Permit Requirements Based on those WLAs" (2040-ZA17)	03/13/2012	475
Agency for International Development	Participation by Religious Organizations in USAID Programs (0412-AA69)	08/11/2011	690

Source: OIRA database, available at www.reginfo.gov.

Note: Days elapsed calculations include the last day, as OIRA review was not completed as of the end of June 30, 2013.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMPETITIVE ENTERPRISE INSTITUTE, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendant.	))))))))))	Civil Action No. 12-1617 (JEB)

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

DEPOSITION
EXHIBIT NUMBER Perciasepe 43
DATE 2-21-14 REPORTER ML
ART MILLER & ASSOCIATES

of high-ranking EPA officials using private email accounts to skirt FOIA continue to come to light, both in this case, and in other FOIA cases before judges of this Court:

> Documents show that Lisa P. Jackson, as EPA chief, told a lobbyist to shift their conversations to her "home email" account rather than using official government accounts, in a move that appears to contravene the intent of federal sunshine laws. . .In Ms. Jackson's case, the information, released as part of a Freedom of Information Act request, shows she told a vice president at Siemens AG, a multinational electronics corporation, to communicate with her on a private email account rather than at her EPA addresses. "P.S. Can you use my home email rather than this one when you need to contact me directly? Tx, Lisa," Ms. Jackson wrote in a December 2009 email to Siemens USA's vice president for sustainability, Alison Taylor, after the woman asked Ms. Jackson to schedule a meeting with a company executive. Ms. Jackson resigned as head of the Environmental Protection Agency late last year, just as questions about her use of emails were beginning to rise - particularly over whether she was using a secondary government address attached to the name "Richard Windsor" to avoid scrutiny.[22]
>
> Similarly, Deputy Administrator Perciasepe – the very official who pledged to improve

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Friday, March 15th: Dubious E-mail Practices ("Multiple EPA employees have used non-EPA e-mail accounts to conduct agency business, including: Acting Administrator Bob Perciasepe using perciasepe.org; Region 8 Administrator James Martin used me.com; Region 9 Administrator Jared Blumenfeld used comcast.net; and former Deputy General Counsel Tsemin Yang used gmail.com.") (www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=fbadd0c4-6eb9-4e3b-97a1-952fa0b46595) (visited 9/11/2013).

[22] Dinan, *Sunshine Law Gets Cloudy When Federal Officials Take Email Home*, Wash. Times, Aug. 14, 2013, at A1. That December 2009 email is found in one of the documents produced in this case, document #3168, *see Freedom of Information Act Request HQ-FOI-01268-12, Fifth Release Part A*, p. 64, www.epa.gov/foia/docs/Fifth_Release_Attachments_Part_A.pdf (visited 9/11/2013). *Accord* Senate Environment and Public Works Comm., Minority Report, *A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered* (Sept. 9, 2013) at 14 ("former Administrator Lisa Jackson on at least one occasion instructed an environmental lobbyist with Siemens Corporation to communicate via Jackson's personal email account.").

For additional examples of Jackson using personal email accounts for government business, see the following examples of her personal email address being redacted despite EPA claiming official deliberative-process privilege for the related emails. *See, e.g. Vaughn Index - Every 10th (Withheld in Full Documents)* (Docket No. 24-5) at pp. 31-32, documents #2165 (EPA Administrator Lisa Jackson), documents ## 1914, 1947-49, 2159-60, 2162-65, 2264, 2307 (more such Lisa Jackson emails using redacted non-official address but claiming (b)(5) privilege); documents ## 2439, 2481, 2529-30 (using the monicker "Lisa at Home" or "Lisa Home").

For additional examples of Lisa Jackson's use of a Verizon private email account for Alison Taylor of Siemens, and a non-EPA AT&T Blackberry account, see the documents produced by EPA in this case, available at EPA's Frequently Requested Records page, www.epa.gov/epafoia1/frequent.html, specifically, FOIA production, Release 3 Part AA (pages --not document #s -- 282, 283, 285, 286, 287, 288, 289, 290, 603) (www.epa.gov/epafoia1/docs/Part-AA.pdf); Release 3 Part EE (docs ## 3198, 3225, 3543) (www.epa.gov/epafoia1/docs/Part-EE.pdf), Part FF, doc. # 3543 (www.epa.gov/epafoia1/docs/Part-FF.pdf); Part II, doc. # 3790 (www.epa.gov/epafoia1/docs/Part-II.pdf) (all visited Sept. 11, 2013).

the EPA's compliance with its "statutory and regulatory obligations" regarding "email"[23] – uses multiple personal email addresses to conduct official business, as in this very case.[24] So do EPA regional administrators like Region 2 Administrator Judith Enck,[25] and Region 9 Administrator Jared Blumenfeld (jaredblumenfeld@comcast.net)[26] who has just acknowledged doing so after this was first discovered in emails produced in the instant case.[27] Other agency officials like Deputy General Counsel Tsemin Yang,[28] "former Senior Policy Counsel Bob Sussman and

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[23] Ben Geman, *EPA Vows Better Records Management Amid Criticism*, The Hill, April 8; *see also* Stephen Dinan, *EPA Staff to Retrain on Open Records; Memo Suggests Breach of Policy*, Washington Times, April 9, 2013, at A4 ("In a letter to all employees, acting administrator Bob Perciasepe singled out emails and instant messages as areas where the Environmental Protection Agency needs to do a better job. He warned that the agency's auditor is looking into how well they are complying."); May 1 letter from Perciasepe to Sen. Vitter, *ante*, at footnote 12.

[24] *See, e.g.*, document #704 (bperciasepe@audobon.org), in the index of documents withheld, *CEI v. EPA Draft Index of Withholdings 01268*, https://www.dropbox.com/s/5ng181bpl8kbtnf/Horner%20FOIA%209.zip; Ben Geman, *Top EPA Official Used Personal Email Address*, The Hill, Feb. 19, 2013 (http://thehill.com/blogs/e2-wire/e2-wire/283821-top-epa-official-used-personal-email-address) ("Newly released documents show that the acting head of the Environmental Protection Agency has used a personal email address for internal communication. . .Internal documents EPA released on Feb. 15 through Freedom of Information Act litigation show that in 2010, Robert Perciasepe, who was then EPA's deputy administrator, used the account " bob@perciasepe.org" in a message to three other officials. . . Sen. David Vitter (R-La.) . . . pounced on the disclosure, calling it part of an effort to "dodge the agency's mandatory recordkeeping policy.". . .The Perciasepe email is contained in records (available here) released to the Competitive Enterprise Institute . . . about just-departed EPA Administrator Lisa Jackson's use of a secondary government email account under the name Richard Windsor.").

[25] *See* documents ## 1127, 1520, 1521, 7096, 7098, 7173, in *CEI v. EPA Draft Index of Withholdings 01268* (2011 communications with, *e.g.*, "enckj", which email addresses are redacted as "b6 privacy"), available from https://www.dropbox.com/s/5ng181bpl8kbtnf/Horner%20FOIA%209.zip; *compare Judith A. Enck, Administrator for EPA's Region 2 Office in New York*, http://www2.epa.gov/aboutepa/judith-enck-administrator-epas-region-2-office-new-york, (Judith Enck has been Region 2 Administrator since 11/5/2009).

[26] *See, e.g.*, email of 11/19/2011 at 1:27 p.m., found in Second Release, Part P, pg. 125, www.epa.gov/foia/docs/Second-Release-Part-P.pdf (part of February 15, 2013 release); *A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered*, at 13-14; September 5, 2013 letter from Jared Blumenfeld, to Rep. Darrell Issa, at 1 ("There are other examples of emails to or from my Comcast.net account that are related to my work");*Vitter, Issa Question EPA Region 9 Administrator on Personal Email Use*, Press Release, Mar. 19, 2013, www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=8311f916-0582-7f13-d6ff-ece347aed24e).

[27] *See, e.g.*, letters from Jared Blumenthal to Sens. Barbara Boxer and David Vitter, and Reps. Darrell Issa and Elijah Cummings, September 6, 2013. See also letter from Sen. Vitter and Chmn. Issa to Blumenfeld, March 19, 2013, www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=8311f916-0582-7f13-d6ff-ece347aed24e&Region_id=&Issue_id=.

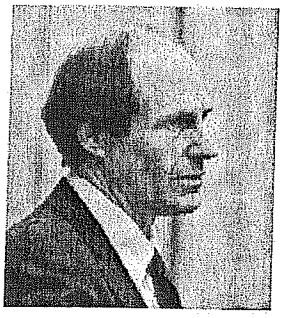
[28] Senate Environment and Public Works Committee, Minority Staff, *Sunshine Week – Friday, March 15th:* . . .

PENN PROGRAM ON REGULATION
REGBLOG

DEPOSITION
EXHIBIT NUMBER Percia Sepe 63
DATE 2-21-14 REPORTER ML
ART MILLER & ASSOCIATES

Inside Baseball: The Nature of OIRA's Work

Cass R. Sunstein | Sep 11, 2013 | Opinion



While my first three observations about how OIRA works shed light on what OIRA *does*, the fourth and last point sheds light on the *nature* of the work: Much of the OIRA process is highly technical, and it's very rarely political in the sense in which that word is used in ordinary language. For example, you might have a rule that has trade implications, and it might affect our relations with China or Korea or Brazil or Germany. The Office of the United States Trade Representative will have something to say about that rule, especially if it's legally problematic under international trade law, but also if the rule would compromise our trade relations with those nations. There might be a rule that an agency is issuing that is going to affect national security: it could be the State Department or it could be the Department of Transportation, which might have a rule that affects aircraft operations somewhere. In that case, I might be on the phone with others asking, "Is this okay?" We don't want to do anything on a rule from an agency that's going to raise a national security issue. Likewise, if the EPA is issuing a rule that some people fear will affect the energy supply, then the Department of Energy will be enlisted to see what the effect is going to be. These are efforts to engage, typically, career officials with technical expertise, not political officials. And the political officials are going to get involved only under a particular set of processes.

Here's how the operation basically works. OIRA has about 45 people. They're organized into branches. There's an environmental and natural resources branch, which mainly handles EPA rules but that also does Interior stuff too. There is a branch that does health care and food and drug stuff. There is a branch that does transportation and homeland security. Basically, there are a bunch of branches with assigned jurisdiction. There's someone who is called the desk officer who plays point guard. They're like a point guard on a basketball team in the sense that a rule comes to them and they allocate it to multiple people throughout the government. If a rule comes in from, let's say, the Department of Transportation, it will be sent out to numerous White House offices, and they will be asked for their views. It will also go to other parts of the federal government that might have an interest in resolving any issues or controversy.

The number of people who may look at it will be very broad. In the White House itself, there's the Office of the Vice President; there's the Domestic Policy Council; there's the

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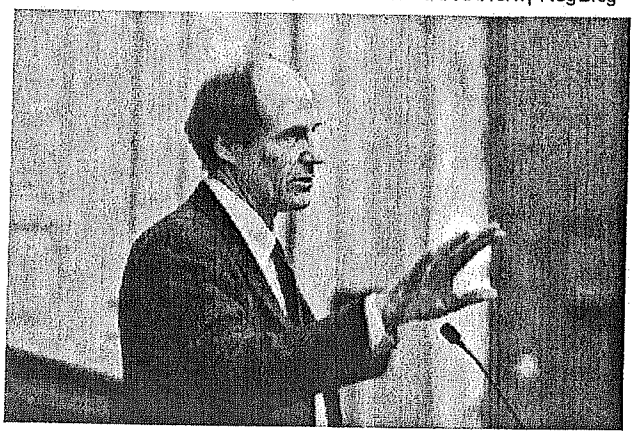

National Economic Council; there's the United States Trade Representative; there's the Council on Environmental Quality—that's just an incomplete, illustrative list. It is also a way of suggesting that the White House is, in an important respect, a "they," not an "it." There's a famous paper about Congress that says Congress is a "they," not an "it." It's a little more complicated for the Executive Branch because there's a boss: the President. But the President usually doesn't get involved, certainly not typically at the early stages, so there's truly a "they" who assesses rules. The desk officer's obligation is to make sure that this "they" reviews the rules.

Now, before the rule gets into OIRA, especially if it's a big deal, there might be White House involvement in advance. There's a recent paper by Dean Richard Revesz, who's one of the best in the business in administrative law, and his plea is that OIRA should be involved not just in scrutinizing rules that are coming in, but also in initiating agency action, particularly to overcome the risk of agency capture. There is a lot to be said about whether that's a good idea.

One thing to keep in mind is that it's actually the job of the White House policy offices to do exactly that. If the President has an idea about something that should be done—let's call it action involving gun control—then the White House will play a big role in initiating that action. For gun control in particular, the Domestic Policy Council and the Office of the Vice President may be natural allies that will work with the relevant agencies, and maybe the Department of Justice, to do something.

Typically, if there is a presidential priority—maybe it involves healthcare reform and how to implement it—there will be people who will be initiating action within the White House long before OIRA gets involved. If the rule is a big economic deal or a big public policy deal, there will be a degree of inter-agency coordination before OIRA even sees a proposed rule.

I've indicated that the White House is a "they" and not an "it." Know also that the range of parts of the federal government that have relevant information about rules submitted to OIRA is very broad. I knew very little, before I got to OIRA, about the Office of Advocacy within the Small Business Administration. But it's an important office. The President is very concerned about small businesses: he actually has a memorandum on this point to make sure that regulation doesn't, without sufficient justification, impose costs and burdens on small businesses. It's the job of the Office of Advocacy, whose name isn't coincidental, to raise the concerns of small business. If there's a rule from one of the cabinet departments that the Small Business Administration's Office of Advocacy thinks is trouble because it's going to crush small business and make it hard for them to do what they should be doing, which is growing and helping the economy, then that opinion is going to be circulated and it's really going to matter.

To pick another example: if the White House Counsel's office has a view on a legal issue and thinks that the general counsel at a department has gotten it wrong, then

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White House lawyers are going to be engaged. The White House Counsel's office can be a central player in the process, along with the Department of Justice.

Now the range of participants, as I am describing it, typically includes career people, not necessarily people with political roles. I have no idea what the political affiliation of OIRA's staff is, and I don't care. Their job is, essentially, to circulate the rules, to develop their own sense of where the rules might be off the mark, and to work with the multiple inter-agency commentators to get a solution that everyone finds agreeable.

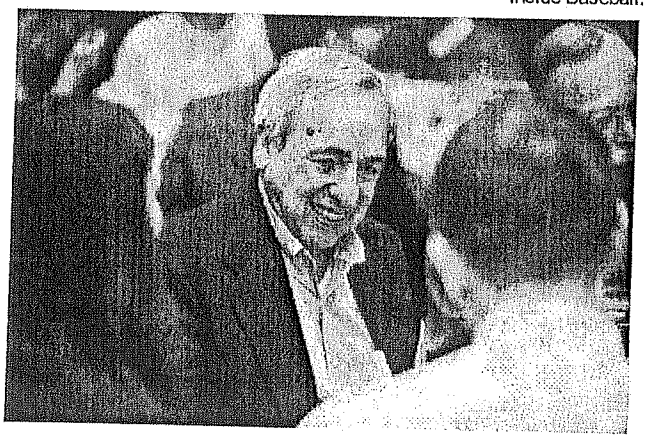
Sometimes, the OIRA Administrator, or other political types in OIRA, won't be involved, certainly not at the early stages. They will largely rely on the career people to work out the substantive concerns to make sure there are no legal problems, to make sure there isn't a scientific error, or to make sure that th
ere isn't going to be an unanticipated bad consequence from a rule.

I'll share a little story that is relevant to this dynamic. Rules are often very long. If you haven't read them, you have some surprises in store: they can be over one thousand pages long. After a while at OIRA, I had read a large number of them, and I discovered on a few occasions that there was a provision on page 700 or 800 that I hadn't known about until I had read all 1,200 pages. That hidden provision, on occasion, seemed to me not clearly ideal, and I wouldn't have known about it except that I had been obsessive about reading all the pages. So with the support of others, I issued a memorandum saying that every long or complex rule had to be accompanied by a short executive summary of typically four to six pages, which basically says what the rule does, what the legal authority is, what all the important provisions say, and what the costs and benefits are so that everyone can see it. It's a ridiculously small thing to do, but it's turned out to be extremely helpful in facilitating scrutiny of rules by career people and, as I am about to mention now, people who are more political.

If a rule can't be sorted out through this inter-agency process dominated by career staff, it's subject to something which is called *elevation*—a word that I really dislike and, at one point, resisted until I gave up. There's a U2 song called *Elevation*. It's a really happy song. I encourage you to listen to it. But elevation within the federal government doesn't have that kind of upbeat feeling.

What would typically happen to prompt elevation is that the staff at, say, the Department of Treasury and, hypothetically, the OIRA staff and the Council of Economic Advisors would have some disagreement that they couldn't work out. An assistant secretary of the Department of Treasury would call me and say, "We're stuck. Help." Then, typically, my number two would call a meeting with all the relevant people to talk through the substance and to try to sort it out.

I learned something about government and human nature through this process because the person who was my number two for two years—Michael Fitzpatrick, a Washington lawyer—is a genius at sorting through complex disagreements. He was (and is) a master. He was so good at figuring out things, such as, "Okay, what are you concerned about? Is there a way of meeting that concern in a way that doesn't disrupt the goals of the person who's issuing the rule?" He just had a kind of very precise sense for figuring it out in a way that wasn't a compromise, really—I don't like the idea of compromise because you're serving the American public, not the combatants—but in a way that would preserve the best arguments of the competing views and make sure they were reflected in the rule. He was quite great at that.



Sometimes it wouldn't work at his level, and it would be elevated further. What that meant in the vast majority of cases is that I and either the deputy secretary, the number two within the relevant agencies, or in some cases the cabinet head, would have to talk. Usually people did not exactly love those meetings: people are really busy, and to try to sort out a complex disagreement isn't always a joy. I would work with them to work it out. Going through the list in my head of the deputies with whom I worked on these meetings: Bob Perciasepe, who became the acting EPA Administrator, an agency where he was number two for a long time; Bill Corr, number two at the Department of Health and Human Services; I worked a lot with Ray LaHood, the Secretary of Transportation, and with Lisa Jackson at EPA. All of these people are phenomenal. When you talk to one of them—take Bob Perciasepe—he's going to talk about something with complete understanding of all the details, he'll say, "The reason we have to do it this way is because of what the law requires or it is environmentally terrific and the science supports it." And then someone else who disagrees might take another view. Then we'd all talk it through in a way that would produce resolution.

And what was remarkable is the unfailingly substantive quality of these dialogues. I can make that clearest in the only well-known case where President Obama actually intervened in a very hard regulatory dilemma. EPA proposed a rule with respect to ozone. The EPA Administrator felt that the Bush Administration's ozone rule was not justified by the science, and she proposed to replace it in 2011 with a final rule. And the President believed that EPA should not finalize the rule for reasons that he directed me to spell out in a return letter to her.

There are a couple things to say about this situation. One is that it was widely said that this was a political judgment and that it was connected with electoral considerations. Really, nothing could be further from the truth. On both the President's part and the EPA's part it was completely substantive. It was entirely based on substantive questions about what was the right policy for the country.

In fact—and this was reported as kind of scandalous, but I think it's the opposite—there was one time there was a political argument made, and it was by an outside group. Because the ozone issue was so contested, so salient, and such a big economic deal in all respects, a lot of people were interested. Bill Daley, then the Chief of Staff, went to a couple of meetings, and there was one such meeting with environmental groups in which they made a lot of useful points, but one of their points was that they had poll figures that suggested that the American people, as a political matter, favored this rule. Bill Daley said something like "I don't care about polls." And that's completely true; he just wanted to know the merits. He didn't care about polls. It wasn't a scandalous moment. If the industry group had said that it had polls showing Americans don't want this kind of rule, he would have said exactly the same thing. He just wanted to know the merits.

Cass Sunstein is the Robert Walmsley University Professor at Harvard Law School.

From 2009 to 2012, he served at the Administrator of the White House Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

This post is the third of a five-part series drawing on Prof. Sunstein's keynote address at the Penn Program on Regulation's annual regulation dinner at the University of Pennsylvania Law School. Professor Sunstein's lecture drew on an article that he subsequently published in the Harvard Law Review. *His latest book,* Simpler: The Future of Government, *provides additional discussion of Sunstein's accomplishments as OIRA Administrator.<*
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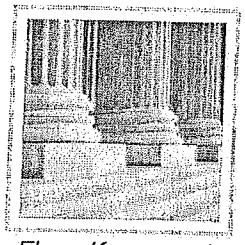

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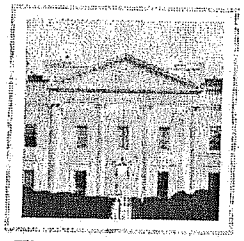

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Lisa Jackson speaks candidly on secret EPA email account

Posted By Michael Bastasch On 1:15 PM 04/10/2013 In | No Comments

Former Environmental Protection Agency Administrator Lisa Jackson spoke candidly about the controversial secret email account, "Richard Windsor," she was using during her tenure as the top environmental regulator in the country.

Jackson spoke before an audience at an event called "The Unfinished Business of the Environmental Movement" at Princeton University. The talk mainly revolved around issues in the environmental movement and what issues it needs to tackle going forward, but one student asked Jackson about her use of an alias email account.

Jackson said an internal email account was necessary due to the high volume of emails her public account gets every year, and she swayed by career staff to pick a name that was not her own. Combining the name of her dog Ricky and the East Windsor Township in New Jersey, she came up with the alias name "Richard Windsor."

"It is not an unofficial account. The account is 'Windsor.richard@epa.gov,'" Jackson said. "When we got to EPA, I said let's make it 'admjackson@epa.gov,' and the career staff, who work there, advised ... that that shouldn't be done, because we have a searchable database, and what would happen is people would search it, find it, and start using it."

"So, that's why we did it, just like the guy before me did it — a Republican — and what the woman before him may have done, I have no idea what she did," she added.

"So it's not unofficial," Jackson said. "And I get very angry at the way politics is done, because you can put that up there — not you personally, I don't know, maybe you did ... so then that becomes that I set up an email — so you take a fact, which is true, that I had another email account."

Jackson also said that she endlessly told people to search for Richard Windsor emails when using a Freedom of Information Act request to get agency information and records.

"After 25 years in public service, I have people accusing me on both sides of doing something unethical to hide information," she said. "And I have endless times when I've said to people, 'Make sure when you're searching for FOIA information you search the Richard Windsor account.'"

Jackson came under fire after Competitive Enterprise Institute senior fellow Chris Horner told the Daily Caller News Foundation that two EPA officials confirmed to him that she was using an account under the name Richard Windsor. A lawsuit from CEI has forced the EPA to turn over thousands of emails between Jackson's alias account and other agency officials.

"As to this notion that it was widely known that Richard Windsor was Jackson's false identity for EPA emailing, that is preposterous," Horner told The Daily Caller News Foundation. "We see emails from many high-ranking EPA officials sent not to Windsor but to Lisa Jackson's account in her name; we have dozens of them proving that in fact the false identity was known only to a select, small group of insiders for certain communications."

Jackson's alias account also piqued the interest of congressional Republicans who began to question Jackson, and other agency officials, on the use of alias and private email accounts to conduct official business.

"Do I regret naming it [that]?" Jackson said at Princeton. "I wish that I had stuck with my original inclination and just left it 'admjackson,' although I'm sure somebody would have decided that that was too obscure as well, but you take that and then you assign a motive to it."

"But the difference between fact and ascription of motive is the most base form of our politics. And as policy students, I certainly hope that's the one thing you know besides

[unintelligible], she said.

Jackson announced she would leave the Obama administration last December, saying that she wished to spend time with her family and pursue other opportunities.

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The New York Times

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November 16, 2011

Re-election Strategy Is Tied to a Shift on Smog

By JOHN M. BRODER

WASHINGTON — The summons from the president came without warning the Thursday before Labor Day. As she was driven the four blocks to the White House, Lisa P. Jackson, the administrator of the Environmental Protection Agency, suspected that the news would not be good. What she did not see coming was a rare public rebuke the president was about to deliver by rejecting her proposal to tighten the national standard for smog.

The half-hour meeting in the Oval Office was not a negotiation; the president had decided against ratcheting up the ozone rule because of the cost and the uncertainty it would impose on industry and local governments. He clearly understood the scientific, legal and political implications. He told Ms. Jackson that she would have an opportunity to revisit the Clean Air Act standard in 2013 — if they were still in office. We are just not going to do this now, he said.

The White House announced the decision the next morning, infuriating environmental and public health advocates. They called it a bald surrender to business pressure, an act of political pandering and, most galling, a cold-blooded betrayal of a loyal constituency.

"This was the worst thing a Democratic president had ever done on our issues," said Gene Karpinski, president of the League of Conservation Voters. "Period."

The full retreat on the smog standard was the first and most important environmental decision of the presidential campaign season that is now fully under way. An examination of that decision, based on interviews with lobbyists on both sides, former officials and policy makers at the upper reaches of the White House and the E.P.A., illustrates the new calculus on political and policy shifts as the White House sharpens its focus on the president's re-election.

Industry groups and their Republican allies praised the move, which leaves a far more lenient ozone rule in place for at least a year. But then they reeled off a dozen other proposed environmental, labor and health regulations they also wanted killed.

In the weeks since that decision, the administration has made a number of oth decisions, sending mixed messages that left both environmentalists and indust perplexed.

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Two major clean air rules have been delayed, at least temporarily. The Interior Department announced a significant expansion of offshore drilling in the Arctic and the Gulf of Mexico over the next five years. Last week, the administration bowed to pressure from protesters, environmental groups, and residents and officials in Nebraska in announcing that it would delay a decision on the bitterly contested Keystone XL oil pipeline until after the 2012 election. Taken together, the moves mark the White House's growing awareness of the costs of environmental regulation in a battered economy.

The ozone decision pitted Ms. Jackson, a Princeton-trained chemical engineer and self-described "New Orleans girl," against the White House chief of staff, William M. Daley, a son and brother of bare-knuckled Chicago mayors who was brought in to help repair relations with business and Congress. It also shows the clout of Cass R. Sunstein, the legal powerhouse who serves, mostly behind the scenes, as the president's regulatory czar with the mission of keeping the costs of regulation under control.

While Mr. Daley has recently given up some responsibilities at the White House, he remains the administration's conduit for business interests.

The ozone decision was jarring because it was wholly unexpected. Ms. Jackson considered resigning but soon abandoned the idea as a futile gesture.

Many of the president's supporters remain unsettled, fearing that the ozone decision meant he was abandoning environmental issues. But White House officials cite two major vehicle emissions rules, the pipeline delay and the president's stated promise to carry through on other clean air measures as evidence of the administration's devotion to their causes.

Revisiting a Law

In his inaugural address, Mr. Obama promised to "restore science to its rightful place" in making government environmental policy. He also pledged to revisit environmental rules set by the administration of George W. Bush that his administration felt were too weak.

The standard for ozone was last set in 2008 by the Bush administration at a level of 75 parts per billion, above the range of 60 to 70 recommended by the E.P.A.'s scientific advisory panel at the time, but never enacted. Environmental and public health groups challenged the Bush standard in court, saying it would endanger human health and had been tainted by political interference. Smog levels have declined sharply over the last 40 years, but each incremental improvement comes at a significant cost to business and government.

So Ms. Jackson asked health and environmental groups to hold their lawsuit in abeyance while

she reconsidered the ozone standard, a job she expected to complete by the summer of 2010. Until then, an outdated ozone standard of 84 parts per billion, set by the E.P.A. of the Bill Clinton administration in 1997, remained the law.

Delay followed delay until the spring of this year, when Ms. Jackson determined that the standard should be set at 65 parts per billion to meet the Clean Air Act's requirement that it be protective of public health "with an adequate margin of safety." At 65 parts per billion, the agency calculated, as many as 7,200 deaths, 11,000 emergency room visits and 38,000 acute cases of asthma would be avoided each year.

Ms. Jackson knew that standard would cause political heartburn at the White House, so before submitting it she met with Mr. Daley at least three times in June to try to deal with any concerns. Mr. Daley, rightly sensing the uproar from business and local governments at the cost of meeting such a standard, sharply questioned the costs and burdens as well as the timing of the new rule but never explicitly asked her to hold off or pull back.

Ms. Jackson went back to her suite in a large office complex off Pennsylvania Avenue to huddle with aides and tweak the proposal.

She returned to Mr. Daley with a compromise, agreeing to settle for a somewhat weaker standard, at the upper limit of the recommendations of the E.P.A.'s scientific advisory board, as well as measures to provide significant flexibility in compliance.

Ms. Jackson thought she had a deal. In early July she sent the White House a 500-page package with a detailed cost-benefit analysis for what she assumed would be routine vetting and approval.

"We were absolutely, 100-percent certain we were going to get this ozone rule," one senior E.P.A. official said.

Counteraction

The business community and its Republican allies in Congress went to war.

The ozone rule became a symbol of what opponents called a "regulatory jihad" and brought out a swarm of industry lobbyists and Republicans in Congress who identified it as one of their top targets. They organized letter-writing campaigns, ran ads in journals seen by Washington policy makers and put the ozone rule at the top of the list of administration environmental initiatives they wanted repealed in the fall. They claimed the rule would cost $90 billion a year — far above E.P.A.'s estimates — and put much of the industrial heartland out of business. Local and state officials complained to Congress and the White House that they lacked the resources to

enforce the new rule. Even some Democratic lawmakers warned the White House that the regulation would damage their re-election prospects.

Against all this, there was no one lobbying strongly within the White House for the tougher standard. Carol M. Browner, a former E.P.A. administrator who had served as the White House coordinator for energy and environmental policy, left earlier this year as Mr. Daley was taking over because she sensed those issues were taking a back seat to economic and political concerns.

Mr. Daley abolished her job, leaving no one in the current White House who speaks as forcefully on environmental issues as she did.

Another Voice

In charge of Mr. Obama's effort to reduce regulatory costs and burdens was Mr. Sunstein, on leave from teaching at Harvard and a onetime colleague of Mr. Obama's at the University of Chicago Law School. One of the most respected liberal legal scholars of his generation, he is known for his at-times unconventional thinking on regulation and economic behavior.

Mr. Sunstein had his pick of jobs in the new administration. He chose the obscure regulatory affairs office as a potential laboratory for his sometimes iconoclastic views. He has challenged the utility of command-and-control-style federal regulation and has written favorably of programs to "name and shame" polluters as a way of getting them to clean up their operations without enforcement actions or fines. He has sought creative ways to encourage responsible economic and environmental behavior without using the heavy hand of the state.

Mr. Sunstein never really warmed to the proposed ozone rule, not least because it would, by law, be subject to revision again in 2013. He also noted that in nearly half of the E.P.A.'s own case studies, the cost of the new rule would outweigh the benefits, raising additional alarms.

One outside adviser, who watched the process closely but declined to be identified for fear of losing access to policy makers, said the ozone rule provided the perfect opportunity for Mr. Sunstein to make his mark.

"Cass was itching, itching, itching to send a return letter," the adviser said.

Early Objections

lthough she was under intense pressure from business and Congressional Republicans over the proposed rule, Ms. Jackson believed the White House would back her. In mid-July, she hosted a delegation of trade group officials at E.P.A. headquarters so they could present their

concerns. Among those present were leaders of the U.S. Chamber of Commerce, the National Association of Manufacturers, the Business Roundtable and the American Petroleum Institute.

They tried a hard sell, according to R. Bruce Josten, the chief lobbyist for the Chamber of Commerce, noting that the new rule would push hundreds of counties out of compliance with the Clean Air Act and force them to devise costly new air pollution control plans. They suggested she wait until the next review in 2013.

"Lisa is very smart, cordial, friendly," Mr. Josten said of Ms. Jackson. "She listened to us, but then talked about how important it was to do this, the lung thing, the asthma thing, the kids' health thing. She felt it was important to go ahead."

Mr. Josten added: "The funny thing was nobody wanted to come right out and say, 'Are you guys thinking this through? Your boss is up for re-election next year, do you really want to shut down industrial permitting? You're going to have a major negative impact on the economy.' "

The executives left frustrated. Ms. Jackson knew their efforts were just beginning.

Maneuvering

The business lobbyists started working the White House, securing a series of meetings with mid-level staff members in July. Mr. Daley and Mr. Sunstein agreed to meet with them on Aug. 16, the same day they were to meet with public health and environmental groups.

For the West Wing gathering that day, Jack N. Gerard, the pugnacious head of the American Petroleum Institute, brought maps showing the areas that would be out of compliance with the proposed regulation in a vivid swath of red states across the Midwest and along the East Coast, states that Mr. Obama won in 2008. They did not need to spell out the implications.

"The maps were on the table," said Khary Cauthen, director of federal relations for the petroleum group and a White House environmental adviser in the Bush administration. "One of the C.E.O.'s had a whole spiel he was going to do, 'This is so bad here, so bad there,' but Daley shut him up. He was like, 'I got that.' "

John Engler, the former Republican governor of Michigan and president of the Business Roundtable, noted the burden to state and local officials. "I told him, 'When there's a cloud over your head about whether you're going to be able to meet the new standard, you're likely to lose new business to some other state,' " Mr. Engler said, referring to Mr. Daley.

Mr. Daley was well aware of state and local concerns. One of the strongest appeals came from North Carolina, a state Mr. Obama narrowly won in 2008. The state's governor, Bev Perdue, a

Democrat, argued against the new ozone rule. Her air quality director, B. Keith Overcash, wrote the E.P.A. pleading for a delay. "Lack of employment, loss of health care, and in some cases, loss of a home, also affect the health of our citizens," he said.

"The governors had a big role," Mr. Engler said. "They were very helpful."

A few hours later, the other side gathered around the same table in the Roosevelt Room. Mr. Daley, Mr. Sunstein and Gina McCarthy, the top clean air official at the E.P.A., sat at the table; a half-dozen more junior aides lined the walls.

Charles D. Connor, president of the American Lung Association and a childhood friend of Mr. Daley's, opened by discussing the adverse health impacts of ozone. He introduced Monica Kraft, a pulmonologist at Duke University and the president-elect of the American Thoracic Society.

"I told them that we thought a 70 p.p.b. standard was appropriate for health reasons and laid out the statistics on deaths associated with progressively higher levels of ozone," Dr. Kraft said. She emphasized the damage smog does to the lungs of even healthy young children.

Mr. Daley listened politely, then asked, "What are the health impacts of unemployment?" It was a question straight out of the industry playbook.

Another member of the group introduced polling data showing strong public support for tougher air rules. Mr. Daley cut him off with an expletive, saying he was not interested in polls.

Daniel J. Weiss of the Center for American Progress presented data showing little difference in employment and economic growth in areas required to adopt stricter ozone standards than those that did not. Mr. Daley nodded but said nothing.

As the meeting was breaking up, Mr. Daley said, "As you know, it's a very difficult economic time."

Still, the group left believing that the rule would go forward.

The Decision

The timing turned out to be terrible. The White House was locked in an ugly battle with Republicans over raising the debt ceiling, job creation had stalled and the presidential campaign was already under way with a singular focus on Mr. Obama's stewardship of the foundering economy. The president was preparing a speech on job creation to a joint session of Congress even as he was considering a regulation that many — including governors of politically pivotal states like North Carolina and Ohio — warned could cost thousands of jobs.

For the next two weeks, none of the parties, including the E.P.A. leadership, heard anything from the White House about ozone. Mr. Obama returned to Washington from vacation near the end of August with a heavy menu of economic decisions before him. He wanted the ozone matter behind him and called Ms. Jackson into his office on Sept. 1 to break the news.

"There was always a notion that they were looking for a regulation to use as an example of the reform initiative, a poster child, and this was potentially it," said a senior E.P.A. official who asked not to be identified on a matter involving discussions with the White House. "We knew one was coming. We just didn't know which one."

Since Mr. Obama took office, Mr. Sunstein's agency has reviewed more than 1,800 rules. Most were approved with some changes and set into law. About 130, including 11 from the E.P.A., were voluntarily and quietly pulled back for further work.

Only one — the ozone standard — was so publicly rejected.

Mr. Sunstein would not discuss his communications with the president, but Mr. Obama is known to prefer concisely written memos to long oral briefings. The president's brief public statement turning back the proposed ozone rule closely mirrored Mr. Sunstein's letter to Ms. Jackson.

In an interview, Mr. Sunstein said the rejection of the rule resulted from a long and detailed analysis.

"This decision was made on the merits and not on politics," he said. "There isn't an agreement to do things until the process runs its course. There is sometimes a surprise."

In a letter rejecting her standard, he reminded Ms. Jackson of the president's executive order in January that all proposed regulations "must promote predictability and reduce uncertainty."

Although Mr. Sunstein was not present in the Oval Office when Mr. Obama delivered the news to Ms. Jackson, Mr. Daley was there, but stayed mostly silent.