EPA Comments on Notice of Intended Action – Amendments to Wastewater Rules related to the Iowa Antidegradation Implementation Procedure as Adopted by Reference
June 29, 2016

The US Environmental Protection Agency (EPA) appreciates the opportunity to comment on the proposed referenced amendments to Iowa's water quality standards. Our comments, which are based upon the recent discussions between the Region, EPA HQ, and IDNR are as follows:

1. EPA understands the economic efficiency percentage of Iowa's antidegradation implementation procedures is being used in the analysis of alternatives when determining which practicable alternative (from a range of non-degrading and less degrading practicable alternatives) to select. EPA's recent update to its implementing regulation outlines the requirements for analyses of alternatives at 40 CFR 131.12(a)(2)(ii).[1] Specifically, the regulation requires:

   (ii) Before allowing any lowering of high water quality, pursuant to paragraph (a)2) of this section, the State shall find, after an analysis of alternatives, that such a lowering is necessary to accommodate important economic or social development in the area in which the waters are located. The analysis of alternatives shall evaluate a range of practicable alternatives that would prevent or lessen the degradation associated with the proposed activity. When the analysis of alternatives identifies one or more practicable alternatives, the State shall only find that a lowering is necessary if one such alternative is selected for implementation.

   The requirement at 40 CFR 131.12(a)(2)(ii) provides for preservation of high water quality by requiring a less degrading practicable alternative to be selected for implementation, if available, before states and authorized tribes may find that a lowering of water quality is necessary. <u>This requirement applies even if the analysis identifies only one practicable alternative.</u> To meet the requirements of 40 CFR 131.12(a)(2)(ii), one of the identified practicable alternatives must be selected for implementation regardless of whether the less degrading practicable alternative cost more than 115% to implement .

   Note that the term "practicable", as defined specifically in 40 CFR 131.3(n) means "means technologically possible, able to be put into practice, and economically viable." Therefore, if Iowa were able to demonstrate that alternatives exceeding a certain percent were not practicable, those alternatives would not fall in to the range of practicable alternatives identified in 40 CFR 131.12(a)(2)(ii). EPA recommends that Iowa provide a rationale explaining why alternatives that exceed a certain percentage do not meet the definition of "practicable."

   If Iowa retains the language on "economic efficiency", EPA recommends that the state provide an explicit explanation of how the economic efficiency percentage accounts for water quality benefits. EPA notes that page 15 of Iowa's Antidegradation Implementation Procedure explains that "An analysis of pollution control costs, or economic efficiency, is appropriate when the applicant desires to optimize the balance between water quality benefits and project costs."

[1] See 80 FR 51019, August 21, 2015. https://www.epa.gov/wqs-tech/final-rulemaking-update-national-water-quality-standards-regulation.

EPA's implementing regulation provides states the flexibility, when selecting a practicable alternative for implementation, to balance multiple considerations,[2] including water quality benefits.

2. "Base cost of pollution control" is explained on page 15 of Iowa Antidegradation Implementation Procedures. "The base cost of pollution control is the cost of the controls required to protect **existing uses** and to achieve the highest statutory and regulatory requirements, i.e., the more stringent of water quality based effluent limits for existing use protection or technology-based effluent limits." (emphasis added). [40 CFR 131.12(a)(1)]

   EPA notes that in other locations in the Implementation Procedures (e.g. page 10) Iowa's Tier 2 antidegradation requirements do not allow authorization of any activity that would lower water quality such that it would no longer protect the existing uses or beneficial uses. Therefore, EPA recommends that the state update "existing uses" to instead be "beneficial uses." On page 1 of the Iowa Antidegradation Implementation Procedure "beneficial uses" is defined as "All existing and designated uses on or in surface waters of the state."

   This recommendation is because of the requirement that the limits in NPDES permits achieve compliance with all water quality standards, which includes protection of existing as well as designated uses and associated criteria.[40 CFR 122.44(d)] It is most appropriate for the state to compare the cost of the alternative(s) above and beyond the cost of implementing controls **to meet the beneficial uses** (rather than just the "existing uses").

Again, we appreciate the opportunity to comment on the proposed water quality standard change. If you have questions, or need further clarification of our comments outlined here, please contact John DeLashmit (delashmit.john@epa.gov) at 913-551-7821.

[2] 80 FR 51033, August 21, 2015. https://www.epa.gov/wqs-tech/final-rulemaking-update-national-water-quality-standards-regulation.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

JAN 09 2017

Mr. Thomas Barron, Chief
Division of Water Quality Standards
Bureau of Clean Water
Department of Environmental Protection
Rachel Carson State Office Building
400 Market St.
Harrisburg, PA 17101

Re: Comments on the "Determination of Copper Water Effect Ratio for Abers Creek and Holiday Park Sewage Treatment Plant" (Report #BRF/ETF15-006, October 16, 2015)

Dear Mr. Barron:

On December 10, 2015, the U. S. Environmental Protection Agency (EPA) Region III Office of Standards, Assessment & TMDLs (OSAT) received for comment the "Determination of Copper Water Effect Ratio for Abers Creek and Holiday Park Sewage Treatment Plant" (Report #BRF/ETF15-006, October 16, 2015) from the Pennsylvania Department of Environmental Protection (PADEP). The submittal included the Abers Creek copper water-effect ratio (WER) for the Plum Borough Municipal Authority, PA (PBMA) for Holiday Park Sewage Treatment Plant (HPSTP), which PADEP is proposing to include in NPDES permit PA0035360. The purpose of this letter is to provide PADEP EPA's comments on this proposed WER. We are providing comments on the specific WER study completed for the HPSTP, as well as a general recommendation for use of the Biotic Ligand Model (BLM), EPA's current recommended criterion for copper under section 304(a) of the Clean Water Act, because it represents the best available science to derive criteria for copper.

1. General Background on Metals Criteria

Criteria for the protection of aquatic life may be based on certain water characteristics (e.g., pH, temperature, hardness, dissolved organic carbon (DOC), and others) because water chemistry can influence a pollutant's bioavailability and toxicity. For metals in particular, EPA recommends expressing the aquatic life criteria as functions of chemical constituents of the water, because those constituents can form complexes with metals and render the metals biologically unavailable, or compete with other metals for binding sites on aquatic organisms[1]. Additionally, in 1993, EPA recommended that criteria for metals be expressed as dissolved (rather than total) metal concentrations because the concentration of dissolved metal better approximates the toxic fraction[2].

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[1] Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants; States' Compliance - Revision of Metals Criteria," 60 Federal Register 86 (May 4, 1995), pp. 22229 – 22237.

[2] Prothro, M. (1993, October 1) *Office of Water Policy and Technical Guidance on Interpretation and Implementation of Aquatic Life Metals Criteria* [Memorandum]. Washington, DC: United States Environmental Protection Agency. https://www3.epa.gov/npdes/pubs/owm0316.pdf

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EPA aquatic life criteria for metals, such as EPA's previous (1985) recommended national criteria for copper, historically addressed the reported effects of hardness on metal toxicity using empirical regressions of toxic concentrations versus hardness for available toxicity data across a wide range of hardness values. Such regressions provided the relative amount by which the criteria change with hardness, but have certain limitations. The regressions incorporated not just hardness, but any other factor that was correlated with hardness in the toxicity data set used for the regressions, particularly pH and alkalinity. Although these regressions therefore address more bioavailability issues than hardness alone, they best apply to waters in which the correlations among hardness, pH, and alkalinity are similar to the data used in the regressions. The separate effects of these factors are not addressed for exposure conditions in which these correlations are different. In addition, some physicochemical factors affecting metal toxicity, such as organic carbon, are not addressed at all. (*See Aquatic Life Ambient Freshwater Quality Criteria – Copper, 2007 Revision*[3], hereafter referred as "*BLM Criteria Document*") at 4.

2. National 304(a) Recommended Criteria for Copper

Because of the limitations of these past approaches for addressing bioavailability in metals criteria, EPA recognized a need for an approach that (l) explicitly and quantitatively accounted for the effect of individual water quality parameters that modify metal toxicity and (2) could be applied more cost-effectively and easily, and hence more frequently across spatial and temporal scales. To meet those goals, EPA developed and issued the 2007 revised recommended copper criteria using the biotic ligand model (BLM) (See *BLM Criteria Document*). In addition to better accounting for the effects of individual parameters while at the same time reducing costs, the *BLM Criteria Document* also incorporated the latest scientific information, including updated toxicity information for six sensitive species (*Ceriodaphnia dubia, Lithoglyphus virens, Scaphofeberis* sp., *Actinonaias pectorosa, Hyalella azteca, and Juga plicifera*), which include a freshwater mussel. EPA recommends use of the BLM to develop criteria for copper, including site-specific criteria.

3. EPA Guidance on Deriving Site-Specific Criteria for Copper

The application of metals criteria to a specific site is complex due to the site-specific nature of metals toxicity. Factors to be considered include: toxicity specific to effluent chemistry; toxicity specific to ambient water chemistry; different patterns of toxicity for different metals; evolution of the state of the science of metals toxicity, fate, and transport; resource limitations for monitoring, analysis, implementation, and research functions; concerns regarding some of the analytical data currently on record due to possible sampling and analytical contamination; and lack of standardized protocols for clean and ultraclean metals analysis[4]. States have the key role in the risk management process of balancing these factors in the management of water programs, but EPA has provided guidance since the 1990s to assist states in adjusting national recommended criteria site-specifically.

EPA has historically developed several procedures for deriving site-specific aquatic life copper criteria. They include: the 1994 *Interim Guidance on Determination and Use of Water-Effect Ratios for*

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[3] USEPA. 2007. Aquatic Life Ambient Freshwater Quality Criteria - Copper. EPA-822-R-07-001.

[4] Prothro, M. (1993, October 1) *Office of Water Policy and Technical Guidance on Interpretation and Implementation of Aquatic Life Metals Criteria* [Memorandum]. Washington, DC: United States Environmental Protection Agency. https://www3.epa.gov/npdes/pubs/owm0316.pdf

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Metals ("*Interim WER Guidance*")[5] which includes as an appendix the option of a Recalculation Procedure; the subsequent 1997 EPA memorandum titled "*Modifications to Guidance Site-Specific Criteria*"[6] which provided three clarifying documents on the recalculation procedure and use of the water-effect ratio (WER) procedure with hardness equations; and the 2013 *Revised Deletion Process for the Site-Specific Recalculation Procedure for Aquatic Life Criteria*[7]. The Recalculation Procedure (or derivation of a SSC) is intended to take into account relevant differences between the sensitivities of the aquatic organisms in the national dataset that EPA used in developing its recommendations for hardness-based criteria as compared to the sensitivities of organisms that occur at the site. The WER, on the other hand, characterizes the bioavailability of metals at a site. EPA also published the 2001 *Streamlined Water-Effect Ratio Procedure for Discharges of Copper*[8] as a complement to the *Interim WER Guidance*, when copper concentrations are elevated primarily due to continuous point source effluent.

EPA provided the WER procedures to address the modifying effects of site water chemistry on bioavailability of copper more accurately than the hardness regressions. The WER is a biological method that accounts for any difference that exists between the toxicity of a pollutant in laboratory dilution water and its toxicity in site water. A WER is calculated by dividing the acute toxicity of the metal in site water by the toxicity of the copper determined in standard laboratory water. The standard laboratory water toxicity is used as the denominator to reflect that this toxicity is measured in test water that has water quality characteristics representative of the test waters used to develop the water quality criteria toxicity database, at least as a good approximation. The State's hardness-based acute and chronic criteria concentrations are then multiplied by this ratio (i.e., the WER) to establish site-specific acute and chronic criteria that reflect the effect of site water characteristics on toxicity. However, a WER accounts only for interactions of water quality parameters and their effects on metal toxicity to the species tested and in the water sample collected at a specific location and at a specific time (*BLM Criteria Document* at 4).

Since 2007, EPA has recommended the use of the BLM over the use of the WER for deriving freshwater site-specific aquatic life criteria for copper. The BLM is a metal bioavailability and toxicity model that uses comprehensive information on water chemistry conditions and parameters in a water body to calculate site-specific criteria. The BLM incorporates more recent toxicity data than older procedures, and therefore represents the most scientifically defensible approach to deriving site-specific criteria for the protection of aquatic life. The BLM also considers the influence of both biotic and abiotic (organic and inorganic) ligands in the calculation of the bioavailability of metals to aquatic organisms. Thus, the BLM better accounts for site-specific conditions affecting copper bioavailability and toxicity. *BLM Criteria Document* at 4-5, 16-17 (describing the limitations of hardness-based and WER copper criteria in comparison with the BLM). EPA's Science Advisory Board (SAB) concluded in its 2000 review of the BLM that the BLM can "significantly improve predictions of the acute toxicity of certain metals across an expanded range of water chemistry parameters compared to the WER."[9]

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[5] USEPA. 1994. Interim Guidance on Determination and Use of Water-Effect Ratios for Metals. EPA-823-B-94-001.
[6] Wiltse, J. (1997, December 3). *Modifications to Guidance Site-Specific Criteria* [Memorandum]. Washington, DC: United Stated Environmental Protection Agency. https://www.epa.gov/sites/production/files/2015-01/documents/modification-int-wer.pdf
[7] USEPA. 2013. Revised Deletion Process for the Site-Specific Recalculation Procedure for Aquatic Life Criteria. EPA-823-R-13-001.
[8] USEPA. 2001. Streamlined Water-Effect Ratio Procedure for Discharges of Copper. EPA-822-R-01-005.
[9] USEP A Science Advisory Board. 2000. Review of the Biotic Ligand Model of the Acute Toxicity of Metals. EP A-SAB-EPEC-00-006. p.1.

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The 2001 streamlined WER protocol requests corresponding measurements of alkalinity, pH, DOC, and total suspended solids (TSS) "to provide ancillary information for understanding the chemistry influencing the observed WER results and for providing a link with the Biotic Ligand Model (BLM) which is ultimately intended to replace the WER toxicity test procedures for copper."[10]

4. Comparison of WER and BLM

As discussed above, before the BLM was developed, EPA recommended the WER for copper to provide for site-specific adjustments to account for variations in water chemistry other than hardness. Use of the WER presents a number of problems. The WER involves site-specific toxicity testing which can be resource-intensive and difficult to conduct for all relevant environmental conditions. Also, the hardness-based equation is less accurate because it does not benefit from the updated toxicity dataset used to develop the BLM, and it accounts for only one of the many variables affecting bioavailability of copper in real world conditions, and that variable (hardness) is less strongly predictive of bioavailability than DOC content. Furthermore, WER outcomes are subject to the many and various uncertainties inherent in extrapolating limited laboratory results with cultured lab test species to field scale protection of a resident aquatic community assemblage. In WER tests a few unusual results can have a large impact on conclusions about potential copper toxicity at a site. The WER represents the water chemistry present at a site only at the time the samples were collected and in practicality and general application is limited to collecting just a few representative points. In contrast, the BLM is capable of predicting protective levels for criteria-setting across a wide range of conditions (e.g., variations in pH, DOC, hardness, etc.) using multiple samples integrated over time.

In contrast to the WER, the BLM can address a broad range of environmental variables across a given site over the course of time. This has the benefit of providing confidence and understanding of why a particular result is obtained in a manner consistent with a scientific understanding of water chemistry and its effects on biota, and that can be replicated across sites to explain both commonalities and differences in observed outcomes. The SAB stated that the BLM's "predictiveness over a wide range of environmental conditions makes the BLM a more versatile and effective tool for deriving site-specific WQC than the WER." (SAB Report, p.12).

5. EPA's Scientific Evaluation of the Proposed Copper WER for HPSTP Discharge

For the above reasons, when determining whether the proposed WER for dissolved copper applicable to HPSTP's discharge is based on a sound scientific rationale and would be protective of aquatic life, consistent with both EPA's 2001 *Streamlined WER Procedure* and the 2007 *BLM Criteria Document*, EPA's review of the WER included a comparison of the WER results against results that would be derived using the BLM. It is appropriate to make this comparison for the following reasons: 1) as described above, the BLM represents the most current and best science for evaluating whether a given copper concentration protects aquatic life; and 2) the BLM allows consideration of site-specific chemical parameters that influence the expression of copper toxicity, and their variability over time, in a manner that examining WER results by themselves cannot. This latter factor is important because it helps EPA ascertain the underlying factors affecting bioavailability and toxicity of copper at a site and whether a particular WER result is scientifically defensible and protective of local aquatic species. Greater consideration of site-specific factors makes the BLM more accurate than the WER in predicting levels of copper that protect aquatic life.

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[10] USEPA. 2001. Streamlined Water-Effect Ratio Procedure for Discharges of Copper. EPA-822-R-01-005. pp. 4-5, 11, 15

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Depending on data inputs provided and the full range of spatial and temporal variability at a site, the BLM typically produces a range of outcomes (called "instantaneous water quality criteria" or "IWQCs"). To ensure protectiveness under critical conditions, EPA examines the range defined by the distribution of IWQCs. If the WER-derived WQC fall within or below this range, then EPA would consider this to be a scientifically defensible result indicating protectiveness under a set of site-specific conditions (although further evaluation of whether this result reflects critical conditions may be necessary). However, if the WER-derived WQC fall above this range, then this is evidence that the WER result is not protective. EPA could also compare individual point values of BLM IWQC representing conditions tested under the WER procedure to WER-derived WQC. If these BLM point value IWQCs are lower than the associated WER-derived criteria, then this is evidence that the WER is not protective. The latter approach is the one EPA took in evaluating PBMA's submitted WER given that PBMA only provided BLM input parameters for two sampling dates.

As part of our review, EPA derived criteria using the BLM and the same chemical data that was used to derive the WER of 6.4 to evaluate the protectiveness of the PBMA WER. EPA compared these BLM-derived criteria to the site-specific criteria calculated using Pennsylvania's current copper criteria multiplied by the derived WER of 6.4.

Table 1 below lists the parameters EPA used for the BLM calculations. For all input parameters except temperature and humic acid percentage, EPA used data from Table 4 on page 9 of the Tetratech Report # BRF/ETF15-006, titled "Determination of Copper Water Effect Ratio for Abers Creek and Holiday Park Sewage Treatment Plant," dated November 25, 2015. The report did not provide data on ambient water temperature or percentage of DOC as humic acid. EPA assumed 10 percent humic acid based on the default value from the *BLM Criteria Document* and used the same temperature as was used to run the WER test, as reported in Table 2 on p.5 of the above-referenced Tetratech report. The same table reported the dilution ratio of the simulated downstream water as 50%.

Table 1: Biotic Ligand Model Data Inputs

Location ('Site label')	**WER 8/10/2015**	**WER 9/9/2015**
Sample Date ('Sample label')	**simulated downstream**	**simulated downstream**
Ambient Water Temperature	25	25
pH	7.7	7.7
DOC	5.9	4.6
Humic Acid % of DOC (default is 10%)	10	10
Ca Total	45	34
Mg Total	10	8.6

Na Total	84	66
K Total	9.4	8
Sulfate	69.2	66.3
Chloride Total	83.2	58.5
Alkalinity	132	92

Table 2 below shows the resulting acute (CMC) and chronic (CCC) criteria values calculated using Pennsylvania's hardness-based equation, the proposed site-specific WER-adjustment to the hardness-based equation, and the BLM. The BLM results represent acute and chronic IWQC at two discrete points in time from the 9/9/2015 and 8/10/2015 sampling events. These IWQC may or may not reflect critical conditions at the site.

Table 2: Comparison of Currently Applicable Hardness-Based Copper Criteria, Proposed WER-Derived Criteria, and BLM-Derived Criteria

	Acute CMC (ug/L) (Dissolved)	**Chronic CCC** (ug/L) (Dissolved)
Currently Applicable Hardness-Based Criteria[1]	13	9.0
Proposed WER-Adjusted Criteria[1]	83.2	57.6
BLM-Derived Instantaneous Water Quality Criteria based on 9/9/2015 Simulated Downstream Water Sample	32	20
BLM-Derived Instantaneous Water Quality Criteria based on 8/10/2015 Simulated Downstream Water Sample	44	28

[1]Calculated using assumed water hardness of 100 mg/L as CaCO3, per table E1 on p.ii of Tetratech report # BRF/ETF 15-006, titled "Determination of Copper Water Effect Ratio for Abers Creek and Holiday Park Sewage Treatment Plant," dated November 25, 2015

40 CFR § 131.11(a) requires states to adopt criteria that protect the designated use. Such criteria must be based on a sound scientific rationale. National Pollutant Discharge Elimination System (NPDES) permits must derive from and comply with water quality standards. The WER-adjusted criteria are approximately two to three times higher than the BLM-derived criteria. EPA therefore cannot conclude that the proposed WER is protective of the designated aquatic life use because the BLM results represent a superior indicator of protectiveness for the reasons articulated above in this enclosure.

The value of the information represented by the BLM result cannot be ignored or set aside in deference to a WER value. EPA developed the BLM to reflect site-specific conditions in the receiving water that affect the expression of copper toxicity and also utilize the full toxicity database of aquatic organisms. A WER relies on transferring the result of just a few laboratory tests using site water for a limited number of species to the field. This introduces many uncertainties, such as whether the tolerance of test species in the laboratory reflects the impact to resident species in the receiving water. EPA's documented scientific judgment, expressed in criteria publications that have undergone rigorous external

scientific peer review and public review, is that the BLM provides the most accurate means to assess the impact of copper toxicity for a wide range of species and site conditions. EPA's criteria derivation methodology encompasses many careful considerations to ensure protectiveness, and the Agency views a significant deviation (such as is the case with the proposed WER) as compromising the level of protection necessary to protect the associated designated use.

The input parameters (listed in Table 1) vary over space and time in natural waters. EPA recommends that PBMA collect multiple samples at different points in time to derive BLM criteria fully reflective of site variability. This way, PBMA can ensure that the most bioavailable conditions are represented, and therefore the resulting criteria will be protective.

If you have any questions, please do not hesitate to contact me at (215) 814-5717.

Sincerely,

Evelyn S. MacKnight

Evelyn S. MacKnight, Associate Director
Office of Standards, Assessment & TMDLs

cc: Chris Kriley, PADEP
Sean Furjanic, PADEP
Brian Trulear, EPA

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From: Reeder, John
Sent: Fri 2/17/2017 5:18:47 PM
Subject: RE: Tuesday's Event with Incoming Aministrator Pruitt

Thank you Patrick.

Personal Security Detail/Ex. 6/Ex. 7C/Ex. 7E/Ex. 7F

I've discussed with Reginald Allen, as acting Deputy Chief of Staff, to follow up and assure appropriate action/coordination.

Best,

John E. Reeder

Acting COS

202 564 6082 (direct)

From: Sullivan, Patrick F.
Sent: Friday, February 17, 2017 11:38 AM
To: Perrotta, Pasquale <Perrotta.Pasquale@epa.gov>; Weese, Eric <Weese.Eric@epa.gov>; Caldwell, James <Caldwell.James@epa.gov>; Barnet, Henry <Barnet.Henry@epa.gov>; Taylor,

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Subject: Tuesday's Event with Incoming Aministrator Pruitt

Yesterday, I had brief discussions with Special Agents Enforcement/Investigatory/Ex. 7c and Enforcement/Investigatory/Ex. 7c, PSD, concerning an event scheduled for February 21, Tuesday morning, in the Green Room, in which Administrator Pruitt will meet EPA employees with media in the room.

Personal Security Detail/Ex. 6/Ex. 7C/Ex. 7E/Ex. 7F

Personal Security Detail/Ex. 6/Ex. 7C/Ex. 7E/Ex. 7F

I am off today, but I am monitoring emails and available via cell phone.

Personal Security Detail/Ex. 6/Ex. 7C/Ex. 7E/Ex. 7F

Thank you,

Patrick F. Sullivan

Assistant Inspector General for Investigations

EPA Office of Inspector General

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https://www.nytimes.com/2017/02/16/us/politics/scott-pruitt-environmental-protection-agency.html?_r=0

E.P.A. Workers Try to Block Pruitt in Show of Defiance

www.nytimes.com

Employees of the Environmental Protection Agency are calling their senators to try to defeat Scott Pruitt's confirmation to run the agency.

To: Schnare, David[schnare.david@epa.gov]; Jackson, Ryan (Inhofe)[Ryan_Jackson@inhofe.senate.gov]
From: Konkus, John
Sent: Tue 2/28/2017 1:29:40 PM
Subject: Draft Farm Bureau Release
EPA Administrator Pruitt Speaks at Farm Bureau Advocacy Conference.docx

The Farm Bureau put out a media advisory last night announcing the Administrator would be speaking today at 4pm. They will resend the advisory with a new time once we have settled on one. Right now I'm operating off of a 3pm time. Please let me know ASAP if that works. We want to give media enough time to plan their coverage.

Regardless of coverage, we will have still and video cameras at the speech. Attached is the draft release to send after the speech. We'll tweak the quotes based off of what he actually says of course. The crowd here is going to VERY enthusiastic, so the optics will be prime for us to hit a homerun.

This event is important because it will help us carry the WOTUS message through the next 24-48 hours which provides everyone cover to work on other things.

DRAFT EPA Administrator Pruitt Speaks at Farm Bureau Advocacy Conference

Less than an hour after joining President Trump at the White House for the announcement of the Executive Order to reconsider the controversial Waters of the United States rule, Environmental Protection Agency Administrator Scott Pruitt spoke to nearly 1,000 participants of the American Farm Bureau Federation's 2017 Advocacy Conference at National Harbor, MD, just outside of Washington D.C.

"The President has directed the EPA and the Army Corps of Engineers to not only reconsider the Waters of the U.S. rule, but has provided clarity on how to apply the Clean Water Act. This action preserves a federal role to protect the nation's water quality and it also restores States' role," Administrator Pruitt said in his remarks.

"American farmers, ranchers and landowners already spend $1.7 billion a year on wetlands permits. No one wants clean water and clean air as much as farmers and ranchers. Not only is a healthy environment important to their livelihoods, it's the same water and air their children and family breath and drink," Administrator Pruitt continued.

"The actions taken by this Administration today, and what we've done at EPA over the past week in office signals a new beginning with our partners like the American Farm Bureau Federation," Administrator Pruitt concluded.

INSERT STILL PHOTO

INSTERT VIDEO CLIPS

Social media:

Administrator Tweet with photo: Reconsideration of #WOTUS rule enthusiastically received at @FarmBureau conf. Very glad I could bring you the good news this afternoon!

EPA Tweet: Administrator @EPAScottPruitt addressed the Farm Bureau today where he carried the news that EPA will reconsider the #WOTUS rule.

EPA Facebook: Cut and paste press release with photo.

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Cc: Elkins, Arthur[Elkins.Arthur@epa.gov]; Sheehan, Charles[Sheehan.Charles@epa.gov]; Larsen, Alan[Larsen.Alan@epa.gov]; Hanger, Eric[Hanger.Eric@epa.gov]; Ulmer, Craig[Ulmer.Craig@epa.gov]; Williams, Allan C. - DC OIG[Williams.Allan@epa.gov]; Smith, Michael[Smith.Michael-S@epa.gov]; Gaffney, Christopher[Gaffney.Christopher@epa.gov]; Zmorzenski, Douglas F.[Zmorzenski.Douglas@epa.gov]; Muskett, Thomas[Muskett.Thomas@epa.gov]; Cruz, Craig[Cruz.Craig@epa.gov]; Altenburg II, Paul[Altenburg.Paul@epa.gov]
From: Sullivan, Patrick F.
Sent: Fri 2/17/2017 4:37:54 PM
Subject: Tuesday's Event with Incoming Aministrator Pruitt

Yesterday, I had brief discussions with Special Agents Personal Security Detail/Ex. 6/Ex. 7C/Ex. 7E/Ex. 7F PSD, concerning an event scheduled for February 21, Tuesday morning, in the Green Room, in which Administrator Pruitt will meet EPA employees with media in the room.

Personal Security Detail/Ex. 6/Ex. 7C/Ex. 7E/Ex. 7F

Personal Security Detail/Ex. 6/Ex. 7C/Ex. 7E/Ex. 7F

I am off today, but I am monitoring emails and available via cell phone.

Personal Security Detail/Ex. 6/Ex. 7C/Ex. 7E/Ex. 7F

Thank you,

Patrick F. Sullivan

Assistant Inspector General for Investigations

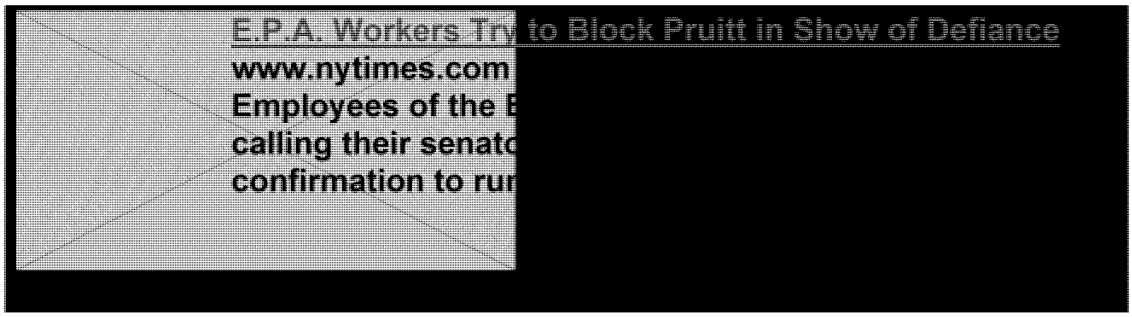
EPA Office of Inspector General

Desk: (202) 566-0308

Cell: Personal Phone/Ex. 6

Email: sullivan.patrick@epa.gov

https://www.nytimes.com/2017/02/16/us/politics/scott-pruitt-environmental-protection-agency.html?_r=0



To: Schnare, David[schnare.david@epa.gov]
From: DWSschnare
Sent: Thur 2/23/2017 11:36:02 AM
Subject: "We Will Never Stop": An EPA Employee Blasts the Trump Administration | Mother Jones

http://www.motherjones.com/environment/2017/02/donald-trump-scott-pruitt-epa-employee-resist

Sent from my iPad

To: Don Benton[Personal Email/Ex. 6]; Ericksen, Doug[ericksen.doug@epa.gov]; Schnare, David[schnare.david@epa.gov]
From: Konkus, John
Sent: Wed 2/15/2017 3:57:01 PM
Subject: FW: TONIGHT: Rally to stop Scott Pruitt from leading the EPA

FYI

https://earthhq.foe.org/
https://org.salsalabs.com/o/455/p/salsa/donation/common/public/?donate_page_KEY=14387&tag
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Join the rally to stop Scott Pruitt from leading the EPA: RSVP NOW!

The Senate is scheduled to vote on Friday on Scott Pruitt to lead the EPA. Pruitt is a climate denier and Big Oil crony who is openly hostile to the EPA's mission.

The vote will be very, very close. So now, in the final hours before the vote, we need your help to keep the pressure on the Senate to vote no!

Join the rally in DC tonight to stop Scott Pruitt from leading the EPA!

What: Rally to stop Scott Pruitt

When: Today at 5 pm
Where: Upper Senate Park, 200 New Jersey Ave. NW, Washington, DC 20001

Click here to RSVP!

Scott Pruitt would be the most anti-environmental EPA Administrator in history. And he's spent his career suing the agency.

As Oklahoma's Attorney General, he boasted that he "led the charge … against the U.S. Environmental Protection Agency for their leadership's activist agenda."

He has sued the EPA multiple times to roll back the Clean Power Plan and the Clean Water Rule.

And he literally copied an anti-EPA letter sent to him by Big Oil lobbyists, pasted it onto government stationery, and sent it to Washington with his signature.

We need your help to send the message to Congress: Scott Pruitt should not lead the EPA!

It's no secret why Pruitt has been so hostile to the EPA. He's received nearly $315,000 in political contributions from fossil fuel industries. And while leading the Republican Attorneys General Association, he raised at least $3.5 million from fossil fuel interests.

We cannot afford to let Scott Pruitt have this job. Our bedrock environmental protections are at stake. Unless we fight back, we'll have no more Clean Power Plan. No more methane rules. And our environmental policy could be dictated by the oil industry at the expense of the American people.

Donald Trump's first 100 days are shaping up to be an environmental nightmare. He's trying to roll back regulations, build the Keystone XL Pipeline, and gut President Obama's climate legacy. Scott Pruitt is a key component of Trump's anti-environmental agenda. But we still have a chance to stop him.

Join the rally TONIGHT, before Friday's vote, to stop Scott Pruitt from destroying to planet!

Standing with you,

Ben Schreiber,
Senior political strategist,
Friends of the Earth

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To: Jackson, Ryan[jackson.ryan@epa.gov]; Schnare, David[schnare.david@epa.gov]
From: Hope, Brian
Sent: Mon 3/6/2017 3:53:36 PM
Subject: FW: OIG Report: "Backlog of Leaking Underground Storage Tank Cleanups in Indian Country Has Been Reduced, but EPA Needs to Demonstrate Compliance With Requirements"
_epaoig_20170306-17-P-0118_cert.pdf

From the Administrator's account.

From: OIG News
Sent: Monday, March 06, 2017 9:33 AM
To: Breen, Barry <Breen.Barry@epa.gov>
Cc: Pruitt, Scott <Pruitt.Scott@epa.gov>; Nishida, Jane <Nishida.Jane@epa.gov>; Bloom, David <Bloom.David@epa.gov>; Rutherford, Debbie <Rutherford.Deborah@epa.gov>; Deane, Benita <Deane.Benita@epa.gov>; Anthony, Sherri <Anthony.Sherri@epa.gov>; Grzegozewski, Nicholas <Grzegozewski.Nicholas@epa.gov>; Howard, MarkT <Howard.Markt@epa.gov>; Trent, Bobbie <Trent.Bobbie@epa.gov>; Richardson, RobinH <Richardson.RobinH@epa.gov>; Hull, George <Hull.George@epa.gov>; Valentine, Julia <Valentine.Julia@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Simon, Nigel <Simon.Nigel@epa.gov>; Hoskinson, Carolyn <Hoskinson.Carolyn@epa.gov>; Cuscino, Glen <Cuscino.Glen@epa.gov>; Thornton, Kecia <Thornton.Kecia@epa.gov>; Tibbs, Yuolanda <Tibbs.Yuolanda@epa.gov>
Subject: OIG Report: "Backlog of Leaking Underground Storage Tank Cleanups in Indian Country Has Been Reduced, but EPA Needs to Demonstrate Compliance With Requirements"

Attached is the EPA Office of Inspector General (OIG) report, *Backlog of Leaking Underground Storage Tank Cleanups in Indian Country Has Been Reduced, but EPA Needs to Demonstrate Compliance With Requirements* (Report No. 17-P-0118). This report will be available to the public on the OIG's website at www.epa.gov/oig.

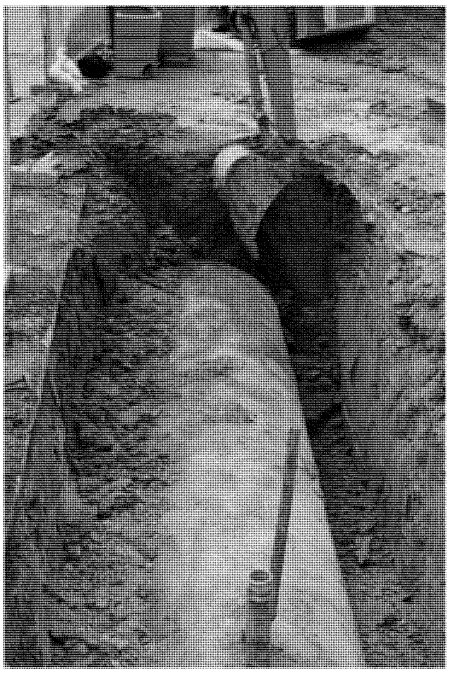
U.S. ENVIRONMENTAL PROTECTION AGENCY

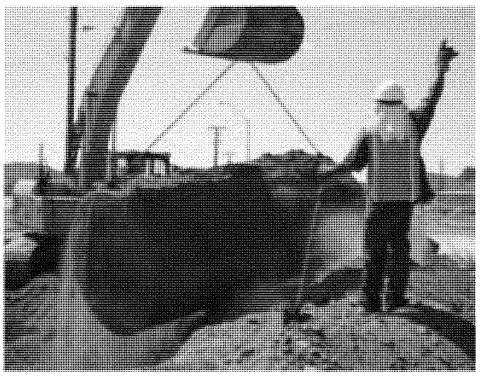
OFFICE OF INSPECTOR GENERAL

Cleaning Up Communities

Backlog of Leaking Underground Storage Tank Cleanups in Indian Country Has Been Reduced, but EPA Needs to Demonstrate Compliance With Requirements

Report No. 17-P-0118 **March 6, 2017**





Report Contributors:

Christina Lovingood
Jill Trynosky
Jenny Drzewiecki
Roopa Mulchandani

Abbreviations

CFR	Code of Federal Regulations
EPA	U.S. Environmental Protection Agency
EPAct	Energy Policy Act of 2005
LUST	Leaking Underground Storage Tank
OIG	Office of Inspector General
OLEM	Office of Land and Emergency Management
OUST	Office of Underground Storage Tanks
RSO	Regional Strategic Overview
U.S.C.	United States Code
UST	Underground Storage Tank

Cover photo: Examples of underground storage tanks being removed. (EPA photos)

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U.S. Environmental Protection Agency
Office of Inspector General

17-P-0118
March 6, 2017

At a Glance

Why We Did This Review

We conducted this review to evaluate the U.S. Environmental Protection Agency's (EPA's) prioritization of releases from underground storage tanks (USTs), and to determine whether the backlog has been reduced for UST cleanups, in Indian country.

An UST is one or more tanks, and any underground piping connected to the tanks, that has at least 10 percent of their combined volume underground. The EPA's federal UST regulation requires that leaking UST (or LUST) sites must be cleaned up. For example, petroleum released from a LUST, such as at a service station, can contaminate groundwater.

The Energy Policy Act of 2005, Section 1529, requires the EPA to prioritize releases from LUSTs that present the greatest threat to human health or the environment. The EPA is responsible for directly implementing the UST program in Indian country across the United States.

This report addresses the following EPA goal or cross-agency strategy:

- *Cleaning up communities and advancing sustainable development.*

Send all inquiries to our public affairs office at (202) 566-2391 or visit www.epa.gov/oig.

Listing of OIG reports.

Backlog of Leaking Underground Storage Tank Cleanups in Indian Country Has Been Reduced, but EPA Needs to Demonstrate Compliance With Requirements

What We Found

The EPA is unable to demonstrate how it is complying with the requirements of the Energy Policy Act of 2005 to give priority to releases from LUST sites in Indian country that present the greatest threats to human health or the environment. The EPA can describe the prioritization process it uses to make annual funding decisions. However, this process is minimally documented, relies on inconsistent regional criteria, and lacks transparency. As a result, we do not have evidence that the EPA's process for selecting and funding sites for cleanup actions gives priority to those sites that present the greatest threat to human health or the environment. The absence of clear priorities could lead to lower-risk sites being addressed while cleanups for higher-risk sites are delayed. Delays in cleanups could create the potential for prolonged exposure to hazardous contaminants, such as gasoline leaks contaminating groundwater.

Without documentation and controls for the prioritization of UST cleanups in Indian country, the sites with the greatest health and environmental risks may not be addressed.

The EPA agreed to improve its documentation process and transparency, and clarify how funding decisions are made. The EPA is also making progress in reducing the backlog of cleanup sites in Indian country. Over the past 5 years, the number of cleanups remaining has decreased from 299 to 271. However, several challenges impede greater progress. These challenges include reliance on other parties for cleanup funds, a lengthy process to approve cleanups that cost more than $250,000 (action memo approval), and the complexity of some remaining sites.

Recommendations and Planned Agency Corrective Actions

We recommend that the Assistant Administrator for Land and Emergency Management document how the process and criteria the EPA uses to prioritize sites comply with the Energy Policy Act of 2005, and communicate the process and criteria to the regions. We also recommend that the Assistant Administrator develop a nationwide tracking tool for LUST sites in Indian country based on the prioritization criteria, and establish a panel to review funding decisions for UST/LUST sites in Indian country. In addition, we recommend the establishment of a time period for action memo review comments from the Assistant Administrator, and identification of opportunities to strengthen staff awareness and adherence to the expectations for action memos.

The agency provided acceptable corrective actions and milestone dates for the recommendations, and all recommendations are resolved.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

THE INSPECTOR GENERAL

March 6, 2017

MEMORANDUM

SUBJECT: Backlog of Leaking Underground Storage Tank Cleanups in Indian Country Has Been Reduced, but EPA Needs to Demonstrate Compliance With Requirements
Report No. 17-P-0118

FROM: Arthur A. Elkins Jr.

TO: Barry Breen, Acting Assistant Administrator
Office of Land and Emergency Management

This is our report on the subject evaluation conducted by the Office of Inspector General (OIG) of the U.S. Environmental Protection Agency (EPA). The project number for this evaluation was OPE-FY16-0013. This report contains findings that describe the problems the OIG has identified and corrective actions the OIG recommends. This report represents the opinion of the OIG and does not necessarily represent the final EPA position. Final determinations on matters in this report will be made by EPA managers in accordance with established audit resolution procedures.

Because all recommendations are agreed to and resolved, you are not required to respond to this report. However, if you submit a response, it will be posted on the OIG's public website, along with our memorandum commenting on your response. Your response should be provided as an Adobe PDF file that complies with the accessibility requirements of Section 508 of the Rehabilitation Act of 1973, as amended. The final response should not contain data that you do not want to be released to the public; if your response contains such data, you should identify the data for redaction or removal along with corresponding justification.

We will post this report to our website at www.epa.gov/oig.

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Chapter 1
Introduction

Purpose

The U.S. Environmental Protection Agency's (EPA's) Office of Inspector General (OIG) evaluated the EPA's work related to the Underground Storage Tank (UST) program in Indian country. We addressed the following questions:

- Do the EPA's 2006 Tribal Strategy and 2015 revised UST regulations prioritize and address releases from USTs that present the greatest threat to human health or the environment?
- Has the EPA reduced the overall backlog of UST cleanups in Indian country?

Background

An UST is one or more tanks, and any underground piping connected to the tanks, that has at least 10 percent of their combined volume underground. The EPA's federal regulations[1] require that released contamination from leaking UST (or LUST) sites must be cleaned up to restore and protect groundwater resources and create a safe environment for those who live or work around these sites. The federal UST regulation applies only to USTs storing petroleum, petroleum blended with biofuels, and certain other hazardous substances. Nearly all USTs regulated by the UST requirement contain petroleum. There were 560,872 active USTs as of September 2016 (at approximately 202,000 sites) regulated by the EPA's UST program. Of the active USTs, approximately 2,600 are on tribal[2] land.

Potential Human Health and Environmental Impacts

Until the mid-1980s, the majority of USTs were constructed from bare steel, which can corrode and cause the contents to be released. Faulty installation or inadequate operating and maintenance procedures can also cause USTs to release their contents into the environment. UST systems contain petroleum or other hazardous substances. Leaks from USTs threaten America's groundwater and land resources as well as human health. Specific pollutants of concern from LUSTs include methyl tert-butyl ether, benzene, toluene, ethylbenzene and xylenes. Exposure to these contaminants poses a significant public health risk, as

[1] Not all USTs are federally regulated, such as a tank used for storing heating oil for consumptive use on the premises where stored, a septic tank, or a stormwater or waste water collection system. For a list of criteria, see federal regulations at 40 CFR Part 280.
[2] "Tribe" or "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1944, 25 U.S.C. 479a.

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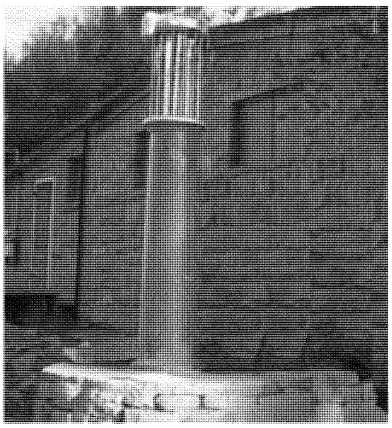
some are known to cause cancer. For example, according to the U.S. Department of Health and Human Services, excessive exposure to benzene can cause leukemia.

Severity and Magnitude of Gasoline Leaks

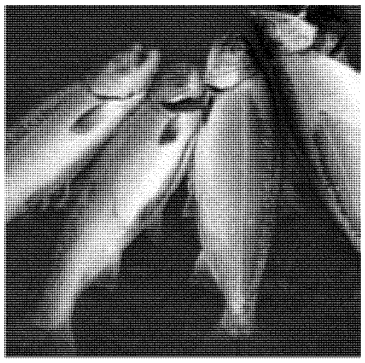
Gasoline or diesel fuel leaking from service stations is one of the most common sources for polluting groundwater—the drinking water source for nearly half of all Americans. Gasoline is a complex manufactured mixture typically containing more than 150 chemicals. Once a tank develops a leak, its contents can migrate through the soil and reach the groundwater, and any nearby river or stream can also become polluted by the groundwater. Even a small release can contaminate groundwater; for example, 12 ounces of gasoline (the volume of a can of soda) can contaminate about 40,000 gallons of water. Additionally, one pin-prick-sized hole in an UST can leak 400 gallons of fuel a year.



A 1930s–1940s-era gas pump on Navajo Nation land. (EPA photo)

Nearly 700,000 people rely on safe drinking water provided by 750 community water systems owned by tribes. Many of these tribal systems have seen treatment costs increase over the past 20 years, and contaminant threats continue to increase as old USTs deteriorate. For example, one of the Region 8 LUST sites we visited—the Pine Ridge Oil site—had over 4,000 gallons of mixed gasoline and water recovered, and the cleanup is still underway.

Tribal citizens experience unique risks because of their traditional lifestyle and use of natural resources. Tribal communities often follow traditional diets that include an abundance of freshwater fish and seafood. Water—considered sacred—plays an important role in tribal cultural and spiritual practices, including sacred springs or drinking water sources. For example, the Nez Perce Tribe, located in Idaho, gets nearly 100 percent of the drinking water on the reservation from groundwater wells. Also, the tribe is historically a fishing culture, with the majority of its diet provided by the threatened and endangered anadromous steelhead and salmon, which spawn on the Nez Perce Reservation. Because of tribes' reliance on natural resources to maintain traditional diets, life ways, customs and languages, there is a unique need for tribal-focused research to identify risks, as well as to inform decisions to reduce health risks in these areas.



Traditional diet items such as fish can be contaminated by LUSTs. (EPA photo)

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EPA Oversight of USTs and LUSTs in Indian Country

The EPA is responsible for directly implementing the UST program in Indian country across the United States. As shown in Figure 1, Indian country lands are widely dispersed, although a large concentration is in the west and southwest parts of the country.

Figure 1. Map of Indian country lands[3]

Source: U.S. Department of the Interior, U.S. Geological Survey, 2014.

EPA implementation and oversight is accomplished in part by providing technical and financial support to tribal governments to prevent and clean up releases from USTs. The EPA's Office of Underground Storage Tanks (OUST) partners with the EPA's regional offices to facilitate implementation of the UST program in Indian country. OUST provides technical and financial support to tribal governments to prevent and clean up petroleum releases from USTs. In cases when the state, with the permission of the tribe, is overseeing existing cleanups or agrees to oversee future cleanups, EPA regions will monitor state oversight of these corrective actions.

According to the EPA's *Tribal Program Report, Accomplishments and Activities 2014*, the EPA's UST program works with about 190 tribes to prevent releases at 2,516 USTs (about 900 facilities) in Indian country. Owners and operators of

[3] The map does not show trust lands where the EPA also implements the Tribal UST program.

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USTs in Indian country must comply with the federal UST regulations. In addition, owners and operators must report the existence of new UST systems, suspected releases and UST system closures; and keep records of operation and maintenance. The responsibility for conducting and paying for cleanups lies with owners and operators in Indian country. However, those owners can find it difficult to initiate and complete cleanups due to the high cost. Although the EPA estimates the average cleanup costs to be about $125,000, a release with significant groundwater contamination can cost more than $1 million to clean up.

Tribal UST Prioritization Requirements and Policy

The EPA must prioritize UST releases that present the greatest threat to human health or the environment. The Energy Policy Act of 2005 (EPAct), Section 1529,[4] directs the EPA to develop and implement, in coordination with Indian tribes, a strategy that includes:

> (1) [G]iving priority to releases that present the greatest threat to human health or the environment, to take necessary corrective action in response to releases from leaking underground storage tanks located wholly within the boundaries of—
>
> (A) an Indian reservation; or
> (B) any other area under the jurisdiction of an Indian tribe; and
>
> (2) [T]o implement and enforce requirements concerning underground storage tanks located wholly within the boundaries of—
>
> (A) an Indian reservation; or
> (B) any other area under the jurisdiction of an Indian tribe.

In 2006, the EPA issued a strategy[5] to address the 2005 EPAct requirements. The strategy referenced and restated the EPAct requirements, but did not include how the agency gives priority to releases presenting the greatest threat to human health and the environment. In 2015, the EPA issued revised UST requirements[6] that included requirements for operator training, maintenance, containment, prevention and detection techniques. The revised UST requirements were created to ensure owners and operators properly operated and maintained their UST systems.

---

[4] Section 1529 of the EPAct of 2005 amends the Solid Waste Disposal Act by establishing a new Section 9013 regarding USTs in Indian country.
[5] *Strategy for An EPA/Tribal Partnership To Implement Section 1529 Of The Energy Policy Act Of 2005,* EPA-510-R-06-005, August 2006.
[6] *40 CFR Parts 280 and 281, Revising Underground Storage Tank Regulations, Revisions to Existing Requirements and New Requirements for Secondary Containment and Operator Training; Final Rule* (2015 Revised UST Regulations).

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EPA Responsibility for Internal Controls in Indian Country

Office of Management and Budget Circular A-123 defines management's responsibility for internal controls in federal agencies, including control activities. Control activities include policies, procedures and mechanisms in place to help ensure that agency objectives are met. As the EPA is responsible for implementing the UST program in Indian country, and adhering to the requirements within the EPAct, internal controls are expected to be in place to ensure compliance.

Funding for UST Program in Indian Country

The EPA's overall UST Indian country budget for fiscal years 2012 through 2016 was estimated at an average of $4.6 million per year. Of that, only a portion—an estimated average of $2.4 million per year—was for cleanup. The program receives three types of federal funding to manage different parts of the tribal UST program:

- Environmental Programs and Management funds, which support the EPA's Indian country UST prevention program.
- LUST Trust Fund prevention funding for Indian country tribal assistance agreements (grants) to prevent releases.
- LUST Trust Fund cleanup funding to support the EPA's Indian country cleanup program and tribal cleanup cooperative agreements.

Additionally, the EPA's Brownfields program can provide cleanup grants to address sites contaminated by relatively low-risk petroleum and hazardous substances, pollutants or contaminants (including hazardous substances commingled with petroleum).

What is the LUST Trust Fund?

Congress created the LUST Trust Fund to address petroleum releases from federally regulated USTs. This fund is financed by a 0.1-cent tax on each gallon of motor fuel sold nationwide, and is used to oversee corrective actions by responsible parties and cleanup sites that require prompt action to protect human health and the environment and/or where the responsible party is unknown, unwilling or unable to perform the cleanup.

Separate from federal funding, some states have state trust funds supported by a gas tax or environmental impact fee. According to OUST, some states with funds allow owners or operators of UST systems in Indian country to buy in to the state fund. Therefore, if there is a cleanup, state funds can be used. Most LUST cleanups are paid for either by the LUST Trust Fund, state funds or insurance.

Backlog and Current Cleanups in Indian Country

Over the course of the program, OUST has confirmed 1,409 releases from LUSTs in Indian country. As of September 2016, there were 271 cleanups remaining in Indian country. These sites are part of the national backlog.

What is the National Backlog?

The backlog is the number of releases from underground storage tanks remaining to be cleaned up nationwide. The EPA maintains a backlog for sites in Indian country and nationwide.

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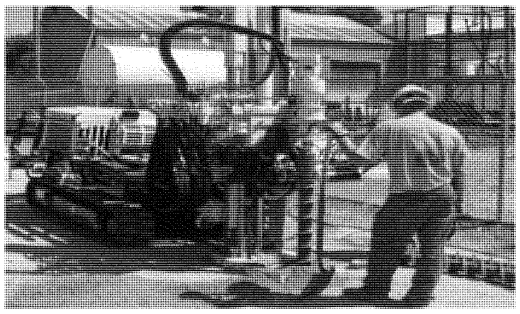

Monitoring well installation, Pine Ridge Oil Company (Pine Ridge Indian Reservation, South Dakota, Oglala Sioux Tribe). During fiscal year 2016, EPA funding was used to remove contamination at two sites. (EPA photo)

In fiscal year 2016, a total of 30 cleanups were completed in Indian country, using funding from owners and operators, state funds, and the EPA. The EPA completed four of the 30 cleanups using LUST Trust Fund money. The four sites are on land located within the boundaries or exterior boundaries of the Uintah and Ouray Indian Reservation in Utah, the Navajo Nation in New Mexico, the Quinault Indian Nation in Washington, and the Yakama Nation in Washington. In addition, EPA provided funding to advance progress at 27 additional cleanup sites in Indian country in fiscal year 2016.

Responsible Office

The EPA's OUST, in the Office of Land and Emergency Management (OLEM), is responsible for implementation of the UST program in Indian country.[7]

Scope and Methodology

We conducted our work from March to November 2016. We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

We interviewed the OLEM Assistant Administrator, EPA staff in OLEM/OUST, and EPA staff in the Office of International and Tribal Affairs. We interviewed regional staff in Regions 5, 6, 8 and 9. We visited and interviewed environmental staff involved in the active remediation of two tribal underground storage tank sites at the Pine Ridge Reservation in South Dakota. We spoke with representatives from a tribal consortium in Region 6. Our review of Indian country UST releases, cleanup and funding amounts focused primarily on the past 5 years, from 2012 to 2016. We also reviewed relevant laws, regulations, guidance and policy, including Resource Conservation and Recovery Act Subtitle I, the EPAct, Fiscal Year 2017 Justifications of Appropriation, UST regulations,[8] the U.S. Government Accountability Office's *Standards for Internal Control in the Federal Government*, and Office of Management and Budget Circular A-123. Further, we reviewed the EPA's 2007 report to Congress on tribal USTs.

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[7] For more information on the UST program, visit: https://www.epa.gov/ust.

[8] The 2015 Revised UST Regulations are included in the objective questions. However, after reviewing the regulations, it was determined that the requirements were created to ensure owners and operators properly operated and maintained their UST systems, and were not directly related to the agency's prioritization process. Therefore, the regulations are not included in the scope of this evaluation.

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Chapter 2
EPA Faces Multiple Challenges in Cleaning Up Tribal Leaking Underground Storage Tanks

The EPA is unable to demonstrate how it is complying with requirements of the EPAct of 2005 to give priority to releases from LUST sites in Indian country that present the greatest threats to human health or the environment. The EPA can describe the prioritization process it uses to make annual funding decisions. However, this process is:

- Minimally documented.
- Relies on inconsistent regional criteria.
- Lacks transparency.

As a result, we do not have evidence that the EPA's process for selecting and funding sites for cleanup actions gives priority to those sites that present the greatest threat to human health or the environment. The absence of clear priorities could lead to lower-risk sites being addressed while higher-risk sites are delayed, thus creating the potential for prolonged exposure to hazardous contaminants, such as gasoline leaks contaminating groundwater. The EPA agrees to improve its documentation process and transparency, and clarify how funding decisions are made. The EPA is making progress in reducing the backlog of cleanup sites in Indian country; over the past 5 years, the number of cleanups remaining has decreased from 299 to 271. However, several challenges impede greater progress, including reliance on other parties for cleanup funds, a lengthy action memo approval process, and the complexity of some remaining sites.

EPA Cannot Demonstrate How Sites Are Prioritized to Meet EPAct Requirements

While the EPA's cleanup funds are intended to address UST releases that present threats to human health and the environment, the EPA cannot demonstrate that releases are being prioritized and addressed based on the greatest threat to human health or the environment. The EPA's 2006 Tribal Strategy, created in response to the EPAct, includes reference to the EPAct's requirement but does not include a written process for how to prioritize releases. Also, EPA headquarters program management described—but were unable to provide us with—documentation, including consistent national criteria to evaluate and prioritize funding decisions.

EPA's Process for Prioritizing Cleanup Activities Needs Improved Documentation

The EPA, through OUST, described its risk-based prioritization process for addressing LUSTs through its regional strategic overview (RSO) calls. OUST

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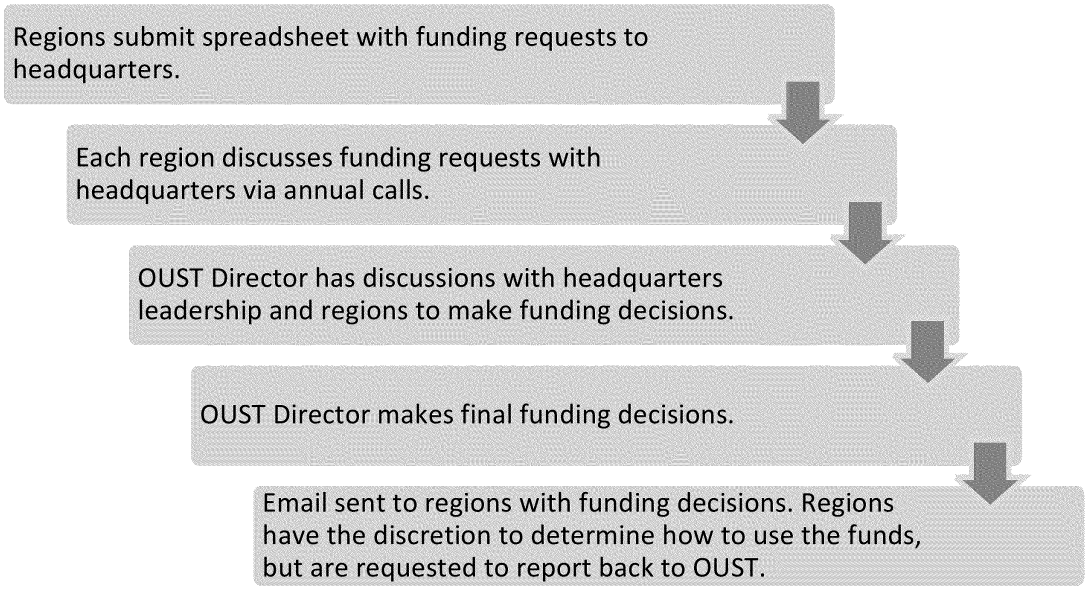
typically receives requests from the regions for more underground storage tank cleanup activities in Indian Country than it can fund. The EPA's RSO process, described in Figure 2, is used to make annual funding decisions nationwide. The process consists of regions submitting a spreadsheet to OUST stating their funding requests by source (e.g., LUST prevention, LUST cleanup) per site and the expected benefits per site. Next, each region discusses with OUST management and its tribal team, via the RSO calls, the requests for funding. OUST does not set site priorities during annual RSO calls. Then, OUST leadership (including headquarters management and the tribal team) discuss the information gathered from the regions. After these discussions, the OUST Director makes the final funding decisions and sends emails to each region informing them of the funds they will receive, and suggestions for the use of the funds.

Figure 2: Regional strategic overview process



Source: OIG-created image based on information gathered from OUST, regional interviews and document requests.

At the end of the funding selection process, it is unclear how the sites selected will meet the requirements of the EPAct. Emails stating funding amounts allocated to each region may be shared with regional program managers. However, these emails do not include details on how priority was given to sites that present the greatest threats nationwide or how funds were allocated amongst the regions consistent with the EPAct requirements. After the OUST Director makes a decision, regions have the discretion on how the funds received will be used, but are requested to report back to headquarters.

OUST stated that the requests for funding are different each year, so the regional funding level from year to year is not consistent. Additionally, the Indian country UST program budget has generally been reduced in recent years and funding requests outpace funding available. We found that there was a significant gap

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between the amount of funds requested by the three regions we met and the funds allocated. For example, one region requested $830,000 for fiscal year 2016 for LUST cleanup activities and received $320,000; the region noted the significant difference between the funding received versus requested can cause the region to need to reevaluate its plans for cleanup activities. The gap between the regional funding requests and allocations makes the OUST prioritization process critical.

Regional Prioritization Processes Vary

The RSO process involves each region separately, and the regions do not apply the same criteria to regional site prioritization. Regions can and do have their own process and tools for documenting prioritization or risk ranking of sites. However, these processes and tools are not consistent.

Table 1: How OUST and select regions prioritize sites

Office/ region	Prioritization process
OUST	☐ Annual regional strategic overview calls. ☐ RSO calls lead to decisions for which cleanups to fund.
Region 5	☐ Focus on sites that have been inherited from predecessors determined as high risk and any new sites considered high risk. ☐ Qualitative process.
Region 6	☐ No ranking. Currently, there are only two sites in this region and both are being cleaned up by the responsible party, according to OUST. ☐ Sites are looked at when they become known because there are so few sites. ☐ Qualitative process.
Region 8	☐ Uses ranking criteria from 1–100 modeled after the state of Colorado. ☐ Prioritization based on ranking criteria for each site. ☐ Combination of knowledge and judgement based on factors, including, but not limited to, exposure pathways, proximity to wells, and more remote locations. ☐ Quantitative and qualitative process.
Region 9	☐ Developed a semi-quantitative ranking consisting of 5 tiers (0–5, 5 being lowest threat). ☐ Highest threats are emergency responses or sites where risks are uncertain/unknown—the higher the ranking, the higher the prioritization. ☐ Sites can be re-ranked as needed. ☐ Ranking includes professional judgement and data based on factors, including, but not limited to, exposure pathways, contamination, future use, and uncertainty of impacts. ☐ Quantitative and qualitative process.

Source: OIG-created table generated based on information gathered from OUST, regional interviews and document requests. Selected regions represent the regions we met during our evaluation.

As shown in Table 1, while one region approaches OUST with a list of cleanup sites ranked according to qualitative and quantitative factors, other regions only provide anecdotal information on sites of concern, while still others provide a ranking based on separate factors. As a result, regions apply criteria inconsistently. Another impediment to the prioritization process is that not all regions have prioritized all sites; this further complicates the EPA's ability to benchmark threats/risks from sites nationwide. In addition, some funds are requested for a specific site while other requests are for broader support, including lab support or

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senior environmental employment program grantees, which are not site-specific. As a result, the lack of a consistent process nationwide to prioritize sites makes it difficult for regions, tribes and the public to understand how one region receives more funding for cleanups than another.

Lack of Transparency in EPA's Funding Decisions

There is no standard or consistent identification of risk or threat to human health or the environment during the national review of tribal LUST sites for funding. The cleanup funding decision process is based on professional judgment and is minimally documented. As a result, the cleanup funding decision process is not transparent, and cleanup funding decisions can appear to be subjective. A few factors contribute to the lack of transparency in the decision process, including:

- ***Funding decisions are minimally documented:*** Regions document their funding requests to headquarters, and headquarters documents its funding decisions with suggestions for use of funds. According to OUST, a number of factors are considered in the funding decision process. OUST noted these factors have included the potential threat to human health and the environment and how much funding is available. However, there is minimal documentation to evidence how the agency is meeting its requirements per the EPAct, such as how sites are compared or benchmarked on a national scale to determine which sites present the greatest health threats and, therefore, should be given priority.

- ***Regions lack access to information on nationwide site and cleanup activity information:*** According to some regional managers and staff we met, the regions are not collectively aware of, nor have access to, the specific documentation that other regions submit to OUST for the annual calls, and the discussions that occur during the calls. OUST management said that because each site is unique, they cannot have a checklist or other guidance document to outline how and what should be reviewed when making prioritization and funding decisions.

- ***Funding decisions are made by an individual rather than a panel:*** While conversations with headquarters leadership and regions occur during the decision-making and prioritization process, the final decision on funding had previously been left to one person—the OUST Director. In contrast, other EPA programs—such as Superfund—use technical panels, which include regional staff, to review components of Superfund remedial investigations or cleanup plans. This allows increased transparency and objectivity.

- ***Regions have funding execution discretion:*** After OUST funding amounts are provided, regions have the discretion to choose how to use the funds. The regions are to inform OUST on how the funds will

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be spent, but the regions have flexibility to make changes. Regions with sites funded by the LUST Trust Fund set priorities for those sites within their region. One region noted having this flexibility is beneficial, but this creates risks that (1) funds are not used consistent with the requirements of the EPAct, and (2) site risks that resulted in OUST funding decisions are not addressed.

- ***Link between supporting activities and EPAct requirements minimally documented:*** LUST funds are not only used for site-specific cleanup activities. Funds can be used as support for cleanup and remediation of LUST-eligible sites in Indian country and grants for tribes to oversee cleanups in Indian country or perform site assessments and remediation on LUST-eligible sites. LUST funds can also support the EPA's Senior Environmental Employee Program[9] grants for implementation of the LUST program in Indian country (e.g., corrective action oversight). For example, at the Pine Ridge Reservation in South Dakota, some funds allocated to the region are used to cover the tribal grantee's salary and work supporting cleanup activities. Further, in a funding decision email provided to one region for fiscal year 2016, OUST recommended that allocated funds be used toward the region's Senior Environmental Employees, site assessment and cleanup activities. According to OUST, much of the work of the grantees and Senior Environmental Employees is focused on addressing high-priority sites, consistent with the EPAct requirements. However, while LUST funds can be used in this way, the link between the grantee and employee activities and this outcome is not documented in OUST funding decisions, and could appear inappropriate or inconsistent when viewed with EPAct requirements.

- ***Internal controls, including standard criteria, operating procedures or guidance, are missing:*** Current EPA resources covering USTs/LUSTs in Indian country do not include criteria or methods for how to prioritize sites based on greatest threats. Without standard operating procedures, guidance, or other types of documentation available for prioritized risks, it is unclear how the institutional knowledge needed to make funding decisions based on sites that present the greatest threats would be transferred if staff leave or vacate their posts. Other programs, such as the Superfund program, use a hazard ranking system to evaluate potential or confirmed releases of hazardous substances that can pose a threat to human health or the environment. The hazard ranking system consists of documented criteria used to guide the process of Superfund site assessments. Having such criteria documented and available to all parties involved in that program's process allows the institutional knowledge associated with Superfund site assessments to maintain

[9] The EPA's Senior Environmental Employee Program provides an opportunity for retired and unemployed Americans age 55 and over to share their expertise with the EPA, remaining active using their matured skills in meaningful tasks that support a wide variety of environmental programs.

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consistency. In this case, internal controls are missing. Per Office of Management and Budget Circular A-123, internal controls should be in place to ensure compliance and help ensure that agency objectives are met. In addition, according to the U.S. Government Accountability Office's *Standards for Internal Control in the Federal Government*, documentation of the internal control system also provides a means to retain organizational knowledge and mitigate the risk of having that knowledge limited to a few personnel, as well as a means to communicate that knowledge as needed to external parties, such as external auditors. Absent documentation, the EPA cannot demonstrate its compliance with the EPAct requirements.

Efforts to Make Improvements Are Underway

Under the guidance of OUST, Region 9 is leading an effort to create a national database for prioritizing UST/LUST sites. Region 9 is currently in the initial scoping phase, and is exploring the feasibility of nationwide use. According to Region 9, the goal of the national database is to increase transparency of site data, improve data quality, and provide a comparable repository for tracking sites nationwide.

Also, the EPA plans to make changes to the OUST funding process for UST cleanups in Indian country as early as 2017. OUST plans to use a panel for future funding decisions, which can help improve transparency and efficiency. In addition, OUST is considering increasing the involvement of all regions in the review of sites and cleanup activities. These changes are in the early stages, and implementation plans have not been finalized.

Number of LUSTs in Indian Country Needing Cleanup Has Been Reduced

The EPA has been tracking progress toward addressing the backlog of LUST sites needing cleanup for years. Although more sites have been added, the total number of sites, including the overall number in Indian country, has been reduced.

Tribal LUST Cleanups and Backlog

As of 2016, there had been about 1,400 UST releases confirmed in Indian country. Table 2 shows the backlog for the previous fiscal years 2012–2016. LUSTs are added to the backlog as they are discovered and, therefore, the backlog or number of cleanups remaining can increase from a previous year despite cleanups completed; this occurred in fiscal year 2013, when the number of cleanups remaining was greater than the number of cleanups remaining for fiscal year 2012. The table also shows that while the number of cleanups remaining can fluctuate year to year, the agency was able to reduce the backlog in 4 of the 5 years we

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reviewed. There was a net reduction of 28 sites in the backlog between fiscal years 2012 and 2016.

Table 2: Indian country backlog of LUSTs

Fiscal year	LUSTs added to backlog	Cleanups completed	Cleanups remaining
2012	23	47	299
2013	23	18	304
2014	20	26	298
2015	25	32	291
2016	10	30	271

Source: OIG-created table generated with EPA data.

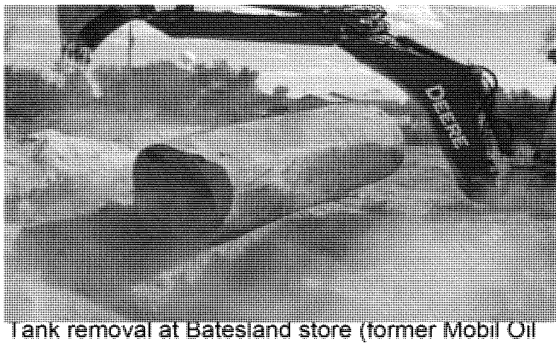
Factors Impacting Reduction of LUST Backlog in Indian Country

A number of factors impact the EPA's ability to address the LUST backlog in Indian country, including:

- The EPA's reliance on other parties to conduct the majority of cleanups.
- LUST sites with low risk can remain on the backlog.
- The action memorandum approval process is lengthy.
- Some LUSTs need more complex and costly cleanups.

Reducing the backlog is important to reducing potential exposure to harmful contaminants that are detrimental to the health of the public and the environment. Details on the four factors noted above follow.

EPA's Reliance on Other Parties to Conduct Majority of Cleanups



Tank removal at Batesland store (former Mobil Oil and gas station), Pine Ridge Reservation, South Dakota. Batesland is on the national backlog, and the EPA is performing cleanup actions at the site. (EPA photo)

The EPA is responsible for implementing the UST program in Indian country. However, funding and cleanup actions can be performed by states and responsible parties as well as the EPA. Due to cleanups of LUSTs by other parties, the EPA is not solely addressing the backlog.

According to OUST data, most of the 271 sites in the backlog will not be cleaned up using the LUST Trust Fund. An EPA report from 2014 notes that state funds were responsible for funding 41 percent of the UST releases in Indian country, and responsible parties were to clean up 32 percent of the sites. The LUST Trust Fund was to be used for 15 percent of the cleanups, and the remaining cleanups fell into other categories, such as unknown funding sources and transfers to other cleanup programs (see Figure 3).

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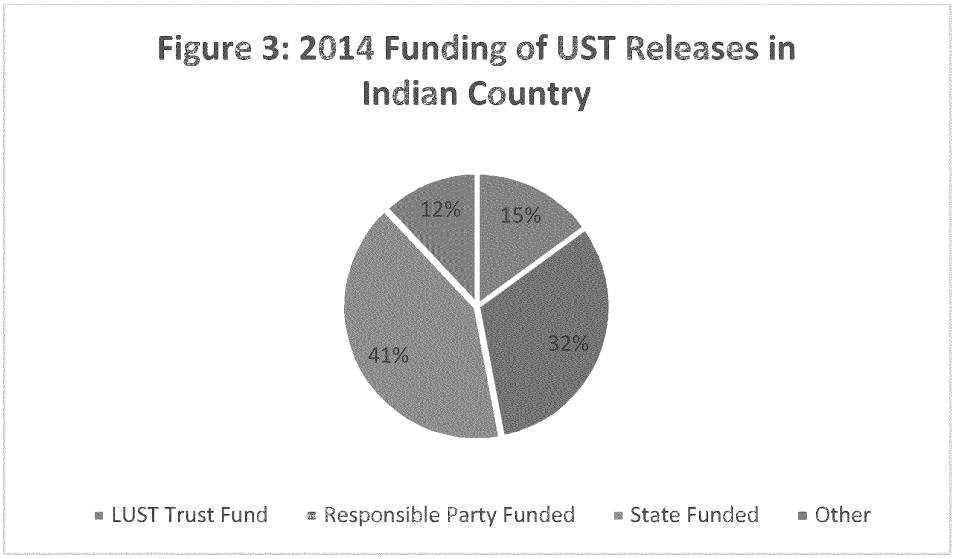

Source: OIG-created chart with EPA data.

In situations when the state, with the permission of the tribe, is overseeing cleanups, the regions will monitor state oversight of these corrective actions. As the EPA is responsible for implementing the UST program in Indian country, according to OUST, the agency will check as to whether the completed cleanup was appropriate. The reduction of the backlog is largely contingent on state funds and responsible parties conducting and completing work at many LUST sites.

LUST Sites With Low Risk Can Remain on Backlog

Some LUSTs have remained on the backlog for a decade or more. In 2014 the EPA reported that 66 percent of the backlog was 15 years old or older. This includes LUSTs the EPA considers "impractical" to clean (those with low risk and high cost to clean). This also includes a small number of LUSTs cleaned to EPA but not tribal standards. In Region 9, staff estimated that three sites do not meet tribal standards and, therefore, are still on the backlog.

Action Memorandum Approval Process Is Lengthy

EPA regional offices must request funding approval through an action memorandum (action memo) to use LUST Trust Fund money to finance a cleanup. Regions justify a site's priority for corrective action (and the other LUST statutory requirements) in action memos. Action memo funding requests over $250,000 are reviewed and approved by the OUST Director but also require the OLEM Assistant Administrator's approval. For these memos, the OLEM Assistant Administrator is personally involved in the review and provides comments to the regions. If additional funds are needed to complete work at a site, multiple action memos will be needed, and the Assistant Administrator's approval will be required for each action memo requesting funds over $250,000. The three regions we interviewed suggested the approval process is a lengthy one and the review period can vary,

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taking a few months to a year for non-emergency approval needs. The lengthy approval process, in conjunction with the need to reissue task orders for different contract periods and weather constraints, can delay the cleanup and other work, such as outreach or field work activities. This, in turn, can prolong exposure to harmful contaminants.

According to the OLEM Assistant Administrator, a rigorous review process is a necessary step to ensure cleanup activities are optimized. He added that the tribal work is very complex, from a government-to-government standpoint, and the tribal views of the cleanup remedies can alter the strategy the EPA takes. The Assistant Administrator wants the project managers to consider the tribal views before funding is requested. He further explained that he applies the same amount of rigor to the review of the tribal UST action memos as for the Superfund removal action memos.

In May 2016, the OLEM Assistant Administrator released a memorandum, *Improving Action Memos for Leaking Underground Storage Tank (LUST) Cleanup Activities in Indian Country.* This document was created to clarify requirements for action memos authorizing the use of LUST Trust Funds, in addition to streamlining the process and strengthening justification for using the LUST Trust Funds. As stated in the document:

> Action memos provide information to meet our statutory obligation for why a site qualifies for LUST Trust Funds, explains what has been done at the site, what still needs to be done, and how much it will cost. The most complete action memos also provide, when applicable, information about:
>
> - The remedial strategy, goals and exit plan
> - Maximizing performance and reducing cost (e.g., optimizing corrective action)
> - Tribal government and affected community perspectives
> - Efforts to mitigate risk and reduce uncertainty
> - Your [UST/LUST Regional Division Directors] confidence in the likelihood the proposed approach will succeed
> - What would trigger the need for additional authorization in the future

According to one region we interviewed after the release of the May 2016 memo, the staff stated they still do not know what is expected, and there are times when the level of detail wanted is unknown and some questions (asked to address in the action memo) are too far in advance to have the answers. For example, the site in question may be in an investigative phase, yet there are already questions on a remedial exit strategy. Additional feedback from a different regional manager of the UST program noted that the technical hurdles placed before those requesting

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funds are inconsistent with the site assessment and cleanup process, and the intent of the action memos.

The action memo approval process is an important senior official oversight tool to ensure that use of public funds is adequately justified. However, the time it takes for the senior official's review can vary, and there is no established time period for the review. A process that is unclear, lengthy or not well understood by those responsible for completing and preparing documentation provides OLEM with a further opportunity for review and possible improvement.

LUSTs Needing More Complex and Costly Cleanups

According to an EPA report from 2016, sites have been more complex and, therefore, more expensive. This has resulted in longer-term cleanups than in the past. While there are difficult and costly LUST sites with substantial releases in Indian country, the EPA has become more vigilant about optimizing remediation plans. According to the EPA, increased scrutiny adds time and more steps to the process, such as a need for more action memos, but, according to the EPA, will lead to more cost-effective and efficient cleanups in the future.

Conclusion

Without a documented and transparent funding decision process nationwide with consistent regional criteria, it is difficult to determine the extent to which UST/LUST sites with the greatest threat to human health and the environment are prioritized and receive funding. The EPA has plans that, when implemented, can enhance the transparency and effectiveness of the funding decision process, through the use of a panel and additional regional involvement. Although the EPA has reduced the backlog in Indian country, factors—such as sites remaining on the backlog for more than a decade or a lengthy action memo approval process—can impede the agency's ability to effectively reduce or eliminate backlog sites. While all UST sites present some degree of risk, when sites are not prioritized for threats, there is a potential public health concern of prolonged exposure to more hazardous contaminants.

Recommendations

We recommend that the Assistant Administrator for Land and Emergency Management:

1. Document how the process and criteria the EPA uses to give priority to those Leaking Underground Storage Tank releases that present the greatest threat to human health and the environment comply with the Energy Policy Act of 2005, Section 1529, including how funding decisions for cleanup activities prioritize these releases, and communicate this with the regions.

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2. Once a process and criteria for prioritizing are documented, develop a tool or mechanism to track each Leaking Underground Storage Tank site in Indian country according to the EPA's prioritization criteria.

3. As other EPA cleanup programs have done, establish a panel, including headquarters and regional staff, to review annual funding decisions for Underground Storage Tank/Leaking Underground Storage Tank sites in Indian country.

4. Establish a standard time period (in days) for the Assistant Administrator and Office of Land and Emergency Management headquarters' offices to provide comments to the regions on submitted action memos.

5. Assess staff understanding of the May 2016 guidance and identify opportunities to strengthen staff awareness and adherence to the expectations for action memos.

Agency Response and OIG Evaluation

The EPA stated it is in full compliance with an EPAct requirement to give priority to releases from LUST sites in Indian country presenting the greatest threats to human health or the environment. The EPA believes its program is robust given the staff and financial resources appropriated by Congress. The EPA agrees it could do more to document the funding decision-making process in a more transparent way, and provide opportunities for cross-regional participation when allocating Indian country funding. We agree that the EPA is working to address threats to human health and the environment at LUST sites in Indian country. However, due to the absence of a transparent prioritization effort and the lack of documentation for funding decisions, we cannot confirm that the requirement is fully met.

The EPA agreed with all recommendations. Based on discussions during a January 2017 meeting with EPA managers and our review of written comments, we made changes to the report where appropriate. In addition, we requested that the EPA make changes to its corrective actions plan, and it did so. All recommendations are resolved. The agency's response is in Appendix A, and its revised corrective actions plan is in Appendix B.

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Status of Recommendations and Potential Monetary Benefits

RECOMMENDATIONS

Rec. No.	Page No.	Subject	Status[1]	Action Official	Planned Completion Date	Potential Monetary Benefits (in $000s)
1	16	Document how the process and criteria the EPA uses to give priority to those Leaking Underground Storage Tank releases that present the greatest threat to human health and the environment comply with the Energy Policy Act of 2005, Section 1529, including how funding decisions for cleanup activities prioritize these releases, and communicate this with the regions.	R	Assistant Administrator for Land and Emergency Management	9/30/17	
2	17	Once a process and criteria for prioritizing are documented, develop a tool or mechanism to track each Leaking Underground Storage Tank site in Indian country according to the EPA's prioritization criteria.	R	Assistant Administrator for Land and Emergency Management	9/30/18	
3	17	As other EPA cleanup programs have done, establish a panel, including headquarters and regional staff, to review annual funding decisions for Underground Storage Tank/Leaking Underground Storage Tank sites in Indian country.	R	Assistant Administrator for Land and Emergency Management	12/31/17	
4	17	Establish a standard time period (in days) for the Assistant Administrator and Office of Land and Emergency Management headquarters' offices to provide comments to the regions on submitted action memos.	R	Assistant Administrator for Land and Emergency Management	6/30/18	
5	17	Assess staff understanding of the May 2016 guidance and identify opportunities to strengthen staff awareness and adherence to the expectations for action memos.	R	Assistant Administrator for Land and Emergency Management	6/30/17	

[1] C = Corrective action completed.
R = Recommendation resolved with corrective action pending.
U = Recommendation unresolved with resolution efforts in progress.

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Agency Response to Draft Report

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 20 2016

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

NOW THE
OFFICE OF LAND AND
EMERGENCY MANAGEMENT

MEMORANDUM

SUBJECT: Response to Office of Inspector General Draft Report No. OPE-FY16-0013 "Backlog of Leaking Underground Storage Tank Cleanups in Indian Country Has Been Reduced, but EPA Needs to Strengthen Requirements," November 22, 2016

FROM: Mathy Stanislaus
Assistant Administrator
Office of Land and Emergency Response

TO: Arthur A. Elkins, Jr.
Inspector General

Thank you for the opportunity to respond to the issues and recommendations in the subject audit report. Following is a summary of the agency's overall position, along with its position on each of the report recommendations. For those report recommendations with which the agency agrees, we have provided high-level intended corrective actions and estimated completion dates to the extent we can. For your consideration, we have included a Technical Comments attachment to supplement this response.

AGENCY'S OVERALL POSITION

The EPA's Underground Storage Tank Program believes it is in full compliance with the Energy Policy Act of 2005 (EPAct) requirement for giving priority to releases from Leaking Underground Storage Tank (LUST) sites in Indian country that present the greatest threats to human health or the environment. The EPA also believes that we have a robust program given the staff and financial resources appropriated to us by Congress. We agree we could do more to document our funding decision-making process in a more transparent way and provide opportunities for cross-regional participation allocating Indian country funding. The statutory structure of the LUST program, which requires UST owners and operators to pay for cleanups

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and uses federal funds for critical situations not covered by other funding, can be complex but is appropriate, effective, and results in significant backlog reduction. We also believe it is important to implement the LUST corrective action program in Indian country in a manner that is consistent with our guidelines for states, where applicable. This includes having an approach to LUST Trust funded site priority setting that gives priority to sites that pose the greatest risk to human health and the environment while ensuring all sites move forward. It necessitates adhering to the statutory structure of the program which relies on several, complementary funding mechanisms and on investing time and money in program management and support activities (such as, Senior Environmental Employees, training, database management, adequate and timely action memo justification authorizing the use of LUST Trust Funds, grants and contracts management) in addition to direct site cleanup to ensure effective protection of human health and the environment.

AGENCY'S RESPONSE TO REPORT RECOMMENDATIONS

Agreements

No.	Recommendation	High-Level Intended Corrective Action(s)	Estimated Completion by Quarter and FY
1	Document how the process and criteria the EPA uses to give priority to those Leaking Underground Storage Tank releases that present the greatest threat to human health and the environment comply with the Energy Policy Act of 2005, Section 1529, including how funding decisions for cleanup activities prioritize these releases, and communicate this with the regions.	The EPA will document the process and criteria it uses to give priority to those Leaking Underground Storage Tank (LUST) releases that present the greatest threat to human health and the environment in Indian country by issuing a memo to the regions. The memo will consider input from the FY17 pilot regional-headquarters funding panel and explain how releases are prioritized when making funding decisions for LUST Trust Funded site cleanup.	4nd Quarter FY FY17
2.	Once a process and criteria for prioritizing are documented, develop a tool or mechanism to track each Leaking Underground Storage Tank site in Indian country according to the EPA's prioritization criteria.	1.1 The EPA will track the LUST Trust Funded sites through the documents developed for the funding panel.	2nd Quarter FY17

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		1.2 The EPA will consider whether there are use the new tribal database we are developing to assist in this tracking.	4th Quarter FY17
3.	As other EPA cleanup programs have done, establish a panel, including headquarters and regional staff, to review annual funding decisions for Underground Storage Tank/Leaking Underground Storage Tank sites in Indian country.	The EPA will establish a regional-headquarters pilot panel to consider FY17 funding requests and make funding recommendations. EPA headquarters and regions UST program will assess the pilot panel approach and make adjustments to improve the effectiveness of future Indian country cleanup funding decisions.	2nd Quarter FY17 1st Quarter FY18
4.	Establish a standard time period (in days) for the Assistant Administrator and OLEM headquarters' offices to provide comments to the regions on submitted action memos.	The EPA will establish a standard period of one month for the Assistant Administrator and OLEM headquarters' offices to provide comments to the regions on submitted action memos.	3rd Quarter FY18
5.	Assess staff understanding of the May 2016 guidance and identify opportunities to strengthen staff awareness and adherence to the expectations for action memos.	The EPA will assess staff understanding of the May 2016 guidance and identify opportunities to strengthen staff awareness and adherence to the expectations for action memos.	3nd Quarter FY17

Disagreements
None

CONTACT INFORMATION

If you have any questions regarding this response, please contact Lela Hagan, Program Analyst of the Office of Underground Storage Tanks on (202) 564-0659 or Kecia Thornton, Organizational Management and Integrity Staff, OLEM on (202) 566-1913.

Attachment: Technical Comments

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cc: Barry Breen
Nitin Natarajan
Carolyn Hoskinson
Mark Barolo
Will Anderson
Judy Barrows
Lela Hagan
Kecia Thornton

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Appendix B

Revised Corrective Actions Plan

The revised corrective actions plan below was submitted by OLEM in February 2017. It represents the position of the action official and has been agreed to by the OIG. Corrective actions with changes from the original submission are shown in blue. All recommendations are agreed to and resolved.

No.	Recommendation	High-Level Intended Corrective Action(s)	Estimated Completion by Quarter and FY
1	Document how the process and criteria the EPA uses to give priority to those Leaking Underground Storage Tank releases that present the greatest threat to human health and the environment comply with the Energy Policy Act of 2005, Section 1529, including how funding decisions for cleanup activities prioritize these releases, and communicate this with the regions.	The EPA will document the process and criteria it uses to give priority to those Leaking Underground Storage Tank (LUST) releases that present the greatest threat to human health and the environment in Indian country by issuing a memo to the regions. The memo will use, where applicable, input from the FY17 pilot regional-headquarters funding panel and explain how releases are prioritized when making funding decisions for LUST Trust Funded site cleanup.	4nd Quarter FY FY17
2.	Once a process and criteria for prioritizing are documented, develop a tool or mechanism to track each Leaking Underground Storage Tank site in Indian country according to the EPA's prioritization criteria.	2.1 The EPA will track the LUST Trust Funded sites through the documents developed for the funding panel.	2nd Quarter FY17
		2.2 As part of the development of the new database for the UST sites in Indian country, EPA will evaluate options to determine whether it is feasible and affordable to track the funding decisions for LUST Trust funded sites.	4th Quarter FY17

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		2.3 If EPA determines that it is not feasible or affordable to use the database for this purpose, EPA will develop an alternative method to track the funding decisions for LUST Trust funded sites.	4th Quarter FY18
3.	As other EPA cleanup programs have done, establish a panel, including headquarters and regional staff, to review annual funding decisions for Underground Storage Tank/Leaking Underground Storage Tank sites in Indian country.	3.1 The EPA will establish a regional-headquarters pilot panel to evaluate FY17 funding requests and make funding recommendations.	2nd Quarter FY17
		3.2 EPA headquarters and regions UST program will assess the pilot panel approach and make adjustments to improve the effectiveness of future Indian country cleanup funding decisions, through continued panels or alternative approaches determined to be more effective.	1st Quarter FY18
4.	Establish a standard time period (in days) for the Assistant Administrator and OLEM headquarters' offices to provide comments to the regions on submitted action memos.	The EPA will establish a standard period of one month for the Assistant Administrator and OLEM headquarters' offices to provide comments to the regions on submitted action memos.	3rd Quarter FY18
5.	Assess staff understanding of the May 2016 guidance and identify opportunities to strengthen staff awareness and adherence to the expectations for action memos.	The EPA will assess staff understanding of the May 2016 guidance and identify opportunities to strengthen staff awareness and adherence to the expectations for action memos.	3nd Quarter FY17

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Appendix C

Distribution

The Administrator
Assistant Administrator for Land and Emergency Management
Assistant Administrator for International and Tribal Affairs
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General Counsel
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Audit Follow-Up Coordinator, Office of the Administrator
Audit Follow-Up Coordinator, Office of Land and Emergency Management
Audit Follow-Up Coordinator, Office of International and Tribal Affairs

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To: Jackson, Ryan[jackson.ryan@epa.gov]; Schnare, David[schnare.david@epa.gov]
From: Hope, Brian
Sent: Mon 3/6/2017 3:52:11 PM
Subject: FW: OIG Report: "Fraud Controls for EPA's Contract Laboratory Program Are Adequate, but Can Be Strengthened With Formal Risk Assessment and Investigative Information Sharing"
_epaoig_20170306-17-P-0119_cert.pdf

From the Administrator's account.

From: OIG News
Sent: Monday, March 06, 2017 9:35 AM
To: Breen, Barry <Breen.Barry@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Elkins, Arthur <Elkins.Arthur@epa.gov>
Cc: Pruitt, Scott <Pruitt.Scott@epa.gov>; Bloom, David <Bloom.David@epa.gov>; Rutherford, Debbie <Rutherford.Deborah@epa.gov>; Deane, Benita <Deane.Benita@epa.gov>; Anthony, Sherri <Anthony.Sherri@epa.gov>; Grzegozewski, Nicholas <Grzegozewski.Nicholas@epa.gov>; Howard, MarkT <Howard.Markt@epa.gov>; Trent, Bobbie <Trent.Bobbie@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Richardson, RobinH <Richardson.RobinH@epa.gov>; Hull, George <Hull.George@epa.gov>; Valentine, Julia <Valentine.Julia@epa.gov>; Simon, Nigel <Simon.Nigel@epa.gov>; Cozad, David <Cozad.David@epa.gov>; Cuscino, Glen <Cuscino.Glen@epa.gov>; Thornton, Kecia <Thornton.Kecia@epa.gov>; Spriggs, Gwendolyn <Spriggs.Gwendolyn@epa.gov>
Subject: OIG Report: "Fraud Controls for EPA's Contract Laboratory Program Are Adequate, but Can Be Strengthened With Formal Risk Assessment and Investigative Information Sharing"

Attached is the EPA Office of Inspector General (OIG) report, *Fraud Controls for EPA's Contract Laboratory Program Are Adequate, but Can Be Strengthened With Formal Risk Assessment and Investigative Information Sharing* (Report No. 17-P-0119). This report will be available to the public on the OIG's website at www.epa.gov/oig.

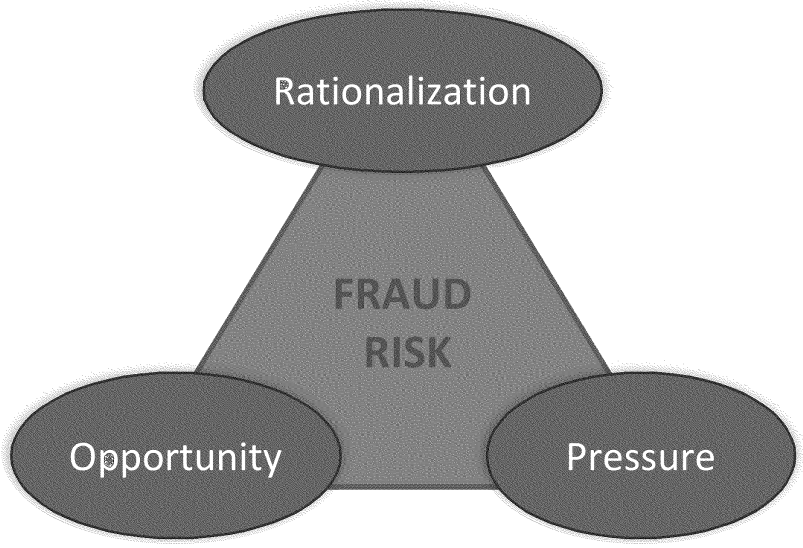
U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL

Science and Research

Fraud Controls for EPA's Contract Laboratory Program Are Adequate, but Can Be Strengthened With Formal Risk Assessment and Investigative Information Sharing

Report No. 17-P-0119 **March 6, 2017**



Report Contributors:

Patrick Gilbride
Erin Barnes-Weaver
Raul Adrian
Monica Brym

Abbreviations

ASB	Analytical Services Branch
CID	Criminal Investigation Division
CLP	Contract Laboratory Program
COR	Contracting Officer's Representative
EPA	U.S. Environmental Protection Agency
EXES	Electronic Data Exchange and Evaluation System
FY	Fiscal Year
GAO	U.S. Government Accountability Office
OAM	Office of Acquisition Management
OCEFT	Office of Criminal Enforcement, Forensics and Training
OECA	Office of Enforcement and Compliance Assurance
OEI	Office of Environmental Information
OI	Office of Investigations
OIG	Office of Inspector General
OLEM	Office of Land and Emergency Management
OMB	Office of Management and Budget
OSRTI	Office of Superfund Remediation and Technology Innovation
QA	Quality Assurance
QATS	Quality Assurance Technical Support
QC	Quality Control
SMO	Sample Management Office

Cover image: EPA OIG graphic depicting fraud risk.

Are you aware of fraud, waste or abuse in an EPA program?

EPA Inspector General Hotline
1200 Pennsylvania Avenue, NW (2431T)
Washington, DC 20460
(888) 546-8740
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U.S. Environmental Protection Agency
Office of Inspector General

17-P-0119
March 6, 2017

At a Glance

Why We Did This Review

We conducted this review to determine whether the U.S. Environmental Protection Agency's (EPA's) Contract Laboratory Program (CLP) has the controls to detect or prevent fraudulent analytical services or data produced by CLP laboratories, and whether those controls provide reasonable assurance that the potential for fraud is minimized. We also sought to identify how the EPA monitors laboratory fraud cases across the agency to inform its system of controls.

The CLP is a national network of EPA-approved contract laboratories whose primary service is the provision of analytical data of known and documented quality. Since the 1980 inception of the CLP, 180 CLP labs have performed over 3.7 million analyses on samples from more than 20,900 sites, at an expense of approximately $431.5 million.

This report addresses the following EPA goals or cross-agency strategies:

- *Protecting human health and the environment by enforcing laws and assuring compliance.*
- *Embracing EPA as a high-performing organization.*

Send all inquiries to our public affairs office at (202) 566-2391 or visit www.epa.gov/oig.

Listing of OIG reports.

Fraud Controls for EPA's Contract Laboratory Program Are Adequate, but Can Be Strengthened With Formal Risk Assessment and Investigative Information Sharing

What We Found

The CLP has demonstrated the effectiveness of four of five internal controls that provide reasonable assurance that the potential for laboratory fraud is minimized. One component—risk assessment—has not been formally documented. Rather, one CLP manager said they address fraud risks informally but on a continual basis, which results in the development of new tools and updated guidance documents. Formal risk assessment would provide the CLP assurance that its controls address risks, as well as provide a clear picture of efforts to address lab performance deficiencies.

The impacts of lab fraud include risks to human health and the undermining of EPA regulatory programs.

Policies for EPA investigative offices do not require them to share information with program offices, or explain how or why lab fraud occurred. According to investigative units, there are additional reasons as to why they do not share information: a small caseload of lab fraud for them to data-mine trends; the inability to share sensitive information until a case closes; and resource limitations. Stakeholders we interviewed agreed with the merit of having investigative offices share relevant aspects of lab fraud findings, including methods and techniques used to commit the fraud. Stakeholders also agreed that investigative offices should share information to help program and regional offices strengthen and update their internal control systems for preventing and detecting lab fraud.

Recommendations and Planned Agency Corrective Actions

We recommend that the Assistant Administrator for the Office of Land and Emergency Management (OLEM) conduct and document a formal risk assessment of the CLP to determine whether additional internal controls are needed to mitigate detected risks. We also recommend that the Office of Enforcement and Compliance Assurance (OECA), and the Office of Inspector General (OIG), require investigative units to share pertinent information from laboratory fraud findings with relevant program and regional offices. Recommendations for OLEM and OECA are agreed-to with corrective actions pending. The OIG completed its corrective action.

Noteworthy Achievements

OLEM developed an electronic laboratory data validation package—the Electronic Data Exchange and Evaluation System (EXES)—that is being made available to other agency programs via pilot implementations. A new version of EXES is in the works, which will incorporate added controls based on a current CLP lab fraud case. This demonstrates OLEM's view of EXES as a dynamic system that will be periodically updated to reflect changes in the program.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
INSPECTOR GENERAL

March 6, 2017

MEMORANDUM

SUBJECT: Fraud Controls for EPA's Contract Laboratory Program Are Adequate, but Can Be Strengthened With Formal Risk Assessment and Investigative Information Sharing
Report No. 17-P-0119

FROM: Charles J. Sheehan, Deputy Inspector General

TO: Barry Breen, Acting Assistant Administrator
Office of Land and Emergency Management

Lawrence Starfield, Acting Assistant Administrator
Office of Enforcement and Compliance Assurance

Arthur A. Elkins Jr., Inspector General

This is our report on the subject evaluation conducted by the Office of Inspector General (OIG) of the U.S. Environmental Protection Agency (EPA). The project number for this evaluation was OPE-FY16-0022. This report contains findings that describe the problems the OIG has identified and corrective actions the OIG recommends. This report represents the opinion of the OIG and does not necessarily represent the final EPA position. Final determinations on matters in this report will be made by EPA managers in accordance with established audit resolution procedures.

Action Required

In accordance with EPA Manual 2750, your offices provided planned corrective actions in response to our recommendations. All recommendations are considered resolved. You are not required to provide a written response to this final report because you provided agreed-to corrective actions and planned completion dates for the report recommendations. Should you choose to provide a final response, we will post your response on the OIG's public website, along with our memorandum commenting on your response. Your response should be provided as an Adobe PDF file that complies with the accessibility requirements of Section 508 of the Rehabilitation Act of 1973, as amended. The final response should not contain data that you do not want to be released to the public; if your response contains such data, you should identify the data for redaction or removal along with corresponding justification.

We will post this report to our website at www.epa.gov/oig.

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Chapter 1
Introduction

Purpose

We conducted this review to determine whether the U.S. Environmental Protection Agency's (EPA's) Contract Laboratory Program (CLP) has the controls to detect or prevent fraudulent analytical services or data produced by CLP laboratories, and whether those controls provide reasonable assurance that the potential for fraud is minimized. We also sought to identify how the EPA monitors laboratory fraud cases across the agency to inform its system of controls.

Background

Contract Laboratory Program

> Since the 1980 inception of the CLP, 180 CLP labs have performed over 3.7 million analyses from more than 20,900 sites, at an expense of approximately $431.5 million.

The CLP is located within the EPA's Office of Land and Emergency Management (OLEM). The CLP is a national network of EPA-approved contract laboratories whose primary service is the provision of analytical data of known and documented quality to support Superfund site decisions. All analytical services are performed by EPA-approved contract laboratories who meet stringent requirements and standards in order to be a part of the CLP. The reliability and accuracy of CLP lab data is important for monitoring environmental and public health issues.

The Analytical Services Branch (ASB) within OLEM's Office of Superfund Remediation and Technology Innovation (OSRTI) manages and supports the CLP. There are 17 participant laboratories in the CLP (as of April 2016). The EPA has a four-tier strategy for acquiring laboratory analytical services for Superfund site sample analyses.[1]

Tier 1	EPA regional and state laboratories.
Tier 2	CLP and other national analytical services contracts.
Tier 3	Region-specific analytical services contracts.
Tier 4	Analytical services interagency agreements and regional field contracts/subcontracts.

[1] In March 1998, the Field and Analytical Services Teaming Advisory Committee (comprised of headquarters and regional Superfund program managers) was convened to promote coordination, enhance customer service and improve the quality assurance program with an emphasis on field activities. The committee recommended using a decision tree for selecting laboratory analytical service providers in order of preference, based on evaluating available analytical sources and considering the following parameters: quality, timeliness, cost, efficiency/availability (on-board resources), and potential vulnerabilities.

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In general, there is increased cost for analyses and quality reviews when using a higher tier. Tiers 1 and 2 are considered the most preferred; Tier 4 the least preferred.

Quality Assurance/Quality Control Processes

The quality assurance (QA) process consists of management review and oversight at the three stages of the environmental data collection: planning, implementation and completion. This process is intended to ensure that the data provided are of known and documented quality. The quality control (QC) process includes those activities required during data collection to produce data suitable for decision-making. Each contract lab has a Quality Management Plan and a Quality Assurance Project Plan. Some labs combine these two documents into one. Each lab must also include the QA/QC activities designed to achieve the data quality requirements in the contract.

Additionally, each CLP analytical method, identified by its respective statement of work, has a corresponding set of guidelines (called the National Functional Guidelines) for the review and evaluation of the data. The National Functional Guidelines are intended to assist in the technical review of analytical data generated by the respective CLP statement of work. The National Functional Guidelines are not intended to be used alone in determining the ultimate usability of the data; rather, the guidelines are intended to aid in the formal data review process, along with other sources of guidance, information and professional judgment.

> Laboratories are used to analyze soil, water and other media to determine their chemical composition, to assess whether such chemicals pose human health risks, and to determine whether such media are contaminated and in need of remedial treatment. In light of this role, maintenance of the integrity of laboratory sample tests, results and reports is critical for providing communities accurate information about their environment and potential health risks.

The ASB and EPA regions conduct primary lab performance monitoring activities to ensure that contract labs produce appropriate, quality data. Monitoring activities include the following: on-site lab evaluations, electronic data audits, data package audits, and lab evaluations through the use of blind performance evaluation samples. Additionally, “proficiency testing” audits are used to evaluate a laboratory’s ability to identify and quantify target analytes in performance evaluation samples provided by the EPA. The agency then uses the results to assess and verify a CLP laboratory’s continuing ability to produce acceptable analytical data in accordance with contractual requirements. CLP laboratories analyze proficiency testing audit samples several times per year under direction from the ASB. The CLP laboratory is not informed of either the analytes or sample concentrations.

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Quality staff in the Office of Environmental Information (OEI) are responsible for issuing agencywide QA/QC policies and procedures. Quality staff have liaisons in every EPA program office and region, although titles may vary by location (e.g., QA Managers, Directors or Coordinators).

CLP Key Entities

Personnel from all 10 EPA regions play a vital role in CLP activities as the primary users of the CLP and as a key part of analytical program management. The regional CLP Contracting Officer's Representative (COR) serves as the primary coordinator for CLP activities within each region; provides feedback on data quality, usability and CLP laboratory performance to ASB; and contacts the laboratory if there are questions or issues that arise during data validation. The regional CLP COR leads on-site laboratory audits and may visit the CLP laboratory if there are serious performance problems.

The Office of Acquisition Management (OAM) is responsible for all contracting-related activities. OAM's Laboratory Analysis Service Center manages CLP contracts. OAM's Contracting Officer is the only person with the authority to enter into, administer and terminate contracts. The Contracting Officer has the authority to approve CLP laboratories exceeding their monthly capacity and place CLP laboratories on "suspension of work" status.

As noted earlier, CLP labs fall under Tier 2 in the EPA's decision tree when selecting analytical service providers. CLP labs are supported by two support contracts: the Sample Management Office (SMO) contract, and the Quality Assurance Technical Support (QATS) contract.

- **SMO**—The contractor-operated SMO provides management, operations and administrative support to the CLP. The SMO receives regional analytical requests, coordinates and schedules sample analyses, and tracks sample shipments. The SMO also receives and checks data for completeness and compliance, performs automated data assessment, processes laboratory invoices, and maintains a repository of sampling records and program data. The SMO's online portal offers CLP users one central location for available tools that support the CLP.

- **QATS**—This is the CLP support contractor directed and tasked by the ASB on behalf of OAM. The QATS provides QA and audit support, as well as technical expertise to assist in evaluating CLP data quality. The primary objective of QATS is to provide a data package and electronic, on-site and special investigative audit[2] support; develop,

[2] The QATS "special investigative audits" are small, targeted and focused audits of particular data from multiple sample delivery groups. These investigative audits are different from the lab fraud investigations we describe in Chapter 3.

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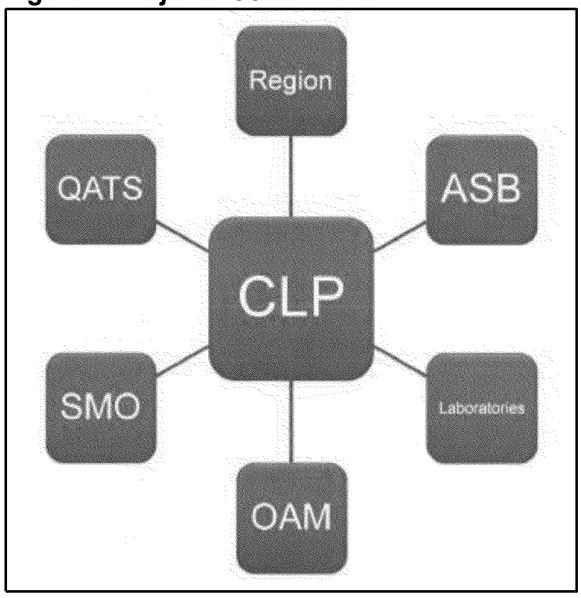
maintain, distribute and scope proficiency testing samples; and provide technical feedback to ASB on required CLP deliverables and data quality. The ASB's QATS contracting officer's representative schedules on-site audits, initiates routing and special investigative audits, oversees the proficiency testing audit program, and gives final approval to all reports produced by QATS in support of the CLP.

Key entities in the CLP are shown in Figure 1.

Figure 1: Major entities in the CLP



Source: OLEM-OSRTI-ASB presentation to the EPA's Office of Inspector General (OIG) on 06/22/16.

CLP Resources

Table 1 presents the headquarters-level CLP budget and full-time equivalent information for fiscal years (FYs) 2005, 2010 and 2015.

According to data provided by the ASB, the budget for the CLP has decreased by over 16 percent from FY 2005 levels, and a near 24-percent decrease from FYs 2010 through 2015. Staff have decreased 36 percent from FY 2005 levels.

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Table 1: Headquarters CLP resources

	FY 05	FY 10	FY 15
Cost of CLP Lab Contracts	9,723,855	10,343,788	6,237,383
Cost of Blanket Purchase Agreements	0	670,425	367,360
Subtotals	9,723,855	11,014,213	6,604,743
Cost of CLP support contracts:			
QATS	3,484,469	3,754,715	4,217,841
SMO	10,703,329	11,519,629	9,182,590
Subtotals	14,187,798	15,274,344	13,400,431
Grand Total	23,911,653	26,288,557	20,005,174
Total Full-Time Equivalents	--	7.3	6.4

Notes: Data for Blanket Purchase Agreements in FY 2005 were not readily available. FY 2005 full-time equivalent data were also unavailable.
Source: OIG analysis of CLP data.

Lab Fraud Allegations

The ASB defines inappropriate laboratory practices as "a technical unjustified omission, manipulation, or alteration of data that bypasses the required QC parameters, making the results appear acceptable." Lab fraud investigations focus on the manipulation of data or equipment, and the falsification of analytical and quality assurance results, where failed methods and contractual requirements are made to appear acceptable. Fraud can involve the backdating of test data, manipulating test samples, or not performing analysis in accordance with established methods among other things.

Lab fraud allegations are investigated either independently or jointly by the EPA OIG's Office of Investigations (OI); and/or the agency's Office of Enforcement and Compliance Assurance (OECA), Office of Criminal Enforcement, Forensics and Training (OCEFT), Criminal Investigation Division (CID), according to statutory authorities (see box) of each office[3] and the terms of an OIG/OECA 2006 Memorandum of Understanding. The EPA's contract labs are at potentially high-risk for fraud because profits are based on the volume of analytical work produced.

Primary investigative responsibilities

- **OIG/OI:** Fraud, waste and abuse in EPA programs or operations.
- **OCEFT/CID:** Criminal violations of federal environmental laws.

[3] The Inspector General Act of 1978, as amended, gives OIG Special Agents law enforcement authority to conduct investigations relating to the programs and operations of the EPA. Law enforcement authority is granted to OCEFT/CID Special Agents by 18 U.S.C. § 3063.

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Internal Control Standards

The U.S. Government Accountability Office (GAO) defines internal control in the following manner:

> [A] process effected by an entity's oversight body, management, and other personnel that provides reasonable assurance that the objectives of an entity will be achieved. Internal control comprises the plans, methods, policies and procedures used to fulfill the mission, strategic plan, goals and objectives of the entity. Internal control is not one event, but a series of actions that occur throughout an entity's operations. Management is responsible for an effective internal control system. As part of this responsibility, management sets the entity's objectives, implements controls, and evaluates the internal control system.[4]

Internal control has five components:

1. **Control Environment.** The foundation for an internal control system. The control environment provides the discipline and structure to help an entity achieve objectives.

2. **Risk Assessment.** Assesses the risks facing the entity as it seeks to achieve its objectives. This assessment provides the basis for developing appropriate risk responses.

3. **Control Activities.** Actions that management establishes through policies and procedures to achieve objectives and respond to risks in the internal control system, which includes the entity's information system.

4. **Information and Communication.** Quality information that management and personnel communicate and use to support the internal control system.

5. **Monitoring.** Activities that management establishes and operates to assess the quality of performance over time, and to promptly resolve audit findings and other reviews.

GAO notes that 17 principles support the effective design, implementation and operation of the associated components, and represent the requirements necessary to establish an effective internal control system.

Office of Management and Budget (OMB) Circular A-123, *Management's Responsibility for Enterprise Risk Management and Internal Control* (July 2016), defines obligations for risk management and internal control in federal agencies. EPA Order 1000.24 CHG 2, "Management's Responsibility for Internal Control,"

[4] GAO, *Standards for Internal Control in the Federal Government*, GAO-14-704G, September 2014.

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requires all EPA organizations to establish and maintain internal controls to achieve the objectives of effective and efficient program operations, including evaluating internal controls on an on-going basis and taking prompt actions to correct any vulnerabilities identified.

Responsible Offices

The CLP is administered by the Analytical Services Branch within the Office of Land and Emergency Management, Office of Superfund Remediation and Technology Innovation. Allegations of fraudulent laboratory data and analysis are handled by the Criminal Investigation Division within the Office of Enforcement and Compliance Assurance, Office of Criminal Enforcement, Forensics and Training; as well as by the OIG's Office of Investigations.

Noteworthy Achievements

The ASB developed an electronic data validation package—the Electronic Data Exchange and Evaluation System (EXES)—which assesses data within 24 to 48 hours after receipt. The ASB is now making EXES available to other agency programs (e.g., the Great Lakes program) via pilot implementations. A new version of EXES is in the works and will incorporate added controls based on the ASB's experience with a current CLP lab fraud case. The new version of EXES demonstrates the ASB's view of EXES as a dynamic system periodically updated to reflect changes in the program.

Scope and Methodology

We conducted our performance audit from April to November 2016. With the exception described below, our work was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Two entities within the EPA are responsible for investigating lab fraud: OCEFT/CID and OIG/OI. To address our objectives, we were required to obtain information and interview employees in both OCEFT/CID and OIG/OI.

Because the staff that conducted this review and the OIG/OI fall structurally within the OIG, there could be the perception of a lack of independence. To address the issue of independence, we developed and adhered to the same procedures to obtain and review information and conduct interviews with both offices. We also adhered to the OIG's quality assurance procedures. We believe these actions mitigate and provide adequate safeguards that reflect our independence.

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We analyzed numerous documents pertaining to the CLP,[5] QA, laboratory fraud and internal controls, including policies, procedures and guidance documents.

In addition to document reviews, and to address our first objective, we interviewed key staff and managers responsible for CLP program implementation, oversight and quality assurance in ASB, OEI, and OAM. We also interviewed all 10 EPA regional CLP CORs (users of the CLP). We developed an internal control checklist to assist us in assessing whether controls we identified within the CLP provide reasonable assurance that the potential for fraud is minimized. We used documentary and testimonial evidence to validate implementation of controls and whether controls were understood across CLP program managers, implementers and users. Our conclusions on the adequacy of CLP's controls do not include an evaluation of the effectiveness of the controls.

To address our second objective we interviewed EPA investigative staff and managers within OIG/OI and OCEFT/CID. We interviewed the OIG's Deputy Counsel on the terms of the 2006 Memorandum of Understanding between the two offices. We also interviewed the EPA's Scientific Integrity Official to understand her role in addressing laboratory fraud as it relates to instances of research misconduct.[6]

Prior Audit Reports

Three prior reports relate to our review on laboratory fraud or managing fraud risks (though none specifically on the CLP):

- **A 2006 EPA OIG report.**[7] The EPA OIG conducted the review to identify vulnerabilities in the drinking water sample analysis process and promising techniques to improve laboratory integrity. The EPA OIG found hundreds of vulnerabilities not addressed by the EPA's process—vulnerabilities that could compromise the integrity of the analysis process and the quality of data produced. The EPA OIG included appendices that listed vulnerabilities identified by error type and severity (see image on next page), and promising techniques based on a literature search. The EPA OIG made 10 recommendations, all of which the EPA completed.

[5] We did not review other Superfund contract programs, such as those that are a part of the Superfund Technical Assessment and Response Team, Emergency and Rapid Response Services, or Remedial Action Contracts; rather, we focused solely on the CLP.
[6] The EPA's Scientific Integrity Official does not investigate allegations of laboratory fraud. Instead, she focuses on research falsification, fabrication and plagiarism. She does not have a role in investigating laboratory fraud allegations. If she does receive any allegations of fraud, she said she refers them to the OIG.
[7] EPA OIG, *Promising Techniques Identified to Improve Drinking Water Laboratory Integrity and Reduce Public Health Risks*, Report No. 2006-P-00036, September 21, 2006.

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Vulnerabilities Identified by EPA Team

Sequenced based on the 13 steps in the drinking water sample analysis process (see Figure 2.1) and ordered within each step from most to least severe.

Error Type: U = Unintentional, I = Intentional, B = Both

Severity Rating: 5 = Most Severe, 1 = Least Severe

Description of Vulnerability	Error Type	Severity Rating
a) Sample Collection		
• Sample is mislabeled	B	4
• Sample not preserved/or no dechlorinating agent/adulteration of sample	B	4
b) Sample Tracking and Recording		
• Holding time/temp. exceeded	B	4
c) Adherence to Standard Operating Procedures (SOPs) for Analytical Methods		
• Adherence to SOP	B	4
• QA manager/lab mgmt. not knowledgeable about approved methodology	B	4
• Untrained/inexperienced analysts	B	4
d) Preparation of Samples and Standard Solutions		
• Incorrect preparations/inappropriate standards (i.e., no traceability; contaminated/expired)	B	4
e) Instrument Performance		
• Instrument response/sensitivity-needs documentation	B	4
f) Instrument Maintenance		
• Analyst/QA officer doesn't understand repair needs	U	4
• No repairs-maintenance log maintenance	U	4
• Repaired incorrectly	U	4
g) Instrument Calibration		
• Calibration curve incorrect-data biased high or low	B	4
• Calibration verification not performed	I	4
• Out of date reference materials	B	3
h) Lab Technician Performance		
• Trained analysts can falsify data	I	5
i) Adherence to Quality Assurance/Quality Control (QA/QC) Plan		
• Analysts can falsify/not performing QA/QC data	I	5
j) Data Validation and Verification		
• Not flagging data outside of acceptance criteria	I	5
• Selection of inappropriate QC acceptance criteria	I	4

Image from EPA OIG Report No. 2006-P-00036, September 21, 2006.

- **A 2014 EPA OIG report.**[8] The EPA OIG reviewed the due diligence process, which included the procedures used by the EPA, other federal agencies and states to manage the communication of, and appropriate action on, laboratory data determined to be fraudulent.

  The EPA OIG found that the EPA lacked a due diligence process for potential fraudulent environmental data. The agency had three policies and procedures that addressed how to respond to instances of fraudulent data, but they were out of date or unimplemented when the report was issued. The OIG made six recommendations, all of which were agreed to and will be completed by March 2017.

- **A 2015 GAO report.**[9] GAO reported on the importance of evaluating outcomes using a risk-based approach and adapting activities to improve fraud risk management. GAO said to collect and analyze data from reporting mechanisms and instances of detected fraud for real-time monitoring of fraud trends; and to use the results of monitoring, evaluations and investigations to improve fraud prevention, detection and response.

[8] EPA OIG, *EPA Has Not Implemented Adequate Management Procedures to Address Potential Fraudulent Environmental Data*, Report No. 14-P-0270, May 29, 2014.
[9] GAO, *A Framework for Managing Fraud Risks in Federal Programs*, GAO-15-593SP, July 28, 2015.

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Chapter 2
CLP's Internal Control System Addresses Four of Five Components and Should Formally Assess Program Risks

The CLP has a system of controls in place that provides reasonable assurance that the potential for fraud is minimized. Based on our analysis, the CLP has sufficiently demonstrated the effectiveness of four of five internal controls, whereas one element—risk assessment—has not been formally documented. Rather, one CLP manager said they address risk assessment informally but on a continual basis, which results in the development of new tools and updated guidance documents that address any potential risks identified.

Federal standards and EPA Order 1000.24 CHG 2 require that federal entities conduct risk assessments and emphasize the responsibility of government managers in managing risk. A formal risk assessment would provide the program with assurance that its controls address risks, help determine whether controls are implemented and operating effectively, and provide a picture (to regional CLP leads and others) of efforts the program undertakes to address performance deficiencies by CLP labs.

CLP's Internal Control System Meets Most of the Principles for Effective Internal Controls

We reviewed the CLP's system of internal controls and assessed whether the system met the intent of GAO internal control principles.

Table 2 summarizes our assessment and illustrates that the CLP has controls to detect or prevent fraudulent analytical services; and that, with one exception, those controls provide reasonable—though not absolute—assurance that the potential for fraud is minimized.

OMB Circular A-123, *Management's Responsibility for Enterprise Risk Management and Internal Control* (July 2016), notes that no matter how well designed, implemented or operated, an internal control system cannot provide absolute assurance that all of an organization's objectives are met. Factors outside the control or influence of management can affect the entity's ability to achieve all of its objectives—factors that could be identified through formal risk assessment.

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Table 2: Summary of CLP controls that meet GAO internal control principles

Internal control components and principles	Met	Partially met	Not met
Control Environment			
1. The oversight body and management should demonstrate a commitment to integrity and ethical values.	●		
2. The oversight body should oversee the entity's internal control system.	●		
3. Management should establish an organizational structure, assign responsibilities, and delegate authority to achieve the entity's objectives.	●		
4. Management should demonstrate a commitment to recruit, develop and retain competent individuals.	●		
5. Management should evaluate performance and hold individuals accountable for their internal control responsibilities.	●		
Risk Assessment			
6. Management should define objectives clearly to enable the identification of risks and define risk tolerances.		●	
7. Management should identify, analyze and respond to risks related to achieving the defined objectives.		●	
8. Management should consider the potential for fraud when identifying, analyzing and responding to risks.		●	
9. Management should identify, analyze and respond to significant changes that could impact the internal control system.		●	
Control Activities			
10. Management should design control activities to achieve objectives and respond to risks.	●		
11. Management should design the entity's information system and related control activities to achieve objectives and respond to risks.	●		
12. Management should implement control activities through policies.	●		
Information and Communication			
13. Management should use quality information to achieve the entity's objectives.	●		
14. Management should internally communicate the necessary quality information to achieve the entity's objectives.	●		
15. Management should externally communicate the necessary quality information to achieve the entity's objectives.	●		
Monitoring			
16. Management should establish and operate monitoring activities to monitor the internal control system and evaluate the results.	●		
17. Management should remediate identified internal control deficiencies on a timely basis.	●		
Totals	**13**	**4**	**0**

Source: OIG analysis based on interviews and document reviews.

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Federal Guidance and EPA Policy Require Risk Assessment

> A precondition to risk assessment is the establishment of clear, consistent agency goals and objectives at both the entity and activity levels. Internal control should provide for an assessment of the risks the agency faces from both internal and external sources.

OMB Circular A-123, *Management's Responsibility for Enterprise Risk Management and Internal Control*, requires that federal programs conduct and document a risk assessment[10] based on GAO's *Standards for Internal Control in the Federal Government*. The aim of the assessment is to identify the major risks facing the entity as it seeks to achieve its objectives. This assessment provides the basis for developing appropriate risk responses.

EPA Order 1000.24 CHG 2*, Management's Responsibility for Internal Control* (July 18, 2008), states that in accordance with GAO standards, a risk assessment is the identification and analysis of relevant risk associated with achieving the agency's mission. The EPA order further states that program managers should identify internal and external risks that may prevent the organization from efficiently and effectively meeting its objectives.

In discussing fraud risk, the GAO standards state that management consider the following factors:

- **Incentive/pressure.** Management or other personnel have an incentive or are under pressure, which provides a motive to commit fraud.
- **Opportunity.** Circumstances exist, such as the absence of controls, ineffective controls, or the ability of management to override controls, and this provides an opportunity to commit fraud.
- **Attitude/rationalization.** Individuals involved are able to rationalize committing fraud (i.e., possess an attitude, character or ethical values that allow them to knowingly and intentionally commit a dishonest act).

Because the CLP operates in an environment characterized by high volume and quick turnaround analysis requests, the CLP should consider the above factors when determining the types of laboratory fraud risks the program faces. The CLP should formulate an approach for risk management based on its mission to provide data of known and documented quality, and decide on the internal controls required to mitigate identified risks. Additionally, CLP program managers should incorporate regional CLP leads into any risk assessment approach since EPA regions are data end users.

[10] The OMB circular refers to this as a "risk profile."

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One CLP manager stated that although they try to identify program risks on a continual basis, they have not conducted or documented a formal risk assessment process. The manager cited their recent updates to the EXES electronic data validation program, where they incorporated information obtained from an ongoing laboratory fraud investigation (in addition to ongoing updates to the *CLP Roles and Responsibilities Guidance Document*), as examples of their continued vigilance. We directed CLP program managers to appropriate sources containing information on how to conduct a risk assessment, including OMB Circular A-123 (July 2016), the GAO Internal Control Management and Evaluation Tool (August 2001), and other materials developed internally within the agency.

Conclusion

Our analysis indicates that the CLP's system of internal controls provides reasonable assurance that the potential for fraud is minimized. Even though the CLP's system of controls has been informed by the program's substantial history and experience in the field of laboratory analytical services, as well as its demonstrated willingness to continually improve and update the program, the CLP would benefit from a structured risk assessment process that reaffirms the strength of the controls already in place and, possibly, uncovers any gaps in the system.

Recommendation

We recommend that the Assistant Administrator for Land and Emergency Management:

1. Conduct and document a formal risk assessment of the EPA's Contract Laboratory Program to determine the adequacy of internal controls currently in place, and determine whether any additional controls are needed to mitigate detected risks.

Agency Response and OIG Evaluation

OLEM agreed with our recommendation and provided a planned completion date. Recommendation 1 is considered resolved with corrective actions pending. OLEM plans to conduct and document a formal risk assessment of the CLP by the fourth quarter of FY 2017. Appendix A contains OLEM's full response to our official draft report.

OLEM also provided technical comments, which we considered and included in Appendix A.

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Chapter 3
Investigative Units Should Formally Share Information From Lab Fraud Investigations With Affected Organizations

We found that while Special Agents handling lab fraud cases share information with affected offices on an informal, ad hoc basis, investigative units do not have a formal, regular process for sharing relevant information from lab fraud investigations with other program and regional offices whose responsibilities include laboratory analytical services/data. GAO's 2015 fraud risk framework[11] recommends that agencies collect and analyze data from reporting mechanisms and instances of detected fraud for real-time monitoring of fraud trends, and use the results of monitoring, evaluations and investigations to improve fraud prevention, detection and response.

The EPA has various mechanisms to report allegations of laboratory fraud from program and regional staff to OIG/OI and OCEFT/CID (as well as the agency's Scientific Integrity Official). However, investigative office policies do not address or require formal information-sharing with EPA program offices and regions that could benefit from information concerning how and why fraud occurred.

According to the two investigative units, there are additional reasons as to why they do not share information: the lab fraud caseload is too small for them to data-mine for trends or lessons learned; the inability to share sensitive case information outside of the affected program; and resource limitations in both offices. As a result, program and regional offices with laboratory-related responsibilities do not always receive the information they need to strengthen their internal controls based on lab fraud findings.

No Formal Requirement to Share Information

OIG/OI and OCEFT/CID policies include guidance on coordinating with one another. However, the policies do not address sharing the root cause analyses about how or why fraud occurred with program and regional offices whose responsibilities include laboratory analytical services/data. There is no formal, consistent process in place for debriefing program offices; rather, each investigative office does so informally.

- **OCEFT/CID** updated its policy, *Investigative Process* (2015), OCEFT-I-002R1, in response to a 2014 OIG report recommendation to "develop guidelines outlining response steps when fraudulent laboratory data is

[11] See our summary of this report in Chapter 1.

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discovered in ongoing criminal investigations," but this does not address sharing information with other offices as a routine practice. However, the CID policy does provide guidance for sharing lab fraud allegations that potentially present a threat to human health or the environment. OCEFT/CID said it does not have an internal procedure for briefing offices and does not conduct briefings on a regular basis. During the course of an investigation, OCEFT/CID might gather information from the affected office (e.g., through meetings, emails, etc.) as it develops the case. OCEFT/CID said post-case analysis is not its focus. OCEFT/CID stated, "There is no post-mortem lessons learned aside from what might happen naturally during the investigation in terms of back and forth with the offices." OCEFT/CID also added there is no debrief or formal report drawn up after a prosecution.

- **OIG/OI** Policy and Procedure 206, *Case Administration* (2016), encompasses administrative aspects of handling complaints and reporting results, but does not address information-sharing with the agency. OIG/OI said its special agents discuss lab fraud matters with Contracting Officers and others (e.g., the EPA's Suspension and Debarment Division). However, unlike the OIG/OI's investigative reports that are provided to the EPA concerning employee cases, OIG/OI does not send formal reports on lab fraud investigations. Like OCEFT/CID, OIG/OI said its agents are responsible for communicating relevant information with the affected program office while the case is ongoing, and that Special Agents-In-Charge are responsible for ensuring that this occurs.

The purpose of the 2006 Memorandum of Understanding between OIG/OI and OCEFT/CID is to clarify each office's respective areas of investigative responsibility. The memo included general obligations of cooperation and information sharing with one another and stated, "Both OIG and CID must immediately notify the other as to any criminal violations that fall within the other organization's area of independent investigative authority." Beyond these requirements, investigative office policies do not address sharing fraud techniques with program and regional offices with laboratory responsibilities. However, offices could use this information to strengthen internal control systems for preventing and detecting lab fraud.

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Few Lab Fraud Cases, Resource Limitations and Sensitive Information Limit Information Sharing

Lab fraud investigations comprise a small percentage of the total caseload for OIG/OI and OCEFT/CID—just over 1 percent in each office from 2010 to 2016,[12] as shown in Table 3.

Table 3: OIG/OI and OCEFT/CID data on lab fraud from 2010 to 2016[13]

	Total caseload	Lab fraud investigations opened	Percent lab fraud
OIG/OI	1905	21	1.1%
OCEFT/CID	1883	25[14]	1.3%

Source: OIG summary of OIG/OI and OCEFT/CID information.

Each office described resource limitations that would limit detailed analysis of lab fraud investigations and the formal sharing of information outside of the affected program office. For example, OCEFT/CID said it does not have a large analytical group, and its staff numbers are down 20 percent or so over the past 6 to 8 years. OIG/OI said it conducted trend analyses when it had a lab fraud directorate; however, that group has since disbanded and now OIG/OI does not monitor or analyze proactively. Both offices noted that declining resources means they have to prioritize and shuffle workloads accordingly.

Additionally, staff in each office noted that there could be some instances where information-sharing would be delayed; for example, when a case is in prosecution or in grand jury proceedings. Thus, the formal sharing of information depends on the nuances involved in each case or situation.

Stakeholders Agree on the Need for Information Concerning Lab Fraud Methods/Techniques

As noted above, neither OCEFT/CID nor OIG/OI do trend analyses on lab fraud investigations. Staff in both offices questioned the value of formal information-sharing. One OIG/OI Special Agent said there is no benefit because convictions, suspensions and debarments stand on their own. An OCEFT/CID staff person said they are not hearing program offices ask for lessons learned. An OIG/OI Special Agent noted the benefit and said, "We are not required to brief the program [staff] but it's a good practice."

[12] Of these, per our first objective summarized in Chapter 2, only one CLP lab fraud investigation has been conducted.

[13] Table 3 captures lab fraud cases opened and investigated from 2010–2016, specifically January 2010 through May 2016 for OIG/OI, and January 2010 through September 2016 for OCEFT/CID. This does not include cases opened prior to 2010 still under investigation during the 2010–2016 timeframe.

[14] According to the CID, seven of its 25 lab fraud investigations are still ongoing. Four of those seven investigations are being worked jointly with the OIG.

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Stakeholders we interviewed on the CLP's lab fraud controls agreed that learning lab fraud case results would be useful:

- **Headquarters CLP Staff in OLEM.** ASB staff stated that they do not receive information from OIG/OI or OCEFT/CID on cases they are working or have worked on and were resolved, other than those cases that pertain to CLP where information is shared during the course of the investigation. They said such information would be very useful to them for strengthening their controls.

- **Headquarters Quality Staff in OEI.** The Director of OEI's Enterprise Quality Management Division said that when they learn about a situation of non-conformance, they share that information with the QA community through established communication channels (e.g., monthly QA meetings, annual conference and on the OEI website). The Director stated that they do not get information on fraud cases, but she indicated they would share the information if received.

- **Regional CLP CORs.** All EPA regions confirmed that it would be useful to receive more information on the techniques detected by lab fraud investigations. Eight regions said it would be useful to receive specific information on improper laboratory practices. Some of these regions said information could, for example, be utilized in their own monitoring and review of laboratory data. Three regions were not aware of the results of OIG/OI or OCEFT/CID investigations but would like to learn about the fraud techniques discovered. Four regions noted that past lab fraud briefings provided by OIG/OI were useful.

Because lab fraud cuts across so many of the EPA's functions, broad coordination is essential in addressing it.[15]

Moreover, impacts of lab fraud are significant,[16] potentially risking human health and undermining the foundations of the EPA's regulatory programs. For example, drinking water regulations require testing for a list of potential contaminants to protect the public from harmful exposures. Testing under hazardous waste regulations may determine harm and responsible parties. Entities incur harm through receipt and reliance on fraudulent test data. The resultant harm may be to the environment (i.e., through the release of what was thought to be safe

[15] EPA, OCEFT, *Report of the Laboratory Fraud Work Group.* September 2001, with June 2002 update, at page 39.
[16] Though not specific to lab fraud, OMB Circular A-123 notes that fraud jeopardizes agency missions by diverting scarce resources from their intended purposes. A single case of fraud can undermine programmatic mission, disrupt services, and force management to expend valuable time and resources to resolve and recover property lost due to fraud. Reputational risks of fraud can damage the perception of an agency, impact employee morale, and create public distrust.

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material), a specific community or the government.[17] (See examples of impacts of lab fraud in the following box.)

Examples of Lab Fraud Impacts

- A recent CLP lab fraud case led OLEM to determine that the quality of the data could not be assessed and should not be used for any site cleanup decisions. OLEM issued a recall of all the data produced by the lab. The recall covered all 10 EPA regions and impacted a total of 237 sites. Funds expended on the analysis of the recalled data were approximately $2.3 million.
- Three former employees of a drinking water laboratory were found to have falsified QA/QC lab data over a 3-year period. Customers affected included schools, day care facilities, government entities, restaurants and mobile home communities.
- The operator of a mass spectrometer, located in a U.S. Geological Survey laboratory responsible for conducting coal and water quality assessments in projects both in the U.S. and abroad, was accused of scientific misconduct and manipulating data. The agency's review revealed far-ranging impacts: retracted or delayed publications due to inaccurate information, diminished employee morale, and reduced public trust in agency-generated information. Moreover, the agency found that 24 research and assessment projects of national and global interest were potentially affected, and that the projects represented about $108 million in funding.
- A lab president was sentenced to serve 48 months incarceration and pay a $50,000 fine stemming from concealing and falsifying pesticide residue tests used by the EPA to determine whether levels of pesticide residues in foods are safe and protective of public health. The lab was sentenced to pay a $15.4 million fine. The president and the company also each paid $3.7 million in restitution to defrauded pesticide manufacturers and the EPA. The defendants falsified the results of their tests in order to save time and money that would have been necessary to repeat tests that did not meet calibration or QC requirements.

GAO's 2015 fraud risk framework[18] describes the importance of using the results of investigations and prosecutions to adapt fraud risk management activities, such as incorporating new information like changing risks or the effect of actions taken to mitigate risks and address vulnerabilities. This point is particularly important considering that a current CLP lab fraud investigation revealed new techniques that offices need to inform their systems of controls. Sharing this information would inform the development and modification of risk assessments and other control activities described in Chapter 2.

OECA's Office of Site Remediation Enforcement (which manages Superfund enforcement) indicated it needs to know about fraud when a program office is contemplating a decision to recall data. The OECA office can then determine any impact of lab fraud on the EPA's enforcement actions.

For example, the current CLP lab fraud investigation impacted agency enforcement and cost recovery actions, and enforcement staff said prompt notification would help mitigate impacts.

[17] EPA, OCEFT, *Report of the Laboratory Fraud Work Group.* September 2001, with June 2002 update, at pages 4, 24 and 25.
[18] GAO, *A Framework for Managing Fraud Risks in Federal Programs*, GAO-15-593SP, July 28, 2015.

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Conclusion

Broad agency coordination is important to address fraudulent laboratory data and analysis. Although the EPA's investigative groups report few laboratory fraud cases, impacts from any lab fraud remain significant. As OMB has identified, fraud jeopardizes agency missions; and reputational risks of fraud can damage agency perceptions, employee morale and public trust. Information identified in investigations about the methods used to conduct fraudulent laboratory data analysis would be useful for program managers' assessments of existing internal controls.

Agency stakeholders have expressed interest in receiving information on methods/techniques used to perpetrate fraud in order to tighten their internal control systems. Collective agency efforts, such as increased information-sharing on fraud methods, would help the agency to further prevent and detect lab fraud.

Recommendations

We recommend that the Assistant Administrator for Enforcement and Compliance Assurance:

2. Require the Criminal Investigation Division to share pertinent information from laboratory fraud findings with relevant EPA program and regional offices. Pertinent information includes the fraudulent method or technique used to commit fraud.

We recommend that the Inspector General:

3. Require the Office of Investigations to share pertinent information from laboratory fraud findings with relevant EPA program and regional offices. Pertinent information includes the fraudulent method or technique used to commit fraud.

Agency Response and OIG Evaluation

OECA agreed with Recommendation 2 and provided a planned completion date. Recommendation 2 is considered resolved with corrective actions pending. OECA suggested changes to the report, which we made where appropriate. Appendix B contains OECA's full response to our official draft report.

While OIG/OI did not explicitly agree or disagree with Recommendation 3, the OIG completed its corrective action prior to our final report issuance. Appendix C contains OIG/OI's full response to our official draft report.

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Status of Recommendations and Potential Monetary Benefits

RECOMMENDATIONS

Rec. No.	Page No.	Subject	Status[1]	Action Official	Planned Completion Date	Potential Monetary Benefits (in $000s)
1	13	Conduct and document a formal risk assessment of the EPA's Contract Laboratory Program to determine the adequacy of internal controls currently in place, and determine whether any additional controls are needed to mitigate detected risks.	R	Assistant Administrator for Land and Emergency Management	9/30/17	
2	19	Require the Criminal Investigation Division to share pertinent information from laboratory fraud findings with relevant EPA program and regional offices. Pertinent information includes the fraudulent method or technique used to commit fraud.	R	Assistant Administrator for Enforcement and Compliance Assurance	12/31/17	
3	19	Require the Office of Investigations to share pertinent information from laboratory fraud findings with relevant EPA program and regional offices. Pertinent information includes the fraudulent method or technique used to commit fraud.	C	Inspector General	1/30/17	

[1] C = Corrective action completed.
R = Recommendation resolved with corrective action pending.
U = Recommendation unresolved with resolution efforts in progress.

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Office of Land and Emergency Management Response to Draft Report

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 13 2017

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

NOW THE
OFFICE OF LAND AND
EMERGENCY MANAGEMENT

MEMORANDUM

SUBJECT: Response to Office of Inspector General Report, *EPA's Contract Laboratory Program Includes Adequate Fraud Controls That Can Be Strengthened with Formal Risk Assessment and Investigative Information Sharing* (Report # OPE-FY16-0022; December 13, 2016)

FROM: Mathy Stanislaus
Assistant Administrator

TO: Arthur A. Elkins, Jr.
Inspector General

Thank you for the opportunity to respond to the recommendation in the subject audit report. The following is a summary of the Office of Land and Emergency Management's (OLEM's) overall position, along with its position on the report recommendation. We have also provided a high-level corrective action and estimated completion date. For your consideration, we have included a Technical Comments Attachment to supplement this response.

OFFICE OF LAND AND EMERGENCY MANAGEMENT'S OVERALL POSITION

OLEM agrees with the recommendation that the OLEM Assistant Administrator conduct and document a formal risk assessment of the EPA's Contract Laboratory Program (CLP) to determine whether additional internal controls are needed to mitigate detected risks.

The Analytical Services Branch (ASB) within OLEM's Office of Superfund Remediation and Technology Innovation (OSRTI) administers the Contract Laboratory Program (CLP). To that end, ASB has initiated a formal CLP risk assessment and will provide the results to OLEM and the Office of the Inspector General by Fiscal Year 2017's fourth quarter.

As noted in the OIG report's Chapter 2 ("CLP's Internal Control System Addresses Four of Five Components and Should Formally Assess Program Risks"), the CLP has documented risk assessment on an informal but continual basis. This ongoing effort resulted in the development of new tools and updated guidance documents to address any potential risks identified. Going forward ASB will formally document risk assessment as part of its quality assurance process.

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RESPONSE TO REPORT RECOMMENDATIONS

Agreements

No.	Recommendation	High-Level Intended Corrective Action(s)	Estimated Completion by Quarter and FY
1	Conduct and document a formal risk assessment of the EPA's CLP to determine the adequacy of internal controls currently in place, and determine whether any additional controls are needed to mitigate detected risks.	The EPA will conduct and document a formal risk assessment of the CLP	4th Quarter FY 2017

CONTACT INFORMATION

If you have any questions regarding this response, please contact Kecia Thornton, OLEM OIG Audit Follow up Coordinator, at (202) 566-1913.

Attachment: Technical Comments

cc: Carolyn Copper, OIG
Patrick Gilbride, OIG
Erin Barnes-Weaver, OIG
Barry Breen
Nitin Natarajan
Jim Woolford
Dan Powell
Keith Upah
Daniel Ginsburg

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Technical Comments Attachment

Audit Objectives

The Analytical Services Branch welcomes the opportunity to be the subject of this review because we continuously strive to maintain a thorough and effective capability to detect improper practices, and to provide relevant information to our stakeholders in a timely manner concerning the impacts of improper practices and fraud. ASB is always re-evaluating our processes to maintain a high level of effectiveness and efficiency, and we are grateful for the opportunity to learn from the experience of others.

Comment 1: Chapter 1, Quality Assurance / Quality Control Processes (paragraph 2)

ASB has included guidelines for evaluating and documenting data quality since the early days of the CLP through the National Functional Guidelines (NFG). These guidance documents (posted on the CLP website, along with the Statements of Work (SOW). The NFG are intended to provide a logical, stepwise approach to evaluating data quality, and a set of recommendations for documenting those findings for the data users. We recognize that data quality requirements are usually project-specific, depending on the project purpose and scope, and that project data reviewers should use our guidelines in conjunction with the project Quality Assurance Project Plan (QAPP).

The ASB and our EPA Regional counterparts conduct laboratory performance monitoring, beginning prior to contract award with pre-award on-site audits and pre-award performance evaluation samples (PES). On-site audits are also conducted post-contract award on an annual basis, and PES testing is routinely done, both on a quarterly basis, and as an optional part of Regional sample shipments.

Chapter 1, CLP Key Entities (paragraph 3, bullet 2)

The Quality Assurance and Technical Support (QATS) contractor is directed and tasked by the ASB. The QATS team provides a wide range of QA support to the CLP, and more broadly to the EPA in general, including conducting on-site laboratory audits, reviewing laboratory quality system documents; performing the development, preparation, management, distribution, evaluation, and reporting of performance evaluation samples for ASB and the EPA Regions to support Superfund activities, designing and conducting method validation studies, evaluating new sample preparation and analysis techniques, and conducting in-depth hard-copy and electronic data package audits. This latter task has proven most useful to ASB, in several Special Audit Investigations, to identify improper practices.

Chapter 1, Lab Fraud Allegations

The ASB strives to pursue all instances of improper practices identified either by our QATS team during their on-site or electronic data package auditing activities, or by our EPA Regional data review teams. To our knowledge, there is no regulatory authority involved with these activities, only the responsibility for contract administration. These monitoring activities focus on the

question of whether or not the requirements of the contract and the SOW have been followed, and occasionally instances of improper practice are found and are documented. ASB will then seek to discover whether the instance noted was a simple error, or is more common among a laboratory's product. Data, submitted by the labs, which resides in the SMO database, and the investigative tools and skills of the QATS team are our primary tools in this effort, and the information gained is communicated to our management, to OAM, our customers, and to the OIG at the appropriate time.

Chapter 2, Internal Control Systems

The ASB agrees that formal documentation of our assessment of risk, subjected to the type of periodic review and re-evaluation that is a normal part of our current operation, could make our system of internal controls more robust.

Chapter 3, Stakeholders Agree on the Need for Information Concerning Lab Fraud Methods/Techniques (paragraph 2, bullet 3)

ASB has presented information on its own experience with monitoring for and detecting improper laboratory practices to the CLP Regional stakeholders (most recently, at the CLP conference, November 2016); the Headquarters Quality Staff in OEI and the community of Regional QA Managers (on their monthly call, November 2016); and to the NELAC/TNI analytical chemistry community (National Environmental Monitoring Conference, August 2016)). These included evaluating the scope and temporal extent of improper practices, as well as the impacts of any subsequent data recall on the community of data users, including cost and delays in completion of EPA projects. In addition, OIG investigator Susan Chandler presented several examples of the types of improper practices her office had been investigating at the CLP Conference in 2014.

Appendix B

Office of Enforcement and Compliance Assurance Response to Draft Report

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 18 2017

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Response to Office of Inspector General Draft Report No. OPE-FY16-0022, "EPA's Contract Laboratory Program Includes Adequate Fraud Controls That Can Be Strengthened with Formal Risk Assessment and Investigative Information Sharing" dated December 13, 2016

FROM: Cynthia Giles
Assistant Administrator
Office of Enforcement and Compliance Assurance

TO: Arthur A. Elkins, Jr.
Inspector General

Thank you for the opportunity to respond to the issues and recommendations in the subject audit report. OECA generally agrees with the report's findings and recommendations, with one suggested edit to the report and one suggested edit to Recommendation No. 2.

Specifically, OECA suggests striking the statement on pages 5-6, which states, "According to OCEFT, the EPA's regulatory authority to inspect environmental labs is limited to labs that participate in the CLP" as that does not accurately reflect EPA's regulatory authority.

Additionally, OECA suggests revising Recommendation No. 2 to state, "Require the Office of Criminal Enforcement, Forensics and Training (OCEFT) to share pertinent information from laboratory fraud investigations with relevant EPA program, regional and enforcement offices and for the Analytical Services Branch within the Office of Land and Emergency Management, Office of Superfund Remediation and Technology Innovation to share pertinent information concerning laboratory fraud with EPA's regional and headquarters enforcement offices. Pertinent information, at a minimum, includes the fraudulent method or technique used to commit fraud."

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Agreements

No.	Recommendation	High-Level Intended Corrective Action(s)	Estimated Completion by Quarter and FY
2	Require the Criminal Investigation Division to share pertinent information from laboratory fraud findings with relevant EPA program and regional offices. Pertinent information includes the fraudulent method or technique used to commit fraud.	Review current information dissemination policies and practices and meet with relevant EPA program, regional and enforcement offices to determine how to best communicate that information.	December 31, 2017 (1st Quarter FY 2018)

CONTACT INFORMATION

If you have any questions regarding this response, please contact Gwendolyn Spriggs, OECA's Audit Follow Up Coordinator on 202-564-2439, or via email spriggs.gwendolyn@epa.gov.

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Office of Inspector General Response to Draft Report

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

THE INSPECTOR GENERAL

JAN 13 2017

MEMORANDUM

SUBJECT: Office of Inspector General Comments on OIG's Draft Report, *EPA's Contract Laboratory Program Includes Adequate Fraud Controls That Can Be Strengthened With Formal Risk Assessment and Investigative Information Sharing*, Project No. OPE-FY16-0022

FROM: Arthur A. Elkins Jr.

TO: Dr. Carolyn Copper, Assistant Inspector General
Office of Program Evaluation

This memorandum is in response to the subject Office of Inspector General (OIG) draft report. The OIG appreciates the evaluation of the Contract Laboratory Program. The OIG Office of Investigations has read the draft report's Recommendation 3, addressed to the Inspector General, that involves action to be taken by the Office of Investigations. The recommendation and OIG response are as follows:

Recommendation 3: Require the Office of Investigations to share pertinent information from laboratory fraud findings with relevant EPA program and regional offices. Pertinent information includes the fraudulent method or technique used to commit fraud.

> **OIG Response:** OIG Office of Investigations management believes pertinent information from laboratory fraud cases is already being shared with the relevant EPA program and regional offices at the appropriate times. However, to ensure that there is no misunderstanding, the Assistant Inspector General for Investigations will send an email message reminding the staff of this requirement. Moreover, the Office of Investigations will continue conducting fraud awareness briefings for its EPA stakeholders, as well as other federal, state, local and tribal partners.
>
> **Timeframe:** OIG will have the Assistant Inspector General for Investigations' email completed by January 30, 2017. The fraud awareness briefings will continue as needed.

If you have any questions regarding the OIG response, please contact Craig Ulmer, Deputy Assistant Inspector General for Investigations, at (202) 566-0943.

cc: Charles Sheehan, Deputy Inspector General
Patrick Sullivan, Assistant Inspector General for Investigations

Attachment

ED_001612_00029176-00032

Appendix D

Distribution

The Administrator
Assistant Administrator for Land and Emergency Management
Assistant Administrator for Enforcement and Compliance Assurance
Inspector General
Agency Follow-Up Official (the CFO)
Agency Follow-Up Coordinator
General Counsel
Associate Administrator for Congressional and Intergovernmental Relations
Associate Administrator for Public Affairs
Deputy Assistant Administrator, Office of Land and Emergency Management
Deputy Assistant Administrator, Office of Enforcement and Compliance Assurance
Audit Follow-Up Coordinator, Office of the Administrator
Audit Follow-Up Coordinator, Office of Land and Emergency Management
Audit Follow-Up Coordinator, Office of Enforcement and Compliance Assurance

ED_001612_00029176-00033

To: chris@horner.com[chris@horner.com]
From: Microsoft Outlook
Sent: Thur 3/9/2017 3:28:13 PM
Subject: Undeliverable: Fwd: OPA Clips 3/9/17
Fwd: OPA Clips 3/9/17

Your message to chris@horner.com couldn't be delivered.

chris wasn't found at horner.com.

schnare.david	**Office 365**	**chris**
Action Required		Recipient

Unknown To address

How to Fix It

The address may be misspelled or may not exist. Try one or more of the following:

- **Send the message again following these steps: In Outlook, open this non-delivery report (NDR) and choose Send Again** from the Report ribbon. In Outlook on the web, select this NDR, then select the link "To send this message again, click here." Then delete and retype the entire recipient address. If prompted with an Auto-Complete List suggestion don't select it. After typing the complete address, click Send.
- Contact the recipient (by phone, for example) to check that the address exists and is correct.
- The recipient may have set up email forwarding to an incorrect address. Ask them to check that any forwarding they've set up is working correctly.
- Clear the recipient Auto-Complete List in Outlook or Outlook on the web by following the steps in this article: Fix email delivery issues for error code 5.1.1 in Office 365, and then send the message again. Retype the entire recipient address before selecting Send.

If the problem continues, forward this message to your email admin. If you're an email admin, refer to the More Info for Email Admins section below.

Was this helpful? Send feedback to Microsoft.

More Info for Email Admins

Status code: 550 5.1.1

This error occurs because the sender sent a message to an email address outside of Office 365, but the address is incorrect or doesn't exist at the destination domain. The error is reported by the recipient domain's email server, but most often it must be fixed by the person who sent the message. If the steps in the **How to Fix It** section above don't fix the problem, and you're the email admin for the recipient, try one or more of the following:

The email address exists and is correct - Confirm that the recipient address exists, is correct, and is accepting messages.

Synchronize your directories - If you have a hybrid environment and are using directory synchronization make sure the recipient's email address is synced correctly in both Office 365 and in your on-premises directory.

Errant forwarding rule - Check for forwarding rules that aren't behaving as expected. Forwarding can be set up by an admin via mail flow rules or mailbox forwarding address settings, or by the recipient via the Inbox Rules feature.

Mail flow settings and MX records are not correct - Misconfigured mail flow or MX record settings can cause this error. Check your Office 365 mail flow settings to make sure your domain and any mail flow connectors are set up correctly. Also, work with your domain registrar to make sure the MX records for your domain are configured correctly.

For more information and additional tips to fix this issue, see Fix email delivery issues for error code 550 5.1.1 in Office 365.

Original Message Details

Created Date:	**3/9/2017 3:28:11 PM**
Sender Address:	**schnare.david@epa.gov**
Recipient Address:	**chris@horner.com**
Subject:	**Fwd: OPA Clips 3/9/17**

Error Details

Reported error:	***550 5.1.1 <chris@horner.com> Recipient not found. <http://x.co/irbounce>***
DSN generated by:	**BN6PR09MB1505.namprd09.prod.outlook.com**
Remote server:	**p3plibsmtp01-05.prod.phx3.secureserver.net**

Message Hops

HOP	TIME (UTC)	FROM	TO	WITH	RELAY TIME
1	3/9/2017 3:28:11 PM	BN6PR09MB1505.namprd09.prod.outlook.com	BN6PR09MB1505.namprd09.prod.outlook.com	mapi	*
2	3/9/2017 3:28:11 PM	BN6PR09MB1505.namprd09.prod.outlook.com	BN6PR09MB1505.namprd09.prod.outlook.com	Microsoft SMTP Server (version=TLS1_2,	*

Original Message Headers


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Received: from BN6PR09MB1505.namprd09.prod.outlook.com ([10.173.202.145]) by
 BN6PR09MB1505.namprd09.prod.outlook.com ([10.173.202.145]) with mapi id
 15.01.0947.022; Thu, 9 Mar 2017 15:28:11 +0000
From: "Schnare, David" <schnare.david@epa.gov>
To: "chris@horner.com" <chris@horner.com>, "dwschnare@gmail.com"
          <dwschnare@gmail.com>
Subject: Fwd: OPA Clips 3/9/17
Thread-Topic: OPA Clips 3/9/17
Thread-Index: AdKY5Ep1pDR8kziAT8SbUK23y3t61w==
Date: Thu, 9 Mar 2017 15:28:11 +0000
Message-ID: <507B61EC-96B2-433E-99D9-2EC6D26ECEC4@epa.gov>
References:
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authentication-results: spf=none (sender IP is )
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X-MS-Exchange-CrossTenant-fromentityheader: Hosted
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X-MS-Exchange-CrossTenant-id: 88b378b3-6748-4867-acf9-76aacbeca6a7
X-MS-Exchange-Transport-CrossTenantHeadersStamped: BN6PR09MB1505

To: chris@horner.com[chris@horner.com]; dwschnare@gmail.com[dwschnare@gmail.com]
From: Schnare, David
Sent: Thur 3/9/2017 3:28:11 PM
Subject: Fwd: OPA Clips 3/9/17

Sent from my iPhone

Begin forwarded message:

From: "McGonagle, Kevin" <mcgonagle.kevin@epa.gov>
Date: March 9, 2017 at 9:49:18 AM EST
To: "So, Katherine" <so.katherine@epa.gov>, "Mccabe, Catherine" <McCabe.Catherine@epa.gov>, "Reeder, John" <Reeder.John@epa.gov>, "Flynn, Mike" <Flynn.Mike@epa.gov>, "Grantham, Nancy" <Grantham.Nancy@epa.gov>, "Hull, George" <Hull.George@epa.gov>, "Slotkin, Ron" <slotkin.ron@epa.gov>, "Sowell, Sarah" <Sowell.Sarah@epa.gov>, "Hart, Daniel" <Hart.Daniel@epa.gov>, "Orquina, Jessica" <Orquina.Jessica@epa.gov>, "Actadmmccabe, Catherine17" <Actadmmccabe.catherine17@epa.gov>, "Benton, Donald" <benton.donald@epa.gov>, "Bangerter, Layne" <bangerter.layne@epa.gov>, "Davis, Patrick" <davis.patrick@epa.gov>, "Ericksen, Doug" <ericksen.doug@epa.gov>, "Konkus, John" <konkus.john@epa.gov>, "Greaves, Holly" <greaves.holly@epa.gov>, "Kreutzer, David" <kreutzer.david@epa.gov>, "Munoz, Charles" <munoz.charles@epa.gov>, "Schnare, David" <schnare.david@epa.gov>, "Schwab, Justin" <schwab.justin@epa.gov>, "Sugiyama, George" <sugiyama.george@epa.gov>, "Jackson, Ryan" <jackson.ryan@epa.gov>, "Valentine, Julia" <Valentine.Julia@epa.gov>, AO OPA Media Relations <AO_OPA_Media_Relations@epa.gov>
Subject: OPA Clips 3/9/17

Below: CNBC (2), Bloomberg BNA (2), E&E News (2), InsideClimate News, LA Times, InsideEPA (3/8), Quartz (3/8)

CNBC

http://www.cnbc.com/2017/03/09/trumps-epa-chief-says-he-will-address-fuel-economy-standards-very-soon.html

Trump's EPA chief says he will address fuel economy standards 'very soon'

By Jacob Pramuk 3/9/17 9:28 AM

The head of President Donald Trump's Environmental Protection Agency said Thursday he expects an announcement rolling back fuel economy rules "very soon."

Automakers have expressed concern about the rules set during the Obama administration, which would have pushed auto fuel economy standards to 54.5 miles per gallon by 2025. Some companies have said the Corporate Average Fuel Economy, or CAFE, standard would boost regulatory compliance costs.

EPA Administrator Scott Pruitt, who has pledged to roll back what he deems burdensome regulations, told CNBC that American automakers wanted to evaluate those standards. He said he believes the rulemaking process was rushed.

"There's going to be an announcement on that very soon and I think what's concerning to me, and I think concerning to the president, is how that process occurred," Pruitt said on "Squawk Box."

"I think that what has been broken in that process is, one, not a recognition of the great progress that's been made with those standards, but two, those in Detroit, those that are manufacturing autos in this country, expressed to the EPA that they wanted to evaluate the impact of the previous standards. And that was largely disregarded."

Backers of the Obama administration rules, which the EPA issued only a week before Trump took office, say automakers have overblown the potential costs of complying with them. They also argue that consumers may be willing to pay for better fuel economy, in any case.

Trump has held several meetings with key executives since taking office, some of which have included the CEOs of Ford and General Motors.

CNBC

http://www.cnbc.com/2017/03/09/epa-chief-scott-pruitt.html

EPA chief Scott Pruitt says carbon dioxide is not a primary contributor to global warming

By Tom DiChristopher 3/9/17 8:57 AM

Environmental Protection Agency Administrator Scott Pruitt said Thursday he does not believe carbon dioxide is a primary contributor to global warming.

"I think that measuring with precision human activity on the climate is something very challenging to do and there's tremendous disagreement about the degree of impact, so no, I

would not agree that it's a primary contributor to the global warming that we see ," he told CNBC's "Squawk Box."

"But we don't know that yet ... We need to continue the debate and continue the review and the analysis," he added.

Pruitt's view is at odds with the opinion of NASA and the National Oceanic and Atmospheric Administration.

"The planet's average surface temperature has risen about 2.0 degrees Fahrenheit (1.1 degrees Celsius) since the late 19th century, a change driven largely by increased carbon dioxide and other human-made emissions into the atmosphere," NASA and NOAA said in January.

Pruitt previously served as Oklahoma attorney general, where he rose to prominence as a leader in coordinated efforts by Republican attorneys general to challenge President Barack Obama's regulatory agenda. He sued or took part in legal actions against the EPA 14 times.

Democrats and environmentalists opposed Pruitt's nomination to lead the EPA due to his close relationship with fossil fuel companies and his history of casting doubt on climate change. Conservatives and the energy industry have cheered his efforts to push back on what they view as over-regulation under Obama.

Pruitt maintained on Thursday it's possible to be pro-growth, pro-jobs and pro-environment all at once.

"This idea that if you're pro-environment you're anti-energy is just something we've got to change so that attitude is something we're working on very much," he said.

Pruitt also called the Paris Agreement, an international accord aimed at mitigating the impacts of climate change, "a bad deal."

"I happen to think the Paris accord, the Paris treaty, or the Paris Agreement, if you will, should have been treated as a treaty, should have gone through senate confirmation. That's a concern," he said.

The Paris Agreement was negotiated by the State Department, and future adherence to U.S. commitments made under Obama will be guided by current Secretary of State Rex Tillerson.

Bloomberg BNA

http://esweb.bna.com/eslw/1245/split_display.adp?fedfid=106790562&vname=dennotallissues&wsn=499970

Trump's Water Promises Face Challenges in 115th Congress

By Sarah Babbage and Adam Schank 3/9/17

President Donald Trump promised a major new investment in infrastructure, including water projects, during his campaign.

His budget proposal, however, is said to propose a 25 percent cut to the budget of the Environmental Protection Agency, which administers many water programs. Financing for water projects could also be imperiled by a tax code overhaul, though it could also benefit from the new administration's drive to cut regulations.

Revolving Loan Funding vs. EPA Cuts

One of Trump's campaign promises was to triple funding for the state revolving loan programs that help state and local governments upgrade their drinking and waste water infrastructure.

The funds had an annual allotment of $2.2 billion in fiscal 2016, requiring another $4.4 billion to meet the president's goal. If Congress provided funding in line with Trump's proposal, tripled revolving funds would leave little space for any other EPA programs.

The EPA is currently operating under an annualized budget of $8.3 billion, including $120 million in supplemental funding for lead contamination in the Flint, Michigan, water supply. The funds were provided under the continuing resolution that expires on April 28, and further action will be needed to keep the agency operating after that date.

While EPA's budget has been relatively flat in recent years, the current level is still less than the $8.7 billion provided in fiscal 2011.

Whither the Municipal Bond Tax Break?

Water authorities and other municipal governments are pre-emptively defending the tax exemption for municipal bond interest, which politicians from both sides of the aisle have previously eyed as an offset for tax cuts.

The tax preference, which Treasury predicts will cost $565 billion over the next decade, allows state and local governments to issue bonds at lower interest rates that are attractive to investors because the interest is tax-free. The House Republican tax reform blueprint proposed closing most credits and deductions to offset cuts to personal and corporate tax rates.

At least 70 percent of water utilities use municipal bonds to finance their capital investments. Municipal governments issued $34 billion in bonds to fund water projects in 2014.

Trump has said he supports the exemption. If Republicans' other major tax pay-for -- the controversial border adjustment tax -- can't get through Congress, it's more likely to be capped or eliminated to generate revenue to offset tax cuts.

$1 Trillion for Infrastructure

Trump's water infrastructure push was part of his campaign promise to spend as much as $1 trillion on infrastructure, which he called on Congress last week to fund through a combination of public and private dollars.

Although his speech barely mentioned water, EPA Administrator Scott Pruitt wants it included in the investment. "One of the things I've tried, in communicating to the White House, is that when we talk about infrastructure spending outside of the budget this year, water infrastructure needs to be part of that," Pruitt said in an interview with Bloomberg BNA.

A $1 trillion investment is substantially more than any recent proposal. Hillary Clinton proposed a $275 billion investment, while the 2009 stimulus law appropriated $150 billion for infrastructure.

Financing Options

Trump's campaign proposed a one-time 10 percent tax on the $2.6 trillion in profits that corporations have been holding overseas to avoid the U.S.'s 35 percent top tax rate, and using some of the revenue for infrastructure. The House GOP tax blueprint also proposed a deemed repatriation tax, but would use the proceeds to pay for personal and corporate tax cuts.

Congressional Democrats, however, have shown an interest in funding infrastructure through repatriation, so it could be used as a bipartisan bargaining chip.

The Trump campaign also released a white paper that proposed raising $167 billion from private investors that would leverage debt financing for a total investment of $1 trillion. Investors would receive an 82 percent tax credit for their investment, and the government would pay for it through the increased tax revenue from contractor profits and worker wages, the paper said.

Democrats have characterized the plan as a tax giveaway and have said it's a non-starter.

Finally, Trump criticized Clinton for proposing an infrastructure bank during her 2016 campaign, but Treasury Secretary Steven Mnuchin has since said it's worth considering. Infrastructure banks pair federal seed money with private dollars to fund projects that are generally large or of regional significance.

In addition to possible skepticism from Trump, an infrastructure bank could face opposition from other Republicans. Pennsylvania Republican Bill Shuster, chairman of the House

Transportation and Infrastructure Committee, called the idea “a boondoggle” in a Feb. 7 interview with Bloomberg News.

Regulatory Rollbacks

Republicans in Congress are attempting to advance a package to repeal and replace the Affordable Care Act, and have said they'll tackle the tax code next. That leaves little room on the spring calendar, which adds to the challenges of funding and assembling a major infrastructure package.

Water entities could, however, benefit from Trump's promise to roll back regulations and speed up review processes.

An executive order signed Jan. 24 would allow governors or the head of a federal agency to designate an infrastructure project as high priority. If the administration agreed, the project would qualify for expedited procedures to get through its environmental reviews.

House Natural Resources Committee Chairman Rob Bishop, a Utah Republican, has also said he wants to take a close look at federal environmental laws to speed up the permitting and review process under the National Environmental Policy Act.

Making those changes legislatively will be difficult as any bill will need to obtain 60 votes in the Senate to overcome a likely filibuster from Democrats.

Bloomberg BNA

http://esweb.bna.com/eslw/1245/split_display.adp?fedfid=106790572&vname=dennotallissues&wsn=499965

Great Lakes Representatives Demand Threatened Cleanup Money

By Sylvia Carignan 3/9/17

A proposal to chop over 90 percent of federal funding for Great Lakes cleanup would “reverse years of progress,” three representatives told a House subcommittee March 7.

The proposal came from the Office of Management and Budget earlier this month. The cut would bring the Environmental Protection Agency's budget for the Great Lakes Restoration Initiative from $300 million a year to $10 million annually.

The proposal is subject to agency and congressional approval, but Reps. Sandy Levin (D-Mich.), David Joyce (R-Ohio) and Louise Slaughter (D-N.Y.) made clear they will fight it. The multi-agency restoration initiative started in 2010 to focus on cleaning up contaminated areas of the Great Lakes, reduce nutrient runoff, restore native species’ habitats and control invasive species.

Great Lakes cleanup resources "have supplemented agency budgets to fund coordinated efforts to protect and restore the Great Lakes ecosystem, and we must ensure that this important work continues," they wrote to the House appropriations committee's Interior and Environment subcommittee. "Halting this commitment would reverse years of progress, dramatically reduce the [Great Lakes Restoration Initiative's] impact, and jeopardize the environmental and economic health of the region."

Deep Cuts

Levin, Joyce and Slaughter are leading the effort to get their colleagues' support on the letter this month. More than 50 members of Congress signed a similar letter asking for continued Great Lakes funding in 2016.

Matt Doss, policy director at the Great Lakes Commission in Ann Arbor, Mich., said the $10 million allocation would not only hobble cleanup efforts, but wouldn't be enough funding to support the EPA's Great Lakes program office.

Bill Becker, executive director of the National Association of Clean Air Agencies, spread word about the proposed cuts in an email he sent to his members March 1.

According to Becker, the OMB's proposal for the EPA slashed staff and grants to states as well as the Great Lakes Restoration Initiative. A group representing U.S. and Canadian mayors in the Great Lakes also has warned the proposed cuts to the initiative would be devastating.

E&E News

http://www.eenews.net/climatewire/2017/03/09/stories/1060051168

Pruitt's first moves worry enviros, open records advocates

By Niina Heikkinen 3/9/17

Ethical and legal questions that dogged Scott Pruitt's nomination process are continuing to shadow his first weeks as U.S. EPA administrator.

From concerns about transparency with his use of private email for official business as Oklahoma attorney general to questions about conflict of interest stemming from his new role at an agency he sued more than a dozen times, environmental and advocacy groups are keeping a close eye on the actions of the new administrator.

Environmental groups called foul late last week when Pruitt canceled an information collection request (ICR) on methane emissions from oil and gas facilities.

The Obama administration had started gathering information from the industry in

preparation for writing regulations to control methane emissions and other greenhouse gases from existing sources. EPA finalized regulations on methane for new and modified sources, the New Source Performance Standards, last year. Pruitt halted the ICR a day after receiving a letter from nine attorneys general and two governors. They contended that collecting the data was too expensive and burdensome to the fossil fuel industry.

"There is extremely well-documented and well-founded reasons to collect this information, and at a stroke of a pen to reverse that at the industry's bidding, it surely looks like EPA is at the beck and call of industry, and there is no justification that we can see for that request to be withdrawn," said Vera Pardee, senior counsel at the Center for Biological Diversity.

She noted that once EPA regulates new sources, the agency has an obligation to "create guidance" for existing sources, too.

The move sent a "strong signal" that the administrator would not move forward with controlling methane emissions, said David Doniger, senior attorney at the Natural Resources Defense Council's climate and clean air program.

That might mean legal trouble ahead for Pruitt if he indeed does not go forward with regulating methane under the Clean Air Act and the new source regulation stays on the books. Environmental groups did not comment on whether they would pursue legal action against the agency. However, yesterday NRDC filed a Freedom of Information Act request with EPA to determine whom Pruitt was communicating with about the ICR prior to making the decision to cancel it.

"It has the hallmark of decision that is legally vulnerable," said Sean Donahue, legal counsel for the Environmental Defense Fund.

Donahue noted that the letter was signed by attorneys general who are close to Pruitt, as well as the new Oklahoma attorney general, Mike Hunter, who had served as Pruitt's first assistant attorney general.

"[Pruitt] holds himself out as protecting states, but he uses regard for federalism as a euphemism for a regard for industry interest," Donahue said. "But in this issue, there are states on both sides, and there are states that believe that [methane] is threatening imminent harm. It doesn't seem like he understands that he is in a new job and he represents everyone."

Pruitt supporters hail end to 'onerous' regs

EPA did not return a request to comment on whether the agency would be moving forward with methane regulations at a later date. Last year, as Oklahoma attorney general, Pruitt joined in a lawsuit brought by West Virginia against EPA, challenging the rule regulating methane for new sources.

Representatives of the fossil fuel industry maintain that the information collection process

was poorly timed and badly handled by the Obama administration and was being challenged well before Pruitt was confirmed as EPA administrator.

"I think the environmental groups are just very upset because they were counting on a different administration that would move forward with very onerous existing source rules," said Kathleen Sgamma, president of the Western Energy Alliance.

"The bottom line was this ICR was rushed at the last minute, it was not well thought-out and was asking for data that would have overwhelmed the agency. It was sending out a huge net to trawl in all kinds of data that would not be useful for regulating methane," she said.

The challenge to the ICR was not in opposition to providing data about methane emissions, at least according to the Independent Petroleum Association of America. Instead, it had objected in part because the agency did not follow advice to seek out data that were already publicly available through state agencies and the private website Drillinginfo, said Lee Fuller, executive vice president of IPAA.

Fuller said IPAA had provided public comment to EPA under the Obama administration, and then had requested a halt to the ICR once Donald Trump was elected president, especially since there is ongoing litigation challenging the new source regulations.

"We started talking to the transition team with the Trump administration, so the new administration could make a decision about whether it would want to pursue the same pathway as the Obama administration. We continued to urge them to reconsider the approach and well before there was any administrator," said Fuller.

He called the decision to terminate the ICR the "right course of action."

Transparency an ongoing concern

As environmental groups seek to dig into Pruitt's communications with industry and his former attorney general colleagues, they may run into another problem: access to his email.

Advocacy groups say there could be cause for concern about transparency at a Pruitt-led EPA, after a recent court case against the former Oklahoma attorney general revealed he had used private email, at least on occasion, to conduct official business.

"The problem is, we don't know how extensive his use of personal email was, we had very few examples of him using his Oklahoma [attorney general] account, there is a lingering question over how prevalent it was," said Nick Surgey, research director at the Center for Media and Democracy.

"We're asking the court to ensure that Scott Pruitt's [personal] email account was searched for and any emails that should have been included in the request to us," Surgey said.

Pruitt's use of private email was not in accordance with the "spirit of the law," said Alex Howard, deputy director of the Sunlight Foundation, an open-government advocacy organization.

"Certainly if an official does have a pattern of using private messaging, then people will naturally put those people under more scrutiny for using that approach," Howard said.

If Pruitt did use a private email as EPA administrator, the public would have a hard time getting access to the records unless the private account is leaked or made public in some way.

Barrasso 'pleased' Pruitt will now stick to EPA email

While it's possible to submit a FOIA request for the administrator's personal email, there has to be some sort of record or trail showing its existence, said Aaron Scherb, director of legislative affairs at Common Cause, a lobbying organization.

"You can't just say any private email address that John Doe could use," said Scherb.

The EPA administrator joins Vice President Mike Pence and former Secretary of State Hillary Clinton as the latest politician to be publicly outed for using personal email for official business.

While they may be the most prominent recent examples, the use of personal email, personal devices and private messaging apps is common practice in all levels of government and among all parties, according to Howard.

"Sometimes it's a matter of convenience, sometimes it's intentional," Howard said. "This is the digital equivalent of stepping out into the hallway to have a conversation that's not on the record."

Now that Pruitt is working at a federal level, he will be subject to more public laws and record requirements than he was as a state attorney general. But short of putting politicians under 24-hour surveillance, there is no way to prevent these kinds of communications from happening, Howard said.

"We have to trust them that they are going to do their best to follow the law," he said.

A spokesman for Sen. John Barrasso (R-Wyo.), head of the Senate Environmental and Public Works Committee, said in an email that the senator had asked Pruitt about whether he would use personal email to conduct EPA business during his confirmation hearing.

"The chairman asked Pruitt if he would commit to only using his EPA email account for official EPA business. The chairman was pleased that Pruitt agreed," the spokesman said.

E&E News

http://www.eenews.net/climatewire/2017/03/09/stories/1060051196

The Clean Power Plan is gone – and there's no 'replace'

By Evan Lehmann 3/9/17

The White House intends to unravel the Clean Power Plan without providing a replacement, according to a source briefed on the issue.

An executive order expected to be released next week also instructs the Justice Department to effectively withdraw its legal defense of the climate rule in the U.S. Court of Appeals for the District of Columbia Circuit. The move aligns the White House with about two dozen Republican state attorneys general who are challenging the way the rule restricts greenhouse gas emissions at power plants.

The result, if successful, would mean the case is "frozen in place," the source said, preventing the D.C. Circuit, which has six judges appointed by Democrats and four by Republicans, from issuing an opinion this spring. Other legal experts say the case could continue if states or other groups go on defending the rule.

"Justice goes to the court and says ... 'Don't waste your time trying to put together an opinion when the legal basis for the case that you're reviewing could potentially go away,'" the source said. "Normally, a court will grant that. There's no guarantee."

It was unclear until now if the Trump administration would "repeal and replace" the Clean Power Plan, or just set upon a path to undo it. Some had anticipated that the Trump administration might pursue an alternative and much less stringent rule, but the executive order will only call for the withdrawal of the regulation.

That raises questions about whether EPA would fail to satisfy legal requirements to regulate carbon dioxide and other climate pollutants.

The agency in 2009, responding to the Supreme Court, determined that greenhouse gases endanger human health. That requires EPA to regulate emissions, and the agency did that by promulgating the Clean Power Plan.

"I think, as a matter of law, that carbon is a pollutant has been settled," said Christine Todd Whitman, who served as EPA administrator under President George W. Bush. "EPA has to act once you have that kind of a finding."

Waiting for the 'right time'?

The new details are surfacing as the White House confirmed yesterday that the executive order's release would be delayed. It was scheduled to be signed by President Trump this week. Now that will likely occur next week.

The delay follows successful efforts by Ivanka Trump, the president's daughter, and her husband, Jared Kushner, to remove language from the order that was critical of the Paris Agreement on climate change.

The current order does not refer to the global pact, and the source said that issue did not hold up the order's release. The delay was caused by the rise of other priorities, including the release of the Republican health care proposal Monday, the source said.

Trump also caused unforeseen turbulence Saturday by accusing former President Obama of wiretapping Trump Tower.

Coal companies and mining groups, which Trump described as being victimized by the climate rule on the campaign trail, have waited patiently through the delays. But now that he's 49 days into his presidency, there are subtle signs that industry wishes he would act more swiftly.

Jeff Holmstead, a former assistant EPA administrator under Bush who represents opponents to the rule, said it's likely the White House is waiting for the right time to unveil the rule with maximum effect.

"I hope it's soon," he added. "I think everybody, certainly all of my clients, think the Clean Power Plan is dead. But there's always uncertainties."

Fresh lawsuits await

For some Democrats, the order represents a tightrope walk. It's bound to be challenged in court by liberal state attorneys general and environmental groups for not providing an alternative to the Clean Power Plan. But if it did provide one, Republicans in coal states would likely feel that Trump had abandoned his campaign promise to terminate the regulation.

"It's not like [Senate Majority Leader] Mitch McConnell [R-Ky.] will say, 'OK, they're gonna do a new rulemaking on power plants, so I'm sure it'll be better,'" said Heather Zichal, Obama's former climate adviser. "They fundamentally don't think coal plants should be held accountable for their carbon pollution. So how do you deal with that piece? I think politically that's hard for them."

Environmental groups are already promising to sue EPA for failing to comply with its own endangerment finding.

"If EPA withdraws [the rule] and does not replace it with strong standards, we will challenge the agency's action in court," said Joanne Spalding, the chief climate counsel at the Sierra Club.

The administration anticipates that. The executive order instructs EPA to "revise or rescind"

the Clean Power Plan, wording that's meant to comply with the Administrative Procedure Act by letting EPA, not the White House, determine the fate of the rule.

The agency will then go through the long rulemaking process. But rather than promulgating a new rule, it will terminate an existing one. It will post notice and take comments and then put out a proposed rule. After accepting more comment, the action will be finalized. Then the administration is "off to the races in court," the source said.

The Clean Power Plan is just one part of the executive order, which is geared around "energy independence."

It does not address the endangerment finding, which is the underpinning of current and future EPA regulations on greenhouse gases. No decision has been made by White House officials about whether to attack the finding in subsequent actions, the source said.

"That is a huge issue," the source said. "That's just going to require a lot of thinking."

InsideClimate News

https://insideclimatenews.org/news/09032017/epa-environmental-justice-mustafa-ali-flint-water-crisis-dakota-access-pipeline-trump-scott-pruitt

Chief Environmental Justice Official at EPA Resigns, With Plea to Pruitt to Protect Vulnerable Communities

By Phil Mckenna 3/9/17

The head of the environmental justice program at the Environmental Protection Agency has stepped down, departing the government with a lengthy letter to Scott Pruitt, the EPA's new administrator, urging him not to kill the agency's programs.

Mustafa Ali, a senior adviser and assistant associate administrator at the agency, worked to alleviate the impact of air, water and industrial pollution on poverty-stricken towns and neighborhoods during nearly a quarter century with the EPA. He helped found the environmental justice office, then the environmental equity office, in 1992, during the presidency of President George H.W. Bush.

Ali leaves the EPA as Pruitt, who took office Feb. 17, prepares to implement deep cuts in the agency's budget and staff. A Trump administration proposal would cut the EPA's $8 billion budget by $2 billion and reduce its roster of 15,000 employees by 20 percent. An internal memo obtained by multiple news outlets on March 1 called for a complete dismantling of the office of environmental justice and elimination of a number of grant programs that address low-income and minority communities. A story in the Oregonian reported that funding for the office would decrease 78 percent, from $6.7 million to $1.5 million.

Justice issues have become an environmental focal point in recent years—most recently in the battle to clean up lead-contaminated water in Flint, Mich., a largely African-American community, and in the fight to stop the nearly completed Dakota Access pipeline just upstream of the Standing Rock Reservation in North Dakota.

"I think it's going to be one of the major civil rights issues of the 21st century," said Benjamin Wilson, head of the National Environmental Justice Conference and chairman of the law firm Beveridge & Diamond. "It's going to become increasingly not simply local but regional, national and international in scope."

Ali said he has received no indication that the adviser position or his job as assistant associate administrator in the agency's Office of Enforcement and Compliance Assurance will be filled by the Trump administration. EPA officials declined to comment on the positions.

The EPA made strides during the Obama administration to address environmental justice concerns, including incorporating equity into regulatory decision-making, and adopting a long-term strategy in its EJ 2020 Action Agenda. The agency was, however, heavily criticized for not doing enough to address environmental concerns of low-income and minority populations.

Ali said in an interview that he considers the shielding of poor and minority neighborhoods from the effects of pollution a crucial function of the EPA, but that the agency's new leaders have not given "any indication that they are focused or interested in helping those vulnerable communities. My values and priorities seem to be different than our current leadership and because of that I feel that it's best if I take my talents elsewhere."

Still, in his resignation letter, which was devoid of rancor, Ali urged former Oklahoma Attorney General Pruitt, a longtime opponent of EPA regulation, to reconsider proposed cuts to environmental justice programs. "When I hear we are considering making cuts to grant programs like the EJ small grants or Collaborative Problem Solving programs, which have assisted over 1,400 communities, I wonder if our new leadership has had the opportunity to converse with those who need our help the most," Ali wrote. "I strongly encourage you and your team to continue promoting agency efforts to validate these communities' concerns, and value their lives."

Meanwhile, the power that Ali once wielded inside the EPA has been dissipated. His position as senior adviser to the EPA administrator was eliminated in January when Obama's EPA chief Gina McCarthy left, he said.

"I am heartbroken that Mustafa feels that his time of productivity in the agency has passed," McCarthy said in an interview. "He managed the interagency working group on environmental justice," she said, referring to a conclave of federal agencies that met to discuss common concerns. "So when I say we brought actions and strategies to the table, it wasn't just EPA, it was throughout the federal government."

Part of the environmental justice program's strategy was to help leverage its relatively small grants into large programs. The town of Spartanburg, South Carolina, for example, received a $20,000 environmental justice grant to help clean up contaminated industrial sites in the town. Spartanburg ultimately raised more than $270 million from public and

private sources and used the recovered land to build housing, a job training facility and health centers.

"You're talking about a community that was devastated and that raised itself up because you had great community members and they had somebody who listened to them at the federal government," McCarthy said. "Mustafa was one of those people. I went to that community. I sat with the mayor. He gave me a key to the city. We were sitting in a community center that had been developed as a result of this small start, where somebody paid attention to that community and it happened to be EPA."

Cynthia Giles, assistant administrator for the Office of Enforcement and Compliance Assurance in the Obama administration, cites the town of Tonawanda, New York, to which the EPA gave a small grant to conduct ambient air monitoring. The grant "ultimately led to a criminal case that EPA brought against Tonawanda Coke Corporation for high levels of benzene emissions," Giles said.

Giles said there is no economic justification for killing the justice program. "The money that is involved is not noticeable in the overall scheme of budgets," she said. "The only reason to eliminate it would be to send a message—that they don't care about the needs of the most vulnerable communities."

"We've had both [Republican and Democratic administrations] over time and none of them tried to do anything to destroy what the previous administration had done," Ali said. "Folks are just hoping that this one will wake up and see value in continuing this important work."

Yet Ali sees nothing in Pruitt's background to support that hope. He repeatedly sued the EPA for its efforts to regulate CO2 emissions, mercury and other forms of pollution. "When the administrator was in Oklahoma I do not know of any time that he made environmental justice a priority," Ali said.

Pruitt tweeted last month he was dedicated to working with "stakeholders—industry, farmers, ranchers, business owners—on traditional values of environmental stewardship."

Some of the responses the tweet garnered included: "What about environmental advocates?" "What about...people w/o access to safe water & air? Our children?" And "what about ordinary citizens."

In a February statement, advocacy group We Act for Environmental Justice said of Pruitt: "His record indicates he lacks awareness or concern for communities impacted by asthma and other environmental health-related issues."

Ali, who grew up near a coal-fired power plant in West Virginia, interned in the office of William Reilly, the agency's third administrator, before joining as a staff member in the newly formed office of environmental equity in Nov. 1992. From 2007-2008, Ali worked on Capitol Hill in the office of Congressman John Conyers before returning to the EPA. He proudly boasts that he has worked on environmental justice issues in more than 500 communities.

"His work and the work of the EPA has helped empower people, and whenever we can have a clear articulation of the issues, it's amazing the common ground that can be

reached by people on opposing sides," Wilson said. "But if we never have that discussion, that frustration festers and that is never good."

Ali will join Hip Hop Caucus as a senior vice president. The group is a non-profit that aims to promote political activism for young U.S. voters through hip-hop music and culture. He is scheduled to speak Thursday at an environmental justice conference in Flint, in his first public appearance with the organization.

"What I'm hoping to do is highlight that environmental justice needs to continue to happen," Ali said, "that there are opportunities to make it happen, and that if we don't do it there will be huge public health impacts."

LA Times

http://www.latimes.com/politics/la-na-pol-regulatory-reform-science-20170309-story.html

What's at stake as the GOP moves to slash regulations? For starters, clean air

By Evan Halper 3/9/17 3:00 AM

Amid the Republican backlash against federal scientists who write rules governing everything from movie theater popcorn to offshore oil drilling, stories abound of overburdened businesses, heavy-handed civil servants and crushing paperwork.

But another story, one involving a deadly household material, offers a lesson in what can go wrong when government experts are shackled, as currently envisioned under a sweeping regulatory reform bill gliding toward President Trump's desk.

The GOP-backed legislation revives many of the rule-making hurdles that for years crippled the government's ability to respond to the asbestos-exposure epidemic, which has been blamed for tens of thousands of American deaths.

"I don't think lawmakers are focusing on how extreme this legislation is," said Paul Billings, lobbyist for the American Lung Assn., which has joined several major public health groups imploring congressional leaders to apply the brakes. "It has been viewed as this abstraction that creates improvements in the regulatory process. This would undermine bedrock public health laws."

The linchpin of the 87-page proposal is a directive to regulators that may be impossible to meet. They would have to prove they have taken the least costly option possible to business before imposing any major new rule. A similar mandate became stifling when applied for decades to the regulation of chemicals such as asbestos because it allowed companies to keep rules at bay by continually arguing for cheaper approaches.

The Environmental Protection Agency gave up trying to ban the substance in 1991, after a

federal appeals court ruled it had not proved its regulation was the least financially burdensome approach. The decision became a rallying point for overhauling the Toxic Substances Control Act, which guides EPA authority over such chemicals. The act finally was revised last year, and in November, the EPA announced asbestos was among the first chemicals it was targeting with its new authority to require safety reviews.

By then, however, there was not much left for the EPA to do on asbestos, after legions of cancer victims took matters into their own hands with civil actions that bankrupted the industry. But the years of government inaction took their toll. A quarter-century later, nearly 15,000 Americans still die annually of diseases caused by asbestos exposure during their lifetime, according to the Asbestos Disease Awareness Organization.

The new GOP regulatory reform bill, which swiftly passed the House in January without committee debate, would apply the same test that hobbled regulators on asbestos to every major rule the government wants to impose. That includes setting Clean Air Act limits for how much toxic pollution can be released into the air in dense, asthma-infested urban areas like Los Angeles. Car safety, food safety, worker safety and consumer product safety rule-making also would be affected.

The far-reaching plan has been overshadowed by more immediate headlines springing from the White House, where wiretapping conspiracies, travel bans and Obamacare repeal anxieties are consuming the oxygen. Even the regulatory reform blueprint's name — the Regulatory Accountability Review Act — is sleep-inducing, masking the gravity of a proposal the U.S. Chamber of Commerce has placed among its top political priorities at a time when its influence in Washington has surged.

The chamber has invested tens of millions of dollars in lobbying for and promoting the bill, HR 5. It alerted lawmakers just before the measure passed the House in January that it "is a long-standing priority for the chamber" that is "long overdue." Lawmakers were cautioned in the letter against supporting any amendments that would moderate the proposed law, warning that such action could reflect unfavorably on the politically potent voting scorecard that the organization publishes to rank lawmakers.

While there are several dramatic proposals before Congress to rein in federal rule-makers, lobbyists are advising clients that the bill is one that actually stands a good chance of advancing to a president who is urgently looking to deliver a blow to the bureaucracy. A few moderate Democrats in the Senate already have expressed interest in helping the GOP leadership secure the 60 votes it needs for passage.

Supporters offer a cache of statistics that frame the bill as a common sense plan to give corporations some influence over a regulatory process they say is suffocating them. They point to a spike over the past 15 years in complex federal rules costing businesses more than a billion dollars, and showcase estimates concluding the rules have become such a drag on the economy that they are costing the average American family $15,000 per year.

"There is a legitimate question of whether you really need this continued churning and

accumulation of all these regulations," said Susan Dudley, who worked on regulatory reform at the George W. Bush White House and is now director of Regulatory Studies Center at George Washington University.

But others warn the legislation threatens to go considerably further than slowing the churn of rule-making. It directs agencies that for decades have used science alone in crafting major public health and worker safety protections to change course and find the most cost-effective approach for business.

"It's not hard to look down the line and see the problems this would create," said Thomas McGarity, professor of administrative law at the University of Texas. He cited several major public safety challenges with which regulators are wrestling and the potentially tragic consequences of cutting corners on oversight, from undrinkable water in cities like Flint, Mich., to blueprints for self-driving 18-wheelers.

Beyond requiring a cost analysis, the legislation also would put dozens of new obstacles on federal agencies before they can finalize a new rule — a process that already takes years. Companies that don't like the approach would be empowered with a bounty of new opportunities to file legal challenges and demand reviews.

Yogin Kothari, a lobbyist at the Environmental Working Group, sees irony in it all: "Their solution to too much bureaucracy and red tape is adding more red tape."

Clean Air Act enforcement, which is based on a painstaking analysis of such factors as how many lives would be saved and cases of asthma averted, could be altered drastically. The toll those rules take on corporate profits would gain new currency. Public health officials warn that enforcement of tobacco laws also would be inhibited.

The Consumers Union advised lawmakers that other landmark protections, including the Consumer Product Safety Act and the Securities Exchange Act, would be weakened substantially. "This dangerous proposal would do severe damage to protections consumers depend on," the group wrote to lawmakers.

Yet the bill's champions in Congress are undeterred. Among them are Rep. Doug Collins (R-Georgia), who took to the House floor the same day Consumers Union sent its plea.

"It is time we demand the voice of the American people be heard," Collins said just before casting his vote in favor of the bill, "rather than letting the others up here, separated in cubicles, decide what is best."

Inside EPA

https://insideepa.com/daily-news/ecos-mounts-defense-epas-state-funding-assistance-fy18-cuts

ECOS Mounts Defense OF EPA's State Funding Assistance from FY18 Cuts

By David LaRoss and Doug Obey 3/8/17

The Environmental Council of the States (ECOS) is mounting a strong defense of EPA grants and other programs that support state activities from the Trump administration's suggested massive cuts to agency funding in fiscal year 2018, warning the cuts could threaten states' ability to meet a wide range of environmental protection goals.

In an exclusive March 8 interview with *Inside EPA*, ECOS President John Linc Stine -- who also serves as commissioner of the Minnesota Pollution Control Agency -- said the council, which represents many state environment regulators, is planning meetings with White House officials and members of Congress in the coming weeks to urge them to defend areas of EPA's budget that provide direct funding support to states.

A reduction in EPA's FY18 budget "has the potential of cutting across the entirety of our activities, but it's unclear until we see the entirety of their budget document what areas they're proposing to reduce," Stine said, with the Trump administration said to consider up to a 25 percent cut to EPA's existing $8.1 billion funding, including possibly reducing EPA's 10 regional offices to eight.

He told *Inside EPA* that ECOS is scheduling meetings with White House Office of Management & Budget (OMB) officials and legislators "to advise them of our concerns."

But the states are also acknowledging that any cuts to EPA will almost certainly impact them in some way, because "it's all a priority for state agencies like ours," he said.

In a separate March 7 interview, ECOS Executive Director and General Counsel Alex Dunn said cuts could be especially harmful when they affect programs where states have accepted delegated authority from EPA with a promise of federal funding -- and could discourage states from seeking such delegation.

For instance, she said budget cuts might complicate efforts by states like Massachusetts,

which is currently weighing accepting delegated authority over the Clean Water Act discharge permit program.

“The natural question from Massachusetts legislature will be, we are going to take on performing a service or an activity previously done by EPA Region 1. How much will EPA be giving us to assist? . . . When you look at a new delegation it becomes clear that new federal funding should be a part of” the process, she said.

ECOS' Concerns

ECOS has previously raised concerns that the White House's plan to cut EPA's budget significantly may renege on commitments by agency Administrator Scott Pruitt to preserve state grants as he works to return much of the responsibility for implementing environmental programs to states.

In a March 1 letter to Pruitt and OMB Director Mick Mulvaney, ECOS questioned the proposed cuts in light of Feb. 25 remarks by Pruitt at the Conservative Political Action Conference where he called states and EPA "partners, not adversaries," and said, "help is on the way."

While the Trump administration has yet to release its formal budget request for FY18, OMB's initial “pass back” includes a 25 percent cut to EPA's current $8.14 billion overall budget and a 30 percent cut to many grant programs.

OMB's threatened cuts for EPA have raised concerns among a wide array of stakeholders, including industry and states, that EPA could be left without the funds needed to perform mandatory duties such as providing resources to state environment departments that lack the ability to operate solely on state funds.

“When I look at our budget in Minnesota for example, we receive $25 million a year in EPA grant funds not including the Great Lakes Restoration Initiative project dollars,” Stine told *Inside EPA*.

He said EPA money "across our grants" supports monitoring for "air, land and water contamination," state regulators' permitting and enforcement work, and contaminated site cleanups including but not limited to the Superfund and brownfields programs.

In the separate interview, Dunn said, "States have made it pretty clear that core funding for the air, water, land programs needs to remain whole."

Regional Offices

Beyond threats to federal funds, Stine added that a plan to possibly close EPA regional offices is concerning to state officials, both because states receive technical and regulatory assistance from regional officials and because some high-profile program efforts like the Great Lakes Restoration Initiative (GLRI) are operated by the regions.

The effect of shuttering regional offices "really does depend on the transactional requirements for each regional office, but it would be a concern because if you're going to have a change . . . there's always a transitional period where things get less efficient and less clear for people, so there's time that gets consumed in trying to sort that all out," he said.

As part of the budget planning process, OMB is requiring EPA to craft a plan for consolidating the current 10 regional offices down to eight in order to realize "efficiencies" -- though it is unclear how likely it is that such a plan will make it into the budget request.

"I know that there are some of the regions that are having a conversation with the states, I think the Western states," but there are no indications of whether the consolidation will happen, Stine said. He noted that along with GLRI, restoration efforts for the Chesapeake Bay, Puget Sound and San Francisco Bay are all administered through EPA regional offices.

However, he did not dismiss the idea that consolidating regions could ultimately make EPA

more efficient. Beyond the initial “transitional period,” it is “too soon to tell whether it has a positive, negative or neutral impact at this point,” Stine said.

EPA Budget

ECOS discussed budget priorities with OMB staff during a “recent” phone call, Stine and Dunn told *Inside EPA*. There, the White House expressed interest in state input on EPA's budget, signaling that the administration will at least consider states' requests to shore up the agency's funding despite the GOP's long-standing push to dramatically cut its activities.

“It was pretty much a listening and gathering from their perspective. . . . They did ask us to be prepared to carefully review the budget and offer more comments,” Stine said.

Dunn added that OMB appeared to be under pressure to broadly cut federal spending. “It is very clear . . . There is a very strong directive for all agencies to look very closely at the budget,” she said.

Even though Pruitt has vowed to fight to preserve funds for his priorities -- such as water infrastructure assistance, site cleanups and attainment of existing water and air standards -- Stine said it is unclear what steps the agency's leadership is taking or could take to shore up the FY18 budget.

“We’re aware that the agency is in dialogue with OMB about this . . . we’ve not received anything directly from Mr. Pruitt, but we’ve heard in communications with senior staff that they are looking closely at the budget for state programs,” he said.

Dunn said pressure from the White House to cut spending seems to put Pruitt in a tough position, because maintaining state assistance will almost certainly mean deeper cuts to EPA's own programs if EPA's overall budget is in fact reduced.

“The challenge is defending the state programs when the inevitable next question is, what about the staff and the agency that he has to run as well?” she said, adding that if EPA avoids reducing state assistance then it will almost certainty have to cut resources and staff from program offices, prompting “some very difficult decisions.”

ECOS' March 1 letter to Pruitt and Mulvaney called for an increase to state and tribal assistance grants (STAG), including the categorical grants that support states' and tribes' implementation of federal environmental mandates.

"Cuts to STAG categorical grants, or to EPA programs operated by states, will have profound impacts on states' ability to implement the core environmental programs as expected by our citizens," the letter said. -- *David LaRoss* (dlaross@iwpnews.com) *& Doug Obey* (dobey@iwpnews.com)

Quartz

https://qz.com/928236/the-word-science-has-disappeared-from-the-mission-statement-of-the-epas-office-of-science-and-technology/

Who needs “science” in an EPA Office of Science and Technology mission statement anyway?

By Zoe Schlanger 3/8/17

The branch of the US Environmental Protection Agency in charge of creating science-based clean water standards no longer has the word “science” in its mission statement.

Earlier this year, the stated mission of the Office of Science and Technology at the EPA’s Water Office was “developing sound, science-based standards,” and “scientific and technological foundations to achieve clean water,” according to a copy of the EPA’s website archived in January on the Internet Archive’s Wayback Machine.

The text of the mission statement has changed; the office’s mandate is now to create “economically and technologically achievable performance standards.” The word “science-based” and “scientific” no longer appear.

A coalition of researchers called the Environmental Data and Governance Initiative, or EDGI, found the changes. They are monitoring about 25,000 government web pages for any modifications under the new administration, by comparing them to copies archived on the Internet Archive by "data rescuing" events staged by archivists and programmers at universities across the country. (EDGI also plans to track any data sets that are removed.)

EDGI researcher Gretchen Gehrke told the New Republic she worries the switch is not just a linguistic detail—that it may signal a change in policy.

Instead of a science-based approach to clean water requirements—where water must meet quality standards based on peer-reviewed toxicology science, and companies can choose how to meet those standards—calling for "economically and technologically achievable" standards puts greater emphasis on the economic impact of regulation, and may mean companies would install certain technologies determined by the EPA rather than comply with a specific water-quality standard.

The EDGI researchers have found a number of other notable website tweaks: Climate change reports have disappeared off of State Department websites, while a description of a federal fracking rule, and another about a methane emissions rule, have also gone missing from Interior Department web pages.

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To: Schnare, David[schnare.david@epa.gov]
From: Jackson, Ryan (Inhofe)
Sent: Fri 2/17/2017 2:55:02 PM
Subject: RE: Pruitt Personal Security Detail coordinatin

Thank you.

From: Schnare, David [mailto:schnare.david@epa.gov]
Sent: Friday, February 17, 2017 9:55 AM
To: Jackson, Ryan (Inhofe) <Ryan_Jackson@inhofe.senate.gov>
Subject: Pruitt Personal Security Detail coordinatin

Ryan:

Personal Security Detail/Ex. 6/Ex. 7C/Ex. 7E/Ex. 7F

dschnare

To: Schnare, David[schnare.david@epa.gov]
From: Minoli, Kevin
Sent: Fri 2/17/2017 10:23:13 PM
Subject: This afternoon

Hi David- I understand that you will be here in case Administrator Pruitt decides to come by after the swearing in. I plan to be here for a couple more hours as well in case you need anything or if you wanted to be able to introduce him to at least one career person. I will just be up here working until at least 7:00 so let me know if you do need me for any reason. Thanks, Kevin

Kevin S. Minoli

Acting General Counsel

Office of General Counsel

US Environmental Protection Agency

Main Office Line: 202-564-8040

To: 2017HQfirstassistants[2017HQfirstassistants@epa.gov]; 2017Regionfirstassistants[2017Regionfirstassistants@epa.gov]
Cc: Schnare, David[schnare.david@epa.gov]; Benton, Donald[benton.donald@epa.gov]; AO Staff Office Directors and AA's[AO_Staff_Office_Directors_and_AAs@epa.gov]; Anderson, Denise[anderson.denise@epa.gov]; Knapp, Kristien[Knapp.Kristien@epa.gov]; Hautamaki, Jared[Hautamaki.Jared@epa.gov]; Burden, Susan[Burden.Susan@epa.gov]; Threet, Derek[Threet.Derek@epa.gov]; Naples, Eileen[Naples.Eileen@epa.gov]
From: Reeder, John
Sent: Fri 2/17/2017 9:52:24 PM
Subject: Weekly Senior staff meeting HEADS UP

Senior team,

Our usual Monday Senior Staff meeting (1:00pm eastern time) is going to be held **February 21, TUESDAY at 2:00pm** (Eastern) -- one day and one hour later than usual.

This change is necessary to accommodate the schedule of Administrator Pruitt.

Attendance for this meeting should be the same as always….but please, not expanded beyond usual participants.
As we did for the first wave ("beachhead") transition team, you should provide a very high level introduction of your office - i.e., our Region includes the states of…and we have a major focus on XX-type issues (e.g., great lakes, agriculture...etc.)
You may also highlight the normal issues that you might raise, but of course keep to priority matters.
AND…please avoid acronyms!!

Enjoy your weekend. We have a big week ahead.

John E. Reeder
Acting Chief of Staff
202 564 6082 (direct)

To: Schnare, David[schnare.david@epa.gov]
From: John Konkus
Sent: Mon 2/13/2017 1:52:04 PM
Subject: Fwd: DRAFT EO Points

David read all the way to the bottom here… These are Ryan's points for the EOs in response to my own. I will take his and put them together with mine so were working off of one set of documents. I will incorporate whatever additions you have as well if you want to send along.

John Konkus

Begin forwarded message:

From: "Jackson, Ryan (Inhofe)" <Ryan_Jackson@inhofe.senate.gov>
Date: February 12, 2017 at 10:49:03 PM EST
To: John Konkus <Personal Email/Ex. 6
Subject: RE: DRAFT EO Points

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

From: John Konkus Personal Email/Ex. 6
Sent: Sunday, February 12, 2017 10:25 PM
To: Jackson, Ryan (Inhofe) <Ryan_Jackson@inhofe.senate.gov>
Subject: Re: DRAFT EO Points

Got this. Thank you. David Schnare has my original points and I expect his feedback soon. I'll also give these to him for his review. He is smart, tough as nails and has a good feel for how these things will be received inside and outside the agency.

I have not seen this one: "Establishing National Policy in Favor of Energy Independence, Economic Growth, and the Rule of Law?"

Deliberative Process Privilege/Ex. 5

John Konkus

On Feb 12, 2017, at 10:08 PM, Jackson, Ryan (Inhofe) <Ryan_Jackson@inhofe.senate.gov> wrote:

This responds to both of your emails. I also wanted to respond to your gmail.

This incorporates your talking points plus. Let me know what you think. Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

DRAFT Messaging Points

Executive Order Top Line

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

2.) **WOTUS**

DRAFT Messaging Points

Executive Order Top Line

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

3.) MEMORANDUM FOR THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

SUBJECT: LNG Export Licensing

DRAFT Messaging Points

Top Line

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

4.) EXECUTIVE ORDER

Restoring the Rule of Law, Federalism, and Economic Growth by Rescinding the "2015 Ozone NAAQS" Rule

Executive Order Top Line

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

5.) Executive Order – Ensuring Scientific Rigor in Agency Decisions

EXECUTIVE ORDER

Ensuring Scientific Rigor in Agency Decisions

DRAFT Messaging Points

Executive Order Top Line

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

6.) Executive Order----Expediting Critical Infrastructure Projects

EXECUTIVE ORDER

Expediting Environmental Review and Permitting of Critical Infrastructure Projects

DRAFT Messaging Points

Executive Order Top Line

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

7.) EXECUTIVE ORDER

Improving Cost-Benefit Analysis of Energy and Environmental Regulation

DRAFT Messaging Points

Executive Order Top Line

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

8.) MEMORANDUM FOR THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

SUBJECT: Renewable Fuel Standard

DRAFT Messaging Points

Top Line Points

Deliberative Process Privilege/Ex. 5

From: Konkus, John [mailto:konkus.john@epa.gov]

Sent: Saturday, February 11, 2017 6:26 PM
To: Jackson, Ryan (Inhofe) <Ryan_Jackson@inhofe.senate.gov>
Subject: Fwd: DRAFT EO Points

1 of 2 emails

Sent from my iPhone

Begin forwarded message:

From: "Konkus, John" <konkus.john@epa.gov>
Date: February 10, 2017 at 12:14:08 PM EST
To: "Jackson, Ryan (Inhofe)" <Ryan_Jackson@inhofe.senate.gov>,
Personal Email/Ex. 6 - Samantha Dravis
Subject: DRAFT EO Points

Please see attached. This is the big one. Seven more sets of shorter EOs with points coming over shortly.

<SPW 022416.doc>

To: Williams, Steven[Williams.Steven@epa.gov]; Martin, JohnC[Martin.JohnC@epa.gov]; Kling, David[Kling.Dave@epa.gov]; Caraballo, Mario[Caraballo.Mario@epa.gov]; Weese, Eric[Weese.Eric@epa.gov]; Perrotta, Pasquale[Perrotta.Pasquale@epa.gov]; Dixon, Diane[Dixon.Diane@epa.gov]; Glazier, Kelly[Glazier.Kelly@epa.gov]; Reeder, John[Reeder.John@epa.gov]; Barnet, Henry[Barnet.Henry@epa.gov]; Schwartz, Martin[Schwartz.Martin@epa.gov]; McKinney, Robert[mckinney.robert@epa.gov]; Stanich, Ted[Stanich.Ted@epa.gov]; Noga, Vaughn[Noga.Vaughn@EPA.GOV]; Jackson, Vernon[Jackson.Vernon@epa.gov]; Jackson, Yvette[Jackson.Yvette@epa.gov]; Showman, John[Showman.John@epa.gov]; Vizian, Donna[Vizian.Donna@epa.gov]; Taylor, Jessica[taylor.jessica@epa.gov]; Jefferson, Gayle[Jefferson.Gayle@epa.gov]; Blake, Wendy[Blake.Wendy@epa.gov]; Minoli, Kevin[Minoli.Kevin@epa.gov]; Martin, John C. (WF) (OGA[John.Martin5@ic.fbi.gov]; Flynn, Mike[Flynn.Mike@epa.gov]; Caldwell, James[Caldwell.James@epa.gov]; Youngblood, Charlotte[Youngblood.Charlotte@epa.gov]; Benton, Donald[benton.donald@epa.gov]; Schnare, David[schnare.david@epa.gov]; Pirzadeh, Michelle[Pirzadeh.Michelle@epa.gov]; Uribe, Diana[Uribe.Diana@epa.gov]; Jackson, Ryan[jackson.ryan@epa.gov]; Schwab, Justin[schwab.justin@epa.gov]; Allen, Reginald[Allen.Reginald@epa.gov]
Cc: OIG-OI-Supervisors[OIGOISupervisors@epa.gov]; Elkins, Arthur[Elkins.Arthur@epa.gov]; Sheehan, Charles[Sheehan.Charles@epa.gov]; Larsen, Alan[Larsen.Alan@epa.gov]; Hanger, Eric[Hanger.Eric@epa.gov]; Smith, Michael[Smith.Michael-S@epa.gov]; Sykes, Marcus[Sykes.Marcus@epa.gov]; Altenburg II, Paul[Altenburg.Paul@epa.gov]; Clark, Richard[Clark.Richard-J@epa.gov]; Leta-Leroux, Maria[Leta-Leroux.Maria@epa.gov]; Cruz, Craig[Cruz.Craig@epa.gov]; Earle, Sean[Earle.Sean@epa.gov]; Bailey, Heather[bailey.heather@epa.gov]; Yung, Jeffrey[Yung.Jeffrey@epa.gov]; Brown, Clay[Brown.Clay@epa.gov]; Harris, Reginald[harris.reginald@epa.gov]; Alderton, Steven M.[Alderton.Steve@epa.gov]; **Enforcement/Investigatory/Ex. 7** Dean, Sanchai[Dean.Sanchai@epa.gov]
From: Sullivan, Patrick F.
Sent: Fri 3/3/2017 10:00:42 PM
Subject: Possible Threat to Administrator Pruitt received at R-10 in Seattle
Post Card to R10 Back.png
Post Card to R10 Front.jpg

To Threat Coordination Group:

On March 2, 2017, Special Agent Enforcement/Investigatory/Ex. 7 OIG Office of Investigations (OI), Seattle, was notified by the Region 10 Administrator's Office, that a postcard, addressed to Administrator Scott Pruitt, was received in R10. A copy of the front and back of the postcard is attached.

The postcard, postmarked "Portland OR, 22 FEB 2017" was received in R10 on February 28, 2017. The front of the postcard depicts a lone man standing on a small iceberg in the middle of the ocean. The back contains a message written in cursive in red ink and addressed to Scott Pruitt, c/o EPA, 1200 Sixth Avenue, Seattle, WA 98101.

The message is as follows:

Dear Mr. Pruitt, CLIMATE CHANGE IS REAL!!! We are watching you. For the sake of our planet, our children & our grandchildren, will you be a reasonable man? I repeat, we are watching you! Personal Matters/Ex. 6

Although the message does not contain a direct threat, the statements "will you be a reasonable man?" and "we are watching you" can be interpreted as intimidating and potentially threatening.

The OIG will coordinate this investigation with the Enforcement/Investigatory/Ex. 7C Enforcement/Investigatory/Ex. 7C We will attempt to identify, locate and interview the author of this postcard.

Potential criminal violations include:

- 18 U.S. Code § 876 – Mailing threatening communications
- 18 U.S. Code § 111 - Assaulting, resisting, impeding or intimidating certain officers or employees

The OIG case agent is SA Enforcement/Investigatory/Ex. 7 Seattle, desk Enforcement/Investigatory/Ex. 7 cell Enforcement/Investigatory/Ex. 7 and email Enforcement/Investigatory/Ex. 7

PLEASE NOTE:

The above information is being provided to the EPA Threat Coordination Group, and certain other officials within EPA and Region 10, based upon your need to know. Since this is law enforcement sensitive information, please do not further disseminate this investigative information without first coordinating with the OIG.

Patrick F. Sullivan

Assistant Inspector General for Investigations

EPA Office of Inspector General

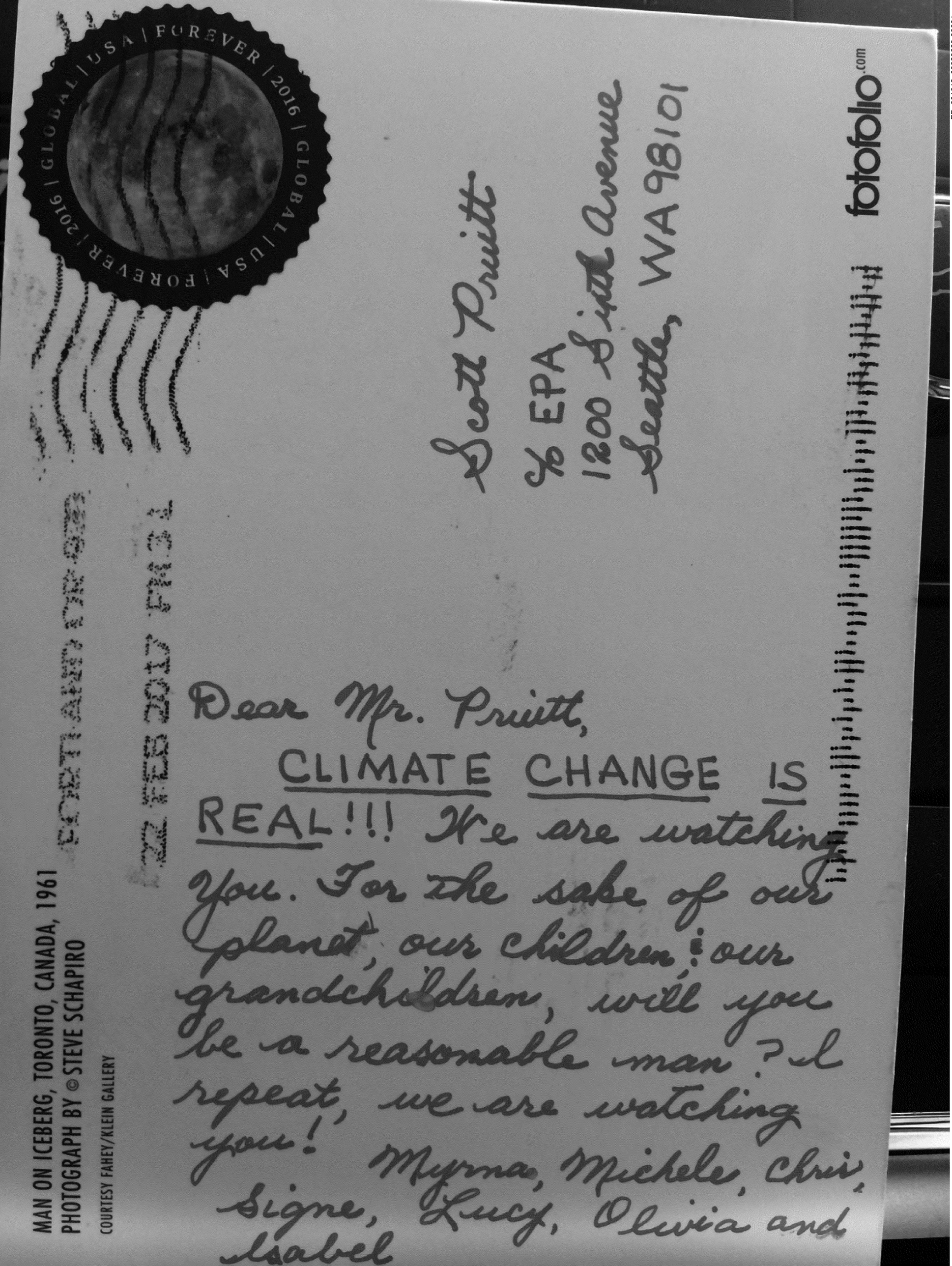
Desk: (202) 566-0308

Personal Phone/Ex. 6

FAX: (202) 566-0814

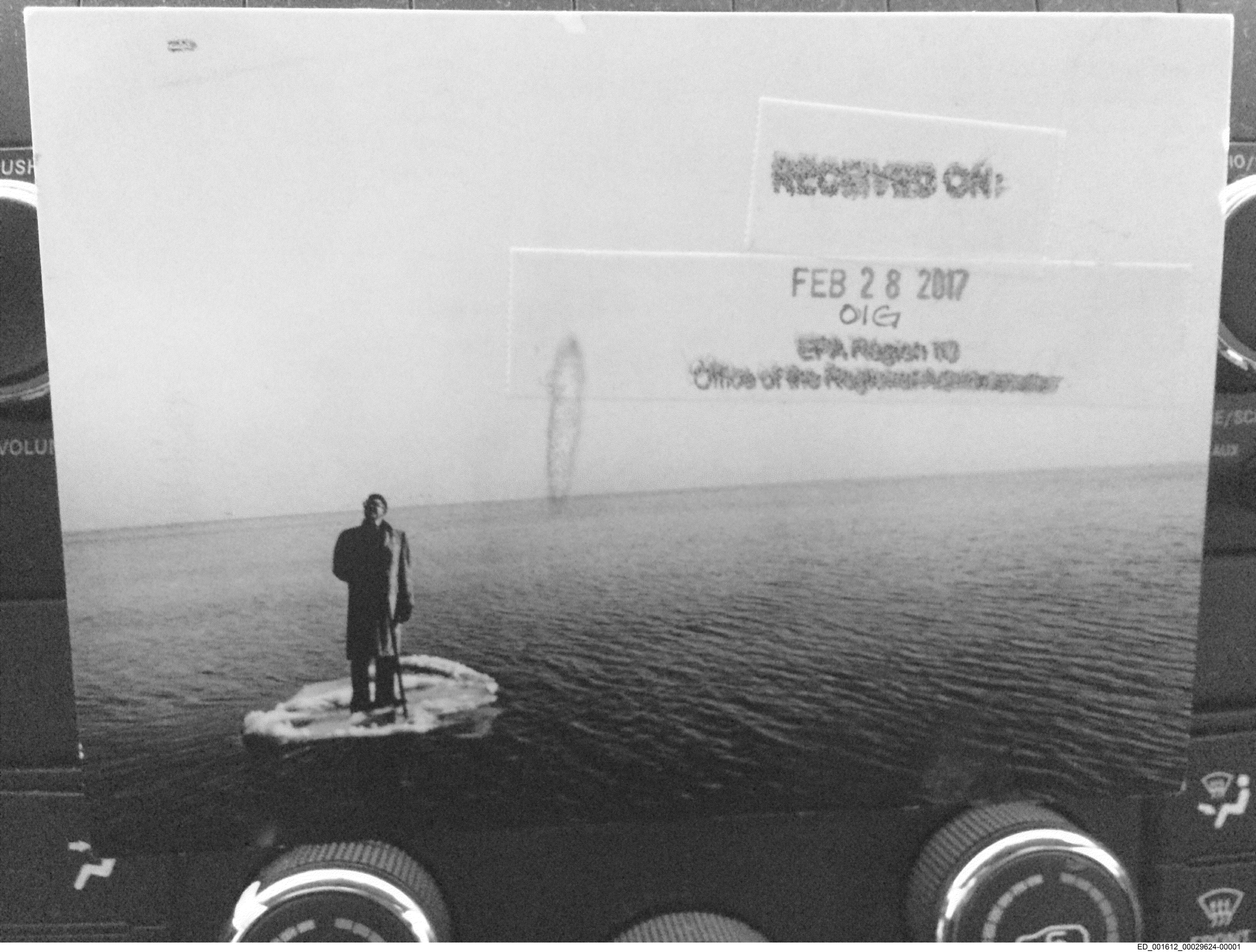
Email: sullivan.patrick@epa.gov

This message may contain information that is law enforcement sensitive but unclassified. If you are not the intended recipient, please immediately (1) advise the sender by reply e-mail that this message was inadvertently transmitted to you, and (2) delete this e-mail from your system. Thank you for your cooperation.



MAN ON ICEBERG, TORONTO, CANADA, 1961
PHOTOGRAPH BY © STEVE SCHAPIRO
COURTESY FAHEY/KLEIN GALLERY

ED_001612_00029623-00001



RECEIVED ON:
FEB 28 2017
OIG
EPA Region 10
Office of the Regional Administrator

To: Schnare, David[schnare.david@epa.gov]
From: Bromberg, Kevin L.
Sent: Tue 2/21/2017 10:28:53 PM
Subject: You made it in E&E news again
removed.txt

Members of the administration's "beachhead" team, including Don Benton, the agency's senior White House adviser, were spotted milling around before Pruitt came to the podium. Another team member, David Schnare, sat between acting Deputy Administrator Mike Flynn and Catherine McCabe, formerly the acting chief, off to Pruitt's left during the speech.

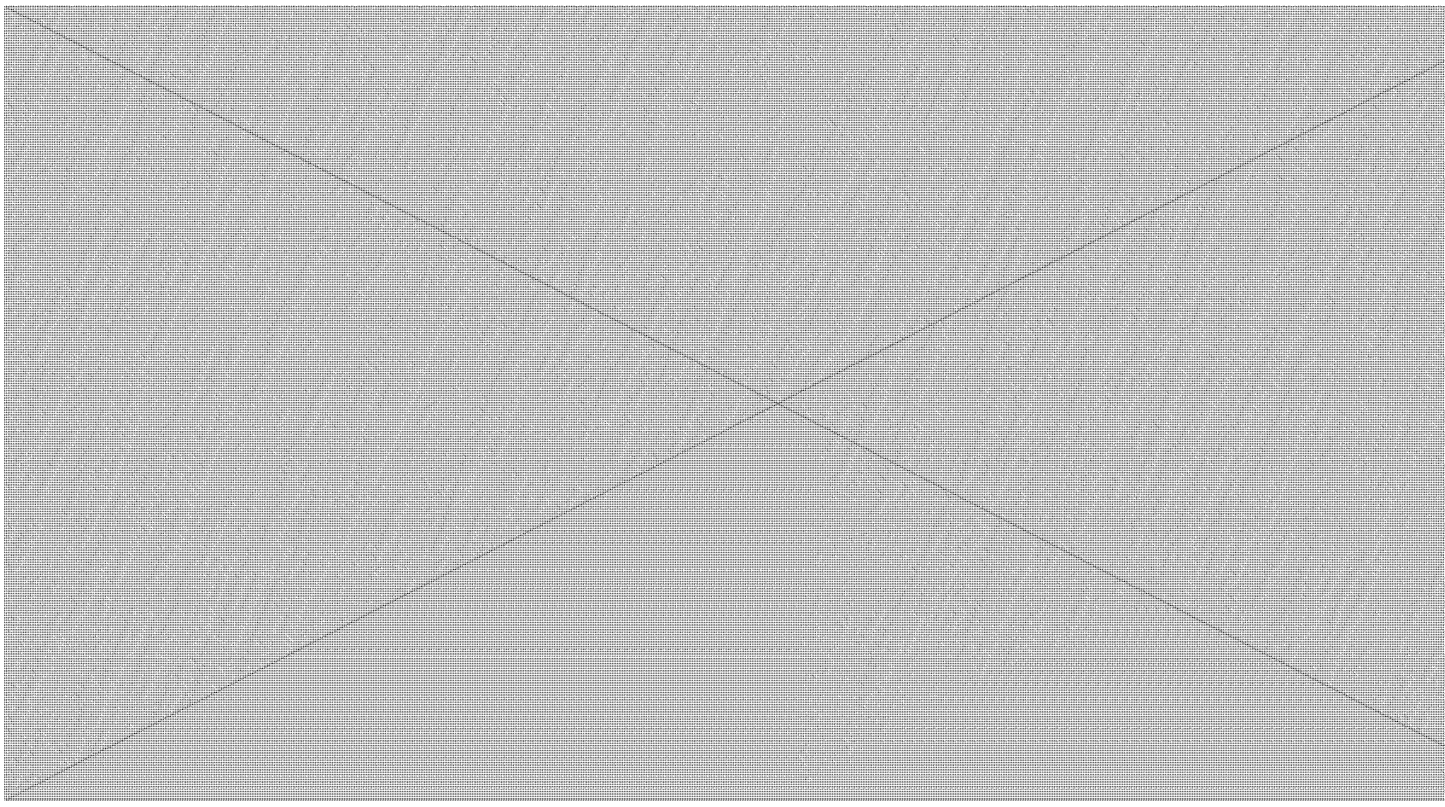
E&E News PM

EPA

'He didn't allay people's fears today' — union leader

Kevin Bogardus, E&E News reporter

Published: Tuesday, February 21, 2017



Catherine McCabe, formerly U.S. EPA's acting chief, introduces EPA Administrator Scott Pruitt to agency staff today.
Photo courtesy of C-SPAN.

U.S. EPA Administrator Scott Pruitt left unanswered questions for career employees today in his first speech as agency chief.

Pruitt made a plea for civility and touted his beliefs in the rule of law and states' rights, but he failed to offer details on the Trump administration's plans for the agency, leaving EPA staff anxious about what comes next.

Joe Edgell, senior vice president for National Treasury Employees Union Chapter 280, told E&E News that he noticed what Pruitt didn't say in his speech.

"He didn't say we're not going to shrink the agency. He didn't say we're not going to fire people," Edgell said. "He didn't allay people's fears today."

NTEU Chapter 280 represents EPA professional employees who work out of the Washington headquarters.

Advertisement

"We were encouraged that he wanted to talk to and listen before making decisions," Edgell said. "Taking him at his word, we were encouraged by that."

Some EPA staffers were more sanguine in response to Pruitt's speech.

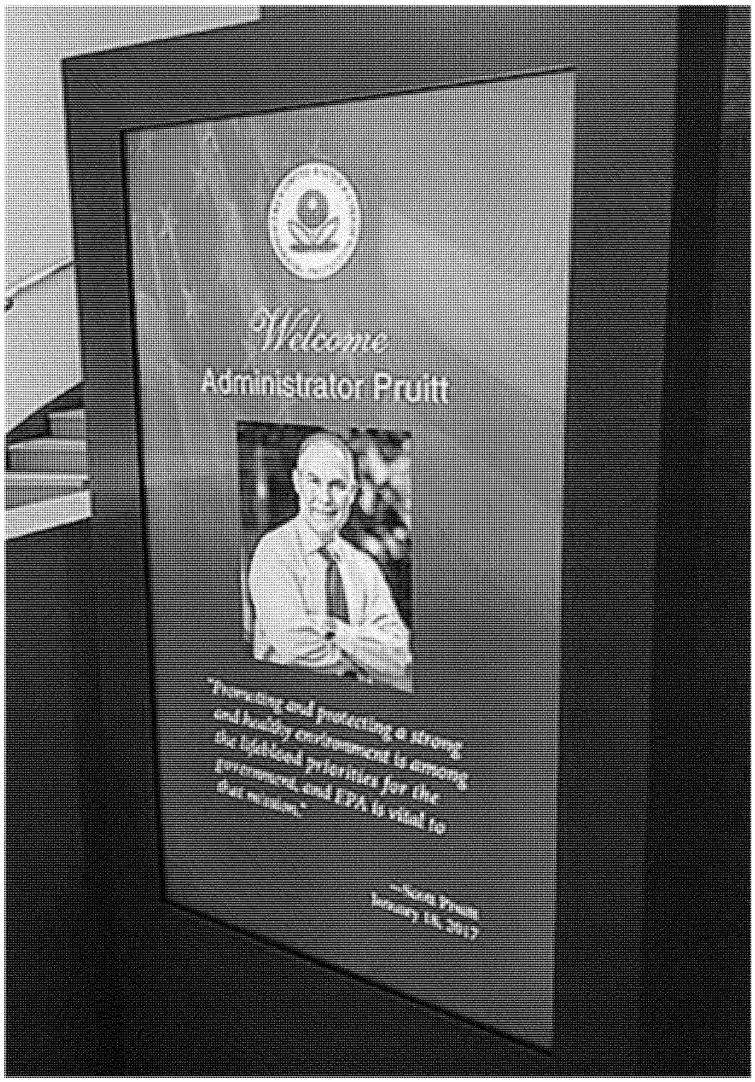
"There was no talk about executive orders or anything else," one longtime employee said. "What you saw

is what you got. We will have to see what happens from here."

John O'Grady, president of American Federation of Government Employees Council 238, which represents thousands of EPA employees, said he appreciated Pruitt's offer of civility. But he noted that Pruitt's focus on the power of states when it comes to protecting the environment might not be doable, considering the scarce resources available for regulators outside the federal government.

"Federalism is one that stuck out like a sore thumb," O'Grady said. "If we pushed environmental protection, environmental enforcement to the states, how are they going to get it done?"

O'Grady said he expects big changes at the agency during Pruitt's tenure.



An electronic sign welcomes EPA Administrator Scott Pruitt in the north entrance lobby of the William Jefferson Clinton Federal Building, the agency's Washington headquarters. Photo by Kevin Bogardus.

"I say nothing is off the table, just because they didn't address it in this speech," O'Grady said. "They are definitely going to go after shrinking the federal workforce, going to go after EPA and going to go after federal unions. There is no question about that."

Pruitt spoke in the Rachel Carson Green Room at EPA's headquarters (*Greenwire*, Feb. 21).

Members of the administration's "beachhead" team, including Don Benton, the agency's senior White House adviser, were spotted milling around before Pruitt came to the podium. Another team member, David Schnare, sat between acting Deputy Administrator Mike Flynn and Catherine McCabe, formerly the acting chief, off to Pruitt's left during the speech.

EPA employees were invited to attend Pruitt's speech and were asked to RSVP to reserve their seat, according to an agencywide email — subject line: "Meet Administrator Pruitt" — obtained by E&E News. They could also watch the EPA chief's speech online or listen over the phone.

Pruitt echoed many of his thoughts already shared during his confirmation hearing and a recent *Wall Street Journal* interview, including that the agency can be pro-energy and pro-environment. In his speech, Pruitt quoted John Muir, founder of the Sierra Club, which led to a fierce response from Michael Brune, the group's executive director.

"John Muir is rolling over in his grave at the notion of someone as toxic to the environment as Scott Pruitt taking over the EPA," Brune said in a statement.

Pruitt comes to EPA during a tumultuous time.

President Trump had harsh words for EPA on the campaign trail, saying he wanted to roll back many of its regulations and pare down the agency. The nomination of Pruitt, a vocal EPA critic who sued the agency over several of those rules as Oklahoma attorney general, only seemed to intensify environmental opposition to Trump and his administration.

Pruitt underwent a lengthy confirmation process that ended Friday as the Senate approved him on a mostly party-line vote of 52-46. Pruitt was confirmed by the Senate with the most recorded "no" votes of any EPA administrator in the history of the agency, according to an E&E News review of congressional records.

Now as administrator, Pruitt said it was time for "a beginning" as he and agency staff get to know each other at EPA.

"In fact, you don't know me hardly at all other than what you've read in the newspaper and seen on the news," Pruitt said.

He added, "I look forward to sharing the rest of the story with you as we spend time together. This is a beginning. It's a beginning for us to spend time and discuss certain principles by which I think this agency should conduct itself."

Reporter Sam Mintz contributed.

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Kevin Bromberg

Assistant Chief Counsel for Environmental Policy

SBA // Office of Advocacy

409 3rd St. SW, Washington, D.C. 20416

kevin.bromberg@sba.gov 202.481.2963

202.205.6964

To: Minoli, Kevin[Minoli.Kevin@epa.gov]; Schnare, David[schnare.david@epa.gov]; Jackson, Ryan[jackson.ryan@epa.gov]
Cc: Dravis, Samantha[dravis.samantha@epa.gov]
From: Benton, Donald
Sent: Thur 3/2/2017 6:53:36 PM
Subject: FW: Petition to EPA for Reconsideration of the HHWQS Rule for Maine/Idaho Letter on HHWQS
removed.txt
Letter to Admin Scott Pruit - Idaho's WQS HHC 2017-0228.pdf
20170227090758285.pdf

FYI- petition on HH Water Quality Standards to:

a) Approve WA Dept of Ecology rule

b) Withdraw EPA rule

Don

Senator Don Benton

Senior White House Advisor

Office of the Administrator

202.564.4711

From: Schwartz, Jerry [mailto:Jerry_Schwartz@afandpa.org]
Sent: Thursday, March 2, 2017 1:43 PM
To: Benton, Donald <benton.donald@epa.gov>
Subject: Petition to EPA for Reconsideration of the HHWQS Rule for Maine/Idaho Letter on HHWQS

Dear Mr. Benton,

As Chris McCabe indicated to you, Maine and Idaho are facing similar issues to those that the underlie the petition for reconsideration in Washington State.

Specifically, in Maine, EPA disapproved previous Human Health Water Quality Standards (HHWQS) and issued a final federal rule applicable to certain waters in the state. In response, Maine sued the agency, and that case is ongoing. Attached is a petition for reconsideration and withdrawal that Governor LePage sent to Administrator Pruitt on February 27th.

In Idaho, EPA also disapproved existing HHWQS. In response, Idaho Department of Environmental Quality (DEQ) revised the HHWQS and sent them to EPA for approval. Attached is a letter from the Director of DEQ to Administrator Pruitt requesting that EPA approve the revised HHWQS.

EPA's actions in all three states are based on the same legal theories and policies.

Please feel free to contact me if you have any questions or need additional information.

Jerry Schwartz

Senior Director

Energy and Environmental Policy

Jerry_Schwartz@afandpa.org

Personal Phone/Ex. 6

AMERICAN FOREST & PAPER ASSOCIATION

1101 K Street, N.W., Suite 700

Washington, D.C. 20005

STATE OF MAINE
OFFICE OF THE GOVERNOR
1 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0001

Paul R. LePage
GOVERNOR

February 27, 2017

Via overnight Fed Ex and email

Mr. Scott Pruitt, Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue
Mail Code: 1101A
Washington D.C. 20460
Pruitt.scott@Epa.gov

Re: *Petition for EPA's partial withdrawal of EPA letter actions and repeal of EPA's final rule on Maine's water quality standards*

Dear Mr. Pruitt:

Attached is a Petition for the reconsideration and withdrawal, with one important exception, of three EPA letter actions on Maine's water quality standards, and the repeal or withdrawal of EPA's final rule entitled Promulgation of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92466 (Dec. 19, 2016). Also attached in support of this Petition are comments by the Maine Attorney General and the Maine Department of Environmental Protection on the proposed version of EPA's final Maine rule, as well as a copy of Maine's Second Amended Complaint filed in *Maine v. McCarthy, et al.*, currently pending in the United States District Court for the District of Maine, No. 1:14-cv-00264-JDL. I hope that you give this Petition the serious consideration it deserves.

Sincerely,

Paul R. LePage

Paul R. LePage
Governor, State of Maine

PETITION TO THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Petition for EPA's reconsideration and withdrawal of all portions of EPA's letter actions dated February 2, 2015, March 16, 2015, and June 5, 2015, with the exception of EPA's recognition of Maine's statewide environmental regulatory jurisdiction and authority, and repeal or withdrawal of EPA's final rule entitled Promulgation of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92466 (Dec. 19, 2016)	Submitted February 27, 2017, to the Administrator, U.S. Environmental Protection Agency

The State of Maine, through Governor Paul R. LePage, submits this petition to the Administrator of the U.S. Environmental Protection Agency ("EPA") pursuant to 5 U.S.C. § 553(e) for the following actions: 1) reconsideration and withdrawal of all aspects of EPA's letter actions and supporting rationale regarding Maine's water quality standards dated February 2, 2015, March 16, 2015, and June 5, 2015, with the exception of EPA's recognition of Maine's statewide environmental regulatory jurisdiction and authority, including in Indian waters and lands; and 2) repeal or withdrawal of EPA's final rule entitled Promulgation of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92466 (Dec. 19, 2016) ("Maine Rule").

In support of this request, and in addition to the following Supporting Statement, attached are copies of comments previously submitted to EPA by the Maine Attorney General and the Maine Department of Environmental Protection on the proposed version of EPA's Maine Rule, as well as a copy of Maine's Second Amended Complaint filed in *Maine v. McCarthy, et al.*, which is currently pending in the United States District Court for the District of Maine, No. 1:14-cv-00264-JDL. These attached materials more fully outline the nationally unique tribal-state relationship that exists between the State of Maine and the four federally-recognized Maine Indian tribes as a result of Maine's state and federal Indian settlement acts, including the state Maine Implementing Act, 30 M.R.S. §§ 6201 *et seq.* ("MIA") and the federal Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721 *et seq.* ("MICSA")[1] (collectively the "1980 Acts"). The materials also more fully outline the history in recent years of EPA's failure to recognize Maine's role as a state under the Clean Water Act ("CWA") and under the unique jurisdictional principles contained in the 1980 Acts.

Because this matter is also the subject of currently pending litigation, the following Supporting Statement describing the rationale for Maine's request to EPA is relatively brief. For a more in-depth discussion of background, Maine's positions, and the intricacies of Maine's

[1] MICSA was formerly codified at 25 U.S.C. §§ 1721-1735. MICSA and other settlement acts remain in effect but were removed from the United States Code as of 25 U.S.C. Supp. IV (September 2016) in an effort by codifiers to improve the code's organization.

unique tribal-state jurisdictional arrangement under the 1980 Acts, Maine invites EPA to follow up this Petition with a meeting with the members of the Office of the Maine Attorney General representing Maine in the pending litigation with EPA.

MAINE'S SUPPORTING STATEMENT

Under Maine's nationally-unique 1980 Acts, Maine has statewide environmental regulatory jurisdiction and authority, including in all Indian waters and lands, which was confirmed by the First Circuit Court of Appeal in the context of water regulation in *Maine v. Johnson,* 498 F.3d 37 (1st Cir. 2007).

Under the CWA, states like Maine must establish water quality standards ("WQS") for all surface waters, including designating the uses of all such waters and establishing water quality criteria designed to protect the state's designated uses. In 1986, Maine adopted a new and comprehensive water classification program, now codified at 38 M.R.S. §§ 464-470, which contained all of Maine's designated uses and other WQS for its waters, and which EPA fully approved by 1990 without ever suggesting that Maine's WQS in that program did not apply or were not fully in effect in Indian waters for CWA purposes. By law, under both the CWA and EPA's regulations, those approved Maine WQS became the WQS in effect for CWA purposes for all applicable Maine waters at that time, including Maine's Indian waters. Indeed, for decades prior to 2005, EPA consistently applied Maine's WQS in Indian waters for CWA purposes, which also created significant reliance interests on the part of the regulated community.

In late 2004, however, Maine sought review in the First Circuit Court of Appeals of an EPA decision that Maine had no jurisdiction to regulate certain discharges of pollutants from two tribal wastewater treatment facilities. In *Maine v. Johnson,* the First Circuit concluded that EPA was wrong and that Maine did have such jurisdiction. Under the 1980 Acts, Maine's environmental laws on water quality, including its WQS, apply in Indian waters to the same extent as in other waters, and EPA cannot require that tribal members be treated differently than the rest of Maine's citizens for any environmental regulatory or water quality purposes. Congress reaffirmed this core principle of the 1980 Acts in 1987 when it first added tribal provisions to the CWA, but expressly stated that the new CWA tribal provisions would not apply in Maine for regulatory purposes because of the 1980 Acts.

Also in 2004, and as Maine pursued its appeal in the *Maine v. Johnson* matter, EPA began limiting its approvals of Maine's WQS revisions to non-Indian waters only while taking no action for an unspecified set of Indian waters. EPA later suggested that Maine's already-EPA-approved WQS that had been governing Maine's Indian waters for decades had never actually been in effect for any CWA purposes. The implication of this EPA reversal in position was that, under EPA's new thinking, a total water regulatory void existed in all of Maine's Indian waters, which was in violation of Congressional directives in the CWA and EPA's own regulations, guidance, and past application of Maine's WQS in Maine's Indian waters. EPA's change in position also disrupted decades of settled expectations regarding the Maine regulatory structure in those areas.

Faced with this new unsettling EPA approach, Maine originally filed its federal legal action in the District of Maine in 2014 to get EPA to honor Maine's statewide regulatory jurisdiction and to approve all of Maine's outstanding WQS for Indian waters. Maine expected this to happen, especially given that even EPA now agrees that Maine has statewide regulatory jurisdiction and authority over all its waters, including Indian waters. In response to Maine's action, however, EPA did something unexpected when it issued its February 2, 2015 letter, which generally does two things. First, EPA belatedly but correctly acknowledged Maine's statewide environmental regulatory jurisdiction and authority to set WQS for all Maine waters, including Indian waters, which EPA was effectively required to do under the 1980 Acts and *Maine v. Johnson*. Maine is not asking for EPA to reconsider or withdraw this portion of EPA's February 2, 2015 letter.

But then, in a surprising end-run of *Maine v. Johnson*, the plain language of the 1980 Acts, and CWA procedural requirements, EPA's February 2, 2015 letter also disapproved various Maine WQS (Maine's human health water quality criteria) for unspecified Indian waters based on a complex and convoluted new rationale that Maine is challenging in the District of Maine litigation, and that Maine is now asking EPA to fully reconsider and withdraw here.[2] In this portion of EPA's February 2, 2015 letter, EPA claims for the first time that in exercising its jurisdiction, Maine must ensure through new and heightened tribal-specific WQS that fish in Indian waters are of sufficient quality for tribal members to subsist on at consumption levels derived from historical reconstructed estimates taken from ethnographic accounts from the 16th through 19th centuries. EPA also now claims that its decades-long prior acceptance and consistent application of Maine's WQS throughout Indian waters were all mistakes.

EPA arrived at this remarkable change in position by newly and incorrectly interpreting (in 2015) the 1980 Acts as implicitly creating a new designated use of tribal sustenance fishing for Maine's Indian waters, even though Maine's water program contains no such use. The Maine Legislature, which has sole authority to make changes to Maine's water classifications and designated uses of its waters, 38 M.R.S. §§ 464(2)(D), 464(2-A)(E), never created such a sustenance fishing use, but actually considered and rejected a controversial 2002 proposal to create a similar "subsistence" designated use for limited portions of the Penobscot River only. The new sustenance fishing designated use is entirely a creation of EPA based on its new and incorrect 2015 interpretation of Maine law.

EPA's 2015 creation of a new designated use of tribal sustenance fishing for Maine is also based on a convoluted new interpretation of the 1980 Acts and other Maine Indian

---

[2] Maine is also asking EPA to reconsider and withdraw two additional subsequent letters regarding Maine's WQS dated March 16, 2015, and June 5, 2015, which EPA issued as a result of Maine's original federal action. The March 2015 letter contains some EPA tribal WQS disapprovals, as well as some non-tribal components, while the June 2015 letter contains EPA actions primarily involving non-tribal WQS. Maine asks that all three letters be reconsidered and withdrawn, in addition to the repeal of EPA's resulting Maine Rule, so that the unlawful tribal components of EPA's various actions can be undone, and so that Maine can consult with EPA to find reasonable, mutually agreeable approaches to the remaining non-tribal WQS issues outside of the adversarial context of ongoing federal court litigation to protect Maine's jurisdiction under the 1980 Acts.

settlement acts that turns those acts and the intent of Congress on their head by establishing different WQS requirements for Maine's Indian tribes than for other Maine citizens – the very thing that the 1980 Acts were designed to avoid. EPA's new interpretation is also contrary to Congress' subsequent statement that the CWA's tribal provisions do not apply in Maine for regulatory purposes because of the 1980 Acts. Moreover, by creating a new designated use of sustenance fishing for Maine, EPA has usurped Maine's role as a state under the CWA, which reserves the function of designating the uses of state waters to the states. EPA also did all of this without following CWA procedural requirements regarding the creation of new WQS such as a new designated use.

EPA began quietly pursuing this new revised approach to Maine's WQS around 2004 in order to further separate tribal environmental goals pursuant to EPA national tribal policies that were developed after 1980 and that do not apply in Maine under the 1980 Acts. Since EPA's change in position around 2004, EPA has increasingly been working on important Maine water quality issues with Maine's Indian tribes, who have no environmentally regulatory authority in Maine under either the CWA or the 1980 Acts, while excluding the State of Maine, which has full statewide environmental regulatory authority over all waters. This has unfortunately created discord and tension in Maine and has strained relationships with EPA and the Maine tribes.

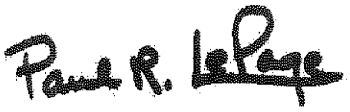
EPA's new approach to WQS in Maine is also similar to EPA actions in other states such as Washington and Idaho. The common features of EPA's recent actions in Maine and other states include new EPA requirements when states develop WQS that intrude on state policy decisions and generally eliminate state discretion, such as forcing states to use higher cancer risk levels and aspirational unsuppressed fish consumption rates for tribes. In Washington, as in Maine, EPA has created new tribal-specific federal designated uses through new EPA interpretations of existing state WQS laws, and has reformulated the states' chosen "target" populations of such designated uses based on the new EPA interpretations. The CWA requires that any federal WQS be created through rulemaking – not through new EPA interpretations of state law, which sidesteps CWA legal requirements. All of these EPA intrusions into traditional state matters are contrary to the CWA's principles of cooperative federalism and EPA's existing guidance, and represent an increasingly federalized regulatory approach to state waters.

Reconsideration and withdrawal of EPA's three letters at issue here and EPA's final Maine Rule (with the exception of EPA's long overdue acknowledgement of Maine's statewide environmental regulatory jurisdiction and authority) will honor clear Congressional and Maine legislative intent regarding Maine's unique tribal-state relationship, restore Maine's state role over the planning and management of its waters, and hopefully represent a positive first step start towards improved working relationships with EPA and the Maine Indian tribes.

CONCLUSION

For the reasons described above, as well as in Maine's Second Amended Complaint and various comments submitted on EPA's Maine Rule, Maine respectfully requests that EPA 1) reconsider and withdraw all aspects of EPA's letter actions dated February 2, 2015, March 16, 2015, and June 5, 2015, with the exception of EPA's recognition of Maine's statewide environmental regulatory jurisdiction and authority, including in Indian waters and lands; and 2) repeal or withdraw EPA's final Maine Rule.

Dated this 22 day of February, 2017.



Paul R. Lepage
Governor, State of Maine

Docket ID. No. EPA-HQ-OW-2015-0804

COMMENTS OF MAINE ATTORNEY GENERAL JANET MILLS IN RESPONSE TO EPA'S PROPOSAL OF CERTAIN FEDERAL WATER QUALITY STANDARDS APPLICABLE TO MAINE

June 14, 2016

Maine Attorney General Janet T. Mills ("Maine AG") hereby submits the following comments in response to the Proposal of Certain Federal Water Quality Standards ("WQS") Applicable to Maine ("Proposed Maine Rule") by the United States Environmental Protection Agency ("EPA") under the Clean Water Act, 33 U.S.C. §§ 1251, *et seq.* ("CWA"). 81 Fed. Reg. 23239 (April 20, 2016). The underlying basis for much of the Proposed Maine Rule (*see id.* at 23241-47) is set forth in EPA Region 1's letter action dated February 2, 2015, and its accompanying 51-page rationale (collectively the "February 2, 2015 Action"), which Maine is presently challenging in a separate federal court action pending in the United States District Court for the District of Maine, Civil Action No. 14-cv-264-JDL ("Pending Action").

1. All of Maine's arguments in its Pending Action also apply to the Proposed Maine Rule.

All portions of EPA's Proposed Maine Rule that were prompted by, taken in response to, or are otherwise based on EPA's February 2, 2015 Action (including Sections II-IV(A)-(B) of the Proposed Maine Rule) are unlawful based on Maine's arguments raised in its Pending Action, which apply with equal force to EPA's Proposed Maine Rule. Maine's Second Amended Complaint filed in the Pending Action is attached as Exhibit ("Ex.") 1, and is incorporated herein by reference.[1] The Maine AG comments more specifically as follows:

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[1] Maine requests that EPA consider as part of these proceedings and include in EPA's administrative record all exhibits to Maine's Ex. 1 (Second Amended Complaint). Because EPA already has these exhibits as a result of the Pending Action, they are not being resubmitted here absent an express EPA request.

2. Maine's Indian Settlement Acts did not "expressly confirm" or establish any "aboriginal" right to tribal sustenance fishing, let alone any kind of right to any heightened quality of water and/or fish based on membership in a Maine tribe.

EPA's Proposed Maine Rule, like its February 2, 2015 Action, wrongfully asserts that an underlying purpose of Maine's various Indian settlement acts was to expand the land base for all of Maine's tribes in order to preserve their cultural sustenance practices (including sustenance fishing), and that this alleged underlying purpose in turn requires EPA, in its reviewing role with respect to Maine's WQS submissions under the CWA, to ensure a heightened quality of water and/or fish in order to protect Maine's tribes. 81 Fed. Reg. at 23241-42. Nothing in the CWA contemplates or authorizes this EPA approach. Likewise, the history and plain language of Maine's Indian settlement acts do not support EPA's interpretation of the alleged underlying (and unwritten) purpose of those acts, but instead prohibit EPA's position, which would impermissibly give Maine's tribes an enhanced status and greater rights with respect to water quality than the rest of Maine's population.

With respect to the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs (collectively the "Northern Tribes"), EPA's interpretation of the underlying purpose of the Maine Indian settlement acts is flatly contradicted by express provisions of the Maine Implementing Act, 30 M.R.S. §§ 6201 *et seq.* ("MIA"), as confirmed and ratified by the federal Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721 *et seq.* ("MICSA") (collectively the "1980 Acts"). Under the plain language of these 1980 Acts, the Northern Tribes are, without exception, fully subject to Maine's jurisdiction to the same extent as any other person or "lands and natural resources," a phrase which expressly includes water and water rights, and fishing rights. 30 M.R.S. §§ 6203(3), 6204; 25 U.S.C. §§ 1722(d), 1725(a); (Ex. 1, Second Amended Complaint, ¶¶ 47-48). Thus, under the 1980 Acts, the Northern Tribes are subject to the same

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environmental regulatory treatment as the rest of Maine's citizens, including with respect to water quality and fishing, and that aspect of the settlement is unaffected by EPA's novel new interpretation of the underlying purpose of the 1980 Acts.

The Penobscot Indian Nation ("PIN") and the Passamaquoddy Tribe (collectively the "Southern Tribes") are also subject to the same environmental regulatory treatment as the rest of Maine's citizens, including with respect to water quality and fishing, but with a limited caveat – namely, that members of these Southern Tribes may, within their respective reservations only, generally take fish free from otherwise applicable State fish and game rules regulating the method, manner, bag and size limits and season for taking fish, provided that the fish is taken for the Southern Tribal member's individual sustenance rather than for a commercial or some other purpose. 30 M.R.S. § 6207(4); (Ex. 1, Second Amended Complaint, ¶¶ 41-46). This limited right of members of the Southern Tribes to take fish arises from a hunting and fishing provision in MIA, rather than from any of the express jurisdictional provisions of the 1980 Acts, which memorialized a negotiated settlement that resolved disputed claims and expressly transferred and extinguished all aboriginal tribal rights. *See* 30 M.R.S. § 6204; 25 U.S.C. §§ 1721(a)(2), 1721(b)(2)-(4), 1723, 1725(a)-(b)(1).[2] Thus, with respect to the Southern Tribes, EPA's Proposed Maine Rule wrongfully asserts that MIA, 30 M.R.S. § 6207(4), "expressly confirmed an aboriginal right" to tribal sustenance fishing in the Southern Tribes' reservations. 81 Fed. Reg. at 23241. That limited right in MIA is not an aboriginal right, as all aboriginal rights were transferred and extinguished; it is a statutory entitlement as a result of the settlement underlying

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[2] Maine's position on the transfer and extinguishment of all aboriginal tribal rights is more fully set forth in briefs filed in the federal Maine District Court action over PIN's alleged ownership of portions of the Penobscot River, which position and briefs are incorporated herein by reference. (*See* Maine's motion for summary judgment in *PIN v. Mills*, No. 12-cv-254-GZS, attached as Ex. 2 (at pp. 33-38), and Maine's reply in support of that motion, attached as Ex. 3 (at pp. 20-25)).

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the 1980 Acts. It also has nothing to do with Maine's underlying environmental regulatory jurisdiction over the quality of all State waters, which is expressly addressed by different jurisdictional portions of the 1980 Acts that contain no exceptions to Maine's statewide environmental regulatory jurisdiction. *See* 30 M.R.S. §§ 6204, 6206; 25 U.S.C. §§ 1721(b)(2)-(4), 1725(a)-(b)(1). Thus, like the Northern Tribes, the Southern Tribes are subject to the same environmental regulatory treatment as the rest of Maine's citizens, including with respect to water quality, and that aspect of the settlement is also unaffected by any new EPA interpretation of any alleged underlying purpose of the 1980 Acts.

Under MICSA's Sections 1725(a)-(b)(1) and MIA's Section 6204, all Maine tribes are subject to Maine's environmental regulatory jurisdiction with respect to the quality of Maine's waters. Under MIA's Section 6206, the Southern Tribes are treated like municipalities and are exempt from Maine's jurisdiction with respect to "internal tribal matters," which the First Circuit Court of Appeals has interpreted narrowly so that it "does not displace general Maine law on most substantive subjects, including environmental regulation." *Maine v. Johnson*, 498 F.3d 37, 46 (1st Cir. 2007); *see also id.* at 45 (if the internal affairs exemption negated Maine's ability to environmentally regulate within tribal waters, it would be "hard to see what would be left of the compromise restoration of Maine's jurisdiction" set forth in the 1980 Acts). MIA's Section 6207(4) and its limited right to take fish free from fish and game restrictions are not mentioned in either MIA's Sections 6204 or 6206, because that limited right to "take" fish is not a general exception with respect to Maine's environmental regulatory jurisdiction – it is confined entirely to the type of fish and game rules and regulations outlined in Section 6207 such as "the method, manner, bag and size limits and season for fishing." *See* 30 M.R.S. § 6207(3).

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Moreover, no part of MIA Sections 6204, 6206, or 6207 suggests in any way that there is any implicit or bootstrapped tribal right to a heightened quality of water or fish for any reason, let alone as a result of Section 6207(4). This is because the intent and plain terms of the 1980 Acts require equal environmental regulatory treatment with respect to all Maine waters for all Maine citizens, including members of all of Maine's Indian tribes. (Ex. 1, Second Amended Complaint, ¶¶ 16-50, 62-67). EPA wrongly cites to 30 M.R.S. § 6207 (81 Fed. Reg. at 23241) as an alleged reflection of Maine's intent to create a CWA designated use of "sustenance fishing," which would violate other express provisions and the core principles of the 1980 Acts.

3. Maine has never adopted any CWA designated use of "sustenance fishing" for any waters, and Maine's existing designated use of "fishing" for all surface waters, which protects Maine's general population only, has been in effect statewide since EPA's approval of Maine's Water Classification Program in the 1980s.

EPA unlawfully bases its Proposed Maine Rule on two new EPA interpretations of longstanding Maine law as establishing a new designated use of tribal "sustenance fishing" for all Maine Indian waters in order for all Maine's tribes "to preserve their culture and lifeways." 81 Fed. Reg. at 23241-42. These new EPA interpretations, first made and announced in EPA's February 2, 2015 Action (and now echoed in the Proposed Maine Rule), and which EPA wrongfully claims flow from the 1980 Acts, are unlawful.

Since at least 1986, Maine's Water Classification Program, now codified at 38 M.R.S. §§ 464-470, has included State-adopted and EPA-approved designated uses of "fishing" and "recreation in or on the water," which reflect the fishable/swimmable goals that are generally required by the CWA. (Ex. 1, Second Amended Complaint, ¶¶ 68-77). Decades ago, EPA fully approved all aspects of Maine's water program, including Maine's designated uses of "fishing" for all Maine surface waters – without any exception for any tribal waters. (*See* Ex. 1, Second Amended Complaint, ¶¶ 68-73).

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EPA was also fully aware of the effect of the terms of the 1980 Acts prior to approving Maine's Water Classification Program in the 1980s. For instance, EPA issued an informal Maine status report (provided to Maine in March 1982) acknowledging Maine's statewide environmental regulatory jurisdiction over all of its waters, including Maine's Indian waters. (*See* Ex. 4, which is incorporated herein by reference, at p. 4, rejecting tribal rights with respect to areas under the Clean Air Act analogous to CWA designated uses, and noting that State law on environmental protection will apply in Indian territory). After EPA approved Maine's Water Classification Program (including Maine's designated use of "fishing" for all surface waters), EPA again stated its view that Maine has statewide environmental regulatory jurisdiction in a July 1993 EPA legal memorandum, which expressly limited Maine tribal rights under the CWA's new 1987 tribal provisions (Section 518) to receipt of CWA Section 106 funding grants – specifically because of the unique provisions of the 1980 Acts Maine giving statewide environmental regulatory jurisdiction over core environmental matters such as air and water quality. (*See* Ex. 5, which is incorporated herein by reference).

Until EPA's February 2, 2015 Action, EPA had never taken the position that Maine's longstanding designated use of "fishing" also encompassed an unwritten second designated use of "sustenance fishing" for the protection of anyone, let alone Maine's Indian tribes, in all (undefined) Indian waters. Likewise, until EPA's February 2, 2015 Action, EPA had never taken the position that any portion of MIA (including 30 M.R.S. § 6207(4)) was intended as or constituted a designated use of "sustenance fishing" for the reservation waters of the Southern Tribes (or any other waters). These recent EPA positions (*see* 81 Fed. Reg. at 23241-42) are contrary to the 1980 Acts, the CWA, EPA's guidance, and EPA's historical practice with respect to Maine's WQS.

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As EPA knows, for CWA purposes there has never been any State-adopted designated use of "sustenance fishing" for any Maine waters. (*See* Ex. 1, Second Amended Complaint, ¶¶ 68-77). As EPA also knows, Maine expressly considered but rejected a controversial 2002 State proposal to the Maine Legislature that would have created for the first time a designated use of "subsistence" fishing, which was analogous to EPA's newly created designated use of "sustenance fishing," but for only a limited portion of the Penobscot River as opposed to all of Maine's Indian waters. (*See* Ex. 6, which is incorporated herein by reference). Maine is aware of no other Maine effort to adopt any designated use of "sustenance" or "subsistence" fishing for any Maine waters. Moreover, as mentioned above, EPA already fully approved all aspects of Maine's Water Classification Program, including Maine's designated uses of "fishing" for all surface waters of the State, without any exception for any Maine Indian waters. Under EPA's rules, 40 C.F.R. §§ 131.21(c)-(e), these WQS, which purport to apply to all Maine waters and which were adopted by Maine and submitted to EPA for review and approval prior to May 30, 2000, have been and ***are*** the WQS in effect for CWA purposes for all Maine surface waters, including all of Maine's Indian waters.[3]

EPA's new interpretations of Maine's existing designated use of "fishing" and MIA's Section 6207(4) as incorporating a new designated use of tribal "sustenance fishing" for Maine Indian waters represent federal actions taken entirely by EPA and do not reflect any State-adopted designated use. By these new interpretations of existing Maine law, EPA has attempted to federalize Maine's WQS and create a new federal designated use in violation of both the

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[3] As of these comments, and as discussed below, EPA has never determined that Maine's existing designated uses of "fishing" for all surface waters do not meet the requirements of the CWA, which means that EPA has never lawfully promulgated any more stringent designated uses. As a consequence, Maine's designated use of "fishing" is and has been the applicable fishing use since EPA's approval of Maine's program in the 1980s. 40 C.F.R. §§ 131.21(c)-(e).

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CWA and the 1980 Acts. In the course of creating its new federal designated use of tribal "sustenance fishing," EPA also did not adhere to any of the CWA process required for new WQS, such as seeking public comment and/or holding public hearings on the new designated use. *See, e.g.* 40 C.F.R. §§ 131.21(c)-(e) (state WQS adopted and submitted to EPA prior to May 30, 2000 *are* the applicable WQS for CWA purposes until replaced by more stringent federal WQS), 131.22(c) (when promulgating WQS, EPA Administrator is subject to same process requirements as states); 40 C.F.R. §§ 131.10(e) (requiring states to provide notice and opportunity for hearing "[p]rior to adding or removing any use") (removed and reserved eff. October 20, 2015, 80 Fed. Reg. 51020, 51021-22).

4. EPA also lacks authority under the CWA to create any new kind of fishing designated use because there has never been any EPA determination that Maine's existing designated use of "fishing" for all surface waters does not meet CWA requirements.

The February 2, 2015 Action and EPA's new interpretations of Maine law creating a new designated use of "sustenance fishing," were by the EPA Region 1 Regional Administrator, who has no authority under the CWA to replace Maine's existing statewide designated use of "fishing" with a new designated use of "sustenance fishing" for any Maine Indian waters. This was something that only the EPA Administrator could have done – if she had first made a formal determination that Maine's prior adoption of a designated use of "fishing" violated the requirements of the CWA for such waters.[4] To date, no such formal determination has ever been

[4] If the EPA Administrator (rather than any Regional Administrator) determines that existing State WQS do not meet CWA requirements, or that a revised or new WQS is necessary to meet CWA requirements, then the EPA Administrator may, upon determining such a WQS is necessary, prepare and publish proposed regulations setting forth the revised or new WQS. 33 U.S.C. § 1313(c)(4)(B); 40 C.F.R. § 131.22(a)-(b); *Puget Soundkeeper Alliance v. EPA*, 2014 WL 4674393, *5 (W.D. Wash., 2014).

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made by anyone at EPA, let alone the EPA Administrator.[5] This is presumably because it is something that EPA could not do under the CWA, as Maine's designated use of "fishing" for all surface waters, which is designed to protect Maine's general population rather than a more focused population, meets all CWA requirements and is in full keeping with EPA regulations and guidance. In any event, and as discussed above, such a determination would also violate the 1980 Acts and their prohibition against any special or heightened environmental regulatory treatment based solely on membership in a Maine tribe. 25 U.S.C. §§ 1725(h), 1735(b).

The February 2, 2015 Action and the Proposed Maine Rule try to get around this deficiency (the lack of any EPA determination that Maine's existing statewide designated use of "fishing" violated CWA requirements) by claiming that no WQS (including designate uses) had ever been approved for Maine's Indian waters, so (in EPA's view) no such determination was ever necessary and EPA was free to simply make up its own new designated use of tribal "sustenance fishing." This revisionist approach defies historical reality, as EPA not only already fully approved all aspects of Maine's Water Classification Program for all Maine waters in the 1980s, but then also consistently enforced Maine's WQS in Indian waters in a variety of ways – as was required under the CWA. (*See* Ex. 1, Second Amended Complaint, ¶¶ 93-103). EPA's position also violates the CWA's requirement that States promulgate WQS for all interstate waters, and EPA's own rules and guidance. 33 U.S.C. §§ 1313(c)(1), (2); 40 C.F.R. § 131.3(i),

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[5] The necessity determination made by the EPA Administrator in the Proposed Maine Rule involves the sufficiency of Maine's human health criteria ("HHC") for undefined Indian waters only, and presumes the existence of EPA's newly-created designated use of tribal "sustenance fishing." 81 Fed. Reg. at 23242-43 ("for the waters in Maine where there is a sustenance fishing designated use and Maine's existing HHC are in effect, EPA hereby determines... that new or revised WQS for the protection of human health are necessary to meet the requirements of the CWA for such waters."). There has never been any EPA determination that Maine's existing "fishing" designated use does not meet CWA requirements for any waters, or that a new designated use of tribal "sustenance fishing" is required to meet CWA requirements for Indian (or any other) waters.

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131.4; *PUD No. 1 of Jefferson Co. v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994); 40 C.F.R. §§ 131.21(c)-(e).[6] It is also an absurd position, as it would result in a decades-long regulatory void based on a lack of any WQS and resulting CWA protections for all of Maine's Indian waters, which would violate the CWA and the 1980 Acts. But this is exactly what EPA claims here – that there have never been any WQS (including designated uses) for any Maine Indian waters, and that all EPA permits, enforcement measures, and other actions taken to date with respect to water quality in Maine's Indian waters were mistakes and of no effect.

5. Maine has never chosen to protect Maine tribal members only as the "general target population" of any "fishing" or other designated use for any Maine waters.

As noted above, EPA purports to have already created (as a result of its new interpretations in its February 2, 2015 Action) a new designated use of tribal "sustenance fishing" for Maine (81 Fed. Reg. at 23242-43), which EPA designed to protect a tribal-only "general target population" that Maine itself never chose to provide with heightened protections. *Id.* at 23245 ("EPA's analysis of the settlement acts also led EPA to consider the tribes to be the general target population in their waters."); (*see also* Ex. 1, Second Amended Complaint, ¶ 86).

EPA's decision to focus on protecting Maine's tribes as the intended "general target population" is a new EPA approach that unlawfully usurps Maine's primary role over its water under the CWA, as states have the primary authority and responsibility to establish WQS, including designated uses for all interstate waters. In its EPA-approved Water Classification

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[6] As EPA acknowledged in July 1983 (in a tribal discussion paper), the environmental laws that EPA administers (such as the CWA) apply to all lands within the U.S. including Indian lands, as general statutes apply to all persons including Indians. *See Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116-18 (1960). Thus, EPA understood in the 1980s that Maine was historically required to, and did, promulgate and obtain EPA-approval for its WQS (including its designated uses) under the CWA for all Maine waters, including tribal waters. This was consistent with EPA's WQS guidance issued in 1972, 1983, and 1988, each of which state that WQS are required for all waters within the U.S.

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System, Maine deliberately chose to protect Maine's entire general population only with respect to its designated use of "fishing" for all of Maine's surface waters. Under EPA's regulations, Maine's "fishing" use has been the Maine WQS/designated use in effect for CWA purposes since its adoption by Maine and submission to EPA. 40 C.F.R. §§ 131.21(c)-(e). With respect to fishing, and in keeping with EPA's guidance, Maine made a risk management decision not to protect more specific population groups such as Maine's tribes as the "general target population" of any more focused use, such as EPA's new "sustenance fishing" use. (*See* EPA's Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000), EPA-822-B-00-004 (October 2000), §§ 2.1 (identifying the population to protect; "criteria could be set to protect those individuals who have average or "typical" exposures. . ."), 4.3.3.1 ("If a State or authorized Tribe has not identified a separate well-defined population of high-end consumers and believes that the national data . . . are representative, they may choose these recommended rates. . ."); *see also* Ex. 1, Second Amended Complaint, ¶¶ 78-87).

In addition, and as noted above, in 2002 the Maine Legislature expressly considered and rejected a controversial proposal to establish this kind of a "subsistence" fishing designated use, which – if adopted by Maine – would have protected defined subsistence fishers as a "target" population for a limited stretch of the Penobscot River only. (*See* Ex. 6). This is something that Maine could have done voluntarily outside of the context of the 1980 Acts, but that EPA could not (and cannot) force Maine to do as a matter of federal law, as such action would violate both the 1980 Acts and Maine's State role under the CWA.

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6. To protect its new designated use of "sustenance fishing," EPA unlawfully relies on aspirational tribal fish consumption data based on historical estimates in an EPA-funded tribal study instead of Maine's already EPA-approved actual local data.

Even assuming that Maine had itself chosen to adopt a designated use of "sustenance fishing" in order to protect tribal members only instead of Maine's general population, which Maine purposely did not do, EPA unlawfully relies on vague historical anthropological estimates in an EPA-funded tribal study (the Wabanaki Cultural Lifeways Scenario ("Wabanaki Study")) in support of EPA's new elevated fish consumption rate ("FCR") that it claims is required when developing HHC in Indian waters in order to protect EPA's new designated use. 81 Fed. Reg. at 23245-46. EPA's reliance on this aspirational Wabanaki Study over Maine's actual local consumption data from 1990 violates the 1980 Acts, the CWA, and EPA's own guidance, and does not factually support EPA's new elevated tribal FCR.

According to EPA, the Wabanaki Study was EPA-funded and conducted by the Aroostook Band of Micmacs on behalf of all Maine Indian tribes pursuant to a grant awarded by EPA (81 Fed. Reg. at 23246), all of which occurred without the knowledge or involvement of Maine's Department of Environmental Protection ("DEP"). Maine, which has the primary authority and responsibility under the CWA to establish WQS for all Maine waters, including designated uses and HHC to protect its chosen uses, was never provided with a copy of or informed about the 2009 Wabanaki Study, even though the study was designed to support EPA's review and/or development of tribal-based WQS in Maine based on elevated tribal FCRs. 81 Fed. Reg. at 23246. In fact, Maine DEP first learned of the Wabanaki Study in connection with EPA's issuance of its February 2, 2015 Action. This secretive EPA approach is in full keeping with EPA's practice in recent years of consulting with Maine's Indian tribes only behind closed

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doors regarding the development of WQS for Maine's Indian waters. (*See* Ex. 1, Second Amended Complaint, ¶¶ 110-125).

The Wabanaki Study relied upon by EPA in the Proposed Maine Rule is also irrelevant because it is based on historical evidence from the 16th through 19th centuries and has no bearing on actual tribal FCRs, either current tribal FCRs or those at the time the 1980 Acts were enacted. Thus, even if the 1980 Acts contemplated a separate designated use of tribal "sustenance fishing," which they do not, any consumption levels that such a use could arguably protect would be those existing at the time of the 1980 Acts – not levels based on estimates from as early as the 16th century. There is also nothing in the CWA that supports EPA's abandonment of sound science in favor of historical anthropological estimates as support for present day FCRs.

EPA also states that it "consulted with the tribes in Maine about the Wabanaki Study and their sustenance fishing uses of the waters in Indian lands" (81 Fed. Reg. at 23246), but cites nothing in the Proposed Maine Rule resulting from these private consultations that would support any actual elevated tribal FCRs. Without citing any evidence, EPA also states that the Wabanaki Study reflects a former tribal lifestyle in Maine that "some tribal members practice today." 81 Fed. Reg. at 23246. EPA also cites no evidence, and Maine is aware of none, of any actual present day (or even 1980 era) FCRs for any Maine tribal population at the levels in the aspirational Wabanaki Study or in EPA's Proposed Maine Rule.

If anything, the Wabanaki Study shows that EPA's proposed elevated tribal FCR does ***not*** reflect any actual current (or 1980) tribal consumption patterns. *See* 81 Fed. Reg. at 23246 ("There has been no contemporary local survey of current fish consumption, adjusted to account for suppression, that documents fish consumption rates for sustenance fishing in the waters in Indian lands in Maine."); *see also id.* at 23246-47 (acknowledging "uncertainties associated with

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a lack of knowledge about tribal exposure in Maine Indian waters," that "contemporaneous populations of anadromous species in Penobscot waters are too low to be harvested in significant quantities," and that the "Wabanaki Study presented estimates" of historical consumption only and "not the amount consumed"). In these respects, EPA's Proposed Maine Rule is unsupported by EPA's own primary evidence.

In addition, EPA's assertion that the Wabanaki Study represents the "best currently available information" (81 Fed. Reg. at 23246) to establish FCRs for Maine Indian waters is wrong. As EPA acknowledged in the February 2, 2015 Action (Attachment A at pp. 37-38), Maine previously relied on actual 1990 local consumption data (in the form of EPA-preferred method of statewide surveys) to support its highly protective statewide FCR, which was based on sound science and approved by EPA. (*See* Ex. 1, Second Amended Complaint, ¶¶ 87-92). As EPA noted in its February 2, 2015 Action (Attachment A at p. 38), 11% of the participants in that 1990 EPA-approved, local statewide survey were Native Americans. EPA's only new concern with this data, as outlined in the February 2, 2015 Action, is that it does not reflect "unsuppressed sustenance fish consumption in tribal waters" – new EPA requirements that have no legal basis under the CWA and are unlawful under the 1980 Acts.

7. To protect its new designated use of "sustenance fishing" in Maine, EPA unlawfully adds a new tribal requirement that any FCR used to develop HHC must be "unsuppressed" by tribal pollution concerns.

In its Proposed Maine Rule, EPA proposes a significantly elevated tribal FCR (286 grams/day as compared to Maine's already EPA-approved and highly protective statewide FCR of 32.4 grams/day for the general population), which EPA, without any evidence or legal support, claims is required for purposes of its new designated use and "represents present day sustenance-level fish consumption, unsuppressed by pollution concerns." 81 Fed. Reg. at 23245-

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47. Thus, EPA's Proposed Maine Rule and its underlying February 2, 2015 Action reflect a new EPA requirement (formerly a mere preference at most), that FCRs used to derive HHC for Indian waters reflect tribal FCRs "unsuppressed by pollutant concerns." 81 Fed. Reg. at 23244-45.

Maine is aware of nothing in either the CWA or any EPA regulation under the CWA that authorizes or provides legal support for EPA's new requirement of the use of tribal FCRs "unsuppressed by pollutant concerns." Indeed, EPA cites no such CWA or regulatory authority in support of its new requirement, but instead relies on its assertion of its "scientific and policy judgment" that EPA alleges was "necessary and appropriate" to protect EPA's own newly created designated use of tribal "sustenance fishing." 81 Fed. Reg. at 23245. EPA's only cited authority for its new requirement of "unsuppressed" tribal FCRs is an informal EPA January 2013 "Frequently Asked Questions" document concerning HHC and FCRs generally, which, according to EPA, "generally recommends" the use of FCRs unsuppressed by concerns over the safety or availability of fish, *id.* at 23244 & n. 17, and which was itself never the subject of any public input or comment process.[7] In fact, EPA has never engaged in ***any*** public hearings, comment, or other process with respect to its new tribal policy of forcing States to use "unsuppressed" tribal FCRs. (*See* Ex. 7, which is incorporated herein by reference, at ¶¶ 15-

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[7] EPA's January 18, 2013 FAQ document also contains an express disclaimer that it does not "impose legally binding requirements on [EPA], states, tribes, or the regulated community..." The FAQs also undercut EPA's position by reaffirming EPA's prior guidance allowing States to lawfully choose a cancer risk level of 1 in 100,000 for the general population, and limiting the risk to 1 in 10,000 "for any sensitive sub-population (such as those who may consume a great deal more fish because of a subsistence lifestyle)." Because FCRs and cancer risk levels are relative, these EPA-approved State options, when combined with Maine's general FCR of 32.4 grams/day at Maine's conservative risk level of 1 in 1,000,000, equate to FCRs of 324 grams/day (at a risk level of 1 in 100,000) and 3240 grams/day (at a risk level of 1 in 10,000) – FCRs that greatly exceed the new FCR required by EPA in its Proposed Maine Rule (286 grams/day). In this way, Maine's existing HHC are scientifically defensible, adhere to EPA guidance, and far exceed EPA's requirements for the protection of both Maine's general population and Maine's sensitive subsistence fishers. (*See* Ex. 1, Second Amended Complaint, ¶¶ 78-92).

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17).[8] EPA's unilateral creation of this new requirement, which affords members of Maine's tribes greater rights than the rest of Maine's population, also violates the 1980 Acts and their principle of equal environmental regulatory treatment for all Maine citizens.

As far as Maine is aware, EPA's February 2, 2015 Action and its Proposed Maine Rule also represent the first instances where EPA has affirmatively required "unsuppressed" tribal FCRs anywhere in the nation. (*Id.*). A partial transcript of EPA staff testimony in December 2015 before the Idaho Board of Environmental Quality (and submitted in an EPA headquarters' proceeding for the State of Washington) shows that EPA's focus on unsuppressed FCRs is a recent effort directed by EPA's national headquarters. (*See* Ex. 8, which is incorporated herein by reference). This requirement of unsuppressed FCRs, to the extent it is being applied here in Maine, also appears to have been developed in consultation with Maine's tribes without the involvement of Maine. 81 Fed. Reg. at 23247 (noting EPA's approach was "consistent with the Penobscot Nation's approach to deriving a current, unsuppressed FCR to protect sustenance fishing").

Even assuming that there is a lawful requirement that Maine use a FCR "unsuppressed by tribal pollutant concerns" when developing HHC for Maine's Indian waters, which there is not, EPA cites no surveys or other evidence (and Maine is not aware of any) detailing any actual suppression effects based on any pollution concerns by any Maine tribal populations. *See* 81 Fed. Reg. at 23246. Neither the Proposed Maine Rule nor the Wabanaki Study reference any such surveys or evidence. The Wabanaki Study relied on by EPA focuses instead on historical

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[8] As with Ex. 1, Maine requests that EPA consider as part of these proceedings and include in EPA's administrative record all exhibits to Maine's Ex. 7 (Joint Stipulations). Because EPA already has these exhibits as a result of the Pending Action, they are not being resubmitted here absent an express EPA request.

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FCR estimates from the 16th through 19th centuries, and does not establish or support any present day tribal FCRs, let alone document any actual suppressive effects on such FCRs based on pollution concerns. Indeed, other factors such as historical loss of habitat and/or other reductions in fish populations are equally (if not more) likely to explain the absence of any present day FCRs at the elevated levels in the aspirational Wabanaki Study and in the Proposed Maine Rule.[9]

8. The scope of the Maine waters subject to EPA's newly created designated use of "sustenance fishing" is overly broad, vague and indefinite, and unlawful.

The waters contemplated by EPA's February 2, 2015 Action underlying the Proposed Maine Rule are themselves vague, indefinite, and unsupported, because the February 2, 2015 Action does not define EPA's concept of "Indian waters" or the scope of that prior action. Instead, the February 2, 2015 Action (at Section 1.4.1, pp. 6-7) vaguely incorporates "waters adjacent to land held in trust" for tribes by the federal government, disputed reservations, and additional common law rights with uncertain application to Maine tribes, yet still acknowledges "remaining uncertainties" in areas such as the Penobscot and St. Croix rivers.

At the outset, the scope of EPA's vague and indefinite concept of "Indian waters" at issue in the February 2, 2015 Action (underlying the Proposed Maine Rule) is overly broad, contrary to the CWA and EPA's tribal WQS regulations, and unlawful, as the scope of those waters impermissibly encompasses indefinite waters adjacent to trust lands in addition to reservation waters. This is significantly broader than the limits of any WQS program that any authorized tribe could lawfully establish under the CWA's tribal TAS provisions and related regulations, which confine such tribal WQS programs to water resources within tribal reservation borders.

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[9] For purposes of setting its tribal FCR in the Proposed Maine Rule, EPA also simply assumes, without any evidence, that the insufficiency of anadromous fish (*i.e.* fish that is "now less available") shifted tribal diets towards inland non-anadromous species. *See* 81 Fed. Reg. at 23247. This is yet another unsupported aspect of EPA's Proposed Maine Rule.

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See 40 C.F.R. § 131.8(a)(3); *see also Wisconsin v. EPA*, 266 F.3d 741, 746 (7th Cir. 2001). In this respect, EPA is unlawfully attempting to expand tribal influence over water quality regulation beyond what is contemplated by or permissible under the CWA and EPA's own regulations.

The Proposed Maine Rule does not clarify or limit the scope of the waters affected by the rule or EPA's new designated use of "sustenance fishing," which remains overly broad, vague and indefinite, and unlawful. Although EPA provides some additional information regarding the scope of waters at issue in the Proposed Maine Rule (*see* Section II(C), 81 Fed. Reg. at 23242-43 and n.8-9, and the new EPA supporting Technical Support Document, both entitled "Scope of Waters"), the same underlying problems regarding the scope of affected waters persist, and new uncertainties are raised. For instance, the Proposed Maine Rule vaguely states that it will apply to "[a]ny waters in Indian lands in Maine for which a court in the future determines that EPA's 2015 disapprovals of HHC for such waters were unauthorized and that Maine's existing HHC are in effect." *Id.* at 23243. In addition to undercutting the lawfulness of EPA's underlying February 2, 2015 Action as well as EPA's authority to disapprove Maine's HHC in that action, this statement also serves as proof of the inherently vague and indefinite nature of the Proposed Maine Rule.

The Proposed Maine Rule also states that the rule and EPA's new designated use of "sustenance fishing" are intended to open-endedly apply to protect the Southern Tribes ***wherever*** they ultimately have a limited right to take fish pursuant to MIA's Section 6207(4), which has yet to be finally determined. *Id.* at 23243, n.9.[10] Thus, the scope and intended effect of EPA's

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[10] EPA's technical "Scope of Waters" document (at pp. 2, 4-5) also acknowledges that portions of its Proposed Maine Rule may apply outside of Indian lands based on the holding in *PIN v. Mills*, No. 1:12-cv-254-GZS, 2015 U.S. Dist. LEXIS 169342 (D. Me. Dec. 16, 2015) regarding the geographic scope of

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Proposed Maine Rule are knowingly based on multiple uncertainties, which hinge on the resolution by federal courts of the Pending Action (addressing Maine's challenge to the February 2, 2015 Action, currently pending in the United States District Court for the District of Maine), *PIN v. Mills* (addressing disputes over the ownership of portions of the Penobscot River and the limited right to take fish in MIA Section 6207, currently on appeal to the First Circuit Court of Appeals), and possibly other actions.

EPA's supporting "Scope of Waters" technical document adds further uncertainty to the application of the Proposed Maine Rule and EPA's new designated use of "sustenance fishing." For instance, this document asserts (at p. 3) that the Proposed Maine Rule and the new designated use of "sustenance fishing" may apply to the "thread" (*i.e.*, generally the middle) of waters adjacent to tribal trust lands, which creates uncertainty based on the potential existence of multiple different designated uses in a single body of water, separated by an invisible line in the water representing the water's "thread." As noted above, the application of any EPA rule to waters adjacent to tribal trust lands would also be impermissibly broad, as no tribal WQS program could lawfully have such an extended reach under the CWA's tribal TAS provisions and related regulations.

The "Scope of Waters" document further suggests (at p. 3) that the waters subject to EPA's Proposed Maine Rule and its new designated use of "sustenance fishing" may also be enlarged in the future through the acquisition of additional trust lands on behalf of any Maine tribe.

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the limited right to take fish in MIA's Section 6207(4), and that the extent of the application of its new designated use of "sustenance fishing" is currently unknown.

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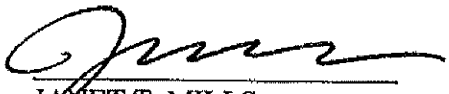
The "Scope of Waters" document also announces (at pp. 3-4) that EPA will adhere to its own expansive interpretation of the District of Maine's decision in *PIN v. Mills*, No. 1:12-cv-254-GZS, 2015 U.S. Dist. LEXIS 169342 (D. Me. Dec. 16, 2015). This EPA interpretation, which is contrary to the actual District Court holding and disputed by Maine, creates additional uncertainty by suggesting that EPA believes that there may be additional tribal rights in waters around the outside of the PIN reservation based on "common law riparian rights in the river."

Finally, the "Scope of Waters" document suggests (at pp. 4-5) that EPA believes that there may be similar additional tribal rights in waters in and around the reservation of the Passamaquoddy Tribe in the St. Croix River, which EPA suggests would also be subject to the Proposed Maine Rule and the new EPA designated use of "sustenance fishing." Such rights in that waterbody have never been established by law and would likely be vigorously contested by both Canadian and U.S. parties, were they to be asserted

For all of these reasons, the scope of EPA's Proposed Maine Rule is overly broad, vague and indefinite, and unlawful.

Dated: June 14, 2016

JANET T. MILLS
ATTORNEY GENERAL



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Docket ID. No. EPA-HQ-OW-2015-0804

COMMENTS OF MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION COMMISSIONER PAUL MERCER ON THE EPA PROPOSED WATER QUALITY STANDARDS FOR MAINE

June 20, 2016

On April 20, 2016, EPA published proposed water quality standards ("WQS") for the State of Maine. 81 Fed. Reg. 23239 (April 20, 2016). These comments are submitted in response to those proposed standards. Overall, EPA's proposed WQS, especially to the extent that they are unique to unspecified tribal waters in the proposed Maine rule, are unnecessary and should be withdrawn. Maine presently maintains highly protective WQS statewide, which were approved by EPA over the past approximately thirty years. The following comments highlight the adverse impact EPA's proposed rule will have on the regulatory environment in Maine and the licensing process managed by the Maine Department of Environmental Protection ("Department"), as well as the lack of benefit to Maine's environment and to the protection of human health that would result from EPA's proposed new WQS.

Comments from Janet Mills, Maine Attorney General

EPA claims authority to act pursuant to Section 303(c) of the Clean Water Act ("CWA"); 33 U.S.C. § 1313, and 40 C.F.R. §§ 131.5, 131.6, 13.11 and 131.21. EPA identified its February 2, 2015 disapprovals of Maine's WQS and its proposed federal WQS in the proposed rule as being "necessary" to meet CWA requirements, most notably by claiming that existing Maine WQS (Maine's human health criteria, or "HHC") are insufficient to protect designated uses,

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including EPA's own, newly-created designated use of "sustenance fishing." 81 Fed. Reg. 23241-23247. The Department disputes EPA's underlying determination of necessity because, among other things, EPA wrongfully relies upon and presumes the lawful establishment of a new designated use of "sustenance fishing" for unspecified tribal waters, which is a use that was never adopted by Maine. This and other legal concerns with EPA's proposed Maine rule are more fully addressed by the comments filed by Maine Attorney General Janet Mills on June 14, 2016, which are incorporated into these comments in their entirety by reference. In addition to the points raised by Attorney General Mills, the Department further comments as follows:

Tribal Waters

Beyond the points raised by Attorney General Mills regarding this issue, the Department has serious concerns about the impact of the overly broad, vague and indefinite language used to define EPA's concepts of "Indian waters" and "waters where the Southern tribes have a right to sustenance fish" on the regulatory and licensing process. Without clear definitions of such waters, it is impossible for the Department's permit writers to develop permit limits that are reflective of applicable standards, make many important permitting decisions, or even identify which facilities may be affected by EPA's proposed rule.

In addition, absent a clear definition of all Maine waters covered by the proposed rule, it would appear impossible for EPA (or anyone else) to perform an accurate or meaningful economic impact analysis. Without knowing exactly which facilities will be affected by the proposed rule, the Department (and presumably EPA) cannot measure or even estimate the economic impact or cost to Maine's communities and businesses that may need to upgrade systems or engage in other capital expenditures to meet EPA's new WQS. Indeed, it is unclear

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the extent or whether the EPA factored in these possible costs to point source dischargers in its estimates. Additionally, for non-point discharges, EPA itself stated that it "did not fully evaluate the potential for costs to nonpoint discharges..." 81 Fed. Reg. 23259.

Fish Consumption Rates (FCR) and Excess Cancer Risk Factor

Beyond the points raised by Attorney General Mills regarding these issues, the Department urges EPA not to consider any values from the anecdotal Wabanaki Cultural Lifeways Exposure Scenario ("Wabanaki Report") to develop FCR. 81 Fed. Reg. 23245-47. While the Wabanaki Report holds some anthropological value, extending its reach to regulatory standards is inappropriate. The Wabanaki Report is entirely subjective and aspirational, and is based on outdated historical estimates rather than on any actual consumption data for the population that EPA seeks to protect with its new designated use of "sustenance fishing." 81 Fed. Reg. 23246. The Wabanaki Report is certainly not the best available evidence for Maine FCR purposes, especially in light of the existence of the 1990 study based on actual local consumption data that was used to develop Maine's current statewide FCR of 32.4 grams/day at a 10^{-6} cancer risk level. In the Department's view, the Wabanaki Report is not even competent evidence, and is simply not the kind of reliable evidence that the Department would consider when establishing enforceable permit limits. It should not be used as support for EPA's newly proposed tribal FCR of 286 grams/day, or for any other purpose.

Even so, in light of the acceptable range of protections outlined in EPA's 2000 Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health ("2000 Guidance"), EPA's proposed HHC based on its new FCR of 286 grams/day are simply

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not required in order to achieve an acceptable level of protection (*i.e.*, to meet the requirements of the CWA) because Maine's existing statewide FCR of 32.4 grams/day at a 10^{-6} cancer risk level already achieves what EPA considers to be an acceptable level of protection. For instance, if an individual consumed 10 times the amount of fish contemplated by Maine's current FCR (or 324 grams/day), he or she would still be protected to an EPA-acceptable risk level of 10^{-5}. Similarly, if an individual consumed 100 times Maine's current FCR (3240 grams/day, *or over 7 pounds of fish per day*), he or she would still be protected to at least a 10^{-4} risk level, which, under EPA's 2000 Guidance, is also acceptable and adequately protective of sport and subsistence fishers. The Department is unaware of any evidence suggesting actual consumption anywhere near these levels, and doubts that it exists. But even assuming the existence of such consumption levels, Maine's existing FCR of 32.4 grams/day at a 10^{-6} cancer risk level is still adequately protective of all Maine-promulgated designated uses based upon the acceptable range of protections set forth in EPA's own 2000 Guidance, and there is no necessity for any higher FCR in order to meet the requirements of the CWA. Any determination of EPA necessity here is thus based purely on EPA's own, more recent risk preferences, and not on any requirements of EPA's 2000 Guidance or the CWA.

EPA's attempt to force Maine to protect tribes using an elevated 286 grams/day FCR at a 10^{-6} cancer risk level also may not result in any statistically relevant levels of protection. EPA's 2000 Guidance is structured to account for a broad range of consumption rates (90th to 99th percentile). A recent white paper by ARCADIS (Summary of Health Risk Assessment Decisions in Environmental Regulations, March 6, 2015), notes that the impact of the conservative approach of EPA's 2000 Guidance results in significantly higher levels of protection from the development of one excess cancer due to exposure to chemicals in the environment. Under

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principles of compound conservatism, protection to the 95th percentile based on exposure, and amount of fish consumed, and total number of years consuming, protects significantly more than the 95th percentile for each of those variables individually. In their example, protecting to the 95th percentile (or 9,500 out of 10,000, which is equivalent to 10^{-4} risk level) actually protects to the 99.78th percentile when considering the combined impact of each assumption in EPA's 2000 Guidance. Factoring in these same assumptions to Maine's WQS clearly results in protection for more highly exposed subgroups not exceeding the 10^{-4} level. The ARCADIS paper shows that the proposed EPA standards protect well beyond that required by EPA's 2000 Guidance, and that Maine's WQS, especially combined with principles of compound conservatism are well within the acceptable range of protection for exposed subgroups authorized by EPA's 2000 Guidance.

pH

EPA proposes a new range of pH criterion for Maine's Indian waters only. 81 Fed. Reg. 23255. The Department maintains that the original pH standard of 6.0 to 8.5 was already approved by the EPA and is the valid standard for discharges in Maine statewide. This standard is fully protective of aquatic life and protects recreation in and on the water; 99% of the river and stream miles in Maine are at Class B or higher with 95% meeting standards, including biological structure and function. Almost all of the non-attainment is due to either nutrients or an aspect of run-off (metals, chlorides, bacteria, etc.). Regardless, the pH range is the measure of stringency, not the actual values. EPA's range of 6.5-9.0 is just as protective as the former pH standard. The Department's biologists believe that a range of 6.0 to 8.5 provides better Maine habitat than does the range of 6.5 to 9.0, noting that several functioning Maine streams naturally fall below the 6.0 lower threshold. Additionally, the Department has measured pH below 6.5 where, based on the

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Department's monitoring, waters are considered to be attaining Maine's aquatic life criteria. The Department believes that a pH of 9.0, however, approaches levels toxic to Maine fish and other aquatic life. Therefore, the Department would like to maintain the current pH range of 6.0-8.5 for the health of the Maine's streams and rivers.

Bacteria

EPA proposes new recreational bacteria criteria for Maine's Indian waters in part because Maine's existing criteria do not apply to naturally occurring (*i.e.*, wildlife) fecal sources. 81 Fed. Reg. 23254. Under the CWA, States such as Maine have the primary responsibility of preventing, reducing, and eliminating "pollution," 33 U.S.C § 1251(b), which is defined by the CWA as "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C § 1362(19). Thus, the CWA regulates human pollution, and not wildlife, and EPA's proposal of WQS designed to regulate "wildlife sources" of bacteria in Maine's Indian waters is beyond the scope of the CWA.

The November 5, 1997 guidance cited by EPA states that, "(f)or human health uses, where the natural background concentration is documented, this new information should result in, at a minimum, a re-evaluation of the human health designation." "Establishing Site Specific Aquatic Life Criteria Equal to Natural Background." ("1997 Guidance"). The 1997 Guidance stands for possible reevaluation of uses based on known background concentrations not establishing criteria which necessitates regulation of naturally occurring bacteria, hence, the existing Maine rule excepts bacteria sources from wildlife. Bacteria from natural sources are likely to be temporal, therefore removing a use (recreation in and on the water) simply due to a

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high level E. coli an organism that is used as an indicator of human sewage, which does not include E. coli of natural origins is, at best, unwise. EPA's source, the 2012 Recreational Water Quality Criteria ("2012 RWQC"), is unconvincing regarding the expected impact of non-human sources of bacteria causing human health risks. EPA incorrectly construes "animal sources" of bacteria from studies as equivalent to naturally occurring "wildlife sources" used in the proposed rule. When directly linking human health concerns to "wildlife" sources, EPA's 2012 RWQC indicate, "sources of fecal contamination in these waters were not identified;" or wildlife, "could not be confirmed as the primary source of the zoonotic pathogens", or worse, "found a lack of a statistical association between swimmers' illness risk and FIB (fecal indicator bacteria) levels in a rural fresh waterbody impacted by animal fecal contamination; Calderon et al. (1991)." EPA only directly cited one study to link potential human health risks with non-human sources of fecal contamination. That study, from New Zealand, linked human health risks to agricultural sources (presumably cattle, not wildlife) and qualified that the relationship was "unlikely to hold in all waters" (2012 RWQC, section 3.5 1-2).

The Department also opposes the EPA's proposal to apply these criteria year round. States may adopt seasonal uses pursuant to 40 C.F.R. 131.10. The information cited by EPA as indicating potential recreational activities in or on the water after October 1 continued for only a few days after October 1, and are located several miles upstream of any point source discharge. Neither source cited by EPA offers these activities in October 2016. These activities are unaffected by seasonal chlorination of wastewater and we found no documentation of other recreational activity specific to the Penobscot River.

The proposed rule also utilizes total coliform bacteria and makes reference to using this indicator organism as it is consistent with the National Shellfish Sanitation Program (NSSP);

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however, the NSSP program allows states to use fecal coliform bacteria as an indicator also. E. coli is an indicator organism because it is easier to detect and quantify than pathogenic organisms of concern. Maine has written permits limiting fecal coliform bacteria (not total coliform) to 15/100 ml as a geometric mean and 50/100 ml as a daily maximum in marine waters for several years. They were written this way to be consistent with Maine Department of Marine Resources sampling program which uses fecal coliform bacteria as their indicator parameter when making opening/closure decisions. The NSSP establishes a geometric mean of 14/100 ml and not more than 10% of the samples shall exceed a most probable number (MPN) of 49/100 ml. It is much easier to write and determine compliance with a permit if the daily maximum limit is one numeric value that is not conditioned 10% of samples exceeding MPN. The Department suggests EPA continue to focus on organisms and standards that are currently regulated. Both are consistent with the NSSP and a more straightforward method for addressing bacteria in shellfish areas than EPA's approach.

Temperature

EPA proposes to limit the weekly average monthly rise in ambient temperature to 1.8°F during all seasons of the year provided the weekly average summer maximum of 64.4°F is not exceeded. The summer season is defined as May 15 – September 30. EPA's proposal is less stringent during the summer season (1.8°F vs 1.5°F) more stringent than the non-summer months (1.8°F vs 4.0°F) and more stringent as a daily maximum (64.4°F vs 85°F), compared to Maine's current temperature regulations.

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The above criteria must be compared to baseline thermal conditions. The baseline thermal conditions shall be measured or modeled from a site where there is no artificial thermal addition from any source and which is in reasonable proximity to the thermal discharge (within 5 miles) and has similar hydrography to that of the receiving waters at the discharge. This will be problematic given the issues with reference sites being representative the Department has encountered over the years in the aquaculture general permit. It also begs the question: what are the seasons (assuming four seasons with summer already defined as May 15 – September 30) and should a baseline be established for each season?

Timing

In the Department's view, EPA's haste to promulgate these standards is unwise given the degree of impact expected. The need for additional time is evident for all parties, including EPA, to adequately address the process. Impacted parties and other commenters have expressed interest in extending the deadline for comments so that the impact of the proposed standards can be more carefully considered. The Department has similar concerns about whether a sufficient degree of care was used by the EPA in promulgating these standards. For instance, in addition to deficiencies in economic impact analysis mentioned, the Department has noticed errors in the WQS, such as the listing of a non-priority pollutant, Bis(2-Chloro-1-Methylethyl) Ether, in EPA figures.

EPA developed and has now proposed WQS for Maine, citing their obligation under the CWA to do so if the State has not made sufficient progress towards rectifying the disapproved standards. EPA has been informed numerous times that there are several WQS that will require

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changes in statute. EPA has been informed numerous times that the next legislature will not convene until January 2017, therefore legislative changes will have to be tabled until that time.

In addition, in docket filings dated June 16, 2016, EPA denied requests by several commenters to extend the comment period in order to address the many important issues implicated by EPA's proposed Maine rule. In its denials of those requests, EPA stated: "Our primary concern with extending the comment period is that for many pollutants there are currently no criteria for Clean Water Act purposes, including most human health criteria for waters in Indian lands." This explanation of the apparent urgency surrounding the promulgation of EPA's proposed Maine WQS makes no sense because EPA's new approach in Maine is the cause of the regulatory void that EPA now scrambles to address. EPA's current position, which the Department disputes, is that prior to EPA's February 2, 2015 action, there had never been any WQS of any kind, including HHC, in effect and requiring attainment for any CWA purposes for any of EPA's unspecified Indian waters in Maine. If EPA had truly believed that such a gaping void in protection (and a clear violation of the CWA) had always existed due to the lack of any EPA-approved WQS for such waters, as EPA now claims (and the Department disputes), EPA has had decades to address the regulatory void, as Maine's WQS date back to the mid-1980s. If there is any sudden urgency now, it is entirely the result of EPA's changed position with respect to Maine underlying its February 2, 2015 disapprovals of Maine's WQS for Indian waters and its rushed promulgation of this proposed Maine rule. EPA has already failed to provide the public with any opportunity to comment on other critical aspects of its novel new approach to WQS in Maine – most notably with respect to EPA's creation of its new designated use of "sustenance fishing" and its new requirement that "unsuppressed" tribal FCRs be used to develop criteria to protect tribal rights. EPA should not further compound the problem by

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restricting the duration of the public comment period and rushing the process with respect to this proposed Maine rule.

Conclusion

In summation, the Department maintains that the WQS approved by EPA over the past thirty years are still valid and in force, and are fully protective of all existing, Maine-promulgated uses. These comments are provided to demonstrate the potential added for unnecessary complexity in permitting and compliance activities should these proposed standards be promulgated. For these reasons, EPA should withdraw these rules.

Dated: June 20, 2016

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UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

STATE OF MAINE, and AVERY DAY, in his capacity as Acting Commissioner of the Maine Department of Environmental Protection, Plaintiffs, v. GINA MCCARTHY, in her capacity as Administrator, United States Environmental Protection Agency, and H. CURTIS SPALDING, in his capacity as Regional Administrator of the United States Environmental Protection Agency (Region 1), Defendants.	Civil Action No: 1:14-cv-264-JDL

SECOND AMENDED COMPLAINT

Introduction

1. Plaintiffs State of Maine and Avery Day, Acting Commissioner of the Maine Department of Environmental Protection ("DEP") (collectively "Plaintiffs" or "Maine"), bring this action to challenge the lawfulness of certain disapprovals by Defendants (collectively "EPA") of Maine's surface water quality standards ("WQS") promulgated pursuant to the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* ("CWA") for unspecified waters that EPA claims may be within Indian territories and lands ("Indian Waters"). The challenged EPA disapprovals and rationale, which effectively establish different WQS for Maine's Indian tribes than for Maine's other citizens, are set forth in a letter sent by EPA's Region 1 to Maine dated February 2, 2015, and a 51-page "Attachment A" to that letter (collectively EPA's "February 2, 2015 letter," a copy of which is attached hereto as Exhibit 1).

2. Maine's environmental regulatory jurisdiction over all intrastate waters, including Indian Waters, has long been established by the Maine Implementing Act, 30 M.R.S. §§ 6201 *et seq.* ("MIA") and the federal Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721 *et seq.* ("MICSA") (collectively the "1980 Acts"), and was reaffirmed by the First Circuit Court of Appeals in *Maine v. Johnson,* 498 F.3d 37 (1st Cir. 2007).

3. Under the 1980 Acts, Maine's WQS, including Maine's designated uses of its intrastate waterbodies (set forth in Maine's established Water Classification Program, 38 M.R.S. §§ 464 *et seq.*) and Maine's water quality criteria designed to protect its designated uses, apply throughout Indian Waters to the same extent and in the same manner as those WQS apply to other Maine waters. (30 M.R.S. § 6204; 25 U.S.C. §§ 1725(a) & (b)(1), 1725(h), 1735(b)).

4. Similarly, under the 1980 Acts, members of Maine's Indian tribes have no special or greater status or rights with respect to water quality and are subject to Maine's WQS to the same extent and in the same manner as the rest of Maine's general population. (30 M.R.S. § 6204; 25 U.S.C. §§ 1725(a) & (b)(1), 1725(h), 1735(b)).

5. In 2004, however, EPA began limiting its approvals of Maine's WQS to non-Indian Waters only, while taking no action on Maine's WQS for Indian Waters, in contravention of the CWA, the 1980 Acts, and *Maine v. Johnson,* 498 F.3d 37 (1st Cir. 2007). As a consequence, and with no other remaining extra-judicial options, Maine resorted to filing this action in 2014, which originally sought to force EPA to honor Maine's statewide environmental regulatory jurisdiction to set WQS for all intrastate waters, including Indian Waters, and to act on Maine's outstanding WQS for its Indian Waters.

6. In response, and while this action was pending, EPA issued its February 2, 2015 letter, which generally does two things: first, it belatedly but correctly determines that Maine has

statewide environmental regulatory authority under the 1980 Acts to set WQS for all Maine waters, including Indian Waters, consistent with *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007). (Exhibit 1, Attachment A, pp. 2, 7-10). However, EPA's February 2, 2015 letter then unlawfully disapproves certain Maine WQS (human health water quality criteria) for Indian Waters based on an intricate rationale, announced for the first time in the February 2, 2015 letter, that is built on a series of unlawful determinations that EPA employs to try to get around the 1980 Acts and *Maine v. Johnson* and reach an apparently pre-determined result – EPA's disapproval of Maine's human health criteria for Maine's Indian Waters only. (Exhibit 1, Attachment A, pp. 2-3, 10-44).

7. EPA's disapprovals of Maine's WQS for Indian Waters affords members of Maine's Indian tribes special rights and a status that is greater than the rest of Maine's general population in violation of the 1980 Acts, the CWA, and *Maine v. Johnson*.

8. EPA's February 2, 2015 letter also suggests that any separate WQS ultimately implemented for Maine's Indian Waters will have a regulatory reach beyond those Indian Waters into Maine' non-Indian Waters within the same watersheds, which irresponsibly disrupts settled regulatory expectations and creates uncertainty with respect to Maine's long-standing Water Classification Program. (Exhibit 1, Attachment A, p. 11).

9. The many unlawful aspects of EPA's February 2, 2015 letter that EPA relies on to ultimately disapprove Maine's human health criteria for Maine's Indian Waters include, without limitation, the following:

- EPA unlawfully asserts that, prior to February 2, 2015, no WQS were ever in effect for Maine's Indian Waters, even though EPA historically (*i.e.*, pre-2004) approved Maine's WQS without qualification as to their effect in Indian Waters, and has acted as if those WQS were in effect for Indian Waters (Exhibit 1, Attachment A, p. 14);
- EPA unlawfully asserts that its pre-2004 approvals of Maine's WQS did not extend to Indian Waters because EPA was required to make a formal threshold determination that Maine has environmental regulatory jurisdiction over its Indian Waters before

EPA could ever approve any Maine WQS for such Indian Waters (Exhibit 1, Attachment A, pp. 14-15);

- EPA unlawfully asserts that its historical recognition of and acquiescence to the application of Maine's WQS in Indian Waters was the result of individual mid-level EPA mistakes (Exhibit 1, Attachment A, p. 15);
- EPA unlawfully asserts that the purpose of MIA, MICSA, and each of Maine's other Indian Settlement Acts was to establish a land base from which Maine's Indian tribes could practice their unique cultures, including tribal sustenance living practices and fishing rights, free from Maine regulation (Exhibit 1, Attachment A, pp. 2, 17-28);
- EPA unlawfully asserts that Maine's WQS and the protection of Maine's existing designated uses of its waterbodies must be "harmonized" with EPA's flawed interpretation of the purpose of MIA, MICSA, and Maine's other Indian Settlement Acts (Exhibit 1, Attachment A, pp. 2, 28-30);
- EPA unlawfully interprets the narrow portions of MIA that permit members of Maine's Southern Tribes to take fish within their reservations (provided that such fish takings are for individual sustenance only) as more broadly constituting a designated use of tribal "sustenance fishing" for the Southern Tribes in their respective Indian Waters (Exhibit 1, Attachment A, pp. 2, 30-31);
- EPA unlawfully issues a new interpretation of Maine's longstanding designated use of "fishing," as used throughout Maine's Water Classification Program for all Maine waters, as instead meaning tribal "sustenance fishing" with respect to each of Maine's Indian tribes in their respective Indian Waters (Exhibit 1, Attachment A, pp. 2, 31-32);
- EPA unlawfully usurps Maine's role as a State under the CWA by establishing its own new WQS in Maine (*i.e.*, EPA's newly-created designated use of tribal "sustenance fishing") without any public input or other required process (Exhibit 1, Attachment A, pp. 2, 30-32);
- EPA unlawfully interprets its new designated use of tribal "sustenance fishing" as in turn requiring an implicit, bootstrapped right to heightened water quality in Indian Waters (and potentially beyond) in order to protect the use by ensuring a higher quality of fish for tribal-only sustenance purposes (Exhibit 1, Attachment A, pp. 2-3, 12, 20-21, 27-28);
- EPA unlawfully analyzes its new designated use of tribal "sustenance fishing" in the context of a tribal-only "target" population, as opposed to Maine's general population, for purposes of establishing water quality criteria to protect that new use (Exhibit 1, Attachment A, pp. 2-3, 35-36);
- EPA unlawfully interprets its new designated use of tribal "sustenance fishing" as requiring unsuppressed tribal fish consumption rates based on a new historical tribal fish consumption "scenario" that assumes fish free from any pollution and that was

itself never the subject of any public input process (Exhibit 1, Attachment A, pp. 3, 37-41); and

- EPA unlawfully disapproves Maine's human health water quality criteria for Indian Waters as being un-protective of EPA's new tribal "sustenance fishing" designated use (Exhibit 1, Attachment A, pp. 3, 41-43).

Jurisdiction and Venue

10. The Court has jurisdiction over this action pursuant to 5 U.S.C. §§ 701-706, 28 U.S.C. §§ 1331 & 2201-2202, and 33 U.S.C. § 1365(a)(2).

11. Venue is proper in this Court pursuant to 5 U.S.C. § 703, 28 U.S.C. § 1391, and 33 U.S.C. § 1365.

The Parties

12. Plaintiff State of Maine is a sovereign state with environmental regulatory jurisdiction over all waters within its boundaries, including Indian Waters.

13. Plaintiff Avery Day is the Acting Commissioner of the Maine DEP and has primary responsibility for the environmental protection, regulation and control of all waters within the State of Maine.

14. Defendant Gina McCarthy is the Administrator of EPA and is being sued in her official capacity. EPA is an agency of the United States and has responsibility and oversight regarding federal statutes and regulations dealing with the protection, regulation and control of waters within the United States. As Administrator, Ms. McCarthy oversaw or was responsible for EPA's February 2, 2015 letter and the positions and disapprovals of Maine's WQS contained therein.

15. Defendant H. Curtis Spalding, who is also being sued in his official capacity, is the EPA Regional Administrator for Region 1 (New England), which includes the State of Maine. Within EPA's Region 1, Mr. Spalding has responsibility and oversight regarding federal statutes and regulations dealing with the protection, regulation and control over waters within the United

States. As Regional Administrator for EPA's Region 1, Mr. Spalding oversaw or was responsible for EPA's February 2, 2015 letter and the positions and disapprovals of Maine's WQS contained therein.

Maine's Indian Settlement Acts

16. There are now four federally recognized Indian tribes in Maine represented by five governing bodies: the Penobscot Indian Nation ("PIN") and the Passamaquoddy Tribe (with two separate Passamaquoddy governing bodies) (collectively the "Southern Tribes"); and the Houlton Band of Maliseet Indians ("Maliseets") and the Aroostook Band of Micmacs ("Micmacs") (collectively the "Northern Tribes").

17. In 1980, Congress passed MICSA, which, among other things, resolved litigation in which the Southern Tribes asserted land claims to an area consisting of approximately two-thirds of the State of Maine's land mass. (25 U.S.C. §§ 1721 *et seq.*; *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 44 (1st Cir. 2007)).

18. MICSA also ratified MIA, a Maine law that reflects a comprehensive negotiated settlement between the State of Maine and the Southern Tribes, and that also addresses jurisdictional issues and defines the relationship between Maine and its Indian tribes. (30 M.R.S. §§ 6201 *et seq.*; *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 44 (1st Cir. 2007)).

19. As a result of MIA and MICSA, Maine has a nationally unique and novel relationship with its Indian tribes. (*See Akins v. Penobscot Nation,* 130 F.3d 482, 483 (1st Cir. 1997) ("The relations between Maine and the Maine Tribes are not governed by all of the usual laws governing such relationships, but by two unique laws, one Maine and one federal, approving a settlement.")).

20. In 1989, Maine passed the Micmac Settlement Act (the "Micmac Act"), which was ratified by Congress in 1991 through passage of the Aroostook Band of Micmacs Settlement Act ("ABMSA"), and which was designed to give the Micmacs the same limited settlement that had been provided to the Maliseets under the 1980 Acts (the Micmac Act, ABMSA, and the 1980 Acts are collectively referred to as Maine's "Indian Settlement Acts"). (*Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 56-58 & n. 20 (1st Cir. 2007); Pub. L. 102-171, Nov. 26, 1991, 105 Stat. 1143, §2(a)(5) ("It is now fair and just to afford the Aroostook Band of Micmacs the same settlement provided to the Houlton Band of Maliseet Indians for the settlement of that Band's claims, to the extent they would have benefitted from inclusion in the Maine Indian Claims Settlement Act of 1980.")).

21. MIA, as ratified by MICSA, generally establishes that:

> Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State ***to the same extent as any other person or lands or other natural resources therein***.

(30 M.R.S. § 6204 (emphasis added), confirmed by MICSA, 25 U.S.C. § 1725).

22. Similarly, MICSA establishes that the Southern Tribes and their "lands and natural resources" are subject to Maine's jurisdiction as provided in MIA, while the Northern Tribes:

> and any lands or natural resources held in trust by the United States, or by any other person or entity, for [the Northern Tribes] shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.

(25 U.S.C. § 1725(a) and (b)(1); 25 U.S.C. § 1725(f); *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 50-51 (1st Cir. 2007)).

23. Both MIA and MICSA use the same broad definition of "lands and natural resources," which expressly includes tribal water and water rights, and tribal hunting and fishing rights. (30 M.R.S. § 6203(3); 25 U.S.C. § 1722(d)).

24. As recognized by the First Circuit Court of Appeals, Congress expressly understood that, under MICSA, Maine would retain its environmental regulatory jurisdiction and authority over Maine's Indian lands and waters:

> The Senate Report, adopted by the House Report, declared that "State law, including but not limited to laws regulating land use or management, conservation and environmental protection, are fully applicable as provided in [the proposed bill] and Section 6204 of the Maine Implementing Act." S. Rep. 96-957 at 27; H.R. Rep. 96-1353 at 20.

(*Maine v. Johnson,* 498 F.3d 37, 43-44 (1st Cir. 2007)).

25. As recognized by the First Circuit Court of Appeals, Congress also understood that, under MICSA, any special or greater environmental status or rights afforded to Indian tribes generally, such as those under the Clean Air Act (no similar tribal provisions had yet been enacted under the CWA in 1980), would expressly ***not*** apply in Maine:

> The Senate Report stated that "for example, although the federal Clean Air Act, 42 U.S.C. § 7474, accords special rights to Indian tribes and Indian lands, such rights will not apply in Maine because otherwise they would interfere with State air quality laws which will be applicable to the lands held by or for the benefit of the Maine Tribes. This would also be true of police power laws on such matters as safety, public health, environmental regulation or land use." S. Rep. 96-957 at 31.

(*Maine v. Johnson,* 498 F.3d 37, 44 n.7 (1st Cir. 2007)).

26. The principle that the State of Maine's jurisdiction and environmental laws extend throughout Maine and encompass Indian tribal "lands and natural resources" was central to the 1980 Acts, and in crafting MICSA, Congress carefully ensured that no then-existing federal Indian law of any kind would be interpreted in a manner that would call into question the applicability of Maine's State laws to Maine's tribes, which would upset the jurisdictional bargain that had been negotiated:

> [No] law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory, or land held in trust for Indians, and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.

(25 U.S.C. § 1725(h)).

27. Elsewhere in MICSA, Congress further secured Maine's unique tribal-State jurisdictional arrangement against ***future*** changes in federal law by using language that essentially tracks the language used in Section 1725(h):

> The provisions of any Federal law enacted after October 10, 1980, for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this subchapter and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

(25 U.S.C. § 1735(b)).

28. The combined effect of MICSA Sections 1725(h) and 1735(b) is to bar the application of any kind of federal law that accords special or greater status or rights to Indians and affects or preempts Maine's jurisdiction, unless Congress expressly makes such law applicable in Maine. (25 U.S.C. §§ 1725(h) & 1735(b); *see also Penobscot Nation v. Stilphen*, 461 A.2d 478, 489 (Me. 1983); 68 Fed. Reg. 65052, 65057 (November 18, 2003) (EPA concluded that the combination of MICSA Sections 1725(h) and 1735(b) "prevents the general body of federal Indian law from unintentionally affecting or displacing MICSA's grant of jurisdiction to the state."); 25 U.S.C. § 1722(d) (defining "laws" of the State to include common law)).

29. The Congressional Senate Report makes clear that the application of federal Indian canons of construction was one of the specific concerns that gave rise to MICSA's Sections

1725(h) and 1735(b), and that these provisions were intended to prevent courts from applying the common law canons to questions of interpretation involving the 1980 Acts:

> The phrase "civil, criminal, or regulatory jurisdiction" as used in [section 1725(h)] is intended to be broadly construed to encompass the statutes and regulations of the State of Maine as well as of the jurisdiction of the courts of the State. The word "jurisdiction" is not to be narrowly interpreted as it has in cases construing Public Law 83-280 such as *Bryan v. Itasca County*, 426 U.S. 373 (1976).

(S. Rep. 96-957, at 30-31).

30. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976), issued just four years before passage of the 1980 Acts, illustrated how federal courts generally rely (except where Congress provides otherwise) on Indian canons of construction to resolve ambiguities in statutes against states and in favor of Indians, and the Congressional Senate Report invoked *Bryan* to clarify that the *Bryan* decision's mode of analysis – including its use of Indian canons favoring Indian tribes – was not to apply to questions arising under the 1980 Acts. (S. Rep. 96-957, at 30).

31. Indeed, during the Senate hearings, counsel for the Southern Tribes testified that the "general body of Federal Indian law" had been excluded in Maine "in part because that was the position that the State held to in the negotiations. . . [and] it is also true to say that the tribes are concerned about the problems that existed in the West because of the pervasive interference and involvement of the federal government in internal tribal matters." (Hearings before the Senate Committee on Indian Affairs on S. 2829, 96th Cong. 2d Sess. 181-82 (1980)).

32. Similarly, before Maine's Joint Select Committee, the same counsel for the Southern Tribes had stated:

> Increasingly [during negotiations], both sides found areas of mutual interest as, for example, in the case of the General Body of Federal Indian Regulatory Law, which the tribes came to see as a source of unnecessary federal interference in the management of tribal property and the State came to see as a source of uncertainty in future Tribal-State relations.

(Transcript of March 28, 1980 Public Hearing before the Maine Joint Select Comm. on Indian Land Claims, Statement of attorney for the Southern Tribes, Thomas Tureen, *reprinted in* Me. Leg. Record (1980) at 25).

33. Overall, as the Maine Supreme Court summarized:

> It was generally agreed that [the 1980 Acts] set up a relationship between the tribes, the state, and the federal government different from the relationship of Indians in other states to the state and federal governments. . . . We therefore look not to federal common law . . . but to the statute itself and its legislative history.

(*Penobscot Nation v. Stilphen*, 461 A.2d 478, 489 (Me. 1983)).

34. The First Circuit Court of Appeals has concluded that, when interpreting the 1980 Acts or other Maine Indian Settlement Acts, EPA is not to be afforded any deference. (*Maine v. Johnson,* 498 F.3d 37, 45 (1st Cir. 2007); *see also id.* at 45 & n.9-10 (also discounting a Department of Interior ("DOI") opinion letter to EPA as non-authoritative and in apparent tension with DOI's 1980 testimony to Congress regarding Maine's jurisdiction under the 1980 Acts)).

The jurisdictional effect of the 1980 Acts on the Southern Tribes

35. With respect to the Southern Tribes, and as the First Circuit Court of Appeals has observed, "[a]t the time the Settlement Acts were adopted, the Interior Department, largely responsible for relations with Indian tribes, told Congress that the southern tribes' lands would generally be subject to Maine law. (H.R. Rep. 96-1353 at 28 (report of the Department of the Interior)." (*Maine v. Johnson,* 498 F.3d 37, 43 (1st Cir. 2007); *see also id.* at 45 n.10).

36. This understanding was shared by the Southern Tribes, who, through their counsel during the State hearings, explained:

> In light of all this, one might ask why the Indians were willing to even discuss the question of jurisdiction with the State but simply the answer is that they were obliged to do so if they wanted to effectuate the Settlement of the monetary and land aspects of the claim.... [T]he Tribes opened negotiation with the State concerning the question of

> jurisdiction not because they wanted to do so but because they were obliged to do so to obtain a Settlement that they had already negotiated with the Federal Government.

(Transcript of March 28, 1980 Public Hearing before the Maine Joint Select Comm. on Indian Land Claims, Statement of attorney for the Southern Tribes, Thomas Tureen, *reprinted in* Me. Leg. Record (1980) at 23-24; *Penobscot Nation v. Stilphen*, 461 A.2d 478, 488 n.7 (Me. 1983)).

37. Counsel for the Southern Tribes further explained that, "[f]or the Indians [negotiating the settlement] meant, among other things, understanding the legitimate interests of the State in having basic laws such as those dealing with the environment apply uniformly throughout Maine." (Transcript of March 28, 1980 Public Hearing before the Maine Joint Select Comm. on Indian Land Claims, Statement of attorney for the Southern Tribes, Thomas Tureen, *reprinted in* Me. Leg. Record (1980) at 25).

38. Similarly, the State of Maine, through the Maine Attorney General, explained that MIA would avoid a situation where Maine's water and air pollution control laws would be unenforceable within tribal areas. (Transcript of March 28, 1980 Public Hearing before the Maine Joint Select Comm. on Indian Land Claims, Statement of Maine Attorney General Richard S. Cohen, *reprinted in* Me. Leg. Record (1980) at 6-7).

39. Thus, as the First Circuit Court of Appeals determined, MIA (as ratified by MICSA) "provided that 'with very limited exceptions,' the southern tribes would be 'subject to' Maine law…." (*Maine v. Johnson,* 498 F.3d 37, 42 (1st Cir. 2007) (*quoting Akins v. Penobscot Nation,* 130 F.3d 482, 484 (1st Cir. 1997); *see also Passamaquoddy Tribe v. Maine,* 75 F.3d 784, 787 (1st Cir. 1996) (the 1980 Acts were designed to "create a unique relationship between state and tribal authority" by submitting the Maine Indians and their tribal lands and resources to the State's jurisdiction and by giving the State "a measure of security against future federal incursions upon these hard-won gains.")).

40. Under MIA, the Southern Tribes were to be treated like municipalities and subject to the laws and regulatory oversight of the State with the exception of things such as "internal tribal matters," which have been determined not to encompass environmental regulation. (30 M.R.S. § 6206(1); *Akins v. Penobscot Nation*, 130 F.3d 482, 484 (1st Cir. 1997) (the Southern Tribes benefitted from the settlement by gaining municipal powers); *Maine v. Johnson,* 498 F.3d 37, 46, 47 (1st Cir. 2007) ("In our view, the Settlement Acts make ordinary Maine law apply, even if only tribal members and tribal lands are affected . . . *unless* the internal affairs exemption applies;" discharge of pollutants into Maine waters was not of the same character as "the structure of Indian government or distribution of tribal property;" concluding that the internal tribal matter exception did not apply to bar Maine's environmental regulatory jurisdiction over Indian wastewater facilities); (Exhibit 1, Attachment A, pp. 8-11)).

41. Among the other very limited exceptions to the general application of Maine laws and regulations to the Southern Tribes is a provision involving certain regulatory restrictions on the taking of fish:

> Notwithstanding any rule or regulation promulgated by the commission or any other law of the State, the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish within the boundaries of their respective Indian reservations, for their individual sustenance subject to the limitations of [30 M.R.S. § 6207(6)].

(30 M.R.S. § 6207(4)).

42. In general, a combination of the Southern Tribes, the joint Maine Indian Tribal-State Commission ("MITSC"or the "commission"), and/or the Commissioner of Maine's Department of Inland Fisheries and Wildlife ("IFW") regulate fish catch and size limits and fishing seasons with respect to waters within or bounding on Maine's Indian territory. (30 M.R.S. § 6207).

43. Section 6207(4) of MIA merely permits members of the Southern Tribes the limited

right to take fish within their respective reservations regardless of and free from the normally applicable IFW and/or MITSC restrictions on things such as the "method, manner, bag and size limits and season for fishing" provided that (*i.e.*, only if) the fish being taken is for the tribal member's individual sustenance. (30 M.R.S. §§ 6207(3), (4)).

44. The use of the word "sustenance" in Section 6207(4) of MIA was intended as (and is) a limitation on the exemption from otherwise applicable IFW and/or MITSC fishing laws and regulations with respect to fishing catch and size limits and seasons only; the use of the word "sustenance" in Section 6207(4) does not provide for any kind of special or expanded tribal right to any particular quantity or quality of fish or heightened level of underlying water quality, or otherwise create a Southern Tribal-specific designated use of "sustenance fishing" for any Maine water bodies. (30 M.R.S. § 6207(4); *see also* 38 M.R.S. § 464(2-A)(F) (under Maine's Water Classification System, "designated use" means the use specified in WQS for each waterbody or segment under Title 38, Sections 465 – 465-C, 467 – 470, and not under any part of MIA); *Menominee Indian Tribe of Wisconsin v. Thompson*, 922 F. Supp. 184, 215-16 (W.D. Wis. 1996)).

45. During Maine's legislative hearings on MIA, there was testimony regarding whether the Southern Tribes' limited right to "take fish" under Section 6207(4) was intended to apply to commercial as well as personal fishing, which testimony clarified that the phrase "for their individual sustenance" was used merely as a way to limit the exception from Maine and/or MITSC fishing laws and regulations to personal consumption only:

> We didn't just use the word sustenance, we used sustenance for the individual which we construe as not covering commercial fishing operations. We believe that means consumption by the individual.

(Transcript of March 28, 1980 Public Hearing before the Maine Joint Select Comm. on Indian Land Claims, Statement of John Paterson, *reprinted in* Me. Leg. Record (1980) at 165-66).

46. Nothing in the text or history of the 1980 Acts suggests that Section 6207(4) of MIA was intended to create any kind of special designated use of tribal "sustenance fishing" for the Southern Tribes (or any other Maine Indians), let alone entitle any Indian tribes to any kind of bootstrapped special status or rights with respect to water or fish quality, as this would have been contrary to one of the State's primary goals with respect to the settlement and the 1980 Acts – the avoidance of a two-tiered system, or a "nation within a nation" in Maine. (*See* Hearings before the Senate Committee on Indian Affairs on S. 2829, 96th Cong. 2d Sess. 139 (1980) (Testimony of Maine Governor Joseph Brennan: "We could never have a nation within a nation in Maine. . . . So we have created a new model. . . . [O]ur Indian citizens [will] be on a substantially equal footing with their fellow citizens . . .")).

The jurisdictional effect of the 1980 Acts on the Northern Tribes

47. Under MIA and MICSA, and as recognized by the First Circuit Court of Appeals, there are no exceptions to Maine's environmental regulatory jurisdiction for the Northern Tribes, and their tribal "lands and natural resources" are fully subject to Maine's jurisdiction to the same extent as any other person or "lands and natural resources." (30 M.R.S. § 6202 (the Maliseets and their lands "will be wholly subject to the laws of the State"); 30 M.R.S. § 7205 (the Micmacs have no municipality status or civil or criminal jurisdiction within their lands); 30 M.R.S. §§ 6204, 6206-A, 7203; *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 45-46 (1st Cir. 2007) (State Micmac Act gave the Micmacs a status similar to the Maliseets, which was different from that of the Southern Tribes)).

48. Thus, Maine's Indian Settlement Acts afford the Northern Tribes significantly less than the Southern Tribes, as their lands and resources, including their tribal water and water rights and tribal hunting and fishing rights, are wholly subject to the laws of the State to the

same extent as any other person or lands or other natural resources therein. (30 M.R.S. 7203; 30 M.R.S. §§ 6202, 6204; *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 49-50 (1st Cir. 2007); *Houlton Band of Maliseet Indians v. Ryan*, 484 F.3d 73, 74-75 (1st Cir. 2007); (Exhibit 1, Attachment A, p. 8)).

EPA's contemporaneous view of tribal authority under the 1980 Acts

49. Shortly after the passage of the 1980 Acts, EPA prepared a report summarizing its understanding of the terms of the 1980 Acts for EPA's internal use ("EPA Report"), which EPA forwarded to Maine in March 1982. (EPA Report, which is attached hereto as Exhibit 2 (cover letter)).

50. The EPA Report does not acknowledge any separate or special tribal right to or authority over water quality for any purpose, but instead assumes Maine's full environmental regulatory authority over all Indian Waters, while limiting tribal and/or MITSC authority over the regulation of "fish and game laws" only – implicitly for things such as fish catch and size limits and fishing seasons, and not enhanced water quality. The EPA Report states in part:

> The Maine Settlement Act establishes [Southern] tribal governments as municipalities, rather than federal reservations. They are "subject to the laws of the state and to the civil and criminal jurisdiction of the courts of the state" except for "internal tribal matters", minor crime, juvenile crime, small claims and domestic relations. . . .
>
> Tribes will have jurisdiction over hunting and over fishing on ponds of less than 10 acres. Fishing in larger bodies of water and river reaches will be controlled by the Maine Indian Tribal Commission described below. At the same time, the Indians will register game like other hunters and take part in the game census conducted by the State. The State, in turn, may overrule Indian fish and game laws after notice and adjudicatory hearing if species are threatened. . . .
>
> INDIAN AUTONOMY
>
> . . .the state and federal acts declare [Southern tribal governments] to be

> municipalities. . . the Maine Settlement Acts impose State law on the Indian territories, although minor crime, juvenile crime, small claims and domestic relations will be handled in tribal courts. . . .
>
> STATE ENVIRONMENTAL LAWS
>
> . . .state law on land use, land management, conservation and environmental protection will apply on Indian territory. "That the regulation of land or natural resources may diminish or restrict maximization of income or value is not considered a financial encumbrance and not barred from application under this Act." according to the Section-by-Section Analysis of the Federal Act. . . .
>
> OPERATION AND MAINTENANCE OF WATER AND SEWER FACILITIES
> . . .
>
> Maine DEP has two staffers assigned to make regular visits and to provide training, and hope to start receiving regular lab reports in the near future. . .
>
> Although DEP has the same enforcement power against the reservations as against any other municipality, DEP is reluctant to incur tribal hostility by using it. . .

(Exhibit 2).

Maine's role as a State under the CWA

51. The CWA has deep roots within the State of Maine, as Maine's Senator Edmund Muskie was one of the CWA's chief architects. Consistent with this legacy, Maine takes seriously its responsibility and commitment to uniformly protect Maine's water quality on behalf of all citizens throughout the State of Maine, including members of Maine's Indian tribes.

52. In 1972, Congress substantially amended the Federal Water Pollution Control Act, commonly known as the CWA, which aims to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and seeks to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." (33 U.S.C. § 1251(a)).

53. In establishing the CWA's regulatory framework, Congress was careful to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and

eliminate pollution, [and] to plan the development and use . . . of land and water resources . . ." (33 U.S.C. § 1251(b)).

54. Congress provided, additionally, that nothing in the CWA "shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." (33 U.S.C. § 1370).

55. Under the CWA, States rather than EPA have the primary authority and responsibility to create, review and revise WQS for all intrastate waters. (33 U.S.C. §§ 1313(c)(1), (2); 40 C.F.R. §§ 131.3(i), 131.4; *PUD No. 1 of Jefferson Co. v. Washington Dep't of Ecology,* 511 U.S. 700, 704 (1994); *Pronsolino v. Nastri,* 291 F.3d 1123, 1127 (9th Cir. 2002); *Natural Resources Defense Council, Inc. v. U.S. E.P.A.*, 16 F.3d 1395, 1400 (4th Cir. 1993); *Friends of Merrymeeting Bay v. Olsen*, 839 F.Supp.2d 366, 370 (D. Me. 2012)).

56. A State's WQS both define the water quality goals of intrastate water bodies (or portions thereof) by designating the uses to be made of the waters, and set numeric water quality criteria to protect the State's designated uses. (33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 130.3, 131.2, 131.3(i), 131.10, 131.11).

57. Prior to changing a WQS by either adding a new designated use or establishing any sub-category(ies) of use, a State (or EPA, as the case may be) must provide notice and opportunity for a public hearing. (33 U.S.C. §§ 1251(e), 1313(c)(4); 40 C.F.R. § 131.10(e); (EPA Water Quality Standards Handbook, § 6.1.2 (a copy of this and other relevant portions of EPA's WQS Handbook (chapters 3 and 6) are attached hereto as Exhibit 3)).

58. Upon adopting or revising WQS, a State must submit its WQS to EPA for review, and EPA then has the non-discretionary duty either to approve the new or revised WQS within 60 days of their submission if they meet the requirements of the CWA, or disapprove the WQS

within 90 days of their submission. (33 U.S.C. § 1313(c)(2) & (3); 40 C.F.R. §§ 131.5 & 131.21).

59. If a State's new or revised WQS are disapproved or determined by EPA not to meet the requirements of the CWA in any way, then EPA has the non-discretionary duty to notify the State of the deficiencies in the WQS and specify the changes required for EPA approval within 90 days of the State's submission of those WQS. (33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21).

60. In addition to promulgating WQS such as designated uses of intrastate waterbodies and water quality criteria to protect those uses, States may also apply to EPA for authorization to regulate point sources of pollution by prohibiting unpermitted discharges of pollutants into waters of the United States under the National Pollution Discharge Elimination System ("NPDES"). (33 U.S.C. §§ 1311(a) & 1342; *Maine v. Johnson*, 498 F.3d 37, 39-40 (1st Cir. 2007)).

61. In November 1999, Maine applied for such NPDES permitting authority and submitted its Maine Pollution Discharge Elimination System ("MEPDES") program to EPA for approval for all Maine waters, including Indian Waters. (33 U.S.C. § 1342(b); *Maine v. Johnson*, 498 F.3d 37, 40 (1st Cir. 2007)).

Under the 1980 Acts, the 1987 tribal amendments to the CWA do not apply in Maine

62. In 1987, Congress amended the CWA by, among other things, adding Section 518, which for the first time set forth Indian tribal rights and responsibilities under the CWA and allowed Indian tribes outside of Maine to prospectively apply for "treatment as state" status under the CWA. (33 U.S.C. § 1377(e)).

63. Generally, as a result of the 1987 amendments to the CWA, a qualifying Indian tribe outside of Maine may now be granted jurisdiction to regulate water resources within its

borders in the same manner as states, including the authority to establish tribal WQS subject to EPA review and approval and to issue NPDES permits for discharges into such waters. (33 U.S.C. § 1377(e); 40 C.F.R. § 131.8; *City of Albuquerque v. Browner,* 97 F.3d 415, 418 (9th Cir. 1996)).

64. Under MICSA, however, the 1987 addition of Section 518 to the CWA does not apply in Maine and affords Maine's Indian tribes no separate status or rights because it would affect Maine's regulatory jurisdiction and because it was not made explicitly applicable to Maine. (25 U.S.C. §§ 1725(h), 1735(b); *Maine v. Johnson,* 498 F.3d 37, 43 n.5 (1st Cir. 2007)).

65. Congress considered this very issue when enacting Section 518 of the CWA:

> This section does not override the provisions of the Maine Indian Claims Settlement Act (25 U.S.C. 1725). Consistent with subsection (h) of the Settlement Act, the tribes addressed by the Settlement Act are not eligible to be treated as States for regulatory purposes . . .

(Water Quality Act of 1987, Section-by-Section Analysis, *reprinted in* 1987 U.S.C.C.A.N. 5, at 43; *see also Maine v. Johnson*, 498 F.3d 37, 43 n.5 (1st Cir. 2007)).

66. EPA itself also addressed this issue at length in a 1993 guidance document from the Chief of its General Law Office:

> The critical jurisdictional section of the Federal [Settlement] Act is § 1725, which ratifies the State Act, limits the application of federal Indian law in Maine if it would affect State law, and bars the application of future federal Indian law in Maine unless the federal legislation specifically notes its applicability in Maine. . . .
>
> Subsection 1725(h) is a critical provision of the Federal [Settlement] Act that explicitly and completely <u>prohibits the application to the [Maine Indian tribes] of any federal law</u> that (1) <u>gives special status to the [Maine Indian tribes]</u> <u>and</u> (2) <u>"affects or preempts" Maine's civil, criminal, or regulatory jurisdiction</u>. 25 U.S.C. § 1725(h). This provision <u>specifically includes state environmental law</u> and land use law. . . This subsection would seem to invalidate federal laws that might give the [Maine Indian tribes] special status, including treatment as a state, for certain environmental programs or

> purposes if it would "affect or preempt" the State's authority, including the State's jurisdiction over environmental and land use matters.
>
> The final critical provision of the 1980 Federal Act for jurisdictional analysis relates to future legislation. Future federal legislation for the benefit of Indians that "would affect or preempt" state laws (including the State Act) would not apply in Maine unless the federal legislation specifically addressed its application in Maine . . . Thus, any post-1980 special federal legislative provisions that might give Indians special jurisdictional authority (if, for example, any federal laws in the 1980's provided authority for EPA approval of a Tribal environmental program equivalent to a state environmental program delegated by EPA to the state) could not provide the [Maine Indian tribes] with such jurisdictional authority unless the federal legislation specifically addressed Maine and made the legislation applicable within Maine.

(EPA Memorandum: Penobscot's Treatment as a State under CWA § 518(e) for Purposes of Receiving CWA § 106 Grant, at 7-8 (July 20, 1993) (emphasis in original) (a copy of this 1993 EPA Memorandum is attached hereto as Exhibit 4)).

67. To date, and as far as Maine is aware, no Maine Indian tribe has been authorized by EPA to issue NPDES permits, promulgate WQS, or administer a WQS program in Maine pursuant to 33 U.S.C. § 1377(e) and/or 40 C.F.R. § 131.8, as such an EPA authorization would violate the 1980 Acts and be inconsistent with *Maine v. Johnson*, 498 F.3d 37, 43 n.5 (1st Cir. 2007).

Maine's longstanding and EPA-approved Water Classification Program

68. Maine's designated uses of its intrastate waterbodies are set forth in Maine's Water Classification Program, which was enacted in its current form in 1986 to strengthen Maine's WQS. (P.L. 1985, c. 698, §15 (eff. July 16, 1986), now as amended 38 M.R.S. §§ 464 *et seq.*; 38 M.R.S. § 464(1) ("The Legislature intends by passage of this article [Title 38, c. 3, sub. 1, art. 4-A] to establish a water quality classification system. . . based on water quality standards which designate the uses and related characteristics of those uses for each class of water. . . The Legislature further intends by passage of this article to assign to each of the State's surface water

bodies the water quality classification which shall designate the minimum level of quality. . . intended to direct the State's management of that water body. . ."); 38 M.R.S. § 464(2-A)(F) (under Maine's Water Classification Program, "designated use" means the use specified in WQS for each waterbody or segment under Title 38, Sections 465-465-C and 467-470, and not under any part of MIA)).

69. Since 1986, the designated uses and other WQS set forth in Maine's Water Classification Program have applied statewide to all of Maine's surface waterbodies, including all portions of Maine's major river basins and minor drainages and Maine's Indian Waters, and have not provided any special status, rights or protections with respect to (or have even mentioned) Maine's Indian tribes or tribal sustenance fishing. (P.L. 1985, c. 698, §15 (eff. July 16, 1986); 38 M.R.S. §§ 464-470).

70. Since 1986, the designated uses set forth in Maine's Water Classification Program have included uses such as "fishing" and "recreation in or on the water," which are goals that are generally required by the CWA. (38 M.R.S. §§ 465, 465-A, 465-B; P.L. 1985, c. 698, §15 (eff. July 16, 1986); 33 U.S.C. § 1251(a)(2); EPA's Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000), EPA-822-B-00-004 (October 2000) (EPA's "2000 Guidance, " portions of which are attached hereto as Exhibit 5), § 4.1.1.2 (State standards for human health are set to protect CWA Section 101(a) "fishable" and "swimmable" uses)).

71. Historically, EPA communicated extensively with Maine regarding Maine's development and enactment of its Water Classification Program, including EPA's communications set forth in EPA letters to Maine dated February 20, 1985; November 12, 1985; July 16, 1986; August 20, 1986; April 24, 1987; May 21, 1987; August 31, 1987; November 3, 1988; May 11, 1989;

December 20, 1990; and June 28, 1999. (Copies of these letters are collectively attached hereto as Exhibit 6).

72. As of December 20, 1990, EPA had determined that Maine's Water Classification Program (including all of Maine's designated uses) as well as Maine's numeric water quality criteria were in compliance with the CWA and corresponding federal regulations, and EPA had not: 1) limited EPA's approval of Maine's Water Classification Program, designated uses, or water quality criteria to non-Indian Waters only; 2) recognized (or even mentioned) any kind of designated use for sustenance fishing for any Maine waterbody; or 3) raised any other question regarding the application of Maine's Water Classification Program in Indian Waters. (Exhibit 6).

73. In June 1999, Maine submitted what was then a "complete and current" set of WQS to EPA for inclusion in EPA's CWA WQS docket for Maine, and Maine's submission did not include or identify 30 M.R.S. § 6207(4) or any other portion of MIA as a WQS. In its response dated June 28, 1999, EPA raised no objection or concern regarding the absence of any portion of MIA or of Section 6207(4) in particular, which EPA now contends (as of its February 2, 2015 letter) constitutes a WQS – an alleged designated use of tribal "sustenance fishing" for the Southern Tribes' Indian Waters. (Exhibit 6).

74. The Maine Legislature has sole authority to make changes in the designated uses of the waters of the State of Maine, and has never enacted a designated use (for WQS purposes) of sustenance or subsistence fishing for any Maine surface waterbody. (38 M.R.S. § 464(2-A)(E)).

75. In 2002, the Maine Legislature considered but rejected a controversial proposal to create a designated use of "subsistence" fishing within Maine's Water Classification Program (at 38 M.R.S. §§ 466(10-A) & 467(7)(A)), which was proposed following a DEP review of Maine's Water Classification Program that resulted in suggested changes to Maine's WQS. (A copy of

DEP's recommendations, the proposed bill (L.D. 1529) and amendment, and related materials is attached hereto as Exhibit 7).

76. The rejected portion of the 2002 bill (L.D. 1529) would have created a new designated use of "subsistence" fishing for select portions of the Penobscot River only, and was not intended to affect or change the 1980 Acts in any way, but was instead designed to recognize for the first time, as a matter of State environmental policy and within Maine's Water Classification Program, a new and more specific kind of "fishing" designated use for a subset of Maine's general population that purportedly engaged in higher-than-average rates of fish consumption. (Exhibit 7).

77. L.D. 1529, however, was ultimately amended to remove any reference to the controversial proposal for a new designated use of subsistence fishing. The amendment also authorized further consideration of a new designated use of subsistence fishing in the next legislative session. (Exhibit 7, Summary of Committee Amendment A to L.D. 1529). As far as Maine is aware, no further action was taken regarding the proposal for a new designated use of subsistence fishing.

States such as Maine have flexibility when establishing numeric water quality criteria to protect those designated uses and populations that the State chooses to protect

78. States have the primary authority to determine the appropriate numeric water quality criteria levels to protect their designated uses and the human health of the populations that they have chosen to protect, and may make their own judgments, within reasonable scientific bounds, on factors such as cancer potency or systemic toxicity, exposure, and risk characterization. (Exhibit 3, § 3.1.1 ("EPA's water quality criteria documents are available to assist States in . . . adopting [WQS] that include appropriate numeric water quality criteria . . . in these situations,

States have primary authority to determine the appropriate level to protect human health . . .”); *see also* 40 C.F.R. § 131.11(b); 33 U.S.C. § 1251(b)).

79. In establishing numeric water quality criteria to protect their designated uses, States may adopt numeric water quality values based on published EPA guidance. (40 C.F.R. § 131.11(b)(1)(i) (“In establishing criteria, States should . . . [e]stablish numerical values based on . . . 304(a) Guidance. . .”); 40 C.F.R. § 131.3(c) (Section 304(a) criteria are developed by EPA based on the latest scientific information and are issued to the States for use in developing criteria); 33 U.S.C. § 1314 (EPA information and guidelines on criteria); Exhibit 3, Chapter 3 introduction (States may use EPA’s published water quality criteria “as the basis for developing enforceable water quality standards”) & §§ 3.1.1, 3.4.1 (“Under EPA’s regulation, in addition to basing numeric criteria on EPA’s section 304(a) criteria documents, States may also base numeric criteria on site-specific determinations or other scientifically defensible methods,” & State Option 1)).

80. In 2000, EPA released its Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (“2000 Guidance”), which updated EPA’s methodology for deriving human health criteria and its prior criteria recommendations (published in 1980), and which was intended to provide States with flexibility when establishing WQS by providing scientifically valid WQS options that States could use as default human health criteria for various populations such as the general population. (Exhibit 5, §§ 1.2, 1.3; Exhibit 1, Attachment A, p. 34 & n. 25).

81. Multiple factors are considered together when developing human health criteria, including factors such as an individual fish consumption rate (“FCR,” measured in the amount of fish and shell fish consumed per day) and lifetime excess cancer risk level (“Risk Level,” which

represents a carcinogenic dose associated with a chosen target risk measured in number of people, such as EPA's accepted risk range of 10^{-4} (10,000 people) and 10^{-6} (1,000,000 people)). (Exhibit 5, §§ 1.6, 2.4 ("EPA believes that both 10^{-6} and 10^{-5} may be acceptable for the general population and that highly exposed populations should not exceed a 10^{-4} risk level."); Exhibit 3, § 3.4.1 ("EPA generally regulates pollutants treated as carcinogens in the range of 10^{-6} and 10^{-4} to protect average exposed individuals and more highly exposed populations."); 06-096 C.M.R. ch. 584, §§ 4 (Risk levels), 5 (Human health assumptions) (eff. July 29, 2012)).

82. A State's chosen FCR works with and is relative to the State's selected cancer Risk Level, which is a parameter that represents what the State considers to be an appropriate level of cancer risk. Differences in Risk Levels will in turn affect the levels of FCRs that will protect human health to the State's chosen level of individual cancer risk, which EPA explains as follows:

> the incremental cancer risk levels are ***relative***, meaning that any given criterion associated with a particular cancer risk level is also associated with specific exposure parameter assumptions (i.e., intake rates, body weights). When these exposure values change, so does the relative risk. For a criterion derived on the basis of a cancer risk level of 10^{-6}, individuals consuming up to 10 times the assumed fish intake rate would not exceed a 10^{-5} risk level. Similarly, individuals consuming up to 100 times the assumed rate would not exceed a 10^{-4} risk level. Thus, for a criterion based on EPA's default intake rate (17.5 gm/day) and a risk level of 10^{-6}, those consuming a pound per day (i.e., 454 grams/day) would potentially experience between a 10^{-5} and a 10^{-4} risk level). (Note: Fish consumers of up to 1,750 gm/day would not exceed the 10^{-4} risk level).

(Exhibit 5, § 2.4 (emphasis in original)).

83. EPA's 2000 Guidance permits the use of cancer Risk Levels that are lower than Maine's conservative Risk Level of 10^{-6}, and recognizes that such lower Risk Levels (10^{-5} and 10^{-4}) are and have been properly used by States and Indian tribes:

> EPA believes that both 10^{-6} or 10^{-5} may be acceptable for the general population and that highly exposed populations should not exceed a 10^{-4} risk level. States or Tribes that have adopted standards based on criteria at the 10^{-5} risk level can continue to do so, if the highly exposed groups would at least be protected to the 10^{-4} level. . . .

> Adoption of a 10^{-6} or 10^{-5} risk level, both of which States and authorized Tribes have chosen in adopting water quality standards to date, represents a general acceptable risk management decision, and EPA intends to continue to provide this flexibility to States and Tribes. . .

(Exhibit 5, § 2.4; Exhibit 1, Attachment A, p. 36 (discussing EPA's approved range of Risk Levels)).

84. EPA issued additional guidance in November 2000 entitled Guidance for Assessing Chemical Contaminant Data for Use in Fish Advisories, Volume 2: Risk Assessment and Fish Consumption Limits, Third Edition, EPA 823-B-00-008 (November 2000) ("2000 Fish Consumption Guidance," portions of which are attached hereto as Exhibit 8), which "presents consumption limits that were calculated using a risk level of 1 in 100,000 (10^{-5})" but notes that "states may choose to calculate consumption limits based on other risk levels." (Exhibit 8, § 1.2 (Objectives)).

85. EPA's 2000 Fish Consumption Guidance also recommends default FCRs of 17.5 grams/day for recreational fishers and 142.4 grams/day for subsistence fishers using a cancer Risk Level of 10^{-5}, which EPA believes is "especially protective of recreational fishers and subsistence fishers within the general U.S. population," and which equates to a FCR of 14.24 grams/day when coupled with a Risk Level (like Maine's) of 10^{-6}. (Exhibit 8, § 1.3; *see also id.* at § 1.5 (noting that the guidance assumed an acceptable risk of 1 in 100,000 (10^{-5}) in meal consumption limits, as opposed to the July 1997 second edition, which "used an acceptable risk of 1 in 10,000, 1 in 100,000, and 1 in 100,000" (*i.e.*, 1 in 10^{-4}, 10^{-5}, and 10^{-6})).

86. EPA's 2000 Guidance affords States the flexibility to select the particular population that the State wishes to protect, and to either use EPA's default national recommendations for factors such as the FCR, or to make alternative exposure estimates for subpopulations based on more localized data – something which EPA encourages but does not (and may not) require. (Exhibit

5, § 2.1 ("An important decision . . . is the choice of the particular population to protect. For instance, criteria could be set to protect those individuals who have average or "typical" exposures . . . EPA has selected default parameter values that are representative of several defined populations . . . EPA believes that its assumptions afford an overall level of protection targeted at the high end of the general population . . . EPA also believes that this is reasonably conservative and appropriate to meet the goals of the CWA . . ."); § 4.2.2.3 (States have "the flexibility to choose alternative intake rate . . . assumptions to protect specific population groups that they have chosen."); § 4.2.4 (States are "encouraged to consider protecting population groups that they determine are at greater risk . . . The ultimate choice of. . . exposure intake rates requires the use of professional judgment"); § 4.3 ("In providing additional exposure intake values for highly exposed subpopulations (e.g., sport angler, subsistence fishers), EPA is providing flexibility for States and authorized Tribes to establish criteria specifically targeted to provide additional protection using adjusted values for exposure parameters for. . . fish consumption."); 4.3.3.1 ("If a State or authorized Tribe has not identified a separate well-defined population of high-end consumers and believes that the national data . . . are representative, they may choose these recommended rates. . . . Once again, EPA emphasizes the flexibility for States and authorized Tribes to use alternative assumptions based on local or regional data to better represent their population groups of concern."); *see also* 65 Fed. Reg. 66444-01, 66449, §C (November 3, 2000) ("For the purpose of deriving criteria based on the 2000 Human Health Methodology, EPA is publishing default values for risk level, fish intake. . . We believe these default values result in water quality criteria protective of the general population, and we will use these values when deriving 304(a) criteria. States and authorized Tribes may use other values more representative of local conditions . . ."); *but see* Exhibit 1, Attachment A, p. 35).

87. EPA's recommended criteria for potentially exposed subpopulations are non-binding options that are available should a State opt not to use EPA's recommended criteria for the general population or some other scientifically defensible criteria:

> States and authorized Tribes have the option to develop their own criteria and the flexibility to base those criteria on population groups that they determine to be at potentially greater risk because of higher exposures, yet, EPA cannot oblige the States to specific consulting agreements because, again, criteria are guidance, not enforceable regulations, and do not impose legally binding requirements. Therefore, we recommend that States and Tribes give priority to identifying and adequately protecting their most highly exposed population by adopting more stringent criteria, ***if the State or Tribe determines that the highly exposed populations would not be adequately protected by criteria based on the general population.*** In all cases, States and authorized Tribes have the flexibility to use local or regional data that they believe to be more indicative of the population's fish consumption—instead of EPA's default rates—and we strongly encourage the use of these data.

65 Fed. Reg. 66444, 66468 (November 3, 2000) (emphasis added); *see also id.* at 66454 (EPA recommended criteria serve as guidance to States, and "EPA cannot force States or Tribes to conduct their own evaluations.").

88. For purposes of Maine's human health numeric water quality criteria, Maine utilizes a general FCR of 32.4 grams/day coupled with a Risk Level of 10^{-6} for all pollutants other than inorganic arsenic, and a FCR of 138 grams/day coupled with a Risk Level of 10^{-4} for inorganic arsenic. (Exhibit 1, Attachment A, p. 37 & n. 31; EPA's January 25, 2013 comparison of State and tribal FCRs, a copy of which is attached hereto as Exhibit 9; 06-096 C.M.R. ch. 584, §§ 4 (Risk levels), 5 (Human health assumptions) (eff. July 29, 2012)).

89. Thus, Maine's use of a general 32.4 grams/day FCR coupled with a cancer Risk Level of 10^{-6} is the equivalent of a FCR of 324 grams/day coupled with a Risk Level of 10^{-5}, or a FCR of 3240 grams/day coupled with a Risk Level of 10^{-4} – both FCRs that greatly exceed any EPA default FCR recommendations for any subpopulations, including subsistence fishers, within EPA-accepted Risk Levels. (Exhibit 5, § 2.4).

90. As reflected by EPA's January 2013 comparison of FCRs, Maine's FCR of 32.4 grams/day coupled with a cancer risk level of 10^{-6} represents one of the highest and most protective FCRs of all of the 50 States, and exceeds any EPA guidance on recommended FCRs for the general population. (Exhibit 9).

91. In contrast to Maine's general FCR of 32.4 grams/day, EPA's 2000 Guidance, which is currently in effect, utilizes a FCR of 17.5 grams/day for the general population, which, according to EPA represents the 90th percentile of EPA's data, is protective of the majority of the general population, and is recommended by EPA for State use as a FCR for the general population. (Exhibit 5, §§ 4.2.2.3, 4.3.3.1; Exhibit 1, Attachment A, p. 34 & n.25).

92. EPA's prior 1980 human health guidance for the general population assumed a default FCR of 6.5 grams/day, which was EPA's estimated national per capita FCR for freshwater and estuarine fish. As EPA acknowledges, many States utilize this 1980 EPA-recommended FCR of 6.5 grams/day in the development of their human health criteria, while other States such as Maine utilize a higher and more protective FCR. (Exhibit 3, § 3.1.3 ("Many States use EPA's 6.5 g/day consumption value. . ."); Exhibit 9).

Prior to 2004, EPA had already approved Maine's WQS for Indian Waters and had acted as if those WQS were fully in effect for Maine's Indian Waters

93. Historically, both before and after passage of the 1980 Acts, and throughout the 1980s and 1990s, EPA reviewed, acted on, and fully approved Maine's WQS for Indian Waters without any qualification as to the effect of those WQS within Maine's Indian Waters. (Exhibit 6).

94. Historically, EPA, including the highest members of EPA's Region 1, also acted as if Maine's WQS were in effect for Maine's Indian Waters for various CWA purposes. (Exhibit 1, Attachment A, p. 15; *but see id.* (asserting that mid-level EPA officials mistakenly assumed, without expressly considering the issue, that Maine's WQS applied within Indian Waters)).

95. For instance, in a letter dated May 31, 1996, EPA's then Regional Administrator for Region 1, John DeVillars, declined a request to EPA by PIN to begin a process of establishing federally promulgated WQS for the Penobscot River, including "waters affecting the Penobscot Indian Nation's reservation," and instead stated that he believed "the most promising approach to achieving our mutual objective is through thoughtfully applying the current [Maine] standards." The EPA Regional Administrator's letter goes on to discuss implementation of Maine's dioxin criterion ("based on EPA's national criterion") within waters "adjacent to" PIN's reservation, and states that EPA Region 1 believes that the "most efficient and effective way to address the tribe's concern at this time is through the permit process [based on Maine's WQS], rather than through a separate federal promulgation of a dioxin criterion." (A copy of this letter is attached hereto as Exhibit 10).

96. In 1997, EPA also responded to comments in connection with a proposed EPA NPDES permit for discharges by Lincoln Pulp and Paper within Indian Waters on the Penobscot River. (A copy of EPA's response to comments on Lincoln Pulp and Paper's proposed NPDES permit, along with portions of a draft fact sheet for the same NPDES permit, is attached hereto as Exhibit 11). In its responses, EPA applied Maine's WQS (including Maine's dioxin criterion) within Indian Waters, and determined that the EPA NPDES permit protected a FCR of 110 grams/day to a Risk Level of 10^{-5} [the equivalent of a FCR of 11.0 grams/day to a Risk Level of 10^{-6}], which EPA described as a "reasonable level of risk." (Exhibit 11, Response to Comments, p. 18; *see also id.*, draft fact sheet, p. 11 ("EPA seeks to apply the criterion for dioxin that Maine has adopted so as to ensure protection of human health, including the health of members of the Penobscot Nation who consume relatively large quantities of fish from this river."), p. 12 (EPA's NPDES permit protects both members of PIN and the general population; EPA has "left it to the

states to select a risk level from within an acceptable range" for human health, and has approved state human health criteria "based on risk levels ranging from 10^{-4} to 10^{-6}"), pp. 12-13 (for NPDES permit purposes, treating Maine tribes such as PIN as a "highly exposed subpopulation" of Maine's general population, and not as a separate "target population" protected by any kind of tribal-specific designated use of "sustenance fishing").

97. In addition, when EPA issues such a NPDES discharge permit, a State water quality certification that the discharge complies with the State's WQS and State law requirements is required pursuant to Section 401 of the CWA, 33 U.S.C. § 1341. (*PUD No. 1 of Jefferson Co. v. Washington Dep't of Ecology,* 511 U.S. 700, 707-708 (1994); (Exhibit 1, Attachment A, p. 15)). Historically, Maine has issued Section 401 water quality certifications for EPA-issued NPDES permits throughout Maine, including permits for discharges in Indian Waters, and EPA has never suggested that Maine's Section 401 certifications were unnecessary or that Maine's WQS were not applicable within those Indian Waters. (Exhibit 1, Attachment A, p. 15 (acknowledging EPA Region 1's historical requests for State Section 401 certifications that discharges within Indian Waters complied with Maine's WQS, but dismissing those requests as mid-level EPA mistakes).

98. In addition, EPA, in its oversight role over its CWA-delegated authority to Maine under the Maine Pollutant Discharge Elimination System ("MEPDES"), has historically reviewed draft MEPDES permits issued by Maine for discharges within Indian Waters.

99. EPA has never taken the position that any WQS other than Maine's generally-applicable WQS govern its NPDES permits, or Maine's MEPDES permits, for Indian Waters.

100. In fact, by letter dated June 10, 1998, EPA wrote DEP stating that, despite the "great strides in protection of water quality and human health Maine has taken," EPA believed that portions of the Penobscot River within Indian Waters immediately below Lincoln Pulp and Paper

still failed to meet Maine's stringent WQS applicable to those Indian Waters, which needed "to remain on [Maine's] 1998 §303(d) list." (33 U.S.C. § 1313(d) (requiring States to identify a list of those intrastate waters not attaining applicable State WQS); a copy of EPA's June 10, 1998 letter is attached hereto as Exhibit 25).

101. In addition, on January 26, 2006, EPA, through the Director of EPA Region 1's Office of Ecosystems Protection, renewed NPDES permit No. ME 0101311 issued to PIN for discharges into the Penobscot River from PIN's wastewater facility in Indian Island, Maine, which permit was governed by Maine's WQS and superseded prior EPA-issued NPDES permits stretching back to 1985 and 1990, which were also governed by Maine's WQS. (A copy of this EPA-issued renewal of PIN's NPDES permit in Indian Waters is attached hereto as Exhibit 12).

102. EPA's January 2006 renewal of PIN's NPDES permit clearly applies Maine's WQS to Indian Waters and documents EPA's historical acceptance and application of Maine's WQS within Indian Waters for things such as prior NPDES permits, Penobscot River modeling, and non-attainment findings with respect to Maine's WQS:

> B. NARRATIVE EFFLUENT LIMITATIONS
>
> . . .
>
> 5. The discharge shall not cause a violation of state water quality standards (Maine Law, 38 M.R.S.A. 467(15)(1)(4) which classifies the Penobscot River as a Class B waterway in the proximity of the discharge.
>
> . . .
>
> <u>FACT SHEET</u>
>
> . . .
>
> RECEIVING WATER: Penobscot River
>
> CLASSIFICATION: Class B
>
> . . .
>
> 1. APPLICATION SUMMARY

a. Application: The applicant applied for renewal of its Clean Water Act permit on May 8, 1990. The application reflects the discharge of 0.10 MGD of secondary treated municipal wastewater from the Penobscot Indian Nation's publicly owned treatment works facility to the Penobscot River, Class B, in Indian Island.

b. History: The most recent relevant licensing/permitting actions include the following:

November 21, 1985 – The U.S. Environmental Protection Agency (EPA) reissued NPDES permit No.ME0101311 authorizing 0.07 MGD of treated municipal wastewater discharge from its wastewater treatment facility to the Penobscot River.

1990 – Maine DEP upgraded section of Penobscot River (previously classified as Class C)

May 8, 1990 – The U.S. Environmental Protection Agency (EPA) received a complete application from the Penobscot Indian Nation.

March 30, 2000 – The Maine Department of Environmental Protection (DEP) issued Waste Discharge License WDL#W002672-59-B-R authorizing 0.07 MGD (based on a monthly average) of treated municipal wastewater discharge from its wastewater treatment facility to the Penobscot River.

October 31, 2003 – EPA approved Maine to implement the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permit program in the territories of two Maine Indian tribes, the Penobscot Indian Nation and Passamaquoddy Tribe. However, EPA did not [at that time] authorize the state to regulate two tribally owned and operated sewage treatment facilities: the Penobscot Indian Nations' Water Pollution Control Facility on Indian Island and the Passamaquoddy Tribe's Pleasant Point Facility.

. . .

2. RECEIVING WATER QUALITY CONDITIONS

The Penobscot River is classified as a class B waterway in the proximity of the discharge. Refer to state water quality standards (Maine Law, 38 M.R.S.A. § 467(15)(1)(4)). Class B waters require that a minimum dissolved oxygen level of 7 ppm and 75% of saturation be maintained at all times. A Penobscot River Modeling Report (April 2003) recommended that all municipal wastewater discharges should be capped at current phosphorus input levels. . . . This study of the Penobscot River from Millinocket to Bucksport (103 miles) began in the summer of 1997 involving the DEP and a number of stakeholders such as the Penobscot Nation, Great Northern Paper, International Paper, USEPA, and the Lincoln Sanitary District. A second round of monitoring was conducted in the summer of 2001. . . .

Non-attainment of class B dissolved oxygen criteria was observed at one location in 1997, but at ten of fourteen (10/14) locations sampled in 2001. . .

. . .

3. EFFLUENT LIMITATIONS & MONITORING REQUIREMENTS

. . .

Limits for pH are consistent with Maine Water Quality Standards for the adjacent receiving waters. (Class B).

Limits on e. coli bacteria are consistent with Maine Water Quality Standards for the adjacent receiving waters (Class B). . .

4. ENDANGERED SPECIES ACT ASSESSMENT

. . .

Receiving Water
The secondary treated wastewaters are discharged to the Penobscot River – Maine Class B upstream of the Veazie Dam and downstream of the confluence of the Stillwater River.

. . .

6. DISCHARGE IMPACT ON RECEIVING WATER QUALITY

As permitted, the EPA has determined the existing water uses will be maintained and protected and the discharge will not cause or contribute to the failure of the water body to meet standards for Class B classification.

- Discuss any recent plant improvements to improve water quality impacts
- Discuss WQ assessment results

. . .

(Exhibit 12). As EPA's own permit reflects, EPA has historically not recognized or applied any designated use of tribal "sustenance fishing" for Indian Waters in the Penobscot River, but has instead recognized and applied Maine's designated uses set forth in its established Water Classification Program. (*Id.*).

103. Maine's EPA-delegated authority to issue MEPDES permits for PIN's facility on Indian Island, as well as for the Passamaquoddy Tribe's Pleasant Point Facility, was subsequently confirmed by the First Circuit Court of Appeals in *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007).

EPA's disapproval of Maine's 1999 application for NPDES permitting authority for tribal facilities, and the Maine v. Johnson decision

104. In January 2001, EPA approved Maine's 1999 application for its MEPDES permitting program for non-Indian Waters only and EPA took no "final action on the issues related to the State's jurisdiction and the applicability of State law in Indian country for the purposes of implementing the NPDES program in those areas." (*Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007); 66 Fed. Reg. 12791, 12,795 (February 28, 2001)).

105. Thereafter, in October 2003, EPA approved Maine's MEPDES permitting program for all non-Indian facilities discharging into Maine's Indian Waters, but not for two Indian wastewater facilities operated by the Southern Tribes that discharged into Indian Waters under the EPA theory that the operation of those two facilities constituted "internal tribal matters" not subject to Maine's regulation under the 1980 Acts. (*Maine v. Johnson*, 498 F.3d 37, 40 (1st Cir. 2007); 68 Fed. Reg. 65052, 65053 (November 18, 2003)).

106. In the course of reaching this October 2003 decision, EPA acknowledged that the 1980 Acts prevent "the general body of Indian law from unintentionally affecting or displacing MICSA's grant of jurisdiction to the state," 68 Fed. Reg. 65052, 65057 (November 18, 2003), and rejected arguments that the Southern Tribes had concurrent environmental regulatory jurisdiction with Maine over Maine's Indian Waters. (*Id.* at 65058-65059).

107. In any event, Maine appealed and ultimately prevailed on its challenge to EPA's refusal to fully approve Maine's MEPDES permitting program for Indian Waters in *Maine v. Johnson*, which confirmed Maine's statewide environmental regulatory authority as well as Maine's authority to issue MEPDES permits for all facilities discharging into Indian Waters, including Indian facilities. (*Maine v. Johnson*, 498 F.3d 37, 42, 45-46 (1st Cir. 2007)).

108. Based on the history and text of the 1980 Acts, the First Circuit Court of Appeals interpreted the "internal tribal matters" exception in the 1980 Acts (*see* 30 M.R.S. § 6206(1)) narrowly so that it "does not displace general Maine law on most substantive subjects, including environmental regulation," and held that regulation of the discharge of pollutants into Maine's Indian Waters was not an internal tribal matter because it is "not of the same character as tribal elections, tribal membership or other examplars that relate to the structure of Indian government or the distribution of tribal property." (*Maine v. Johnson*, 498 F.3d 37, 46 (1st Cir. 2007); *see also id.* at 45 (if the internal affairs exemption negated Maine's ability to environmentally regulate within tribal waters, it would be "hard to see what would be left of the compromise restoration of Maine's jurisdiction" set forth in the 1980 Acts)).

109. Following the decision in *Maine v. Johnson,* 498 F.3d 37 (1st Cir. 2007), Maine's DEP wrote EPA in mid-2008 stating:

> I hereby request that U.S.E.P.A. amend its January 2001 delegation decision to make it consistent with the Maine v. Johnson decision. We expect that this amendment will include acknowledgement both of D.E.P.'s jurisdiction over all dischargers within the State, and that Maine's water quality standards apply uniformly throughout the State. . . .
>
> As you are aware, we are in the midst of relicensing all dischargers on the Penobscot River. . .
>
> As we have discussed with both you and George Frantz, the State is in very close communications with the Penobscot Indian Nation in regards to pending licenses. . .

(A copy of this letter is attached hereto as Exhibit 13).

110. EPA delayed responding to the order on remand in *Maine v. Johnson,* 498 F.3d 37, 49 (1st Cir. 2007) for over four years, and did not take action to fully approve Maine's delegated NPDES permitting authority over the two remaining Indian wastewater facilities until March 28, 2012. That EPA Region 1 March 28, 2012 action states in part:

> On December 17, 1999, EPA determined that the State of Maine had submitted a complete application to administer the NPDES permitting program in the state under the Clean Water Act. . .
>
> On January 12, 2001, EPA approved the State of Maine's application to administer the NPDES program for all areas of the state other than Indian country. . .
>
> On October 31, 2003, EPA approved the State of Maine's application to administer the NPDES program in the Indian territories of the Penobscot Indian Nation and the Passamaquoddy Tribe, with the exception of any discharges that qualified as "internal tribal matters" under MICSA and MIA. . . .
>
> On August 8, 2007, the U.S. Court of Appeals for the First Circuit issued its opinion in *Maine v. Johnson*, 498 F.3d 37. . . . The court's mandate was issued on October 2, 2007. . . .
>
> EPA proposed to implement the court's order by modifying its approval of Maine's NPDES program to authorize the State to issue NPDES permits for all discharges within the Indian territories of the Penobscot Nation and Passamaquoddy Tribe. . . . As a result, the state will assume responsibility from EPA for issuing and administering the permits for the Penobscot Nation Indian Island treatment works (EPA NPDES Permit No. ME 0101311 and MEPDES License No. 2672) and the Passamaquoddy Tribal Council treatment works (EPA NPDES Permit No. ME 0101311 and MEPDES License No. 2672). Neither tribe has applied to EPA to implement the NPDES permit program, so this action does not address the question of either tribe's authority to implement the program.

(77 Fed. Reg. 23481, 23482 (April 19, 2012)). As noted above, these NPDES permits for tribal wastewater discharges into Indian Waters were (and are) governed by Maine's WQS, and before its February 2, 2015 letter, EPA never raised any objections or concerns about the application of Maine's WQS in those Indian Waters.

111. Shortly thereafter, by letter dated May 29, 2012, and without informing Maine, PIN wrote EPA requesting a determination that PIN "qualifies pursuant to section 518 of the Clean Water Act for the purposes of seeking NPDES permit program approval for pollution discharges in the Penobscot River." (A copy of this letter and certain other communications between EPA and Maine's tribes are attached hereto as Exhibit 14).

112. By letter dated July 17, 2012, and without informing Maine, EPA initiated "consultation and coordination" with PIN regarding PIN's "request for a determination that the PIN qualifies

for treatment in the same manner as a state (TAS), pursuant to Section 518" of the CWA for purposes of PIN's attempt to obtain NPDES permit program approval from the EPA for discharges into the Penobscot River. (Exhibit 14).

113. By letter dated August 23, 2012, and without informing Maine, EPA wrote to PIN as a follow-up to a meeting between PIN and EPA Region 1 staff held on July 25, 2012, which EPA described as "a very positive and productive meeting, as one step in EPA Region 1's ongoing efforts to consult with the PIN and deliberate upon your request for a TAS determination for purposes of NPDES program authorization." (Exhibit 14).

EPA's secret communications with Maine Indian tribes regarding tribal WQS for and NPDES permitting authority over Maine waters

114. Beginning as early as 1999, and without informing Maine, EPA has been communicating with Maine Indian tribes regarding environmental matters such as a separate set of WQS (different from Maine's WQS) for Maine's Penobscot River. (Exhibit 14).

115. For instance, in July 1999, and without informing Maine, EPA and PIN, "in order to better achieve mutual environmental-governmental goals in the[ir] government-to-government relationship," entered into a Tribal Environment Agreement that contemplates EPA's implementation of its alleged federal trust responsibility towards PIN, contains a confidentiality agreement regarding communications between EPA and PIN, and commits EPA to using "best efforts to protect all such communications, including those that predate this agreement that are requested under the Freedom of Information Act." (A copy of this agreement is attached hereto as Exhibit 15).

116. By letter dated February 4, 2000, and without informing Maine, EPA wrote PIN stating that EPA would "fully consider" PIN's request that EPA promulgate separate WQS and administer CWA programs for PIN's reservation in Maine. (Exhibit 14).

117. Without informing Maine, EPA sent letters dated March 6, 2013, to all four of Maine's recognized Indian tribes, which, citing EPA's alleged "federal trust responsibility and government-to-government relationship" with Maine's tribes, initiated "consultation and coordination" with the tribes regarding certain Maine WQS revisions (including arsenic) addressed by EPA's February 2, 2015 letter. The letters each acknowledge that "EPA's guidance for the development and approval of human health criteria for carcinogenic compounds allows states and tribes to use cancer risk levels between 10^{-6} and 10^{-4} as long as sensitive subpopulations are protected to at least the 10^{-4} cancer risk." (Exhibit 14).

118. Three months later, EPA, by letter dated June 24, 2013, informed Maine of its approval of Maine's WQS revisions for arsenic for non-Indian Waters only and of its "consultation and coordination" with Maine's tribes regarding Maine's WQS, stating that "[a]s part of EPA's trust responsibility to the tribes, EPA must consult with the tribes in Maine before determining whether to approve" Maine's human health criteria revisions for Indian Waters. (Exhibit 14).

119. To the extent that EPA claims any authority to invoke a federal "trust responsibility" with respect to Maine's Indian tribes in a manner that would affect Maine's state environmental regulatory jurisdiction, it would not apply in Maine. (25 U.S.C. §§ 1725(h) & 1735(b)).

120. Substantive statutes and regulations must expressly create a fiduciary relationship giving rise to defined obligations in order for any federal "trust responsibility" to exist with respect to Maine's Indian tribes, *Nulankeyutmonen Nkihttaqmikon v. Impson*, 503 F.3d 18, 31 (1st Cir. 2007), and no such express relationship exists in Maine. (*See also Bangor Hydroelectric Co.,* 83 FERC P 61,037, 61,085 – 61,086, 1998 WL 292768 (with limited exceptions, Indian "reservation" lands in Maine are not held in trust by the federal government)).

121. By letter dated January 23, 2014, and without informing Maine, PIN wrote to EPA referencing the "ongoing government-to-government consultations" between EPA and PIN regarding the "administration and operation of the Clean Water Act within Penobscot Indian Reservation." PIN's January 23, 2014 letter to EPA also notified EPA of PIN's intention to promulgate its own WQS pursuant to Sections 303 and 518(e) of the CWA, and sought EPA input on "issues surrounding any competing authorities between the EPA, the State, and the Penobscot Nation with respect to the promulgation of water quality standards within the Reservation." (Exhibit 14).

122. As a follow-up to its January 23, 2014 letter, PIN, without informing Maine, sent EPA a letter dated February 27, 2014, referencing its prior request to EPA for input on "issues surrounding any competing authorities between the EPA, the State, and the Penobscot Nation with respect to the promulgation of water quality standards within the Reservation," and inviting the EPA Regional Administrator and Region 1 staff to a meeting to discuss PIN's forthcoming WQS application "in relation to the overall environmental regulatory regime within the Penobscot Indian Reservation." (Exhibit 14).

123. EPA sent a letter dated April 18, 2014, apparently to all federally-recognized Indian tribes (including those in Maine), which states:

> [EPA] is initiating consultation and coordination with federally-recognized Indian tribes concerning a potential reinterpretation of Clean Water Act provisions regarding treatment of tribes in the same manner as a state (TAS). The reinterpretation could reduce some of the time and effort for tribes submitting applications for TAS for regulatory programs under the Clean Water Act. Specifically, EPA is considering reinterpreting section 518(e) as a delegation by Congress of authority to eligible tribes to administer Clean Water Act regulatory programs over their entire reservations. This reinterpretation would replace EPA's current interpretation that applicant tribes need to demonstrate their inherent regulatory authority. . . .

(Exhibit 14).

124. On or about June 10, 2014, PIN published for hearing and comment draft tribal WQS applicable to PIN Indian Waters, and on or about October 8, 2014, PIN, without informing Maine, applied to EPA Region 1 seeking TAS status for purposes of a separate PIN WQS program in Maine and EPA approval of PIN's proposed tribal WQS for PIN Indian Waters. EPA Region 1 acknowledged receipt of PIN's application by letter dated November 5, 2014, which did not copy Maine. (Exhibit 14). Maine received a copy of EPA's letter on or about December 2, 2014.

125. Maine learned after-the-fact of the 1999 Tribal Environment Agreement between EPA and PIN and many of the other communications between EPA and Maine's Indian tribes only as a result of Maine's own efforts, including Maine's requests for public records and information, discovery requests in other litigation, and independent research.

From 2004-2015, EPA refused to act on Maine's WQS for unspecified Indian Waters

126. Beginning in approximately 2004, and despite its historical approvals of and adherence to Maine's WQS within Maine's Indian Waters, EPA began to limit its approvals of revisions to Maine's WQS to non-Indian Waters only. (Exhibit 1, Attachment A, pp. 1, 4, 14).

127. For example, EPA sent a letter to Maine dated February 9, 2004, which approved certain revisions to Maine's WQS, but which stated in part:

> I hereby approve the revised water quality standards in Chapter 257. This approval is made pursuant to Section 303(c)(2) of the Clean Water Act and 40 CFR Part 131, and is based on my determination that the approved revisions are consistent with the requirements of Section 303 of the Act. . . .
>
> EPA's approval of Maine's surface water standards revisions does not extend to waters that are within Indian territories and lands. EPA is taking no action to approve or disapprove the State's standards revisions with respect to those waters at this time. EPA will retain responsibility under Section 303(d) for those waters. . . .

Thereafter, and even after the issuance of *Maine v. Johnson,* 498 F.3d 37 (1st Cir. 2007), EPA continued to include similar limiting language in additional EPA letters to Maine dated April 14, 2004; January 25, 2005; April 17, 2006; July 7, 2006; September 18, 2006; August 19, 2009; May 19, 2010; July 20, 2011; and May 16, 2013. (Copies of these letters are collectively attached as Exhibit 16).

128. In one such letter dated May 16, 2013, EPA formally approved (for non-Indian Waters only) Maine's revised WQS related to arsenic, including Maine's revised cancer Risk Level "used to calculate the human health criteria for arsenic from one in 1,000,000 [10^{-6}] to one in 10,000 [10^{-4}]" and Maine's revised numeric criteria for inorganic arsenic using a FCR of 138 grams/day, but EPA continued to take no action on those WQS with respect to Indian Waters. (Exhibit 16 (May 16, 2013 letter)).

129. In approving Maine's WQS for arsenic in non-Indian Waters, EPA's May 16, 2013 letter acknowledges:

> Maine's revised numeric criteria for arsenic were derived using the same general methodology and equations used to calculate EPA's current 304(a) recommended criteria for carcinogens. . .
>
> Cancer Risk Factor (RF): The State of Maine enacted LD 515 in 2011 directing DEP to revise Maine's human health water quality criteria for arsenic based on a cancer risk factor of 1 in 10,000 [10^{-4}] rather than the previous RF of 1 in 1,000,000 [10^{-6}]. EPA's recommended methodology for the derivation of water quality criteria states that 1 in 1,000,000 [10^{-6}] or 1 in 100,000 [10^{-5}] may be acceptable cancer risk factors for the general population and that highly exposed populations should not exceed a 1 in 10,000 [10^{-4}] risk level. [citing EPA's 2000 Guidance, Exhibit 5]
>
> Fish Consumption Rate (FCR): Maine's previous 32.4 g/day FCR represents the 94th percentile for Native American anglers in Maine and the 95th percentile for the total angler population in Maine, based on data from a 1990 survey of licensed Maine anglers. In deriving the new arsenic criteria, DEP used 138 g/day, which is the 99th percentile of this survey, to ensure that the criteria are protective of subsistence fishers, a highly exposed population. This approach is consistent with EPA recommendations for estimating fish consumption rates for subsistence fishers and is appropriate to ensure that highly exposed subpopulations are not exposed to a risk level greater than 1 in 10,000 [10^{-4}]. [Table 1 omitted]

. . .

> EPA approves of the WQS revision to the arsenic criteria on the basis of the demonstrated use of available sound science, including state specific data, to derive the new criteria. . . .

(Exhibit 16 (May 16, 2013 letter)).

130. EPA's refusal to act on Maine's WQS for Indian Waters continued even after the Maine Office of the Attorney General sent a letter to EPA dated October 27, 2009, stating:

> As you know, it has now been established that Maine's environmental regulatory jurisdiction, in particular regarding water resources, applies uniformly throughout the State, and that jurisdiction applies to all of Maine's waters including those in the Penobscot River basin. *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007). Thus, it is clear that these standards apply to those areas previously disputed by the Maine tribes. In acting on the water quality standards set forth above, therefore, EPA should expressly confirm their applicability throughout Maine without exception.

(A copy of this letter is attached hereto as Exhibit 17).

131. EPA sent a letter dated October 16, 2012, to former Maine Attorney General William J. Schneider setting forth an apparent explanation for its recent (since 2004) failures to act on Maine's WQS for Indian Waters: "EPA's policy is that states are not authorized to implement federally approved environmental programs, like the WQS program under the federal Clean Water Act (CWA), in the territories of federally recognized tribes unless and until EPA has made clear findings on the record approving the state standards to apply in Indian country." (A copy of this letter is attached hereto as Exhibit 18).

132. This was contrary to not only the CWA and *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007), but also to EPA's WQS Handbook, which at least as of September 24, 2014, still stated in part:

> Until tribes qualify for the standards program and adopt standards under the Clean Water Act, EPA will, when possible, assume that existing water quality standards remain applicable. EPA's position on this issue was expressed in a September 9, 1988, letter from EPA's then General Counsel, Lawrence Jensen, to Dave Frohnmayer, Attorney General for the State of Oregon. This letter states: "if States have established standards

> that purport to apply to Indian reservations, EPA will assume without deciding that those standards remain applicable until a Tribe is authorized to establish its own standards or until EPA otherwise determines in consultation with a State and Tribe that the State lacks jurisdiction…"

(EPA WQS Handbook, § 1.8.6; because this portion of EPA's WQS Handbook no longer exists online, a copy of the former Chapter 1 of EPA's WQS Handbook (printed on August 22, 2014) is attached hereto as Exhibit 19).

133. In response to EPA's refusals to act on Maine's WQS for Indian Waters, Maine repeatedly asked EPA to identify what specific Maine waters comprised EPA's undefined concept of Indian Waters, and what WQS, if any, EPA believed were in effect for Maine's Indian Waters. (*See, e.g.*, letters to EPA dated January 14, 2013, and February 27, 2014, attached hereto as Exhibit 20).

134. Prior to EPA's February 2, 2015 letter, EPA never advised Maine: 1) what specific Maine waters comprised EPA's concept of Indian Waters; or 2) what WQS, if any, EPA believed were in effect for such Indian Waters.

135. While this action was pending, EPA issued its February 2, 2015 letter, which remains unclear as to what specific waterbodies comprise EPA's concept of Indian Waters. (Exhibit 1, Attachment A, p. 7). The many other unlawful aspects of EPA's February 2, 2015 letter include, without limitation, the twelve bulleted items set forth in paragraph 9 of this Second Amended Complaint.

EPA's disapproval of Maine's WQS reflects a larger EPA attempt to force States to accept the higher end of EPA's criteria recommendations based on tribal considerations

136. In addition to EPA's disapprovals of Maine's WQS, EPA has also recently expressed its disapproval of other states' human health criteria for their respective Indian Waters, even where

those other states' human health criteria (like Maine's) were within the range of EPA's recommended criteria options.

137. For instance, by letter dated March 23, 2015 (EPA's "Washington Letter"), EPA Region 10 stated its disapproval of a recent rule proposal by the State of Washington, which proposed to increase Washington's FCR from 6.5 grams/day to 175 grams/day and reduce its cancer Risk Level from 10^{-6} to 10^{-5}. (A copy of EPA's Washington Letter and attached EPA comments, as well as a response by the National Association of Clean Water Agencies ("NACWA") are attached hereto as Exhibit 21).

138. Contrary to EPA's 2000 Guidance, EPA's Washington Letter alleges that "a cancer risk level of 10^{-5} does not provide appropriate risk protection for all Washington citizens, including tribal members with treaty-protected fishing rights, when coupled with a fish consumption rate of 175 grams per day or higher." (Exhibit 21, at p. 1).

139. Echoing the new kind of approach outlined in EPA's February 2, 2015 letter to Maine (Exhibit 1), EPA's Washington Letter also asserts that EPA and Washington must "interpret the state's designated uses to include subsistence fishing," treat Washington's tribal population as "the target general population, not as a high-consuming subpopulation of the state," utilize FCR data reflecting tribal subsistence practices "unsuppressed by fish availability or concerns about the safety of the fish available for them to consume," and select a Risk Level that ensures "a minimum level of protection for that tribal target population when consuming fish at unsuppressed levels." (Exhibit 21 (Comments at pp. 2-3, 4-5)).

140. EPA's apparent rationale for its Washington Letter is based on the relationship between Risk Levels and FCRs (in a way that is inconsistent with States' roles under the CWA and that

violates EPA's own 2000 Guidance), and on treaty rights that are different from the terms of Maine's 1980 Acts:

> By using a 10^{-5}cancer risk level, the state has substantially offset the environmental benefits of raising the fish consumption rate for carcinogenic human health criteria. For tribes with treaty-protected fishing rights, this approach to the cancer risk level will not advance health protections consistent with their treaty-reserved right to harvest and eat fish and shellfish.

(Exhibit 21, pp. 1-2); *see also id.* at Comments at p. 2 ("In Washington, many tribes hold a treaty-reserved right to take fish for subsistence, ceremonial, religious, and commercial purposes at all usual and accustomed fishing grounds. . .") and p. 5 ("It should also be noted that the 2000 Human Health Methodology did not consider how CWA decisions should account for applicable treaty-reserved fishing rights, and the treaties themselves may require higher levels of protection.")

141. By letter dated May 13, 2015, the National Association of Clean Water Agencies ("NACWA") responded to EPA's Washington Letter in a way that carries equal force here in Maine:

> [T]he language in the CWA and the implementing regulations was not intended to give EPA authority to disapprove standards because the state's science and policy decisions are not identical to [EPA's] preference, policies and guidance. . . . In the case of Washington's proposed rule, which in fact was consistent with the range of values and approaches included in existing federal guidance, EPA appears to ignore the flexibility afforded to states in its own guidance by insisting that the state's program conform to EPA's preferred approach. These tactics are inconsistent with the CWA's cooperative federalism foundation and history that provides the states the responsibility for developing and approving water quality standards. . . . The structure established by the CWA – where EPA provides criteria recommendations and guidance and the states develop water quality standards based on that information as well as state policy and risk decisions (where a range of acceptable CWA options exist) – must be preserved to ensure that federal preference and the criteria recommendations do not become de facto regulations.

(Exhibit 21 (NACWA letter at pp. 2-3)).

142. EPA sent a similar letter and comments to Idaho dated May 29, 2015 (EPA's "Idaho Letter"), which responds to Idaho's proposed revisions to its human health criteria in a way that is similar to EPA's new and aggressive approach in Maine and Washington. (A copy of EPA's Idaho

Letter with EPA's comments is attached hereto as Exhibit 22; *see also id.* at Comments, p. 4 (outlining EPA's new position that states must select FCRs reflecting unsuppressed fish consumption, which EPA believes may be "necessary" to protect "tribal treaty or other reserved fishing rights")).

143. EPA's recent attempts to force States such as Maine, Washington, and Idaho to adopt the higher end of EPA's criteria recommendations (set forth in EPA's long established guidance) appear to stem from a late 2014 policy directive made at EPA's national level "regarding the role of tribal treaty rights in the context of EPA's activities," which directive was developed outside of the context of Maine's unique Indian Settlement Acts and which encourages EPA to implement and "enhance protection of tribal treaty rights and treaty-covered resources [including "hunting, fishing, and gathering"] when [EPA has] discretion to do so." (Copies of memoranda on this directive from EPA's national leadership dated November 28, 2014, and December 1, 2014, are attached hereto as Exhibit 23).

Count I – 5 U.S.C. §§ 701-706
Appeal of EPA's disapprovals of Maine's WQS set forth in
EPA's February 2, 2015 Letter under the Administrative Procedure Act

144. Plaintiffs reallege the allegations contained in paragraphs 1 through 143 and incorporate them herein.

145. EPA's February 2, 2015 letter sets forth EPA final agency action(s) with respect to Maine's WQS for Indian Waters only, which have harmed Plaintiffs and which are reviewable by this Court under the Administrative Procedure Act, *5 U.S.C. §§ 701-706* ("APA"), and for which Plaintiffs have no other adequate remedy in court other than review under the APA.

146. EPA's disapprovals of Maine's WQS (*i.e.*, Maine's human health water quality criteria) for Indian Waters only set forth in EPA's February 2, 2015 letter, as well as EPA's supporting

rationale set forth in Attachment A to that letter, are, among other things within the meaning of 5 U.S.C. § 706(2), arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law (including, without limitation, the CWA and corresponding regulations, EPA's Section 304(a) and other guidance documents, the 1980 Acts and other Maine Indian Settlement Acts, and *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007)), in excess of EPA's jurisdiction and authority and without observance of required procedure under the same authorities, and unsupported by substantial evidence and unwarranted by the facts, inasmuch as Defendants, among other things: 1) do not define with specificity their concept of Maine's Indian Waters; 2) assert that no Maine WQS are currently or were ever in effect for Maine's Indian Waters; 3) assert that EPA's pre-2004 approvals of Maine's WQS did not extend to Indian Waters because EPA was first required to make a formal threshold determination that Maine has environmental regulatory jurisdiction over its Indian Waters; 4) assert that EPA's historical recognition of and acquiescence to the application of Maine's WQS in Indian Waters was mistaken; 5) assert that the purpose of MIA, MICSA, and each of Maine's other Indian Settlement Acts was to establish a land base from which Maine's Indian tribes could practice their unique cultures, including tribal sustenance living practices and fishing rights, free from Maine environmental regulation; 6) assert that Maine's WQS and the protection of Maine's own existing designated uses of its waterbodies must be "harmonized" by EPA with EPA's flawed interpretation of the underlying and unwritten purpose of MIA, MICSA, and Maine's other Indian Settlement Acts; 7) interpret the narrow portions of MIA permitting members of Maine's Southern Tribes to take fish without restriction within their reservations (provided that such fish takings are for individual sustenance only) as more broadly constituting a designated use of tribal "sustenance fishing" for the Southern Tribes in their respective Indian Waters; 8) assert a new interpretation of Maine's longstanding

designated use of "fishing," as used throughout Maine's established Water Classification Program, as now meaning tribal "sustenance fishing" with respect to each of Maine's Indian tribes in their respective Indian Waters; 9) usurp Maine's role as a State under the CWA by purporting to establish EPA's own new WQS in Maine (*i.e.*, EPA's newly-created designated use of tribal "sustenance fishing") without any public input or other required process; 10) interpret EPA's own new designated use of tribal "sustenance fishing" as in turn requiring an implicit, bootstrapped right to heightened water quality in Indian Waters (and potentially beyond) in order to protect EPA's new use by ensuring a higher quality of fish for tribal-only sustenance purposes; 11) focus on a tribal-only fish consuming population, as opposed to Maine's general population, as the "target" population to be protected by EPA's new designated use of tribal "sustenance fishing"; 12) interpret EPA's new designated use of tribal "sustenance fishing" as requiring an unsuppressed tribal FCR based on a newly announced historical tribal fish consumption study that was never the subject of any public input process; and 13) disapprove Maine's human health water quality criteria for Indian Waters only as being un-protective of EPA's new tribal "sustenance fishing" designated use for those unspecified waters.

Count II – 28 U.S.C. §§ 2201, 2202
Requests for declaratory relief under the Declaratory Judgment Act

147. Plaintiffs reallege the allegations contained in paragraphs 1 through 146 and incorporate them herein.

148. An actual controversy within the Court's jurisdiction exists between the parties regarding EPA's disapprovals of Maine's WQS (*i.e.*, Maine's human health water quality criteria) for Indian Waters only set forth in EPA's February 2, 2015 letter, as well as EPA's supporting rationale set forth in Attachment A to that letter, including, without limitation, EPA's interpretations of the CWA and corresponding regulations, the 1980 Acts and Maine's other Indian Settlement Acts,

EPA's Section 304(a) and other guidance documents, and applicable case law, and EPA's assertions identified in paragraphs 9 and 146 of this Second Amended Complaint.

149. Additional actual controversies within the Court's jurisdiction also exist between the parties, including the following: 1) whether under the CWA and the 1980 Acts Maine's pre-2004 WQS were already approved and remain approved for Maine's non-Indian and Indian Waters; 2) whether Maine can lawfully be, or have been without, any WQS for Indian Waters, as EPA's rationale in its Attachment A to its February 2, 2015 letter states; 3) whether EPA waived all rights to disapprove, or is otherwise barred from disapproving, some or all of Maine's WQS that were previously approved without qualification as to their effect in Indian Waters by EPA, or that have been approved for adjacent non-Indian Waters; 4) whether there are any Indian Waters that warrant different environmental regulatory treatment from other Maine waters, and/or special treatment for members of Maine's Indian tribes from the standpoint of water quality regulation; 5) the meaning of the narrow portions of MIA permitting members of Maine's Southern Tribes to take fish without restriction within their reservations provided that the taking of such fish is for the members' individual sustenance only, and whether such portions of MIA amount to a designated use tribal "sustenance fishing" for any Maine waterbodies; 6) the meaning of Maine's longstanding designated use of "fishing" within Maine's established Water Classification Program, and whether that designated use also encompasses a separate tribal "sustenance fishing" designated use with respect to each of Maine's Indian tribes within their respective Indian Waters; 7) whether EPA may create its own designated use of tribal "sustenance fishing" for Maine, and if so, whether EPA can do so without the benefit of any public input or process; 8) whether EPA may select a tribal-only fish consuming population as the target population to be protected under provisions of Maine law, the CWA, and EPA's regulations; and 9) the range of

acceptable Risk Levels and FCRs available to States such as Maine under the CWA and existing EPA Section 304(a) guidance, whether EPA can restrict those options without new guidance subject to a public input process, and whether Maine's Risk Levels and FCRs fall within permissible EPA criteria options for WQS purposes.

150. Declarations by the Court of the rights and legal relations of the parties will redress the existing actual controversies between the parties, and the requested declarations in favor of Plaintiffs will redress the harms to Plaintiffs.

Count III – 33 U.S.C. §§ 1313, 1365(a)(2)
EPA's failure to perform non-discretionary duties under the CWA

151. Plaintiffs reallege the allegations contained in paragraphs 1 through 150 and incorporate them herein.

152. Plaintiffs are entitled to commence a civil action on their own behalf against Defendants pursuant to 33 U.S.C. §§ 1365(a)(2), 1365(g).

153. Plaintiffs have provided the requisite notice pursuant to 33 U.S.C. § 1365(b) by virtue of a certified letter sent to the EPA Administrator and the United States Attorney General dated 1) March 17, 2015, which, per that letter's return receipts, was received by both EPA and the U.S. Attorney General on March 23, 2015. (A copy of the March 17, 2015 notice letter and corresponding return receipts is attached hereto as Exhibit 24).

154. Defendants have a non-discretionary, official and public duty under the CWA, 33 U.S.C. § 1313, and the 1980 Acts to approve, and have no discretion to disapprove, WQS for Maine's Indian Waters where those same standards have been determined to be consistent with the CWA, 33 U.S.C. § 1313, and 40 C.F.R. §§ 131.5 & 131.6, and approved by EPA for Maine's non-Indian Waters, and where no Indian tribe has been authorized by EPA to promulgate WQS or administer a WQS program in Maine pursuant to 33 U.S.C. § 1377(e) and/or 40 C.F.R. § 131.8.

155. Defendants failed to fulfill this non-discretionary duty by disapproving Maine's WQS (*i.e.*, its human health water quality criteria) for Indian Waters only, as set forth in its February 2, 2015 letter, which WQS had already been determined to be consistent with the CWA and approved by EPA for Maine's non-Indian Waters.

156. Defendants have a non-discretionary, official and public duty under the CWA and the 1980 Acts to approve, and have no discretion to disapprove, Maine's WQS that EPA already approved without qualification as to their effect in Maine's Indian Waters (*i.e.*, before 2004), where no Indian tribe has been authorized by EPA to promulgate WQS or administer a WQS program in Maine pursuant to 33 U.S.C. § 1377(e) and/or 40 C.F.R. § 131.8.

157. Defendants failed to fulfill this non-discretionary duty by disapproving Maine's WQS (*i.e.*, its human health water quality criteria) for Maine's Indian Waters only, as set forth in its February 2, 2015 letter, to the extent those disapprovals extend to Maine's WQS previously approved by EPA before 2004 without qualification as to their effect in Maine's Indian Waters.

158. Defendants have a non-discretionary, official and public duty under the CWA and the 1980 Acts to disapprove Maine's WQS within 90 days of their submission to EPA, and Defendants have no discretion to disapprove Maine's WQS for Indian Waters only after expiration of the 90 day deadline where no Indian tribe has been authorized by EPA to promulgate WQS or administer a WQS program in Maine pursuant to 33 U.S.C. § 1377(e) and/or 40 C.F.R. § 131.8.

159. Defendants failed to fulfill this duty by disapproving Maine's WQS (*i.e.*, its human health water quality criteria) for Maine's Indian Waters only, as set forth in EPA's February 2, 2015 letter, which occurred well beyond any applicable 90-day deadline for such disapprovals.

160. Prior to the issuance of EPA's February 2, 2015 letter, Defendants waived all right to disapprove and/or specify any changes required for approval of, or are otherwise legally barred

from disapproving, Maine's WQS that had historically been approved by EPA without qualification as to their effect in Indian Waters (*i.e.*, before 2004), and that had previously been fully approved by EPA for non-Indian Waters.

161. Defendants have a non-discretionary, official and public duty under the CWA to approve Maine's WQS that are consistent with EPA Section 304(a) guidance, and Defendants have no discretion to disapprove Maine's WQS provided they are within the acceptable range of EPA's guidance.

162. Defendants failed to fulfill this duty by failing to approve Maine's WQS (*i.e.*, its human health water quality criteria) that were well within the range of acceptable EPA criteria recommendations considering the relative relationship of Maine's FCRs and Risk Levels.

163. The failure by Defendants and EPA to perform their non-discretionary duties under the CWA and the 1980 Acts and approve Maine's WQS at issue in EPA's February 2, 2015 letter has harmed Plaintiffs, and the relief requested by Plaintiffs will redress those harms.

164. Plaintiffs are seeking their litigation costs, including attorneys' fees, pursuant to 33 U.S.C. § 1365(d).

Requests For Relief

Plaintiffs request from the Court the following relief:

a. A declaration and order setting aside as unlawful and void each of EPA's disapprovals of Maine's WQS (*i.e.*, Maine's human health water quality criteria) set forth in EPA's February 2, 2015 letter, as well as EPA's rationale for those disapprovals;

b. A declaration and order that all Maine WQS that are or were approved by EPA for non-Indian Waters are also required under the CWA and the 1980 Acts to be approved by EPA for Indian Waters;

c. A declaration and order that all of Maine's WQS submitted to EPA prior to 2004 that purported to apply to Indian Waters and that were previously approved by EPA for non-Indian Waters only were fully approved by EPA for both Indian Waters and non-Indian Waters, and were in effect for Indian Waters as of the date of their approval by EPA for non-Indian Waters;

d. A declaration and order that, in Maine and under the 1980 Acts, EPA's concept of Indian Waters has no relevance or meaning for WQS purposes under the CWA, and EPA may not lawfully base any disapproval of Maine's WQS on any distinctions between Indian Waters and non-Indian Waters, or between Maine's tribal population and its general population;

e. A declaration and order that the portions of MIA permitting members of Maine's Southern Tribes to take fish without restriction (within their reservations provided that the taking of such fish is for the members' individual sustenance only) relate only to IFW and/or MITSC restrictions on things such as the "method, manner, bag and size limits and season for fishing," and do not, for CWA and WQS purposes, constitute a separate "sustenance fishing" designated use for any waterbodies in Maine for CWA and WQS purposes, entitle any Maine Indian tribes or members to any special rights or status greater than the rest of Maine's general population, or require any heightened quality of water or fish in any waterbodies;

f. A declaration and order that Maine's longstanding designated use of "fishing" as used in Maine's established Water Classification Program for all Maine waterbodies does not, for CWA and WQS purposes, encompass or also constitute a separate "sustenance fishing" designated use for any waterbodies in Maine, entitle any Maine Indian tribes or members to any special rights or status greater than the rest of Maine's general population, or require any heightened quality of water or fish in any waterbodies;

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g. A declaration and order that, when developing WQS under the CWA for any of its intrastate water bodies, Maine retains the flexibility to choose from among its many CWA options any of EPA's acceptable criteria recommendations set forth in EPA's Section 304(a) guidance documents, including EPA's 2000 Guidance, and may rely on its chosen EPA criteria recommendations as a lawful basis for establishing enforceable Maine WQS under the CWA;

h. An order awarding Plaintiffs their attorneys' fees and costs incurred in bringing and maintaining this action pursuant to 33 U.S.C. § 1365(d), 28 U.S.C. § 2412, and 5 U.S.C. § 504; and

i. Such further and additional relief as the Court may deem just and proper.

Dated: October 8, 2015

Respectfully submitted,

JANET T. MILLS
Attorney General

/s/ Scott W. Boak
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October, 2015, I electronically filed Plaintiffs' Second Amended Complaint and exhibits with the Clerk of Court using the CM/ECF system, which will send notification and a copy of such filing(s) to all counsel of record who have consented to electronic service, including the following:

- **DAVID A. CARSON**
  david.a.carson@usdoj.gov
- **JOHN G. OSBORN**
  john.osborn2@usdoj.gov
  Amy.Imbergamo@usdoj.gov
  Christine.Melhorn@usdoj.gov
  usame.ecf@usdoj.gov

/s/ Scott W. Boak

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STATE OF IDAHO
DEPARTMENT OF
ENVIRONMENTAL QUALITY

1410 North Hilton • Boise, Idaho 83706 • (208) 373-0502
www.deq.idaho.gov

C.L. "Butch" Otter, Governor
John H. Tippets, Director

February 28, 2017

The Honorable Scott Pruitt
Administrator
United States Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue Mail Code: 1101A Washington D.C. 20460

Re: Request for Approval of Idaho's Revised Water Quality Standards, Human Health Criteria

Dear Administrator Pruitt:

I am writing to request that the EPA formally approve the revised water quality standards, Human Health Criteria update (HHC) that the Idaho Department of Environmental Quality (IDEQ) submitted to EPA Region 10 for approval on December 13, 2016. The package of supporting material submitted at that time (and enclosed with this letter) demonstrates that the revised HHC meet all required statutory and regulatory requirements forapproval.

As you have emphasized throughout your career and upon taking the helm at EPA, the nation's environmental laws, including the Clean Water Act (the Act), are built on the principle of cooperative federalism. Under the CWA, states have the primary responsibility to develop water quality standards, including the criteria necessary to protect the designated uses of the waters of the state. While EPA issues recommended national HHC pursuant to Section 304(a) of the Act, those criteria are only guidance and states should adapt them as needed to protect their waters. The states' criteria must protect the designated use and be based on "sound scientific rationale"(40 C.F.R. § 131.11(a)). Finally, under existing regulations (40 C.F.R. § 131.11(b)), states may adopt the EPA national criteria; modify the national criteria to reflect site-specific conditions; or develop other "scientifically defensible" criteria.

The revised HHC IDEQ submitted for approval were developed through an open, transparent stakeholder process that took several years. IDEQ made availablethe data and scientific support for its HHC throughout that process, as well as the rationale forthepolicy choices it made-choices clearly leftto the discretion ofthe states under the Act, EPA rules and guidance. The process culminated with the approval of the HHC Rule before the Idaho Board of Environmental Quality in December 2015 and the Idaho Legislature, in 2016.

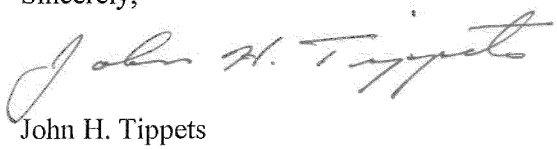
In a January 19th letter, the then-EPA Regional Administrator responded to IDEQ informing the agency that EPA had serious concerns with the revised HHC and questioned whether the package was approvable. The letter raised a number of concerns about tribal treaty rights, the proper calculation of fish consumption rates, IDEQ risk policy choices andother aspects of the HHC. Many ofthoseconcerns are based on arguments with no legal foundation in the Act or on disagreements with IDEQ's policy choices. However, the "Idaho Human Health Criteria Update

Justification and Compliance with the Clean Water Act" document included as part of the submittal more than adequately addresses the concerns included in EPA's letter.

The concerns raised by EPA regarding Idaho's HHC are very similar to those raised by EPA when it disapproved HHC adopted by Washington and Maine. Like Idaho, Washington and Maine developed HHC in accordance with the CWA, federal regulations and EPA national guidance. Nevertheless, EPA disapproved the criteria and based its disapproval on the rejection of policy choices allowed States under the law. Petitions have been filed in both Washington and Maine asking EPA to withdraw its disapproval.

Thank you for your consideration of Idaho's request for approval of our revised HHC. We look forward to hearing from you soon, and to working cooperatively with you and your staff in the future.

Sincerely,



John H. Tippets
Director

JHT:ra

Enclosures

c: Michelle L. Prizadeh, EPA Region 10 Acting Administrator

To: Schnare, David[schnare.david@epa.gov]
From: Cathy Milbourn
Sent: Fri 2/17/2017 7:35:38 PM
Subject: EMBARGOED RELEASE:Scott Pruitt Confirmed and Sworn in as EPA Administrator

EMBARGOED UNTIL 5:30 P.M. EST FEB. 17, 2017

CONTACT:
Press@epa.gov

Scott Pruitt Confirmed and Sworn in as EPA Administrator

WASHINGTON--Today, Oklahoma Attorney General Scott Pruitt was confirmed and sworn in as the 14th administrator of the U.S. Environmental Protection Agency (EPA).

Administrator Pruitt believes promoting and protecting a strong and healthy environment is one of the lifeblood priorities of the government, and EPA is a vital part of that mission.

Pruitt became a national leader through a career of advocating to keep power in the hands of hardworking Americans. He has a proven record of working with industry, farmers, ranchers, landowners, small business owners and others to protect our natural resources.

As a dedicated civil servant, Pruitt created policies that serve the people. He strongly believes environmental law, policy, and progress are all based on cooperation among the states, cooperation between the states and EPA, and cooperation between regulators and the public.

As Administrator, Mr. Pruitt will lead EPA in a way that our future generations inherit a better and healthier environment while advancing America's economic interests. He is committed to working with the thousands of dedicated public servants at EPA who have devoted their careers to helping realize this shared vision, while faithfully administering environmental laws.

Most recently, Administrator Pruitt served as the Attorney General for Oklahoma. He worked with his Democratic counterpart in Arkansas to reach agreement to study the water quality of the Illinois River that crosses between the two states and has been enjoyed by generations of Oklahomans and Arkansans. The Statement of Joint Principles provided for a best science study using EPA-approved methods, with both states agreeing, for the first time, to be bound by the outcome.

During his tenure as Oklahoma's Attorney General, Mr. Pruitt led an historic water rights settlement between the State of Oklahoma, Oklahoma City and the Choctaw and Chickasaw Nations that preserved the ecosystems of scenic lakes and rivers on native lands. The agreement, which required Congressional approval, was signed into law on December 2016.

The Law provides a framework that fosters intergovernmental collaboration on significant water resource concerns while protecting existing water rights and affirming the State's role in water rights permitting and administration. Water settlement cases can be lengthy, costly, divisive and disruptive, however under Pruitt's forward thinking leadership the process was hailed by all parties as one of commitment, hard work, perseverance and cooperation.

As Attorney General for Oklahoma, he also led the State's legal challenges against property rights intrusion while protecting Oklahoma's natural resources and environment.

Administrator Pruitt is recognized as a national leader in the cause to restore the proper balance between the states and federal government, and established common sense regulations that are fair and provide relief where needed. Before being elected attorney general, he served eight years in the Oklahoma State

Senate where he was a leading voice for fiscal responsibility.

After earning his Bachelor's Degree from Georgetown College and graduating from the University of Tulsa law school, Pruitt went into private legal practice, specializing in Constitutional Law.

In addition to his life as a civil servant, Administrator Pruitt is a successful entrepreneur. As a co-owner and managing general partner of Oklahoma City's Triple-A minor league baseball affiliate, the Oklahoma City RedHawks, Mr. Pruitt took over the team's marketing operations and helped the team become one of the league's leaders in attendance and merchandise sales.

Scott Pruitt is, first and foremost, a family man. Scott and Marlyn, his wife of 27 years, proudly raised their daughter, McKenna, and son, Cade, in Tulsa. Scott has made it a priority to pass on to his children the same principled, family values with which he was raised.

To see Administrator Pruitt's biography, visit: **Non-responsive Internal URL/Ex. 6**

R020

If you would rather not receive future communications from Environmental Protection Agency, let us know by clicking here.
Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460 United States

To: Schnare, David[schnare.david@epa.gov]
From: John Hall
Sent: Thur 1/26/2017 11:29:34 PM
Subject: RE: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017
House Oversight Committee Request on EPA Nutrient Criteria Methods - 3-2....pdf
Hall Issues - OW Approach Document 12-16-16. docx.pdf

D.

Agree completely and will do. I can give you the timeline that you want – we had previously developed several to explain what was going on in several cases and how science is now largely ignored in EPA decision making.

Attached is one of several letters we had sent to Congressional Committees detailing the junk science EPA was using to impose easily a hundred billion (yes it costs that much) in new nutrient removal requirements. (see, the Case studies attachment pgs 6-17). Tip of the iceberg.

Incidentally ,I was on the EPAHQ Advanced Treatment Review Task Force in the 1980's when EPA actually cared about getting science and expenditures right. Most of the things they have been doing in recent years can be "referred" to an independent technical team (or SAB) who would promptly detail why these decisions were not scientifically defensible. I'm looking at numerous TMDLs that even violate the laws of physics – all care of the expert consultant TetraTech – who would literally say anything EPA wanted to produce a more restrictive result. The way to end this idiocy is with real science, not cherry picked science or summary reversal.

If I actually get the call from PPO to come over and assist on regulatory reform as I have offered, we will have a field day – and right the ship. Attached is the strategy I recommended to Scott Pruitt to provide a process to effectively reconsider various unnecessary regulatory actions of the prior administration. Drop the issue into the correct bin, and proceed to resolution.

John

John C. Hall

Hall & Associates

1620 I Street, NW, Suite 701

Washington, DC 20006

Phone: Personal Phone/Ex. 6

Fax: 202-463-4207

E-Mail: jhall@hall-associates.com

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From: Schnare, David [mailto:schnare.david@epa.gov]
Sent: Thursday, January 26, 2017 6:05 PM
To: John Hall
Subject: RE: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017

John:

Can you send me a timeline and examples of the less than credible science R1 has been using, and that OW has approved. I need context and specifics to approach this issue. It would be very helpful if you cast that briefing in the context of EPA's Information Quality Act guidance. That is the tool I want to see used to pull the agency back into the mainstream.

d.

From: John Hall [mailto:jhall@hall-associates.com]
Sent: Thursday, January 26, 2017 5:49 PM
To: Schnare, David <schnare.david@epa.gov>

Subject: RE: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017

David

Most appreciated.

Regarding a Regional Office response, in my 35 years of doing NPDES permitting around the country (45 different states and every EPA Region – see Bio) I have never encountered a group that fabricates more positions (legal and scientific) than EPA Region I. The types of mandates they have been imposing on New England communities over the past 8 years, with essentially no scientific backup or specific regulatory authority, is astounding. It got so bad that I even had to file science misconduct charges in 2012 to address what they were doing to create state of the art TN limits for all municipal dischargers to Great Bay Estuary. Eventually, the State of New Hampshire convened an independent peer review committee in 2014 (four nationally recognized water quality/estuary experts) who determined that the TN impairment conclusions were not based on scientifically defensible analyses. Since then the State of New Hampshire, in conjunction with the local municipalities, has been supporting a program to ensure only sound scientific information and practices are employed in future decision making. The Region, for its part, has refused to participate in and actively undercuts these efforts and continues to claim TN impairments are well documented – appalling. This is just one of a dozen similar stories.

Regarding the MS4 permit, the more restrictive requirements were actually coming out of EPA HQ, with R1 as the testing ground because they get to issue the NPDES permits for NH and MA (2 of the 4 non-delegated CWA programs in the country). Region I was an optimum location to do this because EAB review is essentially a rubber stamp and the 1st Circuit is, in general, extremely deferential to EPA positions. Consequently, New England permittees know the cards are stacked against then so they just roll over. In any event, we contacted EPA HQ on several occasions to complain about the imposition of new regulatory prohibitions not contained in federal law and, of course, got nowhere. We can give you that correspondence if you would like.

While I understand the need to engage the Region in the process, asking the Region to review whether that which they have already claimed is mandated, is actually required by the Act, is

largely a waste of time. If we sat down with the NPDES rules for 1 hour, we could confirm to you that none of these requirements are actually in the current law. In fact, several plainly exceed statutory authority (flow limits, imposition of individual antidegradation reviews under MEP, the prohibition against "causing or contributing", presuming water quality impairment is caused by a discharge). These MS4 permit provisions are fundamental changes to how the CWA itself is intended to operate. They are intended to give environmental groups and EPA control over land use planning (something also plainly outside the scope of their authority) and to switch the burden of proof on compliance (presumed guilty). So, in short, this is quite a mess, but a nice case study in what has been going on under the purview of the Obama Administration appointees (who were typically former heads of environmental organizations – like Regional Administrator Spalding who signed this permit).

I'm sure you are beyond busy with similar requests. Just let me know whenever your schedule might accommodate a chance to sit down over a cup of coffee.

PS – To actually stop the clock on the "issuance date" of the permit, you may have to issue a notice on the R1 website stating that the prior Regional Administrator approval is on hold, pending more detailed regulatory review.

PPS - I promise to send a shorter email next time - really.

John

John C. Hall

Hall & Associates

1620 I Street, NW, Suite 701

Washington, DC 20006

Phone: **Personal Phone/Ex. 6**

Fax: 202-463-4207

E-Mail: jhall@hall-associates.com

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From: Schnare, David [mailto:schnare.david@epa.gov]
Sent: Thursday, January 26, 2017 4:55 PM
To: John Hall
Subject: RE: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017

John:

I have pulled the FR notice. The Region has been asked to respond to the points you have raised. The MS4 permit will not be effective until we have fully reviewed the issue and determined the validity of the Region I action. This is a heads up to you. I don't want this email to be further distributed.

dschnare

From: John Hall [mailto:jhall@hall-associates.com]
Sent: Thursday, January 26, 2017 2:01 PM
To: Schnare, David <schnare.david@epa.gov>; Benton, Donald <benton.donald@epa.gov>
Subject: RE: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017

David

This is the link to the Region I notice of final agency action:
https://www3.epa.gov/region1/npdes/stormwater/MS4_NH.html

The website description is a little confusing, in one spot stating:

In accordance with 40 CFR part 23, this permit shall be considered issued for the purpose of judicial review at 1:00 pm eastern daylight time on February 1, 2017. Under section 509(b) of the Clean Water Act, judicial review of this general permit can be requested by filing a petition for review in the United States Court of Appeals within 120 days after the permit is considered issued, i.e. by June 1, 2017.

Howe4ver, the list of records shows a copy of the FR notice that is needed to properly inform the public of the final action since this is a statewide applicable permit. (Attached) Our understanding is that the FR notice was not yet published and without this official notice to the affected public, the agency's action can be withdrawn for further consideration.

Regards,

John

John C. Hall

Hall & Associates

1620 I Street, NW, Suite 701

Washington, DC 20006

Phone: Personal Phone/Ex. 6

Fax: 202-463-4207

E-Mail: jhall@hall-associates.com

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From: Schnare, David [mailto:schnare.david@epa.gov]
Sent: Thursday, January 26, 2017 1:32 PM
To: Benton, Donald; John Hall
Subject: RE: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017

John:

I'm looking into this and will get back to you once I know its status. We have a list of agency actions for which we have extended the effective date. I am not sure that this is on that list, or whether it should be. If it is on that list, there has been an automatic extension of the effective date by 60 days, unless the effective date is more than 60 days from Jan 20th in the first place.

I'll let you know what you can do and what we can do to deal with this issue once I'm up to speed.

dschnare

From: Benton, Donald
Sent: Thursday, January 26, 2017 12:38 PM
To: John Hall <jhall@hall-associates.com>
Cc: Schnare, David <schnare.david@epa.gov>
Subject: RE: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017

Dear John,

Thanks for your note. I ordered all scheduled publications not yet published to be pulled back last Saturday. We are double checking to see if this item even appeared on that list. If it did not we will pull it back until it can be reviewed.

David Schnare, my acting counsel, will be getting back to you.

Thank you again for your communication.

Don

Don Benton

Senior White House Advisor

From: John Hall [mailto:jhall@hall-associates.com]
Sent: Thursday, January 26, 2017 10:56 AM
To: Ericksen, Doug <ericksen.doug@epa.gov>; Munoz, Charles <munoz.charles@epa.gov>; Benton, Donald <benton.donald@epa.gov>
Cc: Robert R. Lucic <RLUCIC@sheehan.com>; Lynn Preston <lpreston@sheehan.com>;
Personal Email/Ex. 6 - Philip D. Rosenman
Subject: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017
Importance: High

Dear Messrs. Ericksen, Munoz and Benton,

Attached please find a copy of the letter and email (below) transmitted yesterday to Administrator –designate Scott Pruitt from the Center for Regulatory Reasonableness on behalf of 20 New Hampshire Communities and stormwater coalitions from four other states (Pennsylvania, Colorado, Massachusetts, and Minnesota). As noted, just two days before President Trump's inauguration, EPA issued a 250 page, multi-billion dollar MS4 General Permit to small communities in New Hampshire, knowing there was no possibility such an action would be countenanced by the new Administration. In the classic EPA style of the prior Administration, imbedded within this permit action were a series of major regulatory changes and new mandates that appear NOWHERE in the adopted NPDES rules or the statute itself. As discussed in the letter, these were extreme changes to the existing MS4 regulatory regime that could not possibly been adopted if they were proposed as actual changes to the NPDES rules. However, as it has done in many other cases over the past 8 years, EPA used unilateral

authority to impose the new requirements, and to disregard ignore all contrary public comment, by using a general permit as the vehicle to implement these unadopted and *ultra vires* rule modifications.

Because this is a permit action of statewide applicability, it would not appear to fall specifically under the regulatory freeze imposed by the President, even though EPA's action implements regulatory changes the rule freeze was intended to stop. However, the document has not yet been published in the Federal Register and can be pulled back, effectively negating the action. If this does not occur, communities in NH will be forced to file an action in Federal Court to stop this abusive permit, an action they most certainly would like to avoid, if possible.

Could you please promptly take action to freeze this clear example of regulatory overreach and abuse of administrative process by the prior Administration?

I am available at any time to come over to EPA and discuss this matter with you in detail. I look forward to hearing from you.

Respectfully

John C. Hall

Hall & Associates

Center for Regulatory Reasonableness

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From: Tonja Scott
Sent: Wednesday, January 25, 2017 6:41 PM
To: Personal Email/Ex. 6 - Michelle Connell Hale
Cc: 'scott.pruitt@oag.ok.gov'
Subject: CRR Letter to New Administration - NH Stormwater Permit

Dear Mr. Pruitt:

I trust your confirmation process is moving along on a positive track – there is so much regulatory reform work to be done at EPA, it will be a pleasure to work with you on those efforts. My offer to assist the Administration in regulatory reform at EPA is still pending and I hope to hear from the Presidential Personnel Office in the next month or so.

As discussed in my prior emails, there are a number of seriously flawed and wasteful EPA Office of Water regulatory decisions/practices that I would like to discuss with you, given the vast resources at stake nationwide with each of these decisions. They are quintessential examples of illegal rulemaking, regulatory overreach and scientifically indefensible activities.

The items I would like to discuss with you include:

- EPA's small MS4 permit for New England communities, issued on January 18, 2017 (created new regulatory prohibitions, impossible compliance requirements, exposed all MS4 communities to immediate citizen suits and modified statutory program to create >$10 billion in increased compliance mandates – *all with no change in existing rules*) **(SEE ATTACHED LETTER REQUESTING REGULATORY FREEZE)**
- EPA's continued imposition of a nationwide ban on blending and bacteria mixing

zones following the 8th Circuit's 2013 *Iowa League of Cities* decision that vacated those actions on APA and *ultra vires* grounds (demonstrates a complete disregard for the rule of law and statutory framework of the Clean Water Act) (PS – They did something similar in the *NEDACAP* air case from the 6th Circuit)

- EPA's use of junk science and unproven evaluation techniques to develop highly restrictive nutrient TMDLs and NPDES permits in an effort to impose stringent nutrient limits nationwide (three examples will be discussed which violate the laws of physics, use methods the scientific community has rejected as indefensible and show a complete disregard for following the recommendations of EPA's Science Advisory Board and EPA's own Peer Review Policy in creating defensible regulatory decisions)
- EPA's NPDES program actions that plainly exceed statutory authority in seeking to regulate flow, land use decisions and created a new trillion dollar "antidegradation" mandate that is contrary to the basic structure of the Clean Water Act.

I suspect it would take an hour of your time to review these issues and to discuss how they may be addressed effectively. It would be my pleasure to fly to Oklahoma City to talk with you on these issues if your schedule would allow.

I look forward to hearing from you.

John

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Hall Recommendations on EPA OW Reform Efforts

OW Activities Requiring Immediate Reassessment

- Revise Specific Permitting/TMDL decisions (>Thousands – but many are similar)
- Regulatory Guidance on Impaired Waters Listing
- MS4/Stormwater Program Mandates, scope of MEP requirements.
- Water Quality Standard Updates (Stressor-Response Approach, Chlorides, several toxics/metals seriously outdated, nutrients, narrative criteria implementation, state adoption of updates)
- 2015 Antidegradation Rule Amendment
- Section 404 Implementation/Waters of US Designation
- CWA Scope of Authority Issues (Flow as Pollutant, Dictating Plant Design/Blending prohibition, regulating basement Backups, MS4 land use planning submissions, WQ-based MS4 limits, Antideg)
- Water Quality-based permitting Guidance (discharge significance, cause and effect requirement, discharges to impaired waters, nutrient evaluations, allowable mixing zones, pre-TMDL permitting, TMDL consistency, agricultural trading program restrictions)
- BAT/BCT Updates for Industrial Categories (Cooling Water Intakes, Mercury restrictions)

Approach to Issue Resolution – Ensure All Agency Actions Are Based on "Good Science" "Adequate Regulatory/Statutory Support" "Economic Reasonableness" and "Cost-Effectiveness"

The issues need to be sorted – legal, regulatory, scientific and Congressional. Those issues that fail to have reasonable scientific support (this is a substantial number) should go to an independent science panel for review – insulating the Administration from charges of selective scientific review. Internal regulatory review should occur on all claims of illegal rulemaking to confirm whether or not prior rule adoptions had actually addressed the issue. A cost impacts assessment should be prepared on items that were not clearly part of the adopted rules/statutory mandates to address CRA concerns. Issues of statutory authority and illegal rulemaking may be presented to House and Senate Committees for evaluation.

The OW and each office will need an independent regulatory/technical review panel (like the AT Review Task Force of the 1980's) for quality control over HQ/regional decision making (there will be pushback and comprehensive review will be needed for at least 2 years).

Ongoing federal litigation on various OW issues should be stayed, for 120 days, pending internal review of the issues raised and regulatory defenses claimed by EPA – cases that should be settled for exceeding authority or illegal rule amendment can be presented, publically, to House Oversight Committees that had sought earlier inquiry on these matters.

Regional forums should be held with stakeholders/delegated state programs to form the basis of a new infrastructure/schedule of compliance policy – so existing regulatory mandates with little or no real ecological benefit can be deferred for more important state/local projects.

A forum on issue prioritization/ CWA Amendment should be held with all major industrial, municipal, and environmental stakeholders to foster cooperative issue resolution. (This may, in the end, fall flat, but the effort will show that broader environmental and affordability concerns are not being ignored.)

For further info contact John C. Hall @ jhall@hall-associates.com or Personal Phone/Ex. 6

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March 20, 2013

Chairman, Darrell E. Issa
Committee on Oversight and Government Reform
2347 Rayburn House Office Building,
Washington, DC 20515

Chairman, Bill Shuster
Committee on Transportation and Infrastructure
2209 Rayburn House Office Building
Washington, D.C. 20515

Chairman, Bob Gibbs
Subcommittee on Water Resources and Environment
329 Cannon House Office Building
Washington, DC 20515

Chairman, Chris Stewart
Subcommittee on Environment
323 Cannon House Office Building
Washington, DC 20515

RE: EPA's Use of Scientifically Flawed Methods for Imposing Nutrient Reduction Requirements Is Poised to Waste Billions in State, Municipal and Agricultural Resources Throughout the Country

Dear Chairmen Issa, Gibbs, Shuster and Stewart:

For the past thirty years I have been engaged as an environmental engineer and attorney, representing municipal interests throughout the country. My firm has a highly specialized practice – water quality-based permitting under the Clean Water Act (CWA). This involves the statutory section that controls the need for setting more restrictive effluent limitation requirements under Section 301(b)(1)(C) of the Act. Consequently, we also have been extensively engaged in the complex process of water quality criteria development and water

quality modeling on a national and state level. Our small group of environmental engineers and attorneys has addressed (and resolved) hundreds of complex NPDES permit and water quality standards issues through the application of more sophisticated analyses and updated scientific approaches. Using such approaches, we have fostered both nationwide and statewide changes in outdated water quality-based requirements that would have otherwise wasted many of billions of dollars on local expenditures without producing any meaningful ecological benefit. Such efforts have allowed state and local resources to be focused on water quality improvements that would produce real benefits to the environment and the public – a win-win for all involved.

Historically, the Environmental Protection Agency (EPA) has strongly supported the use of the latest and best scientific approaches to ensure that regulatory efforts would produce meaningful, cost-effective results, particularly when federal monies were involved (see, e.g., 1979-1985 Advanced Treatment Review Program implemented by the Office of Water Program Operations) This is also a central underpinning of the Clean Water Act which, for example, requires water quality criteria to be based on "the latest scientific information" available. See, CWA Section 304(a). Likewise, the Federal Register notice for the water quality based permitting rules (40 CFR 122.44(d)) stated that "all available scientific information" should be considered in developing appropriate effluent limitations and that "EPA emphasizes however, that scientifically valid procedures must be used to develop criteria that protect aquatic life and human health." 54 Fed. Reg. 23873, 23876 (June 2, 1989). Ensuring that the standards and more restrictive permit limits were based on well documented "cause and effect" relationships and, as appropriate, accounted for site-specific impacts was a bedrock principle of the CWA (see, National Guidelines for the Development of Numeric Water Quality Criteria - 1983). This was necessary given the high costs that could be imposed on communities by this provision on the Act.

Unfortunately, over the past several years EPA's commitment to using "good science" in water quality criteria derivation, particularly for nutrients, has eroded dramatically and gone from fairly consistent to virtually non-existent. Site-specific impact considerations are now routinely ignored in nutrient TMDLs. This unilateral change in what EPA now claims is a "scientifically defensible" basis for imposing extremely restrictive nutrient reduction mandates nationwide is causing and will continue to cause major adverse economic impacts on municipal and agricultural entities. For example, EPA recently announced that more restrictive water quality-based permit requirements (often costing communities $50-100 million to achieve), need no longer be based on "cause and effect" demonstrations or confirmation that the pollutant discharge is likely to cause any actual impairment. In essence, when it comes to nutrient regulation, basic scientific principles long used to ensure proper regulatory decision making under Section 301(b)(1)(C) no longer apply. EPA now claims that "weight of evidence" (which is neither defined nor explained anywhere in federal rule or guidance) is sufficient to impose billion dollar nutrient reduction mandates even in the face of federally funded studies confirming such nutrient impairment does not exist. (See, Attachment – Case Studies in "End Justifies the Means" Nutrient Regulation)

In 2010, EPA's Science Advisory Board (SAB) informed the agency that its proposed simplified statistical approaches to nutrient regulation were not "scientifically defensible" and could squander resources broadly:

> *Numeric nutrient criteria developed and implemented without consideration of site specific conditions can lead to management actions that may have negative social and economic and unintended environmental consequences without additional environmental protection.*[1]

In response to these and other highly critical comments (over 42 pages of SAB criticisms) EPA claimed that the SAB supported the simplified approaches as long as a "weight of evidence" assessment was included. Of course, the SAB report made no such statement. Rather, to have any confidence in the simplified methods, the SAB clearly stated that the impacts of concern must be linked to actual use impairment and the effects of well-known confounding factors must be addressed (i.e., non-nutrient factors, both natural and man-induced, that could cause the same ecological effects being attributed to nutrients). Thus, EPA essentially ignored its own SAB findings and continued to broadly employ these new "empirical" methods that were found to produce fundamentally flawed results. Moreover, since 2010, EPA has made further changes in its "stressor-response" methods that any first year graduate student would know are not scientifically defensible (use mere correlations based on shot gun blast datasets to declare nutrients to be the cause of the impact and dictate stringent effluent limitations). In short, EPA has abandoned the use of the accepted scientific methods that the SAB found were necessary to produce "scientifically defensible" nutrient regulation and avoid misdirected expenditures.

EPA's recent nutrient proposal for the State of Florida contains numerous examples of these flawed methods as do dozens of federally issued TMDLs. EPA is now aggressively applying these flawed methods in its TMDL program, federal permits, and regional nutrient control policies. (See, e.g., Newmarket NH permit where EPA declares that "cause and effect" confirmation is no longer required to impose state-of-the-art nitrogen reduction on municipal wastewater and stormwater discharges.) With regard to the new "scientific" methods EPA recently employed in New Hampshire to impose over *one billion dollars in nutrient reduction mandates* for the Great Bay Estuary watershed, Dr. Steven Chapra, an internationally renowned expert on nutrient impact assessment, has stated the following:

> *In summary the analysis presented in the document entitled "Numeric Nutrient Criteria for the Great Bay Estuary" (2009) are (1) not based on methods generally accepted by the scientific community, (2) are contrary to the methods published in dozens of treatises on this topic (3) utilize obviously incorrect and physically impossible relationships attributed to algal growth and nitrogen influences and (4) are so thoroughly*

[1] USEAP Science Advisory Board, April 2010 SAB Review of Empirical Approaches for Nutrient Criteria Derivation

confounded and unexplained as to render them worthless for the purposes of numeric nutrient criteria development.

Thus, we have entered an "end justifies the means" period of regulatory decision making at EPA, that relies on obviously flawed scientific claims and creative statistics to assert that "strong" relationships exist to justify federal actions, when the accepted methods of data analysis plainly show the opposite is occurring. This is not hyperbole - nor any form of ideological attack. It is simply a sad fact that science now plays a minimal role in the Office of Water decisions affecting municipalities and agricultural interests across this country. Examples of this are easy to document and are widespread. (See, Attachment – Case Studies in "End Justifies the Means" Nutrient Regulation)

The only reason EPA has been able to get away with such actions is that federal courts rarely second guess whether EPA is accurately portraying the science. Courts do not expect that EPA would knowingly use methods that are not accepted within the scientific community or were rejected by the agency's own Science Advisory Board. The "expert agency" is given "great deference" in technical decisions, largely insulating these actions from judicial review. EPA's Office of Water certainly knows how to play the game and is using federal law to implement methods that could not possibly pass any rational evidentiary standard in a typical court of law.

The cost of this seriously flawed decision making is staggering and will easily approach several hundred billion dollars in misdirected, unfunded federal mandates if it is not stopped by your Committees. It is also not hyperbole to say that EPA's unfounded mandates will bankrupt small communities and consume enormous energy resources when implemented, causing far more ultimate ecological harm than good. If we do not stop this blatant abuse of scientific procedures and misrepresentation of data, states in the mid-West will be next in the agency's crosshairs to adopt stringent nutrient criteria.[2] Again, the economic dislocation and harm that will be caused by these irrational analyses will be severe. EPA's new scientific "theories" constitute "highly influential scientific assessments" under the USEPA "Peer Review Handbook" 3rd edition. These scientific claims should have undergone the most thorough independent assessment and been subject to public comment *prior to* nationwide implementation. As EPA has essentially ignored the advice of its own Science Advisory Board, I would encourage your Committees to consider the following approaches to stop these wasteful practices:

1. Hold hearings on EPA's ongoing use of methods found to be scientifically flawed by EPA's Science Advisory Board and ask for an independent bi-partisan panel of technical experts to report whether the agency is fabricating analyses and/or misrepresenting the available data in seeking to justify stringent nutrient controls throughout the country; and

2. Establish an independent National Academy of Sciences (NAS) review of EPA's new statistical and "weight of evidence" methods to determine if they are scientifically

[2] EPA's Office of Inspector General and Office of Water recently announced a joint study to determine if states in the Mississippi River basin are being aggressive enough in reducing nutrient loadings to the Gulf of Mexico.

defensible for establishing numeric nutrient criteria and TMDL requirements. If EPA fails that NAS review (as would be expected), they will be effectively precluded from applying these methods in future regulatory actions since no court would, thereafter, uphold EPA's actions employing such methods.

For the benefit of the country, and the environment, decisive action must occur to protect the scientific integrity of regulatory agency decision making. I hope that your Committees will be able to take one or both of the actions described above. I am available to meet with your staff at their earliest convenience to provide the detailed backup information showing how EPA's flawed methods are being used to impose requirements that bear no meaningful relationship to actual environmental needs.

Respectfully Submitted,

John C. Hall

Enclosure

Case Studies in Demonstrating "End Justifies the Means" Nutrient Regulation

Over the past 4 years I have been personally involved in three cases where EPA collected data to demonstrate that nutrients were causing water quality impairments, but found that they could show no impairment (i.e., no excessive plant growth or dissolved oxygen problems attributed to plant growth). Rather than base decision making on the applicable site-specific data, EPA excluded the contrary information from their public records and simply issued new "scientific" findings claiming that they had demonstrated impairment caused by nutrients and that stringent controls were necessary. This is no different than a prosecuting attorney finding out that the accused actually didn't commit the crime, and then burying the evidence to get a conviction in any event. These actions affect both "democratic" and "republican" areas of the country. EPA is NOT doing this in any political sense. It is philosophically driven, "faith-based science" that certain actions are "bad" and need to be stopped, regardless of the cost or ability to actually justify the action.

The following examples illustrate the degree to which EPA will go to claim it has demonstrated nutrient "impairment" with "scientific" certainty, justifying the imposition of stringent limits on all communities in an area or a state. These claims of nutrient impairment, however, are complete and utter scientific fabrications, as illustrated in the cases discussed below.

EPA Internally Abandons Published Nutrient Criteria Derivation Guidance and Decides to Eliminate "Cause and Effect" Demonstration Requirement - 2008

1. Prior to the year 2000, impairments caused by nutrients were addressed as site-specific wasteload allocations or TMDLs. The focus of these evaluations typically was the effect of excessive plant growth on dissolved oxygen and setting appropriate nutrient reduction targets required development of a calibrated and validated water quality model. This process was time consuming and costly, but it generally resulted in a scientifically defensible causal relationship that could avoid over or under regulation. EPA's Chesapeake Bay and Long Island Sound TMDLs are examples of such scientific efforts.

2. In 2000-2005 EPA published a series of documents explaining how to develop scientifically defensible nutrient criteria. These were generally well received documents that required an appropriate "cause and effect" relationship to be developed before setting statewide nutrient criteria for various classes of waters (e.g., Nutrient Criteria Technical Guidance Manual: Rivers and Streams (2000). These procedures typically required a demonstration that nutrients caused excessive plant growth that then caused use impairment (e.g., dissolve oxygen criteria violations, adverse effect on aquatic insect populations). EPA guidance also noted that a "case by case" approach was acceptable, only imposing nutrient

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reduction requirements where documented to be "necessary" to protect the water body.

3. From 2005-2008, it became obvious to state agencies that uniform nutrient criteria for streams (and estuaries)could not be justified on either a national or statewide basis, as nutrient impacts were highly site-specific and no consistent adverse impact in such waters could be attributed to a particular nutrient concentration. Nonetheless, EPA pressed the states to set uniform standards, despite state objections that it was simply not necessary or scientifically defensible to do so. EPA's solution was to lower the bar; come up with new simplified procedures and claim to the public that they have confirmed the scientific need for such uniform standards (i.e., the "weight of evidence" approach). EPA then began to "test run" these procedures in individual state TMDLs where EPA was responsible under various federal consent decrees to issue the findings, knowing such actions are very difficult to challenge in court.

4. In 2008, after realizing that the plant growth data it had collected for three Pennsylvania TMDLs (prepared under a federal court order) **did not** support the need to issue stringent nutrient limits in these watersheds, EPA (and its contractor Tetra Tech) employed a new statistical analysis that claimed to demonstrate nutrients were the cause of reduced insect populations in streams. In a public forum and later under oath, the Agency's primary contractor on nutrient criteria development (Tetra Tech) admitted EPA directed them to presume that nutrients were causing insect population changes and that they knew the new statistical analyses did not demonstrate "cause and effect." Nonetheless, EPA continued to assert that the analysis was "scientifically defensible." (This is the review standard and courts rarely believe that they are competent to overturn such EPA "scientific" claims).

5. The Pennsylvania communities challenged these new methods (i.e., claims of statistical plots "proving" nutrients caused insect population impairment) and demanded that the Science Advisory Board (SAB) independently review EPA's new scientific methods and claims. EPA resisted the request, but under pressure from dozens of organizations (and the entire Pennsylvania delegation), in September 2009 a review occurred. The SAB thoroughly rejected the new statistical approaches as insufficient to impose stringent nutrient criteria without showing nutrients caused excessive plant growth.[3] The SAB determined that the simplified statistical methods were not "scientifically defensible," since the many factors (unrelated to nutrients) could cause the same changes to insect populations. Most importantly, the SAB noted that without carefully checking the applicability of these simplified methods to individual locations, resources would be wasted and no beneficial environmental improvement would occur. This, of course, was precisely what field testing had confirmed in the Pennsylvania streams – and what EPA sought to hide from the record (i.e., if the nutrients levels

[3] Review of Empirical Approaches for Nutrient Criteria Derivation, USEPA Science Advisory Board, April 27, 2010.

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never caused excessive plant growth, reducing those nutrient levels would have no beneficial effect on insect populations).

6. EPA's response to the SAB report in late 2010 was jaw-dropping. They informed the public that the SAB actually supported the use of the new simplified statistical approaches. They further informed the Pennsylvania communities that "weight of evidence" now justified keeping the proposed TMDLs in place using the same simplified statistical methods the SAB had just rejected as scientifically deficient. EPA then began promoting the use of simplified statistical methods (and "weight of evidence" claims)[4] in other cases under their control (e.g., Florida nutrient standards and Great Bay New Hampshire permits, other EPA issued TMDLs).

7. EPA then published a revised "stressor-response" guidance document in late 2010 incorporating many of the SAB's recommended changes. However, EPA has failed to apply the changes deemed "necessary" by the SAB to generate a scientifically defensible basis for nutrient regulation on subsequent nutrient criteria actions.

To date, the Agency continues to promote numeric nutrient criteria development and stringent nutrient TMDLs using methods that the Science Advisory Board determined were not scientifically defensible. These methods will result in negative social and economic consequences by wasting state and local resources on unnecessary capital improvements, as well as produce unintended adverse environmental consequences, without additional environmental protection. Several specific cases using these fundamentally flawed methods are highlighted below.

1. South Eastern Pennsylvania 2008-2012 TMDL Actions (Estimated Cost Impact Four Communities > $500 million)

Multiple TMDLs were prepared by EPA for the State of Pennsylvania in 2008 employing nutrient impairment thresholds based on "weight of evidence". The "weight of evidence" included a new statistical analysis called conditional probability which allegedly shows the direct effect of nutrients on aquatic insects (Tetra Tech, 2007). The graph below from the Tetra Tech report presents data that were used in its conditional probability analysis.

[4] The term "weight of evidence" has no definition in any federal rules or guidance. Presently EPA uses this term to bolster the otherwise poor to non-existent nutrient – impairment "cause and effect" relationships presented in TMDL documents. It should be noted that EPA nowhere "weighs" any evidence; these EPA analyses exclude all contrary evidence in attempting to make the case for stringent controls.

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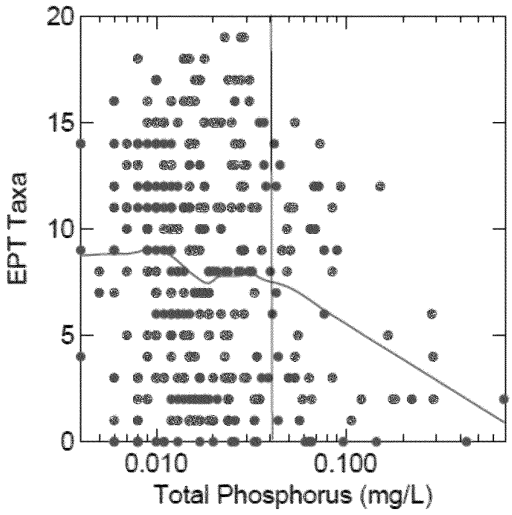

The graph presents data showing a measure of insect diversity (EPT Taxa) and the nutrient concentration level (total phosphorus) at the time of sampling. These data were used to assert that EPT Taxa were adversely affected when the TP concentration exceeded 0.040 mg/L. As is apparent from this graph, insect diversity is both very high and very low for identical nutrient concentrations above and below 0.040 mg/L, confirming no apparent relationship between the two parameters. EPA's "new scientific method" is just "snaking" a line through a highly variable dataset. The analysis does not even attempt to show that the change in insect diversity is related to excessive plant growth or low dissolved oxygen caused by excessive plant growth (the primary way nutrients could cause this metric to change). Not unexpectedly, in its 2010 report, the SAB commented that the use of this method does not yield scientifically defensible numeric nutrient criteria:

> For criteria that meet EPA's stated goal of "protecting against environmental degradation by nutrients," the underlying causal models must be correct. Habitat condition is a crucial consideration in this regard (e.g., light [for example, canopy cover], hydrology, grazer abundance, velocity, sediment type) that is not adequately addressed in the Guidance. Thus, a major uncertainty inherent in the Guidance is accounting for factors that influence biological responses to nutrient inputs. Addressing this uncertainty requires adequately accounting for these factors in different types of water bodies. (SAB at 38)

The data in the graph did not account for any of the other factors (identified by the SAB) influencing the response. Consequently, as evidenced by the SAB comment, this analysis cannot be used to develop scientifically defensible numeric nutrient criteria.

Subsequently, EPA asked Tetra Tech to review the 2007 Endpoint Report in light of the comments made by the SAB and the publication of EPA's final guidance on the use of stressor-response analysis for nutrient criteria derivation (2010). Tetra Tech prepared a

follow-up analysis in 2012.[5] This analysis did not discard the flawed 2007 approach, but simply added justifications to support the original report findings. Tetra Tech claimed that the stressor-response models used in the 2007 report (i.e., the Conditional Probability analyses) were not a concern because the SAB report stated:

> The stressor-response approach is a legitimate, scientifically based method for developing numeric nutrient criteria if the approach is appropriately applied (i.e., not used in isolation but as part of a weight-of-evidence approach).

The follow-up analysis now claims that the "wedge-shaped" data presented in the figure is an indication that nutrients are causing the observed invertebrate response. The scientific basis for such a statement is unknown and appears to be a purposeful fabrication. Certainly EPA's SAB, who looked at all of these charts, indicated no such finding was possible simply because the data formed a "wedge shape." The SAB report, as well as EPA's subsequent "stressor-response" guidance, both recognize that numerous natural and man-influenced factors, other than nutrients, could produce the same "wedge shaped" data.[6] These latest claims are simply one more excuse to ignore all of the prerequisites on the proper use of the stressor-response approach because the flawed procedures produce a particular result EPA desires.

a. Goose Creek (Eastern Pennsylvania) – EPA Hides the Stream Data Showing No Excessive Plant Growth

EPA developed a TMDL for Goose Creek (June 2008) claiming that the creek was impaired by nutrients, although no EPA-approved 303(d) listing since 1996 indicated that such an impairment exists. The Pennsylvania Listing Methodology, upon which impairment status is determined, defines nutrient impairment as the presence dense algal growth and wide fluctuations in dissolved oxygen due to excessive plant growth. Neither of these conditions exists in Goose Creek. During the preparation of the TMDL, EPA sampled the level of plant growth upstream and downstream of the point source dischargers. The results of this sampling confirmed that aquatic plant growth in the stream was not excessive (actually plant growth is minimal because the stream is well shaded), but these data were not reported in the TMDL which claimed nutrients were

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[5] Development of Nutrient Endpoints for the Northern Piedmont Ecoregion of Pennsylvania: TMDL Application. Follow-up Analysis. Tetra Tech. July 18, 2012.

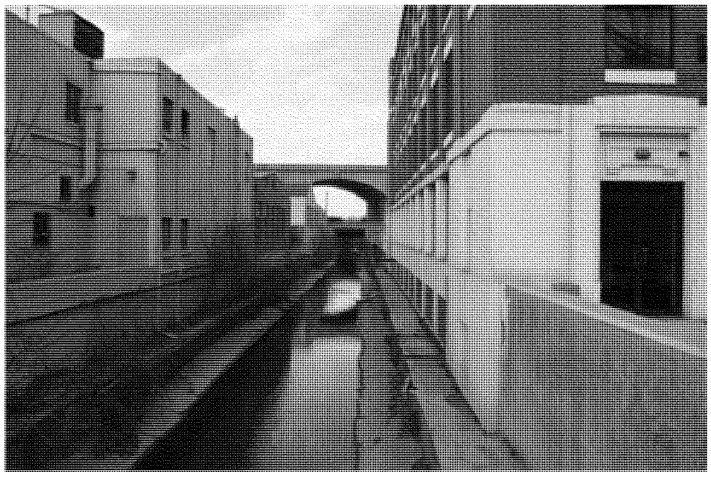
[6] EPA's November 2010 "Stressor-Response" Guidance Document for Nutrient Criteria Derivation (that incorporated the SAB recommendations) underscored that none of these simplified methods may be used unless sufficient information exists to confirm that other factors are not controlling the simplified statistical relationship. Most importantly, EPA's final document specified that the methods would only be considered sufficient if data are available on "causal variables, response variables and confounding factors" (EPA Guidance @ 4). Consequently, EPA notes that "many confounding factors must be considered when estimating the effects of nitrogen/phosphorus on a measure of aquatic life in streams (e.g., macroinvertebrate index)." (EPA Guidance @ 11) Absent such information, a "scientifically defensible' relationship generally cannot be developed.

causing impairment to stream insect populations (although no data on insect populations were presented either).

In response to comments on the draft TMDL, the available plant growth data were released to the public and EPA admitted dissolved oxygen levels met applicable standards. Nonetheless, EPA still claimed that stringent nutrient control was necessary to protect insect populations in this stream. This is a thoroughly baseless and demonstrably incorrect assertion given the minimal plant growth and excellent dissolved oxygen levels present in this creek.

b. <u>Paxton Creek (Central Pennsylvania -Harrisburg) – EPA Regulates Stormwater Nutrient Sources to a Concrete Lined Channel</u>

EPA prepared a similar nutrient endpoint report for application to the Paxton Creek watershed, claiming that nutrient reduction was needed to restore insect diversity in Paxton Creek, a stream flowing through the urban Harrisburg area. Like Goose Creek (above), a detailed stream survey was conducted that concluded nutrients were not controlling plant growth in this stream. Again, since the plant growth and dissolved oxygen data did not support the need for nutrient regulation, the basis for claiming the nutrient TMDL was still necessary was switched to insect diversity. As demonstrated by the picture below, this was an absurd claim since the concrete lined channel and other hydrologic modifications to this waterway controlled insect diversity, not the level of nutrients present.



After EPA's issuance of the TMDL, in 2009, Pennsylvania DEP re-evaluated the stream using updated information and determined that the stream is not impaired due to nutrients. DEP submitted the revised impairment listing for Paxton Creek with its 2010 draft Integrated List for EPA review and approval. For two years EPA refused to allow this change to be approved, given the implications of the delisting to the federal TMDL action. On March 14, 2013 EPA finally approved the changed impairment listing; however, to date, the flawed TMDL for this creek has not been withdrawn.

2. Florida 2012 (Statewide cost ->$10 billion)

In late 2009, EPA promulgated numeric nutrient criteria for freshwater lakes and streams in the State of Florida at the same time that it was developing its Stressor-Response Guidance and meeting with the SAB. The Agency initially set out to derive separate criteria for lakes and streams using stressor-response relationships. However, EPA concluded that a scientifically defensible cause and effect relationship could not be demonstrated with the available data for streams (i.e., EPA could not show nutrients caused either excessive plant growth or impairment of insect diversity). Consequently, EPA developed stream criteria using a distribution-based approach that was not based on any demonstrated threshold of impairment. These numeric nutrient criteria, promulgated in December 2010, were challenged by a diverse group consisting of industries, municipalities, and non-governmental organizations.

The agency's "distribution-based" (sometimes known as "reference waters") approach for streams was struck down on appeal as unrelated to a specific impairment demonstration. The Court wrote that it was appropriate to set criteria based on the avoidance of any harmful increase in nutrients, but it appeared that EPA set the stream criteria to avoid any increase, rather than a harmful increase. Following the Court's decision in February 2012, EPA re-proposed the same stream criteria on December 18, 2012, now claiming that the previously rejected distribution-based criteria are actually based on preventing harmful increases in nutrients. This explanation now included new stressor-response evaluations that claimed to demonstrate that nutrient levels were adversely impacting insect diversity and dissolved oxygen levels in Florida waters.

In essence, EPA now claimed that it found scientifically defensible stressor-response relationships for streams which neither EPA nor the Florida DEP could document when the data were previously analyzed. Since this new "justification" relied on stressor-response evaluations, it was a relatively easy task to compare the agency's new analysis with the recommendations made by the SAB and EPA's 2010 Stressor-Response Guidance. One of EPA's new stressor-response relationships is illustrated below - Figure 1-37 (attempting to relate insect diversity (called Stream Condition Index (SCI) to the nutrient concentration present). As is apparent from the graph, this is simply another "shotgun blast" data pattern with no discernible relationship to the monitored nutrient level. <u>This is *precisely* the type of analysis that EPA's SAB rejected as fundamentally flawed.</u> That, however, did not stop EPA from drawing lines through the data and claiming certain "statistically significant" relationships existed.

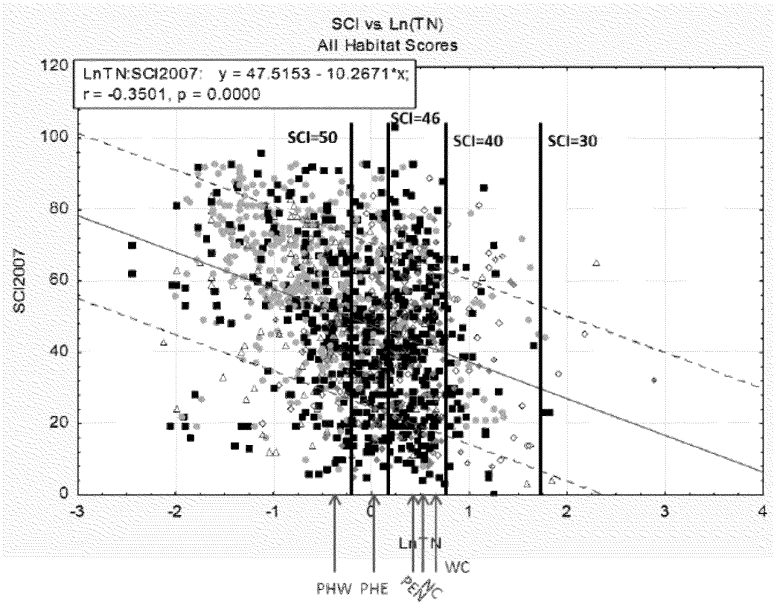
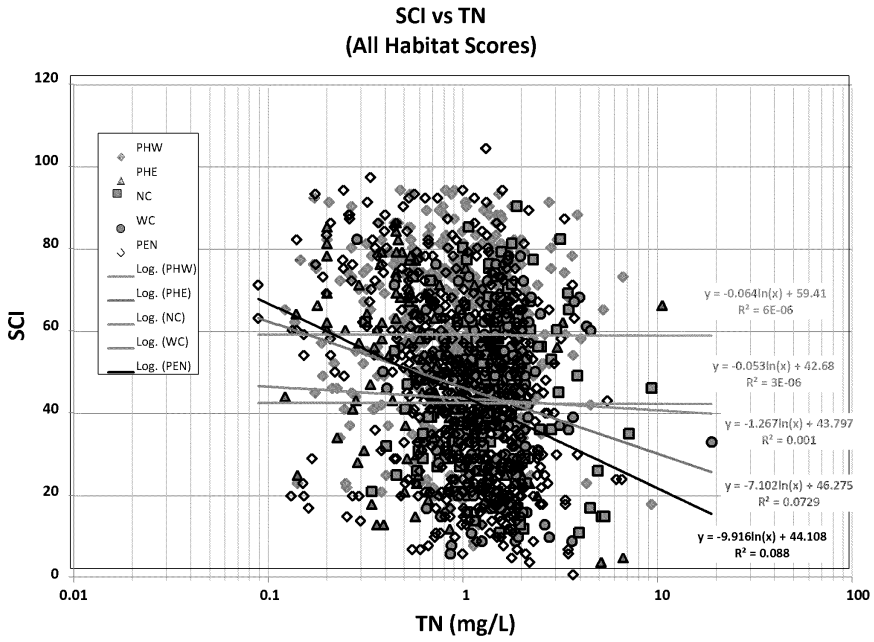


Figure 1-37. SCI versus Ln(TN), 2006–2011 data, relationship for all regions combined. Linear fit is shown. Panhandle West: pink closed circle, pink line; Panhandle East: green open triangle, green line; Peninsula: black closed square; North Central: red open diamond, red line; West Central: gray closed diamond, gray line.

The relationship that was claimed to exist is an artifact of the manner in which the contractor improperly manipulated the data. EPA further compounds prior errors by combining different types of stream environments that to create the "illusion" of a downward trend in insect populations associated with increasing nutrient concentration. This decision to mix data from different ecological settings is precisely what the SAB informed the Agency *it may not do*. The 2010 Stressor-Response Guidance indicates that proper classification of the data is the first critical step in data analysis, and nutrient region is one of the primary classifications. EPA previously divided Florida into six nutrient watershed regions and these regions should have been evaluated separately. If this classification had been performed on the data in Figure 1-37, the regression analysis would show that TN does not affect SCI in three of the five nutrient watershed regions, as illustrated in Figure 1 below and the two "significant" relationships are trivial ($r^2 < 10\%$) .

Figure 1



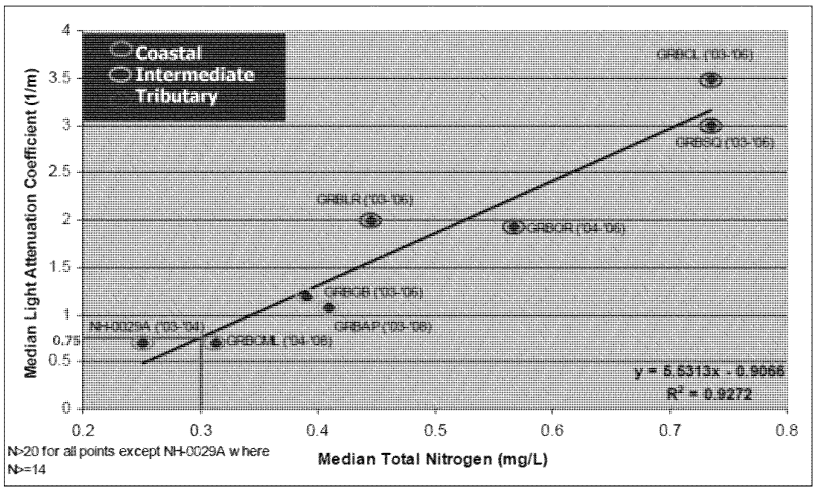
Had EPA systematically evaluated the scientific defensibility of these relationships and considered whether the estimated relationships were accurate enough to inform its decision, as the SAB instructed, the only rational conclusion would be that the data do not support the chosen numeric nutrient criteria. It should be apparent just looking at these charts that nutrient control will not ensure any particular insect population response with a reasonable degree of certainty and will broadly waste state and local resources if applied uniformly as EPA intended.

3. New Hampshire – 2010/2012 (>$1.0 Billion in Municipal Impacts)

Over the course of a decade, EPA and the New Hampshire Department of Environmental Services (DES) have been evaluating the Great Bay Estuary, with particular concern for the potential adverse effect of nitrogen on submerged aquatic vegetation (eelgrass) in the estuary. Multiple studies conducted by University of New Hampshire scientists, funded by EPA, considered whether elevated nitrogen was leading to increased algal growth which could cause a reduction in light penetration adversely effecting eelgrass. These studies determined that increased nitrogen concentration *did not* result in any change in algal levels or system transparency in Great Bay. Additional studies determined that algal growth was not a significant contributor to light penetration because the algal levels were generally quite low. However, water color and turbidity, due to natural conditions, were the primary contributors to reduced light attenuation, particularly in the tidal rivers.

In 2009, at EPA's urging, the state prepared a revised analysis (without any additional data) to conclude that nitrogen reduction was necessary to prevent the loss of eelgrass in the estuary and impose "state of the art" nitrogen reduction requirements on all major

municipal discharges to the system. This analysis was based on a "stressor-response" evaluation claiming to relate light attenuation to total nitrogen concentrations across the estuary, illustrated in the graph presented below.



While this graph looks impressive at first glance, the analysis is, in fact, a complete fabrication. It was created by manipulating the available data and combining results from ecologically and hydrodynamically distinct areas (tidal rivers, bay and ocean) to give the impression that nitrogen caused the change in transparency when the detailed studies confirmed it had not.[7] As stated by Dr. Chapra (a leading expert on nutrient impact evaluation and modeling):

> Upon review, it is my opinion that the DES criteria document did not use scientifically defensible methods and it failed to apply stressor-response methods in a manner accepted by the scientific community. *The methods applied are, in fact, grossly incorrect, internally inconsistent and have produced results that bear no reasonable relationship to reality*

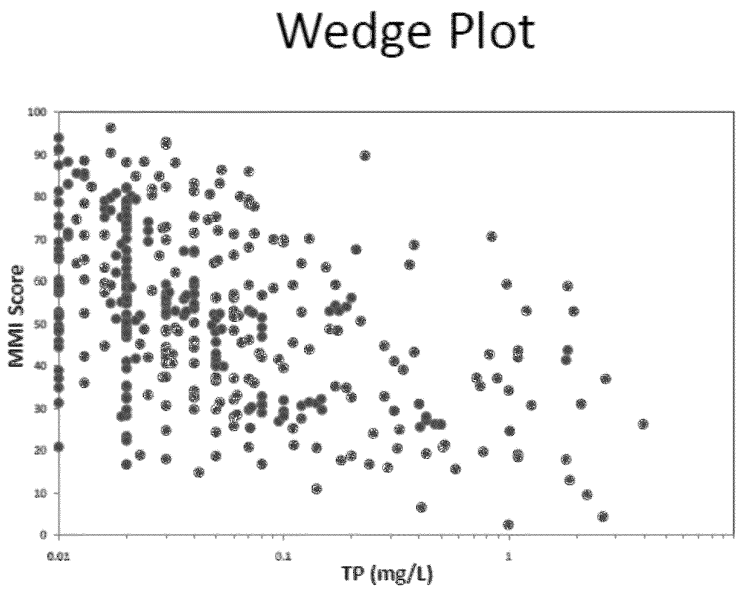
This analysis followed EPA's recent pattern of ignoring the site-specific data and studies if those studies confirmed nutrients had not actually caused the impact in question (in this case reduced transparency or increased algal growth). Thus, the Agency is now not merely creating nutrient reduction requirements based on poor scientific methods, they are actively helping to create requirements that they know to be unsupported.

4. Colorado 2012 (Anticipated Cost >$500 million)

The Colorado Water Quality Control Division (WQCD) has been in the process of developing numeric nutrient criteria for streams since 2009, using stressor-response regressions of aquatic insect metrics (MMI score) versus nutrient concentration. The

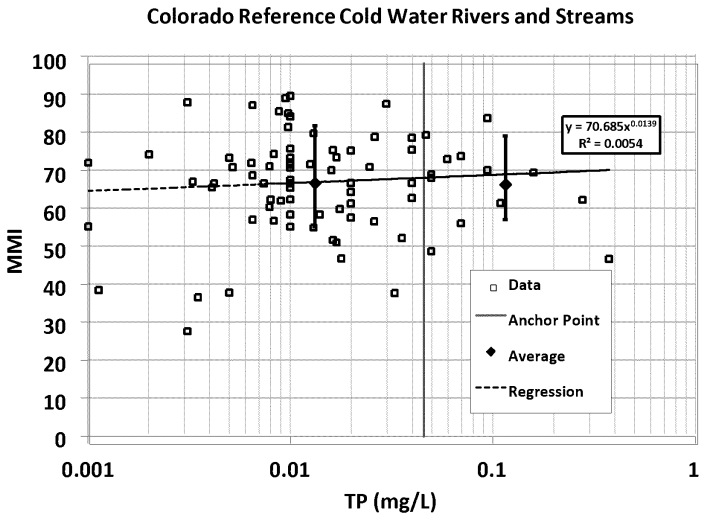
[7] The federally-funded study completed by (Morrison et al) in 2008 confirmed that the nitrogen level present has virtually nothing to do with the changing light attenuation that occurs in this system. Nitrogen simply co-varies along with the parameters that do control transparency.

WQCD, supported by EPA Region VIII, claimed that the mere observation of a decline in the aquatic insect metric with increasing nutrient concentration (i.e., a wedge plot) is proof of a cause-and-effect relationship between the two. An example of this wedge plot is illustrated below from a presentation by WQCD used to support the adoption of nutrient criteria for streams.



This "wedge plot," like the others previously reviewed, combines data from different stream environments without attempting to segregate the information based on well-known factors, like habitat condition or cold/warm water use designation, that greatly affect the invertebrate populations. This approach is fundamentally flawed, as discussed by the SAB and illustrated in EPA's attempt to justify the proposed nutrient criteria in Pennsylvania. The WQCD, with EPA's assistance, used these confounded data to develop "scientifically defensible" numeric nutrient criteria for cold water streams. They first determined a reference stream concentration, called the "anchor point", and calculated the "acceptable" nutrient concentration based a presumed reduction in invertebrate population (MMI) "caused" by the nutrient concentration. However, the suggested criterion value is simply an artifact of the statistical methods employed and is easily demonstrated to be unnecessary if the underlying reference stream data are properly considered in accordance with the SAB recommendations and 2010 Stressor-Response Guidance.

The reference stream data (streams with minimal human disturbance which limit the confounding factors influencing MMI score), are illustrated below. As this proper classification of the relevant data demonstrates, there is virtually no difference in MMI score for reference streams with TP concentrations above or below the "anchor concentration". The associated regression line is nearly flat, indicating that TP does not significantly influence MMI score when habitat conditions are appropriate to support aquatic insects.



Despite the obvious errors and deficiencies in this criteria derivation analysis, EPA supported the state's approach as "scientifically defensible" and the concept that the existence of a "wedge" in the data confirms nutrients are the cause of the changing insect populations. These concepts have no accepted basis in science.

Conclusion

EPA is actively promoting the use of new criteria derivation methods that are not based on accepted scientific methods and will produce nutrient restrictions that have no reasonable basis in environmental need. Nationwide implementation of these fundamentally flawed methods is already underway and needs to be halted to prevent misallocation of billions of dollars in state, local and private resources for unnecessary nutrient control.

ED_001612_00029853-00017

To: Schnare, David[schnare.david@epa.gov]
From: DWSschnare
Sent: Thur 1/26/2017 11:29:28 PM
Subject: Fwd: Thread on Pruitt testimony on warming

Sent from my iPad

Begin forwarded message:

From: "John Dunn" Personal Email/Ex. 6
Date: January 26, 2017 at 3:33:28 PM EST
To: "steve milloy" Personal Email/Ex. 6, "Richard Farina" Personal Email/Ex. 6 "david schnare" Personal Email/Ex. 6 "Myron Ebell" <MEbell@cei.org>, "joe BAST" <jbast@heartland.org>, "james taylor" Personal Email/Ex. 6 "H. Sterling Burnett" <HBurnett@heartland.org>
Subject: Thread on Pruitt testimony on warming

Subject: Trump: Pruitt questions warming

EPA administrator nominee Scott Pruitt yesterday sent 242 pages of responses to questions from Democratic senators, doubling down on his stances that the severity of climate change is up for debate and that the agency he would run has overstepped its congressional mandate.
In response to numerous general and specific questions about climate science, the Republican Oklahoma attorney general pasted the same response:
"The climate is changing and human activity impacts our changing climate in some manner. The ability to measure with precision the degree and extent of that impact, and what to do about it, are subject to continuing debate and dialogue," he said, echoing his comments from a hearing last week with the Senate Environment and Public Works Committee.
The EPA nominee said he would "work to ensure that any regulatory actions are based on the most up to date and objective scientific data, including the ever-evolving understanding of the impact increasing greenhouse gases have on our changing climate."
Pruitt agreed he would not retaliate against EPA employees who work on climate change issues. He said repeatedly that it would be his privilege to work with scientists and other public servants and added that he would "follow applicable laws and federal guidance on scientific integrity, information quality, and transparency."
His **responses** landed in inboxes last night as the Associated Press**reported** that the Trump administration intends to require scientific reports from EPA to get final signoff by political appointees.
Pruitt also weighed in on an international deal to curb climate change, which President Trump has said he will exit. Pruitt said that if the State Department

decides to continue to participate in the Paris Agreement, he would "work with all involved agencies to ensure that commitments made on behalf of the United States are achievable and consistent with requisite legal authorities delegated by Congress."
For many questions about how he would handle certain policies and enforcement issues, he stated broadly that he would carry out authorities granted to EPA by Congress, without explaining how. Delaware Sen. Tom Carper, the ranking Democrat on the committee, called Pruitt's answers "shockingly devoid of substance." Committee leaders have not yet agreed on a date to vote on confirming the nomination.
"I also believe the Administrator has an important role when it comes to the regulation of carbon dioxide," Pruitt wrote, saying he would follow the agency's endangerment finding that CO2 is a pollutant that is harmful to public health. He said he would do that "respective of the applicable statutory framework established by Congress."

Sent: Thursday, January 26, 2017 9:20 AM
Subject: Re: Trump: Pruitt questions warming

Dunn says:

unless he is intentionally deceitful, Mr. Pruitt is enormously ignorant of the problem with the EPA.

He says he will be respectful of the endangerment finding????

He, like so many other nominees, accepts the bullshit about warming that is anthropogenic, and catastrophic?

does he also accept the pile of epidemiological papers that make small associations on air pollutions effects into major public health scaremongering—like claims that small particles kill almost as many people in America annually as cancer?

this all starts with the nature of lawyers, my friends, lawyers who have never even cracked the book *Reference Manual on Scientific Evidence* published by the Federal Judicial Center and written by a cadre of science experts on multiple subjects that pertain to admissibility of evidence under the Federal Rules of Evidence 701 et seq.

link to the reference manual

http://www.fjc.gov/public/home.nsf/autoframe?openagent&url_l=/public/home.nsf/inavgeneral?openp

there is a group of lawyers who know the Daubert v Merrill Dow Case and the jurisprudence related to admissibility of scientific evidence, that's tort and products

plaintiff and defense lawyers—because scientific testimony and evidence is critical to their cases and Federal Jurisprudence as well as the State Jurisprudence that derives from the Federal makes admissibility challenges a vital part of litigation related to personal injury and products liability.

In fact I would bet that very few of you, not being lawyers, own or have read the book in any of its three editions, 1995, 2000, and 2011.

If you were to give testimony in court it might govern the conduct of the judge who is designated as gatekeeper for admissibility of evidence and testimony.

the Daubert v Merrill Dow case of 1993 went to the Supreme Court on appeal regarding scientific testimony admissibility disputes on a drug for nausea in pregnancy called Bendectin, that was very popular and very effective. I am old enough to have used it for a long time. Claim was it caused Birth Defects, trial court denied plaintiff's experts testimony, finally the SCOTUS, in an opinion by Blackmun who fancied himself knowledgeable in these things as former general Counsel to the Mayo Clinic, laid out the rules for admissibility—common sense rules that govern admissibility decisions till today. Merrill Dow won their case eventually tried by the court that threw out the experts, but the company withdrew Bendectin from the market because the litigation risk was considered to be a continued problem, just like Dow Corning caved to the bullshit breast implants litigation industry and they were eventually proven wrong by the same FDA that put a hold on silicone implants. Now you can get a silicone implant, and they are better than the saline ones but there is a new junk tox attack on another plastic component BPA, also proven safe for decades. Scaremongering is easy—just say it enough times, and the neurotics/media/scammers will make it happen.

Daubert opinion is here:
https://www.law.cornell.edu/supct/html/92-102.ZS.html

Problem is that I can never find a way to get opponents of the EPA to get the admissibility of EPA science in dispute, which has to happen at the trial court level and has been one of the big reasons that the administrative/agency run state has gone rogue and overreached with junk science. Long story, but the Courts have expanded the concept of deference to agency actions to the ridiculous point and have refused to properly apply the Administrative Procedure act to stop arbitrary and capricious junk science based agency actions.

the reason I am irritated with lawyers like Pruitt is they are afraid to wade in and fight the science battle—preferring to argue process and economics issues. LOOOOOOSER. When the EPA claims they are saving lives, thousands, hundreds of thousands of lives, based on their bullshit science, the courts accept their claims—the high priced lawyers lose again.

Get why I am so frustrated? Why Priutt's responses need to have a scientific review as

being concessions on junk science claims about climate and more than that, all of the EPAs regulatory actions on air, water, species are based on junk science that is the product of political agendas, enviro advocacy and dishonest use of epidemiology and toxicology. Linear no threshold tox is junk, small associations epi is junk, but the courts allow it under the *Chevron* deference rule

https://en.wikipedia.org/wiki/Chevron_U.S.A.,_Inc._v._Natural_Resources_Defense_Council,_Inc.

Lawyers like Pruitt and Greg Abbott, who challenge as AGs or representing industry and business conceerns will continue to lose politically and legally until they prepare and plan and challenge the junk science. Get any sense that Pruitt knows the science debate? Greg Abbott didn't, I pounded on his guy Weber who was heading up the EPA lawsuits—no response, no interest—this is years ago. Still can't get any attention to the strategies necessary—they just pull out the same old arguments and lose again. And the EPA laughs at em--

But the wind just shifted. The Trump admiinistration gets the advantage and Chevron will play out for Trump administration agency decisions, but we should revive the Data Quality Act (Randy says it's the Information Quality Act , 2000) and we need to get smart about making it impact all science/policy decision making now and in the future.

That's why, until Trump (Bushes were both just as bad as the dems) we had no chance—all your elegant talk about the climate and GHG effects and the records of sea level meant nothing, because the enviros were in charge, in control.

Everybody was so pleased with the quality of scientific challenge on endangerment—did it do any good—not as long as it's in a court that defers to agency science and refuses to make evidentiary decisions guided by Daubert jurisprudence, the way it is dealt with in regular litigtion if the judge is doing his or her job. Regulatory challenges are on a different track that puts us at a disadvantage because of *Chevron* deference. Remember that.

Did you know you can get it free on line, the whole book. Download it for free or just look at it and download chapters that pertain to your work or the science issues. Written by the elite of experts, no hacks were engaged—and the editions got better and better.

The first two were published by a legal pub house in Minneapolis, the 3rd latest edition is available from the National Academies Press in a hard back about 1000 pages, or on line.

John,
Thanks for the references. Yes that third edition is downloadable (~1024 pages, 14.7 mbytes) and therefore searcheable.

Perhaps the best thing that could happen, though risky, is to stop the sue-and-settle approach and force all the sue'ers to actually go to court and litigate. That takes

lots of time and money, especially if appeals go on and on. The so-called science arguments will have to play out in the open rather than behind closed doors. I suspect venue choices will play a role and we need to avoid the 9th district..

Jack K

Subject: Re: Trump: Pruitt questions warming

Jack,

The answer to that suggestion is no—sue and settle collusive suits were effective in pushing more regs not because they suggested new junk scinece, but because they gave the EPA an opportunity to agree to follow the junk science and do more regulating. The sue and settle suits were not about new scientific junk "evidence" but about pushing the EPA to do more based on the EPA's own evidence. They were dragged kicking and screaming (and secretly smiling) to regulate more, to reach farther.

Again, I emphasize courts that use the Chevron deference as their standard for assessing agency conduct are the problem so you have to go in with a different agency position or opinion to get a favorable ruling.

Now we are in the position that the EPA was in for 3 decades. they put up science, opinions and make policy positions and then they just get to brush aside any objections in courts that allow the Chevron deference to prevent any review of agency action under the arbitrary and capricious standard of the Adminstrative Procedure Act.

The place to force the evidentiary decision is the trial court, and in theses cases that have gone before the appellate court there has never, to my recollection, been a successful appeal to the appellate court to rule on the trial court's evidentiary decisions based on deference.

That's why the appellate court judges looked over their glasses at the industry and state lawyers and said, to paraphrase—you aren't going to talk to us about scientific disagreements are you?

Now do you get my point—courts are unfriendly to a fault with agencies on the march.

John Dale Dunn MD JD
Civilian Faculty Emergency Medicine
Carl R Darnall Army Medical Center
Fort Hood, Texas
401 Rocky Hill Road

Brownwood, TX 76801

Ex. 6

To: Schnare, David[schnare.david@epa.gov]
From: Smith, Loren (OST)
Sent: Tue 2/21/2017 9:37:25 PM
Subject: RE: URGENT Letter from Alliance of Automobile Manufacturers to EPA Administrator G. Scott Pruitt
Letter to EPA Admin. Pruitt Feb. 21, 2016 Signed.pdf

Attached.

From: Schnare, David [mailto:schnare.david@epa.gov]
Sent: Tuesday, February 21, 2017 4:07 PM
To: Smith, Loren (OST)
Subject: RE: URGENT Letter from Alliance of Automobile Manufacturers to EPA Administrator G. Scott Pruitt

Loren:

The email system blocked the attachment. Can you save it as a pdf and send it to me?

d.

From: Smith, Loren (OST) [mailto:Loren.Smith@dot.gov]
Sent: Tuesday, February 21, 2017 3:16 PM
To: Schnare, David <schnare.david@epa.gov>
Subject: FW: URGENT Letter from Alliance of Automobile Manufacturers to EPA Administrator G. Scott Pruitt
Importance: High

From: Wood, Steve (NHTSA)
Sent: Tuesday, February 21, 2017 1:11 PM
To: Smith, Loren (OST)
Subject: FW: URGENT Letter from Alliance of Automobile Manufacturers to EPA Administrator G. Scott

Pruitt
Importance: High

From: Tamm, James (NHTSA)
Sent: Tuesday, February 21, 2017 1:08 PM
To: Danielson, Jack (NHTSA); Shelton, Terry (NHTSA); Posten, Ryan (NHTSA); Wood, Steve (NHTSA); Mullins, Timothy (OST)
Cc: Schade, Rebecca (NHTSA)
Subject: FW: URGENT Letter from Alliance of Automobile Manufacturers to EPA Administrator G. Scott Pruitt
Importance: High

From: Susan Conti [mailto:sconti@autoalliance.org]
Sent: Tuesday, February 21, 2017 1:02 PM
To: pruitt.scott@epa.gov; pruitt.gscott@epa.gov
Cc: McInerney, Marianne (OST) <marianne.mcinerney@dot.gov>; grundler.christopher@epa.gov; Bill Charmley <charmley.william@epa.gov>; olechiw.michael@epa.gov; Green, Kevin (VOLPE) <Kevin.Green@dot.gov>; Tamm, James (NHTSA) <james.tamm@dot.gov>; Schade, Rebecca (NHTSA) <rebecca.schade@dot.gov>; annette.hebert@arb.ca.gov; michael.mccarthy@arb.ca.gov; Chris Nevers <CNevers@autoalliance.org>; David Schwietert <DSchwietert@autoalliance.org>; Gloria Bergquist <GBERGQUIST@autoalliance.org>; John Whatley <JWhatley@autoalliance.org>
Subject: URGENT Letter from Alliance of Automobile Manufacturers to EPA Administrator G. Scott Pruitt
Importance: High

Dear Administrator Pruitt:

The attached letter, on behalf of the Alliance of Automobile Manufacturers, requests that the U.S. Environmental Protection Agency (EPA) withdraw the Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation (Final Determination) which was announced on January

13, 2017 but never published in the *Federal Register*.

The Alliance is not asking EPA to make a different Final Determination at this time. All we are asking is that EPA withdraw the Final Determination and resume the Midterm Evaluation, in conjunction with NHTSA, consistent with the timetable embodied in EPA's own regulations. We believe that, if carried out as intended, the Midterm Evaluation can lead to an outcome that makes sense for all affected stakeholders and for society as a whole.

The Alliance welcomes the opportunity for further dialogue. Please contact me at your earliest convenience to discuss this matter further. Thank you.

Mitch Bainwol

President and CEO

AUTO ALLIANCE
DRIVING INNOVATION℠

803 7th Street N.W., Suite 300 | Washington, DC 20001
202.326.5500 | www.autoalliance.org

February 21, 2017

G. Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, D.C. 20460

RE: Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation

Dear Administrator Pruitt,

I write on behalf of the Alliance of Automobile Manufacturers (Alliance), an association representing twelve leading manufacturers of cars and light trucks,[1] to request that the U.S. Environmental Protection Agency (EPA) withdraw the Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation (Final Determination) which was announced on January 13, 2017 but never published in the *Federal Register*.

For the auto industry, the Final Determination may be the single most important decision that EPA has made in recent history. The Alliance requests that EPA withdraw the Final Determination and resume the Midterm Evaluation, in accordance with its original timetable, to remedy the severe procedural and substantive defects that have infected the process to date. We explain, in more detail below, EPA's authority to withdraw the Final Determination and why that withdrawal is appropriate and essential.

1. <u>EPA Should Exercise Its Authority to Withdraw the Final Determination</u>

As you know, on January 20, the White House issued a memorandum to the heads of all executive departments and agencies instituting a freeze on regulatory activity, pending review by the Office of Management and Budget (OMB) Director.[2] The Alliance urges EPA to withdraw the Final Determination on its own initiative in accordance with the regulatory freeze. Irrespective of whether EPA considers the Final Determination a rule or an adjudication, the Final Determination should be reviewed

[1] Alliance members are BMW Group, FCA US LLC, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota, Volkswagen Group of America, and Volvo Car USA.

[2] *See* Memorandum for the Heads of Executive Departments and Agencies, Jan. 20, 2017, https://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies.

and withdrawn. As the Alliance has noted, a wealth of precedents confirm that the Final Determination is a rule, and all rules not yet published in the *Federal Register* are subject to the regulatory freeze.[3] Even if EPA continues to construe the Final Determination as an adjudication, however, it is still subject to the regulatory freeze as an "agency statement of general applicability and future effect 'that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue.'" The Final Determination reaffirms and reinstates industry-wide greenhouse gas emissions standards for all light vehicles sold in America for MY 2022-2025, and thereby establishes a policy on a regulatory issue of central importance to the auto industry.

Furthermore, EPA has ample authority to withdraw the Final Determination on its own initiative, irrespective of whether EPA considers it a rule or an adjudication. If the Final Determination is a rule, it is clearly a nonfinal one, because it has not been published in the *Federal Register*. *See* 5 U.S.C. § 553(d); *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1209 (D.C. Cir. 1996). And, as a nonfinal rule, EPA can readily withdraw the Final Determination without engaging in notice-and-comment rulemaking. *Kennecott,* 88 F.3d at 1206.

Even if EPA continues to endorse the view that the Final Determination is an adjudication, however, EPA has broad inherent power to reconsider its decision "within the period available for taking an appeal." *Am. Methyl Corp. v. EPA*, 749 F.2d 826, 835 (D.C. Cir. 1984). Agencies have long exercised this power to fix determinations like this one that suffer from "serious procedural and substantive deficiencies." *Belville Min. Co. v. United States*, 999 F.2d 989, 998 (6th Cir. 1993). Regardless of how EPA classifies the Final Determination, EPA should promptly withdraw it in light of the many procedural and substantive flaws described below.

2. <u>EPA Has Abrogated Its Commitment to a Robust Midterm Evaluation</u>

As the Supreme Court has recognized, EPA's regulatory efforts to address greenhouse gases have already produced "the single largest expansion in the scope of the [Clean Air Act] in its history."[4] In 2009, EPA issued an Endangerment Finding that motor vehicle greenhouse gas emissions contribute to climate change and thereby threaten public health and welfare. Thereafter, EPA and the National Highway Traffic Safety Administration (NHTSA) began jointly setting greenhouse gas emissions and fuel economy standards for new light-duty motor vehicles, starting with Model Year (MY) 2012-2016. Then, in 2012, EPA and NHTSA took the unprecedented step of

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[3] *See* Alliance Comments on Proposed Determination on Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation at 11-13, Dec. 30, 2016, Docket ID No. EPA-HQ-OAR-2015-0827; Memorandum for the Heads of Executive Departments and Agencies, Jan. 20, 2017.

[4] *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2436 (2014) (internal quotation marks omitted).

ED_001612_00029930-00002

setting joint greenhouse gas and fuel economy standards over a decade in advance for MY 2022-2025 vehicles. 77 Fed. Reg. 62,628 (Oct. 15, 2012). No agency ever had set emissions standards so far into the future, and all stakeholders understood that no one could accurately project the circumstances affecting the technological and economic feasibility of these standards.

The Alliance supported these efforts—but only on the condition that EPA and NHTSA would reassess standards as data became available to test their feasibility. That commitment was essential because of the great uncertainty regarding the feasibility of the future standards. Based on the projections in the 2012 rule, manufacturers must achieve an average 54.5 miles per gallon equivalent across their new vehicle fleets by 2025. Even today, no conventional vehicle today meets that target, and conventional vehicles comprise 96.5% of the new light-duty vehicle fleet. Only some non-conventional vehicles (i.e., hybrid, plug-in electric, and fuel-cell vehicles), which comprise fewer than 3.5% of today's new vehicles, currently can do so.[5] Even under EPA's optimistic estimates, the automotive industry will have to spend a staggering $200 billion between 2012 and 2025 to comply, making these standards many times more expensive than the Clean Power Plan.[6]

EPA and NHTSA committed to a robust Midterm Evaluation that would take a fresh look at these standards by April 2018. The agencies promised that this review would be collaborative, so that the industry could offer the agencies real-life data to adjust their model-driven forecasts. The agencies also committed to developing greenhouse gas emissions standards and fuel economy standards in tandem.[7] And they repeatedly represented that they would not complete the Proposed Determination/Notice of Proposed Rulemaking until mid-2017 at the earliest.[8] The industry took the agencies at their word, commissioning complex studies critical to assessing the MY 2022-2025 standards and the processes used by EPA in its analysis, that we had expected to add to the administrative record for the Midterm Evaluation in 2017.

On November 30, 2016, EPA abruptly abrogated these commitments. EPA issued a Proposed Determination that the MY 2022-2025 standards should go into force

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[5] "Light-Duty Automotive Technology, Carbon Dioxide Emissions, and Fuel Economy Trends: 1975 through 2016," at 118. U.S. Environmental Protection Agency. EPA-420-R-16-010, Nov. 2016.

[6] *See* EPA Regulatory Impact Analysis for 2012-2016 rule (EPA-420-R-10-009, Apr. 2010) at https://www.epa.gov/regulations-emissions-vehicles-and-engines/final-rule-model-year-2012-2016-light-duty-vehicle; EPA Regulatory Impact Analysis for 2017-2025 rule (EPA-420-R-12-016, Aug. 2012) at https://www.epa.gov/regulations-emissions-vehicles-and-engines/final-rule-model-year-2017-and-later-light-duty-vehicle.

[7] *See* 40 C.F.R. § 86.1818-12(h), 77 Fed. Reg. 62,784 (Oct. 15, 2012), 40 C.F.R. § 86.1818-12(h)(1) -(2); 81 Fed. Reg. 49,219 (July 27, 2016).

[8] *See* Alliance Comments on Proposed Determination at 10, Dec. 30, 2016, Docket ID No. EPA-HQ-OAR-2015-0827.

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without modification. EPA issued the Proposed Determination without coordinating with NHTSA. EPA demanded comments by December 30, 2016, even though the Proposed Determination was not published in the *Federal Register* until December 6. The public and industry had a mere 24 days, spanning a major national holiday, to comment on nearly 1,000 pages of documents, plus additional cited documents and computer modeling, regarding requirements that will profoundly affect the automobile industry and the more than 900,000 American workers it directly employs.[9] After EPA denied requests by various stakeholders to extend the abbreviated comment period, we did our best to file substantive comments. EPA received more than 100,000 public comments, including 63 sets of comments from various organizations spanning hundreds of pages.[10] Many objected that the comment period was inadequate. EPA denied all requests to extend the abbreviated comment period and yet EPA issued the Final Determination on January 13, 2017, just 14 days after the comment period closed. EPA brushed aside objections to its procedural shortcuts and never justified the need for such an abbreviated comment period. EPA also rejected commenters' substantive and technical concerns by resting on its earlier analysis.

3. EPA Should Withdraw the Final Determination Immediately

The Final Determination is the product of egregious procedural and substantive defects and EPA should withdraw it.[11] In EPA's rush to promulgate the Final Determination before the new administration took office, EPA bypassed required procedures, failing for instance to provide an adequate period for meaningful notice and comment. The Final Determination asserts that there was no need for more time because the Proposed Determination did not include much new material. But that contention is belied by EPA's acknowledgement that the Proposed Determination adjusted a number of EPA assumptions in response to commenters who pointed out errors at earlier stages. The industry also had an unacceptably short period to try to ascertain why EPA rejected many of its objections.[12] These procedural defects are significant irrespective of whether the Final Determination constitutes rulemaking or adjudication.

EPA's unilateral announcement of its Final Determination also constitutes a failure to harmonize its greenhouse gas emissions standards with NHTSA's fuel-economy standards, contrary to the letter and intent of EPA's own regulations. NHTSA has not yet reached a determination on its fuel economy standards and continues its

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[9] U.S. Department of Labor, Bureau of Labor Statistics, 2015, U.S. Vehicle and Equipment Manufacturing Employment equaled 909,700 people.

[10] Final Determination, Response to Comments at 1-3.

[11] *See* Alliance Comments on Proposed Determination, Dec. 30, 2016, Docket ID No. EPA-HQ-OAR-2015-0827.

[12] *See* Final Determination, Response to Comments at 7.

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Midterm Evaluation rulemaking activities. EPA's failure to act in coordination with NHTSA also casts serious doubt on the legitimacy of EPA's data and conclusions, given the substantial discrepancies between EPA's and NHTSA's analysis of the technologies and costs associated with the MY 2022-2025 standards.[13]

Furthermore, EPA's Final Determination that the MY 2022-2025 greenhouse gas standards should remain unchanged, is riddled with indefensible assumptions, inadequate analysis, and a failure to engage with contrary evidence. Here are just a few examples:

- EPA estimated that these standards will cost the industry at least $200 billion. But EPA underestimated the burden. Contrary to EPA's assumptions, manufacturers will have to rely on much more expensive electrified technologies (i.e., hybrids and plug-ins), driving up vehicle prices and depressing auto sales.

- EPA refused to conduct an analysis of consumer acceptance and technology affordability needed for compliance, claiming this was too difficult.

- EPA refused to analyze substantively the economic impact of the MY 2022-2025 standards, instead making cursory assertions that downplayed the impact of its mandate on auto sales and employment.

- EPA refused to consider many of the Alliance's technical concerns even when supported by an outside consultant[14], asserted the Alliance provided insufficient data, and then refused further meetings for clarification.

4. <u>Studies and Data Highly Relevant to the Midterm Evaluation Have Not Been Submitted to EPA Because They Still Are Pending</u>

It is particularly critical that EPA withdraw the current Final Determination and reopen the Midterm Evaluation process because analysis commissioned according to EPA's original timetable is ongoing and the Alliance expects that new information relevant to the Final Determination's underlying assumptions and resulting analysis will soon emerge. EPA's rushed timetable, coupled with its about-face on the timing of the Midterm Evaluation, prevented consideration of this information.

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[13] *See* Alliance Comments on US EPA, US DOT, California's Air Resources Board Draft Technical Assessment Report of Greenhouse Gas Emissions and Fuel Economy Standards for Model Year 2022-2025 Cars and Light Trucks at ES-9, Sept. 26, 2016, Docket ID No. EPA-HQ-OAR-2015-0827, NHTSA's costs are approximately 42% higher than EPA's (NHTSA Table ES-2 v. EPA ES-4 Table ES-1).

[14] *See* Novation Analytics Comments on Draft Technical Assessment, Sept. 26, 2016; Docket ID No. EPA-HQ-OAR-2015-0827.

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We urge EPA to reconsider imposing such a far-reaching mandate on an entire industry without adequately considering the consequences, and without giving stakeholders a meaningful opportunity to comment. The MY 2022-2025 standards threaten to depress an industry that can ill afford spiraling regulatory costs. If left unchanged, those standards could cause up to *1.1 million* Americans to lose jobs due to lost vehicle sales.[15] And low-income households would be hit the hardest.[16]

The Alliance is not asking EPA to make a different Final Determination at this time. All we are asking is that EPA withdraw the Final Determination and resume the Midterm Evaluation, in conjunction with NHTSA, consistent with the timetable embodied in EPA's own regulations. We believe that, if carried out as intended, the Midterm Evaluation can lead to an outcome that makes sense for all affected stakeholders and for society as a whole.

The Alliance welcomes the opportunity for further dialogue about ways to rekindle the industry's longstanding cooperation with EPA on these issues.

Sincerely,

Mitch Bainwol
President and CEO

Cc: Secretary Elaine Chao, DOT
Kevin Green, DOT
Bill Charmley, EPA
Chris Grundler, EPA
Michael Olechiw EPA
Rebecca Yoon, NHTSA
James Tamm, NHTSA
Mike McCarthy, CARB
Annette Hebert, CARB

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[15] McAlinden, Sean, et al., *The Potential Effects of the 2017-2025 EPA/NHTSA GHG/Fuel Economy Mandates on the U.S. Economy*, Center for Automotive Research (Sep. 2016) at 49. Referring to the $3.00 per gallon gasoline price $6,000 technology cost scenario.

[16] Walton, Tom, et al., *The Impact of Future Fuel Economy Standards on Low Income Households*, Defour Group LLC (Sep. 2016); Walton, Tom, et al., *Defour Group Response to EPA Rejoinders to Defour Group / Alliance of Automobile Manufacturers Submission Regarding the Regressivity/Affordability of EPA's Proposed Fuel Economy Standards*, (Dec. 2016).

ED_001612_00029930-00006

To: Ericksen, Doug[ericksen.doug@epa.gov]; Benton, Donald[benton.donald@epa.gov]; Schnare, David[schnare.david@epa.gov]
Cc: Cox, Michael[Cox.Michael@epa.gov]
From: Cox, Michael
Sent: Fri 2/24/2017 8:17:28 PM
Subject: Presentation by Administrator Pruitt: Friendly suggestions for next presentation

I wanted to pass along some friendly suggestions from a fellow Pacific Northwesterner.

I started working for EPA in 1987 (I actually worked with Dave on the Lead/Copper Drinking Water Rule. He may not remember me) and have heard several new Administrators first speeches.

I thought Administrators Pruitt's presentation was good especially when he discussed the importance of listening and learning.

I understand this was his introduction to EPA staff and it was short, but I had a few suggestions for future speeches to EPA employees.

1. **Science:** I did not hear much about science. For many of us at EPA, using the best science is the backbone of the work we do. Suggest emphasizing the use of science.

2. **Tribes:** Did not hear anything about Tribes. They are a critical partner and as you know we have specific treaty obligations towards tribes. Suggest including tribes as partners along with states and others.

3. **Human Health**: As you know our mission is to protect human health and the environment. I heard a lot about the environment but not much, if anything, about human health. Suggest emphasizing both.

4. **Questions:** I understand the intent of the first speech was to introduce himself, but in the future I would suggest taking questions. While I understand this can be challenging, I think to

gain credibility it is important. A past Administrator came to Seattle and her staff told us very clearly that we could not ask questions. We could submit written questions but not ask directly. I think it sends a very bad message to staff if the leader of the organization is not willing to answer questions.

5. **Quote**: The quote Administrator Pruitt provided from John Muir was good. However, subsequent to that, some people went and found the whole quote, which conveys a different meaning read in whole than I think Administrator Pruitt wanted to convey.

Anyway. Good luck.

Michael Cox

Office of Environmental Assessment

US EPA Region 10, 1200 Sixth Avenue, Suite 900

Seattle, WA 98101

206-553-1597

cox.michael@epa.gov

To: Benton, Donald[benton.donald@epa.gov]
Cc: Schnare, David[schnare.david@epa.gov]
From: John Hall
Sent: Thur 1/26/2017 6:08:40 PM
Subject: RE: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017
Analysis of Small MS4 Permit Provisions.docx

Dear Don

Thank you for that news, it is most appreciated. I will let the affected communities know the matter will be under review. Here is a short analysis of the most egregious provisions in the new MS4 permit. There are plenty more.

I look forward to talking further.

John

John C. Hall

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From: Benton, Donald [mailto:benton.donald@epa.gov]
Sent: Thursday, January 26, 2017 12:38 PM
To: John Hall
Cc: Schnare, David
Subject: RE: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017

Dear John,

Thanks for your note. I ordered all scheduled publications not yet published to be pulled back last Saturday. We are double checking to see if this item even appeared on that list. If it did not we will pull it back until it can be reviewed.

David Schnare, my acting counsel, will be getting back to you.

Thank you again for your communication.

Don

Don Benton

Senior White House Advisor

From: John Hall [mailto:jhall@hall-associates.com]
Sent: Thursday, January 26, 2017 10:56 AM
To: Ericksen, Doug <ericksen.doug@epa.gov>; Munoz, Charles <munoz.charles@epa.gov>; Benton, Donald <benton.donald@epa.gov>
Cc: Robert R. Lucic <RLUCIC@sheehan.com>; Lynn Preston <lpreston@sheehan.com>; prosenman@hall-associates.com
Subject: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017
Importance: High

Dear Messrs. Ericksen, Munoz and Benton,

Attached please find a copy of the letter and email (below) transmitted yesterday to Administrator –designate Scott Pruitt from the Center for Regulatory Reasonableness on behalf of 20 New Hampshire Communities and stormwater coalitions from four other states (Pennsylvania, Colorado, Massachusetts, and Minnesota). As noted, just two days before President Trump's inauguration, EPA issued a 250 page, multi-billion dollar MS4 General Permit to small communities in New Hampshire, knowing there was no possibility such an action would be countenanced by the new Administration. In the classic EPA style of the prior Administration, imbedded within this permit action were a series of major regulatory changes and new mandates that appear NOWHERE in the adopted NPDES rules or the statute itself. As discussed in the letter, these were extreme changes to the existing MS4 regulatory regime that could not possibly been adopted if they were proposed as actual changes to the NPDES rules. However, as it has done in many other cases over the past 8 years, EPA used unilateral authority to impose the new requirements, and to disregard ignore all contrary public comment, by using a general permit as the vehicle to implement these unadopted and *ultra vires* rule modifications.

Because this is a permit action of statewide applicability, it would not appear to fall specifically under the regulatory freeze imposed by the President, even though EPA's action implements regulatory changes the rule freeze was intended to stop. However, the document has not yet been published in the Federal Register and can be pulled back, effectively negating the action. If this does not occur, communities in NH will be forced to file an action in Federal Court to stop this abusive permit, an action they most certainly would like to avoid, if possible.

Could you please promptly take action to freeze this clear example of regulatory overreach and abuse of administrative process by the prior Administration?

I am available at any time to come over to EPA and discuss this matter with you in detail. I look forward to hearing from you.

Respectfully

John C. Hall

Hall & Associates

Center for Regulatory Reasonableness

1620 I Street, NW, Suite 701

Washington, DC 20006

Phone: Personal Phone/Ex. 6

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E-Mail: jhall@hall-associates.com

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From: Tonja Scott
Sent: Wednesday, January 25, 2017 6:41 PM
To: Ex. 6 - Personal Privacy
Cc: 'scott.pruitt@oag.ok.gov'
Subject: CRR Letter to New Administration - NH Stormwater Permit

Dear Mr. Pruitt:

I trust your confirmation process is moving along on a positive track – there is so much regulatory reform work to be done at EPA, it will be a pleasure to work with you on those efforts. My offer to assist the Administration in regulatory reform at EPA is still pending and I hope to hear from the Presidential Personnel Office in the next month or so.

As discussed in my prior emails, there are a number of seriously flawed and wasteful EPA Office of Water regulatory decisions/practices that I would like to discuss with you, given the vast resources at stake nationwide with each of these decisions. They are quintessential examples of illegal rulemaking, regulatory overreach and scientifically indefensible activities.

The items I would like to discuss with you include:

- EPA's small MS4 permit for New England communities, issued on January 18, 2017 (created new regulatory prohibitions, impossible compliance requirements, exposed all MS4 communities to immediate citizen suits and modified statutory program to create >$10 billion in increased compliance mandates – *all with no change in existing rules*) **(SEE ATTACHED LETTER REQUESTING REGULATORY FREEZE)**
- EPA's continued imposition of a nationwide ban on blending and bacteria mixing zones following the 8th Circuit's 2013 *Iowa League of Cities* decision that vacated those actions on APA and *ultra vires* grounds (demonstrates a complete disregard for the rule of law and statutory framework of the Clean Water Act) (PS – They did something similar in the *NEDACAP* air case from the 6th Circuit)
- EPA's use of junk science and unproven evaluation techniques to develop highly restrictive nutrient TMDLs and NPDES permits in an effort to impose stringent nutrient limits nationwide (three examples will be discussed which violate the laws of physics, use methods the scientific community has rejected as indefensible and show a complete disregard for following the recommendations of EPA's Science Advisory Board and EPA's own Peer Review Policy in creating defensible regulatory decisions)
- EPA's NPDES program actions that plainly exceed statutory authority in seeking to regulate flow, land use decisions and created a new trillion dollar "antidegradation" mandate that is contrary to the basic structure of the Clean Water Act.

I suspect it would take an hour of your time to review these issues and to discuss how they may be addressed effectively. It would be my pleasure to fly to Oklahoma City to talk with you on these issues if your schedule would allow.

I look forward to hearing from you.

John

John C. Hall

Center for Regulatory Reasonableness

1620 I Street, NW, Suite 701

Washington, DC 20006

Phone: Personal Phone/Ex. 6

Fax: 202-463-4207

E-Mail: Deliberative Process Privilege/Ex. 5

Examples of Arbitrary and Abusive Provisions Contained in
New Small Community MS4 Permit
Nowhere Found in Adopted NPDES Rules or Statute

Provision 2.1.1(a) prohibits any discharge from "causing or contributing" to any water quality standard exceedance thereby creating immediate exposure to citizen suits and eliminating allowable schedules of compliance.

> *"The permittee shall reduce the discharge of pollutants such that discharges from the MS4 do not cause or contribute to an exceedance of water quality standards."*

Analysis: Under EPA's existing (albeit legally flawed) interpretation, the mere presence of a pollutant of concern (regardless of cause – *e.g.*, natural occurrence or degree of significance) is grounds for claiming permittee is "causing and contributing" and therefore in violation of the provision. This prohibition does not exist in the adopted NPDES rules applicable to existing dischargers, is contrary to decades of NPDES program implementation and, in any event, schedules of compliance are authorized to avoid creating non-compliance in these situations while analysis and remediation efforts are ongoing.

Provision 2.1.2(a)-(b) specifies no new development may occur that increases any pollutant loading (or flow) anywhere in the MS4 system.

> *"Any increased discharge (including increased pollutant loadings) through the MS4 to waters of the United States is subject to New Hampshire antidegradation regulations. The permittee shall comply with the provisions of N.H. Code Admin. R. Part Env-Wq 1708.04 and 1708.06 including information submittal requirements and obtaining authorization for increased discharges where appropriate."*

Analysis: EPA falsely claims that state antidegradation rule compliance applies to the review of all pollutant impacts of individual local land use planning and development decisions. It does not. This new provision also violates CWA statutory scheme that only imposes a Maximum Extent Practical ("MEP") standard on the overall MS4 community and exceeds statutory authority by seeking to regulate the every individual component of MS4 decision making. The Act does not give EPA authority to federalize local land use planning determinations via the federal antidegradation policy.

Provision 2.2.2(a)-(e) creates a presumption that more restrictive MS4 remedial measures are required if the MS4 discharges upstream of a listed impaired water and the pollutant is contained in MS4 discharge.

> *If there is a discharge from the MS4 to a water quality limited waterbody where pollutants typically found in stormwater (specifically nutrients (Total Nitrogen or Total Phosphorus), solids (Sedimentation/Siltation or Turbidity), bacteria/pathogens (Enterococcus, fecal coliform, or Escherichia Coli), chloride (Chloride), metals (Cadmium, Copper, Iron, Lead or Zinc) and oil and grease (Oil Slicks, Benzo(a) pyrene (PAHs)) are the cause of the impairment and there is not an approved TMDL, or the MS4 is located in a town listed in Part 2.2.2.a.-e. the permittee shall comply with the provisions in Appendix H applicable to it."*

Analysis: This provision is expressly contrary to adopted NPDES rule (40 C.F.R. § 122.44(d)) that

mandates EPA, as the permit writer, is responsible for confirming (with evaluations/analyses) the need to regulate a discharge more restrictively and ignores that other factors may be responsible for the impairment (*e.g.*, natural weathering (aluminum), low flow conditions or agricultural sources causing bacteria exceedance).

Provision 2.1.1(d) creates an impossibly strict compliance schedule (60 days) for addressing any newly discovered water quality standard or permit condition violation associated with the discharge:

> *"[I]f a pollutant in a discharge from the MS4 is causing or contributing to a violation of applicable water quality criteria for the receiving water, the permittee shall, as expeditiously as possible, but no later than 60 days of becoming aware of the situation, reduce or eliminate the pollutant in its discharge such that the discharge meets applicable water quality criteria."*

Analysis: This provision has no basis in federal law and improperly negates state schedule of compliance authority which is intended to avoid placing dischargers in ongoing non-compliance. Sixty days is a patently arbitrary compliance deadline that is unrealistic when addressing complex water quality impairment issues. Imposing immediate compliance responsibilities without opportunity for notice and comment regarding the nature of the new requirement violates Section 101(e) of the Act.

To: Schnare, David[schnare.david@epa.gov]
From: John Hall
Sent: Mon 1/30/2017 5:30:01 PM
Subject: RE: Examples of Science Credibility Issues/Illegal Rulemaking - please pick one
EPA Nutrient Criteria Method Changes- Policy Overides Science.docx
Timeline of NPDES Related Issues -Great Bay Estuary, NH.docx
Great Bay Estuary Nutrient Criteria Timeline.docx
Timeline on Post-ILOC actions. v.2.pdf

David

Taking with my staff, there are a few different formats that could be provided (simple chronology, timeline graphic, Timeline with comments, etc). However, we want to provide the info in the manner you would find most helpful and easiest to review. Attached are a few different versions of timelines. Each would be accompanied by a one page "Fact Sheet" explaining the problem, cost impact and legal/scientific errors and a small group of relevant backup documents.

Does this work for you, and which do you prefer?

John

John C. Hall

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From: Schnare, David [mailto:schnare.david@epa.gov]
Sent: Thursday, January 26, 2017 6:05 PM
To: John Hall
Subject: RE: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017

John:

Can you send me a timeline and examples of the less than credible science R1 has been using, and that OW has approved. I need context and specifics to approach this issue. It would be very helpful if you cast that briefing in the context of EPA's Information Quality Act guidance. That is the tool I want to see used to pull the agency back into the mainstream.

d.

From: John Hall [mailto:jhall@hall-associates.com]
Sent: Thursday, January 26, 2017 5:49 PM
To: Schnare, David <schnare.david@epa.gov>
Subject: RE: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017

David

Most appreciated.

Regarding a Regional Office response, in my 35 years of doing NPDES permitting around the country (45 different states and every EPA Region – see Bio) I have never encountered a group that fabricates more positions (legal and scientific) than EPA Region I. The types of mandates they have been imposing on New England communities over the past 8 years, with essentially no scientific backup or specific regulatory authority, is astounding. It got so bad that I even had to file science misconduct charges in 2012 to address what they were doing to create state of the art TN limits for all municipal dischargers to Great Bay Estuary. Eventually, the State of New Hampshire convened an independent peer review committee in 2014 (four nationally recognized water quality/estuary experts) who determined that the TN impairment conclusions were not based on scientifically defensible analyses. Since then the State of New Hampshire, in conjunction with the local municipalities, has been supporting a program to ensure only sound scientific information and practices are employed in future decision making. The Region, for its part, has refused to participate in and actively undercuts these efforts and continues to claim TN impairments are well documented – appalling. This is just one of a dozen similar stories.

Regarding the MS4 permit, the more restrictive requirements were actually coming out of EPA HQ, with R1 as the testing ground because they get to issue the NPDES permits for NH and MA (2 of the 4 non-delegated CWA programs in the country). Region I was an optimum location to do this because EAB review is essentially a rubber stamp and the 1st Circuit is, in general, extremely deferential to EPA positions. Consequently, New England permittees know the cards are stacked against then so they just roll over. In any event, we contacted EPA HQ on several occasions to complain about the imposition of new regulatory prohibitions not contained in federal law and, of course, got nowhere. We can give you that correspondence if you would like.

While I understand the need to engage the Region in the process, asking the Region to review whether that which they have already claimed is mandated, is actually required by the Act, is largely a waste of time. If we sat down with the NPDES rules for 1 hour, we could confirm to you that none of these requirements are actually in the current law. In fact, several plainly exceed statutory authority (flow limits, imposition of individual antidegradation reviews under MEP, the prohibition against "causing or contributing", presuming water quality impairment is caused by a discharge). These MS4 permit provisions are fundamental changes to how the CWA itself is intended to operate. They are intended to give environmental groups and EPA control over land use planning (something also plainly outside the scope of their authority) and to switch the burden of proof on compliance (presumed guilty). So, in short, this is quite a mess, but a nice case study in what has been going on under the purview of the Obama Administration appointees (who were typically former heads of environmental organizations – like Regional Administrator Spalding who signed this permit).

I'm sure you are beyond busy with similar requests. Just let me know whenever your schedule might accommodate a chance to sit down over a cup of coffee.

PS – To actually stop the clock on the "issuance date" of the permit, you may have to issue a notice on the R1 website stating that the prior Regional Administrator approval is on hold, pending more detailed regulatory review.

PPS - I promise to send a shorter email next time - really.

John

John C. Hall

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From: Schnare, David [mailto:schnare.david@epa.gov]

Sent: Thursday, January 26, 2017 4:55 PM
To: John Hall
Subject: RE: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017

John:

I have pulled the FR notice. The Region has been asked to respond to the points you have raised. The MS4 permit will not be effective until we have fully reviewed the issue and determined the validity of the Region I action. This is a heads up to you. I don't want this email to be further distributed.

dschnare

From: John Hall [mailto:jhall@hall-associates.com]
Sent: Thursday, January 26, 2017 2:01 PM
To: Schnare, David <schnare.david@epa.gov>; Benton, Donald <benton.donald@epa.gov>
Subject: RE: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017

David

This is the link to the Region I notice of final agency action:
https://www3.epa.gov/region1/npdes/stormwater/MS4_NH.html

The website description is a little confusing, in one spot stating:

In accordance with 40 CFR part 23, this permit shall be considered issued for the purpose of judicial review at 1:00 pm eastern daylight time on February 1, 2017. Under section 509(b) of the Clean Water Act, judicial review of this general permit can be requested by filing a petition for review in the United States Court of Appeals within 120 days after the permit is considered issued, i.e. by June 1, 2017.

Howe4ver, the list of records shows a copy of the FR notice that is needed to properly inform the public of the final action since this is a statewide applicable permit. (Attached) Our understanding is that the FR notice was not yet published and without this official notice to the affected public, the agency's action can be withdrawn for further consideration.

Regards,

John

John C. Hall

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Washington, DC 20006

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Fax: 202-463-4207

E-Mail: jhall@hall-associates.com

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From: Schnare, David [mailto:schnare.david@epa.gov]
Sent: Thursday, January 26, 2017 1:32 PM
To: Benton, Donald; John Hall
Subject: RE: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017

John:

I'm looking into this and will get back to you once I know its status. We have a list of agency actions for which we have extended the effective date. I am not sure that this is on that list, or whether it should be. If it is on that list, there has been an automatic extension of the effective date by 60 days, unless the effective date is more than 60 days from Jan 20th in the first place.

I'll let you know what you can do and what we can do to deal with this issue once I'm up to speed.

dschnare

From: Benton, Donald
Sent: Thursday, January 26, 2017 12:38 PM
To: John Hall <jhall@hall-associates.com>
Cc: Schnare, David <schnare.david@epa.gov>
Subject: RE: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017

Dear John,

Thanks for your note. I ordered all scheduled publications not yet published to be pulled back last Saturday. We are double checking to see if this item even appeared on that list. If it did not we will pull it back until it can be reviewed.

David Schnare, my acting counsel, will be getting back to you.

Thank you again for your communication.

Don

Don Benton

Senior White House Advisor

From: John Hall [mailto:jhall@hall-associates.com]
Sent: Thursday, January 26, 2017 10:56 AM
To: Ericksen, Doug <ericksen.doug@epa.gov>; Munoz, Charles <munoz.charles@epa.gov>; Benton, Donald <benton.donald@epa.gov>
Cc: Robert R. Lucic <RLUCIC@sheehan.com>; Lynn Preston <lpreston@sheehan.com>; prosenman@hall-associates.com
Subject: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017
Importance: High

Dear Messrs. Ericksen, Munoz and Benton,

Attached please find a copy of the letter and email (below) transmitted yesterday to Administrator –designate Scott Pruitt from the Center for Regulatory Reasonableness on behalf of 20 New Hampshire Communities and stormwater coalitions from four other states (Pennsylvania, Colorado, Massachusetts, and Minnesota). As noted, just two days before President Trump's inauguration, EPA issued a 250 page, multi-billion dollar MS4 General Permit to small communities in New Hampshire, knowing there was no possibility such an action would be countenanced by the new Administration. In the classic EPA style of the prior Administration, imbedded within this permit action were a series of major regulatory changes and new mandates that appear NOWHERE in the adopted NPDES rules or the statute itself. As discussed in the letter, these were extreme changes to the existing MS4 regulatory regime that could not possibly been adopted if they were proposed as actual changes to the NPDES rules. However, as it has done in many other cases over the past 8 years, EPA used unilateral authority to impose the new requirements, and to disregard ignore all contrary public comment, by using a general permit as the vehicle to implement these unadopted and *ultra vires* rule modifications.

Because this is a permit action of statewide applicability, it would not appear to fall specifically under the regulatory freeze imposed by the President, even though EPA's action implements regulatory changes the rule freeze was intended to stop. However, the document has not yet been published in the Federal Register and can be pulled back, effectively negating the action. If this does not occur, communities in NH will be forced to file an action in Federal Court to stop this abusive permit, an action they most certainly would like to avoid, if possible.

Could you please promptly take action to freeze this clear example of regulatory overreach and abuse of administrative process by the prior Administration?

I am available at any time to come over to EPA and discuss this matter with you in detail. I look forward to hearing from you.

Respectfully

John C. Hall

Hall & Associates

Center for Regulatory Reasonableness

1620 I Street, NW, Suite 701

Washington, DC 20006

Phone: Ex. 6

Fax: 202-463-4207

E-Mail: jhall@hall-associates.com

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From: Tonja Scott
Sent: Wednesday, January 25, 2017 6:41 PM
To: Personal Email/Ex. 6 Michelle Connell Hale
Cc: 'scott.pruitt@oag.ok.gov'
Subject: CRR Letter to New Administration - NH Stormwater Permit

Dear Mr. Pruitt:

I trust your confirmation process is moving along on a positive track – there is so much regulatory reform work to be done at EPA, it will be a pleasure to work with you on those efforts. My offer to assist the Administration in regulatory reform at EPA is still pending and I hope to hear from the Presidential Personnel Office in the next month or so.

As discussed in my prior emails, there are a number of seriously flawed and wasteful EPA Office of Water regulatory decisions/practices that I would like to discuss with you, given the vast resources at stake nationwide with each of these decisions. They are quintessential examples of illegal rulemaking, regulatory overreach and scientifically indefensible activities.

The items I would like to discuss with you include:

- EPA's small MS4 permit for New England communities, issued on January 18, 2017 (created new regulatory prohibitions, impossible compliance requirements, exposed all MS4 communities to immediate citizen suits and modified statutory program to create >$10 billion in increased compliance mandates – *all with no change in existing rules*) **(SEE ATTACHED LETTER REQUESTING REGULATORY FREEZE)**
- EPA's continued imposition of a nationwide ban on blending and bacteria mixing zones following the 8th Circuit's 2013 *Iowa League of Cities* decision that vacated those actions on APA and *ultra vires* grounds (demonstrates a complete disregard for the rule of law and statutory framework of the Clean Water Act) (PS – They did something similar in the *NEDACAP* air case from the 6th Circuit)
- EPA's use of junk science and unproven evaluation techniques to develop highly restrictive nutrient TMDLs and NPDES permits in an effort to impose stringent nutrient limits nationwide (three examples will be discussed which violate the laws of physics, use methods the scientific community has rejected as indefensible and show a complete disregard for following the recommendations of EPA's Science Advisory Board and EPA's own Peer Review Policy in creating defensible regulatory decisions)
- EPA's NPDES program actions that plainly exceed statutory authority in seeking to regulate flow, land use decisions and created a new trillion dollar "antidegradation" mandate that is contrary to the basic structure of the Clean Water Act.

I suspect it would take an hour of your time to review these issues and to discuss how they may be addressed effectively. It would be my pleasure to fly to Oklahoma City to talk with you on these issues if your schedule would allow.

I look forward to hearing from you.

John

John C. Hall

Center for Regulatory Reasonableness

1620 I Street, NW, Suite 701

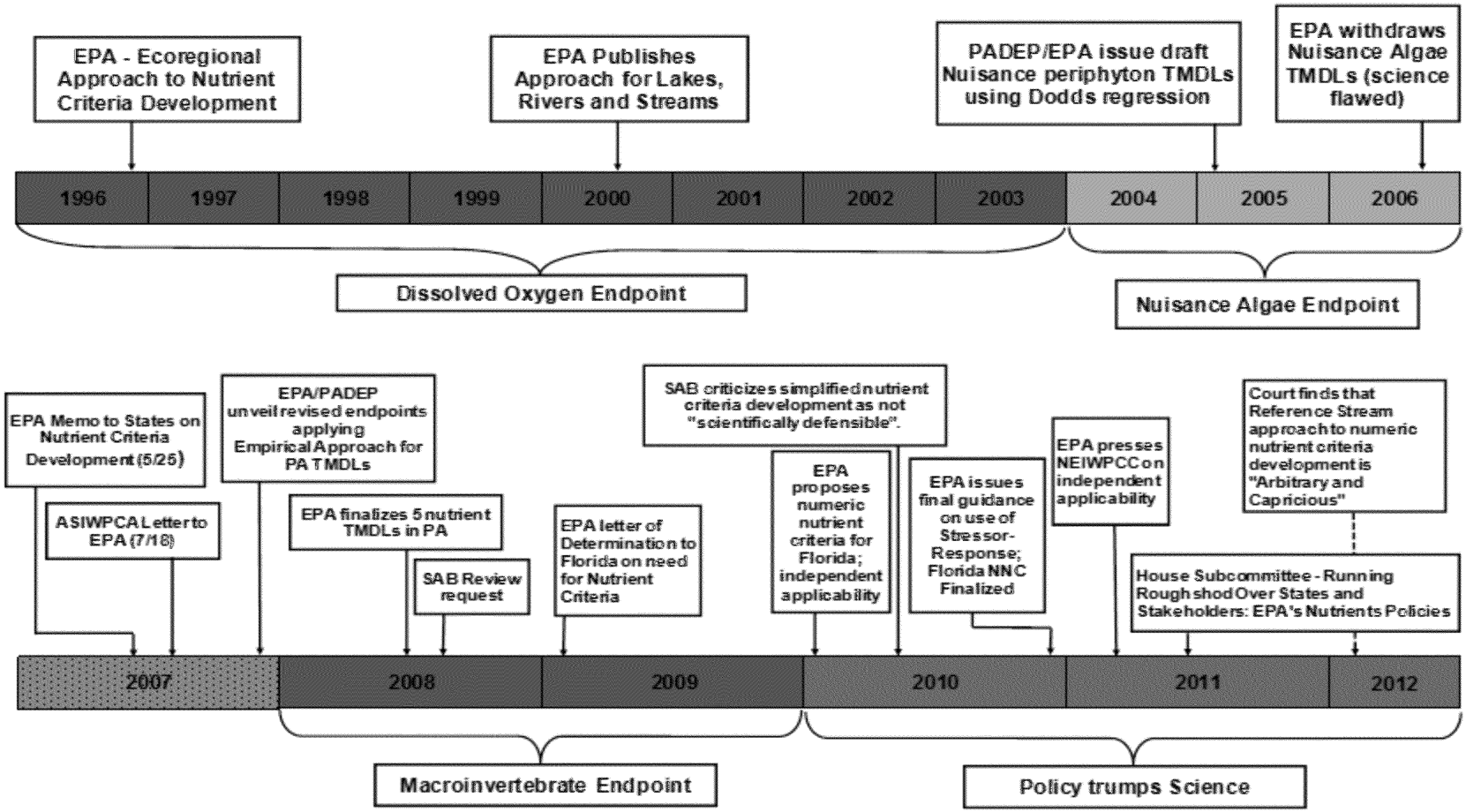
Washington, DC 20006

Phone: Ex. 6

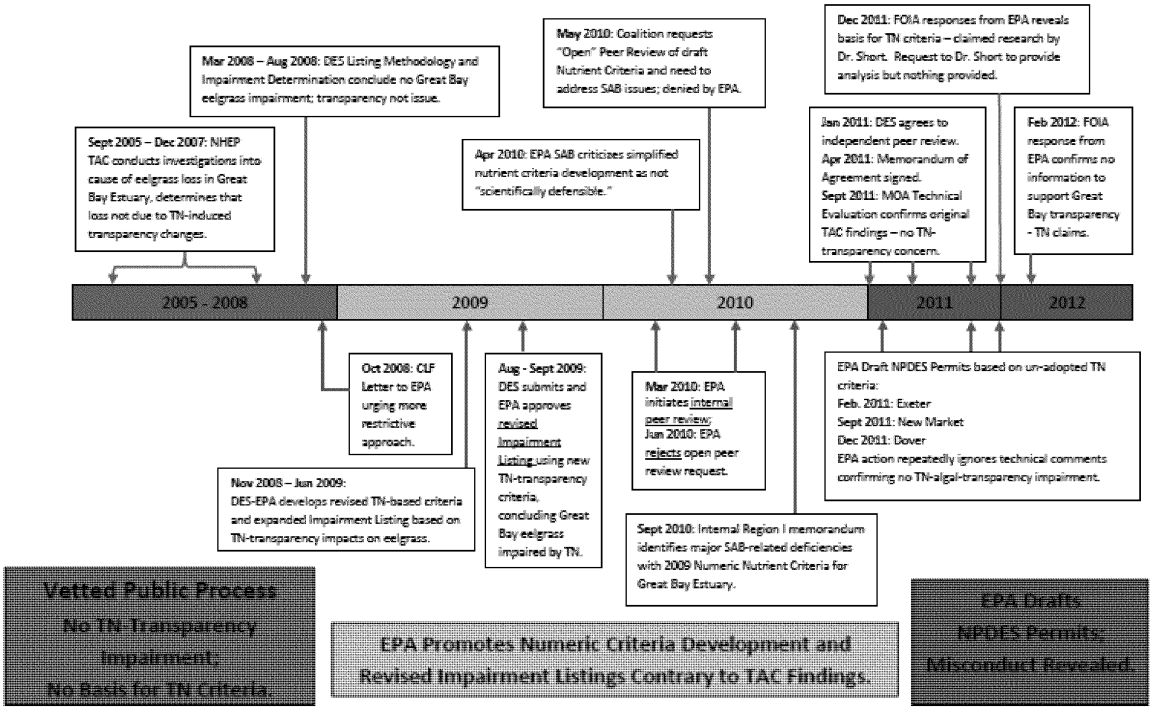
Fax: 202-463-4207

E-Mail: Personal Email/Ex.6

EPA Nutrient Criteria Method Changes



Timeline for Nitrogen Criteria Development in Great Bay Estuary



Timeline of NPDES Related Issues

1990 – 2006 Great Bay not identified as nutrient impaired.

2006 – Major reduction in eelgrass cover in system following extreme storm occurring in May 2006.

2006-2008 - NH Technical Advisory Committee review system data and concludes no apparent basis for finding system is impaired by nutrients. In particular, no basis to claim nutrients have impaired system transparency based on detailed studies of the system.

Summer 2008 - Conservation Law Foundation sends letter to EPA asking to impose stringent nitrogen limits on all municipal facilities in system. EPA begins process to create basis to impose TN limits.

Fall 2008 – Spring 2009 – EPA provides technical assistance to NH DES to develop nutrient criteria under claim that nutrients are causing adverse impacts on system transparency. Internal emails confirm DES and EPA knew that the claimed "scientific relationships between nutrient and transparency" were not confirmed by the data.

June 2009 DES issued Nutrient Criteria Document (NCD) indicating that nitrogen was causing significant loss of eel grass in Great Bay. Dover, Durham, Exeter, Newmarket, Portsmouth, and Rochester collaborate on strategy to address flaws in NCD. Communities formed Great Bay Coalition (GBC).

2010 June – EPA conducts internal peer review of 2009 NCD and refuses to allow GBC to participate in review or provide additional information to peer review panel. Peer reviewers determine proposed criteria are "defensible". A review of records obtained via FOIA confirms EPA was directed not to consider coalition information.

March 2011 EPA issues draft NPDES permit to Exeter. Permit had low limit of nitrogen at 3.0 mg/L. Draft permits for Newmarket and Dover followed thereafter.

December 2011 GBC negotiates an agreement with DES to have them would undertake additional scientific efforts regarding nitrogen control.

March 2012 frustrated by DES's lack of commitment, GBC filed in Superior Court to require DES to do formal rule making process. Depositions confirmed that the data relied on by DES was thin and speculative, and did not consider prior studies that nutrient impacts were not a problem.

November 2012, Superior Court dismissed GBC's request. Said it wasn't a DES issue since EPA was responsible for issuing permits. Newmarket and Exeter withdrew from litigation.

December 2012 GBC (now Dover, Portsmouth & Rochester) initiated suit in U.S. District Court alleging that EPA misapplied its duties under the Clean Water Act and erroneously relied on flawed data.

January 2013 Exeter and Newmarket opted to accept final permits with lengthy compliance schedules. Cost to Exeter $55 million, Newmarket $14 million.

January 2013 Senator Watters proposed legislation to require DES to conduct formal rule making process. It halted litigation and resulted in DES and GBC agreeing to an independent review of data via 4 national experts, what resulted in the Peer Review Report.

July 2013 Superior Court dismissed action, but suggested a more focused challenge on EPA's reliance on limited science and data. An amended action was filed.

January 2014 Peer Review completed. Independent review by four nationally recognized experts found extensive flaws in NCD, said several water bodies were not nutrient impaired, and recommended program for additional data collection and monitoring.

Early-2014, EPA approached Rochester with draft NPDES permit. Rochester negotiated 18-month deferment (expiration August 2016). Request was based on 8 action-items to experiment with optimization at treatment plant and to perform more data collection and stormwater analysis.

December 2014 – EPA issues letter to City of Rochester stating that EPA has determined the system is nutrient impaired despite the findings of the 2014 Peer Review.

October 2015 - DES issues draft 303-d list of nutrient impaired water bodies and removes some nutrient impairments based on the findings of the Peer Review.

Mid-June 2016 GBC/City of Rochester meet with EPA in Boston. Very discouraging meeting, EPA doesn't care how well plant discharges have been optimized, doesn't believe data showing improvements in water bodies, and expresses no willingness to allow additional time for data collection. Permit will be issued in September.

Late-June 2016, DES does an about-face on 303-d list. Apparently under pressure from EPA they find a new assessment methodology to suggest our discharges may cause and contribute to nutrient impairments on both the Cocheco River and Great Bay.

December 2016 – Following change in Administration (federal and state), DES agrees that the entire system should not be identified as nutrient impaired.

January 2017 - To delay decision, EPA Region 1 now informs DES that additional public comment should be sought. (No basis in federal rules for this demand).

Synopsis of Permitting Status - Wastewater Plant Discharge

2009 DES developed a Nutrient Control Document (NCD) that indicated excessive nitrogen was killing eel grass in Great Bay. Communities of Dover, Durham, Newmarket, Exeter, Portsmouth and Rochester formed the Great Bay Coalition (GBC) in response to concerns about the science and data in the NCD.

Concerns over NCD were justified, as EPA would use NCD as justification to enforce very strict nutrient discharge limits at our wastewater treatment plants.

Rochester's last permit was issued in 1997 and expired in 2002. Under the Clean Water Act, permits are supposed to be updated every 5 years and logic suggests a progressive evolution of modifications, not a drastic one-time jump. There is an anti-backsliding provision that future permits can't be "relaxed".

During period of 2011 thru 2013, GBC tried negotiating with DES. GBC also initiated litigation in NH Superior Court and US District Court. Lost both cases but re-filed in State Supreme Court with more focused legal objection. EPA seemed to be making data fit their predetermined conclusions.

Simultaneously, while litigation was pending, Senator David Watters from Dover pushed legislative effort (January 2013) that DES would need to go through formal rule-making process to justify a major shift in their decision to impose strict, unjustified nutrient limits.

Mid-2013, litigation and legal efforts were put on hold when the GBC and DES agreed to a collaboration to have a Peer Review of 2009 NCD conducted by a panel of 4 national experts.

DES agreed in settlement language of litigation that they would honor and abide by the suggestions of the Peer Review experts as they reviewed and commented on the original NCD findings.

2014 Peer Review was completed and found that nitrogen was not a smoking-gun in the cause of eel grass loss. Peer Review determined that the NCD was exceedingly based on very limited data and presumptive conclusions.

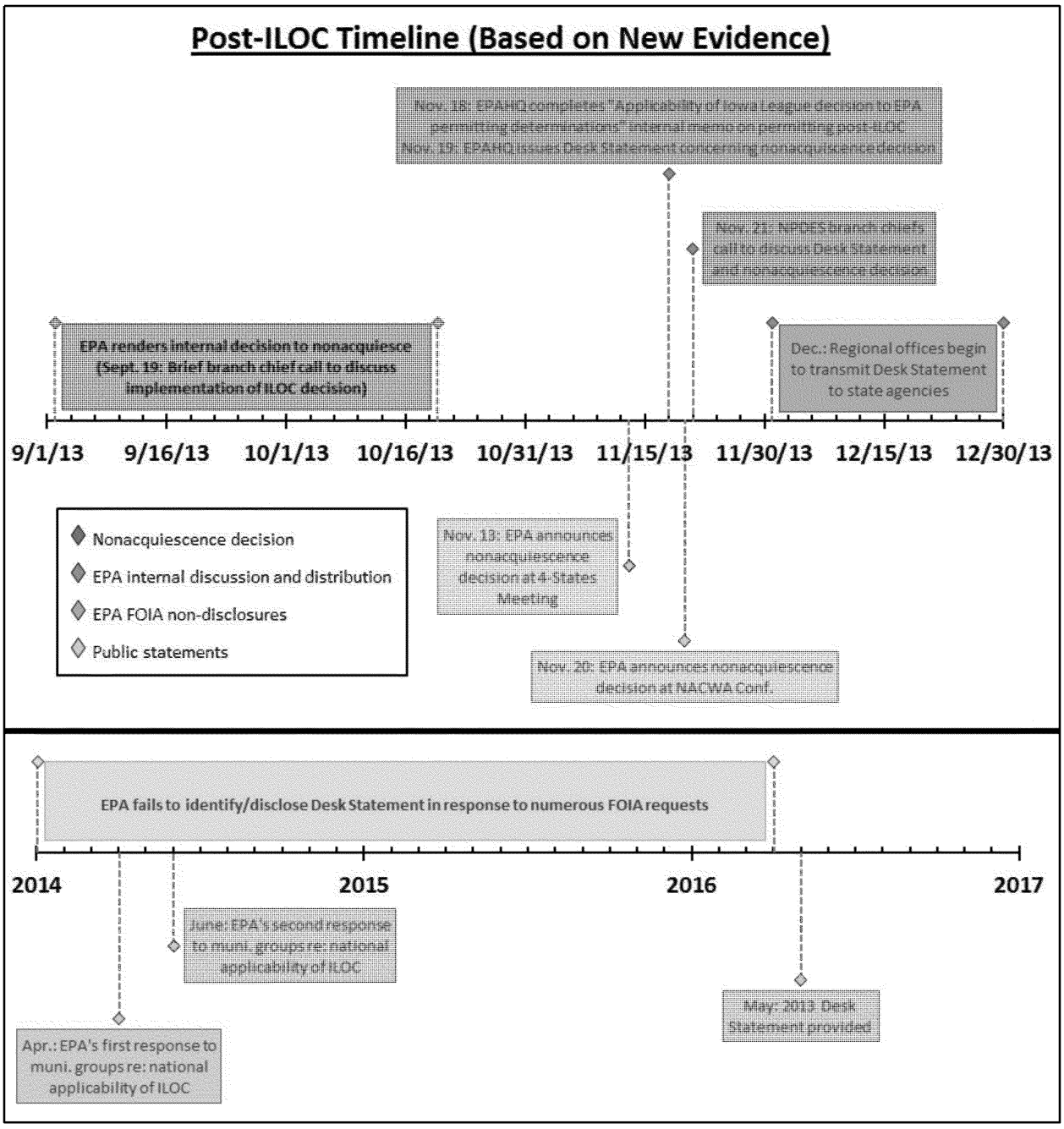
The Peer Review supported that several water bodies should not be listed as nutrient impaired. DES essentially agreed and during issuance of their formal listing of impaired waters (*what is termed the "303-d list"*) they would utilize the Peer Review findings. DES must issue a new 303-d list every 2 years and their formal 2014 draft list was issued in October 2015. Draft 2014 303-d list was reasonably favorable.

Sometime post-October 2015, DES apparently lost any backbone and caved to EPA pressure and reversed some of their 303-d impaired waters listings. Rochester and Dover met with DES in late June 2016 and learned that DES had essentially changed their mind and found a new assessment methodology to support that discharges may cause and contribute to impairments in either the Cocheco River or Great Bay. This runs counter to the findings of the Peer Review report, and what DES and GBC had previously agreed.

By now, the GBC has essentially been reduced to only Rochester and Dover. EPA succeeded in a sort of a "divide & conquer" to issue permits individually to Portsmouth, Exeter and Newmarket, with one pending for Durham. Portsmouth will be spending $75 million, Exeter $55 million, and Newmarket $14 million on plant upgrades. Durham is negotiating what is being called an integrated permit pooling NPDES and MS4 rules together. Durham's approach is baffling, as they are getting the strictest limits of both permits (stormwater & wastewater) which will have major cost implications.

DES's current about-face is disingenuous, dishonest, and contrary to a previously agreed-to course of action. Rochester and Dover's technical consultants indicate DES and EPA are not relying on available

science. EPA seems to be rushing to issue a new permit while extensive data collection efforts are ongoing. Our belief is that EPA is worried the new data would not support their proposed permit limits.


Post-ILOC Timeline (Based on New Evidence)
Nov. 18: EPAHQ completes "Applicability of Iowa League decision to EPA permitting determinations" internal memo on permitting post-ILOC
Nov. 19: EPAHQ issues Desk Statement concerning nonacquiescence decision
Nov. 21: NPDES branch chiefs call to discuss Desk Statement and nonacquiescence decision
EPA renders internal decision to nonacquiesce (Sept. 19: Brief branch chief call to discuss implementation of ILOC decision)
Dec.: Regional offices begin to transmit Desk Statement to state agencies
9/1/13
9/16/13
10/1/13
10/16/13
10/31/13
11/15/13
11/30/13
12/15/13
12/30/13
Nonacquiescence decision
EPA internal discussion and distribution
EPA FOIA non-disclosures
Public statements
Nov. 13: EPA announces nonacquiescence decision at 4-States Meeting
Nov. 20: EPA announces nonacquiescence decision at NACWA Conf.
EPA fails to identify/disclose Desk Statement in response to numerous FOIA requests
2014
2015
2016
2017
June: EPA's second response to muni. groups re: national applicability of ILOC
May: 2013 Desk Statement provided
Apr.: EPA's first response to muni. groups re: national applicability of ILOC

To: Schnare, David[schnare.david@epa.gov]
Cc: Ericksen, Doug[ericksen.doug@epa.gov]; Benton, Donald[benton.donald@epa.gov]; Munoz, Charles[munoz.charles@epa.gov]; Flynn, Mike[Flynn.Mike@epa.gov]; Mccabe, Catherine[McCabe.Catherine@epa.gov]
From: Reeder, John
Sent: Mon 1/30/2017 2:13:38 PM
Subject: Re: EPA Climate Change Awards

Will follow up with you

Sent from my iPhone

On Jan 30, 2017, at 8:01 AM, Schnare, David <schnare.david@epa.gov> wrote:

We need to find out exactly what our role in this meeting is, whether we are sponsors and whether the awards are from EPA or the other sponsors.

We also need to find out what other such events are planned for which EPA is a sponsor.

John, can you please get us this information?

d.

From: Ericksen, Doug
Sent: Monday, January 30, 2017 7:49 AM
To: Benton, Donald <benton.donald@epa.gov>; Munoz, Charles <munoz.charles@epa.gov>; Schnare, David <schnare.david@epa.gov>
Subject: EPA Climate Change Awards

How do we want to handle this one?

The event in question is scheduled for March 1-3.

ericksen

EPA

Agency awaiting Pruitt plans to give climate awards

Jean Chemnick, E&E News reporter

Published: Friday, January 27, 2017

U.S. EPA will likely be led soon by a climate skeptic, but it's still planning to give out climate leadership awards to businesses and professionals at a Chicago ceremony later this winter.

The agency is listed as the headline sponsor of a voluntary awards program to be held as part of the three-day Climate Leadership Conference on March 1-3. The gathering is presented by the Center for Climate and Energy Solutions and the Climate Registry with other private sponsors. The awards recognize private-sector achievements in carbon reduction. Winners have not been announced.

The ceremony is still being planned despite the Trump administration's decision to cancel other climate-related gatherings, like a Climate and Health Summit that the Centers for Disease Control and Prevention had planned to host next month. It seems likely that Oklahoma Attorney General Scott Pruitt (R) will be EPA administrator at the time of that agency's event. He has expressed doubt about the role human activity plays in driving climate change.

A vote hasn't been scheduled yet on Pruitt's nomination, but the longtime adversary of EPA climate rules told a Senate committee earlier this week that the consequences of CO2 emissions are "subject to continuing debate and dialogue."

The event's planners said they had not been notified of any changes to either the conference or dinner and are hopeful that it will not be affected since it's not related to regulations. The awards dinner is an annual affair that former EPA Administrator Gina McCarthy presided over last year. Organizers said that no EPA officials were ever slated to speak, though support staff typically attends. EPA did not return calls.

The speakers lineup includes Paula Gant, deputy assistant secretary for oil and natural gas at the Energy Department.

To: Schnare, David[schnare.david@epa.gov]
From: Reeder, John
Sent: Tue 1/31/2017 1:38:25 PM
Subject: Re: EPA Climate Change Awards

David, good morning.
Nancy followed up under separate cover on the climate leaders award. I recognize we have more follow up to do in terms of other similar events. So more coming, if that hasn't already come to you.

Sent from my iPhone

On Jan 30, 2017, at 9:15 AM, Schnare, David <schnare.david@epa.gov> wrote:

Thx

d.

From: Reeder, John
Sent: Monday, January 30, 2017 9:14 AM
To: Schnare, David <schnare.david@epa.gov>
Cc: Ericksen, Doug <ericksen.doug@epa.gov>; Benton, Donald <benton.donald@epa.gov>; Munoz, Charles <munoz.charles@epa.gov>; Flynn, Mike <Flynn.Mike@epa.gov>; Mccabe, Catherine <McCabe.Catherine@epa.gov>
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Sent: Monday, January 30, 2017 7:49 AM
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The speakers lineup includes Paula Gant, deputy assistant secretary for oil and natural gas at the Energy Department.

To: Milbourn, Cathy[Milbourn.Cathy@epa.gov]
Cc: Konkus, John[konkus.john@epa.gov]
From: Schnare, David
Sent: Wed 3/8/2017 2:45:44 AM
Subject: Re: Draft GHG News Release

They are correctly stated.

Sent from my iPhone

On Mar 7, 2017, at 6:02 PM, Milbourn, Cathy <Milbourn.Cathy@epa.gov> wrote:

Hi David,

Nice to see you again. I'm asking for your advice. Please look at two sentences highlighted in yellow below to see if there are any issues with including that information as stated in the release. Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

Thank you!

Cathy

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

Catherine C. Milbourn

Office of Media Relations

Office of the Administrator

U.S. EPA HQ

202-564-7849 (office)

Personal Phone/Ex. 6 (mobile)

Milbourn.cathy@epa.gov

To: Ericksen, Doug[ericksen.doug@epa.gov]
From: Schnare, David
Sent: Tue 3/14/2017 3:52:13 PM
Subject: Re: Letter for Don Benton

Would be nice to show Don and me as the leadership team, since that was the reality. Nevertheless , I'll sign it.

d

Sent from my iPhone

On Mar 14, 2017, at 11:20 AM, Ericksen, Doug <ericksen.doug@epa.gov> wrote:

I have put together the following letter for Don Benton to President Trump. I am emailing to see if the members of the Beach Head team would sign on.

Please get back to me.

Doug

TO: President Donald J. Trump

FROM: EPA Transition Team Members

DATE: March 14, 2017

RE: Senior White House Advisor Don Benton

On January 21 ten members of the EPA transition team took the oath of Federal office and officially got to work making American great again.

Perhaps more than any other agency or department, the EPA transition team was viewed from within and on the outside as a beachhead team entering hostile territory. Media and special interest groups made the EPA transition the focus of attention.

Under the leadership of Don Benton, our team of 10 functioned as a unit. We worked to

implement the President's action plan for the EPA while working with the career professionals at the Agency to keep the wheels turning.

During the first week of the transition Don Benton organized a group of people who had never met before into a team with a solid mission—serve the President and make him proud of the work we are doing.

Each member of the transition team knew that Don Benton had their back and that he would work hard to help them be successful. The success of the EPA transition team leading up to the confirmation of Administrator Pruitt was in many ways attributable to the leadership of Mr. Benton.

Don also developed a strong positive relationship with the career professionals at the EPA. It was not, and still is not, an easy arena to navigate. There are clear differences between the philosophy of President Trump and his predecessor. This differences often escalated into tensions that Don was able to manage in a thoughtful, successful and professional fashion.

We write this letter to let you know the respect we have for the job done by Don Benton in the first month of the transition. He served our President and the EPA well as the Senior White House Advisor and continues to do so today.

Sincerely,

To: chris@horner.com[chris@horner.com]; dwschnare@gmail.com[dwschnare@gmail.com]
From: Schnare, David
Sent: Thur 3/9/2017 3:28:11 PM
Subject: Fwd: OPA Clips 3/9/17

Sent from my iPhone

Begin forwarded message:

From: "McGonagle, Kevin" <mcgonagle.kevin@epa.gov>
Date: March 9, 2017 at 9:49:18 AM EST
To: "So, Katherine" <so.katherine@epa.gov>, "Mccabe, Catherine" <McCabe.Catherine@epa.gov>, "Reeder, John" <Reeder.John@epa.gov>, "Flynn, Mike" <Flynn.Mike@epa.gov>, "Grantham, Nancy" <Grantham.Nancy@epa.gov>, "Hull, George" <Hull.George@epa.gov>, "Slotkin, Ron" <slotkin.ron@epa.gov>, "Sowell, Sarah" <Sowell.Sarah@epa.gov>, "Hart, Daniel" <Hart.Daniel@epa.gov>, "Orquina, Jessica" <Orquina.Jessica@epa.gov>, "Actadmmccabe, Catherine17" <Actadmmccabe.catherine17@epa.gov>, "Benton, Donald" <benton.donald@epa.gov>, "Bangerter, Layne" <bangerter.layne@epa.gov>, "Davis, Patrick" <davis.patrick@epa.gov>, "Ericksen, Doug" <ericksen.doug@epa.gov>, "Konkus, John" <konkus.john@epa.gov>, "Greaves, Holly" <greaves.holly@epa.gov>, "Kreutzer, David" <kreutzer.david@epa.gov>, "Munoz, Charles" <munoz.charles@epa.gov>, "Schnare, David" <schnare.david@epa.gov>, "Schwab, Justin" <schwab.justin@epa.gov>, "Sugiyama, George" <sugiyama.george@epa.gov>, "Jackson, Ryan" <jackson.ryan@epa.gov>, "Valentine, Julia" <Valentine.Julia@epa.gov>, AO OPA Media Relations <AO_OPA_Media_Relations@epa.gov>
Subject: OPA Clips 3/9/17

Below: CNBC (2), Bloomberg BNA (2), E&E News (2), InsideClimate News, LA Times, InsideEPA (3/8), Quartz (3/8)

CNBC

http://www.cnbc.com/2017/03/09/trumps-epa-chief-says-he-will-address-fuel-economy-standards-very-soon.html

Trump's EPA chief says he will address fuel economy standards 'very soon'

By Jacob Pramuk 3/9/17 9:28 AM

The head of President Donald Trump's Environmental Protection Agency said Thursday he expects an announcement rolling back fuel economy rules "very soon."

Automakers have expressed concern about the rules set during the Obama administration, which would have pushed auto fuel economy standards to 54.5 miles per gallon by 2025. Some companies have said the Corporate Average Fuel Economy, or CAFE, standard would boost regulatory compliance costs.

EPA Administrator Scott Pruitt, who has pledged to roll back what he deems burdensome regulations, told CNBC that American automakers wanted to evaluate those standards. He said he believes the rulemaking process was rushed.

"There's going to be an announcement on that very soon and I think what's concerning to me, and I think concerning to the president, is how that process occurred," Pruitt said on "Squawk Box."

"I think that what has been broken in that process is, one, not a recognition of the great progress that's been made with those standards, but two, those in Detroit, those that are manufacturing autos in this country, expressed to the EPA that they wanted to evaluate the impact of the previous standards. And that was largely disregarded."

Backers of the Obama administration rules, which the EPA issued only a week before Trump took office, say automakers have overblown the potential costs of complying with them. They also argue that consumers may be willing to pay for better fuel economy, in any case.

Trump has held several meetings with key executives since taking office, some of which have included the CEOs of Ford and General Motors.

CNBC

http://www.cnbc.com/2017/03/09/epa-chief-scott-pruitt.html

EPA chief Scott Pruitt says carbon dioxide is not a primary contributor to global warming

By Tom DiChristopher 3/9/17 8:57 AM

Environmental Protection Agency Administrator Scott Pruitt said Thursday he does not believe carbon dioxide is a primary contributor to global warming.

"I think that measuring with precision human activity on the climate is something very challenging to do and there's tremendous disagreement about the degree of impact, so no, I

would not agree that it's a primary contributor to the global warming that we see ," he told CNBC's "Squawk Box."

"But we don't know that yet ... We need to continue the debate and continue the review and the analysis," he added.

Pruitt's view is at odds with the opinion of NASA and the National Oceanic and Atmospheric Administration.

"The planet's average surface temperature has risen about 2.0 degrees Fahrenheit (1.1 degrees Celsius) since the late 19th century, a change driven largely by increased carbon dioxide and other human-made emissions into the atmosphere," NASA and NOAA said in January.

Pruitt previously served as Oklahoma attorney general, where he rose to prominence as a leader in coordinated efforts by Republican attorneys general to challenge President Barack Obama's regulatory agenda. He sued or took part in legal actions against the EPA 14 times.

Democrats and environmentalists opposed Pruitt's nomination to lead the EPA due to his close relationship with fossil fuel companies and his history of casting doubt on climate change. Conservatives and the energy industry have cheered his efforts to push back on what they view as over-regulation under Obama.

Pruitt maintained on Thursday it's possible to be pro-growth, pro-jobs and pro-environment all at once.

"This idea that if you're pro-environment you're anti-energy is just something we've got to change so that attitude is something we're working on very much," he said.

Pruitt also called the Paris Agreement, an international accord aimed at mitigating the impacts of climate change, "a bad deal."

"I happen to think the Paris accord, the Paris treaty, or the Paris Agreement, if you will, should have been treated as a treaty, should have gone through senate confirmation. That's a concern," he said.

The Paris Agreement was negotiated by the State Department, and future adherence to U.S. commitments made under Obama will be guided by current Secretary of State Rex Tillerson.

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Trump's Water Promises Face Challenges in 115th Congress

By Sarah Babbage and Adam Schank 3/9/17

President Donald Trump promised a major new investment in infrastructure, including water projects, during his campaign.

His budget proposal, however, is said to propose a 25 percent cut to the budget of the Environmental Protection Agency, which administers many water programs. Financing for water projects could also be imperiled by a tax code overhaul, though it could also benefit from the new administration's drive to cut regulations.

Revolving Loan Funding vs. EPA Cuts

One of Trump's campaign promises was to triple funding for the state revolving loan programs that help state and local governments upgrade their drinking and waste water infrastructure.

The funds had an annual allotment of $2.2 billion in fiscal 2016, requiring another $4.4 billion to meet the president's goal. If Congress provided funding in line with Trump's proposal, tripled revolving funds would leave little space for any other EPA programs.

The EPA is currently operating under an annualized budget of $8.3 billion, including $120 million in supplemental funding for lead contamination in the Flint, Michigan, water supply. The funds were provided under the continuing resolution that expires on April 28, and further action will be needed to keep the agency operating after that date.

While EPA's budget has been relatively flat in recent years, the current level is still less than the $8.7 billion provided in fiscal 2011.

Whither the Municipal Bond Tax Break?

Water authorities and other municipal governments are pre-emptively defending the tax exemption for municipal bond interest, which politicians from both sides of the aisle have previously eyed as an offset for tax cuts.

The tax preference, which Treasury predicts will cost $565 billion over the next decade, allows state and local governments to issue bonds at lower interest rates that are attractive to investors because the interest is tax-free. The House Republican tax reform blueprint proposed closing most credits and deductions to offset cuts to personal and corporate tax rates.

At least 70 percent of water utilities use municipal bonds to finance their capital investments. Municipal governments issued $34 billion in bonds to fund water projects in 2014.

Trump has said he supports the exemption. If Republicans' other major tax pay-for -- the controversial border adjustment tax -- can't get through Congress, it's more likely to be capped or eliminated to generate revenue to offset tax cuts.

$1 Trillion for Infrastructure

Trump's water infrastructure push was part of his campaign promise to spend as much as $1 trillion on infrastructure, which he called on Congress last week to fund through a combination of public and private dollars.

Although his speech barely mentioned water, EPA Administrator Scott Pruitt wants it included in the investment. "One of the things I've tried, in communicating to the White House, is that when we talk about infrastructure spending outside of the budget this year, water infrastructure needs to be part of that," Pruitt said in an interview with Bloomberg BNA.

A $1 trillion investment is substantially more than any recent proposal. Hillary Clinton proposed a $275 billion investment, while the 2009 stimulus law appropriated $150 billion for infrastructure.

Financing Options

Trump's campaign proposed a one-time 10 percent tax on the $2.6 trillion in profits that corporations have been holding overseas to avoid the U.S.'s 35 percent top tax rate, and using some of the revenue for infrastructure. The House GOP tax blueprint also proposed a deemed repatriation tax, but would use the proceeds to pay for personal and corporate tax cuts.

Congressional Democrats, however, have shown an interest in funding infrastructure through repatriation, so it could be used as a bipartisan bargaining chip.

The Trump campaign also released a white paper that proposed raising $167 billion from private investors that would leverage debt financing for a total investment of $1 trillion. Investors would receive an 82 percent tax credit for their investment, and the government would pay for it through the increased tax revenue from contractor profits and worker wages, the paper said.

Democrats have characterized the plan as a tax giveaway and have said it's a non-starter.

Finally, Trump criticized Clinton for proposing an infrastructure bank during her 2016 campaign, but Treasury Secretary Steven Mnuchin has since said it's worth considering. Infrastructure banks pair federal seed money with private dollars to fund projects that are generally large or of regional significance.

In addition to possible skepticism from Trump, an infrastructure bank could face opposition from other Republicans. Pennsylvania Republican Bill Shuster, chairman of the House

Transportation and Infrastructure Committee, called the idea “a boondoggle” in a Feb. 7 interview with Bloomberg News.

Regulatory Rollbacks

Republicans in Congress are attempting to advance a package to repeal and replace the Affordable Care Act, and have said they'll tackle the tax code next. That leaves little room on the spring calendar, which adds to the challenges of funding and assembling a major infrastructure package.

Water entities could, however, benefit from Trump's promise to roll back regulations and speed up review processes.

An executive order signed Jan. 24 would allow governors or the head of a federal agency to designate an infrastructure project as high priority. If the administration agreed, the project would qualify for expedited procedures to get through its environmental reviews.

House Natural Resources Committee Chairman Rob Bishop, a Utah Republican, has also said he wants to take a close look at federal environmental laws to speed up the permitting and review process under the National Environmental Policy Act.

Making those changes legislatively will be difficult as any bill will need to obtain 60 votes in the Senate to overcome a likely filibuster from Democrats.

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Great Lakes Representatives Demand Threatened Cleanup Money

By Sylvia Carignan 3/9/17

A proposal to chop over 90 percent of federal funding for Great Lakes cleanup would “reverse years of progress,” three representatives told a House subcommittee March 7.

The proposal came from the Office of Management and Budget earlier this month. The cut would bring the Environmental Protection Agency's budget for the Great Lakes Restoration Initiative from $300 million a year to $10 million annually.

The proposal is subject to agency and congressional approval, but Reps. Sandy Levin (D-Mich.), David Joyce (R-Ohio) and Louise Slaughter (D-N.Y.) made clear they will fight it. The multi-agency restoration initiative started in 2010 to focus on cleaning up contaminated areas of the Great Lakes, reduce nutrient runoff, restore native species’ habitats and control invasive species.

Great Lakes cleanup resources "have supplemented agency budgets to fund coordinated efforts to protect and restore the Great Lakes ecosystem, and we must ensure that this important work continues," they wrote to the House appropriations committee's Interior and Environment subcommittee. "Halting this commitment would reverse years of progress, dramatically reduce the [Great Lakes Restoration Initiative's] impact, and jeopardize the environmental and economic health of the region."

Deep Cuts

Levin, Joyce and Slaughter are leading the effort to get their colleagues' support on the letter this month. More than 50 members of Congress signed a similar letter asking for continued Great Lakes funding in 2016.

Matt Doss, policy director at the Great Lakes Commission in Ann Arbor, Mich., said the $10 million allocation would not only hobble cleanup efforts, but wouldn't be enough funding to support the EPA's Great Lakes program office.

Bill Becker, executive director of the National Association of Clean Air Agencies, spread word about the proposed cuts in an email he sent to his members March 1.

According to Becker, the OMB's proposal for the EPA slashed staff and grants to states as well as the Great Lakes Restoration Initiative. A group representing U.S. and Canadian mayors in the Great Lakes also has warned the proposed cuts to the initiative would be devastating.

E&E News

http://www.eenews.net/climatewire/2017/03/09/stories/1060051168

Pruitt's first moves worry enviros, open records advocates

By Niina Heikkinen 3/9/17

Ethical and legal questions that dogged Scott Pruitt's nomination process are continuing to shadow his first weeks as U.S. EPA administrator.

From concerns about transparency with his use of private email for official business as Oklahoma attorney general to questions about conflict of interest stemming from his new role at an agency he sued more than a dozen times, environmental and advocacy groups are keeping a close eye on the actions of the new administrator.

Environmental groups called foul late last week when Pruitt canceled an information collection request (ICR) on methane emissions from oil and gas facilities.

The Obama administration had started gathering information from the industry in

preparation for writing regulations to control methane emissions and other greenhouse gases from existing sources. EPA finalized regulations on methane for new and modified sources, the New Source Performance Standards, last year. Pruitt halted the ICR a day after receiving a letter from nine attorneys general and two governors. They contended that collecting the data was too expensive and burdensome to the fossil fuel industry.

"There is extremely well-documented and well-founded reasons to collect this information, and at a stroke of a pen to reverse that at the industry's bidding, it surely looks like EPA is at the beck and call of industry, and there is no justification that we can see for that request to be withdrawn," said Vera Pardee, senior counsel at the Center for Biological Diversity.

She noted that once EPA regulates new sources, the agency has an obligation to "create guidance" for existing sources, too.

The move sent a "strong signal" that the administrator would not move forward with controlling methane emissions, said David Doniger, senior attorney at the Natural Resources Defense Council's climate and clean air program.

That might mean legal trouble ahead for Pruitt if he indeed does not go forward with regulating methane under the Clean Air Act and the new source regulation stays on the books. Environmental groups did not comment on whether they would pursue legal action against the agency. However, yesterday NRDC filed a Freedom of Information Act request with EPA to determine whom Pruitt was communicating with about the ICR prior to making the decision to cancel it.

"It has the hallmark of decision that is legally vulnerable," said Sean Donahue, legal counsel for the Environmental Defense Fund.

Donahue noted that the letter was signed by attorneys general who are close to Pruitt, as well as the new Oklahoma attorney general, Mike Hunter, who had served as Pruitt's first assistant attorney general.

"[Pruitt] holds himself out as protecting states, but he uses regard for federalism as a euphemism for a regard for industry interest," Donahue said. "But in this issue, there are states on both sides, and there are states that believe that [methane] is threatening imminent harm. It doesn't seem like he understands that he is in a new job and he represents everyone."

Pruitt supporters hail end to 'onerous' regs

EPA did not return a request to comment on whether the agency would be moving forward with methane regulations at a later date. Last year, as Oklahoma attorney general, Pruitt joined in a lawsuit brought by West Virginia against EPA, challenging the rule regulating methane for new sources.

Representatives of the fossil fuel industry maintain that the information collection process

was poorly timed and badly handled by the Obama administration and was being challenged well before Pruitt was confirmed as EPA administrator.

"I think the environmental groups are just very upset because they were counting on a different administration that would move forward with very onerous existing source rules," said Kathleen Sgamma, president of the Western Energy Alliance.

"The bottom line was this ICR was rushed at the last minute, it was not well thought-out and was asking for data that would have overwhelmed the agency. It was sending out a huge net to trawl in all kinds of data that would not be useful for regulating methane," she said.

The challenge to the ICR was not in opposition to providing data about methane emissions, at least according to the Independent Petroleum Association of America. Instead, it had objected in part because the agency did not follow advice to seek out data that were already publicly available through state agencies and the private website Drillinginfo, said Lee Fuller, executive vice president of IPAA.

Fuller said IPAA had provided public comment to EPA under the Obama administration, and then had requested a halt to the ICR once Donald Trump was elected president, especially since there is ongoing litigation challenging the new source regulations.

"We started talking to the transition team with the Trump administration, so the new administration could make a decision about whether it would want to pursue the same pathway as the Obama administration. We continued to urge them to reconsider the approach and well before there was any administrator," said Fuller.

He called the decision to terminate the ICR the "right course of action."

Transparency an ongoing concern

As environmental groups seek to dig into Pruitt's communications with industry and his former attorney general colleagues, they may run into another problem: access to his email.

Advocacy groups say there could be cause for concern about transparency at a Pruitt-led EPA, after a recent court case against the former Oklahoma attorney general revealed he had used private email, at least on occasion, to conduct official business.

"The problem is, we don't know how extensive his use of personal email was, we had very few examples of him using his Oklahoma [attorney general] account, there is a lingering question over how prevalent it was," said Nick Surgey, research director at the Center for Media and Democracy.

"We're asking the court to ensure that Scott Pruitt's [personal] email account was searched for and any emails that should have been included in the request to us," Surgey said.

Pruitt's use of private email was not in accordance with the "spirit of the law," said Alex Howard, deputy director of the Sunlight Foundation, an open-government advocacy organization.

"Certainly if an official does have a pattern of using private messaging, then people will naturally put those people under more scrutiny for using that approach," Howard said.

If Pruitt did use a private email as EPA administrator, the public would have a hard time getting access to the records unless the private account is leaked or made public in some way.

Barrasso 'pleased' Pruitt will now stick to EPA email

While it's possible to submit a FOIA request for the administrator's personal email, there has to be some sort of record or trail showing its existence, said Aaron Scherb, director of legislative affairs at Common Cause, a lobbying organization.

"You can't just say any private email address that John Doe could use," said Scherb.

The EPA administrator joins Vice President Mike Pence and former Secretary of State Hillary Clinton as the latest politician to be publicly outed for using personal email for official business.

While they may be the most prominent recent examples, the use of personal email, personal devices and private messaging apps is common practice in all levels of government and among all parties, according to Howard.

"Sometimes it's a matter of convenience, sometimes it's intentional," Howard said. "This is the digital equivalent of stepping out into the hallway to have a conversation that's not on the record."

Now that Pruitt is working at a federal level, he will be subject to more public laws and record requirements than he was as a state attorney general. But short of putting politicians under 24-hour surveillance, there is no way to prevent these kinds of communications from happening, Howard said.

"We have to trust them that they are going to do their best to follow the law," he said.

A spokesman for Sen. John Barrasso (R-Wyo.), head of the Senate Environmental and Public Works Committee, said in an email that the senator had asked Pruitt about whether he would use personal email to conduct EPA business during his confirmation hearing.

"The chairman asked Pruitt if he would commit to only using his EPA email account for official EPA business. The chairman was pleased that Pruitt agreed," the spokesman said.

E&E News

http://www.eenews.net/climatewire/2017/03/09/stories/1060051196

The Clean Power Plan is gone – and there's no 'replace'

By Evan Lehmann 3/9/17

The White House intends to unravel the Clean Power Plan without providing a replacement, according to a source briefed on the issue.

An executive order expected to be released next week also instructs the Justice Department to effectively withdraw its legal defense of the climate rule in the U.S. Court of Appeals for the District of Columbia Circuit. The move aligns the White House with about two dozen Republican state attorneys general who are challenging the way the rule restricts greenhouse gas emissions at power plants.

The result, if successful, would mean the case is "frozen in place," the source said, preventing the D.C. Circuit, which has six judges appointed by Democrats and four by Republicans, from issuing an opinion this spring. Other legal experts say the case could continue if states or other groups go on defending the rule.

"Justice goes to the court and says ... 'Don't waste your time trying to put together an opinion when the legal basis for the case that you're reviewing could potentially go away,'" the source said. "Normally, a court will grant that. There's no guarantee."

It was unclear until now if the Trump administration would "repeal and replace" the Clean Power Plan, or just set upon a path to undo it. Some had anticipated that the Trump administration might pursue an alternative and much less stringent rule, but the executive order will only call for the withdrawal of the regulation.

That raises questions about whether EPA would fail to satisfy legal requirements to regulate carbon dioxide and other climate pollutants.

The agency in 2009, responding to the Supreme Court, determined that greenhouse gases endanger human health. That requires EPA to regulate emissions, and the agency did that by promulgating the Clean Power Plan.

"I think, as a matter of law, that carbon is a pollutant has been settled," said Christine Todd Whitman, who served as EPA administrator under President George W. Bush. "EPA has to act once you have that kind of a finding."

Waiting for the 'right time'?

The new details are surfacing as the White House confirmed yesterday that the executive order's release would be delayed. It was scheduled to be signed by President Trump this week. Now that will likely occur next week.

The delay follows successful efforts by Ivanka Trump, the president's daughter, and her husband, Jared Kushner, to remove language from the order that was critical of the Paris Agreement on climate change.

The current order does not refer to the global pact, and the source said that issue did not hold up the order's release. The delay was caused by the rise of other priorities, including the release of the Republican health care proposal Monday, the source said.

Trump also caused unforeseen turbulence Saturday by accusing former President Obama of wiretapping Trump Tower.

Coal companies and mining groups, which Trump described as being victimized by the climate rule on the campaign trail, have waited patiently through the delays. But now that he's 49 days into his presidency, there are subtle signs that industry wishes he would act more swiftly.

Jeff Holmstead, a former assistant EPA administrator under Bush who represents opponents to the rule, said it's likely the White House is waiting for the right time to unveil the rule with maximum effect.

"I hope it's soon," he added. "I think everybody, certainly all of my clients, think the Clean Power Plan is dead. But there's always uncertainties."

Fresh lawsuits await

For some Democrats, the order represents a tightrope walk. It's bound to be challenged in court by liberal state attorneys general and environmental groups for not providing an alternative to the Clean Power Plan. But if it did provide one, Republicans in coal states would likely feel that Trump had abandoned his campaign promise to terminate the regulation.

"It's not like [Senate Majority Leader] Mitch McConnell [R-Ky.] will say, 'OK, they're gonna do a new rulemaking on power plants, so I'm sure it'll be better,'" said Heather Zichal, Obama's former climate adviser. "They fundamentally don't think coal plants should be held accountable for their carbon pollution. So how do you deal with that piece? I think politically that's hard for them."

Environmental groups are already promising to sue EPA for failing to comply with its own endangerment finding.

"If EPA withdraws [the rule] and does not replace it with strong standards, we will challenge the agency's action in court," said Joanne Spalding, the chief climate counsel at the Sierra Club.

The administration anticipates that. The executive order instructs EPA to "revise or rescind"

the Clean Power Plan, wording that's meant to comply with the Administrative Procedure Act by letting EPA, not the White House, determine the fate of the rule.

The agency will then go through the long rulemaking process. But rather than promulgating a new rule, it will terminate an existing one. It will post notice and take comments and then put out a proposed rule. After accepting more comment, the action will be finalized. Then the administration is "off to the races in court," the source said.

The Clean Power Plan is just one part of the executive order, which is geared around "energy independence."

It does not address the endangerment finding, which is the underpinning of current and future EPA regulations on greenhouse gases. No decision has been made by White House officials about whether to attack the finding in subsequent actions, the source said.

"That is a huge issue," the source said. "That's just going to require a lot of thinking."

InsideClimate News

https://insideclimatenews.org/news/09032017/epa-environmental-justice-mustafa-ali-flint-water-crisis-dakota-access-pipeline-trump-scott-pruitt

Chief Environmental Justice Official at EPA Resigns, With Plea to Pruitt to Protect Vulnerable Communities

By Phil Mckenna 3/9/17

The head of the environmental justice program at the Environmental Protection Agency has stepped down, departing the government with a lengthy letter to Scott Pruitt, the EPA's new administrator, urging him not to kill the agency's programs.

Mustafa Ali, a senior adviser and assistant associate administrator at the agency, worked to alleviate the impact of air, water and industrial pollution on poverty-stricken towns and neighborhoods during nearly a quarter century with the EPA. He helped found the environmental justice office, then the environmental equity office, in 1992, during the presidency of President George H.W. Bush.

Ali leaves the EPA as Pruitt, who took office Feb. 17, prepares to implement deep cuts in the agency's budget and staff. A Trump administration proposal would cut the EPA's $8 billion budget by $2 billion and reduce its roster of 15,000 employees by 20 percent. An internal memo obtained by multiple news outlets on March 1 called for a complete dismantling of the office of environmental justice and elimination of a number of grant programs that address low-income and minority communities. A story in the Oregonian reported that funding for the office would decrease 78 percent, from $6.7 million to $1.5 million.

Justice issues have become an environmental focal point in recent years—most recently in the battle to clean up lead-contaminated water in Flint, Mich., a largely African-American community, and in the fight to stop the nearly completed Dakota Access pipeline just upstream of the Standing Rock Reservation in North Dakota.

"I think it's going to be one of the major civil rights issues of the 21st century," said Benjamin Wilson, head of the National Environmental Justice Conference and chairman of the law firm Beveridge & Diamond. "It's going to become increasingly not simply local but regional, national and international in scope."

Ali said he has received no indication that the adviser position or his job as assistant associate administrator in the agency's Office of Enforcement and Compliance Assurance will be filled by the Trump administration. EPA officials declined to comment on the positions.

The EPA made strides during the Obama administration to address environmental justice concerns, including incorporating equity into regulatory decision-making, and adopting a long-term strategy in its EJ 2020 Action Agenda. The agency was, however, heavily criticized for not doing enough to address environmental concerns of low-income and minority populations.

Ali said in an interview that he considers the shielding of poor and minority neighborhoods from the effects of pollution a crucial function of the EPA, but that the agency's new leaders have not given "any indication that they are focused or interested in helping those vulnerable communities. My values and priorities seem to be different than our current leadership and because of that I feel that it's best if I take my talents elsewhere."

Still, in his resignation letter, which was devoid of rancor, Ali urged former Oklahoma Attorney General Pruitt, a longtime opponent of EPA regulation, to reconsider proposed cuts to environmental justice programs. "When I hear we are considering making cuts to grant programs like the EJ small grants or Collaborative Problem Solving programs, which have assisted over 1,400 communities, I wonder if our new leadership has had the opportunity to converse with those who need our help the most," Ali wrote. "I strongly encourage you and your team to continue promoting agency efforts to validate these communities' concerns, and value their lives."

Meanwhile, the power that Ali once wielded inside the EPA has been dissipated. His position as senior adviser to the EPA administrator was eliminated in January when Obama's EPA chief Gina McCarthy left, he said.

"I am heartbroken that Mustafa feels that his time of productivity in the agency has passed," McCarthy said in an interview. "He managed the interagency working group on environmental justice," she said, referring to a conclave of federal agencies that met to discuss common concerns. "So when I say we brought actions and strategies to the table, it wasn't just EPA, it was throughout the federal government."

Part of the environmental justice program's strategy was to help leverage its relatively small grants into large programs. The town of Spartanburg, South Carolina, for example, received a $20,000 environmental justice grant to help clean up contaminated industrial sites in the town. Spartanburg ultimately raised more than $270 million from public and

private sources and used the recovered land to build housing, a job training facility and health centers.

"You're talking about a community that was devastated and that raised itself up because you had great community members and they had somebody who listened to them at the federal government," McCarthy said. "Mustafa was one of those people. I went to that community. I sat with the mayor. He gave me a key to the city. We were sitting in a community center that had been developed as a result of this small start, where somebody paid attention to that community and it happened to be EPA."

Cynthia Giles, assistant administrator for the Office of Enforcement and Compliance Assurance in the Obama administration, cites the town of Tonawanda, New York, to which the EPA gave a small grant to conduct ambient air monitoring. The grant "ultimately led to a criminal case that EPA brought against Tonawanda Coke Corporation for high levels of benzene emissions," Giles said.

Giles said there is no economic justification for killing the justice program. "The money that is involved is not noticeable in the overall scheme of budgets," she said. "The only reason to eliminate it would be to send a message—that they don't care about the needs of the most vulnerable communities."

"We've had both [Republican and Democratic administrations] over time and none of them tried to do anything to destroy what the previous administration had done," Ali said. "Folks are just hoping that this one will wake up and see value in continuing this important work."

Yet Ali sees nothing in Pruitt's background to support that hope. He repeatedly sued the EPA for its efforts to regulate CO2 emissions, mercury and other forms of pollution. "When the administrator was in Oklahoma I do not know of any time that he made environmental justice a priority," Ali said.

Pruitt tweeted last month he was dedicated to working with "stakeholders—industry, farmers, ranchers, business owners—on traditional values of environmental stewardship."

Some of the responses the tweet garnered included: "What about environmental advocates?" "What about...people w/o access to safe water & air? Our children?" And "what about ordinary citizens."

In a February statement, advocacy group We Act for Environmental Justice said of Pruitt: "His record indicates he lacks awareness or concern for communities impacted by asthma and other environmental health-related issues."

Ali, who grew up near a coal-fired power plant in West Virginia, interned in the office of William Reilly, the agency's third administrator, before joining as a staff member in the newly formed office of environmental equity in Nov. 1992. From 2007-2008, Ali worked on Capitol Hill in the office of Congressman John Conyers before returning to the EPA. He proudly boasts that he has worked on environmental justice issues in more than 500 communities.

"His work and the work of the EPA has helped empower people, and whenever we can have a clear articulation of the issues, it's amazing the common ground that can be

reached by people on opposing sides," Wilson said. "But if we never have that discussion, that frustration festers and that is never good."

Ali will join Hip Hop Caucus as a senior vice president. The group is a non-profit that aims to promote political activism for young U.S. voters through hip-hop music and culture. He is scheduled to speak Thursday at an environmental justice conference in Flint, in his first public appearance with the organization.

"What I'm hoping to do is highlight that environmental justice needs to continue to happen," Ali said, "that there are opportunities to make it happen, and that if we don't do it there will be huge public health impacts."

LA Times

http://www.latimes.com/politics/la-na-pol-regulatory-reform-science-20170309-story.html

What's at stake as the GOP moves to slash regulations? For starters, clean air

By Evan Halper 3/9/17 3:00 AM

Amid the Republican backlash against federal scientists who write rules governing everything from movie theater popcorn to offshore oil drilling, stories abound of overburdened businesses, heavy-handed civil servants and crushing paperwork.

But another story, one involving a deadly household material, offers a lesson in what can go wrong when government experts are shackled, as currently envisioned under a sweeping regulatory reform bill gliding toward President Trump's desk.

The GOP-backed legislation revives many of the rule-making hurdles that for years crippled the government's ability to respond to the asbestos-exposure epidemic, which has been blamed for tens of thousands of American deaths.

"I don't think lawmakers are focusing on how extreme this legislation is," said Paul Billings, lobbyist for the American Lung Assn., which has joined several major public health groups imploring congressional leaders to apply the brakes. "It has been viewed as this abstraction that creates improvements in the regulatory process. This would undermine bedrock public health laws."

The linchpin of the 87-page proposal is a directive to regulators that may be impossible to meet. They would have to prove they have taken the least costly option possible to business before imposing any major new rule. A similar mandate became stifling when applied for decades to the regulation of chemicals such as asbestos because it allowed companies to keep rules at bay by continually arguing for cheaper approaches.

The Environmental Protection Agency gave up trying to ban the substance in 1991, after a

federal appeals court ruled it had not proved its regulation was the least financially burdensome approach. The decision became a rallying point for overhauling the Toxic Substances Control Act, which guides EPA authority over such chemicals. The act finally was revised last year, and in November, the EPA announced asbestos was among the first chemicals it was targeting with its new authority to require safety reviews.

By then, however, there was not much left for the EPA to do on asbestos, after legions of cancer victims took matters into their own hands with civil actions that bankrupted the industry. But the years of government inaction took their toll. A quarter-century later, nearly 15,000 Americans still die annually of diseases caused by asbestos exposure during their lifetime, according to the Asbestos Disease Awareness Organization.

The new GOP regulatory reform bill, which swiftly passed the House in January without committee debate, would apply the same test that hobbled regulators on asbestos to every major rule the government wants to impose. That includes setting Clean Air Act limits for how much toxic pollution can be released into the air in dense, asthma-infested urban areas like Los Angeles. Car safety, food safety, worker safety and consumer product safety rule-making also would be affected.

The far-reaching plan has been overshadowed by more immediate headlines springing from the White House, where wiretapping conspiracies, travel bans and Obamacare repeal anxieties are consuming the oxygen. Even the regulatory reform blueprint's name — the Regulatory Accountability Review Act — is sleep-inducing, masking the gravity of a proposal the U.S. Chamber of Commerce has placed among its top political priorities at a time when its influence in Washington has surged.

The chamber has invested tens of millions of dollars in lobbying for and promoting the bill, HR 5. It alerted lawmakers just before the measure passed the House in January that it "is a long-standing priority for the chamber" that is "long overdue." Lawmakers were cautioned in the letter against supporting any amendments that would moderate the proposed law, warning that such action could reflect unfavorably on the politically potent voting scorecard that the organization publishes to rank lawmakers.

While there are several dramatic proposals before Congress to rein in federal rule-makers, lobbyists are advising clients that the bill is one that actually stands a good chance of advancing to a president who is urgently looking to deliver a blow to the bureaucracy. A few moderate Democrats in the Senate already have expressed interest in helping the GOP leadership secure the 60 votes it needs for passage.

Supporters offer a cache of statistics that frame the bill as a common sense plan to give corporations some influence over a regulatory process they say is suffocating them. They point to a spike over the past 15 years in complex federal rules costing businesses more than a billion dollars, and showcase estimates concluding the rules have become such a drag on the economy that they are costing the average American family $15,000 per year.

"There is a legitimate question of whether you really need this continued churning and

accumulation of all these regulations," said Susan Dudley, who worked on regulatory reform at the George W. Bush White House and is now director of Regulatory Studies Center at George Washington University.

But others warn the legislation threatens to go considerably further than slowing the churn of rule-making. It directs agencies that for decades have used science alone in crafting major public health and worker safety protections to change course and find the most cost-effective approach for business.

"It's not hard to look down the line and see the problems this would create," said Thomas McGarity, professor of administrative law at the University of Texas. He cited several major public safety challenges with which regulators are wrestling and the potentially tragic consequences of cutting corners on oversight, from undrinkable water in cities like Flint, Mich., to blueprints for self-driving 18-wheelers.

Beyond requiring a cost analysis, the legislation also would put dozens of new obstacles on federal agencies before they can finalize a new rule — a process that already takes years. Companies that don't like the approach would be empowered with a bounty of new opportunities to file legal challenges and demand reviews.

Yogin Kothari, a lobbyist at the Environmental Working Group, sees irony in it all: "Their solution to too much bureaucracy and red tape is adding more red tape."

Clean Air Act enforcement, which is based on a painstaking analysis of such factors as how many lives would be saved and cases of asthma averted, could be altered drastically. The toll those rules take on corporate profits would gain new currency. Public health officials warn that enforcement of tobacco laws also would be inhibited.

The Consumers Union advised lawmakers that other landmark protections, including the Consumer Product Safety Act and the Securities Exchange Act, would be weakened substantially. "This dangerous proposal would do severe damage to protections consumers depend on," the group wrote to lawmakers.

Yet the bill's champions in Congress are undeterred. Among them are Rep. Doug Collins (R-Georgia), who took to the House floor the same day Consumers Union sent its plea.

"It is time we demand the voice of the American people be heard," Collins said just before casting his vote in favor of the bill, "rather than letting the others up here, separated in cubicles, decide what is best."

Inside EPA

https://insideepa.com/daily-news/ecos-mounts-defense-epas-state-funding-assistance-fy18-cuts

ECOS Mounts Defense OF EPA's State Funding Assistance from FY18 Cuts

By David LaRoss and Doug Obey 3/8/17

The Environmental Council of the States (ECOS) is mounting a strong defense of EPA grants and other programs that support state activities from the Trump administration's suggested massive cuts to agency funding in fiscal year 2018, warning the cuts could threaten states' ability to meet a wide range of environmental protection goals.

In an exclusive March 8 interview with *Inside EPA*, ECOS President John Linc Stine -- who also serves as commissioner of the Minnesota Pollution Control Agency -- said the council, which represents many state environment regulators, is planning meetings with White House officials and members of Congress in the coming weeks to urge them to defend areas of EPA's budget that provide direct funding support to states.

A reduction in EPA's FY18 budget "has the potential of cutting across the entirety of our activities, but it's unclear until we see the entirety of their budget document what areas they're proposing to reduce," Stine said, with the Trump administration said to consider up to a 25 percent cut to EPA's existing $8.1 billion funding, including possibly reducing EPA's 10 regional offices to eight.

He told *Inside EPA* that ECOS is scheduling meetings with White House Office of Management & Budget (OMB) officials and legislators "to advise them of our concerns."

But the states are also acknowledging that any cuts to EPA will almost certainly impact them in some way, because "it's all a priority for state agencies like ours," he said.

In a separate March 7 interview, ECOS Executive Director and General Counsel Alex Dunn said cuts could be especially harmful when they affect programs where states have accepted delegated authority from EPA with a promise of federal funding -- and could discourage states from seeking such delegation.

For instance, she said budget cuts might complicate efforts by states like Massachusetts,

which is currently weighing accepting delegated authority over the Clean Water Act discharge permit program.

“The natural question from Massachusetts legislature will be, we are going to take on performing a service or an activity previously done by EPA Region 1. How much will EPA be giving us to assist? . . . When you look at a new delegation it becomes clear that new federal funding should be a part of” the process, she said.

ECOS' Concerns

ECOS has previously raised concerns that the White House's plan to cut EPA's budget significantly may renege on commitments by agency Administrator Scott Pruitt to preserve state grants as he works to return much of the responsibility for implementing environmental programs to states.

In a March 1 letter to Pruitt and OMB Director Mick Mulvaney, ECOS questioned the proposed cuts in light of Feb. 25 remarks by Pruitt at the Conservative Political Action Conference where he called states and EPA "partners, not adversaries," and said, "help is on the way."

While the Trump administration has yet to release its formal budget request for FY18, OMB's initial “pass back” includes a 25 percent cut to EPA's current $8.14 billion overall budget and a 30 percent cut to many grant programs.

OMB's threatened cuts for EPA have raised concerns among a wide array of stakeholders, including industry and states, that EPA could be left without the funds needed to perform mandatory duties such as providing resources to state environment departments that lack the ability to operate solely on state funds.

“When I look at our budget in Minnesota for example, we receive $25 million a year in EPA grant funds not including the Great Lakes Restoration Initiative project dollars,” Stine told *Inside EPA*.

He said EPA money "across our grants" supports monitoring for "air, land and water contamination," state regulators' permitting and enforcement work, and contaminated site cleanups including but not limited to the Superfund and brownfields programs.

In the separate interview, Dunn said, "States have made it pretty clear that core funding for the air, water, land programs needs to remain whole."

Regional Offices

Beyond threats to federal funds, Stine added that a plan to possibly close EPA regional offices is concerning to state officials, both because states receive technical and regulatory assistance from regional officials and because some high-profile program efforts like the Great Lakes Restoration Initiative (GLRI) are operated by the regions.

The effect of shuttering regional offices "really does depend on the transactional requirements for each regional office, but it would be a concern because if you're going to have a change . . . there's always a transitional period where things get less efficient and less clear for people, so there's time that gets consumed in trying to sort that all out," he said.

As part of the budget planning process, OMB is requiring EPA to craft a plan for consolidating the current 10 regional offices down to eight in order to realize "efficiencies" -- though it is unclear how likely it is that such a plan will make it into the budget request.

"I know that there are some of the regions that are having a conversation with the states, I think the Western states," but there are no indications of whether the consolidation will happen, Stine said. He noted that along with GLRI, restoration efforts for the Chesapeake Bay, Puget Sound and San Francisco Bay are all administered through EPA regional offices.

However, he did not dismiss the idea that consolidating regions could ultimately make EPA

more efficient. Beyond the initial “transitional period,” it is “too soon to tell whether it has a positive, negative or neutral impact at this point,” Stine said.

EPA Budget

ECOS discussed budget priorities with OMB staff during a “recent” phone call, Stine and Dunn told *Inside EPA*. There, the White House expressed interest in state input on EPA's budget, signaling that the administration will at least consider states' requests to shore up the agency's funding despite the GOP's long-standing push to dramatically cut its activities.

“It was pretty much a listening and gathering from their perspective. . . . They did ask us to be prepared to carefully review the budget and offer more comments,” Stine said.

Dunn added that OMB appeared to be under pressure to broadly cut federal spending. “It is very clear . . . There is a very strong directive for all agencies to look very closely at the budget,” she said.

Even though Pruitt has vowed to fight to preserve funds for his priorities -- such as water infrastructure assistance, site cleanups and attainment of existing water and air standards -- Stine said it is unclear what steps the agency's leadership is taking or could take to shore up the FY18 budget.

“We’re aware that the agency is in dialogue with OMB about this . . . we’ve not received anything directly from Mr. Pruitt, but we’ve heard in communications with senior staff that they are looking closely at the budget for state programs,” he said.

Dunn said pressure from the White House to cut spending seems to put Pruitt in a tough position, because maintaining state assistance will almost certainly mean deeper cuts to EPA's own programs if EPA's overall budget is in fact reduced.

“The challenge is defending the state programs when the inevitable next question is, what about the staff and the agency that he has to run as well?” she said, adding that if EPA avoids reducing state assistance then it will almost certainty have to cut resources and staff from program offices, prompting “some very difficult decisions.”

ECOS' March 1 letter to Pruitt and Mulvaney called for an increase to state and tribal assistance grants (STAG), including the categorical grants that support states' and tribes' implementation of federal environmental mandates.

"Cuts to STAG categorical grants, or to EPA programs operated by states, will have profound impacts on states' ability to implement the core environmental programs as expected by our citizens," the letter said. -- *David LaRoss* (dlaross@iwpnews.com) *& Doug Obey* (dobey@iwpnews.com)

Quartz

https://qz.com/928236/the-word-science-has-disappeared-from-the-mission-statement-of-the-epas-office-of-science-and-technology/

Who needs “science” in an EPA Office of Science and Technology mission statement anyway?

By Zoe Schlanger 3/8/17

The branch of the US Environmental Protection Agency in charge of creating science-based clean water standards no longer has the word “science” in its mission statement.

Earlier this year, the stated mission of the Office of Science and Technology at the EPA’s Water Office was “developing sound, science-based standards,” and “scientific and technological foundations to achieve clean water,” according to a copy of the EPA’s website archived in January on the Internet Archive’s Wayback Machine.

The text of the mission statement has changed; the office’s mandate is now to create “economically and technologically achievable performance standards.” The word “science-based” and “scientific” no longer appear.

A coalition of researchers called the Environmental Data and Governance Initiative, or EDGI, found the changes. They are monitoring about 25,000 government web pages for any modifications under the new administration, by comparing them to copies archived on the Internet Archive by "data rescuing" events staged by archivists and programmers at universities across the country. (EDGI also plans to track any data sets that are removed.)

EDGI researcher Gretchen Gehrke told the New Republic she worries the switch is not just a linguistic detail—that it may signal a change in policy.

Instead of a science-based approach to clean water requirements—where water must meet quality standards based on peer-reviewed toxicology science, and companies can choose how to meet those standards—calling for "economically and technologically achievable" standards puts greater emphasis on the economic impact of regulation, and may mean companies would install certain technologies determined by the EPA rather than comply with a specific water-quality standard.

The EDGI researchers have found a number of other notable website tweaks: Climate change reports have disappeared off of State Department websites, while a description of a federal fracking rule, and another about a methane emissions rule, have also gone missing from Interior Department web pages.

Kevin McGonagle

Office of Media Relations Intern

U.S. Environmental Protection Agency

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mcgonagle.kevin@epa.gov

Katherine So

Office of Media Relations Intern

U.S. Environmental Protection Agency

Telephone: (202)-564-4511

so.katherine@epa.gov

To: Kaplan, Robert[kaplan.robert@epa.gov]
From: Schnare, David
Sent: Sat 2/18/2017 8:57:01 PM
Subject: Fwd: Request for Reconsideration of EPA Region 5 Action and/or Alternative Dispute Resolution
CGMC -MESERB Letter to new Administration - MN WQS. Final.pdf
ATT00001.htm
INDEX OF ATTACHMENTS.pdf
ATT00002.htm
Att. 1. Letter to G McCarthy and S Hedman RE MN Stream Nutrient WQS - 12-10-15.pdf
ATT00003.htm
Att. 2- BOD5 FOIA Request & Response.pdf
ATT00004.htm
Att. 3 - DO Flux FOIA Request, Response & Follow up.pdf
ATT00005.htm
Att. 4- Standard Methods memo on BOD5 test.pdf
ATT00006.htm
Att. 5- EPA Email to PADEP on DO Flux.pdf
ATT00007.htm

Did we have a fix on this that we could do through ADR or are we committed to a court battle? This is the reverse of the kinds of issues that have been coming up, ones where EPA demands more strict action than the state would allow. It puts the Administrator in the position of being asked to reject a state's decision rather than supporting the state, despite the views of a regional staff recommendation. Any way to get past putting Pruitt in that position?

dschnare

Sent from my iPhone

Begin forwarded message:

From: "Benton, Donald" <benton.donald@epa.gov>
To: "Minoli, Kevin" <Minoli.Kevin@epa.gov>, "Schnare, David" <schnare.david@epa.gov>
Subject: FW: Request for Reconsideration of EPA Region 5 Action and/or Alternative Dispute Resolution

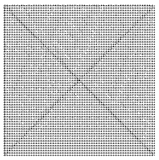
Don

Senator Don Benton

Senior White House Advisor

Office of the Administrator

202.564.4711



From: Daniel M Marx [mailto:DMMarx@flaherty-hood.com]
Sent: Wednesday, February 15, 2017 5:05 PM
To: Benton, Donald <benton.donald@epa.gov>; Schnare, David <schnare.david@epa.gov>; scott.pruitt@oag.ok.gov
Cc: samantha.dravis@gmail.com
Subject: Request for Reconsideration of EPA Region 5 Action and/or Alternative Dispute Resolution
Importance: High

Dear Administrator Pruitt and Messrs. Benton and Schnare:

Attached please find a letter and attachments from the Coalition of Greater Minnesota Cities (CGMC) and Minnesota Environmental Science and Economic Review Board (MESERB), which represent 93 communities in Minnesota. CGMC/MESERB are requesting that EPA reconsider the EPA Region 5 approval of Minnesota's scientifically flawed numeric nutrient standards for rivers and streams and hold the existing federal litigation challenging that approval in abeyance so the parties can participate in the alternative dispute resolution process.

The flawed standards at issue will require our communities to spend hundreds of millions of dollars of local and state resources, limit future growth, and will fail to produce measureable benefits to water quality.

In December 2015, our organizations, through the Center for Regulatory Reasonableness (CRR) requested that EPA Region 5 reconsider its approval of Minnesota's scientifically flawed standards. EPA Region 5 rejected this request and our organizations, through CRR,

were forced to file a Circuit Court appeal in the D.C. District Court, (Docket 16-1435-RJL).

The legal action is presently pending in the D.C. District Court. As explained in the attached letter, EPA Region 5's action ignored the following:

(1) Significant scientific evidence from national water quality experts demonstrating that the standards approved by Region 5 rely upon scientifically indefensible criteria;

(2) Responses to Freedom of Information Act requests, where EPA headquarters acknowledged that it possessed no records showing it was scientifically defensible to use the criteria at issue;

(3) A document prepared by an EPA Region 3 scientist in which EPA's scientist admitted that scientific objections to the use of one of the challenged criterion are well founded prompting the state of Pennsylvania to withdraw its use of the same criterion;

EPA Region 5's initial approval of these flawed standards and refusal to withdraw its approval after being presented with the above referenced evidence is precisely the type of arbitrary regulatory action that the Trump Administration has committed to address to avoid wasting local resources. To force municipal organizations to expend additional resources to challenge such clearly flawed science is unreasonable in light of the compelling evidence in this case.

By the attached letter, we respectfully request that the new Administration agree to hold the current litigation in abeyance, so the parties may engage in alternative dispute resolution. Moreover, as the EPA is under a duty to independently ensure that proposed state water quality criteria are scientifically defensible, and these criteria plainly are not, the EPA's reconsideration of its earlier approval would be most appreciated.

Thank you for your consideration of these requests.

Sincerely,

Daniel Marx, Counsel for MESERB/CGMC

Daniel Marx, Associate Attorney

Flaherty & Hood, P.A.

525 Park Street, Suite 470

St. Paul, MN 55103

Direct Dial: 651-259-1907

Office: 651-225-8840

dmmarx@flaherty-hood.com

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To: Nolan, Rich[RNolan@nma.org]
From: Schnare, David
Sent: Tue 2/7/2017 5:48:03 PM
Subject: RE: Mining

We are going to deal with this as soon as Scott Pruitt is confirmed and is in place.

d.

From: Nolan, Rich [mailto:RNolan@nma.org]
Sent: Tuesday, February 7, 2017 12:31 PM
To: Schnare, David <schnare.david@epa.gov>
Subject: Mining
Importance: High

Hi David, might you have a few minutes to talk about a extending a comment period on a pending rulemaking. We are running up to a March 13 deadline on the Financial Assurance rulemaking for hardrock and really need an extension very soon. Rich

Rich Nolan
Senior Vice President, Government and Political Affairs
National Mining Association
101 Constitution Ave. NW, Suite 500 East
Washington, D.C. 20001
Phone: (202) 463-2600
Direct: (Ex. 6
rnolan@nma.org

To: Allen, Reginald[Allen.Reginald@epa.gov]
From: Schnare, David
Sent: Fri 2/10/2017 7:52:02 PM
Subject: FW: ESP First Weeks
ESP First Weeks.docx

Reggie:

Amend your doc to reflect the attached. The attached started with your previous. Pruitt is looking at the attached today.

dschnare

To: Reeder, John[Reeder.John@epa.gov]
From: Schnare, David
Sent: Mon 1/30/2017 2:15:48 PM
Subject: RE: EPA Climate Change Awards

Thx

d.

From: Reeder, John
Sent: Monday, January 30, 2017 9:14 AM
To: Schnare, David <schnare.david@epa.gov>
Cc: Ericksen, Doug <ericksen.doug@epa.gov>; Benton, Donald <benton.donald@epa.gov>; Munoz, Charles <munoz.charles@epa.gov>; Flynn, Mike <Flynn.Mike@epa.gov>; Mccabe, Catherine <McCabe.Catherine@epa.gov>
Subject: Re: EPA Climate Change Awards

Will follow up with you

Sent from my iPhone

On Jan 30, 2017, at 8:01 AM, Schnare, David <schnare.david@epa.gov> wrote:

> We need to find out exactly what our role in this meeting is, whether we are sponsors and whether the awards are from EPA or the other sponsors.
>
> We also need to find out what other such events are planned for which EPA is a sponsor.
>
> John, can you please get us this information?
>
> d.
>
> **From:** Ericksen, Doug
> **Sent:** Monday, January 30, 2017 7:49 AM

To: Benton, Donald <benton.donald@epa.gov>; Munoz, Charles <munoz.charles@epa.gov>; Schnare, David <schnare.david@epa.gov>
Subject: EPA Climate Change Awards

How do we want to handle this one?

The event in question is scheduled for March 1-3.

ericksen

EPA

Agency awaiting Pruitt plans to give climate awards

Jean Chemnick, E&E News reporter

Published: Friday, January 27, 2017

U.S. EPA will likely be led soon by a climate skeptic, but it's still planning to give out climate leadership awards to businesses and professionals at a Chicago ceremony later this winter.

The agency is listed as the headline sponsor of a voluntary awards program to be held as part of the three-day Climate Leadership Conference on March 1-3. The gathering is presented by the Center for Climate and Energy Solutions and the Climate Registry with other private sponsors. The awards recognize private-sector achievements in carbon reduction. Winners have not been announced.

The ceremony is still being planned despite the Trump administration's decision to cancel other climate-related gatherings, like a Climate and Health Summit that the Centers for Disease Control and Prevention had planned to host next month. It seems likely that Oklahoma Attorney General Scott Pruitt (R) will be EPA administrator at the time of that agency's event. He has expressed doubt about the role human activity plays in driving climate change.

A vote hasn't been scheduled yet on Pruitt's nomination, but the longtime adversary of EPA climate rules told a Senate committee earlier this week that the consequences of CO2 emissions are "subject to continuing debate and dialogue."

The event's planners said they had not been notified of any changes to either the conference or dinner and are hopeful that it will not be affected since it's not related to regulations. The awards dinner is an annual affair that former EPA Administrator Gina McCarthy presided over last year. Organizers said that no EPA officials were ever slated to speak, though support staff typically attends. EPA did not return calls.

The speakers lineup includes Paula Gant, deputy assistant secretary for oil and natural gas at the Energy Department.

To: Ericksen, Doug[ericksen.doug@epa.gov]; Benton, Donald[benton.donald@epa.gov]; Munoz, Charles[munoz.charles@epa.gov]; Reeder, John[Reeder.John@epa.gov]
Cc: Flynn, Mike[Flynn.Mike@epa.gov]; Mccabe, Catherine[McCabe.Catherine@epa.gov]
From: Schnare, David
Sent: Mon 1/30/2017 1:01:20 PM
Subject: RE: EPA Climate Change Awards

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To: Reeder, John[Reeder.John@epa.gov]
From: Schnare, David
Sent: Tue 1/31/2017 1:53:34 PM
Subject: RE: EPA Climate Change Awards

Thx

d.

From: Reeder, John
Sent: Tuesday, January 31, 2017 8:38 AM
To: Schnare, David <schnare.david@epa.gov>
Subject: Re: EPA Climate Change Awards

David, good morning.

Nancy followed up under separate cover on the climate leaders award. I recognize we have more follow up to do in terms of other similar events. So more coming, if that hasn't already come to you.

Sent from my iPhone

On Jan 30, 2017, at 9:15 AM, Schnare, David <schnare.david@epa.gov> wrote:

> Thx
>
> d.
>
> **From:** Reeder, John
> **Sent:** Monday, January 30, 2017 9:14 AM
> **To:** Schnare, David <schnare.david@epa.gov>
> **Cc:** Ericksen, Doug <ericksen.doug@epa.gov>; Benton, Donald <benton.donald@epa.gov>; Munoz, Charles <munoz.charles@epa.gov>; Flynn, Mike <Flynn.Mike@epa.gov>; Mccabe, Catherine <McCabe.Catherine@epa.gov>
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Sent: Monday, January 30, 2017 7:49 AM
To: Benton, Donald <benton.donald@epa.gov>; Munoz, Charles <munoz.charles@epa.gov>; Schnare, David <schnare.david@epa.gov>
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The speakers lineup includes Paula Gant, deputy assistant secretary for oil and natural gas at the Energy Department.

To: Jackson, Ryan (Inhofe)[Ryan_Jackson@inhofe.senate.gov]
From: Schnare, David
Sent: Fri 2/17/2017 2:54:39 PM
Subject: Pruitt Personal Security Detail coordinatin

Ryan:

You can expect a call from Personal Security Detail/Ex. 6/Ex. 7C who runs the personal security detail to discuss this afternoon and how PSD can assist Scott in leaving OEOB and go wherever he wants to go. He has your cell phone number. A member of the detail spoke with Scott yesterday to introduce him to the PSD and let him know they would be by his side while he is administrator.

dschnare

To: Ericksen, Doug[ericksen.doug@epa.gov]
From: Schnare, David
Sent: Fri 1/27/2017 11:25:04 AM
Subject: Re: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017

I froze that yesterday and informed John.

d

Sent from my iPhone

On Jan 26, 2017, at 12:06 PM, Ericksen, Doug <ericksen.doug@epa.gov> wrote:

From: John Hall [mailto:jhall@hall-associates.com]
Sent: Thursday, January 26, 2017 10:56 AM
To: Ericksen, Doug <ericksen.doug@epa.gov>; Munoz, Charles <munoz.charles@epa.gov>; Benton, Donald <benton.donald@epa.gov>
Cc: Robert R. Lucic <RLUCIC@sheehan.com>; Lynn Preston <lpreston@sheehan.com>; prosenman@hall-associates.com
Subject: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017
Importance: High

Dear Messrs. Ericksen, Munoz and Benton,

Attached please find a copy of the letter and email (below) transmitted yesterday to Administrator –designate Scott Pruitt from the Center for Regulatory Reasonableness on behalf of 20 New Hampshire Communities and stormwater coalitions from four other states (Pennsylvania, Colorado, Massachusetts, and Minnesota). As noted, just two days before President Trump's inauguration, EPA issued a 250 page, multi-billion dollar MS4 General Permit to small communities in New Hampshire, knowing there was no possibility such an action would be countenanced by the new Administration. In the classic EPA style of the prior Administration, imbedded within this permit action were a series of major regulatory changes and new mandates that appear NOWHERE in the adopted NPDES rules or the statute itself. As discussed in the letter, these were extreme changes to the existing MS4 regulatory regime that could not possibly been adopted if they were proposed as actual

changes to the NPDES rules. However, as it has done in many other cases over the past 8 years, EPA used unilateral authority to impose the new requirements, and to disregard ignore all contrary public comment, by using a general permit as the vehicle to implement these unadopted and *ultra vires* rule modifications.

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Could you please promptly take action to freeze this clear example of regulatory overreach and abuse of administrative process by the prior Administration?

I am available at any time to come over to EPA and discuss this matter with you in detail. I look forward to hearing from you.

Respectfully

John C. Hall

Hall & Associates

Center for Regulatory Reasonableness

1620 I Street, NW, Suite 701

Washington, DC 20006

Phone: Ex. 6

Fax: 202-463-4207

E-Mail: jhall@hall-associates.com

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From: Tonja Scott
Sent: Wednesday, January 25, 2017 6:41 PM
To: ([redacted])
Cc: 'scott.pruitt@oag.ok.gov'
Subject: CRR Letter to New Administration - NH Stormwater Permit

Dear Mr. Pruitt:

I trust your confirmation process is moving along on a positive track – there is so much regulatory reform work to be done at EPA, it will be a pleasure to work with you on those efforts. My offer to assist the Administration in regulatory reform at EPA is still pending and I hope to hear from the Presidential Personnel Office in the next month or so.

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The items I would like to discuss with you include:

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mandates – *all with no change in existing rules*) **(SEE ATTACHED LETTER REQUESTING REGULATORY FREEZE)**

- EPA's continued imposition of a nationwide ban on blending and bacteria mixing zones following the 8th Circuit's 2013 *Iowa League of Cities* decision that vacated those actions on APA and *ultra vires* grounds (demonstrates a complete disregard for the rule of law and statutory framework of the Clean Water Act) (PS – They did something similar in the *NEDACAP* air case from the 6th Circuit)
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E-Mail: Ex. 6

<CRR Letter to new Administration - NH Stormwater Permit 1-25-17 - Final.pdf>

To: John Hall[jhall@hall-associates.com]
From: Schnare, David
Sent: Thur 1/26/2017 11:05:29 PM
Subject: RE: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017

John:

Can you send me a timeline and examples of the less than credible science R1 has been using, and that OW has approved. I need context and specifics to approach this issue. It would be very helpful if you cast that briefing in the context of EPA's Information Quality Act guidance. That is the tool I want to see used to pull the agency back into the mainstream.

d.

From: John Hall [mailto:jhall@hall-associates.com]
Sent: Thursday, January 26, 2017 5:49 PM
To: Schnare, David <schnare.david@epa.gov>
Subject: RE: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017

David

Most appreciated.

Regarding a Regional Office response, in my 35 years of doing NPDES permitting around the country (45 different states and every EPA Region – see Bio) I have never encountered a group that fabricates more positions (legal and scientific) than EPA Region I. The types of mandates they have been imposing on New England communities over the past 8 years, with essentially no scientific backup or specific regulatory authority, is astounding. It got so bad that I even had to file science misconduct charges in 2012 to address what they were doing to create state of the art TN limits for all municipal dischargers to Great Bay Estuary. Eventually, the State of New

Hampshire convened an independent peer review committee in 2014 (four nationally recognized water quality/estuary experts) who determined that the TN impairment conclusions were not based on scientifically defensible analyses. Since then the State of New Hampshire, in conjunction with the local municipalities, has been supporting a program to ensure only sound scientific information and practices are employed in future decision making. The Region, for its part, has refused to participate in and actively undercuts these efforts and continues to claim TN impairments are well documented – appalling. This is just one of a dozen similar stories.

Regarding the MS4 permit, the more restrictive requirements were actually coming out of EPA HQ, with R1 as the testing ground because they get to issue the NPDES permits for NH and MA (2 of the 4 non-delegated CWA programs in the country). Region I was an optimum location to do this because EAB review is essentially a rubber stamp and the 1st Circuit is, in general, extremely deferential to EPA positions. Consequently, New England permittees know the cards are stacked against then so they just roll over. In any event, we contacted EPA HQ on several occasions to complain about the imposition of new regulatory prohibitions not contained in federal law and, of course, got nowhere. We can give you that correspondence if you would like.

While I understand the need to engage the Region in the process, asking the Region to review whether that which they have already claimed is mandated, is actually required by the Act, is largely a waste of time. If we sat down with the NPDES rules for 1 hour, we could confirm to you that none of these requirements are actually in the current law. In fact, several plainly exceed statutory authority (flow limits, imposition of individual antidegradation reviews under MEP, the prohibition against "causing or contributing", presuming water quality impairment is caused by a discharge). These MS4 permit provisions are fundamental changes to how the CWA itself is intended to operate. They are intended to give environmental groups and EPA control over land use planning (something also plainly outside the scope of their authority) and to switch the burden of proof on compliance (presumed guilty). So, in short, this is quite a mess, but a nice case study in what has been going on under the purview of the Obama Administration appointees (who were typically former heads of environmental organizations – like Regional Administrator Spalding who signed this permit).

I'm sure you are beyond busy with similar requests. Just let me know whenever your schedule might accommodate a chance to sit down over a cup of coffee.

PS – To actually stop the clock on the "issuance date" of the permit, you may have to issue a notice on the R1 website stating that the prior Regional Administrator approval is on hold, pending more detailed regulatory review.

PPS - I promise to send a shorter email next time - really.

John

John C. Hall

Hall & Associates

1620 I Street, NW, Suite 701

Washington, DC 20006

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Fax: 202-463-4207

E-Mail: jhall@hall-associates.com

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From: Schnare, David [mailto:schnare.david@epa.gov]
Sent: Thursday, January 26, 2017 4:55 PM
To: John Hall
Subject: RE: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017

John:

I have pulled the FR notice. The Region has been asked to respond to the points you have raised. The MS4 permit will not be effective until we have fully reviewed the issue and determined the validity of the Region I action. This is a heads up to you. I don't want this email to be further distributed.

dschnare

From: John Hall [mailto:jhall@hall-associates.com]
Sent: Thursday, January 26, 2017 2:01 PM
To: Schnare, David <schnare.david@epa.gov>; Benton, Donald <benton.donald@epa.gov>
Subject: RE: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017

David

This is the link to the Region I notice of final agency action:
https://www3.epa.gov/region1/npdes/stormwater/MS4_NH.html

The website description is a little confusing, in one spot stating:

In accordance with 40 CFR part 23, this permit shall be considered issued for the purpose of judicial review at 1:00 pm eastern daylight time on February 1, 2017. Under section 509(b) of the Clean Water Act, judicial review of this general permit can be requested by filing a petition for review in the United States Court of Appeals within 120 days after the permit is considered issued, i.e. by June 1, 2017.

Howe4ver, the list of records shows a copy of the FR notice that is needed to properly inform the public of the final action since this is a statewide applicable permit. (Attached) Our understanding is that the FR notice was not yet published and without this official notice to the affected public, the agency's action can be withdrawn for further consideration.

Regards,

John

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From: Schnare, David [mailto:schnare.david@epa.gov]
Sent: Thursday, January 26, 2017 1:32 PM
To: Benton, Donald; John Hall
Subject: RE: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017

John:

I'm looking into this and will get back to you once I know its status. We have a list of agency actions for which we have extended the effective date. I am not sure that this is on that list, or whether it should be. If it is on that list, there has been an automatic extension of the effective date by 60 days, unless the effective date is more than 60 days from Jan 20th in the first place.

I'll let you know what you can do and what we can do to deal with this issue once I'm up to speed.

dschnare

From: Benton, Donald
Sent: Thursday, January 26, 2017 12:38 PM
To: John Hall <jhall@hall-associates.com>
Cc: Schnare, David <schnare.david@epa.gov>
Subject: RE: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017

Dear John,

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David Schnare, my acting counsel, will be getting back to you.

Thank you again for your communication.

Don

Don Benton

Senior White House Advisor

From: John Hall [mailto:jhall@hall-associates.com]
Sent: Thursday, January 26, 2017 10:56 AM
To: Ericksen, Doug <ericksen.doug@epa.gov>; Munoz, Charles <munoz.charles@epa.gov>; Benton, Donald <benton.donald@epa.gov>
Cc: Robert R. Lucic <RLUCIC@sheehan.com>; Lynn Preston <lpreston@sheehan.com>;

prosenman@hall-associates.com
Subject: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017
Importance: High

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Could you please promptly take action to freeze this clear example of regulatory overreach and abuse of administrative process by the prior Administration?

I am available at any time to come over to EPA and discuss this matter with you in detail. I look forward to hearing from you.

Respectfully

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From: Tonja Scott
Sent: Wednesday, January 25, 2017 6:41 PM
To: Michelle Hale Personal Email/Ex. 6
Cc: scott.pruitt@oag.ok.gov
Subject: CRR Letter to New Administration - NH Stormwater Permit

Dear Mr. Pruitt:

I trust your confirmation process is moving along on a positive track – there is so much regulatory reform work to be done at EPA, it will be a pleasure to work with you on those efforts. My offer to assist the Administration in regulatory reform at EPA is still pending

and I hope to hear from the Presidential Personnel Office in the next month or so.

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Fax: 202-463-4207

E-Mail: Ex. 6

To: John Hall[jhall@hall-associates.com]
From: Schnare, David
Sent: Thur 1/26/2017 9:55:17 PM
Subject: RE: CRR Letter to New Administration - Request to Immediately Freeze NH Stormwater General Permit Issued by EPA January 18, 2017

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Cc: Robert R. Lucic <RLUCIC@sheehan.com>; Lynn Preston <lpreston@sheehan.com>; prosenman@hall-associates.com
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John

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E-Mail: Ex. 6

To: Ericksen, Doug[ericksen.doug@epa.gov]
From: Schnare, David
Sent: Mon 2/13/2017 1:53:52 PM
Subject: FW: DRAFT EO Points

Doug

You need to get on top of this with your edits.

d.

From: John Konkus [mailto: Personal Email/Ex. 6
Sent: Monday, February 13, 2017 8:52 AM
To: Schnare, David <schnare.david@epa.gov>
Subject: Fwd: DRAFT EO Points

David read all the way to the bottom here… These are Ryan's points for the EOs in response to my own. I will take his and put them together with mine so were working off of one set of documents. I will incorporate whatever additions you have as well if you want to send along.

John Konkus

Begin forwarded message:

From: "Jackson, Ryan (Inhofe)" <Ryan_Jackson@inhofe.senate.gov>
Date: February 12, 2017 at 10:49:03 PM EST
To: John Konkus < Personal Email/Ex. 6 >
Subject: RE: DRAFT EO Points

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

From: John Konkus [mailto: Personal Email/Ex. 6
Sent: Sunday, February 12, 2017 10:25 PM
To: Jackson, Ryan (Inhofe) <Ryan_Jackson@inhofe.senate.gov>
Subject: Re: DRAFT EO Points

Got this. Thank you. David Schnare has my original points and I expect his feedback soon. I'll also give these to him for his review. He is smart, tough as nails and has a good feel for how these things will be received inside and outside the agency.

I have not seen this one: "Establishing National Policy in Favor of Energy Independence, Economic Growth, and the Rule of Law?"

Maybe David has.

Deliberative Process Privilege/Ex. 5

John Konkus

On Feb 12, 2017, at 10:08 PM, Jackson, Ryan (Inhofe) <Ryan_Jackson@inhofe.senate.gov> wrote:

This responds to both of your emails. I also wanted to respond to your gmail.

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

2.) **WOTUS**

DRAFT Messaging Points

Executive Order Top Line

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

3.) MEMORANDUM FOR THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

SUBJECT: LNG Export Licensing

DRAFT Messaging Points

Top Line

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

4.) EXECUTIVE ORDER

Restoring the Rule of Law, Federalism, and Economic Growth by Rescinding the "2015 Ozone NAAQS" Rule

Executive Order Top Line

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

5.) Executive Order – Ensuring Scientific Rigor in Agency Decisions

EXECUTIVE ORDER

Ensuring Scientific Rigor in Agency Decisions

DRAFT Messaging Points

Executive Order Top Line

Deliberative Process Privilege/Ex. 5

6.) Executive Order----Expediting Critical Infrastructure Projects

EXECUTIVE ORDER

Expediting Environmental Review and Permitting of Critical Infrastructure Projects

DRAFT Messaging Points

Executive Order Top Line

Deliberative Process Privilege/Ex. 5

7.) EXECUTIVE ORDER

Improving Cost-Benefit Analysis of Energy and Environmental Regulation

DRAFT Messaging Points

Executive Order Top Line

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

8.) MEMORANDUM FOR THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

SUBJECT: Renewable Fuel Standard

DRAFT Messaging Points

Top Line Points

Deliberative Process Privilege/Ex. 5

Deliberative Process Privilege/Ex. 5

From: Konkus, John [mailto:konkus.john@epa.gov]
Sent: Saturday, February 11, 2017 6:26 PM
To: Jackson, Ryan (Inhofe) <Ryan_Jackson@inhofe.senate.gov>
Subject: Fwd: DRAFT EO Points

1 of 2 emails

Sent from my iPhone

Begin forwarded message:

> **From:** "Konkus, John" <konkus.john@epa.gov>
> **Date:** February 10, 2017 at 12:14:08 PM EST
> **To:** "Jackson, Ryan (Inhofe)" <Ryan_Jackson@inhofe.senate.gov>, "samantha.dravis@gmail.com" <samantha.dravis@gmail.com>
> **Subject: DRAFT EO Points**
>
> Please see attached. This is the big one. Seven more sets of shorter EOs with points coming over shortly.

<SPW 022416.doc>

To: Ericksen, Doug[ericksen.doug@epa.gov]
From: Schnare, David
Sent: Thur 2/16/2017 7:26:54 PM
Subject: FW: InsideClimate News story published

The hit job on me.

dschnare

From: DWSschnare [Personal Email/Ex. 6]
Sent: Thursday, February 16, 2017 12:50 PM
To: Schnare, David <schnare.david@epa.gov>
Subject: Fwd: InsideClimate News story published

Sent from my iPad

Begin forwarded message:

From: Marianne Lavelle <marianne.lavelle@insideclimatenews.org>
Date: February 16, 2017 at 11:05:32 AM EST
To: David Schnare <Personal Email/Ex. 6>
Subject: InsideClimate News story published

Hello Dr. Schnare,

Here is a link to our story, which was just published on our web site:

https://insideclimatenews.org/news/15022017/david-schnare-epa-donald-trump-climate-change-denial-scott-pruitt

I hope in its entirety you think it is fair.

Thanks again for sharing your thoughts on these complex issues.

Best,

Marianne Lavelle

reporter and writer, politics

InsideClimate News

marianne.lavelle@insideclimatenews.org

703-677-6835 | Skype: mlavelles

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InsideClimate News is an independent, non-profit, non-partisan news organization that covers clean energy, carbon energy, nuclear energy and environmental science—plus the territory in between where law, policy and public opinion are shaped. It is staffed by professional journalists with decades of experience from leading media organizations. ICN has earned national recognition for its groundbreaking work including the Pulitzer Prize, as well as many other prestigious awards. To learn more, please visit ICN's **About page**.

To: Flynn, Mike[Flynn.Mike@epa.gov]; Reeder, John[Reeder.John@epa.gov]; Minoli, Kevin[Minoli.Kevin@epa.gov]; Schwab, Justin[schwab.justin@epa.gov]; Benton, Donald[benton.donald@epa.gov]; Kenny, Shannon[Kenny.Shannon@epa.gov]
From: Schnare, David
Sent: Mon 2/13/2017 1:09:14 AM
Subject: Fwd: updated schedule
SCAN0020.pdf
ATT00001.htm
ESP First Weeks Updated 021217.docx
ATT00002.htm

FYI let's get together after the 9:00 staff meeting to go over this. DA's office.

dschnare.

Sent from my iPhone

Begin forwarded message:

From: "Jackson, Ryan (Inhofe)" <Ryan_Jackson@inhofe.senate.gov>
To: "Schnare, David" <schnare.david@epa.gov>
Subject: updated schedule

David, the attached Word document is a very draft document based on a long and good conversation with Pruitt Friday.

This reflects some of that, but it requires us to talk through this so you know what he's expecting. This has a lot of holes in it.

Essentially, this is the message he conveyed to me. He wants to get started immediately though which means speech Friday as we've discussed which is underway, interviews are possible, getting the necessary administrative things taken care of the first day like badges etc, hitting each day with a 7:30 senior staff meeting, and hitting the weekly AA and RA meeting immediately as in Tuesday morning after the first week. I'm assuming Tuesday since Monday is a federal holiday?

I would like to get him a draft of his opening day if not seek as soon as possible tomorrow, but let me know when we can talk through this.

I also need to give him a briefer on first 30 days as soon as I can as well. I think we need at least the list of items so he knows what he needs to get talked about and in that document or a separate document a list of upcoming court ordered deadlines. I originally received the attached PDF document on court ordered deadlines, but this is a couple of months old now. Additionally, it's not entirely helpful and does not include court ordered deadlines on the EPA to issue proposed or final rules due to consent orders. That's the kind of meat Pruitt is looking for.

Do you have an opportunity to talk in the morning?

Ryan Jackson

Chief of Staff

U.S. Senator James M. Inhofe

205 Russell Senate Office Building

Washington, D.C. 20510

(202) 224-4721

(202) 228-1007 facsimile

To: Shapiro, Mike[Shapiro.Mike@epa.gov]
From: Schnare, David
Sent: Thur 2/16/2017 1:42:00 PM
Subject: RE: Request for Reconsideration of EPA Region 5 Action and/or Alternative Dispute Resolution

thx

dschnare

From: Shapiro, Mike
Sent: Thursday, February 16, 2017 8:40 AM
To: Schnare, David <schnare.david@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Kaplan, Robert <kaplan.robert@epa.gov>
Cc: Flynn, Mike <Flynn.Mike@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>
Subject: RE: Request for Reconsideration of EPA Region 5 Action and/or Alternative Dispute Resolution

David,

I understand that this is a decision that OW HQ worked with the Region on, so we will take an initial look as the request and work with Region 5 and OGC to get back to you quickly with our assessment of timing to complete the review and brief the management team.

Mike

Michael Shapiro

Acting Assistant Administrator, Office of Water

US EPA, 4101M

1200 Pennsylvania Ave., NW

Washington, DC 20460

202-564-5700

From: Schnare, David
Sent: Thursday, February 16, 2017 7:45 AM
To: Minoli, Kevin <Minoli.Kevin@epa.gov>; Shapiro, Mike <Shapiro.Mike@epa.gov>; Kaplan, Robert <kaplan.robert@epa.gov>
Cc: Flynn, Mike <Flynn.Mike@epa.gov>
Subject: FW: Request for Reconsideration of EPA Region 5 Action and/or Alternative Dispute Resolution
Importance: High

Folks:

This letter is equivalent to a petition for redress and I'd like to treat it that way. Would OW please take the lead on this, consulting with Region 5 and OGC. Please let me know when you expect to complete your review and area ready to brief on this petition.

Thanks,

dschnare

From: Daniel M Marx [mailto:DMMarx@flaherty-hood.com]
Sent: Wednesday, February 15, 2017 5:05 PM
To: Benton, Donald <benton.donald@epa.gov>; Schnare, David <schnare.david@epa.gov>; scott.pruitt@oag.ok.gov
Cc: samantha.dravis@gmail.com
Subject: Request for Reconsideration of EPA Region 5 Action and/or Alternative Dispute Resolution
Importance: High

Dear Administrator Pruitt and Messrs. Benton and Schnare:

Attached please find a letter and attachments from the Coalition of Greater Minnesota Cities (CGMC) and Minnesota Environmental Science and Economic Review Board (MESERB), which represent 93 communities in Minnesota. CGMC/MESERB are requesting that EPA reconsider the EPA Region 5 approval of Minnesota's scientifically flawed numeric nutrient standards for rivers and streams and hold the existing federal litigation challenging that approval in abeyance so the parties can participate in the alternative dispute resolution process.

The flawed standards at issue will require our communities to spend hundreds of millions of dollars of local and state resources, limit future growth, and will fail to produce measureable benefits to water quality.

In December 2015, our organizations, through the Center for Regulatory Reasonableness (CRR) requested that EPA Region 5 reconsider its approval of Minnesota's scientifically flawed standards. EPA Region 5 rejected this request and our organizations, through CRR, were forced to file a Circuit Court appeal in the D.C. District Court, (Docket 16-1435-RJL).

The legal action is presently pending in the D.C. District Court. As explained in the attached letter, EPA Region 5's action ignored the following:

(1) Significant scientific evidence from national water quality experts demonstrating that the standards approved by Region 5 rely upon scientifically indefensible criteria;

(2) Responses to Freedom of Information Act requests, where EPA headquarters acknowledged that it possessed no records showing it was scientifically defensible to use the criteria at issue;

(3) A document prepared by an EPA Region 3 scientist in which EPA's scientist admitted that scientific objections to the use of one of the challenged criterion are well founded prompting the state of Pennsylvania to withdraw its use of the same criterion;

EPA Region 5's initial approval of these flawed standards and refusal to withdraw its approval after being presented with the above referenced evidence is precisely the type of arbitrary regulatory action that the Trump Administration has committed to address to avoid wasting local resources. To force municipal organizations to expend additional resources to challenge such clearly flawed science is unreasonable in light of the compelling evidence in this case.

By the attached letter, we respectfully request that the new Administration agree to hold the current litigation in abeyance, so the parties may engage in alternative dispute resolution. Moreover, as the EPA is under a duty to independently ensure that proposed state water quality criteria are scientifically defensible, and these criteria plainly are not, the EPA's reconsideration of its earlier approval would be most appreciated.

Thank you for your consideration of these requests.

Sincerely,

Daniel Marx, Counsel for MESERB/CGMC

Daniel Marx, Associate Attorney

Flaherty & Hood, P.A.

525 Park Street, Suite 470

St. Paul, MN 55103

Direct Dial: 651-259-1907

Office: 651-225-8840

dmmarx@flaherty-hood.com

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To: Minoli, Kevin[Minoli.Kevin@epa.gov]; Shapiro, Mike[Shapiro.Mike@epa.gov]; Kaplan, Robert[kaplan.robert@epa.gov]
Cc: Flynn, Mike[Flynn.Mike@epa.gov]
From: Schnare, David
Sent: Thur 2/16/2017 12:44:45 PM
Subject: FW: Request for Reconsideration of EPA Region 5 Action and/or Alternative Dispute Resolution
CGMC -MESERB Letter to new Administration - MN WQS. Final.pdf
INDEX OF ATTACHMENTS.pdf
Att. 1. Letter to G McCarthy and S Hedman RE MN Stream Nutrient WQS - 12-10-15.pdf
Att. 2- BOD5 FOIA Request & Response.pdf
Att. 3 - DO Flux FOIA Request, Response & Follow up.pdf
Att. 4- Standard Methods memo on BOD5 test.pdf
Att. 5- EPA Email to PADEP on DO Flux.pdf

Folks:

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Thanks,

dschnare

From: Daniel M Marx [mailto:DMMarx@flaherty-hood.com]
Sent: Wednesday, February 15, 2017 5:05 PM
To: Benton, Donald <benton.donald@epa.gov>; Schnare, David <schnare.david@epa.gov>; Administrator's Email/Ex. 6
Cc: Personal Email/Ex. 6
Subject: Request for Reconsideration of EPA Region 5 Action and/or Alternative Dispute Resolution
Importance: High

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Sincerely,

Daniel Marx, Counsel for MESERB/CGMC

Daniel Marx, Associate Attorney

Flaherty & Hood, P.A.

525 Park Street, Suite 470

St. Paul, MN 55103

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To: Benton, Donald[benton.donald@epa.gov]; Schnare, David[schnare.david@epa.gov]; Greaves, Holly[greaves.holly@epa.gov]; Sugiyama, George[sugiyama.george@epa.gov]; Bangerter, Layne[bangerter.layne@epa.gov]; Schwab, Justin[schwab.justin@epa.gov]; Munoz, Charles[munoz.charles@epa.gov]; Davis, Patrick[davis.patrick@epa.gov]; Kreutzer, David[kreutzer.david@epa.gov]; Ericksen, Doug[ericksen.doug@epa.gov]
From: Grantham, Nancy
Sent: Mon 1/23/2017 7:58:47 PM
Subject: FW: EPA - Midday Update for Monday, January 23, 2017
epamiddayNewsBriefing170123.doc

Nancy Grantham

Office of Public Affairs

US Environmental Protection Agency

202-564-6879 (desk)

202-253-7056 (mobile)

From: Bulletin Intelligence [mailto:epa@bulletinintelligence.com]
Sent: Monday, January 23, 2017 1:14 PM
To: epa@BulletinIntelligence.com
Subject: EPA - Midday Update for Monday, January 23, 2017

Mobile version and searchable archives available at epa.bulletinintelligence.com.

TO: ADMINISTRATOR AND SENIOR EXECUTIVES

DATE: MONDAY, JANUARY 23, 2017 1:00 PM EST

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Off The Wires

British Prime Minister Under Fire Over Reports Of Erroneous Trident Missile Test.

The British government says Prime Minister Theresa May was informed upon her ascension to the leadership of a pending test of the Trident missile system that reportedly went awry. The issue has riled Labour and Scottish National Party members of Parliament, because May urged the body to renew the Trident nuclear weapons program without mentioning whether there had been an erroneous test.

In The White House And Around Town

Trump Signs Executive Orders On TPP, Federal Hiring Freeze, Abortion.

President Trump today signed three executive orders in a brief ceremony in the Oval Office. The first ends US participation in the negotiations for the Trans-Pacific Partnership trade deal. The second freezes hiring of Federal workers except for the military. The third reinstates the Mexico City language, which bars spending federal funds for international groups that perform abortions or that provide information on abortion procedures.

Trump Meets With Manufacturing Executives.

President Trump today met with corporate CEOs, where he announced he would follow through on his promises on trade, corporate tax reform, and cutting regulations. Vice President Pence, White House chief of staff Reince Priebus, and chief strategist Steve Bannon also attended the meeting. Among the attendees from the business community were Michael S. Dell, Dell Technologies; Jeff M. Fettig, Whirlpool; Mark Fields, Ford Motor Company; Alex Gorsky, Johnson & Johnson; Marillyn A. Hewson, Lockheed Martin; Klaus Kleinfeld, Arconic; Andrew N. Liveris, Dow Chemical; Mario Longhi, US Steel; Elon R. Musk, SpaceX; Kevin Plank, Under Armour; Mark S. Sutton, International Paper; and Wendell P.

Weeks, Corning.

In his remarks, President Trump said, "This is really our first official meeting. And Andrew, it is nice to have you set everything up so well, and I hear that your company is doing well. And I really do, I appreciate, we'll get to know each other very well. We'll have these meetings every – whenever you need them. I would say every quarter, perhaps. You could say monthly but then all of a sudden monthly becomes repetitive. As we now, it sounds good but then it gets repetitive. But I would say on a quarterly basis.

"You are great people, you've done an amazing job and the biggest in the world. And this is a worldwide meeting, and what we want to do is bring manufacturing back to our country. Vice President Pence, good morning, is very much involved with me on that. It's what the people wanted. It's one the reasons I'm sitting here instead of someone else sitting here. I think it's something I'm good at. We've already had a big impact, and I want to thank Mark and Ford because you've been great. I think that Marilyn is going to be terrific, we'll find out soon. That's Lockheed Martin.

"I think we're going to have a terrific amount of business coming back here. If you read today's papers, you'll see what's happening with four or five different companies that announced that they feel much differently. Foxcon is going to spend a tremendous amount of money on building a massive plant and probably more than one. So that's what we want. We want to start making our products again. We don't want to bring them in, we want to make them here. That doesn't mean we don't trade because we do trade, but we want to make our products here.

"If you look at some of the original great people that ran this country, you will see that they felt very strongly about that, about making products. We're going to start making our products. There will be advantages to companies that do, indeed, make their products here. We've seen it. It's going to get – it's going to be a wave – you watch. It's going to be a win. I've always said, by the time you put them on these massive ships or airplanes and fly them, I think it's going to be cheaper.

"What we're doing is we are going to be cutting taxes massively for both the middle class and for companies, and that's massively. We're trying to get it down to anywhere from 15 percent to 20 percent, and it's now 35 percent. But it's probably more 38 percent than it is 35, wouldn't you say? That's a big thing.

"A bigger thing, and that surprised me, is the fact that we're going to be cutting regulation massively. We're going to have regulation and it will be just as strong and just as good and just as protective of the people as the regulation we have right now. The problem with regulation that we have right now is you that can't do anything. I have people that tell me they have more people working on regulations than they have doing product, and it's out of control. It's gotten out of control.

"I'm a very big person when it comes to the environment. I've received awards on the environment, but some of that stuff makes it impossible to get anything built. It takes years and years – you can look at some examples, I read one recently where a man has been trying to build a factory for many, many years, and his vote was going to be fairly soon, and he gave up because he wasn't going to win the vote. Spent millions and millions of dollars. Actually ruined his life. We can't have that.

"If somebody wants to put up a factory, it's going to be expedited. You have to go through the process, but it's going to be expedited, and we're going to take care of the environment, we're going to take care of safety and all the other things we have to take care of. You're going to get such great service. There will be no country that's going to be faster, better, more fair, and at the same time protecting the people of the country, whether it's safety or so many other reasons.

"We think we can cut regulations by 75 percent, maybe more, but by 75 percent. To have, in a certain way, better protections. But when you want to expand your plant or when Mark wants to come in

and build a big massive plant or when Dell wants to come in and do something monstrous and special, you're going to have your approvals really fast. And the one thing that surprised me, and I want to hear what you have to say. The one thing that surprised me, going around and meeting with a lot of people at this table and meeting with a lot of the small business owners. If I gave them a choice of this massive tax decrease that we're giving for business, for everybody, but for business, or the cutting down of regulation, if I took a vote, I think the regulation wins 100 percent. In one case it's hard dollars. In the other case it's regulation. You would think that the regulations would have no chance. It's – I've never seen anything like it, virtually everybody is happier with regulation than even cutting the taxes.

"The regulations are going to be cut massively and the taxes are going to be cut way down. You're going to have now incentive to build. The one thing I do have to warn you about, when you have a company here, you have a plant here, it's going to be in Indiana or it's in Ohio or it's in Michigan or it's in North Carolina or Pennsylvania, anywhere in this country, when it decides – when you decide – if you decide to close it and you no longer will have a real reason because your taxes will be lower – by the way, if you go to another state, that's it, that's great. If you can go from Ohio to Indiana or from Indiana to Ohio, that's fine. You have 50 great wonderful governors to negotiate with. It's not like we're taking away competition.

"But if you go to another country and you decide you're going to close and get rid of 2,000 people or 5,000 people, I tell you, United Technologies was an example with Carrier and I got involved two years after they announced. In all fairness, that was tough, but United Technologies was terrific and brought back many of those jobs. But if that happens, we are going to be imposing a very major border tax on the product when it comes in, which I think is fair. So a company that wants to fire all of its people in the United States and build some factory someplace else and then thinks that product is going to just flow across the border into the United States, that's not going to happen. They're going to have a tax to pay, a substantial border tax.

"Now, some people would say that's not free trade, but we don't have free trade now. We're the only one that makes it easy to come into the country. If you look at China, if you look at many other countries, I don't have to name them, but many other countries, they can't believe what we do. We take in things free. Yet, if you want to take a plant or want to do something, sell something into China and other countries, it's very, very hard. In some cases it's impossible. They won't even take your product. But when they do take your product, they charge a lot of tax. So I don't call that free trade. What we want is fair trade, fair trade.

"We're going to treat countries fairly, but they have to treat us fairly. If they're going to charge tax to our countries – if, as an example, we sell a car into Japan and they do things to us that make it impossible to sell cars in Japan and yet they sell cars in to us and they come in by the hundreds of thousands on the biggest ships I've ever seen, we have to all talk about that. It's not fair. It's not fair. Never was. I just can't believe it took so long for somebody to come along. So that's the only thing I will tell you. Essentially I'm talking about no tax. If you stay here, there's no tax. Somebody would say, oh, Trump is going to tax. I'm not going to tax. There is no tax, none whatsoever. I just want to tell you, all you have to do is stay. Don't leave. Don't fire your people in the United States. We have the greatest people, and many other countries have great people. We all have great people. This isn't that kind of competition. Everybody has great people. If we're going to fire people and build a product outside, not going to happen. So with that, we'll take some questions. Marilyn, you want to start? Gotten to know Marilyn very well, in deep negotiation."

Trump Asks CEOs For Manufacturing Action Plan. After the meeting, Dow Chemical CEO Andrew Liveris said President Trump has asked the CEOs to develop an action plan to stimulate the US manufacturing sector.

Trump Tweets On "Busy Week." President-elect Trump today touted his meeting with manufacturing executives via both the @POTUS and @realDonaldTrump handles. Trump tweeted, "Busy week planned with a heavy focus on jobs & national security. Top executives coming in at 9 A.M. to talk manufacturing in America. –DJT"

Other Business: Trump Signing Executive Orders, Meeting With Union Leaders, Congressional Leadership. In other actions today, President Trump met with Vice President Pence for lunch, and will hold an afternoon listening session with union leaders and workers. This evening, the President will host a bicameral leadership reception. The invitees include Speaker Paul Ryan, House Majority Leader Kevin McCarthy, Senate Majority Leader Mitch McConnell, Senate Majority Whip John Cornyn, Senate Minority Leader Chuck Schumer, Senate Minority Whip Dick Durbin, House Minority Leader Nancy Pelosi, and House Minority Whip Steny Hoyer. The President will hold a separate meeting with Ryan afterward.

Trump To Nominate Wilson To Serve As Air Force Secretary.

The White House press secretary today announced President Trump intends to nominate former Rep. Heather Wilson (R), the President of the South Dakota School of Mines & Technology, to serve as Secretary of the Air Force. If confirmed, the White House says "she will be the first Air Force Academy graduate to become Secretary of the Air Force."

Cardin To Oppose Tillerson For State; Rubio Backs Nominee.

On the day the Senate Foreign Relations Committee is scheduled to vote on the nomination of Rex Tillerson for Secretary of State, lawmakers are split exactly down party lines. Ranking Member, Maryland Sen. Ben Cardin (D), announced Monday he would oppose President Donald Trump's pick. "After long and careful consideration, I believe Mr. Tillerson's demonstrated business orientation and his responses to questions during the confirmation hearing could compromise his ability as Secretary of State to forcefully promote the values and ideals that have defined our country and our leading role in the world for more than 200 years," Cardin said in a prepared statement. He specifically highlighted Tillerson's unwillingness to call Russia and Syria's actions "war crimes" and extrajudicial killings in the Philippines "gross human rights violations." Meanwhile, Florida Sen. Marco Rubio (R), who had been the sole Republican holdout, announced he will vote for Tillerson despite his reservations. "Given the uncertainty that exists both at home and abroad about the direction of our foreign policy, it would be against our national interests to have this confirmation unnecessarily delayed or embroiled in controversy," Rubio said in a prepared statement.

McCaskill To Vote Against DeVos, Has Concerns About Sessions.

On MSNBC's "Morning Joe," Missouri Sen. Claire McCaskill (D) said she would evaluate each of President Trump's cabinet nominees individually. She added, "I had worked with" Defense Secretary-designate James Mattis and Homeland Security Secretary Gen. John Kelly, and "I do think they are a tempering influence on some of Donald Trump's irresponsible rhetoric when it comes to the worldwide stage."

However, she added, "I will be voting against Betsy DeVos" as Education Secretary "because I don't think she's qualified by her answers. If she doesn't know what IDEA is, which is the act protecting the disabled people within our education system, if she doesn't know the issue of proficiency versus growth, she doesn't belong in that job. I will be voting against" Scott Pruitt for EPA Administrator.

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TO: ADMINISTRATOR AND SENIOR EXECUTIVES

DATE: MONDAY, JANUARY 23, 2017 1:00 PM EST

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OFF THE WIRES:

British Prime Minister Under Fire Over Reports Of Erroneous Trident Missile Test. The British government says Prime Minister Theresa May was informed upon her ascension to the leadership of a pending test of the Trident missile system that reportedly went awry. The issue has riled Labour and Scottish National Party members of Parliament, because May urged the body to renew the Trident nuclear weapons program without mentioning whether there had been an erroneous test.

IN THE WHITE HOUSE AND AROUND TOWN:

Trump Signs Executive Orders On TPP, Federal Hiring Freeze, Abortion. President Trump today signed three executive orders in a brief ceremony in the Oval Office. The first ends US participation in the negotiations for the Trans-Pacific Partnership trade deal. The second freezes hiring of Federal workers except for the military. The third reinstates the Mexico City language, which bars spending federal funds for international groups that perform abortions or that provide information on abortion procedures.

Trump Meets With Manufacturing Executives. President Trump today met with corporate CEOs, where he announced he would follow through on his promises on trade, corporate tax reform, and cutting regulations. Vice President Pence, White House chief of staff Reince Priebus, and chief strategist Steve Bannon also attended the meeting. Among the attendees from the business community were Michael S. Dell, Dell Technologies; Jeff M. Fettig, Whirlpool; Mark Fields, Ford Motor Company; Alex Gorsky, Johnson & Johnson; Marillyn A. Hewson, Lockheed Martin; Klaus Kleinfeld, Arconic; Andrew N. Liveris, Dow Chemical; Mario Longhi, US Steel; Elon R. Musk, SpaceX; Kevin Plank, Under Armour; Mark S. Sutton, International Paper; and Wendell P. Weeks, Corning.

In his remarks, President Trump said, "This is really our first official meeting. And Andrew, it is nice to have you set everything up so well, and I hear that your company is doing well. And I really do, I appreciate, we'll get to know each other very well. We'll have these meetings every – whenever you need them. I would say every quarter, perhaps. You could say monthly but then all of a sudden monthly becomes repetitive. As we now, it sounds good but then it gets repetitive. But I would say on a quarterly basis.

"You are great people, you've done an amazing job and the biggest in the world. And this is a worldwide meeting, and what we want to do is bring manufacturing back to our country. Vice President Pence, good morning, is very much involved with me on that. It's what the people wanted. It's one

the reasons I'm sitting here instead of someone else sitting here. I think it's something I'm good at. We've already had a big impact, and I want to thank Mark and Ford because you've been great. I think that Marilyn is going to be terrific, we'll find out soon. That's Lockheed Martin.

"I think we're going to have a terrific amount of business coming back here. If you read today's papers, you'll see what's happening with four or five different companies that announced that they feel much differently. Foxcon is going to spend a tremendous amount of money on building a massive plant and probably more than one. So that's what we want. We want to start making our products again. We don't want to bring them in, we want to make them here. That doesn't mean we don't trade because we do trade, but we want to make our products here.

"If you look at some of the original great people that ran this country, you will see that they felt very strongly about that, about making products. We're going to start making our products. There will be advantages to companies that do, indeed, make their products here. We've seen it. It's going to get – it's going to be a wave – you watch. It's going to be a win. I've always said, by the time you put them on these massive ships or airplanes and fly them, I think it's going to be cheaper.

"What we're doing is we are going to be cutting taxes massively for both the middle class and for companies, and that's massively. We're trying to get it down to anywhere from 15 percent to 20 percent, and it's now 35 percent. But it's probably more 38 percent than it is 35, wouldn't you say? That's a big thing.

"A bigger thing, and that surprised me, is the fact that we're going to be cutting regulation massively. We're going to have regulation and it will be just as strong and just as good and just as protective of the people as the regulation we have right now. The problem with regulation that we have right now is you that can't do anything. I have people that tell me they have more people working on regulations than they have doing product, and it's out of control. It's gotten out of control.

"I'm a very big person when it comes to the environment. I've received awards on the environment, but some of that stuff makes it impossible to get anything built. It takes years and years – you can look at some examples, I read one recently where a man has been trying to build a factory for many, many years, and his vote was going to be fairly soon, and he gave up because he wasn't going to win the vote. Spent millions and millions of dollars. Actually ruined his life. We can't have that.

"If somebody wants to put up a factory, it's going to be expedited. You have to go through the process, but it's going to be expedited, and we're going to take care of the environment, we're going to take care of safety and all the other things we have to take care of. You're going to get such great service. There will be no country that's going to be faster, better, more fair, and at the same time protecting the people of the country, whether it's safety or so many other reasons.

"We think we can cut regulations by 75 percent, maybe more, but by 75 percent. To have, in a certain way, better protections. But when you want to expand your plant or when Mark wants to come in and build a big massive plant or when Dell wants to come in and do something monstrous and special, you're going to have your approvals really fast. And the one thing that surprised me, and I want to hear what you have to say. The one thing that surprised me, going around and meeting with a lot of people at this table and meeting with a lot of the small business owners. If I gave them a choice of this massive tax decrease that we're giving for business, for everybody, but for business, or the cutting down of regulation, if I took a vote, I think the regulation wins 100 percent. In one case it's hard dollars. In the other case it's regulation. You would think that the regulations would have no chance. It's – I've never seen anything like it, virtually everybody is happier with regulation than even cutting the taxes.

"The regulations are going to be cut massively and the taxes are going to be cut way down. You're going to have now incentive to build. The one thing I do have to warn you about, when you have a company here, you have a plant here, it's going to be in Indiana or it's in Ohio or it's in Michigan or it's in North Carolina or Pennsylvania, anywhere in this country, when it decides – when you decide – if you decide to close it and you no longer will have a real reason because your taxes will be lower – by the way, if you go to another state, that's it, that's great. If you can go from Ohio to Indiana or from Indiana to Ohio, that's fine. You have 50 great wonderful governors to negotiate with. It's not like we're taking away competition.

"But if you go to another country and you decide you're going to close and get rid of 2,000 people or 5,000 people, I tell you, United Technologies was an example with Carrier and I got involved two years after they announced. In all fairness, that was tough, but United Technologies was terrific and brought back many of those jobs. But if that happens, we are going to be imposing a very major border tax on the product when it comes in, which I think is fair. So a company that wants to fire all of its people in the United States and build some factory someplace else and then thinks that product is going to just flow across the border into the United States, that's not going to happen. They're going to have a tax to pay, a substantial border tax.

"Now, some people would say that's not free trade, but we don't have free trade now. We're the only one that makes it easy to come into the country. If you look at China, if you look at many other countries, I don't have to name them, but many other countries, they can't believe what we do. We take in things free. Yet, if you want to take a plant or want to do something, sell something into China and other countries, it's very, very hard. In some cases it's impossible. They won't even take your product. But when they do take your product,

they charge a lot of tax. So I don't call that free trade. What we want is fair trade, fair trade.

"We're going to treat countries fairly, but they have to treat us fairly. If they're going to charge tax to our countries – if, as an example, we sell a car into Japan and they do things to us that make it impossible to sell cars in Japan and yet they sell cars in to us and they come in by the hundreds of thousands on the biggest ships I've ever seen, we have to all talk about that. It's not fair. It's not fair. Never was. I just can't believe it took so long for somebody to come along. So that's the only thing I will tell you. Essentially I'm talking about no tax. If you stay here, there's no tax. Somebody would say, oh, Trump is going to tax. I'm not going to tax. There is no tax, none whatsoever. I just want to tell you, all you have to do is stay. Don't leave. Don't fire your people in the United States. We have the greatest people, and many other countries have great people. We all have great people. This isn't that kind of competition. Everybody has great people. If we're going to fire people and build a product outside, not going to happen. So with that, we'll take some questions. Marilyn, you want to start? Gotten to know Marilyn very well, in deep negotiation."

Trump Asks CEOs For Manufacturing Action Plan. After the meeting, Dow Chemical CEO Andrew Liveris said President Trump has asked the CEOs to develop an action plan to stimulate the US manufacturing sector.

Trump Tweets On "Busy Week." President-elect Trump today touted his meeting with manufacturing executives via both the @POTUS and @realDonaldTrump handles. Trump tweeted, "Busy week planned with a heavy focus on jobs & national security. Top executives coming in at 9 A.M. to talk manufacturing in America. –DJT"

Other Business: Trump Signing Executive Orders, Meeting With Union Leaders, Congressional Leadership. In other actions today, President Trump met with Vice President Pence for lunch, and will hold an afternoon listening session with union leaders and workers. This evening, the President will host a bicameral leadership reception. The invitees include Speaker Paul Ryan, House Majority Leader Kevin McCarthy, Senate Majority Leader Mitch McConnell, Senate Majority Whip John Cornyn, Senate Minority Leader Chuck Schumer, Senate Minority Whip Dick Durbin, House Minority Leader Nancy Pelosi, and House Minority Whip Steny Hoyer. The President will hold a separate meeting with Ryan afterward.

Trump To Nominate Wilson To Serve As Air Force Secretary. The White House press secretary today announced President Trump intends to nominate former Rep. Heather Wilson (R), the President of the South Dakota School of Mines & Technology, to serve as Secretary of the Air Force. If confirmed, the White House says "she will be the first Air Force Academy graduate to become Secretary of the Air Force."

Cardin To Oppose Tillerson For State; Rubio Backs Nominee. On the day the Senate Foreign Relations Committee is scheduled to vote on the nomination of Rex Tillerson for Secretary of State, lawmakers are split exactly down party lines. Ranking Member, Maryland Sen. Ben Cardin (D), announced Monday he would oppose President Donald Trump's pick. "After long and careful consideration, I believe Mr. Tillerson's demonstrated business orientation and his responses to questions during the confirmation hearing could compromise his ability as Secretary of State to forcefully promote the values and ideals that have defined our country and our leading role in the world for more than 200 years," Cardin said in a prepared statement. He specifically highlighted Tillerson's unwillingness to call Russia and Syria's actions "war crimes" and extrajudicial killings in the Philippines "gross human rights violations." Meanwhile, Florida Sen. Marco Rubio (R), who had been the sole Republican holdout, announced he will vote for Tillerson despite his reservations. "Given the uncertainty that exists both at home and abroad about the direction of our foreign policy, it would be against our national interests to have this confirmation unnecessarily delayed or embroiled in controversy," Rubio said in a prepared statement.

McCaskill To Vote Against DeVos, Has Concerns About Sessions. On MSNBC's "Morning Joe," Missouri Sen. Claire McCaskill (D) said she would evaluate each of President Trump's cabinet nominees individually. She added, "I had worked with" Defense Secretary-designate James Mattis and Homeland Security Secretary Gen. John Kelly, and "I do think they are a tempering influence on some of Donald Trump's irresponsible rhetoric when it comes to the worldwide stage."

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