Appointment

From: Gelber, Bruce (ENRD) [Bruce.Gelber@usdoj.gov]
Sent: 3/16/2017 1:46:29 PM
To: Gelber, Bruce (ENRD) [Bruce.Gelber@usdoj.gov]; Grishaw, Letitia (ENRD) [Letitia.Grishaw@usdoj.gov]; O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]; Doyle, Andrew (ENRD) [Andrew.Doyle@usdoj.gov]; martha.mann@usdoj.gov [Martha.Mann@usdoj.gov]; Neumann, Jennifer Scheller (ENRD) [Jennifer.Neumann@usdoj.gov]; craig.r.schmauder.civ@mail.mil; 'Cooper, David R SES HQ02' [David.R.Cooper@usace.army.mil]; Schwab, Justin [schwab.justin@epa.gov]; Minoli, Kevin [Minoli.Kevin@epa.gov]; Greenwalt, Sarah [greenwalt.sarah@epa.gov]; Neugeboren, Steven [Neugeboren.Steven@epa.gov]; Wendelowski, Karyn [wendelowski.karyn@epa.gov]; Wehling, Carrie [Wehling.Carrie@epa.gov]; Hazard, Katherine (ENRD) [Katherine.Hazard@usdoj.gov]; Thode, Anna (ENRD) [Anna.Thode@usdoj.gov]; Wood, Jeffrey (ENRD) [Jeffrey.Wood@usdoj.gov]; Middleton, Brandon (ENRD) [Brandon.Middleton@usdoj.gov]

Subject: Options for Revising WOTUS Rule
Location: RFK 2143 - Call in Conference Line/Code / Ex. 6

Start: 3/17/2017 7:00:00 PM
End: 3/17/2017 8:00:00 PM
Show Time As: Tentative

Recurrence: (none)

All visitors to the Robert F. Kennedy Justice Department Building must enter via the Constitution Avenue center entrance located between 9th & 10th Streets, NW and will need to show a photo ID.

Appointment

From: Koslow, Karin [Koslow.Karin@epa.gov]
Sent: 2/14/2017 5:09:47 PM
To: Koslow, Karin [Koslow.Karin@epa.gov]; OGC ADDs & RCs [OGC_ADDs_&_RCs@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]; Minoli, Kevin [Minoli.Kevin@epa.gov]; Packard, Elise [Packard.Elise@epa.gov]; Lipshultz, Jon (ENRD) [Jon.Lipshultz@usdoj.gov]
CC: Briskin, Jeanne [Briskin.Jeanne@epa.gov]; Albores, Richard [Albores.Richard@epa.gov]; Siciliano, CarolAnn [Siciliano.CarolAnn@epa.gov]; Youngblood, Charlotte [Youngblood.Charlotte@epa.gov]; Michaud, John [Michaud.John@epa.gov]; Srinivasan, Gautam [Srinivasan.Gautam@epa.gov]; Schefski, Kenneth [Schefski.Kenneth@epa.gov]; Lewis, Jen [Lewis.Jen@epa.gov]; Logan, Paul [Logan.Paul@epa.gov]; Mclean, Kevin [Mclean.Kevin@epa.gov]; Neugeboren, Steven [Neugeboren.Steven@epa.gov]

Subject: DOJ quarterly - MATERIALS ADDED
Attachments: ENV_DEFENSE-#796682-v1-admin_su_epa_ogc_quarterly_agenda_Feb_23_2017.DOCX; Upcoming EPA Actions February 2017.docx
Location: Patrick Henry Building, 601 D Street, NW., Room 3025, Dial-in is Conference Line/Code / Ex. 6

Start: 2/23/2017 4:00:00 PM
End: 2/23/2017 5:30:00 PM
Show Time As: Busy

DOJ is hosting this quarter's meeting - I will update this invite with the agenda before Thursday.

If you plan on attending the meeting in person, please be sure to RSVP to this invite by 10 a.m. Wednesday, so that I can provide a list of attendees in advance, to facilitate entry into the building.

Thanks,
Karin

DOJ EDS/APPELLATE and EPA OGC
QUARTERLY MEETING

Thursday, February 23, 2017, 11 a.m. – 12:30 p.m.

Patrick Henry Building, 601 D Street, NW., ROOM: 3025
Conference Call Number: Conference Line/Code / Ex. 6

AGENDA

I.	Introductions	5 min
II.	Opening Remarks (Jeff Wood, Kevin Minoli and Justin Schwab)	10 min
III.	Discussion of upcoming EPA rules and other significant actions to be issued in approximately the next six months.	40 min
	A. Identification of any anticipated litigation and significant defensibility concerns	
	B. Preparation of OGC responses to defensive discovery requests and subpoenas	
IV.	Discussion:	30 min
	A. Upcoming EDS petition for review briefs and arguments	
	B. Pending Appellate Section briefs and arguments	
V.	Closing Remarks/set date for next Quarterly	5 min

Message

From: Shinkman, Susan [Shinkman.Susan@epa.gov]
Sent: 3/29/2017 9:02:09 PM
To: Schwab, Justin [schwab.justin@epa.gov]
CC: Cozad, David [Cozad.David@epa.gov]; Starfield, Lawrence [Starfield.Lawrence@epa.gov]
Subject: FW: DPP / AC / AWP / Ex. 5
Attachments: DPP / AC / AWP / Ex. 5

Justin,

I do not think I got any comments back on this brief - DPP / AC / AWP / Ex. 5 Can we assume you are ok with it?

Also, DPP / AC / AWP / Ex. 5
DPP / AC / AWP / Ex. 5

Please let me know if you have any questions.

Thanks,
Susan

From: Shinkman, Susan
Sent: Monday, March 27, 2017 6:21 PM
To: Schwab, Justin <schwab.justin@epa.gov>
Cc: Cozad, David <Cozad.David@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>
Subject: FW: DPP / AC / AWP / Ex. 5

Justin,

Attached is the draft of t DPP / AC / AWP / Ex. 5 It must be filed by March 30.

Please let us know if you have any questions.

Susan

From: Rose, Cheryl
Sent: Monday, March 27, 2017 5:51 PM
To: Shinkman, Susan <Shinkman.Susan@epa.gov>
Cc: Pollins, Mark <Pollins.Mark@epa.gov>; Theis, Joseph <Theis.Joseph@epa.gov>; Bahk, Benjamin <Bahk.Benjamin@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>
Subject: FW: DPP / AC / AWP / Ex. 5

Susan,

Attached is the DPP / AC / AWP / Ex. 5 hat was sent to the Acting AAG for review, with all staff comments incorporated from EPA (including Region 9), DOJ and USCG. This reply brief relates to the United States' DPP / AC / AWP / Ex. 5 which have already been filed. This brief responds to DPP / AC / AWP / Ex. 5 DPP / AC / AWP / Ex. 5 Please let me know if and when I can tell DOJ that EPA has no further comments on the brief. Our deadline to file with the court is Thursday, March 30th.

Thank you,

Cheryl

Cheryl T. Rose
Senior Attorney
Water Enforcement Division
Office of Civil Enforcement/OECA
202-564-4136

This email may contain deliberative, attorney-client, attorney work product or otherwise privileged material. Do not release under FOIA without appropriate review. If this email has been received by you in error, you are instructed to delete it from your machine and all storage media whether electronic or hard copy.

From: Sabath, Mark (ENRD) [mailto:Mark.Sabath@usdoj.gov]
Sent: Monday, March 27, 2017 5:28 PM
To: Rose, Cheryl <Rose.Cheryl@epa.gov>
Cc: Bachman, Stefan (ENRD) <Stefan.Bachman@usdoj.gov>; Massey, Michael <Massey.Michael@epa.gov>; Helmlinger, Andrew <Helmlinger.Andrew@epa.gov>
Subject: DPP / AC / AWP / Ex. 5

Cheryl: Attached is the updated version of th DPP / AC / AWP / Ex. 5 . Filing deadline remains Thursday, March 30.

Mark

Mark Sabath
U.S. Department of Justice
Environmental Enforcement Section
P.O. Box 7611
Washington, DC 20044-7611
(202) 514-1196 (phone)
(202) 616-2427 (fax)
mark.sabath@usdoj.gov

Message

From: Greenwalt, Sarah [greenwalt.sarah@epa.gov]
Sent: 4/25/2017 5:46:50 PM
To: Neugeboren, Steven [Neugeboren.Steven@epa.gov]
CC: Schwab, Justin [schwab.justin@epa.gov]; Fotouhi, David [fotouhi.david@epa.gov]; Dravis, Samantha [dravis.samantha@epa.gov]
Subject: WOTUS preamble edits from SG and JS

<!--[if lte mso 15 || CheckWebRef]-->

Greenwalt, Sarah has shared a OneDrive for Business file with you. To view it, click the link below.

WOTUS step 1 preamble draft 4-25 (SG and JS edits).docx

<!--[endif]-->

Steve - Attached is a redline of the preamble. A few other thoughts:

Deliberative Process/ Attorney-Client / Ex. 5

Let me know if you have any other questions for me.

Sarah A. Greenwalt
Senior Advisor to the Administrator
for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency
Work: 202-564-1722 | Personal Phone / Ex. 6
Greenwalt.Sarah@epa.gov

Message

From: Minoli, Kevin [Minoli.Kevin@epa.gov]
Sent: 3/20/2017 1:35:21 AM
To: Greenwalt, Sarah [greenwalt.sarah@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]
CC: Neugeboren, Steven [Neugeboren.Steven@epa.gov]
Subject: Re: OGC assessment of legal issues in WOTUS rulemaking

Hi Sarah and Justin-

I know that each of you was in at least one conversation last week where we in OGC were not yet on the same page. Or to be blunt: where I was in a different place than the rest of our team. One of the things that makes our work product and our workplace great is that we cultivate an atmosphere where those conversations can and do occur. Normally, they happen internally and without guests from outside of the office, but I appreciated that you gave us the space to have them and that each of you participated in them to some degree as well.

I want to assure you -- or reassure you -- that the assessment contained in the email that Steve sent earlier tonight is one that we all stand behind as an office.

See you tomorrow.

Kevin

Kevin S. Minoli
Acting General Counsel
Office of General Counsel
US Environmental Protection Agency
Main Office Line: 202-564-8040

On Mar 19, 2017, at 7:53 PM, Greenwalt, Sarah <greenwalt.sarah@epa.gov> wrote:

> That's great, thank you.
>
> On Mar 19, 2017, at 6:44 PM, Neugeboren, Steven <Neugeboren.Steven@epa.gov> wrote:
>
> *Predecisional/Attorney-Client Privileged*
>
> Sarah – Sorry it took longer than anticipated but per your request, below is OGC's evaluation of some of the core legal issues for rulemaking – Attorney Client/ Deliberative/ Attorney Work Product/ Ex. 5

Attorney Client/ Deliberative/ Attorney Work Product/ Ex. 5

Attorney Client/ Deliberative/ Attorney Work Product/ Ex. 5 Feel free to call me anytime at 564-5488 if you would like to discuss.

Attorney Client / Deliberative / Attorney Work Product / Ex. 5

Attorney Client / Deliberative / Attorney Work Product / Ex. 5

Attorney Client / Deliberative / Attorney Work Product / Ex. 5

Attorney Client / Deliberative / Attorney Work Product / Ex. 5

Attorney Client / Deliberative / Attorney Work Product / Ex. 5

Courts of Appeals

Attorney Client / Deliberative / Attorney Work Product / Ex. 5

The District Courts

Attorney Client / Deliberative / Attorney Work Product / Ex. 5

Attorney Client / Deliberative / Attorney Work Product / Ex. 5

Steven Neugeboren
Associate General Counsel
Water Law Office
Environmental Protection Agency
202-564-5488

Message

From: Bowman, Liz [Bowman.Liz@epa.gov]
Sent: 4/13/2017 6:35:07 PM
To: Schwab, Justin [schwab.justin@epa.gov]
Subject: RE: Seeking comment on reply brief in CPP stay request

Sorry! Can you send me a list of who is recused from what? So I don't bug people unnecessarily…thanks!

From: Schwab, Justin
Sent: Thursday, April 13, 2017 2:23 PM
To: Bowman, Liz <Bowman.Liz@epa.gov>
Cc: Fotouhi, David <fotouhi.david@epa.gov>
Subject: Re: Seeking comment on reply brief in CPP stay request

I'm recused. David should know.

Sent from my iPhone

On Apr 13, 2017, at 2:22 PM, Bowman, Liz <Bowman.Liz@epa.gov> wrote:

> Do you all know what this is?
>
> **From:** Keith Goldberg [mailto:keith.goldberg@law360.com]
> **Sent:** Thursday, April 13, 2017 1:19 PM
> **To:** Press <Press@epa.gov>
> **Subject:** Seeking comment on reply brief in CPP stay request
>
> I'm working on a story on the reply brief filed by the EPA yesterday urging a stay of the CPP litigation and wanted to see if the agency wanted to make any additional comment. If you could get back to me ASAP, I'd appreciate it.
>
> --
> Best,
>
> Keith Goldberg
> Senior Reporter, Energy
>
> Legal News & Data
> 111 West 19th Street
> 5th Floor
> New York, NY 10011
> Phone: Personal Email / Ex. 6
> Mobile:
> E-mail: keith.goldberg@law360.com
> @kdgscribe
> @Energy Law360

Message

From: Gunasekara, Mandy [Gunasekara.Mandy@epa.gov]
Sent: 4/28/2017 3:09:11 PM
To: Schwab, Justin [schwab.justin@epa.gov]; Dravis, Samantha [dravis.samantha@epa.gov]
CC: Bolen, Brittany [bolen.brittany@epa.gov]; Jackson, Ryan [jackson.ryan@epa.gov]
Subject: RE:

Yes – just heads up, program folks said CPP could be ready for OMB by Deliberative Process / Ex. 5 Sam, they needed direction from you to Deliberative Process / Ex. 5 ... I'm free at noon as well. Brown bag lunch it?

From: Schwab, Justin
Sent: Friday, April 28, 2017 10:46 AM
To: Dravis, Samantha <dravis.samantha@epa.gov>
Cc: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Bolen, Brittany <bolen.brittany@epa.gov>; Jackson, Ryan <jackson.ryan@epa.gov>
Subject: Re:

I'm free noon-1:30

Sent from my iPhone

On Apr 28, 2017, at 10:27 AM, Dravis, Samantha <dravis.samantha@epa.gov> wrote:

> Even though we are not meeting with Pruitt I think it makes sense to rendezvous on CPP and understand the outstanding issues with the preamble and then approve the draft RIA today so we can stay on track to be done on Monday.
>
> What time works for people?

Appointment

From: Penman, Crystal [Penman.Crystal@epa.gov]
Sent: 3/22/2017 2:18:34 PM
To: Peck, Gregory [Peck.Gregory@epa.gov]; Loop, Travis [Loop.Travis@epa.gov]; Best-Wong, Benita [Best-Wong.Benita@epa.gov]; Goodin, John [Goodin.John@epa.gov]; Downing, Donna [Downing.Donna@epa.gov]; Kwok, Rose [Kwok.Rose@epa.gov]; Neugeboren, Steven [Neugeboren.Steven@epa.gov]; Wehling, Carrie [Wehling.Carrie@epa.gov]; Klasen, Matthew [Klasen.Matthew@epa.gov]; Wendelowski, Karyn [wendelowski.karyn@epa.gov]; Kaiser, Sven-Erik [Kaiser.Sven-Erik@epa.gov]; Christensen, Damaris [Christensen.Damaris@epa.gov]; Campbell, Ann [Campbell.Ann@epa.gov]; Schnare, David [schnare.david@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]; Bangerter, Layne [bangerter.layne@epa.gov]; McDavit, Michael W. [Mcdavit.Michael@epa.gov]; Frithsen, Jeff [Frithsen.Jeff@epa.gov]; Nickerson, William [Nickerson.William@epa.gov]; Stokely, Peter [Stokely.Peter@epa.gov]; Frazer, Brian [Frazer.Brian@epa.gov]; Dravis, Samantha [dravis.samantha@epa.gov]; Keating, Jim [Keating.Jim@epa.gov]; ian.p.osullivan@usace.army.mil; jennifer.a.moyer@usace.army.mil; David.F.Dale@usace.army.mil; Breen, Barry [Breen.Barry@epa.gov]; Cheatham, Reggie [cheatham.reggie@epa.gov]; Greenwalt, Sarah [greenwalt.sarah@epa.gov]; Schmauder, Craig R SES (US [craig.r.schmauder.civ@mail.mil]; Lamont, Douglas W SES (US [douglas.w.lamont2.civ@mail.mil]
CC: FertikEdgerton, Rachel [FertikEdgerton.Rachel@epa.gov]; Borum, Denis [Borum.Denis@epa.gov]; Orvin, Chris [Orvin.Chris@epa.gov]; Eisenberg, Mindy [Eisenberg.Mindy@epa.gov]; Pollins, Mark [Pollins.Mark@epa.gov]; Kupchan, Simma [Kupchan.Simma@epa.gov]; Cherry, Andrew [Cherry.Andrew@epa.gov]; Lousberg, Macara [Lousberg.Macara@epa.gov]; Theis, Joseph [Theis.Joseph@epa.gov]; Bahk, Benjamin [Bahk.Benjamin@epa.gov]; Evalenko, Sandy [Evalenko.Sandy@epa.gov]; Barger, Cindy S CIV USARMY HQDA ASA CW (US) [cindy.s.barger.civ@mail.mil]; McGartland, Al [McGartland.Al@epa.gov]; Penman, Crystal [Penman.Crystal@epa.gov]; Jennings, Kim [Jennings.Kim@epa.gov]

Subject: Clean Water Rule Call in Conference Line/Code / Ex. 6 passcode Conference Line/Code / Ex. 6
Attachments: WOTUS2 proposed plan 3-22-17 draft.docx; overall Rule Timeline 3-21-17.xlsx; Rule Timeline short v5.xlsx
Location: 3233 WJCE

Start: 3/22/2017 2:30:00 PM
End: 3/22/2017 3:15:00 PM
Show Time As: Tentative

Recurrence: Weekly
every Wednesday from 10:00 AM to 10:45 AM

Moving Forward on Waters of the U.S.
March 22, 2017

Scope of Proposed Rule:

Deliberative Process / Attorney-Client / Ex. 5

Process:

Deliberative Process / Attorney-Client / Ex. 5

Additional Statutory Requirements and Assumptions:

1. Small Business Regulatory Enforcement Fairness Act (SBREFA): SBREFA requires agencies to convene a Small Business Advocacy Review panel to analyze the impact certain rules will have on small entities unless an agency certifies "that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities" (no SISNOSE). 5 U.S.C. §§ 603-605. Deliberative Process / Attorney-Client / Ex. 5

Deliberative Process / Attorney-Client / Ex. 5

2. Endangered Species Act (ESA): Section 7(a)(2) of the ESA directs each federal agency to ensure, in consultation with the Secretary of Commerce or of the Interior, that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any threatened or endangered species, or to destroy or adversely modify such species' critical habitat. 16 U.S.C. § 1536(a)(2). Deliberative Process / Attorney-Client / Ex. 5

Deliberative Process / Attorney-Client / Ex. 5

3. National Environmental Policy Act (NEPA) – Deliberative Process / Attorney-Client / Ex. 5

Deliberative Process / Attorney-Client / Ex. 5

Message

From: Bowman, Liz [Bowman.Liz@epa.gov]
Sent: 4/18/2017 2:21:46 PM
To: Greenwalt, Sarah [greenwalt.sarah@epa.gov]; Fotouhi, David [fotouhi.david@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]
Subject: FW: Politico: Industry groups explore outsourcing EPA water rule rewrite, 4/18/17

From: So, Katherine
Sent: Tuesday, April 18, 2017 9:50 AM
To: McGonagle, Kevin <mcgonagle.kevin@epa.gov>; Jefferson, Gayle <Jefferson.Gayle@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>; 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>; Schwab, Justin <schwab.justin@epa.gov>; Sugiyama, George <sugiyama.george@epa.gov>; Jackson, Ryan <jackson.ryan@epa.gov>; Valentine, Julia <Valentine.Julia@epa.gov>; Wilcox, Jahan <wilcox.jahan@epa.gov>; Freire, JP <Freire.JP@epa.gov>; Bowman, Liz <Bowman.Liz@epa.gov>; Graham, Amy <graham.amy@epa.gov>; MacKinnon, Kathleen <MacKinnon.Kathleen@epa.gov>; Dibble, Christine <Dibble.Christine@epa.gov>; Younes, Lina <Younes.Lina@epa.gov>; AO OPA Media Relations <AO_OPA_Media_Relations@epa.gov>; Brennan, Thomas <Brennan.Thomas@epa.gov>; Richardson, RobinH <Richardson.RobinH@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>
Cc: So, Katherine <so.katherine@epa.gov>
Subject: Politico: Industry groups explore outsourcing EPA water rule rewrite, 4/18/17

Politico
https://www.politicopro.com/agriculture/story/2017/04/industry-groups-explore-outsourcing-epa-water-rule-rewrite-155385

Industry groups explore outsourcing EPA water rule rewrite
By Annie Snider 4/18/17, 5:01AM

Industry groups with close ties to EPA Administrator Scott Pruitt are studying whether he could hire lawyers from the private sector to redo the Obama administration's most controversial water rule.

Such an approach would effectively privatize the rulemaking process, allowing Pruitt to sidestep career bureaucrats who spent the last five years writing the Waters of the U.S. regulation, which President Donald Trump has promised to swiftly replace. But legal experts say the unusual move also would raise a host of ethical questions and likely limit the public's view into how decisions are made about which streams, wetlands and lakes across the country receive federal protection.

The idea is taking shape in discussions among members of the Waters Advocacy Coalition, which advocates to restrain the scope of federal water regulation on behalf of more than 60 industry groups including the American Farm Bureau Federation and National Mining Association. The coalition is represented by Hunton & Williams LLP, whose lawyers fought Obama-era environmental regulations alongside Pruitt when he was attorney general of Oklahoma.

The discussion is driven by a desire to help Pruitt quickly replace the rule while he deals with a dearth of political appointees at the agency to help him, multiple industry sources said, requesting anonymity to divulge private conversations. Industry insiders have been reaching out to lawyers who may be interested in leading a WOTUS rewrite

from outside the agency, according to an environmental lawyer who served in a previous Republican administration and recently received one such overture.

But members of the coalition appear to be torn on whether privatization is the right approach, according to sources familiar with the internal debate. And it is unclear whether anyone has taken the idea to Pruitt or his staff, and whether the administration would be open to it. EPA did not respond to multiple requests for comment.

EPA and other agencies routinely hire contractors to produce technical analyses or sort through public comments related to rulemakings, but it is rare that they are tapped to write the actual rules. Legal experts say it would be possible for EPA to outsource the WOTUS rewrite, although doing so would stretch the limits of federal contracting law and present ethical questions for any lawyer who took on the work.

Environmentalists decried the possibility that the Trump administration would outsource work that is supposed to be done by people in Senate-confirmed positions in order to ensure a transparent, accountable rulemaking process.

"To then say it's OK for a cabal of industry groups to put some gun for hire in charge of writing the rule, that just seems absolutely, wildly unethical," said John Rumpler, who directs the clean water program for Environment America.

While it remains to be seen if Pruitt brings in an outside attorney to help rewrite the water rule, doing so would not be out of character. As Oklahoma's attorney general, he regularly hired outside counsel to work on litigation and worked closely with industry groups to challenge environmental rules. In some cases he took industry-drafted language almost verbatim and sent it out on his office's letterhead, a 2014 New York Times article found.

Pruitt also has a history with Hunton & Williams, the water coalition's law firm. In 2013, the firm's senior director of governmental relations, Roderick Hastie, prepared talking points against an EPA rule that he encouraged Pruitt's deputy solicitor general to "cut and paste," according to emails released following an open-records lawsuit in Oklahoma. Pruitt also invited one of the firm's top attorneys to a 2013 "Summit on Federalism and the Future of Fossil Fuels" he hosted in Oklahoma City.

Don Parrish, senior director for regulatory relations at the American Farm Bureau Federation, said the idea has not been discussed at formal meetings of the Waters Advocacy Coalition, which he chairs.

"That's something that our coalition has not talked about nor would we take a position on," he said.

But Pruitt has touted the administration's move on the water rule to industry groups. He vowed "relief" was coming soon to farmers when he spoke at the Farm Bureau's Washington-based Advocacy Conference in February, just hours after Trump signed the executive order directing his agency to review and rewrite the Obama administration's water rule. Parrish said the coalition as a whole has not met with Pruitt or his team, but would not address whether individual members have.

It is not unusual for EPA to hear from experts representing both industry and environmental groups when writing rules, although the agency generally tries to avoid getting too close so as not to violate the Administrative Procedure Act, which requires a transparent rulemaking process.

Past administrations were accused of getting too close to that line. For example, The Wall Street Journal editorial page blasted the Obama administration for its relationship with the Natural Resources Defense Council when writing its climate change rules, and former Vice President Dick Cheney faced criticism for stacking his energy task force with pro-industry voices.

Trump has not nominated anyone to lead Office of Water and Office of General Counsel — two positions that were critical to writing the Obama-era rule — and it is an open question whether he will. That has motivated some of the desire for Pruitt to bring in outside firepower.

Right now, the rewrite effort is being shepherded by Sarah Greenwalt, who went to work for Pruitt in Oklahoma just after finishing law school. The bulk of the work of rewriting the rule is being done by career staffers in EPA's Office of Water. Nearly all of those staffers spent years building the Obama administration rule, raising concerns among some of Pruitt's allies about whether they can be trusted to dismantle it.

Some of the legal experts industry groups would like to lead the rewrite are hesitant to join the agency. Sources say that is the case for Susan Bodine, the chief Republican counsel for the Senate Environment and Public Works Committee. Bodine did not respond to a request for comment Monday.

Working as outside counsel on the rewrite could offer a seasoned lawyer more flexibility and more money than a government position would, while sidestepping a Senate confirmation fight. And experts say there is little in the law to prevent the agency from tapping an outside lawyer for the task.
Regulations governing federal contracting bar the government from hiring out for "inherently governmental functions ... such as determining the content and application of regulations."

But agencies typically deal with this by writing contracts that say the outside entity will be only assisting, and the final decision will be made by federal officials, said Dan Guttman, an expert on federal contracting at New York University Shanghai.

"You end up with this fiction that as long as the official signs the final document, it doesn't matter," Guttman, who investigated federal contracting as an aide to then-Sen. David Pryor. "You deal with this by wordsmithing."

Laws designed to prevent conflicts of interest among federal contractors also may not prove much of a barrier, despite the likelihood that any law firm with the requisite Clean Water Act expertise would have a long roster of clients with a stake in a new regulation's outcome.

Potential conflicts must be disclosed, but a firm can still win a contract by demonstrating that it will take sufficient steps to avoid any impropriety and convincing Pruitt that its work would be in the government's interest.

Meanwhile, rules governing individual conflicts of interests, rather than corporate conflicts of interest, wouldn't apply to a contractor unless it was written into the contract, said Kathleen Clark a Washington University Law School professor. For example, a federal employee with a weekend job working for a coal company would be automatically barred from working on a regulation that affected the coal industry, but a contractor in the same position would not, she said.

"As a policy matter, I think this would be a terrible mistake, but as a legal matter, it may be possible," said Emily Hammond, an expert on environmental and administrative law at George Washington University Law School.

Still, a bigger challenge could be finding a lawyer willing to do the work.

Attorneys risk being disbarred if they represent opposing sides in litigation, and they take pains to avoid conflicts among their clients. Taking on a WOTUS rewrite could raise red flags at some of the firms with the most expertise in the Clean Water Act.

While industries ranging from agriculture to oil and gas to homebuilding to golf courses were united in their opposition to the Obama administration rule, when it comes down to the technical details of writing a new rule, those groups will have different interests.

Even within the agricultural sector, not everyone is on the same page, said Michael Formica, lead counsel for the National Pork Producers Council, a member of the Waters Advocacy Coalition. For example, farmers who plan to continue working the land for generations may be willing to cut a deal with federal regulators to exempt farm ditches from regulation in exchange for preserving a plot of land, but that would be a no-go for landowners who hope to someday turn their property into a subdivision or shopping center, he said.

"Some people are gentleman farmers — their farm land is really just an investment, but they want a right to develop that down the road," Formica said. "My people are real farmers and they want to buy more farmland."

Even if all of these hurdles could be overcome, it's not clear that hiring an outside lawyer to run the EPA rulemaking would get the agency anything it couldn't get otherwise, except for a giant headache, said Cary Coglianese, who leads the University of Pennsylvania Law School's Program on Regulation. He said the rulemaking process already allows ample opportunities for industry groups to weigh in, often in less obvious ways.

"What good lawyers always worry about is not only real conflicts of interest, but the appearance of conflicts of interest," Coglianese said. "If indeed you've got someone who looks too partisan and the agency's trying to basically circumvent the nomination and confirmation process by having a general counsel that's essentially on retainer — that's just the kind of swampy arrangement that the administration has claimed it wants to drain."

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Message

From: So, Katherine [so.katherine@epa.gov]
Sent: 2/21/2017 9:45:30 PM
To: McGonagle, Kevin [mcgonagle.kevin@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]; Valentine, Julia [Valentine.Julia@epa.gov]; AO OPA Media Relations [AO_OPA_Media_Relations@epa.gov]
CC: So, Katherine [so.katherine@epa.gov]
Subject: RE: Pruitt Post Speech/Event Clips 2/21/17

Below: Reuters, Time, Fiscal Times, Fox News, InsideEPA, Wall Street Journal, Buzzfeed News, Mashable, Business Insider, Argus Media, Bloomberg, The Hill, Washington Post, Huffington Post, CNN, The Guardian, LA Times, Bloomberg BNA, Politico, E&E News, Forbes, Washington Examiner, Washington Times, CNBC

Reuters
http://www.reuters.com/article/us-usa-trump-epa-idUSKBN1601Q3
New U.S. environmental chief says agency can also be pro jobs
By Timothy Gardner 2/21/17, 4:23PM

The new head of the U.S. Environmental Protection Agency said on Tuesday that America need not choose between jobs and the environment, in a nod to the energy industry as the White House prepares executive orders that could come as soon as this week to roll back Obama-era regulation.

"I believe that we as an agency, and we as a nation, can be both pro-energy and jobs, and pro-environment," Scott Pruitt said in his first address to staff. "We don't have to choose between the two."

Critics of the agency have complained that regulations ushered in by former President Barack Obama have killed thousands of energy jobs by imposing restrictions on carbon dioxide emissions and by limiting areas open to coal mining and oil drilling.

But Democrats, environmental advocates and many of the EPA's current and former staff worry President Donald Trump's appointment of Pruitt signals a reversal in America's progress cleaning air and water and in fighting global climate change.

Pruitt sued the agency he now leads more than a dozen times while attorney general of Oklahoma to stop federal environmental rules, and has expressed doubts about the science behind climate change.

He struck a conciliatory tone in his address, saying he would "listen, learn and lead" and that he valued civil discussion and the contributions of career staff.

Trump is expected to sign executive orders aimed at reshaping U.S. environmental policy as early as this week, the Washington Post reported. He would instruct the Department of the Interior to lift a ban on new coal mining leases on federal lands and would require the EPA to ease greenhouse gas emissions curbs on electric utilities, according to the report.

The orders would also require the EPA to change Obama's Waters of the United States rule that details which U.S. waterways fall under federal environmental protection, according to the report.

The White House did not immediately reply to a request for comment on the Washington Post story.

Pruitt was confirmed by the U.S. Senate last week after contentious hearings that focused on his record as top prosecutor of oil- and gas-producing state Oklahoma.

"Pruitt has been a shill for the fossil fuel industry his entire career, and there's no reason to believe he's going to stop now," said League of Conservation Voters senior vice president Tiernan Sittenfeld.

But many Republican lawmakers view Pruitt as a refreshing change at the top of an agency they have long accused of federal overreach.

CLIMATE CHANGE

Both Trump and Pruitt have expressed doubts about climate change, and Trump vowed during his 2016 campaign for the White House to pull the United States out of a global pact to fight it.

Trump has promised to slash environmental regulation ushered in by Obama, and to help bolster the drilling and mining industries, but without hurting air and water quality.

A spokeswoman for the American Petroleum Institute, which represents oil and gas companies, did not immediately respond to a request for comment.

Before Pruitt's confirmation, some 800 former EPA staff signed a letter urging senators to reject him, and around 30 current EPA staff joined a protest set up by the environmental group Sierra Club in Chicago.

Liz Purchia, who headed EPA public affairs during the Obama administration, said Pruitt may struggle to get staff to quickly dismantle regulations. Accomplishing agency priorities was "no easy task" when political appointees and career workers at the EPA agreed most of the time in the Obama years, Purchia said. "Let's see how well they do getting staff, who feel disrespected, to follow them."

Democrats had sought to delay Pruitt's nomination over questions about his ties to the oil industry in Oklahoma.

In Oklahoma, a state judge ruled last week that he will have to turn over thousands of emails between his office and energy companies by Tuesday after a watchdog group, the Center for Media and Democracy, sued for their release.

The judge will review and perhaps hold back some of the emails before releasing them, a court clerk said.

(Reporting by Timothy Gardner; Writing by Richard Valdmanis; Editing by Howard Goller and Alistair Bell)

Time
http://time.com/4676732/donald-trump-epa-executive-orders/
President Trump Is Expected to Make a Significant Rollback to EPA Regulations
By Justin Worland 2/21/17

President Donald Trump is expected to announce his most significant moves yet to roll back environmental regulations this week as his newly confirmed pick to lead the Environmental Protection Agency (EPA) enters office.

Trump is readying multiple executive orders to roll back several key EPA regulations including the central Obama-era policy addressing climate change, according to reports in several outlets. The executive orders would not undo the policies immediately but would direct the agency to begin the long process required of undoing federal regulation.

The Clean Power Plan, former President Obama's main policy aimed at addressing climate change, ranks high among the likely targets of Trump's actions. The regulation requires states to come up with plans to reduce carbon dioxide emissions from power plants, a policy that is widely expected to hasten the transition away from coal-fired power plants.

Trump promised repeatedly to undo the Clean Power Plan on the campaign trail, though the process will take require more than a simple stroke of a pen. Many environmental policy experts have speculated on how Trump might try to achieve that goal following his election win in November. The administration could have refused to defend the rule in court or asked Congress to pass a law amending the Clean Air Act, which was used to issue the rule in the first place. But the use of executive order suggests the administration will instead take the most straight-forward option of simply unraveling the rule, a years-long process that will almost certainly result in litigation.

But Trump will have a capable ally implementing his order at the EPA. Administrator Scott Pruitt, who took office last Friday, has gained extensive knowledge and experience with the intricacies of EPA regulation at least in part through his 14 lawsuits against the agency as Oklahoma's attorney general. Environmental law experts say that his expertise will help the Trump administration navigate a bureaucracy that might otherwise flummox an agency outsider. "He's got some experience and knows how to get things done in government," said Brendan Collins , an environmental lawyer at the firm Ballard Spahr, prior to Pruitt's confirmation. "That is something that may distinguish him."

Pruitt has not yet laid out detailed priorities for the agency, but in remarks on Tuesday he cited federalism and the rule of law as guiding principles. Presumably Trump's orders, which could come as soon as Wednesday, will fill in the blanks. "Process matters," Pruitt said in address to the agency's career employees. "Regulations ought to make things regular. Regulators exist to give certainty to those that they regulate."

Other targets of Trump's executive orders could include U.S. participation in the landmark on Paris Agreement climate change. Trump vowed to renegotiate the deal or pull out it altogether last year but softened his tone after winning the election. Because the agreement is not a formal treaty, the president has the right to withdraw. But such a move cannot occur until 2019, three years after the measure took effect. Reports last month suggested that Trump might sign an executive order calling for a reevaluation of a wide range of United Nations measures that could include the Paris Agreement rather than pulling out full stop now. Secretary of State Rex Tillerson has said he supports the climate deal.

Another executive order is expected to target the Water of the United States rule, a 2015 policy that classifies which bodies of water are under federal protection. Critics have said the government lacks the authority to regulate many of the bodies included in the rule and argued that it impedes economic development.

The executive orders will build on a series of actions taken by Republicans in Congress to undo environmental regulations issued by the Obama administration in the final months of his presidency including a measure that protects streams from coal debris. Undoing those measures required only a majority vote in Congress and the approval of the president under the Congressional Review Act.

Fiscal Times
http://www.thefiscaltimes.com/2017/02/21/EPA-Chief-s-Magical-Thinking-Push-Energy-Production-and-Protect-Planet
EPA Chief's Magical Thinking: Push Energy Production and Protect the Planet
By Eric Pianin 2/21/17

The Trump administration offered a foretaste of its environmental policy with a speech on Tuesday by Scott Pruitt, the new Environmental Protection Agency administrator. Pruitt vowed to do as much to promote energy production and job creation as he would to protect against climate change.

Pruitt, the former Oklahoma attorney general and a close ally of the fossil fuel industry who made a career of challenging EPA's clean air and water regulations, spelled out his management philosophy during his first speech to the agency's15,000 employees.

Related: The Senate Just Confirmed the EPA's Arch Enemy to Run the Agency

"I believe that we as an agency and we as a nation can be both pro-energy and jobs, and pro-environment, that we don't have to choose between the two," Pruitt said during a relatively brief speech from EPA's headquarters.

"I think our nation has been better than any nation in the world at making sure that we do the job of protecting natural resources and protecting our environment, while also respecting the economic growth and jobs our nation seeks to have," he said.

Pruitt, 48, used his position as state attorney general to sue the EPA at least 14 times – frequently in tandem with major fossil fuel companies that supported his elections. He is widely viewed as the chief architect of the assault against former President Barack Obama's climate change policies that were aimed at sharply reducing greenhouse gas emissions from the nation's aging power plants.

The Washington Post reported yesterday that President Trump is preparing executive orders designed to curtail Obama-era policies on climate change and water pollution.

Related: A Climate Change Doubter Will Overhaul the EPA in Trump's Administration

One of the orders will instruct the EPA to begin rewriting the 2015 regulation that limits greenhouse gas emissions from existing, coal-fired electric utilities. It also would order the Interior Department's Bureau of Land Management to cancel a moratorium on federal coal leasing.

The other order will instruct the EPA and Army Corps of Engineers to revamp the 2015 Waters of the United States rule that applies to 60 percent of the water bodies in the country. That regulation – which was issued under the 1972 Clean Water Act – gives the federal government authority over wetlands, rivers and streams as well as major water bodies, according to *The Post*.

Pruitt didn't go into any details of the administration's planned policy shift. Instead, he outlined the principles that will guide his tenure at the EPA, such as altering the regulatory process, adhering more closely to congressional mandates and deferring more to the states in enforcing environmental laws and regulations.

"Regulations ought to make things regular," Pruitt said. "Regulators exist to give certainty to those that they regulate. Those that we regulate ought to know what's expected of them, so they can plan, and allocate resources to comply."

E&E News
http://www.eenews.net/eenewspm/2017/02/21/stories/1060050376
'He didn't allay people's fears today' – union leader
By Kevin Bogardus 2/21/17

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.

"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.

"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."

Fox News
http://www.foxnews.com/politics/2017/02/21/epas-pruitt-urges-officials-to-avoid-regulatory-abuses-in-first-speech-to-staff.html
EPA's Pruitt urges officials to avoid regulatory 'abuses' in first speech to staff
By Barnini Chakraborty 2/21/17

The new head of the EPA set a decidedly more pro-business tone for the agency Tuesday during his first remarks to rank-and-file employees, promoting a balance between protecting the environment and the economy -- and warning officials to "avoid" regulatory "abuses."

"We as an agency and we as a nation can be both pro-energy and jobs and we can be pro-environment, and we don't have to choose between the two," newly confirmed Administrator Scott Pruitt told a group of Environmental Protection Agency employees.

Pruitt's address follows a heated confirmation process where more than 800 former and current staff members actively campaigned against him. Pruitt, as Oklahoma's attorney general, fought the EPA in court and accused the agency of routinely over-regulating businesses. He vowed that as the agency's new leader, he would work to scale back its authority

"Regulations ought to make things regular. Regulators exist to give certainty to those that they regulate. Those that we regulate ought to know what's expected of them, so that they can plan and allocate resources to comply," he told the crowd.

Tensions with staff, however, could remain high as Pruitt takes over.

In addition to the letter signed by hundreds of employees asking senators to pull their support of Pruitt, more than two-dozen current EPA staff joined a protest set up by the Sierra Club in Chicago against him. The strong internal opposition could mean a standoff down the line between career EPA employees and the man leading them.

Pruitt was narrowly confirmed to head up the agency last week after a lengthy floor debate in the Senate. Democrats blasted him for vowing to roll back Obama-era environmental regulations as well as his past statements challenging the science behind climate change. Republicans countered that Pruitt was the right man to scale back the size and reach of the EPA.

Slapping restraints on the EPA could come sooner rather than later.

On Tuesday, The Washington Post reported that President Trump could head to EPA headquarters this week to sign a pair of executive orders.

One order would instruct the Department of the Interior to lift a ban on new coal mining leases on federal land and instruct the EPA to rewrite a 2015 regulation that limits greenhouse-gas emissions from existing electric utilities.

The second order reportedly would instruct the EPA and Army Corps of Engineers to make significant changes to the Waters of the United States rule which gives the federal government authority over rivers, streams and wetlands. The regulation, issued under the 1972 Clean Water Act, applies to 60 percent of the water bodies in the United States.

As Oklahoma's attorney general, Pruitt was party to lawsuits for both the Clean Power Plan and the Waters of the United States rule. In all, Pruitt sued the EPA 14 times before becoming its administrator.

Pruitt faced additional questions during the confirmation process that extended beyond his history fighting the agency.

On the eve of his confirmation vote, Pruitt was ordered by an Oklahoma judge to hand over thousands of emails between his office and fossil fuel companies like Koch Industries and the National Coal Council to the Center for Media and Democracy, which requested the collection of emails in 2014.

Pruitt and the Oklahoma attorney general's office are accused of ignoring multiple open records requests. Oklahoma County District Judge Aletia Haynes Timmons said "there was an abject failure to provide prompt and reasonable access to documents requested."

So far, only 411 of the more than 3,000 emails CMD requested have been handed over. The 411 were turned over last week. The open records request was made two years ago.

Despite being ordered to turn over the emails, Pruitt and his former office can withhold those they deem exempt under the state's records law.

InsideEPA
https://insideepa.com/daily-news/epa-administrator-scott-pruitt-details-priorities-principles
EPA Administrator Scott Pruitt Details Priorities, Principles
2/21/17

EPA Administrator Scott Pruitt, sworn in Feb. 17 shortly after his Senate confirmation, has begun to detail some of his priorities and principles for his time in office.

During a Feb. 21 address to agency employees, Pruitt largely reiterated the principles he outlined during his Senate confirmation for how he plans to approach his new role, including considering the role of states, the need for acting with civility on contentious matters, finding solutions to difficult problems and more.

For example, he said that the agency needs to follow a set procedure when developing rules to provide certainty to industry. "Regulations ought to make things regular," Pruitt said. "They ought to give certainty to those we regulate. They ought to know what is expected of them so they can plan and allocate resources to comply."

He said he would seek to "avoid abuses" of those processes. That means ending "using the guidance process to do rulemaking or regulation through litigation."

In an interview with the *Wall Street Journal* published Feb. 18, Pruitt added that a lack of regulatory certainty undermines economic growth. "The greatest threat we've had to economic growth has been that those in industry don't know what is expected of them. Rules come that are outside of statutes. Rules get changed midway. It creates vast uncertainty and paralysis, and re-establishing a vigorous commitment to rule of law is going to help a lot."

During his address at EPA, Pruitt also emphasized his commitment to work with states. "Federalism matters," he said. "Congress has been prescriptive, in many instances, in providing a robust role with the states."

He said he talked with Catherine McCabe, who served as EPA's acting administrator pending his confirmation, about the regional offices and "how important they are in partnering with [departments of environmental quality] at the state level with respect to enforcement and other related issues.

"We engender the trust of those at the state level, they see us as partners in the mission and not as adversaries. Process is important."

In his interview with the *Journal*, Pruitt also criticized the Obama administration for preempting state efforts to comply with federal requirements and suggested maintaining the portion of EPA's $8 billion budget that is directed to states, which is about half. "This is the front line of a lot of the work on air and water quality and infrastructure and it is very important that money continue," he said.

Policy Priorities

He also told the *Journal* that he plans to make cleaning up Superfund sites, attaining air quality standards and improving water infrastructure as his top priorities. "Under current measurements, some 40 [percent] of the country is still in nonattainment" for criteria pollutants, he said, adding there are also "1,300 Superfund sites and some of them have been on the list for more than three decades."

In a similar vein, he suggested that he hopes to complete cleanups of the Hanford nuclear reservation in Washington state and the Hudson River in New York. "Think of how tangible it would be to the citizens," of those states, he said.

On water infrastructure, Pruitt said he plans to advance the issue with the president. "When we talk about investing in infrastructure, we need to look more broadly than bridges and roads," he said, citing lead contamination in Flint, MI, and threats to California dams.

But even as he detailed an affirmative agenda, Pruitt also defended Trump administration plans to roll back the Obama administration's greenhouse gas rules for power plants and Clean Water Act jurisdiction rule, saying both measures should be withdrawn because "the courts have seriously called into question the legality of those rules."

He also suggested taking a broader review of whether EPA should be regulating GHGs at all. Part of the rulemaking process to withdraw the Clean Power Plan will consider whether EPA even possesses the tools, under the Clean Air Act, to address climate change.

"It's a fair question to ask if we do, or whether there in fact needs to be a congressional response to the climate issue," he said.

But he also downplayed suggestions that he would neuter the agency. "There is no reason why EPA's role should ebb or flow based on a particular administration, or a particular administrator," he said. "Agencies exist to administer the law. Congress passes statutes, and those statutes are very clear on the job EPA has to do. We're going to do that job.

"There is a time and place to sometimes resolve litigation. . . . But don't use the judicial process to bypass accountability," Pruitt said, suggesting he would not use sue-and-settle tactics now that a move conservative administration will have to defend its policies: "regulation through litigation is simply wrong...we need to end this practice of issuing guidance, to get around the rule-making procedure. Or rushing things through, playing games on the timing."

Wall Street Journal
https://www.wsj.com/articles/scott-pruitt-signals-dramatic-shift-in-epa-priorities-1487708036
Scott Pruitt Signals Dramatic Shift in EPA Priorities
By Amy Harder 2/21/17, 3:13PM

WASHINGTON—In his first speech as administrator of the Environmental Protection Agency, Scott Pruitt stressed a dramatic change of priorities at the agency, stating the importance of the agency's communication and relationship with businesses but giving few details about policy changes.

Mr. Pruitt didn't touch on the hard-fought issues that arose during his confirmation process, including his work as Oklahoma attorney general suing the EPA and comments President Donald Trump has made about nearly eliminating the agency.

The new administrator focused instead on his general aspirations for the agency, such as giving businesses certainty regarding environmental rules and striking an appropriate balance with states when it comes to regulations.

"Regulations ought to make things regular," said Mr. Pruitt, repeating a line he used at his confirmation hearing in January. "Those that we regulate ought to know what they can expect from us."

That is a clear difference in message and focus from the EPA under President Barack Obama, which emphasized first what the agency was trying to protect with its regulations on clean air and water.

Mr. Pruitt's speech at agency headquarters, which went a little over 10 minutes, was aimed at striking a balance between the administrator's mandate from Mr. Trump to roll back Mr. Obama's environmental regulations and persistent concerns from inside and outside the agency about that very mandate. It didn't include questions from either media or the assembled EPA staffers in Washington. EPA employs about 15,000 people across the U.S.; thousands were able to watch the speech online.

"You can't lead unless you listen. I seek to listen and learn and lead with you to address these issues we face as a nation," Mr. Pruitt said.

Mr. Trump's plans for EPA have attracted particular attention, given his stated goal of making wholesale changes at the agency. Current and former officials of the agency had publicly urged the defeat of Mr. Pruitt, saying they were concerned about his close relations with the oil and gas industry in Oklahoma. The Senate narrowly confirmed him on Friday mostly along party lines.

Mr. Pruitt's comments Tuesday didn't ease some critics' concerns.

"Pruitt told EPA staff they may not know him except for what they have read, but perception is reality," said Liz Purchia, a former EPA communications director under Mr. Obama. "Trump's team spent the entire campaign and the last few months railing against EPA's existence, its staff and its purpose."

Mr. Pruitt didn't mention the Trump administration's imminent plans to start undoing two of the biggest rules the agency has issued over the past eight years: one cutting carbon emissions from power plants and another bringing more waters under federal jurisdiction.

Mr. Trump is expected to soon sign at least two executive orders to begin the process of scrapping both of those regulations, along with other Obama-era climate regulations, according to several people familiar with the plans. Both efforts would take months and are likely to face legal challenges.

The executive order focusing on power-plant emissions is expected to be framed as an attempt to reduce the nation's dependence on foreign sources of energy while promoting domestic energy production, two of Mr. Trump's campaign promises. Supporters of the regulation say it is important for fighting climate change.

Other policies likely to be targeted in the executive orders is an Interior Department temporary ban on coal leasing and a measure cutting emissions of methane, a greenhouse gas, from oil and natural gas wells on federal lands. Congress is already in the process of repealing that regulation.

Buzzfeed News
https://www.buzzfeed.com/dinograndoni/trumps-new-epa-chief-promises-to-pull-back-environment-rules?utm_term=.qxRlB2DjB#.frne7Xva7
Trump's New EPA Chief Promises to Pull Back Environment Rules in First Agency Speech
By Dino Grandoni 2/21/17, 1:50PM

WASHINGTON — In a brief introductory speech at the Environmental Protection Agency's headquarters on Tuesday, the agency's new leader, Scott Pruitt, sought to reassure leery staff of his vision for federal environmental protection under Donald Trump — one that involved the agency becoming both "pro-energy and jobs and pro-environment."

"Most of you don't know me very well," Pruitt told roughly 100 employees gathered at EPA headquarters on Tuesday, along with thousands more watching in Washington and at regional EPA offices though the agency's internal television network.

Noting past news stories of his environmental views that have not put him in a flattering light, Pruitt added: "I look forward to sharing the rest of the story with you."

During his 12 minutes of remarks, Pruitt made clear that he wished to cede responsibility for environmental protection back to the states and limit the role of the EPA strictly to what Congress has instructed it to do, saying that regulations must be "need to be tethered to statue."

"When we do that," Pruitt told employees, "we avoid he uncertainty of litigation."

Pruitt knows about litigation against the EPA: As Oklahoma's attorney general, he led more than dozen lawsuits against the EPA on that state's behalf. During his confirmation hearing, Pruitt refused to recuse himself from the eight ongoing lawsuits Oklahoma has filed against the EPA.

Still, the Trump administration does not want to wait for Congress to act. This week, the White House is readying executive actions seeking to undo Obama-era rules meant to curtail water pollution and the release of greenhouse gases, the *Washington Post* reported

Going into more detail than he did during his speech, Pruitt told the *The Wall Street Journal* in his first interview as EPA administrator that he expects to quickly withdraw the US from Clean Power Plan, Obama's landmark proposal for curbing greenhouse gas emissions from power plants.

"There's a very simple reason why this needs to happen," Pruitt said. "Because the courts have seriously called into question the legality of those rules."

But the Supreme Court, in 2007, has already ruled that EPA is obligated to regulate carbon dioxide and other greenhouse gases.

Pruitt delivered his remarks in the agency's ornate Rachel L. Carson Great Hall, named after the scientist who authored the 1962 book *Silent Spring,* which kickstarted the US environmental movement and ultimately led to the creation of the EPA eight years later.

Behind the cameras were security personnel from the Department of Homeland Security — whose presence at the headquarters, according to two EPA employees, was a first for the agency. Pruitt is expected to ask for an around-the-clock security detail as administrator, according to E&E News.

At the end of his speech, Pruitt quoted another famous environmentalist — John Muir, the 19th century activist and founder of the Sierra Club — as a way to reassure employees that his business-friendly approach is compatible with the agency's goal of environmental protection.

"Everybody needs beauty as well as bread," Pruitt said, quoting Muir.

The current head of the Sierra Club, Michael Brune, objected to the name drop.

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

Mashable
http://mashable.com/2017/02/21/scott-pruitt-speech-epa-climate-resistance/#oslu2pflKqqA
EPA's Scott Pruitt meets his hasrshest critics: the employees of his own agency
By Andrew Freedman 2/21/17

Usually, new administrators at the Environmental Protection Agency (EPA) are welcomed at headquarters without too much fanfare. That is, until today.

Scott Pruitt — the new EPA administrator nominated to the position by President Donald Trump — gave his welcome address to his agency Tuesday after garnering more "no" votes on the Senate floor than any other EPA nominee since the agency was founded in 1970.

In taking on the job, Pruitt is facing a daunting challenge: stiff resistance from within the agency itself, with current and former employees having protested his nomination, with some taking the nearly unheard of step of openly advocating for senators to vote "no" when it was brought to the Senate floor.

For some scientists in the agency, his first speech was probably the equivalent of Voldemort himself walking into Hogwarts and assuming the top job.

Pruitt openly doubts mainstream climate science findings, including that human-caused emissions of greenhouse gases are the primary cause of global temperature increases.

Pruitt was confirmed only hours after a judge in Oklahoma ordered the release of nearly 3,000 emails between Pruitt and fossil fuel companies from his time as attorney general. Those emails are due to be released by the end of the day on Tuesday.

In his first speech to agency employees on Tuesday, Pruitt spoke of federal environmental regulations as needing to be tailored for the benefit of regulated parties, rather than to protect the public.

"Regulations ought to make things regular. Regulations exist to give certainty to the regulated," he said.

Pruitt clearly aims to shrink the agency's mandate and footprint, and is expected to quickly move to reverse the Obama administration's Clean Power Plan, which regulates global warming-pollutants emitted from coal-fired power plants, along with a landmark water pollution regulation.

As Oklahoma attorney general, Pruitt sued the EPA more than a dozen times, including in opposition to the Clean Power Plan.

"Regulations exist to give certainty to the regulated"

Pruitt did little to antagonize the EPA rank and file in his speech, saying, "civility is something that I believe in very much." But he also didn't say much that would immediately quell the internal resistance to him, either.

"This environment in which we live today, forgive the reference, but it is a very toxic environment," he said. "I seek to be a good listener."

Pruitt even went so far as quoting famous naturalist John Muir, who founded the Sierra Club, in his comments.

In response, the Sierra Club put out this blistering statement: "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."

A lot is at stake if and when Pruitt and the Trump administration move to dismantle the Clean Power Plan. The Obama administration had turned to the EPA to lead the charge on global warming, and without other rules to drive down emissions, getting rid of the Clean Power Plan would jeopardize America's ability to meet the emissions targets it agreed to under the Paris Climate Agreement.

Pruitt did not mention climate change, or any other specific environmental challenge, in his speech, instead giving general nods to the need to return more of a role for environmental protection to the states.

"We can be both pro-energy and jobs and pro-environment," he said.

Business Insider
http://www.businessinsider.com/scott-pruitt-epa-first-day-speech-2017-2
Trump's new EPA chief barely mentioned the environment in his first address to agency
By Rafi Letzter 2/21/17

Scott Pruitt, the Environmental Protection Agency (EPA) critic who recently took over the agency as part of the Trump administration, gave his first address in his new position Tuesday.

The former Oklahoma Attorney General mentioned "important, monumental issues with respect to our future and our environment," but avoided a number of issues central to the EPA's mission — such as air and water protection, cleanups, public health, and environmental monitoring.

Pruitt, who sued the EPA 14 times in his previous role to fight regulations and cleanup efforts, instead emphasized "abuses" of the agency's rule-making powers.

He called on employees to take a stricter, more limited interpretation of the agency's powers.

"The process we engage in adopting regulations is important, because it shows we take our role seriously," he said, returning to a theme he emphasized during his confirmation hearings.

"Regulations ought to make things regular ... that's the job of a regulator," Pruitt said.

This is the same phrase Pruitt used during his confirmation hearings, during which he suggested that the EPA had failed in its responsibility to create a predictable economic climate for business.

Kimberley Strassel of The Wall Street Journal wrote Friday that Pruitt's passion seems to be neither environmental safety nor deregulation. Rather, she suggested, he seems like a kind of "EPA originalist," who aims to link the EPA to the tightest possible interpretation of its several congressional mandates.

Pruitt has become the nation's top environmental officer without staking out a clear position on several key environmental issues — including whether greenhouse gases like carbon dioxide should be regulated as pollutants. Nothing in Tuesday's talk cleared up any of his environmental views.

The transition at the EPA before Pruitt's arrival was particularly fraught, with reports of leaks, gag orders, and grant freezes creating uncertainty for people who follow environmental policy or rely on on the EPA for funding.

Pruitt's confirmation was particularly contentious. There were questions about his truth-telling during his hearings and Senate Democrats fought until the last minute to delay a vote until undisclosed emails between Pruitt's Oklahoma office and fossil fuel companies were released by court order.

In what may have been a nod to some of those issues, Pruitt told his new workforce on Tuesday to wait on the "rest of the story" about him, beyond what they might have seen in the press.

He also decried the "toxic environment" in American politics and called for "civility."

"I seek to be a good listener," he said, "You can't lead unless you listen."

Argus Media
http://www.argusmedia.com/news/article/?id=1409088
New EPA leader stresses federalism, agency limits
2/21/17

Washington, 21 February (Argus) — US Environmental Protection Agency (EPA) administrator Scott Pruitt today signaled a more restrained regulatory posture from the agency, with an increased role for states and a greater recognition of limits on federal authority.

EPA needs to do a better job of providing certainty to regulated industries and must become more cooperative with the state agencies that are often tasked with implementing federal environmental regulations, Pruitt said in brief remarks to agency staff.

Pruitt stressed the need to provide more regulatory certainty by taking a number of steps, including being more transparent in rule-making processes and honoring limits on the authority Congress has given the agency, he said.

"The only authority that any agency has in the executive branch is the authority given to it by Congress," Pruitt said.

When EPA does not heed those limits, it can lead to litigation and more regulatory uncertainty, he said.

In addition, Pruitt said he wants to improve EPA's relations with the states so that they do not view federal regulators as adversaries. "Federalism matters. Congress has been very prescriptive in providing in many instances a very robust role, an important role, for the states," he said.

President Donald Trump chose Pruitt to lead EPA in an effort to reshape an agency that some Republicans say has overstepped its authority from Congress and has published regulations that are impeding economic development. As attorney general for Oklahoma, Pruitt was involved in a number of efforts to overturn EPA regulations issued by former president Barack Obama's administration, including multi-state lawsuits against the Clean Power Plan to reduce CO2 emissions from power plants, mercury regulations and federal ozone air quality standards.

Many of those regulations will likely be targeted for rollbacks or repeals by Pruitt, whom Trump picked for the job in part because of his opposition to Obama's so-called "war on coal."

The Senate confirmed Pruitt last week by a 52-46 vote, largely along party lines. Senate Democrats had attempted to delay a vote after a judge ruled that the nominee had to hand over thousands of pages of documents related to his correspondence with the fossil fuel industry while attorney general. Pruitt is required to turn over approximately 3,000 documents by today, with more to come before the end of the month.

Despite his hostility to some EPA actions, Pruitt said he is committed to the agency's role in protecting the nation's air and water. "I seek to listen, learn and lead with you," he said.

Bloomberg
https://www.bloomberg.com/news/articles/2017-02-21/trump-s-new-epa-head-woos-skeptical-staff-with-a-new-mission
EPA Chief Woos Staff Skeptical of Tilt to Pro-Energy Mission
By Jennifer A Dlouhy 2/21/17, 1:04PM

President Donald Trump's newly installed environmental chief Scott Pruitt laid out his vision for reshaping the way the federal government safeguards air and water, as he tried to convince skeptical federal employees that a refashioned agency can remain effective.

Pruitt addressed the Environmental Protection Agency's workforce -- including hundreds who had actively battled his confirmation -- on Tuesday, in his first speech since he was sworn in as administrator Friday.

"We as an agency and we as a nation can be both pro-energy and jobs and we can be pro-environment, and we don't have to choose between the two," Pruitt said to employees packed inside an auditorium at the EPA's Washington headquarters. His remarks were also streamed to EPA's 15,000-strong workforce nationwide.

Pruitt decried a deeply politicized environment that he said creates obstacles to finding effective solutions. "We deal with very important, monumental issues with respect to our future," he said. "We can do better as a country."

Perhaps more than any other member of Trump's cabinet, Pruitt is at odds with the agency he now leads. He built his political career fighting federal regulations he said stripped power away from states, and as Oklahoma attorney general, joined more than a dozen lawsuits challenging EPA actions by the Obama administration. He also appeared to relish his role as the agency's chief antagonist; an online biography dubbed Pruitt "a leading advocate against the EPA's activist agenda."

Still, Pruitt has taken pains to emphasize that environmental regulation and economic development can go hand in hand.

In a nearly 12-minute speech that avoided addressing substantive details of EPA policy, Pruitt outlined a "cooperative federalism" approach that gives states a larger role in collaborating with the EPA on environmental matters. Pruitt said he wanted to engender trust among state regulators and carefully follow congressional dictates to write new federal rules that are tethered to the statutes that compel them.

"We need to be open and transparent and objective in how we do rulemaking and make sure we follow the letter of the law as we do so because that would send, I think, a great message to those who are regulated," Pruitt said. "They want to know what's expected of them."

Pruitt sought to soothe unease among the agency's rank and file, with remarks that were measured and focused on process -- far from the bombastic declarations about slashing EPA staff and overhauling its use of science made by former Trump advisers.

Now Pruitt is trying to convince EPA employees that by focusing on core functions, the agency can do a better job keeping pollution out of the air and cleaning toxic chemicals from old industrial sites.

As administrator, Pruitt is positioned to undo some of the same agency regulations he challenged in court, including the Clean Power Plan that slashes greenhouse gas emissions from electricity and the Waters of the U.S. rule that defined which waterways are subject to pollution regulation. Trump administration officials have drafted documents directing Pruitt to begin dismantling those measures, helping fulfill Trump's pledge to eviscerate rules the president has said throttle U.S. energy development.

Some conservatives also are pressing Pruitt to go further and undo the legal underpinning for many Obama-era environmental rules by questioning the scientific basis for them.

Pruitt's efforts will face internal opposition from an agency that made combating climate change its top priority over the past few years.

Scores of EPA scientists, experts and lawyers actively fought Pruitt's nomination, beseeching senators to vote against him and organizing opposition via social media. The union representing agency employees launched an online campaign against Pruitt's agenda under the headline, "Save the EPA." Nearly 800 former EPA officials also signed a letter opposing Pruitt's nomination.

If Pruitt asks the agency's career civil servants to make 180-degree pivots on policy, he may have a hard time getting them to go along, said Kevin Book, managing director of the Washington-based research firm ClearView Energy Partners. It may take years for frustrated civil servants to walk out the door of an agency for good, but in the meantime, they can walk much slower inside it, Book said in an interview.

"You don't get an environmental scientist going to work at the EPA for the privilege of helping to drill more wells," Book said. "They're bound by all of the professional responsibilities and limitations that are imposed by their employer, but they are a force to be reckoned with."

Signs of that resistance have already appeared, with current and former employees setting up Twitter accounts to highlight perceived abuses.

Many agency employees are veterans of presidential transitions and know their fealty is to U.S. law, said Jeff Holmstead, a top EPA official under former President George W. Bush.

"There is a minority -- and I really do think it's a relatively small number -- of people at EPA who believe their mission is more important than their obligation to the law," Holmstead, a partner at Bracewell LLP, said. That opposition can feed leaks to Congress, the press and the public, he said.

Pruitt spoke Tuesday in the Rachel Carson Green Room, named for a noted marine biologist whose work highlighting the dangers of widespread pesticide use helped drive a global environmental movement.

"You can't lead, unless you listen," Pruitt said, promising to do just that as administrator.

The Hill
http://thehill.com/policy/energy-environment/320479-new-epa-head-wants-agency-to-be-pro-energy-and-jobs-and-pro
New EPA head: 'We don't have to choose between' jobs and the environment
By Timothy Cama 2/21/17, 1:32PM

The Trump administration's Environmental Protection Agency (EPA) chief outlined a vision for the agency that places an added focus on economic and job growth.

Scott Pruitt used his first speech to the EPA's 15,000 employees to speak mostly in general terms about his plans for an agency that had been a central target of Republican ire during former President Barack Obama's time in office.

"I believe that we as an agency and we as a nation can be both pro-energy and jobs, and pro-environment, that we don't have to choose between the two," Pruitt said in the 11-minute speech from EPA's headquarters.

"I think our nation has been better than any nation in the world at making sure that we do the job of protecting our natural resources and protecting our environment, while also respecting the economic growth and jobs our nation seeks to have," he said.

Pruitt comes into office with an uneasy relationship to the EPA's workforce, most of whom work outside of Washington, D.C.

Employees have publicly protested against Pruitt in places like Chicago and undertook an unprecedented effort to lobby the Senate to reject his nomination.

Pruitt, who was Oklahoma's attorney general until the Senate confirmed him Friday by a vote of 52-46, is a staunch opponent of Obama EPA regulations like the Clean Power Plan and the Clean Water Rule, which were among the targets of the 14 lawsuits he filed against the agency.

The Trump administration is reportedly preparing as soon as this week to sign executive orders to begin undoing both of those regulations.

But instead of laying out specific plans for those rules and others, Pruitt outlined the principles he wants to guide his time at the EPA, like changing the regulatory process, sticking more closely to mandates from Congress and better respecting states, all of which he implied were not done to a high enough degree under Obama.

Among his goals, he said, is to prioritize "certainty" in regulations.

"Regulations ought to make things regular. Regulators exist to give certainty to those that they regulate. Those that we regulate ought to know what's expected of them, so they can plan, and allocate resources to comply," Pruitt said. "That's really the job of a regulator."

He said the regulatory process "needs to be tethered to the statute" and the EPA should "ensure that we engender the trust of those at the state level" to be seen as partners with the states, not adversaries.

While Pruitt did not directly confront the opposition to him among the EPA workforce, he called for the agency's employees to be civil and listen to one another.

"Civility is something that I believe in very much. We ought to be able to get together and wrestle through some very difficult issues, and do so in a very civil manner," he said.

Washington Post
https://www.washingtonpost.com/news/energy-environment/wp/2017/02/21/pruitt-to-epa-employees-we-dont-have-to-choose-between-jobs-and-the-environment/?utm_term=.8cc027848664
Pruitt to EPA employees: 'We don't have to choose' between jobs and the environment'
By Brady Dennis and Chris Mooney 2/21/17, 1:35PM

In his first full work day as administrator of the Environmental Protection Agency, Scott Pruitt made clear Monday that he intends to step back from what he sees as the agency's regulatory overreach during the Obama administration.

Pruitt, who spent years criticizing and suing the EPA before becoming its newest leader, reiterated an argument he often had made as Oklahoma attorney general.

"The only authority that any agency has in the executive branch is the authority given to it by Congress," he said during a noon address to employees at the agency headquarters. "We need to respect that. We need to follow that. Because when we do that, guess what happens? We avoid litigation. We avoid the uncertainty of litigation and we reach better ends and outcomes at the end of the day."

Pruitt himself was the source of some of that legal conflict in recent years, suing the agency more than a dozen times over the course of President Barack Obama's two terms. And those lawsuits, plus his vocal criticism of the EPA's work generally and skepticism about climate change, have triggered palpable concerns among many longtime agency employees.

In many ways, though, the new administrator's remarks before his staff were conciliatory. Pruitt said he had come to listen to them and outlined principles for how he planned to guide the agency, including emphasizing civility and respect for the role of states.

"In this environment we live in this country today … it's a very toxic environment," Pruitt said. "We have jerseys that we put on both politically and otherwise. And that's something, I think, is damaging to finding results and answers."

Pruitt was confirmed Friday afternoon, mostly along partisan lines in the Senate, after a process that featured much criticism of his statements about climate change, his relationships with the fossil-fuel industry and his history of litigation against the agency he's now leading. Two Democrats in the Senate, Heidi Heitkamp of North Dakota and Joe Manchin of West Virginia, voted for him. One Republican, Susan Collins of Maine, voted against him.

While Republican lawmakers and industry executives welcomed his nomination, it was met with unprecedented opposition from environmental groups and from hundreds of former and current EPA employees, who argued that his track record shows little regard for environmental protection.

Pruitt's remarks were delivered in the Rachel Carson Green Room at the EPA, a large and dramatic wood-paneled room named after the famed environmentalist whose 1962 book, "Silent Spring," helped galvanize a movement that eventually led to the EPA's founding. About 75 EPA employees were on hand — attendance at the event was optional, and staff could also listen or watch online — along with members of the Trump administration and dozens of reporters.

News reports have suggested that President Trump is on the verge of signing a number of executive orders to roll back Obama priorities on the environment, including the Clean Power Plan, which restricts greenhouse gas emissions from

power plants, and the Waters of the U.S. regulation. But Pruitt made no explicit mention of planned policy changes in his remarks, instead focusing on what he said were a set of principles by which he would guide the agency.

Pruitt was introduced at the event by Catherine McCabe, who had served as acting administrator until his confirmation. Her remarks about his background did not mention the many occasions when he, as Oklahoma attorney general, had filed lawsuits against the agency.

"Civility is something I believe in very much," Pruitt told the employees gathered. "We ought to be able to get together and wrestle through some difficult issues and do so in a civil manner." He also noted that the "process" and "rule of law" matter greatly at the EPA. By contrast, he did not talk much about the agency's actual goals, such as preserving clean air and clean water.

"Federalism matters," Pruitt continued, pledging to forge close relationships with the states as he carries out his role. But states are likely to be highly divided over any attempt to undo Obama environmental regulations, with states such as Massachusetts, New York and California likely to oppose such efforts through state-level lawsuits much like the ones that Pruitt himself participated in against Obama's EPA.

At one point, Pruitt actually quoted John Muir, the founder of the Sierra Club — which provoked a quick response from the environmental group's executive director, Michael Brune, that "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."

Pruitt also said that there shouldn't be a contradiction between environmental protection and energy production or job creation, a line also often emphasized by President George W. Bush's administration.

"We as an agency and we as a nation can be both pro-energy and jobs and pro-environment," Pruitt said. "That we don't have to choose between the two. I think our nation has done better than any nation in the world at making sure we do the job of protecting our natural resources and protecting our environment while also respecting the economic growth and jobs our nation seeks to have."

Overall, the comments were very much in line both with what Pruitt said during his confirmation hearing and the arguments he has made for years during his opposition to EPA regulations under the Obama administration. He has been a leading proponent of the notion that the EPA too often overstepped its legal authority, going beyond the language of the statutes passed by Congress to take aggressive regulatory action. In addition, Pruitt has argued that the agency often infringed on the rights of states to regulate within their own borders.

Pruitt's remarks came shortly before the possible release by the Oklahoma attorney general's office of thousands of his emails from his tenure there, as ordered by a judge on Thursday. The office has not said whether it will comply or appeal.

After introducing him, McCabe gave Pruitt an EPA lapel pin and an EPA hat. The new leader, a former partner of a Triple-A baseball team, said he would wear the latter when going to Washington Nationals games.

Huffington Post
http://www.huffingtonpost.com/entry/pruitt-epa-speech_us_58ac7e76e4b0c4d51057164f
Scott Pruitt Goes After Critics, His Own Staff In First Speech To EPA
By Alexander C. Kaufman 2/21/17, 1:44PM

Environmental Protection Agency chief Scott Pruitt mentioned a "toxic environment" just once during his first address Tuesday to the embattled agency staff.

But he wasn't talking about industry pollution or conserving nature. He was referring to his critics' political rhetoric.

"Forgive the reference, but it's a very toxic environment," the controversial new administrator said in the speech, which lasted under 20 minutes.

"Civility is something I believe in very much," he added. "We ought to be able to get together and wrestle through some issues in a civil manner."

Then, at last, he began to outline his vision for the EPA. He described an agency that prioritized making it easier for polluters to comply with regulations. He promised to listen intently to companies before saddling them with new regulations. He admonished his new employees, some fearing layoffs amid looming budget cuts, for acting outside the agency's legal mandate and running roughshod over states' rights.

"Regulations ought to make things regular," Pruitt said. "Regulations exist to give certainty to those they regulate. Those we regulate ought to know what's expected of them so they can place and allocate resources to comply."

He did not mention climate change or environmental destruction.

Pruitt, the former attorney general of Oklahoma, was sworn in last Friday after the Senate voted 52-46 to confirm his nomination. His confirmation came a day after Judge Aletia Haynes Timmons of the District Court of Oklahoma County ruled that the Oklahoma attorney general's office must turn over more than 2,500 emails and correspondence between Pruitt and oil and gas firms. The ruling was in response to a lawsuit from watchdog group Center for Media and Democracy and the American Civil Liberties Union alleging that his office had violated Oklahoma's open records law.

"Scott Pruitt's going to have a lot of questions to answer," said Nick Surgey, the director of research at the Madison, Wisconsin-based Center for Media and Democracy, referring to the emails. "The head of the Environmental Protection Agency, on day three, is already talking about putting the interests of the environment against the interests of industry."

Democrats had sought to delay a vote on his confirmation until after those documents were released. Pruitt's former office is expected to respond by the judge's Tuesday evening deadline.

Pruitt made his reputation suing the EPA 13 times, repeatedly joining oil, gas and coal players — including Oklahoma Gas & Electric and the Domestic Energy Producers Alliance, an industry-backed group — in filing lawsuits to halt regulations. He forged what The New York Times in 2014 called an "unprecedented, secretive alliance" between Republican attorneys general and oil and gas companies to undermine environmental regulations. In 2011, he allowed Devon Energy, an Oklahoma oil and gas firm, to write a three-page complaint to the EPA under his letterhead, which he signed. Pruitt also championed the rights of Exxon Mobil Corp. in investigations into whether the oil giant committed fraud by covering up evidence that burning fossil fuels changes the climate.

In turn, the fossil fuel industry donated more than $300,000 to Pruitt between 2002 and 2016, and even more money to a political action committee and a super PAC that paid for the former Oklahoma attorney general's trips to Hawaii and New Orleans.

"I believe we as an agency and we as a nation can be both pro-energy and jobs and pro-environment," Pruitt said Tuesday, regurgitating a line he used during his confirmation hearing last month. "We don't have to choose between the two."

Pruitt's contentious confirmation drew scorn from a variety of critics. He even plans to request an around-the-clock bodyguard from his agency, according to a report by E&E News. A senior energy official at the U.S. Chamber of Commerce, the country's largest trade group with a history of combatting environmental rules, warned the new administration against repealing a 2009 EPA endangerment finding that classified greenhouse gases as a threat to public health and welfare. The comment underscores growing acceptance of the science of man-made global warming, particularly given that the Chamber's official policy priorities for 2017 "oppose EPA efforts to regulate greenhouse gases under the existing Clean Air Act, including the endangerment finding."

"There's going to be hell to pay from, you know, soccer moms and soccer dads all throughout the country," Christopher Guith, the energy official, said last month, according to a transcript published by the nonprofit Energy and Policy Institute. "People who probably voted for Donald Trump."

President Donald Trump has made slashing environmental restrictions a top priority, and the EPA is a prime target of his regulatory bushwhacking. He tapped Myron Ebell, a once-fringe contrarian who peddles conspiracy theories about climate change, to lead the EPA transition team. Soon after the inauguration, the White House ordered the EPA to freeze grants, putting a vast array of projects and personnel in limbo. That freeze has been lifted, but the White House is considering gutting the EPA's budget, which makes up just 0.22 percent of federal spending. A policy memo leaked to Axios proposed deep cuts to the EPA's budget, including axing hundreds of millions from grants to states and Native American tribes, climate programs, and environmental programs and management.

Trump's transition team also instructed agency employees to halt all press releases, social media, blog posts and external speaking engagements — giving rise to rogue Twitter accounts claiming to represent the views of the silenced regulators. The team announced plans to review all EPA studies before publication, stoking fears that the new administration might stifle research on issues such as climate change.

Inside EPA reported earlier this month that Trump is weighing closing the agency's Office of Enforcement and Compliance Assurance, which handles both civil and criminal enforcement of the country's core environmental laws, including the Clean Air Act, the Clean Water Act, the Oil Pollution Act and the Safe Drinking Water Act. The move would be part of a broader attack on regulations, including an executive order signed last month requiring agencies to suggest two rules to be axed for every new one proposed.

For some, Trump's proposed cuts may not go far enough. Rep. Matt Gaetz (R-Fla.) introduced a bill to "completely abolish" the EPA by the end of next year, as HuffPost reported.

Now that Pruitt is in place, Trump is expected to issue executive orders undoing Obama-era EPA rules on climate and water pollution as early as this week.

CNN
http://www.cnn.com/2017/02/21/politics/scott-pruitt-epa-speech/
Pruitt tries to soothe worries at EPA
By Theodore Schleifer 2/21/17, 2:25PM

Washington (CNN) Environmental Protection Agency Administrator Scott Pruitt tried his best Tuesday to fuse his humbler vision of his new agency with his stated respect for its long-serving, ambitious regulators in his maiden speech to EPA employees.

In a politically difficult pitch to career employees who may sharply disagree with his vision of a more restrained EPA, Pruitt offered something of a homily to the civil service, saluting those with decades of service and proclaiming them symbols of the agency's value. But Pruitt has promised a drastic overhaul of that agency they serve, a re-do that likely escaped few of the roughly 75 employees gathered in a tall, mahogany meeting room.

"It needs to be tethered to the statute," Pruitt said of their work. "We need to respect that. We need to follow that. Because when we do, guess what happens? We avoid litigation, we avoid the uncertainty of litigation and we reach better ends and outcomes at the end of day."
Pruitt knows something about that -- as Oklahoma attorney general, he made his name suing the Obama-era EPA as overzealous regulators without due concern for their effect on job creation.

He has vowed to curtail what critics say is the agency's zest for rulemaking and to offer a more balanced way to promote hiring while still protecting the environment. He did not mention the Clean Air Act or the Clean Water Act, two of the EPA's most prominent enforcement tasks, nor the threat of climate change, in his speech.

What he did offer was a flash of deference to the bureaucracy he inherits. Moments after accepting gifts of an EPA lapel pin and a baseball cap, the former minor league baseball team owner celebrated employees who knew their way around the building better than he did. He pledged to listen intently to the agency's most-tenured workers, and to carry himself with "civility," which he conceded in this political era was "in short supply."

Many EPA employees have expressed an uneasiness with Pruitt; the labor union that represents EPA employees even urged their members to call senators and urge them to vote against Pruitt during the confirmation process.

And Pruitt at one point suggested that his image would soften as he escaped the glare of the media.

"I also recognize you don't know me very well," Pruitt said, urging suspicion of some of of the coverage that only highlighted some of his resume. "I look forward to sharing the rest of the story with you."

Working the room with handshakes and back-pats following his speech, Pruitt signaled that he had to get to know some of his own employees better as well: "I haven't seen you in a while!" he told one of them.

The Guardian
https://www.theguardian.com/us-news/2017/feb/21/epa-scott-pruitt-trump-environment-economy
New EPA head Scott Pruitt: 'We can be both pro-job and pro-environment'
By Edward Helmore 2/21/17, 1:44PM

The new head of the US Environmental Protection Agency, Scott Pruitt, told agency staff on Tuesday that the US should not have to choose between the economy and the environment.

As the White House reportedly prepares executive orders to roll back Obama-era green regulations, Pruitt struck a conciliatory tone in an address to agency staff, saying he would "listen, learn and lead".

William Happer, frontrunner for job of providing mainstream scientific opinion to officials, backs crackdown on federal scientists' freedom to speak out
Read more

"I believe that we as a nation can be both pro-energy and jobs, and pro-environment. We don't have to choose between the two," he said in his first speech to EPA workers since he was confirmed as administrator of the agency by the US Senate last week.

"I think our nation has done better than any nation in the world at making sure that we do the job of protecting our natural resources, and protecting our environment, while also respecting economic growth," he told the room of about 70 staff at EPA headquarters in Washington.

Many Republican lawmakers view Pruitt, who sued the agency he now leads more than a dozen times as Oklahoma attorney general, as a refreshing change at the top of an agency they accuse of federal overreach and killing jobs.

But Democrats, environmental advocates and many of the EPA's current and former staff worry his appointment signals a reversal in America's progress cleaning up air and water and fighting global climate change. Nearly 800 former EPA officials signed a letter urging the Senate to reject his confirmation. Opponents argued that his ties to the fossil fuel industry and frequent lawsuits against the agency he now leads should disqualify him.

In his address to staff, Pruitt invoked the founding fathers Thomas Jefferson, James Madison and Alexander Hamilton to urge compromise.

The political environment, he said, was "a very toxic environment" that is "damaging to the overall objective of finding results and answers to the very challenging issues we face as a country".

Pruitt said he would lead the agency based on the principle of finding solutions and working toward solving problems.

"As we do our work here, we deal with very difficult monumental issues with respect to our future environment and natural resources. We must have the same kind of attitude of finding solutions and solving problems."

He addressed the need for acting with civility in the exchange of ideas. "We ought to be able to get together and wrestle through difficult issues and do so in a civil manner."

The EPA administrator said he would seek to listen to those under him: "You can't lead unless you listen." But he also called the agency to observe process and the rule of law.

Pruitt's address comes as the Oklahoma attorney general's office faces a court-ordered deadline to turn over its communications with fossil fuel companies to a watchdog group. Opponents believe the emails will show Pruitt's close ties to the energy industry.

Myron Ebell, a key presidential aide, said climate education material could be 'withdrawn' and review of car fuel efficiency standards could be reopened
Read more

Pruitt said that by following the rule of law, the agency could avoid litigation and the uncertainty that comes with it and said he would seek to ensure that the EPA engendered trust at the state level.

"Regulations ought to make things regular," he said. "Regulators exist to give certainty to those that they regulate. Those that we regulate ought to know what's expected of them so they can plan and allocate resources to comply.

"We need to avoid abuses, such as using the guidance process to engage in rule-making, or engaging regulation through litigation. We need to open and transparent in our rule-making."

LA Times
http://www.latimes.com/politics/washington/la-na-essential-washington-updates-scott-pruitt-tries-to-calm-a-very-1487701833-htmlstory.html
Scott Pruitt tries to calm a rattles EPA workforce
By Evan Halper 2/21/17

Even as the newly installed Environmental Protection Agency chief sought to calm employees anxious about his longtime opposition to the agency, Scott Pruitt managed to rattle them a little more.

Concerns about the direction he will take the EPA grew with publication over the weekend of his first interview as agency chief.

During it, he suggested to the Wall Street Journal that the EPA, which has taken the lead in federal efforts to regulate greenhouse gases, may not even be equipped to be playing much of a role at all.

He left open the possibility that the agency will look for leadership on global warming from the GOP Congress, where there has been a persistent opposition to meaningful climate action and mainstream climate science.

During his first agency-wide address Tuesday, Pruitt focused on his favorite themes of federalism, the need for predictability among regulated industries and the dangers of agency overreach. But he also sought to reassure the staff by remarking repeatedly about how much he values its work.

He expressed admiration for the many employees he met during his first meetings at the headquarters who have been with the agency for decades.

"You can't lead unless you can listen," Pruitt said. "I seek to listen, learn and lead with you." But he also bemoaned the "toxic" nature of modern politics.

Conservatives have accused the EPA of taking actions outside the rule of law in pursuit of a liberal environmental agenda. That's not how many employees of the 15,000-person agency view their work over the last several years. Their relationship with the new boss is certain to be tense. Just before Pruitt was confirmed Friday, 773 former employees signed a letter urging the Senate to reject him.

On Monday, Greenwire reported that Pruitt, a frequent target of protesters, is requesting round-the-clock security protection from the Secret Service. The protests may only intensify as Pruitt sets about dismantling the last administration's work on the environment.

"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," Sierra Club Executive Director Michael Brune said after Tuesday's speech.

Bloomberg BNA
http://esweb.bna.com/eslw/1245/split_display.adp?fedfid=105798485&vname=dennotallissues&wsn=498768000&searchid=29389141&doctypeid=2&type=date&mode=doc&split=0&scm=1245&pg=0
Pruitt Starts at EPA With Speech to Staff, E-mails Disclosures
By Brian Dabbs 2/21/17

Scott Pruitt will face an eventful first day at the EPA.

The new addition to the agency, fresh off a stint as Oklahoma attorney general, is set to deliver his first remarks to EPA staff just as an Oklahoma district court compels the release of thousands of his former office's e-mails with fossil fuel companies. Adding to that, Democrats and environmental groups are pledging to hound the new Environmental Protection Agency administrator to ensure he complies with the law after Pruitt was confirmed Feb. 17 largely along partisan lines.

The Senate's vote capped weeks of gamesmanship and partisan bickering featuring last-minute Democratic pleas to postpone the vote for 10 days so Senators could review the roughly 2,500 e-mails with fossil fuel companies an Oklahoma judge ordered released by Feb. 21. That's the same day Pruitt will address EPA staff.

"Even if the Republicans in Congress are as actively engaged in covering up his misdeeds at EPA as they have been engaged in covering up the dark-money operation of Mr. Pruitt and the e-mails of Mr. Pruitt, there are still avenues of litigation, of ethics disclosure and of press inquiry that open things up quite a lot," Sen. Sheldon Whitehouse (D-R.I.) told reporters Feb. 16.

Sen. Bernie Sanders (I-Vt.) also denounced Pruitt, but said it's unclear whether the Republican Senate will conduct genuine oversight over the new administrator. "We will see," Sanders told Bloomberg BNA.

Democrats have repeatedly accused Pruitt of secretly raising money from fossil fuel companies, while Republicans and some energy-state Democrats say he will scale back onerous EPA regulations.
Sen. Jim Inhofe (R-Okla.), a chief Pruitt supporter, said massive regulatory rollbacks may take time.

"I think that's jumping the gun," Inhofe told Bloomberg BNA. "The next step is to try to fill in his cabinet. His problem is, he is going to have to have personnel to make all these things happen and get busy. But I know he is going to try and do that."

EPA Extols Pruitt

Still, the EPA lauded the incoming chief in a message immediately following his confirmation.

"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," the agency said in a statement. "Mr. Pruitt will lead EPA in a way that our future generations inherit a better and healthier environment while advancing America's economic interests."

As an example of his environmental accomplishments, the agency pointed to a deal Pruitt with struck with his Arkansas counterpart to decrease phosphorus pollution in the Illinois River watershed. The statement also referenced Pruitt's extensive track record of litigation against EPA regulations.

"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," said the agency.

An EPA spokeswoman didn't respond for comment on whether Pruitt has already resigned as Oklahoma attorney general. Oklahoma, as represented by the attorney general's office, is still involving in a range of suits against EPA, such as challenges to the Clean Water Rule, Clean Power Plan, ozone air quality standards, mercury standards for power plants and methane limits for the oil and natural gas industry.

Neither the EPA or the White House responded to Bloomberg BNA's request for comment on Pruitt's priorities.
Democratic Rancor

The Pruitt nomination passed the Senate 52-46 with two Democrats, Sens. Joe Manchin (W.Va.) and Heidi Heitkamp (N.D.), joining Republicans in support.

An environmental group, Friends of the Earth, pledged to hold Manchin and Heitkamp accountable for undermining the "resistance to [President Donald Trump's] extreme agenda."

Those Democrats, however, joined the rest of their caucus in voting to delay the vote by 10 days. Manchin told Bloomberg BNA the disclosure of the requested e-mails would have helped properly vet the nominee. "I would have liked to have seen them," Manchin said, adding that he personally asked Senate Majority Leader Mitch McConnell (R-Ky.) to delay the vote. But Pruitt will put in place policies to benefit West Virginia, a state embattled by a loss of coal jobs, Manchin said.

The Center for Media and Democracy, a watchdog group, and the Oklahoma chapter of the American Civil Liberties Union, sued the state attorney general's office, headed by Pruitt, over a long-delayed open records release of the 2,500 e-mails.

The request calls for Pruitt's correspondence with Peabody Energy Inc., Arch Coal Inc., Murray Energy Corp., Devon Energy Corp. and Koch Industries Inc., among other organizations. Judge Aletia Haynes Timmons Feb. 17 ordered the release of the e-mails by Feb. 21.

Democrats blasted Republicans for refusing to postpone the confirmation vote to assess the e-mails.
"[Republicans] will now own whatever comes out on [Feb. 21] and subsequent releases of the e-mails," Sen. Brian Schatz (D-Hawaii), a fierce advocate of combating climate change, told reporters.

Asked why he wouldn't sign off on a delay, McConnell responded: "Because I choose not to. And if they were not making that argument, they'd be making another argument."
—With assistance from Dean Scott.

Politico
http://www.politico.com/story/2017/02/scott-pruitt-epa-changes-235231
New EPA chief treads softly, but signals big changes to come
By Eric Wolff and Alex Guillen 2/21/17, 1:22PM

New EPA Administrator Scott Pruitt offered a conciliatory greeting Tuesday to employees of the agency that he frequently sued in his previous job as Oklahoma's attorney general — but he made clear he plans a sharp departure from the Obama administration in the agency's strategy.

"Regulators exist to give certainty to those that they regulate," he told a group of about 100 agency employees. "Those that we regulate ought to know what we expect of them so that they can plan and allocate resources to comply. That's really the job of the regulator, and the process that we engage in in adopting regulation is very, very important because it sends a message."

In his previous job, Pruitt had sued to block Obama's EPA rules on climate change and the reach of the Clean Water Act — regulations that the White House is expected to gut with executive orders in the coming days.

Pruitt said the EPA would stop the "abuses that occur sometimes: Guidance through rulemaking, or using the guidance process to do rulemaking, or engaging in litigation — regulation through litigation, consent decrees that actually bypass the Administrative Procedures Act."

Pruitt also praised the founding fathers, who he said addressed the problems of their day but "didn't shirk their responsibility."

He also used the meeting at EPA headquarters as a sign of how people can disagree and still be able to sit down and have a productive meeting.

"They acted with civility," he said. "Civility is something I believe in very much."

E&E News
http://www.eenews.net/greenwire/2017/02/21/stories/1060050365
Pruitt's pitch to staff: Give me a chance
By Robin Bravender and Kevin Bogardus 2/21/17

Scott Pruitt talked up his listening skills and desire for "civility" as he addressed a skeptical U.S. EPA staff today.

In his first speech to the agency since his swearing in as EPA administrator Friday, Pruitt stressed his respect for the agency's career staff. He hinted broadly at big changes that are expected to come to the agency under the Trump administration, although he declined to offer specific plans about efforts to repeal Obama administration environmental rules.

Many career EPA staffers have been wary about Pruitt's arrival after the former Oklahoma attorney general battled the agency's regulations in court and vowed major overhauls at the agency.

But Pruitt today cautioned those listening against jumping to conclusions.

"You don't know me very well," he told staff and press gathered in the Rachel Carson Green Room at EPA headquarters in Washington.

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

Pruitt steered clear of specifics about the Trump administration's energy policies in his 11-minute speech. He didn't, for example, delve into plans for withdrawing the Obama administration's Waters of the U.S. rule and Clean Power Plan, which he and President Trump have said they plan to do (*Greenwire*, Feb. 20).

Instead, Pruitt's greeting today appeared to be an attempt to calm the waters at the agency where many staffers are anxious.

"Civility is something I believe in very much. We ought to be able to get together and wrestle through some very difficult issues and do so in a civil manner," he told employees.

He added, "I seek to be a good listener. Those of you that have been here for quite some time, whether it's in the air area or water or whatever area that you may be in, I look forward to spending time with you, not just to address certain issues but really spend time and dig down deep with respect to how we're going to do business in the future and get to know you personally and get to know how I can be a resource to you as you do your work. ... You can't lead unless you listen."

The new administrator hinted broadly at some of the reforms he'd like to see at EPA. He said the agency has a responsibility to "avoid abuses that occur sometimes" in rulemaking, and he stressed the importance of following the "rule of law" and in partnering with states through federalism. "I seek to ensure that we engender the trust of those at the state level," he said.

Catherine McCabe, who served as EPA's acting boss ahead of Pruitt's confirmation, offered the new administrator gifts, including an EPA lapel pin and an agency baseball cap.

Pruitt, the former co-owner of Oklahoma City's minor league baseball team, said he'd wear the EPA hat with pride to Washington Nationals games.

"I am excited about being in a city that actually has a major league baseball team," he said.

Some EPA employees attended today's event in person. Others tuned in online or listened by phone.

As Pruitt settles into his job, EPA staff and environmentalists will be watching closely to see how he leads the agency.

Agency employees were "hoping not to hear 'Death and Destruction for EPA,'" said John O'Grady, an EPA union leader, ahead of the speech. "Probably what we will hear is a lot of very smooth political talk, but the proof will be in the executive orders that President Trump issues."

The Trump administration is widely expected to issue executive orders directing the rollback of some of President Obama's signature environmental rules, including the Clean Power Plan and WOTUS. Those orders are expected to come as early as this week.

Forbes
http://www.forbes.com/sites/ericmack/2017/02/21/scott-pruitt-lays-out-a-vision-for-the-epa-that-contradicts-the-mission-of-the-epa/#4a7a83025829
Scott Pruitt Lays Out A Vision For The EPA That Contradicts The Mission Of The EPA
By Eric Mack 2/21/17, 1:10PM

New Environmental Protection Agency administrator Scott Pruitt addressed EPA staff and the media Tuesday and in a speech lasting less than fifteen minutes, he spoke mostly about protecting jobs, industry and "the marketplace" and oh yea, the environment, too.

Pruitt comes to the Trump administration from his previous job as Oklahoma Attorney General where he spent a fair amount of time suing the very federal agency that he now heads. In six years he filed more than a dozen lawsuits against the EPA over expansion of the Clean Water Act and regulations on coal-fired power plants.

If that track record didn't make it clear what direction Pruitt will take the EPA, reading between the words of his introduction to the career employees who have spent decades working to safeguard our natural environment solidify it in crystal.

To start, let's just note that the word "climate" did not pass Pruitt's lips, so that's clearly no longer a priority at EPA, as we suspected.

Pruitt began laying out his vision and principles for running the agency by sharing a story of how the founding fathers once sat down together to work out a compromise that would lead to moving the nation's capitol from New York to the shores of the Potomac. He used the historical anecdote as a metaphor for how he will seek dialogue and compromise to address issues and problem solving related to "our environment and natural resources."

To be clear, in this context Pruitt is clearly referring to the industries that extract natural resources like oil and gas to bring them to market.

Pruitt sounds like a nice, reasonable guy in his remarks to be sure, but he's laying out a vision that already undercuts the very mission and long-term objectives of the agency he now leads.

He's not an elected official trying to compromise with other politicians to get bills passed. More of that sort of compromise, which is what was actually happening in his historical anecdote, would be great. But agencies like the EPA have missions and duties that are laid out in statute, which they must execute. Compromise with industry is not included. The mission of the EPA is actually quite simple: "to protect human health and the environment -- air, water, and land."

That's it. Notice there's no mention of protecting extractive industries. For an EPA administrator to begin his tenure by calling for compromise and working together with polluters is a bit like an attorney representing a rape victim sitting down with the client before trial and reminding her that they'll need to keep in mind the concerns and needs of the perpetrator as they prosecute the case.

Pruitt's concluding message was that he believes the EPA can be "pro-energy, pro-jobs and pro-environment."

I suppose it can, but that's not the EPA's job. There are countless other interests out there that are pro-energy and pro-jobs. The EPA was created to be solely concerned with the environment and human health.

To compromise that mission internally, before even sitting down at the table with the energy industry and other polluters, makes what we already knew a matter of public record and imminent policy: that Administrator Pruitt is still the agency's primary adversary, even as he takes its reins.

Washington Examiner
http://www.washingtonexaminer.com/pruitt-federalism-matters-at-epa/article/2615361
Pruitt: 'Federalism matters' at EPA
By John Siciliano 2/21/17, 1:01PM

New Environmental Protection Agency Administrator Scott Pruitt wants to make the agency a place where "federalism matters" and states are not seen as adversaries, he said Tuesday.

"I seek to ensure that we engender the trust of those at the state level," rather than approach them as "adversaries," Pruitt said in his first address to agency staff on Tuesday.

He made the comments after being sworn in as President Trump's head of the EPA on Friday, despite widespread Democratic opposition and protests by environmental groups and former EPA administrators.

Trump has pledged to roll back a number of EPA regulations seen as detrimental to coal miners and energy production jobs.

Pruitt said Tuesday that he doesn't see a conflict between being pro-energy and pro-environment. "We can be both pro-energy and pro-environment ... and we don't have to choose."

Pruitt also wants to make sure everything the agency does is based firmly in statute and the law.

He said the agency should abide by the law to "avoid litigation," devoting more of its time doing the business of the agency, and less time going to court over its regulations.

Washington Times
http://www.washingtontimes.com/news/2017/feb/21/scott-pruitt-new-epa-chief-agency-will-respect-rul/
New EPA chief Pruitt says agency will respect rule of law, states' rights
By Ben Wolfgang 2/21/17

He didn't delve into policy specifics nor did he mention his predecessors by name, but new Environmental Protection Agency Administrator Scott Pruitt on Tuesday told federal employees that under his leadership the agency once again will adhere to the rule of law and will respect states' rights.

In a speech to EPA workers in Washington, Mr. Pruitt — the former attorney general of Oklahoma who often clashed with the agency in court as he challenged former President Obama's climate-change agenda — said federal environmental; regulations often have been unnecessarily cumbersome and expensive, and have created confusion rather than clarity.

"Regulations ought to make things regular. Regulators exist to give certainty to those they regulate," he said. "I seek to ensure that we engender the trust of those at the state level, that those at the state level see us as partners ... and not as adversaries."

Mr. Pruitt was confirmed last week by a Senate vote of 52 to 46, drawing the support of two Democrats — Sen. Joe Manchin of West Virginia and Sen. Heidi Heitkamp of North Dakota. Republican Sen. Susan Collins of Maine voted against him, saying she believes he's unfit to lead the agency.

His address comes the same day the Oklahoma attorney general's office is set to release nearly 3,000 emails containing communications between Mr. Pruitt and oil-and-gas companies. Democrats believe those documents will show clear collusion between the new EPA chief and the fossil fuels sector, though their concerns were not enough to delay last Friday's vote.

Mr. Pruitt has defended his close relationship with oil-and-gas firms while Oklahoma attorney general, saying it was his duty to defend his state's industries against unfair or unlawful regulations.

CNBC
http://www.kjrh.com/news/local-news/epa-head-scott-pruitt-to-address-agency-employees-in-speech-tuesday
EPA chief Scott Pruitt says regulators' exist to give certainty
2/21/17

EPA Administrator Scott Pruitt called on his agency to offer certainty to those it regulates and advocated for federalism in his first speech to Environmental Protection Agency employees on Tuesday.

"Regulations ought to make things regular. Regulators exist to give certainty to those that they regulate. Those that we regulate ought to know what's expected of them, so that they can plan and allocate resources to comply," Pruitt said in comments that reflected his remarks in a hearing before a Senate committee last month.

President Donald Trump's divisive pick to lead the EPA was confirmed and sworn in on Friday, following efforts by Democrats to block the confirmation in committee hearings and before the full Senate.

Environmentalists and progressives have fiercely opposed Pruitt, who has questioned the science behind climate change and sued the EPA 14 times on behalf of Oklahoma while serving as the state's attorney general. Nearly 800 former EPA officials signed a letter urging the Senate to reject Pruitt's confirmation.

Conservatives and the energy industry have hailed Pruitt as an advocate for giving states more control over environmental rules and for fighting what they see as regulatory overreach by the Obama administration. Pruitt is widely expected to execute Trump'spromise to scale back Obama-era rules and initiatives aimed at curbing greenhouse gas emissions.

Pruitt's first speech comes on the same day the Oklahoma attorney general's office faces a court-ordered deadline to turn over its communications with fossil fuel companies to a watchdog group. A *New York Times* investigation found the office had signed a letter drafted by Devon Energy that accused regulators of overstating pollution from natural gas wells.

Katherine So
Office of Media Relations Intern
U.S. Environmental Protection Agency
Telephone: (202)-564-4511
so.katherine@epa.gov

Message

From: Talty, Mark [Talty.Mark@epa.gov]
Sent: 3/22/2017 11:30:29 AM
To: Greenwalt, Sarah [greenwalt.sarah@epa.gov]
CC: Schwab, Justin [schwab.justin@epa.gov]; Simons, Andrew [Simons.Andrew@epa.gov]; Siciliano, CarolAnn [Siciliano.CarolAnn@epa.gov]
Subject: RE:
Attachments:

Attorney Client/Attorney Work Product/ Ex. 5

Hi, Sara. It was a pleasure meeting you.

Attached please find four cases that address Deliberative Process / Attorney-Client / Attorney Work Product / Ex. 5

Deliberative Process / Attorney-Client / Attorney Work Product / Ex. 5

Please let me know if you have any questions.

Best regards,

Mark

Mark C. Talty
Cross-Cutting Issues Law Office
Office of General Counsel
U.S. Environmental Protection Agency
(202) 564-1262
talty.mark@epa.gov

From: Greenwalt, Sarah
Sent: Tuesday, March 21, 2017 6:40 PM
To: Talty, Mark <Talty.Mark@epa.gov>
Cc: Schwab, Justin <schwab.justin@epa.gov>
Subject:

Hi Mark!

Was glad to meet you this afternoon. Justin mentioned that you had case law relevant to Deliberative Process / Attorney-Client / Attorney Work Product / Ex. 5 Deliberative Process / Attorney-Client / Attorney Work Product / Ex. 5. Can you send me the three or four most salient cases you have on that topic? I'd like to be able to speak knowledgably on that issue.

Appreciate your time.

Message

From: U.S. EPA Media Relations [noreply-subscriptions@epa.gov]
Sent: 4/13/2017 5:46:18 PM
To: Schwab, Justin [schwab.justin@epa.gov]
Subject: EPA Launches Back-to-Basics Agenda at Pennsylvania Coal Mine

EPA HEADQUARTERS
NEWS RELEASE
WWW.EPA.GOV/NEWSROOM

CONTACT:
press@epa.gov

FOR IMMEDIATE RELEASE
April 13, 2017

EPA Launches *Back-to-Basics* Agenda at Pennsylvania Coal Mine

SYCAMORE, Pa. – U.S. Environmental Protection Agency Administrator Scott Pruitt visited the Harvey Mine in Sycamore, Pa., today, to meet with coal miners and announce EPA's *Back-to-Basics* agenda. The agenda reinforces Administrator Pruitt's commitment to refocusing EPA on its intended mission, returning power to the states, and creating an environment where jobs can grow.

"What better way to launch EPA's *Back-to-Basics* agenda than visiting the hard-working coal miners who help power America. The coal industry was nearly devastated by years of regulatory overreach, but with new direction from President Trump, we are helping to turn things around for these miners and for many other hard working Americans," **said Administrator Pruitt.** "*Back-to-Basics* means returning EPA to its core mission: protecting the environment by engaging with state, local, and tribal partners to create sensible regulations that enhance economic growth."

Administrator Pruitt spoke with coal miners about the President's recent Energy Independence Executive Order, which directs EPA and other federal agencies to review the Clean Power Plan and revise regulatory barriers that impede energy independence, including unnecessary burdens on coal miners and coal-fired electric utilities.

"We welcome Administrator Pruitt to Southwestern Pennsylvania and are very encouraged by the new Administration's commonsense approach in balancing the need for environmental protection, energy development and economic growth," **said Jimmy Brock, CEO of CNX Coal Resources.**

"The Pennsylvania Coal Alliance looks forward to new direction from the EPA. We are hopeful that Administrator Pruitt will work with to stop the systematic regulatory approach to dismantle industry, and work with us to continue responsible mining and contribute billions to Pennsylvania's economy," **said Rachel Gleason, Executive Director of PA Coal Alliance.**

"Administrator Pruitt's appearance should give confidence to coal communities across the country that the days when our government stands in opposition to them are over and that the appreciation they deserve for securing the nation's energy supply for our manufacturing industries and families is finally at hand," **said Hal Quinn, President and CEO of the National Mining Association**.

In his speech to Pennsylvania miners, Administrator Pruitt explained that EPA's *Back-to-Basics* agenda means returning EPA to its core mission and focusing on greater value and results. EPA will be partnering with states and tribes to ensure a thoughtful approach is used to maximize resources to protect America's air, land, and water.

EPA'S *BACK-TO-BASICS* AGENDA

Protecting the environment; engaging with state, local and tribal partners; and creating sensible regulations that enhance economic growth.

- Following the President's Energy Independence Executive Order, Administrator Pruitt signed four notices to review and, if appropriate, to revise or rescind major, economically significant, burdensome rules the last Administration issued. This includes the so-called Clean Power Plan that threatens over 125,000 U.S. jobs.
- EPA is restoring states' important role in the regulation of local waters by reviewing the WOTUS ("waters of the U.S.") rule.
- EPA is clearing the backlog of new chemicals that were waiting approval from EPA, so they can go to market, and companies can innovate and create jobs.
- EPA is helping states achieve high air quality targets, clean up toxic waste sites and improve America's water infrastructure.
- EPA rescinded an unjustified, premature evaluation of greenhouse gas and fuel economy standards for model year 2022-2025 vehicles, and is working with the U.S. Department of Transportation (DOT) to conduct a collaborative and robust review of the standards.
- The agency is reviewing the Oil and Gas Methane New Source Performance Standards for new and modified sources, to determine whether it is duplicative.
- EPA is allocating funds for vital environmental projects that go directly to the health of our citizens, such as providing $100 million to upgrade drinking water infrastructure in Flint, Michigan.
- EPA is stopping the methane Information Collection Request (ICR) by telling businesses they no longer have this additional bureaucratic burden, with the cost to American businesses attempting to comply exceeding $42 million.
- Launched the EPA Regulatory Reform Task Force to undergo extensive reviews of the misaligned regulatory actions.

R057

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

Message

From: Bowman, Liz [Bowman.Liz@epa.gov]
Sent: 4/18/2017 1:14:01 PM
To: Fotouhi, David [fotouhi.david@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]
CC: Freire, JP [Freire.JP@epa.gov]; Konkus, John [konkus.john@epa.gov]; Greenwalt, Sarah [greenwalt.sarah@epa.gov]
Subject: RE: Comment on WOTUS rewrite

Thanks, David. I think that suggestion works and would offer the following:

Deliberative Process / Attorney-Client Ex. 5

From: Fotouhi, David
Sent: Tuesday, April 18, 2017 8:22 AM
To: Bowman, Liz <Bowman.Liz@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>
Cc: Freire, JP <Freire.JP@epa.gov>; Konkus, John <konkus.john@epa.gov>; Greenwalt, Sarah <greenwalt.sarah@epa.gov>
Subject: RE: Comment on WOTUS rewrite

Deliberative Process/Attorney-Client Ex. 5

David Fotouhi

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

From: Bowman, Liz
Sent: Monday, April 17, 2017 2:45 PM
To: Fotouhi, David <fotouhi.david@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>
Cc: Freire, JP <Freire.JP@epa.gov>; Konkus, John <konkus.john@epa.gov>; Greenwalt, Sarah <greenwalt.sarah@epa.gov>
Subject: FW: Comment on WOTUS rewrite

Justin/David – I just spoke with Sarah and can you help fill in the following:

Deliberative Process / Attorney-Client Ex. 5

Deliberative Process / Attorney-Client Ex. 5

From: Annie Snider [mailto:asnider@politico.com]
Sent: Monday, April 17, 2017 10:47 AM
To: Konkus, John <konkus.john@epa.gov>
Cc: Press <Press@epa.gov>
Subject: Comment on WOTUS rewrite

Hi John,

I am filing a story today on one of the issues that I floated to you a couple of weeks ago – this idea of EPA contracting with an outside attorney or law firm to help with the WOTUS rewrite. This is something that I know members of the Waters Advocacy Coalition are actively discussing.

Here's what I'm wondering from EPA's end:

-Is EPA considering, or would it consider, contracting with an outside law firm or other entity to work on the Waters of the U.S. rulemaking? If so, what types of activities might the contract involve?

-What kind of conflict of interest guidelines would EPA impose in such a contract? Could a lawyer or firm that represents clients with a stake in the rulemaking be eligible?

-Would meetings between a contracted party and outside groups be subject to the same Administrative Procedures Act and Federal Advisory Committee Act requirements as apply to federal employees conducting a rulemaking?

-Has Pruitt or have EPA staffers met with any of the following groups on the Waters of the U.S. rulemaking? Hunton & Williams LLP, the American Farm Bureau Federation, the National Association of Homebuilders, the National Pork Producers Council, the National Cattlemen's Beef Association, the National Association of Realtors, the Fertilizer Institute, the American Petroleum Institute, the National Association of Manufacturers, or the Edison Electric Institute?

I am working on a 3pm deadline today, feel free to give me a call if you'd like to discuss.

Best,
Annie

Annie Snider
Reporter
POLITICO
asnider@politico.com
Personal Phone / Ex. 6 - desk
- cell
@AnnElizabeth18

Message

From: Prabhu, Aditi [Prabhu.Aditi@epa.gov]
Sent: 2/9/2017 11:27:02 PM
To: Schwab, Justin [schwab.justin@epa.gov]
Subject: Litigation deadline charts
Attachments: Litigation Deadlines 2-9-2017 - OneDocket.pdf; Weekly Report 2-9-17.docx

Flag: Flag for follow up

Hi Justin,

Attached are (1) a chart of the litigation deadlines through the end of April, and (2) a more detailed 2-week look ahead with additional information on matters with upcoming deadlines.

Aditi

Aditi Prabhu
Special Assistant, Office of General Counsel
U.S. Environmental Protection Agency
(202)564-2473

Message

From: Fisher, Mike [Fisher.Mike@epa.gov]
Sent: 3/21/2017 11:35:28 PM
To: Neugeboren, Steven [Neugeboren.Steven@epa.gov]
CC: Schwab, Justin [schwab.justin@epa.gov]; Levine, MaryEllen [levine.maryellen@epa.gov]; Harrell, Martin [Harrell.Martin@epa.gov]; Miller, Patricia-C [Miller.Patricia-C@epa.gov]; Seaton, Tom [Seaton.Tom@epa.gov]; Morgan, James [Morgan.James@epa.gov]; Wendelowski, Karyn [wendelowski.karyn@epa.gov]; Wehling, Carrie [Wehling.Carrie@epa.gov]; Kupchan, Simma [Kupchan.Simma@epa.gov]
Subject: Re: Q re WOTUS rule and related EO

Thanks, all - greatly appreciate the quick response.

Michael R . Fisher
Director, Legal Counsel Division
Office of Criminal Enforcement, Forensics & Training
US EPA
(202) 564-1063

On Mar 21, 2017, at 6:41 PM, Neugeboren, Steven <Neugeboren.Steven@epa.gov> wrote:

> Thanks for the quick response.
>
> Steven Neugeboren
> Associate General Counsel
> Water Law Office
> Environmental Protection Agency
> 202-564-5488
>
> -----Original Message-----
> From: Schwab, Justin
> Sent: Tuesday, March 21, 2017 6:41 PM
> To: Neugeboren, Steven <Neugeboren.Steven@epa.gov>
> Cc: Fisher, Mike <Fisher.Mike@epa.gov>; Levine, MaryEllen <levine.maryellen@epa.gov>; Harrell, Martin <Harrell.Martin@epa.gov>; Miller, Patricia-C <Miller.Patricia-C@epa.gov>; Seaton, Tom <Seaton.Tom@epa.gov>; Morgan, James <Morgan.James@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>
> Subject: Re: Q re WOTUS rule and related EO
>
> **Attorney Client / Deliberative / Ex. 5 Ex. 7(a), 7(e)**
>
> Sent from my iPhone
>
> On Mar 21, 2017, at 6:33 PM, Neugeboren, Steven <Neugeboren.Steven@epa.gov> wrote:

Mike – I have discussed and sent your email to Justin Schwabb, new political deputy general counsel who also works with OECA. He is going to discuss with folks. He will also discuss with Kevin Minoli.

Attorney Client / Deliberative / Ex. 5 Ex. 7(a), 7(e)

Justin – please let us know if you need anything or how you'd like to proceed from here.

Am copying the WOTUS team.

Steven Neugeboren
Associate General Counsel
Water Law Office
Environmental Protection Agency
202-564-5488

From: Fisher, Mike
Sent: Tuesday, March 21, 2017 3:40 PM
To: Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Levine, MaryEllen <levine.maryellen@epa.gov>
Cc: Harrell, Martin <Harrell.Martin@epa.gov>; Miller, Patricia-C <Miller.Patricia-C@epa.gov>; Seaton, Tom <Seaton.Tom@epa.gov>; Morgan, James <Morgan.James@epa.gov>
Subject: Q re WOTUS rule and related EO
Importance: High

Attorney Client / Deliberative / Ex. 5 Ex. 7(a), 7(e)

Attorney Client / Deliberative / Ex. 5 Ex. 7(a), 7(e)

Thanks much . . .

Attorney Client / Deliberative / Ex. 5 Ex. 7(a), 7(e)

Michael R. Fisher
Director, Legal Counsel Division
Office of Criminal Enforcement, Forensics & Training U.S. EPA
1200 Pennsylvania Ave. N.W.
WJC South Room 1202D (Mail Code 2232A) Washington, D.C. 20004

202 564 1063 (phone) : 202 501 0579 (fax)

Help EPA fight pollution - report environmental violations at http://www.epa.gov/tips

<3-20-17 Defense letter re WOTUS EO.PDF> <US v Brozena - Indictment.pdf>

Message

From: Schmidt, Lorie [Schmidt.Lorie@epa.gov]
Sent: 3/18/2017 4:30:25 AM
To: Schwab, Justin [schwab.justin@epa.gov]
Subject: Re: Draft FR notices for Energy EO

Sorry. Thought I had corrected that.

Sent from my iPhone

On Mar 17, 2017, at 7:11 PM, Schwab, Justin <schwab.justin@epa.gov> wrote:

Deliberative Process / Attorney-Client / Attorney Work Product Ex. 5

Sent from my iPhone

On Mar 17, 2017, at 7:00 PM, Schmidt, Lorie <Schmidt.Lorie@epa.gov> wrote:

Ryan

Deliberative Process / Attorney-Client / Attorney Work Product Ex. 5

Please let me know if you need anything else on these or have any questions. I will be checking email periodically over the week-end.

Lorie

Lorie Schmidt
Associate General Counsel
Air and Radiation Law Office
Office of General Counsel
US Environmental Protection Agency
(202)564-1681 (office)
Personal Phone / Ex. 6 mobile)

<FR Notice.oilandgas 3-17 7 pm.docx>

<FR Notice.CPP 3-17 6 pm.docx>

<FR Notice.CPS 3-17 7 pm.docx>

Message

From: Bowman, Liz [Bowman.Liz@epa.gov]
Sent: 4/18/2017 12:36:47 PM
To: Fotouhi, David [fotouhi.david@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]
CC: Freire, JP [Freire.JP@epa.gov]; Konkus, John [konkus.john@epa.gov]; Greenwalt, Sarah [greenwalt.sarah@epa.gov]
Subject: RE: Comment on WOTUS rewrite

Do y'all have comments on this, is it okay to send?

From: Bowman, Liz
Sent: Monday, April 17, 2017 2:45 PM
To: David Fotouhi (fotouhi.david@epa.gov) <fotouhi.david@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>
Cc: JP (freire.jp@epa.gov) <freire.jp@epa.gov>; Konkus, John <konkus.john@epa.gov>; Greenwalt, Sarah <greenwalt.sarah@epa.gov>
Subject: FW: Comment on WOTUS rewrite

Justin/David – I just spoke with Sarah and can you help fill in the following:

Deliberative Process /Attorney-Client Ex. 5

From: Annie Snider [mailto:asnider@politico.com]
Sent: Monday, April 17, 2017 10:47 AM
To: Konkus, John <konkus.john@epa.gov>
Cc: Press <Press@epa.gov>
Subject: Comment on WOTUS rewrite

Hi John,

I am filing a story today on one of the issues that I floated to you a couple of weeks ago – this idea of EPA contracting with an outside attorney or law firm to help with the WOTUS rewrite. This is something that I know members of the Waters Advocacy Coalition are actively discussing.

Here's what I'm wondering from EPA's end:

-Is EPA considering, or would it consider, contracting with an outside law firm or other entity to work on the Waters of the U.S. rulemaking? If so, what types of activities might the contract involve?

-What kind of conflict of interest guidelines would EPA impose in such a contract? Could a lawyer or firm that represents clients with a stake in the rulemaking be eligible?

-Would meetings between a contracted party and outside groups be subject to the same Administrative Procedures Act and Federal Advisory Committee Act requirements as apply to federal employees conducting a rulemaking?

-Has Pruitt or have EPA staffers met with any of the following groups on the Waters of the U.S. rulemaking? Hunton & Williams LLP, the American Farm Bureau Federation, the National Association of Homebuilders, the National Pork Producers Council, the National Cattlemen's Beef Association, the National Association of Realtors, the Fertilizer Institute, the American Petroleum Institute, the National Association of Manufacturers, or the Edison Electric Institute?

I am working on a 3pm deadline today, feel free to give me a call if you'd like to discuss.

Best,
Annie

Annie Snider
Reporter
POLITICO
asnider@politico.com
Personal Phone / Ex. 6 desk
cell
@AnnElizabeth18

Message

From: Zenick, Elliott [Zenick.Elliott@epa.gov]
Sent: 4/13/2017 3:58:11 PM
To: Schwab, Justin [schwab.justin@epa.gov]
Subject: Automatic reply: CPP status check

I am out of the office please contact Lorie Schmidt for NSPS issues and Gautam Srinivasan for Regional Haze.

Message

From: Fotouhi, David [fotouhi.david@epa.gov]
Sent: 4/26/2017 9:33:15 PM
To: Bennett, Tate [Bennett.Tate@epa.gov]
CC: Schwab, Justin [schwab.justin@epa.gov]; Lyons, Troy [lyons.troy@epa.gov]
Subject: RE: New Mexico Delegation - Request for meeting on Gold King Mine
Attachments: Deliberative Process / Ex. 5

Absolutely.

Just as an FYI, the attached brief Deliberative Process / Ex. 5
Deliberative Process / Ex. 5 These claims are against the US, not EPA directly.

David Fotouhi

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

From: Bennett, Tate
Sent: Wednesday, April 26, 2017 5:31 PM
To: Fotouhi, David <fotouhi.david@epa.gov>
Cc: Schwab, Justin <schwab.justin@epa.gov>; Lyons, Troy <lyons.troy@epa.gov>
Subject: Re: New Mexico Delegation - Request for meeting on Gold King Mine

Can we reschedule till tomorrow so Troy can join?

On Apr 26, 2017, at 4:42 PM, Fotouhi, David <fotouhi.david@epa.gov> wrote:

> It's 4407A. I'm back at my office now.
>
> Sent from my iPhone
>
> On Apr 26, 2017, at 4:41 PM, Bennett, Tate <Bennett.Tate@epa.gov> wrote:
>
> > David, what is your office number again
> >
> > ---
> >
> > **From:** Schwab, Justin
> > **Sent:** Wednesday, April 26, 2017 4:35 PM
> > **To:** Bennett, Tate <Bennett.Tate@epa.gov>
> > **Cc:** Fotouhi, David <fotouhi.david@epa.gov>; Lyons, Troy <lyons.troy@epa.gov>
> > **Subject:** Re: New Mexico Delegation - Request for meeting on Gold King Mine
> >
> > I may not be able to join -
> > David if you can meet at 5 please don't wait for me and I will try to join (please email me to let me know where and when do you meet)
> >
> > Sent from my iPhone

On Apr 26, 2017, at 4:08 PM, Bennett, Tate <Bennett.Tate@epa.gov> wrote:

Sounds good.

From: Fotouhi, David
Sent: Wednesday, April 26, 2017 4:04 PM
To: Bennett, Tate <Bennett.Tate@epa.gov>
Cc: Schwab, Justin <schwab.justin@epa.gov>; Lyons, Troy <lyons.troy@epa.gov>
Subject: RE: New Mexico Delegation - Request for meeting on Gold King Mine

Both Justin and I just finished a meeting and are heading to another. I could regroup for a few minutes at 5:00 if that works.

David Fotouhi

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

From: Bennett, Tate
Sent: Wednesday, April 26, 2017 3:57 PM
To: Fotouhi, David <fotouhi.david@epa.gov>
Cc: Schwab, Justin <schwab.justin@epa.gov>; Lyons, Troy <lyons.troy@epa.gov>
Subject: RE: New Mexico Delegation - Request for meeting on Gold King Mine

Figured. Slammed from 4-5 unless you want to call me right now. Personal Phone / Ex. 6
Personal Phone / Ex. 6

From: Fotouhi, David
Sent: Wednesday, April 26, 2017 3:56 PM
To: Bennett, Tate <Bennett.Tate@epa.gov>
Cc: Schwab, Justin <schwab.justin@epa.gov>; Lyons, Troy <lyons.troy@epa.gov>
Subject: Re: New Mexico Delegation - Request for meeting on Gold King Mine

We should discuss before responding to this. Are you around this afternoon?

Sent from my iPhone

On Apr 26, 2017, at 3:54 PM, Bennett, Tate <Bennett.Tate@epa.gov> wrote:

Thoughts on how to handle?

From: Levine, Carolyn
Sent: Wednesday, April 26, 2017 3:26 PM
To: Richardson, RobinH <Richardson.RobinH@epa.gov>; Lyons, Troy <lyons.troy@epa.gov>; Ringel, Aaron <ringel.aaron@epa.gov>; Bennett, Tate <Bennett.Tate@epa.gov>; Gray, David <gray.david@epa.gov>
Subject: FW: New Mexico Delegation - Request for meeting on Gold King Mine

See request from NM delegation requesting a meeting with the Administrator for a status of activities related to the August 2015 Gold King Mine release.

Carolyn Levine
Office of Congressional and Intergovernmental Relations
U.S. EPA
(202) 564-1859
levine.carolyn@epa.gov

From: Black, Jonathan (Tom Udall) [mailto:Jonathan_Black@tomudall.senate.gov]
Sent: Wednesday, April 26, 2017 3:17 PM
To: Levine, Carolyn <Levine.Carolyn@epa.gov>
Cc: Hermann, Maya (Heinrich) <Maya_Hermann@heinrich.senate.gov>; Neff, Kirstin (Heinrich) <Kirstin_Neff@heinrich.senate.gov>; Mason, Graham (Graham.Mason@mail.house.gov) <Graham.Mason@mail.house.gov>; Garcia, Sisy <Sisy.Garcia@mail.house.gov>; Acosta, Alma <Alma.Acosta@mail.house.gov>; Schelble, Nathan <Nathan.Schelble@mail.house.gov>; MacGregor, Robert <Robert.MacGregor@mail.house.gov>; Black, Jonathan (Tom Udall) <Jonathan_Black@tomudall.senate.gov>
Subject: New Mexico Delegation - Request for meeting on Gold King Mine

Hi Carolyn,

Please find attached a copy of a letter that we will be putting into the mail today. The New Mexico Delegation is requesting a meeting with Administrator Pruitt on the Gold King Mine.

I will follow up with scheduler contacts if that will be helpful.

Thanks,
---Jonathan

TEXT:

April 26, 2017

The Honorable Scott Pruitt
Administrator
The Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Dear Mr. Administrator:

The spill at the Gold King Mine is now approaching its second anniversary. As you know, the spill had a devastating effect on the state of New Mexico and the Navajo Nation. Earlier this year, we denounced a decision by the previous Environmental Protection Agency (EPA) Administrator and Department of Justice announcing that the EPA is not liable under the Federal Tort Claims Act (FTCA) for damages caused by the Gold King Mine spill. This decision has left many impacted citizens without compensation. Nothing has changed in the past several months to assist them.

We write to you today to request a meeting to review the status of EPA's current and ongoing efforts to clean up the mine and impacted areas, to review monitoring of the affected rivers, to discuss compensation efforts for impacted citizens and to discuss what if any options EPA is now considering to further address the Gold King Mine in light of the decision by the EPA and Department of Justice. In your confirmation hearing before the Senate Committee on Environment and Public Works, you committed to reviewing the FTCA decision by the EPA and the Department of Justice and using whatever authorities you have under the law to help the impacted victims. We would appreciate hearing from you on this as well.

In the past Congress we introduced legislation to compensate injured individuals and businesses,

reimburse state, tribal and local governments, and support long term independent water quality monitoring. We worked in a bipartisan manner to include legislation addressing some of these issues in the Water Infrastructure Improvements for the Nation Act. However, the crucial issue of individual and business injury compensation remains unaddressed, especially in light of the FTCA decision. We have consistently expressed a willingness to work on legislation in a bipartisan manner to ensure that EPA is able to effectively address the needs of our constituents. We would like to reaffirm our position and engage with you on any tools necessary to make sure that those who were harmed are taken care of to the fullest.

Sincerely,

_____

_____

Tom Udall
United States Senator

Steve Pearce
United States Representative

_____

_____

Martin Heinrich
United States Senator

Ben Ray Luján
United States Representative

_____

Michelle Lujan Grisham

United States Representative

<Gold King Mine - NM Delegation - Meeting Request - (4-26-17).pdf>

Message

From: Neugeboren, Steven [Neugeboren.Steven@epa.gov]
Sent: 3/21/2017 10:41:22 PM
To: Schwab, Justin [schwab.justin@epa.gov]
CC: Fisher, Mike [Fisher.Mike@epa.gov]; Levine, MaryEllen [levine.maryellen@epa.gov]; Harrell, Martin [Harrell.Martin@epa.gov]; Miller, Patricia-C [Miller.Patricia-C@epa.gov]; Seaton, Tom [Seaton.Tom@epa.gov]; Morgan, James [Morgan.James@epa.gov]; Wendelowski, Karyn [wendelowski.karyn@epa.gov]; Wehling, Carrie [Wehling.Carrie@epa.gov]; Kupchan, Simma [Kupchan.Simma@epa.gov]
Subject: RE: Q re WOTUS rule and related EO

Thanks for the quick response.

Steven Neugeboren
Associate General Counsel
Water Law Office
Environmental Protection Agency
202-564-5488

-----Original Message-----
From: Schwab, Justin
Sent: Tuesday, March 21, 2017 6:41 PM
To: Neugeboren, Steven <Neugeboren.Steven@epa.gov>
Cc: Fisher, Mike <Fisher.Mike@epa.gov>; Levine, MaryEllen <levine.maryellen@epa.gov>; Harrell, Martin <Harrell.Martin@epa.gov>; Miller, Patricia-C <Miller.Patricia-C@epa.gov>; Seaton, Tom <Seaton.Tom@epa.gov>; Morgan, James <Morgan.James@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>
Subject: Re: Q re WOTUS rule and related EO

Deliberative Process / Attorney-Client / Ex. 5 7a / 7e

Sent from my iPhone

> On Mar 21, 2017, at 6:33 PM, Neugeboren, Steven <Neugeboren.Steven@epa.gov> wrote:
>
> Mike – I have discussed and sent your email to Justin Schwabb, new political deputy general counsel who also works with OECA. He is going to discuss with folks. He will also discuss with Kevin Minoli.
>

Deliberative Process / Attorney-Client / Ex. 5 7a / 7e

>
> Justin – please let us know if you need anything or how you'd like to proceed from here.
>
> Am copying the WOTUS team.
>
> Steven Neugeboren
> Associate General Counsel
> Water Law Office
> Environmental Protection Agency
> 202-564-5488
>
> From: Fisher, Mike
> Sent: Tuesday, March 21, 2017 3:40 PM
> To: Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Levine, MaryEllen
> <levine.maryellen@epa.gov>
> Cc: Harrell, Martin <Harrell.Martin@epa.gov>; Miller, Patricia-C
> <Miller.Patricia-C@epa.gov>; Seaton, Tom <Seaton.Tom@epa.gov>; Morgan,
> James <Morgan.James@epa.gov>
> Subject: Q re WOTUS rule and related EO
> Importance: High
>
> Hi you two –

Deliberative Process / Attorney-Client / Ex. 5 7a / 7e

Deliberative Process / Attorney-Client / Ex. 5 7a / 7e

Deliberative Process / Attorney-Client / Ex. 5 7a / 7e

> Thanks much . . .
>
> PS – Deliberative Process / Attorney-Client / Ex. 5 7a / 7e

Deliberative Process / Attorney-Client / Ex. 5 7a / 7e

>
> Michael R. Fisher
> Director, Legal Counsel Division
> Office of Criminal Enforcement, Forensics & Training U.S. EPA
> 1200 Pennsylvania Ave. N.W.
> WJC South Room 1202D (Mail Code 2232A) Washington, D.C. 20004
> 202 564 1063 (phone) : 202 501 0579 (fax)
>
> Help EPA fight pollution - report environmental violations at
> http://www.epa.gov/tips
>
> <3-20-17 Defense letter re WOTUS EO.PDF> <US v Brozena -
> Indictment.pdf>

Message

From: Schmidt, Lorie [Schmidt.Lorie@epa.gov]
Sent: 3/17/2017 11:00:04 PM
To: Jackson, Ryan [jackson.ryan@epa.gov]
CC: Greenwalt, Sarah [greenwalt.sarah@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]; Minoli, Kevin [Minoli.Kevin@epa.gov]; Dunham, Sarah [Dunham.Sarah@epa.gov]; Zenick, Elliott [Zenick.Elliott@epa.gov]; Brown, Byron [brown.byron@epa.gov]
Subject: Draft FR notices for Energy EO
Attachments: FR Notice.oilandgas 3-17 7 pm.docx; FR Notice.CPP 3-17 6 pm.docx; FR Notice.CPS 3-17 7 pm.docx

Ryan

Deliberative Process / Attorney-Client / Ex. 5

Please let me know if you need anything else on these or have any questions. I will be checking email periodically over the week-end.

Lorie

Lorie Schmidt
Associate General Counsel
Air and Radiation Law Office
Office of General Counsel
US Environmental Protection Agency
(202)564-1681 (office)
Personal Phone / Ex. 6 mobile)

Message

From: Schmidt, Lorie [Schmidt.Lorie@epa.gov]
Sent: 4/21/2017 3:35:09 AM
To: Schwab, Justin [schwab.justin@epa.gov]
Subject: **Attorney Client / Ex. 5**

Thanks.

Sent from my iPhone

On Apr 20, 2017, at 8:08 PM, Schwab, Justin <schwab.justin@epa.gov> wrote:

> Looks good. Lorie, i have left a copy with hand edits/comments on your chair.
>
> Sent from my iPhone
>
> On Apr 20, 2017, at 1:58 PM, Schwab, Justin <schwab.justin@epa.gov> wrote:
>
> > Thank you!
> >
> > Sent from my iPhone
> >
> > On Apr 20, 2017, at 1:38 PM, Schmidt, Lorie <Schmidt.Lorie@epa.gov> wrote:
> >
> > > Justin and Sarah
> > >
> > > **Ex. 5 - Deliberative Process/Attorney Client**
> > >
> > > Happy to talk if anyone has questions.
> > >
> > > Elliott – please chime in if I am missing anything we need to convey at this point.

Lorie

Attorney Client / Ex. 5

Message

From: Minoli, Kevin [Minoli.Kevin@epa.gov]
Sent: 4/21/2017 2:18:49 AM
To: OGC HQ ADDs [OGC_HQ_ADDs@epa.gov]; Albores, Richard [Albores.Richard@epa.gov]; Trudeau, Shaun [Trudeau.Shaun@epa.gov]; Prabhu, Aditi [Prabhu.Aditi@epa.gov]
CC: Packard, Elise [Packard.Elise@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]; Fotouhi, David [fotouhi.david@epa.gov]
Subject: Fwd: OGC Weekly Report 4.20.17.docx
Attachments: OGC Weekly Report 4.20.17.docx; ATT00001.htm

Flag: Flag for follow up

FYI

Kevin S. Minoli
Acting General Counsel
Office of General Counsel
US Environmental Protection Agency
Main Office Line: 202-564-8040

Begin forwarded message:

> **From:** "Minoli, Kevin" <Minoli.Kevin@epa.gov>
> **Date:** April 20, 2017 at 10:18:11 PM EDT
> **To:** Weekly Report Group <Weekly_Report_Group@epa.gov>
> **Cc:** "Packard, Elise" <Packard.Elise@epa.gov>, "Schwab, Justin" <schwab.justin@epa.gov>, "Fotouhi, David" <fotouhi.david@epa.gov>, "Greenwalt, Sarah" <greenwalt.sarah@epa.gov>, "Gunasekara, Mandy" <Gunasekara.Mandy@epa.gov>, "Brown, Byron" <brown.byron@epa.gov>, "Dravis, Samantha" <dravis.samantha@epa.gov>, "Shapiro, Mike" <Shapiro.Mike@epa.gov>, "Dunham, Sarah" <Dunham.Sarah@epa.gov>, "Cleland-Hamnett, Wendy" <Cleland-Hamnett.Wendy@epa.gov>, "Breen, Barry" <Breen.Barry@epa.gov>, "Fine, Steven" <fine.steven@epa.gov>, "Vizian, Donna" <Vizian.Donna@epa.gov>
> **Subject: OGC Weekly Report 4.20.17.docx**
>
> All- OGC's Weekly Report is attached. Feel free to reach out to me, Elise, Justin, or David with any questions. Thanks, Kevin
>
> Kevin S. Minoli
> Acting General Counsel
> Office of General Counsel
> US Environmental Protection Agency
> Main Office Line: 202-564-8040
>
> Begin forwarded message:
>
>> **From:** "Minoli, Kevin" <Minoli.Kevin@epa.gov>
>> **Date:** April 20, 2017 at 7:23:38 PM EDT
>> **To:** "Minoli, Kevin" <Minoli.Kevin@epa.gov>
>> **Subject: OGC Weekly Report 4.20.17.docx**

Message

From: Neugeboren, Steven [Neugeboren.Steven@epa.gov]
Sent: 3/21/2017 10:33:18 PM
To: Fisher, Mike [Fisher.Mike@epa.gov]; Levine, MaryEllen [levine.maryellen@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]
CC: Harrell, Martin [Harrell.Martin@epa.gov]; Miller, Patricia-C [Miller.Patricia-C@epa.gov]; Seaton, Tom [Seaton.Tom@epa.gov]; Morgan, James [Morgan.James@epa.gov]; Wendelowski, Karyn [wendelowski.karyn@epa.gov]; Wehling, Carrie [Wehling.Carrie@epa.gov]; Kupchan, Simma [Kupchan.Simma@epa.gov]
Subject: Attorney Client / Ex. 5
Attachments: Attorney Client / Ex. 5

Mike – I have discussed and sent your email to Justin Schwabb, new political deputy general counsel who also works with OECA. Deliberative Process / Attorney-Client / Ex. 5 7a / 7e

Deliberative Process / Attorney-Client / Ex. 5 7a / 7e

Justin – please let us know if you need anything or how you'd like to proceed from here.

Am copying the WOTUS team.

Steven Neugeboren
Associate General Counsel
Water Law Office
Environmental Protection Agency
202-564-5488

From: Fisher, Mike
Sent: Tuesday, March 21, 2017 3:40 PM
To: Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Levine, MaryEllen <levine.maryellen@epa.gov>
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Subject: Attorney Client / Ex. 5
Importance: High

Hi you two - Deliberative Process / Attorney-Client / Ex. 5 7a / 7e

Deliberative Process / Attorney-Client / Ex. 5 7a / 7e

Deliberative Process / Attorney-Client / Ex. 5 7a / 7e

Thanks much . . .

PS - Deliberative Process / Attorney-Client / Ex. 5 7a / 7e

Deliberative Process / Attorney-Client / Ex. 5 7a / 7e

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Director, Legal Counsel Division
Office of Criminal Enforcement, Forensics & Training
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Help EPA fight pollution - report environmental violations at http://www.epa.gov/tips

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March 20, 2017

VIA ELECTRONIC MAIL: sarah.grieb@usdoj.gov
AND FIRST CLASS MAIL

Assistant United States Attorney Sarah L. Grieb
615 Chestnut Street
Suite 1250
Philadelphia, PA 19106

Re: MAB Environmental Services, Inc. – No.: 15-595-02
Matthew A. Brozena – No.: 15-595-01

Dear Assistant United States Attorney Grieb:

I am writing at the instruction of my clients, MAB Environmental Services, Inc. and Matthew A. Brozena, and with the consent of Robert E. Welsh, Jr., Esquire.

On February 28, 2017, the President signed an Executive Order, which we believe profoundly and directly affects these cases.

The Executive Order entitled *Restoring the Rule of Law, Federalism and Economic Growth by Reviewing the "Waters of the United States" Rule*. Section (c), states as follows:

> "(c) With respect to any litigation before the Federal courts related to the final rule listed in subsection (a) of this section, the Administrator and the Assistant Secretary shall promptly notify the Attorney General of the pending review under subsection (b) of this section so that the Attorney General may, as he deems appropriate, inform any court of such review and take such measures as he deems appropriate concerning any such litigation pending the completion of further administrative proceedings related to the rule."

It is our position that this Executive Order requires the Department of Justice and the Environmental Protection Agency to review these cases in a manner consistent with the Executive Order and other policy directives of the President and the Administration before any further actions can be taken in these cases.

Specifically, these cases relate to an unnamed tributary in the utmost reaches of the watersheds involved and appears to be what the President indicated would be reviewed under and subject to his Executive Order.

The President, the Director of the Environmental Protection Agency and the Attorney General have all begun to change the former policies of your client, the Environmental Protection Agency, and its past practices regarding enforcement, prosecutions and litigation.

As you are aware, in this case, Matthew A. Brozena has consistently stated, under oath, that he did not know or direct the employees involved to violate the law.

In addition, the Department of Justice and my clients have not been able to agree on a number of essential facts necessary to provide a factual basis for the Plea Agreement which was reached.

The Environmental Protection Agency has spent years, money and great time and effort to prosecute this case.

It is clear that the President, the Environmental Protection Agency Administrator and the new Attorney General would not have pursued these cases in a manner and with the intensity which have taken us to this point.

Accordingly, we respectfully ask that the United States Attorney's Office join with us in requesting the Court continue these cases until the review required by the President's Executive Order is conducted by the Department of Justice and the and Environmental Protection Agency.

We anticipate that you will be in contact with the necessary officials regarding this, both in Philadelphia and Washington, at the regional office of Environmental Protection Agency, and the main office in Washington and the Department of Justice as you deem appropriate.

We await your answer and prompt action.

Sincerely,

JAMES W. MAZA

JWM:lac
cc: Matthew A. Brozena
Robert E. Welsh, Jr., Esquire

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CRIMINAL NO:** _____
v.	:	**DATE FILED:** _____
MATTHEW BROZENA **MAB ENVIRONMENTAL SERVICES, INC.**	: : : : :	**VIOLATIONS:** **18 U.S.C. § 371 (conspiracy – 1 count)** **33 U.S.C. § 1319(c)(2) (violation of permit – 4 counts)** **33 U.S.C. § 1319(c)(4) (tampering with required monitoring method – 4 counts)** **33 U.S.C. § 1319(c)(4) (false reporting – 6 counts)** **18 U.S.C. § 2 (aiding and abetting)**

INDICTMENT

COUNT ONE

THE GRAND JURY CHARGES THAT:

At all times material to this indictment:

THE DEFENDANTS AND RELEVANT PERSONS AND ENTITIES

1. Defendant MAB ENVIRONMENTAL SERVICES, INC. was a company located in Telford, Pennsylvania that contracted to operate, maintain, and manage wastewater treatment facilities for its customers.

2. Defendant MATTHEW BROZENA was certified to operate sewage treatment plants and water treatment plants and was part-owner, president, and a responsible corporate officer of defendant MAB ENVIRONMENTAL SERVICES, INC.

3. From in or about August 2009 to in or about February 2011, James Wetzel, charged elsewhere, was certified to operate sewage treatment plants and was employed by defendant MAB ENVIRONMENTAL SERVICES, INC.

4. From in or about May 2011 to in or about January 2012, James Crafton, charged elsewhere, was certified to operate sewage treatment plants and was employed by defendant MAB ENVIRONMENTAL SERVICES, INC.

5. Company No. 1, a company known to the grand jury, was a company located in Harleysville, Pennsylvania, that contracted to operate, maintain, and manage wastewater treatment facilities for its customers. Defendant MATTHEW BROZENA was part-owner, president, and a responsible corporate officer of Company No. 1.

6. From in or about January 2012 to in or about June 2012, James Crafton was certified to operate sewage treatment plants and was employed by Company No. 1.

7. From at least in or about March 2010 to in or about October 2011, Person No. 1, whose identity is known to the grand jury, was employed by defendant MAB ENVIRONMENTAL SERVICES, INC.

8. From at least in or about August 2010 to in or about January 2012, Person No. 2, whose identity is known to the grand jury, was employed by defendant MAB ENVIRONMENTAL SERVICES, INC.

9. BC Natural Chicken ("BC Natural") was a chicken processing plant located in Bethel Township, Lebanon County, Pennsylvania, with a wastewater treatment plant.

10. Buckingham Valley Nursing Center ("Buckingham") was a nursing home located in Buckingham Township, Bucks County, Pennsylvania, with a wastewater treatment plant.

THE CLEAN WATER ACT

11. The Clean Water Act ("CWA"), 33 U.S.C. § 1251, et seq., is the Nation's comprehensive water pollution control statute. The purpose of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation's water. In addition, the CWA was enacted to prevent, reduce, and eliminate water pollution in the United States and to conserve the waters of the United State for the protection and propagation of fish and aquatic life and wildlife, recreational purposes, and for the use of such waters for public drinking water, agricultural, and industrial purposes. 33 U.S.C. § 1252(a).

12. Title 33, United States Code, Section 1311 of the CWA, prohibits the discharge of any pollutant by any person, except in compliance with provisions of the CWA, including 33 U.S.C. § 1342.

13. The CWA defines a "person" as an individual and a corporation, 33 U.S.C. § 1362(5), and "any responsible corporate officer," 33 U.S.C. § 1319(c)(6); "discharge of a pollutant" as any addition of any pollutant to navigable waters from any point source, 33 U.S.C. § 1362(12); "pollutant" as, among other things, solid waste, sewage, sewage sludge, chemical wastes, and industrial and agricultural waste discharged into water, 33 U.S.C. § 1362(6); "navigable waters" as waters of the United States, 33 U.S.C. § 1362(7); and "point source" as any discernible, confined, and discrete conveyance from which pollutants are discharged, including any pipe, ditch, channel, conduit, and discrete fissure, 33 U.S.C. § 1362(14).

14. Title 33, United States Code, Section 1342 of the CWA authorizes the discharge of pollutants in compliance with a permit issued under the National Pollution Discharge Elimination Systems ("NPDES") by the U.S. Environmental Protection Agency ("EPA") or a

federally authorized state agency, including the Pennsylvania Department of Environmental Protection ("PADEP").

BC NATURAL PERMIT

15. Under the CWA's NPDES permit program for industrial wastewater facilities, PADEP issued to BC Natural Chicken, NPDES Permit No. PA 0024228 (the "BC Natural Permit"), authorizing BC Natural to discharge pollutants from the chicken plant located in Bethel Township, Lebanon County, Pennsylvania, to Deep Run in Watershed 7-D in accordance with effluent limitations, monitoring requirements, and other conditions set forth in the BC Natural Permit and in compliance with federal and state laws and regulations.

16. Deep Run flowed into navigable waters of the United States.

17. The BC Natural Permit required that the permittee at all times maintain in good working order and properly operate and maintain all facilities and systems which were installed and used by the permittee to achieve compliance with the terms and conditions of the BC Natural Permit.

18. The BC Natural Permit set discharge limits for pollutants, including ammonia-nitrogen ("NH3-N") and total suspended solids ("TSS").

19. The BC Natural Permit set the discharge limit for NH3-N for two time frames. For the period from May 1 to October 31, the daily maximum concentration limit was 3.0 mg of NH3-N per liter of effluent. For the period from November 1 to April 30, the daily maximum concentration limit was 9.0 mg of NH3-N per liter of effluent. The BC Natural Permit required that NH3-N be monitored and measured in a 24-hour composite sample of effluent once a week.

20. The BC Natural Permit set the discharge limit for TSS as a daily maximum concentration limit of 50 mg of TSS per liter of effluent, to be monitored and measured in a 24-hour composite sample of effluent once a week.

21. The BC Natural Permit required that: samples and measurements taken for the purpose of monitoring be representative of the monitored activity; each sample and each measurement taken pursuant to the requirements of the BC Natural Permit be recorded; approved test procedures for the analysis of the pollutants be used; Discharge Monitoring Reports ("DMRs"), which required the reporting of samples and measurements taken pursuant to the BC Natural Permit, be properly completed; if the permittee monitored any pollutant using the analytical methods described in the BC Natural Permit more frequently than the BC Natural Permit required, the results of the monitoring be incorporated into the calculations on the DMR; properly completed DMRs be submitted to the PADEP within 28 days after the end of the monthly reporting period; and all instances of noncompliance be reported.

22. From in or about August 2009 to in or about February 2011, BC Natural contracted with defendant MATTHEW BROZENA and defendant MAB ENVIRONMENTAL SERVICES, INC. to operate and manage BC Natural's wastewater treatment plant with respect to the regulations and limitations specified in the BC Natural Permit.

23. From in or about January 2006 through in or about December 2009, BC Natural violated the pollutant limits for NH3-N, TSS, and other pollutants in the BC Natural Permit and received notices of violations. On or about August 2, 2010, BC Natural entered into a Consent Order and Agreement with the Pennsylvania Department of Environmental Protection for the violations.

BUCKINGHAM PERMIT

24. Under the CWA's NPDES permit program for non-municipal sewage treatment works, PADEP issued to Buckingham Valley Nursing Center, NPDES Permit No. PA0052761 (the "Buckingham Permit"), authorizing Buckingham to discharge pollutants in wastewater to the unnamed tributary to Mill Creek in Watershed 2F in accordance with effluent limitations, monitoring requirements, and other conditions set forth in the Buckingham Permit and in compliance with federal and state laws and regulations.

25. Mill Creek flowed into navigable waters of the United States.

26. The Buckingham Permit required that the permittee at all times properly operate and maintain all facilities and systems of treatment and control and related appurtenances which were installed and used by the permittee to achieve compliance with the terms and conditions of the Buckingham Permit.

27. The Buckingham Permit set discharge limits for pollutants, including total residual chlorine ("TRC"), dissolved oxygen ("DO"), pH, and fecal coliform.

28. The Buckingham Permit set the monthly average discharge limit for TRC of 0.1 mg of TRC per liter of effluent and the instantaneous maximum discharge limit for TRC of 0.25 mg of TRC per liter of effluent, to be monitored and measured at the minimum in a daily grab sample of effluent.

29. The Buckingham Permit set the instantaneous minimum discharge limit for DO of 5.0 mg of DO per liter of effluent, to be monitored and measured at the minimum in a daily grab sample of effluent.

30. The Buckingham Permit set the instantaneous minimum discharge limit for pH of 6.0 and the instantaneous maximum discharge limit for pH of 9.0, to be monitored and measured at the minimum in a daily grab sample of effluent.

31. The Buckingham Permit required that: samples and measurements taken for the purpose of monitoring be representative of the monitored activity; each sample and each measurement taken pursuant to the requirements of the Buckingham Permit be recorded; approved test procedures for the analysis of the pollutants be used; DMRs, which required the reporting of samples and measurements taken pursuant to the Buckingham Permit, be properly completed; if the permittee monitored any pollutant using the analytical methods described in the Buckingham Permit more frequently than the Buckingham Permit required, the results of the monitoring be incorporated into the calculations on the DMR; properly completed DMRs be received by the PADEP within 28 days after the end of the monthly reporting period; and all instances of noncompliance be reported.

32. The Buckingham Permit required the permittee to employ an operator certified in compliance with Water and Wastewater Systems Operators Certification Act for the proper operation and maintenance of the Buckingham wastewater treatment plant.

33. From in or about September 2001 to at least in or about February 2012, Buckingham contracted with defendant MATTHEW BROZENA and defendant MAB ENVIRONMENTAL SERVICES, INC. to operate and maintain Buckingham's wastewater treatment plant with respect to the regulations and limitations specified in the Buckingham Permit.

34. From in or about November 2008 to in or about 2012, Buckingham received notices of violations for exceeding pollutant limits for fecal coliform and other pollutants, and for other violations.

CONSPIRACY TO VIOLATE CWA

35. From at least in or about 2009 to at least in or about 2012, in the Eastern District of Pennsylvania and elsewhere, defendants

MATTHEW BROZENA
and
MAB ENVIRONMENTAL SERVICES, INC.

conspired and agreed, together and with James Wetzel, James Crafton, and others known and unknown to the grand jury, to commit an offense against the United States, that is, to:

a. Knowingly violate permit conditions and limitations implementing sections in permits issued under 33 U.S.C. § 1342, in violation of 33 U.S.C. § 1319(c)(2);

b. Knowingly falsify, tamper with, and render inaccurate monitoring devices and methods required to be maintained under the CWA, in violation of 33 U.S.C. § 1319(c)(4); and

c. Knowingly make false material statements, representations, and certifications in records, reports, and other documents filed and required to be maintained under the CWA, in violation of 33 U.S.C. § 1319(c)(4).

Manner and Means

It was part of the conspiracy that:

36. Defendants MATTHEW BROZENA and MAB ENVIRONMENTAL SERVICES, INC., and others known and unknown to the grand jury, knowingly failed to properly

operate and maintain the facilities and systems of treatment and control that were installed at the wastewater treatment plants and used to achieve compliance with the terms and conditions of the NPDES permits.

37. Defendants MATTHEW BROZENA and MAB ENVIRONMENTAL SERVICES, INC., and others known and unknown to the grand jury, knowingly discarded effluent samples when they believed that the measurements of pollutants in the samples exceeded the pollutant limits in the NPDES permits, and resampled.

38. Defendants MATTHEW BROZENA and MAB ENVIRONMENTAL SERVICES, INC., and others known and unknown to the grand jury, knowingly failed to take samples and measurements for the purpose of monitoring that were representative of the monitored activity.

39. Defendants MATTHEW BROZENA and MAB ENVIRONMENTAL SERVICES, INC., and others known and unknown to the grand jury, knowingly falsely reported sampling and test results for pollutants that were required to be measured and reported under the NPDES permits.

Overt Acts

In furtherance of the conspiracy and to accomplish its objects, defendants MATTHEW BROZENA and MAB ENVIRONMENTAL SERVICES, INC. and others committed the following overt acts, among others, in the Eastern District of Pennsylvania and elsewhere:

1. From in or about August 2009 to in or about February 2011, at the direction of defendants MATTHEW BROZENA and MAB ENVIRONMENTAL SERVICES, INC., James

Wetzel discarded composite samples of effluent at BC Natural and resampled because defendant BROZENA believed that the composite samples would exceed the pollutant limits for TSS in the BC Natural Permit.

2. From in or about August 2009 to in or about February 2011, at the direction of defendants MATTHEW BROZENA and MAB ENVIRONMENTAL SERVICES, INC., James Wetzel discarded composite samples of effluent at BC Natural and resampled because defendant BROZENA believed that the composite samples would exceed the pollutant limits for NH3-N in the BC Natural Permit.

3. On or about September 14, 2010, defendants MATTHEW BROZENA and MAB ENVIRONMENTAL SERVICES, INC. directed James Wetzel to possibly delay composite sampling of effluent until later in the week at BC Natural because defendant BROZENA believed that the composite sample would exceed the pollutant limit for NH3-N in the BC Natural Permit.

4. On or about September 15, 2010, defendants MATTHEW BROZENA and MAB ENVIRONMENTAL SERVICES, INC. directed James Wetzel to discard the composite sample of effluent at BC Natural that defendant BROZENA believed exceeded the pollutant limit for NH3-N in the BC Natural Permit, and to resample later in the week.

5. On or about September 15, 2010, at the direction of defendants MATTHEW BROZENA and MAB ENVIRONMENTAL SERVICES, INC., James Wetzel discarded the composite sample of effluent at BC Natural because defendant BROZENA believed that the composite sample would exceed the pollutant limit for NH3-N in the BC Natural Permit.

6. On or about October 28, 2010, defendants MATTHEW BROZENA and MAB ENVIRONMENTAL SERVICES, INC. and James Wetzel did not report the composite

sampling at BC Natural on or about September 15, 2010, in BC Natural's September 2010 DMR that was submitted to PADEP.

7. From at least in or about July 2010 to in or about February 2012, defendant MATTHEW BROZENA directed employees of defendant MAB ENVIRONMENTAL SERVICES, INC. and Company No. 1 to report test results for the pollutant TRC in grab samples of effluent at Buckingham as 0.0.

8. From at least in or about July 2010 to in or about 2012, defendant MATTHEW BROZENA directed employees of defendant MAB ENVIRONMENTAL SERVICES, INC. that when the test results for the pollutant TRC were not 0.0 in the grab samples of effluent at Buckingham, to discard the samples, add dechlorination tablets, resample, and retest.

9. From at least in or about July 2010 to in or about October 2011, at the direction of defendants MATTHEW BROZENA and MAB ENVIRONMENTAL SERVICES, INC., Person No. 1 discarded grab samples of effluent at Buckingham when the test results for the pollutant TRC in the samples were not 0.0, added dechlorination tablets, resampled, and retested.

10. From at least in or about July 2010 to in or about October 2011, at the direction of defendants MATTHEW BROZENA and MAB ENVIRONMENTAL SERVICES, INC., Person No. 1 falsely reported test results for TRC in grab samples of effluent at Buckingham as 0.0.

11. From in or about August 2010 to in or about January 2012, at the direction of defendants MATTHEW BROZENA and MAB ENVIRONMENTAL SERVICES, INC., Person No. 2 discarded grab samples of effluent at Buckingham when the test results for the pollutant TRC in the samples were not 0.0, added dechlorination tablets, resampled, and retested.

12. From in or about August 2010 to in or about January 2012, at the direction of defendants MATTHEW BROZENA and MAB ENVIRONMENTAL SERVICES, INC., Person No. 2 falsely reported test results for TRC in grab samples of effluent at Buckingham as 0.0.

13. From in or about August 2010 to in or about January 2012, at the direction of defendants MATTHEW BROZENA and MAB ENVIRONMENTAL SERVICES, INC., Person No. 2 discarded grab samples of effluent at Buckingham when the test results for the pollutants DO and pH in the samples were not within limits that defendant BROZENA required, added chemicals, and retested.

14. From in or about August 2010 to in or about January 2012, at the direction of defendants MATTHEW BROZENA and MAB ENVIRONMENTAL SERVICES, INC., Person No. 2 falsely reported test results for DO and pH in grab samples of effluent at Buckingham to be within the limits that defendant BROZENA required.

15. From in or about May 2011 to in or about February 2012, at the direction of defendants MATTHEW BROZENA and MAB ENVIRONMENTAL SERVICES, INC., James Crafton falsely reported test results for TRC in grab samples of effluent at Buckingham as 0.0.

16. On or about January 20, 2012, defendants MATTHEW BROZENA and MAB ENVIRONMENTAL SERVICES, INC. caused to be reported false test results for TRC of 0.0 at Buckingham in Buckingham's December 2011 DMR that was submitted to PADEP.

17. On or about February 22, 2012, defendants MATTHEW BROZENA and MAB ENVIRONMENTAL SERVICES, INC. caused to be reported false test results for TRC of 0.0 at Buckingham in Buckingham's January 2012 DMR that was submitted to PADEP.

18. On or about March 22, 2012, defendants MATTHEW BROZENA and MAB ENVIRONMENTAL SERVICES, INC. caused to be reported false test results for TRC of 0.0 at Buckingham in Buckingham's February 2012 DMR that was submitted to PADEP.

All in violation of Title 18. United States Code, Section 371.

COUNT TWO

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs 1 through 3, 9, and 11 through 23 of Count One are incorporated here.

2. On or about September 15, 2010, in the Eastern District of Pennsylvania, and elsewhere, defendant

MATTHEW BROZENA

knowingly caused the violation of a permit condition and limitation implementing Title 33, United States Code, Section 1311 in the permit issued under Title 33, United State Code, Section 1342, that is, defendant BROZENA knowingly caused James Wetzel to discard a composite sample of effluent and resample at BC Natural when defendant BROZENA believed that the measurement of the pollutant NH3-N in the discarded sample exceeded the BC Natural Permit limit for NH3-N, thereby rendering the sampling non-representative of the monitored activity, in violation of the BC Natural Permit.

In violation of Title 33, United States Code, Section 1319(c)(2)(A), and Title 18, United States Code, Section 2.

COUNT THREE

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs 1 through 3, 9, and 11 through 23 of Count One are incorporated here.

2. On or about September 15, 2010, in the Eastern District of Pennsylvania, and elsewhere, defendant

MAB ENVIRONMENTAL SERVICES, INC.,

through its agents defendant MATTHEW BROZENA and James Wetzel, knowingly violated and caused the violation of a permit condition and limitation implementing Title 33, United States Code, Section 1311 in the permit issued under Title 33, United State Code, Section 1342, that is, defendant MAB ENVIRONMENTAL SERVICES, INC. knowingly discarded a composite sample of effluent and resampled, and caused James Wetzel to discard a composite sample of effluent and resample, at BC Natural when defendant MAB ENVIRONMENTAL SERVICES, INC. believed that the measurement of the pollutant NH3-N in the discarded sample exceeded the BC Natural Permit limit for NH3-N, thereby rendering the sampling non-representative of the monitored activity, in violation of the BC Natural Permit.

In violation of Title 33, United States Code, Section 1319(c)(2)(A), and Title 18, United States Code, Section 2.

COUNT FOUR

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs 1 through 3, 9, and 11 through 23 of Count One are incorporated here.

2. On or about September 15, 2010, in the Eastern District of Pennsylvania, and elsewhere, defendant

MATTHEW BROZENA

knowingly caused to be falsified, tampered with, and rendered inaccurate, a monitoring device and method required to be maintained under the CWA, that is, defendant BROZENA knowingly caused James Wetzel to discard a composite sample of effluent and resample at BC Natural when defendant BROZENA believed that the measurement of the pollutant NH3-N in the discarded sample exceeded the BC Natural Permit limit for NH3-N, thereby rendering the sampling non-representative of the monitored activity.

In violation of Title 33, United States Code, Section 1319(c)(4), and Title 18, United States Code, Section 2.

COUNT FIVE

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs 1 through 3, 9, and 11 through 23 of Count One are incorporated here.

2. On or about September 15, 2010, in the Eastern District of Pennsylvania, and elsewhere, defendant

MAB ENVIRONMENTAL SERVICES, INC.,

through its agents defendant MATTHEW BROZENA and James Wetzel, knowingly falsified, tampered with, and rendered inaccurate, and caused to be falsified, tampered with, and rendered inaccurate, a monitoring device and method required to be maintained under the CWA, that is, defendant MAB ENVIRONMENTAL SERVICES, INC. knowingly discarded a composite sample of effluent and resampled, and caused James Wetzel to discard a composite sample of effluent and resample, at BC Natural when defendant MAB ENVIRONMENTAL SERVICES, INC. believed that the measurement of the pollutant NH3-N in the discarded sample exceeded the BC Natural Permit limit for NH3-N, thereby rendering the sampling non-representative of the monitored activity.

In violation of Title 33, United States Code, Section 1319(c)(4), and Title 18, United States Code, Section 2.

COUNT SIX

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs 1, 2, 4 through 8, 10 through 14, and 24 through 34 of Count One are incorporated here.

2. From at least in or about April 2011 to in or about February 2012, in the Eastern District of Pennsylvania, and elsewhere, defendant

MATTHEW BROZENA

knowingly violated and caused the violation of a permit condition and limitation implementing Title 33, United States Code, Section 1311 in the permit issued under Title 33, United State Code, Section 1342, that is, defendant BROZENA knowingly caused employees of defendant MAB ENVIRONMENTAL SERVICES, INC. and Company No. 1 to discard grab samples of effluent and resample, at Buckingham when the measurements of the pollutant TRC in the discarded samples were not 0.0, and knowingly falsely reported and caused the false reporting of test results for the pollutant TRC in grab samples of effluent at Buckingham as 0.0, thereby rendering the sampling and measurements non-representative of the monitored activity, in violation of the Buckingham Permit.

In violation of Title 33, United States Code, Section 1319(c)(2)(A), and Title 18, United States Code, Section 2.

COUNT SEVEN

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs 1, 2, 4 through 8, 10 through 14, and 24 through 34 of Count One are incorporated here.

2. From at least in or about April 2011 to in or about February 2012, in the Eastern District of Pennsylvania, and elsewhere, defendant

MAB ENVIRONMENTAL SERVICES, INC.,

through its agents defendant MATTHEW BROZENA and James Crafton, knowingly violated and caused the violation of a permit condition and limitation implementing Title 33, United States Code, Section 1311 in the permit issued under Title 33, United State Code, Section 1342, that is, defendant MAB ENVIRONMENTAL SERVICES, INC. knowingly discarded grab samples of effluent and resampled, and caused employees of defendant MAB ENVIRONMENTAL SERVICES, INC. to discard grab samples of effluent and resample, at Buckingham when the measurements of the pollutant TRC in the discarded samples were not 0.0, and knowingly falsely reported and caused the false reporting of test results for the pollutant TRC in grab samples of effluent at Buckingham as 0.0, thereby rendering the sampling and measurements non-representative of the monitored activity, in violation of the Buckingham Permit.

In violation of Title 33, United States Code, Section 1319(c)(2)(A), and Title 18, United States Code, Section 2.

COUNT EIGHT

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs 1, 2, 4 through 8, 10 through 14, and 24 through 34 of Count One are incorporated here.

2. From at least in or about April 2011 to in or about February 2012, in the Eastern District of Pennsylvania, and elsewhere, defendant

MATTHEW BROZENA

knowingly caused to be falsified, tampered with, and rendered inaccurate, a monitoring device and method required to be maintained under the CWA, that is, defendant BROZENA knowingly caused employees of defendant MAB ENVIRONMENTAL SERVICES, INC. and Company No. 1 to discard grab samples of effluent and resample at Buckingham when the measurements of the pollutant TRC in the discarded samples were not 0.0, and knowingly caused the false reporting of test results for the pollutant TRC in grab samples of effluent at Buckingham as 0.0, thereby falsifying, tampering with, and rendering inaccurate the monitoring device and method required to be maintained under the CWA.

In violation of Title 33, United States Code, Section 1319(c)(4), and Title 18, United States Code, Section 2.

COUNT NINE

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs 1, 2, 4 through 8, 10 through 14, and 24 through 34 of Count One are incorporated here.

2. From at least in or about April 2011 to in or about February 2012, in the Eastern District of Pennsylvania, and elsewhere, defendant

MAB ENVIRONMENTAL SERVICES, INC.,

through its agents defendant MATTHEW BROZENA and James Crafton, knowingly falsified, tampered with, and rendered inaccurate, and caused to be falsified, tampered with, and rendered inaccurate, a monitoring device and method required to be maintained under the CWA, that is, defendant MAB ENVIRONMENTAL SERVICES, INC. knowingly caused employees of defendant MAB ENVIRONMENTAL SERVICES, INC. to discard grab samples of effluent and resample at Buckingham when the measurements of the pollutant TRC in the discarded samples were not 0.0, and knowingly falsely reported and caused the false reporting of test results for the pollutant TRC in grab samples of effluent at Buckingham as 0.0, thereby falsifying, tampering with, and rendering inaccurate the monitoring device and method required to be maintained under the CWA.

In violation of Title 33, United States Code, Section 1319(c)(4), and Title 18, United States Code, Section 2.

COUNTS TEN THROUGH TWELVE

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs 1, 2, 4 through 8, 10 through 14, and 24 through 34 of Count One are incorporated here.

2. On or about the dates set forth below, in the Eastern District of Pennsylvania, and elsewhere, defendant

MATTHEW BROZENA

knowingly caused false material statements, representations, and certifications to be made in records, reports, and other documents filed and required to be maintained under the CWA and the regulations promulgated thereunder, that is, defendant BROZENA knowingly caused to be reported in the Buckingham DMRs submitted to PADEP set forth below, false test results for TRC of 0.0 at Buckingham, each DMR submitted constituting a separate count:

COUNT	DATE	DMR
Ten	January 20, 2012	December 2011
Eleven	February 22, 2012	January 2012
Twelve	March 22, 2012	February 2012

All in violation of Title 33, United States Code, Section 1319(c)(4), and Title 18, United States Code, Section 2.

COUNTS THIRTEEN THROUGH FIFTEEN

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs 1, 2, 4 through 8, 10 through 14, and 24 through 34 of Count One are incorporated here.

2. On or about the dates set forth below, in the Eastern District of Pennsylvania, and elsewhere, defendant

MAB ENVIRONMENTAL SERVICES, INC.,

through its agents defendant MATTHEW BROZENA and James Crafton, knowingly caused false material statements, representations, and certifications to be made in records, reports, and other documents filed and required to be maintained under the CWA and the regulations promulgated thereunder, that is, defendant MAB ENVIRONMENTAL SERVICES, INC. knowingly caused to be reported in the Buckingham DMRs submitted to PADEP set forth below, false test results for TRC of 0.0 at Buckingham, each DMR submitted constituting a separate count:

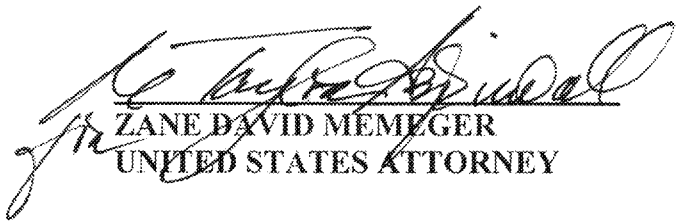
COUNT	DATE	DMR
Thirteen	January 20, 2012	December 2011
Fourteen	February 22, 2012	January 2012
Fifteen	March 22, 2012	February 2012

All in violation of Title 33, United States Code, Section 1319(c)(4), and Title 18, United States Code, Section 2.

A TRUE BILL:

_____

GRAND JURY FOREPERSON



ZANE DAVID MEMEGER
UNITED STATES ATTORNEY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

INDICTMENT

DESIGNATION FORM to be used by counsel to indicate the category of the case for the purpose of assignment to appropriate calendar. 15cr595

Address of Plaintiff: 615 Chestnut Street, Suite 1250, Philadelphia, PA 19106-4476

Post Office: Philadelphia County: Philadelphia

City and State of Defendant: Telford, PA

County: N/A Register number: N/A

Place of accident, incident, or transaction: Eastern District of Pennsylvania

Post Office: Philadelphia County: Philadelphia

RELATED CASE, IF ANY:

Criminal cases are deemed related when the answer to the following question is "yes".

Does this case involve a defendant or defendants alleged to have participated in the same action or transaction, or in the same series of acts or transactions, constituting an offense or offenses?

YES/NO:

Case Number: Crafton (15-358), Fritz (15-412), Wetzel (15-413) Judge: Kelly

CRIMINAL: (Criminal Category - FOR USE BY U.S. ATTORNEY ONLY)

1. ○ Antitrust
2. ○ Income Tax and other Tax Prosecutions
3. ○ Commercial Mail Fraud
4. ○ Controlled Substances
5. ○ Violations of 18 U.S.C. Chapters 95 and 96 (Sections 1951-55 and 1961-68) and Mail Fraud other than commercial
6. ● General Criminal

(U.S. ATTORNEY WILL PLEASE DESIGNATE PARTICULAR CRIME AND STATUTE CHARGED TO BE VIOLATED AND STATE ANY PREVIOUS CRIMINAL NUMBER FOR SPEEDY TRIAL ACT TRACKING PURPOSES)
18 U.S.C. § 371 (conspiracy – 1 count)
33 U.S.C. § 1319(c)(2) (violation of permit – 4 counts)
33 U.S.C. § 1319(c)(4) (tampering with required monitoring method – 4 counts)
33 U.S.C. § 1319(c)(4) (false reporting – 6 counts)
18 U.S.C. § 2 (aiding and abetting)

DATE: 12/15/15

Matthew Brozena
MAB Environmental Services Inc.
File No. 2015R00658

Sarah L. Grieb
Assistant United States Attorney

Message

From: Fotouhi, David [fotouhi.david@epa.gov]
Sent: 4/18/2017 12:05:42 PM
To: Minoli, Kevin [Minoli.Kevin@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]
Subject: ARLO hot issues

Kevin, Justin,

FYI, I will have a standing weekly conflict with ARLO hot issues, as the weekly WOTUS rule working group meeting (that includes WLO, OW, and the Corps) has been scheduled from 10:00-10:45 a.m. each Wednesday moving forward. Please let me know if you would be amenable to rescheduling ARLO hot issues or if you think it would be best for Justin to continue at the scheduled time and for me to follow up one-on-one with Lorie or Gautam on any matters from which Justin is recused. I'd be glad to discuss this further.

Thanks,

David

David Fotouhi

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

Message

From: DCOGCLN1/DC/USEPA/US [DCOGCLN1/DC/USEPA/US@epamail.epa.gov]
Sent: 4/13/2017 9:30:35 AM
To: Prabhu, Aditi [Prabhu.Aditi@epa.gov]; Dolph, Becky [Dolph.Becky@epa.gov]; Veney, Carla [Veney.Carla@epa.gov]; Fort, Daniel [Fort.Daniel@epa.gov]; Packard, Elise [Packard.Elise@epa.gov]; Jones, Gail-R [Jones.Gail-R@epa.gov]; Duross, Jeanne [Duross.Jeanne@epa.gov]; Keith, Jennie [Keith.Jennie@epa.gov]; Justin Schwab [Schwab.Justin@epamail.epa.gov]; Fugh, Justina [Fugh.Justina@epa.gov]; Minoli, Kevin [Minoli.Kevin@epa.gov]; Patrick, Monique [Patrick.Monique@epa.gov]; Rich Lumley [Lumley.Rich@epamail.epa.gov]; Albores, Richard [Albores.Richard@epa.gov]; David Fotouhi [Fotouhi.David@epamail.epa.gov]
Subject: CTS Pending Items Newsletter

CTS Pending Items - Your goal is to make this list EMPTY! Click a link at the left and follow-up on every item.

Current Approver [Due Date] Showing Pending Items Only

Deliberative Process / Ex. 5

Message

From: ODea, Elise [odea.elise@epa.gov]
Sent: 4/11/2017 7:08:39 PM
To: Schwab, Justin [schwab.justin@epa.gov]; Fotouhi, David [fotouhi.david@epa.gov]
CC: Michaud, John [Michaud.John@epa.gov]; Lewis, Jen [Lewis.Jen@epa.gov]
Subject: FOR REVIEW: Deliberative Process / Attorney-Client / Ex. 5
Attachments: Deliberative Process / Attorney-Client / Ex. 5

Hi Justin and David,

Attached please find our near-final draft of Deliberative Process / Attorney-Client / Ex. 5 Deliberative Process / Attorney-Client / Ex. 5 We have submitted this draft for inclusion in Kevin's binder this afternoon, and wanted to provide you with an opportunity to review as well.

The letter refers to several attachments Deliberative Process / Attorney-Client / Ex. 5

Deliberative Process / Attorney-Client / Ex. 5

We plan to have the letter signed and finalized by Thursday afternoon. We do not anticipate making any substantive changes; rather, edits will likely be limited to correcting citations and tightening language. As such, to the extent that you have any comments or concerns, we ask that you **please let us know by Thursday morning (4/13)**.

Thank you,
Elise

--

Elise M. O'Dea
Solid Waste & Emergency Response Law Office
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20004
(202) 564-4201
odea.elise@epa.gov

Appointment

From: Hale, Michelle [hale.michelle@epa.gov]
Sent: 3/17/2017 8:43:32 PM
To: Minoli, Kevin [Minoli.Kevin@epa.gov]; Greenwalt, Sarah [greenwalt.sarah@epa.gov]
CC: Dravis, Samantha [dravis.samantha@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]; Shapiro, Mike [Shapiro.Mike@epa.gov]; Jackson, Ryan [jackson.ryan@epa.gov]; Brown, Byron [brown.byron@epa.gov]; Best-Wong, Benita [Best-Wong.Benita@epa.gov]

Subject: WOTUS Rules Options
Location: Administrator's Office

Start: 3/20/2017 3:00:00 PM
End: 3/20/2017 3:30:00 PM
Show Time As: Tentative

Message

From: Dravis, Samantha [dravis.samantha@epa.gov]
Sent: 4/28/2017 1:00:23 PM
To: McGartland, Al [McGartland.Al@epa.gov]
CC: Gunasekara, Mandy [Gunasekara.Mandy@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]
Subject: Attorney Client / Ex. 5

Apparently we are not meeting at noon anymore.

Sent from my iPad

On Apr 28, 2017, at 8:52 AM, McGartland, Al <McGartland.Al@epa.gov> wrote:

> Ok. I will still check with OAQPS Ex. 5 - Deliberative Process/Attorney Client
>
> **From:** Dravis, Samantha
> **Sent:** Friday, April 28, 2017 8:51 AM
> **To:** McGartland, Al <McGartland.Al@epa.gov>
> **Cc:** Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>
> **Subject:** Attorney Client / Ex. 5
>
> Hold tight and let me make sure we are all set to meet at noon. Standby.
>
> Sent from my iPad
>
> On Apr 28, 2017, at 8:45 AM, McGartland, Al <McGartland.Al@epa.gov> wrote:
>
>> Yes, I can be available. I was planning on wrapping up the ria from home (Personal Matters / Ex. 6 Personal Matters / Ex. 6 but I'm happy to come into the office. It would be easier for me if I know to come in by 10 or so.
>>
>> I will check now.
>>
>> **From:** Dravis, Samantha
>> **Sent:** Friday, April 28, 2017 8:43 AM
>> **To:** McGartland, Al <McGartland.Al@epa.gov>
>> **Cc:** Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>
>> **Subject:** Attorney Client / Ex. 5
>>
>> We need to discuss this, then. Al is there anyway that you can be available at noon for a meeting with the administrator? Please check on the things you listed below
>>
>> Sent from my iPad
>>
>> On Apr 28, 2017, at 8:29 AM, McGartland, Al <McGartland.Al@epa.gov> wrote:
>>
>> Ex. 5 - Deliberative Process/Attorney Client

Ex. 5 - Deliberative Process/Attorney Client

Message

From: So, Katherine [so.katherine@epa.gov]
Sent: 2/21/2017 8:38:30 PM
To: McGonagle, Kevin [mcgonagle.kevin@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]; Valentine, Julia [Valentine.Julia@epa.gov]; AO OPA Media Relations [AO_OPA_Media_Relations@epa.gov]
CC: So, Katherine [so.katherine@epa.gov]
Subject: RE: Pruitt Post Speech/Event Clips 2/21/17

Below: InsideEPA, Wall Street Journal, Buzzfeed News, Mashable, Business Insider, Argus Media, Reuters, Bloomberg, The Hill, Washington Post, Huffington Post, CNN, The Guardian, LA Times, Bloomberg BNA, Politico, E&E News, Forbes, Washington Examiner, Washington Times, CNBC

InsideEPA
https://insideepa.com/daily-news/epa-administrator-scott-pruitt-details-priorities-principles
EPA Administrator Scott Pruitt Details Priorities, Principles
2/21/17

EPA Administrator Scott Pruitt, sworn in Feb. 17 shortly after his Senate confirmation, has begun to detail some of his priorities and principles for his time in office.

During a Feb. 21 address to agency employees, Pruitt largely reiterated the principles he outlined during his Senate confirmation for how he plans to approach his new role, including considering the role of states, the need for acting with civility on contentious matters, finding solutions to difficult problems and more.

For example, he said that the agency needs to follow a set procedure when developing rules to provide certainty to industry. "Regulations ought to make things regular," Pruitt said. "They ought to give certainty to those we regulate. They ought to know what is expected of them so they can plan and allocate resources to comply."

He said he would seek to "avoid abuses" of those processes. That means ending "using the guidance process to do rulemaking or regulation through litigation."

In an interview with the *Wall Street Journal* published Feb. 18, Pruitt added that a lack of regulatory certainty undermines economic growth. "The greatest threat we've had to economic growth has been that those in industry don't know what is expected of them. Rules come that are outside of statutes. Rules get changed midway. It creates vast uncertainty and paralysis, and re-establishing a vigorous commitment to rule of law is going to help a lot."

During his address at EPA, Pruitt also emphasized his commitment to work with states. "Federalism matters," he said. "Congress has been prescriptive, in many instances, in providing a robust role with the states."

He said he talked with Catherine McCabe, who served as EPA's acting administrator pending his confirmation, about the regional offices and "how important they are in partnering with [departments of environmental quality] at the state level with respect to enforcement and other related issues.

"We engender the trust of those at the state level, they see us as partners in the mission and not as adversaries. Process is important."

In his interview with the *Journal*, Pruitt also criticized the Obama administration for preempting state efforts to comply with federal requirements and suggested maintaining the portion of EPA's $8 billion budget that is directed to states, which is about half. "This is the front line of a lot of the work on air and water quality and infrastructure and it is very important that money continue," he said.

Policy Priorities

He also told the *Journal* that he plans to make cleaning up Superfund sites, attaining air quality standards and improving water infrastructure as his top priorities. "Under current measurements, some 40 [percent] of the country is still in nonattainment" for criteria pollutants, he said, adding there are also "1,300 Superfund sites and some of them have been on the list for more than three decades."

In a similar vein, he suggested that he hopes to complete cleanups of the Hanford nuclear reservation in Washington state and the Hudson River in New York. "Think of how tangible it would be to the citizens," of those states, he said.

On water infrastructure, Pruitt said he plans to advance the issue with the president. "When we talk about investing in infrastructure, we need to look more broadly than bridges and roads," he said, citing lead contamination in Flint, MI, and threats to California dams.

But even as he detailed an affirmative agenda, Pruitt also defended Trump administration plans to roll back the Obama administration's greenhouse gas rules for power plants and Clean Water Act jurisdiction rule, saying both measures should be withdrawn because "the courts have seriously called into question the legality of those rules."

He also suggested taking a broader review of whether EPA should be regulating GHGs at all. Part of the rulemaking process to withdraw the Clean Power Plan will consider whether EPA even possesses the tools, under the Clean Air Act, to address climate change.

"It's a fair question to ask if we do, or whether there in fact needs to be a congressional response to the climate issue," he said.

But he also downplayed suggestions that he would neuter the agency. "There is no reason why EPA's role should ebb or flow based on a particular administration, or a particular administrator," he said. "Agencies exist to administer the law. Congress passes statutes, and those statutes are very clear on the job EPA has to do. We're going to do that job.

"There is a time and place to sometimes resolve litigation. . . . But don't use the judicial process to bypass accountability," Pruitt said, suggesting he would not use sue-and-settle tactics now that a move conservative administration will have to defend its policies: "regulation through litigation is simply wrong...we need to end this

practice of issuing guidance, to get around the rule-making procedure. Or rushing things through, playing games on the timing."

Wall Street Journal
https://www.wsj.com/articles/scott-pruitt-signals-dramatic-shift-in-epa-priorities-1487708036
Scott Pruitt Signals Dramatic Shift in EPA Priorities
By Amy Harder 2/21/17, 3:13PM

WASHINGTON—In his first speech as administrator of the Environmental Protection Agency, Scott Pruitt stressed a dramatic change of priorities at the agency, stating the importance of the agency's communication and relationship with businesses but giving few details about policy changes.

Mr. Pruitt didn't touch on the hard-fought issues that arose during his confirmation process, including his work as Oklahoma attorney general suing the EPA and comments President Donald Trump has made about nearly eliminating the agency.

The new administrator focused instead on his general aspirations for the agency, such as giving businesses certainty regarding environmental rules and striking an appropriate balance with states when it comes to regulations.

"Regulations ought to make things regular," said Mr. Pruitt, repeating a line he used at his confirmation hearing in January. "Those that we regulate ought to know what they can expect from us."

That is a clear difference in message and focus from the EPA under President Barack Obama, which emphasized first what the agency was trying to protect with its regulations on clean air and water.

Mr. Pruitt's speech at agency headquarters, which went a little over 10 minutes, was aimed at striking a balance between the administrator's mandate from Mr. Trump to roll back Mr. Obama's environmental regulations and persistent concerns from inside and outside the agency about that very mandate. It didn't include questions from either media or the assembled EPA staffers in Washington. EPA employs about 15,000 people across the U.S.; thousands were able to watch the speech online.

"You can't lead unless you listen. I seek to listen and learn and lead with you to address these issues we face as a nation," Mr. Pruitt said.

Mr. Trump's plans for EPA have attracted particular attention, given his stated goal of making wholesale changes at the agency. Current and former officials of the agency had publicly urged the defeat of Mr. Pruitt, saying they were concerned about his close relations with the oil and gas industry in Oklahoma. The Senate narrowly confirmed him on Friday mostly along party lines.

Mr. Pruitt's comments Tuesday didn't ease some critics' concerns.

"Pruitt told EPA staff they may not know him except for what they have read, but perception is reality," said Liz Purchia, a former EPA communications director under Mr. Obama. "Trump's team spent the entire campaign and the last few months railing against EPA's existence, its staff and its purpose."

Mr. Pruitt didn't mention the Trump administration's imminent plans to start undoing two of the biggest rules the agency has issued over the past eight years: one cutting carbon emissions from power plants and another bringing more waters under federal jurisdiction.

Mr. Trump is expected to soon sign at least two executive orders to begin the process of scrapping both of those regulations, along with other Obama-era climate regulations, according to several people familiar with the plans. Both efforts would take months and are likely to face legal challenges.

The executive order focusing on power-plant emissions is expected to be framed as an attempt to reduce the nation's dependence on foreign sources of energy while promoting domestic energy production, two of Mr. Trump's campaign promises. Supporters of the regulation say it is important for fighting climate change.

Other policies likely to be targeted in the executive orders is an Interior Department temporary ban on coal leasing and a measure cutting emissions of methane, a greenhouse gas, from oil and natural gas wells on federal lands. Congress is already in the process of repealing that regulation.

Buzzfeed News
https://www.buzzfeed.com/dinograndoni/trumps-new-epa-chief-promises-to-pull-back-environment-rules?utm_term=.qxRlB2DjB#.frne7Xva7
Trump's New EPA Chief Promises to Pull Back Environment Rules in First Agency Speech
By Dino Grandoni 2/21/17, 1:50PM

WASHINGTON — In a brief introductory speech at the Environmental Protection Agency's headquarters on Tuesday, the agency's new leader, Scott Pruitt, sought to reassure leery staff of his vision for federal environmental protection under Donald Trump — one that involved the agency becoming both "pro-energy and jobs and pro-environment."

"Most of you don't know me very well," Pruitt told roughly 100 employees gathered at EPA headquarters on Tuesday, along with thousands more watching in Washington and at regional EPA offices though the agency's internal television network.

Noting past news stories of his environmental views that have not put him in a flattering light, Pruitt added: "I look forward to sharing the rest of the story with you."

During his 12 minutes of remarks, Pruitt made clear that he wished to cede responsibility for environmental protection back to the states and limit the role of the EPA strictly to what Congress has instructed it to do, saying that regulations must be "need to be tethered to statue."

"When we do that," Pruitt told employees, "we avoid he uncertainty of litigation."

Pruitt knows about litigation against the EPA: As Oklahoma's attorney general, he led more than dozen lawsuits against the EPA on that state's behalf. During his confirmation hearing, Pruitt refused to recuse himself from the eight ongoing lawsuits Oklahoma has filed against the EPA.

Still, the Trump administration does not want to wait for Congress to act. This week, the White House is readying executive actions seeking to undo Obama-era rules meant to curtail water pollution and the release of greenhouse gases, the *Washington Post* reported

Going into more detail than he did during his speech, Pruitt told the *The Wall Street Journal* in his first interview as EPA administrator that he expects to quickly withdraw the US from Clean Power Plan, Obama's landmark proposal for curbing greenhouse gas emissions from power plants.

"There's a very simple reason why this needs to happen," Pruitt said. "Because the courts have seriously called into question the legality of those rules."

But the Supreme Court, in 2007, has already ruled that EPA is obligated to regulate carbon dioxide and other greenhouse gases.

Pruitt delivered his remarks in the agency's ornate Rachel L. Carson Great Hall, named after the scientist who authored the 1962 book *Silent Spring,* which kickstarted the US environmental movement and ultimately led to the creation of the EPA eight years later.

Behind the cameras were security personnel from the Department of Homeland Security — whose presence at the headquarters, according to two EPA employees, was a first for the agency. Pruitt is expected to ask for an around-the-clock security detail as administrator, according to E&E News.

At the end of his speech, Pruitt quoted another famous environmentalist — John Muir, the 19th century activist and founder of the Sierra Club — as a way to reassure employees that his business-friendly approach is compatible with the agency's goal of environmental protection.

"Everybody needs beauty as well as bread," Pruitt said, quoting Muir.

The current head of the Sierra Club, Michael Brune, objected to the name drop.

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

Mashable
http://mashable.com/2017/02/21/scott-pruitt-speech-epa-climate-resistance/#oslu2pflKqqA
EPA's Scott Pruitt meets his hasrshest critics: the employees of his own agency
By Andrew Freedman 2/21/17

Usually, new administrators at the Environmental Protection Agency (EPA) are welcomed at headquarters without too much fanfare. That is, until today.

Scott Pruitt — the new EPA administrator nominated to the position by President Donald Trump — gave his welcome address to his agency Tuesday after garnering more "no" votes on the Senate floor than any other EPA nominee since the agency was founded in 1970.

In taking on the job, Pruitt is facing a daunting challenge: stiff resistance from within the agency itself, with current and former employees having protested his nomination, with some taking the nearly unheard of step of openly advocating for senators to vote "no" when it was brought to the Senate floor.

For some scientists in the agency, his first speech was probably the equivalent of Voldemort himself walking into Hogwarts and assuming the top job.

Pruitt openly doubts mainstream climate science findings, including that human-caused emissions of greenhouse gases are the primary cause of global temperature increases.

Pruitt was confirmed only hours after a judge in Oklahoma ordered the release of nearly 3,000 emails between Pruitt and fossil fuel companies from his time as attorney general. Those emails are due to be released by the end of the day on Tuesday.

In his first speech to agency employees on Tuesday, Pruitt spoke of federal environmental regulations as needing to be tailored for the benefit of regulated parties, rather than to protect the public.

"Regulations ought to make things regular. Regulations exist to give certainty to the regulated," he said.

Pruitt clearly aims to shrink the agency's mandate and footprint, and is expected to quickly move to reverse the Obama administration's Clean Power Plan, which regulates global warming-pollutants emitted from coal-fired power plants, along with a landmark water pollution regulation.

As Oklahoma attorney general, Pruitt sued the EPA more than a dozen times, including in opposition to the Clean Power Plan.

"Regulations exist to give certainty to the regulated"

Pruitt did little to antagonize the EPA rank and file in his speech, saying, "civility is something that I believe in very much." But he also didn't say much that would immediately quell the internal resistance to him, either.

"This environment in which we live today, forgive the reference, but it is a very toxic environment," he said. "I seek to be a good listener."

Pruitt even went so far as quoting famous naturalist John Muir, who founded the Sierra Club, in his comments.

In response, the Sierra Club put out this blistering statement: "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."

A lot is at stake if and when Pruitt and the Trump administration move to dismantle the Clean Power Plan. The Obama administration had turned to the EPA to lead the charge on global warming, and without other rules to drive down emissions, getting rid of the Clean Power Plan would jeopardize America's ability to meet the emissions targets it agreed to under the Paris Climate Agreement.

Pruitt did not mention climate change, or any other specific environmental challenge, in his speech, instead giving general nods to the need to return more of a role for environmental protection to the states.

"We can be both pro-energy and jobs and pro-environment," he said.

Business Insider
http://www.businessinsider.com/scott-pruitt-epa-first-day-speech-2017-2
Trump's new EPA chief barely mentioned the environment in his first address to agency
By Rafi Letzter 2/21/17

Scott Pruitt, the Environmental Protection Agency (EPA) critic who recently took over the agency as part of the Trump administration, gave his first address in his new position Tuesday.

The former Oklahoma Attorney General mentioned "important, monumental issues with respect to our future and our environment," but avoided a number of issues central to the EPA's mission — such as air and water protection, cleanups, public health, and environmental monitoring.

Pruitt, who sued the EPA 14 times in his previous role to fight regulations and cleanup efforts, instead emphasized "abuses" of the agency's rule-making powers.

He called on employees to take a stricter, more limited interpretation of the agency's powers.

"The process we engage in adopting regulations is important, because it shows we take our role seriously," he said, returning to a theme he emphasized during his confirmation hearings.

"Regulations ought to make things regular ... that's the job of a regulator," Pruitt said.

This is the same phrase Pruitt used during his confirmation hearings, during which he suggested that the EPA had failed in its responsibility to create a predictable economic climate for business.

Kimberley Strassel of The Wall Street Journal wrote Friday that Pruitt's passion seems to be neither environmental safety nor deregulation. Rather, she suggested, he seems like a kind of "EPA originalist," who aims to link the EPA to the tightest possible interpretation of its several congressional mandates.

Pruitt has become the nation's top environmental officer without staking out a clear position on several key environmental issues — including whether greenhouse gases like carbon dioxide should be regulated as pollutants. Nothing in Tuesday's talk cleared up any of his environmental views.

The transition at the EPA before Pruitt's arrival was particularly fraught, with reports of leaks, gag orders, and grant freezes creating uncertainty for people who follow environmental policy or rely on on the EPA for funding.

Pruitt's confirmation was particularly contentious. There were questions about his truth-telling during his hearings and Senate Democrats fought until the last minute to delay a vote until undisclosed emails between Pruitt's Oklahoma office and fossil fuel companies were released by court order.

In what may have been a nod to some of those issues, Pruitt told his new workforce on Tuesday to wait on the "rest of the story" about him, beyond what they might have seen in the press.

He also decried the "toxic environment" in American politics and called for "civility."

"I seek to be a good listener," he said, "You can't lead unless you listen."

Argus Media
http://www.argusmedia.com/news/article/?id=1409088
New EPA leader stresses federalism, agency limits
2/21/17

Washington, 21 February (Argus) — US Environmental Protection Agency (EPA) administrator Scott Pruitt today signaled a more restrained regulatory posture from the agency, with an increased role for states and a greater recognition of limits on federal authority.

EPA needs to do a better job of providing certainty to regulated industries and must become more cooperative with the state agencies that are often tasked with implementing federal environmental regulations, Pruitt said in brief remarks to agency staff.

Pruitt stressed the need to provide more regulatory certainty by taking a number of steps, including being more transparent in rule-making processes and honoring limits on the authority Congress has given the agency, he said.

"The only authority that any agency has in the executive branch is the authority given to it by Congress," Pruitt said.

When EPA does not heed those limits, it can lead to litigation and more regulatory uncertainty, he said.

In addition, Pruitt said he wants to improve EPA's relations with the states so that they do not view federal regulators as adversaries. "Federalism matters. Congress has been very prescriptive in providing in many instances a very robust role, an important role, for the states," he said.

President Donald Trump chose Pruitt to lead EPA in an effort to reshape an agency that some Republicans say has overstepped its authority from Congress and has published regulations that are impeding economic development. As attorney general for Oklahoma, Pruitt was involved in a number of efforts to overturn EPA regulations issued by former president Barack Obama's administration, including multi-state lawsuits against the Clean Power Plan to reduce CO2 emissions from power plants, mercury regulations and federal ozone air quality standards.

Many of those regulations will likely be targeted for rollbacks or repeals by Pruitt, whom Trump picked for the job in part because of his opposition to Obama's so-called "war on coal."

The Senate confirmed Pruitt last week by a 52-46 vote, largely along party lines. Senate Democrats had attempted to delay a vote after a judge ruled that the nominee had to hand over thousands of pages of documents related to his correspondence with the fossil fuel industry while attorney general. Pruitt is required to turn over approximately 3,000 documents by today, with more to come before the end of the month.

Despite his hostility to some EPA actions, Pruitt said he is committed to the agency's role in protecting the nation's air and water. "I seek to listen, learn and lead with you," he said.

Reuters
http://www.reuters.com/article/us-usa-trump-epa-idUSKBN1601Q3
New U.S. environmental chief says agency can also be pro jobs
By Timothy Gardner 2/21/17, 1:56PM

The new head of the U.S. Environmental Protection Agency, Scott Pruitt, said on Tuesday in his first address to his staff that America should not have to choose between jobs and the environment, as the White House prepares executive orders to roll back Obama-era green regulations.

The controversial pick who has sued the agency he now leads more than a dozen times while attorney general of Oklahoma also struck a conciliatory tone saying he would "listen, learn and lead" and that he valued civil discussion.

"I believe that we as a nation can be both pro-energy and jobs, and pro-environment. We don't have to choose between the two," he said in his 12-minute speech to about 70 staff seated in a room at EPA headquarters in Washington, who had greeted him with a standing ovation.

Pruitt, President Donald Trump's pick to head the EPA, was confirmed by the U.S. Senate last week after contentious hearings that focused on his record as top prosecutor of oil- and gas-producing state Oklahoma, where he sued the EPA repeatedly to stop federal environmental rules.

Democrats, environmental advocates and many of the EPA's current and former staff worry Pruitt's appointment signals a reversal in America's progress cleaning up air and water and in fighting global climate change.

But many Republican lawmakers view him as a refreshing change at the top of an agency they have long accused of federal overreach and killing jobs.

Both Trump and Pruitt have expressed doubts about the science behind climate change, and Trump vowed during his 2016 campaign for the White House to pull the United States out of a global pact to fight it.

Trump has promised to slash environmental regulation ushered in by his predecessor, President Barack Obama, and to help bolster the drilling and mining industries, but without hurting air and water quality.

EXECUTIVE ORDERS

Trump is expected to sign executive orders aimed at reshaping U.S. environmental policy as early as this week, the Washington Post reported, citing unnamed sources with knowledge of the orders. He would instruct the Department of the Interior to lift a ban on new coal mining leases on federal lands and would require the EPA to ease greenhouse gas emissions curbs on electric utilities, according to the news report.

The orders would also require the EPA to change Obama's Waters of the United States rule that details which U.S. waterways fall under federal environmental protection, according to the report.

Before Pruitt's confirmation, some 800 former EPA staff signed a letter urging senators to reject him, and around 30 current EPA staff joined a protest set up by the environmental group Sierra Club in Chicago.

Democrats had sought to delay his nomination over questions about his ties to the oil industry in Oklahoma.

In Oklahoma, a state judge ruled last week that Pruitt will have to turn over thousands of emails between his office and energy companies by Tuesday after a watchdog group, the Center for Media and Democracy, sued for their release.

The judge will review and perhaps hold back some of the emails before releasing them, a court clerk said.

(Reporting by Timothy Gardner; Writing by Richard Valdmanis; Editing by Howard Goller and Alistair Bell)

Bloomberg
https://www.bloomberg.com/news/articles/2017-02-21/trump-s-new-epa-head-woos-skeptical-staff-with-a-new-mission
EPA Chief Woos Staff Skeptical of Tilt to Pro-Energy Mission
By Jennifer A Dlouhy 2/21/17, 1:04PM

President Donald Trump's newly installed environmental chief Scott Pruitt laid out his vision for reshaping the way the federal government safeguards air and water, as he tried to convince skeptical federal employees that a refashioned agency can remain effective.

Pruitt addressed the Environmental Protection Agency's workforce -- including hundreds who had actively battled his confirmation -- on Tuesday, in his first speech since he was sworn in as administrator Friday.

"We as an agency and we as a nation can be both pro-energy and jobs and we can be pro-environment, and we don't have to choose between the two," Pruitt said to employees packed inside an auditorium at the EPA's Washington headquarters. His remarks were also streamed to EPA's 15,000-strong workforce nationwide.

Pruitt decried a deeply politicized environment that he said creates obstacles to finding effective solutions. "We deal with very important, monumental issues with respect to our future," he said. "We can do better as a country."

Perhaps more than any other member of Trump's cabinet, Pruitt is at odds with the agency he now leads. He built his political career fighting federal regulations he said stripped power away from states, and as Oklahoma attorney general, joined more than a dozen lawsuits challenging EPA actions by the Obama administration. He also appeared to relish his role as the agency's chief antagonist; an online biography dubbed Pruitt "a leading advocate against the EPA's activist agenda."

Still, Pruitt has taken pains to emphasize that environmental regulation and economic development can go hand in hand.

In a nearly 12-minute speech that avoided addressing substantive details of EPA policy, Pruitt outlined a "cooperative federalism" approach that gives states a larger role in collaborating with the EPA on environmental matters. Pruitt said he wanted to engender trust among state regulators and carefully follow congressional dictates to write new federal rules that are tethered to the statutes that compel them.

"We need to be open and transparent and objective in how we do rulemaking and make sure we follow the letter of the law as we do so because that would send, I think, a great message to those who are regulated," Pruitt said. "They want to know what's expected of them."

Pruitt sought to soothe unease among the agency's rank and file, with remarks that were measured and focused on process -- far from the bombastic declarations about slashing EPA staff and overhauling its use of science made by former Trump advisers.

Now Pruitt is trying to convince EPA employees that by focusing on core functions, the agency can do a better job keeping pollution out of the air and cleaning toxic chemicals from old industrial sites.

As administrator, Pruitt is positioned to undo some of the same agency regulations he challenged in court, including the Clean Power Plan that slashes greenhouse gas emissions from electricity and the Waters of the U.S. rule that defined which waterways are subject to pollution regulation. Trump administration officials have drafted documents directing Pruitt to begin dismantling those measures, helping fulfill Trump's pledge to eviscerate rules the president has said throttle U.S. energy development.

Some conservatives also are pressing Pruitt to go further and undo the legal underpinning for many Obama-era environmental rules by questioning the scientific basis for them.

Pruitt's efforts will face internal opposition from an agency that made combating climate change its top priority over the past few years.

Scores of EPA scientists, experts and lawyers actively fought Pruitt's nomination, beseeching senators to vote against him and organizing opposition via social media. The union representing agency employees launched an online campaign against Pruitt's agenda under the headline, "Save the EPA." Nearly 800 former EPA officials also signed a letter opposing Pruitt's nomination.

If Pruitt asks the agency's career civil servants to make 180-degree pivots on policy, he may have a hard time getting them to go along, said Kevin Book, managing director of the Washington-based research firm ClearView Energy Partners. It may take years for frustrated civil servants to walk out the door of an agency for good, but in the meantime, they can walk much slower inside it, Book said in an interview.

"You don't get an environmental scientist going to work at the EPA for the privilege of helping to drill more wells," Book said. "They're bound by all of the professional responsibilities and limitations that are imposed by their employer, but they are a force to be reckoned with."

Signs of that resistance have already appeared, with current and former employees setting up Twitter accounts to highlight perceived abuses.

Many agency employees are veterans of presidential transitions and know their fealty is to U.S. law, said Jeff Holmstead, a top EPA official under former President George W. Bush.

"There is a minority -- and I really do think it's a relatively small number -- of people at EPA who believe their mission is more important than their obligation to the law," Holmstead, a partner at Bracewell LLP, said. That opposition can feed leaks to Congress, the press and the public, he said.

Pruitt spoke Tuesday in the Rachel Carson Green Room, named for a noted marine biologist whose work highlighting the dangers of widespread pesticide use helped drive a global environmental movement.

"You can't lead, unless you listen," Pruitt said, promising to do just that as administrator.

The Hill
http://thehill.com/policy/energy-environment/320479-new-epa-head-wants-agency-to-be-pro-energy-and-jobs-and-pro
New EPA head: 'We don't have to choose between' jobs and the environment
By Timothy Cama 2/21/17, 1:32PM

The Trump administration's Environmental Protection Agency (EPA) chief outlined a vision for the agency that places an added focus on economic and job growth.

Scott Pruitt used his first speech to the EPA's 15,000 employees to speak mostly in general terms about his plans for an agency that had been a central target of Republican ire during former President Barack Obama's time in office.

"I believe that we as an agency and we as a nation can be both pro-energy and jobs, and pro-environment, that we don't have to choose between the two," Pruitt said in the 11-minute speech from EPA's headquarters.

"I think our nation has been better than any nation in the world at making sure that we do the job of protecting our natural resources and protecting our environment, while also respecting the economic growth and jobs our nation seeks to have," he said.

Pruitt comes into office with an uneasy relationship to the EPA's workforce, most of whom work outside of Washington, D.C.

Employees have publicly protested against Pruitt in places like Chicago and undertook an unprecedented effort to lobby the Senate to reject his nomination.

Pruitt, who was Oklahoma's attorney general until the Senate confirmed him Friday by a vote of 52-46, is a staunch opponent of Obama EPA regulations like the Clean Power Plan and the Clean Water Rule, which were among the targets of the 14 lawsuits he filed against the agency.

The Trump administration is reportedly preparing as soon as this week to sign executive orders to begin undoing both of those regulations.

But instead of laying out specific plans for those rules and others, Pruitt outlined the principles he wants to guide his time at the EPA, like changing the regulatory process, sticking more closely to mandates from Congress and better respecting states, all of which he implied were not done to a high enough degree under Obama.

Among his goals, he said, is to prioritize "certainty" in regulations.

"Regulations ought to make things regular. Regulators exist to give certainty to those that they regulate. Those that we regulate ought to know what's expected of them, so they can plan, and allocate resources to comply," Pruitt said. "That's really the job of a regulator."

He said the regulatory process "needs to be tethered to the statute" and the EPA should "ensure that we engender the trust of those at the state level" to be seen as partners with the states, not adversaries.

While Pruitt did not directly confront the opposition to him among the EPA workforce, he called for the agency's employees to be civil and listen to one another.

"Civility is something that I believe in very much. We ought to be able to get together and wrestle through some very difficult issues, and do so in a very civil manner," he said.

Washington Post
https://www.washingtonpost.com/news/energy-environment/wp/2017/02/21/pruitt-to-epa-employees-we-dont-have-to-choose-between-jobs-and-the-environment/?utm_term=.8cc027848664
Pruitt to EPA employees: 'We don't have to choose' between jobs and the environment'
By Brady Dennis and Chris Mooney 2/21/17, 1:35PM

In his first full work day as administrator of the Environmental Protection Agency, Scott Pruitt made clear Monday that he intends to step back from what he sees as the agency's regulatory overreach during the Obama administration.

Pruitt, who spent years criticizing and suing the EPA before becoming its newest leader, reiterated an argument he often had made as Oklahoma attorney general.

"The only authority that any agency has in the executive branch is the authority given to it by Congress," he said during a noon address to employees at the agency headquarters. "We need to respect that. We need to follow that. Because when we do that, guess what happens? We avoid litigation. We avoid the uncertainty of litigation and we reach better ends and outcomes at the end of the day."

Pruitt himself was the source of some of that legal conflict in recent years, suing the agency more than a dozen times over the course of President Barack Obama's two terms. And those lawsuits, plus his vocal criticism of the EPA's work generally and skepticism about climate change, have triggered palpable concerns among many longtime agency employees.

In many ways, though, the new administrator's remarks before his staff were conciliatory. Pruitt said he had come to listen to them and outlined principles for how he planned to guide the agency, including emphasizing civility and respect for the role of states.

"In this environment we live in this country today … it's a very toxic environment," Pruitt said. "We have jerseys that we put on both politically and otherwise. And that's something, I think, is damaging to finding results and answers."

Pruitt was confirmed Friday afternoon, mostly along partisan lines in the Senate, after a process that featured much criticism of his statements about climate change, his relationships with the fossil-fuel industry and his history of litigation against the agency he's now leading. Two Democrats in the Senate, Heidi Heitkamp of North Dakota and Joe Manchin of West Virginia, voted for him. One Republican, Susan Collins of Maine, voted against him.

While Republican lawmakers and industry executives welcomed his nomination, it was met with unprecedented opposition from environmental groups and from hundreds of former and current EPA employees, who argued that his track record shows little regard for environmental protection.

Pruitt's remarks were delivered in the Rachel Carson Green Room at the EPA, a large and dramatic wood-paneled room named after the famed environmentalist whose 1962 book, "Silent Spring," helped galvanize a movement that eventually led to the EPA's founding. About 75 EPA employees were on hand — attendance at the event was optional, and staff could also listen or watch online — along with members of the Trump administration and dozens of reporters.

News reports have suggested that President Trump is on the verge of signing a number of executive orders to roll back Obama priorities on the environment, including the Clean Power Plan, which restricts greenhouse gas emissions from

power plants, and the Waters of the U.S. regulation. But Pruitt made no explicit mention of planned policy changes in his remarks, instead focusing on what he said were a set of principles by which he would guide the agency.

Pruitt was introduced at the event by Catherine McCabe, who had served as acting administrator until his confirmation. Her remarks about his background did not mention the many occasions when he, as Oklahoma attorney general, had filed lawsuits against the agency.

"Civility is something I believe in very much," Pruitt told the employees gathered. "We ought to be able to get together and wrestle through some difficult issues and do so in a civil manner." He also noted that the "process" and "rule of law" matter greatly at the EPA. By contrast, he did not talk much about the agency's actual goals, such as preserving clean air and clean water.

"Federalism matters," Pruitt continued, pledging to forge close relationships with the states as he carries out his role. But states are likely to be highly divided over any attempt to undo Obama environmental regulations, with states such as Massachusetts, New York and California likely to oppose such efforts through state-level lawsuits much like the ones that Pruitt himself participated in against Obama's EPA.

At one point, Pruitt actually quoted John Muir, the founder of the Sierra Club — which provoked a quick response from the environmental group's executive director, Michael Brune, that "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."

Pruitt also said that there shouldn't be a contradiction between environmental protection and energy production or job creation, a line also often emphasized by President George W. Bush's administration.

"We as an agency and we as a nation can be both pro-energy and jobs and pro-environment," Pruitt said. "That we don't have to choose between the two. I think our nation has done better than any nation in the world at making sure we do the job of protecting our natural resources and protecting our environment while also respecting the economic growth and jobs our nation seeks to have."

Overall, the comments were very much in line both with what Pruitt said during his confirmation hearing and the arguments he has made for years during his opposition to EPA regulations under the Obama administration. He has been a leading proponent of the notion that the EPA too often overstepped its legal authority, going beyond the language of the statutes passed by Congress to take aggressive regulatory action. In addition, Pruitt has argued that the agency often infringed on the rights of states to regulate within their own borders.

Pruitt's remarks came shortly before the possible release by the Oklahoma attorney general's office of thousands of his emails from his tenure there, as ordered by a judge on Thursday. The office has not said whether it will comply or appeal.

After introducing him, McCabe gave Pruitt an EPA lapel pin and an EPA hat. The new leader, a former partner of a Triple-A baseball team, said he would wear the latter when going to Washington Nationals games.

Huffington Post
http://www.huffingtonpost.com/entry/pruitt-epa-speech_us_58ac7e76e4b0c4d51057164f
Scott Pruitt Goes After Critics, His Own Staff In First Speech To EPA
By Alexander C. Kaufman 2/21/17, 1:44PM

Environmental Protection Agency chief Scott Pruitt mentioned a "toxic environment" just once during his first address Tuesday to the embattled agency staff.

But he wasn't talking about industry pollution or conserving nature. He was referring to his critics' political rhetoric.

"Forgive the reference, but it's a very toxic environment," the controversial new administrator said in the speech, which lasted under 20 minutes.

"Civility is something I believe in very much," he added. "We ought to be able to get together and wrestle through some issues in a civil manner."

Then, at last, he began to outline his vision for the EPA. He described an agency that prioritized making it easier for polluters to comply with regulations. He promised to listen intently to companies before saddling them with new regulations. He admonished his new employees, some fearing layoffs amid looming budget cuts, for acting outside the agency's legal mandate and running roughshod over states' rights.

"Regulations ought to make things regular," Pruitt said. "Regulations exist to give certainty to those they regulate. Those we regulate ought to know what's expected of them so they can place and allocate resources to comply."

He did not mention climate change or environmental destruction.

Pruitt, the former attorney general of Oklahoma, was sworn in last Friday after the Senate voted 52-46 to confirm his nomination. His confirmation came a day after Judge Aletia Haynes Timmons of the District Court of Oklahoma County ruled that the Oklahoma attorney general's office must turn over more than 2,500 emails and correspondence between Pruitt and oil and gas firms. The ruling was in response to a lawsuit from watchdog group Center for Media and Democracy and the American Civil Liberties Union alleging that his office had violated Oklahoma's open records law.

"Scott Pruitt's going to have a lot of questions to answer," said Nick Surgey, the director of research at the Madison, Wisconsin-based Center for Media and Democracy, referring to the emails. "The head of the Environmental Protection Agency, on day three, is already talking about putting the interests of the environment against the interests of industry."

Democrats had sought to delay a vote on his confirmation until after those documents were released. Pruitt's former office is expected to respond by the judge's Tuesday evening deadline.

Pruitt made his reputation suing the EPA 13 times, repeatedly joining oil, gas and coal players — including Oklahoma Gas & Electric and the Domestic Energy Producers Alliance, an industry-backed group — in filing lawsuits to halt regulations. He forged what The New York Times in 2014 called an "unprecedented, secretive alliance" between Republican attorneys general and oil and gas companies to undermine environmental regulations. In 2011, he allowed Devon Energy, an Oklahoma oil and gas firm, to write a three-page complaint to the EPA under his letterhead, which he signed. Pruitt also championed the rights of Exxon Mobil Corp. in investigations into whether the oil giant committed fraud by covering up evidence that burning fossil fuels changes the climate.

In turn, the fossil fuel industry donated more than $300,000 to Pruitt between 2002 and 2016, and even more money to a political action committee and a super PAC that paid for the former Oklahoma attorney general's trips to Hawaii and New Orleans.

"I believe we as an agency and we as a nation can be both pro-energy and jobs and pro-environment," Pruitt said Tuesday, regurgitating a line he used during his confirmation hearing last month. "We don't have to choose between the two."

Pruitt's contentious confirmation drew scorn from a variety of critics. He even plans to request an around-the-clock bodyguard from his agency, according to a report by E&E News. A senior energy official at the U.S. Chamber of Commerce, the country's largest trade group with a history of combatting environmental rules, warned the new administration against repealing a 2009 EPA endangerment finding that classified greenhouse gases as a threat to public health and welfare. The comment underscores growing acceptance of the science of man-made global warming, particularly given that the Chamber's official policy priorities for 2017 "oppose EPA efforts to regulate greenhouse gases under the existing Clean Air Act, including the endangerment finding."

"There's going to be hell to pay from, you know, soccer moms and soccer dads all throughout the country," Christopher Guith, the energy official, said last month, according to a transcript published by the nonprofit Energy and Policy Institute. "People who probably voted for Donald Trump."

President Donald Trump has made slashing environmental restrictions a top priority, and the EPA is a prime target of his regulatory bushwhacking. He tapped Myron Ebell, a once-fringe contrarian who peddles conspiracy theories about climate change, to lead the EPA transition team. Soon after the inauguration, the White House ordered the EPA to freeze grants, putting a vast array of projects and personnel in limbo. That freeze has been lifted, but the White House is considering gutting the EPA's budget, which makes up just 0.22 percent of federal spending. A policy memo leaked to Axios proposed deep cuts to the EPA's budget, including axing hundreds of millions from grants to states and Native American tribes, climate programs, and environmental programs and management.

Trump's transition team also instructed agency employees to halt all press releases, social media, blog posts and external speaking engagements — giving rise to rogue Twitter accounts claiming to represent the views of the silenced regulators. The team announced plans to review all EPA studies before publication, stoking fears that the new administration might stifle research on issues such as climate change.

Inside EPA reported earlier this month that Trump is weighing closing the agency's Office of Enforcement and Compliance Assurance, which handles both civil and criminal enforcement of the country's core environmental laws, including the Clean Air Act, the Clean Water Act, the Oil Pollution Act and the Safe Drinking Water Act. The move would be part of a broader attack on regulations, including an executive order signed last month requiring agencies to suggest two rules to be axed for every new one proposed.

For some, Trump's proposed cuts may not go far enough. Rep. Matt Gaetz (R-Fla.) introduced a bill to "completely abolish" the EPA by the end of next year, as HuffPost reported.

Now that Pruitt is in place, Trump is expected to issue executive orders undoing Obama-era EPA rules on climate and water pollution as early as this week.

CNN
http://www.cnn.com/2017/02/21/politics/scott-pruitt-epa-speech/
Pruitt tries to soothe worries at EPA
By Theodore Schleifer 2/21/17, 2:25PM

Washington (CNN) Environmental Protection Agency Administrator Scott Pruitt tried his best Tuesday to fuse his humbler vision of his new agency with his stated respect for its long-serving, ambitious regulators in his maiden speech to EPA employees.

In a politically difficult pitch to career employees who may sharply disagree with his vision of a more restrained EPA, Pruitt offered something of a homily to the civil service, saluting those with decades of service and proclaiming them symbols of the agency's value. But Pruitt has promised a drastic overhaul of that agency they serve, a re-do that likely escaped few of the roughly 75 employees gathered in a tall, mahogany meeting room.

"It needs to be tethered to the statute," Pruitt said of their work. "We need to respect that. We need to follow that. Because when we do, guess what happens? We avoid litigation, we avoid the uncertainty of litigation and we reach better ends and outcomes at the end of day."
Pruitt knows something about that -- as Oklahoma attorney general, he made his name suing the Obama-era EPA as overzealous regulators without due concern for their effect on job creation.

He has vowed to curtail what critics say is the agency's zest for rulemaking and to offer a more balanced way to promote hiring while still protecting the environment. He did not mention the Clean Air Act or the Clean Water Act, two of the EPA's most prominent enforcement tasks, nor the threat of climate change, in his speech.

What he did offer was a flash of deference to the bureaucracy he inherits. Moments after accepting gifts of an EPA lapel pin and a baseball cap, the former minor league baseball team owner celebrated employees who knew their way around the building better than he did. He pledged to listen intently to the agency's most-tenured workers, and to carry himself with "civility," which he conceded in this political era was "in short supply."

Many EPA employees have expressed an uneasiness with Pruitt; the labor union that represents EPA employees even urged their members to call senators and urge them to vote against Pruitt during the confirmation process.

And Pruitt at one point suggested that his image would soften as he escaped the glare of the media.

"I also recognize you don't know me very well," Pruitt said, urging suspicion of some of of the coverage that only highlighted some of his resume. "I look forward to sharing the rest of the story with you."

Working the room with handshakes and back-pats following his speech, Pruitt signaled that he had to get to know some of his own employees better as well: "I haven't seen you in a while!" he told one of them.

The Guardian
https://www.theguardian.com/us-news/2017/feb/21/epa-scott-pruitt-trump-environment-economy
New EPA head Scott Pruitt: 'We can be both pro-job and pro-environment'
By Edward Helmore 2/21/17, 1:44PM

The new head of the US Environmental Protection Agency, Scott Pruitt, told agency staff on Tuesday that the US should not have to choose between the economy and the environment.

As the White House reportedly prepares executive orders to roll back Obama-era green regulations, Pruitt struck a conciliatory tone in an address to agency staff, saying he would "listen, learn and lead".

William Happer, frontrunner for job of providing mainstream scientific opinion to officials, backs crackdown on federal scientists' freedom to speak out
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"I believe that we as a nation can be both pro-energy and jobs, and pro-environment. We don't have to choose between the two," he said in his first speech to EPA workers since he was confirmed as administrator of the agency by the US Senate last week.

"I think our nation has done better than any nation in the world at making sure that we do the job of protecting our natural resources, and protecting our environment, while also respecting economic growth," he told the room of about 70 staff at EPA headquarters in Washington.

Many Republican lawmakers view Pruitt, who sued the agency he now leads more than a dozen times as Oklahoma attorney general, as a refreshing change at the top of an agency they accuse of federal overreach and killing jobs.

But Democrats, environmental advocates and many of the EPA's current and former staff worry his appointment signals a reversal in America's progress cleaning up air and water and fighting global climate change. Nearly 800 former EPA officials signed a letter urging the Senate to reject his confirmation. Opponents argued that his ties to the fossil fuel industry and frequent lawsuits against the agency he now leads should disqualify him.

In his address to staff, Pruitt invoked the founding fathers Thomas Jefferson, James Madison and Alexander Hamilton to urge compromise.

The political environment, he said, was "a very toxic environment" that is "damaging to the overall objective of finding results and answers to the very challenging issues we face as a country".

Pruitt said he would lead the agency based on the principle of finding solutions and working toward solving problems.

"As we do our work here, we deal with very difficult monumental issues with respect to our future environment and natural resources. We must have the same kind of attitude of finding solutions and solving problems."

He addressed the need for acting with civility in the exchange of ideas. "We ought to be able to get together and wrestle through difficult issues and do so in a civil manner."

The EPA administrator said he would seek to listen to those under him: "You can't lead unless you listen." But he also called the agency to observe process and the rule of law.

Pruitt's address comes as the Oklahoma attorney general's office faces a court-ordered deadline to turn over its communications with fossil fuel companies to a watchdog group. Opponents believe the emails will show Pruitt's close ties to the energy industry.

Myron Ebell, a key presidential aide, said climate education material could be 'withdrawn' and review of car fuel efficiency standards could be reopened
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Pruitt said that by following the rule of law, the agency could avoid litigation and the uncertainty that comes with it and said he would seek to ensure that the EPA engendered trust at the state level.

"Regulations ought to make things regular," he said. "Regulators exist to give certainty to those that they regulate. Those that we regulate ought to know what's expected of them so they can plan and allocate resources to comply.

"We need to avoid abuses, such as using the guidance process to engage in rule-making, or engaging regulation through litigation. We need to open and transparent in our rule-making."

LA Times
http://www.latimes.com/politics/washington/la-na-essential-washington-updates-scott-pruitt-tries-to-calm-a-very-1487701833-htmlstory.html
Scott Pruitt tries to calm a rattles EPA workforce
By Evan Halper 2/21/17

Even as the newly installed Environmental Protection Agency chief sought to calm employees anxious about his longtime opposition to the agency, Scott Pruitt managed to rattle them a little more.

Concerns about the direction he will take the EPA grew with publication over the weekend of his first interview as agency chief.

During it, he suggested to the Wall Street Journal that the EPA, which has taken the lead in federal efforts to regulate greenhouse gases, may not even be equipped to be playing much of a role at all.

He left open the possibility that the agency will look for leadership on global warming from the GOP Congress, where there has been a persistent opposition to meaningful climate action and mainstream climate science.

During his first agency-wide address Tuesday, Pruitt focused on his favorite themes of federalism, the need for predictability among regulated industries and the dangers of agency overreach. But he also sought to reassure the staff by remarking repeatedly about how much he values its work.

He expressed admiration for the many employees he met during his first meetings at the headquarters who have been with the agency for decades.

"You can't lead unless you can listen," Pruitt said. "I seek to listen, learn and lead with you." But he also bemoaned the "toxic" nature of modern politics.

Conservatives have accused the EPA of taking actions outside the rule of law in pursuit of a liberal environmental agenda. That's not how many employees of the 15,000-person agency view their work over the last several years. Their relationship with the new boss is certain to be tense. Just before Pruitt was confirmed Friday, 773 former employees signed a letter urging the Senate to reject him.

On Monday, Greenwire reported that Pruitt, a frequent target of protesters, is requesting round-the-clock security protection from the Secret Service. The protests may only intensify as Pruitt sets about dismantling the last administration's work on the environment.

"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," Sierra Club Executive Director Michael Brune said after Tuesday's speech.

Bloomberg BNA
http://esweb.bna.com/eslw/1245/split_display.adp?fedfid=105798485&vname=dennotallissues&wsn=498768000&searchid=29389141&doctypeid=2&type=date&mode=doc&split=0&scm=1245&pg=0
Pruitt Starts at EPA With Speech to Staff, E-mails Disclosures
By Brian Dabbs 2/21/17

Scott Pruitt will face an eventful first day at the EPA.

The new addition to the agency, fresh off a stint as Oklahoma attorney general, is set to deliver his first remarks to EPA staff just as an Oklahoma district court compels the release of thousands of his former office's e-mails with fossil fuel companies. Adding to that, Democrats and environmental groups are pledging to hound the new Environmental Protection Agency administrator to ensure he complies with the law after Pruitt was confirmed Feb. 17 largely along partisan lines.

The Senate's vote capped weeks of gamesmanship and partisan bickering featuring last-minute Democratic pleas to postpone the vote for 10 days so Senators could review the roughly 2,500 e-mails with fossil fuel companies an Oklahoma judge ordered released by Feb. 21. That's the same day Pruitt will address EPA staff.

"Even if the Republicans in Congress are as actively engaged in covering up his misdeeds at EPA as they have been engaged in covering up the dark-money operation of Mr. Pruitt and the e-mails of Mr. Pruitt, there are still avenues of litigation, of ethics disclosure and of press inquiry that open things up quite a lot," Sen. Sheldon Whitehouse (D-R.I.) told reporters Feb. 16.

Sen. Bernie Sanders (I-Vt.) also denounced Pruitt, but said it's unclear whether the Republican Senate will conduct genuine oversight over the new administrator. "We will see," Sanders told Bloomberg BNA.

Democrats have repeatedly accused Pruitt of secretly raising money from fossil fuel companies, while Republicans and some energy-state Democrats say he will scale back onerous EPA regulations.
Sen. Jim Inhofe (R-Okla.), a chief Pruitt supporter, said massive regulatory rollbacks may take time.

"I think that's jumping the gun," Inhofe told Bloomberg BNA. "The next step is to try to fill in his cabinet. His problem is, he is going to have to have personnel to make all these things happen and get busy. But I know he is going to try and do that."

EPA Extols Pruitt

Still, the EPA lauded the incoming chief in a message immediately following his confirmation.

"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," the agency said in a statement. "Mr. Pruitt will lead EPA in a way that our future generations inherit a better and healthier environment while advancing America's economic interests."

As an example of his environmental accomplishments, the agency pointed to a deal Pruitt with struck with his Arkansas counterpart to decrease phosphorus pollution in the Illinois River watershed. The statement also referenced Pruitt's extensive track record of litigation against EPA regulations.

"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," said the agency.

An EPA spokeswoman didn't respond for comment on whether Pruitt has already resigned as Oklahoma attorney general. Oklahoma, as represented by the attorney general's office, is still involving in a range of suits against EPA, such as challenges to the Clean Water Rule, Clean Power Plan, ozone air quality standards, mercury standards for power plants and methane limits for the oil and natural gas industry.

Neither the EPA or the White House responded to Bloomberg BNA's request for comment on Pruitt's priorities.
Democratic Rancor

The Pruitt nomination passed the Senate 52-46 with two Democrats, Sens. Joe Manchin (W.Va.) and Heidi Heitkamp (N.D.), joining Republicans in support.

An environmental group, Friends of the Earth, pledged to hold Manchin and Heitkamp accountable for undermining the "resistance to [President Donald Trump's] extreme agenda."

Those Democrats, however, joined the rest of their caucus in voting to delay the vote by 10 days. Manchin told Bloomberg BNA the disclosure of the requested e-mails would have helped properly vet the nominee. "I would have liked to have seen them," Manchin said, adding that he personally asked Senate Majority Leader Mitch McConnell (R-Ky.) to delay the vote. But Pruitt will put in place policies to benefit West Virginia, a state embattled by a loss of coal jobs, Manchin said.

The Center for Media and Democracy, a watchdog group, and the Oklahoma chapter of the American Civil Liberties Union, sued the state attorney general's office, headed by Pruitt, over a long-delayed open records release of the 2,500 e-mails.

The request calls for Pruitt's correspondence with Peabody Energy Inc., Arch Coal Inc., Murray Energy Corp., Devon Energy Corp. and Koch Industries Inc., among other organizations. Judge Aletia Haynes Timmons Feb. 17 ordered the release of the e-mails by Feb. 21.

Democrats blasted Republicans for refusing to postpone the confirmation vote to assess the e-mails.
"[Republicans] will now own whatever comes out on [Feb. 21] and subsequent releases of the e-mails," Sen. Brian Schatz (D-Hawaii), a fierce advocate of combating climate change, told reporters.

Asked why he wouldn't sign off on a delay, McConnell responded: "Because I choose not to. And if they were not making that argument, they'd be making another argument."
—With assistance from Dean Scott.

Politico
http://www.politico.com/story/2017/02/scott-pruitt-epa-changes-235231
New EPA chief treads softly, but signals big changes to come
By Eric Wolff and Alex Guillen 2/21/17, 1:22PM

New EPA Administrator Scott Pruitt offered a conciliatory greeting Tuesday to employees of the agency that he frequently sued in his previous job as Oklahoma's attorney general — but he made clear he plans a sharp departure from the Obama administration in the agency's strategy.

"Regulators exist to give certainty to those that they regulate," he told a group of about 100 agency employees. "Those that we regulate ought to know what we expect of them so that they can plan and allocate resources to comply. That's really the job of the regulator, and the process that we engage in in adopting regulation is very, very important because it sends a message."

In his previous job, Pruitt had sued to block Obama's EPA rules on climate change and the reach of the Clean Water Act — regulations that the White House is expected to gut with executive orders in the coming days.

Pruitt said the EPA would stop the "abuses that occur sometimes: Guidance through rulemaking, or using the guidance process to do rulemaking, or engaging in litigation — regulation through litigation, consent decrees that actually bypass the Administrative Procedures Act."

Pruitt also praised the founding fathers, who he said addressed the problems of their day but "didn't shirk their responsibility."

He also used the meeting at EPA headquarters as a sign of how people can disagree and still be able to sit down and have a productive meeting.

"They acted with civility," he said. "Civility is something I believe in very much."

E&E News
http://www.eenews.net/greenwire/2017/02/21/stories/1060050365
Pruitt's pitch to staff: Give me a chance
By Robin Bravender and Kevin Bogardus 2/21/17

Scott Pruitt talked up his listening skills and desire for "civility" as he addressed a skeptical U.S. EPA staff today.

In his first speech to the agency since his swearing in as EPA administrator Friday, Pruitt stressed his respect for the agency's career staff. He hinted broadly at big changes that are expected to come to the agency under the Trump administration, although he declined to offer specific plans about efforts to repeal Obama administration environmental rules.

Many career EPA staffers have been wary about Pruitt's arrival after the former Oklahoma attorney general battled the agency's regulations in court and vowed major overhauls at the agency.

But Pruitt today cautioned those listening against jumping to conclusions.

"You don't know me very well," he told staff and press gathered in the Rachel Carson Green Room at EPA headquarters in Washington.

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

Pruitt steered clear of specifics about the Trump administration's energy policies in his 11-minute speech. He didn't, for example, delve into plans for withdrawing the Obama administration's Waters of the U.S. rule and Clean Power Plan, which he and President Trump have said they plan to do (*Greenwire*, Feb. 20).

Instead, Pruitt's greeting today appeared to be an attempt to calm the waters at the agency where many staffers are anxious.

"Civility is something I believe in very much. We ought to be able to get together and wrestle through some very difficult issues and do so in a civil manner," he told employees.

He added, "I seek to be a good listener. Those of you that have been here for quite some time, whether it's in the air area or water or whatever area that you may be in, I look forward to spending time with you, not just to address certain issues but really spend time and dig down deep with respect to how we're going to do business in the future and get to know you personally and get to know how I can be a resource to you as you do your work. ... You can't lead unless you listen."

The new administrator hinted broadly at some of the reforms he'd like to see at EPA. He said the agency has a responsibility to "avoid abuses that occur sometimes" in rulemaking, and he stressed the importance of following the "rule of law" and in partnering with states through federalism. "I seek to ensure that we engender the trust of those at the state level," he said.

Catherine McCabe, who served as EPA's acting boss ahead of Pruitt's confirmation, offered the new administrator gifts, including an EPA lapel pin and an agency baseball cap.

Pruitt, the former co-owner of Oklahoma City's minor league baseball team, said he'd wear the EPA hat with pride to Washington Nationals games.

"I am excited about being in a city that actually has a major league baseball team," he said.

Some EPA employees attended today's event in person. Others tuned in online or listened by phone.

As Pruitt settles into his job, EPA staff and environmentalists will be watching closely to see how he leads the agency.

Agency employees were "hoping not to hear 'Death and Destruction for EPA,'" said John O'Grady, an EPA union leader, ahead of the speech. "Probably what we will hear is a lot of very smooth political talk, but the proof will be in the executive orders that President Trump issues."

The Trump administration is widely expected to issue executive orders directing the rollback of some of President Obama's signature environmental rules, including the Clean Power Plan and WOTUS. Those orders are expected to come as early as this week.

Forbes
http://www.forbes.com/sites/ericmack/2017/02/21/scott-pruitt-lays-out-a-vision-for-the-epa-that-contradicts-the-mission-of-the-epa/#4a7a83025829
Scott Pruitt Lays Out A Vision For The EPA That Contradicts The Mission Of The EPA
By Eric Mack 2/21/17, 1:10PM

New Environmental Protection Agency administrator Scott Pruitt addressed EPA staff and the media Tuesday and in a speech lasting less than fifteen minutes, he spoke mostly about protecting jobs, industry and "the marketplace" and oh yea, the environment, too.

Pruitt comes to the Trump administration from his previous job as Oklahoma Attorney General where he spent a fair amount of time suing the very federal agency that he now heads. In six years he filed more than a dozen lawsuits against the EPA over expansion of the Clean Water Act and regulations on coal-fired power plants.

If that track record didn't make it clear what direction Pruitt will take the EPA, reading between the words of his introduction to the career employees who have spent decades working to safeguard our natural environment solidify it in crystal.

To start, let's just note that the word "climate" did not pass Pruitt's lips, so that's clearly no longer a priority at EPA, as we suspected.

Pruitt began laying out his vision and principles for running the agency by sharing a story of how the founding fathers once sat down together to work out a compromise that would lead to moving the nation's capitol from New York to the shores of the Potomac. He used the historical anecdote as a metaphor for how he will seek dialogue and compromise to address issues and problem solving related to "our environment and natural resources."

To be clear, in this context Pruitt is clearly referring to the industries that extract natural resources like oil and gas to bring them to market.

Pruitt sounds like a nice, reasonable guy in his remarks to be sure, but he's laying out a vision that already undercuts the very mission and long-term objectives of the agency he now leads.

He's not an elected official trying to compromise with other politicians to get bills passed. More of that sort of compromise, which is what was actually happening in his historical anecdote, would be great. But agencies like the EPA have missions and duties that are laid out in statute, which they must execute. Compromise with industry is not included. The mission of the EPA is actually quite simple: "to protect human health and the environment -- air, water, and land."

That's it. Notice there's no mention of protecting extractive industries. For an EPA administrator to begin his tenure by calling for compromise and working together with polluters is a bit like an attorney representing a rape victim sitting down with the client before trial and reminding her that they'll need to keep in mind the concerns and needs of the perpetrator as they prosecute the case.

Pruitt's concluding message was that he believes the EPA can be "pro-energy, pro-jobs and pro-environment."

I suppose it can, but that's not the EPA's job. There are countless other interests out there that are pro-energy and pro-jobs. The EPA was created to be solely concerned with the environment and human health.

To compromise that mission internally, before even sitting down at the table with the energy industry and other polluters, makes what we already knew a matter of public record and imminent policy: that Administrator Pruitt is still the agency's primary adversary, even as he takes its reins.

Washington Examiner
http://www.washingtonexaminer.com/pruitt-federalism-matters-at-epa/article/2615361
Pruitt: 'Federalism matters' at EPA
By John Siciliano 2/21/17, 1:01PM

New Environmental Protection Agency Administrator Scott Pruitt wants to make the agency a place where "federalism matters" and states are not seen as adversaries, he said Tuesday.

"I seek to ensure that we engender the trust of those at the state level," rather than approach them as "adversaries," Pruitt said in his first address to agency staff on Tuesday.

He made the comments after being sworn in as President Trump's head of the EPA on Friday, despite widespread Democratic opposition and protests by environmental groups and former EPA administrators.

Trump has pledged to roll back a number of EPA regulations seen as detrimental to coal miners and energy production jobs.

Pruitt said Tuesday that he doesn't see a conflict between being pro-energy and pro-environment. "We can be both pro-energy and pro-environment ... and we don't have to choose."

Pruitt also wants to make sure everything the agency does is based firmly in statute and the law.

He said the agency should abide by the law to "avoid litigation," devoting more of its time doing the business of the agency, and less time going to court over its regulations.

Washington Times
http://www.washingtontimes.com/news/2017/feb/21/scott-pruitt-new-epa-chief-agency-will-respect-rul/
New EPA chief Pruitt says agency will respect rule of law, states' rights
By Ben Wolfgang 2/21/17

He didn't delve into policy specifics nor did he mention his predecessors by name, but new Environmental Protection Agency Administrator Scott Pruitt on Tuesday told federal employees that under his leadership the agency once again will adhere to the rule of law and will respect states' rights.

In a speech to EPA workers in Washington, Mr. Pruitt — the former attorney general of Oklahoma who often clashed with the agency in court as he challenged former President Obama's climate-change agenda — said federal environmental; regulations often have been unnecessarily cumbersome and expensive, and have created confusion rather than clarity.

"Regulations ought to make things regular. Regulators exist to give certainty to those they regulate," he said. "I seek to ensure that we engender the trust of those at the state level, that those at the state level see us as partners ... and not as adversaries."

Mr. Pruitt was confirmed last week by a Senate vote of 52 to 46, drawing the support of two Democrats — Sen. Joe Manchin of West Virginia and Sen. Heidi Heitkamp of North Dakota. Republican Sen. Susan Collins of Maine voted against him, saying she believes he's unfit to lead the agency.

His address comes the same day the Oklahoma attorney general's office is set to release nearly 3,000 emails containing communications between Mr. Pruitt and oil-and-gas companies. Democrats believe those documents will show clear collusion between the new EPA chief and the fossil fuels sector, though their concerns were not enough to delay last Friday's vote.

Mr. Pruitt has defended his close relationship with oil-and-gas firms while Oklahoma attorney general, saying it was his duty to defend his state's industries against unfair or unlawful regulations.

CNBC
http://www.kjrh.com/news/local-news/epa-head-scott-pruitt-to-address-agency-employees-in-speech-tuesday
EPA chief Scott Pruitt says regulators' exist to give certainty
2/21/17

EPA Administrator Scott Pruitt called on his agency to offer certainty to those it regulates and advocated for federalism in his first speech to Environmental Protection Agency employees on Tuesday.

"Regulations ought to make things regular. Regulators exist to give certainty to those that they regulate. Those that we regulate ought to know what's expected of them, so that they can plan and allocate resources to comply," Pruitt said in comments that reflected his remarks in a hearing before a Senate committee last month.

President Donald Trump's divisive pick to lead the EPA was confirmed and sworn in on Friday, following efforts by Democrats to block the confirmation in committee hearings and before the full Senate.

Environmentalists and progressives have fiercely opposed Pruitt, who has questioned the science behind climate change and sued the EPA 14 times on behalf of Oklahoma while serving as the state's attorney general. Nearly 800 former EPA officials signed a letter urging the Senate to reject Pruitt's confirmation.

Conservatives and the energy industry have hailed Pruitt as an advocate for giving states more control over environmental rules and for fighting what they see as regulatory overreach by the Obama administration. Pruitt is widely expected to execute Trump'spromise to scale back Obama-era rules and initiatives aimed at curbing greenhouse gas emissions.

Pruitt's first speech comes on the same day the Oklahoma attorney general's office faces a court-ordered deadline to turn over its communications with fossil fuel companies to a watchdog group. A *New York Times* investigation found the office had signed a letter drafted by Devon Energy that accused regulators of overstating pollution from natural gas wells.

Katherine So
Office of Media Relations Intern
U.S. Environmental Protection Agency
Telephone: (202)-564-4511
so.katherine@epa.gov

Message

From: Prabhu, Aditi [Prabhu.Aditi@epa.gov]
Sent: 2/24/2017 7:33:22 PM
To: Schwab, Justin [schwab.justin@epa.gov]
Subject: Charts of Upcoming Litigation Deadlines
Attachments: One Docket Report 2-24-17.pdf; Weekly Report 2-24-17.docx

Flag: Flag for follow up

Hi Justin,

Attached are (1) a chart of the litigation deadlines through the end of April, and (2) a more detailed 2-week look ahead with additional information on matters with upcoming deadlines.

Aditi

Aditi Prabhu
Special Assistant, Office of General Counsel
U.S. Environmental Protection Agency
(202)564-2473

Message

From: Levine, MaryEllen [levine.maryellen@epa.gov]
Sent: 4/5/2017 10:01:36 PM
To: Neugeboren, Steven [Neugeboren.Steven@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]; Fotouhi, David [fotouhi.david@epa.gov]
CC: Zomer, Jessica [Zomer.Jessica@epa.gov]; Prabhu, Aditi [Prabhu.Aditi@epa.gov]; Trudeau, Shaun [Trudeau.Shaun@epa.gov]; Minoli, Kevin [Minoli.Kevin@epa.gov]
Subject: Steam - new Petition for Reconsideration from SBA
Attachments: Advocacy Petition for Review re EPA Steam Electric Power Plant Effluent Limitations Guidelines.pdf; ATT00001.htm

We will mention this at reg review tomorrow

- *Mary Ellen*

Mary Ellen Levine
Assistant General Counsel
Water Law Office, Office of General Counsel
7510 C WJC North
(202) 564-5487

From: Matuszko, Jan
Sent: Wednesday, April 05, 2017 5:57 PM
To: Zomer, Jessica <Zomer.Jessica@epa.gov>; Levine, MaryEllen <levine.maryellen@epa.gov>
Subject: Fwd: Petition for Reconsideration

Sent from my iPhone

Begin forwarded message:

> **From:** "Maresca, Charles A." <Charles.Maresca@sba.gov>
> **Date:** April 5, 2017 at 5:47:45 PM EDT
> **To:** "Mancini, Dominic J. EOP/OMB" <Dominic_J._Mancini@omb.eop.gov>
> **Subject: Petition for Reconsideration**
>
> Attached please find a Petition for Reconsideration of EPA's Effluent Limitation Guidelines for the Steam Electric Power Generating Point Source Category, Docket ID No. EPA-HQ-OW-2009-0819, 80 Fed. Reg. 67,838 (November 3, 2015), which the Office of Advocacy of the U.S. Small Business filed with the Environmental Protection Agency today. Please let me know if you have any questions
>
> **Charles Maresca** | Director of Interagency Affairs | SBA Office of Advocacy |
> 409 3rd St. SW, Washington, DC 20416 |p 202/205-6978 | f 202/481-0408

SBA
Office of Advocacy
www.sba.gov/advocacy

Advocacy: the voice of small business in government

April 5, 2017

BY ELECTRONIC MAIL

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: ***Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, Docket ID No. EPA-HQ-OW-2009-0819, 80 Fed. Reg. 67,838 (November 3, 2015)***

Dear Administrator Pruitt:

The U.S. Small Business Administration, Office of Advocacy (Advocacy), submits a regulatory petition to modify the final Steam Electric Power Plant Effluent Limitations Guidelines (ELG) which imposed technology-based standards to control wastewater under the Clean Water Act (CWA).[1] Advocacy supports the petition to reopen the rulemaking for reconsideration filed by the Utility Water Act Group (UWAG)[2], as it provides the opportunity for regulatory relief for small entities. Advocacy supplements that petition with specific recommendations to alleviate burdens on small entity owned power plants. Regulatory relief in this rulemaking should play a key role in the implementation of the recent Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs which requires agencies to eliminate unnecessary regulations, and reduce costs on regulated entities.[3] These unduly stringent requirements are likely to force closures of a significant number of coal-fired utilities, and adversely affect mining and utility jobs and rural communities that depend on those plants, without concomitant environmental benefits. Advocacy believes that there are alternatives that would achieve important statutory goals while also providing regulatory burden relief for small entities.

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[1] 78 Fed. Reg. 67,838 (November 3, 2015).
[2] UWAG's Petition for Rulemaking to Reconsider and Administratively Stay the ELGs and Standards for the Steam Electric Power Generating Point Source Category, March 24, 2017, filed with U.S. EPA.
[3] 82 Fed. Reg. 9339 (Feb. 3, 2017); The Executive Order states, in section 2(a): " Unless prohibited by law, whenever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed."

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),[4] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[5] gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.[6] The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.[7]

Introduction

The Office of Advocacy worked closely with EPA's Office of Water in developing the proposed and final rules. EPA's proposed rule included consideration of additional regulatory alternatives that would have addressed small business concerns, but the agency failed to adopt these alternatives in the final rule. EPA certified that the final rule would not have a significant economic impact on small entities under the Regulatory Flexibility Act (RFA). As stated in our 2013 comment letter, Advocacy disagreed and believed that EPA should have convened a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel, as required by the RFA.[8] Our view is unchanged with respect to the final rule. Small entities potentially affected by this rule include several hundred small independently-owned private utilities, small government-owned utilities, and small rural electric cooperative-owned utilities.[9]

Advocacy has offered a set of recommendations that would be consistent with the Regulatory Flexibility Act, Executive Order 13563, Executive Order 13771, and the Clean Water Act. Advocacy recommends that EPA strongly consider regulatory options that exclude all plants with de minimis amounts of pollution, primarily by excluding smaller plants with generation capacity below a certain size, measured in megawatts (MW), or some other appropriate alternative metric. This rule imposes, in our best estimate, hundreds of millions of dollars annually in unnecessary costs, jeopardizing well-paying jobs, particularly in rural America.

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[4] 5 U.S.C §601 et seq.
[5] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et. seq.).
[6] Small Business Jobs Act of 2010 (Pub. L. 111-240) § 1601.
[7] *Id.*
[8] Section 609(c) of the RFA requires the formation of a SBREFA panel of three federal agency representatives that receives small entity input for all EPA rules, except those that are certified by the Administrator as having no significant economic impact on a substantial number of small entities.
[9] Advocacy's 2013 comments are found at https://www.sba.gov/content/9192013-effluent-limitations-guidelines-and-standards-steam-electric-power-generating-point-source-category-docket-id-no-epa-hq.

ED_002401_00000366-00002

This Expensive Rule Imposes Costs that Outweigh Benefits and Warrants Review Under the New Executive Orders 13771 and 13777.

This is exactly the kind of regulation targeted by the President's new Executive Order 13771,[10] to revise costly regulations that are not justified by the benefits. As the UWAG petitioners noted, this rulemaking also triggers review under the related EO 13777[11] on three grounds listed in that Executive Order.[12] Those three grounds are: (1) effect on jobs, (2) costs that exceed benefits and (3) lack of transparency of the underlying information. EPA's revision of this rule could result in annual savings of $500 million or more and conserve jobs in rural America. The cost of additional controls on bottom ash wastewater alone would be hundreds of millions of dollars annually, using EPA's estimates, and yet the environmental benefits would be negligible. Therefore this rulemaking should be placed on a high priority for review under Executive Orders 13771 and 13777.

EPA's Certification of No Significant Economic Impact on Small Entities Lacks a Factual Foundation and Transparency.

As discussed in detail in the 2013 comments, the agency certified that its proposed rule would not have a significant economic impact on a substantial number of small entities.[13] EPA produced a certification analysis that showed surprisingly few plants are owned by small entities subject to compliance costs. The analysis showed some significant costs for a large fraction of plants owned by municipalities and rural electric cooperatives of unknown size. EPA failed to identify the affected plants, and in turn, which affected plants with costs had small entity owners, preventing us from commenting effectively on the validity of EPA's determinations.[14] Given the hundreds of small entity owners that could be affected, small entity trade associations also concluded that the EPA estimate of the number of plants with costs owned by small entities was too low.[15] In the final Regulatory Impact Analysis, EPA now finds that only 12 small entities face costs in excess of one percent annualized cost/sales.[16] This is lower than stated in the proposed rule Regulatory Impact Analysis (RIA), and EPA has provided no explanation of the significant downward revision.

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[10] 82 Fed. Reg. 12285 (March 1, 2017).

[11] The related Regulatory Reform Order (EO 13777) reads: "At a minimum, each Regulatory Reform Task Force shall attempt to identify regulations that:
(i) eliminate jobs, or inhibit job creation; ...
(iii) impose costs that exceed benefits; ... [or]
(v) are inconsistent with the requirements of section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note), or the guidance issued pursuant to that provision, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility;..."

[12] UWAG petition at 7.

[13] 78 Fed. Reg. 34432, 34530 (June 7, 2013).

[14] See EPA Proposed rule Regulatory Impact Analysis (RIA) Chapters 3, 4 and 8.

[15] Phone conversation with Dorothy Kellogg, National Rural Electric Cooperative Association (NRECA) and Theresa Pugh, American Public Power Association (APPA), July 19, 2013.

[16] Annualized costs divided by sales are typically used to measure economic impact on small firms. EPA Final RIA Table 8-4.

ED_002401_00000366-00003

For both the proposed and final rules, the agency has not revealed which plants will have compliance costs, which plants with costs have small entity owners, what those costs are, or the revenues that such plants have to address those costs. This makes it impossible to verify EPA's underlying data, estimated values and calculations in either the proposed or final rules.[17] Advocacy reaffirms our previous view that a small business panel was warranted in 2013 and is still warranted now for the final rule.[18]

Further, in the final rule, EPA excludes from the economic impact analysis all the plants that are expected to close due to two other costly EPA rules – the Coal Combustion Residual (CCR) rule[19] and the Clean Power Plan (CPP) rule.[20] By excluding dozens of plants, primarily owned by small businesses, the Agency has reduced the estimated adverse impact of the Steam Electric rule. In other words, by excluding the most vulnerable plants from the analysis, the projected economic effects on the remaining plants appear substantially improved. Given that both these rules are also under reconsideration, those previously excluded more vulnerable utility plants are likely to re-emerge in the analysis of plants subject to the ELG requirements, increasing the estimated adverse economic effects on ELG plants.

The agency needs to provide more transparency regarding the pollution control and economic data when it reopens this rulemaking. EPA needs to repropose this rule, and reconsider regulatory options that minimize small business burdens, such as the regulatory flexibility alternatives that were seriously considered in the proposed rule, but rejected in the final rule.

The Regulatory Flexibility Act Requires EPA to Consider Less Stringent Alternatives for Small Entities under the Steam Electric ELG

The Regulatory Flexibility Act requires EPA to consider small entity alternatives that achieve regulatory purposes and minimize small business burdens consistent with the statutory goals. This rule warranted a robust examination under the Regulatory Flexibility Act because the rule imposes billions of dollars of capital costs, hundreds of millions of dollars in annual operating expenses, and jeopardizes jobs.[21] As noted above, Advocacy believes that EPA should have a convened a panel under section 609 of the Regulatory Flexibility Act before it issued the proposed rule.[22]

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[17] The UWAG petition for reconsideration of this rule demonstrates that the lack of transparency in the final rule effectively bars a reasonable review of the costs and economic impacts. UWAG petition at 13-32. The Office of Advocacy agrees that EPA did not provide additional transparency in the final rule record.

[18] In the event EPA reproposes this final rule without significant change, Advocacy believes a panel should be required for such a proposed rule.

[19] 80 Fed. Reg. 21,301 (Mar. 17, 2015).

[20] 80 Fed. Reg. 64,661 (Oct. 23, 2015).

[21] EPA's own estimate of job impact included 953 full-time-equivalents at power plants and 525 full-time-equivalents at coal mines in the year 2020. EPA RIA Tables 6-2 and 6-6, September 25, 2016. Given the expected change in the implementation of related regulations described above, this estimated impact would increase significantly, even according to EPA's conservative estimate.

[22] 5 U.S.C. § 609(b).

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Indeed, during 2011 and 2012, EPA had been planning to initiate the small business panel proceeding, and then terminated those plans, without explanation, shortly before the proposed rule was issued in 2013. We agree with EPA's original determination, and recommend that EPA complete the SBREFA panel process, and then repropose, unless the stringency of the new proposed rule is low enough to support a new certification of no significant economic impact under section 605 of the RFA.[23]

In a well-crafted proposed rule, in accordance with the Regulatory Flexibility Act, EPA did outline several regulatory alternatives that would minimize small utility burdens, while achieving statutory objectives. EPA even identified several "preferred" alternatives that would potentially provide a substantial fraction of the pollution reductions (the benefits arising from this water pollution control rule) at much lower costs. Unfortunately, in the 2015 final rule, EPA rejected these "preferred" regulatory flexibility alternatives, and adopted a very stringent set of requirements that were neither cost-effective nor warranted by the Clean Water Act. These "preferred" alternatives and other options merit close re-examination in a new review of the final rule.

In addition to the baseline issue related to the CCR and CPP rules, as part of the reconsideration, the agency needs to address the overlap with these two rules. EPA is in the process of reviewing and revising those two closely related rules, and this review is likely to take years to complete.[24] [25] Each utility needs to consider the costs and the technical requirements of all these related rules in developing, testing and implementing a compliance strategy. This ELG rule, including the compliance dates, needs to be reopened simply in order to coordinate the juncture between these different rules.

The key standards to be revisited are the BAT technology based standards (best available technology economically achievable) required under the Clean Water Act.[26] These standards are based on considerations of cost and the pollution reductions to be achieved by the given technology.

Controls for two wastewater streams, namely bottom ash wastewater and flue gas desulfurization (FGD or scrubber) wastewater, should be evaluated for modifications. In the case of bottom ash, EPA is requiring a no-discharge standard to be applied to all units above 50 megawatts (MW). In the case of FGD, EPA requires the application of both chemical precipitation and biological treatment to all units above 50 MW. Both of these standards will be extremely costly – EPA estimates $292 million annually for the bottom ash regulation nationwide and $195 million annually for the FGD regulation nationwide.[27] Industry estimates suggest that these

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[23] 5 U.S.C. § 605.

[24] The CCR rule reconsideration is included in the Fall 2016 EPA Regulatory Agenda, RIN 2050-AG88; Notice of Proposed Rulemaking scheduled for October 2017. Final Rule scheduled for June 2019.

[25] Section 4 of March 28, 2017 Executive Order, Presidential Executive Order on Promoting Energy Independence and Economic Growth addresses the CPP reconsideration.

[26] 33 U.S.C. §§ 1311 and 1314.

[27] See Table 2-2 and 2-3, Memorandum entitled, "Compliance Costs, Loadings Reductions, and Cost-effectiveness by Wastestream Control Technologies," Isabelle Morin, Abt Associates, dated September 25, 2015.

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costs may be underestimated by a factor of two or more, which makes the reconsideration more critical for small power plants that are least able to afford these upgrades.[28]

Without modification, we expect that this extraordinarily stringent final rule would force early closures of many small units owned by small entities, predominantly in rural America, with serious consequences to jobs and communities.[29] This rule is exactly the type of rule targeted for review by the new EO 13771 to address reduce regulatory costs.

In the case of bottom ash, the proposed rule included options that would exclude all plants (Options 1, 2 and 3).[30] Option 4a would exclude bottom ash units of nameplate generating capacity of under 400 MW.[31] Review of the bottom ash controls is the most significant issue, because it drives the highest costs, and it also controls the least amount of toxic pollution. These four options reflect the view of many commenters[32] that no additional bottom ash controls are warranted,[33] or at a minimum, only the largest units should be controlled further. In the case of FGD, the proposed rule included Option 3a which exempted smaller plants with total scrubbed MW capacity of 2000 MW[34] from all FGD requirements. EPA estimates excluding all bottom ash plants would save $292 million annually, and this estimate is likely an underestimate. Therefore, these regulatory revisions addressed in the proposed rule could provide a lifeline to small plants and preserve local jobs and the economy in the affected areas.

EPA Needs to Correct Overestimation of Pollution Removals

A. Bottom Ash Pollutant Removals are Overestimated

EPA historically has measured the environmental benefits of ELG rules in terms of the quantities and relative toxicities of the pollutants to be removed, known as toxic-weighted pound equivalents (TWPEs).[35] The TWPE metric is used to measure the benefits of pollutant removals to the public. The agency has used this metric over several decades in determining whether the rule is achieving cost-effective pollutant reductions. ELGs typically cost less than $100/TWPE

[28] See 2013 UWAG comments, attachment 10, UWAG Methodology for Calculating Dollars per TWPE for Bottom Ash, Fly Ash, and FGD Wastewaters.
[29] See proposed rule's preamble discussion of the rule's expected effect on small unit closures. 78 Fed. Reg. 34450. Also, see later discussion of small unit closures in this letter.
[30] 78 Fed. Reg. 34459-61.
[31] 78 Fed. Reg. 344679-81.
[32] See 2013 UWAG, NRECA and APPA comments.
[33] Bottom ash wastewater is now subject to Best Practical Control Technology (BPT), which requires an impoundment pond to settle the pollution in the pond before discharge, which was established in the 1982 ELG. In the 1982 Technical Development Document, EPA stated that it could not quantify any additional pollution reductions that another control technology could achieve.
[34] Scrubbed MW refers to the cumulative MW capacity of all units at a plant with scrubbers, pollution equipment designed to recover sulfur dioxide emissions.
[35] Toxic weighted pound equivalents, or TWPEs are the measure of total pollution removals, weighted by appropriate toxicity-related factors derived by the agency. See Table F-5, EPA Regulatory Impact Analysis, September 25, 2015.

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($1981).[36] Rules well in excess of this benchmark were determined to be not cost-effective and not Best Available Technology (BAT).[37]

In Advocacy's comments on the proposed rule, we stated that EPA made several major errors in overestimating the amount of pollution removals to be achieved by the proposed regulation for direct dischargers, particularly with respect to the bottom ash wastewater. This had the effect of dramatically increasing the projected benefits of the proposed rule. EPA corrected some of those earlier major errors, but unfortunately introduced new significant errors in the final rule analysis. Instead of being overestimated by a factor of about 10, EPA's new estimate is inflated by about a factor of three. In other words, Advocacy estimates that the more accurate cost/TWPE is roughly three times EPA's published figures of $289 - $383/TWPE.[38] $289/TWPE is the EPA estimate for units over 400 MW, and $383/TWPE is the EPA estimate for the remaining smaller units. This cost/TWPE is far in excess of all ELGs except one since 1979.[39] This suggests that EPA should re-evaluate the efficacy of controlling bottom ash for all units, including small units.

According to the EPA final rule, the bottom ash wastewater removals account for 344,000 toxic pound-equivalents (TWPEs). Based on making only corrections for four pollutants of the approximately 50 pollutants analyzed, a better estimate would be 127,000 TWPEs. This means that the agency has inflated the benefits of this regulation with respect to ash pollutant removals. Part of the determination of what constitutes "best available technology economically achievable" has historically included consideration of the costs and pollutant removals (benefits to the public). Proper estimation of the bottom ash wastewater flows is critical in estimating the cost effectiveness of this rule and evaluating the merits of the regulatory options for bottom ash wastewater controls. In the past, EPA has promulgated only those rules whose cost effectiveness (cost/toxic pound-equivalent of pollution removed) was in the $100/pound-equivalent (TWPE) and under range for direct dischargers of wastewater (facilities that discharge water directly into water bodies).[40] This calculation was used in past ELGs to help design the final regulation, so it needs to be carefully determined.

A review of EPA's data, made available only after the rule was published, reveals significant flaws. In one case, EPA used incorrect reporting units. In another instance, the agency confused the plant value for magnesium for manganese. This error is evident because this manganese value is about 100 times higher than all other manganese values at all other ELG plants. In another instance, EPA used a value for thallium that was based almost entirely on unreliable non-

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[36] The Cost Effectiveness Factor is calculated using the 1981 dollars, the year this benchmark was first adopted by EPA. By standardizing the real value of money, EPA can fairly compare cost-effectiveness of rulemakings over time. The conversion factor for converting 2013 dollars into 1981 dollars is 0.37 (from Engineering News Construction Cost Index). See Table F-5, EPA Regulatory Impact Analysis, September 25, 2015 for the list of rules.

[37] See further discussion on pages 7-8.

[38] EPA's estimates are found in Table 2-3, Memorandum entitled, "Compliance Costs, Loadings Reductions, and Cost-effectiveness by Wastestream Control Technologies," Isabelle Morin, Abt Associates, dated September 25, 2015, Docket EPA-HQ-OW-2009-0819.

[39] See Table F-5, EPA Regulatory Impact Analysis, September 25, 2015.

[40] See discussion below about the basis for the $100/TWPE benchmark.

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detect data,[41] which was obviously too high because the eleven other measurements are 30 or more times lower. Lastly, despite earlier strong criticism from public comment, EPA continued to use 40-year-old data from plants that were not identified and for which the underlying records were unavailable to characterize the pollution loadings. These determinations were not consistent with the data quality procedures required under the OMB Information Quality Guidelines.[42] Even before correction of these data flaws, the bottom ash requirement in this rule still has the distinction of being the second most cost-ineffective rule in EPA's history of all ELGs.[43]

In short, EPA substituted one set of errors for another, and commenters, including Advocacy had no opportunity to comment on the calculations using the new data. Correction of these and other errors would dramatically change the estimated cost effectiveness of the rule with respect to bottom ash wastewaters.

B. Best Available Technology Historically Was Established by EPA at Under $100/PE

Industry estimated that the cost effectiveness of the rule as proposed was thousands of dollars/pound-equivalent (TWPE) for regulation of bottom ash, not the $200 - $300/TWPE now estimated by EPA.[44] The February 2012 UWAG comments on the draft Merrimack Station permit offer a good summary of the history of cost effectiveness in ELGs.[45] For example, in the 2003 promulgation of the Metals Products and Machinery (MP&M) ELG, EPA found that $1000/PE was too high; less than $200/PE was typical for BAT; $420/PE was "quite expensive;" and $455/PE was "very expensive." The cost effectiveness for this rule with respect to bottom ash cannot be justified, since the figure, as in MP&M, is about $1000/TWPE, according to our recalculation. In sum, EPA should seek a regulation with a cost/TWPE that is $100/TWPE or lower. In that manner, it would be complying with both the RFA and the Clean Water Act and minimizing small firm costs.

As stated above, the cost/TWPE (toxic weighted pound equivalent) is far in excess of the historical benchmarks set by the agency. This is yet another sign that there would be little pollution, particularly from the smallest units in the industry. In addition, by our calculation, the total toxic pollutants average about three pounds (TWPE) per day per plant.[46]

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[41] Non-detect data is data for which the pollutant was not detected, and the value of the pollutant is estimated by taking one half of the detection limit in this rulemaking. The true value is between zero and the detection level.
[42] OMB, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by Federal Agencies, Republication*, 67 Fed. Reg. 8452 (Feb. 22, 2002). .
[43] See 78 Fed. Reg. at 34,504. Only one ELG has a higher cost/TWPE.
[44] The industry estimate varied by size of plant, varying from several thousand dollars/PE to over ten thousand dollars/TWPE. 2013 UWAG comments, Attachment 10. The Advocacy estimate, based on the new final rule data is approximately $780 to $1000/TWPE.
[45] Region I Draft Permit for Merrimack Station, UWAG Comments, February 28, 2012, https://www3.epa.gov/region1/npdes/merrimackstation/comments.html.
[46] 127,000 TWPEs divided by 365 operating days and 103 plants > 50 MW is approximately 3 TWPE/day.

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Regulatory Options to be Considered in the Reconsideration

A. EPA Should Consider Two Options: Exempt All Bottom Ash Units or Exempt Bottom Ash Units Under 400 MW

The high cost/TWPE for bottom ash demonstrates that the no-discharge bottom ash requirement is very expensive and yields little incremental environmental protection. Thus, EPA should prioritize reconsideration of bottom ash controls. Small entities, including small rural electric cooperatives and municipalities, own many plants that discharge bottom ash wastewater. These discharges are already being treated in ponds using Best Practicable Technology (BPT).[47] EPA found in 1982 that these discharges were so low that the agency could not quantify the pollutant reductions that would be obtained from further regulation.[48] Given the large expense, and small pollutant loadings, EPA needs to seriously examine exempting all bottom ash units from additional controls, and retaining the 1982 BPT requirement for coal ash impoundments.

At a minimum, EPA should exempt small units - under 400 MW - as EPA itself recommended as one of the preferred alternatives in the 2013 proposed rule. This exemption would have no significant adverse effect on the environment while lifting a heavy burden on small entities, particularly in rural America.

EPA recognized the utility of this regulatory flexibility alternative (option 4a) in the preamble to the proposed rule.[49] Many small plants are under great economic pressure to close. In the proposed rule, EPA observed that "most" plants could theoretically install and operate the new systems required by the rule. However, EPA stated in the proposed rule preamble:

> EPA believes that companies may choose to shut down 400 MW and smaller units instead of making new investments to comply with proposed zero discharge bottom ash requirements. EPA is basing this belief on its review of units that facilities have announced will be retired or converted to non-coal based fuel sources. Of those units that plants have announced for retirement, and that also generate bottom ash transport water, over 90 percent are 400 MW or less.[50]

Using the 2015 final rule estimates, EPA estimates that excluding units under 400 MW would save $96 million per year nationwide for small units, and would still preserve 73 percent of the bottom ash pollutant reductions.[51] This is a very attractive trade-off between costs and benefits. Elimination of all bottom ash upgrades would save $292 million a year nationwide (an additional $196 million), a very considerable savings with relatively minimal benefits foregone. This means that EPA should consider whether these additional controls are warranted at all.

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[47] The surface impoundment pond was defined as Best Practicable Technology in the 1982 ELG for bottom ash wastewater. See discussion in the 1982 Steam Electric EPA Technical Development Document found in the EPA rulemaking docket. EPA-HQ-OW-2009-0819.
[48] 1982 EPA Steam Electric Technical Development Document at 498.
[49] 78 Fed Reg. 34450 (June 7, 2013).
[50] Id.
[51] See Morin MemoTables 2-2 and 2-3.

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We agree with EPA that many plants have already achieved zero discharge for bottom ash wastewater, suggesting that this alternative is economically achievable; this does not mean that it is achievable for small units. EPA is relying on information from plants that have installed zero discharge systems in new plants. There is no information about whether the same would be true for plants that would have to retrofit. Advocacy believes it would be particularly difficult for small plants that do not have available space to expand.

In conclusion, EPA could exempt from BAT requirements either all bottom ash units or all units under 400 MW that discharge bottom ash wastewater without any adverse effect on the environment, while accomplishing the goals of the Clean Water Act, the Regulatory Flexibility Act and the relevant Executive Orders.

B. *Flue Gas Desulfurization: EPA Should Consider Excluding Small Plants or Only Requiring Small Plants To Address Local Water Quality*

There has been considerable criticism of the practicability, high costs, and feasibility of the biological treatment option for FGD wastewaters.[52] Advocacy recommends that biological treatment be required only by local permit authorities that are trying to address localized water quality issues, such as excessive selenium, rather than impose this technology across the board. Selenium is the only pollutant identified by EPA to justify the use of the high cost biological treatment. Since this is only a problem at a minority of plants that discharge into small water bodies, it makes sense to limit this technology to those scenarios. In all other situations, this technology drives up the cost but creates no additional environmental benefits.

Alternatively, we recommend that the more complex and expensive biological treatment be reserved for the largest plants. Biological treatment requires consideration of complex design and maintenance of delicate biological processes, including close control of temperature, chloride and other wastewater constituents under operating conditions that are constantly changing. As of the time of the proposed rule, this was only implemented in six plants in the U.S.[53] Restricting this rule to the largest plants will account for a larger portion of the pollution reduction benefits at a fraction of the cost of the final rule, and will avoid burdening small entities. In other words, a much more cost-effective rule can be designed to replace this final rule, more in line with the requirements of EO 12866, where the costs of the rule must be less than by the expected benefits.[54]

In our calculations, Advocacy finds that the total annualized pre-tax compliance costs for all facilities would be $195 million, and the TWPEs reduced would be 825,000 per year. Regulating only the larger units, borrowing from the proposed rule to regulate only units with more than 2000 MW scrubbed, the rule would cost only $92 million and reduce TWPEs by

[52] See 2013 comments of UWAG and the National Rural Electric Association (NRECA).
[53] 78 Fed. Reg. 34452.
[54] The February 2, 2017 interim guidance on EO 13771 explicitly states that the regulatory cost cap has "no effect on the requirements of EO 12866 or the consideration of regulatory benefits in making regulatory decisions." This EO includes the central principle that regulatory costs should be justified by regulatory benefits.

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550,000.[55] EPA could achieve 67 percent of the TWPE reductions at 47 percent of the costs.[56] This is the expected pattern because small plants generally are disproportionately affected by uniform standards, and would need to spend more to remove the same amount of pollution as a large plant. Excluding the smallest units is a good regulatory option because it relieves the burden on small plants, more frequently owned by smaller entities, increases the cost effectiveness of the regulation and lowers total costs.

There is a separate issue with regard to the applicable FGD limits, which are based on biological treatment. EPA relied upon a limited set of data upon which to set FGD limits, and overlooked the fact that none of this data reflected the many plants in the industry that relied on subbituminous coal or lignite. The record includes data which strongly suggests that these FGD limits are not feasible for such plants or plants with high chloride content. EPA needs to reflect further upon this, and re-examine its derived limits, possibly including excluding plants that use subbituminous coal and lignite.

C. *Other Issues*

1. Pretreatment Standards for Indirect Dischargers

We understand that six plants are indirect dischargers,[57] and those face the same stringent standards required for direct dischargers, despite the fact that these discharges go through publicly-owned treatment plants before discharging into the waters of the United States. Given the extremely limited pollutant loadings and relative high costs, according to EPA's own analysis,[58] these requirements appear to be ripe for substantial reduction or elimination. Under the 1979 NRDC consent decree, this entire subcategory would be excluded by rule given the de minimis amount of pollution,[59] as this is less than one pound TWPE/day.[60] As detailed in the UWAG petition, the City of Springfield is facing a heavy expense to address this rule.[61] Furthermore, these plants face the November 1, 2018 compliance date, with no permit authority flexibility to grant extensions, unlike direct dischargers. These compliance dates need to be

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[55] Calculations are based on the proportion of total annualized compliance costs and TWPE reduction associated with covering only plants with greater than 2,000 MW wet scrubbed capacity from the proposed rule. [These options were not analyzed in the final rule.] This was derived by comparing costs and TWPE reductions for policy options 3b and 3, representing the coverage of only large plants and all plants, respectively. See EPA figures at Table XI-1 and Table XII-1, 78 Fed. Reg. at 34504.

[56] As described above, Advocacy used the proposal preamble figures to derive these estimates since EPA did not examine these proposal options in the final rule.

[57] March 2017 Fact Sheet on Stream Electric ELG Pretreatment Standards, City of Springfield, Illinois, Office of Public Utilities.

[58] See EPA RIA, Table F-2 which shows that the total pollutant removals from this sector is barely 0.1% of the entire industry sector. The cost/ton, even under EPA's understated math is stated as $5,441/TWPE (Table F-4)..

[59] Paragraph 8(a)(iii) of the consent decree listed an exclusion where the "amount and toxicity in the discharge does not justify developing national regulations." The 1984 Clean Water Amendments generally codified the provisions in this consent decree. See discussion in *Economic Objectives within a Bureaucratic Process: Setting Pollution Control Requirements under the Clean Water Act*, Fraas & Mulvey, Journal of Environmental Economics and Management Vol 17, 35-53. (1989) "For example, if the loading is considered *de minimis* then the Administrator can find that additional treatment is unnecessary." Fraas & Mulvey at 39.

[60] EPA RIA Table F-2 shows 1,556 TWPE removed for final rule. Divided by 365 days per year and six plants yields about one pound TWPE/day.

[61] UWAG petition at 66-67.

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amended now under applicable legal standards, including consideration of a stay under section 705 of the Administrative Procedure Act, given that engineering and financial planning and permitting requires years. Under 5 U.S.C. § 705, EPA may postpone the effective dates of rules where "justice may require it," pending judicial review.

2. Compliance Dates for Indirect and Direct Dischargers

As addressed above, the compliance date for indirect dischargers needs immediate revision, given the imminence of the November 1, 2018 deadline. Direct dischargers face a similar problem, with the requirement to be completed as "soon as possible", which could be November 2018, or as distant as December 2023, with the compliance date established by the permit authorities. Similarly, EPA should act administratively to stay or extend these deadlines. Further, as explained in the UWAG petition, in more detail, EPA could issue informal guidance to the permit writers stating that the pendency of this reconsideration and related litigation are grounds for later deadlines.

3. Related Rulemakings

The agency needs to coordinate review and revision of this ELG with the CCR and CCP rulemaking proceedings. For example, the UWAG petition stated that it would be extremely inefficient to undertake system retrofits for this ELG and then revise these plans after EPA modifies the CCR requirements.[62]

4. Extension of Compliance Time for Plants Scheduled to Close – Lifeline Extension

EPA did not consider adjustment of the final compliance dates for plants that are planning to close shortly after the compliance dates. It would be extremely expensive and wasteful to expend millions of dollars in capital costs, and then simply close. The agency should consider an exemption for units that plan to close within five to ten years.

[62] UWAG petition at 73.

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Conclusion

Advocacy strongly believes that the final rule is not consistent with the requirements of the Regulatory Flexibility Act, and not consistent with provisions of relevant Executive Orders.[63] EPA should provide greater transparency in its pollutant loadings and cost estimates, and correct its overestimations of pollution removals. EPA should consider further regulatory options, including exempting all bottom ash wastewater flows, and setting an exclusion levels for FGD wastewaters subject to biological treatment.

We look forward to working further with the agency on developing the final rule. If you have any questions or comments on this letter, please contact me or Kevin Bromberg of my staff at 202-205-6964 or kevin.bromberg@sba.gov.

Sincerely,

Major Clark
Acting Chief Counsel for Advocacy

Kevin Bromberg
Assistant Chief Counsel
Office of Advocacy

cc: The Honorable Dom Mancini, Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Docket No. EPA-HQ-OW-2009-0819
Mike Shapiro, Acting Assistant Administrator for Water

[63] President Obama's EO 13563 was a essentially a reissue of President Clinton's EO 12866, with some small modifications. President Trump issued EO 13771, and the related 13777.

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Message

From: Schmidt, Lorie [Schmidt.Lorie@epa.gov]
Sent: 3/24/2017 6:13:00 PM
To: Schwab, Justin [schwab.justin@epa.gov]
Subject: RE: Recusal check

I will confirm, buy my understanding is that the only petitions for these two matters that we are looking at are from Texas and Luminant.

Lorie Schmidt
Associate General Counsel, Air and Radiation
Office of General Counsel
US Environmental Protection Agency
(202)564-1681

From: Schwab, Justin
Sent: Friday, March 24, 2017 1:44 PM
To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>
Subject: Re: Recusal check

If there are any parties involved other than Texas or Luminant, I would need to know

Sent from my iPhone

On Mar 24, 2017, at 1:40 PM, Schmidt, Lorie <Schmidt.Lorie@epa.gov> wrote:

> OK. **Attorney Client / Ex. 5**
>
> If you need more info, please let me know.
>
> Lorie Schmidt
> Associate General Counsel, Air and Radiation
> Office of General Counsel
> US Environmental Protection Agency
> (202)564-1681
>
> ---
>
> **From:** Schwab, Justin
> **Sent:** Friday, March 24, 2017 1:39 PM
> **To:** Schmidt, Lorie <Schmidt.Lorie@epa.gov>
> **Subject:** Re: Recusal check
>
> I will need to check with Justina and/or Kevin on the metes and bounds of the Trump Administration ethics pledge (which goes beyond the regulations). I do not *think* I am recused on these but will not know for sure until after that conversation.
>
> Sent from my iPhone
>
> On Mar 24, 2017, at 12:06 PM, Schmidt, Lorie <Schmidt.Lorie@epa.gov> wrote:

It looks like there are some issues coming up regarding reconsideration or stay petitions filed by Texas (related to SSM SIP Call and SO2 designations).

Are you recused on Texas or Luminant matters?

Let me know if you need more info to determine your recusal status.

Lorie Schmidt
Associate General Counsel, Air and Radiation
Office of General Counsel
US Environmental Protection Agency
(202)564-1681

Message

From: Minoli, Kevin [Minoli.Kevin@epa.gov]
Sent: 3/7/2017 8:51:53 PM
To: OGC ALL USERS [OGC_ALL_USERS@epa.gov]; OGC RCs and DRCs [OGC_RCs_and_DRCs@epa.gov]
Subject: A Quick Update on Avi's New Position

Hi Folks- I know that many of you were interested to know where Avi was headed after his time with OGC. Today he announced that he has joined the firm of Gibson Dunn. See below for an article on what he will be working on (and his mindfulness of the ethics rules!)

Thanks, Kevin

Kevin S. Minoli
Acting General Counsel
Office of General Counsel
US Environmental Protection Agency
Main Office Line: 202-564-8040

Gibson Dunn Snags Obama EPA GC

Share us on: By **Juan Carlos Rodriguez**

Law360, New York (March 6, 2017, 8:51 PM EST) --

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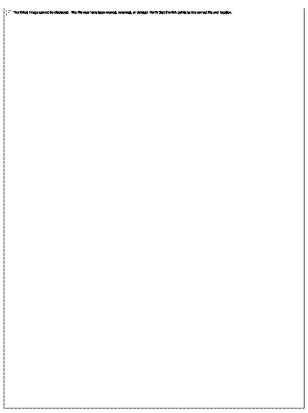

Avi Garbow

Former U.S. Environmental Protection Agency General Counsel Avi Garbow has joined Gibson Dunn, and tells Law360 he'll continue to focus on climate change and clean technology matters as he did under the Obama administration, this time from the industry side.

Like most of the EPA public servants who were appointed by President Barack Obama, Garbow headed for the exit with the election of President Donald Trump. He said that after leading the agency's legal team during the crafting of the most important environmental regulations of recent years and helping shape the federal government's approach to climate change, Gibson Dunn offered the best opportunity for him to continue his work in the areas he focused on at the EPA.

"I was looking for a top-tier law firm with an international presence and a crop of talented lawyers, and a deep environmental bench. And I was looking for a firm that would accommodate and embrace my interest in working on a broad environmental portfolio for clients, to include work on issues relating to climate change, clean tech and renewable energy," Garbow said Monday.

He'll be working as a partner in Gibson Dunn's environmental litigation and mass tort practice group, and crisis management practice group.

At the EPA, Garbow led the legal development of some landmark environmental regulations: the **Clean Power Plan**, which aims to reduce carbon dioxide emissions from existing power plants, and the **Clean Water Rule**, which would clarify the federal government's permitting jurisdiction over certain water bodies. Both rules are now stayed pending the outcome of challenges.

The Trump administration has taken a dim view of those rules, and has already started an effort to roll back the Clean Water Rule, which was criticized by some states and industry groups as an overreach on the part of the EPA and the Army Corps of Engineers. Trump signed an executive order last week that called on the agencies to begin work on a new rule that revises or rescinds the older one, and the agencies have already filed an official notice that they'll get the process under way. A similar executive order is expected soon on the Clean Power Plan.

Garbow defended both, saying the Clean Water Rule "greatly increased" the degree of certainty about which waters are or may not be subject to jurisdiction under the Clean Water Act, and that the Clean Power Plan is noteworthy for the way it incorporated input from states and other stakeholders, including industry groups.

"The Clean Power Plan is a strong, effective, flexible and achievable regulation done with the utmost deference to the public engagement that really is the hallmark of the EPA," he said. "It may be relatively easy to pen an executive order — it is not so easy, when you have rules that have already been promulgated on a solid scientific and legal record, to simply rescind or change them."

A replacement for Garbow hasn't been nominated yet, but new EPA Administrator Scott Pruitt was a court opponent of both rules as Oklahoma attorney general. Asked how he thinks the career attorneys at the EPA will deal with a new leadership that's hostile to what were the signature regulations of the Obama administration, Garbow was sanguine.

"I've got the greatest respect for the career staff and the career lawyers at the agency," he said. "Most of them have been through changes of administration and have provided tremendous service to leadership from either political party."

Gibson Dunn isn't involved in any of the litigation surrounding either of those rules, but because of legal ethics rules, Garbow couldn't have contributed his expertise anyway. Like other attorneys who have worked for the government, he is bound by standards that prohibit him from switching sides on matters, or even participating in those in which he was "personally and substantially" involved. He said he went through a thorough vetting process to figure out all those types of matters, and that he'll continue to work with the EPA's Office of Ethics as need be.

Garbow has switched gears from public to private work before, however, so it's not all new to him. He started his legal career 25 years ago as an attorney in the EPA's enforcement office and later became a federal prosecutor at the U.S. Department of Justice's Environmental Crimes

Section. He then joined WilmerHale, and later Cohen Milstein Sellers & Toll PLLC, before being appointed the EPA's deputy general counsel in 2009. He was nominated and confirmed as the agency's general counsel in 2013.

"I've often thought that government works best when you have an engaged and informed citizenry," Garbow said. "Having lawyers and other professionals who themselves have spent time, particularly in leadership positions within the federal government, or at an agency like EPA, be able to translate what goes on at the agency to clients who are themselves important stakeholders, I think is critical to the best workings of government."

Aside from helping craft and defend the Clean Power Plan and Clean Water Rule, Garbow said he's proud of the way he beefed up the Office of General Counsel with new attorneys and the way his office helped the EPA implement a more coherent environmental justice policy across the entire agency. And he said he thinks the agency, despite heated criticism, showed that environmental regulations can work with market forces to effect positive change.

"I think we spent a lot of time making the case, and truly demonstrating, that when it came to environmental protection and the economy, it was not an either-or proposition. We could do solid, responsible, protective environmental standards that also allowed companies to thrive and really grow in the economy," he said. "The opportunity to kind of take that truism and apply it in a private practice setting is very attractive."

Message

From: So, Katherine [so.katherine@epa.gov]
Sent: 2/21/2017 7:43:03 PM
To: McGonagle, Kevin [mcgonagle.kevin@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]; Valentine, Julia [Valentine.Julia@epa.gov]; AO OPA Media Relations [AO_OPA_Media_Relations@epa.gov]
CC: So, Katherine [so.katherine@epa.gov]
Subject: RE: Pruitt Post Speech/Event Clips 2/21/17

Below: Reuters, Bloomberg, The Hill, Washington Post, Huffington Post, CNN, The Guardian, LA Times, Bloomberg BNA, Politico, E&E News, Forbes, Washington Examiner, Washington Times, CNBC

Reuters
http://www.reuters.com/article/us-usa-trump-epa-idUSKBN1601Q3
New U.S. environmental chief says agency can also be pro jobs
By Timothy Gardner 2/21/17, 1:56PM

The new head of the U.S. Environmental Protection Agency, Scott Pruitt, said on Tuesday in his first address to his staff that America should not have to choose between jobs and the environment, as the White House prepares executive orders to roll back Obama-era green regulations.

The controversial pick who has sued the agency he now leads more than a dozen times while attorney general of Oklahoma also struck a conciliatory tone saying he would "listen, learn and lead" and that he valued civil discussion.

"I believe that we as a nation can be both pro-energy and jobs, and pro-environment. We don't have to choose between the two," he said in his 12-minute speech to about 70 staff seated in a room at EPA headquarters in Washington, who had greeted him with a standing ovation.

Pruitt, President Donald Trump's pick to head the EPA, was confirmed by the U.S. Senate last week after contentious hearings that focused on his record as top prosecutor of oil- and gas-producing state Oklahoma, where he sued the EPA repeatedly to stop federal environmental rules.

Democrats, environmental advocates and many of the EPA's current and former staff worry Pruitt's appointment signals a reversal in America's progress cleaning up air and water and in fighting global climate change.

But many Republican lawmakers view him as a refreshing change at the top of an agency they have long accused of federal overreach and killing jobs.

Both Trump and Pruitt have expressed doubts about the science behind climate change, and Trump vowed during his 2016 campaign for the White House to pull the United States out of a global pact to fight it.

Trump has promised to slash environmental regulation ushered in by his predecessor, President Barack Obama, and to help bolster the drilling and mining industries, but without hurting air and water quality.

EXECUTIVE ORDERS

Trump is expected to sign executive orders aimed at reshaping U.S. environmental policy as early as this week, the Washington Post reported, citing unnamed sources with knowledge of the orders. He would instruct the Department of the Interior to lift a ban on new coal mining leases on federal lands and would require the EPA to ease greenhouse gas emissions curbs on electric utilities, according to the news report.

The orders would also require the EPA to change Obama's Waters of the United States rule that details which U.S. waterways fall under federal environmental protection, according to the report.

Before Pruitt's confirmation, some 800 former EPA staff signed a letter urging senators to reject him, and around 30 current EPA staff joined a protest set up by the environmental group Sierra Club in Chicago.

Democrats had sought to delay his nomination over questions about his ties to the oil industry in Oklahoma.

In Oklahoma, a state judge ruled last week that Pruitt will have to turn over thousands of emails between his office and energy companies by Tuesday after a watchdog group, the Center for Media and Democracy, sued for their release.

The judge will review and perhaps hold back some of the emails before releasing them, a court clerk said.

(Reporting by Timothy Gardner; Writing by Richard Valdmanis; Editing by Howard Goller and Alistair Bell)

Bloomberg
https://www.bloomberg.com/news/articles/2017-02-21/trump-s-new-epa-head-woos-skeptical-staff-with-a-new-mission
EPA Chief Woos Staff Skeptical of Tilt to Pro-Energy Mission
By Jennifer A Dlouhy 2/21/17, 1:04PM

President Donald Trump's newly installed environmental chief Scott Pruitt laid out his vision for reshaping the way the federal government safeguards air and water, as he tried to convince skeptical federal employees that a refashioned agency can remain effective.

Pruitt addressed the Environmental Protection Agency's workforce -- including hundreds who had actively battled his confirmation -- on Tuesday, in his first speech since he was sworn in as administrator Friday.

"We as an agency and we as a nation can be both pro-energy and jobs and we can be pro-environment, and we don't have to choose between the two," Pruitt said to employees packed inside an auditorium at the EPA's Washington headquarters. His remarks were also streamed to EPA's 15,000-strong workforce nationwide.

Pruitt decried a deeply politicized environment that he said creates obstacles to finding effective solutions. "We deal with very important, monumental issues with respect to our future," he said. "We can do better as a country."

Perhaps more than any other member of Trump's cabinet, Pruitt is at odds with the agency he now leads. He built his political career fighting federal regulations he said stripped power away from states, and as Oklahoma attorney general, joined more than a dozen lawsuits challenging EPA actions by the Obama administration. He also appeared to relish his role as the agency's chief antagonist; an online biography dubbed Pruitt "a leading advocate against the EPA's activist agenda."

Still, Pruitt has taken pains to emphasize that environmental regulation and economic development can go hand in hand.

In a nearly 12-minute speech that avoided addressing substantive details of EPA policy, Pruitt outlined a "cooperative federalism" approach that gives states a larger role in collaborating with the EPA on environmental matters. Pruitt said he wanted to engender trust among state regulators and carefully follow congressional dictates to write new federal rules that are tethered to the statutes that compel them.

"We need to be open and transparent and objective in how we do rulemaking and make sure we follow the letter of the law as we do so because that would send, I think, a great message to those who are regulated," Pruitt said. "They want to know what's expected of them."

Pruitt sought to soothe unease among the agency's rank and file, with remarks that were measured and focused on process -- far from the bombastic declarations about slashing EPA staff and overhauling its use of science made by former Trump advisers.

Now Pruitt is trying to convince EPA employees that by focusing on core functions, the agency can do a better job keeping pollution out of the air and cleaning toxic chemicals from old industrial sites.

As administrator, Pruitt is positioned to undo some of the same agency regulations he challenged in court, including the Clean Power Plan that slashes greenhouse gas emissions from electricity and the Waters of the U.S. rule that defined which waterways are subject to pollution regulation. Trump administration officials have drafted documents directing Pruitt to begin dismantling those measures, helping fulfill Trump's pledge to eviscerate rules the president has said throttle U.S. energy development.

Some conservatives also are pressing Pruitt to go further and undo the legal underpinning for many Obama-era environmental rules by questioning the scientific basis for them.

Pruitt's efforts will face internal opposition from an agency that made combating climate change its top priority over the past few years.

Scores of EPA scientists, experts and lawyers actively fought Pruitt's nomination, beseeching senators to vote against him and organizing opposition via social media. The union representing agency employees launched an online campaign against Pruitt's agenda under the headline, "Save the EPA." Nearly 800 former EPA officials also signed a letter opposing Pruitt's nomination.

If Pruitt asks the agency's career civil servants to make 180-degree pivots on policy, he may have a hard time getting them to go along, said Kevin Book, managing director of the Washington-based research firm ClearView Energy Partners. It may take years for frustrated civil servants to walk out the door of an agency for good, but in the meantime, they can walk much slower inside it, Book said in an interview.

"You don't get an environmental scientist going to work at the EPA for the privilege of helping to drill more wells," Book said. "They're bound by all of the professional responsibilities and limitations that are imposed by their employer, but they are a force to be reckoned with."

Signs of that resistance have already appeared, with current and former employees setting up Twitter accounts to highlight perceived abuses.

Many agency employees are veterans of presidential transitions and know their fealty is to U.S. law, said Jeff Holmstead, a top EPA official under former President George W. Bush.

"There is a minority -- and I really do think it's a relatively small number -- of people at EPA who believe their mission is more important than their obligation to the law," Holmstead, a partner at Bracewell LLP, said. That opposition can feed leaks to Congress, the press and the public, he said.

Pruitt spoke Tuesday in the Rachel Carson Green Room, named for a noted marine biologist whose work highlighting the dangers of widespread pesticide use helped drive a global environmental movement.

"You can't lead, unless you listen," Pruitt said, promising to do just that as administrator.

The Hill

http://thehill.com/policy/energy-environment/320479-new-epa-head-wants-agency-to-be-pro-energy-and-jobs-and-pro

New EPA head: 'We don't have to choose between' jobs and the environment

By Timothy Cama 2/21/17, 1:32PM

The Trump administration's Environmental Protection Agency (EPA) chief outlined a vision for the agency that places an added focus on economic and job growth.

Scott Pruitt used his first speech to the EPA's 15,000 employees to speak mostly in general terms about his plans for an agency that had been a central target of Republican ire during former President Barack Obama's time in office.

"I believe that we as an agency and we as a nation can be both pro-energy and jobs, and pro-environment, that we don't have to choose between the two," Pruitt said in the 11-minute speech from EPA's headquarters.

"I think our nation has been better than any nation in the world at making sure that we do the job of protecting our natural resources and protecting our environment, while also respecting the economic growth and jobs our nation seeks to have," he said.

Pruitt comes into office with an uneasy relationship to the EPA's workforce, most of whom work outside of Washington, D.C.

Employees have publicly protested against Pruitt in places like Chicago and undertook an unprecedented effort to lobby the Senate to reject his nomination.

Pruitt, who was Oklahoma's attorney general until the Senate confirmed him Friday by a vote of 52-46, is a staunch opponent of Obama EPA regulations like the Clean Power Plan and the Clean Water Rule, which were among the targets of the 14 lawsuits he filed against the agency.

The Trump administration is reportedly preparing as soon as this week to sign executive orders to begin undoing both of those regulations.

But instead of laying out specific plans for those rules and others, Pruitt outlined the principles he wants to guide his time at the EPA, like changing the regulatory process, sticking more closely to mandates from Congress and better respecting states, all of which he implied were not done to a high enough degree under Obama.

Among his goals, he said, is to prioritize "certainty" in regulations.

"Regulations ought to make things regular. Regulators exist to give certainty to those that they regulate. Those that we regulate ought to know what's expected of them, so they can plan, and allocate resources to comply," Pruitt said. "That's really the job of a regulator."

He said the regulatory process "needs to be tethered to the statute" and the EPA should "ensure that we engender the trust of those at the state level" to be seen as partners with the states, not adversaries.

While Pruitt did not directly confront the opposition to him among the EPA workforce, he called for the agency's employees to be civil and listen to one another.

"Civility is something that I believe in very much. We ought to be able to get together and wrestle through some very difficult issues, and do so in a very civil manner," he said.

Washington Post

https://www.washingtonpost.com/news/energy-environment/wp/2017/02/21/pruitt-to-epa-employees-we-dont-have-to-choose-between-jobs-and-the-environment/?utm_term=.8cc027848664

Pruitt to EPA employees: 'We don't have to choose' between jobs and the environment'

By Brady Dennis and Chris Mooney 2/21/17, 1:35PM

In his first full work day as administrator of the Environmental Protection Agency, Scott Pruitt made clear Monday that he intends to step back from what he sees as the agency's regulatory overreach during the Obama administration.

Pruitt, who spent years criticizing and suing the EPA before becoming its newest leader, reiterated an argument he often had made as Oklahoma attorney general.

"The only authority that any agency has in the executive branch is the authority given to it by Congress," he said during a noon address to employees at the agency headquarters. "We need to respect that. We need to follow that. Because when we do that, guess what happens? We avoid litigation. We avoid the uncertainty of litigation and we reach better ends and outcomes at the end of the day."

Pruitt himself was the source of some of that legal conflict in recent years, suing the agency more than a dozen times over the course of President Barack Obama's two terms. And those lawsuits, plus his vocal criticism of the EPA's work generally and skepticism about climate change, have triggered palpable concerns among many longtime agency employees.

In many ways, though, the new administrator's remarks before his staff were conciliatory. Pruitt said he had come to listen to them and outlined principles for how he planned to guide the agency, including emphasizing civility and respect for the role of states.

"In this environment we live in this country today … it's a very toxic environment," Pruitt said. "We have jerseys that we put on both politically and otherwise. And that's something, I think, is damaging to finding results and answers."

Pruitt was confirmed Friday afternoon, mostly along partisan lines in the Senate, after a process that featured much criticism of his statements about climate change, his relationships with the fossil-fuel industry and his history of litigation against the agency he's now leading. Two Democrats in the Senate, Heidi Heitkamp of North Dakota and Joe Manchin of West Virginia, voted for him. One Republican, Susan Collins of Maine, voted against him.

While Republican lawmakers and industry executives welcomed his nomination, it was met with unprecedented opposition from environmental groups and from hundreds of former and current EPA employees, who argued that his track record shows little regard for environmental protection.

Pruitt's remarks were delivered in the Rachel Carson Green Room at the EPA, a large and dramatic wood-paneled room named after the famed environmentalist whose 1962 book, "Silent Spring," helped galvanize a movement that eventually led to the EPA's founding. About 75 EPA employees were on hand — attendance at the event was optional, and staff could also listen or watch online — along with members of the Trump administration and dozens of reporters.

News reports have suggested that President Trump is on the verge of signing a number of executive orders to roll back Obama priorities on the environment, including the Clean Power Plan, which restricts greenhouse gas emissions from power plants, and the Waters of the U.S. regulation. But Pruitt made no explicit mention of planned policy changes in his remarks, instead focusing on what he said were a set of principles by which he would guide the agency.

Pruitt was introduced at the event by Catherine McCabe, who had served as acting administrator until his confirmation. Her remarks about his background did not mention the many occasions when he, as Oklahoma attorney general, had filed lawsuits against the agency.

"Civility is something I believe in very much," Pruitt told the employees gathered. "We ought to be able to get together and wrestle through some difficult issues and do so in a civil manner." He also noted that the "process" and "rule of law"

matter greatly at the EPA. By contrast, he did not talk much about the agency's actual goals, such as preserving clean air and clean water.

"Federalism matters," Pruitt continued, pledging to forge close relationships with the states as he carries out his role. But states are likely to be highly divided over any attempt to undo Obama environmental regulations, with states such as Massachusetts, New York and California likely to oppose such efforts through state-level lawsuits much like the ones that Pruitt himself participated in against Obama's EPA.

At one point, Pruitt actually quoted John Muir, the founder of the Sierra Club — which provoked a quick response from the environmental group's executive director, Michael Brune, that "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."

Pruitt also said that there shouldn't be a contradiction between environmental protection and energy production or job creation, a line also often emphasized by President George W. Bush's administration.

"We as an agency and we as a nation can be both pro-energy and jobs and pro-environment," Pruitt said. "That we don't have to choose between the two. I think our nation has done better than any nation in the world at making sure we do the job of protecting our natural resources and protecting our environment while also respecting the economic growth and jobs our nation seeks to have."

Overall, the comments were very much in line both with what Pruitt said during his confirmation hearing and the arguments he has made for years during his opposition to EPA regulations under the Obama administration. He has been a leading proponent of the notion that the EPA too often overstepped its legal authority, going beyond the language of the statutes passed by Congress to take aggressive regulatory action. In addition, Pruitt has argued that the agency often infringed on the rights of states to regulate within their own borders.

Pruitt's remarks came shortly before the possible release by the Oklahoma attorney general's office of thousands of his emails from his tenure there, as ordered by a judge on Thursday. The office has not said whether it will comply or appeal.

After introducing him, McCabe gave Pruitt an EPA lapel pin and an EPA hat. The new leader, a former partner of a Triple-A baseball team, said he would wear the latter when going to Washington Nationals games.

Huffington Post
http://www.huffingtonpost.com/entry/pruitt-epa-speech_us_58ac7e76e4b0c4d51057164f
Scott Pruitt Goes After Critics, His Own Staff In First Speech To EPA
By Alexander C. Kaufman 2/21/17, 1:44PM

Environmental Protection Agency chief Scott Pruitt mentioned a "toxic environment" just once during his first address Tuesday to the embattled agency staff.

But he wasn't talking about industry pollution or conserving nature. He was referring to his critics' political rhetoric.

"Forgive the reference, but it's a very toxic environment," the controversial new administrator said in the speech, which lasted under 20 minutes.

"Civility is something I believe in very much," he added. "We ought to be able to get together and wrestle through some issues in a civil manner."

Then, at last, he began to outline his vision for the EPA. He described an agency that prioritized making it easier for polluters to comply with regulations. He promised to listen intently to companies before saddling them with new regulations. He admonished his new employees, some fearing layoffs amid looming budget cuts, for acting outside the agency's legal mandate and running roughshod over states' rights.

"Regulations ought to make things regular," Pruitt said. "Regulations exist to give certainty to those they regulate. Those we regulate ought to know what's expected of them so they can place and allocate resources to comply."

He did not mention climate change or environmental destruction.

Pruitt, the former attorney general of Oklahoma, was sworn in last Friday after the Senate voted 52-46 to confirm his nomination. His confirmation came a day after Judge Aletia Haynes Timmons of the District Court of Oklahoma County ruled that the Oklahoma attorney general's office must turn over more than 2,500 emails and correspondence between Pruitt and oil and gas firms. The ruling was in response to a lawsuit from watchdog group Center for Media and Democracy and the American Civil Liberties Union alleging that his office had violated Oklahoma's open records law.

"Scott Pruitt's going to have a lot of questions to answer," said Nick Surgey, the director of research at the Madison, Wisconsin-based Center for Media and Democracy, referring to the emails. "The head of the Environmental Protection Agency, on day three, is already talking about putting the interests of the environment against the interests of industry."

Democrats had sought to delay a vote on his confirmation until after those documents were released. Pruitt's former office is expected to respond by the judge's Tuesday evening deadline.

Pruitt made his reputation suing the EPA 13 times, repeatedly joining oil, gas and coal players — including Oklahoma Gas & Electric and the Domestic Energy Producers Alliance, an industry-backed group — in filing lawsuits to halt regulations. He forged what The New York Times in 2014 called an "unprecedented, secretive alliance" between Republican attorneys general and oil and gas companies to undermine environmental regulations. In 2011, he allowed Devon Energy, an Oklahoma oil and gas firm, to write a three-page complaint to the EPA under his letterhead, which he signed. Pruitt also championed the rights of Exxon Mobil Corp. in investigations into whether the oil giant committed fraud by covering up evidence that burning fossil fuels changes the climate.

In turn, the fossil fuel industry donated more than $300,000 to Pruitt between 2002 and 2016, and even more money to a political action committee and a super PAC that paid for the former Oklahoma attorney general's trips to Hawaii and New Orleans.

"I believe we as an agency and we as a nation can be both pro-energy and jobs and pro-environment," Pruitt said Tuesday, regurgitating a line he used during his confirmation hearing last month. "We don't have to choose between the two."

Pruitt's contentious confirmation drew scorn from a variety of critics. He even plans to request an around-the-clock bodyguard from his agency, according to a report by E&E News. A senior energy official at the U.S. Chamber of Commerce, the country's largest trade group with a history of combatting environmental rules, warned the new administration against repealing a 2009 EPA endangerment finding that classified greenhouse gases as a threat to public health and welfare. The comment underscores growing acceptance of the science of man-made global warming, particularly given that the Chamber's official policy priorities for 2017 "oppose EPA efforts to regulate greenhouse gases under the existing Clean Air Act, including the endangerment finding."

"There's going to be hell to pay from, you know, soccer moms and soccer dads all throughout the country," Christopher Guith, the energy official, said last month, according to a transcript published by the nonprofit Energy and Policy Institute. "People who probably voted for Donald Trump."

President Donald Trump has made slashing environmental restrictions a top priority, and the EPA is a prime target of his regulatory bushwhacking. He tapped Myron Ebell, a once-fringe contrarian who peddles conspiracy theories about climate change, to lead the EPA transition team. Soon after the inauguration, the White House ordered the EPA to freeze grants, putting a vast array of projects and personnel in limbo. That freeze has been lifted, but the White House is considering gutting the EPA's budget, which makes up just 0.22 percent of federal spending. A policy memo leaked to Axios proposed deep cuts to the EPA's budget, including axing hundreds of millions from grants to states and Native American tribes, climate programs, and environmental programs and management.

Trump's transition team also instructed agency employees to halt all press releases, social media, blog posts and external speaking engagements — giving rise to rogue Twitter accounts claiming to represent the views of the silenced regulators. The team announced plans to review all EPA studies before publication, stoking fears that the new administration might stifle research on issues such as climate change.

Inside EPA reported earlier this month that Trump is weighing closing the agency's Office of Enforcement and Compliance Assurance, which handles both civil and criminal enforcement of the country's core environmental laws, including the Clean Air Act, the Clean Water Act, the Oil Pollution Act and the Safe Drinking Water Act. The move would be part of a broader attack on regulations, including an executive order signed last month requiring agencies to suggest two rules to be axed for every new one proposed.

For some, Trump's proposed cuts may not go far enough. Rep. Matt Gaetz (R-Fla.) introduced a bill to "completely abolish" the EPA by the end of next year, as HuffPost reported.

Now that Pruitt is in place, Trump is expected to issue executive orders undoing Obama-era EPA rules on climate and water pollution as early as this week.

CNN
http://www.cnn.com/2017/02/21/politics/scott-pruitt-epa-speech/
Pruitt tries to soothe worries at EPA
By Theodore Schleifer 2/21/17, 2:25PM

Washington (CNN) Environmental Protection Agency Administrator Scott Pruitt tried his best Tuesday to fuse his humbler vision of his new agency with his stated respect for its long-serving, ambitious regulators in his maiden speech to EPA employees.

In a politically difficult pitch to career employees who may sharply disagree with his vision of a more restrained EPA, Pruitt offered something of a homily to the civil service, saluting those with decades of service and proclaiming them symbols of the agency's value. But Pruitt has promised a drastic overhaul of that agency they serve, a re-do that likely escaped few of the roughly 75 employees gathered in a tall, mahogany meeting room.

"It needs to be tethered to the statute," Pruitt said of their work. "We need to respect that. We need to follow that. Because when we do, guess what happens? We avoid litigation, we avoid the uncertainty of litigation and we reach better ends and outcomes at the end of day."
Pruitt knows something about that -- as Oklahoma attorney general, he made his name suing the Obama-era EPA as overzealous regulators without due concern for their effect on job creation.

He has vowed to curtail what critics say is the agency's zest for rulemaking and to offer a more balanced way to promote hiring while still protecting the environment. He did not mention the Clean Air Act or the Clean Water Act, two of the EPA's most prominent enforcement tasks, nor the threat of climate change, in his speech.

What he did offer was a flash of deference to the bureaucracy he inherits. Moments after accepting gifts of an EPA lapel pin and a baseball cap, the former minor league baseball team owner celebrated employees who knew their way around the building better than he did. He pledged to listen intently to the agency's most-tenured workers, and to carry himself with "civility," which he conceded in this political era was "in short supply."

Many EPA employees have expressed an uneasiness with Pruitt; the labor union that represents EPA employees even urged their members to call senators and urge them to vote against Pruitt during the confirmation process.

And Pruitt at one point suggested that his image would soften as he escaped the glare of the media.

"I also recognize you don't know me very well," Pruitt said, urging suspicion of some of of the coverage that only highlighted some of his resume. "I look forward to sharing the rest of the story with you."

Working the room with handshakes and back-pats following his speech, Pruitt signaled that he had to get to know some of his own employees better as well: "I haven't seen you in a while!" he told one of them.

The Guardian
https://www.theguardian.com/us-news/2017/feb/21/epa-scott-pruitt-trump-environment-economy
New EPA head Scott Pruitt: 'We can be both pro-job and pro-environment'
By Edward Helmore 2/21/17, 1:44PM

The new head of the US Environmental Protection Agency, Scott Pruitt, told agency staff on Tuesday that the US should not have to choose between the economy and the environment.

As the White House reportedly prepares executive orders to roll back Obama-era green regulations, Pruitt struck a conciliatory tone in an address to agency staff, saying he would "listen, learn and lead".

William Happer, frontrunner for job of providing mainstream scientific opinion to officials, backs crackdown on federal scientists' freedom to speak out
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"I believe that we as a nation can be both pro-energy and jobs, and pro-environment. We don't have to choose between the two," he said in his first speech to EPA workers since he was confirmed as administrator of the agency by the US Senate last week.

"I think our nation has done better than any nation in the world at making sure that we do the job of protecting our natural resources, and protecting our environment, while also respecting economic growth," he told the room of about 70 staff at EPA headquarters in Washington.

Many Republican lawmakers view Pruitt, who sued the agency he now leads more than a dozen times as Oklahoma attorney general, as a refreshing change at the top of an agency they accuse of federal overreach and killing jobs.

But Democrats, environmental advocates and many of the EPA's current and former staff worry his appointment signals a reversal in America's progress cleaning up air and water and fighting global climate change. Nearly 800 former EPA officials signed a letter urging the Senate to reject his confirmation. Opponents argued that his ties to the fossil fuel industry and frequent lawsuits against the agency he now leads should disqualify him.

In his address to staff, Pruitt invoked the founding fathers Thomas Jefferson, James Madison and Alexander Hamilton to urge compromise.

The political environment, he said, was "a very toxic environment" that is "damaging to the overall objective of finding results and answers to the very challenging issues we face as a country".

Pruitt said he would lead the agency based on the principle of finding solutions and working toward solving problems.

"As we do our work here, we deal with very difficult monumental issues with respect to our future environment and natural resources. We must have the same kind of attitude of finding solutions and solving problems."

He addressed the need for acting with civility in the exchange of ideas. "We ought to be able to get together and wrestle through difficult issues and do so in a civil manner."

The EPA administrator said he would seek to listen to those under him: "You can't lead unless you listen." But he also called the agency to observe process and the rule of law.

Pruitt's address comes as the Oklahoma attorney general's office faces a court-ordered deadline to turn over its communications with fossil fuel companies to a watchdog group. Opponents believe the emails will show Pruitt's close ties to the energy industry.

Myron Ebell, a key presidential aide, said climate education material could be 'withdrawn' and review of car fuel efficiency standards could be reopened
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Pruitt said that by following the rule of law, the agency could avoid litigation and the uncertainty that comes with it and said he would seek to ensure that the EPA engendered trust at the state level.

"Regulations ought to make things regular," he said. "Regulators exist to give certainty to those that they regulate. Those that we regulate ought to know what's expected of them so they can plan and allocate resources to comply.

"We need to avoid abuses, such as using the guidance process to engage in rule-making, or engaging regulation through litigation. We need to open and transparent in our rule-making."

LA Times
http://www.latimes.com/politics/washington/la-na-essential-washington-updates-scott-pruitt-tries-to-calm-a-very-1487701833-htmlstory.html
Scott Pruitt tries to calm a rattles EPA workforce
By Evan Halper 2/21/17

Even as the newly installed Environmental Protection Agency chief sought to calm employees anxious about his longtime opposition to the agency, Scott Pruitt managed to rattle them a little more.

Concerns about the direction he will take the EPA grew with publication over the weekend of his first interview as agency chief.

During it, he suggested to the Wall Street Journal that the EPA, which has taken the lead in federal efforts to regulate greenhouse gases, may not even be equipped to be playing much of a role at all.

He left open the possibility that the agency will look for leadership on global warming from the GOP Congress, where there has been a persistent opposition to meaningful climate action and mainstream climate science.

During his first agency-wide address Tuesday, Pruitt focused on his favorite themes of federalism, the need for predictability among regulated industries and the dangers of agency overreach. But he also sought to reassure the staff by remarking repeatedly about how much he values its work.

He expressed admiration for the many employees he met during his first meetings at the headquarters who have been with the agency for decades.

"You can't lead unless you can listen," Pruitt said. "I seek to listen, learn and lead with you." But he also bemoaned the "toxic" nature of modern politics.

Conservatives have accused the EPA of taking actions outside the rule of law in pursuit of a liberal environmental agenda. That's not how many employees of the 15,000-person agency view their work over the last several years. Their relationship with the new boss is certain to be tense. Just before Pruitt was confirmed Friday, 773 former employees signed a letter urging the Senate to reject him.

On Monday, Greenwire reported that Pruitt, a frequent target of protesters, is requesting round-the-clock security protection from the Secret Service. The protests may only intensify as Pruitt sets about dismantling the last administration's work on the environment.

"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," Sierra Club Executive Director Michael Brune said after Tuesday's speech.

Bloomberg BNA
http://esweb.bna.com/eslw/1245/split_display.adp?fedfid=105798485&vname=dennotallissues&wsn=498768000&searchid=29389141&doctypeid=2&type=date&mode=doc&split=0&scm=1245&pg=0
Pruitt Starts at EPA With Speech to Staff, E-mails Disclosures
By Brian Dabbs 2/21/17

Scott Pruitt will face an eventful first day at the EPA.

The new addition to the agency, fresh off a stint as Oklahoma attorney general, is set to deliver his first remarks to EPA staff just as an Oklahoma district court compels the release of thousands of his former office's e-mails with fossil fuel companies. Adding to that, Democrats and environmental groups are pledging to hound the new Environmental Protection Agency administrator to ensure he complies with the law after Pruitt was confirmed Feb. 17 largely along partisan lines.

The Senate's vote capped weeks of gamesmanship and partisan bickering featuring last-minute Democratic pleas to postpone the vote for 10 days so Senators could review the roughly 2,500 e-mails with fossil fuel companies an Oklahoma judge ordered released by Feb. 21. That's the same day Pruitt will address EPA staff.

"Even if the Republicans in Congress are as actively engaged in covering up his misdeeds at EPA as they have been engaged in covering up the dark-money operation of Mr. Pruitt and the e-mails of Mr. Pruitt, there are still avenues of litigation, of ethics disclosure and of press inquiry that open things up quite a lot," Sen. Sheldon Whitehouse (D-R.I.) told reporters Feb. 16.

Sen. Bernie Sanders (I-Vt.) also denounced Pruitt, but said it's unclear whether the Republican Senate will conduct genuine oversight over the new administrator. "We will see," Sanders told Bloomberg BNA.

Democrats have repeatedly accused Pruitt of secretly raising money from fossil fuel companies, while Republicans and some energy-state Democrats say he will scale back onerous EPA regulations.
Sen. Jim Inhofe (R-Okla.), a chief Pruitt supporter, said massive regulatory rollbacks may take time.

"I think that's jumping the gun," Inhofe told Bloomberg BNA. "The next step is to try to fill in his cabinet. His problem is, he is going to have to have personnel to make all these things happen and get busy. But I know he is going to try and do that."

EPA Extols Pruitt

Still, the EPA lauded the incoming chief in a message immediately following his confirmation.

"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," the agency said in a statement. "Mr. Pruitt will lead EPA in a way that our future generations inherit a better and healthier environment while advancing America's economic interests."

As an example of his environmental accomplishments, the agency pointed to a deal Pruitt with struck with his Arkansas counterpart to decrease phosphorus pollution in the Illinois River watershed. The statement also referenced Pruitt's extensive track record of litigation against EPA regulations.

"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," said the agency.

An EPA spokeswoman didn't respond for comment on whether Pruitt has already resigned as Oklahoma attorney general. Oklahoma, as represented by the attorney general's office, is still involving in a range of suits against EPA, such as challenges to the Clean Water Rule, Clean Power Plan, ozone air quality standards, mercury standards for power plants and methane limits for the oil and natural gas industry.

Neither the EPA or the White House responded to Bloomberg BNA's request for comment on Pruitt's priorities.
Democratic Rancor

The Pruitt nomination passed the Senate 52-46 with two Democrats, Sens. Joe Manchin (W.Va.) and Heidi Heitkamp (N.D.), joining Republicans in support.

An environmental group, Friends of the Earth, pledged to hold Manchin and Heitkamp accountable for undermining the "resistance to [President Donald Trump's] extreme agenda."

Those Democrats, however, joined the rest of their caucus in voting to delay the vote by 10 days. Manchin told Bloomberg BNA the disclosure of the requested e-mails would have helped properly vet the nominee. "I would have liked to have seen them," Manchin said, adding that he personally asked Senate Majority Leader Mitch McConnell (R-Ky.) to delay the vote. But Pruitt will put in place policies to benefit West Virginia, a state embattled by a loss of coal jobs, Manchin said.

The Center for Media and Democracy, a watchdog group, and the Oklahoma chapter of the American Civil Liberties Union, sued the state attorney general's office, headed by Pruitt, over a long-delayed open records release of the 2,500 e-mails.

The request calls for Pruitt's correspondence with Peabody Energy Inc., Arch Coal Inc., Murray Energy Corp., Devon Energy Corp. and Koch Industries Inc., among other organizations. Judge Aletia Haynes Timmons Feb. 17 ordered the release of the e-mails by Feb. 21.

Democrats blasted Republicans for refusing to postpone the confirmation vote to assess the e-mails.
"[Republicans] will now own whatever comes out on [Feb. 21] and subsequent releases of the e-mails," Sen. Brian Schatz (D-Hawaii), a fierce advocate of combating climate change, told reporters.

Asked why he wouldn't sign off on a delay, McConnell responded: "Because I choose not to. And if they were not making that argument, they'd be making another argument."
—With assistance from Dean Scott.

Politico
http://www.politico.com/story/2017/02/scott-pruitt-epa-changes-235231
New EPA chief treads softly, but signals big changes to come
By Eric Wolff and Alex Guillen 2/21/17, 1:22PM

New EPA Administrator Scott Pruitt offered a conciliatory greeting Tuesday to employees of the agency that he frequently sued in his previous job as Oklahoma's attorney general — but he made clear he plans a sharp departure from the Obama administration in the agency's strategy.

"Regulators exist to give certainty to those that they regulate," he told a group of about 100 agency employees. "Those that we regulate ought to know what we expect of them so that they can plan and allocate resources to comply. That's really the job of the regulator, and the process that we engage in in adopting regulation is very, very important because it sends a message."

In his previous job, Pruitt had sued to block Obama's EPA rules on climate change and the reach of the Clean Water Act — regulations that the White House is expected to gut with executive orders in the coming days.

Pruitt said the EPA would stop the "abuses that occur sometimes: Guidance through rulemaking, or using the guidance process to do rulemaking, or engaging in litigation — regulation through litigation, consent decrees that actually bypass the Administrative Procedures Act."

Pruitt also praised the founding fathers, who he said addressed the problems of their day but "didn't shirk their responsibility."

He also used the meeting at EPA headquarters as a sign of how people can disagree and still be able to sit down and have a productive meeting.

"They acted with civility," he said. "Civility is something I believe in very much."

E&E News
http://www.eenews.net/greenwire/2017/02/21/stories/1060050365
Pruitt's pitch to staff: Give me a chance
By Robin Bravender and Kevin Bogardus 2/21/17

Scott Pruitt talked up his listening skills and desire for "civility" as he addressed a skeptical U.S. EPA staff today.

In his first speech to the agency since his swearing in as EPA administrator Friday, Pruitt stressed his respect for the agency's career staff. He hinted broadly at big changes that are expected to come to the agency under the Trump administration, although he declined to offer specific plans about efforts to repeal Obama administration environmental rules.

Many career EPA staffers have been wary about Pruitt's arrival after the former Oklahoma attorney general battled the agency's regulations in court and vowed major overhauls at the agency.

But Pruitt today cautioned those listening against jumping to conclusions.

"You don't know me very well," he told staff and press gathered in the Rachel Carson Green Room at EPA headquarters in Washington.

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

Pruitt steered clear of specifics about the Trump administration's energy policies in his 11-minute speech. He didn't, for example, delve into plans for withdrawing the Obama administration's Waters of the U.S. rule and Clean Power Plan, which he and President Trump have said they plan to do (*Greenwire*, Feb. 20).

Instead, Pruitt's greeting today appeared to be an attempt to calm the waters at the agency where many staffers are anxious.

"Civility is something I believe in very much. We ought to be able to get together and wrestle through some very difficult issues and do so in a civil manner," he told employees.

He added, "I seek to be a good listener. Those of you that have been here for quite some time, whether it's in the air area or water or whatever area that you may be in, I look forward to spending time with you, not just to address certain issues but really spend time and dig down deep with respect to how we're going to do business in the future and get to know you personally and get to know how I can be a resource to you as you do your work. ... You can't lead unless you listen."

The new administrator hinted broadly at some of the reforms he'd like to see at EPA. He said the agency has a responsibility to "avoid abuses that occur sometimes" in rulemaking, and he stressed the importance of following the "rule of law" and in partnering with states through federalism. "I seek to ensure that we engender the trust of those at the state level," he said.

Catherine McCabe, who served as EPA's acting boss ahead of Pruitt's confirmation, offered the new administrator gifts, including an EPA lapel pin and an agency baseball cap.

Pruitt, the former co-owner of Oklahoma City's minor league baseball team, said he'd wear the EPA hat with pride to Washington Nationals games.

"I am excited about being in a city that actually has a major league baseball team," he said.

Some EPA employees attended today's event in person. Others tuned in online or listened by phone.

As Pruitt settles into his job, EPA staff and environmentalists will be watching closely to see how he leads the agency.

Agency employees were "hoping not to hear 'Death and Destruction for EPA,'" said John O'Grady, an EPA union leader, ahead of the speech. "Probably what we will hear is a lot of very smooth political talk, but the proof will be in the executive orders that President Trump issues."

The Trump administration is widely expected to issue executive orders directing the rollback of some of President Obama's signature environmental rules, including the Clean Power Plan and WOTUS. Those orders are expected to come as early as this week.

Forbes
http://www.forbes.com/sites/ericmack/2017/02/21/scott-pruitt-lays-out-a-vision-for-the-epa-that-contradicts-the-mission-of-the-epa/#4a7a83025829
Scott Pruitt Lays Out A Vision For The EPA That Contradicts The Mission Of The EPA
By Eric Mack 2/21/17, 1:10PM

New Environmental Protection Agency administrator Scott Pruitt addressed EPA staff and the media Tuesday and in a speech lasting less than fifteen minutes, he spoke mostly about protecting jobs, industry and "the marketplace" and oh yea, the environment, too.

Pruitt comes to the Trump administration from his previous job as Oklahoma Attorney General where he spent a fair amount of time suing the very federal agency that he now heads. In six years he filed more than a dozen lawsuits against the EPA over expansion of the Clean Water Act and regulations on coal-fired power plants.

If that track record didn't make it clear what direction Pruitt will take the EPA, reading between the words of his introduction to the career employees who have spent decades working to safeguard our natural environment solidify it in crystal.

To start, let's just note that the word "climate" did not pass Pruitt's lips, so that's clearly no longer a priority at EPA, as we suspected.

Pruitt began laying out his vision and principles for running the agency by sharing a story of how the founding fathers once sat down together to work out a compromise that would lead to moving the nation's capitol from New York to the shores of the Potomac. He used the historical anecdote as a metaphor for how he will seek dialogue and compromise to address issues and problem solving related to "our environment and natural resources."

To be clear, in this context Pruitt is clearly referring to the industries that extract natural resources like oil and gas to bring them to market.

Pruitt sounds like a nice, reasonable guy in his remarks to be sure, but he's laying out a vision that already undercuts the very mission and long-term objectives of the agency he now leads.

He's not an elected official trying to compromise with other politicians to get bills passed. More of that sort of compromise, which is what was actually happening in his historical anecdote, would be great. But agencies like the EPA have missions and duties that are laid out in statute, which they must execute. Compromise with industry is not included. The mission of the EPA is actually quite simple: "to protect human health and the environment -- air, water, and land."

That's it. Notice there's no mention of protecting extractive industries. For an EPA administrator to begin his tenure by calling for compromise and working together with polluters is a bit like an attorney representing a rape victim sitting down with the client before trial and reminding her that they'll need to keep in mind the concerns and needs of the perpetrator as they prosecute the case.

Pruitt's concluding message was that he believes the EPA can be "pro-energy, pro-jobs and pro-environment."

I suppose it can, but that's not the EPA's job. There are countless other interests out there that are pro-energy and pro-jobs. The EPA was created to be solely concerned with the environment and human health.

To compromise that mission internally, before even sitting down at the table with the energy industry and other polluters, makes what we already knew a matter of public record and imminent policy: that Administrator Pruitt is still the agency's primary adversary, even as he takes its reins.

Washington Examiner
http://www.washingtonexaminer.com/pruitt-federalism-matters-at-epa/article/2615361
Pruitt: 'Federalism matters' at EPA
By John Siciliano 2/21/17, 1:01PM

New Environmental Protection Agency Administrator Scott Pruitt wants to make the agency a place where "federalism matters" and states are not seen as adversaries, he said Tuesday.

"I seek to ensure that we engender the trust of those at the state level," rather than approach them as "adversaries," Pruitt said in his first address to agency staff on Tuesday.

He made the comments after being sworn in as President Trump's head of the EPA on Friday, despite widespread Democratic opposition and protests by environmental groups and former EPA administrators.

Trump has pledged to roll back a number of EPA regulations seen as detrimental to coal miners and energy production jobs.

Pruitt said Tuesday that he doesn't see a conflict between being pro-energy and pro-environment. "We can be both pro-energy and pro-environment ... and we don't have to choose."

Pruitt also wants to make sure everything the agency does is based firmly in statute and the law.

He said the agency should abide by the law to "avoid litigation," devoting more of its time doing the business of the agency, and less time going to court over its regulations.

Washington Times
http://www.washingtontimes.com/news/2017/feb/21/scott-pruitt-new-epa-chief-agency-will-respect-rul/
New EPA chief Pruitt says agency will respect rule of law, states' rights

By Ben Wolfgang 2/21/17

He didn't delve into policy specifics nor did he mention his predecessors by name, but new Environmental Protection Agency Administrator Scott Pruitt on Tuesday told federal employees that under his leadership the agency once again will adhere to the rule of law and will respect states' rights.

In a speech to EPA workers in Washington, Mr. Pruitt — the former attorney general of Oklahoma who often clashed with the agency in court as he challenged former President Obama's climate-change agenda — said federal environmental; regulations often have been unnecessarily cumbersome and expensive, and have created confusion rather than clarity.

"Regulations ought to make things regular. Regulators exist to give certainty to those they regulate," he said. "I seek to ensure that we engender the trust of those at the state level, that those at the state level see us as partners ... and not as adversaries."

Mr. Pruitt was confirmed last week by a Senate vote of 52 to 46, drawing the support of two Democrats — Sen. Joe Manchin of West Virginia and Sen. Heidi Heitkamp of North Dakota. Republican Sen. Susan Collins of Maine voted against him, saying she believes he's unfit to lead the agency.

His address comes the same day the Oklahoma attorney general's office is set to release nearly 3,000 emails containing communications between Mr. Pruitt and oil-and-gas companies. Democrats believe those documents will show clear collusion between the new EPA chief and the fossil fuels sector, though their concerns were not enough to delay last Friday's vote.

Mr. Pruitt has defended his close relationship with oil-and-gas firms while Oklahoma attorney general, saying it was his duty to defend his state's industries against unfair or unlawful regulations.

CNBC
http://www.kjrh.com/news/local-news/epa-head-scott-pruitt-to-address-agency-employees-in-speech-tuesday
EPA chief Scott Pruitt says regulators' exist to give certainty
2/21/17

EPA Administrator Scott Pruitt called on his agency to offer certainty to those it regulates and advocated for federalism in his first speech to Environmental Protection Agency employees on Tuesday.

"Regulations ought to make things regular. Regulators exist to give certainty to those that they regulate. Those that we regulate ought to know what's expected of them, so that they can plan and allocate resources to comply," Pruitt said in comments that reflected his remarks in a hearing before a Senate committee last month.

President Donald Trump's divisive pick to lead the EPA was confirmed and sworn in on Friday, following efforts by Democrats to block the confirmation in committee hearings and before the full Senate.

Environmentalists and progressives have fiercely opposed Pruitt, who has questioned the science behind climate change and sued the EPA 14 times on behalf of Oklahoma while serving as the state's attorney general. Nearly 800 former EPA officials signed a letter urging the Senate to reject Pruitt's confirmation.

Conservatives and the energy industry have hailed Pruitt as an advocate for giving states more control over environmental rules and for fighting what they see as regulatory overreach by the Obama administration. Pruitt is

widely expected to execute Trump'spromise to scale back Obama-era rules and initiatives aimed at curbing greenhouse gas emissions.

Pruitt's first speech comes on the same day the Oklahoma attorney general's office faces a court-ordered deadline to turn over its communications with fossil fuel companies to a watchdog group. A *New York Times* investigation found the office had signed a letter drafted by Devon Energy that accused regulators of overstating pollution from natural gas wells.

Katherine So
Office of Media Relations Intern
U.S. Environmental Protection Agency
Telephone: (202)-564-4511
so.katherine@epa.gov

Message

From: Neugeboren, Steven [Neugeboren.Steven@epa.gov]
Sent: 4/7/2017 7:52:44 PM
To: Fotouhi, David [fotouhi.david@epa.gov]
CC: Minoli, Kevin [Minoli.Kevin@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]; Wood, Robert [Wood.Robert@epa.gov]; Levine, MaryEllen [levine.maryellen@epa.gov]; Zomer, Jessica [Zomer.Jessica@epa.gov]
Subject: Deliberative Process / Attorney-Client / Ex. 5 options
Attachments: Deliberative Process / Attorney-Client / Ex. 5

David – as discussed in our meeting today and per your request, attached are two documents for further use on Deliberative Process / Attorney-Client / Ex. 5

1. The options paper that we discussed with you today
2. The option that you asked us to write up Deliberative Process / Attorney-Client / Ex. 5 Deliberative Process / Attorney-Client / Ex. 5

I'm out after today until the 18th so you can follow up with Mary Ellen next week for anything you need.

Steven Neugeboren
Associate General Counsel
Water Law Office
Environmental Protection Agency
202-564-5488

Message

From: Schmidt, Lorie [Schmidt.Lorie@epa.gov]
Sent: 4/17/2017 11:07:48 PM
To: Schwab, Justin [schwab.justin@epa.gov]
CC: Dunham, Sarah [Dunham.Sarah@epa.gov]; Srinivasan, Gautam [Srinivasan.Gautam@epa.gov]; Zenick, Elliott [Zenick.Elliott@epa.gov]; Minoli, Kevin [Minoli.Kevin@epa.gov]; Fotouhi, David [fotouhi.david@epa.gov]; Gunasekara, Mandy [Gunasekara.Mandy@epa.gov]; Tsirigotis, Peter [Tsirigotis.Peter@epa.gov]; Page, Steve [Page.Steve@epa.gov]
Subject: RE: CPP status check

We will have an updated draft.

Lorie Schmidt
Associate General Counsel, Air and Radiation
Office of General Counsel
US Environmental Protection Agency
(202)564-1681

-----Original Message-----
From: Schwab, Justin
Sent: Monday, April 17, 2017 6:51 PM
To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>
Cc: Dunham, Sarah <Dunham.Sarah@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Page, Steve <Page.Steve@epa.gov>
Subject: Re: CPP status check

Deliberative Process / Attorney-Client / Attorney Work Product Ex. 5

Sent from my iPhone

> On Apr 17, 2017, at 6:50 PM, Schwab, Justin <schwab.justin@epa.gov> wrote:
>
> I can work through OP to get answers to these questions
>
> Sent from my iPhone
>
>> On Apr 17, 2017, at 6:44 PM, Schmidt, Lorie <Schmidt.Lorie@epa.gov> wrote:
>>

Deliberative Process / Attorney-Client / Attorney Work Product Ex. 5

>> Lorie Schmidt
>> Associate General Counsel, Air and Radiation Office of General
>> Counsel US Environmental Protection Agency
>> (202)564-1681
>>
>> -----Original Message-----
>> From: Schwab, Justin
>> Sent: Monday, April 17, 2017 2:30 PM
>> To: Dunham, Sarah <Dunham.Sarah@epa.gov>
>> Cc: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Srinivasan, Gautam
>> <Srinivasan.Gautam@epa.gov>; Zenick, Elliott
>> <Zenick.Elliott@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>;
>> Fotouhi, David <fotouhi.david@epa.gov>; Gunasekara, Mandy
>> <Gunasekara.Mandy@epa.gov>; Tsirigotis, Peter
>> <Tsirigotis.Peter@epa.gov>; Page, Steve <Page.Steve@epa.gov>
>> Subject: Re: CPP status check
>>

Deliberative Process / Attorney-Client / Attorney Work Product Ex. 5

>> Sent from my iPhone
>>
>>> On Apr 17, 2017, at 2:22 PM, Dunham, Sarah <Dunham.Sarah@epa.gov> wrote:
>>>

Deliberative Process / Attorney-Client / Attorney Work Product Ex. 5

Deliberative Process / Attorney-Client / Attorney Work Product Ex. 5

>>> -----Original Message-----
>>> From: Schmidt, Lorie
>>> Sent: Monday, April 17, 2017 10:34 AM
>>> To: Schwab, Justin <schwab.justin@epa.gov>
>>> Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Zenick, Elliott
>>> <Zenick.Elliott@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>;
>>> Fotouhi, David <fotouhi.david@epa.gov>; Gunasekara, Mandy
>>> <Gunasekara.Mandy@epa.gov>; Tsirigotis, Peter
>>> <Tsirigotis.Peter@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>
>>> Subject: RE: CPP status check
>>>

Deliberative Process / Attorney-Client / Attorney Work Product Ex. 5

>>> Lorie Schmidt
>>> Associate General Counsel, Air and Radiation Office of General
>>> Counsel US Environmental Protection Agency
>>> (202)564-1681
>>>
>>> -----Original Message-----
>>> From: Schwab, Justin
>>> Sent: Saturday, April 15, 2017 11:25 AM
>>> To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>
>>> Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Zenick, Elliott
>>> <Zenick.Elliott@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>;
>>> Fotouhi, David <fotouhi.david@epa.gov>; Gunasekara, Mandy
>>> <Gunasekara.Mandy@epa.gov>; Tsirigotis, Peter
>>> <Tsirigotis.Peter@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>
>>> Subject: Re: CPP status check

Deliberative Process / Attorney-Client / Attorney Work Product Ex. 5

>>> Sent from my iPhone
>>>
>>>> On Apr 15, 2017, at 11:17 AM, Schmidt, Lorie <Schmidt.Lorie@epa.gov> wrote:
>>>>
>>>> Looping in Sarah Dunham and Peter Tsirigotis since OAR is the program lead.

Deliberative Process / Attorney-Client / Attorney Work Product Ex. 5

>>>> Sent from my iPhone
>>>>
>>>>> On Apr 14, 2017, at 7:35 PM, Schwab, Justin <schwab.justin@epa.gov> wrote:
>>>>>
>>>>> Update:

Deliberative Process / Attorney-Client / Attorney Work Product Ex. 5

Deliberative Process / Attorney-Client / Attorney Work Product Ex. 5

>>>>> Sent from my iPhone
>>>>>
>>>>>> On Apr 13, 2017, at 11:58 AM, Schwab, Justin <schwab.justin@epa.gov> wrote:
>>>>>>
>>>>>> How's the second draft coming along?
>>>>>>
>>>>>> Sent from my iPhone

Message

From: David Fotouhi [Fotouhi.David@epamail.epa.gov]
Sent: 4/12/2017 8:24:04 PM
To: Minoli, Kevin [Minoli.Kevin@epa.gov]
CC: Prabhu, Aditi [Prabhu.Aditi@epa.gov]; Veney, Carla [Veney.Carla@epa.gov]; Jones, Gail-R [Jones.Gail-R@epa.gov]; Justin Schwab [Schwab.Justin@epamail.epa.gov]; Patrick, Monique [Patrick.Monique@epa.gov]; Trudeau, Shaun [Trudeau.Shaun@epa.gov]
Subject: Attorney Client / Ex. 5

Scott Jordan has submitted a package with the case name/subject of Attorney Client / Ex. 5 Attorney Client / Ex. 5

Please click the link below to see the routing and transmittal record for this package. After reviewing the package please:

* go to the Routed To section;
* route 3 line; and
* select the Add Comments button, or the Make Decision button.

LINK -> Notes://DCOGCLN1/FrontOff/OGCCTS.nsf/0/1B58A8A91D28DA1E852580FF00712025

Message

From: So, Katherine [so.katherine@epa.gov]
Sent: 2/21/2017 6:36:59 PM
To: McGonagle, Kevin [mcgonagle.kevin@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]; Valentine, Julia [Valentine.Julia@epa.gov]; AO OPA Media Relations [AO_OPA_Media_Relations@epa.gov]
CC: So, Katherine [so.katherine@epa.gov]
Subject: Pruitt Post Speech/Event Clips 2/21/17

Below: Reuters, Bloomberg, Bloomberg BNA, Politico, E&E News, Forbes, Washington Examiner, Washington Times, CNBC

Reuters
http://www.reuters.com/article/us-usa-trump-epa-idUSKBN1601Q3
New U.S. environmental chief tells staff he will 'listen, learn and lead'
By Timothy Gardner 2/21/17, 12:42PM

The new head of the U.S. Environmental Protection Agency, Scott Pruitt, told agency staff on Tuesday that America should not have to choose between the economy and the environment.

As the White House prepares executive orders to roll back Obama-era green regulations, Pruitt struck a conciliatory tone in an address to agency staff, saying he would "listen, learn and lead."

"I believe that we as a nation can be both pro-energy and jobs, and pro-environment. We don't have to choose between the two," he said in his first speech to EPA workers since he was confirmed as administrator by the U.S. Senate last week.

"I think our nation has done better than any nation in the world at making sure that we do the job of protecting our natural resources, and protecting our environment, while also respecting economic growth," he told the room of about 70 staff at EPA headquarters in Washington.

Many Republican lawmakers view Pruitt, who sued the agency he now leads more than a dozen times as the attorney general of Oklahoma, as a refreshing change at the top of an agency they accuse of federal overreach and killing jobs.

But Democrats, environmental advocates and many of the EPA's current and former staff worry his appointment signals a reversal in America's progress cleaning up air and water and fighting global climate change.

(Reporting by Timothy Gardner; Writing by Richard Valdmanis; Editing by Howard Goller and Alistair Bell)

Bloomberg
https://www.bloomberg.com/news/articles/2017-02-21/trump-s-new-epa-head-woos-skeptical-staff-with-a-new-mission
Trump's New EPA Head Woos Skeptical Staff With a New Mission
By Jennifer A Dlouhy 2/21/17, 12:27PM

President Donald Trump's newly installed environmental chief Scott PruitNt laid out his vision for reshaping the way the federal government safeguards air and water, as he tried to convince skeptical federal employees that a refashioned agency can remain effective.

Pruitt addressed the Environmental Protection Agency's workforce -- including hundreds who had actively battled his confirmation -- on Tuesday, in his first speech since he was sworn in as administrator Friday.

"We as an agency and we as a nation can be both pro-energy and jobs and we can be pro-environment, and we don't have to choose between the two," Pruitt said to employees packed inside an auditorium at the EPA's Washington headquarters. His remarks were also streamed to EPA's 15,000-strong workforce nationwide.

Pruitt also decried a deeply politicized environment that he said creates obstacles to finding effective solutions. "We deal with very important, monumental issues with respect to our future," he said.

Perhaps more than any other member of Trump's cabinet, Pruitt is at odds with the agency he now leads. He built his political career fighting federal regulations he said stripped power away from states, and as Oklahoma attorney general, joined more than a dozen lawsuits challenging EPA actions by the Obama administration. He also appeared to relish his role as the agency's chief antagonist; an online biography dubbed Pruitt "a leading advocate against the EPA's activist agenda."

Still, Pruitt has taken pains to emphasize that environmental regulation and economic development can go hand in hand. He has espoused a "cooperative federalism" approach that gives states a larger role in collaborating with the EPA "to achieve important environmental objectives." Now he is trying to convince EPA employees that by focusing on core functions, the agency can do a better job keeping pollution out of the air and cleaning toxic chemicals from old industrial sites.

Pruitt also is positioned to undo some of the same agency regulations he challenged in court, including the Clean Power Plan that slashes greenhouse gas emissions from electricity and the Waters of the U.S. rule that defined which waterways are subject to pollution regulation. Trump administration officials have drafted documents directing Pruitt to begin dismantling those measures, helping fulfill Trump's pledge to eviscerate rules the president has said throttle U.S. energy development.

Some conservatives also are pressing Pruitt to go further and undo the legal underpinning for many Obama-era environmental rules by questioning the scientific basis for them.

Pruitt's efforts will face internal opposition from an agency that made combating climate change its top priority over the past few years.

Scores of EPA scientists, experts and lawyers actively fought Pruitt's nomination, beseeching senators to vote against him and organizing opposition via social media. The union representing agency employees launched an online campaign against Pruitt's agenda under the headline, "Save the EPA." Nearly 800 former EPA officials also signed a letter opposing Pruitt's nomination.

If Pruitt asks the agency's career civil servants to make 180-degree pivots on policy, he may have a hard time getting them to go along, said Kevin Book, managing director of the Washington-based research firm ClearView Energy Partners. It may take years for frustrated civil servants to walk out the door of an agency for good, but in the meantime, they can walk much slower inside it, Book said in an interview.

"You don't get an environmental scientist going to work at the EPA for the privilege of helping to drill more wells," Book said. "They're bound by all of the professional responsibilities and limitations that are imposed by their employer, but they are a force to be reckoned with."

Signs of that resistance have already appeared, with current and former employees setting up Twitter accounts to highlight perceived abuses.

Many agency employees are veterans of presidential transitions and know their fealty is to U.S. law, said Jeff Holmstead, a top EPA official under former President George W. Bush.

"There is a minority -- and I really do think it's a relatively small number -- of people at EPA who believe their mission is more important than their obligation to the law," Holmstead, a partner at Bracewell LLP, said. That opposition can feed leaks to Congress, the press and the public, he said.

Pruitt spoke Tuesday in the Rachel Carson Green Room, named for a noted marine biologist whose work highlighting the dangers of widespread pesticide use helped drive a global environmental movement.

"You can't lead, unless you listen," Pruitt said, promising to do just that as administrator.

Bloomberg BNA
http://esweb.bna.com/eslw/1245/split_display.adp?fedfid=105798485&vname=dennotallissues&wsn=498768000&searchid=29389141&doctypeid=2&type=date&mode=doc&split=0&scm=1245&pg=0
Pruitt Starts at EPA With Speech to Staff, E-mails Disclosures
By Brian Dabbs 2/21/17

Scott Pruitt will face an eventful first day at the EPA.

The new addition to the agency, fresh off a stint as Oklahoma attorney general, is set to deliver his first remarks to EPA staff just as an Oklahoma district court compels the release of thousands of his former office's e-mails with fossil fuel companies. Adding to that, Democrats and environmental groups are pledging to hound the new Environmental Protection Agency administrator to ensure he complies with the law after Pruitt was confirmed Feb. 17 largely along partisan lines.

The Senate's vote capped weeks of gamesmanship and partisan bickering featuring last-minute Democratic pleas to postpone the vote for 10 days so Senators could review the roughly 2,500 e-mails with fossil fuel companies an Oklahoma judge ordered released by Feb. 21. That's the same day Pruitt will address EPA staff.

"Even if the Republicans in Congress are as actively engaged in covering up his misdeeds at EPA as they have been engaged in covering up the dark-money operation of Mr. Pruitt and the e-mails of Mr. Pruitt, there are still avenues of litigation, of ethics disclosure and of press inquiry that open things up quite a lot," Sen. Sheldon Whitehouse (D-R.I.) told reporters Feb. 16.

Sen. Bernie Sanders (I-Vt.) also denounced Pruitt, but said it's unclear whether the Republican Senate will conduct genuine oversight over the new administrator. "We will see," Sanders told Bloomberg BNA.

Democrats have repeatedly accused Pruitt of secretly raising money from fossil fuel companies, while Republicans and some energy-state Democrats say he will scale back onerous EPA regulations.
Sen. Jim Inhofe (R-Okla.), a chief Pruitt supporter, said massive regulatory rollbacks may take time.

"I think that's jumping the gun," Inhofe told Bloomberg BNA. "The next step is to try to fill in his cabinet. His problem is, he is going to have to have personnel to make all these things happen and get busy. But I know he is going to try and do that."

EPA Extols Pruitt

Still, the EPA lauded the incoming chief in a message immediately following his confirmation.

"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," the agency said in a statement. "Mr. Pruitt will lead EPA in a way that our future generations inherit a better and healthier environment while advancing America's economic interests."

As an example of his environmental accomplishments, the agency pointed to a deal Pruitt with struck with his Arkansas counterpart to decrease phosphorus pollution in the Illinois River watershed. The statement also referenced Pruitt's extensive track record of litigation against EPA regulations.

"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," said the agency.

An EPA spokeswoman didn't respond for comment on whether Pruitt has already resigned as Oklahoma attorney general. Oklahoma, as represented by the attorney general's office, is still involving in a range of suits against EPA, such as challenges to the Clean Water Rule, Clean Power Plan, ozone air quality standards, mercury standards for power plants and methane limits for the oil and natural gas industry.

Neither the EPA or the White House responded to Bloomberg BNA's request for comment on Pruitt's priorities.
Democratic Rancor

The Pruitt nomination passed the Senate 52-46 with two Democrats, Sens. Joe Manchin (W.Va.) and Heidi Heitkamp (N.D.), joining Republicans in support.

An environmental group, Friends of the Earth, pledged to hold Manchin and Heitkamp accountable for undermining the "resistance to [President Donald Trump's] extreme agenda."

Those Democrats, however, joined the rest of their caucus in voting to delay the vote by 10 days. Manchin told Bloomberg BNA the disclosure of the requested e-mails would have helped properly vet the nominee. "I would have liked to have seen them," Manchin said, adding that he personally asked Senate Majority Leader Mitch McConnell (R-Ky.) to delay the vote. But Pruitt will put in place policies to benefit West Virginia, a state embattled by a loss of coal jobs, Manchin said.

The Center for Media and Democracy, a watchdog group, and the Oklahoma chapter of the American Civil Liberties Union, sued the state attorney general's office, headed by Pruitt, over a long-delayed open records release of the 2,500 e-mails.

The request calls for Pruitt's correspondence with Peabody Energy Inc., Arch Coal Inc., Murray Energy Corp., Devon Energy Corp. and Koch Industries Inc., among other organizations. Judge Aletia Haynes Timmons Feb. 17 ordered the release of the e-mails by Feb. 21.

Democrats blasted Republicans for refusing to postpone the confirmation vote to assess the e-mails.
"[Republicans] will now own whatever comes out on [Feb. 21] and subsequent releases of the e-mails," Sen. Brian Schatz (D-Hawaii), a fierce advocate of combating climate change, told reporters.

Asked why he wouldn't sign off on a delay, McConnell responded: "Because I choose not to. And if they were not making that argument, they'd be making another argument."
—With assistance from Dean Scott.

Politico
http://www.politico.com/story/2017/02/scott-pruitt-epa-changes-235231
New EPA chief treads softly, but signals big changes to come
By Eric Wolff and Alex Guillen 2/21/17, 1:22PM

New EPA Administrator Scott Pruitt offered a conciliatory greeting Tuesday to employees of the agency that he frequently sued in his previous job as Oklahoma's attorney general — but he made clear he plans a sharp departure from the Obama administration in the agency's strategy.

"Regulators exist to give certainty to those that they regulate," he told a group of about 100 agency employees. "Those that we regulate ought to know what we expect of them so that they can plan and allocate resources to comply. That's really the job of the regulator, and the process that we engage in in adopting regulation is very, very important because it sends a message."

In his previous job, Pruitt had sued to block Obama's EPA rules on climate change and the reach of the Clean Water Act — regulations that the White House is expected to gut with executive orders in the coming days.

Pruitt said the EPA would stop the "abuses that occur sometimes: Guidance through rulemaking, or using the guidance process to do rulemaking, or engaging in litigation — regulation through litigation, consent decrees that actually bypass the Administrative Procedures Act."

Pruitt also praised the founding fathers, who he said addressed the problems of their day but "didn't shirk their responsibility."

He also used the meeting at EPA headquarters as a sign of how people can disagree and still be able to sit down and have a productive meeting.

"They acted with civility," he said. "Civility is something I believe in very much."

E&E News
http://www.eenews.net/greenwire/2017/02/21/stories/1060050365
Pruitt's pitch to staff: Give me a chance
By Robin Bravender and Kevin Bogardus 2/21/17

Scott Pruitt talked up his listening skills and desire for "civility" as he addressed a skeptical U.S. EPA staff today.

In his first speech to the agency since his swearing in as EPA administrator Friday, Pruitt stressed his respect for the agency's career staff. He hinted broadly at big changes that are expected to come to the agency under the Trump administration, although he declined to offer specific plans about efforts to repeal Obama administration environmental rules.

Many career EPA staffers have been wary about Pruitt's arrival after the former Oklahoma attorney general battled the agency's regulations in court and vowed major overhauls at the agency.

But Pruitt today cautioned those listening against jumping to conclusions.

"You don't know me very well," he told staff and press gathered in the Rachel Carson Green Room at EPA headquarters in Washington.

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

Pruitt steered clear of specifics about the Trump administration's energy policies in his 11-minute speech. He didn't, for example, delve into plans for withdrawing the Obama administration's Waters of the U.S. rule and Clean Power Plan, which he and President Trump have said they plan to do (*Greenwire*, Feb. 20).

Instead, Pruitt's greeting today appeared to be an attempt to calm the waters at the agency where many staffers are anxious.

"Civility is something I believe in very much. We ought to be able to get together and wrestle through some very difficult issues and do so in a civil manner," he told employees.

He added, "I seek to be a good listener. Those of you that have been here for quite some time, whether it's in the air area or water or whatever area that you may be in, I look forward to spending time with you, not just to address certain issues but really spend time and dig down deep with respect to how we're going to do business in the future and get to know you personally and get to know how I can be a resource to you as you do your work. ... You can't lead unless you listen."

The new administrator hinted broadly at some of the reforms he'd like to see at EPA. He said the agency has a responsibility to "avoid abuses that occur sometimes" in rulemaking, and he stressed the importance of following the "rule of law" and in partnering with states through federalism. "I seek to ensure that we engender the trust of those at the state level," he said.

Catherine McCabe, who served as EPA's acting boss ahead of Pruitt's confirmation, offered the new administrator gifts, including an EPA lapel pin and an agency baseball cap.

Pruitt, the former co-owner of Oklahoma City's minor league baseball team, said he'd wear the EPA hat with pride to Washington Nationals games.

"I am excited about being in a city that actually has a major league baseball team," he said.

Some EPA employees attended today's event in person. Others tuned in online or listened by phone.

As Pruitt settles into his job, EPA staff and environmentalists will be watching closely to see how he leads the agency.

Agency employees were "hoping not to hear 'Death and Destruction for EPA,'" said John O'Grady, an EPA union leader, ahead of the speech. "Probably what we will hear is a lot of very smooth political talk, but the proof will be in the executive orders that President Trump issues."

The Trump administration is widely expected to issue executive orders directing the rollback of some of President Obama's signature environmental rules, including the Clean Power Plan and WOTUS. Those orders are expected to come as early as this week.

Forbes
http://www.forbes.com/sites/ericmack/2017/02/21/scott-pruitt-lays-out-a-vision-for-the-epa-that-contradicts-the-mission-of-the-epa/#4a7a83025829
Scott Pruitt Lays Out A Vision For The EPA That Contradicts The Mission Of The EPA
By Eric Mack 2/21/17, 1:10PM

New Environmental Protection Agency administrator Scott Pruitt addressed EPA staff and the media Tuesday and in a speech lasting less than fifteen minutes, he spoke mostly about protecting jobs, industry and "the marketplace" and oh yea, the environment, too.

Pruitt comes to the Trump administration from his previous job as Oklahoma Attorney General where he spent a fair amount of time suing the very federal agency that he now heads. In six years he filed more than a dozen lawsuits against the EPA over expansion of the Clean Water Act and regulations on coal-fired power plants.

If that track record didn't make it clear what direction Pruitt will take the EPA, reading between the words of his introduction to the career employees who have spent decades working to safeguard our natural environment solidify it in crystal.

To start, let's just note that the word "climate" did not pass Pruitt's lips, so that's clearly no longer a priority at EPA, as we suspected.

Pruitt began laying out his vision and principles for running the agency by sharing a story of how the founding fathers once sat down together to work out a compromise that would lead to moving the nation's capitol from New York to the shores of the Potomac. He used the historical anecdote as a metaphor for how he will seek dialogue and compromise to address issues and problem solving related to "our environment and natural resources."

To be clear, in this context Pruitt is clearly referring to the industries that extract natural resources like oil and gas to bring them to market.

Pruitt sounds like a nice, reasonable guy in his remarks to be sure, but he's laying out a vision that already undercuts the very mission and long-term objectives of the agency he now leads.

He's not an elected official trying to compromise with other politicians to get bills passed. More of that sort of compromise, which is what was actually happening in his historical anecdote, would be great. But agencies like the EPA have missions and duties that are laid out in statute, which they must execute. Compromise with industry is not included. The mission of the EPA is actually quite simple: "to protect human health and the environment -- air, water, and land."

That's it. Notice there's no mention of protecting extractive industries. For an EPA administrator to begin his tenure by calling for compromise and working together with polluters is a bit like an attorney representing a rape victim sitting down with the client before trial and reminding her that they'll need to keep in mind the concerns and needs of the perpetrator as they prosecute the case.

Pruitt's concluding message was that he believes the EPA can be "pro-energy, pro-jobs and pro-environment."

I suppose it can, but that's not the EPA's job. There are countless other interests out there that are pro-energy and pro-jobs. The EPA was created to be solely concerned with the environment and human health.

To compromise that mission internally, before even sitting down at the table with the energy industry and other polluters, makes what we already knew a matter of public record and imminent policy: that Administrator Pruitt is still the agency's primary adversary, even as he takes its reins.

Washington Examiner
http://www.washingtonexaminer.com/pruitt-federalism-matters-at-epa/article/2615361
Pruitt: 'Federalism matters' at EPA
By John Siciliano 2/21/17, 1:01PM

New Environmental Protection Agency Administrator Scott Pruitt wants to make the agency a place where "federalism matters" and states are not seen as adversaries, he said Tuesday.

"I seek to ensure that we engender the trust of those at the state level," rather than approach them as "adversaries," Pruitt said in his first address to agency staff on Tuesday.

He made the comments after being sworn in as President Trump's head of the EPA on Friday, despite widespread Democratic opposition and protests by environmental groups and former EPA administrators.

Trump has pledged to roll back a number of EPA regulations seen as detrimental to coal miners and energy production jobs.

Pruitt said Tuesday that he doesn't see a conflict between being pro-energy and pro-environment. "We can be both pro-energy and pro-environment ... and we don't have to choose."

Pruitt also wants to make sure everything the agency does is based firmly in statute and the law.

He said the agency should abide by the law to "avoid litigation," devoting more of its time doing the business of the agency, and less time going to court over its regulations.

Washington Times
http://www.washingtontimes.com/news/2017/feb/21/scott-pruitt-new-epa-chief-agency-will-respect-rul/
New EPA chief Pruitt says agency will respect rule of law, states' rights
By Ben Wolfgang 2/21/17

He didn't delve into policy specifics nor did he mention his predecessors by name, but new Environmental Protection Agency Administrator Scott Pruitt on Tuesday told federal employees that under his leadership the agency once again will adhere to the rule of law and will respect states' rights.

In a speech to EPA workers in Washington, Mr. Pruitt — the former attorney general of Oklahoma who often clashed with the agency in court as he challenged former President Obama's climate-change agenda — said federal environmental; regulations often have been unnecessarily cumbersome and expensive, and have created confusion rather than clarity.

"Regulations ought to make things regular. Regulators exist to give certainty to those they regulate," he said. "I seek to ensure that we engender the trust of those at the state level, that those at the state level see us as partners ... and not as adversaries."

Mr. Pruitt was confirmed last week by a Senate vote of 52 to 46, drawing the support of two Democrats — Sen. Joe Manchin of West Virginia and Sen. Heidi Heitkamp of North Dakota. Republican Sen. Susan Collins of Maine voted against him, saying she believes he's unfit to lead the agency.

His address comes the same day the Oklahoma attorney general's office is set to release nearly 3,000 emails containing communications between Mr. Pruitt and oil-and-gas companies. Democrats believe those documents will show clear collusion between the new EPA chief and the fossil fuels sector, though their concerns were not enough to delay last Friday's vote.

Mr. Pruitt has defended his close relationship with oil-and-gas firms while Oklahoma attorney general, saying it was his duty to defend his state's industries against unfair or unlawful regulations.

CNBC
http://www.kjrh.com/news/local-news/epa-head-scott-pruitt-to-address-agency-employees-in-speech-tuesday
EPA chief Scott Pruitt says regulators' exist to give certainty
2/21/17

EPA Administrator Scott Pruitt called on his agency to offer certainty to those it regulates and advocated for federalism in his first speech to Environmental Protection Agency employees on Tuesday.

"Regulations ought to make things regular. Regulators exist to give certainty to those that they regulate. Those that we regulate ought to know what's expected of them, so that they can plan and allocate resources to comply," Pruitt said in comments that reflected his remarks in a hearing before a Senate committee last month.

President Donald Trump's divisive pick to lead the EPA was confirmed and sworn in on Friday, following efforts by Democrats to block the confirmation in committee hearings and before the full Senate.

Environmentalists and progressives have fiercely opposed Pruitt, who has questioned the science behind climate change and sued the EPA 14 times on behalf of Oklahoma while serving as the state's attorney general. Nearly 800 former EPA officials signed a letter urging the Senate to reject Pruitt's confirmation.

Conservatives and the energy industry have hailed Pruitt as an advocate for giving states more control over environmental rules and for fighting what they see as regulatory overreach by the Obama administration. Pruitt is widely expected to execute Trump'spromise to scale back Obama-era rules and initiatives aimed at curbing greenhouse gas emissions.

Pruitt's first speech comes on the same day the Oklahoma attorney general's office faces a court-ordered deadline to turn over its communications with fossil fuel companies to a watchdog group. A *New York Times* investigation found the office had signed a letter drafted by Devon Energy that accused regulators of overstating pollution from natural gas wells.

Katherine So
Office of Media Relations Intern
U.S. Environmental Protection Agency
Telephone: (202)-564-4511
so.katherine@epa.gov

Message

From: David Fotouhi [Fotouhi.David@epamail.epa.gov]
Sent: 4/12/2017 8:22:00 PM
To: Minoli, Kevin [Minoli.Kevin@epa.gov]
CC: Prabhu, Aditi [Prabhu.Aditi@epa.gov]; Veney, Carla [Veney.Carla@epa.gov]; Jones, Gail-R [Jones.Gail-R@epa.gov]; Justin Schwab [Schwab.Justin@epamail.epa.gov]; Patrick, Monique [Patrick.Monique@epa.gov]; Trudeau, Shaun [Trudeau.Shaun@epa.gov]
Subject: Attorney Client / Ex. 5

Scott Jordan has submitted a package with the case name/subject of Attorney Client / Ex. 5 Attorney Client / Ex. 5

Please click the link below to see the routing and transmittal record for this package. After reviewing the package please:

* go to the Routed To section;
* route 3 line; and
* select the Add Comments button, or the Make Decision button.

LINK -> Notes://DCOGCLN1/FrontOff/OGCCTS.nsf/0/3BDFFD72CE78BAFD8525810000471483

Message

From: Greenwalt, Sarah [greenwalt.sarah@epa.gov]
Sent: 4/4/2017 2:12:35 PM
To: Schwab, Justin [schwab.justin@epa.gov]
CC: Fotouhi, David [fotouhi.david@epa.gov]
Subject: RE: DOJ call

Appreciate it, thank you

Sarah A. Greenwalt
Senior Advisor to the Administrator
for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency
Work: 202-564-1722 | Cell: Personal Matters / Ex. 6
Greenwalt.Sarah@epa.gov

From: Schwab, Justin
Sent: Tuesday, April 4, 2017 10:12 AM
To: Greenwalt, Sarah <greenwalt.sarah@epa.gov>
Cc: Fotouhi, David <fotouhi.david@epa.gov>
Subject: Re: DOJ call

Ex. 5 AC/DP

Sent from my iPhone

On Apr 4, 2017, at 10:07 AM, Greenwalt, Sarah <greenwalt.sarah@epa.gov> wrote:

ACP DPP / Ex. 5

Sarah A. Greenwalt
Senior Advisor to the Administrator
for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency
Work: 202-564-1722 | Cell: Personal Matters / Ex. 6
Greenwalt.Sarah@epa.gov

Message

From: Greenwalt, Sarah [greenwalt.sarah@epa.gov]
Sent: 3/17/2017 6:39:20 PM
To: Schwab, Justin [schwab.justin@epa.gov]

Will you be at the WOTUS DOJ meeting at 3? I'm assuming we're calling in rather than meeting there?

Message

From: Glenn Lammi [GLammi@WLF.org]
Sent: 4/26/2017 5:56:05 PM
To: Glenn Lammi [GLammi@WLF.org]
Subject: Washingotn Legal Foundation commentary on WOTUS

We thought that this commentary on the "waters of the US" rule would be of interest.

WLF Legal Pulse blog

April 20, 2017
US Food Security and Farmers' Livelihoods at Stake in "Waters of the US" Rule Rewrite
By Lawrence A. Kogan

For decades, federal agencies have incrementally extended their control over agricultural lands by expanding the definition of "waters of the US" (WOTUS) under the Clean Water Act (CWA) and asserting broad legal jurisdiction over WOTUS-adjacent "wetlands." Those efforts triggered intense legal conflicts, facilitated the CWA's growth into a "regulatory hydra," and caused a "reversal of terms [in our unique relationship with government] that is worthy of *Alice in Wonderland*."

President Trump recently issued Executive Order 13778 as the first step aimed at curtailing this government juggernaut. The order directs the heads of the US Environmental Protection Agency (EPA) and the US Army Corps of Engineers (the Corps) to review for substantial revision or rescission their jointly issued 2015 CWA regulation that expanded the definition of "WOTUS." Presumably, EPA's review of this regulation will be undertaken while the October 9, 2015 federal court-issued stay of its implementation remains in place. (Click here to continue reading)

Glenn G. Lammi
Chief Counsel, Legal Studies Division
Washington Legal Foundation (www.wlf.org)
202.588.0302

WLF Legal Pulse blog: www.wlflegalpulse.com
Twitter: www.Twitter.com/WLF
Receive free publications: http://www.wlf.org/subscribe.asp

Message

From: Gunasekara, Mandy [Gunasekara.Mandy@epa.gov]
Sent: 3/27/2017 7:23:08 PM
To: Schwab, Justin [schwab.justin@epa.gov]
CC: Greenwalt, Sarah [greenwalt.sarah@epa.gov]
Subject: RE: AC DP / Ex. 5

Ok – will do.

From: Schwab, Justin
Sent: Monday, March 27, 2017 3:23 PM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>
Cc: Greenwalt, Sarah <greenwalt.sarah@epa.gov>
Subject: Re: AC DP / Ex. 5

AC DP / Ex. 5

Sent from my iPhone

On Mar 27, 2017, at 3:21 PM, Gunasekara, Mandy <Gunasekara.Mandy@epa.gov> wrote:

AC DP / Ex. 5

Message

From: Schmidt, Lorie [Schmidt.Lorie@epa.gov]
Sent: 4/5/2017 9:18:21 PM
To: Schwab, Justin [schwab.justin@epa.gov]
CC: Zenick, Elliott [Zenick.Elliott@epa.gov]; Marks, Matthew [Marks.Matthew@epa.gov]
Subject: AC DP / Ex. 5
Attachments: AC DP / Ex. 5

Justin, as you requested, Matt Marks did some research into AC DP / Ex. 5

AC DP / Ex. 5

Lorie

Lorie Schmidt
Associate General Counsel, Air and Radiation
Office of General Counsel
US Environmental Protection Agency
(202)564-1681

From: Marks, Matthew
Sent: Tuesday, April 04, 2017 2:35 PM
To: Zenick, Elliott <Zenick.Elliott@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>
Subject: Research on Justin's ask

Hi Elliott and Lorie,

Here are my thoughts on Justin's ask, AC DP / Ex. 5

AC DP / Ex. 5

AC DP / Ex. 5

Matt

Matthew C. Marks
U.S. Environmental Protection Agency
Office of General Counsel
Air and Radiation Law Office
1200 Pennsylvania Avenue, NW
Washington, DC 20460
T: 202-564-3276
E: marks.matthew@epa.gov

Message

From: Cozad, David [Cozad.David@epa.gov]
Sent: 3/13/2017 9:01:20 PM
To: Schwab, Justin [schwab.justin@epa.gov]
CC: Starfield, Lawrence [Starfield.Lawrence@epa.gov]
Subject: Ameren
Attachments: ameren response to sierra club motion to intervene.pdf; sierra club reply to ameren's opp to sc's motion to intervene.pdf

Hi Justin,

Here's Ameren's response to the motion to intervene, and the Sierra Club's reply.

Dave Cozad
Acting PDAA, OECA
Office 202-564-4861
Cell Personal Phone / Ex. 6

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	**Case No. 4:11-CV-00077-RWS**
v.	)	
	)	**Judge Rodney W. Sippel**
AMEREN MISSOURI,	)	
	)	
Defendant.	)	
	)	

AMEREN MISSOURI'S OPPOSITION TO SIERRA CLUB'S MOTION TO INTERVENE

Ameren Missouri ("Ameren") opposes Sierra Club's Motion to Intervene in this case (ECF No. 858). Ameren is aware of no instance in which intervention was allowed at so late a stage in a case when the claimed need to intervene is based on purely hypothetical future scenarios rather than some actual present harm. Sierra Club does not identify any specific, concrete interests that are *currently* jeopardized or inadequately represented, and it tacitly admits that there is no current impairment of its interests. The motion also is unclear and nonspecific as to what exactly may occur in the future that *would* hinder its interests. Sierra Club relies only on speculation based on the presidential election to justify intervention six years into this litigation. Conjecture about politics, however, especially in the absence of evidence that Sierra Club's interests are currently jeopardized, is insufficient under the law in this Circuit to allow untimely intervention.

Moreover, allowing Sierra Club's untimely intervention would unquestionably prejudice Ameren, including through redundant discovery. Only two weeks ago, the Government told this Court unequivocally that it intends to proceed with full fact and expert discovery and to put on an "expert-heavy" case in the remedy phase. What has the Government done or said in this case that lends any credibility to the notion that the case will no longer be faithfully litigated? As an

intervenor, Sierra Club will take duplicative full fact and expert written discovery of Ameren, submit expert reports, take depositions, and broaden the scope of the remedy phase. Given that the Government already plans a full remedy offensive, Ameren would bear the costs of defending itself against *two* organizations and would be forced to do *double* the defensive work. The burdens to Ameren would be real and substantial.

The bottom line is that Sierra Club has not shown an interest in the case that is no longer being protected. The already long-standing case between the Government and Ameren is at risk of getting exponentially longer, broader, more expensive, and much more complicated to orderly and fairly administer. Weighing the lack of any justification for this untimely intervention against the burdens that would be imposed upon Ameren, the Court should deny Sierra Club's motion.

ARGUMENT

I. Standards Applicable to Sierra Club's Motion.

Sierra Club seeks intervention of right pursuant to Fed. R. Civ. P. 24(a)(1) and 42 U.S.C. § 7604(b)(1)(B). Sierra Club ("SC") Mem. at 1. It bears the burden to prove that it satisfies all requirements of those statutes, in particular the requirements that its motion be timely under Rule 24 and that it has Article III standing. *F.T.C. v. Johnson*, 800 F.3d 448, 452 (8th Cir. 2015); *Mausolf v. Babbitt*, 85 F. 3d 1295, 1299 (8th Cir. 1996). Both timeliness and standing are threshold issues. *United States v. Ritchie Special Credit Invs., Ltd.*, 620 F.3d 824, 832 (8th Cir. 2010); *Brown v. Medtronic, Inc.*, 628 F.3d 451, 455 (8th Cir. 2010).

Ameren does not dispute that Sierra Club has a statutory right pursuant to 42 U.S.C. § 7604(b)(1)(B) to intervene under Rule 24(a)(1), but that is not the end of the inquiry. "An application for intervention whether asserted as a matter of right or judicial discretion must be timely." *Iowa State Univ. Research Found., Inc. v. Honeywell, Inc.*, 459 F.2d 447, 449 (8th Cir. 1972) (affirming denial of motion for Rule 24(a) intervention of right filed four years after case

commenced and weeks into the trial on the merits). If a motion to intervene is untimely, the movant is absolutely barred from intervening. *Arrow v. Gambler's Supply, Inc.*, 55 F. 3d 407, 409 (8th Cir. 1995); *see also NAACP v. N.Y.*, 413 U.S. 345, 365 (1973) ("If [a motion to intervene] is untimely, intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness."). Courts consider "all of the circumstances" when determining timeliness, but "should pay particular attention to: (1) how far the proceedings have progressed; (2) the proposed intervenor's reason for delay in seeking intervention; and (3) the possible prejudice to the parties already in the proceedings if the court allows intervention." *Jenkins v. State of Mo.*, 78 F. 3d 1270, 1273–74 (8th Cir. 1996) (citing *NAACP*, 413 U.S. at 365–66).[1]

Each of these three factors weighs against allowing intervention here. First, Sierra Club admits it knowingly waited six years while this case proceeded through discovery, extensive motions practice, and a bench trial. Second, Sierra Club alleges no actual or imminent harm — only hypothetical future harm — and makes no showing that the Government no longer represents its interests such that intervention is needed. Third, Sierra Club's intervention will unfairly prejudice Ameren. The second and third factors are discussed further below.

II. Sierra Club Has Not Overcome the Presumption that Its Interests Are Still Adequately Represented by the Government.

As noted above, a party seeking to intervene must give a good reason for any delay in seeking intervention and show that its request is timely. Sierra Club argues that its motion is timely

[1] Although *Jenkins* involved a Rule 24(a)(2) motion for intervention of right based on an interest at stake in the litigation, the Eighth Circuit applies the same timeliness factors to evaluate a Rule 24(a)(1) motion for intervention of right based on an unconditional statutory right. *See, e.g.*, *Nevilles v. Equal Employment Opportunity Comm'n*, 511 F.2d 303, 305 (8th Cir. 1975) (affirming denial of motion to intervene despite a statutory right to intervene because motion was untimely where movants "did not allege or prove that they had no knowledge of the suit during its pendency which would justify the delay in filing their motion").

because Sierra Club apparently now believes its interests in this case will no longer be protected. There are two problems with this contention: first, Sierra Club never explains what interests it believes "*are not* adequately represented" by the Government, *Chiglo v. City of Preston*, 104 F. 3d 185, 187 (8th Cir. 1997) (emphasis added), and, second, Sierra Club raises a purely hypothetical concern about unspecified harm that it *may* face at some unknown point in the future.

In cases such as this, the Government is presumed to represent the interests of all citizens (including but not limited to Sierra Club members), and the would-be intervenor has a heightened burden to prove that its interests are no longer represented by the Government. *Id.* (affirming denial of intervention of right of individuals who "have not rebutted the presumption that the city government adequately represents their interests as citizens"); *Mausolf v. Babbitt*, 85 F.3d at 1303 (theory of *parens patriae* "creates a presumption that a government agency will represent the interests of all citizens"); *National Parks Conservation Ass'n v. U.S. E.P.A.*, 759 F.3d 969, 976 (8th Cir. 2014) ("the bar is raised" by operation of *parens patriae* on the burden for prospective intervenors to show inadequate representation).[2] In *Chiglo*, the Eighth Circuit explained:

> [I]f an existing party to the suit is charged with the responsibility of representing the intervenor's interests, a presumption of adequate representation arises. When one of the parties is an arm or agency of the government, acting in a matter of sovereign interest, the governmental entity is presumed to represent the interests of its citizens as *parens patriae*[.] . . . The proposed intervenor may rebut this presumption, among other ways, by showing that the *parens patriae* has committed misfeasance or nonfeasance in protecting the public.

Id. at 187-88 (internal citation omitted). The court then cited an example of an environmental group that overcame the presumption when that group "was able to back up its claim [of inadequate representation] with evidence that the government had waived and failed to enforce regulations

[2] The Government has not taken a position on Sierra Club's intervention, but certainly has not stated that it no longer represents Sierra Club's general interest in enforcing the Clean Air Act.

against snowmobile use in the park, and that it had disregarded a statutory mandate." *Id.* at 188. That was sufficient, the Eighth Circuit stated, for the environmental group to show it was not adequately represented. "Absent *this sort of clear dereliction of duty*, however, the *proposed intervenor cannot rebut the presumption* of representation by *merely disagreeing with the litigation strategy or objectives of the party representing him*." *Id.* (emphases added) (holding citizens failed to demonstrate city did not adequately represent their interest in preventing children from smoking because that interest coincided with city's duty to protect the public health, even though citizens had attempted to intervene *after* the city declined to appeal from an adverse ruling). Sierra Club claims a need to protect its interests to justify late intervention, but it never shows why it believes the Government no longer represents its interests in enforcing the Clean Air Act, so the applicable presumption of adequate representation is never rebutted.

Sierra Club's argument rests solely on concerns about hypothetical harms and what may or may not affect it in the future. *See* SC Mem. at 1 (asserting its "interests *may* no longer be protected by the United States"); *id.* at 6 n. 14 (the case "*may* as a practical matter impair or impede" Sierra Club's interests); *id.* at 7 (interests "*may*" not be adequately protected) (emphases added). All of these statements reflect potential, not actual or imminent, harms. The motion also relies on news articles and public statements, but those do not demonstrate harm to Sierra Club's interests in this case — indeed, they have nothing to do with this case. For instance, Sierra Club cites a recommendation regarding potential staff cuts at EPA, as if that recommendation has any bearing on the remedy phase of a case in which the Department of Justice has a full fleet of lawyers staffed and actively representing the EPA. *Id.* at 3 n. 3.[3] Moreover, these sources do not show a

[3] Despite claiming it moved "as soon as it became apparent that its interests may no longer be protected," Sierra Club relies on statements made by President Trump almost a full year ago as the justification for intervening now. SC Mem. at 1, 3 n. 1. The same is true for Sierra Club's

"clear dereliction of duty" by the Government justifying Sierra Club's purported need to intervene now. *Chiglo*, 104 F. 3d at 187.

The Eighth Circuit has held that intervention should be denied when the proposed intervenor resorts to its own "characterizations" and "conclusions" about the alleged conflict between its interests and those of the party-plaintiff, but fails to show "collusion" between the parties to the case evidencing inadequate representation, or otherwise fails to show that any claimed adversity between the intervenor and the party-plaintiff equates to their possessing *disparate* interests. *Stadin v. Union Elec. Co.*, 309 F.2d 912, 919 (8th Cir. 1962).[4] This precedent controls. The Court need look no further than the liability trial to confirm the absence of collusion between the parties here. Sierra Club fails to identify any interest that is distinct from a general interest in Clean Air Act enforcement against Ameren, fails to prove that any interest is presently

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statements about EPA Administrator Pruitt. SC Mem. at 3-5. Sierra Club offers no justification to explain why, based on precisely the statements it cites, it did not move to intervene last year when the presidential election occurred or several months ago when Administrator Pruitt was nominated.

[4] Allegations that the Government's representation may at some future point become inadequate does not authorize intervention, especially at a late stage: "[T]he requirement of proving inadequacy of representation by existing parties[ ] is taken seriously and for good reasons already touched upon. Increasing the number of parties to a suit can make the suit unwieldy. Of particular concern, it can impede settlement. . . . We are sympathetic to the aspiring intervenors' concern that at some future point in this litigation the government's representation of their interest may turn inadequate . . . . The proper way to handle such an eventuality is for the would-be intervenor, when as here no present inadequacy of representation can be shown, to file *at the outset of the case* a standby or conditional application for leave to intervene and ask the district court to defer consideration . . . until the applicant is prepared to demonstrate inadequacy." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 101 F. 3d 503, 508–09 (7th Cir. 1996) (emphasis added) (where defendant Corps had denied plaintiff's permit to build landfill, residents sought intervention to defend Corps, alleging landfill would specifically affect them through lower property values, etc., but residents were denied intervention where there was "no suggestion that the Department is dragging its heels in defending the Corps or is prepared to sell out the Corps for the sake of some competing interest of the United States").

jeopardized or inadequately represented, and relies on sheer speculative theory that it "may" no longer be adequately represented. This does not justify a tardy intervention.

Sierra Club's motion does not assert a single difference of opinion or point of contention between it and the Government regarding liability, remedy going forward, or the general strategy of litigating the case. Even if it had, that still would not be enough. *Chiglo*, 104 F. 3d at 188. "A difference of opinion concerning litigation strategy or individual aspects of a remedy does not overcome the presumption of adequate representation." *F.T.C. v. Johnson*, 800 F. 3d at 452 (quotation omitted) (affirming denial to intervene as a matter of right where "the interests of the consumers' proposed class are subsumed within the public interest because the F.T.C. [ ] seeks relief for the same 'deceptive and unconscionable business practices' alleged by the consumers."). In *Little Rock Sch. Dist. v. N. Little Rock Sch. Dist.*, 378 F.3d 774 (8th Cir. 2004), the Eight Circuit affirmed the denial of a motion to intervene for failure to overcome the presumption that the state adequately represented a group's interests, concluding:

> The state directly represented the [purported intervenor's] asserted interest. . . . That the [purported intervenor] has asserted its interest with arguably greater fervor than has the state and would have made different procedural choices, including a decision to appeal, *does not make its interest distinct*.

Id. at 780-81 (emphasis added); *see also United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 987 (2d Cir. 1984) (affirming denial of environmental groups' motions to intervene at late stage of settlement talks on containment program, stating that "[t]he mere existence of disagreement over some aspects of the remediation . . . does not demonstrate a lack of capacity on the part of the government as *parens patriae* to represent its constituents fairly and faithfully"); *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) (affirming denial of motion to intervene brought at advanced remedial stage of case, finding intervenors failed to show interests were not adequately represented "when no collusion is shown between the representatives and an opposing

party, when the representative does not have or represent an interest adverse to the proposed intervenor, and when the representative has not failed in its fulfillment of his duty").

If Sierra Club wishes to argue for a different remedy than what the Government advocates, that does not equate to a disparate interest and does not support Sierra Club's position that it may no longer be adequately represented in the remedy phase of the case.

III. An Attempt to Intervene Under These Circumstances Is Untimely.

Sierra Club cites no legal authority holding that late-filed motions to intervene are permissible based on a mere potential that an individual's interest may, in the future, not be protected by the parties to a case. It relies on *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), which has no bearing on its motion. (*See* SC Mem. at 8.) In that case, the Supreme Court stated that certain interests "would no longer be protected" because the named plaintiffs had elected not to appeal from an adverse class action judgment. *Id.* at 395–96. Here, Sierra Club speculates that its interests "may" not be protected in the future, but that speculation is contradicted by the Government's litigation of this case. Furthermore, there is no indication that the Government, after a final judgment, would not elect to appeal if necessary. *McDonald* provides no grounds to find that Sierra Club's motion is timely.

Sierra Club offers similarly inapplicable precedent by citing *Winbush v. State of Iowa By Glenwood State Hosp.*, 66 F.3d 1471 (8th Cir. 1995) (*see* SC Mem. at 7-8), in which the Eighth Circuit found no error in the late intervention of individuals who had been members in a class action throughout the trial proceedings until that class was decertified, "many of [whom] had been deposed by the defendants and . . . testified at trial," where the defendants were aware of those individual claimants-intervenors and had the opportunity to settle with them during the case. *Id.* at 1479. There is nothing of that sort here. Sierra Club has had no involvement in this case at any point.

Sierra Club's argument fairs no better relying on *WaterLegacy v. U.S. E.P.A.*, 300 F.R.D. 332 (D. Minn. 2014). (*See* SC Mem. at 8-9.) There, the district court highlighted that "the parties have engaged in no discovery or motion practice[,] and no proceedings regarding the merits of the litigation have occurred. . . . This is therefore not a case where extensive litigation has occurred suggesting that the parties would be prejudiced by intervention." *Id.* at 343. The court contrasted the lack of proceedings in the case before it with denials of motions to intervene in already well-advanced proceedings. *Id.* (citing *Am. Civil Liberties Union of Minnesota v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1094 (8th Cir. 2011) (affirming denial of motion to intervene as untimely where "the fact that extensive motion practice and some discovery had occurred during the parents' delay in moving to intervene would prejudice the existing parties"); *Clarke v. Baptist Mem'l Healthcare Corp.*, 264 F.R.D. 375, 379 (W.D. Tenn. 2009) (extent of litigation weighed against a finding of timeliness where "several important litigation milestones have passed")).

Finally, the *WaterLegacy* court specifically considered that the movant "s[ought] intervention for [a] limited purpose" unrelated to "the merits of the case." *Id.* (noting courts have permitted intervention where the parties to a case have settled if intervention is sought for only limited purposes such as "modify[ing] a protective order").[5] That court's reasoning undermines Sierra Club's position that its motion to intervene is an automatic green light into the merits of the case, allowing it to argue for whatever remedies against Ameren it feels are best.

The Eighth Circuit case law omitted by Sierra Club just as forcefully dispels any notion that its motion is timely:

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[5] Even when the purported intervention would be limited, nonetheless the motion may be denied. *Jiang v. Porter*, No. 4:15-CV-1008, 2016 WL 4415352, at *2 (E.D. Mo. Aug. 19, 2016) (Jackson, J.) (denying motion of alleged victims of sexual abuse by clergy members to intervene for limited purpose of requesting the Court to partially vacate a discovery order).

- *Liddell v. Bd. of Educ. of City of St. Louis, State of Mo.*, 98 F.R.D. 548, 549–50 (E.D. Mo. 1983) (teachers' union's motion to intervene at remedy stage was untimely, based on its delay in seeking intervention, the "union's prolonged awareness of both this litigation and its potential impact on the union's asserted interests," "numerous opportunities for the union's participation throughout" the case, and the insufficient justification for the motion's untimeliness);

- *Am. Civil Liberties Union of Minnesota,* 643 F.3d at 1094 (affirming denial of motion to intervene on timeliness ground, where intervenors knew of suit from its inception but filed their motion to intervene fourteen months later, and delay would prejudice parties who had already engaged in motion practice and discovery);

- *Arrow*, 55 F.3d at 409 (proposed intervenor's two-year "monitoring" of the lawsuit before seeking to intervene, after a settlement was reached and one month before trial, was excessive delay, even if intervention would not prejudice existing parties);

- *Arkansas Elec. Energy Consumers v. Middle S. Energy, Inc.*, 772 F.2d 401, 403 (8th Cir. 1985) (affirming denial of leave to intervene just twelve days after commencement of suit because proceedings were already well advanced, though district court made no finding of prejudice to existing parties);

- *United States v. Associated Milk Producers, Inc.*, 534 F.2d 113, 117 (8th Cir. 1976) (affirming denial of competitor's motion to intervene at consent decree stage in antitrust suit "to protect the public interest").

"It is axiomatic that the Attorney General must retain considerable discretion in controlling government litigation and in determining what is in the public interest. . . . Bad faith or malfeasance on the part of the Government in negotiating and accepting a consent decree must be shown before intervention will be allowed." *Id.* (internal quotation, citation omitted). Each of these decisions alone supports that Sierra Club's motion is untimely, but taken together, the untimeliness of the motion is clear cut.

IV. Intervention at This Stage Would Unfairly Prejudice Ameren.

Sierra Club's motion is untimely for the reasons discussed above, and should be denied on those grounds, even before reaching the third factor in the timeliness inquiry: the possible prejudice to the existing parties if the Court grants intervention. As the Eighth Circuit has categorically stated, "even absent any prejudice [to the parties to the case], the district court [i]s free to conclude

that given the progress of the litigation, the [prospective intervenor's] knowledge of it, and the [prospective intervenor's] failure to adequately explain the delay, the motion [i]s untimely." *Am. Civil Liberties Union of Minnesota*, 643 F.3d at 1095 (citing cases finding motions to intervene untimely even absent prejudice to the parties and affirming denial of motion to intervene as a matter of right). Nevertheless, Ameren *will* be prejudiced if Sierra Club is allowed to intervene at this late stage, and that additional reason further supports denying Sierra Club's motion.

Multiplying the number of opponents here will interfere with orderly discovery and briefing, will delay resolution of a case ultimately headed to the Eighth Circuit, and will cause substantial additional expenses. Ameren would have to defend itself against two lines of investigation, two lines of discovery, double the expert reports and depositions, and so on.[6] If Sierra Club were permitted to argue for and take discovery on its preferred remedy or were permitted to file expert opinions regarding its preferred remedy or the alleged harms to be remediated, defending against those additional issues could and likely would require Ameren to hire more experts and conduct additional fact gathering and technical evaluations. Ameren would be unexpectedly forced to fight with an activist public interest group that has no shortage of funds to throw into the case and faces no risk itself from arguing for whatever remedy it believes would harm Ameren the most. Sierra Club has a national campaign aimed at shutting down coal-fired power plants like Rush Island and sees no downside to joining the case to advance that campaign, but the harms to Ameren as a result are certain and numerous. The unfairness that would result is precisely why motions to intervene must be timely.

Sierra Club's proposed complaint demands that Ameren conduct audits and report on those

[6] There is no suggestion that Sierra Club would seek to take discovery of the Government, but if it did, that would delay and complicate the remedy phase proceedings even more.

audits *to Sierra Club*, converting Sierra Club into an ongoing monitor and regulator of an entity it sees as its adversary.[7] (*See* SC Proposed Compl. at 13.) Sierra Club also asks the Court to force Ameren to pay for Sierra Club's unjustified and untimely intervention. (*Id.* at 14.) These requests make plain that Sierra Club will impose new and real burdens on Ameren once it intervenes.

Aside from the potentially exorbitant financial costs on Ameren and the increased time burdens on everyone involved, what will Sierra Club do in the remedy phase that will not already be done by the Government? Sierra Club does not suggest what relevant expertise it has regarding the technology, feasibility, regulations, guidance, and other factors relevant to shaping a Best Available Control Technology remedy. If Sierra Club simply wanted to make its views known, it could do so, with leave of the Court to file an *amicus curiae* brief at the appropriate stage in the remedy proceedings. Instead, intervention gives Sierra Club the power to demand redundant discovery, delay final judgment, and force its views upon the parties, without ever having to identify to the Court how its views and interests differ from those the Government is already protecting. As one of the core factors this Court should consider in determining whether a motion is timely, the real prejudices to Ameren from a late intervention by Sierra Club, weighed against the unilateral benefits to the non-party, are another reason that intervention should be denied.

V. If Sierra Club Is Allowed to Intervene, Its Participation Should Be Limited.

If Sierra Club is allowed to intervene, then at the very least this Court should exercise its plenary authority to control the scope of discovery and limit what Sierra Club may seek from

[7] Sierra Club is a serial litigant against Ameren and opposes Ameren as often as and wherever possible, by filing litigation against it (*e.g.*, *Sierra Club v. Union Electric Co.*, Case No. 14-cv-00408-JAR (E.D. Mo.)) and by intervening in regulatory proceedings involving Ameren (*e.g.*, Missouri Public Service Commission's Report and Order in ER-2014-0258 (Apr. 29, 2015)), no matter the positions Sierra Club must stake out in order to oppose Ameren in each venue.

Ameren and how it otherwise may participate in the case.

For instance, the Court may consider whether Sierra Club's participation should be sequenced with that of the Government to avoid duplication. Similarly, since Sierra Club disclaims an interest to re-litigate any issues, it should not have a right or a need to access any of the parties' discovery from the liability phase. These types of restrictions have been imposed on intervening environmental groups in similar cases. In *United States v. Duke Energy Corp.*, 171 F. Supp. 2d 560 (M.D.N.C. 2001), a case cited by Sierra Club (*see* SC Mem. at 6), the district court granted the intervenors' motion to intervene at the commencement of the litigation,[8] but noted that a right to intervene "does not prevent the imposition of reasonable limitations on [intervenors'] participation to ensure the efficient adjudication of the litigation." *Id.* at 565–66. The court specifically ordered that the intervenors' participation be "limit[ed]" and "coordinate[d]" with that of the Government "to avoid duplication, expense, and delay." *Id.* The same principles should guide the restrictions on Sierra Club here.

To ensure that Ameren does not face redundant discovery burdens from both the Government and Sierra Club, Ameren requests a discussion at the next hearing regarding what Sierra Club intends to seek from Ameren, how Sierra Club intends to participate in expert discovery, and how, if at all, Sierra Club's remedy positions differ from those of the Government.

CONCLUSION

Ameren requests that Sierra Club's Motion to Intervene be denied as untimely and without merit. In the alternative, if the motion is granted, the Court should impose restrictions on Sierra Club's participation to avoid duplicate discovery, to minimize costs, and to streamline the remedy proceedings as much as practicable accounting for a new party-plaintiff.

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[8] In that proceeding, there was no dispute that the motion to intervene was timely. *Id.* at 562.

Dated: March 2, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2017, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will cause an electronic copy to be served on counsel of record.

/s/ Matthew B. Mock

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	**Case No. 4:11 CV 77 RWS**
AMEREN MISSOURI,	)	
Defendant.	)	

SIERRA CLUB'S REPLY MEMORANDUM
IN SUPPORT OF ITS MOTION TO INTERVENE

I. INTRODUCTION

Sierra Club demonstrated in its Motion to Intervene and supporting memorandum (Doc. Nos. 858, 859) that:

(a) it has satisfied Fed.R.Civ.P. 24(a)(1) because it is given "an unconditional right to intervene" by the Clean Air Act, 42 U.S.C. § 7604(b)(1)(B);
(b) it has acted in a timely manner in light of all the circumstances in the case; and
(c) there is no likelihood of prejudice caused by the timing of its motion to intervene.

In its Opposition (Doc. No. 866, "Opp."), Ameren concedes that "Sierra Club has a statutory right pursuant to 42 U.S.C. § 7604(b)(1)(B) to intervene under Rule 24(a)(1)." (Opp. at 2). But then Ameren spends nearly half of its brief arguing that Sierra Club has not established one of the requirements of Rule 24**(a)(2)**—*i.e.*, the requirement that the existing parties do not adequately protect its interests. Because it is undisputed that Sierra Club has an unconditional right to intervene under Rule 24(a)(1), it is unnecessary for Sierra Club to meet the requirements

of Rule 24(a)(2), including proving that the United States does not adequately represent its interests, or rebutting any presumption under a *parens patriae* theory that the Government represents the interests of all citizens. Ameren's reliance on Rule 24(a)(2) jurisprudence is an exercise in misdirection and confusion and should be rejected.

Ameren's arguments regarding timeliness (and any prejudice caused by the motion's timing) fare no better. In considering these issues, each case must be decided on "its own peculiar facts and circumstances." *Liddell v. Caldwell*, 546 F.2d 768, 770 (8th Cir. 1976). The cases relied upon by Ameren involved different circumstances which are plainly distinguishable.

Moreover, Ameren has not shown any prejudice stemming from the *timing* of Sierra Club's motion. Instead, Ameren focuses on whether Sierra Club's *presence in the case* would harm Ameren's interests. However, our Court of Appeals has made clear that "[p]rejudice that results from the mere fact that a proposed intervenor opposes one's position…always exists when a party with an adverse position seeks intervention" and that "Rule 24(a) protects precisely this ability to intervene in litigation to protect one's interests." *Mille Lacs Band of Chippewa Indians v. State of Minn.*, 989 F.2d 994, 999 (8th Cir. 1993). Thus, Ameren's assertion that Sierra Club's "activist" agenda will harm Ameren is extraneous to the Court's inquiry, since "whether the intervention itself will cause the nature, duration, or disposition of the lawsuit to change" is irrelevant. *United States v. Union Elec. Co.*, 64 F.3d 1152, 1159 (8th Cir. 1995). Likewise, the timing of Sierra Club's motion will not result in any additional cost to Ameren than if Sierra Club had intervened at an earlier time.

Finally, Ameren presents no legitimate justification for imposing limits on Sierra Club's participation in discovery or other aspects of the remedy phase. Sierra Club has met the requirements of Rule 24(a)(1), and intervention is appropriate as shown further below.

II. DISCUSSION

A. Because Sierra Club has an Unconditional Right to Intervene Under Rule 24(a)(1), it is Unnecessary to Prove that its Interests Are Not Adequately Represented Under Rule 24(a)(2).

Ameren's Opposition is premised upon a fundamental misstatement of Rule 24(a)'s requirements, and it is therefore necessary to briefly re-state the applicable law.

> Rule 24(a) states: "Intervention of Right. On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."

Fed.R.Civ.P. 24(a).

Under Rule 24, there are two main requirements: a right to intervene, and timeliness. A right to intervene may be established <u>either</u> under Rule 24(a)(1) through an unconditional right given by a federal statute, <u>or</u> under Rule 24(a)(2) by showing that "(1) the proposed intervenor has an interest in the subject matter of the action; (2) the interest may be impaired; and (3) the interest is not adequately represented by an existing party to the action." *Sierra Club v. Robertson*, 960 F.2d 83, 85 (8th Cir. 1992).

Ameren concedes that Sierra Club has an unconditional statutory right pursuant to the Clean Air Act, 42 U.S.C. § 7604(b)(1)(B), to intervene under Rule 24(a)(1). (Opp. at 2). That is the end of the inquiry with regard to the first requirement under Rule 24. There is no need for Sierra Club to satisfy the three-part demonstration required by Rule 24(a)(2). *See United States v. Duke Energy Corp.*, 171 F. Supp.2d 560, 565 n. 1 (M.D.N.C. 2001) ("Having found an unconditional statutory right to intervene under Rule 24(a)(1), the court need not address

Applicants' alternative arguments for intervention: intervention of right under Rule 24(a)(2) and permissive intervention under Rule 24(b)(2).")

Nevertheless, Ameren's main argument is that Sierra Club has not satisfied the third prong of the Rule 24(a)(2) inquiry—the requirement that Sierra Club's interests are not adequately protected by an existing party. Thus, Ameren argues at length that Sierra Club has not shown that the Government will not protect its interests (Opp. at 3-8); that Sierra Club has not rebutted the presumption under the *parens patriae* theory that the Government represents the interests of all citizens (*id.* at 4); and that Sierra Club has not shown that the Government has committed misfeasance, nonfeasance, or colluded with Ameren. (*Id.* at 5-6). Relatedly, Ameren argues that Sierra Club has not shown that its interests are currently jeopardized or inadequately represented, and that it alleges only "hypothetical future harm" based on speculation that the Government may no longer represent its interests in the future. (*Id.* at 1, 3).

None of these demonstrations of "inadequate representation" apply in a case, such as here, where the proposed intervenor has an unconditional statutory right to intervene under Rule 24(a)(1). Rule 24(a)(1) simply does not include the language found in Rule 24(a)(2) which requires, *inter alia*, an inquiry into whether "existing parties adequately represent [the movant's] interest." Fed.R.Civ.P. 24(a)(2). Therefore, the three-pronged test of Rule 24(a)(2) does not apply. *See* 7A Wright, Miller & Kane, *Federal Practice and Procedure*: Civil 3d § 1908 (2007) ("Rule 24(a)(2) creates a threefold test for intervention of right, save for those unusual situations in which there is an unconditional statutory right to intervene and Rule 24(a)(1) is the controlling provision."). It is undisputed that the present case is one of those situations in which Rule 24(a)(1) controls. (Opp. at 2).

Tellingly, all of the cases upon which Ameren relies that discuss the "inadequate representation" issue were decided under Rule 24(a)(2), and did not involve a statutory right to intervene under Rule 24(a)(1).[1] Those courts' analyses of Rule 24(a)(2)'s three-pronged test – including the third-prong "adequacy of representation" requirement – are simply irrelevant to the present case.

Ameren also erroneously suggests that the obligation to demonstrate inadequate representation flows from Rule 24's "timeliness" requirement. (Opp. at 3-4). However, the four well-known factors considered in analyzing timeliness say nothing whatsoever about inadequate representation: "how far the litigation had progressed at the time of the motion for intervention, the prospective intervenor's prior knowledge of the pending action, the reason for the delay in seeking intervention, and the likelihood of prejudice to the parties in the action." *Arrow v. Gambler's Supply, Inc.*, 55 F.3d 407, 409 (8th Cir. 1995).

To be sure, Sierra Club pointed to its concerns that the United States may no longer protect its interests in order to explain the reason for the timing of its motion to intervene, but that did not transform its motion to intervene into a Rule 24(a)(2) application, or otherwise create an obligation to satisfy the three-part requirements of Rule 24(a)(2). Because Sierra Club has indisputably satisfied Rule 24(a)(1), it is not required to prove that its interests are not adequately

[1] The following cases relied upon by Ameren were all decided based on a Rule 24(a)(2) analysis: *Chiglo v. City of Preston*, 104 F.3d 185 (8th Cir. 1987); *Mausolf v. Babbitt*, 85 F.3d 1295 (8th Cir. 1996); *National Parks Conservation Ass'n v. U.S. Environmental Protection Agency*, 759 F.3d 969 (8th Cir. 2014); *Stadin v. Union Elec. Co.*, 309 F.2d 912 (8th Cir. 1962); *Solid Waste Agency of Northern Cook County v. U.S. Army of Engineers*, 101 F.3d 503 (8th Cir. 1996); *Federal Trade Commission v. Johnson*, 800 F.3d 448 (8th Cir. 2015); *Little Rock School Dist. v. North Little Rock School Dist.*, 378 F.3d 774 (8th Cir. 2004); *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968 (8th Cir. 1984); *Bradley v. Milliken*, 828 F.2d 1186 (6th Cir. 1987).

represented by the United States, rebut the *parens patriae* presumption, show collusion between the United States and Ameren, or make any other purported Rule 24(a)(2) showing.[2]

By ignoring the distinction between Rule 24(a)(1) and Rule 24(a)(2), Ameren would essentially erase Rule 24(a)(1) from the Federal Rules of Civil Procedure. Moreover, imposing Rule 24(a)(2) requirements in this case would transform Sierra Club's *unconditional* right to intervene under 42 U.S.C. § 7604(b)(1)(B) into a *conditional* right, contingent on whether the Government is providing adequate representation. However, § 7604(b)(1)(B) explicitly states that, if the EPA Administrator is prosecuting an action to enforce compliance with an "emission standard or limitation," then "any person may intervene as a matter of right"—not that a person "may intervene if the Government is no longer protecting their interests."

Finally, Ameren argues that Sierra Club has shown "no actual or imminent harm—only hypothetical future harm" that would occur if the Government no longer faithfully litigates the case. (Opp. at 1, 3). However, this is simply a variation of its argument that Sierra Club has failed to show inadequate representation by the United States which, as shown above, is meritless. Because it is undisputed that Sierra Club has an unconditional right to intervene under Rule 24(a)(1), it is unnecessary to show that its interests are not adequately represented under Rule 24(a)(2).[3]

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[2] Although it is unnecessary to reach this issue, it is worth noting that our Court of Appeals in *Sierra Club v. Robertson*, 960 F.2d at 86, found that Sierra Club and other organizations "represent the interests of their members and answer only to their members" whereas a State government has different interests because, *inter alia*, it is "obliged to represent the interests of all of its citizens." Here, Ameren has not explained how, if "the Government is presumed to represent the interests of all citizens" (Opp. at 4), that could include both Ameren and Sierra Club who, according to Ameren, have antithetical interests.

[3] Ameren's Opposition does not raise any argument that Sierra Club cannot establish Article III standing, or that it has not adequately alleged injury in fact. Therefore, we do not interpret Ameren's assertion that Sierra Club has not shown "actual or imminent harm" as an attack on standing. In any event, Sierra Club's motion to intervene demonstrates that it has Article III standing (Doc. No. 859 at 11-12). Ameren simply fails to address this demonstration, much less show that Sierra Club lacks standing.

B. Sierra Club's Motion is Timely.

Ameren next argues that Sierra Club's motion is untimely, and cites to various cases in which intervention was inappropriate given the particular circumstances presented in those cases. (Opp. at 8-10). However, courts in numerous other cases have found intervention timely even after many years of litigation and when the case was at an advanced stage, including stages more advanced than that of the present litigation. *See, e.g.*, *Liddell*, 546 F.2d at 771 (intervention into remedy stage should have been permitted as timely even though judgment had been entered); *Winbush v. State of Iowa*, 66 F.3d 1471, 1479 (8th Cir. 1995) (intervention proper 10 years after complaint filed, following bench trial); *Kozak v. Wells*, 278 F.2d 104, 109 (8th Cir. 1960) (intervention may be proper after judgment); *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 390-96 (1977) (intervention proper five years after litigation commenced).

The guiding principal, as our Court of Appeals has instructed, is that "each case must rise and fall on its own peculiar facts and circumstances." *Liddell*, 546 F.2d at 770.[4] Moreover, the Court has consistently held that we "construe Rule 24 liberally and resolve any doubts in favor of the proposed intervenors." *United States v. Ritchie Special Credit Investments, Ltd.*, 620 F.3d 824, 831 (8th Cir. 2010) (quoting *Kan. Pub. Employees Ret. Sys. v. Reimer & Koger Assoc., Inc.*, 60 F.3d 1304, 1307 (8th Cir. 1995)). "'[A]bsolute measures of timeliness should be ignored,' [internal citation omitted], and 'nothing in Rule 24(a) precludes postjudgment or even post-appeal intervention.'" *WaterLegacy v. United States Environmental Protection Agency*, 300 F.R.D. 332, 343 (D. Minn. 2014) (quoting *Tweedle v. State Farm Fire & Cas. Co.*, 527 F.3d 664, 671 (8th Cir. 2008)).

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[4] This principle is demonstrated by contrasting the holdings in *Liddell* and *Winbush*, *supra*, where intervention was found to be timely even after the litigation had progressed for many years, with the holding in *Arkansas Elec. Energy Consumers v. Middle South Energy, Inc.*, 772 F.2d 401 (8th Cir. 1985), where intervention was not timely even though it was sought 12 days after the complaint was filed.

Turning to the particular circumstances of the present case, the timing of intervention is appropriate given the closure of the liability phase and the commencement of the remedy phase. All parties, including Sierra Club, are similarly situated at the very beginning of the remedy phase. All parties—in accordance with the Court's February 16, 2017 Order (Doc. No. 863)—will submit Rule 26 disclosures on April 5, and a joint proposed scheduling plan by April 13, 2017. Moreover, Sierra Club will not attempt to re-litigate any issue that has already been decided during the liability phase.

In stark contrast, in the cases relied upon by Ameren (Opp. at 10), the timing of intervention posed complications and thorny issues given the particular circumstances—none of which are present in our case. For example:

- In *Liddell v. Bd. of Educ. of City of St. Louis*, 98 F.R.D. 548, 551 (E.D. Mo. 1983), intervention by a teacher's union relating to the remedy contained in a settlement agreement negotiated by the existing parties would have posed problems given that "[i]n this phase of the case alone the parties have completed wide-ranging and extensive discovery, have prepared for trial on interdistrict liability, have conducted sensitive negotiations in an effort to settle this phase of the case, and have taken on the responsibilities of implementing the agreement if approved or, as to some parties, proceeding to trial if the agreement is not approved." No such complications exist in the present case.

- In *Am. Civil Liberties Union of Minnesota v. Tarek Ibn Ziyad Academy*, 643 F.3d 1088, 1094 (8th Cir. 2011), the district court appropriately denied intervention where "the delay would prejudice the existing parties because they had already engaged in extensive motion practice, commenced written discovery, and begun taking depositions." The procedural posture of our case is different, and will not lead to such problems since remedy phase discovery has not yet begun.

- In *Arrow v. Gambler's Supply, Inc.*, 55 F.3d at 409, denial of intervention was proper where the proposed intervenor "moved to join the litigation when the parties reached a settlement agreement one month before the trial date." Again, the posture of our case is very different, as there is no settlement agreement and this case is very far from a trial on remedies.

- In unique, expedited litigation in *Arkansas Elec. Energy Consumers v. Middle South Energy, Inc.*, 772 F.2d 401, 402-03 (8th Cir. 1985), the district court properly denied intervention after an evidentiary hearing had been held and a temporary restraining order had been issued within two weeks of the case's commencement, and where the court found that "in all probability" the injunction would be made permanent. Clearly, this ruling was tailored to unique circumstances which are unlike anything in the present case.

- In *United States v. Associated Milk Producers*, 534 F.2d 113, 114-116 (8th Cir. 1976), a motion to intervene filed after the district court had already considered, heard objections to, and approved a consent decree in an antitrust suit was properly denied. The present case is obviously in a different procedural posture.

- In *Clarke v. Baptist Memorial Healthcare Corp.*, 264 F.R.D. 375, 381 (W.D. Tenn. 2009), the court did not allow intervention of a new class representative *after* class certification had been denied because it would allow plaintiffs to "effectively ...relitigate the issue of class certification with the benefit of hindsight" and would require beginning class certification discovery "from scratch." No such circumstances exist in the present case.

Thus, the cases relied upon by Ameren are neither helpful nor persuasive. In the particular circumstances of the present case, intervention is timely.

C. There is No "likelihood of prejudice" Caused by the Timing of Sierra Club's Motion.

In determining whether a motion to intervention is "timely," a court should consider whether the movant's delay created a "likelihood of prejudice" to the existing parties. *Arrow*, 55 F.3d at 409. As our Court of Appeals has explained, the relevant inquiry is whether any prejudice stems from the *timing of the intervenor's motion*, not from the intervenor's "presence in the suit" or the fact that the intervenor may espouse positions adverse to an existing party. *Mille Lacs*, 989 F.2d at 999. That is because "Rule 24 protects precisely this ability to intervene in litigation to protect one's interests." *Id.* Thus, "[t]he question for determining the timeliness of a motion to intervene is whether existing parties may be prejudiced by the delay in moving to intervene, not whether the intervention itself will cause the nature, duration, or disposition of the lawsuit to change." *Union Elec. Co.*, 64 F.3d at 1159 (citing *Mille Lacs*, 989 F.2d at 998-999).

Ameren simply ignores this legal standard and presents a red herring, focusing on whether Sierra Club's presence in the lawsuit will harm Ameren's interests. Thus, Ameren objects to being "forced to fight with an activist public interest group" whose positions are often adverse to Ameren's interests. (Opp. at 11). Ameren also complains that Sierra Club will "force its views upon the parties." (*Id.* at 12). However, Sierra Club's ability to intervene and present its views is precisely what is bestowed by the unconditional statutory right set forth in the Clean Air Act, 42 U.S.C. § 7604(b)(1)(B). As the Second Circuit has noted, "[i]n enacting [the CAA's citizen suit provision], Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests." *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976).[5]

For similar reasons, the Court should reject Ameren's argument that Sierra Club's intervention would result in increased costs to Ameren. (Opp. at 10-12). Any additional discovery costs would derive from Sierra Club's "presence in the suit" rather than from the timing of Sierra Club's motion to intervene, and are therefore irrelevant under *Mille Lacs* and *Union Electric Co.* Put another way, Ameren cannot show that it will incur additional costs that it would not have incurred if Sierra Club had intervened at an earlier date. Ameren cites no authority suggesting that intervention may be denied because a movant's participation in the lawsuit will increase discovery costs, and indeed *Mille Lacs* and *Union Electric Co.* indicate otherwise. "[W]hether the intervention itself will cause the nature, duration, or disposition of the lawsuit to change" is not germane. *Union Electric Co.*, 64 F.3d at 1159 (citing *Mille Lacs*, 989 F.2d at 998-999).

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[5] Ameren's accusations that "Sierra Club is a serial litigant" (Opp. at 12, n. 7), or that Sierra Club will argue "for whatever remedy it believes would harm Ameren the most" (*id.* at 11), are baseless and not worthy of further response.

Even if such considerations were relevant, Ameren greatly exaggerates by arguing that intervention will result in "potentially exorbitant financial costs to Ameren" and "increased time burdens on everyone." (Opp. at 12). For example, Ameren claims that Sierra Club will engage in "redundant discovery" (*id.* at 1, 12) and will take "duplicative full fact and expert written discovery of Ameren" (*id.* at 2) so that Ameren's discovery burdens will be "double[d]." (*Id.* at 2, 11). It will not. Moreover, Ameren fails to explain why Sierra Club (or any intervenor for that matter) would want to bear the cost of taking full, duplicative, redundant discovery. Likewise, Ameren speculates that Sierra Club's intervention will "delay final judgment" (*id.* at 12) but fails to explain how. These failures speak volumes. Ameren ignores that it is commonplace and ordinary for a third-party intervenor to participate in discovery and trial without significantly adding to the discovery costs of the existing parties or delaying the proceedings.

D. Sierra Club's Participation Should Not Be Limited.

Ameren next contends that, although Sierra Club has an unconditional statutory right to participate in this case, Sierra Club's participation in discovery and perhaps other aspects of the remedy phase should be limited. (Opp. at 12-13). However, no such limitations are appropriate or necessary here, and Ameren's argument should be rejected.

When an intervenor satisfies the requirements of Rule 24(a) and Article III standing, the intervenor "become[s] a 'suitor' and asks the court to 'decide the merits of the dispute.'" *Mausolf v. Babbitt*, 85 F.3d 1295, 1300-01 (8th Cir. 1996) (quoting *Building and Const. Trades Dept., AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994)). The intervenor therefore "'participates on an equal footing with the original parties to [the] suit.'" *Id.*

Here, however, Ameren seeks second-class status for Sierra Club. To justify its proposed limitations, Ameren again invokes a strawman, arguing that Sierra Club will engage in duplicative discovery. (Opp. at 12-13). In actuality, Sierra Club has a keen interest in avoiding duplication and minimizing costs. Ameren's assertion that Sierra Club "has no shortage of funds to throw into the case" (*id.* at 11) is, unfortunately, untrue. Sierra Club has already reached out to the Department of Justice's litigation counsel to begin discussions about ways to avoid duplication and minimize costs. Wherever possible, Sierra Club will coordinate discovery to streamline the process and reduce costs for all parties.

However, Sierra Club objects to the artificial "limitations" proposed by Ameren. For example, Ameren seeks to block Sierra Club's access to any of the parties' discovery from the liability phase. (Opp. at 13). Although Sierra Club will not re-litigate any liability issues, there is no basis whatsoever for restricting access to liability-phase discovery that in all likelihood will be relied upon by the parties to some extent during the remedy phase. Ameren offers no justification for allowing the existing parties, but not Sierra Club, access to liability-phase discovery. In fact, such a restriction might lead to precisely the type of duplication of effort that Ameren wishes to avoid.

Ameren's reliance on *Duke Energy Corp.*, 171 F.Supp.2d at 565-66, to justify such a sweeping limitation is misplaced. The *Duke Energy* court only noted that "the magistrate judge *may* impose limitations on [the movants'] participation in the *currently ongoing discovery*" and their "ability to initiate unilateral independent discovery without leave of the court." *Id.* (emphasis added). However, there is no "currently ongoing discovery" that would warrant such limitations in our case.

In any event, Sierra Club will attempt to coordinate to the full extent possible with the Department of Justice to streamline discovery and minimize costs and burdens.

III. CONCLUSION

For the foregoing reasons, Sierra Club respectfully requests that its motion to intervene be granted.

Date: March 10, 2017

Respectfully submitted,

/s/ Benjamin Blustein
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Attorneys for Plaintiff-Intervenor Sierra Club

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2017, I caused a copy of the foregoing Reply Memorandum in Support of Sierra Club's Motion to Intervene to be filed and served upon all counsel of record via CM/ECF.

/s/ Benjamin Blustein
Attorney for Sierra Club

Message

From: Cozad, David [Cozad.David@epa.gov]
Sent: 2/17/2017 10:56:01 PM
To: Schnare, David [schnare.david@epa.gov]
CC: Schwab, Justin [schwab.justin@epa.gov]; Starfield, Lawrence [Starfield.Lawrence@epa.gov]; Shiffman, Cari [Shiffman.Cari@epa.gov]
Subject: Updated table
Attachments: AC DP AWP / Ex. 5

Flag: Flag for follow up

Hi David,

Attached, as promised earlier in the week, is an updated table of AC DP AWP / Ex. 5 AC DP AWP / Ex. 5 The additions and edits, which are relatively few, are in blue. Let me know if questions.

Have a good weekend –

Dave

Dave Cozad
Acting PDAA, OECA
Office 202-564-4861
Cell Personal Phone / Ex. 6

Message

From: Cozad, David [Cozad.David@epa.gov]
Sent: 4/26/2017 5:46:54 PM
To: Schwab, Justin [schwab.justin@epa.gov]; Fotouhi, David [fotouhi.david@epa.gov]
CC: Michaud, John [Michaud.John@epa.gov]; Worthman, Gary [Worthman.Gary@epa.gov]; Mackey, Cyndy [Mackey.Cyndy@epa.gov]
Subject: DPP ACP AWP / Ex. 5
Attachments: DPP ACP AWP / Ex. 5

Hi David and Justin,

Attached is the draft DPP ACP AWP / Ex. 5

DPP ACP AWP / Ex. 5

Dave

From: Albert, Eric (ENRD) [mailto:Eric.Albert@usdoj.gov]
Sent: Tuesday, April 25, 2017 12:13 PM
To: Nazar, Kristen <Nazar.Kristen@epa.gov>; Pemberton, Scott <Pemberton.Scott@epa.gov>; Peterson, Mary <Peterson.Mary@epa.gov>
Cc: Hoefer, David <Hoefer.David@epa.gov>; Cozad, David <Cozad.David@epa.gov>; Moor, Zachary (ENRD) <Zachary.Moor@usdoj.gov>; Loeb, Elizabeth (ENRD) <Elizabeth.Loeb@usdoj.gov>
Subject: DPP ACP AWP / Ex. 5

Hi everyone. Attached is our draft post-trial brief DPP ACP AWP / Ex. 5

DPP ACP AWP / Ex. 5

Please review and let us know if you have any comments/concerns. **Please give us any feedback you may have not later than May 2, 2017.**

DPP ACP AWP / Ex. 5

Thanks.

Eric

Message

From: Greenwalt, Sarah [greenwalt.sarah@epa.gov]
Sent: 4/25/2017 3:31:43 PM
To: Schwab, Justin [schwab.justin@epa.gov]; Fotouhi, David [fotouhi.david@epa.gov]
Subject: RE: my WOTUS redline

Thanks. Will add my edits here. David, let me know if you wanted to add anything.

Sarah A. Greenwalt
Senior Advisor to the Administrator
for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency
Work: 202-564-1722 | Cell: Personal Phone / Ex. 6
Greenwalt.Sarah@epa.gov

From: Schwab, Justin
Sent: Tuesday, April 25, 2017 11:07 AM
To: Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>
Subject: my WOTUS redline

Please find attached

Message

From: U.S. EPA Media Relations [noreply-subscriptions@epa.gov]
Sent: 2/28/2017 11:07:51 PM
To: Schwab, Justin [schwab.justin@epa.gov]
Subject: EPA to Act on Waters of the United States Rule

CONTACT:
press@epa.gov

FOR IMMEDIATE RELEASE
February 28, 2017

EPA to Act on Waters of the United States Rule

WASHINGTON -- President Donald Trump issued an Executive Order at the White House today, directing the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers to review and then rescind or revise the 2015 Clean Water Rule: Definition of "Waters of the United States".

EPA Administrator Scott Pruitt joined the President for this announcement and afterward issued the following statement: "EPA intends to immediately implement the Executive Order and submit a Notice to the Office of the Federal Register announcing our intent to review the 2015 Rule, and then to propose a new rule that will rescind or revise that rule. The President's action today preserves a federal role in protecting water, but it also restores the states' important role in the regulation of water."

View the Executive Order and the Federal Register Notice: https://www.epa.gov/cleanwaterrule

R033

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

Message

From: US EPA Media Relations [noreply-subscriptions@epa.gov]
Sent: 2/17/2017 10:05:18 PM
To: Schwab, Justin [schwab.justin@epa.gov]
Subject: Stakeholders Cheer Scott Pruitt's Ascension to EPA Administrator

FOR IMMEDIATE RELEASE

February 17, 2017

Job Creators, American Energy Producers, Farmers and Elected Officials Cheer Scott Pruitt's Ascension to EPA Administrator

WASHINGTON--American leaders and job creators all across the country today cheered as Scott Pruitt was confirmed by the U.S. Senate to become the new EPA Administrator.

Here is some of what they are saying:

U.S. Representative David McKinley (WV)
"Scott Pruitt is the leader America needs at the EPA. He understands that we can protect our environment with common sense policies that don't attack job creators and send thousands of workers, like West Virginia's coal miners, to the unemployment line. In Oklahoma, Mr. Pruitt tirelessly fought unwarranted regulations and federal government abuse. I am confident he will bring a pragmatic and balanced approach to the EPA by returning it to its original and lawful mission."

Zippy Duvall, President, American Farm Bureau Federation
"Scott Pruitt's confirmation to lead the Environmental Protection Agency will bring a breath of fresh air to the post. America's farmers and ranchers look forward to working with Administrator Pruitt as he leads the EPA with a welcome level of common sense in the important job of protecting the environment. For too long, farmers and ranchers have been victims of EPA's harsh regulatory overreach. Farmers are conservationists to the core and we want to play a positive, cooperative role in protecting the environment we rely on to produce food for this nation. In his position as attorney general in Oklahoma, Pruitt stood up for common-sense, effective regulation that protects the environment and the rights of the regulated community. We're optimistic that he will retain those same values as administrator and we look forward to working with him. But what we truly look forward to is working with someone at EPA who understands how farmers and ranchers care for our nation's natural resources each and every day."

U.S. Senator Shelly Moore Capito (WV)
"Attorney General Pruitt is the most thoroughly vetted nominee for administrator in the history of the EPA. He embodies the leadership we need to restore accountability to the agency. He will return the EPA to its core mission of protecting public and environmental health while balancing economic impact. While I am disappointed by the Democrat obstruction that delayed today's vote, I am very glad the Senate has confirmed Attorney General Pruitt. I know he will be an excellent partner to West Virginia as the next administrator of the EPA."

U.S. Senator Pat Roberts (KS)
"I look forward to working with Administrator Pruitt. He understands that while farmers and ranchers make their living off the land, they are also its best stewards. For years we have struggled with an EPA that was not only tone deaf to the needs and concerns of rural America, it was downright adversarial. Producers were burdened with overregulation, which left them feeling ruled, not governed. I am confident Pruitt will lead an EPA that is more respectful of agriculture and will work to restore the trust of farmers, ranchers, and rural Americans."

Jeff Keffer, the Chief Executive Officer of Longview Power
"We are pleased the Senate has confirmed Mr. Pruitt to be the next EPA Administrator. He will make an exceptional head of EPA. Under his leadership, we expect the EPA to return to sensible environmental policies based on our existing laws that protect the environment and public health while recognizing the need for reliable and affordable clean coal-based electricity and the many jobs in the coal industry."

Mitch Bainwol, President & CEO, Auto Alliance
"We congratulate Administrator Pruitt on his confirmation and look forward to working with him and his team to get the Midterm Review back on track. The Administrator has a keen understanding of how compliance with the government fuel economy/greenhouse gas program depends on what consumers buy, not what automakers produce. That's why standards must also reflect market realities. We remain convinced the best way to advance our shared goals for the environment, safety, consumer affordability and manufacturing jobs is to reinstate the data-driven review -- under the originally promised schedule."

Paul Bailey, President and CEO, American Coalition for Clean Coal Electricity
"We are pleased the Senate has confirmed Mr. Pruitt to be the next EPA Administrator. He will make an exceptional head of EPA. Under his leadership, we expect EPA to return to sensible policies that both protect the environment and recognize the need for reliable and affordable coal-based electricity."

Jay Ashcroft, Missouri Secretary of State
"An expert on regulatory and constitutional law, Scott Pruitt will bring a necessary balance to the Environmental Protection Agency. He recognizes that a clean environment and a vibrant economy do not have to be mutually exclusive. As Oklahoma Attorney General, he has repeatedly taken on the tough fights to stop the regulatory overreach of the past decade. Above all, he has a record of distinguished service that will serve our nation well."

Jay Timmons, President, National Association of Manufacturers
"After facing record high costs to comply with EPA regulations over the past decade, manufacturers welcomed today's Senate confirmation of Scott Pruitt to lead the EPA. We are confident that under his leadership, Pruitt will restore balance to the way environmental regulations are developed. Manufacturers look forward to him getting to work right away. Manufacturers know it's possible to have responsible environmental stewardship and robust economic growth at the same time. We are leaders on sustainability and developing emissions-reducing innovations, and as we look to find solutions to the environmental challenges we face, manufacturers will continue to lead the way."

Hal Quinn, CEO, National Mining Association
"The mining community welcomes Mr. Pruitt to Washington as EPA administrator. He brings to this important position a wealth of knowledge about the laws that provide environmental protection to the American people, as well as respect for the law and its limitations on a powerful bureaucracy. As a distinguished attorney general he has demonstrated his appreciation for the right of states to manage their affairs where the law allows, and coming from an important energy state he is mindful of the costs that regulations can impose on the economy. NMA looks forward to working with Administrator Pruitt and his staff to deliver the balanced policies the nation deserves."

John Weber, National Pork Producers Council
"As Oklahoma attorney general, he struck a balance between protecting the environment and protecting the livelihoods of farmers and business owners. Everyone, particularly farmers, wants to have clean air and water and to preserve and protect our natural resources. But you don't achieve those goals by piling regulations on the very people who are the stewards of the land, air and water. Scott Pruitt understands that, and that will serve him well as EPA administrator."

U.S. Representative Paul Gosar (AZ)
"President Trump's selection of Scott Pruitt for EPA Administrator is a clear signal that people, not politics, will be the top priority of his administration. Scott Pruitt believes the EPA should work with local and state governments to enact common-sense regulations that will protect the environment without crushing our economy, I enthusiastically support Administrator Pruitt and I know that he will listen to the unique concerns of Western communities and work with Congress to develop positive legislative solutions. The Western Caucus looks forward to working with him closely."

U.S. Representative Markwayne Mullin (OK)
"After today's confirmation vote in the Senate, I can hear the sighs of relief coming from thousands of business owners, farmers, and citizens across the country. As the head of the EPA, Scott Pruitt will provide relief for those businesses, farmers, and citizens that have been suffering under this toxic regulatory environment for the last eight years. In Scott's work as Oklahoma's Attorney General, he recognized that Oklahomans know their state best. The most efficient regulatory environment is one where the federal government doesn't tell the states how to regulate; it lets the states determine what is most effective for their state and people. I want to congratulate Scott on this new position and I look forward to following his work cutting the bureaucratic tape at the EPA."

U.S. Representative Randy Weber (TX)
"Oklahoma Attorney General Scott Pruitt is both capable and qualified for the role of EPA Administrator. As Oklahoma Attorney General, he combatted a rogue EPA on numerous occasions. His confirmation will help restore the EPA to an organization that balances environmental protection with practical regulation."

U.S. Representative Jim Bridenstine (OK)
"President Obama turned the EPA into one of the most vilified agencies in the 'swamp' of over-reaching government. As EPA Administrator, Scott Pruitt will bring a rational, constitutional, and federalist perspective to environmental stewardship. He knows the value of preserving our air, water, and land as well as the impact that regulations have had on jobs and people. He is an excellent addition to the Trump Administration."

Craig Uben, President National Cattlemen's Beef Association
"For far too long, the EPA has been a runaway bureaucracy largely out of touch with how its policies directly affect folks like cattle ranchers, who use – and responsibly care for – the environment while providing the safest and most abundant food supply in the world. Scott Pruitt will restore some common sense to environmental policy and we look forward to working with him on restoring regulatory sanity to Washington, such as by killing the onerous 'Waters of the United States' rule."

Granger MacDonald, Chairman of the National Association of Home Builders
"NAHB congratulates Scott Pruitt on being confirmed as the nation's next EPA Administrator. Pruitt understands the need for a commonsense regulatory process that is based on sound science, and does not trample states' rights or ignore the economic impact on small businesses. NAHB looks forward to working with Administrator Pruitt and his team to help move towards this more reasonable approach."

R022

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

Message

From: U.S. EPA Media Relations [noreply-subscriptions@epa.gov]
Sent: 4/28/2017 11:08:20 PM
To: Schwab, Justin [schwab.justin@epa.gov]
Subject: EPA Kicks Off Updates to Website

CONTACT:
press@epa.gov

FOR IMMEDIATE RELEASE
April 28, 2017

EPA Kicks Off Website Updates

WASHINGTON – EPA.gov, the webpage for the United States Environmental Protection Agency, is undergoing changes that reflect the agency's new direction under President Donald Trump and Administrator Scott Pruitt. The process, which involves updating language to reflect the approach of new leadership, is intended to ensure that the public can use the website to understand the agency's current efforts. The changes will comply with agency ethics and legal guidance, including the use of proper archiving procedures. For instance, a screenshot of the last administration's website will remain available from the main page.

"As EPA renews its commitment to human health and clean air, land, and water, our website needs to reflect the views of the leadership of the agency," said J.P. Freire, Associate Administrator for Public Affairs. "We want to eliminate confusion by removing outdated language first and making room to discuss how we're protecting the environment and human health by partnering with states and working within the law."

The first page to be updated is a page reflecting President Trump's Executive Order on Energy Independence, which calls for a review of the so-called Clean Power Plan. Language associated with the Clean Power Plan, written by the last administration, is out-of-date. Similarly, content related to climate and regulation is also under review.

R066

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

Message

From: Minoli, Kevin [Minoli.Kevin@epa.gov]
Sent: 4/26/2017 5:23:49 PM
To: Srinivasan, Gautam [Srinivasan.Gautam@epa.gov]; Veney, Carla [Veney.Carla@epa.gov]
CC: Fotouhi, David [fotouhi.david@epa.gov]; Jones, Gail-R [Jones.Gail-R@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]; Schmidt, Lorie [Schmidt.Lorie@epa.gov]; Hooks, Samantha [hooks.samantha@epa.gov]
Subject: RE: ARLO Hot Issues

I missed this from this morning, but just so folks do not think I ignored it, neither Justin nor David would have been able to attend at 10:00. In response to requests that we ensure the right FO folks are there when we have these meetings, we needed to reschedule it. I realize the impact that has on the PARS process, and hope it will not be too difficult to reschedule those. Kevin

Kevin S. Minoli
Acting General Counsel
Office of General Counsel
US Environmental Protection Agency
Main Office Line: 202-564-8040

-----Original Message-----
From: Srinivasan, Gautam
Sent: Wednesday, April 26, 2017 8:47 AM
To: Veney, Carla <Veney.Carla@epa.gov>
Cc: Minoli, Kevin <Minoli.Kevin@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Jones, Gail-R <Jones.Gail-R@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Hooks, Samantha <hooks.samantha@epa.gov>
Subject: Re: ARLO Hot Issues

I believe David can't make 10 but Kevin and Justin can. We were hoping to make progress with Kevin and Justin and loop in David at another time if needed on matters where Justin has a conflict. (Conversely, I haven't to looked to see whether there are CDs/settlements where David has a conflict).

Kevin, if you think all three of you are required for the discussion, then we will move the meeting.

I'll note we are also trying to balance this with our PARS deadline, and moving to 2p will require us to reschedule two mid-years. (Which is significant given the number we have to get through)

++++++++++
(202) 564-5647 (o)
Personal Phone / Ex. 6 (c)

> On Apr 26, 2017, at 8:36 AM, Veney, Carla <Veney.Carla@epa.gov> wrote:
>
> I suggested moving it to 2:00 since CCILO's reg. review was cancelled. ARLO wanted an hour with you, David, and Justin. So, that seemed like a good fit. I checked with ARLO before it was moved and it was fine. But, after I left I saw an email to put it back on at 10:00. I will move it back to 2:00.
>
> -----Original Message-----
> From: Minoli, Kevin
> Sent: Wednesday, April 26, 2017 8:32 AM
> To: Fotouhi, David <fotouhi.david@epa.gov>; Veney, Carla <Veney.Carla@epa.gov>; Jones, Gail-R <Jones.Gail-R@epa.gov>
> Cc: Schwab, Justin <schwab.justin@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>
> Subject: Re: ARLO Hot Issues
>
> Good morning Carla and Gail- ARLO Hot Issues had been moved to the afternoon so Justin and David could attend this morning, but around 5:15 yesterday it moved back. Do either of you know why? It will now need to be rescheduled again as they are essential to thd meeting. Thanks, Kevin
>
> Kevin S. Minoli
> Acting General Counsel
> Office of General Counsel
> US Environmental Protection Agency
> Main Office Line: 202-564-8040
>
>> On Apr 26, 2017, at 8:27 AM, Fotouhi, David <fotouhi.david@epa.gov> wrote:
>>

>> I don't think this time works for either of us. From 10-11, I had planned to attend a briefing on MATS for Sarah Dunham and Mandy, and Justin had planned to attend the weekly WOTUS meeting with WLO, OW, and the Corps.
>>
>>
>> David Fotouhi
>>
>> Deputy General Counsel
>> Office of General Counsel
>> U.S. Environmental Protection Agency
>> Tel: +1 202.564.1976
>> fotouhi.david@epa.gov
>>
>> -----Original Message-----
>> From: Minoli, Kevin
>> Sent: Wednesday, April 26, 2017 8:26 AM
>> To: Schwab, Justin <schwab.justin@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>
>> Subject: ARLO Hot Issues
>>
>> Good Morning- With it moving back to 10:00, are you both still able to attend? Kevin
>>
>> Kevin S. Minoli
>> Acting General Counsel
>> Office of General Counsel
>> US Environmental Protection Agency
>> Main Office Line: 202-564-8040

Delivery Report

From: Microsoft Outlook [MicrosoftExchange329e71ec88ae4615bbc36ab6ce41109e@usepa.onmicrosoft.com]
Sent: 4/11/2017 4:59:48 PM
To: David Fotouhi [Fotouhi.David@epamail.epa.gov]; Justin Schwab [Schwab.Justin@epamail.epa.gov]
Subject: DPP ACP / Ex. 5
Attachments:

Your message
To: Schmidt, Lorie
CC: David Fotouhi; Prabhu, Aditi; Veney, Carla; Jones, Gail-R; Justin Schwab; Patrick, Monique; Trudeau, Shaun
Subject: DPP ACP / Ex. 5
Sent: 4/11/2017 4:59:47 PM

Office 365

Your message couldn't be delivered to multiple recipients.

The recipients weren't found at epamail.epa.gov.

schwab.justin	Office 365	Recipients
Action Required		Recipients
Unknown To address		

Couldn't deliver to the following recipients:
Fotouhi.David@epamail.epa.gov, Schwab.Justin@epamail.epa.gov

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 5.1.10 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 5.1.10

This error occurs because the sender sent a message to an email address hosted by 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.

Recipient has a valid license - Make sure the recipient has an Office 365 license assigned to them. The recipient's email admin can use the Office 365 admin center to assign a license (Users > Active Users > select the recipient > Assigned License > Edit).

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 5.1.10 in Office 365.

Original Message Details

Created Date:	4/11/2017 4:59:47 PM
Sender Address:	schwab.justin@epa.gov
Recipient Address:	Fotouhi.David@epamail.epa.gov, Schwab.Justin@epamail.epa.gov
Subject:	DPP ACP / Ex. 5

Error Details

Reported error:	*550 5.1.10 RESOLVER.ADR.RecipientNotFound; Recipient not found by SMTP address lookup*
DSN generated by:	BY2PR09MB0262.namprd09.prod.outlook.com

Message Hops

HOP	TIME (UTC)	FROM	TO	WITH
1	4/11/2017 4:59:47 PM	BY2PR09MB0296.namprd09.prod.outlook.com	BY2PR09MB0296.namprd09.prod.outlook.com	mapi
2	4/11/2017 4:59:48 PM	BY2PR09MB0296.namprd09.prod.outlook.com	BY2PR09MB0262.namprd09.prod.outlook.com	Microsoft SMTP Server cipher=TLS_ECDHE_RSA

Original Message Headers

```
Authentication-Results: epa.gov; dkim=none (message not signed)
 header.d=none;epa.gov; dmarc=none action=none header.from=epa.gov;
Received: from BY2PR09MB0296.namprd09.prod.outlook.com (10.160.65.28) by
 BY2PR09MB0262.namprd09.prod.outlook.com (10.160.122.28) with Microsoft SMTP
 Server (version=TLS1_2, cipher=TLS_ECDHE_RSA_WITH_AES_128_CBC_SHA256_P256) id
 15.1.1005.10; Tue, 11 Apr 2017 16:59:48 +0000
Received: from BY2PR09MB0296.namprd09.prod.outlook.com ([10.160.65.28]) by
 BY2PR09MB0296.namprd09.prod.outlook.com ([10.160.65.28]) with mapi id
 15.01.1005.016; Tue, 11 Apr 2017 16:59:47 +0000
Content-Type: application/ms-tnef; name="winmail.dat"
Content-Transfer-Encoding: binary
From: "Schwab, Justin" <schwab.justin@epa.gov>
To: "Schmidt, Lorie" <Schmidt.Lorie@epa.gov>
CC: David Fotouhi <Fotouhi.David@epamail.epa.gov>, "Prabhu, Aditi"
        <Prabhu.Aditi@epa.gov>, "Veney, Carla" <Veney.Carla@epa.gov>, "Jones, Gail-R"
        <Jones.Gail-R@epa.gov>, Justin Schwab <Schwab.Justin@epamail.epa.gov>,
        "Patrick, Monique" <Patrick.Monique@epa.gov>, "Trudeau, Shaun"
        <Trudeau.Shaun@epa.gov>
Subject: DPP ACP / Ex. 5
DPP ACP / Ex. 5
Thread-Topic: DPP ACP / Ex. 5
DPP ACP / Ex. 5
Thread-Index: AQHSsuERbvQEIuzp9UCkcbRWRt8NE6HAZEpT
X-MS-Exchange-MessageSentRepresentingType: 1
Date: Tue, 11 Apr 2017 16:59:47 +0000
Message-ID: <A4DC4B93-1D83-49A6-A72F-8A910AF87285@epa.gov>
References: <OF2175A6CE.39E46D47-ON852580FF.005AC097-852580FF.005AC1C3@epamail.epa.gov>
In-Reply-To: <OF2175A6CE.39E46D47-ON852580FF.005AC097-852580FF.005AC1C3@epamail.epa.gov>
Accept-Language: en-US
Content-Language: en-US
X-MS-Has-Attach:
X-MS-TNEF-Correlator: <A4DC4B93-1D83-49A6-A72F-8A910AF87285@epa.gov>
MIME-Version: 1.0
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1;SPVR:BY2PR09MB0262;H:BY2PR09MB0296.namprd09.prod.outlook.com;FPR:;SPF:None;LANG:en;

Return-Path: schwab.justin@epa.gov

X-MS-Office365-Filtering-Correlation-Id: 2b30af67-dded-4fbe-5def-08d480fc28ed

X-Microsoft-Antispam:

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X-Exchange-Antispam-Report-Test: UriScan:(229425074694992);

X-Exchange-Antispam-Report-CFA-Test:

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X-Microsoft-Exchange-Diagnostics:

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X-MS-Exchange-CrossTenant-OriginalArrivalTime: 11 Apr 2017 16:59:47.0699
(UTC)

X-MS-Exchange-CrossTenant-FromEntityHeader: Hosted
X-MS-Exchange-CrossTenant-Id: 88b378b3-6748-4867-acf9-76aacbeca6a7
X-MS-Exchange-Transport-CrossTenantHeadersStamped: BY2PR09MB0262

Message

From: Schwab, Justin [schwab.justin@epa.gov]
Sent: 4/11/2017 4:59:47 PM
To: Schmidt, Lorie [Schmidt.Lorie@epa.gov]
CC: David Fotouhi [Fotouhi.David@epamail.epa.gov]; Prabhu, Aditi [Prabhu.Aditi@epa.gov]; Veney, Carla [Veney.Carla@epa.gov]; Jones, Gail-R [Jones.Gail-R@epa.gov]; Justin Schwab [Schwab.Justin@epamail.epa.gov]; Patrick, Monique [Patrick.Monique@epa.gov]; Trudeau, Shaun [Trudeau.Shaun@epa.gov]
Subject: DPP ACP / Ex. 5

I should be removed from this one

Sent from my iPhone

On Apr 11, 2017, at 12:31 PM, Lorie Schmidt <Schmidt.Lorie@epamail.epa.gov> wrote:

DPP ACP / Ex. 5

Please click the link below to see the routing and transmittal record for this package. After reviewing the package please:

* go to the Routed To section;
* route 2 line; and
* select the Add Comments button, or the Make Decision button.

LINK -> Notes://DCOGCLN1/FrontOff/OGCCTS.nsf/0/98F33BDB4CBFB98B852580FF0058F7DC

Message

From: Kime, Robin [Kime.Robin@epa.gov]
Sent: 4/25/2017 3:23:49 PM
To: Greenwalt, Sarah [greenwalt.sarah@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]
Subject: RE: 11:30 -Meeting with the Northwest Public Power Association

Totally understood- thank you!

From: Greenwalt, Sarah
Sent: Tuesday, April 25, 2017 11:22 AM
To: Schwab, Justin <schwab.justin@epa.gov>
Cc: Kime, Robin <Kime.Robin@epa.gov>
Subject: Re: 11:30 -Meeting with the Northwest Public Power Association

Sorry Robin, there is no way! Glad Justin can help out

Sent from my iPhone

On Apr 25, 2017, at 11:19 AM, Schwab, Justin <schwab.justin@epa.gov> wrote:

> Yes I will try to be there
>
> Sent from my iPhone
>
> On Apr 25, 2017, at 11:18 AM, Kime, Robin <Kime.Robin@epa.gov> wrote:
>
> > Hi,
> > Hope you are well. Samantha and Mandy are tied up- is there any chance you are able to join Brittany for this listening session?
> >
> > -----Original Appointment-----
> > **From:** Kime, Robin **On Behalf Of** Dravis, Samantha
> > **Sent:** Thursday, April 20, 2017 8:24 AM
> > **To:** Bolen, Brittany; Greenwalt, Sarah; Gunasekara, Mandy; theresapughconsulting@gmail.com; elizabeth@meguirewhitney.com; Kime, Robin; Schwab, Justin
> > **Cc:** Germann, Sandy; Irving, Verna; Steve Taylor
> > **Subject:** Meeting with the Northwest Public Power Association
> > **When:** Tuesday, April 25, 2017 11:30 AM-12:00 PM (UTC-05:00) Eastern Time (US & Canada).
> > **Where:** DCRoomARN3500/OPEI
> >
> > Directions: Please use the **William Jefferson Clinton North Entrance located on your right as you exit the Federal Triangle Metro Station**. Please arrive 20 minutes prior to the meeting with photo IDs to clear Security.
> >
> > For an escort from Security to the meeting call (202) 564-4332; for all other matters call Robin Kime (202)564-6587.
> >
> > Attendees:

Anita Decker, Executive Director NWPPA
Doug Hardy, Central Montana Electric Power Cooperative, MT
Dave Kelsey, Yellowstone Valley Electric Cooperative, MT
Norman Tebay, Vigilante Electric Cooperative, MT
Clay Koplin, Mayor of Cordova, AK
Brad Janorschke, Homer Electric Association, AK
Molly Simpson, Douglas County Public Utility District, WA
Steve Taylor, Mason County Public Utility District #1, WA

Contact:
Theresa Pugh Consulting, LLC
-a woman-owned small business
703-507-6843 Office
2313 North Tracy Street
Alexandria, Virginia 22311
www.theresapughconsulting.com

Request: I am writing today on behalf of Northwest Public Power Association (NWPPA)'s Executive Director Anita Decker. Anita will be in Washington D, C. from Washington state on April 25-26, 2017. She would like to meet with Administrator Pruitt, you or other political appointees who are assigned to work on electric utility issues of interest to NWPPA.

NWPPA is an electric utility association in the Pacific Northwest representing 151 hydroelectric, nuclear power and natural gas electric utilities (municipal and electric coops) affected by EPA regulations including some that are going to be revisited under recent Executive Orders. Their membership involves many electric utilities (municipal and coop) that would be affected by EPA regulations across several states in the Northwest—not just those in Washington state. NWPPA's member utilities serve 20 million customers making it one of the largest electric utility organizations in the western part of the United States.

They are interested in the following:

- Waters of the US – next steps (realizing it has been addressed in the Executive Order)
- Clean Power Plan review and replacement (they are aware of the Executive Order action last week)
- General EPA priorities related to the electric power sector

A link to the NWPPA organization is https://www.nwppa.org/about-nwppa/ and board information at https://www.nwppa.org/about-nwppa/nwppa-board-of-trustees/

Message

From: Schmidt, Lorie [Schmidt.Lorie@epa.gov]
Sent: 3/17/2017 5:32:47 PM
To: Greenwalt, Sarah [greenwalt.sarah@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]; Minoli, Kevin [Minoli.Kevin@epa.gov]
CC: Dunham, Sarah [Dunham.Sarah@epa.gov]; Siciliano, CarolAnn [Siciliano.CarolAnn@epa.gov]; Zenick, Elliott [Zenick.Elliott@epa.gov]; Jordan, Scott [Jordan.Scott@epa.gov]
Subject: RE: Attorney Client / Ex. 5

Also – are there press materials that we should be reviewing?

Lorie Schmidt
Associate General Counsel, Air and Radiation
Office of General Counsel
US Environmental Protection Agency
(202)564-1681

From: Schmidt, Lorie
Sent: Friday, March 17, 2017 1:23 PM
To: Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Kevin Minoli (Minoli.Kevin@epa.gov) <Minoli.Kevin@epa.gov>
Cc: Dunham, Sarah <Dunham.Sarah@epa.gov>; Siciliano, CarolAnn <Siciliano.CarolAnn@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>; Jordan, Scott <Jordan.Scott@epa.gov>
Subject: Attorney Client / Ex. 5

Sarah G, Justin and Kevin,

Ex. 5 - Deliberative Process/Attorney Client

Lorie

Lorie Schmidt
Associate General Counsel
Air and Radiation Law Office
Office of General Counsel
US Environmental Protection Agency
(202)564-1681

Message

From: Packard, Elise [Packard.Elise@epa.gov]
Sent: 3/6/2017 11:05:51 PM
To: Schwab, Justin [schwab.justin@epa.gov]
Subject: FW: Urgent - draft FR notices
Attachments: DPP ACP / Ex. 5

Elise B. Packard
Acting Principal Deputy General Counsel
U.S. EPA Office of General Counsel, Rm. 4020
(202) 564-7729

From: Schmidt, Lorie
Sent: Monday, March 06, 2017 6:04 PM
To: Dunham, Sarah <Dunham.Sarah@epa.gov>
Cc: Minoli, Kevin <Minoli.Kevin@epa.gov>; Packard, Elise <Packard.Elise@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>
Subject: DPP ACP / Ex. 5

Sarah

DPP ACP / Ex. 5

Thanks

Lorie

Message

From: Minoli, Kevin [Minoli.Kevin@epa.gov]
Sent: 4/23/2017 12:30:54 AM
To: Schwab, Justin [schwab.justin@epa.gov]; Greenwalt, Sarah [greenwalt.sarah@epa.gov]
CC: Fotouhi, David [fotouhi.david@epa.gov]
Subject: Re: DPP ACP / Ex. 5 / Ex. 7(e)

DPP ACP / Ex. 5 / Ex. 7(e)

DPP ACP / Ex. 5 / Ex. 7(e)

Thanks, Kevin

Kevin S. Minoli
Acting General Counsel
Office of General Counsel
US Environmental Protection Agency
Office Line: 202-564-8040
Direct Dial: Personal Phone / Ex. 6

From: Schwab, Justin
Sent: Saturday, April 22, 2017 1:10 PM
To: Greenwalt, Sarah
Cc: Fotouhi, David; Minoli, Kevin
Subject: Re: DPP ACP / Ex. 5 / Ex. 7(e)

Kevin, see below - we DPP ACP / Ex. 5 / Ex. 7(e)

DPP ACP / Ex. 5 / Ex. 7(e)

Sent from my iPhone

On Apr 22, 2017, at 12:21 PM, Greenwalt, Sarah <greenwalt.sarah@epa.gov> wrote:

> Does Kevin need/want to attend this?

I now have an 11am on Friday so I'm going to propose Thursday at 5.

Sent from my iPhone

On Apr 22, 2017, at 10:19 AM, Fotouhi, David <fotouhi.david@epa.gov> wrote:

> I'm available at the same times that Justin mentioned. Thanks!
>
> Sent from my iPhone
>
> On Apr 22, 2017, at 9:09 AM, Schwab, Justin <schwab.justin@epa.gov> wrote:
>
>> I'm free Thursday after 5, and Friday 11-noon
>>
>> Sent from my iPhone
>>
>> On Apr 22, 2017, at 8:44 AM, Greenwalt, Sarah <greenwalt.sarah@epa.gov> wrote:
>>
>>> Thanks, David.
>>>
>>> Right now I'm free on Thursday after 4:15, and Friday from 9:30-noon.
>>>
>>> David F. and Justin, at least one of you should be at this meeting. Do those times work with your schedule?
>>>
>>> Sent from my iPhone
>>>
>>> Begin forwarded message:
>>>
>>>> **From:** "Cozad, David" <Cozad.David@epa.gov>
>>>> **Date:** April 21, 2017 at 7:34:14 PM CDT
>>>> **To:** "Greenwalt, Sarah" <greenwalt.sarah@epa.gov>
>>>>
>>>> **Attorney Client / Ex. 5**
>>>>
>>>> Hi Sarah
>>>>
>>>> I can make those times work. Have a nice weekend.
>>>>
>>>> Dave
>>>>
>>>> Sent from my iPhone

Begin forwarded message:

From: "Gelber, Bruce (ENRD)" <Bruce.Gelber@usdoj.gov>
Date: April 21, 2017 at 1:35:49 PM CDT
To: "Greenwalt, Sarah" <greenwalt.sarah@epa.gov>
Cc: "Cozad, David" <Cozad.David@epa.gov>, "Schwab, Justin" <schwab.justin@epa.gov>, "Minoli, Kevin" <Minoli.Kevin@epa.gov>, "Vaden, Christopher (ENRD)" <Christopher.Vaden@usdoj.gov>, "Miller, Wendy (ENRD)" <Wendy.Miller@usdoj.gov>

DPP ACP / Ex. 5 / Ex. 7(e)

Sarah: Hi. Hope you're doing well. I'd like to

DPP ACP / Ex. 5 / Ex. 7(e)

Right now, Jeff and I are available to meet almost anytime next Friday as well as next Thursday, between 12:30 and 2 pm or after 4 pm. Will any of those times work for you and your team?

DPP ACP / Ex. 5 / Ex. 7(e)

Thanks. We look forward to meeting on this.

Bruce S. Gelber

Deputy Assistant Attorney General

Environment and Natural Resources Division
U.S. Department of Justice

950 Pennsylvania Avenue, N.W., Room 2609

Washington, D.C. 20530-0001

Phone: (202) 514-4624

Facsimile: (202) 514-0557

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Message

From: Fotouhi, David [fotouhi.david@epa.gov]
Sent: 4/20/2017 10:59:34 PM
To: Schwab, Justin [schwab.justin@epa.gov]
Attachments: 1630246.pdf

Flag: Flag for follow up

FYI

David Fotouhi

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

14-1150

UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

CENTER FOR REGULATORY REASONABLENESS,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Petition for Review of Respondent Agency's Promulgations and Approvals of Effluent Limitations and Other Limitations

PETITIONER'S THIRD MOTION TO SUPPLEMENT ITS APPENDIX AND TO REQUEST CONSIDERATION OF SANCTIONS

Oral argument requested but not yet scheduled

//s// John C. Hall
JOHN C. HALL
D.C. Cir. #44296
GARY B. COHEN
D.C. Cir. #49377
PHILIP D. ROSENMAN
D.C. Cir. #55525
Hall & Associates
Attorneys for Petitioner
1620 I Street, NW, Suite 701
Washington, DC 20006
Telephone: (202) 463-1166

August 12, 2016

ED_002401_00000638-00001

Petitioner, Center for Regulatory Reasonableness ("CRR"), submits this Third Motion to Supplement its Appendix, again seeking this Court to accept, and evaluate, the attached additional agency records that clearly document EPA's decision to disregard the *Iowa League of Cities* decision outside of the Eighth Circuit (*i.e.*, non-acquiescence to the Clean Water Act § 509(b) decision). (*See*, Attachment A – "Relevant Documents for Showing EPA Decision Timeline and DOJ Involvement in Non-Acquiescence Scheme that Avoids Judicial Review."). This filing has been discussed with opposing counsel, who, at the time of filing, has not indicated whether the Agency will oppose this motion.

Since the commencement of this litigation, Petitioner has averred that EPA: (1) rendered *a decision to non-acquiesce* regarding the Eighth Circuit's ruling in *Iowa League of Cities v. EPA,* 711 F.3d 844 (8th Cir. 2013) ("*ILOC*") (vacating several illegal amendments to the Clean Water Act's ("CWA") National Pollutant Discharge Elimination System ("NPDES") rules, and declaring EPA's "blending" prohibition to exceed its statutory authority); (2) decided it would *continue to impose the illegal rule amendments* (*e.g.*, "blending" prohibition) outside of the Eighth Circuit (re-creating more restrictive NPDES rules in those states); and, (3) *actively enforced that position* since announcing the decision verbally in November 2013 and again in writing in April and June 2014.

EPA, for its part, has repeatedly denied rendering any such decision or undertaking any enforcement of such position. In a relentless effort to have this Petition dismissed, the Agency, by its counsel, informed this Court on numerous occasions that no final decision has been rendered and that EPA views the applicability of the *ILOC* ruling – outside the Eighth Circuit – on a "case by case" basis. The Agency has also claimed that no records of such alleged decision exist, other than the two letters that CRR attached to its Petition for Review.[1]

Given the Agency's litigation posturing, Petitioner has been forced to use other means, the Freedom of Information Act ("FOIA"), 5 U.S.C. §551. *et seq.*, to reveal EPA's full decision-making record. Subsequently, several prior motions were filed with this Court to admit records as they became available.[2]
The recently obtained documents, which CRR seeks to add to the Petition's administrative record, confirm, beyond any reasonable doubt, that CRR's factual account of EPA's actions is completely accurate. The documents show that the EPA and DOJ counsel in this matter were, in fact, the architects of the non-acquiescence strategy and recommendation to avoid written public disclosure of

[1] A good reference regarding the procedural history of the CRR Petition is found at, *Petitioner's Motion to Supplement the Administrative Record,* [Document: 01217671180], at 6 – 9 (January 31, 2015).

[2] See, *Petitioner's Motion To Supplement Its Appendix* [Document: 1604989], at 1-2 (March 21, 2016), for a summary of prior steps to file necessary additional materials to produce a complete record.

that regulatory decision. The new Agency documents show that EPA's entire litigation position – with counsel from the Department of Justice acting as "co-architects" – was a sham, with the evident hope of avoiding any meaningful judicial review of the "non-acquiescence" decision.

Petitioner respectfully requests that this Court accept these documents into the administrative record of this matter to avoid the occurrence of a "fraud on the court," that EPA sought to create by providing a truncated record and claims that no other related decision documents existed. Petitioner also reiterates its prior request that this Court consider appropriate sanctions on government counsel that knowingly and consistently sought to (1) conceal the relevant EPA records confirming the Agency's decision; and, (2) mislead the Court regarding the actions of EPA (and DOJ) in creating the scheme to continue imposing the illegal rule amendments that were vacated by the Eighth Circuit while attempting to avoid judicial review

ARGUMENT

It is respectfully asserted that EPA, with the direct assistance and direction of its Justice Department legal counsel, cannot be permitted to unilaterally withhold agency records that establish the "working law" of the Agency, for the express purpose of avoiding the legal consequences of its behavior, including

thwarting judicial review.[3] This Court has shown little patience with other EPA attempts to deflect the impact of adverse Circuit Court decisions, via non-acquiescence and subvert judicial review via claims of "case by case" decision making. *See, e.g., Nat'l Envtl. Dev. Ass'n v. Clean Air Project,* 752 F.3d 999, 1003 (D.C. Cir. 2014) ("*NEDACAP*") (Rejecting EPA's "case by case" description and finding: "The Directive is a final agency action because it sets forth EPA's binding and enforceable policy regarding permit determinations."). As in *NEDACAP*, the new documents offered by Petitioner demonstrate conclusively that an EPA non-acquiescence decision was made regarding continued imposition of the vacated rule modifications in NPDES permit and enforcement actions outside the Eighth Circuit's jurisdiction, in flagrant disregard of several federal statutes, such as the Administrative Procedure Act ("APA") and Section 509(b) of the CWA, as well as basic notions of fairness and due process.[4] Consequently, EPA's non-acquiescence decision in this matter should also be soundly rejected.

---

[3] A similar pattern of such EPA activity was addressed and rejected by the Eighth Circuit. See *ILOC* at 711 F.3d 860-872.

[4] EPA's strategy in *NEDACAP* rested on closely parallel facts to those here. Among other things, the *Summit* Directive there employs virtually identical language to that used in the EPA Desk Statement, and the other documents CRR now requests be made part of the administrative record: *i.e.*, ". . . EPA does not intend to change its longstanding practice []" and, "EPA will continue to make source determinations on a case-by-case basis[.]" *Id.*, at 1003. EPA continues to stubbornly insist that it can avoid the impact of court decisions that it does not like by couching its regulatory decision in similar "case-by-case" language, and here,

I. Legal Authority Supports Record Supplementation

The obdurate behavior of EPA has caused Petitioner to file three requests to supplement the administrative record. Petitioner need not repeat its prior extensive legal analyses regarding record supplementation that have already been submitted to the Court.[5] It is appropriate, however, to repeat, from these prior filings, the words of EPA and DOJ counsel where they refused to identify, and objected to admitting, any other agency documents as part of the administrative record in this matter:

> EPA has explained that an administrative record is "the set of non-deliberative documents that the decision-maker considered, directly or indirectly (e.g., through staff) in making the final decision. AR Guidance at 4. This definition is supported by case law. *See, E.g., Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 420 (1971)....Because EPA did not regard the letters to reflect any substantive decision-making, it did not contemporaneously develop a record. (EPA's Opposition to Petitioner's Motion to Supplement the Administrative Record [Document 1537684], at 12)
>
> "To overcome the strong presumption of regularity to which an agency is entitled, a plaintiff must put forth concrete evidence that the documents it seeks to "add" to the record were actually before decisionmakers." *Marcum v. Salazar,* 751 F. Supp. 2d 74, 78 (D.D.C. 2010); *Id.* at 14.

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by attempting to hide documents that confirm the Agency's intent to enforce two different regulatory schemes, depending on geographic location.

[5] Please see Court docket numbers 1535311, 1619583, and 604994.

> As an initial matter, the Center's argument is premised on an unsupported reading of the challenged letters. The letters do not address and EPA has not elsewhere decided, whether and to what extent the Agency will follow *Iowa League* outside the Eighth Circuit. …The Center cannot expand the record simply by claiming that EPA made a decision – a decision that the Agency denies making and which is not reflected on the face of the letters in question. *Id.* at 15-16.

The records recently obtained by Petitioner from its FOIA activity, and which form the basis of this Motion, were all Agency records which were: (1) developed by EPA and DOJ staff as the basis for rendering EPA's non-acquiescence decision; (2) transmitted to regional and state NPDES program managers as the working law of the Agency; (3) provided to senior management as the legal position the Agency would implement post-*ILOC* in permitting and enforcement; and/or, (4) intended to serve as the underlying basis of the Agency's two letters attached to the Petition for Review, as well as the public announcements of senior agency managers that occurred on November 13, 2013, November 20, 2013, and April 6, 2014. In a word, these are precisely the type of documents EPA's own "AR Record Guidance" specified must be in the administrative record "…documents that the decision-maker considered directly or indirectly (through staff) in making the final decision". *Supra*, at 5. EPA hid these records and falsely claimed that they were "deliberative" to avoid disclosing the decision that

had been rendered based on the advice of the DOJ and EPA attorneys in this matter: Andrew Doyle and Richard Witt.[6] (See, Exs.73, 78, 85).

II. New FOIA-Based Factual Information

a. Jaw-dropping new information is provided by EPA

Since filing its last record supplement, Petitioner's efforts consisted of sending FOIA requests to DOJ and EPA regarding: (1) the decision to non-acquiesce (as part of the decision to not seek Supreme Court review of the Eighth Circuit's *ILOC v. EPA* ruling); and, (2) records that were developed by EPA regarding the "Desk Statement", which clearly stated that EPA would continue to impose the vacated rules outside of the Eighth Circuit. The "Desk Statement" and related documents were filed with the Court on June 15, 2016. *See*, Petitioner's Motion to Supplement the Appendix Based on New Evidence (Docket No. 1619583). EPA has, for its part, once again denied that the documents confirmed any final agency decision or how to proceed on permitting outside of the Eighth

[6] Pursuant to FOIA, Section 552(a)(2) mandates Agency disclosure of "statements of policy that and interpretations that have been adopted by the Agency and are not published in the Federal Register" as well as "instructions to staff that affect a member of the public." *See also*, *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153-54 (1975) (Reasons which supply the basis for adopted policy constitute the "working law" of an agency). Finally, the working law of the agency is never "predecisional" and must always be disclosed.to the public; secret law is never tolerated. *NLRB v. Sears, Roebuck & Co.*, 421 U.S., at 153-54; *Coastal States Gas Corp. v. Dep't of Energy,* 617 F.2d 854, 867 (1980).

Circuit. *See* EPA Response in Opposition to CRR's Motion to Supplement [Docket No. 1622555], at 9.

In response to this latest round of FOIA requests, EPA identified a series of new documents spanning from April 2013 to April 2014. Consistent with its prior FOIA response approach, the Agency once again heavily redacted any information that would have revealed that the Agency had rendered the decision that is the central issue of this litigation. However, EPA's response and document release allowed access to a number of unredacted records that formulated and communicated its non-acquiescence decision throughout the Agency. The now available information confirms the depth of the deception EPA had sought to create, with DOJ's assistance, in filings before this court. The "jaw-dropping" information that was provided confirmed the following:

- DOJ and EPA carefully coordinated the decision to non-acquiesce in August – October 2013 and the implementation of that decision in ongoing enforcement cases in January 2014. (Exs. 74 to 79, 87)[7]
- DOJ advised EPA that it should avoid putting the decision in writing, as that would likely trigger another round of judicial review. (Ex. 78, highlighted)

[7] The FOIA records confirm that DOJ consistently received copies of EPA's emails detailing the status and strategy that the parties agreed should be implemented. The EPA and DOJ attorneys on this case were the ones who developed the "non-acquiescence" strategy and counselled the Agency to avoid putting the decision in writing. The full set of the relevant email correspondence and timeline of Agency decision-making is presented in Attachment A hereto.

- EPA briefed the highest Agency officials regarding the approved OW/OECA/DOJ/OCG[8] non-acquiescence decision as part of the strategy for responding to the November 2013 municipal group letter challenging EPA's verbally announced position (including the Deputy Assistant Administrator, Robert Perciasepe). (Ex. 86, 88)
- In advance of responding to the municipal group letter in February 2014, EPA-OW completed a detailed "strategy" for nationwide implementation of the decision to continue imposing the vacated requirements and that outside the Eighth Circuit, blending is *always* considered an illegal bypass. (Ex. 88)
- The Regional Offices' further actions were carefully coordinated to ensure national uniformity of the decision to continue imposing the vacated rules outside of the jurisdiction of the Eighth Circuit. (Exs. 83 and 84)

Thus, contrary to the Agency's claim that the the April and June 2014 EPA letters and other agency documents do not reflect a nationwide non-acquiescence decision (*supra*, at 6), the wording of the two letters carefully mirrored the wording and recommended approaches outlined in the various briefing sheets and strategy

[8] OW-Office of Water; OECA –Office of Enforcement and Compliance Assurance; DOJ – Department of Justice; OGC – Office of General Counsel

documents developed by EPA staff to implement the non-acquiescence decision, prior to the issuance of the 2014 letters.[9]

b. Unequivocal confirmation that EPA rendered a final agency decision

The fact and scope of EPA's non-acquiescence decision is precisely stated in the "talking points" prepared for EPA Deputy Administrator Robert Perciasepe in December 2013:

> - *The Eighth Circuit's opinion is inconsistent with EPA's long-standing interpretation of the Clean Water Act, the bypass rule and the secondary treatment standard as prohibiting the routing of waste streams around secondary treatment units and subsequently blending the partially treated wastewater back in with treated flows.* ***EPA's position is that blending is a bypass and can only be justified upon a demonstration of "no feasible alternatives."***
> - ***EPA has determined*** that the *Iowa League of Cities'* interpretation of blending and bypass is binding within the Eighth Circuit. Outside the Eighth Circuit, ***EPA will continue to apply the bypass rule consistent with the Agency's existing interpretation of its regulations.***

[9] Based on these new EPA records, the Agency's repeated averments that: "The letters do not address and EPA has not elsewhere decided, whether and to what extent the Agency will follow *Iowa League* outside the Eighth Circuit. …The Center cannot expand the record simply by claiming that EPA made a decision – a decision that the Agency denies making and which is not reflected on the face of the letters in question," were plainly attempts to mislead counsel, and this Court. EPA's Opposition to Petitioner's Motion to Supplement the Administrative Record [Document 1537684], at 15-16. Both EPA and DOJ attorneys on this matter knew the statements were false as both were centrally involved in formulating the Agency's permitting/non-acquiescence position in response to *ILOC* (Ex. 78, 85, 87).

Ex. 86 (Emphasis supplied).

EPA's February 21, 2014 Strategy Document further explained what was meant by "case by case" decision-making with regard to municipal entities outside of the Eighth Circuit:

> ***Direction to take inside 8th Circuit:*** *Permits for POTWs that blend must:*
> - *Have a bypass provision that is at least as stringent as EPA's regulations at 40 CFR 122.41(m),*
> - *Clearly identify the treatment train that will be used during dry and wet weather,*
> - *Will not have internal permit limitations (unless end-of-pipe effluent limits are impracticable),*
> - *Require monitoring to yield data that is representative of the monitored activity (see 122.48(b)) (permits should clearly specify end-of-pipe compliance monitoring during wet weather),*
> - *Provide percent removal requirements according to the secondary treatment regulations, and*
> - *Meet water quality standards.*
>
> ***Direction to take outside 8th Circuit:*** ***EPA would continue to apply its historic interpretation, that bypasses are prohibited by the CWA unless a NPDES permittee can meet all of the following criteria:***
> - *The bypass was "unavoidable to prevent loss of life, personal injury or severe property damage";*
> - *There were no "feasible alternatives" to the bypass, and*
> - *The permittee must have submitted notice of the bypass to the director of the permitting authority.*
>
> ***On a case-by-case basis, a permittee will be considered to be implementing all feasible alternatives if it is implementing an adequate CMOM program, including an acceptable I/I program, is in compliance with pretreatment requirements, and for any bypass around secondary treatment:***
> - *There is side stream treatment that meets an acceptable level of treatment (e.g., significant solids removal);*

> o *The recombined flow meets effluent limits, utilizing representative monitoring during dry and wet weather; and,*
> o *Flows to the secondary treatment units are maximized.*
> *Note: There was general agreement at the 2010 workshop on this approach to blending. ...*
> ***Communicating our Strategy:*** *We could respond to the US Conference of Mayor, et al letter by summarizing this strategy or we could send a memo to the regions.*

Ex. 88 (Emphasis supplied.)

The unequivocal message from these, and other new record documents, is that EPA intentionally adopted the approach that outside the Eighth Circuit, blending remains classified as a prohibited bypass that is subject to *a no feasible alternatives* demonstration. The new documents confirm that EPA rendered a reviewable final Agency decision to continue to implement the rule revisions that were vacated by the Eighth Circuit in *ILOC v. EPA*. The record also confirmed that, as in *NEDACAP*, EPA created a more restrictive regulatory scheme for all municipal entities outside of the Eighth Circuit, in clear violation of the CWA Section 509(b)(1) requirement for national uniformity. The fact that EPA, with its legal counsel, has created a scheme to "keep everything secret" (Ex. 78) simply underscores the degree of distain EPA has for adverse judicial decisions that conflict with its desired regulatory approach. However, as this Court said in *NEDACAP*, "The doctrine of intercircuit nonacquiesence does not allow EPA to ignore the plain language of its own regulations." 752 F.3d, at 1011. Certainly, ignoring the "plain language" of the CWA to ensure a uniform nationwide NPDES

program fits within this same concern, particularly given the heavy financial cost arbitrarily re-established by EPA on municipal governments, outside of the Eighth Circuit.[10]

III. Request for Consideration of Sanctions

These latest records confirm, beyond any reasonable doubt, that EPA's attempt to convince the Court that no decision had been rendered, and that "case by case" meant that EPA had not rendered a decision to continue to implement the vacated blending prohibition, was a complete and utter sham.[11] The EPA records – well known to counsel in this matter - directly state that the Agency will continue to implement precisely the same rule interpretation that was vacated by the Eighth Circuit (a declaration that blending is always a bypass subject to a *no*

[10] In *NEDACAP*, 799 F.3d, at 1003, this Court stated its concern that EPA's "*Summit* Directive creates a standard that gives facilities located in the Sixth Circuit a competitive advantage. It therefore causes competitive injury to Petitioner's members located outside of the Sixth Circuit." Municipal members of CRR, and nationwide, also suffer the threat of serious economic impact given the high costs to meet the alleged "longstanding" EPA requirements, while communities within the Eighth Circuit alone enjoy the economic benefits of the vacated rules in the *ILOC* case. Not only are direct, construction-related costs at issue for these communities, as implementation of the "longstanding" EPA requirements leave them subject to greater risk of needless permit enforcement from states, EPA, and, potentially, citizen suits.

[11] After discovering the existence of the "Desk Statement", Petitioner previously notified this Court of the bad faith and lack of candor demonstrated by EPA, and its legal counsel, further requesting that appropriate sanctions be investigated and imposed. *See, Petitioner's Reply in Support of Its Motion to Have Court Consider Additional Argument and Supplement the Appendix Based on New Evidence* (July 7, 2016) [Docket No. 1623659].

feasible alternative demonstration). In fact, as with the Eighth Circuit case, there are no "case by case" facts that would allow blending to be permitted as anything other than a bypass that must be eliminated, if feasible. *ILOC*, 711 F.3d at 877-878.

The inter-agency correspondence clearly confirms that DOJ and EPA carefully concocted the scheme to continue to impose the illegal rule amendments in all permit and enforcement actions outside of the Eighth Circuit. This conspiratorial activity can be readily seen in the document, Attachment A: "Relevant Documents for Showing EPA Decision Timeline and DOJ Involvement in Non-Acquiescence Scheme that Avoids Judicial Review." Based on the advice of DOJ counsel, any release of written documentation of EPA's decision was to be avoided, as that would be certain to trigger another round of judicial review (not something EPA or DOJ relished, given this Court's adverse *NEDACAP* decision).

(Ex. 78, text highlighted).[12] EPA and DOJ plainly hid these records from this Court to avoid undercutting their arguments that jurisdiction was lacking.[13]

EPA repeatedly (and illegally) sought to prevent this Court's, and the public's, access to the decision records (*i.e.*, the "working law" of the agency)[14] under FOIA by claiming, that the "deliberative process" and "attorney-client" privilege applied – knowing full well those assertions were also a sham. However, the now released records confirm that EPA, with DOJ assistance, had unequivocally determined in the October and November 2013 timeframe that the Agency would refuse, in all permit and enforcement matters, to follow the *ILOC* decision outside the Eighth Circuit (claiming that the decision was "wrongfully decided"). EPA was concerned that if it appealed to the Supreme Court and lost

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[12] One of the proffered documents, in fact, is a single sheet showing emails by and between Justice Department and EPA regarding the *NEDACAP* D.C. Circuit decision. *See* Ex. 89. While redacted, it is likely that the email contents warn of the dangers of the "case-by-case" discretion approach taken by EPA for both the *NEDACAP* and *post-ILOC* circumstances. EPA must surely be told to be careful now, given the direction of this Court and the Agency's fear of "more litigation."

[13] Litigation should not become a game of "hide the peanut" to avoid probing judicial scrutiny of the type for which this Court is known. *Connecticut Light & Power Co. v. Nuclear Regulatory Com.*, 673 F.2d 525, 530 (D.C. Cir. 1982).

[14] *See*, *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152-53 (1975); *Bowen v. New York*, 476 U.S. 467, 481 (1986) *citing City of New York v. Heckler*, 742 F.2d 729, 738 (2nd Cir. 1984) (citations omitted) (finding that the government's arguments for dismissal could not prevail on account of "secretive conduct" and "clandestine policy" that were "uncovered only in the course of [] litigation").

again, the Agency's ability to ignore the ruling outside the Eighth Circuit would be undercut. (Ex. 76, highlighted).

In summary, as shown by a full accounting of the documents and transmittal emails, legal counsel in this matter were centrally involved in each step, including: (1) being well aware of, and assisting in creating, the scheme to disregard the Eighth Circuit decision, in derogation of CWA Section 509 regulatory review process that designed to ensure national uniformity of applicable NPDES rules; (2) undermining the judicial review process by actively seeking to conceal the relevant records from this Court, and Petitioner, confirming the existence of the a final agency decision; and (3) creating a new "story" about "case by case" decision-making in the permit process to feign regulatory flexibility and conceal the existence of the conclusive decision EPA actually had rendered.

Petitioner respectfully requests that this Court review and, under its several sanctioning authorities, including Rule 46(c) of the Fed. R. App. P. and the recognized "inherent power" of courts to deal with litigation abuses and bad faith conduct, investigate the conduct of counsel here.[15] The apparent scope of ethical violations created is astonishing and fits securely within applicable standards for imposition of sanctions (*e.g.*, "conduct unbecoming a member of the bar," or "bad

[15] *See, e.g., Chambers v. Nasco, Inc.*, 501 U.S. 32, 46 (1991).

faith" or "perpetrating a fraud on the court").[16] As this Court has said on more than one occasion, "When an agency honestly believes a circuit court has misinterpreted the law, there are two places it can go to correct the error: Congress or the Supreme Court." *Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1092 (D.C. Cir. 1992), (cited in *NEDACAP*, 752 F.3d, at 1010). EPA refused to take either step and its counsel should not be rewarded for their efforts in creating an alternate regulatory universe that shuts out the public, does real economic harm on a nationwide basis, and makes shambles of regular order in the judicial process. We therefore ask this Court to investigate the matter and, as appropriate, consider the imposition of sanctions, consistent with appropriate opportunity for counsel to be heard.

Respectfully Submitted,

/s/ John C. Hall
John C. Hall
Court of Appeals - D.C. Circuit - #44296
Hall & Associates
1620 I St. NW, Suite 701
Washington, DC 20006
Telephone (202) 463-1166
Facsimile (202) 463-4207
E-mail: jhall@hall-associates.com

[16] Problems with Justice Department candor have arisen in several recent cases; *see, e.g., United States v. NorCal Tea Party Patriots (In re United States),* 817 F.3d 953, 965 (6th Cir. 2016); *Texas v. United States,* No. B-14-254, 2016 U.S. Dist. LEXIS 79546, at *37-39 (S.D. Tex. May 19, 2016).

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2016, I caused a copy of **Petitioner's Third Motion to Supplement its Appendix and to Request Consideration of Sanctions** to be served on all registered counsel in *Center for Regulatory Reasonableness v. United States Environmental Protection Agency*, (D.C. Cir. No. 14-1150) via the D.C. Circuit's CM/ECF system.

/s/ John C. Hall
John C. Hall

Attorney for Petitioner
Counsel for the Center for Regulatory Reasonableness

Attachment A - Relevant Documents for Showing EPA Decision Timeline and DOJ Involvement in Non-Acquiescence Scheme that Avoids Judicial Review

I. DOJ/EPA Evaluating how to reverse/limit *ILOC* Ruling (April-July 2013)

April 19, 2013 – DOJ Attorney J. Lipschulz cc. A. Doyle informs EPA non-acquiescence is possible option on the *ILOC* decision, notes that this position is preliminary, but still needs concurrence from DOJ (ENRD) management. (Supp. Appx. Ex. 73) (Full email is repeated in Supp. Appx. Ex. 78)

May 9, 2013 – EPA seeks *en banc* review asserting decision not consistent with federal bypass rule and 1987 D.C. Circuit Court decision in *NRDC v. EPA.* (Supp. Appx. Ex. 62)

July 10, 2013 – Rehearing *en banc* denied.

July 31 – August 7, 2013 – OGC informs OW that the request for appeal the Supreme Court is due by August 20, 2013. EPA seeks a decision on whether it should petition the Supreme Court and distributes options concerning the pros and cons of seeking a Writ of Certiorari; including the ability of the Agency to limit the decision to the Eighth Circuit. (Supp. Appx. Exs. 74, 75)

August 9-13, 2013 – EPA Staff (OW/OGC) request emergency meeting with AA for Water (Nancy Stoner) on DOJ Request for Cert.; Option Paper is transmitted including Option 3 – no appeal, assert nonacquiesce outside 8th Circuit. Memorandum explains that non-acquiescence means continue to apply the EPA rule interpretations vacated by the 8th Circuit, outside of the 8th Circuit (*i.e.*, blending is always a bypass subject to a no feasible alternative test). (Supp. Appx. Ex. 76)

II. EPA Chooses Non- Acquiescence to Limit Decision and Continue to Implement Rule Interpretations Vacated by 8th Circuit (August-September 2013)

August 13, 2013 – AA for Water Nancy Stoner decides not to Appeal and chooses Option 3 – non-acquiescence – staff are told to inform regional offices of decision and develop permit implementation memorandum (Note – EPA is still withholding records of this decision though follow up actions all implement non-acquiescence decision.)

August 15, 2013 – Staff notify regional offices of September 19, 2013 meeting to discuss *ILOC* meeting and next steps. (Supp. Appx. Ex. 42 [withheld doc. #46])

September 19, 2013 – EPA HQ holds Regional Office Conference Call on *ILOC* decision and permitting approach. (Supp. Appx. Ex. 42 [withheld doc. #48])

September 26, 2013 – OGC memorandum (Richard Witt) entitled "How Should EPA interpret the Iowa League decision?" for discussing with EPA General Counsel Avi Garbow about the Agency's non-acquiescence options after not seeking a Writ of Certiorari. It notes that a blending

prohibition is favored by staff in OECA and OW because it enables the Agency to continue current practices, dating back to the Agency's 2005 blending policy. (Supp. Appx. Ex. 77)

III. DOJ Coordinates with EPA OGC on how to Continue using the Vacated Rules while Avoiding Judicial Review (August – October 2013)

October 28-29, 2013 – Memorandum entitled "Iowa League of Cities – Next Steps", developed by DOJ (A. Doyle)/EPA OGC (R. Witt), *the attorneys on the CRR v. EPA matter*, coordinated completion of non-acquiescence "next steps" memorandum for distribution to EPA management. Memorandum explains that non-acquiescence means EPA may continue its "longstanding" (sic "vacated") rule interpretation outside the 8th Circuit. The *memorandum expressly and repeatedly states that DOJ cautions that EPA should avoid putting the decision in writing as that could trigger another round of judicial review.* (Supp. Appx. Ex. 78)

October 29, 2013 – OW(Permits) briefing sheet entitled "Moving Forward After Iowa League of Cities" on follow up actions to implement EPA non-acquiescence decision; indicating "short term action" to non-acquiescence "approach" and addressing "permit objections." (Supp. Appx. Ex. 79)

IV. EPA Completes Internal Documents describing how future Permitting is to Occur and Verbally Announces Position (November 2013 – April 2014)

Early November 2013 – EPA Office of Water (Nancy Stoner/Deborah Nagle) decide to send OGC (Steve Neugeboren) and OW staff to Region VII 4 States meeting to publically announce EPA position. EPA prepares "talking points" to announce its non-acquiescence decision. (Supp. Appx. Ex. 80)

November 13, 2013 – Region 7 Meeting EPA HQ (OGC announces to public non-acquiescence to *ILOC* decision). (Supp. Appx. Ex. 10; Supp. Appx. Ex. 59)

November 18, 2013 – OGC completes editing on "Applicability of ILOC to EPA permit determinations" memo for distribution to Regional Offices. This is likely a copy of withheld Document 1B. (Ex. #81). Nancy Stoner is provided talking points on how to address questions permitting post-*ILOC*. (Supp. Appx. Ex. 11)

November 19, 2013 – EPA OW/OGC develops "Desk Statement" based upon "Applicability of ILOC to EPA permit determinations" memorandum due to press inquiries over *ILOC* implementation position announced by EPA on November 13, 2013 at EPA Region VII meeting. (Approved by AA OECA [Giles], AA OW [Stoner], and OGC) (Supp. Appx. Ex. 68).

November 20-21, 2013 – Desk Statement is publically released; Regional Office briefing on how to use the Desk Statement and NACWA meeting where Nancy Stoner again announces that EPA has non-acquiesced and outside the 8th Circuit EPA is not bound by the *ILOC* decision. (Supp. Appx. Exs. 82, 83).

November 22, 2013 – EPA HQ agrees that the Desk Statement is final and that HQ may distribute it among State permitting offices. (Supp. Appx. Ex. 84)

November 26, 2013 – Municipal Group Letter to EPA objecting to EPA's public announcements and failure to follow *ILOC* decision nationwide. (Supp. Appx. Ex. 3)

December 3, 2013 – DOJ requests to coordinate with EPA on how to respond to the Municipal Group Letter. (Supp. Appx. Ex. 85)

December 12, 2013 – EPA develops talking points for meeting with Municipal Group that sent Nov. 26, 2013 letter for Robert Perciasepe (Deputy Administrator) – this document expressly states that EPA has determined (1) *ILOC* improperly decided, (2) blending is still a bypass outside the 8th Circuit and (3) no feasible alternative (NFA) demonstration applies outside 8th Circuit to allow blending. (Supp. Appx. Ex. 86)

January 9, 2014 – EPA OECA and DOJ coordinate the Agency's legal position of non-acquiescence within the context of future enforcement actions where blending is being classified as a bypass – the transmittal letter and the Dec. 15, 2013 memo stating the Agency's non-acquiescence decision. (Supp. Appx. Ex. 87)

February 19, 2013 – EPA distributes copy of "Strategy for Responding to Iowa League of Cities Questions" document in which Office of Water (Nagle/Stoner) and OGC (Neugeboren) specify a "case by case" approach for dischargers outside the 8th Circuit that (1) always classifies blending as a bypass and (2) requires the submission/demonstration of no feasible alternatives (NFA) to allow practice to continue. (Supp. Appx. Ex. 88)

April 2, 2014 – Municipal Letter Response singed by Nancy Stoner (language near identical to August 13, 2013 memo). (Supp. Appx. Ex. 1).

April 6, 2014 – National Fly-In Conference in Washington, D.C. – EPA (Stoner/Pollins) again announces that *ILOC* is only binding in 8th Circuit.

May 30, 2014 – DOJ emails EPA a warning of the consequences of the NEDACAP decision on non-acquiescence. (Supp. Appx. Ex. 89)

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Ex. 89*	May 30, 2014 DOJ email to EPA concerning *NEDACAP* decision	698-699

* - Denotes documents that were not included in EPA's Index to the Administrative Record.

Exhibit 73

April 19, 2013 Email from DOJ concerning EPA's ability to non-acquiesce

From: Levine, MaryEllen
To: Neugeboren, Steven; Schroer, Lee
Cc: Witt, Richard; Hall, Jessica
Subject: FW: Iowa League - nonacquiescence issue
Date: Friday, April 19, 2013 5:35:21 PM

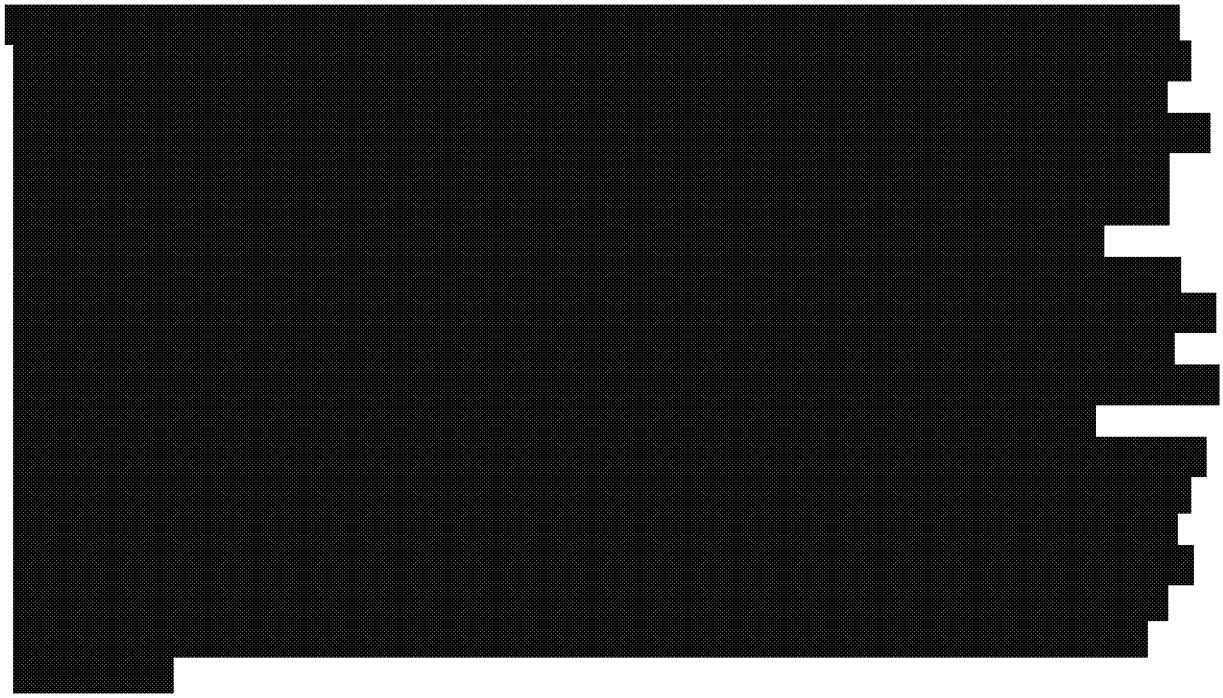
Mary Ellen

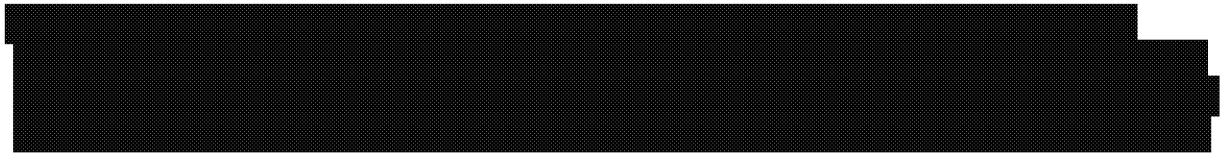
Mary Ellen Levine
Assistant General Counsel
Water Law Office
(202) 564-5487
Ariel Rios North Rm. 7510C

From: Lipshultz, Jon (ENRD) [mailto:Jon.Lipshultz@usdoj.gov]
Sent: Friday, April 19, 2013 4:08 PM
To: Levine, MaryEllen
Cc: Doyle, Andrew (ENRD); Vaden, Christopher (ENRD); Lorenzen, Thomas (ENRD)
Subject: Iowa League - nonacquiescence issue

ATTORNEY WORK PRODUCT

Hi Mary Ellen -





[redacted]

I very much appreciate all your help and hard work on this case, especially in Richard's absence.

Jack cc: Andy, Chris and Tom

Exhibit 74

August 2, 2013 Email expressing Writ of Certiorari deadline

To: Giles-AA, Cynthia[Giles-AA.Cynthia@epa.gov]
Cc: Theis, Joseph[Theis.Joseph@epa.gov]; Denton, Loren[Denton.Loren@epa.gov]
From: Shinkman, Susan
Sent: Fri 8/2/2013
Subject:Fw: Need for AA Level Recommendation on Seeking Supreme Court Review of 8th Circuit Decision Vacating Congressional Letters Addressing Mixing Zones and Blending - Iowa League of Cities v. EPA
MAIL_RECEIVED
711_F_3d_844.doc

Cynthia,
We will brief you about this at our next OCE General on Thursday, August 8.
Susan

From: Neugeboren, Steven
Sent: Friday, August 02, 2013 2:15:09 PM
To: Giles-AA, Cynthia; Stoner, Nancy

Cc: Starfield, Lawrence; Kopocis, Ken; Gilinsky, Ellen; Shinkman, Susan; Chester, Steven; Pollins, Mark; Theis, Joseph; Vinch, James; Morrissey, Alan; Denton, Loren; Sawyers, Andrew; Frace, Sheila; Nagle, Deborah; Bosma, Connie; Weiss, Kevin; Witt, Richard; Levine, MaryEllen; Hall, Jessica; Southerland, Elizabeth; Wood, Robert; Matuszko, Jan; Schroer, Lee

Subject: Need for AA Level Recommendation on Seeking Supreme Court Review of 8th Circuit Decision Vacating Congressional Letters Addressing Mixing Zones and Blending - Iowa League of Cities v. EPA

Nancy and Cynthia – As you know, in March the 8th Circuit Court of Appeals issued a decision finding letters by the agency to Congress answering questions about the regulatory requirements applicable to mixing zones and blending constituted final agency action subject to judicial review and held that the position of the Agency in the letter regarding blending was inconsistent with the statute.

This week, rehearing petitions in the case were disposed of, and we now must decide whether to recommend to the Department of Justice whether to seek Supreme Court review. Our Recommendation to DOJ is due August 20th. We will work with your schedulers to set up a joint briefing for you early in the week of August 12th.

[redacted]

Below is a summary of the decision, which is attached.

If you or you staff have any questions, you can call me at 564-5488 or Richard Witt at 564-5496

Summary of the Decision

[redacted]

The Court's decision

[redacted]

Steven Neugeboren

Associate General Counsel for Water
U.S. EPA
1200 Penn Ave., NW
Washington DC 20460
202-564-5488

Exhibit 75

August 7, 2013 "Iowa League options" memo and transmittal email

From: Witt, Richard
To: Theis, Joseph; Vinch, James; Pollins, Mark; Denton, Loren; Weiss, Kevin; Neugeboren, Steven
Subject: Here"s a brief options sheet for the discussion at 2
Date: Wednesday, August 07, 2013 1:05:05 PM
Attachments: Iowa League options.docx

For your review, comments.

Option 1 – Ask for cert.

Pro – Opportunity to reverse decision with significantly adverse implications for Water Program and Enforcement Offices.

Con – Court may disagree with EPA view and in any resulting decision more directly undercut bypass regulation. Potential result may be precedent undercutting our authority to include internal waste stream limitations in the ELG context.

– A strong cert. brief suggesting how the Eighth Circuit decision conflicts with the NRDC decision may leave us stuck with our own characterization of the decision that seriously limits the bypass provision's future enforceability

Option 2 – Don't seek cert.

Pro – Can formally or informally acquiesce and thereby limit the effect of the decision to the Eighth Circuit. Court did not vacate the bypass rule, only stated that the "blending rule" (as expressed in the letters) irreconcilable with the secondary treatment regulation and bypass rule.

Con – Reasoning of the Eighth Circuit may prove persuasive to other courts.

Exhibit 76

August 13, 2013 memo entitled "Should EPA recommend that DOJ petition the Supreme Court for writ of certiorari to overturn the Eighth Circuit's decision in Iowa League of Cities?" and transmittal email

From: Weiss, Kevin
To: Penman, Crystal
Subject: RE: Iowa League of Cities v EPA Case 8/13
Date: Tuesday, August 13, 2013 8:02:00 AM
Attachments: Option for Iowa Cities briefing revised 8 10 13 RTW.DOCX
Options v4.docx

Crystal:

Sorry these are late. I'll bring copies to the meeting.

Kevin

From: Penman, Crystal
Sent: Monday, August 12, 2013 2:34 PM
To: Weiss, Kevin
Subject: Iowa League of Cities v EPA Case 8/13

Are there any materials for Nancy on this meeting? Please advise

Issue: Should EPA recommend that DOJ petition the Supreme Court for writ of certiorari to overturn the Eighth Circuit's decision in *Iowa League of Cities*?

Standard for petition for writ of certiorari. Supreme Court Rule 10 provides that a petition for a writ of certiorari will be granted "only for compelling reasons," and describes examples of situations that may meet this standard, including:

- where a court of appeals has "entered a decision in conflict with the decision of another United States court of appeals on the same important matter," or

- "decided an important question of federal law that has not been, but should be, settled by this Court."

Timing – Any petition for writ of certiorari must be filed within 90 days after denial of a petition for rehearing. On July 30, the court granted an Iowa League rehearing petition and motion for fees remains. Any EPA letter recommending seeking certiorari is due within 21 days (August 20) of that order.

Option 1 – Request the Department of Justice to seek *certiorari* on APA issue alone

Pro – Decision limits EPA's and other Federal agencies' ability to respond forthrightly to public inquiry. Reversal of determination that EPA statements without legal effect are reviewable would remove these constraints.

Con – Court may use review as occasion to opine on rule vs. guidance and further restrict Agency ability to use informal mechanism to promote compliance with its regulations.

Option 2 – Request the Department of Justice to seek *certiorari* on blending issue

Pro – Opportunity to reverse decision with significantly adverse implications for Water Program and Enforcement Offices.

- Grant of cert. could limit additional litigation in other Regions

Con – Court may disagree with EPA's view and adopt an interpretation of the statute that more directly undercuts the bypass regulation as well as the Agency's authority to regulate internal waste streams in the context of permitting and effluent limitations guidelines (e.g., as in the case of discharges from construction sites and an ongoing rulemaking establishing effluent guidelines for the power industry).

– In order to maximize our likelihood of the Court granting review, we would need to adopt a broad reading of the decision's implications outside the 8th Circuit, which would then constitute the government's interpretation of the decision in the event the Court denies review.

Option 3 – Do not recommend that DOJ seek *certiorari*

Pro – Limits risk of additional adverse language from Supreme Court. The Agency can seek seek to avoid similar decisions on its public statements in the future by carefully drafting them to minimize the risk of such statements being found to constitute rulemaking.

- Retain flexibility to amend regulations to address bypass issue for POTWs

– Decision is not binding outside the 8th Circuit; the Agency can maintain our current position elsewhere either through issuance of a policy statement "non-acquiescing" in the decision or continuing to maintain our current position on a case-by-case basis in permitting and enforcement actions outside the 8th Circuit. Court did not vacate the bypass rule, only stated that the "blending rule" (as expressed in the letters) irreconcilable with the secondary treatment regulation and bypass rule.

Con – Stuck with cloud on our ability to communicate with members of the public or Congress without fear of running afoul of rulemaking requirements.

- Either the Agency follows the decision nationwide and "blending" becomes a common practice, with attendant environmental consequences, or the Agency must expend significant resources to maintain its current position on a case-by-case basis in permitting and enforcement actions outside the 8th Circuit.
-

  – Reasoning of the Eighth Circuit may prove persuasive to other courts

Exhibit 77

Sept. 26, 2013 Draft of memo entitled "How Should EPA interpret the Iowa League decision?" with transmittal email

From: Witt, Richard
To: Weiss, Kevin
Subject: Here"s what we are using for Avi
Date: Thursday, September 26, 2013 10:34:31 AM
Attachments: Iowa League of Cities Briefing for GC.DOCX

How Should EPA interpret the *Iowa League* decision?

Issue: How to interpret the court's decision with respect to EPA's authority to regulate "blending"?

Timing: Briefings for the AAs for Water and Enforcement will held in the next few days. OMB is very interested in the Agency's position, there is a high degree of interest by stakeholders and HQ is receiving requests from the Regions for guidance.

I. Background and context

a. *Iowa League v. EPA* , 711 F.3d 844 (8th Cir. 2013), rehearing denied (July , 2013). The Eighth Circuit concluded that it had jurisdiction to review two EPA letters sent in response to inquiries from a Senator regarding certain requirements under the Clean Water Act (CWA). The court determined that the letters promulgated two new rules regarding mixing zones and "blending." The court vacated the rules because they had been promulgated without following notice and comment procedures required under the Administrative Procedure Act (APA). In addition, the court determined that, even if EPA had followed APA procedures, EPA lacked statutory authority to promulgate the new "blending rule."

b. Bypass regulation. 40 C.F.R. § 122.41(m) prohibits bypass defined as "the intentional diversion of waste streams from any portion of a treatment facility" unless certain conditions are meet, including that there are "no feasible alternatives" to the bypass.. EPA's letter explained when diversions from any portion of the treatment system at a POTW would constitute a bypass and thus be prohibited under the bypass regulation and subject to having to make a "no feasible alternatives demonstration. Here is the specific language from the letter that the court reviewed:

> **"Is the permitted use of ACTIFLO or other similar peak flow treatment processes to augment biological treatment subject to a "no feasible alternatives" demonstration?**
>
> Yes. The NPDES regulations define bypass as the intentional diversion of waste streams from any portion of a treatment facility. In general, flows diverted around biological treatment units would constitute a bypass regardless of whether or not the diverted flows receive additional treatment after the diversion occurs. The one exception to this would be if the diverted flow is routed to a treatment unit that is itself a secondary treatment unit. In this context, EPA considers treatment units that are designed and demonstrated to meet all of the effluent limits based on the secondary treatment regulations to be secondary treatment units. Based on the data EPA has reviewed to date, ACTIFLO systems that do not include a biological component, do not provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133, and hence are not considered secondary treatment units. Wastewater flow that is diverted around secondary treatment units and that receive treatment from ACTIFLO or similar treatment processes is a bypass, and therefore subject to the "no feasible alternatives" demonstration in the "bypass" provision at 40 CFR 122.4 1(m)(4). In

certain circumstances, the EPA supports the use of these types of high rate treatment technologies to provide treatment during wet weather conditions. For this reason, the Agency will continue to explore in what circumstances use of these technologies is consistent with a determination that there are "no feasible alternatives" to an anticipated bypass, and where it would be appropriate to approve in a permit the use of such units."

II. Interpretations of the 8th Circuit decision

We see two possible interpretations of the Court's decision. The first interpretation below is favored by staff in OECA and OW because it enables the Agency to continue current practices, dating back to the Agency's 2005 blending policy. The impact of the decision is best framed by the following question:

Under the court's decision, if a permittee requests that its permit allow or be modified to allow blending, does the decision dictate the outcome and if so, how?

Interpretation 1 – The decision only prohibits permit writers from issuing NPDES permits that actually impose secondary treatment effluent limitations on the internal waste streams within a POTW. The bypass regulation continues to prohibit the permitting authority from allowing any diversion of flow from any portion of secondary treatment units that is blended with treated effluent and discharged in compliance with NPDES permit effluent limitations unless the conditions in 40 CFR § 122.41(m) are satisfied.

- **Legal support for this conclusion:** We would argue that the court specifically held that EPA did not have the statutory authority to "apply effluent limitations to the discharge flows from one internal treatment unit to another." The court did not invalidate the bypass rule, 40 CFR § 122.41(m), instead holding that EPA's position on blending as expressed in the letter exceeds its statutory authority. See language from the opinion highlighted in red on the Attachment.

- **Programmatic Considerations:** Permit writers can continue to issue NPDES permits requiring that all waste streams within a POTW be treated by secondary treatment units and that intentional diversions around secondary treatment units would be prohibited unless no feasible alternatives demonstrated violate the bypass rule. EPA cannot impose effluent limitations on a POTW's internal waste streams as a condition in an NPDES permit. EPA could follow the decision nationwide and therefore would avoid issue of non-acquiescence.

- **Enforcement Considerations:** EPA can continue to enforce NPDES permits that require all internal waste streams within a POTW to be treated by secondary treatment units, reject requests to modify an existing decree.

Interpretation 2 (may be applied nationally or just in Eighth Circuit) – Permit writers may no longer require permittees to comply with the conditions in the bypass rule in order to allow blending. The permit writer may only require the facility to meet secondary treatment effluent limitations at the end-of-pipe.

- **Legal support for this conclusion:**
    - While the court's rationale for finding EPA's position exceeded EPA's statutory authority was that it imposed secondary treatment on internal wastestreams, that is not the extent of its holding.
    - The facts before the court was not a position that permit writers should impose internal wastestream limits. Rather, before the court was EPA's position that the bypass regulation applies to any diversion that is not itself subject to secondary treatment. The court held that position was contrary to the statute, but interpretation #1 would allow EPA to maintain that position, restricted only by the prohibition against imposing internal effluent limitations.

●**Programmatic Considerations**: EPA cannot, through application of the bypass regulation, require that all waste streams within a POTW be treated by secondary treatment units. EPA cannot evaluate whether or not a particular diversion is a bypass by assessing whether flow is diverted to a treatment unit that provides secondary or equivalent treatment.

●**Enforcement Considerations:** EPA cannot enforce the bypass provision of NPDES permits to require all internal waste streams within a POTW to be treated by secondary treatment units.

ATTACHMENT

How the Iowa League court described the effluent guideline program and secondary treatment regulations.

If a state chooses to operate its own permit program, it first must obtain EPA permission and then ensure that it issues discharge permits in accord with the same federal rules that govern permits issued by the EPA. *§ 1342(a)*; *40 C.F.R. § 122.41*.

The EPA has interpreted this regime as "preclud[ing] [it] from imposing any particular technology on a discharger." *In re Borden, Inc.*, Decision of the General Counsel on Matters of Law Pursuant to 40 C.F.R. § 125.36(m), No. 78 (Feb. 19, 1980), at *2; *see also* NPDES Permit Writers' Manual 5-14, 5-15 ("Therefore, each facility has the discretion to select any technology design and process changes necessary to meet the performance-based discharge limitations and standards specified by the effluent guidelines."). The technology-based effluent limitations applicable to publicly-owned treatment works ("POTWs"), such as municipal sewer authorities, are based on a special set of rules known as the "secondary treatment" regulations. *§ 1311(b)(1)(B)*; *40 C.F.R. § 125.3(a)(1)*; *see generally 40 C.F.R. § 133.102* (describing average monthly and weekly "minimum level[s] of effluent quality attainable by secondary treatment"). The secondary treatment regulations also do not mandate the use of any specific type of technology to achieve their requisite levels of effluent quality. *See 48 Fed. Reg. 52,258, 52,259 (Nov. 16, 1983)*. When technology-based effluent limitations would fall short of achieving desired water quality levels, the EPA is authorized to devise additional, more stringent water quality-based effluent limitations for those particular point sources. *33 U.S.C. § 1312(a)*. (footnotes omitted) *Id.* at pp. 855-56.

How the Iowa League court described the letter

During the spring of 2011, the League asked the EPA whether it could use "physical/chemical treatment processes, such as Actiflo . . . to augment biological treatment and recombine the treatment streams prior to discharge, without triggering application of [the bypass rule]." The June 2011 letter responded by summarizing the EPA's 2005 proposed policy without specifically addressing how the application of that policy would impact the use of ACTIFLO or similar processes. The League sought additional clarification on whether this response meant that ACTIFLO could be used only if there were no feasible alternatives, which the September 2011 letter answered in the affirmative. According to the EPA, ACTIFLO units fail to "provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133." Because ACTIFLO by itself is not considered a satisfactory secondary treatment unit, the EPA views the practice of intentionally routing flows away from a facility's traditional biological secondary treatment units and through ACTIFLO as a bypass that would only be allowed upon a showing of no feasible alternatives.

The League argues that by prohibiting the use of ACTIFLO internally, as one element of a facility's secondary treatment procedures, the EPA is effectively dictating treatment design, despite the agency's acknowledgment that the bypass rule and secondary treatment regulations do not allow for such determinations at the federal level. The League also claims that the EPA is effectively applying secondary treatment effluent limitations within a treatment facility; that is, it

is applying effluent limitations to the individual streams exiting peak flow treatment units, instead of at the end of the pipe. The EPA responds that using ACTIFLO to process peak wet weather flows diverts water from biological secondary treatment units, and therefore subjecting its use to a no-feasible-alternatives analysis comports with the plain language of the bypass rule. *Id.* at 859-60.

The court's discussion of blending

The EPA contends that the letters simply reflect an interpretation of the bypass rule, which it has been considering since 2005. *See 70 Fed. Reg. at 76,015* (describing the 2005 policy as "the Agency's interpretation" of the bypass rule). To be sure, a legislative rule is not created simply because an agency "supplies crisper and more detailed lines than the authority being interpreted." *Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112, 302 U.S. App. D.C. 38 (D.C. Cir. 1993)*. Nevertheless, the EPA's new blending rule is a legislative rule because it is irreconcilable with both the secondary treatment rule and the bypass rule. Municipalities chose to use ACTIFLO and analogous blending methods as an exercise of their discretion under the bypass rule, *see 53 Fed. Reg. at 40,609*, and secondary treatment rule, *see 48 Fed. Reg. at 52,259*, to select the particular technologies they deemed best suited to achieving the applicable secondary treatment requirements. However, the September 2011 letter severely restricts the use of "ACTIFLO systems that do not include a biological component" because the EPA does not "consider[] [them to be] secondary treatment units." The effect of this letter is a new legislative rule mandating certain technologies as part of the secondary treatment phase. If a POTW designs a secondary treatment process that routes a portion of the incoming flow through a unit that uses non-biological technology disfavored by the EPA, then this will be viewed as a prohibited bypass, regardless of whether the end of pipe output ultimately meets the secondary treatment regulations.

The EPA's new blending rule further conflicts with the secondary treatment regulations because the EPA has made clear that effluent limitations apply at the end of the pipe unless it would be impractical to do so. *40 C.F.R. § 122.45(h)*. There is no indication that the secondary treatment regulations established situations in which it would be impractical to apply effluent limitations at the end of the pipe or otherwise altered the application of this default rule. *See 40 C.F.R. § 133.100-102*. But the blending rule applies effluent limitations within facilities' secondary treatment processes. The September 2011 letter rejected the use of ACTIFLO because these units "do not provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133." If streams move around traditional biological secondary treatment processes and through a non-biological unit that "is itself a secondary treatment unit," then the system would not need to meet the restrictive no-feasible-alternatives requirement. In other words, under the September 2011 blending rule, if POTWs separate incoming flows into different streams during the secondary treatment phase, the EPA will apply the effluent limitations of the secondary treatment regulations to each individual stream, rather than at the end of the pipe where the streams are recombined and discharged.

The court's holding on the blending rule

However, the blending rule clearly exceeds the EPA's statutory authority and little would be gained by postponing a decision on the merits. As discussed above, the September 2011 letter applies effluent limitations to a facility's internal secondary treatment processes, rather than at the end of the pipe. The CWA permits the EPA to set "effluent limitations based upon secondary treatment." *33 U.S.C. § 1311(b)(1)(B)*. But effluent limitations are restricted to regulations governing "discharges from point sources into navigable waters." *33 U.S.C. § 1362(11)*. The EPA is authorized to administer more stringent "water quality related effluent limitations," but the CWA is clear that the object of these limitations is still the "discharges of pollutants from a point source." *33 U.S.C. § 1312(a)*. In turn, "discharge of pollutant" refers to the "addition of any pollutant to navigable waters." *§ 1362(11)*. The EPA would like to apply effluent limitations to the discharge of flows from one internal treatment unit to another. We cannot reasonably conclude that it has the statutory authority to do so. *See also Am. Iron & Steel Inst. v. EPA, 115 F.3d 979, 996, 325 U.S. App. D.C. 76 (D.C. Cir. 1997)* ("The statute is clear: The EPA may regulate the pollutant levels in a waste stream that is discharged directly into the navigable waters of the United States through a 'point source'; it is not authorized to regulate the pollutant levels in a facility's internal waste stream."). Therefore, insofar as the blending rule imposes secondary treatment regulations on flows within facilities, we vacate it as exceeding the EPA's statutory authority.

V. Conclusion

For the foregoing reasons, we deny the EPA's motion to dismiss and grant the League's petition for review. We vacate both the mixing zone rule in the June 2011 letter and the blending rule in the September 2011 letter as procedurally invalid. Further, we vacate the blending rule as in excess of statutory authority insofar as it would impose the effluent limitations of the secondary treatment regulations internally, rather than at the point of discharge into navigable waters. We remand to the EPA for further consideration. [footnote omitted]. *Id.* at 877-78.

Exhibit 78

EPA's Oct. 29, 2013 "ILOC Next Steps" document with transmittal email

From: Doyle, Andrew (ENRD)
To: Witt, Richard
Subject: FW: Iowa League - nonacquiescence issue
Date: Monday, October 28, 2013 5:59:04 PM

Richard,

I'm not sure whether you previously saw this – I see that Jack sent it to Mary Ellen – (b) (5) attorney client

From: Lipshultz, Jon (ENRD)
Sent: Friday, April 19, 2013 4:08 PM
To: levine.maryellen@epamail.epa.gov
Cc: Doyle, Andrew (ENRD); Vaden, Christopher (ENRD); Lorenzen, Thomas (ENRD)
Subject: Iowa League - nonacquiescence issue

ATTORNEY WORK PRODUCT

Hi Mary Ellen -

(b) (5) attorney client

(b) (5) attorney client [redacted] However, if you do need anything further from us on this, feel free to call.

I very much appreciate all your help and hard work on this case, especially in Richard's absence.

Jack cc: Andy, Chris and Tom

From: Witt, Richard
To: Neugeboren, Steven; Levine, MaryEllen
Subject: Here"s a draft paper for our meeting with Avi and Brenda
Date: Tuesday, October 29, 2013 10:48:00 AM
Attachments: Next Steps pre-briefing for Avi rtw mel 10 29 13.docx

---

For your review. I ran an earlier version past Andy Doyle for his comments.
I know it's a little weird having the quote from Jack upfront but I thought it was better than my paraphrasing might be.

DOJ view on *Iowa League* and non-acquiesence

Here's what Jack Lipshultz at DOJ told us earlier this year about non-aquiescence in this case:

"I did a little research to follow up on our conversation regarding the degree to which EPA would be obligated to follow the substantive aspects of the Iowa League decision outside the 8th Circuit should that decision stand. The bottom line is there appears to be pretty sound support for the proposition that EPA is not bound to follow Iowa League's reasoning in agency actions that we either know would be reviewed outside the 8th Circuit (e.g., a facility-specific permit action in a different part of the country) or where the 8th Circuit is only one of many circuits that could properly hear a judicial challenge. In the latter situation, however, EPA would have to accept the risk that if the challenge in fact wound up in the 8th Circuit (e.g., through the multi-district panel process) a panel of the 8th Circuit would be bound to follow Iowa League unless and until it is overruled by the full court or the Supreme Court. I would not advise EPA to pursue nonacquiescence in actions that the agency knows to be reviewable only within the 8th Circuit. The majority of judicial decisions and legal commentary frown on such "intra-circuit" (as opposed to "inter-circuit") nonacquiescence except in very limited circumstances, and as a practical matter it would ultimately seem to serve little purpose. A good general overview of these issues can be found in Estreicher and Revesz, "Nonacquiescence by Federal Administrative Agencies," 98 Yale Law Journal 679 (Feb. 1989). And, of course, to the extent Iowa League is not changed on rehearing or cert, it is the last word on the vacatur of the Grassley Letters themselves.

At this point you should regard all this as informal, staff-level advice, and in particular, please understand that it has not been presented to or approved by the ENRD front office."

Two holdings of the case are at issue:

(1) whether EPA's statements in the letters constituted legislative rules; and

(2) the substantive holding related to blending as being ultra vires under the Act

Holding that statements are a legislative rule

Issue: Should EPA non-acquiesce outside the 8th Circuit with the court's jurisdictional conclusions that the statements on blending in the letters constituted a legislative rule? Our staff attorney at DOJ (ENRD) has recently explained that if we acquiesce in the determination that that 8th Circuit had jurisdiction to review the letter, then EPA would presumably treat the court's opinion as it would any other appellate opinion resulting from a petition for review of a CWA rule or other agency action properly within the scope of CWA section 509. That is, we would be bound by its substantive conclusions. If we don't acquiesce, then no parts of the 8th Circuit's opinion are binding outside the 8th Circuit.

Substantive Holding - We've discussed two possible alternative interpretations of the court's substantive holding that the EPA could follow within the 8th Circuit.

- **Narrow interpretation.** The court held only that EPA's "rule" exceeded its CWA authority because the rule imposed secondary treatment limitations on internal flows rather than at the end of the pipe.

- **Broader interpretation.** The court held that EPA lacks statutory authority to apply secondary treatment limitations to discharges of flow from one internal treatment unit to another. To the extent that the blending "rule" effectively imposes internal secondary treatment limitations on discharges from ACTIFLO units, rather than at the end of the pipe where streams are combined and discharged, it exceeds EPA's statutory authority.

Options?

- **The EPA may formally or informally non-acquiesce in the 8th Circuit jurisdictional determination that the EPA's letter response promulgated a rule** – DOJ staff cautions that any formal expression of non-acquiescence runs the risk of a challenge.

- **The EPA may choose not to take any formal position on the 8th Circuit's substantive conclusions** – Under this approach, EPA may continue to express its views about blending and the proper interpretation of the bypass regulation informally. DOJ cautions that, in the event, we express our views in written form that we should expect to be subject to judicial challenge like in *Iowa League*. There should be a complete record of the basis for written interpretation that includes all materials supporting our view to avoid what happened in *Iowa League*. Recall that in that case, all that the court had before it was material that supported the petitioner's view of the history of blending and the bypass regulation.

Exhibit 79

EPA's Oct. 29, 2013 "Moving Forward" action plan with transmittal email

From: Weiss, Kevin
To: Witt, Richard
Cc: Levine, MaryEllen
Subject: Meeting with Andrew today
Date: Tuesday, October 29, 2013 10:11:00 AM
Attachments: Moving Forward cover v2.docx

Richard:

Today's meeting with Andrew is to discuss potential follow up actions to address peak flow permitting issues. Here is a draft outline of what we hope to discuss.

Thanks

Kevin

Moving Forward After Iowa League of Cities

Assumptions

1. EPA interprets Iowa League of Cities to 1) prohibit the use of internal permit limits to address blending; and 2) prohibit EPA from objecting to or issuing POTW permits that authorize wet weather blending scenarios in the 8th Circuit.
2. EPA non-acquiesces in other Circuits besides the 8th Circuit

Short-Term Actions

1) Clarify response to the decision in the Eighth Circuit.

2) Clarify Non-Acquiescence approach
   a. Option 1 – Memo from HQ
   b. Option 2 – Actions (e.g. permit objections and enforcement orders) in individual Regions

3) Approve BioActiflo unit in permit (indicating bypass provision is not triggered)

Ongoing Efforts

4) Improve NPDES permits for POTWs
   a. Ensure permits have appropriate percent removal requirements
   b. Improve monitoring requirements during blending events
   c. Ensure WQBELs adequately address wet weather conditions
   d. Include additional WQBELs
   e. Include mass limits for WQBELs (including mass limits for wet weather conditions)

Long Term Actions

5) Finalize a Policy on application of the bypass provision to blending outside of the 8th Circuit
   a. Finalize 2005 draft Policy with appropriate modifications to address Iowa League decision
   b. Public notice and finalize policy

6) Improving Regulations
   a. Amend bypass regulation at 40 CFR 122.41(m)
   b. Develop comprehensive rule that addresses wet weather issues in collection system and at plant (e.g. comprehensive CMOM, SSO, bypass/blending)
   c. Amend secondary treatment regulations at 40 CFR 133
      i. Add pathogen limit
      ii. Modify percent removal requirements
   d. Develop regulation to prohibit dilution (similar to pretreatment regulations at 40 CFR 403.6(c)(5)(i)(B))
   e. Amend 122.45(d)(2) to facilitate maximum daily effluent limits for POTWs

Exhibit 80

Nov. 5, 2013 email transmitting "Draft Memorandum on Iowa League" prior to meeting with Deborah Nagle

From: Levine, MaryEllen
To: Witt, Richard
Subject: RE: Draft Iowa League memo
Date: Tuesday, November 05, 2013 3:30:09 PM
Attachments: Draft memorandum on Iowa League.docx

Some thoughts. Off to meet with Deborah Nagle . . . [redacted]

Mary Ellen

Mary Ellen Levine
Assistant General Counsel
Water Law Office
(202) 564-5487
Ariel Rios North Rm. 7510C

From: Witt, Richard
Sent: Tuesday, November 05, 2013 2:18 PM
To: Levine, MaryEllen
Subject: Draft Iowa League memo

I type "daft" instead of "draft" each time. Hmmmm.

Still steaming from my machine. [redacted]

Exhibit 81

Nov. 19, 2013 final draft of memo entitled "Applicability of ILOC to EPA permit determinations" with transmittal email

From: Vinch, James
To: Theis, Joseph; Crossland, Andy
Cc: Denton, Loren
Subject: ILOC
Date: Tuesday, November 19, 2013 12:31:46 PM
Attachments: Draft memorandum on Iowa League rtw mel 11.18.13 (2).docx

---

Here is what I was able to pry out of Kevin just now:

[redacted]

Jim Vinch
Attorney
Water Enforcement Division
US Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington DC 20460
tel: (202) 564-1256
fax: (202) 564-0024

MEMORANDUM

SUBJECT: Applicability of *Iowa League* decision to EPA permitting determinations

[redacted]

1. Background

In *Iowa League*, the court reviewed two EPA letters and determined that the letters had promulgated two new rules regarding mixing zones and "blending." The court vacated the rules because they had been promulgated without following notice and comment procedures required under the Administrative Procedure Act (APA). In addition, the court determined that, even if the EPA had followed APA procedures, it lacked statutory authority to promulgate the new "blending rule" concerning application of the bypass regulation in the factual circumstance described in the letters. *Iowa League v. EPA*, 711 F.3d 844 (8th Cir. 2013), rehearing denied (July 30, 2013).

The NPDES regulations require that every NPDES permit must include, either expressly or by reference, certain conditions, including a bypass condition. 40 C.F.R. § 122.41(a). With respect to bypass, the regulation provides in pertinent parts as follows:

"**(m) Bypass— (1) Definitions.** (i) *Bypass* means the intentional diversion of waste streams from any portion of a treatment facility

(2) Bypass not exceeding limitations. The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs (m)(3) and (m)(4) of this section.

(3) Notice— (i) Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least ten days before the date of the bypass.

(ii) Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required in paragraph (l)(6) of this section (24-hour notice).

(4) Prohibition of bypass. (i) Bypass is prohibited, and the Director may take enforcement action against a permittee for bypass, unless:

(A) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(B) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and

(C) The permittee submitted notices as required under paragraph (m)(3) of this section.

(ii) The Director may approve an anticipated bypass, after considering its adverse effects, if the Director determines that it will meet the three conditions listed above in paragraph (m)(4)(i) of this section."

2. The Eighth Circuit's decision

a. The issue before the Eighth Circuit

The court explained the issue before it as follows.

"During the spring of 2011, the Iowa League of Cities asked the EPA whether it could use 'physical/chemical treatment processes, such as Actiflo . . . to augment biological treatment and recombine the treatment streams prior to discharge, without triggering application of [the bypass rule].'" *Id.* at 859.

Here is the specific language from the September 2011 EPA letter that the court reviewed:

"Is the permitted use of ACTIFLO or other similar peak flow treatment processes to augment biological treatment subject to a "no feasible alternatives" demonstration?

Yes. The NPDES regulations define bypass as the intentional diversion of waste streams from any portion of a treatment facility. In general, flows diverted around biological treatment units would constitute a bypass regardless of whether or not the diverted flows receive additional treatment after the diversion occurs. The one exception to this would be if the diverted flow is routed to a treatment unit that is itself a secondary treatment unit. In this context, EPA considers treatment units that are designed and demonstrated to meet all of the effluent limits based on the secondary treatment regulations to be secondary treatment units. Based on the data EPA has reviewed to date, ACTIFLO systems that do not include a biological component, do not provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133, and hence are not considered secondary treatment units. Wastewater flow that is diverted around secondary treatment units and that receive treatment from ACTIFLO or similar treatment processes is a bypass, and therefore subject to the "no feasible alternatives" demonstration in the "bypass" provision at 40 CFR 122.41(m)(4). In certain circumstances, the EPA supports the use of these types of high rate treatment technologies to provide treatment during wet weather conditions. For this reason, the Agency will continue to explore in what circumstances use of these technologies is consistent with a determination that there are "no feasible alternatives" to an anticipated bypass, and where it would be appropriate to approve in a permit the use of such units."

[redacted]

"The effect of this letter is a new legislative rule mandating certain technologies as part of the secondary treatment phase. If a POTW designs a secondary treatment process that routes a portion of the incoming flow through a unit that uses non-biological technology disfavored by the EPA, then this will be viewed as a prohibited bypass, regardless of whether the end of pipe output ultimately meets the secondary treatment regulations.

The EPA's new blending rule further conflicts with the secondary treatment regulations because the EPA has made clear that effluent limitations apply at the end of the pipe unless it would be impractical to do so. *40 C.F.R. § 122.45(h)*. There is no indication that the secondary treatment regulations established situations in which it would be impractical to apply effluent limitations at the end of the pipe or otherwise altered the application of this default rule. *See 40 C.F.R. § 133.100-102*. But the blending rule applies effluent limitations within facilities' secondary treatment processes. The September 2011 letter rejected the use of ACTIFLO because these units 'do not provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133.' If streams move around traditional biological secondary treatment processes and through a non-biological unit that 'is itself a secondary treatment unit,' then the system would not need to meet the restrictive no-feasible-

alternatives requirement. In other words, under the September 2011 blending rule, if POTWs separate incoming flows into different streams during the secondary treatment phase, the EPA will apply the effluent limitations of the secondary treatment regulations to each individual stream, rather than at the end of the pipe where the streams are recombined and discharged." *Id.* at 876.

c. The Eighth Circuit's decision

[redacted] "The EPA would like to apply effluent limitations to the discharge of flows from one internal treatment unit to another. We cannot reasonably conclude that it has the statutory authority to do so . . . . Therefore, insofar as the blending rule imposes secondary treatment regulations on flows within facilities, we vacate it as exceeding the EPA's statutory authority." *Id.* at 877-78. [redacted]

Formatted: Highlight

[redacted]

[redacted]

[redacted]

[redacted]

Exhibit 82

Nov. 19, 2013 EPA emails finalizing and issuing the EPA HQ Desk Statement

From: Giles-AA, Cynthia
To: Kika, Stacy
Subject: RE: draft desk statement on Iowa League
Date: Tuesday, November 19, 2013 1:04:31 PM

I am ok with this

From: Kika, Stacy
Sent: Tuesday, November 19, 2013 12:37 PM
To: Weiss, Kevin; Neugeboren, Steven; Sawyers, Andrew; Loop, Travis; Stoner, Nancy; Nagle, Deborah; Bosma, Connie; Levine, MaryEllen; Witt, Richard; Gilinsky, Ellen; Kopocis, Ken; Giles-AA, Cynthia; Pollins, Mark; Theis, Joseph; Shinkman, Susan
Cc: Senn, John; McDermott, Marna; Smith, Kristi; Gude, Karen; Vinch, James
Subject: RE: draft desk statement on Iowa League

Thank you Kevin and Steven. Please let me know if there are any other concerns as the reporter is pinging me. Her hard deadline was noon ET and if we do not get anything to her soon she will write in her story that "EPA declined to comment".

Thanks,
Stacy

~~~~~~~~~~~~~~~~~~~~~~~~~~

Stacy Kika
U.S. Environmental Protection Agency
Office of Media Relations
Email: kika.stacy@epa.gov
Desk: 202.564.0906
EPA news releases on Twitter: http://twitter.com/epanews

From: Weiss, Kevin
Sent: Tuesday, November 19, 2013 12:32 PM
To: Neugeboren, Steven; Sawyers, Andrew; Loop, Travis; Stoner, Nancy; Nagle, Deborah; Bosma, Connie; Levine, MaryEllen; Witt, Richard; Gilinsky, Ellen; Kopocis, Ken; Giles-AA, Cynthia; Pollins, Mark; Theis, Joseph; Shinkman, Susan
Cc: Kika, Stacy; Senn, John; McDermott, Marna; Smith, Kristi; Gude, Karen; Vinch, James
Subject: RE: draft desk statement on Iowa League

We have some suggestions [redacted]

The Eighth Circuit's interpretation in *Iowa League of Cities v EPA* of EPA's regulations relating to blending and bypass is legally binding within the Eighth Circuit. Outside of the Eighth Circuit, EPA will continue to work with States and communities with the goal of finding solutions that protect public health and the environment while recognizing economic constraints and feasibility concerns, consistent with the Agency's existing interpretation of the regulations.

Thanks

Kevin
~~~~~~~~~~~~~~~~~~~~~~~~~~

From: Neugeboren, Steven
Sent: Tuesday, November 19, 2013 12:14 PM
To: Sawyers, Andrew; Loop, Travis; Stoner, Nancy; Nagle, Deborah; Bosma, Connie; Weiss, Kevin; Levine, MaryEllen; Witt, Richard; Gilinsky, Ellen; Kopocis, Ken; Giles-AA, Cynthia; Pollins, Mark; Theis, Joseph; Shinkman, Susan
Cc: Kika, Stacy; Senn, John; McDermott, Marna; Smith, Kristi
Subject: draft desk statement on Iowa League

Attached is a draft statement after discussion with Kevin Weiss in OW, and review here in OGC. Please call Richard Witt at 564-5496 if you have any comments or you can email if you are o[redacted] with it. Press office needs it asap.

[redacted]

Steven Neugeboren
Associate General Counsel for Water
U.S. EPA
1200 Penn Ave., NW
Washington DC 20460
202-564-5488

From: Kika, Stacy
To: Neugeboren, Steven; Shinkman, Susan; Weiss, Kevin; Sawyers, Andrew; Loop, Travis; Stoner, Nancy; Nagle, Deborah; Bosma, Connie; Levine, MaryEllen; Witt, Richard; Gilinsky, Ellen; Kopocis, Ken; Giles-AA, Cynthia; Pollins, Mark; Theis, Joseph
Cc: Senn, John; McDermott, Marna; Smith, Kristi; Gude, Karen; Vinch, James; Mallory, Brenda; Garbow, Avi
Subject: RE: draft desk statement on Iowa League
Date: Tuesday, November 19, 2013 2:05:33 PM

Thank you all for your help. Here is the final statement.

Statement:

The Eighth Circuit's interpretation in Iowa League of Cities v EPA of EPA's regulations relating to blending and bypass is legally binding within the Eighth Circuit. Outside of the Eighth Circuit, EPA will continue to work with States and communities with the goal of finding solutions that protect public health and the environment while recognizing economic constraints and feasibility concerns, consistent with the Agency's existing interpretation of the regulations.

Stacy Kika
U.S. Environmental Protection Agency
Office of Media Relations
Email: kika.stacy@epa.gov
Desk: 202.564.0906
EPA news releases on Twitter: http://twitter.com/epanews

From: Neugeboren, Steven
Sent: Tuesday, November 19, 2013 1:21 PM
To: Shinkman, Susan; Kika, Stacy; Weiss, Kevin; Sawyers, Andrew; Loop, Travis; Stoner, Nancy; Nagle, Deborah; Bosma, Connie; Levine, MaryEllen; Witt, Richard; Gilinsky, Ellen; Kopocis, Ken; Giles-AA, Cynthia; Pollins, Mark; Theis, Joseph
Cc: Senn, John; McDermott, Marna; Smith, Kristi; Gude, Karen; Vinch, James; Mallory, Brenda; Garbow, Avi
Subject: Re: draft desk statement on Iowa League

Just letting folks that nancy and cynthia ok'd the language so we are done.

From: Neugeboren, Steven
Sent: Tuesday, November 19, 2013 1:12:11 PM
To: Shinkman, Susan; Kika, Stacy; Weiss, Kevin; Sawyers, Andrew; Loop, Travis; Stoner, Nancy; Nagle, Deborah; Bosma, Connie; Levine, MaryEllen; Witt, Richard; Gilinsky, Ellen; Kopocis, Ken; Giles-AA, Cynthia; Pollins, Mark; Theis, Joseph
Cc: Senn, John; McDermott, Marna; Smith, Kristi; Gude, Karen; Vinch, James
Subject: Re: draft desk statement on Iowa League

[redacted]

From: Shinkman, Susan
Sent: Tuesday, November 19, 2013 1:08:33 PM
To: Neugeboren, Steven; Kika, Stacy; Weiss, Kevin; Sawyers, Andrew; Loop, Travis; Stoner, Nancy; Nagle, Deborah; Bosma, Connie; Levine, MaryEllen; Witt, Richard; Gilinsky, Ellen; Kopocis, Ken; Giles-AA, Cynthia; Pollins, Mark; Theis, Joseph

Cc: Senn, John; McDermott, Marna; Smith, Kristi; Gude, Karen; Vinch, James
Subject: RE: draft desk statement on Iowa League

[redacted]

Thanks,
Susan

From: Neugeboren, Steven
Sent: Tuesday, November 19, 2013 1:04 PM
To: Kika, Stacy; Weiss, Kevin; Sawyers, Andrew; Loop, Travis; Stoner, Nancy; Nagle, Deborah; Bosma, Connie; Levine, MaryEllen; Witt, Richard; Gilinsky, Ellen; Kopocis, Ken; Giles-AA, Cynthia; Pollins, Mark; Theis, Joseph; Shinkman, Susan
Cc: Senn, John; McDermott, Marna; Smith, Kristi; Gude, Karen; Vinch, James
Subject: Re: draft desk statement on Iowa League

We have ow clerance so need oeca's. May be too late but I think we want to get out our views.

From: Kika, Stacy
Sent: Tuesday, November 19, 2013 12:36:49 PM
To: Weiss, Kevin; Neugeboren, Steven; Sawyers, Andrew; Loop, Travis; Stoner, Nancy; Nagle, Deborah; Bosma, Connie; Levine, MaryEllen; Witt, Richard; Gilinsky, Ellen; Kopocis, Ken; Giles-AA, Cynthia; Pollins, Mark; Theis, Joseph; Shinkman, Susan
Cc: Senn, John; McDermott, Marna; Smith, Kristi; Gude, Karen; Vinch, James
Subject: RE: draft desk statement on Iowa League

Thank you Kevin and Steven. Please let me know if there are any other concerns as the reporter is pinging me. Her hard deadline was noon ET and if we do not get anything to her soon she will write in her story that "EPA declined to comment".

Thanks,
Stacy

Stacy Kika
U.S. Environmental Protection Agency
Office of Media Relations
Email: kika.stacy@epa.gov
Desk: 202.564.0906
EPA news releases on Twitter: http://twitter.com/epanews

From: Weiss, Kevin
Sent: Tuesday, November 19, 2013 12:32 PM
To: Neugeboren, Steven; Sawyers, Andrew; Loop, Travis; Stoner, Nancy; Nagle, Deborah; Bosma, Connie; Levine, MaryEllen; Witt, Richard; Gilinsky, Ellen; Kopocis, Ken; Giles-AA, Cynthia; Pollins, Mark; Theis, Joseph; Shinkman, Susan
Cc: Kika, Stacy; Senn, John; McDermott, Marna; Smith, Kristi; Gude, Karen; Vinch, James
Subject: RE: draft desk statement on Iowa League

We have some suggestions [redacted]

The Eighth Circuit's interpretation in *Iowa League of Cities v EPA* of EPA's regulations relating to blending and bypass is legally binding within the Eighth Circuit. Outside of the Eighth Circuit, EPA will continue to work with States and communities with the goal of finding solutions that protect public health and the environment while recognizing economic constraints and feasibility concerns, consistent with the Agency's existing interpretation of the regulations.

Thanks

Kevin

From: Neugeboren, Steven
Sent: Tuesday, November 19, 2013 12:14 PM
To: Sawyers, Andrew; Loop, Travis; Stoner, Nancy; Nagle, Deborah; Bosma, Connie; Weiss, Kevin; Levine, MaryEllen; Witt, Richard; Gilinsky, Ellen; Kopocis, Ken; Giles-AA, Cynthia; Pollins, Mark; Theis, Joseph; Shinkman, Susan
Cc: Kika, Stacy; Senn, John; McDermott, Marna; Smith, Kristi
Subject: draft desk statement on Iowa League

Attached is a draft statement after discussion with Kevin Weiss in OW, and review here in OGC. Please call Richard Witt at 564-5496 if you have any comments or you can email if you are ok with it. Press office needs it asap.

[redacted]

Steven Neugeboren
Associate General Counsel for Water
U.S. EPA
1200 Penn Ave., NW
Washington DC 20460
202-564-5488

Exhibit 83

Minutes from EPA's Nov. 21, 2013 Branch Chief Call with transmittal email

From: Metchis, Karen

To: Metchis, Karen; Larsen, Brent; Frazer, Brian; Pitt, Brian; Trulear, Brian; Knopes, Christopher; Rathbone, Colleen; Webster, David; Smith, DavidW; Nagle, Deborah; Corb, Doug; Pabst, Douglas; MacKnight, Evelyn; Cruz, Francisco; Curtis, Glenn; Shaw, Hanh; Geliga, Jaime; Pritts, Jesse; Dunn, John; Hamilton, Karen; Obrien, Karen; Pierard, Kevin; Bose, Laura (Separated); Phillips, Laura; Farzaad, Marjan; Matthews, Mark; Nuhfer, Mark; Krudner, Maureen; Lidgard, Michael; Angelich, Michelle; Kuefler, Patrick; Surampalli, Rao; Wooster, Richard; Brown, Samuel (Separated); Jann, Stephen; Poulsom, Susan; Hill, Troy; Webb, Adelaide; Wiedeman, Allison; Letnes, Amelia; Mitschele, Becky; Rittenhouse, Bryan; Kloss, Christopher; Bosma, Connie; Stephan, Danielle; Hair, David; Clovis, Debora; Gray, Doris; Ragnauth, Elizabeth; Farris, Erika D.; Flannery-Keith, Erin; Hudiburgh, Gary; Utting, George; Schaner, Greg; Subramanian, Hema; Galavotti, Holly; Faulk, Jack; Clark, Jackie; Piziali, Jamie; Pickrel, Jan; Potent, Jeff; Chan, Jennifer; Molloy, Jennifer; Wilson, Scott; Saxena, Juhi; Jackson, June; Kelley, Kathryn; Weiss, Kevin; Boynton, King; Eby, Louis; Zobrist, Marcus; Klasen, Matthew; Billah, Mohammed; Bonnelycke, Nina; Bathersfield, Nizanna; Chumble, Prasad; Herbert, Rachel; Powell, Robert; Danesi, Robin; Brennan, Ross; Albert, Ryan; Rivera, Sandra; Hoyt, Sarita; Yager, Scott; Whitehurst, Shanika; Syed, Sharmin; Mittman, Tamara; Laverty, Tom; Kibler, Virginia; Anderson, Kate; Sanelli, Diane; Tyler, Patti; Wellesley, Sunny; Hill, Kimberly; Kent, Bruce; Fonzi, Gina; Tyler, Kip; Burgess, Karen; Lozano, VelRey; Hyatt, Marshall; Stuber, Robyn; Bromley, Eugene; Voorhees, Mark; Kaspar, Paul; Kozelka, Peter; Gregg, Caitlin; Hosch, Claudia; Kermish, Laurie; Thomas, Chris; Opie, Jodie; Sablad, Elizabeth

Subject: Monthly NPDES BC Call - Minutes for Oct and Nov

Date: Tuesday, November 26, 2013 12:23:52 PM

Attachments: BC conf call notes -11 21 13.docx
BC conf call notes - 2013-10-24.docx

BC con call notes 2013-10-24- WIP Ex. 5 DPP and not responsive;
BC conf call notes 11 21 13 WIP Ex. 5 DPP and not responsive

Attached are the minutes for both this month's NPDES BC call and October's. Please let me know if you have any corrections.

I would like some feedback as to the level of detail you prefer in the notes. Is the Nov. version to detailed? Is the October version too brief? We want these notes to be useful to you while not conveying too great a level of detail. Your suggestions are welcome.

I hope you have (or had) a great Thanksgiving!

NPDES Branch Chief Call
November 21, 2013
Minutes

Attending:

Region 2. Kate Anderson, Michele Josilo
Region 3. Brian Trulear
Region 4. Mark Nuhfer, Chris Thomas
Region 6. Claudia Hosch
Region 7. Glenn Curtis, Amy Shields, Mike Jay
Region 8. Colleen Rathbone
Region 9. Dave Smith, Elizabeth Sablad
Region 10. Mike Lidgard
HQ: Ross Brennan, Karen Metchis
On phone: Kevin Weiss

Summary of Follow-up Action Items:

1. All: Chicago Fly-in: Ross provided an update for the December 9-12 branch chiefs meeting and reminded participants about the interview process underway with SRA. To prepare for the fly-in: think about both the short and long term: the budget drivers, FY14 challenges, and the hard decisions you think you'll need to make. In addition, for the long term, think about your vision about the nature of program oversight.

2. All: Pathogen FAQ: Please send comments to Karen Metchis by Tuesday, Dec. 24, if not sooner.

3. All: TMDL Process: Dave Smith from Region 9 asked for other Regions to volunteer to beta test their TMDL Review process.

4. Kevin Weiss: Blending/Iowa League of Cities: See attached desk statement.

5. Rachel Herbert: Stormwater Rule: Rachael will report more info back to the Regions soon.

6. Colleen Rathbone: agreed to share their letter on RP issues. Participants suggested including RP and/or multidischarger variances on the issue agenda for in Chicago.

7. Karen Metchis: will schedule issue-oriented telecons (unless they are addressed at the Fly-in) on:
   a. antidegradation lawsuit in Florida
   b. multi-discharger variances
   c. RP methods (effluent variability, sufficiency of number of samples, use of the TSD approach vs. the State's approach, what constitutes a sufficient application)

HQ UPDATES:

1. **Chicago Fly-in [HQ Lead: Ross Brennan]**
   The Fly-in will run from Monday Dec. 9, 1 pm through Thursday Dec. 12, 2:30 pm
   It will be at the Hotel Union League Club, and SRA will facilitate. SRA has been interviewing each Region. These interviews will be followed by a second set of questions on structuring the agenda so we leave there with something concrete in hand.

On Nov. 21 Ross forwarded an email thread that included both Deborah Nagle's vision for the fly-in and an email from Chris Thomas describing R4's brainstorming process. Ross said, at this point, all you need to do to prepare for the fly-in is to think about both the short and long term: the budget drivers, FY14 challenges, and the hard decisions you think you'll need to make. In addition, for the long term, think about your vision about the nature of program oversight. Feel free to send questions or comments to either Ross Brennan or Brian Frazer on either logistics or themes.

2. **Pathogen FAQ [HQ Lead: Karen Metchis]**
Karen Metchis sent to the Regions a draft FAQ on incorporating the 2012 Recreational Water Quality Criteria into NPDES permits. Please send comments to her by Tuesday, Dec. 24, if not sooner, so we can finalize these for web posting in early January. We don't think that the FAQ document raises any policy issues; it is pretty straight-forward. A few issues are being held for future resolution (e.g., application to non-continuous dischargers, selection of receiving water flow, use of qPCR).
Currently, HQ is working on developing an answer to the question: *What if the water body has a TMDL that is based on an older water quality standard, such as a fecal indicator, but the state adopts a new water quality standard for E. coli/enterococci?* WPD is working with OGC, OST and OWOW to develop an answer that does not undermine any portion of our programs, and will send that to the Regions to review as soon as we have an agreed-upon draft answer. Region 4 asked Karen to include Carol Baschon in this discussion thread as this is an issue in Florida, which she did.

3. **Selenium Update:** Ross reported that OST had its kickoff meeting (11/14/13) with the Selenium Criteria Workgroup, working towards an anticipated February 2014 release for public comment. OST will continue to work through its Regional and HQ contacts, after which they will reach out to States and ACWA as well. Dave Smith from Region 9 indicated they were already familiar with this, and expects something that is more stringent.

4. **TMDL Workgroup [HQ Lead: Jenny Molloy, Greg Schaner; Regional Lead: Peter Kozelka, R9]:** Jenny and Greg reported that the TMDL Workgroup is working through the conundrums of about 15 specific logistical, data, and legal authority issues. Dave Smith from Region 9 said they developed a process for reviewing TMDLs that include having a cross-program team and a checklist. He said the key is to have more cross-program collaboration. He asked for other Regions to volunteer to beta test their process.

REGIONAL ROUND ROBIN:

Region 2. Pass.

Region 3. Brian Trulear raised the Iowa League of Cities blending issue. He indicated that cities in Pennsylvania want guidance from EPA on how the Agency is interpreting and applying the decision. He sent Connie Bosma and Kevin Weiss a copy of a recent letter from John Hall. Kevin indicated that Steve Neugeboren has recently talked with the Region 7 states and we are continuing to talk with Nancy Stoner and Cynthia Giles to resolve this. Nancy Stoner will also be talking at a Conference for NACWA attorneys. For the interim, until we are able to roll out a clear message, Kevin is sending the desk statement to the Regions [attached here]. Dave, Region 9, suggested that HQ check with the Regions on their actual practices.

Region 4. Mark Nuhfer reported that they are facing a slew of retirements: (Connie Kagie, Marshall Hyatt, Cheryl Espy, and one later in the year). As a result of this loss of expertise, they reorganized on October 1, shifting from a State-based program to a Sector-based program.

The Region noted that an antidegradation lawsuit in Florida, concerning incorporating nonpoint sources in 303(d) listing, has serious implications for our program. We agreed to set up a longer discussion on this issue in the near future.

Region 6. Claudia Hosch reported that she is going to Santa Fe to meet with Albuquerque State and municipal officials and developers to discuss pre-development hydrology and development rights. They have a permit that will be impacted by the outcome of this discussion.

Region 7. Glenn Curtis reported that in Fulton, MO the TMDL is driving a WLA below the limits of technology, and they are developing a Factor 6 variance and a new Fact Sheet. The Region is also grappling with how to deal with a multi-discharger variance (MDV) for ammonia criteria in Kansas. Region 2 had a similar experience with a MDV for mercury in NY State; there are implementation challenges. Region 9 also has MDV efforts in Oregon. We agreed to either discuss MDVs at the Chicago Fly-in or on a longer issue telecom.

Glen also asked about the prognosis for the Stormwater Rule. Kevin indicated that Rachel Hebert will send out information on what is going forward in the Stormwater Rule shortly.

Region 8. Colleen Rathbone said the Region objected to a major municipal permit in Wyoming as the permit did not include several criteria (copper, lead, cadmium) in their reasonable potential calculation. A discussion ensued with Regions 7, 4 and 2 all weighing in on the issue of RP methodology (we can't make a state use a certain method). Colleen said they were on solid ground because the permit application did not include certain data that they should have had. However, this still leaves the question about RP methods, including effluent variability, sufficiency of number of samples, use of the TSD approach vs. the State's approach, and what constitutes a sufficient application. Colleen agreed to share their letter discussing this and Karen agreed to set up a longer telecom to explore the RP methods issue more.

Region 9. Elizabeth Sablad indicated they received a stormwater petition. Also, The Offshore Oil permit has taken a long time to come to internal decision, one which the Coastal Commission concurred on. But, the Coastal Commission may take back their concurrence if we make changes. The next meeting is in December. There is an issue in Hawaii on use of the census threshold in an urbanized area on one of the islands. We need a consistent approach to designating urban clusters for Phase II.

Region 10. Mike Lidgard said they are issuing a draft oil and gas permit on the North Slope of Alaska, for Geotech Survey activity this summer. They are issuing the permit in parallel with the State for State waters, and are including tribal consultation.

Exhibit 84

EPA Nov. 19-22, 2013 emails confirming finality of desk statement

From:	Weiss, Kevin
To:	Webster, David; Anderson, Kate; Trulear, Brian; MacKnight, Evelyn; Thomas, Chris; Nuhfer, Mark; Pierard, Kevin; Wiemhoff, John; Kaspar, Paul; Schwab, Kay; Curtis, Glenn; Nix, Tanya; Dunn, John; Hosch, Claudia; Rathbone, Colleen; Sablad, Elizabeth; Smith, DavidW; Lidgard, Michael; Poulsom, Susan; Pitt, Brian; Angelich, Michelle
Cc:	Bosma, Connie
Subject:	Desk Statement for Iowa League of Cities
Date:	Friday, November 22, 2013 2:21:23 PM
Attachments:	Desk Statement 11-19-13.docx

Record 14
Ex. 84, at 2
(680)

From: Gude, Karen
To: Weiss, Kevin
Subject: RE: draft desk statement on Iowa League
Date: Friday, November 22, 2013 2:42:00 PM

Kevin,

It should be fine to share the statement with states and Regions.

Karen Gude
Communications Coordinator
Office of Wastewater Management, Office of Water
U.S. Environmental Protection Agency
Phone: (202) 564-9567

From: Weiss, Kevin
Sent: Friday, November 22, 2013 2:06 PM
To: Gude, Karen
Subject: FW: draft desk statement on Iowa League

From: Conger, Nick
Sent: Friday, November 22, 2013 2:00 PM
To: DeMarco, Carol; Weiss, Kevin
Cc: Vinch, James
Subject: RE: draft desk statement on Iowa League

Hi Carol,

The desk statement is ok to send to the folks in New Jersey. That's the extent of our public communications on this subject, to my knowledge. It's fair game to send to media/stakeholders.

Kevin can chime in if there's been any more recent direction.

Nick

The Eighth Circuit's interpretation in *Iowa League of Cities v EPA* of EPA's regulations relating to blending and bypass is legally binding within the Eighth Circuit. Outside of the Eighth Circuit, EPA will continue to work with States and communities with the goal of finding solutions that protect public health and the environment while recognizing economic constraints and feasibility concerns, consistent with the Agency's existing interpretation of the regulations.

Nick Conger
Communications Director
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
Office: (202) 564-6287
Cell: (202) 412-2655

From: Weiss, Kevin
To: Nuhfer, Mark
Subject: RE: Desk Statement for Iowa League of Cities
Date: Friday, November 22, 2013 2:54:00 PM

It is final – [redacted]

From: Nuhfer, Mark
Sent: Friday, November 22, 2013 2:48 PM
To: Weiss, Kevin
Subject: RE: Desk Statement for Iowa League of Cities

Is this final? [redacted]

From: Weiss, Kevin
Sent: Friday, November 22, 2013 2:21 PM
To: Webster, David; Anderson, Kate; Trulear, Brian; MacKnight, Evelyn; Thomas, Chris; Nuhfer, Mark; Pierard, Kevin; Wiemhoff, John; Kaspar, Paul; Schwab, Kay; Curtis, Glenn; Nix, Tanya; Dunn, John; Hosch, Claudia; Rathbone, Colleen; Sablad, Elizabeth; Smith, DavidW; Lidgard, Michael; Poulsom, Susan; Pitt, Brian; Josilo, Michelle
Cc: Bosma, Connie
Subject: Desk Statement for Iowa League of Cities

Exhibit 85

Dec. 3, 2013 DOJ email requesting EPA coordination on how to respond to the Municipal Group Letter

From: Allen, Leslie (ENRD)
To: Vinch, James
Subject: RE: Letter on Iowa League of Cities
Date: Tuesday, December 03, 2013 5:40:55 PM

Hey Jim. I just tried to call you on this. Is EPA planning to respond, and if so how and when? And, will DOJ get to review? The conference is fast approaching, yes?

From: Vinch, James [mailto:Vinch.James@epa.gov]
Sent: Tuesday, November 26, 2013 3:36 PM
To: Allen, Leslie (ENRD)
Subject: FW: Letter on Iowa League of Cities

Leslie,

FYI attached is the newest pressure point. It will require a response from the Agency in relatively short order and will force us to clarify our message on Iowa League.

Please feel free to give me a call if you have any questions.

Jim Vinch
Attorney
Water Enforcement Division
US Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington DC 20460
tel: (202) 564-1256
fax: (202) 564-0024

From: Weiss, Kevin
Sent: Tuesday, November 26, 2013 2:24 PM
To: Witt, Richard; Levine, MaryEllen; Vinch, James; Theis, Joseph; Denton, Loren
Subject: Letter on Iowa League of Cities

Exhibit 86

EPA Deputy Administrator Robert Perciasepe's talking points

From: Denton, Loren
To: Hannon, Arnita; Cook-Shyovitz, Becky; Samy, Kevin; Pollins, Mark; Giles-AA, Cynthia; Stoner, Nancy; Nagle, Deborah; Bosma, Connie; Shinkman, Susan; Chester, Steven; Weiss, Kevin; Crossland, Andy; Sawyers, Andrew
Subject: RE: Status: Briefing; TPs
Date: Thursday, December 12, 2013 4:59:45 PM
Attachments: DeputyAdministratorBriefingDec2013USCMNLCNACoDialogueMtg.docx
Revised Talking Points for DAA 12 11 13 (3).docx

Attached are Bob P's talking points and a one-pager on Iowa League of Cities in case he gets a question on it.

Loren Denton
Chief, Municipal Enforcement Branch
Water Enforcement Division
U.S. EPA (2243A)
Washington, D.C. 20460
Phone: (202) 564-1148

CONFIDENTIAL: This transmission may contain deliberative, attorney client, attorney work product, or otherwise privileged material. Do not release under FOIA without appropriate review. If this message was sent to you in error, you are instructed to delete this message from your machine and all storage media whether electronic or hard copy.

From: Weiss, Kevin
Sent: Thursday, December 12, 2013 4:25 PM
To: Denton, Loren
Subject: FW: Status: Briefing; TPs

From: Hannon, Arnita
Sent: Thursday, December 12, 2013 3:26 PM
To: Weiss, Kevin; Crossland, Andy
Cc: Samy, Kevin; Cook-Shyovitz, Becky
Subject: Status: Briefing; TPs

Hi Guys!
Are you close to sending the Briefing and Talking Points over? Please cc Kevin Samy and Becky Cook-Shyovitz when you send this material just in case I've had to leave the office. I am also having trouble sending messages from my blackberry and just got back to my desk so really sorry about having to be a pain☺!

Thx as always,

Arnita

PS – Just got word that Nancy Sutley's schedule will prevent her from coming tomorrow fyi!

M. Arnita Hannon

Intergovernmental Liaison
Office of Congressional and Intergovernmental Relations
US EPA
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460
202.564.3704 (O)
202.302.9109 (M)
240.602.7118 (C)
202.501.1545 (Fax)
hannon.arnita@epa.gov

If asked about EPA's response to Iowa League of Cities:

- EPA received a letter dated November 26, 2013 from the U.S. Conference of Mayors, the National League of Cities and other organizations requesting clarification of the Agency's position on the *Iowa League of Cities* decision in the 8th Circuit Court of Appeals. EPA is currently reviewing the letter and will provide a response in the near future.

Background of Iowa League of Cities Decision

- In Iowa League of Cities v. EPA (March 25, 2013) the Eighth Circuit Court of Appeals:

  (1) vacated portions of two letters that EPA sent to Senator Grassley in response to his questions about blending and mixing zones because the letters constituted legislative rules that were promulgated without notice and comment rulemaking in violation of the APA; and

  2) held that EPA exceeded it statutory authority insofar as it imposes secondary treatment regulations on flows within treatment facilities (e.g. apply effluent limitations to the discharge of flows from one internal treatment unit to another), and thus within the Eight Circuit this decision will have practical effect of limiting how the Agency approaches blended wastestreams.

- The Eighth Circuit's opinion is inconsistent with EPA's long-standing interpretation of the Clean Water Act, the bypass rule and the secondary treatment standard as prohibiting the routing of waste streams around secondary treatment units and subsequently blending the partially treated wastewater back in with treated flows. EPA's position is that blending is a bypass and can only be justified upon a demonstration of "no feasible alternatives."

- EPA has determined that the *Iowa League of Cities'* interpretation of blending and bypass is binding within the Eighth Circuit. Outside the Eighth Circuit, EPA will continue to apply the bypass rule consistent with the Agency's existing interpretation of its regulations.

Exhibit 87

OECA Dec. 15, 2013 summary of ILOC applicability with Jan. 9, 2014 transmittal email

From: Vinch, James
To: "allen.leslie@doj.gov"
Subject: Draft Partial Outline
Date: Thursday, January 09, 2014 9:34:57 AM
Attachments: Iowa League 12.15.13.docx

Leslie,

Here is what I have so far [redacted]

Jim Vinch
Attorney
Water Enforcement Division
US Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington DC 20460
tel: (202) 564-1256
fax: (202) 564-0024

Attorney-Client Privileged/Enforcement Confidential

12.15.13 Working Draft

1. Iowa League of Cities held that EPA does not have the statutory authority to prohibit "blending" as a violation of the bypass rule, 40 C.F.R. § 122.41(m) as long as the discharges from the POTW comply with the effluent limits in its NPDES permit. This decision will be applied within the Eighth Circuit. Outside the Eighth Circuit, EPA will continue to apply its long standing interpretation of the Clean Water Act ("CWA"), its regulations and case law that "blending" does violate the bypass rule unless a POTW establishes that there are "no feasible alternatives" as set forth in 40 C.F.R. § 122.41(m)(4)(B).

2. The Clean Water Act requires that publically owned treatment works treat all wastewater streams using the technology-based standard of "secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title." 33 U.S.C. § 1311(b)(1)(B). Section 1314(a) of the CWA requires the Administrator to promulgate regulations concerning the "degree of effluent reduction attainable through the application of secondary treatment" focusing on the "amounts of constituents and chemical, physical and biological characteristics of pollutants." Although EPA lacks the authority to prescribe specific treatment technologies necessary to meet the secondary treatment standard, NRDC v. EPA, 822 F.2d 1276 (9th Cir. 1989), EPA has specified a minimum level of effluent reduction required to meet secondary treatment.

3. The secondary treatment regulations, 40 C.F.R. Part 133, sets forth the "level of effluent quality attainable through the application of secondary treatment or equivalent technology." 40 C.F.R. § 133.100. In general, the secondary treatment regulation requires that the minimum level of effluent quality attainable by secondary treatment requires the removal of the pollutants BOD, suspended solids and pH to the certain numeric levels of concentration as specified in the rule.[i] 40 C.F.R. § 133.102(a)-(c). As long as a POTW's end-of-the-pipe discharges satisfy these numeric standards, then the POTW is arguably satisfying the secondary treatment requirement. While the secondary treatment standard does not prescribe that any particular treatment technology be employed, it does identify the type of technology required in order for a treatment system to be considered "equivalent to secondary treatment."

4. **Not sure how relevant this is:** In 1981, Congress amended the CWA to allow POTWs to use certain existing technologies as "equivalent to secondary treatment" even though the discharges from the use of these technologies could not meet the effluent limits specified in 40 C.F.R. § 133.103.102(a)-(c). The legislative history suggests that this amendment was intended to minimize the need for increased treatment and construction of costly new facilities where existing treatment technologies, including "such biological treatment facilities as oxidation

ponds, lagoons and ditches and trickling filters," could provide equivalent treatment at a reduced cost. 33 U.S.C. § 1314(d)(4). See H.R. Rep. No. 97-30, 97th Cong., 1st Sess. 34-35, 73 (1981).

In its regulations, EPA defined "facilities eligible for treatment equivalent to secondary treatment" as those facilities that use "a trickling filter or waste stabilization pond as the principal process" and are unable to meet the removal requirements for BOD and suspended solids as set forth in 40 C.F.R. § 133.103 and that "provide significant **biological treatment** of municipal wastewater." If treatment equivalent to secondary treatment is defined as including biological treatment then it can be argued that the performance standard for standard secondary treatment must include a treatment technology that provides at least the same performance standard as provided by biological treatment. This does not necessary mean that a POTW must use a biological treatment process in its design of standard secondary treatment technology, but it must remove the same types of pollutants as is removed by biological treatment.[ii] [Pathogens are the pollutant that EPA is concerned about even though the secondary treatment rule does not include an effluent limitation for pathogens. If biological treatment is not used, the some other technology must be used to remove pathogens.]

****Another interesting point**: In the FR preamble finalizing the equivalent to secondary rule, EPA responded to a comment that some of these "equivalent facilities" have been able to meet secondary treatment standards by by-passing flows rather than treating all flows. The commenter stated that the effluent limitations under the equivalent to secondary rule should assume that the facility is treating all of the previously by-passed flows. EPA agreed that the effluent limitations must be "adjusted to account for those attainable when the by-passed flows are treated." Does this support our theory that all bypassed flows have to be treated, or is this just applicable to the equivalent to secondary rule?

5. **Bypass rule:** The bypass rule, 40 C.F.R. § 122.41(m), prohibits the intentional diversion of waste streams from any portion of a treatment facility unless the discharger can demonstrate that the bypass was "unavoidable to prevent loss of life, personal injury or severe property damage" or there were "no feasible alternatives" to the bypass. 40 C.F.R. § 122.41(m)(4). One of the primary purposes of the bypass rule is to require that "permittees operate control equipment at all times, thus obtaining the maximum pollutant reductions consistent with technology-based requirements." 49 Fed.Reg. 38,036 (Sept. 26, 1984). The bypass rule is designed to "ensure that users properly operate and maintain their treatment facilities . . . [pursuant to applicable] technology-based standards." 53 Fed. Reg. 40,562, 40,609 (Oct.17, 1988). The bypass restriction requires that all waste streams be treated through the appropriate technology-based standard even where a bypass would not result in a violation of NPDES effluent limits.

In *National Resources Defense Council v. EPA*, 822 F.2d 104 (D.C. Cir. 1987) industry groups argued that the bypass rule does not require the continuous treatment of wastewater through the technology-based treatment process specified in an NPDES permit as long as the effluent limitations in the permit were met. In cases where effluent limits are expressed as monthly

averages (as is the case with the effluent limits based on secondary treatment), turning the treatment technology off for several days during the month would still allow a facility to meet its monthly average limit as long as it treated all the wastewater on the remaining days. The court held that, although Congress did not intend to impose a "one size fits all" technology standard:

[w]e do not agree....that "on-off" regulation constitutes a choice of treatment technologies. Since that sort of option does nothing to further the goal of exploring diverse treatment technologies, we are unpersuaded that the "on-off" decision is the sort of technological choice Congress intended to leave entirely to the discharger.

Id. at 123. Furthermore, the court reasoned,

[i]n the context of a statute which seeks the elimination of pollution, it is difficult to believe that Congress *intended* that dischargers be entitled to shut off their treatment facilities and "coast" simply because they were momentarily not in danger of violating effluent limitations. . . . In view if the Act's ambitious policies, we cannot say that the Act requires EPA to allow bypasses which are not provided for in the permit and which are unnecessary for maintenance purposes or to avoid harm to life or property. The statute's goals are hardly fostered by allowing dischargers to shut off their systems at will whenever they are in compliance with the requirements represented by the effluent limitations.

Id. at 123-24.

According to the reasoning of *NRDC v. EPA,* the bypassing of the technology-based treatment process, such as secondary treatment in the context of publically owned treatment works, is prohibited even if the final effluent meets NPDES permit limits because Congress intended that full treatment be employed in order to further the goals of the CWA.

In addition, the court recognized that the bypass rule performed another valuable function in the CWA regulatory scheme. By insisting on full treatment of wastestreams though the technology-based treatment process, EPA is using the bypass regulation "as a means of minimizing the discharge of indirectly regulated pollutants." It is not always feasible or technologically possible to set an effluent limit for every pollutant that the agency has reason to regulate. For instance, some pollutants cannot be detected simply or in a cost effective manner. Therefore, in these situations EPA frequently establish effluent limits for certain pollutants which serve as "'indicators' of the probable level of the unregulated pollutants because the model treatment technology removes both." *Id.* at 125. The court upheld this "practice of indirectly regulating pollutants without promulgation of specific effluent limits under section 304...[as] unsurprising."

In fact, in the preamble to the bypass regulation itself, EPA identifies the indirect regulation of other pollutants as one of the primary purposes of the bypass rule. The preamble to the publication of the final bypass rule states that "the restriction on bypasses where permit limits are

being met is necessary for several reasons. EPA's effluent limitations guidelines and standards-setting process are predicted [sic] upon the efficient operation and maintenance of removal systems. A number of effluent limitations guidelines and standards upon which NPDES permits are based do not contain specific limitations for all of the pollutants of concern. . . . The data available to EPA show that effective control of these pollutants can be obtained by controlling the discharge of [other] pollutants" specifically regulated in the NPDES permit. . . . If bypass of treatment equipment is allowed, there is no assurance that these [unregulated] pollutants will be controlled even though those specifically limited still meet permit limitations." *Id.* at 38,037.

The preamble continues:

> Similarly, permit writers who establish permit limitations. . .generally evaluate the relevant treatment system and often decide that limitations on all pollutants of concern are not necessary. This may be because. . it is determined that the limitations on only some of the pollutants will provide adequate control of remaining pollutants so long as treatment equipment is properly operated and maintained. This eliminates the need to impose numerous pollutant limitations and corresponding monitoring requirements which are burdensome and costly to the permittee . . . . If bypasses if treatment equipment are allowed, it is possible that all pollutants of concern will not receive the level of control anticipated in the establishment of the permit limitations.

Id.

As discussed above, EPA has identified pathogens as a pollutant of concern in municpal wastewater systems. Even though pathogens are not directly regulated through NPDES permit effluent limitations (because they are difficult to measure in a cost effective manner), the effective removal of pathogens is an important characteristic of the secondary treatment process. If it is permissible to route flows around secondary treatment units during wet weather events, then the re-routed flows would likely contain high levels of pathogens, which would present a significant threat to human health and the environment. Blending would significantly undermine one of the central rationales of the bypass rule.

[i] The secondary treatment regulation defines secondary treatment as attaining an average effluent for both BOD and suspended solids of 30 mg/l in a period of 30 consecutive days, and average effluent quality of 45 mg/l for the same pollutants in a period of 7 consecutive days, and 85 percent removal of the same pollutants in a period of 30 consecutive days. The effluent levels for pH must be maintained between 6.0 and 9.0 unless certain demonstrations are made.

[ii] The counter argument is that because the equivalent to secondary standard allows discharges of higher concentrations of BOD and suspended solids than required by 40 C.F.R. 133.102, then it makes sense for the equivalent to secondary standard to require something in addition to the regular secondary treatment standard to compensate for the higher BOD and suspended solids limits allowed in the equivalent to secondary rule.

Exhibit 88

Feb. 19, 2014 *ILOC* strategy document with transmittal email

From: Weiss, Kevin
To: Clovis, Debora
Subject: FW: Final Strategy for Responding to Iowa League
Date: Wednesday, February 26, 2014 1:43:00 PM
Attachments: Strategy for Responding to Iowa League 2 19 14 draft.docx

---

Debora:

Here is the strategy I mentioned that talks about the experts workshop . . . .

Kevin

From: Nagle, Deborah
Sent: Wednesday, February 19, 2014 1:56 PM
To: Weiss, Kevin; Pollins, Mark; Theis, Joseph; Denton, Loren; Vinch, James; Bosma, Connie; Witt, Richard
Subject: Re: Final Strategy for Responding to Iowa League

Good. Now let's put this w pager down and move on to the important effort of organizing a panel discussion on health impacts.

From: Weiss, Kevin
Sent: Wednesday, February 19, 2014 1:09:41 PM
To: Pollins, Mark; Theis, Joseph; Denton, Loren; Vinch, James; Nagle, Deborah; Bosma, Connie; Witt, Richard
Subject: Final Strategy for Responding to Iowa League

Here is the final version of the strategy – [redacted]

Strategy for Responding to Iowa League

Direction to take inside 8th Circuit: Permits for POTWs that blend must:

- Have a bypass provision that is at least as stringent as EPA's regulations at 40 CFR 122.41(m),
- Clearly identify the treatment train that will be used during dry and wet weather,
- Will not have internal permit limitations (unless end-of-pipe effluent limits are impracticable),
- Require monitoring to yield data that is representative of the monitored activity (see 122.48(b)) (permits should clearly specify end-of-pipe compliance monitoring during wet weather),
- Provide percent removal requirements according to the secondary treatment regulations, and
- Meet water quality standards.

Direction to take outside 8th Circuit: EPA would continue to apply its historic interpretation, that bypasses are prohibited by the CWA unless a NPDES permittee can meet all of the following criteria:

- The bypass was "unavoidable to prevent loss of life, personal injury or severe property damage";
- There were no "feasible alternatives" to the bypass, and
- The permittee must have submitted notice of the bypass to the director of the permitting authority.

On a case-by-case basis, a permittee will be considered to be implementing all feasible alternatives if it is implementing an adequate CMOM program, including an acceptable I/I program, is in compliance with pretreatment requirements, and for any bypass around secondary treatment:

- There is side stream treatment that meets an acceptable level of treatment (e.g., significant solids removal);
- The recombined flow meets effluent limits, utilizing representative monitoring during dry and wet weather; and,
- Flows to the secondary treatment units are maximized.

  Note: There was general agreement at the 2010 workshop on this approach to blending.

EPA would hold a workshop with public health and engineering experts to ask questions about the public health implications of blending:

- OECA and OW would agree on questions to ask the panel of experts and would send these questions to them ahead of time. The questions would cover effluent from full secondary treatment as well as blended effluent and other discharges during peak flow events (including bypasses that are not blended) with and without side stream treatment.
- The workshop would be facilitated by a professional facilitator.
- Purpose is not to seek consensus but to solicit individual views – so it is not a FACA.

Depending on the outcome of the public health workshop, we could:

- Implement the approach that was generally supported at the 2010 workshop (see discussion above);
- We could hold another workshop of representatives from states, municipalities, NGOs, WEF, etc to review the findings from the public health experts workshop and to review the outcome of the 2010 workshop and provide individual views on the steps that should be taken in wet weather events to protect the public from inadequately treated wastewater;
- We could maintain our historic interpretation without any change; or
- Adopt one of the previous draft blending/peak flow policies.

The next step depends on the recommendations. It could be a policy or a memo to the regions.

Communicating our Strategy: We could respond to the US Conference of Mayor, et al letter by summarizing this strategy or we could send a memo to the regions.

Exhibit 89

May 30, 2014 DOJ email to EPA concerning NEDACAP decision

From: Levine, MaryEllen
To: Witt, Richard; Neugeboren, Steven; Nagle, Deborah; Sawyers, Andrew; Bosma, Connie; Weiss, Kevin; Pollins, Mark; Denton, Loren; Theis, Joseph; Vinch, James
Cc: Schramm, Daniel
Subject: FW: Adverse Decision in NEDA/CAP v. EPA (DC Cir.) (Summit guidance case)
Date: Friday, May 30, 2014 11:34:07 AM
Attachments: ENV_DEFENSE-#683387-v1-admin_su_summit_guidance_decision.PDF

OWM/OECA - [redacted]

From: Lipshultz, Jon (ENRD) [mailto:Jon.Lipshultz@usdoj.gov]
Sent: Friday, May 30, 2014 10:40 AM
To: Levine, MaryEllen; Doyle, Andrew (ENRD)
Subject: FW: Adverse Decision in NEDA/CAP v. EPA (DC Cir.) (Summit guidance case)

[redacted]

From: Lipshultz, Jon (ENRD)
Sent: Friday, May 30, 2014 10:31 AM
To: 'Schmidt, Lorie'; Vaden, Christopher (ENRD); Grishaw, Letitia (ENRD); O'Donnell, Jessica (ENRD); Hostetler, Eric (ENRD); Silverman, Steve (ENRD); Embrey, Patricia
Cc: 'kim smaczniak'
Subject: Adverse Decision in NEDA/CAP v. EPA (DC Cir.) (Summit guidance case)

[redacted]

Jack Lipshultz, Assistant Chief
Environmental Defense Section
202-514-2191

Message

From: Cozad, David [Cozad.David@epa.gov]
Sent: 3/13/2017 7:21:17 PM
To: Schwab, Justin [schwab.justin@epa.gov]
Subject: Fwd: Updated Red/Green Case Charts
Attachments: DPP ACP / Ex. 5 / Ex. 7(e)

Sent from my iPhone

Begin forwarded message:

From: "Shiffman, Cari" <Shiffman.Cari@epa.gov>
Date: March 13, 2017 at 2:44:52 PM EDT
To: "LaBoda, Sarah" <LaBoda.Sarah@epa.gov>, "Gargas, Toni" <Gargas.Toni@epa.gov>
Cc: "Cozad, David" <Cozad.David@epa.gov>, "Mackey, Cyndy" <Mackey.Cyndy@epa.gov>, "DeLeon, Rafael" <Deleon.Rafael@epa.gov>, "Worthman, Gary" <Worthman.Gary@epa.gov>, "Shinkman, Susan" <Shinkman.Susan@epa.gov>, "Kelley, Rosemarie" <Kelley.Rosemarie@epa.gov>
Subject: Updated Red/Green Case Charts

Please find the most recent version of the Red/Green case charts.

Thanks,

Cari Shiffman, Special Assistant
U.S. Environmental Protection Agency
Office of Enforcement and Compliance Assurance
Office: (202) 564-2898 | Mobile: Personal Phone / Ex. 6

Message

From: Schmidt, Lorie [Schmidt.Lorie@epa.gov]
Sent: 3/17/2017 5:22:41 PM
To: Greenwalt, Sarah [greenwalt.sarah@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]; Minoli, Kevin [Minoli.Kevin@epa.gov]
CC: Dunham, Sarah [Dunham.Sarah@epa.gov]; Siciliano, CarolAnn [Siciliano.CarolAnn@epa.gov]; Zenick, Elliott [Zenick.Elliott@epa.gov]; Jordan, Scott [Jordan.Scott@epa.gov]
Subject: Attorney Client / Ex. 5
Attachments:

Sarah G, Justin and Kevin,

Ex. 5 - Deliberative Process/Attorney Client

Lorie

Lorie Schmidt
Associate General Counsel
Air and Radiation Law Office
Office of General Counsel
US Environmental Protection Agency
(202)564-1681

Message

From: Trudeau, Shaun [Trudeau.Shaun@epa.gov]
Sent: 2/17/2017 9:20:43 PM
To: Schwab, Justin [schwab.justin@epa.gov]
CC: Minoli, Kevin [Minoli.Kevin@epa.gov]; Packard, Elise [Packard.Elise@epa.gov]
Subject: FW: Transmittal of annual ECCR report for submittal to OMB via USIECR by Friday 2/24- For review by Elise/Kevin
Attachments: EPA ECCR Annual Report for FY 2016 2 17 17 .docx

Flag: Flag for follow up

Hi Justin,

Attached is the draft Environmental Collaboration and Conflict Resolution (ECCR) Annual Report from ADRLO that was referenced to during last week's short briefings. I understand that you may not have access to a computer and this is a lengthy document. I have a printed version that I will bring to your office.

Thank you,
Shaun

Shaun R. Trudeau
Attorney-Advisor
Operational Special Assistant to the Principal Deputy
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202.564.5127

From: Briskin, Jeanne
Sent: Friday, February 17, 2017 9:07 AM
To: Packard, Elise <Packard.Elise@epa.gov>; OGC Immediate Office Support <OGCFrontOfficeSupportStaff@epa.gov>
Cc: Strickler, Jacob <Strickler.Jacob@epa.gov>; Ross, Margaret <Ross.Margaret@epa.gov>; Fenton, Terry <fenton.terry@epa.gov>
Subject: Transmittal of annual ECCR report for submittal to OMB via USIECR by Friday 2/24- For review by Elise/Kevin

Dear Kevin and Elise,

Attached please find FY 2016's Environmental Collaboration and Conflict Resolution (ECCR) Annual Report. We will also upload an electronic copy into CTS and will drop off printed copies at your offices.

Jake Strickler was the major author of the report this year, having picked up the work from Will Hall. He contacted all EPA headquarters programs and regions to collect responsive information. Terry Fenton worked with our contractor to gather key statistics regarding this year's contractor supported ECCR services. Margaret Ross contributed to writing the report and compiled the data to produce the quantitative statistics cited in the report.

CPRC has the lead to compile this report on behalf of EPA, consistent with the 2012 OMB/CEQ memo on ECCR. The report follows the format defined by OMB, and is in a very similar format to past years' reports.

This report will be publicly available. As in past years, we expect to excerpt data and key write-ups from it for use in meetings with internal and external stakeholders. We've worked to get the best information that we could from all of the regions and program offices. You may be aware that this report has never had a high-profile and rarely gets much attention.

All agencies that complete the report submit it to the U.S. Institute on Environmental Conflict Resolution (USIECR). USIECR then compiles all of the information and sends OMB and CEQ a summary report comprised of reports from all participating agencies. Last year, Kevin suggested that it made sense for me, as the Agency's Dispute Resolution Specialist, to transmit the report to USIECR. Please let me know if this year a different approach for transmittal to USIECR should be used instead.

We welcome your review. Please let me know if you have any questions. Our plan is to email it to USIECR when it is due on February 24, so your feedback before COB Wednesday 2/22 would be appreciated.

Best,

Jeanne

Jeanne Briskin
Director, Conflict Prevention and Resolution Center
Dispute Resolution Specialist
Alternative Dispute Resolution Law Office
U.S. Environmental Protection Agency
"Making Agreement Easier" | (202) 564-4583
http://intranet.epa.gov/adr or http://www.epa.gov/adr

Message

From: Kwok, Rose [Kwok.Rose@epa.gov]
Sent: 3/15/2017 2:04:32 PM
To: Shapiro, Mike [Shapiro.Mike@epa.gov]; Peck, Gregory [Peck.Gregory@epa.gov]; Loop, Travis [Loop.Travis@epa.gov]; Best-Wong, Benita [Best-Wong.Benita@epa.gov]; Goodin, John [Goodin.John@epa.gov]; Downing, Donna [Downing.Donna@epa.gov]; Neugeboren, Steven [Neugeboren.Steven@epa.gov]; Wehling, Carrie [Wehling.Carrie@epa.gov]; Klasen, Matthew [Klasen.Matthew@epa.gov]; Wendelowski, Karyn [wendelowski.karyn@epa.gov]; Kaiser, Sven-Erik [Kaiser.Sven-Erik@epa.gov]; Christensen, Damaris [Christensen.Damaris@epa.gov]; Campbell, Ann [Campbell.Ann@epa.gov]; Schnare, David [schnare.david@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]; Bangerter, Layne [bangerter.layne@epa.gov]; Frithsen, Jeff [Frithsen.Jeff@epa.gov]; Nickerson, William [Nickerson.William@epa.gov]; McDavit, Michael W. [Mcdavit.Michael@epa.gov]; Stokely, Peter [Stokely.Peter@epa.gov]; Frazer, Brian [Frazer.Brian@epa.gov]; Dravis, Samantha [dravis.samantha@epa.gov]; Keating, Jim [Keating.Jim@epa.gov]; ian.p.osullivan@usace.army.mil; jennifer.a.moyer@usace.army.mil; Greenwalt, Sarah [greenwalt.sarah@epa.gov]; David.F.Dale@usace.army.mil
CC: McGartland, Al [McGartland.Al@epa.gov]; FertikEdgerton, Rachel [FertikEdgerton.Rachel@epa.gov]; Borum, Denis [Borum.Denis@epa.gov]; Orvin, Chris [Orvin.Chris@epa.gov]; Eisenberg, Mindy [Eisenberg.Mindy@epa.gov]; Pollins, Mark [Pollins.Mark@epa.gov]; Kupchan, Simma [Kupchan.Simma@epa.gov]; Cherry, Andrew [Cherry.Andrew@epa.gov]; Lousberg, Macara [Lousberg.Macara@epa.gov]; Theis, Joseph [Theis.Joseph@epa.gov]; Bahk, Benjamin [Bahk.Benjamin@epa.gov]; Lamont, Douglas W SES (US) [douglas.w.lamont2.civ@mail.mil]; Evalenko, Sandy [Evalenko.Sandy@epa.gov]; Schmauder, Craig R SES (US) [craig.r.schmauder.civ@mail.mil]; Barger, Cindy S CIV USARMY HQDA ASA CW (US) [cindy.s.barger.civ@mail.mil]
Subject: RE: Clean Water Rule Call in Conference Line/Code / Ex. 6
Attachments: WOTUS2 briefing paper 3.14.17 - clean.docx; Rule Timeline short v4.xlsx; WOTUS2_briefingTableShort - clean.docx

For those on the phone, here are the materials we will discuss today.

-----Original Appointment-----
From: Shapiro, Mike
Sent: Tuesday, January 17, 2017 7:47 AM
To: Shapiro, Mike; Peck, Gregory; Loop, Travis; Best-Wong, Benita; Goodin, John; Downing, Donna; Kwok, Rose; Neugeboren, Steven; Wehling, Carrie; Klasen, Matthew; Wendelowski, Karyn; Kaiser, Sven-Erik; Christensen, Damaris; Campbell, Ann; Schnare, David; Schwab, Justin; Bangerter, Layne; Frithsen, Jeff; Nickerson, William; McDavit, Michael W.; Stokely, Peter; Frazer, Brian; Dravis, Samantha; Keating, Jim; ian.p.osullivan@usace.army.mil; jennifer.a.moyer@usace.army.mil; Greenwalt, Sarah; David.F.Dale@usace.army.mil
Cc: McGartland, Al; FertikEdgerton, Rachel; Borum, Denis; Orvin, Chris; Eisenberg, Mindy; Pollins, Mark; Kupchan, Simma; Cherry, Andrew; Lousberg, Macara; Theis, Joseph; Bahk, Benjamin; Lamont, Douglas W SES (US); Evalenko, Sandy; Schmauder, Craig R SES (US); Barger, Cindy S CIV USARMY HQDA ASA CW (US)
Subject: Clean Water Rule Call in Conference Line/Code / Ex. 6
When: Wednesday, March 15, 2017 10:00 AM-10:45 AM (UTC-05:00) Eastern Time (US & Canada).
Where: 3233 WJCE

Message

From: Kime, Robin [Kime.Robin@epa.gov]
Sent: 4/25/2017 3:19:54 PM
To: Schwab, Justin [schwab.justin@epa.gov]
Subject: RE: 11:30 -Meeting with the Northwest Public Power Association

Appreciated!

From: Schwab, Justin
Sent: Tuesday, April 25, 2017 11:20 AM
To: Kime, Robin <Kime.Robin@epa.gov>
Cc: Greenwalt, Sarah <greenwalt.sarah@epa.gov>
Subject: Re: 11:30 -Meeting with the Northwest Public Power Association

Yes I will try to be there

Sent from my iPhone

On Apr 25, 2017, at 11:18 AM, Kime, Robin <Kime.Robin@epa.gov> wrote:

> Hi,
> Hope you are well. Samantha and Mandy are tied up- is there any chance you are able to join Brittany for this listening session?
>
> -----Original Appointment-----
> **From:** Kime, Robin **On Behalf Of** Dravis, Samantha
> **Sent:** Thursday, April 20, 2017 8:24 AM
> **To:** Bolen, Brittany; Greenwalt, Sarah; Gunasekara, Mandy; theresapughconsulting@gmail.com; elizabeth@meguirewhitney.com; Kime, Robin; Schwab, Justin
> **Cc:** Germann, Sandy; Irving, Verna; Steve Taylor
> **Subject:** Meeting with the Northwest Public Power Association
> **When:** Tuesday, April 25, 2017 11:30 AM-12:00 PM (UTC-05:00) Eastern Time (US & Canada).
> **Where:** DCRoomARN3500/OPEI
>
> Directions: Please use the **William Jefferson Clinton North Entrance located on your right as you exit the Federal Triangle Metro Station**. Please arrive 20 minutes prior to the meeting with photo IDs to clear Security.
>
> For an escort from Security to the meeting call (202) 564-4332; for all other matters call Robin Kime (202)564-6587.
>
> Attendees:
> Anita Decker, Executive Director NWPPA
> Doug Hardy, Central Montana Electric Power Cooperative, MT
> Dave Kelsey, Yellowstone Valley Electric Cooperative, MT
> Norman Tebay, Vigilante Electric Cooperative, MT
> Clay Koplin, Mayor of Cordova, AK
> Brad Janorschke, Homer Electric Association, AK
> Molly Simpson, Douglas County Public Utility District, WA

Steve Taylor, Mason County Public Utility District #1, WA

Contact:
Theresa Pugh Consulting, LLC
-a woman-owned small business
703-507-6843 Office
2313 North Tracy Street
Alexandria, Virginia 22311
www.theresapughconsulting.com

Request: I am writing today on behalf of Northwest Public Power Association (NWPPA)'s Executive Director Anita Decker. Anita will be in Washington D, C. from Washington state on April 25-26, 2017. She would like to meet with Administrator Pruitt, you or other political appointees who are assigned to work on electric utility issues of interest to NWPPA.

NWPPA is an electric utility association in the Pacific Northwest representing 151 hydroelectric, nuclear power and natural gas electric utilities (municipal and electric coops) affected by EPA regulations including some that are going to be revisited under recent Executive Orders. Their membership involves many electric utilities (municipal and coop) that would be affected by EPA regulations across several states in the Northwest—not just those in Washington state. NWPPA's member utilities serve 20 million customers making it one of the largest electric utility organizations in the western part of the United States.

They are interested in the following:

- Waters of the US – next steps (realizing it has been addressed in the Executive Order)
- Clean Power Plan review and replacement (they are aware of the Executive Order action last week)
- General EPA priorities related to the electric power sector

A link to the NWPPA organization is https://www.nwppa.org/about-nwppa/ and board information at https://www.nwppa.org/about-nwppa/nwppa-board-of-trustees/

Message

From: Green, Noelle [Green.Noelle@epa.gov]
Sent: 4/17/2017 6:16:31 PM
To: OGC RCs and DRCs [OGC_RCs_and_DRCs@epa.gov]; OGC ALL USERS [OGC_ALL_USERS@epa.gov]; OARM EAB EVERYONE [OARM_EAB_EVERYONE@epa.gov]; NILWG EPA Only [NILWG_EPA_Only@epa.gov]; OECA OCE Regional Managers [OECA-OCE-Regional-Managers@epa.gov]
CC: Sheehan, Charles [Sheehan.Charles@epa.gov]; Kowalski, Ed [Kowalski.Edward@epa.gov]; Bigioni, Neil [bigioni.neil@epa.gov]; Badalamente, Mark [Badalamente.Mark@epa.gov]; Alvarado, Tina [Alvarado.Tina@epa.gov]; Schaedle, Candi [Schaedle.Candi@epa.gov]; Mattick, Richard [Mattick.Richard@epa.gov]; Ergener, Deniz [Ergener.Deniz@epa.gov]; Figur, Charles [Figur.Charles@epa.gov]; Hessert, Aimee [Hessert.Aimee@epa.gov]; Perkins, Erin [Perkins.Erin@epa.gov]; Giles-AA, Cynthia [Giles-AA.Cynthia@epa.gov]; Starfield, Lawrence [Starfield.Lawrence@epa.gov]; Fisher, Mike [Fisher.Mike@epa.gov]; Tozzi, Lauren [Tozzi.Lauren@epa.gov]; Hill, Randy [Hill.Randy@epa.gov]; Rivera, Nina [Rivera.Nina@epa.gov]; Root, Kathleen [Root.Kathleen@epa.gov]; Crum, Lynda [Crum.Lynda@epa.gov]; Nowell, Valerie [Nowell.Valerie@epa.gov]; Powell, Sheri [Powell.Sheri@epa.gov]; Day, Christopher [Day.Christopher@epa.gov]; Kulschinsky, Edward [Kulschinsky.Edward@epa.gov]; Myers, Lucretia [MYERS.LUCRETIA@EPA.GOV]; Gardner, Allison [Gardner.Allison@epa.gov]
Subject: March 2017 CCILO Monthly Report
Attachments: Vol 03 March 2017 CCILO Monthly Report.pdf

Flag: Flag for follow up

Attached is the March 2017 CCILO Monthly Report.

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ADMINISTRATIVE LAW DEVELOPMENTS

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- D. MASS. ISSUES DECISION PRESERVING EPA'S DISCRETION IN DETERMINING WHETHER UNREGULATED STORMWATER DISCHARGES REQUIRE NPDES PERMITS

- *HUNTON & WILLIAMS V. EPA*

INTERNATIONAL ENVIRONMENTAL LAW DEVELOPMENTS

- OGC CONTRIBUTES TO STATE DEPARTMENT EFFORTS TO PROMOTE THE RULE OF LAW IN THE ENVIRONMENT SECTOR

- OGC DISCUSSES ENVIRONMENTAL LAW WITH VISITING JUDGES FROM CHINA

Thank you to all those who contributed articles and photos to this month's issue: Noelle Green, Sylvia Horwitz, Lynn Kelly, Matt Schwarz, Don Sadowsky, and Steve Wolfson.

This and prior issues of the CCILO Monthly Report can be found on the Administrative Law Resources SharePoint site as well as the CCILO Intranet site. If you or your staff would like access to the Administrative Law Resources SharePoint site, please send a request to Andy Simons.

If you have an article or photos that you would like included in the next issue of the CCILO Monthly Report, feel free to send those my way! The deadline for submissions for the March 2017 issue is **COB Friday, May 5**.

Happy Reading!

Noelle Green
Cross-Cutting Issues Law Office
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, Northwest
Washington, DC 20460
(202) 564-1236
green.noelle@epa.gov

Matt Schwarz

CCILO REPORT

March 2017

Editor: Noelle Green

INSIDE THIS ISSUE

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Don Sadowsky

Hyperlinks -- All entries in the index on the left are hyperlinked to articles within this document. Hyperlinks to cases and other relevant documents outside of this document are indicated by blue lettering.

Administrative Law Developments

D.C. District Court Reaffirms That FACA Claims Not Pertaining to FACA's Document Disclosure Requirements Are Mooted Upon Termination of the Committee

On March 9, the D.C. District Court granted in part and denied in part the USDA's motion to dismiss claims brought by the Center for Biological Diversity (CBD) that the USDA violated the Federal Advisory Committee Act (FACA) in establishing an advisory committee tasked with developing a conservation strategy for the California spotted owl (the "Strategy Team" or "Team"). Specifically, the district court held that all of the CBD's FACA claims were moot, except those alleging that the Strategy Team failed to make certain documents available to the public under FACA § 10(b). *Ctr. for Biological Diversity v. Tidwell*, No. 15-2176 (D.D.C. Mar. 9, 2017).

Background

Pursuant to a 2014 settlement agreement, the Forest Service agreed to create a strategy for conserving the California spotted owl, but retained the discretion to select experts to inform that strategy and to determine the scope of the strategy. In September 2015, the Forest Service announced via "initiation letter" that it was convening "a team of experienced managers and scientific advisors" to develop the conservation strategy. At the time the Strategy Team was formed, it consisted of 17 members, 4 of which were non-federal scientists. The Strategy Team did not include any of the experts that the CBD had recommended in a July 2015 letter to the Forest Service. Slip op. at 3.

The CBD sent the Forest Service another letter after the Strategy Team was convened, requesting that the Forest Service add more experts to ensure that the Team was fairly balanced and warning that the team as proposed was "not conducive to spotted owl conservation" and was violating FACA. The CBD sent another similar letter in November 2015. and, after no response, filed its complaint on December 15. *Id.* at 4.

Three days after the CBD filed its complaint, but before the complaint was served, the Forest Service issued a "revised initiation letter," in which it announced that the 4 non-federal scientists were no longer serving on the Strategy Team. This meant that the Team was now wholly comprised of federal government employees. The Forest Service made this change out of an abundance of caution in response to the FACA concerns that the CBD raised in its letters to the Forest Service. The Forest Service represented that it would solicit the non-federal scientists' input on an individual basis, but that they would not be included in any group emails, conference calls, or working group meetings that the Forest Service manages or controls. *Id.* at 4.

The Team met once for a two-day period from November 12-13, 2015, and the USDA disclosed various documents associated with that meeting on May 27, 2016. *Id.*

The Court's Analysis

The CBD alleged that: (1) the USDA convened the advisory committee in the interest of obtaining group advice and indeed used that advice, but failed to fairly balance the committee, open its meetings to the public, or make the committee's documents available to the public, thereby violating FACA; and (2) the USDA engaged in a pattern and practice of violating FACA and therefore acted arbitrarily, capriciously, and contrary to law in violation of the Administrative Procedure Act (APA). Because the CBD styled its claims as arising under FACA and the APA, the court preliminarily noted that FACA does not provide a private right of action and held that the CBD's claims must be dismissed to the extent that they are founded on the existence of one. *Id.* at 7.

The CBD's Non-Document FACA Claims

The court then turned to the CBD's claims that the USDA's pattern and practice of violating FACA was arbitrary, capricious, and contrary to law and therefore violated the APA. Reserving its discussion of the CBD's claims that the USDA failed to make all Strategy Team documents available to the public as required by FACA § 10(b), the court first addressed the CBD's allegations that the Strategy Team was not fairly balanced and its meetings were not open to the public (the CBD's "non-document claims") and therefore the USDA violated FACA, and the APA by extension. The court assumed that the Strategy Team was an advisory committee in September 2015, but observed that as of December 2015, the date of the instant lawsuit, the Team was comprised exclusively of federal government employees, meaning that the Team was not subject to FACA's requirements. Therefore, the court concluded, the CBD's non-document claims were moot. *Id.* at 10-13.

The court next addressed the CBD's argument that despite removing the non-federal scientists from the Strategy Team, the USDA nevertheless planned to utilize them in a manner that would render them *de facto* members of the Team. The court noted that the USDA voluntarily changed the Team's membership and therefore had to demonstrate that it is absolutely clear that the Strategy Team would not again fall out of compliance with FACA in order to moot the CBD's non-document claims, and ultimately held that the USDA had met that burden. First, the court observed that the USDA submitted declarations under penalty of perjury that it reconfigured the Team's membership in order to ensure that it complied with FACA. The court also opined that simply consulting the non-federal scientists on an *ad hoc*, individual basis would not necessarily transform the Strategy Team into an advisory committee, given that the non-federal scientists were not going to be included in Strategy Team discussions or in discussions of working groups that the Forest Service manages or controls. In any event, the court speculated that even if the Strategy Team were to become an advisory committee, it may choose to hold open public meetings and fairly balance the Team at that point. *Id.* at 13-17.

The court also rejected the CBD's claim that the USDA was engaging in a pattern or practice of violating FACA, which could potentially save the CBD's non-document claim from mootness, noting that CBD did not proffer any plausible facts to support that claim. Instead, the only violation that the court could identify from the complaint stemmed from the creation of the Strategy Team in September 2015. *Id.* at 17-18.

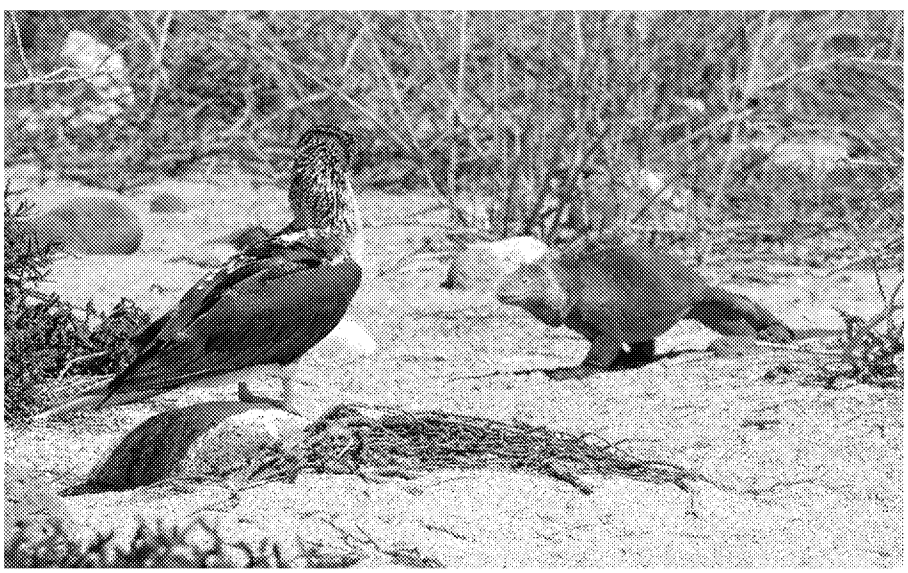
The CBD's Section 10(b) Document Claims

Under FACA § 10(b), an advisory committee is required to make available to the public all documents that are provided to or prepared by or for the committee, unless a FOIA exemption applies. The USDA contended that all covered materials associated with the November 2015 Strategy Team meeting were disclosed, but the CBD identified some correspondence and the first three chapters of a memorandum that Team members had drafted that were not disclosed. The USDA countered that the draft chapters need not be disclosed because they were the preliminary work of subgroups. However, the court rejected that contention, pointing to the plain language of FACA providing that materials "prepared for" a committee must be publically disclosed and to the USDA's own declarations that the chapters were prepared specifically for the Team to use. The court noted that the decisions the USDA cited in support of its position were inapposite, because they stood for the proposition that materials prepared by staff of an advisory committee, as opposed to members of the advisory committee, may not be subject to § 10(b). Therefore, the court concluded that USDA had not demonstrated that all the requisite § 10(b) materials had been disclosed. *Id.* at 20-22.

The court further observed that because §10(b) is contingent on the existence of the documents, and not the existence of the committee, a claim for document disclosure survives the termination of an advisory committee. Therefore, despite noting earlier that the Strategy Team ceased to exist as an advisory committee because at the time of the lawsuit it was comprised solely of federal government employees, the court held that the CBD's claim that the USDA violated § 10(b) by failing to disclose all requisite Strategy Team documents was not moot. *Id.* at 22.

The court also held that the CBD pleaded a viable claim under the APA for violation of § 10(b) because the USDA established the Strategy Team which was tasked with advising the Forest Service on conserving the California spotted owl; the Team at the time the documents were generated was not comprised exclusively of non-federal members; and the Team had failed to disclose all documents associated with its actions despite repeated requests for them. *Id.*

OGC Contact: Noelle Green, CCILO (202) 564-1236



Matt Schwarz

D. Mass. Issues Decision Preserving EPA's Discretion in Determining Whether Unregulated Stormwater Discharges Require NPDES Permits

On March 24, 2017, the District Court for the District of Massachusetts issued a decision preserving EPA's discretion to determine whether unregulated stormwater discharges require NPDES permits. *Conservation Law Foundation et al. v. U.S. Environmental Protection Agency, et al.*, No. 16-10397 (D. Mass. Mar. 24, 2017).

The Conservation Law Foundation (CLF) and the Charles River Watershed Association (CRWA) filed a citizen's suit alleging that EPA was required to notify dischargers of unregulated stormwater to the Charles River to apply for NPDES permits for their stormwater discharges, citing 40 C.F.R. §124.52. CLF and CWRA claimed that because EPA approved total maximum daily loads (TMDLs) that identified stormwater as sources of the pollutants addressed in the TMDLs, EPA "determined" unregulated stormwater sources to "cause or contribute to a violation of water quality standards" and therefore had exercised "residual designation authority" (RDA) under 40 C.F.R. § 122.26(a)(9)(i)(D). EPA filed a motion to dismiss. First, EPA argued that TMDLs are not exercises of RDA on three grounds: (1) exercise of RDA requires an express determination to require an NPDES permit for the designated discharge, (2) EPA's approval of a TMDL cannot constitute a designation, because the TMDLs are informational tools that are not independently enforceable; and (3) nothing in Charles River TMDLs constituted a designation of any particular discharges or category of discharges. EPA also argued that 40 C.F.R. §124.52, regarding notification to the operator of a stormwater discharge does not create a "nondiscretionary duty" subject to citizen suit enforcement under section 505 of the Clean Water Act.

The District Court's Analysis:

The court noted that "[t]he jurisdictional question in this case turns on the contextual meaning of the word 'determines' as it appears in the RDA." Slip op. at 8. The court summarized CLF's argument: that "the TMDLs, with their underlying wasteload allocations and targeted reductions in contaminants, amount to a determination that unpermitted stormwater discharges are contributing to violations of water quality standards. It follows . . . that the EPA must carry out its duty to 'notify the discharger in writing' of its determination and 'send [a permit] application form with the notice.' 40 C.F.R. § 124.52(b)." Slip op. at 9. The court then summarized EPA's argument that while "a TMDL could provide a basis on which the EPA could exercise its RDA, that exercise . . . requires an 'express determination' resulting from an 'affirmative exercise[]' of the RDA that is independent of the TMDL process." Slip op. at 9-10.

The central question the court addressed was whether EPA's interpretation of its regulation contradicts the plain text of the regulation. Citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997), the court stated that unless an agency's interpretation is "plainly erroneous" or "inconsistent with regulation," the agency interpretation is generally "controlling." The court found that "[n]othing in the plain text of the CWA or regulations . . . precludes the EPA's reading." The court was ultimately persuaded by the fact that RDA determinations may be based on wasteload allocations in TMDLs under 40 C.F.R. § 122.26(a)(9)(i)(C). The language of paragraph (C) "clearly implies that the RDA

will be exercised separately from the TMDL process; it would be an oddity, if not an outright oxymoron, to say that a determination is 'based on' a TMDL's wasteload allocations if the TMDL itself constitutes the determination." Slip op. at 11-12. Thus, the Court found that EPA's reading of its regulations was reasonable, and therefore entitled to deference. The court did not reach the issue as to whether 40 C.F.R. §124.52 creates a nondiscretionary duty.

Second, the court noted that EPA's reading "comports with" the way the Act treats stormwater discharges – *i.e.*, only requiring NPDES permits for certain stormwater discharges – and with the role of TMDLs under the Act. ("[A]lthough the purpose of a TMDL is to evaluate sources of water pollution, there is nothing leading inexorably to the conclusion that the analysis underlying a TMDL is itself a determination under the RDA.").

After briefing and oral argument had concluded, CLF and CWA moved to amend the complaint to add a claim that EPA had failed to perform a nondiscretionary duty to respond to its 2013 petition to EPA for designation of stormwater discharges in Region 1 states. Under 40 C.F.R. § 122.26(f)(2), "[a]ny person may petition" the permitting authority to exercise residual designation authority to require an NPDES permit for a stormwater discharge "which contributes to a violation of a water quality standard or is a significant contributory of pollutants to waters of the United States." Under § 122.26(f)(5), EPA "shall make a final determination on any petition received under this section within 90 days after receiving the petition." EPA argued that the motion should be denied because plaintiffs had not submitted notice of its intent to bring an action under CWA § 505(a)(2) against EPA with respect to the 2013 petition, as required by section 505(b)(2). The court agreed and denied the motion to amend.

What this decision means:

This decision is important because it preserves EPA's discretion to regulate – or not – currently unregulated stormwater discharges. Because states that are authorized to administer the NPDES program could also face similar lawsuits, the reasoning in this case preserves states' RDA discretion as well. The decision also affirms the role of TMDLs. An appeal to the First Circuit is expected. The court ended on a cautionary note to EPA, noting that "the citizen petition procedure remains open" to CLF and CWRA. While denying the motion to amend the complaint for failure to timely respond to the 2013 petition, the court stated that "there is less justification for delay by the EPA in this instance, where the TMDLs already contain highly detailed information regarding stormwater discharges, their severe impact on the Charles, and the reductions required from major land use categories to achieve water quality standards. [footnote omitted]. Slip op. at 22.

Next steps:

CLF and CRWA have until May 23 to file an appeal in the U.S. Court of Appeals for the First Circuit. CLF had filed a similar complaint in the District of Rhode Island, and the court granted EPA's motion to dismiss that complaint on December 13, 2016. CLF appealed the RI decision to the First Circuit on February 13, 2017 (*Conservation Law Foundation v. Pruitt*, No. 17-1166).

EPA Contacts: Sylvia Horwitz, WLO (202) 564-5511; Michael Curley, Region 1 (617) 918-1623

Hunton & Williams v. EPA

Hunton & Williams v. EPA is a Freedom of Information Act ("FOIA") lawsuit pertaining to the EPA Region 9 and Office of Water response to a FOIA request seeking certain records relating to an Approved Jurisdictional Determination (AJD) for the DMB Redwood City Saltworks site. Plaintiff filed three individual FOIA suits against three agencies (EPA, the Corps of Engineers, and the Department of the Army) for similar or identical requests. Those lawsuits were consolidated in the above-referenced matter. *Hunton & Williams v. EPA*, No. 1:15-cv-01203 (D.D.C. Mar. 31, 2017).

Some of the key documents at issue in the case are: (1) a draft AJD that was provided to EPA by the Army Corps in November 2014, but which was never issued, (2) documents relating to EPA's decision to exercise its special case authority under the Clean Water Act, and (3) documents relating to the Army's legal and policy review of the matter.

EPA moved for summary judgment in February of 2016, and briefing was completed on EPA's motion in August of 2016.

Key Aspects of the Court's Decision

On March 31, 2017, Judge Contreras partially granted and partially denied EPA's Motion for Summary Judgment. The court upheld EPA's search for documents and the searches conducted by the other two agencies. Although the issue of personal email use was not at issue for EPA, it was an issue for the Corps. The Court provided helpful language regarding the standard for searching personal email accounts in response to FOIA requests:

> Both agencies [the Corps and the Department of the Army] have thus performed searches when specific facts indicated that a particular employee had used a personal email account for agency business. Hunton identifies no other particular employees whose accounts it asserts should be searched, or other specific facts in the record indicating that personal email accounts were used. Hunton seeks to require the agencies to search other personal email accounts—presumably those for all employees identified as having been involved with the Saltworks issues—even in the absence of any indication that any such personal accounts were used for agency business. This goes too far. Unlike the requestor in *Competitive Enterprise Institute*, Hunton is unable to identify any "countervailing evidence" of personal email use. *Cf.* 827 F.3d at 146. Indeed, Hunton states merely that that "it is *plausible* that non-formal channels may have been utilized here." Pl.'s MPSJ Corps at 20 (emphasis added). Here, as in Wright, the Court finds that Hunton's purely speculative claims are insufficient to overcome the presumption that the agency's search was adequate.

The Court denied all three agencies' motions for summary judgment on the basis that the supporting *Vaughn* indices were too vague.

As for EPA, the Court indicated that its *Vaughn* index "does not sufficiently describe the particular decisionmaking process or the function of the records in that process." To support an assertion of the deliberative process privilege on a document-by-document basis the Court stated that:

> [A]n agency must address the following areas: '(1) the nature of the specific deliberative process involved, (2) the function and significance of the document in that process, and (3) the nature of the decisionmaking authority vested in the document's author and recipient'.... In addition, other courts in this jurisdiction have held, and the D.C. Circuit has suggested, that 'the agency must make the additional showing that disclosure would cause injury to the decisionmaking process.'

EPA argued that the filed *Vaughn* index must be read in conjunction with the detailed supporting declaration, but the Court found that while EPA's descriptions in the declaration "come closer" to describing the specific deliberative process at issue, the descriptions were not matched with specific records and were thus insufficient.

Next Steps:

The Court ordered the parties to propose jointly a method for a representative sample of documents for *in camera* review by May 1, 2017. The Court also invited the parties to provide supplemental briefing. EPA will revise the *Vaughn* index in accordance with the Court's instruction and will ensure that the revised index is available to the Court at the time of *in camera* review.

OGC Contact: Lynn Kelly, GLO (202) 564-3266

Noelle Green

International Environmental Law Developments

OGC Contributes to State Department Efforts to Promote the Rule of Law in the Environment Sector

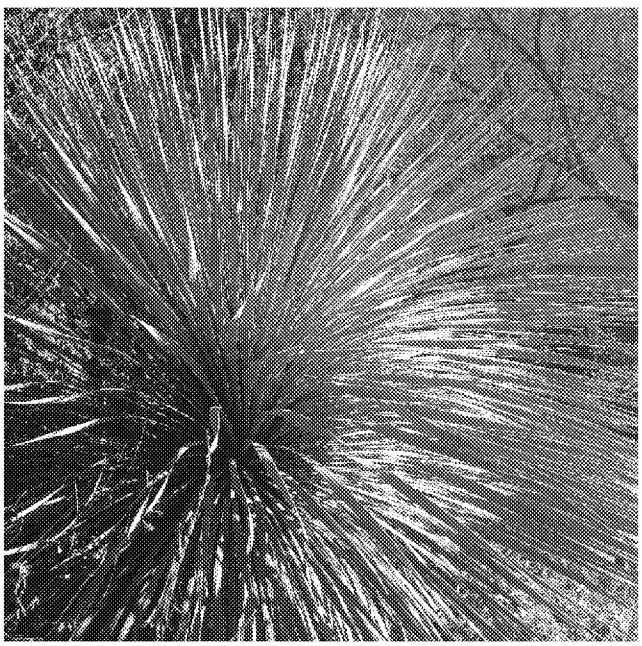
EPA designed a panel discussion on Youth and the Environment as part of a seminar on Youth and the Rule of Law in Africa sponsored by the U.S. State Department. The March 7 panel discussion included environmental law and public health experts from Kenya, Ghana, Nigeria, and Uganda discussing how corruption and other environmental governance challenges contribute to environmental impacts affecting youth in Africa, including adverse impacts on health and economic development. EPA was not able to attend the symposium, which took place in Capetown, South Africa. However, it is part of an ongoing series of activities to promote training, research, and coordination in promoting the Rule of Law. *See* http://justrac.org/. The Department of State and their implementing partner the University of South Carolina's Rule of Law Collaborative, are increasingly seeking EPA input on incorporating environmental Rule of Law issues into their programming.

OGC Contact: Steve Wolfson, CCILO (202) 564-5411

OGC Discusses Environmental Law with Visiting Judges from China

In March, OGC discussed environmental law with a group of five judges visiting from China. After 2 months of study and research on environmental law at Vermont Law School under the aegis of the U.S.-Asia Environmental Law Partnership, the judges visited Washington, D.C. for a series of meetings with environmental law practitioners, including OGC as well as Office of Enforcement and Compliance Assurance (OECA) and the Environmental Appeals Board.

OGC Contact: Steve Wolfson, CCILO (202) 564-5411



Don Sadowsky

Message

From: David Fotouhi [Fotouhi.David@epamail.epa.gov]
Sent: 4/12/2017 7:35:21 PM
To: Minoli, Kevin [Minoli.Kevin@epa.gov]
CC: Prabhu, Aditi [Prabhu.Aditi@epa.gov]; Veney, Carla [Veney.Carla@epa.gov]; Jones, Gail-R [Jones.Gail-R@epa.gov]; Justin Schwab [Schwab.Justin@epamail.epa.gov]; Patrick, Monique [Patrick.Monique@epa.gov]; Trudeau, Shaun [Trudeau.Shaun@epa.gov]
Subject: DPP ACP / Ex. 5

DPP ACP / Ex. 5

Please click the link below to see the routing and transmittal record for this package. After reviewing the package please:

* go to the Routed To section;
* route 3 line; and
* select the Add Comments button, or the Make Decision button.

LINK -> Notes://DCOGCLN1/FrontOff/OGCCTS.nsf/0/98F33BDB4CBFB98B852580FF0058F7DC

Message

From: Chang, Patrick [Chang.Patrick@epa.gov]
Sent: 3/29/2017 7:08:05 PM
To: Fotouhi, David [fotouhi.david@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]
CC: Michaud, John [Michaud.John@epa.gov]; Andrews, Mary [Andrews.Mary@epa.gov]
Subject: Briefs in DSW litigation
Attachments: 1 A SIERRA CLUB ERRATA.pdf; 1 SIERRA CLUB BRIEF.pdf; 2 INDUSTRY BRIEF.pdf; 4 EPA BRIEF.pdf; 5 INDUSTRY INTERVENOR BRIEF.pdf; 6 A ENVIRO INTERVENOR ERRATA.pdf; 6 ENVIRO INTERVENOR BRIEF.pdf; 7 SIERRA CLUB REPLY BRIEF.pdf; 8 INDUSTRY REPLY BRIEF.pdf; Supp brf order 03.21.2017.pdf; DSW final rule 2015.pdf

As we discussed during our 1 PM meeting, attached are the briefs in the litigation on the 2015 DSW rule. Contrary to what I said during that meeting, enviros participated as both petitioners and intervenors. I've also attached a copy of the court's order and the FR notice.

The DOJ staff atty is meeting with his manager this afternoon to talk about how to proceed. We'll update you when we hear how that goes.

Patrick S. Chang
US EPA, Office of General Counsel, Solid Waste & Emergency Response Law Office
202/564-1528 (office); 202/564-5416 (fax)

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PETROLEUM INSTITUTE, *Petitioner*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	Case No. 09-1038 (and consolidated cases)

ERRATA TO THE PROOF BRIEFS OF ENVIRONMENTAL PETITIONERS

Petitioners California Communities Against Toxics, Clean Air Council, Coalition for a Safe Environment, Louisiana Environmental Action Network, and Sierra Club (collectively, "Environmental Petitioners") hereby notify the Court that, in addition to inserting citations to the Joint Appendix, correcting typographical errors, and updating their Statutory and Regulatory Addenda, Table of Authorities, and Certificate as to Parties, Rulings, and Related Cases, they have included the following non-typographical corrections in their final briefs:

Opening Brief

p.8, corrected short-citation:

Original: ("Damage Correlation Analysis")

Corrected: ("Correlation Study")

p.8, corrected short-citation:

Original: Damage Correlation Analysis

Corrected: Correlation Study

p.15, corrected text:

Original: is a minimum requirement compared to

Corrected: is a minimal requirement compared to

p.32, corrected text:

Original: in EPA's new transfer exclusion.

Corrected: in EPA's new transfer-based exclusion.

p.42, corrected citation:

Original: 76 Fed. Reg. at 44,136/1

Corrected: 76 Fed. Reg. at 44,104/1

p.43, corrected citation:

Original: 40 C.F.R. § 260.10

Corrected: 40 C.F.R. § 260.10 (80 Fed. Reg. at 1771/2, JA0342)

p.46, corrected quotation:

Original: in terms of evaluating specific gaps,"

Corrected: in terms of evaluating specific regulatory gaps,"

p.48, corrected citation:

Original: 76 Fed. Reg. at 14,440/1-3

Corrected: 76 Fed. Reg. at 44,140/1-3

p.49, corrected text:

Original: to promulgate the notification,

Corrected: to promulgate the notification requirement,

p.51, corrected citation:

Original: 80 Fed. Reg. at 1766/1

Corrected: 76 Fed. Reg. at 44,140/1

p.52, corrected text:

Original: require containment changes makes it

Corrected: require containment makes it

Reply Brief

p.4, corrected quotation:

Original: "'discarded' within ordinary meaning of the term"

Corrected: "'discarded' within the ordinary meaning of the term"

p.4 n.1, corrected text:

Original: a non-precedential holding

Corrected: an unprecedented holding

p.5, corrected text:

Original: To the contrary, *Solvay*

Corrected: Rather, *Solvay*

p.5, corrected quotation:

Original: but not as applied to others.'"

Corrected: but not as applied to others.'"

p.6, corrected text:

Original: EPA itself has never

Corrected: EPA has never

p.7, corrected text:

Original: It was not supported by any statutory interpretation, and rested on claims that were either unsupported by the record or conflicted with the record.

Corrected: It is not supported by any statutory interpretation, and rests on claims that are either unsupported by the record or conflict with the record.

p.14, corrected text:

Original: EPA goes on to explain

Corrected: EPA went on to explain

p.15, corrected citation:

Original: Sierra Club *et al.* 2009 Comments at 5-7

Corrected: Sierra Club *et al.* 2009 Comments at 6-7

pp.15-16, relocated footnote 6 from p.16 to p.15:

Original: *See also NRDC v. EPA*, 824 F.2d 1146, 1150-51 (D.C. Cir. 1987) (*en banc*).[6]

Corrected: as hazardous waste under RCRA Subtitle C.[6]

p.19, corrected citation:

Original: *Nat'l Envtl. Dev. Ass'n's Clean Air Proj. v. EPA*, 752 F.3d 999, 1006 (D.C. Cir. 2014) (same).

Corrected: *Nat'l Envtl. Dev. Ass'n's Clean Air Proj. v. EPA*, 752 F.3d 999, 1006 (D.C. Cir. 2014) (same); Br. at 45.

p.15, corrected text:

Original: was a deferral.

Corrected: is a deferral.

p.21, corrected citation:

Original: DEC018-19

Corrected: DEC018-20

p.22, corrected citation:

Original: ("Correlation Study"), JA____).

Corrected: ("Correlation Study"), JA0561); Br. at 25.

p.23, corrected text:

Original: There, intervenors argued

Corrected: There, as here, intervenors argued

p.24, corrected text:

Original: cannot dispute that the facilities identified in the declarations handle the hazardous materials excused from regulation by the four Pre-2008 Exclusions, are positioned to take advantage of these exclusions, and will benefit financially by doing so.

Corrected: cannot dispute that because the facilities identified in the declarations handle the hazardous materials excused from regulation by the four Pre-2008 Exclusions, they are positioned to take advantage of these exclusions, and would benefit financially by doing so.

p.24, corrected text:

Original: – including those identified

Corrected: – including facilities identified

p.24, corrected citation:

Original: EPA-HQ-RCRA-2010-0742-0232 at 4, 32

Corrected: EPA-HQ-RCRA-2010-0742-0232 at 1, 32

p.26, corrected text:

Original: EPA's refusal to require this minimal information

Corrected: EPA's refusal to require this information

As a result of all the changes, the certificates regarding word limitation have been updated from 11,752 words (proof opening brief) to 11,746 words (final opening brief) and 6,968 (proof reply brief) to 6,975 (final reply brief).

DATED: June 20, 2016

Respectfully submitted,

/s/ James S. Pew
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ED_002401_00000687-00006

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June, 2016, I have served the foregoing **Errata to the Proof Briefs of Environmental Petitioners** on all registered counsel through the court's electronic filing system (ECF).

/s/ James S. Pew
James S. Pew

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1038 (and consolidated cases)

AMERICAN PETROLEUM INSTITUTE,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review of Final Administrative Actions of the
United States Environmental Protection Agency

FINAL OPENING BRIEF OF ENVIRONMENTAL PETITIONERS

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Counsel for California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Louisiana Environmental Action Network, and Sierra Club

DATED: June 20, 2016

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PETROLEUM INSTITUTE, *Petitioner*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	Case No. 09-1038 (and consolidated cases)

ENVIRONMENTAL PETITIONERS' CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Louisiana Environmental Action Network, and Sierra Club (collectively, "Environmental Petitioners") hereby certify as follows:

(A) Parties and Amici

(i) Parties, Intervenors, and Amici Who Appeared in the District Court

This case is a petition for review of final agency action, not an appeal from the ruling of a district court.

(ii) Parties to This Case

Petitioners:

09-1038 American Petroleum Institute

15-1083 Utility Solid Waste Activities Group, Edison Electric Institute, National Rural Electric Cooperative Association, American Gas Association

15-1085 American Petroleum Institute

15-1088 Freeport-McMoRan Inc.

15-1089 National Association of Manufacturers, American Chemistry Council

15-1094 California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Louisiana Environmental Action Network, Sierra Club

Respondents:

The respondent in all cases is the United States Environmental Protection Agency. Also named as a respondent in case nos. 15-1089 and 15-1094 is Gina McCarthy, in her official capacity as Administrator of the U.S. Environmental Protection Agency.

Intervenors:

American Chemistry Council, American Coke and Coal Chemicals Institute, American Forest & Paper Association, American Gas Association, American Petroleum Institute, California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Edison Electric Institute, Environmental

Technology Council, Inc., Freeport-McMoRan Inc., Louisiana Environmental Action Network, Metals Industry Recycling Coalition, National Association of Manufacturers, National Mining Association, National Rural Electric Cooperative Association, Sierra Club, Society of Chemical Manufacturers and Affiliates, Synthetic Organic Chemical Manufacturers Association, Inc., Treated Wood Council, and Utility Solid Waste Activities Group have intervened on behalf of the respondent in these consolidated cases.

Gulf Chemical and Metallurgical Corporation has moved to intervene on behalf of the respondent.

(iii) *Amici* in This Case

Eastman Chemical Company and Solvay USA Inc. have filed an *amici curiae* brief in support of Industry Petitioners.

(iv) Circuit Rule 26.1 Disclosures for Environmental Petitioners

See disclosure form filed below.

(B) Rulings Under Review

Environmental Petitioners seek review of the final action taken by EPA at 80 Fed. Reg. 1694 (Jan. 13, 2015), and titled "Definition of Solid Waste; Final Rule." Petitioner American Petroleum Institute additionally seeks review of the final action taken by EPA at 73 Fed. Reg. 64,668 (Oct. 30, 2008), and titled "Revisions to the Definition of Solid Waste; Final Rule."

(C) Related Cases

Apart from the consolidated cases, Environmental Petitioners are unaware of any other currently pending related cases.

DATED: June 20, 2016

Respectfully submitted,

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ED_002401_00000688-00005

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PETROLEUM INSTITUTE, *Petitioner*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	)	Case No. 09-1038 (and consolidated cases)

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Louisiana Environmental Action Network, and Sierra Club (collectively, "Environmental Petitioners") make the following disclosures:

California Communities Against Toxics

Non-Governmental Party to this Action: California Communities Against Toxics ("CCAT").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: CCAT is a non-profit network that is a project of a non-profit corporation (Del Amo Action Committee) that is organized and

existing under the laws of the State of California. It is an environmental justice network that aims to reduce exposure to pollution, to expand knowledge about the effects of toxic chemicals on human health and the environment, and to protect the most vulnerable people from harm.

Clean Air Council

Non-Governmental Corporate Party to this Action: Clean Air Council ("CAC").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: CAC is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. CAC is a not-for-profit organization focused on protection of public health and the environment.

Coalition For A Safe Environment

Non-Governmental Party to this Action: Coalition For A Safe Environment ("CFASE").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: CFASE is a not-for-profit organization based in Wilmington, California dedicated to improving the environment, public health, public safety, and socio-economic justice through advocacy, community organizing, research, and public education.

Louisiana Environmental Action Network

Non-Governmental Corporate Party to this Action: Louisiana Environmental Action Network ("LEAN").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: LEAN is a corporation organized and existing under the laws of the State of Louisiana. LEAN is a nonprofit organization which works with citizens' groups throughout the state of Louisiana to develop, implement, protect, and enforce legislative and regulatory environmental safeguards.

Sierra Club

Non-Governmental Corporate Party to this Action: Sierra Club.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

DATED: June 20, 2016

Respectfully submitted,

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

2011 RIA	EPA, *Regulatory Impacts Analysis: EPA's 2011 Proposed Revisions to the Industrial Recycling Exclusions of the RCRA Definition of Solid Waste* (June 30, 2011) (EPA-HQ-RCRA-2010-0742-0002)
ABR	American Battery Recyclers
AMC	American Mining Congress
APA	Administrative Procedure Act
API	American Petroleum Institute
DEC	Petitioners' Opening Brief Declarations
EPA	U.S. Environmental Protection Agency and Gina McCarthy, Administrator
JA	Joint Appendix
OMB	Office of Management and Budget
PCBs	Polychlorinated Biphenyls
PERC	Tertrachloroethylene
RCRA	Resource Conservation and Recovery Act
RTC	EPA, *Revisions to the Definition of Solid Waste Final Rule: Response to Comments Document Summaries and Responses* (Dec. 10, 2014) (EPA-HQ-RCRA-2010-0742-0372)

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JURISDICTIONAL STATEMENT

(A) Agency. Respondents U.S. Environmental Protection Agency and Gina McCarthy, Administrator, (collectively, "EPA" or "the agency") have jurisdiction to issue rules implementing the Resource Conservation and Recovery Act ("RCRA"). 42 U.S.C. § 6912.

(B) Court of Appeals. Pursuant to 42 U.S.C. § 6976(a)(1), this Court has jurisdiction to review the final EPA action entitled Definition of Solid Waste; Final Rule and published at 80 Fed. Reg. 1694 (Jan. 13, 2015).

(C) Timeliness. California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Louisiana Environmental Action Network, and Sierra Club (collectively, "Environmental Petitioners") filed a timely petition for review of the Definition of Solid Waste within the 90-day review period provided in RCRA § 7006(a)(1), 42 U.S.C. § 6976(a)(1), on April 13, 2015.

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in an addendum to this brief.

STATEMENT OF ISSUES

1. Without providing notice or opportunity for comment, EPA created a new exclusion from its regulatory definition of solid waste for certain hazardous wastes that are discarded by the company that generates them and subsequently recycled

by another company. Among the excluded wastes are hazardous materials that the generator pays to have hauled away.

a. Did EPA's failure to provide notice and comment opportunity on the new exclusion violate the Administrative Procedure Act, 5 U.S.C. § 553?

b. Is EPA's contention that these materials are "not discarded" contrary to the plain meaning of the term "discarded" in RCRA, unreasonable, or arbitrary?

c. Is EPA's failure to articulate its interpretation of "discarded" or explain why it believes that generators of hazardous materials do not discard them, even when they pay to have them hauled away, unreasonable or arbitrary?

d. Is EPA's claim that such materials are not discarded solely because it has established certain conditions governing their management circular, irrational, or otherwise arbitrary?

e. Is EPA's failure to include specific protections against known hazardous waste risks in the Verified Recycler Exclusion arbitrary and capricious?

2. In its proposed rule, after studying more than 200 cases of environmental damages at hazardous waste recycling sites, EPA took comment on whether

32 other exclusions from the definition of solid waste that the agency promulgated before 2008 ("Pre-2008 Exclusions") allow hazardous wastes to evade RCRA regulation in the absence of additional requirements. 76 Fed. Reg. 44,094, 44,097/1, 44,138/2-40/3 (July 22, 2011), JA0207, 0248-50. EPA specifically requested comment on additional requirements for compliance with the agency's containment standard and for notifying EPA (and the public) of the types and quantities of hazardous wastes managed under each Pre-2008 Exclusion. *Id.* at 44,139/1-3, JA0249. In the final rule, however, EPA decided not to promulgate these requirements. 80 Fed. Reg. at 1696/1, JA0267.

a. Do EPA's Pre-2008 Exclusions unlawfully or arbitrarily exclude hazardous wastes from the regulatory definition of solid waste?

b. Did EPA arbitrarily fail to provide a rational explanation for its decision?

STATEMENT OF FACTS

I. INTRODUCTION.

For years, EPA has known that its many exclusions from RCRA's definition of solid waste cause serious harm to human health and the environment when hazardous wastes leak, spill, catch fire, or explode because they are not being properly handled. The present case challenges a new exclusion that stretches the

statutory definition of solid waste beyond the breaking point by exempting hazardous wastes as not discarded even when the owners of these wastes must pay to have hauled them away. It also challenges EPA's decision to leave dozens of outdated exclusions on the books and unchanged even after the agency became aware that these exclusions lack the minimum requirements necessary to prevent the unlawful discard of hazardous wastes.

II. GENERAL BACKGROUND.

RCRA "establishes a comprehensive 'cradle to grave' regulatory system for the treatment, storage, and disposal of hazardous waste." *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 858 (D.C. Cir. 2001) (quoting *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1252 (D.C. Cir. 1994)). "[A] preventative statute," 80 Fed. Reg. at 1740/2, JA0311, RCRA was designed by Congress to prevent the harms to public health and the environment known to result when hazardous wastes are not safely handled:

> The overriding concern of the Committee … is the effect on the population and the environment of the disposal of discarded hazardous wastes—those which by virtue of their composition or longevity are harmful, toxic or lethal. Unless neutralized or otherwise properly managed in their disposal, hazardous wastes present a clear danger to the health and safety of the population and to the quality of the environment. In addition, much of the hazardous waste disposed of in an environmentally sound manner is in interstate commerce without adequate monitoring of its movement or disposition.

H. R. Rep. 94-1491, pt. I, at 3 (1976), *reprinted at* 1976 U.S.C.C.A.N. 6238, 6240.

Since RCRA was enacted, however, EPA has promulgated many regulatory provisions that limit the scope of RCRA's protections by "exclud[ing] or exempt[ing]" a wide variety of materials and activities from the statutory definition of solid waste. 76 Fed. Reg. at 44,139/1-2 & tbl.1, JA0249.[1] EPA's RCRA obligations extend only to materials that are "solid waste" as RCRA defines that term, *i.e.* to "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities." 42 U.S.C. § 6903(27). *See Am. Mining Cong. v. EPA*, 907 F.2d 1179, 1185 n.7 (D.C. Cir. 1990) ("*AMC II*") (citing *Am. Mining Cong. v. EPA*, 824 F.2d 1177, 1179 (D.C. Cir. 1987) ("*AMC I*")). Thus, excluding materials from the definition of solid waste exempts the facilities that handle those materials from RCRA's requirements for safe storage, treatment, transportation, and disposal, regardless of how hazardous those materials are or what the public health and environmental consequences will be if they leak, spill, or otherwise escape into the environment.

[1] This Court recently vacated two of EPA's exclusions as contrary to the plain meaning of RCRA. *See Sierra Club v.* EPA, 755 F.3d 968 (D.C. Cir. 2014) (vacating exclusion for hazardous waste gasification at 40 C.F.R. § 261.4(a)(12)); *Natural Res. Def. Council v. EPA*, 755 F.3d 1010 (D.C. Cir. 2014) (vacating exclusion for "comparable fuels" at 40 C.F.R. § 261.4(a)(16)).

The action challenged here, the latest addition to EPA's long list of exclusions and exemptions, debuted with EPA's 2003 proposal to "revise and clarify the RCRA definition of solid waste" in a way that would "remov[e] hazardous waste regulatory controls over certain recycling practices." 68 Fed. Reg. 61,558, 61,560/1-2 (Oct. 28, 2003), JA0017. Prompted by criticism of its proposal, which pointed out that EPA had not studied the public health and environmental impacts of its many "recycling" exclusions, EPA undertook a study of 208 cases in which "some type of recycling activity" resulted in "environmental damage." EPA, *An Assessment of Environmental Problems Associated with Recycling of Hazardous Secondary Materials* at 2, 5 (Jan. 11, 2007) (EPA-HQ-RCRA-2002-0031-0355) ("Damage Study"), JA0452, 0455. The study examined "leaks, spills, dumps, or other types of releases of hazardous substances into the environment that were serious enough to require some type of cleanup action." *Id.* at 5, JA0455. It also considered "situations in which materials were abandoned (e.g., in warehouses) without having been actually released into the environment, but which posed potential threats and thus required removal actions that were conducted by one or more government agencies, and involved expenditure of public funds." *Id.*

Of the 208 damage cases EPA studied, 85 involved some combination of soil and groundwater contamination, and 21 involved releases of hazardous substances into the air. *Id.* at 7 (*Exhibit 2: Type of Damage*), JA0457. Sixty-nine

cases involved the abandonment of hazardous materials, including situations where abandoned hazardous wastes "caused environmental damages (e.g., leaking containers improperly stored out of doors)." *Id.* EPA found that "[m]ismanagement of recyclable materials prior to their reclamation or reuse was the most common cause of contamination at these sites (40%), while almost as many sites involved mismanagement of recycling residuals (34%) as the primary cause." *Id.* at 8, JA0458. EPA's descriptions of the damage cases show a wide variety of situations in which excluded recycling of hazardous wastes caused or contributed to extensive, long-term environmental damage. Even more importantly, they show many situations in which the exclusions led to spills, leaks, fires, and explosions that either exposed people to hazardous substances or had the potential to do so.

For example, one case discusses a lead battery recycler that contaminated soil, surface water, and groundwater with lead and cadmium, and appears to have caused elevated lead concentrations in the ambient air. *Id.*, app. 2 at 3, JA0474. The estimated cleanup cost was "approximately $60,000,000." *Id.* Another metals recycler, operating in Mojave, California, deposited incinerator ash "in piles outside the building" and became "[p]art of the Rosamond Cancer Cluster Investigation." *Id.*, app. 2 at 38, JA0477. A used oil recycler in Portland, Oregon caught fire, "spread[ing] ash and soot into the air and downwind" and "spread[ing] used oil and other potential hazardous chemicals into an adjacent drainage ditch

which flows into Johnson Creek, a tributary of the Willamette River." *Id.*, app. 2 at 266, JA0480.

EPA analyzed the damage cases to assess which ones were "likely associated with an exclusion, exemption, or alternate standard within the hazardous waste management regulations." EPA, *Correlation of Recycling Damage Cases With Regulatory Exclusions, Exemptions or Alternative Standards* at 3 (June 2011) (EPA-HQ-RCRA-2010-0742-0010) ("Correlation Study"), JA0563. The analysis allowed EPA to determine whether its many exceptions, exemptions, and alternate standards "are adequately protecting human health and the environment." *Id.* It revealed that "118 damage cases out of a total 223 *(53%)*" were "likely correlated" with one or more regulatory exclusions, exemptions, or alternative standards for the following recycled materials: scrap metals, lead-acid batteries, drums, mercury-containing wastes, other petroleum wastes, precious metal-containing wastes, and used oil. *Id.* at 9 tbl.2, 10, JA569-70.

Despite the evidence in the Damage Study and Correlation Study, EPA did not rein in any of its existing "recycling" exclusions. Instead, EPA promulgated more of them. 73 Fed. Reg. 64,668, 64,669/2-70/2 (Oct. 30, 2008), JA0066-70. In particular, EPA promulgated a broad "Transfer-Based" Exclusion for "hazardous secondary materials (i.e., spent materials, listed sludges, and listed by-products) that are generated and subsequently transferred to a different person or company

for the purpose of reclamation." *Id.* at 64,669/3-70/1, JA0066-70. EPA did not even try to determine whether or when those materials are actually hazardous waste for which RCRA regulation is required. Rather, EPA included conditions in the Exclusion that it thought required "reasonable efforts" to manage and recycle the materials properly, *id.*, and merely assumed those conditions would prevent discard. 76 Fed. Reg. at 44,109/1, JA0219.

Sierra Club petitioned for review of the 2008 final rule (Sierra Club v. EPA, No. 09-1041 (D.C. Cir. filed Jan. 28, 2009)) and also filed an administrative petition for repeal of the rule. Sierra Club, *Petition for Reconsideration of "Revisions to the Definition of Solid Waste," 73 Fed. Reg. 64,668 (Oct. 30, 2008) and Request for Stay* (Jan. 29, 2009) (EPA-HQ-RCRA-2009-0315-0002) ("2009 Petition for Repeal"), JA0528. *See* 76 Fed. Reg. at 44,101/2, JA0211 (discussing petition). EPA and Sierra Club reached a settlement in No. 09-1041 pursuant to which EPA agreed to issue a proposed rule that would address the issues raised in Sierra Club's petition by 2011 and to take final action on that proposal by 2012. Settlement Agreement, Sierra Club v. EPA, No. 09-1041 (D.C. Cir. Sept. 10, 2010); *see* 76 Fed. Reg. at 44,102/1-2 (discussing settlement agreement), JA0212. EPA issued the proposed rule in 2011 and eventually promulgated the final rule challenged here in 2015.

III. DEVELOPMENT OF EPA'S VERIFIED RECYCLER EXCLUSION.

A. EPA's Proposal To Eliminate The Transfer-Based Exclusion And Promulgate Protective Standards Under RCRA Subtitle C.

EPA's 2011 proposal considered new analyses of the "potential hazards" posed by its 2008 rule. 76 Fed. Reg. at 44,096/1, JA0206. The agency conceded that the Transfer-Based Exclusion, in particular, "may pose significant risk to human health and the environment from hazardous secondary material that may become discarded" and that, "in most cases, hazardous secondary materials transferred to another party for reclamation are discarded and are best regulated under RCRA." *Id.* at 44,096/1-2, JA0206. EPA explained:

> Because of the low commercial value and the high potential liability associated with most types of hazardous secondary materials (*i.e.*, spent materials and listed hazardous waste by-products and sludges), generators will typically pay the reclamation facility to accept these hazardous secondary materials or receive a salvage fee that only partially offsets the cost of transporting and managing them. In such situations, the generator has relinquished control of the hazardous secondary materials and the entity receiving such materials may not have the same incentive to manage them as a useful product.

Id. at 44,108/3, JA0218.

Notably, EPA also admitted that it had "failed to take into account how the conditions of the 2008 transfer-based exclusion would work when actually implemented," and that the agency simply "assumed that [the] conditions would operate with the same level of oversight as the Subtitle C hazardous waste regulations." *Id.* at 44,109/1, JA0219. In a departure from earlier exclusions that

"were developed based on EPA's knowledge of the specific hazardous secondary materials, the industries generating them, or the current recycling management practice for those hazardous secondary materials, the … transfer-based exclusion relied entirely on the conditions that were developed by EPA operating as the Agency anticipates they should" and "without specific evidence that they would work as intended (*i.e.*, would not result in significant risk to human health and the environment from discarded materials)." *Id.* at 44,109/2, JA0219. In its Regulatory Impact Analysis, EPA elaborated:

> Based on the evidence of EPA's 2007 industrial recycling historical damage case study and EPA's 2008 recycling market forces study, most transfers of hazardous secondary material for recycling do involve discard, and EPA's attempt to define such material as "not discarded" solely by setting additional management conditions poses the danger of circular reason. In other words, adding conditions, many of which resemble hazardous waste requirements, in order to attempt to prevent the discard of hazardous secondary materials that would otherwise be subject to full hazardous waste requirements, is potentially counter to the original intent of RCRA.

EPA, *Regulatory Impact Analysis: EPA's 2011 Proposed Revisions to the Industrial Recycling Exclusions of the RCRA Definition of Solid Waste* at 214 (June 30, 2011) (EPA-HQ-RCRA-2010-0742-0002) ("2011 RIA"), JA0547.

EPA thus proposed to eliminate the Transfer-Based Exclusion and to regulate "hazardous secondary materials transferred for the purpose of legitimate reclamation … under Subtitle C of RCRA." 76 Fed. Reg. at 44,109/3, JA0219.

B. The Verified Recycler Exclusion.

The 2015 final rule does not regulate hazardous secondary material transferred for the purpose of recycling "under Subtitle C of RCRA," as proposed. *Id.* Instead, it promulgates a new exclusion from the definition of solid waste that substitutes a different set of agency-created conditions for the statutory requirements that would otherwise apply. *See* 80 Fed. Reg. at 1708/2-15/2, JA0279-86. EPA calls its new exclusion the "Verified Recycler Exclusion." *Id.* at 1708/2, JA0279. Notably, EPA did not discuss the Verified Recycler Exclusion or even allude to it during the rulemaking. This "new exclusion" and EPA's rationale for it both appear for the first time in redline revisions authored at the end of the rulemaking process by the Office of Management and Budget ("OMB"). OMB, *Record of Revisions to the Draft Final DSW Rule during White House Review Per EO 12866* at 7 (Nov. 10, 2014) (EPA-HQ-RCRA-2010-0742-0373) ("OMB Redline"), JA0955. *See also id.* at 3, 56, 64-94, JA0953, 0957, 0966-95.

The agency's primary rationale for reversing course is that the Department of Environmental Protection for Pennsylvania ("Pennsylvania DEP"), where 27 of 65 facilities currently using the Transfer-Based Exclusion are located, commented that RCRA hazardous waste regulation was unnecessary and would discourage reclamation. 80 Fed Reg. at 1708/3, JA0279. EPA also notes that Pennsylvania

DEP does not regard the excluded materials as waste and did not want to regulate them under RCRA as hazardous waste. *Id.*

EPA does not state that it shares Pennsylvania DEP's view that transfers of hazardous secondary materials to third-party recyclers never constitute discard. Indeed, EPA continues to acknowledge that: (1) such transfers do "generally involve discard"; (2) generators "typically pay" to have these materials hauled away; (3) the record shows environmental problems from third party reclamation activities, including "clear instances of discard resulting in risk to human health"; and (4), "third-party recyclers have economic incentives to accumulate waste beyond their ability to deal with it." *Id.* at 1707/1-3, JA0278.

IV. EPA'S DECISION TO LEAVE DEFECTIVE PRE-2008 EXCLUSIONS UNCHANGED.

A. EPA's Conclusion That Its Pre-2008 Exclusions Lack The Minimum Necessary Requirements To Prevent Unlawful Discard Of Hazardous Waste.

The Verified Recycler Exclusion is just one of many exclusions from the statutory definition of solid waste that EPA has promulgated since RCRA was enacted. In its 2011 proposal, EPA acknowledged that many of its earlier exclusions and exemptions (the 32 "Pre-2008 Exclusions") lacked the "minimum requirements necessary to define when recycled hazardous secondary materials are not discarded." 76 Fed. Reg. at 44,138/3-39/1, JA0248-49. As noted above,

"discarded" hazardous secondary materials are hazardous waste, for which RCRA requires hazardous waste regulation. *See* 42 U.S.C. §§ 6903(27), 6921-6924. Thus, EPA acknowledged that it could not determine whether its Pre-2008 Exclusions unlawfully exempt from RCRA requirements facilities that are storing, transporting, or disposing of hazardous wastes.

Although EPA claimed it was "not reopening comment on any substantive provisions of the [pre-2008] regulatory exclusions or exemptions," the agency "request[ed] comment" on whether it should revise all of the Pre-2008 Exclusions to include the "minimum requirements" it identified. 76 Fed. Reg. at 44,138/3-39/3, JA0248-49. These were "the legitimate recycling standard in 40 C.F.R. 260.43, additional recordkeeping requirements in the speculative accumulation standard in 40 C.F.R. 261.1(c)(8), the contain[ment] standard in 40 C.F.R. 260.10, and the notification provision in 40 C.F.R. 260.42." *Id.* at 44,139/1, JA0249.

EPA recognized that the lack of notification requirements in the Pre-2008 Exclusions is especially problematic. *Id.* at 44,140/2-3, JA0250. Notification requirements allow EPA, States, and the public to determine which exclusions are being claimed at any given facility and the type and quantity of hazardous secondary materials being handled there. *Id.* at 44,140/1-2, JA0250. EPA explained that, without notification, the agency has "no reliable or efficient way to receive information that enables regulatory authorities to adequately monitor [the pre-

2008] exclusions and exemptions. [EPA] believe[s] this gap increases the risk of environmental damage stemming from improper management of hazardous secondary materials being recycled." *Id.* at 44,140/3, JA0250.

EPA likewise acknowledged the significance of applying the regulatory containment standard to the Pre-2008 Exclusions, given that mismanagement of hazardous wastes was found to be "a major cause[]" of environmental damage. 80 Fed. Reg. at 1766/1, JA0337; *see also* 76 Fed. Reg. 44,140/1, JA0250. The containment standard, codified at 40 C.F.R. § 260.10, is a minimal requirement compared to Subtitle C's design, operating, inspection, and closure standards (including air emission standards) for containers, tanks, containment buildings, and drip pads. *See, e.g.*, 40 C.F.R. § 262.34; 40 C.F.R. part 264, subparts I, J, W, AA, BB, CC, DD; 40 C.F.R. part 265, subparts I, J, W, AA, BB, CC, DD. EPA stated that compliance with the 40 C.F.R. § 260.10 containment standard "ensures that the materials are managed in a manner protective of human health and the environment" and are not discarded. 76 Fed. Reg. 44,140/1, JA0250.

B. EPA's Decision To Leave The Pre-2008 Exclusions Unchanged.

In the 2015 final rule, EPA abandons its proposal to revise the Pre-2008 Exclusions. 80 Fed. Reg. at 1696/1, 1740/2-41/2, JA0267, 0311-12. EPA does not retract its conclusion that the Pre-2008 Exclusions lack minimum necessary conditions to prevent unlawful discard of hazardous waste, and the agency

maintains that it can connect seven of these exclusions "with confidence" to specific cases of environmental damage documented in its Damage Study. *Id.* at 1741/1, JA0312; *see also* EPA, *Revisions to the Definition of Solid Waste Final Rule: Response to Comments Document Summaries and Responses* at 249 (Dec. 10, 2014) (EPA-HQ-RCRA-2010-0742-0372) ("RTC") (explaining that EPA "conservatively identif[ied] damage case correlations where the type of hazardous waste [involved] very clearly matches to an exclusion (e.g., scrap metal)."), JA1140.

EPA's rationale for refusing to revise the Pre-2008 Exclusions to require notification is that the agency lacked sufficient information about the environmental damage the Exclusions may cause. 80 Fed. Reg. at 1741/1-2, JA0312. The agency states it "may need to consider each exclusion in terms of evaluating specific regulatory gaps," and is therefore "deferring action" on revisions. *Id.* at 1741/2, JA0312. Though four years passed between the proposal and the final rule, EPA does not identify any ongoing or future rulemaking in which it is addressing or will address the regulatory gaps it identified. Indeed, EPA appears to recognize that, without notification requirements, it cannot possibly "evaluat[e] specific regulatory gaps." *Id.* EPA cites the lack of notification requirements as a reason for declining to establish notification requirements:

> Because the majority of the pre-2008 exclusions and exemptions do not include notification requirements, EPA does not have precise data

> regarding how many facilities are recycling hazardous secondary materials under these exclusions and exemptions. This lack of data hinders EPA's ability to more precisely estimate the burden on states and whether such a requirement would be environmentally beneficial.

Id. at 1766/2-3, JA0337.

Despite acknowledging that containment is another "minimum requirement" needed to ensure that hazardous wastes are not discarded, EPA also decided not to apply its containment standard to the Pre-2008 Exclusions. EPA's reasoning is that commenters pointed out that EPA "has already promulgated certain management standards for some exclusions." *Id.* at 1766/1, JA0337. On that basis, EPA concludes that applying the standard "wholesale across the 32 recycling provisions, may not be the most efficient or effective course of action." *Id.* at 1766/1-2, JA0337. EPA does not explain why the fact that some of the Pre-2008 Exclusions already include containment requirements led it to conclude that the others should not be revised to include them as well.

SUMMARY OF ARGUMENT

Verified Recycler Exclusion. EPA violated the Administrative Procedure Act ("APA") by issuing the Verified Recycler Exclusion without providing notice or opportunity for comment. EPA proposed to regulate the hazardous wastes at issue under Subtitle C of RCRA. Instead, it adopted a new exclusion from RCRA for these wastes – the Verified Recycler Exclusion – that was created by the Office

of Management and Budget and inserted into the 2015 Definition of Solid Waste Rule long after the notice-and-comment rulemaking process ended.

The Verified Recycler Exclusion is also substantively unlawful and arbitrary. When a company cannot use or sell a hazardous material it has generated and must pay to have it taken away, the company has discarded that material in the ordinary sense of the word. RCRA defines all "discarded" materials to be solid waste. By excluding hazardous wastes from RCRA's definition of solid waste – and therefore from regulation under RCRA – EPA exceeds its authority and violates the plain meaning of the statute. EPA's argument that hazardous wastes are not wastes so long as their owners comply with certain conditions that EPA placed on the Verified Recycler Exclusion must be rejected under the first step of *Chevron* analysis. None of those conditions alters the fact that hazardous materials are discarded in the ordinary sense of the word when the company that owns them pays to have them hauled away.

Even if the term "discarded" is ambiguous, EPA's exclusion of hazardous wastes that must be hauled away at their owners' expense is unreasonable and arbitrary. "[T]he range of permissible interpretations of a statute is limited by the extent of its ambiguity," and claiming that materials are not discarded under these circumstances "diverges from any realistic meaning of the statute." *Massachusetts v. DOT*, 93 F.3d 890, 893 (D.C. Cir. 1996). Further, by failing even to consider

that such materials are discarded in the ordinary sense, EPA arbitrarily failed to consider an important aspect of the exclusion it created.

EPA also frustrates the intent of RCRA by allowing hazardous wastes to escape RCRA's protective requirements just because they are subject to far less protective requirements invented by EPA. EPA itself described the whole rationale underlying the Verified Recycler Exclusion as potentially "circular" and "counter to the original intent of RCRA," 2011 RIA at 214, JA0547, and the agency has linked many of its other "recycling" exclusions to serious environmental damage cases, where hazardous wastes have spilled, leaked, caught fire, or exploded because they were not being handled in compliance with RCRA. Damage Study at 5-6, JA0455-56. Because the Verified Recycler Exclusion frustrates Congress's intent, it is unreasonable under *Chevron* step two and arbitrary.

Further, EPA neither acknowledges that the Verified Recycler Exclusion relies on the same rationale the agency previously described as potentially "counter to the original intent of RCRA," nor makes any effort to explain its apparent change of view. For these reasons as well, EPA's explanation for the Verified Recycler Exclusion falls far short of the reasoned decision-making required for a reasonable, non-arbitrary rule.

In addition, EPA does not support the Verified Recycler Exclusion with any interpretation of "discarded" to which the Court can defer. Nowhere in the record

does EPA say what it thinks the term "discarded" means or why it believes that term does not encompass materials that companies must pay to have hauled away. Also missing entirely from the record is any explanation for why EPA believes that compliance with the conditions in its Verified Recycler Exclusion make such materials not "discarded." EPA's failure to even articulate a statutory interpretation that supports its action is unreasonable and arbitrary, as is the agency's failure to provide a detailed and reasoned explanation for the choice it made.

Even assuming that EPA could exempt hazardous wastes from the more protective requirements of RCRA just by choosing to subject them to lesser agency-created requirements instead, the Verified Recycler Exclusion lacks conditions EPA itself has identified as critical. In particular, EPA refused to place meaningful limits on the accumulation and containment of hazardous wastes, even though EPA found that mismanagement of hazardous wastes is a known major cause of air emissions, leaks, fires, explosions, and water and soil contamination.

Pre-2008 Exclusions. EPA attempts to avoid judicial review of its Pre-2008 Exclusions first by claiming first that it was not reopening comment on any of their substantive provisions and, second, by claiming that its decision not to revise those exclusions was merely a deferral. Neither argument has merit. EPA stated it believed all 32 Pre-2008 Exclusions lack the "minimum requirements necessary" to prevent the unlawful discard of hazardous waste, and solicited comment on

whether to revise them. 76 Fed. Reg. at 44,138/3-39/1, JA0248-49. EPA then refused to revise them. That decision marks the consummation of EPA's decision-making process in this rulemaking and has severe legal consequences for Environmental Petitioners' members and other Americans: it leaves in force exclusions from RCRA that, according to EPA itself, allow for the unlawful disposal of hazardous wastes and lead to serious environmental damage. In short, EPA opened the issue of whether its Pre-2008 Exclusions are lawful in the absence of the additional conditions it proposed, and the agency's decision to leave the exclusions in place without those conditions is reviewable final action.

EPA's decision to leave the Pre-2008 Exclusions in force and unchanged is unlawful and arbitrary. Nothing in the final rule refutes or even detracts from EPA's conclusion in the proposed rule that these exclusions lack the minimum requirements necessary to prevent unlawful discard. Accordingly, without those requirements, the Pre-2008 Exclusions are unlawful.

Further, EPA's rationale for leaving them in place – that it is uncertain about the costs and benefits of adding the conditions it previously identified as necessary – is arbitrary. Contrary to EPA's apparent position, the agency is not free to leave unlawful regulatory exclusions in place unless it believes that fixing their legal defects is worthwhile. Moreover, although EPA now claims to be uncertain about whether all of the Pre-2008 Exclusions can be linked to damage cases, EPA

maintains that it can link "with confidence" at least seven of the Pre-2008 Exclusions to environmental damage cases. 80 Fed. Reg. at 1741/1, JA0312. Nowhere in the record does EPA explain why it is uncertain whether preventing at least those seven exclusions from causing similar damage in the future is worthwhile.

In addition, EPA's rationale for refusing to incorporate the notification requirements into the Pre-2008 Exclusions is arbitrary and capricious. None of EPA's arguments on this point even speak to EPA's reason for proposing notification requirements in the first place: that, without this "minimum necessary requirement," 76 Fed. Reg. at 44,138/3-39/1, JA0248-49, EPA cannot know whether the exclusions permit the unlawful discard of hazardous waste. EPA's claims of uncertainty boil down to a circular argument that, without notification requirements, it will never have enough information to decide whether to promulgate notification requirements. Further, much of that claimed uncertainty rests on EPA's remarkable assertion that companies using EPA's Pre-2008 Exclusions do not even know which of the materials they handle are actually excluded hazardous wastes. If that is true, EPA's assumption that such companies are in compliance with the requirements in those exclusions is completely unrealistic and irrational. Far from supporting EPA's decision not to establish notification requirements, the possibility that companies are using EPA's Pre-2008

Exclusions without knowing which of the materials they handle are hazardous underscores the urgent need for notification requirements. EPA completely fails to grapple with this issue.

EPA's rationale for refusing to incorporate the containment requirements into the Pre-2008 Exclusions is similarly flawed. The agency argues that because some of these exclusions already have containment requirements, it does not make sense to incorporate them into all the Pre-2008 Exclusions. That argument lends no support for refusing to incorporate containment requirements into the exclusions that do not have them already. Nor does it speak to EPA's rationale for proposing containment requirements: that the Pre-2008 Exclusions cannot prevent unlawful discard without them.

STANDARD OF REVIEW

Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), this Court rejects agency statutory interpretations that are either contrary to the "unambiguously expressed intent of Congress" or unreasonable. 467 U.S. at 842-43. Under *Chevron*, EPA's interpretation of ambiguous statutory provisions must be rejected as unreasonable, *see id.* at 843, if the agency has not "offered a reasoned explanation for why it chose that interpretation," *Village Of Barrington, Ill. v. Surface Transportation Board*, 636 F.3d 650, 660 (D.C. Cir. 2011), or the interpretation "frustrate[s] the policy that Congress sought to

implement," *Shays v. FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008) (internal quotation marks and citation omitted). The "range of permissible interpretations of a statute is limited by the extent of its ambiguity." *Massachusetts*, 93 F.3d at 893. Interpretations issued without notice-and-comment opportunity and lacking the force of law "do not warrant *Chevron*-style deference," and are entitled to respect only "in proportion to their 'power to persuade.'" *Wos v. E.M.A.*, 133 S. Ct. 1391, 1402 (2013) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) and citing *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (quotations omitted)).

The Court reviews EPA's actions and decisions under the "arbitrary and capricious" standard. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). EPA's action is arbitrary and capricious if the agency has not "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

STANDING

Petitioners have members who live, work, and recreate in close proximity to several facilities that EPA reports as having claimed the Transfer-Based Exclusion to manage significant amounts of hazardous wastes without adhering to otherwise mandatory RCRA Subtitle C requirements. *See* Declarations and Addenda to Declarations. These facilities are expected to, or already are, using the new Verified Recycler Exclusion to continue those practices. *See* Addenda to Declarations, DEC041-56; *see also* EPA, *EPA's Evaluation of Data Collected from Notifications Submitted under the 2008 Definition of Solid Waste Exclusions* (Apr. 11, 2014) (EPA-HQ-RCRA-2010-0742-0387). Petitioners also have members whose homes, workplaces, and places of recreation are close to facilities that could be using the Pre-2008 Exclusions – specifically those EPA correlated "with confidence" to environmental damage – that do not impose "minimum requirements" for notification or containment. *See* Declarations at DEC001-40. Each of these members is aware that the RCRA exclusions at issue here allow facilities in their communities to manage hazardous wastes without providing all of the protections that would otherwise be required by RCRA. As a result, these members are concerned that they are at greater risk of being harmed by toxic air pollution, fires, explosions, and soil and water contamination, like those studied by

EPA in this rulemaking. These worries diminish the members' abilities to enjoy and feel safe in their everyday lives.

Carl Ford, a Sierra Club member in West Deptford Township, New Jersey, lives approximately 2.5 miles from the West Deptford Johnson Matthey plant that claimed the Transfer-Based Exclusion for its ignitable and spent solvent hazardous wastes. DEC015. Carl is very concerned that Johnson Matthey's use of the Verified Recycler Exclusion is contributing to the known toxic pollution problem in West Deptford Township. *Id.* Often when he is outside of his home, Carl smells strange chemical odors that make him worry that he will be harmed by toxins in the air, and that diminish his ability to enjoy relaxing and gardening in his own yard with his wife. DEC016. Carl also worries that the Verified Recycler Exclusion allows Johnson Matthey to accumulate, store, and transport hazardous wastes in ways that could result in releases of harmful chemicals into the air he breathes and the local waters where he kayaks and walks. DEC015.

Sierra Club member Janice Rhodes lives about 1.5 miles from the Dow Chemical (formerly Rohm & Haas) plastics plant in Bristol, Pennsylvania, which is expected to use the Verified Recycler Exclusion to continue handling hundreds of tons of ignitable hazardous wastes and spent solvents annually without meeting RCRA's requirements for safe storage and handling. DEC032. Janice enjoys walking through Silver Lake Nature Center, which is adjacent to her home and

about 1 mile from Dow, every day and observing the different wildlife there, including endangered red bellied turtles. *Id.* Knowing that Dow is able to manage hazardous wastes comprised of harmful, volatile, and ignitable chemicals like xylene, toluene, and benzene so close by without complying with RCRA requirements that protect against toxic releases causes Janice to worry about her own health and the health of everything in the Nature Center. *Id.* She is specifically concerned that the Verified Recycler Exclusion increases the risk that she and the nature center's animals, trees, and vegetation will be harmed in a serious fire or explosion, and or by toxic chemicals that have leached into the soil or groundwater. These worries diminish Janice's enjoyment of her trips to the Center. DEC032-33.

Sierra Club member Janet Bischoff and Clean Air Council member Norman Feldman each live less than one mile from De-Val Corp. in Philadelphia, Pennsylvania. DEC003; DEC008. Based on its prior use of the Transfer-Based Exclusion, De-Val Corp. is expected to continue using the Verified Recycler Exclusion to manage its tertrachloroethylene (or "PERC") – a known neurotoxin and likely carcinogen – outside of RCRA's subtitle C program. DEC003; DEC008. Because of the Verified Recycler Exclusion, and because PERC is a highly volatile chemical that can be released into the air if not properly stored and handled, both Janet and Norman are concerned this means that toxic PERC is being emitted into

the air they have to breathe, and thereby is seriously compromising their health. These concerns lessen Janet's and Norman's ability to enjoy their time outdoors in their neighborhood. DEC004; DEC008-09.

Petitioners were also injured procedurally by EPA's failure to provide notice of the Verified Recycler Exclusion or opportunity for comment on it. Had EPA provided that opportunity, Sierra Club's comments would have been markedly different: rather than merely supporting EPA's proposal to withdraw the Transfer-Based Exclusion and replace it with Subtitle C hazardous waste regulations, Petitioners would have opposed the Verified Recycler Exclusion and provided detailed explanation as to why it is unlawful and insufficiently protective of human health and the environment. *See* DEC035 (Declaration of Jane Williams); DEC026 (Declaration of Joanne Kilgour).

Furthermore, Petitioners' members are harmed by EPA's decision to leave the Pre-2008 Exclusions in force without the notification and containment requirements EPA described as "necessary" to make those exclusions lawful. Sierra Club member Stephanie Herron, for example, lives, works, and recreates within two miles of Delaware's largest scrap metal recycler, Diamond State Recycling, which appears to be related to Diamond State Salvage, a former scrap metal yard that was featured in EPA's damage study and correlated to the Pre-2008 Exclusions for scrap metal recycling, drums, and lead-acid batteries. DEC018.

Because Diamond State Recycling is likewise engaged in scrap metals recycling, Stephanie is very concerned that it could use one or more of the Pre-2008 Exclusions to handle hazardous wastes unsafely, causing the same kind of extensive soil and water contamination that Diamond State Salvage previously caused by releasing lead, polychlorinated biphenyls ("PCBs"), and other harmful toxins into Stephanie's community and the Delaware River. DEC019. Stephanie worries that toxic emissions released from the Diamond State Recycling facility contaminate the air she breathes and contribute to the breathing problems she has developed in recent years. DEC019-20.

Stephanie's concerns are intensified by the fact that the Pre-2008 Exclusions do not require Diamond State Recycling to provide notification to the state or the public if it is in fact using one or more of the exclusions, or to comply with EPA's own containment standard to protect against releases. DEC020-21. The lack of a notice requirement deprives Stephanie of important information she needs to protect herself from risks to her health. DEC021. It also impairs her ability, as Sierra Club Chapter Volunteer and Outreach Coordinator, to collect information to educate Sierra Club members about the pollution threats they face, and to help them engage in public processes and enforcement actions to ensure that hazardous waste recycling sites provide proper public protections. DEC021-22; *see also* Declaration of Jane Williams, DEC035-40 (discussing concerns about exclusions

for scrap metal and precious metal-containing wastes); Declaration of William Fontenot, DEC010-14 (discussing concerns about exclusions for scrap metals, used oil, and other petroleum wastes); Declaration of Jesse Marquez, DEC027-31 (discussing concerns about exclusions for scrap metal recycling).

ARGUMENT

I. EPA'S VERIFIED RECYCLER EXCLUSION IS UNLAWFUL AND ARBITRARY.

A. EPA Violated The APA By Issuing The Verified Recycler Exclusion Without Providing Notice Or Opportunity For Comment.

EPA did not propose the Verified Recycler Exclusion or provide any opportunity to comment on it. Both the Exclusion and EPA's rationale for it appear for the first time in OMB's redline revisions, at the very end of the rulemaking process and years after the comment period closed. *See* OMB Redline at 64-94, JA0966-95. EPA's failure to provide notice-and-comment opportunity violates the Administrative Procedure Act, which provides that "[g]eneral notice of proposed rule making shall be published in the Federal Register" and that "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(b), (c).

Nor is the Verified Recycler Exclusion a "logical outgrowth" of EPA's 2011 proposal. *See Envtl. Integrity Proj. v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) ("Given the strictures of notice-and-comment rulemaking, an agency's proposed rule and its final rule may differ only insofar as the latter is a 'logical outgrowth' of the former."). Far from proposing any kind of exclusion from RCRA for the hazardous materials at issue, EPA proposed to eliminate its exclusion for them, acknowledge that they are hazardous wastes, and regulate them "under RCRA Subtitle C." 76 Fed. Reg. at 44,096/1-2, JA0206. *See Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 387 (D.C. Cir. 2012) (explaining "the [2011] proposed rule would wholly eliminate the very transfer-based exclusion of which API's members wish to take advantage.").

B. EPA's Verified Recycler Exclusion Is Unlawful And Arbitrary.

1. EPA's Interpretation Of "Discarded" To Exclude Materials That Companies Must Pay To Have Hauled Away Is Unlawful Under Chevron Step One.

The Verified Recycler Exclusion exempts materials that companies cannot use or sell and, according to EPA itself, must "pay" other companies to accept. 80 Fed. Reg. at 1707/2, JA0278. When one company pays another to haul its hazardous secondary materials away, it has discarded those materials in the ordinary sense of the word. *AMC I*, 824 F.2d at 1184 & n.7 (in RCRA, "discarded"

unambiguously has its "ordinary, plain-English meaning" of "'disposed of,' 'thrown away,' or 'abandoned,'" and "is neither inherently difficult to define nor is so intimately tied to knowledge of the industry and the practicalities of regulation that definition requires agency expertise"). Because such materials are undisputedly hazardous and have been "discarded," they are hazardous waste under the plain meaning of the statute, and EPA lacks authority to exclude them from RCRA's cradle-to-grave regulatory requirements. 42 U.S.C. § 6903(27). *See U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 592 (D.C. Cir. 2004) ("Even under the deferential *Chevron* standard of review, an agency cannot, absent strong structural or contextual evidence, exclude from coverage certain items that clearly fall within the plain meaning of a statutory term."); *see also Petit v. Dep't of Educ.*, 675 F.3d 769, 781 (D.C. Cir. 2012) ("In the absence of an express definition, [courts] must give a term its ordinary meaning.").

EPA takes the position that although the excluded materials would be discarded in the absence of the conditions in its Verified Recycler Exclusion, they are not discarded so long as these conditions are satisfied. 80 Fed. Reg. at 1750/1-51/1, JA0321-22. When one company must pay another to haul away its hazardous secondary materials, however, those materials are "discarded" in the ordinary sense regardless of whether the paying company has met the conditions in EPA's new transfer-based exclusion. For example, a company that contains its hazardous

secondary materials in compliance with new containment requirements for generators before it pays to have them hauled away, *id.* at 1710/2, JA0281, nonetheless discards those materials in the ordinary sense of the word when it pays to have them hauled away. In *Association of Battery Recyclers v. EPA*, 208 F.3d 1047, 1051 (D.C. Cir. 2000) ("*ABR*"), the Court rejected the argument that the "dividing line between 'waste' and nonwaste" was compliance with EPA storage requirements where the materials at issue had not been discarded in the ordinary sense. Here, by the same token, compliance with the storage requirements and other conditions in EPA's Verified Recycler Exclusion do not make hazardous secondary materials non-wastes when companies discard them in the ordinary sense by paying to have them hauled away.

ABR suggests the term "discarded" "may be ambiguous as applied to some situations, but not as applied to others." *Id.* at 1056. Assuming there are situations with respect to which the term is ambiguous, the situation in which one company must pay another to haul something away is not one of them.[2]

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[2] *ABR* did not hold that the term "discarded" is ambiguous, and it rejected EPA's contention that cases subsequent to *AMC I* rendered the term ambiguous. *Id.* To the extent any cases subsequent to *AMC I* hold or suggest that "discarded" is ambiguous, those cases conflict with *AMC I*, which is controlling Circuit precedent. *See United States v. Old Dominion Boat Club*, 630 F.3d 1039, 1045 (D.C. Cir. 2011) ("when a conflict exists within our own precedent, we are bound by the earlier decision.").

Nor is the meaning of "discarded" rendered any less clear with respect to the wastes at issue here by the holding in *Safe Food and Fertilizer v. EPA*, 350 F.3d 1263, 1268 (D.C. Cir. 2003), that materials transferred from one company to another for subsequent recycling are not "always" discarded. The issue presented here is not whether such materials are always discarded, but whether they are discarded in a specific and limited circumstance: when the company that owns them must pay another company to haul them away.

Finally, the possibility that EPA's Verified Recycler Exclusion may cover some hazardous secondary materials that are not discarded – *e.g.*, materials that companies can sell rather than having to pay other companies to accept – does not make the exclusion any less unlawful. As this Court held in *ABR*, a RCRA regulation that covered "at least some" materials that were not waste was a "'contravention of Congress' intent.'" 208 F.3d at 1056 (quoting *AMC I*, 824 F.2d at 1193). Likewise, a rule that excludes at least some materials that are waste from RCRA regulation also contravenes Congress' intent.

2. EPA's Contention That Hazardous Materials Are Not Waste Even When Companies Must Pay To Have Them Hauled Away Is Unlawful Under Chevron Step Two And Arbitrary.

Even if "discarded" were ambiguous, EPA's interpretation of it is unreasonable under *Chevron* step two. First, interpreting "discarded" to exclude

hazardous materials that companies must pay to have hauled away "diverges from any realistic meaning of the statute" for the reasons given above. *Supra* at 31-34; *Massachusetts*, 93 F.3d at 893 ("Because the range of permissible interpretations of a statute is limited by the extent of its ambiguity, an agency cannot exploit some minor unclarity to put forth a reading that diverges from any realistic meaning of the statute lest the agency's action be held unreasonable."). Further, by failing even to consider that companies discard hazardous materials in the ordinary sense when they pay other companies to haul them away, EPA "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43.

Second, EPA admits that "most transfers of hazardous secondary material for recycling do involve discard." 2011 RIA at 214, JA0547. It then explains that "attemp[ting] to define such material as 'not discarded' solely by setting additional management conditions poses the danger of circular reason," and that "adding conditions, many of which resemble hazardous waste requirements, in order to attempt to prevent the discard of hazardous secondary materials that would otherwise be subject to full hazardous waste requirements, is potentially counter to the original intent of RCRA." *Id.* The Verified Recycler Exclusion is a perfect illustration of the very dodge EPA identifies – inventing lesser conditions and then claiming that regulated entities' compliance with those conditions prevents materials from being "discarded" and excuses the agency from establishing RCRA

requirements. *Id.* The end result frustrates the undisputed "original intent of RCRA," *id.*, by allowing companies to store, transport, and dispose of hazardous wastes without meeting the protective requirements mandated by RCRA and giving short shrift to the people whom RCRA was enacted to protect. *See Shays*, 528 F.3d at 925 ("administrative constructions of [a] statute … that frustrate the policy that Congress sought to implement" are both unreasonable under *Chevron* step two and arbitrary) (internal quotation marks and citation omitted).

Third, EPA does not even acknowledge its prior statements on "the original intent of RCRA," and offers no explanation for adopting a rule rationale it previously regarded as at least potentially "circular" and unlawful. 2011 RIA at 214, JA0547; *see Mountain Commc'ns v. FCC*, 355 F.3d 644, 648-49 (D.C. Cir. 2004) (holding action arbitrary where the "Commission … has not even tried to explain how its position can be reconciled with the statutory provision"); *see also Nat'l Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1145-46 (D.C. Cir. 2013) (agency acted arbitrarily where it failed to explain apparent contradiction between positions taken in proposed and final rules).

Fourth, EPA does not even say whether it thinks the term "discarded" is ambiguous as applied to materials that companies must pay to have hauled away,

let alone why it might think so.[3] EPA's failure to even acknowledge that the term "discarded" is clear at least "as applied to some situations," *ABR*, 208 F.3d at 1056, and to state its reasons for concluding the term is ambiguous in this situation is unreasonable. *ITT Indus. v. NLRB*, 413 F.3d 64, 69 (D.C. Cir. 2005) (Court could not "assess the reasonableness of the Board's decision" because agency had "failed even to acknowledge that the question … was an open one.") (internal quotation marks omitted). So too is EPA's utter failure to say how it interprets "discarded" – either generally or as applied to materials that companies must pay to have hauled away. Under *Chevron*, courts defer to agency interpretations "only if the agency has offered a reasoned explanation for why it chose that interpretation." *Barrington*, 636 F.3d at 660. *A fortiori*, courts cannot defer where an agency has not even provided an interpretation to review. *See PDK Labs. Inc. v. DEA*, 362 F.3d 786, 798 (D.C. Cir. 2004) (court cannot sustain agency's action as reasonable "on some other basis the agency did not mention."); *Public Citizen v. HHS*, 332 F.3d 654, 661 (D.C. Cir. 2003) ("even if we were prepared to accord *Chevron* deference …, that document contains no interpretation … to which we might defer").

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[3] Indeed, EPA argues in a different context that it does not matter whether the term is ambiguous or unambiguous. RTC at 14-15, JA1091-92. This Court held otherwise in *AMC I*, 824 F.2d at 1184 & n.7, and *ABR*, 208 F.3d at 1056. *See supra* at 31-33 & n.2.

Fifth, to the extent the meaning of discarded is ambiguous, *Safe Foods* strongly indicates that the "market valuation" of the materials at issue is an important indicator of whether they are wastes. 350 F.3d at 1269. The market valuation of these materials is negative: the generators must pay other companies to haul them away and the recyclers get paid to take those materials rather than having to buy them. EPA acknowledges this fact, 80 Fed. Reg. at 1707/2, JA0278, but fails to acknowledge its significance: that the negative value of these materials confirms they are waste. *See Rettig v. Pension Benefit Guar.Corp.*, 744 F.2d 133, 151 (D.C. Cir. 1984) (interpretation fails under *Chevron* step two where agency failed to "consider[] the matter in a detailed and reasoned fashion"); *State Farm*, 463 U.S. at 43 (action is arbitrary where agency "entirely failed to consider important aspect of the problem").

Finally, despite relying entirely on the Verified Recycler Exclusion's conditions to claim it will not unlawfully exempt discarded hazardous secondary materials from RCRA regulation, EPA does not say <u>why</u> these conditions prevent discard from occurring when a company that cannot use or sell its hazardous secondary materials "pay[s]" to get rid of them. *See* 80 Fed. Reg. at 1749/2-51/1, JA0320-22; RTC at 76-77, JA1100-01. EPA's failure to "engage in considered analysis" on this issue, *ITT Industries v. NLRB*, 251 F.3d 995, 1004 (D.C. Cir. 2001), is especially glaring given that the conditions on which EPA relies are not

even relevant to whether an ordinary-sense discard occurs when a company does pay to have its wastes hauled away. If EPA believes its conditions prevent such materials from being "discarded," the agency must at least explain its belief. Nowhere in the record has the agency done so. *See Fox v. Clinton*, 684 F.3d 67, 75 (D.C. Cir. 2012) (even where "an agency's decreed result [is] within the scope of its lawful authority … the process by which it reaches that result must be logical and rational.") (quoting *Tripoli Rocketry Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 437 F.3d 75, 77 (D.C. Cir. 2006)).

3. The Verified Recycler Exclusion Arbitrarily Excuses Compliance With Requirements Necessary To Prevent Discard And Risks To Human Health And The Environment.

The Verified Recycler Exclusion fails to ensure against discard and the various human health and environment risks EPA's record shows to be associated with the excluded wastes and process.

In this rulemaking, EPA stated that before it can promulgate a RCRA exclusion, the agency "needs adequate assurance that the conditional exclusion will not result in discarded hazardous materials posing significant risks to human health and the environment (*e.g.*, fires/explosion, soil and water contamination, air emissions, and abandoned hazardous secondary materials)." 76 Fed. Reg. at 44,109/1, JA0219. It explicitly recognized that "[b]ecause hazardous secondary materials sent to recycling are physically and chemically similar, if not identical to

many of the hazardous wastes sent for treatment and disposal, the potential risks from their management are similar, if not the same, as from hazardous wastes sent for treatment and disposal." *Id.* at 44,104/1, JA0214.

With this in mind, EPA determined that the conditions in the old Transfer-Based Exclusion were issued "without specific evidence that they would work as intended (*i.e.*, would not result in significant risk to human health and the environment from discarded materials)" and that they "lack[ed] several important implementation provisions that the Subtitle C requirements" otherwise provide. *Id.* at 44,109/2, JA0219. Nonetheless, in the final rule, EPA neglects these concerns and establishes another set of conditions that fall short of providing "adequate assurance" that the new Verified Recycler Exclusion will not constitute discard or pose the serious human health and environmental risks EPA sought to address.

In particular, EPA stated that one of the top concerns presented by the Transfer-Based Exclusion was that it provided "incentives to accumulate larger volumes of hazardous secondary materials due to longer storage time limits," as compared to RCRA, which, for example, requires generators to remove their hazardous wastes every 90 days (for large quantity generators) or 180 days (for small quantity generators). *Id.* at 44,107/1, JA0217. EPA's Environmental Justice Analysis specifically stated that the Transfer-Based Exclusion's lack of an accumulation time limit could increase the risks of "fire and explosion hazards,"

"soil and water contamination hazards," "volatile air emissions," and "particulate wind dispersal" at the generator site because their hazardous wastes "can be accumulated longer, and potentially greater quantities can be accumulated on-site." EPA, *Environmental Justice Analysis of the Definition of Solid Waste Rule* at 46-51 (June 30, 2011) (EPA-HQ-RCRA-2010-0742-0004) ("Environmental Justice Analysis"), JA0555-60. EPA's proposed rule would have reduced these hazards by eliminating the Transfer-Based Exclusion, 76 Fed. Reg. at 44,096/1-2, JA0206. *See Am. Petroleum Inst.*, 683 F.3d at 388 (explaining that the 2011 proposed rule "would wholly eliminate the very transfer-based exclusion of which API's members wish to take advantage."). But instead, the Verified Recycler Exclusion continues to allow generators to accumulate their wastes on site for longer periods of time than the hazardous waste regulations would allow. 80 Fed. Reg. at 1709/3, JA0280. In contrast to the explicit limits in the hazardous waste requirements, the Verified Recycler Exclusion's general "speculative accumulation" requirement merely requires the facility to show that the waste is "potentially recyclable" and that during a calendar year, it transferred just 75% of whatever amount of hazardous wastes it had on-site at the start of that year. *Id.* EPA fails to explain how this condition specifically addresses each of the serious environmental and human health risks it identified in the record and how it "adequately assu[res]" that discard or damage will not occur. *See generally State Farm*, 463 U.S. at 43

(agency action arbitrary where it "entirely failed to consider an important aspect of the problem"); *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996) ("agency action is arbitrary when the agency offered insufficient reasons for treating similar situations differently.").

The Verified Recycler Exclusion also does not require compliance with prescriptive design, operating, inspection, and closure standards, including those for control of air pollution releases, which collectively ensure that hazardous wastes are properly contained. *See, e.g.*, 40 C.F.R. § 262.34; 40 C.F.R. §§ 265.1030-.1049 (air emission standards for process vents), 265.1050-.1079 (air emission standards for equipment leaks), and 265.1080-.1091 (air emission standards for tanks, surface impoundments, and containers). As EPA explained at proposal, volatile air emissions could occur during accumulation and transportation under the Transfer-Based Exclusion because it does not provide "explicit standards for containment of volatile organic emissions as do the hazardous waste regulations." Environmental Justice Analysis at 50, JA0559; *see also* 76 Fed. Reg. at 44,104/1, JA0214 (describing various hazardous waste "management challenges"). But in the final rule, EPA does not require compliance with such "explicit standards," and instead applies its new general containment standard that simply requires units to be in "good condition with no leaks or other continuing or intermittent unpermitted releases," "properly labeled," and compatible with

hazardous materials placed in the unit and the materials used to construct the unit. *See* 40 C.F.R. § 260.10 (80 Fed. Reg. at 1771/2, JA0342); 80 Fed. Reg. at 1710/2, JA0281. EPA's decision fails to explain how the new containment standard provides adequate protections against the well-documented risks of discard, or why wastes under the Exclusion should be contained any less carefully than regulated wastes. *Transactive Corp.*, 91 F.3d at 236-37.

II. EPA'S PRE-2008 EXCLUSIONS ARE UNLAWFUL AND ARBITRARY.

A. EPA Re-Opened Comment On Its Pre-2008 Exclusions.

In its proposed rule, EPA claimed it was "not reopening comment on any substantive provisions of the [pre-2008] regulatory exclusions or exemptions." 76 Fed. Reg. at 44,138/3, JA0248. EPA acknowledged, however, that all of the 32 Pre-2008 Exclusions lacked four conditions the agency "believe[d] to be minimum requirements necessary to define when recycled hazardous secondary materials are not discarded." *Id.* at 44,138/3-39/1, JA0248-49. The agency then expressly "request[ed] comment" on whether it should codify these conditions. *Id.* at 44,139/1-2, JA0249. By expressly requesting comment on whether additional conditions are "necessary" to make the Pre-2008 Exclusions lawful, EPA reopened the Pre-2008 Exclusions for comment on this issue. *See Mendoza v. Perez*, 754 F.3d 1002, 1019 n.12 (D.C. Cir. 2014) ("The reopener doctrine is employed when

an agency has considered substantively changing a rule but ultimately *declined* to do so.").

B. EPA Took Final Action By Refusing To Revise Its Pre-2008 Exclusions.

Although EPA characterizes its decision to leave the Pre-2008 Exclusions unchanged as a deferral, 80 Fed. Reg. at 1741/2, JA0312, that decision marks the "consummation" of EPA's decision-making process in this rulemaking, and "legal consequences will flow" from it. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citations omitted). EPA expressly opened the question of whether its Pre-2008 Exclusions are lawful in the absence of certain "minimum" requirements that EPA believed "necessary" to prevent discard. 76 Fed. Reg. at 44,138/3-39/1, JA0248-49. EPA's subsequent decision not to revise those exclusions, 80 Fed. Reg. at 1741/2, JA0312, is the "consummation" of EPA's decision-making process in this rulemaking. *Bennett*, 520 U.S. at 177-78. Its "legal consequence[]," *id.*, is that unlawful exclusions from RCRA are left in force and Environmental Petitioners' members and other Americans who live, work, and recreate in communities where these companies operate will lose the benefit of health and environmental protections that Congress intended RCRA to guarantee. Notably, EPA itself has linked the Pre-2008 Exclusions with serious environmental

damage cases, and maintains that it can attribute damage cases to at least seven of these exclusions "with confidence." 80 Fed. Reg. at 1741/1, JA0312.

It does not matter whether EPA will address the Pre-2008 Exclusions' defects in a future rulemaking or rulemakings, as the agency implies it might, *id.* at 1741/2, JA0312. EPA completed the present rulemaking when it issued the 2015 Rule, and it does not claim that any further rulemaking on these exclusions is currently underway or even scheduled. Any changes in EPA's position on the Pre-2008 Exclusions will take place, if at all, in a different rulemaking that may, or may not, be conducted in the future. "[A]ll laws are subject to change," and "[t]he fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000); *see also Nat'l Envtl. Dev. Ass'n's Clean Air Proj. v. EPA*, 752 F.3d 999, 1006 (D.C. Cir. 2014) ("An agency action may be final even if the agency's position is 'subject to change' in the future.") (quoting *Appalachian Power*, 208 F.3d at 1022).

C. Absent The "Minimum" Requirements Necessary To Prevent "Discard," EPA's Pre-2008 Exclusions Are Unlawful.

EPA's rationale for proposing to codify four additional conditions in the Pre-2008 Exclusions shows that the exclusions are unlawful without them. EPA describes these conditions – which are missing from all 32 of the Pre-2008

Exclusions – as "the minimum requirements necessary to define when recycled hazardous secondary materials are not discarded." 76 Fed. Reg. at 44,138/3-39/1 (emphasis added), JA0248-49. Hazardous secondary materials that have been "discarded" are hazardous waste. *See AMC I*, 824 F.2d at 1178-79; *Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 741 (D.C. Cir. 1990). Thus, the Pre-2008 Exclusions lack the "minimum requirements necessary" to assure that they do not unlawfully exclude hazardous wastes from RCRA regulation. *See Sierra Club v. EPA*, 755 F.3d 968, 980 (D.C. Cir. 2014) ("EPA cannot carve out of RCRA one of the very activities that Congress commanded it to regulate.").

Nothing in the final rule refutes the conclusion EPA reached in its proposal: that these Exclusions are unlawful without, at a "minimum," the additional conditions it proposed as "necessary." 76 Fed. Reg. at 44,138/3-39/1, JA0248-49. Although EPA now claims "it may need to consider each exclusion in terms of evaluating specific regulatory gaps," 80 Fed. Reg. at 1741/2, JA0312, the additional information EPA claims to need is about whether and how individual exclusions cause environmental damage is irrelevant to whether the exclusions are unlawful. Because they allow companies to handle hazardous waste in violation of RCRA requirements, as EPA indicated at proposal, they are unlawful regardless of how well EPA understands the damage they may cause. Indeed, to argue that RCRA regulation of hazardous wastes is contingent on EPA's views about whether

such regulation is warranted flouts this Court's precedent and turns RCRA on its head. *See, e.g.*, *Sierra Club*, 755 F.3d at 980. As EPA itself has said, "RCRA is a preventative statute," 80 Fed. Reg. at 1740/2, JA0311, and it prevents harm to human health and the environment by requiring Subtitle C regulation of all hazardous wastes, not by relying on EPA to decide if such regulation is worthwhile.[4]

Further, even if the lawfulness of the EPA's Pre-2008 Exclusions turned on whether EPA believes they will cause environmental damage, EPA states that it can correlate at least seven of the 32 Pre-2008 Exclusions to environmental damage cases "with confidence." *Id.* at 1741/1, JA0312. At a minimum, those Exclusions – and EPA's decision to keep them on the books without applying all of the requirements necessary to protect against discard – are arbitrary even by the agency's own reasoning. *See State Farm*, 463 U.S. at 43 (agency must articulate "rational connection between the facts found and the choice[s] made").

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[4] If EPA wished to claim that human health and the environment will be protected even in the absence of RCRA requirements for the hazardous wastes currently excluded by its Pre-2008 Exclusions, the agency would need to make that claim and support it with substantial evidence in the administrative record. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."). It has not done so.

D. EPA's Refusal To Establish Notification Requirements Is Unlawful And Arbitrary.

One of the four "minimum necessary requirements" that EPA identified at proposal is notification. 76 Fed. Reg. at 44,138/3-39/1, JA0248-49. The intent of notification requirements, EPA explained, "is to provide basic information to regulatory authorities in order to enable adequate compliance monitoring and to ensure that hazardous secondary materials are managed according to the exclusion and not discarded." *Id.* at 44,140/1, JA0250. In the final rule, however, EPA states that requiring notification could impose a burden on companies that would have to start identifying and reporting the hazardous wastes for which they currently claim the Pre-2008 Exclusions. 80 Fed. Reg. at 1766/2-3, JA0337.

That argument does not even speak to the underlying statutory concern that EPA articulated in its proposal – *i.e.*, that notification is necessary to ensure the Pre-2008 Exclusions do not allow hazardous wastes to evade RCRA regulation. 76 Fed. Reg. at 44,140/1-3, JA0250. *See State Farm*, 463 U.S. at 43 (action is arbitrary where the agency "failed to consider important aspect of problem"); *Mountain Commc'ns*, 355 F.3d at 648-49 (holding action arbitrary where the "Commission … has not even tried to explain how its position can be reconciled with the statutory provision"); *Nat'l Ass'n of Clean Water Agencies*, 734 F.3d at 1145-46 (agency acted arbitrarily where it failed to explain apparent contradiction between positions taken in proposed and final rules).

To the extent they are relevant at all, EPA's arguments reinforce the need for notification requirements rather than supporting EPA's decision to drop them. First, EPA states that some facilities do not currently "distinguish" between the excluded hazardous wastes and the non-hazardous materials they handle. 80 Fed. Reg. at 1766/2, JA0337. From this, EPA concludes only that it might be burdensome for such facilities to conduct the testing necessary to make that distinction and provide notice with respect to the materials that are hazardous. *Id.* Nothing in the final rule suggests that EPA grappled with the more obvious and more shocking implication of its revelation: that companies currently using EPA's exclusions to handle hazardous wastes do not even know which of the materials they handle are excluded hazardous wastes. If that is true, it is hardly reasonable or even realistic for EPA to assume those companies are handling the excluded wastes in compliance with the regulatory conditions on which those exclusions rely to prevent unlawful discard. Nor can EPA realistically expect States to ensure compliance with those conditions when the States – like EPA and the facilities themselves – do not know which materials are subject to the conditions. A rational response to this record evidence would be to promulgate the notification requirement, not drop it. At a minimum, EPA needed to draw a rational connection between the facts it found and the choice it made, and that connection is wholly missing from the record. *State Farm*, 463 U.S. at 43.

Second, EPA's rationale for dropping the notification requirement boils down to a circular argument that, because the Pre-2008 Exclusions do not currently require notification, EPA cannot promulgate notification requirements. EPA claims that because it does not know how many companies are using the exclusions, it cannot "precisely estimate" either the burden that requiring notification would impose on States or the environmental benefits that notification requirements would yield. 80 Fed. Reg. at 1766/2-3, JA0337. By that self-fulfilling logic, the agency will never require notification requirements because, without them, it will never be able to precisely estimate the burdens and benefits of requiring them. *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 778 (D.C. Cir. 2005) (finding "circularity" of agency's reasoning to be arbitrary and capricious); *U.S. Telecom*, 359 F.3d at 577 (rejecting agency's "circular" reasoning).

E. EPA's Refusal To Require Compliance With The Containment Standard Is Unlawful and Arbitrary.

According to EPA, proper containment is another "minimum requirement[] necessary to define when recycled hazardous secondary materials are not discarded." 76 Fed. Reg. at 44,138/3-39/1, JA0248-49. In light of clear evidence that mismanagement of hazardous materials is "one of the major causes" of damage at hazardous waste recycling sites, EPA proposed to apply its general

containment standard at 40 C.F.R. § 260.10 to all hazardous secondary materials that are subject to a Pre-2008 Exclusion. 76 Fed. Reg. at 44,140/1, JA0250.

In its proposal, EPA recognized that certain Pre-2008 Exclusions and exemptions may already include specific containment requirements, and noted that "[o]f course, facilities operating under provisions that already contain management requirements would have to continue meeting those requirements." *Id.* In the final rule, EPA cites that exact same fact as its sole reason for not applying the containment standard to any of the Pre-2008 Exclusions. Specifically, EPA concludes that its proposal "may not be the most efficient or effective cause of action" because "EPA has already promulgated certain management standards for some exclusions." 80 Fed. Reg. at 1766/1-2, JA0337 (citing just one exclusion with specific management requirements).

The same facts that previously supported promulgating containment requirements cannot support dropping containment requirements without at least some explanation from EPA about why it now thinks they now point in the opposite direction. *See State Farm*, 463 U.S. at 43 ("agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts founds and the choice made") (internal quotation and citation omitted). Nowhere does EPA explain how the fact that

"some" exclusions require containment makes it inappropriate to promulgate containment requirements for the rest.

Finally, as is the case with the notification requirement discussed above, EPA's rationale for refusing to include the containment standard in any of the Pre-2008 Exclusions improperly ignores the statutory problem EPA sought to correct in the rulemaking. Regardless of the logic (or lack thereof) in EPA's argument that because some of the Pre-2008 Exclusions already have containment requirements the others should not be revised to include them, that argument does not speak to EPA's rationale for proposing containment requirements in the first place: that any exclusion lacking a containment requirement lacks a "minimum requirement necessary" to prevent unlawful discard. 76 Fed. Reg. at 44,138/3-39/1, JA0248-49. *See State Farm*, 463 U.S. at 43 (failure to articulate rational connection between facts found and choice made); *Mountain Commc'ns*, 355 F.3d at 648-49 (failure to explain how position can be reconciled with statute); *Nat'l Ass'n of Clean Water Agencies*, 734 F.3d at 1145-46 (failure to explain apparent contradiction between positions taken in proposed and final rules).

CONCLUSION

For the reasons given above, Environmental Petitioners respectfully request that this Court vacate the Verified Recycler Exclusion codified at 40 C.F.R.

§ 261.4(a)(24) and the Pre-2008 Exclusions identified at 76 Fed. Reg. 44,139, JA0249.

DATED: June 20, 2016

Respectfully submitted,

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CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing **Final Opening Brief of Environmental Petitioners** contains 11,746 words, as counted by counsel's word processing system, and thus complies with the applicable word limit established by the Court.

DATED: June 20, 2016

/s/James S. Pew
James S. Pew

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June, 2016, I have served the foregoing **Final Opening Brief of Environmental Petitioners** on all registered counsel through the Court's electronic filing system (ECF).

/s/James S. Pew
James S. Pew

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1038 (and consolidated cases)

AMERICAN PETROLEUM INSTITUTE,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review of Final Administrative Actions of the
United States Environmental Protection Agency

ADDENDA TO THE FINAL OPENING BRIEF OF ENVIRONMENTAL PETITIONERS

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DATED: June 20, 2016

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DECLARATION OF THOMAS BELL

I, Thomas Bell, declare as follows:

1. I am 53 years old. I live in Linden, New Jersey. I have lived in Linden, New Jersey, for over 23 years.
2. I am a member of Sierra Club. I have been a member for over four years.
3. As a resident of Linden, I am aware of the many sources of environmental contamination in the area and am very concerned about their effects on my health. It is my understanding that, at one time, Linden had one of the highest cancer rates in the U.S. per square mile, and Linden used to be called "Cancer Alley." I am aware that studies of New Jersey communities found a significant correlation between toxic-waste disposal sites and cancer death rates in the surrounding communities. Members of my community frequently get sick and complain about their health, and I worry that the prevalence of toxic sites in Linden may be contributing to their ill health.
4. In addition, I frequently smell foul odors in my community. These odors are often the subject of people's complaints because they are unavoidable, and the odors have been prevalent in Linden for decades.
5. My house is located approximately one mile from the Fiabila Nail Polish Manufacturing Plant located at 1601 Lower Rd, Linden, New Jersey 07036. I am aware that, among other things, Fiabila generates hazardous waste during its manufacturing process for nail polish.
6. In addition, my house is located approximately two miles from the Safety-Kleen Systems Recycling Facility located at 1200 Sylvan Street, Linden, New Jersey 07036. I am aware that, among other things, Safety-Kleen accepts for reprocessing waste from the chemical, electronics, pharmaceutical, and manufacturing industries.
7. Both the Fiabila facility and the Safety-Kleen facility are located in a commercial district that includes various restaurants and shops, such as Walmart, ALDI, and Buffalo Wild Wings. I frequently shop, eat, and recreate in this commercial district because it is so close to my house. This commercial district is adjacent to another commercial area with Home Depot, Staples, Target, ShopRite, and a movie theater, which I also frequent.
8. I understand that Fiabila is a hazardous-waste generator that used a regulatory exemption called the Transfer-Based Exclusion to generate, store, and transport approximately 200 tons of hazardous waste annually, including ignitable waste. Because of this exemption, Fiabila did not need to meet otherwise mandatory requirements in the Resource Conservation and Recovery Act ("RCRA") that were enacted to protect human health and the environment from the hazards of waste handling, such as toxic leaks, spills, fires, and explosion. I understand that Fiabila is now expected to use a new "verified recycler exclusion" to continue this practice.
9. I understand that Safety-Kleen is a hazardous-waste reclaimer that used this same Transfer-Based Exclusion to accept, store, treat, and dispose of approximately 3,800 tons of hazardous waste annually, including ignitable waste, methyl ethyl ketone, and spent solvents. Because of this exemption, Safety-Kleen did not need to meet otherwise mandatory RCRA requirements that protect human health and the environment. I understand that Safety-Kleen is now expected to use a new "verified recycler exclusion" to continue this practice.

10. I am aware that EPA's new "verified recycler exclusion" exempts Safety-Kleen and Fiabila from compliance with important hazardous waste regulations that are necessary to protect me and my community from harm caused by improperly stored and transported hazardous waste. I am worried that, under this exclusion, these hazardous wastes are more likely to spill or leak into nearby waters and soil, or form poisonous gases in the event of a fire or explosion on site.
11. I am particularly concerned about the potential health risks I face when I am outside because I live, shop, dine, and recreate so near to the Fiabila and Safety-Kleen facilities.
12. I support Sierra Club's efforts to have the "verified recycler exclusion" be held unlawful so that Fiabila and Safety-Kleen must safely manage the hazardous waste they generate and reclaim in accordance with the law. This will put me at ease and allow me to feel much safer living in my home and being active in my community.

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

Thomas Bell

Thomas Bell

Executed on 12/31/, 2015.

DECLARATION OF JANET BISCHOFF

I, Janet Bischoff, declare as follows:

- I have been a Sierra Club member since 2009. I joined Sierra Club along with my husband because we both love the outdoors and have a deep interest in protecting the environment.

- My husband and I recently retired and moved to Philadelphia last year to be closer to our daughter. Since then, I have very much enjoyed gardening in our yard and walking around our new neighborhood every day, as long as the weather cooperates. A couple times a week, we walk around with garbage bags to pick up trash so that it does not end up in our waterways.

- However, I am still concerned about the potential health risks my husband and I face when we are outside because our home is just about ½ mile down the street from De-Val Corp., a small arms, ordnance, and ordnance accessories manufacturing company that is located at 7341 Tulip Street Philadelphia, Pennsylvania 19136, I understand that De-Val Corp. used a regulatory exemption called the Transfer-Based Exclusion to generate, store, and transport approximately 2 tons of a hazardous waste called tetrachloroethylene (also known as "PERC" or "PCE") annually, without meeting otherwise mandatory requirements in the Resource Conservation and Recovery Act (RCRA) that were enacted to protect human health and the environment from toxic leaks, spills, fires, and explosions. I understand that De-Val is now expected to continue that practice under the U.S. EPA's recently issued Verified-Recycler Exclusion.

- I am aware that PERC is a toxic chemical that EPA has classified as a likely human carcinogen. EPA's website explains that inhaling PERC can cause short-term health problems-- like upper respiratory and eye irritation, kidney dysfunction, and neurological effects— as well as long-term health problems, including adverse effects in the kidney, liver, immune system, reproductive system, and hematologic system. I also understand that, according to EPA, some people who drink water contaminated with tetracholorethylene may be at greater risk of having liver problems and getting cancer.

- Although I support EPA's decision to revoke the Transfer-Based Exclusion, I am very concerned and disappointed that EPA created a new exclusion, the Verified Recycler Exclusion, that will allow De-Val Corp. to generate, store and transport hazardous wastes, such as PERC, without meeting all of RCRA's requirements for safe storage, handling, and transportation of hazardous wastes. Unless De-Val is required to provide all of the protections promised by the Resource Conservation and Recovery Act and EPA's regulations, I fear that this facility will store and transport its PERC in dangerous ways that put me, my husband, and everyone in our community in greater danger of suffering from any and all the serious health problems EPA says are associated with the pollutant.

- As I've grown older, I have noticed that I have become more sensitive to what's in the air and that it has become more difficult for me to breathe. I am worried that De-Val Corp.'s use of the Exclusion allows PERC, which I understand is highly volatile, to be stored for too long near my home in containers that do not fully protect against emissions and leaks and that as a result, unsafe levels of PERC will enter the air I breathe into my lungs every day. I worry that such emissions may put me and my husband at a heightened risk of suffering from more serious respiratory problems in the future.

- I am also concerned that the Verified-Recycler Exclusion allows De-Val to store large amounts of PERC could be emitted through leaks, for long periods of time near my home, and that this increases the likelihood that large amounts of PERC could be emitted during a fire or explosion at De-Val Corp. or while the waste is being transported on the nearby streets or railway, putting me and my neighbors at risk of suffering from acute health impacts from inhalation.

- Weather permitting, my husband and I enjoy spending time outside in our garden every day tending to our various leafy greens, herbs, and root vegetables. It worries me that De-Val Corp.'s PERC could contaminate our soil and our foods if it is not properly stored and is allow to leak into the air, or if it is spilled during transportation processes that are not properly tracked and regulated as required by the hazardous waste regulations. This diminishes my ability to fully enjoy gardening in my yard.

- Likewise, I am concerned that the Exclusion increases the chance that De-Val Corp.'s PERC will spill or leak into the groundwater, and harm me, my husband, and my community. I am aware that groundwater and soil contaminated with PERC can enter homes via vapor intrusion and I worry that this could happen here as a result of DeVal's use of the Exclusion..

- My husband and I have enjoyed spending some time boating on the Delaware River this year and we hope to do more of that next year, and also go fishing. The Delaware River is located less than ½ mile from De-Val Corp. It is very concerning to think that improperly stored and transported PERC could end up in this River and harm its aquatic life. Because of this, I will have had to think twice about how much we want to be exposed to the water and whether we will consume consuming any fish we catch, which is something we would otherwise enjoy doing.

- I am very worried that under the Exclusion De-Val Corp. does not have to comply with closure requirements that would help make ensure that when De-Val Corp. shuts down it will properly clean up and remove its exempted PERC, so that it does not continue contaminating the site and our surrounding neighborhood. This unfairly risks putting me and my community in danger indefinitely, long after De-Val stops operating.

- I am especially concerned about De-Val Corp.'s use of the Exclusion here because there are many people in our neighborhood who are very poor and who face serious hardship every day. It is simply not fair for the United States Environmental Protection Agency to make things worse by not requiring De-Val Corp. to provide our community with all of the health protections we would be entitled to without the Verified-Recycler Exclusion.

- I support Sierra Club's efforts to vacate the Verified Recycler Exclusion so that my community can have all of the hazardous waste protections we are entitled to under the law. This new loophole continues to deprive me of my ability to fully enjoy my own yard and my neighborhood because I still have to worry about increased exposures and health risks associated with the generation, storage, and transportation of toxic PERC at De-Val Corp. I want the Verified-Recycler Exclusion to be deemed unlawful so that De-Val has to safely manage its hazardous wastes in accordance with the law. This will put me at ease and allow me to feel safer while at home and in my neighborhood.

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

Janet Bischoff

Janet Bischoff

Executed on November 26, 2015.

DECLARATION OF HUDA FASHHO

1. I am the Member Services Manager for the Sierra Club, a non-profit corporation organized under the laws of the State of California. I work in Sierra Club's national office in San Francisco, California. I became Member Services Manager in 2011. In that capacity, I am responsible for planning, developing, and directing the programs, and Club staff responsible for: providing information services to members, the operational and user aspects of the Club's member/donor database, the delivery of member/donor acknowledgments and membership renewals. My work requires that I be familiar with the Club's purpose, organization, structure and activities, and with environmental interests and concerns of Club members. My work also requires me to be familiar with the nature and scope of the Club's membership programs, its membership records, and the manner in which information on members can be retrieved.

2. The Sierra Club is a nonprofit corporation existing under the laws of California, with its principal place of business in San Francisco, California. The Club is a membership organization dedicated to exploring, enjoying, and protecting the wild places of the earth, and to protecting and restoring the quality of the natural and human environment. The Club's actions to protect and enhance the environment include advocacy and litigation to strengthen and enforce environmental laws and regulations. Club members are greatly concerned about air quality, and the Club has a long history of activities at both the local and national levels to protect air quality, often working closely with our members to provide them with services and information that are helpful to them locally.

3. The Club regularly maintains membership records that include the address of each member. These records are regularly updated each business day to add new members, reflect address changes, and change membership status for those who are no longer active members. The records are maintained on a computer database, from which I obtained the information provided below.

4. Sierra Club currently has 633,126 individual members, residing in all 50 states and Puerto Rico.

5. The Club has the following number of members living in the following U.S. states and territories:

a. Iowa: 5484
b. Illinois: 24,483
c. Idaho: 2391
d. New Jersey: 17,374
e. Pennsylvania: 24,310
f. Puerto Rico: 1,122
g. U.S. Virgin Islands: 42

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

Executed this 2 day of December, 2015.

Muda Tashlio

DECLARATION OF NORMAN FELDMAN

I, Norman Feldman, declare as follows:

1. I am 92 years old. I live at 7160 Erdrick Street, Philadelphia, Pennsylvania, 19135. I have lived in the same house in Philadelphia since 1951.
2. I am a member of the Clean Air Council. I have been a member for over 20 years. I began volunteering with the Clean Air Council in 1984, through the Retired Seniors Volunteer Program. I have continued to volunteer since then.
3. My house is located less than a mile, by foot, from DeVal Corporation, located at 7341 Tulip Street, Philadelphia, PA 19136. I am aware that, among other things, DeVal Corporation manufactures accessories that are used to store and transport munitions, weapons and explosives.
4. I am aware that DeVal Corp previously used what is known as the "transfer-based exclusion" to generate, store, and transport approximately two tons of hazardous waste on site, specifically tetrachloroethylene (also known as "PERC"), without providing all of the hazardous waste protections required by RCRA. I also understand that DeVal is now expected to use the new "verified recycler exclusion" to continue that practice. I am aware that PERC has various health impacts, including causing neurological damage and respiratory problems, and that it has been classified as a likely human carcinogen. I am also aware from my years of experience working on air quality issues at the Clean Air Council that people of my age are more susceptible to the effects of air pollution than the general population.
5. I spend a significant amount of time outdoors. I have several rose bushes, and during the spring and summer I spend time outside tending to my garden nearly every day.
6. I also go walking nearly every day along the Delaware River on the Pennypack Trail. I enter the trail at State Road and Rhawn Street, approximately a mile by foot from DeVal Corp. Being able to enjoy the nature that surrounds the trail, including the wildlife and the river, significantly enhances my quality of life.
7. I am aware that EPA's "verified recycler exclusion" exempts DeVal from compliance with important hazardous waste regulations that are necessary to protect me and my community from harm caused by improperly stored and transported PERC. I am worried that under the exclusion, PERC is more likely to spill or leak into nearby waters and soil, or form poisonous gases in the event of a fire or explosion on site.
8. I am also concerned about being forced to breathe air pollution from DeVal Corp. while I am outside gardening and walking on the Pennypack Trail. I am aware that PERC is volatile and I am particularly concerned that the exclusion means that DeVal's PERC is released regularly into the air I have to breathe into my body at harmful levels. I am also concerned that the storage of PERC and other hazardous waste at DeVal pursuant to the

exclusion results in a higher risk of these materials leaking into the soil near my home or near Pennypack Trail, or into the Delaware River I walk near, or causing an explosion.

9. Concerns about this air pollution make me less comfortable while I am outside. I am also concerned about air pollution from DeVal Corp.'s facility making my garden less healthy. Knowing that I am potentially breathing air pollution from this facility decreases my enjoyment of spending time outside.
10. I am concerned that I am at an elevated risk of cancer based on my increased exposure to this air pollution due to how near I am to this facility. I am also concerned about respiratory and other harm to my health because I am being exposed to PERC and other hazardous substances near my home and while walking on the Pennypack Trail.
11. In addition, it greatly concerns me that Deval Corp. is located only about a block away from a fairly large playground, Russo Playground located in Tacony Park at the intersection of Cottman and Torresdale Avenues. I frequently pass this park and worry for the children who play there and others in my community who use the park for recreation so close to a facility where such dangerous materials are being generated and stored.
12. I support Clean Air Council's challenge to the verified recycler exclusion because the exclusion does not sufficiently protect my health and my environment from the risks associated with DeVal's management of PERC or other hazardous wastes. If the Council's litigation is successful, DeVal will be subject to RCRA's full, protective requirements for hazardous waste management and this will lessen my concerns about increased pollution risks posed by DeVal's use of the exclusion.
13. I believe that DeVal Corp. needs to comply with all hazardous waste regulations in order to adequately protect me and also protect the nature of the Pennypack Trail that I currently enjoy on a regular basis and hope to continue to enjoy.

I declare under penalty of perjury that the foregoing is true and correct.

Executed November 25, 2015

Norman Feldman

Norman Feldman

DECLARATION OF WILLIAM FONTENOT

I, William Fontenot, declare as follows:

1. I am a member of Louisiana Environmental Action Network ("LEAN") and Sierra Club, and have been actively involved with both organizations for several decades. I have served in various leadership positions within both groups over the last 40 years. For the last two summers, I served as the Acting Chair of Sierra Club's Delta Chapter, and I am currently the Conservation Chair of Sierra Club's Delta Chapter and Baton Rouge Group. I have worked with LEAN and Sierra Club, other environmental groups and affected communities in Louisiana to advocate on behalf of poor communities, communities of color, and industrial plant workers to demand protections from harmful pollution. At 73 years old, I am now retired, which allows me to devote a majority of my time to volunteering for LEAN, Sierra Club and other environmental and community groups throughout Louisiana.

2. People who live in Baton Rouge are perpetually exposed to pollution. I myself live and spend time working and recreating near numerous polluting facilities, including large refineries and chemical plants that generate, store, transport, and dispose of hazardous wastes, including facilities that purport to reclaim and recycle hazardous wastes. For too long, these facilities have polluted the air, the water, and the lands in our community and, in doing so, have put me, my wife, my neighbors, facility workers, and emergency responders at serious risk of health harms, and have simultaneously compromised the health of our environment.

3. I believe that the toxic conditions in Baton Rouge are due in part to the U.S. EPA's failure to ensure proper regulation of facilities that generate, store, transport, and recycle hazardous wastes. I am aware that over the years, the EPA has issued numerous regulatory exclusions and exemptions from the federal Resource Conservation and Recovery Act (RCRA) that allow facilities like those near me to manage hazardous wastes with providing all of the human health and environmental protections that are necessary and otherwise required by law.

4. I understand that in its recent rulemaking on the Definition of Solid Waste, EPA recognized that RCRA exclusions and exemptions the agency issued before 2008 may be resulting in the mishandling and unlawful disposal of hazardous wastes. I am aware that EPA studied over 200 cases of environmental damage at facilities that recycle hazardous wastes, and found that more than half of those cases were linked to EPA RCRA exclusions and exemptions adopted before 2008. It is extremely concerning that despite this, EPA did not eliminate those exclusions and exemptions or otherwise strengthen them to make them more protective for the environment, facility workers, emergency responders, and people like me and my wife who live, work, and spend time outdoors near the facilities that could use these loopholes.

5. I am aware that almost a quarter of EPA's damage cases were correlated to EPA's RCRA exclusions for scrap metal recycling, 40 C.F.R. 261.4(a)(13) and 40 C.F.R. 261.6(a)(3)(ii). This is very concerning to me because my home is close to at least two scrap metal yards that could use these exclusions to cause environmental and human health harm in my community. I live approximately 3 miles from Southern Recycling's Port Allen site, which is located at 1367 Mahaffey Road; approximately 5 miles from Louisiana Scrap Metal Recycling,

which is located at 2527 South Westport Drive, also in Port Allen; and approximately 5 miles from Southern Recycling's Baton Rouge facility, located at 6847 Scenic Highway.

6. I am aware that scrap metal yards handle all kinds of toxic materials and constituents and can routinely release fumes and dusts containing harmful toxins, like PCBs and mercury, into the air. I worry that this is happening at the scrap metal yards near my home and that they are putting me, my wife, and my neighbors at greater risk of suffering from adverse health effects, including nervous system problems and cancers. I have heard numerous stories about serious fires are scrap metal yards across the country, and worry that a fire will occur here at one of the scrap metal yards close to my home and injure me.

7. I also live less than 9 miles from Safety-Kleen Corp., a used oil recycler located at 13351 Scenic Hwy in Baton Rouge. I am concerned that this facility could use EPA's RCRA exemption for used oil recycling, 40 CFR part 279, to avoid requirements that are otherwise mandatory, and necessary to protect human health and the environment from dangerous air emissions, fires, explosions, spills and leaks on-site or while in transport, near my home. This is particularly concerning because EPA's damage cases featured several examples of environmental contamination at Safety-Kleen facilities, and because EPA found that the used oil exemption is likely correlated to serious damage, including cases involving air pollution, massive fires, water pollution, and even death.

8. I am further concerned that the facilities near me are using hazardous waste exclusions for hazardous oil-bearing wastes and recovered oil from petroleum refineries, including 40 CFR 261.4(a)(12), which EPA also correlated to environmental damage. For the last 40 years, I have lived approximately 2 miles from the Exxon Mobil Baton Rouge Refinery (located at 4045 Scenic Highway). I constantly worry about the toxic air pollution and other serious threats from this massive, old Refinery because I live so close to it and I have to breathe the air and drink the water here, as do the many other citizens of Baton Rouge. I am very familiar with this Refinery and the fact that it has been a major pollution source in Baton Rouge for decades. Every day when I leave my home to walk my dog, I worry about harmful air pollution from this Exxon Refinery and the many other industrial sites nearby. In particular, I think about the Exxon Refinery's major explosion on Christmas Eve 1989, which I recall resulted in a giant plume of smoke and was reported to shatter windows and set off burglar alarms up to 6 miles away. I am concerned that we are greater risk of having another a similar accident, or one that is even more catastrophic, because of the hazardous waste exclusions that can be used at the Refinery, and cause harm to me, the people in my community, and the Refinery workers.

9. My concerns about refineries using the hazardous waste exclusions continue to affect me when I am outside of Baton Rouge on many advocacy-related trips near the large refineries in Lake Charles, Convent, and Norco. I have visited those areas many times, and will continue to do so in the future, to conduct toxic tours and help communities and industrial facility workers protect themselves from pollution related risks. I also visit the Norco area for my own recreational and educational purposes a few times a year. I enjoy canoeing in the La Branche wetlands and seeing the natural life and habitats there. When I am near these refineries I have to worry about my health because I am forced to breathe their harmful emissions into my body. Knowing that these refineries can use RCRA hazardous waste exceptions, I worry that

there is a very high chance that a serious accident will occur at any of these refineries while I am near them and traveling down the road to and from them. I am also concerned about the impacts toxic pollution from these refineries has on surface and ground water, vegetation, aquatic species, and aquatic-dependent species.

10. The refineries in Louisiana are dangerous and are in many ways disasters waiting to happen. There was another accident at the Exxon Baton Rouge Refinery in 2012 during which a chemical leak released hazardous substances into the air and was said to have caused several people, including children, in the community to fall ill. In 2006, there was a major spill at the Citgo Lake Charles Refinery that caused serious environmental damage to the Calcasieu River and surrounding areas. And in 1988 a major explosion and fire caused by a catalytic cracking unit at the Shell Oil Co. Refinery in Norco killed seven plant workers and injured over 40 people. I recall that the explosion shattered windows on Canal Street in New Orleans, which is more than 20 miles away from Norco, and set off burglar alarms in Chalmette, which is 30 miles from the Shell Refinery. It was reported that the explosion released over 150 million pounds of chemical pollution into the air.

11. On top of the concerns for my own health and the environment here, I also worry very much about the harmful impacts EPA's pre-2008 exclusions and exemptions have on the people who work at the facilities and those who respond to emergencies, like fires, explosions, and spills, at these sites. Workers at facilities that use exclusions and exemptions may not have any idea they are handling and being exposed to toxic chemicals. Without that information, they have no way of knowing if or how they should protect themselves. For example, I am aware of several instances where workers at scrap yards have been exposed to and harmed by dangerous toxins, including one significant case involving dangerous radioactive materials. This is also a major risk for any firemen, police, and EMTs who would be called to these facilities in the event of an accident. It is absolutely critical for these responders to have information about all the chemicals that are at the facilities, so they can know what the risks are, how to quickly control the accident, and how to protect themselves from harmful exposures.

12. Knowing that EPA decided not to apply a containment standard to the pre-2008 exclusions and exemptions that facilities near me can use is extremely troubling. Without this requirement, I worry that these facilities are not safely storing their hazardous wastes and that this makes it more likely that toxins in the wastes are being released into our air, groundwater, and soil.

13. Among the most alarming aspects of EPA's pre-2008 exclusions and exemptions, including those applicable to the scrap yards, used oil facility, and refineries near me, is the fact that they do not include a notification requirement. This means that facilities are not required to inform EPA, the state, or the public if they are using an exclusion or exemption from hazardous waste laws that are necessary to protect communities and the environment from harmful releases of toxic chemicals. This is absolutely unacceptable. People have a right to know what they are being exposed to and what risks they face every day, simply by breathing, drinking water, or recreating outdoors. EPA's exclusions and exemptions deprive all of us of that right by not requiring notification. As EPA acknowledged in the definition of solid waste rule, the lack of a notice in the pre-2008 exclusions and exemptions is a serious problem that precludes the

government and the public from knowing whether facilities are properly managing and discarding their hazardous wastes. I believe that EPA's decision to keep these exclusions and exemptions in place is unlawful and wrongfully puts me and everyone else who is similarly situated at risk of harm caused by hazardous waste mismanagement.

14. Through my decades of environmental work, I have learned that it is not uncommon for facilities to hide important information about dangerous conditions from the public and its own workers. For instance, I've learned that in 2012 when the Exxon Baton Rouge Refinery released pollutants into the air, Exxon did not inform the State or the public of the true nature and extent of its emissions. I firmly believe that exemptions from regulation, especially the pre-2008 ones that do not require notification, make this kind of malfeasance far more likely to occur. There is no reason that industrial facilities should get to be excused from having to provide protections that are necessary to protect my health, the health of the environment, and the health of everyone who lives and works near (or in) the refineries.

15. I understand that despite what it learned in the environmental damage case study, the U.S. EPA has finalized yet another RCRA exclusion called the "Verified-Recycler Exclusion." I fear that this new "Verified-Recycler Exclusion" will be used by facilities in Baton Rouge and worsen the already toxic conditions here by not ensuring all of the protections needed to protect us against air emissions, and toxic contamination of our community's soils and waters. Specifically, I worry that the Safety-Kleen facility near my home will use the Exclusion to recycle additional hazardous wastes because I understand that other Safety-Kleen facilities have already done so.

16. I am troubled that EPA continues to use what I call "linguistic detoxification" to magically deem hazardous wastes that are unquestionably hazardous and wastes, as something other than hazardous waste just because they will end up at some kind of recycling site. EPA should understand that the fact that these wastes are ultimately recycled, does not make them any less hazardous to people and the planet while they are being managed, before they are recycled. It is unacceptable, and illogical, for EPA to excuse facilities that generate, store, and transport hazardous waste from otherwise mandatory requirements for safe storage, movement, and clean up of their hazardous wastes.

17. I understand that if the facilities near me did not have the option of using EPA's pre-2008 exclusions and exemptions they would have to comply with RCRA's hazardous waste requirements that provide necessary protections for human health and the environment. This would trigger permitting processes in which I, Sierra Club, LEAN, and other members of the public could participate to ensure that the facilities are properly regulated and safe. We could also enforce those permits, when necessary. These exclusions and exemptions deprive us of those opportunities.

18. I support this challenge to the definition of solid waste rule because if successful it will result in stricter requirements for hazardous waste management and eliminate exclusions and exemptions that currently put me and my community at risk. This outcome would lessen my worries about the toxic risks we face here in Baton Rouge and allow me to feel safer here.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 12/3/15

William Fontenot

DECLARATION OF CARL FORD

I, Carl Ford, declare as follows:

1. I am 78 years old and I have been a member of Sierra Club since 1984. Environmental conservation has been an interest of mine for as long as I can remember; over the years, I have supported Sierra Club and various other national and New Jersey-based groups that work to, among other things, protect our lands, air, and water from pollution.

2. I grew up in Salem County, New Jersey, very close to a large DuPont chemical facility that was a known dirty polluter in our community. I can still remember the foul smells of hydrogen sulfide and other chemicals that overwhelmed the air there almost every day, depending on which way the wind was blowing. I recall a major explosion at the plant in 1969 that killed several people, including someone I knew. I have heard of other serious accidents at that site involving releases of toxic chemicals through fires and groundwater contamination. I understand that it is extremely important to ensure safe management of chemicals and hazardous materials for the protection of all the people who work at the facilities and live near them.

3. For the last six years, my wife and I have lived in West Deptford Township, New Jersey, approximately 2.5 miles from Johnson Matthey Inc., a pharmaceutical preparation manufacturing facility located at 2003 Nolte Drive. I am aware that this facility previously claimed an EPA hazardous waste exclusion that is known as the "Transfer-Based Exclusion" to generate, store, and manage some kind of ignitable and spent solvent hazardous wastes, without complying with otherwise mandatory requirements in the Resource Conservation and Recovery Act (RCRA) that were enacted to protect human health and the environment. I understand that EPA has recently replaced that exclusion with a new one, known as the Verified-Recycling Exclusion, which will allow Johnson Matthey to continue generating, storing, and managing hazardous wastes without meeting full RCRA requirements.

4. I am very concerned about Johnson Matthey's use of the Exclusion. I have recently read that West Deptford Township is listed as one of the most toxic towns in New Jersey, in terms of industrial releases of chemicals into the air, water, and land. I worry that Johnson Matthey's use of EPA's "Transfer-Based Exclusion" and now the "Verified Recycler Exclusion contributes to these toxic conditions and puts my health and safety, and the health and safety of my wife and neighbors, at serious risk.

5. Given how close my home is to Johnson Matthey, I am worried that the facility uses the Exclusion to accumulate, store, and transport hazardous wastes in dangerous ways that increase the likelihood that there will be a fire, explosion, spill, or leak of toxic chemicals here. I am aware that spent solvent wastes can be released into the air through evaporation if they are not properly managed and stored, and am particularly concerned that the Exclusion allows Johnson Matthey to release unsafe levels of hazardous air pollutants into the air my wife and I breathe.

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6. About once a week—some times several times a week—I smell strange chemical odors in the air outside our home from the nearby industrial facilities, which includes Johnson Matthey. I have had to get used to these kinds of smells over time, but they are still very troubling and cause me to worry about the chemicals are being released into our air and what affects they may have on our bodies.

7. My wife and I enjoy spending as much time as possible out in outside in our yard. We are typically out there relaxing 3-4 times a week and gardening about twice a week, weather permitting. However, our enjoyment of these activities in our own outdoor space is diminished when the air fills with the concerning, unpleasant chemical odors.

8. I enjoy kayaking Mantua Creek, which is about 1 mile from my home and runs right by the Johnson Matthey facility. I have kayaked the Creek several times a year in the past, and I hope to do so again in the years to come. But I worry that harmful chemical pollution from Johnson Matthey and other nearby industries entering could make the Creek unsafe for such recreational use, especially knowing that Johnson Matthey can its store hazardous wastes without complying with all of the RCRA requirements enacted to prevent releases of these wastes.

9. A few years ago, a train carrying chemicals derailed nearby in Paulsboro. Several tank cars fell into Mantua Creek, causing vinyl chloride—a very toxic chemical—to be released into the air. This presented a dangerous and frightening health risk that required the authorities to instruct people in the surrounding area to stay indoors. I worry that Johnson Matthey's use of the Exclusion makes it more likely that an accident like this will occur in my community because the facility is able to manage and transport hazardous wastes without providing all of the hazardous waste safeguards.

10. For recreation, I enjoy walking along bank of the Delaware River, which is just about ½ mile from my home, about once or twice a week. I also kayak the River about once or twice a year. I intend to continue these activities into the future. Since I have lived near the River most of my life, I have been able to observe that the water looks clearer and cleaner than it was many years ago. However, I have noticed troubling declines in the number of fish and fish species. When I was younger, I remember regularly seeing many catfish, carp, and perch in the River, but now those sightings are rare. To me, this suggests that the River is not as healthy as it should be, and that diminishes my enjoyment of my recreational activities there. I worry that that, by allowing Johnson Matthey not to follow the requirements in RCRA, the Exclusion will lead to leaks and spills of hazardous waste into the River, further harming the health of the River and the species that live in and around it.

11. I understand that Johnson Matthey is likely to continue using EPA's Verified-Recycler Exclusion to manage ignitable hazardous wastes without meeting the protective requirements in RCRA, just as it did under the Transfer-Based Exclusion. I am worried that this presents an increased risk of a fire and explosion that could release harmful amounts of toxic chemicals into the air my wife and I breathe. I am also concerned about

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being injured in such an accident when my wife and I go grocery shopping every week off Route 40 and Mantua Pike, which is even closer to Johnson Matthey's plant.

12. I support Sierra Club's litigation to eliminate the Verified-Recycler Exclusion and to require Johnson Matthey's compliance with the full set of hazardous waste regulations that are designed to protect me and everyone who has to live near this facility. Knowing that Johnson Matthey is likely to use the Exclusion—and that the other facilities here might too if the Exclusion is left in place—makes me feel that it is not safe to live in West Deptford. If Sierra Club prevails in this case and the Exclusion is eliminated, my concerns about pollution risks will be lessened.

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

Carl B Ford

Carl Ford

Executed on Nov. 20, 2015

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DECLARATION OF STEPHANIE HERRON

I, Stephanie Herron, declare as follows:

1. I have been a Sierra Club member since 2012 and I currently serve as the Volunteer and Outreach Coordinator for Sierra Club's Delaware Chapter, which is based in Wilmington, DE. I became involved with the Sierra Club because I believe that everyone has a human right to live in a healthy and clean environment
2. There are serious pollution problems in Wilmington impairing our local air and waters and putting the health of our citizens at risk. Since I have lived here over the last few years, I have noticed that there are too many times a year when the air quality is deemed to be so poor that it is unhealthy for citizens, especially children, the elderly, and asthmatics, to be outdoors. The Delaware and Christina Rivers and their streams and creeks are overly polluted and seem far from being safely swimmable and fishable. On both a personal and professional level, I am concerned that inadequate regulation of hazardous waste in Wilmington is contributing to these issues.
3. I am aware that the over time, the U.S. EPA has issued a variety of exclusions from the Resource Conservation and Recovery Act's ("RCRA") hazardous waste laws, which were adopted to ensure that facilities generating, storing, transporting, handling, and disposing of hazardous wastes do so in a manner that is protective of the surrounding environment and communities. I also understand that as part of its recent rulemaking on the RCRA definition of solid waste, EPA found a correlation between various pre-2008 exclusions, including several that apply to scrap metal yards, and serious incidents of environmental damage, including fires, explosions, spills, leaks and associated soil and water contamination. I am deeply disturbed that EPA has decided to allow these exclusions to stand as they are, even though it is not sure they are lawful or safe. This decision affects me personally and professionally, because I live and work very close to a large scrap metal yard that could use one or more of these exclusions to endanger my health and environment and because it deprives me of information I would share with Sierra Club members and the public if I had it.
4. The scrap metal yard near me, Diamond State Recycling Corp., located at 1600 Bowers Street, Wilmington, DE 19802, claims to be Delaware's largest processor of scrap metal and buys scrap iron, steel, steel, copper, brass, lead, and motor vehicle lead acid batteries. My

home is approximately 1.1 miles from the Diamond State Recycling's site, and my office is approximately 1.7 miles away from it.

5. I worry that Diamond State Recycling can use any of EPA's RCRA exclusions to cause serious environmental damage in my community and endanger my health and the health of my neighbors. Because of the nature of its business, I am particularly concerned about Diamond State Recycling's use of the RCRA exclusions for recycling of scrap metals (40 CFR 261.4(a)(13), 261.6(a)(3)(ii), lead-acid batteries (40 CFR 273.3 and 40 CFR 266 subpart G), and drums (40 CFR 261.7) that EPA has reviewed as part of the definition of solid waste rulemaking. I am aware that almost half of the environmental damage case correlations identified by EPA involved these exclusions.
6. I am also aware that EPA's damage case study associated the extensive environmental contamination at Diamond State Salvage—which I believe was a related scrap yard that was located about ½ mile away from the current site and engaged in the same kind of activity—with the RCRA exclusions for scrap metals, batteries, and drums. As EPA reported, the Diamond State Salvage site is now a Superfund site contaminated with lead and polychlorinated biphenyls (PCBs) and oily waste that has discharged into the Delaware and Christina Rivers, and has cost the government millions of dollars to clean up. I am very worried that similar problems could arise at Diamond State Recycling and harm me and the areas I enjoy, since I live, work, and recreate very close by.
7. I spend a lot of time outside within 2 miles of Diamond State Recycling. Walking is one of my main modes of transportation—from my home, I walk to work regularly (as long as the weather cooperates), and I walk downtown or to the grocery store at least once a week. The air pollution in Wilmington affects me every day because I have to breathe in the air and whatever the polluters, including Diamond State Recycling, emit. I understand that there are studies finding potentially dangerous air emissions at scrap metal yards that showed the presence of heavy metals, like arsenic, cadmium, manganese, nickel and Freon, in the air near such sites.
8. I worry that Diamond State Recycling's use of RCRA exclusions for scrap metals, lead acid batteries, and drums could, or already is, worsening air quality here and endangering my health and the health of others who live near this site. I understand that facilities using the RCRA exclusions can evade otherwise mandatory, protective air pollution standards. In

recent years, I have developed breathing problems and allergies, and I now have to carry a rescue inhaler. I am concerned that this could be air pollution related and that toxic air emissions from Wilmington sources are putting me at a greater risk of suffering from more serious long-term health problems.

9. I understand that recycling at scrap metal yards can involve releases of dust and fumes composed of toxic heavy metals like lead, and PCBs. I especially worry about the serious health effects such emissions that could result from Diamond State Recycling's regular handling of scrap metals, batteries, drums, and other hazardous wastes, as well as dangerous emissions released during a fire or explosion. I am aware that serious, long-lasting fires are not uncommon at scrap metal yards like Diamond State Recycling.
10. Given the hazardous contamination at the former Diamond State site, I am extremely worried that this site will spill or leach harmful contaminants like lead and PCBs into the soil, the groundwater, and the nearby waterways, and cause harm to me and everyone else in this community.
11. My concerns about toxic releases into the air, water, and soil are heightened knowing that EPA's pre-2008 exclusions, including those that could be used by Diamond State Recycling, do not all require compliance with minimum requirements, including, EPA's own containment standard, that I understand are designed to ensure the exclusions are lawful and to prevent hazardous waste mismanagement and associated human health and environmental harm.
12. I enjoy spending as much time as I can in Wilmington's natural spaces. Several times a week, I like to walk along the Brandywine Creek, which runs past Diamond State Recycling, to get my office, downtown or to Alapocas Run State Park. I also take ferries on the Delaware River, where Brandywine Creek discharges. I plan to continue these activities into the future, but my ability to fully enjoy the waters is limited by the pollution, including toxic PCBs. I am wary of getting the water on my skin, and in the back of my mind, I constantly worry about the effects the contaminants have on the aquatic life and those who consume fish from the River. When I was in college, I used to love river swimming and I would love to swim in the Delaware River, but it is too polluted and unsafe to do so now.
13. That Diamond State Recycling can use unlawful RCRA exclusions that EPA has linked to extensive environmental harm is alarming on its own, and is made worse knowing that these

exclusions do not require Diamond State Recycling to notify the public, the state, or even EPA if it is indeed using one or more exclusion. I understand and am disturbed that EPA, in the definition of solid waste rulemaking, acknowledged the significant problems associated with the lack of such a notification requirement but did not correct it.

14. I-- and everyone else in my community-- have a right to know whether, which, where, and how hazardous wastes are being handled at local industries like Diamond State Recycling, and what risks those practices pose to our health and environment. It is common sense that the members of the public cannot protect themselves from dangers they do not know exist. The importance of a notification requirement should be even more obvious in situations like this where industries are using regulatory exclusions that allow for and incentivize lesser protections for protect human health and the environment.
15. Without notice that Diamond State Recycling is using or more of the pre-2008 RCRA exclusions I am deprived of my right to know whether I am at a greater risk every day of being injured and/or breathing in more toxic air pollution because there could a fire or explosion at the site involving hazardous wastes, or because hazardous wastes are leaching into our soil, water supplies and the waterways I use and enjoy. I cannot even take any comfort knowing that EPA or the State is properly overseeing Diamond State Recycling's hazardous waste practices and protecting me and my community from these risks because the State and EPA also do not have notice of which facilities are claiming what exclusions. This is unacceptable in any circumstance and is especially unjust here where the communities closest to Diamond State Recycling and other industries—and therefore at the greatest risk of suffering harm—are comparatively poor and forced to deal with various pollution threats.
16. I believe it is very important for people to be informed about what is taking place in our community, so they can prepare for emergencies and take preventative measures to protect themselves. For one thing, people have to know what they are being exposed to in order to get proper medical care. If I am being exposed to dangerous toxics, including carcinogens, I need to be able to share that information to my doctor when he is assessing my health, and particularly my breathing problems, so that I can get the right treatment and advice.
17. As part of my role at Sierra Club, I try to educate our members and the broader public in Delaware about the pollution risks they face in their communities and to connect them to resources about how they can protect their health. For example, in the past I helped organize

a campaign to inform people more about air pollution—among other things, we handed out magnets with a number to call if they smelled something strange near their home. We wanted to ensure people were informed about the pollution they were being exposed to, and had a way to find out more information when something did not seem right. The lack of the notification requirement in the pre-2008 exclusions makes it difficult, if not impossible, for me and Sierra Club to accurately educate our members and the public about hazardous wastes threats, including air and water pollution.

18. If notice were required for Diamond State Recycling and other facilities in Wilmington that using a pre-2008 hazardous waste exclusion, Sierra Club could share that information broadly to inform Sierra Club members and the public about which facilities are managing hazardous wastes in their communities without providing all of the safeguards otherwise required by law. Sierra Club could also use that information, as it often does, to monitor those facilities and ensure they are acting responsibly.
19. I understand that if facilities, including Diamond State Recycling, were not able to use the pre-2008 hazardous waste exclusions at all, they would all have to obtain RCRA hazardous wastes permits that protect against the risks I am concerned about, including toxic air emissions, soil and water contamination, fires, and explosions. Sierra Club and other members of the public could participate in those permitting processes, access information about the facilities' compliance with applicable environmental and human health requirements, and engage in enforcement actions, if necessary. I am concerned that currently, the public, including Sierra Club and I, are being deprived of the opportunities for public participation and information access we would otherwise have.
20. If the pre-2008 hazardous waste exclusions that EPA assessed in its recent rulemaking—including those applicable to scrap yards, lead acid batteries, and drums— required notification and proper containment, or did not exist, my concerns about the mismanagement of hazardous wastes and associated risks at Diamond State Recycling and any other hazardous waste facilities in Wilmington that could claim those exclusions would be lessened and I would feel safer living, working, and spending time outdoors near the scrap yard. This would also address the harm to Sierra Club's educational efforts and ability to participate in hazardous waste permitting and enforcement actions.

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

Executed 12/4, 2015.

Stephanie Herron

Stephanie Herron

DECLARATION OF JOANNE KILGOUR

I, Joanne Kilgour, declare as follows:

1. I am the current Director of Sierra Club's Pennsylvania Chapter. I have held this position since November 2013 and have been a member of Sierra Club since 2012.

2. I live in Lancaster, Pennsylvania, approximately 2 miles from Alumax Mill Products, Inc. (also known as Alcoa Mill Products, Inc.), which is located at 1480 Manheim Pike, Lancaster, PA 17601.

3. I understand that Alumax engages in secondary smelting and alloying of aluminum—processes that generate hazardous wastes that can pose serious harm to human health and the environment. Because of this, I know that Alumax is supposed to comply with the cradle to grave hazardous wastes requirements under the Resource Conservation and Recovery Act ("RCRA").

4. Based on information provided by the United States Environmental Protection Agency ("EPA"), I am aware that Alumax has nonetheless avoided compliance with RCRA's hazardous waste requirements by using a regulatory exemption issued by EPA in 2008, known as the "Transfer Based Exclusion." According to EPA, Alumax used the Exclusion to generate, store, and transport approximately 250 tons of ignitable hazardous wastes each year, without meeting RCRA's requirements for safe storage, transportation and handling of such materials. I understand that Alumax is now expected to use the new Verified Recycler Exclusion, which replaced the Transfer Based Exclusion, to continue these risky practices.

5. I support EPA's decision to eliminate the Transfer-Based Exclusion, but the agency's decision to replace that exclusion with the Verified Recycler Exclusion, is unacceptable and very worrisome because it does not provide the full array of hazardous waste protections required by the Resource Conservation and Recovery Act (RCRA). As a result, I still worry about the potential for mismanagement of hazardous wastes at Alumax and the risks that presents to people like me who live, work, and recreate near this facility. This includes the threat of toxic air emissions, fires, explosions, water, and soil contamination.

6. I spend time outside in my yard with my dog every day, and visit the shops and bank in the local mall on Plaza Boulevard, which is only about 500 feet from Alumax, about once a week. Alumax is right off of Route 238 and Manheim Pike, and I have no choice but to go past it on my way to work every day, be it by car or train.

7. Because of my proximity to Alumax, I am forced to breathe into my lungs the pollutants Alumax emits into the air. I am concerned that Alumax's use of the Exclusion means that ignitable and volatile hazardous wastes are not properly regulated and that this results in an increase in the

amount and toxicity of the pollution in our air. I worry that those emissions could adversely affect my health and the health of my neighbors.

8. I also worry that that Alumax's exempted ignitable hazardous wastes are more likely to spill, set fire or explode since the Verified Recycler Exclusion allows Alumax to accumulate large amounts of hazardous wastes for longer periods of time than would otherwise be permitted under RCRA's regulations. I'm particularly concerned that I could be seriously injured by an accident like this when I am shopping nearby on Plaza Boulevard, driving by the facility on my way to and from work, or sharing Route 238 with a transporter of Alumax's exempted wastes. I'm also worried that if an accident like this were to happen, it would force me and my neighbors to breathe even greater amounts of toxic air pollutants into our lungs and possibly suffer from acute adverse health effects.
9. I am especially concerned about any toxic air emissions that could result from Alumax's use of the Exclusion because Lancaster County has poor air quality. This is evidenced by the many air quality action days we have here and the fact that the American Lung Association's "State of the Air" report consistently gives our town a failing grade for air quality—it describes Lancaster at one of the most polluted cities in the country in terms of air pollution. Alumax should not be allowed to risk making this problem any worse by using the Exclusion; we simply don't have any room for more emissions here.
10. When the weather is nice, I walk my dog along Little Conestoga Creek, which is a tributary to Conestoga Watershed and very close to Alumax, every day; now that it's chillier outside, we make these trips about once a week. During our walks, my dog often gets into the water and drinks it. I am very concerned that improper containment of hazardous wastes at Alumax under the Exclusion could result in toxic pollutants getting into these waters and could harm my dog's health, and the health of the aquatic ecosystem. I also worry that the toxics can accumulate in the fish and the people in my community who catch and consume those fish. These concerns inhibit my ability to fully and freely enjoy my time recreating at the creek.
11. A lot of the food I consume is locally grown here in Lancaster. I am concerned that under the Exclusion, toxins from Alumax's exempted hazardous wastes could leach into the soil and groundwater and contaminate these foods in a way that could harm all of us who eat it.

12. Should Alumax shutdown its facility here, it should absolutely have to comply with RCRA requirements that aim to ensure that the site and all of its equipment is properly decontaminated and that the exempted hazardous wastes are not left on-site. By excusing Alumax from those requirements, the Exclusion unfairly and inexcusably allows the facility to expose me and my community to health and environmental risks for years and years. As a homeowner, this is extremely concerning because being in such close proximity to a contaminated site could potentially impact the value of my home. I understand that this is the kind of toxic situation that could result in a Superfund site that uses taxpayer money to clean up; this is something EPA should be acting to prevent, not promote.

13. I understand that EPA did not provide the public with adequate notice and an opportunity to comment on the Verified Recycler Exclusion. Had EPA done so, I-- as Director of Sierra Club's Pennsylvania Chapter-- could have participated in the public process and submitted information showing why Alumax and other hazardous waste generators in Pennsylvania should not be excluded from any otherwise mandatory RCRA requirements, and explaining why the additional conditions EPA included in the Verified Recycler Exclusion were not lawful or sufficiently protective of human health and the environment. Our Chapter frequently shares information about EPA rulemaking processes with Pennsylvania Sierra Club members and facilitates opportunities for them to engage. EPA's failure to provide notice and comment opportunity on the Verified Recycler Exclusion therefore deprived Sierra Club of its procedural rights and ability to engage its members on the Verified Recycler Exclusion.

14. I understand that if Sierra Club prevails in its challenge to the Verified Recycler Exclusion, the full range of RCRA hazardous waste requirements would be restored for Alumax. This would provide the necessary protections for me, my community, and the environment in Lancaster County, and lessen my concerns about hazardous wastes being mishandled so close to my home and other areas I enjoy. Vacating the Verified Recycler Exclusion would also redress the procedural injury Sierra Club has suffered as a result of EPA's failure to provide notice and an opportunity to comment on the Exclusion.

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

Executed on ____December 1___, 2015.

DECLARATION OF JESSE N. MARQUEZ

1. I am the founder, a member, and the executive director of Coalition For A Safe Environment (CFASE). I have been a member of CFASE since I founded it in 2001.

2. CFASE has more than 500 members in 24 California cities, which include Los Angeles's communities of Wilmington, San Pedro, and Harbor City, and the cities of Carson, Long Beach, and Torrance. CFASE works to protect the interests of its members and its members' communities. It is also an organizational member of California Communities Against Toxics, which works to protect all of CFASE's members' health and interests in having clean air and a safe environment.

3. I am 64 years old. I live on W. Lomita Blvd. in Wilmington, CA 90744, which is a neighborhood in the City of Los Angeles. I have lived in Wilmington, a predominantly Latino community existing in the shadow of the Ports of Los Angeles and Long Beach, most of my life. The CFASE office where I work daily is located at 1601 N. Wilmington Blvd., Ste. B, Wilmington, CA 90744, which is just a few blocks from my home.

4. There are many scrap metal yards located in and around my community, and less than 3 miles from my home and work, including: SA Recycling (which is approximately 3 miles away), LKQ Pick Your Part (which is approximately 1.5 miles away), Alameda Recycling & Metals (which is approximately 2 miles away), AMC Auto Salvage (which is approximately 1.5 miles away), Wilmington Recyclers (which is approximately 2 miles away), Auto Recycling of Wilmington (which is approximately 1.5 miles away), and California Metals Recycling (which is approximately 1.0 miles away). Both as an individual and as the director of CFASE, I worry about the many forms of toxic pollution that these facilities release and the health impacts their pollution may have on me. Several of these scrap yards, discussed below, have had fires, explosions and other documented accidents during the years that I have lived here. Based on my experiences with and knowledge about the dangers at these sites, I disagree with, and am very concerned by, the U.S. EPA's decision to maintain the federal hazardous waste exclusions for scrap metal recycling from the Resource Conservation and Recovery Act (RCRA). EPA's failure to do more to protect the public is egregious because the agency knows about the connections between environmental damage and its hazardous waste regulatory exclusions, including specifically those applicable to scrap metal recycling yards.

5. Scrap metal yards release nasty harmful pollution into the air, in the form of fumes and dusts, as part of their every day operations. For instance, when scrap metal yards crush their wastes into cubes, they apply heat that results in toxic emissions that I have to breathe into my lungs since I live so close by.

6. On too many occasions, there have been serious fires and explosions at the scrap metal yards in my community. When this happens, my neighbors and I are exposed to a mix of toxic emissions that result from the burning of gasoline, gasoline or oil stored in the junk, various

automotive fluids (brake fluid, transmission fluid, power steering fluid), rubber, plastics, vinyl, leather, paints, dyes, other materials coatings, and whatever else is on site. These yards tends to have all kinds of wastes that could present all kinds of hazards; people in my community frequently drive around our neighborhoods to pick up various scrap metals—including everything from old washers/dryers, refrigerators, barbeques—so they can take it to the yards and get compensated. I worry about what's in those scraps and what they are doing to us when they are sitting and being handled at the nearby scrap yards.

7. I can still clearly recall the 2010 massive explosion at the Wilmington Pick Your Part scrap yard, approximately two miles from my home. I was driving in my car at the time of the explosion and was only about a mile away. Reports later said that you could hear the explosion 3-5 miles away, and that it burned for more than 30 hours. I understand that this was due, in part, to the fact that emergency responders who arrived on site did not know what was burning in the fire and therefore did not know how to contain it. I also learned that the site was not prepared for this kind of accident and as a result, the firemen did not have proper access to the fire because there were no fire engine truck accessible roads in the junk yard and there were no fire hydrants on-site; the fire engine hoses had to connect to a fire hydrant in the community residential area one block away.

8. I spent some time outside on the day of that fire because I wanted to take some video and pictures of it for my advocacy and educational work with CFASE. After breathing the neighborhood air that day I was sick as a dog for the next two or three days. It took a month before I could get the smell and taste completely out of my lungs. I was, and still am, concerned about what I was exposed to and forced to breathe into my lungs that day. I also worry about how it affected my neighbors here and in the cities of Carson and Long Beach. There's a residential area and a small park just behind the scrap yard, and it's terrifying to think about how the fire and every day releases from the site affect children and other vulnerable sensitive receptors living there.

9. There have been several fires at the SA Recycling facility on Terminal Island in the time I have lived here. At the most recent fire, there was an explosion and lots of contamination was released into the air and the ocean, which is adjacent to the yard. The wind tends to blow north over there, and so much of the air pollution blew directly into my community, Wilmington. When shredded waste is dumped onto shipping barges for transfer at the SA Recycling facility, lots of hazardous metal dust is released into the air, ocean and impacting marine life. There is also runoff of contaminated water, from the scrap yard terminal dock and from these boats, into the ocean whenever it rains.

10. Personally, I am concerned that I face a greater threat of cancer and various types of cancer due to my exposure of numerous types of toxic chemicals just because of the pollution I have to breathe daily. I know many family and community members who have been diagnosed with cancer, and I believe we are at greater risk of cancer because of the toxic pollution. I worry

about the risk that I will develop cancer, or that other family members and friends will. My 18 year old nephew was diagnosed with lymphoma and is now a surviving cancer victim. My 44 year old sister was diagnosed with colon cancer and recently had to go through surgery. My father was recently diagnosed with bladder failure and is currently going through treatment. We are facing numerous health problems that have not existed previously in our family, and we believe that our daily exposure to numerous toxic chemicals from local industries—including the scrap industry—is the cause. The smoke released when the Pick Your Part scrap yard had a fire near my home made me feel physically ill for days—I have no doubt that the toxins these facilities release into the air, water, and soil of my community is affecting my health.

11. When the toxic air pollution gets especially bad in my neighborhood, my eyes, throat, and lungs burn, and I have extreme difficulty breathing and have to gasp for more air. I experience headaches and choking, feel dizzy, have nausea, and get an upset stomach. I also feel very tired and weak and have to take medicine and lie down. I must use a nasal decongestant daily for my sinusitis. Without it I cannot breathe. On regular occasions, I have extreme difficulty breathing and must use an inhaler. The air regularly gets so bad that I feel sick, often for as long as two to three days, and am not well enough to work, visit friends, enjoy everyday activities, or do anything except lay in bed.

12. My ability to enjoy spending time in my home, neighborhood, outdoors, and at work is negatively impacted by the hazardous air pollutants I breathe every day. Multiple times each week, I go to local parks, visit family and friends, sit outside, or engage in other outdoor activities. For example, I like to go for walks, exercise, ride my bike, and bar-b-que. I have four dogs, a thirteen-year old, an eleven-year old, and two four-year olds. I enjoy walking my dogs or playing with them outside nearly every day.

13. My concerns about the health threats from air pollution from our polluting neighbors reduce my enjoyment of these outdoor activities. I would spend more time outside, walking, spending time in a park, playing with my dogs, and doing other activities if not for these threats to my health. I also hesitate to have parties and celebrations at home because I am concerned for the welfare and health of my family, friends, and other guests. In addition, some days I am unable to walk or play with my dogs outside for long, because two of them have asthma and are especially affected by the toxins in our local air. This restricts my ability to spend time outside and enjoy that time, and makes me concerned about these pets whom I love. I want to be able to breathe freely and safely while walking my dogs and doing other activities in my community, without having to worry about how the air is affecting me and my dogs.

14. I am not alone in being so affected. Toxic pollution threatens the health and quality of life of CFASE members, member families, volunteers, student interns, and visitors. Almost every family I know has someone suffering from asthma, respiratory health problems, or cancer. On many days in any given month our members, volunteers, and student interns cannot work on

our community environmental, public health, and public safety campaigns, projects, meetings, surveys, and interviews because the air pollution in our community makes them feel sick.

15. I am very worried about the cumulative health impacts that pollution from scrap metal sites will have on me and on others in my community. In addition to the many scrap yards, lots of oil refineries, fuel storage tank facilities, fuel distribution centers, and other industrial operations are currently located and in daily operation near my community and others that CFASE represents. The nearby ports stimulate the production and movement of a large variety of goods. Many CFASE members and residents of these communities are forced to live in close proximity to these major industrial operations, so they are already exposed to substantial pollution.

16. It concerns me that my exposure to pollutants increases my risk of cancer and other health problems and excessive health care costs. I have chronic sinusitis, and every year my health gets worse. People in my community are also affected by the toxic air pollution, including my brothers and parents, and many other members of CFASE. I believe this pollution comes from the scrap yards, in addition to the other industrial sources in and near my neighborhood.

17. I am also very concerned about the soil and groundwater contamination occurring at these scrap yards. Some of the scrap yards are on top of dirt, not concrete, and so the hazardous materials can leach into the ground whenever it rains and contaminate our fresh under water aquifers. Dust from the materials also contaminates the dirt in and around scrap facilities. Furthermore, some of these scrap yards have dirt access roads—which get contaminated, too—and then the trucks that drive in and out of the scrap yards end up tracking this contaminated dirt into the residential streets of the surrounding neighborhood.

18. In addition to what enters the air and the ocean, polluted runoff leaving these scrap yards when it rains. A lot of people fish in the ocean waters near my neighborhood—part of the San Pedro Bay—despite signs warning that the fish are contaminated. Poor people need to eat, though, and often these fish end up forming an essential part of their diet. Others swim and recreate in the San Pedro Bay. I am concerned that these scrap yards are adding significant pollution to the waters of the Bay, because they are not being properly regulated.

19. It is very troubling that the federal hazardous waste RCRA regulations make it possible for the scrap metal yards near me to use the regulatory exclusion to avoid providing full hazardous waste protections that are needed to protect me and my community from the kinds of fires, explosions, spills, and leaks that are known to occur all too frequently at these kinds of sites. I find it extremely frustrating that despite documenting so many instances of pollution disasters at scrap metal recycling sites around the country, especially in overburdened communities like mine, EPA decided to leave its scrap metals exclusions in place and failed to protect members of the public, who like me, have to deal with the risks presented by these sites every day. At the very least, EPA's must require these yards and others like it across the country to provide meaningful notice to the government and the public if they are using the exclusions

from RCRA requirements, and to comply with containment standards that ensure that toxic chemicals are not released into the environment where they can harm us.

20. As someone who has been exposed to toxic releases from hazardous waste sites like scrap metal yards, I am extremely concerned about EPA's regulatory exclusions from the definition of solid waste, which allows hazardous waste facilities to avoid RCRA requirements when they pay to have a reclaimer take their wastes in the name of "recycling". I cannot emphasize enough how real and how serious the consequences of hazardous waste mismanagement are for the public; it poisons the air, water, and soil and adversely affects those of us who live and work in these areas. The EPA should be doing all it can to protect us from these sites, not offering them more excuses to put us at risk. If this litigation challenging the definition of solid waste rule is successful, I understand that EPA's RCRA exclusions and exemptions for scrap metal recycling and other risky hazardous waste recycling practices will be deemed unlawful and communities like mine will be better protected.

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

Executed on: 12/3/2015

Jesse N. Marquez

Jesse N. Marquez

DECLARATION OF JANICE RHODES

1. My name is Janice Rhodes. I am a Sierra Club member and have been since 2008.

2. For the last 29 years of my life, I have lived in Bristol, Pennsylvania, approximately 1.5 miles from the Dow Chemical plastics and resin plant (formerly Rohm &Haas Chemical LLC), located at 310 George Patterson Boulevard, Bristol, PA 19007.

3. I am aware, and extremely concerned, that this facility has used a regulatory exclusion known as the "Transfer-Based Exclusion" to generate, store, and manage hazardous wastes without adhering to hazardous waste laws that were passed for the purpose of protecting our natural environment, and individuals like me, who live near industrial sites like Dow, from harm. I understand that Dow is expected to use the new replacement exclusion, known as the "Verified Recycler Exclusion," which was issued by the U.S. EPA earlier this year, to continue avoiding those mandatory laws while storing, generating, and managing 420 tons of hazardous wastes every year, including ignitable hazardous wastes, methyl ethyl ketone, spent non- halogenated solvents that can include harmful chemicals like xylene, acetone, toluene, and benzene.

4. I absolutely love the outdoors and being in nature. One of my most favorite things about my home is that it is adjacent to the Silver Lake Nature Center, a gorgeous 235 acre park, which includes Silver Lake; it is a 2 minute walk from my yard and between about 0.75 and 1.15 miles from Dow. I visit and walk through the Park's trails each day with my dogs, and I walk around the Lake a couple times a week. I am lucky enough to be able to see a beautiful wooded portion of the Park directly behind my backyard.

5. I am an avid bird-watcher and during my daily trips to the Park, I very much enjoy observing Canada geese, night herons, waterfowl, wood peckers, and the many other bird species that frequent the Park. I have recently heard people say they have seen bald eagles here, and I hope to able to see one myself soon. I always look out for and love to encounter red bellied turtles, which are on the Pennsylvania Threatened Species list and the United State's Fish and Wildlife Service's Endangered Species List.

6. I am very concerned that Dow's use of the Exclusion to generate and handle large amounts of hazardous wastes without providing otherwise mandatory safeguards puts the Nature Center and the many plant and animal species I enjoy in danger. I am concerned that the Exclusion means that harmful, unregulated toxic air pollutants from improperly contained hazardous waste equipment are consistently contaminating the air those species need to survive and thrive. When I see unpleasant smoke-like releases from Dow, I become worried about the health of the Park and everything in it, and my ability to enjoy the Nature Center is lessened as a result.

7. I also worry that Dow's use of the Exclusion means that hazardous wastes are improperly stored and transported at the facility and that this increases the chance that a serious fire or explosion will occur and spread into the Park or release large amounts of toxic air pollutants that could harm the trees and the animals I enjoy observing. And I am concerned that the Exclusions makes it more likely that harmful chemicals will enter the

Park's soil and Silver Lake and adversely impact the health of the trees, vegetation, and all the animals that feed in the Park. Thinking about the risk of such an accident makes me sad and diminishes my ability to fully enjoy my trips to the Nature Center.

8. Dow is also disturbingly close-- approximately ½ mile-- to the Delaware River, which I walk along about once every two weeks for exercise, and Bristol Lions Park, which is adjacent to the River and a place I visit at least once a month for various festivals and organized events for residents of Buck's County, like my book club meetings. I worry that Dow's use of the Exclusion increases the risk that I could be harmed by toxic air emissions, a fire or explosion while I am walking along the River or visiting Lions Park. I am also very worried that the Exclusion increases the likelihood that chemicals at Dow will leak, spill or runoff in the River could further impair the River's water quality and poison the fish.

9. I often purchase fish from local markets, but I am concerned that the fish carry toxins from the River that could be harmful to my health. This worry is intensified knowing that Dow's hazardous waste practices are excused from providing all the protections necessary to prevent against releases of toxic chemicals into the River.

10. Because I live so close to Dow and spend so much time outdoors in this area, I have to worry about the air pollutants it emits into the air I breathe into my own lungs every day, and how that might harm my health. I am concerned that such air emissions from inadequately regulated hazardous waste equipment could worsen my allergies or put me at risk of suffering from serious health problems over time.

11. I constantly try to avoid drinking tap water in my home or when I am out in Bristol because I am concerned that the groundwater is polluted and that consuming it will harm me. I wish I could feel safe drinking the water from my own spigot, but knowing that there are hazardous wastes nearby at Dow that are not fully regulated only increases my fear that the water may be polluted.

12. I understand that under the Exclusion, Dow could shutdown and abandon its facility without properly decontaminating its site and removing all of its hazardous wastes. This means that the health and environmental risks presented by the facility could outlive the facility itself. This is terrifying and completely unacceptable. Under no circumstances should Dow be allowed to leave behind any amount of a toxic mess for me and my community to deal with after the facility has closed.

13. I support Sierra Club's challenge to the Verified Recycler Exclusion because I believe the Exclusion unfairly threatens the health and safety of my community and the beautiful natural spaces we have here. I find it extremely worrisome and reprehensible that the government has chosen to excuse Dow for providing human health and environmental protections against wastes that are known to be hazardous; I believe that all facilities, including Dow, that generate and manage hazardous wastes must provide those safeguards no matter what. Should Sierra Club prevail in this case, my concerns about the risks to my health and the Parks and wildlife I love would be lessened.

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

Janice Rhodes

Janice Rhodes 11/25/15

DECLARATION OF JANE WILLIAMS

1. I am the executive director of California Communities Against Toxics (CCAT), and I have served in this role since 1997. I have been a member of Sierra Club since 1995 and served as the Co-Chair of Sierra Club's National Air Toxics Taskforce for the last 16 years. Both CCAT and Sierra Club work for environmental justice and protection from toxic pollution across the country.

2. Among other things, CCAT and Sierra Club use public education, advocacy, community organizing, and enforcement to reduce individuals' exposure to pollution, to expand knowledge about the human health and environmental risks associated with improper storage, transportation, handling and disposal of hazardous waste, and to protect vulnerable citizens from the impacts of mismanaged hazardous wastes in their communities. In this context, I have long worked on issues concerning various regulatory exemptions from the Resource Conservation and Recovery Act (RCRA) that have been promulgated by the U.S. Environmental Protection Agency (EPA) over the last several decades. During this time, I have seen RCRA's hazardous waste protections unravel and create a largely deregulated system that favors polluters over the public. In my personal and professional experiences, I have seen and heard about too many instances of environmental damage and health impacts occurring as a result of improperly handled hazardous wastes all across the country. Over the last several years, I have been involved with EPA's definition of solid waste rulemaking.

3. Sierra Club has more than 600,000 members nationwide and CCAT has more than 25 organizational members across California, as well as individuals who are active members and constituents in the Los Angeles County area. CCAT also represents and works on behalf of thousands of individuals and constituents who are members of CCAT's organizational members in these areas and across California.

4. Sierra Club and CCAT supported EPA's proposal to do away with the 2008 Transfer Based Exclusion and replace it with RCRA Subtitle C requirements necessary to protect human health and the environment, particularly in low income communities of color that are known to be disproportionately impacted by hazardous waste damage. In the proposed Rule, EPA acknowledged the many problems associated with the Transfer Based Exclusion and indicated that it viewed the hazardous wastes covered by that exclusion as discarded and therefore hazardous waste for which RCRA regulation is required. The agency proposed to regulate these wastes under Subtitle C of RCRA. Instead, without providing notice or an opportunity for public comment, EPA adopted the Verified Recycler Exclusion, which excludes

the hazardous wastes it covers from the definition of solid waste, and therefore, from RCRA regulation, and does not require all of the safeguards needed to protect human health and the environment.

5. EPA's failure to provide notice and comment on the Verified Recycler Exclusion has deprived Sierra Club of its procedural right to participate in the definition of solid waste rulemaking. If EPA had properly proposed and solicited comment on the Verified Recycler Exclusion, Sierra Club would have submitted comments explaining why the Verified Recycler Exclusion is unlawful and why the conditions it contains are not adequately protective of human health and the environment, particularly with respect to protecting against toxic air pollution, soil and water contamination, and fire and explosion hazards. Public comment is a fundamental procedure for Sierra Club to work for strengthened hazardous waste requirements for the protection of their members nationwide. The denial of the opportunity to submit comments and data challenging the details of the Verified Recycler Exclusion diminishes the ability of Sierra Club to advance its mission.

6. EPA's definition of solid waste rule also harms me personally because it retains dangerous old hazardous waste exclusions and exemptions that apply to the kinds of facilities near my home, including precious metal recyclers and scrap metal yards, and that were correlated to serious environmental damage in EPA's damage case study.

7. One of the damage cases EPA reviewed involved Commodity Refining Exchange, which is now known as Commodity Resource & Environmental, Inc. ("CRE"), located at 11847 United St. in Mojave, CA. This facility, which calls itself "one of the world's leading silver recovery companies," recovers silver from photographic film, like X-rays, and is located approximately 8 miles from my home in Rosamond. EPA's damage case study reports that CRE recovered lead and copper from circuit boards and insulated wire, and incinerated these materials, which resulted in a waste dioxin ash that polluted the air and soil. EPA included this site in its analysis correlating damage cases to RCRA regulatory exclusions and described it as "likely correlated" to the exclusion for precious metal recycling, 40 C.F.R. § 266 subpart F. I am extremely concerned that the CRE could use EPA's precious metal recycling exclusion to put me, my family, and community at risk of suffering harm from another incident like-- or even worse than-- the one reported in the damage study. Since my home is nearby, I worry that use of the exclusion allows CRE to release more hazardous air pollution, including dangerous dioxins, into the air I breathe than would otherwise be permitted under RCRA. Also, twice a month I ride my horse all over the area that just southwest of CRE, within approximately 2-3 miles of the facility. Because I am so close to CRE so often, I fear that the precious metals exclusion puts me

at a greater risk of suffering toxic air pollution-related harm to my health.

8. My home is also less than 5 miles from National Metals and Surplus, a scrap metal facility at 1400 Orange Street in Rosamond, which handles everything from cars to appliances. I worry National Metals could use EPA's exclusions for scrap metal recycling to evade critical hazardous waste protections. Scrap metal yards like this are very dangerous; fires and explosions frequently occur at these sites across the country and they are known release toxic dusts and emissions into the air as well as in nearby waters and the soil. This fact was confirmed by EPA's own damage study, which correlated numerous instances of environmental harm to EPA's scrap metal recycling exclusions. I constantly worry about National Metals and Surplus causing this type of contamination occurring in my community and adversely impacting my health and my family's health as a result.

9. I live with my 14-year-old son and 16-year-old nephew. Every day I can, I spend a significant amount of time outside. I walk outside for at least 30 minutes every day during the week, and I spend significant time in and around my home with my family doing various recreational activities, like riding horses and bikes, swimming, and hiking. When we are at home, enjoying these activities, visiting friends, or just out and about near my home, my family and I have to breathe in the hazardous air pollutants from the nearby facilities, including CRE and National Metals Surplus, which threaten our health and cause us harm. Those exposures cannot be undone. My son and nephew are even more susceptible to the toxic pollutants from the above facilities because they breathe more air per pound of body weight than adults, and their bodies are still developing. As a result, they have a greater sensitivity and are even more at risk to air pollution from the above facilities. I am aware from studies, reports, and domestic and international regulatory programs that hazardous air pollutants can be transported great distances by air currents.

10. I am well aware that hazardous wastes can contain harmful chemicals like lead, arsenic, and mercury that can enter the air, soil, and waters and present serious health risks, including cancer. I do not want to face a heightened threat of developing cancer just because my family and I live and recreate here in Rosamond nearby CRE and National Metals and are being exposed to whatever cancer-causing chemicals they may be handling. In addition to cancer, I worry that CRE and National Metals' "recycling" practices are emitting hazardous air pollutants that can cause serious health problems including central nervous system harm, respiratory problems, damage to the heart, liver, and kidney, and developmental effects.

11. Over the last few decades, I have become all too familiar with the dangers that hazardous waste sites present. In the 1970s and 1980s, Rosamond, where I have lived on and off

all my life and continuously for the last 7 years, was the subject of the Rosamond Cancer Cluster Investigation- which is referenced in EPA's damage study- because the childhood cancer rate here was unacceptably high. According to Kern County health officials, this was the result of unregulated, mismanaged hazardous wastes at nearby facilities that handled harmful wastes like car batteries and copper wire. I am also very aware of the severe soil and groundwater contamination in Los Angeles caused by the Cooper Drum Company, which purported to recycle hazardous waste drums and is also referenced in EPA's environmental damage study. In light of so many instance of environmental damage like these, there is simply no excuse for the U.S. EPA to continue to allow hazardous waste "recyclers" like CRE and National Metals to evade RCRA's safeguards.

12. My serious concerns about the threat of cancer and health harms from toxic pollution from CRE and National Metals' management of hazardous wastes prevent me from fully enjoying the time I spend riding horses, hiking, biking, observing plants and wildlife, and doing other outdoor activities. My health concerns about breathing in toxic pollution from these facilities also diminish the pleasure I get from visiting with friends and spending time with my family. The toxic pollution released by CRE and National Metals impairs my ability to live a normal life with my family at my home and in my community and natural areas near where I live that we like to be able to visit, decreases the enjoyment I get from outdoor activities, and degrades my quality of life.

13. I am deeply concerned that persistent and bioaccumulative pollutants, such as mercury, lead, and other heavy metals, released from the above facilities contaminate the air, water, wildlife, groundwater, and food sources on our property and in the communities where we live, visit, and spend time outdoors. I know that these pollutants are deposited on water and soil, where they persist for long periods of time and bioaccumulate in wildlife and livestock and harm wildlife, vegetation, and ecosystems. The pollution that is deposited on the land and on our property diminishes our enjoyment of outdoor activities and life on the ranch. Knowing that the wildlife and plants that I observe and enjoy when spending time outdoors may be contaminated with and sickened by toxic pollutants takes away from my enjoyment of horseback riding, hiking, and other recreational activities.

14. I am concerned that by eating fish, meat, and dairy products, my family and I are exposed to toxic chemicals released by nearby facilities that could be mismanaging hazardous wastes and our health is endangered. I am a vegetarian due to health concerns about, among other things, bioaccumulation of pollutants. My family and I go fishing in the Antelope Valley area about half a dozen times a year, but we throw the fish we catch back because of concerns of

mercury contamination, and this disappoints my family and diminishes my enjoyment of fishing. If it were safe to eat the fish, my family would do so and we would go fishing more often.

15. Because they are known to pose great risks, the United States EPA must fully regulate and closely oversee all hazardous waste "recycling" operations under RCRA. EPA's pattern of issuing exclusions instead seriously compromises the health of people like me who have no choice but to live with these hazardous waste facilities.

16. EPA's failures to eliminate or at least strengthen these federal loopholes also prolong the loss I suffer from my reduced enjoyment of daily life at home and in my community and engaging in outdoor and other activities, depriving me of my full enjoyment of life here.

17. Based on my experiences, notification to the state, EPA, and the public is essential for safe management of hazardous wastes and adequate public and regulatory oversight. This information would include the types and amounts of hazardous wastes are being handled under the exclusions. As Co-Chair of Sierra Club's National Air Toxics Taskforce, I know that having access to and being able collect this kind of information is fundamental to Sierra Club's ability to carry out its mission. In particular, Sierra Club needs this basic information to educate its many members and constituents all across the country about the health threats they face while at home, at work, or outdoors recreating, and what can be done to reduce and prevent dangerous exposures, to raise public awareness of these threats, and to work on behalf of its members to strengthen health and environmental protections for hazardous waste management from facilities using RCRA hazardous waste exclusions all across the country. This information is also key to Sierra Club's ability to carry out its role in citizen enforcement actions. EPA's refusal to apply the notification requirement to the pre-2008 exclusions deprives Sierra Club of its right to this information, impedes Sierra Club's ability to provide educational services to its members and constituents and the public, and hinders Sierra Club's ability to fulfill its core mission of safeguarding health and the environment.

18. If notification were mandated by the U.S. EPA for all facilities claiming EPA's pre-2008 recycling exclusions, I would also use it personally to understand my own exposure and my family's exposure to toxic chemicals from the sites claiming the exclusions, including potentially CRE and National Surplus and those in areas across the country where I travel to for my advocacy work and with my family.

19. EPA's verified recycler exclusion is unlawful and must be vacated because it deprived Sierra Club and CCAT of their procedural rights to know about and comment on the new exclusion, and because it allows facilities like those near me to use old exclusions and

exemptions that are tied to serious environmental damage and may not be lawful. If Sierra Club and the other Environmental Petitioners prevail in this litigation these groups' procedural and information injuries would be resolved. In addition, my concerns about my own exposure to toxic wastes would be lessened because it would not be possible for the facilities near me to claim EPA's dangerous exclusions from hazardous waste laws.

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

Executed on: 12-9-05

Jane Williams

Jane Williams

Menu

Related Topics: Hazardous Waste Generators

List of Facilities That Have Notified That They Are Managing under the 2015 Definition of Solid Waste (DSW) Final Rule

EPA is providing a summary of notifications that facilities have submitted notifying that they are managing hazardous secondary materials under the DSW rule.

You will need Adobe Reader to view some of the files on this page. See EPA's About PDF page to learn more.

- Summary of Facilities That Have Notified That They Are Managing Secondary Hazardous Materials Under the DSW Final Rule (PDF) (15 pp, 395 K)

Last updated on August 7, 2015

DEC041

Summary of Definition of Solid Waste Final Rule Notifications
As of November 7, 2014

Under the Revisions to the Definition of Solid Waste (DSW) final rule, published October 30, 2008 (73 FR 64668), facilities are required to notify their regulatory authority prior to managing hazardous secondary materials under the DSW rule and every other year thereafter. EPA is providing this *Summary of Definition of Solid Waste Final Rule Notifications* to allow public access to the information received from these notifications. Note: The information from the notifications is reported as it was submitted by the companies; some information from recent re-notifications may not be included.

State/Territory	# of facilities that have submitted a DSW notification
Idaho	2
Illinois	12
Iowa	21
New Jersey	28
Pennsylvania	40
Puerto Rico	1
U.S. Virgin Islands	1
TOTAL	**105**

Facility Type	# of facilities[1]
Generator-controlled exclusion, reclaiming onsite	36
Generator-controlled exclusion, reclaiming within same company	8
Generator-controlled exclusion, tolling	4
Transfer-based exclusion, generator transferring offsite	58
Transfer-based exclusion, reclamation facility[2]	7
Transfer-based exclusion, intermediate facility	0
Transfer-based exclusion, generator exporting HSM	1
Transfer-based exclusion, reclamation facility importing HSM	1

[1] Some facilities notified they are operating as multiple facility types and thus are counted more than once in this column.
[2] Seven reclaimers receiving hazardous secondary materials under the transfer-based exclusion have notified under the rule (INMETCO- Ellwood City, PA; Safety-Kleen- Linden, NJ; Safety-Kleen- Dolton, IL; Veolia- Middlesex, NJ; World Resources Company- Pottsville, PA; Clean Harbors RSC- Chicago, IL, and Envirite of Pennsylvania- York, PA). All have RCRA permits.

Hazardous Secondary Material Type	# of facilities[3]
Spent Solvents (F001-F005, D035, plus D001)	47
Electric arc furnace dust (K061)	9
Spent pickle liquor (K062)	7
WW treatment sludges; plating bath residues from electroplating operations (F006;F007;F008)	6
Petroleum refining sludges; tank sediments (F037;F038;K050;K051;K169;K170)	1
Ignitable and/or corrosive (only) (D001, D002)	36
Characteristically toxic for metals (D004-D011)[4]	17
Other characteristically toxic (D012-D043, except D035)	5
U-listed/P-listed	2

[3] Some facilities notified they are managing multiple types of hazardous secondary materials and thus are counted more than once in this column.
[4] May also be ignitable or corrosive.

List of Facilities that have Notified Under the Definition of Solid Waste Final Rule:

EPA ID	Name	City	State	NAICS Description	Facility Description	Waste codes for Hazardous Secondary Material	Estimated Annual Quantity	Start Date
Idaho								
IDR000204735	Best Bath Systems Inc	Caldwell	ID	Custom Compounding of Purchased Resins	HSM Generator reclaiming onsite	D001	1 ton	Jun-10
IDR000003673	GEM State Manufacturing INC	Caldwell	ID	Truck Trailer Manufacturing	HSM Generator reclaiming onsite	D001;F003;F005	0 tons	Apr-14
Illinois								
ILD984851055	ADM Railcar Repair	Decatur	IL	Support Activities for Rail Transportation	HSM Generator reclaiming onsite	D001	3 tons	Aug-11
ILD005070719	Caterpillar Inc	Decatur	IL	Construction Machinery Manufacturing	HSM Generator reclaiming onsite	D001;F003	230 tons	Dec-13
ILR000106674	CCI Manufacturing IL Corp	Lemont	IL	All Other Miscellaneous Chemical Product and Preparation Manufacturing	HSM Generator transferring offsite	D001;D022;D038; F001;F003;F005	0 tons	Jun-14
ILD005450697	Clean Harbors RSC LLC	Chicago	IL	Waste Collection	Reclaimer receiving HSM from offsite	D001;F002	1,060 tons	Mar-12
ILD984805317	Clear Lam Packaging Inc	Elk Grove Village	IL	Plastics Packaging Film and Sheet (including Laminated) Manufacturing	HSM Generator reclaiming onsite	D001	300 tons	Aug-14
ILD039103239	General Mills Cereal Properties LLC	West Chicago	IL	Breakfast Cereal Manufacturing	HSM Generator reclaiming onsite	D001	0 tons	May-13

EPA ID	Name	City	State	NAICS Description	Facility Description	Waste codes for Hazardous Secondary Material	Estimated Annual Quantity	Start Date
ILD025423054	John Deere Harvester Works	East Moline	IL	Farm Machinery and Equipment Manufacturing	HSM Generator reclaiming onsite	D001	60 tons	Mar-11
ILD000608992	Momentive Speciality Chemicals Inc	Bedford Park	IL	Plastics Material and Resin Manufacturing	HSM Generator transferring offsite	D001;D035;F003; F005	500 tons	Jan-14
ILD005229448	NB Coatings Inc	Lansing	IL	Paint and Coating Manufacturing	HSM Generator transferring offsite	D001;D004;D005; D007;D010;D035; D038;F003;F005; U002;U031;U056; U112;U113;U118; U140;U154;U159 U161;U162;U196	1,303 tons	Feb-14
ILR000131110	Nicks Body Shop	Chicago	IL	General Automotive Repair	HSM Generator transferring offsite	D001;D002;D003; D018;D039;D040; F001;F002;F003; F005	0 tons	Dec-13
ILD980578876	Polychem Services Inc	Chicago Heights	IL	All Other Basic Organic Chemical Manufacturing	Tolling Contractor reclaiming HSM; HSM Generator and Reclaimer of Imported HSM	D002	410 tons	Nov-11
ILD980613913	Safety Kleen Systems Inc	Dolton	IL	Hazardous Waste Treatment and Disposal	HSM Generator reclaiming onsite; Tolling Contractors reclaiming HSM; Reclaimer receiving HSM from offsite; HSM Generator exporting HSM	D001;D004;D005; D006;D007;D008; D010;D018;D027; D035;D040;F003	28,942 tons	Oct-12
Iowa								
IAD184106243	Archer Daniels Midland – ADM Railcar Repair	Cedar Rapids	IA	Support Activities for Rail Transportation	HSM Generator reclaiming onsite	D001	1 ton	Aug-11
IAR000510172	Arnold Motor Supply	Sioux City	IA	Automotive Parts and Accessories Stores	Toll Manufacturer managing HSM pursuant to a tolling contract	D001;F003;F005	1 ton	Jun-14

EPA ID	Name	City	State	NAICS Description	Facility Description	Waste codes for Hazardous Secondary Material	Estimated Annual Quantity	Start Date
IA0000362905	Curries 12th St NW Facility	Mason City	IA	Metal Window and Door Manufacturing	HSM Generator reclaiming onsite	D001; D035;F005	20 tons	Jan-09
IAD043490150	Curries 9th Street Facility	Mason City	IA	Metal Window and Door Manufacturing	HSM Generator reclaiming onsite	D001;D005;D035; D039;F003:F005	8 tons	Jan-09
IAD055803423	Diamond Vogel Paint Co., Inc.	Burlington	IA	Paint and Coating Manufacturing	HSM Generator transferring within "same company"	D001;F003;F005	45 tons	Jan-10
IAR000006577	Eagle Window and Door	Dubuque	IA	Metal Window and Door Manufacturing	HSM Generator reclaiming onsite	D001;D007;D035; F004	230 tons	May-10
IAR000008482	Eagle Window and Door	Dubuque	IA	Metal Window and Door Manufacturing	HSM Generator reclaiming onsite	D001;D007;D035; F004	12 tons	Jan-14
IAD022079164	East Penn Manufacturing Co Inc	Corydon	IA	Storage Battery Manufacturing	HSM Generator transferring within "same company"	D008	10 tons	Jun-11
IAR000007013	Fres-co System USA, Inc	Red Oak	IA	Commercial Gravure Printing	Toll Manufacturer managing HSM pursuant to a tolling contract	D001;F003	15 tons	Mar-10
IAD073489288	Industrial Laminates/ Norplex Inc	Postville	IA	Laminated Plastics Plate, Sheet (except Packaging), and Shape Manufacturing	HSM Generator reclaiming onsite; HSM Generator transferring offsite	D001;F003;F005	28 tons	Jan-10
IA0000990762	Iowa Contract Fabricators Inc	Riceville	IA	Motor Vehicle Body Manufacturing	HSM Generator transferring offsite	D001;D035;F003; F005	23 tons	Mar-09

EPA ID	Name	City	State	NAICS Description	Facility Description	Waste codes for Hazardous Secondary Material	Estimated Annual Quantity	Start Date
IAD005286539	Iowa Mold Tooling Company Inc	Garner	IA	Construction Machinery Manufacturing	HSM Generator transferring offsite	D001;D035;F003; F005	49 tons	Mar-09
IAD073489726	John Deere Davenport Works	Davenport	IA	Construction Machinery Manufacturing	HSM Generator reclaiming onsite	D001;D035	66 tons	May-10
IAD069624500	John Deere Des Moines Works	Ankeny	IA	Farm Machinery and Equipment Manufacturing	HSM Generator reclaiming onsite	D001;D035;F003; F005	50 tons	Nov-09
IAD005269527	John Deere Dubuque Works	Dubuque	IA	Construction Machinery Manufacturing	HSM Generator reclaiming onsite	D001	67 tons	Apr-10
IAD000678094	John Deere Engine Works	Waterloo	IA	Other Engine Equipment Manufacturing	HSM Generator reclaiming onsite	D001	140 tons	Aug-09
IAD005291182	John Deere Ottumwa Works	Ottumwa	IA	Farm Machinery and Equipment Manufacturing	HSM Generator reclaiming onsite	D001;D035;F003; F005	20 tons	Dec-10
IAD000805168	John Deere Waterloo Works	Waterloo	IA	Farm Machinery and Equipment Manufacturing	HSM Generator reclaiming onsite	D001	113 tons	Oct-09
IAD078096732	Siegwerk USA Co	Des Moines	IA	Printing Ink Manufacturing	HSM Generator reclaiming onsite	D001	319 tons	Mar-09
IAR000007377	Siegwerk USA Co	Des Moines	IA	Printing Ink Manufacturing	HSM Generator transferring offsite	D001	200 tons	Mar-09

EPA ID	Name	City	State	NAICS Description	Facility Description	Waste codes for Hazardous Secondary Material	Estimated Annual Quantity	Start Date
IAD007276728	Vogel Paint & Wax Co Inc	Orange City	IA	Paint and Coating Manufacturing	HSM Generator reclaiming onsite	D001;D035;F003; F005	995 tons	Feb-09
New Jersey								
NJD051415909	Aleris Rolled Products, Inc	Clayton	NJ	Aluminum Sheet, Plate, and Foil Manufacturing	HSM Generator transferring offsite	D001	20 tons	Jul-10
NJD002338267	Aluminum Shapes LLC	Delair	NJ	Secondary Smelting and Alloying of Aluminum	HSM Generator reclaiming onsite	D001;F005	11 tons	Jul-09
NJD091860437	API Foils Inc	Rahway	NJ	Coated and Laminated Packaging Paper Manufacturing	HSM Generator transferring HSM to reclaimer within the "same company"	D001;D005;D006: D007;D008;F003; F005	96 tons	Jul-11
NJD000531707	Arrow Shed LLC	Haskell	NJ	Electroplating, Plating, Polishing, Anodizing, and Coloring	HSM Generator transferring offsite	F003	20 tons	Jun-13
NJD056699267	BASF Corp	Union	NJ	Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology)	HSM Generator transferring HSM to reclaimer within the "same company"	D002	7 tons	Jun-14
NJD054056049	Consolidated Packaging Group	Ridgefield Park	NJ	Packaging Machinery Manufacturing	HSM Generator transferring offsite	D001;F003	26 tons	Dec-11
NJD054120571	Cyalume Specialty Products Inc	Bound Brook	NJ	Plastics Material and Resin Manufacturing	HSM Generator transferring offsite	D001	120 tons	Jul-13

EPA ID	Name	City	State	NAICS Description	Facility Description	Waste codes for Hazardous Secondary Material	Estimated Annual Quantity	Start Date
NJR000000752	Datascope Corp	Mahwah Twp	NJ	Surgical and Medical Instrument Manufacturing	HSM Generator transferring offsite	D001	10 tons	Jun-13
NJD002169712	Digital Color Concepts	Mountainside	NJ	Other Electric Power Generation	HSM Generator transferring offsite	D001	13 tons	May-10
NJR000049247	Eagle Point Tank Farm	Westville	NJ	Other Warehousing and Storage	HSM Generator reclaiming onsite; HSM Generator transferring offsite	D001	200 tons	Jul-11
NJD001340686	Elementis Specialties	Jersey City	NJ	All Other Basic Organic Chemical Manufacturing	HSM Generator transferring offsite	D001	43 tons	Aug-12
NJR986637007	Fiabila Inc USA – Linden Division	Linden	NJ	Toilet Preparation Manufacturing	HSM Generator transferring offsite	D001;F003	200 tons	Dec-13
NJD982794364	Fiabila Inc USA	Mine Hill	NJ	Toilet Preparation Manufacturing	HSM Generator transferring offsite	D001	1,030 tons	Dec-13
NJR000041970	Hovione LLC	East Windsor	NJ	Research and Development in Biotechnology	HSM Generator transferring offsite	D001;F002;F003	9 tons	Jan-14
NJD002139228	International Paint LLC	Union	NJ	Paint and Coating Manufacturing	HSM Generator transferring offsite	D001	200 tons	Mar-12
NJD980755367	Johnson Matthey Inc	West Deptford Twp	NJ	Pharmaceutical Preparation Manufacturing	HSM Generator reclaiming onsite; HSM Generator transferring offsite	D001;F002;F003; F005	1,628 tons	Jan-13

EPA ID	Name	City	State	NAICS Description	Facility Description	Waste codes for Hazardous Secondary Material	Estimated Annual Quantity	Start Date
NJD006979363	LTS Lohmann Therapy Systems Corp	West Caldwell	NJ	Pharmaceutical Preparation Manufacturing	HSM Generator transferring offsite	F003	200 tons	May-11
NJD981483035	Melton Sales & Service	Bordentown	NJ	Industrial Truck, Tractor, Trailer, and Stacker Machinery Manufacturing	HSM Generator transferring offsite	D001	3 tons	Jul-10
NJR000075796	Melton Sales & Service	Burlington	NJ	Industrial Truck, Tractor, Trailer, and Stacker Machinery Manufacturing	HSM Generator transferring offsite	D001	6 tons	Jul-10
NJR000023499	Nu-World Corporation	Carteret	NJ	Toilet Preparation Manufacturing	HSM Generator transferring HSM to reclaimer within the "same company"	F001	11 tons	Apr-11
NJD011806122	Oticon Corp	Somerset	NJ	Electromedical and Electrotherapeutic Apparatus Manufacturing	HSM Generator transferring offsite	D001	1 ton	Mar-11
NJD093843258	Quest Diagnostics	Teterboro	NJ	Medical Laboratories	HSM Generator transferring offsite	D001	26 tons	Jul-13
NJD002182897	Safety-Kleen Systems, Inc	Linden	NJ	Hazardous Waste Treatment and Disposal	Reclaimer receiving HSM from offsite	D001;D035;F003; F005	500 tons	Jun-09
NJD986629491	Sancoa International	Lumberton	NJ	Commercial Gravure Printing	HSM Generator transferring offsite	D001;D035;F003; F005	60 tons	Aug-10
NJD064344575	Siegfried USA Incorporated	Pennsville	NJ	Medicinal and Botanical Manufacturing	HSM Generator reclaiming onsite; HSM Generator transferring offsite	D001;D002	1,600 tons	Aug-09

EPA ID	Name	City	State	NAICS Description	Facility Description	Waste codes for Hazardous Secondary Material	Estimated Annual Quantity	Start Date
NJD059825513	Synray Corp	Kenilworth	NJ	Paint and Coatings Manufacturing	HSM Generator transferring offsite	D001	32 tons	Mar-11
NJD002454544	Veolia ES Technical Solutions LLC	Middlesex	NJ	Hazardous Waste Treatment and Disposal	Reclaimer receiving HSM from offsite	D001;F003;F005	2,400 tons	Sep-09
NJD002482545	Viking Yacht Company	New Gretna	NJ	Boat Building	HSM Generator transferring offsite	D001	70 tons	Dec-09
Pennsylvania								
PAD003010345	Adhesive Research Inc	Glen Rock	PA	Paper Bag and Coated and Treated Paper Manufacturing	HSM Generator transferring offsite	F003;F005	10 tons	Aug-13
PAD004335154	Allegheny Ludlum Brackenridge	Brackenridge	PA	Iron and Steel Mills	HSM Generator transferring offsite	D007;K061	5,000 tons	Dec-08
PAD057629479	Allegheny Ludlum Latrobe	Latrobe	PA	Iron and Steel Mills	HSM Generator transferring offsite	K061	700 tons	Dec-08
PAD049029697	Alumax Mill Products Inc	Lancaster	PA	Secondary Smelting and Alloying of Aluminum	HSM Generator transferring offsite	D001	300 tons	Feb-13
PAD003025418	BAE Systems, Land & Armaments	York	PA	Military Armored Vehicle, Tank, and Tank Component Manufacturing	HSM Generator transferring offsite	D001;F003	40 tons	Sep-09
PAD041399403	BASF Corp	Erie	PA	Other Basic Inorganic Chemical Manufacturing	HSM Generator transferring offsite	D009	1 ton	Jun-14

EPA ID	Name	City	State	NAICS Description	Facility Description	Waste codes for Hazardous Secondary Material	Estimated Annual Quantity	Start Date
PAR000042168	Bimax Inc	Glen Rock	PA	All Other Miscellaneous Chemical Product and Preparation Manufacturing	HSM Generator reclaiming onsite	D001;F003;F005	54 tons	Jan-12
PAR000508333	CAM Superline Inc	Waynesboro	PA	Truck Trailer Manufacturing	HSM Generator transferring offsite	D001;D005;D006; D035;F003:F005	9 tons	Jun-11
PAD002344315	Carpenter Technology Corporation	Reading	PA	Iron and Steel Mills	HSM Generator reclaiming onsite; HSM Generator transferring offsite	K061;K062; F006;F007;F008	14,970 tons	Jul-09
PAD003043353	Cherokee Pharmaceuticals LLC	Riverside	PA	Medicinal and Botanical Manufacturing	HSM Generator transferring offsite	D001; D002;F002	370 tons	Jul-09
PAD053276085	Cleveland Steel Container	Quakertown	PA	Metal Can Manufacturing	HSM Generator transferring offsite	D001;D005;D007 D035;F005	6 tons	Mar-11
PAR000520510	Core Label LLC	Tyrone	PA	Commercial Printing (except Screen and Books)	HSM Generator transferring offsite	D001	195 tons	Jul-13
PAD002279206	De-Val Corp	Philadelphia	PA	Small Arms, Ordnance, and Ordnance Accessories Manufacturing	HSM Generator transferring offsite	D039	2 tons	Dec-12
PAR000002105	Dura Bond Pipe LLC	Steelton	PA	Metal Coating, Engraving (except Jewelry and Silverware), and Allied Services to Manufacturers	HSM Generator reclaiming onsite	D001;F003;F005	14 tons	Apr-12

EPA ID	Name	City	State	NAICS Description	Facility Description	Waste codes for Hazardous Secondary Material	Estimated Annual Quantity	Start Date
PAD010154045	Envirite of Pennsylvania Inc	York	PA	Acid waste disposal facilities	Reclaimer receiving HSM from offsite	D001 through D043	500 tons	Jan-12
PAD981037377	Global Circuits Inc	Oakmont	PA	Bare Printed Circuit Board Manufacturing	HSM Generator transferring offsite	F006	20 tons	Jan-10
PAD987278082	Greenville Metals Inc	Transfer	PA	Secondary Smelting, Refining, and Alloying of Nonferrous Metal (except Copper and Aluminum)	HSM Generator transferring offsite	K061	400 tons	Nov-10
PAD004372363	Horsehead Corporation	Monaca	PA	Secondary Smelting, Refining, and Alloying of Nonferrous Metal (except Copper and Aluminum)	Reclaimer receiving HSM from HSM generator within the "same company"	K061;K062	8,000 tons	May-12
PAD002395887	Horsehead Corporation	Palmerton	PA	All Other Basic Inorganic Chemical Manufacturing	Reclaimer receiving HSM from HSM generator within the "same company"	K061	9,000 tons	Sep-12
PAD087561015	International Metals Reclamation Company Inc	Ellwood City	PA	Nonferrous Metal (Except Aluminum) Smelting and Refining	Reclaimer receiving HSM from offsite	D001 through D009; D011; F006;K061;K062	58,500 tons	Jun-09
PAR000510602	Jewell Acquisition, LLC – Midland	Midland	PA	Iron and Steel Mills	HSM Generator transferring offsite	K061	5,600 tons	Dec-08
PAD004338091	JMC Steel Group Wheatland Division	Wheatland	PA	Fabricated Pipe and Pipe Fitting Manufacturing	HSM Generator reclaiming onsite	D002;D007;K062	25,350 tons	Dec-08

EPA ID	Name	City	State	NAICS Description	Facility Description	Waste codes for Hazardous Secondary Material	Estimated Annual Quantity	Start Date
PAR000038067	John Maneely Co Wheatland Tube Division	Wheatland	PA	Iron and Steel Pipe and Tube Manufacturing from Purchased Steel	HSM Generator reclaiming onsite	D002;K062	5,167 tons	Dec-08
PAD004322863	John Maneely Co Wheatland Tube Division	Sharon	PA	Iron and Steel Pipe and Tube Manufacturing from Purchased Steel	HSM Generator reclaiming onsite	D002;K062	13 tons	Dec-08
PAD980550412	Johnson Matthey Inc	Conshohocken	PA	Medicinal and Botanical Manufacturing	HSM Generator transferring offsite	D001	360 tons	Feb-12
PAR000519322	Johnson Matthey Inc	Smithfield	PA	All Other Motor Vehicle Parts Manufacturing	HSM Generator transferring within "same company"	D002	12 tons	Aug-09
PAR000527051	Kensey Nash Corp	Exton	PA	Surgical and Medical Instrument Manufacturing	HSM Generator transferring offsite	D001	25 tons	Nov-11
PAD098735244	Kovatch Mobile Equipment	Nesquehoning	PA	Motor Vehicle Body Manufacturing	HSM Generator transferring offsite	D001;D018;F003; F005	15 tons	Oct-11
PAD004393468	Latrobe Specialty Metals	Latrobe	PA	Iron and Steel Mills	HSM Generator transferring offsite	D007;K062	570 tons	Oct-13
PAD048203822	Lord Corp	Saegertown	PA	Paint and Coating Manufacturing	HSM Generator reclaiming onsite	D001;D006;D007; D008;D010;D035 D039;D040; F003;F005	100 tons	Jan-11
PAD002283547	National Label Company	Lafayette Hill	PA	Other Commercial Printing	HSM Generator transferring offsite	D001;F003	38 tons	Sep-10

EPA ID	Name	City	State	NAICS Description	Facility Description	Waste codes for Hazardous Secondary Material	Estimated Annual Quantity	Start Date
PAD002292068	Rohm & Haas Chemical LLC	Bristol	PA	Plastics Material and Resin Manufacturing	HSM Generator transferring offsite	D001;D035;F003; F005	420 tons	Oct-10
PAD981044704	Silberline Manufacturing Co Inc	Tamaqua	PA	Secondary Smelting and Alloying of Aluminum	HSM Generator transferring offsite	D001	6 tons	Apr-14
PAD043882323	Spectrum Control Technology Inc	State College	PA	Electronic Capacitor Manufacturing	HSM Generator transferring offsite	F006	12 tons	Mar-10
PAR000514299	Spectrum Industrial Coatings	Saint Thomas	PA	Metal Coating, Engraving (except Jewelry and Silverware), and Allied Services to Manufacturers	HSM Generator reclaiming onsite	D001;D035;F003; F005	10 tons	Feb-14
PAD042716084	Spray Products Corp	Plymouth Meeting	PA	All Other Miscellaneous Chemical Product and Preparation Manufacturing	HSM Generator transferring offsite	D001	200,000 tons	May-11
PAD980827976	Springs Window Fashions LLC	Montgomery	PA	Blind and Shade Manufacturing	HSM Generator transferring offsite	D001;D006;D018; F001;F003;F005	15 tons	Jan-14
PAR000537860	Titan International West Pottsgrove	Pottstown	PA	Alloying purchased nonferrous metals (except aluminum, copper)	HSM Generator transferring offsite	D002;D007	570 tons	Nov-10
PAR000505222	V&S Lebanon Galvanizing LLC	Jonestown	PA	Metal Coating, Engraving (except Jewelry and Silverware), and Allied Services to Manufacturers	HSM Generator reclaiming onsite; HSM Generator transferring offsite	D006;D008	264 tons	Dec-11

EPA ID	Name	City	State	NAICS Description	Facility Description	Waste codes for Hazardous Secondary Material	Estimated Annual Quantity	Start Date
PAD981038227	World Resources Company	Pottsville	PA	All Other Miscellaneous Nonmetallic Mineral Product Manufacturing	Reclaimer receiving HSM from offsite	D002;D006;D007; D008;F006	550 tons	Feb-10
Puerto Rico								
PRD090346909	Pfizer Pharmaceuticals LLC	Barceloneta	PR	Medicinal and Botanical Manufacturing	HSM Generator transferring offsite	D001;F002;F003; F005	4,830 tons	Jul-11
U.S. Virgin Islands								
VID980536080	Hovensa LLC	Christiansted	VI	Petroleum Refineries	HSM Generator reclaiming onsite	F037;F038;K051; K169;K170	15,800 tons	Oct-09

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STATUTES

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 5. Administrative Procedure (Refs & Annos)
Subchapter II. Administrative Procedure (Refs & Annos)

5 U.S.C.A. § 553

§ 553. Rule making

Currentness

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

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(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

CREDIT(S)
(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 12044

Ex. Ord. No. 12044, Mar. 23, 1978, 43 F.R. 12661, as amended by Ex. Ord. No. 12221, June 27, 1980, 45 F.R. 44249, which related to the improvement of Federal regulations, was revoked by Ex. Ord. No. 12291, Feb. 17, 1981, 46 F.R. 13193, formerly set out as a note under section 601 of this title.

Notes of Decisions (1283)

5 U.S.C.A. § 553, 5 USCA § 553
Current through P.L. 114-86 (excluding P.L. 114-74 and 114-81) approved 11-5-2015

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 82. Solid Waste Disposal (Refs & Annos)
Subchapter I. General Provisions

42 U.S.C.A. § 6902

§ 6902. Objectives and national policy

Currentness

(a) Objectives

The objectives of this chapter are to promote the protection of health and the environment and to conserve valuable material and energy resources by--

(1) providing technical and financial assistance to State and local governments and interstate agencies for the development of solid waste management plans (including resource recovery and resource conservation systems) which will promote improved solid waste management techniques (including more effective organizational arrangements), new and improved methods of collection, separation, and recovery of solid waste, and the environmentally safe disposal of nonrecoverable residues;

(2) providing training grants in occupations involving the design, operation, and maintenance of solid waste disposal systems;

(3) prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health;

(4) assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment;

(5) requiring that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date;

(6) minimizing the generation of hazardous waste and the land disposal of hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment;

(7) establishing a viable Federal-State partnership to carry out the purposes of this chapter and insuring that the Administrator will, in carrying out the provisions of subchapter III of this chapter, give a high priority to assisting and cooperating with States in obtaining full authorization of State programs under subchapter III of this chapter;

(8) providing for the promulgation of guidelines for solid waste collection, transport, separation, recovery, and disposal practices and systems;

(9) promoting a national research and development program for improved solid waste management and resource conservation techniques, more effective organizational arrangements, and new and improved methods of collection, separation, and recovery, and recycling of solid wastes and environmentally safe disposal of nonrecoverable residues;

(10) promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water, and land resources; and

(11) establishing a cooperative effort among the Federal, State, and local governments and private enterprise in order to recover valuable materials and energy from solid waste.

(b) National policy

The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.

CREDIT(S)

(Pub.L. 89-272, Title II, § 1003, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2798; amended Pub.L. 98-616, Title I, § 101(b), Nov. 8, 1984, 98 Stat. 3224.)

Notes of Decisions (3)

42 U.S.C.A. § 6902, 42 USCA § 6902
Current through P.L. 114-165.

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 82. Solid Waste Disposal (Refs & Annos)
Subchapter I. General Provisions

42 U.S.C.A. § 6903

§ 6903. Definitions

Effective: December 16, 2014
Currentness

As used in this chapter:

(1) The term "Administrator" means the Administrator of the Environmental Protection Agency.

(2) The term "construction," with respect to any project of construction under this chapter, means (A) the erection or building of new structures and acquisition of lands or interests therein, or the acquisition, replacement, expansion, remodeling, alteration, modernization, or extension of existing structures, and (B) the acquisition and installation of initial equipment of, or required in connection with, new or newly acquired structures or the expanded, remodeled, altered, modernized or extended part of existing structures (including trucks and other motor vehicles, and tractors, cranes, and other machinery) necessary for the proper utilization and operation of the facility after completion of the project; and includes preliminary planning to determine the economic and engineering feasibility and the public health and safety aspects of the project, the engineering, architectural, legal, fiscal, and economic investigations and studies, and any surveys, designs, plans, working drawings, specifications, and other action necessary for the carrying out of the project, and (C) the inspection and supervision of the process of carrying out the project to completion.

(2A) The term "demonstration" means the initial exhibition of a new technology process or practice or a significantly new combination or use of technologies, processes or practices, subsequent to the development stage, for the purpose of proving technological feasibility and cost effectiveness.

(3) The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

(4) The term "Federal agency" means any department, agency, or other instrumentality of the Federal Government, any independent agency or establishment of the Federal Government including any Government corporation, and the Government Publishing Office.

(5) The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may--

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(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

(6) The term "hazardous waste generation" means the act or process of producing hazardous waste.

(7) The term "hazardous waste management" means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes.

(8) For purposes of Federal financial assistance (other than rural communities assistance), the term "implementation" does not include the acquisition, leasing, construction, or modification of facilities or equipment or the acquisition, leasing, or improvement of land.

(9) The term "intermunicipal agency" means an agency established by two or more municipalities with responsibility for planning or administration of solid waste.

(10) The term "interstate agency" means an agency of two or more municipalities in different States, or an agency established by two or more States, with authority to provide for the management of solid wastes and serving two or more municipalities located in different States.

(11) The term "long-term contract" means, when used in relation to solid waste supply, a contract of sufficient duration to assure the viability of a resource recovery facility (to the extent that such viability depends upon solid waste supply).

(12) The term "manifest" means the form used for identifying the quantity, composition, and the origin, routing, and destination of hazardous waste during its transportation from the point of generation to the point of disposal, treatment, or storage.

(13) The term "municipality" (A) means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law, with responsibility for the planning or administration of solid waste management, or an Indian tribe or authorized tribal organization or Alaska Native village or organization, and (B) includes any rural community or unincorporated town or village or any other public entity for which an application for assistance is made by a State or political subdivision thereof.

(14) The term "open dump" means any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under section 6944 of this title and which is not a facility for disposal of hazardous waste.

(15) The term "person" means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States.

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(16) The term "procurement item" means any device, good, substance, material, product, or other item whether real or personal property which is the subject of any purchase, barter, or other exchange made to procure such item.

(17) The term "procuring agency" means any Federal agency, or any State agency or agency of a political subdivision of a State which is using appropriated Federal funds for such procurement, or any person contracting with any such agency with respect to work performed under such contract.

(18) The term "recoverable" refers to the capability and likelihood of being recovered from solid waste for a commercial or industrial use.

(19) The term "recovered material" means waste material and byproducts which have been recovered or diverted from solid waste, but such term does not include those materials and byproducts generated from, and commonly reused within, an original manufacturing process.

(20) The term "recovered resources" means material or energy recovered from solid waste.

(21) The term "resource conservation" means reduction of the amounts of solid waste that are generated, reduction of overall resource consumption, and utilization of recovered resources.

(22) The term "resource recovery" means the recovery of material or energy from solid waste.

(23) The term "resource recovery system" means a solid waste management system which provides for collection, separation, recycling, and recovery of solid wastes, including disposal of nonrecoverable waste residues.

(24) The term "resource recovery facility" means any facility at which solid waste is processed for the purpose of extracting, converting to energy, or otherwise separating and preparing solid waste for reuse.

(25) The term "regional authority" means the authority established or designated under section 6946 of this title.

(26) The term "sanitary landfill" means a facility for the disposal of solid waste which meets the criteria published under section 6944 of this title.

(26A) The term "sludge" means any solid, semisolid or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility or any other such waste having similar characteristics and effects.

(27) The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges

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which are point sources subject to permits under section 1342 of Title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C.A. § 2011 et seq.].

(28) The term "solid waste management" means the systematic administration of activities which provide for the collection, source separation, storage, transportation, transfer, processing, treatment, and disposal of solid waste.

(29) The term "solid waste management facility" includes--

(A) any resource recovery system or component thereof,

(B) any system, program, or facility for resource conservation, and

(C) any facility for the collection, source separation, storage, transportation, transfer, processing, treatment or disposal of solid wastes, including hazardous wastes, whether such facility is associated with facilities generating such wastes or otherwise.

(30) The terms "solid waste planning", "solid waste management", and "comprehensive planning" include planning or management respecting resource recovery and resource conservation.

(31) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(32) The term "State authority" means the agency established or designated under section 6947 of this title.

(33) The term "storage", when used in connection with hazardous waste, means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste.

(34) The term "treatment", when used in connection with hazardous waste, means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

(35) The term "virgin material" means a raw material, including previously unused copper, aluminum, lead, zinc, iron, or other metal or metal ore, any undeveloped resource that is, or with new technology will become, a source of raw materials.

(36) The term "used oil" means any oil which has been--

(A) refined from crude oil,

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(B) used, and

(C) as a result of such use, contaminated by physical or chemical impurities.

(37) The term "recycled oil" means any used oil which is reused, following its original use, for any purpose (including the purpose for which the oil was originally used). Such term includes oil which is re-refined, reclaimed, burned, or reprocessed.

(38) The term "lubricating oil" means the fraction of crude oil which is sold for purposes of reducing friction in any industrial or mechanical device. Such term includes re-refined oil.

(39) The term "re-refined oil" means used oil from which the physical and chemical contaminants acquired through previous use have been removed through a refining process.

(40) Except as otherwise provided in this paragraph, the term "medical waste" means any solid waste which is generated in the diagnosis, treatment, or immunization of human beings or animals, in research pertaining thereto, or in the production or testing of biologicals. Such term does not include any hazardous waste identified or listed under subchapter III of this chapter or any household waste as defined in regulations under subchapter III of this chapter.

(41) The term "mixed waste" means waste that contains both hazardous waste and source, special nuclear, or by-product material subject to the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.).

CREDIT(S)

(Pub.L. 89-272, Title II, § 1004, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2798; amended Pub.L. 95-609, § 7(b), Nov. 8, 1978, 92 Stat. 3081; Pub.L. 96-463, § 3, Oct. 15, 1980, 94 Stat. 2055; Pub.L. 96-482, § 2, Oct. 21, 1980, 94 Stat. 2334; Pub.L. 100-582, § 3, Nov. 1, 1988, 102 Stat. 2958; Pub.L. 102-386, Title I, §§ 103, 105(b), Oct. 6, 1992, 106 Stat. 1507, 1512; Pub.L. 113-235, Div. H, Title I, § 1301(b), Dec. 16, 2014, 128 Stat. 2537.)

Notes of Decisions (98)

42 U.S.C.A. § 6903, 42 USCA § 6903
Current through P.L. 114-86 (excluding P.L. 114-74 and 114-81) approved 11-5-2015

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 82. Solid Waste Disposal (Refs & Annos)
Subchapter II. Office of Solid Waste; Authorities of the Administrator

42 U.S.C.A. § 6912

§ 6912. Authorities of Administrator

Currentness

(a) Authorities

In carrying out this chapter, the Administrator is authorized to--

(1) prescribe, in consultation with Federal, State, and regional authorities, such regulations as are necessary to carry out his functions under this chapter;

(2) consult with or exchange information with other Federal agencies undertaking research, development, demonstration projects, studies, or investigations relating to solid waste;

(3) provide technical and financial assistance to States or regional agencies in the development and implementation of solid waste plans and hazardous waste management programs;

(4) consult with representatives of science, industry, agriculture, labor, environmental protection and consumer organizations, and other groups, as he deems advisable;

(5) utilize the information, facilities, personnel and other resources of Federal agencies, including the National Institute of Standards and Technology and the National Bureau of the Census, on a reimbursable basis, to perform research and analyses and conduct studies and investigations related to resource recovery and conservation and to otherwise carry out the Administrator's functions under this chapter; and

(6) to delegate to the Secretary of Transportation the performance of any inspection or enforcement function under this chapter relating to the transportation of hazardous waste where such delegation would avoid unnecessary duplication of activity and would carry out the objectives of this chapter and of chapter 51 of Title 49.

(b) Revision of regulations

Each regulation promulgated under this chapter shall be reviewed and, where necessary, revised not less frequently than every three years.

(c) Criminal investigations

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In carrying out the provisions of this chapter, the Administrator, and duly-designated agents and employees of the Environmental Protection Agency, are authorized to initiate and conduct investigations under the criminal provisions of this chapter, and to refer the results of these investigations to the Attorney General for prosecution in appropriate cases.

CREDIT(S)

(Pub.L. 89-272, Title II, § 2002, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2804; amended Pub.L. 96-482, § 5, Oct. 21, 1980, 94 Stat. 2335; Pub.L. 98-616, Title IV, § 403(d)(4), Nov. 8, 1984, 98 Stat. 3272; Pub.L. 100-418, Title V, § 5115(c), Aug. 23, 1988, 102 Stat. 1433.)

Notes of Decisions (6)

42 U.S.C.A. § 6912, 42 USCA § 6912
Current through P.L. 114-86 (excluding P.L. 114-74 and 114-81) approved 11-5-2015

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 82. Solid Waste Disposal (Refs & Annos)
Subchapter III. Hazardous Waste Management (Refs & Annos)

42 U.S.C.A. § 6921

§ 6921. Identification and listing of hazardous waste

Effective: March 9, 2006
Currentness

(a) Criteria for identification or listing

Not later than eighteen months after October 21, 1976, the Administrator shall, after notice and opportunity for public hearing, and after consultation with appropriate Federal and State agencies, develop and promulgate criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste, which should be subject to the provisions of this subchapter, taking into account toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics. Such criteria shall be revised from time to time as may be appropriate.

(b) Identification and listing

(1) Not later than eighteen months after October 21, 1976, and after notice and opportunity for public hearing, the Administrator shall promulgate regulations identifying the characteristics of hazardous waste, and listing particular hazardous wastes (within the meaning of section 6903(5) of this title), which shall be subject to the provisions of this subchapter. Such regulations shall be based on the criteria promulgated under subsection (a) of this section and shall be revised from time to time thereafter as may be appropriate. The Administrator, in cooperation with the Agency for Toxic Substances and Disease Registry and the National Toxicology Program, shall also identify or list those hazardous wastes which shall be subject to the provisions of this subchapter solely because of the presence in such wastes of certain constituents (such as identified carcinogens, mutagens, or teratagens [1]) at levels in excess of levels which endanger human health.

(2)(A) Notwithstanding the provisions of paragraph (1) of this subsection, drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil or natural gas or geothermal energy shall be subject only to existing State or Federal regulatory programs in lieu of this subchapter until at least 24 months after October 21, 1980, and after promulgation of the regulations in accordance with subparagraphs (B) and (C) of this paragraph. It is the sense of the Congress that such State or Federal programs should include, for waste disposal sites which are to be closed, provisions requiring at least the following:

(i) The identification through surveying, platting, or other measures, together with recordation of such information on the public record, so as to assure that the location where such wastes are disposed of can be located in the future; except however, that no such surveying, platting, or other measure identifying the location of a disposal site for drilling fluids and associated wastes shall be required if the distance from the disposal site to the surveyed or platted location to the associated well is less than two hundred lineal feet; and

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(ii) A chemical and physical analysis of a produced water and a composition of a drilling fluid suspected to contain a hazardous material, with such information to be acquired prior to closure and to be placed on the public record.

(B) Not later than six months after completion and submission of the study required by section 6982(m) of this title, the Administrator shall, after public hearings and opportunity for comment, determine either to promulgate regulations under this subchapter for drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil or natural gas or geothermal energy or that such regulations are unwarranted. The Administrator shall publish his decision in the Federal Register accompanied by an explanation and justification of the reasons for it. In making the decision under this paragraph, the Administrator shall utilize the information developed or accumulated pursuant to the study required under section 6982(m) of this title.

(C) The Administrator shall transmit his decision, along with any regulations, if necessary, to both Houses of Congress. Such regulations shall take effect only when authorized by Act of Congress.

(3)(A) Notwithstanding the provisions of paragraph (1) of this subsection, each waste listed below shall, except as provided in subparagraph (B) of this paragraph, be subject only to regulation under other applicable provisions of Federal or State law in lieu of this subchapter until at least six months after the date of submission of the applicable study required to be conducted under subsection (f), (n), (o), or (p) of section 6982 of this title and after promulgation of regulations in accordance with subparagraph (C) of this paragraph:

(i) Fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels.

(ii) Solid waste from the extraction, beneficiation, and processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore.

(iii) Cement kiln dust waste.

(B)(i) Owners and operators of disposal sites for wastes listed in subparagraph (A) may be required by the Administrator, through regulations prescribed under authority of section 6912 of this title--

(I) as to disposal sites for such wastes which are to be closed, to identify the locations of such sites through surveying, platting, or other measures, together with recordation of such information on the public record, to assure that the locations where such wastes are disposed of are known and can be located in the future, and

(II) to provide chemical and physical analysis and composition of such wastes, based on available information, to be placed on the public record.

(ii)(I) In conducting any study under subsection (f), (n), (o), or (p), of section 6982 of this title, any officer, employee, or authorized representative of the Environmental Protection Agency, duly designated by the Administrator, is authorized, at reasonable times and as reasonably necessary for the purposes of such study, to enter any establishment where any waste subject

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to such study is generated, stored, treated, disposed of, or transported from; to inspect, take samples, and conduct monitoring and testing; and to have access to and copy records relating to such waste. Each such inspection shall be commenced and completed with reasonable promptness. If the officer, employee, or authorized representative obtains any samples prior to leaving the premises, he shall give to the owner, operator, or agent in charge a receipt describing the sample obtained and if requested a portion of each such sample equal in volume or weight to the portion retained. If any analysis is made of such samples, or monitoring and testing performed, a copy of the results shall be furnished promptly to the owner, operator, or agent in charge.

(II) Any records, reports, or information obtained from any person under subclause (I) shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, to which the Administrator has access under this subparagraph if made public, would divulge information entitled to protection under section 1905 of Title 18, the Administrator shall consider such information or particular portion thereof confidential in accordance with the purposes of that section, except that such record, report, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter. Any person not subject to the provisions of section 1905 of Title 18 who knowingly and willfully divulges or discloses any information entitled to protection under this subparagraph shall, upon conviction, be subject to a fine of not more than $5,000 or to imprisonment not to exceed one year, or both.

(iii) The Administrator may prescribe regulations, under the authority of this chapter, to prevent radiation exposure which presents an unreasonable risk to human health from the use in construction or land reclamation (with or without revegetation) of (I) solid waste from the extraction, beneficiation, and processing of phosphate rock or (II) overburden from the mining of uranium ore.

(iv) Whenever on the basis of any information the Administrator determines that any person is in violation of any requirement of this subparagraph, the Administrator shall give notice to the violator of his failure to comply with such requirement. If such violation extends beyond the thirtieth day after the Administrator's notification, the Administrator may issue an order requiring compliance within a specified time period or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

(C) Not later than six months after the date of submission of the applicable study required to be conducted under subsection (f), (n), (o), or (p), of section 6982 of this title, the Administrator shall, after public hearings and opportunity for comment, either determine to promulgate regulations under this subchapter for each waste listed in subparagraph (A) of this paragraph or determine that such regulations are unwarranted. The Administrator shall publish his determination, which shall be based on information developed or accumulated pursuant to such study, public hearings, and comment, in the Federal Register accompanied by an explanation and justification of the reasons for it.

(c) Petition by State Governor

At any time after the date eighteen months after October 21, 1976, the Governor of any State may petition the Administrator to identify or list a material as a hazardous waste. The Administrator shall act upon such petition within ninety days following his receipt thereof and shall notify the Governor of such action. If the Administrator denies such petition because of financial considerations, in providing such notice to the Governor he shall include a statement concerning such considerations.

(d) Small quantity generator waste

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(1) By March 31, 1986, the Administrator shall promulgate standards under sections 6922, 6923, and 6924 of this title for hazardous waste generated by a generator in a total quantity of hazardous waste greater than one hundred kilograms but less than one thousand kilograms during a calendar month.

(2) The standards referred to in paragraph (1), including standards applicable to the legitimate use, reuse, recycling, and reclamation of such wastes, may vary from the standards applicable to hazardous waste generated by larger quantity generators, but such standards shall be sufficient to protect human health and the environment.

(3) Not later than two hundred and seventy days after November 8, 1984, any hazardous waste which is part of a total quantity generated by a generator generating greater than one hundred kilograms but less than one thousand kilograms during one calendar month and which is shipped off the premises on which such waste is generated shall be accompanied by a copy of the Environmental Protection Agency Uniform Hazardous Waste Manifest form signed by the generator. This form shall contain the following information:

(A) the name and address of the generator of the waste;

(B) the United States Department of Transportation description of the waste, including the proper shipping name, hazard class, and identification number (UN/NA), if applicable;

(C) the number and type of containers;

(D) the quantity of waste being transported; and

(E) the name and address of the facility designated to receive the waste.

If subparagraph (B) is not applicable, in lieu of the description referred to in such subparagraph (B), the form shall contain the Environmental Protection Agency identification number, or a generic description of the waste, or a description of the waste by hazardous waste characteristic. Additional requirements related to the manifest form shall apply only if determined necessary by the Administrator to protect human health and the environment.

(4) The Administrator's responsibility under this subchapter to protect human health and the environment may require the promulgation of standards under this subchapter for hazardous wastes which are generated by any generator who does not generate more than one hundred kilograms of hazardous waste in a calendar month.

(5) Until the effective date of standards required to be promulgated under paragraph (1), any hazardous waste identified or listed under this section generated by any generator during any calendar month in a total quantity greater than one hundred kilograms but less than one thousand kilograms, which is not treated, stored, or disposed of at a hazardous waste treatment, storage, or disposal facility with a permit under section 6925 of this title, shall be disposed of only in a facility which is permitted, licensed, or registered by a State to manage municipal or industrial solid waste.

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(6) Standards promulgated as provided in paragraph (1) shall, at a minimum, require that all treatment, storage, or disposal of hazardous wastes generated by generators referred to in paragraph (1) shall occur at a facility with interim status or a permit under this subchapter, except that onsite storage of hazardous waste generated by a generator generating a total quantity of hazardous waste greater than one hundred kilograms, but less than one thousand kilograms during a calendar month, may occur without the requirement of a permit for up to one hundred and eighty days. Such onsite storage may occur without the requirement of a permit for not more than six thousand kilograms for up to two hundred and seventy days if such generator must ship or haul such waste over two hundred miles.

(7)(A) Nothing in this subsection shall be construed to affect or impair the validity of regulations promulgated by the Secretary of Transportation pursuant to chapter 51 of Title 49.

(B) Nothing in this subsection shall be construed to affect, modify, or render invalid any requirements in regulations promulgated prior to January 1, 1983 applicable to any acutely hazardous waste identified or listed under this section which is generated by any generator during any calendar month in a total quantity less than one thousand kilograms.

(8) Effective March 31, 1986, unless the Administrator promulgates standards as provided in paragraph (1) of this subsection prior to such date, hazardous waste generated by any generator in a total quantity greater than one hundred kilograms but less than one thousand kilograms during a calendar month shall be subject to the following requirements until the standards referred to in paragraph (1) of this subsection have become effective:

(A) the notice requirements of paragraph (3) of this subsection shall apply and in addition, the information provided in the form shall include the name of the waste transporters and the name and address of the facility designated to receive the waste;

(B) except in the case of the onsite storage referred to in paragraph (6) of this subsection, the treatment, storage, or disposal of such waste shall occur at a facility with interim status or a permit under this subchapter;

(C) generators of such waste shall file manifest exception reports as required of generators producing greater amounts of hazardous waste per month except that such reports shall be filed by January 31, for any waste shipment occurring in the last half of the preceding calendar year, and by July 31, for any waste shipment occurring in the first half of the calendar year; and

(D) generators of such waste shall retain for three years a copy of the manifest signed by the designated facility that has received the waste.

Nothing in this paragraph shall be construed as a determination of the standards appropriate under paragraph (1).

(9) The last sentence of section 6930(b) of this title shall not apply to regulations promulgated under this subsection.

(e) Specified wastes

(1) Not later than 6 months after November 8, 1984, the Administrator shall, where appropriate, list under subsection (b)(1) of this section, additional wastes containing chlorinated dioxins or chlorinated-dibenzofurans. Not later than one year after

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November 8, 1984, the Administrator shall, where appropriate, list under subsection (b)(1) of this section wastes containing remaining halogenated dioxins and halogenated-dibenzofurans.

(2) Not later than fifteen months after November 8, 1984, the Administrator shall make a determination of whether or not to list under subsection (b)(1) of this section the following wastes: Chlorinated Aliphatics, Dioxin, Dimethyl Hydrazine, TDI (toluene diisocyanate), Carbamates, Bromacil, Linuron, Organo-bromines, solvents, refining wastes, chlorinated aromatics, dyes and pigments, inorganic chemical industry wastes, lithium batteries, coke byproducts, paint production wastes, and coal slurry pipeline effluent.

(f) Delisting procedures

(1) When evaluating a petition to exclude a waste generated at a particular facility from listing under this section, the Administrator shall consider factors (including additional constituents) other than those for which the waste was listed if the Administrator has a reasonable basis to believe that such additional factors could cause the waste to be a hazardous waste. The Administrator shall provide notice and opportunity for comment on these additional factors before granting or denying such petition.

(2)(A) To the maximum extent practicable the Administrator shall publish in the Federal Register a proposal to grant or deny a petition referred to in paragraph (1) within twelve months after receiving a complete application to exclude a waste generated at a particular facility from being regulated as a hazardous waste and shall grant or deny such a petition within twenty-four months after receiving a complete application.

(B) The temporary granting of such a petition prior to November 8, 1984, without the opportunity for public comment and the full consideration of such comments shall not continue for more than twenty-four months after November 8, 1984. If a final decision to grant or deny such a petition has not been promulgated after notice and opportunity for public comment within the time limit prescribed by the preceding sentence, any such temporary granting of such petition shall cease to be in effect.

(g) EP toxicity

Not later than twenty-eight months after November 8, 1984, the Administrator shall examine the deficiencies of the extraction procedure toxicity characteristic as a predictor of the leaching potential of wastes and make changes in the extraction procedure toxicity characteristic, including changes in the leaching media, as are necessary to insure that it accurately predicts the leaching potential of wastes which pose a threat to human health and the environment when mismanaged.

(h) Additional characteristics

Not later than two years after November 8, 1984, the Administrator shall promulgate regulations under this section identifying additional characteristics of hazardous waste, including measures or indicators of toxicity.

(i) Clarification of household waste exclusion

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if--

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(1) such facility--

(A) receives and burns only--

(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this section, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

(j) Methamphetamine production

Not later than every 24 months, the Administrator shall submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Environment and Public Works of the Senate a report setting forth information collected by the Administrator from law enforcement agencies, States, and other relevant stakeholders that identifies the byproducts of the methamphetamine production process and whether the Administrator considers each of the byproducts to be a hazardous waste pursuant to this section and relevant regulations.

CREDIT(S)

(Pub.L. 89-272, Title II, § 3001, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2806; amended Pub.L. 96-482, § 7, Oct. 21, 1980, 94 Stat. 2336; Pub.L. 98-616, Title II, §§ 221(a), 222, 223(a), Nov. 8, 1984, 98 Stat. 3248, 3251, 3252; Pub.L. 104-119, § 4(1), Mar. 26, 1996, 110 Stat. 833; Pub.L. 109-177, Title VII, § 742, Mar. 9, 2006, 120 Stat. 272.)

Notes of Decisions (28)

Footnotes

1 So in original. Probably should be "teratogens".

42 U.S.C.A. § 6921, 42 USCA § 6921

Current through P.L. 114-86 (excluding P.L. 114-74 and 114-81) approved 11-5-2015

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 82. Solid Waste Disposal (Refs & Annos)
Subchapter III. Hazardous Waste Management (Refs & Annos)

42 U.S.C.A. § 6922

§ 6922. Standards applicable to generators of hazardous waste

Currentness

(a) In general

Not later than eighteen months after October 21, 1976, and after notice and opportunity for public hearings and after consultation with appropriate Federal and State agencies, the Administrator shall promulgate regulations establishing such standards, applicable to generators of hazardous waste identified or listed under this subchapter, as may be necessary to protect human health and the environment. Such standards shall establish requirements respecting--

(1) recordkeeping practices that accurately identify the quantities of such hazardous waste generated, the constituents thereof which are significant in quantity or in potential harm to human health or the environment, and the disposition of such wastes;

(2) labeling practices for any containers used for the storage, transport, or disposal of such hazardous waste such as will identify accurately such waste;

(3) use of appropriate containers for such hazardous waste;

(4) furnishing of information on the general chemical composition of such hazardous waste to persons transporting, treating, storing, or disposing of such wastes;

(5) use of a manifest system and any other reasonable means necessary to assure that all such hazardous waste generated is designated for treatment, storage, or disposal in, and arrives at, treatment, storage, or disposal facilities (other than facilities on the premises where the waste is generated) for which a permit has been issued as provided in this subchapter, or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C.A. § 1411 et seq.]; and

(6) submission of reports to the Administrator (or the State agency in any case in which such agency carries out a permit program pursuant to this subchapter) at least once every two years, setting out--

(A) the quantities and nature of hazardous waste identified or listed under this subchapter that he has generated during the year;

(B) the disposition of all hazardous waste reported under subparagraph (A);

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(C) the efforts undertaken during the year to reduce the volume and toxicity of waste generated; and

(D) the changes in volume and toxicity of waste actually achieved during the year in question in comparison with previous years, to the extent such information is available for years prior to November 8, 1984.

(b) Waste minimization

Effective September 1, 1985, the manifest required by subsection (a)(5) of this section shall contain a certification by the generator that--

(1) the generator of the hazardous waste has a program in place to reduce the volume or quantity and toxicity of such waste to the degree determined by the generator to be economically practicable; and

(2) the proposed method of treatment, storage, or disposal is that practicable method currently available to the generator which minimizes the present and future threat to human health and the environment.

CREDIT(S)

(Pub.L. 89-272, Title II, § 3002, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2806; amended Pub.L. 95-609, § 7(f), Nov. 8, 1978, 92 Stat. 3082; Pub.L. 96-482, § 8, Oct. 21, 1980, 94 Stat. 2338; Pub.L. 98-616, Title II, § 224(a), Nov. 8, 1984, 98 Stat. 3252.)

Notes of Decisions (3)

42 U.S.C.A. § 6922, 42 USCA § 6922
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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 82. Solid Waste Disposal (Refs & Annos)
Subchapter III. Hazardous Waste Management (Refs & Annos)

42 U.S.C.A. § 6923

§ 6923. Standards applicable to transporters of hazardous waste

Currentness

(a) Standards

Not later than eighteen months after October 21, 1976, and after opportunity for public hearings, the Administrator, after consultation with the Secretary of Transportation and the States, shall promulgate regulations establishing such standards, applicable to transporters of hazardous waste identified or listed under this subchapter, as may be necessary to protect human health and the environment. Such standards shall include but need not be limited to requirements respecting--

(1) recordkeeping concerning such hazardous waste transported, and their source and delivery points;

(2) transportation of such waste only if properly labeled;

(3) compliance with the manifest system referred to in section 6922(5) of this title; and

(4) transportation of all such hazardous waste only to the hazardous waste treatment, storage, or disposal facilities which the shipper designates on the manifest form to be a facility holding a permit issued under this subchapter, or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C.A. § 1411 et seq.].

(b) Coordination with regulations of Secretary of Transportation

In case of any hazardous waste identified or listed under this subchapter which is subject to chapter 51 of Title 49, the regulations promulgated by the Administrator under this section shall be consistent with the requirements of such Act and the regulations thereunder. The Administrator is authorized to make recommendations to the Secretary of Transportation respecting the regulations of such hazardous waste under the Hazardous Materials Transportation Act and for addition of materials to be covered by such Act.

(c) Fuel from hazardous waste

Not later than two years after November 8, 1984, and after opportunity for public hearing, the Administrator shall promulgate regulations establishing standards, applicable to transporters of fuel produced (1) from any hazardous waste identified or listed under section 6921 of this title, or (2) from any hazardous waste identified or listed under section 6921 of this title and any other material, as may be necessary to protect human health and the environment. Such standards may include any of the requirements set forth in paragraphs (1) through (4) of subsection (a) of this section as may be appropriate.

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CREDIT(S)

(Pub.L. 89-272, Title II, § 3003, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2807; amended Pub.L. 95-609, § 7(g), Nov. 8, 1978, 92 Stat. 3082; Pub.L. 98-616, Title II, § 204(b)(2), Nov. 8, 1984, 98 Stat. 3238.)

42 U.S.C.A. § 6923, 42 USCA § 6923
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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 82. Solid Waste Disposal (Refs & Annos)
Subchapter III. Hazardous Waste Management (Refs & Annos)

42 U.S.C.A. § 6924

§ 6924. Standards applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities

Effective: March 26, 1996
Currentness

(a) In general

Not later than eighteen months after October 21, 1976, and after opportunity for public hearings and after consultation with appropriate Federal and State agencies, the Administrator shall promulgate regulations establishing such performance standards, applicable to owners and operators of facilities for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter, as may be necessary to protect human health and the environment. In establishing such standards the Administrator shall, where appropriate, distinguish in such standards between requirements appropriate for new facilities and for facilities in existence on the date of promulgation of such regulations. Such standards shall include, but need not be limited to, requirements respecting--

(1) maintaining records of all hazardous wastes identified or listed under this chapter which is treated, stored, or disposed of, as the case may be, and the manner in which such wastes were treated, stored, or disposed of;

(2) satisfactory reporting, monitoring, and inspection and compliance with the manifest system referred to in section 6922(5) of this title;

(3) treatment, storage, or disposal of all such waste received by the facility pursuant to such operating methods, techniques, and practices as may be satisfactory to the Administrator;

(4) the location, design, and construction of such hazardous waste treatment, disposal, or storage facilities;

(5) contingency plans for effective action to minimize unanticipated damage from any treatment, storage, or disposal of any such hazardous waste;

(6) the maintenance of operation of such facilities and requiring such additional qualifications as to ownership, continuity of operation, training for personnel, and financial responsibility (including financial responsibility for corrective action) as may be necessary or desirable; and

(7) compliance with the requirements of section 6925 of this title respecting permits for treatment, storage, or disposal.

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No private entity shall be precluded by reason of criteria established under paragraph (6) from the ownership or operation of facilities providing hazardous waste treatment, storage, or disposal services where such entity can provide assurances of financial responsibility and continuity of operation consistent with the degree and duration of risks associated with the treatment, storage, or disposal of specified hazardous waste.

(b) Salt dome formations, salt bed formations, underground mines and caves

(1) Effective on November 8, 1984, the placement of any noncontainerized or bulk liquid hazardous waste in any salt dome formation, salt bed formation, underground mine, or cave is prohibited until such time as--

(A) the Administrator has determined, after notice and opportunity for hearings on the record in the affected areas, that such placement is protective of human health and the environment;

(B) the Administrator has promulgated performance and permitting standards for such facilities under this subchapter, and;

(C) a permit has been issued under section 6925(c) of this title for the facility concerned.

(2) Effective on November 8, 1984, the placement of any hazardous waste other than a hazardous waste referred to in paragraph (1) in a salt dome formation, salt bed formation, underground mine, or cave is prohibited until such time as a permit has been issued under section 6925(c) of this title for the facility concerned.

(3) No determination made by the Administrator under subsection (d), (e), or (g) of this section regarding any hazardous waste to which such subsection (d), (e), or (g) of this section applies shall affect the prohibition contained in paragraph (1) or (2) of this subsection.

(4) Nothing in this subsection shall apply to the Department of Energy Waste Isolation Pilot Project in New Mexico.

(c) Liquids in landfills

(1) Effective 6 months after November 8, 1984, the placement of bulk or noncontainerized liquid hazardous waste or free liquids contained in hazardous waste (whether or not absorbents have been added) in any landfill is prohibited. Prior to such date the requirements (as in effect on April 30, 1983) promulgated under this section by the Administrator regarding liquid hazardous waste shall remain in force and effect to the extent such requirements are applicable to the placement of bulk or noncontainerized liquid hazardous waste, or free liquids contained in hazardous waste, in landfills.

(2) Not later than fifteen months after November 8, 1984, the Administrator shall promulgate final regulations which--

(A) minimize the disposal of containerized liquid hazardous waste in landfills, and

(B) minimize the presence of free liquids in containerized hazardous waste to be disposed of in landfills.

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Such regulations shall also prohibit the disposal in landfills of liquids that have been absorbed in materials that biodegrade or that release liquids when compressed as might occur during routine landfill operations. Prior to the date on which such final regulations take effect, the requirements (as in effect on April 30, 1983) promulgated under this section by the Administrator shall remain in force and effect to the extent such requirements are applicable to the disposal of containerized liquid hazardous waste, or free liquids contained in hazardous waste, in landfills.

(3) Effective twelve months after November 8, 1984, the placement of any liquid which is not a hazardous waste in a landfill for which a permit is required under section 6925(c) of this title or which is operating pursuant to interim status granted under section 6925(e) of this title is prohibited unless the owner or operator of such landfill demonstrates to the Administrator, or the Administrator determines, that--

(A) the only reasonably available alternative to the placement in such landfill is placement in a landfill or unlined surface impoundment, whether or not permitted under section 6925(c) of this title or operating pursuant to interim status under section 6925(e) of this title, which contains, or may reasonably be anticipated to contain, hazardous waste; and

(B) placement in such owner or operator's landfill will not present a risk of contamination of any underground source of drinking water.

As used in subparagraph (B), the term "underground source of drinking water" has the same meaning as provided in regulations under the Safe Drinking Water Act (title XIV of the Public Health Service Act) [42 U.S.C.A. § 300f et seq.].

(4) No determination made by the Administrator under subsection (d), (e), or (g) of this section regarding any hazardous waste to which such subsection (d), (e), or (g) of this section applies shall affect the prohibition contained in paragraph (1) of this subsection.

(d) Prohibitions on land disposal of specified wastes

(1) Effective 32 months after November 8, 1984 (except as provided in subsection (f) of this section with respect to underground injection into deep injection wells), the land disposal of the hazardous wastes referred to in paragraph (2) is prohibited unless the Administrator determines the prohibition on one or more methods of land disposal of such waste is not required in order to protect human health and the environment for as long as the waste remains hazardous, taking into account--

(A) the long-term uncertainties associated with land disposal,

(B) the goal of managing hazardous waste in an appropriate manner in the first instance, and

(C) the persistence, toxicity, mobility, and propensity to bioaccumulate of such hazardous wastes and their hazardous constituents.

For the purposes of this paragraph, a method of land disposal may not be determined to be protective of human health and the environment for a hazardous waste referred to in paragraph (2) (other than a hazardous waste which has complied with the pretreatment regulations promulgated under subsection (m) of this section), unless, upon application by an interested person,

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it has been demonstrated to the Administrator, to a reasonable degree of certainty, that there will be no migration of hazardous constituents from the disposal unit or injection zone for as long as the wastes remain hazardous.

(2) Paragraph (1) applies to the following hazardous wastes listed or identified under section 6921 of this title:

(A) Liquid hazardous wastes, including free liquids associated with any solid or sludge, containing free cyanides at concentrations greater than or equal to 1,000 mg/l.

(B) Liquid hazardous wastes, including free liquids associated with any solid or sludge, containing the following metals (or elements) or compounds of these metals (or elements) at concentrations greater than or equal to those specified below:

(i) arsenic and/or compounds (as As) 500 mg/l;

(ii) cadmium and/or compounds (as Cd) 100 mg/l;

(iii) chromium (VI and/or compounds (as Cr VI)) 500 mg/l;

(iv) lead and/or compounds (as Pb) 500 mg/l;

(v) mercury and/or compounds (as Hg) 20 mg/l;

(vi) nickel and/or compounds (as Ni) 134 mg/l;

(vii) selenium and/or compounds (as Se) 100 mg/l; and

(viii) thallium and/or compounds (as Th) 130 mg/l.

(C) Liquid hazardous waste having a pH less than or equal to two (2.0).

(D) Liquid hazardous wastes containing polychlorinated biphenyls at concentrations greater than or equal to 50 ppm.

(E) Hazardous wastes containing halogenated organic compounds in total concentration greater than or equal to 1,000 mg/kg.

When necessary to protect human health and the environment, the Administrator shall substitute more stringent concentration levels than the levels specified in subparagraphs (A) through (E).

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(3) During the period ending forty-eight months after November 8, 1984, this subsection shall not apply to any disposal of contaminated soil or debris resulting from a response action taken under section 9604 or 9606 of this title or a corrective action required under this subchapter.

(e) Solvents and dioxins

(1) Effective twenty-four months after November 8, 1984 (except as provided in subsection (f) of this section with respect to underground injection into deep injection wells), the land disposal of the hazardous wastes referred to in paragraph (2) is prohibited unless the Administrator determines the prohibition of one or more methods of land disposal of such waste is not required in order to protect human health and the environment for as long as the waste remains hazardous, taking into account the factors referred to in subparagraph (A) through (C) of subsection (d)(1) of this section. For the purposes of this paragraph, a method of land disposal may not be determined to be protective of human health and the environment for a hazardous waste referred to in paragraph (2) (other than a hazardous waste which has complied with the pretreatment regulations promulgated under subsection (m) of this section), unless upon application by an interested person it has been demonstrated to the Administrator, to a reasonable degree of certainty, that there will be no migration of hazardous constituents from the disposal unit or injection zone for as long as the wastes remain hazardous.

(2) The hazardous wastes to which the prohibition under paragraph (1) applies are as follows--

(A) dioxin-containing hazardous wastes numbered F020, F021, F022, and F023 (as referred to in the proposed rule published by the Administrator in the Federal Register for April 4, 1983), and

(B) those hazardous wastes numbered F001, F002, F003, F004, and F005 in regulations promulgated by the Administrator under section 6921 of this title (40 C.F.R. 261.31 (July 1, 1983)), as those regulations are in effect on July 1, 1983.

(3) During the period ending forty-eight months after November 8, 1984, this subsection shall not apply to any disposal of contaminated soil or debris resulting from a response action taken under section 9604 or 9606 of this title or a corrective action required under this subchapter.

(f) Disposal into deep injection wells; specified subsection (d) wastes; solvents and dioxins

(1) Not later than forty-five months after November 8, 1984, the Administrator shall complete a review of the disposal of all hazardous wastes referred to in paragraph (2) of subsection (d) of this section and in paragraph (2) of subsection (e) of this section by underground injection into deep injection wells.

(2) Within forty-five months after November 8, 1984, the Administrator shall make a determination regarding the disposal by underground injection into deep injection wells of the hazardous wastes referred to in paragraph (2) of subsection (d) of this section and the hazardous wastes referred to in paragraph (2) of subsection (e) of this section. The Administrator shall promulgate final regulations prohibiting the disposal of such wastes into such wells if it may reasonably be determined that such disposal may not be protective of human health and the environment for as long as the waste remains hazardous, taking into account the factors referred to in subparagraphs (A) through (C) of subsection (d)(1) of this section. In promulgating such

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regulations, the Administrator shall consider each hazardous waste referred to in paragraph (2) of subsection (d) of this section or in paragraph (2) of subsection (e) of this section which is prohibited from disposal into such wells by any State.

(3) If the Administrator fails to make a determination under paragraph (2) for any hazardous waste referred to in paragraph (2) of subsection (d) of this section or in paragraph (2) of subsection (e) of this section within forty-five months after November 8, 1984, such hazardous waste shall be prohibited from disposal into any deep injection well.

(4) As used in this subsection, the term "deep injection well" means a well used for the underground injection of hazardous waste other than a well to which section 6979a(a) of this title applies.

(g) Additional land disposal prohibition determinations

(1) Not later than twenty-four months after November 8, 1984, the Administrator shall submit a schedule to Congress for--

(A) reviewing all hazardous wastes listed (as of November 8, 1984) under section 6921 of this title other than those wastes which are referred to in subsection (d) or (e) of this section; and

(B) taking action under paragraph (5) of this subsection with respect to each such hazardous waste.

(2) The Administrator shall base the schedule on a ranking of such listed wastes considering their intrinsic hazard and their volume such that decisions regarding the land disposal of high volume hazardous wastes with high intrinsic hazard shall, to the maximum extent possible, be made by the date forty-five months after November 8, 1984. Decisions regarding low volume hazardous wastes with lower intrinsic hazard shall be made by the date sixty-six months after November 8, 1984.

(3) The preparation and submission of the schedule under this subsection shall not be subject to the Paperwork Reduction Act of 1980. No hearing on the record shall be required for purposes of preparation or submission of the schedule. The schedule shall not be subject to judicial review.

(4) The schedule under this subsection shall require that the Administrator shall promulgate regulations in accordance with paragraph (5) or make a determination under paragraph (5)--

(A) for at least one-third of all hazardous wastes referred to in paragraph (1) by the date forty-five months after November 8, 1984;

(B) for at least two-thirds of all such listed wastes by the date fifty-five months after November 8, 1984; and

(C) for all such listed wastes and for all hazardous wastes identified under section 6921 of this title by the date sixty-six months after November 8, 1984.

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In the case of any hazardous waste identified or listed under section 6921 of this title after November 8, 1984, the Administrator shall determine whether such waste shall be prohibited from one or more methods of land disposal in accordance with paragraph (5) within six months after the date of such identification or listing.

(5) Not later than the date specified in the schedule published under this subsection, the Administrator shall promulgate final regulations prohibiting one or more methods of land disposal of the hazardous wastes listed on such schedule except for methods of land disposal which the Administrator determines will be protective of human health and the environment for as long as the waste remains hazardous, taking into account the factors referred to in subparagraphs (A) through (C) of subsection (d)(1) of this section. For the purposes of this paragraph, a method of land disposal may not be determined to be protective of human health and the environment (except with respect to a hazardous waste which has complied with the pretreatment regulations promulgated under subsection (m) of this section) unless, upon application by an interested person, it has been demonstrated to the Administrator, to a reasonable degree of certainty, that there will be no migration of hazardous constituents from the disposal unit or injection zone for as long as the wastes remain hazardous.

(6)(A) If the Administrator fails (by the date forty-five months after November 8, 1984) to promulgate regulations or make a determination under paragraph (5) for any hazardous waste which is included in the first one-third of the schedule published under this subsection, such hazardous waste may be disposed of in a landfill or surface impoundment only if--

(i) such facility is in compliance with the requirements of subsection (o) of this section which are applicable to new facilities (relating to minimum technological requirements); and

(ii) prior to such disposal, the generator has certified to the Administrator that such generator has investigated the availability of treatment capacity and has determined that the use of such landfill or surface impoundment is the only practical alternative to treatment currently available to the generator.

The prohibition contained in this subparagraph shall continue to apply until the Administrator promulgates regulations or makes a determination under paragraph (5) for the waste concerned.

(B) If the Administrator fails (by the date 55 months after November 8, 1984) to promulgate regulations or make a determination under paragraph (5) for any hazardous waste which is included in the first two-thirds of the schedule published under this subsection, such hazardous waste may be disposed of in a landfill or surface impoundment only if--

(i) such facility is in compliance with the requirements of subsection (o) of this section which are applicable to new facilities (relating to minimum technological requirements); and

(ii) prior to such disposal, the generator has certified to the Administrator that such generator has investigated the availability of treatment capacity and has determined that the use of such landfill or surface impoundment is the only practical alternative to treatment currently available to the generator.

The prohibition contained in this subparagraph shall continue to apply until the Administrator promulgates regulations or makes a determination under paragraph (5) for the waste concerned.

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(C) If the Administrator fails to promulgate regulations, or make a determination under paragraph (5) for any hazardous waste referred to in paragraph (1) within 66 months after November 8, 1984, such hazardous waste shall be prohibited from land disposal.

(7) Solid waste identified as hazardous based solely on one or more characteristics shall not be subject to this subsection, any prohibitions under subsection (d), (e), or (f) of this section, or any requirement promulgated under subsection (m) of this section (other than any applicable specific methods of treatment, as provided in paragraph (8)) if the waste--

(A) is treated in a treatment system that subsequently discharges to waters of the United States pursuant to a permit issued under section 1342 of Title 33, treated for the purposes of the pretreatment requirements of section 1317 of Title 33, or treated in a zero discharge system that, prior to any permanent land disposal, engages in treatment that is equivalent to treatment required under section 1342 of Title 33 for discharges to waters of the United States, as determined by the Administrator; and

(B) no longer exhibits a hazardous characteristic prior to management in any land-based solid waste management unit.

(8) Solid waste that otherwise qualifies under paragraph (7) shall nevertheless be required to meet any applicable specific methods of treatment specified for such waste by the Administrator under subsection (m) of this section, including those specified in the rule promulgated by the Administrator June 1, 1990, prior to management in a land-based unit as part of a treatment system specified in paragraph (7)(A). No solid waste may qualify under paragraph (7) that would generate toxic gases, vapors, or fumes due to the presence of cyanide when exposed to pH conditions between 2.0 and 12.5.

(9) Solid waste identified as hazardous based on one or more characteristics alone shall not be subject to this subsection, any prohibitions under subsection (d), (e), or (f) of this section, or any requirement promulgated under subsection (m) of this section if the waste no longer exhibits a hazardous characteristic at the point of injection in any Class I injection well permitted under section 300h-1 of this title.

(10) Not later than five years after March 26, 1996, the Administrator shall complete a study of hazardous waste managed pursuant to paragraph (7) or (9) to characterize the risks to human health or the environment associated with such management. In conducting this study, the Administrator shall evaluate the extent to which risks are adequately addressed under existing State or Federal programs and whether unaddressed risks could be better addressed under such laws or programs. Upon receipt of additional information or upon completion of such study and as necessary to protect human health and the environment, the Administrator may impose additional requirements under existing Federal laws, including subsection (m)(1) of this section, or rely on other State or Federal programs or authorities to address such risks. In promulgating any treatment standards pursuant to subsection (m)(1) of this section under the previous sentence, the Administrator shall take into account the extent to which treatment is occurring in land-based units as part of a treatment system specified in paragraph (7)(A).

(11) Nothing in paragraph (7) or (9) shall be interpreted or applied to restrict any inspection or enforcement authority under the provisions of this chapter.

(h) Variance from land disposal prohibitions

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(1) A prohibition in regulations under subsection (d), (e), (f), or (g) of this section shall be effective immediately upon promulgation.

(2) The Administrator may establish an effective date different from the effective date which would otherwise apply under subsection (d), (e), (f), or (g) of this section with respect to a specific hazardous waste which is subject to a prohibition under subsection (d), (e), (f), or (g) of this section or under regulations under subsection (d), (e), (f), or (g) of this section. Any such other effective date shall be established on the basis of the earliest date on which adequate alternative treatment, recovery, or disposal capacity which protects human health and the environment will be available. Any such other effective date shall in no event be later than 2 years after the effective date of the prohibition which would otherwise apply under subsection (d), (e), (f), or (g) of this section.

(3) The Administrator, after notice and opportunity for comment and after consultation with appropriate State agencies in all affected States, may on a case-by-case basis grant an extension of the effective date which would otherwise apply under subsection (d), (e), (f), or (g) of this section or under paragraph (2) for up to one year, where the applicant demonstrates that there is a binding contractual commitment to construct or otherwise provide such alternative capacity but due to circumstances beyond the control of such applicant such alternative capacity cannot reasonably be made available by such effective date. Such extension shall be renewable once for no more than one additional year.

(4) Whenever another effective date (hereinafter referred to as a "variance") is established under paragraph (2), or an extension is granted under paragraph (3), with respect to any hazardous waste, during the period for which such variance or extension is in effect, such hazardous waste may be disposed of in a landfill or surface impoundment only if such facility is in compliance with the requirements of subsection (o) of this section.

(i) Publication of determination

If the Administrator determines that a method of land disposal will be protective of human health and the environment, he shall promptly publish in the Federal Register notice of such determination, together with an explanation of the basis for such determination.

(j) Storage of hazardous waste prohibited from land disposal

In the case of any hazardous waste which is prohibited from one or more methods of land disposal under this section (or under regulations promulgated by the Administrator under any provision of this section) the storage of such hazardous waste is prohibited unless such storage is solely for the purpose of the accumulation of such quantities of hazardous waste as are necessary to facilitate proper recovery, treatment or disposal.

(k) "Land disposal" defined

For the purposes of this section, the term "land disposal", when used with respect to a specified hazardous waste, shall be deemed to include, but not be limited to, any placement of such hazardous waste in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave.

(l) Ban on dust suppression

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The use of waste or used oil or other material, which is contaminated or mixed with dioxin or any other hazardous waste identified or listed under section 6921 of this title (other than a waste identified solely on the basis of ignitability), for dust suppression or road treatment is prohibited.

(m) Treatment standards for wastes subject to land disposal prohibition

(1) Simultaneously with the promulgation of regulations under subsection (d), (e), (f), or (g) of this section prohibiting one or more methods of land disposal of a particular hazardous waste, and as appropriate thereafter, the Administrator shall, after notice and an opportunity for hearings and after consultation with appropriate Federal and State agencies, promulgate regulations specifying those levels or methods of treatment, if any, which substantially diminish the toxicity of the waste or substantially reduce the likelihood of migration of hazardous constituents from the waste so that short-term and long-term threats to human health and the environment are minimized.

(2) If such hazardous waste has been treated to the level or by a method specified in regulations promulgated under this subsection, such waste or residue thereof shall not be subject to any prohibition promulgated under subsection (d), (e), (f), or (g) of this section and may be disposed of in a land disposal facility which meets the requirements of this subchapter. Any regulation promulgated under this subsection for a particular hazardous waste shall become effective on the same date as any applicable prohibition promulgated under subsection (d), (e), (f), or (g) of this section.

(n) Air emissions

Not later than thirty months after November 8, 1984, the Administrator shall promulgate such regulations for the monitoring and control of air emissions at hazardous waste treatment, storage, and disposal facilities, including but not limited to open tanks, surface impoundments, and landfills, as may be necessary to protect human health and the environment.

(o) Minimum technological requirements

(1) The regulations under subsection (a) of this section shall be revised from time to time to take into account improvements in the technology of control and measurement. At a minimum, such regulations shall require, and a permit issued pursuant to section 6925(c) of this title after November 8, 1984, by the Administrator or a State shall require--

(A) for each new landfill or surface impoundment, each new landfill or surface impoundment unit at an existing facility, each replacement of an existing landfill or surface impoundment unit, and each lateral expansion of an existing landfill or surface impoundment unit, for which an application for a final determination regarding issuance of a permit under section 6925(c) of this title is received after November 8, 1984--

(i) the installation of two or more liners and a leachate collection system above (in the case of a landfill) and between such liners; and

(ii) ground water monitoring; and

(B) for each incinerator which receives a permit under section 6925(c) of this title after November 8, 1984, the attainment of the minimum destruction and removal efficiency required by regulations in effect on June 24, 1982.

The requirements of this paragraph shall apply with respect to all waste received after the issuance of the permit.

(2) Paragraph (1)(A)(i) shall not apply if the owner or operator demonstrates to the Administrator, and the Administrator finds for such landfill or surface impoundment, that alternative design and operating practices, together with location characteristics, will prevent the migration of any hazardous constituents into the ground water or surface water at least as effectively as such liners and leachate collection systems.

(3) The double-liner requirement set forth in paragraph (1)(A)(i) may be waived by the Administrator for any monofill, if--

(A) such monofill contains only hazardous wastes from foundry furnace emission controls or metal casting molding sand,

(B) such wastes do not contain constituents which would render the wastes hazardous for reasons other than the Extraction Procedure ("EP") toxicity characteristics set forth in regulations under this subchapter, and

(C) such monofill meets the same requirements as are applicable in the case of a waiver under section 6925(j)(2) or (4) of this title.

(4)(A) Not later than thirty months after November 8, 1984, the Administrator shall promulgate standards requiring that new landfill units, surface impoundment units, waste piles, underground tanks and land treatment units for the storage, treatment, or disposal of hazardous waste identified or listed under section 6921 of this title shall be required to utilize approved leak detection systems.

(B) For the purposes of subparagraph (A)--

(i) the term "approved leak detection system" means a system or technology which the Administrator determines to be capable of detecting leaks of hazardous constituents at the earliest practicable time; and

(ii) the term "new units" means units on which construction commences after the date of promulgation of regulations under this paragraph.

(5)(A) The Administrator shall promulgate regulations or issue guidance documents implementing the requirements of paragraph (1)(A) within two years after November 8, 1984.

(B) Until the effective date of such regulations or guidance documents, the requirement for the installation of two or more liners may be satisfied by the installation of a top liner designed, operated, and constructed of materials to prevent the migration of any constituent into such liner during the period such facility remains in operation (including any post-closure monitoring period), and a lower liner designed, operated [1] and constructed to prevent the migration of any constituent through such liner

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during such period. For the purpose of the preceding sentence, a lower liner shall be deemed to satisfy such requirement if it is constructed of at least a 3-foot thick layer of recompacted clay or other natural material with a permeability of no more than 1×10^{-7} centimeter per second.

(6) Any permit under section 6925 of this title which is issued for a landfill located within the State of Alabama shall require the installation of two or more liners and a leachate collection system above and between such liners, notwithstanding any other provision of this chapter.

(7) In addition to the requirements set forth in this subsection, the regulations referred to in paragraph (1) shall specify criteria for the acceptable location of new and existing treatment, storage, or disposal facilities as necessary to protect human health and the environment. Within 18 months after November 8, 1984, the Administrator shall publish guidance criteria identifying areas of vulnerable hydrogeology.

(p) Ground water monitoring

The standards under this section concerning ground water monitoring which are applicable to surface impoundments, waste piles, land treatment units, and landfills shall apply to such a facility whether or not--

(1) the facility is located above the seasonal high water table;

(2) two liners and a leachate collection system have been installed at the facility; or

(3) the owner or operator inspects the liner (or liners) which has been installed at the facility.

This subsection shall not be construed to affect other exemptions or waivers from such standards provided in regulations in effect on November 8, 1984, or as may be provided in revisions to those regulations, to the extent consistent with this subsection. The Administrator is authorized on a case-by-case basis to exempt from ground water monitoring requirements under this section (including subsection (o) of this section) any engineered structure which the Administrator finds does not receive or contain liquid waste (nor waste containing free liquids), is designed and operated to exclude liquid from precipitation or other runoff, utilizes multiple leak detection systems within the outer layer of containment, and provides for continuing operation and maintenance of these leak detection systems during the operating period, closure, and the period required for post-closure monitoring and for which the Administrator concludes on the basis of such findings that there is a reasonable certainty hazardous constituents will not migrate beyond the outer layer of containment prior to the end of the period required for post-closure monitoring.

(q) Hazardous waste used as fuel

(1) Not later than two years after November 8, 1984, and after notice and opportunity for public hearing, the Administrator shall promulgate regulations establishing such--

(A) standards applicable to the owners and operators of facilities which produce a fuel--

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(i) from any hazardous waste identified or listed under section 6921 of this title, or

(ii) from any hazardous waste identified or listed under section 6921 of this title and any other material;

(B) standards applicable to the owners and operators of facilities which burn, for purposes of energy recovery, any fuel produced as provided in subparagraph (A) or any fuel which otherwise contains any hazardous waste identified or listed under section 6921 of this title; and

(C) standards applicable to any person who distributes or markets any fuel which is produced as provided in subparagraph (A) or any fuel which otherwise contains any hazardous waste identified or listed under section 6921 of this title;

as may be necessary to protect human health and the environment. Such standards may include any of the requirements set forth in paragraphs (1) through (7) of subsection (a) of this section as may be appropriate. Nothing in this subsection shall be construed to affect or impair the provisions of section 6921(b)(3) of this title. For purposes of this subsection, the term "hazardous waste listed under section 6921 of this title" includes any commercial chemical product which is listed under section 6921 of this title and which, in lieu of its original intended use, is (i) produced for use as (or as a component of) a fuel, (ii) distributed for use as a fuel, or (iii) burned as a fuel.

(2)(A) This subsection, subsection (r) of this section, and subsection (s) of this section shall not apply to petroleum refinery wastes containing oil which are converted into petroleum coke at the same facility at which such wastes were generated, unless the resulting coke product would exceed one or more characteristics by which a substance would be identified as a hazardous waste under section 6921 of this title.

(B) The Administrator may exempt from the requirements of this subsection, subsection (r) of this section, or subsection (s) of this section facilities which burn de minimis quantities of hazardous waste as fuel, as defined by the Administrator, if the wastes are burned at the same facility at which such wastes are generated; the waste is burned to recover useful energy, as determined by the Administrator on the basis of the design and operating characteristics of the facility and the heating value and other characteristics of the waste; and the waste is burned in a type of device determined by the Administrator to be designed and operated at a destruction and removal efficiency sufficient such that protection of human health and environment is assured.

(C)(i) After November 8, 1984, and until standards are promulgated and in effect under paragraph (2) of this subsection, no fuel which contains any hazardous waste may be burned in any cement kiln which is located within the boundaries of any incorporated municipality with a population greater than five hundred thousand (based on the most recent census statistics) unless such kiln fully complies with regulations (as in effect on November 8, 1984) under this subchapter which are applicable to incinerators.

(ii) Any person who knowingly violates the prohibition contained in clause (i) shall be deemed to have violated section 6928(d)(2) of this title.

(r) Labeling

(1) Notwithstanding any other provision of law, until such time as the Administrator promulgates standards under subsection (q) of this section specifically superceding this requirement, it shall be unlawful for any person who is required to file a notification in accordance with paragraph (1) or (3) of section 6930 of this title to distribute or market any fuel which is produced from any hazardous waste identified or listed under section 6921 of this title, or any fuel which otherwise contains any hazardous waste identified or listed under section 6921 of this title if the invoice or the bill of sale fails--

(A) to bear the following statement: "WARNING: THIS FUEL CONTAINS HAZARDOUS WASTES", and

(B) to list the hazardous wastes contained therein.

Beginning ninety days after November 8, 1984, such statement shall be located in a conspicuous place on every such invoice or bill of sale and shall appear in conspicuous and legible type in contrast by typography, layouts, or color with other printed matter on the invoice or bill of sale.

(2) Unless the Administrator determines otherwise as may be necessary to protect human health and the environment, this subsection shall not apply to fuels produced from petroleum refining waste containing oil if--

(A) such materials are generated and reinserted onsite into the refining process;

(B) contaminants are removed; and

(C) such refining waste containing oil is converted along with normal process streams into petroleum-derived fuel products at a facility at which crude oil is refined into petroleum products and which is classified as a number SIC 2911 facility under the Office of Management and Budget Standard Industrial Classification Manual.

(3) Unless the Administrator determines otherwise as may be necessary to protect human health and the environment, this subsection shall not apply to fuels produced from oily materials, resulting from normal petroleum refining, production and transportation practices, if (A) contaminants are removed; and (B) such oily materials are converted along with normal process streams into petroleum-derived fuel products at a facility at which crude oil is refined into petroleum products and which is classified as a number SIC 2911 facility under the Office of Management and Budget Standard Industrial Classification Manual.

(s) Recordkeeping

Not later than fifteen months after November 8, 1984, the Administrator shall promulgate regulations requiring that any person who is required to file a notification in accordance with subparagraph (1), (2), or (3), of section 6930(a) of this title shall maintain such records regarding fuel blending, distribution, or use as may be necessary to protect human health and the environment.

(t) Financial responsibility provisions

(1) Financial responsibility required by subsection (a) of this section may be established in accordance with regulations promulgated by the Administrator by any one, or any combination, of the following: insurance, guarantee, surety bond, letter

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of credit, or qualification as a self-insurer. In promulgating requirements under this section, the Administrator is authorized to specify policy or other contractual terms, conditions, or defenses which are necessary or are unacceptable in establishing such evidence of financial responsibility in order to effectuate the purposes of this chapter.

(2) In any case where the owner or operator is in bankruptcy, reorganization, or arrangement pursuant to the Federal Bankruptcy Code or where (with reasonable diligence) jurisdiction in any State court or any Federal Court cannot be obtained over an owner or operator likely to be solvent at the time of judgment, any claim arising from conduct for which evidence of financial responsibility must be provided under this section may be asserted directly against the guarantor providing such evidence of financial responsibility. In the case of any action pursuant to this subsection, such guarantor shall be entitled to invoke all rights and defenses which would have been available to the owner or operator if any action had been brought against the owner or operator by the claimant and which would have been available to the guarantor if an action had been brought against the guarantor by the owner or operator.

(3) The total liability of any guarantor shall be limited to the aggregate amount which the guarantor has provided as evidence of financial responsibility to the owner or operator under this chapter. Nothing in this subsection shall be construed to limit any other State or Federal statutory, contractual or common law liability of a guarantor to its owner or operator including, but not limited to, the liability of such guarantor for bad faith either in negotiating or in failing to negotiate the settlement of any claim. Nothing in this subsection shall be construed to diminish the liability of any person under section 9607 or 9611 of this title or other applicable law.

(4) For the purpose of this subsection, the term "guarantor" means any person, other than the owner or operator, who provides evidence of financial responsibility for an owner or operator under this section.

(u) Continuing releases at permitted facilities

Standards promulgated under this section shall require, and a permit issued after November 8, 1984, by the Administrator or a State shall require, corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter, regardless of the time at which waste was placed in such unit. Permits issued under section 6925 of this title shall contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) and assurances of financial responsibility for completing such corrective action.

(v) Corrective action beyond facility boundary

As promptly as practicable after November 8, 1984, the Administrator shall amend the standards under this section regarding corrective action required at facilities for the treatment, storage, or disposal, of hazardous waste listed or identified under section 6921 of this title to require that corrective action be taken beyond the facility boundary where necessary to protect human health and the environment unless the owner or operator of the facility concerned demonstrates to the satisfaction of the Administrator that, despite the owner or operator's best efforts, the owner or operator was unable to obtain the necessary permission to undertake such action. Such regulations shall take effect immediately upon promulgation, notwithstanding section 6930(b) of this title, and shall apply to--

(1) all facilities operating under permits issued under subsection (c) of this section, and

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(2) all landfills, surface impoundments, and waste pile units (including any new units, replacements of existing units, or lateral expansions of existing units) which receive hazardous waste after July 26, 1982.

Pending promulgation of such regulations, the Administrator shall issue corrective action orders for facilities referred to in paragraphs (1) and (2), on a case-by-case basis, consistent with the purposes of this subsection.

(w) Underground tanks

Not later than March 1, 1985, the Administrator shall promulgate final permitting standards under this section for underground tanks that cannot be entered for inspection. Within forty-eight months after November 8, 1984, such standards shall be modified, if necessary, to cover at a minimum all requirements and standards described in section 6991b of this title.

(x) Mining and other special wastes

If (1) solid waste from the extraction, beneficiation or processing of ores and minerals, including phosphate rock and overburden from the mining of uranium, (2) fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels, or (3) cement kiln dust waste, is subject to regulation under this subchapter, the Administrator is authorized to modify the requirements of subsections (c), (d), (e), (f), (g), (o), and (u) of this section and section 6925(j) of this title, in the case of landfills or surface impoundments receiving such solid waste, to take into account the special characteristics of such wastes, the practical difficulties associated with implementation of such requirements, and site-specific characteristics, including but not limited to the climate, geology, hydrology and soil chemistry at the site, so long as such modified requirements assure protection of human health and the environment.

(y) Munitions

(1) Not later than 6 months after October 6, 1992, the Administrator shall propose, after consulting with the Secretary of Defense and appropriate State officials, regulations identifying when military munitions become hazardous waste for purposes of this subchapter and providing for the safe transportation and storage of such waste. Not later than 24 months after October 6, 1992, and after notice and opportunity for comment, the Administrator shall promulgate such regulations. Any such regulations shall assure protection of human health and the environment.

(2) For purposes of this subsection, the term "military munitions" includes chemical and conventional munitions.

CREDIT(S)

(Pub.L. 89-272, Title II, § 3004, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2807; amended Pub.L. 96-482, § 9, Oct. 21, 1980, 94 Stat. 2338; Pub.L. 98-616, Title II, §§ 201(a), 202(a), 203, 204(b)(1), 205 to 209, Nov. 8, 1984, 98 Stat. 3226, 3233, 3234, 3236, 3238 to 3240; Pub.L. 102-386, Title I, § 107, Oct. 6, 1992, 106 Stat. 1513; Pub.L. 104-119, §§ 2, 4(2) to (5), Mar. 26, 1996, 110 Stat. 830, 833.)

Notes of Decisions (47)

Footnotes

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1 So in original. Probably should be followed by a comma.

42 U.S.C.A. § 6924, 42 USCA § 6924

Current through P.L. 114-86 (excluding P.L. 114-74 and 114-81) approved 11-5-2015

End of Document

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 82. Solid Waste Disposal (Refs & Annos)
Subchapter III. Hazardous Waste Management (Refs & Annos)

42 U.S.C.A. § 6925

§ 6925. Permits for treatment, storage, or disposal of hazardous waste

Effective: March 26, 1996
Currentness

(a) Permit requirements

Not later than eighteen months after October 21, 1976, the Administrator shall promulgate regulations requiring each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit issued pursuant to this section. Such regulations shall take effect on the date provided in section 6930 of this title and upon and after such date the treatment, storage, or disposal of any such hazardous waste and the construction of any new facility for the treatment, storage, or disposal of any such hazardous waste is prohibited except in accordance with such a permit. No permit shall be required under this section in order to construct a facility if such facility is constructed pursuant to an approval issued by the Administrator under section 2605(e) of Title 15 for the incineration of polychlorinated biphenyls and any person owning or operating such a facility may, at any time after operation or construction of such facility has begun, file an application for a permit pursuant to this section authorizing such facility to incinerate hazardous waste identified or listed under this subchapter.

(b) Requirements of permit application

Each application for a permit under this section shall contain such information as may be required under regulations promulgated by the Administrator, including information respecting--

(1) estimates with respect to the composition, quantities, and concentrations of any hazardous waste identified or listed under this subchapter, or combinations of any such hazardous waste and any other solid waste, proposed to be disposed of, treated, transported, or stored, and the time, frequency, or rate of which such waste is proposed to be disposed of, treated, transported, or stored; and

(2) the site at which such hazardous waste or the products of treatment of such hazardous waste will be disposed of, treated, transported to, or stored.

(c) Permit issuance

(1) Upon a determination by the Administrator (or a State, if applicable), of compliance by a facility for which a permit is applied for under this section with the requirements of this section and section 6924 of this title, the Administrator (or the State) shall issue a permit for such facilities. In the event permit applicants propose modification of their facilities, or

in the event the Administrator (or the State) determines that modifications are necessary to conform to the requirements under this section and section 6924 of this title, the permit shall specify the time allowed to complete the modifications.

(2)(A)(i) Not later than the date four years after November 8, 1984, in the case of each application under this subsection for a permit for a land disposal facility which was submitted before such date, the Administrator shall issue a final permit pursuant to such application or issue a final denial of such application.

(ii) Not later than the date five years after November 8, 1984, in the case of each application for a permit under this subsection for an incinerator facility which was submitted before such date, the Administrator shall issue a final permit pursuant to such application or issue a final denial of such application.

(B) Not later than the date eight years after November 8, 1984, in the case of each application for a permit under this subsection for any facility (other than a facility referred to in subparagraph (A)) which was submitted before such date, the Administrator shall issue a final permit pursuant to such application or issue a final denial of such application.

(C) The time periods specified in this paragraph shall also apply in the case of any State which is administering an authorized hazardous waste program under section 6926 of this title. Interim status under subsection (e) of this section shall terminate for each facility referred to in subparagraph (A)(ii) or (B) on the expiration of the five- or eight-year period referred to in subparagraph (A) or (B), whichever is applicable, unless the owner or operator of the facility applies for a final determination regarding the issuance of a permit under this subsection within--

(i) two years after November 8, 1984 (in the case of a facility referred to in subparagraph (A)(ii)), or

(ii) four years after November 8, 1984 (in the case of a facility referred to in subparagraph (B)).

(3) Any permit under this section shall be for a fixed term, not to exceed 10 years in the case of any land disposal facility, storage facility, or incinerator or other treatment facility. Each permit for a land disposal facility shall be reviewed five years after date of issuance or reissuance and shall be modified as necessary to assure that the facility continues to comply with the currently applicable requirements of this section and section 6924 of this title. Nothing in this subsection shall preclude the Administrator from reviewing and modifying a permit at any time during its term. Review of any application for a permit renewal shall consider improvements in the state of control and measurement technology as well as changes in applicable regulations. Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment.

(d) Permit revocation

Upon a determination by the Administrator (or by a State, in the case of a State having an authorized hazardous waste program under section 6926 of this title) of noncompliance by a facility having a permit under this chapter with the requirements of this section or section 6924 of this title, the Administrator (or State, in the case of a State having an authorized hazardous waste program under section 6926 of this title) shall revoke such permit.

(e) Interim status

(1) Any person who--

(A) owns or operates a facility required to have a permit under this section which facility--

(i) was in existence on November 19, 1980, or

(ii) is in existence on the effective date of statutory or regulatory changes under this chapter that render the facility subject to the requirement to have a permit under this section,

(B) has complied with the requirements of section 6930(a) of this title, and

(C) has made an application for a permit under this section,

shall be treated as having been issued such permit until such time as final administrative disposition of such application is made, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. This paragraph shall not apply to any facility which has been previously denied a permit under this section or if authority to operate the facility under this section has been previously terminated.

(2) In the case of each land disposal facility which has been granted interim status under this subsection before November 8, 1984, interim status shall terminate on the date twelve months after November 8, 1984, unless the owner or operator of such facility--

(A) applies for a final determination regarding the issuance of a permit under subsection (c) of this section for such facility before the date twelve months after November 8, 1984; and

(B) certifies that such facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements.

(3) In the case of each land disposal facility which is in existence on the effective date of statutory or regulatory changes under this chapter that render the facility subject to the requirement to have a permit under this section and which is granted interim status under this subsection, interim status shall terminate on the date twelve months after the date on which the facility first becomes subject to such permit requirement unless the owner or operator of such facility--

(A) applies for a final determination regarding the issuance of a permit under subsection (c) of this section for such facility before the date twelve months after the date on which the facility first becomes subject to such permit requirement; and

(B) certifies that such facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements.

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(f) Coal mining wastes and reclamation permits

Notwithstanding subsection (a) through (e) of this section, any surface coal mining and reclamation permit covering any coal mining wastes or overburden which has been issued or approved under the Surface Mining Control and Reclamation Act of 1977 [30 U.S.C.A. § 1201 et seq.] shall be deemed to be a permit issued pursuant to this section with respect to the treatment, storage, or disposal of such wastes or overburden. Regulations promulgated by the Administrator under this subchapter shall not be applicable to treatment, storage, or disposal of coal mining wastes and overburden which are covered by such a permit.

(g) Research, development, and demonstration permits

(1) The Administrator may issue a research, development, and demonstration permit for any hazardous waste treatment facility which proposes to utilize an innovative and experimental hazardous waste treatment technology or process for which permit standards for such experimental activity have not been promulgated under this subchapter. Any such permit shall include such terms and conditions as will assure protection of human health and the environment. Such permits--

(A) shall provide for the construction of such facilities, as necessary, and for operation of the facility for not longer than one year (unless renewed as provided in paragraph (4)), and

(B) shall provide for the receipt and treatment by the facility of only those types and quantities of hazardous waste which the Administrator deems necessary for purposes of determining the efficacy and performance capabilities of the technology or process and the effects of such technology or process on human health and the environment, and

(C) shall include such requirements as the Administrator deems necessary to protect human health and the environment (including, but not limited to, requirements regarding monitoring, operation, insurance or bonding, financial reponsibility, [1] closure, and remedial action), and such requirements as the Administrator deems necessary regarding testing and providing of information to the Administrator with respect to the operation of the facility.

The Administrator may apply the criteria set forth in this paragraph in establishing the conditions of each permit without separate establishment of regulations implementing such criteria.

(2) For the purpose of expediting review and issuance of permits under this subsection, the Administrator may, consistent with the protection of human health and the environment, modify or waive permit application and permit issuance requirements established in the Administrator's general permit regulations except that there may be no modification or waiver of regulations regarding financial responsibility (including insurance) or of procedures established under section 6974(b)(2) of this title regarding public participation.

(3) The Administrator may order an immediate termination of all operations at the facility at any time he determines that termination is necessary to protect human health and the environment.

(4) Any permit issued under this subsection may be renewed not more than three times. Each such renewal shall be for a period of not more than 1 year.

(h) Waste minimization

Effective September 1, 1985, it shall be a condition of any permit issued under this section for the treatment, storage, or disposal of hazardous waste on the premises where such waste was generated that the permittee certify, no less often than annually, that--

(1) the generator of the hazardous waste has a program in place to reduce the volume or quantity and toxicity of such waste to the degree determined by the generator to be economically practicable; and

(2) the proposed method of treatment, storage, or disposal is that practicable method currently available to the generator which minimizes the present and future threat to human health and the environment.

(i) Interim status facilities receiving wastes after July 26, 1982

The standards concerning ground water monitoring, unsaturated zone monitoring, and corrective action, which are applicable under section 6924 of this title to new landfills, surface impoundments, land treatment units, and waste-pile units required to be permitted under subsection (c) of this section shall also apply to any landfill, surface impoundment, land treatment unit, or waste-pile unit qualifying for the authorization to operate under subsection (e) of this section which receives hazardous waste after July 26, 1982.

(j) Interim status surface impoundments

(1) Except as provided in paragraph (2), (3), or (4), each surface impoundment in existence on November 8, 1984, and qualifying for the authorization to operate under subsection (e) of this section shall not receive, store, or treat hazardous waste after the date four years after November 8, 1984, unless such surface impoundment is in compliance with the requirements of section 6924(o)(1)(A) of this title which would apply to such impoundment if it were new.

(2) Paragraph (1) of this subsection shall not apply to any surface impoundment which (A) has at least one liner, for which there is no evidence that such liner is leaking; (B) is located more than one-quarter mile from an underground source of drinking water; and (C) is in compliance with generally applicable ground water monitoring requirements for facilities with permits under subsection (c) of this section.

(3) Paragraph (1) of this subsection shall not apply to any surface impoundment which (A) contains treated waste water during the secondary or subsequent phases of an aggressive biological treatment facility subject to a permit issued under section 1342 of Title 33 (or which holds such treated waste water after treatment and prior to discharge); (B) is in compliance with generally applicable ground water monitoring requirements for facilities with permits under subsection (c) of this section; and (C)(i) is part of a facility in compliance with section 1311(b)(2) of Title 33, or (ii) in the case of a facility for which no effluent guidelines required under section 1314(b)(2) of Title 33 are in effect and no permit under section 1342(a)(1) of Title 33 implementing section 1311(b)(2) of Title 33 has been issued, is part of a facility in compliance with a permit under section 1342 of Title 33, which is achieving significant degradation of toxic pollutants and hazardous constituents contained in the untreated waste stream and which has identified those toxic pollutants and hazardous constituents in the untreated waste stream to the appropriate permitting authority.

(4) The Administrator (or the State, in the case of a State with an authorized program), after notice and opportunity for comment, may modify the requirements of paragraph (1) for any surface impoundment if the owner or operator demonstrates that such surface impoundment is located, designed and operated so as to assure that there will be no migration of any hazardous constitutent [2] into ground water or surface water at any future time. The Administrator or the State shall take into account locational criteria established under section 6924(o)(7) of this title.

(5) The owner or operator of any surface impoundment potentially subject to paragraph (1) who has reason to believe that on the basis of paragraph (2), (3), or (4) such surface impoundment is not required to comply with the requirements of paragraph (1), shall apply to the Administrator (or the State, in the case of a State with an authorized program) not later than twenty-four months after November 8, 1984, for a determination of the applicability of paragraph (1) (in the case of paragraph (2) or (3)) or for a modification of the requirements of paragraph (1) (in the case of paragraph (4)), with respect to such surface impoundment. Such owner or operator shall provide, with such application, evidence pertinent to such decision, including:

(A) an application for a final determination regarding the issuance of a permit under subsection (c) of this section for such facility, if not previously submitted;

(B) evidence as to compliance with all applicable ground water monitoring requirements and the information and analysis from such monitoring;

(C) all reasonably ascertainable evidence as to whether such surface impoundment is leaking; and

(D) in the case of applications under paragraph (2) or (3), a certification by a registered professional engineer with academic training and experience in ground water hydrology that--

(i) under paragraph (2), the liner of such surface impoundment is designed, constructed, and operated in accordance with applicable requirements, such surface impoundment is more than one-quarter mile from an underground source of drinking water and there is no evidence such liner is leaking; or

(ii) under paragraph (3), based on analysis of those toxic pollutants and hazardous constituents that are likely to be present in the untreated waste stream, such impoundment satisfies the conditions of paragraph (3).

In the case of any surface impoundment for which the owner or operator fails to apply under this paragraph within the time provided by this paragraph or paragraph (6), such surface impoundment shall comply with paragraph (1) notwithstanding paragraph (2), (3), or (4). Within twelve months after receipt of such application and evidence and not later than thirty-six months after November 8, 1984, and after notice and opportunity to comment, the Administrator (or, if appropriate, the State) shall advise such owner or operator on the applicability of paragraph (1) to such surface impoundment or as to whether and how the requirements of paragraph (1) shall be modified and applied to such surface impoundment.

(6)(A) In any case in which a surface impoundment becomes subject to paragraph (1) after November 8, 1984, due to the promulgation of additional listings or characteristics for the identification of hazardous waste under section 6921 of this title, the period for compliance in paragraph (1) shall be four years after the date of such promulgation, the period for demonstrations under paragraph (4) and for submission of evidence under paragraph (5) shall be not later than twenty-four months after the date of such promulgation, and the period for the Administrator (or if appropriate, the State) to advise such owners or operators under paragraph (5) shall be not later than thirty-six months after the date of promulgation.

(B) In any case in which a surface impoundment is initially determined to be excluded from the requirements of paragraph (1) but due to a change in condition (including the existence of a leak) no longer satisfies the provisions of paragraph (2), (3), or (4) and therefore becomes subject to paragraph (1), the period for compliance in paragraph (1) shall be two years after the date of discovery of such change of condition, or in the case of a surface impoundment excluded under paragraph (3) three years after such date of discovery.

(7)(A) The Administrator shall study and report to the Congress on the number, range of size, construction, likelihood of hazardous constituents migrating into ground water, and potential threat to human health and the environment of existing surface impoundments excluded by paragraph (3) from the requirements of paragraph (1). Such report shall address the need, feasibility, and estimated costs of subjecting such existing surface impoundments to the requirements of paragraph (1).

(B) In the case of any existing surface impoundment or class of surface impoundments from which the Administrator (or the State, in the case of a State with an authorized program) determines hazardous constituents are likely to migrate into ground water, the Administrator (or if appropriate, the State) is authorized to impose such requirements as may be necessary to protect human health and the environment, including the requirements of section 6924(o) of this title which would apply to such impoundments if they were new.

(C) In the case of any surface impoundment excluded by paragraph (3) from the requirements of paragraph (1) which is subsequently determined to be leaking, the Administrator (or, if appropriate, the State) shall require compliance with paragraph (1), unless the Administrator (or, if appropriate, the State) determines that such compliance is not necessary to protect human health and the environment.

(8) In the case of any surface impoundment in which the liners and leak detection system have been installed pursuant to the requirements of paragraph (1) and in good faith compliance with section 6924(o) of this title and the Administrator's regulations and guidance documents governing liners and leak detection systems, no liner or leak detection system which is different from that which was so installed pursuant to paragraph (1) shall be required for such unit by the Administrator when issuing the first permit under this section to such facility. Nothing in this paragraph shall preclude the Administrator from requiring installation of a new liner when the Administrator has reason to believe that any liner installed pursuant to the requirements of this subsection is leaking.

(9) In the case of any surface impoundment which has been excluded by paragraph (2) on the basis of a liner meeting the definition under paragraph (12)(A)(ii), at the closure of such impoundment the Administrator shall require the owner or operator of such impoundment to remove or decontaminate all waste residues, all contaminated liner material, and contaminated soil to the extent practicable. If all contaminated soil is not removed or decontaminated, the owner or

operator of such impoundment shall be required to comply with appropriate post-closure requirements, including but not limited to ground water monitoring and corrective action.

(10) Any incremental cost attributable to the requirements of this subsection or section 6924(o) of this title shall not be considered by the Administrator (or the State, in the case of a State with an authorized program under section 1342 of Title 33)--

(A) in establishing effluent limitations and standards under section 1311, 1314, 1316, 1317, or 1342 of Title 33 based on effluent limitations guidelines and standards promulgated any time before twelve months after November 8, 1984; or

(B) in establishing any other effluent limitations to carry out the provisions of section 1311, 1317, or 1342 of Title 33 on or before October 1, 1986.

(11)(A) If the Administrator allows a hazardous waste which is prohibited from one or more methods of land disposal under subsection (d), (e), or (g) of section 6924 of this title (or under regulations promulgated by the Administrator under such subsections) to be placed in a surface impoundment (which is operating pursuant to interim status) for storage or treatment, such impoundment shall meet the requirements that are applicable to new surface impoundments under section 6924(o)(1) of this title, unless such impoundment meets the requirements of paragraph (2) or (4).

(B) In the case of any hazardous waste which is prohibited from one or more methods of land disposal under subsection (d), (e), or (g) of section 6924 of this title (or under regulations promulgated by the Administrator under such subsection) the placement or maintenance of such hazardous waste in a surface impoundment for treatment is prohibited as of the effective date of such prohibition unless the treatment residues which are hazardous are, at a minimum, removed for subsequent management within one year of the entry of the waste into the surface impoundment.

(12)(A) For the purposes of paragraph (2)(A) of this subsection, the term "liner" means--

(i) a liner designed, constructed, installed, and operated to prevent hazardous waste from passing into the liner at any time during the active life of the facility; or

(ii) a liner designed, constructed, installed, and operated to prevent hazardous waste from migrating beyond the liner to adjacent subsurface soil, ground water, or surface water at any time during the active life of the facility.

(B) For the purposes of this subsection, the term "aggressive biological treatment facility" means a system of surface impoundments in which the initial impoundment of the secondary treatment segment of the facility utilizes intense mechanical aeration to enhance biological activity to degrade waste water pollutants and

(i) the hydraulic retention time in such initial impoundment is no longer than 5 days under normal operating conditions, on an annual average basis;

(ii) the hydraulic retention time in such initial impoundment is no longer than thirty days under normal operating conditions, on an annual average basis: *Provided,* That the sludge in such impoundment does not constitute a hazardous waste as identified by the extraction procedure toxicity characteristic in effect on November 8, 1984; or

(iii) such system utilizes activated sludge treatment in the first portion of secondary treatment.

(C) For the purposes of this subsection, the term "underground source or[3] drinking water" has the same meaning as provided in regulations under the Safe Drinking Water Act (title XIV of the Public Health Service Act) [42 U.S.C.A. § 300f et seq.].

(13) The Administrator may modify the requirements of paragraph (1) in the case of a surface impoundment for which the owner or operator, prior to October 1, 1984, has entered into, and is in compliance with, a consent order, decree, or agreement with the Administrator or a State with an authorized program mandating corrective action with respect to such surface impoundment that provides a degree of protection of human health and the environment which is at a minimum equivalent to that provided by paragraph (1).

CREDIT(S)

(Pub.L. 89-272, Title II, § 3005, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2808; amended Pub.L. 95-609, § 7(h), Nov. 8, 1978, 92 Stat. 3082; Pub.L. 96-482, §§ 10, 11, Oct. 21, 1980, 94 Stat. 2338; Pub.L. 98-616, Title II, §§ 211 to 213(a), (c), 214(a), 215, 224(b), 243(c), Nov. 8, 1984, 98 Stat. 3240 to 3243, 3253, 3261; Pub.L. 104-119, § 4(6), (7), Mar. 26, 1996, 110 Stat. 833.)

Notes of Decisions (36)

Footnotes

1 So in original. Probably should be "responsibility".

2 So in original. Probably should be "constituent".

3 So in original. Probably should be "of".

42 U.S.C.A. § 6925, 42 USCA § 6925
Current through P.L. 114-165.

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 82. Solid Waste Disposal (Refs & Annos)
Subchapter III. Hazardous Waste Management (Refs & Annos)

42 U.S.C.A. § 6926

§ 6926. Authorized State hazardous waste programs

Currentness

(a) Federal guidelines

Not later than eighteen months after October 21, 1976, the Administrator, after consultation with State authorities, shall promulgate guidelines to assist States in the Development of State hazardous waste programs.

(b) Authorization of State program

Any State which seeks to administer and enforce a hazardous waste program pursuant to this subchapter may develop and, after notice and opportunity for public hearing, submit to the Administrator an application, in such form as he shall require, for authorization of such program. Within ninety days following submission of an application under this subsection, the Administrator shall issue a notice as to whether or not he expects such program to be authorized, and within ninety days following such notice (and after opportunity for public hearing) he shall publish his findings as to whether or not the conditions listed in items (1), (2), and (3) below have been met. Such State is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste (and to enforce permits deemed to have been issued under section 6935(d)(1) of this title) unless, within ninety days following submission of the application the Administrator notifies such State that such program may not be authorized and, within ninety days following such notice and after opportunity for public hearing, he finds that (1) such State program is not equivalent to the Federal program under this subchapter, (2) such program is not consistent with the Federal or State programs applicable in other States, or (3) such program does not provide adequate enforcement of compliance with the requirements of this subchapter. In authorizing a State program, the Administrator may base his findings on the Federal program in effect one year prior to submission of a State's application or in effect on January 26, 1983, whichever is later.

(c) Interim authorization

(1) Any State which has in existence a hazardous waste program pursuant to State law before the date ninety days after the date of promulgation of regulations under sections 6922, 6923, 6924, and 6925 of this title, may submit to the Administrator evidence of such existing program and may request a temporary authorization to carry out such program under this subchapter. The Administrator shall, if the evidence submitted shows the existing State program to be substantially equivalent to the Federal program under this subchapter, grant an interim authorization to the State to carry out such program in lieu of the Federal program pursuant to this subchapter for a period ending no later than January 31, 1986.

(2) The Administrator shall, by rule, establish a date for the expiration of interim authorization under this subsection.

(3) Pending interim or final authorization of a State program for any State which reflects the amendments made by the Hazardous and Solid Waste Amendments of 1984, the State may enter into an agreement with the Administrator under which the State may assist in the administration of the requirements and prohibitions which take effect pursuant to such Amendments.

(4) In the case of a State permit program for any State which is authorized under subsection (b) of this section or under this subsection, until such program is amended to reflect the amendments made by the Hazardous and Solid Waste Amendments of 1984 and such program amendments receive interim or final authorization, the Administrator shall have the authority in such State to issue or deny permits or those portions of permits affected by the requirements and prohibitions established by the Hazardous and Solid Waste Amendments of 1984. The Administrator shall coordinate with States the procedures for issuing such permits.

(d) Effect of State permit

Any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this subchapter.

(e) Withdrawal of authorization

Whenever the Administrator determines after public hearing that a State is not administering and enforcing a program authorized under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw authorization of such program and establish a Federal program pursuant to this subchapter. The Administrator shall not withdraw authorization of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(f) Availability of information

No State program may be authorized by the Administrator under this section unless--

(1) such program provides for the public availability of information obtained by the State regarding facilities and sites for the treatment, storage, and disposal of hazardous waste; and

(2) such information is available to the public in substantially the same manner, and to the same degree, as would be the case if the Administrator was carrying out the provisions of this subchapter in such State.

(g) Amendments made by 1984 act

(1) Any requirement or prohibition which is applicable to the generation, transportation, treatment, storage, or disposal of hazardous waste and which is imposed under this subchapter pursuant to the amendments made by the Hazardous and Solid Waste Amendments of 1984 shall take effect in each State having an interim or finally authorized State program on the same date as such requirement takes effect in other States. The Administrator shall carry out such requirement

directly in each such State unless the State program is finally authorized (or is granted interim authorization as provided in paragraph (2)) with respect to such requirement.

(2) Any State which, before November 8, 1984, has an existing hazardous waste program which has been granted interim or final authorization under this section may submit to the Administrator evidence that such existing program contains (or has been amended to include) any requirement which is substantially equivalent to a requirement referred to in paragraph (1) and may request interim authorization to carry out that requirement under this subchapter. The Administrator shall, if the evidence submitted shows the State requirement to be substantially equivalent to the requirement referred to in paragraph (1), grant an interim authorization to the State to carry out such requirement in lieu of direct administration in the State by the Administrator of such requirement.

(h) State programs for used oil

In the case of used oil which is not listed or identified under this subchapter as a hazardous waste but which is regulated under section 6935 of this title, the provisions of this section regarding State programs shall apply in the same manner and to the same extent as such provisions apply to hazardous waste identified or listed under this subchapter.

CREDIT(S)

(Pub.L. 89-272, Title II, § 3006, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2809; amended Pub.L. 95-609, § 7(i), Nov. 8, 1978, 92 Stat. 3082; Pub.L. 98-616, Title II, §§ 225, 226(a), 227, 228, 241(b)(2), Nov. 8, 1984, 98 Stat. 3254, 3255, 3260; Pub.L. 99-499, Title II, § 205(j), Oct. 17, 1986, 100 Stat. 1703.)

Notes of Decisions (27)

42 U.S.C.A. § 6926, 42 USCA § 6926
Current through P.L. 114-165.

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 82. Solid Waste Disposal (Refs & Annos)
Subchapter III. Hazardous Waste Management (Refs & Annos)

42 U.S.C.A. § 6927

§ 6927. Inspections

Currentness

(a) Access entry

For purposes of developing or assisting in the development of any regulation or enforcing the provisions of this chapter, any person who generates, stores, treats, transports, disposes of, or otherwise handles or has handled hazardous wastes shall, upon request of any officer, employee or representative of the Environmental Protection Agency, duly designated by the Administrator, or upon request of any duly designated officer, employee or representative of a State having an authorized hazardous waste program, furnish information relating to such wastes and permit such person at all reasonable times to have access to, and to copy all records relating to such wastes. For the purposes of developing or assisting in the development of any regulation or enforcing the provisions of this chapter, such officers, employees or representatives are authorized--

(1) to enter at reasonable times any establishment or other place where hazardous wastes are or have been generated, stored, treated, disposed of, or transported from;

(2) to inspect and obtain samples from any person of any such wastes and samples of any containers or labeling for such wastes.

Each such inspection shall be commenced and completed with reasonable promptness. If the officer, employee or representative obtains any samples, prior to leaving the premises, he shall give to the owner, operator, or agent in charge a receipt describing the sample obtained and if requested a portion of each such sample equal in volume or weight to the portion retained. If any analysis is made of such samples, a copy of the results of such analysis shall be furnished promptly to the owner, operator, or agent in charge.

(b) Availability to public

(1) Any records, reports, or information (including records, reports, or information obtained by representatives of the Environmental Protection Agency) obtained from any person under this section shall be available to the public, except that upon a showing satisfactory to the Administrator (or the State, as the case may be) by any person that records, reports, or information, or particular part thereof, to which the Administrator (or the State, as the case may be) or any officer, employee or representative thereof has access under this section if made public, would divulge information entitled to protection under section 1905 of Title 18, such information or particular portion thereof shall be considered confidential in accordance with the purposes of that section, except that such record, report, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, or when relevant in any proceeding under this chapter.

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(2) Any person not subject to the provisions of section 1905 of Title 18 who knowingly and willfully divulges or discloses any information entitled to protection under this subsection shall, upon conviction, be subject to a fine of not more than $5,000 or to imprisonment not to exceed one year, or both.

(3) In submitting data under this chapter, a person required to provide such data may--

(A) designate the data which such person believes is entitled to protection under this subsection, and

(B) submit such designated data separately from other data submitted under this chapter.

A designation under this paragraph shall be made in writing and in such manner as the Administrator may prescribe.

(4) Notwithstanding any limitation contained in this section or any other provision of law, all information reported to, or otherwise obtained by, the Administrator (or any representative of the Administrator) under this chapter shall be made available, upon written request of any duly authorized committee of the Congress, to such committee.

(c) Federal facility inspections

The Administrator shall undertake on an annual basis a thorough inspection of each facility for the treatment, storage, or disposal of hazardous waste which is owned or operated by a department, agency, or instrumentality of the United States to enforce its compliance with this subchapter and the regulations promulgated thereunder. Any State with an authorized hazardous waste program also may conduct an inspection of any such facility for purposes of enforcing the facility's compliance with the State hazardous waste program. The records of such inspections shall be available to the public as provided in subsection (b) of this section. The department, agency, or instrumentality owning or operating each such facility shall reimburse the Environmental Protection Agency for the costs of the inspection of the facility. With respect to the first inspection of each such facility occurring after October 6, 1992, the Administrator shall conduct a comprehensive ground water monitoring evaluation at the facility, unless such an evaluation was conducted during the 12-month period preceding October 6, 1992.

(d) State-operated facilities

The Administrator shall annually undertake a thorough inspection of every facility for the treatment, storage, or disposal of hazardous waste which is operated by a State or local government for which a permit is required under section 6925 of this title. The records of such inspection shall be available to the public as provided in subsection (b) of this section.

(e) Mandatory inspections

(1) The Administrator (or the State in the case of a State having an authorized hazardous waste program under this subchapter) shall commence a program to thoroughly inspect every facility for the treatment, storage, or disposal of hazardous waste for which a permit is required under section 6925 of this title no less often than every two years as to its compliance with this subchapter (and the regulations promulgated under this subchapter). Such inspections shall commence not later than twelve months after November 8, 1984. The Administrator shall, after notice and opportunity

for public comment, promulgate regulations governing the minimum frequency and manner of such inspections, including the manner in which records of such inspections shall be maintained and the manner in which reports of such inspections shall be filed. The Administrator may distinguish between classes and categories of facilities commensurate with the risks posed by each class or category.

(2) Not later than six months after November 8, 1984, the Administrator shall submit to the Congress a report on the potential for inspections of hazardous waste treatment, storage, or disposal facilities by nongovernmental inspectors as a supplement to inspections conducted by officers, employees, or representatives of the Environmental Protection Agency or States having authorized hazardous waste programs or operating under a cooperative agreement with the Administrator. Such report shall be prepared in cooperation with the States, insurance companies offering environmental impairment insurance, independent companies providing inspection services, and other such groups as appropriate. Such report shall contain recommendations on provisions and requirements for a program of private inspections to supplement governmental inspections.

CREDIT(S)

(Pub.L. 89-272, Title II, § 3007, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2810; amended Pub.L. 95-609, § 7(j), Nov. 8, 1978, 92 Stat. 3082; Pub.L. 96-482, § 12, Oct. 21, 1980, 94 Stat. 2339; Pub.L. 98-616, Title II, §§ 229 to 231, Title V, § 502(a), Nov. 8, 1984, 98 Stat. 3255, 3256, 3276; Pub.L. 102-386, Title I, § 104, Oct. 6, 1992, 106 Stat. 1507.)

Notes of Decisions (12)

42 U.S.C.A. § 6927, 42 USCA § 6927
Current through P.L. 114-165.

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 82. Solid Waste Disposal (Refs & Annos)
Subchapter III. Hazardous Waste Management (Refs & Annos)

42 U.S.C.A. § 6930

§ 6930. Effective date

Currentness

(a) Preliminary notification

Not later than ninety days after promulgation of regulations under section 6921 of this title identifying by its characteristics or listing any substance as hazardous waste subject to this subchapter, any person generating or transporting such substance or owning or operating a facility for treatment, storage, or disposal of such substance shall file with the Administrator (or with States having authorized hazardous waste permit programs under section 6926 of this title) a notification stating the location and general description of such activity and the identified or listed hazardous wastes handled by such person. Not later than fifteen months after November 8, 1984--

(1) the owner or operator of any facility which produces a fuel (A) from any hazardous waste identified or listed under section 6921 of this title, (B) from such hazardous waste identified or listed under section 6921 of this title and any other material, (C) from used oil, or (D) from used oil and any other material;

(2) the owner or operator of any facility (other than a single- or two-family residence) which burns for purposes of energy recovery any fuel produced as provided in paragraph (1) or any fuel which otherwise contains used oil or any hazardous waste identified or listed under section 6921 of this title; and

(3) any person who distributes or markets any fuel which is produced as provided in paragraph (1) or any fuel which otherwise contains used oil or any hazardous waste identified or listed under section 6921 of this title [1]

shall file with the Administrator (and with the State in the case of a State with an authorized hazardous waste program) a notification stating the location and general description of the facility, together with a description of the identified or listed hazardous waste involved and, in the case of a facility referred to in paragraph (1) or (2), a description of the production or energy recovery activity carried out at the facility and such other information as the Administrator deems necessary. For purposes of the preceding provisions, the term "hazardous waste listed under section 6921 of this title" also includes any commercial chemical product which is listed under section 6921 of this title and which, in lieu of its original intended use, is (i) produced for use as (or as a component of) a fuel, (ii) distributed for use as a fuel, or (iii) burned as a fuel. Notification shall not be required under the second sentence of this subsection in the case of facilities (such as residential boilers) where the Administrator determines that such notification is not necessary in order for the Administrator to obtain sufficient information respecting current practices of facilities using hazardous waste for energy recovery. Nothing in this subsection shall be construed to affect or impair the provisions of section 6921(b)(3) of this title. Nothing in this subsection shall affect regulatory determinations under section 6935 of this title. In revising any regulation under section 6921 of this title identifying additional characteristics of hazardous waste or listing any additional substance as hazardous waste subject to this subchapter, the Administrator may require any person referred to in the preceding provisions to file with the Administrator (or with States having authorized hazardous waste permit

programs under section 6926 of this title) the notification described in the preceding provisions. Not more than one such notification shall be required to be filed with respect to the same substance. No identified or listed hazardous waste subject to this subchapter may be transported, treated, stored, or disposed of unless notification has been given as required under this subsection.

(b) Effective date of regulation

The regulations under this subchapter respecting requirements applicable to the generation, transportation, treatment, storage, or disposal of hazardous waste (including requirements respecting permits for such treatment, storage, or disposal) shall take effect on the date six months after the date of promulgation thereof (or six months after the date of revision in the case of any regulation which is revised after the date required for promulgation thereof). At the time a regulation is promulgated, the Administrator may provide for a shorter period prior to the effective date, or an immediate effective date for:

(1) a regulation with which the Administrator finds the regulated community does not need six months to come into compliance;

(2) a regulation which responds to an emergency situation; or

(3) other good cause found and published with the regulation.

CREDIT(S)

(Pub.L. 89-272, Title II, § 3010, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2812; amended Pub.L. 96-482, § 15, Oct. 21, 1980, 94 Stat. 2342; Pub.L. 98-616, Title II, §§ 204(a), 234, Nov. 8, 1984, 98 Stat. 3235, 3258.)

Notes of Decisions (3)

Footnotes

1 So in original. Probably should be followed by a semicolon.

42 U.S.C.A. § 6930, 42 USCA § 6930
Current through P.L. 114-165.

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 82. Solid Waste Disposal (Refs & Annos)
Subchapter VII. Miscellaneous Provisions

42 U.S.C.A. § 6974

§ 6974. Petition for regulations; public participation

Currentness

(a) Petition

Any person may petition the Administrator for the promulgation, amendment, or repeal of any regulation under this chapter. Within a reasonable time following receipt of such petition, the Administrator shall take action with respect to such petition and shall publish notice of such action in the Federal Register, together with the reasons therefor.

(b) Public participation

(1) Public participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish minimum guidelines for public participation in such processes.

(2) Before the issuing of a permit to any person with any respect to any facility for the treatment, storage, or disposal of hazardous wastes under section 6925 of this title, the Administrator shall--

(A) cause to be published in major local newspapers of general circulation and broadcast over local radio stations notice of the agency's intention to issue such permit, and

(B) transmit in writing notice of the agency's intention to issue such permit to each unit of local government having jurisdiction over the area in which such facility is proposed to be located and to each State agency having any authority under State law with respect to the construction or operation of such facility.

If within 45 days the Administrator receives written notice of opposition to the agency's intention to issue such permit and a request for a hearing, or if the Administrator determines on his own initiative, he shall hold an informal public hearing (including an opportunity for presentation of written and oral views) on whether he should issue a permit for the proposed facility. Whenever possible the Administrator shall schedule such hearing at a location convenient to the nearest population center to such proposed facility and give notice in the aforementioned manner of the date, time, and subject matter of such hearing. No State program which provides for the issuance of permits referred to in this paragraph may be authorized by the Administrator under section 6926 of this title unless such program provides for the notice and hearing required by the paragraph.

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(Pub.L. 89-272, Title II, § 7004, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2826; amended Pub.L. 96-482, § 26, Oct. 21, 1980, 94 Stat. 2348.)

Notes of Decisions (2)

42 U.S.C.A. § 6974, 42 USCA § 6974
Current through P.L. 114-165.

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 82. Solid Waste Disposal (Refs & Annos)
Subchapter VII. Miscellaneous Provisions

42 U.S.C.A. § 6976

§ 6976. Judicial review

Currentness

(a) Review of final regulations and certain petitions

Any judicial review of final regulations promulgated pursuant to this chapter and the Administrator's denial of any petition for the promulgation, amendment, or repeal of any regulation under this chapter shall be in accordance with sections 701 through 706 of Title 5, except that--

(1) a petition for review of action of the Administrator in promulgating any regulation, or requirement under this chapter or denying any petition for the promulgation, amendment or repeal of any regulation under this chapter may be filed only in the United States Court of Appeals for the District of Columbia, and such petition shall be filed within ninety days from the date of such promulgation or denial, or after such date if such petition for review is based solely on grounds arising after such ninetieth day; action of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in civil or criminal proceedings for enforcement; and

(2) in any judicial proceeding brought under this section in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if a party seeking review under this chapter applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that the information is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, and to be adduced upon the hearing in such manner and upon such terms and conditions as the court may deem proper; the Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file with the court such modified or new findings and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(b) Review of certain actions under sections 6925 and 6926 of this title

Review of the Administrator's action (1) in issuing, denying, modifying, or revoking any permit under section 6925 of this title (or in modifying or revoking any permit which is deemed to have been issued under section 6935(d)(1) of this title), or (2) in granting, denying, or withdrawing authorization or interim authorization under section 6926 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such issuance, denial, modification, revocation, grant, or withdrawal, or after such date only if such application is based solely on grounds which arose after such ninetieth day. Action of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in civil or criminal proceedings for enforcement. Such review shall be in accordance with sections 701 through 706 of Title 5.

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CREDIT(S)

(Pub.L. 89-272, Title II, § 7006, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2827; amended Pub.L. 96-482, § 27, Oct. 21, 1980, 94 Stat. 2349; Pub.L. 98-616, Title II, § 241(b)(1), Title IV, § 403(d)(5), Nov. 8, 1984, 98 Stat. 3259, 3273.)

Notes of Decisions (64)

42 U.S.C.A. § 6976, 42 USCA § 6976
Current through P.L. 114-86 (excluding P.L. 114-74 and 114-81) approved 11-5-2015

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REGULATIONS

KeyCite Yellow Flag - Negative Treatment
Proposed Regulation

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter I. Solid Wastes
Part 260. Hazardous Waste Management System: General (Refs & Annos)
Subpart B. Definitions

40 C.F.R. § 260.10

§ 260.10 Definitions.

Effective: July 13, 2015
Currentness

When used in parts 260 through 273 of this chapter, the following terms have the meanings given below:

Above ground tank means a device meeting the definition of "tank" in § 260.10 and that is situated in such a way that the entire surface area of the tank is completely above the plane of the adjacent surrounding surface and the entire surface area of the tank (including the tank bottom) is able to be visually inspected.

Act or RCRA means the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. section 6901 et seq.

Active life of a facility means the period from the initial receipt of hazardous waste at the facility until the Regional Administrator receives certification of final closure.

Active portion means that portion of a facility where treatment, storage, or disposal operations are being or have been conducted after the effective date of part 261 of this chapter and which is not a closed portion. (See also "closed portion" and "inactive portion".)

Administrator means the Administrator of the Environmental Protection Agency, or his designee.

Ancillary equipment means any device including, but not limited to, such devices as piping, fittings, flanges, valves, and pumps, that is used to distribute, meter, or control the flow of hazardous waste from its point of generation to a storage or treatment tank(s), between hazardous waste storage and treatment tanks to a point of disposal onsite, or to a point of shipment for disposal off-site.

Aquifer means a geologic formation, group of formations, or part of a formation capable of yielding a significant amount of ground water to wells or springs.

Authorized representative means the person responsible for the overall operation of a facility or an operational unit (i.e., part of a facility), e.g., the plant manager, superintendent or person of equivalent responsibility.

Battery means a device consisting of one or more electrically connected electrochemical cells which is designed to receive, store, and deliver electric energy. An electrochemical cell is a system consisting of an anode, cathode, and an electrolyte, plus

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such connections (electrical and mechanical) as may be needed to allow the cell to deliver or receive electrical energy. The term battery also includes an intact, unbroken battery from which the electrolyte has been removed.

Boiler means an enclosed device using controlled flame combustion and having the following characteristics:

(1)(i) The unit must have physical provisions for recovering and exporting thermal energy in the form of steam, heated fluids, or heated gases; and

(ii) The unit's combustion chamber and primary energy recovery section(s) must be of integral design. To be of integral design, the combustion chamber and the primary energy recovery section(s) (such as waterwalls and superheaters) must be physically formed into one manufactured or assembled unit. A unit in which the combustion chamber and the primary energy recovery section(s) are joined only by ducts or connections carrying flue gas is not integrally designed; however, secondary energy recovery equipment (such as economizers or air preheaters) need not be physically formed into the same unit as the combustion chamber and the primary energy recovery section. The following units are not precluded from being boilers solely because they are not of integral design: process heaters (units that transfer energy directly to a process stream), and fluidized bed combustion units; and

(iii) While in operation, the unit must maintain a thermal energy recovery efficiency of at least 60 percent, calculated in terms of the recovered energy compared with the thermal value of the fuel; and

(iv) The unit must export and utilize at least 75 percent of the recovered energy, calculated on an annual basis. In this calculation, no credit shall be given for recovered heat used internally in the same unit. (Examples of internal use are the preheating of fuel or combustion air, and the driving of induced or forced draft fans or feedwater pumps); or

(2) The unit is one which the Regional Administrator has determined, on a case-by-case basis, to be a boiler, after considering the standards in § 260.32.

Carbon dioxide stream means carbon dioxide that has been captured from an emission source (e.g., power plant), plus incidental associated substances derived from the source materials and the capture process, and any substances added to the stream to enable or improve the injection process.

Carbon regeneration unit means any enclosed thermal treatment device used to regenerate spent activated carbon.

Cathode ray tube or CRT means a vacuum tube, composed primarily of glass, which is the visual or video display component of an electronic device. A used, intact CRT means a CRT whose vacuum has not been released. A used, broken CRT means glass removed from its housing or casing whose vacuum has been released.

Certification means a statement of professional opinion based upon knowledge and belief.

Closed portion means that portion of a facility which an owner or operator has closed in accordance with the approved facility closure plan and all applicable closure requirements. (See also “active portion” and “inactive portion”.)

Component means either the tank or ancillary equipment of a tank system.

Contained means held in a unit (including a land-based unit as defined in this subpart) that meets the following criteria:

(1) The unit is in good condition, with no leaks or other continuing or intermittent unpermitted releases of the hazardous secondary materials to the environment, and is designed, as appropriate for the hazardous secondary materials, to prevent releases of hazardous secondary materials to the environment. Unpermitted releases are releases that are not covered by a permit

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(such as a permit to discharge to water or air) and may include, but are not limited to, releases through surface transport by precipitation runoff, releases to soil and groundwater, wind-blown dust, fugitive air emissions, and catastrophic unit failures;

(2) The unit is properly labeled or otherwise has a system (such as a log) to immediately identify the hazardous secondary materials in the unit; and

(3) The unit holds hazardous secondary materials that are compatible with other hazardous secondary materials placed in the unit and is compatible with the materials used to construct the unit and addresses any potential risks of fires or explosions.

(4) Hazardous secondary materials in units that meet the applicable requirements of 40 CFR parts 264 or 265 are presumptively contained.

Confined aquifer means an aquifer bounded above and below by impermeable beds or by beds of distinctly lower permeability than that of the aquifer itself; an aquifer containing confined ground water.

Container means any portable device in which a material is stored, transported, treated, disposed of, or otherwise handled.

Containment building means a hazardous waste management unit that is used to store or treat hazardous waste under the provisions of subpart DD of parts 264 or 265 of this chapter.

Contingency plan means a document setting out an organized, planned, and coordinated course of action to be followed in case of a fire, explosion, or release of hazardous waste or hazardous waste constituents which could threaten human health or the environment.

Corrosion expert means a person who, by reason of his knowledge of the physical sciences and the principles of engineering and mathematics, acquired by a professional education and related practical experience, is qualified to engage in the practice of corrosion control on buried or submerged metal piping systems and metal tanks. Such a person must be certified as being qualified by the National Association of Corrosion Engineers (NACE) or be a registered professional engineer who has certification or licensing that includes education and experience in corrosion control on buried or submerged metal piping systems and metal tanks.

CRT collector means a person who receives used, intact CRTs for recycling, repair, resale, or donation.

CRT exporter means any person in the United States who initiates a transaction to send used CRTs outside the United States or its territories for recycling or reuse, or any intermediary in the United States arranging for such export.

CRT glass manufacturer means an operation or part of an operation that uses a furnace to manufacture CRT glass.

CRT processing means conducting all of the following activities:

(1) Receiving broken or intact CRTs; and

(2) Intentionally breaking intact CRTs or further breaking or separating broken CRTs; and

(3) Sorting or otherwise managing glass removed from CRT monitors.

Designated facility means:

(1) A hazardous waste treatment, storage, or disposal facility which:

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(i) Has received a permit (or interim status) in accordance with the requirements of parts 270 and 124 of this chapter;

(ii) Has received a permit (or interim status) from a State authorized in accordance with part 271 of this chapter; or

(iii) Is regulated under § 261.6(c)(2) or subpart F of part 266 of this chapter; and

(iv) That has been designated on the manifest by the generator pursuant to § 262.20.

(2) Designated facility also means a generator site designated on the manifest to receive its waste as a return shipment from a facility that has rejected the waste in accordance with § 264.72(f) or § 265.72(f) of this chapter.

(3) If a waste is destined to a facility in an authorized State which has not yet obtained authorization to regulate that particular waste as hazardous, then the designated facility must be a facility allowed by the receiving State to accept such waste.

Destination facility means a facility that treats, disposes of, or recycles a particular category of universal waste, except those management activities described in paragraphs (a) and (c) of §§ 273.13 and 273.33 of this chapter. A facility at which a particular category of universal waste is only accumulated, is not a destination facility for purposes of managing that category of universal waste.

Dike means an embankment or ridge of either natural or man-made materials used to prevent the movement of liquids, sludges, solids, or other materials.

Dioxins and furans (D/F) means tetra, penta, hexa, hepta, and octa-chlorinated dibenzo dioxins and furans.

Discharge or hazardous waste discharge means the accidental or intentional spilling, leaking, pumping, pouring, emitting, emptying, or dumping of hazardous waste into or on any land or water.

Disposal means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

Disposal facility means a facility or part of a facility at which hazardous waste is intentionally placed into or on any land or water, and at which waste will remain after closure. The term disposal facility does not include a corrective action management unit into which remediation wastes are placed.

Drip pad is an engineered structure consisting of a curbed, free-draining base, constructed of non-earthen materials and designed to convey preservative kick-back or drippage from treated wood, precipitation, and surface water run-on to an associated collection system at wood preserving plants.

Electronic manifest (or e–Manifest) means the electronic format of the hazardous waste manifest that is obtained from EPA's national e–Manifest system and transmitted electronically to the system, and that is the legal equivalent of EPA Forms 8700–22 (Manifest) and 8700–22A (Continuation Sheet).

Electronic Manifest System (or e–Manifest System) means EPA's national information technology system through which the electronic manifest may be obtained, completed, transmitted, and distributed to users of the electronic manifest and to regulatory agencies.

Elementary neutralization unit means a device which:

(1) Is used for neutralizing wastes that are hazardous only because they exhibit the corrosivity characteristic defined in § 261.22 of this chapter, or they are listed in subpart D of part 261 of the chapter only for this reason; and

(2) Meets the definition of tank, tank system, container, transport vehicle, or vessel in § 260.10 of this chapter.

EPA hazardous waste number means the number assigned by EPA to each hazardous waste listed in part 261, subpart D, of this chapter and to each characteristic identified in part 261, subpart C, of this chapter.

EPA identification number means the number assigned by EPA to each generator, transporter, and treatment, storage, or disposal facility.

EPA region means the states and territories found in any one of the following ten regions:

Region I—Maine, Vermont, New Hampshire, Massachusetts, Connecticut, and Rhode Island.

Region II—New York, New Jersey, Commonwealth of Puerto Rico, and the U.S. Virgin Islands.

Region III—Pennsylvania, Delaware, Maryland, West Virginia, Virginia, and the District of Columbia.

Region IV—Kentucky, Tennessee, North Carolina, Mississippi, Alabama, Georgia, South Carolina, and Florida.

Region V—Minnesota, Wisconsin, Illinois, Michigan, Indiana and Ohio.

Region VI—New Mexico, Oklahoma, Arkansas, Louisiana, and Texas.

Region VII—Nebraska, Kansas, Missouri, and Iowa.

Region VIII—Montana, Wyoming, North Dakota, South Dakota, Utah, and Colorado.

Region IX—California, Nevada, Arizona, Hawaii, Guam, American Samoa, Commonwealth of the Northern Mariana Islands.

Region X—Washington, Oregon, Idaho, and Alaska.

Equivalent method means any testing or analytical method approved by the Administrator under §§ 260.20 and 260.21.

Existing hazardous waste management (HWM) facility or existing facility means a facility which was in operation or for which construction commenced on or before November 19, 1980. A facility has commenced construction if:

(1) The owner or operator has obtained the Federal, State and local approvals or permits necessary to begin physical construction; and either

(2)(i) A continuous on-site, physical construction program has begun; or

(ii) The owner or operator has entered into contractual obligations—which cannot be cancelled or modified without substantial loss—for physical construction of the facility to be completed within a reasonable time.

Existing portion means that land surface area of an existing waste management unit, included in the original Part A permit application, on which wastes have been placed prior to the issuance of a permit.

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Existing tank system or existing component means a tank system or component that is used for the storage or treatment of hazardous waste and that is in operation, or for which installation has commenced on or prior to July 14, 1986. Installation will be considered to have commenced if the owner or operator has obtained all Federal, State, and local approvals or permits necessary to begin physical construction of the site or installation of the tank system and if either (1) a continuous on-site physical construction or installation program has begun, or (2) the owner or operator has entered into contractual obligations —which cannot be canceled or modified without substantial loss—for physical construction of the site or installation of the tank system to be completed within a reasonable time.

Explosives or munitions emergency means a situation involving the suspected or detected presence of unexploded ordnance (UXO), damaged or deteriorated explosives or munitions, an improvised explosive device (IED), other potentially explosive material or device, or other potentially harmful military chemical munitions or device, that creates an actual or potential imminent threat to human health, including safety, or the environment, including property, as determined by an explosives or munitions emergency response specialist. Such situations may require immediate and expeditious action by an explosives or munitions emergency response specialist to control, mitigate, or eliminate the threat.

Explosives or munitions emergency response means all immediate response activities by an explosives and munitions emergency response specialist to control, mitigate, or eliminate the actual or potential threat encountered during an explosives or munitions emergency. An explosives or munitions emergency response may include in-place render-safe procedures, treatment or destruction of the explosives or munitions and/or transporting those items to another location to be rendered safe, treated, or destroyed. Any reasonable delay in the completion of an explosives or munitions emergency response caused by a necessary, unforeseen, or uncontrollable circumstance will not terminate the explosives or munitions emergency. Explosives and munitions emergency responses can occur on either public or private lands and are not limited to responses at RCRA facilities.

Explosives or munitions emergency response specialist means an individual trained in chemical or conventional munitions or explosives handling, transportation, render-safe procedures, or destruction techniques. Explosives or munitions emergency response specialists include Department of Defense (DOD) emergency explosive ordnance disposal (EOD), technical escort unit (TEU), and DOD-certified civilian or contractor personnel; and other Federal, State, or local government, or civilian personnel similarly trained in explosives or munitions emergency responses.

Facility means:

(1) All contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste, or for managing hazardous secondary materials prior to reclamation. A facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them).

(2) For the purpose of implementing corrective action under 40 CFR 264.101 or 267.101, all contiguous property under the control of the owner or operator seeking a permit under Subtitle C of RCRA. This definition also applies to facilities implementing corrective action under RCRA Section 3008(h).

(3) Notwithstanding paragraph (2) of this definition, a remediation waste management site is not a facility that is subject to 40 CFR 264.101, but is subject to corrective action requirements if the site is located within such a facility.

Federal agency means any department, agency, or other instrumentality of the Federal Government, any independent agency or establishment of the Federal Government including any Government corporation, and the Government Printing Office.

Federal, State and local approvals or permits necessary to begin physical construction means permits and approvals required under Federal, State or local hazardous waste control statutes, regulations or ordinances.

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Final closure means the closure of all hazardous waste management units at the facility in accordance with all applicable closure requirements so that hazardous waste management activities under parts 264 and 265 of this chapter are no longer conducted at the facility unless subject to the provisions in § 262.34.

Food-chain crops means tobacco, crops grown for human consumption, and crops grown for feed for animals whose products are consumed by humans.

Free liquids means liquids which readily separate from the solid portion of a waste under ambient temperature and pressure.

Freeboard means the vertical distance between the top of a tank or surface impoundment dike, and the surface of the waste contained therein.

Generator means any person, by site, whose act or process produces hazardous waste identified or listed in part 261 of this chapter or whose act first causes a hazardous waste to become subject to regulation.

Ground water means water below the land surface in a zone of saturation.

Hazardous secondary material means a secondary material (e.g., spent material, by-product, or sludge) that, when discarded, would be identified as hazardous waste under part 261 of this chapter.

Hazardous secondary material generator means any person whose act or process produces hazardous secondary materials at the generating facility. For purposes of this paragraph, "generating facility" means all contiguous property owned, leased, or otherwise controlled by the hazardous secondary material generator. For the purposes of § 261.2(a)(2)(ii) and § 261.4(a)(23), a facility that collects hazardous secondary materials from other persons is not the hazardous secondary material generator.

Hazardous waste means a hazardous waste as defined in § 261.3 of this chapter.

Hazardous waste constituent means a constituent that caused the Administrator to list the hazardous waste in part 261, subpart D, of this chapter, or a constituent listed in table 1 of § 261.24 of this chapter.

Hazardous waste management unit is a contiguous area of land on or in which hazardous waste is placed, or the largest area in which there is significant likelihood of mixing hazardous waste constituents in the same area. Examples of hazardous waste management units include a surface impoundment, a waste pile, a land treatment area, a landfill cell, an incinerator, a tank and its associated piping and underlying containment system and a container storage area. A container alone does not constitute a unit; the unit includes containers and the land or pad upon which they are placed.

In operation refers to a facility which is treating, storing, or disposing of hazardous waste.

Inactive portion means that portion of a facility which is not operated after the effective date of part 261 of this chapter. (See also "active portion" and "closed portion".)

Incinerator means any enclosed device that:

(1) Uses controlled flame combustion and neither meets the criteria for classification as a boiler, sludge dryer, or carbon regeneration unit, nor is listed as an industrial furnace; or

(2) Meets the definition of infrared incinerator or plasma arc incinerator.

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Incompatible waste means a hazardous waste which is unsuitable for:

(1) Placement in a particular device or facility because it may cause corrosion or decay of containment materials (e.g., container inner liners or tank walls); or

(2) Commingling with another waste or material under uncontrolled conditions because the commingling might produce heat or pressure, fire or explosion, violent reaction, toxic dusts, mists, fumes, or gases, or flammable fumes or gases.

(See appendix V of parts 264 and 265 of this chapter for examples.)

Individual generation site means the contiguous site at or on which one or more hazardous wastes are generated. An individual generation site, such as a large manufacturing plant, may have one or more sources of hazardous waste but is considered a single or individual generation site if the site or property is contiguous.

Industrial furnace means any of the following enclosed devices that are integral components of manufacturing processes and that use thermal treatment to accomplish recovery of materials or energy:

(1) Cement kilns

(2) Lime kilns

(3) Aggregate kilns

(4) Phosphate kilns

(5) Coke ovens

(6) Blast furnaces

(7) Smelting, melting and refining furnaces (including pyrometallurgical devices such as cupolas, reverberator furnaces, sintering machine, roasters, and foundry furnaces)

(8) Titanium dioxide chloride process oxidation reactors

(9) Methane reforming furnaces

(10) Pulping liquor recovery furnaces

(11) Combustion devices used in the recovery of sulfur values from spent sulfuric acid

(12) Halogen acid furnaces (HAFs) for the production of acid from halogenated hazardous waste generated by chemical production facilities where the furnace is located on the site of a chemical production facility, the acid product has a halogen acid content of at least 3%, the acid product is used in a manufacturing process, and, except for hazardous waste burned as fuel, hazardous waste fed to the furnace has a minimum halogen content of 20% as-generated.

(13) Such other devices as the Administrator may, after notice and comment, add to this list on the basis of one or more of the following factors:

(i) The design and use of the device primarily to accomplish recovery of material products;

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(ii) The use of the device to burn or reduce raw materials to make a material product;

(iii) The use of the device to burn or reduce secondary materials as effective substitutes for raw materials, in processes using raw materials as principal feedstocks;

(iv) The use of the device to burn or reduce secondary materials as ingredients in an industrial process to make a material product;

(v) The use of the device in common industrial practice to produce a material product; and

(vi) Other factors, as appropriate.

Infrared incinerator means any enclosed device that uses electric powered resistance heaters as a source of radiant heat followed by an afterburner using controlled flame combustion and which is not listed as an industrial furnace.

Inground tank means a device meeting the definition of "tank" in § 260.10 whereby a portion of the tank wall is situated to any degree within the ground, thereby preventing visual inspection of that external surface area of the tank that is in the ground.

Injection well means a well into which fluids are injected. (See also "underground injection".)

Inner liner means a continuous layer of material placed inside a tank or container which protects the construction materials of the tank or container from the contained waste or reagents used to treat the waste.

Installation inspector means a person who, by reason of his knowledge of the physical sciences and the principles of engineering, acquired by a professional education and related practical experience, is qualified to supervise the installation of tank systems.

Intermediate facility means any facility that stores hazardous secondary materials for more than 10 days, other than a hazardous secondary material generator or reclaimer of such material.

International shipment means the transportation of hazardous waste into or out of the jurisdiction of the United States.

Lamp, also referred to as "universal waste lamp", is defined as the bulb or tube portion of an electric lighting device. A lamp is specifically designed to produce radiant energy, most often in the ultraviolet, visible, and infra-red regions of the electromagnetic spectrum. Examples of common universal waste electric lamps include, but are not limited to, fluorescent, high intensity discharge, neon, mercury vapor, high pressure sodium, and metal halide lamps.

Land-based unit means an area where hazardous secondary materials are placed in or on the land before recycling. This definition does not include land-based production units.

Landfill means a disposal facility or part of a facility where hazardous waste is placed in or on land and which is not a pile, a land treatment facility, a surface impoundment, an underground injection well, a salt dome formation, a salt bed formation, an underground mine, a cave, or a corrective action management unit.

Landfill cell means a discrete volume of a hazardous waste landfill which uses a liner to provide isolation of wastes from adjacent cells or wastes. Examples of landfill cells are trenches and pits.

Land treatment facility means a facility or part of a facility at which hazardous waste is applied onto or incorporated into the soil surface; such facilities are disposal facilities if the waste will remain after closure.

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Leachate means any liquid, including any suspended components in the liquid, that has percolated through or drained from hazardous waste.

Leak-detection system means a system capable of detecting the failure of either the primary or secondary containment structure or the presence of a release of hazardous waste or accumulated liquid in the secondary containment structure. Such a system must employ operational controls (e.g., daily visual inspections for releases into the secondary containment system of aboveground tanks) or consist of an interstitial monitoring device designed to detect continuously and automatically the failure of the primary or secondary containment structure or the presence of a release of hazardous waste into the secondary containment structure.

Liner means a continuous layer of natural or man-made materials, beneath or on the sides of a surface impoundment, landfill, or landfill cell, which restricts the downward or lateral escape of hazardous waste, hazardous waste constituents, or leachate.

Management or hazardous waste management means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous waste.

Manifest means the shipping document EPA Form 8700–22 (including, if necessary, EPA Form 8700–22A), or the electronic manifest, originated and signed in accordance with the applicable requirements of parts 262 through 265 of this chapter.

Manifest tracking number means: The alphanumeric identification number (i.e., a unique three letter suffix preceded by nine numerical digits), which is pre-printed in Item 4 of the Manifest by a registered source.

Mercury-containing equipment means a device or part of a device (including thermostats, but excluding batteries and lamps) that contains elemental mercury integral to its function.

Military munitions means all ammunition products and components produced or used by or for the U.S. Department of Defense or the U.S. Armed Services for national defense and security, including military munitions under the control of the Department of Defense, the U.S. Coast Guard, the U.S. Department of Energy (DOE), and National Guard personnel. The term military munitions includes: confined gaseous, liquid, and solid propellants, explosives, pyrotechnics, chemical and riot control agents, smokes, and incendiaries used by DOD components, including bulk explosives and chemical warfare agents, chemical munitions, rockets, guided and ballistic missiles, bombs, warheads, mortar rounds, artillery ammunition, small arms ammunition, grenades, mines, torpedoes, depth charges, cluster munitions and dispensers, demolition charges, and devices and components thereof. Military munitions do not include wholly inert items, improvised explosive devices, and nuclear weapons, nuclear devices, and nuclear components thereof. However, the term does include non-nuclear components of nuclear devices, managed under DOE's nuclear weapons program after all required sanitization operations under the Atomic Energy Act of 1954, as amended, have been completed.

Mining overburden returned to the mine site means any material overlying an economic mineral deposit which is removed to gain access to that deposit and is then used for reclamation of a surface mine.

Miscellaneous unit means a hazardous waste management unit where hazardous waste is treated, stored, or disposed of and that is not a container, tank, surface impoundment, pile, land treatment unit, landfill, incinerator, boiler, industrial furnace, underground injection well with appropriate technical standards under part 146 of this chapter, containment building, corrective action management unit, unit eligible for a research, development, and demonstration permit under 40 CFR 270.65, or staging pile.

Movement means that hazardous waste transported to a facility in an individual vehicle.

New hazardous waste management facility or new facility means a facility which began operation, or for which construction commenced after November 19, 1980. (See also “Existing hazardous waste management facility”.)

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New tank system or new tank component means a tank system or component that will be used for the storage or treatment of hazardous waste and for which installation has commenced after July 14, 1986; except, however, for purposes of § 264.193(g)(2) and § 265.193(g)(2), a new tank system is one for which construction commences after July 14, 1986. (See also "existing tank system.")

No free liquids, as used in 40 CFR 261.4(a)(26) and 40 CFR 261.4(b)(18), means that solvent-contaminated wipes may not contain free liquids as determined by Method 9095B (Paint Filter Liquids Test), included in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods" (EPA Publication SW–846), which is incorporated by reference, and that there is no free liquid in the container holding the wipes. No free liquids may also be determined using another standard or test method as defined by an authorized state.

On ground tank means a device meeting the definition of "tank" in § 260.10 and that is situated in such a way that the bottom of the tank is on the same level as the adjacent surrounding surface so that the external tank bottom cannot be visually inspected.

On-site means the same or geographically contiguous property which may be divided by public or private right-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing as opposed to going along, the right-of-way. Non-contiguous properties owned by the same person but connected by a right-of-way which he controls and to which the public does not have access, is also considered on-site property.

Open burning means the combustion of any material without the following characteristics:

(1) Control of combustion air to maintain adequate temperature for efficient combustion,

(2) Containment of the combustion-reaction in an enclosed device to provide sufficient residence time and mixing for complete combustion, and

(3) Control of emission of the gaseous combustion products.

(See also "incineration" and "thermal treatment".)

Operator means the person responsible for the overall operation of a facility.

Owner means the person who owns a facility or part of a facility.

Partial closure means the closure of a hazardous waste management unit in accordance with the applicable closure requirements of parts 264 and 265 of this chapter at a facility that contains other active hazardous waste management units. For example, partial closure may include the closure of a tank (including its associated piping and underlying containment systems), landfill cell, surface impoundment, waste pile, or other hazardous waste management unit, while other units of the same facility continue to operate.

Performance Track member facility means a facility that has been accepted by EPA for membership in the National Environmental Performance Track Program and is still a member of the Program. The National Environmental Performance Track Program is a voluntary, facility based, program for top environmental performers. Facility members must demonstrate a good record of compliance, past success in achieving environmental goals, and commit to future specific quantified environmental goals, environmental management systems, local community outreach, and annual reporting of measurable results.

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Person means an individual, trust, firm, joint stock company, Federal Agency, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body.

Personnel or facility personnel means all persons who work at, or oversee the operations of, a hazardous waste facility, and whose actions or failure to act may result in noncompliance with the requirements of part 264 or 265 of this chapter.

Pesticide means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, or intended for use as a plant regulator, defoliant, or desiccant, other than any article that:

(1) Is a new animal drug under FFDCA section 201(w), or

(2) Is an animal drug that has been determined by regulation of the Secretary of Health and Human Services not to be a new animal drug, or

(3) Is an animal feed under FFDCA section 201(x) that bears or contains any substances described by paragraph (1) or (2) of this definition.

Pile means any non-containerized accumulation of solid, nonflowing hazardous waste that is used for treatment or storage and that is not a containment building.

Plasma arc incinerator means any enclosed device using a high intensity electrical discharge or arc as a source of heat followed by an afterburner using controlled flame combustion and which is not listed as an industrial furnace.

Point source means any discernible, confined, and discrete conveyance, including, but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.

Publicly owned treatment works or POTW means any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a “State” or “municipality” (as defined by section 502(4) of the CWA). This definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment.

Qualified Ground–Water Scientist means a scientist or engineer who has received a baccalaureate or post-graduate degree in the natural sciences or engineering, and has sufficient training and experience in ground-water hydrology and related fields as may be demonstrated by state registration, professional certifications, or completion of accredited university courses that enable that individual to make sound professional judgements regarding ground-water monitoring and contaminant fate and transport.

Regional Administrator means the Regional Administrator for the EPA Region in which the facility is located, or his designee.

Remanufacturing means processing a higher-value hazardous secondary material in order to manufacture a product that serves a similar functional purpose as the original commercial-grade material. For the purpose of this definition, a hazardous secondary material is considered higher-value if it was generated from the use of a commercial-grade material in a manufacturing process and can be remanufactured into a similar commercial-grade material.

Remediation waste means all solid and hazardous wastes, and all media (including ground water, surface water, soils, and sediments) and debris, that are managed for implementing cleanup.

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Remediation waste management site means a facility where an owner or operator is or will be treating, storing or disposing of hazardous remediation wastes. A remediation waste management site is not a facility that is subject to corrective action under 40 CFR 264.101, but is subject to corrective action requirements if the site is located in such a facility.

Replacement unit means a landfill, surface impoundment, or waste pile unit (1) from which all or substantially all of the waste is removed, and (2) that is subsequently reused to treat, store, or dispose of hazardous waste. "Replacement unit" does not apply to a unit from which waste is removed during closure, if the subsequent reuse solely involves the disposal of waste from that unit and other closing units or corrective action areas at the facility, in accordance with an approved closure plan or EPA or State approved corrective action.

Representative sample means a sample of a universe or whole (e.g., waste pile, lagoon, ground water) which can be expected to exhibit the average properties of the universe or whole.

Run-off means any rainwater, leachate, or other liquid that drains over land from any part of a facility.

Run-on means any rainwater, leachate, or other liquid that drains over land onto any part of a facility.

Saturated zone or zone of saturation means that part of the earth's crust in which all voids are filled with water.

Sludge means any solid, semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility exclusive of the treated effluent from a wastewater treatment plant.

Sludge dryer means any enclosed thermal treatment device that is used to dehydrate sludge and that has a maximum total thermal input, excluding the heating value of the sludge itself, of 2,500 Btu/lb of sludge treated on a wet-weight basis.

Small Quantity Generator means a generator who generates less than 1000 kg of hazardous waste in a calendar month.

Solid waste means a solid waste as defined in § 261.2 of this chapter.

Solvent-contaminated wipe means—

(1) A wipe that, after use or after cleaning up a spill, either:

(i) Contains one or more of the F001 through F005 solvents listed in 40 CFR 261.31 or the corresponding P- or U- listed solvents found in 40 CFR 261.33;

(ii) Exhibits a hazardous characteristic found in 40 CFR part 261 subpart C when that characteristic results from a solvent listed in 40 CFR part 261; and/or

(iii) Exhibits only the hazardous waste characteristic of ignitability found in 40 CFR 261.21 due to the presence of one or more solvents that are not listed in 40 CFR part 261.

(2) Solvent-contaminated wipes that contain listed hazardous waste other than solvents, or exhibit the characteristic of toxicity, corrosivity, or reactivity due to contaminants other than solvents, are not eligible for the exclusions at 40 CFR 261.4(a)(26) and 40 CFR 261.4(b)(18).

Sorbent means a material that is used to soak up free liquids by either adsorption or absorption, or both. Sorb means to either adsorb or absorb, or both.

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Staging pile means an accumulation of solid, non-flowing remediation waste (as defined in this section) that is not a containment building and that is used only during remedial operations for temporary storage at a facility. Staging piles must be designated by the Director according to the requirements of 40 CFR 264.554.

State means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

Storage means the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed of, or stored elsewhere.

Sump means any pit or reservoir that meets the definition of tank and those troughs/trenches connected to it that serve to collect hazardous waste for transport to hazardous waste storage, treatment, or disposal facilities; except that as used in the landfill, surface impoundment, and waste pile rules, "sump" means any lined pit or reservoir that serves to collect liquids drained from a leachate collection and removal system or leak detection system for subsequent removal from the system.

Surface impoundment or impoundment means a facility or part of a facility which is a natural topographic depression, man-made excavation, or diked area formed primarily of earthen materials (although it may be lined with man-made materials), which is designed to hold an accumulation of liquid wastes or wastes containing free liquids, and which is not an injection well. Examples of surface impoundments are holding, storage, settling, and aeration pits, ponds, and lagoons.

Tank means a stationary device, designed to contain an accumulation of hazardous waste which is constructed primarily of non-earthen materials (e.g., wood, concrete, steel, plastic) which provide structural support.

Tank system means a hazardous waste storage or treatment tank and its associated ancillary equipment and containment system.

TEQ means toxicity equivalence, the international method of relating the toxicity of various dioxin/furan congeners to the toxicity of 2,3,7,8–tetrachlorodibenzo–p–dioxin.

Thermal treatment means the treatment of hazardous waste in a device which uses elevated temperatures as the primary means to change the chemical, physical, or biological character or composition of the hazardous waste. Examples of thermal treatment processes are incineration, molten salt, pyrolysis, calcination, wet air oxidation, and microwave discharge. (See also "incinerator" and "open burning".)

Thermostat means a temperature control device that contains metallic mercury in an ampule attached to a bimetal sensing element, and mercury-containing ampules that have been removed from these temperature control devices in compliance with the requirements of 40 CFR 273.13(c)(2) or 273.33(c)(2).

Totally enclosed treatment facility means a facility for the treatment of hazardous waste which is directly connected to an industrial production process and which is constructed and operated in a manner which prevents the release of any hazardous waste or any constituent thereof into the environment during treatment. An example is a pipe in which waste acid is neutralized.

Transfer facility means any transportation-related facility, including loading docks, parking areas, storage areas and other similar areas where shipments of hazardous waste or hazardous secondary materials are held during the normal course of transportation.

Transport vehicle means a motor vehicle or rail car used for the transportation of cargo by any mode. Each cargo-carrying body (trailer, railroad freight car, etc.) is a separate transport vehicle.

Transportation means the movement of hazardous waste by air, rail, highway, or water.

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Transporter means a person engaged in the offsite transportation of hazardous waste by air, rail, highway, or water.

Treatability Study means a study in which a hazardous waste is subjected to a treatment process to determine: (1) Whether the waste is amenable to the treatment process, (2) what pretreatment (if any) is required, (3) the optimal process conditions needed to achieve the desired treatment, (4) the efficiency of a treatment process for a specific waste or wastes, or (5) the characteristics and volumes of residuals from a particular treatment process. Also included in this definition for the purpose of the § 261.4 (e) and (f) exemptions are liner compatibility, corrosion, and other material compatibility studies and toxicological and health effects studies. A "treatability study" is not a means to commercially treat or dispose of hazardous waste.

Treatment means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste, or so as to recover energy or material resources from the waste, or so as to render such waste non-hazardous, or less hazardous; safer to transport, store, or dispose of; or amenable for recovery, amenable for storage, or reduced in volume.

Treatment zone means a soil area of the unsaturated zone of a land treatment unit within which hazardous constituents are degraded, transformed, or immobilized.

Underground injection means the subsurface emplacement of fluids through a bored, drilled or driven well; or through a dug well, where the depth of the dug well is greater than the largest surface dimension. (See also "injection well".)

Underground tank means a device meeting the definition of "tank" in § 260.10 whose entire surface area is totally below the surface of and covered by the ground.

Unfit-for use tank system means a tank system that has been determined through an integrity assessment or other inspection to be no longer capable of storing or treating hazardous waste without posing a threat of release of hazardous waste to the environment.

United States means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

Universal waste means any of the following hazardous wastes that are managed under the universal waste requirements of part 273 of this chapter:

(1) Batteries as described in § 273.2 of this chapter;

(2) Pesticides as described in § 273.3 of this chapter;

(3) Mercury-containing equipment as described in § 273.4 of this chapter; and

(4) Lamps as described in § 273.5 of this chapter.

Universal Waste Handler:

(1) Means:

(i) A generator (as defined in this section) of universal waste; or

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(ii) The owner or operator of a facility, including all contiguous property, that receives universal waste from other universal waste handlers, accumulates universal waste, and sends universal waste to another universal waste handler, to a destination facility, or to a foreign destination.

(2) Does not mean:

(i) A person who treats (except under the provisions of 40 CFR 273.13(a) or (c), or 273.33(a) or (c)), disposes of, or recycles universal waste; or

(ii) A person engaged in the off-site transportation of universal waste by air, rail, highway, or water, including a universal waste transfer facility.

Universal Waste Transporter means a person engaged in the off-site transportation of universal waste by air, rail, highway, or water.

Unsaturated zone or zone of aeration means the zone between the land surface and the water table.

Uppermost aquifer means the geologic formation nearest the natural ground surface that is an aquifer, as well as lower aquifers that are hydraulically interconnected with this aquifer within the facility's property boundary.

Used oil means any oil that has been refined from crude oil, or any synthetic oil, that has been used and as a result of such use is contaminated by physical or chemical impurities.

User of the electronic manifest system means a hazardous waste generator, a hazardous waste transporter, an owner or operator of a hazardous waste treatment, storage, recycling, or disposal facility, or any other person that:

(1) Is required to use a manifest to comply with:

(i) Any federal or state requirement to track the shipment, transportation, and receipt of hazardous waste or other waste material that is shipped from the site of generation to an off-site designated facility for treatment, storage, recycling, or disposal; or

(ii) Any federal or state requirement to track the shipment, transportation, and receipt of rejected wastes or regulated container residues that are shipped from a designated facility to an alternative facility, or returned to the generator; and

(2) Elects to use the system to obtain, complete and transmit an electronic manifest format supplied by the EPA electronic manifest system, or

(3) Elects to use the paper manifest form and submits to the system for data processing purposes a paper copy of the manifest (or data from such a paper copy), in accordance with § 264.71(a)(2)(v) or § 265.71(a)(2)(v) of this chapter. These paper copies are submitted for data exchange purposes only and are not the official copies of record for legal purposes.

Vessel includes every description of watercraft, used or capable of being used as a means of transportation on the water.

Wastewater treatment unit means a device which:

(1) Is part of a wastewater treatment facility that is subject to regulation under either section 402 or 307(b) of the Clean Water Act; and

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(2) Receives and treats or stores an influent wastewater that is a hazardous waste as defined in § 261.3 of this chapter, or that generates and accumulates a wastewater treatment sludge that is a hazardous waste as defined in § 261.3 of this chapter, or treats or stores a wastewater treatment sludge which is a hazardous waste as defined in § 261.3 of this Chapter; and

(3) Meets the definition of tank or tank system in § 260.10 of this chapter.

Water (bulk shipment) means the bulk transportation of hazardous waste which is loaded or carried on board a vessel without containers or labels.

Well means any shaft or pit dug or bored into the earth, generally of a cylindrical form, and often walled with bricks or tubing to prevent the earth from caving in.

Well injection: (See "underground injection".)

Wipe means a woven or non-woven shop towel, rag, pad, or swab made of wood pulp, fabric, cotton, polyester blends, or other material.

Zone of engineering control means an area under the control of the owner/operator that, upon detection of a hazardous waste release, can be readily cleaned up prior to the release of hazardous waste or hazardous constituents to ground water or surface water.

Credits

[45 FR 33073, May 19, 1980, as amended at 45 FR 72028, Oct. 30, 1980; 45 FR 76075, Nov. 17, 1980; 45 FR 76630, Nov. 19, 1980; 45 FR 86968, Dec. 31, 1980; 46 FR 2348, Jan. 9, 1981; 46 FR 27476, May 20, 1981; 47 FR 32349, July 26, 1982; 48 FR 2511, Jan. 16, 1983; 48 FR 14293, April 1, 1983; 49 FR 10500, March 20, 1984; 50 FR 661, Jan. 4, 1985; 51 FR 10174, March 24, 1986; 51 FR 16443, May 2, 1986; 51 FR 25471, July 14, 1986; 51 FR 40636, Nov. 7, 1986; 52 FR 46963, Dec. 10, 1987; 53 FR 27301, July 19, 1988; 53 FR 34086, Sept. 2, 1988; 55 FR 2353, Jan. 23, 1990; 55 FR 50482, Dec. 6, 1990; 56 FR 7206, Feb. 21, 1991; 56 FR 66368, Dec. 23, 1991; 57 FR 3486, Jan. 29, 1922; 57 FR 37263, Aug. 18, 1992; 57 FR 38564, Aug. 25, 1992; 57 FR 39275, Aug. 28, 1992; 57 FR 41173, Sept. 9, 1992; 57 FR 41611, Sept. 10, 1992; 57 FR 54460, Nov. 18, 1992; 58 FR 8682, Feb. 16, 1993; 60 FR 25540, May 11, 1995; 62 FR 6650, Feb. 12, 1997; 63 FR 65937, Nov. 30, 1998; 64 FR 36487, July 6, 1999; 64 FR 53070, Sept. 30, 1999; 67 FR 3024, Jan. 22, 2002; 70 FR 10814, March 4, 2005; 70 FR 45520, Aug. 5, 2005; 70 FR 53453, Sept. 8, 2005; 71 FR 16902, April 4, 2006; 71 FR 40258, July 14, 2006; 71 FR 42947, July 28, 2006; 73 FR 72, Jan. 2, 2008; 73 FR 64757, Oct. 30, 2008; 75 FR 13001, March 18, 2010; 78 FR 46484, July 31, 2013; 79 FR 363, Jan. 3, 2014; 79 FR 7558, Feb. 7, 2014; 79 FR 36230, June 26, 2014; 80 FR 1771, Jan. 13, 2015; 80 FR 18780, April 8, 2015]

SOURCE: 45 FR 33073, May 19, 1980; 50 FR 18374, April 30, 1985; 50 FR 28742, July 15, 1985; 51 FR 25471, July 14, 1986; 52 FR 41295, Oct. 27, 1987; 52 FR 46963, Dec. 10, 1987, unless otherwise noted.

AUTHORITY: 42 U.S.C. 6905, 6912(a), 6921 through 6927, 6930, 6934, 6935, 6937, 6938, 6939, and 6974.

Notes of Decisions (204)

Current through Dec. 3, 2015; 80 FR 75638.

End of Document

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Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter I. Solid Wastes
Part 260. Hazardous Waste Management System: General (Refs & Annos)
Subpart C. Rulemaking Petitions

40 C.F.R. § 260.42

§ 260.42 Notification requirement for hazardous secondary materials.

Effective: July 13, 2015
Currentness

(a) Facilities managing hazardous secondary materials under §§ 260.30, 261.4(a)(23), 261.4(a)(24), or 261.4(a)(27) must send a notification prior to operating under the regulatory provision and by March 1 of each even-numbered year thereafter to the Regional Administrator using EPA Form 8700–12 that includes the following information:

(1) The name, address, and EPA ID number (if applicable) of the facility;

(2) The name and telephone number of a contact person;

(3) The NAICS code of the facility;

(4) The regulation under which the hazardous secondary materials will be managed;

(5) When the facility began or expects to begin managing the hazardous secondary materials in accordance with the regulation;

(6) A list of hazardous secondary materials that will be managed according to the regulation (reported as the EPA hazardous waste numbers that would apply if the hazardous secondary materials were managed as hazardous wastes);

(7) For each hazardous secondary material, whether the hazardous secondary material, or any portion thereof, will be managed in a land-based unit;

(8) The quantity of each hazardous secondary material to be managed annually; and

(9) The certification (included in EPA Form 8700–12) signed and dated by an authorized representative of the facility.

(b) If a facility managing hazardous secondary materials has submitted a notification, but then subsequently stops managing hazardous secondary materials in accordance with the regulation(s) listed above, the facility must notify the Regional

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Administrator within thirty (30) days using EPA Form 8700–12. For purposes of this section, a facility has stopped managing hazardous secondary materials if the facility no longer generates, manages and/or reclaims hazardous secondary materials under the regulation(s) above and does not expect to manage any amount of hazardous secondary materials for at least 1 year.

Credits

[73 FR 64759, Oct. 30, 2008; 80 FR 1772, Jan. 13, 2015]

SOURCE: 45 FR 33073, May 19, 1980; 50 FR 18374, April 30, 1985; 50 FR 28742, July 15, 1985; 51 FR 25471, July 14, 1986; 52 FR 41295, Oct. 27, 1987; 52 FR 46963, Dec. 10, 1987, unless otherwise noted.

AUTHORITY: 42 U.S.C. 6905, 6912(a), 6921 through 6927, 6930, 6934, 6935, 6937, 6938, 6939, and 6974.

Current through Dec. 3, 2015; 80 FR 75638.

End of Document

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Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter I. Solid Wastes
Part 260. Hazardous Waste Management System: General (Refs & Annos)
Subpart C. Rulemaking Petitions

40 C.F.R. § 260.43

§ 260.43 Legitimate recycling of hazardous secondary materials.

Effective: July 13, 2015
Currentness

(a) Recycling of hazardous secondary materials for the purpose of the exclusions or exemptions from the hazardous waste regulations must be legitimate. Hazardous secondary material that is not legitimately recycled is discarded material and is a solid waste. In determining if their recycling is legitimate, persons must address all the requirements of this paragraph.

(1) Legitimate recycling must involve a hazardous secondary material that provides a useful contribution to the recycling process or to a product or intermediate of the recycling process. The hazardous secondary material provides a useful contribution if it:

(i) Contributes valuable ingredients to a product or intermediate; or

(ii) Replaces a catalyst or carrier in the recycling process; or

(iii) Is the source of a valuable constituent recovered in the recycling process; or

(iv) Is recovered or regenerated by the recycling process; or

(v) Is used as an effective substitute for a commercial product.

(2) The recycling process must produce a valuable product or intermediate. The product or intermediate is valuable if it is:

(i) Sold to a third party; or

(ii) Used by the recycler or the generator as an effective substitute for a commercial product or as an ingredient or intermediate in an industrial process.

(3) The generator and the recycler must manage the hazardous secondary material as a valuable commodity when it is under their control. Where there is an analogous raw material, the hazardous secondary material must be managed, at a

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minimum, in a manner consistent with the management of the raw material or in an equally protective manner. Where there is no analogous raw material, the hazardous secondary material must be contained. Hazardous secondary materials that are released to the environment and are not recovered immediately are discarded.

(4) The product of the recycling process must be comparable to a legitimate product or intermediate:

(i) Where there is an analogous product or intermediate, the product of the recycling process is comparable to a legitimate product or intermediate if:

(A) The product of the recycling process does not exhibit a hazardous characteristic (as defined in part 261 subpart C) that analogous products do not exhibit, and

(B) The concentrations of any hazardous constituents found in appendix VIII of part 261 of this chapter that are in the product or intermediate are at levels that are comparable to or lower than those found in analogous products or at levels that meet widely-recognized commodity standards and specifications, in the case where the commodity standards and specifications include levels that specifically address those hazardous constituents.

(ii) Where there is no analogous product, the product of the recycling process is comparable to a legitimate product or intermediate if:

(A) The product of the recycling process is a commodity that meets widely recognized commodity standards and specifications (e.g., commodity specification grades for common metals), or

(B) The hazardous secondary materials being recycled are returned to the original process or processes from which they were generated to be reused (e.g., closed loop recycling).

(iii) If the product of the recycling process has levels of hazardous constituents that are not comparable to or unable to be compared to a legitimate product or intermediate per paragraph (a)(4)(i) or (ii) of this section, the recycling still may be shown to be legitimate, if it meets the following specified requirements. The person performing the recycling must conduct the necessary assessment and prepare documentation showing why the recycling is, in fact, still legitimate. The recycling can be shown to be legitimate based on lack of exposure from toxics in the product, lack of the bioavailability of the toxics in the product, or other relevant considerations which show that the recycled product does not contain levels of hazardous constituents that pose a significant human health or environmental risk. The documentation must include a certification statement that the recycling is legitimate and must be maintained on-site for three years after the recycling operation has ceased. The person performing the recycling must notify the Regional Administrator of this activity using EPA Form 8700–12.

(b), (c) [Reserved by 80 FR 1772]

Credits

[73 FR 64759, Oct. 30, 2008; 80 FR 1772, Jan. 13, 2015]

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SOURCE: 45 FR 33073, May 19, 1980; 50 FR 18374, April 30, 1985; 50 FR 28742, July 15, 1985; 51 FR 25471, July 14, 1986; 52 FR 41295, Oct. 27, 1987; 52 FR 46963, Dec. 10, 1987, unless otherwise noted.

AUTHORITY: 42 U.S.C. 6905, 6912(a), 6921 through 6927, 6930, 6934, 6935, 6937, 6938, 6939, and 6974.

Current through Dec. 3, 2015; 80 FR 75638.

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KeyCite Yellow Flag - Negative Treatment
Proposed Regulation

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter I. Solid Wastes
Part 261. Identification and Listing of Hazardous Waste (Refs & Annos)
Subpart A. General

40 C.F.R. § 261.1

§ 261.1 Purpose and scope.

Effective: July 13, 2015
Currentness

(a) This part identifies those solid wastes which are subject to regulation as hazardous wastes under parts 262 through 265, 268, and parts 270, 271, and 124 of this chapter and which are subject to the notification requirements of section 3010 of RCRA. In this part:

(1) Subpart A defines the terms "solid waste" and "hazardous waste", identifies those wastes which are excluded from regulation under parts 262 through 266, 268 and 270 and establishes special management requirements for hazardous waste produced by conditionally exempt small quantity generators and hazardous waste which is recycled.

(2) Subpart B sets forth the criteria used by EPA to identify characteristics of hazardous waste and to list particular hazardous wastes.

(3) Subpart C identifies characteristics of hazardous waste.

(4) Subpart D lists particular hazardous wastes.

(b)(1) The definition of solid waste contained in this part applies only to wastes that also are hazardous for purposes of the regulations implementing subtitle C of RCRA. For example, it does not apply to materials (such as non-hazardous scrap, paper, textiles, or rubber) that are not otherwise hazardous wastes and that are recycled.

(2) This part identifies only some of the materials which are solid wastes and hazardous wastes under sections 3007, 3013, and 7003 of RCRA. A material which is not defined as a solid waste in this part, or is not a hazardous waste identified or listed in this part, is still a solid waste and a hazardous waste for purposes of these sections if:

(i) In the case of sections 3007 and 3013, EPA has reason to believe that the material may be a solid waste within the meaning of section 1004(27) of RCRA and a hazardous waste within the meaning of section 1004(5) of RCRA; or

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(ii) In the case of section 7003, the statutory elements are established.

(c) For the purposes of §§ 261.2 and 261.6:

(1) A "spent material" is any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing;

(2) "Sludge" has the same meaning used in § 260.10 of this chapter;

(3) A "by-product" is a material that is not one of the primary products of a production process and is not solely or separately produced by the production process. Examples are process residues such as slags or distillation column bottoms. The term does not include a co-product that is produced for the general public's use and is ordinarily used in the form it is produced by the process.

(4) A material is "reclaimed" if it is processed to recover a usable product, or if it is regenerated. Examples are recovery of lead values from spent batteries and regeneration of spent solvents. In addition, for purposes of § 261.4(a)(23) and (24), smelting, melting, and refining furnaces are considered to be solely engaged in metals reclamation if the metal recovery from the hazardous secondary materials meets the same requirements as those specified for metals recovery from hazardous waste found in § 266.100(d)(1) through (3) of this chapter, and if the residuals meet the requirements specified in § 266.112 of this chapter.

(5) A material is "used or reused" if it is either:

(i) Employed as an ingredient (including use as an intermediate) in an industrial process to make a product (for example, distillation bottoms from one process used as feedstock in another process). However, a material will not satisfy this condition if distinct components of the material are recovered as separate end products (as when metals are recovered from metal-containing secondary materials); or

(ii) Employed in a particular function or application as an effective substitute for a commercial product (for example, spent pickle liquor used as phosphorous precipitant and sludge conditioner in wastewater treatment).

(6) "Scrap metal" is bits and pieces of metal parts (e.g.,) bars, turnings, rods, sheets, wire) or metal pieces that may be combined together with bolts or soldering (e.g., radiators, scrap automobiles, railroad box cars), which when worn or superfluous can be recycled.

(7) A material is "recycled" if it is used, reused, or reclaimed.

(8) A material is "accumulated speculatively" if it is accumulated before being recycled. A material is not accumulated speculatively, however, if the person accumulating it can show that the material is potentially recyclable and has a feasible means of being recycled; and that—during the calendar year (commencing on January 1)—the amount of material that is recycled, or transferred to a different site for recycling, equals at least 75 percent by weight or volume of the amount

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of that material accumulated at the beginning of the period. Materials must be placed in a storage unit with a label indicating the first date that the material began to be accumulated. If placing a label on the storage unit is not practicable, the accumulation period must be documented through an inventory log or other appropriate method. In calculating the percentage of turnover, the 75 percent requirement is to be applied to each material of the same type (e.g., slags from a single smelting process) that is recycled in the same way (i.e., from which the same material is recovered or that is used in the same way). Materials accumulating in units that would be exempt from regulation under § 261.4(c) are not to be included in making the calculation. Materials that are already defined as solid wastes also are not to be included in making the calculation. Materials are no longer in this category once they are removed from accumulation for recycling, however.

(9) "Excluded scrap metal" is processed scrap metal, unprocessed home scrap metal, and unprocessed prompt scrap metal.

(10) "Processed scrap metal" is scrap metal which has been manually or physically altered to either separate it into distinct materials to enhance economic value or to improve the handling of materials. Processed scrap metal includes, but is not limited to scrap metal which has been baled, shredded, sheared, chopped, crushed, flattened, cut, melted, or separated by metal type (i.e., sorted), and, fines, drosses and related materials which have been agglomerated. (Note: shredded circuit boards being sent for recycling are not considered processed scrap metal. They are covered under the exclusion from the definition of solid waste for shredded circuit boards being recycled (§ 261.4(a)(14)).

(11) "Home scrap metal" is scrap metal as generated by steel mills, foundries, and refineries such as turnings, cuttings, punchings, and borings.

(12) "Prompt scrap metal" is scrap metal as generated by the metal working/fabrication industries and includes such scrap metal as turnings, cuttings, punchings, and borings. Prompt scrap is also known as industrial or new scrap metal.

Credits

[45 FR 33119, May 19, 1980, as amended at 48 FR 14293, April 1, 1983; 50 FR 663, Jan. 4, 1985; 51 FR 10174, March 24, 1986; 51 FR 40636, Nov. 1, 1986; 62 FR 26018, May 12, 1997; 73 FR 64760, Oct. 30, 2008; 75 FR 13001, March 18, 2010; 80 FR 1773, Jan. 13, 2015]

SOURCE: 45 FR 33119, May 19, 1980; 51 FR 28682, Aug. 8, 1986; 51 FR 46668, Dec. 24, 1986; 52 FR 28698, Aug. 3, 1987; 53 FR 27163, 27301, July 19, 1988; 54 FR 4021, Jan. 27, 1989; 62 FR 6651, Feb. 12, 1997, unless otherwise noted.

AUTHORITY: 42 U.S.C. 6905, 6912(a), 6921, 6922, 6924(y), and 6938.

Notes of Decisions (118)

Current through Dec. 3, 2015; 80 FR 75638.

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KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or Preempted **Held Invalid** Sierra Club v. E.P.A., D.C.Cir., June 27, 2014

KeyCite Yellow Flag - Negative Treatment Proposed Regulation

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter I. Solid Wastes
Part 261. Identification and Listing of Hazardous Waste (Refs & Annos)
Subpart A. General

40 C.F.R. § 261.4

§ 261.4 Exclusions.

Effective: October 19, 2015
Currentness

<For statute(s) affecting validity, see: Solid Waste Disposal Act, § 3004(q), 42 USCA § 6924(q).>

(a) Materials which are not solid wastes. The following materials are not solid wastes for the purpose of this part:

(1)(i) Domestic sewage; and

(ii) Any mixture of domestic sewage and other wastes that passes through a sewer system to a publicly-owned treatment works for treatment. "Domestic sewage" means untreated sanitary wastes that pass through a sewer system.

(2) Industrial wastewater discharges that are point source discharges subject to regulation under section 402 of the Clean Water Act, as amended.

[Comment: This exclusion applies only to the actual point source discharge. It does not exclude industrial wastewaters while they are being collected, stored or treated before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment.]

(3) Irrigation return flows.

(4) Source, special nuclear or by-product material as defined by the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 et seq.

(5) Materials subjected to in-situ mining techniques which are not removed from the ground as part of the extraction process.

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(6) Pulping liquors (i.e., black liquor) that are reclaimed in a pulping liquor recovery furnace and then reused in the pulping process, unless it is accumulated speculatively as defined in § 261.1(c) of this chapter.

(7) Spent sulfuric acid used to produce virgin sulfuric acid, unless it is accumulated speculatively as defined in § 261.1(c) of this chapter.

(8) Secondary materials that are reclaimed and returned to the original process or processes in which they were generated where they are reused in the production process provided:

(i) Only tank storage is involved, and the entire process through completion of reclamation is closed by being entirely connected with pipes or other comparable enclosed means of conveyance;

(ii) Reclamation does not involve controlled flame combustion (such as occurs in boilers, industrial furnaces, or incinerators);

(iii) The secondary materials are never accumulated in such tanks for over twelve months without being reclaimed; and

(iv) The reclaimed material is not used to produce a fuel, or used to produce products that are used in a manner constituting disposal.

(9)(i) Spent wood preserving solutions that have been reclaimed and are reused for their original intended purpose; and

(ii) Wastewaters from the wood preserving process that have been reclaimed and are reused to treat wood.

(iii) Prior to reuse, the wood preserving wastewaters and spent wood preserving solutions described in paragraphs (a)(9)(i) and (a)(9)(ii) of this section, so long as they meet all of the following conditions:

(A) The wood preserving wastewaters and spent wood preserving solutions are reused on-site at water borne plants in the production process for their original intended purpose;

(B) Prior to reuse, the wastewaters and spent wood preserving solutions are managed to prevent release to either land or groundwater or both;

(C) Any unit used to manage wastewaters and/or spent wood preserving solutions prior to reuse can be visually or otherwise determined to prevent such releases;

(D) Any drip pad used to manage the wastewaters and/or spent wood preserving solutions prior to reuse complies with the standards in part 265, subpart W of this chapter, regardless of whether the plant generates a total of less than 100 kg/month of hazardous waste; and

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(E) Prior to operating pursuant to this exclusion, the plant owner or operator prepares a one-time notification stating that the plant intends to claim the exclusion, giving the date on which the plant intends to begin operating under the exclusion, and containing the following language: "I have read the applicable regulation establishing an exclusion for wood preserving wastewaters and spent wood preserving solutions and understand it requires me to comply at all times with the conditions set out in the regulation." The plant must maintain a copy of that document in its on-site records until closure of the facility. The exclusion applies so long as the plant meets all of the conditions. If the plant goes out of compliance with any condition, it may apply to the appropriate Regional Administrator or state Director for reinstatement. The Regional Administrator or state Director may reinstate the exclusion upon finding that the plant has returned to compliance with all conditions and that the violations are not likely to recur.

(10) EPA Hazardous Waste Nos. K060, K087, K141, K142, K143, K144, K145, K147, and K148, and any wastes from the coke by-products processes that are hazardous only because they exhibit the Toxicity Characteristic (TC) specified in section 261.24 of this part when, subsequent to generation, these materials are recycled to coke ovens, to the tar recovery process as a feedstock to produce coal tar, or mixed with coal tar prior to the tar's sale or refining. This exclusion is conditioned on there being no land disposal of the wastes from the point they are generated to the point they are recycled to coke ovens or tar recovery or refining processes, or mixed with coal tar.

(11) Nonwastewater splash condenser dross residue from the treatment of K061 in high temperature metals recovery units, provided it is shipped in drums (if shipped) and not land disposed before recovery.

(12)(i) Oil-bearing hazardous secondary materials (i.e., sludges, byproducts, or spent materials) that are generated at a petroleum refinery (SIC code 2911) and are inserted into the petroleum refining process (SIC code 2911—including, but not limited to, distillation, catalytic cracking, fractionation, or thermal cracking units (i.e., cokers)) unless the material is placed on the land, or speculatively accumulated before being so recycled. Materials inserted into thermal cracking units are excluded under this paragraph, provided that the coke product also does not exhibit a characteristic of hazardous waste. Oil-bearing hazardous secondary materials may be inserted into the same petroleum refinery where they are generated, or sent directly to another petroleum refinery and still be excluded under this provision. Except as provided in paragraph (a)(12)(ii) of this section, oil-bearing hazardous secondary materials generated elsewhere in the petroleum industry (i.e., from sources other than petroleum refineries) are not excluded under this section. Residuals generated from processing or recycling materials excluded under this paragraph (a)(12)(i), where such materials as generated would have otherwise met a listing under subpart D of this part, are designated as F037 listed wastes when disposed of or intended for disposal.

(ii) Recovered oil that is recycled in the same manner and with the same conditions as described in paragraph (a)(12)(i) of this section. Recovered oil is oil that has been reclaimed from secondary materials (including wastewater) generated from normal petroleum industry practices, including refining, exploration and production, bulk storage, and transportation incident thereto (SIC codes 1311, 1321, 1381, 1382, 1389, 2911, 4612, 4613, 4922, 4923, 4789, 5171, and 5172.) Recovered oil does not include oil-bearing hazardous wastes listed in subpart D of this part; however, oil recovered from such wastes may be considered recovered oil. Recovered oil does not include used oil as defined in 40 CFR 279.1.

(13) Excluded scrap metal (processed scrap metal, unprocessed home scrap metal, and unprocessed prompt scrap metal) being recycled.

(14) Shredded circuit boards being recycled provided that they are:

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(i) Stored in containers sufficient to prevent a release to the environment prior to recovery; and

(ii) Free of mercury switches, mercury relays and nickel-cadmium batteries and lithium batteries.

(15) Condensates derived from the overhead gases from kraft mill steam strippers that are used to comply with 40 CFR 63.446(e). The exemption applies only to combustion at the mill generating the condensates.

(16) [Reserved by 80 FR 18780]

(17) Spent materials (as defined in § 261.1) (other than hazardous wastes listed in subpart D of this part) generated within the primary mineral processing industry from which minerals, acids, cyanide, water, or other values are recovered by mineral processing or by beneficiation, provided that:

(i) The spent material is legitimately recycled to recover minerals, acids, cyanide, water or other values;

(ii) The spent material is not accumulated speculatively;

(iii) Except as provided in paragraph (a)(17)(iv) of this section, the spent material is stored in tanks, containers, or buildings meeting the following minimum integrity standards: a building must be an engineered structure with a floor, walls, and a roof all of which are made of non-earthen materials providing structural support (except smelter buildings may have partially earthen floors provided the secondary material is stored on the non-earthen portion), and have a roof suitable for diverting rainwater away from the foundation; a tank must be free standing, not be a surface impoundment (as defined in 40 CFR 260.10), and be manufactured of a material suitable for containment of its contents; a container must be free standing and be manufactured of a material suitable for containment of its contents. If tanks or containers contain any particulate which may be subject to wind dispersal, the owner/operator must operate these units in a manner which controls fugitive dust. Tanks, containers, and buildings must be designed, constructed and operated to prevent significant releases to the environment of these materials.

(iv) The Regional Administrator or State Director may make a site-specific determination, after public review and comment, that only solid mineral processing spent material may be placed on pads rather than tanks containers, or buildings. Solid mineral processing spent materials do not contain any free liquid. The decision-maker must affirm that pads are designed, constructed and operated to prevent significant releases of the secondary material into the environment. Pads must provide the same degree of containment afforded by the non-RCRA tanks, containers and buildings eligible for exclusion.

(A) The decision-maker must also consider if storage on pads poses the potential for significant releases via groundwater, surface water, and air exposure pathways. Factors to be considered for assessing the groundwater, surface water, air exposure pathways are: The volume and physical and chemical properties of the secondary material, including its potential for migration off the pad; the potential for human or environmental exposure to hazardous constituents migrating from the pad via each exposure pathway, and the possibility and extent of harm to human and environmental receptors via each exposure pathway.

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(B) Pads must meet the following minimum standards: Be designed of non-earthen material that is compatible with the chemical nature of the mineral processing spent material, capable of withstanding physical stresses associated with placement and removal, have run on/runoff controls, be operated in a manner which controls fugitive dust, and have integrity assurance through inspections and maintenance programs.

(C) Before making a determination under this paragraph, the Regional Administrator or State Director must provide notice and the opportunity for comment to all persons potentially interested in the determination. This can be accomplished by placing notice of this action in major local newspapers, or broadcasting notice over local radio stations.

(v) The owner or operator provides notice to the Regional Administrator or State Director providing the following information: The types of materials to be recycled; the type and location of the storage units and recycling processes; and the annual quantities expected to be placed in land-based units. This notification must be updated when there is a change in the type of materials recycled or the location of the recycling process.

(vi) For purposes of paragraph (b)(7) of this section, mineral processing spent materials must be the result of mineral processing and may not include any listed hazardous wastes. Listed hazardous wastes and characteristic hazardous wastes generated by non-mineral processing industries are not eligible for the conditional exclusion from the definition of solid waste.

(18) Petrochemical recovered oil from an associated organic chemical manufacturing facility, where the oil is to be inserted into the petroleum refining process (SIC code 2911) along with normal petroleum refinery process streams, provided:

(i) The oil is hazardous only because it exhibits the characteristic of ignitability (as defined in § 261.21) and/or toxicity for benzene (§ 261.24, waste code D018); and

(ii) The oil generated by the organic chemical manufacturing facility is not placed on the land, or speculatively accumulated before being recycled into the petroleum refining process. An "associated organic chemical manufacturing facility" is a facility where the primary SIC code is 2869, but where operations may also include SIC codes 2821, 2822, and 2865; and is physically co-located with a petroleum refinery; and where the petroleum refinery to which the oil being recycled is returned also provides hydrocarbon feedstocks to the organic chemical manufacturing facility. "Petrochemical recovered oil" is oil that has been reclaimed from secondary materials (i.e., sludges, byproducts, or spent materials, including wastewater) from normal organic chemical manufacturing operations, as well as oil recovered from organic chemical manufacturing processes.

(19) Spent caustic solutions from petroleum refining liquid treating processes used as a feedstock to produce cresylic or naphthenic acid unless the material is placed on the land, or accumulated speculatively as defined in § 261.1(c).

(20) Hazardous secondary materials used to make zinc fertilizers, provided that the following conditions specified are satisfied:

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(i) Hazardous secondary materials used to make zinc micronutrient fertilizers must not be accumulated speculatively, as defined in § 261.1(c)(8).

(ii) Generators and intermediate handlers of zinc-bearing hazardous secondary materials that are to be incorporated into zinc fertilizers must:

(A) Submit a one-time notice to the Regional Administrator or State Director in whose jurisdiction the exclusion is being claimed, which contains the name, address and EPA ID number of the generator or intermediate handler facility, provides a brief description of the secondary material that will be subject to the exclusion, and identifies when the manufacturer intends to begin managing excluded, zinc-bearing hazardous secondary materials under the conditions specified in this paragraph (a)(20).

(B) Store the excluded secondary material in tanks, containers, or buildings that are constructed and maintained in a way that prevents releases of the secondary materials into the environment. At a minimum, any building used for this purpose must be an engineered structure made of non-earthen materials that provide structural support, and must have a floor, walls and a roof that prevent wind dispersal and contact with rainwater. Tanks used for this purpose must be structurally sound and, if outdoors, must have roofs or covers that prevent contact with wind and rain. Containers used for this purpose must be kept closed except when it is necessary to add or remove material, and must be in sound condition. Containers that are stored outdoors must be managed within storage areas that:

(1) Have containment structures or systems sufficiently impervious to contain leaks, spills and accumulated precipitation; and

(2) Provide for effective drainage and removal of leaks, spills and accumulated precipitation; and

(3) Prevent run-on into the containment system.

(C) With each off-site shipment of excluded hazardous secondary materials, provide written notice to the receiving facility that the material is subject to the conditions of this paragraph (a)(20).

(D) Maintain at the generator's or intermediate handlers's facility for no less than three years records of all shipments of excluded hazardous secondary materials. For each shipment these records must at a minimum contain the following information:

(1) Name of the transporter and date of the shipment;

(2) Name and address of the facility that received the excluded material, and documentation confirming receipt of the shipment; and

(3) Type and quantity of excluded secondary material in each shipment.

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(iii) Manufacturers of zinc fertilizers or zinc fertilizer ingredients made from excluded hazardous secondary materials must:

(A) Store excluded hazardous secondary materials in accordance with the storage requirements for generators and intermediate handlers, as specified in paragraph (a)(20)(ii)(B) of this section.

(B) Submit a one-time notification to the Regional Administrator or State Director that, at a minimum, specifies the name, address and EPA ID number of the manufacturing facility, and identifies when the manufacturer intends to begin managing excluded, zinc-bearing hazardous secondary materials under the conditions specified in this paragraph (a)(20).

(C) Maintain for a minimum of three years records of all shipments of excluded hazardous secondary materials received by the manufacturer, which must at a minimum identify for each shipment the name and address of the generating facility, name of transporter and date the materials were received, the quantity received, and a brief description of the industrial process that generated the material.

(D) Submit to the Regional Administrator or State Director an annual report that identifies the total quantities of all excluded hazardous secondary materials that were used to manufacture zinc fertilizers or zinc fertilizer ingredients in the previous year, the name and address of each generating facility, and the industrial process(s) from which they were generated.

(iv) Nothing in this section preempts, overrides or otherwise negates the provision in § 262.11 of this chapter, which requires any person who generates a solid waste to determine if that waste is a hazardous waste.

(v) Interim status and permitted storage units that have been used to store only zinc-bearing hazardous wastes prior to the submission of the one-time notice described in paragraph (a)(20)(ii)(A) of this section, and that afterward will be used only to store hazardous secondary materials excluded under this paragraph, are not subject to the closure requirements of 40 CFR Parts 264 and 265.

(21) Zinc fertilizers made from hazardous wastes, or hazardous secondary materials that are excluded under paragraph (a)(20) of this section, provided that:

(i) The fertilizers meet the following contaminant limits:

(A) For metal contaminants:

Constituent	Maximum Allowable Total Concentration in Fertilizer, per Unit (1%) of Zinc (ppm)
Arsenic	0.3
Cadmium	1.4

Chromium	0.6
Lead	2.8
Mercury	0.3

(B) For dioxin contaminants the fertilizer must contain no more than eight (8) parts per trillion of dioxin, measured as toxic equivalent (TEQ).

(ii) The manufacturer performs sampling and analysis of the fertilizer product to determine compliance with the contaminant limits for metals no less than every six months, and for dioxins no less than every twelve months. Testing must also be performed whenever changes occur to manufacturing processes or ingredients that could significantly affect the amounts of contaminants in the fertilizer product. The manufacturer may use any reliable analytical method to demonstrate that no constituent of concern is present in the product at concentrations above the applicable limits. It is the responsibility of the manufacturer to ensure that the sampling and analysis are unbiased, precise, and representative of the product(s) introduced into commerce.

(iii) The manufacturer maintains for no less than three years records of all sampling and analyses performed for purposes of determining compliance with the requirements of paragraph (a)(21)(ii) of this section. Such records must at a minimum include:

(A) The dates and times product samples were taken, and the dates the samples were analyzed;

(B) The names and qualifications of the person(s) taking the samples;

(C) A description of the methods and equipment used to take the samples;

(D) The name and address of the laboratory facility at which analyses of the samples were performed;

(E) A description of the analytical methods used, including any cleanup and sample preparation methods; and

(F) All laboratory analytical results used to determine compliance with the contaminant limits specified in this paragraph (a)(21).

(22) Used cathode ray tubes (CRTs)

(i) Used, intact CRTs as defined in § 260.10 of this chapter are not solid wastes within the United States unless they are disposed, or unless they are speculatively accumulated as defined in § 261.1(c)(8) by CRT collectors or glass processors.

(ii) Used, intact CRTs as defined in § 260.10 of this chapter are not solid wastes when exported for recycling provided that they meet the requirements of § 261.40.

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(iii) Used, broken CRTs as defined in § 260.10 of this chapter are not solid wastes provided that they meet the requirements of § 261.39.

(iv) Glass removed from CRTs is not a solid waste provided that it meets the requirements of § 261.39(c).

(23) Hazardous secondary material generated and legitimately reclaimed within the United States or its territories and under the control of the generator, provided that the material complies with paragraphs (a)(23)(i) and (ii) of this section:

(i)(A) The hazardous secondary material is generated and reclaimed at the generating facility (for purposes of this definition, generating facility means all contiguous property owned, leased, or otherwise controlled by the hazardous secondary material generator); or

(B) The hazardous secondary material is generated and reclaimed at different facilities, if the reclaiming facility is controlled by the generator or if both the generating facility and the reclaiming facility are controlled by a person as defined in § 260.10 of this chapter, and if the generator provides one of the following certifications: "on behalf of [insert generator facility name], I certify that this facility will send the indicated hazardous secondary material to [insert reclaimer facility name], which is controlled by [insert generator facility name] and that [insert name of either facility] has acknowledged full responsibility for the safe management of the hazardous secondary material," or "on behalf of [insert generator facility name], I certify that this facility will send the indicated hazardous secondary material to [insert reclaimer facility name], that both facilities are under common control, and that [insert name of either facility] has acknowledged full responsibility for the safe management of the hazardous secondary material." For purposes of this paragraph, "control" means the power to direct the policies of the facility, whether by the ownership of stock, voting rights, or otherwise, except that contractors who operate facilities on behalf of a different person as defined in § 260.10 shall not be deemed to "control" such facilities. The generating and receiving facilities must both maintain at their facilities for no less than three years records of hazardous secondary materials sent or received under this exclusion. In both cases, the records must contain the name of the transporter, the date of the shipment, and the type and quantity of the hazardous secondary material shipped or received under the exclusion. These requirements may be satisfied by routine business records (e.g., financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations); or

(C) The hazardous secondary material is generated pursuant to a written contract between a tolling contractor and a toll manufacturer and is reclaimed by the tolling contractor, if the tolling contractor certifies the following: "On behalf of [insert tolling contractor name], I certify that [insert tolling contractor name] has a written contract with [insert toll manufacturer name] to manufacture [insert name of product or intermediate] which is made from specified unused materials, and that [insert tolling contractor name] will reclaim the hazardous secondary materials generated during this manufacture. On behalf of [insert tolling contractor name], I also certify that [insert tolling contractor name] retains ownership of, and responsibility for, the hazardous secondary materials that are generated during the course of the manufacture, including any releases of hazardous secondary materials that occur during the manufacturing process". The tolling contractor must maintain at its facility for no less than three years records of hazardous secondary materials received pursuant to its written contract with the tolling manufacturer, and the tolling manufacturer must maintain at its facility for no less than three years records of hazardous secondary materials shipped pursuant to its written contract with the tolling contractor. In both cases, the records must contain the name of the transporter, the date of the shipment, and the type and quantity of the hazardous secondary material shipped or received pursuant to the written contract. These requirements may be satisfied by routine business records (e.g., financial records, bills of

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lading, copies of DOT shipping papers, or electronic confirmations). For purposes of this paragraph, tolling contractor means a person who arranges for the production of a product or intermediate made from specified unused materials through a written contract with a toll manufacturer. Toll manufacturer means a person who produces a product or intermediate made from specified unused materials pursuant to a written contract with a tolling contractor.

(ii)(A) The hazardous secondary material is contained as defined in § 260.10 of this chapter. A hazardous secondary material released to the environment is discarded and a solid waste unless it is immediately recovered for the purpose of reclamation. Hazardous secondary material managed in a unit with leaks or other continuing or intermittent unpermitted releases is discarded and a solid waste.

(B) The hazardous secondary material is not speculatively accumulated, as defined in § 261.1(c)(8).

(C) Notice is provided as required by § 260.42 of this chapter.

(D) The material is not otherwise subject to material-specific management conditions under paragraph (a) of this section when reclaimed, and it is not a spent lead-acid battery (see § 266.80 and § 273.2 of this chapter).

(E) Persons performing the recycling of hazardous secondary materials under this exclusion must maintain documentation of their legitimacy determination on-site. Documentation must be a written description of how the recycling meets all four factors in § 260.43(a). Documentation must be maintained for three years after the recycling operation has ceased.

(F) The emergency preparedness and response requirements found in subpart M of this part are met.

(24) Hazardous secondary material that is generated and then transferred to a verified reclamation facility for the purpose of reclamation is not a solid waste, provided that:

(i) The material is not speculatively accumulated, as defined in § 261.1(c)(8);

(ii) The material is not handled by any person or facility other than the hazardous secondary material generator, the transporter, an intermediate facility or a reclaimer, and, while in transport, is not stored for more than 10 days at a transfer facility, as defined in § 260.10 of this chapter, and is packaged according to applicable Department of Transportation regulations at 49 CFR parts 173, 178, and 179 while in transport;

(iii) The material is not otherwise subject to material-specific management conditions under this paragraph (a) when reclaimed, and it is not a spent lead-acid battery (see §§ 266.80 and 273.2 of this chapter);

(iv) The reclamation of the material is legitimate, as specified under § 260.43 of this chapter;

(v) The hazardous secondary material generator satisfies all of the following conditions:

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(A) The material must be contained as defined in § 260.10. A hazardous secondary material released to the environment is discarded and a solid waste unless it is immediately recovered for the purpose of recycling. Hazardous secondary material managed in a unit with leaks or other continuing releases is discarded and a solid waste.

(B) The hazardous secondary material generator must arrange for transport of hazardous secondary materials to a verified reclamation facility (or facilities) in the United States. A verified reclamation facility is a facility that has been granted a variance under § 260.31(d), or a reclamation facility where the management of the hazardous secondary materials is addressed under a RCRA Part B permit or interim status standards. If the hazardous secondary material will be passing through an intermediate facility, the intermediate facility must have been granted a variance under § 260.31(d) or the management of the hazardous secondary materials at that facility must be addressed under a RCRA Part B permit or interim status standards, and the hazardous secondary material generator must make contractual arrangements with the intermediate facility to ensure that the hazardous secondary material is sent to the reclamation facility identified by the hazardous secondary material generator.

(C) The hazardous secondary material generator must maintain at the generating facility for no less than three (3) years records of all off-site shipments of hazardous secondary materials. For each shipment, these records must, at a minimum, contain the following information:

(1) Name of the transporter and date of the shipment;

(2) Name and address of each reclaimer and, if applicable, the name and address of each intermediate facility to which the hazardous secondary material was sent;

(3) The type and quantity of hazardous secondary material in the shipment.

(D) The hazardous secondary material generator must maintain at the generating facility for no less than three (3) years confirmations of receipt from each reclaimer and, if applicable, each intermediate facility for all off-site shipments of hazardous secondary materials. Confirmations of receipt must include the name and address of the reclaimer (or intermediate facility), the type and quantity of the hazardous secondary materials received and the date which the hazardous secondary materials were received. This requirement may be satisfied by routine business records (e.g., financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations of receipt);

(E) The hazardous secondary material generator must comply with the emergency preparedness and response conditions in subpart M of this part.

(vi) Reclaimers of hazardous secondary material excluded from regulation under this exclusion and intermediate facilities as defined in § 260.10 of this chapter satisfy all of the following conditions:

(A) The reclaimer and intermediate facility must maintain at its facility for no less than three (3) years records of all shipments of hazardous secondary material that were received at the facility and, if applicable, for all shipments of hazardous secondary materials that were received and subsequently sent off-site from the facility for further reclamation. For each shipment, these records must at a minimum contain the following information:

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(1) Name of the transporter and date of the shipment;

(2) Name and address of the hazardous secondary material generator and, if applicable, the name and address of the reclaimer or intermediate facility which the hazardous secondary materials were received from;

(3) The type and quantity of hazardous secondary material in the shipment; and

(4) For hazardous secondary materials that, after being received by the reclaimer or intermediate facility, were subsequently transferred off-site for further reclamation, the name and address of the (subsequent) reclaimer and, if applicable, the name and address of each intermediate facility to which the hazardous secondary material was sent.

(B) The intermediate facility must send the hazardous secondary material to the reclaimer(s) designated by the hazardous secondary materials generator.

(C) The reclaimer and intermediate facility must send to the hazardous secondary material generator confirmations of receipt for all off-site shipments of hazardous secondary materials. Confirmations of receipt must include the name and address of the reclaimer (or intermediate facility), the type and quantity of the hazardous secondary materials received and the date which the hazardous secondary materials were received. This requirement may be satisfied by routine business records (e.g., financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations of receipt).

(D) The reclaimer and intermediate facility must manage the hazardous secondary material in a manner that is at least as protective as that employed for analogous raw material and must be contained. An "analogous raw material" is a raw material for which a hazardous secondary material is a substitute and serves the same function and has similar physical and chemical properties as the hazardous secondary material.

(E) Any residuals that are generated from reclamation processes will be managed in a manner that is protective of human health and the environment. If any residuals exhibit a hazardous characteristic according to subpart C of 40 CFR part 261, or if they themselves are specifically listed in subpart D of 40 CFR part 261, such residuals are hazardous wastes and must be managed in accordance with the applicable requirements of 40 CFR parts 260 through 272.

(F) The reclaimer and intermediate facility have financial assurance as required under subpart H of 40 CFR part 261,

(G) The reclaimer and intermediate facility have been granted a variance under § 260.31(d) or have a RCRA Part B permit or interim status standards that address the management of the hazardous secondary materials; and

(vii) All persons claiming the exclusion under this paragraph (a)(24) of this section provide notification as required under § 260.42 of this chapter.

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(25) [Reserved by 80 FR 1774]

(26) Solvent-contaminated wipes that are sent for cleaning and reuse are not solid wastes from the point of generation, provided that

(i) The solvent-contaminated wipes, when accumulated, stored, and transported, are contained in non-leaking, closed containers that are labeled "Excluded Solvent–Contaminated Wipes." The containers must be able to contain free liquids, should free liquids occur. During accumulation, a container is considered closed when there is complete contact between the fitted lid and the rim, except when it is necessary to add or remove solvent-contaminated wipes. When the container is full, or when the solvent-contaminated wipes are no longer being accumulated, or when the container is being transported, the container must be sealed with all lids properly and securely affixed to the container and all openings tightly bound or closed sufficiently to prevent leaks and emissions;

(ii) The solvent-contaminated wipes may be accumulated by the generator for up to 180 days from the start date of accumulation for each container prior to being sent for cleaning;

(iii) At the point of being sent for cleaning on-site or at the point of being transported off-site for cleaning, the solvent-contaminated wipes must contain no free liquids as defined in § 260.10 of this chapter.

(iv) Free liquids removed from the solvent-contaminated wipes or from the container holding the wipes must be managed according to the applicable regulations found in 40 CFR parts 260 through 273;

(v) Generators must maintain at their site the following documentation:

(A) Name and address of the laundry or dry cleaner that is receiving the solvent-contaminated wipes;

(B) Documentation that the 180–day accumulation time limit in 40 CFR 261.4(a)(26)(ii) is being met;

(C) Description of the process the generator is using to ensure the solvent-contaminated wipes contain no free liquids at the point of being laundered or dry cleaned on-site or at the point of being transported off-site for laundering or dry cleaning;

(vi) The solvent-contaminated wipes are sent to a laundry or dry cleaner whose discharge, if any, is regulated under sections 301 and 402 or section 307 of the Clean Water Act.

(27) Hazardous secondary material that is generated and then transferred to another person for the purpose of remanufacturing is not a solid waste, provided that:

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(i) The hazardous secondary material consists of one or more of the following spent solvents: Toluene, xylenes, ethylbenzene, 1,2,4–trimethylbenzene, chlorobenzene, n-hexane, cyclohexane, methyl tert-butyl ether, acetonitrile, chloroform, chloromethane, dichloromethane, methyl isobutyl ketone, NN–dimethylformamide, tetrahydrofuran, n-butyl alcohol, ethanol, and/or methanol;

(ii) The hazardous secondary material originated from using one or more of the solvents listed in paragraph (a)(27)(i) of this section in a commercial grade for reacting, extracting, purifying, or blending chemicals (or for rinsing out the process lines associated with these functions) in the pharmaceutical manufacturing (NAICS 325412), basic organic chemical manufacturing (NAICS 325199), plastics and resins manufacturing (NAICS 325211), and/or the paints and coatings manufacturing sectors (NAICS 325510).

(iii) The hazardous secondary material generator sends the hazardous secondary material spent solvents listed in paragraph (a)(27)(i) of this section to a remanufacturer in the pharmaceutical manufacturing (NAICS 325412), basic organic chemical manufacturing (NAICS 325199), plastics and resins manufacturing (NAICS 325211), and/or the paints and coatings manufacturing sectors (NAICS 325510).

(iv) After remanufacturing one or more of the solvents listed in paragraph (a)(27)(i) of this section, the use of the remanufactured solvent shall be limited to reacting, extracting, purifying, or blending chemicals (or for rinsing out the process lines associated with these functions) in the pharmaceutical manufacturing (NAICS 325412), basic organic chemical manufacturing (NAICS 325199), plastics and resins manufacturing (NAICS 325211), and the paints and coatings manufacturing sectors (NAICS 325510) or to using them as ingredients in a product. These allowed uses correspond to chemical functional uses enumerated under the Chemical Data Reporting Rule of the Toxic Substances Control Act (40 CFR parts 704, 710–711), including Industrial Function Codes U015 (solvents consumed in a reaction to produce other chemicals) and U030 (solvents become part of the mixture);

(v) After remanufacturing one or more of the solvents listed in paragraph (a)(27)(i) of this section, the use of the remanufactured solvent does not involve cleaning or degreasing oil, grease, or similar material from textiles, glassware, metal surfaces, or other articles. (These disallowed continuing uses correspond to chemical functional uses in Industrial Function Code U029 under the Chemical Data Reporting Rule of the Toxics Substances Control Act.); and

(vi) Both the hazardous secondary material generator and the remanufacturer must:

(A) Notify EPA or the State Director, if the state is authorized for the program, and update the notification every two years per 40 CFR 260.42;

(B) Develop and maintain an up-to-date remanufacturing plan which identifies:

(1) The name, address and EPA ID number of the generator(s) and the remanufacturer(s),

(2) The types and estimated annual volumes of spent solvents to be remanufactured,

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(3) The processes and industry sectors that generate the spent solvents,

(4) The specific uses and industry sectors for the remanufactured solvents, and

(5) A certification from the remanufacturer stating "on behalf of [insert remanufacturer facility name], I certify that this facility is a remanufacturer under pharmaceutical manufacturing (NAICS 325412), basic organic chemical manufacturing (NAICS 325199), plastics and resins manufacturing (NAICS 325211), and/or the paints and coatings manufacturing sectors (NAICS 325510), and will accept the spent solvent(s) for the sole purpose of remanufacturing into commercial-grade solvent(s) that will be used for reacting, extracting, purifying, or blending chemicals (or for rinsing out the process lines associated with these functions) or for use as product ingredient(s). I also certify that the remanufacturing equipment, vents, and tanks are equipped with and are operating air emission controls in compliance with the appropriate Clean Air Act regulations under 40 CFR part 60, part 61 or part 63, or, absent such Clean Air Act standards for the particular operation or piece of equipment covered by the remanufacturing exclusion, are in compliance with the appropriate standards in 40 CFR part 261, subparts AA (vents), BB (equipment) and CC (tank storage),";

(C) Maintain records of shipments and confirmations of receipts for a period of three years from the dates of the shipments;

(D) Prior to remanufacturing, store the hazardous spent solvents in tanks or containers that meet technical standards found in subparts I and J of 40 CFR part 261, with the tanks and containers being labeled or otherwise having an immediately available record of the material being stored;

(E) During remanufacturing, and during storage of the hazardous secondary materials prior to remanufacturing, the remanufacturer certifies that the remanufacturing equipment, vents, and tanks are equipped with and are operating air emission controls in compliance with the appropriate Clean Air Act regulations under 40 CFR part 60, part 61 or part 63; or, absent such Clean Air Act standards for the particular operation or piece of equipment covered by the remanufacturing exclusion, are in compliance with the appropriate standards in 40 CFR part 261 subparts AA (vents), BB (equipment) and CC (tank storage); and

(F) Meet the requirements prohibiting speculative accumulation per 40 CFR 261.1(c)(8).

(b) Solid wastes which are not hazardous wastes. The following solid wastes are not hazardous wastes:

(1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or reused. "Household waste" means any material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels, bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds and day-use recreation areas). A resource recovery facility managing municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subtitle, if such facility:

(i) Receives and burns only

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(A) Household waste (from single and multiple dwellings, hotels, motels, and other residential sources) and

(B) Solid waste from commercial or industrial sources that does not contain hazardous waste; and

(ii) Such facility does not accept hazardous wastes and the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

(2) Solid wastes generated by any of the following and which are returned to the soils as fertilizers:

(i) The growing and harvesting of agricultural crops.

(ii) The raising of animals, including animal manures.

(3) Mining overburden returned to the mine site.

(4)(i) Fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels, except as provided by § 266.112 of this chapter for facilities that burn or process hazardous waste.

(ii) The following wastes generated primarily from processes that support the combustion of coal or other fossil fuels that are co-disposed with the wastes in paragraph (b)(4)(i) of this section, except as provided by § 266.112 of this chapter for facilities that burn or process hazardous waste:

(A) Coal pile run-off. For purposes of paragraph (b)(4) of this section, coal pile run-off means any precipitation that drains off coal piles.

(B) Boiler cleaning solutions. For purposes of paragraph (b)(4) of this section, boiler cleaning solutions means water solutions and chemical solutions used to clean the fire-side and water-side of the boiler.

(C) Boiler blowdown. For purposes of paragraph (b)(4) of this section, boiler blowdown means water purged from boilers used to generate steam.

(D) Process water treatment and demineralizer regeneration wastes. For purposes of paragraph (b)(4) of this section, process water treatment and demineralizer regeneration wastes means sludges, rinses, and spent resins generated from processes to remove dissolved gases, suspended solids, and dissolved chemical salts from combustion system process water.

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(E) Cooling tower blowdown. For purposes of paragraph (b)(4) of this section, cooling tower blowdown means water purged from a closed cycle cooling system. Closed cycle cooling systems include cooling towers, cooling ponds, or spray canals.

(F) Air heater and precipitator washes. For purposes of paragraph (b)(4) of this section, air heater and precipitator washes means wastes from cleaning air preheaters and electrostatic precipitators.

(G) Effluents from floor and yard drains and sumps. For purposes of paragraph (b)(4) of this section, effluents from floor and yard drains and sumps means wastewaters, such as wash water, collected by or from floor drains, equipment drains, and sumps located inside the power plant building; and wastewaters, such as rain runoff, collected by yard drains and sumps located outside the power plant building.

(H) Wastewater treatment sludges. For purposes of paragraph (b)(4) of this section, wastewater treatment sludges refers to sludges generated from the treatment of wastewaters specified in paragraphs (b)(4)(ii)(A) through (F) of this section.

(5) Drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas or geothermal energy.

(6)(i) Wastes which fail the test for the Toxicity Characteristic because chromium is present or are listed in subpart D due to the presence of chromium, which do not fail the test for the Toxicity Characteristic for any other constituent or are not listed due to the presence of any other constituent, and which do not fail the test for any other characteristic, if it is shown by a waste generator or by waste generators that:

(A) The chromium in the waste is exclusively (or nearly exclusively) trivalent chromium; and

(B) The waste is generated from an industrial process which uses trivalent chromium exclusively (or nearly exclusively) and the process does not generate hexavalent chromium; and

(C) The waste is typically and frequently managed in non-oxidizing environments.

(ii) Specific wastes which meet the standard in paragraphs (b)(6)(i) (A), (B), and (C) (so long as they do not fail the test for the toxicity characteristic for any other constituent, and do not exhibit any other characteristic) are:

(A) Chrome (blue) trimmings generated by the following subcategories of the leather tanning and finishing industry; hair pulp/chrome tan/retan/wet finish; hair save/chrome tan/retan/wet finish; retan/wet finish; no beamhouse; through-the-blue; and shearling.

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(B) Chrome (blue) shavings generated by the following subcategories of the leather tanning and finishing industry: Hair pulp/chrome tan/retan/wet finish; hair save/chrome tan/retan/wet finish; retan/wet finish; no beamhouse; through-the-blue; and shearling.

(C) Buffing dust generated by the following subcategories of the leather tanning and finishing industry; hair pulp/chrome tan/retan/wet finish; hair save/chrome tan/retan/wet finish; retan/wet finish; no beamhouse; through-the-blue.

(D) Sewer screenings generated by the following subcategories of the leather tanning and finishing industry: Hair pulp/chrome tan/retan/wet finish; hair save/chrome tan/retan/wet finish; retan/wet finish; no beamhouse; through-the-blue; and shearling.

(E) Wastewater treatment sludges generated by the following subcategories of the leather tanning and finishing industry: Hair pulp/chrome tan/retan/wet finish; hair save/chrome tan/retan/wet finish; retan/wet finish; no beamhouse; through-the-blue; and shearling.

(F) Wastewater treatment sludges generated by the following subcategories of the leather tanning and finishing industry: Hair pulp/chrome tan/retan/wet finish; hair save/chrome tan/retan/wet finish; and through-the-blue.

(G) Waste scrap leather from the leather tanning industry, the shoe manufacturing industry, and other leather product manufacturing industries.

(H) Wastewater treatment sludges from the production of TiO_2 pigment using chromium-bearing ores by the chloride process.

(7) Solid waste from the extraction, beneficiation, and processing of ores and minerals (including coal, phosphate rock, and overburden from the mining of uranium ore), except as provided by § 266.112 of this chapter for facilities that burn or process hazardous waste.

(i) For purposes of § 261.4(b)(7) beneficiation of ores and minerals is restricted to the following activities; crushing; grinding; washing; dissolution; crystallization; filtration; sorting; sizing; drying; sintering; pelletizing; briquetting; calcining to remove water and/or carbon dioxide; roasting, autoclaving, and/or chlorination in preparation for leaching (except where the roasting (and/or autoclaving and/or chlorination)/leaching sequence produces a final or intermediate product that does not undergo further beneficiation or processing); gravity concentration; magnetic separation; electrostatic separation; flotation; ion exchange; solvent extraction; electrowinning; precipitation; amalgamation; and heap, dump, vat, tank, and in situ leaching.

(ii) For the purposes of § 261.4(b)(7), solid waste from the processing of ores and minerals includes only the following wastes as generated:

(A) Slag from primary copper processing;

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(B) Slag from primary lead processing;

(C) Red and brown muds from bauxite refining;

(D) Phosphogypsum from phosphoric acid production;

(E) Slag from elemental phosphorus production;

(F) Gasifier ash from coal gasification;

(G) Process wastewater from coal gasification;

(H) Calcium sulfate wastewater treatment plant sludge from primary copper processing;

(I) Slag tailings from primary copper processing;

(J) Fluorogypsum from hydrofluoric acid production;

(K) Process wastewater from hydrofluoric acid production;

(L) Air pollution control dust/sludge from iron blast furnaces;

(M) Iron blast furnace slag;

(N) Treated residue from roasting/leaching of chrome ore;

(O) Process wastewater from primary magnesium processing by the anhydrous process;

(P) Process wastewater from phosphoric acid production;

(Q) Basic oxygen furnace and open hearth furnace air pollution control dust/sludge from carbon steel production;

(R) Basic oxygen furnace and open hearth furnace slag from carbon steel production;

(S) Chloride process waste solids from titanium tetrachloride production;

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(T) Slag from primary zinc processing.

(iii) A residue derived from co-processing mineral processing secondary materials with normal beneficiation raw materials or with normal mineral processing raw materials remains excluded under paragraph (b) of this section if the owner or operator:

(A) Processes at least 50 percent by weight normal beneficiation raw materials or normal mineral processing raw materials; and,

(B) Legitimately reclaims the secondary mineral processing materials.

(8) Cement kiln dust waste, except as provided by § 266.112 of this chapter for facilities that burn or process hazardous waste.

(9) Solid waste which consists of discarded arsenical-treated wood or wood products which fails the test for the Toxicity Characteristic for Hazardous Waste Codes D004 through D017 and which is not a hazardous waste for any other reason if the waste is generated by persons who utilize the arsenical-treated wood and wood products for these materials' intended end use.

(10) Petroleum-contaminated media and debris that fail the test for the Toxicity Characteristic of § 261.24 (Hazardous Waste Codes D018 through D043 only) and are subject to the corrective action regulations under part 280 of this chapter.

(11) Injected groundwater that is hazardous only because it exhibits the Toxicity Characteristic (Hazardous Waste Codes D018 through D043 only) in § 261.24 of this part that is reinjected through an underground injection well pursuant to free phase hydrocarbon recovery operations undertaken at petroleum refineries, petroleum marketing terminals, petroleum bulk plants, petroleum pipelines, and petroleum transportation spill sites until January 25, 1993. This extension applies to recovery operations in existence, or for which contracts have been issued, on or before March 25, 1991. For groundwater returned through infiltration galleries from such operations at petroleum refineries, marketing terminals, and bulk plants, until [insert date six months after publication]. New operations involving injection wells (beginning after March 25, 1991) will qualify for this compliance date extension (until January 25, 1993) only if:

(i) Operations are performed pursuant to a written state agreement that includes a provision to assess the groundwater and the need for further remediation once the free phase recovery is completed; and

(ii) A copy of the written agreement has been submitted to: Waste Identification Branch (5304), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

(12) Used chlorofluorocarbon refrigerants from totally enclosed heat transfer equipment, including mobile air conditioning systems, mobile refrigeration, and commercial and industrial air conditioning and refrigeration systems that use chlorofluorocarbons as the heat transfer fluid in a refrigeration cycle, provided the refrigerant is reclaimed for further use.

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(13) Non-terne plated used oil filters that are not mixed with wastes listed in subpart D of this part if these oil filters have been gravity hot-drained using one of the following methods:

(i) Puncturing the filter anti-drain back valve or the filter dome end and hot-draining;

(ii) Hot-draining and crushing;

(iii) Dismantling and hot-draining; or

(iv) Any other equivalent hot-draining method that will remove used oil.

(14) Used oil re-refining distillation bottoms that are used as feedstock to manufacture asphalt products.

(15) Leachate or gas condensate collected from landfills where certain solid wastes have been disposed, provided that:

(i) The solid wastes disposed would meet one or more of the listing descriptions for Hazardous Waste Codes K169, K170, K171, K172, K174, K175, K176, K177, K178 and K181 if these wastes had been generated after the effective date of the listing;

(ii) The solid wastes described in paragraph (b)(15)(i) of this section were disposed prior to the effective date of the listing;

(iii) The leachate or gas condensate do not exhibit any characteristic of hazardous waste nor are derived from any other listed hazardous waste;

(iv) Discharge of the leachate or gas condensate, including leachate or gas condensate transferred from the landfill to a POTW by truck, rail, or dedicated pipe, is subject to regulation under sections 307(b) or 402 of the Clean Water Act.

(v) As of February 13, 2001, leachate or gas condensate derived from K169–K172 is no longer exempt if it is stored or managed in a surface impoundment prior to discharge. As of November 21, 2003, leachate or gas condensate derived from K176, K177, and K178 is no longer exempt if it is stored or managed in a surface impoundment prior to discharge. After February 26, 2007, leachate or gas condensate derived from K181 will no longer be exempt if it is stored or managed in a surface impoundment prior to discharge. There is one exception: if the surface impoundment is used to temporarily store leachate or gas condensate in response to an emergency situation (e.g., shutdown of wastewater treatment system), provided the impoundment has a double liner, and provided the leachate or gas condensate is removed from the impoundment and continues to be managed in compliance with the conditions of this paragraph (b)(15)(v) after the emergency ends.

(16) [Reserved by 73 FR 35946]

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(17) Solid waste that would otherwise meet the definition of low-level mixed wastes (LLMW) pursuant to § 266.210 of this chapter that is generated at the Ortho–McNeil Pharmaceutical, Inc. (OMP Spring House) research and development facility in Spring House, Pennsylvania and treated on-site using a bench-scale high temperature catalytic oxidation unit is not a hazardous waste provided that:

(i) The total volume of LLMW generated and treated is no greater than 50 liters/year,

(ii) OMP Spring House submits a written report to the EPA Region III office once every six months beginning six months after June 27, 2005, that must contain the following:

(A) Analysis demonstrating the destruction and removal efficiency of the treatment technology for all organic components of the wastestream,

(B) Analysis demonstrating the capture efficiencies of the treatment technology for all radioactive components of the wastestream and an estimate of the amount of radioactivity released during the reporting period,

(C) Analysis (including concentrations of constituents, including inorganic constituents, present and radioactivity) of the wastestream prior to and after treatment,

(D) Volume of the wastestream being treated per batch, as well as a total for the duration of the reporting period, and

(E) Final disposition of the radioactive residuals from the treatment of the wastestream.

(iii) OMP Spring House makes no significant changes to the design or operation of the high temperature catalytic oxidation unit or the wastestream.

(iv) This exclusion will remain in affect for 5 years from June 27, 2005.

(18) Solvent-contaminated wipes, except for wipes that are hazardous waste due to the presence of trichloroethylene, that are sent for disposal are not hazardous wastes from the point of generation provided that

(i) The solvent-contaminated wipes, when accumulated, stored, and transported, are contained in non-leaking, closed containers that are labeled "Excluded Solvent–Contaminated Wipes." The containers must be able to contain free liquids, should free liquids occur. During accumulation, a container is considered closed when there is complete contact between the fitted lid and the rim, except when it is necessary to add or remove solvent-contaminated wipes. When the container is full, or when the solvent-contaminated wipes are no longer being accumulated, or when the container is being transported, the container must be sealed with all lids properly and securely affixed to the container and all openings tightly bound or closed sufficiently to prevent leaks and emissions;

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(ii) The solvent-contaminated wipes may be accumulated by the generator for up to 180 days from the start date of accumulation for each container prior to being sent for disposal;

(iii) At the point of being transported for disposal, the solvent-contaminated wipes must contain no free liquids as defined in § 260.10 of this chapter.

(iv) Free liquids removed from the solvent-contaminated wipes or from the container holding the wipes must be managed according to the applicable regulations found in 40 CFR parts 260 through 273;

(v) Generators must maintain at their site the following documentation:

(A) Name and address of the landfill or combustor that is receiving the solvent-contaminated wipes;

(B) Documentation that the 180 day accumulation time limit in 40 CFR 261.4(b)(18)(ii) is being met;

(C) Description of the process the generator is using to ensure solvent-contaminated wipes contain no free liquids at the point of being transported for disposal;

(vi) The solvent-contaminated wipes are sent for disposal

(A) To a municipal solid waste landfill regulated under 40 CFR part 258, including 40 CFR 258.40, or to a hazardous waste landfill regulated under 40 CFR parts 264 or 265; or

(B) To a municipal waste combustor or other combustion facility regulated under section 129 of the Clean Air Act or to a hazardous waste combustor, boiler, or industrial furnace regulated under 40 CFR parts 264, 265, or 266 subpart H.

(c) Hazardous wastes which are exempted from certain regulations. A hazardous waste which is generated in a product or raw material storage tank, a product or raw material transport vehicle or vessel, a product or raw material pipeline, or in a manufacturing process unit or an associated non-waste-treatment-manufacturing unit, is not subject to regulation under parts 262 through 265, 268, 270, 271 and 124 of this chapter or to the notification requirements of section 3010 of RCRA until it exits the unit in which it was generated, unless the unit is a surface impoundment, or unless the hazardous waste remains in the unit more than 90 days after the unit ceases to be operated for manufacturing, or for storage or transportation of product or raw materials.

(d) Samples.

(1) Except as provided in paragraph (d)(2) of this section, a sample of solid waste or a sample of water, soil, or air, which is collected for the sole purpose of testing to determine its characteristics or composition, is not subject to any requirements of this part or parts 262 through 268 or part 270 or part 124 of this chapter or to the notification requirements of section 3010 of RCRA, when:

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(i) The sample is being transported to a laboratory for the purpose of testing; or

(ii) The sample is being transported back to the sample collector after testing; or

(iii) The sample is being stored by the sample collector before transport to a laboratory for testing; or

(iv) The sample is being stored in a laboratory before testing; or

(v) The sample is being stored in a laboratory after testing but before it is returned to the sample collector; or

(vi) The sample is being stored temporarily in the laboratory after testing for a specific purpose (for example, until conclusion of a court case or enforcement action where further testing of the sample may be necessary).

(2) In order to qualify for the exemption in paragraphs (d)(1)(i) and (ii) of this section, a sample collector shipping samples to a laboratory and a laboratory returning samples to a sample collector must:

(i) Comply with U.S. Department of Transportation (DOT), U.S. Postal Service (USPS), or any other applicable shipping requirements; or

(ii) Comply with the following requirements if the sample collector determines that DOT, USPS, or other shipping requirements do not apply to the shipment of the sample:

(A) Assure that the following information accompanies the sample:

(1) The sample collector's name, mailing address, and telephone number;

(2) The laboratory's name, mailing address, and telephone number;

(3) The quantity of the sample;

(4) The date of shipment; and

(5) A description of the sample.

(B) Package the sample so that it does not leak, spill, or vaporize from its packaging.

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(3) This exemption does not apply if the laboratory determines that the waste is hazardous but the laboratory is no longer meeting any of the conditions stated in paragraph (d)(1) of this section.

(e) Treatability Study Samples.

(1) Except as provided in paragraph (e)(2) of this section, persons who generate or collect samples for the purpose of conducting treatability studies as defined in section 260.10, are not subject to any requirement of parts 261 through 263 of this chapter or to the notification requirements of Section 3010 of RCRA, nor are such samples included in the quantity determinations of § 261.5 and § 262.34(d) when:

(i) The sample is being collected and prepared for transportation by the generator or sample collector; or

(ii) The sample is being accumulated or stored by the generator or sample collector prior to transportation to a laboratory or testing facility; or

(iii) The sample is being transported to the laboratory or testing facility for the purpose of conducting a treatability study.

(2) The exemption in paragraph (e)(1) of this section is applicable to samples of hazardous waste being collected and shipped for the purpose of conducting treatability studies provided that:

(i) The generator or sample collector uses (in "treatability studies") no more than 10,000 kg of media contaminated with non-acute hazardous waste, 1000 kg of non-acute hazardous waste other than contaminated media, 1 kg of acute hazardous waste, 2500 kg of media contaminated with acute hazardous waste for each process being evaluated for each generated waste stream; and

(ii) The mass of each sample shipment does not exceed 10,000 kg; the 10,000 kg quantity may be all media contaminated with non-acute hazardous waste, or may include 2500 kg of media contaminated with acute hazardous waste, 1000 kg of hazardous waste, and 1 kg of acute hazardous waste; and

(iii) The sample must be packaged so that it will not leak, spill, or vaporize from its packaging during shipment and the requirements of paragraph A or B of this subparagraph are met.

(A) The transportation of each sample shipment complies with U.S. Department of Transportation (DOT), U.S. Postal Service (USPS), or any other applicable shipping requirements; or

(B) If the DOT, USPS, or other shipping requirements do not apply to the shipment of the sample, the following information must accompany the sample:

(1) The name, mailing address, and telephone number of the originator of the sample;

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(2) The name, address, and telephone number of the facility that will perform the treatability study;

(3) The quantity of the sample;

(4) The date of shipment; and

(5) A description of the sample, including its EPA Hazardous Waste Number.

(iv) The sample is shipped to a laboratory or testing facility which is exempt under § 261.4(f) or has an appropriate RCRA permit or interim status.

(v) The generator or sample collector maintains the following records for a period ending 3 years after completion of the treatability study:

(A) Copies of the shipping documents;

(B) A copy of the contract with the facility conducting the treatability study;

(C) Documentation showing:

(1) The amount of waste shipped under this exemption;

(2) The name, address, and EPA identification number of the laboratory or testing facility that received the waste;

(3) The date the shipment was made; and

(4) Whether or not unused samples and residues were returned to the generator.

(vi) The generator reports the information required under paragraph (e)(2)(v)(C) of this section in its biennial report.

(3) The Regional Administrator may grant requests on a case-by-case basis for up to an additional two years for treatability studies involving bioremediation. The Regional Administrator may grant requests on a case-by-case basis for quantity limits in excess of those specified in paragraphs (e)(2)(i) and (ii) and (f)(4) of this section, for up to an additional 5000 kg of media contaminated with non-acute hazardous waste, 500 kg of non-acute hazardous waste, 2500 kg of media contaminated with acute hazardous waste and 1 kg of acute hazardous waste:

(i) In response to requests for authorization to ship, store and conduct treatability studies on additional quantities in advance of commencing treatability studies. Factors to be considered in reviewing such requests include the nature of the

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technology, the type of process (e.g., batch versus continuous), size of the unit undergoing testing (particularly in relation to scale-up considerations), the time/quantity of material required to reach steady state operating conditions, or test design considerations such as mass balance calculations.

(ii) In response to requests for authorization to ship, store and conduct treatability studies on additional quantities after initiation or completion of initial treatability studies, when: There has been an equipment or mechanical failure during the conduct of a treatability study; there is a need to verify the results of a previously conducted treatability study; there is a need to study and analyze alternative techniques within a previously evaluated treatment process; or there is a need to do further evaluation of an ongoing treatability study to determine final specifications for treatment.

(iii) The additional quantities and timeframes allowed in paragraph (e)(3)(i) and (ii) of this section are subject to all the provisions in paragraphs (e)(1) and (e)(2)(iii) through (vi) of this section. The generator or sample collector must apply to the Regional Administrator in the Region where the sample is collected and provide in writing the following information:

(A) The reason why the generator or sample collector requires additional time or quantity of sample for treatability study evaluation and the additional time or quantity needed;

(B) Documentation accounting for all samples of hazardous waste from the waste stream which have been sent for or undergone treatability studies including the date each previous sample from the waste stream was shipped, the quantity of each previous shipment, the laboratory or testing facility to which it was shipped, what treatability study processes were conducted on each sample shipped, and the available results on each treatability study;

(C) A description of the technical modifications or change in specifications which will be evaluated and the expected results;

(D) If such further study is being required due to equipment or mechanical failure, the applicant must include information regarding the reason for the failure or breakdown and also include what procedures or equipment improvements have been made to protect against further breakdowns; and

(E) Such other information that the Regional Administrator considers necessary.

(f) Samples Undergoing Treatability Studies at Laboratories and Testing Facilities. Samples undergoing treatability studies and the laboratory or testing facility conducting such treatability studies (to the extent such facilities are not otherwise subject to RCRA requirements) are not subject to any requirement of this part, part 124, parts 262–266, 268, and 270, or to the notification requirements of Section 3010 of RCRA provided that the conditions of paragraphs (f)(1) through (11) of this section are met. A mobile treatment unit (MTU) may qualify as a testing facility subject to paragraphs (f)(1) through (11) of this section. Where a group of MTUs are located at the same site, the limitations specified in (f)(1) through (11) of this section apply to the entire group of MTUs collectively as if the group were one MTU.

(1) No less than 45 days before conducting treatability studies, the facility notifies the Regional Administrator, or State Director (if located in an authorized State), in writing that it intends to conduct treatability studies under this paragraph.

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(2) The laboratory or testing facility conducting the treatability study has an EPA identification number.

(3) No more than a total of 10,000 kg of "as received" media contaminated with non-acute hazardous waste, 2500 kg of media contaminated with acute hazardous waste or 250 kg of other "as received" hazardous waste is subject to initiation of treatment in all treatability studies in any single day. "As received" waste refers to the waste as received in the shipment from the generator or sample collector.

(4) The quantity of "as received" hazardous waste stored at the facility for the purpose of evaluation in treatability studies does not exceed 10,000 kg, the total of which can include 10,000 kg of media contaminated with non-acute hazardous waste, 2500 kg of media contaminated with acute hazardous waste, 1000 kg of non-acute hazardous wastes other than contaminated media, and 1 kg of acute hazardous waste. This quantity limitation does not include treatment materials (including nonhazardous solid waste) added to "as received" hazardous waste.

(5) No more than 90 days have elapsed since the treatability study for the sample was completed, or no more than one year (two years for treatability studies involving bioremediation) have elapsed since the generator or sample collector shipped the sample to the laboratory or testing facility, whichever date first occurs. Up to 500 kg of treated material from a particular waste stream from treatability studies may be archived for future evaluation up to five years from the date of initial receipt. Quantities of materials archived are counted against the total storage limit for the facility.

(6) The treatability study does not involve the placement of hazardous waste on the land or open burning of hazardous waste.

(7) The facility maintains records for 3 years following completion of each study that show compliance with the treatment rate limits and the storage time and quantity limits. The following specific information must be included for each treatability study conducted:

(i) The name, address, and EPA identification number of the generator or sample collector of each waste sample;

(ii) The date the shipment was received;

(iii) The quantity of waste accepted;

(iv) The quantity of "as received" waste in storage each day;

(v) The date the treatment study was initiated and the amount of "as received" waste introduced to treatment each day;

(vi) The date the treatability study was concluded;

(vii) The date any unused sample or residues generated from the treatability study were returned to the generator or sample collector or, if sent to a designated facility, the name of the facility and the EPA identification number.

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(8) The facility keeps, on-site, a copy of the treatability study contract and all shipping papers associated with the transport of treatability study samples to and from the facility for a period ending 3 years from the completion date of each treatability study.

(9) The facility prepares and submits a report to the Regional Administrator, or state Director (if located in an authorized state), by March 15 of each year, that includes the following information for the previous calendar year:

(i) The name, address, and EPA identification number of the facility conducting the treatability studies;

(ii) The types (by process) of treatability studies conducted;

(iii) The names and addresses of persons for whom studies have been conducted (including their EPA identification numbers);

(iv) The total quantity of waste in storage each day;

(v) The quantity and types of waste subjected to treatability studies;

(vi) When each treatability study was conducted;

(vii) The final disposition of residues and unused sample from each treatability study.

(10) The facility determines whether any unused sample or residues generated by the treatability study are hazardous waste under § 261.3 and, if so, are subject to parts 261 through 268, and part 270 of this chapter, unless the residues and unused samples are returned to the sample originator under the § 261.4(e) exemption.

(11) The facility notifies the Regional Administrator, or State Director (if located in an authorized State), by letter when the facility is no longer planning to conduct any treatability studies at the site.

(g) Dredged material that is not a hazardous waste. Dredged material that is subject to the requirements of a permit that has been issued under 404 of the Federal Water Pollution Control Act (33 U.S.C.1344) or section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. 1413) is not a hazardous waste. For this paragraph (g), the following definitions apply:

(1) The term dredged material has the same meaning as defined in 40 CFR 232.2;

(2) The term permit means:

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(i) A permit issued by the U.S. Army Corps of Engineers (Corps) or an approved State under section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344);

(ii) A permit issued by the Corps under section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. 1413); or

(iii) In the case of Corps civil works projects, the administrative equivalent of the permits referred to in paragraphs (g)(2)(i) and (ii) of this section, as provided for in Corps regulations (for example, see 33 CFR 336.1, 336.2, and 337.6).

(h) Carbon dioxide stream injected for geologic sequestration. Carbon dioxide streams that are captured and transported for purposes of injection into an underground injection well subject to the requirements for Class VI Underground Injection Control wells, including the requirements in 40 CFR Parts 144 and 146 of the Underground Injection Control Program of the Safe Drinking Water Act, are not a hazardous waste, provided the following conditions are met:

(1) Transportation of the carbon dioxide stream must be in compliance with U.S. Department of Transportation requirements, including the pipeline safety laws (49 U.S.C. 60101 et seq.) and regulations (49 CFR Parts 190–199) of the U.S. Department of Transportation, and pipeline safety regulations adopted and administered by a state authority pursuant to a certification under 49 U.S.C. 60105, as applicable.

(2) Injection of the carbon dioxide stream must be in compliance with the applicable requirements for Class VI Underground Injection Control wells, including the applicable requirements in 40 CFR Parts 144 and 146;

(3) No hazardous wastes shall be mixed with, or otherwise co-injected with, the carbon dioxide stream; and

(4)(i) Any generator of a carbon dioxide stream, who claims that a carbon dioxide stream is excluded under this paragraph (h), must have an authorized representative (as defined in 40 CFR 260.10) sign a certification statement worded as follows:

I certify under penalty of law that the carbon dioxide stream that I am claiming to be excluded under 40 CFR 261.4(h) has not been mixed with hazardous wastes, and I have transported the carbon dioxide stream in compliance with (or have contracted with a pipeline operator or transporter to transport the carbon dioxide stream in compliance with) Department of Transportation requirements, including the pipeline safety laws (49 U.S.C. 60101 et seq.) and regulations (49 CFR Parts 190–199) of the U.S. Department of Transportation, and the pipeline safety regulations adopted and administered by a state authority pursuant to a certification under 49 U.S.C. 60105, as applicable, for injection into a well subject to the requirements for the Class VI Underground Injection Control Program of the Safe Drinking Water Act.

(ii) Any Class VI Underground Injection Control well owner or operator, who claims that a carbon dioxide stream is excluded under paragraph (h) of this section, must have an authorized representative (as defined in 40 CFR 260.10) sign a certification statement worded as follows:

I certify under penalty of law that the carbon dioxide stream that I am claiming to be excluded under 40 CFR 261.4(h) has not been mixed with, or otherwise co-injected with, hazardous waste at the Underground Injection Control (UIC) Class VI permitted facility, and that injection of the carbon dioxide stream is in compliance with the applicable requirements for UIC Class VI wells, including the applicable requirements in 40 CFR Parts 144 and 146.

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(iii) The signed certification statement must be kept on-site for no less than three years, and must be made available within 72 hours of a written request from the Administrator, Regional Administrator, or state Director (if located in an authorized state), or their designee. The signed certification statement must be renewed every year that the exclusion is claimed, by having an authorized representative (as defined in 40 CFR 260.10) annually prepare and sign a new copy of the certification statement within one year of the date of the previous statement. The signed certification statement must also be readily accessible on the facility's publicly-available Web site (if such Web site exists) as a public notification with the title of "Carbon Dioxide Stream Certification" at the time the exclusion is claimed.

Credits

[45 FR 33119, May 19, 1980, as amended at 45 FR 72037, Oct. 30, 1980; 45 FR 76620, Nov. 19, 1980; 45 FR 78531, Nov. 25, 1980; 45 FR 80287, Dec. 4, 1980; 46 FR 27476, May 20, 1981; 46 FR 47429, Sept. 25, 1981; 48 FR 14293, April 1, 1983; 48 FR 30115, June 30, 1983; 49 FR 44980, Nov. 13, 1984; 50 FR 665, Jan. 4, 1985; 50 FR 14219, April 11, 1985; 50 FR 28743, July 15, 1985; 51 FR 25471, July 14, 1986; 51 FR 40636, Nov. 7, 1986; 53 FR 27301, July 19, 1988; 53 FR 35420, Sept. 13, 1988; 54 FR 36641, Sept. 1, 1989; 55 FR 2353, Jan. 23, 1990; 55 FR 11862, March 29, 1990; 55 FR 26987, June 29, 1990; 55 FR 40837, Oct. 5, 1990; 55 FR 50482, Dec. 6, 1990; 56 FR 3978, Feb. 1, 1991; 56 FR 5915, Feb. 13, 1991; 56 FR 7206, Feb. 21, 1991; 56 FR 13411, April 2, 1991; 56 FR 27318, June 13, 1991; 56 FR 30195, July 1, 1991; 56 FR 41177, Aug. 19, 1991; 57 FR 21534, May 20, 1992; 57 FR 27888, June 22, 1992; 57 FR 29220, July 1, 1992; 57 FR 30658, July 10, 1992; 57 FR 37305, Aug. 18, 1992; 58 FR 26424, May 3, 1993; 59 FR 8365, Feb. 18, 1994; 59 FR 38545, July 28, 1994; 61 FR 13106, March 26, 1996; 62 FR 26019, May 12, 1997; 63 FR 18635, April 15, 1998; 63 FR 28637, May 26, 1998; 63 FR 33823, June 19, 1998; 63 FR 42184, Aug. 6, 1998; 63 FR 54356, Oct. 9, 1998; 63 FR 65937, Nov. 30, 1998; 64 FR 6814, Feb. 11, 1999; 64 FR 25414, May 11, 1999; 65 FR 54965, Sept. 12, 2000; 66 FR 23624, May 9, 2001; 66 FR 58297, Nov. 20, 2001; 67 FR 11253, March 13, 2002; 67 FR 48413, July 24, 2002; 67 FR 78730, Dec. 26, 2002; 68 FR 8553, Feb. 24, 2003; 70 FR 9175, Feb. 24, 2005; 70 FR 36857, June 27, 2005; 71 FR 16902, April 4, 2006; 71 FR 40258, July 14, 2006; 71 FR 42948, July 28, 2006; 73 FR 72, Jan. 2, 2008; 73 FR 35946, June 25, 2008; 73 FR 64760, Oct. 30, 2008; 73 FR 77997, Dec. 19, 2008; 74 FR 38109, July 31, 2009; 75 FR 13001, March 18, 2010; 75 FR 33716, June 15, 2010; 78 FR 46484, July 31, 2013; 79 FR 364, Jan. 3, 2014; 80 FR 1774, Jan. 13, 2015; 80 FR 18780, April 8, 2015; 80 FR 21500, April 17, 2015; 80 FR 37989, July 2, 2015]

SOURCE: 45 FR 33119, May 19, 1980; 51 FR 28682, Aug. 8, 1986; 51 FR 46668, Dec. 24, 1986; 52 FR 28698, Aug. 3, 1987; 53 FR 27163, 27301, July 19, 1988; 54 FR 4021, Jan. 27, 1989; 62 FR 6651, Feb. 12, 1997, unless otherwise noted.

AUTHORITY: 42 U.S.C. 6905, 6912(a), 6921, 6922, 6924(y), and 6938.

Notes of Decisions (86)

Current through Dec. 3, 2015; 80 FR 75638.

End of Document

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KeyCite Yellow Flag - Negative Treatment
Proposed Regulation

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter I. Solid Wastes
Part 262. Standards Applicable to Generators of Hazardous Waste (Refs & Annos)
Subpart C. Pre–Transport Requirements

40 C.F.R. § 262.34

§ 262.34 Accumulation time.

Effective: June 16, 2010
Currentness

(a) Except as provided in paragraphs (d), (e), and (f) of this section, a generator may accumulate hazardous waste on-site for 90 days or less without a permit or without having interim status, provided that:

(1) The waste is placed:

(i) In containers and the generator complies with the applicable requirements of subparts I, AA, BB, and CC of 40 CFR part 265; and/or

(ii) In tanks and the generator complies with the applicable requirements of subparts J, AA, BB, and CC of 40 CFR part 265 except §§ 265.197(c) and 265.200; and/or

(iii) On drip pads and the generator complies with subpart W of 40 CFR part 265 and maintains the following records at the facility:

(A) A description of procedures that will be followed to ensure that all wastes are removed from the drip pad and associated collection system at least once every 90 days; and

(B) Documentation of each waste removal, including the quantity of waste removed from the drip pad and the sump or collection system and the date and time of removal; and/or

(iv) In containment buildings and the generator complies with subpart DD of 40 CFR part 265, has placed its professional engineer certification that the building complies with the design standards specified in 40 CFR 265.1101 in the facility's operating record no later than 60 days after the date of initial operation of the unit. After February 18, 1993, PE certification will be required prior to operation of the unit. The owner or operator shall maintain the following records at the facility:

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(A) A written description of procedures to ensure that each waste volume remains in the unit for no more than 90 days, a written description of the waste generation and management practices for the facility showing that they are consistent with respecting the 90 day limit, and documentation that the procedures are complied with; or

(B) Documentation that the unit is emptied at least once every 90 days.

In addition, such a generator is exempt from all the requirements in subparts G and H of 40 CFR part 265, except for §§ 265.111 and 265.114.

(2) The date upon which each period of accumulation begins is clearly marked and visible for inspection on each container;

(3) While being accumulated on-site, each container and tank is labeled or marked clearly with the words, "Hazardous Waste"; and

(4) The generator complies with the requirements for owners or operators in subparts C and D in 40 CFR part 265, with § 265.16, and with all applicable requirements under 40 CFR part 268.

(b) A generator of 1,000 kilograms or greater of hazardous waste in a calendar month, or greater than 1 kg of acute hazardous waste listed in §§ 261.31 or 261.33(e) in a calendar month, who accumulates hazardous waste or acute hazardous waste for more than 90 days is an operator of a storage facility and is subject to the requirements of 40 CFR parts 264, 265, and 267 and the permit requirements of 40 CFR part 270 unless he has been granted an extension to the 90–day period. Such extension may be granted by EPA if hazardous wastes must remain on-site for longer than 90 days due to unforeseen, temporary, and uncontrollable circumstances. An extension of up to 30 days may be granted at the discretion of the Regional Administrator on a case-by-case basis.

(c)(1) A generator may accumulate as much as 55 gallons of hazardous waste or one quart of acutely hazardous waste listed in § 261.31 or § 261.33(e) in containers at or near any point of generation where wastes initially accumulate which is under the control of the operator of the process generating the waste, without a permit or interim status and without complying with paragraph (a) or (d) of this section provided he:

(i) Complies with §§ 265.171, 265.172, and 265.173(a) of this chapter; and

(ii) Marks his containers either with the words "Hazardous Waste" or with other words that identify the contents of the containers.

(2) A generator who accumulates either hazardous waste or acutely hazardous waste listed in § 261.31 or § 261.33(e) in excess of the amounts listed in paragraph (c)(1) of this section at or near any point of generation must, with respect to that amount of excess waste, comply within three days with paragraph (a) of this section or other applicable provisions of this chapter. During the three day period the generator must continue to comply with paragraphs (c)(1)(i) and (ii) of this section. The generator must mark the container holding the excess accumulation of hazardous waste with the date the excess amount began accumulating.

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(d) A generator who generates greater than 100 kilograms but less than 1000 kilograms of hazardous waste in a calendar month may accumulate hazardous waste on-site for 180 days or less without a permit or without having interim status provided that:

(1) The quantity of waste accumulated on-site never exceeds 6000 kilograms;

(2) The generator complies with the requirements of subpart I of part 265 of this chapter, except for §§ 265.176 and 265.178;

(3) The generator complies with the requirements of § 265.201 in subpart J of part 265;

(4) The generator complies with the requirements of paragraphs (a)(2) and (a)(3) of this section, the requirements of subpart C of part 265, with all applicable requirements under 40 CFR part 268; and

(5) The generator complies with the following requirements:

(i) At all times there must be at least one employee either on the premises or on call (i.e., available to respond to an emergency by reaching the facility within a short period of time) with the responsibility for coordinating all emergency response measures specified in paragraph (d)(5)(iv) of this section. This employee is the emergency coordinator.

(ii) The generator must post the following information next to the telephone:

(A) The name and telephone number of the emergency coordinator;

(B) Location of fire extinguishers and spill control material, and, if present, fire alarm; and

(C) The telephone number of the fire department, unless the facility has a direct alarm.

(iii) The generator must ensure that all employees are thoroughly familiar with proper waste handling and emergency procedures, relevant to their responsibilities during normal facility operations and emergencies;

(iv) The emergency coordinator or his designee must respond to any emergencies that arise. The applicable responses are as follows:

(A) In the event of a fire, call the fire department or attempt to extinguish it using a fire extinguisher;

(B) In the event of a spill, contain the flow of hazardous waste to the extent possible, and as soon as is practicable, clean up the hazardous waste and any contaminated materials or soil;

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(C) In the event of a fire, explosion, or other release which could threaten human health outside the facility or when the generator has knowledge that a spill has reached surface water, the generator must immediately notify the National Response Center (using their 24–hour toll free number 800/424–8802). The report must include the following information:

(1) The name, address, and U.S. EPA Identification Number of the generator;

(2) Date, time, and type of incident (e.g., spill or fire);

(3) Quantity and type of hazardous waste involved in the incident;

(4) Extent of injuries, if any; and

(5) Estimated quantity and disposition of recovered materials, if any.

(e) A generator who generates greater than 100 kilograms but less than 1000 kilograms of hazardous waste in a calendar month and who must transport his waste, or offer his waste for transportation, over a distance of 200 miles or more for off-site treatment, storage or disposal may accumulate hazardous waste on-site for 270 days or less without a permit or without having interim status provided that he complies with the requirements of paragraph (d) of this section.

(f) A generator who generates greater than 100 kilograms but less than 1000 kilograms of hazardous waste in a calendar month and who accumulates hazardous waste in quantities exceeding 6000 kg or accumulates hazardous waste for more than 180 days (or for more than 270 days if he must transport his waste, or offer his waste for transportation, over a distance of 200 miles or more) is an operator of a storage facility and is subject to the requirements of 40 CFR parts 264, 265 and 267, and the permit requirements of 40 CFR part 270 unless he has been granted an extension to the 180–day (or 270–day if applicable) period. Such extension may be granted by EPA if hazardous wastes must remain on-site for longer than 180 days (or 270 days if applicable) due to unforeseen, temporary, and uncontrollable circumstances. An extension of up to 30 days may be granted at the discretion of the Regional Administrator on a case-by-case basis.

(g) A generator who generates 1,000 kilograms or greater of hazardous waste per calendar month who also generates wastewater treatment sludges from electroplating operations that meet the listing description for the RCRA hazardous waste code F006, may accumulate F006 waste on-site for more than 90 days, but not more than 180 days without a permit or without having interim status provided that:

(1) The generator has implemented pollution prevention practices that reduce the amount of any hazardous substances, pollutants or contaminants entering F006 or otherwise released to the environment prior to its recycling;

(2) The F006 waste is legitimately recycled through metals recovery;

(3) No more than 20,000 kilograms of F006 waste is accumulated on-site at any one time; and

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(4) The F006 waste is managed in accordance with the following:

(i) The F006 waste is placed:

(A) In containers and the generator complies with the applicable requirements of subparts I, AA, BB, and CC of 40 CFR part 265; and/or

(B) In tanks and the generator complies with the applicable requirements of subparts J, AA, BB, and CC of 40 CFR part 265, except §§ 265.197(c) and 265.200; and/or

(C) In containment buildings and the generator complies with subpart DD of 40 CFR part 265, and has placed its professional engineer certification that the building complies with the design standards specified in 40 CFR 265.1101 in the facility's operating record prior to operation of the unit. The owner or operator must maintain the following records at the facility:

(1) A written description of procedures to ensure that the F006 waste remains in the unit for no more than 180 days, a written description of the waste generation and management practices for the facility showing that they are consistent with the 180–day limit, and documentation that the generator is complying with the procedures; or

(2) Documentation that the unit is emptied at least once every 180 days.

(ii) In addition, such a generator is exempt from all the requirements in subparts G and H of 40 CFR part 265, except for §§ 265.111 and 265.114.

(iii) The date upon which each period of accumulation begins is clearly marked and visible for inspection on each container;

(iv) While being accumulated on-site, each container and tank is labeled or marked clearly with the words, "Hazardous Waste;" and

(v) The generator complies with the requirements for owners or operators in subparts C and D in 40 CFR part 265, with 40 CFR 265.16, and with 40 CFR 268.7(a)(5).

(h) A generator who generates 1,000 kilograms or greater of hazardous waste per calendar month who also generates wastewater treatment sludges from electroplating operations that meet the listing description for the RCRA hazardous waste code F006, and who must transport this waste, or offer this waste for transportation, over a distance of 200 miles or more for off-site metals recovery, may accumulate F006 waste on-site for more than 90 days, but not more than 270 days without a permit or without having interim status if the generator complies with the requirements of paragraphs (g)(1) through (g)(4) of this section.

(i) A generator accumulating F006 in accordance with paragraphs (g) and (h) of this section who accumulates F006 waste on-site for more than 180 days (or for more than 270 days if the generator must transport this waste, or offer this waste for

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transportation, over a distance of 200 miles or more), or who accumulates more than 20,000 kilograms of F006 waste on-site is an operator of a storage facility and is subject to the requirements of 40 CFR parts 264, 265 and 267, and the permit requirements of 40 CFR part 270 unless the generator has been granted an extension to the 180–day (or 270–day if applicable) period or an exception to the 20,000 kilogram accumulation limit. Such extensions and exceptions may be granted by EPA if F006 waste must remain on-site for longer than 180 days (or 270 days if applicable) or if more than 20,000 kilograms of F006 waste must remain on-site due to unforeseen, temporary, and uncontrollable circumstances. An extension of up to 30 days or an exception to the accumulation limit may be granted at the discretion of the Regional Administrator on a case-by-case basis.

(j) A member of the Performance Track Program who generates 1000 kg or greater of hazardous waste per month (or one kilogram or more of acute hazardous waste) may accumulate hazardous waste on-site without a permit or interim status for an extended period of time, provided that:

(1) The generator accumulates the hazardous waste for no more than 180 days, or for no more than 270 days if the generator must transport the waste (or offer the waste for transport) more than 200 miles from the generating facility; and

(2) The generator first notifies the Regional Administrator and the Director of the authorized State in writing of its intent to begin accumulation of hazardous waste for extended time periods under the provisions of this section. Such advance notice must include:

(i) Name and EPA ID number of the facility, and specification of when the facility will begin accumulation of hazardous wastes for extended periods of time in accordance with this section; and

(ii) A description of the types of hazardous wastes that will be accumulated for extended periods of time, and the units that will be used for such extended accumulation; and

(iii) A Statement that the facility has made all changes to its operations, procedures, including emergency preparedness procedures, and equipment, including equipment needed for emergency preparedness, that will be necessary to accommodate extended time periods for accumulating hazardous wastes; and

(iv) If the generator intends to accumulate hazardous wastes on-site for up to 270 days, a certification that a facility that is permitted (or operating under interim status) under part 270 of this chapter to receive these wastes is not available within 200 miles of the generating facility; and

(3) The waste is managed in:

(i) Containers, in accordance with the applicable requirements of subparts I, AA, BB, and CC of 40 CFR part 265 and 40 CFR 264.175; or

(ii) Tanks, in accordance with the applicable requirements of subparts J, AA, BB, and CC of 40 CFR part 265, except for §§ 265.197(c) and 265.200; or

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(iii) Drip pads, in accordance with subpart W of 40 CFR part 265; or

(iv) Containment buildings, in accordance with subpart DD of 40 CFR part 265; and

(4) The quantity of hazardous waste that is accumulated for extended time periods at the facility does not exceed 30,000 kg; and

(5) The generator maintains the following records at the facility for each unit used for extended accumulation times:

(i) A written description of procedures to ensure that each waste volume remains in the unit for no more than 180 days (or 270 days, as applicable), a description of the waste generation and management practices at the facility showing that they are consistent with the extended accumulation time limit, and documentation that the procedures are complied with; or

(ii) Documentation that the unit is emptied at least once every 180 days (or 270 days, if applicable); and

(6) Each container or tank that is used for extended accumulation time periods is labeled or marked clearly with the words "Hazardous Waste," and for each container the date upon which each period of accumulation begins is clearly marked and visible for inspection; and

(7) The generator complies with the requirements for owners and operators in subparts C and D in 40 CFR part 265, with § 265.16, and with § 268.7(a)(5). In addition, such a generator is exempt from all the requirements in subparts G and H of part 265 of this chapter, except for §§ 265.111 and 265.114; and

(8) The generator has implemented pollution prevention practices that reduce the amount of any hazardous substances, pollutants, or contaminants released to the environment prior to its recycling, treatment, or disposal; and

(9) The generator includes the following with its Performance Track Annual Performance Report, which must be submitted to the Regional Administrator and the Director of the authorized State:

(i) Information on the total quantity of each hazardous waste generated at the facility that has been managed in the previous year according to extended accumulation time periods; and

(ii) Information for the previous year on the number of off-site shipments of hazardous wastes generated at the facility, the types and locations of destination facilities, how the wastes were managed at the destination facilities (e.g., recycling, treatment, storage, or disposal), and what changes in on-site or off-site waste management practices have occurred as a result of extended accumulation times or other pollution prevention provisions of this section; and

(iii) Information for the previous year on any hazardous waste spills or accidents occurring at extended accumulation units at the facility, or during off-site transport of accumulated wastes; and

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(iv) If the generator intends to accumulate hazardous wastes on-site for up to 270 days, a certification that a facility that is permitted (or operating under interim status) under part 270 of this chapter to receive these wastes is not available within 200 miles of the generating facility; and

(k) If hazardous wastes must remain on-site at a Performance Track member facility for longer than 180 days (or 270 days, if applicable) due to unforseen, temporary, and uncontrollable circumstances, an extension to the extended accumulation time period of up to 30 days may be granted at the discretion of the Regional Administrator on a case-by-case basis.

(l) If a generator who is a member of the Performance Track Program withdraws from the Performance Track Program, or if the Regional Administrator terminates a generator's membership, the generator must return to compliance with all otherwise applicable hazardous waste regulations as soon as possible, but no later than six months after the date of withdrawal or termination.

(m) A generator who sends a shipment of hazardous waste to a designated facility with the understanding that the designated facility can accept and manage the waste and later receives that shipment back as a rejected load or residue in accordance with the manifest discrepancy provisions of § 264.72 or § 265.72 of this chapter may accumulate the returned waste on-site in accordance with paragraphs (a) and (b) or (d), (e) and (f) of this section, depending on the amount of hazardous waste on-site in that calendar month. Upon receipt of the returned shipment, the generator must:

(1) Sign Item 18c of the manifest, if the transporter returned the shipment using the original manifest; or

(2) Sign Item 20 of the manifest, if the transporter returned the shipment using a new manifest.

Credits

[45 FR 33142, May 19, 1980, as amended at 45 FR 76626, Nov. 19, 1980; 47 FR 1251, Jan. 11, 1982; 48 FR 14294, April 1, 1983; 49 FR 49571, Dec. 20, 1984; 51 FR 10175, March 24, 1986; 51 FR 25472, July 14, 1986; 55 FR 22684, June 1, 1990; 55 FR 50483, Dec. 6, 1990; 56 FR 3877, Jan. 31, 1991; 56 FR 30195, July 1, 1991; 57 FR 37264, Aug. 18, 1992; 59 FR 62926, Dec. 6, 1994; 60 FR 26828, May 19, 1995; 60 FR 56952, Nov. 13, 1995; 61 FR 4911, Feb. 9, 1996; 61 FR 59950, Nov. 25, 1996; 64 FR 3388, Jan. 21, 1999; 64 FR 25414, May 11, 1999; 64 FR 56471, Oct. 20, 1999; 65 FR 12397, March 8, 2000; 69 FR 21753, April 22, 2004; 69 FR 62224, Oct. 25, 2004; 70 FR 10817, March 4, 2005; 71 FR 40271, July 14, 2006; 75 FR 13004, March 18, 2010; 75 FR 31717, June 4, 2010]

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AUTHORITY: 42 U.S.C. 6906, 6912, 6922–6925, 6937, and 6938.

Notes of Decisions (42)

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