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April 24, 2017

VIA ELECTRONIC MAIL

Deb Thomas
Acting Regional Administrator
U.S. EPA Region 8
1595 Wynkoop St.
Denver, CO 80202-1129
Mail Code: 8RA
thomas.debrah@epa.gov

Lawrence Starfield
Acting Assistant Administrator
Office of Enforcement and Compliance Assurance
U.S. EPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
Mail Code: 2201A
starfield.lawrence@epa.gov

Dear Ms. Thomas and Mr. Starfield:

The Colorado Oil & Gas Association (COGA) respectfully submits this letter to request clarification for our members as to whether the EPA will suspend EPA Office of Enforcement and Compliance and Region 8's ongoing enforcement campaign against oil and gas operators in Colorado regarding alleged violations of *state air quality regulations* included in an approved State Implementation Plan regarding storage tank emissions and design.

For over 30 years, COGA has fostered and promoted the beneficial, efficient, responsible, and environmentally sound development, production, and use of Colorado's oil and natural gas resources. COGA members are committed to environmental compliance and operate under a comprehensive set of state regulations, which are among the most stringent in the nation. For example, the 2014 amendments to Colorado Regulation No. 7 ushered in arguably the most stringent oil and gas air quality control regime in the country. This includes a robust, statewide Leak Detection and Repair (LDAR) program,

stringent storage tank controls, storage tank emissions management requirements, and numerous other requirements designed to reduce emissions. These regulations are appropriately administered at the state level and the subject of numerous compliance discussions.

On March 2, 2017, EPA Headquarters Assistant Administrators (AAs) and Regional Administrators (RAs) were notified that the Administrator was retaining approval authority for actions having significant regulatory and enforcement effect.[1] Specifically, the electronic memo directed AAs and RAs to identify and send upward any proposed decisions or final agency actions for the Administrator's review, those items that would limit the flexibility of the States, limit energy resource use, impose significant costs on industry or commerce or otherwise result in significant public attention on the proposed decisions.

Furthermore, President Trump's March 28, 2017 Executive Order (Promoting Energy Independence and Economic Growth) states that "[i]t is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation." Consistent with that national policy, the President has ordered the heads of agencies to "review all existing regulations, orders, guidance documents, *policies*, and *any other similar agency actions* . . . that potentially burden the development or use of domestically produced energy resources, with particular attention to oil [and] natural gas." Executive Order, Section 2(a) (emphasis added). In fact, in our view, the Executive Order *prohibits* the EPA from moving forward with its national enforcement initiative until it has undergone the review and approval contemplated in the Executive Order.

EPA's enforcement campaign, which is based entirely on its enforcement of state air quality regulations contained in EPA approved SIPs, clearly meets the criteria laid out by the above-referenced memo and Executive Order and necessitates a review by the EPA Administrator before further action is taken. Thus, in light of the memo and Executive Order, and for the reasons outlined below, the EPA Administrator should discontinue this targeted enforcement campaign and allow Colorado operators to continue their proactive work with the Colorado Department of Public Health and Environment (CDPHE) to develop constructive and responsible solutions.

EPA's National Enforcement Initiative and Ongoing Enforcement in Colorado

Since 2013, EPA Region 8 has issued numerous Clean Air Act Section 114 Information Requests to Colorado Operators regarding storage tank emission and design issues that ultimately resulted in millions of dollars in civil penalties, injunctive relief and mitigation. As time passed, the Obama Administration expanded its enforcement initiative to operators and ultimately issued approximately a dozen or more Section 114

[1] **Pruitt Withdraws Decision-Making Powers From Senior Officials** https://insideepa.com/daily-news/pruitt-withdraws-decision-making-powers-senior-officials-email-shows

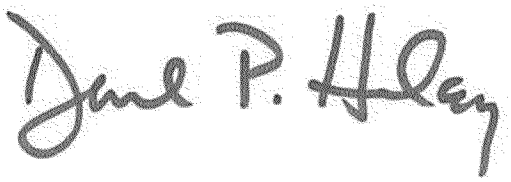
Information Requests to other Colorado, North Dakota, and Texas operators requesting the same type of information sought from the agency's initial 2013 request and enforcement action. In fact, a 2016 Information Request ultimately led to an EPA consent decree with a North Dakota operator. That consent decree resulted in EPA enforcement of SIP approved *state air quality regulations*. Notably, North Dakota did not sign on to that consent decree and has instead been pursuing its own state-only consent agreements with many North Dakota operators on these storage tank issues.

Given the emphasis that the President and EPA Administrator have placed on "the important role of States in implementing the Nation's environmental laws" (see President's Budget Blueprint, p. 41), COGA questions whether EPA's continued enforcement of Colorado regulations is supported by the new Administration.

Additionally, EPA's enforcement campaign is a classic example of "rulemaking via enforcement," which doesn't appear to be supported by the new EPA Administrator. EPA is seeking injunctive relief that is arguably far outside the bounds of current regulatory requirements. This injunctive relief (and civil penalties and mitigation) in highly public and severe federal consent decrees with a limited number of operators is an attempt to add requirements outside of the formal rulemaking process. In many cases, the injunctive relief being sought is dangerously close to dictating how a company designs and operates its own facilities and manages its own employees. If left unchecked, EPA's actions could force companies to permanently plug and abandon many wells at which it would not be economic to operate under an onerous and unduly burdensome federal consent decree.

In closing, please understand that our members do not expect any special treatment or exclusion from environmental laws and regulations. Our operators are committed to environmental compliance and, in fact, worked closely with the CDPHE to develop and implement the 2014 oil and gas air quality regulations, which are among the most stringent in the nation. COGA is merely asking that EPA discontinue its targeted enforcement campaign and return to the principle of "cooperative federalism" to allow Colorado operators to continue their proactive work with CDPHE to find responsible and constructive solutions.

Respectfully,



Dan Haley
President & CEO
Colorado Oil & Gas Association

cc: Scott Pruitt, EPA Administrator
Suzanne Bohan, Acting Deputy Regional Administrator, EPA Region 8
Samantha Dravis, Associate Administrator Office of Policy
Brittany Bolen, Deputy Associate Administrator Office of Policy

To: Schwab, Justin[schwab.justin@epa.gov]; Cozad, David[Cozad.David@epa.gov]
From: Starfield, Lawrence
Sent: Thur 3/2/2017 3:23:40 PM
Subject: FW: Another item from the Administrator's daily

Justin/Dave,

Ex. 5 - Deliberative Process

Larry

Sent from my Windows Phone

From: Schnare, David
Sent: 3/2/2017 9:32 AM
To: Minoli, Kevin; Starfield, Lawrence
Subject: RE: Another item from the Administrator's daily

Ex. 5 - Deliberative Process

d.

From: Minoli, Kevin
Sent: Thursday, March 2, 2017 9:29 AM
To: Schnare, David <schnare.david@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>
Subject: Re: Another item from the Administrator's daily

Adding in Larry as I think this is an enforcement matter not one OGC was involved in.

Ex. 5 - Deliberative Process

Kevin

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

On Mar 2, 2017, at 9:25 AM, Schnare, David <schnare.david@epa.gov> wrote:

Ex. 5 - Deliberative Process

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dschnare

To: Schwab, Justin[schwab.justin@epa.gov]
From: Traylor, Patrick
Sent: Tue 8/1/2017 12:31:11 PM
Subject: Sue and settle

Justin:

Ex. 5 - Deliberative Process

Do you have anything top of mind?

Best,

Patrick

Patrick Traylor

Deputy Assistant Administrator

Office of Enforcement and Compliance Assurance

U.S. Environmental Protection Agency

(202) 564-5238 (office)

(202) 809-8796 (cell)

HEARING ON NOMINATION OF ATTORNEY GENERAL SCOTT PRUITT TO BE ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY

Wednesday, January 18, 2017

United States Senate

Committee on Environment and Public Works

Washington, D.C.

The committee met, pursuant to notice, at 10:00 a.m. in room 406, Dirksen Senate Office Building, the Honorable John Barrasso [chairman of the committee] presiding.

Present: Senators Barrasso, Carper, Inhofe, Capito, Boozman, Wicker, Fischer, Moran, Rounds, Ernst, Sullivan, Cardin, Sanders, Whitehouse, Merkley, Gillibrand, Booker, Markey, Duckworth, and Harris.

Also Present: Senator Lankford.

NRDC v. EPA, 1:17-cv-03519 (S.D.N.Y.) EPA-HQ-2017-005678 ED_001327C_00008967-00001

STATEMENT OF THE HONORABLE JOHN BARRASSO, A UNITED STATES SENATOR FROM THE STATE OF WYOMING

Senator Barrasso. Good morning. I call this hearing to order.

We have quite a full house today. I welcome the audience. This is a formal Senate hearing, and in order to allow the Committee to conduct its business, we will maintain decorum. That means if there are disorders, demonstrations by a member of the audience, the person causing the disruption will be escorted from the room by the Capitol Police.

Since this is our first hearing of this session, I would like to welcome our new members, Senators Jerry Moran, Joni Ernst, Tammy Duckworth and Kamala Harris. Thank you very much and congratulations in joining the Committee.

I would also like to welcome Senator Tom Carper in his new role as the Ranking Member of the Committee. You are here, even if you have a scratchy throat, 40 years from when you were Treasurer of Delaware, member of Congress, governor, member of the U.S. Senate. Have not missed a day. You are Cal Ripken, Jr. and the iron man. So thanks for being here. Thank you. I look forward to working with you.

He deserves applause.

With regard to procedure, we will follow the early bird rule in terms of the order of member questions. Members who were here at the start, as you all are, will be placed in the line based on your seniority on the Committee. Members who arrive after the hearing has started will be added to the line in the order they arrive.

With respect to today's hearing, we will abide by the Committee's five-minute rule. The five minutes includes not just the questions, but also the nominee's answers, so I ask our members to please leave enough time for the nominee to answer your question. Today we will have many rounds of questions as are necessary so that members' questions are answered.

Today's hearing is to consider the nomination of Attorney General of Oklahoma, Scott Pruitt, to be the Administrator of the Environmental Protection Agency. Attorney General Pruitt has been a distinguished public servant as well, and we will hear the same from his fellow Oklahomans today. He served eight years in the Oklahoma State Senate before being elected Attorney General of Oklahoma in November of 2010, where he still serves.

There are numerous statements from his peers and the people that he has helped over the years that stand as a testament to his strong qualifications to run the Environmental Protection Agency.

Twenty-four State attorneys general wrote to both Ranking Member Carper and to me stating that "As attorneys general, we understand the need to work collaboratively to address threats to our environment that cross State lines, as well as the importance of a Federal counterpart in the EPA Administrator who possesses the knowledge, experience, and principles to work with our States to address issues affecting our environment. We believe that no one exemplifies these qualities more than Scott Pruitt."

Now, Attorney General Pruitt has taken on polluters, including the oil industry, when there was cause. Randy Ellis, an award-winning

investigative reporter with the Oklahoman newspaper, praised Pruitt for his ability to take on industry. The paper highlighted the work of Attorney General Pruitt to hold a large oil company accountable. This is what Ellis stated. He said, "Mr. Pruitt demonstrated that he will take on industry when they overstep when he sued oil companies such as BP who knowingly double-dipped by collecting reimbursements for corrective action environmental costs for sites that they polluted."

This is why I believe President-elect Trump nominated Attorney General Pruitt to serve as the Administrator of the Environmental Protection Agency. The EPA, under the leadership of a qualified and responsible administrator, is a vital tool that must be used to protect the air we breathe, the water we drink, and the communities where our families live. It is truly a sacred trust.

Colleagues on both sides of the aisle say that Attorney General Pruitt has the right experience for the position. Attorney General Pruitt understands the need to both protect the environment, while allowing our Nation's economy to grow. The agency needs a leader who will follow the laws created by this Committee.

During the last eight years, EPA administrators created broad and legally questionable new regulations which have undermined the American people's faith in the Agency. These regulations have done great damage to the livelihoods of our Nation's hardest working citizens. The regulatory zeal of the last eight years has violated a fundamental principle of environmental stewardship, which is do no harm. This failed environmental leadership has contributed to two of

the worst Government-created environmental disasters in decades: the Gold King Mine spill and Flint, Michigan's water crisis. Those disasters hurt people, many from low-income and minority communities who can least afford it.

As I have discussed with Attorney General Pruitt, my home State of Wyoming is a leading energy producing State. We have abundant supplies of coal, natural gas, crude oil, and uranium. These industries provide thousands of good paying jobs for Wyoming communities. We are also, in my opinion, one of the most beautiful States in the Nation. We are home to Yellowstone and Grand Teton National Parks and numerous national forests and pristine lakes and waterways. Our wildlife population is diverse and abundant. We have thriving populations of grizzly bears, wolves, elk, and bison. People travel from around the world to come to Wyoming because our State's natural resources are spectacular.

Wyoming has managed to strike that balance between our environment and our economy, and it shows. For eight years, Wyoming has suffered under an EPA that didn't believe in striking a balance. As EPA regulations crushed energy jobs in my State, State revenue fell that pays for State programs. This includes paying for our vital environmental programs. Clearly, a wholesale change is needed. Any new Administrator of the Environmental Protection Agency needs to protect the environment in a responsible way that doesn't ignore the good work that States do to protect their air, land, and water, as well as their economies.

At this time I would like to ask Ranking Member Senator Carper for an opening statement.

[The prepared statement of Senator Barrasso follows:]

STATEMENT OF THE HONORABLE THOMAS R. CARPER, A UNITED STATES SENATOR FROM THE STATE OF DELAWARE

Senator Carper. Mr. Chairman, thank you for bringing us here today. Thank you for your kind words, as well.

Let me begin by welcoming our nominee, his wife Marlyn, and his children, Cade and McKenna, to what is a very important hearing.

Mr. Pruitt, this past Sunday morning I rose at dawn. I went for a long run, took me through a beautiful State park in the northern part of Delaware. I reached the park at sunrise, just as the sun was coming up and the sky was turning a brilliant blue. The winter air was crisp and clear. Wildlife was all around. In a word, it was perfect.

As I ran, I said a prayer of thanksgiving for the gift of this moment. Later that morning, my wife and I went to church. There we joined our congregation in singing a hymn that began with these words: "For the beauty of the earth, for the glory of the skies, for the love which from our birth over and around us lies, Lord of all, to these we raise this our hymn of grateful praise."

Those words filled my heart with emotion then and they do so again this morning.

In little more than 48 hours, Donald Trump will place his hand on a Bible. He will take an oath to defend our Country and Constitution. That Bible reminds us repeatedly to love our neighbors as ourselves and it answers the question who is my neighbor. Also found in those pages are scores of admonitions about another obligation that those of us who live on this Earth are expected to meet. Simply put, we are to

serve as stewards of this planet. I believe that we have a moral obligation to do so.

A great many of my colleagues in the Senate agree, and so do most Americans. We need to be convinced that you embrace it as well; not just with your words, but with your deeds. Much of your record suggests otherwise. And today, and in the days that follow, we need to find out where the truth lies.

Leading the Environmental Protection Agency is hard work. That Agency, created by President Richard Nixon and a bipartisan Congress 46 years ago, is tasked with implementing our Nation's most important clean air, clean water, and safe chemical laws. The EPA is required to use sound science to protect both our environment and our public health. By and large, the EPA has done this successfully for decades while our economy has continued to grow.

Many in this room today may not remember a time before the EPA, a time when States had to work individually to protect citizens and the community in which they live, a time before the Clean Water Act and Clean Air Act were signed into law, a time when businesses operating throughout the U.S. were faced with a myriad of conflicting State and local laws affecting our health and our environment. The choking smog and soot of a half century ago seem unfathomable now. Rivers on fire and deadly toxic plumes sound like something from another world, impossible in our United States of America.

Today we have the luxury of largely forgetting these frightening circumstances thanks to the efforts of the Environmental Protection Agency, its employees, partnership with State and local agencies and

with companies across America. In fact, the EPA and its many partners throughout this Country have been so successful that it is easy for some of us to forget just why this Agency is so critical. For some it is also easy to presume that there is not much more for the Agency to do, and that just could not be further from the truth.

The environmental threats that we face today are real, and they don't respect State boundaries. As we consider a nominee to run our Nation's foremost environmental agency, it is worth reminding everyone here why the mission of the EPA is so critical and just what is at stake.

Over time, my State of Delaware has made great strides in cleaning up our own air pollution, but our work only goes so far. Delaware, like many States on the East Coast, sits at the end of what is known as America's tailpipe. Ninety percent of the air pollution in Delaware comes from outside of the First State, from power plants hundreds of miles away in places like Kentucky, Ohio, Indiana, and across the Midwest.

As governor of Delaware, if I had eliminated every source of air pollution with my State, stopped every combustion source and ordered every motor vehicle off the roads, Delaware would still have faced deadly doses of air pollution. Should children and others in Delaware really be forced to live with the consequences of decisions made by polluters hundreds or even thousands of miles away who gain economically from our disadvantage? I don't think so.

Fortunately, the EPA has recently implemented something called the Good Neighbor Rule to make sure that all States do their fair

share to clean up the air. Every citizen in this Country has the right to breathe clean air, regardless of whether they are in a downwind or upwind State. That is why we have the EPA.

I remember fishing as a boy with my dad along the Dan River, near my hometown of Danville, Virginia. We brought home the fish that we caught to eat, and my mom and sister ate them as well. Today that quintessential American pastime comes with a warning label. That river, along with countless other polluted streams, rivers, and lakes in all 50 States are subject to public health advisories cautioning citizens against eating the mercury-laden fish found in them.

We have known for decades that most of the mercury in our fish come from air pollution that is emitted from the dirtiest coal plants and then settles in our waterways. We also know that mercury is a powerful neurotoxin that accumulates in the human body over time, threatening the health of this environment and this generation, and for generations to come.

The EPA recently issued public health protections to clean up the toxic air pollution from our dirtiest coal plants, allowing families in Delaware and thousands of other communities to once again eat the fish from our rivers, our lakes, our streams without concern of mercury poisoning. That is why we have the EPA.

Too often, when State and local communities are pinched for cash, they try to save money by short-changing clean air and clean water protections, and improvements to water infrastructure are oftentimes ignored. Corners are cut; solutions are adopted that may save dollars now, but inflict costly and unnecessary damage later. As we have seen

most recently in the city of Flint, Michigan, these cuts can have a terrible, even a tragic, impact on the health of the most vulnerable in our society, especially the youngest among us.

Today, the citizens of Flint still lack clean drinking water, and the new generation there which has been exposed to high levels of lead faces an uncertain future. That is why we have the EPA.

You may not know it, Mr. Pruitt, but Delaware is the lowest lying State in our Nation. The highest point in Delaware is a bridge. Back home, the reality that our climate is changing is not up for grabs or up for debate. Families and business owners face the stark reality of climate change every single day, and tackling that challenge is not just the right thing to do, what is best for Delaware's economy; it is a matter of survival.

Take a ride with me sometime some 30 miles south of Dover Air Force Base, heading east toward the Delaware Bay, on Prime Hook Road, and you will see what I mean. There was a time not long ago where, just before you reached the Delaware Bay, you came to a parking lot. Today that parking lot is under water. Stand there with me, looking to the east, and you will see part of a concrete bunker slipping out of the water about 1:00. Recently, someone showed me a photo taken of that bunker in 1947, the year I was born. It was on dry land, 500 feet west of the water's edge. Five hundred feet west.

But our little State alone cannot stem the flow of greenhouse gases into our atmosphere that is largely causing our climate to change, our seas to rise, and our coastline to retreat. Every State

must do its fair share to safeguard our climate and their neighbors. That is why we have the EPA.

Examples of air and water pollution produced by one State and fouling the air and water of others can still be found in too many parts of America, like the runoff from Pennsylvania that degrades the waters of the Chesapeake Bay or the haze exported from other States that oftentimes shrouds the Smokey Mountains and degrades visibility at the Grand Canyon. That is why we have the EPA.

Some of my colleagues describe me as recovering governor. For the most part, I believe that governors and presidents deserve deference in picking the members of their leadership teams and, as a result, I have given presidents of both parties that deference in most instances. Since coming to the Senate in 2001, I have opposed only one of the nominees for EPA administrator; supporting two Republicans, two Democrats nominees. Subsequently, every EPA administrator that I have supported demonstrated clearly that they were committed to furthering the overall mission of the EPA, protecting human health and our environment.

I am also committed to a full and fair confirmation process with respect to our nominations that this President-elect has offered, too.

Having said that, though, I have shared with Mr. Pruitt, and I will share with my colleagues today, that too much of what I have seen of his record of the environment and his views about the role of EPA are troubling, and in some cases deeply troubling. Even former Republican EPA Administrator Christine Whitman, with whom I served for seven years as governor of neighboring States, recently said that she

"can't recall ever having seen an appointment of someone who is so disdainful of the agency and the science behind what the agency does."

Let me conclude with this. It is hard to imagine a more damning statement, and from one who served not long ago in that position of trust, Mr. Pruitt, to which you have been nominated. Today is your opportunity to show us that she has gotten it wrong. To be honest with you, coming to this hearing today, I fear that she has gotten it right.

Thank you.

[The prepared statement of Senator Carper follows:]

Senator Barrasso. Thank you very much, Senator Carper.

In a few moments I would like to turn to Senator Inhofe and Lankford from their home State of Oklahoma regarding the nominee's distinguished career. Before I do that, though, I want to say a few words about Senator Inhofe and his distinguished career as chairman of the Senate Environment and Public Works Committee.

First, I want to thank my friend, Jim Inhofe, for his leadership of this Committee. His dedication to protecting the environment, rebuilding our Nation's infrastructure, strengthening the Country's economy, were clearly evident throughout his time as chairman. He worked across party lines to get things done. During the 114th Congress, under Jim Inhofe's leadership, this Committee held 67 hearings. Of those, 8 were field hearings. Thirty-two bills passed out of the Committee that were signed into law.

Chairman Inhofe oversaw the first long-term highway bill in a decade. This law will improve the Nation's roads, bridges, transit systems, and rail transportation networks. He also worked on a bipartisan basis with former Ranking Member Barbara Boxer to pass badly needed Water Resources Development Act legislation. This new law prioritizes dam, waterway, and port construction projects, and it supports flood control projects that protect millions of people.

For the first time in 40 years, the Toxic Substances Control Act was modernized under Chairman Inhofe's tenure. This law enacts a new uniform regulatory program that will improve public confidence in the safety of chemicals, promote innovation, and provide manufacturers with certainty regarding regulation.

Chairman Inhofe also worked to keep the Administration accountable. Chairman Inhofe worked to ensure that there was oversight of overreaching administration regulations concerning the Clean Power Plan, Waters of the U.S., the Stream Buffer Rule, coal ash regulations, and many more.

So I am very glad that Senator Inhofe will remain on the Committee. I look forward to working closely with him to protect our environment and bolster our Nation's economy.

Senator Inhofe, thank you for your hard work, your dedication, and your leadership. Senator Inhofe, you are now recognized to introduce and talk about Attorney General Pruitt. Thank you.

STATEMENT OF THE HONORABLE JAMES M. INHOFE, A UNITED STATES SENATOR FROM THE STATE OF OKLAHOMA

Senator Inhofe. Senator Barrasso, thank you very much, and I am looking forward to working in a very senior position on your Committee. This is the Committee that gets things done, as Scott Pruitt is fully aware.

I thank you, Chairman Barrasso, and also you, Senator Carper, for letting me join you for this, and I am honored to join my fellow Senator, Senator Lankford, in introducing not just the Attorney General Scott Pruitt, but my good friend, and to offer my support for his nomination to be the next Administrator of the Environmental Protection Agency.

Though neither of us were born in Oklahoma, we got here as quick as we could, and both ended up in Tulsa, so he is also a neighbor. Attorney General Pruitt, you will be glad to know this, he was born in Kentucky. He showed what he was made out of and ended up a great baseball player that was able to get a scholarship and go through the university there. Then he came to Oklahoma, went through law school at the University of Tulsa, and did all kinds of things, specialized at that time in constitutional law.

In 1998, General Pruitt ran and was elected to the Oklahoma State Senate, where he served six years and he quickly became a leader. Indeed, success has followed him throughout his law practice to the State Senate, to become the co-owner and manager, managing general partner of Oklahoma City's AAA minor league baseball team -- see, we

have something in addition to the Thunder that we are all fully aware of -- and is currently Oklahoma's Attorney General.

Through the course of his career, Attorney General Pruitt has stood out as a champion of State and individual rights, and has fought against Federal overreach. He has earned a reputation as a defender of the rule of law and has worked to keep the role of the Federal Government in check. As head of the Environmental Protection Agency, Attorney General Pruitt will ensure that the Agency fulfills the role delegated to it by the laws passed by Congress, nothing more and nothing less.

Oklahoma is an energy and agricultural State, but we are also a State that knows what it means to protect the environment while balancing competing interests. As attorney general, Scott was instrumental -- oh, this is a big deal. We actually have had an ongoing litigation for 100 years; it was the State of Oklahoma, the City of Oklahoma City, the Choctaw Nation, the Chickasaw Nation. It was over water rights. We weren't able to resolve that problem. This guy comes trotting along and resolves it overnight, after 100 years of failures of trying to get this done.

He has also worked with Oklahoma Department of Environmental Quality and the Oklahoma Water Resources Board to protect the scenic rivers. He is kind of a hero of the scenic rivers place. People don't know, Scott, that we in Oklahoma actually have more miles of freshwater shoreline --

[Interruption from audience.]

Senator Barrasso. I would ask the Senator to please suspend his remarks for a few seconds.

[Interruption from audience.]

Senator Barrasso. Thank you, Senator Inhofe.

Senator Inhofe. They obviously don't like scenic rivers, but we do in Oklahoma.

Anyway, additionally, in 2012, Oklahoma partnered with four other States, New Mexico, Colorado, Kansas, and Texas, to bring together State official conservation groups, energy and ag industries, and other private landowners to address the challenges facing one of the problems that we have there having to do with what might become an endangered species. It was an effort that saw success in its first year. Now, this is working with four different States. Despite endorsing the plan, the Fish and Wildlife Service moved forward with listing the species as threatened, endangering the cooperation reached between these varying interests.

So Attorney General Pruitt sued the Fish and Wildlife Department for ignoring the unique cooperative agreement and he won. He wins. He wins these things.

Yes, as Attorney General, Scott Pruitt has fought the EPA, the Fish and Wildlife Service, the oil companies, and the outgoing administration on many fronts. But all of these suits were brought to protect State and local interests from overzealous and activist executive agencies.

Over the last eight years, the Obama Administration has advanced a radical environmental agenda, has exhibited a deep distrust of State

governments and private landowners, and has worked to obstruct the fossil fuel industry and agriculture producers, the most ardent protectors of the environment. These are industries and interests that Oklahoma relies on, and, far from being an enemy of the environment, Scott has proven himself to be an expert at balancing economic growth with environmental stewardship.

So it is my belief that Attorney General Pruitt will return the Environmental Protection Agency to its proper role as a steward for the environment, acting within the bounds prescribed by Congress and the Constitution.

Thank you, Mr. Chairman.

[The prepared statement of Senator Inhofe follows:]

Senator Barrasso. Thank you, Senator Inhofe.

Senator Lankford.

STATEMENT OF THE HONORABLE JAMES LANKFORD, A UNITED STATES SENATOR FROM THE STATE OF OKLAHOMA

Senator Inhofe. Chairman Barrasso, thank you. Ranking Member Carper, members of the Committee, thank you for allowing me to be able to be here today, introduce my fellow Oklahoman, and for Senator Inhofe and I to both be able to stand with him and to be able to introduce who we believe will be a tremendous nominee as Administrator for the Environmental Protection Agency.

It is an honor to speak in support of Attorney General Pruitt today. Over the past six years, Scott has been a leader in the State of Oklahoma, strongly committed to enforcing the law and adhering to the Constitution. He is a statesman. He is a dedicated public servant. As Administrator of the EPA, I would fully expect Scott to lead the Agency to follow every environmental law and to partner with States, local authorities, and Tribes to do what is best for our present and for our future.

As Attorney General of Oklahoma, he stood shoulder to shoulder with more than half of the States to ensure the Federal Government operates within the bounds of the statute and the Constitution. He has argued consistently that many regulations that the EPA promulgates are in fact the responsibilities of State governments first.

In an environment where Chevron deference is precedent, it is critical that the leader of an agency that has such wide latitude to extract costs from the economy also respects the importance of our federalist foundation and the pocketbooks of hardworking families.

In previous congressional testimony, Scott has emphasized the importance of laws like the Clean Air Act, stressing that the intention was for States and the EPA to work together under a model of cooperative federalism that protects the environment, while considering economic costs.

As Attorney General, Scott has been an ardent defender of the rule of law for Oklahomans. In 2012, he sued British Petroleum, arguing that they knowingly double-dipped through the collection of funds through a cleanup fund despite having insurance coverage for environmental cleanup. He did not hesitate to stand up for his constituents and for his State.

Mike Turpen is the former Attorney General of the State of Oklahoma and the former Chairman of the Oklahoma Democratic Party. He spoke out in mid-December, when Scott was first announced. Let me just read a short portion of his very long statement in support of Scott Pruitt.

Former Attorney General Mike Turpen and our former Democratic Party Chairman said, "Oklahoma Attorney Scott Pruitt is a good choice to head up the Environmental Protection Agency. I am convinced Scott Pruitt will work to protect our natural habitats, reserves, and resources. His vision for a proper relationship between protection and prosperity makes him superbly qualified to serve as our next EPA Administrator."

Scott is an active member and a deacon at his church, First Baptist Church Broken Arrow, a congregation of almost 2,000 people. He is incredibly strong in his faith and he strives to walk in

integrity. Scott is a serious baseball fan, as well. If you run out of environmental or legal questions today, which I doubt you will, but if you run out, why don't you ask him a couple questions about baseball strategy and spring training, which starts in just a few weeks.

I have to tell you Scott is a friend. I have prayed with Scott. I have seen Scott struggle with hard decisions that affect our State's future. I have seen Scott listen to people to try to learn all sides of an issue. And I have seen Scott take difficult stands on matters of law. I think he will be an excellent administrator for the EPA and I think he will do very well today in getting a chance to bring you the confidence that he will work hard for our Nation's present and for the future.

Thank you, Mr. Chairman.

[The prepared statement of Senator Lankford follows:]

Senator Barrasso. Well, thank you so very much, Senator Lankford and Senator Inhofe. Senator Lankford, you are welcome to stay, but you can't stay in that seat.

[Laughter.]

Senator Lankford. You got it.

Senator Barrasso. Now I would like to welcome Attorney General Pruitt to the Senate Environment and Public Works Committee. Welcome. I invite you to first introduce your family and then proceed with your statement. Congratulations and welcome.

STATEMENT OF HONORABLE E. SCOTT PRUITT, ATTORNEY GENERAL, STATE OF OKLAHOMA (OKLAHOMA CITY, OK)

Mr. Pruitt. Good morning, Chairman Barrasso, Ranking Member Carper, members of the Committee. It is an honor and a privilege to be before you today to be considered for the position of EPA Administrator.

I first want to say thank you to Senators Inhofe and Lankford for their opening comments. Senator Inhofe has been a mentor and a friend to me many, many years, and he spent a lot of time with me through this process, introducing me to many of you, and I really appreciate his guidance and his help.

Senator Lankford was a friend well before he entered Congress, and he is already serving Oklahoma and this Country with great distinction.

Mr. Chairman, you indicated to introduce my family. I am blessed today to have my family in attendance with me. My wife, Marlyn, of 27 years, is in attendance, along with my children, McKenna and Cade. There is a little change going on in their life as well. McKenna is actually graduating from Oklahoma University this spring and Senator Whitehouse's alma mater of the University of Virginia Law School. And my son is going to be graduating high school and heading to Oklahoma University, following in his sister's footsteps, to be a Boomer Sooner.

So there is lots of change going on in their lives, lots of change going on in my family's life, and lots of change going on in

the Country. And I think the people of this Country are really hungry for some change.

And with change comes an opportunity for growth, an opportunity to assess how we can reprioritize as a Nation. And when I ponder leading the EPA, I get excited about the great work to be done on behalf of our Nation and being a good steward of the natural resources we have as a Nation. What could be more important than protecting our Nation's waters, improving our air, and managing the land that we have been blessed with as a Nation, all the while protecting the health and welfare of our people?

So, if confirmed, I would lead the EPA with the following principles in mind.

First, we must reject as a Nation the false paradigm that if you are pro-energy, you are anti-environment; and if you are pro-environment, you are anti-energy. I utterly reject that narrative. In this Nation, we can grow our economy, harvest the resources God has blessed us with, while also being good stewards of the air, land, and water by which we have been favored. It is not an either-or proposition.

Next, we should celebrate the great progress that we have made as a Nation since the inception of the EPA and the laws that have been passed by this body, but recognize that we have much work to do.

Third, rule of law matters. Process matters. It inspires confidence in those that are regulated. The law is static, not transient. Regulators are supposed to make things regular, to fairly and equitably enforce the rules and not pick winners and losers. A

regulator should not be for or against any sector of our economy. Instead, a regulator ought to follow law in setting up the rules so that those who are regulated can plan, allocate resources to meet the standards, versus operating in a state of uncertainty and duress.

Fourth, federalism matters. It matters because Congress says so. And because we need to achieve good outcomes as a Nation for air and water quality, we need the partnership of the States to achieve that. It is our State regulators who oftentimes best understand the local needs and the uniqueness of our environmental challenges. Plus, our State regulators possess the resources and expertise to enforce our environmental laws.

Fifth, public participation is key. We need to hear all voices as we make decisions on behalf of our Country with respect to environmental laws.

Two final things personally. I seek to be a good listener, to listen and to lead. You can't do one without the other. Listen to those career staff --

[Interruption from audience.]

Mr. Pruitt. Listen to those career staff at the EPA, as I have done as Attorney General of Oklahoma, and listen to you here in Congress with respect to the needs of your respective States, and listen to the voice of all Americans as we seek to carry out our duties under the law.

Lastly, and this is very important, I seek to serve with civility. Oftentimes, as policymakers, you deal with very contentious issues; I have as Attorney General of Oklahoma, as well. We deal with

weighty issues and there is passion on both sides of issues. But we should not succumb to personalizing matters. We should encourage open and civil discourse. One such issue where civil discourse is absent involves climate change. Let me say to you science tells us that the climate is changing, and that human activity in some manner impacts that change. The ability to measure with precision the degree and extent of that impact, and what to do about it, are subject to continuing debate and dialogue, and well it should be.

So with these principles in mind, I seek to answer your questions today, and I am honored to be here today to be considered for the position of EPA Administrator.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Pruitt follows:]

Senator Barrasso. Well, thank you very much. Welcome to your family, and thank you and congratulations again.

Attorney General Pruitt, you have answered the Committee questionnaire. The United States Office of Government Ethics has stated that you are "in compliance with applicable laws and regulations governing conflicts of interest."

Throughout this hearing, and with the questions for the record, our Committee members will have an opportunity to learn more about your commitment to public service and our Nation. I would ask that throughout this hearing you please respond to the questions for the record.

With that said, I have to ask the following questions that we ask of all nominees on behalf of the Committee. Do you agree, if confirmed, to appear before this Committee or designated members of this Committee, and other appropriate committees of the Congress, and provide information subject to appropriate and necessary security protection with respect to your responsibilities?

Mr. Pruitt. Yes, Mr. Chairman.

Senator Barrasso. Do you agree to ensure that testimony, briefings, documents, and electronic and other forms of information are provided to this Committee and its staff, and other appropriate committees, in a timely manner?

Mr. Pruitt. Yes, Mr. Chairman.

Senator Barrasso. Do you know of any matters which you may or may not have disclosed that might place you in any conflict of interest if you are confirmed?

Mr. Pruitt. No, Chairman.

Senator Barrasso. Thank you.

Just a couple quick questions before we go back and forth. I would just ask if you could just please describe your environmental philosophy, what you would do to protect our environment.

Mr. Pruitt. Well, Mr. Chairman, as I indicated in my opening statement, I believe that the role of a regulator, and this may not sound too exciting, but is to make things regular. And I think one of the difficult challenges we see with individuals across the Country is the inability to predict or know what is expected of them as far as their obligations under our environmental laws. And I really believe, Mr. Chairman, that if confirmed as EPA Administrator, this public participation, cooperative federalism, rule of law being the focus of how we do business at the EPA, is center to restoring confidence and certainty in those that are regulated.

Clearly, the mission of the EPA, as I indicated in my opening statement, to protect our natural resources, protecting our water quality, improving our air, helping protect the health and welfare of our citizens, is key to the leadership of the EPA, and, where enforcement is necessary, vigorous enforcement. I have done that as attorney general in Oklahoma. I have taken very constructive steps against those that have violated the law, but we have done so, I think, in a very decisive and meaningful way.

So, Mr. Chairman, with that in mind.

Senator Barrasso. I am going to ask one other question, then I am going to reserve the balance of my time for some interjection and questioning throughout.

There are still a number of environmental problems that I see in the Country and in my State. Cold War legacy pollution is a serious problem, where chemical compounds are left deep in the soil from our military activity decades ago. Often, there are not the tools yet available to adequately address this pollution. If confirmed, would you advocate increasing the EPA's focus on innovative technological solutions to address these and other environmental problems?

Mr. Pruitt. Yes, Mr. Chairman, and this Congress, this past Congress, as you indicated in your statement and as Senator Inhofe recognized, with the changes to the TSCA law, there are priorities this year, new authority actually that has been given to the EPA Administrator to order testing on certain chemicals. As I have spent time with some of the members on this Committee, Senator Gillibrand, as an example, mentioned PFOA as a concern with respect to the Safe Drinking Water Act, along with TSCA. So, yes, Mr. Chairman, I believe that there are priorities that are key to improving our environment, from CERCLA to TSCA, across air quality, with non-attainment to attainment, and would seek to focus and prioritize those efforts.

Senator Barrasso. Thank you.

Senator Carper.

Senator Carper. Mr. Pruitt, we don't often have the kind of disruptions in this room and in this building that we are witnessing here today. This is extraordinary. Not unprecedented, but

extraordinary. And people might ask, well, why are folks so concerned. Well, I will tell you why they are so concerned. And you don't have to go back to March 3rd up in Detroit, Michigan, where President-elect, then Candidate Trump, Donald Trump said these words, "We're going to get rid of EPA in almost every form. We are going to have little tidbits left, but we are going to take a tremendous amount out." That is what he said during the Republican primary.

And what did he say after the election? Well, November 10th, Fox News with Chris Wallace, he said, "Environmental Protection, what they do is a disgrace. Every week they come out with new regulations." Chris Wallace asked him, "Well, who is going to protect the environment?" He responded by saying, "We'll be fine with the environment." We'll be fine with the environment.

Well, we are concerned that we won't be fine with the environment. Sometimes words do matter. And one of the concerns that I have is he is the president, you would be his nominee, you would be his EPA Administrator. All the things that he said in the campaign, do they just go away? In you he has put somebody in place who has actually defunded or led to the defunding of the Environmental Protection Unit within your own agency. And yet you have joined in a dozen or more lawsuits over the last six years, ever since you have been attorney general, going after the EPA. That is why I have the kind of concern that you are witnessing here today; not just on that side of the dais, but on this side as well.

You just took an oath, you raised your hand and took an oath to answer the questions that our Chairman asked of you, and one of them

was a question dealing with your willingness to respond to reasonable questions that are asked of you. One of the things I asked of you, I submitted a letter that I think you received shortly after Christmas, maybe December 28th, close of business, and in it I asked a lot of questions. I asked you to try to respond by January 9th. You didn't respond to one of them by January 9th, not even one. Today's hearing, I just asked my staff have you responded to any of those questions in writing that I asked almost three weeks ago and, to my knowledge, no response has yet been received. That is why we have a concern. That is why we have a concern.

Mercury.

Mr. Pruitt. I am sorry?

Senator Carper. I am going to start off by talking about mercury. In 2011, the EPA required dirty coal power plants to clean up mercury and air toxic emissions by issuing the Mercury and Air Toxic Standards Rule. This rule will reduce the mercury, a neurotoxin that contaminates our streams and our oceans, pollutes our fish, and harms our children's health.

As attorney general, I believe you have been part of at least 14 legal cases against the EPA, and at least three of these cases against the EPA's rules, to reduce mercury emissions from power plants. Is that correct? Just yes or no.

Mr. Pruitt. Senator, we have been involved in litigation around the MATS Rule.

Senator Carper. Is that correct, yes or no?

Mr. Pruitt. As I indicated, yes, we have been a part of litigation involving the MATS Rule.

Senator Carper. Thank you. It is my understanding that at least one of these cases against the mercury rule is still pending. Is that correct? Just yes or no.

Mr. Pruitt. I believe so, Senator, yes.

Senator Carper. Thank you. In the cases against the mercury rule, you questioned the EPA's determination that mercury emissions from power plants are harmful to health and should be regulated. To be clear, have you ever supported a case against the EPA that claims, and this is a quote, "human exposure to methylmercury resulting from coal-fired power plants is exceedingly small," yes or no?

Mr. Pruitt. Senator, that is not a yes or no question, if I may.

Senator Carper. Fair enough. This position seems to question an EPA decision in 2000 in which the Agency determined, after almost a decade of study, and this is a quote from them, "mercury emissions from power plants pose significant hazards to public health and must be reduced." Would you say the legal cases you have supported in the past directly challenge this Agency finding, yes or no?

Mr. Pruitt. Senator, the challenges we have had as a State --

Senator Carper. Yes or no?

Mr. Pruitt. -- along with the other States --

Senator Carper. Yes or no?

Mr. Pruitt. If I may, Senator. If I may.

Senator Carper. Just hold your fire. Just hold your fire.

Mr. Pruitt. Okay.

Senator Carper. The legal position you have taken on mercury also seems to call in question the 2003 testimony from then EPA Assistant Administrator of Air and Radiation, Jeff Holmstead, under George W. Bush, who sat right where you are sitting today, and this is what he said, "EPA is required to regulate mercury because EPA determined that mercury emissions from power plants pose an otherwise unaddressed significant risk to health and the environment, and because controls options to reduce this risk are available."

This Bush EPA statement on mercury risk seems contrary to the legal arguments you have supported in the past. Is that correct, yes or no?

Mr. Pruitt. I agree with Mr. Holmstead's position that mercury is something that is very dangerous to the environment and should be regulated under section 112.

Senator Carper. Thank you very much. Are you aware that the last three administrators have publicly stated that the EPA is required to regulate mercury from power plants because of the health risk, yes or no?

Mr. Pruitt. I believe that mercury should be regulated under Section 112.

Senator Carper. Thank you very much. My time is about to expire. I will just hold it there. Thank you very much, Mr. Chairman.

Senator Barrasso. Thank you, Senator Carper.

Senator Inhofe.

Senator Inhofe. Thank you, Mr. Chairman.

Well, I don't think you had adequate time to answer some of the questions that were asked. Is there anything you would like to add, to elaborate on?

Mr. Pruitt. Yes, Senator, thank you. I do want to say to Senator Carper's concern with respect to the President-elect's statements throughout the campaign, I believe there is a very important role for the Environmental Protection Agency. In fact, you and I talked about that in your office. I believe that there are air quality issues and water quality issues that cross State line; that the jurisdiction of the EPA, its involvement in protecting our air quality and improving our Nation's waters is extremely important.

And the EPA has served a very valuable role, historically. After all, it was Republicans who created the EPA under executive order in 1970, and this body has passed many pieces of legislation since the 1970s to focus upon improving our air and improving our water quality, and we have much to celebrate. Actually, there are six criteria pollutants under the NAAQS program since 1980 that are down 63 percent. We have made progress as a Country, but we have work to do, and the EPA has a very valuable role, in partner with the States, to carry out those steps to ensure improving our air quality and protecting our Nation's waters.

So, Senator Carper, I am hopeful that, in response to your concern about the role of the EPA, I believe it is a very valuable role, and it is something that we should focus on in partnering with our States.

With respect to mercury, the litigation that you referred to, there was no argument that we made from a State perspective that mercury is not a hazardous air pollutant under Section 112. Our argument focused upon the cost-benefit analysis that the EPA failed to do, and in the Michigan v. EPA case, the Supreme Court actually agreed. So it was more about the process, again, that the EPA was supposed to go through in regulating mercury to provide certainty to those in the marketplace, not a statement with respect to whether mercury should be regulated or not under Section 112.

Thank you, Senator Inhofe.

Senator Inhofe. Thank you, General. I am glad you brought up this thing about the Clean Air Act. The amendments from 1990, I was one of the co-sponsors, it has been incredibly successful. You mentioned that we have reduced those pollutants by 63 percent, but what you didn't add was that is in spite of the fact that we had 153 percent increase in our economic activity. That is a major thing.

In my introduction I mentioned this thing that you did that no one can figure out how you did it, involved a 100-year dispute between not just the State of Oklahoma and the City of Oklahoma City and the Choctaws and the Chickasaws. Do you want to share with us how you did that? You know, they tried for 100 years, and you came in and did it in less than 100 days.

Mr. Pruitt. Less than eight months into my administration as attorney general, we were sued as a State by the Choctaw and Chickasaw Nation with respect to water in 17 counties in Southeast Oklahoma. Many of you, if you know anything about water litigation, it generally

takes decades to resolve water litigation. We were able to go from August of 2011 until 2016 and negotiate an historic water rights agreement with those two Nations to provide certainty to those that are regulated, to provide a voice to the Tribes with respect to water allocation and water quality; and the State has maintained its position as arbiter of how those permits are allocated, as well.

So it was a partnership. It was the way things ought to work when litigation occurs. Sitting across the table from individuals and working together to try to solve the problem. And, Senator, we were able to achieve that in record time, and I am very proud of what we did as a State and as the Chickasaw and Choctaw Nation together.

Senator Inhofe. Yes, that is good. I think, also, you got them all in one room, didn't you?

Mr. Pruitt. Yes, sir.

Senator Inhofe. That works.

You have been criticized by some of the people talking about some of your environmental record. I would like to be sure that people are aware of a number of people, I have some here that I will submit for the record, but a guy named Ed Fite is the vice president of scenic rivers and water quality of the GRDA. This is a person who has really been at the forefront of our scenic rivers program; he praises you, saying, "I found that General Pruitt has always done right by our scenic rivers. He has done everything constructive that he told me that he would do."

The same thing comes from the North Carolina Department of Environmental Quality, Donald van der Vaart. He wrote, "Pruitt is

committed to clean air and clean water, and to restoring the EPA to its original mission of enforcing the environmental laws written by Congress."

J.D. Strong, head of the Water Resources Board, said, "Attorney General Pruitt" and he goes on and praises you.

I would like to know why it is you have become such a hero of the scenic river people.

Mr. Pruitt. Well, Senator, as you know, Oklahoma has endured many decades of dispute with respect to phosphorous levels in the scenic Illinois River. In fact, there has been litigation that has been a part of that dispute for some time. There was actually a memorandum of understanding that Arkansas and Oklahoma entered into around 2002, 2003, and that memorandum expired during my time as attorney general. There were many in government at the time that said we should just wait on the EPA to come in and address the issue, and I chose a different path. I actually reached out to my Democratic colleague, Dustin McDaniel, the attorney general of the State of Arkansas, and we were able to negotiate an agreement that had phosphorous levels set at .037 scientifically driven and enforced on both sides of the border for the first time in history.

So I think Mr. Fite is actually the head of the Scenic Illinois Rivers Commission. He has been center on this issue for a number of years, and I think his good word relates to the work that we did in my office, working with Dustin McDaniel, to achieve that good outcome.

Senator Inhofe. I know my time has expired, but, Mr. Chairman, I would like to enter into the record at this point in the record the statement by the DEQ that I referred to.

Senator Barrasso. Without objection, hearing none.

[The referenced information follows:]

Senator Barrasso. Senator Whitehouse.

Senator Whitehouse. Thank you, Chairman.

Welcome to the Committee, Mr. Pruitt. As we discussed when you and I met, the oceans off of our ocean State are warming due to fossil fuel-driven climate change. It is crashing our fisheries like lobster and winter flounder, and making earning a living harder for our fishermen. I see nothing in your career to give those fishermen any confidence that you will care one bit for their well-being, and not just the well-being of the fossil fuel industry.

In a process that you could replicate in an Oklahoma high school science lab, excess carbon dioxide from fossil fuel emissions is turning our seas more acid. Rhode Island shell fishermen and shell fish growers are concerned. In my colleague, Senator Merkley's State, they have already had oysters spat wiped out for businesses by acidified waters. I see nothing in your career that you would care at all about our Rhode Island shell fishermen.

In Rhode Island, we have bad air days, and because of EPA's work there are fewer and fewer. A bad air day is a day when people driving into work hear on the radio that ozone from out-of-State smoke stacks has made the air in Rhode Island dangerous and that infants and the elderly and people with breathing difficulties should stay home on an otherwise beautiful day. Because those smoke stacks are out-of-State, we need EPA to protect us, and I see nothing in your record that would give a mom taking her child to the hospital for an asthma attack any comfort that you would take the slightest interest in her.

And your passion for devolving power down to States doesn't help us, because our State regulators can't do anything about any of those problems; they all come from out-of-State sources. In this respect we are very like Delaware.

One of the things I would like to ask you about here is the connection between you and some of these fossil fuel companies. These are some of the companies that have supported you. These are some of the political organizations that you have raised money for. You have raised money for them for Pruitt for Attorney General, correct?

Mr. Pruitt. Yes, sir. I had a campaign committee for that, yes.

Senator Whitehouse. And Devon Energy, Koch Industries, Exxon-Mobil have all maxed out to that account.

Mr. Pruitt. I am not aware if they maxed out or not, Senator, but I am sure they have given to that committee.

Senator Whitehouse. Oklahoma Strong PAC is your leadership pack?

Mr. Pruitt. It was, yes.

Senator Whitehouse. It was? And, similarly, they gave money, they maxed out to that organization as well, which you controlled?

Mr. Pruitt. I am unsure about that, Senator.

Senator Whitehouse. Okay. But they contributed to it.

Mr. Pruitt. I am even unsure about that as well. I haven't looked at that.

Senator Whitehouse. You closed your super PAC, Liberty 2.0, but that took fossil fuel contributions as well, correct?

Mr. Pruitt. That particular entity has been closed, yes.

Senator Whitehouse. Now, you helped to raise money for the Republican Attorney Generals Association. While you were a member of its executive committee, they received $530,000 from Koch Industries, $350,000 from Murray Energy, $160,000 from Exxon-Mobil, and $125,000 from Devon Energy, the company whose letter you transposed onto your letterhead and sent as an Oklahoma attorney general document.

Did you solicit, in your role at the Republican Attorney Generals Association, any of that funding?

Mr. Pruitt. I am unable to confirm if they gave those numbers, Senator, those amounts. There were several --

Senator Whitehouse. Did you solicit funding from them in your role at the Republican Attorney Generals Association?

Mr. Pruitt. I attended fundraising events as an attorney general, along with other attorneys general with respect to the RAGA.

Senator Whitehouse. And did you solicit? Did you ask them for money for RAGA?

Mr. Pruitt. As I indicated, I attended fundraising events with respect to this.

Senator Whitehouse. But that is different. Attending fundraising is one thing. Asking them is my question. Did you ask them for money?

Mr. Pruitt. Specifically, you would have to ask about certain entities. I don’t know. You have an entire list.

Senator Whitehouse. Those are the entities: Koch Industries, Murray Energy, Exxon-Mobil, Devon Energy.

Mr. Pruitt. I did not ask of Koch or -- what were the other ones?

Senator Whitehouse. Murray Energy, Exxon-Mobil, Devon Energy.

Mr. Pruitt. I have not asked them for money on behalf of RAGA.

Senator Whitehouse. You said to the Chairman that there is nothing that might place you in a conflict of interest that you have not disclosed. Yet, you founded the Rule of Law Defense Fund, which is a dark money operation that supports the Republican Attorney Generals Association, and you have not disclosed any of your solicitations for that entity, nor have you disclosed what money was raised pursuant to those solicitations. This is an organization that appears to have a million dollar a year budget, so very substantial funds have been solicited. I believe you were its chairman. Will you disclose your role in soliciting money and in receiving money for the Rule of Law Defense Fund pursuant to your solicitations?

Mr. Pruitt. Senator, a point of clarification. I actually did not start nor initiate the Rule of Law Defense Fund. That is something I did not do.

Senator Whitehouse. You led it?

Mr. Pruitt. I have been an officer of that organization for 2016.

Senator Whitehouse. Okay, an officer of it.

Mr. Pruitt. There is an executive staff, fundraisers that actually carry out the functions of that organization. There are many attorneys general that serve on that board. It is not a decision of

one; it is a decision of those that are empowered to make those decisions.

Senator Whitehouse. But you haven't told us anything about that. You haven't told us --

Mr. Pruitt. I have no access --

Senator Whitehouse. -- who you asked money from, --

Mr. Pruitt. That is a file that --

Senator Whitehouse. -- you haven't told us what they gave, if you asked them. It is a complete black hole into which at least a million dollars goes, and, based on your record of fundraising, it appears that a great deal of your fundraising comes from these organizations who are in the energy sector and devoted to fighting climate change.

Mr. Pruitt. Some of whom I have actually sued, as well, Senator. But with respect to the Rule of Law --

Senator Whitehouse. Name one you have sued up there.

Mr. Pruitt. Exxon-Mobil.

Senator Whitehouse. Really?

Mr. Pruitt. Yes.

Senator Whitehouse. My time has expired. We will pursue this in further questions.

Mr. Pruitt. We are involved in, as I indicated, I think, in your office, we are involved in, and Senator Inhofe mentioned it in his comments, a situation in Oklahoma where multiple oil and gas companies, ConocoPhillips and others, have defrauded the State in cleanup with respect to spills that have occurred, and Exxon-Mobil --

Senator Whitehouse. That is a qui tam fraud case; it has nothing to do with the environment.

Mr. Pruitt. Senator, --

Senator Barrasso. I thought you were going to resolve that for the second round.

Senator Whitehouse. I am sorry, he was coming back to me, so I was responding.

Senator Barrasso. Thank you.

Before heading to Senator Capito, there are two articles I will be introducing into the record. One from The Wall Street Journal in September, headlined "Hillary Clinton Raises More Than Donald Trump from Oil Industry." The second article that I will be introducing for the record is from Politico from December 27th, by Elana Schor, who quotes America Rising Executive Director Brian Rogers: "This is a partisan fishing expedition by six liberal Democrats who, combined, have taken more than $1.2 million from far left environmentalist groups dead set against any reforms to an out-of-control EPA."

[The referenced information follows:]

Senator Barrasso. Senator Capito.

Senator Capito. Thank you, Mr. Chairman.

And thank you, Attorney General Pruitt, for being here, for your willingness to throw your hat in the ring to serve. I would like to quote the Ranking Member when he says it is hard work, because it is. The EPA is hard work.

But one of the things you said really struck me, and I believe that the rule of law does matter, and I am heartened by your passion for that.

The regulatory overreach of the EPA has contributed to economic devastation in my State of West Virginia and my region. Data from the Mine Safety and Health Administration shows that 60,000 coal jobs have been lost between 2011 and 2016. Thousands of these were in West Virginia. We are in a desperate situation in our State right now because of this.

We had a field hearing in Beckley, West Virginia, where our WVU economist, John Deskins, said that the coal industry downturn had resulted in six of our southern West Virginia counties being in a great depression.

For the past eight years, the EPA has given no indication at all that it cares about the economic impact of its policies, even though Congress has said very clearly in the Clean Air Act and other environmental statutes that we expect jobs and economic factors to be taken into account. That is part of the law. In October, a federal court held that the EPA had failed to evaluate the job impacts of the

EPA Clean Air Act as required by 321(a) of that Act, and ordered the EPA to submit a schedule for conducting the required jobs analysis.

Incredibly, the EPA told the court it would take two years -- this was just in the last several weeks -- it would take two years just to come up with a plan on how to do the analysis, which, in my view, if that is part of the law that EPA is supposed to be following, they should already have the protocols set up to do an effective and accurate job analysis.

So the court responded like this: "This response is wholly inefficient, unacceptable, and unnecessary. It evidences the continued hostility on the part of the EPA to the acceptance of the mission established by Congress."

So I would like to ask you to commit to me to ensure that the EPA will follow the law it is charged with implementing and do those ongoing evaluation of job losses and economic shifts due to the requirements of the Act as required by the law.

Mr. Pruitt. Senator, as you indicated, I really believe that it is important that rule of law is adhered to because it inspires confidence in those that are regulated. I think oftentimes those that are regulated don't know what is expected of them. They look at a statute, they see the requirements of the statute, and then those that are regulating act in a way that is not consistent with that framework, so they don't know what is expected of them; and that causes uncertainty and, I think, paralysis to a certain degree. So rule of law is something that we should take seriously. It has been at the heart of the litigation that we have initiated as a State.

A lot of times these cases, as we were talking earlier with Senator Carper, there is a policy or a political kind of attention that is drawn to it, but really is about process and rule of law, and making sure that the framework that this body, Congress, has established is respected and enforced. So I appreciate your comments.

Senator Capito. Well, in looking for the balance, we need to have at least a correct analysis of what the economic implications are of regulations.

It is so important, critically important that we enforce our environmental laws, and to keep our air clean and get it cleaner and protect our waters.

In January of 2014, a storage tank in Charleston, West Virginia was corrupted and went into the river. It was right by the water flow of the major water source in my community. Three hundred thousand people had to do without water for several weeks. It caused a lot of angst economically to small businesses. Imagine a restaurant not being able to use water or you can't wash your clothes. You couldn't do anything with the water.

But also, and I share this concern, concern about the health and the long-range implications of what has happened. Several people, multiple individuals and Freedom Industries have pled guilty to environmental crimes in federal court, which I am very pleased about.

So let's talk about TSCA, because in TSCA I was able to support a provision that would say that if you are storing in close proximity to drinking water, you have to take that into consideration when you are reviewing potentially hazardous chemicals.

Can we count on you to work with this Committee to make sure that this bipartisan TSCA reform bill is fully implemented, and efficiently and fully?

Mr. Pruitt. Absolutely, Senator. In fact, I would commend the work of this Committee, with Senator Inhofe's leadership, in passing that update to the TSCA legislation. For the first time in history, as you know, the EPA has the ability to order testing to address chemicals that are going to be entered into the stream of commerce, and that is a very big substantive change that exists. There are many deadlines --

Senator Capito. And I would also add that in TSCA -- excuse me just a minute because I am running out of time. In TSCA we actually expanded the EPA's reach. So when you are asked if you are wanting to get rid of the EPA or it doesn't have a value, I voted to expand that reach of EPA to make sure that I have clean water and that if a spill happens in a community around this Country, what has happened in Flint, Michigan, doesn't have the far-reaching implications that it does.

Thank you very much.

Mr. Pruitt. Thank you, Senator.

Senator Barrasso. Senator Cardin.

Senator Cardin. Thank you, Mr. Chairman.

Mr. Pruitt, welcome to the Committee. Thank you for your willingness to serve our Country.

I want to talk about the Chesapeake Bay Program. We talked about that in my office. I explained to you, and I will do it very quickly,

that this is a program that was developed at the State level with the States that are in the watershed, including Delaware, with my colleague, Senator Carper. It is a State that the locals have determined how it is best to reach their pollution targets in order to help preserve the Chesapeake Bay. It is the largest estuary in the northern hemisphere. It is critically important; it is complicated. It doesn't flush itself, as many bodies of water do; it has a reduction of oyster crops. There are so many problems. All the stakeholders have gotten together; they worked out a plan. The Federal Government is part of that plan. It is enforced through the TMDL program and it has been agreed to by the local governments.

It was challenged, the TMDLs, including you joined that lawsuit. The Supreme Court refused to overturn the Court of Appeals supporting the use of the TMDLs.

If you are confirmed, will you support the Federal role in the Chesapeake Bay Program as envisioned by the partners and stakeholders, enforcing the TMDLs, if necessary?

Mr. Pruitt. Yes, Senator. And as I indicated in your office, the time that we had together, I really commend the six States that joined together to address the Chesapeake Bay and to try to set levels for both point source and non-point source type of discharge into the Chesapeake Bay. There were some concerns about the precedent, the role that EPA was playing initially, but through that litigation the EPA has acknowledged that their role is more informational. And there was concern in Oklahoma about the Mississippi River Basin and the

precedent that was set in that matter, and that is what spawned our litigation.

But I really want to emphasize to you that process represents what should occur, for States to join together and enter into an agreement to address water quality issues and then involve the EPA to serve the role it is supposed to serve is something that should be commended and celebrated. And as it relates to enforcing that TMDL, I can commit to you that in fact I will do so.

Senator Cardin. Part of the Federal Government's partnership is to provide resources. There are several programs that fund initiatives within the Chesapeake Bay Watershed; probably the largest is the State Revolving Funds dealing with wastewater. Will you support the Federal Government's partnership through funding these programs that are critically important to make the advancements in the Chesapeake Bay Watershed?

Mr. Pruitt. Yes, Senator. I believe that the grant-making role of the EPA, as we talked about in your office, is very important to States across this Country, whether it is the revolving funds or the WIFIA portions of our statutes. But grant-making, in general, is very important, and I will commit to you in that regard that I would do so with respect to the Chesapeake Bay.

Senator Cardin. I want to continue on clean water for one moment. We have had significant problems with safe drinking water and clean water. Let me ask you a preliminary question. Do you believe there is any safe level of lead that can be taken into the human body, particularly a young person?

Mr. Pruitt. Senator, that is something I have not reviewed, nor know about. I would be very concerned about any level of lead going into the drinking water or, obviously, human consumption, but I have not looked at the scientific research on that.

Senator Cardin. The Clean Water Act provides for Federal guidance as to acceptable clean water. It is enforced by the States. So my question to you in regards to clean water is what steps will you take to make sure that our children are safe. We saw in Flint, Michigan a tragedy occur. Where do you think the Federal Government needs to strengthen its regulatory roles to make sure that our children are safe from lead?

Mr. Pruitt. Well, I think with Flint, Michigan it is an example of delay in response by the EPA. There should have been more done on corrosion control programs with the Flint, Michigan system. As you know, under the Clean Water Act and the Safe Drinking Water Act, if there is an emergency situation, the EPA can enter an emergency order to address those kinds of concerns. I think there should have been a more fast response, a more rapid response to Flint, Michigan.

I think with respect to water quality it is infrastructure. Water infrastructure is important. And, as you indicated, the States play a very vital role in that process, and there needs to be more cooperation between the EPA and the States to ensure water quality is protected.

Senator Cardin. Just so I understand, you have participated in several lawsuits against the EPA's involvement, saying that the locals should have the responsibility. If you are confirmed, will you

support Federal enforcement, particularly in multi-State issues, where the only way we can get enforcement is at the Federal level?

Mr. Pruitt. I believe that is a vital role of the EPA. As I indicated in your office, with air quality, water quality, issues that cross State line, there is an enforcement mechanism that is important, and would seek to do so if confirmed as EPA Administrator.

Senator Cardin. Thank you.

Senator Barrasso. Thank you, Senator Cardin.

Senator Fischer.

Senator Fischer. Thank you, Mr. Chairman.

And thank you, Mr. Pruitt, for being here today, but also for accepting the nomination. It is a service and a sacrifice not just for you, but for your family, as well, to step forward to serve this Country. So thank you, sir, for being willing to do that.

Mr. Pruitt. Thank you, Senator.

Senator Fischer. For your testimony, I do thank you, and I would like to, first of all, let you know that Nebraskans have been really affected by the EPA in many instances, and I will give you some examples of that.

Nebraska's public power utilities are grappling with how they could ever comply with the EPA's carbon emission reduction mandates. The City of Omaha is struggling with the Agency's expensive CSO mandate and drinking water affordability. Nebraska farmers are waiting on new crop technology products that are stuck in a broken regulatory process. Our biofuel investors and producers are desperate for certainty under the RFS. Homebuilders, transportation

stakeholders, and local county officials are concerned about the jurisdictional expansion to control our State's water resources. Communities and small business owners fear that the EPA's ozone mandate will stunt potential economic development and growth in our State. As a result of the activist role the EPA has played for the past eight years, families are concerned about the futures of their livelihood.

We all want clean air and we all want clean water. That is one point that I know each and every person here agrees on. But with the EPA's tremendous impact on Americans' lives each and every day, it is important that the Agency be open, transparent, and answerable for its actions. Given these concerns, along with the many others that have been and will continue to be discussed today, what steps will you take as the EPA Administrator to provide relief for American families that are faced truly with an onslaught of EPA rules?

Mr. Pruitt. Senator, you mentioned open, transparent rulemaking. There are concerns that have been expressed recently with respect to regulation through litigation, where groups initiate litigation against the EPA and the United States Government, and set environmental policy through something called a sue and settle process. I think this body, as well as the U.S. House, has looked at those kinds of issues. And when we talk about open transparency, there is a reason why the Administrative Procedures Act exists. It is intended to provide notice to those that are going to be impacted with rules to give them the opportunity to offer comment and to inform the regulators on the impact of those rules. And then it is the

obligation of the regulator to take those things into consideration in finalizing rules; otherwise, they act in an arbitrary and capricious way.

So it is very important that that process be adhered to, to give voice to all Americans in balancing the environmental objectives we have, but also the economic harm that results. And the Supreme Court has spoken about that rather consistently of late, and I would seek to lead the EPA in such a way to ensure that openness and transparency.

Senator Fischer. You know, a couple weeks ago I held a very good conversation about our shared vision for the EPA, to bring common sense and accountability back to that Agency, and I think that is going to go a long way in restoring confidence in the Agency by the American people.

One issue we did discuss was the Renewable Fuel Standard and its importance to my home State of Nebraska. We are the largest ethanol producer west of the Missouri River. Our neighbors to the east, Senator Ernst's home State, they do lead the Nation in ethanol production. So honoring the congressionally-mandated timelines and the volume requirements that are critical from an investment point of view and also from a planning perspective, I think that this is especially relevant, and especially during the current farm crisis that we are seeing and the negative impact on people in agriculture all across this Nation.

In our meeting you did express your commitment to me to honor the law and you echoed President-elect Trump's support for the statute

itself and a strong RVO. For the record, can you please once again express your commitment to uphold the congressional intent of the RFS?

Mr. Pruitt. Yes, Senator, and you said it well, to honor the intent, and the expression of the Renewable Fuel Standard statute is very, very important. It is not the job of the Administrator of the EPA to do anything other than administer the program according to the intent of Congress, and I commit to you to do so.

Senator Fischer. And you also --

Mr. Pruitt. And I would say this. The waivers that routinely are offered by the Administrator, recently another waiver was offered, it should be used judiciously. There is a reason why Congress put in that statute those statutory objectives. The market has changed since 2005, and the waiver authority that has been provided by this body is important, but that waiver authority should be used judiciously, and the act should be complied with and enforced consistent with the will of Congress.

Senator Fischer. Thank you, sir. And I would ask that you also tell us publicly what you told us, that you will honor the timelines on the volume levels that are mandated by Congress.

Mr. Pruitt. Yes, Senator.

Senator Fischer. Thank you very much.

Senator Barrasso. Thank you, Senator Fischer.

Senator Merkley.

Senator Merkley. Thank you, Mr. Chairman.

Over a number of years, information started pouring into EPA that the estimate of the amount of fugitive methane escaping in gas and oil

drilling had been deeply underestimated. In 2011, the EPA put out its best estimates based on the information that was being presented. And this is relevant because methane is a global warming gas, more potent than CO2.

Gas companies didn't like this because, well, it presented a vision of natural gas being more damaging environmentally than folks had previously understood. Devon Energy is one of the groups that sought to cast doubt on this scientific information, and they came to you to be their spokesperson; and they asked will you be our mouthpiece in casting doubt and send a letter we have drafted to the EPA, and you sent that letter.

And I just want to ask, first, are you aware that methane is approximately 30 times more potent than carbon dioxide as a global warming gas?

Mr. Pruitt. I am, Senator.

Senator Merkley. Thank you.

Mr. Pruitt. I think the impact on human --

Senator Merkley. That is the answer. Yes. Thank you. It is a yes or no question.

And on a 1 to 10 scale, how concerned are you about the impacts of fugitive methane in driving global warming?

Mr. Pruitt. Methane, as you indicated --

Senator Merkley. One to 10 scale. Highly, 10, very concerned, or 1, not so concerned?

Mr. Pruitt. The quantities of methane in the atmosphere compared to CO2 is less, but it is far more potent, and it is --

Senator Merkley. Are you concerned? I am asking about your level of concern.

Mr. Pruitt. Yes. Yes.

Senator Merkley. Highly concerned?

Mr. Pruitt. I am concerned.

Senator Merkley. Thank you. Do you acknowledge sending this letter to the EPA in October 2011?

Mr. Pruitt. Senator, if that is a letter that is on my letterhead that was sent to the EPA, yes, with respect to the issue.

Senator Merkley. Do you acknowledge that 97 percent of the words in that letter came directly from Devon Energy?

Mr. Pruitt. I have not looked at the percentage, Senator.

Senator Merkley. The statement that has been analyzed many times is that all of the 1,016 words, except for 37 words, were written directly by Devon Energy.

Mr. Pruitt. Senator, that was a step that was taken as attorney general representing the interest of our State. Over 25 percent of --

Senator Merkley. I didn't ask that question. I was just asking if you copied the letter virtually word for word. You have acknowledged that, yes, it is in the record. People can count it. It is correct.

All right, so a public office is about serving the public. There is a public concern over the impact of methane on global warming. There is scientific research showing that it is far more devastating than anticipated and far more is leaking. But you used your office as a direct extension of an oil company, rather than a direct extension

of the interests of the public health of the people of Oklahoma. Do you acknowledge that you presented a private oil company's position rather than a position developed by the people of Oklahoma?

Mr. Pruitt. Senator, with respect, I disagree. The efforts that I took as attorney general were representing the interests of the State of Oklahoma.

Senator Merkley. Earlier you said you --

Mr. Pruitt. And there was a concern about --

Senator Merkley. No, no, excuse me. I am asking the questions. You said earlier you listen to everyone. In drafting this letter, you took an oil company's position and then, without consulting people who had diverse views about the impact, you sent it off. How can you present that as representing the people of Oklahoma when you simply only consulted an oil company to push its own point of view for its private profit?

Mr. Pruitt. Senator, there is an obligation the EPA has to follow processes as established by this body. The cost-benefit analysis under Section 112 is something that they have to engage in. There was a concern about the overestimated percentages that the EPA put in the record; it was a record-based challenge. That was the expression of the letter to the EPA, and it was representing the interests of an industry in the State of Oklahoma; not a company, an industry.

Senator Merkley. Thank you. But my question was what other groups, environmental groups or other groups, did you consult so that

you had that full perspective before representing simply a for-profit oil company using your official office and your official letterhead?

Mr. Pruitt. I consulted with other environmental officials in Oklahoma that regulate that industry and learned from them with respect to the concerns about the estimates that were provided by the EPA.

Senator Merkley. Can you provide this Committee with information showing who you consulted in representing this letter specifically for Devon Energy? Because the information that is in the public realm only shows that they simply sent you a letter, asked you to send it, and you sent it without questions.

Mr. Pruitt. We have seven or so individuals in our office that are involved in these kinds of issues, and we will collect the information they have and provide it to this body pursuant to the Chairman's direction.

Senator Merkley. Your staff expanded substantially while you were in charge, to 251 staff members. Why do you need an outside oil company to draft a letter when you have 250 people working for you?

Mr. Pruitt. Senator, as I have indicated, that was an effort that was protecting the State's interest in making sure that we made the voices of all Oklahomans heard on a very important industry to our State.

Senator Merkley. You said all heard, but you only sent it on behalf of a single voice, the oil company. Thank you.

Senator Barrasso. I still have some time remaining from my questioning. Is there anything you would like to add that you haven't

felt you have had a chance in terms of answering fully some of the areas of the questioning?

Mr. Pruitt. I think, Senator, the clarification that the letter that was sent to the EPA was not sent on behalf of any one company. This was not particular to Devon Energy, not particular to Chesapeake, not particular to other companies in our State; it was particular to an industry. The State of Oklahoma has an oil and gas industry that is vibrant to our State, as you might imagine, just like many of you have industry in your State. There was concern expressed by that industry, many folks in that industry, about the overestimating that occurred with that methane rule. That was the communication to the EPA. It was a position of the State, not the position of any one company.

Senator Barrasso. Thank you.

Senator Moran.

Senator Moran. Chairman, thank you very much.

General Pruitt, welcome to the Committee. Thank you for your public service. I am going to see if I can get through three areas in the five minutes that I have.

First of all, WOTUS, Waters of the United States. Despite there being an injunction against the enforcement of the WOTUS rule, I am told that EPA Region 7, the region in which Kansas is part, those regional inspectors have increased their inspection of smaller animal feeding operations. Unlike many States, Kansas has a well-established State permit system for small facilities, as well as the delegated authority under the Clean Water Act. The EPA, rather than cooperating

with the State agency, the EPA is engaged in its own inspections and its own enforcement on these small facilities, often conflicting with State permitting and the enforcement process.

In these actions, the EPA has claimed jurisdiction over features like grass waterways, culverts under county roads unconnected to the feeding operation and not situated in or near any body of water.

General Pruitt, what would your direction be to the EPA staff, to Region 7 and others, in regard to their actions enforcing WOTUS while an injunction is in place?

Mr. Pruitt. Well, Senator, as you indicated, and I do want to acknowledge the same concerns have been expressed by those individuals in Oklahoma in different groups with respect to the WOTUS definition that has been offered by the EPA that is subject to a 31-State challenge that was consolidated there before the 6th Circuit, and, as you indicated, there has been a stay of enforcement against that particular rule. The Supreme Court actually, last Friday, took up a matter of jurisdiction on that case, so that adds some complexity to this.

But I think the role of the EPA, prospectively, is to seek to provide clarity on what the true definition, what the best definition is with respect to Waters of the United States. As you know, there is much flexibility and discretion there given to the EPA in a series of cases that lead up to the Rapanos decision that haven't provided a tremendous amount of clarity. The best thing the EPA can do going forward is to reestablish that clarity so that States and individuals know what is expected of them in compliance.

Senator Moran. General, thank you. I don't think I need to remind you, in particular, about the role that States play in clean water. But I would take a moment to highlight something that is often, I think, forgotten in the regulatory world of water, water quality, is the Department of Agriculture, the Natural Resource Conservation Service, in which landowners are assisted through the Department of Agriculture in improving water quality and water quantity in a very partnership-oriented local effort that is significantly different than the tremendous reach from the EPA in Washington, D.C. as compared to the local efforts by landowners themselves to work with USDA to solve problems.

Let me move to my second question. It revolves the Flint Hills. That is a Native grassland in our State. The owners of those grasslands, these are thousands of acres of grass, they burn the prairie in the early spring for purposes of regeneration of that grass. It is learned from the Indians that lightning used to be the method by which that grassland burned. Less so now with the settlement that have occurred of our Country. And as a result of that annual burning, that is ecologically desirable, there is times in which a city, even one of our own, Wichita, for example, is in non-attainment under the Clean Air Act. And I raise this issue to you in asking that you work, if you are confirmed, with the State of Kansas in our local efforts to manage the burning of the national grasslands in a way that is advantageous to wildlife habitat, at the same time done in a timely fashion, at appropriate times, in appropriate

amounts, that preserves the air quality; but, again, not a heavy-handed approach that one-size solution or a ban fits the circumstance.

Mr. Pruitt. If confirmed, Senator, I look forward to working with you on that issue.

Senator Moran. I thank you for that.

Finally, I want to highlight a small town in Kansas named Pretty Prairie, a typical name or a perfect name for a town in our State. Pretty Prairie, Kansas, has a population of about 700 people. For several decades, because of the high nitrates in the city's water levels -- I didn't say that very well. Because of high levels of nitrate in the city water system, the city has provided free bottled water to its citizens. And my question to you is now the EPA is disallowing that practice and requiring the city to spend approximately $2.4 million and raise the rates of our residents of that community by $80 a month while the community seemingly is satisfied with the solution of the city providing an alternative to the expense of a new water treatment plant.

I ask this question, again, as an example of where a rigid decision, as compared to a community-based decision, seems to prevail at the EPA, and would give you an opportunity to confirm to me what I hope you would say is that you will work with communities. You, as an Oklahoman, and, me as a Kansan, and many of the members of this Committee represent lots of communities in which the population is insufficient to be able to pay for the costs of water or sewer treatment. We need financial resources to accomplish that, but we also need common sense solutions to the problem.

Mr. Pruitt. Senator, I look forward to working with you on that issue as well as the other. There was a saying in the environmental space: national standards, neighborhood solutions. And I think it is important for the EPA Administrator, those in Washington, as I said in my opening statement, to listen and learn from those, from you with respect to the needs of your community and your State, and collaborate with you and the local officials to achieve good outcomes.

Senator Moran. I look forward to educating you on behalf of Kansans.

Senator Barrasso. Thank you, Senator Moran.

Senator Booker.

Senator Booker. Good morning, Mr. Pruitt.

Mr. Pruitt. Good morning, Senator Booker.

Senator Booker. I have a letter that I read that you sent to the Committee last year, and you said that the Oklahoma Attorney General, you said, "I am responsible for protecting the welfare of Oklahoma citizens." I assume that is still correct and you believe that.

Mr. Pruitt. Yes, Senator.

Senator Booker. And during the past six years in pursuit of that, if you look at the record of the lawsuits you filed against the EPA, you have joined or filed 14 lawsuits against the EPA challenging clean air and clean water rules, yes?

Mr. Pruitt. We have been involved in multiple pieces of litigation, Senator.

Senator Booker. Yes, but I am looking at specifically 14, and, Mr. Chairman, I would like to put those 14 lawsuits into the record,

of where you specifically challenged the EPA on air quality. And let me just go through some of those.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Booker. Thank you, sir.

To reflect your recollection, you filed two lawsuits challenging the EPA Mercury and Air Toxics Standard; you filed a lawsuit challenging the EPA's 2015 National Ambient Air Quality Standards for ozone; you filed four lawsuits challenging the EPA's Clean Power Plan; you have sued to challenge the EPA's 111(b) standards for carbon dioxide emissions from new power plants; and you also sued to challenge the EPA's Federal implementation plan for Oklahoma under the Regional Haze Rule.

You are familiar with those, I imagine?

Mr. Pruitt. Yes, Senator.

Senator Booker. And you filed a lawsuit challenging the EPA Cross-State Air Pollution Rule, something in New Jersey we are very concerned with. Are you aware that that rule, which you lost in that suit, scientists estimate that that alone prevents 400,000 asthma attacks nationally each year? Are you aware of those estimations?

Mr. Pruitt. Yes, Your Honor. Yes, Senator. May I offer --

Senator Booker. I appreciate your promotion to judge.

[Laughter.]

Senator Booker. Let me continue, Mr. Pruitt. I don't have much time.

Mr. Pruitt. Okay.

Senator Booker. So each of these lawsuits that I just went through and that we analyzed, all of them challenge attempts by the EPA to reduce air pollution. In all of them except one you filed those lawsuits joining with polluting companies that were also suing

the EPA. And, so, in addition to filing those lawsuits with some of the polluting companies, or at least one that has now been specifically mentioned by two of my colleagues, you used substantial portions of the letters from those companies, put them on your official attorney general letterhead; and what was sort of surprising to me is that when you have been asked about this in the public, you basically represented that that is actually called representative government in my view of the world. Your testimony here says that you were representing industry; you were representing the polluters.

So with all of these lawsuits you filed, and with all of these letters like this one, written to the EPA on behalf of the industries that are causing the pollution, it seems clear to me that obviously the fact pattern on representing polluters is clear, that you worked very hard on behalf of these industries that have their profits externalized, negative externalities are their pollution.

So I just have a question for you specifically about the children of Oklahoma. Do you know how many kids in Oklahoma, roughly, have asthma?

Mr. Pruitt. I do not, Senator.

Senator Booker. Well, according to data published by the very non-partisan group, the American Lung Association, more than 111,000 children in Oklahoma, which is more than 10 percent, more than 1 in 10 of all the kids in Oklahoma, have asthma. That is one of the highest asthma rates in the entire United States of America.

Now, this is a crisis, similar data, for where I was mayor, and I can tell you firsthand the devastating impacts that asthma has on

children and families; affecting their economic well-being, parents who have to watch their children struggle to breathe, people that have to miss work, rushing their kids to the hospital. One in 10 kids having a disease, missing school, is a significant problem.

So if you have been writing letters on behalf of polluting industries, I want to ask you how many letters did you write to the EPA about this health crisis? If this is representative government, did you represent those children? I want to know what actions you have taken in the past six years in your capacity as protector of the welfare of Oklahoma citizens to protect the welfare of those 111,000 children. Did you ever let any of them write letters on your letterhead to the EPA, and did you even file one lawsuit, one lawsuit on behalf of those kids to reduce the air pollution in your State and help them to have a healthy life?

Mr. Pruitt. Senator, I have actually provided a list of cases to the Chairman with respect to enforcement steps we have taken in multiple pieces of environmental litigation. But let me say to you, with respect to cross-State pollution and some of the cases you referred to, the State has to have an interest before it can bring those cases, as you know. You can't just bring a lawsuit if you don't have standing, if there has not been some injury to the State of Oklahoma. In each of those cases --

Senator Booker. My time has expired, but if I could just say injury, clearly asthma is triggered and caused by air pollutants. Clearly there is an air pollution problem. And the fact that you have not brought suits in any of the levels which you have represented the

industries that are causing the pollution is really problematic when you are going to sit in a position that is nationally supposed to be affecting this reality. And asthma, in our Country, is the number one reason why children in America, health reason why children in America miss school.

Mr. Chairman, thank you.

Senator Barrasso. Thank you very much.

I submit for the record first an article from the Tulsa World from Scott Thompson. The headline is "EPA will be in good hands with Scott Pruitt." Scott Thompson is the Executive Director of the Oklahoma Department of Environmental Quality. Talks about the excellent work done and ends with a quote: "EPA will be in good hands with Scott Pruitt."

I would point out that between 2004 and 2008, and we will submit this for the record, the most recent employers of Obama Administration senior EPA officials sue the EPA with 12 lawsuits, at least, in the time when George W. Bush was in his second term, including Lisa Jackson, Assistant Administrator Cynthia Giles, Gina McCarthy, and Stephen Owens. They were petitioners and plaintiffs filing suits against the EPA.

And, finally, I will submit an editorial from the Tulsa World. "Over the past six years, Pruitt's legal team has consistently shown deference to the legal expertise and professionals at DEQ," the Department of Environmental Quality. This was written by the executive director. More importantly, he said, "I cannot recall an

instance where they did not allow us to pursue legal action when deemed necessary."

And then, finally, from Mike Turpen, who is the former Chairman of the Oklahoma Democratic Party, says, "The job of the EPA is the essential mission of guarantying clean air and clean water. Pruitt has never compromised those critical components of a healthy population with any actions he has taken."

[The referenced information follows:]

Senator Barrasso. Senator Rounds.

Senator Rounds. Thank you, Mr. Chairman.

Welcome, Attorney General Pruitt.

Mr. Pruitt. Thank you, Senator Rounds.

Senator Rounds. I notice that you didn't have the opportunity in the time allotted for Senator Booker's question. Would you care to finish your response with regard to the role that the States have in their ability to either participate in a suit and whether or not they have standing? Would you like to finish your thoughts on that?

Mr. Pruitt. Thank you, Senator.

Senator, as I indicated in your office, when we spent time together, the enforcement role in the State of Oklahoma is different than other States. With respect to the Department of Environmental Quality, the Oklahoma Water Resources Board, we had multiple agencies, Department of Agriculture, that have frontline enforcement authority with respect to our environmental laws.

The role that we play in my office largely is a general counsel role. We provide guidance and direction to those agencies. There were many cases we have initiated in conjunction with them, but mainly those agencies enforce actions at their level. Many of those agencies have dozens of attorneys on their staff and a general counsel in their own right bringing those enforcement actions.

You mentioned several of the cases. From MATS to Cross-State Air Pollution and the rest. I believe the Cross-State Air Pollution Rule is a very important statute that EPA should enforce. I believe that if there are downwind States that are contributing to non-attainment -

- I am sorry, upwind States that are contributing to non-attainment in downwind States, that there should be responsibility for those States. We had that issue with Texas at times.

So the lawsuit was not questioning the authority of the EPA to regulate under the Cross-State Air Pollution Rule; it was more that they were trying to assess damages against certain States that were in excess of their allocated share.

So each of those cases I would ask you to remember I am an advocate in behalf of the State of Oklahoma. There is a State's interest that Senator Rounds indicated that has to be in play. To say that any of those cases is about any one company is just simply not right. There is no parens patriae standing that I have as attorney general to bring a case on behalf of a private citizen or a company; there has to be a standing, an injury to the State's interest to bring those cases.

So I would ask you to consider that as we go through those cases you mentioned earlier.

Thank you, Senator Rounds.

Senator Rounds. Thank you.

And thank you, sir, for your response, your complete response. Also, as the chairman of the Subcommittee on Oversight of the Environmental Protection Agency, I have had the opportunity to look at their basis or the way that they make their decisions known, and the logic they use in getting to those decisions. We had a chance to talk about it in my office the other day, and one of the items that I brought up was the fact that we actually had received comments from

the Small Business Administration Office of Advocacy, a copy of which I got.

Mr. Chairman, I would like to have put into the record.

Senator Barrasso. Without objection.

Senator Rounds. Thank you.

[The referenced information follows:]

Senator Rounds. And with this, this was a letter that was sent to the EPA in October of 2014 requesting that the EPA withdraw the proposed Waters of the U.S. Rule, the WOTUS Rule, and reevaluate the impacts the rule would have on American small business. Now, this is a Federal agency requesting the EPA take a second look at a proposed rule.

The EPA refused this request and issued the final rule that we have today.

What are your thoughts on this? And would you, if you are approved and become the next Administrator of the EPA, would you take a second look at whether or not they had a valid reason for having the Waters of the U.S. Rule considered again?

Mr. Pruitt. I think, Senator, the response of the 6th Circuit and where we are presently with litigation, there is definitely a need to address that on a prospective basis. Historically, as you know, under the Clean Water Act, and even before the Clean Water was passed, waters of the United States equaled navigable waters, navigable in fact waters. We know from a couple of cases that led up to the most recent case, Rapanos, that the Clean Water Act is something more than navigable in fact. But what that more is has to be determined and assessed.

So, as I indicated earlier to another Senator's question, the most important thing is to provide certainty, to make sure that the Clean Water Act helps those at the State level know where the boundaries are, where they have jurisdiction and where they don't, so

that we can have regulations that are fair and equitable, and uncertainty is not created.

Senator Rounds. In the lawsuits that you brought against the Environmental Protection Agency on behalf of the State of Oklahoma, would it be fair to say that a number of those are based upon the Environmental Protection Agency failing to follow its own rules and the promulgation of those rules?

Mr. Pruitt. Yes, Senator. I think whether it is the MATS case or the Clean Power Plan case or the WOTUS case, or a multitude of cases, the courts have agreed that the EPA has exceeded its authority; that the EPA has not acted within the framework that Congress has established in performing the role that it is supposed to perform. That is the reason I mentioned in my opening statement that process matters; rule of law matters; federalism matters. Those issues matter because Congress has said so. It is Congress who gives authority to the EPA. The EPA is an administrative agency, it is not a legislative body. So it is important for that agency to act within the framework, within the substantive authority that Congress has provided it in doing its job.

In leading the EPA, if confirmed, I think if I do that effectively, it will provide confidence, certainty to those that are regulated to know what is expected to them, and improve our air and improve our water because of that.

Senator Rounds. Thank you, Mr. Chairman.

Senator Barrasso. Thank you, Senator Rounds.

Senator Markey.

Senator Markey. Thank you, Mr. Chairman.

This morning, NOAA, NASA has declared 2016 the hottest year in the 137-year-old record that has been kept. Donald Trump has called global warming a hoax caused by the Chinese. Do you agree that global warming is a hoax?

Mr. Pruitt. I do not, Senator.

Senator Markey. So Donald Trump is wrong?

Mr. Pruitt. I do not believe that climate change is a hoax.

Senator Markey. Okay. That is important for the president to hear.

Mr. Pruitt, you have made a career working on behalf of the fossil fuel industry to eviscerate regulations designed to protect public health and the environment. You have sued the EPA 19 times to stop clean air and water protections. Eight of those cases are still ongoing, including your litigation that challenges critical rules that reduce levels of hazardous smog, mercury, and carbon pollution.

As EPA Administrator, you would be in a position to serve as plaintiff, defendant, judge, and jury on these ongoing eight lawsuits, and that would be wrong. In your ethics agreement you have said that you would not participate in any matter that is ongoing litigation within one year. But, Mr. Pruitt, isn't it correct that these lawsuits may very well continue for much longer than one year?

Mr. Pruitt. Well, Senator, I have the letter from the ethics counsel at the EPA, and the one-year time period is intended to address covered entities, entities that I served in a chairmanship or an officer capacity. The Southern Theological Seminary, the Windows

Ministry, those entities are covered entities. So if there is a matter that arises before the EPA within a one-year period, a particular matter, a specific case that involves those entities, then the recusal would be in order. But that is really the focus of the one-year timeline.

Senator Markey. So will you agree to recuse yourself from those lawsuits which you brought as the attorney general of Oklahoma against the EPA, not just for one year, but for the entirety of the time that you are the Administrator of the EPA? Will you commit to doing that?

Mr. Pruitt. Senator, for clarity, I think that it is important to note that the one-year time period, again, is for those covered entities that were highlighted in the EPA letter.

With respect to pending litigation, the EPA ethics counsel has indicated, with respect to particular matters and specific parties, there will be an opportunity to get counsel from the EPA at that point to determine what steps could be taken to avoid appearances of impropriety.

Senator Markey. Are you saying that you will not recuse yourself from the actual matters which you are suing the EPA on right now as Attorney General of Oklahoma for the time that you are the head of the EPA?

Mr. Pruitt. I am not saying that at all, Senator.

Senator Markey. You are saying that. Will you recuse yourself?

Mr. Pruitt. I am saying that the EPA ethics counsel has indicated those cases will require a review by the EPA ethics counsel, and if it involves a particular matter with a specific party, then

recusal would potentially be in order and I would follow the guidance and counsel of EPA ethics.

Senator Markey. This is a clear line for the American public, given your record from Oklahoma in suing the EPA on all of these matters, that if you don't agree to recuse yourself, then, again, you become plaintiff, defendant, judge, and jury on the cases that you are bringing right now as Attorney General of Oklahoma against the EPA; and the EPA is for all of the people of the United States, not just the fossil fuel industry of Oklahoma. So you are not committing, and I think that is a big mistake, Mr. Pruitt, to recuse yourself from those cases. It is critical.

Moreover, you also are in a position to initiate regulations that could overturn smog protections, carbon pollution protections that are right now on the books that you are suing as Attorney General of Oklahoma to overturn. Would you commit to not regulating, promulgating new regulations in any of the areas where you right now are suing the EPA? Would you make a commitment that you would recuse yourself from doing that?

Mr. Pruitt. Let me be clear, Senator, because we talked about this in your office, and I very much enjoyed the conversation that we had there in this area that we talked about. I have every willingness and desire to recuse, as directed by EPA ethics counsel; and if directed to do so I will in fact do so, to recuse from those cases. There is a difference, as you know, between pending litigation in a particular matter with specific parties and prospective rulemaking. Rulemaking goes through a process.

Senator Markey. What the American people are expecting here is the EPA doesn't turn into every polluter's ally. The only way to ensure that is for you to recuse yourself from the cases that you have brought, because most of them are to overturn the clean air, clean water, smog regulations. So to create an appearance of independence, it is critical that you recuse yourself; otherwise --

Mr. Pruitt. And I will --

Senator Markey. -- otherwise, honestly, people are going to think that it is not just the fox guarding the hen house, it is the fox destroying the hen house, because you haven't distanced yourself from the actual litigation that you have initiated on most of the key issues that you are now going to have responsibility for protecting in terms of the public health of the entire Country.

Mr. Pruitt. And, Senator, I can say to you unequivocally I will recuse, as directed by EPA ethics counsel.

Senator Markey. And I am saying to you that you should just start out saying I am going to recuse myself from anything that relates to any litigation that I have initiated as the Attorney General of Oklahoma that questions the clean air, clean water, climate change, smog, or mercury protections which are right now on the books that the EPA is honored to protect. And if you don't do that, then we are going to have a fundamental conflict of interest that is presented by your presence as the Administrator of the EPA. It just gets down to being a matter as simple as that.

Senator Barrasso. The Senator's time has expired. Thank you, Senator Markey.

For clarification, will you fully follow the advice of the EPA ethics counsel?

Mr. Pruitt. Yes, Mr. Chairman.

Senator Barrasso. Thank you.

Just for additional clarification, regarding conflicts of interest, I note the letter to this Committee on January 4th that I am submitting to the record. "We," this is the Office of Government Ethics, "believe that this nominee is in compliance with applicable laws and regulations governing conflicts of interest."

And then there was a letter yesterday from Walter Shaub, Director, Office of Government Ethics, responding to a letter from Senator Carper and other EPW Democrats regarding Attorney General Pruitt and potential conflicts of interest, and they say, "If the Office of Government Ethics has transmitted a certified financial disclosure report and an ethics agreement to the Senate," which they have, "it means the Office of Government Ethics is satisfied that all financial conflicts of interest have been identified and resolved."

Senator Ernst.

Senator Ernst. Thank you, Mr. Chair.

Thank you, Attorney General Pruitt, for appearing in front of us today. I enjoyed our conversation, both one-on-one and then in a group setting as well, and I would like to go back and revisit our discussion on the RFS. As you know, Iowa is home to 43 ethanol refineries. We are the largest producer of ethanol west or east of the Missouri River.

President-elect Trump reiterated his support for biofuels while he was campaigning cross Iowa and all across the Midwest, and those areas of the Country overwhelmingly supported his candidacy and led to his victory. And thank you for stating once again that you would honor his commitment to biofuels by carrying out the RFS as intended by Congress.

Policy certainty is key for economic growth, and this is something that we discussed in my office. Unfortunately, as a result of uncertainty surrounding the EPA's renewable fuel volume targets in 2014, 2015, and 2016, second generation biofuel investment decreased and proposed projects moved overseas. Fortunately, the EPA has recently changed its course and released updated volume targets for the RFS that meet the levels prescribed by Congress.

If confirmed as Administrator, what will you do to continue to provide certainty so that investment can continue to happen right here at home in the United States?

Mr. Pruitt. You know, Senator, as you indicated in our meeting, the importance of the infrastructure, the investment that has occurred in reliance upon the law was passed in 2005 and updated in 2007, and as I indicated earlier to Senator Fischer's question, the latitude discretion that has been given to the EPA Administrator with respect to waiving those statutory targets should be judiciously used. It shouldn't be automatic; it should be something that the EPA Administrator seeks to comply with and adhere to because of the will of this body.

So I think those waivers obviously are in order, but with respect to market conditions, we have less consumption today, more fuel-efficient vehicles. Market conditions have changed since 2005, but, despite that, the EPA Administrator should not use that to undermine or to somehow put into question the commitments made by this body in the Renewable Fuel Standards statute.

Senator Ernst. Thank you for your commitment to the RFS and the intention of Congress.

I also want to touch on an issue you mentioned in your testimony, which is the level of fear and distrust many folks have of the EPA. When I am home in Iowa, I host town halls all across the State, and just want to hear what is going on in their communities, and what I hear, without fail, at these town halls is that folks are frustrated with the EPA and the gotcha mentality that has stemmed from the Agency. My constituents tell me the EPA is out to get them rather than work with them, and there is a huge lack of trust between many of my constituents and the EPA. And if we take a look specifically at the WOTUS rule, Iowans truly feel that the EPA ignored their comments and concerns, threw them under the rug and then just moved forward.

We know now that the EPA relied on gimmicky mass emails and social media events to prop up their message, and then they used those tactics to insinuate that anyone who had reasonable concerns about the WOTUS rule are somehow in favor of dirty water, which is absolutely ridiculous. And this type of culture that was created under the Obama Administration has no place, has no place here.

So, Mr. Pruitt, what do you plan to do in your first days as the Administrator to improve the relationships EPA has with the hardworking folks across the Country?

Mr. Pruitt. Well, Senator, as I indicated in my opening statement, this paradigm that we live within today, that if you are pro-energy, you are anti-environment, if you are pro-environment, you are anti-energy, is something that I think is just a false narrative. We can do better than that. In fact, this Country has shown for decades that we can grow our economy and be a good steward of our air, land, and water, and we need to get back to that.

Cooperative federalism is at the heart of many of the environmental statutes that have been passed by this body, and the reason for that is it is the States, many times, that have the resources, the expertise, and understanding what the unique challenges are for the environment and improving our water and our air. It is not that they don't care about it. Senator Whitehouse indicated a devolution of authority to the States would create a problem. That is not what I am advocating. And I think we hear in the marketplace we need a partnership, a true partnership between the EPA in performing its role along with the States in performing theirs. And if we had that partnership, as opposed to punishment, as opposed to uncertainty and duress that we currently see in the marketplace, I think we will have better air, better water quality as a result.

Senator Ernst. Thank you. I look forward to that partnership and transparency.

Thank you, Mr. Chair.

Senator Barrasso. Thank you, Senator.

Senator Duckworth.

Senator Duckworth. Thank you.

Mr. Pruitt, I want to clarify your response to Senator Ernst on this whole congressional intent when it comes to the RFS. What I want to know, and what the people of Illinois, we are also a great producer of ethanol, what we need to know is where exactly you stand on the RFS. Are you the attorney general who only three years ago sided with big oil to slam the RFS? You said that RFS was "unworkable" and also that it was a "flawed program."

So I am a little confused by what you are saying today. Are you that Mr. Pruitt, or are you the Scott Pruitt today who is saying all the right things in this confirmation hearing and in these meetings to try to reassure pro-RFS States by repeating nice sounding, but ultimately vague and hollow mantra that, if confirmed, you would enforce the RFS law as written by Congress?

As you and I are quite well aware of, such a statement essentially dodges the critical issue for biofuels producers and workers, because under the law the EPA has considerable discretion to adjust the renewable volume obligation in a manner that you would argue is contrary to congressional intent, yet may be compliant with the explicit letter of the statute. So, as EPA Administrator, you could still technically be in compliance with Congress, with the law, but actually be working against it; and your answers today have not clarified that.

So my question to you, Mr. Pruitt, is this: Which specific actions has EPA taken since 2007 while administering the RFS that you, in your view, are not consistent with congressional intent? Can you name any?

Mr. Pruitt. Thank you, Senator. The Administrator and the EPA routinely misses the statutory targets in publishing those each year, creating great uncertainty in the marketplace. In fact, in some years they have missed the timeline, as far as submitting those targets, by over a year; in some cases over two years.

Senator Duckworth. Okay, so let me ask you this, then. Yes or no, do you believe that Congress intended for the RFS to increase the amount of renewable fuel blended in our Nation's liquid transportation fuel supply, yes or no?

Mr. Pruitt. Without question.

Senator Duckworth. Without question.

Mr. Pruitt. Yes.

Senator Duckworth. All right. My second question, then, is, yes or no, do you believe Congress intended for the RFS to be a stable policy that drives private investment in the renewable energy industry?

Mr. Pruitt. Yes.

Senator Duckworth. And, finally, if confirmed, will you commit to opposing any and all proposals to move the point of obligation under the RFS program from refiners to blenders?

Mr. Pruitt. Senator, as you know, the EPA is actually involved in a comment period on that very issue, and to prejudge the outcome of

that I think would be -- I would not be able to do that. There are many aspects of the program, from the trading program, the monitoring of fraud in the system, that need to be better administrated by the EPA. These have been administration issues. The EPA has created uncertainty. We talked about, a minute ago, with the Senator, about the amount of investment that has gone into the infrastructure because of the 2005 law. Those individuals need to have certainty and confidence that the RFS is going to be enforced and administered pursuant to the desires of Congress.

Senator Duckworth. Right. But if you were to do that, then you would actually have to answer yes, because to move the RFS program from refiners to blenders is actually one of those ways that you can actually undermine the RFS standards as intended by Congress, which you yourself just now said was intended to increase the amount of biofuels blended into the fuel supply of the United States.

This is my problem. On the one hand, your entire track record shows you to be someone who opposes the RFS and yet here, in front of Congress and in meetings with Senators, you are giving these vague answers that sound right when it comes to the RFS, but really opens all sorts of back doors for you to oppose the Renewable Fuel Standard; and that is very troublesome because all across the Midwest -- you know, for those of us who have fought to strengthen national security by lessening our Country's dangerous dependence on foreign oil, I am really incredibly concerned about the future of the RFS on American-produced biofuels under a Scott Pruitt-led EPA. And I am also

incredibly concerned about what you are going to do in terms of protecting the environment.

In your answer to one of my colleagues about what the role of the EPA is, what is the job of the EPA, one of the first questions you got, you spent five minutes talking before you actually said protect the environment. You talked all about reducing EPA's influence over States for a good five minutes before you actually got to the environment. And then for my farmers, my corn and soybean producers for my biofuel industry, the RFS is critical in order to continue that. And I would rather burn American-made American-grown corn and soybean in my gas tank then I would oil from the Middle East. I have already been to a war fought over oil in the Middle East, and I don't intend to allow us to continue to do that; which is why the RFS is so critical not just for the jobs in Illinois, not just to support Illinois agriculture, but for our national security when it comes to where we are going to get our energy supply.

I am out of time. Thank you, Mr. Chairman.

Senator Barrasso. Thank you, Senator Duckworth.

Mr. Pruitt. If I may, Senator, let me say to you the role of the Administrator of the EPA is to enforce and administer the RFS program to carry out the objectives of that statute. Those targets that have been put in that statute by this body need to be respected. The discretion authority, the waiver authority of the Administrator needs to be judiciously used to address those concerns that we talked about.

So I don't want you to have any concern about the intent, objective, or will, if confirmed, of carrying out the RFS mandate or the statute in its whole.

Senator Duckworth. That very answer concerns me because you have not actually said that you are going to stick with it.

Senator Barrasso. I would like to submit for the record two. One, a letter from the American Farm Bureau Federation which strongly supports the nomination of Scott Pruitt as Administrator of the U.S. Environmental Protection Agency and urges a vote in favor of his confirmation. The second is a letter from the Democrat Attorney General of the State of Arkansas, former Democrat Attorney General, Dustin McDaniel, who has this to say about Attorney General Scott Pruitt's work on the stem phosphorous levels in the Illinois River watershed. He said, "Recent press accounts regarding these efforts unfairly mischaracterize the work that was done by General Pruitt and his team. He was a staunch defender of sound science and good policy as appropriate tools to protect the environment of his State. I saw firsthand how General Pruitt was able to bridge political divides and manage multiple agency agendas to reach an outcome that was heralded by most credible observers as both positive and historic."

[The referenced information follows:]

Senator Barrasso. Senator Boozman.

Senator Boozman. Thank you, Mr. Chairman.

And thank you, Attorney General Pruitt, for your willingness to serve, and your family. I think everybody at the dais here realizes these really are family affairs that truly affect everyone.

In recent years, EPA has made it increasingly difficult for Arkansas to manage its delegated national pollutant discharge elimination system. Too often, the permits, rulemakings, or other actions sent to EPA for review are returned with demands far more restrictive, additional expensive data collection is required, and other costly onerous requirements. New leadership at EPA has an opportunity to correct this coercive federalism and, instead, restore cooperative federalism as intended. The States have the expertise and local knowledge necessary to administer environmental programs.

Mr. Pruitt, EPA has the opportunity to play a significant role in supporting a move back to cooperative federalism. Can you please explain how you plan to change the EPA's State dynamic?

My experience with EPA, and being on transportation in the House, being ranking member on water there, ranking member of the Senate is the EPA, their attitude is we are with you unless you come out with a finding that is contrary, and then we are going to do it our way. So can you address that?

Mr. Pruitt. I think two things, Senator. One, as we indicated earlier, rule of law and making sure that the authority granted to the States under State implementation plans, delegation under certain clean water provisions, that that is respected. But also I think the

EPA needs to provide more assistance to the States and work in partnership and be proactive. Those regional administrators that we have across the Country need to be seen as partners, and not adversaries.

So I think restoring that confidence, restoring that relationship and seeking to do so is very, very important in carrying out this partnership that we know exists under the various environmental statutes.

Senator Boozman. Very good.

For the past eight years, EPA has acted as a political arm of the Obama Administration time and time again. We have seen rules developed not based on sound science, but on political ideology. When rules have been released, States and private sector, and even Congress, have had trouble getting EPA to show the science that helped develop these rules.

Under your leadership, can we expect EPA to be more transparent, in other words, how the rules are being developed, the science behind them? And you have continued to allude to this and I think it is so important, as Administrator of the EPA, can we count on you to base all of your decisions on the rule of law, not on the Administrator's or even your own political ideology?

Mr. Pruitt. Absolutely, Senator, in response to the latter point of your question. Public participation is important. There is a reason why, in rulemaking, that you take comment. There is a reason, as I indicated earlier to Senator Ernst, that you involve those that are impacted by rulemaking, because you want to understand the impact,

both economically and otherwise, in the benefit of the environment, as well as making sure that you craft rules and regulations that take all those things into consideration. So hearing the voices of all Americans in that rulemaking process, responding to those comments in the record before rules are finalized, transparency, objectivity, a commitment to process is very important, in my view, of restoring the confidence of the American people in the rulemaking processes that occur here in Washington, D.C.

Senator Boozman. So, again, releasing the scientific data behind that would be something that you would very much support?

Mr. Pruitt. Yes, Senator.

Senator Boozman. A problem with the EPA the EPW Committee has faced with the current Administration is a lack of communication. Time and time again EPA either did not respond to questions from Committee members or, at the very least, took months to respond. Under your leadership, can we expect EPA to get Committee members answers in a timely fashion?

Mr. Pruitt. Yes, Senator. As I indicated in my opening statement, listening is an important role of leadership, and listening to the voices of folks here in Congress. As I went through and met with many of you through this process, there were issues particular to your State that you made me aware of, and I, if confirmed as EPA Administrator, seek to be very active in listening to the needs with respect to your various States and respond to this body with respect to questions.

Senator Boozman. Let me just comment on the Arkansas-Oklahoma issue. I was the Congressman in that district, so I inherited that in 2001. I have been working on this for 15 years. And I appreciate you and Attorney General McDaniel doing a very good job of getting things done. On the other hand, the idea that somehow you were soft, in fact, I would argue that the agreement that was reached was way too restrictive and is probably one of the most restrictive watersheds as far as phosphorous requirements of anyplace in the United States.

Mr. Pruitt. Well, as you know, Senator, in that process we actually selected a biologist from Baylor University to engage in a scientific study on what the phosphorous levels should be, the numeric quality of the water, and it was determined at the end of that process that .037 was the right standard and is now enforceable on both sides of the border for the first time in history. So it is a very important outcome.

Senator Boozman. No, I understand, and I commend you on the process. You know, the implication here is somehow, you know, you came up with a deal that was too soft, and, if anything, I would argue that it was perhaps a little bit too harsh. But I do appreciate the process. I know that you and our former attorney general were able to do something that had been going on for decades.

Mr. Pruitt. Thank you, Senator.

Senator Barrasso. You have been at it now for about two hours. If you can stay with us 'til we finish the first round of questioning; we have about five or six additional questions coming.

Senator Harris is next and then we will break at about 12:30, if that is all right.

Senator Carper. Can I make a unanimous consent request, Mr. Chairman?

Senator Barrasso. Yes, sir.

Senator Carper. I would like to ask unanimous to submit for the record the legal brief against the Mercury and Air Toxics rule which Mr. Pruitt supported. Stated in that brief, I will just quote it, it says "Human exposure to methylmercury resulting from coal-fired electric-generating utilities is exceedingly small." That is the quote.

Also ask unanimous consent to submit for the record a recent article that quotes, I think from the New York Times, it quotes a 40-year career employee of the Oklahoma Department of Environmental Quality that has him saying these words: "Mr. Pruitt has advocated and stood up for the profits of businesses, be it poultry companies or the energy industry and other polluters, at the expense of people who have to drink the water or breathe the air."

Other statements have been introduced for the record saying quite a different thing about Mr. Pruitt. I think it is only fair to go to someone who has worked there for 40 years that has quite a different view than the one than the witness has expressed. Thank you.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Barrasso. Senator Harris.

Senator Harris. Thank you, Chairman.

Mr. Pruitt, as an attorney general, I know as former attorney general of California, that we, as attorneys general, have several duties, which include representing our clients, State agencies, and also the discretion and power to initiate lawsuits in our independent capacity as attorneys general. Would you agree with that?

Mr. Pruitt. Some States provide more latitude than others.

Senator Harris. Does your State?

Mr. Pruitt. Our State has not provided constitutionally as much authority as other States --

Senator Harris. Have you never exercised your independent capacity as attorney general to bring a legal action?

Mr. Pruitt. Senator, I would have to know more specifics about what you are referring to. But in response to your question, it does --

Senator Harris. Have you ever exercised your independent capacity as the attorney general of your State to initiate a legal action, yes or no?

Mr. Pruitt. The litigations that we have engaged in largely have been in consultation with agencies that --

Senator Harris. Largely. So you have also exercised your independent capacity as the attorney general of your State, is that correct or not?

Mr. Pruitt. I may have, Senator. I don’t know.

Senator Harris. You don't know if you have or not? You have been attorney general for your State for almost seven years, is that correct?

Mr. Pruitt. Approaching that, yes. Six years, actually.

Senator Harris. And I have read that you have initiated, and it has been mentioned before, 14 lawsuits in your independent capacity as the attorney general of Oklahoma, and apparently seven of those cases have been resolved, six of which you have lost. My question is I hear that you are a lover of baseball. What would your batting average then be?

Mr. Pruitt. It was generally about 300, which is pretty good for a second baseman.

Senator Harris. My calculation is it is 142.

Moving on, would you agree that as attorneys who have the responsibility for doing the work of justice, and particularly as an attorney general, that we make decisions based on propriety and impropriety; we make decisions based on what is not only an actual conflict, but what is an appearance of conflict? Would you agree that is important?

Mr. Pruitt. I believe that is important, Senator.

Senator Harris. Okay. And so on this issue of whether or not you would be recused if you are nominated and actually voted in as the Administrator of the EPA, you have said that you will recuse yourself from the cases your office has been involved with if directed to do that. Do you agree that you also have the discretion to recuse yourself from those cases?

Mr. Pruitt. I believe, Senator, the rules of professional conduct, in addition to the review that OGE --

Senator Harris. Do you believe that you have the discretion to recuse yourself from the cases that you were involved with as attorney general?

Mr. Pruitt. I think it is actually stronger than that, Senator. I actually have an obligation in those instances, as directed by ethics counsel, and that is the reason I indicated earlier that I will recuse.

Senator Harris. Independent of any direction from ethics counsel, do you agree you have the discretion to recuse yourself from those cases?

Mr. Pruitt. I believe that it is important to maintain --

Senator Harris. I am asking about whether or not you actually have the discretion, the power, to recuse yourself. Do you disagree or agree with that?

Mr. Pruitt. Clearly, there is a discretion to recuse.

Senator Harris. Clearly.

You are familiar with the Clean Air Act, yes?

Mr. Pruitt. I am sorry, Senator?

Senator Harris. You are familiar with the Clean Air Act?

Mr. Pruitt. I am.

Senator Harris. And as you may know, Section 209, subdivision (b) of the Clean Air Act, recognizes California's authority to issue air pollution standards for new motor vehicles that go above and beyond Federal standards. The EPA has historically recognized

California's authority to issue new motor vehicle pollution standards that go above and beyond Federal standards.

In your opening statement you write, "It is not EPA's mission to be against sectors of industry in general or against particular States." Will you commit, then, to upholding that same standard and recognizing California's authority to issue its own new motor vehicle air pollution standards?

Mr. Pruitt. You know, Senator, as you indicated, California was actually regulating those standards before the EPA was actually created, which is why the California waiver exists under statute.

Senator Harris. Do you agree to uphold that same standard that has been held by your previous administrators?

Mr. Pruitt. I agree to review that as each administrator before me has. It has been granted at times and denied at times.

Senator Harris. Do you agree to uphold it? Reviewing and upholding are two different points.

Mr. Pruitt. Senator, as you know, administrators in the past have not granted the waiver and in fact have granted the waiver. That is a review process that will be conducted if confirmed.

Senator Harris. What is your intention, sir?

Mr. Pruitt. I don't know without going through the process to determine that, Senator, and one would not want to presume the outcome.

Senator Harris. In the 14 cases that have been previously mentioned, in each of those cases regulated companies were also a party to your suits, is that correct?

Mr. Pruitt. In some instances, yes.

Senator Harris. In most of them. Can you name a few instances in which you have filed a lawsuit in your independent capacity as attorney general against a corporate entity for violating State or Federal pollution laws?

Mr. Pruitt. Senator, I have a list here that has been provided.

Senator Harris. Can you name them, please?

Mr. Pruitt. Sure. There is a list that has been --

Senator Harris. Can you name one?

Mr. Pruitt. Yes. The first is the Mahard Egg Farm involving a CAFO situation and cleanup of a large hen operation that affected water quality. Coco Manufacturing --

Senator Harris. Did you file a lawsuit in that case, sir?

Mr. Pruitt. I did, Senator.

Senator Harris. Okay. And what was the outcome of that case?

Mr. Pruitt. We received a good outcome against them.

Senator Harris. And the name of that entity was what?

Mr. Pruitt. Mahard Egg Farm.

Senator Harris. And can you name any other cases where you have actually filed a lawsuit against a corporate entity for violating Federal pollution laws?

Mr. Pruitt. In fact, that case was brought in conjunction with the EPA. And I want to address something, Senator. Earlier, when you say independent capacity, those cases that you referred to, the list of cases, were as an extension of the DEQ in the State of Oklahoma, an

extension of agencies at the State level that had authority granted to them by this body that we were --

Senator Harris. And I understand that role, as a former attorney general, but that is you representing your client. I am asking about your independent capacity as the attorney general of your State.

Let's move on.

On the issue of mercury --

Senator Barrasso. I would suggest that the Senator's time has expired.

Senator Harris. Thank you.

Senator Barrasso. Thank you.

I would like to introduce for the record a letter by J.D. Strong, who is the Director of the Oklahoma Department of Wildlife Conservation, who, in reference to the submission recently by the Ranking Member, makes reference to that former employee who is retired from the State of Oklahoma and is currently serving as Vice Chairman of the Oklahoma chapter of the Sierra Club. So the references are from now someone who is no longer a State employee, but the Vice Chairman of the Oklahoma chapter of the Sierra Club.

But this letter from Mr. Strong goes to talk about the efforts by Attorney General Pruitt, who says, "For the past six years General Pruitt has been instrumental in many of our successes and has never asked me to compromise regulatory efforts to benefit industry." He says, "On the contrary. All of our projects and cases that involved his office were given staff support at the highest level and, more often than not, resulted in more stringent environmental protection.

He has been a strong ally in defending our ability to continue the great progress that we made in protecting Oklahoma's environment."

Senator Carper. Mr. Chairman, in response, let me just ask for unanimous consent to put in the record, and this is on behalf of Senator Whitehouse, rebuttal articles for Mr. Pruitt's claim on litigation against fossil companies. Some of the topline points from these articles are, one, that they are fraud cases first and foremost; second, some were brought by his predecessor, Drew Edmondson; third point, the case against BP was filed and left dormant at least for any publication; and also that Mr. Pruitt fought against the participation of State whistleblowers in the litigation, and that was a reference to qui tam action.

Thank you.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Barrasso. Senator Sullivan.

Senator Sullivan. Thank you, Mr. Chairman.

General Pruitt, it is good to see you again. Thank you for your willingness to serve. And to your family, as you know, it is a team effort, so I want to thank them as well.

I appreciated your opening statement, particularly your written statement, and I want to emphasize we all want clean air. We all want clean water. My State of Alaska has some of the cleanest air, cleanest water, pristine environment literally in the world. But your emphasis on the ability to do both, to grow an economy, to develop our resources responsibly, and protect the environment I think is very, very important, and I appreciate that focus.

I believe the EPA needs a serious course correction. As Senator Ernst talked about, there is a lot of anger, even fear of this Agency throughout many parts of the Country, and I believe you are the right person to provide that course correction and do something that is very important, which is regain the trust of the American people that I think has been lost in a lot of places in America because of the overreach, because of the lack of focusing on the law.

So there has been a lot of discussion this morning about cooperative federalism. Can you explain it in a little more detail? Is that your term or is that a term that -- did you come up with that or is that something that was actually directed by Congress?

Mr. Pruitt. Directed by Congress, Senator.

Senator Sullivan. And so in the Clean Air Act and the Clean Water Act who was given, what entity in our Republican form of

Government was given the primary responsibility over clean air and clean water in the United States?

Mr. Pruitt. Well, as you know, Senator, under the Clean Air Act there is something called State implementation plans that the EPA and the States review together, but the States have that responsibility of adopting the plan --

Senator Sullivan. So isn't it correct actually in the law it says --

Mr. Pruitt. It is.

Senator Sullivan. -- the primary responsibility under the Clean Air Act and Clean Water -- and who directed that?

Mr. Pruitt. Congress.

Senator Sullivan. Okay. So when you are talking about cooperative federalism, that is not some Scott Pruitt invented; you are focusing on the intent of the Congress.

Mr. Pruitt. Probably more so than any statutes that have been adopted by Congress historically, the environmental statutes that we know, from clean water to clean air to Safe Drinking Water Act, many pieces of legislation, Congress has been very explicit and very specific in saying that cooperative federalism, the role of the States is important, should be respected, and should be emphasized.

Senator Sullivan. So let me show you a chart here. This is the Waters of the U.S. in the States and entities that sued to stop that rule. Thirty-two. Democrats and Republicans and Independents. Do you think this is an example of cooperative federalism? And if not, if you are confirmed, what are you going to do to get back to what is

not a Scott Pruitt idea, it is the direct direction of the Congress of the United States?

Mr. Pruitt. Senator, when you think about the relationship between the EPA and the States, the States are not mere vessels of federal will; they don't exist simply to carry out federal dictates from Washington, D.C. There are substantive requirements, obligations, authority, jurisdiction granted to the States under our environmental statutes. That needs to be respected. When it is not respected, that is what spawned most of this litigation that has been referenced here today. And why does it spawn it? Because it matters. It matters that the States participate in the way that Congress has directed, and they have been unable to do so for a number of years.

Senator Sullivan. So, again, cooperative federalism, you are carrying out the will of Congress when you are focused on that issue.

Mr. Pruitt. That is exactly right. The expertise, the resources, the knowledge, the awareness of how to fix environmental issues at the local level is something that is important for the entire Country to know.

Senator Sullivan. So I am a former attorney general myself who has sued the EPA, and some of my colleagues on the other side of the aisle, Judge Booker's comments, I think he tried to equate a little bit suing the EPA, not caring for Oklahoma's children. Do you care about Oklahoma's children?

Mr. Pruitt. Without question. I have a couple sitting behind me.

Senator Sullivan. Fourteen lawsuits. And again, Senator Boozman mentioned this, what has been the primary focus of those lawsuits? It is not that you don't care about the environment, is it?

Mr. Pruitt. Absolutely not. I care very much about the environment. It is to restore the relationship and ensure the relationship that Congress has directed, the role of the States in improving our environment. There is an idea in Washington that the States, those in Oklahoma or in Alaska or other parts of the Country, don't care about the water we drink or the air we breathe. The farmers and ranchers, those in industry in the State of Oklahoma, most of them are very committed to that. When they have not been, we have taken enforcement action against them.

Senator Sullivan. And just one final question. A lot of my colleagues on the other side of the aisle spent a lot of time, and I think Senator Sanders is up next, vilifying the oil and gas industry, somehow bad actors, polluters. According to the American Petroleum Institute, 364,000 Oklahomans work in the oil and gas industry or related service sectors. Are these people bad actors? Are they polluters? Can you describe? You talk about the good people in your written statement. Who are these people, and are you representing them when you are bringing these kind of actions? Are they evil people?

Mr. Pruitt. No, Senator. They want to comply with the law. They want to know what is expected of them. They care about the air they breathe and the water they drink, and they want to make sure that

the EPA is partnering with State agencies and industry to ensure that that outcome occurs.

Senator Sullivan. And aren't these hundreds of thousands of people part of that industry?

Mr. Pruitt. Absolutely. In fact, 25 percent of our entire State budget in Oklahoma is from that industry. This is a State concern. And more than that, we have significant regulation over this industry. Our Corporation Commission has oversight over many of these issues. So we have regulatory bodies, from DEQ to the Corporation Commission to others, that are involved in making sure that the air we breathe and the water we drink is clear in the State of Oklahoma.

Senator Barrasso. Thank you.

Senator Sullivan. Thank you, Mr. Chairman.

Senator Barrasso. Senator Gillibrand.

Senator Gillibrand. Thank you, Mr. Chairman.

Thank you, Mr. Pruitt, for being willing to serve this Administration, for your interest in public service, and your past public service.

Mr. Pruitt. Thank you, Senator.

Senator Gillibrand. I want to talk to you about some of the constituents in my State and the challenges, the very real challenges we face. First, we had millions of people's lives upended with Superstorm Sandy. I mean, millions of people. We had parents who lost their children who drowned because of surges of water coming through their homes, through the streets. The devastation was literally unparalleled in my State; it was just something we had never

seen before. And we are going to be looking to you to protect these families and protect these communities, because we know, with global climate change, the incidents of super storms and violent weather impacts is changed, it is very, very different. And you have already told folks that you do believe that global climate change is real, it has been caused by human activity.

Do you believe also that sea levels are rising?

Mr. Pruitt. Senator, I believe that the EPA, addressing this issue because of the MATS v. EPA case and the endangerment finding has obligations to address the CO2 issue. In doing so, they need to follow the processes as set up by Congress. So I think it is very important to do both.

Senator Gillibrand. But you have studied this issue of sea levels. You do realize they are rising. And it is one of the reasons why these storm surges were so high and devastating communities all across New York City. So I need you to be vigilant because lives are at stake, and I think you have the purview to do that. Will you be vigilant?

Mr. Pruitt. Senator, we will obviously address those issues that we talked about in your office, and I appreciate your passion on this issue.

Senator Gillibrand. One of the other issues that we talked about that I think is equally as concerning is issues of mercury that have been raised, about asthma rates that have been raised, about groundwater polluted. I have looked at your record. Most of the lawsuits you filed as attorney general were related to businesses,

specifically what was important for your State in terms of employers and businesses. And the few lawsuits you did file about human safety were few and far between.

But this role as head of the EPA, you are going to have a much more important role to play, and I want to talk specifically about mercury. If you believe that mercury is a threat to public health, but oppose the remedy of reducing mercury air pollution from power plants because it is too costly, what, then, do you think you should do or what should be done to address the mercury pollution?

Mr. Pruitt. Let me say, Senator, mercury is something, it is a hazardous air pollutant under Section 112. It is something that the EPA has authority to regulate and should regulate. It should do so, though, within the framework established by this body, and the Supreme Court said that the EPA did not follow the cost-benefit obligations. It is not that the benefits outweigh the costs, it is just that they simply didn't engage in a proper record-based support for their rule. So that goes back to earlier questions with other Senators about the process mattering, being committed to the rule of law and the rulemaking authority that Congress has given the EPA in making sure that as rules are passed, that they can be upheld in court.

Senator Gillibrand. But I need you also to be worried about human health. I understand there is a cost, but when you are talking about lives, when you are talking about children who can't breathe, I have been to the emergency room at 2 in the morning with a child who can't breathe; it is a horrible thing. We have had children die in New York City because none of their teachers, no administrators in the

schools knew what to do when a child has an asthma attack. It is a huge problem. So I need you to care about human health and really believe that the cost, when human health is at risk, when people are dying, is far higher than it is the cost to that polluter to clean up the air and change their processes. I need you to feel it as if your children sitting behind you are the ones in the emergency room. I need you to know it.

Mr. Pruitt. And, Senator, I would say to you there are certain instances where costs can't even be considered, as you know. Those criteria pollutants under our NAAQS program, cost is not even a factor because human health is the focus.

Senator Gillibrand. So let's talk about that. So you and I previewed this in my office. We have a horrible problem in New York State with Superfund sites and with groundwater that is polluted. We have PFOA in our water. We have the largest PCB Superfund site in the United States in the Hudson River. When families who don't have money fish in the Hudson River, they eat those fish, they get ill. It is horrible. The contaminants are real, they are pervasive, and they are destroying lives. They are also destroying the economy, because when you have contaminants all over the place you can't sell your house, you can't put in industries that are relying on tourism. It is a huge problem.

So PFOA is an example of a chemical that needs to be tested. I need you to put it number one on your list, to test it, and if it is the carcinogen that many scientists have said it is, it needs to be banned.

Mr. Pruitt. The TSCA authority that has been granted by this body, you and I talked about that in your office, PFOA needs to be addressed quickly, even under the Safe Drinking Water Act as well.

Senator Gillibrand. Will you commit to doing that work?

Mr. Pruitt. Yes, Senator.

Senator Gillibrand. Thank you.

Thank you, Mr. Chairman.

Senator Barrasso. Thank you, Senator.

Senator Carper. Mr. Chairman, I have a unanimous consent request. I would like to submit for the record, and this is sort of in response to a question raised by Senator Harris. Mr. Pruitt, in his response to her question on whether he had ever filed a lawsuit against a corporate entity for violating State or Federal pollution, apparently was not correct. I want to just submit for the record a list of cases that have been active under Mr. Pruitt's leadership. It notes which ones were started by his predecessor and it shows that the case in which he mentioned in his exchange with Senator Harris I think it was the egg case. That case actually was initiated not by Mr. Pruitt, but by this predecessor.

Thank you.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Barrasso. And I would like to submit to the record, as well, having heard that some of my Democratic colleagues have expressed their concerns that Attorney General Pruitt is not open to the finding of science, especially as it relates to climate change, this is not so. I would like to call the Committee's attention to a letter by the Cornwall Alliance for the Stewardship of Creation. The letter is signed by 130 scientists, economists, legal scholars, policy experts, religious leaders, and over 230 other citizens urging Attorney General Pruitt's confirmation. The group includes David Legates, who is a Ph.D. in climatology, Professor of Climatology and Geography at the University of Delaware. The author praises Pruitt, stating, "Mr. Pruitt has also demonstrated understanding of and open-mindedness toward scientific insights crucial to the formulation and implementation of environmental regulation."

The organization's founder and national spokesman, Calvin Beisner, is quoted in the press release announcing the letter as saying the following, "Some environmental activists are determined to prevent Mr. Pruitt's confirmation, painting him as a science denier or a climate change denier." Mr. Beisner continues, "He is neither. He is a solid, common-sense attorney general who will bring much needed reform to the EPA."

Without objection, the letter will be submitted for the record.

[The referenced information follows:]

Senator Barrasso. Senator Wicker.

Senator Wicker. Thank you, Mr. Chairman and Mr. Ranking Member. I think it has been a good hearing so far. I think we have a lot of information that will be reassuring to the American people.

One thing I do object to, though, is something that has happened for years since I have been a member of this Committee, and that is somehow to list political contributions and suggest that somehow they make an individual suspect or not qualified. My dear friend from Rhode Island showed a poster and showed some contributions and suggested that based on those contributions from companies like Southern Company, for example, who has contributed to my campaign, that his appropriateness for the job should be challenged.

So I am glad that the Chairman had added to the record this article from September 6 from the Washington Street Journal, September 6 of last year, pointing out the Democratic presidential candidate, Hillary Clinton, raised significantly more money than Donald Trump from the oil and gas industry. Individuals who worked for oil and gas companies donated $149,000 to Mr. Trump's GOP campaign as of the date of July 30, compared with $525,000 to Mrs. Clinton.

Mr. Chairman, I am glad you put this in the record, and presumably, based on that argument, Hillary Clinton would be suspect, were she to have been nominated for the position of heading the EPA.

Now, Mr. Attorney General, let's talk about States as partners. And I enjoyed your exchange with Senator Cardin about the Chesapeake Bay program. As I understand, you actually applaud the Chesapeake Bay

program, and particularly the way the EPA worked with States as partners, is that correct? And could you enlarge on that?

Mr. Pruitt. Senator, I absolutely applaud the effort by the States to join together in a six-State coalition to address the quality of the Chesapeake Bay's water quality. That is what we did in Arkansas, Oklahoma and Arkansas did with the scenic Illinois River that has already been talked about with Senator Boozman and others. So I think the effort that they engaged in was something that other States ought to model, and the EPA came alongside and took that TMDL and is providing assistance to those six States with respect to that agreement.

Senator Wicker. Now, with regard to the Clean Power Plan and the Waters of the United States rules, where did those regulations go wrong in this respect?

Mr. Pruitt. Well, with respect to the Clean Power Plan, in the cases, the Supreme Court has actually said -- it was an unprecedented step that the Supreme Court took. Never in history had the Supreme Court issued a stay against a rule like the Clean Power Plan, and they did so because of the likelihood of success on the merits, in the sense that the Clean Power Plan did not reflect the authority of Congress given to the EPA to regulate CO2. As an example, with respect to power generation, there has to be a significant finding that poses risk to public health and welfare. They did not do that. They did not go through the proper processes of inside the fence and regulations of facilities, power generation facilities.

So those matters, Senator, are about rule of law. And the same is true with the Waters of the United States rule.

Senator Wicker. And I have not delved into this as an attorney, as you have, but I can tell you that the Department of Environmental Quality in my State told me very emphatically that the Clean Power Plan would put us out of business because we would not have had an alternative to the coal that we use. So I hope we can continue to make progress on this issue.

Let me ask you about wood products. The Federal Government buys a lot of lumber, uses a lot of wood in construction and procures a lot of wood. There are standards certifying that the forests are appropriate. One is the American Tree Farm System; another is the Sustainable Forestry Initiative.

EPA seems to like a certification program called the FSC, the Forest Stewardship Council. Problem is, with this certification program, it excludes 90 percent of the lumber grown in the United States of America.

We have had a lot of activity on both sides of the aisle in challenging this, and I object also to a so-called interim recommendation made by EPA in this regard. As far as I am concerned, it is discrimination against domestic wood, and now they have come back and told us that this interim recommendation is under review.

Could you comment about both of these, the idea of an interim recommendation being imposed on an entire industry and also give us any thoughts you have about using the Forest Stewardship Council

certification model as opposed to these other perfectly good Sustainable Forestry Initiative and American Tree Farm System?

Senator Barrasso. And if I could ask you to do it briefly, as the Senator's time has expired?

Mr. Pruitt. Senator, as you and I discussed in our meeting, I am very concerned about the latter issue, and making sure that all voices, all options are considered is something the EPA Administrator should do and I would seek to do, if confirmed.

With respect to the interim step, I think that there is a concern that many have offered throughout the last several years, that regulators in Washington, not just the EPA, are seeking to use guidance or other steps to avoid what would be called formal rulemaking; that Congress has obligated those agencies to reform to ensure exactly what you just described, that all voices are heard. And that is unfortunate when agencies do that, because that is an abuse of the process.

Senator Wicker. Thank you, sir.

Thank you, Mr. Chairman.

Senator Barrasso. Thank you, Senator Wicker.

Senator Sanders.

Senator Sanders. Thank you, Mr. Chairman. And I apologize for being late, but we were at a hearing with Congressman Price, who is the nominee for HHS. Perhaps not a great idea to have important nominating hearings at exactly the same time. So I apologize for not being here earlier.

My office has received a great deal of comments from people in the State of Vermont, which takes environmental protection very seriously, as well as from all over the Country, and the fear is that the nomination of Mr. Pruitt is a nomination designed to protect the fossil fuel industry, and not the environment.

I would like to ask Mr. Pruitt a question. As I understand it, earlier in this hearing you said that Mr. Trump was wrong in suggesting, in stating over and over again that climate change was a "hoax." Is that in fact the case?

Mr. Pruitt. That is correct, Senator.

Senator Sanders. Okay. Let me ask you this. As you may know, some 97 percent of scientists who have written articles for peer-reviewed journals have concluded that climate change is real, it is caused by human activity, and it is already causing devastating problems in our Country and around the world. Do you believe that climate change is caused by the emission, by carbon emissions by human activity?

Mr. Pruitt. Senator, as I indicated, you weren't here during my opening statement, but as I indicated in my opening statement, the climate is changing and human activity contributes to that in some manner.

Senator Sanders. In some manner.

Mr. Pruitt. Yes, sir.

Senator Sanders. Ninety-seven percent of the scientists who wrote articles in peer-reviewed journals believe that human activity

is the fundamental reason we are seeing climate change. You disagree with that?

Mr. Pruitt. I believe the ability to measure with precision the degree of human activity's impact on the climate is subject to more debate on whether the climate is changing or the human activity contributes to it.

Senator Sanders. While you are not certain, the vast majority of scientists are telling us that if we do not get our act together and transform our energy system away from fossil fuel, there is a real question as to the quality of the planet that we are going to be leaving our children and our grandchildren. So you are applying for a job as Administrator for the EPA to protect our environment. Overwhelming majority of scientists say we have got to act boldly, and you are telling me that there needs to be more debate on this issue and that we should not be acting boldly.

Mr. Pruitt. No, Senator. As I have indicated, the climate is changing and human activity impacts that.

Senator Sanders. But you haven't told me why you think the climate is changing.

Mr. Pruitt. Well, Senator, the job of the Administrator is to carry out the statutes as passed by this body and to --

Senator Sanders. Why is the climate changing?

Mr. Pruitt. Senator, in response to the CO2 issue, the EPA Administrator is constrained by statutes --

Senator Sanders. I am asking you a personal opinion.

Mr. Pruitt. My personal opinion is immaterial --

Senator Sanders. Really?

Mr. Pruitt. -- to the job of carrying out --

Senator Sanders. You are going to be the head of the agency to protect the environment, and your personal feelings about whether climate change is caused by human activity and carbon emissions is immaterial?

Mr. Pruitt. Senator, I have acknowledged to you that the human activity impacts the climate.

Senator Sanders. Impacts.

Mr. Pruitt. Yes.

Senator Sanders. Scientific community doesn't tell us it impacts; they say it is the cause of climate change and we have to transform our energy system. Do you believe we have to transform our energy system in order to protect the planet for future generations?

Mr. Pruitt. I believe the EPA has a very important role at regulating the emissions of CO2.

Senator Sanders. You didn't answer my question. Do you believe we have to transform our energy system away from fossil fuel, to do what the scientific community is telling us, in order to make sure that this planet is healthy for our children and grandchildren?

Mr. Pruitt. Senator, I believe that the Administrator has a very important role to perform in regulating CO2.

Senator Sanders. Can you tell me, as I think all of us know, Oklahoma has been subjected to a record-breaking number of earthquakes. Scientists say that Oklahoma is almost certain to have more earthquakes with heightened risk of a large quake probable to

endure for a decade and that the cause of this is fracking. Picking up on Senator Harris's discussion with you, can you point me to any opinion that you wrote, any enforcement actions you took against the companies that were injecting waste fracking water?

Mr. Pruitt. Senator, let me say I am very concerned about the connection between activity in Oklahoma and --

Senator Sanders. And, therefore, you must have taken action, I guess. Can you tell me who you fined for doing this, if you are very concerned?

Mr. Pruitt. The Corporation Commission in Oklahoma is vested with the jurisdiction and they have actually acted on that.

Senator Sanders. And you have made public statements expressing your deep concern about this.

Mr. Pruitt. We have worked with, through our --

Senator Sanders. You have made public statements. You are in a State which is seeing a record-breaking number of earthquakes. You are the attorney general. Obviously, you have stood up and said you will do everything you can to stop future earthquakes as a result of fracking.

Mr. Pruitt. Senator, I have acknowledged that I am concerned about --

Senator Sanders. Acknowledged that you are concerned. Your State is having a record number of -- well, if that is the kind of Administrator for the EPA, your State is having a record-breaking number of earthquakes, you acknowledge that you are concerned. If

that is the kind of EPA Administrator you will be, you are not going to get my vote.

Senator Barrasso. Senator Inhofe.

Senator Inhofe. Mr. Chairman, a UC request. I ask at this point in the record that we reprint the Wall Street Journal op-ed piece that was written by two outstanding scientists called "The Myth of the Climate Change Ninety-Seven Percent."

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Barrasso. I have a little bit of time left in my questioning from the first round. I just wanted to talk about some of the concerns I have with overregulation. Do you have the same concerns with the overregulation of U.S. manufacturing over the last eight years? I believe we have exported manufacturing jobs overseas, the jobs that go with them in terms of the manufacturing of those goods to places like China and India that are going to produce those products in a less environmentally friendly way. Do you agree with this notion that this approach harms not just the environment, but also our own U.S. economy?

Mr. Pruitt. I believe, Senator, that it puts us in an economic disadvantage when we don't hear all voices in the rulemaking process with respect to these issues, absolutely.

Senator Barrasso. I would also like to submit for the record an op-ed on CNN by Jeb Bush, saying, "Scott Pruitt is ready to turn around the EPA. I cannot think of a person more suited to lead the Environmental Protection Agency than Oklahoma Attorney General Scott Pruitt. He has acknowledged human impact on the climate and supports a robust discussion about its affects and what the Government should and shouldn't do to address it."

And then also submitting for the record a report that I did as ranking member of the Subcommittee on Clean Air and Nuclear Safety of this Committee, this was a couple of years ago, called "Red Tape Making Americans Sick." I put this together as a physician where we talk about unemployment, long-term unemployment increases the likelihood of hospital visits, illnesses, premature deaths in

communities due to joblessness; it hurts children's health, hurts family well-being, and quote scientists who point that the unemployment rate is well established as a risk factor for elevated illness and mortality rates in epidemiological studies performed since the 1980s. Additionally, there is influencing on mental disorders, on suicide, alcohol abuse, alcoholism. We also see it with spouse abuse, drug abuse.

So that the regulations that come out of the EPA that do cut into employment of hardworking Americans actually contributes to a deterioration of their health.

I don't know if you have any comments on that or what you may have seen in Oklahoma at times of unemployment.

Mr. Pruitt. Senator, we have seen similar issues in Oklahoma. We have prescription drug abuse that occurs at rates that are unprecedented, as other parts of the Country, so there is a similar concern that we have in Oklahoma.

Senator Barrasso. I appreciate your patience, your honesty, your forthright presentation this morning. We are going to go to a second round. I now have about 12:45. If it is all right with you, Ranking Member Carper, we will come back in an hour. We will take an hour break and come back and resume with a second round of questioning at 1:45.

The Committee is in recess.

Mr. Pruitt. Thank you, Senator.

[Recess.]

Senator Barrasso. Let us resume the confirmation hearing for Scott Pruitt to be EPA Administrator.

Attorney General Pruitt, let me start by saying sometimes you get a chance to sit down over lunch and you say, I have been answering questions for over two-and-a-half hours. I wish I had said something differently about something or other. Is there anything you would like to clarify?

Mr. Pruitt. I have just one point of clarification in response to Senator Whitehouse's questions this morning about different environmental enforcement steps we have taken with respect to the leaky underground storage and double dipping in our State. I have officially initiated three cases there with respect to Valero, BP and Conoco. Exxon and a number of other cases are still in settlement discussions. Those cases have not materialized in actual litigation just yet.

Senator Barrasso. Thank you for that clarification.

I have a couple quick questions. In the City of Cheyenne, Wyoming, it was discovered that trichloroethylene, a chemical that has been used by the military to degrease the engines of rocket motors, was seeping into the city's drinking water supply. The Army Corps of Engineers, which was in charge of a nearby former Atlas nuclear missile site, refused to even admit that the site was the cause of the pollution. I fought the Corps on this to do testing needing to prove what was obvious to everyone who looked at it. The test results showed a large plume coming from the Atlas site directly into the city's wells. The Corps is now addressing the pollution of the city's

water supply. It is now protected through a state-of-the-art water treatment facility that was installed by the Corps.

Can you perhaps give me an example from when you served as Oklahoma's State Attorney General where you went after polluters and held them accountable in that same way?

Mr. Pruitt. Yes, Senator. As I indicated earlier, I think this was indicated earlier in this morning's testimony, I mentioned the case with the hen producing, the CAFO. That was something we actually initiated. I know there was some question that Senator Carper raised in that regard. That was both with respect to Federal and State violations. We actually joined the State of Texas and the EPA in that enforcement action.

I have submitted for the record, as you know, a list of cases where we have worked with the Wildlife Commission in Oklahoma, the DEQ around CERCLA matters and enforcement of our State laws.

Senator Barrasso. What was troubling to many of us in the previous Administration was when officials within the Obama Administration went to extraordinary lengths to avoid disclosing their official written communications under the Freedom of Information Act. This is the law that allows public access to government records. For example, EPA Administrator Lisa Jackson, at the time, used an EPA email account under the name of Richard Windsor, Richard Windsor, as opposed to her own email account.

If confirmed, will you refrain from taking any such action that makes it difficult or impossible for the public to access your official written communications under the Freedom of Information Act?

Mr. Pruitt. Yes, Mr. Chairman. As I indicated in my opening statement, I really believe that public participation and transparency in rulemaking is very important. I think that extends to this matter as well.

Senator Barrasso. Thank you. I will reserve the remainder of my time.

Senator Carper?

Senator Carper. Thanks, Mr. Chairman.

As we discussed before, you are a part, I think, of at least three lawsuits, Mr. Pruitt, I think one is pending on the EPA's efforts to reduce mercury emissions from power plants. We know that 50 percent of our Nation's mercury emissions come from power plants, not nuclear plants, but generally fossil fuel plants, largely coal-fired plants. We know there are more fish consumption advisories in the U.S. for mercury than I think all other contaminants combined, including in your own State of Oklahoma.

If you believe that the EPA should not move forward on the Mercury and Air Toxics rule, how do States clean up mercury? What do you think are the health impacts of mercury emissions?

Mr. Pruitt. Senator, I actually have not stated that I believe the EPA should not move forward on regulating mercury or adopting rulemaking in that regard. Our challenge was with regard to the process that was used in that case and how it was not complicit with the statutes as defined by Congress.

There is not a statement, nor a belief that I have, that mercury is something that should not be regulated under Section 112 as a

hazardous air pollutant, a HAP. As you know, that section directly deals with health concerns of our citizens. That is the reason why there is control technology that is very heightened in that statute, maximum achievable control technology that is required. So I believe that mercury should be dealt with and dealt with in a meaningful way by the EPA but subject to the processes this body has outlined.

Senator Carper. Senators Lamar Alexander and I worked together for a number of years on clear skies legislation. The George Bush Administration had proposed Clear Skies dealing with sulfur dioxide, nitrogen oxide and mercury. Several colleagues of my own, including Senator Alexander, worked on legislation similar. One of the differences between what we proposed and the Bush Administration's proposal was with respect to reducing the emissions of mercury. I do not recall exactly what the Bush proposal called for in terms of emissions reductions from power plants and others from mercury but it was not very aggressive.

I proposed a reduction of 80 percent over a certain number of years. Senator Alexander said he thought folks could do better than 80 percent and he proposed a 90 percent reduction schedule.

We literally had here at this table witnesses from utilities and one witness from a trade association representing technology companies that focused on reducing emissions of harmful substances into our air and into our water. Every utility representative said, we cannot meet an 80 percent reduction in mercury. The witness from the trade association representing the industry which was in business just to try to reduce emissions like mercury said, not only can the industry

meet those reductions over the stipulated period of time, they could exceed them.

As it turns out, they exceeded them. They actually did better than 80 percent, actually did better than 90 percent and did it more quickly than I think was anticipated.

Is that instructive to you in any way on this question? Is there any lesson there for you or for us from that experience?

Mr. Pruitt. As I have indicated, Senator, I really believe that it is important and it is a partnership between the EPA and the States. I made reference to the phrase earlier of national standards and neighborhood solutions. I think that shows the EPA can be involved and should be involved in setting standards and setting objective, science-based standards to improve air quality and protecting the health of our citizens but also to be a meaningful partner with the States in implementing those laws.

Senator Carper. Let me just stop you there, please. I like to say that in adversity lies opportunity. That is not me. That is Albert Einstein. There is economic advantage to be gained from cleaning up pollution. We have seen there are companies that worked on mercury emissions. They make money doing that and starting that technology around the world. Similarly, there has been money made from the Diesel Emission Reduction Act, the American technology reducing emissions from old diesel engines.

Do you ever give any thought to the economic gain, the economic advantage that can flow from developing that technology to reduce

emissions? I actually think sometimes of setting regulations, clear regulations.

I will never forget a conversation I had when we were working on our Clear Skies legislation addressing four pollutants, meeting with a bunch of utility CEOs, and talking about how to go forward on that issue. At the end of the conversation, one of the utility CEOs, I think a curmudgeon-like older fellow. I do not remember where he was from. He said at the end of the day, here is what you need to do, Congress and the EPA. You need to tell us what the rules are going to be; you need to give us some time and flexibility; and you need to get out of the way. That was what he said. Tell us what the rules are going to be; give us some flexibility; and get out of the way.

Do you believe that actually setting standards, whether it happens to be mercury reductions, CAFE standards, fuel efficiency requirements, that we are actually setting those standards, making it clear that we actually provide certainty and actually open a door for economic production?

Mr. Pruitt. I do, Senator, actually.

Senator Carper. Can you give us an example where you actually saw that happen, were helpful in making that happen?

Mr. Pruitt. In Oklahoma, this is not widely known because we are known as an oil and gas State, but in the generation of electricity in our State, 17 percent of our electricity is generated through wind. We have had a heavy emphasis on renewables. That puts us in the top three in the Country.

Our Corporation Commission, I actually have obligations to appear before the Corporation Commission in the setting of rates. As utility companies are looking at modifying their facilities to comply with environmental statutes, there is great discussion about how to do that more economically and to achieve the air quality objectives we have under EPA and State mandates. I have been very involved in that process through that part of my office.

Senator Carper. Thanks, Mr. Chairman.

Senator Barrasso. Thank you, Senator Carper.

Senator Capito.

Senator Capito. Thank you, Mr. Chairman.

Thank you again for being before us. Congratulations on your nomination.

Mr. Pruitt. Thank you, Senator.

Senator Capito. I think, as you can tell from this committee and the Country is divided on a lot of the issues in and around involving what you are endeavoring to headline here at the EPA. I think understanding one another is extremely important. No matter how many times I might say the same thing and somebody else on the other side might say the same thing, it gives me a greater understanding of where they live and how they think best way to pursue environmental issues are.

In the crowd that just joined us here after lunch are several coal miners who traveled all morning, have been waiting in the hall and made some new friends in the audience. I want to thank them for coming because those are the faces of the issues that I try to address

when we are talking about the different facets of the regulatory environment that we see that has been put forth over the last several years. This question is for you all.

In my very first hearing as a United States Senator on this committee, we had the Assistant Administrator, Janet McCabe. She came to testify about the EPA CO2 rules. When I pressed her about why in the public meetings on the existing plant rules, EPA had not bothered to come to West Virginia or, for that matter, any of the other States that most heavily rely on coal for electricity generation, this is what she said: "We tried to. When we were scheduling national level meetings, we wanted to have those in locations where people were comfortable coming."

Mr. Attorney General, I want you to be comfortable coming anywhere in this Country to talk about whether it is Rhode Island, West Virginia, or Alaska. People need to know you are listening, that you care and that you are understanding the ramifications for the decisions that you make.

So this did not sit very well for me. We had a meeting after that in Beckley, West Virginia, which is the birthplace of the Ranking Member. We had Bo Copley there, who was a laid-off coalminer. He talked about all the hardships of his friends and neighbors. We had the county commissioner who talked about the loss of revenue to the county and how it was impacting the school systems, the real estate values and the bankruptcies of all the different coal companies and people who had been out of work.

I would implore you to commit today to visit West Virginia, both sides of West Virginia, and talk to our coal miners and their families to talk about the job and economic impacts and how we can work together with both sides to try to get to the intended goal of cleaner air and cleaner water.

Mr. Pruitt. Senator, I really appreciate you sharing that. That is the reason I mentioned in my opening statement the importance of listening and leading. This process I have been a part of obviously is very new, but I spent time with each of you, many of you, in individual meetings. Senator Gillibrand talked about issues important to her around CERCLA. You cited concerns and issues that are important to you in West Virginia. I think it is very important, if confirmed as Administrator, that I spend time responding, learning and listening to you and your respective States and trying to be helpful with regard to the environmental issues you face.

Senator Capito. Thank you. That means a lot.

I would like to get some clarification on a topic has been coming up about how many times you, as Attorney General, sued the EPA. You began your statement by saying the rule of law is very important to you. Then you talked about several of the cases and probably most of the cases you brought forward as not challenging the regulations so much as the process or whether the rule of law has been overstepped and the boundaries of the EPA has been the intent of Congress by legislating to the EPA, has been overstepped. The courts have agreed, in some cases, that this is the case.

Could you kind of restate that position on the different actions?

Mr. Pruitt. Senator, as I indicated I think in response to Senator Sullivan, probably more so than most statutes that are passed by Congress, this body has recognized the very important and vibrant role the States play in partnership with the EPA in implementing and enforcing our environmental statutes. Many of you talked about that in your offices and how your DEQ works with the Regional Administrator.

So when we talk about rule of law, as you deal with mercury, as you deal with CO2, as you deal with water issues around WOTUS and the definition in those cases, it is important that you do so consistent with the framework that has been established by this body and that it is respected. That gives confidence to the people that are regulating it.

When you have an administrative agency of any type that acts inconsistent or tries to enlarge its authority, it does not inspire confidence in those that are regulated. You are seeing a matter of picking winners and losers and being against certain things as opposed to protecting people. That rule of law is not something that is academic in my view. It is not something that is just legal; I think it is important to ensuring good outcomes as far as improving our air and protecting our waters.

Senator Capito. Thank you.

Senator Barrasso. Senator Whitehouse.

Senator Whitehouse. Thank you, Mr. Chairman.

Mr. Pruitt, when we left off, we were talking about things that, to quote the Chairman, "might place you in a conflict of interest but

have not been disclosed." We were talking about the dark money operation that supports the Republican Attorney Generals Association.

Before we get back into that, let me ask you this as a hypothetical. If you had raised significant amounts of money for the rule of law defense fund from corporations who will be subject to EPA's regulation, before EPA, with matters before EPA, might that place you in a conflict of interest?

Mr. Pruitt. The EPA Ethics Counsel has said, by the way these are career individuals as you know, Senator. Justina Fugh is a career person at EPA Ethics. So as they have reviewed these potential conflicts, I have disclosed all entities I have been affiliated with.

Senator Whitehouse. I understand that but I am asking you if you think it might place you in a conflict of interest because we both understand that the ethics rules that the EPA is enforcing predate Citizens United, predate dark money. They have said in the letter that they are not even looking at that because they do not have the authority to. That does not mean it is not a conflict of interest. It means that the regulatory authority on government ethics has not caught up with this post-Citizens United, dark money world.

My question is, you are a lawyer, you know conflicts of interest. You have been an attorney general. Might it be a conflict of interest within your definition of the term if you had raised significant amounts of money for this Rule of Law Defense Fund and they will have business before EPA with you? Is that a potential conflict of interest?

Mr. Pruitt. I think if you actually did address those entities to the degree that I was never an officer of the super PAC you are referred to earlier, the Liberty 2.0.

Senator Whitehouse. The question was fund raising. That is the question we do not have any answers on, is what you raised.

Mr. Pruitt. They looked at those entities to determine the nature of my relationship and indicated those would have to be evaluated in the future as certain cases arose.

Senator Whitehouse. Right now, the Chairman asked you a question which is, are there matters that might place you in a conflict of interest that you have not disclosed. You answered no.

Might not having raised significant money, let's say $1 million. Let's say you made a call to Devon Energy and said, I did your letter for you. RAGA needs a lot of money. We have this dark money thing where we can launder your identity clean off it and the money will go into RAGA. I need $1 million out of you. Might that not create a conflict of interest for you if that were the facts?

Mr. Pruitt. Ms. Fugh has indicated in her letter to me, again, these are career individuals at EPA Ethics, that if particular matters involving specific parties arise in the future, it will be evaluated at that point.

Senator Whitehouse. How will they know if you are not willing to disclose that you raised a hypothetical $1 million from Devon Energy?

Mr. Pruitt. Those aren't even covered entities under her letter at this point.

Senator Whitehouse. That is my point. That may very well create a conflict of interest, mightn't it?

Mr. Pruitt. Senator, I did not serve in an office or capacity at that entity in any way.

Senator Whitehouse. That also is not the question. The question is a very simple one. Did you raise money for the Rule of Law Defense Fund, front entities that will appear before EPA as potential defendants in subjects of regulation? If so, how much and what did you tell them and what did you ask? It seems to me that is not an unusual or --

Mr. Pruitt. The Rule of Law Defense Fund, according to Ms. Fugh, would need to be a party in the future for that to be an issue. That is what she has indicated in her letter to me. At the time, if it should arise in the future, I will seek the counsel of EPA Ethics and follow the advice of those career folks to make a decision and recuse if necessary. That is something I commit to doing.

Senator Whitehouse. At this point, what I deduce from your statement is that if that set of hypothetical facts were true, if you had raised $1 million from a big energy corporation to go through the Rule of Law Defense Fund to support your efforts at RAGA, that is not something anybody should care about, even if that corporation is before you at EPA and subject to your regulation?

Mr. Pruitt. I think it is something that if presented in the future, Justina Fugh, myself and EPA Ethics would evaluate that and I would take the appropriate steps to recuse if they told me to do so.

Senator Whitehouse. But how would it be presented in the future if you are not willing to present it now? Why does it matter in the future and not now?

Mr. Pruitt. If there is a matter or case that comes before the EPA's authority, that would be something. There is ongoing, as you know, Senator, Ms. Fugh indicated this in her letter, there is ongoing obligations that I will have, if confirmed as Administrator, to bring those kinds of matters to the attention of EPA Ethics.

Senator Whitehouse. For what it is worth, I think the Senate has a role in policing this as well, that the whole purpose of advice and consent and the reason there are these government ethics filings is so we can look at this exact question. The fact they haven't been updated to take into account dark money and all these big political organizations that have been created with dark money doesn't take away our Senate obligation to find out what conflicts of interest you will bring to the position of Administrator. It gives me very little comfort that you are not willing to answer those questions here.

My time has expired. I will continue in another round.

Senator Barrasso. Thank you very much, Senator Whitehouse.

I would like to introduce for the record an article in the Associated Press in the Seattle Times headlined, "Ethics Officials Clear Trump EPA Nominee." It says, "The Office of Government Ethics on Monday released the personal financial disclosure report for Scott Pruitt, currently Oklahoma's Attorney General. The Ethics Office affirmed that Pruitt's disclosures comply with applicable federal laws

and rules. "His finances," it says, "are among the least complicated of Trump's Cabinet nominees."

[The referenced information follows:]

Senator Barrasso. Senator Boozman.

Senator Boozman. Thank you, Mr. Chairman.

I really do find it ironic and hypocritical that we are in a situation that my friends on the other side of the aisle in this committee, using their definition of dark money as elected official, have literally raised millions of dollars of so-called dark money.

I'd like to talk a little bit about some of the over-regulatory burden that the States are facing. Air quality in Arkansas is among some of the cleanest in the Nation. Despite the progress that the State has made in looking forward, trying to do the right thing, the Regional Haze Federal Plan is going to produce a tremendous economic burden on them.

I think it is a prime example of the haphazard regulatory atmosphere that we have had in the past with little input from the States and stakeholders. For years, the regulatory certainty has prevented businesses from hiring new employees and stunting economic growth. In fact, the National Small Business Association that was just released found that more than half of small businesses have held off on hiring because they don't know what the rules are going to be.

You have mentioned it several times. Can you talk a little bit more about the impact that you have seen in regard to regulatory uncertainty in the State of Oklahoma and the experiences you have had?

Mr. Pruitt. Senator, the Visibility Program, we have had similar challenges in Oklahoma. The Regional Haze Program under the Clean Air Act, that section of the Clean Air Act is really quite a bit different

than other provisions of the Clean Air Act. It gives primacy to the States in adopting plans to increase or improve visibility.

That particular section of the law says by the year 2064, we should have natural visibility in some key areas across the Country. Oklahoma several years ago, actually in 2010 under a different Administration, both Governor and Attorney General submitted a State implementation plan that beat that deadline by decades. Despite that, the EPA came in and rejected that State implementation plan and forced a federal implementation plan on the State, costing the consumers quite a bit of money.

One thing I would add that I didn't talk about earlier is we talked about cooperative federalism and the importance of partnership. I have talked about that; you've talked about that. Under this past Administration, the use of federal implementation plans, if you combine President Bush, President Clinton and President George W. Bush, those three Administrations combined issued five federal implementation plans under the Clean Air Act in three Administrations. This Administration has issued 56. So it shows an attitude of indifference, an attitude of trying to be dictatorial in some respects toward the State's role or manipulative of the State's role in a way that is, I think, counterproductive for air quality.

Senator Boozman. When you and fellow Attorney Generals and other stakeholders sue the Federal Government, whether it is regional haze or waters of the U.S. or whatever, your goal is not to do away with the regulation, your goal is to make it such that the EPA follows their regulatory authority, is that correct?

Mr. Pruitt. Yes, Senator. In that example I provided to you where the State implementation plan of Oklahoma that was rejected, we actually satisfied the statutory mandate that was under the regionalized program. We reached natural visibility a couple of decades ahead of schedule. The methodology that was used, the EPA simply disagreed with it. So they used their authority to displace the State plan costing consumers in the State hundreds of millions of dollars in increased utility costs.

Senator Boozman. One of the things I think we have also seen in the last eight years is tremendous mission creep on the part of the EPA where they have gotten into areas where they don't have the expertise. I think expertise would be the best word in regard to coming out with some of the things they have done where they lack jurisdiction and haven't really been in the past.

Can we count on you to work with the other agencies and take their expertise into careful consideration as we come out with the rules and regulations?

Mr. Pruitt. I think interagency cooperation is very, very important. Obviously with rulemaking, that is something that occurs and should occur, I think, in a very collaborative way. So yes, Senator, I believe it is very important as the EPA conducts its business that it works with the Corps and works with other agencies at the federal level to ensure that it is doing all it can to advance and protect water quality and air quality and do so within the framework established by Congress.

Senator Boozman. Does it feel like it is the ultimate decider again when they sometimes do not have the expertise of the other agency?

Mr. Pruitt. Yes, Senator. I agree.

Senator Boozman. Thank you.

Mr. Pruitt. Thank you.

Senator Boozman. Thank you, Mr. Chairman.

Senator Barrasso. Thank you, Senator Boozman.

Senator Merkley.

Senator Merkley. Thank you, Mr. Chairman.

Mr. Pruitt, are you familiar with this piece of medical equipment?

Mr. Pruitt. Yes, an inhaler, it looks like.

Senator Merkley. Yes, an asthma inhaler. Are you familiar with how many Americans have asthma?

Mr. Pruitt. No, Senator, I am not.

Senator Merkley. It's about 1 out of 10 Americans, including over 7 million children. It is a pretty significant health problem across the Country. I know I have been fortunate not to have asthma but some folks I know who have it and have asthma attacks feel like they are suffocating. Sometimes they go into crisis. People go into crisis with asthma. Sometimes they die from it. It is a terrifying condition.

The EPA, in October 2015, strengthened the National Ambient Air Quality Standards for ground level ozone. They strengthened it to 70 ppb, adjusting it from 75 ppb, because they argued that it was an

attainable standard that would save $3 billion to $6 billion and in addition, of course, greatly improve the quality of life by diminishing the amount of asthma attacks and deaths.

You challenged this. You launched a lawsuit against this standard. Was the basis of your lawsuit cost benefit analysis, that they didn't follow their process?

Mr. Pruitt. It was not, Senator. As you know, under the NAAQS Program, the Whitman decision, cause cannot be considered in a criteria pollutant.

Senator Merkley. What was the standard you were challenging?

Mr. Pruitt. It was a records-based challenge that the need to ratchet down from 75 parts per billion to 70 parts per billion. As you know, the 75 parts per billion had only been in operation for two years. I think, Senator, it is important from a priority perspective or the resource perspective of the EPA when 40 percent of the Country is in nonattainment for one of those criteria pollutants, perhaps there should be focus on how to meet the level already in statute or already in rule.

Senator Merkley. So you challenged this based on the attainability standard? I already know that --

Mr. Pruitt. The records-based challenge, yes.

Senator Merkley. Yes, the attainability standard. There were numerous groups that weighed in and said no, this is totally attainable. I will submit a list for the record of that, Mr. Chairman.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Merkley. The key to this is that by implementing that, by the time it is implemented, it would save annually 230,000, an estimate of course, asthma attacks among children, 160,000 missed school days, a tremendous number of missed work days, 630 emergency room visits and 340 cases of acute bronchitis. But it also would save, best estimate, 320 to 660 premature deaths.

Here is something that profoundly affects the health of folks in Oklahoma, folks across the Country, folks in my home State of Oregon, something that expert after expert said is fully attainable, and you challenged it not on a process issue, that is not on whether or not there was a cost benefit analysis because as you rightly pointed out, cost is not allowed to be a factor, but whether it was attainable. Why fight so hard on the side of the oil industry rather than fighting on the side of the health of the people of Oklahoma?

Mr. Pruitt. Senator, let me say to you with respect to the NAAQS Program, when you look at the nonattainment we have in this Country, it is presently around 40 percent, I think increasing the nonattainment percentage as opposed to focusing resources to get nonattainment into attainment is a very important role of the EPA. We should be taking those marginal and moderate areas on our map that are in nonattainment and work with local officials, those counties, through monitoring and assistance to help move from nonattainment to attainment. That is a very important goal of the EPA in each of these criteria.

Senator Merkley. Thank you. You have made your point clear. I just simply disagree with you. None of these standards, when they are

set, are attained. That is the point. It is an objective to be worked at over time. There was a strategy that this might take until 2025 to be fully implemented.

But in the course of laying out that vision and having folks across the Country work towards that vision, you end up saving a tremendous amount of money and a tremendous amount of lives. I, as a Senator from Oregon, fighting for the quality of life of Oregonians, deeply resent folks fighting for oil industry that are trying to damage the health of my constituents and Americans across this Country. It is a question of values and valuing profits of companies over the health of our citizens, it is a character issue and that is what these hearings are all about. We are charged with Hamilton to determine whether or not an individual is of fit character. To me this is a character issue, valuing profits over people's health.

Thank you, Mr. Chair.

Senator Barrasso. Thank you, Senator Merkley.

I am submitting for the record a report by the National Black Chamber of Commerce entitled, Potential Impact of Proposed EPA Regulations on Low Income Groups and Minorities. The report goes from 2015 and goes on to say that EPA regulations, including its regulation on carbon dioxide emissions, would result in the year 2020 in nearly 200,000 black jobs would be lost and more than 300,000 Hispanic jobs would be lost. Additionally, commensurate with this, there would be median household income significant decreases throughout the communities listed in the report.

[The referenced information follows:]

Senator Barrasso. Senator Fischer.

Senator Fischer. Thank you, Mr. Chairman. Here we go again on round two. I am happy that we have an opportunity to continue questioning with you, General Pruitt.

Nebraska, much like Oklahoma, is a rural State. In many cases, the closest town or the neighbor can be located miles and sometimes hours away. In Nebraska one in four jobs is directly tied to production agriculture. Under this Administration, farmers and ranchers felt especially targeted by the EPA. For example, in 2011 and 2012, EPA Region 7 conducted aerial surveillance or flyovers of feed yards in my State. While flying over my State, EPA documented these facilities with photographs.

This was very disconcerting to me given that many livestock producers in Nebraska also live and raise their families on these properties. Not only were these producers not informed beforehand but the EPA has already delegated the authority to carry out the Clean Water Act in Nebraska to the State Department of Environmental Quality.

What will you do to ensure that the EPA sticks to its core mission? Furthermore, how will you work with the regulated community, including agriculture, to build trust among constituencies that have been, I would say, the subject of bullying tactics by this EPA that we have now?

Mr. Pruitt. Senator, I indicated in my opening statement some core themes, if confirmed as Administrator, that I would seek to comply with. One is public participation, full participation to

ensure that all voices are heard as the EPA conducts its activities with respect to rulemaking particularly. I think perhaps what you are referring to is the lack of that voice or opportunity in the last several years. So I would work to build a collaborative relationship with those States. As I have indicated, I think the Departments of Environmental Quality at the State level are valuable partners, that we need to restore their confidence in the partnership with the EPA and then seek to listen to the community concerns in addressing and responding to environmental issues.

Senator Fischer. Thank you.

In one of her exit interviews, EPA Administrator Gina McCarthy has admitted that she has had a bad relationship with agriculture and with the agriculture community. She listed it as one of her regrets. I think a bad relationship is an understatement in this case.

This Administration's EPA philosophy is diametrically opposed to the idea that farmers can be good stewards of our land, our water, our environment. Instead, it seemed that this Administration's EPA wanted to regulate. In some cases, it looked like they wanted to prevent farming. The agriculture community is looking forward to a new leadership at the EPA and working with you.

Mr. Chairman, I have here some statements from agriculture officials and groups I would like inserted into the record.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Fischer. If I may, I would close by quoting a few of those. Jim Reese, the Oklahoma Secretary of Agriculture, says that "Scott Pruitt will continue EPA's efforts to protect our environment but with respect towards landowners, taxpayers, municipalities, businesses and Congress." That is nice to hear, sir.

Troy Stowater, Nebraska Cattlemen president, stated "Simply put, Mr. Pruitt sees clearly that agriculture and environment are not opposing terms but rather, they are complementary. He will work to cultivate the relationships which will lead to the United States leading in food and fiber production while improving the environment in which it is accomplished." Again, I am happy to look forward to that relationship being established again so that all parts of our society here in this Country can participate and receive the recognition that we are good stewards of the land.

If confirmed, what will be your relationship with the agriculture community? Are you going to enforce current laws and will you also respect the limits that we have on those laws?

Mr. Pruitt. Yes, on both counts, Senator, and also the theme I mentioned in my opening statement that I would highlight again, is that we need to reject this paradigm that if you are pro-energy, you are anti-environment or if you are pro-environment; you are anti-energy. I believe that we, as a Country, have demonstrated that and we have made great progress since the 1970s in improving our air quality and protecting our waters. We can grow an economy and also protect and be a good steward of our environment. We need to restore that proper balance and commitment to both as we seek to do our job.

Senator Fischer. Thank you. As I said earlier, every member of this committee believes in clean air and clean water. We want an environment that is respected where we can manage our natural resources in a responsible manner. Thank you, sir.

Senator Barrasso. Thank you, Senator Fischer.

Senator Cardin.

Senator Cardin. Thank you, Mr. Chairman.

Mr. Pruitt, I want to try to get your understanding. I heard you say that you wanted to see the regulations and the laws predictable so that stakeholders know exactly what is required so there is no confusion.

I want to concentrate on the waters of the U.S. because, ever since the Supreme Court decisions, there has been an uncertainty as to what waters are, in fact, subject to regulation by the Federal Government and what waters are not. Do you believe that priority should be set by statute or should it be set by regulations from the EPA?

Mr. Pruitt. Senator, I think that is a great question. If you look at the series of cases going back to Bayview all the way to Rapanos, I think you are exactly right. The definition in the Clean Water Act says that navigable waters are waters of the United States. That doesn't provide a great deal of clarity to those that administer the law. I think the EPA taking steps to provide clarity is important absent Congress responding. I think that perhaps there is a time and place for Article 1 response, congressional response, to what this

body means when it says navigable waters are waters of the United States.

Senator Cardin. Of course, the Congress, for whatever reasons, for a long period of time, has not been able to respond as to what we think the definition of the waters of the U.S. should be. The Administration did come forward with proposed regulations which were resisted by many of the stakeholders that you are aware of.

How would you define the waters of the U.S.? What was wrong in the regulation? I don't want to go through all the details. Tell me, where do you think we should regulate? You already said more than just navigable. How do we define it? How do you do it? What did the Administration do wrong?

Mr. Pruitt. The challenge up until now with respect to the current rule, this involves actually an air case, the UARG case, where Justice Scalia talked about the counterbalance to Massachusetts v. EPA where the steps taken by the EPA to take the endangerment finding in 2009 that dealt with Title II mobile sources and then link that over the PSD Program was something Justice Scalia said transformed the statute and was not lawful or constitutional.

I think the same thing perhaps is going on with the current rule. When you are classifying dry creek beds in southeast Oklahoma that are dry 90 percent of the year as a water of the United States, that clearly is something that is --

Senator Cardin. The Administration, in its regulation, had certain exceptions that tried to deal with that. You obviously didn't think those exceptions were clear enough.

Mr. Pruitt. Actually, the Sixth Circuit said that those clarifications were not sufficient. I would agree with you, Senator Cardin, that I believe the clarity around this definition, the jurisdiction of the EPA, is essential to get right and to address. As I indicated earlier to some questions, the Supreme Court has actually taken up a matter from last Friday, it is more jurisdictional and not merit-based. But the response by Congress, the response to provide clarity, perhaps is a very important step to take.

Senator Cardin. I want to pursue this. I think we have asked questions for the record as to specific provisions you believe should be in that rule that would be different than the proposed rule. I would appreciate a response to that so we can try to see where we are heading in your thought process as to how you define the regulated waters of the U.S. That would be helpful to us.

Mr. Pruitt. I think, Senator, the reason that is difficult, as you know, is because in that process, whatever process that would take place, that would be rulemaking which means there would be comment.

Senator Cardin. I understand that. I am not trying to get every I dotted and every T. I just want to get your philosophy as to where the waters of the U.S. lines would be drawn and where you took exception to the regulatory efforts of the Obama Administration.

Let me get to the second point, if I might, on fracking. Fracking is an interesting area because it is State-regulated principally. There are very few federal regulations. My State has gas deposits that could be subject to fracking. Pennsylvania, our neighboring State, has done that. There have been some problems with

pollution of water. We know about the gas releases that have already been talked about. There is some concern particularly with deep well drilling that when you inject the fluids back into the cavities, that it may cause instability. In your State, I know there were a lot of earthquakes and there has been talk about whether these earthquakes were motivated by the fracking activities or not.

How well have the States regulated fracking? Where do you see the federal role should be in protecting our environment from fracking?

Mr. Pruitt. I am glad you mentioned the State role because we actually have been regulating hydraulic fracturing in Oklahoma since the late 1940s, early 1950s. It is not a new process. Horizontal drilling is, but the hydraulic fracturing process is not. Many States have been very aggressive in regulating it for a number of decades.

With response to the seismicity issue you are talking about, the earthquakes in Oklahoma, the Corporation Commission has actually declared off limits certain drilling activity in hot spots already. They have taken a very aggressive approach. I too share their concern. I have been in conversation with the commissioners at the Corporation Commission, that is who has jurisdiction in this matter. They have taken very meaningful steps to declare off limits certain drilling activity to try to see if it will help reduce the number of earthquakes happening in Oklahoma. It has helped.

Senator Cardin. Thank you. Thank you, Mr. Chairman.

Senator Barrasso. Thank you, Senator Cardin.

Senator Inhofe.

Senator Inhofe. Thank you, Mr. Chairman.

I have two unanimous consent requests, so don't start my clock yet.

One is I really believe, and perhaps am overly sensitive to this, that Mr. Pruitt's integrity has been put into question with the accusations of contributions to his campaign. I would like to keep in mind that the oil industry is a huge industry in my State of Oklahoma. They have things called PACs where the middle income people will say yes, they support me also.

I think we need to have in the record that there are some things that are going on that should not be going on. This affects the Democrats and not the Republicans. There is a guy named Tom Steyer, I want to put this in the record, who actually said he was going to put $100 million into campaigns of individuals talking about global warming and what he expected. In 2014, he didn't do that. He only put in $75 million of his own money. In 2016, he was the largest contributor putting in $86 million of his own money. I am not going to read this because it does reflect the names of people who are at this dais.

I ask unanimous consent that this be entered into the record.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Inhofe. The other thing --

Senator Carper. I'd like to object. I'd like to ask for clarification from my friend from Oklahoma. The monies that you are referring to, were those donations that were disclosed, fully disclosed?

Senator Inhofe. Oh, yes, I believe they were.

Senator Carper. Then that does not sound like dark money to me.

Senator Inhofe. All right.

On the last question that Mr. Pruitt concerning the earthquakes, I'd like to make this a part of the record because it will surprise you guys that the Oklahoma Corporation Commission has really focused in on this thing and talked about it. This is wastewater in disposal wells that we are concerned with. They clamped down on it and you are exactly right in your response to the question except you didn't go far enough. In 2016, they actually reduced the earthquakes by 31 percent.

So we are doing, in the State of Oklahoma, something that we have been complimented about, the fact we are taking these actions. I'd like to make this a part of the record.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Inhofe. The other thing I want to bring out, and I have done this before but I wasn't going to do it until people kept talking about the science is settled, the science is settled, the science is settled. I know people want to believe that.

I remember so well, every year the UN has a big party and they invite everyone to come in. I was going to go to Copenhagen to be the one-man truth squad which I did and went over there. But during that time, right before I left, I asked the Administrator of the EPA, the job I believe you are going to have, Lisa Jackson, I said I have a feeling once I leave town you are going to come up with an endangerment finding and you are going to give your justification for getting involved in this issue. She smiled so I could tell it was true. I said, when you do this, it has to be based on science. Tell me the science that you are going to use for this. She said, well, the IPCC, the Intergovernmental Panel on Climate Change.

Now, as luck would have it, my luck and not theirs, right after that is when ClimateGate came. That's when it was disclosed that the individuals, the scientists in IPCC rigged the numbers and came up with such an outrageous lie in terms of what causes global warming, all of that. I will just read a couple of them. One of the physicists in the IPCC said "ClimateGate was a fraud on a scale I have never seen before." Clive Cooke with the Financial Times said "The closed-mindedness of these supposed men of science is surprising even to me. The stink of intellectual corruption is overpowering." The UK Telegraph, that is one of the largest publications in the UK, said "It's the worse scientific scandal of our generation." Nobody talks

about that but that is the science they are talking about. I really believe it is necessary to have that as a part of this record of this meeting.

General Pruitt, in 2012, the EPA and the National Highway Traffic Safety Administration issued updated fuel economy standards that were result of a compromise. That compromise was between the Obama Administration, the automakers and the State of California. Part of this deal required a review of these regulations in 2018 before -- these are their words and not mine -- any new standards were put in place. After losing the election, however, the Obama Administration broke the deal by prematurely issuing new regulations. This decision was made unexpectedly and well over a year before the EPA said they would make the determination. This shortened the timeframe and process, and this is concerning.

Mr. Chairman, I do ask unanimous consent that the previous EPA timeline for the expected action on the midterm review be included in the record.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Inhofe. Attorney General Pruitt, as Administrator, will you look into this matter to see whether this extreme action was appropriate or a hasty political decision?

Mr. Pruitt. Senator, as you indicated, the obligation was to meet the November 2018 midterm review. I think the study that was completed was finished December 30 and they issued their findings within 14 days. That time period is something I am not sure normally happens as far as the time, the velocity of 14 days, but it merits review. I would review that, yes.

Senator Inhofe. The follow-up question would be, would you commit to sitting down with the Transportation Secretary, Elaine Chao? I have already talked to her about this, incidentally. Both will be confirmed, I am convinced, and you are working to address the impacts of the EPA's decision on automobile manufacturers and consumers. Will you work with her on that issue?

Mr. Pruitt. Absolutely.

Senator Inhofe. Very good. Thank you, Mr. Chairman.

Senator Barrasso. Thank you, Senator Inhofe.

Senator Booker.

Senator Booker. Thank you very much.

Thank you, Mr. Pruitt. I want to jump into one of the areas that you said is a principal part of one of your achievements. In your opening statement, you said that as Attorney General you were confronted with an important water quality issue on the scenic Illinois River, the high phosphorous levels that were causing a range of problems that come from the manure principally from farm animals.

You go on to state that this was a historic agreement to clean up the river. It was in your opening statement and a number of the other documents that you provided.

You also described the agreement with Arkansas as an important agreement to reduce the pollution again that was the result from poultry growers, that was "occurring as a result of pollution from poultry growers." Are you familiar with this?

Mr. Pruitt. Yes, also discharge from municipalities in northwest Arkansas as well.

Senator Booker. I think that is an important point, yes. I would like to ask you some questions about this but I think it is important. I really dug into this and did some research. I want to go through with my colleagues what the fact pattern is that led to this moment where you intervened.

It really starts with a Supreme Court decision way back in 1992, Arkansas v. Oklahoma. I imagine you are familiar with this Supreme Court decision that resolved the lawsuit between these two States that held that basically upriver States, such as Arkansas, must comply with water quality standards adopted by downriver States and then approved by the EPA. You are familiar with that?

Mr. Pruitt. I am familiar with the litigation, yes.

Senator Booker. After that Supreme Court decision effective July 1, 2002, Oklahoma actually did adopt a .037 water quality standard for phosphorous. Importantly, they gave a decade, ten-year phase-in period before full compliance was required. Then in 2003, your predecessor, Drew Edmondson, negotiated an agreement with Arkansas,

which I have read, called the Statement of Joint Principles and Actions. Mr. Chairman, I'd like to enter that into the record.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Booker. In 2003, to give more teeth to this, this goes to what you were saying about municipalities, it created phosphorous limits for municipal discharges. That 2003 agreement that I have also read through also states that Oklahoma will reevaluate the .037 criteria for total phosphorus in Oklahoma's rivers by 2012.

Then, this is the big part, in accordance with the instructions, the mandates of the Supreme Court, the EPA gave its approval to Oklahoma's .037 phosphorous standard. This was critical because under the Supreme Court decision, now Oklahoma had a water quality standard approved by the EPA that was now enforceable against up-States like Arkansas.

Let's fast forward to April 2012. Oklahoma's Water Resources Board reviewed the best scientific information available in 2012. It reevaluated and reaffirmed the .037 phosphorous standard.

Mr. Chairman, I want to put in an executive summary of that review.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Booker. Then on June 30th, 2012, the ten-year phase-in going back to the Supreme Court decision, the actions by Oklahoma, the ten-year phase-in period was completed in full compliance and the .037 became required. It became now what was required by the States.

Just to recap all of this, because it is a lot, 20 years, Oklahoma's EPA approved a .037 phosphorous standard more than two decades in the making. It had just been reaffirmed by the Oklahoma Water Resources Board and then the ten-year compliance period phase-in had expired.

So when you said that you had entered into a second agreement with Arkansas that, in your words was a historic agreement to clean up the river, that would reduce pollution from poultry growers, this is the question that I have, sincerely, I pulled that 2013 agreement and read it and it was stunning to see that it actually didn't take any steps to reduce pollution but actually only proposes another unnecessary study and attempts to suspend compliance that was two decades in the making with the .037 standard. It suspended compliance for yet another three years of pollution.

Isn't it true that is what the agreement did?

Mr. Pruitt. It isn't, Senator. There was actually no enforcement of the .037 standard taking place on Arkansas' side of the border. You referred to the Memorandum of Understanding, and I actually have the second Statement of Principles here before me as well, that expired in the 2012-2013 timeframe. That is what presented my office with the opportunity to go to Arkansas to ensure that the

.037 standard would actually be enforced from a State law perspective on that side of the border. That had never taken place in history.

You mentioned the EPA. There was no enforcement authority that had taken place on that phosphorous level by the EPA. Oklahoma had it, as you have indicated, as a standard but it was not being enforced upstream in Arkansas. That is what the agreement addresses.

Senator Booker. Mr. Pruitt, I don't have the seniority or the stature or the grandchildren of Senator Inhofe so I can't go over my time but I will say this. In my next round, I will go back into this, because the documents don't seem consistent at all with what you are saying. In my next round of questioning, I'd like to go a little bit deeper into this historic settlement.

Thank you, Mr. Chairman.

Senator Barrasso. Thank you, Senator Booker.

I would introduce for the record an article that appeared in the Tulsa World this past January 12th, 2017 going way beyond the 20 years of that panel, but 33 years. It is by Ed Fite who served as the agency Administrator of the Oklahoma Scenic Rivers Commission from September of 1983 until June of 2016, 33 years. His statement in this op ed that he wrote is "I have found that Pruitt has always done right by our scenic rivers. For the first time ever, he has gotten the State of Arkansas, which happens to have parts of the streams we have designated as scenic rivers originating in and flowing through their State, to agree to Oklahoma's scenic rivers phosphorous standard, an incredible environmental accomplishment, the effect of which cannot be understated."

[The referenced information follows:]

Senator Barrasso. Senator Rounds.

Senator Rounds. Thank you, Mr. Chairman.

Attorney General Pruitt, in August 2016, the EPA Inspector General found the EPA had failed to follow through with its commitment to update its 2010 life cycle analysis for corn ethanol and has also failed to perform its legally required comprehensive study on the environmental effects of the RFS, the Renewable Fuel Standard. EPA's information on ethanol's life cycle emissions is inaccurate and it is outdated. Today's best available science shows that blending ethanol into gasoline can significantly reduce greenhouse gases. However, the EPA has failed to update its own science with most recent, best science that is available and continues to rely on outdated, inaccurate science when setting national policy, regulatory biofuels policy.

What are your thoughts on the EPA relying on outdated, inaccurate science to set federal regulatory policy?

Mr. Pruitt. Senator, I think it is the obligation of the EPA in taking steps, rulemaking and otherwise, to ensure that it has the most up to date, objective scientific data possible.

Senator Rounds. Let me follow up a little bit. The current EPA process for considering the scientific information underpinning major regulations, I believe, is flawed and it is unbalanced. For example, the Scientific Advisory Board, or the SAB, is to provide scientific advice to the EPA Administrator and Congress. But there is a significant lack of geographic diversity in State, local and tribal representation on the SAB.

Can you explain to us what your views are on the agency science and what you envision as the role of agency science at the EPA?

Mr. Pruitt. Senator, as you and I talked about in our meeting, I think it is important to have that geographical representation better represented and there are some conflicts of interest application with the Science Advisory Board that need to be addressed as well, and also with the Clean Air Science Advisory Committee, which is a standing committee of the Science Advisory Board.

Senator Rounds. I have got a chart that shows the geographic makeup of the 2015 chartered SAB. Of the 54 members, the majority of them come from East or West Coast States. I also have a chart that shows the number of States that have government representatives on the SAB.

How would you broaden the geographic scope of SAB members to make certain that States and various governmental entities are represented? The one on the left shows the lack of diversity with regard to the actual members on the board. The one on the right actually shows that we have a grand total of two States with representation for State and local units of government on those boards.

Mr. Pruitt. Senator, if confirmed, it is an issue as I have indicated and we talked about in your office, that is important to address to ensure there is confidence that science is driving rulemaking that it is objective and tethered to the rules adopted by the EPA. So this is a very important issue that needs to be evaluated and discussed to ensure the efficacy of the science that occurs at the EPA.

Senator Rounds. Would you commit to us that you would make an effort to see that the Science Advisory Board actually reflects some fairness with regard to geographic diversity as well as recognizing the important role that local and regional governments and State and local governments have in determining or at least participating in these boards and commissions?

Mr. Pruitt. If confirmed, I look forward to working with you on that issue.

Senator Rounds. Thank you.

Let me finish quickly with just one other item. We have listened a lot to whether you are working on behalf of industries, whether you are working on behalf of the folks from Oklahoma, and your role as an administrator with regard to clean air, water and so forth. As the Attorney General, you have represented the interests of your State and both your State's economy and your State's environment. Just because you are pro-economic development and pro-economic development growth does not mean that you have to be anti-environment. Preserving the environment and preserving the economy I don't believe are mutually exclusive. I don't think you have to choose between the two.

How would you balance economic growth with making certain that we have clean air and clean water?

Mr. Pruitt. I think part of it is inherent in the statutes and the process that the EPA is supposed to conduct. I know sometimes rulemaking is seen as something that is not terribly important or something laborious, but the reason rulemaking, the reason Congress has said you offer notice on a proposed rule and you take comment is

it is needed to make sure all voices are heard and that there is an informed decision that regulators are making before they finalize rules, because of the impact it has on the economy and on the environment in this instance.

Rulemaking is something we should take seriously and that we should do so consistent with the framework outlined by Congress so that all those voices are heard that you are referring to, Senator, in the rulemaking process.

Senator Rounds. Thank you.

Thank you, Mr. Chairman.

Senator Barrasso. Thank you very much, Senator Rounds. Senator Markey?

Senator Markey. Thank you, Mr. Chairman.

Mr. Pruitt, earlier today you said the EPA has an important role in regulating carbon dioxide because of the 2007 landmark Supreme Court ruling in Massachusetts v. EPA. The EPA Administrators for both President Bush and President Obama made a decision that carbon pollution poses a danger to America, otherwise known as the Endangerment Finding.

Will you promise to keep on the books the scientific finding that carbon pollution poses a danger to the American public health and welfare?

Mr. Pruitt. Two things, Senator. First, with respect to Massachusetts v. EPA, the Supreme Court said to the EPA that they had to make a decision.

Senator Markey. That's right.

Mr. Pruitt. To determine whether CO2 posed a risk and, as you indicated, in 2009 they did so. That is the law of the land, those two cases. There is an obligation of the EPA Administrator to do his or her job in fulfilling Massachusetts v. EPA and that endangerment finding from 2009.

Senator Markey. So you will keep that scientific finding on the books?

Mr. Pruitt. That the endangerment finding is there and needs to be enforced and respected.

Senator Markey. You will not review that scientific finding?

Mr. Pruitt. There is nothing that I know that would cause a review at this point.

Senator Markey. That's very good.

Massachusetts v. EPA made it possible for States like California and Massachusetts to set higher standards for the fuel economy of vehicles using their authority under the Clean Air Act. This is a powerful tool for States to reduce emissions and address global warming.

As a direct result of the Clean Air Act authority combined with my 2007 fuel economy law, the Obama Administration reached a historic agreement, with the auto industry's support, to increase fuel economy standards to 54.5 miles per gallon by 2025. Those standards are projected to reduce our dependence on foreign oil by more than 2 million barrels a day, prevent 6 billion tons of carbon pollution and save consumers more than $1.7 trillion at the gas pump because their cars will be so much more efficient.

Those standards are also unleashing a TESLA revolution, clean energy vehicles all across the Country. Ten thousand people are going to be employed, for example, in Nevada in this technology area.

You have said you want States to play a larger role in environmental regulation. In your 2015 testimony before the House Science Committee you wrote, "The EPA was never intended to be our Nation's front line environmental regulator. The States were to have regulatory primacy." But earlier today, you wouldn't commit to maintaining California, Massachusetts and other States' ability to have regulatory primacy as the leaders of the effort to protect their own States to do what is best for global warming in their own States.

So I am going to ask you again, will you support the statutory right of States to do more to reduce dependence on foreign oil, reduce global warming, pollution, save money at the gas pumps and create tens of thousands, hundreds of thousands of jobs in the clean car job business?

Mr. Pruitt. I think, Senator, generally, the answer to that would be yes. But in application with the California waiver that was discussed earlier, that is an adjudicatory process that I can't prejudge what would occur there. As you know, previous Administrators have either granted or denied that based upon a record that was made. I do respect and do believe that States have a very important role. We've acknowledged that or I have acknowledged that today with respect to the Chesapeake Bay situation, as an example.

I will look at that issue, like others, to make sure that it is respected but also is consistent with the statutory framework that you have outlined.

Senator Markey. Do you support the law that says California has a right to ask for a waiver?

Mr. Pruitt. It is statutory and it is something the Administrator has an obligation to do. So yes, I do respect it.

Senator Markey. Do you support the current California waiver for greenhouse gas standards?

Mr. Pruitt. Senator, that is what would be evaluated. I think it is very difficult and we shouldn't prejudge the outcome in that regard if confirmed as Administrator.

Senator Markey. So you are questioning the current waiver? You don't think they're entitled to the current waiver?

Mr. Pruitt. The waiver is something that is granted on an annual basis. The Administrator would be responsible for making that decision.

Senator Markey. You say you are going to review it?

Mr. Pruitt. Yes, Senator.

Senator Markey. When you say review, I hear undo the rights of the States. I think to a certain extent that is troublesome. Because obviously, what we have heard all day is how much you support States' rights when it comes to these issues, but now when it comes to the right of California, Massachusetts and other States to be able to reduce carbon pollution, you are saying you are going to review that.

My problem really goes to this double standard that is created that when you sue, from the Oklahoma perspective, from the oil and gas industry perspective and you represent Oklahoma, you say they have a right to do what they want to do in the State of Oklahoma. When it comes to Massachusetts or California, and it comes to the question of those States wanting to increase their protection of the environment, protect their victimization from carbon pollution, you say there you are going to review.

I think the history of the agency in granting reviews that have been necessary for Massachusetts, for California and other States to improve the environment are still valid. The science hasn't changed, the new clean energy technologies have not changed, the danger to the public from environmental exposure to carbon pollution has not changed. So from our perspective, we are fearful of what a review would actually result in. From my perspective, I think it is going to lead to you undoing that right of the States to be able to provide that protection.

Senator Barrasso. The Senator's time has expired. Thank you, Senator Markey.

I am going to introduce for the record a report from the National Energy Assistance Directors Association. These are the State officials who oversee the financial assistance programs for people to heat their homes.

The report says that when energy prices go up, higher energy prices result in 24 percent of the recipients who go without food for at least a day, 37 percent go without medical or dental care, 34

percent didn't fill a prescription and 19 percent had someone in their home become sick because the house was cold due to increased energy costs.

[The referenced information follows:]

Senator Ernst?

Senator Ernst. Thank you, Mr. Chairman.

Again, Attorney General Pruitt, thank you for being here today.

I would like to go back to something a colleague, Senator Duckworth, mentioned earlier today, and that is the point of obligation. The proposal to change the point of obligation under the RFS is an example of regulatory change that would destabilize the policy environment if adopted. What is interesting with the point of obligation, we have two sides that normally oppose each other that have actually come together. Both biofuel producers and the American Petroleum Institute oppose this change, both groups.

I would like to submit a letter for the record showing the united opposition to moving the point of obligation. Mr. Chair, if we could have that entered into the record?

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Ernst. I'd like to revisit this. If you can, yes or no, as Administrator, will you oppose changes to the point of obligation?

Mr. Pruitt. Senator, as I indicated in my meeting with you, and I think in response to Senator Duckworth earlier, there is a comment period in process now at the EPA about the point of obligation. I think prejudging the outcome of that process at this point is unwise.

I can say to you as I said to you in the office, any steps that I would take as EPA Administrator with respect to any issues as far as the RNS program, the Monitor Net Program, point of obligation, all these various issues that we discussed, the job of the EPA Administrator is to make sure that the statute is upheld and enforced and not undermined. The vitality of the RFS Program has been defined by Congress dating back to 2005. Any steps the EPA Administrator takes need to be done in such a way to further the objectives of Congress in that statute, not undermine the objectives of Congress in that statute.

Senator Ernst. I do appreciate your being objective. I am sure that Senator Duckworth and I will look forward to continuing to educate you on those issues. Thank you very much.

I would like to show a chart of the State of Iowa. I would like to go back to some of Senator Cardin's comments about who should define what the expanded definition of Waters of the U.S. is. This is a chart of the State of Iowa. As you can see, with the expanded definition, as provided by the EPA, 97 percent of the State of Iowa is now considered Waters of the U.S. If you are in area like mine in southwest Iowa here, I live in a Water of the U.S. Most of the State

is covered by the waters of the U.S. I bring that up, because in a moment, I am going to show you another picture of the consequences of the EPA defining what a Water of the U.S. is.

Last Congress, this committee examined the scope of the federal Clean Water Act jurisdiction EPA and the Corps of Engineers claim today, even without the new WOTUS Rule. The committee found that EPA and the Corps are already expanding their jurisdiction using the concepts that they codified in WOTUS. They are just doing it on a case by case basis.

The jurisdictional claims already being made are very troubling. For example, the Obama EPA told the public that they will not regulate puddles. They will not regulate puddles. However, we learned that the Corps is already regulating puddles by claiming that a puddle in a gravel parking lot is "a degraded wetland." A degraded wetland.

The Obama EPA also told farmers not to worry about being regulated because ordinary farming activities have a statutory exemption. We learned that the Corps of Engineers and the Department of Justice have decided that plowing is not an ordinary farming activity. Explain that to my dear deceased grandfather and my father whose activities in farming include plowing.

According to the Obama Administration, any plowing that pushes soil into furrows is not an exempt farming activity because the tops of plowed furrows can dry out. According to a brief filed by the United States "the furrow tops now serve as small mountain ranges." Right there, folks, small mountain ranges. "These furrow tops now provide conditions that are not conducive to growth and development of

wetland plant species. They are mini-uplands." This is a picture of these small mountain ranges from the government's expert report.

Mr. Pruitt, will you commit to me that if confirmed, EPA will work with the Corps and DOJ to make sure that federal agencies stop trying to regulate ordinary farming practices?

Mr. Pruitt. Yes, Senator.

Senator Ernst. Thank you for that very concise answer.

Thank you, Mr. Chairman.

Senator Barrasso. Thank you, Senator Ernst.

Senator Duckworth.

Senator Duckworth. Thank you, Mr. Chairman.

Mr. Pruitt, I want to come back to this question again. Let me just tell you, I played second base as well. This is a hanging curve ball. You can knock this out of the park with a yes.

Will you commit, yes or no, to reversing the EPA's current interpretation that available infrastructure should limit the requirements to blend biofuels into our fuel supply, given that it runs counter to congressional intent?

Mr. Pruitt. I don't want to take any steps to undermine the objectives in the statute of the RFS as Administrator of EPA.

Senator Duckworth. Will you commit to opposing any attempts to move the point of obligation from the farmer, the soybean producers, the corn producers and biofuel manufacturers away from them and towards the blenders? Because that would be counter to congressional intent.

Mr. Pruitt. Senator, that is something, as I have indicated, that there is an open comment period on that very issue. If confirmed, I would be dealing with that issue and need to respond to the comments that have been made as part of the record. It would be unwise to prejudge that outcome. I can say to you that any steps that I would take as Administrator would be in furtherance of the RFS and not to undermine the RFS.

Senator Duckworth. But the comment period has nothing to do with congressional intent. Earlier today, you said you would abide by congressional intent. The congressional intent is to keep that point of obligation with the soybean and corn producers and the biofuel manufacturers and not to move away from it, regardless of what the open comment period says. So you are saying that you are willing, that your answer is no, because you would be open to moving it away from the soybean and corn growers, the farmers, towards the blenders if that is what comes out of the comment period? Is that what you are saying? That would be against congressional intent though.

Mr. Pruitt. Senator, I think with respect to congressional intent and the statute, the intent, as far as the point of obligation, is not addressed in the statute itself. That is a decision and the Administrator has been involved in that process historically. It's been subject to much discussion. In fact, the EPA has dealt with this issue before.

What I am saying to you is, it is the job of the Administrator to enforce the program, to administer the program, to ensure that the intent of Congress as far as the RFS is upheld. I will do that.

To prejudge the outcome of that particular comment period is something that I can't do and shouldn't do at this point. I would need to respond to that only after being confirmed and going through the rest of the process.

Senator Duckworth. You're saying that you would be open to moving the point of obligation away from the corn and soybean producers and the ethanol manufacturers, if that is what the open comment period says? If that is the result, then you would be open to moving it away from the farmers?

Mr. Pruitt. No. I am saying, Senator, that any actions taken as Administrator that would jeopardize and endanger the RFS as intended by Congress, I would not take. That is different from prejudging an outcome in that particular matter.

Senator Duckworth. But the intent of Congress is to keep the point of obligation with the producers.

Mr. Pruitt. That's something I am not aware of, Senator

Senator Duckworth. Okay. Let's move on. I am very concerned and we will follow up with this in the future. Let's go to safe drinking water.

I sat on the Government and Oversight Committee in the House where in a bipartisan manner we explored what happened in Flint, Michigan. I was actually flabbergasted earlier today when in response to my colleague, Senator Cardin, on whether you believe there is any safe level of lead that children can consume, you responded by saying "Senator, that is not something I have reviewed or know about. I

believe there is some concern but I have not looked into the scientific research on that."

You are about to become the EPA Administrator. You are seeking to be the EPA Administrator, and you've not looked into the issue of lead in our drinking water supply? I think that is something, especially in the aftermath of Flint, that is a serious oversight on your part. Have you even studied the Flint water crisis in preparing for this hearing? Do the names Mary Gade and Susan Hedman ring a bell to you?

Mr. Pruitt. In the situation in Flint, as I indicated earlier, the EPA should have acted more expeditiously in responding to Flint and did not. There was indication at the regional level that there were concerns and there was not a response.

I think that the EPA bears responsibility for what happened in Flint and would seek to, in the future, avoid those kinds of situations by being more proactive through the regional administrators, and the States and municipalities in ensuring the quality of our drinking water.

Senator Duckworth. As EPA Administrator, will you commit to appointing a permanent regional administrator to the Midwest region based out of Chicago, but they cover Michigan? We have issues with lead in Galesburg, Illinois, for example. And will you give them the responsibility and the ability to act proactively so that they can step in when they see that the State is not doing its job in protecting the safe water drinking supply for its citizens?

Mr. Pruitt. As you know, Senator, the answer is yes. The EPA has emergency order authority to respond to situations like you describe. I think the EPA should step in, in those situations, in a very meaningful way.

Senator Duckworth. That's good news, because they did not do it in the case of Flint.

Thank you. I am out of time, Mr. Chairman.

Senator Barrasso. Thank you very much.

I would like to introduce for the record an article from The Oklahoman by Rick Green that says J.D. Strong, Director of the State Wildlife Conservation Department, says of Attorney General Pruitt, "Attorney General Pruitt has been a really good partner and ally in making sure we have adequate protections in place for the quality and quantity of water," said Strong, who previously led the Oklahoma Water Resources Board and was State Secretary of the Environment. "I have never seen him put us in a position where we had to compromise anything to protect the waters of Oklahoma."

[The referenced information follows:]

Senator Barrasso. Senator Boozman.

Senator Boozman. Thank you, Mr. Chairman.

Again, I was the Congressman in the district with the Arkansas-Oklahoma Illinois River situation. I was elected in a special election in 2001 and inherited this. This had been going on for about ten years. In 2001, from that time on until recently, we probably worked on this, it seems like every week.

What happened was in 2003, the EPA came out and said the standard was such that by 2013, the river needed to have an attainment of .037 standard of phosphorous. Arkansas worked very, very hard, changed out all of its treatment plants in that area. That is one of the fastest growing areas in the Country. The ratepayers paid for all of that, hauled out chicken litter and all those kinds of things and made a dramatic improvement in the attainment.

The problem was, though, Arkansas, and you mentioned, my good friend, Senator Booker and he is a good friend, mentioned a lot about Oklahoma this and that. Arkansas never agreed to any of that. So they were going forward but they felt they could not attain the .037 standard because the first national river is in Arkansas, the Buffalo River, and it was not at .037, it is pristine.

In good faith in 2005, I believe, the Attorney General in Oklahoma sued Arkansas. You can correct me if I am wrong on some of these things. In 2010, in that case, all of the stuff was put in place but the federal judges never ruled on it so it was open.

Fast forward, 2013 is arriving. Arkansas does still not agree that the .037 standard is the appropriate one, so they were squaring

off getting ready to sue each other again. Attorney General Pruitt and Attorney General McDaniel, a Democrat in my State, got together and said, let's not waste a ton of money with lawyers, let's use science and things like this to figure this out.

They chose a neutral site, Baylor University, which has an excellent water department. They came in and did a study and came back and said .037 is the standard. Right now, the States are living with that. It was a tremendous effort, took a long time and it was a very, very difficult situation. So I applaud you.

I want to put in the record a letter from our former Attorney General McDaniel that again outlines this. It was very, very complimentary of the Attorney General.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Boozman. Thank you.

Let me quote one of the final paragraphs: "Recent press accounts regarding these efforts unfairly mischaracterize the work that was done by General Pruitt and his team. He was a staunch defender of sound science and good policy as appropriate tools to protect the environment of the State. I saw firsthand how General Pruitt was able to bridge political divides and manage multiple agency agendas to reach an outcome that was heralded by most credible observers as both positive and historic."

Again, as someone who was intimately involved in that, more involved than I wanted to be in things, there really was a heroic effort by yourself and the people in Arkansas trying to resolve a difficult situation.

Mr. Pruitt. Thank you, Senator.

Senator Boozman. Thank you. That's really all I have Mr. Chair.

Senator Barrasso. Thank you very much, Senator Boozman.

Senator Sullivan.

Senator Sullivan. Thank you, Mr. Chairman and General Pruitt.

I wanted to focus on, a number of us talked earlier about the frustrations that the American people have with the EPA. We talked about anger, Senator Ernst talked about fear. I believe it extends to a couple reasons underlying that.

One is the agency currently feels that it is empowered to regulate literally every nook and cranny of American life. Related to that, they seem to have very little respect for the rule of law. Let me touch on those.

Senator Ernst talked about the WOTUS rule. Literally, the EPA has claimed the ability to regulate puddles. As a State with, pre-WOTUS by the way, 65 percent of America's wetlands in Alaska, we have very significant concerns about this.

I want to actually address an earlier comment by Senator Whitehouse where he said there is nothing in your record that shows that you have the background to help America's fishing industry. Well, I couldn't disagree more with Senator Whitehouse, who is a friend and colleague. My State has a fishing industry like Rhode Island's. It is a little bigger. Sixty percent of all the seafood that is --

Senator Whitehouse. It's considerably bigger.

Senator Sullivan. Thank you.

[Laughter.]

Mr. Chairman, would you please acknowledge that for the record?

Senator Barrasso. With no objection.

Senator Sullivan. Almost 60 percent of all seafood harvested in the United States comes from the waters of Alaska and it is considered the best, most sustainable, best managed from an environmental standpoint, fishery in the world.

Do you know what the number one issue is, the top issue of the fishermen of Alaska is? It is EPA overreach. Let me give you a specific example.

This is a regulation, 200 pages, on America's fishermen, the ultimate small businessmen and women. This actually requires that

every fisherman in Alaska, commercial fisherman, requires a discharge permit to literally hose off the deck of a ship. Think about that.

If you are gutting fish and fish guts or pieces of a fish fall on the deck of your ship and you hose it down, fish back into the water of the oceans, you need a permit, 200 pages. This is the kind of thing where the trust between Americans and the EPA has eroded so much because of these kinds of issues.

If confirmed, will you work with me and others on this committee to make sure that these kinds of regulations are balancing environmental needs with jobs that are so important? You mentioned it as a cost. Will you work with us on that and would you care to comment on a regulation like this, fish back into the ocean requiring a permit? Congress, by the way, has extended this twice, the implementation of this, so there is bipartisan agreement that we need to do something about this overreach. Would you care to comment on this?

Mr. Pruitt. Senator, I think it is exemplary of a lack of priority. We have many, like I indicated earlier, 40 percent of our country is in nonattainment under the NAAQS Program. We have over 1,300 CERCLA sites in this Country that need attention to move those areas into remediation and restore those areas for environmental related issues. I think in some respects what you cite there is just missed priorities, trying to focus on something like that as opposed to focusing on these other areas that will really improve tangibly the environmental protections for people across the Country.

Senator Sullivan. Let me talk next about the rule of law. I am glad you emphasized it as a priority. I believe it is one of the principal reasons again why, again, there is such a lack of trust between the American people and the EPA. But it is not just a Republican issue. As a matter of fact, there are a number of examples where this is viewed as a bipartisan issue that we need to address. You may have seen with regard to the Clean Power Plan, Laurence Tribe, not known as a strong staunch Republican, Harvard law professor, stated, "The EPA is attempting to exercise lawmaking that belongs to the Congress and judicial power that belongs to the federal courts. EPA is attempting an unconstitutional trifecta usurping the prerogatives of the States, Congress and the federal courts all at once with its Clean Power Plan." Then he stated, "Burning the Constitution should not become part of our national energy policy."

You've been involved in some of these cases, the Clean Power Plan, the Waters of the U.S. In both of these cases, courts have stayed the EPA's rule. Why do you think the courts have done that? Do you think the rule of law that has been ignored by the EPA is something that if confirmed, you will work on to regain the trust between the EPA and the American people?

Mr. Pruitt. As I indicated earlier, Senator, I think at times perhaps there those in law and the courts that look at rule of law as something that is academic and technical. But it is real. It affects people in very real ways. When you have agencies of any type that act inconsistent with the statutory authority given to them by Congress,

it creates the kind of uncertainty that you are talking about. People don't know what is expected of them, and paralysis happens.

And so rule of law is important to economic development, it is important to send messages of certainty, it is important so that people can plan and allocate resources. There are many laws that people look at and say, I don't really like that. So long as they know what is expected of them, they can plan and allocate resources to comply. I think that is what is important about rule of law.

Senator Sullivan. And as one of the lead litigators on the WOTUS rule and the Clean Power Plan and the fact that the Supreme Court and the Sixth Circuit have put stays on those rules, what do you think that indicates the courts' view is of those two rules issued by the EPA at this moment?

Mr. Pruitt. Well, it is unprecedented for the Supreme Court to have done what they did in the Clean Power Plan.

Senator Sullivan. Never happened in the history --

Mr. Pruitt. Never happened in the history of jurisprudence before the U.S. Supreme Court. That says a lot.

Senator Sullivan. Thank you, Mr. Chairman.

Senator Barrasso. Thank you very much. Senator Moran?

Senator Moran. Mr. Chairman, I yield to somebody ahead of me if they would yield back to me for the next question.

Senator Barrasso. That would be fine. I have some time that I haven't gotten to yet in this second round. We will go shortly to a third round.

I wanted to talk a little about the Mercury Rule that the Supreme Court overturned. They overturned the EPA's Mercury Rule, finding that the EPA did not appropriately consider the costs of the rule. Noting that between the time that the rule is issued and the Supreme Court decision, three years passed, the EPA Administrator Gina McCarthy was on a television show a couple days before the Supreme Court made its ruling, and they said, well, what if the Supreme Court says you are wrong? And essentially, she said, well, the majority of the power plants have already decided and invested in a path, because it is been three years, to achieve compliance with the Mercury Air Toxic Standards. In other words, she had already gotten her result, even though what she had done was found by the courts to be illegal.

So I would ask you your thoughts on her statement, and do you believe that her statement shows respect for the rule of law?

Mr. Pruitt. Well, Senator, this is speculation to a certain degree, and one of my favorite philosophers is Yogi Berra, and he said, "Predictions are pretty tough, particularly about the future." So I don't want to be too speculative here. But when you look at the response of the Supreme Court and the Clean Power Plan, I think largely the reason they acted in an unprecedented way is because of what you just addressed, Mr. Chairman, that in response to the Michigan and the EPA case, there were some comments made that they had achieved the outcome, despite the fact that it acted inconsistent with the framework under the law.

So I think rule of law is something, as I indicated to Senator Sullivan, it is not something that is academic. I think it is

meaningful. It inspires confidence in those that are regulated. It gives them assurance that regulators are acting consistent with their authority, and it allows them to plan and allocate resources to meet the standard sand meet the objectives that Congress and regulators established.

Senator Barrasso. Senator Moran?

Senator Moran. Mr. Chairman, thank you very much.

General, you can see by where I sit on the dais that I haven't been in the Senate a terribly long time. But one of my causes, upon my arrival and the discovery of how the Senate works is to try to work with my colleagues to reassert Congressional authority. In my view, there is a number of ways we could do that. One, Congress could quit passing huge pieces of legislation and delegating authorities to agencies and departments. Another one that we could pursue, and I hope we will this year, is an appropriations process, by which we have the opportunity to influence decisions made at the Environmental Protection Agency and every other agency and department.

One of the things, when we do that by developing a relationship with an agency head, knowing that, and I guess part of that is that members of Congress need to have greater levels of expertise on the subject matter of their jurisdiction. One of the subcommittee I chair is in the Commerce Committee. It has jurisdiction over the National Highway Traffic Safety Administration. The Environmental Protection Agency just last week finalized its greenhouse gas standards for light duty cars and trucks for 2022 to 2025.

Now, the law says that it is to coordinate that effort with the National Highway Traffic Safety Administration. And that agency is still developing its own process to determine appropriate fuel standards. I raise this as an example of where, once again, two agencies instructed by Congress to work together to find a solution or the right answer to an issue ignore the law. I assume you would assure me or members of this committee that the Environmental Protection Agency, to the best of your ability, will obey the law.

But I also assume that you are willing to assure me that when directed by the law to cooperate with other agencies, to have the input of an agency that our subcommittee has jurisdiction over, as the person in the Senate responsible for these issues, I go to the agency that I have the most influence over, and they say, well, EPA's already done its thing. I assume we can bring those kinds of practices to an end.

Mr. Pruitt. Absolutely, Senator. I think that interagency discussion, that collaboration to ensure that there is meaningful discussion, review of action, takes place. I want to speak generally to your delegation reference, because I do think that that is a very important issue that you raise. I think a lot of times, what has happened is that Congress has spoken in very general ways, I will not say vague, but approaching vagueness, and giving carte blanche or substantial authority to agencies without providing the kind of framework that is necessary for them to make their decision.

From a separation of powers issue, I think that is very important. I think it is important for Congress, Article 1, to

exercise its authority and to give the direction to these agencies on how they should conduct their business. Senator Cardin, in his comments and questions earlier about the Waters of the United States Rule, I think that is a problem, presently, largely because the definition of Waters of the United States in the statute is so vague and so general, it creates uncertainty.

So I think making sure that Congress performs its role and the Executive Branch performs its role in enforcing laws, and we try to do less delegation and respect separation of powers, is very, very important.

Senator Moran. I appreciate your reassurance of how you would conduct, if confirmed, the agency. It also is a reflection upon the need for Congress to do its job better. Perhaps, I guess you'd have nothing to do with that. But for me and my colleagues, we need to be much more precise and clear in legislation and much more likely to deal in smaller bite-size pieces. Too often I think Congress is interested, and I don't want to be derogatory to any of my colleagues, but too often we look for the headline, we solved a problem, and yet we complain about what an agency's decisions are and we have given them so much authority they have the ability to make what I would consider, some of us may consider a bad decision.

Mr. Pruitt. And there are important steps that have been taken. We've mentioned TSCA this morning, where you've done just that, in his past year. So I think that is a very important item that you raise, Senator

Senator Moran. Thank you. Thank you, Mr. Chairman.

Senator Barrasso. Thank you very much, Senator Moran.

We'll now move to a third round of questions. Attorney General Pruitt, you just mentioned TSCA. You sent a letter to this committee in April of 2015, supporting the Frank Lautenberg Chemical Safety Act. In fact, the timing of your letter was less than a month after the bill was introduced, and you were the first Attorney General of the United States to support the bill.

The bill ultimately received overwhelming bipartisan support in Congress. It would be your job to implement the bipartisan reforms and ensure we have consistent regulation throughout the Country. Would you discuss the plans that you might have to implement this legislation, and will you commit to implementing the legislation in a timely manner?

Mr. Pruitt. Senator, and Mr. Chairman, yes. I think in response to obligations of the EPA, this body has put timelines before the EPA to carry out certain rulemaking, the Prioritization Rule, the Risk Evaluation Rule, fees that need to be established, all those are mid-term in 2017. And I think it is a matter of the EPA Administrator making that a priority at the agency.

I also think that in response to Senator Gillibrand earlier, and others have raised this too, there are certain, like PFOA, that need to be addressed in evaluating that listing under TSCA or perhaps the Safe Drinking Water Act as well. So I think there are specific actions that need to be taken, but also the rulemaking process and the deadlines be adhered to.

Senator Barrasso. You made reference to, and I did in my opening statements as well, to Flint. There was give and take on Flint a little earlier. The other thing I brought up was the Gold Key mine spill in Colorado, an environmental disaster caused by the EPA. Last Friday, the EPA announced that it has denied all claims for the $1.2 billion in lost income, loss of use of property and damage to the businesses and the property suffered by 73 tribes, by land owners, local businesses, local governments as a result of the spill. The EPA's excuse was its legal interpretation of the Federal Tort Claims Act. According to the EPA, if a federal agency hurts someone through a discretionary action, then the Federal Tort Claims Act does not apply. This doesn't sound right to me.

So if confirmed, will you commit that you will review that decision and use whatever authority is available to you under the law to help the people who have been harmed by the EPA's negligence?

Mr. Pruitt. Yes, Mr. Chairman.

Senator Barrasso. Thank you. Senator Carper?

Senator Carper. Thanks very much. A question. Mr. Chairman, I know you did not use, when we started this round of questioning, you did not use like two minutes and 30 seconds of your time. When you comment like you have just commented, are you drawing down on that two minutes and 30 seconds?

Senator Barrasso. I am now in the third round of questioning, yes, sir. And I would reflect that looking back at EPA nomination hearing processes, when Gina McCarthy was nominated, came to this committee, Chairman Barbara Boxer, two rounds, first round five

minutes, second round, two minutes. We are now in a third round of five minutes, so I think that the Chairman has tried to listen to our discussions with other members to make sure that all the Democrats and every member had a chance to have as many questions as possible.

Senator Carper. Thank you. I want to go back to something you said about one of our colleagues with respect to EPA actually visiting States and participating in meetings in those States with respect to the Clean Power Plan. I think it was said that West Virginia, my native State, native State of my friend of my friend from West Virginia, that was not visited. We have heard since then from Joe Goffman, who was counsel to John McCain, EPA Assistant Administrator for Air, as you may know, he said he personally participated in meetings on the Clean Power Plan in West Virginia, also in Kentucky, Texas, Pennsylvania, Nevada, Washington, California, Wyoming, North Dakota, Colorado, Illinois and I think Nebraska.

I wrote a letter to Gina McCarthy on January 11th. You may recall, Mr. Pruitt, I wrote a letter to you on December 28th, and posed a series of questions to you and asked for your responses by January 9th. I have yet to receive those responses. I wrote a letter to her on January 11th, again, to Gina McCarthy and to Assistant Secretary Darcy of the Department of the Army. I wrote because we were getting and hearing on our office a whole list of assertions about the Waters of the U.S. I think this is maybe instructive for all of us. The things that we were hearing, people were calling in, in Delaware. It led us to ask these questions.

One of the questions was, are the EPA and the Corps currently implementing a new Clean Water Rule. The assertion was that indeed, that has been happening. So we asked, is that really the case. And two days later, two days later, we received a response, no, the agencies are not now implementing the new Clean Water Rule. Implementation of the new rule is temporarily stayed by the Sixth Circuit Court of Appeals. September 2015, the agencies immediately directed their field offices to stop using the new rule, and instead resume implementing regulations interpreting the guidance prior to the new rule. That was one of the questions we asked.

We also asked, because we were hearing assertions otherwise, are the EPA and the Corps currently pursuing enforcement actions pursuant to the new Clean Water Rule. And we got on the same date, January 13th, this response, that said no, the agencies are not pursuing any enforcement actions pursuant to the new Clean Water Rule, and will not enforce this rule unless and until the Sixth Circuit Court of Appeals stay is lifted.

The next question we asked, because we were hearing assertions otherwise, does anything in the Clean Water Rule revoke or otherwise modify the Clean Water Act's statutory or regulatory exemptions for farming and ranching? Response, two days later, January 13th, was no, the Clean Water Rule makes absolutely absolutely no changes to normal farming, ranching and forestry exemptions established under the Clean Water Act in implementing regulations.

So question number four, some have claimed that landowners will no longer be able to rely on the Clean Water Act's statutory and

regulatory exemptions for farming and ranching, should the Clean Water Rule go into effect, because while the statute and regulations remain unchanged, the agency has narrowed those exemptions in practice through the actions in the field. Is that true? And the answer is, not surprisingly, the assertion that the agencies have no application in statutory and regulatory exemptions for farming, ranching and forestry is untrue. The agencies have taken no steps intended to reduce the scope of the exemptions. We have not observed changes by field offices in the way they interpret or implement these exemptions. In fact, the Corps has re-emphasized publicly that these exemptions are self-implementing. Farmers, ranchers and foresters are not required to get approval from the agencies prior to using the exemptions.

I raise this because sometimes what people assert to be true, sometimes it is over the internet, sometimes it is on television, sometimes it is on the radio, newspapers. Assertions are made. And in this case, there is a whole long list of assertions that were made, and none of them were true. They are distortions, untruths about what the EPA is doing with respect to a regulation that was stayed.

I would ask to, for the record, Mr. Chairman, to be able to submit for the record the questions that we posed to EPA on January 11th and also the responses that we have received.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Carper. Thank you. I'd like to look at a chart, if you don't mind. This is a report card that lists 17 counties. How many counties do you have in Oklahoma?

Mr. Pruitt. Seven - seventy-seven.

[Laughter.]

Mr. Pruitt. Mr. Chairman, can I refer to Senator Inhofe for these questions?

[Laughter.]

Senator Carper. I was watching, his lips are barely moving as you speak.

Thank you. At the same time you've been suing EPA on its ozone standards, all the counties in Oklahoma for which data is collected earned an F from the American Lung Association for not meeting ozone health standards. You have 60 counties that the American Lung Association does not have data on the progress made or not made with respect to ozone. These are the ones we have information on, 17. Seventeen counties from Adair to Tulsa. You live in Tulsa, I expect? Tulsa County. They all got Fs. This is last year, 2016. My question to you is, what did you do about it? What did you do about it before or since? Sometimes people may not believe what we say, but they will believe what we do. What have you done about this?

Mr. Pruitt. Senator, two things. I really believe there needs to be a tremendous effort made by counties across this Country to move nonattainment into attainment. Over 40 percent of the Country, presently 40 percent of the Country approximately is in nonattainment.

There needs to be great prioritization with EPA and local officials in achieving attainment.

Senator Carper. But that wasn't my question, Mr. Pruitt. What did you do about it? You have 17 counties for which we have data from last year. What did you do about it? Before or since? That's what I am asking you.

Mr. Pruitt. As indicated in our meeting individually, the primary enforcement responsibility in Oklahoma with respect to air quality permits and the rest is the Department of Environmental Quality. And there have been actions taken by DEQ and they continually work with those counties to reach attainment. And we provide general counsel advice to that agency in the performance of their role.

Senator Carper. I am not the attorney general of Delaware, never had any intention to be, but if 17 of our counties in Delaware -- we only have three - if 17 of them or all three of them got Fs, I promise you, I would do something about it. Thank you.

Senator Barrasso. Senator Inhofe.

Senator Inhofe. Thank you, Mr. Chairman.

Congress recently passed a bipartisan bill, many of us up here supported it, I know I did, as part of the Water Infrastructure Bill to allow States to lead implementation and enforcement of EPA's coal ash rule through the State-based permit program. That rule is already in effect, and it is important that the EPA move quickly on this. If you are confirmed, are you going to get right on this thing?

Mr. Pruitt. Yes, Senator Inhofe.

Senator Inhofe. All right. Sue and settle, we all know what that is, we know that groups, maybe some of the environmentalist extremist groups will file lawsuits against the EPA. The EPA, instead of defending against the lawsuits, will enter into a resolution behind closed doors without any public input or participation. These settlements result in new sets of legally binding priorities and duties for the EPA that achieve demands of special interests. Can you share your thoughts on sue and settle?

Mr. Pruitt. Senator, this issue came up earlier. And it is a concern. Because it is regulation through litigation. There is a place for consent decrees in our litigation system, but to use a consent decree to bypass Congress, bypass the regulatory requirements that you've placed upon those agencies, to engage in rulemaking through litigation is something I think should not occur.

Senator Inhofe. And that is the part that did not come up earlier. I appreciate that very much.

Lastly, the cost of regulations. As you know, the Supreme Court overturned EPA's Mercury and Air Toxics Rule in 2015, because the EPA failed to, ignored the fact that the cost was $9.6 billion annually of the rule. Now, in fact, the EPA's regularly-issued rules over the past eight years are very costly for our industries and our job creators. According to the CRS, now, the CRS, when they make an evaluation, are much more conservative. The figure is always a very conservative figure. But they said the Clean Power Plan would be at least $5 billion to $8 billion a year. The figures I have heard on

that are far greater, because it wouldn't be that much different than the old systems they tried to do through legislation.

The methane standards on oil and gas facilities, $315 million a year. The new ozone standards, $1.4 billion. The 2015 coal ash standards, $587 million a year. And the 2011 sulfur dioxide standards, $1.5 billion a year. Now, when you hear this, all this money is being spent on compliance costs by our job creators, people out there that are working for a living and they are hiring people. What are your thoughts and what do you believe should be the role of the costs of EPA's decision-making?

Mr. Pruitt. I think it is very important in the rulemaking process, Senator. And the Supreme Court and courts have recognized that very important factor.

I mentioned earlier the case that we were involved in in Oklahoma involving the regional haze program. That was an example where Oklahoma actually complied and met and satisfied the requirements under the statute and the rule. But the steps that were taken were displaced by the EPA, adding hundreds of millions of dollars of cost to consumers in the generation of electricity. So costs are very important. We need to make sure that they are considered. In certain areas of the statute, as I indicated earlier, they can't be, under the Title I NAAQS program. But in that case that you are referring to, it is an obligation of the EPA to actually engage in a cost benefit analysis, make a record before it made its decision.

Senator Inhofe. Do you think that the laws that are in the books right now adequately handle this situation?

Mr. Pruitt. I do, largely, Senator. I think it is mostly an application issue that the agency and the regulator is doing its job under the statute as provided by Congress.

Senator Inhofe. Thank you very much.

Senator Barrasso. Senator Whitehouse.

Senator Whitehouse. And presumably, Mr. Pruitt, it goes without saying that if the EPA is going to consider cost to the industry of confirming to pollution guidelines, it should also consider benefits to the public from cleaner air, cleaner water and the results of that compliance, right?]

Mr. Pruitt. It should, Senator.

Senator Whitehouse. So we have been talking about fundraising done by you for the rule of law defense fund during the time when you were both a board member and for a full year the chairman of the Rule of Law Defense Fund and the fact that we have exactly zero information in this committee about that fundraising. We also have zero, and let me ask unanimous consent for the page from the filing that discloses that he was in fact a member of the board of directors and chairman of the Rule of Law Defense Fund.

Senator Barrasso. Without objection.

[The reference information follows:]

Senator Whitehouse. We also have a meeting agenda from the Republican Attorney Generals Association during the time that you were executive committee member of the Republican Attorney Generals Association meeting at the Greenbrier, which I will stipulate to my friend from West Virginia is a lovely place to go. The agenda, which I would like to take this page of and put into the record, mentions a private meeting with Murray Energy. It mentions a private meeting with Southern Company. It mentions a private meeting with the American Fuel Petrochemical Manufacturers. If you will show the graphic, these are all the same groups that I have been asking about in terms of your fundraising for the Rule of Law Defense Fund. And there is Murray Energy, and there is Southern Company, and I am sure the American Fuel Petrochemical Manufacturers represent a lot of the others.

As I understand it, we know nothing, no minutes, no statements, no reports about what took place in those meetings that are described as private meetings on a sheet that is stamped confidential. Correct? We know nothing about the content of those meetings?

Mr. Pruitt. Senator, I did not generate the document. I know nothing about how that document got generated or what --

Senator Whitehouse. Are you denying that those private meetings took place?

Mr. Pruitt. No, Senator. I just didn't generate the document and don't know about the content, other than what you have represented.

Senator Whitehouse. Okay, and we don't know. And because you were on the executive committee of RAGA, that is information that we could get, right? I mean, it is available, if there were minutes or reports out of those meetings, notes taken. But we don't have them, correct?

Mr. Pruitt. Senator, that would be a request made to the Republican Attorney Generals Association. I might add, the Republican Attorney Generals Association, there is a Democrat Attorney Generals Association as well.

[Simultaneous conversations.]

Senator Whitehouse. I am not faulting that. I am talking about private meetings at the time that you were on the executive committee with some of the really, really big polluters with whom you have been very closely politically associated.

Mr. Pruitt. There is a Conference, if I may, Senator, of Western Attorneys General. There is a national association. And they talk about water.

Senator Whitehouse. I know.

Mr. Pruitt. And there are meetings that take place at each of those as well.

Senator Whitehouse. The rest of the attorney generals avoid that because we don't want to talk about water.

Let's talk about FOIA. You have had a conversation with the Chairman about FOIA. As I understand it, there is a FOIA request to the Oklahoma Attorney General's office, to your office, for emails between your office and Devon Energy and Koch Industries and Americans

for Prosperity, the Koch front group, and Murray Energy and the American Petroleum Institute. And the information that I have is that that Open Records Act request was filed more than 740 days ago. More than two years ago. That in response to it, your office has conceded that there are 3,000 responsive documents. Three thousand emails and other documents between your office and these companies. And that in 740 days, exactly zero of those documents have been produced.

Is that acceptable turnaround on a FOIA request, and should we not be concerned that your office is not complying with a FOIA request that relates so specifically to so many of these companies that are going to be before you as EPA Administrator if you are confirmed?

Mr. Pruitt. Senator, I actually have a general counsel and an administrator in my office that are dedicated to performing or providing responses to Open Records requests.

Senator Whitehouse. Not very dedicated, if it takes 740 days. That is still zero.

Mr. Pruitt. But I not involved in that process. That is handled independently by the administrator and that general counsel in responding. So I can't speak to the timeline and why it is taking that length of time. But I will tell you that our office works, we actually go across the State of Oklahoma in training with officials locally in compliance with FOIA and Open Records laws.

[Simultaneous conversations.]

Senator Whitehouse. -- your own training, because it doesn't seem to be sticking very well.

Mr. Pruitt. The representation you made about the timeline, I don't know.

Senator Whitehouse. Given how many of these groups have important financial interests before the EPA, do you not think that 3,000 emails back and forth between you and your office and them are relevant to potential conflict of interest as an administrator and should be before us as we consider this?

Mr. Pruitt. Again, I think the EPA ethics counsel has put out a very clear process with respect to covered entities, as we described it earlier, and on particular matters and specific cases, I will follow the advice of that EPA career person, ethics, to make sure that there -

[Simultaneous conversations.]

Senator Whitehouse. You keep saying that.

Senator Barrasso. The Senator's time has expired.

Senator Whitehouse. Will you let me finish my sentence?

Senator Barrasso. Please do.

Senator Whitehouse. The problem with that is that if you haven't disclosed any of this information, then the EPA ethics counsel would have no idea to even look. They would have no idea what the risks are. You can't say, nobody can look at whether I did this, but by the way, they're going to look at it. It just doesn't add up. Sorry about going over my time.

Senator Barrasso. Thank you, Senator. I would like to point out, we had a report cared that was just brought up. And I would like to introduce for the record a letter from each of the five members of

Congress from the State of Oklahoma with their steadfast support for Scott Pruitt, saying, we are proud of his service to our State and are very confident that he will do a superb job serving our Nation and our citizens in this new role. Also as a follow-up for the first round of questions, there was a dispute about a lawsuit against Mahard Egg Firm and who it was filed by. I have here the complaint in the case, and it was filed May 18th, 2011, and if you read it, it says, in the State of Oklahoma, by and through Attorney General Scott Pruitt. So you are the one that filed the suit, along with the attorney general of Texas against Mahard Egg Firm. This will be submitted for the record as well.

[The referenced information follows:]

Senator Barrasso. Senator Capito.

Senator Capito. Thank you, Mr. Chairman.

Since the Ranking Member mentioned that Mr. Joe Goffman had visited, I call to the attention in beseeching you that when you are successfully the Administrator at the EPA that you will listen to everybody and come to States that are most directly affected. He mentioned that the Associate Assistant Administrator had made the long list that he had said.

I would like to point out a clarification. The EPA announced on September 30th, a day I will remember, because that is the birthday of my youngest child, they announced where they were going to be going for their listening sessions. They went to Boston, they went to New York City, they went to Philadelphia, they went to Atlanta, they went to Denver, they went to Lenaxa, Kansas, and I wish our Kansas Senator was here, which I have looked up is a part of the Kansas City metropolitan area. They went to San Francisco. They went to Washington, D.C. They went to Dallas, they went to Seattle, they went to Chicago.

My State, in the last five years, has lost 10,000 jobs, not wholly because of this, but some of this plays a large part. So I will go back to my original request, that the people that are affected by this environmentally and health-wise are just as important as the people who stand to lose their jobs over this, who then are plunged into poverty, who then have hopelessness around and in their communities, who then become addicted to drugs and other opioids. It

is just a cascading issue. Their lives are just as important. So that is my plea on that.

Now, last question from me.

Senator Carper. Mr. Chairman, could I ask a unanimous consent request?

Senator Barrasso. Yes.

Senator Carper. I am sorry for interrupting. But the document with respect to the outreach that the EPA did, in conjunction with the Clean Power Plan, it shows from October, I think October 16th, 2014, something like this, the document records nearly 1,000 meetings, calls, presentations, conferences, consultations, 1,000, and other outreach with stakeholders. The document shows these post-proposal interactions included more than 300 meetings with State and local stakeholders, had 30 discussions with tribes, 450 meetings with industry stakeholders, 150 discussions in environmental justice and scientific stakeholders, dozens more discussions with conveners. And this goes on and on and on.

In total, the agency received almost 4.3 million comments about all aspects of the proposed rule, more than any rule in EPA history, and thousands of people participated in the agency's public hearings, webinars, listening sessions and so forth, all across the Country. The agency made many revisions in the final rule in response to those comments. Thank you.

Senator Barrasso. Thank you. I would ask that once a questioner starts, they be allowed to continue. We could get into a lengthy discussion. The EPA was found guilty of covert propaganda for

soliciting information through a number of environmental groups. It continues to be a blot on the record of the EPA, and the question of this entire Administration and their approach toward abilities toward the rule of law versus an EPA out of control. So we are going to allow the questioner to continue. Back to you, Senator Capito.

Senator Capito. Thank you.

Not to beat a dead horse, but to try -

[Laughter.]

Senator Capito. I will say that the Assistant Administrator McCabe, when she was telling me that they only wanted to go where places were comfortable, she looked at me and Senator, we are going to Pittsburgh. Gee. Thanks a lot. Which is not in West Virginia, I will make that point.

In any event, my question is, you have said a lot about States, and I agree, the States should have the primacy, it is in the law. And that is something that, part of why you have brought suit and part of the reason you have been successful with other attorneys general.

Let me ask you a question. Let's say you have a State where you are the administrator of the EPA, and you deem that that State's Office of Environmental Quality, or DEP, which is what it is in West Virginia, just doesn't measure up. They are not protecting their people's health, they are not enforcing the law. They are in your judgment and folks that you are working with, are not up to the task and are letting their people down.

What avenues of correction would you have at the EPA, and do you have, and what would you exercise in that kind of category, and what kind of judgments would have to be made for those things to occur?

Mr. Pruitt. Senator, I really appreciate the question. I think there are times where States are recalcitrant, that they don't perform the obligations that they have, let's say, under the Clean Air Act, in adopting a State implementation plan, or as they adopt the State implementation plan they don't take into consideration all the factors that Congress had put in the statute and the EPA requires. In those instances, it is very appropriate for the EPA to use its authority like a federal implementation plan to take over that jurisdiction and to ensure that the safety and health of our citizens is protected, and the air quality is maintained and water quality is maintained.

So there is a time and place for that. I think in many instances, however, over the last several years, it has been the first response as opposed to cooperation. And a federal implementation plan is absolutely in order at times.

Senator Capito. Thank you.

Senator Barrasso. Senator Merkley.

Senator Merkley. Mr. Chairman, before you start my clock, I would like to follow up on Senator Inhofe's strategy here of submitting certain facts back for the record. I would ask unanimous consent to submit for the record an article from the Union of Concerned Scientists related to the so-called ClimateGate that the Senator referred to earlier. That notes that the manufactured controversy over emails stolen from the University has generated a lot

of heat but not light. The email content being quoted does not indicate climate data research has been compromised. Most importantly, nothing in the content of the stolen emails has any impact on our overall understanding of human activities, driving dangerous levels of global warming. Media reports and contrarian claims that they do are inaccurate.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Merkley. Thank you.

Senator Inhofe. Mr. Chairman, since my name was invoked, let me respond. Were you listening when I talked about the various publications that have come and talked about how fraudulent it was? These are publications, science publications, they have gone in and made their own evaluations. And for the U.K Telegraph to say it is the worst scientific scandal for our generation, that is very extreme.

Senator Merkley. We could have an entire day dedicated to the review of the scientific literature on this, and it would weigh very heavily on the scales in the direction I have indicated in support of the information presented by the Union of Concerned Scientists. We may just have to agree to disagree. That is why I submitted it for the record, we will let the public decide.

Senator Inhofe. And that is why the statement is repeated over and over again about the science is settled, that is not an accurate statement.

Senator Barrasso. I would invite the Senator to question the witness.

Senator Merkley. The beauty of the Senate is we get to have our own opinions.

Meanwhile, I also wanted to submit for the record in response, when I was speaking about asthma, Mr. Chairman, you submitted a study from the National Black Chamber of Commerce. And it is important to note that that organization has been funded by the American Petroleum Institute, by a Koch Brothers front group and by Exxon, and that there is a series of responses that invoke the opposite side of that, and

the NAACP, which certainly speak for a broad swath of African Americans, takes a very, very different stance. And it had endorsed the Clean Power Plan.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Merkley. Thank you. I would also like to submit for the record two articles or two statements from the National Congress of American Indians and from Latino organizations, a whole group of Latino organizations, that are very concerned about this nomination.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Merkley. Thank you very much, Mr. Chairman.

Then I would like to turn to a question that has puzzled me over time. And it is in the context of how one evaluates, how one views the world. I heard one of my colleagues once present it this way. If you go to a doctor and they say you have cancer, you decide you had better get a second opinion. You go to a hundred doctors and 97 of them say you have cancer and you had better act, most people feel like, 97 doctors said I should act, three said I should go take some health care supplement. Maybe I had better have the operation.

And that is really the place where we are in climate science now, where the overwhelming weight of the scientific community weighs in and says, yes, it is very logical, you can do it in the laboratory, as Senator Whitehouse noted, that carbon dioxide traps heat. You can do it in a laboratory that methane traps heat. You can track the change in the environment of the concentration of those gases. You can see the impacts on the ground now.

In my home State, you have an impact on the oysters, because the Pacific Ocean is 30 percent more acidic than it was before we started burning coal. That is a scary thing, when shellfish have trouble forming shells. It has an economic impact. Our pine beetles are thriving because the winter is not cold enough to kill them and so it is having a huge impact on our forests. That is an economic impact on rural America.

The southern part of my State has had three worst ever droughts in the last 15 years. It is a huge impact on agricultural communities. The streams in Oregon coming from the snow packs have

been declining in size and raising in temperature, very bad for trout, very bad for salmon. That is an impact on our fishing community.

So the global warming that is taking place and being driven by the burning of fossil fuels is having a huge economic impact on the citizens of my State, my rural citizens, my citizens who depend on timber, who depend on fishing, who depend on farming. Should the citizens seek to address this problem? Because we are just on the front end of this happening.

Ten years ago, we were talking about models that led to the conversation Senator Inhofe had about ClimateGate, about assumptions and models. We don't need models now. We have facts on the ground. The moose are dying because the ticks are not being killed by the winter being cold enough. The fish are migrating on the Atlantic coast and Maine is losing its lobsters to Canada.

These facts on the ground are extraordinarily real. They have a huge economic impact. And shouldn't we take a very serious approach to the urgency of this problem, as we see it descending upon us?

Mr. Pruitt. Senator, I think the EPA, and if confirmed as Administrator, there is currently an obligation to deal with the issue. The Massachusetts v. EPA case says that CO2 is a pollutant under the Clean Air Act. And as such, that is what generated the 2009 endangerment finding. So I think there is a legal obligation presently for the EPA Administrator to respond to the CO2 issue through proper regulations.

Senator Merkley. I believe you are acknowledging in that, which I am glad to hear, that it is a serious problem and that the EPA, that

carbon dioxide is a pollutant and we have a legal obligation to take it on.

Mr. Pruitt. I think Massachusetts v. EPA says that. Counterbalance, by the UARG decision, that came out a few years later, that you can't transform a statute, as the EPA sought to do with the PSD program. So I think the court has spoken very emphatically about this issue. And the EPA has a legal obligation to respond.

Senator Merkley. And as you kind of rank the urgency with which you bring to this, do you see it as something that you wake up every day being, like, the next generation will weigh whether or not we acted promptly? Or is it more, I have a legal obligation because of this court decision, so I will have to have some folks pay some attention to it?

Mr. Pruitt. I think the importance, Senator, it is very difficult to prioritize. Senator Gillibrand is not here, but when she talks to me about PFOA and the threat that she is facing in New York, is that any less important than the CO2 issue? It is not. So the EPA deals with very weighty issues, as you know, water and air quality. It is a matter of prioritizing the resources to achieve better outcomes in each. And I think it is very important to do so as Administrator.

Senator Merkley. I do feel like perhaps you don't understand the gravity of the situation, from your response. Because there are feedback mechanisms that are starting to occur with the open bluewater in the Arctic, feedback from methane bubbling up from the permafrost, bubbling up from the peat bogs, bubbling up from what was previously

frozen methane on the bottom of the ocean that has incredibly accelerating impact on global warming.

Our rate of carbon dioxide pollution is not decreasing globally. It has doubled in rate from one part per million per year to two parts per million per year. So we are on an accelerating curve as a human civilization. And if human civilization doesn't get it together very quickly, we are in very deep trouble. I would hope at some point perhaps the urgency of the situation would be something you will grab hold of. Thank you.

Senator Barrasso. Thank you. Senator Rounds?

Senator Rounds. Thank you, Mr. Chairman.

Attorney General Pruitt, last year at an oversight hearing, we heard reports of the EPA regional offices who are sending companies information collection requests, or ICRs, pursuant to Section 114 of the Clean Air Act, regarding their operations, with no explanation as to the reason for the ICRs. These ICRs, which companies are legally obligated to respond to, can cost the companies millions of dollars to collect the information to respond to the request. They often hear no follow-up from the EPA regarding whether their response was adequate or what the information would be used for.

Last year, I requested from the EPA a record of the ICRs that had been sent to U.S. companies throughout the various regions. I was told by the EPA staff that there was no way to get this information, because they didn't have it.

Second, in 2015, I wrote a letter to the EPA Administrator Gina McCarthy requesting the economic information that forms the basis of

the Clean Power Plan and the ozone NOX standards. These are the major regulations that were being quickly imposed on American taxpayers. The response which I received, it took two and a half months to get the response, but I understand that I am one of the few recipients of an actual letter back from the EPA, and I would ask that it be included as part of the record of the meeting today, Mr. Chairman. The letter was basically nothing short of referring me to an internet link that directed me to a web page, the same web page which generated the questions in the first place. Essentially, they just simply suggested that I Google it. Not hardly a response that you would expect back from a federal agency, at least one that was trying to be responsive with regard to major proposed rules.

Working as a United States Senator, I have found it nearly impossible to easily access the information that I am looking for. I can't imagine the difficulty of a small business, a farmer or a rancher, when they are seeking to get information from the Environmental Protection Agency. As the EPA Administrator, the role which you are seeking, do you believe that this is an adequate way to communicate what the public and elected officials, and where are your views on making agency communication and record-keeping more transparent and accessible?

Mr. Pruitt. Senator, this is actually a common theme. As I met with many of you on this committee, both Democrats and Republicans, it was expressed to me that concern about the lack of response by the EPA at all, in response to inquiries, let alone the time of response. So I believe it is very important, as I indicated in my opening

statement, to listen, not only to the voices of the American people, but listen to members of Congress, listen to members of this body with respect to the issues that are of concern to them in their respective States. That is something I take very seriously and would seek to respond very expeditiously to you and to others in this body with responses.

Senator Rounds. The Ranking Member had asked, and was following up with questions in terms of your role as the attorney general with regard to fracking issues in Oklahoma, but also with regard to clean air attainment levels and so forth. It seemed to me that what you were trying to portray at the time, and I would like you to expand on this, because I think this is important, is that you have a different role as an attorney general than you would be if you were responsible as the agency within the State who had the direct statutory authority to respond to those issues. It seems to me that that is one of the roles that the EPA Administrator has which would be different than that of attorney general, which is the execution of the laws that we have passed.

Could you expand a little bit? Because I think this is really important in terms of the way you perceive your duties with regard to executing the laws that this Congress has passed.

Mr. Pruitt. Yes, Senator, and I appreciate the question. The role of Administrator is to perform an executive role, an executive policy-making role and carrying out the functions and the statutes that Congress has passed. That is much different than my current role as attorney general. As I tried to indicate to Senator Carper, in

respect to enforcement actions in the State of Oklahoma, that is vested specifically in the Department of Environmental Quality. They are the ones that bring enforcement actions against companies who do not comply with air permits, et cetera. We provide general counsel to them in that process, but it is not our responsibility. But more, it is not our jurisdiction. And that is important to me, because it goes back to rule of law, it goes back to process.

I think oftentimes what we see in this Country is that folks kind of disregard the authority or jurisdiction that has been given to them by the statute of the Constitution and they act anyway. That is what creates, I think, a lack of confidence in the American people. So I try to respect those boundaries. I try to respect my role as attorney general, stay in my lane, if you will, and provide the counsel and perform the job that we are supposed to perform to that agency, but then allow that agency to enforce as required by law.

Senator Rounds. And then very quickly, that also means that with regard to determining the science behind the laws that we create, as the Administrator, you are not going to make the determination yourself. You expect that sound science and the scientists with that background would be making the recommendations that you would then face a decision on?

Mr. Pruitt. Yes, Senator, objective and transparent in that process.

Senator Rounds. Thank you. Thank you, Mr. Chairman.

Senator Barrasso. Thank you, Senator Rounds. Senator Booker?

Senator Booker. Mr. Chairman, if you would gracefully hold the clock for a second, because I want to respond very succinctly to something that you and Senator Boozman said. First of all, to you, sir, this is my first time going through nomination hearings. You have been very generous with the way you have been conducting these hearings. I think it is important that we note that, and I appreciate the number of rounds that you are doing.

And then to Senator Boozman, I really do appreciate him adding to the line of inquiry I am having, he referred to me as a friend, which means a lot to me. People around here, your colleagues, know that you have a deep respect for the kind of kindness and just decency that you represent, a level to which I aspire but have not attained. Thank you for that. Thank you for indulging me.

Senator Barrasso. Thank you.

Senator Booker. And again, with respect to my colleague, who is a really good man, if this was between Delaware and New Jersey, I am the up-State, I would be very happy with the agreement that it seems that you, you are the down-State. So that is what I don't understand. You said earlier in your testimony in regard to this matter that you have a copy of the 2003 agreement. Do you have that?

Mr. Pruitt. I have the second agreement, Senator.

Senator Booker. Okay, let's just look at the 2000 agreement. I know you claimed in your testimony earlier that the 2003 agreement had expiration on it.

Mr. Pruitt. There was a ten-year period. But that needed to be reevaluated. This is the second statement I have here, Senator.

Senator Booker. I just want to clarify that it is a contradiction. There is no expiration on the 2003 agreement. It had a reevaluation, a period in which it would be reevaluated. And it was reevaluated by your State with involvement of the EPA and the involvement of Arkansas, and they came up with the same .037 standard. And if you look at the provisions of what you do have in front of you, the 2013 agreement, and I have a blow-up of page 4 of that agreement, it states that, starting here, it states that Oklahoma, through the Water Resources Board, will propose a rule amendment that removes the date to achieve full compliance with a numeric phosphorus criterion set forth in Oklahoma administrative code. Then it lists these two codes.

If you look at those two codes, what those two codes do, you know what they are, they said the sections of phosphorus concentration shall not exceed .037 by June 30th. It is removing the June 30th deadline in these two statutes.

So that is what is frustrating to me, is that this is what you are heralding as a great agreement. But you already had, in the year 2013 agreement, it is clear that you are doing, to me, and I don't know any other way of reading the facts, is that you take a binding rule of law and you suspend it for another three years, allowing more pollution to take place.

Mr. Pruitt. Senator, that is not, the issue here was not whether Oklahoma could enforce its .037 standard, it was whether Arkansas was going to adopt that standard on that side of the border. That had

never taken place in history. That was the concern of Oklahomans. That was the concern of Mr. Fite at the Seneca-Illinois River.

Senator Booker. So I am going to stipulate to what you said, because I am running out of time, sir. I agree with you, whether Arkansas was going to be able to live up to that standard. But you are the Oklahoma attorney general. And this is what I want to say. As soon as you did this so-called historic agreement that set it back, you basically turned to the EPA with a rule, with the power of law of the Supreme Court and said, okay, back off my corporations.

Why do I say that so confidently? Because I pulled a letter from Tyson Foods that literally six days after your so-called historic agreement of suspending this rule for three years, they are delighted. They write to the EPA and say, hey, you may have not only heard of the February 20th agreement by Oklahoma and Arkansas officials to jointly conduct a comprehensive study of concentrations and impacts in the Illinois Rivershed. They are excited. They literally say, compliance, however, with the now .037 has been suspend. So lay off us, EPA, under this agreement, until the study process is completed. In conclusion, the bi-State agreement has suspended implementation date of .037 during the term of the agreement.

Industry is really happy about this, and believes, and of course this letter, you are saying Tyson is wrong, they believe that what you did is give them, the EPA, with the power of the Supreme Court and 20 years of work that predecessors of yours had done, the power to suspend that power over them to comply with the law.

So that is really what I am struggling with. On one hand, you say that you filed lawsuits against 14 people, against the EPA. It is this idea of federalism, of Oklahoma sovereignty, Oklahoma States' rights, you are fiercely fighting for Oklahoma. And on the side of the polluters. You say the EPA is attempting to do things.

But then on the other hand, in this case that you are talking about, you switch suddenly to say, well, Oklahoma's water quality standard for phosphorus, that has been worked on for 25 years, armed with an EPA approval, armed with a Supreme Court decision, on point saying that up-river States are bound, industries believe that they are bound, but suddenly you are no longer fighting for Oklahoma. You are fighting to protect industry, on the side of industry again.

Mr. Pruitt. I can assure you, Senator, that industry didn't think they were bound.

Senator Booker. Why did Tyson write the letter, sir?

Mr. Pruitt. I don't know why they sent that. Because as Senator Boozman indicated earlier, the phosphorus level at .037 was unenforceable on the Arkansas side of the border. That was the concern. Until this agreement that we have here was negotiated and signed by Arkansas, that had never occurred in the history of Oklahoma.

Senator Booker. But sir, Arkansas was party to the 2012 scientific investigation. They are bound by the Supreme Court case which I pointed out to you already, and I can read you the binding paragraphs, bloodened by the EPA and obviously understood by industry that they were bound by that standard. Your agreement didn't stop it.

It extended the period in which people could pollute. I don't understand how that could be historic.

Mr. Pruitt. Senator, I think as you look at what was achieved between Arkansas and Oklahoma, you had the Arkansas attorney general, Ed Fite, who had been involved in these issues, as indicated earlier, since 1983, trying to enforce and obtain water quality that improved the Seneca-Illinois River, he cited the historic results in this matter.

So I am unaware of the letter that you are referring to, but I can assure that industry was not, not at all excited about .037 being enforced on the Arkansas side of the border.

Senator Booker. And I will conclude just by saying, sir, it is clear that industry was excited about the three-year delay that you bought them to continue to pollute. It is written there in a letter. It seems to me the theme in your work is not federalism and States' rights, but deregulation in siding with polluters against the environment and public health standards. It is unfortunate to me that that, unless you can show me something different in the way that this actually helped to clean up the river quicker, but I just don't see that at all in the evidence and the facts that I have before me.

Senator Barrasso. Thank you very much, Senator Booker. Our next questioner is actually Senator Boozman. Since we have Oklahoma and Arkansas both here, I don't know if you have a question, Senator Boozman, or if you just want to make a comment about this agreement, since both of the States are here. You represent the Congressional district directly adjacent.

Senator Boozman. I want to make a quick comment and then after that, I think all of my questions have been answered. I would yield back if we can have agreement.

I think the thing, Senator Booker, to understand is that first of all, the water was not being polluted at that point. Arkansas had made tremendous improvement over the years, and had just, our discharge in Springdale, Fayetteville, Rogers, Bentonville, the major communities there that have grown tremendously during that time frame, their discharges were down to very admirable levels. So all of that was being done.

The question was, was .037 fair versus .04 or .05. As I mentioned earlier, our most pristine river in Arkansas was not at .037. So we didn't feel like we could do that. So Oklahoma was happy with all this stuff. Arkansas is not. And because of that, in 2013, as the agreement ran out, they were prepared to go back to court again. This thing had been litigated since the Supreme Court finding back in the 1990s all along the line.

To be honest, I am not happy with the .037. I think it is too stringent. I would challenge to find a river in New Jersey that meets that standard, and you can't do it. It is a very, very stringent standard.

So it wasn't continuing to pollute and things like that. Tremendous progress made on the Arkansas side. Everyone agrees with that. It was, where do you draw the limit.

So often with the EPA, and this is so important, we have had on the committee, we have had the gentleman that represents the water

district for this huge area. They spent a billion dollars doing a great job of cleaning things up, raising everybody's rates. EPA has come back and wants them to spend another billion dollars for a tiny fraction that everybody agrees would not have any impact on the water quality in the river. These are the kinds of things that you get into.

So again, I am really not happy at all about the .037. I think that Tyson and the industry were happy in the sense that you would have a situation where you would have some finality, you would have some resolution so that everybody could go forward.

Senator Barrasso. Senator Ernst, any final comments or thoughts or questions?

Senator Ernst. Thank you, Mr. Chairman. I don't have any further questions. Whatever additional questions I have, I will submit for the record.

But I do have some closing comments. I do want to push back a little bit on the Ranking Member's comments earlier. I had gone through a series of examples of overreach by the government with the expanded definition of Waters of the U.S. And the Ranking Member had stated that he had a letter that he had received from Administrator Gina McCarthy. And I have no doubt that she was answering those questions honestly, because she wasn't the one making the statements. The statements that I presented came from the Corps of Engineers and the Department of Justice.

Now, I know this to be true: these are not as implied from some obscure website off of the internet done by some blogger in a basement

somewhere. The comments actually came from this committee, case studies from this committee, September of 2016. These are examples of case studies from all across the United States. I will cite just one that I opened up to.

A landowner in California received an investigation letter from the Corps, informing him that disking performed by a tenant farmer on his land may have resulted in an unauthorized discharged into WOTUS, and that regulators had opened a case against the landowner. They are being implemented, case by case. This letter came as a surprise to the landowner, who had been disking this particular site periodically over the last 15 years to sustain grazing conditions for his cattle, a practice he believed was normal, until he received this notice.

The court told the landowner's consultant that all disking for any purpose and at any depth with any potential WOTUS is a discharge into WOTUS and in the absence of a permit, represents an unauthorized discharge in violation of the Clean Water Act. This is an actual letter from the Corps that was submitted to this committee, the EPW committee, last year.

So this is not made up. This is a very real impact to all Americans. So I appreciate your stance, Attorney General Pruitt, that if you are confirmed, you will work with those that wish to continue farming and normal practices. But this is not made up, folks. We just need everyone to understand that the Corps, the DOJ and the EPA have gone beyond what we consider to be reasonable application of the law. Thank you very much.

Senator Carper. Mr. Chairman, if I could just respond very briefly. The letter that I sent on January 11th was not just to the EPA. It was to the head of the EPA and also the Assistant Secretary at the Army, Department of the Army, who is in charge of the Army Corps of Engineers. So it was really to both, both EPA and the Army Corps of Engineers. I gave them a half dozen or more questions and said, these assertions that we are hearing, what is the truth? And they responded jointly.

Senator Ernst. And if I can respond to that, I apologize, because I was going to use Senator Rounds' letter as a prop. I had not seen a letter from the EPA. I had written Administrator Gina McCarthy nearly two years ago on some issues that I was wanting addressed for Iowa. And I invited her to come to Iowa and visit. She never, ever responded to me or my staff.

Thank you, Mr. Chairman.

Senator Barrasso. Senator Markey.

Senator Markey. Thank you, Mr. Chairman.

Mr. Pruitt, you have criticized the Obama Administration on a number of occasions for allegedly "colluding with environmental groups to engage in sue and settle tactics." You just reiterated your concern to Senator Inhofe.

But in December, many of your co-plaintiff attorneys general, who are suing the EPA over the Clean Power Plan, sent a letter to President-Elect Trump, urging him to settle their lawsuits related to the Clean Power Plan. That sure sounds like an invitation to engage in sue and settle to me.

To avoid the appearance of entering into sweetheart settlements on the Clean Power Plan cases, will you commit to recusing yourself form all ongoing litigation that you are involved in?

Mr. Pruitt. Senator, I would say to you that the sue and settle practice, whether by this Administration or future administrations, is a practice that should not be followed. I believe that regulation through litigation is wrong. I believe that the rulemaking process that Congress has established should be respected by agencies, not only the EPA, but across the board.

I would mention one case to you.

Senator Markey. It looks a lot like that is what the attorneys general are doing, who are suing. And you are a co-plaintiff in this case on the Clean Power Plan. Will you recuse yourself from any role in the settling of these cases, in the negotiation on a settling of these cases?

Mr. Pruitt. The sue and settle practice should not be used by any administration to regulate. We have experienced in Oklahoma a case involving the Fish and Wildlife and Endangered Species Act in the relisting of the Lesser Prairie Chicken that impacted our State. So sue and settle is wrong.

Senator Markey. Are you giving me a yes, that you will not settle with these attorneys general?

Mr. Pruitt. I will not engage in a sue and settle practice, if confirmed as EPA Administrator, at any time.

Senator Markey. Will you negotiate with them to reach a settlement, such as has been recommended by the attorneys general who are the plaintiffs in this case against the Clean Power Plan?

Mr. Pruitt. Senator, it is a belief of mine that the use of sue and settle is a practice that should not be done by any agency of the U.S. Government.

Senator Markey. Right. So will you recuse yourself from any involvement in this litigation as it is being decided?

Mr. Pruitt. As I have indicated to you, Senator, the EPA ethics counsel, career staff at the EPA, has said that a particular matter, a specific case that those will be evaluated at the time. I will seek their counsel and comply with their counsel.

Senator Markey. Honestly, Mr. Pruitt, there is no bigger case than the Clean Power Plan. It goes to the promise that the United States is making to the world that we are going to reduce significantly our greenhouse gases. So this just goes to you as an individual saying that since you brought the case, with these other attorneys general, that you will now recuse yourself. Since you are in fact the plaintiff and defendant in this case if you are confirmed as the EPA Administrator.

Mr. Pruitt. Senator, as I indicated to you earlier, and I am sorry to interrupt you, but as I indicated to you earlier, I will recuse if directed by the EPA ethics counsel, career staff at EPA ethics. You know these individuals. They have been there, and I will follow their counsel and guidance.

Senator Markey. All right. I know I am not going to get you to recuse yourself from any of these cases, but I am just telling you, it is going to wind up being a huge conflict of interest if these attorneys general get to settle on their terms with the Trump Administration and you are sitting there in the middle of the room as that occurs.

Now, let me go to another subject, and that is this bottle of Trump water. Trump water, natural spring water. On the label it says, "pure, fresh and free from contaminants. This is water the way it was meant to be." Trump hotel guests have the luxury of drinking this water if they don't trust what comes out of the tap. Low-income communities across our Country do not have the same luxury. Do you agree that the EPA plays a critical role in ensuring that all Americans, regardless of racial, ethnic or economic backgrounds, have a right to clean water, free from contaminants?

Mr. Pruitt. Absolutely. In fact, Senator Booker and I talked about environmental justice in our meeting.

Senator Markey. That is great. As the widespread lead contamination in Flint, Michigan's water supply tragically reminds us, low-income and minority communities often bear far greater environmental burdens. Yet you told Senator Cardin earlier today that you didn't know if there is any safe level of lead. But scientific experts, including the CDC and World Health Organization, have concluded that there is no safe level of lead exposure.

Will you commit to making environmental justice for poor and minority communities an immediate priority of the EPA, if you are confirmed as Administrator?

Mr. Pruitt. I believe it is a very important role of the EPA Administrator.

Senator Markey. Well, minority communities often don't have the money –

Senator Barrasso. The Senator's time has expired in the third round. Thank you.

Senator Sullivan.

Senator Sullivan. General Pruitt, I just have one final question. We talked about some of the challenges that we have, this committee has been working on infrastructure issues. There were a lot of discussions last year about Flint, Michigan and aging infrastructure, which I think is a concern at the State and local and federal levels.

There is also a challenge in certain parts of the Country on no infrastructure. None. No clean water and sewer. My State has over 30 communities that don't have any clean water and sewer. In terms of the diseases and the living conditions in communities like that, as you can imagine, it can be very difficult. So in a bipartisan way, this committee acted last year, established a new program for disadvantaged communities, small communities, to work on those kinds of issues for different communities, whether Alaska or other parts of the Country, that literally live in third world conditions in some communities. So that would be administered by the EPA, this new

program. I just want to get your commitment to work with us to fully fund that new program to work on those kinds of issues.

Mr. Pruitt. As we talked about in our meeting, Senator, I believe sometimes when infrastructure is referenced, we think roads and bridges and we don't think water infrastructure. I think all those are important, and I would make that a priority interfacing with Congress if confirmed as EPA Administrator.

Senator Sullivan. Great. Thank you.

Senator Barrasso. Thank you, Senator Sullivan. I want to thank all the members for the respectful way in which the business was conducted today. Members may also submit follow-up written questions, but it seems that everyone had plenty of opportunity to ask oral questions. Schedule for the close, the recording for the close of business Thursday, January 19th - Senator Carper?

Senator Carper. I thought we were going to do one more.

Senator Barrasso. I thought three rounds was the longest in the history of this. The last, the only other time there were three rounds was Christie Todd Whitman in 2001. Those were three rounds of five minutes each. And the reason that she as a Republican nominee was given three rounds is that the Chairman of the committee was Harry Reid. So three rounds, the witness has been here since 10:00. It is now 4:30, so he has been six and a half hours, and three rounds. By any criteria that one would use, each of five minutes, when Gina McCarthy was nominated, and I had significant numbers of questions, Barbara Boxer limited me to one five-minute round and one two-minute

round. We have more than doubled today that amount of time for questioning.

Senator Whitehouse. Mr. Chairman?

Senator Barrasso. Senator Whitehouse.

Senator Whitehouse. I am certainly not saying that you've been unfair with us, but until this very minute, I don't think it has been clear to anyone that there was a three round limit. I believe you opened the hearing by saying that we would go on until people's questions were answered.

So this is a bit of a novelty. But again, please don't take it as a criticism of your fairness. I think that you have been fair. This is just news. And I do have a bunch of questions right here that I'd hoped to ask as what I expected to be a final fourth round.

Senator Barrasso. Then I would invite you to please submit those follow-up written questions by tomorrow close of business.

Senator Carper. Mr. Chairman, could I be recognized?

Senator Barrasso. Yes, sir. Senator Carper, and then Senator Booker.

Senator Carper. I appreciate the way you've conduced this hearing today. I appreciate all the members coming and coming back again and again. When we were talking a week or two ago about the hearing, whether to have one day of hearings or two days of hearings, our side was interested in having two days of hearings. We were interested in having an outside panel, and it was explained to us that that is not really the tradition of the committee, to have an outside panel.

But you, Senator, preferred to have it in one day, and we'll stay as long as people have questions, I think those were almost exactly your words. And that is hard to argue with, to stay as long as people have questions. Some of the folks have some more questions. I know I do. And we are not running out the clock on those questions. I would just ask that you think back on our earlier conversation and you see your way clear to have one more round and we'll call it a day.

Senator Barrasso. Yes, well, I would say a couple of things. One is, I offered to start the committee meeting earlier today, because there are many of us who have commitments into the evening, people from our home States who are here for the inauguration activities. We have commitments for our home States. And the idea of starting at 9:00 was rejected. And we wanted to go along, right before the third round, I said, now, if there is going to be ongoing, maybe we should take a break, give the witness an opportunity to take a break, you said, no, let's plow on.

The witness has been sitting there now for just about three hours. And depending on wishes of the committee, my preference is to say, we have done more than ever done in the last 16 years or 17 years for nominees. If people have one or two questions, I would want to give the witness an opportunity to stretch his legs. I will be happy to stay. And we can come back with a three-minute round.

But I just think - people have obligations and commitments. And we thought we would be completed by now. It does seem by many of the end, and for people who are here now, they could go. So we have three members, if you want to go two to three minutes or one or two

questions, I think we would be able to accommodate. But to bring back the entire committee and go into the night -

Senator Carper. I am not suggesting we bring back the entire committee. Let me just suggest that if we can, we can agree here. Those that are here today, right this moment, if they have questions, give them five minutes. And then when they're done, we are done.

Senator Barrasso. Any objection from our side? Senator Inhofe.

Senator Inhofe. Though we would be able to yield back any time that we had, if we didn't want to use it.

Senator Barrasso. Sure.

Senator Carper. Or you could yield to us.

[Laughter.]

Senator Inhofe. I can only say that I have chaired this committee for quite a number of years. I have been through this once before and there is always an effort by those who are perhaps not really satisfied, as some of the others might be, to try to make it continue on and on and on.

I would prefer to go ahead. I think we have all had adequate time, and be prepared to vote.

Senator Barrasso. Well, we don't have a vote scheduled for today on this. We don't have an agreement on that. So it wouldn't be a vote. I would say, if we --

Senator Inhofe. Well, if that is the case, then we can confine it for the record, any questions that they have.

Senator Barrasso. Any other suggestions?

Senator Mr. Pruitt. Mr. Chairman, I think you've been exceedingly fair, particularly relative to the confirmation of Gina McCarthy. And I think it is purely within your call to have additional questions be submitted for the record. The opportunity for the witness to answer all the questions, he'll still have to do it before his confirmation. But relative to any other EPA Administrator hearing, you've been very generous, very fair, and I think that, in retrospective, I think that is a very fair outcome, to still ask the questions, just submit the questions for the record.

Senator Carper. Can I respond to our colleague from Alaska? I don't know if you remember a year or two ago, there was a joint session of the House and Senate committees, environment committees. And the witness was Gina McCarthy. And I arrived four hours into the hearing. And after a while, I was recognized to ask a question. And my first question of Gina McCarthy was, you've been here for four hours, haven't you? She said yes. And I said, is there any question you haven't been asked that you wish you had been asked? And she said yes. I said, what is it? She said, I wish I'd been asked if I needed a bathroom break.

[Laughter.]

Senator Carper. I don't know if the witness could use a bathroom break. But if you need one for a couple minutes, we could arrange that.

Here's what we are asking for. Five minutes, Cory Booker, Sheldon Whitehouse, Tom Carper. We ask our questions and we are done.

That's it. Can you handle that? Why don't you say yes? We're wasting a lot of time here.

Senator Barrasso. As you said, you have a couple of questions. Let's go three minutes each and we'll call it good. You're up.

Senator Booker. Mr. Chairman?

Senator Barrasso. Senator Booker.

Senator Booker. I'd asked to be recognized earlier. I do want to –

Senator Barrasso. I apologize. Yes, sir.

Senator Booker. I just want to repeat, I do think what Senator Sullivan said, you have been very, very generous, it is true. I appreciate what seems like an accord right now of a few minutes now. I'd appreciate that.

One thing you didn't mark, which I think should be really important, is I have no sympathy for the nominee and his endurance. I do have for his family, behind him, who has sat through this. I just want to mark for the record that they are true champs. I think that is important to know. I thank them for their indulgence. Not the nominee, but them.

Senator Mr. Pruitt. I would just say that is more evidence that he cares for the children of Oklahoma.

[Laughter.]

Senator Barrasso. I would just say, more people vote for me because of my wife than vote for me, and I would suggest for you as well, in the case of this nominee.

Senator Carper. Let me yield to Senator Whitehouse.

Senator Whitehouse. I just want to touch on two things, and then we'll wrap up. The first is that on your questionnaire you listed an email address with a me.com domain as your business email. You also have an OAG.ok.gov address. Are there other email addresses that you have and are the other email addresses that you use for business other than your me.com and your OAG.ok.gov email addresses?

Mr. Pruitt. I am sorry, Senator. The "me" address is not a business email address. I am not sure why it was designated as such.

Senator Whitehouse. Well, maybe we can just correct the filing on that.

Mr. Pruitt. There are no other email addresses, if that is your question, Senator.

Senator Whitehouse. We have gone through the cases that you list as your environmental cases. When we take out the cases that were started by your predecessor, Drew Edmonson, and when you take out the cases that are fish kill cases, which I understand is a formulaic matter that is resolved by letter at the staff level, you count the fish, you pay the fee, and when you take out the qui tam cases, which are, for those who aren't lawyers, a private individual who brings an action and then the attorney general can step in and take the action over if they want, but it is brought in the first instance by a private individual. And then if you take out the cases in which you sued EPA, there is virtually nothing left.

And in addition to that, we have that you closed the environmental protection unit in Oklahoma as a free-standing unit. You told me when we met that you had rolled it into your federalism

unit. But I was just on the federalism unit is website, and the word "environmental" doesn't even appear on that. It appears to be run by the Solicitor General. It says over and over again that it is involved in appellate litigation. And of course, if you are bringing an action, you are not starting at the appellate level.

Mr. Pruitt. Senator, if I may, the Deputy Solicitor General, Clayton Eubanks, was actually employed by the previous attorney general. He has been designated the Deputy Solicitor General and is responsible for environmental related advice and consent to those agencies.

Senator Whitehouse. Yes. That's a different function, though. That's a different f unction than to bring an action. I have been an attorney general, too. I know the difference. The attorney general has an obligation to provide lawyers, to give advice to agencies. But you also have the authority to bring criminal actions, if you wish. And you have the authority to bring civil actions, if you wish. And it is those authorities that I believe have not gotten much attention.

And the last piece of that, because you will have a chance to respond, but I am on a short clock, is that there was in Oklahoma an environmental crimes task force that your predecessor led. It describes, and I would ask to have these documents put into the record, from 1997 to 2010 the OECTF, the Environmental Crimes Task Force or the Environmental Protection Unit, in conjunction with EPA and other entities, conducted 142 criminal investigations, resulting in 56 prosecutions. Criminal cases resulted in individual convictions on 110 felonies, 21 misdemeanor counts, corporate convictions, 10

felony and 3 misdemeanor counts, $8 million in fines, 28 years of jail time. We can put it in the record.

Do you even participate in the Oklahoma Environmental Crimes Task Force still?

Senator Barrasso. Without objection.

[The referenced information follows:]

Mr. Pruitt. Senator, as I have indicated, we work each day with our Department of Environmental Quality on enforcement along with other agencies. I guess it is a matter of "who takes the credit" for that type of enforcement. But those individuals have offered statements to this body. They are a matter of the record. You've heard statements that the Chairman has referred to that we have worked diligently with those agencies to enforce appropriately. And I would refer to their statements in response.

Senator Barrasso. Thank you, Senator. Senator Booker?

Senator Booker. Thank you very much. First of all, I appreciate your talking about environmental justice and mentioning that. We did talk about that, and I felt good about your personal commitment, at least to me, that you would pursue that.

I just want to go through this last point. I want to put together a fact pattern here to let you have at it and dispute it. I know there is at least one point in here you dispute, and I really want to get to what I draw from the facts. And you can, again, have the last word.

So what I am seeing, that I put together all the facts, just a pattern. There's a litigation from your predecessor that you declined to conclude when you got in against polluting poultry producers who were dumping hundreds of thousands of tons of chicken waste into the Illinois River watershed. You shut down the environmental enforcement unit in your office. This is the one I know you do not agree with me on. But I see it as that you also attempted to suspend Oklahoma's water quality standard for three years.

But the last fact, and again, you have the last word here, sir, is that you also supported a constitutional amendment, State Question 777, the so-called Right to Farm amendment, that would have made it more difficult for the Oklahoma State Legislature, again, you talk about federalism, now trying to take the teeth out of the Oklahoma State Legislature and local governments to enact their own environmental laws in the future,

And this kind of support, and I looked all throughout the magazines, you are going in support of this, it is clear. Here you are in the pro and con about supporting 777. Here is, most of the editorial boards were against you on this in your State. Here's one from Tulsa World Endorsement that said the measure would prevent future State and local regulation on farming and livestock activities unless the State has a compelling State interest, a very high legal standard, as I know, not the lawyer that you are, sir, but I know that is a very hard one, standard, to meet.

So this is the challenge, this idea that you are supporting federalism versus, it seems to me, a pattern of you being on the side of the polluters, and even trying to take the teeth out of the State Legislature's ability to regulate these harmful environmental toxins. I am happy that this ballot initiative was overwhelmingly defeated by Oklahoma voters. But as I see you ascending potentially to this very important position, sir, I just worry about whose side you are going to be on, given the fact pattern that I have about big industry, about big pollution, especially as I know the billions of animals that we have in CAFOs that are poisoning rivers all over this Country.

I really just want you to respond to that, sir. And I will say, because this will be my last word, you will have it. I want to thank you for your indulgence. And I want to thank your family as well.

Mr. Pruitt. Thank you, Senator. And let me respond. There's been some confusion about the litigation. You made reference to several things there, and if I may respond to a couple. The litigation to which you refer, Senator Boozman actually to it as well, my predecessor did bring an action, approximately 2007 timeframe, against the poultry industry and many other defendants in the Northern District of Oklahoma. That case had been fully litigated, submitted to the court for decision before I ever came into office. It was an example of potentially regulation through litigation. And I have talked about that earlier, in response to questions.

I had every authority to dismiss that case when I came into office. I did not. That case is still pending today, awaiting a federal judge's decision. I have taken no action to undermine that case. I have done nothing but file briefs in support of the court making a decision. So that is a point of clarity on the litigation.

With respect to our office, I submitted this in response to Senator Whitehouse's request. We met last week and he asked about FTEs and budget. I have submitted response to him. We have almost a $700,000 budget that the Administrator of our office has attributed to environmental-related activities and seven FTEs that are associated with that as well. So I want to make sure that those two items were shared with you in response to your comments.

Senator Booker. You have nothing to respond to on the State Question 777?

Mr. Pruitt. The State Question 777, we are actually involved in the ballot drafting of those things. So though you represented that I was actively involved in an endorsement, I really was not as far as the actual vote. Now, there was some op ed, and some decisions. But I have tried to make sure that I didn't get involved in that because of our other obligations in the office.

Senator Barrasso. Senator Carper?

Senator Booker. And I can submit this for the record, sir?

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Booker. Thank you, sir.

Senator Carper. Mr. Pruitt, earlier today I mentioned that had submitted a list of about 50 questions to you shortly after Christmas, asked for a response by January 9th and got none. I asked my staff this morning if we had gotten written responses to those questions as of today. And I understand that we have not.

You're going to receive a number of questions for the record from us, Democrats and Republicans. And I am anxious to see what your responses are to those questions. We need your answers, and we need good answers. And the idea of waiting two or three weeks and not providing anything is just unacceptable. So just to put that out there.

And I would like to ask you a question.

Mr. Pruitt. If I may offer this, I tried to, and I talked to the Chairman about this, with respect to your questions I submitted, I was respecting the protocol of the Chair in responding to those questions, and committed that those questions would be answered for the record post the hearing. And that is what I was directed to do by the Chairman.

Senator Carper. All right. Second, based on your other statements, I just want to clarify something. If confirmed, can we have your assurances that the EPA will continue to regulate mercury emissions from power plants under Section 112 of the Clean Air Act, and you will not defer to the States?

Mr. Pruitt. Mercury, under the Section 112, is something that EPA should deal with and regulate.

Senator Carper. Thank you. I came across a quote from you that said, I think you stated the following about an EPA rule involving cross-state smog pollution. And the EPA rule, I think you were quoted as saying, "Threatened the competitive edge Oklahoma has enjoyed for years with low-cost and reliable electric generation. This low-cost energy not only benefits Oklahoma manufacturers but gives our State a considerable edge in recruiting new jobs." And the question I would ask, at the peril of those of us who live in States that are downwind from where Oklahoma might be, as you lower your energy costs to benefit Oklahomans, I just want to ask you, in the spirit of the Golden Rule, keep in mind what that means for us. Keep in mind what that means for us.

Because in my State, I said earlier on, I can shut down my State's economy and we still would be out of compliance on any number of Clean Air requirements. And that was not because of anything we put up in the air, but because of what folks out to the west put up in the air. It eventually came down to the end of America's tailpipe. I would just ask that you do that.

And last, we have a chart, you see this chart. It's an interesting chart. This is what we call a busy chart. It's a busy chart. It looks at the issue of cross-border pollution, as you can see, with this chart, smog, pollution in our Country moves all over the place. I mean, all over the place. As I mentioned, as Delaware's governor, we shut down my State in order to come in compliance with Clean Air challenges. Under your vision for EPA, it sounds like States will be left on their own to deal with this very complex

problem that we see demonstrated right here. I would just ask, how do States address this kind of pollution you see demonstrated here without the assistance of the EPA?

Mr. Pruitt. Well, Senator, as I indicated earlier today, I believe that as an example, the Cross-State Air Pollution Rule, to which you just referred, is a very important authority that the EPA needs to exercise. It needs to do so within the processes that have been provided by the statute. But it is something that is very important for the EPA to perform and execute.

Senator Carper. All right. Mr. Chairman, I have a unanimous consent request to submit for the record, Mr. Chairman, a number of letters with concerns about and many letters in opposition to, some cases for, other cases opposition to Mr. Pruitt's nomination. There are 14 in all.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Carper. Thank you so much. And again, to Mr. Pruitt, to your family, thank you all for joining us today. I see Cage, your son, right behind you, I could barely see Cage's lips moving when you spoke. So I suspect he has a future in law, I am not sure.

[Laughter.]

Mr. Pruitt. We'll see. Thank you, Senator.

Senator Barrasso. Attorney General Pruitt, I do want to follow up, as you said, you were instructed by the committee. I have a copy for the record of a January 9th letter which is the day that you were asked to submit the 52 answers to the questions. It's a letter from

me to the Ranking Member saying, please note the EPW committee does not require nominees to respond to questions in advance of a hearing. And I know you'll be responding to the written questions that will be submitted by tomorrow night.

Senator Carper. Mr. Chairman, could I just add a short thing? That's a conversation between you and the Chairman, I understand that. But again, I would just reiterate, you have received a lot of questions, including some that have been unanswered that I had submitted two or three weeks ago. We need your responses. We need your responses. And I hope the Chairman will give you a reasonable amount of time to respond to those questions, because there will be quite a few of them. They are not going to be like multiple choice answers. They won't be true and false. They will be more complete.

Thank you.

Senator Barrasso. Additionally, I am going to introduce for the record an article from The Economist about mercury and the Mercury Rule. And it is interesting that it says rulemaking is being made to look more beneficial under Barack Obama, but it goes to say, "A casual listener would have assumed that all these benefits came from reduced mercury. In fact, reduced mercury explained none of the purported future reduction in deaths, heart attacks and asthma, and less than 0.01 percent of the monetary benefits. Instead, almost all the benefits came from concomitant reductions in a pollutant that was not the principal target of the Mercury Rule, namely, fine particles."

And I will submit that for the record as we look at the issues going into the future.

[The referenced information follows:]

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Senator Barrasso. I want to thank all the members of the committee for your patience. I certainly want to thank the nominee for his time and his testimony today. The hearing is adjourned.

[Whereupon, at 4:55 p.m., the hearing was adjourned.]

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To: Schwab, Justin[schwab.justin@epa.gov]
From: E&E News
Sent: Tue 7/11/2017 11:16:40 AM
Subject: July 11 -- E&E Daily is ready

Read today's E&E Daily on the web

AN E&E NEWS PUBLICATION

E&E DAILY — Tue., July 11, 2017

READ FULL EDITION

1.CAMPAIGN 2018:

Leading foe of EPA launches Senate bid

West Virginia Attorney General Patrick Morrisey (R) announced yesterday that he would run for Senate in 2018, making official a long-expected challenge to embattled Sen. Joe Manchin (D).

ON THE HILL

2.APPROPRIATIONS:

Climate, fisheries programs under scrutiny in funding bills

3.PIPELINES:

Energy firms fret as Senate stalls on FERC picks

4.TRANSPORTATION:

House appropriators cut TIGER grants, Calif. high-speed rail

5.FORESTS:

Timber interests cheer Senate energy bill provision

6.AGENDA:

Senate confirms reg agency chief; other items in limbo

7.FISHERIES:

Bipartisan bill would boost recreational fishing

8.LAW:

House panel to take up 'sue-and-settle' bill

POLITICS

9.CAMPAIGN 2018:

Perlmutter abruptly exits Colo. gubernatorial race

UPCOMING HEARINGS AND MARKUPS

10.CALENDAR:

Activity for July 10 - July 16, 2017

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From: E&E News
Sent: Mon 7/3/2017 5:44:06 PM
Subject: July 3 -- Greenwire is ready

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AN E&E NEWS PUBLICATION

GREENWIRE — Mon., July 3, 2017

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1.OIL AND GAS:

D.C. Circuit rejects EPA methane rule delay

A federal appeals court today vacated the Trump administration's decision to delay an Obama-era U.S. EPA rule curbing methane emissions from new oil and gas operations.

TOP STORIES

2.WHITE HOUSE:

Science office a shadow of its former self

3.EPA:

Pruitt issued 'oral directive' to end 'sue and settle'

4.NATURAL RESOURCES:

Senators roll out bipartisan sportsmen's bill

POLITICS

5.CLIMATE:

Obama laments 'temporary absence in American leadership'

6.CLIMATE:

Trump could push Earth 'over the brink' — Stephen Hawking

7.CAMPAIGN 2018:

In blow to GOP, Rep. Wagner won't take on McCaskill

CONGRESS

8.PUBLIC LANDS:

Grijalva seeks data on 'anti-government extremism'

9.YUCCA MOUNTAIN:

Nev. shrugs as House panel advances repository plans

10.PUBLIC LANDS:

Advocates say Daines unfairly forced out ranger

NATURAL RESOURCES

11.ENDANGERED SPECIES:

More groups threaten to sue over Yellowstone grizzly delisting

12.INTERIOR:

Trump admin advances plans for Izembek road

13.FISHERIES:

Hatchery strays cause problems for wild salmon — study

14.WILDLIFE:

Tiny, threatened butterfly thriving on military bases

15.WEATHER:

Harsh winter tough for animals across West

LAW

16.OBITUARY:

Pioneering electric industry, nuclear attorney dies

CLIMATE CHANGE

17.PARIS AGREEMENT:

U.S. may meet emission goals — top U.N. official

18. TRAVEL:
Rising temps force airlines to ground flights

ENERGY

19. NUCLEAR:
Vogtle economics foggy, but fight over who pays is certain

20. NUCLEAR:
NRC to lower fees for third consecutive year

21. UTILITIES:
Mass. adopts target for energy storage technologies

BUSINESS

22. OIL SANDS:
Suncor nixes new investment, pleasing investors

23. AUTOS:
Tesla Model 3 to go on sale this week

STATES

24. OHIO:
Court: Utility can charge customers for cleanup costs

25. CALIFORNIA:
Invasive weevil spreads north, endangering palm trees

26. WEST VIRGINIA:
Scandal forces water chief to retire

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To: Schwab, Justin[schwab.justin@epa.gov]
From: E&E News
Sent: Thur 5/25/2017 11:14:58 AM
Subject: May 25 -- E&E Daily is ready

Read today's E&E Daily on the web

AN E&E NEWS PUBLICATION

E&E DAILY — Thu., May 25, 2017

READ FULL EDITION

1.BUDGET:

Top Republicans chagrined over proposed cuts that hit home

In the weeks after the Trump administration sent its skinny budget to Congress, bipartisan angst over the depth of proposed cuts swept across the Capitol. A number of programs also favored by Republicans would suffer under the Trump budget. "I think you have an administration that has a petty aggressive goal, and they've put down some pretty hard-hitting cuts," said Sen. Lisa Murkowski (R-Alaska). "And I think our job now is to step up and make sure that these programs that are so important have that support that they need."

TOP STORIES

2.NATURAL RESOURCES:
Bishop aims to ensure federal, local land-use consultation

3.CLIMATE:
Trump budget looms large over bipartisan caucus meeting

4.NATIONAL MONUMENTS:
Changes to key law would threaten all public lands — paper

POLITICS

5.CAMPAIGN 2017:
Mont. special turns ugly on eve of vote

IN THE HOUSE

6.AGRICULTURE:
Perdue didn't help write budget but says he can make it work

7.LAW:
Republicans drum up support for bills against 'sue and settle'

8.INFRASTRUCTURE:
Democrats unveil $2T blueprint, slam Trump's 'incoherent' plan

9.WATER POLICY:
Lawmakers 'hopeful' about project spending

10.COAL:
Backing for good Samaritan bill just a few tweaks away

ON THE HOUSE FLOOR

11.PESTICIDES:
House OKs bill to allow spraying without EPA water permits

12.FEDERAL AGENCIES:
House passes 'official time' bill

IN THE SENATE

13.AIR POLLUTION:
Hatch revives bill to allow compliance deals with EPA

14.DOE:
Prodded by lawmakers, agency releases research grants

15.NOMINATIONS:
Senate advances Trump appeals court pick

16.EPA:

Senate bill would bar TSCA oversight of lead tackle, ammo

17. PEOPLE:

New Heitkamp staffer comes from pesticides trade group

UPCOMING HEARINGS AND MARKUPS

18. CALENDAR:

Activity for May 22 - May 28, 2017

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To: Schwab, Justin[schwab.justin@epa.gov]
From: E&E News
Sent: Mon 5/22/2017 11:20:21 AM
Subject: May 22 -- E&E Daily is ready

Read today's E&E Daily on the web

AN E&E NEWS PUBLICATION

E&E DAILY — Mon., May 22, 2017

READ FULL EDITION

1.AGENDA:

Lawmakers expected to snub White House budget

Capitol Hill will push back this week against sharp cuts to energy and environmental programs that the Trump administration will detail for the first time in its fiscal 2018 budget, which is due out tomorrow.

IN THE SENATE

2.NOMINATIONS:

Senators set to grill Trump's DOE, FERC picks

3.AIR POLLUTION:

Hearing to focus on bills targeting ozone standard, Clean Air Act

IN THE HOUSE

4.TAX POLICY:

Lawmakers to debate border adjustment plan

5.NATURAL RESOURCES:

Panel to examine whether federal land laws have 'gone astray'

6.LAW:

Republicans revive 'sue and settle' debate

7.EPA:

GOP pushes rulemaking reform; Dems showcase fired scientists

8.PESTICIDES:

House to vote on bill removing permit requirements

9.PUBLIC LANDS:

Panel to consider BLM land transfers, road in conservation area

10.COAL:

House mining panel to mull good Samaritan cleanup proposal

ON THE HOUSE FLOOR

11.FEDERAL AGENCIES:

House to vote on 'official time' bill

UPCOMING HEARINGS AND MARKUPS

12.CALENDAR:

Activity for May 22 - May 28, 2017

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To: Schwab, Justin[schwab.justin@epa.gov]
From: E&E News
Sent: Mon 7/24/2017 11:23:42 AM
Subject: July 24 -- E&E Daily is ready

Read today's E&E Daily on the web

AN E&E NEWS PUBLICATION

E&E DAILY — Mon., July 24, 2017

READ FULL EDITION

1.CLIMATE:
Dem senators to pitch carbon tax plan to conservative group
A pair of Democratic senators will return to a conservative think tank this week to unveil a proposal to impose a carbon tax to curb greenhouse gas emissions.

TOP STORIES

2.APPROPRIATIONS:
Hundreds of amendments likely for first House 'minibus'

3.NATURAL RESOURCES:
Marathon markup to tackle 21 land, renewable energy bills

4.WILDLIFE:
Panel takes up conservation bill amid gray wolf conflict

ADMINISTRATION

5.NATIONAL PARKS:
Zinke announces $50M in grants for park maintenance

IN THE SENATE

6.OCEANS:
Panel takes aim at sea trash

7.INFRASTRUCTURE:
Trump plan to expedite permitting comes under review

8.NOMINATIONS:
Senate to approve Interior No. 2 today

9.TECHNOLOGY:
Lawmakers to delve into carbon capture, nuclear woes

10.NOMINATIONS:
N.D. judge at center of WOTUS fight to face senators

11.NATURAL RESOURCES:
Yellowstone mining ban, water rights bills on panel's agenda

12.FEDERAL AGENCIES:
Committee to consider workforce, regulations bills

IN THE HOUSE

13.ENERGY MARKETS:
Lawmakers to vote on tweaked Russia sanctions bill

14.BIOFUELS:
2 panels to enter fray as fight over ethanol intensifies

15.LAW:
GOP lawmakers gear up for repeat attack on 'sue and settle'

16.NATURAL RESOURCES:
Coal, carbon and Minn. mining bills get hearing

17.ELECTRICITY:
Grid operators to share reliability, planning

18.SUSPENSIONS:
House to vote on land bills

UPCOMING HEARINGS AND MARKUPS

19.CALENDAR:

Activity for July 24 - July 30, 2017

E&ETV'S ONPOINT

20.DOE:

SunShot director talks new funding, future of program under Trump

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To: Minoli, Kevin[Minoli.Kevin@epa.gov]
From: Schwab, Justin
Sent: Wed 5/24/2017 9:17:30 PM
Subject: Fwd: "Sue and settle" directive

Sent from my iPhone

Begin forwarded message:

From: "Graham, Amy" <graham.amy@epa.gov>
Date: May 24, 2017 at 5:01:09 PM EDT
To: "Schwab, Justin" <schwab.justin@epa.gov>, "Brown, Byron" <brown.byron@epa.gov>, "Fotouhi, David" <fotouhi.david@epa.gov>, "Bolen, Brittany" <bolen.brittany@epa.gov>, "Dravis, Samantha" <dravis.samantha@epa.gov>
Cc: "Bowman, Liz" <Bowman.Liz@epa.gov>, "Ferguson, Lincoln" <ferguson.lincoln@epa.gov>
Subject: FW: "Sue and settle" directive

Do you all have the document referenced below on sue and settle?

-----Original Message-----
From: David LaRoss [mailto:dlaross@iwpnews.com]
Sent: Wednesday, May 24, 2017 4:47 PM
To: Press <Press@epa.gov>
Subject: "Sue and settle" directive

Today at Faegre Baker Daniels' Energy & Environmental Symposium, Administrator Pruitt said he has signed an agency-wide "directive" on sue and settle practices, saying "the days of ruling by consent order, the days of ruling by litigation in the judicial system are over." Can you provide a copy of this document?

Deadline is ASAP.

--
David LaRoss
Inside EPA
(703) 416-8536

To: Stern, Allyn[Stern.Allyn@epa.gov]
From: InsideEPA.com
Sent: Wed 7/5/2017 11:32:40 AM
Subject: The Morning Headlines from InsideEPA.com -- July 5, 2017

The critical environmental policy-making news you need as you begin your day

July 5, 2017

Latest News

D.C. Circuit Vacates EPA Methane Rule Stay Over Flaws In Reconsideration

The U.S. Court of Appeals for the District of Columbia Circuit in a split opinion has vacated EPA's administrative stay of several key requirements in an Obama-era rule setting limits on the potent greenhouse gas methane from new oil and gas equipment, finding major flaws in how the Trump EPA paused the provisions to reconsider them.

House GOP Bills Aim To Achieve Industry's Renewed Bid To Overhaul NSR

House Republicans have introduced two bills that would relax several Clean Air Act new source review (NSR) permitting requirements, which could help industry groups achieve some of the NSR overhauls that they have urged EPA to make as part of its ongoing regulatory review initiative weighing revisions to agency policies.

Eyeing January Proposal, EPA Pushes Ahead With Aircraft GHG Standards

EPA is pushing ahead with developing greenhouse gas standards for new aircraft engines consistent with a global pact on reducing aircraft GHGs, a move that runs counter to the administration's many efforts to roll back energy-sector GHG rules and ultimately could make it more difficult for Trump officials to target EPA's GHG endangerment finding.

DOJ Asks Court To Uphold Denial Of Citizens' Intervention In Cleanup Pact

The Justice Department (DOJ) is asking a federal district court to uphold a magistrate judge's order rejecting citizens' attempt to intervene in a cost recovery cleanup settlement at a high-profile Superfund site in Indiana, arguing such a reversal would allow for hundreds of different "starting times" for challenges to cleanups at residential sites.

Daily Feed

House GOP seeks clarity on Pruitt's 'sue and settle' directive

House Republicans are asking EPA Administrator to clarify his recent comments

about issuing a “directive” to limit the agency “ruling by consent order.”

D.C. Circuit grants unions role in RMP delay suit

A federal appeals court has granted labor unions' bid to intervene in litigation over the Trump EPA's almost two-year delay of Obama-era revisions to the Risk Management Plan Program.

EPA seeks continued abeyance of CPP suits

EPA submitted court-ordered status reports providing updates on its review of the Clean Power Plan and related new source rule, as the 60-day abeyance period imposed by the court in April expires.

Senate panel postpones EPA enforcement nominee's confirmation vote

Bodine is expected to face Democratic opposition but two bills that will also be considered at the business meeting are likely to win broad bipartisan support.

California high court upholds GHG auction ruling

While the ruling is a win for GHG rule supporters, officials and legislators are still grappling with how to overhaul the state's cap-and-trade program when its expires in 2020.

Ewire: Democrats ready bills to block EPA overhaul

Democrats ready a bill that prohibits any EPA office from being “closed, consolidated, or eliminated” using appropriated funds. Plus, local residents slam EPA's Hudson cleanup decision and Trump officials draw criticisms.

NAHB faults EPA stormwater permit's 'retention' mandates

The National Association of Home Builders' suit over EPA's stormwater permit for New Hampshire will challenge the agency's power to mandate on-site retention.

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From: E&E News
Sent: Mon 7/3/2017 5:39:00 PM
Subject: July 3 -- Greenwire is ready

GREENWIRE -- Mon., July 3, 2017
https://www.greenwire.com

For these stories and more go to
https://www.eenews.net/greenwire/2017/07/03/full

1. OIL AND GAS: D.C. Circuit rejects EPA methane rule delay
https://www.eenews.net/greenwire/2017/07/03/stories/1060056926

A federal appeals court today vacated the Trump administration's decision to delay an Obama-era U.S. EPA rule curbing methane emissions from new oil and gas operations.

TOP STORIES

2. WHITE HOUSE: Science office a shadow of its former self
https://www.eenews.net/greenwire/2017/07/03/stories/1060056920

3. EPA: Pruitt issued 'oral directive' to end 'sue and settle'
https://www.eenews.net/greenwire/2017/07/03/stories/1060056921

4. NATURAL RESOURCES: Senators roll out bipartisan sportsmen's bill
https://www.eenews.net/greenwire/2017/07/03/stories/1060056914

POLITICS

5. CLIMATE: Obama laments 'temporary absence in American leadership'
https://www.eenews.net/greenwire/2017/07/03/stories/1060056903

6. CLIMATE: Trump could push Earth 'over the brink' — Stephen Hawking
https://www.eenews.net/greenwire/2017/07/03/stories/1060056910

7. CAMPAIGN 2018: In blow to GOP, Rep. Wagner won't take on McCaskill
https://www.eenews.net/greenwire/2017/07/03/stories/1060056916

CONGRESS

8. PUBLIC LANDS: Grijalva seeks data on 'anti-government extremism'
https://www.eenews.net/greenwire/2017/07/03/stories/1060056913

9. YUCCA MOUNTAIN: Nev. shrugs as House panel advances repository plans
https://www.eenews.net/greenwire/2017/07/03/stories/1060056915

10. PUBLIC LANDS: Advocates say Daines unfairly forced out ranger
https://www.eenews.net/greenwire/2017/07/03/stories/1060056905

NATURAL RESOURCES

11. ENDANGERED SPECIES: More groups threaten to sue over Yellowstone grizzly delisting
https://www.eenews.net/greenwire/2017/07/03/stories/1060056919

12. INTERIOR: Trump admin advances plans for Izembek road
https://www.eenews.net/greenwire/2017/07/03/stories/1060056896

13. FISHERIES: Hatchery strays cause problems for wild salmon — study
https://www.eenews.net/greenwire/2017/07/03/stories/1060056900

14. WILDLIFE: Tiny, threatened butterfly thriving on military bases
https://www.eenews.net/greenwire/2017/07/03/stories/1060056906

15. WEATHER: Harsh winter tough for animals across West
https://www.eenews.net/greenwire/2017/07/03/stories/1060056899

LAW

16. OBITUARY: Pioneering electric industry, nuclear attorney dies
https://www.eenews.net/greenwire/2017/07/03/stories/1060056918

CLIMATE CHANGE

17. PARIS AGREEMENT: U.S. may meet emission goals — top U.N. official
https://www.eenews.net/greenwire/2017/07/03/stories/1060056898

18. TRAVEL: Rising temps force airlines to ground flights
https://www.eenews.net/greenwire/2017/07/03/stories/1060056909

ENERGY

19. NUCLEAR: Vogtle economics foggy, but fight over who pays is certain
https://www.eenews.net/greenwire/2017/07/03/stories/1060056912

20. NUCLEAR: NRC to lower fees for third consecutive year
https://www.eenews.net/greenwire/2017/07/03/stories/1060056917

21. UTILITIES: Mass. adopts target for energy storage technologies
https://www.eenews.net/greenwire/2017/07/03/stories/1060056907

BUSINESS

22. OIL SANDS: Suncor nixes new investment, pleasing investors
https://www.eenews.net/greenwire/2017/07/03/stories/1060056897

23. AUTOS: Tesla Model 3 to go on sale this week
https://www.eenews.net/greenwire/2017/07/03/stories/1060056902

STATES

24. OHIO: Court: Utility can charge customers for cleanup costs
https://www.eenews.net/greenwire/2017/07/03/stories/1060056908

25. CALIFORNIA: Invasive weevil spreads north, endangering palm trees
https://www.eenews.net/greenwire/2017/07/03/stories/1060056901

26. WEST VIRGINIA: Scandal forces water chief to retire
https://www.eenews.net/greenwire/2017/07/03/stories/1060056904

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To: Stern, Allyn[Stern.Allyn@epa.gov]
From: InsideEPA.com
Sent: Mon 7/3/2017 11:18:46 AM
Subject: The Morning Headlines from InsideEPA.com -- July 3, 2017

The critical environmental policy-making news you need as you begin your day

July 3, 2017

Latest News

Barrasso Distances Himself From Possible Bipartisan Vehicle GHG Statement

The Senate environment committee's top Republican is distancing himself from a nascent effort, first reported by *Inside EPA*, to craft a bipartisan letter floating near-term flexibility under light-duty vehicle greenhouse gas and fuel economy standards in exchange for continued progress on emissions in later years.

D.C. Circuit Rejects EPA Plan To Forgo Species Reviews Of New Pesticides

A federal appeals court has rejected EPA's plan to forgo Endangered Species Act (ESA) consultations with federal wildlife officials for registrations of new pesticides, remanding to EPA its registration of the pesticide cyantraniliprole for further review and faulting the agency for attempting to “duck” the consultation requirement.

DOJ Says Plaintiffs Fail To Prove Injury Justifying Suit Over '2-1' Rule Order

The Department of Justice (DOJ) says that plaintiffs cannot prove injury to justify their suit over the legality of President Donald Trump's executive order (EO) requiring EPA and other agencies to identify two rules for repeal for every new rule they issue, saying that undoing the rules would not cause harm warranting the lawsuit.

High Court Rejection Of Gold King Case Creates Doubts Over District Suit

The Supreme Court's order rejecting New Mexico's suit against Colorado over its role in the 2015 Gold King Mine spill creates doubts over a pending district court case over the spill, because it leaves open the possibility of a ruling that the lower court suit is invalid and cannot move forward because Colorado is not involved in the case.

Peer Reviewers Question EPA Drinking Water Lead Modeling Approaches

Scientific experts reviewing proposed modeling approaches that EPA plans to use in revising its Safe Drinking Water Act lead and copper rule are questioning whether the methods can fully address risks to key populations, noting limitations in each of the three approaches -- although the peer reviewers are generally supportive of EPA's efforts.

Daily Feed

House GOP seeks clarity on Pruitt's 'sue and settle' directive

House Republicans are asking EPA Administrator to clarify his recent comments about issuing a “directive” to limit the agency “ruling by consent order.”

D.C. Circuit grants unions role in RMP delay suit

A federal appeals court has granted labor unions' bid to intervene in litigation over the Trump EPA's almost two-year delay of Obama-era revisions to the Risk Management Plan Program.

EPA seeks continued abeyance of CPP suits

EPA submitted court-ordered status reports providing updates on its review of the Clean Power Plan and related new source rule, as the 60-day abeyance period imposed by the court in April expires.

Senate panel postpones EPA enforcement nominee's confirmation vote

Bodine is expected to face Democratic opposition but two bills that will also be considered at the business meeting are likely to win broad bipartisan support.

California high court upholds GHG auction ruling

While the ruling is a win for GHG rule supporters, officials and legislators are still grappling with how to overhaul the state's cap-and-trade program when its expires in 2020.

Ewire: Democrats ready bills to block EPA overhaul

Democrats ready a bill that prohibits any EPA office from being “closed, consolidated, or eliminated” using appropriated funds. Plus, local residents slam EPA's Hudson cleanup decision and Trump officials draw criticisms.

NAHB faults EPA stormwater permit's 'retention' mandates

The National Association of Home Builders' suit over EPA's stormwater permit for New Hampshire will challenge the agency's power to mandate on-site retention.

Read all the latest EPA news, analysis and documents →

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Sent: Fri 6/30/2017 11:18:46 AM
Subject: The Morning Headlines from InsideEPA.com -- June 30, 2017

The critical environmental policy-making news you need as you begin your day

June 30, 2017

Latest News

States Hopeful Pruitt Will Back Crucial Grants Despite Proposed FY18 Cuts

Some state officials are hopeful that EPA Administrator Scott Pruitt will support continuing crucial grants to states for monitoring, cleanups, and other programs despite President Donald Trump's proposal to slash the grants in fiscal year 2018, with the officials citing Pruitt's weak defense of the cuts and ongoing agency issuance of the grants.

Democrats Fear Trump ENRD Pick Could Undermine GHG, Other EPA Rules

Democratic lawmakers are strongly criticizing Jeffrey Clark, President Donald Trump's nominee to head the Justice Department's (DOJ) environment division, suggesting his prior antipathy toward climate regulation and his private sector work defending industry clients could drive him to help undermine EPA climate and environmental protections.

The Emerging Debate Over New TSCA Rules: 'Achievable' v. 'Lawful'

The Trump administration's recently unveiled framework rules for implementing key provisions of the new Toxic Substances Control Act (TSCA) are sparking a debate that suggests different visions for how the law should be implemented in the future with EPA officials saying the rules were crafted to be “achievable,” while agency critics charge they still need to be lawful.

States Prepare To Sue EPA For Delaying Oil & Gas Methane NSPS Controls

A coalition of 15 attorneys general (AGs) lead by New York AG Eric Schneiderman (D) is threatening to sue EPA for unreasonable delay in issuing methane emissions limits for existing oil and gas operations, ratcheting up a confrontation with the Trump EPA as it retreats from Obama-era climate strategies.

Finding No Jurisdiction, 4th Circuit Ends Mandate For EPA 'Jobs' Review

The U.S. Court of Appeals for the 4th Circuit in a unanimous ruling has vacated a lower court's order forcing EPA to conduct a sweeping review of the impact its Clean

Air Act (CAA) rules have had on coal sector employment, saying courts lack jurisdiction to hear suits claiming the agency is violating the law by not performing the review.

Daily Feed

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Subject: The Morning Headlines from InsideEPA.com -- May 25, 2017

The critical environmental policy-making news you need as you begin your day

May 25, 2017

Latest News

Pruitt Moves To Curtail EPA Use Of 'Sue And Settle' As GOP Pushes Bills

EPA Administrator Scott Pruitt says he has signed a “directive” curtailing so-called sue and settle tactics that produce consent decrees including court-enforced deadlines for rulemaking even as observers have warned it will be difficult for the administrator to adopt such limits and as administration allies move to use the process for their own deregulatory goals.

Trump's FY18 Budget Would Maintain Smaller, 'Refocused' IRIS Program

EPA's proposed budget for fiscal year 2018 seeks to preserve a smaller version of the agency's influential but often controversial Integrated Risk Information System (IRIS), which had been slated for elimination in an early budget memo, signaling the program will be devoted in part to assessing substances under the revised toxics law and other mandatory regulatory programs.

After Delays, EPA's Superfund Vapor Intrusion Rule Quietly Takes Effect

EPA has quietly put into effect an Obama-era rule that opens the door to listing Superfund sites based solely on vapor or water intrusion, after twice delaying the effective dates of the rule along with several others that were signed late in the last administration but which were slated to take effect under the new regime.

Trump EPA's High Court Brief Defends Obama-Era Malfunction Air Policy

The Trump EPA in a new Supreme Court brief is defending an Obama-era policy under which the agency sets Clean Air Act limits without allowing any exceedances of those standards due to emissions spikes associated with facility malfunctions, even as the administration reconsiders a rule that barred states from granting such waivers.

Trump EPA Advances First Final Rule To Implement Revised Toxics Law

The Trump EPA has sent for White House pre-publication review its first final rule to implement the revised Toxic Substances Control Act (TSCA), advancing a measure

establishing how to prioritize chemicals for risk evaluation that the Obama EPA proposed but the new administration will finalize based on its own approach to TSCA.

Trump's 2-1 Order Seen Driving 'Haphazard Regulation,' Experts Charge

Almost 100 economists and lawyers are criticizing President Donald Trump's executive order that requires EPA and other agencies to repeal two rules for every new measure promulgated, charging it retreats from the long-standing principle of maximizing rules' “net benefits” and opens the door to “haphazard regulation” that could harm the public.

Appliance Group Warns EPA Against 'Broad Reconsideration' Of HFC Limits

As EPA is gathering input on which regulations it should scrap or significantly revise, a major commercial appliance industry group is urging the agency to maintain its rules limiting hydrofluorocarbon (HFC) refrigerants, requesting only targeted changes to some of the deadlines.

Daily Feed

Pruitt, queried by lead candidate, remains mum on EPA deputy

“When are you going to name a deputy administrator at EPA?” the lead candidate for the post asked the administrator.

House approves bill exempting pesticide spraying from CWA

Similar legislation has cleared the House in the past but has never made it out of the Senate, though its prospects may now be better given pressure on many farm state Democrats who face tough re-election battles in 2018.

Pruitt starts over on BOSC nominees

EPA seeks nominees for its BOSC panel one day after its chair doubted new panelists could be selected in time for an August meeting.

Quote-Unquote: Talking about budgets, science and Superfund

A lot of budget talk in a week when the Trump administration proposed a 31 percent funding cut for EPA in fiscal year 2018.

EPA's FY18 budget request: A recap of our coverage

A wrap up of our recent coverage of EPA's budget request and what it means for states, the administration's efforts to reshape the agency and its regulatory agenda, climate policy and more.

Ewire: A daily news roundup

EPA cuts climate funds to bolster TSCA implementation. Plus, Fiat-Chrysler targeted over emissions cheating and health risks from coal mining.

Power company urges 4th Circuit to take up coal ash CWA appeal

Dominion says 4th Circuit has authority to decide whether it faces Clean Water Act liability for groundwater contamination, without waiting for a district court ruling.

Read all the latest EPA news, analysis and documents →

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From: E&E News
Sent: Thur 5/25/2017 11:12:03 AM
Subject: May 25 -- E&E Daily is ready

E&E DAILY -- Thu., May 25, 2017
https://www.eedaily.com

For these stories and more go to
https://www.eenews.net/eedaily/2017/05/25/full

1. BUDGET: Top Republicans chagrined over proposed cuts that hit home
https://www.eenews.net/eedaily/2017/05/25/stories/1060055122

In the weeks after the Trump administration sent its skinny budget to Congress, bipartisan angst over the depth of proposed cuts swept across the Capitol. A number of programs also favored by Republicans would suffer under the Trump budget. "I think you have an administration that has a petty aggressive goal, and they've put down some pretty hard-hitting cuts," said Sen. Lisa Murkowski (R-Alaska). "And I think our job now is to step up and make sure that these programs that are so important have that support that they need."

TOP STORIES

2. NATURAL RESOURCES: Bishop aims to ensure federal, local land-use consultation
https://www.eenews.net/eedaily/2017/05/25/stories/1060055130

3. CLIMATE: Trump budget looms large over bipartisan caucus meeting
https://www.eenews.net/eedaily/2017/05/25/stories/1060055125

4. NATIONAL MONUMENTS: Changes to key law would threaten all public lands — paper
https://www.eenews.net/eedaily/2017/05/25/stories/1060055129

POLITICS

5. CAMPAIGN 2017: Mont. special turns ugly on eve of vote
https://www.eenews.net/eedaily/2017/05/25/stories/1060055126

IN THE HOUSE

6. AGRICULTURE: Perdue didn't help write budget but says he can make it work
https://www.eenews.net/eedaily/2017/05/25/stories/1060055121

7. LAW: Republicans drum up support for bills against 'sue and settle'
https://www.eenews.net/eedaily/2017/05/25/stories/1060055123

8. INFRASTRUCTURE: Democrats unveil $2T blueprint, slam Trump's 'incoherent' plan
https://www.eenews.net/eedaily/2017/05/25/stories/1060055115

9. WATER POLICY: Lawmakers 'hopeful' about project spending
https://www.eenews.net/eedaily/2017/05/25/stories/1060055113

10. COAL: Backing for good Samaritan bill just a few tweaks away
https://www.eenews.net/eedaily/2017/05/25/stories/1060055120

ON THE HOUSE FLOOR

11. PESTICIDES: House OKs bill to allow spraying without EPA water permits
https://www.eenews.net/eedaily/2017/05/25/stories/1060055118

12. FEDERAL AGENCIES: House passes 'official time' bill
https://www.eenews.net/eedaily/2017/05/25/stories/1060055124

IN THE SENATE

13. AIR POLLUTION: Hatch revives bill to allow compliance deals with EPA
https://www.eenews.net/eedaily/2017/05/25/stories/1060055116

14. DOE: Prodded by lawmakers, agency releases research grants
https://www.eenews.net/eedaily/2017/05/25/stories/1060055117

15. NOMINATIONS: Senate advances Trump appeals court pick
https://www.eenews.net/eedaily/2017/05/25/stories/1060055127

16. EPA: Senate bill would bar TSCA oversight of lead tackle, ammo
https://www.eenews.net/eedaily/2017/05/25/stories/1060055119

17. PEOPLE: New Heitkamp staffer comes from pesticides trade group
https://www.eenews.net/eedaily/2017/05/25/stories/1060055114

UPCOMING MARKUPS AND HEARINGS

18. CALENDAR: Activity for May 22 - May 28, 2017
https://www.eenews.net/eedaily/2017/05/25/calendars

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Sent: Mon 5/22/2017 11:22:17 AM
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E&E DAILY -- Mon., May 22, 2017
https://www.eedaily.com

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1. AGENDA: Lawmakers expected to snub White House budget
https://www.eenews.net/eedaily/2017/05/22/stories/1060054878

Capitol Hill will push back this week against sharp cuts to energy and environmental programs that the Trump administration will detail for the first time in its fiscal 2018 budget, which is due out tomorrow.

IN THE SENATE

2. NOMINATIONS: Senators set to grill Trump's DOE, FERC picks
https://www.eenews.net/eedaily/2017/05/22/stories/1060054882

3. AIR POLLUTION: Hearing to focus on bills targeting ozone standard, Clean Air Act
https://www.eenews.net/eedaily/2017/05/22/stories/1060054875

IN THE HOUSE

4. TAX POLICY: Lawmakers to debate border adjustment plan
https://www.eenews.net/eedaily/2017/05/22/stories/1060054874

5. NATURAL RESOURCES: Panel to examine whether federal land laws have 'gone astray'
https://www.eenews.net/eedaily/2017/05/22/stories/1060054876

6. LAW: Republicans revive 'sue and settle' debate
https://www.eenews.net/eedaily/2017/05/22/stories/1060054881

7. EPA: GOP pushes rulemaking reform; Dems showcase fired scientists
https://www.eenews.net/eedaily/2017/05/22/stories/1060054877

8. PESTICIDES: House to vote on bill removing permit requirements
https://www.eenews.net/eedaily/2017/05/22/stories/1060054872

9. PUBLIC LANDS: Panel to consider BLM land transfers, road in conservation area
https://www.eenews.net/eedaily/2017/05/22/stories/1060054880

10. COAL: House mining panel to mull good Samaritan cleanup proposal
https://www.eenews.net/eedaily/2017/05/22/stories/1060054873

ON THE HOUSE FLOOR

11. FEDERAL AGENCIES: House to vote on 'official time' bill

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12. CALENDAR: Activity for May 22 - May 28, 2017
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Sent: Tue 3/28/2017 11:15:04 AM
Subject: The Morning Headlines from InsideEPA.com -- March 28, 2017

The critical environmental policy-making news you need as you begin your day

March 28, 2017

Latest News

Trump Order Requires Agencies To ID Rules That Stymie Energy Production

President Donald Trump will sign a long-awaited executive order March 28 that a senior White House official says will begin to lay out a framework for the administration's energy and environment policy -- one that will prioritize energy production and eliminate climate or environmental policies that "put the U.S. economy at risk."

On Eve Of Trump Order, EPA Faces Petitions To Reverse GHG Risk Finding

As President Donald Trump prepares to sign an order rolling back a suite of Obama-era climate policies, EPA is facing a set of petitions from free-market and industry groups seeking to reconsider the agency's landmark finding that greenhouse gases endanger public health and the environment.

High Court Appeal Challenges EPA Bar On Facility Malfunction Air Waivers

An electric utility is asking the Supreme Court to force EPA to end its "absurd" Obama-era policy prohibiting waivers from Clean Air Act emissions limits for accidental air pollution releases due to facility malfunctions, using an appeal of a case over EPA's boiler air toxics rule as the vehicle for the broader push to undo the policy.

Flint Pact Avoids Answer On SDWA Lead Service Line Replacement Duty

A tentative settlement to resolve some litigation over the lead in drinking water crisis in Flint, MI, would require the full replacement of lead service lines and increased drinking water monitoring in the city but leaves unanswered questions about water utilities' responsibility under the Safe Drinking Water Act (SDWA) to conduct such replacements.

Scientists, Tribes Aim To Boost Legal Defense Of Utility MACT Cost Finding

Scientists and native American tribes are aiming to the boost the legal defense of EPA's revised cost finding that underpins its utility maximum achievable control

technology (MACT) air toxics rule, saying some benefits of the rule such as reduced IQ losses might be hard to quantify in financial terms but still help to justify the regulation.

Environmentalists Fault Pruitt's Use Of Jobs Study To Undercut Vehicle Rules

Environmentalists are criticizing EPA Administrator Scott Pruitt's reliance on a study by a deregulatory group that claims the agency's vehicle GHG rules are responsible for moving jobs to Mexico to bolster his decision to reconsider the rules, saying it appears based on little actual study but is being cited in a hasty effort to shore up administration claims that its regulatory rollbacks protect employment.

Environmentalists Eye Law, Science To Fight Trump's CWA Rule Revisions

Environmentalists plan to use Supreme Court precedent and extensive scientific data to fight the Trump administration's expected revisions to weaken EPA's Clean Water Act (CWA) jurisdiction rule, saying an executive order (EO) forcing the changes conflicts with high court rulings and the existing rule's scientific justification.

Brick Sector Defends Against Push For Tougher 'Health-Based' Air Rule

Brick manufacturers are defending EPA's air toxics rule for the sector against environmentalists' claims that EPA failed to follow Clean Air Act mandates and set unlawfully weak "health-based" air standards for the sector, saying nothing in the air law specifies harder limits and that EPA has discretion on how to set alternative air toxics standards.

Daily Feed

EPA reschedules hearing on expanding ozone transport area

EPA has rescheduled a public hearing on the Obama EPA's proposal to reject a push by East Coast states to add nine Midwestern and Southern states to the OTC.

Coal group 'confident' of major EPA rule changes

A coal industry group is urging a regional power grid operator to assume increased production of coal-fired generation because the Trump EPA will “withdraw or rewrite” several major regulations.

Missouri attorney general embraces 'sue-and-settle'

Hawley said it could take years to roll back rules and that lawsuits expedite things, especially if the federal government decides to settle.

Top Obama EPA lawyers go to D.C. firms

Former top EPA lawyers in the Obama administration have landed at Washington,

DC, law firms.

Ewire: A daily news roundup

Concern mounts over EPA's proposed budget cuts. Plus, states ease environmental requirements.

Trump slated to sign climate rollback order March 28

"Whatever steps we take in the future will be pro-growth, pro-environment, but within the framework of the Clean Air Act," EPA Administrator Scott Pruitt said in announcing the upcoming climate executive order.

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March 16, 2017

Latest News

Pruitt Said To Be Seriously Weighing Shuttering EPA's Enforcement Office

EPA Administrator Scott Pruitt and top White House officials are said to be seriously considering a major reorganization of EPA's Office of Enforcement & Compliance Assurance (OECA), which could result in moving much of the office's personnel to the agency's program offices.

EPA's Reopening Of Vehicle GHG Decision Opens Door For Industry Pitch

EPA's move to reopen its mid-term review of light-duty vehicle greenhouse gas standards gives automakers an opportunity to build a case over the next year to support weakening the requirements, though the agency faces several significant hurdles to softening the federal GHG and fuel economy limits.

Supreme Court Urged To Hear CWA Rule Suit Despite Trump EPA Review

Environmentalists are urging the Supreme Court to reject the Trump administration's request to indefinitely stay a suit over the correct venue for challenging the Obama-era Clean Water Act (CWA) jurisdiction rule while EPA weighs revising or scrapping it, arguing a stay would effectively repeal the existing rule with no way to contest that decision.

Pruitt Withdraws Decision-Making Powers From Senior Officials, Email Shows

EPA Administrator Scott Pruitt has since March 2 rescinded delegated authority for acting assistant administrators and regional administrators to take “significant” actions on his behalf, according to an internal email obtained by *Inside EPA*, centralizing decision-making for many high-profile issues despite Pruitt's lack of agency experience and minimal staff.

Parties Spar Over RCRA Authority For Underground Disposal Of Liquid Waste

Opposing parties in a Resource Conservation & Recovery Act (RCRA) citizen suit are both citing correspondence between EPA and an Oklahoma state commission to underpin competing arguments over whether the case alleging endangerment from

earthquakes prompted by oil and gas liquid waste disposal into underground wells should proceed.

Analysis Says EPA Understates Methane From Power Plants, Refineries

EPA's greenhouse gas inventory is significantly underestimating methane emissions from natural gas power plants and petroleum refineries, according to a new study from Purdue University that suggests the categories “contribute significantly” to U.S. emissions and recommends further work -- including enhanced monitoring -- to understand and curb the emissions.

House Lawmakers Weigh Options To Speed Water Infrastructure Projects

House lawmakers are weighing options to speed water infrastructure projects as part of a potential legislative deal between Congress and the White House on boosting overall infrastructure funding, with Republicans saying they favor streamlining environmental reviews for projects while Democrats are focusing on increasing spending.

Daily Feed

Medical groups form consortium to raise concerns on climate risks

“There has been relatively little public discussion of the health harms of climate change. But we also know people are eager to hear from us,” the medical associations write.

Canada's McKenna eyes 'common ground' with Pruitt

The Canadian environment minister also said she “will make the economic case for clean energy innovation” to Pruitt, adding that the incentive for cleaner energy “is there . . . no matter your perspective on climate.”

EPA announces intent to reopen vehicle GHG decision

The administration says the move is justified because the Obama EPA did not consult the National Highway Traffic Safety Administration when it made the January determination to retain its GHG standards.

Ewire: A daily news roundup

EPA faces “deeper” budget cuts than previously reported. Plus, EPA works to limit cyber threats and Inhofe's new influence.

Pruitt faces ozone deadline suit in California

If it reaches litigation, the case could be an early test of the new administrator's vow not to engage in so-called “sue-and-settle” deals.

Read all the latest EPA news, analysis and documents →

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To: Stern, Allyn[Stern.Allyn@epa.gov]
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Sent: Wed 3/15/2017 11:15:05 AM
Subject: The Morning Headlines from InsideEPA.com -- March 15, 2017

The critical environmental policy-making news you need as you begin your day

March 15, 2017

Latest News

Trump Moves To Reopen EPA Vehicle Rules, With NHTSA 'More Of A Partner'

President Donald Trump is poised to announce during a March 15 visit to Michigan a plan to formally reverse EPA's decision to maintain light duty vehicle greenhouse gas standards for model years (MY) 2022-2025, with a senior official saying transportation officials will play a greater role in the decision than when the Obama administration made its decision.

Industry Petition Tees Up Issues For Revised EPA RMP Rule, Litigation

The industry petition that prompted the Trump administration to agree to reconsider the Obama-era overhaul of EPA's risk management plan (RMP) facility accident prevention program tees up numerous issues on which the agency may seek public input, including the threshold question of whether the finding that arson caused the fire that drove the rulemaking undermines the need for the final rule.

EPA Opens Door To Consolidating ESPS Suits But Seeks Additional Parties

The Trump EPA is opening the door to an industry request to consolidate pending challenges over the Obama administration's denials of their administrative petitions concerning EPA's power plant greenhouse gas rule into the separate, already-argued cause on the rule's merits -- a move that would further delay a long-awaited ruling.

District Court Weighs Claims Over EPA's Liability For Gold King Mine Spill

New Mexico and the Navajo Nation are urging a federal district court to hold EPA liable for its role in the 2015 Gold King Mine wastewater spill, arguing that the Superfund law does not shield a government agency from penalties for its negligence and that the court should allow their lawsuits to proceed.

Sen. McCain Seeks IG Information On EPA Mine Spill Criminal Investigation

Sen. John McCain (R-AZ) is asking EPA's Office of Inspector General (OIG) to release new information from its investigation into potential criminal wrongdoing by officials involved in an agency cleanup team's accidental release of millions of gallons

of wastewater from the abandoned Gold King Mine in Colorado in 2015.

9th Circuit To Hear Suit Over SO2 NAAQS Designations Consent Decree

The U.S. Court of Appeals for the 9th Circuit will hear oral argument March 16 in litigation filed by several states seeking to overturn a federal district court approval of a consent decree between the Sierra Club and EPA setting a deadline for issuing findings of which areas are attaining the agency's sulfur dioxide (SO2) air standard.

Judge Sets Three-Year Deadline For EPA To Review 20 Air Toxics Rules

A federal district court is ordering EPA to within three years complete reviews of existing air toxics rules for 20 industrial sectors and determine whether to revise them, siding with environmentalists in a lawsuit that argued the agency is many years overdue on meeting Clean Air Act deadlines for assessing whether the rules are adequate.

Monsanto Fights Push To Remand Washington PCB Claims To State Court

Chemical manufacturer Monsanto and two offshoot companies are fighting Washington state's attempt to move litigation seeking compensation for damages and cleanup costs caused by polychlorinated biphenyls (PCBs) from federal court back to state court.

Daily Feed

Trump's order expected to target host of Obama climate policies

Bloomberg reports that the president's upcoming climate executive order will target a host of Obama administration climate policies, including EPA's power plant rules, NEPA guidance and more.

Refiners target EPA's cellulosic targets in 2017 RFS

Refiners are detailing alleged flaws with EPA's 2017 renewable fuel standard (RFS), but a federal appeals court will delay the case until it rules on a suit over the agency's 2014-2016 RFS.

Most read: EPA regions, budget cuts and federal-state relationships

OMB plans to eliminate EPA regions, industry defends EPA programs and EPA-state relations.

Carper urges Pruitt to retain GHG risk finding, power sector rules

Pruitt's statement that carbon dioxide is not a “primary contributor” to climate change is “scientifically false” and in “direct contradiction” with his Senate confirmation testimony, Sen. Tom Carper writes.

Ewire: A daily news roundup

Trump warned over planned reopening of EPA's vehicle greenhouse gas standards. Plus, the national security case for funding EPA.

Obama deal on air monitoring guide tests Pruitt on sue-and-settle

Texas and Ohio are urging EPA to include states in future deadline settlements with environmentalists that result in new state burdens.

Read all the latest EPA news, analysis and documents →

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Subject: The Morning Headlines from InsideEPA.com -- March 9, 2017

The critical environmental policy-making news you need as you begin your day

March 9, 2017

Latest News

ECOS Mounts Defense Of EPA's State Funding Assistance From FY18 Cuts

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

Industry Asks Pruitt To 'Rescind' Obama EPA's RMP Rule Pending Litigation

A broad coalition of petrochemical, power and other industry groups is petitioning EPA Administrator Scott Pruitt to “reconsider and rescind” the Obama administration's final rule overhauling the agency's industrial facility accident prevention program even as the groups prepare to file litigation that they hope will lead to the rule's elimination.

EAB Suit Claims Unlawful EPA 'Rewriting' Of Waste Combustor MACT Rule

A waste disposal company's pending Environmental Appeals Board (EAB) suit accuses EPA Region 5 of unlawfully “rewriting” the agency's hazardous waste combustor (HWC) maximum achievable control technology (MACT) air toxics rule, saying an air permit the region issued sets stricter monitoring mandates than the MACT requires.

DOJ Asks Supreme Court To Stay Suit On Venue For CWA Rule Challenges

The Department of Justice (DOJ) is asking the Supreme Court to stay a suit on which courts should hear challenges to the Obama EPA's Clean Water Act (CWA) jurisdiction rule while the agency weighs revising or scrapping the rule, signaling the case could end without a decision and leave uncertainty on the venue for suits over a future rule.

Pruitt May Have To Embrace 'Sue-And-Settle' Tactic He Pledged To End

EPA Administrator Scott Pruitt has promised to end “sue-and-settle” suits that

environmentalists bring to enforce missed statutory deadlines, but many observers say he may have to embrace the tactic or face the risk of courts imposing much shorter deadlines than what he would otherwise be able to negotiate.

Environmentalists Vow Strong Opposition To Trump Bid To End CPP Suit

Environmental groups say they intend to oppose any Trump administration request for the U.S. Court of Appeals for the District of Columbia Circuit to remand or place in abeyance litigation over EPA's power plant greenhouse gas rule, saying it is important for the court to rule on many issues in the case regardless of whether the Trump EPA intends to scale back the rule.

White House Said To Defer Attack On California's Vehicle GHG Waiver Power

The Trump administration appears likely to defer any attack on California's authority to regulate vehicle greenhouse gases until at least a few months after an expected announcement due in the coming days to revisit EPA's light-duty vehicle GHG standards, according to sources tracking the issue.

Daily Feed

OIRA's 'Unified Agenda' memo seeks to bolster deregulatory agenda

The memo reminds agencies to comply with President Trump's recent executive order that requires agencies to identify rules for repeal.

DOJ nominee acknowledges deregulatory order subject to APA

“Any regulatory action taken by any agency of the government has to comply with the requirements” of the APA, the nominee for associate attorney general said.

Quote-unquote: budget cuts, states’ rights, and the emerging Trump EPA

EPA's budget, vehicle rules, federalism and more.

Pruitt joins Trump to talk infrastructure

EPA Administrator Scott Pruitt joins President Trump, other cabinet members and business leaders to discuss infrastructure issues.

D.C. Circuit rejects brick MACT suit briefing extension

The appellate court's rejection of a briefing extension means that the next briefs are due March 17.

IG launches probe of EPA vehicle emissions testing

The new inquiry will seek to determine whether EPA's “existing internal controls are

effective at detecting and preventing light-, medium-, and heavy-duty on-road vehicle emissions fraud."

Ewire: A daily news roundup

Pruitt's early staff picks. Plus, Murkowski's home-state budget priorities and EPA's Energy Star program.

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From: E&E News
Sent: Mon 7/24/2017 11:24:17 AM
Subject: July 24 -- E&E Daily is ready

E&E DAILY -- Mon., July 24, 2017
https://www.eedaily.com

For these stories and more go to
https://www.eenews.net/eedaily/2017/07/24/full

1. CLIMATE: Dem senators to pitch carbon tax plan to conservative group
https://www.eenews.net/eedaily/2017/07/24/stories/1060057763

A pair of Democratic senators will return to a conservative think tank this week to unveil a proposal to impose a carbon tax to curb greenhouse gas emissions.

TOP STORIES

2. APPROPRIATIONS: Hundreds of amendments likely for first House 'minibus'
https://www.eenews.net/eedaily/2017/07/24/stories/1060057765

3. NATURAL RESOURCES: Marathon markup to tackle 21 land, renewable energy bills
https://www.eenews.net/eedaily/2017/07/24/stories/1060057766

4. WILDLIFE: Panel takes up conservation bill amid gray wolf conflict
https://www.eenews.net/eedaily/2017/07/24/stories/1060057768

ADMINISTRATION

5. NATIONAL PARKS: Zinke announces $50M in grants for park maintenance
https://www.eenews.net/eedaily/2017/07/24/stories/1060057776

IN THE SENATE

6. OCEANS: Panel takes aim at sea trash
https://www.eenews.net/eedaily/2017/07/24/stories/1060057762

7. INFRASTRUCTURE: Trump plan to expedite permitting comes under review
https://www.eenews.net/eedaily/2017/07/24/stories/1060057770

8. NOMINATIONS: Senate to approve Interior No. 2 today
https://www.eenews.net/eedaily/2017/07/24/stories/1060057774

9. TECHNOLOGY: Lawmakers to delve into carbon capture, nuclear woes
https://www.eenews.net/eedaily/2017/07/24/stories/1060057778

10. NOMINATIONS: N.D. judge at center of WOTUS fight to face senators
https://www.eenews.net/eedaily/2017/07/24/stories/1060057771

11. NATURAL RESOURCES: Yellowstone mining ban, water rights bills on panel's agenda

https://www.eenews.net/eedaily/2017/07/24/stories/1060057764

12. FEDERAL AGENCIES: Committee to consider workforce, regulations bills
https://www.eenews.net/eedaily/2017/07/24/stories/1060057769

IN THE HOUSE

13. ENERGY MARKETS: Lawmakers to vote on tweaked Russia sanctions bill
https://www.eenews.net/eedaily/2017/07/24/stories/1060057785

14. BIOFUELS: 2 panels to enter fray as fight over ethanol intensifies
https://www.eenews.net/eedaily/2017/07/24/stories/1060057775

15. LAW: GOP lawmakers gear up for repeat attack on 'sue and settle'
https://www.eenews.net/eedaily/2017/07/24/stories/1060057753

16. NATURAL RESOURCES: Coal, carbon and Minn. mining bills get hearing
https://www.eenews.net/eedaily/2017/07/24/stories/1060057772

17. ELECTRICITY: Grid operators to share reliability, planning
https://www.eenews.net/eedaily/2017/07/24/stories/1060057773

18. SUSPENSIONS: House to vote on land bills
https://www.eenews.net/eedaily/2017/07/24/stories/1060057777

UPCOMING MARKUPS AND HEARINGS

19. CALENDAR: Activity for July 24 - July 30, 2017
https://www.eenews.net/eedaily/2017/07/24/calendars

E&ETV'S ONPOINT

20. DOE: SunShot director talks new funding, future of program under Trump
https://www.eenews.net/tv/videos/2239/preview

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GREENWIRE -- Mon., July 17, 2017
https://www.greenwire.com

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1. ENERGY POLICY: Pipeline's path paved with high hopes — and broken dreams
https://www.eenews.net/greenwire/2017/07/17/stories/1060057421

RITTMAN, Ohio — Promoters of the Nexus pipeline say it will bring "energy, jobs and a vibrant economy" as it carries cheap Appalachian gas to power plants in Ohio and Michigan. But the ballyhooed project means heartbreak for retiree Tom West and his neighbors here.

TOP STORIES

2. DOE: Leaked text disappears from grid study
https://www.eenews.net/greenwire/2017/07/17/stories/1060057486

3. AIR POLLUTION: 'Sue and settle' critic Pruitt abides by NOx consent decree
https://www.eenews.net/greenwire/2017/07/17/stories/1060057465

4. LAW: Trump staffs up DOJ's enviro division
https://www.eenews.net/greenwire/2017/07/17/stories/1060057483

TRANSITION

5. EPA: Chemical appointee pushes back on 'distractions'
https://www.eenews.net/greenwire/2017/07/17/stories/1060057461

POLITICS

6. NEVADA STANDOFF: Roger Stone urges Trump to pardon the Bundys
https://www.eenews.net/greenwire/2017/07/17/stories/1060057484

7. PEOPLE: Former Sen. Ayotte joins enviro group
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8. ADVOCACY: Enviro ads target vulnerable Republicans over EPA cuts
https://www.eenews.net/greenwire/2017/07/17/stories/1060057485

9. NATIONAL MONUMENTS: Gov. Brown gets no answer from Zinke on Cascade-Siskiyou
https://www.eenews.net/greenwire/2017/07/17/stories/1060057482

10. CAMPAIGN 2018: Caitlyn Jenner mulls Senate bid for Feinstein's seat
https://www.eenews.net/greenwire/2017/07/17/stories/1060057469

NATURAL RESOURCES

11. GREAT LAKES: 'At the end of the day ... the water had to go somewhere'
https://www.eenews.net/greenwire/2017/07/17/stories/1060057460

12. MARINE MAMMALS: NOAA suspends rescue efforts for trapped whales
https://www.eenews.net/greenwire/2017/07/17/stories/1060057462

13. WILDLIFE: Devastating bat disease targeted by new federal grants
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14. TRIBES: Navajo panel rejects Grand Canyon gondola plan
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15. WETLANDS: Company restores marsh but fails to make a profit
https://www.eenews.net/greenwire/2017/07/17/stories/1060057474

16. WILDLIFE: Wolf rebound leaves ranchers tense
https://www.eenews.net/greenwire/2017/07/17/stories/1060057471

LAW

17. WATER POLLUTION: Greens seek rehearing on EPA withholding power plant data
https://www.eenews.net/greenwire/2017/07/17/stories/1060057468

18. EMISSIONS: Ex-Suzuki employee pleads guilty on motorcycle cheat
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CLIMATE CHANGE

19. OIL AND GAS: Emissions surge as production areas age — study
https://www.eenews.net/greenwire/2017/07/17/stories/1060057476

20. PARIS AGREEMENT: Charm may have softened Trump's stance — Macron
https://www.eenews.net/greenwire/2017/07/17/stories/1060057470

ENERGY

21. SOLAR: DOE to track rooftop systems in forecasts
https://www.eenews.net/greenwire/2017/07/17/stories/1060057480

AIR AND WATER

22. AIR POLLUTION: Texas companies often go unpunished for industrial incidents
https://www.eenews.net/greenwire/2017/07/17/stories/1060057475

PUBLIC HEALTH

23. SOLID WASTE: Communities deal with pollution from drug crisis
https://www.eenews.net/greenwire/2017/07/17/stories/1060057478

24. AGRICULTURE: Grisly farmworker deaths highlight risky industry
https://www.eenews.net/greenwire/2017/07/17/stories/1060057473

RESEARCH

25. SCIENCE: Massive costs loom for famed Antarctic research station
https://www.eenews.net/greenwire/2017/07/17/stories/1060057479

STATES

26. FLORIDA: Auditors find $26M in 'questionable costs' at water district
https://www.eenews.net/greenwire/2017/07/17/stories/1060057472

27. WASHINGTON: Lawmakers deadlock over massive budget, water bill
https://www.eenews.net/greenwire/2017/07/17/stories/1060057477

28. FLORIDA: 225-foot-wide sinkhole swallows 2 homes
https://www.eenews.net/greenwire/2017/07/17/stories/1060057463

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E&E DAILY -- Thu., July 13, 2017
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For these stories and more go to
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1. DEFENSE: House to debate climate impact on national security
https://www.eenews.net/eedaily/2017/07/13/stories/1060057310

Even though the House is debating an amendment on climate to the Pentagon policy bill, leaders blocked other Democratic proposals on the issue.

ON THE HILL

2. CARBON CAPTURE: After Kemper debacle, senators see promise in CCS bill
https://www.eenews.net/eedaily/2017/07/13/stories/1060057308

3. AGENDA: House budget standoff could stall spending bills
https://www.eenews.net/eedaily/2017/07/13/stories/1060057309

4. WATER POLICY: House passes contentious drought bill
https://www.eenews.net/eedaily/2017/07/13/stories/1060057304

5. OFFSHORE DRILLING: Calif. in crosshairs as panel wrangles over development
https://www.eenews.net/eedaily/2017/07/13/stories/1060057306

6. LAW: Lawmakers approve 'sue-and-settle' bill
https://www.eenews.net/eedaily/2017/07/13/stories/1060057303

7. ENERGY MARKETS: Frustration mounts over Russian sanctions standoff
https://www.eenews.net/eedaily/2017/07/13/stories/1060057302

8. WILD HORSES: House panel moves to block BLM from killing excess animals
https://www.eenews.net/eedaily/2017/07/13/stories/1060057307

9. INFRASTRUCTURE: Experts fret about funding instability under Trump
https://www.eenews.net/eedaily/2017/07/13/stories/1060057305

UPCOMING MARKUPS AND HEARINGS

10. CALENDAR: Activity for July 10 - July 16, 2017
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E&ETV'S ONPOINT

11. BIOFUELS: Dinneen talks next steps for industry following EPA's 2018 proposal

https://www.eenews.net/tv/videos/2237/preview

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The Heritage Foundation

SPECIAL REPORT

No. 193 | JuNe 30, 2017

Blueprint for Reorganization: Pathways to Reform and Cross-Cutting Issues

Edited by David B. Muhlhausen, PhD

The Heritage Foundation

Blueprint for Reorganization: Pathways to Reform and Cross-Cutting Issues

Edited by David B. Muhlhausen, PhD

SR-193

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This paper, in its entirety, can be found at:
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Blueprint for Reorganization: Pathways to Reform and Cross-Cutting Issues

David B. Muhlhausen, PhD

Introduction

President Donald Trump has called for a systematic restructuring of the executive branch, led by the Office of Management and Budget (OMB). The President's executive Order No. 13781 is "intended to improve the efficiency, effectiveness, and accountability of the executive branch."[1] More important, the OMB is directed "to propose a plan to reorganize governmental functions and eliminate unnecessary agencies."[2]

The OMB was instructed to present President Trump with a comprehensive executive branch–wide reorganization plan. Paraphrasing the executive order, the OMB's recommendations are to be guided by the following key considerations:

- Whether the functions of an agency are appropriate for the federal government or would be better left to state and local governments or to the private sector;
- Whether the functions of an agency are redundant with the functions of other agencies;
- Whether administrative fuctions for operating an agency are redundant with those of other agencies;
- Whether the costs of an agency are justified by the public benefits it provides; and
- What it would cost to shut down or merge agencies.[3]

This document, "Blueprint for Reorganization: Pathways to Reform and Cross-Cutting Issues," is a follow-up report to "Blueprint for Reorganization: An Analysis of Departments and Agencies."[4] The initial report contains numerous bold and timely recommendations to downsize and reform the executive branch. However, the success of the President's executive order faces considerable obstacles, which can be overcome with legislative changes that are explained in this follow-up report.

Chapters 1 to 4 of this report discuss the problems of a cluttered and overgrown federal government,

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the history of executive branch reorganizations, and the various pathways for how a successful reorganization can take place today.

Chapters 5 to 12 detail cross-cutting issues that cut across a broad array of departments and agencies within the executive branch. Packed within these chapters are innovative ideas to fundamentally reshape the executive branch in order to achieve a more efficient and streamlined federal government. While the task at hand is daunting, achieving meaningful reform is possible—and critical for right-sizing the federal bureaucracy, as well as unleashing economic growth and prosperity for the American people.

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Chapter 1: The Problem with a Bloated, Ineffective Government

Rachel Greszler and David B. Muhlhausen, PhD

The U.S. government is enormous. It employs more people than the combined populations of Wyoming, Vermont, Alaska, North Dakota, and South Dakota,[1] and it consumes more than 20 cents of every dollar of American gross domestic product (GDP).[2] Its services expand far beyond national security and the rule of law—the federal government's tentacles reach into virtually every sector and industry of the American economy.

This is not what America's Founding Fathers envisioned. In his first inaugural address, Thomas Jefferson rhetorically asked, "[W]hat more is necessary to make us a happy and a prosperous people?" His answer:

> A wise and frugal government, which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned.[3]

In many ways, the U.S. government lacks the sensibility and frugality envisioned and desired by the Founding Fathers. Americans clearly sense that the federal government has gone astray. According to a 2015 Gallup poll, 60 percent of Americans think the federal government has accumulated too much power.[4] Similarly, a 2017 Rasmussen Report survey found that 52 percent of Americans favor a smaller government with fewer taxes, compared to 36 percent preferring more services and higher taxes.[5]

Today, federal departments and agencies perform functions for which they were never intended. This mission creep means that many departments perform functions that are extraneous to their original purposes. Moreover, related functions are scattered throughout the federal government. An example of this mission creep and scattering are the 47 job-training programs operated by the Departments of Labor, education, Health and Human Services, Agriculture, the Interior, Veterans Affairs, Defense, Justice, and the Environmental Protection Agency.[6] Putting aside the wisdom of government intervention for job training, such dispersion of job-training programs make no sense.

Scattering and mission creep among the various departments means that the President has inadequate control of the executive branch. Reorganizing the executive branch around the core missions of departments should contribute to better management. Additionally, a more coherently structured executive branch should make oversight by Congress easier.

Led by the Office of Management and Budget (OMB), President Donald Trump has embarked on what he intends to be an unprecedented restructuring of the executive branch of the federal government. As specified in the President's executive order on this matter, the goal is a leaner, more efficient, and more accountable federal government that provides uniquely federal services not available in the private sector or through state and local governments. This includes modernizing the federal workforce and eliminating barriers to delivery of effective government services. Although not the primary goal, it will also include an overall reduction in the federal workforce.[7]

In response to the OMB's request for ideas from any and all individuals and organizations, The Heritage Foundation has prepared these "Blueprint for Reorganization" reports to help achieve a leaner, more efficient, and more accountable federal government. America is still a great nation, but the federal government's massive size and inefficient operations are increasingly preventing it from serving its people the way the Founding Fathers intended.

Scale of Government Employment

The federal government directly employs about 4.1 million workers, including about 1.4 million uniformed military members.[8] Although direct civilian employment has not changed substantially over the past decades, the federal government's de facto employment has grown substantially. Millions of workers rely either in part or entirely on federal contracts for their paychecks. Between just 2000 and 2012, federal spending on contracts increased by 87 percent, to $518 billion in 2012.[9] Moreover, the federal government provides roughly $550 billion in aid to state and local governments. These funds indirectly pay all or some of the salaries of many state and local

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government workers.[10] The federal government also subsidizes certain private-sector workers and businesses through its many programs and tax credits and deductions. For example, the government directly funds certain research projects and its select tax credits and deductions subsidize workers in industries, such as farming, higher education, and housing.

Consequently, when policymakers consider reducing total federal spending, federal workers are not the only ones who object. The government's massive reach into nearly every state, city, and industry creates inertia in an ever-expanding government. When everyone has a stake in one government program or another, no one wants comprehensive government reform.

Provider of Everything But the Kitchen Sink

Once the provider of a national defense and judicial system, the federal government now directly provides or subsidizes just about every aspect of American life—from food, health care, housing, childcare, and transportation to cell phones, television and radio broadcasting, video games, and yoga classes.

Former Senator Tom Coburn (R–OK) and current Senator Rand Paul (R–KY) have documented some of the most egregious uses of federal taxpayer dollars. Senator Paul's most recent "Festivus" report documented the federal government paying for: Pakistani children to travel to the U.S. to attend space camp and visit Dollywood; Albanian tourism promotion; a winemaking curriculum; a flower show; and a study on whether college students' friends have an impact on their weight gain in their freshman year.[11]

Notion of Free Services. A significant problem with government spending is that most people view government services as free. As any economist will point out, however, there is no such thing as a free lunch, or, in this case, a free government service.

An estimated 12.5 million[12] households receive "free" cell phone services through the Lifeline program, while all *other* cell phone users pay about $2.50 per month to cover Lifeline and other federal communications programs.[13] What is "free" to one person cannot be free to every person.

Spread across roughly 125 million households across the U.S.—and in comparison to the federal government's $4.0 trillion in total spending—many of the government's spending line items can be reduced to marginal, "free" services. Whereas individuals or companies would have to invest millions to undertake certain projects, special interests can petition the government to socialize—or marginalize—those costs into spare change for average Americans.

The problem is, however, that all of the government's special interests' unnecessary, wasteful, and duplicative spending quickly adds up. The sum of all of the government's "spare change" spending leaves the average American with little change to spare.

Spending Other People's Money. As the late Nobel Laureate Milton Friedman observed, we never spend other people's money as carefully as we spend our own.[14] Individuals experience this as they dine out with the corporate credit card, as do children when they spend their parents' money. If a person does not have to earn the money he spends, he will not fully appreciate its value. Likewise, individuals in charge of spending taxpayers' dollars do not apply the same prudence they do in spending their own dollars.

Massive Budget Marginalizes Monumental Costs. That lack of prudence applied to the government's $4.0 trillion budget marginalizes otherwise monumental decisions. If an individual had $1,000 on the line, or a business had $100,000 on the line, the individual and business would devote significant time and effort to that task or decision. With agency budgets in the hundreds of millions and hundreds of billions, it is not in many politicians' or bureaucrats' interest to devote significant time and resources to saving $1 million here or even $100 million there. This is especially true under the federal government's broken budget process which, due to lack of regular oversight and a misguided focus on outputs rather than outcomes, penalizes savings with smaller future budgets and rewards overruns with budget increases.

Monopoly on Federal Tax Collection. Individuals and businesses have to compete for limited financial resources. If a family does not spend its money wisely, it cannot just simply request a bigger paycheck the next month. Similarly, if a company spends money needlessly or pays for things that benefit only one or two people in the organization, it cannot just increase prices to cover those costs—at least not without losing customers. Even state and local governments face some competition to keep their residents from moving across state or county lines.

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The federal government, however, has very little competition. Most U.S. citizens cannot freely pick up and move to another country of their choosing. If the government spends money on wasteful, inefficient, unnecessary, duplicative, and crony things, it can just raise taxes or deficits with little or no immediate consequence. This lack of competition and consequence establishes a lower bar for federal spending. That lower bar causes individuals, businesses, and state and local governments—and the federal lawmakers who represent them—to seek federal provision of goods and services that should instead be paid for by those who stand to benefit.

Deadweight Costs and Improper Payments. Government redistribution involves significant leakage. That is, when the government takes $1 from John to give to Sue, Sue ends up with significantly less than $1. That is because it takes time and effort—that is, money—to collect that dollar, determine who is eligible to receive it, and ultimately deliver what is left of that dollar to Sue.

Take the example of the Lifeline program mentioned above which provides "free" cell phones and cellular service to as many as one-third of all U.S. households. A report by the non-partisan Government Accountability Office[15] said that the Lifeline program is an inefficient and costly program, and an economic study found that every dollar of actual Lifeline support results in 65 cents of administrative costs.[16] In other words, $1 taken from John provides Sue with only 35 cents in benefits. That's 65 cents in deadweight loss.

While the government spends vast sums of money administering programs and trying to make sure the money it collects goes only to the intended recipients, it still delivers tens of billions of dollars in improper payments each year. The federal government spends more than $80 billion a year in Child Tax Credits and earned Income Tax Credits, of which about $21 billion—more than 25 percent—goes to improper payments.[17] In 2016, the Medicare program doled out $41 billion in improper payments.[18]

Costly and Inefficient Tax Subsidies. At least in principle, the federal government uses tax deductions and credits to encourage what it considers favorable behaviors. While some of those credits and subsidies do help to generate their intended effect, they do so with significant cost and sometimes adverse consequences, and others, such as the state and local tax deduction, are outright counterproductive.

By allowing federal taxpayers to deduct their state and local taxes, the federal government effectively pays for up to 40 percent of state and local government services.[19] This encourages state and local governments to spend more than they otherwise would, and it causes them to turn appropriately private services into inappropriately public ones. For example, many jurisdictions provide public trash collection. That effectively reduces taxpayers' trash collection costs by up to 40 percent, but it does so by shifting those costs to federal taxpayers. Why should residents in Wheeler County, Georgia, have to pay for a portion of the trash collection of residents in Montgomery County, Maryland—one of the richest counties in America?

While most federal spending redistributes money from higher-income Americans to lower-income ones, the state and local income tax does the opposite. Residents in the high-income states of New York and California receive 30 percent of all state and local tax deductions,[20] and according to the Congressional Budget Office, 80 percent of the value of the state and local tax deduction goes to the top 20 percent of taxpayers.[21]

Although not a direct part of government organization, a more efficient tax system—one that does not exclude large portions of the tax base and one that does not tax savings twice—could help limit the federal government's size and improve its productivity.

Diminished Federalism

Congress has persistently expanded the scope and power of the federal government beyond its proper constitutional purview. The largest expansion in federal spending since World War II has occurred due to the creation of programs to address numerous social and economic concerns. This large and overextended federal bureaucracy fails at its most basic functions for being distracted by matters that belong in the proper purview of states, localities, and the private sector.

As Heritage's *Index of U.S. Military Strength* demonstrates, America's military services and the United States' nuclear enterprise is suffering from force degradation resulting from many years of underinvestment, poor execution of modernization programs, and the negative effects of budget sequestration (cuts in funding) on readiness and capacity.[22] Congress should refocus on its core constitutional responsibility to provide for the

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nation's defense. Moreover, in order to make good on the promise to "care for him who has borne the battle," Congress also needs to exercise more oversight over the Department of Veterans Affairs (VA), to ensure the VA pursues reforms aimed at providing timely access to quality care for current veterans and a reassessment of how best to serve the health care needs of future veterans. Excessively long wait lines that have caused too many veterans to die before ever receiving care are completely unacceptable. These are just a few of the areas where the federal government has fallen short, as federal funding and congressional oversight resources have been stretched over an increasingly expansive federal bureaucracy.

Federal government activities should be strictly limited to those assigned to it by the Constitution. The tendency to search for a one-size-fits-all solution at the national level to a variety of economic and social concerns is misguided and harmful.

Compassion is often used as justification for federal expansion into the constitutional purview of state and local governments, and those suffering from problems such as crime and poverty deserve compassion. However, the federal government is handicapped at addressing these problems because it is not close to them. Just as a parent is better equipped at addressing the needs of his own child living in his home than of a distant relative living hundreds of miles away, state and local governments and private sector organizations are better-equipped to deal with the unique social and economic needs of the people in their immediate surroundings.

Although the federal government has an advantage in *funding* such programs—through its monopoly on federal taxation and seemingly limitless deficit-financed spending—its bankrolling ultimately inflates costs because those administering federal programs (often state and local officials) have little incentive to restrain expenses. This leaves current and future federal taxpayers with the tab for inefficient programs that are of little benefit—and potentially even detrimental—to them. Moreover, when the federal government intervenes in the provision of appropriately state and local or private services, it displaces existing programs, many of which better accommodate individuals' needs, and squelches innovation and experimentation that help determine best practices which ultimately can improve programs and services across the country.

One of the most egregious areas of government intervention in this way is in energy markets and research. By playing market investor through loan programs, research, development, and commercialization, the federal government jeopardizes taxpayers' dollars and positions itself in direct competition with businesses, entrepreneurs, non-profits, and universities. Both public and private investment dollars are drawn to politically preferred projects and technologies. Other potentially promising technologies lose out and artificially look more risky simply because they lack the full faith and credit of the federal government to back them. Government intervention in the energy economy is also entirely unnecessary. energy is a multi-trillion-dollar international market, and the uS. is home to one of the world's most attractive energy sectors. The private sector is capable in meeting energy needs and looking to the future. Congress should remove all policies that subsidize specific energy technologies, whether through the tax code or through government programs to research, develop, and commercialize energy technologies.

ultimately, federal intervention into constitutionally state and local issues or private markets is a disservice to all Americans. Current and future federal taxpayers are forced to pay inflated costs for inefficient programs that are of little benefit—and potentially even detrimental—to them, and those who are supposed to benefit from newly federal programs instead receive subpar services through one-size-fits-all programs that fail to accommodate their unique needs and that lack the flexibility to adjust to changing circumstances and incentives.

While social and economic problems, such as poverty and crime, are serious and common to all states, these problems are almost entirely and inherently local in nature and should be addressed by state and local governments and the private sector. Moreover, federal intervention in private markets disrupts those markets and leaves taxpayers financing potentially inefficient resources and technologies and insolvent companies. Pouring federal funding into routine state and local or private operations misuses federal resources, distracts from the federal government's primary concerns, and squelches innovation and experimentation.

President Trump's executive order offers a rare opportunity to revive true federalism by refocusing the federal government on its essential responsibilities.

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Summary

The U.S. federal government is simultaneously 10 times the government it once was and half the government it used to be. The government's massive growth and tremendous spending have made it bigger but not better. The good news is, with so much inefficiency and unnecessary spending, there is plenty of room for improvement.

President Trump has directed the OMB to embark on a wide-scale, unrivaled government reorganization. Only time will tell how much the Administration can achieve. As the President works with agencies as well as Congress, the perfect should not be the enemy of the good. There is no such thing as a perfect government. While government failures will always exist (just as market failures will always exist), there are seemingly endless ways to improve upon the current system. This document aims to provide policies and pathways to a better government that serves the whole of its people without imposing unjustified levies and burdens on them.

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Endnotes

1. Total federal employment was about 4.9 million at the end of 2016. This includes 2.8 million civilian employees (including 619,000 postal employees) plus 2.1 million active-duty and reserve military workers (1.32 million active-duty and 817,000 reserves). Excluding military reserves, total federal employment was 4.1 million at the end of 2016. The combined populations of Alaska, North Dakota, South Dakota, Vermont, and Wyoming equal 3.575 million. Federal employment data for December 2016 is from the Bureau of Labor Statistics database, https://data.bls.gov/pdq/SurveyOutputServlet (accessed June 4, 2017). Military employment levels are from the Department of Defense's Defense Manpower Data Center, "DoD Personnel, Workforce Reports and Publications," https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp (accessed June 1, 2017). Population data is from the U.S. Census Bureau, "State Population Totals Tables, 2010-2016," Table 1. Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2016, https://www.census.gov/data/tables/2016/demo/popest/state-total.html (accessed June 1, 2017).
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Chapter 2: Pathways to Reform

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A major executive reorganization is long overdue. Republicans and many Democrats agree that the wasteful redundancies, stultifying layers of oversight, and inefficient divisions of labor that exist today contribute to a less effective and more expensive federal government. There is no shortage of ideas for how to pare down the overgrown administrative state and President Donald Trump has expressed a clear determination to lead such an effort.[1] The Office of Management of Budget (OMB) under the leadership of Director Mick Mulvaney is responsible for developing the Administration's executive branch reorganization plan.[2] In this chapter we explore the two pathways to reform that are available to the new Administration.

Unfortunately, the President, who has the strongest incentives to restructure the sprawling federal bureaucracy, is effectively barred from taking a comprehensive approach to reorganization. This is a change from the recent past. For most of the 20th century, Presidents had great leeway to rearrange the executive branch as they saw fit, subject to approval by Congress.[3] But this authority expired in 1984 and has not been renewed by Congress.

Though executive reorganization is more difficult procedurally than in the past, it is still possible, as the creation of the Department of Homeland Security (DHS) and Consumer Financial Protection Bureau (CFPB), and President Bill Clinton's National Performance Review (NPR) demonstrate. However, these efforts fall far short of the broad aspirations of the Trump Administration. In fact, modern efforts to reform the federal government have been counterproductive in the sense that they have grafted massive new appendages onto the administrative state rather than reducing and consolidating functions. To make a more comprehensive and positive contribution than recent presidential Administrations, the Trump Administration will have to avoid the pitfalls that have forestalled serious reform in the recent past.

An Abbreviated History of Executive Reorganization

Despite the fact that the President presides over the executive branch, the bulk of the administrative state is not of the President's creation. Most agencies are given life and form via legislation, are funded by appropriations from Congress, and enforce regulations authorized by statute. As such, the President cannot independently construct and reconstruct the branch over which he presides unless Congress authorizes him to do so. In 1932, Congress did just that. In that year, a heavily Democratic Congress drafted legislation to allow Herbert Hoover to draft a plan for the reorganization of the executive branch to be considered under expedited parliamentary procedures.[4] From 1932 to 1983, Congress reauthorized the President's reorganization authority, with periodic adaptations, 16 times.[5] With the exception of Gerald Ford, every President from Herbert Hoover to Ronald Reagan has had reorganization authority. Over time, however, Presidents were granted less latitude to restructure the executive branch, and plans were submitted to more rigorous procedural requirements before implementation.[6]

Presidents made frequent use of their reorganization power. On average, four reorganization plans were submitted each year the President had authority from Congress to submit such plans.[7] Congress ordinarily allowed these plans to go into effect. Of the 126 plans submitted to Congress from 1932 to 1984, 93 of them—roughly 73 percent—went into effect.[8] These plans varied greatly in terms of their scope and significance. Some plans involved relatively minor changes within a single agency, while others created agencies out of whole cloth as with the Department of Health, Education, and Welfare, the Environmental Protection Agency, and the Federal Emergency Management Agency.

The Supreme Court's 1983 decision in *Immigration and Naturalization Services (INS) v. Chadha* brought to a close the period of regular President-led executive branch reorganization. In a seven-to-two decision, the court ruled that the congressional veto, the procedure by which Congress could reject *ex post facto* reorganization plans submitted by the President, were unconstitutional. In light of the *INS v. Chadha* decision, Congress amended the 1939 Reorganization Act in 1983 to require both houses of Congress to vote to approve a President's plan. While in the past inaction on the part of Congress

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would result in the President's plan going into effect, now congressional inaction would result in a plan's death. Perhaps due to the significantly higher procedural hurdle, President Reagan did not propose any reorganization plans after 1983. When the statutory window for new reorganization plans closed in 1984, Congress did not extend it. Though the Reorganization Act remains in the U.S. Code, Congress has not revisited it since.

While the President's reorganization authority is much diminished today, Presidents have led reorganization efforts—sometimes aided by congressional action—in the years since 1984. The Clinton Administration undertook one of the most persistent efforts to reform the federal bureaucracy in history. After the completion of a six-month study, the NPR made 1,200 proposals to cut unneeded regulations, improve "customer service," expand the use of the Internet and digital technology across the federal government, eliminate unnecessary levels of bureaucracy and oversight, and increase coordination between federal, state, and local government.[9] Nevertheless, the NPR focused more on reforming the bureaucracy to improve customer service rather than rethinking the organizational structure of the executive branch.

The impact of this effort is disputed. Vice President Al Gore, who oversaw the NPR, claimed it led to the elimination of 282,000 civil service jobs, but of that number 96 percent were part of the military's civilian workforce, which was reduced following the conclusion of the Cold War.[10] Nonetheless, over a dozen badly outdated departments were eliminated with the help of newly elected congressional Republicans.[11] As important, the federal government began the transition from the analog to the digital age. Also, by some accounts, the NPR effectively addressed the growing sense of contempt among federal regulators for the private-sector businesses they oversaw.[12]

According to some analysts, President Clinton's reform effort was hampered by his Administration's deference to organized labor. Due to the influence of public-sector unions, the NPR did not impose any real consequences for poor performance or wasteful ness on the part of civil servants nor did they create any incentives for outstanding work or thriftiness. In effect, the Clinton Administration attempted to change the way government functions without changing the incentives that drive its functionaries. Further, the Clinton Administration did not try to reorganize the executive branch by consolidating departments and agencies by function.

In the post–Reorganization Act era, changes to the processes and procedures of government can be largely orchestrated from the Oval Office; though changing the architecture of government almost always requires coordination with Congress. While much of the NPR was accomplished without the assistance of Congress, the creation of DHS, a major goal of President George W. Bush, as well as of the CFPB promoted by Barack Obama, were accomplished legislatively. It is important to note that in both cases, an ordinarily lethargic Congress was spurred to action by existential threat: in the former case, 9/11; in the latter case, the Great Recession.

Lessons from the Past

The history of past executive reorganizations gives a sense of the opportunities and obstacles that await the new Administration. The good news is if history is any guide, executive branch reorganization may represent an opportunity for bipartisan action. Some of the most dogged efforts to reform the executive branch in recent years were undertaken by Democratic Presidents. Even President Obama put forward a sensible reorganization plan, which would have combined the six agencies primarily concerned with trade and commerce into one department, saving an estimated $3 billion, and eliminated 1,000 federal jobs.[13] early in his presidency, Obama also admitted the need to shift the civil service from a seniority-based pay structure to a performance-based system in the public school system, something conservatives have long supported.[14]

Lesson #1: Iron Triangles Will Fight to Protect the Status Quo. Despite a surprising degree of bipartisan consensus on the need to address the unwieldy and too-often incompetent administrative state, serious reorganization efforts face stiff resistance. This is especially true of reforms that seek to shift authority from one agency to another, merge agencies, or eliminate agencies and departments altogether. In fact, over the last half century, only one cabinet-level department has been eliminated: the Post Office Department in 1971, which was immediately refashioned as an independent agency rather than eliminated altogether.[15]

The reason for resistance is clear: Once an agency is in existence, the administrators employed by

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that agency, interest groups served by them, and the Members of Congress whose subcommittee over sees their work all have an interest in perpetuating it. These three elements—agency administrators, interest groups, and subcommittee members—are sometimes referred to collectively as "iron trian gles"[16] and they represent a formidable obstacle to eliminating even the most obviously outdated department (of which there are many[17]). Any serious effort to reorganize the fragmented and happenstance organization of the executive branch will disrupt long-established alliances between the bureaucracy, congressional committees, and special interest groups.

Lesson #2: Creating New, Redundant Entities Is Easier than Consolidating and Eliminating Existing Agencies. Due to the strong resistance to consolidating and eliminating existing agencies, reorganization efforts have focused on building new agencies and adding new layers of bureaucracy. Creating a new department or agency—as President Bush did with DHS and President Obama did with the CFPB—does not ignite nearly the same resistance. Though some will bridle as regulatory responsibility is transferred from old agencies to a new creation, there are typically at least as many Members of Congress, interest groups, and administrators who see a new agency as an opportunity to advance their career or expand their influence.

An additional reason why agencies and bureaus tend to proliferate is the difficulty of changing the organizational culture in an existing bureaucracy. Though un-elected bureaucrats are theoretically the agents of the elected representatives of the public, in reality regulators sometimes act according to their own preferences.[18] This is especially true of agencies like the Environmental Protection Agency that tend to attract committed ideologues. Agencies may also adopt the viewpoint of the industry they are meant to regulate and, as a result, adopt a hands-off mentality vis-à-vis enforcement. When an agency ceases to faithfully carry out the intentions of elected officials, it is very difficult for either Congress or the President to reassert control, since firing recalcitrant bureaucrats is nearly impossible, and monitoring their every activity is equally inconceivable. It is much easier to build a new agency that will (it is hoped) develop an organizational culture and ideological bent that is in line with the preferences of the elected officials creating it.

Lesson #3: Not Everyone Wants to Rein in Bureaucrats. While, at least in theory, there is widespread support for addressing redundancies, overlap, and fragmentation caused by the federal bureaucracy's unwieldy structure, progressives and conservatives tend to part ways when it comes to reining in the discretion of bureaucrats. Progressive advocacy of bureaucratic autonomy is rooted in both theoretical principle and pragmatic self-interest. Since the late 19th century, progressives have avowed faith in the expertise of a career civil service trained in the social sciences and a distrust of elected officials. Where politicians are focused on pleasing constituents and special interests, bureaucrats are focused only on crafting good public policy; where politicians are generalists, bureaucrats are subject matter experts; where politicians are driven by ideology, bureaucrats are driven by science. Thus, according to Woodrow Wilson, "the greater part of their affairs is altogether outside of politics."[19]

Bureaucratic autonomy not only resonates with many progressives' theories of government, it also accords with their self-interest and tends to advance their policy goals. By promising career bureaucrats limited oversight and accountability, progressives have forged a very close relationship with public-sector unions.[20] Some politicians who clearly understand the need to reform the career civil service have been unwilling to jeopardize relations with such powerful coalition partners.[21] Further, because their natural tendency is to support progressive policy priorities and undercut conservative solutions, progressive elected officials understand that granting civil servants more autonomy means that their policy agenda will move forward even if their electoral fortunes sag.[22]

Lesson #4: The Administration Should Engage Congress Early to Gain Support. The road to congressional acceptance of any meaningful reorganization of the executive branch will be paved with many obstacles and road blocks. In order to navigate this road, the Administration should actively engage Congress and seek its support. Any proposed plan created in a political vacuum may not be received well by Congress. Given the entrenched interests of congressional committee members to protect their turf and deliver programs to special interests, the Trump Administration will have to accurately gauge Congress's tolerance for reform,

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and in many cases, persuade recalcitrant Members of Congress to support meaningful reform.

By seeking out the views of Congress and other important stakeholders, the Administration can potentially achieve buy-in from Congress and avoid getting blindsided by unanticipated criticism and opposition. A savvy effort to foster political support early in the process will build a foundation that will pay dividends to the Administration and taxpayers.

Lesson #5: Relying on the Departments to Develop Their Own Reform Is Fraught with Risk. A new Administration with few political appointees in place should be wary of proposals for organizational reform coming from the depths of the bureaucracy. The goal of the President's Executive Order No. 13781 is to fundamentally rethink the organization of the executive branch, not to protect and increase bureaucratic turf.

First, department heads may respond defensively to being asked to rethink how their departments are structured, and apprehensive about closing down agencies or seeing entities transferred from their control.[23] This is because, as Anthony Downs of the Brookings Institution observed, bureaucrats are not simply conduits for the policy choices of politicians, nor vessels for a political ideology that animates their every action. They are also motivated to preserve their jobs, work as they please, and defend their turf—what Downs calls "bureau territoriality."[24] According to the Ronald Moe, "Reorganizations that are designed and implemented by the agencies themselves tend to meet parochial needs that may or may not be in concert with the President's interests."[25] Second, department heads may see an executive order as a chance for enlarging their departments.[26] According to Moe's review of the history of reorganization efforts, previous "plans submitted by the departments generally called for the aggrandizement of their functions. In no instance did a department propose to limit or shed one of its functions." For example, when President Warren Harding asked his department heads to develop an executive branch reorganization plan, Secretary of Commerce Herbert Hoover took the "opportunity to recast his Department as the centerpiece of a completely redesigned government" where the Commerce Department "would become a 'super department' responsible for government's activities in industry, trade, and transportation." [27]

Principles of Reform

The most recent reorganizations of the executive branch have been hampered by the challenges described above. Instead of simplifying and streamlining government, massive new departments and agencies have been added; instead of taking on entrenched interests, obsolete agencies have been left intact; and instead of confronting ideological agencies head on, politicians have allowed increasing insulation of career civil servants from elected officials. In contrast, future reform must accomplish the following:

- Downsize government and reduce spending;
- ease the regulatory burden on businesses and citizens;
- Prevent creation of new agencies;
- Reward performance and fiscal discipline of career civil servants;
- Re-establish elected officials' control of career civil servants; and
- Make independent agencies accountable to the executive branch.

Downsizing Government and Reducing Spending. The first objectives of any executive branch reorganization should be to reduce the size of the federal government and save the taxpayer money. Cutting redundant and wasteful agencies and offices will not cure the country's budget woes alone, but it is a critical first step to restoring fiscal responsibility in Washington. Stripping away layers of bureaucracy will likely improve the life for the average citizen and build credibility to tackle other fiscal challenges.

In addition, meaningful reform should eliminate agencies and programs that are ineffective or have no demonstrable and credible record of effectiveness. Far too frequently, the amount of money spent to alleviate social problems and the good intentions of the government-program advocates are considered measures of success. Instead, the degree to which social problems are reduced should be the measure of success. While continually spending taxpayer dollars on government programs may symbolize the

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compassion of program advocates, it does not mean that social problems are being alleviated. Intentions are often confused with results.

For decades, large-scale evaluations using the "gold standard" of random assignment have consistently found that federal social programs are ineffective.[28] For example, a scientifically rigorous evaluation of Head Start, a pre-K education program for disadvantaged children, demonstrated that almost all the benefits of the program disappear by kindergarten.[29] Alarmingly, Head Start actually had a harmful effect on participants once they entered kindergarten, with teachers reporting that non-participating children were more prepared in math skills than the children who attended Head Start.

These failures extend to numerous other federal social programs. For instance, large-scale experimental evaluations of federal job-training programs intended to help individuals find jobs and increase their earnings have consistently failed.[30] Federal training programs intended to boost entrepreneurship and self-employment of the unemployed have not worked, either. And federal job-training programs targeting teens and young adults have been found to be extraordinarily ineffective.

The simple fact is that when it comes to federal social programs, there is a dearth of evidence suggesting that these programs work. Americans should not fear eliminating ineffective federal government programs.

Easing the Regulatory Burden on Businesses and Citizens. Overlap and fragmentation between executive agencies have real consequences for citizens and businesses.[31] When multiple agencies are given nearly equivalent areas of responsibility—as is too often the case—the result is duplicative paperwork, unnecessary regulatory hurdles, and long work delays as permit requests make their way up and down labyrinthine flowcharts. Any reorganization should approach reform from the perspective of the private landowner, taxpayer, or entrepreneur who bears the brunt of the cumbersome administrative state.

Preventing Creation of New Agencies. Creating new agencies, as both Presidents Bush and Obama did, may be easier than cutting obsolete or obstinate ones, but this does nothing to "drain the swamp" as President Trump memorably pledged to do. At best, a new agency can build a bridge across the most festering sections of the quagmire. More often, new agencies end up reflecting the same perverse incentives and ideological biases that infest the rest of the administrative state.

Rewarding Performance and Fiscal Discipline of Career Civil Servants. In order for a reform of the bureaucracy to have meaningful and lasting consequences, it must do more than shuffle departments around and redraw organization charts. Without changing the incentives that drive career civil servants—especially mid-level and upper-level managers—structural changes will have little substantive impact on the way government actually operates. The new Administration should undertake not just structural and procedural reform, but also an *incentive-based reform* that will change government from the bottom up. By rewarding outstanding career civil servants, motivating those who have not realized their full potential, and incentivizing fiscal responsibility on the part of managers, civil servants will become integral partners in the reinvention of government. Chapter 8 ("Human Resources") of this volume will discuss in more detail how this can be accomplished.

Re-Establishing Elected Officials' Control of Career Civil Servants. Though most civil servants seek to carry out the law in accordance with the wishes of the people's elected representatives, some seek to scuttle programs they disagree with and sabotage politicians they dislike. This behavior is not only undemocratic, it is dangerous. While no one wants to return to the spoils system of the 1800s, reforms initially meant to assure a non-partisan civil service by protecting bureaucrats from being fired without cause are now having the exact opposite effect. The new Administration must defend the principle that elected officials, not un-elected bureaucrats, are responsible for setting public policy. Career civil servants who seek to advance their own agenda instead of faithfully carrying out the policies set by the President and Congress should pay serious consequences. Further, independent agencies—the existence of which is premised on the idea that some government functions are too important to be left to the political process—should be brought back under the control of Congress and the President.

Making Independent Agencies Accountable to the Executive Branch. Independent agencies, such as the Federal Reserve, the Federal Communications Commission (FCC), and the Securities and Exchange Commission (SEC), were founded on the

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faulty premise that some functions of the federal government are so technical and so important that they should be wholly insulated from popular opinion and elected officials. Admittedly, some policy areas demand extraordinary expertise that most legislators and Presidents, let alone average citizens, do not possess. In these areas, highly trained and experienced career civil servants are invaluable. But un-elected bureaucrats should always work at the behest of elected representatives, never the other way around.

Congress has attempted to make independent agencies more accountable in the recent past. The Independent Agency Regulatory Analysis Act of 2015 would have authorized the President to require independent regulatory agencies to comply with cost-benefit analysis requirements applicable to other federal agencies.[32] Reviving such a statute would be a solid step in the right direction. A more thorough-going program of reform would include (1) bringing independent agencies under the purview of cabinet secretaries and (2) giving the President the power to dismiss agency heads and commission members just as he can the head of the Federal Bureau of Investigation and Central Intelligence Agency—positions that demand at least as much subject matter expertise and partisan neutrality as the SEC or FCC.

Pathways to Reform

Two pathways to reform are available to the new Administration. First, the President can act alone within the constraints imposed by existing statutes and the federal budget, which together limit the basic outline of the federal bureaucracy. Second, the President can enlist the support of Congress to implement truly transformative change.

Change by Presidential Action Only. The President can act alone within the constraints imposed by existing statutes and the federal budget, which together limit the basic outline of the federal bureaucracy. As Chapter 3 ("The President's Reorganization Authority") shows in depth, the President's latitude to reorganize the federal government is constrained by federal statute. However, some smaller agencies—for example, the Citizen's Stamp Advisory Committee and the Delaware River Basin Commission—are not specifically mentioned in the U.S. Code and were not created by Congress. Such agencies are the creation of the executive branch and can be dismantled without Congress' permission. These branches of the federal government are, however, small in number and size.

While few agencies rest on an entirely extra-legal foundation, almost every agency's organizational structure, mission, and operating procedures are determined largely by regulations and internal guidance. As many analysts and academics have noted, Congress too often crafts vague statutes filled with aspirational language but very light on detail. This leaves regulators to fill in the gaps.[33] Irresponsible as this practice is, it gives Presidents significant latitude to reform the bureaucracy without overstepping legal bounds. President Trump has already discovered how much can be done to reverse bad policies through executive order, but he has yet to use the considerable authority permitted by loosely worded statutes to change the structure of agencies.

Transformative Change Requires Congressional Support. Though the President can make some headway acting alone, truly transformative change will require Congress. Acting alone, the Trump Administration will not be able to implement an overarching, government-wide reorganization, and will have to pick targets of opportunity and act in piecemeal fashion. Given the amount of duplication, overlap, and fragmentation in the federal government, the Trump Administration needs congressional approval to achieve the goals of the executive order. The bureaucracy's structure is long overdue for the sort of thorough overhaul that was common before 1984. Entrenched interests, intent on maintaining the status quo, will be a significant obstacle to major reform legislation in Congress. However, as Chapter 4 ("Congressional Action Needed for Reform") shows, there are creative ways to structure legislation so that loftier motives win the day in Congress.

Conclusion

While most modern Presidents, both Republican and Democrat, have attempted to reinvent government, the federal bureaucracy has proven very resistant to thoroughgoing change. To succeed where so many others have failed, the Trump Administration will have to carefully plot a new course bearing in mind the problems that scuttled prior reform efforts. The overarching lesson to draw from the recent past is that despite near-unanimous agreement that the federal bureaucracy has become unwieldy and inefficient, no one wants cuts and consolidations to come at their expense. No matter how sensible a change to the status quo, fierce resistance from at least one

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set of stakeholder interest groups, Members of congressional committees, and agency bureaucrats is all but guaranteed.

While vexing, these obstacles to executive reorganization must not deter the Trump Administration. Overlap, duplication, fragmentation, and the continuance of obsolete agencies makes the federal government both costly and ineffective. The American people deserve much better. Moreover, there are pathways to reform that have not yet been explored; Chapters 3 and 4 discuss several such avenues. Until every possible option is exhausted, there is still cause for hope. In fact, there is more cause for optimism today than any time in the recent past. As President Trump's electoral victory demonstrated, there is increasing frustration among the public with "the swamp." While the arcane details of executive reorganization are not generally the stuff of political slogans and campaign advertisements, they are now. Palpable pressure from the grassroots will give this President leverage in his negotiations with entrenched interests that no President in the recent past as enjoyed.

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19. Woodrow Wilson, "Government by Debate," December 1882, in Arthur S. Link, ed., *The Papers of Woodrow Wilson* (Princeton, NJ: Princeton University Press, 1967). Vol. 2: 1881–1884, p. 224.
20. Daniel DiSalvo, *Government Against Itself: Public Union Power and Its Consequences* (New York: Oxford University Press, 2015).
21. According to analysts George Nesterczuk and Donald Devine, one major limitation on President Clinton's NPR was his deference to public-sector unions throughout the reform process. George Nesterczuk, "Reviewing the National Performance Review," Cato Institute, 1996, and Donald J. Devine, "Why President Clinton's Reinventing of Government Is Not Working," *The Wall Street Journal*, 1994.

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22. The leftward tilt of the federal civil service is well known, persistent, and highly consequential for policy implementation. The past two Administrations provide several clear-cut examples of how the leftward tilt of the career civil service benefits the Democratic Party. Lois Lerner, an IRS careerist purportedly working on her own initiative, subjected the nonprofit applications of Tea Party groups to a level of scrutiny orders of magnitude higher than any other group. Career civil servants in the Trump Administration are actively sabotaging his presidency.
23. Moe, *Administrative Renewal*, p. 43.
24. Anthony Downs, *Inside Bureaucracy* (Boston: Little, Brown, 1967).
25. Moe, *Administrative Renewal*, p. 137.
26. Ibid., p. 44.
27. Ibid.
28. David B. Muhlhausen, *Do Federal Social Programs Work?* (Santa Barbara, CA: Praeger, 2013).
29. U.S. Department of Health and Human Services, Administration for Children and Families, Office of Planning, Research, and Evaluation, *Head Start Impact Study: First Year Findings*, June 2005; U.S. Department of Health and Human Services, Administration for Children and Families, Office of Planning, Research, and Evaluation, *Head Start Impact Study: Final Report*, January 2010; and Mike Puma et al., "Third Grade Follow-Up to the Head Start Impact Study: Final Report," *OPRE Report* 2012–45, October 2012. For a review of the Head Start Impact Study findings, see Muhlhausen, *Do Federal Social Programs Work?* pp. 104–125.
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31. Nicola Ulibarria, Bruce E. Cain, and Newsha K. Ajami, "A Framework for Building Efficient Environmental Permitting Processes," *Sustainability*, Vol. 9, No. 2 (2017), p. 180, and Nicola Ulibarri, "Streamlining Permitting Processes for Multi-Benefit Water Projects," Association for Public Policy Analysis and Management, Fall Conference: The Role of Research in Making Government More Effective, 2016.
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Chapter 3: The President's Reorganization Authority

Paul J. Larkin, Jr., and John-Michael Seibler

Introduction

What is the President's authority to reorganize the executive branch? The Constitution vests authority in Congress as an instance of its power to enact legislation; to create the departments, agencies, and offices within the executive branch; to define their duties; and to fund their activities. The President may create, reorganize, or abolish an office that he established, but he cannot fundamentally reorganize the executive branch in direct violation of an act of Congress.

The President traditionally has "acquiesce[ed] in the need for reorganization legislation in order to restructure or consolidate agencies within the executive Branch."[1] Prior Reorganization Acts were valuable to the President, in part because they incorporated expedited parliamentary procedures, and to Congress because they included a one-house legislative veto. But in 1983, the Supreme Court of the United States, in *INS v. Chadha*, found the legislative veto to be unconstitutional.[2] While Reagan-era legislation purported to offer a procedure to preserve presidential reorganization authority, that authority has never been used and so remains untested.[3] The most recent Reorganization Act expired in 1984.

The President retains whatever reorganization authority Congress has delegated to him by law, as well as the ability to develop task forces and commissions and to work with Congress on reorganization plans. The exact limits of the President's authority to reorganize the executive branch "can properly be analyzed only in light of the particular changes which are proposed" and the relevant statutory authority.[4]

Does the President Have Authority Under Article II of the U.S. Constitution to Reorganize the Executive Branch on His Own?

Article II of the U.S. Constitution provides three potential sources of authority for the President to reorganize the executive branch on his own. Each, however, falls short of that goal.

First, the executive Vesting Clause specifies that "[t]he executive Power shall be vested in a President of the united States of America."[5] This grants the President "those authorities that were traditionally wielded by executives" subject to constitutional constraints.[6] The Founders did not leave this as a kingly power to change government functions at will. Rather, the power to execute the laws extends only as far as the laws allow.[7] For entities created by Congress, the power to enact, amend, or abolish these executive departments and agencies and their functions belongs to Congress.[8] Article II's Take Care Clause—that "[The President] shall take Care that the Laws be faithfully executed"[9]—"refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."[10]

Yet the U.S. Supreme Court has recognized that the executive Vesting Clause did not compel the President to execute the laws alone.[11] "To aid him in the performance of these duties, he is authorized to appoint certain officers who act by his authority and in conformity with his orders."[12] May the President therefore reorganize the executive branch through subordinates in executive departments and agencies? Two more Article II clauses are pertinent, but the answer remains no.

Second, the Appointments Clause reads, "The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . [the] Officers of the united States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."[13] That provision enables the President to select officers who will implement his policies.[14] Subject to statutory restrictions,[15] the President may remove those who prove obstinate,[16] but the power to appoint and remove officers "alone does not ensure that all decisions made by administrative officials will accord with the President's views and priorities."[17]

Third, the Opinion Clause enables the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[18] This allows the President to obtain information from, and to "consult with and try to

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persuade," his subordinates in the course of their official conduct.[19] President George Washington used this process to direct subordinates' official actions, but the relevant statutes "commonly delegated final authority directly to him."[20] These provisions do not enable the President to reorganize the executive branch on his own or though subordinates.[21]

Congress, not the President or the U.S. Constitution, creates and organizes the offices and departments that the Appointments and Opinion Clauses address by virtue of the Necessary and Proper Clause.[22] "The organizational function of this clause was recognized from the outset. Among Congress's first acts were establishing executive departments and staffs."[23] When the First Congress created the Treasury Department, for example, it established therein "distinct offices—Secretary, Comptroller, Auditor, Treasurer and Register—and their duties."[24] Congress sets "to whatever degree it chooses, the internal organization of agencies," their missions, "personnel systems, confirmation of executive officials, and funding, and ultimately evaluates whether the agency shall continue in existence."[25]

Congress may delegate broad authority to executive branch officials to implement, change, and even reorganize their functions.[26] The First Congress, however, "set a precedent" of delegating "statutory powers and instructions . . . to specified officials of or below Cabinet rank, rather than to the President."[27] The President's Article II authority to oversee those powers does not amount to directing every decision that is made by someone within the executive branch.[28]

Congress can also use the Appropriations Clause to curb the President's reorganization efforts, even efforts authorized by substantive statutes.[29] The power of the purse remains "the most complete and effectual weapon" against "carrying into effect" an executive reorganization plan and any other "just and salutary measure."[30] An executive branch officer's statutory authority to execute reorganization schemes "can only be affected by passage of a new law."[31] But Congress can simply amend an appropriations law if it does not like where reorganization is headed,[32] and the Anti-Deficiency Act prohibits officers and employees of the U.S. government from going around the will of Congress in any way that involves incurring obligations in excess of appropriated funds.[33]

The result is that the President does not have constitutional authority to reorganize the executive branch on his own.

Does the President Have Statutory Authority to Reorganize the Executive Branch?

Under current law, the President has no statutory authority to reorganize the executive branch, except where acts of Congress delegate authority to make particular changes.[34]

In 1932, Congress first enacted law delegating to the President broad authority to reorganize the executive branch according to specific guidelines.[35] Since then, nine Presidents have sought and secured similar authority from Congress.[36] The last to exercise that authority was Jimmy Carter; the last to receive it was Ronald Reagan. The most recent Reorganization Act expired in December 1984.[37] Since then, Presidents George W. Bush and Barack Obama sought reorganization power from Congress,[38] which introduced but did not enact legislation that would have granted them reorganization authority.[39]

The history of delegated legislative authority for Presidents to reorganize the executive branch is informative for future usage with one caveat. Those acts were valuable in part because they provided expedited parliamentary procedures—in particular, a one-house legislative veto, which enabled either house of Congress to reject a President's reorganization plan.[40] In 1983, the U.S. Supreme Court held that the one-house veto violated the U.S. Constitution's bicameralism and presentment requirements for lawmaking.[41] In 1984, Congress enacted an alternate procedure along with reorganization authority: "that a joint resolution be introduced in both the House and Senate upon receipt of a reorganization plan."[42] No vote, no plan; no presidential signature, no plan. While that seems to follow the constitutional lawmaking process, President Reagan never used his reorganization authority, and these procedures remain untested.[43]

As a result, the President currently has no general statutory authority to reorganize the executive branch.[44] Yet Congress could decide to enact a law similar to the last-used Reorganization Act of 1977 or one of its progenitors.[45] Even without statutory authority, the President may convene a task force or commission to study concerns within the executive branch and recommend changes to Congress.[46] History provides several examples that met with varying degrees of success.[47]

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Conclusion

The President may be able to accomplish some reorganization goals through particular statutory delegations of authority, executive orders, department memos, management policies, and other devices. But to accomplish major reorganization objectives, he will need explicit statutory authority from Congress, a viable post-*Chadha* procedure to enact reorganization plans,[48] and a feasible implementation strategy.[49] As for the details of any reorganization plan, exact limits on the President's authority to reorganize the executive branch "can properly be analyzed only in light of the particular changes which are proposed" and the relevant constitutional provisions and statutory authority.[50]

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Appendix

Reorganization Act Amendments of 1984, Pub. L. 98-614, 98 Stat. 3192 (1984) (expired 1984) (codified as amended at 5 U.S.C. § 901 (1984))

5 U.S.C. § 903—Reorganization plans:

(a) Whenever the President, after investigation, finds that changes in the organization of agencies are necessary to carry out any policy set forth in section 901(a) of this title, he shall prepare a reorganization plan specifying the reorganizations he finds are necessary. Any plan may provide for—

(1) the transfer of the whole or a part of an agency, or of the whole or a part of the functions thereof, to the jurisdiction and control of another agency;

(2) the abolition of all or a part of the functions of an agency, except that no enforcement function or statutory program shall be abolished by the plan;

(3) the consolidation or coordination of the whole or a part of an agency, or of the whole or a part of the functions thereof, with the whole or a part of another agency or the functions thereof;

(4) the consolidation or coordination of part of an agency or the functions thereof with another part of the same agency or the functions thereof;

(5) the authorization of an officer to delegate any of his functions; or

(6) the abolition of the whole or a part of an agency which agency or part does not have, or on the taking effect of the reorganization plan will not have, any functions.

The President shall transmit the plan (bearing an identification number) to the Congress together with a declaration that, with respect to each reorganization included in the plan, he has found that the reorganization is necessary to carry out any policy set forth in section 901(a) of this title

(b) The President shall have a reorganization plan delivered to both Houses on the same day and to each House while it is in session, except that no more than three plans may be pending before the Congress at one time. In his message transmitting a reorganization plan, the President shall specify with respect to each abolition of a function included in the plan the statutory authority for the exercise of the function. The message shall also estimate any reduction or increase in expenditures (itemized so far as practicable), and describe any improvements in management, delivery of Federal services, execution of the laws, and increases in efficiency of Government operations, which it is expected will be realized as a result of the reorganizations included in the plan. In addition, the President's message shall include an implementation section which shall (1) describe in detail (A) the actions necessary or planned to complete the reorganization, (B) the anticipated nature and substance of any orders, directives, and other administrative and operational actions which are expected to be required for completing or implementing the reorganization, and (C) any preliminary actions which have been taken in the implementation process, and (2) contain a projected timetable for completion of the implementation process. The President shall also submit such further background or other information as the Congress may require for its consideration of the plan.

(c) Any time during the period of 60 calendar days of continuous session of Congress after the date on which the plan is transmitted to it, but before any resolution described in section 909 has been ordered reported in either House, the President may make amendments or modifications to the plan, consistent with sections 903–905 of this title, which modifications or revisions shall thereafter be treated as a part of the reorganization plan originally transmitted and shall not affect in any way the time limits otherwise provided for in this chapter. The President may withdraw the plan any time prior to the conclusion of 90 calendar days of continuous session of Congress following the date on which the plan is submitted to Congress.

5 U.S.C. § 908—Rules of Senate and House of Representatives on reorganization plans:

Sections 909 through 912 of this title are enacted by Congress—

(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions with respect to any reorganization plans transmitted to Congress (in accordance with section 903(b) of this chapter[1]) on or before December 31, 1984; and they supersede other rules only to the extent that they are inconsistent therewith; and

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(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

5 U.S.C. § 909—Terms of resolution:

For the purpose of sections 908 through 912 of this title, "resolution" means only a joint resolution of the Congress, the matter after the resolving clause of which is as follows: "That the Congress approves the reorganization plan numbered transmitted to the Congress by the President on , 19.", and includes such modifications and revisions as are submitted by the President under section 903(c) of this chapter. The blank spaces therein are to be filled appropriately. The term does not include a resolution which specifies more than one reorganization plan.

5 U.S.C. § 910—Introduction and reference of resolution:

(a) No later than the first day of session following the day on which a reorganization plan is transmitted to the House of Representatives and the Senate under section 903, a resolution, as defined in section 909, shall be introduced (by request) in the House by the chairman of the Government Operations Committee of the House, or by a Member or Members of the House designated by such chairman; and shall be introduced (by request) in the Senate by the chairman of the Governmental Affairs Committee of the Senate, or by a Member or Members of the Senate designated by such chairman.

(b) A resolution with respect to a reorganization plan shall be referred to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House (and all resolutions with respect to the same plan shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be. The committee shall make its recommendations to the House of Representatives or the Senate, respectively, within 75 calendar days of continuous session of Congress following the date of such resolution's introduction.

5 U.S.C. § 911—Discharge of committee considering resolution:

If the committee to which is referred a resolution introduced pursuant to subsection (a) of section 910 (or, in the absence of such a resolution, the first resolution introduced with respect to the same reorganization plan) has not reported such resolution or identical resolution at the end of 75 calendar days of continuous session of Congress after its introduction, such committee shall be deemed to be discharged from further consideration of such resolution and such resolution shall be placed on the appropriate calendar of the House involved.

5 U.S.C. § 912—Procedure after report or discharge of committee; debate; vote on final passage:

(a) When the committee has reported, or has been deemed to be discharged (under section 911) from further consideration of, a resolution with respect to a reorganization plan, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for any Member of the respective House to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. The motion shall not be subject to amendment, or to a motion to postpone, or a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the resolution is agreed to, the resolution shall remain the unfinished business of the respective House until disposed of.

(b) Debate on the resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than ten hours, which shall be divided equally between individuals favoring and individuals opposing the resolution. A motion further to limit debate is in order and not debatable. An amendment to, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the resolution is not in order. A motion to reconsider the vote by which the resolution is passed or rejected shall not be in order.

(c) Immediately following the conclusion of the debate on the resolution with respect to a reorganization plan, and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the appropriate House, the vote on final passage of the resolution shall occur.

(d) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution with respect to a reorganization plan shall be decided without debate.

(e) If, prior to the passage by one House of a resolution of that House, that House receives a resolution

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with respect to the same reorganization plan from the other House, then—

(1) the procedure in that House shall be the same as if no resolution had been received from the other House; but

(2) the vote on final passage shall be on the resolution of the other House.

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Endnotes

1. Limitations on Presidential Power to Create a New Executive Branch Entity to Receive and Administer Funds Under Foreign Aid Legislation, 9 Op. O.L.C. 76, 78 (1985).
2. INS v. Chadha, 462 U.S. 919 (1983).
3. *See* Reorganization Act Amendments of 1984, Pub. L. 98-614, 98 Stat. 3192 (1984) (expired 1984) (codified as amended at 5 U.S.C. § 901 (1984)), pertinent parts published *supra* as appendix; Ronald C. Moe, Administrative Renewal: Reorganization Commissions in the 20th Century 114–117 (2003).
4. President's Authority to Promulgate a Reorganization Plan Involving the Equal Employment Opportunity Commission, 1 Op. O.L.C. 248, 251 (1977).
5. U.S. Const. art. II, § 1, cl. 1.
6. "Hence the President cannot declare war, grant letters of marque and reprisal, or regulate commerce, even though executives had often wielded such authority in the past." And "the President cannot make treaties or appointments without the advice and consent of the Senate. Likewise, the President's pardon power is limited to offenses against the United States and does not extend to impeachments or violations of state law." Sai Prakash, *Executive Vesting Clause*, *in* The Heritage Guide to the Constitution, http://www.heritage.org/constitution/#!/articles/2/essays/76/executive-vesting-clause (last visited May 9, 2017).
7. *See*, *e.g.*, Centralizing Border Control Policy Under the Supervision of the Attorney General, 26 Op. O.L.C. 22 (2002); G. Calabresi & Saikrishna Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541 (1994); Prakash, *supra* note 6 (arguing that the U.S. Supreme Court "apparently has accepted the notion that the Executive Vesting Clause grants powers beyond those enumerated in the remainder of Article II") (citing Myers v. United States, 272 U.S. 52 (1926); Nixon v. Fitzgerald, 457 U.S. 731 (1982); Morrison v. Olson, 487 U.S. 654 (1988)).
8. *See* U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); INS v. Chadha, 462 U.S. 919 (1983); Clinton v. City of New York, 524 U.S. 417 (1998) (holding that the President's line-item veto granted by the Line Item Veto Act of 1996 was unconstitutional).
9. U.S. Const. Art. II, § 3. "The Take Care Clause...is best read as a duty that qualifies the President's executive power." Sai Prakash, *Take Care Clause*, *in* The Heritage Guide to the Constitution, http://www.heritage.org/constitution/#!/articles/2/essays/98/take-care-clause (last visited May 13, 2017).
10. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952); *see also* Cass R. Sunstein & Lawrence Lessig, *The President and the Administration*, 94 Colum. L. Rev. 1, 60–69 (1994).
11. "He must execute them by the assistance of subordinates." Myers v. United States, 272 U.S. 52, 117 (1926).
12. Marbury v. Madison, 5 U.S. 137, 166 (1803).
13. U.S. Const. art. II, § 2, cl. 2.
14. Alexander Hamilton explained that department heads "ought to be considered as the [President's] assistants or deputies...and on this account they...ought to be subject to his superintendence." The Federalist No. 72, at 436.
15. *See Morrison*, 487 U.S. 654 ("independent counsel provisions of the Ethics in Government Act of 1978" did not violate separation of powers); Sunstein & Lessig, *supra* note 10, at 116–17.
16. *See Myers*, 272 U.S. at 135; The Jewels of the Princess of Orange, 2 Op. Att'y Gen. 482, 489 (1831) (the President's power of "removal of the disobedient officer, and the substitution of one more worthy in his place, would enable the President, through him, faithfully to execute the law").
17. Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2385 n.307 (2001).
18. U.S. Const. art. II, § 2, cl. 1. *See also* Akhil R. Amar, *Some Opinions on the Opinion Clause*, 82 Va. L. Rev. 647 (1996); Vasan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 Wm. & Mary L. Rev. 1, 8 (2002) (The "clause implies the specification of orders to, and the evaluation of the performance by, someone to whom the President has delegated executive power. The analogy is to a principal and agent relationship.").
19. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 669 (1984). Executive branch "officers cannot keep the President in the dark about how their departments are operating." Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 Yale L.J. 1836, 1879 (2015).
20. Harvey C. Mansfield, *Reorganizing the Federal Executive Branch: The Limits of Institutionalization*, 35 L. & Contemporary Problems 462, 463 (1970).
21. *See* Amar, *supra*, note 18, at 653 ("Even as the sole apex of awesome [executive] powers...the President appears as a limited figure—as a Generalissimo, CEO, and Executioner *under law*."); Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 Geo. Wash. L. Rev. 696 (2007); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 Yale L.J. 2, 60 n.264 (2009) (citing Sierra Club v. Costle, 657 F.2d 298, 410 (D.C. Cir. 1981), for the idea that "an administrative rulemaking may be overturned on the grounds of political pressure if 'the content of the pressure...is designed to force [the agency] to decide upon factors not made relevant by Congress in the applicable statute' and if the agency's determination was actually affected by the 'extraneous considerations.'").
22. U.S. Const. art I, § 8, cl. 18 ("The Congress shall have Power To...make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."); M'Culloch v. Maryland, 17 U.S. 316 (1819); Edward Corwin, The President: Office and Powers 83 (1948).

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23. David Engdahl, *Necessary and Proper Clause*, *in* The Heritage Guide to the Constitution, http://www.heritage.org/constitution/#!/articles/1/essays/59/necessary-and-proper-clause (last visited May 13, 2017).
24. Mansfield,*supra* note 20, at 463.
25. Cong. Res. Serv., RL30876, The President's Reorganization Authority: Review and Analysis 2 (Mar. 8, 2001) (hereafter CRS 2001).
26. *See* Kendall v. U.S. *ex rel.* Stokes, 37 U.S. 524, 610 (1838) ("There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper...and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President."); Isbrandtsen-Moller Co. v. United States, 300 U.S. 139 (1937) (upholding a secretarial order enforced after an executive reorganization plan).
27. Mansfield, *supra* note 20, at 463.
28. *See* Kagan, *supra* note 17.
29. U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.").
30. James Madison, The Federalist No. 58. For instance, in 1989, the U.S. Department of Justice sent Congress its plans to reorganize the Office of Legal Policy under statutory authority to undertake "significant reprogramming, reorganizations, and relocations" within the department. "[C]ertain Congressmen" disapproved and barred any further implementation of departmental reorganization schemes by writing the following into appropriations law: "None of the funds provided in this or any prior Act shall be available for obligation or expenditure to relocate, reorganize, or consolidate any office, agency, function, facility, station, activity, or other entity falling under the jurisdiction of the Department of Justice." *See* Department of Justice Authority Regarding Relocations, Reorganizations, and Consolidations, 13 Op. O.L.C. 280, 281 (Aug. 28, 1989).
31. 13 Op. O.L.C. at 283 (citing INS v. Chadha, 462 U.S. 919 (1983)).
32. *See* United States v. Dickerson, 310 U.S. 554, 555 (1940).
33. 31 U.S.C.A. § 1341 (West) (1990).
34. *See* William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. Politics 1095, 1096 (2002) (identifying "over 240 administrative agencies" that Presidents "constructed" after 1950 "through executive orders, orders issued by department secretaries or agency heads, and reorganization plans"); John Yoo & Todd Gaziano, Presidential Authority to Revoke or Reduce National Monument Designations, Am. Enterprise Inst. 8 (Mar. 2017) ("A basic principle of the Constitution is that a branch of government can reverse its earlier actions using the same process originally used."); Harold J. Krent, *From a Unitary to a Unilateral Presidency*, 88 B.U. L. Rev. 523 554–59 (2008) (criticizing unilateral executive reorganization).
35. *See Isbrandtsen-Moller*, 300 U.S. 147 (noting that a 1932 appropriations law authorized the President to abolish or transfer functions of "'any commission, board, bureau, division, service, or office in the executive branch of the Government'").
36. They are Presidents Herbert Hoover, Franklin D. Roosevelt, Harry S. Truman, Dwight D. Eisenhower, John F. Kennedy, Lyndon B. Johnson, Richard Nixon, Jimmy Carter, and Ronald Reagan. *See* Cong. Res. Serv., RL31446, Reorganizing the Executive Branch in the 20th Century: Landmark Commissions (June 10, 2002) (hereafter CRS 2002). Past reorganization plans have shaped much of the modern executive branch. For example, they created the Department of Health, Education and Welfare; Drug Enforcement Agency; Environmental Protection Agency; and Federal Emergency Management Agency (*see* Howell & Lewis, *supra* note 34, at 1097) and established the Executive Office of the President. *See* Cong. Res. Serv., R42852, Henry B. Hogue, Presidential Reorganization Authority: History, Recent Initiatives, and Options for Congress 31–32 (Dec. 11, 2012) (hereafter CRS 2012).
37. *See* CRS 2001, *supra* note 25, at n.1. Presidents George H. W. Bush and Bill Clinton did not seek statutory reorganization authority. *See* CRS 2012, *supra* note 36.
38. CRS 2012, *supra* note 36, at 32.
39. *See* H.R. 10, § 5021 (108th Congress) and S. 2129 (112th Congress) and H.R. 4409 (112th Congress).
40. *See Chadha*, 462 U.S. 919; CRS 2012, *supra* note 36; Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 L. & Contemporary Problems 273 (1993).
41. *Chadha*, 462 U.S. 919. *But see* Effect of *INS v. Chadha* on the Authority of the Secretary of Defense to Reorganize the Department of Defense Under U.S.C. § 125, 8 Op. O.L.C. 82, 93 (1984) (arguing that prior "reorganization authority survives the fall of the veto").
42. CRS 2001, supra note 25, at 8. *See* Reorganization Act Amendments of 1984, Pub. L. 98-614, 98 Stat. 3192 (1984) (expired 1984) (codified as amended at 5 U.S.C. § 901 (1984)), pertinent parts published *infra* as appendix.
43. *See* Moe, *supra* note 3, at 114–117.
44. Arguably, "what little advantage remained in the reorganization plan process, namely an expedited procedure with a guaranteed vote, was more than matched by the disadvantages of" other procedural and substantive requirements. *Id.* at 116–17. So "[i]n short," it may be easier "to simply follow the regular legislative process." *Id.* But if left entirely to Congress, "we will fiddle around here all summer trying to satisfy every lobbyist, and we will get nowhere." Fisher, *supra* note 40, at 278 (citing 75 Cong. Rec. 9644 (1932) (statement of Sen. David Reed (R–PA))).

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45. *See generally* CRS 2012, *supra* note 36. The 1977 Act offered broad authority to consolidate inter- and intra-agency functions as well as "the abolition of all or a part of the functions of an agency, except" for any "enforcement function or statutory program." 5 U.S.C. § 903. It also prohibited the President from certain actions such as creating, abolishing, or completely consolidating any executive departments. *See* 5 U.S.C. § 905 (1977); CRS 2001, *supra* note 25, at 6.
46. For instance, in 1993, President Bill Clinton "simply announced" the creation of a National Performance Review with "no statutory authority," staff, funding, or "work plan." CRS 2002, *supra* note 36, at 91. Vice President Al Gore shaped it into an interagency task force to make the executive branch leaner and more entrepreneurial. It eventually claimed to have ended "the era of big government," "reduced the size of the federal civilian workforce by 426,200 positions," and delivered "savings of more than $136 billion...by eliminating what wasn't needed." *Id.* at 96.
47. *See generally* Mansfield, *supra* note 20; John W. Lederle, *The Hoover Commission Reports on Federal Reorganization*, 33 Marq. L. Rev. 89, 91 (1949); Harry S. Truman Library Inst., *Truman and the Hoover Commission*, 19 Whistle Stop (1991), https://www.trumanlibrary.org/hoover/commission.htm.
48. *See* CRS 2001, *supra* note 25, at 8 (discussing H.R. 1314 and the Reorganization Act of 1984).
49. *See* GGD-81-57, Report of the U.S. General Accounting Office to the Senate Committee on Governmental Affairs, Implementation: The Missing Link in Planning Reorganizations (Mar. 20, 1981), http://www.gao.gov/assets/140/132455.pdf (advising that implementation plans will help to avoid past staffing, funding, office space, accounting systems, and other problems that distracted officials from their missions).
50. 1 Op. O.L.C. 248, 251.

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Chapter 4: Congressional Action Needed for Reform

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As Chapter 3 illustrates, President Donald Trump needs the cooperation of Congress to significantly reorganize the federal bureaucracy. To truly fulfill his promise to "drain the swamp," he will need to enlist the help of Congress by treating it, correctly, as a coequal branch. After all, the President may supervise and direct the executive branch, but its major contours are determined by statute. Recent Presidents have found Congress to be an insuperable obstacle to their plans for sweeping transformation of government.[1] Lest President Trump's plans also end up in the dustbin of history, his Administration will have to find a way to entice Congress to act—despite the strong incentives for remaining inert.

Obstacles to Reform in Congress

There are at least three major obstacles that stand in the way of major legislation to reorganize the executive branch:

- Turf protection;
- (Dis)trust of the civil service; and
- Polarization of presidential support.

Turf Protection. The most trenchant of these obstacles is the desire of Members of Congress to retain the size and strength of the agencies under their committee or subcommittee's purview. While all Members of Congress might agree that something must be done to pare back the sprawling federal bureaucracy in principle, each individual Member of Congress is likely to adopt a "not in my backyard" attitude to any concrete proposal.

(Dis)trust of the Civil Service. The second obstacle to congressional action on reorganization is partisan disagreement about the degree of oversight under which civil servants should operate. Democrats generally trust career civil servants to enforce the law as drafted by Congress and as clarified by the President's guidance. Republicans tend to view careerists with more suspicion, believing they sometimes follow their own lights rather than working in good faith to enact and enforce the will of elected officials. As a result, Democrats often see layers of oversight, various reporting requirements, and other procedural speed bumps as so much bureaucratic red tape, whereas Republicans see them as necessary constraints.

Polarization of Presidential Support. A third obstacle to significant congressional action on reorganization is partisan opposition to the President himself. As an example, President Barack Obama asked for reorganization authority in order to consolidate six agencies that primarily regulate trade and commerce. Congressional Republicans, who support cutting waste and consolidating duplicative agencies in principle, did not lend their support during the 112th Congress to the Reforming and Consolidating Government Act of 2012 (S. 2129) that would have empowered President Obama to make these changes, and it died long before reaching the floor for a vote. Today, Democrats in Congress may act in the same manner. Not wanting to hand a Republican President a political victory, they may stand against a reorganization plan even if they support some of its provisions.

Recent efforts to reorganize the executive branch have not fallen short for a lack of good ideas or a lack of will on the part of the President. They have fallen short because of the political realities described above. While it is important to have a clear and detailed plan that will animate reform, it is equally important to have a sense of how to get there. There are at least four routes the Trump Administration and Congress can take to legislation on executive branch reorganization:

- Congress could draft a reorganization plan itself;
- Congress could reauthorize the President to present his own reorganization plan as he could prior to 1984;
- Congress could reauthorize and enhance the President's executive reorganization authority, allowing the President to draft a more thoroughgoing plan and opening up a fast track to approval; or
- Congress could create a bipartisan committee or convene an expert commission to devise a

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reorganization plan while providing some incentive to enact the final recommendations.

The merits and disadvantages of each of these plans are discussed below.

Congress-led Reorganization

One option available to the President is to present Congress with a set of priorities, allowing Members to work out the details, or simply ask them to draft a plan of their own. One major advantage of taking this route is that Members of Congress may be less inclined to resist a plan that originated from their branch. Instead of asking them to simply give their stamp of approval to the President's plan, they would be integral partners in refashioning government and could trumpet their successes to their constituents. especially if the Trump Administration stayed relatively aloof from the process, Democratic Members of Congress may be able to vote for—or even sponsor—such legislation without feeling as though they were handing President Trump a significant political victory.

These advantages aside, detailing the responsibility for reorganization to the dozens of authorizing committees will not solve the current duplicative and incoherent structure of the executive branch. For these very congressional committees, with their narrowly focused view of the executive branch and inherent tendency to protect turf, are responsible for the current state of executive branch. Instead, reorganization efforts in Congress should be assigned to committees with a government-wide perspective, such as the Senate Committee on Homeland Security and Governmental Affairs and the House Committee on Oversight and Government Reform.

Further, a comprehensive reorganization of the federal bureaucracy is unlikely to make it through the regular parliamentary hurdles ordinary legislation is subject to. Members of Congress are unlikely to agree to dissolving or moving agencies under their jurisdiction. They may also be hesitant to threaten a colleague's turf for fear that such an attack would be repaid in kind. even if Congress had the will to orchestrate a reorganization of the executive branch, it is not clear it has the institutional capacity.

The federal bureaucracy is overwhelming in both size and scope. A thoroughgoing reorganization of the executive will require a detailed knowledge of the administrative state that only career civil servants and some very experienced senior political appointees are likely to have. In other words, no matter who is nominally in charge of reorganization, the expertise of the executive branch will be indispensable.

Despite these challenges, Congress has passed legislation to significantly reorganize the executive branch in recent years. In 2002, Congress passed the Homeland Security Act, which, among other things, created the Department of Homeland Security (DHS). Most of the agencies that comprise DHS were pulled from other departments, not created from whole cloth. So, how did this reorganization overcome the tendency of Members of Congress to oppose bills that move agencies from the departments they oversee? Jurisdiction of the two largest agencies that migrated over to DHS—the Coast Guard and Customs and Border Protection—were not transferred to the newly formed House Homeland Security Committee and Senate Homeland Security and Governmental Affairs Committee. To this day, the Coast Guard remains under the jurisdiction of the House's Transportation Committee and the Senate's Commerce, Science, and Transportation Committee, while the House and Senate Judiciary Committees still oversee Customs and Border Protection. While the Homeland Security Act may not have passed otherwise, the result of this nod to political expediency is a committee structure that does not fit into the administrative state very neatly. This sort of compromise solution was only possible in the case of the Homeland Security Act because the bill created new agencies and shifted existing ones. No such deal could be struck to secure passage of legislation that threatens to terminate an agency entirely.

Reauthorization of Executive Branch Reorganization as It Existed Prior to 1984

In the past, Congress recognized the President's comparative advantage vis-à-vis planning the reorganization of the executive branch by routinely granting him authority to propose reorganization plans to be considered under expedited parliamentary procedures. Over time, Congress limited the sorts of provisions the President could include in such a plan.[2] Originally, the President could create, consolidate, abolish, or rename departments or agencies. By 1984, the last year the President had statutory authority to submit a reorganization plan,

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the President's proposal could not contain any of these provisions.

Not only could the President accomplish less via reorganization by 1983 and 1984, but his plans were less likely to go into effect. Prior to 1983, executive reorganization plans went into effect unless one chamber of Congress voted to veto the plan. But that year, the Supreme Court ruled in *Immigration and Naturalization Services v. Chadha* that the legislative veto was unconstitutional. In response, Congress amended the Reorganization Act requiring that any reorganization plan would take effect only if both the House and Senate passed a joint resolution approving the plan within 90 days of receiving it from the President.

Restoring the President's authority to submit reorganization plans to Congress would be a relatively easy lift for Congress. The statutory language regarding reorganization plans is still in the U.S. Code. Congress would simply need to update the statute by changing the two sentences denoting December 31, 1984, as the expiration date for the President's reorganization authority.[3] Going this route would not only require minimal effort on the part of Congress; simply reauthorizing a statute already on the books would lend a sense of continuity with the past. It would reinforce the accurate perception that presidential reorganization plans have a long history and well-established provenance going back to the Franklin D. Roosevelt Administration.

Another advantage of this plan is it would allow the President to take charge of the reorganization of the branch he manages. This makes sense. The President, his White House staff, and political appointees in the departments are more deeply embedded in, intimately familiar with, and prepared to diagnose the ailments of, the administrative state.

However, reauthorizing statutory language regarding executive reorganization plans without substantive amendment will not allow the President to propose a plan that has the scope and depth he seems eager to pursue. As discussed, by 1983 the President could not propose a plan to create a new department or agency, consolidate two departments, or even rename a department. Nonetheless, within these limitations, much can be done. Below the department level, the President would have something wider discretion. He could, for instance, call on Congress to abolish most agencies (though independent regulatory agencies are protected by 5 U.S. Code § 905 (a)(1)), consolidate or coordinate all or part of an agency, or transfer regulatory authority from one agency to another.[4] However, the latest authorization of presidential reorganization authority expressly forbids the President from proposing a plan that continues an agency or a function thereof beyond the period authorized by law, authorizing an agency to exercise a function that is not expressly authorized by law, or creating a new agency.[5] According to current statutory language, the President is also forbidden from submitting a plan "dealing with more than one logically consistent matter,"[6] and no more than three plans may be pending before Congress at one time.[7] Therefore, a comprehensive plan of the sort President Trump seems to favor would likely require submitting not one, but many, reorganization plans staggered across a significant length of time.

One additional weakness of reauthorizing restarting the clock on the presidential reorganization authority as it currently exists in statute is that the law does not clear an expedited pathway to adoption. In fact, the procedural hurdles facing such a plan are somewhat higher than they are for an ordinary statute because of a stipulation that the House and Senate must approve a plan within 90 days of receiving it from the President, or the plan dies automatically.[8]

Enhancing Presidential Executive Reorganization Authority

An alternative to simply reauthorizing the President's reorganization authority as it last existed is to pass a bill that reinstates many of the provisions contained in the original 1932 legislation. In the 112th Congress, Senator Joseph Lieberman (I–CT) introduced a bill to this end known as the Reforming and Consolidating Government Act (RCGA) of 2012, but it made little progress. As Chairman of the Senate Committee on Homeland Security and Governmental Affairs, Senator Lieberman held a hearing on the legislation but failed to report it out of committee. Similar legislation for the current Congress would make a comprehensive reorganization of the executive branch much easier to accomplish by allowing the President to propose more thorough-going changes and allowing expedited consideration of his plan in Congress.

If the Trump Administration and Congress decide to pursue this path to executive branch

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Why BRAC Succeeded

With the end of the Cold War, Congress recognized the need to reduce the number of military bases and reorganize the remaining bases to meet the current defense needs of the nation. However, Members of Congress with military bases in their districts, while recognizing the need for cost-savings, fought against closures that affected their districts. Thus, legislative tactics, such as "logrolling" (the exchange of legislative favors between Members of Congress), kept obsolete military bases from closing, and others from being realigned. While Members of Congress recognized an overall need to close bases, no one wanted to be responsible for closing a base in his or her own district. The solution to this dilemma was one that needed to break the legislative deadlock.

Created in 1988, the Base Realignment and Closure (BRAC) Commission was just such a solution. The commission, created by Congress, was composed of independent experts tasked with selecting military bases to be closed or realigned. The commission assessed lists of recommended closures and realignments compiled by the Pentagon. The commission made its recommendations to the President, who then reviewed and transmitted the decisions to Congress. Congress, not allowed to amend the lists of bases, could either do nothing and let the bases close, or reject the entire list by passing a joint resolution that must sustain a presidential veto. The resulting five rounds of BRACs that occurred from 1998 to 2005 were successful at closing 130 major bases and many more minor installations.†

By asking Members of Congress to vote on (a) the creation of the BRAC Commission, and (b) a fast-track approval process for the commission's recommendations rather than generating a list of unneeded bases themselves, BRAC put difficult votes on the right side of public choice theory. Constituencies that benefit from federal spending, in this case communities with military bases, try to influence Congress to continue the spending, even if the spending is ineffective, wasteful, or a questionable use of federal resources. Members of Congress, beholden to these constituencies, ensure continued spending. The beneficiaries of concentrated benefits, like communities with military bases, have strong incentives to influence decisions made by Congress.

* Romina Boccia, "How Congress Can Improve Government Programs and Save Taxpayer Dollars," Heritage Foundation *Backgrounder* No. 2915, June 10, 2014, http://www.heritage.org/taxes/report/how-congress-can-improve-government-programs-and-save-taxpayer-dollars.

† U.S. Government Accountability Office, "Military Bases: Analysis of DOD's 2005 Selection Process and Recommendations for Base Closures and Realignments," GAO–05–785, July 2005, p. 18, Table 1, http://www.gao.gov/assets/250/246994.pdf (accessed May 26, 2017).

reorganization, the RCGA would be a fine piece of model legislation. This bill promised to remove several major limitations on a President's reorganization authority. Most important, it permitted Presidents to propose the creation, abolition, and consolidation of departments and agencies alike, though it left in place limitations on abolishing independent agencies.

While Senator Lieberman's bill generally expanded the President's latitude, it did propose one important new restriction. Under the RCGA, presidential reorganization plans submitted to Congress must be deemed "efficiency-enhancing"—they must either decrease the number of agencies or lead cost savings by other means—by the Director of the Office of Management and Budget. This clause would rule out the possibility that Presidents would use their new authority to build up the administrative state, an outcome contrary to the purpose of the legislation.

In addition to the provisions of the RCGA, new legislation should include the assurance that a President's reorganization plan will actually be considered in Congress. As a result of the Supreme Court's decision in *Chadha*, it is no longer constitutionally permissible to allow a presidential reorganization plan to go into effect in the absence of a vote of disapproval in one house of Congress. However, new legislation could guarantee a plan an up or down vote.

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Conversely, the costs of military bases are spread thinly across all federal taxpayers. To diffuse the cost of these bases means that federal taxpayers are unlikely to be mobilized to influence congressional decisions regarding particular funding decisions, while the beneficiaries of the individual bases have strong incentives to influence funding decisions.

While the public agrees that Congress spends too much, there is little agreement on where to cut funding. The BRAC strategy broke the legislative impasse that prevented Congress from closing and realigning military bases. According to David Primo, professor of political science at the university of Rochester, "By shifting agenda-setting power to an outside agent, making approval the default outcome, and preventing Congress from amending recommendations, the rule achieved its end."‡

Another key to BRAC's success has been Congress' decision to lower the procedural hurdles that new statutes usually face. Once the BRAC Commission submits recommendations for a round of base closures, the proposal goes into effect automatically unless Congress passes a joint resolution disapproving of the entire package within 45 days of the plan's submission.§ Thus, the consequence of gridlock and congressional inaction is the passage of BRAC recommendations rather than the reversion to the status quo, as is the case under ordinary parliamentary procedures.

‡ David M. Primo, *Rules and Restraint: Government Spending and the Design of Institutions* (Chicago: University of Chicago Press, 2007), p. 11.

§ Christopher M. Davis, "'Fast Track' Legislative Procedures Governing Congressional Consideration of a Defense Base Closure and Realignment (BRAC) Commission Report," Congressional Research Service *Report for Congress* No. R43102, June 10, 2013, https://fas.org/sgp/crs/natsec/R43102.pdf (accessed June 16, 2017).

Such a provision would greatly increase the likelihood that a reorganization plan would go into effect by requiring Members of Congress to publicly stake out a position instead of letting a plan die a quiet death in committee.

Another improvement would allow the President to submit amendments to his submission to Congress to address unforeseen objections and include suggestions offered by Congress within a specified time frame. Such a power would allow the President to more ably foster consensus while taking advantage of congressional expertise. President Jimmy Carter requested such an instrument that was enacted as part of the Reorganization Act of 1977.

While restoring the President's reorganization authority to its original 1932 level would be the most efficient means of effecting a reform of the administrative state, such a statute is unlikely to pass. The last bill that attempted to do this made hardly a wave in Washington. even though Republicans voice support for winnowing the overgrown bureaucracy and cutting red tape in theory, in 2012, they were unwilling to sign up as co-sponsors of the RCGA (as were nearly all Democratic Senators) and entrust President Obama with this task. Today, will Democrats and Republicans in Congress support similar legislation?

Members of both parties understand there is significant waste and inefficiency in the federal bureaucracy that could be cleared up, but the specific contours of a reorganization plan are bound to reflect the prejudices and policy priorities of the party controlling the process. Which agencies are downsized and which are passed over, which inefficiencies are deemed too great to ignore, and which departments and agencies gain and lose authority and manpower—these are issues that will look different depending on whether they are handled by a Republican or Democratic Administration. Members of Congress are well aware of these facts. Given the contentiousness of the last election and the intense mobilization of the Left's grassroots, the Trump Administration can rely on fierce obstinacy from Democrats if a bill like the 2012 RCGA is proposed.

Giving Reorganization Authority to a Committee or Commission

As discussed, a successful reorganization plan will need to circumvent not only partisan opposition but also opposition born of each Member of Congress's desire to maintain the power and prestige of his or her assigned committee. One way to avoid both of these pitfalls is to call on Congress to form

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a bipartisan committee or empanel a commission of outside experts to generate a reorganization plan.

Relying on a bipartisan committee or commission of outside experts to draft a proposal might defuse much of the partisan resistance that would likely forestall a proposal to empower President Trump to submit his own reorganization plan. It may also take advantage of the fact that both Republicans and Democrats voice support for reorganization. Addressing fragmentation, redundancy, and overlap in the bureaucracy is not a partisan issue. While there is clearly no perfect agreement on what areas need cutting most, executive reorganization is one of the rare policy issues where Republicans and Democrats could feasibly strike a meaningful compromise.

Still, the track record of purpose-formed congressional committees is far from perfect. Most recently, the Joint Select Committee on Deficit Reduction, popularly known as the Supercommittee, failed to produce the deficit reduction package the Budget Control Act of 2011 tasked it with generating.[10] Congressional committees like this fail for predictable reasons. The Members of such committees face the same set of incentives and limitations that any Member of Congress faces. Simply being chosen for a select committee does not inure a Member to the risk of getting voted out of office, the need to raise campaign contributions, or a desire to curry favor with colleagues who might be useful allies down the road. The Members of Congress selected for a bipartisan committee on reorganization would not be any more willing than Congress as a whole to move agencies from one committee's jurisdiction to another, or strip whole agencies away from their colleagues' purview. Further, the Members of Congress chosen to serve on a select committee may not have the intimate and granular knowledge of the federal bureaucracy that the task demands. For these reasons, the more promising path to executive reorganization may be empaneling a special commission of experts who do not currently hold elected office.

Congress has relied on commissions of outside experts to craft recommendations on contentious or technical issues in the past, and reorganizing the federal bureaucracy certainly meets these criteria.[11] One of the most successful expert commissions in recent memory was the Base Realignment and Closure (BRAC) Commission, which successfully broke the political deadlock that kept obsolete military bases open. Given the parallels between eliminating superfluous military bases and reducing superfluous federal agencies and bureaus, Congress should use BRAC as a model for an executive reorganization commission. Like BRAC, an executive reorganization commission could overcome reluctance among Members of Congress to cut government waste that benefits them.

Incentivizing Adoption of a Commission or Committee's Proposals

All too often, the recommendations of expert commissions and special congressional committees are ignored. The interesting findings and innovative solutions they produce never actually affect policy. To ensure that such a commission or committee is more than an academic exercise, Congress may provide for fast-track legislative procedures, as it did when authorizing BRACs, or create an incentive for action that outweighs the natural bias in favor of the status quo.

A statutory incentive to adopt the recommendations of either a congressional committee or a commission could come in many forms. Budget sequestration—across-the-board budget cuts automatically triggered if and when Congress fails to comply with spending targets—is the most common incentive. The Balanced Budget and Emergency Deficit Control Act of 1985, the Pay-As-You-Go Act of 2010, and the Budget Control Act of 2011 all relied on sequestration to enforce Congress' compliance with the bills' substantive provisions.[12]

By including a strong incentive to act on a commission's or committee's plan once devised, executive reorganization may overcome the thorniest source of obstinacy: committee and subcommittee assignments. In effect, such legislation would put Members of Congress in the position of either pledging support to executive branch reorganization before it was clear which committees would gain or lose power, or making a principled defense of the status quo. Such a plan bets on the likelihood that Members of Congress will not be able to mount a defense of the bloated federal bureaucracy that will resonate with their constituents.

The major weakness of this option is that the Administration would lose the ability to carefully tailor executive reorganization to its tastes. Once a commission is selected, the planning of the executive branch would largely be in the commission's hands. Several safeguards could be put in place to ensure that an executive reorganization plan accomplishes

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Congress' and the Administration's broad objectives. Just as Congress limited what sorts of provisions a President's reorganization plan may include, a congressional committee or expert commission could be given set parameters. For instance, legislation could specify that a commission's or committee's plan enhance efficiency, that it not create any new agency, that it save the taxpayers a set number of dollars, or that it spare certain departments from personnel cuts.

Conclusion

The obstacles that stand in the way of legislation authorizing an executive reorganization are numerous and profound, but not insurmountable. As with any bill, partisanship may militate against a plan submitted by President Trump or Republicans in Congress. Not only do Democrats and Republicans have different views on how to structure the federal bureaucracy and where to make the deepest cuts, Democrats will be hesitant to hand Republicans a political victory even if a proposal steers clear of partisan friction points.

Worse still, President Trump will not be able to rely on unanimous support from his own party. A comprehensive executive reorganization plan that streamlines the federal bureaucracy by eliminating redundant agencies and consolidating like functions will make enemies of every Member of Congress whose committee stands to lose power and oversight. Senators and Representatives who agree that the bloated federal bureaucracy should be cut to size in theory may not be willing to sacrifice any of the bureaus or agencies under their jurisdiction. Fearing that they might be on the chopping block, Members of Congress may short circuit the reorganization process before it even begins.

Daunting as these obstacles may seem, Congress has overcome similar challenges in the past. Close analogues, such as military base reduction via BRAC, show that cleverly constructed legislation can stack the deck in favor of reform rather than the status quo. Like BRAC, executive reorganization has the best chance of succeeding if legislation is structured such that Members of Congress are asked to vote on behalf of the public interest without knowing how their own particular interests will be affected.

These difficulties must be taken head-on. Comprehensive executive reorganization requires congressional action, as it should. Because bureaus differ in their organizational culture and bureaucrats differ in their worldviews, the structure of the federal government—how resources are allocated, to whom statutory authority is assigned, and how the federal chain of command is structured—determines how statutes are interpreted and enforced. In other words, refashioning the bureaucracy is not simply a matter of executive branch housekeeping. Structure, process, and personnel are integrally linked to policy. As a coequal branch of government, Congress should engage constructively with the President in the reorganization process.

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Endnotes

1. For more on relatively recent reorganization efforts, see Ronald C. Moe, *Administrative Renewal: Reorganization Commissions in the 20th Century* (Lanham, MD: University Press of America, 2003).
2. Ibid.
3. 5 U.S. Code § 905, and 5 U.S. Code § 908 (1).
4. 5 U.S. Code § 903 (a).
5. 5 U.S. Code § 905 (a)(1-6).
6. 5 U.S. Code § 905 (a)(7).
7. 5 U.S. Code § 903 (b).
8. 5 U.S. Code § 906 (a).
9. Peri E. Arnold, *Making the Managerial Presidency: Comprehensive Reorganization Planning, 1906–1996*, 2nd ed., revised (Lawrence, KS: University Press of Kansas, 1998), and Public Law 95–17.
10. The Supercommittee was tasked with devising a grand bargain that would cut $1.2 trillion from the deficit over 10 years. The Budget Control Act included a powerful incentive for the Supercommittee to draft a plan and for Congress to pass it. If a plan was not devised and approved by December 31, 2011, nearly across-the-board cuts (a few programs—mostly guaranteed entitlements—were exempt from sequestration) would automatically go into effect. While the amount of spending under sequestration was equal to the amount the Supercommittee was tasked with saving, the indiscriminate nature of the sequestration cuts was meant to be so unpopular that Republicans and Democrats were forced to find common ground in order to avoid it.
11. Recent examples include the Commission to Assess the Threat to the United States from Electromagnetic Pulse (EMP) Attack and the U.S.–China Economic and Security Review Commission, both established pursuant to the National Defense Authorization Act of 2001; the National Commission on Terrorist Attacks Upon the United States, popularly referred to as the 9/11 Commission; and the Financial Crisis Inquiry Commission.
12. Karen Spar, "Budget 'Sequestration' and Selected Program Exemptions and Special Rules," Congressional Research Service, June 13, 2013.

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Chapter 5: Budget Process Reform

Justin Bogie and Romina Boccia

The congressional budget process provides the framework for regular and orderly debate of fiscal issues with the goal of guiding agency and programmatic appropriations. The budget process determines the steps that are necessary for adopting a budget, and for adopting or changing legislation. A well-functioning budget process would encourage debate and strong oversight on fiscal issues and spur negotiations over the trade-offs for congressional spending and taxing.

Congress has all but abandoned the budget process and regular order. Rather than authorizing agencies and programs on a regular basis and passing individual appropriations bills, lawmakers have instead allowed continuing resolutions and massive omnibus spending bills to reign supreme for much of the past two decades. With deficit and debt levels projected to rise sharply over the next decade,[1] the presidency should once again play a larger role in reining in federal spending and bureaucratic overgrowth.

Recognizing this, in March, the President issued an executive order requiring the Office of Management and Budget to develop a comprehensive plan to reorganize the federal government.[2] Undertaking budget process reforms will be an essential part of any successful plan, as much of the growth and inefficiency amongst federal agencies can be directly attributed to the near total breakdown of the budget process. Reviving long-standing policies as well as implementing new ideas will play a crucial role in correcting the nation's wayward fiscal path.

To make this plan a reality, Congress should immediately adopt several key reforms to enhance a President's ability to reshape the size and scope of the federal government and enforce budget discipline and accountability:

Reauthorize the President's Reorganization Authority. Congress should grant the President wide latitude in reshaping and streamlining the nation's ever-expanding bureaucracy. Historically, this has not been a partisan or divisive issue and Congress has granted wide reorganization authority to both Republican and Democratic Presidents. In fact, the campaign promises of reorganization heard over the course of Donald Trump's 2016 campaign mirrored closely those of Jimmy Carter 40 years earlier. At that time, Carter described the federal government as "a horrible bureaucratic mess," and pledged that he would "have a complete reorganization of the executive Branch of government [and] make it efficient, economical, purposeful, simple, and manageable."[3]

The ability of the President to greatly reshape federal agencies and programs is not a foreign concept. From 1932 to 1984, Presidents were granted much power to do just that. With the exception of Gerald Ford, all Presidents from Herbert Hoover to Ronald Reagan possessed reorganization authority, and all besides Reagan used that power. Since 1984, President George W. Bush and President Barack Obama both tried to reassert presidential reorganization authority and introduced legislation to do so. Congress failed to act on the legislation in both cases.

In an effort to improve government efficiency and reduce waste of taxpayer resources, Congress should enact legislation to restore the President's reorganization authority. In doing so, there should be mechanisms to expedite the legislative steps of the process and force an up or down vote on any proposals. With government spending expanding at a growing rate, virtually unchecked, steps must be urgently taken to reduce wasteful and inefficient programs.

Restore Presidential Impoundment Authority. Prior to 1974, Presidents had, and often made use of, the power of impoundment, which allowed them to prevent executive branch agencies from spending part or all of the funds previously appropriated to them by Congress. It served as a tool for Presidents to make generally small cuts to federal spending for programs that they deemed too costly or unnecessary.[4] This process continued on a bipartisan basis for the better part of two centuries.

This all changed in 1972 with the passage of the Clean Water Act (CWA). President Richard Nixon, originally a supporter of the legislation, vetoed the bill when the costs ballooned to around $24 billion, calling it "budget-wrecking."[5] Congress eventually overrode his veto, leading Nixon to invoke his impoundment authority and withhold about half of the funding for the CWA.[6]

In response to Nixon's impoundment of CWA funds, Congress decided to entirely revamp the

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congressional budget process by enacting the Congressional Budget and Impoundment Control Act of 1974. The act made major changes to the budget process, including drastically reducing the President's impoundment authority. Under the 1974 act, the President may request that funds designated for an agency or program be rescinded, but ultimately Congress must pass legislation for the rescission to become a reality. Nixon, less than a month away from his resignation and mired in scandal, signed the bill into law.

Since then, both Democratic and Republican Presidents and Members of Congress have pushed for impoundment authority to be reinstated. Unfortunately Congress' insatiable thirst to keep spending has prevented this from happening. With the nation $20 trillion in debt and the congressional budget process utterly broken, the President needs this tool to help correct the country's fiscal path. Congress has the opportunity to follow budget order and timelines, doing its job of providing oversight and budget controls. Since Congress continues to fail to live up to this responsibility, the President needs the power and authority to do so.

Require User Fees and Other Federal Agency Collections to be Subject to the Appropriations Process. The "power of the purse" is one of the fundamental responsibilities delegated to Congress by Article 1 of the U.S. Constitution.[8] The Supreme Court has consistently reaffirmed this power, including in 1976 when the court declared: "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."[9]

Unfortunately, as the federal bureaucracy has continued to grow, Congress has ceded more and more of this responsibility to federal agencies. Under current law, agencies have the ability to use funds received through fines, fees, and proceeds from legal settlements without going through the formal appropriations process, thus avoiding congressional oversight. In fiscal year (FY) 2015 alone, agencies collected $516 billion through a wide array of user fees.[10] Between 2010 and 2015, agencies collected an additional $83 billion from fines. According to the House Oversight and Government Reform Committee, the amount of power given to agencies to pursue penalties and legal settlements allows them to act as both judge and jury.[11]

Numerous federal agencies, including the Consumer Financial Protection Bureau and the Financial Stability Oversight Council, are funded solely through fines and fees and receive no annual appropriations from Congress, resulting in almost no congressional involvement in the way these agencies are run.

Congress should enact legislation requiring that any fees, fines, penalties, or proceeds from a legal settlement collected by a federal agency be deposited into the Treasury's general fund and subject to the annual appropriations process. This would allow Congress to carefully determine how best to use these funds, rather than leaving it up to the respective agencies to do as they see fit. With about two-thirds of the annual federal budget already consisting of "auto-pilot" mandatory spending, Congress should not allow any additional spending to fall outside its control.

Enact a Statutory Spending Cap Enforced by Sequestration. Congress should enforce fiscal discipline with spending caps. Spending caps motivate Congress to prioritize among competing demands for resources. Designed properly, spending caps curb excessive spending growth over the long run. The Budget Control Act of 2011 (BCA) has shown this to be an effective tool to control spending. When enacted, the Congressional Budget Office estimated that the legislation would save more than $2 trillion over 10 years.[12] While the legislation has been amended and the spending caps have been modified, it has kept spending levels below what they would have otherwise been and, especially in regards to discretionary funding, reduced spending growth.[13]

Congress should expand upon the BCA and adopt a statutory spending cap that encompasses all non-interest outlays and achieves budget balance—given current projections about the economy, revenues, and interest costs—by the end of the decade, or before. Defense and non-defense spending should be considered under the same aggregate spending cap, allowing defense to be funded as Congress sees fit, and without arbitrary limitations that are purely political in nature.[14]

Spending-cap enforcement by sequestration promises to spur negotiations to avoid automatic spending reductions in favor of a more deliberate approach. In the absence of legislative agreement, sequestration ensures that spending reductions take place regardless of the adoption of targeted

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reforms. This process should spur fiscal reforms to limit the growth in government and achieve budget balance.

Once the budget balances, spending should be capped at a level that maintains balance, allowing certain annual adjustments. In the long run, during periods of normal economic activity, and absent exigent national security demands, the spending cap should grow no faster than the U.S. population and inflation. The cap should bind more stringently when debt or deficits exceed specific targets.

Move Toward a Balanced Budget Amendment. One limitation of a statutory law imposing an aggregate cap on non-interest spending is that a future Congress can amend the law. Deficit spending almost always favors the current generation over future generations, who will pay for the spending of today. Ultimately, then, a balanced budget amendment will be necessary to constrain future attempts at eliminating the spending cap and abandoning fiscal discipline.

A balanced budget amendment to the U.S. Constitution is important because it can help to bring long-term fiscal responsibility to Americans' futures. America should not raise taxes to continue its overspending because tax hikes reduce people's ability to spend their own money as they see fit, shrink the economy, and expand government. America should not borrow more to continue overspending because borrowing puts an enormous financial burden on younger generations and expands the size and scope of the federal government. Americans need their government to spend less—because less government spending will advance the interests of the American people through limited government, individual freedom, civil society, and free enterprise.

The balanced budget amendment must control spending, taxation, and borrowing; ensure the defense of America; and enforce the requirement to balance the budget.[15] The constitutional-amendment-ratification process may take time: The fastest ratification took less than four months (the Twenty-Sixth Amendment on the voting age of 18), and the slowest took 202 years (the Twenty-Seventh Amendment on congressional pay raises).[16] Thus, House and Senate passage of a balanced budget amendment must be in addition to, not an excuse to avoid, current hard work to cap and cut federal spending, balance the federal budget through congressional self-discipline, and reform and reduce taxation.

Discontinue Spending on Unauthorized Appropriations. House and Senate rules require that an authorization for a federal activity precede the appropriation that allows agencies to obligate federal funds for that activity. When appropriation bills provide new budget authority for activities whose statutory authorization (the legal authority for the program to continue) has expired, or which were never previously authorized, this is known as an unauthorized appropriation.[17] In FY 2016, lawmakers appropriated about $310 billion for programs and activities whose authorizations of appropriations had expired.[18] These so called zombie appropriations are a violation of congressional rules and evade prudent deliberation of federal funding priorities.

Authorizations define the priorities of agencies and the activities that the government carries out to meet those priorities. Expiring authorizations provide Congress an important oversight opportunity in which Members can take a close look at the agency and re-evaluate the mission and purpose so that it can evolve with changing priorities and technology. Expiring authorizations also ensure that Congress stays aware of the size and scope of these programs and ensures that they do not turn into zombie programs—spending billions of dollars on auto-pilot with little government review or oversight.[19]

Lawmakers should discontinue funding for unauthorized appropriations, as such funding evades the careful congressional scrutiny of programs required by the authorization process. Congress should authorize only those programs that represent federal constitutional priorities—and should eliminate funding for activities that the federal government should not undertake in the first place. The authorization process helps Congress identify the programs that deserve renewed federal funding and those that should be eliminated or reformed.

Congress should reduce the discretionary spending limits provided by the Budget Control Act of 2011 by the amount of current unauthorized appropriations. Congress should then provide for a cap adjustment up to 90 percent of the previous year's funding level if the program is re-authorized. Instead of cutting reauthorizations across the board, Congress may prioritize among reauthorizations as it deems appropriate.[20] If adopted, this policy would discourage Congress from appropriating money for unauthorized programs, since Congress would be forced

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to cut funding for authorized programs to provide an appropriation.

unless Congress takes decisive action to enforce its rules forbidding unauthorized appropriations, these zombie programs will continue to expand unchecked. Oversight is one of the fundamental duties of Members of Congress, and by failing to take action for or against authorizations, they are doing a disservice to taxpayers and being poor stewards of those taxpayers' money.

Congress Must Empower the President to Tackle Reforms. The near-complete breakdown of congressional budgeting—at a time when fiscal discipline is growing ever more important, and as automatic spending on entitlement programs threatens to overwhelm the federal budget and the economy—shows the need for a fundamental reform of the budget process. The inherent power of the presidency, and the platform of the bully pulpit that accompanies it, makes presidential leadership essential for a successful government reorganization effort. Thus, Congress must return that power (one enjoyed for centuries) to the President and take the following steps to ensure fiscal discipline and accountability: lessen the burden on the President's ability to reorganize agencies and programs; reinstitute the President's historical impoundment authority; require that revenues collected by agencies be subject to the annual appropriations process; implement an aggregate spending cap limiting the federal budget, enforced by sequestration; move towards a balanced budget amendment; and eliminate unauthorized appropriations.

These much-needed reforms will help to streamline the federal bureaucracy and spur debate and negotiations over how taxpayer dollars should be spent and prioritized, resulting in a leaner government that is better able to serve the fundamental needs of America's citizens.

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Chapter 6: Federal Regulatory Power

James Gattuso and Diane Katz

Americans have never been as subservient to government as they are today. So expansive has the administrative state become that no one even knows the precise number of departments, agencies, and commissions from which thousands of regulations materialize each year. The volume and scope of this rulemaking imposes a staggering economic burden on the nation. But loss of individual freedom and the flagrant breach of constitutional principles constitute a far greater cost.

The *Federal Register*, the daily journal of government actions, lists 440 federal agencies and subagencies in its index.[1] From them came more than 23,000 new regulations under the Obama Administration alone—at a very conservatively estimated cost to the private sector of $120 billion.[2] And, in 2015 alone, Americans devoted nearly 9.8 billion hours to federal paperwork.[3]

The threat posed by this administrative excess goes well beyond rulemaking. More broadly, it represents what Alexis de Tocqueville termed "soft despotism,"[4] that is, a society controlled by un-elected experts who somehow know what our best interests are better than we do. This progressive paradigm demands that said experts wield all of the powers otherwise constitutionally separated among the executive, legislative, and judicial branches as a check against tyranny. With decades of cooperation from activist judges and weak-willed members of Congress, thousands of civil servants across dozens upon dozens of federal agencies are doing exactly that.

President Donald Trump inherited 1,985 regulations in the rulemaking pipeline—966 in the proposed stage, and 1,019 in the final stage. The White House alone cannot rescind regulations mandated by statute, but there are several actions outlined below that the President can take unilaterally to rein in the regulators. Other reforms require congressional action.

But it is not enough to simply reshuffle the rulemaking process. The nation must address the extent to which federal agencies contravene the U.S. Constitution on a daily basis by autonomously issuing edicts, monitoring compliance, and punishing transgressors. unless constrained, the administrative state will extinguish America's entrepreneurial spirit and the freedoms on which this nation was founded.

Costs

Regulation acts as a stealth tax on Americans and the U.S. economy. The weight of this tax is crushing, with independent estimates of total regulatory costs exceeding $2 trillion annually—more than is collected in income taxes each year. As the number of regulations has grown, so, too, has spending on government bureaucracy. Based on fiscal year (FY) 2017 budget figures, administering red tape will cost taxpayers nearly $70 billion—an increase of 97 percent since 2000.[5]

Regulatory compliance requires the private sector to shift an enormous amount of resources away from innovation, expansion, and job creation. These costs ripple across the economy and soak consumers: higher energy rates from the Environmental Protection Agency's global warming crusade; increased food prices resulting from excessively prescriptive food production standards; restricted access to credit for consumers and small businesses under Dodd–Frank financial regulations; fewer health care choices and higher medical costs due to the misnamed AffordableCare Act; and reduced Internet investment and innovation under the network neutrality rules imposed by the Federal Communications Commission (FCC).

While a burden for all, overregulation harms low-income families and fixed-income seniors the most: The costs translate to higher consumer prices that exhaust a relatively larger share of their personal budgets.

Benefits (Justifications)

Proponents claim that regulation is necessary to protect citizens from their inherent irrationality and the imperfections of a market economy.[6] This dogma is largely rooted in the Progressive era, at the turn of the 20th century, when massive industrialization and waves of immigration contributed to enormous wealth creation, but also to deterioration of living conditions in major cities and dangerous factory work. Reformers promised a better future for all once human foibles were exorcised by the state.[7]

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All of which, in the minds of progressive apostles, rendered representative government and the separation of powers obsolete.

The stock market crash of 1929 and the ensuing Great Depression likewise prompted a slew of federal rules. Another regulatory wave was unleashed in the early 1960s, beginning with President John F. Kennedy's 1962 "Special Message to the Congress on Protecting the Consumer Interest,"[7] and the publication of Ralph Nader's *Unsafe at Any Speed*, which exposed the design flaws of the Chevrolet Corvair (and its rear engine) and detailed automakers' purported resistance to installing safety features.

But 40 years of command-and-control regimes have led to massive, ineffective, and unaccountable bureaucracies. The centralization of administrative authority in Washington subverts direct accountability—taxpayers are unable to identify the officials responsible for regulatory policies, and the people making those regulatory decisions do not have to live with the consequences. Nor are regulators immune to political or ideological biases.

In contrast, the well-being of societies and individuals has long been enhanced by individual freedom, free markets, property rights, and limited government.[8] Heritage's annual *Index of Economic Freedom*, for example, documents that the degree of poverty in countries whose economies are considered "mostly free" or "moderately free" is only about one-fourth the level of that found in countries that are rated less free.[9] Moreover, per capita incomes are much higher in countries that are economically free.[10]

Reforms

The challenge before the nation is to divest the administrative state of its powers. This is no easy task given the decades of judicial precedents and multitude of statutory delegations that have empowered it.

President Trump can take a variety of actions to curb the regulatory frenzy unleashed by his predecessors, but no President enjoys free rein. The U.S. Constitution, if honored, limits a President's power to act unilaterally.

executive orders represent a direct means of establishing his policies, although the President cannot override statutory directives to agencies unless the law expressly grants that power.

President Trump's first actions included a regulatory freeze in the form of a memorandum to executive departments[11] directing agency heads to:

1. Refrain from sending regulations[12] to the Office of the Federal Register until a department or agency head designated by the President reviews and approves it. (Publication in the *Federal Register* is required to finalize a rule.)

2. Withdraw regulations that had been sent to the Office of the Federal Register but have not yet been published.

3. Postpone, for 60 days, regulations that have been published in the *Federal Register* but have not yet taken effect, for the purpose of reviewing questions of fact, law, and policy (as permitted by law).

Also in his first month, the President issued an executive order[13] that directs agencies to identify for elimination at least two prior regulations for every one new regulation issued, and to manage and control regulatory costs through a budgeting process. For the current fiscal year, the total incremental cost of all new regulations, including repealed regulations, shall be no greater than zero (unless otherwise required by law).

Other executive orders issued by President Trump direct agency officials to review IRS regulations;[14] designate a Regulatory Reform Officer to oversee the implementation of regulatory reforms;[15] and review rules that burden the development or use of domestically produced energy resources and to suspend, revise, or rescind those that "unduly burden" domestic energy production.[16]

For regulations that conflict with the new Administration's policies, agencies may propose either to further delay the effective date or to rewrite or repeal a rule. However, this requires following the rulemaking process and providing justification subject to public notice and comment. Though time-consuming, the effort is justified to overturn particularly egregious regulations.

The President also wields budgetary influence over regulatory agencies. Individual agencies submit budget requests to the Office of Management and Budget (OMB), which formulates a proposed budget in accordance with the Administration's priorities. The President's budget submitted to Congress

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will reflect, in part, the extent to which he or she approves or disapproves of various agency actions—regulatory and otherwise. Ultimately, however, Congress determines the level of appropriations.

Another tool is control of litigation through the Department of Justice. Generally speaking, Cabinet agencies rely on the Justice Department to litigate on their behalf, which means that the President (through his appointees) can influence how cases are prioritized and resources are deployed.

The President is also free to rescind any of his predecessors' orders—many of which deserve to be hastily dispatched.

The ultimate White House influence on rulemaking may well be the regulatory review process. The power of regulatory review is evidenced by the attention paid to it by each new Administration: every President over the past four decades has customized regulatory review procedures. And no wonder. The OMB's Office of Information and Regulatory Affairs (OIRA) determines whether agencies have complied with rulemaking requirements, including the integrity of risk assessments and cost-benefit analyses, and controls if and when a regulation is finalized. That is real power in an era of regulatory overload.

The stringency of OIRA's regulatory review is largely the prerogative of the President, and is established by executive order. In its current incarnation, OIRA's regulatory review is overwhelmed by the volume of rulemaking. With a staff of about 50, it is reviewing the work of agencies that employ 279,000 personnel, a ratio of more than 5,600 to 1.

The Trump Administration should issue another executive order to replace the existing regime with stricter standards for review, a broader scope of review, and greater transparency in the review process. Among other elements, the new order should:

- Require independent agencies to comply with all rulemaking requirements under the Paperwork Reduction Act, the Unfunded Mandates Reform Act, the Data Quality Act, and all other rules that apply to executive branch agencies.
- Require agencies to submit all regulations, not just significant regulations, to OIRA.
- Require agencies to conduct a regulatory impact assessment for guidance documents, policy memos, and rule interpretations.
- Require agencies to base decisions on factual data, and to fully disclose any such data and the basis of a proposed decision in a manner that allows critical review by the public.
- Disallow rulemaking that assesses risk based on a "No Safe Threshold" linear regression analysis, which assumes that any chemical posing a health threat at a high exposure will also pose a health threat at any exposure level, no matter how low.
- Reject any rulemaking for which the benefits exceed the cost only by reliance on "co-benefits." (The term refers to ancillary outcomes that are quantified to make it appear that the rule's benefits exceed the costs when the actual focus of the regulation does not justify the regulatory cost.)

The Congressional Review Act provides a legislative means of repealing regulations that have been finalized within the past 60 days (with exceptions). Doing so requires a resolution of disapproval passed by Congress, and the President's signature. Only a simple majority threshold is required for passage of the resolution (218 votes in the House; 51 votes in the Senate). Approval of a resolution prohibits an agency from issuing a substantially similar regulation unless authorized by Congress, and the resolution is not subject to judicial review.

The Trump Administration should also promote congressional consideration and passage of the following regulatory reforms:

- **Require congressional approval of new major regulations issued by agencies.** Congress, not regulators, should make the laws and be accountable to the American people for the results.
- **Do not allow any major regulation to take effect until Congress explicitly approves it.** Legislation to require such congressional approval for all major rules, known as the Regulations from the executive in Need of Scrutiny (REINS) Act, passed the House in July 2015 but is still awaiting action in the Senate. In addition, legislators should include requirements for congressional approval of rules in every bill that expands or reauthorizes regulation. Such an approach would demonstrate how ReINS Act requirements work in practice, paving the way for their broader application.

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- **Create a congressional regulatory analysis capability.** In order to exercise regulatory oversight, especially if the REINS Act is adopted, Congress needs to be able to analyze various regulatory policies objectively. Congress currently depends on OIRA, or the regulatory agencies themselves, for analyses, and needs an independent source of expertise. This could be accomplished through an existing congressional institution, such as the Congressional Budget Office or the Government Accountability Office, or through a new unit established by Congress. This new capability need not require a net increase in staff or budget, but could easily be paid for through reductions in existing regulatory agency expenses.

- **Set sunset dates for all major regulations.** Rules should expire automatically if not explicitly reaffirmed by the relevant agency through the formal rulemaking process. As with any such regulatory decision, this reaffirmation would be subject to review by the courts. Such sunset clauses already exist for some regulations. Congress should make them the rule, not the exception.

- **Codify regulatory impact analysis requirements.** All executive branch agencies are currently required to conduct a regulatory impact analysis (including cost-benefit calculations) when imposing any major regulation. Codifying these requirements would ensure that they cannot be rolled back without congressional action, and provides the basis for judicial review of agency compliance.

- **Subject "independent" agencies to executive branch regulatory review.** Rulemaking is increasingly being conducted by independent agencies outside the direct control of the White House. Regulations issued by agencies, such as the FCC, the Securities and Exchange Commission, and the Consumer Financial Protection Bureau, are not subject to review by OIRA or even required to undergo a cost-benefit analysis. This is a gaping loophole in the rulemaking process. These agencies should be fully subject to the same regulatory review requirements as executive branch agencies. Such a requirement has broad support, even from President Barack Obama's former OIRA chief, Cass Sunstein.[18]

- **Codify stricter information-quality standards for rulemaking.** Federal agencies too often mask politically driven regulations as scientifically based imperatives. In such cases, agencies fail to properly perform scientific and economic analyses or selectively pick findings from the academic literature to justify their actions and ignore evidence that contradicts their agenda. Congress should impose specific strict information-quality standards for rulemaking, and conduct oversight to ensure that federal agencies meet these standards. Congress should also make compliance with such standards subject to judicial review, and explicitly state that noncompliance will cause regulation to be deemed "arbitrary and capricious."

- **Reform "sue and settle" practices.** Regulators often work in concert with advocacy groups to produce settlements to lawsuits that result in greater regulation. Such collaboration has become a common way for agencies to impose rules that otherwise would not have made it through the regulatory review process. To prevent such "faux" settlements, agencies should be required to subject proposed settlements to public notice and comment. The Sunshine for Regulatory Decrees and Settlements Act (H.R. 712) would do just that.

- **Increase professional staff levels within OIRA.** OIRA is one of the only government entities in Washington that is charged with limiting, rather than producing, red tape. More resources should be focused on OIRA's regulatory review function. This should be done at no additional cost to taxpayers: The necessary funding should come from cuts in the budgets of regulatory agencies.

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Chapter 7: Restructuring Federal Financial Regulators

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Financial intermediaries serve a key role in the U.S. economy because they facilitate commerce among nonfinancial firms. Various types of financial firms, such as banks and investment companies, provide financial services. Broadly speaking, they pool individuals' funds and channel the money to others who need capital to operate.

For at least a century, the U.S. regulatory framework has been increasingly hindering the financial-intermediation process. The current regulatory regime is counterproductive, in part, because there are too many regulators with overlapping authority. There is no good reason, for example, to have seven federal financial regulators layered on top of individual state regulatory agencies.[1] Similarly, allowing the monetary authority, the Federal Reserve, to regulate financial firms gives rise to unnecessary and potentially dangerous conflicts of interest.

Consolidation vs. Competition

After the 2008 crisis, Congress considered creating a single consolidated financial regulator.[2] However, the ultimate product of that debate—the Dodd–Frank Wall Street Reform and Consumer Protection Act[3]—did not create such a super regulator. Instead, Dodd–Frank increased the scope of the Federal Reserve's authority by including an explicit systemic-risk mandate. It also gave the Fed supervisory authority over new entities, such as savings-and-loan holding companies, securities holding companies, and systemically important financial institutions (SIFIs).[4]

If these trends continue, financial markets could end up under the de facto control of a super regulator: the Board of Governors of the Federal Reserve. Though the U.S. financial regulatory structure needs reform, a single "super" regulator with a banking mindset and a ready safety net would not improve economic outcomes. Thus, any structural reorganization of financial regulators should guard against the current tendency of bank regulation to seep into capital markets regulation.

There are many arguments for and against regulatory consolidation. Critics of consolidation believe that a structure based on multiple regulatory agencies is good because it allows regulators to specialize in particular types of institutions,[5] it allows regulatory experimentation and competition,[6] and it helps highlight one regulator's mistakes. Also, if a regulator does make an error, only the subset of entities it regulates will be directly affected. Finally, maintaining distinct capital markets and banking regulators creates speed bumps to banking regulators' efforts to apply bank-like regulation more broadly.[7]

One argument for consolidating regulators is to avoid "charter-shopping" or a "race to the bottom" among regulators.[8] This argument, however, assumes a degree of competition between financial regulators that is at odds with the existing regulatory system. During the recent financial crisis, contrary to the charter-shopping argument, banks failed at roughly similar rates across the various bank regulators.[9] Furthermore, as professors Henry Butler and Jonathan Macey have so aptly observed, competition among banking regulators is largely a myth.[10]

In surveying the literature of state corporate governance and banking laws, one recent study found that such competition did not generally lead to a "race to the bottom" but rather to a sorting into alternative regulatory systems.[11] Although full regulatory consolidation could harm financial markets, some streamlining is important because the current framework embodies inefficiencies and redundancies. The U.S. banking regulatory structure, for example, is complex, with responsibilities fragmented among the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), and the Federal Reserve.[12] The following list summarizes these agencies' overlapping authorities:

- The FDIC, in charge of maintaining the Federal Deposit Insurance Fund, has backup supervisory authorities over all banks and thrifts that are federally insured. This responsibility creates overlap between the FDIC's authorities and those of the Federal Reserve and OCC as the primary prudential regulators of insured depository institutions.

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- The NCUA supervises only federally chartered credit unions, but it is the deposit insurer for both federal credit unions and most state-chartered credit unions. Its role as deposit insurer creates overlap with state credit union regulators.

- The Federal Reserve has consolidated supervision authority over most holding companies that own or control a bank or thrift and their subsidiaries. This authority creates overlap because the Fed's role is in addition to the oversight provided by the banks' primary federal regulator.

- State banking regulators share oversight of the safety and soundness of state-chartered banks with the FDIC and the Federal Reserve.

This fragmentation and overlap has a long history of creating inefficiencies in regulatory processes, as well as inconsistencies in how regulators oversee similar types of institutions. Even when these overlapping authorities do not lead to inconsistencies, coordination among agencies requires considerable effort that could be directed to other activities. Inconsistencies create an uncertain operating environment for regulated entities, as well as an uncertain environment for regulators when their decisions are contradicted by those of other regulators. The following points summarize some of the best-known historical examples of these inefficiencies and inconsistencies.[13]

- Differences in examination scope, frequency, documentation, guidance, and rules among the FDIC, OCC, and the Fed;

- Inconsistent methods for assessing loan loss reserves;

- Inconsistent guidance and terminology for Bank Secrecy Act examinations *and* compliance;

- Inconsistencies with oversight and compliance of federal consumer financial protection laws (such as fair lending laws);

- The Fed and other primary regulators have not, though they have tried, successfully coordinated their supervision and examination responsibilities.

- Duplication in the examinations of financial holding companies, despite the OCC's and the Fed's efforts to coordinate;

- Conflicting guidance from the Fed and the OCC; and

- Requirements by prudential regulators of regulated entities to report the same data in different formats.

It makes sense to fix these problems by having one federal banking regulator, but that banking regulator should not be the Federal Reserve.

Removing the Federal Reserve's Regulatory and Supervisory Powers

As the united States central bank, the Federal Reserve's primary role is, and should remain, monetary policy. The Federal Reserve Act directs the central bank to "maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices and moderate long-term interest rates."[14] The Federal Reserve has struggled to fulfill these macroeconomic responsibilities, and its supplementary regulatory and supervisory responsibilities—particularly as they have expanded since the financial crisis[15]—are simply unnecessary for conducting monetary policy.

Dodd–Frank, in conjunction with increasing the responsibilities it placed on the Federal Reserve, established a new, Senate-confirmed position—Vice Chairman for Supervision.[16] This still-vacant position is to be filled by one of the Federal Reserve Board of Governors, whose ability to focus on monetary policy would therefore be attenuated. Perhaps worse, allowing the same entity to exercise regulatory and monetary functions gives rise to unnecessary and potentially dangerous conflicts of interest. A central bank that is also a regulator and supervisor could be tempted to use monetary policy to compensate for mistakes on the regulatory side, and financial stability concerns could lead to regulatory forbearance.

The current system is far from ideal, and the Fed's responsibilities overlap with those of other financial regulators.[17] The overlap results in inconsistencies and duplicative efforts by both regulators and regulated entities.[18] efforts at inducing coordination,

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including the Federal Financial Institutions Examination Council's (FFIeC's)[19] and the Financial Stability Oversight Council's (FSOC's) mandate to encourage cooperation among regulators, have not addressed this problem adequately. Removing the Federal Reserve's regulatory and supervisory powers would allow it to focus on monetary policy, and shifting the Fed's regulatory and supervisory responsibilities to either the OCC or the FDIC would reduce duplicative regulations.

Merging the SEC and the CFTC

Similar to the consolidation of federal banking regulators, it makes sense to have one federal capital markets regulator. Congress has, on several occasions, contemplated merging the Securities and exchange Commission (SeC) and the Commodity Futures Trading Commission (CFTC) into one capital markets regulator.[20] The SeC and CFTC regulate markets that have increasingly blurred into one another over the years, and yet the two agencies have approached their regulatory responsibilities in different and sometimes conflicting ways.[21] There is a theoretical case for allowing the two regulators, which historically have employed very different regulatory approaches,[22] to exist side by side. If one regulator's approach is flawed, for instance, regulated entities may be able to migrate to the markets in the other regulator's purview. In practice, however, the bifurcated responsibility has resulted in tense regulatory battles and duplicative effort by regulators and market participants.

Periodic attempts to address the problem have helped calm some of the interagency fighting, but the agencies' closely related mandates promise continued discord.[23] For example, the Shad–Johnson Jurisdictional Accord of the early 1980s brought a measure of peace, but jurisdictional disputes continued. Dodd–Frank, which awkwardly split regulatory responsibility for the over-the-counter derivatives market between the two agencies, only compounded the problem with overlapping authorities.[24] The CFTC, although built on the hedging of agricultural commodities, now is primarily a financial markets regulator. The markets it regulates are closely tied—through common participants and common purposes—with SeC-regulated markets. The .S. is unusual in having separate regulators for these markets.

A merged SeC and CFTC might be better able to take a complete view of the capital and risk-transfer markets. A single regulator could conserve resources in overseeing entities that are currently subject to oversight by both the SeC and CFTC. In addition, a unified regulator would eliminate discrepancies in the regulatory approaches that can frustrate good-faith attempts by firms to comply with the law.

Conclusion

Many of the changes discussed in this chapter will be contentious and difficult for Congress to implement. One approach that might help facilitate these changes is to revive the reorganization authority codified at 5 u.S. Code §§ 901 et seq. that has been used by past Presidents of both parties.[25] Granting this authority, consistent with prudent protections, would require the Trump Administration to submit reorganization plans for consideration by Congress.

Regardless, the President should work with Congress to implement the following two policy changes:

- establish a single capital-markets regulator by merging the SeC and the CFTC; and
- establish a single bank and credit union supervisor and regulator by merging the OCC, the FDIC, and the NCuA—and transferring the Federal Reserve's bank supervisory and regulatory functions to it.

For at least a century, the u.S. regulatory framework has been increasingly hindering the financial-intermediation process. The current regulatory regime is counterproductive, in part, because there are too many regulators with overlapping authority. Consolidating regulatory authority in one federal banking regulator and one federal capital markets regulator, respectively, would help improve the .S. u regulatory framework.

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Endnotes

1. The Federal Reserve, the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), the National Credit Union Administration (NCUA), the Securities and Exchange Commission (SEC), the Commodities Futures Trading Commission (CFTC), and the Consumer Financial Protection Bureau (CFPB).
2. Restoring American Financial Stability Act of 2009, discussion draft, http://thf_media.s3.amazonaws.com/2016/DoddSenateBankingMarkup.pdf (accessed November 22, 2016). The discussion draft included statutory language to create a single financial regulator called the Financial Institutions Regulatory Administration (FIRA).
3. Public Law 111–203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 5, 7, 12, 15, 22, 26, 28, 31, and 42 U.S. Code).
4. For a discussion of this expansion, see Hester Peirce and Robert Greene, "The Federal Reserve's Expanding Regulatory Authority Initiated by Dodd–Frank," Mercatus Center at George Mason University, November 13, 2013, http://mercatus.org/publication/federal-reserves-expanding-regulatory-authority-initiated-dodd-frank (accessed October 8, 2016).
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6. Ibid., p. 50.
7. Former SEC Commissioner Daniel Gallagher has frequently discussed the importance of preventing bank regulators from taking over capital markets regulation. See, for example, Daniel M. Gallagher, "Bank Regulators at the Gates: The Misguided Quest for Prudential Regulation of Asset Managers," speech at the 2015 Virginia Law and Business Review Symposium, April 10, 2015, https://www.sec.gov/news/speech/041015-spch-cdmg.html (accessed November 22, 2016).
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10. Henry Butler and Jonathan Macey, "The Myth of Competition in the Dual Banking System," *Cornell Law Review*, Vol. 73 (1988).
11. Bruce G. Carruthers and Naomi R. Lamoreaux, "Regulatory Races: The Effects of Jurisdictional Competition on Regulatory Standards," *Journal of Economic Literature*, Vol. 54, No. 1 (2016), pp. 52–97.
12. States also have their own banking regulatory agencies, and banks are subject to various rules and regulations promulgated by the Consumer Financial Protection Bureau (CFPB), the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), the Federal Housing Administration (FHA), the Federal Housing Finance Agency (FHFA), and the Department of Housing and Urban Development (HUD).
13. U.S. Government Accountability Office, "Financial Regulation: Complex and Fragmented Structure Could Be Streamlined to Improve Effectiveness," GAO–16–175, February 2016, http://www.gao.gov/assets/680/675400.pdf (accessed April 4, 2017).
14. Federal Reserve Act § 2A, 12 U.S. Code 225a.
15. Peirce and Greene, "The Federal Reserve's Expanding Regulatory Authority Initiated by Dodd–Frank." Also see Patrick McLaughlin, Chad Reese, and Oliver Sherouse, "Dodd–Frank and the Federal Reserve's Regulations," Mercatus Center at George Mason University, February 4, 2016, http://mercatus.org/publication/dodd-frank-and-federal-reserve-s-regulations (accessed October 8, 2016).
16. Dodd–Frank § 1108(a).
17. See, for example, U.S. Government Accountability Office, "Financial Regulation," p. 28, which explains that "[a]ll forms of consolidated supervision by the Federal Reserve create overlap with authority of the primary regulators of the holding company's regulated subsidiaries."
18. See, for example, U.S. Government Accountability Office, "Financial Regulation," p. 36, which noted that "the Federal Reserve's data requests can be very similar to the OCC's requests and that often the two requests will ask for the same data but in different formats." See also memorandum from the Office of the Inspector General to the Board of Governors of the Federal Reserve System, "2015 List of Major Management Challenges for the Board," September 30, 2015, https://oig.federalreserve.gov/reports/board-management-challenges-sep2015.pdf (accessed October 8, 2016). Among the items in the list was "maintaining effective relationships with other regulators." The Inspector General noted: "While the Board has taken steps to improve interagency collaboration and cooperation...continued coordination with other federal supervisory agencies, such as the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency, is crucial to implementing the financial stability regulatory and supervisory framework." Ibid., p. 6.
19. The FFIEC is "a formal interagency body empowered to prescribe uniform principles, standards, and report forms for the federal examination of financial institutions by" the Board of Governors, the FDIC, the NCUA, the OCC, and the CFPB.
20. House Financial Services Chairman Barney Frank (D–MA) proposed legislation to merge the SEC and CFTC. See Sarah N. Lynch, "Retiring US Lawmaker Barney Frank Seeks SEC–CFTC Merger," Reuters, November 29, 2012, http://www.reuters.com/article/sec-cftc-merger-idUSL1E8MTGFA20121129 (accessed November 24, 2016).

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21. See, for instance, U.S. Government Accountability Office, "Financial Regulation," p. 41, which observes: "Over time, separate regulation of the securities and futures markets has created confusion about which agency has jurisdiction and has raised concerns about duplicative or inconsistent regulation of entities that engage in similar activities."
22. Historically, the CFTC applied a principles-based approach to regulation, whereas the SEC's approach was more rule-based. The two agencies' approach is now very similar, particularly since Congress passed the 2010 Dodd–Frank Act.
23. For a discussion of cooperative efforts over the years, see U.S. Government Accountability Office, "Financial Regulation," pp. 43 and 44.
24. See, for instance, Annette L. Nazareth and Gabriel D. Rosenberg, "The New Regulation of Swaps: A Lost Opportunity," *Comparative Economic Studies*, Vol. 55, No. 3 (September 2013), pp. 535–548.
25. Also see David Walker, U.S. General Accounting Office, "Executive Reorganization Authority: Balancing Executive and Congressional Roles in Shaping the Federal Government's Structure," testimony before the Committee on Government Reform, U.S. House of Representatives, April 3, 2003, and Henry B. Hogue, "Presidential Reorganization Authority: History, Recent Initiatives, and Options for Congress," Congressional Research Service, December 11, 2012.

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Chapter 8: Human Resources

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With roughly two million civilian employees, the United States federal government is one of the largest employers in the world. This massive workforce creates high stakes—in terms of the need for efficiency and accountability—for federal taxpayers. Unfortunately, the federal government operates on a faulty business platform that wastes taxpayer dollars by failing to optimize its human resources.

Despite paying its workers a hefty compensation premium, the federal government is rusty and sluggish.[1] Burdened by excessive red tape, inefficient and outdated practices, and lack of sufficient ways for rewarding high-performing employees or penalizing low-performing ones, federal managers and federal employees alike express widespread frustration with government practices that prohibit them from doing their jobs effectively.

The federal government is a unique entity and there are certain private business practices that are inappropriate for the federal government. However, there are many ways that the federal government can improve its efficiency, accountability, and achievements by making its employment model function more like the private sector.

Bringing Federal Compensation in Line with Private-Sector Compensation

The federal government significantly overcompensates federal employees. According to a 2017 report by the Congressional Budget Office, federal government employees receive 17 percent more, on average, than their private-sector counterparts. This costs taxpayers $31 billion per year in added compensation costs. Reports by The Heritage Foundation[2] and American Enterprise Institute[3] find significantly greater overall compensation premiums of 30 percent to 40 percent, and 61 percent, respectively. Those reports suggest that federal compensation premium costs two or three times as much—an amount between $50 billion and $81 billion per year.

One component of this overcompensation is higher salaries. A 2011 Heritage Foundation analysis of the gap between federal and private-sector compensation found that much of the unexplained wage premium in the federal government comes from federal employees advancing up the pay scale more quickly than private-sector workers.[4] Congress should remove the automatic nature of within-grade-increases (WIGIs) and allow federal managers to determine (within reasonable guidelines) the rate at which particular employees advance up the GS grades and steps.

Benefits are the biggest component of federal employees' overcompensation. On average, federal employees receive 47 percent more in benefits than private-sector workers, and this figure does not even take into account student loan repayment and forgiveness, transportation and childcare subsidies, retiree health benefits, and many other factors such as preferable work schedules. The biggest driver of the gap in benefits is retirement benefits—primarily the government's defined benefit pension plan. Federal workers receive between three and five times as much as the private sector.

Congress should switch all new hires and non-vested federal employees into an exclusively defined contribution system by increasing the federal contribution to employees' thrift savings plan (TSP).[5] Workers with five to 24 years of employment should have the option of keeping their existing benefits with some changes (including higher employee contributions), or shifting entirely to the TSP with higher government contributions. No changes should be made for workers with 25 years or more of government service. Full details of proposed retirement changes can be found in the 2016 Heritage Foundation *Backgrounder* on reforming federal compensation.[6]

Congress should also reduce the amount of paid leave for federal employees by eight days (an employee with three years of service currently receives 43 days of paid leave), eliminate future retirement health benefits for new hires, and provide a flat subsidy for health insurance premiums, regardless of which plan employees choose. Taken together, the compensation changes proposed by Heritage would save $333 billion over 10 years.[7]

Performance Rating System Should Reward and Discipline Employees Accordingly

According to a 2013 Government Accountability Office report, 99.6 percent of federal employees were

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rated at least "fully successful" while only 0.3 percent were rated "minimally successful," and 0.1 percent "unacceptable."[8] Federal employees' so-called performance-based pay increases are tied to these ratings, meaning that these pay increases are effectively automatic.

Managers in the private sector have market incentives to elevate talent and cut dead weight. Instead of bottom lines, federal managers face significant legal constraints and a burdensome process if they rate federal employees anything less than "fully acceptable." In addition to having to develop a performance-improvement plan for those workers, federal employees can appeal a less-than fully acceptable rating through multiple forums. Consequently, a study by the Office of Personnel and Management (OPM) found that 80 percent of all federal managers have managed a poorly performing employee, but fewer than 15 percent issued a less-than fully successful rating, and fewer than 8 percent attempted to take any action against the problematic employees.[9] Among those who did attempt action, 78 percent said their efforts had no effect.[10]

The federal government requires a different system for performance ratings and pay increases. First, the burden on federal managers for rating an employee anything less than "fully successful" must be reduced. Managers should only have to develop time-consuming and burdensome Performance Improvement Plans (PIPs) for employees whose shortcomings are serious enough to result in termination if they are not addressed. Moreover, employees who receive anything less than "fully successful" ratings should only be allowed to appeal that rating through one internal forum (as opposed to four different ones).

Additionally, federal managers need some incentive to identify weak performers despite their hesitance to assume the role of disciplinarian. A forced ratings distribution would accomplish this. The OPM currently bans forced distributions, but there is no statutory basis for this regulation. In fact, the OPM regulation banning forced distributions arguably contravenes the law. According to the authorizing statute (5 uS. Code § 4302), the OPM is responsible for establishing performance standards that "permit the accurate evaluation of job performance on the basis of objective criteria" and that help agencies in "recognizing and rewarding employees whose performance so warrants." In practice, the current rating system falls short of these statutory requirements.

The Office of Management and Budget (OMB) should eliminate the ban on forced distributions and provide a recommended distribution system (including a range to allow for differences in workforce performance across agencies). Moreover, federal managers who do not judge an employee as warranting a scheduled pay raise should not be discouraged from making toughminded managerial decisions by overly burdensome reporting requirements.

Improving and Expanding Pay-for-Performance Compensation Programs

Without adequate means of rewarding good work, performance assessment is little more than an academic exercise, as nearly all of federal employees' pay increases are determined by seniority as opposed to merit. Currently, a manager can only reward a strong performer with a year-end bonus equaling 1.5 percent of the employee's total salary. High-level managers in the Senior Executive Service (SES) can receive a larger bonus equal to 7.5 percent of salary.

The Trump Administration should push for legislation that changes the basis of federal compensation from seniority to performance. In so doing, the Administration and Congress should avoid the pitfalls that hampered previous efforts instituted by the Civil Service Reform Act of 1978 and modified in 1984 via the Performance Management and Recognition System. Neither system affected a broad enough swath of the civil service (it only applies to managers in the GS 13–15 pay bands), and both failed to effectively identify truly outstanding civil servants or to sufficiently reward superior achievement.[11]

The Department of Homeland Security (DHS) and the Department of Defense both developed successful merit pay systems. Despite the OPM's conclusion that those compensation programs "drive improvements in managing performance, recruiting and retaining quality employees, and achieving results-oriented performance cultures,"[12] public-sector union opposition caused these successful systems to be eliminated by the National Defense Authorization Act of 2009.

even without congressional action, the Trump Administration can and should increase the size of year-end bonuses available for high achievers under the condition that such rewards are reserved for truly excellent public servants. Today, performance-based

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bonuses are awarded far too routinely to make them an adequate inducement. In fiscal year 2015, for instance, 71.2 percent of SES managers received a performance bonus.[13] According to an OPM report, 45 percent of employees below the senior levels received bonuses averaging close to $1,000.[14] To limit awards to truly excellent service, the OMB can provide a similar recommended distribution schedule for bonuses, and require managers who deviate from those schedules to provide sufficient evidence for doing so.

Make It Less Burdensome to Dismiss Chronic Low Performers

While high-performing civil servants are not rewarded sufficiently for their good work, underperforming employees rarely face serious consequences. While the risk of getting fired in the private sector is 1 in 77, the odds of being removed from public-sector employment are 1 in 500.[15] Holding on to inadequate employees not only leads to wasted taxpayer dollars and poorly administered government programs, it also poisons the workplace climate as other employees learn that misconduct is tolerated and high performers are called on to pick up the slack.

The Trump Administration should bring public-sector employee accountability in line with that of the private sector. The Administration can do this reform three ways. First, the current probationary period for newly hired civil servants should be extended from one year to three. During this initial probationary period, a government employee does not have the same legal protections against removal as a fully instated employee. It is critical that managers have a longer period to observe an employee's work before handing him or her what amounts to a tenured position in the federal government.

Second, the federal government should simplify and streamline the appeals process available to terminated government employees. Federal employees currently have four venues for fielding their grievances—the Merit Systems Protection Board, the Federal Labor Relations Board, the Office of Special Counsel, and the federal division of the equal employment Opportunity Commission. excessive grievance and appeals options contribute to the prohibitively burdensome and costly process of removing poor performers or problematic employees—a process that takes a year and a half, on average, to complete.[16] Congress should reduce the number of grievance and appeals venues to one.

Lastly, the Trump Administration should shorten the period of time that managers are required to give employees to improve performance before dismissing them. Currently, a manager must provide an underperforming employee with a PIP and give him or her no fewer than 90 days to address his or her shortcomings. This Performance Appraisal Period (PAP) should be shortened to 60 days. As demonstrated by the fact that only 0.4 percent of public-sector employees are rated less than "fully successful" by their managers, it is safe to assume that when a performance issue is finally addressed, it is serious and probably not a new development. Further, the current 90-day PAP has no statutory basis in 5 U.S. Code § 4302.

Ensuring Sufficient Non-Career Executive Staff to Carry Out the President's Agenda

The President promised major change and has an ambitious agenda that requires a strong cadre of non-career (political) appointees who are committed to his agenda, and who are in the appropriate managerial positions throughout the federal departments and agencies.

There is a clear line between career and non-career functions and responsibilities. The career civil service enjoys the protection of the laws, rules, and regulations of the merit system, and they are duty-bound to carry out their responsibilities—including executing the Administration's policies as directed. At the same time, the President's appointees are the ones that must advance those policies through appropriate administrative actions, as well as advocating those policies to Congress. Career bureaucrats cannot perform these key management and policy functions.

Current law provides that 10 percent of the total SES can consist of non-career appointments. The President should make sure that he has the full complement of senior executives within the federal departments and agencies. Moreover, the President should instruct the OPM to undertake a personnel audit within federal departments and agencies to make sure that there are sufficient non-career personnel positions, including both Schedule C and SES, to execute the President's policy agenda. At the same time, the President should emphasize that each of his Cabinet and agency head appointments make every effort to ensure a bright line between career and non-career functions and responsibilities in order to advance his policy agenda while preventing politicization of career staff.

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Seeking Opportunities to Expand Automation

Automation has transformed large swaths of the American economy. While automation does contribute to significant job loss and economic displacement, it also saves companies enormous sums of money, and they pass those savings on to consumers.[17] Certain automations could help reduce the government's annual deficits, which the Congressional Budget Office estimates will average $943 billion over the next 10 years.[18] OMB should commission a report f examining existing government tasks performed by generously paid government employees that could automated. For example, one of the Social Security Administration's largest functions is providing replacements for lost or damaged Social Security cards. Kiosks in Post Offices (which already service u.S. passports) or malls could provide this service instead.

Studies suggest that the potential savings could be significant. According to an economy-wide analysis by McKinsey & Company, 49 percent of the activities that American workers currently perform could be automated by adapting and implementing existing technology.[19] upon investigating the united Kingdom's civil service, Deloitte researchers determined that up to 861,000 (of 5.4 million) public-sector jobs could be automated by 2030, resulting in a £17 billion (roughly $21.5 billion) savings in wage costs.[20] Automating a similar percentage of American public-sector jobs would reduce the federal workforce by 288,000 employees. Even if all of these workers had no more education than a high school diploma, this measure would reduce federal personnel costs by $23.9 billion.[21]

Consider a Contractor Cloud

The fact that the size of the *official* federal workforce has not changed significantly over the past decades hides the true size of the federal workforce. In addition to employing about 2 million civilians, the federal government provides contracts that support far more than 2 million jobs.[22] Between just 2000 and 2012, federal spending on contracts increased by 87 percent to $518 billion in 2012.[23]

Without assessing whether this growth in the number of federal contracts is appropriate or efficient, the fact remains that the federal government spends about one of every seven dollars on contracted goods and services (and one out of every five dollars based on revenues it collects). It is important that these contracting (taxpayer!) dollars are spent wisely.

The Administration should consider the use of a "contracting cloud" that would allow agencies and departments to hire directly from a pre-screened group of workers. This could help save agencies time and money by not having to obtain services through one or more layers of contractors and subcontractors. It could also result in a wider, more skilled set of available federal contractors. The cloud would identify security clearances and other necessary contractor attributes. In some cases, if agencies could directly hire contractors for, say, website design and maintenance, they could cut the cost and the time for projects by more than half.

Conclusion

In many regards, the federal government operates on a severely flawed business model that unnecessarily drives up costs (burdening American taxpayers), fails to encourage excellence, hinders output and efficiency, and lacks certain innovations. Although the federal government is unique, it could benefit significantly from adopting many features of the private sector, including its compensation platform and employee assessment, and its reward and discipline system. Adequate non-career staff to carry out the President's agenda, and the use of 21st-century innovations, will also help to improve the efficiency and accountability of the federal government.

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Chapter 9: Reducing the Federal Government's Footprint

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In March 2017, President Trump issued Executive Order No. 13781 calling for a "Comprehensive Plan for Reorganizing the Executive Branch."[1] The order instructs the Director of the Office of Management and Budget (OMB), Mick Mulvaney, to improve the accountability, effectiveness, and efficiency of federal agencies. The executive order tells Director Mulvaney to consider "whether some or all of the functions of an agency, a component, or a program are appropriate for the Federal Government or would be better left to State or local governments or to the private sector through free enterprise."[2]

The federal government owns and operates far too many assets that could be better managed by the private sector. Quite simply, they are private-sector endeavors that do not belong under the purview of the federal government. Congress and the Trump Administration should privatize the following federal assets and take aggressive steps to downsize the federal government's physical footprint.

Energy and Environment

It is neither necessary nor appropriate for the federal government to intervene in energy markets. The U.S. enjoys diverse and abundant sources of energy and a robust global energy market. The supply of affordable, reliable, and efficient energy technologies is a multi-trillion-dollar private-sector enterprise in which the United States is "one of the world's most attractive market[s]."[3] The federal government is engaged in a number of roles and responsibilities that, while perhaps having merit of their own, are not appropriate to the federal government, and place the government in direct competition with the private sector. The Trump Administration should eliminate programs that intervene in energy markets, and allow free-market competition and innovation.

Power Marketing Administrations (PMAs). The four PMAs—the Southeastern Power Administration, the Southwestern Power Administration, the Western Area Power Administration, and the Bonneville Power Administration—were intended to provide cheap electricity to rural areas, development in economically depressed regions, and to pay off the costs of federal waterway projects, such as federal irrigation and dam construction. They operate electricity generation, reservoirs, land, waterways, and locks.

PMAs sell deeply subsidized power to municipal utilities and cooperatives in the Southeast and West; they do not pay taxes and enjoy low-interest loans subsidized by taxpayers. Originally intended to recover the costs of federal waterway construction projects and to provide subsidized power to poor communities, the PMAs now supply such areas as Los Angeles, Vail, and Las Vegas. Generating and distributing commercial electricity should not be a centralized, government-managed activity; neither should taxpayers be forced to subsidize the electricity bills of a select group of Americans. Both the Reagan and Clinton Administrations proposed PMA privatization, and the Alaska Power Administration was successfully divested in 1996. The four PMAs that remain today should also be sold under competitive bidding.

Tennessee Valley Authority (TVA). The TVA is a federal corporation that provides electricity, flood control, navigation, and land management for the Tennessee River system. Although the TVA does not receive direct taxpayer funds, the corporation benefits from a number of special advantages not enjoyed by other utilities. The TVA has independence from the oversight, review, and budgetary control of a more traditional federal agency, as well as from the rigors of operating as a private shareholder-owned utility.[5] This lack of effective oversight from either the government or the private sector has resulted in costly decisions, excessive expenses, high electricity rates, and growing liabilities for taxpayers.

Tennesseans have not received economic benefits from the TVA, either. The TVA enjoys exemptions from federal statutes and its many federal subsidies are conservatively estimated at 10 percent to 15 percent of the TVA's average wholesale power price. Yet Americans serviced by the TVA pay some of the highest electricity prices in the region. Despite three major debt-reduction efforts in recent history, the TVA has still not reduced its taxpayer-backed and ratepayer-backed debt.[6] The TVA has had ample time to reduce debt, reduce operating costs, and reform and fully fund its pension fund. The most

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effective way to restore efficiency to the TVA system is to sell its assets via a competitive auction and bring it under the rigors of market forces and public utility regulation.[7]

The Strategic Petroleum Reserve (SPR), the Northeast Home Heating Oil Reserve, and the Gasoline Supply Reserves. As part of the U.S. commitment to the International Energy Agency, the federal government created the SPR through the Energy Policy and Conservation Act (EPCA) in 1975.[8] Congress initially authorized the SPR to store up to one billion barrels of petroleum products, and mandated a minimum of 150 million barrels of petroleum products. The SPR, which opened in 1977, has the capacity for 727 million barrels of crude oil, and currently holds 685 million barrels.[9] The Northeast Home Heating Oil Reserve and the Gasoline Supply Reserves were established by EPCA and are held by the Department of Energy. They contain 1 million gallons of diesel and 1 million gallons of refined gasoline to prevent supply disruptions for homes and businesses in the Northeast heated by oil, to be used at the President's discretion.

The SPR has been a futile tool for responding to supply shocks, and disregards the private sector's ability to respond to price changes. Whether a shortage or a surplus of any resource exists, the private sector can more efficiently respond to changes in oil prices, whether it is unloading private inventories, making investments in new drilling technologies, or increasing the use of alternative energy sources. Congress should authorize the Department of Energy to sell off the entire reserve, specifying that the revenues go solely toward deficit reduction. Congress should instruct the Energy Department to sell the oil held by the SPR by auctioning 10 percent of the country's previous month's total crude production until the reserve is completely depleted. The Energy Department should then decommission the storage space or sell it to private companies.

The department should also liquidate or privatize the Northeast Home Heating Oil Reserve and the Gasoline Supply Reserves. Private companies respond to prices and market scenarios by building up inventories and unloading them much more efficiently than government-controlled stockpiles.

Commercial Nuclear Waste Management. Management of nuclear waste from commercial nuclear power reactors is a business activity, not an inherent government function.[10] Yet the Nuclear Waste Policy Act, as amended, established a system where the Department of Energy is legally responsible for collecting and storing waste from commercial nuclear reactors. Decades of dysfunction demonstrate the federal government's inability to manage nuclear waste rationally, economically, or at all. Should the Nuclear Regulatory Commission (NRC) grant a license to build a repository at Yucca Mountain as proposed, this would not solve the nuclear-waste-management challenge. It merely provides a short-sighted solution rather than an innovative, multi-dimensional market with an array of management opportunities for the future nuclear industry.

The private sector should ultimately take responsibility for managing its own nuclear waste, in addition to having the greatest incentive and expertise to reach solutions. The ultimate goal should be to create a competitive market where waste management companies compete to provide services to utilities. The federal government's role should be limited to providing regulatory oversight and taking final title of any waste upon final disposal. A possible model is the Finnish one, where the nuclear industry is responsible for management, and also where the first long-term repository in the world is being built.[11]

To this end, the Department of Energy and the NRC should complete the licensing-review process for a Yucca Mountain repository as the law requires.[12] If a facility at Yucca Mountain is permitted and built, it should be done with the participation and ownership by Nevada to the fullest extent possible. While there are a number of ways to transition to privatization, industry must be responsible for negotiating market prices directly with waste management providers, and must hold the federal final title for the waste.[13] All fees already paid to the nuclear waste fund for the purpose of a repository should remain connected to existing waste. Nuclear waste management funds should be placed in company-controlled escrow accounts for all new fuel.[14]

Income Security and Retirement

With the goal of improving individuals' financial security, the federal government has ventured into multiple areas of individuals' lives that would be better left to the private sector or state and local governments. Setting aside the often problematic and unnecessary nature of federal mandates for certain

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income-insurance programs, the federal government's commandeering role as the provider and administrator of these programs is the primary reason why these programs fail to provide the income security they promise.

Virtually every federal program aimed at providing income security operates in the red, accumulating massive unfunded liabilities that will result in either failure to deliver the promised level of insurance or saddling massive debts on future workers. The federal government should devolve income security programs that provide a false sense of security to the private sector, where individuals can receive greater benefits at lower costs, and taxpayers can avoid multi-billion-dollar and multi-trillion-dollar bailouts.

The Pension Benefit Guaranty Corporation (PBGC). The PBGC is a self-financed government entity that provides insurance to private-sector pension plans.[15] under congressional oversight, the PBGC cannot operate like a real insurance company. Most problematic is its multiemployer program, which charges an excessively low, flat-rate premium to all pension plans regardless of their funding status.[16] This would be like selling car insurance at $100 per year to anyone who wants it, with no difference in price for a 16-year-old male and a 40-year-old woman.

Moreover, when a multiemployer pension plan becomes insolvent and the PBGC has to step in to pay insured benefits, the trustees who oversaw the plan's demise do not lose their jobs. Instead, the PBGC pays them to *continue* overseeing the plan. Consequently, the PBGC's multiemployer program faces an estimated deficit of $58 billion to $101 billion, and that only includes the liabilities of plans that become insolvent between 2017 and 2026.[17] The only way to make the PBGC solvent (and therefore ensure that pensioners receive their insured benefits and that taxpayers do not have to pick up the tab) is to make the PBGC function like a private insurance company. That is not possible if it has to petition Congress to make a change.

Therefore, Congress should establish a path to divest the PBGC's role to the private sector. After addressing its existing deficits, Congress should end the PBGC. In its place, Congress should establish minimum required insurance that private pensions must purchase, similar to how state governments require certain levels of car insurance. Private insurers would do a better job of appropriately pricing insurance and would incentivize plans to maintain higher funding levels. Moreover, taxpayers would be less likely to have to pick up the tab for underfunded pensions.

Social Security Disability Insurance (SSDI). Aside from inefficiencies in the Social Security Administration's (SSA's) operations, the SSDI program's problems and unchecked growth boil down to two factors: too many people get on the rolls, and too few ever leave them. The private sector offers solutions to both of those problems. In contrast to SSDI, private disability insurance (DI) does a significantly better job of identifying eligible individuals who suffer from permanent and deteriorating conditions from those who could be helped with accommodations and rehabilitation. Private DI also helps about four times as many people return to work, provides a more efficient and timely determination process (taking no more than 45 days for a determination compared to more than a year for most SSDI applicants), and provides about 33 percent more in benefits for about half the cost of SSDI.[18]

The SSA should implement a demonstration project to test the viability of providing an optional, private disability insurance component within the current SSDI program. The SSA should use its authority under Section 234 of the Social Security Act[19] to implement a demonstration program that would test the viability—including the budgetary impact for the SSDI system and the economic and physical well-being of potential SSDI beneficiaries—of an optional, private DI component by allowing a limited number of companies and workers to participate in an optional private DI system for their first three years of benefits.[20] If mutually beneficial to the SSDI program's finances and to individuals' well-being, Congress should make private DI an option for all companies and workers.

Subjecting these assets to market forces will result in competitive processes that yield efficient outcomes. In some cases, divesting some of these assets may result in lower prices through increased operational efficiency because private actors are incentivized to reduce costs rather than rely on the preferential treatment from the government. In other cases, privatization may result in higher prices, at least in the short term, as the preferential treatment is stripped away. ultimately, however, taxpayers will not be subject to paying for concentrated benefits

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accrued to those parties receiving special privileges. Notably, taxpayers will be protected from decades of government mismanagement where growing liabilities of government-owned assets would likely result in taxpayer-funded bailouts. Privatization will result not only in a leaner federal government, but will incentivize government-owned assets that have received decades of preferential treatment to operate more efficiently and effectively.

Transportation Infrastructure

Although the federal government is extensively involved in funding and regulating the nation's infrastructure, it directly owns few assets. Indeed, only 3 percent of U.S. infrastructure is federally owned, while the remaining 97 percent is under the stewardship of states, local governments, and the private sector.[21] However, the assets that the federal government does own and operate are of vital interstate importance, and could substantially benefit from improved management and market incentives. The Administration should comprehensively privatize the federally owned infrastructure in the following areas:

Amtrak. established in 1971, Amtrak is a federally funded government corporation that holds an effective monopoly on intercity passenger rail. The majority of Amtrak lines provide poor service and require large taxpayer subsidies, largely due to its monopoly status and government mismanagement.[22] Ideally, Congress and the Administration should eliminate federal subsidies for Amtrak, privatize any viable lines (chiefly the Northeast corridor), and open up intercity passenger rail to competition. Management of current state-supported routes could be turned over to the states, which would then have the option to cover the full cost of providing passenger rail service.

If complete overhaul is not politically possible, an alternative approach would be to lower federal subsidies for the long-haul and state-supported routes, allowing states to replace the subsidy difference if desired, and Amtrak to shutter underperforming routes. The Northeast corridor could also be entered into a public-private partnership by bidding out the right to operate and maintain the Northeast corridor for a set period to a private firm, under the condition that the operator maintain a certain level of service and infrastructure condition.[23]

Allowing firms to compete to provide service would not only decrease costs to taxpayers and improve service for customers, but would also add an additional element of accountability that is currently non-existent for the railway in its current monopoly form.

Air Traffic Control. The Federal Aviation Administration's Air Traffic Organization (ATO) is responsible for providing air traffic control services. Worldwide, it is one of the last air-navigation service providers that is housed within an aviation-safety regulatory agency, and indeed, there is bipartisan agreement that air traffic control is not inherently a government function.[24] Government bureaucracy has led to an ATO that is slow to react, mired in red tape, and managed by Congress, when it should be run like an advanced business. Billions of dollars have been spent on technology modernization, and the ATO struggles with basic business functions, such as hiring employees, investing in capital improvements, and improving efficiency in its current structure.[25] Full privatization of air traffic control would bring private-sector flexibility and efficiency to the essential service and allow it to innovate outside the realm of federal bureaucracy.

Saint Lawrence Seaway Development Corporation (SLSDC). Congress and the Administration should privatize the SLSDC, which maintains and operates the U.S. portion of the Saint Lawrence Seaway under 33 U.S. Code § 981 and 49 U.S. Code § 110. The privatization would end taxpayer contributions for maintenance and operating activities, mirroring the SLSDC's Canadian counterpart, which was privatized in 1998.

Inland Waterways. The Army Corps of Engineers owns and manages the bulk of the United States' vast inland waterways infrastructure, covering an estimated $264 billion of water resources infrastructure—such as locks and dams—across 12,000 miles of waterways.[26] However, the Corps has done a poor job of updating and maintaining this vital infrastructure, the majority of which is past its intended design age of 50 years, resulting in substantial delays and bottlenecks.[27] The waterways suffer from a lack of user-funded financing stream and market incentives to maintain the infrastructure. The waterways rely on a $0.20 tax on commercial fuel on certain segments of the waterways. These taxes cover only 50 percent of capital costs of the inland waterways, and 0 percent of operating

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costs. Federal taxpayers pick up the remaining share, resulting in an effective 90 percent subsidy—by far the most of any freight infrastructure.[28] This reliance on general revenues can explain the poor condition of the waterways infrastructure, especially compared to that of highways and freight rail, the maintenance of which is primarily—entirely in the case of freight rail—funded by the users.

Modern freight infrastructure does not come for free. If the inland waterways are to be modernized, a substantial shift in the funding paradigm is required. Congress and the Administration should completely transition away from the inadequate fuel tax to a direct user-fee system. This approach has bipartisan appeal, garnering support from both the Trump and Obama Administrations.[29] Following the authorization of user fees, the federal government should privatize the locks, allowing private companies to operate and maintain the locks, dams, and other inland waterways infrastructure. If outright privatization is not politically feasible, the Corps should bid out the right to operate and maintain waterway infrastructure under certain specifications to private operators. Moving away from the current outmoded funding system toward one of market incentives is the best option for waterways infrastructure modernization.

Federal Property

The federal government owns vast tracts of land and real property assets that could be put to better use, and in doing so would reduce the burden on taxpayers. Federal lands face multi-billion-dollar maintenance backlogs, and management agencies are increasingly spending resources to meet regulatory reporting requirements and fight lawsuits.[30] Taxpayers also bear the cost of mainlining underutilized or vacant buildings—which could be put to better use through leasing or sale.

Federal Lands. The federal estate is massive, consisting of some 640 million acres. The effective footprint is perhaps even larger as limitations on federal lands often affect the use of adjacent state and private lands, and as government agencies lock up lands through informal designations and study areas. The sheer size and diversity of the federal estate and the resources both above and below ground are too much for distant federal bureaucracies and an overextended federal budget to manage effectively.

Further, both the executive branch and Congress have irresponsibly increased the size of federal land holdings without providing for their maintenance over the years. The federal government can simply pass on the costs of poor land management to federal taxpayers, but private citizens, businesses, and nonprofit organizations have powerful incentives to manage resources better.[31] Private actors are more accountable to the people who will directly benefit from wise management decisions or be marginalized by poor ones.

The President and Congress should keep the size of the federal estate in check by abstaining from adding new properties, and expeditiously devolving those already designated as not needed. Congress should explore avenues to reduce the size of the federal estate, including privatization, but also land transfers to states and county commissioners, and increasing the use of private land trusts. Congress should also give federal land managers more autonomy in setting user fees in order to make them more competitive with the private sector and incentivize better management.

Federal Real Property. The federal government holds a vast array of real property—leasing or owning approximately 273,000 buildings in the United States.[32] Despite recent efforts to downsize the government's inventory of vacant and underutilized property, the most recent data from 2010 suggests that a substantial amount of property—as many as 77,700 buildings—remains vacant or underused.[33] However, significant hurdles exist for the government to offload real property, which would save taxpayers money and provide a boon to local economies. Federal law forces agencies to undergo a time-consuming and inefficient process when trying to offload property by first requiring the property owner to offer the facility to another federal agency, state and local governments, or qualified nonprofits.[34] Specific laws and regulations that hinder property disposal include:

- The National environmental Protection Act (NEPA), which provides many agencies with a direct disincentive to offload old properties;[35]
- The National Historic Preservation Act of 1966, which requires agencies to register historic properties and consult with various stakeholders before taking action on disposing or altering the property;[36]

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- The Stewart B. McKinney Homeless Assistance Act of 1987, which requires agencies to offer properties to organizations alleviating homelessness;[37] and
- Budget scoring rules that act as disincentives to agencies to incur short-term expenses to sell or demolish surplus properties, but lead to greater long-term costs of maintaining suboptimal properties.[38]

In order to expedite the process of offloading surplus real property, the Administration should improve data collection and reporting to adequately quantify the nature of the federal government's properties that are vacant or underutilized, as required by the Federal Assets Sale and Transfer Act of 2016.[39] The Administration and Congress should then further expedite or waive the procedural hurdles facing the federal government from offloading the properties to private ownership. Undertaking a BRAC-like process to dispose of a large number of surplus property is another approach.[40] Facilitating easier disposal of federal real properties would shrink the footprint of the federal government, save long-term budget resources, and allow the free market to make better use of underutilized federal properties.

The benefits of privatization far outweigh the immediate pain of upfront "costs" to privatization, such as caused by budget scoring rules that make privatization unnecessarily difficult politically. While by no means an all-inclusive list, Congress and the Trump Administration could make important headway in reducing federal assets and activities that belong in the private sector. Subjecting these functions to market competition will not only protect taxpayers from current expenditures and future liabilities, it will improve efficiencies that will ultimately benefit the consumers connected with these assets, whether through electricity consumption, air travel, or disability insurance. Congress and the Trump Administration should not treat executive Order No. 13781 as a bureaucratic thought experiment, but as a true opportunity to make the federal government leaner. Reining in government spending and responsibilities will allow the federal government to focus on more priority issues and better management of the assets that remain. Reducing federal assets that drain public resources could be of great use to the private sector.

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Chapter 10: Deputizing Federal Law Enforcement Personnel Under State Law

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The Legislative Response to Unsettling Crimes

The criminal law has always sought to prevent wrongdoing and redress grievances.[1] Both the federal and state governments have that responsibility, with the states doing the lion's share of the work.[2] The reason is that states have a general "police power"—that is, the inherent authority to legislate on any subject to protect the health, safety, and well-being of the public[3] unless the Constitution gives a particular subject matter exclusively to the federal government.[4] This police power enables any state to make it a crime to murder, rape, rob, or swindle anyone within its territory.[5]

The federal government, by contrast, has no general police power.[6] It can define crimes only in connection with one of the powers given to it by the Constitution.[7] Certain crimes—such as treason, espionage, the counterfeiting of U.S. currency, or the murder of federal officials—are natural candidates for federal offenses whether or not they are also crimes under state law.[8] For most of our history, the federal criminal code focused on matters of peculiar interest to the federal government.

But no more. It is not uncommon today to see Congress enact a new federal criminal law in response to a surge of media attention to a problem or a noteworthy event. In 1992, the problem was "carjacking," and the event was a carjacking in the Washington, D.C., region of a mother's car with her child still in it. To signal its disapproval, Congress gave us a federal carjacking statute,[9] even though kidnapping and the interstate transportation of a stolen vehicle were already federal offenses,[10] and kidnapping and theft were crimes in all 50 states.[11] Ten years later, large-scale corporate fraud prompted Congress to enact the Sarbanes–Oxley Act of 2002,[12] even though there already were dozens of federal fraud statutes on the books[13] and both fraud or larceny have been crimes in one form or another since the common law.[14]

Today, the problem is the rise in assaults against police officers, and the events were the murders of officers in San Antonio, Texas, and Baton Rouge, Louisiana, as well as the ambush murders of several officers in Dallas. Together, those incidents have led some Members of Congress to introduce legislation that would make it a federal crime to kill a state or local police officer if his department receives federal funds,[15] even though every state criminal code already outlaws murder.[16] It would not be unreasonable for anyone to conclude that Congress no longer feels itself bound by the principle that there is a limit as to how far it should extend federal criminal jurisdiction in the service of a healthy system of federalism.

Although the reflexive desire to address the murder of state and local police officers through new federal legislation is misguided, the sentiment behind such legislation can be noble. Police officers are "the foot soldiers of an ordered society,"[17] and there is reason to believe that they have recently been under assault. Preliminary data for 2016 recently published by the Federal Bureau of Investigation (FBI) indicate that 66 police officers were feloniously killed in the line of duty, 17 of them by ambush, for a 61 percent increase over the 41 killed in 2015.[18] Also troubling is the trajectory of those numbers. Over the past decade, the number of officers killed in the line of duty peaked at 72 in 2011 and then declined to 27 in 2013 before the recent uptick beginning in 2014, which saw an increase to 51.[19] We are not in the same position today that we found ourselves in during the 1960s, when the Black Liberation Army targeted members of the New York City Police Department for assassination,[20] but the current trend is one that any responsible party wants to see reversed.

Some commentators have concluded that the rise in murders of police officers is due to the vocal outcries made by leftist groups to defy and confront the police, such as clamors heard after a white police officer shot and killed Michael Brown, a black assailant, in Ferguson, Missouri. The private condemnations of the Ferguson incident began before all of the facts were in and, some could argue, were intended to generate media attention and throw back on their heels any politicians who might otherwise automatically support the police for using force in self-defense or to arrest a suspect.[21] The constant reiteration of those claims by the media in their 24/7/365 news cycle only aggravated the harm. It is true

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that the police have abused their authority in some well-publicized cases[22] (and others unknown), but the Michael Brown incident was not one of them.[23] Moreover, it is in the nature of things that calls by extremists for the on-sight murder of white police officers[24] will have an effect on at least some portion of the target audience.[25] When anything can be said—however incendiary, however inciting, however dangerous—there is a real risk that whatever is said will be done. The result is that to some elected officials, the only effective response is new legislation making the strong statement that "This conduct stops *here and now!*"

Yet there is more than one way to address a crime problem. (In fact, the addition of a new provision to the federal criminal code is sometimes the least desirable option.) Congress, like any state or local assembly, can always address a criminal justice problem in several ways. For example, it can increase the number of law enforcement officers (e.g., authorize additional investigators); attract better-quality personnel by increasing the salaries of current investigators (e.g., create a new GS scale level); recruit experts to perform closely allied tasks (e.g., hire forensics or computer personnel); reassign investigators from one agency to another (e.g., shift the Bureau of Alcohol, Tobacco, Firearms, and Explosives from the Treasury Department to the Justice Department); and upgrade the physical assets that investigating officers need to enhance their efficiency (e.g., purchase upgraded patrol car computers or smart phones).[26] Or, alternatively, Congress could leave to the Attorney General the responsibility for designing a solution.

In this case, that last course may be the optimal one. The Attorney General can arrange with state and local governments for the latter to cross-designate federal investigators as state investigators and federal prosecutors as state prosecutors, thereby enlarging the pool of personnel handling violent crimes. Cross-designation would enable the Justice Department to investigate and to prosecute violent crimes in state court, including assaults on police officers, using existing state laws in the applicable jurisdiction.[27]

The Ubiquity of Law Enforcement Task Forces

Federal law enforcement agencies commonly use task forces to bring together different investigative agencies with concurrent jurisdiction over certain offenses or subjects for the purpose of investigating a common problem. For example, the FBI, Drug Enforcement Administration (DEA), and Immigration and Customs Enforcement (ICE) may become partners on a drug task force to conduct a particular investigation or series of investigations. To ensure that the agencies cooperate effectively, they often enter into a formal memorandum of understanding (MOU), which is an agreement among different law enforcement agencies spelling out how they will work cooperatively. MOUs often resolve a number of issues, such as which agency has primary investigatory jurisdiction; which agency is in charge of operations, seizures, evidence collection, and storage of forfeited items; what notice should be given to other federal, state, and local agencies; how to coordinate; and how interagency disputes will be resolved. For example, in 1990, the Secretary of the Treasury, Attorney General, and Postmaster General entered into an MOU regarding money-laundering statutes to "reduce the possibility of duplicative investigations, minimize the potential for dangerous situations which might arise from uncoordinated multi-bureau efforts, and to enhance the potential for successful prosecution in cases presented to the various United States Attorneys."[28] Similarly, in 1984, the Department of Justice entered into an MOU with the Department of Defense to establish policy with "regard to the investigation and prosecution of criminal matters over which the two Departments have jurisdiction."[29]

Federal and State Collaboration via Task Forces

The federal government often partners with state and local law enforcement agencies to address a common problem. For example:

Organized Crime Drug Enforcement Task Forces. A well-known example of strong cooperation among federal, state, and local law enforcement officers can be seen in the Organized Crime Drug Enforcement Task Forces Program (OCDETF). These task forces were formed in recognition that no single government agency is "in a position to disrupt and dismantle sophisticated drug and money laundering organizations alone."[30] The program is a coordinated effort between several federal agencies and state and local law enforcement authorities to combat organized drug trafficking.[31] It allows

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government agencies to share information, coordinate resources and work side-by-side to further each organization's shared law enforcement goal.

The National Infrastructure Protection Plan. The National Infrastructure Protection Plan (NIPP) is an example of a collaborative effort between federal and state officials.[32] Under the NIPP, the Department of Homeland Security (DHS) formulated a "largely voluntary" plan for securing the nation's critical infrastructure and key resources by coordinating with other federal agencies and state governments.[33] The NIPP identifies the roles and responsibilities of the federal, state, and local governments in order to coordinate federal and state resources and share information. It encourages states to facilitate "the exchange of security information, including threat assessments and other analyses, attack indications and warnings, and advisories, within and across jurisdictions and sectors therein."[34]

FBI Violent Gang Task Forces. The FBI created the Safe Streets Violent Crime initiative in January 1992 to bring federal, state, and local law enforcement agencies to bear on "violent gangs, crime of violence, and the apprehension of violent fugitives."[35] This initiative ensures that law enforcement officials at all levels of government collaborate in an effort to eliminate violent, gang-related crime in their communities. The task forces are organized by state; for example, Arizona has the Phoenix Violent Gang Task Force and the Northern Arizona Violent Gang Task Force. This initiative focuses on prosecuting racketeering, drug conspiracy, and firearms violations, specifically.[36] According to FBI testimony, the initiative benefits local law enforcement because it eliminates unnecessary spending and overlap between the federal and state levels. In addition, non-federal law enforcement agencies receive federal support that might not otherwise be readily available.[37]

Disaster Fraud Task Force. The Disaster Fraud Task Force (DFTF) was created on September 8, 2008, to combat various instances of fraud in relation to Hurricane Katrina and other natural disasters,[38] such as the submission of benefit claims on behalf of people who did not exist.[39] In 2006, the Government Accountability Office "estimated that perhaps as much as 21 percent of the $6.3 billion given directly to victims might have been improperly distributed."[40] By working together with local law enforcement, as well as the Federal Trade Commission and the Securities and Exchange Commission (among others), the DFTF is able to combat a wide array of thefts and frauds from both Katrina and subsequent natural disasters.[41]

Fusion Centers. By integrating intelligence and evidence from across government agencies, federal law enforcement can share important counterterrorism and threat information with state and local officials. That is why fusion centers were established pursuant to the Intelligence Reform and Terrorism Prevention Act of 2004,[42] which required the President to facilitate the exchange of information regarding terrorism and homeland security by linking together information and people in the federal, state, local, and tribal communities, along with the private sector.[43] As of 2006, fusion centers were operating in 37 states.[44] Those centers have provided the resources and assistance to local officials that have allowed them to apprehend terrorist suspects.[45]

Intellectual Property Task Force. Law enforcement agencies at the federal, state, and international levels have joined forces via the Intellectual Property Task Force. Intellectual property crimes have been on the rise due to increasing globalization and international trade, among other factors.[46] In 2010, the Intellectual Property Task Force played a part in the arrest of multiple storeowners and subsequent seizure of almost $100 million in counterfeit merchandise in San Francisco, California.[47]

National Explosives Task Force. The Bureau of Alcohol, Tobacco, Firearms, and explosives (BATFe) heads this federal task force, which is designed to use a "whole of Government" approach[48] to combat criminal and terrorist attacks using explosives. Like many other task forces, its goal is to fight dangerous threats against our nation while efficiently consolidating the personnel and assets of different government agencies. For example, as the Government Accountability Office has reported, the BATFe and FBI divisions of the National explosives Task Force are located in the same headquarters to reduce jurisdictional confusion.[49] Other evidence of the high level of collaboration between BATFe and FBI officials can be seen in the consolidation of explosives training, databases, and laboratories.[50]

ICE: Customs Cross-Designation. The office of Homeland Security Investigations (HSI) under ICe is authorized to "cross-designate other federal, state and local law enforcement officers to investigate and enforce customs laws."[51] Those cross-designated officers[52] can conduct customs searches,

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serve customs-related arrest warrants, and carry firearms, just as a standard ICE officer can.[53] Overall, this means that HSI has a much greater reach than it would at just the federal level, and more officers can be utilized in positions where they are needed that would normally be outside their jurisdiction.

Various states have also created their own task forces. For example:

California: Proactive Methamphetamine Laboratory Investigative Task Force. This task force operates on the state level but works with the U.S. Department of Justice and the Bureau of Narcotics enforcement of the California Department of Justice. The Orange County Proactive Methamphetamine Laboratory Investigative Task Force was established in 1998 to "provide support and enhance the existing efforts of the BNE Clandestine Laboratory Program, with the interdiction and eradication of the small to medium size 'stove top' methamphetamine labs."[54]

Pennsylvania: Crimes Against Children Task Force. Created on September 23, 1999, this task force was designed to bring together not only the federal, state, and local governments, but also medical experts, hospitals, and victims' services groups in order to further the fight against the sexual exploitation of underage victims.[55] There are similar task forces at the state and federal levels addressing the same type of crime. As one example, the Alabama and Georgia Internet Crimes Against Children Task Force, a component of the much broader Internet Crimes Against Children Task Force,[56] arrested 29 suspects on the charge of possession and distribution of child pornography.[57]

Virginia: Northern Virginia Regional Gang Task Force. Created to address the growing threat of gangs in Northern Virginia, this task force is a collaboration of federal, state, and local officials that aims to educate on, prevent, and infiltrate gangs in the area.[58] This task force is unique in that its jurisdiction does not extend across state lines and it assists local police departments only when needed.[59] A multijurisdictional task force is important where culprits can easily move across state lines.[60]

The Benefits of Deputizing Federal Investigators and Prosecutors as State Investigators and Prosecutors

There will be occasions when the federal government will want to be involved in the investigation or prosecution of what is, at bottom, an ordinary "street crime." For example, a suspected terrorist might commit an attempt under state law in a field where there is no federal law making an attempt a crime. While that offense would be only a state crime, the federal government would have a strong interest in bringing a terrorist to justice—if for no reason other than to demonstrate to other would-be terrorists that it will pursue and prosecute them for their crimes, whatever they are, wherever they may be—or in assisting a locale, such as Chicago, that is swamped with violent crime. Rather than invent some new arcane statute justified by a tenuous theory of federal jurisdiction—a statute that would remain on the books as a trap for the unwary long after the need for it has passed—Congress could expressly authorize federal law enforcement officers to be deputized under existing state law. Through appropriate use of cross-designation, the federal government could ensure that defendants of particular federal interest get the attention they deserve while also helping states and localities to bring common criminals to book.

The Attorney General, the nation's senior federal law enforcement officer,[61] has the authority under Title 28 of the U.S. Code to manage the conduct of all federal investigations and litigation.[62] The Intergovernmental Personnel Act[63] empowers the Attorney General to assign federal personnel to states or localities "for work that [he or she determines] would be of mutual concern to [both parties]."[64] If so, the Attorney General should be free to enter into an MOU with a senior state official—perhaps the governor or the state attorney general—granting federal investigators and prosecutors the same authority enjoyed by their state counterparts. Where federal and state law enforcement personnel are working on a case or problem of interest to both, cross-designation would be a sensible decision.[65] Federal law expressly allows the Attorney General to appoint state or local prosecutors as Special Assistant U.S. Attorneys (SAUSAs), and those SAUSAs may prosecute cases in federal court.[66] The proposal outlined in this paper is to regularize the same process, just in reverse.

One benefit of a cross-designation program is that it would enhance the federal government's ability to address violent crime while avoiding the statutory and constitutional shortcomings that can keep it from addressing that problem under existing

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federal law. Those statutes often do not empower the Justice Department to prosecute someone for what would normally be seen as a state law crime,[67] in part because Congress lacks the Article I authority to make such conduct a federal offense.[68] In some circumstances, Congress can condition the disbursement of federal funds on a state's willingness to adopt a new state law, even a new criminal law.[69] That proposition, however, cannot be stretched indefinitely. Using the receipt of federal funds simpliciter as a basis for extending the reach of the federal criminal code might be an unconstitutional exercise of federal power. It certainly is an unwise one. It would enable Congress, for example, to make it a crime to murder anyone who is a recipient of any federal payments (or credits) through federal programs such as Social Security, Medicare, Medicaid, Pell Educational Grants, or scores of other similar undertakings. The effect would be to empower Congress to make any conduct a crime despite the limitations expressed by the explicit and particularized grants of power in Article I, Section 8 of the Constitution.

The Role for Congress

Is there a role for Congress? Yes, but adding to the federal criminal code is not it. Instead, Congress should expressly authorize the Attorney General to pursue agreements with state authorities in which federal law enforcement officials are designated with state law enforcement authority. The states have the power to respond to ordinary "street" crimes. Neither the Constitution nor any federal law expressly prohibits states from sharing their authority with federal agents and Justice Department lawyers. Nonetheless, federal legislation would be valuable. It would powerfully signal congressional and executive approval of deputization as a valuable law enforcement option and would eliminate any claim that a particular federal law enforcement officer violated federal law in making an arrest, executing a search, or questioning a suspect for a purely state law crime.

The Constitution. Not surprisingly, while the Constitution does not expressly authorize federal officials to act under state law, it also does not prohibit them from doing so. The Constitution left that issue up to the new national government and the states. Only one provision in the Constitution—the Article I Incompatibility Clause—adverts to the possibility that a federal official could hold another position simultaneously, and it does not speak to the issue here. The clause provides specifically that:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no Person holding any Office under the united States, shall be a Member of either House during his continuation in Office.[70]

The text of the Incompatibility Clause is no bar to the deputization option recommended in this paper. It addresses only interfederal office-holding, not the scenario discussed here, which would involve federal–state power sharing. The clause denies Senators and Representatives the ability to hold any office created "under the Authority of the united States" while they are serving in Congress and imposes a corresponding restraint on members of the executive branch also simultaneously serving in Congress.[71] There is no parallel bar on holding a position in the federal and state governments at the same time.

Allowing a federal official to possess state-delegated authority also does not run afoul of the purposes of the Incompatibility Clause. The Framers intended for the clause to achieve two goals. On the one hand, by denying members of the Senate and House of Representatives any opportunity to serve simultaneously in a position in the Articles II and III branches, it prevents the President from buying votes in Congress by offering members attractive positions and a double salary elsewhere in government. On the other hand, by keeping officials in the executive and judicial departments from serving as Senators or Representatives, it keeps the President and federal bench from infiltrating Congress with their cronies. Neither purpose is offended by allowing officers in Article I, II, or III to serve at the same time in a position in state government.

ethical problems could arise if, for example, a federal agent or prosecutor were subject to a conflict of interest or if inconsistent demands pulled him in two different directions. For instance, a state, county, or city might try to force a federal agent to assist in the investigation of so many open state cases that the agent could not properly perform

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his responsibilities as a federal law enforcement officer.[72] Or the federal government might want to use a particular offender as an informant on the street rather than see him wind up in prison for a state offense.

Those problems, however, are practical ones, not constitutional ones. The Constitution does not establish a code of ethics for federal officials. That is a task for Congress or the heads of the various federal agencies. The Incompatibility Clause is the only provision in the Constitution that is analogous to a canon of ethics, and it is concerned not with morality but with power—in particular, the risk of compromising Congress's ability to operate independently of the President. The cross-designation of law enforcement officers proposed in this paper does not remotely resemble the problem that the Incompatibility Clause avoids.

The Federal Code. There are two relevant issues. One involves the substantive authority of federal agents to enforce state law. The Justice Department, through its Office of Legal Counsel, has concluded that federal agents lack inherent state law enforcement power; they must receive that authority from another source.[73] The second issue concerns the proper use of federal funds. Federal agency expenditures must be expressly authorized by, or at least fully consistent with, an appropriations bill passed by Congress.[74] As the Justice Department has explained: "If the agency believes that [an] expenditure bears a logical relationship to the objectives of the general appropriation, and will make a direct contribution to the agency's mission, the appropriation may be used."[75] Otherwise, any enforcement of state laws must bear a clear and logical relationship to the agency's purpose, which in almost all instances is to enforce federal law, not state law.

Those conclusions are sensible ones. Congress is limited to the authority granted by the Constitution, and federal law enforcement officers—e.g., federal agents and Justice Department lawyers—are limited to the authority that Congress assigns them.[76] The Constitution does not grant Congress the power to create state law, so federal law enforcement officers cannot claim to possess an inherent federal right to exercise state law enforcement authority. For example, because Congress cannot make simple common-law crimes—such as murder, rape, robbery, and burglary—federal offenses (unless the victims are federal officials or the crime occurs on federal property),[77] it cannot authorize federal agents to investigate such violations of state law.

In a few instances, Congress has authorized the Attorney General to provide federal law enforcement assistance to states or localities. The Emergency Law Enforcement Assistance Act authorizes the Attorney General to use federal law enforcement personnel during a state or local "law enforcement emergency."[78] The Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988[79] would empower the President to use federal law enforcement officers to help a state protect the public during a disaster or emergency.[80] The Protection of Children from Sexual Predators Act of 1998[81] authorizes the Attorney General and FBI director, upon request by a senior state or local law enforcement official, to assist in the investigation of "serial killings."[82]

Those, however, are baby steps. Congress took a giant step toward granting federal agents plenary authority to act under state law in the Anti-Drug Abuse Act of 1988.[83] The act added a new Section 564 to Title 28, which provides that U.S. Marshals and Deputy U.S. Marshals may exercise "the same powers which a sheriff of the State may exercise in executing" state law when a marshal or deputy is engaged "in executing the laws of the United States."[84] That provision does not completely turn federal agents into police officers—a federal agent must be in the process of executing federal law to be deemed a state sheriff—but it does signal that Congress does not object to that proposition in appropriate circumstances.

It could be said that by tasking federal law enforcement officers with the responsibility to assist states and localities, Congress has impliedly granted federal officers whatever authority is necessary to assist in the enforcement of state law, including the power to make arrests or execute search warrants. In *Maul v. United States*,[85] Justices Louis Brandeis and Oliver Wendell Holmes agreed that certain law enforcement powers, including the authority to arrest someone for a crime, "inhere" in that office itself and should be assumed to exist unless there is a statutory provision to the contrary.[86] The argument would be that Congress, the President, and the Attorney General know how and when federal law enforcement officers could be useful and would not involve them in a law enforcement setting if they lacked the express or implied authority to carry out the mission for which they are suited.

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But that is merely an argument; it is not a statute. New legislation expressly approving this practice would settle the issue without the need to awaits the outcome of what could be years of litigation. It would empower the Attorney General from the day it is signed into law to enter into deputization or cross-designation agreements with state officials. Those agreements would eliminate any doubt about whether federal law enforcement officers can make an arrest or execute a search warrant solely for a state law crime. And that would go a long way toward assuaging any concern that reliance on federal agents would create problems when it comes to the prosecution of a case and toward eliminating any claim that those agents were engaged in an unauthorized use of federal funds.

Practical Implementation of This Proposal

It may be necessary for the Attorney General to enter into an agreement with a senior state official, whether the governor, the attorney general, or the chief of the state police. Municipalities are merely corporations created by the state, and officers within municipal police departments may not possess statewide law enforcement authority.

One option would be to use the model created by the Anti-Drug Abuse Act of 1988, but with a slight twist. To eliminate all uncertainty, legislation could vest U.S. officials with the power to receive from a state the same authority possessed by a sheriff, state police officer, or state prosecutor in any state willing to deputize federal officials. At common law, the sheriff, then known as the shire rive, was the king's agent, responsible for handling "all the king's business" and maintaining "the king's peace."[87] Different states may assign their sheriffs different law enforcement authority, but a number of them grant their sheriffs and deputies law enforcement authority throughout the state. The alternative of making federal officials state police officers or prosecutors should eliminate any doubt on this score. In sum, an agreement for identified federal agents to receive the same delegated statewide authority would eliminate any question about their authorization.

Conclusion

The use of federal–state task forces is a widespread practice in contemporary law enforcement and offers promise as an alternative to the passage of new federal criminal legislation if the federal government is to tackle violent crimes as one of its principal missions. The authority for such cooperation, including cross-designation of federal authorities to investigate and prosecute alleged violations of state law (and vice versa), exists. Nonetheless, Congress could eliminate any doubt on that score by expressly authorizing federal investigators and prosecutors to be cross-designated as state law enforcement officials.

Federal legislation encouraging deputization would materially assist federal, state, and local law enforcement efforts both by putting the weight of congressional approval behind the practice and by resolving certain questions that would arise when federal agents pursue someone who has violated only state law. An act of Congress would eliminate any risk that authorization could be challenged in a criminal prosecution or that a federal official could be said to have spent federal funds for an unauthorized purpose. Before reflexively adding to the federal penal code and exacerbating the existing overfederalization problem, Congress should expressly allow federal authorities to be deputized to act under state law in order to bring offenders to justice in appropriate cases in state courts.

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Endnotes

1. *See, e.g.*, Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 Catholic U. L. Rev. 293, 328–30 (2016) (so describing the origin of the English common law of crimes).
2. *See* John F. Pfaff, Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform 33 (2017) (noting that approximately 87 percent of all American prisoners are confined in state facilities).
3. *See* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) (noting that each state possesses "the police power—a power which the State did not surrender when becoming a member of the Union under the Constitution," which includes "such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety").
4. *See, e.g.*, U.S. Const. art. I, § 9, cls. 5 (prohibiting the states from imposing a tax or duty on exported goods) & 6 (same, from granting a preference to particular ports).
5. *See* Wayne R. LaFave, Criminal Law § 4.4, at 223–24 (5th ed. 2010); Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 Harv. J.L. & Pub. Pol'y 337, 342 & n.19 (2015) (discussing the territorial basis for criminal jurisdiction).
6. *See, e.g.*, Bond v. United States, 134 S. Ct. 2077, 2086 (2014) ("In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. The States have broad authority to enact legislation for the public good—what we have often called a police power. . . . The Federal Government, by contrast, has no such authority and can exercise only the powers granted to it, including the power to make all Laws which shall be necessary and proper for carrying into Execution the enumerated powers. . . . For nearly two centuries it has been clear that, lacking a police power, Congress cannot punish felonies generally. . . . A criminal act committed wholly within a State cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States.") (citations and internal punctuation omitted).
7. *See, e.g.*, U.S. Const. art. I, § 8, cls. 1–17 (identifying the powers of Congress); *id.* § 8, cl. 18 ("The Congress shall have Power. . .To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof."); Morrison v. United States, 529 U.S. 598, 607 (2000) (holding unconstitutional, as beyond Congress's Commerce Clause power, a statute making rape a federal offense); United States v. Lopez, 514 U.S. 549, 552, 566 (1995) (same, a federal statute making it a crime to possess a firearm in the vicinity of a school).
8. *See, e.g.*, 18 U.S.C. § 472 (2012) (issuing counterfeit U.S. currency); *id.* § 794 (supplying defense information to the advantage of a foreign nation); *id.* § 1114 (murdering a federal official); *id.* § 2381 (treason).
9. *See* the Anti-Car Theft Act of 1992, Pub. L. No. 102–519, title I, subtitle A, § 101(a), 106 Stat. 3384 (1992) (codified as amended at 18 U.S.C. § 2119 (2006)).
10. *See* 18 U.S.C. § 1201 (2012) (kidnapping); *id.* § 2312 (interstate transportation of a stolen motor vehicle).
11. *See* Wayne R. LaFave, *supra* note 5, § 18.1, at 933–47, § 19.1-19.8, at 966–1030.
12. Pub. L. No. 107-204, 116 Stat. 745 (2002).
13. *See, e.g.*, 18 U.S.C. § 1341 (2012) (mail fraud); *id.* § 1343 (wire fraud); Stuart P. Green, Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime 152 & n.23 (2006); Ellen S. Podgor, *Criminal Fraud*, 48 Am. U. L. Rev. 729, 730–31, 740 (1999).
14. See, e.g., LaFave, *supra* note 5, §§ 19.1–19.5, at 966–95, § 19.7, at 1006–24.
15. *See* the Back the Blue Act of 2017, S. 1134, 115th Cong. (2017).
16. *See* LaFave, *supra* note 5, §§ 14.1–14.7, at 764–816 (murder).
17. Roberts v. Louisiana, 431 U.S. 633, 642 (1977) (Rehnquist, J., dissenting).
18. *See* FBI Nat'l Press Office, FBI Releases 2016 Preliminary Statistics for Law Enforcement Officers Killed in the Line of Duty (May 15, 2017), https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2016-preliminary-statistics-for-law-enforcement-officers-killed-in-the-line-of-duty; Christopher Ingraham, *Ambush Killings of Police Officers Has Hit a 10-Year High*, Wash. Post, Nov. 21, 2016, https://www.washingtonpost.com/news/wonk/wp/2016/11/21/ambush-killings-of-police-officers-has-hit-a-10-year-high/?utm_term=.5f3fafc6d9e8; Christopher Ingraham, *Fatal Shootings of Police Officers Are up More Than 50 Percent from Last Year*, Wash. Post, Nov. 2, 2016, https://www.washingtonpost.com/news/wonk/wp/2016/11/02/fatal-shootings-of-police-officers-are-up-more-than-50-percent-from-last-year/?tid=a_inl&utm_term=.e243c2376866 (hereafter Ingraham, *Fatal Shootings*). For the statistics for 2002–2015, see FBI, Uniform Crime Reports, About Law Enforcement Officers Killed and Assaulted, 2015 (Oct. 2016), https://ucr.fbi.gov/leoka/2015 (hereafter LEOKA).
19. *Id.*, Tbl. 23, https://ucr.fbi.gov/leoka/2015/tables/table_23_leos_fk_circumstance_at_scene_of_incident_2006-2015.xls.
20. *See* Robert Daley, Target Blue: An Insider's View of the NYPD (1974).
21. *See, e.g.*, Heather MacDonald, The War on Cops: How the New Attack on Law and Order Makes Everyone Less Safe (2016) (hereafter MacDonald, War on Cops); Sheriff David Clarke, *This Is a War, and Black Lives Matter Is the Enemy*, The Hill, July 18, 2016, http://thehill.com/blogs/pundits-blog/civil-rights/sheriff-david%20clarke-black-lives-matter-baton-rouge-civil-war; *see also, e.g.*, Heather Mac Donald, Are Cops Racist? (2010).

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22. *See, e.g.*, Sewell Chan, *The Abner Louima Case, 10 Years Later*, N.Y. Times, Aug. 9, 2007, https://cityroom.blogs.nytimes.com/2007/08/09/the-abner-louima-case-10-years-later/comment-page-1/; John Marzulli, *The Abner Louima Case: 10 Years Later*, Daily News, Aug. 10, 2007, http://www.nydailynews.com/news/crime/abner-louima-case-10-years-article-1.237985; Editorial, *An End to the Louima Case*, N.Y. Times, Sept. 24, 2002, http://www.nytimes.com/2002/09/24/opinion/an-end-to-the-louima-case.html?rref=collection%2Ftimestopic%2FLouima%2C%20Abner&action=click&contentCollection=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=14&pgtype=collection.
23. *See, e.g.*, Dep't of Justice Report Regarding the Criminal Investigation into the Shooting Death of Michael Brown by Ferguson, Missouri, Police Officer Darren Wilson (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf; Jack Healy et al., *Ferguson Report Puts "Hands Up" to Reality Test*, N.Y. Times, Mar. 5, 2015, https://www.nytimes.com/2015/03/06/us/in-ferguson-both-sides-see-vindication-in-justice-department-reports.html?_r=0; Sari Horwitz, *Justice Department Clears Ferguson Police Officer in Civil Rights Probe*, Wash. Post, Mar. 4, 2015, https://www.washingtonpost.com/world/national-security/justice-dept-review-finds-pattern-of-racial-bias-among-ferguson-police/2015/03/03/27535390-c1c7-11e4-9271-610273846239_story.html?tid=a_inl&utm_term=.d48facbf699a.
24. *See* John G. Malcolm, Book Review of MacDonald, War on Cops, 17 Fed't Soc. Rev. Issue 3, 68, 68–69 (2016) ("The public should be, but too often is not, horrified by spectacles such as Black Lives Matter (BLM) activists in St. Paul, Minnesota marching in the streets yelling, 'Pigs in a blanket, fry 'em like bacon'; or BLM protestors in New York City chanting, 'What do we want? Dead Cops! When do we want it? Now!'; or a message posted by the African American Defense League urging its followers to 'hold a barbeque' and 'sprinkle Pigs Blood!'; or the Facebook posting by a man in Detroit following the slaying of five Dallas police officers which read, 'All lives can't matter until black lives matter. Kill all white cops.' One would think that, in any civilized society, such sentiments would be universally condemned as barbaric. Instead, such deplorable rhetoric is met with sympathy and tolerance by some on the Left. One can acknowledge, as former Speaker of the House Newt Gingrich did recently, that '[i]f you are a normal white American, the truth is you don't understand being black in America and you instinctively under-estimate the level of discrimination and the level of additional risk.' But one should also acknowledge, as Gingrich did, that, from the perspective of the police, '[e]very time you walk up to a car you could be killed. Every time you go into a building where there's a robbery you can be killed.' The hateful rhetoric quoted above only serves to incite violence, and, to put it mildly, generates more heat than light.") (footnotes omitted).
25. *See* Ingraham, *Fatal Shootings*, *supra* note 18 ("There have been two high-profile instances this year in which multiple police officers were targeted and killed by black male suspects with a history of antipathy toward law enforcement. In Dallas in July, Micah Johnson shot and killed five police officers and wounded nine others, telling authorities he 'wanted to kill white people, especially white officers.' [¶] Later that month in Baton Rouge, Gavin Long killed three police officers and wounded three others after leaving behind a long trail on social media arguing that violence was the solution to the oppression of black Americans.").
26. *See* Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 Harv. J.L. & Pub. Pol'y 715, 735–37 (2013).
27. The Heritage Foundation has previously urged the federal government to pursue such undertakings. *See* Paul J. Larkin, Jr. & Daniel J. Dew, *Making Crime Fighting a Team Effort: Cross-Designating Federal Law Enforcement Officers as State Officers*, Heritage Found. Legal Memorandum No. 100 (Aug. 14, 2013), http://thf_media.s3.amazonaws.com/2013/pdf/lm100.pdf
28. *See* Office of the United States Attorneys, U.S. Attorneys Manual, 9-2186, https://www.justice.gov/usam/criminal-resource-manual-2186-memorandum-understanding-investigatory-authority-and-procedures (last visited June 26, 2017).
29. *See* Office of the United States Attorneys, U.S. Attorneys Manual, 9-669, https://www.justice.gov/usam/criminal-resource-manual-669-prosecution-military-personnel (last visited June 26, 2017).
30. U.S. Department of Justice, Privacy Impact Assessment for the Organized Crime Drug Enforcement Task Force Fusion Center and International Organized Crime Intelligence and Operations Center System 2 (June 1, 2009), available at http://www.justice.gov/opcl/crime-taskforce.pdf (last visited Mar. 25, 2013).
31. *See* U.S. Department of Justice, Organized Crime Drug Enforcement Task Forces, available at http://www.justice.gov/criminal/taskforces/ocdetf.html (last visited Mar. 25, 2013).
32. *See* U.S. Department of Homeland Security, National Infrastructure Protection Plan: Partnering to enhance protection and resiliency (2009), available at http://www.dhs.gov/xlibrary/assets/NIPP_Plan.pdf (last visited Mar. 22, 2013).
33. *Id.* at iii. DHS has the responsibility to support "the formation and development of regional partnerships, including promoting new partnerships," and to enable "information sharing." *Id.* at 17.
34. *Id.* at 22.
35. *See* Federal Bureau of Investigation, Violent Gang Task Forces, https://www.fbi.gov/investigate/violent-crime/gangs/violent-gang-task-forces (last visited May 24, 2017).
36. *Id.*
37. Grant D. Ashley, Ass't Director, Criminal Investigative Division, FBI, *Testimony Before the Senate Judiciary Committee*, Federal Bureau of Investigation (Sept. 17, 2003), https://archives.fbi.gov/archives/news/testimony/the-safe-streets-violent-crimes-initiative.
38. *See* U.S. Dep't of Justice, Disaster Fraud Task Force, https://www.justice.gov/criminal-disasters (last visited May 24, 2017).

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39. Eric Lipton, *"Breathtaking" Waste and Fraud in Hurricane Aid*, N.Y. Times, June 27, 2006, http://www.nytimes.com/2006/06/27/washington/27katrina.html.
40. *Id.*
41. *See* U.S. Dep't of Justice, Disaster Fraud Task Force, https://www.justice.gov/criminal-disasters (last visited May 24, 2017).
42. 108 Pub. L. No. 458, 118 Stat. 3868 (2004).
43. Michael C. Mines, Deputy Ass't Director, Directorate of Intelligence, Federal Bureau of Investigation, *Statement Before the House Committee on Homeland Security, Subcommittee on Intelligence, Information Sharing, and Terrorism Risk Assessment*, Federal Bureau of Investigation (Sept. 27, 2007), https://archives.fbi.gov/archives/news/testimony/the-fbi-and-fusion-centers (last visited June 5, 2017).
44. Mary Beth Sheridan and Spencer S. Hsu, *Localities Operate Intelligence Centers to Pool Terror Data*, Wash. Post, Dec. 31, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/12/30/AR2006123000238.html (last visited June 5, 2017).
45. *Id.*
46. Jerry Markon, *11 in San Francisco Charged with Trafficking in Knockoffs Worth Millions*, Wash. Post, Aug. 3, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/08/03/AR2010080304739.html (last visited June 5, 2017).
47. *Id.*
48. *See* U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, National Explosives Task Force, https://www.atf.gov/explosives/national-explosives-task-force (last visited June 5, 2017).
49. *See* U.S. Gov't Accountability Office, Homeland Security/Law Enforcement: Explosives Investigations (Mar. 6, 2013), http://www.gao.gov/duplication/action_tracker/Explosives_Investigations/action1 (last visited June 5, 2017).
50. *Id.*
51. *See* Dep't of Homeland Security, Customs Cross-Designation, http://www.ice.gov/customs-cross-designation (last visited June 5, 2017).
52. *See* 19 U.S.C. § 1401(i) (2012).
53. Customs Cross-Designation, *supra* note 51.
54. *See* Specialized Task Forces, Orange County Sheriff's Department, http://www.ocsd.org/gov/sheriff/divisions/fieldops/investigations/sib/stf/default.asp (last visited May 24, 2017).
55. *See* U.S. Dep't of Justice, U.S. Attorney's Office, Western District of Pennsylvania Task Forces, https://www.justice.gov/usao-wdpa/task-forces#child (last visited May 25, 2017).
56. *See* Internet Crimes Against Children Task Force, https://www.icactaskforce.org/ (last visited June 5, 2017).
57. *Alabama, Georgia Task Forces Honored for Child Porn Investigation*, Gadsen Times, May 24, 2017, http://www.gadsdentimes.com/news/20170524/alabama-georgia-task-forces-honored-for-child-porn-investigation (last visited June 5, 2017).
58. *See* Northern Virginia Regional Gang Task Force Resource Website, http://www.preventgangsnova.org/index.html (last visited June 5, 2017).
59. Jerry Markon, *Va. Task Force, Agencies Unite to Take on Gangs*, Wash. Post, June 6, 2004, http://www.washingtonpost.com/wp-dyn/articles/A8540-2004Jun2.html (last visited June 5, 2017).
60. *Id.*
61. The President appoints the Attorney General, U.S. Attorneys, the Director of the FBI, and other senior federal law enforcement officials. Those officials, in turn, appoint subordinate federal officers. *See, e.g.*, 28 U.S.C. §§ 503, 532–533, 541–542 (2006).
62. *See* 28 U.S.C. §§ 503, 506, 509–519 (2006).
63. 5 U.S.C. §§ 3372–73 (2012).
64. *Id.* § 3372(a)(1) (2006); *see also id.* § 3373.
65. The Attorney General has assigned Justice Department lawyers to act as local prosecutors. *See* Peter F. Neronha, United States Attorney, U.S. Dep't of Justice, *State, Federal Prosecutors Cross-Designated to Prosecute Drugs, Firearms and Neighborhood Crimes*, News Release (Mar. 9, 2010) ("U.S. Attorney Peter F. Neronha and R.I. Attorney General Patrick C. Lynch today jointly announced the cross-designation of several senior prosecutors to bolster the prosecution of neighborhood crimes, particularly crimes involving drugs and firearms. * * * Cross-designation permits prosecutors to cross-over and prosecute cases in either a state or federal court. Targeted cases are jointly reviewed to determine appropriate charges, appropriate jurisdiction and in which court appropriate penalties are likely to be realized. Senior prosecutors experienced in firearms, drugs, organized crime and neighborhood prosecution have been cross-designated.").
66. *See* 28 U.S.C. § 543 (2012); Victoria L. Killion, Comment, *No Points for the Assist: A Closer Look at the Role of Special Assistant United States Attorneys in the Cooperative Model of Federal Prosecutions*, 82 Temp. L. Rev. 789 (2009).
67. *See, e.g.*, Jones v. United States, 529 U.S. 848 (2000) (the arson of an owner-occupied dwelling not used for commercial purposes does not involve property used in interstate commerce or in an activity affecting interstate commerce and therefore cannot be prosecuted under 18 U.S.C. § 844(i) (2006)).

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68. *See, e.g.*, Morrison v. United States, 529 U.S. 598 (2000) (holding unconstitutional, as beyond Congress's Commerce Clause power, a statute making rape a federal offense); United States v. Lopez, 514 U.S. 549 (1995) (same, a federal statute making it a crime to possess a firearm in the vicinity of a school).
69. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987) (ruling that under its Article I Spending Clause power, Congress can condition the receipt of a portion of federal highway funds on the adoption of a speed limit identified by federal law).
70. U.S. Const. art. I, § 6, cl. 2.
71. Of course, a person could resign from Congress or the Executive branch to accept or stand for election to a position in the other branch, as members of both parties have done.
72. In the 19th century, the Supreme Court noted that problem in the context of the opposite problem—namely, the federal government's attempt to impose a burden on state officers. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 674–78 (1978) (discussing 19th century cases). The problem is the same here, just in the opposite direction.
73. *See* U.S. Dep't of Justice, Office of Legal Counsel, *State and Local Deputation of Federal Law Enforcement Officers During Stafford Act Deployments* 4–5 (Mar. 5, 2012) (concluding that federal law enforcement officers have only the arrest power granted them by federal law; also citing earlier OLC opinions to that effect) (hereafter OLC Stafford Act Memo).
74. *See* U.S. Const. Art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."); 31 U.S.C. § 1301(a) (2012) ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.").
75. OLC Stafford Act Memo 8 (internal quotations omitted).
76. *See, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate regulations is limited to the authority delegated by Congress."); La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act...unless and until Congress confers power upon it").
77. *See supra* notes 6–7.
78. 42 U.S.C. § 10501 (2012) provides as follows: "(a) State as applicant ¶ In the event that a law enforcement emergency exists throughout a State or a part of a State, a State (on behalf of itself or another appropriate unit of government) may submit an application under this section for Federal law enforcement assistance. ¶ (b) Execution of application; period for action of Attorney General on application ¶ An application for assistance under this section shall be submitted in writing by the chief executive officer of a State to the Attorney General, in a form prescribed by rules issued by the Attorney General. The Attorney General shall, after consultation with the Assistant Attorney General for the Office of Justice Programs and appropriate members of the Federal law enforcement community, approve or disapprove such application not later than 10 days after receiving such application. ¶ (c) Criteria ¶ Federal law enforcement assistance may be provided if such assistance is necessary to provide an adequate response to a law enforcement emergency. In determining whether to approve or disapprove an application for assistance under this section, the Attorney General shall consider—(1) the nature and extent of such emergency throughout a State or in any part of a State, (2) the situation or extraordinary circumstances which produced such emergency, (3) the availability of State and local criminal justice resources to resolve the problem, (4) the cost associated with the increased Federal presence, (5) the need to avoid unnecessary Federal involvement and intervention in matters primarily of State and local concern, and (6) any assistance which the State or other appropriate unit of government has received, or could receive, under any provision of title I of the Omnibus Crime Control and Safe Streets Act of 1968 [42 U.S.C. § 3701 et seq.].
79. Pub. L. No. 100-707, 102 Stat. 4689 (1988).
80. *See* 42 U.S.C. § 5192(a) (2012) ("In any emergency, the President may—(1) direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law (including personnel, equipment, supplies, facilities, and managerial, technical and advisory services) in support of State and local emergency assistance efforts to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe, including precautionary evacuations[.]"); *id.* § 5201 ("The President may prescribe such rules and regulations as may be necessary and proper to carry out any of the provisions of this chapter, and he may exercise any power or authority conferred on him by any section of this chapter either directly or through such Federal agency or agencies as he may designate."); *id.* at § 5195 ("The purpose of this subchapter is to provide a system of emergency preparedness for the protection of life and property in the United States from hazards and to vest responsibility for emergency preparedness jointly in the Federal Government and the States and their political subdivisions. The Congress recognizes that the organizational structure established jointly by the Federal Government and the States and their political subdivisions for emergency preparedness purposes can be effectively utilized to provide relief and assistance to people in areas of the United States struck by a hazard. The Federal Government shall provide necessary direction, coordination, and guidance, and shall provide necessary assistance, as authorized in this subchapter so that a comprehensive emergency preparedness system exists for all hazards.").
81. Pub. L. No. 105-314, 111 Stat. 1294 (1998) (codified at 28 U.S.C. § 540B (2012)).
82. See 28 U.S.C. 540B (2012) ("(a) In general.—The Attorney General and the Director of the Federal Bureau of Investigation may investigate serial killings in violation of the laws of a State or political subdivision, if such investigation is requested by the head of a law enforcement agency with investigative or prosecutorial jurisdiction over the offense. ¶ (b) Definitions.—In this section: ¶ (1) Killing.—The term 'killing' means conduct that would constitute an offense under section 1111 of Title 18, if Federal jurisdiction existed. ¶ (2) Serial killings.—The term 'serial killings' means a series of three or more killings, not less than one of which was committed within the United States, having common characteristics such as to suggest the reasonable possibility that the crimes were committed by the same actor or actors. ¶ (3) State.—The term 'State' means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.").

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83. Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified at various sections of 42 U.S.C. (2012)).
84. *See* 28 U.S.C. § 564 (2012) ("United States marshals, deputy marshals and such other officials of the Service as may be designated by the Director, in executing the laws of the United States within a State, may exercise the same powers which a sheriff of the State may exercise in executing the laws thereof").
85. 274 U.S. 501 (1927).
86. *Id.* at 744 n.32 ("The power of the ordinary peace officers to arrest and to seize does not seem to have been conferred originally by statute. As to the sheriff, statutes dealt with the method of appointment, tenure of office, and qualifications, but not with the extent of his powers. . . Similarly as to constables and watchmen. . . These powers, including of course the power to arrest, are in this country thought to inhere in these offices, except in so far as they may be limited by statute.") (Brandeis & Holmes, JJ., concurring) (citations omitted).
87. 1 William Blackstone, Commentaries *328, 332; McMillian v. Monroe County, 520 U.S. 781, 793 (1997).

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Chapter 11: Reorganizing the Federal Clemency Process

Paul J. Larkin, Jr.

Western civilization has always encouraged anyone in a position of authority to "temper... Justice with Mercie."[1] "The extraordinary power to grant clemency," which is an integral part of this tradition, "allows a chief executive to play God on this side of the River Styx by forgiving an offender's sins or remitting his punishment."[2] Clemency was a settled feature of English common law[3] and a feature of criminal justice during the early days of our nation.[4] The Framers saw a host of benefits in being able to extend offenders "forgiveness, release, [and] remission"[5] from a conviction or punishment,[6] and they vested that prerogative in the President by Article II of the Constitution.[7]

Criticisms of the Federal Clemency Process

Of late, however, the federal clemency process has come under considerable criticism.[8] Three charges in particular stand out. The first one is that Presidents have granted clemency too infrequently for it to serve its most beneficial and needed goal: expressing forgiveness and wiping the slate clean for an offender, particularly one who is simply an average person rather than a celebrity, who has admitted his wrongdoing and who has turned his life around.[9] Consider President Barack Obama. He commuted the terms of imprisonment imposed on more than 1,700 offenders whom he believed received unduly stiff sentences under the federal drug laws, but neither he nor his predecessors over the past three-plus decades have pardoned offenders at the rate that we saw for most of our prior history.[10] President Donald Trump should renew a hallowed tradition.

The second fault is that Presidents have used their clemency power in dishonorable ways, such as repaying old political debts or making new political allies.[11] Bill Clinton is exhibit A (and B). He offered conditional commutations to the members of a Puerto Rican terrorist group, very possibly to enlist the support of the Puerto Rican community for Hillary Clinton's New York Senate race and Vice President Al Gore's presidential campaign. He also granted pardons and commutations during his last 24 hours in office to cronies, people with White House connections, or individuals who had contributed to his party or presidential library.[12] Such a tawdry practice dishonors a noble, revered criminal justice instrument.

The first and second criticisms focus on the actions of our Presidents, and it may not be possible to answer them without improving the character of the people we elect to that office. The third criticism, however, targets a structural flaw in the federal clemency process: the doorkeeping role played by the Department of Justice.[14]

The President relies on the Justice Department to filter out ineligible applicants[15] and to recommend from the remainder which ones should receive clemency in some form or other, whether a pardon, commutation of sentence, rescission of a fine or forfeiture, general amnesty, or merely a stay in the execution of sentence.[16] The problem with that arrangement, however, is that the Justice Department suffers from an actual or apparent conflict of interest.

The Department of Justice is effectively an adversary to each applicant because it prosecuted every one of them.[17] That fact creates a serious risk that the department would be unlikely to look neutrally and dispassionately on an offender's claim that he should never have been charged with a crime; that he is innocent; that there was a prejudicial error in his proceedings; that his sentence was unduly severe; or that for some other reason, such as his post-conviction conduct, he should be excused or his conduct forgiven.[18] In any other decision-making process, critics maintain, a neutral party would play the role now performed by the department to avoid the appearance of a conflict of interest. The department should remain free to offer a recommendation as to whether the President should award clemency to a particular applicant, but it should not be in a position where it can decline to forward to the White House applications that a reasonable person would support.[19]

The President represents the nation when making clemency judgments. He is entitled to receive unbiased recommendations, and the nation is entitled to believe that those decisions are based on their merits. Granting the Justice Department a privileged position in the clemency process cannot provide the necessary confidence that those goals will be achieved.

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Potential Remedies

A Clemency Board. One proposed remedy for this problem would be for Congress to create an independent, multimember advisory board like the U.S. Sentencing Commission that would review every clemency application and offer the President its recommendations.[20] By being independent of the Justice Department, the board would avoid the conflict of interest afflicting the latter. By being a collegial entity, the board could include a broad range of people—former law enforcement officials, defense attorneys, members of the clergy, criminologists, and so forth—with the types of diverse backgrounds and perspectives that best represent the varied opinions of the American public on clemency. The President, the applicant, and the public, the argument concludes, would be well served by such a commission.

A formal clemency board created by statute, however, would pose several problems for the President that he would rather avoid.[21] Principal among them would be the risk that the board or some of its members would use its existence and mission as a political platform to criticize a President's general clemency philosophy or individual decisions. That is a risk even if the President himself can freely select and remove board members, but the risk becomes a certainty once Congress becomes involved. In any implementing legislation, Congress might demand, expressly or impliedly, the right for each chamber and party to select a certain number of board members or at least to have a role in approving commission members.[22] Politics would inevitably come to play a role in the board's decisions as members campaigned for clemency to be awarded for certain types of offenses (e.g., street crimes vs. white-collar crimes vs. drug crimes); to certain types of offenders (e.g., offenders identified by race, ethnicity, income level, and so forth); or to certain types of constituents (e.g., rural vs. suburban vs. urban offenders).

There is no legal or moral justification for using a spoils system to decide whether someone deserves forgiveness.[23] Besides, the President could always establish his own advisory board if he believed that it would be helpful. Just as the President does not dictate to Congress whether it should use committees and subcommittees to decide how to legislate, Congress should not dictate to the President whether he should use an advisory board to execute one of his prerogatives.

The Vice President. A better alternative would be for the President to move the Office of the Pardon Attorney into the Executive Office of the President and use the Vice President as his principal clemency adviser.[24] Unlike the Attorney General, the Vice President would be seen as impartial. He has no law enforcement responsibility and so lacks an institutional conflict of interest.

The Vice President also enjoys several institutional and practical benefits shared by no one else in the executive branch. He is a constitutional officer who serves the same four-year term as the President, which is generally longer than most Attorneys General serve. He has the stature necessary to referee disputes between White House Clemency Office staff and Justice Department officials, even if one of the latter is the Attorney General. He has ideal access to the President because he has an office in the West Wing. His judgment would be valuable to the President, particularly if he had served previously as a governor, because he would have made clemency decisions in that role.

There are, of course, occasions in which the President might value the opinions of someone else more than those of the Vice President. The classic example occurred when the Attorney General—Robert Kennedy—was the brother of the President—John Kennedy. But those scenarios may be few and far between. That one, after all, has not reappeared in the 50-plus years since it first occurred. Until then, it makes sense for the President to rely on the Vice President as the head of a White House Clemency Office and the President's principal clemency adviser.

Conclusion

The Vice President can offer the President several benefits in the clemency decision-making process that no one else in the government possesses. President Donald Trump should seriously consider using Vice President Mike Pence as his principal clemency adviser. Trump, future Presidents, clemency applicants, and the public would all benefit from that new arrangement.

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Endnotes

1. John Milton, *Paradise Lost*, Book X, in 2 The Works of John Milton 307 (F. Patterson ed. 1931); *see also, e.g.*, William Shakespeare, The Merchant of Venice act 4, sc. 1 ("The quality of mercy is not strained. / It droppeth as the gentle rain from heaven / Upon the place beneath. It is twice blest: / It blesseth him that gives and him that takes... / It is an attribute to God himself, / And earthly power doth then show likest God's / When mercy seasons justice.").
2. Paul J. Larkin, Jr., *Essay: A Proposal to Restructure the Clemency Process—The Vice President as Head of a White House Clemency Office*, 40 Harv. J. L. & Pub. Pol'y 237, 239 (2017) (hereafter Larkin, *The Vice President and Clemency*).
3. *See, e.g.*, United States v. Wilson, 32 (7 Pet.) 150, 160 (1833) ("[T]his power had been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance."); 4 Blackstone, Commentaries *401; Edward Coke, The Third Part of the Institutes of the Law of England 233 (Lawbook Exchange, Ltd. 2002) (1817); Naomi D. Hurnand, The King's Pardon for Homicide Before A.D1307 (1969).
4. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 411–12 (1993); *Ex parte* Wells, 59 U.S. (18 How.) 307, 319–15 (1855); Stuart Banner, The Death Penalty: An American History 54 (2002); Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 Harv. J.L. & Pub. Pol'y 833, 845 & nn. 32–41 (2016) (collecting authorities discussing the historical, legal, policy, and philosophical discussions for the use of clemency in America) (hereafter Larkin, *Revitalizing Clemency*). In fact, the practice likely began long before recorded history. *See, e.g.*, *Genesis* 4:8–16 ("Cain said to the Lord, 'My punishment is greater than I can bear! Today you have driven me away from the soil, and I shall be hidden from your face; I shall be a fugitive and a wanderer on the earth, and anyone who meets me may kill me.' Then the Lord said to him, 'Not so! Whoever kills Cain will suffer a sevenfold vengeance.' And the Lord put a mark on Cain, so that no one who came upon him would kill him. Then Cain went away from the presence of the Lord, and settled in the land of Nod, east of Eden.").
5. *Ex parte* Wells, 59 U.S. (18 How.) at 310.
6. Clemency was not a controversial issue for the Framers. The Articles of Confederation did not create a chief executive and did not empower the legislature to exercise clemency. The issue was the subject of little action or debate at the Constitutional Convention of 1787. Aside from vesting a clemency power in the newly created President, the Framers excluded cases of impeachment from the pardon power and rejected two other proposed restrictions. One would have required the Senate to approve clemency; the other would have exempted treason. *See, e.g.*, Jeffrey P. Crouch, The Presidential Pardon Power 14 (2009); Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 Harv. L. Rev. 1332, 1345 n.55 (2008); Todd David Peterson, *Congressional Power over Pardon and Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 Wake Forest L. Rev. 1225, 1228–35 (2003). The Framers believed that clemency could serve "as a correction for an errant conviction or unduly severe punishment, as a decision that a lesser punishment better serves the nation's interests, as a means of demonstrating that he oversees the operation of the criminal law, or simply as an act of grace." Larkin, *Revitalizing Clemency*, *supra* note 4, at 849–50.
7. *See* the Pardon Clause, U.S. Const. art. II, § 2, cl. 1 ("The President...shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."). The President's authority is plenary. *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1867) ("This power of the President is not subject to legislative control."); 2 Joseph Story, Commentaries on the Constitution of the United States § 1504, at 324 n.4 (2011) (4th ed. Thomas M. Cooley ed., 1873) ("Congress cannot limit or impose restrictions on the President's power to pardon.").
8. *See, e.g.*, Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. Chi. L. Rev. 1 (2015); Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 Tex. L. Rev. 569 (1991); Margaret C. Love, *The Twilight of the Pardon Power*, 100 J. Crim. L. & Criminology 1169 (2010); Jonathan T. Menitove, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 Harv. L. & Pol'y Rev. 447 (2009); Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. Crim. L. & Criminology 593 (2012).
9. *See, e.g.*, Mary Bosworth, The U.S. Federal Prison System 97 (2002) ("[T]his power is hardly ever used."); Love, *supra* note 8, at 1169 ("For most of our nation's history, the president's constitutional pardon power has been used with generosity and regularity to correct systemic injustices and to advance the executive's policy goals. Since 1980, however, presidential pardoning has fallen on hard times, its benign purposes frustrated by politicians' fear of making a mistake, and subverted by unfairness in the way pardons are granted."); Justice Anthony M. Kennedy, Speech at the ABA Annual Meeting 4 (Aug. 9, 2003) ("The pardon process, of late, seems to have been drained of its moral force. Pardons have become infrequent. A people confident in its laws and institutions should not be ashamed of mercy."), http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp08-09-03 [https://perma.cc/6EJN-ZWBE].
10. *See, e.g.*, Larkin, *Revitalizing Clemency*, *supra* note 4, at 854–55 ("From President Reagan through President Obama, the pardon power has fallen into desuetude. In fact, through his first term, President Obama granted fewer clemency applications than any full-term President since George Washington."); Love, *supra* note 8, at 1193–95, 1200–08. Obama increased the number of commutations, but not pardons, during his second term. Larkin, *The Vice President and Clemency*, *supra* note 2, at 237–38 & n.3.
11. *See, e.g.*, Stephanos Bibas, The Machinery of Criminal Justice 24 (2012) ("Presidential clemency is criticized as a perk for the rich and powerful, ranging from vice-presidential aide I. Lewis Libby to fugitive commodities trader Marc Rich."); Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. Crim. L. & Criminology 1131 (2010); Love, *supra* note 8, at 1195–1200.
12. Larkin, *Revitalizing Clemency*, *supra* note 4, at 881.
13. *Id.* at 913–16.

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14. *See*, *e.g.*, Alschuler, *supra* note 11, at 1164; Barkow & Osler, *supra* note 8, at 13–15, 18–19; Larkin, *Revitalizing Clemency*, *supra* note 4, at 903–06; Kobil, *supra* note 8, at 622; Margaret C. Love, *Justice Department Administration of the President's Pardon Power: A Case Study in Institutional Conflict of Interest*, 47 U. Tol. L. Rev. 89 (2015); Rosenzweig, *supra* note 8, at 609–10; P.S. Ruckman, Jr., *Preparing the Pardon Power for the 21st Century,* 12 U. St. Thomas L.J 446, 446–47 (2016); Editorial, *It's Time to Overhaul Clemency,* N.Y. Times (Aug. 18, 2014) ("Even if the [Obama Clemency Project 2014] succeeds, it is a one-time fix that fails to address the core reasons behind the decades-long abandonment of the presidential power of mercy. A better solution would be a complete overhaul of the clemency process. First and foremost, this means taking it out of the hands of the Justice Department, where federal prosecutors with an inevitable conflict of interest recommend the denial of virtually all applications. Instead, give it to an independent commission that makes informed recommendations directly to the president."), http://www.nytimes.com/2014/08/19/opinion/its-time-to-overhaul-clemency.html?_r=0 [https://perma.cc/7ZTM-A7NW].
15. For example, the President can grant clemency only to parties who have been convicted of "Offences against the United States," U.S. Const art. II, § 2, cl. 1, so offenders convicted of state-law crimes are ineligible for federal relief.
16. *See*, *e.g.*, Larkin, *Revitalizing Clemency*, *supra* note 4, at 846–47 (discussing the different forms of federal clemency). Clemency applications are first reviewed by the Office of the Pardon Attorney at the Department of Justice, which forwards recommendations to the White House. *See* 28 C.F.R. §§ 0.35, 1.1 to 1.11 (2011); *Office of the Pardon Attorney*, U.S. Dep't of Justice, http://www.justice.gov/pardon/. For an excellent historical discussion of how the federal clemency process has worked, see Love, *supra* note 8, at 1175–1204.
17. Clemency petitions were initially considered by the Department of State, but the responsibility was transferred to the Justice Department after it was created in the 19th century. The Office of the Pardon Attorney came into being to assist the Attorney General in managing the clemency process for the President. That process worked well until Attorney General Griffin Bell transferred management to the Deputy Attorney General, who is responsible for overseeing all criminal prosecutions brought by the department and the U.S. Attorney's Offices. Combining the two responsibilities in one department official creates an actual or apparent conflict of interest, since few officials in that position, critics argue, would be willing to recommend that the President exonerate or grant leniency to someone whom a colleague has sent to prison. Concern with this conflict of interest has existed for some time. *See* William W. Smithers, *Nature and Limits of the Pardoning Power*, 1 J. Am. Inst. Crim. L. & Criminology 549, 557 (1911) (criticizing the notion that "it is frequently considered advisable to consult the prosecuting attorney" due to the "common belief" that he is "disinterested"; "this is generally an error. The degree of partisanship entering into the selection and the duties of a modern prosecuting officer, the probability of his having set views and his purely legal conception of a case render his opinion of little value in the higher field of clemency. He is not apt to possess or have been impressed with the broader field of facts, and while he may be requested to give some undisputed data, his opinion [on clemency] should not be asked. All the facts, judicial and extra-judicial, plus the doctrines of clemency, ought to guide the executive to an opinion entirely his own. He has no right to shirk the responsibility.").
18. *See*, *e.g.*, Rosenzweig, *supra* note 8, at 609–10 ("[C]areer prosecutors (like any human beings) are products of their culture and less likely to see flaws in the actions of their colleagues.").
19. *See* Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 Va. L. Rev.271, 290 (2013) ("Under Bill Clinton and George W. Bush together, the Justice Department received more than 14,000 petitions for commutations, but recommended only 13 to the White House.") (footnote omitted).
20. *See*, *e.g.*, Barkow & Osler, *supra* note 8, at 1.
21. *See* Larkin, *The Vice President and Clemency*, *supra* note 2, at 249–53.
22. *See*, *e.g.*, U.S. Const. art. II, § 2, cl. 2 (the President can appoint "Officers" of the United States "by and with the Advice and Consent of the Senate"); 47 U.S.C. § 154(b)(5) (2012) ("The maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission."); 52 U.S.C. § 30106(a)(1) (2012) ("There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party."); Buckley v. Valeo, 424 U.S. 1, 113 (1976) (noting that, under the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (held unconstitutional in part by *Buckley*), the President pro tempore of the Senate appointed two members of the Federal Election Commission "upon the recommendations of the majority leader of the Senate and the minority leader of the Senate."). In that regard, if a clemency commission did not exercise governmental power, the Appointments Clause might not legally bar the Senate and House of Representatives from demanding authority to appoint some of its members. Nothing, however, prevents Congress from making such a demand as a matter of politics.
23. The U.S. Sentencing Commission occupies a different position. It is a collegial body, but its sentencing guidelines must comply with the punishments defined by the federal criminal code. Larkin, *Revitalizing Clemency*, *supra* note 4, at 252. A clemency commission would not have to operate within those guardrails because there are and can be no statutory restrictions on who may receive clemency. *See supra* note 7.
24. *See* Larkin, *The Vice President and Clemency*, *supra* note 2, at 241–48; Larkin, *Revitalizing Clemency*, *supra* note 4, at 900–03.

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Chapter 12: Reorganizing the Federal Administrative State: The Disutility of Criminal Investigative Programs at Federal Regulatory Agencies

Paul J. Larkin, Jr.

Introduction

Large American cities—such as New York City, Chicago, and Los Angeles—have municipal police departments as their principal criminal investigative authorities. The federal government, by contrast, does not have a national police force. Instead, there is "a dizzying array" of federal investigative agencies, some of which have limited, specialized investigative authority.[1] More than 30 federal agencies are authorized to investigate crimes, execute search warrants, serve subpoenas, make arrests, and carry firearms.[2] Some of these agencies—such as the Federal Bureau of Investigation (FBI), u.S. Secret Service (Secret Service or SSS), and u.S. Marshal's Service (uSMS)—are well known.[3] A few—such as the National Park Service, u.S. Coast Guard, u.S. Forest Service, and u.S. Postal Service—are fairly well known, especially by people who live in western states, which have a large number of sizeable federal parks and forestlands.[4] Others—such as the environmental Protection Agency (EPA) Office of Criminal enforcement, Forensics, and Training (OCeFT)—are largely unknown.[5]

each agency has a criminal investigative division with sworn federal law enforcement officers even though the parent agency's principal function is to regulate some aspect of the economy or contemporary life. That assignment creates a problem. The law enforcement and regulatory cultures are markedly different, and attempting to cram the former into an agency characterized by the latter hampers effective law enforcement. It dilutes the ability of a law enforcement division to accomplish its mission by housing it in an organization that is not designed to support the specialized mission of federal criminal investigators. Accordingly, Congress and the President should reexamine the placement of federal criminal investigative units within regulatory agencies and reassign the members of those units to a traditional federal law enforcement agency.[6]

Use of the Criminal Law as a Regulatory Tool

Beginning in the mid-19th century, legislatures concluded that industrialization and urbanization had generated widespread harms that no tort system could adequately recompense. That belief led legislators to use the criminal law to enforce regulatory programs by creating what came to be known as "regulatory offenses" or "public welfare offenses." Initially, the category of those crimes was small, limited to building code offenses, traffic violations, and sundry other comparable low-level infractions.[7] But the list of strict liability offenses grew over time. Today, the corpus of regulatory offenses is considerably larger than anyone initially envisioned.[8]

The creation of administrative agencies to implement regulatory programs also added a new feature to the category of federal offenses: crimes defined by regulations. That phenomenon was not the inevitable consequence of creating administrative agencies or authorizing them to promulgate regulations. Articles I, II, and III of the Constitution strongly imply that the legislative, executive, and judicial powers can be exercised only by the particular branch to which they are assigned,[9] but the law did not work out that way.

early in the 20th century, the question arose whether only Congress has the authority to define the elements of a federal offense. The Supreme Court of the united States could have ruled that the power to define federal crimes is a prerogative of Congress that it cannot delegate to administrative agencies. After all, in 1812, the Court held in *United States v. Hudson & Goodwin* that the federal courts lack the authority to create "common law crimes" because only Congress can define a federal offense.[10] It would have been only a small step to apply the rationale of that case to an executive branch agency and decide that the President also may not define a federal offense. Nonetheless, the Court declined the opportunity.[11] In *United States v. Grimaud*,[12] the Court held that Congress may delegate law-creating power to an agency by enabling it to promulgate regulations and that an agency may use that authority to define conduct punishable as a crime.[13]

The *Grimaud* decision was flatly inconsistent with Madisonian separation-of-powers principles. under *Hudson & Goodwin*, Congress cannot share its power to define a federal offense with the judiciary because it is a congressional prerogative. Yet *Grimaud* ruled that

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Congress may empower the executive to create federal offenses. James Madison would have grimaced at the concept of a shared prerogative. He would have been particularly aghast at the notion that the executive branch, which was intentionally and textually limited to enforcing the law, could also make unlawful the very conduct that it would later enforce. Reconciling *Grimaud* with *Hudson & Goodwin* is no easy task. One decision or the other seems wrong.

Despite its analytical weaknesses, *Grimaud* remains "good law" today. The Supreme Court has shown no inclination to reconsider and overturn it. The result has been that federal agencies have taken full advantage of that new power. *Grimaud* erased any hope of building a dam that could have held back administrative criminal lawmaking, and the legislative and executive branches have combined to establish a sub-statutory criminal code. Some commentators have estimated that the Code of Federal Regulations contains hundreds of thousands of regulations that serve as a tripwire for criminal liability.[14] The result is that individuals and businesses, large or small, must be aware of not only the penal code, but also books of federal rules that can occupy multiple shelves in any law library.[15]

Criminal Investigative Programs at Federal Regulatory Agencies

Congress could have tasked the traditional law enforcement agencies with the responsibility to investigate regulatory offenses. By and large, however, it has not done so.[16] Instead, Congress created numerous investigative agencies as components of the administrative agencies that are responsible for promulgating the underlying rules that now carry criminal penalties. According to a 2006 report by the Government Accountability Office, approximately 25,000 sworn officers are spread over numerous administrative agencies, commissions, or special-purpose entitles. Some of those components consist of relatively unknown investigative divisions, such as the Fish and Wildlife Service (SFW&S), National Oceanographic and Atmospheric Administration (NOAA), and National Gallery of Art.

Over time, the size of some of those criminal investigative divisions has increased. For example, the EPA had two criminal investigators in 1977; it now has more than 200.[17] But the number of investigators at any one of the traditional federal investigative agencies (e.g., the FBI) is considerably larger than the number at any one regulatory criminal program.

The Pluses of Establishing Criminal Investigative Programs at Federal Regulatory Agencies

There are various reasons why Congress may decide to create a separate, specialized criminal investigative division within an administrative agency rather than direct a regulatory agency to call on one of the traditional federal law enforcement agencies when it believes that a regulatory crime may have occurred.

First, the agency might have scientific knowledge that is necessary to understand what is and is not an offense and therefore also possess a peculiar ability to guide how an offense can and should be investigated. unlike the conduct made an offense by common law and the state criminal codes (murder, rape, robbery, fraud, and so forth), regulatory crimes (e.g., the illegal disposal of "hazardous" waste) may require technical know-how beyond what the average federal agent learns during basic training. It therefore may make sense to pair those experts with the agents who investigate regulatory crimes. If so, it also may make sense to situate those experts and agents in the same program.

Second, and closely related, is the need for specialized and focused legal training on the meaning of the various regulatory statutes and rules that undergird regulatory offenses. Here, too, the relevant offenses may use abstruse concepts that an attorney can learn only with the specialized training and experience that comes with practicing law in a specific regulatory field. Only the general counsel's office at a particular agency may have attorneys who are sufficiently versed in the relevant statutes and regulations to be able to help federal investigators identify what must be proved to establish an offense. For that reason, too, it therefore makes sense to combine investigators with the lawyers who will advise them about the laws' meaning.

Third, regulatory offenses might not receive the attention they deserve if they are just one type of a large category of crimes that a traditional law enforcement agency is responsible for investigating. environmental crimes, for instance, may threaten injury to the life or health of residents who use a water supply polluted with toxic waste, even though the harmful effects may not become observable for

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years or even longer. By contrast, violent crimes cause obvious injury to readily identifiable victims *now*. Those victims not only enjoy media access, but also possess a powerful voice in the legislature, which may fear angering them unless violent crimes are given a priority higher than regulatory offenses.[18]

Similarly, drug offenses can produce a large number of victims both in the long term (e.g., people with substance abuse problems) and in the short term (e.g., victims of the violence that accompanies drug trafficking). By contrast, environmental crimes might not have immediate, obvious victims. They might pose only a marginally greater risk of injury (e.g., 10 percent) to only a small number of people (e.g., a local community) only in the long term (e.g., 10 years out) and result in a disease that could befall its victims who were never exposed to that toxic substance (e.g., cancer suffered by smokers), making it difficult to blame the violation for the harm. To the extent that law enforcement agencies assign their investigative resources according to the perceived short-run threat of injury to the public and short-run reaction of legislators to reports of local crimes, regulatory offenses could wind up being shortchanged on an ongoing basis to the long-term detriment of a large number of people.

The Minuses of Establishing Criminal Investigative Programs at Federal Regulatory Agencies

At the same time, there is a powerful case to be made that federal law enforcement should be left to traditional investigative agencies.

First, the public likely believes that crimes of violence (e.g., robbery) or deceit (e.g., fraud) are more serious and should be given greater attention than regulatory offenses. Members of Congress may agree with that attitude but nonetheless create regulatory crimes for other reasons. For example, adding criminal statutes to an otherwise civil regulatory scheme allows Congress to cash in on the leverage that a criminal investigation enjoys with the public and the media.[19] Federal agents (think Jack Taggart in *Fire Down Below*[20]) will receive considerable respect from the public and the press; civil inspectors (think Walter Peck in *Ghostbusters*[21]) won't. That is particularly true when agents wear "raid jackets" emblazoned with the agency logo and the word "POLICe." To take advantage of the nimbus that law enforcement officers radiate, Congress may create a misdemeanor or minor offense[22] so that a regulatory agency can call on its criminal investigative arm to conduct an inspection and interview company officials[23]—all that even though Congress may believe that most regulatory offenses should not be investigated and prosecuted as crimes.

Second, creation of specialized law enforcement agencies raises a problem analogous to one that existed with respect to the independent counsel provisions of the now-expired Ethics in Government Act of 1978:[24] a loss of perspective.[25] Agencies with wide-ranging investigative responsibility see a broad array of human conduct and can put any one party's actions into perspective. Agencies with a narrow charter see only what they may investigate. Because the criminal division of an administrative agency might have only a limited number of criminal offenses within its jurisdiction, the division might well spend far more resources than are necessary to investigate minor infractions to obtain the "stats" necessary justify its continued existence.[26]

Of course, a focus on statistics is endemic to federal law enforcement. The reason is that federal law enforcement investigative and prosecutorial agencies measure their success by focusing on the *outputs* rather than the *outcomes* of their efforts. Federal law enforcement agencies operate under an incentive structure that forces them to play the numbers game and "focus on the statistical 'bottom line.'"[27] Statistics—the number of arrests, charges, and convictions; the total length of all terms of incarceration; and the amounts of money paid in fines or forfeited to the government—"are the Justice Department's bread and butter."[28] Just read any criminal law enforcement agency's annual report or congressional budget submission. "As George Washington University Law School Professor Jonathan Turley puts it, 'In some ways, the Justice Department continues to operate under the body count approach in Vietnam. . . . They feel a need to produce a body count to Congress to justify past appropriations and secure future increases.'"[29]

To be sure, even traditional federal investigative agencies like the FBI need to prove to Congress—particularly during the budget submission period—that they have made efficient use of the funds Congress appropriated for them. But the numbers problem is greatly exacerbated in the case of regulatory agency criminal investigative divisions because they do not have a goodly number of traditional, nonregulatory

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offenses within their jurisdiction. They might have to pursue minor or trivial cases as the only way to generate the type of numbers that they can use to persuade congressional budget and appropriations committees that they have spent the taxpayers' money wisely.

Third, that loss of perspective generates miscarriages of justice. Perhaps the "body count" approach would not be a problem if agencies pursued only cases involving conduct that is physically harmful like murder or assault, morally reprehensible like fraud, or both like rape, but regulatory agencies do not investigate those crimes. The conduct outlawed by regulatory regimes can sometime fit into one of those categories (e.g., dumping toxic waste into the water supply), but regulatory criminal statutes cover a far broader range of conduct than is covered in the common law or state criminal codes. Environmental statutes, for example, are sometimes written quite broadly in order to afford the EPA authority to address unforeseen threats to health and safety. That is valuable from a regulatory perspective but quite troubling from a criminal enforcement perspective. Broadly written statutes embrace conduct that no one would have anticipated falling within their terms.

Fourth, the numbers game encourages regulatory agencies to pursue trivial criminal cases that should be treated administratively or civilly, or perhaps with no more than a warning and guidance how to operate in the future. Morally blameless individuals get caught up in the maw of the federal criminal process for matters that would never be treated as a crime by a traditional law enforcement agency.[30] For example:

- Skylar Capo, an 11-year-old girl, rescued a woodpecker about to be eaten by a cat. Rather than leave the bird at home, Skylar carried it with her when she and her mother Alison went to a local home improvement store. There, an agent with the U.S. Fish and Wildlife Service stopped Skylar and told her that transporting a woodpecker was a violation of federal law. Two weeks later, the agent went to Skylar's home, delivered a $535 ticket, and informed Alison that she faced up to one year's incarceration for the offense. The USF&WS dropped the charges only after the case made headlines.[31]

- Abner Schoenwetter was a small-business owner who imported lobsters from Honduras. An anonymous tip to agents of the National Marine and Wildlife Fishery Service said that Schoenwetter intended to import Honduran lobsters that were too small to be taken under Honduran law and that would be packed in plastic rather than in boxes as required by Honduran law. The agents seized Schoenwetter's cargo, and an inspection confirmed the anonymous tip. The government charged Schoenwetter with violating the federal Lacey Act on the ground that he imported lobsters that were taken in violation of Honduran law. After he was convicted (with three other defendants), the district court sentenced him (and two of the other defendants) to *more than eight years' imprisonment for that crime* (the third co-defendant received a two-year sentence). On appeal, the Eleventh Circuit, by a two-to-one vote, upheld their convictions *even though the Honduran Attorney General had informed the court that the Honduran regulation that was the basis for the charge was invalid under Honduran law.*[32]

- USF&WS employees and the U.S. Attorney in North Dakota investigated and filed criminal charges against seven oil and gas companies for violating the Migratory Bird Treaty Act because 28 migratory birds flew into oil pits without encouragement or action by the companies.[33]

- Three-time Indianapolis 500 champion Bobby Unser and a close friend nearly died when caught in a blizzard while snowmobiling in the mountains. Forced to abandon his vehicle and seek help, Unser was later investigated by U.S. Forest Service agents for trespassing onto a protected wilderness area. The government could not prove a felony violation, but Unser was convicted of a misdemeanor.[34]

- While camping in the Idaho wilderness, Eddie Anderson and his son searched for arrowheads, which Eddie collected as a hobby. Unbeknownst to them, the Archaeological Resources Protection Act of 1979[35] regulates the taking of archaeological resources on public and Indian lands. The Andersons found no arrowheads but were nonetheless charged with the offense of attempting to obtain them in violation of that act.[36] They

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pleaded guilty to misdemeanors and were fined $1,500 and placed on one year's probation.[37]

- Nancy Black, a marine biologist, was charged with making a false statement as a "Thank you" for voluntarily providing an edited video of noisemaking on a whale-watching tour to federal investigators and employees of NOAA. She wound up pleading guilty to a misdemeanor to avoid the risk of a felony conviction.[38]

Fifth, legislators also may see constituent benefits from giving regulatory agencies criminal enforcement tasks. Making a regulatory violation a crime adds a certain respectability to the relevant field, thereby satisfying one or more interest groups by publicly declaring that their most important concerns are also society's most important.

Sixth, Congress may believe that regulatory law enforcement divisions are a moneymaking activity. The government may negotiate a plea bargain with a defendant requiring the latter to pay large fines rather than suffer incarceration, and every fine recovered by the government in a plea bargain is found money.[39]

An Example: The EPA's Office of Criminal Enforcement, Forensics, and Training

Consider the EPA criminal program.[40] The contemporary environmental movement was born in the last third of the 20th century, with most of the major laws being enacted in the decade from 1969 to 1979.[41] unlike common-law crimes such as assault or theft, but consistent with other modern regulatory schemes, the early environmental laws did not assume that the primary enforcement mechanism would be criminal prosecutions brought by the government against parties who failed to comply with the new legal regimen. Instead, the environmental laws used a traditional regulatory, top-down, command-and-control approach to govern business and industrial operations that discharged pollutants into the air, water, or ground. The primary enforcement devices were to be government-initiated administrative or civil actions along with private lawsuits brought against alleged wrongdoers. There were some strict liability criminal provisions in the early federal environmental laws, but they started out as misdemeanors; Congress did not elevate them to felonies until later.[42]

By so doing, Congress significantly changed the nature of those offenses. Traditionally, imprisonment had been an optional penalty only for serious wrongdoing.[43] Now it could be used as a punishment without proving that a defendant intended to break the law or knew that his conduct was blameworthy or dangerous. The result was to make it easier to convict and imprison a defendant for regulatory crimes than would be true if those crimes were treated in the same manner as ordinary federal offenses.[44] The stiffer penalties, coupled with creation of a criminal enforcement program at the EPA, upped the ante for large companies and the individuals they employ.

The Pollution Prosecution Act of 1990[45] created a criminal investigative program at the EPA. The act required that the EPA criminal program have at least 200 federal agents as of October 1, 1995,[46] and the number has not increased greatly since then. The agents are assigned to various field offices in such cities as Boston, New York City, Philadelphia, Seattle, and Anchorage. From those offices, they investigate crimes committed in different states within their respective EPA regions.

A mere 200 agents is an insufficient number of criminal investigators. If those agents were spread out evenly across the nation, there would be only four per state. Agents not located in a particular state must travel interstate to interview witnesses, collect evidence with an agency specialist, and partner with local law enforcement. Traveling to another state is not like driving around the Manhattan South Precinct. The agent's office may be a long distance from the site of the crime. Travelling back and forth not only takes a considerable period of time, but also eats up a sizeable portion of a field office's budget. Crimes can go uninvestigated simply because of the difficult logistics involved. That does not benefit either the public or the EPA agents.

Of course, the statutory designation of 200 agents does not take into account several factors. It does not account for the need to have some agents work in management capacities, both in the field offices and in Washington, D.C. It does not account for the need to have some agents work in an internal affairs or professional responsibility office. It does not consider the need for some agents to be assigned to the Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia, to arrange for the necessary basic criminal investigator training and coordinate with the FLETC officials serving as

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instructors. The result is that a 200-agent number does not accurately represent the number investigating environmental crimes. Even if only 10 percent of the EPA's criminal investigative personnel are involved in noninvestigative activity, the EPA has only 180 agents to investigate environmental crimes—less than four per state.

But there is more.

Federal law enforcement agencies also have a considerable number of nonagent employees working in a variety of investigation-related activities, such as scientists, technicians, and office support personnel. The Pollution Prosecution Act of 1990 did not authorize the EPA to hire personnel to fill those slots. To some extent, EPA special agents can draw on evidence-collection and analytical experts at one of the agency's regional laboratories or elsewhere within the EPA.[47] Unlike the forensic service components of the FBI[48] and the Secret Service[49], however, the EPA regional laboratories are not dedicated exclusively to supporting the criminal investigation program. Special agents need to compete with the agency's civil components for resources and the time of laboratory personnel. The point is that the Pollution Prosecution Act of 1990 did not create a full-scale EPA criminal investigation program along the lines of the FBI or the Secret Service.

There are several reasons why having a criminal program at the EPA is a problem. As noted, it forces the EPA criminal program to operate with an inadequate number of personnel and an inadequate amount of resources. This gives the public the impression that there is a robust criminal environmental investigation program when, in fact, that is not true. It also shortchanges the agents tasked with carrying out that assignment by forcing them into an agency where they do not belong and where they might not always be welcome. The reason is that criminal law enforcement is not part of the EPA's core mission.

As Harvard Professor James Q. Wilson once explained, every agency has a "culture" or "personality"—that is, a widespread, settled understanding of the agency's identity and manner of operations.[50] The EPA has four separate but related cultures: environmental, scientific, regulatory, and social worker:[51] each of them combines with the others to implement and reinforce the agency's "mission"—that is, "a widely shared and endorsed definition of the agency's core tasks."[52] Criminal law enforcement rests uneasily within an agency characterized by these four cultures. Law enforcement seeks to punish, not discover, advise, or regulate. It focuses on an actor's immediate effect and intent, not the long-term consequences of his actions for society regardless of his state of mind. It requires mastery of what we learned in high school (reading people), not graduate school (studying ecology).[53]

Remember that unlike the FBI or the Secret Service, the EPA as an institution was not created to investigate crimes; that assignment was added two decades *after* the agency was born.[54] The EPA already had a settled mission, and it is difficult to change an agency's mission, particularly one that is so deeply entrenched.[55] As Professor Wilson noted, "developing a sense of mission is easiest when an organization is first created."[56] Because "most administrators take up their duties in organizations that have long histories," they have "reduce[d]...opportunities for affective culture at all, much less making it into a strong and coherent sense of mission."[57] Put another way, a baseball team may play away games for only half of the season (before an often hostile crowd), but the EPA criminal program has been playing nothing but away games since Day One.

As an "add-on," criminal enforcement has been and will always be subordinated to the EPA's mission and will wind up shortchanged. One way involves the budget. Agencies generally tend to give preference to their core functions when haggling with the Office of Management and Budget (OMB) or Congress over appropriations.[58] The environmental, regulatory, scientific, and social-worker cultures at the EPA will always (or nearly always) win the budget battles. As a result, the EPA's criminal program will never be the effective unit that it could be and that the agents and public deserve.

Another way the EPA criminal investigation program will be shortchanged is the reserve of goodwill that it can draw on if something goes very wrong. That requires some explanation. The mission of a criminal investigative agency is to deal with people who break the law. As the tip of the law enforcement spear, investigating officers deal with offenders outside the niceties of a courtroom, sometimes with the worst of people but, if not, then with good people at their worst. Even the EPA criminal investigation program has that problem.

Consider this example: Hazardous waste has that name for a reason; it is dangerous, and not just for the public. Some business operations (the plating process

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is one example) are dangerous because the chemicals needed to create a finished product (a circuit board) are highly acidic or alkalinic. The working conditions are ones in which you will need to get your hands dirty but also will need to be particularly careful how and with what. In addition, employees working in those businesses make less than hedge fund managers earn. Now ask yourself two questions:

- *Question*: What type of person works in those jobs?
- *Answer*: Someone who cannot get a different job.
- *Question*: What type of person cannot get a different job?
- *Answer*: Often someone with a criminal record, maybe for the same type of violent crime that traditional law enforcement officers investigate (e.g., robbery).

The lesson is this: The conventional wisdom is wrong. Businessmen in suits are not the only, or often the principal, suspected perpetrators of an environmental crime. The issue is more complicated. The risk that a criminal investigation might pose a danger to the agents involved often turns more on the nature and history of the suspects than on the elements of the offense.[59]

EPA agents could find themselves in a predicament. Given the realities of their job, law enforcement officers may need to use force when making an arrest, collecting samples, executing a search warrant, interviewing a suspect, or doing one of the other activities that law enforcement officers perform. The use of force is not a pleasant component of the job, but sometimes it cannot be avoided. A traditional investigative agency understands and appreciates the demands placed on its investigators, so such occurrences are not seen as unthinkable. Moreover, when a traditional law enforcement officer uses force, his parent agency and his colleagues will presume that he acted properly until an internal investigation determines otherwise. He will not automatically and immediately become a pariah.

Regulatory agencies, by contrast, do not have the same law enforcement culture or mission, let alone the corresponding esprit de corps, that is embedded in the DNA of traditional law enforcement agencies like the FBI and Marshals Service. Most agency personnel work in offices. Their principal interactions are with colleagues, members of industry and their lawyers, Members of Congress and their staffs, political superiors within the agency, and officials at OMB or the White House Office of Information and Regulatory Affairs. They are accustomed to seeing outsiders respect their authority, even when the outsiders disagree with them. They are strangers to being placed in situations in which words or numbers will not suffice to deal with a problem or in which outsiders refuse to defer to their position. Their culture—whether environmental, regulatory, scientific, or social worker—does not include people who place their hands on others. In fact, it would be seen as a sign of intellectual weakness and professional failure.

Those cultures have no room for law enforcement officers. Trying to force the latter into one of the cultures at the EPA puts criminal investigators in the difficult position of feeling that they are out of place in their own organization. There is even a risk that the agents in regulatory programs who use force might fear that they will be "hung out to dry" by the agency's senior political officials, particularly if there is public blowback from such an event.[60] All that is the consequence of trying to fit a square peg into a round hole.[61]

To summarize, when deciding whether it is a good idea to have a criminal investigation division in a regulatory agency, consider the words of Professor Wilson describing the costs of that arranged marriage:

> First, tasks that are not part of the culture will not be attended to with the same energy and resources as are devoted to tasks that are part of it. Second, organizations in which two or more cultures struggle for supremacy will experience serious conflict as defenders of one seek to dominate representatives of the other. Third, organizations will resist taking on new tasks that seem incompatible with the dominant culture. The stronger and more uniform the culture—that is, the more the culture approximates a sense of mission—the more obvious these consequences.[62]

A Potential Remedy: Transfer Federal Regulatory Agencies' Criminal Investigative Divisions to the FBI or Marshals Service

The way to fix these problems is to transfer the criminal enforcement authority of regulatory

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agencies such as the EPA to a traditional law enforcement agency. The question is, which one?

A few can be eliminated at the outset. Several traditional investigative agencies have missions that do not readily accommodate regulatory enforcement. The Secret Service (protection and counterfeiting); Drug Enforcement Administration (drug trafficking); Bureau of Alcohol, Tobacco, Firearms, and Explosives (the subjects in the agency's name); Bureau of Immigration and Customs Enforcement (same); and Border Patrol (same) are not good matches for agents who have spent their careers investigating (for example) environmental crimes.

The FBI might be a reasonable home for criminal regulatory enforcement. It has the largest portfolio of federal offenses to investigate, including conduct underlying some regulatory crimes, and has numerous field offices across the country, which would reduce the disruption following the transfer of agents from one agency to another. But forcing the FBI to absorb regulatory investigators would create several sizeable problems. One is that the number of new agents could exceed the number of existing agents. That poses a risk over time of shifting the FBI's focus. Another problem is that since 9/11, the FBI has been the nation's principal federal investigative agency combating domestic terrorism. Adding regulatory responsibilities to the FBI's plate is inconsistent with the principal assignment given the Bureau by former President George W. Bush. Finally, regulatory investigators would need to undergo full-field background investigations and complete FBI agent training at Quantico, Virginia, before becoming FBI agents. That would impose a considerable delay and require an appreciable expenditure before the transferred agents would be able to come on board.[63]

While transferring such duties to the FBI is certainly a viable option, an alternative that may make more sense is to transfer those agents to the U.S. Marshals Service. With an organizational bloodline that begins with the Judiciary Act of 1789,[64] U.S. marshals and their deputies have exceptionally broad law enforcement authority—the same authority as FBI agents[65] as well as the authority possessed by their respective state law enforcement officers.[66] The principal mission of deputy marshals is to assist the federal courts,[67] but they also are generalists.[68] The Marshals Service has offices nationwide. It would expand the coverage that agencies like the EPA can provide and reduce the number of necessary geographic transfers, benefiting both the agents involved and the public.

In addition, the Marshals Service would be a cost-effective option as the home for regulatory agents. Deputy marshals and regulatory criminal investigators undergo the same basic criminal investigator training at FLETC, and former regulatory investigators already have the additional education and training needed to enforce regulatory criminal codes. On a prospective basis, the cost of adding that training to the basic training afforded deputy marshals is likely to be less than the cost of expanding the training programs at the FBI's Quantico facility because FLETC already accommodates numerous federal agencies.

In sum, transferring criminal programs and their agents from regulatory agencies to the Marshals Service would benefit the public and the agents at a potentially lower cost than would result from giving criminal regulatory responsibilities to the FBI.

Conclusion

President Donald Trump has directed federal agencies and has invited the public to suggest ways to reorganize the federal government to make it more effective and efficient. One possibility is to reorganize at least part of federal law enforcement. Numerous federal regulatory agencies have criminal investigative divisions. Congress and the President should consider consolidating those programs and transferring them to a traditional federal law enforcement agency. The FBI is a possible home for those agents, but the U.S. Marshals Service may have certain advantages that the FBI does not possess, including the possibility of a less costly transition. Either agency would make a more suitable home for investigative programs currently housed in administrative agencies.

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Appendix: List of Federal Law Enforcement Agencies

Departments

Department of Agriculture

Animal and Plant Health Inspection Service (APHIS)

Office of the Inspector General

U.S. Forest Service, Law enforcement and Investigations

Department of Commerce

Bureau of Industry and Security, Office of export enforcement

National Institute of Standards and Technology

National Marine Fisheries Service, Office of Law enforcement

Office of Security

Office of the Inspector General

Department of Education

Office of the Inspector General

Department of Energy

National Nuclear Safety Administration, Office of Secure Transportation, Office of Mission Operations

Office of Health, Safety and Security, Office of Security Operations

Office of the Inspector General

Department of Health and Human Services

Food and Drug Administration, Office of Regulatory Affairs (ORA)/Office of Criminal Investigations

National Institutes of Health

Office of the Inspector General

Department of Homeland Security

Citizenship and Immigration Services

Customs and Border Protection, Office of Customs and Border Protection Air and Marine

Customs and Border Protection, Border Patrol

Customs and Border Protection, Office of Field Operations/CBP Officers

Federal emergency Management Agency, Security Branch

Federal Law enforcement Training Center

Office of the Inspector General

Transportation Security Administration, Office of Law enforcement/Federal Air Marshal Service

U.S. Coast Guard, Investigative Service

U.S. Coast Guard, Maritime Law enforcement Boarding Officers

U.S. Immigration and Customs enforcement, Office of Detention and Removal

U.S. Immigration and Customs enforcement, Office of Federal Protective Service

U.S. Immigration and Customs enforcement, Office of Intelligence

U.S. Immigration and Customs enforcement, Office of Investigations

U.S. Immigration and Customs enforcement, Office of Professional Responsibility

U.S. Secret Service

Department of Housing and Urban Development

Office of the Inspector General

Department of the Interior

Bureau of Indian Affairs, Office of Law enforcement Services

Bureau of Land Management, Office of Law enforcement and Security

Bureau of Reclamation, Hoover Dam Police

National Park Service, Ranger Activities

National Park Service, uS. Park Police

Office of Law enforcement, Security and emergency Management

Office of the Inspector General

U.S. Fish and Wildlife Service, National Wildlife Refuge System

U.S. Fish and Wildlife Service, Office of Law enforcement

Department of Justice

Bureau of Alcohol, Tobacco, Firearms, and explosives

Drug enforcement Administration

Federal Bureau of Investigation

Federal Bureau of Prisons

Office of the Inspector General

U.S. Marshals Service

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Department of Labor
employee Benefits Security Administration
Office of Labor Management Standards
Office of the Inspector General

Department of State
Bureau of Diplomatic Security, Diplomatic Security Service
Office of the Inspector General

Department of Transportation
Maritime Administration, Academy Security Force
National Highway Traffic Safety Administration, Odometer Fraud
Office of the Inspector General, Investigations
Office of the Secretary of Transportation, executive Protection

Department of Treasury
Bureau of Engraving and Printing, Police Officers
Internal Revenue Service, Criminal Investigative Division
Office of the Inspector General, Office of Investigations
Treasury Inspector General for Tax Administration
u.S. Mint, Police Division

Department of Veterans Affairs
Office of Security and Law Enforcement
Office of the Inspector General

Nondepartmental Entities

Administrative Office of the U.S. Courts (AOUSC)
Office of Probation and Pretrial Services

Agency for International Development
Office of the Inspector General

Corporation for National and Community Service
Office of the Inspector General

Environmental Protection Agency
Criminal Investigation Division
Office of the Inspector General

Equal Employment Opportunity Commission
Office of the Inspector General

Federal Communications Commission
Office of the Inspector General

Federal Deposit Insurance Corporation
Office of the Inspector General

Federal Reserve Board
Chairman's Protection unit
Office of the Inspector General
Reserve Banks Security
Security unit

General Services Administration
Office of the Inspector General

Government Accountability Office
Controller/Administrative Services, Office of Security and Safety
Financial Management and Assurance, Forensic Audits and Special Investigations

Library of Congress
Office of Security and emergency Preparedness–Police
Office of the Inspector General

National Aeronautics and Space Administration
Office of the Inspector General

National Archives and Records Administration
Office of the Inspector General

National Gallery of Art

National Railroad Passenger Corporation (AMTRAK)
AMTRAK Police
Office of Inspector General

National Science Foundation
Office of the Inspector General
Polar Operations, Antarctica

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Nuclear Regulatory Commission
Office of Investigations
Office of the Inspector General

Office of Personnel Management
Office of the Inspector General

Peace Corps
Office of the Inspector General

Railroad Retirement Board
Office of the Inspector General

Small Business Administration
Office of the Inspector General

Smithsonian Institution
Office of Protection Services

Social Security Administration
Office of the Inspector General

Tennessee Valley Authority
Office of the Inspector General
TVA Police

U.S. Capitol Police

U.S. Government Printing Office
Office of the Inspector General
Police

U.S. Postal Service
Office of Inspector General
u.S. Postal Inspection Service, Inspector
u.S. Postal Inspection Service, Postal Police

U.S. Supreme Court
Marshal of the Supreme Court

Source: U.S. Government Accountability Office, Federal Law Enforcement: Survey of Federal Civilian Law Enforcement Functions and Authorities (Dec. 19, 2006), Appendix II: Number of Federal Civilian LEOs with the Specified Authority, as of June 30, 2006, as Reported by the Federal Components.

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Endnotes

1. Louise Radnofsky, Gary Fields & John R. Emshwiller, *Federal Police Ranks Swell to Enforce a Widening Array of Criminal Laws*, Wall St. J., Dec. 17, 2011, at A1.
2. *See*, *e.g.*, Government Accountability Office, Federal Law Enforcement: Survey of Federal Civilian Law Enforcement Functions and Authorities (Dec. 19, 2006), http://www.gao.gov/new.items/d07121.pdf (last accessed Apr. 19, 2017). The Appendix *supra* contains a list of such agencies. The powers noted in the text are the traditional ones vested in federal law enforcement officers. *See*, *e.g.*, 18 U.S.C. § 3052 (2012) (FBI agents); *id.* § 3053 & 28 U.S.C. §§ 564, 566(c)–(d) (2012) (United States Marshals and deputy marshals); 18 U.S.C. § 3056 (2012) (Secret Service agents).
3. *See*, *e.g.*, 6 U.S.C. 381 (2012) (U.S. Secret Service); 28 U.S.C. § 3053 (2012) (U.S. Marshals Service); *id.* § 3052 (FBI).
4. *See* 14 U.S.C. § 2 (2012) (empowering Coast Guard members to "enforce or assist in the enforcement of all applicable Federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States"); 16 U.S.C. § 559c (2012) (identifying law enforcement authority of U.S. Forest Service officers); 18 U.S.C. § 3061 (2012) (identifying powers of Postal Inspection Service officers); 54 U.S.C. § 102701(a) (2012) (empowering the Secretary of the Interior to designate law enforcement officers).
5. *See* 18 U.S.C. § 3063 (2012) (identifying authority of EPA law enforcement officers); EPA, Criminal Enforcement, https://www.epa.gov/enforcement/criminal-enforcement (last accessed Apr. 29, 2017).
6. Another, more general issue is also worth noting. The assortment of federal law enforcement agencies mentioned in the text has come to exist over time in a random manner. There has been no recent systematic congressional or presidential analysis of their overlapping responsibilities and comparative advantages that they possess by statute, rule, tradition, and practice. Even the best-known federal law enforcement agencies—the FBI and Secret Service—are best known today for missions that differ greatly from the ones they had at their birth. The FBI has the broadest range of responsibilities, such as counterterrorism, counterespionage, and complex white-collar crime. *See*, *e.g.*, 18 U.S.C. §§ 351(g), 3052, 3107 (2012); 28 U.S.C. §§ 533, 540, 540A, 540B (2012); 50 U.S.C. §§ 402–404o–2, §§ 1801–1812 (2012). Yet, today's FBI began as the Bureau of Investigation, which had no law enforcement function and was limited to conducting background investigations of potential federal employees. The Secret Service was created to investigate the rampant counterfeiting seen after the Civil War. It became responsible for protecting the President, Vice President, their families, and visiting heads of state only after the assassination of President William McKinley in 1901. *See*, *e.g.*, 18 U.S.C. § 3056 (2012). But no one has ever inquired whether the responsibilities that each of those agencies has, as well as the ones that other federal law enforcement agencies possess, are better accomplished by combining different agencies or by transferring authority from one agency to another.
7. *See*, *e.g.*, Graham Hughes, *Criminal Omissions*, 67 Yale L.J. 590, 595 (1958); Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 Harv. J.L. & Pub. Pol'y 1065, 1072–79 (2014) (hereafter Larkin, *Strict Liability*); Francis Bowes Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 56–67 (1933). For an explanation of the rationale for those laws, see, for *e.g.*, Morissette v. United States, 342 U.S. 246, 253–56 (1952); Larkin, *Strict Liability*, *supra*, at 1072–79, 1081–83.
8. *See*, *e.g.*, Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing of Economic Regulations*, 30 U. Chi. L. Rev. 423, 424–25 (1963); Gerald E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 Law & Contemp. Probs. 23, 37 (1997) ("Legislatures, concerned about the perceived weakness of administrative regimes, have put criminal sanctions behind administrative regulations governing everything from interstate trucking to the distribution of food stamps to the regulation of the environment.") (footnote omitted).
9. *See*, *e.g.*, Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 Harv. J.L. & Pub. Pol'y 337, 354–58 (2015); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231 (1994).
10. 11 U.S. (7 Cranch) 32 (1812).
11. The Court strongly suggested in *United States v. Eaton*, 144 U.S. 677 (1892), that an agency could *not* issue regulations that created federal crimes: "It is well settled that there are no common-law offenses against the United States. U. S. v. Hudson, 7 Cranch, 32; U. S. v. Coolidge, 1 Wheat. 415; U. S. v. Britton, 108 U. S. 199, 206; Manchester v. Massachusetts, 139 U. S. 240, 262, 26, and cases there cited. [¶] It was said by this court in Morrill v. Jones, 106 U. S. 466, 467, that the secretary of the treasury cannot by his regulations alter or amend a revenue law, and that all he can do is to regulate the mode of proceeding to carry into effect what congress has enacted. Accordingly, it was held in that case, under section 2505 of the Revised Statutes, which provided that live animals specially imported for breeding purposes from beyond the seas should be admitted free of duty, upon proof thereof satisfactory to the secretary of the treasury and under such regulations as he might prescribe, that he had no authority to prescribe a regulation requiring that, before admitting the animals free, the collector should be satisfied that they were of superior stock, adapted to improving the breed in the United States. [¶] Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it.' 4 Amer. & Eng. Enc. Law, 642; 4 Bl. Comm. 5. [¶] It would be a very dangerous principle to hold that a thing prescribed by the commissioner of internal revenue, as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under section 18 of the act; particularly when the same act, in section 5, requires a manufacturer of the article to keep such books and render such returns as the commissioner of internal revenue, with the approval of the secretary of the treasury, may, by regulation, require, and does not impose, in that section or elsewhere in the act, the duty of keeping such books and rendering such returns upon a wholesale dealer in the article. [¶] It is necessary that a sufficient statutory authority should exist for declaring any act or omission a

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criminal offense, and we do not think that the statutory authority in the present case is sufficient. If congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the commissioner of internal revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in section 41 of the act of October 1, 1890. [¶] Regulations prescribed by the president and by the heads of departments, under authority granted by congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense." *Id.* at 687–88.

12. 220 U.S. 506 (1911).
13. *Id.* at 521 ("[T]he authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense.").
14. *See, e.g.*, Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 Harv. J.L. & Pub. Pol'y 715, 728–29 (2013) (hereafter Larkin, *Overcriminalization*). As Stanford Law School Professor Lawrence Friedman once colorfully wrote: "There have always been regulatory crimes, from the colonial period onward. . . . But the vast expansion of the regulatory state in the twentieth century meant a vast expansion of regulatory crimes as well. Each statute on health and safety, on conservation, on finance, on environmental protection, carried with it some form of criminal sanction for violation. . . . Wholesale extinction may be going on in the animal kingdom, but it does not seem to be much of a problem among regulatory laws. These now exist in staggering numbers, at all levels. They are as grains of sand on the beach." Lawrence M. Friedman, Crime and Punishment in American History 282–83 (1993).
15. *See* Michael B. Mukasey & John G. Malcolm, *Criminal Law and the Administrative State: How the Proliferation of Regulatory Offenses Undermines the Moral Authority of Our Criminal Laws*, in Liberty's Nemesis: The Unchecked Expansion of the State 283–98 (Dean Reuter & John Yoo, eds., 2016).
16. Insofar as regulatory offenses involve the same type of lying, cheating, and stealing that also falls under other federal criminal laws, such as fraud, traditional law enforcement agencies like the FBI would also have jurisdiction to investigate the wrongdoing.
17. *See, e.g.*, Government Accountability Office, Federal Law Enforcement: Survey of Federal Civilian Law Enforcement Functions and Authorities (Dec. 19, 2006), http://www.gao.gov/new.items/d07121.pdf (last accessed Apr. 19, 2017); General Accounting Office, Federal Law Enforcement: Information on Certain Agencies' Criminal Investigative Personnel and Salary Costs (Nov. 15, 1995), http://www.gao.gov/assets/110/106306.pdf (last accessed Apr. 19, 2017); General Accounting Office, Federal Law Enforcement: Investigative Authority and Personnel at 13 Agencies (Sept. 30, 1996), http://www.gao.gov/assets/230/223212.pdf (last accessed Apr. 19, 2017); General Accounting Office, Federal Law Enforcement: Investigative Authority and Personnel at 32 Agencies (July 22, 1997), http://www.gao.gov/assets/230/224401.pdf (last accessed Apr. 19, 2017).
18. *See, e.g.*, Larkin, *Overcriminalization*, *supra* note 14, at 742–43.
19. *See* Lynch, supra note 8, at 23, 37. That phenomenon may explain the provenance of the criminal provisions of the federal environmental laws. Initially, those laws created only misdemeanors. *See* Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 Geo. L.J 2407, 2446–47 (1995).
20. *See Fire Down Below* (Warner Bros. 1997). Steven Segal played Jack Taggart, an EPA Special Agent.
21. *See Ghostbusters* (Columbia Pictures 1984). William Atherton played Walter Peck, an EPA official.
22. Generally, felonies are crimes punishable by death or imprisonment for more than one year, misdemeanors are crimes punishable by a fine or by confinement in jail for one year or less, and petty offenses are crimes punishable by a fine or confinement for less than six months. *See, e.g.*, Wayne R. LaFave, Criminal Law § 1.6(a), at 36–38, §1.6(e), at 43–44 (5th ed. 2010); 18 U.S.C. § 19 (2012) (defining "petty offense").
23. That rationale may explain why we see small-scale criminal penalties in regulatory bills. *See, e.g.*, the Contaminated Drywall Safety Act of 2012, H.R. 4212, 112th Cong. (2012) (creating a strict liability offense for importing contaminated drywall, punishable by 90 days in custody); the Commercial Motor Vehicle Safety Enhancement Act of 2011, S. 1950, 112th Cong. (2011) (punishing violations of the bill with up to 90 days in custody).
24. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 28 U.S.C. §§ 49, 591 *et seq.* (1982)).
25. *See* Morrison v. Olson, 487 U.S. 654, 727–28 (1988) (Scalia, J., dissenting).
26. *See, e.g.*, Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. Rev. 785, 793 (1970) (police departments measure efficiency by arrests, not convictions); George F. Will, *Blowing the Whistle on the Federal Leviathan*, Wash. Post, July 27, 2012, http://www.washingtonpost.com/opinions/george-will-blowing-the-whistle-on-leviathan/2012/07/27/gJQAAsRnEX_story.html (last accessed Apr. 28, 2017).
27. Gene Healy, *There Goes the Neighborhood: The Bush–Ashcroft Plan to "Help" Localities Fight Gun Crime*, in Go Directly to Jail: The Criminalization of Almost Everything 105–06 (Gene Healy ed., 2004).
28. *Id.*
29. *Id.*
30. Part of the problem is caused by the needless use of the criminal law to enforce rules that (for several reasons) should not be subject to criminal enforcement at all, a phenomenon known as "overcriminalization." Over the past decade, several former senior Justice Department officials, the American Bar Association, numerous members of the academy, and a number of private organizations with diverse viewpoints have roundly criticized overcriminalization. *See, e.g.*, Zach Dillon, *Symposium on Overcriminalization: Foreword*, 102 J. Crim. L. & Criminology

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525, 525 (2013) ("The Heritage Foundation and the American Civil Liberties Union joined forces to cosponsor our live Symposium and send the unified message that whether you are liberal, moderate, or conservative, overcriminalization is an issue that can no longer be ignored."); Paul J. Larkin, Jr., *Finding Room in the Criminal Law for the Desuetude Principle*, 65 Rutgers L. Rev. Commentaries 1, 1–2 & nn.2–7 (2014) (collecting authorities). There are numerous examples of needless criminal statutes or regulations:

- Making unauthorized use of the 4-H Club logo, the Swiss Confederation Coat of Arms, or the "Smokey the Bear" or Woodsy Owl" characters.
- Misusing the slogan "Give a Hoot, Don't Pollute."
- Transporting water hyacinths, alligator grass, or water chestnut plants.
- Possessing a pet (except for a guide dog) in a public building, on a beach designated for swimming, or on public transportation.
- Operating a "motorized toy, or an audio device, such as a radio, television set, tape deck or musical instrument, in a manner...[t]hat exceeds a noise level of 60 decibels measured on the A-weighted scale at 50 feet."
- Failing to keep a pet on a leash that does not exceed six feet in length on federal parkland.
- Digging or leveling the ground at a campsite on federal land.
- Picnicking in a nondesignated area on federal land.
- Polling a service member before an election.
- Manufacturing and transporting dentures across state lines if you are not a dentist.
- Selling malt liquor labeled "pre-war strength."
- Writing a check for an amount less than $1.
- Installing a toilet that uses too much water per flush.
- Rolling something down a hillside or mountainside on federal land.
- Parking your car in a way that inconveniences someone on federal land.
- Skiing, snowshoeing, ice skating, sledding, inner tubing, tobogganing, or doing any "similar winter sports" on a road or "parking area... open to motor vehicle traffic" on federal land.
- Allowing a pet "to make a noise that...frightens wildlife on federal land."
- Bathing or washing food, clothing, dishes, or other property at public water outlets, fixtures, or pools not designated for that purpose.
- Allowing horses or pack animals to proceed in excess of a slow walk when passing in the immediate vicinity of persons on foot or bicycle.
- Operating a snowmobile that makes "excessive noise" on federal land.
- Using roller skates, skateboards, roller skis, coasting vehicles, or similar devices in nondesignated areas on federal land.
- Failing to "turn in found property" to a national park superintendent "as soon as practicable."
- Using a surfboard on a beach designated for swimming.
- Certifying that McIntosh apples are "extra fancy" unless they're 50 percent red.
- Labeling noodle soup as "chicken noodle soup" if it has less than 2 percent chicken.
- Riding your bicycle in a national park while holding a glass of wine.
- Failing, if a winemaker, to report any "extraordinary or unusual loss" of wine.

See, *e.g.*, Larkin, *Overcriminalization*, *supra* note 14, at 750–51; John G. Malcolm, *Criminal Justice Reform at the Crossroads*, 20 Tex. Rev. L. & Pol. 249, 279–81 (2016); Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. Crim. L. & Criminology 725, 740–41 (2012).

31. *See* The Heritage Found., USA vs. YOU 4 (2013); Joe Luppino-Esposito & Raija Churchill, *Overcriminalization Victimizes Animal-Loving 11-Year-Old and Her Mother*, The Heritage Found., The Daily Signal (Aug. 05, 2011), http://dailysignal.com/2011/08/05/overcriminalization-victimizes-animal-loving-11-year-old-and-her-mother.
32. *See* United States v. McNab, 331 F.3d 1228 (11th Cir. 2003), *as amended on denial of rehearing*, 2003 WL 21233539 (May 29, 2003); One Nation Under Arrest 3–11 (2d ed. Paul Rosenzweig ed., 2013); USA vs. YOU, *supra* note 31, at 20; Meese & Larkin, *supra* note 30, at 777–82.
33. *See* Joe Luppino-Esposito, *A Bird-Brained Use of the Migratory Bird Treaty Act*, The Heritage Found., The Daily Signal (Feb. 6, 2012), http://dailysignal.com/2012/02/06/a-bird-brained-use-of-the-migratory-bird-treaty-act/.
34. USA vs. YOU, *supra* note 31, at 15.
35. 16 U.S.C. § 470aa–470mm (2012).
36. 16 U.S.C. § 470ee(a).
37. *See* USA vs. YOU, *supra* note 31, at 11.
38. *See* Paul J. Larkin, Jr. et al., *Time to Prune the Tree, Part 3: The Need to Reassess the Federal False Statements Laws*, Heritage Foundation Legal

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Memorandum No. 196 (Dec. 15, 2016), http://www.heritage.org/crime-and-justice/report/time-prune-the-tree-part-3-the-need-reassess-the-federal-false-statements. The states also have their own share of insane criminal laws. *See, e.g.*, Evan Bernick, *"Drop the Cabbage, Bullwinkle!": Alaskan Man Faces Prison for the Crime of Moose-Feeding*, The Heritage Found., The Daily Signal (Jan. 22, 2014), http://dailysignal.com/2014/01/22/drop-cabbage-bullwinkle-alaskan-man-faces-prison-crime-moose-feeding/ (noting that a 67-year-old man faced state misdemeanor charges, punishable by a maximum $10,000 fine and one year in jail, for feeding vegetables to a moose).

39. *Id.* There is an additional point worth noting: It might often be the case that regulatory infractions should be subject only to administrative or civil sanctions, not penal ones. That is true for several reasons. *First,* the criminal law should reflect the moral code that everyone knows by heart. Turning regulatory infractions into strict liability crimes because criminal enforcement is more efficient than civil enforcement may be fiscally responsible, but it does not reflect society's serious, sober, and moral decision that incarceration is an appropriate sanction. If the latter is what we are concerned with, then the ubiquitous presence of strict liability crimes authorizing incarceration does not represent that type of judgment by a mature society, a judgment that finds regulatory infractions to be as serious as traditional blue- or white-collar crimes. *Second,* regulatory crimes can spur companies to seek their own industry-specific law for anticompetitive purposes, to garner economic rents—supernormal profits obtained because of government regulation. For example, a business threatened by a particular imported commodity may persuade the government to impose strict regulations on importing that item, backed with criminal sanctions, to restrict competition. Antitrust experts have long believed that businesses will use the regulatory process as a form of economic predation, especially if a company can persuade the government to bear the investigative and prosecutive costs by bringing a criminal prosecution against a rival. *See, e.g.*, W. Kip Viscusi et al., Economics of Regulation and Antitrust 375, 381–92 (4th ed. 2005) (collecting authorities); William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & Econ. 247 (1985); *see generally* Larkin, *Overcriminalization*, *supra* note 14, at 744–45. The point is not that there is something illegitimate about using law enforcement officers to enforce civil laws. The federal, state, and local governments may empower their officers to enforce the full range of provisions in the criminal and civil codes for whatever reasons those governments see fit. Whether the police can *arrest* someone for a purely civil infraction raises a different question. *See* Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (holding that the Fourth Amendment does not forbid the warrantless arrest of a person suspected of committing a crime for which incarceration is not an authorized penalty). The point is that calling a civil or administrative infraction a crime should make us wary of what elected officials are doing. Tacking a term of confinement onto an administrative misstep or breach of contract is not a response signifying the same type of moral disapproval that people naturally feel at the sight of dangerous, harmful, or repulsive conduct. There should be more than the desire merely to enhance the U.S. Treasury as the justification for exposing people to criminal liability. Authorizing and imposing incarceration on a particular individual is a moral judgment about his actions and character. Imprisonment represents an extreme form of societal condemnation, one that should be seen as necessary only when an offender is deemed not fit to live free for a certain period. No court or legislature should make that judgment just to save or make a few bucks here and there.

40. For a discussion of the development of federal environmental criminal law, *see, e.g.*, Richard J. Lazarus, *supra* note 19; Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 Loy. L.A. L. Rev. 867 (1994). The author of this Legal Memorandum was a Special Agent in the EPA criminal investigation program from 1998 to 2004 and draws on his experiences there as a basis for the recommendations contained herein.

41. For a discussion of the development of federal environmental regulation, *see, e.g.*, Richard J. Lazarus, The Making of Environmental Law (2004).

42. There has been no shortage of criticisms of strict liability offenses. *See, e.g.*, Lon L. Fuller, The Morality of Law 77 (1969) ("Strict criminal liability has never achieved respectability in our law."); H.L.A. Hart, *Negligence, Mens Rea, and Criminal Responsibility*, in H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of law 152 (1968) ("Strict liability is odious[.]"); *see generally* Larkin, *Strict Liability*, *supra* note 7, at 1079 n.46 (2014) (collecting authorities). Common-law courts and scholars since William Blackstone have consistently and stridently disparaged liability without culpability, by which they have meant without proof of a wicked state of mind. At one time, even the Supreme Court wrote that it would shock a universal "sense of justice" for a court to impose criminal punishment without proof of a wicked intent. *See* Felton v. United States, 96 U.S. 699, 703 (1877) ("But the law at the same time is not so unreasonable as to attach culpability, and consequently to impose punishment, where there is no intention to evade its provisions, and the usual means to comply with them are adopted. All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of every one."). As argued elsewhere: "Critics maintain that holding someone liable who did not flout the law cannot be justified on retributive, deterrent, incapacitative, or rehabilitative grounds. By dispensing with any proof that someone acted with an 'evil' intent, strict liability ensnares otherwise law-abiding, morally blameless parties and subjects them to conviction, public obloquy, and punishment—that is, it brands as a 'criminal' someone whom the community would not label as blameworthy. By imposing liability for conduct that no reasonable person would have thought to be a crime, strict liability also denies an average person notice of what the law requires. The result is to violate a principal universally thought to be a necessary predicate before someone can be convicted of a crime and to rob people of the belief, necessary for the law to earn respect, that they can avoid criminal punishment if they choose to comply with the law. By making into criminals people who had no knowledge that their conduct was unlawful, strict liability violates the utilitarian justification for punishment, since a person who does not know that he is committing a crime will not change his behavior. Lastly, strict criminal liability flips on its head the criminal law tenet that '[i]t is better that ten guilty persons escape than that one innocent suffer.' Strict liability accomplishes that result because it sacrifices a morally blameless party for the sake of protecting society. In sum, by punishing someone for unwittingly breaking the law, strict criminal liability statutes mistakenly use a legal doctrine fit only for the civil tort purpose of providing compensation as a mechanism for imposing criminal punishment. By so doing, they unjustifiably impose an unnecessary evil. Strict liability for a criminal offense is, in a phrase, fundamentally unjust." Larkin, *Strict Liability*, *supra* note 7, at 1079–81 (footnotes omitted).

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43. *See, e.g.*, Meese & Larkin, *supra* note 30, at 734–36, 744–46. The concern with strict liability exists not only when a criminal statute dispenses altogether with proof of any mental element, but also when a statute does not require proof of mens rea in connection with a fact relevant to a defendant's culpability. Mistakenly taking someone else's umbrella does not constitute theft. *See, e.g.*, Herbert Packer, The Limits of the Criminal Sanction 122 (1968). Eliminating proof of that fact abandons the precept that the criminal law should punish only culpable behavior.

44. That prospect is terrifying enough for people who believe that the criminal law must give the average person adequate notice of what is and is not a crime without the need to resort to legal advice to stay out of jail, but there is more. Regulations do not exhaust the number and type of administrative dictates that can define criminal liability. Agencies often construe their regulations in the course of applying them, and the interpretations that agencies give to their own rules receive a great degree of deference from the courts. The Supreme Court has explained that an agency's reading of its own regulations should be deemed "controlling" on the courts unless that interpretation is unconstitutional or irreconcilable with the text of the regulation. *See, e.g.*, Auer v. Robbins, 519 U.S. 452, 457 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 417–18 (1945). If an agency's interpretations of its regulations were to be applied in a criminal prosecution, the result would be the development of a body of private agency "case law" that a person must know to be aware of the full extent of his potential criminal liability. In an opinion accompanying the denial of certiorari, Justices Antonin Scalia and Clarence Thomas wrote that the courts should never give deference to the government's interpretation of an ambiguous criminal law because the "rule of lenity" demands the exact opposite result. *See, e.g.*, Whitman v. United States, 135 S. Ct. 352, 353 (2014) (statement by Scalia & Thomas, JJ., respecting the denial of certiorari; concluding that courts should never give deference to the government's interpretation of an ambiguous criminal law because the "rule of lenity" demands the exact opposite result).

45. The Pollution Prosecution Act of 1990, Tit. II of the Act of Nov. 16, 1990, §§ 201–05, 101 Pub. L. No. 593, 104 Stat. 2954 (1990).

46. *Id.* § 202(a)(5).

47. U.S. Environmental Protection Agency, "Environmental Management Systems at Regional Laboratories," https://www.epa.gov/ems/environmental-management-systems-regional-laboratories (last accessed June 28, 2017).

48. *See* FBI, Laboratory Services, https://www.fbi.gov/services/laboratory (last accessed May 1, 2017).

49. *See* U.S. Secret Service, The Investigative Mission, Forensic Services, https://www.secretservice.gov/investigation/ (last accessed May 1, 2017).

50. "Every organization has a culture, that is, a persistent, patterned way of thinking about the central tasks of and human relationships within an organization. Culture is to an organization what personality is to an individual. Like human culture generally, it is passed on from one generation to the next. It changes slowly, if at all." James Q. Wilson, Bureaucracy 91 (1989).

51. I use the term "social worker" not to malign EPA employees with that mindset, but to describe a culture that, in the vernacular, might be referred to as a "do-gooder" enterprise. In my experience, EPA personnel see the agency's mission as protecting the environmental integrity of the nation and planet, goals that should be pursued above all others that the agency has been tasked with achieving and that are more important than most of the nation's other goals.

52. Wilson, *supra* note 50, at 99; *see also id.* at 95 ("When an organization has a culture that is widely shared and warmly endorsed by operators and managers alike, we say that the agency has a sense of *mission*. A sense of mission confers a feeling or special worth on the members, provides a basis for recruiting and socializing new members, and enables the administration to economize on the use of other incentives.") (emphasis in original; footnote omitted).

53. Also keep in mind that the special agents at the EPA criminal division have the authority to initiate criminal investigations of EPA employees who violate the environmental laws. So far, they have not done so. *See* Paul J. Larkin, Jr., & John-Michael Seibler, *Agencies Not Coming Clean About the EPA's Responsibility for Poisoning the Animas River*, Heritage Found. Legal Memorandum No. 170 (Dec. 8, 2015), file:///C:/Users/Larkinp/AppData/Local/Temp/LM-170.pdf; Paul J. Larkin, Jr. & John-Michael Seibler, *"Sauce for the Goose Should Be Sauce for the Gander": Should EPA Officials Be Criminally Liable for the Negligent Discharge of Toxic Waste into the Animas River?*, Heritage Found. Legal Memorandum No. 162 (Sept. 10, 2015), http://thf_media.s3.amazonaws.com/2015/pdf/LM162.pdf. But the possibility exists.

54. President Richard Nixon created the agency out of parts taken from several other agencies (such as the Department of Agriculture; the Department of Health, Education, and Welfare; and the Department of the Interior; the Atomic Energy Commission; and the Council on Environmental Quality) that he (with Congress's blessing) combined together as the EPA. Reorganization Plans Nos. 3 and 4 of 1970, Message from the President of the United States, H.R. Comm. on Government Operations, H.R. Cong. Doc. No. 91-366, 91st Cong. (July 9, 1970).

55. Wilson, *supra* note 50, at 96.

56. *Id.*

57. *Id.*

58. *See id.* at 101.

59. For example, the author was involved in the execution of a search warrant at a plant where a majority of the more than 100 employees had criminal records.

60. Which can happen. *See, e.g.*, Sean Doogan, *Alaska Governor Calls for Investigation of Armed, EPA-led Task Force*, Alaska Dispatch, Sept. 5, 2013, https://www.adn.com/alaska-news/article/governor-calls-special-counsel-investigate-actions-armed-epa-led-task-force/2013/09/05/; Valerie Richardson, *EPA Facing Fire for Armed Raid on Mine in Chicken, Alaska: Population, 7*, Wash. Times, Oct. 11, 2013, http://www.washingtontimes.com/news/2013/oct/11/epa-facing-fire-armed-raid-alaska-mine/.

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61. *See* Wilson, *supra* note 50, at 95 ("Since every organization has a culture, every organization will be poorly adapted to perform tasks that are not part of that culture."). As an example, Professor Wilson pointed to the Tennessee Valley Authority (TVA). "[F]or a long time [it] has had (and may still have) an engineering culture that values efficient power production and undervalues environmental protection." *Id.* For that reason, he concluded, it is unreasonable to expect that the TVA will treat environmental protection on a par with efficient power production, the mission for which Congress created it. *Id.*
62. *Id.* at 101.
63. It would be most unwise to exempt the newly added criminal investigators from the same education and training requirements demanded of FBI recruits. That would create two tiers of agents at the Bureau, which would generate a host of undesirable results such as ill will, ostracism, and so forth.
64. Ch. 20, § 27, 1 Stat. 73, 87 (1789).
65. *Compare* 18 U.S.C. § 3053 (2012) ("United States marshals and their deputies may carry firearms and may make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony."), *and* 28 U.S.C. § 566(c) (2012) ("Except as otherwise provided by law or Rule of Procedure, the United States Marshals Service shall execute all lawful writs, process, and orders issued under the authority of the United States, and shall command all necessary assistance to execute its duties."); *id.* § 566(d) ("Each United States marshal, deputy marshal, and any other official of the Service as may be designated by the Director may carry firearms and make arrests without warrant for any offense against the United States committed in his or her presence, or for any felony cognizable under the laws of the United States if he or she has reasonable grounds to believe that the person to be arrested has committed or is committing such felony."), *with* 18 U.S.C. § 3052 ("The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.").
66. *See* 28 U.S.C. § 564 (2012) ("United States marshals, deputy marshals and such other officials of the Service as may be designated by the Director, in executing the laws of the United States within a State, may exercise the same powers which a sheriff of the State may exercise in executing the laws thereof."). In *Cunningham v. Neagle*, 135 U.S. 1 (1890), the Supreme Court recognized the broad authority that U.S. marshals and their deputies enjoy under federal and state law in finding justified the decision of a deputy marshal to use deadly force to protect Justice Stephen Field from a murderous assault. *Id.* at 52–76.
67. *See* 28 U.S.C. § 566(a) (2012) ("It is the primary role and mission of the United States Marshals Service to provide for the security and to obey, execute, and enforce all orders of the United States District Courts, the United States Courts of Appeals, the Court of International Trade, and the United States Tax Court, as provided by law.").
68. "[The Marshals] were law enforcers, but also administrators. They needed to be adept in accounting procedures and pursuing outlaws, in quelling riots and arranging court sessions. The legacy of their history was the avoidance of specialization. Even today, in this age of experts, U.S. Marshals and their Deputies are the general practitioners within the law enforcement community. As the government's generalists, they have proven invaluable in responding to rapidly changing conditions. Although other Federal agencies are restricted by legislation to specific well-defined duties and jurisdictions, the Marshals are not. Consequently, they are called upon to uphold the government's interests and policies in a wide variety of circumstances." U.S. Marshals Service, History—General Practitioners, https://www.usmarshals.gov/history/general_practitioners.htm (last accessed May 5, 2017).

NRDC v. EPA, 1:17-cv-03519 (S.D.N.Y.) EPA-HQ-2017-005678 ED_001327C_00009648-00110

214 Massachusetts Avenue, Ne
Washington, DC 20002-4999

(202) 546-4400
heritage.org

U.S. Department of Justice

Office of Legal Policy

Washington, D.C. 20530

F.G.

MEMORANDUM

October 27, 1986

TO: Samuel A. Alito
Steven G. Calabresi
Michael A. Carvin
Roger B. Clegg
T. Kenneth Cribb, Jr.
Stephen H. Galebach
John C. Harrison
Kevin R. Jones
James I. Knapp
Roger J. Marzulla
David M. McIntosh
Roger M. Olsen
Charles F. Rule
James M. Spears
Victoria Toensing

FROM: Donald B. Ayer
Deputy Solicitor General

Lowell V. Sturgill, Jr.
Attorney-Advisor

SUBJECT: Litigation Strategy Working Group

The Litigation Strategy Working Group will meet this Thursday, October 30, 1986 from 11:00 - 12:00 a.m. in the Antitrust Division's Conference Room, Room 3101. At that time, we will discuss the following subjects:

1. Alternative Sentencing Guidelines.

2. The role of intervenors in suits settled by consent decrees in the wake of Local 93, International Association of Firefighters v. City of Cleveland, 106 S. Ct. 3063 (July 2, 1986). A revised copy of a memorandum prepared by Roger Marzulla and Ray Ludwiszewski on this subject is attached, along with a copy of the Consent Decree Guidelines signed by the Attorney General this spring.

3. Federal agencies funding private litigation against the federal government.

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4. The press disclosure policies of the federal government relating to plea agreements.

As time permits, we will, as usual, discuss other matters of interest to the Group.

We look forward to seeing you on Thursday.

Attachments

cc: All Assistant Attorneys General (Litigating Divisions)

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U.S. Department of Justice

Land and Natural Resources Division

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

OCT 2 4 1986

MEMORANDUM

TO: Litigation Strategy Working Group

FROM: Roger J. Marzulla
Deputy Assistant Attorney General

Raymond B. Ludwiszewski
Special Counsel
Land & Natural Resources Division

SUBJECT: Role of Intervenors in Suits Settled by Consent Decrees in the Wake of Local 93, International Association of Firefighters v. City of Cleveland, 106 S. Ct. 3063 (July 2, 1986)

Last term the Supreme Court decided Local 93, International Association of Firefighters v. City of Cleveland, 106 S. Ct. 3063 (July 2, 1986) in which Justice Brennan made two interesting rulings with respect to consent decrees: (1) since they are essentially agreements between the parties, they may provide for remedies which the court would not have jurisdiction to order if the case had been tried; and (2) likewise because they are private agreements, the consent of other parties to the action (to wit, intervenors as-of-right) need not be obtained. These rulings were contrary to the position taken by the United States. I think it would be worthwhile for the LSWG to discuss the impact of this decision on our consent decree practice.

I. Consent Decree as Agreement. The opinion discusses the dual nature of a consent decree as an agreement between the parties that is also a judicial order. The court concludes that the scope of the agreement is not limited by the court's authority to issue orders, so that the parties can agree to remedies (here race conscience hiring) which the court could not have ordered in the absence of such an agreement. This directly challenges an important premise of the Attorney General's consent decree policy: that a consent decree is an order whose scope may not exceed the court's jurisdictional order authority. The group should discuss, what, if any, effect the Local 93 decision has on the way we analyze proposed consent decrees.

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II. Consent of All Parties (Including Intervenors). Our Firefighters amicus brief suggested that the consent of an intervenor as-of-right is required in Title VII cases before the court may enter a consent decree. The amicus brief properly emphasized the importance of safeguarding the rights of those individuals who may be disadvantaged by a Title VII decree. The brief notes:

> It is one thing for consenting parties to enter into consent decrees affecting only their own rights. but a Title VII consent decree awarding preferences in hiring, promotions, seniority, or layoffs to minority employees or prospective employees necessarily disadvantages those individuals who are not preferred. (Brief at 24)

Although this position makes sense in the Title VII arena where a limited number of jobs or promotions is being divided up, is problematic in environmental cases where virtually anyone has standing to challenge actions taken by the federal government. Citizen suit provisions allow almost anyone to challenge EPA's failure to perform "nondiscretionary" duties, while the APA gives any aggrieved party standing to challenge new regulations. In environmental enforcement cases such as those brought under the Clean Air Act, Clean Water Act or Superfund, the United States frequently enters into proposed consent decrees with polluters only to have them challenged by intervenors as inadequate remedies. We have consistently taken the position that the court may approve such consent decrees over the objection of intervenors. U.S. v. Hooker Chemical Plastics (Hyde Park case), 540 F.Supp. 1067, 1083 (W.D.N.Y. 1982).

Perhaps a valid distinction can be drawn between those who suffer injury differentiated from that of the public in a Title VII case and those who suffer no more than anyone else in an environmental case. However, this sounds very much like the test for standing, and may appear that we concede that significant injury in fact is not required to bring suit but only to challenge consent decrees. Perhaps a preferable approach is to attempt to limit (as Justice Brennan does) the impact the consent decree itself by arguing that it cannot affect the rights of those not a party to it. This too poses difficulties, however, as it undercuts the finality of our consent decrees.

We would like the LSWG to discuss the appropriate Department position with regard to the need for intervenors' consent to entry of a decree.

Attachment: Local 93 Opinion

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Office of the Attorney General
Washington, D. C. 20530

13 March 1986

MEMORANDUM

TO: All Assistant Attorneys General
All United States Attorneys

FROM: EDWIN MEESE III
Attorney General

SUBJECT: Department Policy Regarding Consent Decrees and Settlement Agreements

The following policy is adopted to guide government attorneys involved in the negotiating of consent decrees and settlements. Adopted pursuant to the Attorney General's litigation and settlement authority, these guidelines are designed to ensure that litigation is terminated in a manner consistent with the proper roles of the Executive and the courts. They are to be followed in all cases tried by counsel under the direction of the Attorney General.

I. General Policy on Consent Decrees and Settlement Agreements

Consent decrees are negotiated agreements that are given judicial imprimatur when entered as an order of the court. Because of their unique status as both contract and judicial act, consent decrees serve as a useful device for ending litigation without trial, providing the plaintiff with an enforceable order, and insulating the defendant from the ramifications of an adverse judgement. In the past, however, executive departments and agencies have, on occasion, misused this device and forfeited the prerogatives of the Executive in order to preempt the exercise of those prerogatives by a subsequent Administration. These errors sometimes have resulted in an unwarranted expansion of the powers of judiciary -- often with the consent of government parties -- at the expense of the executive and legislative branches.

The executive branch and the legislative branch may be unduly hindered by at least three types of provisions that have been found in consent decrees:

1. A department or agency that, by consent decree, has agreed to promulgate regulations, may have relinquished its power to amend those regulations or promulgate new ones without the participation of the court.

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2. An agreement entered as a consent decree may divest the department or agency of discretion committed to it by the Constitution or by statute. The exercise of discretion, rather than residing in the Secretary or agency administrator, ultimately becomes subject to court approval or disapproval.

3. A department or agency that has made a commitment in a consent decree to use its best efforts to obtain funding from the legislature may have placed the court in a position to order such distinctly political acts in the course of enforcing the decree.

In Section II these guidelines address each of these concerns and limit authority to enter into consent decrees that would require the Secretary or agency administrator to revise, amend or promulgate regulations; that would require the Secretary or agency administrator to expend funds which Congress has not appropriated, or to seek appropriations from Congress; or that would divest the Secretary or the agency administrator of discretion granted by the Constitution or by statue.

These limitations on entry into consent decrees that might include such provisions are required by the executive's position, that it is constitutionally impermissible for the courts to enter consent decrees containing such provisions where the courts would not have had the power to order such relief had the matter been litigated.

The limitations in Section II.A. of the guidelines are not intended to discourage termination of litigation through negotiated settlements. The Attorney General has plenary authority to settle cases tried under his direction, including authority to enter into settlement agreements on terms that a court could not order if the suit were tried to conclusion. Settlement agreements -- similar in form to consent decrees, but not entered as an order of the court -- remain a perfectly permissible device for the parties and should be strongly encouraged. Section II.B., however, places some restrictions on the substantive provisions which may properly be included in settlement agreements. For example, Section II.B.1. allows a department or agency to agree in a settlement document to revise, amend, or promulgate new regulations, but only so long as the department or agency is not precluded from changing those regulations pursuant to the APA. Similarly, under Section II.B.2. the Secretary or agency administrator may agree to exercise his discretion in a particular manner, but may not divest himself entirely of the power to exercise that discretion as necessary in the future. The guidelines further provide that in certain circumstances where the agreement constrains agency discretion, a settlement agreement should specify that the only sanction for the government's failure to comply with a provision of a settlement agreement shall be the revival of the suit. Revival of the suit as the sole remedy removes the danger of a judicial order

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awarding damages or providing specific relief for breach of an undertaking in a settlement agreement.

Finally, it must be recognized that the Attorney General has broad flexibility and discretion in the conduct of litigation to respond to the realities of a particular case. Such flexibility can be exercised by the Attorney General in granting exceptions to this policy.

II. Policy Guidelines on Consent Decrees and Settlement Agreements

A. Consent Decrees

A department or agency should not limit its discretion by consent decree where it would assert that a similar limitation imposed by injunction unduly or improperly constrains executive discretion. In particular, the Department of Justice will not authorize any consent decree limiting department or agency authority in the following manner:

1. The department or agency should not enter into a consent decree that converts into a mandatory duty the otherwise discretionary authority of the Secretary or agency administrator to revise, amend, or promulgate regulations.

2. The department or agency should not enter into a consent decree that either commits the department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or commits a department or agency to seek a particular appropriation or budget authorization.

3. The department or agency should not enter into a consent decree that divests the Secretary or agency administrator, or his successors, of discretion committed to him by Congress or the Constitution where such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.

B. Settlement Agreements

The Department of Justice will not authorize any settlement agreement that limits the discretion of a department or agency in the following manner:

1. The department or agency should not enter into a settlement agreement that interferes with the Secretary or agency administrator's authority to revise, amend, or promulgate regulations through the procedures set forth in the Administrative Procedure Act.

2. The department or agency should not enter into a settlement agreement that commits the Department or agency to

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expend funds that Congress has not appropriated and that have not been budgeted for the action in question.

In any settlement agreement in which the Secretary or agency administrator agrees to exercise his discretion in a particular way, where such discretionary power was committed to him by Congress or the Constitution to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties, the sole remedy for the department or agency's failure to comply with those terms of the settlement agreement should be the revival of the suit.

C. Exceptions

The Attorney General does not hereby yield his necessary discretion to deal with the realities of any given case. If special circumstances require any departure from these guidelines, such proposed departure must be submitted for the approval of the Attorney General, the Deputy Attorney General, or the Associate Attorney General at least two weeks before the consent decree is to be entered, or the settlement agreement signed, with a concise statement of the case and of reasons why departure from these guidelines will not tend to undermine their force and is consistent with the constitutional prerogatives of the executive or the legislative branches. Written approval of the Attorney General, the Deputy Attorney General, or the Associate Attorney General will be required to authorize departure from these guidelines.

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To: Fidis, Alexander[Fidis.Alexander@epa.gov]; Stern, Allyn[Stern.Allyn@epa.gov]
Cc: Steiner-Riley, Cara[Steiner-Riley.Cara@epa.gov]
From: Szalay, Endre
Sent: Thur 3/16/2017 8:33:36 PM
Subject: RE: Administrator TPs on "sue & settle" for ECOS meeting - 4 pm deadline

Ex. 5 - Deliberative Process

Endre Szalay

US EPA Region 10

Office of Regional Counsel

206-553-1073

From: Fidis, Alexander
Sent: Thursday, March 16, 2017 1:17 PM
To: Stern, Allyn <Stern.Allyn@epa.gov>; Szalay, Endre <Szalay.Endre@epa.gov>
Cc: Steiner-Riley, Cara <Steiner-Riley.Cara@epa.gov>
Subject: RE: Administrator TPs on "sue & settle" for ECOS meeting - 4 pm deadline

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

From: Stern, Allyn
Sent: Thursday, March 16, 2017 12:37 PM
To: Szalay, Endre <Szalay.Endre@epa.gov>
Cc: Steiner-Riley, Cara <Steiner-Riley.Cara@epa.gov>; Fidis, Alexander <Fidis.Alexander@epa.gov>
Subject: Re: Administrator TPs on "sue & settle" for ECOS meeting - 4 pm deadline

This is the first I've heard about this.

Allyn Stern

Regional Counsel

US EPA Region 10

1200 Sixth Avenue, Seattle, WA 98101

206-553-1223. (desk)

206-619-4356 (cell)

On Mar 16, 2017, at 12:28 PM, Szalay, Endre <Szalay.Endre@epa.gov> wrote:

Ex. 5 - Deliberative Process

Endre Szalay

US EPA Region 10

Office of Regional Counsel

206-553-1073

From: Ford, Peter
Sent: Thursday, March 16, 2017 12:08 PM
To: Szalay, Endre <Szalay.Endre@epa.gov>
Subject: RE: Administrator TPs on "sue & settle" for ECOS meeting - 4 pm deadline

Thanks, this is great.

Peter Z. Ford

U.S. EPA Office of General Counsel

202.564.5593

From: Szalay, Endre
Sent: Thursday, March 16, 2017 2:45 PM
To: Ford, Peter <Ford.Peter@epa.gov>
Subject: RE: Administrator TPs on "sue & settle" for ECOS meeting - 4 pm deadline

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Endre Szalay

US EPA Region 10

Office of Regional Counsel

206-553-1073

From: Ford, Peter
Sent: Thursday, March 16, 2017 11:32 AM
To: Szalay, Endre <Szalay.Endre@epa.gov>
Subject: FW: Administrator TPs on "sue & settle" for ECOS meeting - 4 pm deadline

Ex. 5 - Deliberative Process

Thanks, and hope you're doing well.

Peter Z. Ford

U.S. EPA Office of General Counsel

202.564.5593

From: Neugeboren, Steven
Sent: Thursday, March 16, 2017 2:08 PM
To: Prabhu, Aditi <Prabhu.Aditi@epa.gov>; OGC WLO <OGC_WLO@epa.gov>
Cc: Schroer, Lee <schroer.lee@epa.gov>
Subject: RE: Administrator TPs on "sue & settle" for ECOS meeting - 4 pm deadline

I see Lee's in a mtg until about 3 so I'm forwarding Aditi's message below to all WLO. She has a 4 pm deadline so please reply to her and copy Lee and me if you have anything to offer

Ex. 5 - Deliberative Process

Steven Neugeboren

Associate General Counsel

Water Law Office

Environmental Protection Agency

202-564-5488

From: Prabhu, Aditi
Sent: Thursday, March 16, 2017 11:15 AM
To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>
Cc: Schroer, Lee <schroer.lee@epa.gov>

Subject: Administrator TPs on "sue & settle" for ECOS meeting

Lorie/Gautam & Steve,

The Administrator will be speaking at ECOS next week and has been asked to respond to a question about "sue & settle":

State Authority & Consultation:

1. *ECOS is generally opposed to the "sue and settle" approach where consent decrees may impose deadlines and obligations on state agencies without allowing them to weigh in before agreeing to a proposed consent decree. Can you discuss any ideas you are looking at to help ensure that states at least have a role in these settlement discussions?*

Ex. 5 - Deliberative Process

Please send me any input **by 4pm today** as I need to get this to Kevin by COB given OA's deadline. Feel free to give me a call if you'd like to discuss.

Thanks,

Aditi

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

To: Nalven, Heidi[Nalven.Heidi@epa.gov]; Wehling, Carrie[Wehling.Carrie@epa.gov]
Cc: Stern, Allyn[Stern.Allyn@epa.gov]; Palomaki, Ashley[Palomaki.Ashley@epa.gov]; Allnutt, David[Allnutt.David@epa.gov]
From: Steiner-Riley, Cara
Sent: Thur 3/16/2017 8:25:07 PM
Subject: Fwd: Administrator TPs on "sue & settle" for ECOS meeting - 4 pm deadline

Ex. 5 - Deliberative Process See aditi's message at bottom of chain.

Sent from my iPhone

Begin forwarded message:

From: "Szalay, Endre" <Szalay.Endre@epa.gov>
Date: March 16, 2017 at 12:28:11 PM PDT
To: "Stern, Allyn" <Stern.Allyn@epa.gov>, "Steiner-Riley, Cara" <Steiner-Riley.Cara@epa.gov>, "Fidis, Alexander" <Fidis.Alexander@epa.gov>
Subject: FW: Administrator TPs on "sue & settle" for ECOS meeting - 4 pm deadline

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Office of Regional Counsel

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Thanks,

Aditi

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

To: Glenn, William[Glenn.William@epa.gov]; Huitric, Michele[Huitric.Michele@epa.gov]; Mogharabi, Nahal[MOGHARABI.NAHAL@EPA.GOV]; PerezSullivan, Margot[PerezSullivan.Margot@epa.gov]; Calvino, Maria Soledad[Calvino.Maria@epa.gov]; Keener, Bill[Keener.Bill@epa.gov]; Gaudario, Abigail[Gaudario.Abigail@epa.gov]; R9 Supervisors[R9_Supervisors@epa.gov]
Cc: Barkett, Bonnie[Barkett.Bonnie@epa.gov]; Maier, Brent[Maier.Brent@epa.gov]; Higuchi, Dean[Higuchi.Dean@epa.gov]; Reyes, Deldi[Reyes.Deldi@epa.gov]; Nazmi, Niloufar[Nazmi.Niloufar@epa.gov]; Harris-Bishop, Rusty[Harris-Bishop.Rusty@epa.gov]; Ford, Margaret[Ford.Margaret@epa.gov]; Henderson, Alita[Henderson.Alita@epa.gov]; COHEN, Deborra[Cohen.Deborra@epa.gov]; Pratt, Kristen[Pratt.Kristen@epa.gov]; Meltzer, Kathy[Meltzer.Kathy@EPA.GOV]; Hood, Timonie[Hood.Timonie@epa.gov]; Blazej, Nova[Blazej.Nova@epa.gov]; Stollman, Scott[Stollman.Scott@epa.gov]; Amato, Paul[Amato.Paul@epa.gov]; Rao, Kate[Rao.kate@epa.gov]; Schmidt, David[Schmidt.David@epa.gov]; Ty, Fatima[Ty.Fatima@epa.gov]; Kao, Jessica[Kao.Jessica@epa.gov]; Karlson, Kristine[Karlson.Kristine@epa.gov]; CHENG, CHRISTINA[Cheng.Christina@epa.gov]; Yogi, David[Yogi.David@epa.gov]; Engelman, Alexa[ENGELMAN.ALEXA@EPA.GOV]; Sebastian, Chris[Sebastian.Chris@epa.gov]; Marincola, JamesPaul[Marincola.JamesPaul@epa.gov]; LUEHE, DOUGLAS[luehe.douglas@epa.gov]
From: Zito, Kelly
Sent: Fri 7/28/2017 12:06:33 AM
Subject: End of day -- July 27, 2017

PRESS

Univision – Calexico (Lourdes Mendoza) [Received 7/19] – OPEN – Producer Is interested in interviewing an EPA official on-camera about air issues/asthma in the Calexico/Mexicali Binational area. She sent specific questions. Sent request to HQ for approval. Interview can be in English or Spanish. AIR/BORDER. Soledad Calvino.

Las Vegas Review Journal (Art Marroquin) [Received 7/27] – CLOSED – Reporter saw agenda item on City of North Las Vegas' city council agenda regarding the upcoming August 2nd vote on a proposed Consent Decree. Reporter seeking comment on the agenda item. Sent HQ approved desk statement. Margot Perez-Sullivan ENF

Fronteras NPR (Laurel Morales) [Received 7/13] – OPEN – Reporter checking in on possible Navajo AUM site tour. There are two ongoing cleanups this summer, one at Quivira (funded through Tronox settlement). Quivira mine cleanup being run by Navajo-owned business and is planning to employ locals. Propose bringing reporter to site with press officer and allow her to tour the ongoing cleanup with experienced RPM on-site. Waiting to get clearance from HQ. Margot Perez-Sullivan SF

Filmmaker (Jeff Spitz) [Received 7/26] - OPEN - Navajo Boy filmmaker checking in on progress of Navajo AUM clean ups for his seminar/film showing at colleges & universities. Former SF AD provided funding for a follow up documentary film. Spitz particularly interested in Tronox settlement. Sent link to website. Filmmaker wants additional information. Sent latest Tronox update. Margot Perez-Sullivan SF

New Times San Luis Obispo (Karen Garcia) – CLOSED – Reached out to reporter with request for her to correct a statement in her story on the WIFIA loans. Morro Bay has chance at federal dollars to help fund its water facility WTR, Michele Huitric

Freelance writer (Chris Roberts) [Received 7/27] – OPEN – Writer is asking for copies of presentations that the Navy and EPA have made at meetings organized by SF Mayor's Office regarding Hunters Point Naval Shipyard cleanup. He had previously written about the cleanup for SF Magazine and thinks they might be interested in running an update. Working with program to pull together EPA's documents; will also refer him to the Navy and the Mayor's Office. DDL: 8/2. SF, Michele Huitric

WEB & SOCIAL MEDIA

Social Media:

Nutrient Sensor Action Challenge – Posted to our Twitter page about the upcoming Nutrient Sensor Action Challenge Informational Webinar. The Nutrient Sensor Action Challenge aims to help address nutrient pollution monitoring and data management for local nutrient management decision-making.

Web Updates:

Media Center – Completed final edits and published the new version of the Pacific Southwest Media Center which now conforms with OneEPA Web microsite guidance.

9online Updates:

Kaleidoscope Day – Posted agenda for next week's all-day diversity event.

CONGRESSIONAL & INTERGOVERNMENTAL

Rep. Nanette Barragan (D-CA-44): Brent Maier coordinated and participated in a follow up call along with Superfund Division's Kay Lawrence and Andrew Helmlinger in our Office of Regional Counsel with the Congresswoman's office to discuss the Rancho LPG issue. Participants from the Congresswoman's office included: Acting District Director Morgan Roth, District Representative Gabriela Medina, and Legislative Director Javier Gamboa. Kay discussed the Risk Management Program in detail and responded to a number of questions related to the Rancho LPG facility

Rep. Grace Napolitano (D-CA): Brent Maier shared some follow up information with the Congresswoman's staff requested during our Tuesday, July 25th call with the Congresswoman and her staff. Information was shared from our Water and Superfund Divisions. Thanks to David W. Smith and Wayne Praskins for the quick turnaround for the requested information.

Rep. Tom O'Halleran (D-AZ-1): Superfund's Will Duncan alerted Brent Maier that Chip Poalinelli was recently at a Cove Chapter House to meet with the Cove Day School utilities manager because the school principal called Chip with concerns that EPA's equipment might hit the schools waterline. While at this meeting, Congressman Tom O'Halleran's tribal engagement representative, Luther Lee, stopped by the Chapter and introduced himself to Chip. Chip briefly told him about the uranium cleanup work EPA is doing the in Cove area. Luther then asked Chip if he could provide him with an update on the Sanders, AZ, water issue. Chip let Luther Lee know that EPA would have someone more familiar with the Sanders water issue contact him. Luther Lee also mentioned that the Congressman is interested in regular updates on uranium mines on the Navajo Nation. Brent is following up with Water Division's Corine Li and Superfund's Sean Hogan and will work to set up a follow-up call with Luther Lee on the Sanders water issue.

Arizona Senate Democratic Caucus Policy Advisor Inquiry: Water Division's Corine Li received an inquiry from Roxanna Pitones, Arizona State Senate staff, concerning issues

surrounding the water quality in Sanders, AZ. One of the members in their caucus, State Senator Jamescita Mae Peshlakai, who represents the Navajo Nation, is deeply concerned about whether the necessary steps are being taken to ensure the Sanders community has suitable drinking water. Roxanna notes in her message that abandoned uranium mines have affected the water quality of Sanders. Sanders Unified School District had an issue with uranium in their drinking water a while back – the issue at the school has since been resolved with the help of the Navajo Tribal Utility Authority. Her understanding is that while the school matter has been resolved, the community may be exposed to contaminated water. The Arizona Department of Environmental Quality has assured her that any regulated water source in the area is meeting safe water standards. Roxanna's asking if the EPA is taking efforts to address contaminated water from unregulated sources? Corine is reaching out to Superfund's Sean Hogan and will work with Brent Maier to set up a follow-up call for Friday afternoon with Roxanna Pitones.

Upcoming Congressional District Office Meetings:

Rep. Lucille Roybal-Allard (D-CA-40): Brent Maier has confirmed a meeting on **Wednesday, August 2nd at 10:00am** with Steven Leonido-John of our Southern California Field Office with the Congresswoman's Los Angeles District Director Ana Figueroa. Please note that the Congresswoman has the **Pemaco/Maywood Superfund Sites** in her District and has also asked for an update on the ongoing cleanup of the Exide facility in Vernon and the ongoing issues in the City of Paramount.

Recap of Recent Intergovernmental Meetings:

EPA Meets with San Diego Supervisor Cox: On Wednesday, July 26th, Office of International and Tribal Affairs, Office of Water, and Region IX staff joined Senior Advisor Bangerter and OIR staff in a meeting with San Diego County Supervisor Greg Cox to discuss concerns about a major sewage spill in the Tijuana River from Mexico, and impacts to the surrounding US municipalities. Danny Melgoza, Deputy Chief of Staff, accompanied the Supervisor. There is considerable support from members of the county's congressional delegation, as well as San Diego Mayor Kevin Faulconer for maintaining federal programs like the US/Mexico Border Water Infrastructure Program, to support addressing water-related infrastructure projects in the San Diego-Tijuana border region.

Supervisor Cox discussed the impact of a recent spill of over 143 million gallons of sewage into the Tijuana River from Mexico. County officials have stated that this is the worst sewage spill in

the region in over a decade, and the impact on surrounding communities is significant. The Supervisor also outlined more generally the water infrastructure challenges in the region that have plagued the county for many decades. There are economic, public health, environmental health, and even Border Patrol and U.S. Navy Training facilities' impacts posed by the chronic wastewater infrastructure problems. The Supervisor noted that these problems also stifle efforts to attract businesses, and promote job growth in the area. Supervisor Cox noted the fairly productive working relationship the County enjoys with the Mexico side of the border. However, there are concerns that Mexico should be urged to invest more significantly in addressing the water infrastructure challenges that result in transboundary issues. Supervisor Cox appreciated the dialogue and the updates provided by Region IX and Office of Wastewater Management staff on EPA's continuing efforts to address these concerns, working collaboratively with the IBWC, NADBank, and the BECC, as well as supporting EPA's own Border Infrastructure program. Supervisor Cox welcomed the report from Region IX on progress related to the Notification Protocol for spills . Region IX has been providing comments to the IBWC on the need for a more formal process.

Supervisor Cox noted the county's continuing commitment to invest in addressing critical water infrastructure issues on the US side of the border, including recently committing $700,000 to support the design and EIS for a newly proposed project. The Supervisor also supports legislation introduced at the State level (SB 507) that is intended to support work with the IBWC to coordinate and collaborate on funding for projects aimed specifically at addressing the issue of raw sewage flowing into the Tijuana River and other transboundary pollution issues. The projects must document demonstrated benefits, and there is a match requirement.

Supervisor Cox welcomed the invitation from Region IX to participate in the next meeting of Stakeholders the Region will convene around the Border Issues. The last such convening was in April, and the next will be in October of this year. He also will welcome and help all that he can with any travel that the Administrator may be planning to his region. OCIR Contacts: M. Arnita Hannon Christmon and Andrew Hanson

OCIR Weekly Legislative Report:

Committee Action

- On July 21st, the House Committee on Appropriations reported an original measure, H.R.3354, the Department of the Interior, Environment, and Related Agencies

Appropriations Act, 2018 (H. Rept. 115-238),

- On July 24th, the Senate Committee on Homeland Security and Governmental Affairs reported from committee, S.760 , the "OPEN Government Data Act" (report No. 115-134).

- On July 24th, the Senate Committee on Commerce, Science, and Transportation reported out of committee S.756, the "Save Our Seas Act of 2017" or "SOS Act of 2017" (report No. 115-135), a bill to reauthorize and amend the Marine Debris Act to promote international action to reduce marine debris, and for other purposes.

- On July 25th, the Subcommittee on Clean Air and Nuclear Safety of the Senate Committee on Environment and Public Works held a hearing on "Developing and Deploying Advanced Clean Energy Technologies." Additional information is available at: https://www.epw.senate.gov/public/index.cfm/hearings?ID=B65EC8DE-D144-4109-A469-5B5F77A16540

- On July 25th, Subcommittee on Environment and the Subcommittee on Energy of the House Committee on Science, Space, and Technology held a joint hearing entitled "Examining Advancements in Biofuels: Balancing Federal Research and Market Innovation." Additional information is available at: https://science.house.gov/legislation/hearings/joint-subcommittee-environment-and-subcommittee-energy-hearing-examining

- On July 25th, the Subcommittee on Oceans, Atmosphere, Fisheries and Coast Guard of the Senate Committee on Commerce, Science and Transportation held a hearing "Efforts on Marine Debris in the Oceans and Great Lakes." Additional information is available at: https://www.commerce.senate.gov/public/index.cfm/hearings?ID=62EF9156-2910-4318-BC6C-3D4801C82C6B

- On July 25th, the Intergovernmental Affairs Subcommittee and Interior, Energy and Environment Subcommittee of the House Committee on Oversight & Government Reform held a joint hearing on "Examining 'Sue and Settle' Agreements: Part II." Additional information is available at: https://oversight.house.gov/hearing/examining-sue-settle-agreements-part-ii/

- On July 26th, the Senate Committee on Environment and Public Works marked up, and ordered reported out of committee, S.1514, the "Hunting Heritage and Environmental Legacy Preservation for Wildlife Act." Additional information is available at: https://www.epw.senate.gov/public/index.cfm/hearings?ID=D9333483-0E73-4DB6-BC99-506EB883651B

- On July 26th, the Senate Homeland Security and Governmental Affairs Committee marked up and ordered reported from committee a number of bills, including: S. 873, to amend section 8433 of title 5, United States Code, to provide for flexibility in making withdrawals from the Thrift Savings Fund; S. 938, to require notice of cost-free Federal procurement technical assistance in connection with registration of small business concerns in procurement systems; H.R. 1293, to amend title 5, United States Code, to require that the Office of Personnel Management submit an annual report to Congress relating to the use of official time by Federal employees; H.R. 195, to amend title 44, United States Code, to restrict the distribution of free printed copies of the Federal Register to Members of Congress and other officers and employees of the United States; and

H.R. 194, to ensure the effective processing of mail by Federal agencies,

Additional information is available at: https://www.hsgac.senate.gov/hearings/business-meeting-07/19/07/19/2017/2017

- On July 26th, the House Committee on Natural Resources reported from committee H.R. 2937, to amend the Surface Mining Control and Reclamation Act of 1977 to authorize partnerships between States and nongovernmental entities for the purpose of reclaiming and restoring land and water resources adversely affected by coal mining activities before August 3, 1977, and for other purposes (H. Rept. 115–260);

- A hearing, originally scheduled for July 26th by the Investigations Subcommittee of the Senate Committee on Homeland Security and Governmental Affairs, regarding federal infrastructure permitting and the Federal Permitting Improvement Steering Council was postponed

- On July 27th, the House Committee on Transportation and Infrastructure marked up and ordered reported from committee a number of bills, including H.R. 1758, the "Brownfields

Reauthorization Act of 2017."

- On July 27th, the House Energy and Commerce Committee marked up a number of bills, including H.R. 3387, Drinking Water System Improvement Act. Additional information is available at: https://energycommerce.house.gov/hearings-and-votes/markups/energy-and-commerce-committee-vote-hr-767-hr-772-hr-880-hr-931-hr-2422-hr

- On July 27th, the Subcommittee on Energy and Mineral Resources of the House Committee on Natural Resources held a legislative hearing on three bills: H.R. 1778, a bill to provide that an order by the Secretary of the Interior imposing a moratorium on Federal coal leasing shall not take effect unless a joint resolution of approval is enacted, and for other purposes; H.R. 3117 , a bill to prohibit the Secretary of Energy, the Administrator of the Environmental Protection Agency, the Secretary of the Interior, and the Chair of the Council on Environmental Quality from considering the social cost of carbon, the social cost of methane, or the social cost of nitrous oxide, in taking any action, and for other purposes. *"Transparency and Honesty in Energy Regulations Act of 2017"*; and, Discussion Draft on H.R. __ a bill to require congressional approval of any mineral withdrawal or monument designation involving the National Forest System lands in the State of Minnesota, to provide for the renewal of certain mineral leases in such lands, and for other purposes. Additional information is available at: https://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=402604

Future Committee Action

- On August 1st, the Subcommittee on Superfund, Waste Management, and Regulatory Oversight of the Senate Committee on Environment and Public Works will hold a hearing on "Oversight of the U.S. Environmental Protection Agency's Superfund Program."

To: Strauss, Alexis[Strauss.Alexis@epa.gov]
From: InsideEPA.com
Sent: Wed 7/5/2017 11:33:02 AM
Subject: The Morning Headlines from InsideEPA.com -- July 5, 2017

The critical environmental policy-making news you need as you begin your day

July 5, 2017

Latest News

D.C. Circuit Vacates EPA Methane Rule Stay Over Flaws In Reconsideration

The U.S. Court of Appeals for the District of Columbia Circuit in a split opinion has vacated EPA's administrative stay of several key requirements in an Obama-era rule setting limits on the potent greenhouse gas methane from new oil and gas equipment, finding major flaws in how the Trump EPA paused the provisions to reconsider them.

House GOP Bills Aim To Achieve Industry's Renewed Bid To Overhaul NSR

House Republicans have introduced two bills that would relax several Clean Air Act new source review (NSR) permitting requirements, which could help industry groups achieve some of the NSR overhauls that they have urged EPA to make as part of its ongoing regulatory review initiative weighing revisions to agency policies.

Eyeing January Proposal, EPA Pushes Ahead With Aircraft GHG Standards

EPA is pushing ahead with developing greenhouse gas standards for new aircraft engines consistent with a global pact on reducing aircraft GHGs, a move that runs counter to the administration's many efforts to roll back energy-sector GHG rules and ultimately could make it more difficult for Trump officials to target EPA's GHG endangerment finding.

DOJ Asks Court To Uphold Denial Of Citizens' Intervention In Cleanup Pact

The Justice Department (DOJ) is asking a federal district court to uphold a magistrate judge's order rejecting citizens' attempt to intervene in a cost recovery cleanup settlement at a high-profile Superfund site in Indiana, arguing such a reversal would allow for hundreds of different "starting times" for challenges to cleanups at residential sites.

Daily Feed

House GOP seeks clarity on Pruitt's 'sue and settle' directive

House Republicans are asking EPA Administrator to clarify his recent comments

about issuing a “directive” to limit the agency “ruling by consent order.”

D.C. Circuit grants unions role in RMP delay suit

A federal appeals court has granted labor unions' bid to intervene in litigation over the Trump EPA's almost two-year delay of Obama-era revisions to the Risk Management Plan Program.

EPA seeks continued abeyance of CPP suits

EPA submitted court-ordered status reports providing updates on its review of the Clean Power Plan and related new source rule, as the 60-day abeyance period imposed by the court in April expires.

Senate panel postpones EPA enforcement nominee's confirmation vote

Bodine is expected to face Democratic opposition but two bills that will also be considered at the business meeting are likely to win broad bipartisan support.

California high court upholds GHG auction ruling

While the ruling is a win for GHG rule supporters, officials and legislators are still grappling with how to overhaul the state's cap-and-trade program when its expires in 2020.

Ewire: Democrats ready bills to block EPA overhaul

Democrats ready a bill that prohibits any EPA office from being “closed, consolidated, or eliminated” using appropriated funds. Plus, local residents slam EPA's Hudson cleanup decision and Trump officials draw criticisms.

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Subject: The Morning Headlines from InsideEPA.com -- July 3, 2017

The critical environmental policy-making news you need as you begin your day

July 3, 2017

Latest News

Barrasso Distances Himself From Possible Bipartisan Vehicle GHG Statement

The Senate environment committee's top Republican is distancing himself from a nascent effort, first reported by *Inside EPA*, to craft a bipartisan letter floating near-term flexibility under light-duty vehicle greenhouse gas and fuel economy standards in exchange for continued progress on emissions in later years.

D.C. Circuit Rejects EPA Plan To Forgo Species Reviews Of New Pesticides

A federal appeals court has rejected EPA's plan to forgo Endangered Species Act (ESA) consultations with federal wildlife officials for registrations of new pesticides, remanding to EPA its registration of the pesticide cyantraniliprole for further review and faulting the agency for attempting to “duck” the consultation requirement.

DOJ Says Plaintiffs Fail To Prove Injury Justifying Suit Over '2-1' Rule Order

The Department of Justice (DOJ) says that plaintiffs cannot prove injury to justify their suit over the legality of President Donald Trump's executive order (EO) requiring EPA and other agencies to identify two rules for repeal for every new rule they issue, saying that undoing the rules would not cause harm warranting the lawsuit.

High Court Rejection Of Gold King Case Creates Doubts Over District Suit

The Supreme Court's order rejecting New Mexico's suit against Colorado over its role in the 2015 Gold King Mine spill creates doubts over a pending district court case over the spill, because it leaves open the possibility of a ruling that the lower court suit is invalid and cannot move forward because Colorado is not involved in the case.

Peer Reviewers Question EPA Drinking Water Lead Modeling Approaches

Scientific experts reviewing proposed modeling approaches that EPA plans to use in revising its Safe Drinking Water Act lead and copper rule are questioning whether the methods can fully address risks to key populations, noting limitations in each of the three approaches -- although the peer reviewers are generally supportive of EPA's efforts.

Daily Feed

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The critical environmental policy-making news you need as you begin your day

June 30, 2017

Latest News

States Hopeful Pruitt Will Back Crucial Grants Despite Proposed FY18 Cuts

Some state officials are hopeful that EPA Administrator Scott Pruitt will support continuing crucial grants to states for monitoring, cleanups, and other programs despite President Donald Trump's proposal to slash the grants in fiscal year 2018, with the officials citing Pruitt's weak defense of the cuts and ongoing agency issuance of the grants.

Democrats Fear Trump ENRD Pick Could Undermine GHG, Other EPA Rules

Democratic lawmakers are strongly criticizing Jeffrey Clark, President Donald Trump's nominee to head the Justice Department's (DOJ) environment division, suggesting his prior antipathy toward climate regulation and his private sector work defending industry clients could drive him to help undermine EPA climate and environmental protections.

The Emerging Debate Over New TSCA Rules: 'Achievable' v. 'Lawful'

The Trump administration's recently unveiled framework rules for implementing key provisions of the new Toxic Substances Control Act (TSCA) are sparking a debate that suggests different visions for how the law should be implemented in the future with EPA officials saying the rules were crafted to be “achievable,” while agency critics charge they still need to be lawful.

States Prepare To Sue EPA For Delaying Oil & Gas Methane NSPS Controls

A coalition of 15 attorneys general (AGs) lead by New York AG Eric Schneiderman (D) is threatening to sue EPA for unreasonable delay in issuing methane emissions limits for existing oil and gas operations, ratcheting up a confrontation with the Trump EPA as it retreats from Obama-era climate strategies.

Finding No Jurisdiction, 4th Circuit Ends Mandate For EPA 'Jobs' Review

The U.S. Court of Appeals for the 4th Circuit in a unanimous ruling has vacated a lower court's order forcing EPA to conduct a sweeping review of the impact its Clean

Air Act (CAA) rules have had on coal sector employment, saying courts lack jurisdiction to hear suits claiming the agency is violating the law by not performing the review.

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From: Glenn, William
Sent: Fri 7/14/2017 12:50:51 AM
Subject: End of Day -- July 13, 2017

PRESS

Press Release issued: U.S. EPA Requires Southern California Plastic Manufacturers to Protect L.A. River from Pollution. Nahal Mogharabi.

- **San Fernando Valley Business Journal:** Valley Plastic Firms Settle With EPA. ENF, Nahal Mogharabi.

Press Release Issued: **EPA requires Matheson Tri-Gas Kapolei to close illegal cesspools** ENF, Dean Higuchi

KITV News (Catherine Cruz) [Received 7/13] CLOSED – Reporter just checking in to see if there is anything new on Red Hill and also the ASIG Sand Island Fuel spill. Let her know nothing new on Red Hill and that the State DOH HEER Office has taken over the oversight of the cleanup at the ASIG Fuel Spill site. LAND, SFD, Dean Higuchi

Inside EPA (Suzanne Yohannan) [Received 7/12] – CLOSED -- Reporter has questions related to Hunters Points, Tetra Tech, and a possible EPA criminal investigation. Sent response approved by HQ. SFD, Michele Huitric

Fronteras NPR (Laurel Morales) [Received 7/13] – OPEN – Reporter checking in on possible Navajo AUM site tour. Reporter checking back with her editor to determine scope of possible story. Margot Perez-Sullivan, SFD

Native America Calling (Andi Murphy) [Received 7/12] – OPEN—Radio producer would like to book EPA staff on radio show to discuss the NECR cleanup work. Sent producer questions regarding format, timing, whether or not it's a live show and requested topics/questions. Waiting to hear back. Margot Perez-Sullivan, SFD

Knight Wallace Fellow/BBC Reporter (Leana Hosea) [Received 6/28] – OPEN – Documentary filmmaker looking to go to Navajo to film assessment and cleanup work. Reporter sent a copy of her Navajo film permit. Her film crew will arrive July 20. She is interested in Cove work. Spoke to ethics attorney who recommends we have a statement prepared for staff if/when film crew shows up at site work. Spoke to HQ today to determine how they want region to respond. Reporter is in talks with PBC Independent Lens as well as Netflix and Amazon to sell a documentary on Navajo water issues. Margot Perez-Sullivan, SFD

Center for Investigative Reporting (Freelancer Autumn Spanne) [Received 7/6] –OPEN – Reporter initially reached out regarding Navajo AUM work and the President's proposed budget. Sent reporter to HQ. Reporter requested fact checking on a variety of different historical items and temporary relocation efforts at NECR, coordinating with program to provide accurate information. Will need to get input from Region 6 prior to HQ for approval. Margot Perez-Sullivan, SFD

News21 (Nicole Tyan) [Received 7/12] –OPEN—Team of 29 journalists using SDWIS data looking at links between drinking water violations and agricultural operations. Waiting on additional information from reporter. Previously sent different reporter information on Dizel Libei Elementary in Cameron, AZ and assisted a third reporter with data interpretation. Flagged for HQ (then & today) as this is a national story. Margot Perez-Sullivan, WTR

WEB & SOCIAL MEDIA

Web Updates:

Hawaii Cesspools – Published the Matheson Tri-Gas, Inc., Kapolei, HI; Consent Agreement and Proposed Final Order and the related Public Notice and linked to them from our Hawaii Cesspools: Administrative Orders page.

Office of Regional Counsel Careers – Published the new Positions in the Office of Regional Counsel in San Francisco page.

Palmdale Energy Project Public Meeting – Published the event page, Public Information Meeting: Palmdale Energy Project.

CONGRESSIONAL & INTERGOVERNMENTAL

Rep. Pete Aguilar (D-CA-31) and Rep. Norma Torres (D-CA-35) : Brent Maier coordinated and participated in a "joint" meeting along with Steven Leonido-John of our Southern California Field Office with Curt Lewis, Constituent Service Representative/Faith Based Liaison, Andrea Harland, District Representative, and Omar Pamplona, District Representative in Congressman Aguilar's San Bernardino District Office and with Marc Hanson, District Director in Congresswoman Norma Torre's Ontario office. We covered the following topics: Overview of Southern California Field Office; Superfund Updates - Rockets, Fireworks, and Flares; Newmark; and Norton Air Force Base Superfund Sites; Brownfields Program Overview; Small Drinking Water Systems Compliance Issue; EPA Grants; and Doing Business with EPA. EPA participants included Superfund's Wayne Praskins, Nadia-Hollan Burke, Miriam Fawaz, and Mindy Clements. Both District Offices expressed interest in offering Grants Workshops and inviting EPA to participate. Brent will be sharing some follow up information on our Brownfields Program and some questions related to our Drinking Water Program.

Rep. Jeff Denham (R-CA-10): The Congressman's new District Director, Mike Anderson, reached out to Brent Maier to request an update on the Coast Wood/Valley Wood consent decrees. Office of Regional Counsel's Sara Goldsmith shared an update which Brent shared with Mike Anderson. We had previously been providing bi-weekly updates to the prior District Director who retired in June and now that Mike is on board as the new District Director asked if we could once again provide the Congressman's office with bi-weekly updates wh ich we agreed to do. Brent spoke today with Mike Anderson and thanked him for reaching out to our office for

the update and to let him know that we stand ready to work with the Congressman's office on any environmental issues of interest/concern.

Rep. Nanette Barragan (D-CA-44): Brent Maier provided some requested follow up information to the Congresswoman's staff following our recent District Office meeting that included some Superfund links and information on the Montrose/Del Amo Superfund Sites, information on small drinking water systems in the Congresswoman's District and information on the prior water discoloration issue in the City of Watts, and will be working to set up a call in the near future for a briefing on the Rancho LPG issue with Superfund's Kay Lawrence and ORC's Andrew Helmlinger.

San Diego Border Office Briefing on Border Water Infrastructure: At the request of Water Division, Brent Maier sent out calendar invites to Congressional staff to participate in an upcoming meeting to be held in our San Diego Border Office on Wednesday, July 19th from 2:00pm – 3:00pm to update staff on EPA's Border water infrastructure program. Participants from EPA will include Tomás Torres, Mike Montgomery, David Albright, Doug Liden, and Hector Aguirre, Director, San Diego Border Office. Brent also offered up a teleconference line for participants not able to attend in person. We have received **RSVPs from eight (8) Congressional staff** including: Rudy Vargas, District Representative in Sen. Kamala Harris' office; Janine Bryant, District Director and Paola Guzman, District Representative in Rep. Juan Vargas' office; MaryAnne Pintar, District Director in Rep. Scott Peters' office, Bill Christensen, District Director and Veronica Wong in Rep. Darrell Issa's office; Jessica Mier, District Representative in Rep. Susan Davis' office; and Bill Kratz in Sen. Dianne Feinstein's office have RSVP'd that they plan to attend.

H.R. 23 - Gaining Responsibility on Water Act: The House last night passed a controversial water bill over Democrats' objections that it would harm fisheries and undermine states' rights. The "Gaining Responsibility on Water Act," H.R. 23, passed the lower chamber, 230-190. Sponsored by Rep. David Valadao and 11 other California Republicans, H.R. 23 would reduce the cost of water delivery contracts and amend the 1992 Central Valley Project Improvement Act to give users more authority over how restoration funds are spent.

H.R. 469 - Sunshine for Regulations and Regulatory Decrees and Settlements Act of 2017 - A House Committee yesterday advanced legislation Republican backers say is necessary to counter the so-called sue-and-settle phenomenon. The bill, introduced by Rep. Doug Collins (R-Ga.), would require agencies to publicly post and report to Congress any information on lawsuits, consent decrees or settlement agreements. It would also prohibit same-day filing of complaints and pre-negotiated settlements. The House Judiciary Committee voted 15-8 along

party lines to approve the measure after voting down — also along party lines — a Democratic amendment to exempt settlements related to toxic pollution. H.R. 469 would cut down on instances in which special interests file litigation to force federal agencies to cut backroom deals and settle disputes through new regulation.

House Appropriations Committee: Next week, on Tuesday July 18, 2017, the Full House Appropriations Committee will have a markup including EPA's FY 2018 Bill.

Upcoming Congressional District Office Meetings:

Rep. Tony Cardenas (D-CA-29): Brent Maier has confirmed a meeting on **Tuesday, July 18th at 9:00am** with Steven Leonido-John of our Southern California Field Office with Gabriela Marques, District Director in the Congressman's Panorama City District Office. Please note that the Congressman has no Superfund Sites in his District.

Rep. Brad Sherman (D-CA-30): Brent Maier has confirmed a meeting on **Tuesday, July 18th at 11:00am** with Steven Leonido-John of our Southern California Field Office with Scott Abrahms, District Director in the Congressman's Sherman Oaks District Office. Please note that the Congressman has no Superfund Sites in his District.

Rep. Maxine Waters (D-CA-43): Brent Maier has confirmed a meeting on **Wednesday, July 19th at 10:00am** with Steven Leonido-John of our Southern California Field Office with Special Projects Director Hamilton Cloud in the Congresswoman's Los Angeles District Office. Please note that the Congresswoman has the **Montrose/Del Amo Superfund Sites** in her District.

Rep. Raul Ruiz (D-CA-36): Brent Maier has confirmed a meeting on **Thursday, July 20th at 1:00pm** with Steven Leonido-John of our Southern California Field Office with Jacqueline Lopez,, District Director in the Congressman's Palm Desert District Office. Please note that the Congressman has no Superfund Sites in his District.

Rep. Grace Napolitano (D-CA-32): Brent Maier has confirmed a meeting on **Tuesday, July 25th at 9:00am** with Steven Leonido-John of our Southern California Field Office with District

Director Perla Hernandez in the Congresswoman's El Monte District Office. Please note that the Congresswoman has the **San Gabriel Valley Areas 2 & 4 Superfund Sites** in her District.

Rep. Lucille Roybal-Allard (D-CA-40): Brent Maier has confirmed a meeting on **Wednesday, August 2nd at 10:00am** with Steven Leonido-John of our Southern California Field Office with the Congresswoman's Los Angeles District Director Ana Figueroa. Please note that the Congresswoman has the **Pemaco/Maywood Superfund Sites** in her District and has also asked for an update on the ongoing cleanup of the Exide facility in Vernon and the ongoing issues in the City of Paramount.

To: Szaro, Deb[Szaro.Deb@epa.gov]
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Subject: June 21 -- Daily Environment Report

Daily Environment Report

June 21, 2017 - Number 118

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Leading the News

EPA
EPA to Let More Research Office Science Advisers' Terms Lapse
The Environmental Protection Agency in August will let go dozens more scientists who advise the agency's Office of Research and Development on its priorities and cancel all of the board's subcommittee meetings in 2017, according to a letter obtained by Bloomberg BNA.

Oil & Gas
Zinke Preparing to Reshape Interior Through Personnel
A hiring freeze the Interior Department instituted for staff in the Washington and Denver metropolitan areas is a first step toward its shrinking middle and upper management and shifting more personnel into local and state offices, Interior Secretary Ryan Zinke said June 20.

Radioactive Waste
Interim Waste Storage Possible at Yucca Mountain: Perry
Energy Secretary Rick Perry isn't only eyeing Yucca Mountain for permanent nuclear waste storage.

News

Climate Change
NYC Planners Say Storm Barrier May Come Too Late
The warming Atlantic Ocean has raised the risk of another Hurricane Sandy. And still, trillions of dollars of real estate and infrastructure near the shores of New York City and northern New Jersey remain vulnerable to devastation.

EPA
EPA Could Offer 1,228 Employees Buyouts, Union Says
As many as 1,228 EPA employees will be eligible for buyout offers, according to a proposed memorandum of understanding on the offers released by the agency's union.

Emergency Response
Trump's Emergency Manager Earns Support of Climate Advocates
Brock Long was cleared by the Senate to become President Donald Trump's emergency-management director June 20 after gaining the support of one unlikely constituency: environmentalists.

Energy
Court Upholds Plant Performance Rule in Largest U.S. Power Grid
A U.S. appeals court found that the power plant performance standard in PJM Interconnection's annual forward capacity auction is proper, according to a recent opinion.

Energy
Energy Department Grid Study Expected in June, Perry Says
The Department of Energy's highly anticipated study on the U.S. power grid and how it can help coal and nuclear power "should be" available by the end of the month, Energy Secretary Rick Perry said June 20.

Energy
Green Groups Critical Ahead of Trump Power Grid Report
Critics aren't waiting for opening night to pan a Trump administration study on the U.S. power grid they believe will demonize renewable energy while promoting coal and nuclear generation.

Energy
Nuclear Power Tax Credit Extension Bill Passes House
The House passed a bill June 20 that would extend a nuclear power production tax credit pursued by the energy industry.

Enforcement
'Sue and Settle' Legislation Expected to Start Moving Soon
The House is expected to start moving as early as this summer to pass legislation that would add new public comment requirements to "sue-and-settle" citizen lawsuits, addressing many Republicans' issues over certain types of environmental litigation.

Forests
Brazil President Vetoes Measures to Reduce Amazon Protected Areas
Brazil President Michel Temer in a surprise move June 19 vetoed two measures that would have reduced by more than 2,200 square miles two protected areas in the eastern Amazon.

International Climate
U.S. Exit From Climate Pact Triggers Worries on Transparency
The U.S. exit from the Paris climate pact raises the prospect that the one nation pushing China, India, and other rapidly developing nations for more transparency in their climate actions won't be co-chairing a panel sorting out those rules.

Liable Parties
Allnex Can't Escape Liability for Chemical Plant Cleanup

Chemical manufacturer Allnex (Luxemborg) & Cy S.C.A. is on the hook for $35.1 million in cleanup costs for toxic spills at a chemical plant it bought from Cytec Industries Inc., the Southern District of New York ruled (Cytec Indus. Inc. v. Allnex (Luxembourg) & Cy S.C.A., 2017 BL 208769, S.D.N.Y., No. 14-cv-1561, 6/19/17).

Michigan

Site Owner Can't Recover Cleanup Damages Under Access Law

The owner of contaminated site can't recover damages from a prior owner under the Michigan site access law for a tardy cleanup, the Sixth Circuit said June 19 (Newell Brands, Inc. v. Bosgraaf, 6th Cir., 16-02331, 16-2403, unpublished 6/19/17).

Oil & Gas

Oil, Gas Revenue Must Be Used for Conservation, Pa. Court Rules

Revenue generated by oil and gas development on public land may only be used to conserve and maintain the state's natural resources, the Pennsylvania Supreme Court held June 20.

Pesticides

Hundreds of Scientists Recommend Better Oversight of Germ-Killers

More than 200 scientists and health professionals are urging consumers to avoid two common germ-killers, while recommending that regulators better label products with the chemicals and evaluate the risks the substances may pose to health and the environment.

Pipeline Safety

Pipeline Agency Says It Won't Enforce Obama Gas Storage Regs

Regulations for natural gas storage sites put in place after the Aliso Canyon natural gas leak won't be enforced, PHMSA announced.

Renewable Energy

Brazil Bank Approves $312 Million in Loans for Wind Farms

The Brazilian Development Bank approved 1.04 billion reais ($312 million) in low-cost financing for three utilities to develop wind complexes that will generate enough energy to power 700,000 homes.

Renewable Energy

Lyon Group Plans $501 Million Australia Solar, Storage Project

Lyon Group will build a A$660 million ($501 million) solar and battery storage project in the Nowingi district of Victoria by January 2018 combining a 250-megawatt solar-power station with 160 megawatt-hours of storage, according to a June 20 statement.

Risk Assessment

EPA Extends Time to Plan 10 Chemical Risk Assessments

The EPA is extending the time it will take to prepare its strategy to evaluate the risks of 10 chemicals and giving chemical manufacturers, states and other interested parties until Sept. 19 to comment on the problems the agency should examine.

Toxic Substances

EU Chemicals Agency Tightens Restrictions on Phthalates

A European Chemicals Agency committee adopted an opinion in favor of a wide-ranging restriction under the European Union's REACH law, which would have the effect of largely prohibiting four hazardous phthalates from consumer products sold in the bloc.

Toxic Substances

Lumber Liquidators Dodges Some Toxic Flooring Claims

Lumber Liquidators won dismissal of some homeowners' claims over alleged formaldehyde contamination in its Chinese-made laminated flooring products, but the Eastern District of Virginia declined June 20 to dismiss other allegations (In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices & Prods. Liab. Litig., 2017 BL 210393, E.D. Va., No. 15-md-2627, 6/20/17).

Water Pollution

Minnesota Lacked Proper Permit for Water Transfer: Court

A Minnesota agency erred by not obtaining a federal permit for a construction project affecting a lake's water level, the state's appellate court ruled.

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Daily Environment Report for EPA

To: Szaro, Deb[Szaro.Deb@epa.gov]
From: E&E News
Sent: Mon 7/24/2017 11:23:16 AM
Subject: July 24 -- E&E Daily is ready

Read today's E&E Daily on the web

AN E&E NEWS PUBLICATION

E&E DAILY — Mon., July 24, 2017

READ FULL EDITION

1.CLIMATE:

Dem senators to pitch carbon tax plan to conservative group

A pair of Democratic senators will return to a conservative think tank this week to unveil a proposal to impose a carbon tax to curb greenhouse gas emissions.

TOP STORIES

2.APPROPRIATIONS:
Hundreds of amendments likely for first House 'minibus'

3.NATURAL RESOURCES:
Marathon markup to tackle 21 land, renewable energy bills

4.WILDLIFE:
Panel takes up conservation bill amid gray wolf conflict

ADMINISTRATION

5.NATIONAL PARKS:
Zinke announces $50M in grants for park maintenance

IN THE SENATE

6.OCEANS:
Panel takes aim at sea trash

7.INFRASTRUCTURE:
Trump plan to expedite permitting comes under review

8.NOMINATIONS:
Senate to approve Interior No. 2 today

9.TECHNOLOGY:
Lawmakers to delve into carbon capture, nuclear woes

10.NOMINATIONS:
N.D. judge at center of WOTUS fight to face senators

11.NATURAL RESOURCES:
Yellowstone mining ban, water rights bills on panel's agenda

12.FEDERAL AGENCIES:
Committee to consider workforce, regulations bills

IN THE HOUSE

13.ENERGY MARKETS:
Lawmakers to vote on tweaked Russia sanctions bill

14.BIOFUELS:
2 panels to enter fray as fight over ethanol intensifies

15.LAW:
GOP lawmakers gear up for repeat attack on 'sue and settle'

16.NATURAL RESOURCES:
Coal, carbon and Minn. mining bills get hearing

17.ELECTRICITY:
Grid operators to share reliability, planning

18.SUSPENSIONS:
House to vote on land bills

UPCOMING HEARINGS AND MARKUPS

19.CALENDAR:

Activity for July 24 - July 30, 2017

E&ETV'S ONPOINT

20.DOE:

SunShot director talks new funding, future of program under Trump

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Subject: July 17 -- Greenwire is ready

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GREENWIRE — Mon., July 17, 2017

READ FULL EDITION

1.ENERGY POLICY:

Pipeline's path paved with high hopes — and broken dreams

RITTMAN, Ohio — Promoters of the Nexus pipeline say it will bring "energy, jobs and a vibrant economy" as it carries cheap Appalachian gas to power plants in Ohio and Michigan. But the ballyhooed project means heartbreak for retiree Tom West and his neighbors here.

TOP STORIES

2.DOE:
Leaked text disappears from grid study

3.AIR POLLUTION:
'Sue and settle' critic Pruitt abides by NOx consent decree

4.LAW:
Trump staffs up DOJ's enviro division

TRANSITION

5.EPA:
Chemical appointee pushes back on 'distractions'

POLITICS

6.NEVADA STANDOFF:
Roger Stone urges Trump to pardon the Bundys

7.PEOPLE:
Former Sen. Ayotte joins enviro group

8.ADVOCACY:
Enviro ads target vulnerable Republicans over EPA cuts

9.NATIONAL MONUMENTS:
Gov. Brown gets no answer from Zinke on Cascade-Siskiyou

10.CAMPAIGN 2018:
Caitlyn Jenner mulls Senate bid for Feinstein's seat

NATURAL RESOURCES

11.GREAT LAKES:
'At the end of the day ... the water had to go somewhere'

12.MARINE MAMMALS:
NOAA suspends rescue efforts for trapped whales

13.WILDLIFE:
Devastating bat disease targeted by new federal grants

14.TRIBES:
Navajo panel rejects Grand Canyon gondola plan

15.WETLANDS:
Company restores marsh but fails to make a profit

16.WILDLIFE:
Wolf rebound leaves ranchers tense

LAW

17.WATER POLLUTION:

Greens seek rehearing on EPA withholding power plant data

18.EMISSIONS:

Ex-Suzuki employee pleads guilty on motorcycle cheat

CLIMATE CHANGE

19.OIL AND GAS:

Emissions surge as production areas age — study

20.PARIS AGREEMENT:

Charm may have softened Trump's stance — Macron

ENERGY

21.SOLAR:

DOE to track rooftop systems in forecasts

AIR AND WATER

22.AIR POLLUTION:

Texas companies often go unpunished for industrial incidents

PUBLIC HEALTH

23.SOLID WASTE:

Communities deal with pollution from drug crisis

24.AGRICULTURE:

Grisly farmworker deaths highlight risky industry

RESEARCH

25.SCIENCE:

Massive costs loom for famed Antarctic research station

STATES

26.FLORIDA:

Auditors find $26M in 'questionable costs' at water district

27.WASHINGTON:

Lawmakers deadlock over massive budget, water bill

28.FLORIDA:

225-foot-wide sinkhole swallows 2 homes

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E&E DAILY — Thu., July 13, 2017

READ FULL EDITION

1.DEFENSE:

House to debate climate impact on national security

Even though the House is debating an amendment on climate to the Pentagon policy bill, leaders blocked other Democratic proposals on the issue.

ON THE HILL

2.CARBON CAPTURE:

After Kemper debacle, senators see promise in CCS bill

3.AGENDA:

House budget standoff could stall spending bills

4.WATER POLICY:

House passes contentious drought bill

5.OFFSHORE DRILLING:

Calif. in crosshairs as panel wrangles over development

6.LAW:

Lawmakers approve 'sue-and-settle' bill

7.ENERGY MARKETS:

Frustration mounts over Russian sanctions standoff

8.WILD HORSES:

House panel moves to block BLM from killing excess animals

9.INFRASTRUCTURE:

Experts fret about funding instability under Trump

UPCOMING HEARINGS AND MARKUPS

10.CALENDAR:

Activity for July 10 - July 16, 2017

E&ETV'S ONPOINT

11.BIOFUELS:

Dinneen talks next steps for industry following EPA's 2018 proposal

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Daily Environment Report

July 13, 2017 - Number 133

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Leading the News

Budget
Appropriations Bill Advances With Cuts for EPA, Interior
A spending bill with cuts for environmental and public lands agencies was approved July 12 by a House subcommittee, over Democratic objections that the cuts were too big.

Water Resources
Drought Bill Passes House, Draws Ire of Top California Democrats
The Republican-led House July 12 passed a bill that would streamline water project permitting and take other actions to alleviate drought in California, but the state's top Democrats see it as a threat to state sovereignty and are vowing to kill it in the Senate.

News

Air Pollution
Ozone Standards Delay Illegal, Advocates Argue in Lawsuit
Postponing decisions under the EPA's new ozone pollution limits for a year is illegal, a dozen environmental and public health groups said in a lawsuit.

Air Pollution
Senate Panel Votes to Reauthorize Diesel Grant Program
The Senate Environment and Public Works Committee approved bipartisan legislation to reauthorize a popular federal clean air program that targets emissions from older diesel engines.

Biotechnology
App Links Chinese Farmers With Pesticide-Dropping Drones

Chinese farmers can now order drone-sprayed pesticides and fertilizers via a smartphone app.

Biotechnology

Genetically Modified Soybean to Get EU Okay Despite Split Vote

A genetically modified soybean will soon be allowed to be imported into the European Union, despite an inconclusive vote of the bloc's member countries July 12 and a negative European Parliament opinion, the European Commission told Bloomberg BNA.

Brownfields

Senate Brownfields Bill With Added Liability Relief Advances

New bipartisan brownfields legislation in the Senate could let some entities off the hook for contaminated site cleanup, while allowing more parties to become prospective site purchasers.

Budget

Energy Innovation Agency Told to Work on Despite Budget Cuts

The Energy Department's program to invest in innovative energy technologies should keep working even though it's in line for elimination, a House appropriator said.

Chemical Security

Chemical Safety Board Avoids Funding Cut in House—For Now

House lawmakers' decision to leave the U.S. Chemical Safety Board's funding flat in fiscal 2018 is a small reprieve after the White House proposed eliminating the agency earlier this year.

Chemicals

EPA to Release New Chemical Control Rules Within Month: Official

The EPA will release new chemical control rules within the next month, clearing part of the logjam of company requests to register new chemicals, an agency official told Bloomberg BNA July 12.

Climate Policy

Australian States Seek Zero Carbon Emissions Absent Federal Plan

Another Australian state has committed to net-zero greenhouse emissions by 2050, meaning most of the country's economy now operates under that goal despite the absence of a federal policy.

Climate Policy

EU, the Number 20 in G-20, Finds Its Voice as U.S. Waffles

At global summits, national leaders like Donald Trump, Vladimir Putin, Xi Jinping, or Angela Merkel typically get the bulk of the attention. During last week's Group of 20 meeting in Hamburg, a more faceless entity—the European Union—took the lead, especially on trade and climate change.

EPA

Senate Environment Panel Approves EPA Enforcement Nominee

A Senate committee narrowly approved the nomination of Susan Parker Bodine to serve as EPA's assistant administrator for the Office of Enforcement and Compliance Assurance.

Endangered Species

Interior Picks Hint at Lesser Focus on Endangered Species

President Donald Trump's picks to fill open spots at the Interior Department may indicate

endangered species protections will be less of a priority, according to environmental advocates.

Energy
Bill to Boost Carbon Capture Tax Credit Resurfaces in Senate
The recent collapse of high-profile carbon capture project at Mississippi's Kemper plant isn't deterring Senate lawmakers from pushing forward with a new policy to provide an incentive for that technology.

Energy
Nuclear Regulatory Commission Nominees Clear Senate Panel
Two nominees for the Nuclear Regulatory Commission cleared the Senate Environment and Public Works Committee June 29.

Energy
Trump Picks Banker, Executive as Energy Undersecretaries
President Donald Trump's pick to be the Energy Department's third-ranking official is an energy attorney and executive at an energy company in which billionaire Warren Buffett's Berkshire Hathaway Inc. has a controlling stake.

Food
General Mills Dodges Label Suit Over Pesticide Residue
General Mills, Inc. July 12 dodged would-be class suits alleging it deceptively labels Nature Valley granola products as "natural" when they contain trace amounts of the weedkiller chemical glyphosate (In re General Mills Glyphosate Litig., D. Minn., No. 16-2869, 7/12/17).

Fuel Efficiency
Australia Drive for Stricter Fuel Efficiency Angers Automakers
The Australian government is considering a fuel efficiency standard for new light vehicles that has angered the association representing companies including Toyota, Volkswagen and Ford, but pleased climate advocacy groups.

Hazardous Waste
Tennessee Hazardous Waste Handler Admits to Testing Fraud
An Oak Ridge, Tenn.-based manufacturing company admitted July 11 to fraudulent hazardous material certifications for devices it shipped and agreed to pay $500,000 in remediation and fines.

NAFTA
Texas Lawmaker Sees NAFTA Labor Provisions Attracting Votes
A vote on a modernized North American Free Trade Agreement (NAFTA) will attract more Democrats than past trade deals since NAFTA 2.0 will contain upgrades to labor and environmental provisions, Rep. Will Hurd (R-Texas) said. "There's going to be a labor section in NAFTA," Hurd said, adding that pro-trade Democrats who view labor and environment as critical pieces in trade deals will "probably be happy with it." The pre-election rhetoric on NAFTA was in line with ...

Natural Resources
Utah's National Monument Stance Sends Trade Show to Colorado
Utah's perceived hostile stance against federal public lands designation spurred The North Face, Patagonia, REI and other outdoors recreation companies to urge a retailer association to move three major trade shows from Salt Lake City to Denver, an officer for The North Face told Bloomberg BNA.

Oil & Gas

Billion-Barrel Mexican Find Could Spur Rush on Next Oil Auctions

A billion-barrel crude discovery in Mexico could be just the lure the country badly needs to boost investment from oil majors as it lacks the wherewithal to reverse years of sagging output.

Pipeline Safety

Transportation Agency to Audit Pipeline Safety Research

The Department of Transportation is reviewing its communications on pipeline safety and use of outside research through an audit, it announced July 12.

Regulatory Policy

House Panel Moves to Repress 'Back-Room' Rulemaking

"Sue and settle" rulemaking by federal agencies, carried out without public input or knowledge, would be abolished under a bill approved by a House panel July 12.

Renewable Energy

Solar Power Gets $46 Million Boost From Energy Department

The Energy Department awarded $46.2 million in research grants to improve solar energy technologies and reduce costs to 3 cents per kilowatt-hour by 2030.

Shareholder Activism

NRG to Shed Up to $4 Billion of Assets on Elliott Pressure

NRG Energy Inc., the U.S. power generator facing pressure from billionaire investor Paul Singer, rose the most in almost nine years after announcing plans to shed as much as $4 billion of assets.

Toxic Torts

Correction

A story that ran in Daily Environment Report July 12 on a proposed class settlement involving a 2014 chemical spill into West Virginia's Elk River incorrectly said the settlement had been approved. The story has been corrected and reflects concerns the court said would have to be addressed prior to approval.

Vehicle Fuels

Markup on Ethanol Boost Could Come Before August Recess

A committee vote on legislation to boost ethanol sales could take place before the August recess, a spokeswoman for Sen. Chuck Grassley (R-Iowa), the chief ethanol proponent in the Senate, told Bloomberg BNA.

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Daily Environment Report for EPA

To: Szaro, Deb[Szaro.Deb@epa.gov]
From: Bloomberg BNA
Sent: Wed 7/12/2017 8:01:58 PM
Subject: July 12 -- Daily Environment Report - Afternoon Briefing

Daily Environment Report

Afternoon Briefing - Your Preview of Today's News

The following news provides a snapshot of what Bloomberg BNA is working on today. Read the full version of all the stories in the final issue, published each night. The Bloomberg BNA Daily Environment Report is brought to you by EPA Libraries. Please note, these materials may be copyrighted and should not be forwarded outside of the U.S. EPA. If you have any questions or no longer wish to receive these messages, please contact Josue Rivera-Olds at rivera-olds.josue@epa.gov, 202-566-1558.

Interior Picks Hint at Lesser Focus on Endangered Species

Posted July 12, 2017, 02:26 P.M. ET

By Catherine Douglas Moran

President Donald Trump's picks to fill open spots at the Interior Department may indicate endangered species protections will be less of a priority, according to environmental advocates.

Former Texas Comptroller Susan Combs, the pick for assistant secretary of policy, management, and budget at the Interior Department, has argued that "there is little evidence that the Endangered Species Act regulation does any good" and instead jeopardizes oil production in the Permian Basin region.

Todd Willens recently returned to the Interior Department as deputy assistant secretary, a position he held during the George W. Bush administration. Environmental advocates were critical of Willens role as chief of staff for Rep. Steve Pearce (R-N.M.), a critic of attempts to list the lesser prairie chicken under the Endangered Species Act, as well as his stint as a lobbyist after leaving the Interior Department.

The White House July 10 announced its intent to nominate Combs, who will be subject to Senate approval. Willens' appointment does not require confirmation.

"As the Trump administration starts to fill out the ranks, what is taking shape is an administration that is more hostile to wildlife and endangered species—and those are important values—than any administration that we have ever seen," Bob Dreher, senior vice president of conservation programs for Defenders of Wildlife, told Bloomberg BNA.

Critics of the Endangered Species Act worry the law can block development of any kind—oil and gas drilling, mining, any large-scale construction, cattle grazing—if federal biologists or courts agree a development may harm a species that has been listed as threatened or endangered.

Environmental advocates pointed to a 2011 plan to avoid listing the dunes sagebrush lizard under

the Endangered Species Act that Combs helped write as Texas comptroller as evidence of her opposition to the law. Environmental groups challenged the plan as illegal but lost twice.

Brett Hartl, the government affairs director for the Center of Biological Diversity, told Bloomberg BNA that Combs was the Texas Comptroller at a time when it was "very against endangered species." If she joins the Interior Department, Hartl said that she will have input on hiring and financial decisions, which could "starve an agency and their budget" for protecting endangered species.

"She will be the one implementing [Interior Secretary Ryan] Zinke's efforts to downsize departments or gut the agency of all the career people with expertise in conservation issues," he said.

Business Impacts Get Consideration

However, Gene Richardson, the director of commodity and regulatory activities at the Texas Farm Bureau, who worked with Combs on the conservation plan, praised her for giving consideration to the business consequences of protecting threatened and endangered species.

"She's very inclusive of all the stakeholders," Richardson told Bloomberg BNA. "She'll be looking for those same solutions that are workable for everyone."

A former co-worker also praised Willens' experience in wildlife policy. Before working in Congress, Willens was a founding partner at VC International, the international non-lobbying arm of the government affairs consulting firm Vitello Consulting, where he was previously a partner. Vitello's clients include the Zoological Wildlife Foundation and the Rare Species Fund.

Before that, Willens was a principal at Washington Strategies, LLC, a Washington, D.C. lobbying firm. Willens lobbied from 2008 to 2010 on issues relating to education, appropriations, water, the Animal Welfare Act, wildlife conservation, and a proposed rule to add species to the Lacey Act.

"He is meticulous and he is far more well versed in policy and procedure than most," Andrew Wyatt, a government affairs consultant at Vitello, told Bloomberg BNA. "He's going to to bring that expertise back to the job again."

Michael Halpern, the deputy director at the Union of Concerned Scientists' Center for Science and Democracy, told Bloomberg BNA that Willens' moves between industry and government jobs throughout this career could create an extensive conflict of interest.

"When you have people who come from industry, political interference in science becomes more likely because they have federal ties to agencies they are supposed to keep honest," Halpern said. "He gets to know the inside and become a more effective advocate for the special interests when he goes over to the private sector."

House Panel Moves to Repress 'Back-Room' Rulemaking

Posted July 12, 2017, 03:27 P.M. ET

By Stephen Lee

"Sue and settle" rulemaking by federal agencies, carried out without public input or knowledge, would be abolished under a bill approved by a House panel July 12.

The Sunshine for Regulations and Regulatory Decrees and Settlements Act (H.R. 469) now moves to the full House, where its prospects appear good, considering the keen desire of House Republicans to reduce regulations.

The bill would allow third parties affected by a consent decree or settlement agreement to get involved in the negotiations. It passed the House Judiciary Committee on a 15-8 party line vote. The same legislation cleared the House in the last Congress but never moved in the Senate.

Rep. Bob Goodlatte (R-Va.), the panel's chair, said during the markup hearing that federal agencies have increasingly relied on sue and settle rulemaking, in which an agency cuts a deal with an interest group.

First, the group sues the agency on the grounds that it has violated a statutory requirement, typically involving missed deadlines for issuing a rule.

Then, rather than fighting the litigation, the agency settles with the plaintiff by moving forward with the rule or agreeing to deadlines for decision making.

Democrats Offer Resistance

But Rep. John Conyers (D-Mich.), the committee's top Democrat, said the bill would delay regulatory protections and increase safety and health risks.

By giving affected third parties the right to intervene in settlement negotiations, H.R. 469 would allow "conceivably anyone who breathes air" to participate in Clean Air Act settlements, Conyers said.

During the markup, Rep. David Cicilline (D-R.I.) noted that former Assistant Attorney General John Cruden said he had no evidence suggesting that agencies have participated in sue-and-settle collusion with interest groups.

In January, however, Rep. Doug Collins (R-Ga.), the bill's sponsor, said more than 100 sue-and-settle regulations were issued during the Obama administration, at an annual cost to the economy of more than $100 billion.

Collins also said the Environmental Protection Agency's Mercury and Air Toxics Standards rule was "the result of a consent decree with the EPA that enacted emissions regulations outside of the purview of the Clean Air Act." The rule costs U.S. industry more than $9 billion per year, Collins said.

Environmental groups have historically taken advantage of the sue-and-settle process the most, according to the U.S. Chamber of Commerce. In 2013, the chamber listed the Sierra Club, WildEarth Guardians, Natural Resources Defense Council, Center for Biological Diversity, and Environmental Defense Fund as the tactic's top five abusers.

The Sierra Club has received funding from Bloomberg Philanthropies, the charitable organization founded by Michael Bloomberg, founder of Bloomberg L.P. Bloomberg BNA is an affiliate of Bloomberg L.P.

Senate Picture Cloudy

Sen. Chuck Grassley (R-Iowa) introduced a Senate version (S. 119) in January, but Republicans in the upper chamber haven't shown the same enthusiasm for regulatory changes that their House colleagues have.

Grassley told Bloomberg BNA last month that he couldn't predict whether his legislation would be taken up.

The Judiciary Committee rejected, on a 15-7 party line vote, an amendment offered by Rep. Sheila Jackson Lee (D-Texas) that would have carved out an exemption for low-income and minority populations exposed to toxic substances.

Bill to Boost Carbon Capture Tax Credit Resurfaces in Senate

Posted July 12, 2017, 03:24 P.M. ET

By Brian Dabbs

A bipartisan bill to extend a carbon capture and sequestration tax credit resurfaced in the Senate July 12.

The legislation would boost credits for carbon sequestered tonnage and allow power plants to claim the credit for 12 years following installation of the equipment.

Sen. Heidi Heitkamp (D-N.D.), the lead sponsor, touted the bill as a potential boon to the coal industry.

"The bill recognizes that coal—which provides one-third of electricity in the U.S.—will continue to be part of the nation's and world's energy mix for the foreseeable future, which can be done while making the resource cleaner," she said in a statement.

Sen. John Barrasso (R-Wyo.) and Sen. Sheldon Whitehouse (D-R.I.), unlikely allies on environmental policy, also sponsored the legislation.

House Energy Funding Bill Advances With Renewables Cuts Intact

Posted July 12, 2017, 03:01 P.M. ET

By Rebecca Kern

The House Appropriations Committee approved a $37.56 billion energy and water appropriations bill to fund the Energy Department, Army Corps of Engineers, and other related independent agencies, including the Nuclear Regulatory Commission.

The bill, approved by voice vote July 12, would cut funding for those agencies by $203 million in fiscal year 2018 compared to current funding. The funding level sought by House appropriators is still $3.25 billion above what President Donald Trump sought in his first budget request.

The Energy Department would receive $29.9 billion under the House bill, which is $857.6 million below the fiscal 2017 enacted level, and $2 billion above Trump's request. That includes a nearly $1 billion cut to DOE's Office of Energy Efficiency and Renewable Energy, which invests in energy

efficiency research and reducing the cost of wind, solar, and other renewable technologies.

The bill would eliminate funding for the Advanced Research Projects Agency-Energy (ARPA-E), which provides early stage investment in innovative energy technologies. It was proposed to be eliminated in Trump's budget, which requested just $20 million to wind down remaining projects, compared to $306 million provided in the fiscal 2017 omnibus bill.

Rep. Mike Simpson (R-Idaho), chairman of the committee's Energy and Water Subcommittee, said that while he supports ARPA-E, he noted that the bill is the start of the appropriations process and that funding may be returned.

"The department should not take action to shut down ARPA-E unless Congress directs them to do so by law," Simpson said at the markup. "I like ARPA-E, but our nation's defense and infrastructure are the top priorities and tough choices had to be made. I generally support ARPA-E, and I would like to see this continue."

Two Democratic amendments were offered and failed during the markup. One amendment proposed removing language that would allow the EPA to speed up the rollback of the Obama-era Clean Water Rule, and another recommended returning funding to the Office of Energy Efficiency and Renewable Energy.

Markup on Ethanol Boost Likely Before August Recess

Posted July 12, 2017, 02:58 P.M. ET

By Brian Dabbs

A committee vote on legislation to boost ethanol sales is likely to take place before the August recess, a spokeswoman for Sen. Chuck Grassley (R-Iowa), the chief ethanol proponent in the Senate, told Bloomberg BNA.

The announcement July 11 of an extended work period before the break opens the door to unforeseen legislative developments, and ethanol backers on Capitol Hill are pushing to gain support for the bill.

The legislation (S. 517), which would allow sales of transportation fuel containing 15 percent ethanol (E15) in the summer months, could provide a windfall for POET LLC, Archer Daniels Midland Co. and other ethanol producers.

Still, Sen. John Barrasso (R-Wy.), chairman of the Environment and Public Works Committee, said a markup will be held but stopped short of confirming a time frame.

"I don't know about the timing on it, but I promised them one, and there will be one," Barrasso, who opposes the bill, told Bloomberg BNA July 12. "We just found out yesterday that we're going to be here an additional two weeks, so we're trying to figure out hearings, markups, how we want to spend our time."

Senate Majority Leader Mitch McConnell (R-Ky.) now vows to hold the Senate in session through the week of Aug. 7, a two-week cut to the previously planned schedule.

Barrasso and Senate leadership promised ethanol supporters a vote on the E15 bill in exchange for "yes" votes on a measure to roll back an Interior Department regulation on

methane venting and flaring. That rollback attempt—a use of the Congressional Review Act—ultimately failed in May after unexpected opposition from Sen. John McCain (R-Ariz.).

Committee Support Unclear

While the bill may be poised for a markup, committee support is still unclear. "We are working to get the votes in committee," the spokeswoman for Grassley, who doesn't sit on the committee, said.

Sen. Deb Fischer (R-Neb.), the bill sponsor and a committee member, is reaching out to Sen. Tom Carper (D-Del.), to court his support, she told Bloomberg BNA. Several Republicans, including Barrasso, Sen. James Inhofe (Okla.), and Sen. John Boozman (Ark.), oppose the bill.

Ethanol backer Sen. Joni Ernst (R-Iowa) said she is "cautiously optimistic" about the prospects of the markup. Fischer declined to comment.

Senate Panel Votes to Reauthorize Diesel Grant Program

Posted July 12, 2017, 11:32 A.M. ET

By Catherine Douglas Moran

The Senate Environment and Public Works Committee approved bipartisan legislation to reauthorize a popular federal clean air program that targets emissions from older diesel engines.

The committee July 12 voted to favorably report to the Senate a bill (S. 1447) to reauthorize the Diesel Emissions Reduction Act, commonly known as the DERA program, through fiscal year 2022 at its current funding level of $50 million.

The program provides grants and rebates to states and localities to switch away from diesel engines and upgrade or replace older diesel engine vehicles such as heavy-duty trucks, school buses and equipment at ports and airports.

"It's a very important federal program to incentivize the latest clean technology to generate emission reduction across the country," Ezra Finkin, policy director for Diesel Technology Forum, told Bloomberg BNA. That organization represents companies that manufacture diesel vehicles and equipment, including Ford Motor Co., Caterpillar Inc., and Deere & Co.

The Senate Environment and Public Works Committee ranking member, Sen. Tom Carper (D-Del.), introduced the bill with the support of Sen. James Inhofe (R-Okla.), Sen. John Barrasso (R-Wyo.), and Sen. Sheldon Whitehouse (D-R.I.).

Carper said at the hearing that he is one of the strongest supporters of the program, which he called "one of the most effective EPA programs, resulting in enormous environmental and public health benefits, while creating jobs here at home."

Congress provided almost $670 million to the program between fiscal year 2008 and FY 2016, including $300 million from the American Recovery and Reinvestment Act of 2009, a one-time stimulus package. The EPA has awarded 690 grants since the program started in 2008, according to an April agency press release announcing plans to fund at least $11 million in additional programs.

The Obama administration repeatedly proposed cuts to the DERA program in annual budget requests, a trend that continued in President Donald Trump's first budget proposal. The White House proposed to fund DERA at $10 million for fiscal year 2018, down from the current $50 million.

Senate Brownfields Bill With Added Liability Relief Advances

Posted July 12, 2017, 03:17 P.M. ET

By Sylvia Carignan

New bipartisan brownfields legislation in the Senate could let some entities off the hook for contaminated site cleanup, while allowing more parties to become prospective site purchasers.

The Senate Environment and Public Works Committee approved the Brownfields Utilization, Investment, and Local Development Act of 2017 (S. 822) July 12. The committee approved an amendment to the bill by voice vote that would change the liability qualifications for parties responsible for the cleanup of Alaska properties and for tenants interested in buying and redeveloping brownfields.

A spokesman for the committee declined to state whether the bill is expected to reach the Senate floor before members' August recess.

Kelley Race, brownfields program manager for engineering and environmental consulting firm TRC Solutions, told Bloomberg BNA the legislation could bring wider attention and cleanup funds for contaminated sites, especially those in rural areas.

But urban areas see the benefits, too, said Michael Egenton, executive vice president of the New Jersey Chamber of Commerce.

"We've always been supportive, in concept, of taking properties that are just sitting idle and having them remediated and cleaned up so that they can go to potential use for localities and for businesses," he told Bloomberg BNA.

Relief for Alaska Natives

The bill proposes shielding Alaska Native villages and Alaska Native corporations from liability for cleanup at contaminated properties they received from the federal government. The 13 Native corporations administer settled land and financial claims made by the Alaska Natives. The relief would not apply to villages or corporations that contributed to or caused contamination.

Sarah Lukin, board member of the Afognak Native Corp. in Alaska, testified to the committee in March that the potential liability for contaminated sites is keeping Alaskans from reporting toxic sites.

They are afraid they will have to pay millions for remediation, she said.

A 1997 EPA policy meant to alleviate uncertainty in situations like those has not sufficiently addressed the issue, according to the Alaska Native Village Corporation Association.

"To have received the contaminated lands at all was an injustice, but to be left with the liability to clean up the waste left after years of abuse by various government agencies is

simply unacceptable," Hallie Bissett, executive director of the Alaska Native Village Corporation Association, told Bloomberg BNA.

Bissett said she is "encouraged" by the amendment's provisions for Alaska Native villages and Alaska Native corporations.

Sponsoring the amendment to the bill were Sens. John Barrasso (R-Wyo), Environment and Public Works' chairman; Thomas Carper (D-Del.), the ranking member; Jim Inhofe (R-Okla.), Ed Markey (D-Mass.), Dan Sullivan (R-Alaska), Cory Booker (D-N.J.) and Sheldon Whitehouse (D-R.I.).

Protecting Tenants

The Senate bill also proposes changes for those in tenancy agreements or leases with owners of contaminated sites.

Under the proposed changes, those tenants or lessees would be allowed to qualify as "bona fide prospective purchasers" of those sites.

Those changes are "on the margins," said Larry Schnapf of Schnapf LLC, an environmental law firm specializing in brownfields.

"Most of the nation's brownfields are addressed under state programs by private developers, so the federal assistance is not really a game changer, except perhaps for some very distressed areas," he told Bloomberg BNA.

Having bona fide prospective purchaser status allows a person to acquire a brownfield site with known or suspected contamination without becoming liable for the contamination.

Such a purchaser must demonstrate that they are not affiliated with liable parties, among other conditions.

House Action

On June 28, the House Energy and Commerce Committee put its stamp of approval on H.R. 3017, a similar brownfields reauthorization bill, via voice vote.

None of the four brownfields bills in the House propose changes to liability or prospective purchasers.

The Environmental Protection Agency's brownfields program provides grants to those who want to redevelop contaminated properties. The program started in 2002 and has not been reauthorized since 2006.

Senate Environment Panel Approves EPA Enforcement Nominee

Posted July 12, 2017, 10:45 A.M. ET

By Catherine Douglas Moran

A Senate committee narrowly approved the nomination of Susan Parker Bodine to serve as EPA's assistant administrator for the Office of Enforcement and Compliance Assurance.

The Senate Committee on Environment and Public Works voted 11-10 to approve the nomination of Bodine, who has served as chief counsel for committee Republicans. The vote

will be reported to the full Senate for approval.

"Susan has been a collegial partner to my staff...and the agency's gain will be our committee's loss," Sen. Tom Carper (D-Del.) said before the July 12 vote, though he noted that he would not support any EPA nominees until Administrator Scott Pruitt responded to "many unanswered letters" sent by committee Democrats.

Bodine has almost 30 years of environmental law experience both in government service and private practice.

She served from 2006 to 2009 under the George W. Bush administration as the assistant administrator for the Environmental Protection Agency's Office of Solid Waste and Emergency Response, which directs hazardous and solid waste management and cleanup programs. Earlier in her career she was staff director and senior counsel on the water resources and environment subcommittee of the House Committee on Transportation and Infrastructure. She also was a partner at Barnes & Thornburg LLP and an associate at Covington & Burling LLP.

Lobbying records show her clients when she was at Barnes & Thornburg included Saint-Gobain Containers Inc., the American Farm Bureau Federation, the American Forest and Paper Association, and American Process Inc.

As the next assistant administrator for enforcement and compliance assurance, Bodine would be responsible for managing the office's activities to target pollution problems, oversee enforcement of environmental laws, and protect low-income and minority communities that are overburdened by pollution.

Nuclear Regulatory Commission Nominees Clear Senate Panel

Posted July 12, 2017, 10:17 A.M. ET

By Rebecca Kern

Two nominees for the Nuclear Regulatory Commission cleared the Senate Environment and Public Works Committee June 29.

Annie Caputo and David Wright, the two Republican nominees, advanced to the full Senate for a confirmation vote. Caputo's nomination was approved 15-6, while Wright cleared the committee on a 11-10 vote. Caputo is a longtime energy policy adviser for the committee, and Wright is a former chairman of the South Carolina Public Service Commission. In June, the Senate confirmed current NRC Chairman Kristine Svincki for a third five-year term.

Caputo has more than a decade of experience working as a staffer on both Senate and House energy committees. She has worked as a policy adviser on the Senate Environment and Public Works Committee since January 2015 and was a staffer from 2007 to 2012, specializing in nuclear energy issues. From 2012 to 2015, she worked as a staffer on the House Energy and Commerce Committee.

A former congressional affairs manager at Exelon Corp., Caputo has a chemical engineering degree from Michigan Technological University and a degree in nuclear engineering from the University of Wisconsin-Madison.

Wright has been the owner of Wright Directions LLC, a strategic consulting and communications business based in South Carolina, since 2013. He served on the South

Carolina Public Service Commission from 2004 to 2013.

From 2011–2012, he was president of National Association of Regulatory Utility Commissioners, which represents state public service commissioners. He also was national chairman of the Nuclear Waste Strategy Coalition from 2006 to 2013, a group of state utility regulators, local governments, and tribes on nuclear waste policy issues. He has a political science degree from Clemson University.

The NRC licenses and regulates the country's nuclear reactors. Its five commissioners serve staggered five-year terms, with three seats belonging to the political party in power in the White House. It currently has three commissioners: Svinicki; Stephen Burns (I), the previous chairman in the Obama administration; and Jeff Baran (D).

—With assistance from Catherine Douglas Moran

Tennessee Hazardous Waste Handler Admits to Testing Fraud

Posted July 12, 2017, 03:41 P.M. ET

By Andrew M. Ballard

An Oak Ridge, Tenn.-based manufacturing company admitted July 11 to fraudulent hazardous material certifications for devices it shipped and agreed to pay $500,000 in remediation and fines.

Berthold Technologies USA, LLC, a subsidiary of a German company, said in a plea agreement that it falsely represented where the devices it shipped were made, and that it had conducted testing requirements for radioactive containers when it had not (United States v. Berthold Technologies USA LLC, E.D. Tenn., No. 3:17-cr-71, plea agreement 7/11/17). The devices the company manufactured were used to measure fracking fluid density and were shipped to Oklahoma and Texas in 2014.

Prosecutors charged the company with knowingly and falsely claiming that its packages met federal hazards material shipping requirements that include water spray, free drop, stacking, and penetration tests.

Berthold admitted to its guilt and will spend $500,000 on addressing deficiencies in its shipments and fines under a plea agreement filed July 11 with the U.S. District Court for the Eastern District of Tennessee.

Jon Buchanan, the company's general manager, told Bloomberg BNA July 12 that the company regrets its misrepresentations and believes the plea agreement it reached with federal prosecutors is fair.

The company "accepts full responsibility and apologizes for misrepresentations that were made by former employees with regard to the origin and testing requirements for one of our devices," according to a statement. Berthold said it has worked to ensure the safety and quality of the products and issue.

"We believe that this agreement is fair and will allow our new management team to move forward and to meet those safety and quality goals," the company said in its statement.

The plea agreement calls for the district court to sentence the company in about 18 months from the guilty plea entry. The sentencing will take into account the amount Berthold spends

on remedial measures.

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Daily Environment Report for EPA

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E&E DAILY — Tue., July 11, 2017

READ FULL EDITION

1.CAMPAIGN 2018:

Leading foe of EPA launches Senate bid

West Virginia Attorney General Patrick Morrisey (R) announced yesterday that he would run for Senate in 2018, making official a long-expected challenge to embattled Sen. Joe Manchin (D).

ON THE HILL

2.APPROPRIATIONS:

Climate, fisheries programs under scrutiny in funding bills

3.PIPELINES:

Energy firms fret as Senate stalls on FERC picks

4.TRANSPORTATION:

House appropriators cut TIGER grants, Calif. high-speed rail

5.FORESTS:

Timber interests cheer Senate energy bill provision

6.AGENDA:

Senate confirms reg agency chief; other items in limbo

7.FISHERIES:

Bipartisan bill would boost recreational fishing

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House panel to take up 'sue-and-settle' bill

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9.CAMPAIGN 2018:

Perlmutter abruptly exits Colo. gubernatorial race

UPCOMING HEARINGS AND MARKUPS

10.CALENDAR:

Activity for July 10 - July 16, 2017

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TRUMP'S EPA: Agency at a crossroads -- Complete coverage

July 5, 2017

Latest News

D.C. Circuit Vacates EPA Methane Rule Stay Over Flaws In Reconsideration

The U.S. Court of Appeals for the District of Columbia Circuit in a split opinion has vacated EPA's administrative stay of several key requirements in an Obama-era rule setting limits on the potent greenhouse gas methane from new oil and gas equipment, finding major flaws in how the Trump EPA paused the provisions to reconsider them.

House GOP Bills Aim To Achieve Industry's Renewed Bid To Overhaul NSR

House Republicans have introduced two bills that would relax several Clean Air Act new source review (NSR) permitting requirements, which could help industry groups achieve some of the NSR overhauls that they have urged EPA to make as part of its ongoing regulatory review initiative weighing revisions to agency policies.

Eyeing January Proposal, EPA Pushes Ahead With Aircraft GHG Standards

EPA is pushing ahead with developing greenhouse gas standards for new aircraft engines consistent with a global pact on reducing aircraft GHGs, a move that runs counter to the administration's many efforts to roll back energy-sector GHG rules and ultimately could make it more difficult for Trump officials to target EPA's GHG endangerment finding.

DOJ Asks Court To Uphold Denial Of Citizens' Intervention In Cleanup Pact

The Justice Department (DOJ) is asking a federal district court to uphold a magistrate judge's order rejecting citizens' attempt to intervene in a cost recovery cleanup settlement at a high-profile Superfund site in Indiana, arguing such a reversal would allow for hundreds of different "starting times" for challenges to cleanups at residential sites.

Daily Feed

House GOP seeks clarity on Pruitt's 'sue and settle' directive

House Republicans are asking EPA Administrator to clarify his recent comments

about issuing a “directive” to limit the agency “ruling by consent order.”

D.C. Circuit grants unions role in RMP delay suit

A federal appeals court has granted labor unions' bid to intervene in litigation over the Trump EPA's almost two-year delay of Obama-era revisions to the Risk Management Plan Program.

EPA seeks continued abeyance of CPP suits

EPA submitted court-ordered status reports providing updates on its review of the Clean Power Plan and related new source rule, as the 60-day abeyance period imposed by the court in April expires.

Senate panel postpones EPA enforcement nominee's confirmation vote

Bodine is expected to face Democratic opposition but two bills that will also be considered at the business meeting are likely to win broad bipartisan support.

California high court upholds GHG auction ruling

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To: Szaro, Deb[Szaro.Deb@epa.gov]
From: E&E News
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AN E&E NEWS PUBLICATION

GREENWIRE — Mon., July 3, 2017

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1.OIL AND GAS:

D.C. Circuit rejects EPA methane rule delay

A federal appeals court today vacated the Trump administration's decision to delay an Obama-era U.S. EPA rule curbing methane emissions from new oil and gas operations.

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2.WHITE HOUSE:
Science office a shadow of its former self

3.EPA:
Pruitt issued 'oral directive' to end 'sue and settle'

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Trump could push Earth 'over the brink' — Stephen Hawking

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In blow to GOP, Rep. Wagner won't take on McCaskill

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Tiny, threatened butterfly thriving on military bases

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Pioneering electric industry, nuclear attorney dies

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U.S. may meet emission goals — top U.N. official

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Rising temps force airlines to ground flights

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Vogtle economics foggy, but fight over who pays is certain

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Mass. adopts target for energy storage technologies

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Court: Utility can charge customers for cleanup costs

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Invasive weevil spreads north, endangering palm trees

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TRUMP'S EPA: Agency at a crossroads -- Complete coverage

July 3, 2017

Latest News

Barrasso Distances Himself From Possible Bipartisan Vehicle GHG Statement

The Senate environment committee's top Republican is distancing himself from a nascent effort, first reported by *Inside EPA*, to craft a bipartisan letter floating near-term flexibility under light-duty vehicle greenhouse gas and fuel economy standards in exchange for continued progress on emissions in later years.

D.C. Circuit Rejects EPA Plan To Forgo Species Reviews Of New Pesticides

A federal appeals court has rejected EPA's plan to forgo Endangered Species Act (ESA) consultations with federal wildlife officials for registrations of new pesticides, remanding to EPA its registration of the pesticide cyantraniliprole for further review and faulting the agency for attempting to “duck” the consultation requirement.

DOJ Says Plaintiffs Fail To Prove Injury Justifying Suit Over '2-1' Rule Order

The Department of Justice (DOJ) says that plaintiffs cannot prove injury to justify their suit over the legality of President Donald Trump's executive order (EO) requiring EPA and other agencies to identify two rules for repeal for every new rule they issue, saying that undoing the rules would not cause harm warranting the lawsuit.

High Court Rejection Of Gold King Case Creates Doubts Over District Suit

The Supreme Court's order rejecting New Mexico's suit against Colorado over its role in the 2015 Gold King Mine spill creates doubts over a pending district court case over the spill, because it leaves open the possibility of a ruling that the lower court suit is invalid and cannot move forward because Colorado is not involved in the case.

Peer Reviewers Question EPA Drinking Water Lead Modeling Approaches

Scientific experts reviewing proposed modeling approaches that EPA plans to use in revising its Safe Drinking Water Act lead and copper rule are questioning whether the methods can fully address risks to key populations, noting limitations in each of the three approaches -- although the peer reviewers are generally supportive of EPA's efforts.

Daily Feed

House GOP seeks clarity on Pruitt's 'sue and settle' directive

House Republicans are asking EPA Administrator to clarify his recent comments about issuing a “directive” to limit the agency “ruling by consent order.”

D.C. Circuit grants unions role in RMP delay suit

A federal appeals court has granted labor unions' bid to intervene in litigation over the Trump EPA's almost two-year delay of Obama-era revisions to the Risk Management Plan Program.

EPA seeks continued abeyance of CPP suits

EPA submitted court-ordered status reports providing updates on its review of the Clean Power Plan and related new source rule, as the 60-day abeyance period imposed by the court in April expires.

Senate panel postpones EPA enforcement nominee's confirmation vote

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TRUMP'S EPA: Agency at a crossroads -- Complete coverage

June 30, 2017

Latest News

States Hopeful Pruitt Will Back Crucial Grants Despite Proposed FY18 Cuts

Some state officials are hopeful that EPA Administrator Scott Pruitt will support continuing crucial grants to states for monitoring, cleanups, and other programs despite President Donald Trump's proposal to slash the grants in fiscal year 2018, with the officials citing Pruitt's weak defense of the cuts and ongoing agency issuance of the grants.

Democrats Fear Trump ENRD Pick Could Undermine GHG, Other EPA Rules

Democratic lawmakers are strongly criticizing Jeffrey Clark, President Donald Trump's nominee to head the Justice Department's (DOJ) environment division, suggesting his prior antipathy toward climate regulation and his private sector work defending industry clients could drive him to help undermine EPA climate and environmental protections.

The Emerging Debate Over New TSCA Rules: 'Achievable' v. 'Lawful'

The Trump administration's recently unveiled framework rules for implementing key provisions of the new Toxic Substances Control Act (TSCA) are sparking a debate that suggests different visions for how the law should be implemented in the future with EPA officials saying the rules were crafted to be “achievable,” while agency critics charge they still need to be lawful.

States Prepare To Sue EPA For Delaying Oil & Gas Methane NSPS Controls

A coalition of 15 attorneys general (AGs) lead by New York AG Eric Schneiderman (D) is threatening to sue EPA for unreasonable delay in issuing methane emissions limits for existing oil and gas operations, ratcheting up a confrontation with the Trump EPA as it retreats from Obama-era climate strategies.

Finding No Jurisdiction, 4th Circuit Ends Mandate For EPA 'Jobs' Review

The U.S. Court of Appeals for the 4th Circuit in a unanimous ruling has vacated a lower court's order forcing EPA to conduct a sweeping review of the impact its Clean

Air Act (CAA) rules have had on coal sector employment, saying courts lack jurisdiction to hear suits claiming the agency is violating the law by not performing the review.

Daily Feed

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March 31, 2017

Environmental Protection Agency
Mr. Scott Pruitt, Administrator
Mail Code 28221T
1200 Pennsylvania Ave. NW
Washington, DC 20460

Dear Mr. Pruitt;

Congratulations on your appointment as Administrator of the Environmental Protection Agency. I am the President of the North Dakota Petroleum Council (NDPC) and wanted to take this opportunity to tell you about the overreach of the prior administration that continues to affect NDPC members. Under the previous administration, EPA initiated sweeping Clean Air Act (CAA) Section 114 information requests and threatened company-ending sanctions under the CAA against oil companies operating in North Dakota. EPA's style and process were often contrary to the North Dakota Department of Health's (NDDoH) alternative approach to Clean Air Act Enforcement. In the one consent decree that EPA completed before the election, North Dakota refused to sign the final decree, even though NDDoH had participated fully in months of EPA driven negotiations with the operator. The North Dakota approach produced industry-wide results that immediately benefitted the environment in a shorter timeframe, with substantially less cost and included continued future compliance opportunities. Unfortunately, despite the successful North Dakota effort, we continue to see EPA focused on an aggressive, federal-only approach adopted under the earlier administration.

We respectfully request, consistent with your recent internal directive and President Trump's March 28, 2017 Executive Order, *Promoting Energy Independence and Economic* Growth, that you promptly review EPA's ongoing enforcement activities in North Dakota to determine whether they are consistent with your and the Trump Administration's approach to environmental protection and regulation.[1] We also ask that you seriously consider EPA's adoption of the NDDoH approach to Clean Air Act enforcement and take steps to amend, with court approval, the existing federal consent decree to add North Dakota (ND) so that the state continues to play an important role in protecting its environment. The attached documents describe the EPA Section 114 enforcement process, and contrasts it with the approach that North Dakota utilized. The information provided will show that ND achieved industry-wide compliance plus (above current regulations) in one-third of the time required by EPA to negotiate a settlement with one ND operator. NDPC believes that you will find this information of interest as you seek to make EPA a more effective and efficient agency, which works with states to implement, enforce and adopt resolutions that directly benefit the environment.

Please call or email with any questions you may have. We welcome the opportunity to discuss this with you and would be available to travel to Washington, DC if you feel it would be beneficial.

Thank you for your time and consideration.

Sincerely,

Ron Ness

Ron Ness
President

cc: President Donald Trump
ND Governor Doug Burgum
Senator John Hoeven
Senator Heidi Heitkamp
Senator Cory Gardner
Congressman Kevin Cramer

---

[1] We understand that, on March 2, 2017, EPA Headquarters Assistant Administrators (AAs) and Regional Administrators (RAs) were notified that the Administrator was retaining approval authority for actions having significant regulatory and enforcement effect. The AAs and RAs were directed to "identify and send upward any proposed decisions or final agency actions for the Administrator's review" those items that "would limit the flexibility of the States, limit energy resource use, impose significant costs on industry or commerce, or otherwise likely result in significant public attention on the proposed decisions or final agency actions." *See* **Pruitt Withdraws Decision-Making Powers From Senior Officials,** https://insideepa.com/daily-news/pruitt-withdraws-decision-making-powers-senior-officials-email-shows.

1. **The North Dakota Petroleum Council**. The North Dakota Petroleum Council is a trade association representing more than 510 companies involved in all aspects of the oil and gas industry in North Dakota, South Dakota, and the Rocky Mountain Region. North Dakota is ranked second in the nation in the production of oil and gas, and NDPC members produce 98 percent of the oil and gas in North Dakota. North Dakota produces approximately 350 million barrels of oil per year and 567 billion cubic feet of natural gas per year. In 2015, the economic benefit from the oil and gas industry in North Dakota was approximately $34 billion. North Dakota has two major economic generators, agriculture and energy. The state has more than 13,000 producing wells, and anticipates the development of tens of thousands of additional wells in the coming decades. North Dakota is only one of seven states to meet all national ambient air quality standards.

2. **The EPA CAA Enforcement Process**. Under the Obama Administration, EPA has, in the past two years, pursued a policy of changing regulatory standards via purported enforcement actions in North Dakota. This "sue and settle" strategy threatened companies with draconian penalties, effectively making settlement the only realistic option, generating new industry-wide "rules" that were not created in a formal rulemaking. EPA, without NDDoH's consent as the concurrent regulatory authority, utilized its rarely-justified "over-filing" authority under the Clean Air Act in an attempt to develop new, basin-wide storage tank standards outside of the normal rulemaking procedures.

EPA's "sue and settle" paradigm is slow and costly, and inherently unfair to the companies that are singled out. To pursue this policy regarding storage tank fugitive emissions, EPA first conducts field inspections to identify and allege violations (material and immaterial) of the Clean Air Act. Next, EPA uses Section 114 to collect detailed information about all companies' facilities where any alleged violations were observed. Finally, EPA threatens enforcement actions under Section 113 of the CAA, using emissions calculated using a proprietary model and extrapolating the penalty amount to include all days since the alleged violation at the maximum penalty amount of $37,500 per day per violation. To avoid the costly litigation with potentially massive penalties and negative publicity, the companies are forced to settle by executing a Consent Decree based on EPA's interpretation of the applicable rules. The Consent Decrees often contain requirements for the companies to adopt sweeping changes to monitor operations, including an emphasis on "next-gen" technologies to gather information on, for example, methane emissions, escaping Paperwork Reduction Review Act requirements that would be required in a formal rulemaking effort.

a. **Field Inspections**. During the summer of 2014, EPA conducted several inspections of oil and gas facilities in North Dakota, on and off the Fort Berthold Indian Reservation (FBIR). EPA used AVO (audio, visual and olfactory) inspections and FLIR (Forward Looking Infrared Technology) cameras to detect fugitive emissions. Using FLIR technology in fugitive emissions detection and routine inspections was not required by any federal rulemaking until August 2, 2016 under EPA Quad Oa, and **no** federal rule currently requires use of FLIR emissions technology for existing facilities. The FLIR camera has a very high resolution so it is capable of detecting, without quantifying, minor immaterial leaks that would not otherwise be capable of detection by an operator's standard AVO inspections. In some instances, the fugitive emissions observed by EPA's FLIR cameras were from storage tank equipment such as thief hatches or pressure relief valves, equipment that is designed to provide "pressure relief" as part of normal and safe operations. Many of the fugitive emissions were also due to routine and expected performance of gaskets, seals, and other equipment that wears and becomes dirty during normal, intended use.

b. The Noble Energy Consent Decree. The first example of the "sue and settle" strategy related to storage tank emissions in the oil patch occurred in 2014 and 2015 in Colorado's Denver-Julesburg Basin. In April 2015, EPA, the U.S. Department of Justice, and the State of Colorado entered into a Consent Decree with Noble Energy, Inc. for its alleged violations of Section 113 of the CAA.

EPA has held up the Noble Consent Decree as the template for EPA's national enforcement campaign regarding storage tank fugitive emissions and the model for compliance in North Dakota. EPA interpreted North Dakota's rules and regulations to be similar to the those applicable to nonattainment areas in Colorado. But the differences far outweigh any similarities. North Dakota's laws differ from Colorado. North Dakota is in attainment for ozone and, understandably, its air quality regulations are therefore much less onerous than Colorado's regulations. Nevertheless, EPA's apparent goal is to use the Colorado nonattainment regulations and the Noble Consent Decree as a template for oil and gas operations nationally, even for attainment areas. This is directly at odds with the dynamic of "cooperative federalism" at the core of the Clean Air Act, which affords each state the flexibility to develop and implement its own regulations to meet national air quality standards.

c. EPA Section 114 Information Requests. When a company receives a Section 114 information request, it can take easily six months and hundreds of man-hours, both in the field and office, to provide the required information. In addition, because EPA has in the past threatened significant sanctions for imperfect compliance, companies must spend substantial sums on outside counsel to reduce the risk faced by just providing EPA the request information.

d. Alleged Violations of the Clean Air Act - Design Flaws and The Picard Model. To identify alleged violations of the CAA, EPA relies on conclusions provided by a Canadian company, Clearstone Engineering Ltd, and its engineer, David Picard. Picard developed a proprietary model (the Picard Model)—different from the many off-the-shelf models available to companies—that essentially finds that all of the oil facilities were prone to emissions because they had design flaws. The bias toward design flaws was apparent in the Noble Consent Decree and the NDPC members' interactions with EPA. The Picard Model was at the heart of EPA design flaw assertion, but because the Picard Model was proprietary it had not been subjected to peer review or public comment, nor mandated by agency rulemaking. The companies in the Section 114 process were not allowed access to the Picard Model but were required to accept its results.

The Picard Model was developed for determining vapor generation rate for the worst-case conditions at a production facility. In other words, the Picard Model determines whether a facility is capable of handling peak vapor flow during worst-case conditions, that occur infrequently if at all. EPA then uses Picard Model results, assuming all of an operator's facilities operate in constant worst-case conditions, and calculates unrealistic emissions estimates. Using these drastically overestimated emissions estimates, EPA calculates and threatens multi-billion dollar civil penalties, on the basis of statutory maximum daily penalties, to scare operators into one-sided settlement negotiations. To our knowledge, EPA or Clearstone did not validate the Picard Model against real world performance. Because of the errors and erroneous assumptions in the Picard Model, EPA claimed that operators had violated major federal air regulations and were subject to multibillion dollars in fines, but those claims had no basis in science or observed emissions.

e. **Negotiation of the Consent Decree**. After EPA identified the violations, it would skip issuing a Notice of Violation and move to settlement negotiations. To start the settlement process, EPA typically holds an all hands on deck meeting with the company and representatives from EPA legal and enforcement divisions as well as the Department of Justice. At one such meeting, there were five EPA attorneys, five EPA technical/enforcement personnel and two Department of Justice attorneys. At the meeting, EPA would typically present the results of its analysis of the 114 information after running it through the Picard Model, and the field inspection, and extrapolate the alleged violations over the time-period since the inspection, and calculate a theoretical maximum penalty amount at $37,500 per day per violation. The company is presented two options, proceed to litigation or negotiate a settlement embodied in a Consent Decree. These negotiations often go on for a year or more and involve hundreds of company man-hours and hundreds of thousands of dollars in attorney's fees and third party engineering and modeling experts.

f. **Consent Decrees**. In the first 30 months of the Section 114 effort in North Dakota, EPA settled with only one company in early November 2016. Notably, though the North Dakota Department of Health (NDDoH) initiated a significant effort to address emissions and made substantial progress with most of the industry, EPA demanded terms relating to third party audits and extensive design analysis that were not found in any regulatory requirement. Because EPA steadfastly insisted these onerous settlement terms, NDDoH did not sign as a party to the Consent Decree—even after spending substantial efforts to try to accommodate EPA's unlawful demands.

That company spent substantial time and effort in the office and in the field working through the Section 114 process. The cost to that company for third party consultants, engineers, and attorneys exceeded $1.2 million. Months and hundreds of man-hours were required to provide the information required by the Section 114 request, prior to the negotiation phase. The negotiation phase for the company involved in the settlement with EPA lasted over a year, and involved countless meetings all attended by EPA enforcement personnel, EPA lawyers and at least one DOJ lawyer.

In addressing storage tank emissions, EPA's Section 114 "sue and settle" process has proven to be expensive, inefficient, and unnecessary. NDDoH's enforcement model addresses the goal of minimizing emissions as quickly as possible and has achieved significant emissions reductions via cooperative settlements with numerous companies. In contrast, EPA has signed one Consent Decree in North Dakota that took over two years from the field inspections to execution of the Consent Decree. As set forth in the following section, the NDDoH has a better approach. The NDPC respectfully requests that EPA amend, with court approval, this consent decree to add North Dakota and harmonize its requirements with the effective and broad-reaching steps North Dakota has taken, as described below.

g. **President Trump's March 28, 2017 Executive Order**. EPAs enforcement initiative in North Dakota is just the type of government overreach that President Trump's Executive Order addresses. The Executive Order states,

> "[i]t is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time **avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation**."[1] (emphasis added)

[1] See Section 2(a) of the Executive Order

Consistent with this policy, the President ordered the heads of agencies to "review all existing regulations, orders, guidance documents, policies, and any other similar agency actions . . . that potentially burden the development or use of domestically produced energy resources, with particular attention to oil [and] natural gas."[2]. As EPA stated in its December 1, 2016 news release regarding the Slawson Consent Decree, that settlement (and subsequent similar settlements and enforcement actions) is "part of EPA's national enforcement initiative to reduce public health and environmental impacts from energy extraction activities."[3]

This national enforcement initiative targeting the oil and gas industry clearly constitutes agency policy or other action that requires your immediate review as EPA Administrator. In fact, in our view, the Executive Order prohibits EPA from moving forward with its national enforcement initiative until it has undergone the review and approval contemplated in the Executive Order.

3. **North Dakota Department of Health Process and Approach**. Initially, the NDDoH was participating as a partner with EPA in the 114 process and present at the meeting negotiating the Consent Decrees. However, after several months of observing the EPA process, NDDoH concluded the potential for statewide compliance could be achieved in a much shorter timeframe and at a much lower cost through collaborative effort with the industry. EPA's paradigm was "sue and settle" with individual companies one by one, with the threat of penalties motivating other companies to comply. The NDDoH's paradigm was to work cooperatively with industry to find a solution.

a. **The NDPC Bakken Upstream Air Task Force**. After NDPC's six members received their respective EPA Section 114 information requests in late 2014 through the fall of 2015, the NDPC members formed the Bakken Upstream Air Task Force with the purpose of evaluating technical, mechanical, and engineering aspects of field management of vapor recovery and potential for fugitive emissions. The task force was comprised of more than 130 individuals from 30 companies representing more than 93 percent of the oil and gas production in North Dakota. The task force logged more than 3,000 man-hours exploring these topics and invited both EPA Region 8 and NDDoH personnel to participate in periodic updates and discussions.

b. **North Dakota Industry-Wide Consent Decree**. In a timeframe of six months, NDDoH in cooperation with NDPC finalized an industry-wide consent decree template that results in emissions reductions via provisions that exceed current regulatory requirements. In contrast to the thirty months long, burdensome and costly EPA Section 114 process, NDDoH's policy was to identify problematic emissions and inform the companies accordingly. The companies then fixed the emissions, or faced administrative actions and penalties. This "find it and fix it" policy worked well, and was incorporated into the North Dakota industry-wide consent decree. This cooperative attitude and process between regulators and industry is a model for true innovative environmental improvement **without unnecessarily encumbering energy production, constraining economic groth or preventing job creation.** The success of this model comes not from a roomful of

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[2] See Section 2(a) of the Executive Order

[3] See https://www.epa.gov/enforcement/reference-news-release-slawson-exploration-company-inc-make-system-upgrades-and (copy attached)

attorneys and third party consultants with threatened punitive action, but from discussions between regulators and industry held in the spirit of collaborative problem solving.

NDPC has had a proven track record of industry led efforts leading to wide adoption of industry best practices and common sense rulemaking processes by state agencies. In fact, in 2011, NDPC and NDDoH collaborated to address VOC flash emissions that were self-reported by the industry. This effort led to an industry-wide consent decree with NDDoH, and millions of dollars in equipment upgrades in field equipment for statewide compliance.

The NDPC respectfully requests that EPA promptly reconsider its Clean Air Act enforcement initiative in North Dakota, and in its place, adopt something similar to the NDDoH model of enforcement, including amending, with court approval, the one federal-only Consent Decree in place by adding North Dakota, and making its terms consistent with the NDDoH industry-wide consent decree.

A COMPARATIVE CASE STUDY

The State of North Dakota and the U.S. Environmental Protection Agency under the Obama Administration employed substantially different regulatory approaches to oil and gas development in North Dakota.

NORTH DAKOTA

"FIND & FIX"
Embrace compliance, prevention and innovation for future efficiencies industry-wide. Through this process, regulators and industry work together to identify the issue, find solutions, and fix the issue, resulting in Day 1 compliance that quickly benefits the environment.

THE U.S. EPA

"SUE OR SETTLE"
Emphasis is on penalties and compliance through intimidation. This method embraces bureaucracy and expensive legal pursuits that forces compliance through intimidation rather than focusing on problem-solving. Action is also done one company at a time, meaning very little to no benefit to the environment during the process.

PROCESS DURATION & PARTICIPANTS

10 MONTHS
working with Industry to identify solutions & an agreement issued Oct. 2016. Meanwhile, companies were voluntarily inspecting and modifying equipment.

30 MONTHS
to resolve 1 case with 6 still pending.

3 STATE EMPLOYEES
including 2 from Dept. of Health and 1 from Attorney General's Office.

12 FEDERAL EMPLOYEES
including 5 EPA Attorneys, 2 Dept. of Justice Attorneys and 5 EPA scientists.

X 30

30 COMPANIES
producing 93% of ND's oil and the North Dakota Petroleum Council participated in finding solutions.

1 COMPANY
that produces about 2.5% of North Dakota's oil had its case resolved.

X 130

130 INDUSTRY EMPLOYEES
participated in the Task Force, consolidating time, effort and expertise.

500 PAGES
of documentation, plus more than 10,000 data points of information requested and filed.

COST IN TIME AND MONEY

3K

3,000+ MANHOURS
spent by 30 companies for industry-wide standard.

$4.1 MILLION
in equipment inspection and modification.

$255,000 to $616,000
in estimated industry employee time.

$1.2 MILLION
in industry employee time and contractor fees for *one* company.

$29,200
in estimated government employee time for industry-wide plan.

$186,900 and $560,700
in estimated federal employee time alone, plus thousands for mileage and travel.

RESULTS

19 CONSENT DECREES
signed, covering 69% of ND's oil production & affecting 7500 wells.

1 CONSENT DECREE
signed, with 170 wells modified into compliance.

FUTURE COMPLIANCE
Prevention and even new, leak-proof equipment were created.

$4.1 MILLION
spent on fines and mitigation projects that do not assist in resolving issue.

CONCLUSION. North Dakota's inclusive approach consolidates time and effort, allowing for collaborative education, new technologies and designs for enhanced compliance *industry-wide* that are beneficial early in the process and well into the future.

CONCLUSION. The U.S. EPA's approach addresses the issue one company at a time at a pace three times slower than the "Find and Fix" approach. This means more resources are depleted with very little return to the environment.

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PETROLEUM
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58502-1395

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Environmental Protection Agency
Mr. Scott Pruitt, Administrator
Mail Code 28221T
1200 Pennsylvania Ave. NW
Washington, DC 20460

APR 06 2017

DAILY READING FILE 4/6 mwb

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OFFICE OF THE
EXECUTIVE SECRETARIAT

March 31, 2017

Environmental Protection Agency
Mr. Scott Pruitt, Administrator
Mail Code 28221T
1200 Pennsylvania Ave. NW
Washington, DC 20460

Dear Mr. Pruitt;

Congratulations on your appointment as Administrator of the Environmental Protection Agency. I am the President of the North Dakota Petroleum Council (NDPC) and wanted to take this opportunity to tell you about the overreach of the prior administration that continues to affect NDPC members. Under the previous administration, EPA initiated sweeping Clean Air Act (CAA) Section 114 information requests and threatened company-ending sanctions under the CAA against oil companies operating in North Dakota. EPA's style and process were often contrary to the North Dakota Department of Health's (NDDoH) alternative approach to Clean Air Act Enforcement. In the one consent decree that EPA completed before the election, North Dakota refused to sign the final decree, even though NDDoH had participated fully in months of EPA driven negotiations with the operator. The North Dakota approach produced industry-wide results that immediately benefitted the environment in a shorter timeframe, with substantially less cost and included continued future compliance opportunities. Unfortunately, despite the successful North Dakota effort, we continue to see EPA focused on an aggressive, federal-only approach adopted under the earlier administration.

We respectfully request, consistent with your recent internal directive and President Trump's March 28, 2017 Executive Order, *Promoting Energy Independence and Economic* Growth, that you promptly review EPA's ongoing enforcement activities in North Dakota to determine whether they are consistent with your and the Trump Administration's approach to environmental protection and regulation.[1] We also ask that you seriously consider EPA's adoption of the NDDoH approach to Clean Air Act enforcement and take steps to amend, with court approval, the existing federal consent decree to add North Dakota (ND) so that the state continues to play an important role in protecting its environment. The attached documents describe the EPA Section 114 enforcement process, and contrasts it with the approach that North Dakota utilized. The information provided will show that ND achieved industry-wide compliance plus (above current regulations) in one-third of the time required by EPA to negotiate a settlement with one ND operator. NDPC believes that you will find this information of interest as you seek to make EPA a more effective and efficient agency, which works with states to implement, enforce and adopt resolutions that directly benefit the environment.

Please call or email with any questions you may have. We welcome the opportunity to discuss this with you and would be available to travel to Washington, DC if you feel it would be beneficial.

Thank you for your time and consideration.

Sincerely,

Ron Ness

Ron Ness
President

cc: President Donald Trump
ND Governor Doug Burgum
Senator John Hoeven
Senator Heidi Heitkamp
Senator Cory Gardner
Congressman Kevin Cramer

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[1] We understand that, on March 2, 2017, EPA Headquarters Assistant Administrators (AAs) and Regional Administrators (RAs) were notified that the Administrator was retaining approval authority for actions having significant regulatory and enforcement effect. The AAs and RAs were directed to "identify and send upward any proposed decisions or final agency actions for the Administrator's review" those items that "would limit the flexibility of the States, limit energy resource use, impose significant costs on industry or commerce, or otherwise likely result in significant public attention on the proposed decisions or final agency actions." *See* **Pruitt Withdraws Decision-Making Powers From Senior Officials,** https://insideepa.com/daily-news/pruitt-withdraws-decision-making-powers-senior-officials-email-shows.

1. **The North Dakota Petroleum Council**. The North Dakota Petroleum Council is a trade association representing more than 510 companies involved in all aspects of the oil and gas industry in North Dakota, South Dakota, and the Rocky Mountain Region. North Dakota is ranked second in the nation in the production of oil and gas, and NDPC members produce 98 percent of the oil and gas in North Dakota. North Dakota produces approximately 350 million barrels of oil per year and 567 billion cubic feet of natural gas per year. In 2015, the economic benefit from the oil and gas industry in North Dakota was approximately $34 billion. North Dakota has two major economic generators, agriculture and energy. The state has more than 13,000 producing wells, and anticipates the development of tens of thousands of additional wells in the coming decades. North Dakota is only one of seven states to meet all national ambient air quality standards.

2. **The EPA CAA Enforcement Process**. Under the Obama Administration, EPA has, in the past two years, pursued a policy of changing regulatory standards via purported enforcement actions in North Dakota. This "sue and settle" strategy threatened companies with draconian penalties, effectively making settlement the only realistic option, generating new industry-wide "rules" that were not created in a formal rulemaking. EPA, without NDDoH's consent as the concurrent regulatory authority, utilized its rarely-justified "over-filing" authority under the Clean Air Act in an attempt to develop new, basin-wide storage tank standards outside of the normal rulemaking procedures.

EPA's "sue and settle" paradigm is slow and costly, and inherently unfair to the companies that are singled out. To pursue this policy regarding storage tank fugitive emissions, EPA first conducts field inspections to identify and allege violations (material and immaterial) of the Clean Air Act. Next, EPA uses Section 114 to collect detailed information about all companies' facilities where any alleged violations were observed. Finally, EPA threatens enforcement actions under Section 113 of the CAA, using emissions calculated using a proprietary model and extrapolating the penalty amount to include all days since the alleged violation at the maximum penalty amount of $37,500 per day per violation. To avoid the costly litigation with potentially massive penalties and negative publicity, the companies are forced to settle by executing a Consent Decree based on EPA's interpretation of the applicable rules. The Consent Decrees often contain requirements for the companies to adopt sweeping changes to monitor operations, including an emphasis on "next-gen" technologies to gather information on, for example, methane emissions, escaping Paperwork Reduction Review Act requirements that would be required in a formal rulemaking effort.

a. **Field Inspections**. During the summer of 2014, EPA conducted several inspections of oil and gas facilities in North Dakota, on and off the Fort Berthold Indian Reservation (FBIR). EPA used AVO (audio, visual and olfactory) inspections and FLIR (Forward Looking Infrared Technology) cameras to detect fugitive emissions. Using FLIR technology in fugitive emissions detection and routine inspections was not required by any federal rulemaking until August 2, 2016 under EPA Quad Oa, and **no** federal rule currently requires use of FLIR emissions technology for existing facilities. The FLIR camera has a very high resolution so it is capable of detecting, without quantifying, minor immaterial leaks that would not otherwise be capable of detection by an operator's standard AVO inspections. In some instances, the fugitive emissions observed by EPA's FLIR cameras were from storage tank equipment such as thief hatches or pressure relief valves, equipment that is designed to provide "pressure relief" as part of normal and safe operations. Many of the fugitive emissions were also due to routine and expected performance of gaskets, seals, and other equipment that wears and becomes dirty during normal, intended use.

b. The Noble Energy Consent Decree. The first example of the "sue and settle" strategy related to storage tank emissions in the oil patch occurred in 2014 and 2015 in Colorado's Denver-Julesburg Basin. In April 2015, EPA, the U.S. Department of Justice, and the State of Colorado entered into a Consent Decree with Noble Energy, Inc. for its alleged violations of Section 113 of the CAA.

EPA has held up the Noble Consent Decree as the template for EPA's national enforcement campaign regarding storage tank fugitive emissions and the model for compliance in North Dakota. EPA interpreted North Dakota's rules and regulations to be similar to the those applicable to nonattainment areas in Colorado. But the differences far outweigh any similarities. North Dakota's laws differ from Colorado. North Dakota is in attainment for ozone and, understandably, its air quality regulations are therefore much less onerous than Colorado's regulations. Nevertheless, EPA's apparent goal is to use the Colorado nonattainment regulations and the Noble Consent Decree as a template for oil and gas operations nationally, even for attainment areas. This is directly at odds with the dynamic of "cooperative federalism" at the core of the Clean Air Act, which affords each state the flexibility to develop and implement its own regulations to meet national air quality standards.

c. EPA Section 114 Information Requests. When a company receives a Section 114 information request, it can take easily six months and hundreds of man-hours, both in the field and office, to provide the required information. In addition, because EPA has in the past threatened significant sanctions for imperfect compliance, companies must spend substantial sums on outside counsel to reduce the risk faced by just providing EPA the request information.

d. Alleged Violations of the Clean Air Act - Design Flaws and The Picard Model. To identify alleged violations of the CAA, EPA relies on conclusions provided by a Canadian company, Clearstone Engineering Ltd, and its engineer, David Picard. Picard developed a proprietary model (the Picard Model)—different from the many off-the-shelf models available to companies—that essentially finds that all of the oil facilities were prone to emissions because they had design flaws. The bias toward design flaws was apparent in the Noble Consent Decree and the NDPC members' interactions with EPA. The Picard Model was at the heart of EPA design flaw assertion, but because the Picard Model was proprietary it had not been subjected to peer review or public comment, nor mandated by agency rulemaking. The companies in the Section 114 process were not allowed access to the Picard Model but were required to accept its results.

The Picard Model was developed for determining vapor generation rate for the worst-case conditions at a production facility. In other words, the Picard Model determines whether a facility is capable of handling peak vapor flow during worst-case conditions, that occur infrequently if at all. EPA then uses Picard Model results, assuming all of an operator's facilities operate in constant worst-case conditions, and calculates unrealistic emissions estimates. Using these drastically overestimated emissions estimates, EPA calculates and threatens multi-billion dollar civil penalties, on the basis of statutory maximum daily penalties, to scare operators into one-sided settlement negotiations. To our knowledge, EPA or Clearstone did not validate the Picard Model against real world performance. Because of the errors and erroneous assumptions in the Picard Model, EPA claimed that operators had violated major federal air regulations and were subject to multibillion dollars in fines, but those claims had no basis in science or observed emissions.

e. **Negotiation of the Consent Decree**. After EPA identified the violations, it would skip issuing a Notice of Violation and move to settlement negotiations. To start the settlement process, EPA typically holds an all hands on deck meeting with the company and representatives from EPA legal and enforcement divisions as well as the Department of Justice. At one such meeting, there were five EPA attorneys, five EPA technical/enforcement personnel and two Department of Justice attorneys. At the meeting, EPA would typically present the results of its analysis of the 114 information after running it through the Picard Model, and the field inspection, and extrapolate the alleged violations over the time-period since the inspection, and calculate a theoretical maximum penalty amount at $37,500 per day per violation. The company is presented two options, proceed to litigation or negotiate a settlement embodied in a Consent Decree. These negotiations often go on for a year or more and involve hundreds of company man-hours and hundreds of thousands of dollars in attorney's fees and third party engineering and modeling experts.

f. **Consent Decrees**. In the first 30 months of the Section 114 effort in North Dakota, EPA settled with only one company in early November 2016. Notably, though the North Dakota Department of Health (NDDoH) initiated a significant effort to address emissions and made substantial progress with most of the industry, EPA demanded terms relating to third party audits and extensive design analysis that were not found in any regulatory requirement. Because EPA steadfastly insisted these onerous settlement terms, NDDoH did not sign as a party to the Consent Decree—even after spending substantial efforts to try to accommodate EPA's unlawful demands.

That company spent substantial time and effort in the office and in the field working through the Section 114 process. The cost to that company for third party consultants, engineers, and attorneys exceeded $1.2 million. Months and hundreds of man-hours were required to provide the information required by the Section 114 request, prior to the negotiation phase. The negotiation phase for the company involved in the settlement with EPA lasted over a year, and involved countless meetings all attended by EPA enforcement personnel, EPA lawyers and at least one DOJ lawyer.

In addressing storage tank emissions, EPA's Section 114 "sue and settle" process has proven to be expensive, inefficient, and unnecessary. NDDoH's enforcement model addresses the goal of minimizing emissions as quickly as possible and has achieved significant emissions reductions via cooperative settlements with numerous companies. In contrast, EPA has signed one Consent Decree in North Dakota that took over two years from the field inspections to execution of the Consent Decree. As set forth in the following section, the NDDoH has a better approach. The NDPC respectfully requests that EPA amend, with court approval, this consent decree to add North Dakota and harmonize its requirements with the effective and broad-reaching steps North Dakota has taken, as described below.

g. **President Trump's March 28, 2017 Executive Order**. EPAs enforcement initiative in North Dakota is just the type of government overreach that President Trump's Executive Order addresses. The Executive Order states,

> "[i]t is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time **avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation**."[1] (emphasis added)

[1] See Section 2(a) of the Executive Order

Consistent with this policy, the President ordered the heads of agencies to "review all existing regulations, orders, guidance documents, policies, and any other similar agency actions . . . that potentially burden the development or use of domestically produced energy resources, with particular attention to oil [and] natural gas."[2]. As EPA stated in its December 1, 2016 news release regarding the Slawson Consent Decree, that settlement (and subsequent similar settlements and enforcement actions) is "part of EPA's national enforcement initiative to reduce public health and environmental impacts from energy extraction activities."[3]

This national enforcement initiative targeting the oil and gas industry clearly constitutes agency policy or other action that requires your immediate review as EPA Administrator. In fact, in our view, the Executive Order prohibits EPA from moving forward with its national enforcement initiative until it has undergone the review and approval contemplated in the Executive Order.

3. **North Dakota Department of Health Process and Approach**. Initially, the NDDoH was participating as a partner with EPA in the 114 process and present at the meeting negotiating the Consent Decrees. However, after several months of observing the EPA process, NDDoH concluded the potential for statewide compliance could be achieved in a much shorter timeframe and at a much lower cost through collaborative effort with the industry. EPA's paradigm was "sue and settle" with individual companies one by one, with the threat of penalties motivating other companies to comply. The NDDoH's paradigm was to work cooperatively with industry to find a solution.

a. **The NDPC Bakken Upstream Air Task Force**. After NDPC's six members received their respective EPA Section 114 information requests in late 2014 through the fall of 2015, the NDPC members formed the Bakken Upstream Air Task Force with the purpose of evaluating technical, mechanical, and engineering aspects of field management of vapor recovery and potential for fugitive emissions. The task force was comprised of more than 130 individuals from 30 companies representing more than 93 percent of the oil and gas production in North Dakota. The task force logged more than 3,000 man-hours exploring these topics and invited both EPA Region 8 and NDDoH personnel to participate in periodic updates and discussions.

b. **North Dakota Industry-Wide Consent Decree**. In a timeframe of six months, NDDoH in cooperation with NDPC finalized an industry-wide consent decree template that results in emissions reductions via provisions that exceed current regulatory requirements. In contrast to the thirty months long, burdensome and costly EPA Section 114 process, NDDoH's policy was to identify problematic emissions and inform the companies accordingly. The companies then fixed the emissions, or faced administrative actions and penalties. This "find it and fix it" policy worked well, and was incorporated into the North Dakota industry-wide consent decree. This cooperative attitude and process between regulators and industry is a model for true innovative environmental improvement **without unnecessarily encumbering energy production, constraining economic groth or preventing job creation.** The success of this model comes not from a roomful of

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[2] See Section 2(a) of the Executive Order

[3] See https://www.epa.gov/enforcement/reference-news-release-slawson-exploration-company-inc-make-system-upgrades-and (copy attached)

attorneys and third party consultants with threatened punitive action, but from discussions between regulators and industry held in the spirit of collaborative problem solving.

NDPC has had a proven track record of industry led efforts leading to wide adoption of industry best practices and common sense rulemaking processes by state agencies. In fact, in 2011, NDPC and NDDoH collaborated to address VOC flash emissions that were self-reported by the industry. This effort led to an industry-wide consent decree with NDDoH, and millions of dollars in equipment upgrades in field equipment for statewide compliance.

The NDPC respectfully requests that EPA promptly reconsider its Clean Air Act enforcement initiative in North Dakota, and in its place, adopt something similar to the NDDoH model of enforcement, including amending, with court approval, the one federal-only Consent Decree in place by adding North Dakota, and making its terms consistent with the NDDoH industry-wide consent decree.

A COMPARATIVE CASE STUDY

The State of North Dakota and the U.S. Environmental Protection Agency under the Obama Administration employed substantially different regulatory approaches to oil and gas development in North Dakota.

NORTH DAKOTA

"FIND & FIX"
Embrace compliance, prevention and innovation for future efficiencies industry-wide. Through this process, regulators and industry work together to identify the issue, find solutions, and fix the issue, resulting in Day 1 compliance that quickly benefits the environment.

THE U.S. EPA

"SUE OR SETTLE"
Emphasis is on penalties and compliance through intimidation. This method embraces bureaucracy and expensive legal pursuits that forces compliance through intimidation rather than focusing on problem-solving. Action is also done one company at a time, meaning very little to no benefit to the environment during the process.

PROCESS DURATION & PARTICIPANTS

10 MONTHS
working with Industry to identify solutions & an agreement issued Oct. 2016. Meanwhile, companies were voluntarily inspecting and modifying equipment.

30 MONTHS
to resolve 1 case with 6 still pending.

3 STATE EMPLOYEES
including 2 from Dept. of Health and 1 from Attorney General's Office.

12 FEDERAL EMPLOYEES
including 5 EPA Attorneys, 2 Dept. of Justice Attorneys and 5 EPA scientists.

X 30 — 30 COMPANIES
producing 93% of ND's oil and the North Dakota Petroleum Council participated in finding solutions.

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FCL 2035645

Environmental Protection Agency
Mr. Scott Pruitt, Administrator
Mail Code 28221T
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APR 06 2017

To: Banister, Beverly[Banister.Beverly@epa.gov]; Farmer, Alan[Farmer.Alan@epa.gov]; Gettle, Jeaneanne[Gettle.Jeaneanne@epa.gov]; Hill, Franklin[Hill.Franklin@epa.gov]; Lapierre, Kenneth[Lapierre.Kenneth@epa.gov]; Scaggs, Ben[Scaggs.Ben@epa.gov]; Tellis, Vickie[Tellis.Vickie@epa.gov]; Walker, Mary[walker.mary@epa.gov]; Wilkes, Mary[Wilkes.Mary@epa.gov]
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From: Heard, Anne
Sent: Wed 3/15/2017 8:11:58 PM
Subject: FW: March 15 -- Daily Environment Report - Afternoon Briefing

See Article on Regional/Program action that requires Pruitt review. **Ex. 5 - Deliberative Process** **Ex. 5 - Deliberative Process** VAH

From: Bloomberg BNA [mailto:bloomberg@bna.com]
Sent: Wednesday, March 15, 2017 4:01 PM
To: Heard, Anne <Heard.Anne@epa.gov>
Subject: March 15 -- Daily Environment Report - Afternoon Briefing

Daily Environment Report

Afternoon Briefing - Your Preview of Today's News

The following news provides a snapshot of what Bloomberg BNA is working on today. Read the full version of all the stories in the final issue, published each night. The Bloomberg BNA Daily Environment Report is brought to you by EPA Libraries. Please note, these materials may be copyrighted and should not be forwarded outside of the U.S. EPA. If you have any questions or no

longer wish to receive these messages, please contact Josue Rivera-Olds at rivera-olds.josue@epa.gov, 202-566-1558.

Trump Gives Carmakers a Year to Push for Reset of Mileage Rules

Posted March 15, 2017, 11:17 A.M. ET

By Ryan Beene and John Lippert

Carmakers will get another year to dispute fuel economy standards the Trump administration will scrutinize, overruling an Obama-era ruling that the industry is capable of meeting tougher mileage and emissions rules.

Automakers were right to cry foul over the Environmental Protection Agency failing to collaborate with them and expediting a review of requirements for the companies to boost the fuel economy of their fleets to an average of more than 50 miles per gallon by 2025, a senior White House official said. President Donald Trump will tell auto workers and executives near Detroit on March 15 that his administration will examine the standards into 2018.

Trump's overruling of an attempt by Barack Obama's government, a week before his departure from the White House, to solidify the regulations marks a victory for carmakers. Companies including General Motors Co., Toyota Motor Corp. and Volkswagen Group AG have argued the standards are out of step with market realities. Low gasoline prices have spurred record demand for sport utility vehicles and pickups and dragged on demand for electric vehicles and fuel-sipping passenger cars.

The automakers now get to make their case to new EPA Administrator Scott Pruitt, who downplayed how much human activity is contributing to climate change. The agency will restore the original timeline set in agreement with carmakers, which was to determine by April 2018 whether the standards for 2022 through 2025 are still feasible, the White House official said, speaking on the condition of anonymity ahead of Trump's announcement.

Automakers agreed in 2011 to the so-called "one national program" that coordinated fuel economy standards set by the U.S. Transportation Department, and greenhouse gas emissions standards set by the EPA and California's Air Resources Board.

Eighteen auto industry executives including Mary Barra of GM, Ford Motor Co.'s Mark Fields and Fiat Chrysler Automobiles NV boss Sergio Marchionne sent a letter to Trump in February, asking him to reinstate the review of fuel economy regulations. The EPA's decision to end the review prematurely ended a promised debate, they said.

Cars and light trucks from the 2016 model year will be the first to

fall short of fleet-wide average fuel economy targets in more than a decade, according to automaker projections released by the National Highway Traffic Safety Administration.

The White House official said the administration is not currently contemplating a challenge to California's authority to set its own vehicle emissions standards or electric-car sales mandates. The official said reopening the review does not guarantee that the standards will be weakened.

While the official told reporters the president's move was narrowly focused on reviving the review, the former head of Trump's EPA transition team said Trump's administration is contemplating a full-blown attack on Obama's fuel economy standards.

"This is not coming from the auto industry, it's coming from consumers and the auto dealers association," Myron Ebell, who left the Trump transition team in January, said of the onus for the potential rollback. "I don't think the auto companies are united in what they want."

Automakers aren't looking to slash the efficiency goals they agreed to under Obama, according to Representative Debbie Dingell, a Michigan Democrat and former GM executive. The review will offer a forum for parties involved to reach fresh consensus on the standards, she said in an interview.

"My goal is to bring permanent peace between California, Michigan and the rest of the country and have everybody working together toward strong fuel economy standards," Dingell said. "That was the beauty of the process that President Obama established and the agreement that was reached."

California's top air-quality regulator meanwhile said she's ready to consider changes to the fuel economy standards -- to a point. The current regulations could be improved from both an environmental and administrative standpoint, said Mary Nichols, chairman of California's Air Resources Board.

"We're not going to refuse to participate in the newly-reopened review process," Nichols said in a phone interview. "We'll be there and we'll be active."

That said, the Trump administration and automakers shouldn't expect California to abandon its core principles.

"We have the technical and legal ability to run a program that recognizes where electrification of vehicles is headed," she said. "We're trying to put together a mix of incentives and regulations to move the entire industry in this direction. This is what we're going to do."

--With assistance from Shannon Pettypiece.

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All EPA Regional, Program Action Must Seek Pruitt Review: Memo

Posted March 15, 2017, 11:14 A.M. ET

By Brian Dabbs

EPA Administrator Scott Pruitt is reserving approval authority for all agency actions typically overseen by regions and program offices through the beginning of April, according to a memo obtained by Bloomberg BNA.

The memo authored by transition team member David Schnare, instructs agency employees to send proposed decisions or final actions to Pruitt for review.

All such agency activity that "would limit the flexibility of the states, limit energy resource use, impose significant costs on industry or commerce, or otherwise likely result in significant public attention on the proposed decisions or final agency actions" must now be screened by Pruitt's office, according to the March 2 memo, which says the policy will remain in place for 30 days.

Pruitt has called for a fundamental overhaul of the Environmental Protection Agency, vowing to restore cooperation with states and lift regulatory burdens on industry. EPA spokespeople didn't respond to multiple Bloomberg BNA requests for comment and requests to authenticate the memo.

The memo was sent to regional and lower-level office staff. Agency chief of staff Ryan Jackson, acting deputy administrator Mike Flynn and Samantha Dravis, chief of the agency's policy office, are included as well.

Basic Permitting

The top-level direction applies to basic permitting actions, a high-ranking office director at EPA who requested anonymity told Bloomberg BNA. That would traditionally include approvals of state water-quality standards, some Superfund remedies and a wide range of other actions.

"They're not regulations, but they're agency actions that do have import," the EPA office director said. "I've never seen a memo like this before." The employee added that the memo likely reflects a lack of trust between Pruitt and career employees.

The memo's criteria covers "very, very broad" agency jurisdiction, the employee said. But the precise coverage is so far unclear.

Another high-level EPA official who requested anonymity said the

memo stems from an episode in which Pruitt became apprised of certain decisions on delegated actions that he disagreed with. The official wouldn't reveal the details of those actions, but said the episode reflects Pruitt's lack of knowledge of agency workings.

"He was completely ignorant of the fact that there were over 500 delegations," the official told Bloomberg BNA, who added that the memo incited internal opposition. "It created a deep level of anger or simple animosity amongst the career executives who have been handling routine agency actions for a long time."

Lack of Political Personnel

Following a prolonged nomination fight, Pruitt has only begun to fill out his leadership ranks as he moves into his fourth week in office.

Schnare, in the memo, justified the comprehensive review "because the presidentially-appointed assistant administrators and regional administrators have yet to assume their duties." Assistant administrators need Senate approval but regional administrators do not.

Former EPA team officials said they didn't recall past administrators issuing that type of request. But the lack of top-level personnel, coupled with few signs that nominations are imminent, may in fact rationalize such review, Rick Otis, who headed President George W. Bush's transition at EPA, told Bloomberg BNA.

"If they're not familiar with agency action, and not sure about permitting or rulemaking even, they're probably trying to conform themselves," Otis said, referring to Pruitt's inner circle. "And it might be somewhat that they are cynically distrustful and want to ensure the agency is functioning as they want."

Experience?

Many observers highlight the lack of EPA experience in Pruitt's transition team and initial appointees. Schnare's former EPA career as an agency attorney sets him apart from most other transition members.

Dravis, for instance, comes to EPA following stints at the Republican Attorneys General Association (RAGA) and its affiliated Rule of Law Defense Fund. Prior to joining those organizations, Dravis specialized in Federal Election Commission and Internal Revenue Service compliance law, according to RAGA.

Schnare is widely viewed as an influential figure at EPA, but agency spokespeople didn't respond to a request for confirmation of his current title.

Bob Sussman, the co-chair of former President Barack Obama's EPA transition team, said the request indicates a keen sense of the agency. "It's important to let people know the administrator is the

decision-maker and his perspective is important," Sussman told Bloomberg BNA.

The high-level EPA official also said the spirit of the memo may fit a traditional mold.

"Despite the ignorance of Pruitt with regard to how this agency works, and the fact that people he is placing confidence in haven't a clue either about how it operates, its not unusual that a new administrator would want to get a handle on agency workings," the official said.

Gas Station Violations to Cost Petroleum Companies $3 Million

Posted March 15, 2017, 12:44 P.M. ET

By Sylvia Carignan

A California court is ordering three gas station operators and owners to pay $3 million for continuing to violate underground storage tank protections (People of the State of Cal. v. Golden Gate Petroleum Co. et al., Cal. Super. Ct., 16CV004106, 3/13/17).

According to the state attorney general, the defendants have failed to comply with requirements for monitoring, inspecting and maintaining underground storage tanks, have disabled or tampered with leak-detection systems and have improperly handled hazardous substances.

The defendants—Golden Gate Petroleum, Bay Area/Diablo Petroleum Co. and Westgate Petroleum Co.—own and operate underground storage tank systems at gas stations in northern California.

The defendants were initially sued in 2007 for those environmental protection violations. In a 2011 settlement, the defendants were ordered to pay $3 million in penalties, with an additional $3 million suspended if the defendants could comply with the requirements.

According to the state attorney general, the defendants have not complied. The Contra Costa Superior Court ordered the second $3 million payment March 13.

Representatives for the defendants did not immediately respond to calls or emails for comment. The defendants have 60 days to make the payment.

EPA Scientist Sided with Monsanto on Pesticide's Safety: Emails

Posted March 15, 2017, 12:06 P.M. ET

By Tiffany Stecker

A former EPA scientist allegedly bragged that he could "kill" indications that Monsanto Co.'s widely-used Roundup weedkiller is linked to cancer, according to recently filed court documents (In re Roundup Products Liability Litigation, N.D. Cal., 3/14/17).

Jess Rowland, a retired deputy director of the Environmental Protection Agency's pesticide health effects division, bragged to Monsanto's regulatory affairs lead Dan Jenkins that he "should get a medal" for finding a study to dispute a contentious March 2015 safety finding.

That 2015 conclusion from the International Agency for Research on Cancer found that glyphosate—the main ingredient in Roundup—is "probably" carcinogenic. The exchange involving Rowland's claim is in an April 28, 2015 email from Jenkins to two Monsanto employees.

Jenkins told Monsanto toxicologist William Heydens and global regulatory affairs lead Jennifer Listello that Rowland called "out of the blue" that day to tell him that the EPA had "enough to sustain our conclusions" in an EPA Cancer Assessment Review Committee (CARC) report that found glyphosate is not linked to cancer.

Rowland cited data his office had on a study of mice from pesticide manufacturer Cheminova A/S, which is now a part of FMC Agricultural Solutions that he believed would exonerate glyphosate.

"I am the chair of the CARC: and my folks are running this process for glyphosate in reg review," Jenkins' email quoted Rowland as saying.

A number of previously confidential emails from Monsanto were made public on March 14 as part of multi-district litigation from dozens of plaintiffs who say the agricultural company's signature herbicide, whose main ingredient is glyphosate, caused their non-Hodgkins lymphoma.

Rowland Erred By Siding with Monsanto: Lawyers

The plaintiffs' lawyers want Rowland to submit to a deposition. Rowland retired shortly after the EPA released the CARC findings on April 29, 2015, only to quickly remove them from the EPA website a few days later.

The correspondence "strongly suggests that Mr. Rowland's primary goal was to serve the interests of Monsanto," the attorneys wrote the court in their motion to compel Rowland's deposition.

Jenkins was skeptical of Rowland's claims, though hopeful that he could influence the EPA.

"Don't get your hopes up," he wrote to Heydens and Listello. "I doubt EPA and Jess can kill this; but its good to know they are going to actually make the effort now to coordinate due to our pressing and their shared concern that [Agency for Toxic Substances and Disease Registry] is consistent in its conclusions w EPA."

"I think you and I could get on the phone w Jess Rowland and discuss this pretty openly. He'll give us straight talk," Jenkins wrote.

"Wow! - that's very encouraging. Thanks for the news update," Heydens wrote back.

A spokeswoman for Monsanto did not respond to a request for comment via email.

More to Come

U.S. District Court for the Northern District of California Judge Vince Chhabria ordered that the confidentiality seal on the Monsanto emails be removed on March 13.

He also expressed the "tentative view" that Rowland's testimony to the court would be appropriate, but that testimony from other EPA officials would not.

Plaintiffs' attorney Aimee Wagstaff, in the Lakewood, Colorado office of the firm Andrus Wagstaff, told Bloomberg BNA that her team will file one more document previously under seal in the next few days.

A separate email made public March 14 suggested that Monsanto employees ghost-wrote scientific studies to bolster their claim that glyphosate does not cause cancer.

Monsanto released a statement that afternoon rebuking the assertion that company scientists wrote a 2000 paper published in Regulatory Toxicology & Pharmacology that evaluated the safety of Roundup for humans.

"Plaintiffs' attorneys have cherry picked a single email—out of more than 10 million pages of documents produced—to allege that Monsanto scientists ghostwrote" the study, Monsanto wrote in a blog post.

House Republicans Seek 'Economically Viable' Climate Solutions

Posted March 15, 2017, 02:52 P.M. ET

By Rachel Leven

Nearly 20 House Republicans introduced a resolution that would

commit Congress to finding “economically viable” solutions to climate change risks.

The resolution (bill number unavailable) led by Reps. Elise Stefanik (R-N.Y.), Carlos Curbelo (R-Fla.) and Ryan Costello (R-Pa.), introduced March 15, is identical to one sponsored by now-retired Rep. Chris Gibson (R-N.Y.) in the last Congress. It comes days after Environmental Protection Agency Administrator Scott Pruitt questioned whether carbon dioxide emissions are a major cause of climate change, and the day before the White House is expected to release a proposed budget that is widely expected to significantly cut the EPA.

Gibson’s resolution (H. Res. 424) never received a hearing in the 114th Congress. A Republican House Energy and Commerce Committee aide told Bloomberg BNA in an email that the committee is aware of the resolution and looks “forward to working with” the sponsors “as we reevaluate the Obama EPA policies versus our own new policies going forward.”

‘Not in a State of Denial’

Environmentalists such as the Union of Concerned Scientists lauded the Republican members for urging science-based decision making on climate change.

“If Congress followed the science it would, of course, see that fossil fuel emissions are driving climate change,” Union of Concerned Scientists President Ken Kimmell said in a statement. “While the resolution doesn’t explicitly make that link, it shows that these Republican lawmakers are not in a state of denial about this key issue. There is strength in numbers, and I hope that this sizable group of responsible leaders will have an impact on votes in Congress.”

While the resolution that included 14 other Republican co-sponsors supports addressing climate change, it doesn’t mean those Republicans supported the Obama administration’s approach. Many of the 17 members have opposed such actions as the Clean Power Plan, which was intended to reduce carbon dioxide emissions from electricity-generating units.

Other co-sponsors include Rep. Mark Amodei (R-Nev.), Rep. Don Bacon (R-Neb.), Rep. Barbara Comstock (R-Va.), Rep. John Faso (R-N.Y.), Rep. Brian Fitzpatrick (R-Pa.), Rep. John Katko (R-N.Y.), Rep. Frank LoBiondo (R-N.J.), Rep. Mia Love (R-Utah), Rep. Brian Mast (R-Fla.), Rep. Patrick Meehan (R-Pa.), Rep. Tom Reed (R-N.Y.), Rep. Dave Reichert (R-Wash.), Rep. Ileana Ros-Lehtinen (R-Fla.) and Rep. Mark Sanford (R-S.C.).

Trump’s Infrastructure Plans Could Trigger Coal Hike

Posted March 15, 2017, 7:00 A.M. ET

By Stephen Lee

President Donald Trump's pledge to use American-made steel in his $1 trillion infrastructure plan could boost coal mining activity by 5 percent, industry watchers predict.

Those forecasts are giving environmentalists pause because the coal used to make steel gives off more carbon dioxide, methane and nitrous oxide than the coal used to generate electricity. All three of those gases contribute to global climate change.

Evan Kurtz, executive director of equity research at Morgan Stanley, arrived at the 5 percent projection based on the few details that are known about the Trump plan.

Overall, said Kurtz, the plan could boost U.S. steel demand by 20 percent for five years. Currently, only 30 percent of U.S. metallurgical coal—the high-grade, dense mineral that is cooked into coke for use in steelmaking.

More Steel, More Coal

Similarly, Monica Bonar, a senior director at Fitch Ratings, said Trump's plan could increase domestic steel production by 3 million tons in both 2017 and 2018.

However, Bonar said, most U.S. construction-grade steel doesn't use coal as a raw material. In 2016, 32.9 percent of all U.S. raw steel production was made using metallurgical coal, Evan Martinez, a spokesman for the American Iron and Steel Institute, told Bloomberg BNA.

But Trump's infrastructure package could increase the demand for construction equipment, which is made of blast furnace steel and does use coal, Bonar said.

Environmentalists Watchful

In the meantime, environmentalists say they're eyeing the Trump plan carefully, but aren't yet sounding the alarm bells.

"We're waiting to see what the infrastructure plan looks like," Jeremy Richardson, senior energy analyst at the Union of Concerned Scientists, told Bloomberg BNA. "There aren't a lot of details about what [Trump] is proposing. Is it going to be a bucket of specific projects? Or is it going to be more about policy incentives to drive investments in things that are good? The details really matter, and right now it's just a lot of rumor and innuendo about what the 'is' is."

Jeremy Nichols, climate and energy program director at WildEarth Guardians, broadly agreed, saying the Trump plan is still too murky to raise concerns among the environmental community.

"It doesn't make me worry," Nichols told Bloomberg BNA. "Coal burned for power purposes are more worrisome."

Plans Not Yet Clear

On Jan. 24, Trump issued a memo directing the Commerce Department to write a plan in six months to mandate the use of American-made steel for all new, expanded and retrofitted pipelines.

Earlier this month, however, the White House said U.S. steel won't be used to build the Keystone XL pipeline, because the steel for that project has already been ordered.

The Trump memo doesn't specify that only U.S. coal can be used to make the steel, but most domestic steel producers use domestic coal.

Trump also has repeatedly touted a massive infrastructure package, though without making explicit promises about American steel. That plan appears to be at least several months away from being finalized.

The House Natural Resources Committee will hold a hearing March 21 about the importance of domestically sourced raw materials for infrastructure projects.

World's Most Popular Herbicide, Glyphosate, Not Carcinogenic: EU Science Panel

Posted March 15, 2017, 11:38 A.M. ET

By Stephen Gardner

The world's most widely used herbicide, glyphosate, is not carcinogenic, the European Chemicals Agency said March 15, opening the way for its continued use in the European Union.

Glyphosate should continue to be classified in the EU as potentially causing serious eye damage and as toxic to aquatic life, but there is no evidence to support its classification as carcinogenic, as toxic to reproduction or as causing changes to genetic material, the agency said.

The decision opens the way for the long-term reauthorization of in the EU of glyphosate, the active ingredient in Monsanto's Roundup herbicide. Glyphosate also is the active ingredient in pesticides registered by the BASF Corp., DuPont, FMC Corp. and Syngenta Crop Protection LLC.

The reauthorization has been held up by a dispute over whether the substance is carcinogenic triggered by a 2015 finding from the

World Health Organization's International Agency for Research on Cancer that it was "probably carcinogenic." A conflicting assessment from the European Food Safety Authority, also in 2015, concluded glyphosate was "unlikely to pose a carcinogenic hazard."

"Science prevailed" with the European Chemicals Agency assessment, said Graeme Taylor, director of public affairs for the European Crop Protection Association, which represents pesticides manufacturers.

EU authorities should "move swiftly with the registration process for the substance in the EU and grant a 15-year approval," Taylor said.

Authorization Dispute

Glyphosate was authorized in the EU up to June 30, 2016. Because of disputes over whether it was carcinogenic, the European Commission, the EU's executive, extended the authorization through the end of 2017 while the European Chemicals Agency carried out its assessment.

Jack de Bruijn, the chemicals agency's director of risk management, said the agency's Risk Assessment Committee (RAC) had reached "a very clear conclusion" that glyphosate should not be classified as carcinogenic.

"It does not fulfill the criteria to be called a carcinogen," de Bruijn said.

The chemicals agency said the RAC conclusions would be finalized and forwarded to the commission, which would prepare a new proposal on the reauthorization of glyphosate. That proposal would have to be discussed with EU country authorities.

The RAC decision on glyphosate was taken on the basis of scientific evidence, but the commission might take into account other factors, such as public opposition to the reauthorization of glyphosate, which has become a high-profile issue in the EU.

Consideration of the different aspects of the debate around glyphosate "is a discussion that will have to take place in Brussels," de Bruijn said.

'Emotional' Issue

Taylor said the reauthorization of glyphosate in the EU had become "the subject of a political and emotional debate rather than a scientific one."

In a non-binding vote in March 2016, the European Parliament's environment committee said the substance should not be reauthorized in the EU, and European Commission efforts to find

agreement on reauthorization in a regulatory committee of EU country experts have so far not succeeded.

Environmental groups in February started a European Citizens' Initiative opposing the reauthorization of glyphosate. The initiative could oblige the commission to make a formal response if 1 million validated signatures of EU residents are collected.

Green groups condemned the RAC decision. Greenpeace said the RAC had "rejected glaring scientific evidence of cancers in laboratory animals, ignored warnings by more than 90 independent scientists, and relied on unpublished studies commissioned by glyphosate producers."

Genon K. Jensen, director of the Brussels-based Health and Environment Alliance, said the International Agency for Research on Cancer ultimately "will be recognized as having been right" to say glyphosate is probably carcinogenic, and that the European Chemicals Agency's assessment "feeds public suspicion about the reliability of EU scientific agencies' opinions."

Decision Defended

Tim Bowmer, chair of the RAC, speaking at the same briefing as de Bruijn March 15, said the RAC had assessed a very wide range of evidence and that the International Agency for Research on Cancer did not have strong data proving carcinogenic effects of glyphosate.

"Depending on how it's analyzed statistically, there's either no effect or very little effect," Bowmer said.

European Commission spokesman Enrico Brivio said the commission "takes note" of the RAC assessment and expected to receive the finalized RAC opinion by the middle of 2017.

Thereafter, the commission would "restart their discussions with the member states as regards the approval of glyphosate as an active substance in plant protection products," Brivio said.

Tillerson May Face Deposition About 'Wayne Tracker' Emails

Posted March 15, 2017, 10:53 A.M. ET

By Erik Larson

New York will seek to question top Exxon Mobil Corp. executives under oath as part of a probe into the accuracy of the company's statements about climate change after discovering an email alias used by former Chief Executive Officer Rex Tillerson.

Tillerson, now U.S. Secretary of State, used the name Wayne Tracker for his secondary internal email account at Exxon, created for sending the most sensitive messages to and from company

board members, including communications about the risks associated with climate change, New York Attorney General Eric Schneiderman said.

Tillerson, whose middle name is Wayne, employed the account from at least 2008 through 2015, though Exxon says all relevant emails were turned over to the attorney general last year, without deception.

“We made it clear that the Wayne Tracker account belonged to Rex Tillerson,” said Exxon spokesman Alan Jeffers. “Some of the emails were signed ‘Rex.’” He said Schneiderman’s revelation of the account was “political.“

Name Dropping

Aliases have been employed by top corporate executives for email accounts to throw off hackers, avoid people guessing their digital address or reduce unwanted messages. Some have used secondary email accounts while others sought to mask their communications.

Bob Lutz, a former vice chairman who left General Motors Co. in 2010, used an alternative email while at the automaker to correspond with outsiders. His “Red Rufus” email account, a reference to his call sign as a Marine pilot, is still his primary email address, Lutz said March 14 in an email.

John Mackey, CEO of Whole Foods Market Inc., posted anonymous messages in 2007 on Yahoo Inc.’s financial chat boards using the name “rahodeb.” The company changed its code of conduct to forbid executives from posting on message boards or blogs without company approval.

In the Exxon case, Schneiderman requested all relevant documents, including Tillerson’s Wayne Tracker emails, as he “determines which witnesses to seek testimony from as the investigation proceeds to its next logical phase,” according to the filing. The existence of the secondary email account was discovered by Schneiderman’s team while reviewing other Exxon documents.

Investor Protection

Exxon is seeking to derail probes by New York and Massachusetts into whether the company misled investors for years about the possible impact of climate change on its business.

Someone in Exxon’s general counsel’s office knew or should have known about the alias account, said Carl Barnes, a former corporate general counsel who’s a defense lawyer at Morse, Barnes-Brown & Pendleton PC.

“If they did not know, or if they failed to bring it to the attention of

the litigation team producing documents in response to the court order, that does indicate an ethical and corporate governance failure," Barnes said.

New York's top cop said Exxon has been dragging its feet in turning over the documents, especially those from the company's management committee. The probe was well underway before Tillerson departed Exxon on Jan. 1 after being tapped by President Donald Trump to be America's top diplomat.

The discovery of the alias address increases the likelihood that Tillerson will be among those questioned under oath in the case, according to Jon Barooshian, a former assistant district attorney in Massachusetts who's a white-collar criminal defense lawyer with Bowditch & Dewey LLP in Boston.

"If I'm Eric Schneiderman and I know Tillerson failed to disclose the existence of the second email account, I'd want to know what else he failed to disclose," Barooshian said. "He'll want to get him in front of a court reporter under oath."

Judge to Decide on Hearing

Justice Barry Ostrager in New York state court in Manhattan, who has been overseeing the case, must decide whether to schedule a hearing on the matter.

"Something like this could easily slip through the cracks and only get discovered later," said Richard Scheff, a former federal prosecutor who isn't involved in the matter, said of Exxon's alleged failure to identify the alias account.

It may be up to the judge to decide if Exxon was forthcoming about Tillerson's alias account.

"Rex Tillerson's use of an alias email address raises all sorts of who, what, when, where and why questions," said Carrie Cohen, a former federal prosecutor in Manhattan who is a white-collar criminal-defense lawyer. "These types of questions probably can only be answered by Tillerson, thus greatly increasing his chances of being deposed."

—With assistance from Jeff Green.

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Missing California Ozone Plans Prompt Litigation Threat

Posted March 15, 2017, 01:04 P.M. ET

By Patrick Ambrosio

Missing plans detailing strategies to reduce ozone pollution in

California prompted a litigation threat from environmental advocates, who want the EPA to take action against the state for not meeting a Clean Air Act deadline.

The Center for Biological Diversity and the Center for Environmental Health, in a March 14 letter, asked the Environmental Protection Agency to issue a regulatory determination known as a "finding of failure to submit" against California. The finding would cover missing plans for reducing emissions of ozone precursors such as nitrogen oxides and volatile organics in the Los Angeles and Sacramento metropolitan areas.

That regulatory determination would trigger an obligation that the EPA issue its own federal plans for reducing pollution in those cities within two years.

The advocacy organizations said they will sue the EPA if the agency fails to issue the required findings within 60 days. The EPA's failure to meet Clean Air Act deadlines often prompts such citizen suits from environmental advocates, which typically result in a settlement that establishes a court-enforced deadline for EPA action.

However, EPA Administrator Scott Pruitt has been critical of the number of environmental advocacy organization lawsuits settled by the Obama EPA, a practice opponents often refer to as "sue-and-settle."

"The sue-and-settle practice through consent decrees has been something that the EPA and other agencies have used, I think, to the detriment of the people that we serve," Pruitt said March 10 at an energy conference in Houston. "That will change under our administration."

Sewage From Mexico Tests Binational Framework

Posted March 15, 2017, 12:03 P.M. ET

By Stephen Siciliano

A discharge of sewage from Mexico into U.S. coastal waters is putting to the test a recent treaty minute signed between the two countries for addressing such events.

The amount of sewage discharged between Feb. 6 and Feb. 25 is estimated at between 143 million gallons and 250 million gallons, according to Serge Dedina, mayor, Imperial Beach, Calif., which abuts the border with Tijuana, Mexico.

"It's not like this wasn't foretold," said Dedina in a March 9 interview. "We've been adamantly complaining about ongoing spills for the past two years. It has been nonstop."

In 2015, the U.S. and Mexico signed Minute 320, an amendment to the 1944 Treaty on Utilization of the Waters of the Colorado and Tijuana Rivers and the Rio Grande.

Among the minute's charges is, through cooperative efforts, to improve flood control and water quality in the Tijuana River, which flows north over the border before emptying into the Pacific Ocean off Imperial Beach.

At its mouth, the Tijuana River Estuarine Research Reserve is one of the last remaining wetlands on the California coast and a "Wetlands of International Importance" under the 1971 Ramsar Convention.

"There is supposed to be a framework for working along the border. The wastewater agency in Tijuana could have informed us or asked for help and they didn't," said Dedina. "Beyond infrastructure, lack of transparency is a problem."

Minute 320, Dedina said, "has accomplished little."

Nonetheless, it is through the Minute 320 framework that the matter is being addressed.

Federal Action Sought

In a March 1 letter, Rep. Scott Peters (D) and Rep. Juan Vargas (D) wrote Secretary of State Rex Tillerson and Environmental Protection Agency Administrator Scott Pruitt, calling upon both agencies "to work with affected municipalities in San Diego County to further investigate and commit the appropriate resources to rehabilitate and secure the Tijuana River Valley communities."

Peters said in a March 13 interview that EPA claimed it had no jurisdiction in the matter, which is the provenance of the State Department.

On March 2, U.S. commissioner Edward Drusina and Mexican commissioner Roberto Salmon, of the International Boundary and Water Commission (IBWC), said in a joint statement that the binational Water Quality Work Group, established under Minute 320, will investigate the discharge and report back in 30 days.

Additionally, Peters said representatives from the IBWC, U.S. State Department and U.S. Consul met with Mexican officials March 9 to discuss the incident.

Imperial Beach began experiencing a strong, but familiar odor on Feb. 6, according to Dedina.

Peters said that he received calls from constituents likening the smell to "living in a toilet bowl."

It continued for days thereafter, according to Dedina, who said he contacted both sections of the IBWC on Feb. 15, and followed with queries to the Comisio'n Estatal de Servicios Publicos de Tijuana (CESPT), which operates Tijuana's sewage system.

"We haven't found out anything yet," he said.

Lagging on Infrastructure

In the past decade, Mexico has built two wastewater treatment plants in the state of Baja California, as the U.S. government upgraded its own facility in San Ysidro, Calif., to secondary standards.

But the infrastructure has been unable to keep up with population growth in the border city of approximately two million people.

In 2014, Global Water Forum released a report highlighting the decrease in federal funding for wastewater treatment plants from $100 million annually to $5 million. The figure increased to $24.8 billion in 2015.

The North American Development Bank and its sister agency, the Border Environment Cooperation Commission, sent a Feb. 21 letter to Dedina and officials from other impacted communities including National City, San Diego, Coronado and Chula Vista, promising the completion of a Mexican plan "that prioritizes critical sanitation and disposal needs from Tijuana" this month.

Attempts to contact the Mexican section of the IBWC, and its representative in Tijuana, Roberto Espinosa Mora, were unsuccessful. Similarly, the director of CESPT, Miguel Lemus Zendejas, did not return Bloomberg BNA's requests for comment.

Gas Export Giant Scrambles to Find Enough Supply for Itself

Posted March 15, 2017, 11:58 A.M. ET

By Perry Williams

One of the world's biggest natural gas exporters is struggling to find enough of the fuel to meet its own demand.

Amid surging prices and fears of widespread blackouts, Australian Prime Minister Malcolm Turnbull on March 15 extracted pledges from oil and gas executives to raise production of the fuel. It's the latest effort to bridge a supply shortfall threatening the domestic energy security of a nation forecast to be the world's biggest shipper of liquefied natural gas before 2020.

Natural gas prices for some customers across Australia's patchwork power markets have jumped as exports to buyers including Japan, Korea and China rise while drilling bans in several

states limit supply. Meanwhile, a series of blackouts in the state of South Australia have stoked fears of widespread outages across the nation and raised questions as to why one of the world's largest producers of coal and gas is struggling to keep the lights on.

"We are a massive gas exporter and it is utterly untenable, unacceptable for us to be in a position where domestic gas consumers cannot have access to affordable gas," Turnbull said at a Canberra press conference.

Turnbull convened a meeting with energy executives March 15 to ease mounting concerns over the country's energy security and costs. The commitments by companies including Royal Dutch Shell Plc, Exxon Mobil Corp. and Total SA will mean Australia avoids a projected shortfall of gas-powered electricity generation in the summer of 2018-2019.

The agreements come a day after South Australia announced plans to break away from a national electricity grid and assume control of its own generators when extra supplies are needed, threatening to challenge any nationwide fix.

The growing divide between state and federal governments over energy security is worsening angst among Australian companies over rising energy bills. Building materials company Brickworks Ltd. said March 14 it may relocate its manufacturing units outside of Australia after being forced to pay 76 percent more for gas at its east coast operations. The spot price of wholesale gas in Australia has tripled in the last two years, according to a February report from the Australian Industry Group.

The Ai Group, representing 60,000 Australian businesses, told a conference this week the gas industry was in urgent need of repair. Some manufacturers in the state of Victoria have seen wholesale gas prices soar to $22 a gigajoule in February from $6.

"That's ghastly and apocalyptic as far as the cost structures of energy intensive manufacturers are concerned," said Tennant Reed, an Ai policy adviser.

Turnbull's Liberal-National coalition government, an advocate of higher gas production and technology that reduces emissions from coal, blamed outages in South Australia, ruled by the Labor party, on the rapid uptake of renewable energy. Federal Energy Minister Josh Frydenberg March 14 said South Australia's plan was "nonsense," with the government seeking legal advice if the move was in breach of national electricity market rules.

While South Australia's Premier Jay Weatherill is towing a similar line to Turnbull's on raising gas output, his plan directs utilities to act "in the interests" of the state, potentially in conflict with the national electricity market.

"Going it alone created SA's problems and going it alone won't fix

SA's problems," Frydenberg said in response to the policy.

Drilling Ban

One barrier to greater gas production nationwide has been exploration bans implemented by Victoria and Northern Territory. Land management isn't a matter the federal government can intervene on and any easing of the drilling ban would need to be done at a state level, Resources Minister Matthew Canavan said at a briefing on March 15.

A possible path forward for unlocking greater reserves may come from South Australia's plan to offer farmers a direct share of royalties from drilling for gas on their land. Frydenberg said it was a welcome initiative which could be replicated across the nation to reduce wholesale gas prices.

"If the landowners can be incentivized to develop their land in an environmentally sustainable way, then we can get more gas into the system," he told Sky News on March 15.

—With assistance from Jason Scott.

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European Investment Bank Issues 500 Million Euros of Green Bonds

Posted March 15, 2017, 11:24 A.M. ET

By Anna Hirtenstein

The European Investment Bank issued 500 million euros ($531 million) of its green bonds, doubling amount of environmental securities with a 20-year maturity it has outstanding to 1 billion euros.

The bonds will pay an annual coupon of 0.5 percent, according to an emailed statement. It was priced at the equivalent of 48.6 basis points over the 4 percent German bund with a 20-year maturity. The debt is listed in Luxembourg, where the EIB is also based.

"Building a green benchmark curve in euros is a strategic priority of EIB´s funding program," said Eila Kreivi, head of capital markets at the EIB. "Today's trade accomplishes this goal at the long end of the curve. Strong response of sustainable investors highlights the relevance of the exercise in broader EU policy perspective."

The capital raised will be earmarked for renewable energy and energy efficiency projects. This includes solar, wind, hydro, solar and geothermal energy generation, as well as district heating, co-generation and energy loss reduction in transmission and distribution.

The EIB issued the world's first green bond in 2007, kicking off an industry that has grown to $95 billion last year. This issuance was bought by banks and institutional investors, largely in Europe. Two thirds were picked up by German and French investors. Over half of the order book was bought by asset managers, pension funds and insurers.

The bookrunners were Skandinaviska Enskilda Banken AB, JPMorgan Chase & Co, Barclays Plc, Commerzbank AG and Credit Agricole CIB.

The security "provides exactly what our clients wants - a solid framework, long tenor and a partnership with a leading player in climate finance," said Christopher Flensborg, head of sustainable products and product development at SEB.

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German Energy Faces Turbulence as CEOs Prepare for Deals

Posted March 15, 2017, 11:21 A.M. ET

By Lars Paulsson, Tino Andresen and Weixin Zha

After last year's unprecedented shakeup, anyone who thought the German energy industry was in for a quieter time 2017 is likely to be disappointed.

After the break up of the country's two biggest utilities, there are more deals on the way. Engie SA of France is weighing a bid for Innogy SE, while its majority owner RWE AG is considering all options, including making acquisitions of its own. The utilities have appointed advisers to shape strategy in the new energy world where renewables are king.

"Once the genie is out of the bottle, with Engie looking at Innogy, even if that doesn't happen, you're going to have people thinking about similar transactions that may be possible," John Musk, an analyst at RBC Europe Ltd. said March 14 by phone from London. "You could see bigger deals."

After decades of raking in handsome profits from an old model of generating power at big plants and shipping it via their own grids to the nation's homes and factories, Chancellor Angela Merkel's push for solar and wind has changed everything for the utilities. A plunge in power prices amid a renewables glut have forced record annual losses and the biggest companies have written down about $40 billion on the value of their plants since 2013.

The answer was splitting up RWE and EON SE, once among the biggest companies on the nation's stock market. RWE in October listed a minority stake in Innogy. EON SE spun off its Uniper unit a

month earlier, handing about 2 billion euros ($2.13 billion) worth of stock to shareholders.

"We examine all options, and all means all," RWE's Chief Executive Officer Rolf Martin Schmitz said March 14 at a press conference in Essen, Germany, when asked about selling Innogy or a potential acquisition of Uniper.

No Pressure

All possible investments will be measured against the stable return and dividend outlook of Innogy, he said. "We're under no time pressure and no selling pressure."

While there is no underlying reason why there should be more mergers or consolidation in the industry, the emergence of Innogy and Uniper as separate companies "creates an opportunity for someone who is interested in pursuing a certain strategy," said Deepa Venkateswaran, an analyst at Sanford C. Bernstein & Co in London. "This wasn't there before."

Engie, 29 percent held by the French state, is like many other European utilities trying to shift away from fossil fuels and give renewables a larger share in its portfolio.

In Germany, green output met 29 percent of power demand last year, unchanged from 2015, but up from 11 percent a decade earlier. On one day in May last year, renewable energy met almost all consumption.

Record Loss

Last month, RWE posted its worst annual net loss since at least 1949 and EON reported its worst result ever on March 15. The latter hired Goldman Sachs Group Inc. and Greenhill & Co. to shore up its defense in the event of a bid, according to people familiar with the matter last month. The company retained its renewables, grid and retail units and spun off trading and fossil fuel plants.

While EON kept its nuclear assets, a major uncertainty for any potential buyer was removed last year when Germany's atomic operators agreed with the government to cover 23.6 billion euros for nuclear waste in the future after more than a year of talks.

Uniper is confident it can stay independent, CEO Klaus Schaefer told reporters on March 9 in Dusseldorf. EON also wants to remain independent, CEO Johannes Teyssen said Wednesday at a press conference in Essen. Innogy declined to comment.

Reasons to Merge

"When it comes to thermal generation in Europe right now, because it is really hard to make money" coal and gas plant owners are good candidates for some amount of consolidation, Meredith

Annex, analyst at Bloomberg New Energy Finance, said by phone from London. Continuing high debt levels and a lack of cash at some utilities could still be the limiting factor, she said.

Goldman, which advised RWE on the Innogy spinoff, expects "large, game-changing" mergers and acquisitions in the sector because of low borrowing costs and stronger balance sheets, it said in its utilities outlook report in January.

RWE reduced its consolidated net debt by 11 percent by end of 2016 from a year earlier, while Uniper cut borrowing by 38 percent.

"Balance sheets have improved significantly pretty much across the board," Musk said. "Management teams should be on the front foot now in terms of strategy—looking to grow their businesses or think about enhanced shareholder returns."

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Cutting Climate Spending Made Harder by Obama's Budget Tactics

Posted March 15, 2017, 10:20 A.M. ET

By Christopher Flavelle

President Donald Trump will find the job of reining in spending on climate initiatives made harder by an Obama-era policy of dispersing billions of dollars in programs across dozens of agencies in part so they couldn't easily be cut.

There is no single list of those programs or their cost, because President Barack Obama sought to integrate climate programs into everything the federal government did. The goal was to get all agencies to take climate into account, and also make those programs hard to disentangle, according to former members of the administration. In some cases, the idea was to make climate programs hard for Republicans in Congress to even find.

"Much of the effort in the Obama administration was to mainstream climate change," said Jesse Keenan, who worked on climate issues with the Department of Housing and Urban Development and now teaches at Harvard University. He said all federal agencies were required to incorporate climate-change plans into their operations.

The Obama administration's approach will be tested by Trump's first budget request to Congress, an outline of which is due to be released Thursday. Trump has called climate change a hoax; last November he promised to save $100 billion over eight years by cutting all federal climate spending. His budget will offer an early indication of the seriousness of that pledge -- and whether his administration is able to identify programs that may have intentionally been called anything but climate-related.

The last time the Congressional Research Service estimated total federal spending on climate was in 2013. It concluded 18 agencies have climate-related activities, and calculated $77 billion in spending from fiscal 2008 through 2013 alone.

But that figure could well be too low. The Obama administration didn't always include "climate" in program names, said Alice Hill, director for resilience policy on Obama's National Security Council.

"Given the relationship that existed with Congress on the issue of climate change, you will not readily find many programs that are entitled 'climate change,'" Hill, who is now a research fellow at the Hoover Institution, said in an interview. At the Department of Defense, for example, anything with the word climate would have been "a target in the budget process," she said.

The range of climate programs is vast, stretching across the entire government.

The Department of Agriculture created "climate hubs" to help farmers and ranchers cope with extreme weather. The Department of Health and Human Services began analyzing the effects of climate change on occupational safety. The Bureau of Reclamation started a program called "West-Wide Climate Risk Assessments," measuring changes to water supply and demand. The Bureau of Indian Affairs created the Tribal Climate Resilience Program. The Agency for International Development created a program to help "glacier-dependent mountain areas" deal with the risk of those glaciers melting.

In other cases, agencies expanded existing programs to account for global warming. In 2012, the Federal Highway Administration made climate-adaptation projects eligible for federal aid. Last year, the Department of Housing and Urban Development awarded $1 billion through its Community Development Block Grant program to projects protecting against climate change-related natural disasters.

Meanwhile, a handful of lesser-known offices saw their funding increase while Obama was in office. The budget for NASA's Earth Science program increased 50 percent, to $1.8 billion. Funding for the U.S. Global Change Research Program, which is mandated by Congress to report every four years on the state of climate change, rose 45 percent to $2.6 billion. At the National Science Foundation, the geosciences program almost doubled to $1.3 billion.

Republican Demands

Republicans noticed, and tried to force the administration to offer a tally of climate funding. Last December, senior House Republicans sent a letter to Obama's budget director, demanding that his office report how much federal money had gone toward climate programs in fiscal years 2015 and 2016.

A spokesman for Obama didn't respond to an email seeking comment.

"Budget cuts to programs -- or elimination of entire agencies -- designed to help stem the costs of climate change will only hurt ranchers, agriculture producers, and coastal communities already experiencing the impacts of this global challenge," Christy Goldfuss, managing director of the Council on Environmental Quality in Obama's White House, said by email.

'Gravy Train'

Some in Trump's party now urge him to use his authority to find those programs, and take them apart.

"The Trump Administration needs to defund the entire apparatus of the climate change federal funding gravy train," said Marc Morano, a former Republican staffer for the Senate Environment and Public Works Committee. "In order to dismantle the climate establishment, agencies and programs throughout the federal government need to be targeted."

"The climate funding has spread to almost every aspect of the federal government with sometimes wacky results," said Morano, who doubts global warming and runs the website climatedepot.com. He cited one example of a Department of Transportation query about the link between climate change and fatal car crashes.

Others argue that the spread of climate programs throughout the federal government simply reflects the evolving nature of the risk.

"It is irresponsible not to examine the possibilities and understand our sensitivity to them," said Ed Link, a former director of research and development for the U.S. Army Corps of Engineers who lead the forensic analysis of Hurricane Katrina's effect on New Orleans. If federal agencies stop doing that work, he said by email, "shame on them."

--With assistance from Ari Natter.

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Trump's Coal Promise Faces a Test from 'Monstrous' Wind Farms

Posted March 15, 2017, 10:13 A.M. ET

By Mark Chediak

President Donald Trump, a fossil fuel champion who once called an offshore wind farm near one of his golf courses "monstrous," may have little chance of preventing the renewable fuel from displacing some U.S. coal plants, Moody's Investors Service said.

Nearly two-thirds of about 87 gigawatts of coal-fired power in 15 states across the Great Plains are at risk of being phased out should utilities opt for low-cost wind, according to a report March 15 by Moody's. The average cost of wind power has dropped to $20 a megawatt-hour compared with many coal plants in the region that operate at over $30.

The Trump Administration has vowed to revive the coal industry by rolling back federal environmental regulations and promoting mining on federal land even as profits at plants that burn the fuel have been squeezed by cheap natural gas and power from wind and solar systems. About 15 percent of U.S. coal-plant capacity has been shut in the past five years, according to the U.S. Energy Information Administration.

"It's really not environmental driven, it's economic," Jairo Chung, lead author of the Moody's report, said in a phone interview. "The cost of wind generation has decreased dramatically making it competitive and a lot of the state regulators and the utilities are seeing wind as a viable option to diversify their generation portfolio."

U.S. utilities are increasingly seeking to build wind power instead of buying it, even in the absence of state mandates on renewable energy, according to the report. Power companies see investments in the renewable resource as an opportunity to grow earnings, lower electric bills and offer more clean power.

Grid operators can also incorporate greater amounts of wind at lower costs as a result of better weather forecasting tools, Moody's said. One megawatt can power 750 to 1000 homes, according to the Electric Power Supply Association, a trade group.

"What's happening at the Federal level, one could argue it's a moot point," Chung said. Many utilities already meet the carbon emission mandates that had been proposed under the Obama administration that Trump is looking to roll back, she said. "We are seeing renewables really gaining momentum."

Before becoming president, Trump tried to block an offshore wind farm in Scotland he said would spoil the view from the Trump International Golf Links, located over 1,400 acres (567 hectares) on the Menie Estate north of Aberdeen.

The U.K.'s Supreme Court eventually threw out a legal challenge against the wind farm brought by the real estate tycoon and the project is moving ahead after developer Vattenfall AB reached financial close on the 300 million pound ($366 million) European Offshore Wind Deployment Center last year.

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Renault Insists Its Cars Don't Cheat as Emissions Doubts

Linger

Posted March 15, 2017, 11:07 A.M. ET

By Ania Nussbaum

Renault SA insisted its cars meet emissions rules after French newspaper Liberation reported that the country's economic-fraud watchdog found the vehicle maker had misled customers about how much its models pollute.

Renault didn't breach European or national vehicle standards and its models "are not equipped with cheating software affecting anti-pollution systems," the French manufacturer said in a statement. "Renault will prove its compliance with the regulations and reserves its explanations for the judges in charge of investigating this case." A spokesman declined to comment further.

Paris prosecutors opened a preliminary probe into Renault's vehicle emissions in January, on allegations that its cars are a pollution hazard. Liberation reported March 15 that the Economy Ministry's fraud office, known as DGCCRF, said in a confidential report to prosecutors that the carmaker aimed to skew antipollution test results. As many as 900,000 cars with emissions breaching standards could have been sold, according to the newspaper. Renault called the newspaper article "unbalanced," and said it hadn't seen the investigators' report.

Volkswagen Scandal

Concern over emissions has shadowed the car industry since German competitor Volkswagen AG revealed in September 2015 that some of its diesel models carried engine software that switched pollution controls on only during emissions tests. Renault, which is based in the Paris suburb of Boulogne-Billancourt, said in February that it doesn't plan on any financial provisions tied to the prosecutors' probe.

Authorities across Europe are focusing attention on whether technology enabling emissions controls to switch off at certain temperatures violates legal conditions that allow the shutdowns as an engine-protection measure. Under French law, carmakers found to have cheated on the vehicle-certification process can be fined as much as 10 percent of their average revenue for the three years prior to the incident. Executives risk up to two years in jail and 300,000 euros in fines.

French prosecutors have also opened preliminary investigations into PSA Group and Volkswagen, and they received a report from the DGCCRF about Fiat Chrysler Automobiles NV last month.

Liberation cited the DGCCRF report as accusing Renault of using fraudulent strategies for more than seven years. The worst-performing vehicles in terms of carbon-dioxide emissions were the

main brand's Captur small sport utility vehicle and Clio IV hatchback, the newspaper said. In emails found by the DGCCRF, executives at the company acknowledged that antipollution systems were deactivated on the road but functioned during emissions tests, Liberation said, citing the report.

Temperature Range

The fraud office's investigation is partly based on the findings of a committee created by the French Ministry of Environment to test 86 cars from various manufacturers following the Volkswagen revelations. The committee determined that Renault's antipollution systems only activate when outside temperatures are in a range of 17 to 35 degrees Celsius (63 to 95 degrees Fahrenheit), though it didn't have the means to analyze the software used, members have said in interviews in recent months.

"We found out more than a year ago that the antipollution systems work only on a limited temperature zone—the temperature of the approval tests," Lorelei Limousin, a committee member from the Reseau Action Climat environmental non-profit group, said by phone March 15.

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China To Establish Air Pollution Research Fund

Posted March 15, 2017, 01:03 P.M. ET

By Michael Standaert

China will establish a special fund to direct scientific research toward fighting air pollution.

Without going into detail, Premier Li Keqiang said March 15 that "special conditions" contribute to northern China's heavy air pollution.

While the government will do more to reduce emissions caused by coal-fired power plants, vehicle exhaust and dust, other lesser-known factors must be studied to make combating the problem more effective, Li said at the close of the annual National People's Congress (NPC) meetings in Beijing.

In his government work report delivered before the full membership of the NPC—comparable to a U.S. president's State of the Union address—the premier outlined five actions the government would take over the rest of the year to reduce air pollution.

Upgrading Plants

Those actions include reducing emissions by installing electricity and natural gas in 3 million homes that use small, often poor-quality coal bricks for home heating as well as upgrading coal-burning plants to reduce emissions, particularly in the eastern coastal areas where most of the country's population lives.

Other actions include:

• Further expanding 24-hour real time monitoring of emissions of key heavy industries;

• Further reducing the number of older vehicles on the nation's roads and improving emissions and fuel standards nationwide;

• Further coordinating emergency response and air pollution control measures during heavy air pollution periods, which are now mainly in the winter heating months; and

• Increasing enforcement actions and investigations into pollution violations.

"In the future, blue skies will not and should not be a luxury," Li said.

China has seen improvements in air quality in most key areas three years after launching a national action plan, the Ministry of Environmental Protection announced last week.

Last year in Beijing, for example, average concentrations of PM2.5—small particles that pose the greatest risk to human health—fell almost 10 percent, the biggest annual decrease in the past four years.

Still, the annual average remains more than seven times the World Health Organization's recommended level.

The NPC, or China's main legislative body, meets for two weeks every March to review the work report, budgets and major plans for the rest of the year, approving these in nearly unanimous fashion in the final days of the event.

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Daily Environment Report for EPA

SUE AND SETTLE

Regulating Behind Closed Doors

U.S. CHAMBER OF COMMERCE

Reconsideration of 2008 Ozone NAAQS

$738 million

Boiler MACT Rule

Lead RRP Rule

$2.16 billion

Regional Haze Implementation Rules

Utility MACT Rule

$9.6 billion

Standards for Cooling Water Intake Structures

$90 billion

$18 billion

Florida Nutrient Standards for Estuaries and Flowing Waters

Revision to the Particulate Matter ($PM_{2.5}$) NAAQS

$3 billion

$350 million

TMDL for Chesapeake Bay

$500 million

Oil and Natural Gas MACT Rule

$384 million

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A Report on

SUE AND SETTLE

REGULATING BEHIND CLOSED DOORS

U.S. Chamber of Commerce

May 2013

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Introduction

What Is Sue and Settle?

Sue and settle occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups that effectively dictate the priorities and duties of the agency through legally binding, court-approved settlements negotiated behind closed doors—with no participation by other affected parties or the public.

As a result of the sue and settle process, the agency intentionally transforms itself from an independent actor that has discretion to perform its duties in a manner best serving the public interest into an actor subservient to the binding terms of settlement agreements, which includes using congressionally appropriated funds to achieve the demands of specific outside groups. This process also allows agencies to avoid the normal protections built into the rulemaking process—review by the Office of Management and Budget and the public, and compliance with executive orders—at the critical moment when the agency's new obligation is created.

What Is the Sue and Settle Process?

Executive Summary

William L. Kovacs
U.S. Chamber Senior Vice President for Environment, Technology & Regulatory Affairs

Background

The U.S. Chamber of Commerce undertook an investigation of the sue and settle process because of the growing number of complaints by the business community that it was being entirely shut out of regulatory decisions by key federal agencies. While the U.S. Environmental Protection Agency (EPA) and the Fish and Wildlife Service have been leaders in settling—rather than defending—cases brought by advocacy groups, other agencies, including the U.S. Forest Service, the Bureau of Land Management, the National Park Service, the Army Corps of Engineers, the U.S. Department of Agriculture, and the U.S. Department of Commerce, have also agreed to this tactic.

As discussed in our report *Sue and Settle: Regulating Behind Closed Doors*, we found that under this sue and settle process, EPA chose at some point not to defend itself in lawsuits brought by special interest advocacy groups at least 60 times between 2009 and 2012.[1] In each case, it agreed to settlements on terms favorable to those groups. These settlements directly resulted in EPA agreeing to publish more than 100 new regulations,[2] many of which impose compliance costs in the tens of millions and even billions of dollars.[3]

Lack of Agency Transparency On Sue and Settle Cases

We also found that when EPA was asked by Congress to provide information about the notices of intent to sue received by the agency or the petitions for rulemaking served on EPA by private parties, the agency could not—or would not—provide the information. When such lawsuits were initiated, EPA does not disclose the notice of the lawsuit or its filing until a settlement agreement had been worked out with the private parties and filed with the court. As a result, court orders were entered, binding the agency to undertake a specific rulemaking within a specific and usually very short time period, notwithstanding whether the agency actually had sufficient time to perform the obligations imposed by the court order. In response to Congress, EPA made it clear that it is "unable to accommodate this [congressional] request to make all petitions, notices, and requests for agency action publicly accessible in one location on the

[1] A description of the methodology the Chamber used to identify sue and settle cases is discussed in Appendices A and B of this report.
[2] *See* pages 43–45 for the list of rules and agency actions resulting from sue and settle cases.
[3] For a description of the costs of selected rules, see discussion and notes on pages 14–22.

Internet."[4] Specifically, "the EPA does not have a centralized process to individually characterize and sort all the different types of notices of intent the agency receives."[5] Imagine what would happen if a state or local government, a school district, or a publicly traded company claimed to have no knowledge about lawsuits brought against it, the number of cases settled by its lawyers, or the number of agreements that obligated it to undertake extensive new action? It is unimaginable that such an entity would be able to claim ignorance of lawsuits that significantly impact it or to be unable to provide its citizens, customers, and regulatory agencies with required information. And yet, the position of EPA has been that it would not be bothered to track settlements that impose significant new rules and requirements on the country or to notify the public about them in any systematic fashion.[6]

Sue and Settle Skirts Procedural Safeguards On the Rulemaking Process

The practice of agencies entering into voluntary agreements with private parties to issue specific rulemaking requirements also severely undercuts agency compliance with the Administrative Procedure Act. The Administrative Procedure Act is designed to promote transparency and public participation in the rulemaking process. Because the substance of a sue and settle agreement has been fully negotiated between the agency and the advocacy group before the public has any opportunity to see it—even in those situations where the agency allows public comment on the draft agreement—the outcome of the rulemaking is essentially set. Sue and settle allows EPA to avoid the normal protections built into the rulemaking process, such as review by OMB, reviews under several executive orders, and reviews by the public and the regulated community. Further, the principles of federalism are also flagrantly ignored when EPA uses the conditions in sue and settle agreements to set aside state-administered programs, such as the Regional Haze program. With no public input, EPA binds itself to the demands of a private entity with special interests that may be adverse to the public interest, especially in the areas of project development and job creation. Sue and settle activities deny the public its most basic of all rights in the regulatory process: the right to weigh in on a proposed regulatory decision before agency action occurs.

Sue and Settle Creates Tension Between the Branches of Government

At its heart, the sue and settle issue is a situation in which the executive branch expands the authority of agencies at the expense of congressional oversight. This occurs with at least the implicit cooperation of the courts, which typically rubber stamp proposed settlement agreements even though they enable private parties to dictate agency policy. Congress is harmed because its control over appropriations diminishes. Sue and settle deals (and not Congress) increasingly are what drive an agency's budget concerns. Additionally, the

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[4] Letter from Arvin Ganesan, EPA Associate Administrator for the Office of Congressional and Intergovernmental Affairs, to Hon. Fred Upton, Chairman, House Committee on Energy and Commerce (June 12, 2012) at 2.

[5] *Id.*

[6] It is our understanding that EPA has very recently begun to disclose on its website the notices of intent to sue that it receives from outside parties. While this is a welcome development, this important disclosure needs to be required by statute and not just be a voluntary measure. Moreover, agencies such as EPA also need to provide public notice of the filing of a complaint and/or petitions for rulemaking.

implementation of congressionally directed policies is now reprioritized by court orders that the agency asks the court to issue. Once the court approves the consent decree or settlement agreement, EPA is free to tell Congress "we are acting under court order and we must publish a new regulation."

Sue and Settle Migrates To Other Statutes?

A major concern is that the sue and settle tactic, which has been so effective in removing control over the rulemaking process from Congress—and placing it instead with private parties under the supervision of federal courts—will spread to other complex statutes that have statutorily imposed dates for issuing regulations, such as Dodd-Frank or Obamacare. On April 22, 2013, the U.S. District Court for the Northern District of California, which has been very active in sue and settle cases, issued an order in a Food Safety Modernization Act case that sets in motion a new process to bring sue and settle actions under Section 706 of the Administrative Procedure Act. In *Center for Food Safety v. Hamburg*,[7] the court recognized a statutorily imposed deadline, but also recognized that food safety is not always served by rushing a regulation to finality. In this instance, the court ordered the parties to "arrive at a mutually acceptable schedule" because "it will behoove the parties to attempt to cooperate on this endeavor, as any decision by the court will necessarily be arbitrary. The parties are hereby ORDERED to meet and confer, and prepare a joint written statement setting forth proposed deadlines, in detail sufficient to form the basis of an injunction." With a new structure in place that uses the Administrative Procedure Act as a basis for citizen suits, private interest groups and agencies could—without use of any other citizen suit provision—negotiate private arrangements for how an agency will proceed with a new regulation.

The Importance of Fixing the Sue and Settle Problem

Why is it so important to fix the sue and settle process? Congress's ability to act on or undertake oversight of the executive branch is diminished and perhaps eliminated through the private agreements between agencies and private parties. Rulemaking in secret, a process that Congress abandoned 65 years ago when it passed the Administrative Procedure Act, is dangerous because it allows private parties and willing agencies to set national policy out of the light of public scrutiny and the procedural safeguards of the Administrative Procedure Act.

Perhaps the most significant impact of these sue and settle agreements is that by freely giving away its discretion in order to satisfy private parties, an agency uses congressionally appropriated funds to achieve the demands of private parties. This happens even though there are congressional appropriations specifying the use of such funds. In essence, the agency intentionally transforms itself from an independent actor that has discretion to perform duties in a manner best serving the public interest into an actor subservient to the binding terms of the settlement agreements. The magnitude and serious consequences of the sue and settle problem have recently been recognized by at least one court, when it set aside a sue and settle

[7] *Center for Food Safety v. Hamburg*, No. C 12-4529 PJH, slip op. at 10 (N.D. Cal. Apr. 22, 2013).

agreement that would "promulgate a substantial and permanent amendment" to an agency rule.[8]

The Most Effective Solution to Sue and Settle Lies With Congress

In the final analysis, Congress is also to blame for letting the sue and settle process take on a life free of congressional review. Most of the sue and settle lawsuits were filed as citizen suits authorized under the various environmental statutes.[9] Because citizen suit provisions were included within the environmental titles of the U.S. Code, Congress placed jurisdiction and oversight of citizen suits with congressional authorizing committees rather than with the House and Senate Judiciary Committees. Despite the fact that the sole purpose of citizen suits is to grant access to the federal courts, which is the primary jurisdiction of the Judiciary committees, jurisdiction was instead placed in committees that had no expertise in the subject matter. Accordingly, no meaningful oversight has been conducted in more than four decades over the use and abuse of citizen suit activity, such as sue and settle.

Fortunately, however, in 2012, the House Judiciary Committee began looking at the abuses of the sue and settle process. It introduced the Sunshine for Regulatory Decrees and Settlements Act of 2012, which the House passed as part of a larger bill. Under the bill, before the agency and outside groups can file a proposed consent decree or settlement agreement with a court, the proposed consent decree or settlement has to be published in the *Federal Register* for 60 days to allow for public comment. Also, affected parties would be afforded an opportunity to intervene prior to the filing of the consent decree or settlement.

On April 11, 2013, the Sunshine for Regulatory Decrees and Settlements Act of 2013 was introduced in the Senate as S. 714, and in the House as H.R. 1493. It is a strong bill that would implement these and other important common-sense changes. Passage of this legislation will close the massive sue and settle loophole in our regulatory process.

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[8] *Conservation Northwest v. Sherman*, No. 11-35729, slip op. at 15 (9th Cir. Apr. 25, 2013) ("Because the consent decree in this case allowed the Agencies effectively to promulgate a substantial and permanent amendment to [a regulation] without having followed statutorily required procedures, it was improper.").

[9] *See, e.g.*, Clean Air Act, 42 U.S.C. § 7604; Clean Water Act, 33 U.S.C. § 1365; Resource Conservation and Recovery Act, 42 U.S.C. § 6972.

SUE AND SETTLE

REGULATING BEHIND CLOSED DOORS

May 2013

INTRODUCTION

Over the past several years, the business community has expressed growing concern about interest groups using lawsuits against federal agencies and subsequent settlements as a technique to shape agencies' regulatory agendas. The overwhelming majority of instances of sue and settle actions from 2009 to 2012 have occurred in the environmental regulatory context. These actions were primarily brought under the citizen suit provisions of the Clean Air Act, the Clean Water Act, and the Endangered Species Act.[10] The citizen suit provisions in environmental statutes such as the Clean Air Act provide advocacy groups with the most direct and straightforward path to obtain judicial review of an agency's failure to meet a statutory deadline or perform such other duty a plaintiff group believes is necessary and desirable.[11] From a new wave of endangered species listings to the EPA's federalization of the Chesapeake Bay cleanup program, to the federal takeover of regional haze programs, recent sue and settle arrangements have fueled fears that the rulemaking process itself is being subverted to serve the ends of a few favored interest groups.

Beginning in 2011, the U.S. Chamber of Commerce began working to better understand the full scope and consequences of the sue and settle issue. We set out to determine how often sue and settle actually happens, to identify major sue and settle cases, and to track the types of agency actions involved. Compiling information on sue and settle agreements turned out to be labor intensive and time consuming. Many such agreements are not clearly disclosed to the

[10] Clean Air Act, 42 U.S.C. § 7604; Clean Water Act, 33 U.S.C. § 1365; Endangered Species Act, 16 U.S.C. §1540(g).

[11] Interest groups have traditionally also obtained judicial review of agency action (or inaction) through section 706 of the Administrative Procedure Act (APA), even where the underlying statute does not contain an explicit citizen suit provision. *See, e.g., Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971)(Court of Appeals for the D.C. Circuit holds that an agency's compliance with NEPA is reviewable, and that the agency is not entitled to assert that it has wide discretion in performing the procedural duties required by NEPA). APA-based citizen suits to enforce or expand the requirements of regulatory programs developed under recent laws such as Dodd-Frank and the Affordable Care Act, and the potential for advocacy group-driven sue and settle agreements in areas like financial regulation, healthcare, transportation, and immigration are a growing likelihood. *See Center for Food Safety v. Hamburg*, No. C 12-4529 (PJH)(N.D. Cal. Apr. 22, 2013)(nonprofit group sued the Food and Drug Administration under section 706 of the APA to compel a rulemaking on a specific deadline. Despite agency's assertion that the "issuance of the required regulations on a rushed or hurried basis would not help protect human health and safety," the court ordered the parties to "meet and confer, and prepare a joint written statement setting forth proposed deadlines, in detail sufficient to form the basis of an injunction.").

public or other parties until after they have been signed by a judge and the agency has legally bound itself to follow the settlement terms. Even then, agencies do not maintain lists of their sue and settle cases that are publicly available.

Using a combination of approaches, the Chamber was able to compile a database of sue and settle cases and their subsequent rulemaking outcomes. This combined database, which is summarized at the end of this report, indicates the sue and settle cases for the current administration. The Chamber also developed data on the use of the tactic during earlier administrations.

WHAT IS SUE AND SETTLE?

Sue and settle occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups which effectively dictate the priorities and duties of the agency through legally binding, court-approved settlements negotiated behind closed doors—with no participation by other affected parties or the public.[12]

As a result of the sue and settle process, the agency intentionally transforms itself from an independent actor that has discretion to perform its duties in a manner best serving the public interest into an actor subservient to the binding terms of settlement agreements, which includes using congressionally appropriated funds to achieve the demands of specific outside groups. This process also allows agencies to avoid the normal protections built into the rulemaking process—review by the Office of Management and Budget (OMB) and other agencies, reviews under executive orders, and review by other stakeholders—at the critical moment when the agency's new obligations are created.

Because sue and settle lawsuits bind an agency to meet a specified deadline for regulatory action—a deadline the agency often cannot meet—the agreement essentially reorders the agency's priorities and its allocation of resources. These sue and settle agreements often go beyond simply enforcing statutory deadlines and the agreements themselves become the legal authority for expansive regulatory action with no meaningful participation by affected parties or the public. The realignment of an agency's duties and priorities at the behest of an individual special interest group runs counter to the larger public interest and the express will of Congress.

WHAT DID OUR RESEARCH REVEAL?

By using the methodologies described in Appendix A and Appendix B, the Chamber was able to compile a list of sue and settle cases that occurred between early 2009 and 2012. Because agencies are not required to notify the public when they receive notices from outside groups of

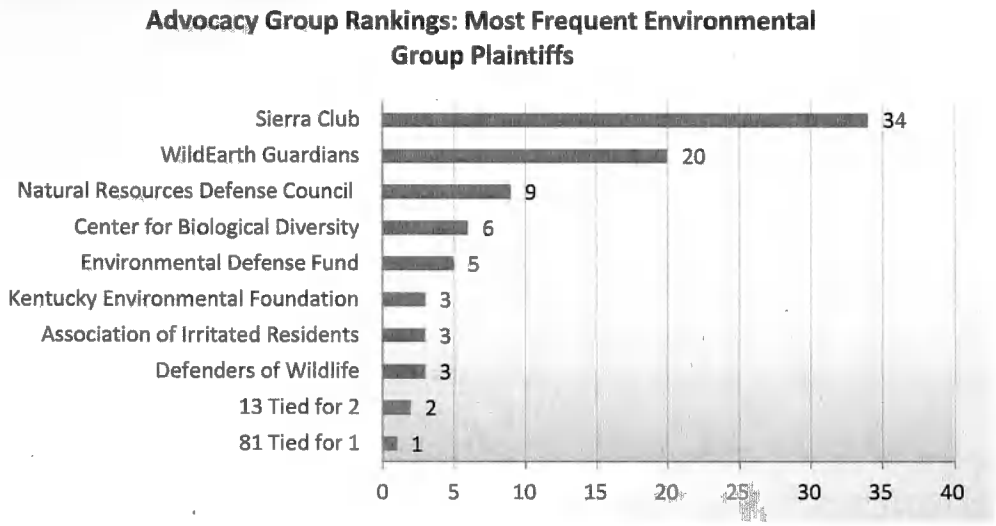
[12] The coordination between outside groups and agencies is aptly illustrated by a November 2010 sue and settle case where EPA and an outside advocacy group filed a consent decree and a joint motion to enter the consent decree with the court *on the same day* the advocacy group filed its complaint against EPA. *See Defenders of Wildlife v. Perciasepe*, No. 12-5122, slip op. at 6 (D.C. Cir. Apr. 23, 2013).

their intent to sue, or, in many cases, when they reach tentative settlement agreements with the groups, it is often extremely difficult for an interested party (e.g., a state, a regulated business, the public) to know about a settlement until it is final and has legally binding effect on the agency. For this reason, we do not know if the list of cases we have developed is a truly complete list of recent sue and settle cases. Only the agencies themselves and the Department of Justice[13] really know this.

Number of Sue and Settle Cases

Our investigation shows that from 2009 to 2012, a total of 71 lawsuits (including one notice of intent to sue) were settled under circumstances such that they can be categorized as sue and settle cases under the Chamber's definition. These cases include EPA settlements under the Clean Air Act and the Clean Water Act, along with key Fish and Wildlife Service (FWS) settlements under the Endangered Species Act. Significantly, settlement of these cases directly resulted in more than 100 new federal rules, many of which are major rules with estimated compliance costs of more than $100 million annually.

Which Advocacy Groups Use the Sue and Settle Process the Most?

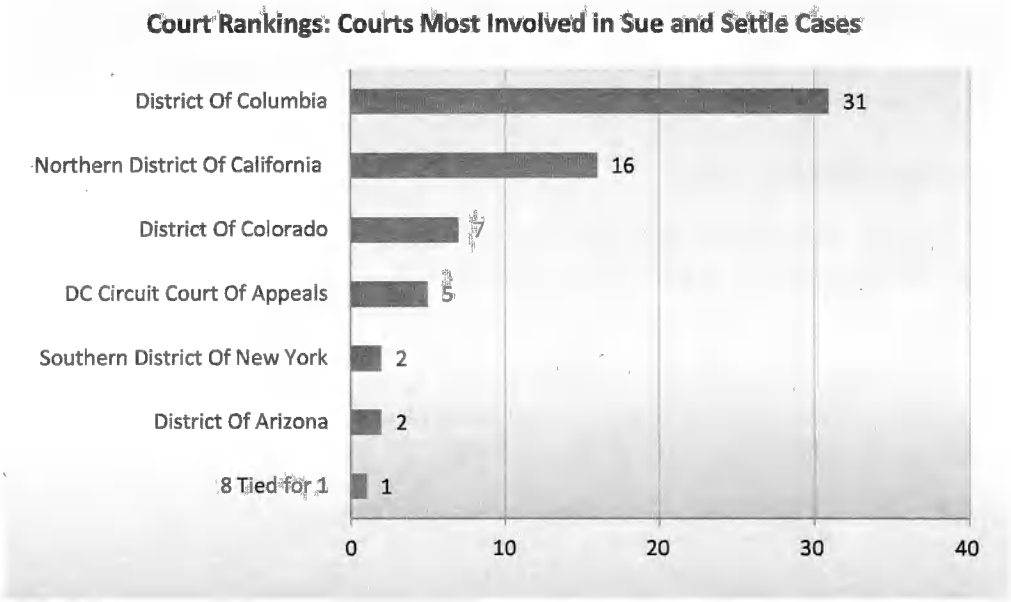


Several environmental advocacy groups have made the sue and settle process a significant part of their legal strategy. By filing lawsuits covering significant EPA rulemakings and regulatory initiatives, and then quickly settling, these groups have been able to circumvent the normal rulemaking process and effect immediate regulatory action with the consent of the agencies themselves.[14]

[13] Virtually all lawsuits against federal agencies are handled by U.S. Department of Justice attorneys. In all of the sue and settle cases the Chamber found, the Department of Justice represented the agency.

[14] Although the Chamber was not able to compile a complete database on the extent to which advocacy groups receive attorney's fees from the federal government, a review of a portion of the Chamber's database revealed that attorney's fees

Which Courts Handle the Most Sue and Settle Cases?

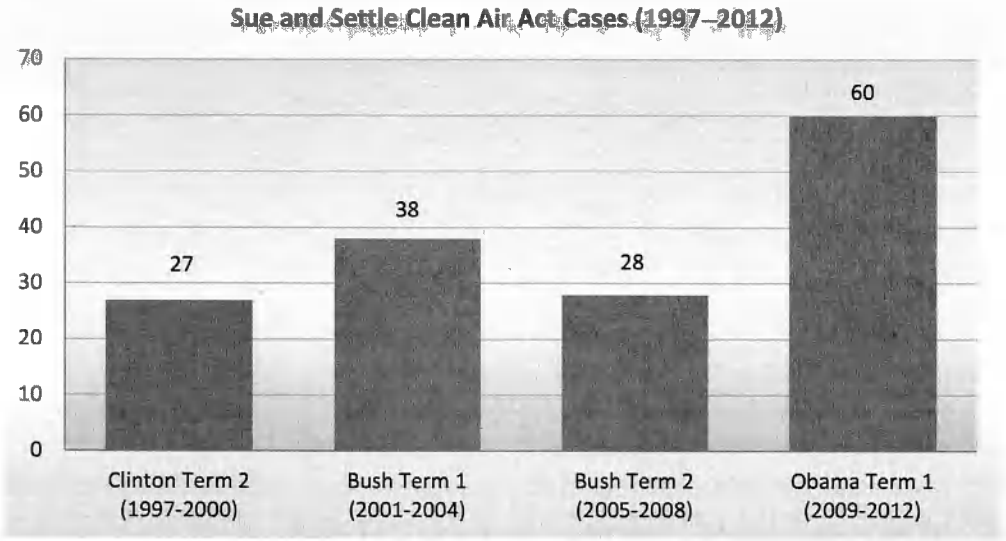


Comparing the Use of Sue and Settle Over the Past 15 Years

Unlike other environmental laws, the Clean Air Act specifically requires EPA to publish notices of draft consent decrees in the *Federal Register*.[15] These public notices gave the Chamber the opportunity to identify Clean Air Act settlement agreements/consent decrees going back to 1997. By excluding agreements resulting from enforcement actions, permitting cases, and other non-sue and settle cases (e.g., cases not involving the issuance of rules of general applicability), we have been able to compare the Clean Air Act sue and settle cases that occurred between 1997 and 2012. The following chart compares Clean Air Act sue and settle settlement agreements and consent decrees finalized during that period.

were awarded in at least 65% (49 of 71) of the cases. These fees are not paid by the agency itself, but are paid from the federal Judgment Fund. In effect, advocacy groups are incentivized by federal funding to bring sue and settle lawsuits and exert direct influence over agency agendas.

[15] Section 113(g) of the Clean Air Act, 42 U.S.C. § 7413(g), provides that "[a]t least 30 days before a consent decree or settlement agreement of any kind under [the Clean Air Act] to which the United States is a party (other than enforcement actions) . . . the Administrator shall provide a reasonable opportunity by notice in the *Federal Register* to persons who are not named as parties or intervenors to the action or matter to comment in writing." Of all the other major environmental statutes, only section 122(i) of the Superfund law, (42 U.S.C. § 9622(i)) requires an equivalent public notice of a settlement agreement.



The results show that sue and settle is by no means a recent phenomenon[16] and that the tactic has been used during both Democratic and Republican administrations. To the extent that the sue and settle tactic skirts the normal notice and comment rulemaking process, with its procedural checks and balances, agencies have been willing for decades to allow sue and settle to vitiate the rulemaking requirements of the Administrative Procedure Act.[17] Moreover, our research found that business groups have also taken advantage of the sue and settle approach to influence the outcome of EPA action. While advocacy groups have used sue and settle much more often in recent years, both interest groups and industry have taken advantage of the tactic.

WHAT ARE THE ECONOMIC IMPLICATIONS OF OUR FINDINGS?

Since 2009, regulatory requirements representing as much as $488 billion in new costs have been imposed by the federal government.[18] By itself, EPA is responsible for adding tens of billions of dollars in new regulatory costs.[19] Significantly, more than 100 of EPA's costly new rules were the product of sue and settle agreements. The chart below highlights just ten of the most significant rules that arose from sue and settle cases:

[16] The sue and settle problem dates back at least to the 1980s. In 1986, Attorney General Edward Meese III issued a Department of Justice policy memorandum, referred to as the "Meese Memo," addressing the problematic use of consent decrees and settlement agreements by the government, including the agency practice of turning discretionary rulemaking authority into mandatory duties. *See* Meese, Memorandum on Department Policy Regarding Consent Decrees and Settlement Agreements (March 13, 1986).

[17] 5 U.S.C. Subchapter II.

[18] Sam Batkins, American Action Forum, "President Obama's $488 Billion Regulatory Burden" (September 19, 2012).

[19] *Id.* Mr. Batkins estimates the regulatory burden added by EPA in 2012 alone to be $12.1 billion.

Ten Costly Regulations Resulting From Sue and Settle Agreements		
1.	Utility MACT Rule	Up to $9.6 billion annually
2.	Lead Renovation, Repair and Painting (LRRP) Rule	Up to $500 million in first-year
3.	Oil and Natural Gas MACT Rule	Up to $738 million annually
4.	Florida Nutrient Standards for Estuaries and Flowing Waters	Up to $632 million annually
5.	Regional Haze Implementation Rules	$2.16 billion cost to comply
6.	Chesapeake Bay Clean Water Act Rules	Up to $18 billion cost to comply
7.	Boiler MACT Rule	Up to $3 billion cost to comply
8.	Standards for Cooling Water Intake Structures	Up to $384 million annually
9.	Revision to the Particulate Matter ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS)	Up to $350 million annually
10.	Reconsideration of 2008 Ozone NAAQS	Up to $90 billion annually

1. Utility MACT Rule

In December 2008, environmental advocacy groups sued EPA, seeking to compel the agency to issue maximum achievable control technology (MACT) air quality standards for hazardous air pollutants from power plants.[20] In October 2009, EPA lodged a proposed consent decree.[21] The intervenor in the case, representing the utility industry, argued that MACT standards such as those proposed by EPA were not required by the Clean Air Act.[22]

Utility MACT (also known as the Mercury Air Toxics Standard, or MATS) is a prime example of EPA taking actions, in the wake of a sue and settle agreement, that were not mandated by the Clean Air Act. Ironically, even in this situation, where an affected party was able to intervene, EPA and the advocacy groups did not notify or consult with them about the proposed consent decree. Moreover, even though the District Court for the District of Columbia expressed some concern about the intervenor being excluded from the settlement negotiations, the court still approved the decree in the lawsuit.[23] The extremely costly Utility MACT Rule, which EPA was not previously required to issue, is estimated by EPA to cost $9.6 billion annually by 2015.[24]

2. Lead Renovation, Repair and Painting Rule for Residential Buildings

In 2008, numerous environmental groups sued EPA to challenge EPA's April 22, 2008, Lead Renovation, Repair and Painting Program (LRRP) Rule, and these suits were consolidated in the

[20] *American Nurses Ass'n v. Jackson*, No. 1:08-cv-02198 (RMC) (D.D.C.), filed December 18, 2008.
[21] *American Nurses Ass'n*, Defendant's Notice of Lodging of Proposed Consent Decree (Oct. 22, 2009).
[22] *American Nurses Ass'n*, Motion of Defendant-Intervenor Utility Air Regulatory Group for Summary Judgment (June 24, 2009)(Defendant-Intervenors argued that the proposed consent decree improperly limited the government's discretion because it required EPA to find that MACT standards under section 112(d) of the Clean Air Act were required, rather than issuing less burdensome standards or no standards at all).
[23] *American Nurses Ass'n v. Jackson*, No. 1:08-cv-02198 (RMC), 2010 WL 1506913 (D.D.C. Apr. 15, 2010).
[24] 77 Fed. Reg. 9,304, 9306 (Feb. 16, 2012); *see also* Letter from President Barack Obama to Speaker John Boehner (August 30, 2011), Appendix "Proposed Regulations from Executive Agencies with Cost Estimates of $1 Billion or More."

D.C. Circuit Court of Appeals. EPA chose not to defend the suits and settled with the environmental groups on August 24, 2009. As part of the settlement agreement, EPA agreed to propose significant and specific changes to the rule, including the elimination of an "opt-out" provision that had been included in the 2008 rule. The opt-out authorized homeowners without children under six or pregnant women residing in the home to allow their contractor to forgo the use of lead-safe work practices during the renovation, repair, and/or painting activity. Removing the opt-out provision more than doubled the amount of homes subject to the LRRP rule—to an estimated 78 million—and increased the cost of the rule by $500 million per year.[25] To make matters worse, EPA underestimated the number of contractors who would have to be trained to comply with the new rule and failed to anticipate that there were too few trainers to prepare contractors by the rule's deadline.

3. Oil and Natural Gas MACT Rule

In January 2009, environmental groups sued EPA to update federal regulations limiting air emissions from oil- and gas-drilling operations. EPA settled the dispute with environmentalists on December 7, 2009. The settlement required EPA to review and update three sets of regulations: (1) new source performance standards (NSPS) for oil and gas drilling, (2) the Oil and Gas MACT standard, and (3) the air toxics "residual risk" standards. On August 23, 2011, EPA proposed a comprehensive set of updates to these rules, including new NSPS and MACT standards. Despite concerns by the business community that EPA had rushed its analysis of the oil and gas industry's emissions and relied on faulty data, EPA issued final rules on August 16, 2012. These rules are estimated by the agency to impose up to $738 million in additional regulatory costs each year.[26]

4. Florida Nutrient Standards for Estuaries and Flowing Waters

Environmental groups sued EPA in July 2008 to set water quality standards in Florida that would cut down on nitrogen and phosphorous in order to reduce contamination from sewage, animal waste, and fertilizer runoff. EPA entered into a consent decree with the plaintiffs in August 2009—a consent decree that was opposed by nine industry intervenors. As part of the settlement, EPA agreed to issue numeric nutrient limits in phases. Limits for Florida's estuaries and flowing waters were proposed on December 18, 2012. Final rules are required by September 30, 2013. EPA recently approved Florida's proposed nutrient standards as substantially complying with the federal proposal. The estimated cost of the federal standards is up to $632 million per year.[27]

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[25] 75 Fed. Reg. 24,802, 24,812 (May 6, 2010).

[26] *See* Fall 2011 Regulatory Plan and Regulatory Agenda, "Oil and Natural Gas Sector – New Source Performance Standards and NESHAPS," RIN: 2060-AP76, at http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201110&RIN=2060-AP76.

[27] EPA, Proposed Nutrient Standards for Florida's Coastal, Estuarine & South Florida Flowing Waters, November 2012, at http://water.epa.gov/lawsregs/rulesregs/upload/floridafaq.pdf.

5. Regional Haze Implementation Rules

EPA's regional haze program, established decades ago by the Clean Air Act, seeks to remedy visibility impairment at federal national parks and wilderness areas. Because regional haze is an aesthetic requirement, and not a health standard, Congress emphasized that states—and not EPA—should decide which measures are most appropriate to address haze within their borders.[28] Instead, EPA has relied on settlements in cases brought by environmental advocacy groups to usurp state authority and federally impose a strict new set of emissions controls costing 10 to 20 times more that the technology chosen by the states. Beginning in 2009, advocacy groups filed lawsuits against EPA alleging that the agency had failed to perform its nondiscretionary duty to act on state regional haze plans. In five separate consent decrees negotiated with the groups and, importantly, without notice to the states that would be affected, EPA agreed to commit itself to specific deadlines to act on the states' plans.[29] Next, on the eve of the deadlines it had agreed to, EPA determined that each of the state haze plans was in some way procedurally deficient. Because the deadlines did not give the states time to resubmit revised plans, EPA argued that it had no choice but to impose its preferred controls federally. EPA used sue and settle to reach into the state haze decision-making process and supplant the states as decision makers—despite the protections of state primacy built into the regional haze program by Congress.

As of 2012, the federal takeover of the states' regional haze programs is projected to cost eight states an estimated $2.16 billion over and above what they had been prepared to spend on visibility improvements.[30]

6. Chesapeake Bay Clean Water Act Rules

On January 5, 2009, individuals and environmental advocacy groups filed a lawsuit against EPA alleging that the agency was not taking necessary measures to protect the Chesapeake Bay.[31] On May 10, 2010, EPA and the groups entered into a settlement agreement that would require EPA to establish stringent total maximum daily load (TMDL) standards for the Bay. EPA also agreed to establish a new stormwater regime for the watershed. The U.S. District Court for the District of Columbia signed the settlement agreement on May 19, 2010.[32] The agency later cited the binding agreement as the legal basis for its expansive action on TMDLs and stormwater.[33]

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[28] *See* 42 U.S.C. § 7491 (b)(2)(A).

[29] The five consent decrees are: *Nat'l Parks Cons. Ass'n, et al. v. Jackson*, No. 1:11-cv-01548 (D.D.C. Aug 18, 2011); *Sierra Club v. Jackson*, No. 1-10-cv-02112-JEB (D.D.C. Aug. 18, 2011); *WildEarth Guardians v. Jackson*, No. 1:11-cv-00743-CMA-MEH (D.Col. June 16, 2011); *WildEarth Guardians v. Jackson*, No. 4-09-CV02453 (N.D.Cal. Feb. 23, 2010); *WildEarth Guardians v. Jackson*, No. 1:10-cv-01218-REB-BNB (D.Col. Oct. 28, 2010).

[30] *See* William Yeatman, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012)(Oklahoma was ultimately forced to comply with federally mandated SO2 controls rather than implementing fuel switching; costs for the SO2 controls were estimated to at $1.8 billion). The report is available at http://www.uschamber.com/sites/default/files/reports/1207_ETRA_HazeReport_lr.pdf.

[31] *Fowler v. EPA*, case 1:09-00005-CKK, Complaint (Jan. 5, 2009).

[32] *Fowler v. EPA*, Settlement Agreement (May 19, 2010).

[33] *See Clouded Waters: A Senate Report Exposing the High Cost of EPA's Water Regulations and Their Impacts on State and Local Budgets*, U.S. Senate Committee on Environment and Public Works, Minority Staff, at pp. 2-3 (June 30, 2011), available at http://epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=fbcb69a1-802a-23ad-4767-8b1337aba45f.

Several lawmakers, in a 2012 letter, argued that EPA was taking this substantive action even though it was not authorized to do so under law.[34] Further, they also argued that EPA was improperly using settlements as the regulatory authority for other Clean Water Act actions:

> We are concerned that EPA has demonstrated a disturbing trend recently, whereby EPA has been entering into settlement agreements that purport to expand federal regulatory authority far beyond the reach of the Clean Water Act and has then been citing these settlement agreements as a source of regulatory authority in other matters of a similar nature.
>
> One example of this practice is EPA's out-of-court settlement agreement with the Chesapeake Bay Foundation in May 2010. EPA has referred to that settlement as a basis for its establishment of a federal total maximum daily load (TMDL) for the entire 64,000 square-mile Chesapeake Bay watershed and EPA's usurpation of state authority to implement TMDLs in that watershed. EPA also has referred to that settlement as a basis for its plan to regulate stormwater from developed and redeveloped sites, which exceeds the EPA's statutory authority.[35]

The sweeping new federal program for the Chesapeake Bay is major in its scope and economic impact. The program sets land use–type limits on businesses, farms, and communities on the Bay based upon their calculated daily pollutant discharges. EPA's displacement of state authority is estimated to cost Maryland and Virginia up to $18 billion[36] to implement.

The federal takeover of the Chesapeake Bay program is unprecedented in its scope; however, by relying on the settlement agreement as the source of its regulatory authority for the TMDLs and stormwater program, EPA did not have to seek public input, explain the statutory basis for its actions in the Clean Water Act, or give stakeholders an opportunity to evaluate the science upon which the agency relies. Because the rulemakings resulted from a settlement agreement that set tight timelines for action, the public never had access to the information, which would have been necessary in order to comment effectively on the modeling and the assumptions EPA used.

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[34] Letter to EPA Administrator Lisa Jackson from House Transportation and Infrastructure Committee Chairman John L. Mica, House Water Resources and Environment Subcommittee Chairman Bob Gibbs, Senate Environment and Public Works Committee Ranking Member James Inhofe, and Senate Water and Wildlife Subcommittee Ranking Member Jeff Sessions, January 20, 2012. The date of the letter is based on the press release date, http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=fbcb69a1-802a-23ad-4767-8b1337aba45f and this project Vote Smart page, http://votesmart.org/public-statement/663407/letter-to-lisa-jackson-administrator-of-environmental-protection-agency-epa.

[35] "House, Senate Lawmakers Highlight Concerns with EPA Sue & Settle Tactic for Backdoor Regulation," United States Senate Committee on Environment & Public Works, Minority Office, January 20, 2012 at http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=fbcb69a1-802a-23ad-4767-8b1337aba45f.

[36] *See* Sage Policy Group, Inc., *The Impact of Phase I Watershed Implementation Plans on Key Maryland Industries* (Apr. 2011); *CHESAPEAKE BAY JOURNAL*, January 2011, available at www.bayjournal.com/article.cfm?article=4002.

7. Boiler MACT Rule

In 2003, EPA and Sierra Club entered into a consent agreement that required EPA to set a MACT standard for major- and area-source boilers. In 2006, the U.S. District Court for the District of Columbia issued an order detailing a schedule for the rulemaking. On September 10, 2009, April 3, 2010, and September 20, 2010, EPA and Sierra Club agreed to extend the deadline for the rule. Sierra Club subsequently opposed EPA's request to further extend the deadline from January 16, 2011, to April 13, 2012, despite declarations by EPA officials that the agency could not meet the January 2011 deadline because of the time necessary to consider and respond to all of the public comments on the proposed rule. The D.C. District Court ruled that EPA had had enough time and gave the agency only an additional month to finalize the rule. EPA knew the final rule it had been ordered to issue would not survive court challenge. Accordingly, EPA published a notice of reconsideration the same day it finalized the rule: March 21, 2011. Based on comments it received from the public as well as additional data, EPA issued final reconsidered rules on January 31, 2013, and February 1, 2013. The cost of the 2012 Boiler MACT Rule that EPA had to issue prematurely was estimated by the agency to be $3 billion.[37]

8. Standards for Cooling Water Intake Structures

On November 17, 2006, environmental advocacy groups sued EPA, claiming that the agency had failed to use "Best Technology Available" when it issued a final rule setting standards for small, existing cooling water intake structures under section 316(b) of the Clean Water Act.[38] EPA defended against this lawsuit. On July 23, 2010, EPA and the groups agreed to a voluntary remand of the 2006 cooling water intake rule. On November 22, 2010, EPA entered into a settlement agreement with the environmental groups to initiate a new rulemaking and to take public comment on the appropriateness of subjecting small, existing facilities to the national standards developed for larger facilities. EPA published the proposed rule on April 20, 2011. The proposal would increase dramatically the cost to smaller facilities—such as small utilities, pulp and paper plants, chemical plants, and metal plants—by more than $350 million each year.[39]

9. Revision to the Particulate Matter ($PM_{2.5}$) NAAQS

EPA entered into a consent decree with advocacy groups and agreed to issue a final rule by December 14, 2012, revising the NAAQS for fine particulate matter ($PM_{2.5}$). Even by EPA's own admission, this deadline was unrealistic. In a May 4, 2012, declaration filed with the U.S. District Court of the District of Columbia, Assistant Administrator for Air Regina McCarthy stated that EPA would need until August 14, 2013, to finalize the $PM_{2.5}$ NAAQS due to the many technical and complex issues included in the proposed rulemaking.[40] Despite this recognition of the time

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[37] Letter from President Barack Obama to Speaker John Boehner (Aug. 30, 2011), Appendix "Proposed Regulations from Executive Agencies with Cost Estimates of $1 Billion or More."

[38] 71 Fed. Reg. 35,046 (Jun. 16, 2006).

[39] "2012 Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," rule web page for "Criteria and Standards for Cooling Water Intake Structures," RIN: 2040-AE95, available at http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=2040-AE95.

[40] *American Lung Ass'n v. EPA*, Nos. 1:12-cv-00243, 1:12-cv-00531, Declaration of Regina McCarthy (D.D.C. May 4, 2012) at ¶ 20.

constraints, EPA agreed in the original consent decree to a truncated deadline, promising to finish the rule in only half the time it believed it actually needed to do the rulemaking properly. The final rule is estimated to cost as much as $382 million each year.[41]

10. Reconsideration of the 2008 Ozone NAAQS

On May 23, 2008, environmental groups sued EPA to challenge the final revised ozone NAAQS, which the agency had published on March 27, 2008. The 2008 rule had lowered the eight-hour primary ground-level ozone standard from 84 parts per billion (ppb) to 75 ppb. On March 10, 2009, EPA filed a motion requesting that the court hold the cases in abeyance to allow time for officials from the new administration to review the 2008 standards and determine whether they should be reconsidered. On January 19, 2010, EPA announced that it had decided to reconsider the 2008 ozone NAAQS.[42] Although EPA did not enter into a settlement agreement or consent decree with the environmental group, it readily accepted the legal arguments put forth by the group despite available legal defenses.[43] The agency announced its intention to propose a reconsidered standard ranging between 70 ppb and 65 ppb.[44] Although the reconsidered ozone NAAQS was not published—and was withdrawn by the administration on September 2, 2011—EPA had estimated that the reconsidered standard would impose up to $90 billion of new costs per year on the U.S. economy.[45]

Other Sue and Settle-Based Rulemakings of Particular Note

Revisions to EPA's Rule on Protections for Subjects in Human Research Involving Pesticides

In 2006, EPA issued a final rule on protecting human subjects in research involving pesticides.[46] Various advocacy groups sued EPA, alleging that the rule did not go far enough.[47] In November 2010, EPA and the advocacy groups finalized a settlement agreement that required EPA to include specific language for a new proposed rule.

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[41] "Overview of EPA's Revisions to the Air Quality Standards for Particle Pollution (Particulate Matter)," Environmental Protection Agency (2012), *see* http://www.epa.gov/pm/2012/decfsoverview.pdf.

[42] 75 Fed. Reg. 2,938, 2,944 (Jan. 19, 2010).

[43] Most of the sue and settle cases identified in this report involve a consent decree or settlement agreement. However, there is a variation of this standard type of sue and settle case that contains many of the same problems that these cases contain, but do not involve a consent decree or settlement agreement. In these cases, advocacy groups sue agencies and then the agencies take the desired action sought by the advocacy groups without any consent decrees or settlement agreements.

[44] 75 Fed. Reg. 2,938, 2,944 (Jan. 19, 2010).

[45] Letter from President Barack Obama to Speaker John Boehner (Aug. 30, 2011), Appendix "Proposed Regulations from Executive Agencies with Cost Estimates of $1 Billion or More." EPA's intention to revise the 2008 Ozone NAAQS Rule less than two years after it had been finalized—which was unprecedented—and the standard's staggering projected compliance costs, caused tremendous public outcry, which lead to the planned rule being withdrawn at the order of the White House on September 2, 2011. EPA is expected to propose the revised ozone NAAQS in late 2013 or early 2014.

[46] 71 Fed. Reg. 6,138 (Feb. 6, 2006).

[47] *Natural Resources Defense Council v. EPA*, No. 06-0820-ag (2d Cir.). NRDC filed a petition for review on February 23, 2006. Other plaintiffs filed petitions shortly thereafter. The case was consolidated into this case before the Second Circuit.

The advocacy group's influence on the substance of the rules is reflected in the fact that their desired regulatory changes were directly incorporated into the proposed rule. In the preamble of the 2011 proposed rule,[48] EPA wrote:

> EPA also agreed to propose, at a minimum, amendments to the 2006 rule that are substantially consistent with language negotiated between the parties and attached to the settlement agreement.... Although the wording of the amendments proposed in this document [2011 proposed rule] differs in a few details of construction and wording, they are substantially consistent with the regulatory language negotiated with Petitioners, and EPA considers these amendments to address the Petitioners' major arguments.[49]

In fact, there are entire passages from the settlement agreement that are identical to the language included in the 2011 proposed rule.[50] EPA was not mandated by statute to take any action on the human-testing rule and certainly was not required to "cut and paste" the language sought by the advocacy groups. If EPA was concerned that the rule needed to be changed, it should have gone through a normal notice and comment rulemaking rather than writing the substance of the proposed rule behind closed doors.

U.S. Fish and Wildlife Service (FWS) Endangered Species Act Listings and Critical Habitat Designation

FWS agreed in May and July 2011, to two consent decrees with an environmental advocacy group requiring the agency to propose adding more than 720 new candidates to the list of endangered species under the Endangered Species Act.

FWS used a settlement in 2009 to designate a large critical habitat area under the Endangered Species Act.[51] In 2008, environmental advocacy groups sued FWS to protest the exclusion of 13,000 acres of national forest land in Michigan and Missouri from the final "critical habitat" designation for the endangered Hine's emerald dragonfly under the Endangered Species Act.[52] Initially, FWS disputed the case; however, while the case was pending, the new administration took office, changed its mind, and settled with the plaintiffs on February 12, 2009.[53] FWS doubled the size of the critical habitat area from 13,000 acres to more than

[48] 76 Fed. Reg. 5,735, 5,740 (February 2, 2011).
[49] Settlement Agreement between EPA and plaintiffs connected to *Natural Resources Defense Council v. EPA*, 06-0820, (2nd Cir.), November 3, 2010. *See also* 76 Fed. Reg. 5,735, 5,740-5,741 (February 2, 2011).
[50] *See* Settlement Agreement between EPA and plaintiffs connected to *Natural Resources Defense Council v. EPA*, 06-0820 (2nd Cir.), November 3, 2010, and the proposed rule at 76 Fed. Reg. 5735, 5740. Much of the language in 26.1603(b) and (c) of the proposed rule is identical to the language set forth in the settlement agreement.
[51] *Northwoods Wilderness Recovery v. Kempthorne*, Civil Action No. 08-01407, (N.D. Ill.), Stipulated Settlement Agreement and Order of Dismissal (February 12, 2009).
[52] *Northwoods Wilderness Recovery v. Kempthorne*, Civil Action No. 08-01407, Complaint for Declaratory and Injunctive Relief, March 10, 2008 (N.D. Ill.).
[53] *Supra*, note 37.

26,000 acres, as sought by the advocacy groups.[54] Thus, FWS effectively removed a large amount of land from development without affected parties having any voice in the process. Even the federal government did not think FWS was clearly mandated to double the size of the critical habitat area, as evidenced by the previous administration's willingness to fight the lawsuit.

Moreover, FWS agreed in May and July 2011 to two consent decrees with an environmental advocacy group, requiring the agency to propose adding more than 720 new candidates to the list of endangered species under the Endangered Species Act.[55] Agreeing to list this many species all at once imposes a huge new burden on the agency. According to the director of FWS, in FY 2011, FWS was allocated $20.9 million for endangered species listing and critical habitat designation; the agency spent more than 75% of this allocation ($15.8 million) taking the substantive actions required by court orders or settlement agreements resulting from litigation.[56] In other words, sue and settle cases and other lawsuits are effectively driving the regulatory agenda of the Endangered Species Act program at FWS.

THE PUBLIC POLICY IMPLICATIONS OF SUE AND SETTLE

By being able to sue and influence agencies to take actions on specific regulatory programs, advocacy groups use sue and settle to dictate the policy and budgetary agendas of an agency. Instead of agencies being able to use their discretion on how best to utilize their limited resources, they are forced to shift these resources away from critical duties in order to satisfy the narrow demands of outside groups.

According to the director of the FWS, in FY 2011 the FWS was allocated $20.9 million for endangered species listing and critical habitat designation; the agency spent more than 75% of this allocation ($15.8) taking the substantive actions required by court orders or ***settlement agreements*** *resulting from litigation.*

Through sue and settle, advocacy groups also significantly affect the regulatory environment by getting agencies to issue substantive requirements that are not required by law. Even when a regulation is required, agencies can use the terms of a sue and settle agreement as a legal basis for allowing special interests to dictate the discretionary terms of the regulations. Third parties have a very difficult time challenging the agency's surrender of its discretionary power because they typically cannot intervene, and the courts often simply want the case to be settled quickly.

[54] *See, e.g.*, 75 Fed. Reg. 21,394 (August 30, 2010).

[55] Stipulated Settlement Agreements, *WildEarth Guardians v. Salazar* (D.D.C. May 10, 2011) and *Center for Biological Diversity v. Salazar* (D.D.C. July 12, 2011). The requirement to add more than 720 candidates for listing as endangered species would significantly add to the existing endangered species list that contains 1,118 plant and animal species, which could significantly expand the amount of critical habitat in the U.S. This would be a nearly two-thirds expansion in the number of listed species. Fish and Wildlife Species Reports, at http://ecos.fws.gov/tess_public/pub/Boxscore.do.

[56] Testimony of Hon. Dan Ashe, Director, U.S. Fish and Wildlife Service before the House Natural Resources Committee (December 6, 2011).

Likewise, when advocacy groups and agencies negotiate deadlines and schedules for new rules through the sue and settle process, the rulemaking process can suffer greatly. Dates for regulatory action are often specified in statutes, and agencies like EPA are typically unable to meet the majority of those deadlines. To a great extent, these agencies must use their discretion to set resource priorities in order to meet their many competing obligations. By agreeing to deadlines that are unrealistic and often unachievable, the agency lays the foundation for rushed, sloppy rulemaking that often delays or defeats the objective the agency is seeking to achieve. These hurried rulemakings typically require correction through technical corrections, subsequent reconsiderations, or court-ordered remands to the agency. Ironically, the process of issuing rushed, poorly developed rules and then having to spend months or years to correct them defeats the advocacy group's objective of forcing a rulemaking on a tight schedule. The time it takes to make these fixes, however, does not change a regulated entity's immediate obligation to comply with the poorly constructed and infeasible rule.

Instead of agencies being able to use their discretion on how best to utilize their limited resources, they are forced to shift these resources away from critical duties in order to satisfy the narrow demands of outside groups.

Moreover, if regulated parties are not at the table when deadlines are set, an agency will not have a realistic sense of the issues involved in the rulemaking (e.g., will there be enough time for the agency to understand the constraints facing an industry, to perform emissions monitoring, and to develop achievable standards?). Especially when it comes to implementation timetables, agencies are ill-suited to make such decisions without significant feedback from those who actually will have to comply with a regulation.

By setting accelerated deadlines, agencies very often give themselves insufficient time to comply with the important analytic requirements that Congress enacted to ensure sound policymaking. These requirements include the Regulatory Flexibility Act (RFA)[57] and the Unfunded Mandates Reform Act.[58] In addition to undermining the protections of these statutory requirements, rushed deadlines can limit the review of regulations under the OMB's regulatory review under executive orders,[59] among other laws. This short-circuited process deprives the public (and the agency itself) of critical information about the true impact of the rule.

Unreasonably accelerated deadlines, such as with $PM_{2.5}$ NAAQS, have adverse impacts that go well beyond the specific rule at issue. As Assistant Administrator McCarthy noted in her declaration before the court in the $PM_{2.5}$ NAAQS case discussed above, an unreasonable deadline for one rule will draw resources from other regulations that may also be under

[57] Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. §§ 601-612.

[58] Unfunded Mandates Reform Act of 1995, 2 U.S.C. § 1501 et seq.

[59] *See, e.g.,* Executive Order 12,866, "Regulatory Planning and Review" (September 30, 1993); Executive Order 13132, "Federalism" (August 4, 1999); Executive Order 13,211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (May 18, 2001); Executive Order 13,563 "Improving Regulation and Regulatory Review" (January 18, 2011).

deadlines.[60] When there are unrealistic deadlines, there will be collateral damage on these other rules, which will invite advocacy groups to reset EPA's priorities further when they sue to enforce those deadlines.

In fact, one of the primary reasons advocacy groups favor sue and settle agreements approved by a court is that the court retains jurisdiction over the settlement and the plaintiff group can readily enforce perceived noncompliance with the agreement by the agency. For its part, the agency cannot change any of the terms of the settlement (e.g., an agreed deadline for a rulemaking) without the consent of the advocacy group. Thus, even when an agency subsequently discovers problems in complying with a settlement agreement, the advocacy group typically can force the agency to fulfill its promise, regardless of the consequences for the agency or regulated parties.

Because a settlement agreement directs the structure (and sometimes even the actual substance) of the agency rulemaking that follows, interested parties have a very limited ability to alter the subsequent rulemaking through comments.

For all of these reasons, sue and settle violates the principle that if an agency is going to write a rule, then the goal should be to develop the most effective, well-tailored regulation. Instead, rulemakings that are the product of sue and settle agreements are most often rushed, sloppy, and poorly conceived. They usually take a great deal of time and effort to correct, when the rule could have been done right in the first place if the rulemaking process had been conducted properly.

Notice and Comment Allowed After a Sue and Settle Agreement Does Not Give the Public Real Input

The opportunity to comment on the product of sue and settle agreements, either when the agency takes comment on a draft settlement agreement or takes notice and comment on the subsequent rulemaking, is not sufficient to compensate for the lack of transparency and participation in the settlement process itself. In cases where EPA allows public comment on draft consent decrees, EPA only rarely alters the consent agreement—even after it receives adverse comments.[61]

[60] "This amount of time [requested as an extension by EPA] also takes into account the fact that during the same time period for this rulemaking, the Office of Air and Radiation will be working on many other major rulemakings involving air pollution requirements for a variety of stationary and mobile sources, many with court-ordered or *settlement agreement deadlines*." *American Lung Ass'n v. EPA*, Nos. 1:12-cv-00243, 1:12-cv-00531, Declaration of Regina McCarthy (D.D.C. May 4, 2012) at ¶ 15 (emphasis added).

[61] In the $PM_{2.5}$ NAAQS deadline settlement agreement discussed above, for example, the timetable for final rulemaking action remained unchanged despite industry comments insisting that the agency needed more time to properly complete the rulemaking. Even though EPA itself agreed that more time was needed, the rulemaking deadline in the settlement agreement was not modified.

Moreover, because the settlement agreement directs the timetable and the structure (and sometimes even the actual substance[62]) of the agency rulemaking that follows, interested parties usually have a very limited ability to alter the design of the subsequent rulemaking through their comments.[63] In effect, the "cement" of the agency action is set and has already hardened by the time the rule is proposed, and it is very difficult to change it. Once an agency proposes a regulation, the agency is restricted in how much it can change the rule before it becomes final.[64] Proposed regulations are not like proposed legislation, which can be very fluid and go through several revisions before being enacted. When an agency proposes a regulation, they are not saying, "let's have a conversation about this issue," they are saying, "this is what we intend to put into effect unless there is some very good reason we have overlooked why we cannot." By giving an agency feedback during the early development stage about how a regulation will affect those covered by it, the agency learns from all stakeholders about problems before they get locked into the regulation.

Rather than hearing from a range of interested parties and designing the rule with a panoply of their concerns in mind, the agency essentially writes its rule to accommodate the specific demands of a single interest. Through sue and settle, advocacy groups achieve their narrow goals at the expense of sound and thoughtful public policy.

Sue and settle agreements cut this critical step entirely out of the process. Rather than hearing from a range of interested parties and designing the rule with a panoply of their concerns in mind, the agency essentially writes its rule to accommodate the specific demands of a single interest. Through sue and settle, advocacy groups achieve their narrow goals at the expense of sound and thoughtful public policy.

Sue and Settle is An Abuse of the Environmental Citizen Suit Provisions

Congress expressed concern long ago that allowing unlimited citizen suits under environmental statutes to compel agency action has the potential to severely disrupt agencies' ability to meet their most pressing statutory responsibilities.[65] Matters are only made worse when an agency

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[62] *See* discussion of the Human Testing Rule, *supra* on page 21.

[63] EPA overwhelmingly rejected the comments and recommendations submitted by the business community on the major rules that resulted from sue and settle agreements. These rules were ultimately promulgated largely as they had been proposed. As EPA Assistant Administrator for Air McCarthy recently noted, "[m]y staff has made me aware of some instances in which EPA changed the substance of Clean Air Act settlement agreements in response to public comments. For example, after receiving adverse comments on a proposed settlement agreement [concerning hazardous air standards for 25 individual industries] EPA modified deadlines for taking proposed or final actions and clarified the scope of such actions for a number of source categories before finalizing the agreement. However, I am not aware of every instance in which EPA has made such a change." McCarthy Response to Questions for the Record submitted by Senator David Vitter to Assistant Administrator Gina McCarthy, Senate Environment and Public Works Committee April 8, 2013, Confirmation Hearing at 24. The Chamber is not aware of any other instances where EPA has made such a change in response to public comments.

[64] *See South Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir. 1974) ("logical outgrowth doctrine" requires additional notice and comment if final rule differs too greatly from proposal).

[65] The Court of Appeals for the District of Columbia noted in 1974 that "While Congress sought to encourage citizen suits, citizen suits were specifically intended to provide only 'supplemental ... assurance that the Act would be implemented and

does not defend itself against sue and settle lawsuits, and when it willingly allows outside groups to reprioritize its agenda and deadlines for action.

Most of the legislative history that gives an understanding of the environmental citizen suit provision comes from the congressional debate on the 1970 Clean Air Act. There is little legislative history beyond the Clean Air Act.[66] The addition of the citizen suit provision in later statutes was perfunctory, and the statutory language used was generally identical to the Clean Air Act language.[67]

The inclusion of a citizen suit provision was far from a given when it was being considered in the Clean Air Act. The House version of the bill did not include a citizen suit provision.[68] The Senate bill did include such a provision,[69] but serious concern was expressed during the Senate floor debate. Senator Roman Hruska (R-NE), who was ranking member of the Senate Judiciary Committee, expressed two major concerns about the citizen suit provision: the limited opportunity for Senators to review the provision and the failure to involve the Senate Judiciary Committee:

> Frankly, inasmuch as this matter [the citizen suit provision] came to my attention for the first time not more than 6 hours ago, it is a little difficult to order one's thoughts and decide the best course of action to follow.
>
> Had there been timely notice that this section was in the bill, perhaps some Senators would have asked that the bill be referred to the Committee of the Judiciary for consideration of the implications for our judicial system.[70]

Senator Hruska entered into the record a memo written by one of his staff members. It reiterated the problem of ignoring the Judiciary Committee:

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enforced.' *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974). Congress made 'particular efforts to draft a provision that would not reduce the effectiveness of administrative enforcement, ... nor cause abuse of the courts while at the same time still preserving the right of citizens to such enforcement of the act.' Senate Debate on S. 3375, March 10, 1970, *reprinted in* Environmental Policy Division of the Congressional Research Service, A Legislative History of the Clean Air Act Amendments of 1970, Vol. I. at 387 (1974) (remarks of Senator Cooper)." *Friends of the Earth, et al. v. Potomac Electric Power Co.*, 546 F. Supp. 1357 (D.D.C. 1982); "[T]he agency might not be at fault if it does not act promptly or does not enforce the act as comprehensively and as thoroughly as it would like to do. Some of its capabilities depend on the wisdom of the appropriation process of this Congress. It would not be the first time that a regulatory act would not have been provided with sufficient funds and manpower to get the job done.... Notwithstanding the lack of capability to enforce this act, suit after suit after suit could be brought. The functioning of the department could be interfered with, and its time and resources frittered away by responding to these lawsuits. The limited resources we can afford will be needed for the actual implementation of the act." (Sen. Hruska arguing against the citizen suit provision of the Clean Air Act during Senate debate on S.4358 on Sept. 21, 1970).

[66] *See, e.g.,* Robert D. Snook, *Environmental Citizen Suits and Judicial Interpretation: First Time Tragedy, Second Time Farce*, 20 W. New Eng. L. Rev. 311 (1998) at 318.

[67] *Id.* at 313–314, 318.

[68] *See, e.g.,* "A Legislative History of the Clean Air Amendments, Together with a Section-by-Section Index," Library of Congress, U.S. Govt. Print. Off., 1974-1980, Conference Report, at 205-206.

[69] *Id.*

[70] Senate debate on S. 4358 at 277.

> The Senate Committee on the Judiciary has jurisdiction over, among other things, "(1) Judicial proceedings, civil and criminal, generally.... (3) Federal court and judges...." The Senate should suspend consideration of Section 304 [the citizen suit provision] pending a study by the Judiciary Committee of the section's probable impact on the integrity of the judicial system and the advisability of now opening the doors of the courts to innumerable Citizens Suits against officials charged with the duty of carrying out the Clean Air Act.[71]

Senator Griffin (R-MI), also a member of the Senate Judiciary Committee, noted the lack of critical feedback that was received regarding the provision:

> [I]t is disturbing to me that this far-reaching provision was included in the bill without any testimony from the Judicial Conference, the Department of Justice, or the Office of Budget and Management concerning the possible impact this might have on the Federal judiciary.[72]

The citizen suit provision in the Clean Air Act was never considered by either the House or Senate Judiciary Committees. The same is true for the citizen suit provision in the Clean Water Act, which was enacted just two years later. There was no House or Senate Judiciary Committee hearing focused specifically on citizen suits for 41 years, dating back to the creation of the first citizen suit provision in 1970.

The citizen suit provision in the Clean Air Act was never considered by either the House or Senate Judiciary Committees.[73] The same is true for the citizen suit provision in the Clean Water Act, which was enacted just two years later.[74] There was no House or Senate Judiciary Committee hearing focused specifically on citizen suits for 41 years, dating back to the creation of the first citizen suit provision in 1970.[75]

Fortunately however, in 2012, during the 112th Congress, the House Judiciary Committee began looking at the abuses of the sue and settle process. Representative Ben Quayle (R-AZ) introduced H.R. 3862, the Sunshine for Regulatory Decrees and Settlements Act of 2012. This bill became Title III of H.R. 4078, the Red Tape Reduction and Small Business Job Creation Act, which passed the House of Representatives on July 24, 2012, by a vote of 245 to 172. As part of the development of the Sunshine for Regulatory Decrees

[71] *Id.* at 279.
[72] *Id.* at 350.
[73] "A Legislative History of the Clean Air Amendments, Together with a Section-by-Section Index," Library of Congress, U.S. Govt. Print. Off., 1974-1980; The legislative history was also searched using Lexis.
[74] "A Legislative History of the Water Pollution Control Act Amendments of 1972, Together with a Section-By-Section Index," Library of Congress, U.S. Govt. Print. Off., 1973-1978; The legislative history was also searched using Lexis.
[75] In 1985, the Senate Judiciary Committee held a hearing on the Superfund Improvement Act of 1985 that among other things discussed citizen suits (S. Hrg. 99-415). The hearing covered a wide range of issues, such as financing of waste site clean-up, liability standards, and joint and several liability. To find hearing information, a comprehensive search was conducted using ProQuest Congressional at the Library of Congress. The search focused on hearings from 1970-present that addressed citizen suits.

and Settlements Act, the House Judiciary Committee held extensive hearings on sue and settle and issued a committee report on July 11, 2012. Under the bill, which passed the House as Title III of H.R. 4078, before a court could sign a proposed consent decree between a federal agency and an outside group, the proposed consent decree or settlement must be published in the *Federal Register* for 60 days for public comment. Also, affected parties would be afforded an opportunity to intervene prior to the filing of the consent decree or settlement. The agency would also have to inform the court of its other mandatory duties and explain how the consent decree would benefit the public interest. Unfortunately, the Senate never took action on its version of the sue and settle bill, also called the Sunshine for Regulatory Decrees and Settlements Act of 2012, which was introduced by Senator Chuck Grassley on July 12, 2012.

On April 11, 2013, the Sunshine for Regulatory Decrees and Settlements Act of 2013 was introduced in the Senate as S. 714, and in the House as H.R. 1493. The 2013 Act is a strong bill that would implement these and other important common-sense changes. Passage of this legislation will close the massive sue and settle loophole in our regulatory process.

RECOMMENDATIONS

The regulatory process should not be radically altered simply because of a consent decree or settlement agreement. There should not be a two-track system that allows the public to meaningfully participate in rulemakings, but excludes the public from sue and settle negotiations which result in rulemakings designed to benefit a specific interest group. There should not be one system where agencies can use their discretion to develop rules and another system where advocacy groups use lawsuits to legally bind agencies and improperly hand over their discretion.

- **Notice**

Federal agencies should inform the public immediately upon receiving notice of an advocacy group's intent to file a lawsuit.[76] This public notice should be provided in a prominent location, such as the agency's website or through a notice in the *Federal Register*.[77] By having this advanced notice, affected parties will have a better opportunity to intervene in cases and also prepare more thoughtful comments.

- **Comments and Intervening**

Federal agencies should be required to submit a notice of a proposed consent decree or settlement agreement before it is filed with the court. This notice should be published in the *Federal Register* and allow a reasonable period for public comment (e.g., 45 days).

[76] The Department of Justice also should provide public notice of the filing of lawsuits against agencies, as well as settlements the agencies agree to.

[77] It is our understanding that EPA recently began to disclose on this website the notices of intent to sue that it receives from outside parties. While this is a welcome development, this important disclosure needs to be statutorily required, not just a voluntary measure.

Currently, because it is so difficult for third parties to intervene in sue and settle cases, courts should presume that it is appropriate to include a third party as an intervenor. The intervenors should only be excluded if this strong presumption could be rebutted by showing that the party's interests are adequately represented by the existing parties in the action. Given that intervenors presently can be excluded from settlement negotiations, *sometimes without even being notified of the negotiations*, there should be clarification that all parties in the action, including the intervenors, should have a seat at the negotiation table.

- **Substance of Rules**

Agencies should not be able to cede their discretionary powers to private interests, especially the power to issue regulations and to develop the content of rules. This problem does not exist in the normal rulemaking process. Yet, since courts readily approve consent decrees that legally bind agencies in the sue and settle context, the decree itself becomes a vehicle for agencies to give up their discretionary rulemaking power—and even to develop rules with questionable statutory authority.

Courts should review the statutory basis for agency actions in consent decrees and settlement agreements in the same manner as if they were adjudicating a case. For example, they should ensure that an agency is required to perform a mandatory act or duty, and, if so, that the agency is implementing the act or duty in a way that is authorized by statute.

- **Deadlines**

Federal agencies should ensure that they (and their partners, including states and other agencies) have enough time to comply with regulatory timelines. The public also should be given enough time to meaningfully comment on proposed regulations, and agencies should themselves take enough time to adequately conduct proper analysis. This would include agency compliance with the RFA, executive orders, and other requirements designed to promote better regulations. This is particularly important because recent rulemakings are often more challenging to evaluate in terms of scope, complexity, and cost than earlier rules were.

- **The Sunshine for Regulatory Decrees and Settlements Act of 2013**

Fortunately, there is a simple, noncontroversial way to address the sue and settle problem that currently undermines the fundamental protections that exist within our regulatory system. Passage of the Sunshine for Regulatory Decrees and Settlements Act of 2013 would solve the sue and settle problem and restore the protections of the Administrative Procedure Act to all citizens and stakeholders.

Catalog of Sue and Settle Cases

Sue and Settle Cases Resulting in New Rules and Agency Actions[78] (2009–2012)

Case	Agency	Issue and Result
***American Petroleum Institute v. EPA* (petroleum refineries NSPS)** 08-1277 (D.C. Cir.) Settled: 12/23/2010 (date is from EPA website)	EPA	**Issue**: Greenhouse gas (GHG) New Source Performance Standards (NSPS) for petroleum refineries **Result**: EPA agreed to issue the first-ever NSPS for GHG emissions from petroleum refineries.
***American Lung Association v. EPA* (consolidated with *New York v. Jackson*)** 12-00243 (consolidated with 12-00531) (D.D.C.) Settled: 6/15/2012	EPA	**Issue**: National ambient air quality standards (NAAQS) for particulate matter **Result**: EPA agreed to sign a final rule addressing the NAAQS for particulate matter. In January 2013, EPA published a final rule making the standard more stringent.
American Nurses Association v. Jackson 08-02198 (D.D.C.) Settled: 10/22/2009	EPA	**Issue**: Maximum achievable control technology (MACT) emissions standards for hazardous air pollutants (HAP) from coal- and oil-fired electric utility steam generating units (EGUs) **Result**: EPA entered into a consent decree requiring the agency to issue MACT standards under Section 112 of the Clean Air Act for coal- and oil-fired electric utility steam generating units (known as the "Utility MACT" rule). The rule was finalized in February 2012.
***Association of Irritated Residents v. EPA et al.* (2008 $PM_{2.5}$ SIP)** 10-03051 (N.D. Cal.) Settled: 11/12/2010	EPA	**Issue**: CA state implementation plan (SIP) submission regarding 1997 $PM_{2.5}$ NAAQS **Result**: EPA agreed to take final action on the 2008 $PM_{2.5}$ San Joaquin Valley Unified Air Control District Plan for compliance with 1997 $PM_{2.5}$ NAAQS. The final action was taken in November 2011.
***Association of Irritated Residents v. EPA et al.* (SIP revisions)** 09-01890 (N.D. Cal.) Settled: 10/21/2009	EPA	**Issue**: CA SIP revision regarding two rules amended by the San Joaquin Valley Unified Air Pollution Control District **Result**: EPA agreed to take final action on the SIP revision and specifically the two rules amended by the San Joaquin Valley Unified Air Pollution Control District (Rule 2020 "Exemptions" and Rule 2020 "New and Modified Stationary Source Review Rule"). The final action was taken in May 2010.
***Center for Biological Diversity et al. v. EPA* (kraft pulp NSPS)**	EPA	**Issue**: Kraft pulp NSPS

[78] For a description of the methodology the Chamber used to identify sue and settle cases is discussed in Appendices A and B of this report.

Case	Agency	Issue and Result
11-06059 (N.D. Cal.) Settled: 8/27/2012		**Result**: EPA agreed to review and, if applicable, revise the kraft pulp NSPS air quality standards.
Center for Biological Diversity v. EPA 09-00670 (W.D. Wash.) Settled: Settlement agreement (parties entered into it on 3/10/10). Notice of voluntary dismissal, 3/11/10. Notice discusses settlement agreement.	EPA	**Issue**: GHGs and ocean acidification under the Clean Water Act **Result**: In a settlement agreement, EPA agreed to take public comment and begin drafting guidance on how to approach ocean acidification under the Clean Water Act. On November 15, 2010, in guidance, EPA urged states to identify waters impaired by ocean acidification under the Clean Water Act and urged states to gather data on ocean acidification, develop methods for identifying waters affected by ocean acidification, and create criteria for measuring the impact of acidification on marine ecosystems.
Center for Biological Diversity v. U.S. Department of Agriculture 08-03884 (N.D. Cal.) Settled: 12/15/2010	Dept. of Agriculture, U.S. Forest Service	**Issue**: Southern California Forest Service Management Plans **Result**: Conservation groups sued U.S. Forest Service over a forest management plan for four California national forests. The challenged plans designated more than 900,000 roadless acres for possible road building or other development. In 2009, a federal district court agreed with the groups, ruling that the plans violated the National Environmental Policy Act (NEPA). The parties entered into a settlement agreement that withholds more than 1 million acres of roadless areas from development. Further, the agency allowed the advocacy groups to participate in a collaborative process to, among other things, identify a list of priority roads and trails for decommissioning and/or restoration projects.
Center for Biological Diversity v. U.S. Dept. of the Interior (DOI) 10-00952 (D.D.C.) Settled: 1/14/2011	DOI, Dept. of Agriculture, BLM, U.S. Forest Service	**Issue**: Grazing fees on federal lands; environmental groups wanted the fees raised **Result**: In a settlement agreement, agencies agreed to respond to the plaintiffs' petition by January 18, 2011, and determine whether a NEPA environmental impact statement was required to issue new rules for the fee grazing program. The agencies ultimately declined to revise the rules for the fee grazing program, citing other high-priority efforts that took precedence.
Coal River Mountain Watch. et al. v. Salazar et al. 08-02212; A related case is National Parks Conservation Association v. Kempthorne: 09-001 15; Settlement agreement: 09-00115 (D.D.C) (D.D.C.) Settled: 3/19/2010	EPA and DOI	**Issue**: Stream Buffer Zone Rule **Result**: The 1983 stream buffer rule restricted mining activities from impacting resources within 100 feet of waterways. The Bush administration revised the rule to allow activity inside the buffer if it was deemed impractical for mine operators to comply. Environmental groups want the Obama administration to undo that change and declare that the stream buffer zone rule prohibits "valley fills." Environmental groups sued DOI in 2008 over the changes. Secretary Salazar tried to revoke the rule in April 2009, but a court held that OSM must go through a full rulemaking process. OSM agreed to amend or replace the stream buffer rule.
Colorado Citizens Against Toxic Waste, Inc. et al. v. Johnson 08-01787 (D. Colo.) Settled: 9/3/2009	EPA	**Issue**: National emission standards for radon emissions from operating mill tailings **Result**: EPA agreed to review and, if appropriate, revise national emission standards for radon emissions from operating mill tailings. EPA also agreed to certain public participation stipulations.

Case	Agency	Issue and Result
Colorado Environmental Coalition v. Salazar 09-00085 (D. Colo.) Settled: 2/15/2011	DOI	**Issue**: Bureau of Land Management (BLM) decision to amend resource management plans (RMPs), which opened 2 million acres of federal lands for potential oil shale leasing; plaintiffs alleged failure to comply with NEPA and other statutes **Result**: BLM agreed to consider amending each of the 2008 RMP decisions. As part of the amendment process, BLM agreed to consider several proposed alternatives, including alternatives that would exclude lands with wilderness characteristics and core or priority habitat for the imperiled sage grouse from commercial oil shale leasing. BLM also agreed to delay any calls for commercial leasing, but retained the right to continue nominating parcels for Research, Development, and Demonstration (RD&D) leases and to convert existing RD&D leases to commercial leases.
***Comite Civico del Valle, Inc. v. Jackson et al.* (CA SIP)** 10-00946 (N.D. Cal.) Settled: 6/11/2010	EPA	**Issue**: CA SIP regarding measures to control particulate matter emissions from beef feedlot operations within the Imperial Valley **Result**: EPA agreed to take final action on the SIP revision regarding particulate matter emissions from beef feedlot operations within the Imperial Valley. The final rule was published on November 10, 2010.
***Comite Civico del Valle, Inc. v. Jackson et al.* (Imperial County 1)** 09-04095 (N.D. Cal.) Settled: 11/10/2009	EPA	**Issue**: CA SIP revision regarding Imperial County Air Pollution Control District Rules 800-806 (addressing PM_{10}) **Result**: EPA agreed to take final action on the Imperial County Air Pollution Control District's Rules 800-806 (addressing PM_{10}) that revise the CA SIP. A proposed rule was published on January 7, 2013.
***Comite Civico del Valle, Inc. v. Jackson et al.* (Imperial County 2)** 10-02859 (N.D. Cal.) Settled: 10/12/2010	EPA	**Issue**: CA SIP revision regarding Imperial County Air Pollution Control District Rules 201, 202, and 217 **Result**: EPA agreed to take final action on Imperial County Air Pollution Control District Rules 201, 202, and 217 that revise the CA SIP.
Defenders of Wildlife v. Jackson 10-01915 (D.D.C.) Settled: 11/5/2010, 11/8/10 moved for entry same day the complaint was filed (see page 3 of the 3/18/12 memorandum opinion), 3/18/12 (ordered)	EPA	**Issue**: Effluent Limitation Guidelines for Steam Electric Power Generating Point Source **Result**: EPA agreed to sign a notice of proposed rulemaking regarding revisions to the effluent guidelines for steam electric power plants, followed by a final rule. In this case, the advocacy group's complaint was filed on the same day that the parties moved to enter the consent decree.
El Comite Para El Bienestar De Earlimart et al. v. EPA et al. 11-03779 (N.D. Cal.) Settled: 11/14/2011	EPA	**Issue**: CA SIP submission regarding fumigant rules in San Joaquin Valley **Result**: EPA agreed to take final actions on the Pesticide Element SIP Submittal and the Fumigant Rules Submittal. A final rule was published on October 26, 2012.
Environmental Defense Fund v. Jackson 11-04492 (S.D.N.Y.) Settled: 7/6/2012	EPA	**Issue**: NSPS for municipal solid waste landfills **Result**: EPA agreed to review and, if applicable, revise the NSPS for municipal solid waste landfills.

Case	Agency	Issue and Result
Florida Wildlife Federation v. Jackson 08-00324 (N.D. Fla.) Settled: 8/25/2009	EPA	**Issue**: Numeric nutrient criteria for waters in FL **Result**: Environmental groups sued EPA in July 2008 to develop numeric nutrient criteria for FL. EPA entered into a consent decree with the plaintiffs in 2009. As part of the consent decree, EPA agreed to issue limits in phases. Limits for FL's inland water bodies outside South FL were finalized on December 6, 2010; the limits for estuaries and coastal waters, and South FL's inland flowing waters were proposed on December 18, 2012. Final rules, by consent decree, are required by September 30, 2013.
Fowler v. EPA 09-00005 (D.D.C.) Settled: 5/10/2010	EPA	**Issue**: Clean Water Act regulatory regime for Chesapeake Bay **Result**: EPA agreed to establish a Total Maximum Daily Load for the Chesapeake Bay. The settlement requires EPA to develop changes to its storm water program affecting the Bay.
Friends of Animals v. Salazar 10-00357 (D.D.C.) Settled: 7/21/2010	DOI	**Issue**: DOI non-action on plaintiff's petitions to list 12 species of parrots, macaws, and cockatoos as endangered or threatened under the Endangered Species Act **Result**: DOI agreed to issue 12-month findings on the 12 species contained in the petition.
***In re Endangered Species Act Section 4 Deadline Litigation* (This case relates to Center for *Biological Diversity v. Salazar*, 10-0230, and 12 different WildEarth Guardians complaints)** 10-00377 (D.D.C.) Settled: Wildlife Guardians: 5/10/2011 CBD: July 12, 2011	DOI	**Issue**: WildEarth Guardians cases: 12 lawsuits seeking to designate 251 species as threatened or endangered under the Endangered Species Act. CBD case: Seeking 90-day findings for 32 species of Pacific Northwest mollusks, 42 species of Great Basin springsnails, and 403 southeast aquatic species. **Result**: WildEarth: U.S. Forest Service agreed to make a final determination on Endangered Species Act status for 251 candidate species on or before September 2016. CBD: FWS agreed to make requested findings no later than the end of 2011 (this covers 32 species of Pacific Northwest mollusks, 42 species of Great Basin springsnails, and the 403 southeast aquatic species). Note: There are additional actions required for both settlements.
***Kentucky Environmental Foundation v. Jackson* (Huntington-Ashland SIP)** 10-01814 (D.D.C.) Settled: 8/4/2011	EPA	**Issue**: KY SIP revision addressing 1997 $PM_{2.5}$ NAAQS **Result**: EPA agreed to take final action on the Kentucky SIP addressing 1997 $PM_{2.5}$ NAAQS for the Huntington-Ashland area. The final rule was published in April 2012.
***Kentucky Environmental Foundation v. Jackson* (Louisville SIP)** 11-01253 (D.D.C.) Settled: 2/27/2012	EPA	**Issue**: KY SIP regarding 1997 $PM_{2.5}$ NAAQS **Result**: EPA had already taken actions by the time the agreement was made. EPA did agree to take final action on the $PM_{2.5}$ emissions inventory for the Louisville SIP.
Louisiana Environmental Action Network v. Jackson 09-01333 (D.D.C.) Settled: 11/23/2010	EPA	**Issue**: LA SIP for 1997 ozone NAAQS **Result**: LEAN brought the case to compel EPA to take action on ozone standards in the Baton Rouge area. As part of the settlement, LEAN agreed to ask the court to hold the litigation in abeyance and EPA agreed to take action if the Baton Rouge area does not come into attainment.
Mossville Environmental	EPA	**Issue**: New MACT standards for polyvinyl chloride (PVC) manufacturers

Case	Agency	Issue and Result
Action NOW v. Jackson 08-01803 (D.D.C.) Settled: 10/30/2009		**Result**: Environmental groups previously litigated and won a decision overturning EPA's 2002 decision not to make the MACT standards for PVC makers more stringent. Environmental groups brought this case in 2008 to compel EPA to set new MACT standards. In 2009, there was a settlement agreement between EPA and the plaintiffs. The agreement called upon EPA to finalize the new MACT standards. EPA issued a final rule in April 2012.
***National Parks Convservation Association v. Jackson* (Regional haze FIPS and SIPs)** 11-01548 (D.D.C.) Settled: 11/9/2011	EPA	**Issue**: Regional haze FIPs and SIPs **Result**: EPA agreed to deadlines to promulgate proposed and final regional haze FIPs and/or SIPs (or partial FIPs and SIPs).
Natural Resources Defense Council et al. v EPA 09-60510 (5th Cir.) Settled: 5/25/2010	EPA	**Issue**: Reporting requirements for concentrated animal feeding operations (CAFOs) **Result**: EPA agreed to create publicly available guidance to assist in the implementation of NPDES permit regulations and Effluent Limitation Guidelines and Standards for CAFOs. The agency also agreed to publish a proposed rule regarding reporting requirements for CAFOs. A proposed rule was published in October 2011 and later withdrawn in July 2012.
Natural Resources Defense Council v. EPA 06-0820 (2d Cir.) Settled: 6/17/2010 (see EarthJustice press release), Finalized on 11/3/10 (see proposed rule)	EPA	**Issue**: Pesticide human testing consent rule **Result**: A 2006 human-testing rule required subjects of paid pesticide experiments to provide "legally effective informed consent." Environmental groups challenged the rule. A June 2010 settlement required EPA to propose amendments to the rule to make it stricter. The settlement required EPA to incorporate specific language in the rule. The new rules were proposed on February 2, 2011. The final rule was published on February 14, 2013 and includes the negotiated language.
***Natural Resources Defense Council v. EPA* (California SIP)** 10-06029 (C.D. Cal.) Settled: 12/13/2010	EPA	**Issue**: CA SIP submission for 1997 ozone and $PM_{2.5}$ NAAQS **Result**: EPA agreed to take action on SIPs as they apply to $PM_{2.5}$ and ozone for California's South Coast Air Basin.
Natural Resources Defense Council v. Salazar 10-00299 (D.D.C.) Settled: 6/18/2010	Fish and Wildlife Service (FWS); DOI	**Issue**: Listing of whitebark pine tree as an endangered species under the Endangered Species Act as a result of climate change **Result**: On July 19, 2011, FWS found that the whitebark pine tree should be listed as threatened or endangered under the Endangered Species Act as a result of climate change. It was the first time the federal government has declared a widespread tree species in danger of extinction because of climate change.
New York v. EPA 06-1322 (D.C. Cir.) Settled: 12/23/2010 (see EPA settlement page)	EPA	**Issue**: GHG NSPS for power plants **Result**: On April 13, 2012, EPA proposed the first-ever NSPS for GHG emissions from new coal- and oil-fired power plants. This came about as a result of a settlement of a 2006 lawsuit challenging power plant NSPS.
Northwoods Wilderness Recovery v. Kempthorne 08-01407 (N.D. Ill.)	FWS; DOI	**Issue**: FWS's exclusion of 13,000 acres of national forest land in Michigan and Missouri from the final "critical habitat" designation for the Hine's emerald dragonfly under the Endangered Species Act

Case	Agency	Issue and Result
Settled: 1/13/2009		**Result**: FWS agreed to a remand without vacatur of the critical habitat designation in order to reconsider the federal exclusions from the designation of critical habitat for the Hine's emerald dragonfly. FWS doubled the size of the critical habitat from 13,000 acres to more than 26,000. The final rule was published in April 2010.
Portland Cement Assn. v. EPA 07-1046 (D.C. Cir.) Settled: 1/6/2009 (This date is based on when DOJ signed the settlement agreement)	EPA	**Issue**: MACT standards for cement kilns **Result**: EPA settled a lawsuit seeking to force the agency to control mercury emissions from cement kilns. The settlement was between EPA and numerous petitioners that challenged the 2006 cement MACT rule. The petitioners included environmental groups, states, and the cement industry. The final cement MACT rule was published in the Federal Register on September 9, 2010; environmental groups and cement industry petitioned for reconsideration of the 2010 rule. EPA denied in part and amended in part the petitions to reconsider. EPA published a new final rule on February 12, 2013. The reconsidered rule relaxed some aspects of the 2010 rule, and allowed cement companies more time to comply.
Riverkeeper v. EPA 06-12987 (S.D.N.Y.) Settled: 11/22/2010	EPA	**Issue**: Clean Water Act 316(b) standards on cooling water intake structures **Result**: The EPA agreed to propose and finalize a rule regulating cooling water intake structures under 316(b), and to consider the feasibility of more stringent technical controls.
***Sierra Club et al. v. Jackson* (ozone NC, NV, ND, HI, OK, AK, ID, OR, WA, MD, VA, TN, AR, AZ, FL, and GA)** 10-04060 (N.D. Cal.) Settled: 8/12/2011 (Date that court ordered Joint Motion to Stay All Deadlines. This motion was filed with the Notice of Proposed Settlement)	EPA	**Issue**: Action on 1997 ozone NAAQS revisions for NC, NV, ND, HI, OK, AK, ID, OR, WA, MD, VA, TN, AR, AZ, FL, and GA **Result**: EPA agreed to take final action on 1997 Ozone NAAQS revision for NC, NV, ND, HI, OK, AK, ID, OR, WA, MD, VA, TN, AR, AZ, FL, and GA.
***Sierra Club et al. v. Jackson et al.* (CA RACT SIP)** 11-03106 (N.D. Cal.) Settled: 1/6/2012	EPA	**Issue**: CA SIP submissions regarding reasonably available control technology demonstration **Result**: EPA agreed to take final action on the CA RACT SIP.
***Sierra Club et al. v. Jackson et al.* (San Joaquin Valley)** 10-01954 (N.D. Cal.) Settled: 11/8/2010	EPA	**Issue**: CA SIP submission for 1997 ozone NAAQS **Result**: EPA agreed to take final action on the 8-hour ozone plan submitted by the San Joaquin Valley Air Pollution Control District, the purpose of which is to achieve progress toward attainment of 1997 ozone NAAQS. A final rule was published on March 1, 2012.
***Sierra Club et al. v EPA* (lead case)** 08-1258 (D.C. Cir.) Settled: 8/24/2009 (see also the amended settlement	EPA	**Issue**: Lead Renovation, Repair and Painting Program **Result**: In 2008, numerous environmental groups commenced lawsuits against EPA to challenge the Lead Renovation, Repair, and Painting Program Rule, and these suits were consolidated in the DC Circuit Court of Appeals.

Case	Agency	Issue and Result
agreement referring to this date)		As part of this settlement agreement, EPA agreed to propose significant and specific changes to the rule that were outlined in the settlement agreement. Significantly, EPA agreed to drop an "opt-out" provision that would allow millions of homes without children or pregnant women to waive the lead restrictions.
Sierra Club filed a notice of intent to file a lawsuit NOTICE OF INTENT Settled: 12/19/2011	EPA	**Issue**: Attainment determinations for 1997 ozone NAAQS for areas in NY, NJ, CT, MA, IL, MO and other areas **Result**: EPA agreed to make attainment determinations for 1997 ozone NAAQS for areas in NY, NJ, CT, MA, IL, and MO. The "other areas" were not included because EPA and plaintiffs agreed that EPA had already addressed the issues for those areas.
***Sierra Club v. EPA* (Nitric Acid)** 09-00218 (D.D.C.) Settled: 11/3/2009	EPA	**Issue**: Nitric acid plants NSPS **Result**: EPA agreed to review NSPS for nitric acid plants. As a result of this review, EPA proposed NSPS for nitric acid plants in October 2011. The final rule was published in August 2012.
***Sierra Club v. EPA et al.* (clay ceramics)** 08-00424 (D.D.C.) Settled: 11/20/2012	EPA	**Issue**: Brick MACT **Result**: EPA agreed to issue final rules setting MACT standards for brick and structural clay products manufacturing facilities located at major sources and clay ceramics manufacturing facilities located at major sources.
***Sierra Club v. EPA et al.* (TX ozone PM SIP)** 10-01541 (D.D.C.) Settled: 9/13/2011	EPA	**Issue**: TX SIP submission regarding 1997 ozone and $PM_{2.5}$ NAAQS **Result**: EPA agreed to take final action on certain infrastructure components of TX SIP submissions for 1997 ozone and $PM_{2.5}$ NAAQS.
***Sierra Club v. Jackson* (21 states)** 10-00133 (D.D.C.) Settled: 4/29/2010 (EPA lodged consent decree with court on this date)	EPA	**Issue**: 21 states' SIPs submissions for 1997 ozone NAAQS **Result**: EPA agreed to approve or disapprove the 1997 8-hour ozone NAAQS Infrastructure SIPs for ME, RI, CT, NH, AL, KY, MS, SC, WI, IN, MI, OH, LA, KS, NE, MO, CO, MT, SD, UT, and WY.
***Sierra Club v. Jackson* (28 different MACT)** 09-00152 (N.D. Cal.) Settled: 7/6/2010	EPA	**Issue**: MACT standards for 28 industry source categories **Result**: Sierra Club sued EPA on January 13, 2009—seven days prior to the change in administration—to review and revise Clean Air Act MACT standards for 28 different categories of industrial facilities, including wood furniture manufacturing, Portland Cement, pesticides, lead smelting, secondary aluminum, pharmaceuticals, shipbuilding, and aerospace manufacturing. On July 6, 2010, EPA lodged a consent decree that required EPA to revise MACT standards for all 28 categories.
***Sierra Club v. Jackson* (AL and GA SIPs)** 11-02000 (D.D.C.) Settled: 7/20/2012	EPA	**Issue**: AL SIP submission for 1997 $PM_{2.5}$ NAAQS and GA SP submission for 1997 ozone NAAQS **Result**: EPA agreed to take final action on "numerous SIP submittals" by AL for the 1997 $PM_{2.5}$ NAAQS and GA for the 1997 8-hour ozone NAAQS.
***Sierra Club v. Jackson* (AR Regional Haze)**	EPA	**Issue**: AR Regional Haze SIP

Case	Agency	Issue and Result
10-02112 (D.D.C.) Settled: 8/3/2011		**Result**: EPA agreed to sign a notice of final rulemaking to approve or disapprove the AR Regional Haze SIP.
***Sierra Club v. Jackson* (Boiler MACT and RICE rule)** 01-01537 (D.D.C.) Settled: RICE and Boiler MACT: 5/22/03 (consent decree). For RICE: 11/15/07 amendment to change deadlines; 11/9/09 amendment to change deadlines; 2/10/10 was a third modification to the deadline.	EPA	**Issue**: MACT standards for boilers and stationary reciprocating internal combustion engines (RICE) **Result**: In 2003, EPA and Sierra Club entered into a consent decree that required MACT standards for boilers and RICE. There were other MACT standards requirements as well. For Boiler MACT: The rule history is extremely complicated. In 2006, the DC District court issued an order detailing a schedule. EPA and Sierra Club both agreed multiple times to extend the deadline to finalize rules. However, Sierra Club opposed EPA's motion to extend a January 16, 2011 deadline that was established in a September 20, 2010, order, from January 16, 2011 to April 13, 2012. EPA realized that it needed much more time for the final rules. Judge Paul Friedman of the DC District Court decided that enough was enough and gave EPA only one month to issue the rules. EPA did in fact issue the rule on March 21, 2011, and that same day published a notice of reconsideration. The final rules based on the reconsideration were published on January 31, 2013, and February 1, 2013. For the RICE rule: In 2007, 2009, and 2010, EPA and Sierra Club modified the deadline dates for final action as required in the decree. EPA agreed to take additional comment on the RICE rule in June and October 2012, and published the final RICE rule in January 2013.
***Sierra Club v. Jackson* (DSW Rule)** 09-1041 Consol. with 09-1038 (D.C. Cir.) Settled: 9/7/2010 (see also proposed rule that says this date, pp. 44, 102)	EPA	**Issue**: Revisions to the Definition of Solid Waste under RCRA **Result**: Sierra Club challenged the 2008 "Definition of Solid Waste" rule, which established requirements for recycling hazardous secondary materials. To settle the lawsuit, EPA agreed it would review and reconsider the rule. In July 2011, EPA published a proposed rule, significantly tightening the types of materials that can be recycled under RCRA.
***Sierra Club v. Jackson* (Houston-Galveston-Brazoria)** 12-00012 (D.D.C.) Settled: 6/21/2012	EPA	**Issue**: TX SIP submission for 1997 ozone NAAQS **Result**: EPA agreed to take final action on the SIP for the Houston-Galveston-Brazoria 1997 8-hour ozone nonattainment areas.
***Sierra Club v. Jackson* (Kentucky Regional Haze)** 10-00889 (D.D.C.) Settled: 10/29/2010	EPA	**Issue**: KY SIP submissions for 1997 ozone NAAQS and Regional Haze **Result**: EPA agreed to the following: By April 15, 2011, EPA would take final action on ozone SIP submittals for various Kentucky ozone maintenance areas; by March 15, 2012, EPA would take final action on KY's Regional Haze SIP.
***Sierra Club v. Jackson* (MA, CT, NJ, NY, PA. MD, and DE SIPs)** 11-02180 (D.D.C.) Settled: 7/23/2012	EPA	**Issue**: SIP submissions for certain NAAQS by MA, CT, NJ, NY, PA, MD, and DE **Result**: EPA agreed to take final actions on SIPs for certain NAAQS for MA, CT, NJ, NY, PA, MD, and DE.
***Sierra Club v. Jackson* (ME, MO, IL, and WI SIPs)** 11-00035 (D.D.C.) Settled: 11/30/2011	EPA	**Issue**: SIP submissions for 1997 ozone NAAQS by ME, MO, IL, and WI **Result**: EPA agreed to take final action on the SIPs for certain areas of IL, ME, and MO. Wisconsin was not included because the issue was already

Case	Agency	Issue and Result
		resolved.
***Sierra Club v. Jackson* (NC and SC SIPs)** 12-00013 (D.D.C.) Settled: 6/28/2012	EPA	**Issue**: NC and SC SIP submissions regarding 1997 ozone NAAQS **Result**: EPA agreed to take final actions on North Carolina and South Carolina SIPs for Charlotte-Gastonia-Rock Hill.
***Sierra Club v. Jackson* (OK SIP)** 12-00705 (D.D.C.) Settled: 10/15/2012	EPA	**Issue**: OK SIP revision regarding excess emissions **Result**: EPA agreed to ake final action on a revision to the OK SIP regarding excess emissions.
***Sierra Club v. Jackson* (ozone TX, CT, MD, NY, NJ, MA, and NH)** 11-00100 (D.D.C.) Settled: 9/12/2011	EPA	**Issue**: Attainment determinations for 1-hour ozone for areas in TX, CT, MD, NY, NJ, MA, and NH **Result**: EPA agreed to make attainment determinations for 1 hour ozone for areas in TX, CT, MD, NY, NJ, MA, and NH.
***WildEarth Guardians et al. v. Jackson* (ozone AZ, NV, PA, and TN)** 10-04603 (N.D. Cal.) Settled: 3/23/2011 (Date found in the notice of proposed settlement)	EPA	**Issue**: Nonattainment of 1997 ozone NAAQS for areas in AZ, NV, PA, and TN **Result**: EPA agreed to set a deadline for issuing findings of failure to submit SIPs for the 1997 ozone NAAQS for areas in NV and PA. Other actions addressed concerns in two other states.
***WildEarth Guardians v. Jackson* (2008 ozone NAAQS)** 11-01661 (D. Ariz.) Settled: 12/12/2011	EPA	**Issue**: Area designations for 2008 ground level ozone NAAQS **Result**: EPA agreed to sign for publication in the Federal Register a notice of the Agency's promulgation of area designations for the 2008 ground-level ozone NAAQS.
***WildEarth Guardians v. Jackson* (2nd suit for Phoenix)** 11-02205 (N.D. Cal.) Settled: 6/7/2011	EPA	**Issue**: AZ SIP submission for 1997 ozone NAAQS **Result**: EPA agreed to take action on AZ SIP submission pertaining to Phoenix-Mesa's plan to achieve progress toward attainment of 1997 ozone NAAQS. EPA issued a final rule on June 13, 2012.
***WildEarth Guardians v. Jackson* (CO, UT, MT, and NM SIPs)** 09-02148 (D. Colo.) Settled: 2/1/2010	EPA	**Issue**: Final action on 22 SIP submissions from CO, UT, and MT **Result**: EPA agreed to take final action on 22 SIP submissions from CO, UT, and MT, and then added 19 SIP submissions from NM, for a total of 41 SIP submissions.
***WildEarth Guardians v. Jackson* (oil and gas)** 09-00089 (D.D.C.) Settled: 12/3/2009	EPA	**Issue**: Clean Air Act Regulations on Oil and Gas Drilling Operations **Result**: In January 2009, environmental groups sued EPA to update federal regulations limiting air pollution from oil and gas drilling operations. EPA settled with environmentalists on December 3, 2009. The settlement required EPA to review and update three sets of regulations: (1) NSPS for oil and gas drilling; (2) MACT standards for hazardous air pollutant emissions; (3) and "residual risk" standards. On August 23, 2011, EPA proposed a comprehensive set of updates to these rules, including new NSPS and MACT standards. On August 16, 2012, EPA issued final rules covering NSPS, MACT, and residual risk for the oil and gas sector.

Case	Agency	Issue and Result
***WildEarth Guardians v. Jackson* (ozone)** 09-02453 (N.D. Cal.) Settled: 2/18/2010	EPA	**Issue**: SIP submissions for 1997 8-hour ozone and $PM_{2.5}$ NAAQS by CA, CO, ID, NM, ND, OK, and OR **Result**: EPA agreed to decide, for each state, whether to approve or deny SIPs for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS, or whether to instead force the states to comply with a federal implementation plan.
***WildEarth Guardians v. Jackson* ($PM_{2.5}$)** 11-00190 (N.D. Cal.) Settled: 8/25/2011	EPA	**Issue**: SIP submissions for 2006 $PM_{2.5}$ MAAQS infrastructure by 20 states **Result**: EPA agreed to sign a final action to approve or disapprove the 2006 $PM_{2.5}$ NAAQS infrastructure SIPs for AL, CT, FL, MS, NC, TN, IN, ME, OH, NM, DE, KY,NV, AR, NH, SC, MA, AZ, GA, and WV.
***WildEarth Guardians v. Jackson* (CO, WY, MT, and ND SIPs)** 11-00001 (Consolidated with 11-00743) (D. Colo.) Settled: 6/6/2011	EPA	**Issue**: CO, WY, MT, and ND SIP submissions for Regional Haze and excess emissions standards **Result**: EPA agreed to decide for each state whether to approve or deny the SIP submissions.
***WildEarth Guardians v. Jackson* (Utah breakdown provision)** 09-02109 (D. Colo.) Settled: 11/23/2009	EPA	**Issue**: Utah SIP revision regarding breakdown provision **Result**: EPA agreed to take a final action regarding the "Utah breakdown provision," which allows sources to exceed their permitted air pollution limits during periods of "unavoidable breakdown." In April 2011, EPA found the breakdown provision inadequate and called on the state to revise its SIP.
***WildEarth Guardians v. Jackson* (Utah SIP)** 10-01218 (D. Colo.) Settled: 10/28/2010	EPA	**Issue**: Utah SIP submissions for Regional Haze and PM_{10} NAAQS **Result**: EPA agreed to sign a final action approving or disapproving, in whole or in part, Utah's request to redesignate Salt Lake City's attainment status for PM_{10} NAAQS. EPA also agreed to take final action on Utah's Regional Haze submission.
***WildEarth Guardians v. Jackson, et al.* (Utah Salt Lake and Davis Counties SIP)** 12-00754 (D. Colo.) Settled: 7/11/2012	EPA	**Issue**: Deadline for action on Utah SIP for 1997 NAAQS for ozone regarding Salt Lake and Davis Counties **Result**: EPA agreed to sign a notice of final action regarding Utah's proposed SIP revision for maintenance of the 1997 8-hour NAAQS for ozone in Salt Lake and Davis Counties.
WildEarth Guardians v. Kempthorne 08-00689 (D. Ariz.) Settled: 4/29/2009	DOI	**Issue**: Critical habitat designation for the Chiricahua leopard frog **Result**: DOI under the Bush administration listed the leopard frog as threatened under the Endangered Species Act but declined to designate a critical habitat because doing so would not be "prudent," as is permitted by the Endangered Species Act. WildEarth Guardians sued to challenge this decision, and the Obama administration's DOI settled the case. The terms of the settlement provided that DOI would reconsider its prudency determination. On March 20, 2012, DOI finalized a rule that reversed its prudency decision and designated approximately 10,346 acres as critical habitat for the Chiracahua leopard frog.
WildEarth Guardians v. Locke 10-00283 (D.D.C.)	Dept. of Commerce	**Issue**: Alleged failure by National Marine Fisheries Service (NMFS) to set Endangered Species Act protections for sperm whales, fin whales, and sei

Case	Agency	Issue and Result
Settled: 6/25/2010		whales **Result**: NMFS agreed to issue recovery plans for sperm whales, fin whales, and sei whales by the end of 2011.
***WildEarth Guardians v. Salazar* (674 species)** 08-00472 (D.D.C.) Settled: 3/13/2009	DOI	**Issue**: DOI non-action on plaintiff's petitions to list 674 plant and animal species as threatened under the Endangered Species Act **Result**: DOI agreed to issue decisions on hundreds of species for which no finding had already been made.
***WildEarth Guardians v. Salazar* (Wright's marsh thistle)** 10-01051 (D.N.M.) Settled: 6/2/2010	DOI	**Issue**: DOI non-action on petition to list the Wright's marsh thistle as endangered or threatened under the Endangered Species Act **Result**: DOI agreed to issue a decision on whether to list the the Wright's marsh thistle. FWS listed the Wright's marsh thistle as endangered or threatened on November 4, 2010 (it was a 12-month petition finding).

Most sue and settle cases are resolved through a consent decree or settlement agreement. However, there is a comparable type of case in which the case is resolved by agency action in response to the legal challenge, as opposed to resolving the case with a consent decree or settlement agreement. Like with the "standard" sue and settle cases, special interests bring legal actions to compel agencies to take their desired actions. A common thread between the cases is the special interests are able to change policy affecting the general public without the public having sufficient notice or opportunity to change agency actions.

Case	Agency	Issue and Result
California v. EPA 08-1178 (D.C. Cir.) Settled: 6/30/2009 (EPA granted the waiver; see also EPA waiver web page)	EPA	**Issue**: Grant of California GHG Waiver **Result**: EPA, California, environmental groups and the automobile industry negotiated a settlement of a multi-party lawsuit requesting that EPA set Clean Air Act Title II emissions limitations on GHG emissions from automobiles, and granting California a waiver to set its own automobile GHG standards. EPA had previously denied the waiver in 2008; a lawsuit followed. In January, 2009, California asked for reconsideration of the waiver request. EPA granted the waiver in June 2009 (the notice was published in the Federal Register on July 8, 2009).
Center for Biological Diversity v. Kempthorne 08-05546 (lead case--a consolidated case is NRDC v. DOI, 08-05605) (N.D. Cal.) Settled: 5/14/2009	DOI, NMFS, Dept. of Commerce	**Issue**: December 2008 amendments to the Section 7 consultation rules under the Endangered Species Act and the decision to exempt greenhouse gas emitters from regulation under the Endangered Species Act **Result**: While the lawsuit was pending, the Department of Interior unilaterally revoked the Section 7 rule at issue, reverting to the Section 7 consultation process as it existed prior to the December 2008 amendments. The parties to this lawsuit then jointly agreed to dismiss the case. A formal settlement agreement was not issued.
Greater Yellowstone Coalition v. Kempthorne 08-02138 (D.D.C.) Settled: 11/2/2009	National Park Service, DOI	**Issue**: December 2008 rule allowing limited recreational snowmobile use (720 snowmobiles per day) inside Yellowstone National Park **Result**: While the lawsuit was pending, the National Park Service

Case	Agency	Issue and Result
		announced, on October 15, 2009, a new winter rule superseding the December 2008 rule of which the plaintiffs complained. The plan reduced snowmobile usage to 318 snowmobiles per day, which is less than half the allowed number under the prior rule.
League of Wilderness Defenders-Blue Mountains Biodiversity Project v. Kevin Martin 09-01023 (D. Or.) Settled: Stipulation of Dismissal, 12/30/2009	U.S. Forest Service	**Issue**: Whether authorization of the Wildcat Fuels Reduction and Vegetation Management Project in the Umatilla National Forest violates NEPA and Administrative Procedure Act **Result**: U.S. Forest Service agreed to withdraw its decision notice for the project, which would have allowed timber to be harvested from the National Forest. The parties then agreed to dismiss the case.
***Mississippi v. EPA* (ozone case)** 08-1200 (D.C. Cir.) Settled: 1/19/2010 (This is the publication date of the proposed ozone standards)	EPA	**Issue**: Ozone NAAQS Reconsideration **Result**: Earthjustice sued EPA in 2008 challenging the NAAQS for ground-level ozone, which were lowered at the time from 84 parts per billion (ppb) to 75 ppb. In 2009, EPA announced it would reconsider the rule, and Earthjustice agreed to place its lawsuit on hold as long as EPA imposed stricter ozone NAAQS. EPA proposed new NAAQS somewhere in the range of 60 and 70 ppb. The Obama Administration put the planned rule on hold. However, the rule is expected to be proposed in late 2013.
Natural Resources Defense Council v. Federal Maritime Commission 08-07436 (C.D. Cal.) Settled: 9/11/2009	Federal Maritime Comm'n	**Issue**: Federal Maritime Commission (FMC) decision to terminate portions of the Port of Los Angeles' and Long Beach's Clean Trucks Programs **Result**: While the lawsuit was pending, FMC ended its administrative investigation against the Ports of Los Angeles and Long Beach related to their clean trucks programs, and in a related case, FMC's attempt to block implementation of the ports' clean trucks program was dismissed.
Natural Resources Defense Council v. DOI 08-05605 (N.D. Cal.) Settled: 5/15/2009	DOI, NMFS, Dept. of Commerce	**Issue**: December 2008 amendments to the Section 7 consultation rules under the Endangered Species Act and the decision to exempt greenhouse gas emitters from regulation under the Endangered Species Act **Result**: While the lawsuit was pending, the Department of Interior unilaterally revoked the Section 7 rule at issue, reverting to the Section 7 consultation process as it existed prior to the December 2008 amendments. The parties to this lawsuit then jointly agreed to dismiss the case. A formal settlement agreement was not issued.
Ohio Valley Environmental Coalition v. Army Corps of Engineers 09–247 (R46–024) (U.S.) Settled: 7/30/2010 (Memo that effectively settled the case)	EPA	**Issue**: Clean Water Act Guidance for Mountaintop Removal Mining Permits **Result**: Environmental groups challenged Clean Water Act permitting for mountaintop removal mining, saying EPA did not account for the impact on stream function. EPA issued this "guidance" while suit was pending in the U.S. Supreme Court, which effectively settled the case.
***Sierra Club v. EPA* (emission case)** 09-1063 (D.C. Cir.) Settled: 6/15/2010 EPA revoked the rule	EPA	**Issue**: Emission-Comparable Fuels (ECF) conditional exclusion reconsideration **Result**: EPA issued a December 2008 rule creating a category of Emission-Comparable Fuels (ECF) wastes that could be burned in industrial boilers without triggering RCRA combustion requirements, as long as the resulting

Case	Agency	Issue and Result
		emissions were comparable to those produced by burning fuel oil. Environmental groups sued, and EPA proposed a rule that would withdraw this conditional exclusion for ECF. In June, 2010, EPA published a final rule that revoked this conditional exclusion.
Southern Appalachian Mountain Stewards v. Anninos 09-00200 (Complaint, Army Corps Joint Status Report (stating decision to suspend NWP 21 permit), Stipulation of Dismissal) Settled: 6/18/2010 (This date is based on a 6/30/10 status report explaining the suspension of permits as of 6/18/10)	Army Corps	**Issue**: Decision to issue a streamlined nationwide Clean Water Act permit for surface coal mining **Result**: Army Corps suspended the use of Nationwide Permit 21, which authorized discharges of dredged or fill material into waters of the United States for surface coal mining activities. As a result, coal mining companies must obtain costly, time-consuming individual dredge and fill permits from the Corps.
Taylor v. Locke 09-02289 (D.D.C.) Settled: 7/19/2010	National Marine Fisheries Service (NMFS)	**Issue**: Atlantic Herring Fishery Revocation of Exemption **Result**: Settlement removes exemption that allowed herring industrial trawlers to release small amounts of fish that remain after pumping without federal inspection. The new final rule by NMFS, published in 2010, requires federal accounting and inspection for all fish brought on board.

List of Rules and Agency Actions

Rules and Agency Actions Resulting From Sue and Settle Cases (Pending or Final) 2009–2012

Air

- The Environmental Protection Agency (EPA) agreed to propose the first-ever greenhouse gas (GHG) regulations for power plants.
- EPA agreed to propose the first-ever GHG regulations for petroleum refineries.
- EPA issued Maximum Achievable Control Technology (MACT) standards for cement kilns.
- EPA revoked rule that made it easier to burn Emission Comparable Fuel wastes.
- EPA proposed stricter ozone standards (withdrawn, but could be published at any time).
- EPA issued a rule that made the National Ambient Air Quality Standards (NAAQS) for particulate matter more stringent.
- EPA issued MACT standards for hazard air pollutants for coal- and oil-fired electric utility steam generating units (Utility MACT).
- EPA granted waiver to CA to set its own limitations on GHG emissions from automobiles.
- EPA to increase regulations on oil- and gas-drilling operations regulations, including:
  - New Source Performance Standards (NSPS) for oil and gas drilling
  - MACT standards for hazardous air pollutant emissions
  - Residual Risk Standards
- EPA finalized new MACT standards for polyvinyl chloride manufacturers.
- EPA agreed to set MACT standards for brick and structural clay products manufacturing facilities located at major sources and clay ceramics manufacturing facilities located at major sources.
- EPA imposed a Federal Implementation Plan (FIP) on OK impacting three coal-fired power plants.
- EPA imposed an FIP on ND impacting seven coal-fired power plants.
- EPA imposed an FIP on NM impacting one coal-fired power plant.
- EPA imposed an FIP on NE impacting one coal-fired power plant.
- EPA agreed to review kraft pulp NSPS.
- EPA revised NSPS for nitric acid plants.
- EPA agreed to review national emissions standards for radon emissions from operating mill tailings.
- EPA agreed to review NSPS for municipal solid waste landfills.
- EPA issued MACT standards for boilers (Boiler MACT).
- EPA issued MACT standards for stationary reciprocating internal combustion engines (RICE rule).

EPA issuing MACT standards for:

- Marine tank vessel loading operations
- Pharmaceuticals production
- Printing and publishing industry
- Hard and decorative chromium electroplating and chromium anodizing tanks
- Steel pickling—HCL process facilities and hydrochloric acid regeneration plants
- Group I polymers and resins
- Shipbuilding and ship repair
- Ferroalloys production—ferromanganese and silicomanganese
- Wool fiberglass manufacturing
- Secondary aluminum production
- Pesticide active ingredient production
- Polyether polyols production
- Group IV polymers and resins
- Flexible polyurethane foam production
- Generic MACT—acrylic and modacrylic fibers

- Wood furniture manufacturing operations
- Primary lead smelting
- Secondary lead smelting
- Pulp and paper production industry
- Aerospace manufacturing and rework facilities
- Mineral wool production
- Primary aluminum reduction plants
- Portland cement manufacturing industry
- production
- Generic MACT—polycarbonate production
- Off-site waste and recovery operations
- Phosphoric acid manufacturing
- Phosphate fertilizers production plants
- Group III polymers and resins—manufacture of amino/phenolic resins

EPA agreed to take action on the following proposals related to State Implementation Plans (SIPs):

- CA SIP revision regarding San Joaquin Valley (SJV) 1997 $PM_{2.5}$ attainment plan
- CA SIP revision regarding rule changes for SJV Unified Air Pollution Control District
- CA SIP revision regarding particulate matter from beef feedlot operations
- CA SIP revision regarding PM_{10} emissions in Imperial County
- CA SIP revision regarding air quality rules in Imperial County
- Pesticide Element SIP submittal and the Fumigant Rules submittal
- KY SIP submission regarding 1997 $PM_{2.5}$ NAAQS for the Huntington-Ashland area
- KY SIP submission regarding 1997 $PM_{2.5}$ NAAQS emissions inventory for Louisville
- EPA agreed to issue a federal plan if Louisiana regulators do not attain 1997 ozone standards in Baton Rouge
- CA SIP revisions addressing 1997 $PM_{2.5}$ and ozone NAAQS for South Coast Air Basin
- 1997 ozone NAAQS revision for NC, NV, ND, HI, OK, AK, ID, OR, WA, MD, VA, TN, AR, AZ, FL, and GA
- CA SIP submission demonstrating RACT for SJV
- CA SIP submission for 1997 ozone NAAQS plan for SJV
- 1997 ozone NAAQS submission by NY, NJ, CT, MA, IL, and MO
- TX SIP submission addressing 1997 ozone and $PM_{2.5}$ NAAQS
- EPA required to approve or disapprove ozone NAAQS SIPs for 21 states
- AL SIP for 1997 $PM_{2.5}$ NAAQS and GA SIP for 1997 8-hour ozone NAAQS
- AR regional haze SIP
- TX SIP submission for Houston-Galveston-Brazoria 1997 8-hour ozone nonattainment areas
- KY SIP submission addressing 1997 ozone NAAQS in 3 counties
- SIP submission for certain NAAQS for MA, CT, NJ, NY, PA, MD, and DE
- SIPS for certain areas of IL, ME, and MO
- NC and SC SIP submissions for 1997 ozone NAAQS
- OK SIP submission regarding excess emissions
- Determination of 1-hour ozone attainment designations for areas in TX, CT, MD, NY, NJ, MA, and NH
- 1997 ozone NAAQS for areas in NV and PA
- Determination of area designations for the 2008 ground-level ozone NAAQS
- AZ SIP submission regarding plan for 1997 NAAQS attainment in Phoenix-Mesa
- 41 SIP submissions by CO, UT, MT, and NM
- SIP submissions for 1997 8-hour ozone and $PM_{2.5}$ NAAQS by CA, CO, ID, NM, ND, OK, and OR
- 2006 $PM_{2.5}$ NAAQS Infrastructure SIP submissions by AL, CT, FL, MS, NC, TN, IN, ME, OH, NM, DE, KY, NV, AR, NH, SC, MA, AZ, GA, and WV
- SIP submissions regarding regional haze and excess emissions standards in CO, WY, MT, and ND
- UT SIP revision regarding the "breakdown provision"
- Two UT SIP submissions, including one on regional haze
- 1997 8-hour NAAQS for ozone in Salt Lake and Davis Counties (UT)
- UT SIP submission addressing PM_{10} NAAQS designations for Salt Lake County, Utah County, and Ogden City

Land

- U.S. Forest Service (USFS) considering blocking 1 million acres in CA federal parks from development.
- EPA considering revisions to "definition of solid waste."
- Office of Surface Mining agreed to consider restricting mining activities near waterways (Stream Buffer Zone Rule).
- The Bureau of Land Management agreed to consider amending 12 resource management plans that opened 2

million acres of federal lands for potential oil shale leasing.
- National Park Service reduced snowmobile usage inside Yellowstone National Park.
- USFS agreed to withdraw its decision notice regarding the "Wildcat" project on the Umatilla National Forest.

Plants and Animals

- National Marine Fisheries Service (NMFS) imposed inspection requirements for Atlantic Herring Fishery.
- Fish and Wildlife Service (FWS) doubled size of critical habitat of Hine's emerald dragonfly to more than 26,000 acres in MI and MO.
- The Department of the Interior (DOI) designated about 10,386 acres of critical habitat for Chiracahua leopard frog.
- DOI agreed to issue decisions that had not already been made on hundreds of plant and animal species from list of 674 species.
- FWS listed the whitebark pine tree as an endangered species as a result of climate change.
- NMFS agreed to issue recovery plans for sperm plans, fin whales, and sei whales.
- DOI agreed to issue 12-month findings under the Endangered Species Act on 12 species of parrots, macaws, and cockatoos.
- USFS agreed to make final determinations under the Endangered Species Act for 251 species.
- FWS agreed to make findings under the Endangered Species Act for at least 477 species.
- DOI agreed to issue a decision whether to list Wright's marsh thistle.

Water

- New water quality standards for FL (inland).
- New water quality standards for FL (coastal).
- Guidance for mountaintop removal mining permits.
- EPA issued guidance on how states should address ocean acidification under the Clean Water Act.
- Army Corps of Engineers suspended nationwide surface coal mining permit.
- EPA finalizing rule regulating cooling water intake structures.
- EPA agreed to issues rules that revise steam electric effluent guidelines.
- EPA agreed to establish a total maximum daily load for the Chesapeake Bay.
- EPA agreed to develop changes to its stormwater regulations nationally.

Other

- EPA issued stricter pesticide human-testing consent rule.
- EPA agreed to issue specific changes to the Lead Renovation, Repair and Painting Program Rule.
- Federal Maritime Commission ended its administrative investigation of the ports of Los Angeles and Long Beach related to their clean trucks program.

Appendix A

Methodology I for Identifying Cases in the Sue and Settle Database

To identify the cases included in the current version of the sue and settle database, the following approaches were used:

The database was *only* designed to capture examples of major sue and settle cases. To accomplish this, a multijurisdictional federal court search was conducted in 2011 using Lexis-Nexis looking at cases 2.5 years before the start of the Obama administration and 2.5 years after (through June 2011). The names of numerous environmental groups were used and dockets of cases were identified.

For those cases identified that were still open, they were not pursued any further because an open case is by its nature not a sue and settle case. If the case was closed, then the case was searched on PACER (www.pacer.gov). If there was a settlement, relevant cases were included in a larger database that included challenges to projects. In the current version of the database, challenges to projects were excluded.

To add major cases or cross-check the existing database:

- A search was conducted in the Fall Unified Agendas for 2009–2012.[79] Economically significant active, completed, and long-term actions were searched. If a consent decree or settlement agreement was listed as being connected to a specific rule, a case search was conducted to verify this information.
- House Report 112-593, which is the House Report for the Sunshine for Regulatory Decrees and Settlements Act of 2012 (H.R. 3862), included information on sue and settle cases. These cases were either added or cross-checked with the database, as was information from the following House testimony: *Addressing Off Ramp Settlements: How Legislation Can Ensure Transparency, Public Participation, and Judicial Review in Rulemaking Activity*, Testimony of Roger R. Martella, Jr. before the House Committee on the Judiciary, Feb. 2, 2012; and *The Use and Abuse of Consent Decrees in Federal Rulemaking*, Testimony of Andrew M. Grossman before the House Committee on the Judiciary, Feb. 2, 2012.
- The following GAO report was used: GAO, *Environmental Litigation: Cases Against EPA and Associated Costs Over Time* GAO-11-650 (Washington, D.C.: August, 2011). The U.S. Chamber's report on regional haze and sue and settle was also used: *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs, Chamber of Commerce of the United States*, William Yeatman (August 2012). In addition,

[79] Since only one Unified Agenda was published in 2012, which was in December, this agenda was used for 2012.

environmental groups announce settlements and lawsuits on their websites—this information served as a resource.

The database includes environmental-related cases, regardless of federal agency or federal statute; however, actions that were not of general applicability (except for some FOIA cases) were excluded, such as enforcement actions and Title V permit cases.

Appendix B

Methodology II for Identifying Cases in the Sue and Settle Database

Clean Air Act

Clean Air Act settlement agreements and were compiled using a database search of the *Federal Register*. Pursuant to Clean Air Act section 113(g), all settlement agreements and consent decrees must be announced in the *Federal Register*. The search terms were:

- Agency: "Environmental Protection Agency"
  Title: "Settlement Agreement" or "Consent Decree"
  Dates: Between "1/20/2009" and "1/20/2013"

All settlement agreements and consent decrees pursuant to a Title V challenge or an enforcement action were removed in order to ensure that the settlement agreement or consent decree had a general applicability.

It was possible to determine whether EPA and the petitioners either litigated or went straight to negotiations by checking the case docket using www.pacer.gov.

Clean Water Act

Clean Water Act settlement agreements pursuant to citizen deadline suits are not announced in the *Federal Register*. Two techniques were used to find them.

The first was a database search of "Inside EPA," and used two sets of search terms:

- "Clean Water Act" and "Settlement Agreement"
  "Clean Water Act" and "Consent Decree"

The second was a database search of the *Federal Register*. Instead of searching for announcements of settlement agreements (as had been done for the Clean Air Act), regulations pursuant to Clean Water Act settlement agreements or consent decrees were searched. The search terms were as follows:

- Agency: "Environmental Protection Agency"
  Title: "Clean Water Act"
  Full Text or Metadata: "Settlement Agreement" or "Consent Decree"
  Dates: Between "1/20/2009" and "1/20/2013"

As with the Clean Air Act methodology, all settlement agreements and consent decrees pursuant to an enforcement action were removed to ensure that the settlement agreement or consent decree had general applicability. It was possible to determine whether EPA and the petitioners either litigated or went straight to negotiations by checking the case docket using www.pacer.gov.

Environmental Law & Property Rights

Do Sue and Settle Practices Undermine Congressional Intent for Cooperative Federalism on Environmental Matters?

By David B. Rivkin, Jr. & Adam Doverspike***

Note from the Editor:

This article is about whether sue and settle practices undermine congressional intent for cooperative federalism on environmental matters. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the authors. The Federalist Society seeks to further discussion about sue and settle, federalism, and the Environmental Protection Agency. To this end, we offer links below to other perspectives on the issue, and we invite responses from our audience. To join this debate, please email us at info@fed-soc.org.

Related Links:

- Avi Bargow, *Setting the Record Straight*, EPA Connect: The Official Blog of EPA's Leadership (Feb. 12, 2014, 1:35 PM): http://blog.epa.gov/epaconnect/2014/02/setting-the-record-straight/
- Stephen M. Johnson, *Sue and Settle: Demonizing the Environmental Citizen Suit*, 37 Seattle U. L. Rev. 891 (2014): http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2478866
- Ann Alexander, *Sue and settle legislation: a cure in search of a disease*, Switchboard: Natural Resources Defense Council Staff Blog (Jul. 16, 2012): http://switchboard.nrdc.org/blogs/aalexander/sue_and_settle_legislation_a_c.html
- John Walke, *Cantor Report Attacks Environmental Law Enforcement, Falls Flat With Baseless Conspiracy Theory*, Switchboard: Natural Resources Defense Council Staff Blog (Oct. 25, 2012): http://switchboard.nrdc.org/blogs/jwalke/the_office_of_house_majority.html

I. Environmental Statutes Embrace Cooperative Federalism

Environmental statutes give states primary responsibility for regulatory rules. The Environmental Protection Agency reviews state programs and, in certain cases, may supplant the state program. This model has become known as cooperative federalism.[1]

Cooperative federalism encourages state regulation rather than compelling or commandeering it. Such restraint permits state officials to remain accountable to their citizens.[2] Congress embraced cooperative federalism in the Clean Air Act and Clean Water Act—the major environmental statutes that invite sue and settle arrangements.[3] The Endangered Species Act did not explicitly adopt cooperative federalism; however, in practice, a "partnership federalism" has emerged.[4]

The environmental statutes do not require the EPA to work with environmental groups; rather, they mandate the EPA to work cooperatively with the states. Yet the increasingly common sue and settle tactic permits the EPA to collude with environmental activists to keep states from having a say in important procedural and substantive decision-making.

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II. Sue and Settle—Illustrative Examples

Certain environmental statutes mandate agency action by non-discretionary deadlines.[5] The EPA chronically misses mandatory deadlines because congressional allocations and agency staffing cannot meet the sheer number of congressionally-required regulations. Citizen suit provisions entice environmental activists to sue the EPA for missing those mandatory deadlines.[6] And attorney fee provisions allow activists to profit from the lawsuits.[7]

The EPA often admits fault and settles with activists, agreeing to an expedited timetable to issue regulations. The EPA rarely informs other stakeholders, including states, regulated entities, and industry groups, about the settlement. The EPA sometimes settles the same day the suit is filed, suggesting collusion between the nominally adverse parties.[8] The EPA and the activists enter a draft consent decree with the court. Under most environmental statutes, the EPA need not even receive public comment on the consent decree, much less heed the advice of anyone other than the activists that sued.[9]

Even if third parties hear about a sue and settle case, courts generally deny intervention.[10] The court enters the consent decree, which cannot be modified without the activist group's agreement or a court order. The EPA then relies upon the consent decree deadlines to cut off stakeholders and to adopt activist-friendly regulations. The practice predates the current administration, but has exploded since President Obama took office.[11]

In practice, sue and settle shuts out all stakeholders other than the agency and the activist groups that filed a given suit. Two recent cases illustrate common problems with the sue and

settle tactic.

A. The Regional Haze Cases

The EPA prevents Oklahoma and other affected states from pursuing state plans to regulate regional haze under the Clean Air Act by relying on deadlines set through a sue and settle agreement.

The 2007 regional haze rule required states to submit State Implementation Plans by 2009. In 2009, the EPA found more than 30 states, including Oklahoma, had not submitted a State Plan. The Clean Air Act requires the EPA to create Federal Implementation Plans within 2 years after finding no State Plan was filed. By 2011, the EPA had not promulgated Federal Plans and some states, including Oklahoma, had submitted belated State Plans.

Environmental activists sued the EPA for not promulgating Federal Plans.[12] Neither the activists, nor the EPA, nor the court notified the states about the lawsuit. Plaintiffs and the EPA entered a partial consent decree that created a table of deadlines for each of the 30+ states involved.[13]

Plaintiffs and the EPA permitted one state, Arizona, to intervene solely to argue that the EPA ought to act on Arizona's February 2011 State Plan and provide time for the state to correct any deficiencies before promulgating a Federal Plan.[14] The court ultimately overruled Arizona's objection to the consent decree because Arizona had missed the State Plan deadline.[15]

While enforcing hard deadlines against the states, plaintiffs and the EPA agreed repeatedly to extend deadlines for the EPA to promulgate Federal Plans.[16] Indeed, even when the EPA missed a court-ordered deadline, the parties agreed to retroactively adjust it.[17]

Despite the EPA's freedom to miss deadlines, it relied upon the consent decree deadlines to undermine the cooperative federalism principle that the agency should consider State Plans before imposing a Federal Plan:

- New Mexico: "It would not have been possible to review the July 5, 2011 [State Plan] submission, propose a rulemaking, and promulgate a final action by the dates required by the consent decree."[18]

- North Dakota: "Given our September 1, 2011 deadline to sign this notice of proposed rulemaking under the consent decree discussed in section III.C, we lack sufficient time to act on or consider this aspect of Amendment No. 1."[19]

- Oklahoma: "We also are required by the terms of a consent decree with WildEarth Guardians, lodged with the U.S. District Court for the Northern District of California to ensure that Oklahoma's CAA requirements for 110(a)(2)(D)(i)(II) are finalized by December 13, 2011. Because we have found the state's [State Plan] submissions do not adequately satisfy either requirement in full and because we have previously found that Oklahoma failed to timely submit these [State Plan] submissions, we have not only the authority but a duty to promulgate a [Federal Plan] that meets those requirements."[20]

The EPA abandoned a cooperative federalism approach that permits states to remedy issues in the State Plans solely to meet the sue and settle deadlines that the EPA and activists set without input from the states.

B. The Lesser Prairie-Chicken Endangered Species Act Listing

Fish and Wildlife Services (FWS) abdicated its authority to prioritize which species need be considered for listing as endangered or threatened to an activist group that required unrealistic deadlines and excluded all other stakeholders. Additionally, the agency inserted a substantive rulemaking into the consent decree. While the settlement covered over 250 species, we focus here on the lesser prairie-chicken (LPC), fully cognizant that similar stories exist for other species.

FWS found the LPC warranted listing under the Act in June 1998, but that the listing was precluded by higher priority actions.[21] From 1998-2009, FWS annually found that listing was "warranted but precluded" by pending proposals in each annual Candidate Notice of Review.[22] In 2008, FWS elevated the LPC's numeric threat level from 8 to 2.[23]

Then the EPA's sue and settle practices ensnared the entire endangered species Listing Program. An environmentalist group filed suit in Colorado, alleging FWS's "warranted but precluded" finding for the LPC was arbitrary and capricious.[24] The LPC case was rolled into a multi-district litigation encompassing over 250 species in the DC federal court.[25]

The DC federal court approved a settlement requiring FWS to publish proposed rules or not warranted findings for 251 species by September 2016.[26] FWS acknowledged that meeting the settlement demands will "require substantially all of the resources in the Listing Program."[27] The Agreement set a FY 2012 deadline for FWS to submit a work-plan on the lesser prairie-chicken.[28]

The settlement also substantively restricted FWS from listing a species as warranted but precluded. Congress permits FWS to deem a species listing as warranted, not warranted, or warranted but precluded.[29] The settlement agreement, however, requires each species listing be deemed warranted or not warranted, precluding a statutorily available option.[30]

Environmentalists and agencies successfully precluded all interested parties from participating in the regulatory process that eliminated the warranted but precluded option and tied up most of the agency's listing program funds. The DC court denied stakeholders' attempts to intervene.[31] And after the Colorado court permitted industry stakeholders to intervene,[32] the parties settled the DC action without including the intervenors.[33] The settlement resolved the Colorado case as well, but sidestepped meaningful participation by the intervenors.

Before the sue and settle mandated deadline, FWS proposed a rule listing the LPC as threatened.[34] FWS delayed the LPC listing several times while repeatedly invoking the settlement as requiring quick resolution.[35] And FWS repeatedly found that Oklahoma had taken great steps in conservation:

- "The Oklahoma PFW program has implemented 154 private lands agreements on about 38,954 ha (96,258 ac) of private lands for the benefit of the lesser prairie-chicken in the State." Listing the Lesser Prairie-Chicken as a Threatened Species, 77 Fed. Reg. at 73835.

- "The [Oklahoma Department of Wildlife

Conservation] has shown the ability to administer the CCAA and work effectively with participating landowners to implement conservation commitments in the CCAA." Final Candidate Conservation Agreement With Assurances, Final Environmental Assessment, and Finding of No Significant Impact; Lesser Prairie Chicken, Oklahoma, 78 Fed. Reg. 14111, 14113 (Mar. 4, 2013).

Nonetheless, FWS pushed forward with asserting federal control due to the sue and settle deadline, ultimately issuing a final rule declaring the LPC as threatened on April 10, 2014.[36]

III. Sue And Settle Undermines Cooperative Federalism

A. Sue And Settle Excludes States From The Rulemaking Process

Sue and settle excludes states from participating in the rulemaking process. While courts have resisted most agency efforts to change substantive law without notice and comment procedures,[37] some agencies continue to circumvent proper rulemaking by removing substantive choices in settlements. And even settlements restricted to setting deadlines affect the substantive outcome when agencies claim an inability to consider all evidence, comments, or state efforts because a deadline looms.[38]

Agencies move their own deadlines, but forbid states to do so. The EPA relies on "court-ordered" deadlines to curtail stakeholder input.[39] When the agencies cannot meet a consent decree deadline, the colluding activists agree to extend it. Thus, states must comply with deadlines they had no input on, but the EPA and activist groups can extend their self-imposed deadlines.

B. Activists Rather Than Congress or Agencies Set Agency Priorities

When agencies embrace a consent decree without stakeholder input, it permits activists to dictate agency priorities. Activists decide when and where the EPA and FWS develop onerous regulations.

FWS functionally ceded all agency prioritization to activists without consulting with the states or considering state conservation efforts.[40] FWS Director Dan Ashe admits that the "torrent of deadline-related cases over the past decade has had the unfortunate effect of distorting and delaying our biological priorities."[41] In FY 2011, the agency spent $15.8 million of its $20.9 million Listing Program budget on taking "substantive actions required by court orders or settlement agreements resulting from litigation."[42]

Activists not only set agency priorities, they get paid by the government to do so. Activists often receive attorney fee awards for winning the lawsuits against agencies that did not even fight back. From 2003-2010, activists received millions in federal dollars for suing the EPA.[43] FWS Director Ashe testified that activists obtained "$134,156 paid out of Service funds for attorneys' fees in FY 2010."[44] With sue and settle practices increasing in recent years, the total government funding to activist groups is likely growing as well.

C. Agencies and the Courts Should Respect Congressional Intent To Bolster Cooperative Federalism

Agencies and courts can fix the major problems of sue and settle tactics. First, courts should permit intervention more freely to ensure settlements between colluding entities receive needed scrutiny.[45] Second, agencies should welcome states and other stakeholders participating fully in all sue and settle processes. Stakeholders can ensure deadlines are feasible and will not create rushed, inaccurate rulemaking processes. Third, agencies should treat states as cooperative allies rather than uninterested outsiders. If the EPA extends its own deadlines repeatedly, it should offer similar grace periods for State Plans. The agencies undermine congressional intent for them to work with states when the agencies repeatedly argue that states have no role in the activist-generated settlement process.

IV. Conclusion

Activists and federal agencies are implementing federal programs over the objections of states by relying on sue and settle tactics that make state participation in the substantive rulemaking difficult or impossible. The consent decree deadlines do not provide states sufficient time to provide state-based programs, or sufficient time to rectify minor issues in state-based programs before agencies impose federal programs.

The agencies have thwarted Congressional intent that they work with states in a cooperative manner respecting federalist principles. If the agencies and courts do not reign in this ongoing power grab, Congress should revise the environmental statutes to withdraw the citizens suit provisions or otherwise limit the collusive settlements that undermine cooperative federalism today.

Endnotes

1 *See* American Corn Growers v. EPA, 291 F.3d 1 (D.C. Cir. 2002).

2 New York v. United States, 505 U.S. 144, 168 (1992) ("By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.").

3 The Clean Air Act "'uses a cooperative-federalism approach to regulate air quality.'" Oklahoma v. EPA, 723 F.3d 1201, 1204 (10th Cir. 2013) (quoting U.S. Magnesium, LLC v. EPA, 690 F.3d 1157, 1159 (10th Cir. 2012)); *see also* Friends of the Earth v. Carey, 552 F.2d 25, 29-30 (2d Cir. 1997) ("Under the [Clean Air] Act, state and local governments assume the primary responsibility for establishing and implementing air quality control programs"). And the "Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' 33 U. S. C. § 1251(a)." Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992).

4 Jean O. Melious, Enforcing the Endangered Species Act Against The States, 25 Wm. & Mary Envtl. L. & Pol'y Rev. 605, 609 (2001) ("The ESA has not adopted this cooperative federalism model, however, in which the federal government dictates the content of programs and state governments carry out the programs. Because all biodiversity issues, like all politics, are local, and because states have traditionally exercised primary authority over wildlife and natural resource regulation, a model is emerging that 'allows state and local governments to define the content of federal mandates.' This model has been referred to as 'partnership federalism.'"); *see also generally* Kaush Arha & Barton H. Thompson Jr., The Endangered Species Act And Federalism: Effective Conservation Through Greater State Commitment (2012).

5 *See, e.g.*, Clean Air Act, 42 U.S.C. § 7401 *et seq.*; Clean Water Act, 33 U.S.C. § 1251 *et seq.*

6 *See* 42 U.S.C. § 7604(a)(2) (CAA); 33 U.S.C. § 1365(a)(2) (CWA).

7 U.S. Government Accountability Office, Cases Against EPA and Associated Costs over Time, GAO-11-650 at 40-48 (Aug. 2011); *see also* U.S. Chamber of Commerce, *A Report on Sue and Settle: Regulating Behind*

Closed Doors at 12-13 n.14 (May 2013) (hereinafter "Chamber Report") ("In effect, advocacy groups are incentivized by federal funding to bring sue and settle lawsuits and exert direct influence over agency agendas…"), *available at* https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf.

8 *See, e.g.*, William S. Jordan, III, *News from the Circuits*, 38 Admin. & Reg. L. News 28, 29 (Summer 2013) (describing *Defenders of Wildlife v. Perciasepe*, 2013 WL 1729598 (D.C. Cir. 2013) where "Defenders and EPA apparently negotiated a settlement, Defenders sued EPA on November 8, 2010, and on the same day the parties filed a joint motion to enter a proposed consent decree.").

9 *But see* 42 U.S.C. § 7413(g) (for Clean Air Act cases, "[a]t least 30 days before a consent order or settlement agreement of any kind," the "Administrator shall provide a reasonable opportunity by notice in the Federal Register to persons who are not named as parties or intervenors to the action or matter to comment in writing.").

10 *E.g.*, Defenders of Wildlife v. Perciasepe, 714 F.3d 1317 (D.C. Cir. 2013) (denying Utility Water Act Group petition to intervene); *but see* Order Granting State of Oklahoma's Motion to Intervene (Doc. No. 16), WildEarth Guardians v. McCarthy, 13-cv-2748 (D. Colo. Feb. 11, 2014) (unopposed motion).

11 *See* Chamber Report, *supra* note 7, at 13-14.

12 *See* National Parks Conservation Ass'n v. Jackson, Case No. 11-cv-1548 (D.D.C.).

13 Partial Consent Decree (Doc. No. 21 in *National Parks Conservation Ass'n*) (D.D.C. March 30, 2012).

14 Stipulated Order (Doc. No. 12 in *National Parks Conservation Ass'n*) (D.D.C. Jan. 20, 2012).

15 Memorandum Opinion and Order (Doc. No. 35 in *National Parks Conservation Ass'n*) (D.D.C. May 25, 2012).

16 Orders and Stipulation re Consent Decree (Doc. Nos. 71, 75, 78, 80 in *National Parks Conservation Ass'n*) (orders granting extensions).

17 *See* Unopposed Mot. to Amend/Correct Consent Decree (Doc. No. 70 in *National Parks Conservation Ass'n*) (D.D.C. May 24, 2013) (Oklahoma State Plan).

18 Approval and Promulgation of Implementation Plans; New Mexico; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determination,76 Fed. Reg. 52388, 52390 (Aug. 22, 2011).

19 Approval and Promulgation of Implementation Plans; North Dakota; Regional Haze State Implementation Plan; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Regional Haze,76 Fed. Reg. 58,570, 58,579 (Sept. 21, 2011).

20 Approval and Promulgation of Implementation Plans; Oklahoma; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determinations, 76 Fed. Reg. 81728, 81732 (Dec. 28, 2011).

21 Endangered and Threatened Wildlife and Plants; 12-Month Finding for a Petition To List he Lesser Prairie-Chicken as Threatened and Designate Critical Habitat, 63 Fed. Reg. 31400, 31406 (June 9, 1998) ("A listing priority of 8 has consequently been assigned for the lesser prairie-chicken"); 16 U.S.C. §1533(b)(3)(B)(iii)(I).

22 16 U.S.C. §1533(b)(3)(B)(iii)(I).

23 Listing Priority Numbers range from 1 to 12 with 1 the most urgent. *See* Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions, 73 Fed. Reg. 75,176, 75,179-80 (Dec. 10, 2008).

24 Petition (Doc. No. 1), Wildearth Guardians v. Salazar, 10-cv-2129 (D. Colo. Aug. 31, 2010); *see also* In re Endangered Species Act Section 4 Deadline Litigation, MDL No. 2165 (D.D.C.) (other species).

25 In re Endangered Species Act Section 4 Deadline Litigation, MDL No. 2165 (D.D.C.).

26 Orders (Doc. Nos. 55, 56), In re Endangered Species Act Section 4 Deadline Litigation (D.D.C. Sept. 9, 2011); Agreements (Doc. Nos. 31-1, 32-1).

27 Proposed Settlement Agreement (Doc. No. 31-1 at 10), In re Endangered Species Act Section 4 Deadline Litigation (D.D.C. May 10, 2011).

28 *Id.* at 6, 26.

29 16 U.S.C. § 1533(b)(3)(B).

30 Proposed Settlement Agreement (Doc. No. 31-1 at 7), In re Endangered Species Act Section 4 Deadline Litigation (D.D.C. May 10, 2011) ("The Defendants shall, for all 251 species that were designated as 'candidates' in the 2010 CNOR, submit to the Federal Register for publication either a Proposed Rule or a not-warranted finding no later than September 30, 2016.").

31 Memorandum Opinion (Doc. No. 16) In re Endangered Species Act Section 4 Deadline Litigation (D.D.C. Aug. 27, 2010) ("allowing TRC to intervene could lead to undue delay and would potentially prejudice the adjudication of the original parties' rights"); Memorandum Opinion (Doc. #54) (D.D.C. Sept. 9, 2011) ("the Court finds that allowing SCI to intervene could lead to undue delay").

32 Order Granting Intervention (Doc. No. 18) Wildearth Guardians v. Salazar (D. Colo. Jan. 3, 2011).

33 Notice of Approval of Related Settlement Agreements (Doc. No. 31) Wildearth Guardians v. Salazar (D. Colo Sept. 23, 2011).

34 Endangered and Threatened Wildlife and Plants; Listing the Lesser Prairie-Chicken as a Threatened Species, 77 Fed. Reg. 73,827, 73,830 (Dec. 11, 2012) (describing sue and settle agreement mandating "a proposed listing rule for the lesser prairie-chicken" by September 30, 2012).

35 Endangered and Threatened Wildlife and Plants; Listing the Lesser Prairie-Chicken as a Threatened Species With a Special Rule, 78 Fed. Reg. 26,302, 26,304 (May 6, 2013) ("On September 27, 2012, the settlement agreement was modified to require that the proposed listing rule be submitted to the Federal Register on or before November 29, 2012. On December 11, 2012, we published in the Federal Register a proposed rule to list the lesser prairie-chicken as a threatened species under the Act (77 FR 73,828)."); Endangered and Threatened Wildlife and Plants; 6-Month Extension of Final Determination for the Proposed Listing of the Lesser Prairie-Chicken as a Threatened Species, 78 Fed. Reg. 41,022 (July 9, 2013) ("As noted in the proposed listing rule (77 FR 73828), we were previously required by the terms of judicially approved settlement agreement to make a final determination on the lesser prairie-chicken proposed listing rule no later than September 30, 2013. Therefore, with this 6-month extension, we will make a final determination on the proposed rule no later than March 30, 2014."); Endangered and Threatened Wildlife and Plants; Listing the Lesser Prairie-Chicken as a Threatened Species With a Special Rule, 78 Fed. Reg. 75,306, 73,508 (Dec. 11, 2013) ("As noted in the proposed listing rule (77 FR 73,828), we were previously required by the terms of judicially approved settlement agreement to make a final determination on the lesser prairie-chicken proposed listing rule no later than September 30, 2013. With the 6-month extension, we will make a final determination on the proposed rule no later than March 31, 2014.").

36 Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Lesser Prairie-Chicken, 79 FR 20,074 (Apr. 10, 2014).

37 *See* Conservation N.W. v. Sherman, 715 F.3d 1181, 1187 (9th Cir. 2013) ("…a district court abuses its discretion when it enters a consent decree that permanently and substantially amends an agency rule that would have otherwise been subject to statutory rulemaking procedures."); *id.* ("Because the consent decree allows for substantial, permanent amendments to Survey and Manage, it impermissibly conflicts with laws governing the process for such amendments. It was therefore an abuse of discretion for the district court to approve it in its current form.").

38 *See* Defenders of Wildlife v. Perciasepe, 714 F.3d 1317, 1323 (D.C. Cir. 2013) ("UWAG first argues that its members have standing because the consent decree imposes too strict a timeline for EPA to decide whether and when to engage in rulemaking. According to UWAG, the timeline provides too little time for notice and comment such that its members will not have an adequate opportunity to participate in the rulemaking, making it more likely

that EPA will promulgate a rule economically harmful to its members."); *but see* Nat. Resources Def. Council v. Costle, 561 F.2d 904, 910 (D.C. Cir. 1977) ("Another impairment of the appellants' interest in valid regulations arises from their exclusion from possible proceedings about modifications in the timetable.").

39 *See, e.g.*, 76 Fed. Reg. 52,390 (EPA found the "court-supervised consent decree deadline" made review of New Mexico's State Plan impossible, requiring an EPA-written Federal Plan); 76 Fed. Reg. 58,579 (EPA "lack[ed] sufficient time to act on or consider" North Dakota Department of Environmental Protection's determination due to consent decree deadline); 76 Fed. Reg. 81,732 (finding Oklahoma's State Plan did not meet certain requirements, EPA claimed a "duty to promulgate" a Federal Plan due to a consent decree that required finalization by December 13, 2011).

40 Testimony of Hon. Dan Ashe, Director, U.S. Fish and Wildlife Service before House Natural Resources Committee (December 6, 2011).

41 *Id.*

42 *Id.* Until recently, the agencies did not holistically track sue and settle agreements, rendering research about how much activists set agency priorities difficult. *See* http://www.epa.gov/ogc/noi.html (listing Notices of Intent to Sue since Jan. 1, 2013).

43 U.S. Government Accountability Office, Cases Against EPA and Associated Costs over Time, GAO-11-650 at 40-48 (Aug. 2011); *see also* Chamber Report, *supra* note 7, at 12-13 n.14 ("In effect, advocacy groups are incentivized by federal funding to bring sue and settle lawsuits and exert direct influence over agency agendas").

44 Testimony of Hon. Dan Ashe, Director, U.S. Fish and Wildlife Service before House Natural Resources Committee (December 6, 2011).

45 *E.g.*, Order Granting State of Oklahoma's Motion to Intervene (Doc. No. 16), WildEarth Guardians v. McCarthy (D. Colo. Feb. 11, 2014) (unopposed motion).

The Heritage Foundation

LEGAL MEMORANDUM

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Regulation Through Sham Litigation: The Sue and Settle Phenomenon

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Abstract

Typically, the federal government defends itself vigorously against lawsuits challenging its actions. But not always: Sometimes regulators are only too happy to face collusive lawsuits by friendly "foes" that are aimed at compelling government action that would otherwise be difficult or impossible to achieve. Rather than defend these cases, regulators settle them in a phenomenon known as "sue and settle." This tactic has exploded under the Obama Administration, costing the economy tens of billions of dollars while eroding political accountability and public participation in government. There are solutions: The executive branch should return to the principles adopted during the Reagan Administration by Attorney General Edwin Meese III, and Congress should require transparency and accountability in settlements that commit agencies to action.

Typically, the federal government defends itself vigorously against lawsuits challenging its actions. But not always: Sometimes, regulators are only too happy to face collusive lawsuits by friendly "foes" that are aimed at compelling government action that would otherwise be difficult or impossible to achieve. Rather than defend these cases, regulators settle them in a phenomenon known as "sue and settle."

In an increasing number of cases brought by activist groups, the Obama Administration has chosen to enter into settlements that commit it to taking action, often promulgating new regulations, on a set schedule. While the "sue and settle" phenomenon is not new, what is novel is the frequency with which generally applicable regu-

Key Points

- "Sue and settle" is a tactic by which agencies settle cases through consent decrees that voluntarily cede lawful agency discretion. These cases typically arise from private lawsuits that seek to commit the defendant agency to issue regulations by a set deadline.
- This tactic has exploded under the Obama Administration, costing the economy tens of billions of dollars while eroding political accountability and public participation in government.
- The Obama Administration's increased reliance on consent-decree settlements to further its regulatory agenda is a short-sighted strategy. Whatever benefits this model offers in the short term are undermined by the risk that poorly reasoned regulations will be struck down by the courts or reversed by a future Administration.
- There is, however, a solution to the sue and settle scheme: The executive branch should adopt the Meese Policy. Failing action by the executive branch, Congress should still force agencies to honor sound rulemaking procedures.

This paper, in its entirety, can be found at **http://report.heritage.org/lm110**

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lations—particularly in the environmental sphere—are being promulgated according to judicially enforceable consent decrees. For instance, the Environmental Protection Agency (EPA) alone entered into more than 60 such settlements between 2009 and 2012, committing the agency to publish more than 100 new regulations at a cost to the economy of tens of billions of dollars.[1]

Perhaps greater still are the costs to political accountability. Especially in recent years, consent decrees have been used to skirt the inherently political process of setting governmental priorities.

At the most basic level, sue and settle compromises public officials' duty to serve the public interest. Outside groups, rather than officials, are empowered to further their own interests by using litigation to set agency priorities. In some cases, consent-decree settlements appear to be the result of collusion, with an agency's political leadership sharing the goals of those suing it and taking advantage of litigation to achieve those shared goals in ways that would be difficult outside of court.

At the same time, consent-decree settlements allow political actors to disclaim responsibility for agency actions that are unpopular, thereby evading accountability. Consent decrees also diminish the influence of other executive branch actors, such as the President and the Office of Management and Budget, and of Congress, which may use oversight and the power of the purse to promote its view of the public interest. By entering into consent-decree settlements, an Administration may also bind its successors to its regulatory program far into the future, raising serious policy and constitutional concerns.

Consent-decree settlements have also been used to short-circuit normal agency rulemaking procedures, to accelerate rulemaking in ways that constrain the public's ability to participate in the regulatory process. The Administrative Procedure Act (APA) and other statutes recognize the values of notice and transparency, public participation, and careful agency deliberation—the very elements that sue and settle undermines. Settlements that resolve important questions of policy—whether to issue a regulation, the timeline for doing so, what entities will be covered, etc.—are struck behind closed doors, free from public scrutiny and input. By mandating aggressive regulatory timelines, settlements limit what opportunity for public participation remains while circumscribing officials' ability to accommodate the comments they do receive.

Tossing the normal rulemaking procedures by the wayside is, in some sense, the very point of sue and settle: Doing so empowers the special-interest group that brought suit in the first place at the expense of parties that might otherwise use their political leverage and the rulemaking process to force compromises that serve the broader public interest.

There are, however, solutions to the sue and settle phenomenon. For example, in order to preserve its powers and discretion, the executive branch should decline to enter into consent decrees that compromise either. But such reform takes fortitude and the willingness to pass up short-term gain for less tangible, longer-term benefits such as greater public participation in rulemaking and robust democratic accountability.

It should come as little surprise that the Reagan Administration was willing to make this trade-off and that Attorney General Edwin Meese III spearheaded its policy.[2] The principles that Attorney General Meese laid out in a 1986 memorandum setting Department of Justice policy on consent decrees and settlements remain vital today and should form the backbone of any attempt by the executive branch to address this problem.

Congress can also play a critical role in these reforms. Although the ultimate decision on whether to enter into any given settlement should be left to high-ranking and accountable executive branch officials such as the Attorney General and agency heads, Congress can and should provide for greater transparency and public participation. Additionally, Congress can ensure that settlements are entered into and carried out in the public interest rather than as a means to circumvent usual rulemaking procedures or to evade accountability.

More fundamentally, though, the source of this problem—and its ultimate solution—lies with Congress. It should recognize that setting governmen-

1. U.S. Chamber of Commerce, Sue and Settle: Regulating Behind Closed Doors 14 (2013) (hereinafter "Chamber Report").

2. Memorandum from Edwin Meese III, Attorney General, to All Assistant Attorneys General and All United States Attorneys, Re: Department Policy Regarding Consent Decrees and Settlement Agreements (Mar. 13, 1986) (hereinafter "Meese Policy"), *available at* http://www.archives.gov/news/samuel-alito/accession-060-89-1/Acc060-89-1-box9-memoAyer-LSWG-1986.pdf.

tal priorities is an inherently political process and therefore act to limit the availability of "citizen suits" that seek to spur the government into furthering the litigants' parochial view of the public good.

Background of Sue and Settle

The Phenomenon. "Sue and settle" is a tactic by which agencies settle cases through consent decrees that voluntarily cede lawful agency discretion. These cases typically arise from private lawsuits that seek to commit the defendant agency to issue regulations by a set deadline.

Typically, an outside group petitions the agency to undertake a rulemaking and then brings suit under either a "citizen suit" provision or the Administrative Procedure Act, which authorizes a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed."[3] The Clean Air Act, Clean Water Act, and Endangered Species Act contain specific citizen suit provisions that authorize plaintiffs to bring suit to challenge an agency's failure to perform mandatory acts under those statutes.[4] Such causes of action do not, in themselves, necessarily constrain agency discretion, but rather provide a mechanism to compel an agency to make *some* decision: "[W]hen an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be."[5]

But "failure to act" lawsuits almost always go farther than merely seeking to require the agency to act on a rulemaking petition—such as by denying it. Instead, they typically argue that the governing statute mandates that the agency regulate in a specific manner and that the agency has failed to do so. The legal basis of such a claim may be that the statute sets a deadline for regulatory action—for example, that the Food and Drug Administration propose "science-based minimum standards for the safe production and harvesting" of certain vegetables no later than January 4, 2012[6]—or that the statute requires certain substantive action—for example, as in *Massachusetts v. EPA*, that the EPA regulate automobile emissions of greenhouse gases because they fall within the Clean Air Act's "capacious definition of 'air pollutant.'"[7]

In other words, the very obligation of an agency to act is often contingent on answering some antecedent question of law or policy. Accordingly, when an agency settles such a lawsuit, it commits to issuing regulations, and that commitment often compromises the agency's statutory discretion. For example, had the EPA settled *Massachusetts* rather than litigate the case, the likely consent decree would have required the EPA to issue emissions standards, committing the agency to determine that greenhouse gas emissions are a "pollutant" as that term is defined in the Act. This determination, which the Supreme Court of the United States in *Massachusetts* recognized may involve some degree of agency discretion,[8] would have been made by the private agreement of the parties in the settlement and resulting consent decree.

Thus, when an agency settles a "failure to act" case, that settlement decides both the threshold question of whether it ought to regulate at all and important subsidiary questions such as the targets of its regulation. It also sets agency priorities through deadlines that compel the agency to issue the regulations sought by plaintiffs, even ahead of other actions that public officials may consider to be more pressing.

Sue and settle is not confined to any particular subject matter. Many prominent cases arise under environmental statutes due to their broad, aspirational language that affords regulators commensurately broad discretion to act;[9] the high costs of the resulting regulations; and a concentrated and well-

3. 5 U.S.C. § 706(1).
4. Clean Air Act, 42 U.S.C. § 7604(a)(2); Clean Water Act, 33 U.S.C. § 1365(a)(2); Endangered Species Act, 16 U.S.C. § 1540(g)(1)(B).
5. Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 65 (2004).
6. *See* 21 U.S.C. § 350h.
7. Massachusetts v. EPA, 127 S. Ct. 1438, 1462 (2007).
8. *Id.* at 1462–63 ("We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding.").
9. As Chief Justice John Roberts recently noted, "Congressional delegations to agencies are often ambiguous—expressing 'a mood rather than a message.'" City of Arlington v. FCC, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting) (quoting Henry J. Friendly, *Administrative Agencies: The Need for a Better Definition of Standards*, 75 Harv. L. Rev. 1263, 1311 (1962)). For example, the Clean Air Act requires EPA to set national ambient air quality standards that "are requisite to protect the public health" and "the public welfare." 42 U.S.C. § 7409(b).

funded environmental lobby. But consent decrees binding federal actors have also been considered in cases concerning food safety, civil rights, federal mortgage subsidies, national security, and many other areas. Basically, consent decrees may become an issue in any area of the law where federal policymaking is driven by litigation.

Both data and anecdotal evidence show that, under the Obama Administration, consent-decree settlements have become more frequent. A recent report by the U.S. Chamber of Commerce tallied draft consent decrees under the Clean Air Act, which (unlike under other statutes) require publication in the *Federal Register*.[10] The report found that the EPA had entered into some 60 consent decrees requiring the issuance of rules of general applicability during President Barack Obama's first term—more than twice the 28 settlements of President George W. Bush's second term. At the same time, nearly all of the Obama EPA's most expensive rulemakings have been governed by consent decrees. This figure includes the "Utility MACT" rule discussed below, the "Boiler MACT" rule, and new air quality standards for ozone.

The Principles of Sound Rulemaking. At a minimum, the backroom dealing inherent in "sue and settle" cases conflicts with the norms of administrative rulemaking as prescribed by the Administrative Procedure Act and other statutes.[11] To begin with, the APA requires that an agency publish a proposed rule in the *Federal Register*. The proposal must include:

1. A statement of the time, place, and nature of public rulemaking 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.[12]

The agency must then "give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments"—i.e., a public comment period.[13] The amount of time that the agency must provide for public comment varies with the urgency and complexity of the proposed rule, from as little as 30 days for narrow, emergency fixes[14] to a year or more for complex regulatory schemes.[15] In general, courts review compliance with these requirements holistically; key is that the agency must "afford[] interested persons a reasonable and meaningful opportunity to participate in the rulemaking process."[16]

The agency, in turn, is directed to consider the "relevant matter presented" in the comments and to incorporate in its final rule a "concise general statement" of the "basis and purpose" of the final rule. In other words, the agency must respond to comments, affording them adequate consideration and explaining how it has accounted for them. This then facilitates judicial review of the final rule to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and therefore must be set aside.[17]

Furthermore, Congress has enacted a number of additional statutes to improve agencies' deliberative processes and, consequently, the results of their rulemakings. For example:

- The Regulatory Flexibility Act requires agencies to evaluate the impact of proposed regulations on small businesses and consider alternatives that may prove less onerous;[18]

10. Chamber Report at 13–14.
11. For example, the Clean Air Act specifies its own rulemaking procedures, largely in line with those of the APA. *See* 42 U.S.C. § 7607(d).
12. 5 U.S.C. § 553(b).
13. 5 U.S.C. § 553(c).
14. 5 U.S.C. § 553(b)–(d); *see also* Petry v. Block, 737 F.2d 1193 (D.C. Cir. 1984); Fund for Animals v. Frizzell, 530 F.2d 982 (D.C. Cir. 1975) (reluctantly approving 10-day comment period for good cause).
15. *See, e.g.*, 74 C.F.R. § 27,265 (2009) (providing 120 days for comment on proposed National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry).
16. Forester v. Consumer Product Safety Commission, 559 F.2d 774, 787 (D.C. Cir. 1977).
17. 5 U.S.C. § 706(2)(A).
18. 5 U.S.C. § 603.

- The Paperwork Reduction Act requires agencies to estimate the paperwork burden of their proposals and scrap reporting requirements that are unnecessary or inefficient;[19] and

- The Unfunded Mandates Reform Act requires agencies to assess the impact of their proposals on state, local, and tribal governments and either adopt "the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule" or explain why that option could not be adopted.[20]

Each of these statutes relies on the APA's notice-and-comment process to inform the regulated community of proposed rules and their consequences and solicit its feedback with the goal of crafting rules that reasonably account for the circumstances of those they will govern and are no more burdensome than necessary.

Taken together, these procedural requirements "reflect Congress' judgment that informed administrative decisionmaking requires that agency decisions be made only after affording interested persons" an opportunity to communicate their views to the agency. "Equally important, by mandating openness, explanation, and participatory democracy in the rulemaking process, these procedures assure the legitimacy of administrative norms."[21] Attempts to circumvent these requirements necessarily undermine these values.

Sue and Settle in Action

Regrettably, when agencies enter into consent decrees that mandate accelerated rulemaking, sound policymaking often falls by the wayside. Several examples are illustrative.

EPA Utility MACT Rule. In December 2008, shortly after the presidential election, a coalition of environmental organizations sued the EPA, faulting the agency's failure to issue emissions standards for certain "hazardous air pollutants" emitted by power plants under Section 112 of the Clean Air Act.[22] In its final months in office, the Clinton EPA had issued a predicate finding that such regulations were "appropriate and necessary," but the George W. Bush Administration subsequently attempted to reverse that finding. Soon after the lawsuit (titled *American Nurses Assoc. v. Jackson*) was filed, a coalition of industry members was granted leave to intervene.

To the public, the case appeared stalled until October 2009, when the plaintiffs and the EPA concluded their private negotiations and lodged a proposed consent decree with the court. The decree stipulated that the EPA had failed to perform a mandatory duty under the Clean Air Act by not issuing a "maximum achievable control technology" (MACT) rule for power plants under Clean Air Act Section 112(d). The decree further specified that the EPA would sign a proposed rule by March 16, 2011, and would then sign a final rule no later than November 16, 2011—just eight months later.

EPA leaders, far from adverse to the plaintiffs who had initiated the suit, publicly touted the rulemaking as a signal achievement of the Obama EPA.[23] At the same time, by trading away its discretion to consider a less burdensome regulatory regime, or no regulation at all, the EPA gained political cover to issue a rule that was far more costly than might otherwise have emerged from the regulatory process.

The utility industry challenged the proposed consent decree, which the plaintiffs and the EPA had negotiated without any industry participation. The agreement unduly constrained executive discretion, the interveners argued, because it required the EPA to conclude that Section 112(d) standards would be mandated. In turn, this requirement blocked the agency from either declining to issue standards[24] or implementing standards based, in whole or in part,

19. 44 U.S.C. § 3506.

20. 2 U.S.C. § 1535.

21. Air Transport Ass'n of America v. Department of Transportation, 900 F.2d 369, 376 (D.C. Cir. 1990) (internal quotation marks and citations omitted).

22. 42 U.S.C. § 7412.

23. *See Presidential Memorandum—Flexible Implementation of the Mercury and Air Toxics Standards Rule*, THE WHITE HOUSE (Dec. 21, 2011), http://www.whitehouse.gov/the-press-office/2011/12/21/presidential-memorandum-flexible-implementation-mercury-and-air-toxics-s (describing the rule as "a major step forward in my Administration's efforts to protect public health and the environment").

24. *See* New Jersey v. EPA, 517 F.3d 574, 582 (EPA may delist power plants under Clean Air Act § 112(d)(9)).

on health-based thresholds rather than the more onerous MACT standard.

Further, the proposed decree, they argued, all but guaranteed violations of the Administrative Procedure Act; the vast complexity of the task before the EPA could not possibly be completed in such a short period under the APA's "arbitrary and capricious" standard.[25] As the interveners explained, the schedule contemplated by the proposal was far shorter than the EPA had employed in less complicated rulemakings that did not require the agency, as in this instance, to evaluate its proposed rule's impact on the nation's electric generating fleet. The public interest, it concluded, required at least 12 months for the industry and interested parties to undertake this task.

In its order and opinion approving the consent decree, the court ruled on none of these points. As to the language constraining the EPA's discretion in the final rule, the court simply stated that the agency believed itself to be legally obligated to issue Section 112(d) standards and that "by entering this consent decree the Court is only accepting the parties' agreement to settle, not adjudicating whether EPA's legal position is correct." The interveners, the court explained, could simply challenge the final rule. And with regard to the schedule, while appreciating the interveners' position, the court refused to accord it any weight due to their status as third-party objectors: "If the science and analysis require more time, EPA can obtain it." Ultimately, the court held that third parties are powerless to block a consent decree, even one that intimately affects their interests.[26]

Unfortunately, it appears that the interveners' claims were, as the court acknowledged, "not insubstantial." The EPA's proposed rule, rushed out in a matter of months, contained numerous errors (one emission standard, for example, was off by a factor of 1,000[27]); lacked technical support documents necessary for interested parties to assess it; and was in some instances sufficiently vague that regulated entities were unable to determine their compliance obligations.[28] The EPA, in its haste, had also declined to assess the implications of its rule on electric reliability or to provide sufficient time for industry and regulators to do so—despite a statutory requirement that it take account of "energy requirements" and the possibility that the rule could conflict with requirements under the Federal Power Act.[29]

Several preliminary assessments by the Federal Energy Regulatory Commission and North American Electric Reliability Corporation suggested that the rule would force enough shutdowns to threaten reliability in some areas.[30] Those assessments, as well as industry evaluations, also raised the prospect that significant numbers of sources would be unable to come into compliance with the proposed standards within the three-year compliance window, even with the possibility of an additional year to achieve compliance.[31]

Late in 2011, industry interveners brought these concerns to the district court, seeking relief from the consent decree on the basis of changed circumstances—specifically, the unforeseen circumstance that, faced with overwhelming evidence that more time was necessary to craft a rule that complied with all procedural and substantive requirements, the EPA would not avail itself of the consent decree's provision to seek the time needed to carry out its legal obligations. The court never ruled on the interveners' motion, and the EPA signed a final rule in late December.

25. *See* Motor Vehicle Manufacturers' Association v. State Farm Insurance, 463 U.S. 29, 43 (1983) (action is arbitrary and capricious where agency "entirely failed to consider an important aspect of the problem" before it).

26. Memorandum Opinion, American Nurses Assoc. v. Jackson, No. 1:08-cv-02198-RMC (Apr. 15, 2010).

27. *EPA Admits Error in Proposed Mercury MACT Rule*, Power Magazine (May 25, 2011), http://www.powermag.com/epa-admits-error-in-proposed-mercury-mact-rule/.

28. *See generally* Oversight: Review of EPA Regulations Replacing the Clean Air Interstate Rule (CAIR) and the Clean Air Mercury Rule, Hearing Before the Subcomm. on Clean Air and Nuclear Safety, Testimony of Dr. Bryan W. Shaw, Chairman of the Texas Commission on Environmental Quality, http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=eedf7d18-3b2f-4a1c-b267-713eca4fc1cd.

29. 42 U.S.C. § 7412(d)(2).

30. FERC, Office of Electric Reliability, Potential Retirement of Coal Fired Generation and its Effect on System Reliability; NERC, 2011 Long-Term Reliability Assessment 73, 76 (2011).

31. *See, e.g.*, Comments of Southern Company, Docket No. EPA-HQ-OAR-2009-0234-18023, at 35–37 (Aug. 4, 2011) (presenting current timelines for installation of scrubbers and fabric filter systems).

Regulated entities brought challenges to many aspects of the final rule, and their case is currently pending before the United States Court of Appeals for the District of Columbia Circuit. The rule, meanwhile, has gone into effect at an estimated cost of $9.6 billion per year.[32]

Habitat for the Hine's Emerald Dragonfly. The Hine's emerald dragonfly has, according to the Fish and Wildlife Service (FWS), "brilliant green eyes" and is distinguished "by its dark metallic green thorax with two distinct creamy-yellow lateral lines, and distinctively-shaped male terminal appendages and female ovipositor."[33] In 1995, the insect was listed as endangered, and in 2004, a coalition of environmentalist groups "filed a lawsuit to stand up for the Hine's emerald dragonfly" by forcing the FWS to provide "critical habitat" for it to breed.[34]

The agency was reluctant to do so, citing the lack of scientific knowledge regarding this particular dragonfly and the "significant social and economic cost" of removing lands from many productive uses.[35] It explained that litigation over critical habitat designations was actually distracting the agency from focusing on "urgent species conservation needs."[36]

Nonetheless, the agency settled the case to forestall still more litigation, agreeing to an aggressive rulemaking schedule.[37] In 2007, it designated 13,221 acres in Illinois, Michigan, and Wisconsin as critical habitat for the dragonfly.[38] Within the year, some of the same plaintiffs filed suit again, charging that the agency had improperly excluded national forest lands in Michigan and Missouri from the dragonfly's critical habitat.

The agency initially contested the suit, but that opposition was dropped shortly after the Obama Administration began. On February 12, 2009, the court entered a consent decree that required the FWS to revisit its decision. The agency committed to issue a new proposed rule no later than April 15 and then a revised final rule within the following year. It also agreed to pay the plaintiffs' attorneys' fees, totaling $30,000. A little more than a year later, the FWS issued the revised final rule more than doubling the size of the dragonfly's critical habitat designation.

Education Funding. A final example demonstrates how sue and settle can be used to bind future policymakers to their predecessors' policy choices.[39] In September 1980, the Carter Administration's Department of Justice and Chicago's public school system entered into a consent decree that required the federal government "to make every good faith effort to find and provide every available form of financial resources [sic] adequate for the implementation of the desegregation plan."[40] The district court ruled in 1983 that the Reagan Administration had failed to satisfy this vague obligation and ordered it "to provide presently available funds, to find every available source of funds, to support specific legislative initiatives to meet the obligations of the [Chicago] Board [of Education], and 'not [to] fail[] to seek appropriations that could be used for desegregation assistance to the Board.'"[41]

The Seventh Circuit vacated the district court's order, taking care to interpret the consent decree narrowly on the ground that "a government's attempts to remedy its noncompliance with a consent decree are to be preferred over judicially-

32. 77 C.F.R. § 9,304, 9306 (2012).
33. 71 C.F.R.§ 42,442, 42,444 (2006).
34. *Saving the Hine's Emerald Dragonfly*, CENTER FOR BIOLOGICAL DIVERSITY, http://www.biologicaldiversity.org/species/invertebrates/Hines_emerald_dragonfly/index.html (last visited Feb. 18, 2014).
35. 71 C.F.R. §. 42,443.
36. *Id.*
37. *See* 75 C.F.R. §. 21,394 (2010).
38. 73 C.F.R. §. 51,102 (2007).
39. For more on this topic, *see* Jeremy Rabkin and Neal Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203 (1987).
40. United States v. Board of Education of Chicago, 744 F.2d 1300 (1984). While, technically, the settlement was to resolve civil rights claims brought by the federal government against the school system, it also committed the federal government to take action. For that reason, despite its unusual posture, the settlement raises the same concerns as other "sue and settle" cases.
41. *Id.* at 1301.

imposed remedies."[42] As to the government's argument that its legislative activities are unreviewable by the judiciary, however, the court allowed that the district court, rather than impose a penalty for the executive branch's lobbying Congress to cut off some funding to Chicago schools, should instead have entered a civil contempt citation that "ordered the government either to refrain from specific efforts to make desegregation funds unavailable to the Board or to inform Congress about the funding obligations of the government under the Decree" and that, if the government persisted, "criminal contempt charges might have been appropriate."[43] The Seventh Circuit also chastised the government for actions that, "while perhaps within constitutional limits, cannot enhance the respect to which this Decree is entitled and do not befit a signatory of the stature of the United States Department of Justice."[44]

Thus, the Reagan Administration found itself bound to an unwise and open-ended obligation willingly entered into by its predecessor.

An End Run Around Democratic Governance and Accountability

The abuse of consent decrees in regulation raises a number of practical problems that reduce the quality of policymaking actions and undermine representative government. In general, public policy should be made in public through the normal mechanisms of legislating and administrative law and subject to the give-and-take of politics. When, for reasons of convenience or advantage, public officials attempt to make policy in private sessions between government officials and (as is often the case) activist groups' attorneys, it is the public interest that often suffers.

Experience demonstrates at least five specific consequences that arise when the federal government regulates pursuant to a consent decree.

Special Interest–Driven Priorities. Consent decrees can undermine presidential control of the executive branch, empowering activists and subordinate officials to set the federal government's policy priorities. Regulatory actions are subject to the usual give-and-take of the political process, with Congress, outside groups, and the public all influencing an Administration's or an agency's agenda through formal and informal means. These include, for example, congressional policy riders or pointed questions for officials at hearings; petitions for rulemaking filed by regulated entities or activists; meetings between stakeholders and government officials; and policy direction to agencies from the White House.

Especially when they are employed collusively, consent decrees short-circuit these political processes. In this way, agency officials can work with outside groups to force their agenda in the face of opposition—or even just reluctance in light of higher priorities—from the White House, Congress, and the public. When this happens, the public interest—as distinct from activists' or regulators' special interests—may not have a seat at the table. Indeed, an agency may be committed to taking particular regulatory actions at particular times—actions that may be executed in advance or to the exclusion of other rulemaking activities that may be of greater or broader benefit.

Rushed Rulemaking. The public interest may also be sacrificed when officials use consent decrees to insulate the rulemaking process from political pressures that may require an agency to achieve its goals at a more deliberate speed. In this way, officials may gain an advantage over other officials and agencies that may have competing interests, as well as over their successors, by rushing out rules that they otherwise may not have been able to complete or would have had to scale back in certain respects.

In some instances, aggressive consent decree schedules, as in *American Nurses*, may provide the agency with a practical excuse (albeit not a legal excuse) to play fast and loose with the Administrative Procedure Act and other procedural requirements, reducing the opportunity for public participation in rulemaking and, substantively, likely resulting in lower-quality regulation. Although a consent decree deadline does not excuse an agency's failure to observe procedural regularities, courts are typically deferential in reviewing regulatory actions and are reluctant to vacate rules tainted by procedural irregularity in all but the most egregious

42. *Id.* at 1306.
43. *Id.* at 1308.
44. *Id.*

cases—for example, where agency misconduct and party prejudice are manifest. In practical terms, citizens and regulated entities whose procedural rights are compromised by overly aggressive consent decree schedules can rarely achieve proper redress.

Practical Obscurity. Consent decrees are often criticized as "secret regulations" because they occur outside of the usual process designed to guarantee public notice and participation in policymaking.[45] As one recent article argues, "[W]hen the government is a defendant, the public has an important interest in understanding how its activities are circumscribed or unleashed by a decree," but too often, these settlements are not subject to any public scrutiny.[46] Even when the public is technically provided notice, that notice may be far less effective than would ordinary be required under the Administrative Procedure Act.

Consequently, the agency may make very serious policy determinations that affect the rights of third parties in serious ways without subjecting its decision-making process to the standard public scrutiny and participation. This is so despite the fact that a consent decree may be more binding on an agency than a mere regulation, which it may alter or abandon without a court's permission.

Eliminating Flexibility. Abusive consent decrees may reduce the government's flexibility to alter its plans and to select the best policy response to address any given problem. Recognizing the value of flexibility in administering the law, the Supreme Court has clarified that agencies need not provide any greater justification for a change in policy than for adopting a new policy.[47] It is unusual, then, that when an agency acts pursuant to a consent decree, it has substantially less discretion to select other means that may be equally effective in satisfying its statutory or constitutional obligations.

In effect, consent decrees have the potential to "freeze the regulatory processes of representative democracy."[48] This is what the Reagan Administration learned when it entered office to find that its predecessor had already traded away its ability to adopt new approaches and respond to changing circumstances.

Evading Accountability. What the preceding points share in common is that they all reduce the accountability of government officials to the public. The formal and informal control that Congress and the President wield over agency officials is hindered when they act pursuant to consent decrees, and as this control wanes, the influence of non-elected bureaucrats grows.

At its very center, government by consent decree enshrines those special-interest groups that are party to the decree. They stand in a strong tactical position to oppose changing the decree and so likely will enjoy material influence on proposed changes in agency policy.

Standing guard over the whole process is the court, the one branch of government that is, by design, least responsive to democratic pressures and least fit to accommodate the many and varied interests affected by the decree. The court can neither effectively negotiate with all the parties affected by the decree nor ably balance the political and technological trade-offs involved. Even the best-intentioned and most vigilant court will prove institutionally incompetent to oversee an agency's discretionary actions.[49]

The High Costs of Sue and Settle

According to the Chamber of Commerce analysis, which is based on the agencies' own cost estimates that accompany proposed rules, consent-decree settlements struck during the first term of the Obama Administration are costing the economy tens of billions of dollars. Such an impact should come as little surprise, given that the Utility MACT rule is the EPA's most expensive regulation ever. What is surprising, though, is how many other costly rules are the result of sue and settle.

By design, sue and settle facilitates expensive, burdensome rules.

45. *See, e.g.*, Margo Schlanger, *Against Secret Regulation: Why and How We Should End the Practical Obscurity of Injunctions and Consent Decrees*, 59 DePaul L. Rev. 515 (2010). Such concerns may be overblown, however, when they concern settlements between private parties or settlements with the government that predominantly affect private rights.

46. *Id.* at 516.

47. FCC v. Fox Television Stations, 129 S.Ct. 1806 (2009).

48. *Citizens for a Better Environment*, 718 F.2d at 1136 (Wilkey, J., dissenting).

49. *Id.* at 1136–37.

TABLE 1

Ten Costly Regulations Resulting from Sue and Settle Agreements

1.	Utility MACT Rule	Up to $9.6 billion annually
2.	Lead Renovation, Repair and Painting (LRRP) Rule	Up to $500 million in first year
3.	Oil and Natural Gas MACT Rule	Up to $738 million annually
4.	Florida Nutrient Standards for Estuaries and Flowing Waters	Up to $632 million annually
5.	Regional Haze Implementation Rules	$2.16 billion cost to comply
6.	Chesapeake Bay Clean Water Act Rules	Up to $18 billion cost to comply
7.	Boiler MACT Rule	Up to $3 billion cost to comply
8.	Standards for Cooling Water Intake Structures	Up to $384 million annually
9.	Revision to the Particulate Matter ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS)	Up to $350 million annually
10.	Reconsideration of 2008 Ozone NAAQS	Up to $90 billion annually

Source: U.S. Chamber of Commerce, Sue and Settle: Regulating Behind Closed Doors 15 (2013). LM110 heritage.org

First, as described above, it allows agency officials to evade political accountability for their actions by genuflecting to a judicially enforceable consent decree that mandates their action. As a result, officials face less pressure to moderate their approaches to regulation or to consider less burdensome alternatives. This, in turn, presents the risk of collusion and still more burdensome rules that would be politically untenable but for a consent decree.

Second, due to skirting of the notice-and-comment procedure, officials may not even be aware of alternatives.

Third, even when alternatives do present themselves, officials may lack the time to analyze and consider them—assuming, of course, that alternative approaches are not barred altogether by one or another provision of the consent decree.

In sum, it may be expected that the rules resulting from consent-decree settlements will be on the whole less efficient, more burdensome, and more expensive than those adopted through the normal rulemaking process.

In some instances, sue-and-settle litigation imposes more direct costs as the federal government commits to make payments to favored litigants. For example, the Department of the Treasury maintains the federal government's "Judgment Fund," a permanent, indefinite appropriation intended to pay monetary awards against the United States.[50] Often, settlements that commit the government to take action also require it to pay the "prevailing" plaintiff's costs of litigation, including attorneys' fees.[51] In this way, activist groups can be compensated for bringing collusive litigation intended to facilitate regulatory action. In other cases, settlements provide for payments to litigants. When such settlements rely upon novel legal theories or dubious evidence, the effective result is to authorize new government benefits while sidestepping Congress.[52] Not only do such settlements undermine transparency and accountability, but they also (like other instances of sue and settle) compromise the constitutional separation of powers.

Regrettably, due to "cryptic" reporting by Treasury, few details are available regarding most settlements that draw on the Judgment Fund in these ways. This makes it impossible to say how much money in the aggregate is being paid to the plaintiffs and attorneys who bring sue-and-settle lawsuits.[53]

50. 31 U.S.C. § 1304(a).

51. *See, e.g.,* 42 U.S.C. § 7607(f) (Clean Air Act provision). *See generally* Congressional Research Service, Award of Attorneys' Fees by Federal Courts and Federal Agencies, CRS Report for Congress No. 94-970 (2008), *available at* http://www.fas.org/sgp/crs/misc/94-970.pdf.

52. *See* Sharon LaFraniere, *U.S. Opens Spigot After Farmers Claim Discrimination,* N.Y. Times, April 26, 2013, at A1 (reporting how the Departments of Agriculture and Justice acted to "sidestep Congress and compensate the Hispanic and female farmers out of a special Treasury Department account, known as the Judgment Fund," to settle claims of discrimination unlikely to prevail in litigation).

53. *See* Hans von Spakovsky, *Transparency in Government: Finding Out How Much the Government's Mistakes Are Costing Us,* The Foundry (Jan. 18, 2013), http://blog.heritage.org/2013/01/18/transparency-in-government-finding-out-how-much-the-governments-mistakes-are-costing-us/.

Basic Principles for the Executive: The Meese Memorandum

The Carter Administration's abuse of consent decrees and the courts' willingness to hold the government to agreements that bound the Reagan Administration to its predecessor's unwise policy choices led Attorney General Edwin Meese III to rethink the federal government's approach to settlements. While a partisan might have seized the opportunity to enter into more consent decrees on every possible topic so as to entrench the present Administration's views for years or decades to come, Attorney General Meese looked to the broader principles of the Constitution in formulating a policy that would take the opposite tack. Specifically, Attorney General Meese sought to limit the permissible subject matter of consent decrees "in a manner consistent with the proper roles of the Executive and the courts"[54] while promoting sound policymaking principles.

The Meese Policy identified three types of provisions in consent decrees that had "unduly hindered" the executive branch and the legislative branch:

1. A department or agency that, by consent decree, has agreed to promulgate regulations may have relinquished its power to amend those regulations or promulgate new ones without the participation of the court.

2. An agreement entered as a consent decree may divest the department or agency of discretion committed to it by the Constitution or by statute. The exercise of discretion, rather than residing in the Secretary or agency administrator, ultimately becomes subject to court approval or disapproval.

3. A department or agency that has made a commitment in a consent decree to use its best efforts to obtain funding from the legislature may have placed the court in a position to order such distinctly political acts in the course of enforcing the decree.[55]

Accordingly, the Meese Policy propounded policy guidelines prohibiting the Department of Justice, whether on its own behalf or on behalf of client agencies and departments, from entering into consent decrees that limited discretionary authority in any of three manners:

1. The department or agency should not enter into a consent decree that converts to a mandatory duty the otherwise discretionary authority of the Secretary or agency administrator to revise, amend, or promulgate regulations.

2. The department or agency should not enter into a consent decree that either commits the department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question or commits a department or agency to seek a particular appropriation or budget authorization.

3. The department or agency should not enter into a consent decree that divests the Secretary or agency administrator, or his successors, of discretion committed to him by Congress or the Constitution where such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.[56]

With respect to settlement agreements unsupported by consent decree, the Meese Policy imposed similar limitations buttressed by the following requirement: that the sole remedy for the government's failure to comply with the terms of an agreement requiring it to exercise its discretion in a particular manner would be revival of the suit against it.[57] In all instances, the Attorney General retained the authority to authorize consent decrees and agreements that exceeded these limitations but did not "tend to undermine their force and is consistent with the constitutional prerogatives of the executive or the legislative branches."[58]

54. *See supra* note 2.

55. *Id.* at 1–2.

56. *Id.* at 3.

57. *Id.* at 4.

58. *Id.*

The Meese Policy addresses the fundamental problem of sue and settle: It blocks agencies from relinquishing their discretionary authority to outside groups, thereby reinforcing traditional norms of administrative rulemaking. An Administration that embraces the Meese Policy will benefit from greater flexibility, improved transparency, and, ultimately, better policy results.

Suggestions for Reform

In an ideal world, the executive branch would take full responsibility for the exercise of its powers and refuse to cede its authority to the courts and private-party litigants, despite the promise of some short-term gain from doing so. Barring settlements that restrain executive discretion by statute would itself raise constitutional and policy questions and would be, in any case, incongruous with the many provisions of law that afford private parties license to compel the government to take future actions.

But Congress can and should adopt certain common-sense policies that provide for transparency and accountability in consent decrees. Any legislation that is intended to address this problem in a comprehensive fashion should include the following features with respect to consent decrees that commit the government to undertake future action of a generally applicable quality:

- **Transparency.** Proposed consent decrees should be subject to the usual notice-and-comment requirements, as is generally the case under the Clean Air Act.[59] To aid Congress and the public in its understanding of this issue, the Department of Justice should be required to make annual reports to Congress on the government's use of consent decrees. In addition, the Department of the Treasury should be required to report the details of cases that result in payments by the Judgment Fund.[60]

- **Robust Public Participation.** As in any rulemaking, an agency or department should be required to respond to the issues raised in public comments on a proposed consent decree, justifying its policy choices in terms of the public interest; failure to do so would prevent the court from approving the consent decree. These comments, in turn, would become part of the record before the court when it rules on the consent decree. Parties who would have standing to challenge an action taken pursuant to a consent decree should have the right to intervene in a lawsuit where a consent decree may be lodged. As described below, these interveners should have the opportunity to demonstrate to the court that a proposed decree is not in the public interest.

- **Sufficient Time for Rulemaking.** The agency should bear the burden of demonstrating that any deadlines in the proposed decree will allow it to satisfy all applicable procedural and substantive obligations and further the public interest.

- **A Public-Interest Standard.** Especially for consent decrees that concern future rulemaking, parties in support of the decree should bear the burden of demonstrating that it is in the public interest. In particular, they should have to address (1) how the proposed decree would affect the discharge of all other uncompleted nondiscretionary duties and (2) why taking the regulatory actions required under the consent decree, to the delay or exclusion of other actions, is in the public interest. The court, in turn, before ruling on the supporters' motion to accept the consent decree, would have to "satisfy itself of the settlement's overall fairness to beneficiaries and consistency with the public interest,"[61] which supporters of the consent decree

59. Clean Air Act § 113(g), 42 U.S.C. § 7413(g). Note that this provision, however, does not require EPA to respond to comments, only that, "as appropriate," it "shall promptly consider" them.

60. To that end, the Judgment Fund Transparency Act, H.R. 317, 113th Cong. (2013), would require Treasury to publish the following for each disbursement from the Judgment Fund: (1) the name of the specific federal agency or entity whose actions gave rise to the claim or judgment; (2) the name of the plaintiff or claimant; (3) the name of counsel for the plaintiff or claimant; (4) the amount paid representing principal liability and any amounts paid representing any ancillary liability, including attorney fees, costs, and interest; (5) a brief description of the facts that gave rise to the claim; (6) a copy of the original or amended complaint or written claim and any written answer given by the federal government to that complaint or claim; (7) a copy of the final action by a court regarding the claim (whether by decree, approval of settlement, or otherwise) or of the settlement agreement in any action not involving a court; and (8) the name of the agency that submitted the claim. A companion bill, S. 1420, has been introduced in the Senate.

61. United States v. Trucking Employers, Inc., 561 F.2d 313, 317 (D.C.Cir.1977) (internal quotation marks and citation omitted).

should be required to demonstrate by clear and convincing evidence.

- **Accountability.** Before the government enters into a consent decree that contains any of the types of provisions identified in the Meese Policy, the Attorney General or agency head (for agencies with independent litigating authority) should be required to certify that he has reviewed the decree's terms, found them to be consistent with the prerogatives of the legislative and executive branches, and approves them. In effect, Congress should implement the Meese Policy, consistent with the executive branch's discretion, by requiring accountability when the federal government enters into consent decrees or settlements that constrain executive discretion or require it to undertake future actions.

- **Flexibility.** Finally, Congress should act to ensure that consent decrees do not freeze in place a particular official's or Administration's policy preferences, but rather afford the government reasonable flexibility, consistent with its constitutional prerogatives, to address changing circumstances. To that end, if the government moves to terminate or modify a consent decree on the grounds that it is no longer in the public interest, the court should review that motion *de novo* under the public-interest standard articulated above.

Each of the above-numerated principles are reflected in the Sunshine for Regulatory Decrees and Settlements Act, H.R. 1493 and S. 714. Representing a leap forward in transparency, this bill requires agencies to publish proposed consent decrees before they are filed with a court and to accept and respond to comments on proposed decrees. It also requires agencies to submit annual reports to Congress identifying any consent decrees into which they have entered.

The bill loosens the standard for intervention so that parties opposed to a "failure to act" lawsuit may intervene in the litigation and participate in any settlement negotiations. Most substantially, it requires the court, before approving a proposed consent decree, to find that any deadlines contained in the decree allow for the agency to carry out standard rulemaking procedures. In this way, the federal government could continue to benefit from the appropriate use of consent decrees to avoid unnecessary litigation while ensuring that the public interest in transparency and sound rulemaking is not compromised.

Conclusion

The Obama Administration's increased reliance on consent-decree settlements to further its regulatory agenda is a shortsighted strategy. Whatever benefits the sue and settle model offers in the short term are undermined by the risk that poorly reasoned regulations will be struck down by the courts or reversed by a future Administration. The political benefits of evading accountability may also be fleeting as Congress and the public begin to hold the Administration and its agencies accountable for their regulatory actions.

The better course, in terms of the public interest, is for the executive branch to exercise policymaking discretion itself rather than outsourcing it to third parties. But even if the Administration continues to engage in regulation through litigation, Congress should still force agencies to honor sound rulemaking procedures.

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