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APPROACHING MIDNIGHT: OVERSIGHT OF THE BUSH ADMINISTRATION'S LAST MINUTE RULEMAKINGS

HEARING

BEFORE THE

SELECT COMMITTEE ON
ENERGY INDEPENDENCE
AND GLOBAL WARMING
HOUSE OF REPRESENTATIVES

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APPROACHING MIDNIGHT: OVERSIGHT OF THE BUSH ADMINISTRATION'S LAST MINUTE RULEMAKINGS

THURSDAY, DECEMBER 11, 2008

HOUSE OF REPRESENTATIVES,
SELECT COMMITTEE ON ENERGY INDEPENDENCE
AND GLOBAL WARMING,
Washington, DC.

The committee met, pursuant to call, at 10:00 a.m. in Room 210, Cannon House Office Building, Hon. Edward J. Markey [chairman of the committee] presiding.

Present: Representatives Markey, Inslee, Cleaver, and Hall.

Staff Present: Morgan Gray.

The CHAIRMAN. Welcome, ladies and gentlemen, to this Select Committee on Energy Independence and Global Warming hearing. While the clock may be winding down on the Bush administration's time in office, its regulatory damage is unfortunately far from over. The administration is currently working on finalizing a number of last minute rule changes that, if enacted, will have serious negative impacts on our environment long after this administration has left office. Those proposed midnight rules are so numerous and far reaching that they would harm everything from the quality of our air and water to our public lands, to the survival of endangered species and our warming climate.

Indeed, the Bush administration is on pace to do almost as much damage to our environment in its last 8 weeks in office as it did over the last 8 years. The administration has set its regulatory sights on two of our Nation's longest standing and most important environmental laws. The Environmental Protection Agency is attempting to push through multiple rules that will severely weaken clear air, degrading air quality of all Americans and worsening our climate crisis. Meanwhile, the Department of Interior is seeking to gut the Endangered Species Act by removing scientific input weakening protections for iconic species like the polar bear and preventing consideration of the impacts of global warming.

The administration is seeking to make these sweeping changes to the Endangered Species Act while minimizing public input and review. Recently, the Bush administration rushed through consideration of 300,000 comments on the proposed rule in 32 hours. And then provided a mere ten days for the public to review the environmental assessment of the changes. The administration is also pushing to ease restrictions on some of the most destructive practices for our climate. The Interior Department is in the process of

issuing rules that will remove key protections against mountaintop removal mining and allow the development of oil shale in 2 million acres of western public lands.

With so much work to be done on the economy, energy and health care it is unfortunate that President-elect Obama and the Democratic Congress will have to expend so much time recovering from the regulatory nightmare of these midnight rulemakings. Sadly, these rule changes are not a deviation from the Bush administration record. They are the culmination of 8 years of industry handouts and environmental deregulation. By ramming through these eleventh-hour regulations, President Bush will simply cement his legacy as the most anti-environmental President in our Nation's history.

Today the Select Committee has convened an oversight hearing with a panel of environmental and regulatory experts to further examine some of the most egregious of those last-minute rule changes. It is imperative that the Bush administration not be allowed to finalize these rules under the cover of darkness without public scrutiny. It is amazing what casting a little sunlight on these midnight regulations can do. Late yesterday afternoon, the EPA announced that it would drop its attempt to issue a regulatory loophole that would have allowed dirty power plants to produce even more air pollution and heat trapping emissions, which had been recommended by the Cheney secret energy task force. This reversal prevented a rule change that would have increased global warming pollution by the equivalent of adding 50 million cars to the roads. In addition, the EPA subsequently confirmed reports that it would also abandon its push to roll back regulations on air pollution in our national parks and wilderness areas. The committee and this Congress will continue to keep a watchful eye on the Bush administration's regulatory actions until they have turned off the lights at 1600 Pennsylvania Avenue once and for all. Now, let me turn and recognize the gentleman from Missouri, Mr. Cleaver, for an opening statement.

[The prepared statement of Mr. Markey follows:]

Chairman Edward J. Markey
Opening Statement
Select Committee Hearing Entitled
"Approaching Midnight: Oversight of the Bush Administration's Last-Minute Rulemakings"
December 11, 2008

Good morning.

While the clock may be winding down on the Bush Administration's time in office, its regulatory damage is, unfortunately, far from over. The Administration is currently working on finalizing a number of last-minute rule changes that, if enacted, will have serious negative impacts on our environment long after this Administration has left office. These proposed "midnight rules" are so numerous and far reaching that they would harm everything from the quality of our air and water, to our public lands, to the survival of endangered species and our warming climate. Indeed, the Bush Administration is on pace to do almost as much damage to our environment in its last eight weeks in office as it did over the last eight years.

The Administration has set its regulatory sights on two of our nation's longest standing and most important environmental laws. The Environmental Protection Agency is attempting to push through multiple rules that will severely weaken Clean Air Act requirements for industry -- degrading air quality for all Americans and worsening the climate crisis.

Meanwhile, the Department of Interior is seeking to gut the Endangered Species Act by removing scientific input, weakening protections for iconic species like the polar bear and preventing consideration of the impacts of global warming. The Administration is seeking to make these sweeping changes to the ESA while minimizing public input and review. Recently, the Bush Administration rushed through consideration of 300,000 comments on the proposed rule in 32 hours and then provided a mere 10 days for the public to review the environmental assessment of the changes.

The Administration is also pushing to ease restrictions on some of the most destructive practices for our climate. The Interior Department is in the process of issuing rules that will remove key protections against mountaintop removal mining and allow the development of oil shale in 2 million acres of western public lands.

With so much work to be done on the economy, energy, and health care, it's unfortunate that President-elect Obama and the Democratic Congress will have to expend so much time recovering from the regulatory nightmare of these midnight rulemakings.

Sadly, these rule changes are not a *deviation* from the Bush Administration's record, they are the *culmination* of eight years of industry handouts and environmental deregulation. By ramming through these eleventh-hour regulations, President Bush will simply cement his legacy as the most anti-environmental president in our nation's history.

Today, the Select Committee has convened an oversight hearing with a panel of environmental and regulatory experts to further examine some the most egregious of these last-minute rule changes. It is imperative that the Bush Administration not be allowed to finalize these rules under the cover of darkness without public scrutiny.

It's amazing what casting a little sunlight on these midnight regulations can do. Late yesterday afternoon, the EPA announced that it would drop its attempt to issue a regulatory loophole that would have allowed dirty power plants to produce even more air pollution and heat-trapping emissions, which had been recommended by the Cheney Secret Energy Task Force. This reversal prevented a rule change that would have increased global warming pollution by the equivalent of adding fifty million cars to the roads. In addition, the agency subsequently confirmed reports that it also would abandon its push to roll back regulations on air pollution in our national parks and wilderness areas. This Committee and this Congress will continue to keep a watchful eye on the Bush Administration's regulatory actions until they have turned off the lights at 1600 Pennsylvania Avenue once and for all.

Mr. CLEAVER. Thank you, Mr. Chairman. And thank you for this hearing, because I think that it is important for the Nation to understand what is actually taking place. As the Bush administration winds down, they are also winding up their efforts to do further damage to the U.S. environment. And I would hope that through this hearing and testimony from our witnesses that we will be able to alert not only our colleagues here in Congress, but the people around this Nation who are concerned that their children and their children's children might not have the opportunity to live in an environment that is conducive for human habitation if these moves by the administration continues.

The administration of Barack Obama to come in is hiring and bringing in new staff, but at the same time, we are going to have to look at this bold and reckless action that is taking place right now around irresponsible rule making. So I look forward, Mr. Chairman, to having the opportunity to become dialogical with our witnesses and to sound the alarm to the American public. I yield back the balance of my time.

[The prepared statement of Mr. Cleaver follows:]

U.S. Representative Emanuel Cleaver, II
5th District, Missouri
Statement for the Record
House Select Committee on Energy Independence and Global Warming Hearing
"Approaching Midnight: Oversight of the Bush Administration's Last-Minute Rulemakings"
Thursday, December 11, 2008

Chairman Markey, Ranking Member Sensenbrenner, other Members of the Select Committee, good morning. I would like to welcome our distinguished panel of witnesses to the hearing today.

As the White House goes through a historic transition, supporters of the environment have real reason for optimism. The new Administration brings a promise for stronger policies concerning environmental protection and energy efficiency. I look forward to working with my House colleagues and the new Administration to progress these initiatives.

However, as the new Administration is organizing and hiring staff, the current one is enacting dangerous last-minute, or "midnight" rulemakings that are aiming to open public land to drilling preliminary to the development of oil shale extraction. Another proposed rule seeks to deregulate industrial farms in order to permit them to discharge animal waste into our nation's waterways. These rules are bold in their recklessness and the potential threat they could have on water and air quality, endangered species, and public lands. It is my hope that many of the irresponsible rulemakings made by the current Administration can and will be reversed at the start of the 111th Congress in January 2009. I look forward to hearing what our witnesses can tell the Select Committee of the effects these rules will have on our world today and in the future.

I thank all of our witnesses for their insight and suggestions, and I appreciate them taking the time to visit with our committee today.

Thank you.

The CHAIRMAN. Great. The gentleman's time is expired. The Chair recognizes the gentleman from New York, Mr. Hall.

Mr. HALL. Thank you, Mr. Chairman, for holding this important hearing, and thank you to our witnesses today for being here, especially my fellow New Yorker, Mr. Kennedy. I am pleased that we are holding this hearing today to call attention to these several so-called midnight rules affecting the environment that the outgoing administration has proposed. They apply to very technical subject matter that is often overlooked by the media, particularly in the wake of all the press coverage associated with the incoming administration. But if allowed to stand, these rules could have very serious long-term effects on human health, the environment. And Congress has a responsibility to conduct appropriate oversight of these actions. Take, for example, just three of the regulations under consideration here today. First, if allowed to be implemented the administration's rule changing, the section 7 consultation process under the Endangered Species Act could have far reaching implications for how the Federal Government protects endangered species. Section 7 of the ESA requires Federal agencies to conduct with the Fish and Wildlife Service and/or the National Marine Fishery Service. When either of the two agencies determine that a Federal agency's action could impact a threatened or endangered species the purpose of that consultation is to seek solutions to mitigate any harmful affects on wildlife.

The proposed final rule awaiting action of OMB would reverse this process, instead allowing Federal agencies the discretion their own discretion as to whether they need to consult with the services. The effect of this rule would be to take away the decision making authority from trained biologists and instead place it in the hands of political appointees in the bureaucracy. It is yet another attempt to politicize decisions that should be based purely on sound science.

The administration also proposes weakening the Clean Air Act with respect to pollution in the national parks. The EPA currently measures air pollution in the national parks based on a 3-hour and 24-hour increment. A proposed final rule awaiting action to OMB would change the measurement metric to annual pollution averages, thus allowing for significant spikes in pollution during the peak summer months. The practical effect of this rule change is to make the air dirtier in our national parks, expose visitors to all the risks ranging from asthma to heart disease and others that are associated with air pollution. The administration is also using a tortured interpretation of section 4(d) of the Endangered Species Act to avoid issuing regulations to polar bears recently listed as threatened under the Act.

Section 4(d) requires that the Secretary issue regulations to protect threatened species. But in the regulations issued and awaiting final approval the Secretary effectively exempts oil and gas companies and their activities from having to develop plans to protect polar bears and to mitigate impacts on their habitat. It also limits the applicability of consideration of climate change with respect to the polar bear listing despite overwhelming evidence that climate change is responsible for habitat loss.

These are just three examples of midnight regulations pending at OMB that will affect the environment, human health and wildlife.

And the hearing today will touch on many more unfortunately. It is imperative that we examine these so that the House can take whatever actions necessary to reverse them or change them so they reflect the intent of Congress when it passed the statutes originally. Thank you, Mr. Chairman, and I look to the testimony of our witnesses and I yield back.

The CHAIRMAN. The gentleman's time is expired. The Chair recognizes the gentleman from Washington State, Mr. Inslee.

Mr. INSLEE. Thank you. I want to thank our witnesses, all of who have been doing great service for the country and the environment during the long darkness, environmental darkness of the Bush administration. I want to thank you for keeping the hope alive during that long 8 years. I do want to express disappointment, if not shock, that this administration is going out the way they have governed, which is with great arrogance towards the public and great indifference to the species they have a responsibility to protect. And I want to thank the Chair for holding this hearing, because I would look at this as just sort of a final capping of the environmental nightmare of the Bush administration and the beginning of our effort to restore integrity to the law and to our environmental programs in this country. And I think we should use this as a springboard to be back here January 6th to really redouble our efforts to following the law. Thank you.

The CHAIRMAN. Great. The gentleman's time has expired. Now, we will turn to our witnesses. And our first witness today is Mr. Robert F. Kennedy, Jr., who is President of the Waterkeeper Appliance. Mr. Kennedy is one of our Nation's foremost champions for clean water and clean air, who has led the fight to restore the Hudson River and protect New York City's water supply. For his environmental leadership, Mr. Kennedy was named one of Time Magazine's Heroes of the Planet. He is a tireless advocate, a prolific author and a living environmental legend.

STATEMENTS OF ROBERT KENNEDY, JR., CHAIRMAN, WATERKEEPER ALLIANCE; JAMIE RAPPAPORT CLARK, EXECUTIVE VICE PRESIDENT, DEFENDERS OF WILDLIFE; JOHN WALKE, CLEAN AIR DIRECTOR, NATURAL RESOURCES DEFENSE COUNCIL; AND JEFFREY HOLMSTEAD, PARTNER, BRACEWELL & GIULIANI LLP.

The CHAIRMAN. And we welcome you, Mr. Kennedy. Whenever you are ready, please begin.

STATEMENT OF ROBERT F. KENNEDY, JR.

Mr. KENNEDY. Thank you, Mr. Chairman. I want to start just by expressing my gratitude to the Capitol Police for incredible detective work this morning of recovering my suitcase, my briefcase from the taxicab that took off when I went to check whether the Capitol door was open. I think it involved looking at some tapes and enlarging a license plate. But they did get my testimony back to me only moments ago and they were incredibly nice. And I also want to thank you, Mr. Chairman, for your leadership on this issue, as well as my friend, Congressman Jay Inslee, Congressman John Hall and Congressman Cleaver all of whom have demonstrated extraordinary leadership on this issue. We have been

fighting a rear door guard action. Over the past 8 years, we had the finest environmental laws in the world in this world that we passed, 28 major environmental laws that we passed after Earth Day 1970.

The last 8 years—if you look at—as you pointed out, this is the worst environmental administration that we have ever had in American history, bar none. If you look at NRDC's Web site, you will see over 400 major environmental rollbacks that have been promoted or implemented by this White House over the past 8 years as part of a deliberate concerted effort to eviscerate 30 years of environmental law. It has been a stealth attack. The White House has used all kinds of ingenious machinations to conceal this radical agenda from the American people, including Orwellian rhetoric. When they wanted to shore the forests, they call it the Healthy Forest Act. When they wanted to shore the air they call it the Clear Skies Bill. Most insidiously, they put polluters in charge of virtually all the agencies of government that are supposed to be protecting Americans from pollution.

In the head of the forest service, they put in a timber industry lobbyist Mark Ray, probably the most rapacious in history. As head of public lands and mining industry lobbyist, Steven J. Griles, now serving a ten-month jail sentence. But Mr. Griles, for 20 years, has been saying that he believes that public lands are unconstitutional. And they put him in charge of public lands. In the head of the air division, Mr. Holmstead, who is sitting to my left, who has been during virtually all of his career an attorney for the worst polluters in this country, particularly utility air polluters as second in command of EPA, a Monsanto lobbyist. As head of the Superfund, a woman whose last job was teaching corporate polluters how to evade Superfund. The President's chief environmental advisor Philip Cooney, the head of Council on Environmental Quality, was a lobbyist for the American Petroleum Institute.

In addition to that, these people very cleverly and very ingeniously, over the past 5 years, because the American public supports these laws as you know, but they have deviously and ingeniously used riders, used all kinds of alternations and guidance and interpretations and then back-door regulatory manipulations in order to do this, in order to eviscerate these laws out of sight of the American public. And these last—this final effort that President Bush and his cronies are attempting is some of the most, we are seeing some of the most damaging efforts of all to finally, to take down the final safeguards of the environment and public health that have been erected by Congress, Republicans and Democrats in Congress in the White House over the past 30 years.

I filed very detailed testimony about some of the worse of these actions. But I just wanted to give you a real life expression of what is going on. I flew over only a few weeks ago over the Appalachian Mountains over eastern Kentucky and West Virginia, mainly over the Cumberland plateau. If the American people could see what I saw on that trip there would be a revolution in this country. We are literally cutting down the Appalachian Mountains, these historic landscapes where Daniel Boone and Davey Crockett roamed. The Appalachians, Chairman, were a refuge during the place of the Ice Age 20,000, 12,000 years ago, when where I live and where

Congressman Hall at the district that he represents was under 2 miles of ice at that time. And the rest of North America turned into a tundra where there was no forests.

And the last refuge for those forests was the Appalachian Mountains. And when the tundras withdrew when the glaciers withdraw all of North America was reseeded from the seed stock in those forests. So it is the mother forest of all of North America. And that is why it is the most diverse and abundant for tempered forests in the world, because it is the longest living. And today, these mining companies with the help of their indentured servants in the White House are doing what the glaciers couldn't accomplish, what the Pleistocene ice age couldn't accomplish, which is to flatten the Appalachian Mountains and destroy those forests.

They are using these giant machines called drag lines which are 22 stories high. I flew under one of them in a Piper Cub. They cost half a billion dollars, and they practically dispense with the need for human labor, which indeed is the point. When my father was fighting strip mining in Appalachia back in the 1960s I remember a conversation that I had with him when I was 14 years old where he said to me, they are not just destroying the environment, they are permanently impoverishing these communities because there is no way that they will ever be able to regenerate an economy from those barren moonscapes that are left behind. And he said, they are doing it so they can break the unions.

And that is exactly what happened. When he told me that there were 140,000 unionized mine workers in West Virginia digging coal out of tunnels in the ground. Today there are fewer than 11,000 miners left in the State. Very few of them are unionized because the strip industry isn't. They are taking more coal out of West Virginia than they were in 1968. The difference is back then at least some of that money was being left in the State for salaries and pensions and reinvestment in those communities. Today virtually all of it is leaving the State and going straight up to Wall Street to the big banking houses—well, to the corporate headquarters of Arch Coal, Massey Coal and PV Coal, mainly Massey Coal, and then to the big banking houses like Bank of America and Morgan which own these operations.

Ninety-five percent of the coal in West Virginia is owned by out-of-State interest, which are liquidating the State cash literally, using these giant machines and 2,500 tons of explosives that they detonate every day in West Virginia. The power of a Hiroshima bomb once a week. They are blowing the tops off the mountains to get at the coal seams beneath. Then they take these giant machines and they scrape the rock and debris and rubble into the hollows and into the adjacent river valleys. They flatten out the landscapes, they flatten out the valleys, they have already flattened 400,000 acres of the Appalachian Mountains. By the time they get done within a decade, if this rule goes through and we don't, and you don't succeed in getting rid of it, they will have flattened 2,200 miles, an area the size of Delaware. According to EPA, they have already buried 1,200 miles of America's rivers and streams, these critical headwater streams that are critical to the hydrology and to the water quality and to the abundance of the wildlife and the forests of those regions.

It is all illegal. You cannot, in the United States, under the Clean Water Act, dump rock, debris and rubble into a waterway without a Clean Water Act permit, and you can never get such a permit. So in talking with the Commonwealth, my good friend, Joe Lovitt, sued the companies in Federal Court in front of a conservative Republican Federal judge, Judge Charles Hayden. And Judge Hayden, during that hearing, I want to tell you this, he said to the Corps of Engineers colonel who was there to testify, he said, you know this is illegal, it says so in the Clean Water Act, how did you happen to start writing these permits to allow these companies to break the law and engage in this criminal activity?

And he said, quote—the colonel answered him and said, quote, unquote, "I don't know, your Honor, we just kind of oozed into it." And Judge Hayden, at the end of that hearing, declared—said exactly what I just said, it is all illegal, it has been illegal since day one, and he enjoined all mountaintop mining. Two days from when we got that decision, lobbyists from PB Coal and Massey Coal met in the back door of the Interior Department with Gale Norton's first deputy chief, Steven J. Griles, who was a former lobbyist for those companies, and together they rewrote the interpretation of one word of the Clean Water Act, the definition of the word fill, to change 30 years of statutory interpretation and make it legal as it is today, not just in West Virginia, but in every State in this country, to dump rock, debris, rubble, garbage, any solid material into any waterway of the United States without a Clean Water Act permit. All you need today, according to the administration, is a rubber stamp permit from the Corps of Engineers, which, in some districts, you can get over the telephone or through the mail.

Now, the last vestige of protection that we had in West Virginia was a stream buffer zone law that was upheld also by Judge Charles Hayden, which said that you can't do this if you are within 100 feet of a stream. Well, this is the law today that this administration is trying to get rid of before it leaves office to make it so there is absolutely no way, there is not a single obstacle or impediment for these companies coming and just flattening the entire Appalachian chain.

Now, I think I have run out of time for my prepared statement. I wanted to talk about CAFOs because they are even worse, but you have my testimony here.

[The statement of Mr. Kennedy follows:]

STATEMENT OF ROBERT F. KENNEDY, JR.
CHAIRMAN, WATERKEEPER ALLIANCE
BEFORE THE
U.S. HOUSE OF REPRESENTATIVES,
SELECT COMMITEE ON ENERGY INDEPENDENCE AND GLOBAL WARMING
HON. EDWARD J. MARKEY, CHAIR

DECEMBER 11, 2008

Thank you Mr. Chairman and Members of this Select Committee for the opportunity to testify today. My name is Robert F. Kennedy, Jr., and I am Chairman of the Board of Waterkeeper Alliance, a non-profit, international organization of community advocates dedicated to protecting our waters and the communities that depend upon them. A large part of our mission involves advocating for effective administration and enforcement of environmental laws. I am testifying this morning on behalf of our members in the United States.

We are extremely concerned by the recent flurry of environmental and public health regulations being proposed or finalized by government agencies such as EPA and the Department of Interior. In the coming weeks, the most environmentally damaging presidency in American history comes to its well-deserved end. However, President Bush leaves in his wake thousands of miles of polluted and degraded waterways across America. Even at this late date, President Bush's Administration continues to affirm its loyalty to industrial polluters by issuing rules that undercut environmental law and underfunded federal environmental programs. These regulations uniformly reflect the political ideology of the current, outgoing Administration, and seek to make permanent the anti-regulatory, self-policing, industry-friendly agenda that has driven their approach to governing for the last eight years.

Waterkeeper Alliance, OMB Watch, Center for American Progress, and other organizations are tracking the surge in last-minute rulemakings that the Bush Administration has either finalized or is seeking to finalize in their waning days in office. According to OMB's website, there are 85 regulations that are currently undergoing EO 12866 regulatory review. OMB has completed review of a further 69 in the last 30 days. Twenty-one of these rules, both in review and final, are from EPA alone, and several of these have direct or indirect ramifications for our nation's water quality.

I am here today to draw attention to a handful of extremely significant regulations that have dramatic consequences for the protection of our Nation's waters. In addition to my remarks here before you, I have provided the Committee with formal written testimony that addresses these rule in far greater detail.

Stream Buffer Zone Rule

Perhaps the most dramatic assault upon America's waters occurs in the Appalachian Mountains, where entire mountain tops are blasted off and dumped into stream and river valleys so that coal companies can access coal reserves in the cheapest possible manner. This practice, known as Mountaintop Removal Mining has have buried or damaged more than 1,200 miles of

irreplaceable headwater streams. What's left is a wasteland. Well over 400,000 acres of the world's most productive and diverse temperate hardwood forests have already disappeared, and it is predicted that that figure could increase to 1.4 million acres - 2,200 square miles - by the end of the decade if nothing is done to limit this practice. Since the first days of the Bush Administration, EPA, the Army Corps of Engineers and the Department of the Interior's Office of Surface Mining have taken every possible step to make this destruction easier.

On December 1, 2008, DOI issued a final **Stream Buffer Zone Rule**, officially referred to as the Placement of Excess Spill rule. This rule eliminates the standing prohibition against mining within 100 feet of streams if it will have an adverse effect on water quantity, water quality, and other environmental resources of the stream. In its place, the new rule merely asks coal operators to "minimize" harm to the extent possible. This is an open invitation to industry to ignore a rule that already, as a practical matter, has been routinely abused and violated as federal and state regulators looked the other way.

The final Stream Buffer Zone rule is a reversal of OSM's prior interpretation of legal requirements to protect headwaters. When it promulgated the original Buffer Zone rule in 1983, OSM chose to protect intermittent and perennial streams because they were especially significant in establishing the hydrologic balance. Even during the Reagan Administration, the Department recognized its responsibility "to protect streams from sedimentation and gross disturbances of stream channels caused by surface coal mining and reclamation operations." 48 Fed. Reg. 30312 (June 30, 1983).

Nearly ten years ago, in a court decision interpreting the previous rule, the Southern District of West Virginia, ruled that "[n]othing in the statute, the federal or state buffer zone regulations, or the agency language promulgating the federal regulations suggests that portions of existing streams may be destroyed so long as (some other portion of) the stream is saved." *Bragg v. Robertson*, 72 F. Supp.2d 642, 651 (S.D.W.Va. 1999). The Court held that the practice of burying valley streams under tons of blasted mountain top debris violated federal and state water quality standards. *Id.* at 661. The law has not changed. Instead, the new Stream Buffer Zone rule relies on polite legal fictions to eviscerate meaning and letter of the Clean Water Act and prioritize the convenience of the coal mining industry over the health and safety of Appalachian communities and their waterways.

For a more comprehensive discussion of this issue, please see the comments on the Proposed Stream Buffer Zone Rule, filed by Public Justice and Appalachian Center for the Economy and the Environment, on behalf of Waterkeeper Alliance, West Virginia Highlands Conservancy, Sierra Club, Ohio Valley Environmental Coalition, and Coal River Mountain Watch on November 20, 2007, attached at Exhibit A.

Concentrated Animal Feeding Operations (CAFO) Permitting Rule (EPA)

Over the past two decades, the rise in the number of factory farms (CAFOs) and concentration of the livestock industry has given rise to significant environmental and community health problems in rural America. Modern, industrialized agriculture is the number one cause of water quality impairment in the United States. Factory farms, or Concentrated Animal Feeding

Operations (CAFOs), are a big part of this problem. According to EPA, agricultural operations that confine livestock and poultry animals generate about 500 million tons of animal waste annually or three times more waste than humans generate each year. USEPA, *National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs)*, 68 Fed. Reg. 7176, 7180 (2003). Hogs in North Carolina alone produce more fecal waste than all people in **North Carolina, California, Pennsylvania, New York, Texas, New Hampshire and North Dakota combined.** Heather Jacobs & Larry Baldwin, *North Carolina Hog Vigil*, Waterkeeper Magazine (Summer 2007), http://switchstudio.com/waterkeeper/issues/Fall07/north-carolina.html. Meanwhile, Maryland raises 270 million chickens a year which generate one billion pounds of manure annually. Bill Gerlach, *State Secrets: What are they Hiding on Maryland Chicken Farms?*, Waterkeeper Magazine (Fall, 2007), *citing* Delmarva Poultry Institute, *Facts About Maryland's Broiler Chicken Industry* (2006). Pollution from industrial dairy and cattle operations produce similarly staggering amounts of waste. The estimated three million cows in the Central Valley of California create as much waste as a city of 20 million people. Natural Resources Defense Council, *America's Animal Factories: How State Fail to Prevent Pollution from Livestock Waste* (1998), http://www.nrdc.org/water/pollution/factor/stcal.asp. Yet, unlike human waste, most animal waste receives no treatment. Rather, it is stored in unlined manure pits and then spread onto land. CAFO waste contains nutrients and bacteria that affect human health and destroy ecology, particularly when manure overflows from storage pits or is over applied to land, where it seeps into groundwater or runs into our waterways. USEPA, *2003 CAFO Final Rule,* 68 Fed. Reg. 7181. Waste also contains toxic metal contamination, like arsenic in the poultry industry and copper and selenium in the hog industry. *See, e.g.,* Nachman, Keeve E. et al., *Arsenic: a Potential Roadblock to Animal Waste Management Solutions*, *Environ Health Perspect* 113:1123–1124 (2005).

In January 2001, one of the Bush Administration's first actions was to pull back a Clean Water Act regulation developed by President Clinton's EPA that would have required CAFOs to clean up their act. In February 2003, President Bush's EPA issued its own rule, which created huge loopholes for the industry, kept the public in the dark about impacts to their own homes and communities, and kept alive the sixteenth-century technology of spreading untreated manure on fields. We challenged this absurd Rule in court, and won on many counts. *See Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2d Cir. 2005). But EPA failed to strongly defend against Industry's most important challenge – against the Agency's decision that **all** CAFOs were required to obtain NPDES permits. As a result, the court sided with industry, ruling that EPA could only require permits when CAFOs had "actual discharges." *Id.* at 506.

In response, EPA should have used its ample authority and discretion to assemble all the evidence available to it, collect further data, and determine that all Large CAFOs discharge, based on the nature of their design and method of operation, or that some set of Large CAFOs, those in floodplains, or areas with sandy soils, or high water tables discharge because of their location. Instead, on Halloween, the Agency issued a new Final Rule that almost completely exempts the industry from any regulation whatsoever. 73 Fed. Reg. 70418 (Nov. 20, 2008).

EPA's new approach actually exempts almost all CAFOs from a requirement to apply for NPDES permits; only those that determine, based on the results of an unreviewed, unguided

analysis that they discharge or "propose to discharge" are required to obtain permits. The vast majority of CAFOs can be expected to hide behind the myth that since they have no outlet pipes directly flowing into nearby rivers or streams, that they are "non discharge" facilities. As a result, few CAFOs will apply to state agencies or EPA for NPDES permits. In fact, CAFO operators are given the option of taking a further step, of "self-certifying" that their facilities do not and will not discharge. This "no discharge certification" gives them a certain degree of immunity against prosecution in the likely event that they discover an "actual discharge."

However, even after an obvious discharge, CAFO operators are not required to obtain NPDES permits. Indeed, the existence of a previous discharge is just one of the factors that EPA advises CAFO operators to consider when deciding whether they need NPDES permits. Again, if the operator decides that a repeat discharge is unlikely, then he or she can decide not to apply for a permit. The decisions of these CAFO operators are never subject to public scrutiny, or reviewed by state environmental agencies. The entire scheme rests on the good word of an industry that claims in the face of all evidence to be responsible managers of the mountains of waste that they generate.

In creating this "hand-off" self-regulation scheme, EPA has undermined the efforts of state regulatory programs, shielded the operators of CAFOs from close examination of their waste management practices, and unduly surrendered its legal obligations to regulate industries that pollute our common waterways.

For a more comprehensive discussion of this issue, please see the comments on the Revised NPDES Permit Regulations and Effluent Limitation Guidelines for CAFOs in Response to Waterkeeper Decision filed by Waterkeeper Alliance, NRDC, and Sierra Club on Aug. 29, 2006, attached at Exhibit B.

Gutting protections for wetlands: EPA/Army Corps of Engineers Guidance

On Tuesday, December 2, EPA and the Corps of Engineers release new Guidance on Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision Rapanos v. United States & Carabell v. United States. This Guidance is critically important because it shapes the decisions that regional Corps of Engineers offices use to determine whether the protections of the Clean Water Act extend to local wetlands or streams (even stretches of rivers.) Unfortunately, the Guidance continues the Administration's previous history of limiting the reach of the Clean Water Act in order to reduce the impact of its requirements and regulations upon builders, agriculture and other industries.

As discovered by Representative Waxman this past July, EPA identified a dramatic drop in its own enforcement cases in the two year after the *Rapanos* decision. According to a memo drafted by EPA Assistant Administrator for Enforcement Granta Nakayama, EPA regions decided not to pursue formal enforcement in 304 separate instances where there were potential CWA violations because of jurisdictional uncertainty. In addition, the regions identified 147 instances where the priority of an enforcement case was lowered due to jurisdictional concerns. Finally, the regions indicated that lack of CWA jurisdiction has been asserted as an affirmative defense in 61

enforcement cases since July 2006. In total, between July 2006 and July 2008, the *Rapanos* decision or the Guidance negatively affected approximately 500 enforcement cases.

In one notable instance where the reach of the Act was unduly limited, the Corps' Southwest Regional Office determined that only portions of the Los Angeles River were within the jurisdiction of the Clean Water Act. See James L. Oberstar, Henry A. Waxman, Letter to Hon. John Paul Woodley, Ass't. Sec'y. of the Army, Civil Works, Aug. 7, 2008, available at http://transportation.house.gov/Media/File/press/TNW.pdf. While EPA later responded to massive public pressure by reviewing the Corps determination, many of the nation's waters have not been so fortunate. *See id.*

After the *Rapanos* decision, EPA and the Corps made a promise to the American public – the agencies would use their legal authority to the maximum extent they could to protect water bodies. Washington State Water Resources Association, *Carabell* and *Rapanos* Rulings: How Will They Change the CWA? (July 26, 2006) (interview transcript with Ann Klee), available online at http://www.wswra.org/files_for_news_archives/carabell_rapanos_rulings.html. *Also*, Statement of Benjamin H. Grumbles, EPA Assistant Administrator for Water & John Paul Woodley, Jr., Assistant Sec'y of Army for Civil Works, Before the Subcommittee on Fisheries, Wildlife, & Water of the Senate Environment & Public Works Committee, at 4 (Aug. 1, 2006). However, as discussed in much greater detail in the documents submitted with my written testimony, the guidance issued by EPA and the Corps repeatedly and egregiously breaks this promise, leaving numerous waters unprotected or inadequately protected. It seems as though the agencies took nearly every opportunity to misinterpret the Court's opinions in a way that constrained, rather than maintained, protective jurisdiction.

One of the critical errors EPA and the Corps made in this guidance was to decide that the *Rapanos* decision placed limits on Clean Water Act protections for tributary streams. In fact, long established and still valid regulations do not qualify the inclusion of tributaries as regulated "waters of the United States." By contrast, the Guidance fails to categorically protect tributaries. In the case of streams that are less than "relatively permanent" the Guidance requires a case-by-case demonstration of a "significant nexus" with downstream traditional navigable waters.

The next major flaw with the guidance is its failure to provide meaningful instruction to field staff about how they should identify aquatic features that have a "significant nexus" to waters of the United States, and thus qualify for protection under the Clean Water Act. However, perhaps the most damaging aspect of the guidance is its unnecessary limitation on the consideration of the cumulative effect that wetlands have on water quality when evaluating whether a "significant nexus" is present. In so doing, EPA and the Corps go further than the Rapanos decision intended, and unnecessarily and disastrously limit the reach of the law's protective programs.

For a more comprehensive discussion of this issue, please see the comments on the Proposed Guidance on Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision Rapanos v. United States & Carabell v. United States filed by Waterkeeper Alliance and other environmental organization on January 21, 2008, attached at Exhibit C.

Department of Interior Oil Shale Leasing Rule

One of the more egregious midnight regulations – a rule governing commercial leasing and production of oil shale on two million acres of public land in Colorado, Wyoming and Utah – was issued on November 18, 2008. This rule hastens the process for opening two million acres of public land in Wyoming, Colorado and Utah for leasing to drill for oil shale and makes permanent a set of industry-friendly parameters for development. The Secretary of the Interior rushed the finalization of this rule even though no oil shale industry currently exists and, if one does exist in the future, no one currently has any idea what technology will be used or what the ultimate impacts will be. This rule was issued solely to benefit private oil companies at the expense of our environment, our climate, and local communities. Even the Bureau of Land Management has stated that insufficient information exists to fully plan for commercial oil shale production.

Big Oil's gross over-estimate claims that there are nearly 800 billion untapped barrels of oil trapped in the sedimentary shale of some of our most prized public lands. However, tapping into this unsustainable energy source will require between 2.1 and 5 barrels of water for each barrel of oil produced, not to mention the vast amounts of energy required for the process. There are even plans to build new coal fired power plants simply to provide the energy needed to transform rock into oil, essentially accelerating a natural process that takes millions of years. Ruthlessly advancing their enthusiasm for repeating a boondoggle of the 1970s oil crisis, Big Oil has aggressively lobbied the Bush Administration to put in place protections for their industry even though there's no compelling need for, or consensus around, this last minute rulemaking.

Congress itself acknowledged the infancy of oil shale technology last year when it prohibited taxpayer dollars from being used to issue this rule. Unfortunately, in the short-sighted panic over gas prices, this limitation was not renewed and the Bush administration was able to proceed with this ill-informed rule. This rule must be withdrawn and the current federal policy must be reviewed to ensure decisions regarding commercial leasing are based on data and analysis generated from the Congressionally-authorized research programs on federal lands. Even the oil companies have admitted this is at least a decade away.

The fate of this rule is vitally important because commercial development of oil shale on public land, using public resources, is bad for the environment, bad for taxpayers, and inconsistent with our need for a clean energy future for our nation. As the Department of the Interior (DOI) readily acknowledges, oil shale development will compromise the region's scarce water supplies, degrade sensitive wildlife habitats, and further alter local communities already impacted because of unprecedented oil and gas drilling. Impacts would also be felt nationally and globally as oil shale production would generate significantly more global warming pollution than conventional gasoline production.

For more details on the problems associated with oil shale extraction, and the necessity for vacating this rule, see my statement attached at Exhibit D.

The List Goes On: Four Additional Midnight Regulations Affecting Our Nation's Waters.

These four rollbacks are among the most significant of a host of midnight rulemakings that undo legal protections for our waters or jeopardize public health. Other agency actions, or deliberate inactions, will perpetuate the Bush Administration's lack of regard for our environment for years to come. A quick roll-call listing some of these other rules reveals the breadth of this presidency's assault on our commonwealth.

CAFO CERCLA/EPCRA Exemption

Under the proposed rule change, large chicken production facilities, hog confinements, and cattle feeding operations would no longer have to report hazardous releases of ammonia, hydrogen sulfide, and other toxic gases. Despite protestations from big agriculture, CAFOs are significant sources of hazardous air pollutants. At the Threemile Canyon Farms in Boardman, Ore., EPA found waste from the operation's 52,000 dairy cows pumps more than 5.5 million pounds of ammonia into the atmosphere each year.

The reporting provisions in CERCLA and EPCRA require CAFOs to report releases of hazardous substances from animal waste. From a public health standpoint, the proposed exemption ignores the increasing body of scientific evidence which shows that ammonia, hydrogen sulfide, and other hazardous emissions from animal feeding operations may have significant impacts on human health and the environment. EPA has ignored such information in its determination that the source and nature of such pollution makes an emergency response "unnecessary, impractical and unlikely," and that the proposal is "is protective of human health and the environment." *See* Fed. Reg. at 73,700-04. Moreover, the proposed exemption is contrary to both the plain language and primary purposes of CERCLA and EPCRA, which were enacted to enable government officials to assess and respond to releases of hazardous substances, as well as to inform the public about contaminants in their communities. EPA has provided no legal justification that would allow it to carve out the proposed exemption from these statutory requirements.

For more comprehensive discussion of this issue, please see the comments on the CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances From Animal Waste at Animal Feeding Operations, filed by Earthjustice on behalf of Waterkeeper Alliance and other organizations, attached at Exhibit E.

Construction and Development Effluent Limitations Guidelines

Stormwater pollution, particularly from construction sites and new developments, is the fastest growing source of water quality impairment in the country. Excessive sediment is the leading cause of impairment of the Nation's waters (United States Environmental Protection Agency, 2000). In 1998, approximately 40 percent of assessed river miles in the U.S. were impaired or threatened from suspended and bedded sediments (United States Environmental Protection Agency, 2000). Construction activity is a major source of anthropogenic sediment loads to water resources and a significant source of pollutants to adhere to sediment particles, including nutrients that cause eutrophication. An estimated 80 million tons of sediment enter receiving

waterbodies each year from construction sites (Goldman et al., 1986, cited by United States Environmental Protection Agency, 2002).

In 2000, EPA responded to this crisis by listing construction and development as an industry category that required regulations, "effluent limitations," to reduce discharges of excessive volumes of stormwater, laden with sediment and other pollutants, from construction sites and new development. In 2002, the Agency unlawfully tried to change its mind, an effort that Waterkeeper Alliance, NRDC and the States of New York and Connecticut stopped in court. In November, EPA finally released its long overdue proposed rule, which largely relies on the same suite of inadequate technologies that have failed for decades to control erosion and sediment.

While there is some hope that the Agency's final rule, due out next December, will have improved performance and technology standards that meaningfully protect our rivers and streams from this scourge. However, there's little chance at this date that EPA will reconsider the most troubling aspect of its proposed rule – its decision to ignore the permanent pollution caused by runoff from these newly developed impervious surfaces. About 90 percent of precipitation or other water that falls on pavement is converted to runoff; roughly 5 to 15 percent of water that falls on grass lawns is converted to runoff (Schueler, T.R. 1987. Controlling Urban Runoff: A Practical Manual for Planning and Designing Urban Best Management Practices. Publication No. 87703. Metropolitan Washington Council of Governments. Washington, D.C.). Even at low levels of imperviousness, the ecological integrity of coastal watersheds declines rapidly (White, N.M, D.E. Line, J.D. Potts, W. Kirby-Smith, B. Doll, W.F. Hunt. 2000. Jump Run Creek shellfish restoration project. Journal of Shellfish Restoration. 19(1).) Suburban and urban stormwater carries oils and metals from motor vehicles; fertilizers, pesticides, and sediment from landscaping activities; and pathogens and excess nutrients from pets, improperly installed or maintained septic tanks, and combined sewer overflows (Environmental Assessment for the Proposed Effluent Limitation Guidelines and New Source Performance Standards for the Construction and Development Category. Washington, D.C.). Flooding, channel erosion, landslides, and degradation of aquatic ecosystems associated with urbanization have been documented for decades (*See, e.g.*, Wilson, K.V. 1967. A preliminary study of the effects of urbanization on floods in Jackson, Mississippi. Professional Paper 575-D. United States Geological Survey. Denver, Colorado.).

EPA's short-sighted proposal neglects to require developers to adopt low impact development, or better site design, approaches to reducing stormwater, many of which dramatically reduce stormwater while saving builders money and recharging local aquifers. By failing to think and act progressively, EPA has set back by decades our collective efforts to rein in this most serious threat to water quality and undercut important economic growth opportunities.

For a more comprehensive discussion of this issue, including the necessity for post-construction stormwater controls, please refer to the proposal submitted by Waterkeeper Alliance and NRDC to EPA on November 30, 2007, attached at Exhibit F.

Perchlorate Standards for Drinking Water

This Administration has a long track record of trying to rollback drinking water standards that put the public's health above industry profits. Nearly eight years ago, EPA attempted to raise the level of arsenic allowed in drinking water supplies to 50 micrograms/litter, a more permissive standard than the 10 micrograms/liter allowed in the Europe Union and recommended by both the World Health Organization and the United States Public Health Service. See, e.g., O'Connor, John, "Arsenic in Drinking Water; Part 1. The development of drinking water regulations," available at http://www.h2oc.com/pdfs/DW.pdf. When faced with the need to create standards for perchlorate, a toxic ingredient in rocket fuel that has been linked to impaired thyroid function and developmental health risks, particularly for babies and fetuses, EPA has demonstrated a continuing reluctance to act in the public's interest.

After decades of study, last month EPA decided that there was no benefit to be gained by setting a "national primary drinking water regulation" for perchlorate as required by Safe Drinking Water Act. 78 Fed. Reg. 60262. Under this new standard, more than 16 million Americans are exposed to unsafe levels of perchlorate in their drinking water, and independent analysis shows anywhere from 20 to 40 million Americans at risk. *See* Eilperin, Juliet, "EPA Advisers Seek Perchlorate Review; Scientists Hope Agency Rethinks Decision Not to Issue Standard," Washington Post (Nov. 14, 2008), available at http://www.washingtonpost.com/wp-dyn/content/article/2008/11/13/AR2008111303906.html?nav=rss_nation. Perchlorate is particularly widespread in California and the Southwest, where it's been found in groundwater and in the Colorado River, a drinking-water source for 20 million people.

EPA has rushed to finalize its decision in defiance of its own scientific advisers, who criticize the Agency's political appointees with ignoring data from the Centers from Disease Control in favor of the results of an untested computer model funded by the chemical industry. *See id.* Most perchlorate contamination is the result of defense and aerospace activities, and the Agency's refusal to set a protective standard is widely seen as a capitulation to the interests of the Pentagon and defense industry.

Uranium Mining Near the Grand Canyon

After an unconscionably short comment period, 15 days, on December 5th the Department of Interior issued a final rule that attempts to strip Congress of its authority to protect sensitive public lands from the ravages of mining. Stripping this House of its emergency withdrawal power will effectively open lands next to Grand Canyon National Park to uranium mining, providing another last-minute gift to the mining and energy industries that have formed the Bush Administration's agenda in these areas for the past eight years.

The immediate effect of this rule is to allow a British company to explore for uranium within three miles of the lookout point over the south rim of the Canyon, and potentially will allow dozens of mines to be developed in the area. This region still suffers from a legacy of past generations of uranium mines, and local residents oppose further mining in and around their communities. Mining in the region could pose a grave threat to the quality of the Colorado River and other regional lakes and streams. The Interior Department flouted these concerns by rushing

the rule through with almost no opportunity for the public to have a voice, once again favoring the interests of a friendly industry over the public.

Thank you very much for inviting me to testify before the Committee this morning. As you have heard during today's hearing, the last months of the current Administration have been spent cementing preferences for industry while undermining or delaying protections for our waterways and communities. I encourage this Committee to further review these regulations, and to carefully consider the legislative and appropriations responses available to Congress.

The CHAIRMAN. And I think you are going to have plenty of time and interest in the members continuing this discussion with you. We thank you, Mr. Kennedy. I might also note that one of the great citizens of the United States is here with us as well. Mr. Kennedy's mother, Ethel Kennedy, is sitting out here as well in this hearing. So let me now turn and recognize our second witness, Ms. Jamie Rappaport Clark, who is executive vice president for Defenders of Wildlife. She has spent 20 years in government service, primarily with the U.S. Fish and Wildlife Service where she served as director from 1977 to 2001. During her tenure as director, we added 2 million acres to the National Wildlife Refuge system and established 27 new wildlife refuges. Welcome Ms. Clark. Whenever you are ready, please begin.

STATEMENT OF JAMIE RAPPAPORT CLARK

Ms. CLARK. Thank you, Mr. Chairman. And I am delighted to be here this morning. Members of the committee, I appreciate your support. It is hard to follow the eloquent testimony of Mr. Kennedy. But what I will add to that is just the sheer frustration of the last 8 years. As you mentioned, I was a public servant my entire career up until the day Mr. Bush took office. And it is hard to describe what the last 8 years have done to my former colleagues trying their hardest to protect the environment and our natural resources over these years. They are demoralized and have really hit their limit. So I am delighted to see this oversight.

I also appreciate the opportunity to shed some light on efforts by this administration to dismantle longstanding regulations and policies that protect endangered species in our cherished public lands. In its waning days, this administration is carrying out a calculated strategy to undo decades, decades of commitment to natural resources conservation when it has nothing more to lose and it can largely escape the scrutiny of this Congress and the general public. I am going to highlight just a few, there are plenty, but a few of the most damaging regulatory assaults this morning.

First, as was mentioned, is the rewrite of the section 7 regulations under the Endangered Species Act that implement interagency consultation proposed last August. The consultation regulations are the absolute heart of the Endangered Species Act. But the administration is on the verge of allowing any Federal agency to avoid consultation if the agency unilaterally decides that an action it sponsors is not anticipated to result and take of illicit species, and its other effects are insignificant or unlikely not defined.

Now this might sound reasonable. I have been at this for many years on the ESA. And this notion that the government agencies can evaluate their own actions sure sounds reasonable. Why have consultation, if there is no effects? Sounds bureaucratic. But figuring out whether an action will cause take or other effects often is the issue at hand, and why we have an inter-agency consultation process. It is a very difficult and complex evaluation. On many occasions, the question of whether take will occur is not readily apparent. It requires an in-depth knowledge of the species' behavior, biology and extent throughout its entire range, just not in the area of the project.

Current rules allow Federal agencies to decide whether there will be adverse effects from their actions today, but the agencies must obtain the concurrence from the experts at the Fish and Wildlife Service at the National Fishery Service. Under this administration's proposal, however independent species experts at one of the services no longer are in the review loop. They no longer review Federal agency judgments about the effects of actions that it sponsors, clearly allowing the fox to guard the chicken coop. This administration is also proposing to drastically narrow the consideration of Federal agency impacts even when consultation does occur.

There will be no review of Federal agencies that contribute to affect other species, even if it is substantial impacts if the effects would still occur to some extent without the action. Even though scientific evidence builds every day the greenhouse gas pollution is a significant cause of adverse effects on wildlife the proposed rules would make it nearly impossible to consider these impacts on species, such as the polar bear that we all know is threatened by global warming.

The Congress should act promptly to stop this dismantling of section 7 consultation. If legislation isn't successful by stopping the proposed rule, the incoming administration of President-elect Obama should prevent it from going into effect, if possible. Or take steps to minimize its effect while undoing the regulations finalized in the last days. Second, is this administration's repackaged effort to prematurely delist the gray wolf in the Northern Rocky Mountains, one of this country's most amazing and successful species recovery efforts of the last century.

Although two separate Federal Court decisions have cast doubt on the Bush administration's delisting efforts due to concerns about genetic isolation and the adequacy of State management plans that hasn't kept this crowd from still trying to push its same failed delisting rule out the door before they leave office next month. Congress should act while it can to stop the proposed delisting of the gray wolf from going forward. Undermining one of the great conservation achievements of the last century should not be allowed at the 11½ hour.

The incoming administration should be given the opportunity to address the inadequacies of this current rule, hold together all the stakeholders involved, develop a science based management plan that will guide recovery and address the concerns of both people and wolves. Third, is the Bush administration's abusive regulations to minimize protection for the polar bear. Last May compelled by a hearing held by you, Mr. Chairman, in the face of insurmountable scientific evidence indicating that polar bears in the United States face extinction by mid century in our lifetime due to global warming, the administration finally, after much delay, listed the polar bear as a threatened species.

We had about a nanosecond to cheer when we realized that they lost no time in making sure that the listing would not result in any greater protection for the species by issuing concurrently a so-called section 4(d) rule under the Endangered Species Act with no notice and no opportunity for public comment. In my Federal career I have never seen that happen. The Bush administration has

been unbelievable. They argue that other laws and international treaties make the Endangered Species Act protection superfluous.

In other words, business as usual is good enough for the polar bear. If that were true, of course, then the polar bear wouldn't have needed the Endangered Species Act protections in the first place. The incoming Obama administration should rescind the illegal 4(d) rule and replace it with a rule that actually improves the polar bear's chances of actually surviving and recovering. And finally, Mr. Chairman, the Bush administration has launched an incredible assault of last minute rulemakings on our public lands, and we could go on and on and on about that, including efforts that threaten our national parks and fast tracking of oil shale development that fails to protect people, our wildlife and the U.S. Treasury.

The Bush administration's assault on our Nation's stewardship of endangered species and public lands presents challenges of unprecedented magnitude and scope for Congress and the incoming administration of President-elect Obama. We look forward to working with you under your leadership to restore our commitment to protection of these magnificent and irreplaceable natural resources. Thank you.

[The statement of Ms. Clark follows:]

TESTIMONY OF JAMIE RAPPAPORT CLARK
EXECUTIVE VICE PRESIDENT
DEFENDERS OF WILDLIFE
BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
SELECT COMMITTEE ON ENERGY INDEPENDENCE AND GLOBAL WARMING
HEARING ON
INVESTIGATING LAST-MINUTE BUSH ENERGY AND ENVIRONMENT RULEMAKINGS
DECEMBER 11, 2008

Mr. Chairman and members of the Committee, I am Jamie Rappaport Clark, Executive Vice President of Defenders of Wildlife. Founded in 1947, Defenders of Wildlife has over 1.1 million members and supporters across the nation and is dedicated to the protection and restoration of wild animals and plants in their natural communities.

I appreciate this opportunity to shed greater light on efforts by the Bush administration's Interior Department to dismantle long-standing regulations and policies that protect endangered species and public lands. The Bush administration is in the midst of carrying out a calculated strategy of using its waning days as a shield against Congressional and public challenges so that it can undo decades of commitment to natural resources conservation.

Given the magnitude of unprecedented challenges that the incoming administration of President-elect Obama and the Congress will face on the economy and foreign policy, this hearing is an important means of ensuring that we do not lose track of the pressing needs created by the Bush administration's assault on key rules that have guided this nation's stewardship of our endangered species and public lands.

Breaking Faith With A 35-Year Bipartisan Legacy Of Endangered Species Protection

Thirty-five years ago, Congress enacted the current Endangered Species Act, and this nation put in place the world's most farsighted and important protection for imperiled wildlife and plant species and the ecosystems on which they depend. This protection has everyday value for humans because these plants and animals, many seemingly insignificant, play crucial roles in their ecosystems that help sustain all life on Earth.

The Endangered Species Act has helped rescue hundreds of species from extinction. But the even greater achievement of the Act has been the efforts it has prompted to recover species to the point at which they no longer need special protections. It is because of the Act that we have wolves in Yellowstone, manatees in Florida and sea otters in California. We can

marvel at the sight of bald eagles in the lower 48 states and other magnificent creatures like the whooping crane, the American alligator and California condors, largely because of the ESA.

1. Section 7 Interagency Consultation Regulations: Striking at the heart of the Endangered Species Act

During the last eight years the Bush administration has taken many actions and proposed budgets that abandoned or actively undermined our longstanding bipartisan commitment to protect imperiled species, but none has had the potential to do as much harm as the re-write of the interagency consultation requirements under Section 7 of the Endangered Species Act, which was proposed on August 15, 2008.

The Section 7 consultation requirements are the heart of the protections of the Endangered Species Act. By requiring federal agencies to work with the Fish and Wildlife Service or National Marine Fisheries Service to insure that an agency's actions do not jeopardize the existence of a species or adversely change or destroy habitat critical to a species, the Act's consultation requirement establishes a system of checks and balances that provides an essential safety net for imperiled plants and animals.

Consultation under Section 7 may be either "informal" or "formal." For actions that "may affect" listed species or designated critical habitat, informal consultation allows federal agencies sponsoring the actions to assess, in conjunction with one of the Services, whether formal consultation is required. In those cases in which one of the Services is unable to agree with a federal agency that an activity is not likely to adversely affect listed species, the Service and the action agency may use the informal consultation process to work together to gather further information or to identify modifications to the activity that will avoid adverse effects.

Over the years, the Section 7 process of informal consultation between the Fish and Wildlife Service or National Marine Fisheries Service and other federal agencies has been one of the Endangered Species Act's most successful provisions in reconciling species conservation needs with other objectives. For example, progress towards the conservation of species such as the grizzly bear and piping plover would have been virtually inconceivable without the beneficial influence of Section 7. Yet, the net effect of the Bush administration's proposed changes will almost certainly be to make species recovery less likely rather than more likely.

Eliminating important checks and balances protecting endangered species.—The Bush administration's August 15th proposal dismantles a key Section 7 safety net by limiting the ability of wildlife experts in the Fish and Wildlife Service or National Marine Fisheries Service to protect threatened and endangered species and categorically excludes numerous federal projects from consultation regardless of their impacts on listed species or critical habitat. The proposal allows a federal agency to avoid Section 7 consultation if the agency unilaterally decides that an action it sponsors is not anticipated to result in death, harm or other "take" of a threatened or endangered species, and that the action has inconsequential, uncertain, unlikely or beneficial effects. The determination of whether take or other effects will occur often is not readily apparent, and requires in-depth knowledge of the affected species' "essential behavioral patterns, including breeding, feeding or sheltering."

Current rules allow federal agencies to make such determinations, but the agencies must obtain the concurrence of the Fish and Wildlife Service or National Marine Fisheries Service. Frequently, this requirement for concurrence by one of the Services has led to a better understanding of an activity's effects, through the collection and analysis of additional information to assess whether take is likely. Under the administration's proposal, however, independent species experts at one of the Services would no longer review federal agency judgments about the effects of actions that it sponsors.

The administration's proposed framework lets the fox guard the chicken coop. Action agencies often have their own institutional biases and priorities that may not be consistent with conservation of threatened and endangered species. Indeed, many federal agencies lack expertise in species conservation and may not even have biologists or botanists on staff. There is no evidence provided in the proposed rule to support the claim that other federal agencies are willing and able to effectively review species impacts without input from the Fish and Wildlife Service or National Marine Fisheries Service.

Although the Bush administration's August 15th proposed rule allows an agency voluntarily to request the concurrence of the Fish and Wildlife Service or National Marine Fisheries Service on determinations of the effects of projects it sponsors, the proposal ties the hands of the Services in the process by imposing an arbitrary 60-day limit (subject to a possible extension of 60 days) on completion of the informal consultation; otherwise, the project can move forward regardless of the impacts on listed species.

The Bush administration's dismantling of informal consultation under Section 7 of the Endangered Species Act is an open invitation for agencies to cut corners and take advantage of the changes to push through damaging projects. Without any reporting requirement or ability to know what is happening across the geographic range of a species, it will be almost impossible to monitor species condition over time. Allowing federal agencies to decide for themselves, without checking with wildlife biologists at the Fish and Wildlife Service or National Marine Fisheries Service, whether their projects will harm endangered species represents a step backwards not only for endangered wildlife conservation, but also for federal agencies trying to move their projects forward. In the past, requiring such consultations provided both a safeguard for endangered species and also helped assure federal agencies that their projects would not be delayed by legal challenges.

Barring consideration of the impacts on endangered species from actions that contribute to global warming.—The Bush administration August 15th proposed changes to the Section 7 Endangered Species Act regulations also propose drastically narrowing consideration of impacts of federal actions even when consultation occurs. The proposed rule limits application of section 7 consultation to those federal agency actions that are an "essential cause" of the effects and for which there is "clear and substantial information" that they "are reasonably certain to occur." The proposal's new concept of essential causation would eliminate consultation for federal actions that contribute to an effect on a species, perhaps even substantially, if the effect would otherwise occur to some extent without the federal action.

Actions that contribute to the extent, duration or severity of global warming would escape review entirely under the Endangered Species Act as long as global warming would

otherwise occur to some extent. Interior Secretary Kempthorne has made clear that the revisions were intended to put off limits any consideration of the impacts of greenhouse gas emissions on polar bears or other wildlife affected by global warming. In the words of the proposal: "This regulation would enforce the Services' current view that there is no requirement to consult on greenhouse gas (GHG) emissions' contribution to global warming and its associated impacts on listed species (e.g., polar bears)."

The Bush administration's proposed changes in the Endangered Species Act rules, however, go well beyond global warming. They have proposed this sweeping change in a way that will potentially harm all listed species today. The change would make it far more difficult to address all types of cumulative impacts on wildlife. It would allow endangered species and their habitat to be quietly destroyed a little bit at a time, even if the destruction eventually adds up to losing the species altogether. In effect, the Bush administration proposes to address the "problem" of consultation on global warming impacts to species by illegally sweeping this very real threat under a rug that bars evaluation of cumulative impacts and possible solutions across the board.

Thwarting the Bush administration attack.—As the front line of defense, the Congress should act promptly to stop the regulations dismantling Section 7 consultation that were proposed on August 15, 2008. If legislation is not successful in stopping the proposed rule, the incoming administration of President-elect Obama should prevent it from going into effect, if possible, or take steps to minimize its effect while proposing regulations that would undo the changes proposed on August 15.

2. Regulatory Lists of Endangered and Threatened Species: Cementing in place a radical new interpretation of the Endangered Species Act

On August 5, 2008, the Bush administration unleashed an attack on the Endangered Species Act that is nearly as harmful as the changes proposed to the Section 7 regulations just ten days later. By very quietly proposing changes to column headings and descriptions in the official "Lists of Endangered and Threatened Wildlife and Plants" found in the regulations implementing the Endangered Species Act, the administration is trying to disguise a radical new interpretation of the law as minor clerical edits.

The practical effect of the proposed format revisions is to codify the legal conclusions of a Solicitor's opinion dated March 16, 2007, which changed the previously unvarying understanding of how the Endangered Species Act applies to species that have been designated as "endangered" or "threatened." The opinion departs dramatically from the text and history of the Act. It limits protection to species that are facing risk of extinction in their current range, which could significantly limit the protections available to species that formerly occupied large geographical areas. The opinion also undoes long-standing ESA administrative practice of listing a species, subspecies or distinct population segment of a vertebrate species wherever it occurs if it is threatened or endangered either in its entirety or in a significant portion of its range. For more than three decades, a species, subspecies or distinct population segment has been listed in its entirety or not listed at all.

The 2007 opinion concluded, however, that any entity eligible for listing under the Endangered Species Act (i.e., a species, subspecies, or vertebrate "distinct population

segment") may be given the protection of the Act only in some places and not in others. Prior to the Solicitor's opinion, the consistent and unvarying administrative practice for nearly 35 years was that any taxon that met the act's definition of an "endangered species" or a "threatened species" received the act's protection wherever it occurred. The opinion reversed this settled understanding.

The Bush administration's August 5th proposed rule changes attempt to effectuate the Solicitor's novel interpretation of the law by making subtle, but important changes in two sentences explaining the "historic range" column in the official species lists. Significantly, neither of the changes is explained, or even acknowledged, in the preamble to the proposed rule. Instead, they are buried in the text of the actual revised regulations, where they are easily overlooked. The practical effect for protection of any species designated as threatened or endangered in the future will be to exclude individual organisms, populations, and entire portions of a species range from protection under the Endangered Species Act.

Thwarting the Bush administration attack.— The administration of President-elect Obama should revise the March 16, 2007 Solicitor's opinion and develop policy guidance to restore the long-standing interpretation that a species determined to be endangered or threatened "throughout a significant portion of its range" should be listed in its entirety. The Congress should act promptly to stop the regulatory changes in the official "Lists of Endangered and Threatened Wildlife and Plants" that were proposed on August 5, 2008. If legislation is not successful in stopping the proposed rule, the incoming administration of President-elect Obama should prevent it from going into effect, if possible, or take steps to minimize its effect while proposing regulations that would undo the changes proposed on August 5.

3. Delisting Gray Wolves in the Northern Rocky Mountains: Repackaging a deeply flawed proposed rule

Although two separate federal court decisions have cast doubt on the Bush administration's effort to remove Endangered Species Act protections for gray wolves in the northern Rocky Mountains, the administration has demonstrated its zeal for deregulation by still trying to push a failed delisting rule out the door in its final remaining days.

In February 2008, the Bush administration finalized a proposal to establish a distinct population segment of the Northern Rocky Mountains gray wolf and simultaneously delist this population. This premature decision undermined the work over the last 35 years to reintroduce and recover the wolf in the northern Rockies. It was based on flawed assessments of the adequacy of state laws and management plans and of the importance of establishing connectivity among the largely isolated state wolf populations. Not troubled by these weaknesses in its approach, the Bush administration forged ahead with stripping Endangered Species Act protections from the northern Rocky Mountains' wolves and began to undo the hard-earned progress toward wolf recovery of recent years.

In July 2008, however, the U.S. District Court in Missoula issued a preliminary injunction against delisting, which temporarily placed wolves back under federal protection. The court determined that Defenders and 11 other conservation groups were likely to prevail on claims

that delisting was premature because of concerns regarding genetic isolation and the adequacy of state management plans.

Wolves in central Idaho, northwestern Montana, and the Greater Yellowstone area remain largely disconnected from each other and wolves in Canada. The wolves of the Greater Yellowstone area, in particular, have remained genetically isolated since 31 wolves were introduced into Yellowstone National Park more than a decade ago. Moreover, the region's population of 1,500 wolves still falls short of the numbers that independent scientists have determined to be necessary to secure the health of the species in the northern Rockies. In addition, state laws and management plans remain inadequate. While ensuring that wolves can and will be killed in defense of property or recreation, Wyoming, Idaho, and Montana have refused to make enforceable commitments to maintaining viable wolf populations within their borders. The states also have failed to keep track of recent wolf killings and have neglected to secure funding for essential monitoring and conservation efforts.

Nevertheless, just a few weeks after the Montana court allowed the Fish and Wildlife Service to rescind its flawed rule on October 14, 2008, the Bush administration went forward seeking public comment on the same discredited rule. The repackaged rule does not give the Fish and Wildlife Service time to address the flaws underscored by the court when it rebuked the agency earlier this year.

Thwarting the Bush administration attack.—Although the Bush administration should withdraw its proposed delisting of the gray wolf in the Northern Rocky Mountains, the Congress should act while it still can to stop the proposal from going forward. The administration of President-elect Obama should be given the opportunity to address the inadequacies of the current rule by bringing all of the stakeholders together to devise science-based management plans that will benefit wolves, ranchers, hunters, Northern Rockies residents and all Americans who care deeply about wildlife conservation. Without the opportunity to pursue full cooperation among interested parties, we'll end up in the same ineffective tug-of-war that has dominated the wolf recovery during the Bush administration.

4. Polar Bear Section 4(d) Rule: Listing while withholding protections for the species

The listing of the polar bear as a threatened species under the Endangered Species Act on May 15, 2008, after much delay, illustrates the great lengths to which the Bush administration has been prepared to go to avoid regulation of activities that would protect the species.

Unable to avoid listing the polar bear in the face of insurmountable scientific evidence indicating that the species faces extinction in the United States by mid-century due to global warming, the Bush administration instead hastily sought to ensure that no consequences would flow from the listing by issuing an "interim final" rule under Section 4(d) of the Endangered Species Act, without prior notice or opportunity for public comment. With respect to activities in Alaska, the Section 4(d) rule declares that the "existing conservation regulatory requirements" of the Marine Mammal Protection Act and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) are sufficient to ensure the continued survival and recovery of the polar bear. With respect to activities outside Alaska but still within the jurisdiction of the United States, the Section 4(d) rule, without explanation, withholds any protection for the polar bear from incidental take.

What is most striking about the Bush administration's Section 4(d) rule is that it effectively repudiates the very action of listing the polar bear as threatened under the Endangered Species Act. Section 4(d) of the Act imposes a mandate on the Interior Secretary to adopt all measures necessary for the conservation – that is, the survival *and recovery* – of threatened species. Yet Bush administration officials chose not to adopt *any* measure under the Endangered Species Act for the conservation of the polar bear. They made no real attempt to evaluate what measures are needed to address the immediate and long-term threats to the polar bear's existence, or what further measures are needed for the species to achieve recovery. Instead, they suggest that the protections provided for the species by the Marine Mammal Protection Act and CITES make the Endangered Species Act's protections superfluous, with no recognition of the critical differences in the protections afforded by the statutes and the international treaty and no explanation of how it can possibly benefit the conservation of the polar bear to deprive it of the additional protections afforded by the Endangered Species Act. The Bush administration simply declared that existing protections under another statute, the Marine Mammal Protection Act, suffice for actions in Alaska, and that no protections are needed for the polar bear outside of Alaska.

Essentially, the Bush administration decided that "business-as-usual" is enough for the polar bear. If that were true, of course, then the polar bear would hardly have needed listing in the first place. In framing its Section 4(d) rule in these terms to reassure development interests (particularly the oil, gas, and coal industries) that listing the bear will not affect their interests, the administration abdicated its legal duties under the Endangered Species Act.

Reversing the Bush administration attack.—The incoming administration of President-elect Obama should rescind the illegal Section 4(d) polar bear rule and promulgate in its place a rule that adopts appropriate measures to ensure the survival and recovery of the polar bear. Such measures must, at a minimum, include the full protection of the Endangered Species Act against take of the polar bear.

Abandoning Stewardship of Our Public Lands

Last-minute rulemakings and other fast-tracked decisions are occurring throughout agencies responsible for the sustainable management of U.S. public lands. At the Forest Service, Bush administration political appointees are bent on deregulating the National Forest Management Act, the primary statute governing land management planning on our national forests. As direct attempts to significantly weaken the National Forest Management Act regulations make their way through the courts, the Bush administration has used midnight regulatory efforts to erode the regulatory environment piecemeal. For example, an interim Forest Service directive (ID_1909.12-2008-1) could allow increased logging on lands once considered unsuitable for timber harvest. The Bush administration also continues to push regulatory measures that ignore abundant National Park Service science associated with the negative environmental impacts of snowmobile use in Yellowstone National Park. But the Bush administration has been the most aggressive in its use of the Department of the Interior's Bureau of Land Management (BLM) to pursue measures damaging to sound public lands management.

1. Oil Shale Leasing: Failing to protect people, wildlife and treasuries

On November 16, 2008, the Bush administration issued a Record of Decision amending 12 BLM resource management plans (RMPs) to provide for oil shale leasing in Colorado, Utah and Wyoming. One day later, on November 17, 2008, the Bush administration finalized commercial oil shale leasing and development regulations.

These two rulemaking actions are flawed in numerous ways. They fail to ensure that royalty rates guarantee a fair return to state and federal treasuries. They also fail to address impacts to sensitive wildlife habitats, to the availability of water for Upper Colorado River Basin users, and to local communities that already are suffering degraded air quality because of unprecedented oil and gas drilling. Moreover, because oil shale production would generate more carbon dioxide than conventional gasoline production, impacts also would be felt nationally and globally. Yet, against the advice of the non-partisan RAND Corporation; over the concerns of the Environmental Protection Agency, Fish and Wildlife Service, and other Interior Department agencies; and despite opposition from western governors, Members of Congress, affected communities, and many others, the Bush administration is rushing development of a commercial oil shale leasing program in a manner that solely benefits industry—at the expense of taxpayers and sound policy.

A commercial leasing program cannot be properly developed until the results of the Congressionally mandated research, development and demonstration program, which is still in its infancy, are known and analyzed. This effort is expected to take more than a decade. Without knowing which oil shale technologies will prove viable and what the associated costs and impacts will be, it is impossible to develop regulations that contain appropriate protections for the environment, appropriate royalty rates to ensure a fair return to taxpayers, and a financial safety net for affected communities.

In a particularly egregious and unusual act, the Bush administration used its November 16, 2008 Record of Decision amending the 12 Resource Management Plans in Colorado, Utah and Wyoming to deny the public the right to protest and to deny governors of affected states the right to appeal summary dismissal of concerns they raised regarding inconsistencies of the amended plans with state and local laws, plans and policies.

Reversing the Bush administration attack.—The incoming administration of President-elect Obama should take immediate action to review current oil shale policy and withdraw the deficient regulation and support Congressional efforts to revise misguided statutory directives, to ensure that America's energy vision is based on efficiency and sustainable alternatives rather than dirty fuels and increased greenhouse gas emissions.

2. Utah RMP Amendments: Rolling back protections for wildlife and cultural resources

After dismissing or resolving 87 protests in less than a month, the BLM will implement five of six resource management plans that govern all aspects of management on 11 million acres of Utah's public lands, including the state's renowned canyon country, for the next 15-20 years. The Bush administration released these six Utah plans in a flurry – one plan almost every week from August 1 to September 5, 2008. While the public was given 30 days to protest each plan, the public effectively had only one week between each protest deadline to

review and digest each 1,000-page plan, and submit protest letters to the BLM detailing concerns and inadequacies of plans.

The Bush administration proposes limited protections for only 16 percent of the lands within the plan areas that it determined to have wilderness characteristics. In contrast, the vast majority of lands within the plan areas are prioritized for energy development. The new plans prescribe that 80 percent of the 11 million acres will be available to oil and gas development. Exploration, drilling, and access road construction will put at risk premier Fremont rock art sites in Nine Mile Canyon and wilderness character lands near the Green River in Desolation Canyon. Off-road vehicle use is permitted on an appalling 95 percent of wilderness-quality lands (more than 2.3 million acres). The new plans also roll back significant protections for wildlife, sensitive species and cultural resources by eliminating existing Area of Critical Environmental Concern (ACEC) protections from almost one-half million acres of land—threatening resources and places like the ancestral Puebloan ruins at Cedar Mesa. The BLM is mandated under the Federal Land Policy and Management Act to prioritize designation and protection of ACECs to protect specific resources like critical species of wildlife, archaeological resources, or fragile or unique geologic formations.

Reversing the Bush administration attack.— The incoming administration of President-elect Obama should review and revise the six new Utah RMPs, and take immediate steps to ensure that proposed lease tracts in areas designated as ACECs, or that have wilderness qualities, are not offered in future Utah BLM oil and gas lease sales.

3. December 19, 2008 BLM Lease Sale: Threatening Parks and Wilderness

After releasing the six revised Utah RMPs, on November 11, 2008, the Bush administration announced the auction of 360,000 acres in a December 19th lease sale, including parcels near or adjacent to national treasures such as Arches National Park, Dinosaur National Monument, and Canyonlands National Park. More than 50 percent of the lease sale includes land that has been nominated for wilderness as part of America's Redrock Wilderness Act now pending before Congress, as well as lands that the BLM has acknowledged have wilderness characteristics. This announcement was made without consulting with, or even advising, the National Park Service, an atypical move for a lease sale of parcels so close to National Park System protected areas. (The National Park Service also was denied the opportunity to act as a cooperating agency on the revision of the six RMPs that authorized the lease sales.) Following the lease sale announcement, the National Park Service formally requested that the BLM remove 93 parcels based on concerns about air and water quality, wildlife and serenity in the parks if drilling were to occur near park borders. However, BLM agreed to remove only 24 of those 93 parcels. Southern Utah Wilderness Alliance, The Wilderness Society, the Natural Resources Defense Council and the Grand Canyon Trust filed a formal protest on December 4, 2008, in an effort to get BLM to remove as many as 100 additional parcels from the list.

Reversing the Bush administration attack.— The incoming administration of President-elect Obama should either halt completion of lease transactions for the protested parcels or cancel the leases if they already have been issued. Information should be requested from BLM regarding the number of acres leased and the revenue collected for parcels not protested.

4. Emergency Land Withdrawals: Removing Congressional authority

Pursuant to Section 204(e) of the Federal Land Policy Management Act, when an emergency situation exists and when extraordinary measures are necessary to preserve values that otherwise would be lost, the House of Representatives Committee on Natural Resources or the Senate Committee on Energy and Natural Resources has the authority to call upon the Secretary of the Interior to make an immediate emergency withdrawal of land (42 U.S.C. § 1714(e)).

On June 25, 2008, the House Natural Resource Committee issued an emergency resolution, directing the Secretaries of the Interior and Agriculture to withdraw BLM and Forest Service lands adjacent to Grand Canyon National Park from uranium mining, pursuant to its authority under Federal Land Policy Management Act and its implementing regulations. Rather than withdrawing these lands, on October 10, 2008, the Bush administration announced a drastic change in policy with regard to emergency land withdrawals, providing the public only 15 days to comment. This rule, which was finalized December 5, 2008, eliminates any and all Congressional authority to make emergency land withdrawals, in contravention of Congressional intent as set forth in Federal Land Policy Management Act.

Reversing the Bush administration attack.— The incoming administration of President-elect Obama should withdraw BLM and Forest Service lands adjacent to Grand Canyon National Park from uranium mining and fully restore emergency land withdrawal regulations that affirm the authority of Congress to make emergency land withdrawals.

Conclusion

The magnitude and scope of the Bush administration's assault on key rules that have guided this nation's stewardship of our endangered species and public lands present unprecedented challenges for Congress and the incoming administration of President-elect Obama. Congress should act promptly to prevent the Endangered Species Act regulations proposed on August 5 and August 15, 2008 from being finalized and to bar completion of the pending proposal to delist the gray wolf in the northern Rocky Mountains. If these proposed regulations are successfully finalized by the Bush administration, then the incoming administration of President-elect Obama seek to minimize their effects while working to reverse them as quickly as possible.

To further erase the stained natural resources legacy of the Bush administration, the incoming administration of President-elect Obama also will need to act promptly to rescind the polar bear Section 4(d) rule, take immediate action to review current oil shale policy and withdraw the deficient commercial oil shale leasing and development regulations, review and revise the six new Utah RMPs, halt completion of lease transactions for the protested parcels or cancel the leases if they already have been issued as part of the December 19th Utah lease sale, withdraw BLM and Forest Service lands adjacent to Grand Canyon National Park from uranium mining, and fully restore emergency land withdrawal regulations that affirm the authority of Congress to make emergency land withdrawals under the Federal Land Policy Management Act.

Thank you for considering my testimony. I'll be happy to answer questions.

The CHAIRMAN. Thank you, Ms. Clark, very much. Our next witness is Mr. Jeffrey Holmstead. He is a partner at Bracewell and Giuliani. Previously, Mr. Holmstead served at the Environmental Protection Agency as assistant administrator for air and radiation. Prior to that, Mr. Holmstead was a partner at Latham and Watkins and served as associate counsel for President George H. W. Bush from 1989 to 1993. Welcome Mr. Holmstead. Whenever you are ready please begin.

STATEMENT OF JEFFREY R. HOLMSTEAD

Mr. HOLMSTEAD. Thank you, Mr. Chairman. I appreciate the chance to be here again today. And I always appreciate the opportunity to shed a little light on some of these issues. As you noted, my expertise is primarily in air pollution issues. And I am going to depart from my written statement. If I could just make a couple of points that I think should be interesting to everybody on this panel and folks up there as well. I always find these hearings interesting because of the failure to look at kind of the actual data that are out there. You and others on this panel have accused the Bush administration of eviscerating the Clean Water Act. I was amused to see your report about the radical anti-environmental agenda of the Bush administration.

And so my question is this: How is it that air quality throughout the county is so much better today than it was 8 years ago. How is it that pollution is down significantly compared to 8 years ago. The fact of the matter is the Bush administration, at least in the areas that I know, has tried to achieve our environmental goals in the most sensible cost effective way. And we haven't always been successful, and there are some things that I certainly wish we could have accomplished that we were not able to. But last night on the computer, as I was thinking about this hearing, I looked up on the EPA Web site where they actually track emissions, and these are actual emissions from coal-fired power plants, and I know my friend John Walke cares about those, Mr. Kennedy does as well.

Eight years ago, SO_2 emissions from coal-fired power plants were just a little over 13 million tons a year. Last year, the last year for which we have emissions measurements, those are now below 9 million tons a year. So that is roughly a 35 percent reduction. The reduction in NO_X emissions is even greater. In 1999, the emissions were about 2.4, I am sorry, 5.5 million tons of NO_X, and last year they were 3.5 million. There are legitimate kind of regulatory policy questions. You may have a different view of the way we ought to do things, whether it is through aggressive enforcement or whether it is sort of through more effective regulatory programs. But the fact of the matter is the air is cleaner today in the United States because of actions taken by the first Bush administration, the Clinton administration and this Bush administration. It is an ongoing legacy that we all should be proud of.

And the other thing that I would like to mention is EPA does careful analysis, and there is what 17,000 employees and a handful of political appointees, and most of the folks there are career staff who are dedicated public servants. They did an analysis of the most important health protections achieved by EPA in its history,

and they found three rules that were substantially more—that were far and away the most important rules that EPA has ever done. Number one was the phase down of lead in gasoline which took place back in the 1970s, 1980s.

Number two was the Clean Air Interstate Rule which is now kind of in legal limbo because of a court case. But the second most important rule in terms of improving public health was issued under this administration, and the third was also issued under this administration, having to do with reducing diesel emissions. So again, I am entertained by some of the comments that have been made, but I find them troubling insofar as they are completely devoid of what has actually happened out there.

So I know that there is a lot more force covered now in the U.S. than there was 20, 30 years ago. I am not an expert on public lands. I know something about the Endangered Species Act. And I just think it is a little disingenuous to suggest that the Endangered Species Act is the tool that anybody intended to deal with climate change. Climate change is an important issue. We have got to think about how to deal with it. But the way to deal with it is not by doing an Endangered Species Act consultation on hundreds of individual projects which collectively have less than a trivial impact on CO_2 emissions.

Let's talk about the best way to achieve our goals instead of somehow suggesting that there is a calculated effort here by the Bush administration which has really made a lot of progress on all these environmental issues. Now, I can't see the clock. I may be well past my time already. But rather than talking about midnight regulations, let's talk about individual specific issues and what is the best way to achieve the objectives that I think we all share. Thank you very much and I really would be quite happy to answer any questions that anybody has.

The CHAIRMAN. Thank you, Mr. Holmstead, very much.

[The statement of Mr. Holmstead follows:]

Testimony of Jeffrey R. Holmstead
Before the
House Select Committee on Energy Independence and Global Warming
December 11, 2008

Mr. Chairman, my name is Jeff Holmstead. I appreciate the opportunity to appear before the Committee. I am a partner in the law firm of Bracewell & Giuliani and the head of the firm's Environmental Strategies Group. This morning, however, I am not appearing on behalf of my law firm or any of my firm's clients. I am here solely in my personal capacity as a former EPA and White House official who has spent almost 20 years working on regulatory issues.

I understand this committee's interest in so-called "midnight" regulations, but the notion of an outgoing Administration working to finalize regulations before leaving office should not be surprising to anybody who is familiar with the process by which regulations are developed. The Administrative Procedure Act (generally known as the APA) governs the regulatory process, and it requires federal agencies to go through a series of time-consuming steps before issuing a regulation. For any significant regulation, this process takes at least 18 months and normally takes several years. Officials in the Bush Administration, like officials in prior Administrations, have been working on a wide range of regulatory issues and, like officials in prior Administrations, they want to get them finished before they leave office. History has shown that there is a natural tendency at the end of any Administration to try to finish up the things that political officials have been working on for years. The Bush Administration is no different than other modern presidencies in this respect. I also think it would be irresponsible for a President to cease all regulatory work months before his term in office is over. We elect our Presidents for a specific term and we expect them to carry out their work during that entire term, and regulatory policymaking is a crucial part of these duties.

Since President Carter left office in 1980, interest groups have used the term "midnight regulations" to draw attention to regulatory changes that they oppose and to call into doubt their legitimacy. Under President Carter, executive branch agencies completed more than 24,000 pages of new regulations during the last three months of his administration and, more recently, President Clinton published more 26,000 pages of new

regulations in the Federal Register during the midnight period of his administration. While the notion of secretive and rushed regulations may appeal to the cynicism that underscores much of the public's thinking about Washington, DC, it simply does not square with the facts – or with my first-hand experience.

At the beginning of this Administration, President Bush appointed me to serve as the head of the Air Office at EPA, and one of first tasks of the new political appointees was to review the regulations issued during the last weeks of the Clinton Administration. When I reviewed the Clinton regulations I found that these regulations – although unpopular with some stakeholders – were the product of years of work and deliberation. While they may not have been finalized until the last few months or weeks of the Administration, they were – with only one exception – no less legitimate or thorough than regulations finalized at any other time during the Clinton administration. My experience is consistent with the conclusions of scholars who have analyzed claims that midnight regulations are inherently deficient. For example, an empirical study of midnight regulations published in the *Wake Forest Law Review* noted that:

> The inherent problem with these arguments [against midnight regulations] is that they assume that regulations promulgated in the midnight period are rushed through the system during the interim period. Significant regulations, however, cannot be proposed and completed in the period between election day and inauguration day, as it can take years for a significant regulation [to go through the rulemaking process].[1]

Regulatory agencies are bound by the terms that Congress has dictated by statute. Any regulatory action must be consistent with the underlying statute that authorizes that particular action. Substantial transparency and due process protections ensure that all regulations, even so-called "midnight regulations" are based on a public rulemaking record. With very few exceptions, important regulatory actions are subject to the notice-and-comment requirements of the Administrative Procedure Act, which mandates that all interested parties have an opportunity to review and comment on proposed rules. None of these procedural protections are jeopardized by the midnight regulation process. Any

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[1] Jason M. Loring and Liam R. Roth, *Empirical Study: After Midnight: The Durability of the "Midnight" Regulations Passed by the Two Previous Outgoing Administrations*, 40 Wake Forest L. Rev. 1441, 1448 (2005).

regulatory action that has not gone through the proper administrative process, or that is inconsistent with the underlying statute, is likely to be overturned in court.

I know that the other witnesses here today have strong views about certain regulatory actions taken by the Bush Administration – and about other regulatory actions that were proposed some time ago and may be finalized during the next few weeks. I believe that they have all taken advantage of the opportunity to submit comments on those regulatory actions. These comments are part of the public record. I assume, because of their presence here today, that they have also made their views known to members of Congress.

I am familiar with some of the proposed regulations that they oppose, and would be happy to discuss the merits of those regulations. But this sort of debate should occur on the merits of each specific rule and not be cast as a general criticism of midnight regulations. It is more productive to focus on the content of regulations, rather than the date they were finalized. The Bush administration disagreed with a variety of Clinton Administration rules and my fellow witnesses have disagreed with a variety of Bush Administration rulemakings----but none of these disagreements would have been avoided by releasing rulemakings at an earlier date.

Mr. Chairman, I am happy to discuss past and predicted rulemakings that I may have expertise on, and I encourage all interested parties to participate vigorously in this debate. However, my hope is that all parties can avoid the hyperbole and innuendo associated with casting all "midnight" regulations as rushed, secretive, or somehow inherently illegitimate because they were completed in the final months of an administration. Such rhetoric does not further policy discussions and contributes to a widespread cynicism that undermines the public's faith in all institutions of government.

The CHAIRMAN. And our final witness, Mr. John Walke, is the Clean Air Director at Natural Resources Defense Council. He, prior to joining the NRDC, Mr. Walke served at the Environmental Protection Agency where he helped implement the Clean Air Act. Mr. Walke is one of the preeminent experts on clean air issues in our country. We welcome you, sir. Whenever you are ready, please begin.

STATEMENT OF JOHN D. WALKE

Mr. WALKE. Thank you, Chairman Markey and members of the committee. I am pleased to appear before the committee for this important hearing. I am even more pleased that two harmful air pollution rules I addressed at length in my written testimony were abruptly abandoned by EPA yesterday, which renders nearly all of my written testimony moot, so I look forward to questions from the committee.

In all seriousness, though, let me first answer Jeff's question. How is it that the air is cleaner today? Fundamentally, because of steps taken by the Clinton administration and the first Bush administration, and even before that the Reagan administration, it is important to recognize something about clean air laws and rules in this country. There is basically an 8- to 10-year lag time between the time a rule is adopted and the time that the effects of a rule are felt.

So important rules like the acid rain program passed by this Congress in 1990, the NO_X SIP Call passed by the Clinton administration in the late 1990s are bearing fruit today and are responsible for the reductions that Mr. Holmstead mentioned. The rules adopted by the Bush administration are not. The diesel rule that they adopted, a positive rule, based upon successes they inherited from the Clinton administration and continued with the fine professional staff at EPA, and they deserve credit for that, the compliance states for that rule will not occur, by and large, to achieve their measurable meaningful reductions until after they leave office.

The Clean Air Interstate rule, which was struck down in court, had compliance dates of 2010 and 2015. Their mercury rule 2010, 2015, clear skies 2018. Again, there is a lag time and we will enjoy some of the benefits of their diesel rule, but thankfully will not enjoy the disbenefits of the rules that were struck down in court. Abandoning the two rules that were announced yesterday was the right thing to do. The power plant rule would have resulted in enormous emissions increase of smog and soot pollution.

Mr. HOLMSTEAD. John, how can you say that? That is just not true.

Mr. WALKE. I thought I was testifying now, but if you would like to testify again.

The CHAIRMAN. There will be plenty of time.

Mr. HOLMSTEAD. Very good. I look forward to that.

Mr. WALKE. EPA's rulemaking record itself projected that the rule would have increased pollution in entire counties throughout states like Indiana, Tennessee, Michigan, Arizona, Georgia, Ohio, Wisconsin, Pennsylvania, New York, Illinois and others. I took that from EPA's own projections. As the chairman mentioned in his

opening statement, EPA projected in a letter to Congressman Waxman that the rule would have allowed a carbon dioxide emissions increase of 74 million tons per year. That is roughly equivalent to the total annual CO_2 emissions of about 14 average coal-fired power plants or the annual emissions from 50 million vehicles.

There are about 250 million vehicles in this country. That is one-fifth of the total U.S. population. Adding 74 million tons of CO_2 to the atmosphere each year would nearly double the amount that EPA removes under its voluntary Energy Star program. These were enormous emissions increases, and it is a very good thing that the rule was abandoned. The EPA yesterday acknowledged in scrapping these two highly controversial air pollution rules that they were classic midnight regulations and that EPA would not issue them for that reason. You can look at today's Washington Post and New York Times articles.

I welcome those explanations, but at the same time, we should recognize that they are deeply questionable explanations. On the very same day the EPA scrapped these two rules it issued, guess what, a midnight deregulation weakening a Clean Air Act rule governing emissions from factory farms and mines. The question of midnight regulations is unfortunately one that is not going away despite announcements like yesterday. With permission of the chairman, I would like to enter into the record a 60-page document prepared by EPA, it is an internal document that I obtained, and I don't believe has been publicly released before. But it contains EPA's own list of rules that they plan to adopt in 60 days from the Environmental Protection Agency. It is startling the number of days—the number of rules that will be issued and signed in December and January according to this own list.

So I commend it to the Committee's attention. EPA will issue controversial rules and harmful rules under the Clean Air Act by January 20th. They have told us they will do so. One, for example, will allow increased emissions from chemical plants, oil refineries, pharmaceutical plants and the like that have multiple uses of equipment. They also issued a rule just last month actually that will reduce the number of lead monitors that should be required in this country. After the rule was directly overruled by the White House less than 24 hours before the rule's signature, it prohibited EPA from monitoring lead emissions from facilities that emit more than 1,000 pounds per year of lead.

Instead, the White House allowed EPA only to monitor facilities emissions emitting more than 2,000 pounds of lead resulting in more than 200 lead polluters nationwide that will now go unmonitored. This will affect residents in Indiana, Michigan, Pennsylvania, Ohio, New York, Texas and Minnesota that will not have the benefit of lead monitors downwind of cement plants, oil refineries or lead smelters in their communities thanks to this irresponsible White House intervention.

In conclusion I will just note that the Obama administration already has a lot to do to clean up air pollution and global warming pollution from power plants. We really should not saddle them with the additional insult and injury of these midnight regulations. Thank you.

The CHAIRMAN. Thank you, Mr. Walke, very much.

[The statement of Mr. Walke follows:]

Testimony of John D. Walke
Clean Air Director
Natural Resources Defense Council

Before the Select Committee on
Energy Independence and Global Warming
U.S. House of Representatives

EPA's Midnight Deregulation Under the Clean Air Act

December 11, 2008

NRDC
THE EARTH'S BEST DEFENSE

In a Washington Post article published appropriately enough on Halloween this year, entitled "A Last Push to Deregulate: White House to Ease Many Rules," EPA spokesperson Jonathan Shrader was asked about the highly controversial Clean Air Act rulemaking that EPA intends to adopt that will effectively eliminate the new source review (NSR) protections that apply to existing power plants. He replied that any rule that EPA completes in the remaining time under this administration will be "more stringent than the previous one." The only way for that statement to be true with respect to this NSR rulemaking – or the national parks rule discussed in the following section of my testimony -- would be for EPA to abandon these rulemakings. EPA is rushing to adopt these two Clean Air Act (CAA) rules that will dramatically weaken current law and are in *no* respect more stringent than existing rules.

Indeed, the statement by EPA's spokesperson is demonstrably false. And the proof is to be found within the Bush administration itself: (1) in the very words of outraged, dissenting officials from EPA and the National Park Service; and (2) in the formal objections (or nonconcurrences) lodged by principled EPA offices and officials in opposition to these two dangerous rules.

* * * * *

EPA will issue several controversial, harmful and in all likelihood illegal rules under the Clean Air Act prior to January 20th, 2009. For example, the agency has signaled its intention to weaken the Act's NSR rules to allow emissions increases from oil refineries, chemical plants, and other major industrial polluters to escape review and control, by artificially separating – and thereby ignoring – emissions increases that occur at multiple pieces of equipment at a facility. See generally the proposed EPA rule published on September 14th, 2006 at 71 Fed. Reg. 54,235.

Similarly, EPA plans to adopt a rule that weakens the Act's NSR program (yet again) by allowing mining operations and factory farms to ignore so-called "fugitive emissions" that under today's law must be included in determining whether a facility is a "major source" subject to Clean Air Act control programs. EPA's weakening rule change effectively will exempt mines and factory farms from important Clean Air Act regulations. See generally the proposed EPA rule published on November 13th, 2007 at 72 Fed. Reg. 63,850.

Finally, there are controversial, damaging and unlawful Clean Air Act rules that EPA has issued in recent months, such as a rule in which the White House overruled EPA fewer than 24 hours before the rule's signature, prohibiting EPA from monitoring lead emissions from facilities that emit more than 1,000 pounds per year of lead. Instead, the White House allowed EPA only to monitor facilities emitting more than 2,000 pounds of lead per year, resulting in more than 200 lead polluters nationwide that now will go unmonitored. For example, residents of Cass County, Indiana, Charlevoix County, Michigan, Lawrence County, Pennsylvania, Cuyahoga County, Ohio, Oswego County, New York, Harris County, Texas and Dakota County, Minnesota won't have the benefit of lead monitors downwind of the cement plants, oil refineries or lead smelters in their communities, thanks to the irresponsible White House intervention. (To find out if a community has a facility that should have a lead air monitor (but won't), check out NRDC's map of lead polluters here: http://www.nrdc.org/health/effects/lead/lead_emitters_maps.asp.)

My testimony today, however, will focus on two new source review (NSR) rules under the Clean Air Act that the EPA plans to finalize in the coming weeks: one eviscerating air quality safeguards that apply to industrial air pollution near national parks and wilderness areas; and the second effectively eliminating NSR control obligations covering existing power plants – the

largest industrial source of criteria air pollution, toxic air pollution and global warming pollution in the United States.

I. EPA's Rule to Allow Significant Air Pollution Increases From Power Plants

The Clean Air Act requires an existing industrial facility such as a power plant to undergo new source review (NSR) – requiring pollution controls and air quality review and sometimes emissions offsets -- whenever it makes a "modification." This is defined in the statute as, *inter alia*, any physical or operational change that "*increases* the amount of any pollutant emitted." CAA § 111(a)(4) (emphasis added). EPA has always – quite logically and across Republican and Democratic administrations alike – defined a pollution "increase" as more pollution after a facility change than there was before, measuring that pollution in tons per year. For example, a change that causes pollution to increase by more than 40 tons per year requires the facility either to offset that pollution increase (with a pollution decrease elsewhere at the plant), or to install pollution controls such as Best Available Control Technology (BACT).

In a 2005 decision, the U.S. Court of Appeals for the D.C. Circuit held that "the CAA unambiguously defines 'increases' in terms of actual emissions." 413 F.3d 3, 39 (D.C. Cir. 2005). Specifically, after reviewing the various ways that the 1977 Congress chose to modify the terms "emit" and "emitted, the Court concluded that Congress was "conscious of the distinction between actual and potential emissions," and "use[d] the term 'emitted' to refer to actual emissions." *Id.*

In the 1977 amendments to the CAA, Congress further defined "major emitting facilit[ies]" as "stationary sources of air pollutants which emit, or have the potential to emit, one hundred *tons per year or more* of any air pollutant." 42 U.S.C. § 7479(1) (emphasis added). Thus, brand new sources of air pollution such as a new plant must obtain NSR permits and install

BACT if they will create more than 250 tons per year of pollution. For new power plants, Congress set that threshold even lower – 100 tons per year. And as noted above, existing plants that undertake changes causing more than 40 tons per year of pollution, for example, must also install pollution controls or offset those pollution increases with decreases.

In a proposed rulemaking in 2005, 70 Fed. Reg. 61,081 (October 20, 2005), followed by a supplemental rulemaking proposal in 2007 (72 Fed. Reg. 26,202 (May 8, 2007), EPA proposed to redefine emissions "increases" at power plants under the NSR program. EPA proposed to no longer define emissions increases for power plant modifications based upon actual emissions increases on an annual basis (measured in tons per year, following the statute). Instead, EPA's planned rule would define emissions increases based upon a facility's potential emissions (relating to its highest historic capacity levels), measured on an hourly basis.

In its proposal, EPA asserted that it has discretion "to propose a reasonable method" to decide how emissions increases are to be measured" 72 Fed. Reg. 26,219/2. And in an eyebrow-raising passage, EPA expressed "respectful[] disagree[ment]" with the D.C. Circuit's 2005 ruling that the Clean Air Act requires emissions increases to be measured based upon "actual, not potential" emissions. 70 Fed. Reg. at 61,091. The D.C. Circuit and Supreme Court subsequently rejected EPA and utility industry appeals of the D.C. Circuit's 2005 holding, yet EPA has not explained how its planned rule would be consistent with that binding court precedent.

The crux of EPA's weakening rule change is to render irrelevant *how many* hours a power plant operates each year after it undertakes construction activity that enables it to run longer and harder and thereby pollute more. A dirty, grandfathered power plant that undertakes a so-called "life extension" project in order to prolong its operating life and increase power generation may well experience marginal improvements in its hourly pollution rate. But if that

power plant runs longer and harder than it did before the life extension project, as history shows power plant operators invariably do, then the increased operating time will swamp any marginal emission improvements in hourly emissions rates; the *total* annual pollution levels from that power plant will be vastly higher after the construction project than before. In other words, the power plant and surrounding air quality will be dirtier, by hundreds, thousands or even tens of thousands of tons per year. This situation – with its higher (*i.e.*, "increased") air pollution levels – is precisely what Congress intended to be controlled through the NSR program, and precisely what the planned EPA rule change exempts from pollution control.

Thus, on the question of measuring emissions "increases" based on annual emissions (longstanding, current law) versus grossly weaker hourly emissions (EPA's planned rule change), it is important to appreciate the absurdity of EPA's position. EPA pretends that Congress meant to allow the agency to interpret "increases" in section 111(a)(4) to allow constructive activity at *existing* power plants to escape control when pollution increases exceed thousands or even tens of thousands of tons per year, while Congress applied BACT on *new* major sources of 250 and even 100 tons per year, 42 U.S.C. § 7479(1), (and even stricter controls and offsets on new major sources at even lower thresholds in nonattainment areas). In EPA's view, Congress was acutely concerned with controlling new power plants that produced over 100 tons of additional air pollution each year, but Congress was perfectly apathetic and even accepting in the face of existing, grandfathered, and *uncontrolled* power plants that would produce over *tens of thousands* of additional tons of air pollution each year that would escape control.

Revealingly, neither EPA's proposal nor supplemental proposal offers a rational explanation for this outcome flowing from EPA's strained legal interpretation. Nor does EPA

proffer any explanation or legislative history justification why Congress would make such an absurd choice -- allowing air quality to degrade in this fashion from existing power plants but not from new ones.

EPA Itself Projects its NSR Rule Will Increase Pollution in Many Parts of the Country

Materials accompanying EPA's supplemental proposal reveal EPA admissions that the rule would result in: entire counties in Tennessee, Pennsylvania and Ohio experiencing SO_2 emissions increases between 3,001 – 34,275 tons per year, with no adjacent or nearby counties experiencing emissions decreases that would offset those emissions increases. Humphreys County, Tennessee alone experiences a projected SO_2 emissions increase of 34,275 tons per year. Counties in eastern Michigan, Georgia, Indiana and Wisconsin each would experience SO_2 emissions increases between 3,000 – 6,801 tons per year, and counties in Illinois, Indiana, South Carolina, Georgia, Alabama, Pennsylvania, Ohio and New York each would experience SO_2 increases between 1,001 – 3,000 tons per year.

EPA admits further that the rule would result in widespread NO_x emissions increases that would not be allowed under current law: entire counties in Michigan, Utah, Arizona, New Mexico and Wisconsin would experience NO_x emissions increases between 1,000 – 3,172 tons per year. Counties in Washington, California, Arizona, New Mexico, Utah, Colorado, Wyoming, Montana, Minnesota, Wisconsin, Michigan, Illinois, Florida, South Carolina, North Carolina, Alabama, Pennsylvania and New York, among many others, would experience county-wide NO_x emissions increases between 40 – 1,000 tons per year.

Examining several case studies in which the proposed rule was applied to actual emissions data and identified plants, EPA's Office of Enforcement of Compliance Assurance (OECA) concluded that the proposed rule would allow increased SO_2 emissions exceeding

13,000 tons per year from a *single* analyzed plant to escape control, when those increases would require control under current law. In other plant-specific case studies, OECA projected emissions increases under the rule of 939 tpy of SO_2 and 1,405 tpy of NO_x in one example, and 1,700 tpy of SO_2 and 507 tpy of NO_x in another. In one example, the annual SO_2 emissions increase that the rule would allow to escapes control is over 327 times the *de minimis* threshold for SO_2 under current law. The OECA pollution analysis of the proposed rule is available here: http://www.nrdc.org/media/docs/051013a.pdf.

Finally, EPA has admitted further that the NSR rule could allow power plants to increase their CO_2 emissions by up to *74 million tons per year*, in a July 24, 2008 letter from Robert J. Meyers, Principal Deputy Assistant Administrator for EPA's Office of Air & Radiation to Congressman Waxman. 74 million tons of CO_2 is roughly equivalent to the total annual CO_2 emissions of about 14 average coal-fired power plants, or the annual emissions from *50 million vehicles*. Adding 74 million tons of CO_2 emissions to the atmosphere *each year* would nearly double the amount of greenhouse gas emissions that EPA's Energy Star program helped prevent in 2007.

These are EPA's own figures. And it is absolutely crucial to recognize that all of these analyses were conducted *prior* to the D.C. Circuit's vacatur of EPA's Clean Air Interstate Rule (CAIR) and Clean Air Mercury Rule (CAMR). (See below.) Following those vacaturs, without those rules to suppress some of the emissions increases, the NSR rule would result in significantly higher emissions increases of SO_2, NO_x, $PM_{2.5}$ and global warming pollution than even the projections above from individual power plants and entire states.

With CAIR and CAMR Vacated, the Emperor's Rule Has No Clothes

On July 11th, 2008, the U.S. Court of Appeals for the D.C. Circuit vacated EPA's Clean Air Interstate Rule (CAIR) in its entirety. See *State of North Carolina v. EPA*, No. 05-1244 (D.C. Cir.), 2008 U.S. App. Lexis 14733 (July 11th, 2008). In addition, on February 8, 2008, the D.C. Circuit vacated EPA's Clean Air Mercury Rule (CAMR) in its entirety. *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). Finally, although the D.C. Circuit upheld EPA's Clean Air Visibility Rule in *Utility Air Regulatory Group v. EPA*, 471 F.3d 1333, 1339 (D.C. Cir. 2006), the court did so primarily based upon EPA's reliance on CAIR to satisfy the Clean Air Act's requirements for "Best Available Retrofit Technology" (BART). See generally 471 F.3d at 1337-1341.

EPA relied upon the presence and application of CAIR, CAMR and CAVR as its primary and fundamental rationale for declaring that the instant NSR rule change would not have a harmful impact on local air quality or county-level power plant emissions:

> Nonetheless, we want to comprehensively examine the outcomes of a maximum hourly emissions increase test, using a robust methodology based on conservative (that is, protective of the environment) estimates. We therefore developed two IPM scenarios, which we call the CAIR/CAMR/CAVR NSR Availability Scenarios, or, more simply, the NSR Availability Scenarios, to examine how changes to major NSR applicability under the proposed regulations could, by allowing sources to make repairs or improvements that increase hours of operation, affect emissions and control technology installation.

72 Fed. Reg. at 26,208/3.

> States' implementation of the Acid Rain, CAIR, and [Best Available Retrofit Technology (BART)] programs will generate significant reductions in pollution and thereby decrease the likelihood that an unreviewed source could cause an increment violation. We conducted modeling to estimate the impact of the CAIR program on nationwide emissions trends and ambient concentrations. The modeling shows that emissions are predicted to decline in all parts of the country. With nationwide emissions declining, there is a decreased likelihood that unpermitted emissions increases could violate a PSD increment by returning a given geographical area to levels above that area's historical actual levels.

70 Fed. Reg. at 61,094. See also 72 Fed. Reg. 26,208/2 (repeating the same argument).

EPA failed to evaluate SO_2 and NO_x control device installations, national emissions, regional, county-level and local emissions, and impacts on air quality for power plants *without* assuming implementation of CAIR, CAMR and CAVR. *Id.* at 26,208-26,213. Moreover, basic EPA assumptions about local and national emissions behavior from the power sector no longer hold true following the vacatur of CAIR, to the extent there was even any truth in those assumptions before the court decision.

I have previously critiqued EPA's fundamentally flawed reasoning pretending that CAIR could supplant the statutory NSR program. But EPA's rationale has a special poignancy and indefensible ring following the judicial vacaturs of CAIR and CAMR: EPA's "modeling to estimate the impact of the CAIR program on nationwide emissions trends and ambient concentrations" now no longer holds any relevance or support for adoption of the instant NSR rulemaking, even as it yielded no support for this rule prior to vacatur of CAIR. And the Acid Rain program has already achieved its second phase SO_2 emissions targets, meaning that program will not produce "declining" nationwide emissions of SO_2, nor does it even require reductions in the other NSR-regulated air pollutants to which EPA's deregulatory rulemaking would apply. Finally, the BART program does not cover all of the EGUs to which this deregulatory rulemaking would apply, the BART program does not have the geographic sweep of this rulemaking, and the BART program does not cover all of the NSR-regulated pollutants to which EPA's rulemaking would apply.

In light of the vacaturs of CAMR and CAIR, and the failure of CAIR to satisfy the obligation for BART in CAVR, EPA no longer has any basis for relying upon CAIR, CAMR or CAVR to provide any rationale sounding in law, policy, air quality, public health, environmental

protection or emissions control that would justify adopting the instant NSR rulemaking. Following these fundamentally changed circumstances since EPA first proposed the NSR rulemaking in 2005 and later published its supplemental notice of proposed rulemaking in 2007, EPA was called upon by NRDC, Senators Boxer and Carper, and Congressman Waxman either to abandon the instant NSR rulemaking or to convene a new round of notice and comment rulemaking. The latter would offer the public, state and local air quality regulators and regulated industry the chance to comment on the changed circumstances following the vacatur of CAIR and CAMR, and any additional modeling that EPA should perform to assess the air quality impact of its rulemaking. To date, EPA has refused to grant or even so much as respond to these requests. Instead, all indications are that EPA will finalize the NSR rule before this administration leaves office.

Even CAIR Would Not Have Cleaned Up the Electric Power Sector to Justify This Rule

In a spreadsheet that EPA submitted to members of the Senate Environment and Public Works Committee in 2005, EPA identified the specific electric generating units (EGUs) in the 28-state plus District of Columbia CAIR region that would still lack scrubbers (for SO_2) or SCR (for NO_x) or both under a CAIR-CAMR-CAVR scenario in 2010, 2015, and 2020. The results of EPA's own projections are truly astonishing:

Year	No SCR or Scrubber ≤25MW	No SCR or Scrubber ≥25 MW	SCR Only (No Scrubber)	Scrubber Only (No SCR)	SCR & Scrubber	Total EGUs
2010	97	475	106	110	187	975
2015	152	350	92	107	294	995
2020	154	373	59	127	328	1041

In 2010, under EPA's CAIR-CAMR-CAVR national trading programs, a remarkable 81% of 975 total EGUs still would lack scrubbers or SCR or both. In 2015, 70% of 995 total

EGUs still would lack scrubbers or SCR or both. And nearly fifteen years from now, in 2020, an astonishing 68% of 1041 total EGUs still would lack scrubbers or SCR or both. EPA does not project beyond 2020, but considering that the phase II CAIR deadline was 2015 and the phase II CAMR deadline was 2018, it is safe to predict that the 2020 figures for control device installation would not change significantly or even materially. EPA does not refute any of this information in its proposals or the accompanying administrative record.

Accordingly, even EPA's original CAIR-CAMR-CAVR programs – prior to the sweeping vacaturs by the D.C. Circuit Court of Appeals – would have left well over half of the nation's EGUs lacking what are *today* considered available controls for SO_2 or NO_x or both for an indefinite period. And of course technology will continue to advance over those periods, meaning even scrubbers and SCR will become outdated technologies. It is this state of affairs that EPA deemed sufficient to control EGUs "nationwide" in a manner justifying the essential elimination of the NSR program for existing EGUs, when it issued its supplemental proposal in 2007. But as discussed above, even those insupportable assertions are demonstrably erroneous following the vacaturs of CAMR and CAIR.

The Bush Administration EPA Knows This Rule Change is so Harmful and Irresponsible, It Already Refused to Adopt it Once Before

One of the paradoxes and perverse ironies of this NSR rulemaking is that the Bush administration itself opposed the very same approach in 2002 when the utility industry was clamoring for it, because EPA had concluded the approach would harm air quality and public health. That earlier approach allowed emissions increases to be calculated based on "the unit's pre-change and post-change *potential* emissions, measured in terms of *hourly* emissions." 67 Fed. Reg. 80,186, 80,205 (Dec. 31, 2002) (emphasis added).

Here is what the EPA said about this rejected approach in 2002:

- "[W]e also expressed concern about the environmental consequences associated with the Exhibit B provisions. For one, you could modernize your aging facilities (restoring lost efficiency and reliability while lowering operating costs) without undergoing preconstruction review, while increasing annual pollution levels as long as hourly potential emissions did not change." 67 Fed. Reg. at 80,205/2.

- "We agree that a potential-to-potential test for major NSR applicability could lead to unreviewed increases in emissions that would be detrimental to air quality and could make it difficult to implement the statutory requirements for state-of-the-art controls." *Id.* at 80,205/3.

Like the instant rulemaking, that earlier *EPA-rejected* approach to defining emissions "increases" would have permitted sources to increase actual annual emissions without NSR review and pollution controls as long as they did not increase their achievable hourly emission rates. *Id.* Thus, large annual emissions increases would have gone unreviewed and uncontrolled based upon sources increasing emissions up to their historic highest capacity levels based on hourly emissions rates. As it was this very feature that caused the Bush administration to reject this earlier approach in 2002 due to its air quality hazards, it is deeply cynical for EPA to adopt the same approach today and disingenuous for the administration to misrepresent and dismiss the rule's harmful impacts.

EPA's Enforcement Office Has Blasted and Formally Objected to the Planned Rule

In a highly critical August 25, 2005 memorandum commenting on a draft of EPA's proposed rule, the Air Enforcement Division (AED) of the Office of Enforcement and Compliance Assurance (OECA) attacked many key premises that EPA nevertheless went on to rely upon in its proposed rulemaking. OECA made the following points, among others:

- Under the proposed "achievable" test, no change causing an emissions increase, capacity or otherwise, at an EGU would trigger NSR.

- Under the "achieved" test, in only the rarest of operational circumstances would a change causing an emissions increase, capacity or otherwise, trigger NSR.

- Neither test measures "actual" emissions.
- Neither test would provide nationwide consistency in emissions calculations.
- EPA cannot rely on CAIR and BART alone to obtain emissions reductions from EGUs.
- The rule does not address how CAIR and BART will protect local air quality.
- The rule is inconsistent with Congressional intent.
- The rule is inconsistent with case law.

The OECA memorandum is available here: http://www.nrdc.org/media/docs/051013.pdf.

In short, OECA's critique convincingly shows that the planned rule serves no beneficial purpose at all, let alone the intended purposes of the Clean Air Act, which it blatantly flouts. EPA addressed very few, if any, of the "significant concerns" raised in OECA's comments – either in the original proposal or the supplemental proposal.

Although OECA has long expressed serious concerns about the "adverse[] impact" the proposed rule would have on its pending NSR enforcement cases against power plant defendants, OECA Mem. at 1, these concerns fell on deaf ears. OECA repeatedly emphasized the importance of including language in the rule to "expressly and plainly state" that it would only be applied to prospective conduct. *Id.* at 14; *see id.* at 11. OECA also pointed out that the rule did not address recordkeeping or reporting requirements, absent which the rule would be "effectively unenforceable." *Id.* at 10. Despite these recommendations, EPA did not include language in the proposed rules that would limit the rule to prospective conduct or require recordkeeping and reporting specific to the new emissions test.

OECA also critiques the agency's contention that Congress was concerned about regulating capacity, as opposed to emissions, as "fatal" to the enforcement cases. Indeed, the notion that "we have not expanded capacity, and consequently NSR was not triggered" is

industry's "favorite defense." *Id.* at 13. Unconcerned, EPA's proposal repeated these erroneous contentions.

In sum, OECA expressed the view that "a better approach [than the proposed tests] would be not to tinker with the NSR test at all." *Id.* at 5 (emphasis added). Such a strong statement from OECA should have triggered major revisions and reconsideration of the proposed tests. Instead, the agency barreled ahead, ignoring the concerns of its enforcement staff and finalizing a proposed rule that is for all material purposes identical to the one so severely critiqued within the agency. It is this rule that EPA plans to adopt before the current administration leaves office.

Finally, there are reports that OECA and several EPA Regional offices have formally objected to EPA's adoption of the NSR power plant rule in recent weeks, registering what are known as "nonconcurrences" at the highest levels within the relevant offices. In my experience, such nonconcurrences are exceedingly rare and mark a profound professional disagreement with an EPA rule. If the current administration does proceed with this rulemaking, it will be over the objections of the professional and political officials responsible for enforcing the Clean Air Act's protections on behalf of all Americans.

Power Plant Capacity Factors, Emissions Headroom and the NSR Rule

NRDC and the Clean Air Task Force retained the respected firm MSB Energy Associates to examine the current usage levels of coal-fired power plants and emissions headroom related to this capacity, in the context of the aforementioned NSR rulemaking. Specifically, MSB Energy Associates examined the proposition underlying and fundamental to the NSR rulemaking -- that existing plants are currently operating at or very close to full utilization, and therefore that there is little or no potential for increased emissions as a result of the EPA rule change.

The MSB analysis demonstrates that the NSR rulemaking would allow massive and widespread uncontrolled increases in SO_2 and NO_x emissions increases from the

vast majority of coal-fired power plants in the country. This result occurs because the rule permits physical and operational changes to operate at up to – and even beyond -- an 85% capacity factor level, to increase total annual emissions significantly and escape NSR review, and therefore to escape the requirement to control those increased emissions.

The MSB analysis, moreover, is conservative, yielding projected emissions increases under the NSR rulemaking that are lower than actually may be experienced through the rule's implementation. That is because the various options under EPA's NSR rulemaking allow power plants to increase their capacity factors *above* the 85% level examined by MSB, since the rule allows physical and operational changes that enable or facilitate capacity increases up to a plant's *maximum* physical and operational capacity.

Specifically, the MSB Energy Associates analysis finds:

- The 439 coal-fired power plants analyzed, including utility and non-utility plants, had an overall capacity factor of 74% in 2007. Individual capacity factors for plants in the group ranged from highs close to 100% down to lows in the 5-6% range. About 6% of the coal-fired capacity had capacity factors greater than or equal to 90%, while about 15% of the capacity had capacity factors greater than or equal to 85%. Put differently, approximately 85% of the plants analyzed currently have capacity factors less than 85% -- they have headroom to increase capacity and therefore emissions under the PSD/NSR rule.

- If one assumes that all of the existing coal-fired power plants will make changes in order to achieve the capacity factor of at least 85% under the revised rule, this would lead to an increase in coal-fired generation of 16% (over 2007 levels) from these plants. This increased level of generation would result in an additional 18% of SO_2 and NO_x and 15% of CO_2 emitted by these plants.[1] These emission increases total 1.6 million tons of SO_2, 0.5 million tons of NO_x, and 319 million tons of CO_2.

- Of the 439 plants analyzed, identified in a spreadsheet accompanying the MSB Energy Associates memorandum, 308 have the headroom to be able increase SO_2 emissions by more than 100 tons per year, and 322 have the headroom to be able to increase NO_x

[1] As the MSB Energy Associates memorandum notes, these increases are actually understated. A number of power plants – especially non-utility plants – do not report SO2 and CO2 emissions to the EPA, so the MSB analyst was unable to develop actual emission rates to use to convert the additional generation to emissions. He estimated that, substituting the overall average emission rates for actual emissions rates for the plants for which we do not have actual emission rate data, the potential SO2 increase would be 19% rather than 18%, and the potential CO2 increase would be 16% rather than 15%.

> emissions by more than 100 tons per year. 100 tons per year, of course, is the *major source* threshold for power plants. 42 U.S.C. § 7479(1). Also, 335 plants out of the 439 have potential SO_2 increases, NO_x increases, or both of more than 100 tons per year.

Regarding SO_2, it is true of course, as the MSB memorandum notes, that the Clean Air Act limits the total amount of SO_2 that can be emitted from power plants under Title IV; so there could not actually be an overall increase of 1.6 million tons from the utility sector. And there is a regional cap on summertime NO_x emissions in the eastern U.S. under the NO_x SIP Call – which does not, however, cap overall or annual NO_x emissions from the utility sector. In both cases, however, these programs do not do not strictly limit emissions from any particular plant, so the potential for localized SO_2 and NO_x emissions increases under the instant rule would be significant and alarming for purposes of local and regional air quality, public health, the environment, national parks and visibility – all the province of the NSR program.

The MSB analysis shows that under the planned NSR rule, 335 power plants out of the 439 examined – or over 76% -- could increase emissions of SO_2 or NO_x or both by 100 tons per year, or more, while completely escaping any requirement to add pollution controls. Such an outcome is especially indefensible and unlawful, as an emissions increase of 100 tons per year is the *major source* threshold for *new* power plants, and this rule is addressing *modifications* at existing power plants under CAA section 111(a)(4). EPA's proposed tests would allow changes that cause enormous annual emission increases to evade review, well in excess of 100 tons per year. In embracing this approach, EPA disregards Congress' clear intent for NSR to guard against such actual, annual pollution increases.

II. EPA's Rule to Weaken Air Quality Protections for National Parks

A central tenet of the Clean Air Act's Prevention of Significant Deterioration (PSD) program is:

> . . . to *preserve, protect, and enhance the air quality* in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historical value.

42 U.S.C. 7470(2) (emphasis added).

National parks and wilderness areas exceeding a certain size threshold that existed on the date of enactment of the 1977 Clean Air Act Amendments (August 7, 1977) were designated by Congress as mandatory "Class I areas," a designation that EPA may not change by rule. 42 U.S.C. § 7472. Such national parks and wilderness areas are to receive the greatest protections afforded by the Act's PSD program against the degradation of air quality in these treasured national areas. There are currently 158 Class I areas across the United States, including 48 National Parks, 21 Fish & Wildlife refuges, and 88 Forest Service wilderness areas.

As concisely described in an attached fact sheet by the National Parks and Conservation Association:

> Under PSD, Congress established limits (known as increments) on additional amounts of pollution in class I areas over baseline conditions that existed in 1977 when PSD was enacted. Increments are in place for emissions of sulfur dioxide, particulate matter, and nitrogen oxides. Because Congress sought to protect air quality not just from long-term pollution increases, but also from fluctuations and "spikes" that occur at certain times of year (e.g., peak summer energy demand), it created both annual and short-term (3 and 24 hours) increments for these pollutants.

In June 2007, EPA proposed a rulemaking to substantially weaken the PSD increment modeling procedures used to determine both short-term and annual impacts on air quality from plants locating or expanding near national parks and wilderness areas. 72 Fed. Reg. 31,372-99 (June 6, 2007) (Docket ID No. EPA-HQ-OAR-2006-0888). EPA reopened the comment period on this proposed rulemaking in August 2007. 72 Fed. Reg. 49,678 (August 29, 2007).

Fundamentally, EPA's planned rule change allows greater levels of harmful smog, soot, toxic and global warming pollution in and near national parks and wilderness areas. The rule change does so by weakening current, stronger rules designed to protect air quality and visibility in these special places, with the planned rule resorting to annual averaging gimmicks in order to hide and thereby ignore air pollution spikes that occur on an hourly, daily or weekly basis.

As detailed in comments to EPA submitted by NRDC, NPCA and other environmental groups in 2007, the EPA proposal suffered from numerous, serious defects:

> **(1) The planned rule masks short term peak pollution levels**
> Pollution levels in class I areas can vary significantly over the course of a day, week, month and year. For instance higher pollution can occur during the daytime when more commercial activities take place, and during summer months, when power plants increase operations to meet air conditioning energy demand. Congress created short-term pollution increments to protect class I areas from these periods of higher emissions.
>
> EPA's proposed rule would undermine short-term increments by turning them into annual average pollution limits. A facility looking to locate near a class I area could average the hourly and daily emissions of all pollution sources over the course of a year, thus hiding pollution spikes that can cause real harm in class I areas or even exceed the short-term increment limits. Having created a false picture of actual pollution levels in the class I area, the new facility could then claim the right to emit far more pollution than otherwise would be allowed.
>
> **(2) The planned rule ignores major pollution sources in class I areas**
> Under current modeling rules, a pollution source that has received a variance to exceed a class I increment will nonetheless still have its emissions counted when new sources are seeking to add pollution in the class I area. This makes sense because a variance source, by definition, is known to be a major contributor of pollution in the class I area.
>
> Under EPA's proposed rule, the emissions from any pollution source operating under a variance would not be included in a class I increment analysis. When calculating pollution levels in a class I area, a new facility could simply pretend that those sources don't exist. By ignoring these emissions, a new facility can claim there is more "room" for new pollution, thus degrading class I air quality to an even greater extent.
>
> **(3) The planned rule allows manipulation of pollution accounting methods.**
> Under current rules, both baseline emissions and current emissions from existing facilities that impact a class I area are established by looking at the most recent two years of operating data prior to the applicable baseline date or current date. The proposed rule allows actual emissions to be computed based on any time period that is

> claimed to be "more representative" of normal source operations. The alternative time period could even be two non-consecutive 12-month periods picked from anytime in the past. This opens the door to manipulation of pollution accounting by new facilities that have a vested interest in producing the lowest possible pollution estimates for class I areas they are seeking to locate near.
>
> **(4) The planned rule opens the door to 50 different standards.**
> Air pollution does not respect state boundaries, and class I areas may be polluted by sources in many different states. It is therefore important that the methods for estimating class I pollution levels are the most accurate and are consistent from state to state.
>
> EPA's proposal opens the door to 50 different standards for estimating class I pollution levels: Emissions "...shall be calculated based on information that, ***in the judgment of the reviewing authority***, provides the most reliable, consistent and representative indication of the emissions from a unit or group of units in an increment consumption analysis...." Some states are likely to use methods that make the air in class I areas appear cleaner than it actually is, but EPA's rule provides no check against such practices.

July 19, 2007 Comments from Chesapeake Bay Foundation *et al.* to EPA, Document ID: EPA-HQ-OAR-2006-0888-0066.1.

By eliminating concern and tools for short-term emissions spikes in favor of annualized, averaged pollution levels, the planned EPA rule change is fundamentally dishonest, cynical and harmful to air quality. As rightly pointed out by my colleague Mark Wenzler, Director of Clean Air and Climate Programs with the National Parks and Conservation Association, "pollution levels do vary greatly, with emissions generally peaking during the daytime in the summer, when most of our families are visiting the parks. It's no comfort to the parents of a child suffering an asthma attack on a hike in July that the dirty air they're breathing is supposedly mitigated by somewhat cleaner air in the middle of January."

The National Park Service has strongly criticized EPA's planned rule change. I am attaching to my testimony a highly critical December 2nd, 2008 email from Don Shepherd with the Air Resources Division of the National Park Service (NPS), along with his supporting spreadsheet analysis. Mr. Shepherd writes that he wished to test the proposition asserted by

EPA's political management – and vigorously disputed by EPA professional staff, as discussed below – that the upcoming parks rule would not worsen air quality in or near national parks and wilderness areas. To do so, Mr. Shepherd turned to EPA's own Clean Air Markets database to analyze SO_2 emissions data from eleven power plants in one test state, North Dakota.

Here is how Mr. Shepherd describes his inquiry and methodology:

> "So what?" is usually a good question when considering engaging over some policy question, so i (sic) decided to satisfy my curiosity and take a look at how EPA's proposal to estimate emissions for the purpose of evaluating [Prevention of Significant Deterioration] increment consumption might play out in the real world. (Or, in ND, as the case may be.) EPA has tried to justify its proposed approach on the basis that, since it is unlikely that all [Electric Generating Units (EGUs)] will operate at their maximum actual emission rates simultaneously, it would be more realistic to assume that they all operate continuously at their annual average emission rates. If that is true, then the sum of their annual averages should always exceed the sum of their actual emissions over the 3-hour and 24-hour averaging periods relevant to [National Ambient Air Quality Standards] and PSD for SO_2. Let's find out if EPA is correct.

December 2, 2008 email from Don Shepherd, NPS, to John Bunyak *et al.*, NPS. Mr. Shepherd's conclusions, backed by the spreadsheets accompanying his email, are a searing indictment of the EPA rule. His results directly contradict EPA's purely political and rhetorical claims that the rule will not allow or result in dirtier air. Comparing EPA's planned dirtier approach to the approaches mandated by current agency rules, which protect against air pollution spikes over short term (3-hour and 24-hour) periods, he finds that the planned approach would:

- "underestimate[] total actual 3-hour (block average) SO_2 emissions from these eleven EGUs 761 times (26% of the possible results) in 2006, with the worst case underestimating 3-hour SO_2 by 25%";
- "underestimate[] total actual 24-hour (block average) SO_2 emissions from these eleven EGUs 89 times (24% of the possible results) in 2006, with the worst case underestimating 24-hour SO_2 by 14%";
- "underestimate[] total actual 30-day (rolling average) SO_2 emissions from these eleven EGUs 52 times (15% of the possible results) in 2006, with the worst case underestimating 30-day SO_2 by 7%."

Mr. Shepherd rightly concludes: "[t]he approach proposed by EPA clearly fails this test and frequently and significantly underestimates actual emissions from this group of EGUs. This leads me to wonder if anyone at EPA actually bothered to do a 'reality check' on its proposal?"

The inescapable and tragic truth is that no evidence or analysis in EPA's proposed rulemaking or administrative record contradicts the National Park Service analysis. Indeed, we now know that internal EPA analysis and conclusions by professional staff in EPA's Regional offices echo and amplify upon these same conclusions.

For example, an internal analysis prepared by EPA's regional office in Kansas City, Kansas, examined a candidate power plant in Kansas. (Attached.) The analysis reveals that the dirtier approach that EPA plans to finalize would allow SO_2 emissions during 2,857 operating hours at this plant, covering a period of 121 days out of the year, to be higher than under the more protective approach codified in current law. The analysis states: "[t]his would mean that 2857 hours/121 days with higher hourly emissions than the annual mean would not be evaluated under current proposal and would be compared against a standard which allows only one exceedance per year." The Regional officials conclude that under the approach reflected in the upcoming rule, violations of the limits ("increments") that Congress imposed on additional air pollution allowed in national parks "would be underestimated by *1.5 – 13 times.*"

Accordingly, the Regional analysis reached the following damning conclusions about the approach planned for adoption by political officials in EPA headquarters, the Office of Air Quality Planning and Standards:

- "OAQPS made erroneous assumption that a more representative picture of actual conditions can be found by promoting annualizing emission rates. Little source interaction is observed in many cases based upon over 20 years of reviewing PSD modeling."
- "When little source interaction is observed, increment consumption is literally a function of individual source release characteristics and emission rates."

- "Annualized emission rates will relieve increment violations derived from maximum actual emission rates, contrary to OAQPS stated opinion that proposed rulemaking will still remain protective of increments."

The National Parks and Conservation Association fact sheet discussed earlier contains a series of astonishing statements – remarkable for their sheer number, bluntness and principled objection – from the National Park Service (NPS) and EPA regional officials, blasting EPA's planned rule change and the adverse air quality impacts from coal-fired power plants. I excerpt only some of the more revealing criticisms here:

- "The [Clean Air] Act does not … allow for *shopping about for emissions data* from multiple time periods that may be far-removed from the baseline date." NPS;
- "By allowing a different period to be chosen for each unit to represent actual emissions as of the baseline date, EPA is *adding to the complexity and the potential gaming* of an already complex task … [because] it makes PSD baseline concentration(s) up for interpretation by every applicant." NPS;
- The new EPA approach "represents a *180-degree about-face from" recent EPA guidance*. NPS;
- "[U]se of annual average emissions would *not detect the peak impacts of a facility* that previously operated a few hours each day for the entire year and then increases … operation[s]" NPS;
- The proposed EPA methodology "provides the lowest possible degree of protection of short-term increments and it is usually the 24-hour increment that is the most critical" for protecting air quality. NPS;
- The proposed rule "ignores the reality that some sources, such as EGUs, often have peak production in response to external factors and may well peak concurrently." NPS;
- "[T]he current draft may actually muddle matters more…." EPA Region 1;
- "[T]he draft appears to allow the use of annual emission rates to assess short-term increment consumption. This will fail when, for example, a source is permitted to operate seasonally or is permitted to operate 8760 hours per but typically operates a much lower number of hours." EPA Region 1;
- "[The final rule] could significantly underestimate the emission and therefore underestimate the actual impacts." EPA Region 2;
- "[W]e do not agree that using annual average emissions for short term impacts is an improvement over the method that is in the [existing] guidance … [which] has been successfully implemented for many years." EPA Region 2;

- "We believe that the proposed approach … for defining the baseline or current year concentrations is inappropriate and could lead to "gaming" the increment calculation. …. [T]he rule would allow the source to arbitrarily pick and choose which years to model. It could allow sources to pick a year solely because it is most beneficial to the outcome of the modeling. We believe this is not consistent with the intent of Congress." EPA Region 2;

- "[A]llowing the use of proprietary models without requiring that the workings of the model be disclosed for both the reviewing agency and the public could erode the credibility of the Agency's permitting actions." EPA Region 3;

- "The proposed addition to the definition of Actual Emissions … is grossly inadequate" and "opens the door to totally frivolous documentation" of a source's emissions. EPA Region 3;

- "The exclusion [from the baseline of certain sources that have received variances] gives a permanent 'pass' to sources that happen to obtain a variance regardless of subsequent events [or that are] granted based upon error or mischief." EPA Region 3;

- "[T]here remain a number of revisions to the increment calculating procedures that would reduce consistency, accuracy and public review as provided in EPA's current guidance and regulations and could allow greater deterioration of air quality in clean areas rather than preventing significant deterioration." EPA Region 4;

- "[I]n the case where hotspots are due to single sources, the use of average short-term rates will likely underestimate expected actual short-term concentration increases." EPA Region 5;

- "Using annual emissions smoothes out the actual emission peaks and valleys and could result in the modeling significantly underestimating the actual maximum short-term impacts for many source categories. That means that compliance with the short-term PSD increments cannot be assured." EPA Region 5;

- "Our main concern continues to be that this action allows short-term emission rates to be estimated from annualized average emission rates. This estimation will result in a significant underprediction of the actual impact and lead to worsening air quality." EPA Region 6;

- "To change the guidance would undermine many of the permits issued in our Region. From our experience, the use of annual averaged emissions is often significantly different for many industrial emissions, including coal burning power plants and the resultant impacts of annual averaged values would not be protective of short-term increments. It has also been our experience that short-term increment issues have driven the level of controls for some facilities and resulted in overall less emissions from a project. This affect would be weakened by the use of an annual average emission rate." EPA Region 6;

- EPA is arguing that it can use annual emissions as an accurate measure of increment consumption. But "the argument …lacks foundation" and "will likely mask the peak short term concentrations of pollutants." EPA Region 7;

- "Dating back only to 2005, the EPA stated that use of annualized emission rates likely underestimates short-term impacts. In the Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations, EPA opined that the use of an annualized emission rate potentially underestimate visibility impacts." EPA Region 7;

- "Since the inception of this rule, Region 7 has expressed its concern that codification of any procedures which allow for the use of long-term emission rates when modeling against short-term increments would not be reflective of the goal of the PSD program – to minimize the degradation of air quality and preserve the existing air quality in areas of the country that currently enjoy clean air." EPA Region 7;

- "Allowing the use of the annual emissions rate rather than a source's maximum emissions rate could seriously underestimate the change in concentration for the 24-hour or 3-hour time periods." EPA Region 9;

- The proposed rule's preamble states that a PSD permit applicant is not required to release "proprietary data and/or software that may be used in the development of model inputs." "We believe that the public should be entitled to review all of the data used to analyze increment consumption, and should also be able to understand how the model is treating data." EPA Region 9;

- "[T]his proposal … would jeopardize protection of PSD increments and limit the public's ability to be involved contrary to the provisions of CAA Section 160." EPA Region 9;

- "The proposed revisions to the regulatory definitions and procedures for calculating increment consumption would likely result in significant underestimation of emissions, and cause greater deterioration of air quality." EPA Region 9;

- EPA Region 10 notes dozens of inaccuracies in how the proposal describes the legal requirements of the PSD program, describing the document as "full of errors." EPA Region 10;

- "Because of this fundamental misunderstanding of the permit process and the lack of understanding of how variances work, this rulemaking misses the mark on the appropriate solution to the issue of increment consumption for sources with variances." EPA Region 10;

- There needs to be a "hierarchy" of methods for estimating emissions. Without one, the "lowest common denominator" will prevail. EPA Region 10;

- "[T]here are still several 'fatal flaws' with this rulemaking. These flaws are ones that we raised previously and which, in our opinion, have not been adequately addressed. The result of these flaws is that the revised rule would substantially weaken EPA's current regulations and would effectively allow for nearly unfettered deterioration of air quality in clean areas rather than preventing significant deterioration of air quality as required by Part C of Title I of the Act." EPA Region 10; and

- "[A]llowing the permit applicant to manipulate the emissions inventories in this manner completely undermines the entire increment program. . . . . [U]sing allowable

> emissions to establish the baseline concentration for PSD increment consumption analyses is NOT conservative as this will overestimate the baseline emissions and hence underestimate the amount of increment consumption." EPA Region 10.

Notably, copies of these internal EPA comments reveal that multiple EPA regional offices formally objected to the planned adoption of the weaker parks rule, through the EPA "nonconcurrence" process. (Remarkably, despite the very rare practice of nonconcurrences at EPA, both the NSR power plant rule and national parks rule prompted nonconcurrences *en masse* by EPA political and professional officials protesting these irresponsible, harmful rules.) We also know that the EPA parks rule is currently under review at the White House Office of Management and Budget, meaning that the regional nonconcurrences have been disregarded. The dirty parks rule – like the destructive NSR power plants rule -- is planned for adoption by the Bush administration as parting midnight deregulations for power plants and other major industrial polluters.

JOHN D. WALKE

John D. Walke is a senior attorney and Director of Clean Air Programs with the Natural Resources Defense Council, where he has general responsibility for Clean Air Act implementation. His work focuses on the Act's new source review (NSR) preconstruction review programs and a variety of State Implementation Plan measures under Title I of the Act; air toxics programs under Title III of the Act; Title IV's acid rain program; and the Title V operating permits program. Prior to joining NRDC in 2000, John worked for the United States Environmental Protection Agency, in the air and radiation law office of the Office of General Counsel, from 1997-2000. At EPA, John was the primary attorney responsible for the operating permits program under Title V of the Clean Air Act. He also worked extensively on issues relating to NSR programs, air toxics, monitoring, and enforcement under the Clean Air Act. Before working at EPA, John was an associate in the Washington, D.C. office of Beveridge & Diamond, P.C. from 1993-1997, where his practice concentrated on the Clean Air Act, the Clean Water Act, and the representation of individuals and corporations in criminal and administrative proceedings. John has a bachelor's degree in English from Duke University and a law degree from Harvard Law School.

House Select Committee on Energy Independence and Global Warming

Witness Disclosure Form

Clause 2(g) of rule XI of the Rules of the House of Representatives requires non-governmental witnesses to disclose to the Committee the following information. A non-governmental witness is any witness appearing on behalf of himself/herself or on behalf of an organization other than a federal agency, or a state, local or tribal government.

Your Name, Business Address, and Telephone Number:
John Walke
1200 New York Avenue NW, Suite 400
Washington, DC 20005
202-289-6868

1. Are you appearing on behalf of yourself or a non-governmental organization? Please list organization(s) you are representing.

Natural Resources Defense Council

2. Have you or any organization you are representing received any Federal grants or contracts (including any subgrants or subcontracts) since October 1, 2004?

✓ Yes No

3. If your response to question #2 is "Yes", please list the amount and source (by agency and program) of each grant or contract, and indicate whether the recipient of such grant or contract was you or the organization(s) you are representing.

US EPA CFDA 66.034: to NRDC
XA 83033101 $226,119
XA 83222601 $528,824
US EPA CFDA 66.606: to NRDC
X 82891301 $8,712
X 83066401 $44,949
X4 83116601 $11,472
US AID: To NRDC
OUT-LAG-I-00-98-00-00004-00 $35,188

Signature: John D. Walke Date: 12/10/08

Please attach a copy of this form, along with your curriculum vitae (resume) to your written testimony.

ENERGY ASSOCIATES

MEMORANDUM

TO: Conrad Schneider
FROM: David Schoengold
SUBJECT: Current Usage Level of Coal-Fired Power Plants and the Proposed New Source Review Rules
DATE: October 21, 2008

I have been analyzing the current level of usage of coal-fired power plants to test the proposition that these plants are fully utilized and that there is little or no potential for increased emissions from increased usage. My source of data for this analysis has been the Platts COALdat database. COALdat is updated monthly by Platts using forms and reports from the US EPA and the Energy Information Agency. I relied on COALdat for data on the power generated by coal-fired power plants and the SO2, NOx, and CO2 emissions from those plants. I focused on 2007, the most recent year for which there was a full year's data. It is important to use a full year's data because power plant usage varies with the season. Using a partial year like 2008 would have the potential for skewing the results of the analysis.

I was able to obtain generation data for 439 coal-fired power plants. This group of plants included both utility and non-utility plants. Taken as a group, these plants had an overall capacity factor of 74% in 2007. On an individual basis, capacity factors ranged from highs close to 100% down to lows in the 5-6% range. About 6% of the coal-fired capacity had capacity factors greater than or equal to 90%, while about 15% of the capacity had capacity factors greater than or equal to 85%.

I believe it is reasonable to expect that, under pressure for the production of more power, a coal-fired power plant should be able to perform at the 85% capacity factor level. For many of the older plants this might require significant refurbishments, but since that is the key issue in the New Source Review rules, it is appropriate to assume that such refurbishment will take place under the proposed rules.

If we assume that all of the existing coal-fired power plants achieve a capacity factor of at least 85%, this would lead to an increase in coal-fired generation of 16% (over 2007 levels) from these plants. This increased level of generation would result in an additional 18% of SO2 and NOx and 15% of CO2.[1] These emission increases total 1.6

[1] This increase is actually understated. A number of power plants – especially non-utility plants – do not report SO2 and CO2 emissions to the EPA, so I was unable to develop actual emission rates to use to

million tons of SO2, 0.5 million tons of NOx, and 319 million tons of CO2.

Of course, the Clean Air Act Amendments of 1990 limit the total amount of SO2 which can be emitted, so there could not actually be an increase of 1.6 million tons. However, the CAAA does not limit emissions from any particular plant, so the potential for localized emission increases could be great.

I have added a table beginning on the next page which shows the headroom by plant (both MWH and emissions) for each of the coal-fired power plants in the COALdat database. Of the plants in the table, 308 have the headroom to be able increase SO2 emissions by more than 100 tons per year, and 322 have the headroom to be able to increase NOx emissions by more than 100 tons per year. Also, 335 plants have potential SO2 increases, NOx increases, or both of more than 100 tons per year.

convert the additional generation to emissions. I have estimated that, using the overall average emission rates with the plants for which we do not have actual emission rates, the potential SO2 increase would be 19% rather than 18%, and the potential CO2 increase would be 16% rather than 15%.

Table 1. Plant Specific MWH and Emissions Headroom
Based on 2007 Operations

ORIS-ID	Plant	State	MWH	MW	CF	MWH Headroom	SO2 Headroom (Tons)	NOx Headroom (Tons)	CO2 Headroom (Tons)
3	Barry (ALAP)	AL	11,043,397	1,636	77%	1,138,259	3,642	1,150	925,450
8	Gorgas	AL	7,401,201	1,247	68%	1,883,961	17,436	3,005	1,839,716
10	Greene County (ALAP)	AL	3,630,070	497	83%	70,592	510	105	74,493
26	Gaston (ALAP)	AL	12,151,849	1,881	74%	1,854,077	20,348	3,013	1,858,554
47	Colbert	AL	7,536,293	1,197	72%	1,376,569	5,623	2,251	1,345,390
50	Widows Creek	AL	10,017,661	1,628	70%	2,104,427	6,408	3,462	2,207,281
51	Dolet Hills	LA	3,810,763	650	67%	1,029,137	2,887	1,343	1,134,438
56	Lowman (Tombigbee)	AL	3,563,206	556	73%	576,770	2,396	1,494	645,368
59	Platte	NE	609,970	100	70%	134,630	530	284	163,842
87	Escalante	NM	1,853,421	247	86%	0	0	0	0
108	Holcomb	KS	2,849,409	360	90%	0	0	0	0
113	Cholla	AZ	7,935,969	1,021	89%	0	0	0	0
126	Irvington	AZ	752,617	156	55%	408,959	1,043	765	382,812
127	Oklaunion	TX	4,200,859	690	70%	936,881	918	1,611	954,110
130	Cross	SC	12,314,529	1,800	78%	1,088,271	756	446	1,082,247
136	Seminole Generating Station	FL	8,860,755	1,330	76%	1,042,425	2,106	1,876	1,022,374
160	Apache	AZ	2,953,647	350	96%	0	0	0	0
165	Grand River Dam (GRDA)	OK	7,000,952	1,010	79%	519,508	1,221	1,026	580,615
207	St. Johns River Power	FL	8,838,659	1,276	79%	662,437	884	1,428	670,532
298	Limestone (TEGE)	TX	13,567,700	1,614	96%	0	0	0	0
384	Joliet 29	IL	5,400,473	1,044	59%	2,373,151	6,324	1,282	2,467,923
462	W. N. Clark	CO	240,064	43	64%	76,391			
469	Cherokee (PSCO)	CO	4,519,347	717	72%	819,435	1,114	1,627	860,960
470	Comanche 1 and 2 (PSCO)	CO	4,434,142	660	77%	480,218	1,237	732	493,489
477	Valmont (PSCO)	CO	1,306,454	186	80%	78,502	44	131	81,596
492	Drake	CO	1,920,826	254	86%	0	0	0	0
525	Hayden	CO	3,583,486	446	92%	0	0	0	0
527	Nucla	CO	687,622	100	78%	56,978	90	131	64,836
564	Stanton Energy Center I	FL	6,102,920	889	78%	516,574	509	690	514,900
568	Bridgeport Harbor	CT	2,322,119	372	71%	449,282	499	326	493,031
593	Edgemoor	DE	1,611,910	260	71%	324,050	1,421	400	306,295
594	Indian River (NRG)	DE	3,802,100	780	56%	2,005,780	11,463	3,450	2,032,146
602	Brandon Shores	MD	8,370,973	1,297	74%	1,286,489	6,040	1,846	1,164,774
628	Crystal River	FL	15,292,965	2,350	74%	2,205,135	12,613	4,917	2,188,376
641	Crist	FL	6,344,902	930	78%	579,878	3,514	542	622,940

ORIS-ID	Plant	State	MWH	MW	CF	MWH Headroom	SO2 Headroom (Tons)	NOx Headroom (Tons)	CO2 Headroom (Tons)
642	Scholz	FL	411,144	92	51%	273,888	3,102	1,041	356,215
643	Lansing Smith (GUPC)	FL	2,378,645	357	76%	279,577	902	358	224,432
645	Big Bend	FL	8,579,337	1,751	56%	4,458,609	4,815	9,809	5,108,518
663	Deerhaven	FL	1,267,471	228	63%	430,217	2,024	985	443,229
667	Northside	FL	621,005	562	13%	3,559,924	3,026	1,584	3,514,072
676	McIntosh (LALW)	FL	2,515,625	342	84%	30,907	64	47	29,505
703	Bowen	GA	22,963,347	3,222	81%	1,027,665	8,417	791	993,716
708	Hammond (GPCO)	GA	4,813,935	846	65%	1,485,381	13,940	2,265	1,512,615
709	Harlee Branch	GA	10,359,717	1,623	73%	1,725,141	15,587	3,321	1,568,412
710	McDonough	GA	3,761,742	517	83%	87,840	616	99	83,989
727	Mitchell (GPCO)	GA	560,479	155	41%	593,651	4,746	1,915	655,610
728	Yates	GA	7,209,788	1,295	64%	2,432,782	23,197	3,990	2,426,384
733	Plant Kraft (Port Wentworth)	GA	1,242,296	201	71%	254,350	1,427	799	306,268
856	Edwards	IL	4,768,387	749	73%	808,667	4,977	881	472,597
861	Coffeen	IL	5,757,061	900	73%	944,339	3,678	1,586	1,002,033
863	Hutsonville	IL	836,522	156	61%	325,054	1,333	444	400,374
864	Meredosia	IL	1,790,552	343	60%	763,426	5,752	1,603	1,076,690
867	Crawford (MIDGEN)	IL	2,680,000	542	56%	1,355,732	4,121	1,030	1,478,378
874	Joliet 9	IL	1,681,317	314	61%	656,727	1,721	1,392	703,995
876	Kincaid	IL	6,495,172	1,168	63%	2,201,756	5,427	4,833	2,435,351
879	Powerton Generating Station	IL	8,257,468	1,538	61%	3,194,480	7,427	9,599	3,256,549
883	Waukegan (MIDGEN)	IL	4,877,258	789	71%	997,636	2,729	988	1,041,043
884	Will County	IL	5,494,771	1,092	57%	2,636,261	7,698	3,032	2,706,135
886	Fisk	IL	1,626,952	326	57%	800,444	2,257	536	812,895
887	Joppa Steam	IL	8,087,687	1,002	92%	0	0	0	0
889	Baldwin Energy Complex	IL	13,473,856	1,800	85%	0	0	0	0
891	Havana	IL	3,060,973	441	79%	222,713	470	53	236,961
892	Hennepin	IL	2,028,358	305	76%	242,672	536	129	250,601
897	Vermilion (DMG)	IL	790,415	176	51%	520,081	1,199	679	581,224
898	Wood River (DMG)	IL	2,863,586	460	71%	561,574	1,193	418	554,192
963	Dallman	IL	1,753,537	372	54%	1,016,375	1,748	2,292	1,196,655
964	Lakeside (SPRIL)	IL	259,824	78	38%	320,964	11,312	1,785	396,442
976	Marion (SIPC)	IL	1,765,374	280	72%	319,358	808	781	447,800
981	Stateline (DOMENE)	IN	3,102,951	515	69%	731,739	2,009	1,767	737,955
983	Clifty Creek	IN	8,292,975	1,230	77%	865,605	6,466	1,978	783,347
988	Tanners Creek	IN	6,041,569	995	69%	1,367,201	7,198	1,859	1,281,949
990	Harding Street	IN	3,767,353	653	66%	1,094,885	11,858	1,226	1,019,573
991	Eagle Valley	IN	1,456,487	263	63%	501,811	5,126	916	508,139

ORIS-ID	Plant	State	MWH	MW	CF	MWH Headroom	SO2 Headroom (Tons)	NOx Headroom (Tons)	CO2 Headroom (Tons)
994	Pete 1 (IP&L)	IN	11,874,176	1,694	80%	739,348	1,283	943	747,078
995	Bailly	IN	2,346,712	480	56%	1,227,368	1,810	4,732	1,334,032
997	Michigan City	IN	2,547,459	469	62%	944,715	4,615	1,842	990,472
1001	Cayuga	IN	6,942,107	1,005	79%	541,123	6,661	749	483,066
1004	Edwardsport	IN	235,278	120	22%	658,242	17,414	2,965	1,021,745
1008	Gallagher	IN	3,043,302	560	62%	1,126,458	20,361	1,825	1,079,045
1010	Wabash River	IN	4,218,094	668	72%	755,834	8,390	1,119	787,908
1012	Culley	IN	2,607,426	360	83%	73,134	123	82	111,143
1043	Ratts	IN	1,749,268	250	80%	112,232	1,295	293	114,580
1047	Lansing	IA	1,618,324	329	56%	828,208	3,545	2,617	1,122,396
1048	Milton L.Kapp	IA	1,052,692	215	56%	548,645	1,893	346	591,977
1058	Sixth Street	IA	68,175	63	12%	400,253	6,614	3,239	2,633,413
1073	Prairie Creek	IA	808,881	218	42%	811,518	3,873	2,549	1,268,738
1082	Council Bluffs	IA	9,130,634	1,613	65%	2,879,764	5,731	2,174	2,761,204
1091	George Neal North	IA	6,176,287	950	74%	897,413	3,168	1,346	914,711
1104	Burlington (IPL)	IA	1,226,504	213	66%	358,377	1,313	299	421,982
1122	Ames Electric	IA	429,400	107	46%	367,322	784	878	467,478
1167	Muscatine (MPW)	IA	1,462,801	218	77%	161,544	323	433	193,759
1241	Lacygne	KS	10,271,286	1,432	82%	391,386	814	644	394,077
1250	Lawrence Energy Center	KS	3,503,616	533	75%	465,102	307	563	522,963
1252	Tecumseh Energy Center	KS	1,426,987	214	76%	166,457	460	332	190,231
1295	Quindaro	KS	1,167,796	207	64%	373,526	1,335	1,025	422,428
1353	Big Sandy (KPC)	KY	7,522,630	1,060	81%	370,130	2,195	703	336,968
1355	Brown (KUC)	KY	3,899,340	704	63%	1,342,644	15,118	2,128	1,302,888
1356	Ghent	KY	11,938,248	1,949	70%	2,574,006	10,656	3,887	2,503,285
1357	Green River (KUC)	KY	995,101	217	52%	620,681	12,817	1,285	678,696
1363	Cane Run	KY	3,530,399	563	72%	661,699	2,551	1,122	648,157
1364	Mill Creek (LGEC)	KY	10,472,522	1,493	80%	644,356	1,559	786	610,779
1374	Smith (OMU)	KY	2,176,473	409	61%	871,100	1,141	0	965,053
1378	Paradise (TVA)	KY	13,221,567	2,303	66%	3,926,571	13,017	16,256	5,358,081
1379	Shawnee (TVA)	KY	9,621,589	1,369	80%	571,985	2,065	1,084	598,291
1381	Coleman (WKEC)	KY	2,940,714	455	74%	447,216	8,307	742	494,480
1382	Henderson II	KY	1,473,939	312	54%	849,213	1,304	1,316	882,587
1383	Reid	KY	208,584	65	37%	275,406	6,796	763	318,667
1384	Cooper	KY	1,955,315	341	65%	583,771	5,528	1,267	538,932
1385	Dale (EKPC)	KY	1,011,821	196	59%	447,595	3,355	1,097	484,669
1393	Nelson (EGULF)	LA	3,433,704	550	71%	661,596	1,965	708	689,294
1552	C. P. Crane	MD	2,006,981	385	60%	859,729	12,212	2,304	893,168

ORIS-ID	Plant	State	MWH	MW	CF	MWH Headroom	SO2 Headroom (Tons)	NOx Headroom (Tons)	CO2 Headroom (Tons)
1554	Herbert A Wagner	MD	2,858,203	459	71%	559,511	3,712	820	590,572
1571	Chalk Point	MD	3,982,206	684	66%	1,110,858	9,420	2,194	1,074,983
1572	Dickerson	MD	3,027,584	546	63%	1,037,932	10,878	1,609	1,006,374
1573	Morgantown	MD	7,009,216	1,244	64%	2,253,608	28,407	2,997	2,058,862
1619	Brayton Point	MA	8,405,150	1,135	85%	46,954	160	26	41,044
1626	Salem Harbor	MA	1,809,018	314	66%	531,930	1,684	391	543,066
1695	B. C. Cobb	MI	2,133,338	320	76%	249,382	1,162	310	242,568
1702	Dan E. Karn	MI	3,480,499	515	77%	354,191	1,457	381	354,094
1710	J. H. Campbell (CEC)	MI	8,100,980	1,440	64%	2,621,260	9,056	4,509	2,671,234
1720	J. C. Weadock	MI	1,821,448	310	67%	486,812	2,208	818	496,887
1723	J. R. Whiting (CEC)	MI	2,389,140	328	83%	53,148	210	68	59,843
1733	Monroe (DETED)	MI	20,838,176	3,045	78%	1,834,894	10,615	3,092	1,730,461
1740	River Rouge	MI	3,411,752	540	72%	609,088	2,606	946	655,621
1743	St. Clair	MI	7,618,860	1,417	61%	2,932,122	13,634	3,812	2,860,696
1745	Trenton Channel	MI	3,866,111	730	60%	1,569,469	11,617	2,271	1,732,589
1769	Presque Isle	MI	3,435,213	609	64%	1,099,401	4,172	2,292	1,233,456
1831	Eckert	MI	1,579,378	344	52%	982,865	3,268	1,278	1,278,398
1866	Wyandotte (WYAN)	MI	271,911	40	79%	22,206	117	50	26,252
1893	Clay Boswell Energy Center	MN	6,701,160	917	83%	123,322	370	116	137,053
1897	M.L. Hibbard	MN	39,009	16	28%	80,127	727	1,511	871,329
1904	Black Dog	MN	1,472,815	282	60%	626,957	953	1,646	583,073
1915	King	MN	726,942	583	14%	3,614,076	11,330	17,311	4,032,170
1927	Riverside (NSP)	MN	2,004,027	381	60%	834,761	4,620	4,395	991,854
1943	Hoot Lake	MN	954,802	144	76%	116,454	411	200	141,136
2049	Jack Watson	MS	4,761,112	775	70%	1,009,538	4,609	3,084	987,136
2076	Asbury	MO	1,038,488	210	56%	525,172	4,545	1,914	558,389
2079	Hawthorn	MO	3,722,001	563	75%	470,097	207	162	479,344
2080	Montrose	MO	3,070,689	510	69%	726,771	3,103	1,363	823,406
2094	Sibley (UTIL)	MO	3,032,630	508	68%	752,172	2,772	2,343	774,571
2098	Lake Road (UTIL)	MO	671,554	119	64%	215,265	850	768	233,505
2103	Labadie	MO	18,910,229	2,430	89%	0	0	0	0
2104	Meramec	MO	5,863,029	860	78%	540,531	1,951	481	593,603
2107	Sioux	MO	6,642,810	1,007	75%	855,312	5,701	783	783,769
2161	James River (SPCIUT)	MO	1,513,200	219	79%	117,474	317	181	123,011
2167	New Madrid - ASEC	MO	7,620,326	1,160	75%	1,017,034	1,846	3,031	987,148
2168	Thomas Hill	MO	6,965,389	1,120	71%	1,374,131	2,851	2,913	1,432,710
2187	J. E. Corette	MT	1,185,364	158	86%	0	0	0	0
2240	Wright (FRE)	NE	549,916	120	52%	343,604	1,309	371	367,196

ORIS-ID	Plant	State	MWH	MW	CF	MWH Headroom	SO2 Headroom (Tons)	NOx Headroom (Tons)	CO2 Headroom (Tons)
2277	Sheldon (NPPD)	NE	1,521,885	225	77%	153,465	423	771	171,897
2291	North Omaha	NE	3,311,990	663	57%	1,623,219	6,598	2,743	1,718,266
2324	Gardner (NEVP)	NV	3,749,669	595	72%	680,701	191	1,222	783,242
2364	Merrimack	NH	3,287,462	434	86%	0	0	0	0
2367	Schiller Station	NH	652,463	97	77%	66,821	239	58	82,857
2378	B.L. England	NJ	1,357,373	284	55%	757,291	6,062	2,086	800,714
2384	Deepwater (CONEC)	NJ	486,847	81	69%	116,279	540	227	109,807
2403	Hudson (PSEGF)	NJ	1,936,945	608	36%	2,590,223	4,973	3,782	2,933,415
2408	Mercer	NJ	2,861,045	648	50%	1,963,963	8,769	845	2,007,101
2442	Four Corners (AZPS)	NM	14,566,304	2,060	81%	772,456			
2451	San Juan (PNM)	NM	11,180,803	1,643	78%	1,052,975	1,306	2,059	981,689
2480	Danskammer	NY	2,527,525	369	78%	220,049	987	311	223,626
2527	AES Greenidge	NY	703,613	161	50%	495,193	2,013	582	509,469
2535	AES Cayuga	NY	2,256,084	306	84%	22,392	33	23	21,411
2549	Huntley	NY	2,590,770	436	68%	655,686	2,469	646	688,919
2554	Dunkirk (NRG)	NY	3,442,479	591	66%	958,107	2,611	757	962,893
2629	Lovett	NY	1,259,163	191	75%	163,023	826	344	191,659
2642	Rochester 7 (Russell Station)	NY	1,219,343	257	54%	694,279	11,466	1,201	756,584
2706	Asheville	NC	2,286,513	390	67%	617,427	120	374	581,613
2708	Cape Fear	NC	2,088,013	323	74%	317,045	1,858	311	278,730
2709	Wayne Lee	NC	2,296,709	418	63%	815,719	5,078	1,358	767,514
2712	Roxboro (CPLC)	NC	15,489,483	2,492	71%	3,065,949	26,980	2,545	5,979,888
2713	Sutton	NC	3,015,520	623	55%	1,623,338	10,316	2,687	1,651,462
2716	Weatherspoon	NC	943,674	182	59%	411,498	3,880	1,512	484,989
2718	Allen (DUPC)	NC	6,903,503	1,179	67%	1,875,331	12,827	1,632	1,763,608
2720	Buck (DUPC)	NC	1,714,997	377	52%	1,092,145	6,056	983	1,064,033
2721	Cliffside	NC	4,061,214	770	60%	1,672,206	10,635	962	1,619,623
2723	Dan River	NC	1,054,981	283	43%	1,052,237	7,076	1,426	1,134,917
2727	Marshall (DUPC)	NC	14,861,439	2,110	80%	849,621	2,910	850	788,125
2732	Riverbend	NC	2,236,115	464	55%	1,218,829	8,050	1,140	1,209,883
2817	Leland Olds	ND	4,384,749	669	75%	596,625	6,020	1,330	651,422
2823	Young	ND	4,492,726	705	73%	756,704	4,336	3,121	817,172
2828	Cardinal	OH	10,680,795	1,830	67%	2,945,385	21,354	4,094	2,784,523
2830	Beckjord	OH	6,103,502	1,125	62%	2,273,248	17,856	4,308	2,201,766
2832	Miami Fort	OH	6,883,950	1,243	63%	2,371,428	15,153	3,130	2,290,349
2835	Ashtabula (FIRGEN)	OH	1,381,641	244	65%	435,183	1,856	455	470,259
2836	Avon Lake	OH	2,903,034	721	46%	2,465,532	34,863	5,239	2,679,540
2837	Eastlake	OH	7,882,657	1,233	73%	1,298,261	9,341	1,435	1,194,738

ORIS-ID	Plant	State	MWH	MW	CF	MWH Headroom	SO2 Headroom (Tons)	NOx Headroom (Tons)	CO2 Headroom (Tons)
2838	Lake Shore	OH	1,224,029	245	57%	600,241	2,371	981	657,105
2840	Conesville	OH	10,334,121	1,695	70%	2,286,849	23,372	4,551	2,275,918
2843	Picway	OH	340,832	100	39%	403,768	7,805	1,215	527,254
2848	Hutchings	OH	608,874	371	19%	2,153,592	14,741	4,738	2,338,155
2850	Stuart (DP&L)	OH	15,078,413	2,388	72%	2,702,635	18,054	4,216	2,400,413
2861	Niles (ORION)	OH	1,161,437	216	61%	446,899	5,262	1,692	448,868
2864	Burger	OH	1,718,978	312	63%	604,174	7,913	1,196	716,518
2866	Sammis	OH	15,364,175	2,220	79%	1,165,945	7,281	1,428	1,121,866
2872	Muskingum River	OH	8,481,929	1,425	68%	2,128,621	31,674	5,024	1,924,625
2876	Kyger Creek	OH	6,805,576	1,023	76%	811,682	6,327	1,485	755,420
2878	Bay Shore	OH	3,073,601	631	56%	1,624,825	6,296	3,591	2,265,567
2952	Muskogee	OK	8,372,764	1,547	62%	3,146,943	7,789	4,846	3,087,796
2963	Northeastern	OK	6,282,495	918	78%	552,933	1,631	735	460,350
3098	Elrama	PA	1,978,718	487	46%	1,647,484	3,155	4,448	1,730,608
3113	Portland (RRI)	PA	2,238,729	401	64%	747,117	10,187	1,132	741,917
3115	Titus	PA	1,365,856	249	63%	488,198	5,263	757	488,464
3118	Conemaugh	PA	12,937,188	1,700	87%	0	0	0	0
3122	Homer City	PA	13,611,744	1,914	81%	639,900	5,321	768	598,223
3131	Shawville	PA	3,443,868	618	64%	1,157,760	15,282	2,292	1,114,188
3136	Keystone (RRI)	PA	12,253,580	1,700	82%	404,620	5,321	382	370,116
3138	New Castle	PA	1,434,983	333	49%	1,044,535	12,519	2,063	1,061,979
3140	PPL Brunner Island	PA	10,428,960	1,483	80%	613,458	5,926	877	523,792
3149	Montour	PA	10,081,826	1,525	75%	1,273,324	15,350	1,611	1,111,535
3152	Sunbury	PA	2,035,249	389	60%	861,245	12,615	1,597	1,152,391
3159	Cromby	PA	668,928	147	52%	425,634	1,585	909	488,572
3161	Eddystone	PA	2,349,291	606	44%	2,162,985	4,358	3,450	2,447,710
3178	Armstrong Power Station	PA	2,099,745	356	67%	551,031	7,651	912	533,461
3179	Hatfields Ferry Power Station	PA	10,501,489	1,710	70%	2,231,171	29,318	4,786	2,058,144
3181	Mitchell Power Station	PA	871,878	288	35%	1,272,570	846	1,992	1,213,478
3251	Robinson	SC	1,175,480	184	73%	194,584	1,962	440	184,953
3264	Lee Station (DUPC)	SC	1,498,665	372	46%	1,271,247	8,333	1,456	1,260,874
3280	Canadys	SC	2,274,378	396	66%	674,238	4,922	1,261	658,302
3287	McMeekin	SC	1,544,592	250	71%	316,908	1,973	474	276,588
3295	Urquhart - SCEG	SC	706,989	94	86%	0	0	0	0
3297	Wateree (SOCG)	SC	4,299,151	710	69%	987,509	6,671	1,136	855,795
3298	Williams-ST	SC	3,820,672	615	71%	758,618	4,146	1,024	642,675
3319	Jefferies	SC	1,752,701	306	65%	525,775	6,115	1,364	585,782
3393	Allen (TVA)	TN	5,282,189	744	81%	257,635	581	556	240,943

ORIS-ID	Plant	State	MWH	MW	CF	MWH Headroom	SO2 Headroom (Tons)	NOx Headroom (Tons)	CO2 Headroom (Tons)
3396	Bull Run (TVA)	TN	6,638,828	889	85%	0	0	0	0
3399	Cumberland (TVA)	TN	16,947,037	2,524	77%	1,846,667	1,745	3,342	1,832,060
3403	Gallatin (TVA)	TN	7,327,319	976	86%	0	0	0	0
3405	John Sevier	TN	4,781,126	712	77%	520,426	2,789	864	492,139
3406	Johnsonville (TVA)	TN	7,708,137	1,248	71%	1,584,471	11,567	3,248	1,664,891
3407	Kingston	TN	10,134,366	1,433	81%	535,752	2,523	619	540,850
3470	Parish	TX	19,228,332	2,490	88%	0	0	0	0
3497	Big Brown	TX	8,526,768	1,150	85%	36,132	305	26	39,576
3775	Clinch River	VA	4,047,712	705	66%	1,201,718	7,427	2,181	1,055,181
3776	Glen Lyn	VA	1,536,403	335	52%	958,007	6,831	2,050	983,327
3788	Potomac River	VA	1,408,228	482	33%	2,180,744	5,103	3,184	2,419,645
3796	Bremo Bluff	VA	1,461,889	234	71%	280,475	1,853	610	271,946
3797	Chesterfield	VA	8,112,224	1,264	73%	1,299,520	9,376	1,364	1,151,472
3803	Chesapeake Energy Center	VA	3,846,417	605	73%	658,413	3,243	997	667,400
3809	Yorktown	VA	1,960,419	335	67%	533,991	4,248	900	496,297
3845	Centralia (TRAENE)	WA	8,517,807	1,405	69%	1,943,823	350	2,546	2,185,158
3935	Amos	WV	18,301,814	2,900	72%	3,291,586	17,412	5,563	2,922,830
3936	Kanawha River	WV	2,190,325	400	63%	788,075	4,468	1,348	728,406
3938	Sporn	WV	6,138,743	1,050	67%	1,679,557	10,363	3,107	1,572,796
3942	Albright	WV	1,347,719	292	53%	826,513	11,613	1,777	898,287
3943	Fort Martin (MONG)	WV	6,858,340	1,107	71%	1,384,382	16,841	1,724	1,286,652
3944	Harrison	WV	13,786,096	1,975	80%	919,754	294	1,922	857,404
3946	Willow Island	WV	675,333	243	32%	1,134,045	6,628	3,748	1,224,485
3947	Kammer	WV	4,036,718	630	73%	654,262	6,664	1,714	616,730
3948	Mitchell (OPC)	WV	8,757,235	1,600	62%	3,156,365	19,159	6,076	2,827,393
3954	Mount Storm (VIEP)	WV	10,150,134	1,608	72%	1,823,034	447	3,026	1,812,105
3982	Bay Front	WI	177,432	45	45%	154,660	461	637	226,830
3992	Blount	WI	171,552	202	10%	1,328,817	16,949	3,382	1,664,097
4041	Oak Creek South	WI	5,631,354	1,139	56%	2,849,640	6,355	2,151	3,056,966
4042	Valley (WEP)	WI	1,276,042	267	55%	712,040	3,819	1,823	1,054,295
4050	Edgewater (WPL)	WI	4,705,684	816	66%	1,373,901	4,541	1,271	1,471,083
4054	Dewey	WI	1,017,522	226	51%	662,742	7,648	1,491	868,229
4072	Pulliam	WI	2,265,098	341	76%	274,733	1,140	893	317,746
4078	Weston 4	WI	2,670,781	488	63%	960,633	2,992	1,830	1,043,363
4125	Manitowoc	WI	139,699	64	25%	333,122	635	198	478,785
4143	Genoa	WI	2,240,828	380	67%	588,652	3,111	901	549,819
4158	Johnston	WY	5,692,639	762	85%	0			
4162	Naughton	WY	5,192,117	700	85%	20,083	78	50	21,860

ORIS-ID	Plant	State	MWH	MW	CF	MWH Headroom	SO2 Headroom (Tons)	NOx Headroom (Tons)	CO2 Headroom (Tons)
4259	Endicott	MI	392,909	55	82%	16,621	36	23	26,082
4271	J.P. Madgett	WI	2,481,284	368	77%	258,844	780	414	265,090
4941	Navajo (SRP)	AZ	17,599,219	2,250	89%	0	0	0	0
6002	Miller (ALAP)	AL	21,814,012	2,746	91%	0	0	0	0
6004	Pleasants	WV	7,835,675	1,300	69%	1,844,125	8,225	1,881	1,604,859
6009	White Bluff	AR	9,982,175	1,659	69%	2,370,739	7,622	3,165	2,512,379
6016	Duck Creek	IL	446,617	366	14%	2,278,619	2,472	4,477	2,528,503
6017	Newton	IL	8,372,853	1,131	85%	48,573	129	25	52,446
6018	East Bend	KY	3,793,692	600	72%	673,908	371	900	625,710
6019	W.H. Zimmer	OH	8,268,480	1,300	73%	1,411,320	2,618	2,159	1,150,275
6021	Craig (TSGT)	CO	10,235,604	1,274	92%	0	0	0	0
6030	Coal Creek	ND	8,571,826	1,114	88%	0	0	0	0
6031	Killen	OH	4,085,160	615	76%	494,130	941	924	485,297
6034	Belle River	MI	8,029,521	1,260	73%	1,352,439	3,652	1,298	1,347,969
6041	Spurlock	KY	7,761,823	1,118	79%	562,805	3,312	622	730,338
6052	Wansley	GA	12,899,742	1,778	83%	339,246	2,348	346	319,478
6055	Big Cajun 2	LA	12,407,138	1,730	82%	474,442	1,340	453	494,883
6061	Morrow (SOMI)	MS	2,676,132	400	76%	302,268	1,084	836	360,121
6064	Nearman Creek (KACY)	KS	1,627,932	229	81%	77,202	303	187	91,699
6065	Iatan	MO	4,203,350	651	74%	643,996	2,083	972	645,429
6068	Jeffrey Energy Center	KS	15,042,493	2,190	78%	1,264,247	5,076	2,073	1,301,049
6071	Trimble County (LGEC)	KY	3,631,219	515	80%	203,471	47	161	172,253
6073	Victor J. Daniel	MS	6,998,789	1,056	76%	864,187	2,938	1,219	856,634
6076	Colstrip	MT	15,826,245	2,099	86%	0	0	0	0
6077	Gentleman	NE	8,888,651	1,365	74%	1,275,139	3,876	1,830	1,436,992
6082	AES Somerset	NY	5,485,751	684	92%	0	0	0	0
6085	Schahfer	IN	9,826,710	1,625	69%	2,273,040	8,285	3,307	2,557,443
6090	Sherburne	MN	15,863,652	2,270	80%	1,038,768	1,553	1,563	1,110,100
6094	Mansfield (FIRGEN)	PA	17,781,694	2,510	81%	907,766	962	1,166	814,824
6095	Sooner	OK	6,497,626	1,040	71%	1,248,448	3,127	2,054	1,257,986
6096	Nebraska City - OPPD	NE	4,232,877	653	74%	626,383	1,976	1,322	621,807
6098	Big Stone	SD	2,517,798	475	61%	1,019,052	3,536	3,923	1,153,037
6101	Wyodak	WY	2,893,710	335	99%	0	0	0	0
6106	Boardman (PGE)	OR	4,351,990	585	85%	3,920	12	9	4,086
6113	Gibson (PSI)	IN	23,325,192	3,157	84%	181,830	844	265	163,379
6124	McIntosh (SAEP)	GA	694,346	157	51%	470,953	1,947	1,206	492,541
6136	Gibbons Creek	TX	3,439,717	462	85%	335	1	0	327
6137	Brown (SIGE)	IN	3,276,627	490	76%	371,913	893	485	347,529

ORIS-ID	Plant	State	MWH	MW	CF	MWH Headroom	SO2 Headroom (Tons)	NOx Headroom (Tons)	CO2 Headroom (Tons)
6138	Flint Creek (SWEP)	AR	3,564,432	480	85%	9,648	22	14	10,001
6139	Welsh (SWEP)	TX	10,497,026	1,584	76%	1,297,438	3,127	1,174	1,396,251
6146	Martin Lake	TX	18,052,941	2,250	92%	0	0	0	0
6147	Monticello (TXUGEN)	TX	15,387,475	1,880	93%	0	0	0	0
6155	Rush Island	MO	7,011,199	1,208	66%	1,983,569	5,861	823	1,846,663
6165	Hunter	UT	9,583,986	1,320	83%	244,734	149	443	247,367
6166	Rockport (INMI)	IN	16,077,590	2,600	71%	3,282,010	9,436	3,725	2,995,622
6170	Pleasant Prairie	WI	7,771,779	1,234	72%	1,416,585	5,213	1,664	1,575,391
6177	Coronado	AZ	5,805,192	785	84%	39,918	104	87	40,673
6178	Coleto Creek	TX	4,217,795	632	76%	488,077	1,584	349	486,859
6179	Fayette (LCRA)	TX	12,136,085	1,662	83%	239,167	619	130	248,007
6181	J T Deely	TX	5,313,584	824	74%	821,920	3,386	686	1,107,221
6183	San Miguel (SMIG)	TX	2,712,036	391	79%	199,350	546	205	235,299
6190	Rodemacher	LA	3,491,788	523	76%	402,470	1,219	678	372,826
6193	Harrington	TX	7,291,577	1,041	80%	459,709	1,129	582	486,510
6194	Tolk	TX	7,154,884	1,080	76%	886,796	2,221	967	898,692
6195	Southwest II	MO	1,332,335	178	85%	0	0	0	0
6204	Laramie River	WY	12,274,101	1,705	82%	421,329	331	624	476,940
6213	Merom	IN	6,694,381	1,016	75%	870,755	1,398	897	883,237
6248	Pawnee	CO	3,728,818	505	84%	31,412	110	35	32,036
6249	Winyah	SC	7,559,899	1,155	75%	1,040,231	1,971	583	1,085,070
6250	Mayo	NC	4,670,793	749	71%	906,261	4,426	265	870,740
6254	Ottumwa Generating Station	IA	3,781,049	731	59%	1,658,999	5,649	1,717	1,900,001
6257	Scherer	GA	25,044,657	3,421	84%	428,109	1,237	304	440,665
6264	Mountaineer	WV	9,355,562	1,300	82%	324,238	58	391	316,293
6288	Healy	AK	158,385	25	72%	27,765			
6469	Antelope Valley (BEPC)	ND	6,513,325	900	83%	188,075	370	348	214,185
6481	Intermountain Generating	UT	14,420,790	1,660	99%	0	0	0	0
6639	Green	KY	2,223,505	464	55%	1,231,439	880	1,816	1,281,836
6641	Independence	AR	12,101,772	1,678	82%	392,616	917	540	429,893
6648	Sandow 4 & 5	TX	4,446,805	545	93%	0	0	0	0
6664	Louisa (MIDAM)	IA	3,669,568	700	60%	1,542,632	4,612	1,396	1,573,870
6705	Warrick	IN	4,510,110	693	74%	649,968	9,064	1,082	712,618
6761	Rawhide	CO	2,250,045	274	94%	0	0	0	0
6768	Sikeston	MO	2,010,443	233	98%	0	0	0	0
6772	Hugo (WEFA)	OK	2,969,847	450	75%	380,853	1,224	417	427,471
6823	D B Wilson (WKEC)	KY	1,757,307	420	48%	1,370,013	3,788	2,630	1,546,793
7030	Twin Oaks Power One	TX	2,305,483	307	86%	0	0	0	0

ORIS-ID	Plant	State	MWH	MW	CF	MWH Headroom	SO2 Headroom (Tons)	NOx Headroom (Tons)	CO2 Headroom (Tons)
7097	J.K. Spruce	TX	4,102,040	595	79%	328,330	261	223	350,586
7210	Cope	SC	3,306,326	420	90%	0	0	0	0
7213	Clover	VA	6,673,021	865	88%	0	0	0	0
7242	Polk	FL	1,582,554	260	69%	353,406	246	104	438,623
7286	Richard H. Gorsuch	OH	1,118,778	200	64%	370,422	9,065	1,111	589,266
7343	George Neal South	IA	4,564,452	632	82%	141,420	499	148	140,881
7537	North Branch Project	WV	537,182	77	80%	36,160	70	93	51,937
7737	Cogen South	GA	201,725	90	26%	468,415	0	1,537	0
7790	Bonanza	UT	3,447,424	458	86%	0	0	0	0
7902	Pirkey	TX	4,815,552	675	81%	210,498	78	181	233,598
8023	Columbia (WPL)	WI	7,075,390	1,140	71%	1,415,805	4,651	942	1,498,870
8042	Belews Creek	NC	14,992,932	2,320	74%	2,281,788	12,538	502	1,935,972
8066	Jim Bridger	WY	15,094,795	2,120	81%	690,725	791	1,102	690,400
8069	Huntington	UT	7,121,736	895	91%	0	0	0	0
8102	Gavin	OH	18,925,444	2,620	82%	583,076	837	962	549,045
8219	Nixon	CO	1,490,739	208	82%	58,029	144	76	60,888
8222	Coyote	ND	3,007,715	427	80%	171,727	671	655	206,449
8223	Springerville	AZ	5,897,980	1,200	56%	3,037,220	1,838	2,111	2,847,151
8224	North Valmy	NV	3,384,348	522	74%	502,464	1,020	955	514,008
8226	Cheswick	PA	2,904,030	588	56%	1,474,218	16,290	2,130	1,387,114
10002	ACE Cogeneration Facility	CA	830,176	102	93%	0			
10025	Kodak Park Site	NY	528,057	200	30%	961,888			
10043	Logan Generating Plant	NJ	1,528,673	219	80%	102,001		73	
10075	Taconite Harbor	MN	1,489,244	204	83%	31,453	107	63	37,018
10143	Colver Power Project	PA	837,567	110	87%	0	0	0	0
10151	Grant Town Facility	WV	662,289	80	95%	0	0	0	0
10223	AG Processing Inc.	IA	45,606	9	61%	17,685			
10234	Biron Division	WI	287,380	62	53%	171,294			
10244	Mead-Fine Paper Division	OH	268,056	78	39%	312,732		729	
10328	T B Simon Power Plant	MI	238,729	61	45%	215,477		278	
10360	Green Bay Mill	WI	377,250	101	43%	375,541			
10378	Southport (PRIVPO)	NC	335,869	107	36%	460,853		745	
10379	Roxboro (PRIVPO)	NC	186,193	56	38%	230,783		250	
10380	Elizabethtown	NC	17,389	32	6%	220,883	1,751	1,811	347,177
10382	Lumberton	NC	15,222	32	5%	223,050	2,405	1,202	456,543
10464	Black River Power LLC	NY	300,105	50	69%	71,450		110	
10495	Rumford Cogeneration Co	ME	146,756	95	18%	560,614			
10566	Carneys Point	NJ	1,997,243	262	87%	0		0	

ORIS-ID	Plant	State	MWH	MW	CF	MWH Headroom	SO2 Headroom (Tons)	NOx Headroom (Tons)	CO2 Headroom (Tons)
10640	Stockton CoGen	CA	218,208	54	46%	181,642			
10671	AES Shady Point Inc.	OK	2,394,499	320	85%	0		0	
10672	Cedar Bay (CEBAGE)	FL	1,821,673	250	83%	39,827			
10673	AES Barbers Point	HI	1,431,255	180	91%	0		0	
10675	AES Thames Inc.	CT	1,419,565	181	90%	0		0	
10676	AES Beaver Valley	PA	899,873	152	68%	231,919		283	
10678	AES Warrior Run Inc.	MD	1,565,811	180	99%	0		0	
10684	Argus	CA	367,168	50	84%	5,132			
10686	Rapids Energy Center	MN	33,306	29	13%	185,830			
10768	Rio Bravo Jasmin	CA	131,767	33	46%	113,951			
10769	Rio Bravo Poso	CA	133,675	33	46%	112,043			
10771	Hopewell	VA	309,076	63	56%	160,022	147	302	194,480
10773	Altavista Power Station	VA	368,626	63	67%	100,472	22	166	121,961
10774	Southampton (VIEP)	VA	390,392	63	71%	78,706	29	186	100,994
10860	Archer Daniels Midland Clinton	IL	151,328	31	55%	82,327			
10864	Archer Daniels Midland Cedar	IA	970,707	260	43%	965,253			
10865	Decatur (ADM)	IL	1,598,911	335	54%	895,499			
50039	Northeastern Power Cogeneratio	PA	398,543	50	91%	0			
50088	University of Northern Iowa	IA	18,906	8	29%	36,939			
50130	GF Weaton Power Station	PA	521,705	120	50%	371,815		397	
50189	Plymouth NC	NC	107,291	48	26%	246,394			
50240	Purdue University	IN	93,765	41	26%	214,499		478	
50244	Canton North Carolina	NC	157,863	53	34%	233,052		896	
50250	Pensacola Florida	FL	69,703	76	10%	496,193			
50264	Southeast Missouri State	MO	17,185	6	32%	28,980			
50282	Luke Mill	MD	264,985	60	50%	181,775		2,358	
50366	Power Plant (NOTRE)	IN	64,460	21	35%	92,651			
50368	Central Heating Plant (CORNELL	NY	22,406	8	34%	33,439			
50392	Eielson Air Force Base	AK	77,092	24	37%	100,867			
50397	P H Glatfelter Company	PA	328,149	89	42%	336,779		357	
50410	Chester Operations	PA	192,886	67	33%	305,996		305	
50438	S. D. Warren Co. #1 Muskegon	MI	110,270	34	37%	141,405			
50447	Scott-SD Warren (Westbrook)	ME	168,854	15	100%	0			
50481	Tennessee Eastman	TN	1,233,608	194	72%	213,150		453	
50491	Natrium Plant	WV	481,053	123	45%	434,805		664	
50557	Oro Grande Plant	CA	83,616	23	42%	84,366			

ORIS-ID	Plant	State	MWH	MW	CF	MWH Headroom	SO2 Headroom (Tons)	NOx Headroom (Tons)	CO2 Headroom (Tons)
50651	Trigen Syracuse	NY	228,903	90	29%	440,492		1,997	
50711	University of Alaska Fairbanks	AK	46,910	13	42%	48,548			
50805	Snowflake Paper Mill	AZ	364,129	73	57%	179,429			
50807	Stone Container Corp	FL	22,597	34	8%	230,567			
50835	TES Filer City Station	MI	356,358	60	68%	90,402			
50888	Northampton Generating	PA	836,924	112	85%	0			
50956	Bowater Newsprint Calhoun	TN	404,559	66	70%	86,877		51	
50976	Indiantown Cogeneration	FL	2,361,450	330	82%	95,730			
52007	Mecklenburg	VA	736,560	138	61%	290,988	203	494	361,124
52048	Vanderbilt University	TN	43,275	11	45%	38,631			
54081	Cogentrix Richmond	VA	1,308,275	190	79%	106,465		116	
54098	Thilmany Pulp & Paper	WI	73,863	45	19%	258,229			
54238	Port of Stockton District Ener	CA	221,948	44	58%	105,676			
54276	UNC-Chapel Hill Power Plant	NC	64,907	30	25%	158,473		385	
54304	Birchwood Power Facility	VA	1,225,422	242	58%	577,999		254	
54318	Green River Wy Plt.	WY	218,508	30	83%	4,872			
54358	International Paper - Augusta	GA	89,946	80	13%	502,905			
54406	Capitol Heat and Power Plant	WI	2,356	2	14%	11,791			
54407	Waupun Correctional Institution	WI	2,696	1	28%	5,495			
54638	Johnsonburg Plant	PA	78,539	49	18%	286,315		992	
54775	University of Iowa - Main Power Plant	IA	32,172	21	17%	124,194			
54780	University of Illinois Abbott	IL	78,178	27	33%	122,864			
55076	Red Hills Generation Facility	MS	2,982,919	440	77%	293,321	163	244	406,188
56163	Kennecott Utah Copper	UT	883,961	157	64%	283,572			

Fact Sheet

EPA rule will allow more pollution in our national parks & wilderness areas

SUMMARY: The U.S. Environmental Protection Agency (EPA) is attempting to weaken the laws that protect air quality in some of America's most treasured national parks and wilderness areas. A proposed EPA rule, now under final review at the Office of Management and Budget, would allow industries seeking to locate near national parks and wilderness areas to circumvent pollution limits established by Congress to protect these areas. As a result, there could be more power plants and factories emitting more air pollution into "areas of special natural, recreational, scenic or historic value" that Congress sought to preserve and protect for future generations.

The Clean Air Act protects air quality in national parks and wilderness areas

In 1977 Congress amended the Clean Air Act and designated certain federal lands as **class I areas**, giving them the greatest level of protection under the Act. There are 158 class I areas, including 48 National Parks, 21 Fish & Wildlife refuges, and 88 Forest Service wilderness areas.

To protect the air in class I areas, Congress created the **prevention of significant deterioration** or **PSD** program. PSD seeks to "preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special ... natural, recreational, scenic or historic value." *Clean Air Act Sec. 160.*

Under PSD, Congress established limits (known as **increments**) on additional amounts of pollution in class I areas over **baseline** conditions that existed in 1977 when PSD was enacted. Increments are in place for emissions of sulfur dioxide, particulate matter, and nitrogen oxides. Because Congress sought to protect air quality not just from long-term pollution increases, but also from fluctuations and "spikes" that occur at certain times of year (e.g., peak summer energy demand), it created both **annual** and **short-term** (3 and 24 hours) increments for these pollutants.

Since Congress wants class I areas to have the cleanest air in the country, these parks and wilderness areas have the smallest increments, or allowable amounts of new pollution. Most other areas of the country are **class II areas**, and their new pollution increments are about 4-20 times higher. By creating more "room" for new pollution in class II areas, the law seeks to steer new pollution sources away from class I areas.

A major new pollution source like a power plant may not locate near a class I area if it would increase pollution over the class I increments. The plant must do a study (known as an **increment analysis**) to show how much pollution is already in the class I area and how much additional pollution it will add.

In very limited circumstances, a new pollution source may be granted a **variance** allowing it to exceed class I increments if its emissions will not adversely impact air quality in the class I area. The source must, however, comply with alternative, higher increments similar to the class II increments.

EPA's rule will allow more air pollution in national parks and wilderness areas

EPA is seeking to change the way increment analyses are conducted for class I areas. Four changes in particular will allow facilities seeking to locate near class I areas to manipulate the data to make it appear as if the air is cleaner than it actually is. These changes will open the door to new pollution in national parks and wilderness areas.

(1) Hiding pollution spikes from regulators

Pollution levels in class I areas can vary significantly over the course of a day, week, month and year. For instance higher pollution can occur during daytime when more commercial activities take place, and during summer months, when power plants increase operations to meet air conditioning energy demand. Congress created short-term pollution increments to protect class I areas from these periods of higher emissions.

EPA's proposed rule would undermine short-term increments by turning them into annual average pollution limits. A facility looking to locate near a class I area could average the hourly and daily emissions of all area pollution sources over the course of a year, thus hiding pollution spikes that can cause real harm in class I areas or even exceed the short-term increment limits. Having created a false picture of actual pollution levels in the class I area, the new facility could then claim the right to emit far more pollution than otherwise would be allowed.

(2) Ignoring major polluters in class I areas

Under current rules, a pollution source that has received a variance to exceed a class I increment will nonetheless still have its emissions counted when new sources are seeking to add pollution in the class I area. This makes sense because a variance source, by definition, is known to be a major contributor of pollution in the class I area.

Under EPA's proposed rule, the emissions from any pollution source operating under a variance would not be included in an increment analysis. When calculating pollution levels in a class I area, a new facility could simply pretend that those sources don't

exist. By ignoring these emissions, a new facility can claim there is more "room" for new pollution, thus degrading class I air quality to an even greater extent.

(3) Allowing phony pollution accounting methods

Under current rules, emissions from existing facilities that impact a class I area are established by looking at the most recent two years of operating data. The proposed rule allows actual emissions to be computed based on any time period that is claimed to be "more representative" of normal source operations. The alternative time period could even be two non-consecutive 12-month periods picked from anytime in the past. This opens the door to phony pollution accounting by new facilities that have a vested interest in producing the lowest possible pollution estimates for class I areas they are seeking to locate near.

(4) Opening the door to 50 different standards

Air pollution does not respect state boundaries, and class I areas may be polluted by sources in many different states. It's therefore important that the methods for estimating class I pollution levels are the most accurate and are consistent from state to state.

EPA's proposal opens the door to 50 different standards for estimating class I pollution levels: Emissions "...shall be calculated based on information that, ***in the judgment of the reviewing authority***, provides the most reliable, consistent and representative indication of the emissions from a unit or group of units in an increment consumption analysis...." Some states are likely to use methods that make the air in class I areas appear cleaner than it actually is, but EPA's rule provides no check against such practices.

EPA's Regional Offices and the National Park Service object strongly to these changes (*see attached quotes from NPS and EPA Regional Offices*). However their concerns have been largely ignored by political appointees at EPA and the White House Office of Management and Budget.

MORE INFO

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The National Park Service and EPA Regional Offices have strongly criticized EPA's proposed changes to Class I area rule.

They say the rule squanders an opportunity to strengthen the program, opens the door to abusive and inaccurate estimates of existing pollution levels in class I areas, and leaves these protected areas more vulnerable to new pollution. The following are excerpts of comments developed by NPS and EPA regional offices during the development of the rule proposal.

National Park Service

"The [Clean Air] Act does not ... allow for ***shopping about for emissions data*** from multiple time periods that may be far-removed from the baseline date." NPS

"By allowing a different period to be chosen for each unit to represent actual emissions as of the baseline date, EPA is ***adding to the complexity and the potential gaming*** of an already complex task ... [because] it makes PSD baseline concentration(s) up for interpretation by every applicant." NPS

The new EPA approach "represents a ***180-degree about-face from" recent EPA guidance***. NPS

"use of annual average emissions would ***not detect the peak impacts of a facility*** that previously operated a few hours each day for the entire year and then increases ... operation[s]" NPS

"The ***protection of short term PSD increments cannot be assured*** using annual average emission rates." NPS

The proposed EPA methodology "provides ***the lowest possible degree of protection*** of short-term increments and it is usually the 24-hour increment that is the most critical" for protecting air quality. NPS

The proposed rule "***ignores the reality*** that some sources, such as EGUs, often have peak production in response to external factors and may well peak concurrently." NPS

"Allowing the use of the annual emissions rate rather than a source's maximum emissions rate could ***seriously underestimate the change in concentration*** for the 24-hour or 3-hour time periods." NPS

"The EPA proposal would now exclude [sources that have received variances] from all future Class I increment analyses. This in essence would allow future sources to more easily show that the Class I increments are being met, when in fact the total incremental concentrations could be well above the levels set by Congress to 'Prevention [sic] Significant Deterioration' of air quality in our national parks." NPS

EPA Region 1

"PSD permit applicants are always modeled at maximum allowable [emissions] because EPA's regulations require it and actual emissions would be difficult to forecast" EPA/R1

"EPA should make a technical support document or regulatory impact analysis available" to justify its changes. EPA/R1

"the current draft may actually ***muddle matters more***...." EPA/R1

"the draft appears to allow the use of annual emission rates to assess short-term increment consumption. This will fail when, for example, a source is permitted to operate seasonally or is permitted to operate 8760 hours per but typically operates a much lower number of hours." EPA/R1

EPA Region 2

"The protection of short term PSD increments ***cannot be assured*** using annual average emissions rates." EPA/R2

EPA Region 3

"The proposed addition to the definition of Actual Emissions ... is ***grossly inadequate***" and "opens the door to totally ***frivolous documentation***" of a source's emissions. EPA/R3

"The proposed acceptance of evaluating compliance with 3-hour and 24-hour increments by ... 'dividing an annual emission rate by the number of 24-hour or 3-hour time periods in a year' ***provides the lowest possible degree of protection*** of short term increments and it is usually the 24-hour increment that is the most critical." EPA/R3

This proposal "makes the explicit, and probably ***false, assumption*** that the source did or will operate for all 365 days or 2620 3-hour periods in a year." EPA/R3

"The argument, in the preamble, that it is unlikely that multiple sources will experience maximum emissions on the same dates is ***specious*** [and] ***ignores reality*** ...." EPA/R3

"The exclusion [from the baseline of certain sources that have received variances] gives a ***permanent 'pass' to sources that happen to obtain a variance*** regardless of subsequent events [or that are] granted based upon error or mischief." EPA/R3

EPA Region 4

"***the limited review time was not sufficient to provide comments*** on the complete proposed rule nor has it allowed a more appropriate detailed review to better ensure the proposed rule text clearly and accurately clarifies the increment modeling issues." EPA/R4

"Discounting the importance of the NSR Workshop Manual in providing guidance and EPA policy since 1990 is a mistake. The document has been used by EPA, consultants, and permit applicants as the basis for PSD permitting." EPA/R4

"The application of the concept of 'normal operations' to the PSD baseline concentration(s) does not appear appropriate as it makes ***PSD baseline concentration(s) up for interpretation by every applicant***." EPA/R4

EPA Region 5

EPA's contention that annual emission are a more accurate measure of increment consumption than maximum emissions "implies that an analysis, or field study work, etc. has been done showing concentration change results compared to a known baseline. If this is the case, the studies should be cited." EPA/R5

"in the case where hotspots are due to single sources, the use of average short-term rates will likely ***underestimate expected actual short-term concentration increases***." EPA/R5

EPA Region 7

EPA is arguing that it can use annual emissions as an accurate measure of increment consumtion. But "the argument ...lacks foundation" and "will likely mask the peak short term concentrations of pollutants." EPA/R7

"Dating back only to 2005, the EPA stated that use of annualized emission rates likely underestimates short-term impacts. In the Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations, EPA opined that the use of an annualized emission rate potentially underestimate visibility impacts." EPA/R7

"In most source categories with variable operation rates, it is entirely reasonable to assume that higher operation levels than the level represented by the annual average. By annualizing a short-term emission rate, the assumption is then being made that the annualized rate is representative of normal short-term source operations. The fact that higher source operation levels are likely to exist is neglected, which will result in underestimation of short-term concentrations. EPA/R7

EPA Region 9

"the proposed revisions to the regulatory definitions and procedures for calculating increment consumption would ***allow state and local authorities with excessive discretion***" resulting in "a ***significant underestimation of actual increment consumption***." EPA/R9

"Allowing the use of the annual emissions rate rather than a source's maximum emissions rate could ***seriously underestimate the change in concentration*** for the 24-hour or 3-hour time periods." EPA/R9

"allowing unlimited discretion to state and local agencies to define the 24-month period a source must use" to estimate maximum emissions "***will result in underestimating actual increment consumption***" and "***is contrary to allowing informed public participation in the process***." EPA/R9

"We are also opposed to the draft proposed provision ... which provides ... 'that the reviewing authority may select the data and emissions methodology that it judges to be most appropriate for estimating actual emissions for each increment analysis....' Current regulations "allow for use of reasonable, representative, rational and verifiable methodologies on a case-by-case basis after consultation between the source, state or local agency, and EPA Regional Office." Therefore this proposal "may ***undermine the consultation with the EPA Regional Offices*** ... and could ultimately leave sources at risk as well as ***allowing air quality deterioration***." EPA/R9

The preamble states that a PSD permit applicant is not required to release "proprietary data and/or software that may be used in the development of model inputs." "We believe that the ***public should be entitled to review all of the data*** used to analyze increment consumption, and should also be able to understand how the model is treating data." EPA/R9

"this proposal ... would ***jeopardize protection of PSD increments and limit the public's ability to be involved*** contrary to the provisions of CAA Section 160." EPA/R9

EPA Region 10

"Region 10 is ***very disappointed*** with this draft package." "Rather than addressing the issues and giving clear guidance to permitting authorities and permit applicants, this draft proposal would ***further confuse the issues***." EPA/R10.

EPA Region 10 notes dozens of inaccuracies in how the proposal describes the legal requirements of the PSD program, describing the document as "***full of errors***." EPA/R10.

"Because of this ***fundamental misunderstanding*** of the permit process and the lack of understanding of how variances work, this rulemaking ***misses the mark*** on the appropriate solution to the issue of increment consumption for sources with variances." EPA/R10

There needs to be a "hierarchy" of methods for estimating emissions. Without one, the "***lowest common denominator***" will prevail. EPA/R10.

"The discussion of actual emission rates used to model short term increment compliance ... fails to discuss the fundamental question which is what was intended to be protected as a result of establishing short-term increments." EPA/R10

"Region 10 ***strongly objects*** to the new language allowing for actual emissions to be calculated using non-consecutive months. This language would ***allow a source to 'cherry-pick'*** individual months over a 12 to 20-year period to establish baseline actual emissions." EPA/R10

"Region 10 ***strongly objects*** to [the proposed provision] which allows for the use of either one of two entirely different emissions inventories ... for short-term increment analyses. The two inventories can be different by as much as two orders of magnitude ... and will therefore ***produce entirely different results for each permitting action*** or increment consumption analysis." EPA/R10

Region 10 gives two examples of how the proposed method for estimating actual emissions could fail to protect class I areas: "For example, use of maximum emission rates to evaluate increment consumption for a peaking unit that changes to a base-load unit will show no increment consumption (since there would be no increase in its maximum emission rate) when the increase in operation from a few days to year-round may actually have resulted in the area going from pristine to nonattainment. In the same manner, use of annual average emissions would not detect the peak impacts of a facility that previously

operated a few hours each day for the entire year and then increases daily hours of operation but only operates seasonally." EPA/R10

Final Agency Review Comments
From EPA Regional Offices

EPA regional offices were given an opportunity to comment on the final rule before it was sent to OMB for review. Half of EPA's 10 Regional Administrators formally dissented from the final rule, while four other regional offices submitted critical comments. The regional offices believe that most of their concerns raised during the development of the proposed rule were not addressed in the final rule. The following are excerpts of their comments.

EPA Region 1
the final rule may increase inconsistencies that now trouble the PSD program

EPA Region 2
Region 2 does not believe that one of the options for determining the short term emission data is technically defensible.
[The final rule] could significantly underestimate the emission and therefore underestimate the actual impacts.
we do not agree that using annual average emissions for short term impacts is an improvement over the method that is in the [existing] guidance ... [which] has been successfully implemented for many years.
We believe that the proposed approach ... for defining the baseline or current year concentrations is inappropriate and could lead to "gaming" the increment calculation.
the rule would allow the source to arbitrarily pick and choose which years to model. It could allow sources to pick a year solely because it is most beneficial to the outcome of the modeling. We believe this is not consistent with the intent of Congress.
allowing the use of proprietary models without requiring that the workings of the model be disclosed for both the reviewing agency and the public could erode the credibility of the Agency's permitting actions
There is a general theme in the rule that allows discretion at too many steps of the increment calculation.

EPA Region 4
Region 4 non-concurs with this proposed final rulemaking
...there remain a number of revisions to the increment calculating procedures that would reduce consistency, accuracy and public review as provided in EPA's current guidance and regulations and could allow greater deterioration of air quality in clean areas rather than preventing significant deterioration.
The proposed final rule does not provide complete, technically sound, and clear regulations needed to ensure consistent PSD increment assessments nationwide.

EPA Region 5
the draft Final Rulemaking does not address our comments on the methodology allowed for estimating emissions
[the final rule] removes clear recommendations from previous guidance and standard practices and simply gives individual States broad discretion
Dividing annual emissions by a short-term averaging time period does not provide a representative short-term emission rate for most sources.
Using annual emissions smooths out the actual emission peaks and valleys and could result in the modeling significantly underestimating the actual maximum short-term impacts for many source categories. That means that compliance with the short-term PSD increments cannot be assured.
the proposed approach for generating increment consumption emissions allows too much discretion. It would encourage "shopping" for a favorable 2-year period. Such shopping would cast doubt on whether the modeling truly gives a reliable, conservative analysis of the increment consumption.
If the Agency eliminates the [NSR Workshop] manual as a statement of EPA guidance on how to conduct BACT and air quality analyses under PSD, it will create a vacuum that will leave each PSD applicant and each permitting agency with an opportunity to devise its own protocol; there will be no chance for national consistency, no reliable benchmark for a court to determine if an analysis is adequate and less certainty for applicants when they present a protocol to a permit authority.

The concerns noted above are significant enough to support nonconcurrence.

EPA Region 6

EPA Region 6 believes that our comments ... have not been adequately addressed during the final rule development process.

Our main concern continues to be that this action allows short-term emission rates to be estimated from annualized average emission rates. This estimation will result in a significant underprediction of the actual impact and lead to worsening air quality.

In EPA Region 6, as with many other areas of the country, short-term standards/increments are the ones most likely to be exceeded.

To change the guidance would undermine many of the permits issued in our Region. From our experience, the use of annual averaged emissions is often significantly different for many industrial emissions, including coal burning power plants and the resultant impacts of annual averaged values would not be protective of short-term increments. It has also been our experience that short-term increment issues have driven the level of controls for some facilities and resulted in overall less emissions from a project. This affect would be weakened by the use of an annual average emission rate.

By annualizing a short-term emission rate, the assumption is then being made that the annualized rate is representative of normal short-term source operations. The fact that higher source operation levels are likely to exist is neglected, which will result in underestimation of short-term concentrations.

EPA Region 7

Region 7 analysis of this procedure has shown the short-term increments can be significantly underestimated as a result and could change the outcome of increment modeling results which affect air pollution control decisions in PSD permits. The long term impact of this change to the PSD rules could result in permitted emissions causing or contributing to violations of the short-term PSD increments and national ambient air quality standards (NAAQS).

Since the inception of this rule, Region 7 has expressed its concern that codification of any procedures which allow for the use of long-term emission rates when modeling against short-term increments would not be reflective of the goal of the PSD program – to minimize the degradation of air quality and preserve the existing air quality in areas of the country that currently enjoy clean air.

EPA Region 8

I am providing you with my decision to non-concur on the Refinements of Increment Modeling Procedures rulemaking. As discussed below, Region 8 has had long-standing concerns with the inappropriate discretion the rulemaking would provide a reviewing authority for calculating increment consumption.

Averaging the concentrations over longer time periods eliminates short-tenn concentration peaks, which the 3-hour and 24-hour average increments are meant to protect.

the PSD program is intended to prevent air quality degradation from all sources measured from a specific date (the baseline date). If source emissions were calculated using different time periods the emission estimates would not match with what the sources were contributing to the ambient concentration in the baseline year. However, the Refinements of Increment Modeling Procedures rulemaking would allow emissions to be based on a different time period than the 24 months preceding a baseline date (including the use of periods after the baseline date) if it is determined by the reviewing authority that such a period is more representative of normal source operation. This inappropriate discretion would allow baseline emission estimates to be calculated in the same way [Region 8 has previously objected to].

EPA Region 9

Region 9 nonconcurs on the Increment Modeling rule, at the level of the Air Division Director.

The proposed revisions to the regulatory definitions and procedures for calculating increment consumption would likely result in significant underestimation of emissions, and cause greater deterioration of air quality.

[The final rule] could seriously underestimate short-term increment consumption, by a factor of two or more.

the "actual emissions" definition is the unlimited discretion that state and local agencies would be provided for defining the 24-month period a source must use as a basis. The rule would not establish any criteria for justifying use of a particular period. This would likely result in periods chosen that would be favorable to sources (e.g. in terms of coal sulfur content) and in greater deterioration of air quality.

[The final rule] would undermine the consultation with the EPA Regional offices on the advisability of allowing a particular methodology, and also the ability of the public to challenge questionable approaches. We are concerned that limiting EPA Regional office and public involvement could ultimately leave sources at risk as well as allowing air quality deterioration.

we believe that this rule would jeopardize protection of the PSD increments and limit the EPA's and the public's involvement in the permitting process.

EPA Region 10

Region 10 non-concurs with this draft final rulemaking. This non-concurrence represents the position of Regional Administrator Elin Miller.

there are still several "fatal flaws" with this rulemaking. These flaws are ones that we raised previously and which, in our opinion, have not been adequately addressed. The result of these flaws is that the revised rule would substantially weaken EPA's current regulations and would effectively allow for nearly unfettered deterioration of air quality in clean areas rather than preventing significant deterioration of air quality as required by Part C of Title I of the Act.

In PSD permit decisions, there must be a "bright line" test as to whether the proposed new major stationary source or major modification does, or does not, cause or contribute to concentrations that exceed the maximum allowable increase.

applicants would have complete discretion to construct baseline and current actual emission inventories that completely mask the real change in emissions since the baseline date.

allowing the permit applicant to manipulate the emissions inventories in this manner completely undermines the entire increment program.

using allowable emissions to establish the baseline concentration for PSD increment consumption analyses is NOT conservative as this will overestimate the baseline emissions and hence underestimate the amount of increment consumption.

We continue to believe that all software code and data should be available to the public in order for there to be an independent review of a permitting authority's decision to authorize the construction or modification based on the results of a modeling analysis ... [but the final rule] does not ensure that information that should clearly be available to the public, such as onsite meteorological data collected for the permit application, would actually be available to the public for review.

Don Shepherd/DENVER/NPS
To John Bunyak/DENVER/NPS
12/02/2008 11:59 AM MST
cc
Susan Johnson/DENVER/NPS@NPS, Andrea Stacy/DENVER/NPS@NPS, John Notar/DENVER/NPS@NPS
Subject
real world effect of EPA increment proposal

Folks,

"So what?" is usually a good question when considering engaging over some policy question, so i decided to satisfy my curiosity and take a look at how EPA's proposal to estimate emissions for the purpose of evaluating PSD increment consumption might play out in the real world. (Or, in ND, as the case may be.) EPA has tried to justify its proposed approach on the basis that, since it is unlikely that all EGUs will operate at their maximum actual emission rates simultaneously, it would be more realistic to assume that they all operate continuously at their annual average emission rates. If that is true, then the sum of their annual averages should always exceed the sum of their actual emissions over the 3-hour and 24-hour averaging periods relevant to NAAQS and PSD for SO2. Let's find out if EPA is correct.

The first page of the attached workbook

(See attached file: All ND Plants SO2 2006.xls)

is simply a compilation of SO2 emissions data downloaded from EPA's Clean Air Markets (CAM) database for 2006 for ND power plants. Since i am not sure why the Stanton #2 data looks so odd, i separated it from the rest and applied EPA's emission averaging approach to the others by multiplying the annual SO2 MASS emissions (tpy) by 2000 (to get lb/yr) and dividing by the SUM of the annual OPerating TIME (hrs) to get 33,399 lb SO2 emitted/hr from these eleven EGUs.

The second page is a compilation of 2006 hour-by-hour emission rates from the CAM database for the eleven EGUs. These results are plotted on the third page. The EPA approach would have

underestimated total actual 3-hour (block average) SO2 emissions from these eleven EGUs 761 times (26% of the possible results) in 2006, with the worst case underestimating 3-hour SO2 by 25%
underestimated total actual 24-hour (block average) SO2 emissions from these eleven EGUs 89 times (24% of the possible results) in 2006, with the worst case underestimating 24-hour SO2 by 14%
underestimated total actual 30-day (rolling average) SO2 emissions from these eleven EGUs 52 times (15% of the possible results) in 2006, with the worst case underestimating 30-day SO2 by 7%

The approach proposed by EPA clearly fails this test and frequently and significantly underestimates actual emissions from this group of EGUs. This leads me to wonder if anyone at EPA actually bothered to do a "reality check" on its proposal?

Don

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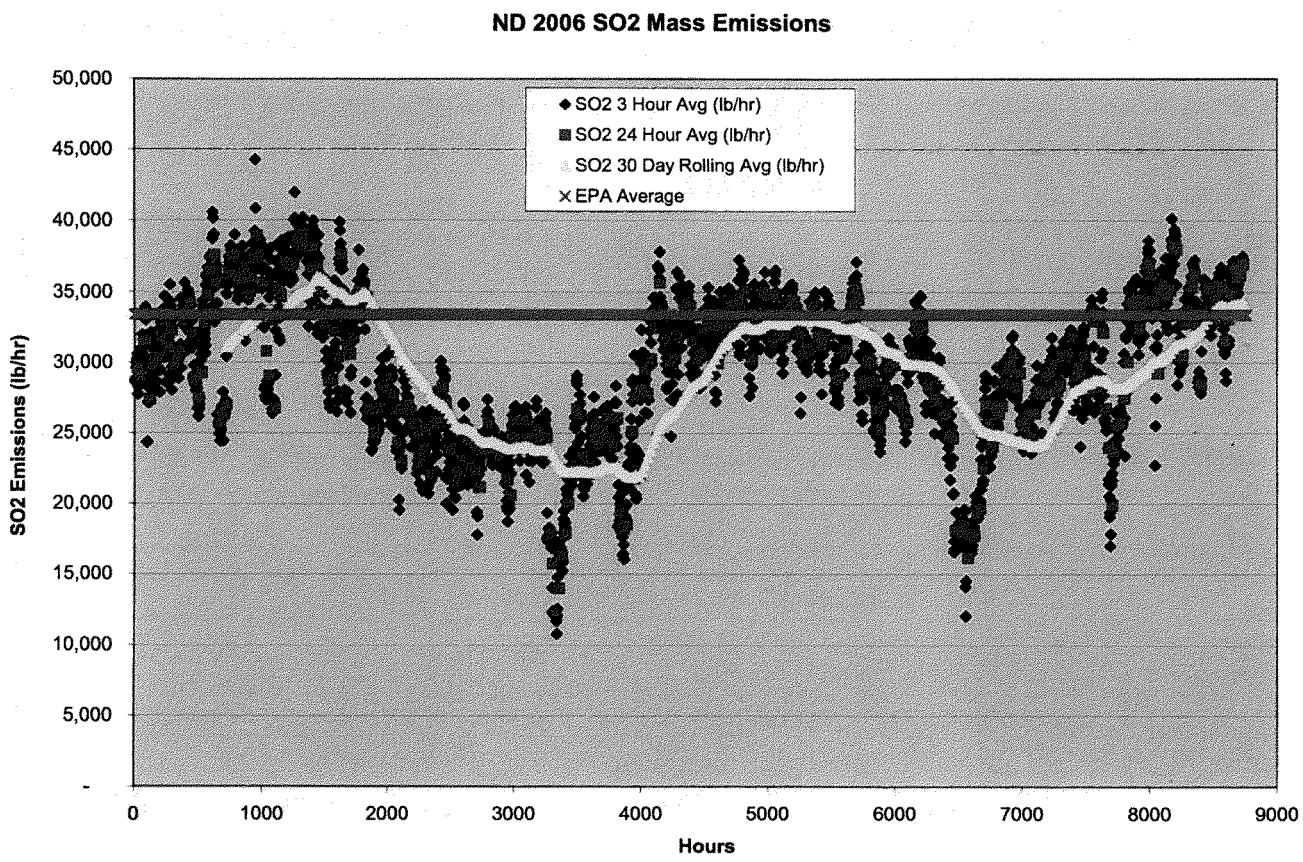

ND 2006 SO2 Mass Emissions
SO2 3 Hour Avg (lb/hr)
SO2 24 Hour Avg (lb/hr)
SO2 30 Day Rolling Avg (lb/hr)
EPA Average
SO2 Emissions (lb/hr)
50,000
45,000
40,000
35,000
30,000
25,000
20,000
15,000
10,000
5,000
-
0
1000
2000
3000
4000
5000
6000
7000
8000
9000
Hours

STATE	FACILITY NAME	ORISPL CODE	UNIT ID	OP YEAR	SUM OP TIME	SO2 MASS (tpy)	SO2 MASS (lb/hr)
ND	Antelope Valley	6469	B1	2006	8,597	7,092	1,650
ND	Antelope Valley	6469	B2	2006	8,648	7,433	1,719
ND	Coal Creek	6030	1	2006	8,531	16,425	3,851
ND	Coal Creek	6030	2	2006	8,591	15,659	3,645
ND	Coyote	8222	B1	2006	7,359	11,472	3,118
ND	Leland Olds	2817	1	2006	8,600	17,768	4,132
ND	Leland Olds	2817	2	2006	6,305	22,259	7,060
ND	Milton R Young	2823	B1	2006	7,442	16,875	4,535
ND	Milton R Young	2823	B2	2006	8,018	10,005	2,495
ND	R M Heskett	2790	B2	2006	5,642	1,836	651
ND	Stanton	2824	1	2006	7,306	1,984	543
							33,399
ND	Stanton	2824	10	2006	7,273	73	20

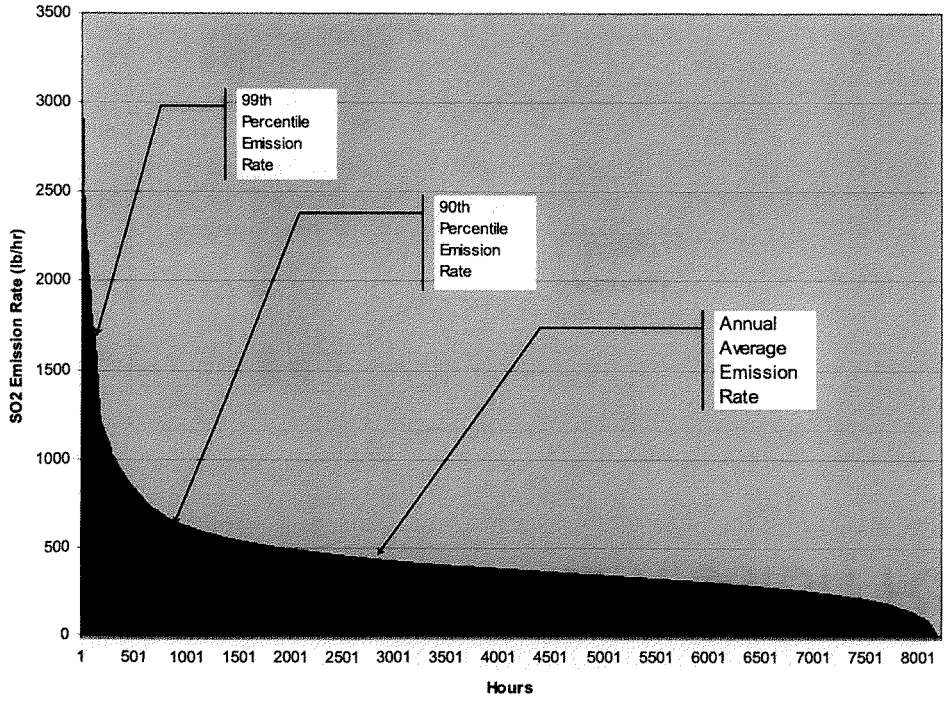
Statistical Analysis of Short Term Increments

- For short term averaging periods where increments may only be exceeded no more than once per year, this translates to 99.5th percentile impact.
- Proposal would permit use of emission rates at 50th – 60th percentile to compare against a standard with a 99.5th percentile impact level.

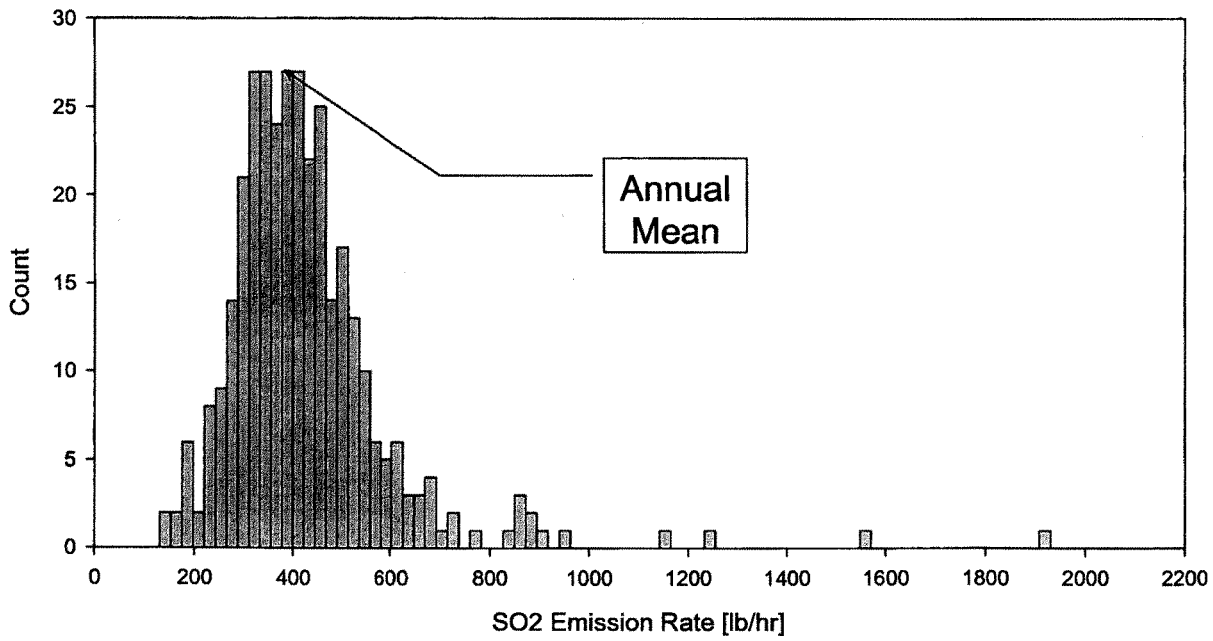
Example Analysis of CEM Data

- 2005 CEM data from Sunflower Electric in Kansas.
- Baseload EGU facility – average heat input rate of 3,327 MMBTU/hr (SD 415 MMBTU)
- The annual average hourly emission rate is 430 lbs/hr for SO_2.

CEM Hourly Emission Rate Analysis



CEM 24-Hour Emission Rates



Comparison of 1-Hour Average Emission Rates

1-Hour Average Emissions (lb/hr)

MAX	99th	90th	75th	50th	25th	10th	Mean	SD
3767.6	2107.6	1228.9	484.1	376.4	295	216.7	430.8	277.9

Ratio of Percentile to Mean

MAX	99th	90th	75th	50th	25th	10th
13.56	4.89	1.52	1.12	0.87	0.68	0.50

Comparison of 24-Hour Average Emission Rates

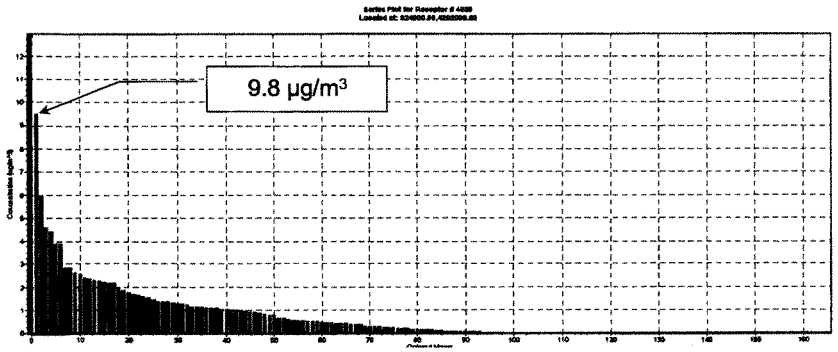
24-Hour Average Emissions (lb/hr)

MAX	99th	90th	75th	50th	25th	10th	Mean	SD
1930.0	1068.30	585.98	485.25	400.69	321.78	270.40	427.22	179.9

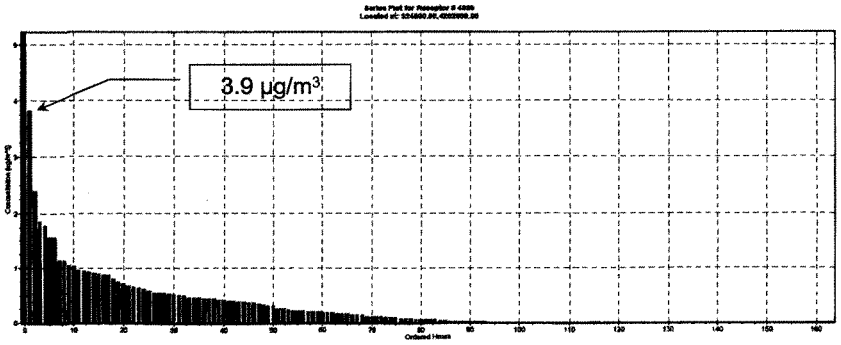
Ratio of Percentile to Mean

MAX	99th	90th	75th	50th	25th	10th
4.52	2.50	1.37	1.13	0.94	0.75	0.63

Comparison of Model Response for Short Term Increments – 99th Percentile to Mean Emission Rates



99th Percentile Emission Rate



Mean 24 Hour Emission Rate

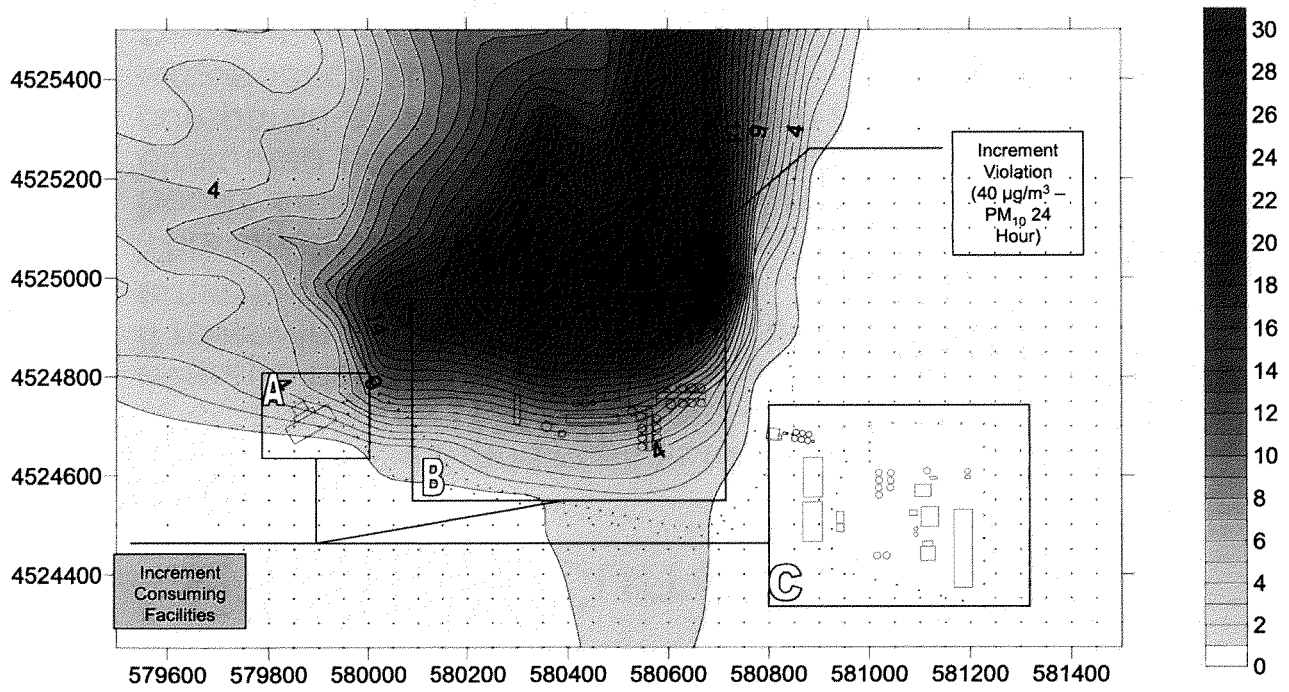
Peak-to-Mean Emission Rate Ratios

- 99th percentile 24-hour emission yields 2.45 times greater concentration than annual mean 24-hour emission rate.
- 99th percentile 1-hour emission yields 4.89 times greater concentration than annual mean 1-hour emission rate.
- Even at the 75th percentile emission rate, increment consumption would be underestimated by 12%.

Effects of Current Proposal

- Under proposed modification to PSD rule, 2857 operating hours (121 days) are greater than the annual average hourly emission rate in the previous distributions if reviewing authority chooses to use annual average emission rate.
- This would mean that 2857 hours/121 days with higher hourly emissions than the annual mean would not be evaluated under current proposal and would be compared against a standard which allows only one exceedance per year.
- Depending upon which cut-point one chooses for actual short-term emission rate, short term increment consumption would be underestimated by 1.5 – 13 times when compared to the annual mean emission rate.

2007 Region 7 PSD Example



24-Hour Increment PM10 Increment Consumption

24-Hour Maximum Actual Emission Rate

A	B	C	Totals
0.018	39.996	0.311	40.32

24-Hour Annual Mean Emission Rate (assuming 2.5 Peak to Mean Ratio)

A	B	C	Totals
0.007	15.999	0.124	16.13

Key Points

- In most short-term PSD increment situations, a majority of times there is little or insignificant collective impacts, even when sources are located next to each other.
- Concentrations on a receptor-by-receptor basis is typically dominated by single source impacts. Model concentrations are extremely sensitive to source-receptor geometry. Sources typically must be aligned along the same wind direction for collective impacts to occur at a given receptor.
- OAQPS made erroneous assumption that a more representative picture of actual conditions can be found by promoting annualizing emission rates. Little source interaction is observed in many cases based upon over 20 years of reviewing PSD modeling.
- When little source interaction is observed, increment consumption is literally a function of individual source release characteristics and emission rates.
- Annualized emission rates will relieve increment violations derived from maximum actual emission rates, contrary to OAQPS stated opinion that proposed rulemaking will still remain protective of increments.

The CHAIRMAN. So let's have a little discussion then, because some have asserted that the Bush administration's midnight regulations are not really rushed and they are not really secretive. And that is a contention which is being made and that they are being properly implemented with all deliberation and proper review. Mr. Kennedy, could you respond to this assertion that they are, in fact, going through a proper regulatory process in their destruction of these rules.

Mr. KENNEDY. There are many, many examples. I mean, normally, regulations, what the Bush administration has even said in the past in a court case over power plant regulations that I argued. We recently had Bush administration attorneys argue that it takes 8 years to pass a regulation.

These regulations, many of them in many, many of these instances, I mean, John Walke is just—I mean, this is actually a very heavy document that appears to have hundreds of rules in it, there is supposed to be notice and comment, there is supposed to be an opportunity for the public to comment on these rules to participate in the regulatory process, and I just don't see how it is possible to issue—the public doesn't even know this at this point. So this is—for the administration to claim that these are going through a normal regulatory process is just, is specious.

The CHAIRMAN. Let me go to Mr. Walke and then we will go to you, Mr. Holmstead. Mr. Walke.

Mr. WALKE. Chairman Markey, there is one easy task to determine whether a rule is being rushed or not. And that is when and whether the rule has been lodged for review at the White House. The Office of Management and Budget has either a 60- or a 90-day review period under executive order to look at final rules. And before I came, I looked at the OMB Web site and many, many of these rules, including ones that we know will be adopted by January 20th, have not even been sent over to the White House. They are not going to have their normal review, they are going to have a review that is by definition rushed.

Now, that is a classic definition of midnight regulation to me. They are hurrying up these rules. The reason the rules were scrapped yesterday is not because they passed the November 1st deadline in the Josh Bolten memo as the White House is now claiming. Count the number of rules that have been issued since November 1st. There are many. By their own standard, they should not issue any more rules for the rest of the administration. Because as they said in The Post today, that would be a midnight regulation. They will not meet that test. This list proves it. And there are rules that the White House is looking at now that are going to be jammed out by the 20th.

The CHAIRMAN. Mr. Holmstead what do you have to say about that.

Mr. HOLMSTEAD. All I know is that EPA follows the Administrative Procedures Act. John is incorrect in saying that all these rules go through OMB review. Most of them don't because OMB only reviews rules that are considered to be significant rules. And there is an ongoing discussion between OMB and many agencies. Look, it is a historical fact that near the end of every administration, there is a lot of things that get done because people respond to

deadlines. All of the issues that I know about have been in the regulatory process for years, right? And they have to go through a common period, and the ones that John doesn't like have been out for public comment. And so the question is, is there something nefarious about trying to clean up the issues that you have been working on for years.

Now, I don't have privy to this particular list, and so I am a little surprised to hear that John and Mr. Kennedy both accusing the administration of violating the law. You would have to look at each one of these and say okay, was this a rule that went out for notice and comment? Is it a rule that qualifies as a significant rule? But the idea, and again, there are several articles that I refer to in my written testimony where there is a natural tendency in our system for every administration to try to finish its work before it leaves office.

The record is held by the way by the Clinton administration, in terms of number of regulations or pages. The second most is the Carter administration. We will see how this administration ends up, but there is always a slug of things that people are trying to finish up before they leave office. But if they don't the follow proper procedures they are clearly illegal.

The CHAIRMAN. So we will come back to you, Mr. Walke, and Mr. Kennedy. What do you have to say to Mr. Holmstead?

Mr. WALKE. Well, the Bush administration significantly expanded review by OMB down to guidance documents that they look at that don't meet anyone's definition of significant or impacts of $100 million or more. So they have been very selective in how they follow their own rules. But I think it is clear that these rules will be pushed out. And I should say, the rules in this list, as far as I can tell, have undergone public review and notice and comment.

But that would be true of any midnight deregulation as well by definition unless they were flagrantly violating the EPA as Jeff said. But that still doesn't obviate the fact that these are harmful midnight deregulations that they will——

Mr. HOLMSTEAD. But how can you say that without looking at the regulation and seeing what it says?

Mr. KENNEDY. I have looked at the clean air regulations.

Mr. HOLMSTEAD. There is that long list. You have got to look at the regulations and say is this a good one or is this a bad one.

Mr. KENNEDY. That is why it is being entered into the record.

Mr. HOLMSTEAD. Good.

The CHAIRMAN. Mr. Kennedy, do you have any comment you would like to add at this point.

Mr. KENNEDY. I think Mr. Walke has covered it.

The CHAIRMAN. Great. Thank you. My time has expired. We will turn and recognize the gentleman from Missouri, Mr. Cleaver.

Mr. CLEAVER. Thank you, Mr. Chairman. I am sure that all the administrations are trying to finish up their agenda. I don't think that is any different. Do you think there has been this much activity by past Presidents, whether they were Democratic or Republican, with regard to the environment? Mr. Holmstead.

Mr. HOLMSTEAD. You know, I am not sure. And the studies that have been done are not entirely satisfactory because they just look at the number of pages in the Federal Register that were issued

during the last three months, so I honestly don't know the answer to that. But as you mentioned it is really quite clear that we all respond to deadlines and we know we are running out of time and we try to get our work done.

So I know that there was a number of things done by the EPA right before the Clinton administration. And because of a concern about midnight regs when I got there one of the first things we did was review all the midnight regs. And what we discovered is that they had done a darn good job, with only one exception. There was one thing that we thought was done improperly. But a lot of these things were very controversial.

Mr. CLEAVER. With regard to environment?

Mr. HOLMSTEAD. Yes, these were all environmental. But we looked at some controversial rules and we decided the Clinton administration had done the right thing, even though they issued the rules on the last week of the administration.

Mr. CLEAVER. Let me ask the other three witnesses, beginning with Ms. Clark. The Obama administration will take office on the 20th. Of the midnight rulings that you have seen, and those, Mr. Walke, in your testimony are the most egregious and that the Obama administration will need to move quickly to either reverse or halt. What have you seen thus far that you think would require as rapid a response as possible.

Ms. CLARK. I will start. Certainly the attempts to undermine the Endangered Species Act. What this administration has failed to do legislatively, and goodness they have tried, they have been quite persistent over the last 8 years, they failed to do it legislatively, they have tried to now accomplish administratively in the eleventh hour. So the section 7 regs have got to be overturned or thwarted. Clearly, regulations that impact or really undermine chances of survival for species we care deeply about, like the gray wolf, the polar bear, will need to be addressed.

And then there is a whole host of public lands. This recent oil shale regulation that is devastating to over 11 million acres of land in Colorado, Utah and Wyoming. BLM, the Bureau of Land Management, has been particularly hard hit by this administration's zeal to pay homage to their industry friends. And that whole agency deserves a look. There are a lot of regulations being finalized against the wishes of governors even in the west that will need to be addressed right out of the box.

Mr. KENNEDY. Well, number one on my list would be the mountaintop removal that I talked about, the 100-foot stream buffer zone. Because the damage that will be caused as a result of—that will be allowed as a result of that rule will be welcome quick and it will be irreparable and it will be monumental literally destroying entire mountain ranges. Already 460 of the largest mountains in West Virginia have been taken down and are just holes in the ground. You can actually go to Google Earth and go to the home page and type in your zip code and you can look at the mountain that has been removed in order to heat your home. This will move the final restraints on that practice.

So I would say that that would be number one on my list. The factory farming regulations removing the efforts by the administration to remove factory farms from not only the Clean Water Act but

also from CERCLA and EPCRA which regulate the air discharges from those facilities. But as you know, these are facilities that over the past 20-years farming has been transformed in this country and taken off the farms by a few large corporations which shoehorn millions of chickens into tiny cages where they literally can't turn around and then dose them with hormones and arsenic so that they literally lay their guts out over a short miserable life.

Hundreds of thousands of hogs are put into warehouses, again in tiny cages, where they produce millions of tons of waste. A hog produces ten times the amount of waste as a human being. So a facility with 100,000 hogs produces the same amount of fecal waste as a city of a million people. Well, the waste is as virulent and obnoxious and as dangerous as human waste and it should be regulated by the Clean Water Act, and under the law it was. But this administration has removed it from that regulation so that these big corporations could simply dump the waste into the waters or onto the land.

And there was—the Bush administration, for 8 years, has been trying to completely remove all legal restraints on these practices. And this final regulation will, in fact, do that. So I would say that the regulations on factory farms are probably some of the worst.

Mr. WALKE. Congressman, I would mention just two air pollution regulations. One recently in which EPA rejected the unanimous advice of its scientific advisors to weaken the health standards that govern smog pollution, our protections against smog pollution; EPA rejected those unanimous scientific recommendations when it adopted the ozone standard. And secondly a rule that we expect to be issued by the end of the term that I refer to in my written testimony in which EPA will create essentially a loophole in accounting gimmicks to allow oil refineries and chemical plants to pollute more under the Clean Air Act, carcinogens and smog and soot pollution.

Mr. CLEAVER. Thank you, Mr. Chairman.

I yield back.

The CHAIRMAN. The gentleman's time has expired.

The Chair recognizes the gentleman from New York, Mr. Hall.

Mr. HALL. Thank you, Mr. Chairman.

Ms. Clark, in the rules that you have seen issued or cancelled or in any actions that you would have noticed over the last 8 years, has there been any effective regulation that you have seen that may help the overfishing and the depopulation of the fisheries of the northeast, something that has been written about a lot lately?

Ms. CLARK. Unfortunately, not to my knowledge. And, in fact, the undermining of the Endangered Species Act changes that they have underway will potentially harm all listed species, 1,400 listed species, and those that are trending towards imperilment as well. So for those species that are in trouble in the ocean environment and may, in fact, deserve protection of the Endangered Species Act, this regulation will certainly hurt them. So I expect that the way that this government has gone about managing imperiled species will certainly result in more species being imperiled than less.

Mr. HALL. And in your opinion, Ms. Clark, could the Fish and Wildlife Service have possibly adequately reviewed the 300,000 public comments on the administration's proposed Section 7 rule in the time they allotted for that work?

Ms. CLARK. Absolutely not. Because I know enough about a number of the comments, including many from this body, that were quite substantive in nature and to see from a career official this all-hands-on-deck call that went across the agency in an e-mail calling for anybody and anybody to come in from Tuesday through Friday to work 8 hours a day to analyze the almost 300,000 comments to then forward onto the Department of the Interior's Solicitor's Office, there is no way they could do much more than stack them in categories.

What was also, though, significant about that e-mail and about the way the process was handled is indicative of what has happened in this administration, and that is, they have totally taken away the opinion—or disregarded is maybe another word—disregarded the opinion of the career biologist and in essence have totally politicized implementation of environmental law. So they in essence asked Section 7 biologists, experts on the law to come to town, and in fact, they couldn't get enough of them. So they brought them from the Park Service and other agencies and said, okay, stack the comments so that you can then forward them to the Solicitor's Office where they will be reviewed and analyzed for policy response. That just didn't happen in my entire time in government. We had a very collegial relationship with the lawyers in the Solicitor's Office, but they didn't unilaterally make policy without biological understanding of the impacts of implementation of law.

Mr. HALL. Thank you.

Mr. Kennedy, I was wondering, have you seen or heard of any attempts or any machines being built to remediate the removal of mountain tops to try to restore the topography as it previously was, and have you any idea how expensive that would be?

Mr. KENNEDY. The law says that once the mountains are moved and the coal has been extracted, that the company then has to restore the mountain top to its natural state and the soils to their natural state. They have to take the soils and put them back on and reclaim the area. But I have actually been on the reclaimed mountain tops. And what happened is at the State agency, which is a classic captured agency that is basically just a hand puppet for the regulated industry, along with the Office of Surface Mining and EPA under the Bush administration have approved an interpretation of the law to say that rock is the equivalent of soil, so that instead of putting soil on the mountain top, they can put rock on the mountain tops. And so they just take the rock and put it back. And when you walk on it, you are just walking on a huge rock pile where nothing can grow. There is some little kind of an exotic grass and some lichens that can grow on it. But these were areas that had some of the finest tempered forests on earth, and you will never see those forests again, ever, until we have another ice age.

That is the kind of the level of deception, of public deception and the manipulation of these laws that we have seen unprecedented come out of the Bush administration. And the people who dream up these schemes are so venal and mendacious and dishonest because the law is there that says you have to grow the forest back. Everybody knows it. Everybody can read that law. And yet you have a conspiracy among these regulatory officials who, you know, who are basically just, as I said, indentured servants for the lob-

bying groups and for the industries that they regulated. And they come in there and plunder our natural resources and plunder the best of our country.

I say one other thing just in answer to your earlier question. We just argued this week against EPA a case in the Supreme Court in which the Bush administration is trying to remove all regulations or weaken the regulations for fish kills at power plants. Now, power plants are the single greatest killer of fish in the oceans. The East Coast power plants by their own records kill a trillion fish a year on their intake screens, a trillion fish a year on their intake screens. There is a single power plant, the Salem Nuclear Plant in the Delaware River, that sucks up the entire fresh water flow of the Delaware every day. And it literally combs the life out of it. Martin Marietta, which is the company that put the man on the moon, that was hired by Salem Nuclear Power Plant to do its fish kill studies said that that plant alone kills 175 billion bay anchovies every year, 165 billion weakfish every year. And it stopped counting after that and said this is going to cause the crash of all the fish in the Delaware Estuary System which, in fact, happened.

And so these power plants, you know, more than the commercial fishery, are impacting huge, huge, mortalities on our oceangoing fish, and the Bush administration is doing everything in its power to try to fight the regulations that would require these plants to install the best available technology for preserving fish.

Mr. HALL. Thank you.

I will just, if I may, just wrap up by saying, in response to comments by Mr. Holmstead and Mr. Walke, that in New York, first of all, the last couple of summers we have had hot spells, extended heat spells where the entire State has been under an air quality alert. Now, I remember—I have grown up in Elmira and spent most of my life in the Hudson Valley. And I remember many times having cities be under an air quality alert, the City of Poughkeepsie, the City of Peekskill, the City of New York, Albany, what have you. But having the farm land and the forest land and the Adirondacks, the entire State, be under an air quality alert where people with asthma or respiratory problems, the elderly and the young are told to stay indoors—not in specific cities, but in the entire State—to me that has only happened in the last couple of years, and it is inconsistent with a statement that air quality is better. I realize that is not a scientific sample of the entire country, but it is an experience that this State has had.

And lastly, regarding whether or not this is intentional and systematic, you know, responding once again to you, Mr. Holmstead and those who say that this is somehow different, we had the administrator of EPA sit here on the 1-year anniversary of the Supreme Court decision in Mass. V. EPA and refuse to give us the internal documents that the staff at EPA had been working on. And we were unanimously, both sides of the aisle, forced to vote for a subpoena for those documents because the administration, as they do with the VA and as they do with the Justice Department and as they do across all branches of the executive, refused to produce documents for our oversight. So I do believe it is systematic, and I am looking forward to working with a more legal admin-

istration and one that believes in the law and in the Constitution and checks and balances.

And I yield back.

The CHAIRMAN. The gentleman's time has expired.

The Chair recognizes the gentleman from Washington, Mr. Inslee.

Mr. INSLEE. Thank you.

Mr. Holmstead, you made a comment in your opening statement that you are entertained by some of the statements that were made by some of your witnesses, and I want to tell you that this was not an entertaining experience for us. Maybe you think it is a joyous occasion because it is the last hearing the U.S. Congress will hear about the multiple depredations and failures of environmental policy by this administration. But it is not something that I find entertaining.

I just find it flabbergasting that you come before us to crow about the achievements of this administration, saying that pollution is better than when this administration came in. In fact, the carbon dioxide levels of the planet have risen significantly, which is the number one, most dangerous, most threatening pollution. And while that has been occurring, the only strategy that the Bush administration has had to deal with it is, one, to gut the listing of the polar bear to make sure that it really didn't mean anything; it didn't occasion the reduction of carbon dioxide. And, number two, the only other strategy the administration has had is to be at least partially responsible for a major recession that might reduce economic activity, which is not the preferred global warming strategy we ought to have.

Now, I am upset about it. I think a lot of people are. I got to be a grandfather for the first time about a week and a half ago. And If my son lives to the ripe age of 100, 35 percent of the birds in the world may be endangered; 52 percent of the amphibians; and 71 percent of the corals may no longer exist. And for 8 years, the Bush administration fiddled while the most dangerous gas in the atmosphere increased while the Bush administration fiddled around. I would like to think that the administration would leave on some note of grace on this last hearing during the Bush administration. And I would like to give you an opportunity to express some sorrow that this administration did not act to deal with this most dangerous pollutant to the great disadvantage of our grandkids. And I want to give you that opportunity to leave on some note of grace.

Mr. HOLMSTEAD. Well, I appreciate your kind invitation, but I find your question somewhat disingenuous.

When I talked about pollution, I was very specific. If you look at air quality in New York or your State or anywhere else, air quality, as measured by scientists around the country, is significantly improved. Now, no one has ever talked about CO_2 as an air quality issue because it is not dangerous to breathe unless you happen to—unless it is at levels or orders of magnitude higher than we talk about today.

It is clear that climate change is a major issue, but don't tell me that CO_2 is the most dangerous gas we face today when there is still people who are dying because of fine particle pollution and

other things. When it comes to CO_2 emissions, this administration has done at least as well as every other country in the world and at least as well as the Clinton administration. The Clinton administration said they had authority under the Clean Air Act to regulate CO_2, they chose not to exercise it very carefully.

When this administration came in, it has undertaken many things to reduce the energy intensity of our economy. And if you look at the Europeans, if you look at the Japanese, if you look at any other economy since the beginning of this administration, they have performed no better than we have. It is a huge, huge challenge that we have, sir, but to somehow suggest that this administration has failed in its efforts; it has spent more time and more effort, and although many other countries talk a good story, they have not achieved anything either. You know why? It is enormously difficult. I think all of us need to be engaged in that opportunity, but it is going to take decades and billions and trillions of dollars to reduce our emissions of CO_2.

Mr. INSLEE. Thank you, Mr. Holmstead.

I think you have answered my question, which is you do not intend to leave on a note of grace, of showing you are sorry—and I will report to my grandchild when he is at the appropriate age that you were proud of your record to watch this international global disaster unfold and do nothing about it. That is what I will report about your last opportunity.

I want to ask Ms. Clark and Mr. Kennedy, procedurally, what do we need to do to roll back these onerous provisions? How can we do that in the quickest, most efficacious way during the Obama administration? What do we need to do day one? How do we hasten this process?

Ms. CLARK. Well, I will speak as a nonlawyer, as a wildlife biologist just to be clear. There are a couple of things. It would be, speaking of grace, it would be nice, like they have done on the air regulations, for them to decline to finalize the Section 7 regulations. That would be a point of grace. And for an administration that has touted their desire for an orderly transition, that would be incredibly helpful for the incoming Secretary of the Interior, because it is a huge issue to have to inherit.

Absent that, and if they do go forward to finalize, know that there are a host of environmental groups, conservation groups like Defenders of Wildlife that is poised to file suit against implementation of the regulations. And so I imagine we will be involved in some dialogue. Also there is certainly the opportunity for the new administration to issue executive orders and in essence dictating how they expect the incoming departments to address global warming considerations that impact on the environment, including endangered species, while they move with due haste to repropose and undo the regulations.

And just to point it out about these regulations I forgot to mention, but it is of interest in the chairman's comment earlier on about how we can assert that these are midnight and last ditch and a bit over the top, the Section 7 regulations, when a bureau wants to issue regulations of this magnitude, regulations like Section 7 that affect every discretionary action of any Federal agency—so it has wide, broad impact on the Federal Government. And

I know from personal experience that the debate and the handwringing and the wrangling that goes on in the interagency clearance process, not the least of which this regulation ran under the radar screen, didn't show up on the dockets that these regs normally show up on, whether it is in the Department of Interior or the Office of Management and Budget. But I heard from at least three of the bureaus, the Department of Agriculture, the Environmental Protection Agency and even the Department of Defense that, in essence, they were persuaded to, quote, stand down, because what typically happens is these bureaus and individual agencies will provide all this comment that has to be reconciled before these regs can go forward. What, in fact, happened is they were in essence ordered to—you know, it is kind of like what your mother says, if you can't say something nice, don't say anything at all. And because they couldn't agree with these regulations, they said nothing.

So the notion that there was unanimity and everybody agreed with these regs in the Federal Government is quite the contrary. In fact, you know, Forest Service, Department of Defense, EPA is very concerned about now having that responsibility unilaterally as well as the accountability unto themselves without the expert backup of the wildlife agencies. So this issue has got to be fixed for the inherent forward movement. And the only time in this administration they really got away with this in toto has been on the national fire plan for the Bureau of Land Management and the Forest Service to implement unilaterally decision-making on fire management and fire planning. Albeit late, the Fish and Wildlife Service finally got around to monitoring the impact of decisions made during this self-consultation process and have now determined that over—almost 70 percent of the unilateral decisions made by the Forest Service and the BLM on this fire management plan implementation have been wrong. And BLM and the Forest Service have wildlife experts. Therein lies the problem. So it is a big challenge.

Mr. INSLEE. Mr. Kennedy, did you want to add something to that?

Mr. KENNEDY. There are three things they should be doing. One is, the Obama administration should stay all rules that are still pending, and they should prevent publication of those rules in the Federal Register, all new rules in the Federal Register. That is something that the Bush-Cheney administration did beginning the first day of that administration with the Clinton administration's last-minute rules.

Second, the Obama administration should begin talks with Congress under the Congressional Review Act. The Congressional Review Act as you know is a statute that gives Congress the power to review regulations after 100 days and then to—if they disapprove of those regulations or believe they are inconsistent with the law, the public interest, Congress has the power to pass a resolution of disapproval which then the President can sign, which effectively vetoes the regulation. That is a real choice that I hope you will exercise.

And then, of course, the Obama administration ought to do what—again, take a page from the Bush-Cheney playbook and refuse to defend regulations that it doesn't like in court so that

when environmental groups, when citizens groups, when public health groups sue the administration over the regulations that we can achieve a regulation that protects public health and that protects the environment.

I just want to make one comment in reaction to some of the things that Mr. Holmstead—some of the claims that Mr. Holmstead just made. One is that nobody has ever, ever called carbon an air quality problem. In fact, that was a pretense that the administration has tried to put over on the American people for the past 8 years, but NRDC sued the administration, won the case in court, in the Supreme Court, and the Supreme Court has said, indeed, carbon is a pollutant, a regulated pollutant. It was one of the games that they played to try to avoid regulation of, as you called, the most dangerous pollutant in the world, which is carbon right now.

I also have to say I was somewhat surprised to hear Mr. Holmstead talk about his great concern for the worst pollutant, which was ozone and particulates, since the Bush administration under his leadership did everything in its power to make sure that there was no regulation of ozone and particulates. As you know, ozone particulates——

Mr. HOLMSTEAD. I am just puzzled. That is factually incorrect.

Mr. KENNEDY. Ozone and particulate emissions were supposed to be removed from coal-burning power plants 18 years ago under the Clean Air Act. The——

Mr. HOLMSTEAD. I'm sorry, but that is just incorrect. As a matter——

Mr. KENNEDY. That is correct.

Mr. HOLMSTEAD. I am sorry, it is not.

Mr. KENNEDY. The Clinton administration, when this administration came in—because many of the plants did, including in the State of Massachusetts, all of the plants installed scrubbing mechanisms to remove the ozone and particulates. Other States didn't do that, states where corporations can easily dominate the State political landscapes. The Clinton administration, there were 400 plants that did not remove ozone and particulates. The Clinton administration was prosecuting the worst 52 of those plants criminally and civilly. They were investigating 200 other plants. One of the first things that the Bush administration did when it came into office was to order the Justice Department and EPA to drop all those lawsuits. As a result, the top three enforcers at EPA, Bruce Buckheit, Sylvia Lawrence and Eric Schaeffer, all resigned their jobs in protest. These were not Democrats. These were people that served under the Bush administration and the previous Reagan administration. They left their jobs because they were ordered by this administration not to do their jobs to reduce ozone and particulates.

Immediately after that, the administration, under Mr. Holmstead's leadership, abolished illegally as it turns out, because we won the lawsuit after 7 years, the New Source Rule, which was the heart and soul of the Clean Air Act, the most important provision in that statute. That is the rule that required those companies to clean up 18 years ago. So I have three sons. I have asthma. One out of every four black children in American cities have asthma.

One out of every eight kids born in this country today have asthma. We have a pediatric asthma epidemic. The principal cause of asthma attacks is ozone and particulates. A million asthma attacks a year, a million lost work days. This is stuff that really hurts our country and causes tremendous pain to people. And this administration went and abolished those controls, so that all those plants in Massachusetts that installed that expensive equipment are now at a profound disadvantage in the marketplace, and I am going to be able to watch my children gasping for air on bad air days because somebody gave money to a politician. And if you go to EPA's Web site today, EPA's Web site, not NRDC, you will see that that single decision alone by EPA kills and—and by this White House—kills 18,000 Americans every year at minimum and probably 20,000 a year.

Mr. HOLMSTEAD. Just a second. I can't—I don't know anything about mountain-top mining, but I know a lot about the Clean Air Act. And maybe we should have a little more polite discussion about this. The things that you are saying are fabricated. They are not true.

Mr. INSLEE. Mr. Holmstead, if you would like to write a letter——

Mr. HOLMSTEAD. I would be happy to, but I think people ought to——

Mr. INSLEE. My time has expired. Mr. Holmstead, we will be happy to put into the record a letter from you. But my time has expired, and thankfully, this administration's time has expired. And as my last comment, I look forward to changing and closing this book and opening a new one of an administration that I hope and do believe will reverse this sorry record and bring back the law and the environmental value of this country. Thank you.

The CHAIRMAN. The gentleman's time has expired.

The Chair will recognize himself again for a round of questions.

Let me go to you, Ms. Rappaport Clark. Let's go to the environment, to the Endangered Species Act. Let's lay out the state of play right now of the Endangered Species Act, what the administration is planning, and what would be the impact if they were successful, and how difficult it would be, then, for the Obama administration to reverse what they are right now still presently contemplating. Could you first lay out the danger, where are they in the regulatory system and then, what are the consequences if they are successful?

Ms. CLARK. Certainly, Mr. Chairman.

First, over the course of this administration, they have had numerous attempts, many caught, thankfully, by you and colleagues up here in an oversight capacity, to undermine the Endangered Species Act administratively when they couldn't accomplish it legislatively. This big issue, though, the significant issue underway now, though, is the change, the unilateral change to the interagency consultation process, which is the heart of the Endangered Species Act. By doing that, what they in essence have allowed are agencies to unilaterally decide whether or not their activities have effect. There is no check and balance. There is a reason for the different Federal agencies, and there is a reason that they are aligned to follow different yet complementary missions.

This interagency Section 7 reg cuts out the check and balance of the wildlife experts in either the Fish and Wildlife Service or the National Fisheries Service, the two agencies set up to protect species and habitat in this country. That is not to say that there aren't wildlife biologists in other agencies. There are, and they are quite competent, but they are often challenged by conflicting missions. The Forest Service, the BLM, they have multiple-use missions. The Fish and Wildlife Service has a wildlife conservation mission.

So by passing this sweeping change, we will lose the ability to monitor the condition of species across the landscape because you will have agencies unilaterally kind of checker boarding impacts on species themselves and there will be no ability to evaluate a species' condition across its range. That will affect all 1,400 listed species today and the many more ultimately that will deserve protection now as a result of implementation of this reg if finalized. So I expect it will result in more species being put in jeopardy than less. It provides an opportunity to cut corners.

The other issue it does is it allows the agencies to disregard certain effects, and that is how they get at global warming. In their zeal to deregulate if you will all of the protections afforded the polar bear by finally listing it a number of months ago through this 4(d) rule, they in essence have excised global warming from consideration. And that is just unprecedented. I am not here to say that this Nation's consideration of global warming and how to deal with the threats of global warming should be borne on the back of the Endangered Species Act but I think it is ridiculous to take something as scientifically proven as the impacts of global warming on species and say disregard it under the Endangered Species Act. We didn't do it with invasive species. We didn't do it with timber harvesting. We didn't do it with the registration of pesticides. How can we unilaterally overturn the Intergovernmental Panel on Climate Changes' acknowledgement to the impact of global warming on species and say, oh, by the way, ESA, leave it alone? That will occur if this regulation is passed.

The CHAIRMAN. Thank you. My time has expired.

The gentleman from Missouri, do you have any additional questions.

Mr. CLEAVER. Yes. Thank you, Mr. Chairman.

I sat in the House last night and nervously awaited a vote, the final vote on a rescue package for the automobile manufacturers. And I sat there probably longer than anybody else trying to understand how we could put ideology ahead of the best welfare of the country. And I think everybody up here, I really in my heart would at least want to believe that everybody here is trying to do the best thing.

I do get nervous when I hear that CO_2 is not a pollutant. I mean, I listened to a debate on television and I don't—I am losing hair right here, so I don't have a lot to pull out. And I wanted to pull some hair out because I couldn't believe that, in 2008, people are arguing whether CO_2 is a pollutant.

Mr. HOLMSTEAD. I don't think there is any question about that. CO_2 is a pollutant.

Mr. CLEAVER. Are you suggesting it is a nice pollutant?

Mr. HOLMSTEAD. No, no. There is a difference between—sir, air quality has always meant the air that we breathe and——

Mr. CLEAVER. Ambient air?

Mr. HOLMSTEAD. The air that we breathe and its effect on us.

Mr. CLEAVER. Ambient air?

Mr. HOLMSTEAD. Ambient air, yeah, the air that we—I am not suggesting that CO_2 is not a pollutant or that it is not a problem. That was never my point, and I am sorry if I——

Mr. CLEAVER. Maybe I misunderstood. What were you saying?

Mr. HOLMSTEAD. I was making a distinction between all of the other pollutants that have historically been regulated under the Clean Air Act in order to protect air quality, the air that we breathe. CO_2, no one is claiming that by breathing CO_2 we are doing any harm to ourselves. It is a very different kind of an issue. But it is, the Supreme Court has said that it is a pollutant under the Clean Air Act, and there is a lot of kind of detailed legal issues there. But please don't misunderstand, I think CO_2 is an issue we have to deal with, yes.

Mr. CLEAVER. I guess if someone wanted to measure where we are in this struggle—I do—I mean, I had to do a funeral of Randy Crawford Jr., his father is probably watching this. And he runs out on the lawn in his underwear, falls down dead of an asthma attack. And it is probably, next to diabetes, it is the most dangerous—it has the most dangerous impact on African Americans. It is so pervasive.

I grew up about 300 yards from what we called at the time "the cesspool" which of the city's treatment plant, and I was about another 200 yards, 500 yards from the landfill, because they historically, as you know, are placed in minority communities. And so I try to speak dispassionately in this committee, but in my spirit, I am screaming. I mean, I am screaming. I know too many people who are in cemeteries because of this. And that is not your fault. I just became very concerned over what I thought you had said. But then I look at the fact that, in 8 years, the EPA administrator has testified before Congress—do you know how many times?

Mr. HOLMSTEAD. I don't know.

Mr. CLEAVER. Two. One of the most significant agencies——

Mr. HOLMSTEAD. Sir, that can't be right because I have sat behind him in numerous hearings. I was at EPA, and I sat behind——

Mr. CLEAVER. Mr. Johnson?

Mr. HOLMSTEAD. Mr. Johnson, I don't know. But the EPA administrator——

Mr. CLEAVER. I am talking about Mr. Johnson.

Mr. HOLMSTEAD. Mr. Johnson. Okay. Yeah, I know I sat behind numerous hearings for EPA administrators.

The CHAIRMAN. Would the gentlemen yield just briefly?

Just for the record, the EPA administrator did not appear before the house Energy and Commerce Committee, which has the legislative jurisdiction over the EPA for the first 6 years of the Bush administration; that is the committee with jurisdiction over it. So just for the record, it was the most successful witness protection program in the history of the United States, Republican Congress, Republican committee, Republican agency, Republican President, the

head of the EPA, that is the environmental minister of the United States, as the rest of the world's environmental ministers are looking for leadership is not asked to testify before the committee in the United States House of Representatives with jurisdiction over that agency.

So I would say that, you know, when Daniel Patrick Moynihan—if the gentleman will continue to yield—when Daniel Patrick Moynihan used to say the way to avoid dealing with an issue is to engage in benign neglect: Don't do anything positive; don't do anything negative. However, this was really a policy of designed neglect, you know, an actual policy designed to ensure that these environmental issues would not be dealt with, and it required a Republican Congress in not calling in the EPA administrator for 6 consecutive years to testify before the House of Representatives. So I know that is a fact.

Mr. Inslee and I sit on the Energy and Commerce Committee. And for most of that time, if you put the EPA administrator on a panel of two people, the committee would have had a 50 percent chance of picking him out of a lineup of two people. So it was a very successful program. If you don't know the name of the EPA administrator—people remember Mr. Rucklehouse's name. People remember names of 30 years ago better than they know the name of the EPA administrator today. It is just a fact of the matter.

I apologize.

Mr. CLEAVER. No. Thank you, Mr. Chairman. The point I was trying to make you have already made quite eloquently, which was that the statement that this administration—we have done, quote, as well as any other country in the world with environmental issues. And I think when we start trying to meet the lowest common denominator of success, we are falling like a rock with regard to our leadership in the world. And I will just close out by asking you—I mean, if you think that with the EPA not appearing before congressional committees is a sign that we are really committed to cleaning up this environment for unborn generations?

Mr. HOLMSTEAD. I have certainly had the opportunity on a number of occasions to testify, and I appreciate your thoughtful questions. In my heart of heart, I believe that the best way to determine our commitment to the environment is to look at the state of our environment and to ask ourselves, is the air cleaner today than was 8 years ago? The answer is yes. I don't—the other measurements are harder to come by. There is no doubt that CO_2 emissions have increased over the last decade. There is no doubt about that. But air quality, as we measure the air we breathe, is significantly cleaner. In CO_2, we have a major challenge, a worldwide challenge. And as I said, we are doing—no other country, despite their rhetoric, is doing better than we are when it comes to reducing CO_2 because it is an enormous challenge.

Mr. CLEAVER. I agree.

If Mr. Kennedy was correct when he provided us with opening comments about the people who are now in positions of significance with regard to our environment who are at least opposed to most of the things that we are for and I think the majority of the American public, I mean, is it, like, you know, like putting a werewolf in charge of the silver bullet store? I mean, first of all, are all of

the people he mentioned—they are strong environmentalists, you would argue they are strong environmentalists?

Mr. HOLMSTEAD. What I can tell you, and he said some things about me that were not right. I never represented a coal-fired power plant before I——

Mr. CLEAVER. Well, let's eliminate you.

Mr. HOLMSTEAD. But I think what you have to do is look at people and what they have done, and are there people in the Obama administration who have worked for industries who will now have these positions? I think the answer is probably yes. But those are people who understand the issues, who truly want to do what is right for the country.

And I know that Mr. Kennedy has—does not support some of the people or maybe all of the people in the Bush administration. But I think you need to judge them by actually what has been accomplished under their leadership. And I think that is the same way we should judge the Obama administration. I don't think my view, we don't look at regulatory controversy or number of hearings. What we look at, is the air cleaner? Are our emissions decreasing? Is the water cleaner? Is the land better protected? Those are the kind of measures that I think we can all agree on. And I think we will have a much more productive conversation if collectively we have that in mind, because I think that is kind of an ultimate goal that we can all agree on.

Mr. CLEAVER. Thank you, Mr. Chairman.

The CHAIRMAN. The gentleman's time has expired.

The gentleman from Washington State?

Here is what I would ask then in conclusion, and that would be that each one of you give us your 2-minute, your 2-minute summary to us as to what you think we should be thinking about with these final 35 or 40 days or so of the Bush administration in terms of this midnight of regulatory attack and the perspective you think not only this committee but the country should have as this last-minute review of regulations and attempts to remove them from the books or modify them are being engaged in by the Bush administration.

We will begin with you Mr. Holmstead, reverse order of the way in which we began the hearing. Two minutes to each one of you.

Mr. HOLMSTEAD. Thank you, again, Mr. Chairman, for giving me the opportunity to be here today.

I am concerned that we are not doing a good job of having constructive conversations about all of these issues, and I just urge this committee to look at the merits of each of these issues, to put aside the political rhetoric and say, in light of our shared goals to have a cleaner environment, is this the most effective way that we can do it? I am not an ESA expert, but I do know that the ESA is not the way that Congress intended to deal with climate change, and I think it is not the way that can have any meaningful impact at all. So let's talk about climate change and how we can deal with it.

And I think if we keep the conversation over the next 45 days and over the next 4 years at that level, we can all have a much more constructive conversation about climate change, which I know is of great interest to you and other members of the committee,

about more traditional clean air issues, about clean water issues, about all of these things. My own hope is that some of the partisanship that has even been maybe in evidence here today can be put aside and that we can work constructively together on these issues.

The CHAIRMAN. Thank you, Mr. Holmstead.

Mr. Walke.

Mr. WALKE. Chairman Markey and members of the committee, first of all, thank you. I am grateful and the country should be grateful to you for holding this hearing and shining an important light on this problem that all too often goes unnoticed inside the beltway and in the broader country.

You know, I am in agreement with a Supreme Court Justice who once said that sunlight is the best disinfectant, and that is starting here.

But let's test the proposition of the administration's pride in these matters. With these deeply controversial rules that we have discussed and others that we have not, let's invite the administration to share their internal documents and professional staff and invite them to discuss what they believe is important, and let's take Mr. Holmstead at his word and discuss the content of these matters. Let's have the staff and have the materials under discussion now be made available to the public and to this committee and to the Senate to examine.

I daresay the administration would not cooperate because, you know, let's be serious here. These are deeply controversial, pro-industry matters that they are trying to push out no matter what spin the administration is trying to put on them.

So I would encourage this committee to look ahead to the transition team and the incoming administration to sit down seriously to discuss ways to go back and reverse abuses that are being committed today and will be committed up until noon on January 20th, because the American people deserve no less.

Thank you.

The CHAIRMAN. Thank you, Mr. Walke.

Ms. Rappaport Clark.

Ms. CLARK. Thank you, Mr. Chairman. Thank you, Mr. Chairman and members of the committee.

You know, given the magnitude of challenges facing President-elect Obama and this Congress on the economy and foreign policy, I hope that through this oversight and continued diligence, we won't lose sight of the pressing effects of what this administration has done, the unprecedented attacks on key rules that govern how we steward our public lands, our endangered species, our air and water. And we shouldn't play to the lowest common denominator. That is just not acceptable.

I do think, however, we need to be ever vigilant because when President-elect Obama takes office on January 20th, there will not be a light switch that just flips and all will be fine. We need to be aware and sensitive to how deep the challenges are in these Federal agencies. Beyond just the political appointees packing up and going home, there are serious budgetary and administrative processes that have now embedded in these organizations, these agencies, that will need significant and continuing oversight so that we

can once again restore our stewardship responsibilities and obligations.

I am guided by my 9-year-old son, and he deserves what I have had over my time. And the fact that our children and our grandchildren will not be able to enjoy this wonderful—these wonderful natural resources should put us all to shame, and I look forward to working with you to right these wrongs.

The CHAIRMAN. Thank you, Ms. Rappaport Clark.

And Mr. Kennedy.

Mr. KENNEDY. Thank you, Mr. Chairman and members of the committee.

I want to respond to one of the things that Mr. Holmstead said because I think it is really important for this committee and for Congress to understand at every level, which is that criticizing the administration is not partisanship. I have been disciplined over 25 years as an environmental advocate about being nonpartisan and bipartisan in my approach to these issues. I don't think there is any such thing as Republican children or Democratic children. I think the worst thing that can happen to the environment is if it becomes the province of a single political party.

But it is hard to talk about the environment in any context honestly today without speaking about this administration and about what it has done to our environment over the past 8 years. And if we don't understand the mechanisms by which this happened and if we don't discuss those honestly—when we discuss them, it is not an attack on Republicans. It is just we have a responsibility to tell the truth, and if we see somebody doing something that is wicked, we need to talk about it, whether Republican or Democrat. I wrote a book about this administration. I would have written the exact same book if they were Democrats. It is a critical book, but it is not partisan. My father was absolutely against partisanship because it is dishonest ultimately.

But I want to give you one example of what this administration has done. You know, Mr. Holmstead just said air quality has improved. He has a very narrowly and carefully constructed world view in which he is able to make these intricate and very narrow arguments. But in the real world, we are experiencing something very different which is a decline in quality of life for all of the people of our country. About 8 years ago, the EPA announced that in 19 States it is now unsafe to eat any fresh water fish caught in the State because of mercury contamination. The mercury is coming from those coal-burning power plants. In 49 States, at least some of the fish are unsafe to eat. In fact, the only State where all of the fish are safe to eat is Dick Cheney's home state of Wyoming where the Republican-controlled legislature has refused to appropriate the money to test the fish. We know a lot about mercury now. According to CDC, the mercury—one out of every six American women now has so much mercury in her womb that her children are at risk for a grim inventory of diseases, autism, blindness, mental retardation, heart, liver and kidney disease. I have so much mercury in my body just from eating fish, two and a half times what EPA has considered safe. I was told by Dr. David Carpenter, who is the principal authority on mercury toxicity in this country, that a woman with my levels of mercury in her blood would have

children with cognitive impairment, with permanent brain neurological injury. Today, according to CDC, there are 640,000 children born in this country every year who have been exposed to dangerous levels of mercury in their mother's womb.

The Clinton administration recognizing the gravity of this national health epidemic reclassified mercury as a hazardous pollutant under the Clean Air Act. That triggered a requirement that all of those plants remove 90 percent of the mercury within 3 and a half years. It would have cost them less than 1 percent of plant revenues, and we know that it works. When they stop emitting the mercury, it disappears within 5 years mostly from the fish and waterways downwind of those plants. But this is an industry that received—that donated $156 million to President Bush and his party since the 2000 election cycle, and they got—their reward was leaders like Mr. Holmstead here who came in and eviscerated that rule and instead replaced a rule that was written by utility industry lobbyists, his own law firm, Latham & Watkins, which ended essentially the regulation, that tight regulation of mercury and allows these utilities to continue to discharge mercury at huge rates for endless periods of time. That is the cost of doing this. And this is why one of the important things, what Mr. Walke said, is to shine light on this situation. It is not partisanship. It is just honesty, and the American public is entitled to that.

The CHAIRMAN. Mr. Holmstead, I am going to give you an opportunity if you would like to say something.

Mr. HOLMSTEAD. Yeah. I certainly agree that we need to be honest about all of these issues, and mercury is a much more complicated issue. And I won't try to address that.

I just would again thank you for the chance to at least share the opportunity to be with others, and I am hoping that Mr. Kennedy and I can maybe talk a little more civilly about these issues, and we could maybe come to a better understanding of what really has and hasn't happened, because I certainly respect his expertise in many areas. But on some of these Clean Air Act issues, I think we just need to sit down and talk them through.

But thank you for giving me the chance to say something.

The CHAIRMAN. Thank you, Mr. Holmstead, very much.

We thank each of you for appearing with us here today. There are 40 days left to go until noon on January 20th. We are not going to turn out the lights in this hearing room. The staff is not going away. What we are going to do on a daily basis for the next 40 days is monitor everything that the Department of Interior is doing, everything that OMB is doing, everything that the Department of Energy is doing, everything that the EPA is doing. We are going to be on their case. They should understand that if they make a decision or they move towards making a decision, they will get a response from this committee. We are going to be there every single minute so that the American people understand what is being done by the Bush administration in these final days that could have a negative impact upon the environment. We have no intention of resting.

If they plan on New Year's Eve to issue a new regulation thinking everyone will be preoccupied, we will be working. If they intend on doing it on Christmas Eve and delivering lumps of coal to the

American people in new environmental regulation, we will be working on this committee. They should just understand we are not going to take off. It is unfortunate, but it has to be the way in which we expect the Bush administration to act because that is the way in which they have acted for the last 8 years.

So we plan on assuming that regulations will be promulgated at the point in a day where they think the least amount of media attention will be paid to it. I hope that is not the case. We are being told it won't be. But I think just the attention that we are paying to these issues resulted in a decision yesterday to withdraw a couple of these poorly thought-out new regulatory actions by the Bush administration. There are many others right now being considered covertly inside of this administration as going-away presents to industries. We don't intend on allowing it to happen without the full light of this committee's attention being drawn to it. We thank each of you for your testimony here today. This hearing is adjourned.

[Whereupon, at 12:00 p.m., the committee was adjourned.]

Witness Follow-up Questions – Jamie Rappaport Clark
Select Committee on Energy Independence and Global Warming
December 11, 2008

1. *What regulatory mechanisms would you implement to protect the polar bear? How would these regulations affect the development of oil exploration?*

The most important actions to immediately reduce the impacts of climate change on polar bears and other species are ones that decrease stresses to their continued existence from other human causes. While loss of sea ice habitat attributed to climate change and industrial soot is the primary reason for the predicted decline in the size and health of the total polar bear population by more than 30 percent within the next 35 to 50 years, polar bear populations suffer from adverse effects due to the stresses of habitat lost to oil and gas development, over-hunting, and contamination from polychlorinated biphenyls ("PCBs") and other pollutants. Persistent organic pollutants, which damage the polar bear's reproductive and immune systems, are particularly problematic for polar bears because wind patterns deposit these substances in the Arctic where bioaccumulation magnifies concentrations at each level of the food chain.

Our approach to increased protection of the polar bear should be, first, to implement research programs on all major population groups that document the level of noise, visual distraction, and other disturbances attributed to oil and gas development that interfere with the movement, distribution, foraging, and other life history needs of polar bears and their sea ice dependant seal prey. Second, avoid siting any oil and gas development structures in high- or other significant-use areas used by polar bears. Third, alleviate the negative effects by adjusting the timing of the most intrusive energy development activities. Fourth, adjust and modify any energy development as new information about the polar bear's requirements is acquired. Fifth, focus the nation's attention and efforts on alternative energy sources that do not cause more environmental harm.

The regulatory mechanisms of the Endangered Species Act provide an effective means of reducing impacts to polar bears from oil and gas development and other human-caused stresses and increasing the likelihood that polar bears will survive the effects of climate change as we work to reduce greenhouse gas pollution. One of the great strengths of the Endangered Species Act has been that its Section 7 federal interagency consultation process has helped bring to bear the best available scientific information to identify alternatives that would allow actions, such as oil and gas development, to proceed without jeopardizing the continued existence of threatened and endangered species and without destroying or adversely modifying habitat critical to these imperiled species. The Endangered Species Act also establishes procedures to allow oil and gas development activities that could incidentally harm individual polar bears through issuance of "incidental take statements" during consultation on federal actions or through the Secretary's issuance of a Section 10 permit.

Finally, while we acknowledge that the Endangered Species Act may not be the best tool to regulate greenhouse gas pollution and prevent climate change impacts to species and habitats, we should not foreclose consideration under the Act of actions that contribute to climate change impacts on listed species and critical habitats. Over the last 35 years, the mandates of the Endangered Species Act have often propelled the law to the forefront in the conservation of imperiled species because we

failed to exercise the discretion available under other federal and state laws to protect these species and habitats.

2. *Oil shale is an 800 billion barrel recoverable resource.....over 100 yrs of US consumption and 3 times as much oil as Saudi Arabia has. If we can produce it the world energy outlook would change. Isn't it true the these regulations only allow the leasing, subject to current environmental laws and if oil shale production cannot be done in a legal manner it wont' be?*

Commercial oil shale and tar sands development relies on unproven, environmentally destructive, and economically dubious technologies that are more than a decade away from commercial readiness. To proceed with a commercial oil shale leasing program is rash and would waste agency resources and taxpayer dollars on an industry whose technologies have not yet been fully developed and whose environmental, economic and societal costs have not yet been fully assessed.

With regard to the statement that "[o]il shale is an 800 billion barrel recoverable resource", it is important to note that, while it has been asserted that billions of barrels of oil shale are "recoverable", not a single barrel is *economically* recoverable at present or will be economically recoverable in the near future, and not a single barrel has ever been extracted and refined without substantial subsidies from the Federal government. Numerous technological, economic, environmental, energy and social challenges and uncertainties continue to hinder the actual recoverability of this resource.

It is these challenges and uncertainties that make a commercial leasing program at this time premature and speculative. The assertion that a commercial leasing program should be permitted to move forward because activities authorized pursuant to commercial oil shale leasing regulations would be subject to current environmental laws ignores the fact that the industry is still decades away from establishing the economic viability, technical efficiency, and environmental performance of the technologies that would make oil shale development economically viable and environmentally sustainable. Commercial leasing regulations that are uninformed put local communities at risk and could cost taxpayers billions of dollars. Critical questions must be answered before a commercial leasing program, with meaningful sideboards, can proceed.

At present, many of the technologies necessary to develop oil shale resources in an economically viable and environmentally sustainable way are still in the research and development phase. Without this specific information, it will be impossible for the U.S. Bureau of Land Management (BLM) to effectively and efficiently assess the potential impacts to our public lands, wildlife, air and water quality and water use, and our quality of life in supporting lease decisions.

Once sufficient information is available, a comprehensive analysis of the impacts of full-scale commercial oil shale leasing poses must be performed. Even on the limited information currently available to the BLM, it is apparent that oil shale leasing will entail potentially significant risks to the environment, which must be fully assessed before a commercial leasing program goes into effect. These large-scale impacts are issues that cannot be adequately assessed during lease- or project-level analysis under the National Environmental Policy Act and other environmental laws.

- ***Commercial development requires 5 barrels of water for every barrel of oil produced—far more water than the region has available.***

- ***Oil shale and tar sands development moves the country in the wrong direction in addressing climate change.*** All extraction technologies currently under development would require massive amounts of new energy development, mostly from new coal plants that would significantly increase air pollution and the release of climate change inducing greenhouse gases. The coal plants needed to produce power for oil sands production would emit an estimated 105 million tons of carbon dioxide every year—80% more than was released by all existing electric utility generating units in Colorado, Utah, and Wyoming in 2005. These inputs make oil shale and tar sands far more carbon intensive than conventional gasoline.
- ***Commercial development will negatively affect most of the protected species that inhabit production zones.*** Oil shale development projects will adversely affect most of the threatened, endangered, and sensitive species that occur in the counties where development could occur. As just two examples, BLM has estimated that large-scale oil shale development would result in the permanent loss of 35% of Colorado River cutthroat trout fisheries, and would sever migration corridors and destroy winter range for big game species, including Colorado's largest elk herd.
- ***Large-scale development would irreversibly disturb land use throughout the region.*** Extraction of oil shale requires companies to scrape clean the majority of each project site, displacing all other uses including recreation, while the tangled web of infrastructure—hundreds of miles of roads, pipelines, and transmission lines—needed to keep each project alive, will fragment wildlife habitat.

The BLM readily acknowledges that it has no way to assess these impacts. The BLM stated in the proposed rule that there is ***"no reasonable way to generate meaningful scenarios to quantify the potential impacts for an industry that does not exist or technologies that have not been deployed."*** The leasing regulations determine policies that will directly and significantly impact the physical, social, and economic environment. If leasing regulations do not also provide methods to assess these impacts from commercial oil shale development, which is impossible at this stage, it will be impossible for the agency to do so during lease- and project-level analysis.

Furthermore, because the oil shale industry is only in the research and development phase, meaningful ways to determine the fair market value of the resource are non-existent. In April 2007 Dr. Jim Bartis of the RAND Corporation, a leading oil shale expert, testified: "The government lacks important information about the costs and risks of development. It thus runs the risk of either being too lenient about lease bonus and royalty payments, allowing firms to have access without adequate compensation to the public, or too zealous, causing a loss of private-sector interest in oil shale development, especially for initial commercial plants."

For regulations to ensure a fair rate of return to the federal taxpayer and guarantee that development is environmentally, socially and economically sustainable, it is imperative that regulations be tied to known extraction technologies and impacts, which cannot be done now. Promulgation of the final commercial oil shale leasing regulations by the BLM was premature, as they are based on nothing more than pure speculation, and thereby fail to address environmental, economic, and social costs to wildlife, public lands and local communities.

3. *Leaders of Canada's Arctic Inuit people denounced US environmentalists on Monday for pushing Washington to declare the polar bear a threatened species, saying the move was unnecessary and would hurt the local economy. I*

see Native Americans as conservationists and responsible stewards of the environment. How do you respond to their concerns?

Canada's Inuit people are legitimately concerned about the future of their culture and communities. Their culture and subsistence way of life are under increasing pressure from a variety of threats, including harmful influences from non-native society. Many of these harmful influences are exacerbated by climate change, resulting in increased intrusion into their communities of non-native social pressures as the Arctic becomes more accessible from melting sea ice.

While Canada's Inuit people do rely on sport hunting of polar bears by primarily American hunters for income, the United States should not abrogate its sovereign responsibilities to protect threatened and endangered species under the Endangered Species Act in order to accommodate the economic concerns of stakeholders in another country. It is the responsibility of the Canadian government to provide sustainable economic opportunities for its citizens. Furthermore, if polar bears are allowed to disappear, no one, including Canada's Inuit people, will benefit economically from their extinction.

The polar bear is a species threatened with extinction. Absent decisive action to address climate change and to protect this species under the Endangered Species Act, populations of polar bears may vanish forever within the lifetimes of Inuit and other children born this year. Consequently, with or without the Endangered Species Act, the economies of the Inuit peoples cannot be sustained by the continued sale of high-priced trophy licenses to wealthy individuals who wish to shoot imperiled wildlife. With or without the Endangered Species Act, other means will have to be found to sustain the economies of the Inuit peoples. One aspect of this solution in some Inuit villages may be to employ Inuit hunters, at rates comparable to those for trophy hunting, to assist in monitoring and researching polar bears. Tracking and hunting skills could still be used as they are today, but not to kill bears.