EPA'S NEW OZONE STANDARDS

HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

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EPA'S NEW OZONE STANDARDS

TUESDAY, MAY 20, 2008

HOUSE OF REPRESENTATIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The committee met, pursuant to notice, at 1:46 p.m., in room 2154, Rayburn House Office Building, Hon. Henry A. Waxman (chairman of the committee) presiding.

Present: Representatives Waxman, Cummings, Kucinich, Tierney, Watson, Higgins, Hodes, Sarbanes, Welch, Platts, Cannon, Issa, Bilbray, and Sali.

Staff present: Phil Barnett, staff director and chief counsel; Kristin Amerling, general counsel; Karen Lightfoot, communications director and senior policy advisor; Greg Dotson, chief environmental counselor; John Williams, deputy chief investigative counsel; Alexander Teitz, senior environmental counsel; Jeff Baran and Erik Jones, counsels; Jen Berenholz, deputy clerk; Matt Siegler, special assistant; Caren Auchman, press assistant; Leneal Scott, information systems manager; Rob Cobbs, William Ragland, and Miriam Edelman, staff assistants; Larry Halloran, minority staff director: Jennifer Safavian, minority chief counsel for oversight and investigations; Keith Ausbrook, minority general counsel; A. Brooke Bennett, Ashley Callen, and Kristina Husar, minority counsels; John Cuaderes and Larry Brady, minority senior investigators and policy advisors; Patrick Lyden, minority parliamentarian and member services coordinator; Benjamin Chance, minority professional staff member; Ali Ahmad, minority deputy press secretary; and John Ohly, minority staff assistant.

Chairman WAXMAN. The committee will please come to order. Today's hearing will focus on several recent decisions that are of fundamental importance to our health and the environment.

I have worked on health and environmental issues for decades, and I know that regulatory decisions in these areas can be very complex. But the law is clear: While all of us may have views as to what we may want the outcome to be in any rulemaking, we don't necessarily get the outcome we want. We are not entitled to specific results, but what we are all entitled to is a fair process that is based on the science, the facts, and the law.

That impartial and rigorous system is one of the critical pillars of our Government.

Unfortunately, President Bush seems to believe these rules don't apply to him. On key issues, this administration has pushed ahead with its agenda despite the evidence and the law. We know that is what happened on the decisions to launch the Iraq war; it hap-

pened again on decisions authorizing torture; and it happened when the White House fired independent and nonpartisan Justice Department officials.

For months this committee has been investigating recent Environmental Protection Agency decisions relating to both global warming and the new air quality standards, and after reviewing nearly 60,000 pages of internal documents and interviewing officials involved in the rulemakings, we have found evidence that the White House often ignored the facts and the law.

The first rulemaking was a response to California's petition to regulate greenhouse gas emissions from cars and light-duty trucks. Under the Clean Air Act, EPA must approve California's request unless it finds the proposal is arbitrary, isn't technically feasible, or isn't justified by compelling and extraordinary conditions.

The record is overwhelming that EPA's experts and career staff all supported granting the California petition. In one internal document, EPA's own lawyer said: "We don't believe that there are any good arguments against granting the waiver. All of the arguments are likely to lose in court if we are sued."

Administrator Johnson apparently listened to his own staff people. The committee has learned that before communicating with the White House, the Administrator supported granting a partial approval to California's request, but then the White House intervened. In December, after secret communications with White House officials, Administrator Johnson ignored the law and the evidence and denied California's petition.

The second EPA rulemaking revised the air quality standards for ozone air pollution to protect both human health and the environment.

In this case, EPA's expert advisory committee, the Clean Air Scientific Advisory Committee, unanimously recommended a new standard for protecting the environment. After considering all of the alternatives, Administrator Johnson agreed with this new approach, which is called a seasonal standard. In a submission to the White House, he described the case for the new standard as "compelling," and he said that there was no evidence from the perspective of biological impact supporting the alternative standard favored by industry.

But once again the White House intervened. On the evening before the final rule was released, President Bush rejected the unanimous recommendation of both EPA's scientific experts, lawyers, and Administrator Johnson and instructed EPA to abandon the new standard.

The committee's investigation reveals that EPA officials were astounded by the President's decision and said it wasn't supported by either the science or the law. One official wrote, "I have been working on National Ambient Air Quality Standards for over 30 years and have yet to see anything like this."

Another wrote, "We could be in a position of having to fend off contempt proceedings. The obligation to promulgate a rule, arguably, means to promulgate one that is nominally defensible."

And an EPA Associate Director observed, "This looks like pure politics."

The same thing happened in a third critical rulemaking. Last April the Supreme Court directed EPA to determine whether CO_2 emissions endanger health and the environment and must be regulated under the Clean Air Act. This is a Supreme Court decision, and under Administrator Johnson EPA assembled a team of over 60 career officials to work on this hugely important regulation. The staff determined that CO_2 did endanger the environment and drafted proposed rules to reduce tailpipe emissions.

To his credit, Administrator Johnson listened to his staff and sent an official "endangerment finding" to the White House. That endangerment finding means that the regulation should go forward. Jason Burnett, the Associate Deputy Administrator, told the committee that he personally transmitted the Administrator's determination to the White House in December.

Yet once again the White House ignored the law, the science, and Administrator Johnson. Two months ago EPA was forced to announce that the agency would go back to square one and start the rulemaking process all over again.

In each of these rulemakings, the pattern is the same: The President apparently insisted on his judgment and overrode the unanimous recommendations of EPA's scientific and legal experts.

Now, our investigation has not been able to find any evidence that the President based his decisions on the science, the record, or the law. Indeed, there is virtually no credible record of any kind in support of the decisions.

I recognize and support the broad powers our Constitution vests with the President of the United States. But the President does not have absolute power, and he is not above the law. The President may have a personal opinion about the new ozone standards, California's regulation standards, and regulating CO_2, but he is not allowed to elevate his views above the requirements of the law.

This is an important hearing, and I look forward to learning more from our witnesses.

[The prepared statement of Chairman Henry A. Waxman follows:]

Opening Statement of Rep. Henry A. Waxman
Chairman, Committee on Oversight and Government Reform
Hearing on EPA's New Ozone Standards
May 20, 2008

Good afternoon. Today's hearing will focus on several recent decisions that are of fundamental importance to our health and the environment.

I have worked on health and environmental issues for decades. I know that regulatory decisions in these areas can be extraordinarily complex. But the law is clear: while all of us are free to have strong views on these decisions, none of us are entitled to specific results. We are only entitled to a fair process that is based on the science, the facts, and the law.

That impartial and rigorous system is one of the critical pillars of our government.

Unfortunately, President Bush seems to believe these rules don't apply to him. On key issues, this Administration has pushed ahead with its agenda despite the evidence and the law. We know that's what happened on the decision to launch the Iraq War. It happened again on decisions authorizing torture. And it happened when the White House fired independent and nonpartisan Justice Department officials.

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are any good arguments against granting the waiver. All of the arguments ... are likely to lose in court if we are sued."

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Our investigation has not been able to find any evidence that the President based his decisions on the science, the record, or the law. Indeed, there's virtually no credible record of any kind in support of the decisions.

I recognize and support the broad powers our Constitution vests with the President of the United States. But the President does not have absolute power and he is not above the law. The President may have a personal opinion about the new ozone standards, California's motor vehicle standards, and regulating CO_2, but he is not allowed to elevate his view above the requirements of the law.

This is an important hearing and I look forward to learning more from our witnesses.

Chairman WAXMAN. Before we proceed with hearing the witnesses, I want to recognize Mr. Issa, who is sitting in for Tom Davis, the ranking member of the committee, with an opening statement.

Mr. ISSA. Thank you, Mr. Chairman, and thank you for expressing the majority position extremely well. As we often say here in Washington, we are all entitled to our opinions, just not our facts.

The appropriate role of the President was established in the Constitution and has been revisited on numerous occasions by all three branches of Government. Presidents of both parties have asserted the right to oversee and direct the actions and decisions of regulatory agencies. President Clinton offered a prime example of an aggressive Executive who was constantly involved in directing regulatory actions. Indeed, the Executive order that gave rise to today's hearing was issued by President Clinton in 1997.

I say this to remind the chairman that the goal of this hearing is to investigate whether or not the President provided his opinions to EPA Administrator Stephen Johnson. On the issue of National Ambient Air Quality Standards [NAAQS], for ozone, it is pretty open and shut. He did.

The President makes no pretense that he did not, as might have been implied by the other opening statement. We knew that on March 12, 2008, a memo sent from Susan Dudley informing Administrator Johnson of the President's judgment on the secondary NAAQS standard. That memorandum is part of EPA's public docket on the ruling and has been available to staff since the initiation of the ozone investigation. In fact, the smoking gun is on the Web site.

Moreover, the President's involvement in the ozone NAAQS discussion does not reflect any unusual or improper action. His involvement was pursuant to a process established by the Clinton Executive order. That order openly declares the President's role in major rulemakings, namely, that the President will resolve disagreements between an agency and the Office of Management and Budgets Office of Information Regulatory Affairs [OIRA].

Accordingly, according to the record, the President himself accepted OIRA's conclusions; therefore, the President carried out his constitutional responsibility consistent with the precedent an applicable Executive order and the Clean Air Act.

I would also like to remind members of this committee that a difference over policy outcomes does not necessarily make a policy outcome fatally flawed, meaning that in fact we can disagree but at the end of the day law is discretionary in this case, and when followed, as it was by the President or any President, he may choose among a variety of policy options.

It should not be surprising that the policy opinion chosen by a President of one party differs from the policy opinion that a Member of Congress from another party would have chosen, nor should it be a reason to cast blameless aspersions or discredit the deliberative process used to arrive at that decision. From the beginning EPA had proposed the option of either setting a secondary standard equal to the primary standard or alternately adopting a more biologically relevant standard, the so-called W–126 standard of 21 parts per million per hour.

Given the legitimate role of the President in this decision and the legitimate choices before him, it appears this kind of oversight simply seeks to bully the President into making a decision supported by some Members of Congress. This is raw politics. The majority supposes that the unwelcome decision is an unlawful one. The President concluded within his discretion, the ozone standard should be set at 0.075 because of the uncertainty of any benefit at a lower level.

Democrats can have a different judgment about the uncertainties and their benefits, but that does not make the President's decision improper in any way. If some Democrats want a stricter ozone standard, they could pass legislation to impose one. They have not done this and do not appear to be ready to do so, at least in part because some Members of their party disagree.

Finally, with respect to the proper role of the Clean Air Scientific Advisory Board, in plain language the Clean Air Act expressly states that CASAC is advisory, not a standard-setting panel and not a policymaking panel. Under no circumstances does the Clean Air Act require the Administrator to simply rubber-stamp CASAC's findings. The Advisory Committee is directed to review the science and make recommendations to the Administrator.

By definition, "recommendations" can be rejected. With respect to the ozone NAAQS standard in particular, there is no bright line in the science today regardless of those who would like to seek one that shows that above-level ozone is unhealthy and below the level it is somehow of no danger.

Accordingly, setting the NAAQS level for ozone is necessarily a policy judgment entrusted to the Administrator and claiming that science dictates a certain outcome is contrary to both science and law. It is worth noting the EPA has spent over 3,200 staff hours in producing over 65,000 pages of documents in their effort to comply with the committee's demands.

OIRA has been similarly responsive, turning over somewhere between 6,800 and 7,900 document pages, and participated in half a dozen in-person meetings in conference calls in support of accommodating this committee's needs. Throughout the process the majority has praised the EPA in their efforts to accommodate the committee's demanding production schedule and acknowledge the logistical difficulties involved in such a voluminous document production.

Finally, I understand the committee has recently released a memorandum summarizing the majority's findings with respect to both ozone investigation as well as the California waiver investigation. The minority has also drafted a separate memorandum based on our own independent evaluation of the facts. I ask that the minority documents be inserted into the record at this time.

Chairman WAXMAN. Without objection, all of the memoranda provided by the majority and minority staff will be made part of the record.

[The information referred to follows:]

MEMORANDUM

May 16, 2008

To: Members of the Committee on Oversight and Government Reform

Fr: Committee on Oversight and Government Reform, Majority Staff

Re: Hearing on EPA's New Ozone Standards

This memorandum provides additional information about the Committee's hearing at 1:00 p.m. on Tuesday, May 20, 2008, regarding EPA's new ozone standards. Because the Committee has several on-going investigations involving two of the witnesses – Stephen Johnson, the Administrator of EPA, and Susan Dudley, the Administrator of the Office of Information and Regulatory Affairs at OMB – questions have been raised about the scope of the hearing.

The primary focus of the hearing will be the revised air quality standards for ozone issued by EPA on March 12, 2008. In particular, questions have been raised about why the ozone standards were changed during the review process at the White House and whether political considerations were inappropriately injected into the decision making.

Other matters that the Committee is investigating appear to raise similar issues. These matters include the rejection of California's efforts to reduce CO2 emissions from motor vehicles, the rejection of EPA's proposed greenhouse gas rules, and the delay in the issuance of regulations to protect right whales. Lines of questions that seek to assess similarities or differences among these issues will be permitted by the Chair at the hearing.

I. EPA's Ozone Standards

A memorandum was circulated to Committee members about EPA's ozone standards on April 21 and May 5. A copy of this memorandum is enclosed with this memorandum for the convenience of members.

Since the May 5 memorandum, the Committee issued a subpoena for the production of withheld documents and took the deposition of Jason Burnett, an official the EPA Administrator's office. As a result of the subpoena, the Committee received some additional

documents. The majority staff will provide a supplemental memorandum to members on these developments and the status of the investigation before the hearing.

II. California's Efforts to Regulate Vehicle CO2 Emissions

On December 19, 2007, the EPA Administrator rejected California's petition to regulate emissions of CO2 from motor vehicles. Chairman Waxman wrote the Administrator about this issue on December 20, 2007. A copy of this letter is enclosed with this memorandum.

Since the Chairman's December 20, 2007, letter, the Committee has received documents from EPA and conducted interviews and one deposition of EPA officials. The majority staff is preparing a memorandum for members on the California vehicle standards petition.

III. Greenhouse Gas Rulemaking

On March 12, 2008, Chairman Waxman wrote a letter to the EPA Administrator about evidence that EPA's efforts to regulate greenhouse gas emissions from motor vehicles were stymied by the White House. This ten-page letter provides a good summary of the evidence that the Committee has received on this issue and is enclosed with this memorandum.

IV. Right Whales

On April 30, 2008, Chairman Waxman wrote Ms. Dudley about evidence that a regulation to protect the endangered right whale was being delayed by objections from White House officials, including officials in the Office of the Vice President. A copy of this letter is also enclosed.

Staff contacts: Greg Dotson, Jeff Baran, or Erik Jones at 225-4407

MEMORANDUM

May 19, 2008

To: Members of the Committee on Oversight and Government Reform

Fr: Committee on Oversight and Government Reform, Majority Staff

Re: EPA's Denial of the California Waiver

For the past five months, the Oversight Committee has been investigating the decision by the Environmental Protection Agency to reject California's petition to regulate greenhouse gas emissions from cars and trucks. During the course of the investigation, the Committee obtained over 27,000 pages of documents from the Environmental Protection Agency (EPA) and deposed or interviewed eight key officials. This memorandum summarizes some of the significant evidence the Committee has received.

The record before the Committee shows: (1) the career staff at EPA unanimously supported granting California's petition; (2) Stephen Johnson, the Administrator of EPA, also supported granting California's petition at least in part; and (3) Administrator Johnson reversed his position after communications with officials in the White House.

The Position of EPA Staff. Internal EPA documents and transcribed interviews with EPA staff show that the agency career staff all supported granting the California petition. This recommendation and the reasons for it were communicated to the Administrator in several meetings. A September 21, 2007, meeting was significant. As one EPA staffer described it, "Administrator Johnson essentially polled the room on what people's final opinions were about granting or not granting a waiver." According to five EPA staff who were in the meeting, not a single staffer argued that the California waiver should be denied.

A briefing prepared by the lead staff lawyer for EPA's General Counsel stated: "After review of the docket and precedent, we don't believe there are any good arguments against granting the waiver. All of the arguments ... are likely to lose in court if we are sued." Similarly, a briefing from the Office of Transportation and Air Quality and the Office of General Counsel stated:

> OTAQ and OGC are reviewing these options from a legal, technical, and waiver precedent perspective and other options may fall in or out of our review. The clearest and most defensible option is to grant the waiver. The other options have high to very high vulnerability to legal challenge.

The EPA staff interviewed by the Committee were unable to identify any agency documents that argued in favor of denial prior to December 19, 2007, the day California's petition was denied.

The Position of Administrator Johnson. EPA Associate Deputy Administrator Jason Burnett told the Committee that Administrator Johnson supported granting California's petition for a waiver of preemption under the Clean Air Act. In a deposition, he testified that Administrator Johnson "was very interested in a full grant of the waiver" in August and September 2007 and then thought that a partial grant of the waiver "was the best course of action." Mr. Burnett explained: "the Administrator was interested in initially a full grant, and became interested in a partial grant, asked for me and others to explore ways of making a partial grant work."

According to Mr. Burnett's deposition testimony, Administrator Johnson's preference for a full or partial grant of the waiver did not change until after he communicated with the White House. When asked by Committee staff "whether the Administrator communicated with the White House in between his preference to do a partial grant and the ultimate decision" to deny the waiver, Mr. Burnett responded: "I believe the answer is yes." When asked "after his communications with the White House, did he still support granting the waiver in part," Mr. Burnett answered: "He ultimately decided to deny the waiver." Mr. Burnett also affirmed that there was "White House input into the rationale in the December 19th letter" announcing the denial of the waiver and in the formal decision document issued in March 2008.

The Position of the White House. The record before the Committee suggests that the White House played a pivotal role in the decision to reject the California petition, but it does not explain the basis for the White House intervention. During his deposition, Mr. Burnett was asked to identify the White House officials who spoke with Administrator Johnson and to describe the substance of their communications with Administrator Johnson. Mr. Burnett informed the Committee that he had been directed not to answer any questions about the involvement of the White House in the decision to reject California's petition.

The President has an obligation under the Constitution to take care that the laws of the United States are faithfully executed. In this case, the applicable law is the Clean Air Act, which requires that California's petition to regulate greenhouse gas emissions from motor vehicles be decided on the merits based on specific statutory criteria. It would be a serious breach if the President or other White House officials directed Administrator Johnson to ignore the record before the agency and deny California's petition for political or other inappropriate reasons. Further investigation will be required to assess the legality of the White House role in the rejection of the California motor vehicle standards.

I. INTRODUCTION

A. California's Waiver Request

The Clean Air Act authorizes two sets of standards to control tailpipe pollution from motor vehicles: (1) federal standards and (2) state standards established by California, which can also be adopted by other states. Section 209(b) of the Clean Air Act requires EPA to waive federal preemption for California motor vehicle standards if the agency determines that California's standards in the aggregate will be at least as protective of public health and welfare as federal standards. EPA may reject a waiver request only if the Administrator finds: (1) California's determination regarding protectiveness is "arbitrary and capricious;" (2) California does not need state standards "to meet compelling and extraordinary conditions;" or (3) California's standards are not consistent with statutory requirements for adequate lead-time and technological feasibility.[1]

The special authority for California to set its own motor vehicle standards was part of the Air Quality Act of 1967 and was retained when Congress adopted the original 1970 Clean Air Act.[2] This authority was expanded in the 1977 amendments, with Congress recognizing that "the underlying intent" of section 209 is "to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare."[3]

In internal documents, EPA has recognized that the language of section 209, its legislative history, court decisions, and consistent EPA interpretation of the provision over several decades all indicate that California has the "broadest possible discretion in developing [its] program, and EPA has only narrow and circumscribed discretion to deny a waiver to California."[4] According to these internal documents, the "[b]urden of proof is on parties opposing a waiver," and "EPA traditionally looks broadly at whether [California] has conditions such that it still needs its own motor vehicle emission program. [EPA has] not examined the need and conditions for specific standards or specific air pollution problem[s]."[5]

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[1] Clean Air Act §209(b).

[2] See Motor & Equipment Mfrs. Ass'n v. EPA ("MEMA I"), 627 F.2d 1095, 1108-1111 (D.C. Cir. 1979); Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. New York State Dept. of Environmental Conservation, 17 F.3d 521, 525 (2nd Cir. 1994).

[3] H.R. Rep. No. 294, 95th Cong., 1st Sess. 301-02 (1977).

[4] Environmental Protection Agency, *California Request for a Waiver of Preemption of GHG Standards*, at 5 (Apr. 30, 2007) (briefing slides for Administrator Johnson). *See also Motor & Equipment Mfrs. Ass'n v. EPA ("MEMA I")*, 627 F.2d 1095, 1108-1111 (D.C. Cir. 1979).

[5] Environmental Protection Agency, *California Request for a Waiver of Preemption of GHG Standards*, at 7, 10 (Apr. 30, 2007) (briefing slides for Administrator Johnson).

In September 2004, California amended its existing motor vehicle regulations to include standards requiring cars and light-duty trucks to limit emissions of greenhouse gases.[6] The standards begin with the 2009 model year and phase-in gradually over eight years.[7] By the 2016 model year, they would cut global warming pollution from new vehicles by almost 30%.[8] Thirteen other states — Arizona, Connecticut, Maine, Maryland, Massachusetts, New Mexico, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington — have already adopted the California standards. Together, these 14 states' consumers buy over 40% of the new vehicles sold nationwide each year.[9]

On December 21, 2005, California requested that EPA grant a waiver of preemption under section 209(b) for the California greenhouse gas emissions standards.[10] EPA took no public action on the waiver request until the Supreme Court ruled in *Massachusetts v. EPA* on April 2, 2007, that greenhouse gases are air pollutants under the Clean Air Act.[11] EPA then published a notice on April 30, 2007, announcing a public hearing and a comment period on the waiver request.[12] The public comment period closed on June 15, 2007.[13]

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[6] California Environmental Protection Agency Air Resources Board, Final Regulation Order — Amendments to Sections 1900 and 1961 and Adoption of New Sections 1961.1, Title 13, California Code of Regulations as Approved by OAL, California Exhaust Emission Standards and Test Procedures for 2001 and Subsequent Model Passenger Cars, Light Trucks and Medium-Duty Vehicles as Approved by OAL (Sept. 24, 2004 hearing date) (online at www.arb.ca.gov/regact/grnhsgas/grnhsgas.htm).

[7] California Environmental Protection Agency Air Resources Board, Request for a Clean Air Act Section 209(b) Waiver of Preemption for California's Adopted and Amended New Motor Vehicle Regulations and Incorporated Test Procedures to Control Greenhouse Gas Emissions: Support Document, at 6 (Dec. 21, 2005).

[8] California Environmental Protection Agency Air Resources Board, *ARB Approves Greenhouse Gas Rule* (Sept. 24, 2004) (press release) (online at www.arb.ca.gov/newsrel/nr092404.htm).

[9] Union of Concerned Scientists, *Automakers v. the People* (online at www.ucsusa.org/clean_vehicles/avp/) (accessed May 8, 2008).

[10] Letter from Catherine Witherspoon, Executive Director, California Air Resources Board, to Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency, Re: Regulations to Control Greenhouse Gas Emissions From Motor Vehicles; Request for Waiver of Preemption Under Clean Air Act Section 209(b) (Dec. 21, 2005).

[11] *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007).

[12] Environmental Protection Agency, California State Motor Vehicle Pollution Control Standards; Request for Waiver of Federal Preemption; Opportunity for Public Hearing, 72 Fed. Reg. 21260 (Apr. 30, 2007).

[13] Environmental Protection Agency, California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12156, 12157 (Mar. 6, 2008).

On December 19, 2007, Administrator Johnson announced that he had "found that California does not have a 'need to meet compelling and extraordinary conditions'" and that he had decided to deny California's waiver request.[14] In an unusual departure from agency practice, the Administrator announced this decision without releasing a decision document explaining the legal basis for the decision. The formal legal justification for the decision was not released until March 6, 2008, when Administrator Johnson wrote in the Federal Register:

> I do not believe section 209(b)(1)(B) was intended to allow California to promulgate state standards for emissions from new motor vehicles designed to address global climate change problems; nor, in the alternative, do I believe that the effects of climate change in California are compelling and extraordinary compared to the effects in the rest of the country.[15]

B. The Committee's Investigation

Upon learning of Administrator Johnson's decision to deny the waiver, Chairman Waxman announced that the Committee would be investigating "how and why this decision was made."[16] On December 20, 2007, Chairman Waxman wrote to Administrator Johnson requesting documents relating to the California waiver request.[17]

EPA initially resisted producing many documents to the Committee. As a result, Chairman Waxman issued subpoenas to compel production of documents on three occasions. Chairman Waxman issued two subpoenas to require production of documents that the Committee staff had reviewed but that EPA had refused to produce.[18] After the issuance of the subpoenas, these documents were provided to the Committee.

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[14] Letter to Arnold Schwarzenegger, Governor of California, from Stephen L. Johnson, Administrator, U.S. EPA (Dec. 19, 2007).

[15] Environmental Protection Agency, California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12156, 12157 (Mar. 6, 2008).

[16] Committee on Oversight and Government Reform, Chairman Waxman's Statement on EPA Denial of California Waiver Request (Dec. 19, 2007) (online at www.oversight.house.gov/story.asp?ID=1672).

[17] Letter from Chairman Henry A. Waxman to Stephen Johnson, Administrator, U.S. EPA (Dec. 20, 2007).

[18] Committee on Oversight and Government Reform, Subpoena to Stephen L. Johnson (Feb. 8, 2008) (compelling production of five sets of briefing slides for the Administrator). Committee on Oversight and Government Reform, Subpoena to Stephen L. Johnson (Mar. 13, 2008) (compelling production of 196 internal EPA documents).

On April 8, 2008, Chairman Waxman issued a third subpoena for the production of communications between EPA and persons in the White House.[19] EPA continues to withhold some documents from the Committee that are responsive to this subpoena. The White House Counsel's office has informed Committee staff that EPA possesses 32 documents that evidence telephone calls or meetings in the White House involving at least one high-ranking EPA official and at least one Assistant to the President or the President himself. The White House Counsel's office has described these documents as "indicative of deliberations at the very highest level of government."[20]

In total, the Committee has received over 27,000 pages of documents from EPA. The Committee staff has also conducted transcribed interviews and a deposition of eight EPA officials.[21]

II. CHRONOLOGY OF EVENTS

Previously undisclosed internal EPA documents and the Committee's interviews and deposition with key EPA staff provide new insights into the decisionmaking process inside EPA. These documents, interviews, and deposition show that EPA's career staff who worked on the California waiver petition all supported granting the request; that Administrator Johnson supported the position of his career staff at least in part; and that there was an unexpected reversal in the Administrator's position after he communicated with White House officials. This section of the memorandum describes key milestones in the administrative process.

A. The June 15, 2007, Briefing

Over a period of several months, EPA staff held a series of briefings for the Administrator on the California waiver request. One of the earlier briefings occurred on June 15, 2007.

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[19] Committee on Oversight and Government Reform, Subpoena to Stephen L. Johnson (Apr. 8, 2008).

[20] Meeting between Committee on Oversight and Government Reform staff, EPA staff, and White House staff (Apr. 22, 2008).

[21] Committee on Oversight and Government Reform, Transcript of Interview of Karl Simon (Jan. 30, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Dina Washburn Kruger (Jan. 31, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Brian McLean (Feb. 5, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Robert David Brenner (Feb. 6, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Margo Oge (Feb. 7, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Maureen Delaney (Feb. 11, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Benjamin DeAngelo (Feb. 12, 2008); Committee on Oversight and Government Reform, Transcript of Deposition of Jason Burnett (May 15, 2008).

At the June 15 briefing, Administrator Johnson reviewed a series of "briefing slides" prepared by the staff. One briefing slide presented a review of the public comments submitted to EPA. The slide included the May 2007 "initial assessment" of the Office of Transportation and Air Quality (OTAQ) career staff: "CA met the statutory criteria for a waiver."[22] It further noted that the staff's "interim assessment based on waiver record to date also supports this conclusion."[23]

According to an internal EPA e-mail, Bob Meyers, the Principal Deputy Assistant Administrator for the Office of Air and Radiation, was upset that this staff view was included in the briefing slides. Mr. Meyers's chief of staff wrote:

> We had a fairly significant slip up in preparing Friday's GHG briefing for the Administrator. It's the very last bullet on page 6 — "OTAQ's initial assessment." ... Bob was not happy when he read that page during the briefing. ... I wanted to let someone in OTAQ know about this so we can permanently delete the offending language and not have it arise again.[24]

B. The September 12, 2007, Briefing

By August 2007, the staff was refining its assessment of the merits of California's request and developing decision options for the Administrator. This culminated in a briefing to the Administrator on September 12, 2007.

On August 29, Karl Simon, the director of the OTAQ division primarily responsible for the waiver, advised his staff to drop the denial option from the list of options presented in draft briefing slides. Regarding the options, he wrote: "I think we should also do something to indicate that not all of these are equal and that the most defensible position remains a clean approval."[25] The draft slides included the following statement:

> OTAQ and OGC [Office of General Counsel] are reviewing these options from legal, technical, and waiver precedent perspective and other options may fall out of our review. Not all of these options are defensible and clearest option is to grant the waiver.[26]

The next day, a new draft of the slides was circulated. This draft included an explicit staff assessment:

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[22] Environmental Protection Agency, *President's GHG Rule: Status Briefing* (June 15, 2007).

[23] *Id.*

[24] E-mail from Don Zinger to Karl Simon and Sarah Dunham (June 18, 2007; 5:36 p.m.).

[25] E-mail from Karl Simon to David Dickinson (Aug. 29, 2007; 9:51 p.m.).

[26] Attachment to e-mail from Ben DeAngelo to Rona Birnbaum, at 40 (Aug. 30, 2007; 5:50 p.m.).

> From a legal, technical and policy perspective (and waiver precedence) CA has made the requisite protectiveness determination and those opposing the waiver have not clearly demonstrated that any of the section 209(b) criteria have been met. A waiver should be granted.[27]

As the slides were being reviewed, the EPA General Counsel, Roger Martella, requested that that they "be focused on our options beyond granting."[28] The next day, the career staff attorney followed this direction by preparing a new briefing document entitled, "California GHG Waiver: Arguments Against Granting."[29] When he sent the document to Mary Ann Poirier, the Deputy General Counsel, he explained: "It is meant to be stripped-down and frank, to give Roger my best advice on the pros and cons of options short of a full grant."[30] Before describing the options other than a full grant of the waiver request, the slides included a strongly-worded "caveat" page, which stated:

> After review of the docket and precedent, we don't believe there are any good arguments against granting the waiver. All of the arguments discussed here are likely to lose in court if we are sued. The arguments here are the best of a bad lot, going from most to least plausible.[31]

The option of denying the waiver based on California's lack of compelling and extraordinary conditions is then presented as the third of six options. An apparently later version of the caveat page is phrased similarly:

> After review of the docket and precedent, we believe the arguments against granting the waiver have high to very high legal vulnerability. All of the arguments discussed here would more likely than not lose in court if they are challenged. The arguments here are presented in decreasing order of defensibility.[32]

On September 11, Karl Simon sent the latest version of the briefing slides to Bob Meyers, the acting head of the air office. Mr. Simon explained: "I modified the options discussion a bit to better reflect the current state of analysis and OGC's views."[33] The options slide did not include a denial option and began with the following statement:

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[27] Attachment to e-mail from David Dickinson to Karl Simon, et al., at 3 (Aug. 31, 2007; 4:17 p.m.).

[28] E-mail from Michael Horowitz to Mary Ann Poirier (Sept. 4, 2007; 4:36 p.m.).

[29] Attachment to e-mail from Michael Horowitz to Mary Ann Poirier (Sept. 5, 2007; 1:36 p.m.).

[30] E-mail from Michael Horowitz to Mary Ann Poirier (Sept. 5, 2007; 1:36 p.m.).

[31] Attachment to e-mail from Michael Horowitz to Mary Ann Poirier (Sept. 5, 2007; 1:36 p.m.).

[32] Environmental Protection Agency, California GHG Waiver: Arguments Against Granting (undated).

[33] E-mail from Karl Simon to Karen Orehowsky (Sept. 11, 2007; 8:18 a.m.).

> OTAQ and OGC are reviewing these options from a legal, technical, and waiver precedent perspective and other options may fall in or out of our review. The clearest and most defensible option is to grant the waiver. The other options have high to very high vulnerability to legal challenge.[34]

At this point, the briefing slides also included a number of explicit "staff evaluations" regarding the compelling and extraordinary conditions criterion. For example, the staff found:

- "CA continues to exhibit extraordinary ozone conditions. CA conditions, such as population and density, coastline, salt-water intrusion, wildfires, agricultural economy, snow pack and melt, etc, when aggregated, represent serious conditions on their own and when compared with other states."[35]

- "The GHG standards are reasonably viewed as necessary to address both climate change and ozone conditions within the state."[36]

- "Opponents have not met their burden of demonstrating that CARB's [California Air Resources Board] GHG program will not have an incremental benefit for both climate change and ozone conditions."[37]

Evidence obtained by the Committee indicates that Mr. Meyers insisted on removing these staff evaluations from the briefing slides so that the information was only communicated to the Administrator orally. None of the staff evaluations regarding the compelling and extraordinary conditions or the legal defensibility of the various options available to the Administrator remained in the final slides that were presented to the Administrator on September 12.

The day the slides were sent to Mr. Meyers's office, Karl Simon sent an e-mail explaining that Mr. Meyers's assistant "is fixing the inclusion of staff evaluations. Note that Bob dropped two slides — the summary of the NERA report and the options summary page. I am pushing back."[38] Christopher Grundler, the Deputy Director of the Office of Transportation and Air Quality, replied: "what do you mean, 'fixing'? as in, deleting?"[39] Mr. Grundler also asked: "Did you get direction NOT to convey staff evaluations or options?"[40] Mr. Simon responded:

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[34] Attachment to e-mail from Karl Simon to Karen Orehowsky, at 32 (Sept. 11, 2007; 8:18 a.m.).

[35] *Id.* at 26.

[36] *Id.* at 22.

[37] *Id.* at 24.

[38] E-mail from Karl Simon to Margo Oge, et al. (Sept. 11, 2007; 1:03 p.m.).

[39] E-mail from Christopher Grundler to Karl Simon (Sept. 11, 2007; 1:24 p.m.).

[40] E-mail from Christopher Grundler to Karl Simon (Sept. 11, 2007; 11:22 p.m.).

"yes, in a written form. we will be having the conversation though."[41] This understanding is reflected in Mr. Grundler's handwritten notes on the options slide presented to Mr. Meyers. Next to the OTAQ and OGC analysis, Mr. Grundler wrote: "Bob changes this."[42] And at the bottom of the page, he wrote: "Staff evaluation Bob deletes — Karl should take original to meeting with Steve verbally go over staff evaluation."[43] During her interview, Maureen Delaney, a career Program Analyst in the Office of Air and Radiation, confirmed that removing the staff evaluations from the slides was "a management-level decision" done at the "political level."[44]

Despite the removal of the staff evaluations from the briefing slides, career EPA staff clearly communicated their professional assessment to the Administrator at the September 12 briefing. Margo Oge, the Director of the Office of Transportation and Air Quality, told Committee staff: "verbally there was a staff evaluation ... that California has met that criteria."[45] When asked by Committee staff about the staff evaluations, Maureen Delaney explained: "I believe that they were spoken, even though they weren't included in the briefing, and they indicated generally that ... we did not have reason to deny the waiver."[46]

C. The September 20 and 21, 2007, Briefing

After the September 12 briefing, EPA staff began preparing slides for the next briefing with the Administrator on September 20 and 21. The purpose of this briefing was to present an in-depth analysis of the decision options available to the Administrator.

On September 18, a career staff attorney in the Office of General Counsel transmitted his first draft of the options slides. The conclusions slide included the following analysis:

- "Most defensible action is to grant waiver."
- "Denial based on lack of need for standards to meet compelling and extraordinary conditions has high legal risk and is contrary with central tenets of prior EPA procedure and likely EPA statements defending its own GHG rule."[47]

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[41] E-mail from Karl Simon to Christopher Grundler (Sept. 12, 2007; 8:07 a.m.).

[42] Christopher Grundler's notes on draft briefing slides (undated).

[43] *Id.*

[44] Committee on Oversight and Government Reform, Transcript of Interview of Maureen Delaney, at 11-12, 72-73 (Feb. 11, 2008).

[45] Committee on Oversight and Government Reform, Transcript of Interview of Margo Oge, at 43-44 (Feb. 7, 2008).

[46] Committee on Oversight and Government Reform, Transcript of Interview of Maureen Delaney, at 13 (Feb. 11, 2008).

[47] Attachment to e-mail from Michael Horowitz to John Hannon, at 16 (Sept. 18, 2007; 9:58 a.m.).

opportunity" to offer a recommendation that "approval or partial approval would be the way to go."[55] Margo Oge explained:

> "What I recall is that all the attendants, with the exception of Bob Meyers who was not asked to express his opinion ... were either supporting granting the full waiver or granting partial waiver.[56]

Jason Burnett told Committee staff: "all EPA recommendations that I am aware of, whether they be staff or me or someone in a similar position, were to grant the waiver."[57]

General Counsel Roger Martella also supported a partial granting of the waiver, although he said that he believed the agency could defend any of the options placed in front of the Administrator.[58] According to Mr. Burnett, Mr. Martella "stated that the legal risk was higher with denying the waiver and that the legal risk was lowest with granting the waiver."[59]

This interview testimony is supported by written notes and summaries of the meeting. Karl Simon's handwritten notes indicate that the Administrator "polled everyone but BM [Bob Meyers] for recommendation — all supported at least 2B," a partial grant of the waiver.[60] Ben DeAngelo's summary of the meeting stated: "OTAQ and OGC folks said granting the waiver straight-up is probably most defensible."[61] Christopher Grundler's handwritten notes simply stated: "all agreed on granting waiver."[62] A second note reads: "All attendees agree for full or partial granting the waiver."[63]

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[55] Committee on Oversight and Government Reform, Transcript of Interview of Karl Simon, at 82-83 (Jan. 30, 2008).

[56] Committee on Oversight and Government Reform, Transcript of Interview of Margo Oge, at 21-22 (Feb. 7, 2008).

[57] Committee on Oversight and Government Reform, Transcript of Deposition of Jason Burnett, at 129 (May 15, 2008).

[58] Committee on Oversight and Government Reform, Transcript of Interview of Margo Oge, at 22 (Feb. 7, 2008).

[59] Committee on Oversight and Government Reform, Transcript of Deposition of Jason Burnett, at 23 (May 15, 2008).

[60] Handwritten notes of Karl Simon on California GHG Waiver: Options Briefing for the Administrator (Sept. 21, 2007).

[61] E-mail from Ben DeAngelo to Dina Kruger (Sept. 21, 2007; 5:07 p.m.).

[62] Handwritten notes of Christopher Grundler on *California GHG Waiver: Options* (undated).

[63] *Id.*

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[57] Committee on Oversight and Government Reform, Transcript of Deposition of Jason Burnett, at 129 (May 15, 2008).

[58] Committee on Oversight and Government Reform, Transcript of Interview of Margo Oge, at 22 (Feb. 7, 2008).

[59] Committee on Oversight and Government Reform, Transcript of Deposition of Jason Burnett, at 23 (May 15, 2008).

[60] Handwritten notes of Karl Simon on California GHG Waiver: Options Briefing for the Administrator (Sept. 21, 2007). +

[61] E-mail from Ben DeAngelo to Dina Kruger (Sept. 21, 2007; 5:07 p.m.).

[62] Handwritten notes of Christopher Grundler on *California GHG Waiver: Options* (undated).

[63] *Id.*

D. The October 30, 2007, Briefing

After the options briefing, some EPA staff expected the Administrator to reach a decision soon.[64] However, on October 9, Administrator Johnson called another meeting, during which he tasked the staff with providing additional information on a number of topics related to the waiver. The final briefing for the Administrator involving career staff was held on October 30. The October 30 briefing slides were intended to provide the Administrator with the information he had requested.

According to the career staff interviewed by the Committee, the final briefing slides represented the professional views of EPA's technical and legal staff.[65] The slides included the following conclusions:

- "Fundamental circumstances of geographic, climatic, human and motor vehicle populations remain compelling and extraordinary (including ozone and PM [particulate matter]) and fit the GHG circumstances which will not only exacerbate the ozone conditions but also such conditions are highly vulnerable to climate change."

- "The potential for climate change to exacerbate California's unique tropospheric ozone problem is one element of California's compelling and extraordinary conditions. However, it is by no means the sole foundation for the compelling and extraordinary argument. In fact, climate change impacts on California's wildfire, water resource, and agricultural situation may be the state's greatest concerns."

- "California exhibits a number of specific features that are somewhat unique and may be considered compelling and extraordinary with regard to both the need for mitigation actions and its potential vulnerability to climate change."[66]

The briefing slides also contained legal analysis regarding the agency's litigation prospects if the waiver was granted or denied. The slide entitled "If We Grant" stated that EPA would face a "Likely Suit by Manufacturers" and that "EPA is almost certain to win such a suit."[67] The slide entitled "If We Deny" stated that EPA would face an "[a]lmost certain lawsuit

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[64] *See* Committee on Oversight and Government Reform, Transcript of Interview of Benjamin DeAngelo (Feb. 12, 2008).

[65] Committee on Oversight and Government Reform, Transcript of Interview of Margo Oge, at 31 (Feb. 7, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Benjamin DeAngelo, at 34, 39 (Feb. 12, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Karl Simon, at 72, 76, 153-154 (Jan. 30, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Dina Kruger, at 26, 31, 32 (Jan. 31, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Brian McLean, at 29, 32 (Feb. 5, 2008).

[66] Environmental Protection Agency, Briefing for the Administrator: California's GHG Waiver Request: Follow-Up on Additional Questions (Oct. 30, 2007).

[67] *Id.*

by California" and that "EPA's litigation risks are significantly higher than if a waiver is granted."[68]

In earlier drafts of the briefing slides, the "If We Deny" slide included stronger language. An October 29 draft provided the following legal prognosis: "EPA likely to lose suit."[69] According to Karl Simon, at the October 29 pre-briefing with Bob Meyers, "there was some discussion on some of — the way to characterize the legal advice."[70] Maureen Delaney told Committee staff: "the last statement on what would happen if California sued under a denial, that was changed, and I think changed the meaning somewhat."[71] When asked whether the earlier draft slides better represented the views of the career staff, she responded: "That conclusion, yes."[72] Ms. Delaney added: "It was a stronger statement in the previous — in the draft version."[73]

The evidence obtained by the Committee shows that EPA staff clearly informed Administrator Johnson that they believed the compelling and extraordinary conditions criterion was met. Margo Oge told Committee staff:

> When Ben presented this information to the Administrator and presented it to me, clearly, clearly what I am hearing is that California meets this extraordinary and compelling needs, the conditions. ...
>
> If you read this whole document ... in its totality, you would walk away with the same impression that I walk away when I talked to the experts ... that California has met the criteria of compelling and extraordinary needs based upon these facts. And that is what Ben told the Administrator.[74]

When asked by Committee staff whether there was "any question in your mind that this staff view that the waiver criteria were met was clearly communicated to Administrator

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[68] *Id.*

[69] Attachment to e-mail from Betsy White to Jo Beth Banas, et al. (Oct. 29, 2007; 3:30 p.m.).

[70] Committee on Oversight and Government Reform, Transcript of Interview of Karl Simon, at 68 (Jan. 30, 2008).

[71] Committee on Oversight and Government Reform, Transcript of Interview of Maureen Delaney, at 25 (Feb. 11, 2008).

[72] *Id.*

[73] *Id.* at 76.

[74] Committee on Oversight and Government Reform, Transcript of Interview of Margo Oge, at 60-61 (Feb. 7, 2008).

Johnson," Maureen Delaney replied: "Was there any doubt? No."[75] In addition, Ben DeAngelo's summary of the meeting states:

> In addition to the argument that climate change may exacerbate CA's tropospheric ozone problem — for which CA has historically demonstrated compelling and extraordinary conditions — I think Johnson now better appreciates that there are additional conditions in CA that make them vulnerable to climate change.[76]

Similarly, Jason Burnett agreed that career staff "clearly communicate[d] to the Administrator that they believed that the compelling and extraordinary conditions criterion was met."[77]

During the October 30 briefing, career EPA staff explicitly told the Administrator that granting the waiver was the most legally defensible option, while a denial of the waiver would be unlikely to survive legal challenge. When asked by Committee staff whether he thought the options of granting, partially granting, or denying the waiver request were all legally defensible, Karl Simon replied: "I think it depends on your definition of 'legally defensible.' ... It would get you in the courthouse door."[78] He explained that the Administrator was told that the available options were "legally defensible" only in the sense that they "get you past rule 11 sanctions" in federal court for raising a frivolous claim.[79] Referring to a lawsuit challenging EPA's denial of the waiver request, Mr. Simon stated: "I think the odds are that we will lose."[80]

Margo Oge also thought that the evidence before the Administrator all pointed toward granting the waiver. She told Committee staff:

> working on the waiver for the time that we had been working and looking at the legislative history, the precedent has been set by EPA approving the California waivers for the past 40 years ... my view was and continues to be, based on the Clean Air Act and all these factors, granting of the waiver was the most defensible way to proceed.[81]

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[75] Committee on Oversight and Government Reform, Transcript of Interview of Maureen Delaney, at 26 (Feb. 11, 2008).

[76] E-mail from Ben DeAngelo to Brian McLean, et al. (Oct. 31, 2007; 12:54 p.m.).

[77] Committee on Oversight and Government Reform, Transcript of Deposition of Jason Burnett, at 128 (May 15, 2008).

[78] Committee on Oversight and Government Reform, Transcript of Interview of Karl Simon, at 69 (Jan. 30, 2008).

[79] Committee on Oversight and Government Reform, Transcript of Interview of Karl Simon, at 133 (Jan. 30, 2008) ("passed" in original transcript).

[80] Committee on Oversight and Government Reform, Transcript of Interview of Karl Simon, at 111 (Jan. 30, 2008).

[81] Committee on Oversight and Government Reform, Transcript of Interview of Margo Oge, at 88-89 (Feb. 7, 2008).

Maureen Delaney agreed that "the thrust of the explanation to him [Administrator Johnson] was that if he denied the waiver, EPA would likely lose any subsequent lawsuit."[82] During her interview, she said: "I think, as we pointed out, some [options] were more likely to survive a litigation risk than others."[83] Ms. Delaney added: "There are varying shades of what would be defensible. ... Most people felt that a denial would be ... a significant litigation risk."[84]

Ben DeAngelo confirmed that the legal jeopardy of a denial was fully explained to Administrator Johnson during the October 30 briefing.[85] When asked by Committee staff what conclusions about the legal defensibility of different options he drew from the October 30 briefing, Mr. DeAngelo stated: "I had heard by this stage in the process now a number of times from the legal people that granting the waiver was, in their minds, most legally defensible and that was my takeaway."[86]

According to Jason Burnett, the legal jeopardy of a denial was communicated to the Administrator on a number of occasions. He told Committee staff that the legal judgment of General Counsel Roger Martella and his office was that "denying the waiver had very significant legal risk."[87] He explained:

> I believe that it was communicated in several fora, through this slide, verbally when these slides were presented to the Administrator, and in multiple meetings that we had, that Roger Martella, I, and others had, with the Administrator.[88]

E. The December 19, 2007, Decision

On December 19, 2007, Administrator Johnson sent a two-page letter to Governor Arnold Schwarzenegger of California announcing that he intended to deny the waiver petition. The stated basis for the denial was California's lack of compelling and extraordinary conditions.

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[82] Committee on Oversight and Government Reform, Transcript of Interview of Maureen Delaney, at 28 (Feb. 11, 2008).

[83] Committee on Oversight and Government Reform, Transcript of Interview of Maureen Delaney, at 93 (Feb. 11, 2008).

[84] Committee on Oversight and Government Reform, Transcript of Interview of Maureen Delaney, at 94 (Feb. 11, 2008).

[85] Committee on Oversight and Government Reform, Transcript of Interview of Benjamin DeAngelo, at 76-77 (Feb. 12, 2008).

[86] Committee on Oversight and Government Reform, Transcript of Interview of Benjamin DeAngelo, at 77 (Feb. 12, 2008).

[87] Committee on Oversight and Government Reform, Transcript of Deposition of Jason Burnett, at 127 (May 15, 2008).

[88] *Id.* at 127.

Career staff who had worked on the issue for months were surprised by the decision to deny the waiver because it did not appear to be supported by the record. When asked by Committee staff if he was surprised by the decision, Rob Brenner, the Director of Policy Analysis and Review, responded:

> Yes, I was surprised. I expected that it would probably be either a grant of the waiver or a partial waiver. ... I felt that ... the analyses that had been put together seemed to point towards either a full or a partial waiver.[89]

Maureen Delaney told Committee staff that she also was surprised by the decision: "Personally, having been at the briefings, and it was contrary to the advice that I thought that he had received from the staff, so I was surprised."[90] She explained: "it was difficult to see how he arrived at that decision, given the information that had been provided and the consensus among the staff ... It seemed like a difficult place to get to."[91]

In his deposition, Mr. Burnett told the Committee that the Administrator's December 19 decision was a reversal of the Administrator's prior position. According to Mr. Burnett, Administrator Johnson "was very interested in a full grant of the waiver" in August and September.[92] Mr. Burnett told the Committee that "at some point in the process," the Administrator then modified his view and believed that a partial grant of the waiver "was the best course of action."[93] Mr. Burnett explained: "the Administrator was interested in initially a full grant, and became interested in a partial grant, asked for me and others to explore ways of making a partial grant work."[94] Mr. Burnett added: "over the course of a period of months he certainly shifted his focus and his stated interests to me and others from a full grant to a partial grant."[95]

According to Mr. Burnett, Administrator Johnson's preference for a full or partial grant of the waiver did not change until after he communicated with the White House about the matter. When asked by Committee staff "whether the Administrator communicated with the White House in between his preference to do a partial grant and the ultimate decision" to deny the

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[89] Committee on Oversight and Government Reform, Transcript of Interview of Rob Brenner, at 32 (Feb. 6, 2008).

[90] Committee on Oversight and Government Reform, Transcript of Interview of Maureen Delaney, at 34 (Feb. 11, 2008).

[91] Committee on Oversight and Government Reform, Transcript of Interview of Maureen Delaney, at 63-64 (Feb. 11, 2008).

[92] Committee on Oversight and Government Reform, Transcript of Deposition of Jason Burnett, at 118 (May 15, 2008).

[93] *Id.* at 119.

[94] *Id.* at 123.

[95] *Id.* at 139.

waiver, Mr. Burnett responded: "I believe the answer is yes."[96] When asked "after his communications with the White House, did he still support granting the waiver in part," Mr. Burnett answered: "He ultimately decided to deny the waiver."[97] Mr. Burnett also affirmed that there was "White House input into the rationale in the December 19th letter."[98]

At the time of the December 19 decision to deny the California waiver, there were apparently no EPA employees or agency documents arguing for this decision. Five EPA staff — Margo Oge, Karl Simon, Ben DeAngelo, Maureen Delaney, and Rob Brenner — told the Committee they were unaware of any EPA employees who espoused or agreed with the argument that California did not meet the compelling and extraordinary conditions criterion.[99] They also told the Committee that they were unaware of any pre-December 19 internal EPA documents recommending that the waiver be denied based upon a lack of compelling and extraordinary conditions.[100] On December 20, the day after Administrator Johnson announced his decision to deny California's waiver request, the most recent internal draft of the decision document was written as if the waiver was to be granted in full.[101]

F. The March 6, 2008, Federal Register Notice

Typically when an EPA Administrator announces a final decision, the agency releases an analysis explaining the basis for the decision on the same day. This did not happen in the case of the denial of the California waiver. EPA did not release a formal legal justification for the denial until March 6, 2008, when the official decision document was published in the Federal Register. This decision document included a more detailed discussion of the rationale for denial put forth in the Administrator's December 19, 2007, letter to Governor Schwarzenegger. The primary legal justification offered by the Administrator was that Section 209 of the Clean Air Act was not

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[96] *Id.* at 60.

[97] *Id.* at 120.

[98] *Id.* at 140.

[99] Committee on Oversight and Government Reform, Transcript of Interview of Margo Oge, at 95 (Feb. 7, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Maureen Delaney, at 36 (Feb. 11, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Karl Simon, at 105 (Jan. 30, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Benjamin DeAngelo, at 87 (Feb. 12, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Rob Brenner, at 36 (Feb. 6, 2008).

[100] Committee on Oversight and Government Reform, Transcript of Interview of Karl Simon, at 112 (Jan. 30, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Brian McLean, at 35 (Feb. 5, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Robert David Brenner, at 38 (Feb. 6, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Maureen Delaney, at 37 (Feb. 11, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Benjamin DeAngelo, at 87 (Feb. 12, 2008).

[101] E-mail from David Dickinson to Michael Horowitz, et al. (Dec. 20, 2007; 6:53 a.m.).

"intended to allow California to promulgate state standards for emissions from new motor vehicles designed to address global climate change problems." He also rejected the view that "the effects of climate change in California are compelling and extraordinary compared to the effects in the rest of the country.[102]

III. THE POSITION OF THE WHITE HOUSE

The record before the Committee — in particular the deposition testimony of Mr. Burnett — indicates that the White House played a decisive role in the rejection of the California motor vehicle standards. Before communicating with White House officials, Administrator Johnson supported the position of career EPA staff that the waiver should be granted. He reversed himself only after these communications.

Little is known publicly about the White House position. According to press accounts, the CEOs of Ford and Chrysler met with Vice President Dick Cheney prior to the denial and urged the Administration to reject the waiver.[103] After Administrator Johnson announced that the waiver would be denied, a White House spokesman said that the White House supported this decision.[104]

During the deposition of Mr. Burnett, Committee staff repeatedly asked about the White House role. In response, Mr. Burnett told the Committee that he had been instructed by EPA not to answer these questions. Based on the instructions from EPA, Mr. Burnett refused to answer:

- With whom in the White House did Administrator Johnson communicate about the California waiver before it was denied?[105]
- "Can you tell us the time at which that communication with the White House occurred?"[106]
- "Will you tell us the substance of those communications?"[107]

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[102] U.S. EPA, California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12156, 12157 (Mar. 6, 2008).

[103] *EPA blocks Calif. fuel rules*, Detroit News (Dec. 20, 2007).

[104] Press Gaggle by Tony Fratto, White House Office of the Press Secretary (Dec. 21, 2007) (online at www.whitehouse.gov/news/releases/2007/12/20071221-5.html).

[105] Committee on Oversight and Government Reform, Transcript of Deposition of Jason Burnett, at 58 (May 15, 2008).

[106] *Id.* at 60.

[107] *Id.* at 61.

- "Do you know if the Administrator communicated or met with the President on this matter?"[108]

- Did White House staff "ever communicate to you a preference or an expectation regarding the outcome of the California waiver?"[109]

- With whom in the White House did you communicate about the California waiver?[110]

- "Can you tell us the reason that ... [the Administrator] told you his mind changed?"[111]

In addition, as described above, EPA has withheld from the Committee documentary evidence of interactions between EPA and the White House about the California waiver before the denial decision was announced. The White House Counsel's office has informed Committee staff that EPA possesses 32 documents that evidence telephone calls or meetings in the White House involving at least one high-ranking EPA official and at least one Assistant to the President or the President himself. The White House Counsel's office has described these documents as "indicative of deliberations at the very highest level of government."[112]

IV. CONCLUSION

The record before the Committee answers many questions about what transpired within EPA prior to the denial of California's petition to regulate greenhouse gas emissions from motor vehicles. The record indicates that the California waiver had unanimous support among the career EPA staff and was backed at least in part by EPA Administrator Johnson. What the record does not answer, however, is why the California petition was denied given the strong support inside EPA.

It appears that the White House played a significant role in the reversal of the EPA position. This raises questions about the basis for the White House actions. The Clean Air Act contains specific standards for considering California's petition. It would appear to be inconsistent with the President's constitutional obligation to faithfully execute the laws of the United States if the President or his advisors pressured Administrator Johnson to ignore the record before the agency for political or other inappropriate reasons.

Additional investigation by the Committee will be required to assess the basis for the White House intervention in the decision.

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[108] *Id.* at 61.

[109] *Id.* at 61.

[110] *Id.* at 61.

[111] *Id.* at 123.

[112] Meeting between Oversight and Government Reform Committee staff, EPA staff, and White House staff (Apr. 22, 2008).

HENRY A. WAXMAN, CALIFORNIA
CHAIRMAN

TOM DAVIS, VIRGINIA
RANKING MINORITY MEMBER

ONE HUNDRED TENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6143

Majority (202) 225–5051
Minority (202) 225–5074

May 19, 2008

To: Members of the Committee on Oversight and Government Reform

Fr: Republican Committee Staff

Re: Memo on California Waiver Decision – Preliminary Assessment

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I. EXECUTIVE SUMMARY

On December 19, 2007, the Administrator of the U.S. Environmental Protection Agency (EPA) announced he would deny the request by California for a waiver to regulate motor vehicle greenhouse gas emissions (GHGs). By December 20, 2007, without a single document having been delivered or a single witness having been questioned, the Majority had already arrived at its conclusion of this investigation: the EPA Administrator's decision was not supported by the law and the facts and, instead was dictated by "politics and ideology."

In the course of their investigation, the Majority has struggled to uncover evidence that the Administrator's decision was not on the merits. This has forced the Majority to conduct its investigation through the prism of their assumptions, featuring questions to witnesses such as "I assume that there was a communication [with the White House] at some point prior to the final decision's being announced." This is not how this Committee conducted investigations under the prior Chairman, where information was gathered and the chips fell where they may.

It is unacceptable is that, for all the efforts of this Committee, this investigation boils down to yet another example of politicization—but not by the White House, as is frequently alleged, but by the Majority. And, there is no better example of this than the Majority's letter to the Administrator on December 14, 2007, in which the Majority sought to intervene prematurely into EPA's decision making process by sending a "we're watching you" shot across the Administrator's bow. In fact, the Majority very well may be upset that their own last-minute effort to intimidate the Administration and to politicize the Administrator's decision apparently has failed.

This investigation could have been conducted as a serious inquiry into agency activity, but instead it has produced yet another in a long line of "Administration attacks

science" stories. In this and past Committee activities, the Majority has made manifestly clear their position that the only consideration relevant to policymaking should be "the science." Pure science is simply not policy.

Further, this is a gross misunderstanding of the balancing of a variety of policy considerations that is required in the policymaking process of any Administration. In this instance, from the Administrator's final decision document, it appears that such a breadth of elements was considered. But, an investigation showing deference to that process would have sounded ridiculous because, indeed, balancing a variety of policy considerations is what policymakers in the executive branch do. This distinction is often lost on the Majority.

In many critical ways, the Majority's investigation is lacking and was never directed at the integrity of the decision making process. For example, in assessing what ultimately amounts to a legal decision by the Administrator on the highly novel question of regulating air pollutants of an entirely global nature, the Majority has relied almost entirely on legal analysis and hearsay from EPA scientists and other non-legal staff to bolster their conclusions—never once attempting to pose a single question to a even one agency attorney. And, in one breath, the Majority confirms White House "intervention" in the Administrator's decision and while admitting they have absolutely no evidence to support such a claim..

Similarly, while the putative purpose of this investigation was to assess the decision making process at EPA, this investigation was never destined to be a serious inquiry into the integrity of the decision making process. Had that been the case, the Majority would have taken seriously the Minority's concerns over evidence of the covert and *ex parte* activities by the very EPA officials responsible for preparing the analysis which made its way in front of the Administrator. These individuals were involved in crafting some rather extraordinary talking points for a senior representative from an environmental organization for use in his meeting with the Administrator, raising questions of inappropriate activities.

Instead of actual consideration of this serious matter, the Majority's response was to blush and demure, saying these individuals were merely "respond[ing] to a request for information from a former EPA Administrator." The Majority's response was as ironic as it was regrettable in light of the putative goal of this investigation: protecting the integrity of the decision making process.

As the Minority has noted before, this Committee must not be seen as the Committee where witnesses and other evidence are validated because of their consistency with the views of the Majority and where serious concerns are disregarded because of their potential impact on the credibility of the Majority's witness-darlings. Thorough investigation and careful evaluation of the evidence lead to credible findings. Sadly, the Majority's report amounts to yet another political attack on the Administration and a knee-jerk conclusion of nefarious intent by the White House derived from a manifestly incomplete investigation. This is yet another inconvenient truth.

II. BACKGROUND

1. Investigation timeline

On December 19, 2007, U.S. Environmental Protection Agency (EPA) Administrator Stephen L. Johnson sent a letter to California Governor Arnold Schwarzenegger denying California's request for a waiver of federal preemption for standards for motor vehicle greenhouse gas emissions (GHGs)[1] that had been submitted by the California Environmental Protection Agency Air Resources Board (CARB).[2] The granting of this waiver would have allowed California to enforce its regulations mandating the reduction of GHGs from vehicles sold and operated within California.

On December 14, 2007, prior to Administrator Johnson's December 19, 2007 letter to Governor Schwarzenegger, the Majority sought to intervene prematurely in Administrator Johnson's decision of whether to grant California's request for a waiver. Specifically, the Majority reminded Administrator Johnson of his "commitment under oath that [he] would make an independent decision on California's request based on the record," and inquiring whether Administrator Johnson had yet tasked EPA staff with preparing the "appropriate decision document and any supporting technical documents."[3]

While, the Majority may have stated that they "want[ed] to be clear [they were] not requesting [Administrator Johnson] provide information on the substance of [his] decision,"[4] the Majority's December 14, 2007 letter was on its face an intervention likely intended to push for the granting of California's request for a waiver as evidenced by the Majority's characterization of California's request as a "a critically important step in reducing the nation's emissions of greenhouse gases."[5]

On December 20, 2007, the Majority opened an investigation into the process undertaken by EPA to arrive at the decision to deny California's petition for a waiver. Within the first four sentences of this letter, the Majority had laid out its preordained conclusion of their investigation, specifically telling Administrator Johnson:

> It does not appear that you fulfilled [your] commitment [to make the decision of whether to grant California's request for a waiver on the merits]. Your decision appears to have ignored the evidence before the agency and the requirements of the Clean Air Act. In fact, reports indicate that you

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[1] Greenhouse gases (GHG emissions) include water vapor, carbon dioxide, methane, nitrous oxide, ozone and hydrofluorocarbons, however, the most commonly discussed GHG is carbon dioxide.
[2] Letter from Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency, to Arnold Schwarzenegger, Governor, State of California (Dec. 19, 2007) [hereinafter *Dec. 19, 2007Johnson Letter*] (on file with Minority Committee staff).
[3] Letter from Henry A. Waxman, Chairman, House Oversight and Government Reform Committee to Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency (Dec. 14, 2007) [hereinafter *Dec. 14, 2007 Waxman Letter*] (on file with Minority Committee staff).
[4] *Id.*
[5] *Id.*

> overruled the unanimous recommendations of EPA's legal and technical staffs in rejecting California's petition.[6]

On December 20, 2007, the Majority could not have been any clearer as to the conclusion this investigation would produce when ultimately reported on May 19, 2008. The Majority's investigation intended to determine "whether political considerations were inappropriately injected into the decision making,"[7] and, in fact, the Majority appears to be upset that their own effort to intimidate the Administration and politicize the Administrator's decision apparently has failed.

2. Investigation Methodology

In the course of this investigation, the Committee has received from EPA 27,000 pages of documents and has reviewed a further nearly 1,000 pages *in camera*. Taking deposition and interview testimony from eight EPA witnesses has consumed over 30 hours of Committee time. The Committee has conducted extensive conversations with EPA, exchanging nearly 50 pieces of formal correspondence and conducting over 30 hours of meetings (including conference calls) between Majority Committee staff, Minority Committee Staff, and EPA staff, periodically also including the White House Counsel office.

III. REGULATORY FRAMEWORK

1. Congressional action on climate change elusive.

Lack of legislative action during 110th Congress. Climate change has been a topic of interest of Congress for over three decades with at least 250 hearings on the topic having been conducted since 1975.[8] Nonetheless, currently no comprehensive federal regulatory framework exists to address the concerns associated with climate change. In the 110th Congress, interest has continued to increase, likely attributable to the increasing body of science pointing towards support for the connection between GHGs and natural phenomena related to climate change and the increased public awareness of and attention to climate change.

Nonetheless, the 110th Congress has exhibited a lack of leadership in progressing towards President Bush's stated goals of addressing the serious challenge of climate

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[6] Letter from Henry A. Waxman, Chairman, House Oversight and Government Reform Committee to Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency (Dec. 20, 2007) [hereinafter *Dec. 20, 2007 Waxman Letter*] (on file with Minority Committee staff).

[7] *EPA's New Ozone Standards: Hearing before the House Committee on Oversight and Government Reform*, 110th Cong. (May 20, 2008) Supplemental Background Memo (May 16, 2008), 1.

[8] James E. McCarthy, Specialist in Environmental Policy, Resources, Science, and Industry Division, Congressional Research Service, *Clean Air Issues in the 110th Congress: Climate Change, Air Quality Standards, and Oversight* (RL33776) (May 15, 2008) [hereinafter *CRS Climate Change Report 2008*], 1-2.

change. Legislative recommendations under consideration by Congress range from mandatory, market-based program to limit greenhouse gas emissions to taxes on carbon emissions. Environmental activists continue their attempts to shift the important task of addressing the serious challenge of climate change from the legislature, where it can be openly debated by elected officials to the courts, where it is decided upon by judges who are unelected and unaccountable to the public. The reliance upon existing regulatory frameworks to effect change is regarded by some commentators as trying to force a square peg into a round hole, and many argue that traditional air pollution regulatory schemes are inappropriate and insufficient to regulate GHGs, and that decisive Congressional action is required.

Massachusetts v. EPA *found carbon dioxide an air pollutant.* The legal landscape relating to climate change changed significantly following the U.S. Supreme Court's decision in *Massachusetts v. EPA*. This decision established that carbon dioxide is an air pollutant subject to regulation under the Clean Air Act. The Court required the EPA Administrator to make a determination of whether carbon dioxide endangers public health and welfare,[9] and this process is currently underway. This is discussed further below.

2. GHG regulation under Clean Air Act

Clean Air Act regulates air pollutants. EPA regulates air pollutants under the Clean Air Act.[10] Under the Clean Air Act, EPA sets limits on certain air pollutants, including limits on how much of a pollutant can be present in the lower troposphere in the United States. The Clean Air Act also gives EPA authority to limit emissions of air pollutants coming from stationary sources (e.g., chemical plants, utilities, and steel mills).

Individual states or tribes may have stronger air pollution laws, but they may not have weaker pollution limits than those set by EPA. EPA must approve state, tribal, and local agency plans for reducing air pollution. If a plan does not meet the necessary requirements, EPA can issue sanctions against the state and, if necessary, take over enforcing the Clean Air Act in that area. EPA assists state, tribal, and local agencies by providing research, expert studies, engineering designs, and funding to support clean air progress.

State and local air pollution agencies take the lead in carrying out the Clean Air Act. They develop solutions for pollution problems that require special understanding of local industries, geography, housing, and travel patterns, as well as other factors. State,

[9] *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007).

[10] The Clean Air Act (CAA), first passed in 1963, established funding for the study and the clean up of air pollution. In 1970, Congress passed the Clean Air Act Extension to address air pollution; the Extension also created the Environmental Protection Agency (EPA), giving it the primary role in carrying out the CAA. Since 1970, EPA's CAA programs have reduced air pollution nationwide. In 1990, Congress' Clean Air Act Amendments dramatically revised and expanded the CAA, providing EPA even broader authority to implement and enforce regulations reducing air pollutant emissions. The 1990 Amendments also placed an increased emphasis on more cost-effective approaches to reduce air pollution.

local, and tribal governments also monitor air quality, inspect facilities under their jurisdictions, and enforce Clean Air Act regulations.

States require waiver to regulate mobile sources of air pollution. Congress allows states to enforce stricter standards to regulate air pollution, however, this presents a challenge in the context mobile sources of pollution (e.g., cars and planes) because of the potential patchwork of state-by-state regulations that manufacturers of motor vehicles could face. Such a collection of varying national standards would almost certainly have the ultimate effect of driving up manufacturing costs of motor vehicles.

Congress included in the mobile source section of the Clean Air Act effectively a reservation to the federal government standard setting for motor vehicles.[11] However, Congress allows for a waiver of federal preemption if EPA determines a state's standards in the aggregate will be at least as protective of public health and welfare as federal standards. Specifically, the Clean Air Act provides:

> The [EPA] Administrator shall, after notice and opportunity for public hearing, waive application of this section [the prohibition of State emission standards] to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.[12]

Because California was the only state to have adopted standards before March 30, 1966, only California qualifies for such a waiver, however, as detailed below, granting requests by California for such waivers is by no means mandatory.

EPA to reject waiver requests. Congress permitted EPA to reject waiver requests. Specifically, section 209(b)(1) of the Clean Air Act allows EPA to reject a request for a waiver in the event the EPA Administrator finds: "(A) California's decision [in relation to protectiveness] is arbitrary and capricious;" "(B) California does not need state standards to meet compelling and extraordinary conditions;" or "(C) California's standards and enforcement procedures are not consistent with section 202(a) [of the Clean Air Act] [which requires adequate lead-time for motor vehicle manufacturers and technological feasibility]."[13]

Rather than requiring California to prove the corollary to each of these requirements, the burden is on the EPA Administrator to justify why he or she has denied the request for a waiver. There is no complete record of the exact disposition of

[11] CAA § 209(b)(1)
[12] *Id.*
[13] *Id.* (referring to CAA § 202(a))

California's requests for waivers,[14] however, one EPA official told the Congressional Research Service (CRS): "I don't think we've ever outright denied a request...."[15]

3. The U.S. Supreme Court found carbon dioxide an air pollutant subject to Clean Air Act regulation.

Massachusetts v. EPA. On April 2, 2007, the U.S. Supreme Court ruled, *inter alia*, in *Massachusetts v. EPA* that EPA has authority to regulate GHGs from motor vehicles under section 202 of the Clean Air Act because "air pollutant" includes GHGs.[16] The lawsuit was filed in 2003 when EPA decided not to regulate motor vehicle emissions pursuant to the Clean Air Act. In *Massachusetts v. EPA*, several states, local governments, and environmental organizations challenged EPA's determination, arguing that GHGs are pollutants within the meaning of the Clean Air Act because of their contributions to climate change. EPA had argued that: (1) the Clean Air Act did not authorize EPA to address global climate change; and, (2) in any event, executive policy specifically addressing global warming justified EPA's refusal to regulate in such area.[17]

The Court disagreed, holding that greenhouse gases are within the Clean Air Act's broad definition of an air pollutant. Specifically, the Court held:

> The Clean Air Act's sweeping definition of "air pollutant" includes "*any* air pollution agent or combination of such agents, including *any* physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air . . . ."[18] On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word "any." Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt "physical [and] chemical . . . substance[s] which [are] emitted into . . . the ambient air." The statute is unambiguous.[19]

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[14] Specifically, the CRS report says: "A precise count of the number of such requests is difficult to determine, according to EPA's Office of Transportation and Air Quality (OTAQ), in large part because the nature of such requests varies. The state has requested waivers for new or amended standards on at least 53 occasions; on another 42 occasions, the state has requested "within the scope" determinations (i.e., a request that EPA rule on whether a new regulation is within the scope of a waiver that the agency has already issued). Adding all of these together, one might say that there have been at least 95 waiver requests, but nearly half of these were relatively minor actions that may not deserve to be counted as formal requests." James E. McCarthy, Specialist in Environmental Policy, Resources, Science, and Industry Division, Congressional Research Service, et al, *California's Waiver Request to Control Greenhouse Gases Under the Clean Air Act* (RL34099) (Mar. 4, 2008) [hereinafter *CRS California Waiver Report 2008*], 14-15.

[15] *CRS California Waiver Report* 15 (*quoting* unnamed official, Office of Transportation and Air Quality, U.S. Environmental Protection Agency)

[16] *Id.*

[17] *Id.*

[18] *Id.* (*citing* Clean Air Act §7602(g)) (**emphasis** and ellipses in original)

[19] *Id.* at 1460 (ellipses in original)

Additionally, the Court held that the clause "in his judgment" in section 202 of the Clean Air Act does not allow the EPA Administrator to exercise discretion against regulating based on policy considerations.[20] Instead, the EPA Administrator must consider only whether an air pollutant "may reasonably be anticipated to endanger public health or welfare," not EPA's policy preferences.[21]

EPA must analyze nature of carbon dioxide. The Court's decision did not cause carbon dioxide and other GHGs to become regulated pollutants. Instead, the Court said: "We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding. We hold only that EPA must ground its reasons for action or inaction in the [Clean Air Act]. [22]

To this end, the Court remanded the case back to EPA to determine whether and, if so, how to regulate carbon dioxide under the Clean Air Act.[23] In other words, the Court found that the EPA Administrator must make requisite findings, including a so-called "endangerment finding," and issue regulations under the Clean Air Act before greenhouse gas air pollutants are actually regulated pollutants. In making this endangerment finding, EPA is required to analyze the science and select one of three options: (1) make an endangerment finding, which would lead to EPA regulation; (2) make a non-endangerment finding, which would not require EPA regulation; or, (3) decide the science is insufficiently certain to decide either way.

4. The Clinton Administration did not institute a comprehensive framework to regulate GHGs despite its self-proclaimed authority to do so.

Although the Clinton Administration affirmatively stated they had the authority to regulate greenhouse gases, it chose not to do so. The Bush Administration has expressed it reservations about exactly how to regulate greenhouse gases in the wake of *Massachusetts v. EPA*.

Clinton Administration failed to regulate. Under the Clinton Administration, EPA's General Counsel argued that carbon dioxide is an air pollutant, and thus could be regulated under the existing authority of the Clean Air Act. Specifically, in his memo to then-EPA Administrator, Carol Browner, Jonathan Z. Cannon argued that carbon dioxide satisfied the Clean Air Act definition of "air pollutant;"[24] EPA, nevertheless, never took

[20] *Id.* at 1451-52
[21] *Id.*
[22] *Id.* at 1463
[23] *See generally Id.*. The Court also held that petitioners had standing to challenge EPA's denial of their rulemaking petition since at least one petitioner state properly asserted a concrete injury from the potential further loss of its coastal land, much of which was owned by the state, from rising seal levels caused by climate change.
[24] Memorandum from Jonathan Z. Cannon, EPA General Counsel, to Carol M. Browner, EPA Administrator, *EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources* (Apr. 10, 1998).

the second required action, namely finding that carbon dioxide poses harm to public health, welfare, or the environment, or a so-called "endangerment finding." Further, in 1999, the subsequent EPA General Counsel specifically stated "EPA currently has no plans to regulate carbon dioxide...."[25]

Bush Administration seeking regulatory mechanism. The Bush Administration took a different approach, consistently arguing that Congress had clearly distinguished carbon dioxide from other air pollutants and had expressly decided not to regulate the pollutant. Further the Bush Administration argued that attempting to regulate GHGs from motor vehicles is equivalent to setting fuel economy standards, an authority designated for the federal government, as opposed to controlling air pollution, in which states have a regulatory role. More conclusively, in his August 29, 2003 Memorandum to current EPA Administrator, Stephen Johnson, then-EPA General Counsel, Robert E. Fabricant, concluded that the Clean Air Act does not grant EPA authority to regulate carbon dioxide and other GHGs for their potential climate change impacts.[26]

Subsequent to the *Massachusetts v. EPA* decision, on May 14, 2007, President George W. Bush signed Executive Order 13432 requiring coordination among specified agencies to "take action under the Clean Air Act regarding greenhouse emissions from motor vehicles."[27] Specifically, President Bush directed the EPA and the Department of Transportation, Energy, and Agriculture "to take the first steps toward regulations that would cut gasoline consumption and greenhouse gas emissions from motor vehicles, using [his] 20-in-10 plan as a starting point."[28]

Likewise, work began within EPA on making an endangerment finding. Finally, on April 16, 2008, President Bush announced during a speech in the Rose Garden a new national goal to stop the growth in U.S. greenhouse gas emissions by 2025 that was intended to inform Congressional debate on legislation to reduce greenhouse gas emissions. The goal of this announcement was to prompt Congress to act rather than to rely upon litigation under disparate regulatory structures, which he believes not to be an efficient manner for regulating GHGs.[29]

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[25] *Is CO_2 A Pollutant and Does EPA Have the Power to Regulate It?: Hearing Before the Subcomm. on National Environmental Growth, Natural Resources and Regulatory Affairs of the House Comm. on Gov't Reform and the Subcomm. on Energy and Environment of the House Comm. on Science*, 106th Cong. 11 (1999) (testimony of Gary Guzy, EPA General Counsel).

[26] Memorandum from Robert E. Fabricant, EPA General Counsel, to Marianne L. Horinko, EPA Acting Administrator, EPA's Authority to Impose Mandatory Controls to Address Global Climate Change Under the Clean Air Act (August 28, 2003).

[27] Exec Order No. 13,432, 72 Fed. Reg. 27,717 (May 14, 2007)

[28] *Id.*

[29] George W. Bush, U.S. President, Speech entitled "Taking additional action to confront climate change" in the Rose Garden of the White House (Apr. 16, 2008) *available at* http://www.whitehouse.gov/news/releases/2008/04/20080416-6.html [last visited May 19, 2008].

IV. CALIFORNIA'S WAIVER REQUEST

1. California adopted regulations, requested waiver

On July 22, 2002, the state of California passed AB 1493 which requires the California Air Resources Board (CARB) to adopt regulations requiring the "maximum feasible and cost-effective reduction" of GHG emissions from any vehicle whose primary use is noncommercial personal transportation.[30] Passing AB 1493 made California the first state with legislation requiring the reduction of greenhouse gas (GHG) emissions from motor vehicles.[31] The reductions required by AB 1493 required a reduction of approximately 30% below the 2002 emissions levels (depending on the type of vehicle) and were to be realized in motor vehicles manufactured for the 2009 model year and thereafter.

On September 24, 2004, CARB adopted regulations requiring gradual reductions in fleet average GHGs until they reach approximately 30% below the emissions of the 2002 fleet in 2016.[32] California's focus on fleet averages rather than reductions for individual vehicles was intended to provide flexibility for automobile manufacturers.

On December 21, 2005, CARB submitted its request for a wavier under section 209 (b) of the Clean Air Act to EPA, having determined, in accordance with section 209 (b) of the Clean Air Act that its "State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards."[33]

2. EPA denied California's waiver request

Immediately following the decision in *Massachusetts v. EPA*, EPA began work on considering California's request for a waiver to regulate GHGs from mobile sources. This was because EPA believed that the decision and opinion in *Massachusetts v. EPA* could potentially be relevant to issues EPA may address in the context of California's request for a waiver, namely whether GHGs were "air pollutants" under the Clean Air

[30] California Assembly Bill 1493, Vehicular Emissions, Greenhouse Gases (Jul. 22, 2002)
[31] There are separate standards for passenger cars and light duty trucks under 3,750 lbs. than there is for vehicles weighing more than 3,750 lbs.
[32] California Environmental Protection Agency Air Resources Board, Final Regulation Order - Amendments to Sections 1900 and 1961 and Adoption of New Sections 1961.1, Title 13, California Code of Regulations as Approved by the Office of Administrative Law (Sept. 24, 2004 hearing date) *available at* http://www.arb.ca.gov/regact/grnhsgas/grnhsgas.htm [last visited May 19, 2008]; California Environmental Protection Agency Air Resources Board, California Exhaust Emission Standards and Test Procedures for 2001 and Subsequent Model Passenger Cars, Light Trucks and Medium-Duty Vehicles as Approved by Office of Administrative Law (Sept. 24, 2004 hearing date) *available at* http://www.arb.ca.gov/regact/grnhsgas/grnhsgas.htm [last visited May 19, 2008].
[33] California Environmental Protection Agency Air Resources Board, Request for a Clean Air Act Section 209(b) Waiver of Preemption for California's Adopted and Amended New Motor Vehicle Regulations and Incorporated Test Procedures to Control Greenhouse Gas Emissions: Support Document (Dec. 21, 2005).

Act and, as such, whether EPA had the authority to regulate GHGs.[34] On April 10, 2007, EPA announced two public hearings to be held in May 2007 and the opening of the docket for public comment.

Having committed to announcing a decision before the end of 2007,[35] as previously discussed, on December 19, 2007, Administrator Johnson wrote to California Governor Schwarzenegger stating "I have decided that EPA will be denying the waiver and have instructed my staff to draft appropriate documents setting forth the rationale for the denial in further detail...."[36]

V. ANALYSIS OF EPA ADMINISTRATOR'S DENIAL

1. Basis of waiver requests generally

According to past interpretation of the Clean Air Act, the EPA Administrator could analyze California's request for a waiver to regulate GHGs from motor vehicles: (1) review the standard to be regulated in isolation; or (2) review the standard to be regulated in the aggregate (i.e., whether, in the aggregate, all of the various emissions controls in effect in the states are as protective of public health and welfare as federal standards, are needed to meet compelling and extraordinary conditions, etc.)

According to the Congressional Research Service, assessing a California regulatory scheme in isolation has historically been rejected by both EPA and California,[37] and the recent decision to deny California's waiver request creates a significant new precedent. In this context it is important to understand that the regulation of GHGs, particularly carbon dioxide, creates effectively a case of first impression for EPA and California due to the global nature of carbon dioxide. As such, analytical theories used in the past by EPA and California may not have ever been directly germane to the instant request by California to regulate GHGs from motor vehicles.

2. Basis for EPA's decision

Congress permitted EPA to reject waiver requests. Specifically, section 209 (b) (1) of the Clean Air Act allows EPA to reject a request for a waiver in the event the EPA Administrator finds: "(A) California's decision [in relation to protectiveness] is arbitrary and capricious;" "(B) California does not need state standards to meet compelling and

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[34] U.S. EPA, California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12156, 12157 (Mar. 6, 2008) [hereinafter *Mar. 6, 2008 Denial Notice*]

[35] *Examining of the Case for the California Waiver: An Update from EPA: Hearing before the Senate Committee on Environment and Public Works*, 110th Cong. (Jul. 26, 2007) (written statement of Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency).

[36] Dec. 19, 2007 Johnson Letter.

[37] *CRS California Waiver Report 2008* at 8

extraordinary conditions;" or "(C) California's standards and enforcement procedures are not consistent with section 202 (a) [of the Clean Air Act] [which requires adequate lead-time for motor vehicle manufacturers and technological feasibility]."[38]

In relation to California's current request for a waiver, Administrator Johnson, in his final decision document dated March 6, 2008, addressed only section 209 (b) (l) (B) of the Clean Air Act, namely whether California has compelling and extraordinary conditions. As such, Administrator Johnson did not make a finding on sections 209 (b) (l) (A) and (C) of the Clean Air Act which determine whether California's regulation is arbitrary and capricious and whether California's regulation provides adequate lead-time and technological feasibility, respectively.[39]

Specifically, Administrator Johnson concluded that "section 209(b) [of the Clean Air Act] was intended to allow California to promulgate state standards applicable to emissions from new motor vehicles to address pollution problems that are local or regional" and that, as such, he "do[es] not believe section 209(b)(l)(B) was intended to allow California to promulgate state standards for emissions from new motor vehicles designed to address global climate change problems; nor, in the alternative, do[es he] believe that the effects of climate change in California are compelling and extraordinary compared to the effects in the rest of the country."[40]

In its petition for a waiver, California identified conditions that climate change presents to California to support its claim of compelling and extraordinary needs. These included "the potential of rising sea levels that would bring increased salt water intrusion to its limited supplies of water, diminishing snow pack that would also threaten its limited water supply, and higher temperatures that would exacerbate the state's ozone nonattainment problem, which is already the worst in the nation."[41] Unlike particulate air pollution or other localized concentration of particulates in a particular city or region, however, the science to support whether the effects of global climate change is unique to a particular state or region is still evolving, and opinion is widespread that significant challenges remain as to whether the harm can be mitigated within the borders of a particular state or region.

Administrator Johnson, however, looked at the "impacts of global climate change in California in comparison to the rest of the nation as a whole."[42] Administrator Johnson stated this "call[ed] for EPA to exercise its own judgment to determine whether the air pollution problem at issue - elevated concentrations of GHG emissions – is within the confines of state air pollution programs covered by section 209(b)(l)(B)."[43] It was on this basis that Administrator Johnson made his final determination that the subject CARB regulations are "not needed to meet compelling and extraordinary conditions."[44]

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[38] CAA § 209(b)(1) referring to CAA §202(a)
[39] *Mar. 6, 2008 Denial Notice*
[40] *Mar. 6, 2008 Denial Notice* at 12157
[41] CRS California Waiver Report 2008 at 17-18
[42] *Mar. 6, 2008 Denial Notice* at 12158
[43] *Mar. 6, 2008 Denial Notice* at 12158
[44] *Mar. 6, 2008 Denial Notice* at 12,156, 12,162

3. EPA found carbon dioxide of distinct nature

Because carbon dioxide collects in an indiscriminate global pool of carbon dioxide gases, Administrator Johnson found that climate change is a global issue and will pose the same challenges to California whether or not the state is permitted to implement the adopted regulations. This distinction, based upon the global nature of greenhouse of gas and the global nature of carbon dioxide, is critical to the Administrator's legal analysis. The regulation of carbon dioxide presented a highly novel question of how to regulate air pollutants of an entirely global nature. This finding is consistent with his December 19, 2007 letter to Governor Schwarzenegger where he stated:

> Unlike other air pollutants covered by previous waivers, greenhouse gases are fundamentally global in nature. Greenhouse gases contribute to the problem of global climate change, a problem that poses challenges for the entire nation and indeed the world. Unlike pollutants covered by the other waivers, greenhouse gas emissions harm the environment in California and elsewhere regardless of where the emissions occur. In other words, this challenge is not exclusive or unique to California and differs in a basic way from the previous local and regional air pollution problems addressed in prior waivers.[45]

This is further consistent with the legal rationale in the decision document that compelling and extraordinary conditions must be of a local or regional nature whereas climate change is global in nature. In addition, the Administrator contends that the impacts to California from climate change will not be different enough from those in the nation as a whole to justify calling California's situation "compelling and extraordinary."

4. Comments received on the public record

According to documents reviewed by the Committee, the majority of comments received in the public record by EPA urged EPA to grant the waiver. This support came primarily from environmental groups, the Manufacturers of Emission Controls Association, the National Association of Clean Air Agencies (which represents state and local air pollution control departments), and a number of state governors.[46]

The automobile industry and the U.S. Department of Transportation (DOT), among others, opposed a waiver grant. The auto industry maintains that there is effectively no difference between California and federal emission standards in their impact on criteria air pollutants (ozone, in particular), that the benefits of the GHG regulations are "zero," and that emissions from California's auto fleet will actually

[45] *Dec 19, 2007 Johnson Letter*

[46] Fourteen states have adopted regulations identical to California's; two additional states have announced their intention to adopt standards similar to California's. The ability of these states to implement these regulations depends on whether or not California was granted their petition for a waiver.

increase as a result of the regulations as consumers keep older, higher-emitting cars longer.

5. Majority's assertion that Johnson "reversed" himself is unsupported by evidence

The Majority concludes that Administrator Johnson "reversed" his position after communicating with the White House,[47] however the evidence reviewed by the Committee simply does not support this conclusion.

The Administrator throughout the course of the decision making process was presented with a variety of options, all legally defensible. According to Jason Burnett, Associate Deputy Administrator, "Over the course of several months, when I had regular conversations with the administrator, I came away with the understanding that he had different opinions at different points in time."[48] For example, Burnett testified that "the Administrator was interested in initially a full grant, and became interested in a partial grant, asked for me and others to explore ways of making a partial grant work."[49] Burnett also testified that "I had the impression that he was quite interested in and was seriously exploring the objection of granting the waiver. Later in the process, as previous questioning has noted, there was a lot of interest in middle-ground options."[50]

It is critical to note that Burnett in the deposition was expressing his "understanding" and his "impression" – not any specific statements or communications from the Administrator. In fact, according to Burnett, he did not know the Administrator's final decision until the Administrator came into Burnett's office on Monday, December 17, 2007, and told him.[51] As such, the Majority's assertion of a reversal of position by Administrator Johnson is specious.

6. Administrator Johnson's decision has a valid legal basis

Administrator Johnson throughout consultation with staff was provided with the option of denying California's request for a waiver. During the course of this investigation, Committee staff was told that the EPA staff would not have presented the Administrator with options that were not legally defensible. For example, in response to a question of "Would [EPA] staff have presented and would the Administrator have ever accepted an option or a piece of information or advice that in some way wasn't legally

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[47] House Committee on Oversight and Government Reform, *Committee Report: EPA's Denial of the California Waiver*, May 19, 2008, 1 [hereinafter *Majority Report*]
[48] Deposition of Jason Burnett, Associate Deputy Administrator, U.S. Environmental Protection Agency, in Washington, D.C. (May 15, 2007) [hereinafter *Burnett Deposition*] Draft Tr. at 59
[49] *Id.* at Draft Tr. at 123
[50] *Id.* at Draft Tr. at 60
[51] *Id.* at Draft Tr. at 131

defensible?" Burnett responded, "I think that we eliminated from consideration options that were not legally defensible."[52]

Rather than interviewing or even seeking to interview any EPA attorney, Majority staff relies upon the legal analysis of non-EPA lawyers and hearsay to assess the legality of the Administrator's decision. For example, rather than speaking with EPA General Counsel Roger Martella directly to assess the legal nuances of this decision, the Majority proffers hearsay and interpretation by others of EPA's legal opinion.[53] While these may be credible witnesses, they are no substitute for the testimony of EPA attorneys. Therefore the Majority's assessment of the legal basis of Administrator Johnson's decision is inadequate.

7. **The Majority provides no evidence to support their implied assertion of intervention by the White House**

The Majority, in their attempt to claim politicization of Administrator Johnson's decision to deny California's request for a waiver by the White House, asserts that there is evidence that "indicates the Whites House played a decisive role in the rejection of the California motor vehicle standard."[54] What is striking, however, is that the Majority has no evidence to support this conclusion, and in fact states "Little is know publicly about the White House position,"[55] and then confirms that a key EPA official with knowledge about Administrator Johnson's interaction with the White House refused to answer questions relating to this interaction.[56]

The evidence offered by the Majority to support White House interference is: "Mr. Burnett also affirmed that there was 'White House input into the rational in the December 19th letter;'"[57] however this is a misrepresentation of Burnett's testimony. In fact, the question posed to Burnett was: "Was there any sort of White House input into the rationale in the December 19th letter, or, for that matter, the decision document?" to which he responded, "Yes." However inconvenient, it is not as clear as the Majority would have the reader believe, whether this response relates to the December 19th letter or the final decision document published March 6, 2008.

[52] *Id.* at Draft Tr. 136-37
[53] *See Majority Report* at 13
[54] *Id.* at 19
[55] *Id.* at 19
[56] *Id.* at 19
[57] *Id.* at 18

8. Ultimately, the rationale for denial was crafted by EPA

According to Burnett, "The rationale presented in [Administrator Johnson's] final decision document was developed by the Agency."[58] Additionally, according to Burnett, the rationale was similar to that in the December 19, 2007 letter from Administrator Johnson to Governor Schwarzenegger which was also developed within EPA.[59] Further, on instances too numerous to count, Administrator Johnson in interviews, written statements, and hearing testimony has taken personal ownership for his decision to deny California's request for a waiver.

VII. INAPPROPRIATE ACTIVITIES BY EPA OFFICIALS

1. Introduction

According to press reports and evidence obtained by the Committee in its investigation of the California request for a waiver, senior EPA officials responsible for EPA's analysis of the California request for a waiver provided substantial information and advice to a private individual to assist in his lobbying efforts to persuade EPA Administrator Johnson to grant California's request for a waiver. The individual in question is former EPA Administrator William Reilly who is now a trustee and Executive Committee member of the World Wildlife Fund International Secretariat, which is a strong advocate for regulation of GHG emissions and other aspects of climate change.

Such conduct raises serious questions about whether senior EPA officials either violated the lobbying ban or otherwise misused their positions to surreptitiously influence EPA's decision on the waiver request. When asked to investigate this matter further,[60] the Majority declined, dismissing the actions of EPA officials as merely "respond[ing] to a request for information from a former EPA Administrator"[61] This is an ironic response from the Majority who, themselves, opened their investigation into Administrator Johnson's actions because his decision "raises serious questions about the integrity of the decision-making process"[62] and to determine "whether political considerations were inappropriately injected into the decision making."[63]

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[58] *Burnett Deposition* at Draft Tr. 139-40

[59] *Id.*

[60] Letter from Tom Davis, Ranking Member, House Oversight and Government Reform Committee, and Darrell Issa, Ranking Member, Domestic Policy Subcommittee of the House Oversight and Government Reform Committee, to Henry A. Waxman, Chairman, House Oversight and Government Reform Committee (Apr. 8, 2008) (on file with Minority Committee staff)

[61] Letter from Henry A. Waxman, Chairman, House Oversight and Government Reform Committee, to Tom Davis, Ranking Member, House Oversight and Government Reform Committee, and Darrell Issa, Ranking Member, Domestic Policy Subcommittee of the House Oversight and Government Reform Committee (Apr. 9, 2008) [hereinafter *Apr. 9, 2008 Waxman Letter*] (on file with Minority Committee staff).

[62] *Dec 20, 2007 Waxman Letter*

[63] *Hearing on EPA's New Ozone Standards before the House Oversight and Government Reform Committee*, May 20, 2008, Supplemental Background Memo (May 16, 2008), 1.

The nature and scope of the lobbying efforts, with which senior EPA officials responsible for the analysis of California's petition to regulate GHG emissions certainly raises questions about the integrity of the decision making process. Because the scope and extent of the assistance provided by EPA officials to an outside entity's lobbying efforts is unknown, further investigation by this Committee, including transcribed interviews with relevant EPA officials, is required.

2. Nature of EPA officials' activities

A February 27, 2008, *San Francisco Chronicle* article reported that a senior agency official, Margo Oge, Director, U.S. Environmental Protection Agency, Office of Transportation and Air Quality within EPA's Office of Air and Radiation, and her subordinate, Karl Simon, Director, U.S. Environmental Protection Agency, Compliance and Innovative Strategies Division within the Office of Transportation and Air Quality within EPA's Office of Air and Radiation, were involved in preparing and providing detailed legal and technical information, including talking points, for "a supporter of California's new rules" to use while "making his case" to the EPA Administrator.[64]

It appears that Oge was actually the director of the EPA office that was "principally responsible" for EPA's analysis of California's waiver request and was the director while California's request was being considered[65] and Simon managed the EPA team preparing analysis of California's waiver request for Administrator Johnson.[66]

According to press reports and documents obtained by the Committee, senior EPA officials were directly involved in preparing and providing information to former EPA Administrator William Reilly to use in his effort to lobby EPA Administrator Stephen Johnson to grant California's waiver request.[67] Specifically, it appears Simon

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[64] Zachary Coile, *Memo Warned: EPA chief's credibility at risk*, S.F. CHRON., Feb. 27, 2008 [hereinafter *Feb. 27, 2008 Article*], *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/02/27/MNBQV8V4J.DTL&type=politics [last visited Apr. 7, 2008].

[65] Transcribed interview with Dr. Margo Oge, Director, U.S. Environmental Protection Agency, Office of Transportation and Air Quality [within EPA's Office of Air and Radiation], in Washington, D.C. (Feb. 7, 2008), Tr. at 6 (Majority Counsel: "From documents and interviews, we understand that your office was principally responsible for the Agency's work on the California waiver request?" Dr. Oge: "Yes, it is.").

[66] Transcribed interview with Karl Simon, Director, U.S. Environmental Protection Agency, Compliance and Innovative Strategies Division [within the Office of Transportation and Air Quality within EPA's Office of Air and Radiation], in Washington, D.C. (Jan. 30, 2008), Tr. at 6 (Karl Simon: "I also manage the waiver team for California waiver review.") and Tr. at 7 (Majority Counsel: "Please generally describe your role with respect to California's request for a waiver to enforce regulations to reduce greenhouse gas emissions from motor vehicles, this latest waiver." . . . . Karl Simon: "Well, as noted, I was the manager for basically the last 2 years for the waiver practice, so working with my team and general counsel, we would have gone through the general steps with additional ones for this one, through the waiver practice review, and that would be -- entail, you know, working, for example, serving on the public hearing panel. We had two public hearing panels. Also [my role included] managing the comment and review process; working with senior management in my office, as well as technical and legal staff that were reviewing the waiver decisions; the general management of the practice and providing feedback on ensuring that we were working to get -- to come to a decision.")

[67] *Feb. 27, 2008 Article*

may have "assigned" Christopher Grundler, the Deputy Director of the Office of Transportation and Air Quality, to prepare this document.[68]

In addition to technical information gleaned from EPA staff's analysis from the docket for California's waiver request, Oge, Simon, and Grundler provided Reilly with a full page of talking points that included such statements as:

- The eyes of the world are on you and the marvelous institution you [Administrator Johnson] and [former Administrator Reilly] I have had the privilege of leading; clearly the stakes are huge, especially with respect to future climate work.

- But I think there must be a win-win here, and you should find it and seize it.....for the sake of the environment and the integrity of the agency.

- Word is out about the option to grant the waiver for the first three years and then defer the subsequent years. I don't have the details, but this sounds like the seed for a "grand bargain", and would put you and the agency in the driver's seat to craft a national solution: something that my automaker contacts and California both say they want.

- You have to find a way to get this done. If you cannot you will face a pretty big personal decision about whether you are able to stay in the job under those circumstances. This is a choice only you can make, but I ask you to think about the history and the future of the agency in making it. If you are asked to deny this waiver, I fear the credibility of the agency that we both love will be irreparably damaged.[69]

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[68] E-mail from Christopher Grundler, Deputy Director, U.S. Environmental Protection Agency, Office of Transportation and Air Quality [within EPA's Office of Air and Radiation] to Karl Simon, Director, U.S. Environmental Protection Agency, Compliance and Innovative Strategies Division [within the Office of Transportation and Air Quality within EPA's Office of Air and Radiation] [Oct. 17, 2007; 14:45] (Bates stamp EPA 614) [hereinafter *Grundler E-mail*]. See Attachment A. The subject of this e-mail is "Homework Assignment" and requests Simon "pls review" the attached document called "CA Waiver Background." The attachment is four pages long and includes, *inter alia*, EPA's legal arguments and analyses and Talking Points as discussed above.

[69] *Id. See also Feb. 27, 2008 Article* and *[Statement by Sen. Barbara Boxer, Chairman, Senate Committee on Environment and Public Works] on Censorship of California Waiver Decision Documents*, Jan. 23, 2008, *available at* http://epw.senate.gov/public/index.cfm?FuseAction=Majority.PressReleases&ContentRecord_id=5688a360-802a-23ad-4441-77f52c3c17b6&Region_id=&Issue_id= [last visited Apr. 7, 2008]) (*see* "2.26.2008 EPA Documents") (citing Senate EPW staff transcription of "E-mail between Staff at EPA Office of Transportation and Air Quality, Oct. 17, 2007, SUBJECT: "FollowUp [sic] to this Morning;" this e-mail includes an attachment entitled "Homework Assignment.doc," the final page of which includes the subject talking points). Note this document and the *Grundler e-mail* differ slightly.

3. Similarities to investigation into alleged inappropriate lobbying by the Department of Transportation

These actions are at least as serious as those already investigated by the Committee regarding the alleged lobbying by a Department of Transportation ("DOT") official to oppose the California request. That investigation lasted for months, including the production of hundreds of documents, several transcribed interviews, and lengthy questioning of the EPA Administrator himself during a Committee hearing.[70]

The Majority's June 12, 2007 letter to Secretary of Transportation Mary E. Peters expressed the Majority's concerns with the use of federal resources to lobby EPA on the California request:

> [DOT staff's action] raises serious concerns. It is not an appropriate use of federal resources to lobby members of Congress to oppose state efforts to protect the environment.[71]

That letter also stated that "[such lobbying] is especially problematic on an issue that is pending for decision before the Administration and that is supposed to be decided based upon an independent assessment of the merits."[72] The Majority further stated that, "[a]t the very least [DOT staff's action] suggests the presence of an improper hidden agenda."[73]

Additionally, the Majority, in a September 24, 2007 letter to White House Council on Environmental Quality Chairman, James E. Connaughton: "[DOT staff's actions] raised questions about whether California's request would receive the independent and objective consideration that the Clean Air Act requires."[74] EPA staff's actions raise similar questions regarding "the independent and objective" consideration of California's request. The EPA staff involved in these ex parte actions do not appear to have maintained their independence or objectivity and may have improperly used federal resources to advance their own preconceptions.

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[70] *Hearing on EPA Approval of New Power Plants: Failure to Address Global Warming Pollutants before the House Oversight and Government Reform Committee* (Nov. 8, 2007).

[71] Letter from Henry A. Waxman, Chairman, House Oversight and Government Reform Committee, to Mary E. Peters, Secretary, U.S. Department of Transportation (Jun. 12, 2007), *available at* http://oversight.house.gov/documents/20070612112959.pdf [last visited Apr. 7, 2008].

[72] *Id.*

[73] *Id.*

[74] Letter from Henry A. Waxman, Chairman, House Oversight and Government Reform Committee, to James E. Connaughton, Chairman, White House Council on Environmental Quality (Sep. 24, 2007), *available at* http://oversight.house.gov/documents/20070924105804.pdf [last visited Apr. 7, 2008].

4. The Majority has yet to acknowledge concerns of activities of EPA officials

In response to a request by the Minority to investigate these actions,[75] the Majority declined to investigate apparently inappropriate ex parte actions taken by senior EPA staff, dismissing the above mentioned actions as "respond[ing] to a request for information from a former EPA Administrator"[76] The Majority has to date not responded to a second request by the Majority to investigate these actions.[77] This is an ironic response from the Majority who, themselves, opened their investigation into Administrator Johnson's actions because his decision "raises serious questions about the integrity of the decision-making process"[78] and to determine "whether political considerations were inappropriately injected into the decision making."[79]

The actions of Oge, Simon, and Grundler were a clear misuse of their position and government resources. The Majority claims these can be distinguished from efforts allegedly coordinated by the Department of Transportation which "raise[] concerns that political considerations—not the merits of the issue—guided EPA's decision."[80]

However, it appears that providing support for secret last-minute efforts by a former Administrator who is a trustee and serves on the Executive Committee of the World Wildlife Fund International Secretariat suggests that the political influence of environmental interest groups and not the merits of the case was indeed intended to influence the EPA Administrator's decision, as the talking points provided to Reilly in no way addressed the merits of the issue. The political influence of a former Administrator associated with environmental groups raises identical concerns, and such concerns, as claimed by the Majority, would be a violation of the Clean Air Act.[81]

Moreover, the Majority has mischaracterized this activity as merely "responding to a request for information" as claimed by the Majority.[82] These officials used their insiders' knowledge to circumvent the legally mandated decision making process for consideration of waiver requests to assist a former EPA Administrator and representative of an environmental interest group to lobby in favor of their view of the appropriate decision. In fact, no one should be given preferred treatment because of their prior

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[75] Letter from Tom Davis, Ranking Member, House Oversight and Government Reform Committee, and Darrell Issa, Ranking Member, Domestic Policy Subcommittee of the House Oversight and Government Reform Committee, to Henry A. Waxman, Chairman, House Oversight and Government Reform Committee (Apr. 8, 2008) (on file with Minority Committee staff)

[76] Letter from Henry A. Waxman, Chairman, House Oversight and Government Reform Committee, to Tom Davis, Ranking Member, House Oversight and Government Reform Committee, and Darrell Issa, Ranking Member, Domestic Policy Subcommittee of the House Oversight and Government Reform Committee (Apr. 9, 2008) [hereinafter *Apr. 9, 2008 Waxman Letter*] (on file with Minority Committee staff).

[77] TMD's second letter.

[78] *Dec 20, 2007 Waxman Letter*

[79] *Hearing on EPA's New Ozone Standards before the House Oversight and Government Reform Committee*, May 20, 2008, Supplemental Background Memo (May 16, 2008), 1.

[80] *Apr. 9, 2008 Waxman Letter*

[81] *Apr. 9, 2008 Waxman Letter*

[82] *Apr. 9, 2008 Waxman Letter*

position, and such misuse of Oge's, Simon's, and Grundler's official positions should be condemned.

5. EPA officials' alleged activity is particularly concerning due to its covert nature

Seeking the assistance of influential outside interests to lobby the EPA Administrator is not with senior EPA officials' proscribed job description and is well outside the parameters all Administration staff is expected to follow in the course of preparing analytical information for the EPA Administrator in the course of his analysis of wavier requests. That officials of such a senior level feel the need to engage in ex parte and covert actions to influence the EPA Administrator, at best, suggests that the process for considering waiver decisions is somehow deficient flawed and, at worst, suggests ulterior motives by these senior officials.

On their face, the actions of Oge, Simon, and Grundler represent a misuse of their position, and this abuse of their office deprived the process of the objectivity and independence to which the public is entitled.

VIII. CONCLUSION

In the course of their investigation, the Majority has struggled to uncover evidence that the Administrator's decision was not on the merits. This has forced the Majority to conduct its investigation through the prism of their assumptions, featuring questions to witnesses such as "I assume that there was a communication [with the White House] at some point prior to the final decision's being announced." This is not how this Committee conducted investigations under the prior Chairman, where information was gathered and the chips fell where they may.

This investigation could have been conducted as a serious inquiry into agency activity, but instead it has produced yet another in a long line of "Administration attacks science" stories. In this and past Committee activities, the Majority has made manifestly clear their position that the only consideration relevant to policymaking should be "the science." Pure science is simply not policy.

The putative purpose of this investigation was to assess the decision making process at EPA, this investigation was never destined to be a serious inquiry into the integrity of the decision making process. Had that been the case, the Majority would have taken seriously the Minority's concerns over evidence of the covert and *ex parte* activities by the very EPA officials responsible for preparing the analysis which made its way in front of the Administrator.

As the Minority has noted before, this Committee must not be seen as the Committee where witnesses and other evidence are validated because of their consistency with the views of the Majority and where serious concerns are disregarded because of their potential impact on the credibility of the Majority's witness-darlings. Thorough investigation and careful evaluation of the evidence lead to credible findings. Sadly, the Majority's report amounts to yet another political attack on the Administration and a knee-jerk conclusion of nefarious intent by the White House derived from a manifestly incomplete investigation.

MEMORANDUM

May 20, 2008

To: Members of the Committee on Oversight and Government Reform

Fr: Committee on Oversight and Government Reform, Majority Staff

Re: Supplemental Information on the Ozone NAAQS

This memorandum provides additional information about the Environmental Protection Agency's revision of the national ambient air quality standards for ozone. The memorandum is based on a review of approximately 30,000 pages of previously undisclosed documents received from EPA and the White House Office of Management and Budget, as well as publicly available documents.

On March 12, 2008, pursuant to a court-ordered deadline, EPA issued two revised national ambient air quality standards (NAAQS) for ozone (O_3): a "primary" standard that protects human health and a "secondary" standard that protects the environment. EPA Administrator Stephen Johnson set both the primary standard and the secondary standard at the same level: 75 parts per billion over an eight-hour period.

The Committee's investigation shows that the process that led to the new standards was highly unusual, particularly the process of setting the secondary standard. EPA's expert advisory panel, the Clean Air Scientific Advisory Committee, had unanimously recommended that to protect crops and vegetation, EPA establish a secondary standard that limited long-term, cumulative exposure over a three-month growing season, not a short-term eight-hour standard. EPA Administrator Johnson agreed with this recommendation. The draft rule, as submitted to the White House by Administrator Johnson, described the evidence supporting a cumulative, seasonal standard as "compelling."

Late on March 11, the evening before the court-ordered deadline, EPA was informed that the President had rejected the position of the EPA Administrator and the Clean Air Scientific Advisory Committee. This decision set off what one official described as an "emergency rewrite" to justify setting the secondary standard at the same level as the primary standard, as the White House directed. The final rule dropped the language in the draft that concluded a

cumulative, seasonal standard was "necessary ... to ensure the requisite degree of protection." In its place, the final rule stated: "The Administrator ... does not believe that an alternative cumulative, seasonal standard is needed."

The documents show that the EPA staff questioned both the legality and motivation for the last-minute change in the secondary standard:

- An EPA associate director commented: "Looks like pure politics."
- An EPA lawyer wrote: "we could be in a position of having to fend off contempt proceedings. ... The obligation to promulgate a rule arguably means to promulgate one that is nominally defensible."
- A career official stated: "I have been working on NAAQS for over 30 years and have yet to see anything like this."
- A career official charged with revising communications materials for the final rule wrote: "I don't think that we need to repeat all this ...um... stuff .... about 'parks and forests' when we're not doing anything to protect them. ... No need to distinguish which types of vegetation are in need of additional protection, since we're not really protecting any of them properly!"

The Committee sought to learn the basis for the President's decision to reject the recommendations of the EPA Administrator and the Clean Air Scientific Advisory Committee. The White House, however, is withholding hundreds of pages of documents that would explain what happened inside the White House.

I. Background

Ozone is an air pollutant that contributes to what is typically referred to as smog. When ozone is inhaled, it reacts chemically with biological molecules in the respiratory tract, causing serious adverse health effects. Exposure to ozone can decrease lung function, cause inflammation of airways, and induce respiratory symptoms such as coughing, throat irritation, chest tightness, wheezing, pain, burning, discomfort, and shortness of breath. Exposure to ozone can result in school absences, doctor visits, emergency room visits, hospital admissions, and even premature death.

Ozone can also damage sensitive vegetation and ecosystems. According to EPA, ozone injures crop production and native vegetation and ecosystems "more than any other air pollutant."[1] Ozone exposure can damage leaves, interfere with photosynthesis, and reduce the ability of sensitive species to adapt to or withstand environmental stresses, such as freezing

[1] Environmental Protection Agency, *Review of National Ambient Air Quality Standards for Ozone: Policy Assessment of Scientific and Technical Information,* at 7-1 (Jan. 2007) (EPA-452/R-07-003).

temperatures and pest infestation.[2] Exposure to ozone reduces crop yields for fruits and vegetables and can stunt the growth of trees.[3]

The Clean Air Act requires EPA to protect against the public health and environmental effects of ozone by establishing national ambient air quality standards.[4] Under the Act, EPA is required to establish two standards: (1) a primary standard for the protection of public health; and (2) a secondary standard for the protection of "public welfare," including the environment.[5] These standards must be established without regard to compliance costs. In 2001, in the case of *Whitman v. American Trucking Association*, the Supreme Court ruled that "EPA may not consider implementation costs in setting the secondary NAAQS."[6]

Once national ambient air quality standards are established, states must develop plans to ensure that the standards are not exceeded. In the case of primary standards, the Clean Air Act establishes deadlines for compliance, with areas with greater pollution challenges being given more time to achieve healthy air.[7] In the case of secondary standards, the Act requires eventual compliance, but does not establish any mandatory deadline.[8] Although costs cannot be considered when establishing the NAAQS, they become a prime factor that the states consider in developing strategies for achieving compliance with the standards.

In 1997, the Clinton Administration set a primary and secondary standard for ozone at 80 ppb.[9] Under the Clean Air Act, these standards were supposed to be reviewed and updated within five years.[10] After EPA failed to meet this deadline, the American Lung Association filed suit against the agency.[11] This litigation resulted in EPA agreeing to a consent decree requiring EPA to promulgate final ozone NAAQS by March 12, 2008.[12]

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[2] *Id.* at 7-6 – 7-9.

[3] *Id.* at 7-9, 7-10.

[4] Clean Air Act § 109 (2005).

[5] *Id.*

[6] *Whitman v. American Trucking Associations,* 531 U.S. 457 (2001).

[7] *See,* Clean Air Act, Title I (2005).

[8] *Id.*

[9] Environmental Protection Agency, *National Ambient Air Quality Standards for Ozone,* Fed. Reg. Vol. 62, No. 138 (July 18, 1997) (online at www.epa.gov/ttnamti1/files/cfr/recent/o3naaqs.pdf).

[10] Clean Air Act § 109(d)(1) (2005).

[11] Complaint for Declaratory and Injunctive Relief, *American Lung Association v. Whitman*, D.D.C. (No. 03-778) (Mar. 31, 2003).

[12] Joint Stipulation to Modify Deadlines in Consent Decree, at 3 (Mar. 2007), *American Lung Association v. Johnson*, D.D.C. (No. 03-778) (online at www.epa.gov/ttn/naaqs/standards/ozone/data/march_2007_stipulation.pdf).

II. The Development of EPA's Draft Final Rule

In January 2007, EPA's Office of Air Quality Planning and Standards finalized its "Staff Paper" on ozone.[13] The staff paper presented to EPA Administrator Johnson "staff conclusions and recommendations on a range of policy options ... concerning whether, and if so how, to revise the primary (health-based) and secondary (welfare-based) O_3 NAAQS."[14] It followed a multi-year review of the science regarding ozone's effects on public health and welfare by EPA staff, which first began in September 2000.[15] The recommendations in the staff paper represented years of work by EPA staff.

In the staff paper, EPA recommended that the primary NAAQS for ozone be reduced from 80 ppb to as low as 60 ppb.[16] In addition, the staff concluded that it was no longer appropriate "to use an 8-hr averaging time for the secondary O_3 standard" and recommended to Administrator Johnson that the "8-hr average form should be replaced with a cumulative, seasonal, concentration weighted form."[17] EPA staff recommended that the new secondary standard be a "cumulative, weighted total of 12-hour (8 a.m. – 8 p.m.) exposures over a 3-month period giving greater weight to exposures at higher levels of ozone."[18] The staff made this recommendation because the cumulative, seasonal form is more "biologically relevant" to vegetation and new research showed that the eight-hour standard would not cover the same "areas of concern for vegetation" as the cumulative, seasonal standard.[19]

The Clean Air Act establishes a Clean Air Scientific Advisory Committee (CASAC) to guide the EPA Administrator on setting the NAAQS.[20] CASAC reviewed the staff recommendations and unanimously supported them. In the case of the secondary standard, its Ozone Review Panel members were "unanimous in supporting the recommendation in the Final Ozone Paper that protection of managed agricultural crops and natural terrestrial ecosystems requires a secondary Ozone NAAQS that is substantially different from the primary ozone standard in averaging time, level and form."[21]

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[13] Environmental Protection Agency, *Review of National Ambient Air Quality Standards for Ozone: Policy Assessment of Scientific and Technical Information* (Jan. 2007) (EPA-452/R-07-003).

[14] *Id.* at 1-1.

[15] *Id.* at 1-5.

[16] *Id.* at 6-77.

[17] *Id.* at 8-24.

[18] Environmental Protection Agency, *Review of National Ambient Air Quality Standards for Ozone Final Staff Paper, Human Exposure and Risk Assessments and Environmental Report* (Jan. 2007) (online at www.epa.gov/ttn/naaqs/standards/ozone/data/2007_01_finalsp_factsheet.pdf).

[19] *Id.* at 8-20.

[20] Clean Air Act § 109(d)(2) (2005).

[21] Letter from Dr. Rogene Henderson, Chair of the Clean Air Scientific Advisory

In July 2007, EPA submitted its proposed ozone NAAQS for public comment.[22] EPA Administrator Johnson proposed a primary standard within a range between 70 ppb and 75 ppb and two alternatives for the secondary standard: (1) a cumulative, seasonal form based upon recommendations presented in the staff paper and (2) a short-term secondary standard identical to the proposed primary standard.[23] During the comment period, the proposal to set a seasonal secondary standard was supported by individual states, state and local air pollution control authorities, and the National Park Service, as well as many other organizations.[24]

Internal EPA documents show that the "option selection" meeting with the Administrator occurred on January 7, 2008.[25] At this meeting or shortly thereafter, the Administrator decided to proceed with a primary standard of 75 ppb and a cumulative, seasonal secondary standard.[26] A draft final rule reflecting these decisions was submitted by Administrator Johnson to the White House Office of Management and Budget on February 22, 2008.[27]

The draft final rule submitted by Administrator Johnson stated that adoption of a seasonal secondary standard was supported by "compelling" evidence and was "necessary" to protect the environment. According to Administrator Johnson's draft:

> the Administrator ... agrees with the CASAC Panel and the Staff Paper conclusions that in revising the secondary standard to provide increased protection it is appropriate to establish a secondary standard that is distinct from the primary standard in that it is based on a biologically relevant form. The Administrator finds the evidence is compelling that O_3-related effects on vegetation are best characterized by an exposure index that is cumulative and seasonal in nature, and that revising the current standard in part by

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Committee, to EPA Administrator Stephen L. Johnson (Mar. 26, 2007).

[22] Environmental Protection Agency, *National Ambient Air Quality Standards for Ozone; Proposed Rule*, 72 Fed. Reg. 37818 (July 11, 2007).

[23] *Id.*

[24] Environmental Protection Agency, *Responses to Significant Comments on the 2007 Proposed Rule on the National Ambient Air Quality Standards for Ozone*, at 105 (Mar. 2008) (online at www.epa.gov/ttn/naaqs/standards/ozone/data/2008_03_rtc.pdf).

[25] Environmental Protection Agency, *Ozone NAAQS Review; SAN 5008; Tier 1* (Revised on Mar. 4, 2008).

[26] *Id.* EPA has not responded to a Committee request to identify the exact date on which Administrator Johnson made the option selection.

[27] Memorandum from Administrator Susan Dudley, Office of Information and Regulatory Affairs, Office of Management and Budget, to EPA Administrator Stephen L. Johnson (Mar. 6, 2008).

adopting such a form is both necessary and appropriate to ensure a requisite degree of protection.[28]

According to the draft approved by Administrator Johnson: "EPA has found no evidence that, from the perspective of biological impact of O_3 exposure, the 8-hour standard form is an appropriate metric to protect vegetation."[29] The draft added: "the Administrator concludes that to provide adequate protection, the standard should be revised by establishing a distinct secondary standard with a cumulative, seasonal form that is biologically relevant to O_3-related effects."[30]

III. White House Objections

On March 6, 2008, six days before the court-ordered deadline, Susan Dudley, Administrator of OMB's Office of Information and Regulatory Affairs, sent a memorandum to EPA informing the agency that OMB disagreed with its proposed secondary ozone standard.[31] She stated that the "draft does not provide any evidence that a separate secondary standard would be more protective than one set equal to the draft primary standard."[32] Ms. Dudley argued that EPA failed to properly consider "economic values" in the setting of the secondary standard and that there was no reason to set a secondary standard that was not identical to the primary standard.[33]

On the following day, EPA Deputy Administrator Marcus Peacock sent a response to OMB that disagreed with OMB's assessment.[34] Mr. Peacock's memo explained that the Supreme Court has clearly stated that "EPA cannot consider implementation costs in setting" the secondary standard, that the agency had appropriately considered the statutory criteria for establishing the secondary standard, and that a "secondary standard that is distinctly different in form and averaging time from the 8-hour primary standard is necessary."[35] In an internal EPA e-

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[28] U.S. Environmental Protection Agency, *Draft Ozone Rule*, at 243 (EPA-HQ-OAR-2005-0172-7183.1) (Mar. 12, 2008).

[29] U.S. Environmental Protection Agency, *Draft Ozone Rule*, at 252 (EPA-HQ-OAR-2005-0172-7183.1) (Mar. 12, 2008).

[30] U.S. Environmental Protection Agency, *Draft Ozone Rule*, at 243 (EPA-HQ-OAR-2005-0172-7183.1) (Mar. 12, 2008).

[31] Memorandum from Administrator Susan Dudley, Office of Information and Regulatory Affairs, Office of Management and Budget, to EPA Administrator Stephen L. Johnson (Mar. 6, 2008).

[32] *Id.*

[33] *Id.*

[34] Memorandum from EPA Deputy Administrator Marcus Peacock to Administrator Susan Dudley, Office of Information and Regulatory Affairs, Office of Management and Budget (Mar. 7, 2008).

[35] *Id.*

mail, the counsel to the Assistant Administrator for Air and Radiation commented that the White House was apparently "p.o.'D about the separate std" and that "the hornets are already worked up."[36]

On March 8, Susan Dudley and Stephen McMillin, the Deputy Director of the Office of Management and Budget, called EPA's Deputy Administrator to inform the agency that "OMB does not concur," thereby blocking EPA from issuing the rule.[37] No written explanation of the OMB position was provided to EPA.

According to Jason Burnett, the EPA Associate Deputy Administrator, Administrator Johnson had multiple meetings with White House officials regarding the secondary ozone standard in March 2008.[38] However, at the direction of EPA, Mr. Burnett refused to discuss his knowledge of the substance of the meetings or the identities of the White House officials involved when he testified in a deposition.[39]

Throughout most of the day on March 11, 2008, the day before the consent decree deadline, EPA staff continued to prepare a final rule that included a secondary ozone standard based upon a cumulative, seasonal form. Drafts from March 11 of the rule, the response to comments, the fact sheet, the answers to anticipated questions, and the "Action Memorandum" from Deputy Administrator Marcus Peacock to Administrator Johnson all reflected a secondary ozone standard based upon a cumulative, seasonal form.[40]

EPA staff also drafted talking points, apparently for Administrator Johnson to use in conversations with the White House. The talking points stated: "The seasonal form is the most scientifically defensible."[41] The document also stated: "The Administrator must decide how best to set the secondary standard and a seasonal form is the most legally defensible."[42]

During the evening of March 11, 2008, EPA staff was directed to reject the seasonal standard and make the secondary standard equal to the primary one, as OMB had previously urged. An e-mail from an EPA attorney working on the ozone standard explained:

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[36] E-mail from George Sugiyama to Lydia Wegman (Mar. 7, 2008; 7:30 p.m.).

[37] E-mail from Marcus Peacock to Robert Meyers and Charles Ingebretson (Mar. 8, 2008; 2:55 p.m.).

[38] Committee on Oversight and Government Reform, Transcript of Deposition of Jason Burnett, at 69 (May 15, 2008).

[39] *Id.* at 67-70.

[40] *See e.g.*, E-mail from Erika Sasser to Sara Terry (Mar. 11, 2008; 9:25 a.m.); E-mail from Diann Frantz to Josh Lewis and Cheryl Mackay (Mar. 11, 2008; 1:03 p.m.); E-mail from Dave Mckee to Joseph Dougherty (Mar. 11, 2008; 2:23 p.m.); E-mail from John Millett to Alison Davis (Mar. 11, 2008; 6:28 p.m.)

[41] Environmental Protection Agency, *Ozone Secondary NAAQS* (Mar. 11, 2008).

[42] *Id.*

> Well, we lost on the secondary. the decision came in about 7:00 to make it equal to the primary. About an hour later we heard there was also to be some sort of presidential announcement.[43]

The following day, Ms. Dudley sent a letter to EPA Administrator Johnson explaining that the President had reviewed the secondary standard. According to Ms. Dudley's letter:

> The President has concluded that, consistent with Administration policy, added protection should be afforded to public welfare by strengthening the secondary ozone standard and setting it to be identical to the new primary standard.[44]

The last-minute change triggered what one EPA staff called an "emergency rewrite" of the final rule.[45] Just before 1:00 a.m. on March 12, 2008, the Director of EPA's Health and Environmental Impacts Division informed EPA staff that "the primary and secondary standards are going to be identical" and asked that the "implementation section" be reworked "first thing in the morning."[46]

The final rule was issued late in the day on March 12. The statements in the draft rule that described the evidence supporting a seasonal standard as "compelling" were deleted, as was Administrator Johnson's finding that a seasonal standard was "necessary ... to ensure the requisite degree of protection." In its place, the final rule contained language justifying the decision to adopt a secondary standard equal to the primary standard, asserting:

> The Administrator believes that such as standard would be sufficient to protect public welfare from known or anticipated adverse effects, and does not believe that an alternative cumulative, seasonal standard is needed to provide this degree of protection.[47]

EPA employees worked at such a furious pace to edit the rule that not every statement in support of a separate secondary standard was deleted from the signed rule published in the *Federal Register*. On March 13, the Group Leader of the Air Quality Analysis Group e-mailed

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[43] E-mail from John Hannon to Richard Ossias and Kevin McLean (Mar. 12, 2008; 7:40 a.m.).

[44] Letter from Administrator Susan Dudley, Office of Information and Regulatory Affairs, Office of Management and Budget, to EPA Administrator Stephen L. Johnson (Mar. 12, 2008). The letter is misdated as March 13, but was actually transmitted on March 12 as evidenced by its availability on that date and the citation to the letter in the March 12 final regulation.

[45] E-mail from Lewis Weinstock to Richard Wayland (Mar. 11, 2008; 9:32 p.m.).

[46] E-mail from Lydia Wegman to Bill Harnett, et al. (Mar. 12, 2008; 12:55 a.m.).

[47] U.S. Environmental Protection Agency, *Draft Ozone Rule*, at 255 (EPA-HQ-OAR-2005-0172-7183.1) (Mar. 12, 2008).

two other EPA employees stating, "I'm wondering if a ... sentence was inadvertently left in the signature version of the ozone rule."[48] The sentence stated:

> The National Park Service (NPS) comment ... specifically stated that "the NPS supports ... the conclusion that a seasonal, cumulative metric is needed to protect vegetation." ... EPA agrees with these comments for the reasons discussed above.[49]

IV. The Views of EPA Career Staff

The reaction of EPA career staff and managers to the decision to drop the secondary standard, as revealed in internal communications obtained by the Committee, illustrates the degree to which the staff viewed the decision as unfounded. In their internal communications, they raised questions about both the legality of and motivation for the last-minute change. They also expressed personal dismay.

On March 10, the Associate Director for Health for EPA's National Center for Environment Assessment commented on the objections raised by OMB, stating: "Looks like pure politics."[50]

On the morning of March 11, an EPA lawyer warned about the legal danger of dropping the seasonal standard:

> One additional thought did occur to me today in discussing with my client what we would do if we were to change the rule at this late date to set a secondary standard equal to the primary. In short, we would have a hard time doing anything other than putting out an obviously legally deficient notice given the time frames. You may have already thought of this, but it occurred to me that we could be in the position of having to fend off contempt proceedings for that sort of action. The obligation to promulgate a rule arguably means to promulgate one that is nominally defensible, i.e. that meaningfully responds to at least most significant comments and has a clear explanation of the basis for the decision.[51]

Another agency lawyer expressed his legal view, "We believe that it is legally stronger to go forward with a seasonal standard ... than to go forward with an 8-hour identical to a primary."[52]

As EPA staff worked on March 11 and March 12 to revise the materials for the final rule to reflect the President's decision, one EPA staffer wrote:

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[48] E-mail from Phil Lorang to Karen Martin and Erika Sasser (Mar. 13, 2008; 5:08 p.m.).

[49] Environmental Protection Agency, *National Ambient Air Quality Standards for Ozone: Final Rule*, 73 Fed. Reg. 16499 (Mar. 27, 2008).

[50] E-mail from John Vandenberg to Ila Cote and Peter Preuss (Mar. 10, 2008; 4:22pm).

[51] E-mail from Lea Anderson to Mary Ann Poirier (Mar. 11, 2008; 11:24 a.m.).

[52] E-mail from John Hannon to Mary Ann Poirier (Mar. 11, 2008; 7:05 a.m.).

> I don't think that we need to repeat all this ...um... stuff .... about "parks and forests" when we're not doing anything to protect them. ... No need to distinguish which types of vegetation are in need of additional protection, since we're not really protecting any of them properly!"[53]

Career EPA staff reacted with frustration when they heard of the decision to drop the seasonal standard. In response to an e-mail referring to "the secondary standard being set the same as the primary," the Acting Group Leader of the Ambient Air Monitoring Group wrote: "My sympathies to all and you in particular for all the work that went down the drain."[54] An agency veteran replied: "I have been working on NAAQS reviews for over 30 years and have yet to see anything like this."[55] The Group Leader of the Ambient Standards Group told her staff: "I know how incredibly frustrated and disgusted we all are at the moment."[56] After midnight, the Director of the Health and Environmental Impacts Division summed up the events of the evening in the subject line of her e-mail: "We lose."[57]

The next day, a career attorney in the Office of General Counsel informed his colleagues: "Well, we lost on the secondary."[58] The Associate General Counsel for the Air and Radiation Law Office replied: "Sorry to hear that. Hopefully the hard work you all did on it will bear fruit in the long run, when a different crew is in charge."[59]

In a consolation e-mail to her staff, the Director of the Health and Environmental Impacts Division made it clear that the White House, not EPA, made the decision on the secondary standard: "While I was quite disappointed that we did not succeed in promulgating a [seasonal secondary] standard, we certainly had the full support of the Administrator in our effort."[60] The Acting Director of Policy Analysis and Communications in the Office of Air Quality Planning and Standards stated: "Bad day for EPA. Primary has held but we lost the 2ndary."[61] Another career EPA employee reported to his colleagues:

> EPA was moving to have a new form of the secondary standard (SUM06, an important change); OMB last Friday said 'no'. I hear final decision came down last night seeing

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[53] E-mail from Erika Sasser to Sara Terry (Mar. 11, 2008; 8:43 p.m.).

[54] E-mail from Lewis Weinstock to Dave McKee (Mar. 11, 2008; 8:41 p.m.).

[55] E-mail from Dave McKee to Lewis Weinstock (Mar. 11, 2008; 9:39 p.m.).

[56] E-mail from Karen Martin to Susan Stone, et al. (Mar. 11, 2008; 8:43 p.m.).

[57] E-mail from Lydia Wegman to Bill Harnett, et al. (Mar. 12, 2008; 12:55 a.m.).

[58] E-mail from John Hannon to Richard Ossias and Kevin McLean (Mar. 12, 2008; 7:40 a.m.).

[59] E-mail from Richard Ossias to John Hannon (Mar. 12, 2008; 9:01 a.m.).

[60] E-mail from Lydia Wegman to Karen Martin, et al. (Mar. 12, 2008; 8:20 p.m.).

[61] E-mail from Jenny Noonan to Jeffrey Clark (Mar. 12, 2008; 11:27 a.m.).

> the wisdom of OMB on this point, so secondary standard will be equal to the primary. To hell with the trees.[62]

In response to an article quoting Administrator Johnson as saying "I followed my obligation. I followed the law. I adhered to the science," a veteran employee in the Ambient Standards Group wrote: "I guess that means that he doesn't have to pay attention to the scientists, who were overly worried about vulnerable citizens."[63]

V. Unanswered Questions about the Decision

As part of the investigation, the Committee has sought to understand the rationale for rejecting the seasonal standard advocated by the EPA Administrator, the Clean Air Scientific Advisory Committee, and the EPA staff. Under the Clean Air Act, the secondary standard is required to be set based on a scientific assessment of harm to public welfare. The decision may not consider the economic costs of compliance as a factor in setting the standards. In its 2001 decision in *Whitman v. American Trucking Association*, the Supreme Court wrote that if EPA established a NAAQS standard by "secretly considering the costs of attainment without telling anyone ..., it would be grounds for vacating the NAAQS, because the Administrator had not followed the law."[64]

There is some evidence that the White House intervention was motivated by an illicit consideration of costs. The March 6 memo from Ms. Dudley, the OIRA Administrator, asserted that the EPA proposal was flawed because it did not consider "economic values." Moreover, news reports have suggested that the White House rejected the EPA position because of the costs of compliance. According to the *Washington Post*:

> Solicitor General Paul D. Clement warned administration officials late Tuesday night that the rules contradicted the EPA's past submissions to the Supreme Court, according to sources familiar with the conversation. As a consequence, administration lawyers hustled to craft new legal justifications for the weakened standard.[65]

The Committee sought — and ultimately issued a subpoena for — documents from Ms. Dudley that would explain why the White House rejected the EPA position. Ms. Dudley provided the Committee with copies of OMB's communications with EPA and access to copies of communications between OMB and other agencies. These documents shed little light on the decision, however. Comments to OMB from the Department of Agriculture on March 11, 2008, at 7:07 p.m. did raise concerns about the science supporting the EPA position, asserting that one study relied upon by EPA was not peer-reviewed. But it is unclear what influence these

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[62] E-mail from John Vandenberg to Linda Tuxen (Mar. 12, 2008; 1:05 p.m.).

[63] E-mail from Dave McKee to Chris Trent (Mar. 12, 2008; 10:50 p.m.).

[64] *Whitman v. American Trucking Associations,* 531 U.S. 457 (2001).

[65] *Ozone Rules Weakened at Bush's Behest*, Washington Post (Mar. 14, 2008).

comments had. Moreover, they appear to be based on a misunderstanding of the basis for EPA's position.[66]

At the same time, Ms. Dudley withheld from the Committee documents that could explain the basis for the White House objections to Administrator Johnson's recommendation. According to White House counsel, approximately 1,900 pages of internal White House communications are being withheld. White House counsel explained that the documents were being withheld because they reflected the contents of deliberations inside the White House.

The Committee staff asked EPA Associate Deputy Administrator Jason Burnett about the White House position in a deposition. Mr. Burnett confirmed that the White House was involved. According to Mr. Burnett, Administrator Johnson had multiple meetings with officials in the White House regarding the primary ozone standard in January 2008 and additional meetings with officials in the White House regarding the secondary ozone standard in March.[67] However, based on instructions from EPA, Mr. Burnett refused to answer the Committee's questions about the substance of these meetings, who the meetings were with, and whether the President was personally involved.[68]

On May 16, 2008, Chairman Waxman wrote Ms. Dudley and Administrator Johnson that unless the White House was prepared to assert a valid claim of executive privilege over the withheld documents, they should appear with the documents when they testify before the Committee. Chairman Waxman's letter explained that the Committee cannot assess whether the Clean Air Act was lawfully administered without access to the documents explaining the basis for the rejection of the EPA position.[69]

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[66] The comments suggest that the Department of Agriculture believed that a Forest Service database of foliar damage was an "unpublished study" that EPA relied upon for the standard it sent to the White House. Majority staff notes, facsimile from Department of Agriculture to Heidi King (Mar. 11, 2008; 7:07 p.m.); Majority staff notes, e-mail from Department of Agriculture to Michele Laur (Mar. 11, 2008; 8:13 p.m.). In fact, EPA based its draft on numerous published studies, as Dr. Gretchen Smith, who served for ten years as the National Ozone Advisor for the USDA Forest Service Ozone Biomonitoring Program, explained in a May 14, 2008, letter to the Committee. Letter from Dr. Gretchen Smith to Chairman Henry A. Waxman (May 14, 2008).

[67] Committee on Oversight and Government Reform, Transcript of Deposition of Jason Burnett, at 67-70 (May 15, 2008).

[68] *Id.*

[69] Letter from Chairman Henry A. Waxman to Susan Dudley, Office of Information and Regulatory Affairs, Office of Management and Budget (May 16, 2008).

Mr. ISSA. Thank you very much, Mr. Chairman. I look forward to this fact-finding hearing. I believe it is appropriate to ask when there are differences in opinions, because I believe Congress has an oversight role, but as I said in my opening statement, it is very clear the President was within his discretion in this case, based on the facts presently available.

With that, I yield back.

Chairman WAXMAN. Thank you, Mr. Issa.

We are pleased to welcome three participants on our panel. We will hear from Stephen Johnson, who has served as the Administrator of the Environmental Protection Agency since May 2005. He has been working at EPA in different capacities for the past 27 years.

Susan Dudley was appointed as Administrator of the Office of Information and Regulatory Affairs in the White House's Office of Management and Budget in April 2007. Prior to her current position, Ms. Dudley worked at the Mercatus Center at George Mason University and as a consultant at Economists, Inc.

Dr. Rogene Henderson is currently the Chair of EPA's Clean Air Scientific Advisory Committee and is a senior scientist emeritus at the Lovelace Respiratory Research Institute. She is an expert on air quality and has had a distinguished career serving on multiple boards and committees related to the topic. I would like to extend a special thank you to Dr. Henderson for the accommodations she has made to make herself available for this hearing. Thank you very much.

This hearing has been postponed twice, and each time Dr. Henderson rescheduled her flight and canceled her plans to make sure she was available. I believe she even canceled a vacation which I am sorry to hear about. Thank you very much for being here.

It is the policy of this committee that all witnesses that testify before us do so under oath, so if the three of you would please stand and raise your hands I would appreciate it.

[Witnesses sworn.]

Chairman WAXMAN. The record will indicate that each of the witnesses answered in the affirmative.

Mr. Johnson, or all three of you, your prepared statements that you have submitted to us in advance will be made part of the record. We would like to call on you for your oral presentation. We usually like to keep that within around 5 minutes, if possible. We will have a clock running. It will be green, and then the last minute will be yellow, and then when the time has expired, it will be red.

I will not cutoff any of you from your presentation, but if you are mindful that the time has expired, we would like you to keep that in mind and try to summarize.

STATEMENTS OF STEPHEN L. JOHNSON, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY; SUSAN E. DUDLEY, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS; AND ROGENE F. HENDERSON, CHAIR, CLEAN AIR SCIENTIFIC ADVISORY COMMITTEE

STATEMENT OF STEPHEN L. JOHNSON

Mr. JOHNSON. Good afternoon, Chairman Waxman, and members of the committee. I am pleased to be here to discuss EPA's decision to significantly strengthen the National Ambient Air Quality Standard [NAAQS], for ground-level ozone.

It is also a pleasure to appear alongside Dr. Rogene Henderson, Chair of EPA's Clean Air Scientific Advisory Committee [CASAC]. Former EPA Administrator Levitt appointed Dr. Henderson to this position in 2004 and in 2006 I invited her to continue serving in this important role.

Since 1980, ozone levels have been cut nation-wide by more than 20 percent, even while our economy has more than doubled. As many of the Bush administration's recent rules to reduce air pollution take effect, we expect that trend to continue.

While air quality has been improving so has our scientific knowledge of the relationship between pollution, public health, and our planet. As we learn more, science and the law require that we make changes. That is what we have done with regard to ozone.

This afternoon, I would like to describe my decisions on the ozone standards, first for the primary standard designed to protect public health, and, second, for the secondary standard designed to protect public welfare. Since EPA last updated ozone standards in 1997, more than 1,700 new studies have been published about ozone's effects on human health. Many of these studies strengthen the linkages between ozone exposure and effects such as reduced lung function or aggravated asthma.

In a large number of new studies showed that ozone is both more damaging and harmful at lower concentrations than scientists understood. After evaluating the results of these studies, along with recommendations of staff, my Clean Air Scientific Advisory Committee and public comments, I concluded that the 1997 standard no longer met the Clean Air Act requirement to protect public health with an adequate margin of safety. To provide that protection at a level that is requisite to protect public health, I selected a level of 0.075 parts per million for the primary standard as the most stringent 8-hour standard for ozone in our Nation's history, it will provide significant public health benefits to millions of Americans.

Advances in science also provided significant new evidence about ozone's impact on the environment, particularly on sensitive plants and trees. When I proposed the standards last June, I presented two options: one, setting the standard identical to the primary as has been the practice for many years; or, two, setting a 3-month standard to address the cumulative effects of plant exposure to ozone over the growing season. Each of these alternatives had strengths and also had weaknesses.

Selecting a secondary standard was difficult, as the record of this rulemaking shows. In making the decision, I reviewed the 1997 NAAQS decision and the scientific evidence available since then. I

considered recommendations from CASAC and my staff. I read comments from the public, and as a matter of good government and as required by Executive Order 12866, I coordinated with others in the executive branch about the two options before me. I weighed all of this information in making my final decision, which was to set the standard identical to the primary standard at 0.075 per million.

This stronger standard will provide significantly increased protection for plants and trees. In my 3 years as Administrator, I have strengthened two air quality standards, one for particulate matter and one for ozone. Earlier this month, I proposed to strengthen our Nation's air quality standards for lead. This is the first time in 30 years.

In the process of navigating the requirements of the Clean Air Act, I have come to see both the strengths and limitations of this law, and, I believe, the need to change it for the better. I believe it is time to modernize the Clean Air Act to improve public health. When I announced the revisals on standards March 12th, I also announced four principles upon which the administration will seek proposals to modernize the Clean Air Act. Congress has adopted these principles and other environmental statutes such as the Safe Drinking Water Act.

The Clean Water Act is an important act for us to review. The Clean Air Act is not a relic to be displayed in the Smithsonian but a living document that must be refurbished to continue realizing results. I look forward to working with you in our efforts to improve this important law and to continue our progress toward clear air across the Nation.

Thank you, Mr. Chairman. I would be happy to answer any questions.

[The prepared statement of Mr. Johnson follows:]

TESTIMONY OF
STEPHEN L. JOHNSON
ADMINISTRATOR
U.S.ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
MAY 20, 2008

Good morning, Chairman Waxman and members of the Oversight and Government Reform Committee. I appreciate this opportunity to appear before you today to discuss the Environmental Protection Agency's (EPA) recent decision to significantly strengthen the National Ambient Air Quality Standards (NAAQS) for ground-level ozone. These changes will improve protection of both public health and sensitive vegetation and ecosystems.

INTRODUCTION

The air we breathe in America has improved considerably over the past 30 years. Each year, EPA looks at emissions that impact the ambient concentrations of the common air pollutants, including ground-level ozone, as one indicator of the effectiveness of our programs. Between 1970 and 2006, total emissions of the six common air pollutants dropped by 54 percent. During that same time period, our nation continued to grow – gross domestic product increased 203 percent, vehicle miles traveled increased 177 percent, energy consumption increased 49 percent, and U.S. population grew by 46 percent. Since 1980, we have reduced ozone levels nationwide by more than 20 percent. This success in reducing air pollution has not happened by accident. By implementing various Clean Air Act programs, and by advancing the state of our scientific understanding, EPA and its partners are continuing to make progress in reducing air pollution from both mobile and stationary sources.

As you know, the Clean Air Act requires EPA to set national ambient air quality standards for pollutants that can be reasonably anticipated to endanger public health or welfare. Under the Act, EPA develops human health-based and welfare-based air quality criteria (which evaluate and integrate the latest scientific information), for the six so-called "criteria pollutants." EPA uses the air quality criteria in setting the acceptable ambient levels for the pollutant – the NAAQS. Primary standards for these pollutants are to be set at a level requisite to protect human health with an adequate margin of safety while secondary standards are to be set at a level requisite to protect public welfare (that is, effects on soils, water, crops, man-made materials, vegetation, etc.). EPA is required to periodically review the standards and their scientific bases to determine whether revisions are appropriate.

Ozone is rarely emitted directly into the air but is formed by the reaction of volatile organic compounds (VOCs) and nitrogen oxides (NOx) in the presence of sunlight. VOCs are emitted from a variety of sources, including motor vehicles, chemical plants, refineries, factories, consumer and commercial products, other industrial sources, and biogenic sources. NOx is emitted from motor vehicles, power plants, and other sources of combustion. Varying weather conditions may contribute to yearly differences in ozone concentrations within and between regions. Geography also plays a role. Ozone and the pollutants that form it can be trapped near their sources by mountains or prevailing winds, or they can be transported hundreds of miles downwind.

Breathing ozone at elevated levels can trigger a variety of health problems including chest pain, coughing, throat irritation, and congestion. It can worsen bronchitis, emphysema, and asthma. Ground-level ozone also can reduce lung function and inflame the lining of the lungs. Repeated exposure may permanently scar lung tissue. In some people, these effects can lead to more frequent doctor visits, school absences, and increased emergency room visits and hospital admissions. The National Academies of Science recently found that "short-term exposure to ambient ozone is likely to contribute to premature deaths." Finally, elevated levels of ground-level ozone can also damage vegetation and ecosystems.

In 1997 EPA established 8-hour primary and secondary ozone standards at a level of 0.08 parts per million (ppm). Because ozone is measured out to three decimal places,

the standards effectively became 0.084 ppm as a result of rounding. As you know, in March I announced that in my judgment these standards were no longer adequate to protect public health and welfare. Before explaining my decision, I would like to describe the extensive process we used to review the ozone NAAQS.

OZONE NAAQS REVIEW PROCESS

The ozone NAAQS review process began with an assessment of scientific studies on ozone by EPA's Office of Research and Development. This assessment was published as an *Air Quality Criteria Document for Ozone*, which explored the scientific data pertaining to the health and welfare effects associated with ozone exposure. EPA's Office of Air Quality Planning and Standards prepared both the *Ozone Health Risk Assessment* and the *Ozone Exposure Analysis Reports* which provided a quantitative assessment of health risks associated with exposure to ozone, along with related uncertainties. The same office then prepared the "staff paper" *Review of the National Ambient Air Quality Standards for Ozone: Policy Assessment of Scientific and Technical Information* which presented key policy-relevant scientific information, the results of the quantitative exposure and risk assessments, and a policy assessment that identified policy options, including ranges of standards, for my consideration.

The criteria document, risk and exposure assessments and staff paper all underwent extensive scientific and public review, including review by the Clean Air Scientific Advisory Committee (CASAC), an independent scientific advisory body established by the Clean Air Act. As part of its mandate, CASAC reviews and makes recommendations to EPA on the science supporting the standards under review. CASAC also advises EPA on the adequacy of the existing standards and revisions it believes would be appropriate. Based on the scientific assessments, and taking into account the recommendations of CASAC and public comments, I considered whether the current primary standard was requisite to protect public health with an adequate margin of safety and whether the current secondary standard was requisite to protect public welfare.

On June 20, 2007, I proposed that the 1997 ozone standards were not adequate and requested comment on several options for strengthening the standards. This proposal was extensively reviewed during a 90-day public comment period. EPA held five

public hearings around the country and received thousands of written comments on the proposal. I carefully reviewed CASAC's scientific advice and their policy views on the current standards and suggested revisions to them as well as the public comments EPA received on the proposed standards. While I am in general agreement with CASAC's views regarding the interpretation of the scientific evidence, there is no bright line clearly directing the choice of level, and the choice of what is appropriate is clearly a policy judgment entrusted to the Administrator.

FINAL RULE SUMMARY

After evaluating the results of more than 1,700 new scientific studies available for this review as reflected in the *Air Quality Criteria Document for Ozone*, I concluded that ozone causes adverse health effects below the level of the 1997 standard. This newly available evidence strengthened my confidence in the findings of the 1997 review and identified important new health endpoints associated with ozone exposure, including mortality, increased asthma medication use, school absenteeism, and cardiac-related effects. Furthermore, studies of asthmatics indicated that they experience more serious responses to ozone that last longer than responses in healthy individuals. In addition, new scientific evidence since the 1997 review of the ozone NAAQS indicates that ambient levels of ozone can result in visible foliage injury and biomass loss in sensitive trees and other vegetation in forests, parks and many other places. In short, current ozone air quality concentrations in many areas of the country – including some areas that meet the 1997 ozone standards – harm both human health and sensitive vegetation and ecosystems.

In light of this convincing evidence, I concluded that the 1997 standards were inadequate to protect public health and welfare and needed to be revised. Therefore, in the final rule, which I signed on March 12, 2008, I revised the 8-hour "primary" ozone standard, designed to protect public health, to a level of 0.075 ppm. I also strengthened the secondary ozone standard to the level of 0.075 ppm. Following the approach taken in 1997, I made the secondary standard identical to the revised primary standard.

In addition to changing the level of the standards from effectively 0.084 ppm to 0.075 ppm, I specified the level of the standard to the third decimal. I made this change in

recognition of the ability of the monitoring technology to measure ambient ozone concentrations to this level of precision.

In coordination with strengthening the nation's ozone standards, I updated the Air Quality Index (AQI) to reflect the new primary standard. The AQI is EPA's color-coded tool designed for use by tribal, state and local authorities to inform the public about daily air pollution levels in their communities. I am encouraging state and local areas to begin using the revised AQI advisory levels during this year's ozone season to ensure maximum public health protection on high pollution days.

In making the decision to revise the ozone NAAQS, I fully agreed with CASAC that the 1997 standards were not adequate to protect public health and welfare and needed to be revised. However, as provided by the Clean Air Act, the standard I judged to be requisite to protect the public health with an adequate margin of safety was different from CASAC's recommendation. Under the Act, CASAC is charged with reviewing both the national primary and secondary ambient air quality standards and the air quality criteria that are developed to support them, and recommending revisions as appropriate. I place great importance on the Committee's advice in making these decisions. However, the Clean Air Act clearly established that the ultimate decisions about retaining or revising a NAAQS must be made by the EPA Administrator after weighing the scientific evidence taking into account the results of the risk and exposure assessments, CASAC's advice, and public comment. As required by the Act, I have taken special care in explaining the rationale for my final decision in the preamble to the final ozone rule to identify and explain the points of departure from CASAC's recommendations.

The decision to revise the ozone NAAQS is a regulatory action that falls under the requirements of Executive Order (EO) 12866, issued by President Clinton in 1993. EO 12866 outlines the role of the White House and the Office of Management and Budget (OMB) in the centralized review of regulations. Among other things, EO 12866 provides OMB with the responsibility for a coordinated review of agency rulemaking to ensure that regulations are consistent with applicable law, the President's priorities, and the principles of the Executive Order. During the inter-agency review for the ozone NAAQS, the public record shows the disagreement between OMB and EPA on the most appropriate form for the secondary ozone standard. Specifically, before me were two legally viable and

record-supported options for the form of the secondary standard, both of which were proposed. The first option was to use a form that accumulates over the course of a season (called a "seasonal form") and the second option was to use the same form as the primary standard by averaging over the course of 8 hours. Both options provided a secondary standard that was more protective than the previous 1997 secondary standard. On the basis of an analysis looking at recent air quality data from currently monitored communities, the seasonal form of the standard would be unlikely to provide additional protection in any areas beyond that likely to be provided by the revised primary standard. The President concluded that, consistent with Administration policy, added protection should be afforded to public welfare by strengthening the secondary ozone standard and setting it to be identical to the new primary standard, the approach adopted when ozone standards were last promulgated. This approach recognizes the Administrator's judgment that the secondary standard needs to be adjusted to provide increased protection to public welfare and avoids setting a standard "lower or higher than is necessary" which is how the Supreme Court articulated setting the standards. While I fully considered the President's views, my decision, and the reasons for it, are based on and supported by the record in this rulemaking. I determined that the appropriate balance to be drawn was to revise the secondary standard to be identical in every way to the revised primary standard.

IMPLEMENTATION

The Clean Air Act requires EPA to designate areas as attainment (meeting the standards), nonattainment (not meeting the standards), or unclassifiable (insufficient data to classify) after the Agency sets a new standard, or revises an existing standard. Although EPA is not making non-attainment determinations at this time, our most recent available data –from 2004 through 2006—show that 345 counties with ozone monitors do not meet the more protective new standard. Actual non-attainment designations will be made in 2010, most likely based on data from either the 2006 - 2008 or 2007 - 2009 monitoring seasons. The areas determined to be out of attainment based on these data will have three years to develop plans to meet the standard and – depending upon the severity of the problem – up to 20 years to comply.

EPA has helped and will continue to help states meet the revised standards by addressing air pollution at the national and regional levels. EPA's rules and voluntary programs will significantly reduce ground-level ozone pollution, mainly by reducing emissions of NOx. These rules include the Clean Air Interstate Rule that reduces ozone forming emissions from power plants in the eastern U.S., and the Clean Diesel Program that reduces emissions from highway, nonroad and stationary diesel engines nationwide.

These programs and many other controls established by states and EPA will continue to reduce ozone levels in years to come. In fact, considering only the control programs in place today, we project that only 28 counties will remain in nonattainment with the new ozone standard in 2020, as compared to the 345 counties measuring exceedances today. Based on air quality modeling projections for 2020 no additional counties would have violated the alternative seasonal cumulative form of the secondary standard that EPA proposed.

UPDATING THE CLEAN AIR ACT

I have now signed two wide-ranging air quality standards – one for particulate matter, and now one for ozone. Earlier this month, I proposed and sought comment on a revised NAAQS for lead. In the process of navigating the requirements of the law, I have come to see the strengths and limitations of the Clean Air Act, and the need to change it for the better.

For 38 years, the Clean Air Act has served the nation well by setting ambitious standards and delivering real results. And during its first 20 years, it was updated to reflect advances in science, technology and policy tools. But it has been nearly two decades since most of the Clean Air Act was last revised. Now is the time to begin the public debate to modernize and upgrade its components.

On the same day I announced our nation's strengthened ground-level ozone standards, I announced four principles upon which the Administration will base legislative proposals to modernize the Clean Air Act. Congress has adopted many of these principles in other environmental statues, such as the Safe Drinking Water Act.

- First, I believe the Clean Air Act legislation should protect the public health and improve the overall well-being of our citizens.

- Second, it should allow decision-makers to consider benefits, costs, risk tradeoffs, and feasibility in making decisions about how to clean the air.
- Third, the Clean Air Act legislation should provide greater accountability and effective enforcement to ensure not only paper requirements but also air quality requirements are met, especially in areas with the furthest to go in meeting our standards.
- And finally, it should allow the schedule for addressing NAAQS standards to be driven by the available science and the prioritization of health and environmental concerns, taking into account the multi-pollutant nature of air pollution.

CONCLUSION

Once again, I want to thank you for the opportunity to be with you today. I would be pleased to answer your questions.

Chairman WAXMAN. Thank you very much, Mr. Johnson.
Ms. Dudley.

STATEMENT OF SUSAN E. DUDLEY

Ms. DUDLEY. Chairman Waxman, and Ranking Member Issa, and distinguished members of the committee, thank you for inviting me and giving me the opportunity to testify today regarding the role of the Executive Office of the President, NEPA's ozone NAAQS rulemaking.

In the interest of public transparency, both OMB and EPA placed in the correspondence related to this rulemaking in the public record to ensure clear presentation of the issues involved, Pursuant to Executive Order 12866 issued in 1993 by President Clinton, OIRA oversees the regulatory process for the executive branch by coordinating interagency review of significant regulatory actions. In most cases OIRA is able to work with the regulatory agency to resolve any issues that arise during the interagency review process. For those rare circumstances when such resolution is not possible, the Executive order provides a process for conflict resolution by the President with the assistance of the Chief of Staff.

EPA's ozone NAAQS is a significant regulation under E.O. 12866 and such was submitted to OIRA on February 22, 2008. In the course of interagency review, concerns were raised with the secondary, the welfare-based standard. These concerns focused on the form of the standard, not the level. EPA's proposed rule had sought comment on two alternative forms. Both were scientifically and legally valid, one set equal to the primary standard and another based on measured ozone levels over a season. The draft final rule would have relied on the seasonal form of the secondary standard.

Establishing a separate seasonal standard would have deviated from EPA's past practice which has been to set the secondary ozone NAAQS equal to the primary NAAQS. The draft initially submitted for review did not clearly support a conclusion that a secondary standard was requisite to protect the public welfare. First, as EPA observed in the preamble to the 2007 proposed rules, a secondary standard set at a level identical to the proposed new primary standard would provide a significant degree of additional protection for vegetation as compared to the current standard established in 1997.

Second, EPA's analysis indicated that the draft secondary standard accumulated over a season would not be more protective of vegetation than one set equal to the primary public health based standard. On the contrary, EPA recognized the seasonal standard in the final draft was generally less stringent than the primary standard.

Given the public interest in this regulatory proceeding, I wanted to ensure that these concerns were laid out clearly to avoid misunderstandings, so I conveyed them to Administrator Johnson in memorandum dated March 6th. On March 7th, EPA Deputy Administrator Peacock responded in writing. Then, pursuant to the appeals procedure, the Executive order, EPA sought further consideration of this disagreement regarding the form of the secondary standard.

Following the established Presidential Review process, the President concluded that, consistent with administration policy, added protection should be afforded to the public welfare by strengthening the secondary ozone standard and setting it equal to the new primary standard.

On March 12th, I sent a memorandum to Administrator Johnson memorializing this process. As the preamble to the final rule states: "While the Administrator fully considered the President's views, the Administrator's decision and the reason for it are based on and supported by the record in this rulemaking."

So, in summary, let me reiterate three key points. First, in the course of interagency review of EPA's final ozone, both OMB and EPA have been forthright in making key correspondence regarding initial disagreements over the form of the secondary standard available to the public.

Second, the focus of my correspondence with EPA was not the primary health-based standard, but the secondary, welfare-based standard. No changes were made to the level or form of the health-based standard.

Third, discussions regarding the secondary standard related exclusively to the form of the secondary standard and did not affect the level of protection from ozone exposure provided to vegetation. Contrary to some media accounts, the 8-hour form ultimately selected by the EPA Administrator is not lower or less protective than the alternative seasonal form of the standard.

Thank you for the opportunity to testify.

[The prepared statement of Ms. Dudley follows:]

STATEMENT OF SUSAN E. DUDLEY
ADMINISTRATOR,
OFFICE OF INFORMATION AND REGULATORY AFFAIRS
BEFORE THE
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES

May 20, 2008

Chairman Waxman, Ranking Member Davis, and distinguished Members of the Committee, thank you for inviting me to testify about the Environmental Protection Agency's recent final regulation strengthening the national ambient air quality standard (NAAQS) for ozone.

In the interest of public transparency, as part of the rulemaking, and before your Committee's inquiry was initiated, both OMB and EPA placed the key correspondence related to this rulemaking in the public record to ensure a clear presentation of the issues involved. Letters between EPA Administrator Stephen Johnson, Deputy Administrator Marcus Peacock and me are available on OIRA's website[1] and on www.regulations.gov.

This testimony (1) lays out the procedures by which OIRA oversees interagency review of agency regulations generally, and then (2) provides information on the specific discussions related to the secondary ozone NAAQS.

Regulatory coordination and review operates under authority of Executive Order 12866, issued by President Clinton in 1993. This Executive Order establishes principles and procedures for regulatory review,[2] including requirements for disclosure.[3] It also sets forth regulatory principles and procedures that are relevant to today's hearing. The Executive Order establishes OIRA as the entity that reviews significant regulations, observing that "[c]oordinated review of agency

[1] See http://www.reginfo.gov/public/postreview/Steve_Johnson_Letter_on_NAAQs_final_3-13-08_2.pdf.
[2] Section 1 of Executive Order 12866, as amended.
[3] Section 6(b)(4) of Executive Order 12866, as amended.

rulemaking is necessary to ensure that regulations and guidance documents are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency."[4]

The confidential nature of interagency deliberations is necessary to allow the Executive Branch to engage in open and candid discussions as policy decisions are debated. Over several administrations, OIRA has sought to strike a balance between this legitimate need to protect the deliberative process and the Congress's and the public's need for information. As part of this effort to strike a balance, E.O. 12866 provides specific procedures on the disclosure of information associated with the review of rules. This Administration has expanded public disclosure by providing on OIRA's website lists of any meetings held with outside parties on rules under review.[5] We also list on our website all regulations under review.[6] Additionally, once a rule has been published, the public has access to the OIRA docket which contains, among other things, a copy of the draft rule as originally submitted to OIRA by the agency and a copy of the draft rule at the conclusion of interagency review.

Executive Order 12866 embraces the regulatory philosophy that "Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people,"[7] and lays out regulatory principles to which agencies should adhere, to the extent permitted by law.[8] Some of these principles cannot be applied to NAAQS regulations.[9] However, others do apply, for example:

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[4] Section 2(b) of Executive Order 12866, as amended.
[5] See http://www.whitehouse.gov/omb/oira/meetings.html
[6] See http://www.reginfo.gov/public/do/eoPackageMain
[7] Section 1(a) of Executive Order 12866, as amended.
[8] Section 1(b) of Executive Order 12866, as amended.
[9] Whitman v. American Trucking Ass'n, 531 U.S. 457, 486 (2001) (EPA may not consider implementation costs in setting primary and secondary NAAQS under section 109(b) of the Clean Air Act).

- In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.[10]
- Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities...[11]
- Each agency shall draft its regulations and guidance documents to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.[12]

Pursuant to Executive Order 12866 and its regulatory principles and philosophies, OIRA oversees the regulatory process for the Executive Branch by coordinating interagency review of significant agency regulations. When agencies submit draft regulations for review under Executive Order 12866, OIRA shares these with other agencies so as to "...avoid regulations and guidance documents that are inconsistent, incompatible, or duplicative with its other regulations and guidance documents or those of other Federal agencies."[13]

In most cases, OIRA is able to work with the regulatory agency to resolve any issues that arise during the interagency review process. For those rare circumstances when such resolution is not possible, the Executive Order provides a process for conflict resolution:[14]

> To the extent permitted by law, disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President, with the assistance of the Chief of Staff to the President ("Chief of Staff"), acting at the request of the President, with the relevant agency head (and, as appropriate, other interested government officials). Presidential consideration of such disagreements may be initiated only by the Director, by the head of the issuing agency, or by the head of

[10] Section 1(b)(4) of Executive Order 12866, as amended.
[11] Section 1(b)(9) of Executive Order 12866, as amended.
[12] Section 1(b)(12) of Executive Order 12866, as amended.
[13] Section 1(b)(10) of Executive Order 12866, as amended.
[14] Section 7 of Executive Order 12866, as amended.

> an agency that has a significant interest in the regulatory action at issue. Such review will not be undertaken at the request of other persons, entities, or their agents.[15]

Under the Executive Order, "[a]t the end of this review process, the President, or the Chief of Staff acting at the request of the President, shall notify the affected agency and the Administrator of OIRA of the President's decision with respect to the matter."[16]

EPA's NAAQS ozone rule is a significant regulation under Executive Order 12866,[17] and as such was submitted to OIRA for interagency review on February 22, 2008.

The Clean Air Act (the Act) provides the authority for setting NAAQS. Section 109 of the Act[18] directs the Administrator to propose and promulgate "primary" and "secondary" NAAQS for pollutants listed under section 108 of the Act. Section 109(b)(1) defines a primary standard as one "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." A secondary standard, as defined in section 109(b)(2), must "specify a level of air quality the attainment and maintenance of which, in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of the pollutant in the ambient air." Section 302(h) of the

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[15] Section 7(a) of Executive Order 12866, as amended.

[16] Section 7(d) of Executive Order 12866, as amended. Additionally, section 7(c) of the Executive Order provides disclosure procedures to be used during any period of Presidential review, when the President is resolving a dispute within the Executive Branch about a regulation under OMB review (communications with any person not employed by the Federal Government relating to the substance of the regulatory action under review must be in writing, shared with the affected agency, and included in the public docket).

[17] Section 3(f) of Executive Order 12866, as amended, defines a "significant regulatory action" as "any regulatory action that is likely to result in a regulation that may:

(1) Have an annual effect on the economy of $ 100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order."

[18] 42 U.S.C. § 7409.

Act defines "welfare" broadly, by setting forth a non-exhaustive list of criteria: ". . . welfare includes, but is not limited to, effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants."

The draft final rule as initially submitted to OIRA included a primary (health-based) standard of 75 parts per billion (ppb) measured over an 8-hour period, and a separate secondary (welfare-based) standard of 21 parts-per-million hours (ppm-hrs) cumulated over three consecutive months during the ozone season.

In the course of interagency review, concerns were raised with the secondary (welfare-based) standard, which is based on ozone effects other than direct human health effects. These concerns focused on the *form* of the standard, not the *level*. EPA's proposed rule had sought comment on two alternative forms, one form identical to the form of the primary standard, and another form based on cumulative ozone levels over a growing season. [19]

Establishing a separate seasonal standard would have deviated from EPA's past practice, which has been to set a secondary ozone NAAQS equal to the primary NAAQS. The preamble to the 1997 final regulation, promulgated pursuant to President Clinton's July 16, 1997 directive to the EPA Administrator,[20] explained the rationale for deciding not to establish a separate secondary standard, as follows:

> The decision not to set a seasonal secondary standard at this time is based in large part on the Administrator's recognition that the exposure, risk, and monetized valuation analyses presented in the proposal contain substantial uncertainties, resulting in only rough estimates of the increased public welfare protection likely to be afforded by each of the proposed alternative standards... In light of these

[19] "... [t]he Administrator is proposing two options for revising the current secondary standard: one option is a cumulative seasonal standard (section IV.E.2) and the other option is an 8-hour average standard consistent with the revised 8-hour average standard proposed above for the primary standard (section IV.E.3)," National Ambient Air Quality Standards for Ozone, 72 Fed. Reg. 37899 (proposed July 11, 2007).

> uncertainties, the Administrator has decided it is not appropriate at this time to establish a new separate seasonal secondary standard given the potentially small incremental degree of public welfare protection that such a standard may afford.[21]

Neither the draft initially submitted for review nor its accompanying analysis clearly supported a different conclusion than that reached in 1997 regarding the need for a separate secondary standard.

First, as EPA observed in the preamble to the proposed rule issued in 2007, a secondary standard set at a level identical to the proposed new primary standard would provide a significant degree of additional protection for vegetation as compared to the standard established in 1997.[22]

Second, EPA's analysis indicated that a separate secondary standard set at 21 ppm-hrs cumulated over a season would be unlikely to be *more protective* than one set equal to the primary (public-health based) standard of 75 ppb averaged over 8 hours. In fact, the preamble to the final rule states: "[t]he Staff Paper analysis shows that at that W126 standard level [21 ppm-h], there would be essentially no counties with air quality that would be expected both to exceed such an alternative W126 standard and to meet the revised 8-hour primary standard—that is, based on this analysis of currently monitored counties, a W126 standard would be unlikely to provide additional protection in any areas beyond that likely to be provided by the revised primary standard."[23] Since EPA's analysis showed the seasonal secondary standard is unlikely to be more protective than one set equal to the revised primary standard, concerns were raised that the draft rule did not contain a reasoned basis for concluding that a separate secondary standard was "requisite to protect the public welfare."

On March 6, 2008, I sent Administrator Johnson a memorandum outlining these concerns.[24] Given the public interest in this regulatory proceeding, I wanted to ensure that these concerns were laid out clearly to avoid misunderstandings. On March 7, 2008, EPA Deputy Administrator

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[20] Implementation of Revised Air Quality Standards for Ozone and Particulate Matter, 62 Fed. Reg. 38421 (July 16, 1997).
[21] National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38856 (July 18, 1997).
[22] National Ambient Air Quality Standards for Ozone, 72 Fed. Reg. 37904 (proposed July 11, 2007).
[23] National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16436, 16500 (March 27, 2008).
[24] A copy of the March 6, 2008 memorandum is attached hereto.

Peacock responded to my memorandum in writing.[25] I then advised EPA's Deputy Administrator that OIRA was still not in a position to conclude interagency review of the rule with the proposed secondary standard unaltered.

Pursuant to section 7(a) of the Executive Order as discussed above, EPA then sought further consideration of this disagreement regarding the form of the secondary standard. Following the established Presidential review process, the President concluded that, consistent with Administration policy, added protection should be afforded to public welfare by strengthening the secondary ozone standard and setting it to be identical to the new primary standard. This policy recognized the Administrator's judgment that the secondary standard needed to be adjusted to provide increased protection to public welfare and avoided setting a standard lower or higher than is necessary.[26]

On March 12, 2008, I sent a memorandum to Administrator Johnson memorializing the process.[27] EPA cited this memorandum in the preamble to the final rule but also noted that the final decision was the EPA Administrator's: "While the Administrator fully considered the President's views, the Administrator's decision, and the reasons for it, are based on and supported by the record in this rulemaking."[28]

As the preamble to the final rule states:

> Based on his consideration of the full range of views ..., the Administrator judges that the appropriate balance to be drawn is to revise the secondary standard to be identical in every way to the revised primary standard. The Administrator believes that such a standard would be sufficient to protect public welfare from known or anticipated adverse effect, and does not believe that an alternative cumulative, seasonal standard is needed to provide this degree of protection. This

[25] A copy of the March 7, 2008 letter is attached hereto.
[26] See American Trucking, 531 U.S. at 475-76 (Justice Scalia observed, "we interpret [Section 109(b)(1) of the CAA] as requiring the EPA to set air quality standards at the level that is 'requisite'—that is, not lower or higher than is necessary—to protect the public health with an adequate margin of safety.").
[27] A copy of the March 12, 2008 memorandum is attached hereto.
[28] National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. at 16497.

> judgment by the Administrator appropriately considers the requirement for a standard that is neither more nor less stringent than necessary for this purpose.[29]

In summary, let me reiterate a few key points. First, in the course of interagency review of EPA's final ozone NAAQS decision under Executive Order 12866, both OMB and EPA have been forthright in making key correspondence regarding initial disagreements over the form of the secondary standard available to the public. Second, the focus of my correspondence with EPA was not the primary (health-based) standard, but the secondary (welfare-based) standard. No changes were made to the level or form of the health-based standard. Third, the discussion regarding the secondary standard related exclusively to the *form* of the standard, and did not affect the level of protection from ozone exposure provided to vegetation. Contrary to some media accounts, the 8-hour form ultimately selected by the EPA Administrator is not lower, nor is it generally expected to be less protective than the alternative seasonal form of the standard. As EPA observed, "based on [its] analysis of currently monitored counties, a W126 standard would be unlikely to provide additional protection in any areas beyond that likely to be provided by the revised primary standard."[30]

Thank you for the opportunity to testify before you today. I hope this is useful for your inquiry.

[29] Id. at 16500.
[30] Id. at 16500.

Chairman WAXMAN. Dr. Henderson.

STATEMENT OF ROGENE F. HENDERSON

Ms. HENDERSON. Thank you for asking me to testify before this committee. I am testifying as the current Chair of the USEPA's Clean Air Scientific Advisory Committee [CASAC], which is a congressionally mandated committee that advises and makes recommendations to the EPA Administrator concerning the scientific basis for setting air quality standards. The CASAC ozone panel included 25 members, all of whom were carefully vetted for their scientific qualifications and for any potential conflicts of interest.

The questions addressed by the ozone panel was the same as for any criteria pollutants. In light of newly available information, are the existing standards adequate to protect public health with a margin of safety in terms of the primary standard or to protect public welfare in terms of the secondary standard.

The ozone panel met with EPA staff in public meetings seven times to review eight documents over a 2-year period. Public comments were solicited at each of our meetings. Highly productive discussions were held between EPA staff, the public and CASAC in our efforts to develop the best scientific advice to provide the Administrator.

A major product of these extended discussions was the unanimous recommendation that the primary standard should be lowered from a level of 84 parts per billion to a level between 60 and 70 parts per billion. Note that the recommendation was in terms of a range. There is enough uncertainty at this low a concentration of ozone that CASAC can only recommend a range of values they consider to be protective of public health. It is a policy decision for the Administrator to determine where within that range to set the standard.

Our scientific advice was not accepted. The primary standard was lowered but only to 75 parts per billion. The CASAC panel does not endorse the new primary standard as being sufficient protective of public health with a margin of safety as explicitly required by the Clean Air Act.

Moving on to the secondary standard, which includes protecting our ecology, the panel was in unanimous agreement that we now have enough information to be able to set a cumulative seasonal secondary standard rather than having to default to using the primary standard. It is both common sense and fully justified scientifically to set a secondary standard separate from the primary standard, since, unlike humans, vegetation is affected by cumulative exposures to ozone during the growing season and during daylight hours.

It is also in agreement with the National Research Council's 2004 Report on Managing Air Quality in the United States in which they strongly recommend that the EPA move away from having identical primary and secondary standards to setting a reasonable secondary standard because there is growing evidence that some vegetation is more sensitive to pollutants than are humans.

Nevertheless, in March, Ms. Dudley of the OMB sent a memo to Administrator Johnson saying the form of the secondary standard should not be changed. This memo was clearly refused in a knowl-

edgeable, well-written reply from Deputy Administrator Marcus Peacock. In reply, Ms. Dudley stated that President Bush had decided against having a secondary standard that was different from a primary standard. In defense of this decision, the White House said the decision was based on following the law. There is no law against having a different standards, as evidenced by the precedent set in 1971 when separate secondary standards were set for both particulate matter and sulfur oxides.

Equally perplexing is the fact that the OMB objections were to the proposed form of the secondary standard, which is a scientific matter and not to the level of the proposed standard, which includes policy decisions. CASAC has been accused of wandering from scientific issues into policy. In this case, policymakers wandered into scientific issues, and they did not do it well. Wilful ignorance triumphed over sound science.

Certainly the Administrator is the one who decides what standard to set, and CASAC's role is only advisory in nature. However, if the Administrator sets the standard outside the range recommended by his Science Advisory Committee, a strong reason for doing so should be given. The Administrator has said his decision was based on his own judgment.

Congress may want to ask, on whose advice is the Administrator basing his judgments? The Clean Air Act mandates that one source be the CASAC whose work is done transparently in public by vetted members. By contract, the advice that appears to be trumping the CASAC advice is not transparent. The OMB and the White House set the secondary standard in effect rather than the EPA Administrator.

In closing, I wold like to quote from Dr. Paul Gilman, who is the former Assistant Administrator for Research and a Science Advisor for the EPA, in a statement he made before a recent hearing of the Senate Committee on Environment and Public Works. "Our best insurance that the science, the scientific judgment, and policymaking are as good as they can be is that the process is transparent, participatory, peer-reviewed, and followed with informed oversight. Setting the standards by fiat behind closed doors is not in our best interest."

Thank you.

[The prepared statement of Dr. Henderson follows:]

Written Testimony Presented to the
Committee on Oversight and Government Reform
at a hearing on the process of the EPA
in setting the new ozone national ambient air quality standards

Witness: Rogene F. Henderson, PhD, DABT
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May 20, 2008

Thank you for asking me to testify before your committee. I am Dr. Rogene Henderson, a Senior Scientist Emeritus at the Lovelace Respiratory Research Institute, an independent, not-for-profit research organization in Albuquerque, NM. I am a National Associate of the National Academies of Science.

I am testifying today as the current Chair of the United States Environmental Protection Agency's Clean Air Scientific Advisory Committee (CASAC), a congressionally-mandated committee that advises and makes recommendations to the EPA Administrator concerning the need and scientific basis for setting national ambient air quality standards (NAAQS) for six criteria air pollutant categories: particulate matter (PM2.5 and PM10), ozone and other photochemical oxidants, lead, NOx, SOx and CO. There are seven chartered members of the CASAC, appointed by the Administrator of the EPA. The CASAC is supplemented for consideration of each pollutant by a panel of approximately 15 additional experts in the field to provide the broad scientific expertise needed. The panel members are appointed by the Director of the Science Advisory Board staff. All members of the CASAC and the supplementary panels are thoroughly vetted for their scientific qualifications and for any potential conflicts of interest. A list of members of the ozone panel, including chartered CASAC members, is provided as Attachment A. All future references to the ozone panel in this document include both the chartered members and the members of the supplementary panel.

The question addressed by the ozone panel was the same as for any criteria pollutant: First, in light of newly available information, does the current primary standard protect public health with an adequate margin of safety? If not, what revisions are appropriate in terms of indicators, averaging times, levels and forms? Second, in light of newly available information, does the current secondary standard protect public welfare (including vegetation and ecosystems) from any known or anticipated adverse effects?

The process for the review of the ozone standards began in May, 2005 with a face to face meeting of the panel to review the criteria document developed by the National Center for Environmental Assessment (NCEA) that contained all the information known about the atmospheric physics and air quality of ozone as well as its human health effects and environmental/welfare effects. A second draft of this document was reviewed in December, 2005, and final advice was provided in May, 2006.

Meanwhile, the panel provided advice to the air office staff (OAQPS) via consultations on their draft ozone health assessment plan (May, 2005) and on their draft ozone environmental assessment plan (October, 2005). The first draft of the Staff Paper was reviewed by the panel in December 2005 and subsequent drafts were reviewed in August, 2006 and March, 2007.

I give you these details so that you may know that a great amount of time and effort on the part of Agency staff and CASAC goes into the periodic review of each NAAQS, including ozone. All of the above meetings were conducted in public with available time set aside for public comment. Highly productive discussions were held between EPA staff, the public, and CASAC.

A major product of these extended discussions was the unanimous recommendation from the ozone panel that, in light of newly available information, the current primary standard was NOT protective of public health with a margin of safety and should be lowered from a level of 0.08 ppm to a level of between 0.060 to 0.070 ppm or 60-70 ppb. CASAC also recommended changing the reporting of the standard to include the third decimal place when the level was given in ppm, because newer monitoring techniques allow more accurate measurements of ozone. Note that the recommendation of CASAC was in terms of a range. There is enough uncertainty at this low a concentration of ozone that CASAC can only recommend a range of values they consider to be protective of public health with a margin of safety. It is a policy decision for the Administrator to determine where within that range to set the standard.

The scientific advice offered to the Administrator was not fully accepted. The primary standard was lowered but only to 75 ppb, outside the recommended 60-70 ppb range. Members of the CASAC ozone review panel were pleased that the administrator lowered the current standard, but do not endorse the new standard as being sufficiently protective of public health with a margin of safety as explicitly required by the Clean Air Act.

The setting of the secondary standard, which is to protect the public welfare, including vegetation and ecosystems, has been problematic in the past because of lack of appropriate scientific information. Although separate secondary standards to protect welfare have been used in the past (see 1971 standards for PM and SO2), lack of data has usually resulted in the default option of setting the secondary standard to be the same as the primary standard. In the recent review of the ozone secondary standard, the panel was in unanimous agreement that we now have enough new information to be able to set a cumulative, seasonal secondary standard rather than to default to using the primary standard. It is both common sense and fully justified scientifically to set a secondary standard separate from the primary standard, since, unlike humans, vegetation is affected by ozone only during the growing season and during daylight hours. The cumulative level recommended by CASAC was between 7 and 15 ppm-hours. The level recommended by the EPA staff and the Administrator was higher, 21 ppm-hr.

At the time of the proposed ruling in July 2007, CASAC, the ozone panel, the EPA staff and the Administrator, were all in agreement that current knowledge was sufficient to scientifically justify consideration of the option to use a different form and averaging time for the secondary standard.

Nevertheless, on March 6, 2008, a week before the deadline for the Administrator to announce the Final Rule for the ozone standards, Ms Dudley of the OMB sent a note to Administrator Johnson saying the form of the secondary standard should not be changed .for two major reasons: The suggested change was too narrowly focused on the effect of ozone on vegetation and forests and the secondary standard would not be more protective than the primary standard.

The memo from Ms Dudley showed an apparent lack of familiarity with the Clean Air Act and each of her points was clearly refuted in a knowledgeable, well-written memo in defense of the change in the form of the secondary standard in a memo sent to Ms Dudley on March 7, 2008 by Deputy Administrator Marcus Peacock. Finally, Ms Dudley stated in a memo dated March 13 that President Bush had decided against

having a secondary standard that was different from the primary standard. In defense of this decision White House spokesman Tony Fratto said the decision was based on following the law. There is no law against using a different form for setting the secondary standard, as evidenced by a reading of the Clean Air Act and by the precedents set in 1971 when separate secondary standards were set for both PM and SOx (copies of the Dudley and Peacock memos are in Attachment B).

The apparent last minute scramble to prevent enactment of the new form for the secondary standard is perplexing. The level of the standard recommended by the Administrator (21 ppm-hr) was well outside the range of the CASAC recommendation (7-15 ppm-hr) and thus was weak enough that, if enacted, would not have resulted in any new non-attainment areas. Thus OMB ignored the policy issue of what the level of the standard should be and chose to object to the form of the standard, which is a scientific issue best addressed by CASAC. CASAC has often been accused of wandering from scientific issues into policy. In this case, policy makers wandered into scientific issues and they did not do it well. **Willful ignorance triumphed over sound science.**

This is not the first time the Administrator has not accepted the scientific advice of his own advisory committee. In October, 2006, the level of the PM2.5 standard was set outside the range recommended by the CASAC and its PM panel. The Administrator is the one who decides where to set the standard and CASAC's role is only advisory in nature. However, if the Administrator sets the standard outside the range recommended by CASAC, a strong reason for doing so should be given. In the case of the PM standard he said he based his judgment on the "best scientific advice available" and because of a degree of uncertainty on the PM panel and in the data. For the ozone standards, for which there was unanimous agreement on advice from CASAC, he emphasized that he used his own judgment to go outside the range recommended by CASAC.

Congress may wish to ask, on whose advice is the Administrator making his judgments? The Clean Air Act mandates that one source be CASAC. The work of CASAC is done in public by vetted members of the group. The basis of their advice is transparent. However, advice that appears to be trumping that of the CASAC is not transparent. The CASAC knows that the process for standard setting involves an interagency review at several points toward the end of the process (see attached diagram of the review process). One agency's review, that of the OMB, became apparent in the recent setting of the secondary ozone standard. In essence the OMB and the White House set the standard, even though theoretically it was set by the EPA Administrator. Thus, all the work that went into the recommendation of

standards by the scientific experts on the CASAC ozone panel and by the EPA staff, and even by the EPA Administrator, was for naught. The standard was set by others, who evidently did not fully understand the Clean Air Act nor its precedents. As Dr. Gilman, former Assistant Administrator for Research and Science Advisor for the EPA, stated before a recent hearing of the Senate Committee on Environment and Public Works, "Our best insurance that the science, the scientific judgment and policy-making are as good as they can be is that the process is transparent, participatory, peer reviewed and followed with informed oversight." Setting the standards by fiat behind close doors is not in our best interests.

Even more alarming is **the removal of science** in the implementation of the new NAAQS Review Process (see Attachment C). The initial part of the revised process is responsive to suggestions made by CASAC. The process begins with a workshop to discuss new, policy-relevant scientific information pertinent to decisions concerning the health and welfare protectiveness of the current NAAQS. This is followed by development of an integrated plan for the review process and an integrated science assessment describing the potential health or welfare effects of the low levels of the pollutants based on the workshop findings. There is also an exposure/risk assessment document that describes the degree of exposure that can be expected and the associated risks. All of these documents are thoroughly reviewed by the CASAC panels and the EPA staff has been responsive to the advice given by CASAC on these documents.

But the final parts of the new NAAQS review process have not proved to be acceptable. One of the most critical documents to be reviewed by CASAC is the Staff Paper. In this document the Agency staff summarizes the air quality information, the policy-relevant assessment of health and welfare effects, the information on exposures to the pollutant and the characterization of health (or welfare) risks. Then a list of staff conclusions and recommendations for options that might be considered in setting a new NAAQS or maintaining the current NAAQS is given. The scientific justification for each option is fully described. In the new review process this critical document is replaced with a Policy Assessment document, to be published as an ANPR. The Policy Assessment document is described in a memo from Deputy Administrator Peacock on April 17, 2007, as containing essentially the same information as the Staff Paper, but with management concerns added. In the recent NAAQS review for lead, the CASAC saw its first Policy Assessment document in the form of an ANPR. The members of CASAC were shocked and dismayed that the ANPR contained none of the information in a Staff Paper. Instead of the carefully thought-out and scientifically justified list of options seen in the Staff Paper, the ANPR was a light weight announcement of

proposed rulemaking as its name implies (Advanced Notice of Proposed Rulemaking). It was the type of document that one would publish at the beginning, not the end of a rule-making review process. The CASAC felt deceived by the contrast between the ANPR and the Policy Assessment document described in Deputy Administrator Peacock's memo. A strong letter expressing the total inadequacy of the document was sent to the Administrator on January 23, 2008, but no response has been given. A phone call from Mr. Peacock indicated that we should hear something by the end if April or May, but we have not.

It is essential that the Staff Paper or its equivalent be restored to the NAAQS review process. The scientific analysis of the data performed by the Agency staff must not be hidden from the CASAC. Obscuring science from the science advisory group cripples the ability of the CASAC to perform its congressionally mandated duties.

Finally, in looking to the future, there is a need to address the extremely difficult problem of considering air quality on a multi-pollutant basis, rather than one pollutant at a time. No one breathes one pollutant at a time. We all inhale mixtures of pollutants which interact in a complex manner, both in the atmosphere and in our bodies. I would recommend that a blue-ribbon committee be appointed by the National Academies of Science to recommend a means of assessing and managing the risk of air pollutants on a multi-pollutant basis. When we have adequate information on how we might achieve such a goal, we will need to revise the Clean Air Act to emphasize a multi-pollutant approach.

Attachment A

U.S. Environmental Protection Agency
Science Advisory Board (SAB) Staff Office
Clean Air Scientific Advisory Committee (CASAC)
CASAC Ozone Review Panel

CASAC MEMBERS

Dr. Rogene Henderson (Chair), Scientist Emeritus, Lovelace Respiratory Research Institute, Albuquerque, NM

Dr. Ellis Cowling, University Distinguished Professor At-Large, Emeritus, Colleges of Natural Resources and Agriculture and Life Sciences, North Carolina State University, Raleigh, NC

Dr. James D. Crapo [M.D.], Professor, Department of Medicine, National Jewish Medical and Research Center, Denver, CO

Dr. Douglas Crawford-Brown, Professor Emeritus, Department of Environmental Sciences and Engineering, University of North Carolina at Chapel Hill, Chapel Hill, NC, Cambridge, England

Dr. Donna Kenski, Director of Data Analysis, Lake Michigan Air Directors Consortium (LADCO), Rosemont, IL

Dr. Armistead (Ted) Russell, Georgia Power Distinguished Professor of Environmental Engineering, Environmental Engineering Group, School of Civil and Environmental Engineering, Georgia Institute of Technology, Atlanta, GA

Dr. Jonathan Samet [M.D.], Professor and Chairman, Department of Epidemiology, Bloomberg School of Public Health, Johns Hopkins University, Baltimore, MD

PANEL MEMBERS

Dr. John Balmes, Professor, Department of Medicine, University of California San Francisco, University of California – San Francisco, San Francisco, California

Dr. William (Jim) Gauderman, Associate Professor, Preventive Medicine, Medicine, University of Southern California, Los Angeles, CA

Dr. Paul J. Hanson, Senior Research and Development Scientist, Environmental Sciences Division, Oak Ridge National Laboratory (ORNL), Oak Ridge, TN

Dr. Jack Harkema, Professor, Department of Pathobiology, College of Veterinary Medicine, Michigan State University, East Lansing, MI

Dr. Philip Hopke, Bayard D. Clarkson Distinguished Professor, Department of Chemical Engineering, Clarkson University, Potsdam, NY

Dr. Michael T. Kleinman, Professor, Department of Community & Environmental Medicine, University of California – Irvine, Irvine, CA

Dr. Allan Legge, President, Biosphere Solutions, Calgary, Alberta, Canada

Dr. Morton Lippmann, Professor, Nelson Institute of Environmental Medicine, New York University School of Medicine, Tuxedo, NY

Dr. Frederick J. Miller, Consultant, Cary, NC

Dr. Maria Morandi, Assistant Professor of Environmental Science & Occupational Health, Department of Environmental Sciences, School of Public Health, University of Texas – Houston Health Science Center, Houston, TX

Dr. Charles Plopper, Professor, Department of Anatomy, Physiology and Cell Biology, School of Veterinary Medicine, University of California – Davis, Davis, California

Mr. Richard L. Poirot, Environmental Analyst, Air Pollution Control Division, Department of Environmental Conservation, Vermont Agency of Natural Resources, Waterbury, VT

Dr. Elizabeth A. (Lianne) Sheppard, Research Professor, Biostatistics and Environmental & Occupational Health Sciences, Public Health and Community Medicine, University of Washington, Seattle, WA

Dr. Frank Speizer, Edward Kass Professor of Medicine, Channing Laboratory, Harvard Medical School, Boston, MA

Dr. James Ultman, Professor, Chemical Engineering, Bioengineering Program, Pennsylvania State University, University Park, PA

Dr. Sverre Vedal, Professor of Medicine, Department of Environmental and Occupational Health Sciences, School of Public Health and Community Medicine, University of Washington, Seattle, WA

Dr. James (Jim) Zidek, Professor, Statistics, Science, University of British Columbia, Vancouver, BC, Canada

Dr. Barbara Zielinska, Research Professor, Division of Atmospheric Science, Desert Research Institute, Reno, NV

SCIENCE ADVISORY BOARD STAFF

Mr. Fred Butterfield, Designated Federal Officer, 1200 Pennsylvania Avenue, N.W., Washington, DC, 20460, Phone: 202-343-9994, Fax: 202-233-0643 (butterfield.fred@epa.gov)

Attachment B:

Memo exchange between Ms. Dudley and Mr. Peacock

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

March 6, 2008

MEMORANDUM FOR ADMINISTRATOR STEVE JOHNSON

FROM: Susan E. Dudley

SUBJECT: Secondary Ozone NAAQS

I am writing with concerns about EPA's preliminary draft final regulation setting national ambient air quality standards (NAAQS) for ozone, submitted for review under Executive Order 12866 on February 22, 2008. Under the draft, EPA would establish, for the first time, a secondary standard for ozone (based on "public welfare") that is different from the primary standard that the draft would establish (based on "public health"). Yet, in the course of interagency review, concerns have been raised that the analysis that accompanies this draft is not adequate to support such a decision. First, the draft would establish a secondary standard without taking into consideration the factors that Congress, in the Clean Air Act, expressly specified as coming within the Act's broad definition of "welfare." Second, the draft does not provide any evidence that a separate secondary standard would be more protective than one set equal to the draft primary standard. This approach is inconsistent with Executive Order 12866, which requires agencies to adhere to certain principles, when not precluded by law.

As you know, in the Clean Air Act, Congress requires EPA to set a secondary standard at a level "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of [the] pollutant in the ambient air." [Sec. 109(b)(2)] The Act defines "welfare" very broadly, by setting forth a non-exhaustive list of criteria which include "effects on economic values and on personal comfort and well-being." Specifically, the Act defines "welfare" as follows:

> Welfare includes, but is not limited to, effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." [Sec. 302(h)]

Executive Order 12866 directs that "Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need..." [Sec. 1(a)]

The language of Section 109(b)(2) clearly allows for the balanced consideration of a broad measure of public welfare. Yet, the draft under review would interpret the statute in a way that sets a separate W126 standard of 21 parts-per-million hours (ppm-h) based exclusively on adverse effects of ozone exposure on sensitive vegetation, with a narrow focus on forested lands in specifically-designated areas. EPA has not considered or evaluated the effects of adopting a W126 standard on economic values, personal comfort and well-being, as specifically enumerated in the Act.[1]

Adopting a W126 standard would also deviate from EPA's past practice, which has been to set a secondary ozone NAAQS equal to the primary NAAQS. The preamble to the 1997 final regulation explained the rationale for deciding not to establish a separate secondary standard, despite a similar scientific basis as today, as follows:

> The decision not to set a seasonal secondary standard at this time is based in large part on the Administrator's recognition that the exposure, risk, and monetized valuation analyses presented in the proposal contain substantial uncertainties, resulting in only rough estimates of the increased public welfare protection likely to be afforded by each of the proposed alternative standards... In light of these uncertainties, the Administrator has decided it is not appropriate at this time to establish a new separate seasonal secondary standard given the potentially small incremental degree of public welfare protection that such a standard may afford."[2]

Nothing in the draft or its accompanying analysis supports a different conclusion today. As EPA observed last summer in the preamble to the proposed rule, a secondary (public welfare) standard that is set at a level identical to the primary (public health) standard would provide a significant degree of additional protection for vegetation as compared to the primary standard currently in effect.[3] By contrast, the incremental protection that would be associated with a W126 standard is far less certain. EPA has not attempted to make even a rough estimate of the increased public welfare protection associated with adopting a separate W126 standard beyond that achieved by adopting a revised secondary standard equal to the primary standard of 75 ppb. In fact, there is substantial uncertainty in the additional benefits of a separate secondary standard, both in terms of the degree of risk attributable to alternative standards and the degree of protection afforded by a W126 standard of 21. As a result, the draft rule under review does not contain a reasoned basis for concluding that a secondary standard set separate from the primary standard is "requisite to protect the public welfare."[4]

I know you are under a tight deadline for issuing a final rule, and my staff and I stand ready to work expeditiously with you to ensure the draft meets the requirements of E.O. 12866 by your deadline.

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[1] EPA's discussion does not include an inquiry into broader effects of a separate secondary standard. See American Trucking Ass'ns v. EPA, 175 F.3d 1027, 1052-53 (D. C. Cir. 1999) ("Legally, then, EPA must consider positive identifiable effects of a pollutant's presence in the ambient air in formulating air quality criteria under § 108 and NAAQS under § 109" and EPA "[should] determine whether . . . tropospheric ozone has a beneficent effect, and if so, then to assess ozone's net adverse health effect by whatever criteria it adopts."), *pet. for reh'g en banc denied*, 195 F.3d 4 (D.C. Cir. 1999), *aff'd in part and rev'd in part on other grounds sub nom.* Whitman v. American Trucking Ass'ns, 531 U.S. 457 ((2001)

[2] National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38856, 38877-78 (July 18, 1997) (codified at 40 C.F.R. part 50).

[3] In this respect, EPA's discussion is even more constricted than the determination reached in 1997, because the discussion expressly acknowledges that the available information is not adequate to establish a secondary standard based on adverse effects to urban/suburban landscaping (or ornamental vegetation) or the need for additional protection for agricultural crops.

[4] The Clean Air Act does not require that secondary standards be set at a zero-risk level, but rather at a level "requisite" to protect public welfare – that is, a standard neither more nor less stringent than necessary for this purpose.

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

MAR 7 2008

DEPUTY ADMINISTRATOR

MEMORANDUM

SUBJECT: Ozone Secondary Standard

FROM: Marcus Peacock

TO: Susan Dudley

Thanks for your memorandum of March 6, 2008 noting two major concerns regarding the adequacy of the support for the proposed W126 secondary national ambient air quality standard (NAAQS) for ozone. EPA appreciates the effort to make this a better and more defensible rule. This memorandum responds to those concerns.

Before going further, it is important to address the context in which the secondary standard is set. EPA cannot consider costs in setting a secondary standard. For instance, Justice Scalia, in speaking for the unanimous Supreme Court in *Whitman v. American Trucking Assns., Inc.*, made clear that EPA cannot consider implementation costs in setting NAAQS – and this prohibition extends even to secondary NAAQS.[1] Thus, the Administrator's standard-setting is constrained. With that observation in mind, this memorandum addresses each of your concerns in turn.

Concern: Focus of Effects Evaluation

The first concern is that the proposed W126 standard is based exclusively on effects of ozone exposure on sensitive vegetation and does not consider or evaluate the effects of a W126 standard on economic values, personal comfort and well-being. In essence, the concern is that the standard does not provide a balanced consideration of all of the factors included in the definition of welfare in the Clean Air Act (CAA) § 302(h). EPA believes the record in this rulemaking addresses this concern.

As in all NAAQS reviews, EPA must first update the air quality criteria to reflect the best and most current science. Per CAA section 108(a)(2), the air quality criteria are to "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air," specifically including information on "any known or anticipated adverse effects

[1] 531 U.S. 457, 471 n.3 (2001) ("EPA may not consider implementation costs in setting the secondary NAAQS.").

on welfare." EPA has been mindful of the welfare effects encompassed by the Act.[2] As in all reviews, the nature and depth of information available on welfare effects has necessarily focused our attention on those effects for which we have adequate information to inform a decision on a quantitative ambient air quality standard.

Welfare effects have been addressed in this review. For instance, Chapters 9 through 11 of the Criteria Document evaluate a broad array of ozone-related welfare effects for which relevant information was available, including effects on vegetation and natural ecosystems; economic values (related to effects on vegetation and ecosystems); climate change; and man-made materials. Additionally, the Staff Paper (Chapters 7 and 8) and the proposal recognize an array of welfare-related effects defined in the CAA and note that the ozone-related effect categories of most concern at concentrations typically occurring in the U.S. include adverse effects on agricultural crops, trees in managed and unmanaged forests, and vegetation species growing in natural settings. These documents also recognize that ozone can affect other ecosystem components such as soils, water, wildlife, and habitat. Further, these documents recognize that increasing protection for vegetation from ozone-related effects would improve the protection afforded to ecosystems and their related public welfare categories.[3] In sum, the quantitative assessments in this review focus on commercial and natural vegetation (including economic values associated with impacts on commercial crops[4]), and the qualitative assessments focus on ecosystem effects, including evidence of potential ozone-related alteration of ecosystem structure and function as well as effects on ecosystems services such as carbon sequestration.

A concern is that EPA has not considered economic values and effects on personal comfort and well-being. EPA agrees it must consider both the beneficial effects of an air pollutant as well as its adverse effects, and must assess the net impact on public health of a pollutant such as tropospheric ozone. However, in this review, EPA is not aware of any information indicating beneficial effects of ozone on public welfare, and we are not aware of any information that ozone has beneficial effects on economic values or on personal comfort and well-being.[5] All of the information in the record seems to indicate otherwise. The effects considered are those attributable to the presence of the pollutant in the ambient air; EPA cannot consider any benefit, regardless of magnitude, that could be attributed to avoiding the cost of implementing a revised NAAQS. That EPA has focused attention where there is the most adequate information in the record should not be confused with failure to consider relevant effects.

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[2] Under CAA § 302(h), welfare effects include, but are not limited to, effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.

[3] In addition, these documents recognize that (1) ozone-related damage to man-made materials and the economic consequences of that damage are too poorly characterized to directly inform standard setting, and (2) although there has been research on ozone-related impacts on climate in recent years, further advances in monitoring and improvement in modeling are needed before such considerations can inform standard setting.

[4] This analysis on economic values is presented in chapter 7 of the Staff Paper. This information was not highlighted in the proposal due to a decision not to focus on impacts on agricultural crops as a basis for the proposed decision, consistent with concerns raised in the interagency process for the proposal.

[5] The secondary standard will protect vegetation in areas that society has decided to preserve as protected areas as well as vegetation that has aesthetic value to the public. To the extent this falls within personal comfort and well-being, then EPA has considered this effect.

In sum, EPA considered the cognizable welfare effects in this NAAQS review to the extent allowed by law. In future reviews the Agency may receive more and better information on welfare-related effects, to the extent that information is available.

Concern: Protectiveness of Secondary Standard

A second concern is that the draft rule does not adequately support the notion that the proposed secondary standard would be more protective than one set equal to the draft primary standard. The memorandum indicates various concerns over the incremental benefits of the W126 standard as compared to a secondary standard set equal to the primary.

As an initial matter, the legal status of a secondary standard differs from that of a primary standard. By definition, the primary and secondary standards are *separate* legal actions based on separate criteria. There is no presumption that the secondary standard should be the same as the primary standard. EPA has the same burden to demonstrate that the secondary standard meets the criteria of section 109(b) of the CAA whether it is the same as or different from the primary standard.

In most prior NAAQS reviews EPA has set the secondary standard the same as the primary. But this has been the result of the state of the evidence in each review and reflected the judgment exercised by the Administrator as to the proper course to follow under those circumstances.[6] In this review, as in others, EPA has evaluated the information available, and then made a judgment as to the appropriate standard that satisfies the criteria of section 109(b).

In this case, EPA evaluated two alternative standards: one with an 8-hour form and level the same as the primary, the other with a form reflecting biologically relevant patterns of exposure and a level appropriately associated with that form. At this point, EPA believes that a secondary standard that is distinctly different in form and averaging time from the 8-hour primary standard is necessary. While a different conclusion on this issue was reached in the last review, the current conclusion is based on new information, which strengthens the information available in the last review.

The draft final preamble discusses this new research and improved analytical methods. For instance, EPA's updated vegetation exposure and risk assessments reduce the uncertainties upon which the previous decision was based. Most notably, new research and methods have increased our confidence in several key aspects of this review:

- New research has strengthened the basis for the conclusion that ozone-related vegetation and ecosystem effects are best characterized by an exposure index that is cumulative and

[6] Where EPA has judged it appropriate to set a separate secondary standard, it has done so. When the initial PM standards were set in 1971, the secondary standard (based on visibility protection) was set at a lower level (150 $\mu g/m^3$) than the primary standard (260 $\mu g/m^3$). When the initial SO_2 standards were set in 1971, the secondary standard was set a different level and averaging time (3-hour) than the 24-hour and annual primary standards.

seasonal in nature, and that revising the current standard in part by adopting such a form is necessary and appropriate.

- New research has strengthened understanding of ozone-related effects on vegetation and ecosystems by providing quantitative information across (1) a broader array of vegetation effects (extending to mature tree growth stages and to linkages between stress-related effects such as ozone exposures at the species level and at higher levels within forested ecosystems); and (2) a more diverse set of field-based research study designs. These new studies include not only additional chamber studies, beyond those available in the last review, but also new free air and gradient field-based studies which provide important support to the quantitative estimates of impaired tree growth and crop yield loss based on chamber studies. These new studies address one of the key data gaps cited in the last review.

- New analytical methods used to characterize exposures of ozone-sensitive tree and crop species further address uncertainties in the assessments done in the last review. These methods include the use of a new multi-pollutant, multi-scale air quality model that contains techniques for simulating atmospheric and land processes that affect the transport, transformation, and deposition of atmospheric pollutant and/or their precursors on both regional and urban scales.

In light of the available information, EPA believes that ozone-related effects on vegetation are clearly linked to cumulative, seasonal exposures and are not appropriately characterized by the use of a short-term (8-hour) daily measure of ozone exposure. Thus, analyses that attempt to estimate the incremental protection that would be afforded by a W126 standard relative to a secondary standard identical to the 8-hour primary standard do not seem to provide as sound a basis for reaching a decision as to what standard is requisite to protect public welfare. EPA's assessment relies on a biologically relevant ozone measure and, then, incorporates this measure into the selected secondary standard.

Conclusion

In sum, EPA appreciates the concerns raised but believes they have been addressed in the existing proposal. If your office still has concerns I ask that they be articulated by tomorrow (Saturday) afternoon, given the court-ordered deadline we all face. This will allow time to elevate any issues so that they may be addressed consistent with Executive Order No. 12866.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

March 13, 2008

The Honorable Stephen L. Johnson
Administrator
Environmental Protection Agency
Washington, DC 20460

Dear Mr. Johnson:

This letter memorializes the results of the coordinated "regulatory planning and review" process for EPA's final regulation concerning the national ambient air quality standard (NAAQS) for ozone pursuant to Executive Order 12866.

As you know, on March 6, 2008, pursuant to section 6(b) of Executive Order 12866, I sent to you in writing a memorandum outlining significant reservations about the preliminary draft's proposal for a secondary (public welfare-based) standard that would have differed from the primary (public health-based) standard in form, though not in effect. (A copy is attached). On March 7, 2008, EPA's Deputy Administrator sent me a response in writing. (A copy is attached.) I then promptly advised EPA's Deputy Administrator of differences between that response and issues that arose during interagency review, and that OIRA was still not in a position to conclude its review of the rule with the proposed secondary standard unaltered. Further consultations ensued.

Pursuant to section 7(a) of the Executive Order, EPA then sought further consideration of this disagreement concerning EPA's proposed departure from precedent on the form of the secondary standard. That process has assisted us both in further considering the issues and legal determinations involved, and pursuant to section 7(d) of the Executive Order we have been advised of the result of that process, as you requested, to enable your determination.

There are two options that were proposed by EPA and are supported by the record and the Clean Air Act, both of which provide an increase in the protection to public welfare from ozone. The two options are: 1) revising the secondary standard to a seasonal, cumulative form; and 2) revising the secondary standard to be identical with the new primary standard.

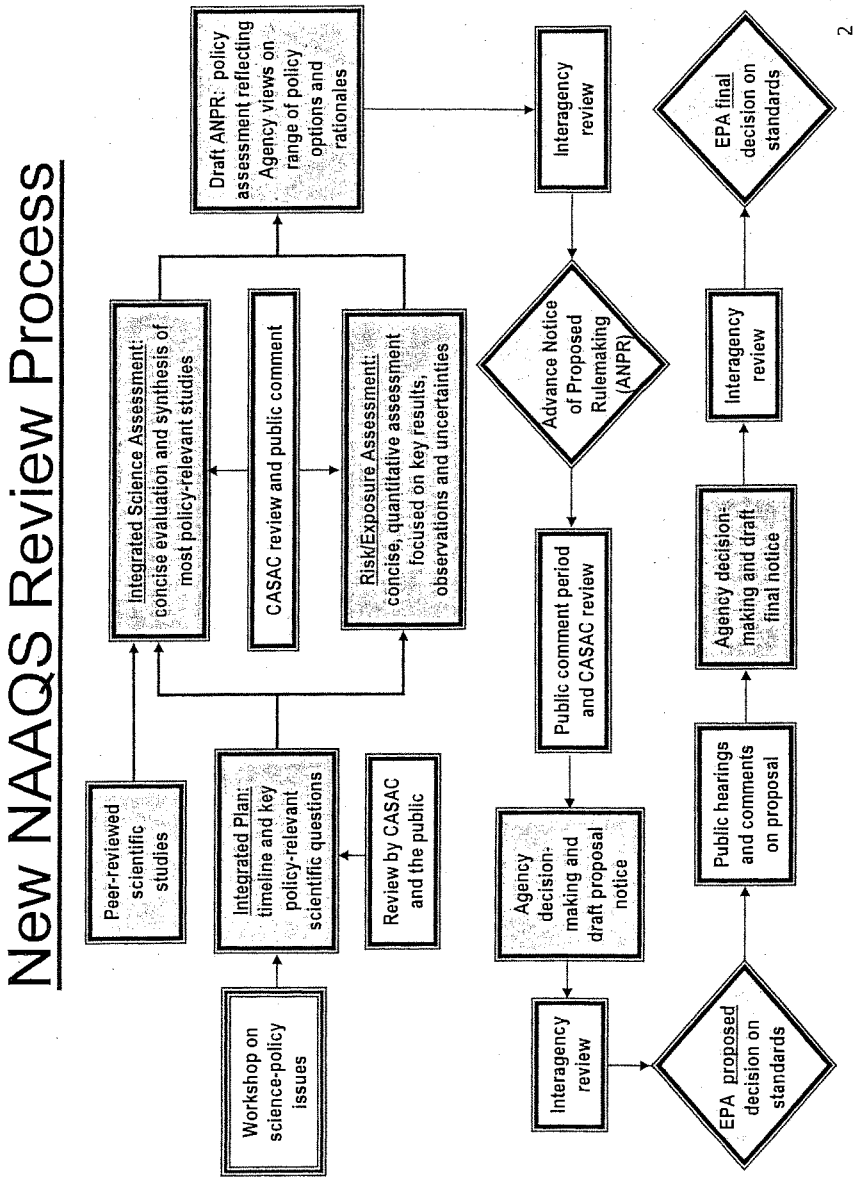
The President has concluded that, consistent with Administration policy, added protection should be afforded to public welfare by strengthening the secondary ozone standard and setting it to be identical to the new primary standard, the approach adopted when ozone standards were last promulgated. This policy thus recognizes the Administrator's judgment that the secondary standard needs to be adjusted to provide increased protection to public welfare and avoids setting a standard lower or higher than is necessary.

I understand that you intend to render your determination today. As usual, my staff is available to work with your staff to meet this deadline.

Sincerely,

Susan E. Dudley
Administrator

Attachment C


New NAAQS Review Process
Workshop on science-policy issues
Integrated Plan: timeline and key policy-relevant scientific questions
Peer-reviewed scientific studies
Review by CASAC and the public
Integrated Science Assessment: concise evaluation and synthesis of most policy-relevant studies
CASAC review and public comment
Risk/Exposure Assessment: concise, quantitative assessment focused on key results, observations and uncertainties
Draft ANPR: policy assessment reflecting Agency views on range of policy options and rationales
Interagency review
Advance Notice of Proposed Rulemaking (ANPR)
Public comment period and CASAC review
Agency decision-making and draft proposal notice
Interagency review
EPA proposed decision on standards
Public hearings and comments on proposal
Agency decision-making and draft final notice
Interagency review
EPA final decision on standards
2

Chairman WAXMAN. Thank you very much, Dr. Henderson.

We will now proceed to questions and, by agreement with the minority, we will have 12 minutes on each side to begin, 12 controlled by the chairman and 12 controlled by Mr. Issa. Then we will proceed to the 5-minute rule. Without objection that will be the order.

Let me start off, Administrator Johnson. My concern is that the decisions at EPA are not being based on the science and they are not being based on the law. They are being made at the White House, and they are being made for political reasons. My concern is that this is happening over and over again. It appears to be what happened on the ozone rule. It appears to be what happened when you rejected California's efforts to regulate carbon dioxide from vehicles, and it appears to be what happened when EPA tried to regulate carbon dioxide itself after the Supreme Court decision.

Dr. Henderson, let me start with you. You are the Chair of the Clean Air Scientific Advisory Committee, and you reviewed the new ozone standards that were recently announced by EPA. Are the standards that Administrator Johnson set consistent with the science?

Ms. HENDERSON. It is not consistent with the CASAC's recommendations which are based on science.

Chairman WAXMAN. Well, did CASAC give a range so that there was some discretion left that you thought would fit with the science that you knew?

Ms. HENDERSON. Yes. The CASAC always recommends a range, never a bright line. We know that there is uncertainty at these low levels of ozone, so with careful consideration of the uncertainties and what we know from the scientific work that has been done since the last ozone standard was set, we recommend a range within which the Administrator could set a level that would be protective of public health with a margin of safety.

Chairman WAXMAN. And did the Administrator select within the range recommended by the Scientific Advisory Committee?

Ms. HENDERSON. No, he did not.

Chairman WAXMAN. Now, in essence, you are saying that Administrator Johnson did not follow the science, is that correct?

Ms. HENDERSON. That is correct.

Chairman WAXMAN. Now, Administrator Johnson, I want to give you a change to respond. Dr. Henderson says you didn't follow the science. Do you agree with that?

Mr. JOHNSON. Well, I would respectfully disagree with that characterization. One is that I did agree with our CASAC that the current standard was not requisite to protect public health with an adequate margin of safety, hence we were in agreement together. I should note that not all comments agreed with that conclusion.

Second is that not only do I have the advice—and I appreciate and certainly respect the advice of CASAC and Dr. Henderson's role as the Chair—but also I have the responsibility to listen to what my staff say and, of course, evaluate all of the public comments after all the comments are in. I made the decision based upon all of the science before me that 0.075 was requisite to protect public health with an adequate margin of safety.

Chairman WAXMAN. Excuse me, you answered my question. You think you set it within the protection of the science.

Mr. JOHNSON. Absolutely.

Chairman WAXMAN. OK. Now, the record shows your views about the science and the law were constantly being reversed by the White House. Your professional views may be scientifically and legally correct, but they are not the ones that are prevailing comments to the White House that the secondary standard for ozone, the one that protects the environment, be set based on cumulative seasonal exposure, isn't that right?

Mr. JOHNSON. Well, more accurately, Mr. Chairman, would be that there are two options. There was one that the Agency preferred as part of the deliberation, and it was clear that there were others in the administration who felt the other was a preferred option. Of course, as I believe good government, we went through the process as outlined by President Clinton's Executive order, and the President provided input. Ultimately, I made the decision, and made the decision to set a secondary standard that is the most protective secondary standard in our Nation's history.

Chairman WAXMAN. You, as the head of EPA, recommended a proposal. OMB and the White House looked at that proposal and said to you, we don't want that proposal. Then you made the decision that they recommended.

When you sent your draft final rule to the White House in February, it said that the evidence for seasonal standard was compelling and that a seasonal standard was necessary to ensure the requisite degree of protection. But the White House then objected to that proposal, and you changed it. Is that what happened?

Mr. JOHNSON. Well, I think, more accurately, was is that certainly it agreed with CASAC that a cumulative seasonal metric is the most biologically relevant form for vegetation; however, at the time we certainly noticed——

Chairman WAXMAN. I really want a direct answer to the question. You submitted a rule to the White House, and the White House said they wanted a different rule, and then you decided what the White House suggested to you.

Mr. JOHNSON. Well, there was a difference of opinion between two——

Chairman WAXMAN. No, no. Yes or no. Yes or no?

Mr. JOHNSON. Well, I don't believe it is a yes or no question, sir.

Chairman WAXMAN. Well, you gave them one option and they gave you the other, and the one you accepted was theirs.

Mr. JOHNSON. We had two options on the table. There was one that was preferred by EPA, one that was preferred by OMB and perhaps others, and it went through an Executive order process. I think that is good government.

Chairman WAXMAN. OK. Well, this is not a minor change; it was a major reversal that I believe was not supported by the record. Your own staff said it was pure politics and that they have never seen anything like it in 30 years of working on air quality standards.

An agency lawyer worried that the final decision was not even nominally defensible, and this wasn't the only time you have been reversed by the White House. It seems to be happening over and over again.

Your Associate Deputy Administrator, Jason Burnett, told the committee that last fall you supported granting California's petition to regulate carbon dioxide emissions from vehicles. According to Mr. Burnett, you changed your position after you talked with the White House. Is that accurate?

Mr. JOHNSON. I don't believe that is a fair characterization, Mr. Chairman. I think, certainly, as you look through the thousands and thousands of pages, including his deposition, that shows a very deliberate process going through where I evaluated all options from moving from a full approval to denial and options in between.

Chairman WAXMAN. And you recommended it be in between. You didn't agree that there should be a complete granting of what California wanted, which was a waiver to do exactly what they wanted. You wanted a partial waiver so that it would go into effect through a period of time, and that was sent to the White House.

Mr. Burnett told us under oath that he thought a partial grant—he, meaning you—thought that a partial grant of California was the best course of action.

Well, that is what happened in this instance. The same thing happened the third time. According to your staff, you decided last fall that EPA should issue its own greenhouse gas rules, and you submitted a proposing endangerment finding to the White House. You also circulated a proposal to other agencies to regulate tailpipe emissions of carbon dioxide. Is that accurate?

Mr. JOHNSON. It is true that we have a draft of endangerment finding that was part of the rulemaking process before the Energy Independence and Security Act was passed.

Chairman WAXMAN. And you also recommended that other agencies regulate tailpipe emissions of carbon dioxide.

Mr. JOHNSON. Well, that was part of a draft decision that has not gone through interagency process.

Chairman WAXMAN. But you recommended it to the Department of Transportation.

Mr. JOHNSON. Well, again, it was so deliberative and they had not reviewed it, and again, it was before the Energy Independence and Security Act, which then changed the course of action for EPA, and that is writing a regulation for renewable fuel standard.

Chairman WAXMAN. We interviewed——

Mr. JOHNSON. Excuse me. I am just working, as required, working with the Department of Transportation as they updated——

Chairman WAXMAN. Well, we interviewed seven senior career EPA officials earlier this year, and they all told us the same thing. You supported Federal regulations for carbon dioxide emissions and submitted an endangerment finding to the White House. They said the proposal was sent to the White House in the first or second week of December. They told us that after you submitted your recommendations to the White House, they were told to stop all work on the regulations. This policy reversal became official in March when you announced that EPA was going to start the regulatory process all over again.

My concern, Administrator Johnson, is that you've become essentially a figurehead. Three times in the last 6 months you have recommended to the White House that EPA take the steps to address

climate change and protect the environment. In each case, your positions were overruled.

Now, your positions were right on the science and the law, yet in each case you backed down. You received your instructions from the White House. Now that is not how our Government is supposed to work. Congress passes the laws and the executive branch is supposed to faithfully administer them.

But what we see happening at EPA is that when you try to follow the law and the science, you are overridden. The attitude in the White House seems to be that President Bush can ignore the environmental laws that Congress wrote and do whatever he pleases.

Now, my questions are about the process and the results. Let's go to this ozone decision. EPA is required under the law to set an ozone standard to protect public health and a secondary ozone standard to protect crops, forests, and other aspects of public, and we just went over that very briefly.

After years of scientific review, you sent the draft final ozone standard to the White House for review. To protect the environment your draft recommended that EPA establish a new standard, one that would protect plants from cumulative exposure over growing season. The document to the White House stated that you found the evidence for the new standard to be compelling and necessary. You also wrote that you found no evidence to support the alternative standard favored by industry.

When the final rule was issued on March 12th, you made a complete reversal on the environmental standard, you abandoned the seasonal approach, and you adopted the short-term approach that industry favored. These changes were made at the last minute pursuant to instructions from White House. According to the record, they were personally directed by the President.

Administrator Johnson, your statement that there was compelling evidence in support of the seasonal standard was dropped in the final rule. So was your statement that there was no biological evidence supporting the industry standard. Why were these statements deleted from the rule?

Mr. JOHNSON. Well, Mr. Chairman, as we prepared for making a decision—as I prepared making a decision on the secondary standard, again, we proposed two options, and I think the important point to note is it was not an issue of a level of protectiveness. Either form provided additional level of protectiveness for public welfare.

Chairman WAXMAN. Did the White House provide you with new scientific evidence to change your mind?

Mr. JOHNSON. Well, Mr. Chairman, certainly during the review, it was part of the Executive order. OMB certainly issued a concern, "The draft is not adequate to support such a decision." And as I evaluated their comments and, certainly, the President's comment and reviewed it, I made the decision to establish the secondary standard——

Chairman WAXMAN. I understand you made that decision.

Mr. JOHNSON [continuing]. After I made the primary standard.

Chairman WAXMAN. But the Clean Air Act is clear in setting ozone standards. The Agency is required to use the best science and set a standard that protects health and environment.

Did the White House do this? Did the administration listen to the scientists, or did they reject the science and set standards that will not protect health and the environment?

Mr. JOHNSON. No. Again, as I said, both forms were protective of the environment. The question is, what is the form? It is not the standard. And, in fact, for the secondary standard, some of the issues that I was facing in terms of uncertainty with adopting a separate standard, a cumulative 3-months so-called W–126 form, was, for example, crop yield data was derived largely from data generated 20 years ago.

In addition, the degree of risk attributable to varying levels of ozone exposure, there were uncertainties. Degree of protection that any specific cumulative seasonal standard would produce an associated potential for error in determining the standard and what would be providing a requisite degree of protection, all of those were among the uncertainties that, certainly, as I factored into my decision played a role. That is why I chose the primary form with input in this case from the President.

I am very proud of the process. It has been a very transparent process where Susan's memo, Marcus' memo, and in fact a letter citing what the President's input to me is a final decision. I think that is good government, and I think that is the way we ought to operate.

Chairman WAXMAN. Thank you very much, Mr. Johnson.

Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman. I will continue where the chairman left off because I think it is a good line of questioning.

Administrator Johnson, you, if I understand correctly, are a career professional, is that right?

Mr. JOHNSON. That is correct.

Mr. ISSA. When did you join the EPA?

Mr. JOHNSON. In 1980.

Mr. ISSA. In 1980.

Mr. JOHNSON. Well, actually, I came to EPA, left and then came back, but my service computation date is 1980.

Mr. ISSA. Longer than some of the staff behind me have been alive, so we will say you have been there a long time, and you are not a political appointee. I mean, even though you sit now in an appointed position, you are a career professional, is that right?

Mr. JOHNSON. I am a career professional who also is a political appointee, and I am proud of both of those mantles.

Mr. ISSA. But you were selected because of your long tenure with the EPA, clearly.

Mr. JOHNSON. I believe the President, in fact, it was said that he wanted the most experienced, best person for the job, and I am honored to be serving our Nation and the President in that capacity.

Mr. ISSA. Well, let's run through a little of that experience. First of all, I assume you were at the EPA when California asked for a waiver from the need for MTBE or other oxygenates and try to use

things that wouldn't destroy our water or wood corrosive, do you remember that?

Mr. JOHNSON. I do remember that, yes, sir.

Mr. ISSA. Do you remember that was denied by the Clinton administration?

Mr. JOHNSON. I do.

Mr. ISSA. So when it came to California meeting its own high clean air standards and not being at the back of the ethanol lobby, the administration under President Clinton was not willing to grant that waiver, right?

Mr. JOHNSON. Well, I must say that is tangential because I was not in the Air Office or working on air issues, but I am aware of that fact.

Mr. ISSA. And California's request for a waiver was, they were going to comply with all of the standards; they simply weren't going to use things that poisoned our water or required that corn farmers in the Midwest get a special benefit.

So the strange thing is, you know, today we are asking about a reduction, and I want to go into that. I am trying to figure out what good deed can possibly go unpunished. Let me run you through that.

You were also there in—and I apologize, I said 1997—it was a typo. The Executive order of President Clinton's was at the beginning of his administration in 1993, isn't that true?

Mr. JOHNSON. That is correct.

Mr. ISSA. And didn't he essentially assign that to Vice President Al Gore as sort of the go-to on air quality, if you remember?

Mr. JOHNSON. I don't remember, sir.

Mr. ISSA. I don't forget on that one. But I certainly think that is within the administration's right. In this case, President Bush has kept that to himself.

But in 1993, if I understand correctly, the ozone level was 1.0 or 120 parts where today it is going to be 75. That was the air quality prior to the 1997 ruling, is that right?

Mr. JOHNSON. Yes.

Mr. ISSA. And so in 1997 it was reduced from 120 to 84. Since 1997 when it was reduced to 0.084, has Mr. Waxman's district ever been in compliance? Does Hollywood or L.A. meet that 0.084?

Mr. JOHNSON. No, sir, not.

Mr. ISSA. OK. So we have had a standard, and many parts of California have never reached that standard. Many parts of America have never reached that standard, is that correct?

Mr. JOHNSON. There are a number of parts of America that have not, that is correct.

Mr. ISSA. And doesn't it make the science a little inexact to figure out where the safety level is if, in fact, people are above the existing standard and you are going to lower it even further? Isn't that one of the variables you have to deal with?

Mr. JOHNSON. Well, the law actually prohibits me from considering costs or considering whether or not the standard is actually able to be implemented. Of course, that is one of the reasons why, among a number of reasons why, that I think that it is worthy of congressional debate.

I believe there is an opportunity to improve the Clean Air Act. I think that it is unconscionable that we have a standard that we have gone through years of scientific evaluation to say this is protective of public health and then communities not even being in compliance with that for 20 or plus years. I think it is worthy of congressional debate, and I believe that there are other approaches that could achieve public health protection sooner.

Mr. ISSA. So, particularly, when it comes to CO_2, if I understand your recommendation, it is time for Congress to act to create a more responsive law that would allow for compliance, offsets, things to deal, to be honest with the chairman and myself as Californians, the fact that we have some containment areas that just simply never complied.

Mr. JOHNSON. Well, sir, I wholeheartedly agree. My experience in 27 years with a very complex statute as the Clean Air Act is, dealing with global air pollutant with many, many, many issues, my experience says that a legislative fix is the more efficient and effective way because, my experience says, with these complex laws subject to years and years of litigation.

I believe that global climate change needs to be addressed. I believe the greenhouse gas emissions need to be addressed, and I think the most efficient and effective way is through a legislative fix. Having said that, I am initiating the rulemaking process by issuing an advance notice of proposed rulemaking of, later this spring.

Mr. ISSA. Well, I appreciate that. Just to finish on my numbers game here a little bit, you mentioned in your opening statement we are down about 20 percent over several decades, most of your career. If I do the numbers, coming from 120 parts to 84 parts, it was about 33 percent reduction. So if we are down 20 percent, we obviously didn't hit—we didn't go from the 120 to the 84.

Now if I understand correctly, going to 0.75 is about an 11 percent reduction, and going to 0.070 would be about a 16 percent. So today we appear to be having a hearing about whether a reduction of 11 percent is somehow anti people's breathing versus a reduction of 16 percent would somehow make it OK. Is that pretty much what I should be understanding today?

Mr. JOHNSON. Well, that is certainly a view. Again, ultimately, when I made the decision on both the primary and the secondary both in regard to the primary, public health, I determined that the existing standard was not protective. It was not requisite to protect public health with an adequate margin of safety and wholeheartedly agreed with CASAC that it needed to be reduced.

I made the decision to reduce it and to make it more health protective. In fact, again this is the Nation's most health-protective 8-hours ozone standard in the history of the Nation, and that shouldn't go unnoticed.

Mr. ISSA. I appreciate that, and I agree. If I understand correctly, though, basically, if 2, 3, 4 years from now after we have achieved a portion of this 11 percent reduction that is presently being ordered, there is nothing that stops this process, with Dr. Henderson's help and so on, from seeing that there is an even lower level bolstering the science and ordering a lower level. There is nothing whatsoever stopping it from happening at any time, is that correct?

Mr. JOHNSON. Well, it is not only not stopping it, we are actually directed by law and it is part of the 77 amendments to the Clean Air Act, we are required every 5 years to review each and every one of these standards.

Of course, one of the challenges for the Agency since that amendment in 1977, the Agency has never met the 5-year requirement, and, of course, that is why we believe that there are changes and improvements in the way we actually go through the NAAQS process: to preserve science as well as to improve the timeliness of what we are doing.

So we are required to make these evaluations and keep up with what the current state of the science is.

Mr. ISSA. I appreciate it. I would like to yield for a few minutes to Mr. Bilbray, as he needs it.

Mr. BILBRAY. Thank you.

Mr. Johnson, I don't come from a business background, and I don't come as a lawyer. I come from the regulatory background. I served on Air Resources Board in California, I served in the air district, San Diego, on the few—in fact the only—air district I know in California that has actually had its standards dropped recently, I mean its category dropped because we were so successful.

You talked about since 1980 a 20 percent reduction in emissions just in California during that time with 20 percent reduction, and I think our California numbers will be less, I think more of a drop. We have had a 50 percent increase in population. And that is one thing I hope that when we talk about the threat to the public health, we think about the fact that sheer population has been ignored from the entire environmental impact of those sheer numbers and that has to be considered.

Doctor, you serve on one of the most critical bodies when it comes to environmental strategies, and I was very happy to work with our scientific body at ARB. California's program has been very successful because of the use of science.

Back in the 1990's when California petitioned a waiver from the oxygen mandate, the mandate that we put ethanol or MTB into our gasoline, was your committee review that mandate?

Ms. HENDERSON. No, because we an air committee, so we did not.

Mr. BILBRAY. Well, this was an air committee. This was coming from the——

Ms. HENDERSON. This was from the Air Board?

Mr. BILBRAY. This was coming from the Air Resources Board.

Ms. HENDERSON. I became chair of this committee back in 2004, so it did not occur during my chairmanship.

Mr. BILBRAY. OK. Let me just tell you something. By 1994, California had recognized and our scientists had recognized that ethanol and methanol in our gasoline was not only not beneficial but was an environmental detriment, not just for water but air pollution.

We formally requested this in 1994. I, for one, authored the bill that every Californian except one signed onto, to allow us to burn a cleaner, cheaper fuel for California. But we were blocked.

Mr. Johnson, what was the rationale of the Clinton administration for blocking the request for a waiver for cleaner fuel for the consumers of California and for the environment of California?

What was their justification requiring us to put MTBE in our fuel and ethanol in our fuel when the best scientists in air pollution that reviewed the process said there was no scientific reason to do it?

Mr. JOHNSON. Well, sir, I am with Dr. Rogene, it was actually before my time, but certainly I know I have staff and can get back for the record to respond to that.

Mr. BILBRAY. Well, I will tell you, now that we have people that are administrators of EPA at that time who was over at California.

And, Mr. Chairman, I am just telling you, I was outraged at that time that the Clinton administration, in my opinion, was bending to political pressure that was influenced by contributions at that time, and I think that we ought to recognize that, yes, there is undue influence on administrations.

But no one administration has a monopoly there, and I wish that both Republicans and Democrats could have stood up for the environment against the political pressure, not only in the White House but here in the legislative body. To this day for us to point fingers at one administration when we went for almost a decade requesting a waiver based on the environment, and it was denied by Washington to the people of the State of California who, I think we all admit, have done extraordinary things to protect the environment.

Thank you very much.

Mr. ISSA. Administrator Dudley, continuing on, let me ask you a question. Could you explain to the committee why the regulations of carbon dioxide is such a unique pollutant that it requires a new regulatory paradigm and doesn't fit into the old regulatory structures of the Clean Air Act?

Ms. DUDLEY. I think that Administrator Johnson mentioned this a bit in his previous remarks, too. CO_2 is a global pollutant. It doesn't matter where it is emitted, the effects will be felt regardless of whether it is emitted here or in China. In order to achieve the reductions that we think we need requires new technology, so massive incentives for new technology.

So the Clean Air Act, which was mostly recently updated in 1990, just was never designed for it and really isn't well-suited to it.

Chairman WAXMAN. Thank you, Mr. Issa.

Mr. ISSA. Could we ask that Administrator Johnson also answer it, if you don't mind, Mr. Chairman? He has something.

Mr. JOHNSON. Yes. I would just say that one of the, I think, important reasons for the advanced notice of proposed rulemaking is that the Massachusetts versus EPA decision was in the context of automobiles and light trucks. The way the Clean Air Act operates is that decision in endangerment not only affects that narrow area of mobile sources but all mobile sources and, in fact, spills over into Title I and all stationary sources as well.

So when I moved forward with an advanced notice for proposed rulemaking, it is actually expanding and looking at the entire, all sources, potential sources, of carbon dioxide and other greenhouse gases. I think that it is important for us as an agency, to understand all of those issues, and I think it will also help Congress, you, as you debate this very important issue.

As I have said I believe, given my experience, a legislative approach is a much better approach than working through the intricacies of the Clean Air Act, and with the likely litigation that would ensue.

Chairman WAXMAN. You might prefer another law, but there was a law. There is a law, the Clean Air Act adopted by Congress, and the U.S. Supreme Court said that EPA is supposed to regulate carbon emissions under that law. Even if you would like another law, you have to enforce the law that is there.

Mr. JOHNSON. Well, and that is why I am proceeding with an advanced notice of proposed rulemaking, which is the first step in the regulatory process.

Chairman WAXMAN. Mr. Tierney.

Mr. TIERNEY. Thank you, Mr. Chairman.

Dr. Henderson, in your written testimony you address the decision to set an environmental standard for ozone that is higher than the standard that scientific experts recommended. You stated, "Wilful ignorance triumphed over sound science."

Those are strong words. Would you explain for us?

Ms. HENDERSON. I was referring, really, to the secondary standard because in the case of the secondary standard, we were really excited that we now have enough information to use a different form for the secondary standard. In the past, we have had to default to the primary standard because we didn't have the right information.

Then, to get so close to having the form changed and then at the last minute, with no explanation, really, of why it was done, that form was squelched. The new form was squelched by the White House because President Bush said we couldn't have a different secondary standard from the primary standard.

Now, that is ignorance to me. That is wilful ignorance because I do not think the OMB really hadn't read the Clean Air Act to know that you can set that. I don't think the OMP really hadn't read the EPA staff documents that carefully explained why we were focusing on vegetation as the welfare effect of concern.

So that is what my "wilful ignorance" meant. It bothers me, with all the hard work that went into this by the EPA staff and by CASAC to develop this different form for a secondary standard that someone can just, for no transparent reason, say, no, can't do that. That is what I meant by wilful ignorance.

Mr. TIERNEY. Thank you very much.

Mr. Johnson, do you want to respond?

Mr. JOHNSON. Well, again, the record clearly indicates that this was a difficult decision and that these were two, both viable, options. Again, an important piece is that the level of protectiveness was essentially equivalent whether a W–126 form or identical to the 8-hour ozone——

Mr. TIERNEY. That is interesting you should say that because what I see is there was no new evidence—at least you couldn't give an answer to Mr. Waxman—no new evidence from the White House at all on that issue. Before you had found evidence to be compelling, in your own words, and necessary, in your own words, and, in your own words, found no evidence to support the alternative standard that was favored by industry.

So, Mr. Johnson, you say that the final decision was justified, but looking at your own words—and let's look at some of the words of your own staff, what they had to say about it. If you look through the documents that were provided by EPA as part of the investigation, and it is stunning; stunning to see how EPA staff reacted to the rejection of the seasonal standard recommended by Dr. Henderson.

An EPA Associate Director comments, "Looks like pure politics."

An EPA lawyer wrote, "We could be in a position of having to fend off contempt proceedings. The obligation to promulgate a rule arguably means to promulgate one that is nominally defensible."

One EPA manager told his colleagues that he offered "sympathies to all for all the work that went down the drain."

Another career official stated, "I have been working on NAAQS for over 30 years and have yet to see anything like this."

Yet another Agency official responded by saying, "I know how incredibly frustrating and disgusted we all are at the moment."

So, Mr. Johnson, I think what is happening with the EPA is pretty unacceptable. It is the Administrator's job to implement our Nation's environmental laws and to protect the public health and welfare. It has to be based on the best evidence, By your own words, the evidence was compelling, it was necessary that the standard be different and the new form be instituted. So it looked to me that by your own words and by your staff's words, you are not doing your job.

Recently, the Union of Concerned Scientists released the results of a survey of nearly 1,600 EPA scientists. The survey revealed that EPA scientists face significant political interference with their work. Nearly 1,000 EPA scientists said they personally experienced at least one incident of political interference during the past 5 years. Over 500 EPA scientists knew of many or some cases where the EPA political appointees had inappropriately involved themselves in scientific decisions.

Mr. Johnson, are you concerned at all that hundreds of EPA scientists are reporting incidences of political interference with their work?

Mr. JOHNSON. Well, sir, I am proud of the fact that EPA has consistently ranked in the top 10 places for Federal employment. As a career——

Mr. TIERNEY. Are you concerned, as my question was, are you concerned that hundreds of EPA scientists are reporting political interference in their work?

Mr. JOHNSON. Well, I would like to quote to you, if I may, a quote from Dr. Paul Gilman, who just recently testified. "EPA has become too politicized in its actions, too eager to pursue narrow political goals and too willing to ignore congressional intent. At least a dozen former EPA officials who played roles in setting policy now work as industry consultants, or"—this is also quoted, Orlando Sentinel—"Science is as politicized in America as it was in the Soviet Union and Nazi Germany, and EPA is a prime example."

He then goes to say, "I want to make this point that these headlines all came prior to the current Administration and pertained to the previous administration."

So, sir——

Mr. TIERNEY. So that is just an excellent defense, Mr. Johnson.

Mr. JOHNSON. So, sir——

Mr. TIERNEY. So apparently because you think something was politicized in a previous administration, politicizing in this administration is laudable.

Mr. JOHNSON. No, that is an inappropriate conclusion, sir.

Mr. TIERNEY. My question to you was, are you proud of the fact, or are you concerned of the fact that hundreds of EPA scientists are reporting political interference with the work now, not in the past administration—we can have a hearing on that some other time. Are you proud of what is going on now?

Mr. JOHNSON. I am very proud of the work of the Agency and all the thousands of scientists that we have and includes 17,000 employees at EPA.

Mr. TIERNEY. Well, I take it some——

Mr. JOHNSON. And, Mr. Tierney, I will say just I will share my experience as a scientist growing up in the Agency that there are those times that scientists agree with the ultimate decision; there are times that they don't, and I understand that.

As my role as Administrator is to evaluate the science and evaluate the policy under what the law directs me to do and make the best decision, that is what I have been doing, and that is what I continue to do.

Mr. TIERNEY. Clearly, that is not what happened here, Mr. Johnson.

Chairman WAXMAN. The gentleman's time has——

Mr. TIERNEY. By your own admission.

Chairman WAXMAN. Time has expired.

Mr. Bilbray.

Mr. BILBRAY. Yes, Mr. Chairman. I have to say—let me just followup on this issue of a survey by scientists that there was an undue political influence here.

Mr. Johnson, is it fair for me to say that there were 55 requests for comment sent out by the Union of Concerned Scientists?

Mr. JOHNSON. I don't——

Mr. BILBRAY. 5,500; 5,500, I am sorry.

Mr. JOHNSON. Yes. I don't know the numbers of what was done or what wasn't. I am aware that, in fact, the survey was received by political appointees and non-scientists, so I have no idea what criteria they used for sending the survey out.

Mr. BILBRAY. That I have, sir. Fifty-five hundred out there. About 1,500 came in, and of that we are looking at maybe half of them had concerns, and there might have been—my concern was that for this to be used in this hearing as some kind of scientific document, and I say anybody who would like to take a look at this and said it is not a scientific document, it doesn't just—no pollster in the world would accept this. Any elected official that would accept it as being a standard, I think, would be appalled by it, but we will talk about with the next panel.

Doctor, my question to you is, in your analysis, you know, you talked about the vegetation and the ecosystem. Was there a consideration of economic value considered in that standard?

Ms. HENDERSON. CASAC is not allowed to consider economic issues, and what we are asked to do is give advice and rec-

ommendations on what will be protective of vegetation and the welfare without regard to the costs or the ease of implementation.

So what we did consider was what was biologically relevant and what was recommended by the National Research Council. Also, I have a concern for the effect of ozone on vegetation as well as on people. When you continually emphasize the primary standard, where do you monitor? You monitor where the people are in urban areas. But we are neglecting the rural areas where our food crops and plants are grown, and when you need to have information, well, how does ozone affect those crops, and how protective do we need to be for that?

Mr. BILBRAY. Doctor, how long have you been chairman of this body?

Ms. HENDERSON. I am in my 4th year. I go off in October.

Mr. BILBRAY. OK. I am concerned because when I talk about economic value, you went immediately to a defensive based on the cost of implementing strategies. You didn't talk about the economic value of the crops that might have been destroyed.

Ms. HENDERSON. Well, I—forgive me.

Mr. BILBRAY. You shifted and went way off of where I was talking about, and I have to understand that, you know, that economic value is something regulatory agencies do all the time.

Ms. HENDERSON. Certainly, and there is a, I believe—what do they call it—a regulatory impact assessment done after our assessment.

Mr. BILBRAY. My question to you, then, if you did not make that, what criteria did you use to set that on the impacts?

Ms. HENDERSON. To set the form?

Mr. BILBRAY. Yes. What standards have you used?

Ms. HENDERSON. The form was purely a scientific issue. I am not an ecologist, but we have very good ecologists on our panel, and they are the ones who develop the form.

I mentioned Ellis Kelling [phonetically], a member of the National Academy of Sciences and others. They know what they are doing, so they developed the form.

Mr. BILBRAY. OK. I am just concerned that, you know, Ms. Dudley and Johnson, this issue of economic values both in the impact of not doing something and—I am sorry, the doctor went off just worried about enforcement, but also enforcement—isn't there a consideration if you have an economic value impact from both sides: first of all, lack of action and action?

Mr. JOHNSON. Well, again, under the Clean Air Act and under establishing NAAQS, I am not allowed to consider costs or whether in fact it can be implemented or not. So I have to base my decisions based upon what the science says. Of course, I think it is also important to note that with all science there are uncertainties, and there is a range of uncertainties. So, then, science, policy, and then ultimately judgment needs to be exercised to make an appropriate decision.

Mr. BILBRAY. Well, isn't, in the statute, the term "economic value" actually integrated right into the statute? Isn't there a reference there?

Ms. DUDLEY. I have it in front of me.

Mr. BILBRAY. Go ahead, ma'am.

Ms. DUDLEY. It says, "Welfare includes but is not limited to effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility and climate, damage to and deterioration of property, hazards to transportation, as well as effects on economic values and on personal comfort and well-being."

Mr. BILBRAY. Well, let me just say that is a consideration with setting standards. I sure wish we would set the same standard before we start putting poison in our field, too.

Chairman WAXMAN. Thank you, Mr. Bilbray.

Mr. Higgins.

Mr. HIGGINS. Thank you, Mr. Chairman. I would like to focus on the primary standard and health impacts. I think this is really important because it affects lives, health, and the well-being of people across the Nation.

There are health risks we have some control over, but unhealthy air affects each and every one of us. Breathing in this life is not an option. Ozone is a dangerous pollutant. It hurts our lungs, worsens coughs and asthma, and makes us more vulnerable to colds and flu. When ozone layers are high, more people go to the hospital, more children miss school, and more adults miss work, and more people die.

Dr. Henderson, will the standards set by EPA adequately protect Americans from ozone pollution?

Ms. HENDERSON. The CASAC panel does not agree that the standard that was set is sufficiently protective of public health, particularly in regard to a margin of safety. Our concern is for particularly asthmatic children whose asthma is aggravated by the higher ozone levels and for what you——

Mr. HIGGINS. So the answer is no?

Ms. HENDERSON. The answer is no. I should be more succinct. No.

Mr. HIGGINS. Administrator Johnson, how do you respond to Dr. Henderson's concerns?

Mr. JOHNSON. Well, I disagree that I set the standard that is requisite to protect public health with an inadequate margin of safety. That is the statutory requirement, and that is what the science in my judgment indicates.

I think it is also, and as you can read in our final agency decision document, and we go in great detail, and in fact we—I think it is a good idea and we are also required to respond to CASAC's recommendations.

There was one study that was a pivotal study, a clinical study conducted by Dr. Adams, and that his study he was the only one that had gone and studied to the level of 0.060, which was at the lower end of the CASAC range. Dr. Adams actually wrote to the Agency twice questioning the use of his study in saying that we were misusing his study, that there were too many scientific uncertainties at that level.

So that, and for other reasons which are documented in our decision document, I disagreed with CASAC on the actual level and agreed—but I did agree that the current standard was not requisite to protect public health, and that is why I reduced it from 0.084 to 0.075.

Mr. HIGGINS. Well, look, yes, I want to address an inconsistency within EPA's analysis. I believe there is a major inconsistency here. EPA developed a regulatory impact analysis comparing the standard you chose to the standard recommended by Dr. Henderson. EPA projected that your weaker standard will produce the following results each year: Between 500 and 3,500 premature deaths, 1,400 non-fatal heart attacks, almost 10,000 asthma attacks or asthma symptoms, 7,500 emergency room and hospital visits, 67,000 lost work days, and almost a million lost school days.

Mr. Johnson, why didn't you listen to your own staff and set a more stringent standard to avoid these harms?

Mr. JOHNSON. Again, the Clean Air Act does not require a primary standard to be set at zero risk, and to achieve that which you are referring would have to be set at a zero, probably zero level. The Clean Air Act does not require that.

The standard of the law is requisite to protect public health within an adequate margin of safety, and through court decisions, that standard is neither more or less stringent than necessary.

Mr. HIGGINS. Yes.

Mr. JOHNSON. And then that is my judgment, and I made the judgment that we needed to strengthen the standard, and I strengthened the standard which is the Nation's most health-protective 8-hour ozone standard in our history. And I am very proud of that.

Mr. HIGGINS. The public health experts aren't uncertain about the harm from ozone. The most eminent public health organizations in America agreed upon the Science Advisory Committee's recommendations, and this included the American Academy of Pediatrics, the American Medical Association, the American Heart Association, among others.

I have a letter from the American Lung Association to this committee strongly critiquing EPA's rule, and I ask unanimous consent to enter it into the record.

Chairman WAXMAN. Without objection that will be ordered.

[The information referred to follows:]

Statement of the American Lung Association

Committee on Oversight and Government Reform
U.S. House of Representatives

Hearing on
EPA's New Ozone Standards

May 20, 2008

The American Lung Association was deeply disappointed that EPA failed to provide the kind of protection from the nation's most widespread air pollutant that the public is legally entitled to expect when it issued the final EPA ozone standards in March 2008. Pushing aside clear and powerful recommendations from his expert scientific advisors on the Clean Air Scientific Advisory Committee, the Administrator chose instead to construct weak arguments that would justify more pollution. While the final standards of 75 ppb are an improvement over the prior standards, they fall short of the Clean Air Act's mandate to protect the health of the public. The American Lung Association does not agree with the Administrator's view of a "sufficient level of public health protection." If EPA had followed the law, we could have cut the risk of life-threatening pollution to millions of Americans nationwide.

The Clean Air Act requires EPA to review the National Ambient Air Quality Standards (NAAQS) every five years to ensure that the standards reflect the latest scientific and medical evidence. Primary standards must be set at levels that will protect the health of the public with an adequate margin of safety, including the health of vulnerable populations such as children with asthma or people with chronic bronchitis or emphysema. In 2001 the Supreme Court unanimously ruled that clean air standards must be based strictly on what is necessary to protect public health.

Ozone air pollution causes serious adverse health effects. Many groups face higher risk from ozone, in particular children and teens, seniors and people with lung diseases like asthma and emphysema. These well-documented health effects include compromised lung function, worsened respiratory symptoms such as cough, worsened asthma, inflammation of the lining of the lungs, heightened susceptibility to respiratory infections such as colds and flu, as well as an increase in hospital admissions and emergency room visits. Most recently, evidence has shown that ozone can kill.

The American Lung Association has closely followed the EPA review of the National Ambient Air Quality Standards for ozone. We sued EPA over its failure to meet the mandatory 5 year deadline for the completion of the review. We have been following and participating in every step of the review process for the primary standards including the review of multiple drafts of the Criteria Document, Staff Paper, risk assessment, and the proposed rule. We have attended each meeting of the Clean Air Scientific Advisory Committee's multi-year review of these documents.

Scientific evidence accumulated over the last ten years clearly indicates that adverse health effects occur at lower levels. Since 1997, when EPA previously revised the ozone NAAQS, more than 1,700 peer-reviewed studies examining the health effects of ozone have been published. Extensive reviews of this new body of evidence by EPA staff scientists and by EPA's Clean Air Scientific Advisory Committee (CASAC) have confirmed that the current primary ozone standard is set at a level that is not sufficient to protect public health with an adequate margin of safety.

Recent epidemiologic studies have demonstrated a range of adverse respiratory health effects at levels below the current 8-hour standard of 0.08 ppm, including increased hospital admissions and emergency room visits, respiratory symptoms in infants and children, asthma exacerbations, school absenteeism, and increased risk of premature death. [1]

A recent report of the National Academy of Sciences confirms the link between short-term exposures to ozone air pollution and premature death, even at concentrations below the final standard.[2]

The epidemiologic evidence is further supported by a number of controlled human exposure studies that have shown that some healthy adults experience reductions in lung function, increased respiratory symptoms, heightened susceptibility to respiratory infection and lung inflammation following just 6.6 hours of exposure to ozone at concentrations of 0.08 ppm.[3] More recent studies have demonstrated effects on lung function and respiratory symptoms down to 0.06 ppm.[4] It is important to emphasize that the respiratory effects observed in these chamber studies occurred in healthy young adult subjects and would likely be more severe among more vulnerable groups, such as children, seniors, or people with asthma or other lung diseases.

Never before has there been such a strong, broad, and unanimous consensus that the standards needed to be significantly strengthened in order to protect public health and to provide a margin of safety as required by the Clean Air Act.

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[1] Comments of the American Lung Association, Environmental Defense, and Sierra Club on the U.S. Environmental Protection Agency's Proposed Revisions to the National Ambient Air Quality Standards for Ozone. October 9, 2007.

[2] National Research Council. Estimating Mortality Risk Reduction and Economic Benefits from Controlling Ozone Air Pollution. April 2008.

[3] Devlin RB, McDonnell WF, Mann R, Becker S, House DE, Schreinemachers D, Koren HS. Exposure of humans to ambient levels of ozone for 6.6 hours causes cellular and biochemical changes in the lung. *Am J Respir Cell Mol Biol* 1991; 4: 72-81; Hortstman DH, Follinsbee LJ, Ives PJ, Abdul-Salaam S, McDonnell WF. Ozone concentration and pulmonary response relationships for 6.6 hour exposures with five hours of moderate exercise to 0.08, 0.10, and 0.12 ppm. *Am Rev Respir Dis* 1990; 142: 1158-1163; McDonnell WF, Kehrl HR, Abdul-Salaam S, Ives PJ, Folinsbee LJ. Respiratory response of humans exposed to low levels of ozone for 6.6 hours. *Arch Environ Health* 1991; 46: 145-150.

[4] Adams WC. Comparison of chamber and face-mask 6.6 hour exposures to ozone on pulmonary function and symptoms responses. *Inhalation Toxicol* 2002; 14: 745-764; Adams WC. Comparison of chamber 6.6 h exposures to 0.04-0.08 PPM ozone via square-wave and triangular profiles on pulmonary responses. *Inhalation Toxicol* 2006; 18: 127-136.

The Clean Air Scientific Advisory Committee (CASAC) is chartered under the Clean Air Act to advise the EPA Administrator on the review of the NAAQS. The CASAC ozone panel was comprised of 23 distinguished scientific experts from a variety of disciplines and perspectives. This panel was composed of the nation's leading experts in ozone air pollution science and health. The panel met at least six times over the course of the review and submitted detailed oral comments and seven sets of written comments totaling 500 pages on the review plan, the exposure and risk assessments, and the draft and final Criteria Document and Staff Paper.

After reviewing the at least two drafts of the Criteria Document and the Staff Paper, the 23-member CASAC ozone panel reported to EPA these unanimous recommendations:[5]

- The current standard fails to protect public health from the harmful effects of ozone, the nation's most widespread outdoor air pollutant.
- EPA should set the 8-hour ozone standard much lower—in the range of 0.060 to 0.070 parts per million (ppm)—to adequately protect public health.
- EPA should eliminate the "rounding" loophole that weakens the current standard and leaves millions of Americans unprotected.

CASAC restated its original recommendations in a follow-up letter to EPA after reviewing the final ozone Staff Paper, and added an additional recommendation:

- EPA must explicitly account for a "margin of safety" in setting the ozone standards.[6]

Then CASAC panel took the unusual step of reiterating its position in a letter sent to the EPA Administrator upon issuance of the final rule.[7] A strongly worded letter to the EPA Administrator stated:

> "*...the members of the CASAC Ozone Review Panel do not endorse the new primary ozone standard as being sufficiently protective of public health.* The CASAC -- as the Agency's statutorily-established science advisory committee for

[5] Letter from Dr. Rogene Henderson, Chair, Clean Air Scientific Advisory Committee to Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency, re Clean Air Scientific Advisory Committee's (CASAC) Peer Review of the Agency's 2nd Draft Ozone Staff Paper, EPA-CASAC-07-001, October 24, 2006.

[6] Letter from Dr. Rogene Henderson, Chair, Clean Air Scientific Advisory Committee to Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency, re Clean Air Scientific Advisory Committee's (CASAC) Review of the Agency's Final Ozone Staff Paper, EPA-CASAC-07-002, March 26, 2007.

[7] Letter from Dr. Rogene Henderson, Chair, Clean Air Scientific Advisory Committee to Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency, re Clean Air Scientific Advisory Committee Recommendations Concerning the Final Rule for the National Ambient Air Quality Standards for Ozone, EPA-CASAC-08-009, April 7, 2008.

> advising you on the national ambient air quality standards -- *unanimously recommended* decreasing the primary standard to within the range of 0.060-0.070 ppm. It is the Committee's consensus scientific opinion that your decision to set the primary ozone standard above this range fails to satisfy the explicit stipulations of the Clean Air Act that you ensure an adequate margin of safety for all individuals, including sensitive populations."

EPA's Children's Health Protection Advisory Committee (CHPAC) endorsed a standard at the lower end of the CASAC-recommended range.[8]

> "As pediatricians, public health and environmental professionals drawn from academia, government, industry and public interest organizations, we would like to again express our unanimous opinion that the 8 hour ozone standard should be set at the lowest level offered by the Clean Air Scientific Advisory Committee (CASAC), 0.060 ppm, in order to adequately protect the health of children with an appropriate margin of safety (CHPAC letter, March 23, 2007). This opinion is based on the existing scientific studies of children, which demonstrate serious adverse health effects of ozone exposure, including exacerbation of asthma with attendant increases in medication use, hospitalization, and missed school days, and impairment of normal lung development. It is also based on consideration of the evidence that disruption of lung development may result in permanent health consequences in children exposed to ozone."

This consensus has been endorsed by over 100 leading independent air quality scientists and physicians.[9] Moreover, mainstream medical and public health organizations including the American Medical Association, the American Academy of Pediatrics, the American Public Health Association, the American Nurses Association, the American Thoracic Society, the American Heart Association, the American College of Chest Physicians and many others have recognized the need for ozone air quality standards consistent with the CASAC recommendations.[10]

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[8] Letter from Melanie A. Marty, Ph.D., Chair, Children's Health Protection Advisory Committee, to Stephen L. Johnson, Administrator, U.S. EPA, re: Review of the NAAQS for Ozone: Policy Assessment of Scientific and Technical Information, March 23, 2007; and Letter from Melanie A. Marty, Ph.D., Chair, Children's Health Protection Advisory Committee, to Stephen L. Johnson, Administrator, U.S. EPA, re: Proposed NAAQS for Ozone, 4 September, 2007.

[9] Letter to U.S. EPA Administrator Stephen Johnson re Broad Scientific Consensus to Lower the Ozone Air Quality Standard and Close the Rounding Loophole, from Jonathan I. Levy, Sc.D., Associate Professor of Environmental Health and Risk Assessment, Harvard School of Public Health; Kent Pinkerton, Ph.D., Director of the Center for Health and the Environment, University of California at Davis; and William Rom, M.D., M.P.H., Sol and Judith Bergstein Professor of Medicine and Environmental Medicine and Director of the Division of Pulmonary and Critical Care Medicine, New York University School of Medicine, and over 100 other air quality scientists and physicians, April 4, 2007. Available at: http://www.cleanairstandards.org/wp-content/uploads/2007/04/final-ozone-scientists-sign-on-letter-4-5-07.doc

[10] Letter to EPA Administrator Stephen L. Johnson, re: Science Compels Stricter NAAQS for Ozone, from the heads of the American Lung Association, American Academy of Pediatrics, American Public Health Association, Asthma and Allergy Foundation of American, and 16 national health and environmental organizations, April 16, 2007. Available at: http://www.cleanairstandards.org/wp-

The recommendations of these prominent scientific and medical panels are more than just optional advisories: they represent repeated peer review and assessment of the scientific research by recognized authorities. The fact that they arrive at similar and unanimous conclusions bears witness to the strength of the underlying science. Unfortunately, EPA's final standards are weaker than those recommended by CASAC, CHPAC, the World Health Organization, and numerous public health and medical organizations. They are weaker than the standards adopted by the State of California and many other countries including Canada and the United Kingdom.

In the face of this strong consensus, it is untenable to cite "uncertainty" as a rationale for failing to promulgate tighter standards. Indeed, EPA mentions uncertainty no fewer than 100 times in the preamble, despite the massive accumulation of new evidence published since EPA's last review. EPA's claims that uncertainty justifies less protective standards than recommended by CASAC are both unfounded and one-sided. EPA's uncertainty claims lack rational support, and arbitrarily ignore uncertainties that favor more protective standards. For instance, controlled human exposure studies typically use healthy young adults as test subjects. This creates uncertainty about what the results would be on infants, or children, or children with severe respiratory disease. When Congress wrote the Clean Air Act, scientists testified that we would never have absolute knowledge: that we would learn more and improve our ability to assess dangers, but that we would always need to protect the public even when we lack full knowledge. Congress included a simple phrase in the Clean Air Act, in the requirements for setting standards, to direct the EPA to include an "adequate margin of safety" to provide a cushion of protection. The Clean Air Act requires that the EPA address such uncertainty in favor of more public health protection, not less.

The American Lung Association was deeply disappointed that the final EPA ozone standards issued in March 2008 failed to follow the recommendations of the Clean Air Scientific Advisory Committee. While the final standards of 75 ppb represent an improvement over the prior standards, they fall short of the Clean Air Act's mandate to protect public health with an adequate margin of safety.

Furthermore, the American Lung Association was greatly dismayed by Administrator Johnson's call for legislative changes to the Clean Air Act's standard-setting provisions.

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content/uploads/2007/04/ltr-from-public-health-environ-groups-on-ozone-naaqs-04-16-07.pdf; letter to EPA Administrator Stephen L Johnson re: Proposed National Ambient Air Quality Standards (NAAQS) for Ozone--Docket ID Number EPA-HQ-OAR-2005-0172, October 5, 2007 signed by American Heart Association and 9 other national health organizations; and Letter from the American Thoracic Society, American Medical Association, American College of Chest Physicians, American College of Preventive Medicine, American College of Occupational and Environmental Medicine, American Association of Cardiovascular and Pulmonary Rehabilitation and National Association for the Medical Direction of Respiratory Care to Stephen L. Johnson, Administrator, Environmental Protection Agency. October 9, 2007.

The great value of the current approach is that the air quality standards, the goals, are strictly science-based. Americans have a right to know if the air they breathe is safe or not. They need clear, unbiased, health-based National Ambient Air Quality Standards that are unalloyed by cost, feasibility, risk, or other considerations. They need standards that are reviewed every five years to ensure that the goals are based on current information -- that children are not born and raised before the standards are updated.

The present Clean Air Act allows ample opportunity for cost, feasibility, timelines and other considerations to be taken in account -- during the implementation phases.

The Clean Air Act has been extremely effective in driving down emissions of air pollution, while accommodated economic growth.[11] Its technology forcing provisions have been a great success story. The air quality standards are central to this success.

We urge this Committee to hold EPA accountable for its final decision on the ozone air quality standard.

Attached is a list of the medical societies and the public health groups who supported an ozone standard in the range that the CASAC recommended.

[11] U.S. EPA. Air Quality and Emissions: Progress Continues in 2006. http://www.epa.gov/air/airtrends/econ-emissions.html

List of Medical Societies and Public Health Organizations Supporting a Primary 8-hr Ozone NAAQS of 0.060 ppm

American Academy of Pediatrics

American Association of Cardiovascular and Pulmonary Rehabilitation

American College of Chest Physicians

American College of Preventive Medicine

American College of Occupational and Environmental Medicine

American Heart Association

American Lung Association

American Medical Association

American Nurses Association

American Public Health Association

American Thoracic Society

Asthma and Allergy Foundation of America

National Association for Medical Direction of Respiratory Care

National Association of City and County Health Officials

Physicians for Social Responsibility

Trust for America's Health

Mr. HIGGINS. The American Lung Association says, "If EPA had followed the law, we could have cut the risk of life-threatening pollution to millions of Americans nationwide.

Administrator Johnson, last question. Your decision seems to be inconsistent with the mainstream thinking. It rejects the recommendations of your expert panel, your own staff, the outside public health organizations. It is just not credible to argue that your decision is based on science.

Mr. JOHNSON. Well, I disagree with that, and we certainly have in excess of 400 pages of document that goes in great detail describing the science behind my decision, and that it is the most health protective standard in the Nation's history.

I might add, as I met with all the public health officials, and I met with others so that I could have their input, and I think that is important as part of the process in me making a decision.

As I mentioned in my oral testimony, I have just proposed a new health protective standard for lead, and I have taken it a step further because CASAC recommended a particular range. But as part of the evaluation the Centers for Disease Control have said that there is no safe level of lead. So CASAC did not recommend, but I felt it was important as a public health official to ask the question: Should we be setting the standard for lead at zero?

Chairman WAXMAN. Mr. Higgins, your——

Mr. JOHNSON. So those are the kinds of decisions that I have to make, and I see input. Again, I appreciate the Council of CASAC, my staff, the notice and comment, the public hearings all of which, but, ultimately, I need to make a tough decision.

Mr. HIGGINS. I yield back, Mr. Chairman.

Chairman WAXMAN. The gentleman's time has expired.

Mr. Platts.

Mr. PLATTS. Thank you, Mr. Chairman. I appreciate you holding this hearing, and I apologize that a scheduling conflict prevents me from remaining, but I would like to yield the balance of my time to the gentleman from California, Mr. Issa.

Mr. ISSA. I thank the gentleman.

You know, if we could put the map up on the board, I think we have——

Chairman WAXMAN. Mr. Platts.

Mr. ISSA. Oh, would you ask Todd to stay for a few minutes?

Chairman WAXMAN. Mr. Platts is yielding his time. He must stay here. Go ahead.

Mr. ISSA. OK. If you could put the map up on the board, and this will primarily concern, I think, most both Administrator Dudley and Administrator Johnson, but if you will look at the chart, these are counties with monitor violations in 2008, primary ozone at the 0.75 parts per million, and secondary standard of 0.21.

Now, my understanding is that every area that is dark, which includes, unfortunately, most of California. There is no effective difference whether you set the standard for secondary higher or lower, is that correct? That basically, the ones that are in compliance will be in compliance at either level; the ones that are not in compliance will not be in compliance at either level. Is that roughly true, based on the map you see up there, if you are familiar with it?

Mr. JOHNSON. Based upon analysis that our staff did that whether the form was the W–126 form or the following identical to the 8-hours ozone standard, based upon the decision that I made to be protective that it didn't matter either way.

Mr. ISSA. OK, following up on that——

Mr. JOHNSON. But, clearly—excuse me, sir.

Mr. ISSA. Yes.

Mr. JOHNSON. But clearly, for the primary standard there were many counties based upon monitoring data that would be out of compliance within the new primary health protective standard.

Mr. ISSA. I realize that and, of course, if California's out of compliance, in such a large area they are going to be in either case.

I would note that the food basket of California appears to be producing a tremendous amount of crops for us with already noncompliant ozone layers.

Dr. Henderson, can you explain, essentially, why productivity has increased dramatically in most of America, whether it is corn, wheat, rice, or the vegetables grown in California during a time in which ozone levels were far above what you are saying you would like them to be?

Ms. HENDERSON. Well, it would be a mistake for me to try to calculate all the factors that go into food production.

What I was trying to mention was we could do a better job of air quality management in rural areas if we had some kind of handle on what the ozone levels are and if they are at a level that can affect the foliage.

Mr. ISSA. OK, but back to Administrator Johnson, you didn't find that setting a different standard would have made any difference. In other words, the economic value that you are required by statute to—and, Administrator Dudley, you, too—you are required to look at this economic value. If I read this map correctly, there is not economic value to the different standard because it doesn't, in fact, change the compliance. Is that correct?

Mr. JOHNSON. You have to be very precise. Based upon the data sets analyzed between 2003 to 2005, and then 2004 to 2006 from currently monitored counties, no additional counties would have been out of attainment under the seasonal secondary standard initially proposed by EPA.

Mr. ISSA. OK. Could we put the chart up that comes next? This is the chart of levels for the 12-hour standard, the so-called W–126 standard. I think all of you are familiar with this.

When I read it, looking at the difference between the 0.075 and the 0.070, under the 126 standard, 21 parts per million, I see no change again. Is that essentially a more graphic way to show that, in fact, there would have been no benefit had we implemented the lower standard? The secondary standard.

Mr. JOHNSON. Yes.

Mr. ISSA. So, Dr. Henderson, if I accept science—and I do—and that your conclusions are well-intended but without the economic value consideration, would you agree, based on no counties changing, the 126, that in fact it was within the Administrator's purview to judge that and to come up with at least the standard for now of 0.075?

Ms. HENDERSON. I am mixing whether you are talking about the secondary standard or the primary standard.

Mr. ISSA. Well, I am going to the secondary standard, but let me put it another way. Your advisory role is for the Administrator to accept or reject that, in fact, it is advisory even though it is scientific based, and you have standards different than he does. You said yourself you do not evaluate this economic value where he does. Is that correct?

Ms. HENDERSON. It is certainly within his purview. He is the one who decides. We are advisory only. In the case of the secondary standard, I think the decider was President Bush. And that is within his purview, I mean.

Mr. ISSA. Thank you. Thank you for allowing me to clear up the difference in scope, Mr. Chairman.

Chairman WAXMAN. Mr. Hodes.

Mr. HODES. Thank you, Mr. Chairman. The law is very clear that EPA may not consider costs in setting a National Air Quality Standard to protect the environment. The Supreme Court specifically addressed the issue in 2001. The court wrote that if EPA established a standard by "secretly considering the costs without telling anyone," it would be grounds for throwing out the standard because the Administrator had not followed the law.

I am concerned that this is exactly what happened in this case. The record before this committee shows that the unanimous recommendation of the Clean Air Scientific Advisory Committee was rejected by you, Mr. Johnson, apparently on the basis of White House opinion or desire to which you apparently exceeded, given the change in your position from February 22nd to March 12th, for which is there is no explanation that is reasonable other than what the White House told you to do, and much weaker standards were finally selected.

I want to know, Mr. Johnson, during the Agency's consultation with the White House, did White House officials express concerns about the costs of implementing the ozone standards?

Mr. JOHNSON. Sir, are you referring to the primary or the secondary standard?

Mr. HODES. Either one. Did they express concerns about the costs of implementing the ozone standards with respect to either primary or secondary? And I will just point out for you that your Administrator, Mr. Peacock, said that it is clear that the prohibition extends even to secondary standards.

Mr. JOHNSON. That is my belief, and that is the way I operated in my decisionmaking.

Mr. HODES. Did the White House express concerns about the costs of implementing either the primary or secondary standards in your consultations with the White House?

Mr. JOHNSON. As I said, for making a decision, it is my decision and my decision alone, made independently, and I cannot consider and did not consider costs nor whether it was implementable.

Chairman WAXMAN. Mr. Hodes, I don't think he has answered your question.

Mr. HODES. I know. I am sorry, Mr. Johnson. Here is my question: Not what you consider, I am asking you, Mr. Johnson, during the consultations you had with the White House, did the White

House officials express concerns to you or your agency about the costs of implementing the ozone standards.

Mr. JOHNSON. Well, if I did recall, I am not sure that it would be appropriate for me to get into what—who said what at what point in time. In fact, I believe that it is important for me and others, future administrators, to be able to have candid discussions with members of the executive branch, and, as I said, I made the decision. I made the decision without consideration of cost, and that is the important——

Mr. HODES. Let's stop there because I want to pursue this, and I want an answer to my question. When I hear a witness start talking to me about "if I did recall," I wonder whether or not the witness is being evasive. Do you recall having discussions with the White House concerning costs of implementing the standards?

Mr. JOHNSON. I have routine conversations with members of the executive branch.

Mr. HODES. Sir, it is a simple yes or no answer. Do you recall?

Mr. JOHNSON. It is not a simple yes or no answer because I have routine conversations on a multitude of issues, and I am saying is that with, on this issue, I made the decision. I understand what the law directs me to do, and that is not consider costs and I did not consider costs.

Mr. HODES. Let me go back. Do you recall, sir—search your memory—having conversations with the White House about costs in implementing the standards?

Mr. JOHNSON. If I did recall, it would not be appropriate for me to discuss the nature of those conversations.

Mr. HODES. So you won't tell me whether you do or do not recall?

Mr. JOHNSON. As I said, it was not part of my decisionmaking.

Mr. HODES. That is not my——

Mr. JOHNSON. That is the important piece, sir.

Mr. HODES. With all due respect, I am asking the questions and you are answering them.

Mr. JOHNSON. I am answering and you don't like the answers.

Mr. HODES. No. What I want to know is, do you recall or don't you recall?

Mr. JOHNSON. I said even if I did recall, it is not appropriate for me to get into the nature of discussions I have within the executive branch.

Mr. HODES. And the basis of your refusal to answer the question, is it your lack of recollection or some assertion of privilege?

Mr. JOHNSON. I am not asserting any privilege at this time, but I think that it is important, and I think that it is important that I and future administrators have the ability to had candid conversations. I also believe that is important, and certainly as the Agency deliberates on issues that are before us, and I think that is an important privilege, and also I think that it is an important principle that I need to maintain for me and for future administrators.

Mr. HODES. I will try this one last time. You understand, sir, you are under oath before this committee?

Mr. JOHNSON. Oh, I understand that, sir.

Mr. HODES. Do you or don't you recall having conversations with the White House about whether or not costs were considered by the White House?

Mr. JOHNSON. As I said, that whether or not I recall or don't recall, I don't believe that it is appropriate for me to discuss the nature of those conversations. I believe it is appropriate for me to be able to have candid conversations, and I also said under oath that I did not consider costs in making my decisions.

Chairman WAXMAN. Thank you, Mr. Hodes. Your time has expired.

Mr. Sarbanes.

Mr. SARBANES. Thank you, Mr. Chairman.

Ms. Dudley, I am going to give you some equal time here. I was intrigued by your memo that came, let me see if I can find it, on March 6th, which was 6 days before this deadline, you sent a memo to EPA where you said, "The draft does not provide"—this is the draft EPA report—"does not provide any evidence that a separate secondary standard would be more protective than one set equal to the draft primary standard." Explain that.

Ms. DUDLEY. The air quality that would be achieved by setting the secondary standard based on that seasonal form averaging it over 3 months or setting it equal to the primary, the level of air quality is the same. I think it gets back to the maps that were up there.

But what we care about is air quality, and the air quality that vegetation and humans are exposed to, the two standards from all the analysis that EPA did would have the same effect.

Mr. SARBANES. I am incredulous that you could claim there wasn't any evidence when in the draft, original draft, the Administrator indicated that he found evidence compelling that ozone-related effects on vegetation are best characterized by an exposure index that is cumulative and seasonal in nature, and that conclusion on the part of the Administrator was reflective of what the expert panel had concluded, and what months if not years of research and work on the part of the EPA staff had concluded.

So again, I mean I could see you asserting perhaps that it does not provide adequate evidence or sufficient evidence, but to suggest that it didn't provide any evidence, that there was no evidence that this secondary standard that was originally being ut forward would be the appropriate one doesn't seem to jibe with all of the other testimony and documentation that we have.

Ms. DUDLEY. There are two different issues here. One is that whether vegetation responds over a season rather than over a day, and EPA did present evidence to that. EPA also presented evidence that the current standards—or the previous standard may not be protective of vegetation.

But at the end of the day, regardless of which form you used, air quality would be reduced so that vegetation would be exposed to the same air quality. That is the bottom line, so that the form of the standard will not affect the air quality. It won't affect what people have to do to come into compliance with the standard, and it won't affect the air quality in those counties that are affected by the standard.

Mr. SARBANES. Well, what you are saying strikes me as double-talk in the context of what we heard in the original draft from the Administrator, and certainly the reaction of the staff and the experts to the ultimate decision to abandon the more cumulative standard in favor of the same standard as the primary was intense, and it was lamented at all levels within the staff which to me suggests that there was sufficient evidence. Certainly, there was evidence that would be the most appropriate route to take.

Administrator Johnson, I just want to say to you that I am offended—and I am not trying to be facetious here, I actually mean this—I am offended on your behalf by the White House's handling of this matter, because right up to the end you were going with the science. In fact, I commend you for the fact that after you started to see the writing on the wall on March 6th, you nevertheless, and then at that point, had the ability, I guess, to begin regrouping. You nevertheless pushed forward right up to the point of the deadline when the rug was essentially pulled out from under you, or you received this countermand, this final countermand or overwrite from the White House.

I am going to ask you a question which again I don't mean to be facetious. You are somebody who was in the Agency for many years, you had this opportunity to take the top spot there. I am curious, when you did that, did the President in speaking with you about taking this job, or the White House in speaking with you about it, did they indicate to you that there would be times when the science would be overridden for political purposes? And you would essentially have to carry that water for the White House? How clear were they about these instances occurring.

Mr. JOHNSON. Sir, my charge and certainly my oath of office was to carry out the mandates and the laws that I am responsible for under the Environmental Protection Agency. That was the charge. The President sent further and said, Steve, I want you to accelerate the pace of environmental protection while you help maintain the Nation's economic competitiveness. That was the charge that was given. I have certainly been very public about that.

I have been carrying out those duties to the best of my ability, looking at sound science, and, as I said, science isn't pure. There are many uncertainties and science requires policy judgments and, of course, then there are a variety of other issues that come into play depending upon the statute.

Mr. SARBANES. Well, with all due respect, I can't imagine a clearer example of where your charge to carry out the law in respect to science could come into conflict with what the President's and White House's edict was in this particular matter.

I yield back.

Chairman WAXMAN. The gentleman's time has expired.

Mr. Welch.

Mr. WELCH. Thank you, Mr. Chairman.

Mr. Johnson, my understanding is Jason Burnett is a senior member of the EPA.

Mr. JOHNSON. Yes.

Mr. WELCH. And he is a trusted and respected advisor, is that right?

Mr. JOHNSON. Yes.

Mr. WELCH. A person on whom you had confidence, have confidence?

Mr. JOHNSON. Yes.

Mr. WELCH. Is that correct? He, as you know, has been deposed, and he testified that, according to him in his testimony, you favored granting this California waiver in full in August and September. Is Mr. Burnett correct?

Mr. JOHNSON. Well, I think that he is correct in characterizing that over time, as I was briefed——

Mr. WELCH. Let's keep it simple. I mean, I understand this is a process. My question, and I am really going to try to frame a question that is clear, that allows you to answer it as clearly and as succinctly as possible. I do appreciate that this is a process, and you have many things that come in so what happens today isn't necessarily what is the wise decision tomorrow, OK?

But is he correct in his recollection, according to his testimony, that in August and September, you were leaning toward a full waiver?

Mr. JOHNSON. Well, I don't recall the August and September timeframe, but I can say with confidence that I was considering all options, including a full grant and also a full denial, and options in between. And I think my recollection is, as I read the transcript last night, and I think he also states that as well.

Mr. WELCH. Mr. Burnett said—it was very clearly—that in August and September you were favoring granting a waiver in full.

We have to move on here. I only have 5 minutes, so you read it last night. That is what he said.

Chairman WAXMAN. Well, the issue isn't what Mr. Burnett said; the issue is whether it is accurate or not.

Mr. JOHNSON. Well, as I said, is that I considered each one of the options.

Mr. WELCH. All right, let me go through this.

Mr. JOHNSON. I don't recall the particular time, but I did consider——

Mr. WELCH. But that is obvious. It is obvious that you did. Here is what he said. I think you have more or less acknowledged that in August and September he was correct, you were leaning toward a full waiver. He said that over time you began to think of a partial grant. Is he right there?

Mr. JOHNSON. I considered a partial grant, that is correct.

Mr. WELCH. All right. Then on December 19th you issued a denial.

Mr. JOHNSON. Yes.

Mr. WELCH. Was that after you had been to the White House to have conversations about this issue?

Mr. JOHNSON. Well, again, I have routine conversations with the White House throughout the calendar. Again, this was my——

Mr. WELCH. Did you have any——

Mr. JOHNSON. This was the decision.

Mr. WELCH. Did you have anything——

Mr. JOHNSON. I understand——

Chairman WAXMAN. Mr. Johnson, we would appreciate it if you answer the questions.

Mr. JOHNSON. Yes, I am trying.

Mr. WELCH. Did you have a meeting with the President about this?

Mr. JOHNSON. I have routine meetings with the executive branch, including the President.

Mr. WELCH. OK. What part of my question don't you understand? Did you have a meeting with the President about this issue of the EPA waiver?

Mr. JOHNSON. When and where and if I have meetings with the President are—I said I have routine meetings with members of the executive branch. Those meetings I believe are in confidence.

Mr. WELCH. Is there something——

Mr. JOHNSON. And as I said, I made the decision. It was my decision alone.

Mr. WELCH. Mr. Johnson, you described this process is transparent and open, correct?

Mr. JOHNSON. Yes.

Mr. WELCH. And you are proud of the process?

Mr. JOHNSON. I am. This was an excellent process. As you can see from the thousands of pages.

Mr. WELCH. Does transparent mean if we can't know whether you, in fact, met with the President and discussed with him this issue?

Mr. JOHNSON. I believe that as Administrator that I need to have the ability to have private meetings with the President and members of the executive branch.

Mr. WELCH. Did I just ask you what the content was of your meeting with the President?

Mr. JOHNSON. I said I have already acknowledged that I have routine meetings with the President and members of the executive branch. I think that is good government.

Mr. WELCH. Yes, but a few things: In your September 12th briefing, there were slides that were presented that included a statement from our staff that the clearest and most defensible option would be to grant the waiver. Is that true?

Mr. JOHNSON. I don't recall that particular slide. I know that there was a wide range of options and that they were all legally defensible.

Mr. WELCH. There were staff evaluations at the September meeting—this is all in the record. This is not disputable.

Mr. JOHNSON. I said I don't remember that particular document.

Mr. WELCH. So we can pretend to the people listening that this is an established fact, but let's——

Mr. JOHNSON. Sir, there were how many thousands of pages of documents that were submitted to you?

Mr. WELCH [continuing]. September 12th briefing it said California has extraordinary ozone conditions, that greenhouse gas standards are reasonably viewed as necessary to address climate change, and opponents to the waiver have not met their burden of showing the California standards won't benefit climate change and ozone conditions.

Are you aware that in these evaluations they originally contained those remarks in writing until they were removed at the insistence of Mr. Meyers?

Mr. JOHNSON. I don't recall that situation, and I don't necessarily see documents that are drafted by individual staffs.

Mr. WELCH. But you were at the meeting.

Mr. JOHNSON. Oh, I don't necessarily see all the workings of drafting and redrafting before that it reaches my desk. That is the point.

Mr. WELCH. This is sounding like some of the meetings you were at you were present, and some of the meetings you are at, you are not. September 20th and 21st briefing, this is your briefing. I mean, it is not somebody else's.

Did the EPA staff make it clear that the statutory criteria for granting the waiver had been met? That is a threshold question, correct?

Mr. JOHNSON. There were a wide range of options, and there were opinions that were provided to me that as part of the record. As I said——

Mr. WELCH. It is a little frustrating.

Mr. JOHNSON. Well, it shouldn't be frustrating——

Mr. WELCH. Well, it is.

Mr. JOHNSON [continuing]. Because there is a 50-page document——

Mr. WELCH. No, no, it is a simple——

Mr. JOHNSON [continuing]. Describing my decision and the scientific basis on what the law requires me to decide, which I decided.

Chairman WAXMAN. Mr. Welch, your time has expired.

Mr. Johnson, you admitted you had a conversation with the President on the California waiver. That wasn't an issue.

Now, you are refusing to say whether you had a conversation with the President on the ozone waiver. What is the difference?

Mr. JOHNSON. As I said, I have routine conversations with the President as well as members of the executive branch, and I believe that those——

Chairman WAXMAN. Let me get the record straight.

Mr. ISSA. Could we have regular order?

Chairman WAXMAN. The chairman is pursuing regular order. You said for the record that you had a conversation with the President on the ozone layer?

Mr. JOHNSON. I don't recall making that——

Chairman WAXMAN. On the ozone ruling?

Mr. JOHNSON. I don't recall making that comment myself.

Chairman WAXMAN. Do you recall making a comment that you have had a conversation with the President on any of these three rules that we have been looking at?

Mr. JOHNSON. As I said, what I do recall and I believe is an accurate reflection of what I have said, is that I have routine conversations with members of the executive branch, including the President on a wide range of issues.

Chairman WAXMAN. OK, I am not going to pursue this because I will have another opportunity, but it seems to me you are being awfully evasive, and I don't know why you cannot tell this committee whether you in fact had a discussion about this rule or that rule or the other rule. We are only talking about three different

rules. Either you did or you didn't. I don't know why you cannot tell us that information.

No one is asking you what was said. We are just asking you whether you had a conversation, and the answer is not acceptable to say, I have had conversations with the President and others on a routine basis, and I am not going to tell you whether I had a conversation on these subjects. What else do you talk to him about?

Mr. JOHNSON. As I have said, I have routine conversations on——

Chairman WAXMAN. In those routine conversations, did you talk about the ozone——

Mr. JOHNSON [continuing]. On a wide range of topics.

Mr. ISSA. Mr. Chairman, I must insist that we go to regular order.

Chairman WAXMAN. The gentleman is not in order at this time.

Mr. ISSA. Mr. Chairman, the rules of the House——

Chairman WAXMAN. The gentleman will cease.

Mr. ISSA. The rules of the House call for an alternating 5 minutes on——

Chairman WAXMAN. The gentleman will cease.

Mr. ISSA [continuing]. On what time does the chairman speak. The point of order, Mr. Chairman, on what time does the chairman speak and ask these questions.

Chairman WAXMAN. The Chair has the prerogative to pursue for the record a clarification and I am pursuing it.

Mr. ISSA. Mr. Chairman, where in the rules is that stated? Could I see a copy of the rules that allow it, because as I said, the rules of the House, Mr. Chairman——

Chairman WAXMAN. We will furnish you with a copy at the appropriate time.

Mr. ISSA. Mr. Chairman, there are multiple Members that could yield to you time. I would ask that you——

Chairman WAXMAN. I will have you physically removed from this meeting if you don't stop. I want to know an answer to the question.

Did you have a discussion with the President on any one of these three rules?

Mr. JOHNSON. Mr. Chairman, as I said, I have routine conversations with the President and the executive branch on all, on many matters before the Agency of particular importance. I don't believe that it is appropriate for me to get into the details of what those conversations are or are not. I think that is an important privilege that and opportunity that we have.

Chairman WAXMAN. Are you asserting executive privilege?

Mr. JOHNSON. Not at this time, sir.

Chairman WAXMAN. OK, Ms. Watson is now recognized.

Ms. WATSON. Thank you, and let me try this: Mr. Johnson, in December 2007, you announced that EPA would deny California's petition—and I am a Californian—for a Clean Air Act waiver to enforce its standards to reduce greenhouse gas pollution from cars and trucks. In our previous investigations of the White House's manipulation of climate change science, we learned that the Office of the Vice President was involved in these activities.

Because the California waiver directly relates to climate change, I would like to ask you about the Vice President's role in the California waiver decision. It is very important to me. Was the Vice President's Office involved with the deliberations on the California waiver?

Mr. JOHNSON. Not to my knowledge, no.

Ms. WATSON. Your answer is no, OK. According to press accounts, the Vice President was involved in the issue and the Press has reported that the CEO of Ford and Chrysler met with Vice President Cheney prior to the denial and urged the administration to reject the waiver. Did the Vice President or his staff put any pressure on you or your staff to deny the California waiver request?

Mr. JOHNSON. No.

Ms. WATSON. Did the Vice President or his staff tell you they opposed the California waiver?

Mr. JOHNSON. Not that I recall.

Ms. WATSON. Mr. Johnson, we are looking at a mysterious, last-minute reversal of your position on the California waiver. We need to fully understand the reasons for that sudden change of course. Transparency is what we are trying to get to, and it would be fundamentally wrong if you reversed your decision because of the meeting the Vice President had with the auto industry. It would violate the Clean Air Act if a denial resulted from any pressure from the Vice President's office.

But the committee won't know the truth if you do not tell us and, in terms of being transparent, we want to know why there was a reversal. We asked for the waiver because living in California, having worked for 20 years in the legislature, we did a lot to clean up our air. In fact, it took us 14 years for the smoking policies that stopped smoking on airplanes in California air space, and now it is the practice around the globe.

So we kind of know what we are doing when we ask for a waiver. So if you could be transparent, was there any pressure put on you at all to change your own recommendations, to reverse your own recommendations.

Mr. JOHNSON. Well, then I would with due respect beg to differ with your characterization. I didn't reverse any decision; I made the decision, and the decision was documented in the letter of what I intended to do—to the Governor—in December, and later on then, as I said, the approximately 50-page document goes into great detail on my decision.

It was my decision, it was mine alone, and as I note in the document that climate change is a problem that is not unique to California. My decision is grounded in the law and the facts that were before me.

Ms. WATSON. We have your words down in the record, but was there any input from the White House that influenced your final decision to deny us a request for a waiver?

Mr. JOHNSON. Again, my decision was based upon the law and the facts in Section 209.

Ms. WATSON. No, let me clarify and speak real clearly.

Mr. JOHNSON. Please.

Ms. WATSON. So you can answer me directly, was there any input from the White House, either the President or Vice President, that influenced your decision?

Mr. JOHNSON. Again, I have routine conversations with the executive branch and——

Ms. WATSON. All right, you will not answer——

Mr. JOHNSON [continuing]. And I made the decision——

Ms. WATSON. Hold on. Hold on, I am asking some questions. I have gone through this for the last hour. Yes or no.

Mr. JOHNSON. As I said, I have routine conversations——

Ms. WATSON. No. That doesn't——

Mr. JOHNSON. Well, again——

Ms. WATSON. Right, we are talking about transparency.

Mr. JOHNSON. As I said——

Ms. WATSON. Yes or no?

Mr. JOHNSON. The answer is no, they did not make the decision. The answer is yes, I made the decision.

Ms. WATSON. I didn't ask did you do that. Maybe my English is not clear. Let me see if I can restate it.

Mr. JOHNSON. Please.

Ms. WATSON. Yes. You have these routine conversations.

Mr. JOHNSON. Yes.

Ms. WATSON. Was there anything—you don't have to give me the content—was there anything in the conversation, any input from either the President or the Vice President—and the Vice President in particular, because we do have a record of conversations with an industry that adds to the pollution in the air, was there any input from the Vice President that impacted on your decision to deny California its waiver?

Mr. JOHNSON. Specifically, for the Vice President I don't recall any.

Ms. WATSON. Your answer is that you don't recall.

Mr. JOHNSON. I said no, I don't recall any.

Ms. WATSON. OK, thank you. Thank you very much.

Chairman WAXMAN. Mr. Issa expressed that I was being unfair by taking additional time out of order, and I, in order to be fair, will yield him at this point 3 minutes so he can pursue further questions.

Mr. ISSA. Thank you, Mr. Chairman, and I appreciate the balance.

In a nutshell, Administrator Johnson, you are aware that Members of Congress enjoy the speeches and debate exemption—it is been well documented—that what we do and say in order to make our decisions and how we come to the floor is protected from, basically, discovery by your branch. So it probably shouldn't come as a surprise, or should come as a surprise to you that we are surprised that you are not going to tell us whether or not there were conversations within the executive branch that led to your independent decision.

So I hope you will take that as an I-understand-it-even-if-others-don't.

In a nutshell, you serve at the pleasure of the President, is that correct?

Mr. JOHNSON. That is correct.

Mr. ISSA. But the President doesn't have the right to order you; he only has the right to either accept what you do, statutorily, make independent judgment if he has statutory, or fire you. Isn't that essentially correct?

Mr. JOHNSON. Essentially, that is——

Mr. ISSA. OK, so you have independent authority subject to that portion of the pleasure, and you have asserted that in order to make your decision.

I would like to quote a well-known gentleman, Chairman Dingell, who declared that this regulation of CO_2 was a glorious mess. Do you agree with Chairman Dingell that under the current law taking a common material that is going to be everywhere and diffuses quickly, and regulating it under the existing Clean Air Act, will be a glorious mess?

Mr. JOHNSON. I believe that there are many intricacies and complications with the Clean Air Act, and my personal opinion is that, given the likely years and years of litigation that would ensue, I prefer a legislative approach. However, as the chairman duly noted, I had responsibilities to administer the Clean Air Act, and that is what I am doing by beginning with an advance notice of proposed rulemaking, which will certain help the Agency as it sorts through the intricacies of the Clean Air Act and, I trust, will also help Members of Congress.

Mr. ISSA. Now, in your consideration of granting a waiver to California, did it occur to you at least as to CO_2 that when you haven't yet set levels on something you have just now been told through the courts you have the ability to set a level on, an independent request would be premature and inappropriate.

Is that part of your consideration in how do you grant a waiver before you have even determined what the basis? You might, in fact, regulate to a level much lower than what California would?

Mr. JOHNSON. Well, actually, the Section 209 of the Clean Air Act actually identifies three very specific criteria, and that has to be the sole basis of my evaluation of any waiver petition. In my judgment, California did not need the second criteria, which is a compelling and extraordinary conditions. I go into great detail describing why I do not believe, in my judgment, they met those conditions.

Chairman WAXMAN. Mr. Cummings.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

Administrator, let me ask you this: I found it interesting that when the chairman was asking you about meetings with the President, you did not provide a direct answer. You talked about all these wonderful times that you have, and then when Ms. Watson asked you about the Vice President, you did answer and say that you didn't have meetings with regard to the California standards.

I just want to make sure I understand why it sounds like there was a different standard there for you.

Mr. JOHNSON. It is not a different standard, sir, but, as I said, I have routine meetings with the executive branch, including the President. Asked specifically about the Vice President, and to best of my recall I did not have any conversations with him. I was just trying to respond to——

Mr. CUMMINGS. And all with regard to this, is that right?

Mr. JOHNSON. With regard to the California waiver, that is correct. So I was just trying to clear that up.

Mr. CUMMINGS. Yes. Well, I am glad you did. I just, you know, one of the things, this stuff is personal for me because I have asthma. In my district in Baltimore, we have a high rate of asthma, and the taxpayers pay you. They pay you as they pay us. We, in Maryland, are anxious to adopt the same standards that California has, and so, you know, we are curious as to how our Administrator, our man in the EPA, how he makes his decisions.

So, you know, during the time that the EPA, as Administrator many of your decisions have provoked widespread public criticism and even outrage. In response, you have said, "It is not a popularity contest," and you said, "In the end, it is the judgment, and each of these decisions is my decision and my decision alone." Do you remember saying that?

Mr. JOHNSON. I do remember saying that, and I agree with that.

Mr. CUMMINGS. But you don't get to decide whatever you want. You must base your decisions on the scientific data and the criteria that Congress established in law. The final decisions are made by the courts to determine whether your decision is conformed to the law. All too frequently their answer has been no.

Chairman Waxman asked you recently about EPA, as to EPA for the full litigation record on the Clean Air Act decisions issued by this administration. It is not a pretty picture. Out of the 26 cases decided by the D.C. Circuit, EPA lost two-thirds in whole or in part.

Did you know that?

Mr. JOHNSON. Yes, I do, and our then General Counsel Roger Martella sent, I believe, a letter to the chairman detailing all of the court cases which do not reflect that kind of percentage. So, yes, I am concerned when we lose cases, and that is why I am going my very best job to make sure that not only are our decisions, my decisions, based upon sound science but on good laws as well.

Mr. CUMMINGS. Well, I am glad you said that, because these losses include some of this administration's highest profile environmental rules. In 11 cases, the court said that the EPA's position was barred by the plain language of the law, which is the legal equivalent of a shutout.

To date, the D.C. Circuit has reviewed eight of your decisions and has entirely or partially rejected half. Does this track record concern you?

Mr. JOHNSON. Yes. Any time that the Agency loses a lawsuit, I think that is important, and that is of concern to me.

Mr. CUMMINGS. And I know EPA has fine lawyers. My concern is whether you and the White House are listening to them.

Mr. JOHNSON. Well, sir, I listen to all of my staff, including a great legal staff. As I said, I base my decisions on science and on the law and on the facts that are before me.

Mr. CUMMINGS. Now, the committee's investigation of your denial of the California waiver decision revealed that legal staff warned that a denial would likely—that you would likely lose, but you disregarded their advice even when EPA has lost in court the first time. That hasn't stopped the administration from trying again.

This summer EPA plans to issue a third New Source Review rule, which would allow dirty power plants to upgrade and increase air pollution without installing pollution control equipment. The D.C. Circuit overturned the administration's second New Source Review rule as well as part of the first, and the Supreme Court has already rejected the legal theory EPA is relying on.

Has your legal staff warned you that this rule would be highly vulnerable to legal challenge?

Mr. JOHNSON. Well, since the rule is pending before the Agency, that is an important issue that we are currently debating.

Mr. CUMMINGS. Thank you, Mr. Chairman.

Chairman WAXMAN. Thank you, Mr. Cummings.

Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. This has been an interesting and relatively intense hearing. I would like to give Mr. Johnson the opportunity just to sort of respond to some questions that he has time to respond to, so we can actually make some sense out of those.

On December 19, 2007, Mr. Johnson, you announced that you would be denying California's waiver request, and on February 29, 2008, you released the complete decision document explaining the decision. Were you advised that the decision to deny California's waiver request was supported by the law?

Mr. JOHNSON. Yes.

Mr. CANNON. Would you like to elaborate on that a little bit?

Mr. JOHNSON. Well, the staff presented me a wide range of options. We went through each of those options, and each one, those that were not defensible, were eliminated, and the ones that were presented, options were presented to me, including denial were presented, and ultimately that is the decision that I made.

Mr. CANNON. So there were some options perhaps out there that didn't make it to you because they were not legally justifiable.

Mr. JOHNSON. Again, I don't know which ones were or were not, but certainly the ones that were presented to me were legally defensible, including a denial.

Mr. CANNON. Were you advised that the decision to deny the waiver we requested was supported by the facts of the record as well as the law?

Mr. JOHNSON. Yes. In fact we have an approximately 50-page decision document that goes into great detail, detailing my decision and based upon all of the facts.

Mr. CANNON. So you were presented with options that were justified by the law and the facts, and then you made a decision, and that decision was then substantiated by the law and the facts in your decision?

Mr. JOHNSON. Yes.

Mr. CANNON. Was denying California's waiver request one of the options that was included as one of the options included by your staff?

Mr. JOHNSON. That is correct.

Mr. CANNON. Do you have any reason to believe your staff would present you with an option that was not supported by the law or the facts of the record?

Mr. JOHNSON. I do not.

Mr. CANNON. Is there anything else you would like to say about this issue since you have been hectored to——

Mr. JOHNSON. Well, sir, I know that the chairman and other members of the committee disagree with my decision, and I understand that. These decisions are not easy decisions, but I made the right decision. I made the decision based upon the facts, based upon the law, what the law directs me to, and I stand by that. It was my decision and my decision alone.

Mr. CANNON. Thank you. You just answered the next question I was about to ask. It was your decision. Do you stand by that decision today?

Mr. JOHNSON. Absolutely.

Mr. CANNON. You know, I personally have some bona fides. I worked in the Reagan administration after the Surface Mining Law had been passed, and the first of the regulations had been done under the Carter administration. The second had been done under Secretary Jim Watt, and both were probably extreme. It is very difficult to find a middle path that actually works, works for industry and works for the American people and works for the environment.

I just want you to understand that some of us understand how difficult these things are, especially difficult when the world changes and technology has changed the world around us. It has changed the world in which we can regulate and manage regulation. And to suggest that we could never do anything new, whether you are Democrat or Republican, would bind us, tie us up in a way that would not make any sense at all. In fact, I would hope that in America we would start looking at how we can actually move away from Federal, centralized regulation to more local regulation throughout the country.

I think our information technology gives us that opportunity. Our understanding that the science of pollution and what is harmful to our bodies, what is harmful to the environment, is moving rapidly forward, and I would hope that the hectoring that you have felt today will not be perpetuated in the future by whoever replaces you and others but, rather, is a thoughtful review of what happens so that we can help guide these sort of bumpers instead of being sledge hammers about it.

Mr. JOHNSON. Well, sir, I appreciate that, and I also respect the role of Congress and important role in oversight, and I am very supportive of oversight responsibility, and I am also supportive of transparency. But, as you can well imagine, I have to also be supportive of the ability to have candid conversations, have advice so that I can make decisions that are independent decisions, whether that be independent decisions from Congress or independent decisions, again under the law, or independent decisions from the White House, or anybody else.

I do respect the oversight responsibility, and I believe that the thousands of pages and the depositions and all the rest demonstrate to me that I went through a very thoughtful, I went through excruciating number of briefings and details so that I could be best equipped to make the most informed decision.

So again, I appreciate the opportunity to be here, Mr. Chairman, and thank you for those remarks.

Mr. CANNON. Thank you, Mr. Chairman. I assume my time has expired.

May I just thank Ms. Dudley for being here? Her office is also under the jurisdiction of the committee that I am the ranking member of on Judiciary. We have spent some time together. I appreciate her being here, and perhaps some other time we can ask more questions of you, Ms. Dudley.

I thank you, Mr. Chairman. I yield back.

Chairman WAXMAN. Thank you, Mr. Cannon.

Ms. WATSON. Mr. Chairman, a question to you.

Chairman WAXMAN. Yes?

Ms. WATSON. Is it possible for us to get a copy? Mr. Johnson has spoken of the 50-page report, and I think it is in the public domain. Can we access a copy of that?

Chairman WAXMAN. We will make it available to you.

Ms. WATSON. All right. Thank you very much.

Chairman WAXMAN. I would like to recognize myself. The Constitution is clear. Congress passes the laws and the executive branch must faithfully execute them.

Administrator Johnson, we knew what your professional positions were as the head of EPA. You had a record. You heard from an advisory committee, you heard from your staff, you got input from all sorts of groups, environmentalists and industry. That is all appropriate that you get all this input in to make the decisions.

We knew what your decision was on three areas: ozone, the California waiver, and the greenhouse gas question. Or at least we know what you sent to the White House.

And then you reversed yourself after you had a candid conversation with the White House that would indicate you are getting input from the President, which you may think is important. But it also may indicate that the President is really making the decisions. What we need to do our oversight job is to find out on what basis he is telling you that you ought to make a different decision than what you initially proposed.

Now, in the case of ozone the Clean Air Act clearly states that air quality standards must be set by you using your best judgment based on the latest scientific information. The law does not provide that it is the President's decision; it says that it is your decision.

Now, I understand some Constitutional scholars would say when Congress grants an agency authority, the President is granted that authority as well. Other scholars disagree. We don't have to resolve that issue, but in the setting of ozone standards, the science and staff work all pointed in one direction: Set a secondary standard that uses a seasonal form.

EPA's record is clear, but in literally the last hours of the rulemaking process when you faced the deadline in which you have to come out with a rule, the President helped you see that you ought to reverse what EPA and what you had suggested, and the record does not explain how the President made his decision.

Now, we issued a subpoena both to Administrator Johnson and Administrator Dudley to provide documents that will help the committee understand how this decision was made.

Ms. Dudley, the subpoena required you to produce the documents by April 18th.

Mr. Johnson, you were required to produce the documents by May 6th. Unfortunately, you both continued to withhold documents.

I wrote to both of you on Friday. I informed you that unless there is an assertion of executive privilege, you must produce the documents at this hearing today. Administrator Johnson, has the President asserted executive privilege over the documents responsive to the subpoena?

Mr. JOHNSON. My understanding, sir, that executive privilege is not something to be invoked lightly, and that constitutional confrontations between the legislative and executive branches should be avoided whenever possible.

At this time I am not making an assertion of executive privilege today. Instead, I am committing that to you that my staff remains available and willing to continue our discussions about how to reach a mutually agreeable resolution regarding the remaining documents.

My staff earlier, right before the hearing, delivered a number of additional documents on the ozone max.

Chairman WAXMAN. Administrator Dudley, has the President asserted executive privilege over the documents that we requested of you pursuant to a subpoena?

Ms. DUDLEY. I know that our lawyers have been discussing the documents. We have produced over 7,000 pages and, in fact, I have a letter delivered to you from OMB General Counsel today which, with permission, I would like to put on the record.

Chairman WAXMAN. Without objection, we will have it in the record.

[The information referred to follows:]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

May 20, 2008

GENERAL COUNSEL

The Honorable Henry A. Waxman
Chairman
Committee on Oversight and
Government Reform
U.S. House of Representatives
Washington, D.C. 20515-6143

Dear Mr. Chairman:

This letter responds to your letter of May 16, 2008 to Susan Dudley, the Administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget within the Executive Office of the President. I am writing to ensure that the Committee has a more complete picture of our extensive and ongoing efforts to achieve a mutual accommodation of the interests of our two separate branches of government.

As you are aware, OIRA has provided the Committee with access to 7,558 pages of documents. Among other things, these include communications between OIRA and EPA at all levels, including directly between Administrators Dudley and Johnson. That represents an extraordinary level of disclosure, and is the information that directly addresses EPA's promulgation of the ozone NAAQS regulation. Moreover, the communications between Administrators Dudley and Johnson were made public at the outset by OIRA and by EPA.

Contrary to the suggestion in your letter, the vast majority of the 7,558 documents we provided to the Committee were provided on March 26, April 11, and April 15, *before* you sent a subpoena to Ms. Dudley. Specifically, you were provided with 1,552 pages on March 26, with 3,559 pages on April 11, and 1,361 pages on April 15. My letter of April 18, 2008 expressed our disappointment that on April 16 you elected to send a subpoena, notwithstanding the very substantial cooperation that had occurred and was even then continuing.

The subpoena that you issued purported to call for additional documents to be provided by April 18, 2008. Although certain internal deliberative documents have been appropriately maintained as confidential, it would be wrong and unfair to characterize OIRA's posture in this regard as one of "defiance." To the contrary, counsel for OIRA and counsel for the Committee have had continuing discussions about ways to accommodate our mutual concerns and interests. As a result, OIRA provided the Committee with 260 additional pages of documents on April 18, and 144 additional pages of documents on April 21. Then, on May 2, 2008, we agreed upon an extraordinary accommodation to enable the Committee's staff to review 680 additional pages of documents that related to OIRA consultations with other agencies during the inter-agency review process.

The Executive Branch is continuing its substantial accommodation of the Committee's information needs by making Administrators Dudley and Johnson available for testimony at today's Committee hearing. As we have previously indicated, we remain open to further discussion and ideas as to ways to meet any legitimate Committee needs while preserving the important Executive Branch interests that are involved. We suggest that you evaluate whether the Committee needs any further information from OIRA after you receive the testimony today from Administrators Dudley and Johnson. Given the substantial Executive Office of the President confidentiality interests implicated by the requests to OIRA, and the availability of very extensive information from EPA itself, should you after the hearing determine you need more documents from OIRA, it will be reasonable for us to ask the Committee to specify in detail why the additional documents are legitimately needed, and for what legitimate legislative purpose. Under the accommodation process, "each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation." *United States v. AT&T*, 567 F.2d 121, 127 (D.C. Cir. 1977). Only after that occurs could it become necessary to work out arrangements for identifying a genuine impasse. As the Supreme Court has said: "These 'occasion[s] for constitutional confrontation between [two coequal branches]' should be avoided whenever possible." *Cheney v. U.S. District Court*, 542 U.S. 367, 389-90 (2004).

We appreciate the professional manner in which our discussions with the Committee's staff have occurred to date, and we likewise have sought to cooperate with the Committee in a professional and productive manner. It remains our desire to have a mutually acceptable resolution, so please feel free to have your staff contact OMB through Shannon O'Keefe at (202) 395-4790, or OMB's Deputy General Counsel John G. Knepper or me at (202) 395-5044, or to communicate directly with the office of the Counsel to the President, through Emmet T. Flood, at (202) 456-1019.

Sincerely,

Jeffrey A. Rosen
General Counsel

cc: The Honorable Tom Davis
Ranking Minority Member

Chairman WAXMAN. Well, during my 2-year tenure as chairman of this committee, we have established a track record of making reasonable accommodations to executive branch interests that have arisen in committee investigations. In this case, you are trying to shield the White House from reasonable oversight, and that is not a reasonable position or an accepted one.

The precedents are clear: Unless there is a valid claim of executive privilege, you need to turn over the documents. As Chairman Burton recognized when he was chairman: "The only privilege under which the President may withhold subpoena documents is an executive privilege."

Ranking Member Davis took the same position. In this investigation there has been no assertion of executive privilege, and the documents the committee seeks are central to understanding whether the President has complied with the law. This is a serious issue, and your defiance of the subpoena is a serious matter that the committee is going to have to address.

An example of this is whether, in establishing the ozone rule whether costs were taken into consideration in a surreptitious way, and we know what the Supreme Court has to say about that matter, and we also know that Ms. Dudley has a March 6th memo from the White House that was sent to EPA where she criticized EPA for failing to respond to economic values in setting the environmental standard.

One of her objections seems to be the EPA proposal would be too costly to industry. We want to know more about that. We want to know on what basis that position is reached and others. So what I am telling you both, that unless you assert executive privilege, this committee has always stood by the fact that we expect the compliance with the subpoena.

Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman.

Chairman WAXMAN. I have taken 5 minutes and 41 seconds. The minute will be given 5 minutes and——

Mr. ISSA. Thank you, Mr. Chairman.

I would like to followup on that. The President's involvement in the ozone proceeding, as I understand it, is not only allowed, and it is not improper influence but, in fact, is consistent with President Clinton's even greater involvement in setting the 1997 standard, isn't that correct?

Mr. JOHNSON. That is correct.

Mr. ISSA. And I wasn't here in 1997, but I don't believe that the deliberative process between the Agency, that internal process, was ever demanded that it be exposed. Do any of you know if there was a record under one of the previous chairmen where they demanded to know everything that led to President Clinton assisting in the decisionmaking process finally made by the EPA but his input into that standard in 1997?

Mr. JOHNSON. I don't know.

Mr. ISSA. I don't think there was, and I think we may be working with slightly different standards of what is appropriate.

Chairman WAXMAN. Will, the gentleman yield?

Mr. ISSA. Of course, Mr. Chairman.

Chairman WAXMAN. Well, I do want to indicate that these standards that you are talking about were exhaustively examined by Congress. In the 105th Congress, there were approximately 30 days of hearings in at least 10 committees on this topic. EPA Administrator Carol Browner personally testified over a dozen times regarding the standards. Our own committee conducted an investigation about the matter as well.

Mr. McIntosh, who was the subcommittee chairman, requested OMB produce all records related to OIRA's view of the proposed rules in response to this and other requests. OMB produced thousands of pages in documents, including internal White House communications, and apparently withheld only two memoranda to the President from senior advisors within the executive branch of the President.

So this record demonstrates that Congress, especially our committee, spared no effort in conducting oversight over the Clinton rulemaking. It also shows that the Clinton administration was extraordinarily responsive to our committee's extensive demands for interviews and documents.

Mr. ISSA. Well, and I appreciate the reclaiming of my time. It certainly shows that we have a long tradition of looking into it and that we also have a long tradition of recognizing that the President has a role to set, to participate in the standard-setting, both President Clinton and now President Bush.

I would like to get to one closing matter, because I think we have sort of made the point with the inclusions of these graphs and so on that the difference in the secondary standard would have made no difference. So I think we will go on to out of ozone and on to CO_2.

Administrator Johnson, if you were to have granted California's waiver request, and if California went into global cap-and-trade, and if California reduced its CO_2, assuming that China and India continue to produce new coal facilities that have absolutely no scrubbers, that are just putting out CO_2, would it really be all that significant when you look at the present level in California reduced by, let's say, 20 or 30 percent versus the new coal plants being put up on a weekly basis in China?

Mr. JOHNSON. Well, if I may, those are not the criteria on which I had to base the California waiver.

Mr. ISSA. No, no, I understand that, but you are obviously——

Mr. JOHNSON. So I based that on were there the criteria that were in the law.

Now, asking the other question, the challenge that we have as a Nation and as we have across all the States, including my home State of Maryland, is that all contributes to global climate change. So, in fact, what is happening in Maryland over what is happening in Florida or New York or wherever, is all contributing to——

Mr. ISSA. OK. And I want to focus on that because, although it is not the primary portion of this hearing, I think as we close t his hearing as to this panel, I think it is important. We have to get down the amount of CO_2 going into the atmosphere on a worldwide basis if we are going to be effective in reducing CO_2 worldwide, thus assuming that the scientists' predictions are right that if we

continuing putting more CO_2 in, we will, by definition, be contributing to global warming.

We make that assumption. This committee has studied it, extensively. Based on that assumption, isn't it a global issue, one that requires treaties and a reduction on a global basis if we are going to be effective?

Mr. JOHNSON. I believe it requires that each of the nations, whether you are a rapidly developing economy like China or India, or the United States or European Union, to be leaders and to move forward, and that each situation is different. Fifty percent of our electricity comes from coal; Australia it is 82 percent; France is much less than that, it is less than 10 percent.

Mr. ISSA. One final question, because I think we have made that point. You have a responsibility as a Federal officer to all Americans, and if I understand the standard under which you rejected California's waiver, part of that is an equal protection, that States are not allowed to arbitrarily have separate standards without need because in fact you are protecting all of us and our commerce against arbitrary changes in standards by States.

Isn't that true?

Mr. JOHNSON. Well, again, the three criteria that focus specifically on California, other States are not allowed to take any other action themselves unless the waiver was granted, and then they can adopt what the California standard is.

The issue that was before me was, was there compelling and extraordinary conditions, and my decision—again part of those 50 pages—clearly shows, and the science clearly shows, whether it is sea level rise—sea level rise is more of a problem for the East Coast than it is for the West Coast. Acceleration of temperature or higher temperatures, yes, California experiences higher temperatures but there are other parts of the country that make it worse.

And so, as looked at, the criteria, particularly compelling and extraordinary, in my judgment based upon the science, did not meet the standard.

Mr. ISSA. Thank you, and thank you for this hearing, Mr. Chairman. I yield back.

Chairman WAXMAN. Thank you, Mr. Issa.

We have another panel of four witnesses. If Members would permit, I would like to move on to the next panel.

Mr. Bilbray.

Mr. BILBRAY. Mr. Chairman, can I just followup, just quickly, on one item?

The standard that we are complaining about with the ozone standard, the Science Committee was saying it should be at 0.07, right, minimum? Or maximum?

Ms. HENDERSON. Maximum, but we gave a range of 0.06 to 0.07.

Mr. BILBRAY. California's standard, Mr. Johnson, is sitting at the maximum that it was recommended. Now, traditionally, has there been ever a time—and I am trying to remember it my 30 years of involvement in this issue—has there ever really been too many regulations where the Federal standard has been more, you know, more stringent than the California standard?

Mr. JOHNSON. I don't recall.

Mr. BILBRAY. I just want to say, when we argue about this, we are talking 5 to 7 percent. But I think we admit that—I know you are going to get sick and tired of hearing me talk about California, and when we get to greenhouse, I will beat our breast about importing all the electricity but not wanting to have the coal plants. But what I am saying, it is in all fairness, we are so close on this issue it is not the huge element, and I would ask our toxicologist how many deaths per million are we talking about here which we usually talk about.

So I yield. Mr. Chairman, I just want to say that there are some big issues out there, and I wish that we would be setting some standards here like stop burning coal here in the capital or buying coal electricity for the capital here. And I hope that we can work together at getting a waiver for California on the greenhouse and the fuel mixture and work on making the capital truly greenhouse neutral, CO_2 neutral, rather than these phony offsets, and I look forward to working with it, Mr. Chairman. With your extensive background on it, I think we have some great opportunities if we just work together on this.

So thank you very much for the added time.

Chairman WAXMAN. Thank you, Mr. Bilbray.

Ms. Watson, I understand you wanted an equal amount of time. Would 2 minutes that we will yield to you, if you wish to pursue it with some documents for the record?

Ms. WATSON. Yes, because my State is involved, and we have tried to address pollution there, the largest State, 38 million people and all their cars. I think every family has 13 cars. So this is really important to me, and I am taking it personally, too.

When EPA makes decisions that don't meet the law and loses in court, environmental protection is delayed and the public indeed is hurt. These aren't the only cause to problems. A State must adopt each new Federal requirement into State law, and those efforts are wasted as well.

Now I have their letters that are addressed to the chairman from Leo Drozdoff, the Administrator of the Division of Environmental Protection for the State of Nevada. Now, this isn't a partisan issue for Nevada has a Republican Governor. Administrator Drozdoff says, "We appreciate your efforts to identify and quantify the impact of EPA's failed rulemaking attempts. Every time we are forced to develop programs that are clearly in conflict with the Federal environmental law, it is an opportunity wasted and environmental protections delayed. The resource implications to a small State like ours and the negative effect on our relationship with the EPA are enormous. These impacts will be felt for years and years to come."

This is an extraordinary protest from a State Energy Policy Act, and, Mr. Chairman, I would like to have unanimous consent to enter this letter into the record.

Chairman WAXMAN. Without objection, that will be the order.

[The information referred to follows:]

ndep
NEVADA DIVISION OF ENVIRONMENTAL PROTECTION
protecting the future for generations

STATE OF NEVADA
Department of Conservation & Natural Resources
DIVISION OF ENVIRONMENTAL PROTECTION

Jim Gibbons, Governor
Allen Biaggi, Director
Leo M. Drozdoff, P.E., Administrator

May 16, 2008

The Honorable Henry A. Waxman
Chairman
Committee on Oversight and Government Reform
House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515-6143

Dear Chairman Waxman,

We read with great interest your letter to Stephen Johnson, dated April 4, 2008, and the subsequent press coverage. As the environmental regulatory agency in Nevada, we have had similar concerns over the past several years as EPA continues to adopt flawed programs that have been overturned by the courts. In requesting information from EPA on the extent and effects of the agency's losses in federal court, we ask that you consider multiplying that number by at least 100 to include the costs incurred by all of the state and local regulatory agencies that have been required to adopt these new federal regulations and develop state implementation plans as required under the various acts. In addition to the money, time and other resources devoted to programs that have eventually been scrapped, many of the states and local governments and various multi-state environmental organizations have also spent an inordinate amount of time and money to sue EPA over regulations and programs that clearly had no basis in federal law. Most troubling to us is the fact that all of this was occurring during a period of funding decreases, increased costs and tightening budgets – a period when states and local agencies, as the agencies responsible for implementing environmental programs, could have been spending those resources addressing real environmental issues.

For example, the Nevada Division of Environmental Protection (NDEP) spent two and a half years and thousands of man hours developing a program to address mercury emissions from electric generating facilities – a program specifically designed to comply with the federal clean air mercury rule (CAMR). As the CAMR provisions clearly allowed, Nevada developed a program that provided additional mercury reductions from facilities within our state. The development of this program required the NDEP to seek changes to the Nevada statutes, develop and adopt new regulations, and develop and submit a State Plan -- all within the timelines specified by the federal regulations and the Clean Air Act. We worked very closely with our legislature, environmental groups and the regulated industry to develop a comprehensive and more stringent program only to have it become moot as a result of the court's decision to over turn EPA's regulations.

Not only did we incur significant costs related to developing our version of the CAMR program, we were also gearing up for a much longer fight. As we were preparing to submit our program, EPA made it clear that they did not like our allocation methodology and would not approve our program, despite repeatedly telling Congress and the courts that the rule provided the states with exactly that flexibility. Had the court not overturned EPA's CAMR, EPA would have disapproved our Plan. We would have been forced to sue EPA over this issue and were preparing to do so. We are now in the process of rewriting our regulations to delete the CAMR provisions and establish a state-only program. Meanwhile, mercury is continuing to be emitted without the benefit of an effective mercury reduction program. So, not only did we lose two and a half years of our time, by the time we are able to finalize our new regulations and get them implemented, it will have taken twice as long to begin seeing any public health and environmental results.

State and local agencies experienced similar resource impacts from EPA's changes to the New Source Review program for major stationary sources of air pollution. These changes included provisions that addressed clean unit exemptions, pollution control projects and routine maintenance, repair and replacement. As a delegated program we were under a very short time frame to adopt and implement these changes or face losing our program delegation. Again, significant time and resources were spent to understand what EPA was proposing and how it would work, develop and adopt new state regulations and draft a plan to submit to EPA. These federal regulations were also overturned by the court and required us to undergo yet another round of revisions to our state regulations. As you know, EPA has a number of additional NSR reforms in the queue.

The air program is not the only one affected. Under the water program, EPA adopted the Confined Animal Feeding Operations (CAFO) rule which required animal producers with the "potential" to discharge to apply for and receive a National Pollutant Discharge Elimination System (NPDES) permit. NDEP worked for almost 2 years to develop regulations with great resistance from our agricultural community and constant pressure from EPA to meet the adoption deadline. EPA's CAFO rule was overturned in the *Waterkeeper Alliance v. EPA* decision where the court determined a permit was needed only for those facilities that actually discharge.

By our count, EPA has lost at least seven major environmental cases before the courts and there are a number of other cases pending such as the soon to be released NPDES "permit fee incentive rule," which we understand EPA has forwarded to the Office of Management and Budget for final approval. Again, EPA is ignoring overwhelming state opposition, congressional input and, most importantly, the law. We intend to file suit against EPA as soon as this rule becomes final. Lawsuits are an incredible resource drain, but, unfortunately, it has become our only option in some cases.

Not only have these overturned rules delayed environmental protection and wasted resources, they have impacted EPA's ability to provide the states and local governments with a number of guidance documents, finalized rulemakings and approved State Implementation Plans (SIPs) needed to implement current federal programs, including implementation guidance for new PM2.5 and ozone standards and the PM2.5 increment rule -- documents and actions we should have had years, and in some cases, more than a decade ago.

We are a small program with limited resources. In the past, we have been able to rely on EPA for direction, but it has been clear to us for a number of years that this is no longer the case. We do not appear to have the same goals and, in fact, their efforts are undermining our ability to adequately and effectively protect public health and the environment. Over the past few years the Environmental Council of States (ECOS) has gathered and annually updated information that compares EPA and state budgets (unadjusted for inflation), for each year since 1997 (Table 1) and then compared those numbers to the number of new rulemakings that the states are required to adopt and implement (Figure 1). As you can see, the workload continues to increase. State funding is declining, yet EPA's funding increased through 2006 and then has remained steady. In order to keep pace with the demands placed on our air program, we have had to significantly increase our state revenue while at the same time watching our federal funds decline. In fact, EPA currently funds only about 10% of our air program.

In April of 2006, as our program's viability continued to be threatened by cuts to state and local grants and the increased burden imposed by unfunded, and, in many cases, eventually reversed, mandates, we wrote a letter to EPA Administrator Stephen Johnson expressing our concerns and our need to work on state, rather than federal, priorities. A copy of that letter is attached; however, we never received the courtesy of a response.

Not only is federal grant funding to the states decreasing, EPA is cutting funding to programs that states recognize as critical and limiting the ability of state and local governments to use state grant funds as we see fit. For example, in the air program, EPA, through the President's budget, proposed to cut the funding to Regional Planning Organizations in FY08 and eliminate that funding in FY09. On the water side, 106 funding is provided to address State water quality priorities pursuant to the Clean Water Act. However, EPA is directing this funding in the form of set-asides for agency specific priorities. These EPA priorities, such as probabilistic monitoring, have shown minimal benefits to the States, and States are not supportive of utilizing federal funds intended for core water programs to implement EPA projects.

Adding to the resource drain, and perhaps an even more important concern, is the impact that these misinterpretations and subsequent lawsuits have had on our relationship with EPA. These court rulings have damaged EPA's credibility. Because we can no longer rely on EPA's legal interpretations, we are now spending an unprecedented amount of time and legal resources reviewing and questioning their decisions, interpretations and motives, doing our own evaluation and when we disagree, resorting to legal action. For a

State with a small program and limited legal resources, this impact is huge. In addition, the current atmosphere of mistrust and conflict is having, and has had, a corrosive effect on our working relationship. In the past, we have had a more productive and collaborative working relationship with EPA and hope to do so again, but it will take years to rebuild trust and restore our relationship to anything remotely resembling a "partnership."

We recognize that federal funding is limited and are not asking you to consider increases. Rather, we would like to see the available funding be used more effectively to ensure that any new federal programs mandating state action are legally defensible, address real environmental issues and provide the state and local agencies with the flexibility they need to identify and address their specific priorities.

We appreciate your efforts to identify and quantify the impact of EPA's failed rulemaking attempts. Every time we are forced to develop programs that are clearly in conflict with the federal environmental law, it is an opportunity wasted and environmental protection delayed. The resource implications to a small state like ours and the negative effect on our relationship with EPA are enormous. These impacts will be felt for years to come.

We would be happy to provide you or your committee with more detailed information if you feel that it would be useful.

Sincerely,

Leo M. Drozdoff, P.E.
Administrator

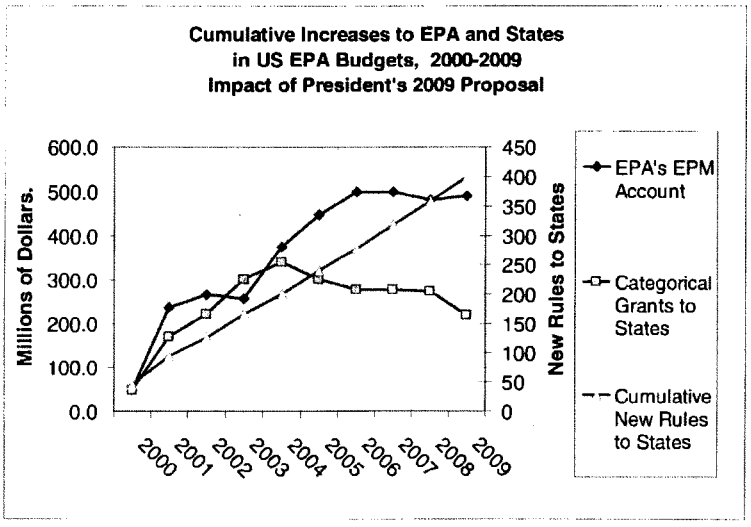
Enc.

cc: Governor Jim Gibbons
Allen Biaggi, Director, DCNR
Senator Harry Reid
Senator John Ensign
Representative Shelley Berkley
Representative Jon Porter
Representative Dean Heller

Table 1. Recent Budget History[1]

	Total EPA Budget (1)	STAG (2)	Non-STAG portion of EPA's budget	Non-STAG increase	State increase	% of EPA's budget to states
	$ billions	$billions	$billions	$billions	$billions	
FY 2009 Proposed	7.143	**2.622**	**4.521**	-0.014	-0.304	36.7%
FY 2008	7.461	2.926	4.535	0.023	-0.287	39.2%
FY 2007	7.725	3.213	4.512	0.015	0.072	41.6%
FY 2006	7.638	3.141	4.497	0.080	-0.442	41.1%
FY 2005	8.000	3.583	4.417	-0.048	-0.322	44.8%
FY 2004	8.370	**3.905**	**4.465**	0.069	0.221	46.7%
FY 2003	8.080	3.684	4.396	-0.341	0.331	45.6%
FY 2002	8.090	3.353	4.737	0.453	-0.195	41.4%
FY 2001	7.832	3.548	4.284	-0.087	0.356	45.3%
FY 2000	7.563	3.192	4.371	-0.475	0.447	42.2%
FY 1999	7.590	2.745	4.845	0.081	0.148	36.2%
FY 1998	7.361	2.597	4.764	0.684	-0.122	35.3%
FY 1997	6.799	2.719	4.080	0.130	0.146	40.0%

Figure 1. [1]



[1] ECOS "The States Environmental Agencies' Proposal to Congress for EPA's 2009 STAG Budget" February 2008.

ndep
NEVADA DIVISION OF ENVIRONMENTAL PROTECTION
protecting the future for generations

STATE OF NEVADA
Department of Conservation & Natural Resources
DIVISION OF ENVIRONMENTAL PROTECTION

Kenny C. Guinn, Governor
Allen Biaggi, Director
Leo M. Drozdoff, P.E., Administrator

April 14, 2006

Stephen L. Johnson, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington D.C. 20460

Dear Mr. Johnson:

For the past three decades, significant improvements to our air and water quality have been realized across the nation. The state and federal environmental agencies have shared in the responsibility to ensure that the nation's air and water are clean and that public health is adequately protected. These improvements would only have been possible through an effective partnership and adequate funding for those federal programs implemented by the states. However, budget reductions in combination with the creation of numerous new unfunded programs and excessive requirements that reduce state flexibility in utilizing the remaining funds are severely comprising state's efforts to protect the environment and improve our air and water. These new proposed budget cuts have put us at a critical juncture in the management of environmental programs in Nevada. We can no longer continue to do more with less and, should these cuts occur, we will be forced to focus our resources on state priorities.

In its 2007 budget recommendation, the Environmental Protection Agency (EPA) proposes to dramatically cut grants to state and local environmental agencies even as it proposes to fully fund its own budget. By taking this action, EPA is placing a higher priority on oversight of state and local agencies than on the actual implementation of core environmental programs that result in human health and environmental benefits. The level of budget cuts that these programs have experienced over the last three years is unprecedented and these cuts are already causing negative consequences. We urge you to change EPA's direction in three basic areas. First, we call on you to restore funding for State and Local Environmental programs to Fiscal Year 2006 levels; Second, if there is no way to eliminate or minimize cuts to environmental programs, EPA's own budget should be cut by at least as much as it is proposing to cut state budgets. Finally, EPA needs to give states maximum flexibility to utilize these shrinking federal funds and should resist any new unfunded mandates to states. I want to provide you with specific examples of what these budget reductions mean to the State of Nevada.

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Clean Air Act – 105 Grant

Clean Air Act grants were originally designed to assist states in the development and implementation of programs to attain and maintain healthful levels of air quality. Because challenges faced by each state may differ, the grant program was designed to be flexible enough to assist states based on their specific needs. These funds have been put to good use. According to EPA's most recent National Air Quality Emissions Trends Report, over the past 20 years emissions of the six principal pollutants have decreased by nearly 50% while the Country's population has increased nearly 38% and the nation's gross domestic product increased 164%. Nevada continues to enjoy an economic boom, yet its air quality has improved despite a tripling of its population.

For the current fiscal year (FY06), Nevada was awarded a 105 Grant in the amount of $745,948.00; however, we have already experienced a 10.43% reduction due to rescissions and holdbacks on a portion of those monies and may only receive $668,157.00. A further reduction in this grant amount by 16% ($106,905.00) as proposed would be devastating. Such a reduction would result in an immediate loss of funding for personnel. EPA is also in the process of re-allocating federal grant funds. Because this re-allocation is designed to fund air toxic programs, our core programs that deal with criteria pollutants could experience even higher funding cuts. This loss of federal revenue will result in longer permit processing times and fewer inspections. Other aspects of our air program such as planning, data management and evaluation, modeling, education, outreach, fugitive dust, woodstove initiatives and smoke management will all be severely impacted. We had already begun the unfortunate work of triaging our most basic air quality program needs to deal with the many program changes that have been adopted by EPA over the past few years – changes such as NSR Reform that required significant additional resources to implement with no federal funding increases. Additional cuts in certain air quality programs would need to be implemented in Nevada to address the new reductions and reallocations being proposed for FY07. Some of the specific measures we are considering include: eliminating reporting to federal databases and discontinuing annual negotiations of the compliance monitoring strategy with EPA. In addition we would obviously be unable to address any new federal reporting requirements such as input to Title V TOPS database, updates to RACT/BACT/LAER Clearinghouse and updates to the Quality Assurance Project Plans.

In the face of all of these cuts and reductions, the states will still be expected to implement significant new federally mandated initiatives, including but not limited to the development and implementation of programs to address fine and coarse particulates, visibility in the nation's parks and wilderness areas, additional NSR reforms and the clean air mercury rule. Implementing federally-mandated air quality management programs with declining federal grant support coupled with the challenging economic climate in many states has caused severe negative impacts in state and local budgets. These budget cuts not only jeopardize our ability to carry out the most basic air management programs, they will also severely limit states' ability to implement important new programs such as particulate pollution, regional haze and mercury.

Nevada recently adopted the most comprehensive mercury reduction program for the mining industry in the country. Nevada Division of Environmental Protection staff put the program together in less than 18 months and now we are in the implementation phase. Again, significant state resources are being utilized in this program. This effort shows the virtue, if not the necessity, to provide states maximum flexibility to address state needs.

Clean Air Act – 103 Grant

A 16% cut to our 103 Grant would reduce it from a mere $15,000 to $12,600. However, according to EPA, this funding may be cut by as much as 40-50%. EPA is also proposing to shift these funds from 103 to our 105 grant which requires a state match of at least 40%. Monitoring provides the truest measure of determining healthful air levels, so these levels of cuts seem particularly short-sighted. Nevada will of necessity terminate several PM2.5 monitoring sites throughout the state – sites that are currently located in areas exhibiting very rapid growth where we are trying to ensure that air quality is managed so that exceedances of the standard do not occur and public health is protected. We will also shut down the CO monitoring site at Lake Tahoe that is required to be operated under our maintenance plan. We will also be forced to reduce the frequency of monitoring several ambient air quality sites and move to seasonal monitoring at others.

Clean Water Act State Revolving Fund (CWSRF)

The present funding formula for the CWSRF is based on outdated population numbers. This means that despite the fact that Nevada has been the fastest growing state for nearly two decades, it receives only 0.5% of the allocation directed to states. When funding was at its peak, Nevada received approximately $6.5 million in capitalization grants per year. With the 20% match requirement, Nevada had about $7.8 million per year available for funding under the CWSRF. Over the past several years, requests for funding under the CWSRF have greatly exceeded the resource with the average loan request being $8.1 million.

In fiscal year 2005, the Nevada capitalization grant amount was reduced to $5.4 million and in fiscal year 2006 it was reduced to $4.2 million. The proposed fiscal year 2007 budget will reduce the grant to $3.1 million. While we've worked with leveraging and other techniques to maximize our funding, the bottom line is fewer projects will be funded in the future.

This reduction in CWSRF funding has the greatest impact on small borrowers who have the least ability to pay for increased shared costs. These communities cannot afford higher interest rates from private institutions due to their size. In fiscal year 2005, more than half the loans in Nevada were given to small, rural communities.

Nevada's administration set aside is 4% of the capitalization grant. We are now forced to add loan fees to this program to cover the reduction in the administrative set aside. This change will result in greater costs to communities that can least afford them and a disincentive to others who can obtain commercially available loans at competitive rates with fewer requirements and less red tape.

Finally, as we begin focusing on state priorities, we will not complete EPA's "Needs Survey" as this effort has only resulted in continued funding cuts. Additionally, we will begin divesting staff resources from various clean water federal databases.

Clean Water Act 319 Nonpoint Source Pollution Program

Nonpoint Source (NPS) pollution is the leading cause of water quality impairments in Nevada. The Nevada 2004 303(d) List of Impaired Waters identifies approximately 1,500 river/stream miles as not meeting water quality standards due to NPS pollution. These problems are caused by past and current human activities, including actions supported by the federal government, particularly in the west, such as dams, irrigation and flood control projects, channel straightening, and other hydrologic modifications. Addressing nonpoint source pollution is a complex and expensive process that requires the long term commitment of local, state and federal governments.

The state received federal Clean Water Act (CWA) Section 319 funds through the EPA to implement the Nevada NPS Pollution Management Program. Nevada NPS program staff develop NPS total maximum daily loads (TMDLs) and TMDL implementation plans to restore impaired waters, manage NPS activities, and directly implement public education projects. Additionally, more than half of the funding is passed on to local and state agencies and environmental groups to hire watershed coordinators and to implement NPS reduction and public education projects. These agencies and groups in turn provide an equal amount of local matching funds.

Federal funding for 319 has been reduced in fiscal years 2004, 2005 and 2006. Over this three year period, Nevada's 319 funding was decreased by approximately $300,000. The President's proposed fiscal year 2007 budget calls for a $10 million cut (about 5%) to the national 319 Program. This would decrease Nevada's 319 funding by an additional $84,000. Section 319 funding is comprised of a base and incremental portions. Base funds can be used by states to implement the full range of activities addressed in their approved nonpoint source management plans. These funds provided Nevada with the flexibility to address state priorities such as protecting unimpaired and threatened waters from current and future threats. However, the EPA directed the fiscal year 2004, 2005 and 2006 cuts to the base component, thus decreasing Nevada's flexibility to address these and other priorities.

The EPA requires states to use the incremental funding to develop and implement TMDLs for watershed-based plans. The EPA imposes the additional caveat that only 20% of the total 319 funds can be used for TMDL development. However, in spite of this restriction, and the decreased funding, the EPA continues to pressure Nevada to develop more TMDLs. This trend cannot continue especially in light of 106 funding being directed by EPA for specific federal purposes like probabilistic monitoring, a program which adds no value to our state nor does it provide health or environmental benefits. Nevada will only develop TMDLs in accordance with our Water Quality Planning, 5-Year Plan (July 2005 – June 2010). Additionally with these cuts, we will cease supporting federal databases such as GRTS and PCS. Finally, like in the air programs, we will not participate in any new federal measures or reviews.

104 Program – Wastewater Operator Training and Technical Assistance for Rural Communities and Native American Communities Wastewater Systems
This grant in the amount of about $40,000 per year, allows Nevada to contract for services that provide operator training and technical assistance to rural communities for the operation, maintenance and problem solving at their wastewater treatment facilities. Cutting this grant as proposed means that the training and technical assistance that is otherwise not available, will be discontinued. Nevada's rural communities will face the increased probability of treatment process upsets, sanitary sewer overflows and other environmental and public health risks.

The importance of this program can be illustrated in the following examples.

The McGill-Ruth GID wastewater treatment ponds were not operating properly and BOD and Suspended Solids permit limits were being exceeded. The 104g-funded contractor diagnosed several operational problems and trained the operators on the appropriate operation of the aeration system and optimum distribution of the effluent to the rapid infiltration basins. The 104g contractor's actions brought the treatment process back into compliance with permit conditions.

The town of Alamo, Nevada, was experiencing poor performance with the pumps at the main lift station. The 104g contractor tested the pumps and found that they were near failure, meaning an increased risk of a sanitary sewer overflow. He advised the operators on some interim measures and assisted the town in preparing a preliminary engineering report and in applying for a USDA grant. A new lift station was constructed and the town has not experienced any problems since.

The Indian Hills General Improvement District needed help in the start-up of its new sequential batch reactor treatment plant. The 104g contractor offered valuable instructions for the plant start-up and trained the operators on the details of process operation. The plant is now operating efficiently, producing a very high quality effluent, and meeting all permit requirements. The effluent is used for the irrigation of a nearby golf course and therefore, the public health risk was minimized.

These are just a few examples of the benefits of the 104g program to Nevada's rural communities. Discontinuing the program means that communities like those mentioned above will not have the ability to train their operators, which in turn will result in poor performance, and permit violations and threats to public health. The small grant that Nevada receives goes a long way toward protecting public health and the environment.

In closing we would like to remind EPA of the National Governors Association principles to promote balanced relationships between the states and federal government. One of these principles addresses unfunded federal mandates that "challenge states either to fund the federal requirements from very limited revenues or divert funds from other state priorities."

> "Congress and the Administration should avoid the imposition of unfunded federal mandates on states. Federal action increasingly has relied on states to carry out policy initiatives without providing necessary funding to pay for these programs. State governments cannot function as full partners in our federal system if the federal government appropriates states' ability to devise and legislate their own solutions to domestic problems by requiring states to devote their limited resources toward complying with unfunded federal mandates."

Federal and state environmental agencies share in the responsibility to protect the public from unhealthy levels of air and water pollution. While there is more work to be done, we can be proud of the success achieved through what has proven to be an effective federal-state partnership. EPA's proposed 2007 budget would dramatically cut funding to state and local air programs by at least 16%, it would cut 5% from the nations Clean Water Act 319 program, it would reduce the SRF 22.5% and it would zero out the Wastewater Operator Certification program. Those cuts on top of past reductions and coupled with the imposition of major new programs in the coming years, would constitute an unprecedented level of unfunded mandates on the states. For these reasons, we urge you to work with Congress to restore assistance funding to at least the Fiscal Year 2006 level, take care to spread any cuts evenly between the states and EPA, ensure that states continue to be provided maximum flexibility to address state specific needs, and lead a change in the way EPA does business with the states.

Sincerely,

Leo M. Drozdoff, P.E.
Administrator

cc: U.S. Senator Harry Reid
U.S. Senator John Ensign
U.S. Congressman Jim Gibbons
U.S. Congresswoman Shelley Berkley
U.S. Congressman Jon Porter
Wayne Nastri, Administrator, US EPA Region IX
Steve Robinson, Deputy Chief of Staff, Governor's Office
Ashley Carrigan, Policy Advisor, Governor's Office
Allen Biaggi, Director, Department of Conservation and Natural Resources

Chairman WAXMAN. The gentlelady's time has expired.

Mr. Cannon requested time as well.

Mr. CANNON. Thank you, Mr. Chairman. First of all, let me just point out that you made the comment that on the ozone rule that you wondered if costs were taken into account in a surreptitious or inappropriate way. I think that is vitally important. That is the work of this committee is to oversee those kinds of things. I would hope that we would be able to find those problems, not just suggest the existence of such problems.

Just finally, Mr. Johnson, suppose California had been allowed to have their CO_2 lower standard, had the waiver granted, would that have made any difference as to CO_2 in California or in the country? Any significant difference?

Mr. JOHNSON. Well, it is an issue of debate, but certainly based upon what we know is that we have both a national and a global problem, and so automobiles and improving efficiency there certainly help, but since it is a global air pollutant, it is highly questionable how much effect it would really have. So again I have to say for the record, those are not the criteria.

Mr. CANNON. Right.

Mr. JOHNSON. The criteria I had to look at were, are there compelling and extraordinary conditions in California.

Mr. CANNON. But the request for the waiver had to be more symbolic than substantive?

Mr. JOHNSON. Well, again, it was a formal waiver request, and certainly we did due diligence and held two hearings. I had many, many briefings and certainly having a 50-page, or approximately 50-page, decision document on waiver is unusual, if nothing else, in its size and all of the issues that are there.

Mr. CANNON. Thank you, Mr. Chairman. I yield back.

Chairman WAXMAN. Thank you.

Mr. Johnson, as we end your participation at this hearing, I want to tell you something very clearly. This hearing isn't about what you decide, it is about how you decide and the integrity of the process. I don't think you ought to leave this room satisfied that you have deflected questions and avoided telling us information that we are entitled to have.

Judging by some of the responses I think you have given us today, I expect you to regard this part of the process with derision from many of us. We walk away from this hearing astounded that you, as a career EPA employee, are willing to be part of a process that makes a mockery of the rulemaking process, and that you are willing to come here and pretend that what really happened didn't happen.

In this case, we have the record to guide us. It tells us how EPA's best legal and scientific experts supported granting California's petition and adopting a new ozone standard for the environment. The record tells us you ultimately agreed with EPA's experts and gave those recommendations to the White House, and we know the White House overruled you.

Yet your testimony pretends that none of this happened, and it pretends you have reached the ultimate decisions independently and with a scientific and legal basis. Your staff knows this isn't true, and we know that it isn't true. As someone who has long

fought for EPA and strong environmental protections, I can't adequately express how deeply this saddens me and how poorly it reflects on the EPA.

I thank the three of you for being here, and we are going to move on to our next witnesses. I call forward our second panel, Dr. Francesca Grifo. Dr. Grifo is a senior scientist and director of the Union of Concerned Scientists, Scientific Integrity Program. She has over 20 years of experience directing science based projects and programs. She holds a Ph.D. in Botany from Cornell University.

Michael Goo is the climate legislative director for the Natural Resources Defense Council. He has previously served as majority counsel for the Senate Committee on Environment and Public Works, minority counsel for the House Energy and Commerce Committee, and as Acting Assistant General Counsel at EPA.

Dr. Roger McClellan currently advises public and private organizations on issues related to air quality. He has previously served as Chair of EPA's Clean Air Scientific Advisory Committee and as president of the Chemical Industry Institute of Technology.

Alan Raul is a partner with Sidley Austin, and is Chair of the firm's Information, Law, and Privacy Practice Group, and he is also a member of the firm's Government and Internal Investigations Group and Appellate Group as well.

I welcome you to our hearing. It is the practice of this committee that all witnesses testify under oath, so I would like to ask each or you to please stand while I ask you to raise your right hands.

[Witnesses sworn.]

Chairman WAXMAN. The record will indicate each of the witnesses answered in the affirmative.

Dr. Grifo, we want to call on you first.

For all of you, your prepared statements are in the record in full. We would like to ask you to try to limit your oral presentations to 5 minutes. The clock will indicate when it is red that the 5-minutes have expired. Please go ahead.

STATEMENTS OF FRANCESCA GRIFO, SENIOR SCIENTIST, UNION OF CONCERNED SCIENTISTS; MICHAEL GOO, CLIMATE LEGISLATIVE DIRECTOR, NATURAL RESOURCES DEFENSE COUNCIL; ROGER O. MCCLELLAN, ADVISOR, TOXICOLOGY AND HUMAN HEALTH RISK ANALYSIS; AND ALAN CHARLES RAUL, PARTNER, SIDLEY AUSTIN LLP

STATEMENT OF FRANCESCA GRIFO

Ms. GRIFO. Good afternoon, and thank you, Mr. Chairman, and thank you to the committee. I am a senior scientist, as you said, and director of the Scientific Integrity Program as the Union of Concerned Scientists, a leading science-based non-profit working for a healthy environment and a safer world.

I would like to thank the committee for the opportunity to speak to you this afternoon about the problem of political interference in the work of Federal Government scientists. The United States has enjoyed prosperity and health in large part because of its strong and sustained commitment to independent science.

As the Nation faces new challenges at home and growing competitiveness abroad, the need for a robust Federal scientific enter-

prise remains critical. Unfortunately, an epidemic of political interference in Federal science threatens this legacy. Political interference in EPA's decision regarding the air quality standard for ground-level ozone is emblematic of the problem of manipulation, suppression, and distortion of science at the EPA.

You have already heard that EPA Administrator Stephen Johnson issued the final ozone standard at an arbitrary level inconsistent with the analysis of EPA scientists and independent science advisors and, ultimately, not sufficiently protective of public health. You have heard that the White House pressured the EPA to consider economic costs associated with tightening the ozone standard. The law, as affirmed by a 2001 Supreme Court decision requires the standard be based solely on best available science. EPA leadership failed to meet that objective.

The White House's interference or meddling in the ozone decision is not a stand-alone incident. Time and time again White House officials or EPA political appointees have stepped in to second guess, manipulate, or suppress the work of EPA scientists, threatening the Agency's ability to protect human health and the environment.

In our investigation of EPA scientists, our survey conducted by Iowa State University together with us, hundreds of scientists report direct interference in their scientific work, fears of retaliation and systemic disregard for the expertise of EPA's Advisory Committee. Our survey found that 889 scientists reported personally experiencing one of these events in the last 5 years. In essay responses, nearly 100 EPA scientists self-identified OMB, Office of Management and Budget, as the primary culprit in this interference. It is important to note that we didn't ask them about OMB. The question was much broader; they volunteered that.

Two hundred and thirty-two scientists had personally experienced frequent or occasional changes or edits during review that changed the meaning of scientific findings, not just routine edits but those that change the meaning. Two hundred and eighty-five scientists had personally experienced frequent or occasional selective or incomplete use of data to justify a specific regulatory outcome.

A hundred and fifty-three scientists had personally experienced frequent or occasional pressure to ignore impacts of a regulation on sensitive populations. Five hundred and thirty-six scientists felt that the Agency occasionally, seldom, or never heeds advice from independent scientific advisory committees. This result was markedly worse at the Office of Air Quality Planning and Standards which works closely with the advisory committees to set the NAAQS. Half of these respondents felt the EPA did not heed the advice of the advisory committees.

The White House has rewritten EPA's scientific documents concerning climate change, pressured EPA scientists to support predetermined conclusions regarding the health effects of toxic mercury pollution, and pushed for rules that politicize the scientific findings contained in the OIRA's toxic data base. Science has been mis-used on air pollution, asbestos, fuel efficiency, mountaintop removal mining, oil extraction, pesticides, plywood plant pollution, toxic selenium contamination, and on and on.

Fortunately, this is not a problem without a solution. A suite of reforms are detailed in our report Interference at the EPA, but here are the most timely. The House and Senate overwhelmingly approved by partisan legislation to strengthen whistleblower protections for Federal employees. It is crucial that the final legislation now in Conference Committee contains specific protections for scientists who expose efforts to suppress or alter Federal research.

The EPA should increase openness in its decisionmaking process. If research results in analysis by EPA scientists are made public before they drop into, as the GAO put it, the black box of OMB, attempts to distort science will be exposed. The expanded breadth of the OMB must be pushed back. Questioning the scientific consensus of Agency experts is not OMB's proper role.

EPA should adopt media communication and scientific publication policies that ensure taxpayer-funded scientists and their research are accessible to Congress and the public, and scientists need to be made proactively aware of these rights.

Finally, there are two actions that can take place immediately: Administrator Johnson should send a clear message to all political appointees that he will not tolerate any attempts to alter or suppress Federal Research just as EPA Administrator William Ruckelshaus did 25 years ago. Administrator Johnson should pledge to operate EPA in a fish bowl.

We would welcome a dialog with Administrator Johnson, although as of this morning he has not responded to repeated requests to begin that conversation. We look forward to continuing our work with the 110th Congress to restore scientific integrity to Federal policymaking.

Thank you.

[The prepared statement of Dr. Grifo follows:]

Written Testimony of Francesca T. Grifo, Ph.D.
Senior Scientist with the Union of Concerned Scientists
Director of the Scientific Integrity Program

Before the U.S. House Committee on Oversight and Government Reform

Hearing on "EPA's New Ozone Standards"
May 20, 2008

This testimony is presented by Dr. Francesca Grifo, Senior Scientist with the Union of Concerned Scientists (UCS), a leading science-based nonprofit working for a healthy environment and a better world. The full testimony is submitted for the record and Dr. Grifo will summarize her statement for the Committee on the problem of political interference in the work of federal government scientists.

Good morning, my name is Dr. Francesca Grifo. I am a Senior Scientist and the Director of the Scientific Integrity Program at the Union of Concerned Scientists, a leading science-based nonprofit working for a healthy environment and a safer world. I would like to thank Chairman Waxman, Ranking Member Davis and the Members of the Committee for the opportunity to speak to you this morning about the problem of political interference in the work of federal government scientists.

This written testimony contains a brief introduction (p. 1), an overview of the issue of scientific integrity (p. 3), a summary of the report *Interference at the EPA: Politics and Science at the U.S. Environmental Protection Agency* released April 23, 2008 (p. 6), a detailed analysis of political interference in the EPA's ozone decision (p. 11), a summary of reforms needed to restore scientific integrity to the federal policy making process (p. 17) and some concluding thoughts (p. 23). Also included are a timeline of abuses of science compiled by UCS (p. 24), selected essay responses from UCS's survey of EPA scientists (p. 27), a statement on *Scientific Freedom and the Public Good* endorsed by many prominent scientists (p. 32), and brief summaries of four past surveys of federal government scientists conducted by UCS (p. 33).

I. Introduction

The United States has enjoyed prosperity and health in large part because of its strong and sustained commitment to independent science. As the nation faces new challenges at home and growing competitiveness abroad, the need for a robust federal scientific enterprise remains critical. Unfortunately an epidemic of political interference in federal science threatens this legacy, promising serious and wide-ranging consequences.

The U.S. Environmental Protection Agency (EPA) has been especially harmed by political interference in its work to protect human health and the environment. The flagrant political interference in EPA's decision regarding the national ambient air quality standard (NAAQS) for ground-level ozone is emblematic of this epidemic.

Despite the unanimous recommendation from the EPA's scientific advisors that the ozone NAAQS should be set no higher than 70 parts per billion (ppb), in March 2008 EPA Administrator Stephen Johnson issued the final ozone standard at 75 ppb – a level not based on the best science and not sufficiently protective of public health. This decision followed multiple edits to EPA documents by the White House that played-up uncertainties in scientific knowledge of the health effects of ozone exposure and laid the groundwork for Johnson's decision. The White House also directly overruled the EPA's attempt to set a secondary standard to protect crops and plant life from ozone exposure.

These and other EPA decisions based on tainted science have consequences for the health and safety of Americans that can be measured in numbers of hospital visits and premature deaths.[1] The White House has also rewritten EPA scientific documents concerning climate change, pressured EPA scientists to support predetermined conclusions regarding mercury pollution and has pushed for rules that politicize the scientific findings contained in the IRIS toxics database.

To assess the breadth and depth of political interference at the EPA, and to give voice to the thousands of civil servant scientists working at the agency, the Union of Concerned Scientists (UCS) distributed a 44-question survey to nearly 5,500 scientists at the EPA in the summer of 2007 and received responses from 1,586 scientists. The results of that survey, as well as additional investigations, are contained in our recently released report *Interference at the EPA: Politics and Science at the U.S. Environmental Protection Agency*.[2] We summarize here the problems with scientific integrity across the federal government, the major findings of this latest report and outline the solutions needed to restore scientific integrity to federal decision making.

Political interference has penetrated deeply into the culture and practices of federal agencies. This interference in science threatens our nation's ability to respond to complex challenges to public health, the environment, and national security. It risks demoralizing the federal scientific workforce and raises the possibility of lasting harm to the federal scientific enterprise. It betrays public trust in our government and undermines the democratic principles upon which this nation was founded. The thousands of scientists in the employ of the federal government represent a tremendous resource and their knowledge and advice should not be manipulated or ignored. Without strong action to restore integrity to federal science our nation will be ill-prepared to deal with the challenges we face.

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[1] Scientific papers documenting the health effects of particulate matter and ozone air pollution are numerous and citations for a number of such studies are collected in the following documents: Shprentz, D. 2007. Top ten ozone studies: Public testimony on EPA's proposed revisions to the national ambient air quality standard for ozone. August 30. Online at http://www.cleanairstandards.org/article/2007/08/743; American Lung Association. 2005. Adverse health effects of particulate matter: New science shows effects below current standards. Online at http://www.cleanairstandards.org/article/2005/06/395.

[2] To read the text of the report and see supporting materials go to http://www.ucsusa.org/EPAscience/.

II. Scientific Integrity

Successful application of science has played a large part in the policies that have made the United States of America the world's most powerful nation and its citizens increasingly prosperous and healthy.

Although scientific input to the government is rarely the only factor in public policy decisions, scientific input should always be weighted from an objective and impartial perspective. Presidents and administrations of both parties have long adhered to this principle in forming and implementing policies. However, the current Bush administration has consistently undermined this legacy by manipulating, censoring and suppressing the work of federal government scientists—with serious consequences for our health, safety, and environment.

Misrepresenting and suppressing scientific knowledge for political purposes can have serious consequences. For example, if the Nixon administration suppressed air quality studies and vetoed the Clean Air Act of 1970, Americans would have suffered more than 200,000 premature deaths and millions of cases of respiratory and cardiovascular disease over the next 20 years.[3]

This misuse of science has led Russell Train, the EPA administrator under Presidents Nixon and Ford, to observe: "How radically we have moved away from regulation based on independent findings and professional analysis of scientific, health and economic data by the responsible agency to regulation controlled by the White House and driven primarily by political considerations."[4]

Political interference in the work of federal scientists has become widespread in the past several years. To catalog these abuses, UCS launched the *A-to-Z Guide to Political Interference in Science* (see p. 18)[5] a webpage that now documents 85 case studies of such interference, involving 24 government agencies. In our February 2008 report, *Federal Science and the Public Good*,[6] we outlined the patterns of interference with government science. The report also highlights the deeper systemic changes that have been made to the structure and policies of the executive branch that threaten to enshrine politicized science even after George W. Bush leaves office. These findings are summarized below.

Patterns of Abuse

Specific examples of the misuse of science have occurred across a broad range of issues such as childhood lead poisoning, toxic mercury emissions, climate change, reproductive health, and nuclear weapons. Experts at the FDA charged with ensuring the safety of our food and drug supply, report being pressured to alter their scientific conclusions. Political appointees in the Department of the Interior have been exposed for overruling the scientific consensus and refusing to protect endangered species. Scientists nominated to serve on scientific advisory boards report being asked about their political leanings. And scientists studying what may very

[3] See http://www.epa.gov/oar/sect812. See also data from the American Meteorological Society, online at http://ametsoc.org/sloan/cleanair/index.html.
[4] Train, R. 2003. "E.P.-Eh?" Grist Magazine, September 23.
[5] See http://www.ucsusa.org/AtoZ/.
[6] To read the text of the report go to http://www.ucsusa.org/scientific_integrity/restoring/federal-science.html.

well be the most profound global change of this century – global warming – are effectively barred from communicating their findings to the news media and the public.

Interference can take many different forms, including:

- Falsifying data and fabricating results. Federal officials with little or no scientific background have misrepresented scientific data and presented scientific results not based on actual research.

- Selectively editing reports and creating false uncertainty. Political appointees have selectively deleted evidence from scientific documents, and exaggerated uncertainty in scientific findings.

- Tampering with scientific procedures. Federal agencies have replaced standard scientific procedures with flawed methodologies, biased toward finding predetermined results.

- Intimidating and coercing scientists. High-level administration officials have directly pressured researchers at federal agencies to alter scientific findings, threatening reprisal if they refuse.

- Censoring and suppressing scientists. Federal officials have prevented scientists from communicating with their colleagues, the media, and the public.

- Hiding, suppressing, and delaying release of scientific findings. Federal officials have buried scientific findings and prevented their public release.

- Disregarding legally mandated science. Federal agencies have repeatedly ignored scientific research that by law must form the basis for certain policy decisions.

- Allowing conflicts of interest. Officials with clear conflicts of interest have held key positions throughout the federal government, from which they have made decisions harming the integrity of federal science.

- Corrupting scientific advisory panels. Political interests have manipulated the process for selecting members of independent scientific advisory panels.

Changing the Rules

Beyond the system-wide epidemic of interference, the Bush administration has instituted deeper changes in the structure and policies of the executive branch. Without a strong commitment to scientific integrity from the next president and Congress, these changes may ensure that politicization of science will continue after President Bush leaves office.

- Centralizing decision making and the unitary executive. The Bush administration has invoked the theory of the "unitary executive" to justify tight White House control over federal agencies. For example, President Bush has greatly expanded the use of signing statements. He has used them to assert his right to ignore or disobey any laws or requests

he considers unconstitutional, including congressional requests for scientific information and whistle-blower rights for federal employees. Executive order 13422 dramatically expands the role of the Office of Management and Budget (OMB) in reviewing all agency regulations, including the scientific basis for regulations.

- Homogenizing agency decision making. The White House has sought to replace the policies of individual agencies regarding peer review of scientific findings, risk assessment, and cost-benefit analysis with inappropriate government-wide standards, ignoring the reality that each federal agency requires different tools to best fulfill its mission.

- Reducing transparency. The Bush administration has limited government transparency and accountability by preventing public disclosure of information on the internal workings of the federal government. New policies regarding Freedom of Information Act requests and classification of government documents have created a "presumption of secrecy." In this approach, agencies automatically keep information from public view unless someone specifically requests it, or the law requires them to disclose it.

- Adding unnecessary bureaucracy. New demands, including interagency review and excessive legal challenges from industry, have prevented federal agencies from acting promptly to protect public health and safety.

- Retaliating against whistle-blowers. The Bush administration's penchant for secrecy and centralizing executive power has increased the vulnerability of federal employees who blow the whistle on government waste, fraud, or abuse.

- Foxes guarding the henhouse. The revolving door for officials who shuttle between high-level government positions and regulated industries has harmed the integrity of federal science. The legacy of political appointees with conflicts of interest lives on in the agencies after their departure—through both the flawed policies they helped enact and the erosion of public trust in agency integrity.

- Removing science from decision making. Administration officials have often simply shut out scientists and scientific information from the policy discussion.

- Weakening enforcement and monitoring. Many federal agencies have seen their ability to enforce the nation's laws decline under the Bush administration. In many cases, agencies are simply not collecting the data they need to ensure robust enforcement.

Scientist Surveys

To move beyond anecdotes and to gather information about the extent and nature of the interference, UCS has conducted a series of surveys of federal scientists. Previous surveys have given voice to scientists at the Fish and Wildlife Service, the National Ocean and Atmospheric

Administration Fisheries, the Food and Drug Administration and climate scientists working in seven federal agencies.[7] The survey of EPA scientists is the fifth in the series.

Collectively 3,400 federal government scientists responded to these five surveys. Several common themes ran through their responses:

- 1301 scientists across nine federal agencies reported that they fear retaliation for openly expressing their concerns about the mission driven work of their agencies.
- 688 scientists from four agencies reported that they were not able to publish work in peer reviewed journals if it did not adhere to agency policies.
- 150 federal climate scientists from seven agencies personally experienced at least one incident of political interference in the past five years.
- And from our most recent report, 889 EPA scientists personally experienced at least one incident of inappropriate interference in their work over the past five years.

Scientists Respond

The scientific community has responded to this growing problem. The more than 15,000 individual scientists, including 52 Nobel Laureates and nearly 200 members of the National Academies, who have called for a restoration of scientific integrity in federal policy making have been joined by several major scientific associations, including the American Association for the Advancement of Science, the American Public Health Association, the American Geophysical Union, and the Ecological Society of America, which have addressed the problem at society wide meetings and have begun to investigate how to defend science.

III. Interference at the EPA

The U.S. Environmental Protection Agency (EPA) has the simple yet profound charge "to protect human health and the environment." EPA scientists apply their expertise to protect the public from air and water pollution, clean up hazardous waste, and study emerging threats such as global warming. Because each year brings new and potentially toxic chemicals into our homes and workplaces, because air pollution still threatens our public health, and because environmental challenges are becoming more complex and global, a strong and capable EPA is more important than ever.

Yet challenges from industry lobbyists and some political leaders to the agency's decisions have too often led to the suppression and distortion of the scientific findings underlying those decisions—to the detriment of both science and the health of our nation. While every regulatory agency must balance scientific findings with other considerations, policy makers need access to the highest-quality scientific information to make fully informed decisions.

Concern over this problem led the Union of Concerned Scientists (UCS) to investigate political interference in science at the EPA. In the summer of 2007, UCS, working with the Center for Survey Statistics and Methodology at Iowa State University, distributed a 44-question survey to nearly 5,500 EPA scientists, asking for information about political interference in their scientific work, the use of science in EPA decision making, barriers to communication, employee morale,

[7] More information about the surveys can be found at http://www.ucsusa.org/surveys/.

and the agency's effectiveness. UCS identified these scientists through EPA websites, consultations with current and former employees, and targeted Internet searches.

We received completed surveys from 1,586 scientists, for a response rate of 29 percent. These respondents represented every scientific program office at EPA headquarters, all 10 regional offices, and more than a dozen research laboratories across the country. Most respondents were agency veterans, with more than a decade of experience at the EPA. Beyond specific survey questions, more than 850 scientists also provided written comments in response to an open-ended essay question. To add to this information, UCS interviewed dozens of current and former EPA scientists.

The results of these investigations show an agency under siege from political pressures. On numerous issues—ranging from mercury pollution to groundwater contamination to climate change—political appointees of the George W. Bush administration have edited scientific documents, manipulated scientific assessments, and generally sought to undermine the science behind dozens of EPA regulations.

These findings highlight the need for strong reforms to protect EPA scientists, make agency decision making more transparent, and reduce politicization of the regulatory process.

Political Interference in Scientific Work

Large numbers of EPA scientists reported widespread and inappropriate interference by EPA political appointees, the White House, and other federal agencies in their scientific work:

- 889 scientists (60 percent of respondents[8]) personally experienced at least one incident of political interference during the past five years.
- Among EPA veterans (scientists with more than 10 years experience at the agency), 409 (43 percent) said interference occurred more often in the past five years than in the previous five-year period.

EPA scientists also reported personally experiencing specific forms of political interference, from the explicit to the subtle:

- 94 scientists (7 percent) had frequently or occasionally been "directed to inappropriately exclude or alter technical information from an EPA scientific document."
- 191 scientists (16 percent) had personally experienced frequent or occasional "situations in which scientists have actively objected to, resigned from, or removed themselves from a project because of pressure to change scientific findings."
- 232 scientists (18 percent) had personally experienced frequent or occasional "changes or edits during review that change the meaning of scientific findings."

[8] Unless otherwise stated, percentages reflect the share of respondents who answered a specific question.

- 285 scientists (22 percent) had personally experienced frequent or occasional "selective or incomplete use of data to justify a specific regulatory outcome."

- 153 scientists (13 percent) had personally experienced frequent or occasional "pressure to ignore impacts of a regulation on sensitive populations."

- 299 scientists (24 percent) had personally experienced frequent or occasional "disappearance or unusual delay in the release of websites, press releases, reports, or other science-based materials."

- 394 scientists (31 percent) had personally experienced frequent or occasional "statements by EPA officials that misrepresent scientists' findings."

Respondents indicated that political interference arose from both internal and external sources:

- 516 scientists (43 percent) knew of "many or some" cases where EPA political appointees had inappropriately involved themselves in scientific decisions.

- 560 scientists (49 percent) knew of "many or some" cases where political appointees at other federal agencies had inappropriately involved themselves in decisions.

- 507 scientists (42 percent) knew of "many or some" cases where "commercial interests have inappropriately induced the reversal or withdrawal of EPA scientific conclusions or decisions through political intervention."

- 329 scientists (28 percent) knew of such interference by "nongovernmental or advocacy groups."

In essay responses, nearly 100 scientists identified the White House Office of Management and Budget (OMB), which oversees the federal budget and coordinates all federal regulations, as the primary source of external interference.

Respondents reported widespread respect for their direct supervisors, but had fewer commendations for EPA's senior leaders:

- 1,282 scientists (81 percent) respected the integrity and professionalism of their direct manager or supervisor, while 686 (43 percent) said the same about EPA's senior leaders.

- A majority of respondents (906 scientists, or 59 percent) agreed that their direct supervisor stands behind scientific staff who express politically controversial opinions.

Rates of political interference varied widely among offices and divisions within the agency:

- The percentage of scientists reporting interference was highest in the program offices with regulatory duties, and at EPA headquarters. A total of 337 scientists in the program

offices (68 percent), and 379 scientists at headquarters (69 percent), reported at least one incident of interference in the past five years.

- The percentage of scientists reporting interference was lower—although still significant—in the Office of Research and Development (ORD), the EPA's main research arm. The ORD's National Health and Environmental Effects Research Laboratory was notably freer of interference (39 percent) than any other EPA division, while its National Center for Environmental Assessment had the highest percentage of scientists reporting interference of all EPA divisions (84 percent).

- The percentages of scientists reporting interference in the 10 regional offices varied widely, from 44 percent (region 6) to 73 percent (region 9).

To place these results in context, we cite specific incidents of interference. For example, political appointees at the White House and in top positions at the EPA manipulated scientific findings and analyses regarding mercury pollution and climate change. These incidents involved pressure to change scientific methods and findings, direct editing of scientific documents by nonscientists, and delayed release of scientific reports.

A third case—involving interagency review of the EPA's assessment of toxic chemicals—illustrates the growing ability of the OMB and other federal agencies to review and second-guess the work of the EPA's scientific experts.

Barriers to the Free Communication of Science

The free communication of scientific results is a critical part of the scientific process. Despite statements by EPA leaders asserting that the agency supports scientific openness, many scientists report that it restricts free communication of the results of taxpayer-funded research:

- 783 scientists (51 percent) disagreed or strongly disagreed that EPA policies allow scientists to "speak freely to the news media about their findings." Another 556 scientists (36 percent) had no opinion or were unsure. Only 197 scientists (13 percent) agreed that the EPA allows scientists to communicate freely with the media.

- 291 scientists (24 percent) disagreed or strongly disagreed that they are "allowed to publish work in peer-reviewed scientific journals regardless of whether it adheres to agency policies or positions."

Beyond these restrictive policies, hundreds of scientists said they fear retaliation for speaking candidly about the EPA's work. More scientists feared retaliation for speaking candidly inside the agency than outside it:

- 492 scientists (31 percent) disagreed or strongly disagreed that they could openly express concerns about the EPA's work *inside* the agency without fear of retaliation.

- 382 scientists (24 percent) disagreed or strongly disagreed that they could openly express concerns about the EPA's work *outside* the agency without fear of retaliation.

Interviews with current and former EPA scientists revealed new examples of problems in communicating scientific research. In two cases, EPA scientists were barred from presenting research on climate change at scientific conferences. Other scientists reported difficulties speaking with the media and obtaining EPA clearance to publish their findings in scientific journals.

Political interference in scientific work combined with barriers to the free communication of scientific findings affect the amount and quality of information the U.S. public receives.

Undermining the Role of Science in EPA Decision Making
Scientific information is the lifeblood of much of the EPA's work and the credibility of its decisions depends on the quality of its scientific work. A plurality of EPA scientists reported that the agency's regulatory policies are consistent with its scientific findings. However, a similar number felt that the EPA could do a better job of using the best judgment of its scientific staff:

- 745 scientists (48 percent) felt that the EPA's determinations and actions are frequently or always consistent with the scientific findings in agency documents and reports.

- 719 scientists (47 percent) felt that the EPA's determinations occasionally, seldom, or never make use of the best judgment of its scientific staff.

Hundreds of EPA scientists also felt that the agency only occasionally incorporates expert advice from advisory committees into policy decisions:

- 553 (36 percent) scientists felt that the agency occasionally, seldom, or never heeds advice from independent scientific advisory committees.

Recent changes in the EPA's process for setting the National Ambient Air Quality Standards provide one prominent example of how political considerations have trumped scientific expertise and sidelined EPA's scientific advisory committees.

Challenges to Agency Effectiveness
Beyond political interference in EPA science, several survey questions asked respondents about other factors that could impair their ability to do their jobs, and the ability of the agency as a whole to fulfill its mission. Large numbers of EPA scientists indicated that a lack of sufficient or appropriate resources was a serious issue in their office or division:

- 969 scientists (62 percent) disagreed or strongly disagreed that the "EPA division where I work has sufficient resources to adequately perform its mission of protecting human health and the environment."

- 555 scientists (36 percent) agreed or strongly agreed that the "recent changes and closures in the EPA library system have impaired my ability to do my job." This opinion was especially prevalent among scientists in regions 5, 6, and 7, which had their libraries closed (86 of these scientists, or 48 percent, agreed).

- 574 scientists (41 percent) agreed or strongly agreed that "the trend toward contracting out scientific work is harming the effectiveness of my division."

Survey questions also asked scientists about their job satisfaction, and the morale in their division:

- Respondents were twice as likely to report a decrease in job satisfaction over the past five years as to report an increase (670 versus 328 scientists).

- Opinions about workforce morale ranged widely. A total of 564 scientists (37 percent) said morale was fair, and 387 (25 percent) said morale was poor or extremely poor. A total of 570 scientists (37 percent) said morale was good or excellent.

Questions about the overall effectiveness of the EPA elicited a range of responses:

- Respondents were more likely to agree than disagree that the EPA was acting effectively to clean up environmental problems. A total of 812 scientists (52 percent) agreed that the EPA acts effectively to "clean up and/or mitigate existing pollution or environmental problems," while 522 (33 percent) disagreed.

- 694 scientists (44 percent) agreed that the EPA acts effectively to "foster practices that prevent environmental degradation or adverse health effects before they occur," while 629 scientists (40 percent) disagreed.

- Respondents were twice as likely to report a decrease in the effectiveness of their office or division (696 scientists, or 45 percent) as an increase (321 scientists, or 21 percent) over the past five years.

- Respondents were evenly split on whether the EPA is moving in the right direction. A total of 685 scientists (44 percent) disagreed that EPA is moving in the right direction, while 624 scientists (40 percent) agreed.

IV. The Ozone NAAQS: A Case Study in Political Interference

The EPA's recent rulemaking setting the national ambient air quality standards (NAAQS) for ground-level ozone provides a perfect case study for understanding the extent of political interference in EPA's science and the consequences of this interference for the health of Americans.

Despite the unanimous recommendation from the EPA's scientific advisors that the ozone NAAQS should be set no higher than 70 parts per billion (ppb), in March 2008 EPA Administrator Stephen Johnson issued the final ozone standard at 75 ppb – a level not based on the best science and not sufficiently protective of public health. This decision followed multiple edits to EPA documents by the White House that played up uncertainties in scientific knowledge of the health effects of ozone exposure and laid the groundwork for Johnson's decision. The

White House also directly overruled the EPA's attempt to set a secondary standard to protect crops and plant life from ozone exposure.

Ground-level ozone—a component of smog—is created by chemical reactions between oxides of nitrogen and volatile organic compounds in the presence of sunlight. Multiple studies indicate that exposure to ozone pollution can cause and exacerbate a variety of respiratory health problems, and can even lead to premature death.[9] The EPA's recent decisions contradict both the letter and spirit of the Clean Air Act, which requires that the NAAQS be based on the "latest scientific knowledge" and be sufficiently protective of public health. Interference in the ozone standard is only the latest example of political meddling with air pollution standards, a disturbing trend that has serious consequences for the health and well-being of Americans.

This example illustrates many of the findings of our survey of EPA scientists, including the intrusive role of the White House Office of Management and Budget (OMB), direct interference in the work of EPA's staff scientists and systemic disregard for the expertise of EPA's advisory committees. The documented interference described below is one instance of the widespread interference seen in the following survey statistics:

- Nearly one-hundred EPA scientists noted in their essay responses widespread interference from OMB not just in reviewing EPA's policies, but also the science underlying those policies.
- 94 scientists (7 percent) had frequently or occasionally been "directed to inappropriately exclude or alter technical information from an EPA scientific document."
- 232 scientists (18 percent) had personally experienced frequent or occasional "changes or edits during review that change the meaning of scientific findings."
- 285 scientists (22 percent) had personally experienced frequent or occasional "selective or incomplete use of data to justify a specific regulatory outcome."
- 153 scientists (13 percent) had personally experienced frequent or occasional "pressure to ignore impacts of a regulation on sensitive populations."
- 553 (36 percent) scientists felt that the agency occasionally, seldom, or never heeds advice from independent scientific advisory committees. This result was markedly worse at the Office of Air Quality Planning and Standards (OAQPS) which works closely with advisory committees to set the NAAQS. Half of these respondents (29 scientists, or 50 percent) felt the EPA did not heed the advice of the advisory committees.

Background

The Clean Air Act requires the EPA to set NAAQS for six "criteria" air pollutants (ozone, fine and coarse particulate matter, lead, nitrogen dioxide, sulfur oxides, and carbon monoxide), and to review each standard every five years. Under the act, the EPA must base the NAAQS on the "latest scientific knowledge" and in 2001 the Supreme Court affirmed that the agency cannot consider costs or other factors in setting the NAAQS.[10] While the EPA has rarely kept to the five-year schedule, the strong scientific mandate of the Clean Air Act has ensured that standards

[9] Shprentz 2007.
[10] Whitman v. American Trucking Associations, Inc. 531 U.S. 457 (2001).

for these air pollutants eventually reflect advances in scientific understanding. These standards are responsible for widespread improvements in air quality and public health.

In 2006, the EPA's Clean Air Science Advisory Committee (CASAC) unanimously recommended tightening the ozone standard from 80 parts per billion (ppb) to a level as strict as 60 ppb, and in no case higher than 70 ppb. To support that standard, the committee cited recent controlled clinical studies documenting "statistically-significant decrements in lung function" at concentrations of 80 ppb, and "adverse lung function effects" in some individuals at 60 ppb.[11] CASAC also cited several new studies providing evidence of increased likelihood of premature death at ozone exposure levels below 80 ppb,[12] a connection that was recently confirmed by a recent report of the National Research Council.[13]

The Clean Air Act provides a strong mandate to the EPA to rely on the consensus opinions of its scientific staff and independent advisers. However, Administrator Johnson overruled these experts by setting the primary ozone standard at 75 ppb, and after direct intervention by President Bush, adopted a secondary standard for ozone that was also weaker than the scientific experts recommended. The decision by Johnson mirrors his earlier decision to overrule his scientific advisers regarding the NAAQS for fine particulate matter pollution. Even more troubling, is the EPA's attempt to cut science out of the standard setting process entirely.

Regulatory Impact Statement

Although the law does not allow the EPA to account for economic costs when setting the NAAQS, the EPA is required to perform a regulatory impact analysis (RIA) that weighs net costs and benefits for any proposed or final regulation. Agencies must adhere to strict guidelines set forth by the OMB when preparing RIAs. The Office of Information and Regulatory Affairs (OIRA, a part of OMB) requested that EPA make a number of changes to the RIA for the ozone NAAQS that undermined the scientific evidence of the benefits of a stronger regulation.[14]

The connection between ozone exposure and premature mortality emphasized by CASAC leads to the single largest economic benefit to a stronger ozone standard in the RIA.[15] Despite the scientific evidence for this connection, OIRA altered statements in the RIA to cast doubt on the findings and requested that EPA include cost-benefit analyses that assume no connection to

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[11] Clean Air Science Advisory Committee (CASAC). 2006. Peer review of the EPA's 2nd draft ozone staff paper. October 24; for example Adams W.C. 2002. Comparison of chamber and face-mask 6.6 hour exposures to ozone on pulmonary function and symptoms responses. *Inhalation Toxicol.* 14:745-764; Adams, W.C. 2006. Comparison of chamber 6.6 h exposures to 0.04-0.08 PPM ozone via square-wave and triangular profiles on pulmonary response. *Inhalation Toxicol*, 18:127-136.

[12] CASAC 2006; for example Bell M.L., A. McDermott, S.L. Zeger, J.M. Samet, F. Dominici. 2004. Ozone and short-term mortality in 95 US urban communities, 1987-2000. *JAMA*, 292: 2372-2378.

[13] National Research Council. 2008. Estimating mortality risk reduction and economic benefits from controlling ozone air pollution. National Academies Press: Washington, DC. Online at http://www.nap.edu/catalog/12198.html.

[14] OMB Watch. 2007. Polluted logic: How EPA's ozone standard illustrates the flaws of cost-benefit analysis in regulatory decision making. December 5. Washington, DC. Online at http://www.ombwatch.org/regs/PDFs/PollutedLogic.pdf.

[15] U.S. Environmental Protection Agency. 2007. Regulatory Impact Analysis of the proposed revisions to the national ambient air quality standards for ground-level ozone. July. Online at www.epa.gov/ttn/ecas/ria.html#ria2007.

premature mortality. OIRA's edits resulted in a downward shift in the range of possible net economic benefits ascribed to a stronger ozone standard.

Primary Standard

In addition to interfering in the scientific information contained in the RIA, OMB also introduced last-minute changes to the proposed ozone rule released in July 2007. These changes played up "uncertainties" in several aspects of the scientific findings and sought to provide justification for maintaining the 80 ppb standard. Other OMB edits also attempted to lay the groundwork for a weakened standard, including a suggestion for legally bypassing the Supreme Court's opinion in *Whitman v. American Trucking Assns, Inc.* [16]

Industry groups and local governments actively lobbied both the White House and the EPA to leave the 80 ppb standard unchanged, an option left open by the EPA's proposed rule.[17] On March 12, 2008, Administrator Johnson overruled CASAC to set the primary NAAQS for ozone at 75 ppb—a level unsupported by the best available science.[18] In defending this level, Johnson followed OMB's lead and pointed to "uncertainties" in the scientific evidence for health effects from ozone. Yet Johnson made no allowance for "uncertainties" in the science that might support a stronger standard (such as a lack of controlled human exposure studies focusing on sensitive populations such as children or asthmatics), despite the fact that the Clean Air Act directs the Administrator to choose a more protective standard when faced with scientific uncertainty.[19]

Johnson also called for changing the Clean Air Act to allow the EPA to consider the costs of complying with the standards when setting the NAAQS—a move that drew immediate condemnation from Congress.[20]

Secondary Standard

President Bush personally intervened to prevent the EPA from also adopting a stronger secondary standard for ozone. The Clean Air Act allows the EPA to set secondary standards to protect the "public welfare"—a broad term that includes lower visibility, ecological damage, and other concerns—beyond the primary standards designed to protect public health. The EPA often sets secondary NAAQS that are identical to the primary standards.

However, the agency, with CASAC's support, initially proposed a more stringent seasonal standard for ozone, to protect crops and other plant life during times of intense exposure. A March 6, 2008, memorandum from OIRA head Susan Dudley to Administrator Johnson

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[16] Patton. V. 2007. Testimony before the Senate Committee on Environment and Public Works, Subcommittee on Clean Air and Nuclear Safety. July 11.
[17] Boyle, K. 2008. Industry groups rallying against EPA ozone proposal. *Greenwire*, February 6.
[18] U.S. Environmental Protection Agency (EPA). 2008. EPA strengthens smog standards to better protect human health and the environment. March 12. Washington, DC.
[19] Thurston, G.D. Testimony before the Senate Committee on Environment and Public Works, Subcommittee on Public Sector Solutions to Global Warming, Oversight, and Children's Health Protection. May 7.
[20] Eilperin, J. 2008a. EPA tightens pollution standards; but agency ignored advisers' guidance. *Washington Post*, March 13. Online at http://www.washingtonpost.com/wp-dyn/content/article/2008/03/12/AR2008031202362.html.

questioned the EPA's scientific basis for the secondary standard, and called on the agency to consider "economic values, personal comfort and well-being."[21] EPA Deputy Administrator Marcus Peacock replied that the EPA was barred by law from considering economic costs, and that the EPA was unaware of "any information indicating beneficial effects of ozone on public welfare."[22] Confidential talking points prepared for Administrator Johnson's March 11 meeting with President Bush also emphasized strong scientific support for the EPA's proposal.[23]

Despite this pushback from the EPA, a last minute intervention by President Bush overruled the agency's proposal and established a secondary standard identical to the primary one. The *Washington Post* reported that Solicitor General Paul Clement warned that Bush's decision contradicted the agency's past submissions to the Supreme Court defending against industry challenges, and touched off a "scramble" to create new legal justifications for the weakened secondary standard.[24] Following the final decision, CASAC sent a letter to Johnson re-emphasizing that the ozone review panel does "*not endorse the new primary ozone standard as being sufficiently protective of public health.*"[25]

Fine Particulate Matter NAAQS

Administrator Johnson's disregard for the recommendations of CASAC and his staff scientists in the ozone decision is a replay of his 2006 decision not to tighten the NAAQS for fine particulate matter. Fine particulate matter (or $PM_{2.5}$) consists of particles less than 2.5 micrometers in diameter. More than 2,000 peer-reviewed studies link $PM_{2.5}$ pollution to strokes, heart disease, respiratory ailments, and premature death.[26]

A 2005 EPA risk assessment found that $PM_{2.5}$ pollution causes more than 4,700 premature deaths each year in just nine cities, while other studies have estimated that tens of thousands of people die nationwide each year from $PM_{2.5}$ exposure.[27] Based on its review of the scientific evidence, CASAC recommended tightening the yearly average standard for $PM_{2.5}$ from 15 micrograms per cubic meter to 13–14 micrograms per cubic meter. Yet Administrator Johnson

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[21] Dudley, S. 2008. Memorandum to EPA Administrator Stephen L. Johnson. Subject: Secondary ozone NAAQS. March 6. Online at *http://www.reginfo.gov/public/postreview/Steve_Johnson_Letter_on_NAAQs_final_3-13-08_2.pdf.*

[22] Peacock, M. 2008. Memorandum to Susan Dudley. Subject: Ozone secondary standard. March 7. The letter from Dudley to Peacock begins on page 5 of this document. Online at *http://www.reginfo.gov/public/postreview/Steve_Johnson_Letter_on_NAAQs_final_3-13-08_2.pdf.*

[23] Johnson, S. 2008. Ozone secondary NAAQS. March 11. Talking points (labeled "deliberative and confidential") prepared for EPA Administrator Johnson's March 11, 2008, meeting with President Bush. The document was placed in the public docket after the decision. Online at *http://ombwatch.org/regs/PDFs/OzoneSecondaryMemo3-11.pdf.*

[24] Eilperin, J. 2008b. Ozone rules weakened at Bush's behest. *Washington Post*, March 14. Online at *http://www.washingtonpost.com/wp-dyn/content/story/2008/03/14/ST2008031400320.html.*

[25] Clean Air Science Advisory Committee (CASAC). 2008. Letter to Stephen Johnson. April 7. Italics in original.

[26] American Lung Association 2005.

[27] Environmental Protection Agency. 2005. Particulate matter health risk assessment for selected urban areas. June. Washington, DC. Online at http://www.epa.gov/ttn/naaqs/standards/pm/data/pm_risk_tsd_finalreport_2005_mainbody.pdf; Abt Associates. 2000. *The particulate-related health benefits of reducing power plant emissions.* Boston: Clean Air Task Force. Online at *http://www.catf.us/publications/view/4.*

issued a final rule in September 2006 that left the standard unchanged. No EPA administrator had disregarded CASAC's advice in its nearly 30-year history.

Yet Johnson claimed that CASAC's nearly unanimous 22 to 2 vote was evidence of disagreement on the science. Shortly after the EPA announced the final rule, CASAC members voiced their objections in a letter to Johnson, emphasizing that, "There is clear and convincing scientific evidence that significant adverse human-health effects occur" at the new $PM_{2.5}$ standard, and that it "does not provide an 'adequate margin of safety . . . requisite to protect the public health' (as required by the Clean Air Act)."[28]

CASAC members also alleged that the EPA had "twisted" or "misrepresented" the panel's recommendations on a number of issues related to the proposed standards. Bart Ostro, chief air pollution epidemiologist at the California EPA, charged that "the EPA had incorporated 'last-minute opinions and edits' by the White House Office of Management and Budget that 'circumvented the entire peer review process.'" Ostro also pointed out that the White House's changes were "very close to some of the letters written by some of the trade associations."[29]

Changes to the NAAQS Process and the Proposed Lead NAAQS Rule

In December 2006, after the controversy surrounding the $PM_{2.5}$ decision, Deputy Administrator Peacock announced a new streamlined policy for setting the NAAQS that removes independent assessments by scientific experts and injects political determinations much earlier in the decision making process.[30]

For decades, the foundation of the NAAQS process was the staff paper, a comprehensive overview of the health effects of the air pollutant in question prepared by EPA scientists. Staff scientists also worked with CASAC to review the latest studies and recommend appropriate standards. Only after this scientific review was complete would the administrator create a draft standard.

The new rules for setting the NAAQS eliminate this critical independent scientific assessment. High-level political appointees are involved right from the start, working with staff scientists to create a document containing "policy relevant science" that "reflects the agency's views." CASAC is cut out of the process until after the EPA has announced its proposed standard, when the advisory group can comment just like any other member of the public. The new rules closely follow recent recommendations from the American Petroleum Institute.[31]

The first criteria pollutant to be reviewed under these new rules is lead, a powerful neurotoxin that accumulates in human and animal tissue. Even low levels of lead can cause osteoporosis, high blood pressure, heart disease, anemia, memory problems, and seizures in adults. Children

[28] Clean Air Science Advisory Committee (CASAC). 2006. Letter to EPA Administrator Stephen L. Johnson. September 29.
[29] Wilson, J. 2006. EPA panel advises agency chief to think again. *Los Angeles Times*, February 4.
[30] Peacock, M. 2006. Memorandum to Dr. George Gray, assistant EPA administrator, Office of Research and Development. Subject: Process for reviewing National Ambient Air Quality Standards. December 7. Online at http://www.epa.gov/ttn/naaqs/memo_process_for_reviewing_naaqs.pdf.
[31] Boxer, B., et al. 2006. Letter to EPA Administrator Stephen L. Johnson, December 21. Washington, DC.

are at the greatest risk: even low levels of lead can lower IQ levels and cause learning deficits.[32] Regulation of lead under the Clean Air Act has dramatically reduced levels in the air and people's blood—one of the crowning public health achievements of the past 30 years.

The severing of independent scientific assessment from the policy-making process was evident in the recent Advanced Notice of Proposed Rulemaking (ANPRM) for lead. Despite scientific consensus on the value of a strong lead standard, the ANPRM still sought input on policy options that would result in a weaker lead standard and even considers removing lead from the criteria pollutant list entirely—options that CASAC explicitly rejected.

CASAC members strongly criticized the ANPRM for lead at a December 2007 meeting. According to one member, "This comes across as an attempt to mystify the process so EPA can come up with whatever [standard] it wants." Another asserted that the process "questions the legitimacy of CASAC's mission." The advisory group plans to propose significant changes to the process by which the EPA sets the NAAQS.[33] On May 1, 2008 the EPA proposed to tighten the lead NAAQS from 1.5 micrograms of lead per cubic meter of air to a range of between 0.10 and 0.30 micrograms per cubic meter. The proposal drew both praise as well as criticism for considering options above the range proposed by CASAC and the EPA's staff scientists (from 0.02 to 0.2 micrograms per cubic meter).[34]

V. Solutions and Reforms

The results of our survey and interviews with EPA scientists show widespread problems at the agency. Hundreds of scientists report direct and indirect interference with their scientific work by political appointees at the EPA and the White House. Despite claims to the contrary from EPA leaders, scientists also report institutional barriers to freely communicating their findings through both the media and scientific publications. EPA scientists are not confident that environmental decision makers respect their expertise. And the agency's effectiveness needs to improve on several fronts.

Wide-ranging political interference in EPA science requires a suite of reforms in five major arenas: protecting EPA scientists, improving the agency's transparency, reforming its regulatory framework, strengthening its system of scientific advice, and depoliticizing funding, monitoring, and enforcement. These efforts to revitalize the EPA and allowing it to fulfill its mission of protecting human health and the environment will require strong leadership from Congress, the next president, and the next EPA administrator, joined by EPA scientists and the broader scientific community.

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[32] American Association of Pediatrics, Committee on Environmental Health. 2005. Lead exposure in children: Prevention, detection, and management. *Pediatrics* 116:1036–1046; Lanphear, B., et al. 2005. Low-level environmental lead exposure and children's intellectual function: An international pooled analysis. *Environmental Health Perspectives* 113(7):894–899.

[33] Inside EPA. 2007. Citing lead standard, CASAC will urge new NAAQS review process. December 27. Arlington, VA.

[34] Eilperin, J. 2008c. New EPA standards would cut amount of lead in the air. *Washington Post*, May 2. Online at http://www.washingtonpost.com/wp-dyn/content/article/2008/05/01/AR2008050103176.html.

Protecting EPA Scientists
To fulfill their profound responsibility to the public, EPA scientists need assurance that standing behind their scientific work will not open them to either official or unofficial retaliation. Congress is now considering several bills that would strengthen the federal whistle-blower system:

- Both houses of Congress have passed legislation that would enhance protections for whistle-blowers under the Whistleblower Protection Act of 1989, and members are now working to reconcile the two versions. The House version, HR 985, includes specific protections from retaliation for scientists, who expose efforts to distort or suppress federal research. The Senate bill, S. 274, unfortunately, lacks these protections for scientists. It is crucial that these protections are part of the final law now being negotiated by the Senate Homeland Security and Governmental Affairs and the House Oversight and Government Reform Committees.

- Members of the House and Senate have introduced bills to reauthorize the Office of Special Council and the Merit Systems Protection Board—federal entities that investigate claims of reprisal against federal whistleblowers and adjudicate whistleblower claims, respectively. Although the legislation includes many important reforms, the Senate has taken no action, and the House bill is still in committee.

- The House has recently passed legislation to grant greater autonomy to inspectors general (IGs), and immunity from coercion by the agencies they police. The Senate has reported such legislation out of committee. Both versions contain an important requirement that IG websites enable employees to anonymously report waste, fraud, and abuse. Government scientists could use this mechanism to confidentially challenge scientific misconduct. Both versions of such legislation also give IGs subpoena power.

Congress should pass the strongest-possible whistle-blower protections, and the president should sign them into law. The next EPA administrator should also work with the coalition of EPA unions to integrate the agency's Principles of Scientific Integrity (EPA 1999) into the official employee grievance procedure.

Making the EPA More Transparent
Some aspects of EPA decision making are open to public scrutiny, but many "predecisional" meetings and discussions are not. The integrity of EPA science is threatened in no small part by decisions made behind closed doors. Opening up these processes to congressional and public scrutiny is an important way to reveal and end abuses of science. The EPA should also better explain how it arrives at decisions that affect health and the environment.

The agency should institute a transparency policy for all meetings attended by non-EPA personnel. Such a policy need not be burdensome to EPA employees: outside participants could enter the required information directly into a database before any meeting, or within a specified time period after a meeting.

- This policy should require the EPA to post all meetings with outside entities on its website, including those with for-profit and not-for-profit organizations, and representatives of other agencies.

- The database should include the names and affiliations of attendees as well as the date, time, location, and subject of each meeting, with an exception granted for cases of national security.

Official EPA reports and documents in draft form are exempt from release under the Freedom of Information Act. Abuse of this exemption—wherein documents remain in draft form indefinitely—does occur.

- To prevent abuse of the "predecisional" exemption, the next EPA administrator should adopt procedures that allow the periodic release of documents that have remained in draft form for a given length of time.

The EPA should also publish a summary statement discussing the scientific basis for any significant policy, guidance, or regulation informed by science. This statement should be available in a timely fashion, and should include:

- The scientific rationale for a decision, and all scientific documents and data used to make it (including reasonable release of information from industry)

- A minority report voicing any significant dissenting scientific evidence or opinions

- An explanation of how the agency resolved such differences of opinion

- Identification by name of each official and employee who participated in the decision.

The Food and Drug Administration Amendments Act of 2007 already incorporates such transparency requirements, and the EPA could adapt them.

Reforming Media Policy

Both science and democracy thrive in an open environment. The EPA should clarify its policies on the interaction between scientists and the media, to ensure that the public has access to taxpayer-funded information that affects their health and safety, and to ensure that scientists and other employees can exercise their rights to free speech:

- Any EPA media policy must respect at least two fundamental rights: (1) scientists have the right to speak freely about any topic (including EPA policy) if they clarify that they are speaking as private citizens, not as agency representatives; and (2) scientists should have the right to review and correct any official document (such as a press release or report) that cites or references their scientific work, to ensure that accuracy has been maintained after the clearance and editing process.

- Congress or the EPA may need to impose narrow restrictions on these basic rights in certain instances, such as in cases under litigation. Officials should clearly define these situations.

- However, because the EPA is also a scientific agency, it should also exceed these basic rights by creating a public affairs system that actively disseminates agency research and codifies the positive rights of EPA scientists.

- The next EPA administrator should review the written policies of all offices and regions on the interaction between agency scientists and the media. Policies that do not explicitly protect scientists' fundamental right to freely communicate their scientific findings should be rewritten, and offices and regions without explicit policies should create them.

- The EPA should hold training sessions to clearly explain employees' rights in communicating their research to the media and the public, and the resources available to them to do so.

Reforming Publication Policy

Peer review is a pillar of the scientific method; political review is not. The EPA's process for clearing information for outside publication sometimes becomes a de facto policy review, and delays publication of controversial papers despite disclaimers that the views are personal.

- The next EPA administrator should review the agency's clearance policies, and work with the agency's offices and divisions to streamline excessive review.

- A disclaimer on a published paper that it is not official agency policy should exempt it from a full policy review.

- The clearance process should set reasonable yet strict time limits on how long the agency can delay publication of a paper. If officials do not reach a decision within that time frame, the paper should automatically proceed to publication with a written disclaimer. If officials deny clearance, they should provide a written explanation to the authors.

- The process for reviewing and clearing papers for outside publication must be transparent, and thus posted on the website of each EPA office and division.

Reforming the Regulatory Process

While the White House oversees federal agencies, it must strike a balance between administration priorities and agency independence. The EPA was created to implement and enforce the nation's environmental laws, and it has developed the expertise, experience, processes, and policies to fulfill those critical duties. The regulatory process should respect the agency's reservoir of scientific and technical knowledge. Congress should also consider ways to strengthen our nation's environmental regulatory system, to fortify the EPA's scientific mission and meet the pressing challenges of the twenty-first century.

Ensuring Agency Independence

The EPA is the nation's first line of defense against threats to public health and the environment. As such, the EPA should be empowered to take the lead on environmental concerns and to push back against interference in its science and decisions by the OMB and other federal agencies. To accomplish this:

- The next president should elevate the EPA to a cabinet-level agency, or establish a Department of the Environment.

- The next president should reverse executive order 13422, removing the power of presidential appointees unaccountable to Congress to commence rulemaking, and returning that power to the EPA and its administrator.

The OMB and its Office of Information and Regulatory Affairs play important roles in coordinating and overseeing the regulatory process. However, those roles should not include second-guessing or editing the science underlying EPA decisions:

- The next president should establish a regulatory process that respects the scientific and technical expertise of the EPA, and that excludes the OMB from interfering in EPA's scientific and technical determinations.

- The next president should repeal the OMB's one-size-fits-all directives on peer review and risk assessment. The EPA should have the flexibility to choose the form of peer review best suited to its needs.

- In particular, EPA experts should prepare risk assessments and the scientific component of regulatory impact assessments without interference from the OMB.

Enacting Legislative Reforms

The dozen or so environmental laws noted in Chapter 2 have led to dramatic improvements in public health and environmental quality. Yet the challenges the nation faces today are very different from those of 30 years ago. Congress should assess the adequacy of our current environmental regulatory structure, and consider reforms to close loopholes and strengthen the EPA's ability to address pressing threats to human health and the environment. (See CPR 2007 for possible recommendations.)

To support the quality of the EPA's scientific work, these reforms should focus on ensuring that the agency has the regulatory tools it needs to collect critical environmental data. Such tools could include stronger scientific testing requirements for pesticides and chemicals used in commerce, expanded TRI reporting requirements, and the authority to broaden environmental monitoring networks where necessary.

Congress should also consider new legislation that gives the EPA a framework to address emerging challenges such as climate change, nanotechnology, and endocrine-disrupting

chemicals. Environmental justice should be a guiding principle in these efforts, to ensure that the costs of pollution and the benefits of environmental protection are shared equitably among all parts of society.

Ensuring Robust Scientific Input to EPA Decision Making
The EPA should review and strengthen the ways it uses the scientific expertise of its staff and advisory committees, especially in cases where scientific input is critical or the law requires it. The agency should also tighten its conflict-of-interest restrictions.

Disclosing and Mitigating Conflicts of Interest

The next EPA administrator should work with employees, industry, and the scientific community to develop comprehensive conflict-of-interest policies for both staff and members of advisory committees:

- Government employees and members of advisory committees who are involved in regulation should disclose all conflicts of interest and special interests that might affect their ability to do their job in an unbiased manner.

- Individuals with a significant conflict of interest may still contribute to a project as invited experts, but the EPA should restrict them from decision-making authority or otherwise influencing policy outcomes.

Conflict-of-interest policies should also prohibit the revolving-door practice of appointing individuals from industry as senior EPA officials who regulate those industries:

- The next administration should provide clear guidelines for minimizing the appointment of senior officials with conflicts of interest. At a minimum, federal employees should be required to recuse themselves from decisions involving former employers (RDWG 2005).

Reforming Advisory Committees

The EPA should pursue reforms to make better use of its independent advisory committees. Specifically, the next EPA administrator should work with the Clean Air Scientific Advisory Committee to improve the process for setting the National Ambient Air Quality Standards, to ensure that decision makers have access to the "best available science."

Depoliticizing Funding, Monitoring, and Enforcement
These actions are essential to restore the scientific integrity of EPA decision making. But, in addition, problems with funding, monitoring and enforcement—which relate to EPA's scientific integrity—also need to be addressed by Congress and the next President to ensure that the EPA is the robust environmental agency that our country needs. In particular, Congress should provide the EPA with resources commensurate with its growing responsibilities and should work to ensure that selective internal budget cuts are not used to punish inconvenient programs or

offices. The next president should commit to strong and consistent enforcement of the nation's environmental laws.

VI. Concluding Thoughts

The EPA's scientific enterprise is our nation's first line of defense against threats to public health and the environment. These threats are growing more complex and global, with the potential to harm the nation's health and prosperity. Despite notable successes, air and water pollution remain serious public health problems. Each year brings new and untested chemicals into our homes, schools, and workplaces. Climate change alone is projected to have profound impacts on public health, agriculture, the economy, and even national security.

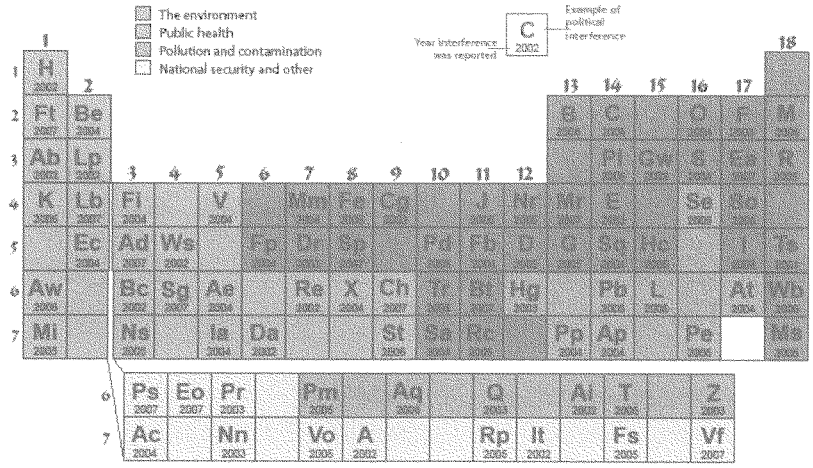
These problems are not insurmountable. The environmental and public health successes of the past several decades show that the country can rise to the challenge of environmental threats—but only if the EPA has the proper tools. Given the complexity of today's environmental challenges, a credible scientific knowledge base is essential to an effective response. To foster and sustain a healthy scientific enterprise, Congress and the next president should take concrete steps to protect EPA's scientists, make the agency more transparent, reform the regulatory process, strengthen the scientific advisory system, and depoliticize funding, monitoring, and enforcement.

Science is not the only element of effective policy making. However, because science enjoys widespread respect, appointed officials will always be tempted to manipulate or suppress scientific findings to support predetermined policies. Such manipulation is not only dishonest; it undermines the EPA's credibility and affects the health and safety of Americans.

The Bush administration's direct abuse of science—combined with systemic changes to the regulatory system that threaten the integrity of EPA science—highlight the need for strong action by the next president and Congress to restore scientific integrity to the agency's decision making. Only then can the EPA fully mobilize to serve the public good and ensure the nation's health.

A. The A to Z Guide to Political Interference in Science

In recent years, scientists who work for and advise the federal government have seen their work manipulated, suppressed, distorted, while agencies have systematically limited public and policy maker access to critical scientific information. To document this abuse, the Union of Concerned Scientists has created the A to Z Guide to Political Interference in Science. To read the full A to Z Guide visit http://www.ucsusa.org/AtoZ/.



From air pollution to Ground Zero, the *A to Z Guide* showcases dozens of examples of the misuse of science on issues like childhood lead poisoning, toxic mercury contamination, global warming, and endangered species. These 85 examples originate in 24 federal agencies and departments.

Timeline of abuses of science

April 2008	Integrity of EPA's toxics database threatened by interagency review
December 2007	All-terrain vehicle danger report
October 2007	NASA pilot survey
	Censoring climate change health hazards
August 2007	Mountain removal mining
July 2007	Surgeon general muzzled
	FEMA trailers
May 2007	Southwestern bald eagle
	Spotted owl
April 2007	Voter fraud
March 2007	Polar bear travel restrictions
February 2007	Lead testing of children's lunchboxes
January 2007	Executive Order 13422

December 2006	Lead national ambient air quality standards
October 2006	Prairie dogs
	Roundtail chub
	Tabernaemontana rotensis
August 2006	EPA closes its scientific libraries
	EPA ignores scientific studies on pesticides
July 2006	Education Department suppresses study on school vouchers
	NASA mission statement
June 2006	Changes in climate change websites
May 2006	STD Panel at CDC conference manipulated,
	Science disregarded for prescription drug Ketek
April 2006	National ambient air quality standards process changes
	Muzzled scientists at carbon conference
	Global warming news releases
	Minders on climate media interviews
February 2006	Navy downplays sonar impact on marine life
	Science suppressed on hurricane/global warming connection
	Bureau of Land Management suspends forest study funding
	EPA distorts evidence for tightening particulate matter standard
January 2006	NASA censors climate scientist James Hansen
November 2005	Economic analysis distorted for endangered red frog habitat
October 2005	EPA limits information about their release of toxic chemicals
August 2005	Department of Justice suppresses racial profiling study
July 2005	EPA report on fuel efficiency withheld
	Top FDA official overrules staff to approve nerve stimulator
June 2005	Bureau of Land Management altered a cattle grazing impact study
	Distortion and censorship of global warming documents
May 2005	Genetics eliminated from Endangered Species Act decisions
April 2005	World Health Organization approval of abortion pill block attempt
March 2005	New selenium pollution control standards misrepresent science
February 2005	First UCS surveys of federal agencies scientists released
December 2004	Endangered Species Act scientific documents altered for greater sage grouse
	Federally funded abstinence-only curriculum contains false science
November 2004	FDA ignores scientists' warnings on arthritis drug Vioxx
October 2004	EPA promotes flawed study on hydraulic fracturing, an oil drilling technique
September 2004	Endangered Species Act science ignored for the marbled murrelet
August 2004	Science obscured on health impacts of weedkiller Atrazine
	Forest Service exaggerates wildfire threat to spotted owl to promote logging
June 2004	Health Organization panel experts are vetted by Health and Human Services
May 2004	EPA uses bad science to create plywood plant pollution rule
	FDA appointees distort science to deny access to emergency contraception
	Research at the U.S. Fish and Wildlife Service is distorted
April 2004	EPA distorts guidelines for monitoring air pollution over national parks
	CDC researchers kept from international AIDS conference
	Fish and Wildlife Service distorted economic analysis of bull trout habitat
	NIH advisory board rejects scientists subjected to political litmus tests
March 2004	Science-based recommendations removed from an official report on salmon
	Scientists dismissed from President's Council on Bioethics
	Carbon sequestration pamphlet
February 2004	Arms Control Advisory Panel dismissed and never reappointed.
January 2004	Multiple agencies disregard science on mountaintop removal mining

December 2003	Office of Management and Budget adopts flawed peer review rule
	Administration officials manipulate Endangered Species Act science
August 2003	White House orders misleading of public on Manhattan air quality after 9/11
July 2003	National Nuclear Security Administration Panel dismissed
	EPA withheld an analysis of alternatives to President Bush's Clear Skies Act
June 2003	Administration officials undermined science behind climate change
March 2003	Forest Service overruled science-based old-growth forest management plan
February 2003	White House suppressed information on impact of mercury on public health
December 2002	Obscured scientific evaluation of abstinence-only education programs
	CDC ordered to change website about the effectiveness of condoms
	NIH Drug Abuse Advisory Panel subject to political litmus tests
	Abortion and breast cancer linked on National Cancer Institute website
	Microbiologist prohibited from publishing on airborne bacteria
November 2002	Workplace Safety Panel scientists rejected because of their beliefs
October 2002	Childhood lead poisoning panelists replaced by scientists with industry funding
	Underqualified doctor nominated to chair FDA reproductive health committee
September 2002	Administration disregarded scientific analysis of aluminum tubes in Iraq
	Engineer rejected from Army Science Board because of political contributions
May 2002	Manipulation of global warming science
August 2001	Fish and Wildlife Service misrepresented information on rare trumpeter swans

B. Selected Quotes from EPA Scientists Arranged by Topic

The following are selected quotes from EPA scientists who responded to a survey by the Union of Concerned Scientists. For more information about the survey, including the text of all essay responses, please visit http://www.ucsusa.org/EPAscience. The quotes are organized by topic.

When asked how to improve scientific integrity at the EPA, scientists said:

Political interference

There are still good scientists producing good science at USEPA. The main problem I see is an administration that considers science only if it supports its agenda. As in other areas, science is used only if it furthers preexisting policy; otherwise it is ignored, marginalized or suppressed (e.g. climate change).
-A scientist from the EPA regional offices

EPA needs dynamic, scientific leadership interested in the well being of the environment and public health. EPA should not be the political agency it has become, the right hand of industry and short economic gain.
-A scientist from the Office of Solid Waste and Emergency Response

Do not trust the Environmental Protection Agency to protect your environment. Ask questions. Be aware of political and economic motives. Become politically active. Elect officials with motives to protect the environment and hold them accountable.
-A scientist from the EPA regional offices

Political considerations should not trump environmental stewardship, and the EPA should not be forced to be silent on the environmental consequences of policy shifts.
-A scientist from the EPA regional offices

Do not allow other entities such as [the White House Office of Management and Budget] to interfere with, or suppress the publication of, EPA's scientific work products. Maintain an open peer review process.... Strengthen whistleblower protections for civil servants.
-A scientist from the EPA regional offices

EPA needs to be an independent agency and the amount of political interference needs to be curtailed.
-A scientist from the EPA regional offices

Keep political appointees from interfering in scientific decisions or publications. Do not allow political appointees to pressure authors to withdraw from publication or pressure their supervisors to carry out actions that inhibit publication.
-A scientist from the EPA regional offices

Funding and Staffing

MORE FUNDING! We do NOT have the resources to meet our mission. My division has seen its resources - in purchasing power- cut over 50% since 10 years ago.
-A scientist from the Office of Research and Development

EPA was created and began recruiting scientists in the 1970s; many have retired or will shortly do so. The inability to fill technical vacancies along with the loss of EPA libraries are bleeding down the EPA's technical knowledge base and our ability to provide or share the skills and knowledge that are critical to overall mission success.
-A scientist from the EPA regional offices

Increase the morale of the employees by providing incentives for growth. New hires, at least among scientists in my area are few and far between (no hires in almost 10 years) and the shrinking and aging employee population is more looking forward to retirement than providing ideas that work and will make a difference, because nobody seems to really listen.
-A scientist from the Office of Prevention, Pesticides, and Toxic Substances

External Interference

[The White House Office of Management and Budget] and the White House have, in some cases, compromised the integrity of EPA rules and policies; their influence, largely hidden from the public and driven by industry lobbying, has decreased the stringency of proposed regulations for non-scientific, political reasons. Because the real reasons can't be stated, the regulations contain a scientific rationale with little or no merit.
-A scientist from the EPA regional offices

Currently, [the White House Office of Management and Budget] is allowed to force or make changes as they want, and [EPA actions] are held hostage until this happens.
OMB's power needs to be checked as time after time they weaken rulemakings and policy decisions to favor industry.
-A scientist from the Office of Air and Radiation

External scientific advisory processes associated with risk assessment should not incorporate industrial perspectives. In other words, "risk management" should be recognized as a human values problem, and should be more explicitly separated from risk assessment.
-A scientist from the EPA regional offices

Openness

Remove the political screening step in science at the Agency. For example, we are not allowed to talk to the press when they call but must refer them to a person in the front office. Often this results in the press not getting the true facts but only those that don't make the Agency look bad.
- A scientist from the Office of Prevention, Pesticides and Toxic Substances

The premise should be that all documents (except enforcement related stuff) start out as public documents unless EPA has jumped through a lot of legal hoops to be able retain them.
-A scientist from the EPA regional offices

The science and risks and benefits need to be honestly and fairly considered. The decisions that are made should be justified and be transparent as to why a decision was made and the risks and benefits be clearly and honestly presented.
-A scientist from the Office of Prevention, Pesticides, and Toxic Substances

I perceive that there is a gag rule that prevents government employees from being allowed to tell the public what they have learned on the job, as well as their job-informed and educated opinions. This work, and knowledge gained during that work, is paid for by the taxpayers.
-A scientist from the Office of Air and Radiation

Scientific Review

Do not allow political appointees into the process of scientific review. Their job is to make management decisions, not influence the data and information before it is collected and presented.
-A scientist from the EPA regional offices

Improve the peer review process by not making it so cumbersome and by allowing those with real experience to participate.
-A scientist from the Office of Solid Waste and Emergency Response

One of the best current safeguards is review of Agency documents and policies by independent advisory boards including the Science Advisory Board, the Clean Air Scientific Advisory Committee, and the Board of Scientific Counselors. Much EPA work in human health risk assessment is now subjected to Inter-Agency Review by other Federal entities which appear to be more closely aligned with private interests than with the public health community.... Maybe more Congressional oversight would help the Executive Branch straighten its priorities.
-A scientist from the Office of Research and Development

Organizational Improvements

I have never seen morale at a lower point than we currently have in EPA. Good scientists are leaving because they can no longer put up with all the micro-management that is heaped on them in lieu of effective administrative leadership.
-A scientist from the Office of Research and Development

Reduce the power of [the White House Office of Management and Budget] over EPA scientific products. All communications between EPA and OMB during the development of Agency technical products and actions should be preserved for the public record.... In particular, implementation of OMB's risk assessment guidelines would be disastrous.
-A scientist from the Office of Air and Radiation

Make sure that there is no way that you can change the science to accommodate a political "need." Currently I think EPA's credibility is in the tank due almost entirely to trying to make the science fit a political need rather than openly admitting that both paradigms exist and then deal with the realities of both politics and science to make the decision.
-A scientist from the EPA regional offices

This is a young and small agency that has, since its inception, been under enormous pressures. The ability to protect the environment is often also bound by the laws that govern the agency. So, the best way to improve the scientific work at EPA is to ensure that appropriate governing laws are enacted so that with reasonable interpretation the goals of protecting the environment may be met.
-A scientist from the Office of Prevention, Pesticides, and Toxic Substances

EPA is by mandate a regulatory agency charged with protecting human health and the environment. To restore the integrity of scientific work at EPA, political appointees must be removed from all levels within the Agency. Those appointees influence ranges from subtle to direct manipulation of statutory/regulatory actions. Further, the influence of other agencies, particularly [the White House Office of Management and Budget] significantly affects the actions of specific individual program offices, which amounts to direct oversight of almost everything EPA does. These influences are not limited to manipulation of the results of basic scientific work, but from everything from how vigorously the Agency pursues oversight, weakening guidance and enforcement of statutes/regulations that are detrimental to human health and the environment.
-A scientist from the EPA regional offices

Respect for Science

My opinion of EPA has changed since being here. Specifically, I had believed EPA was more scientific in its approach. Now I realize that EPA has politically driven agendas that sometimes, not always, affects decisions of scientific nature.
-A scientist from the EPA regional offices

Science and technical information needs to be given more weight in decision-making rather than just seen as background information.
-A scientist from the EPA regional offices

Managers need to learn to trust the expertise of the technical staff.
- A scientist from the Office of Water

Take the politics out of science. Senior EPA leaders and White House officials over the past 6 years have used "junk" science along with biased opinions to make bad environmental decisions. EPA needs to be fully funded to perform its mission.
-A scientist from EPA headquarters

[The integrity of EPA science could best be improved] by allowing scientists with internationally acknowledged expertise to work and publish in their fields, instead of withholding support and restricting activity.
-A scientist from the Office of Air and Radiation

[The integrity of EPA science could best be improved] by staying true to the pollution laws that congress gives us (which means much more frequent revision to reflect the latest science), by leaving less discretion to the executive branch, and by giving the scientific advisory boards more weight to make decisions.
-A scientist from the EPA regional offices

Allow the science to drive policy rather than the other way around.
-A scientist from the Office of Research and Development

Other

Strong, independent oversight and protection of "whistleblowers" (real protection - not what is there now) could stem the most damaging practices.
-A scientist from the Office of Research and Development

As a user rather than producer of technical and scientific information, I find it very frustrating that I have to search out myself research findings and recommendations [of various advisory bodies] that directly affect the management of my programs. By the time the reports filter down to the staff program levels, they have either mutated beyond recognition during intervening manager reviews, or have simply been lost in the fog of the bureaucracy.
-A scientist from the EPA regional offices

1) Improve transparency in government by requiring comments from [the White House Office of Management and Budget] and other agencies on science documents to be made public
2) ensure science decisions on conclusions contained in EPA science documents are made by EPA career scientists
3) require political appointees to post summary of discussion (including any documents provided) and attendees when they meet with external stakeholders
4) encourage accountability in EPA political appointees through Congressional inquiry regarding basis for decisions and role of science versus political considerations in decision making
-A scientist from the Office of Research and Development

"[Restore] the Agency's public role as a faithful advocate for and protector of the environment, as opposed to publicly downplaying the need for action in so many instances. Such a stance would communicate from the top that we are all about scientific excellence because, at heart, we sincerely care about environmental protection."
-A scientist from the Office of Research & Development

C. Scientific Freedom and the Public Good

On February 14, 2008, a group of prominent scientists called on the U.S. government to establish conditions that would enable federal scientists to produce the scientific knowledge that is needed by a government dedicated to the public good.[35] *In an accompanying report,* Federal Science and the Public Good,[36] *UCS details specific steps that Congress and the administration can take to restore scientific integrity to federal policy making.*

Scientific knowledge and its successful applications have played a large role in making the United States of America a powerful nation and its citizens increasingly prosperous and healthy. The challenges that face the United States in the twenty-first century can only be met if this tradition is honored and sustained.

To that end, the U.S. government must adhere to high standards of scientific integrity in forming and implementing its policies. Breaches of this principle have damaged the public good and the international leadership of the United States. To meet its obligation to serve the public interest, the government must have reliable scientific work and advice at its disposal, and provide the public with reliable scientific information. This requires the government to provide federal scientists with the resources and the professional environment necessary to carry out their missions effectively and honestly. The government should also draw on the knowledge of federal scientists and of the larger scientific community to formulate public policy in an objective and transparent manner.

Scientists employed by government institutions commit themselves to serve the public good free from undisclosed conflicts of interest and to carry out science that is reliable and useful, while respecting statutory limitations such as national security laws. Therefore, government scientists should, without fear of reprisal or retaliation, have the freedom:

- to conduct their work without political or private-sector interference;
- to candidly communicate their findings to Congress, the public, and their scientific peers;
- to publish their work and to participate fully in the scientific community;
- to disclose misrepresentation, censorship, and other abuses of science; and
- to have their technical work evaluated by scientific peers.

We call on Congress and the executive branch to codify these freedoms, to establish stronger means for gathering scientific advice, and to take concrete steps to enhance transparency, so as to create conditions conducive to a thriving scientific enterprise that will serve our democracy with integrity and bring the full fruits of science to all Americans and to the world.

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[35] For more information and to see the names of the endorsers go to http://www.ucsusa.org/scientific_integrity/restoring/scientificfreedom.html.

[36] To read the text of the report go to http://www.ucsusa.org/scientific_integrity/restoring/federal-science.html.

D. Previous UCS Surveys of Federal Agency Scientists

Previous UCS surveys have given voice to over 1,800 scientists across the federal government. Full results for these surveys can be found at http://www.ucsusa.org/surveys/. The survey findings include the following:

U.S. Fish and Wildlife Service (FWS)
In February 2005, the Union of Concerned Scientists (UCS) and Public Employees for Environmental Responsibility (PEER) released the results from a 42-question survey distributed to 1,410 FWS biologists, ecologists, botanists and other science professionals working in Ecological Services field offices across the country. The survey was designed to obtain their perceptions of scientific integrity within the FWS, as well as political interference, resources and morale. 414 scientists returned completed surveys (29 percent), despite agency directives not to reply—even on personal time.

Notable results include:

- Nearly half of all respondents whose work is related to endangered species scientific findings (44%) reported that they "have been directed, for non-scientific reasons, to refrain from making jeopardy or other findings that are protective of species."
- One in five agency scientists revealed they have been instructed to compromise their scientific integrity—reporting that they have been "directed to inappropriately exclude or alter technical information from a FWS scientific document," such as a biological opinion.
- More than half of all respondents (56%) knew of cases where "commercial interests have inappropriately induced the reversal or withdrawal of scientific conclusions or decisions through political intervention."

National Oceanic and Atmospheric Administration (NOAA) Fisheries
In June 2005, UCS and PEER released the results from a 34-question survey distributed to 464 NOAA Fisheries biologists, ecologists, botanists and other science professionals working in headquarters and regional and field offices across the country. The survey was designed to obtain their perceptions of scientific integrity within the agency, as well as political interference, resources and morale. 124 scientists returned completed surveys (27 percent).

Notable results include:

- More than one third of respondents positioned to make such recommendations (37%) have "been directed, for non-scientific reasons, to refrain from making findings that are protective" of marine life.
- Nearly one in four (24%) of those conducting such work reported being "directed to inappropriately exclude or alter technical information from a NOAA Fisheries scientific document."
- More than half of all respondents (53%) knew of cases where "commercial interests have inappropriately induced the reversal or withdrawal of scientific conclusions or decisions through political intervention."

Food and Drug Administration (FDA)
In June 2006, UCS and PEER released the results of a 38-question survey distributed to 5,918 scientists at the FDA to obtain their perceptions about scientific integrity. 997 scientists filled out and returned the survey (17 percent).[37]

Notable results include:

- Almost one in five (18 percent) responded, "I have been asked, for non-scientific reasons, to inappropriately exclude or alter technical information or my conclusions in an FDA scientific document."
- Three in five (60 percent) knew of cases "where commercial interests have inappropriately induced or attempted to induce the reversal, withdrawal or modification of FDA determinations or actions."
- Approximately half of the respondents (51 percent) felt the "FDA is acting effectively to protect public health."

Federal Climate Scientists
In January 2007, UCS released the results of a 40-question survey distributed to 1,630 climate scientists at seven federal agencies (NASA, NOAA, EPA, USGS, USDA, DOE and DOD) and 119 climate scientists at the independent National Center for Atmospheric Research (NCAR). 279 federal scientists and 29 NCAR scientists filled out and returned the survey. The survey results were released as a joint report with the Government Accountability Project (GAP) entitled *Atmosphere of Pressure*.[38]

Notable results include:

- 150 scientists (58 percent) said they had personally experienced at least one incident of political interference in the past five years.
- Nearly half of all respondents (46 percent) perceived or personally experienced pressure to eliminate the words "climate change", "global warming" or other similar terms from a variety of communications.
- More than half of respondents (52 percent) said that their agencies always or frequently require public affairs officials to monitor scientists' communications with the media.

[37] For more information about the FDA survey go to http://www.ucsusa.org/scientific_integrity/interference/fda-scientists-survey-summary.html.
[38] To read the text of the report go to http://www.ucsusa.org/scientific_integrity/interference/atmosphere-of-pressure.html.

Ms. WATSON [presiding]. Thank you, Dr. Grifo.
Mr. Michael Goo.

STATEMENT OF MICHAEL GOO

Mr. GOO. Thank you, Chairman Waxman, and Ranking Member Davis and Mr. Issa for the opportunity for the opportunity to testify here regarding EPA's new National Ambient Air Quality Standards for Ozone.

My name is Michael Goo. I am the climate legislative director for the Natural Resources Defense Council. NRDC is a national nonprofit organization of scientists, lawyers, and environmental specialists dedicated to protecting public health and the environment.

Before I turn to my scripted statement, I just wanted to make a couple of points here about some of what we have heard today. And Mr. Johnson won't admit talking to the White House about the ozone decision, but we have the EPA talking points from the meeting with the President, and they say that the seasonal form is the most scientifically defensible, and they say that the seasonal form is the most legally defensible.

And the question that we have is, what caused the Administrator to change his mind, quite literally overnight, so that the EPA staff had to scramble around to change the document within 24 hours?

And then just to also respond to a point, a chart was put up. Administrator Dudley said that there would be no more attainment areas with the secondary standard set the same as a primary standard, but it is not just the form that regulates the stringency of the standard, it is also the level.

The CASAC—and I am not quite sure, Dr. Henderson didn't have the opportunity to comment on this—but the CASAC said that the level should be between 15 and 17, and the level was actually set at 21. Of course, therefore, it wasn't as much more protective than the primary standard.

Now let me turn to my prepared remarks. The first I just want to make with regard to ozone is that we now know that ozone kills people. We say that ozone results in excess or premature mortality. That is a fancy way of saying that smog kills people. Ozone pollution, also, so it is a host of other health effects—susceptibility to infection, asthma attacks, school absences, emergency room visits, and even overnight admission into the hospital—and these are real effects with real consequences for us, for our children, for our elderly, and our infirm.

The second point I wish to emphasize is that ozone pollution is ubiquitous. According to EPA, approximately 140 million Americans live in areas that violate the 1997 8-hour standard, including more than 16 million children, more than 6 million people age 75 and older, and more than 9 million people who suffer from asthma.

Putting these two facts together, it is clear that ozone is a major public health problem in the United States.

In my testimony, I have characterized the decision of the Administrator as a shameful distortion of the scientific and regulatory process for setting National Ambient Air Quality Standards. I say that from my vantage point as a former EPA attorney who spent more than 4 years developing and defending the standards set

forth in the Clinton administration, which were ultimately upheld by the U.S. Supreme Court.

Prior to this administration in an unbroken line of cases extending back nearly 40 years, these standards were repeatedly upheld by the courts, and since its creation in 1977, nearly every Administrator prior to this one has made decisions regarding the National Ambient Air Quality Standards within the scientific boundaries set by the Clean Air Scientific Advisory Committee.

This Administrator, despite very clear recommendations from CASAC, chose to disregard its advice. The Administrator had before him an enormous opportunity to advance the cause of public health protection in the United States. He had a voluminous scientific record documenting health effects at levels below the existing standard.

He had a unanimous recommendation from CASAC, and he has a very clear directive from the Congress and the courts that he must set the standard to protect public health with an adequate margin of safety, erring on the side of caution. In short, he had all the elements that he needed to set a highly defensible standard that would have protected public health with an adequate margin of safety, and it distresses me to report that the Administrator squandered that opportunity.

The record is clear. The Administrator's decision is not based on the latest scientific evidence; it is not based on the recommendations of CASAC; it does not protect public health; and it does not include a margin of safety.

Somebody tried to defend this decision as a reasonable policy decision or attempt to justify the decision on the basis of vague notions of uncertainty, but to say something is a policy judgment, or to say that a decision is based on uncertainty has little by way of actual rationale.

The question is, what is the policy, and in what direction does any alleged uncertainty cut? Is the policy to honor the latest scientific evidence and the recommendation of CASAC erring on the side of safety? I would submit that the record before us makes clear the answers to those questions.

In the end, these standards will be replaced by ones that reflect the science and the law, but in the meantime our citizens' lungs and their health will suffer as a result.

Chairman Waxman, I commend your efforts and the efforts of your staff to bring this deplorable situation into the light of day. Thank you.

[The prepared statement of Mr. Goo follows:]

Michael Goo

Climate Legislative Director, Climate Center

Natural Resources Defense Council

Testimony

Before the
Committee on Oversight and Government Reform
United States House of Representatives

Hearing on EPA's New Ozone Standards

May 20, 2008

Testimony of Michael Goo
Climate Legislative Director,
Natural Resources Defense Council
Before The Committee on Oversight and Government Reform
United States House of Representatives
Hearing On
EPA's New Ozone Standards

May 20, 2008

Chairman Waxman, and Ranking Member Davis, thank you for the opportunity to testify today regarding the EPA's new National Ambient Air Quality Standards for ozone. My name is Michael Goo. I am the Climate Legislative Director at the Natural Resources Defense Council (NRDC). NRDC is a national, nonprofit organization of scientists, lawyers and environmental specialists dedicated to protecting public health and the environment. Founded in 1970, NRDC has more than 1.2 million members and online activists nationwide, served from offices in New York, Washington, Los Angeles and San Francisco, Chicago and Bejing.

I am pleased to have the opportunity to address the Committee on the subject of the National Ambient Air Quality Standards. These standards are the cornerstone of the Clean Air Act and they are fundamental to public health and welfare protection in the United States. These standards tell us when the air safe to breathe. They tell us when public welfare is safe from the deleterious effects of air pollution. They set the level at which our most sensitive populations, including children and the elderly, are protected

"with an adequate margin of safety[1]." These standards are to be based on the "latest scientific knowledge[2]" and in setting these standards, EPA may not be guided by considerations of cost and feasibility[3]. Until recently, the process for developing these standards was regarded as the "gold standard" for rigorous, scientifically based federal decisionmaking, conducted free of political influence.

Although I am pleased to be here to testify regarding the success that these standards have represented over the duration of the Clean Air Act, I am not pleased to be here to tell you about EPA's latest actions with regard to the ozone standard, which amount to a shameful distortion of the scientific and regulatory process that has served the American public so well in the past. I am not pleased to be here to report that the Environmental Protection Agency, which is charged under the Clean Air Act with the duty of protecting the public from the ill effects of air pollution, has buckled under political pressure from the Office of Management and Budget and set a standard that will fail to meet the statutory requirements of the law and will not protect public health or welfare. I am not pleased to tell you that EPA Administrator Johnson chose to disregard the clearly outlined scientific advice of the Clean Air Scientific Advisory Committee (CASAC) which was created under section 109 of the Clean Air Act, and which is charged with providing a scientific recommendation regarding such standards.

Unfortunately, EPA's decision, by setting the bar incorrectly at the beginning of the clean air process, all but ensures that we will not reach the right result—clean, safe

[1] Clean Air Act section 109
[2] Clean Air Act section 108
[3] *Whitman v. American Trucking Associations*, 531 U.S. 457, 464-71 (2001)

air-- at the end of that process Although these standards will ultimately be revised to reflect the true state of scientific knowledge, in the meantime, the result will be that millions of Americans, even people in areas that eventually meet the new standard, will continue to breathe unhealthy air for years to come.

With regard to ozone pollution, the first point that bears emphasis is that we now know that ozone pollution can result in premature mortality. This is a fancy way of saying that smog kills people. During the last ozone NAAQS review in 1997, although there was some evidence regarding ozone mortality, that evidence was much more limited than today. There was, however, ample evidence that exposure to ozone leads to a "pyramid" of health effects ranging from increased asthma and respiratory symptoms to hospital admissions. (*See* Figure 1 below for a current version of EPA's "pyramid" of effects which now includes death at the top.) Those non-mortality effects alone were more than sufficient to justify revising the standard in 1997 and the Supreme Court of the United States agreed, unanimously upholding the standard in the case of *Whitman v. American Trucking Associations*, 531 U.S. 457 (2004)

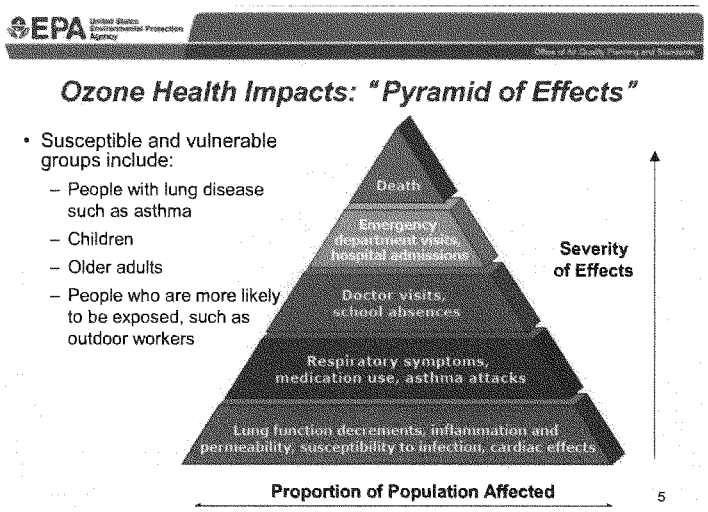

Figure 1. (EPA 2007)

Since the 1997 standard was promulgated a robust body of scientific evidence has been created showing that short term exposure to ozone pollution shortens peoples' lives. In fact, just last month, the National Academy of Sciences, National Research Council, concluded that "short term exposure to ambient ozone is likely to contribute to premature death" and that "human chamber and toxicological studies have yielded strong evidence that short term exposure to ambient ozone can exacerbate lung conditions, causing illness and hospitalization, and can potentially lead to death." The NAS also pointed out that: "available evidence on ozone exposure and exacerbation of heart conditions, which is less abundant, points to another concern." NAS/NRC: Estimating Mortality Risk Reduction and Economic Benefits from Controlling Ozone Air Pollution, April 22, 2008. So ozone can play a role in heart attacks.

The CASAC[4] also reached similar conclusions regarding ozone mortality nearly two years ago. In October of 2006, they indicated that: [A]dverse health effects due to low concentration exposure to ambient ozone (that is below the current primary 8-hour NAAQS) found in the broad range of epidemiologic and controlled exposure studies cited above include...an increase in mortality (non accidental cardio-respiratory deaths)" and that "retaining this [the current] standard would continue to put large numbers of Americans at risk for...mortality[5]." Thus, it is now scientifically well established that ozone is associated with premature death. This means that "judgments" about the public health implications of an ozone standard are in fact decision of the utmost seriousness, with genuine life or death consequences.

Having made clear that ozone kills people and causes other serious health effects, the second factual point I wish to emphasize regarding ozone is that it is ubiquitous. According to EPA, approximately 140 million Americans live in areas that violate the

[4] Although CASAC in 2006 and before found clear evidence for mortality from ozone pollution and relayed that conclusion to EPA, the Bush Administration chose a very different tack. As detailed in the attached testimony presented to the Senate Environment and Public Works Committee by my colleague, Ms. Vicki Patton of the Environmental Defense Fund, the Office of Management and Budget was actually working to delete references to ozone mortality in EPA rulemaking documents. The rulemakings in question related to standards to limit ozone pollution from gasoline powered lawnmowers, handheld garden engines and marine engines. In response to OMB objections to including information relating to mortality, EPA acquiesced and indicated to OMB that "we have removed all references to quantified ozone benefits (including mortality) in the most recent version of the ES." Thus, instead of working to incorporate the latest scientific knowledge into EPA rulemaking efforts, OMB was actually working to purge EPA rules of any mention of ozone mortality. Unfortunately, this level of OMB intrusion into the scientific basis for these rulemakings was but a harbinger of future interference with the scientific process, as I discuss later in my testimony.

[5] Letter from Dr. Rogene Henderson, Chair, Clean Air Scientific Advisory Committee to Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency, re Clean Air Scientific Advisory Committee's (CASAC) Peer Review of the Agency's 2nd Draft Ozone Staff Paper, EPA-CASAC-07-001, October 24, 2006.

1997 8-hour ozone standard[6]. Well over half the population, in the 10 most populous states, live in areas that exceed that standard. According to the American Lung Association, that number includes more than 16 million children and more than 6 million people age 75 and older. It includes more than 9 million people who suffer from asthma, 3.5 million people who suffer from chronic bronchitis and 1.3 million people who suffer from emphysema. These are the "sensitive populations" that EPA is charged with protecting under the Clean Air Act. EPA's decision not only leaves the populations breathing air that is unsafe, but it fails to provide them with any additional "margin of safety" a point made most clearly by the CASAC and numerous other commentors.

Having established that ozone exposure leads to a variety of health effects, including premature death, and that millions of Americans are exposed to these effects, I would like to turn to the statutory process for establishing National Ambient Air Quality Standards, a process which has worked, and worked well, for nearly 40 years to protect public health from air pollution.

The Clean Air Act provides a clear process for establishing the NAAQS. The first step in establishing a NAAQS involves identifying those pollutants "emissions of which, in [EPA's] judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare," and "the presence of which, in the ambient air, results from numerous or diverse mobile or stationary sources."[7] Once EPA identifies a pollutant, it must select a NAAQS that is based on air quality "criteria"

[6] U.S. EPA Green Book, 8 Hour Ozone Nonattainment Areas, (as of March 12, 2008).
[7] Clean Air Act section 108

reflecting "the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air[8]." Primary NAAQS must be set at a level "requisite to protect the public health" with "an adequate margin of safety[9]."

Thus, any standards that EPA promulgates under these provisions must: (1) protect public health and (2) provide an adequate margin of safety. Further, the statute makes clear that there are significant limitations on the discretion granted to EPA in selecting a level for the NAAQS. In exercising its judgment, EPA must (1) err on the side of protecting public health, (2) must base decisions on the latest scientific knowledge giving due deference to the recommendations of the Clean Air Science Advisory Committee, and (3) may not consider cost or feasibility in connection with establishing the NAAQS.

The United States Court of Appeals for the District of Columbia Circuit outlined the process succinctly as follows:

> "Based on these comprehensive [air quality] criteria and taking account of the'preventative' and 'precautionary' nature of the act, the Administrator must then decide what margin of safety will protect the public health from the pollutant's adverse effects – not just known adverse effects, but those of scientific uncertainty or that 'research has not yet uncovered.' Then, and without reference to cost or technological feasibility, the Administrator must promulgate national standards that limit emissions sufficiently to establish that margin of safety. "

American Lung Assn. v. EPA, 134 F.3d 388, 389 (D.C. Cir. 1998) (citations omitted);

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[8] Id.
[9] Clean Air Act section 109

This same process was described by Justice Scalia, writing for the unanimous Supreme Court in the *Whitman v. American Trucking Associations* case as follows: "The EPA, based on the information about health effects contained in the technical 'criteria' documents compiled under section 108(a)(2), is to identify the maximum airborne concentration of a pollutant that the public health can tolerate, decrease the concentration to provide an "adequate" margin of safety and set the standard at that level. *Whitman v. American Trucking Assn.*, 531 U.S. 457, 464- 71 (2001)[10] See also H.Rep. 294, 95th Cong., 1st Sess. 49-51 (1977) (explaining amendments designed *inter alia* "[t]o emphasize the preventive or precautionary nature of the act, i.e., to assure that regulatory action can effectively prevent harm before it occurs").

A key feature of the act is the requirement that NAAQS be based on the "latest scientific knowledge." To assist in ensuring that this is the case, the Act created the independent Clean Air Scientific Advisory Committee. The Act expressly requires EPA, in developing standards, to consider the advice of the statutorily-created CASAC and rationally explain any important departure from CASAC's recommendations[11].

In this case, the CASAC panel appointed to review the ozone standard consists of 23 distinguished scientists representing a broad range of disciplines and perspectives. This panel was comprised of the nation's leading experts in ozone air pollution science

[10] According to the Supreme Court: "Were it not for the hundreds of pages of briefing respondents have submitted on the issue, one would have thought it fairly clear that this text does not permit the EPA to consider costs in setting the standards." *Whitman v. American Trucking Assns.*, 531 U.S. 457, 465 (2001).

[11] Clean Air Act sections 109 and 307(d).

and health. The committee conducted a very thorough review of the adequacy of EPA's scientific assessments. The panel met at least six times over the course of the review and submitted detailed oral comments and seven sets of written comments totaling 500 pages on the review plan, the exposure and risk assessments and the draft and final Criteria Document and Staff Paper. It is remarkable for such a diverse group of scientists to agree upon anything, but in this case they achieved consensus on several key issues.

Most importantly, CASAC unanimously indicated that the primary standard needed to be revised and that the level should be set between 0.060 to 0.070 parts per million. The actual language of the CASAC panel leaves no room for doubt about their conclusions:

"There is no scientific justification for retaining the current primary 8-hr NAAQS of 0.08 parts per million (ppm[12]), and the primary 8-hr NAAQS needs to be substantially reduced to protect human health, particularly in sensitive populations."

"Additionally, we note that the understanding of the associated science has progressed to the point that there is no longer significant scientific uncertainty regarding the CASAC's conclusion that the current 8-hr primary NAAQS must be lowered."

"A large body of data clearly demonstrates adverse human health effects at the current level of the 8-hr primary ozone standard. Retaining this standard would continue to put large numbers of individuals at risk for respiratory effects and/or significant impact on quality of life including asthma exacerbations, emergency room visits, hospital admissions and mortality."

"...on the basis of the large amount of recent data evaluating adverse health effects at levels at or below the current NAAQS for ozone, it is the unanimous opinion of the CASAC that the current primary ozone NAAQS is not adequate to protect human health."

"Therefore, the CASAC unanimously recommends a range of 0.060 to 0.070 ppm for the primary ozone NAAQS."

[12] ppm=parts per million.

"Accordingly, the CASAC unanimously recommends that the current primary ozone NAAQS be revised and that the level that should be considered for the revised standard be from 0.060 to 0.070 ppm, with a range of concentration-based forms from the third- to the fifth-highest daily maximum 8-hr average concentration."

Letter from Dr. Rogene Henderson, Chair, Clean Air Scientific Advisory Committee to Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency, re Clean Air Scientific Advisory Committee's (CASAC) Peer Review of the Agency's 2nd Draft Ozone Staff Paper, EPA-CASAC-07-001, October 24, 2006.

CASAC is not just any public commenter. CASAC is not just any EPA advisory committee. CASAC is the Congressionally-chartered advisory committee specifically charged by the Clean Air Act with making recommendations to the Administrator on the revision of air quality standards. The CASAC committee reviews all the science during the NAAQS review process. Revisions of the standards must by law be based solely on the science. Unfortunately, and contrary to both the scientific evidence and the law, EPA chose to disregard CASAC's advice and to set a final ozone NAAQS at 0.075 parts per million.

As noted in Dr. Henderson's testimony, CASAC's response to the final rule that set the standard at 0.075 ppm, above the CASAC recommended range, was immediate and clear:

"[T]the members of the CASAC Ozone Review Panel do not endorse the new primary ozone standard as being sufficiently protective of public health."

"The CASAC — as the Agency's statutorily-established science advisory committee for advising you on the national ambient air quality standards — unanimously recommended decreasing the primary standard to within the range of 0.060–0.070 ppm."

"It is the Committee's consensus scientific opinion that your decision to set the primary ozone standard above this range fails to satisfy the explicit stipulations of the Clean Air Act

that you ensure an adequate margin of safety for all individuals, including sensitive populations."

Letter from Dr. Rogene Henderson, Chair, Clean Air Scientific Advisory Committee to Stephen L. Johnson,Administrator, U.S. Environmental Protection Agency, re Clean Air Scientific Advisory Committee's (CASAC) Recommendations Concerning Final Rule for National Ambient Air Quality Standards for Ozone: EPA CASAC 08-009. April 7, 2008.

Although many other commenters with substantial scientific expertise[13] agreed with CASAC regarding the need to set the primary ozone standard at between 0.060 ppm and 0.070 ppm, it should be apparent, based on the foregoing discussion, that the new ozone NAAQS does not fulfill the law's health protection mandates. EPA's standard was set outside the scientifically defensible range identified by CASAC, and therefore fails to protect public health. Moreover, EPA's standard fails to include any margin, much less an "adequate" margin, of safety, as required by the statute and by the precautionary principle elucidated in the statute and caselaw.

This is not the first time during this Administration that EPA has distorted the scientific process in favor of polluters and ignored clear language in the statute, only to have its position repudiated by the courts. In fact, at this point, there are too many such examples, ranging from EPA's rules on New Source Review, to its rules on toxic mercury pollution

[13] These commenters included EPA's own Children's Health Protection Advisory Committee, the American Academy of Pediatrics, the American Thoracic Society, the American Medical Association, and the American College of Chest Physicians, among others. A list of such public health commentors is attached to this testimony.

and its untenable legal position regarding greenhouse gas regulation. None of these rules or legal positions has survived judicial review. And EPA's final rule for the particulate matter NAAQS, although it has not yet been invalidated in court, is yet another unfortunate example of clear EPA disregard for the scientific evidence and process. The net effect of these unlawful and unsupported decisions is to delay implementation and compliance with the Clean Air Act, and to therefore expose our citizens to air that we know to be unhealthy, for years to come.

EPA and others have attempted to justify the EPA decision as a "policy judgment." In considering such a claim it is instructive to review the actual language of the statute which states that primary NAAQS "*shall be ambient air quality standards, the attainment and maintenance of which, in the judgment of the Administrator, based on such criteria, and allowing an adequate margin of safety, are requisite to protect the public health*[14]." The term "criteria" refers to the language of section 108, which states that: "*air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public welfare which may be expected from the presence of such pollutant in varying quantities*[15]."

Thus, while there is an element of "judgment" in the NAAQS decision, that judgment must be based on the "latest scientific knowledge" taking into consideration

[14] Clean Air Act section 109
[15] Id.

only questions of "public health" and questions of what constitutes an "adequate margin of safety."

The Administrator's decision in this regard fails to pass muster as a scientifically based "policy judgment" regarding public health. CASAC's language in this regard was unusually clear in indicating that the scientific evidence pointed to health effects occurring with the range of 0.060-0.070 ppm and they made clear that the existing standard was inadequate to protect public health. The basis for the decision recommending that the top of the range be set at 0.070 ppm was that numerous peer reviewed studies indicated health effects at 8 hour ozone levels well below 0.070 ppm. These studies include controlled human exposure studies showing adverse effects in healthy individuals at levels as low as 0.060 ppm, and numerous epidemiological studies showing morbidity and mortality effects at levels even below 0.060 ppm. Allowing the public to be exposed to these effects would not protect public health with an adequate margin of safety. Setting a standard, as EPA did, above this level and then calling it a "policy" judgment is little more than a way of covering over the "policy" decision to disregard the available scientific evidence.

A key example of EPA's flawed approach relates to EPA's rationale for setting the level of the standard. In setting the level of the standard at 0.075 ppm, EPA used information available from the exposure assessment relating to what it called "exposures of concern." EPA indicated that the "continuum" of exposures of concern ran from 0.060-0.080 ppm. However, in explaining its decision to set the level at 0.075 ppm, EPA

noted that it "primarily focused on exposures of concern at and above the 0.070 benchmark level as an important surrogate measure for potentially more serious health effects for at risk groups, including people with asthma. " 72 Fed. Reg. 16477 (March 27, 2008) . EPA went on to state that: "[a] standard within the 0.070-0.075 ppm range would thus substantially reduce exposures of concern by about 90 to 80 percent respectively, from those estimated to occur from just meeting the current standard." Id. EPA therefore concluded that: "a 0.070 ppm standard would be expected to provide protection from exposures of concern that the Administrator had primarily focused on for over 98% of all and asthmatic age school children." Id.

The circularity of this reasoning is characteristic of EPA's decisionmaking in this rulemaking. EPA itself decided to focus on exposures of concern between 0.070 ppm and 0.075 ppm. Not surprisingly then, and simply as a matter of logic and definition, a standard set in that range would eliminate most of those "exposures of concern." However, such a standard would not effectively address exposures of concern in the CASAC identified range of 0.060-0.070 ppm. Had EPA evaluated that information it would have been forced to contend with the fact that a standard between 0.070 ppm and 0.075 ppm leaves unprotected 39,000-78,000 children with asthma in the 12 cities under consideration[16]. EPA's reasoning here is little more than thinly disguised self-justification for its initial arbitrary decision to "primarily focus[] on exposures of concern at and above the 0.070 ppm benchmark level." Unfortunately this leaves thousands of children at risk for health effects and minimizes the import of epidemiological

[16] See Comments of the American Lung Association et al on the EPA's Proposed Revisions to the National Ambient Air Quality Standards for Ozone, (July 11, 2007 at 104-105.)

information showing health effects, such as emergency room visits and hospital admissions, which occur from exposures at levels below that benchmark[17]. It is this type of disregard for the scientific evidence that forced CASAC to conclude that EPA had not met its obligations under the Clean Air Act in setting the standard and thus that the standard "fails to satisfy the explicit stipulations of the Clean Air Act that ensure an adequate margin of safety for all individuals including sensitive populations[18]."

In fact, the record created by EPA and CASAC reveals very solid reasons for CASAC's conclusion that the standard must be set between 0.060 ppm and 0.070 ppm. Since 1996, two controlled human exposure studies have been conducted that evaluated the effect on lung function -- forced expiratory volume in one second (FEV_1) -- of various exposure regimes to concentrations of ozone of 0.08 ppm, 0.06 ppm and 0.04 ppm, for 6.6. hours[19]. In these studies, healthy human subjects are exposed in chambers to low levels of ozone. The fact that effects can be demonstrated in healthy human subjects at such exposure levels indicates that sensitive populations, such as people with asthma and other respiratory illnesses would be even more likely to experience such effects. However, it is not possible to test such sensitive populations consistent with medical ethics.

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[17] Id.

[18] Letter from Dr. Rogene Henderson, Chair, Clean Air Scientific Advisory Committee to Stephen L. Johnson,Administrator, U.S. Environmental Protection Agency, re Clean Air Scientific Advisory Committee's (CASAC) Recommendations Concerning Final Rule for National Ambient Air Quality Standards for Ozone: EPA CASAC 08-009. April 7, 2008.

[19] Adams WC. Comparison of chamber and face-mask 6.6 hour exposures to ozone on pulmonary function and symptoms responses. *Inhalation Toxicol* 2002; 14: 745-764.; Adams WC. Comparison of chamber 6.6 h exposures to 0.04-0.08 PPM ozone via square-wave and triangular profiles on pulmonary responses. *Inhalation Toxicol* 2006; 18: 127-136.

These studies by Adams were funded by the American Petroleum Institute and were intended to address the effect of various exposure regimes on lung function responses to ozone. These studies showed statistically significant effects at 0.06 ppm, which included decreases in FEV1 and pain upon deep inspiration. In response to criticisms from a consultant to the American Petroleum Institute, EPA has undertook a careful reanalysis of the underlying data in the Adams (2002, 2006) studies to assess the change in FEV_1 following exposure to 0.06 ppm ozone and filtered air. The reanalysis concluded that exposure to 0.06 ppm ozone causes a small, but statistically significant decrease in group mean FEV_1 responses compared to filtered air[20].

In addition, there are a number of epidemiological studies that show effects at levels of ozone below 0.060 ppm. It is noteworthy that five studies report positive, statistically significant relationships between 8-hour ozone concentrations and various adverse effects at 98th percentile concentrations below 0.060 ppm, seven additional studies (for a total of 12) report effects below 0.70 ppm. Furthermore, the Criteria Document and Staff Paper include discussion of numerous additional epidemiological studies that are positive, though not statistically significant, which add weight to the overall findings of effects that are evident at low concentrations[21].

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[20] U.S. EPA Memorandum from James S. Brown, EPA, NCEA-RTP Environmental Media Assessment Group, Thru Mary Ross, EPA, NCEA-RTP, EMAG Branch Chief and Ila Cote, EPA, NCEA-RTP, Director, To Ozone NAAQS Review Docket (OAR-2005-0172), The Effects of Ozone on Lung Function at 0.06 ppm in Healthy Adults, June 14, 2007.

[21] See Comments of the American Lung Association et al on the EPA's Proposed Revisions to the National Ambient Air Quality Standards for Ozone, (July 11, 2007 at 51-55.)

Finally, there were a number of epidemiological studies that demonstrated effects even after excluding observations above certain concentrations including some very low concentrations. This type of study provides compelling evidence of associations evident at low concentration and is very relevant to standard setting. Some of the studies can be summarized as follows:

- Brunekreef, 1994: Even after removing all observations with hourly ozone concentrations greater than 60 ppb, researchers found a decline in lung function and an increase in respiratory symptoms in this group of amateur cyclists.

- Brauer 1996: Even after excluding all days when the ozone was greater than 40 ppb, investigators still observed reduced lung function in a cohort of outdoor workers.

- Mortimer 2002: After excluding days when 8-hour average ozone was greater than 0.080 ppm, the associations with morning lung function decrements remained statistically significant.

- Bell, 2004: Estimates of premature mortality attributable to ozone changed little when days with 24-hour average concentrations greater than 0.06 ppm were excluded.

- Bell, 2006: There was little difference in the mortality effect estimate when days with 24-hour ozone concentrations above 0.02 ppm were excluded.

See Comments of the American Lung Association et al on the EPA's Proposed Revisions to the National Ambient Air Quality Standards for Ozone, (July 11, 2007 at 79-80 for a fuller discussion and citations.)

Despite the clear evidence of health effects at levels below 0.070 and even below 0.060, EPA claimed "uncertainty" as a basis for its decision, but the extensive record before the Agency and the unanimous CASAC findings refute that claim. And even if there were uncertainty, the Clean Air Act says that the Administrator must choose a more, not less, stringent standard in the face of uncertainty, to ensure a margin of safety. If uncertainty

is really the reason for disregarding CASAC's advice, then the Administrator should have set an even more stringent standard, not only to protect public health but also to provide a margin of safety against that uncertainty. In this case, however, EPA chose to err not in setting a margin of safety, but by ignoring a clear margin of danger.

My testimony up to this point has focused on the primary standard which is focused on public health. Unfortunately, it is also necessary to address EPA's setting of the secondary standard, a process which reveals even more clearly the stamp of Administration "policy" unfettered from the constraints of the statute.

Under the Clean Air Act, EPA is also required to set a secondary standard for pollutants that are listed under section 108. That standard is to be one that is "requisite to protect the public welfare from any known or adverse effects associated with the presence of such air pollutant in the ambient air." CAA section 109. "Welfare" effects are broadly defined under section 302(h) of the Clean Air Act to include "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility and climate, damage to and deterioration of property and hazards to transportation as well as effects on economic values and personal comfort and well being, whether caused by transformation, conversion or combination with other air pollutants." CAA 302(h).

The record in this case reveals quite clearly that the secondary standard was set at the same level as the primary standard due to last minute interference by the Office of Management and Budget. In fact, with regard to the secondary standard, EPA Deputy

Administrator Marcus Peacock explicitly disagreed with the Office of Management and Budget regarding the decision to set the standard at the same level as the primary standard[22]. Unfortunately, as with the decision regarding the primary standard to protect polluters over people, the Administration also chose to protect polluters over plants and sensitive ecosystems.

Because plants react differently than people to ozone, CASAC unanimously recommended that: "protection of managed agricultural crops and natural terrestrial ecosystems requires a secondary ozone NAAQS that is substantially different from the primary ozone standard in averaging time, level and form[23]." CASAC recommended the "sigmoidally weighted W126 index accumulated over at least the 12 " daylight hours and over at least the three maximum ozone months of the summer season[24]." EPA staff agreed and indicated that: "it is not appropriate to continue to use an 8-hr averaging time for the secondary O_3 standard" and that the "8-hr average form should be replaced with a cumulative seasonal, concentration weighted form."[25]

Despite the clear need for a different secondary standard for ozone, on March 6, 2008, Office of Management and Budget Administrator Susan Dudley, wrote to EPA Administrator Johnson to indicate that "the draft rule "does not contain a reasoned basis for concluding that a secondary standard set separate from the primary standard is

[22] Memorandum from EPA Deputy Administrator Marcus Peacock to Administrator Susan Dudley, Office of Information and Regulatory Affairs, Office of Management and Budget (Mar. 7, 2008).
[23] Letter from Dr. Rogene Henderson, Chair of the Clean Air Scientific Advisory Committee, to EPA Administrator Stephen L. Johnson (Mar. 26, 2007).

[24] Id.
[25] Environmental Protection Agency, *Review of the National Ambient Air Quality Standards for Ozone: Policy Assessment of Scientific and Technical Information* (July 2007)(EPA-452/R-07-007a).

"requisite to protect public welfare[26]." In her letter to Administrator Johnson, Ms. Dudley concluded that: "Adopting a W126 standard would also deviate from EPA's past practice which has been to set a secondary ozone NAAQS equal to the primary ozone NAAQS[27]." Ms. Dudley also indicated that: "EPA has not yet considered or evaluated the effects of adopting aW126 standard on economic values, personal comfort and well being, as specifically enumerated in the Act.[28]"

The very next day, EPA Deputy Administrator Peacock wrote back and noted that with regard to evaluating effects on personal comfort and well being, "EPA is not aware of any information indicating beneficial effects of ozone on public welfare and we are not aware of any information that ozone has beneficial effects on personal comfort or well being. All the information in the record seems to indicate otherwise[29]." Mr. Peacock went on to state that "the legal status of a secondary standard differs from that of a primary standard. By definition, the primary standard and the secondary standard are separate legal actions based on separate criteria[30]." Mr. Peacock went on to note that EPA has in the past set secondary standards that are different than the primary standard. Finally, he noted that: "ozone related effects on vegetation are clearly linked to cumulative, seasonal exposures and are not appropriately characterized by the use of a short-term (8 hour) daily measure of ozone exposure[31]."

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[26] Memorandum from Administrator Susan Dudley, Office of Information and Regulatory Affairs, Office of Management and Budget, to EPA Administrator Stephen L. Johnson (Mar. 6, 2008).
[27] Id.
[28] Id
[29] Memorandum from EPA Deputy Administrator Marcus Peacock to Administrator Susan Dudley, Office of Information and Regulatory Affairs, Office of Management and Budget (Mar. 7, 2008).
[30] Id.
[31] Id.

On March 11, 2008, EPA staff drafted confidential and privileged talking points for a meeting between EPA and the President. These talking points stated that: "[t]he seasonal form is the most scientifically defensible. Ozone decreases the ability of plants to produce and store food. The impact of repeated ozone exposure accumulates over the course of the growing season...new evidence includes a broader array of vegetative effects and a diverse set of research studies looking at the effects of ozone in the real world." The talking points also indicate that the seasonal form "is the most legally defensible" and that "EPA has extensive record support for a seasonal form and lacks scientific support for an 8 hour form."

On March 13, 2008, Ms. Dudley wrote back to indicate that: "The President has concluded that, consistent with Administration policy, added protection should be afforded to public welfare by strengthening the secondary ozone standard and setting it to be identical to the new primary standard[32]."

The story of the behind the scenes maneuvering that, incredibly, resulted in President Bush himself deciding that the secondary ozone standard should match the primary standard, was detailed in an article in the Washington Post: "Ozone Rules Weakened at Bush's Behest." Washington Post, Friday March 14 , p. A14. The struggle between EPA, OMB and the President, and the last minute intervention by U.S. Solicitor General

[32] Letter from Administrator Susan Dudley, Office of Information and Regulatory Affairs, Office of Management and Budget, to EPA Administrator Stephen L. Johnson (Mar. 13, 2008).

Paul Clement, who warned that such a decision "contradicted past submissions to the Supreme Court[33] has been well documented in a number of sources.[34]

The final day scramble to ensure that the secondary standard would be the same as the primary standard is perhaps, to date, one of the most egregious example of a NAAQS standard setting process completely unmoored from its statutory tethers. The science shows that plants need to be protected on a cumulative, seasonal basis and not just on a short-term ambient basis. The fact that plants and human lungs respond differently to ozone, and require different standards, is hardly counterintuitive, novel or difficult to accept[35]. What this decision reveals is a clear Administration "policy" to disregard the scientific evidence and to disregard the well established dictates of the law at the expense of clean air. In the meantime, our children and our elderly, our plants and forests and crops, will all continue to be exposed to levels of ozone that cause health effects, including premature death, and that damage our ecosystems.

Thank you for the opportunity to testify before the Committee. That concludes my written testimony and I would be happy to answer any questions that you may have.

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[33] Washington Post, Friday March 14 , p. A14

[34] See John Walke, "Science Decider in Chief" http://switchboard.nrdc.org/blogs/jwalke/science_decider_in_chief.html

[35] As one member of CASAC put it long ago, "[t]he injurious effects of ozone and other oxidants on plants and ecosystems are CUMULATIVE in their effects rather than acute or chronic in their effects as is found for most health effects of ozone on people…many plant pathologists, plant physiologists and ecologists like me are prone to assert, somewhat facetiously, that: "plants do not worry about a bad Tuesday, but they do worry about a bad ozone season. " Statement of Ellis B. Cowling, University Distinguished Professor at Large and Professor of Plant Pathology and Forest Resources, North Carolina State University, to the Clean Air Scientific Advisory Committee, March 21, 1996.

APPENDIX A:

Testimony of Vickie Patton
Deputy General Counsel
Environmental Defense

Before the
United States Senate
Subcommittee on Clean Air and Nuclear Safety

Review of EPA's Proposed Revision to the Ozone NAAQS

July 11, 2007

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July 11, 2007

Thank you very much, Mr. Chairman and members of the subcommittee, for the opportunity to testify about the U.S. Environmental Protection Agency's proposed revisions to the nation's health-based ambient air quality standard for ground-level ozone.

My name is Vickie Patton. I am the Deputy General Counsel at Environmental Defense, a national non-partisan science-based environmental organization, where I manage national and regional air quality programs. I previously served as an attorney in the U.S. Environmental Protection Agency's Office of General Counsel under the George H.W. Bush and William Clinton administrations where I worked on a variety of Clean Air Act matters.

BIPARTISAN SUPPORT, EXTRAORDINARY ACHIEVEMENTS

The Clean Air Act is one of the nation's single most effective environmental statutes. Since its adoption in 1970, it has been a triumph of bipartisanship and healthier air.

Senator John Sherman Cooper, a Republican from Kentucky, captured the spirit of bipartisan cooperation that led to the United States Senate's historic – and unanimous – adoption of the Clean Air Act in 1970:

> We worked together. We disagreed. We worried about many provisions of the bill. At last, however, we joined unanimously in recommending and sponsoring this bill, believing that our approach was one that could make progress toward the solution of the problem of air pollution.

Senator Cooper was wise in his predictions.

The unanimous will of the United States Senate has secured healthier air for millions of Americans. The 1970 Clean Air Act embodies the great promise of the American system of law-making in practice. People of good will translated studious research and bold aspirations to writing, and changed history forever.

Through its judicious words, the 1970 Senate saved numerous lives and prevented countless illnesses. The bipartisan founders of the Clean Air Act enabled millions of children to realize

their potential unencumbered by neurotoxic lead pollution, and for children across the land to share their precious childhood dreams with grandparents whose lives have been prolonged by reductions in air pollution.

THE CLEAN AIR ACT'S TWO-STEP PROCESS

Congress in 1970 established an effective process in the fight against air pollution. Congress commanded that the national ambient air quality standards be based on public health considerations alone. Then, economics are thoroughly considered in devising the air pollution control strategies to achieve the health standards. So the law is sharply focused in ensuring the nation's health-standards are established solely on the basis of public health, and this same law is broadly encompassing in considering economics when federal, state and local officials determine how to cost-effectively achieve the health standards.

PUBLIC HEALTH

Some in industry have long protested this carefully calibrated dual system. Some have argued that this two-step inquiry should be conflated rather than distinct, that the nation's health standards should be based on economics and then economics should likewise infuse the policies to achieve the standards. This argument has been thoroughly presented – and resoundingly rejected – over the past 37 years.

This question was answered by a unanimous Senate in 1970. The language crafted by Congress in 1970 is straight forward; its meaning is plain. The Administrator is instructed to establish standards that "are requisite to protect the public health" with "an adequate margin of safety."[1] The statute thus provides for the health-based standards to be based exclusively on public health and to be precautionary in safeguarding against adverse health effects.

This question has also been consistently answered by the decisions of prior EPA Administrators and numerous judicial decisions of the federal court of appeals in Washington, D.C.[2]

Ultimately, this question was emphatically answered by a unanimous Supreme Court. Justice Antonin Scalia, writing for the high Court, explained that the text of the Clean Air Act is clear notwithstanding the copious arguments of industry lawyers: "Were it not for the hundreds of pages of briefing respondents have submitted on the issue, one would have thought it fairly clear that this text does not permit the EPA to consider costs in setting the standards."[3]

Justice Scalia then set forth the inquiry the Administrator must make in establishing the nation's health-based air quality standards on the basis of science:

> The EPA, 'based on' the information about health effects contained in the technical 'criteria' documents compiled under §108(a)(2), 42 U.S.C. §7408(a)(2), is to identify the maximum airborne concentration of a pollutant that the public health can tolerate, decrease the concentration to provide an 'adequate' margin of safety, and set the standard at that level. Nowhere are the costs of achieving such a standard made part of that initial calculation.[4]

Accordingly, in setting the health-based air quality standard for ozone, Administrator Johnson must be steadfast–and unwavering–in basing his decision exclusively on what is requisite to protect the public health with an adequate margin of safety.

ECONOMICS

After the standards are established, the Clean Air Act provides a prominent role for consideration of costs in national, state and local decisions about the pollution control strategies deployed to achieve the health standards. EPA is not only empowered to consider costs in setting emission limits for cars, SUVs, trucks, buses, construction equipment, lawnmowers, aircraft, fuels, power plants, and industrial facilities but it is expressly *required* by law to do so.[5]

States and local governments, in turn, are distinctly responsible for designing the air quality management plans for their communities and entrusted with determining how the clean up burden is allocated. Justice Scalia succinctly explained that "[i]t is to the States that the Act assigns initial and primary responsibility for deciding what emissions reductions will be required from which sources."[6]

THE RESULTS

In practice, the two-step process forged in 1970 has been integral to the enduring success of the Clean Air Act. By any measure, the achievements under the national ambient air quality standards have been profound.

Emissions Reductions and Economic Growth

Under this two-step process, America has dramatically reduced the emissions that contribute to the national ambient air quality standards while the economy has grown.

- Lead emissions have been slashed some 98 percent since 1970.
- Volatile organic compounds, which form ground-level ozone and are often comprised of toxic contaminants, have been reduced by over 50 percent since 1970.
- Sulfur dioxide, which transforms into deleterious particulate pollution, has also been cut in half since 1970.
- Nitrogen oxides, which are implicated in the formation of ground-level ozone and particulate pollution, have been lowered nearly one quarter since 1970.

During the period that these remarkable emissions reductions have occurred, gross domestic product has risen some 174 percent.[7]

Summary of pollution levels and economic growth since 1970 Clean Air Act

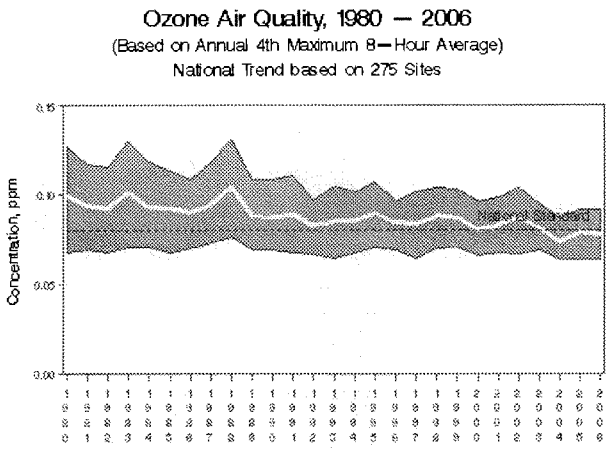
Indicator	Pollution cuts since 1970	Percent change
Oxides of nitrogen (NO$_x$)	6.4 million tons annually	23.8% decrease
Volatile organic compounds (VOC)	18.3 million tons annually	54.3% decrease
Particulate matter (PM)	9.1 million tons annually	74.6% decrease
Sulfur dioxide (SO$_2$)	15.4 million tons annually	69.4% decrease
Lead	0.22 million tons annually	98.5% decrease
Carbon monoxide (CO)	104 million tons annually	52.5% decrease
Gross Domestic Product		174% increase

Restoring Healthy Air in Communities and Neighborhoods

Similarly, communities with pollution concentrations above the national ambient air quality standards have reduced pollution, saved lives, prevented respiratory diseases and made enormous strides in restoring healthy air.

- Carbon Monoxide. In 1971, when the carbon monoxide health standards were established, 53 out of 58 air quality monitors recorded violations. In 2000, only four monitors in the country exceeded the standards.[8] EPA estimates that the average ambient carbon monoxide concentration in 2001 was 62 percent lower than it was in 1982. The 2001 carbon monoxide levels were the lowest recorded in 20 years.[9] Reductions in carbon monoxide pollution have yielded dramatic returns for health and quality of life by preventing thousands of deaths. The Centers for Disease Control and Prevention estimate that approximately 11,700 deaths from accidental, acute exposures to carbon monoxide were avoided between 1968 and 1998 as a result of the strict vehicle emissions standards for carbon monoxide.[10]

- Ozone. In 2004, EPA identified some 126 communities across the nation with air pollution concentrations above the ozone health standard adopted in 1997. Today, based on preliminary air quality data, EPA estimates that all but 35 of those areas have ozone concentrations that meet that health standard. Since 1980, peak ozone concentrations monitored at some 275 sites across the country have declined by more than 20 percent.[11] These pollution reductions have prevented hospital admissions and school absences for respiratory illnesses, and have saved lives.



Health Benefits and Costs

The health benefits secured – each year – due in predominant measure to the national ambient air quality standards under the Clean Air Act are extensive.

- In the late 1970s, nearly every child in America—88.2 percent—had blood lead levels higher than the level of concern established by the Centers for Disease Control and Prevention. By 2000, after the full phase-out of leaded gasoline, 2.2 percent of American children had blood lead levels exceeding the level of concern.[12]

- Each year, the Clean Air Act prevents well over 200,000 premature deaths, more than 650,000 cases of chronic bronchitis, over 200,000 hospital admissions, more than 200 million respiratory ailments, and over 22 million lost work days.[13]

- The monetary benefits to society have outweighed the costs by a factor of more than 40:1.[14]

Technological and Economic Innovation

Technological innovation has made these far-reaching gains in reducing air pollution and protecting public health possible at far less cost than originally anticipated.

- Carbon monoxide is caused by incomplete combustion of gasoline in passenger cars and trucks. Pollution levels were reduced through improved catalytic converters, fuel injection systems and oxygenated fuels.

- In the 1970s, the automakers warned of grave economic consequences if they were required to place catalytic converters in new cars. Today, every car manufactured is equipped with a catalytic control device to reduce tailpipe emissions.

- In 2002, DuPont developed paints and industrial coatings for Daimler Chrysler's coating operation, such as the "Super High Solid" clear coat, that emit few, if any, ozone-forming volatile organic compounds.

- Selective catalytic reduction technologies, deemed infeasible in the early 1990s, are now broadly achieving 90 percent NOx removal from existing coal plants in the East thereby lowering ozone and particulate pollution.

- Diesel desulfurization and fluid catalyst cracking technologies have enabled ultra low sulfur diesel fuels and dramatically reduced emissions of particulates, NOx and sulfur dioxide.

- Scrubber technology to remove sulfur dioxide from power plant stack gases is now deployed at a fraction of the costs predicted during the debate over the 1990 Clean Air Act amendments, and wet scrubbers can now achieve 98 percent sulfur dioxide control.

- In 2001, EPA established rigorous particulate pollution emission standards for new diesel trucks and buses, based on the use of catalyzed diesel particulate filters, after a public rulemaking process in which engine manufactures questioned the timing and stringency. Today, new diesel truck and bus engines rolling off the assembly line have dramatically lower particulate pollution.

- In 1994, automobile manufacturers estimated the cost of advanced low emission vehicles would be in excess of $1,500.[15] One year later, Honda placed a Civic subcompact model on the market that emitted less than half of what was permitted under California law, at a cost of $100.[16]

EPA estimates that the suite of innovative technologies, processes and products that have been developed to meet the nation's air quality standards and other Clean Air Act programs have not only delivered extraordinary results but that the nation's pollution control industry has thrived, generating over $200 billion in revenues and supporting more than 3 million jobs.[17]

Telling the Public Whether the Air is Safe to Breathe

The two-step system of air quality management adopted in 1970 ensures that the nation's health standards will be based, exclusively, on health science. This system of air quality management puts the nation's very best scientists at the forefront while provisionally relegating the economists, lobbyists and lawyers to the backburner. Most importantly, however, this system of

air quality management provides American families with a transparent and unmitigated science-grounded benchmark for determining whether the air in their neighborhood or community is safe to breathe. And it leaves ample room for the economists and the lawyers and the lobbyists to argue subsequently, in a variety of forums, to what extent society should invest in restoring healthy air.

In sum, the Clean Air Act has been vigorously tested over the past 37 years and it has delivered robust results. Central to its success is the two-part inquiry in which the consideration of costs is not commingled with the establishment of the national ambient air quality standards on the basis of public health. As Justice Scalia explained for a unanimous Supreme Court, conflating costs with public health in setting the standards may altogether eliminate protection against adverse health effects: the consideration of costs "is *both* so indirectly related to public health *and* so full of potential for canceling the conclusions drawn from direct health effects."[18]

EPA'S PROPOSED OZONE DECISION

The Administrator, in making his final decision on the ozone NAAQS due March 12, 2008, must establish standards that "are requisite to protect the public health" with "an adequate margin of safety."[19] There are, however, grounds for concern about the direction EPA's final decision will tack notwithstanding this plain statutory mandate and the nation's time tested air quality management system.

Retaining the Current Health Standard is Not Supported by Science and Would Continue to Put Large Numbers of Individuals at Risk

The EPA Clean Air Scientific Advisory Committee unanimously and unambiguously advised EPA Administrator Stephen Johnson: "(1) There is no scientific justification for retaining the current primary 8-hr NAAQS of 0.08 parts per million (ppm), and (2) The primary 8-hr NAAQS needs to be substantially reduced to protect human health, particularly in sensitive subpopulations."[20] The Committee also unanimously agreed upon a recommended range: "Therefore, *the CASAC unanimously recommends a range of 0.060 to 0.070 ppm for the primary ozone NAAQS*."[21] These recommendations leave no room for misinterpretation.

But EPA has nevertheless expressly held open the prospect of retaining the current health standard for ozone unchanged, and EPA explicitly seeks public comment on such an outcome. The CASAC squarely addressed this matter and pointedly found that "*there is no longer significant scientific uncertainty regarding CASAC's conclusion that the current 8-hr primary NAAQS must be lowered*" and "[r]etaining this standard would continue to put large numbers of individuals at risk" –

> *[T]here is no longer significant scientific uncertainty regarding the CASAC's conclusion that*
> *the current 8-hr primary NAAQS must be lowered.* A large body of data clearly demonstrates adverse human health effects at the current level of the 8-hr primary ozone standard. Retaining this standard would continue to put large numbers of individuals at

risk for respiratory effects and/or significant impact on quality of life including asthma exacerbations, emergency room visits, hospital admissions and mortality.[22]

In sum, CASAC unequivocally found that there is no basis in public health considerations for EPA to retain the current standard. EPA nevertheless persists in considering this flawed option.

OMB Instructed EPA to Delete References to Ozone Mortality Benefits in Important Recent Rulemakings Under the Clean Air Act

The scientific evidence of mortality benefits is one of the significant scientific developments since EPA's 1997 decision to lower the ozone health standard. The CASAC expressly pointed to the studies on ozone mortality effects as part of the body of evidence documenting adverse health effects below the current health standard. The CASAC found:

- "Several new single-city studies and large multi-city studies designed specifically to examine the effects of ozone and other pollutants on both morbidity and mortality have provided more evidence for adverse health effects at concentrations lower than the current standard."[23]

- "[A]dverse health effects due to low-concentration exposure to ambient ozone (that is, below the current primary 8-hour NAAQS) found in the broad range of epidemiologic and controlled exposure studies cited above include . . . an increase in mortality (non-accidental, cardiorespiratory deaths) reported at exposure levels well below the current standard."[24]

- "Retaining this [the current] standard would continue to put large numbers of individuals at risk for . . . mortality."[25]

CASAC's series of statements in its October 24, 2006 correspondence to the Administrator placed CASAC's full force, unanimously, on the evidence of mortality and other health effects in compelling EPA to adopt a lower standard to protect public health with an adequate margin of safety. But, only a few moths thereafter, OMB was moving in the opposite direction, instructing EPA staff to remove ozone mortality benefits from major rulemaking initiatives involving reductions in ozone-forming pollution.

Appendix A attached contains three emails between EPA staff and OMB in the context of a draft rulemaking proposal to lower ozone-forming pollutants and other contaminants from diesel locomotives and commercial ships.[26] The first email, dated January 17, 2007, from EPA staff to Mr. David Rostker at OMB, transmits the discussion of ozone mortality that EPA "plan[s] to include in the RIA for the proposed Locomotive and Marine Engine Rule."[27] The EPA staff member further explains that "[m]any Agency staff have contributed to this version, including representatives from OAQPS, OPEI, ORD, and OPAR."[28] On February 22, 2007, EPA staff sends a follow up note to Mr. Rostker at OMB describing the current status of discussions with OMB: "As best we know, the only open issues/comments are ozone mortality and your question about idle reduction."[29] The very next day, EPA staff sends an email to Mr. Rostker, of OMB,

now reporting that the discussion of ozone mortality benefits will be removed from the both the preamble to the rule and the draft Regulatory Impact Analysis: "The text below was written to address the fact that we aren't including ozone benefits (mortality or otherwise) in our analysis. The same paragraph will be included in both the preamble and the RIA. For now, however, I'm pasting it below for your review."[30] The implication is clear. OMB rejected EPA's language analyzing the ozone mortality benefits as part of the basis for an important national rulemaking, and did so only months after CASAC recognized the powerful force of the studies associating ozone and death.

The process repeated itself the very next month. During the development of another important rule, EPA staff responded to an email from Mr. David Rostker at OMB flagging his objections to quantified ozone mortality benefits in the draft Regulatory Impact Analysis. The EPA response to OMB's objection states: "We have removed all references to quantified ozone benefits (including mortality) in the most recent version of the ES."[31] The rulemaking in questions involved proposed new emission standards to limit the ozone-forming pollution from gasoline-powered lawnmowers, handheld garden engines, and marine sterndrive engines.[32]

OMB Transmitted Significant 11th Hour Language Changes to Weaken the Rule That were Incorporated Into EPA's Formal Ozone NAAQS Proposal

EPA was under a court-supervised deadline to issue its proposal regarding the ozone NAAQS by June 20th. The public docket shows that on that day, OMB transmitted a series of inserts to EPA that altered, and materially weakened, the proposal in the following significant respects:

- The first page of the fax from OMB contains excerpts from Justice Breyer's concurring opinion in *Whitman v. American Trucking Assns, Inc.* OMB presents the language to EPA as the basis for the Agency to avoid the majority opinion of the United States Supreme Court. The explanatory language at the top of the fax states: "EPA could follow the direction of *a* Supreme Court Justice without fear of contempt, especially if (as OIRA pointed out) the EPA risk assessment finds little health improvement nationwide."[33] Justice Breyer's language was in fact incorporated on pages 11-12 of the final proposal now posted on EPA's website at: http://www.epa.gov/ttn/naaqs/standards/ozone/data/2007_06_o3npr.pdf

- The second page of this same fax from OMB contains language laying out the rationale for EPA to retain the current ozone health standard without changes based on a host of "uncertainties" provided by OMB. This OMB transmitted language, which was incorporated in substantial part in EPA's preamble, reads as follows: "The Administrator recognizes that there is a concern that adopting a more stringent 8-hour standard now, without a better understanding of the health effects associated with O3 exposure at these lower levels, will have an uncertain public health payoff. These questions include uncertainty in (1) the exposure estimates, (2) the estimation of concentration-response associations in epi studies, (3) the potential role of co-pollutants in interpreting the reported associations in these epi studies, and 4) [sic] the effect of background concentrations. In fact, the Agency continues to undertake a substantial research program in an effort to clarify some of these uncertainties. As a result, the Administrator acknowledges the possibility that it would be appropriate to consider

modifications of the 8-hour standard with a more complete body of information in hand rather than to initiative a change in the standard at this time." This language was incorporated in significant respects at page 252 of the final proposal now posted on EPA's website. The OMB transmitted litany of uncertainties associated with health effects below the current standard is in direct contrast with CASAC's unwavering unanimous statements, recounted above, that there are a suite of adverse health effects below the current standard that compel EPA action and that there is no longer significant scientific uncertainty that the standard must be lowered.

- The final document in the fax from OMB to EPA invokes three separate strands of argument in seeking to buttress EPA's case for inaction. First, the OMB language argues, paradoxically, that the sluggish implementation pace of the current ozone health-standard should delay a new health standard. Second, OMB maintains that the likely delays in achieving a more protective health standard preclude the Administrator from considering the health benefits of lower ozone and, therefore, lowering the health standard will not realize public health gains. Third, it is claimed that the nation's alternative fuels program may supersede the Administrator's duty to establish standards requisite to protect public health with an adequate margin of safety. On this latter point, the language that appears in final form on pages 251-52 expressly cross-references back to Justice Breyer's concurrence, thereby completing the circle with the first insertion above. The actual final language incorporated at OMB's behest provides: "The Administrator is mindful that the country has important goals related to the increase production and use of renewable energy, and that these new energy sources can have important public health, environmental and other benefits, such as national security benefits. In some contexts and situations, however, the use of renewable fuels may impact compliance with a lowered ozone NAAQS standard. For example, the Agency recently promulgated final regulations pursuant to section 211(o) of the Clean Air Act, which was enacted as part of the Energy Policy Act of 2005. This provision requires the use of 7.5 billion gallons of renewable fuel by 2012, a level which will be greatly exceeded in practice. In the Regulatory Impact Analysis which accompanied the renewable fuel regulations, the Agency recognized the impact of this program on emissions related to ozone, toxics and greenhouse gases and otherwise reviewed the impacts on energy security. The Administrator requests comment on such factors and any relationship to this rulemaking, including the extent of EPA's discretion under the Clean Air Act to take such factors into account (see section I.A)." This final portion of the OMB fax was incorporated in large part at pages 251-52 of the final proposal now available on EPA's website.

While the nation's interest in renewable fuels is well-understood, OMB's language inverts the public health protection mandate of the law. OMB's approach would supersede the statute's directive to establish NAAQS that protect public health with an adequate margin of safety for ozone, particulate pollution, lead or any other pollutant by invoking a favored industrial activity or process. In such an illogical world, emissions would inexorably rise as the nation's health standards are adjusted upward to accommodate more pollution.

The rushed OMB fax, which was belatedly inserted into EPA's formal proposal, provides an array of technical, policy and legal arguments designed to justify EPA inaction OMB also pressed for inclusion of the language in the Administrator's own voice. In one revealing passage, the OMB transmitted fax asks whether it is "Possible to include as Administrator's voice or somewhere other than the five pages of input from 'commenters'?"

The Clean Air Scientific Advisory Committee Issued a Unanimous, Clarion Call for the Administrator to Adopt an Ozone Standard More Protective of Public Health

The CASAC has unanimously called for a more protective health standard. It has unambiguously advised EPA that there is no scientific basis for retaining the current health standard. But some political forces have directly commanded important aspects of EPA's proposal.

Today, Administrator Johnson holds the trust of healthier air in his hands. Like the Administrators that preceded him, he is confronting powerful headwinds. We respectfully ask that Administrator Johnson follow the path of science in protecting human health, that he heed the course charted by EPA's own unanimous 23 member independent science advisory committee, and that he be guided by EPA's own professional staff in continuing the nation's critical race for healthier air. We ask that he carry forward the legacy entrusted to him under the Clean air Act to protect human health from ground-level ozone with an adequate margin of safety.

ECHOES FROM THE PAST

In 1997, EPA strengthened the nation's particulate matter and ozone health standards in response to new science. EPA's decision engendered claims of economic demise and social havoc from representatives of industry and members of Congress.

- "So economically you are strangled, you are hung up, you are not going to grow, jobs will not occur." Congressman Ronald Klink.[34]

- The new standards "will wreak havoc on economic growth, jobs, and even personal lifestyles." Congressman Fred Upton.[35]

- "Dry cleaning establishments, hair salons, and other small businesses will not be able to absorb the increased costs imposed by these regulations." Senator Spencer Abraham.[36]

These claims are not dissimilar from arguments being made now about ozone. But, during the 1997 debate, Senator Max Baucus provided perspective on the predictable cycle of discourse that ensues from EPA's decision to strengthen the nation's air quality standards. He recounted the inevitable prognostications of economic demise. He also explained a world where, in the final analysis, costs are in fact reasonable and millions breathe cleaner air:

> This is a familiar pattern. Air quality standards have always been met with claims of

> economic demise. But then technology catches up. Innovative programs are implemented. Further research bolsters the initial decision. In the end, costs are a fraction of initial claims, and everyone breathes cleaner air.

A BIPARTISAN AMERICAN LEGACY

I leave you with the retrospective of former Senator Howard Baker, Jr., who reviewed the historic Clean Air Act legacy forged through the bipartisanship of the 1970 United States Senate and gave life to a law "which more than well demonstrated that the whole is greater than the sum of its parts."

> Retrospectives are interesting for people of my generation. There are many ways to sum up our careers. Many Members of Congress do that with the myriad pictures and awards they display on the walls of their offices. Others summarize their career by pointing to their elective and appointive achievements. Needless to say, mine has been bountiful thanks to my parents, the people of Tennessee, President Ronald Reagan and President George W. Bush.
>
> But at the end of the day, those personal achievements and rewards will be of most importance to my descendants and, hopefully, to my biographers. They will be measures of my success, but they won't reflect the achievement of which I am most proud. But so long as the Clean Air Act, its principles and goals survive, I will have a lasting legacy.
>
> I have always been struck by the fact that Thomas Jefferson insisted that his tombstone reflect only that he had founded the University of Virginia—not that he was Ambassador to France—or Secretary of State—or Vice President or even President of the United States—not that he had drafted the Declaration of Independence, but that he had founded an institution of higher learning.
>
> I cannot compare my own career to Jefferson's, nor would I be so bold to say that I alone wrote the Clean Air Act. But I am willing to say and let my legacy rest on the fact that I was one of two or three American citizens who happened to be United States Senators who came together at a particular moment in history and developed the concept which in many respects can be said to have changed the world in which we live.
>
> In 1969 Senator Ed Muskie and I came together with a shared vision. We each provided critical elements to that vision and we succeeded in producing a law which more than well demonstrated that the whole is greater than the sum of its parts.[37]

Basing the nation's health-based air quality standards on public health concerns is, singularly, the most important principle woven into the vibrant fabric of the bipartisan Clean Air Act. The resulting benefits for healthier air have in fact changed the world in which we live.

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[1] Clean Air Act §109(b)(1), 42 U.S.C.§7409(b)(1).

[2] See *Lead Industries Assn., Inc. v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980); *American Lung Assn. v. EPA*, 134 F.3d 388 (1998); *NRDC v. Administrator, EPA*, 902 F.2d 962 (D.C. Cir. 1990), vacated in part on other grounds, *NRDC v. EPA*, 921 F.2d 326 (D.C. Cir. 1991); *American Petroleum Institute v. Costle*, 665 F.2d 1176 (D.C. Cir. 1981).

[3] *Whitman v. American Trucking Assns., Inc.,* 531 U.S. 457, 465 (2001).
[4] *Id.* (emphasis added).
[5] 42 U.S.C. §§7521(a), 7547(a), 7545, 7541, and 7411(a).
[6] *Whitman v. American Trucking Assns., Inc.,* 531 U.S. at 470.
[7] Department of Commerce, Gross Domestic Product (2005).
[8] National Research Council, Committee on Carbon Monoxide Episodes in Meteorological and Topographical Problem Areas. *Managing Carbon Monoxide Pollution in Meteorological and Topographical Problem Areas,* National Academies Press (2003).
[9] U.S. EPA, "National Air Quality; 2001 Status and Trends" (Sept. 2004).
[10] Mott JA, Wolfe MI, Alverson CJ, Macdonald SC, Bailey CR, Ball LB, Moorman JE, Somers JH, Mannino DM, Redd SC. "National Vehicle Emissions Policies and Practices and Declining US Carbon Monoxide-Related Mortality," *JAMA*, 299 (2002) 988-995.
[11] U.S. EPA, The Ozone Report, *Measuring Progress through 2003,* (Nov. 17, 2005).
[12] Centers for Disease Control and Prevention, Executive Summary, *Third National Report on Human Exposure to Environmental Chemicals* (2005).
[13] U.S. EPA, "The Benefits and Costs of the Clean Air Act, 1970 to 1990," (Oct. 1997)
[14] *Id.*
[15] Sierra Research, Inc., "The Cost Effectiveness of Further Regulating Mobile Source Emissions," Feb. 28, 1994.
[16] The New York Times, "Honda Meets a Strict Emission Rule," August 30, 1995.
[17] Prepared for EPA by ICF Consulting, *The Clean Air Act Amendments: Spurring Innovation and Growth While Cleaning the Air,* (Oct. 27, 2005).
[18] *Whitman v. American Trucking Assns., Inc.,* 531 U.S. at 469.
[19] Clean Air Act §109(b)(1), 42 U.S.C.§7409(b)(1).
[20] Dr. Rogene Henderson, Chair, CASAC, to Stephen Johnson, EPA Administrator, "Clean Air Scientific Advisory Committee's (CASAC) Peer Review of the Agency's 2nd Draft Ozone Staff Paper," (Oct. 24, 2006).
[21] *Id.* at 2 (italics in original).
[22] *Id.* at 5 (italics in original).
[23] *Id.* at 3 (citations omitted).
[24] *Id.* at 4.
[25] *Id.* at 5.
[26] The notice of proposed rulemaking was formally published on April 3, 2007, 72 Fed. Reg. 15,938.
[27] EPA Staff Email to David Rostker, OMB (Jan. 17, 2007), Appendix A.
[28] *Id.*
[29] EPA Staff Email to David Rostker, OMB (Feb. 22, 2007), Appendix A.
[30] EPA Staff Email to David Rostker, OMB (Feb. 23, 2007), Appendix A.
[31] EPA Staff Email to David Rostker, OMB (March 29, 2007), Appendix B.
[32] 72 Fed. Reg. 28,098 (May 18, 2007).
[33] OMB Interagency Fax, available at EPA-HQ-OAR-2005-0171-0215, p. 1, Appendix C (emphasis added).
[34] 143 *Cong. Rec.* 3560 (1997).
[35] 143 *Cong. Rec.* 1286 (1997).
[36] 143 *Cong. Rec.* S10813 (1997).
[37] Remarks by Howard H. Baker, Jr., "Cleaning America's Air—Progress and Challenges," The University of Tennessee, Knoxville, March 9, 2005.

APPENDIX B:

List of Medical Societies and Public Health Organizations Supporting a Primary 8-hr Ozone NAAQS of 0.060 ppm

American Academy of Pediatrics
American Association of Cardiovascular and Pulmonary Rehabilitation
American College of Chest Physicians
American College of Preventive Medicine
American College of Occupational and Environmental Medicine
American Heart Association
American Lung Association
American Medical Association
American Nurses Association
American Public Health Association
American Thoracic Society
Asthma and Allergy Foundation of America
National Association for Medical Direction of Respiratory Care
National Association of City and County Health Officials
Physicians for Social Responsibility
Trust for America's Health

Chairman WAXMAN [presiding]. Thank you very much.
Dr. McClellan.

STATEMENT OF ROGER MCCLELLAN

Mr. MCCLELLAN. Good afternoon, Mr. Chairman, and distinguished members of the committee. I am Roger McClellan, an independent advisor in air quality issues. My home is in Albuquerque, NM. I appreciate the invitation to present my views on EPA's recent review and revision of the National Ambient Air Quality Standards for ozone. I ask that my written testimony be entered in the record as though read in its entirety.

Let me summarize. For more than four decades I have been contributing to the development of science needed to address important societal issues concerned with air quality. I am proud to have served on many EPA scientific advisory committees from the origin of the agency to the present time under administrations of both parties.

This included service on the Clean Air Scientific Advisory Committee, which I chaired 1988–1992, and on panels that have considered all the criteria air pollutants. I served on the Ozone Panel that advised a 1997 standard. I did not serve on the most recent Ozone Panel, however, I have closely followed the standard-setting process that led to the final rule announced by Administrator Johnson on March 12, 2008, focusing on the primary or health-based standard.

As you know, every standard has four interrelated elements: an indicator, an averaging time, a numerical level, and a statistical form. It is important that these always be considered in their entirety.

Throughout the review process leading up to the final rule, there has been debate over the numerical level of the 8-hour or averaging time standard with ozone as the indicator. In my opinion, much of the debate was premature and focused on the outcome desired by some parties, a lowering of the standard even before the review of the science was complete. This resulted in a blurring of the boundary between the role of science and judgment in the setting of the standard.

With publication of the proposed rule for the ozone standard, the debate intensified. That included repeated reference to the CASAC recommendation the primary standard be set within a specific narrow numerical range, 0.060 to 0.070 ppm. In my opinion, the CASAC panel moved from the science arena into the policy arena with its strident advocacy of an upper bright line value of 0.070 ppm for the primary standard.

CASAC's selection of this narrow range and an upper bright line value followed the template that CASAC had been used, used with the pm 2.5 standard. In that case CASAC, the panel I served on, advocated setting the pm 2.5 annual standard setting at 13 to 14 micrograms per cubic meter—a view that I dissented from—and the 24-hour standard at 25 to 35 micrograms per cubic meter.

The Administrator made policy judgments in setting the 24-hour standard at a level of 35 micrograms per cubic meter, a drastic reduction from the previous, and reaffirmation of the annual standard at a level of 15 micrograms per cubic meter.

CASAC argued, with the exception of myself or another, that he had made a political choice and ignored the science. In the case of ozone, Administrator Johnson made a policy judgment. set the ozone standard at 0.075 ppm average over 8 hours. The value was actually consistent with the original advice of his own staff, 0.075 ppm up to a level slightly below the current standard which we know was 0.080, but with rounding could have been up to 0.084.

Again, CASAC argued he made a political decision and ignored the science In my view, the CASAC panels have not fully understood nor communicated the extent to which the recommendations they communicated to the Administrator represented their interpretation of the science and their personal policy preferences on the numerical level of the standard.

Even before the final rule for ozone was announced, CASAC scheduled the teleconference to develop unsolicited advice to the Administrator. This clearly moved CASAC from the scientific advisory arena into the political arena. This was evidenced by panel members noting the importance of getting the record right for the courts and the suggestion that the Administrator should have resigned rather than cooperate with OMB and the White House.

The panel's letter on that teleconference continues to suggest that somehow science and scientists alone can establish the appropriate standard or, at a minimum, dictate the upper bound acceptable for a policy decision. The Clean Air Act does not call for a standard-setting committee with the Administrator merely serving as a rubber stamp for the committee's judgments. The Clean Air Act wisely calls for a Clean Air Scientific Advisory Committee to provide advice to the Administrator on policy judgments that under the Clean Air Act are the exclusive responsibility of the Administrator.

In my opinion, the Administrator has appropriately exercised his authority in making policy judgments on both the revised pm 2.5 and ozone standards, making selections from among an array of scient-based options. The basis for his policy decisions are well documented in both final rules, including consideration of both the science and personal judgments of CASAC. They are also consistent with the Supreme Court's interpretation of the Clean Air Act.

He did not consider cost, however, he did exercise judgment appropriately in deciding how low is low enough in setting the numerical level of both standards from among an array of science-based options. There is no scientific methodology that can be used as a substitute for the Administrator's judgment.

I welcome the opportunity to address any questions you may have.

[The prepared statement of Mr. McClellan follows:]

STATEMENT OF

Roger O. McClellan
Advisor, Toxicology and Human Health Risk Analysis
Albuquerque, New Mexico

Before the

Committee on Oversight and Government Reform
U.S. House of Representatives

Hearing on the U.S. Environmental Protection Agency's
Setting of the New National Ambient Air Quality Standards for Ozone

May 20, 2008

Good Morning, Mr. Chairman and Members of the Committee. Thank you for the invitation to present my views on the U.S. Environmental Protection Agency's recent review and revision of the National Ambient Air Quality Standards (NAAQS) for Ozone.

My biography is attached to this statement (Attachment 1). Since 1999, I have served as an Advisor to public and private organizations on issues related to air quality in the ambient environment and workplace drawing on more than 45 years of experience in comparative medicine, toxicology, aerosol science, and risk analysis. Prior to 1999, I provided scientific leadership for two organizations – the Chemical Industry Institute of Toxicology (1988-1999) in Research Triangle Park, NC and the Lovelace Inhalation Toxicology Research Institute (1966-1988) in Albuquerque, NM. Both organizations, under my leadership, earned an international reputation for developing scientific information under-girding occupational and environmental health standards.

The testimony I offer today also draws on my experience serving on numerous scientific advisory committees. This has included service on many EPA Scientific Advisory Committees from the origin of the Agency to date, including the Clean Air Scientific Advisory Committee (CASAC), which I chaired from 1988 to 1992, and on CASAC Panels that have considered all the criteria pollutants at various times. I served on the CASAC Ozone Panel that reviewed the basis for the NAAQS promulgated in 1997. I did not serve on the most recent CASAC Ozone Panel. However, I have closely followed the current NAAQS Ozone review process from its inception in September 2000 to present. The testimony I offer today reflects my own views on that review process and the science used to inform the policy judgments made in revising the NAAQS for Ozone. In Attachment 2, I briefly review the NAAQS process as background for my comments.

This morning I would like to comment on the role of science and judgment in the "Final Rule for the National Ambient Air Quality Standard for Ozone" announced on March 12, 2008 by EPA Administrator Stephen Johnson. This Final Rule revises the 1997 Standard and concludes a process begun in September 2000. Throughout the review process, there was debate over the numerical level of a revised standard. In my view, much of the debate was premature and focused on the outcome desired by various parties – a lowering of the ozone standard – even before the review of the science was complete. That resulted in a blurring of the boundary between the role of science and judgment in the setting of the standard.

As required by a Court Decree, the EPA published a Proposed Rule on July 11, 2007 and requested public comments on anticipated action in issuing a Final Rule for the ozone standard. Release of the Proposed Rule intensified the debate over the numerical level of the standard and continued to blur the distinction between science and judgment in the setting of the standard. Numerous comments were submitted to the official ozone docket. I submitted my personal comments[1] to the ozone docket and also joined with 9 of my scientific colleagues in submitting a document[2] – "Critical Considerations in Evaluating Scientific Evidence of Health Effects of Ambient Ozone" to the Docket. The

debate over the numerical level of the standard continues even today as evidenced by this Hearing.

Much of the debate fails to acknowledge that the setting of the standard involves policy judgments informed by science. The debate has included repeated reference to the Clean Air Scientific Advisory Committee (CASAC) Ozone Panel recommendation that the primary standard be set within a specific narrow numerical range, i.e. 0.060 – 0.070 ppm. In my opinion, the CASAC Ozone Panel moved from the Science arena into the Policy arena in advocating an upper bright line value of 0.070 ppm for the primary standard. That value represents the personal judgment of the Ozone Panel Members, not just their interpretation of the science. It is my opinion, the CASAC Ozone Panel never adequately communicated the extent to which the recommendations they communicated to the Administrator represented both their interpretation of the science and their personal policy judgments on the numerical level of the standard.

The EPA Administrator, under the authority of the Clean Air Act, has the exclusive responsibility and authority for making policy judgments, informed by science, in setting the ozone standard. Supreme Court Justice Stephen Breyer, in the landmark case, Whitman versus American Trucking Association (531 U.S. 457, 2001), offered "common sense" guidance for setting the standards for criteria pollutants such as ozone (Attachment 3). Justice Breyer expressed the opinion that while the Administrator cannot consider cost in setting air quality standards for the criteria pollutants, the EPA Administrator need not set standards at zero risk. He advised the Administrator to use judgment in a "comparative health" context when "deciding what risks are acceptable in the world in which we live."

In short, Justice Breyer recognized that every day life carries with it a variety of risks. Justice Breyer's opinion provides "common sense" guidance for deciding how low is low enough in setting air quality standards – the numerical level of the standard and the associated acceptable risk level, even if not specifically articulated, are policy judgments that should be informed by science. In my opinion, the Administrator could have made a policy judgment, informed by science, with selection of a numerical value for the ozone primary standard as high as the 1997 primary standard of 0.08 ppm. His selection of a lower value was consistent with the original advice of his own staff – 0.075 ppm up to a level slightly below the current standard.

In my own comments to the Ozone Docket,[1] I reviewed the science available on the health effects of ozone. In my comments, I noted the substantial uncertainty and variability in the findings of an increase in common health effects with ozone exposure in the range of the current standard and below. These scientific uncertainties were also detailed in the comments[2] I and nine of my colleagues submitted to the Docket. Both sets of comments also emphasized that the selection of any specific numerical standard is a policy judgment informed by science.

The CASAC Ozone Panel, in proposing a bright line upper limit of 0.070 ppm, offered their collective judgment on, in the words of Justice Breyer, – "what risks are

acceptable in the world in which we live." That is their policy choice, it should not be postured as being exclusively science based. Science alone can never provide a basis for deciding how low is low enough, policy judgments are always required in deciding "what risks are acceptable." Any specific numerical value for the Standard has an associated implied "acceptable risk value," even if the level of acceptable risk has not been explicitly stated.

The CASAC Ozone Panel's letter to the Administrator dated April 7, 2008, commenting on the Final Rule, continues to suggest that somehow science and scientists alone can establish the appropriate numerical level of the NAAQS for ozone. In that letter, the CASAC Ozone Panel again failed to clarify the distinction between their interpretations of the science and their policy judgment in offering an opinion on the numerical level of the ozone standard. The Panel should have clearly acknowledged that the numerical level they have advocated reflects their personal policy preferences. Likewise, in arguing for "further lowering the national ambient ozone standards," the Panel fails to acknowledge that this is a collective wish that goes well beyond considering just the available scientific information. How low is low enough for the ozone standard is ultimately a policy judgment informed by scientific information and analysis. The Clean Air Act clearly specifies that the EPA Administrator has the exclusive authority and responsibility for using judgment in the setting of the Standard.

Without question, the Administrator, in setting the standard, should consider scientific advice received from many parties, including the special advice provided by the Clean Air Scientific Advisory Committee. However, it is clear that the Clean Air Act calls for an Advisory Committee and not a Clean Air Standard Setting Committee. This places a special responsibility on the Committee to distinguish between their scientific advice and their personal policy judgments as to the numerical level of the Standard.

It is noteworthy that the Final Rule states – "the Administrator observes that he reaches a different policy judgment than the CASAC Panel based on apparently placing different weight in two areas: --" The Final Rule goes on to detail these differences. The Rule goes on to state – "and fully considering the scientific and policy views of CASAC, the Administrator has decided to revise the level of the primary 8-hour O_3 standard to 0.075 ppm." Without question, the Final Rule clearly acknowledges that the CASAC Ozone Panel offered both their scientific and policy views. It is unfortunate that the CASAC Ozone Panel did not make this important distinction in its communications to the Administrator in their public statements on the Final Rule.

References

1. McClellan, R. O. Comments on National Ambient Air Quality Standards for Ozone: Proposed Rule, Federal Register, Vol. 72, No. 132/Wednesday, July 11, 2007, pp 37818-37919, Docket ID No. EPA-HQ-OAR-2005-0172, submitted October 9, 2007.

2. Brauer, M., Frampton, M.W., Koutrakis, P., McClellan, R.O., McDonnell, W.F., Moolgavkar, S., North, D. W., Smith, A.E., Smith, R.L., Utell, M.J. Critical Considerations in Evaluating Scientific Evidence of Health Effects of Ambient Ozone. Comments on National Ambient Air Quality Standards for Ozone: Proposed Rule, Federal Register, Vol. 72, No. 132/Wednesday, July 11, 2007, pp 37818-37919, Docket ID No. EPA-HQ-OAR-2005-0172, submitted October 9, 2007.

ATTACHMENT 1

BIOGRAPHY

ROGER O. McCLELLAN, DVM, MMS, DSc (Honorary), Dipl-ABT, Dipl-ABVT, Fellow-ATS

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ROGER O. McCLELLAN is currently an advisor to public and private organizations on issues concerned with inhalation toxicology and human health risk analysis. He received his Doctor of Veterinary Medicine degree with Highest Honors from Washington State University in 1960 and a Master of Management Science degree from the University of New Mexico in 1980. He is a Diplomate of the American Board of Toxicology, a Diplomate of the American Board of Veterinary Toxicology and a Fellow of the Academy of Toxicological Sciences.

He served as Chief Executive Officer and President of the Chemical Industry Institute of Toxicology (CIIT) in Research Triangle Park, NC from September 1988 through July 1999. The CIIT continues today as The Hamner Institute. During his tenure, the organization achieved international recognition for the development of science under-girding important environmental and occupational health regulations. Prior to his appointment as President of CIIT, Dr. McClellan was Director of the Inhalation Toxicology Research Institute, and President and Chief Executive Officer of the Lovelace Biomedical and Environmental Research Institute, Albuquerque, New Mexico. The Institute continues operation today as a core element of the Lovelace Respiratory Research Institute. During his 22 years with the Lovelace organization, he provided leadership for development of one of the world's leading research programs concerned with the toxic effects of airborne radioactive and chemical materials. Prior to joining the Lovelace organization, he was a scientist with the Division of Biology and Medicine, U.S. Atomic Energy Commission, Washington, DC (1965-1966), and Hanford Laboratories, General Electric Company, Richland, WA (1959-1964). In these assignments, he was involved in conducting and managing research directed toward understanding the human health risks of internally deposited radionuclides.

Dr. McClellan is an internationally recognized authority in the fields of inhalation toxicology, aerosol science and human health risk analysis. He has authored or co-authored over 300 scientific papers and reports and edited 10 books. In addition, he frequently speaks on risk assessment and air pollution issues in the United States and

abroad. He is active in the affairs of a number of professional organizations, including past service as President of the Society of Toxicology and the American Association for Aerosol Research. He serves in an editorial role for a number of journals, including continuing service as Editor of Critical Reviews in Toxicology. He serves or has served on the Adjunct Faculty of 8 universities.

Dr. McClellan has served in an advisory role to numerous public and private organizations. He has served on senior advisory committees for 8 federal agencies. He is past Chairman of the Clean Air Scientific Advisory Committee, Environmental Health Committee, Research Strategies Advisory Committee, and Member of the Executive Committee, Science Advisory Board, U. S. Environmental Protection Agency; Member, National Council on Radiation Protection and Measurements; Member, Advisory Council for Center for Risk Management, Resources for the Future; a former Member, Health Research Committee, Health Effects Institute; and service on National Academy of Sciences/National Research Council Committees on Toxicology (served as Chairman for 7 years), Risk Assessment for Hazardous Air Pollutants, Health Risks of Exposure to Radon, Research Priorities for Airborne Particulate Matter, as well as the Committee on Environmental Justice of the Institute of Medicine. He has recently completed a term on the Board of Scientific Councilors for the Centers for Disease Control and Prevention for Environmental Health Research and the Agency for Toxic Substances and Disease Registry. He is currently serving on the National Institutes of Health Scientific Advisory Committee on Alternative Toxicological Methods and the National Aeronautics and Space Administration Lunar Airborne Dust Toxicity Advisory Group.

Dr. McClellan's contributions have been recognized by receipt of a number of honors, including election in 1990 to membership in the Institute of Medicine of the National Academy of Sciences. He is a Fellow of the Society for Risk Analysis, the American Association for Aerosol Research, the Health Physics Society, and the American Association for the Advancement of Science. In 1998, he received the International Achievement Award of the International Society of Regulatory Toxicology and Pharmacology of standing contributions to improving the science used for decision making and the International Aerosol Fellow Award of the International Aerosol Research Assembly for outstanding contributions to aerosol science and technology. He received the Society of Toxicology 2005 Merit Award for a distinguished career in toxicology. In 2005, The Ohio State University awarded him an Honorary Doctor of Science degree for his contributions to the science under-girding improved air quality. In 2006 he received the New Mexico Distinguished Public Service Award. He has a long-standing interest in environmental and occupational health issues, especially those involving risk assessment and air pollution, and in the management of multidisciplinary research organizations. He is a strong advocate of risk-based decision-making and the need to integrate data from epidemiological, controlled clinical, laboratory animal and cell studies to assess human health risks of exposure to toxic materials.

ATTACHMENT 2

Setting National Ambient Quality Standards

Each NAAQS consists of four elements: (a) an indicator (such as ozone for photochemical oxidants, (b) an averaging time (such as 8 hours), (c) a numerical level (such as 0.08 ppm ozone averaged over 8 hours), and (d) a statistical form (such as the annual fourth-highest daily maximum 8-hour average concentration, averaged over 3 years.

Under the Clean Air Act, the EPA Administrator is required to review the NAAQS for the criteria pollutants at 5-year intervals to evaluate whether or not the four elements of the NAAQS are still deemed to be acceptable based on current scientific knowledge as it applies to the assessment of public health risks. In practice, the interval between reviews has been longer. The process for review and promulgation of a NAAQS, either continuation of the existing standard or establishing a new NAAQS, consists of multiple phases. The initial phase, which is obviously on-going, consists of conduct of research on the various criteria pollutants. This includes a broad spectrum of activities; understanding emissions of pollutants, transport and transformation of pollutants in the atmosphere, ambient measurements of pollutants, estimation of personal exposures to pollutants, assessment of toxic effects and mechanisms of action in cells, tissues and animals, conduct of controlled exposure studies to pollutants in human volunteers and epidemiological investigations of human populations. Most of the research is funded by the EPA, some in the Agency's own laboratories and some in academic and other laboratories, the National Institutes of Health and, to a modest extent, private industry. The dominance of federal government support of research on criteria pollutants relates to their effects being of broad societal concerns with the pollutants, by and large, having no unique industrial emission source.

The findings of this research are used by the EPA's Office of Research and Development to prepare a criteria document (CD). Each CD traditionally has been essentially an encyclopedia of everything known about a given criteria pollutant and is used as a basis of information for the preparation of a Staff Paper (SP) by the EPA's Office of Air Quality Planning and Standards. This is a Policy Assessment of Scientific and Technical Information; in short, an integration and synthesis of the information in the CD that is most relevant to setting the four elements of a NAAQS. In recent years, the Staff Papers have made substantial use of risk assessments for the criteria pollutant being considered. These risk assessments have been conducted by a single EPA Contractor organization. The various versions of the CD and SP are released to the public with an invitation to provide comments as a basis for improving the documents.

Throughout this process, a Clean Air Scientific Advisory Committee Panel, operating as an element of the EPA's Science Advisory Board, is involved in reviewing and advising on the scientific content of both the CD and the SP, including the related risk assessment. This has typically involved several revisions. Prior to the current cycle of ozone review, the CASAC Panel sent a closure letter to the EPA Administrator when

the CASAC was of the opinion that the revised documents were suitable for use by the Administrator in promulgating a NAAQS. In the current ozone review, the "closure letter" process was abandoned. Instead, the current CASAC Ozone Panel has focused on offering a consensus opinion.

At the next step, the Administrator proposes, via a Federal Register Notice, a NAAQS including specific proposals for each of the four elements of the NAAQS; the indicator, averaging times, numerical levels and statistical forms. Comments are solicited from the Public with the opportunity to submit written comments to a specific Docket. The Administrator, acting under a Consent Decree, signed a "Proposed Rule."

The next step is for the Administrator to promulgate a NAAQS consisting of the four elements discussed previously. I purposefully do not use the phrase – "final step," because the Courts may have a role in deciding whether the Administrator's proposed NAAQS for Ozone will stand. The NAAQS are to be based on the available scientific information reviewed in the CD and SP and summarized in the notice of proposed rules. The primary, health-based NAAQS are to be set at a level that will protect public health, including sensitive populations, with an adequate margin of safety. The Administrator is precluded from considering cost in the setting of the NAAQS.

At this point, I would like to emphasize that there exists no absolute and unambiguous scientific methodology that can determine which specific indicator, precise averaging time, numerical level or statistical form will be adequate to protect public health. The available scientific information can inform the NAAQS decisions, however, the Administrator must ultimately use policy judgment in making decisions on each of the four elements from among an array of scientifically acceptable options including consideration of their attendant scientific uncertainties. Beyond the language in the Clean Air Act, Justice Breyer in Whitman v. American Trucking Association (531 U.S. 457, 473) has given very useful guidance for the Administrator in exercising policy judgment in the setting of NAAQS (see Attachment 3).

ATTACHMENT 3

Justice Breyer on Using Policy Judgment (from Whitman v. American Trucking Association, 531 U.S. 457, 473)

In setting standards that are "requisite" to protect public health and welfare, as provided in section 109(b), EPA's task is to establish standards that are neither more or less stringent than necessary for these purposes. *Whitman v. American Trucking Associations*, 531 U.S. 457, 473. In establishing "requisite" primary and secondary standards, EPA may not consider the costs of implementing the standards. *Id.* At 471. As discussed by Justice Breyer in *Whitman v. American Trucking Associations*, however, "this interpretation of § 109 does not require the EPA to eliminate every health risk, however slight, at any economic cost, however great, to the point of "hurtling" industry over "the brink of ruin," or even forcing "deindustrialization." *Id.* At 494 (Breyer, J., concurring in part and concurring in judgment) (*citations omitted).* Rather, as Justice Breyer explained:

> *"The statute, by its express terms, does not compel the elimination of all risk; and it grants the Administrator sufficient flexibility to avoid setting ambient air quality standards ruinous to industry.*
>
> *Section 109(b)(1) directs the Administrator to set standards that are "requisite to protect the public health" with "an adequate margin of safety." But these words do not describe a world that is free of all risk – an impossible and undesirable objective. (citation omitted). Nor are the words "requisite" and "public health" to be understood independent of context. We consider football equipment "safe" even if its use entails a level of risk that would make drinking water "unsafe" for consumption. And what counts as "requisite" to protecting the public health will similarly vary with background circumstances, such as the public's ordinary tolerance of the particular health risk in the particular context at issue. The Administrator can consider such background circumstances when "deciding what risks are acceptable in the world in which we live." (citation omitted).*
> *The statute also permits the Administrator to take account of comparative health risks. That is to say, she may consider whether a proposed rule promotes safety overall. A rule likely to cause more harm to health than it prevents is not a rule that is "requisite to protect the public health." For example, as the Court of Appeals held and the parties do not contest, the Administrator has the authority to determine to what extent possible health risks stemming from reductions in tropospheric ozone (which, it is claimed, helps prevent cataracts and skin cancer) should be taken into account in setting the ambient air quality standard for ozone. (Citation omitted)/*
>
> *The statute ultimately specifies that the standard set must be "requisite to protect the public health" "in the judgment of the Administrator," § 109(b)(1), 84 Stat. 1680 (emphasis added), a phrase that grants the Administrator considerable discretionary standard-setting authority.*

The statute's words, then, authorize the Administrator to consider the severity of a pollutant's potential adverse health effects, the number of those likely to be affected, the distribution of the adverse effects, and the uncertainties surrounding each estimate. (citation omitted). They permit the Administrator to take account of comparative health consequences. They allow him to take account of context when determining the acceptability of small risks to health. And they give her considerable discretion when she does so.

This discretion would seem sufficient to avoid the extreme results that some of the industry parties fear. After all, the EPA, in setting standards that "protect the public health" with "an adequate margin of safety," retains discretionary authority to avoid regulating risks that it reasonably concludes are trivial in context. Nor need regulation lead to deindustrialization. Pre-industrial society, was not a very health society; hence a standard demanding the return of the Stone Age would not prove "requisite to protect the public health."

Chairman WAXMAN. Thank you, Mr. McClellan.
Mr. Raul.

STATEMENT OF ALAN CHARLES RAUL

Mr. RAUL. Mr. Chairman, Mr. Issa, members of the committee, thank you for inviting me to testify today to provide my views on the authority of the President to influence the decisions of his subordinates in the executive branch. It is an honor to appear before you.

I am testifying today in a personal capacity based on my interest and background in administrative and constitutional Law. I am currently engaged in private law practice and have previously served as General Counsel of the U.S. Department of Agriculture, General Counsel of the Office of Management and Budget, and as Associate Counsel to the President.

Until recently, I also served in a part-time capacity as vice chairman of the Privacy and Civil Liberties Oversight Board.

My views here are focused only on the general issue of Presidential authority to influence and direct the regulatory actions and decisions of the executive branch under Article II of the Constitution. It is my view that the President is and should be in control of the executive branch, but, importantly, this does not derogate or diminish Congress' power to set policy by legislation and to oversee the Executive's execution of the laws.

Rather, the unitary Executive means that it must be the President and not some relatively unknown subordinate, narrow agency, or obscure technical committee who is responsible to the public to take care that the laws are well and faithfully executed. In short, the unitary executive concept promotes more effective rulemaking by bringing a broader perspective to bear on important regulatory decisions and enhances democratic accountability for regulatory decisionmaking by pinning responsibility on the President to answer to the public for important regulatory actions taken by his or her administration.

Setting standards requisite to protect public health and welfare is inherently a policy exercise because Congress and the courts acknowledge that government regulations cannot, and need not, achieve zero risk. Indeed, it is the President's responsibility, not just his right, to ensure that executive branch regulatory decisions, to the extent Congress has left the Executive with some discretion, reflect the President's own policy judgments. That way the public can hold the President accountable for important regulatory judgments or, alternatively, look to Congress for stronger, smarter, or more specific laws.

If the EPA Administrator does not agree with the President, he or she may resign or be replaced, but there are no grounds to complain that the President's position is undue interference. The reasons why the Constitution established a powerful President are well known. In short, the Framers were acutely conscious of the debilitating weaknesses that resulted from Executive by Committee during the Revolutionary War and under the Articles of Confederation. They clearly understood that putting one person in charge of the executive branch would promote accountability.

The Constitution adopted a unitary Executive in order that the American people would know exactly whom to credit or whom to blame if the laws were not faithfully and effectively discharged. If responsibility is diffused, then the ability of the public to influence and choose their government is diluted, and Presidents of both parties have asserted the right to oversee and direct the actions and decisions of their regulatory agencies.

Former Chief Judge of the D.C. Circuit, Patricia Wald, who served as Assistant Attorney General for Legislative Affairs in the Carter administration and was appointed to the D.C. Circuit by President Carter, strongly supported the power of the President to direct his or her subordinates in the executive branch. In 1981, she offered the leading opinion on Presidential Control over Rulemaking, *Sierra Club* v. *Cassel.* Interestingly, Judge Wald was joined in that opinion by then Judge, now Justice Ruth Bader Ginsburg.

Judge Wald addressed arguments advanced by environmental plaintiffs who claimed that President Carter had improperly interfered with EPA rulemaking in order to impose weaker pollution controls than the technical staff at EPA desired. She categorically rejected this criticism of President Carter's decisive role. Echoing Alexander Hamilton, Judge Wald opined that preserving the President's flexibility to direct his or her subordinates was so important that it was not legally required for the executive branch to publicly disclose the details of White House and Presidential contacts.

Similarly, President Clinton further codified and solidified the process and desirability of Presidential control over executive branch rulemaking, and you have heard testimony earlier today about Executive Order 12866, which required that Agency regulations be consistent be consistent with the President's priorities and the principles set forth in the Executive order.

As you heard also, President Clinton, himself, was personally involved in improving the 1997 ozone standard that was a precursor of the standard involved today, and just as is the case with the current ozone rule, as was the case with President Carter's sulfur and particulate matter rules that Judge Wald addressed, EPA ultimately chose in 1997 a pollution standard that was more lenient than the one favored by Agency staff and recommended by the CASAC Committee of Scientific Advisors.

I would submit that it makes sense as a matter of public policy to acknowledge and respect the President's ultimate dominion over the executive branch. If Federal Regulations do not serve the public well, either because they are too restrictive or too permissive, or simply not well designed, the President and Congress, of course, should take the blame. If the regulations are reasonable and accomplish the public's goals efficiently, then the President and Congress should receive the credit.

Technical advisors are essential to the rulemaking process, but the buck has to stop with the person who answers to the people. That is the President.

Thank you for considering my views.

[The prepared statement of Mr. Raul follows:]

Testimony of

Alan Charles Raul

Before the U.S. House of Representatives

Committee on Oversight and Government Reform

May 20, 2008

Mr. Chairman, Mr. Davis, and members of the Committee, thank you for inviting me to testify today to provide my views on the authority of the President to influence the decisions of his subordinates in the Executive Branch. It is an honor to appear before you.

I am testifying today in a personal capacity based on my interest and background in administrative and constitutional law. I am currently engaged in private law practice in Washington, D.C. I have previously served as General Counsel of the U.S. Department of Agriculture, General Counsel of the Office of Management and Budget, and Associate Counsel to the President. Until recently, I served part-time as Vice Chairman of the Privacy and Civil Liberties Oversight Board. My experience in government regulatory issues was also developed as a student at Harvard University's John F. Kennedy School of Government and as a law clerk on the U.S. Court of Appeals for the D.C. Circuit.

My views here are focused only on the general issue of presidential authority to influence and direct the regulatory actions and decisions of the Executive Branch, including the EPA Administrator, under Article II of the Constitution. I have no particular position regarding the propriety or correctness of EPA's revised ozone standards. Moreover, my view that the President is – and should be – in control of the Executive Branch is in no way intended to derogate or diminish Congress' power to set policy by legislation and to oversee the Executive's execution of the laws.

Specifically, I do not believe that the President's command of a unitary Executive Branch provides any *carte blanche* to disobey or disregard statutory mandates that are constitutionally enacted by Congress. Rather, the unitary Executive means that it must be the President, not some (relatively) faceless subordinate, narrow agency or obscure technical committee, who is responsible to the public to take care that the laws are

well and faithfully executed. In short, the unitary Executive concept (1) promotes more effective rulemaking by bringing a broader perspective to bear on important regulatory decisions and (2) enhances democratic accountability for regulatory decision-making by pinning responsibility on the President to answer to the public for the important regulatory actions taken by his or her Administration.

It is my understanding that the Committee is interested in the question of whether the President has unduly intervened in the process whereby EPA has set revised national ambient air quality standards for ozone under the Clean Air Act. I believe the Committee's concern in this regard is based on the fact that policy judgments expressed by the President played a role in the final standards established by EPA; and, that EPA exercised its regulatory discretion in a manner that did not wholly acquiesce in the recommendations provided to the agency by the Clean Air Scientific Advisory Committee (CASAC).

I further understand that, in the Clean Air Act, Congress authorized EPA to exercise some residual policy-making discretion in setting national ambient air quality standards that are requisite to protect public health with an adequate margin of safety as well as to protect public welfare as required under the statute.

While the Supreme Court has held that Congress did not authorize EPA to consider the costs (and thus the relative benefits) to the public of setting Clean Air Act standards at any particular level, neither Congress nor the Supreme Court has directed EPA to adopt CASAC's technical recommendations without exercising any further judgment. Significantly, Congress can always, if it chooses, adopt the CASAC recommendations directly into law. It may do so even now, of course, and thereby supersede the policy judgments of the Executive.

I am not in a position to opine or comment on what the parameters for the exercise of that further judgment are or should be, but I will assume that any involvement by the President and/or the Office of Management and Budget (OMB) would have taken place within those parameters – and thus within the range of discretion Congress intended EPA to exercise, and which the Supreme Court has approved.

Setting standards requisite to protect public health and welfare is inherently a policy exercise because Congress and the courts acknowledge that government regulations cannot, and need not, achieve

"zero risk." Accordingly, to achieve legally acceptable risk (i.e., protecting a sufficient percentage of the public from a sufficient degree of risk) policy makers are obligated to consider the science, and then make complex *policy* judgments – not technical judgments – that deal with myriad uncertainties and weighting dilemmas, including gaps in scientific and medical analysis and data, differential impacts on different population groups, and the fact that society is dynamic so that the consequences of taking certain actions are not entirely reliable or predictable. The Supreme Court has substantially constrained Executive Branch policy discretion, but not eliminated it, by ruling that Congress prohibited policy makers from considering the relative costs and benefits of any particular national ambient air quality standard.

In any event, policy makers must apply their best judgment to the administrative record before them. The law requires EPA to adequately explain, justify and defend the national ambient air quality standards it adopts. And, the agency's decisions and explanations are subject to scrutiny, comment and challenge under the Administrative Procedure Act (or the analogous provisions of the Clean Air Act itself).

A regulatory decision that has been dictated by factors other than those prescribed by Congress, or by material considerations that are not disclosed in the public record, would be subject to judicial invalidation. I distinguish, however, between the propriety of the factors to be considered, on the one hand, and the judgments made based on those factors. **Unless Congress sets the specific pollution standards in law itself (which it may certainly choose to do if it wishes to remove Executive discretion), or Congress establishes specific formulae or other fixed methodologies for setting pollution levels, then the Executive Branches decision-making process is necessarily judgmental, not merely mechanical.**

I believe that the President is fully entitled to express his policy judgments to the EPA Administrator, and to expect his subordinate to carry out the presidential judgment of what the law requires and permits. (I note that the President would not be permitted under current law, in my opinion, to compel EPA to set particular Clean Air Act standards based on a cost-benefit analysis. Whether this constraint makes sense or not, the Supreme Court has plainly said that Congress did not authorize public costs and relative benefits to be considered as a factor in setting national ambient air quality standards.)

If the EPA Administrator does not agree with the President, he or she may resign or be replaced, but there are no grounds to complain that the President's position is undue "interference." **It is the President's responsibility, not just his right, to ensure that Executive Branch regulatory decisions – to the extent Congress has left the Executive with some discretion – reflect the President's own policy judgments. That way, the public can hold the President accountable for important regulatory judgments, or alternatively, look to Congress for stronger, smarter or more specific laws.**

Accordingly, the EPA Administrator in the case at hand was well advised to consider and defer to the policy judgments of the President.

I will make a number of further brief points in support of this view, and be happy to respond to any questions you may have.

The Constitution empowered the President to command the Executive Branch.

Article II of the Constitution vests the executive power of the United States in the President. It does not vest executive power in any other authority, and it authorizes only the President to appoint the principal officers of the United States (with the advice and consent of the Senate), and authorizes inferior officers to be appointed by the President, or by agency heads or the courts (without the advice or consent of the Senate). The Constitution specifically empowers the President to require the head of any Executive department to provide his or her opinion on any subject relevant to the duties of the President or of that agency head.

The reasons why the Constitution established a powerful President are well known. In short, the Framers were acutely conscious of the debilitating weaknesses that resulted from "executive by committee" during the Revolutionary War, and under the Articles of Confederation.

Alexander Hamilton, of course, was the leading proponent of both the Constitution and the strong presidency it established. It is impossible to surpass the wisdom or compelling quality of the arguments Hamilton advanced for the Constitution's strong President in his *Federalist Paper* essays.

In Federalist 76, Alexander Hamilton addressed the benefits of a unitary executive to direct the federal government of the United States. He

stated: ". . . one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment. The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation."

In Federalist 70, Hamilton specified that "unity" was one of the key ingredients of the Executive. He explained that "[t]his unity may be destroyed in two ways: either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject, in whole or in part, to the control and co-operation of others, in the capacity of counsellors to him."

He clearly understood that putting one person in charge of the Executive Branch would promote democratic accountability. Hamilton argued that "one of the weightiest objections to a plurality in the Executive . . . is that it tends to conceal faults and destroy responsibility . . . . It is evident from these considerations, that the plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, first, the restraints of public opinion, which lose their efficacy, as well on account of the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall; and, second, the opportunity of discovery with facility and clearness the misconduct . . . ."

In other words, the Constitution adopted a unitary Executive in order that the people would know exactly whom to credit, or whom to blame, if the laws were not faithfully and effectively discharged. If responsibility is diffused, then the ability of the public to influence and choose their government is diluted.

Presidents of both parties have asserted the right to oversee and direct the actions and decisions of regulatory agencies.

Presidential Involvement in Environmental Rulemaking in the Carter Administration

Former Chief Judge Patricia Wald, who served as Assistant Attorney General for Legislative Affairs in the Carter Administration, and was subsequently appointed to the U.S. Court of Appeals for the D.C. Circuit by President Jimmy Carter, strongly supported the power and responsibility of a President to direct his or her subordinates in the Executive Branch. In 1981,

she authored the leading opinion on presidential control over rulemaking, *Sierra Club v. Costle.* Judge Wald was joined in that opinion by then Judge, now Justice, Ruth Bader Ginsburg.

In a context not dissimilar from the current ozone regulation of interest to this Committee, *Sierra Club* concerned EPA rules restricting sulfur and particulate matter emitted by new power plants. Judge Wald addressed arguments advanced by environmental plaintiffs who claimed that President Carter improperly interfered in the EPA rulemaking in order to impose weaker pollution controls than the technical staff at EPA desired. She categorically rejected this criticism of President Carter's decisive role.

Echoing Hamilton, Judge Wald eloquently affirmed the President's power over a unitary Executive Branch. Her opinion explains:

> "The executive power under our Constitution, after all, is not shared it rests exclusively with the President. The idea of a 'plural executive,' or a President with a council of state, was considered and rejected by the Constitutional Convention. Instead the Founders chose to risk the potential for tyranny inherent in **placing power in one person, in order to gain the advantages of accountability fixed on a single source**. . . . In the particular case of EPA, Presidential authority is clear since it has never been considered an 'independent agency,' but always part of the Executive Branch. **The authority of the President to control and supervise executive policymaking is derived from the Constitution**; the desirability of such control is demonstrable from the practical realities of administrative rulemaking. . . . Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. **Single mission agencies do not always have the answers to complex regulatory problems.** An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House."

Indeed, **Judge Wald opined that preserving the President's flexibility to direct his or her subordinates was so important that it was not legally required for the Executive Branch to publicly disclose the details of White House and presidential contacts.** Where the President is directly involved, Judge Wald admonished courts to "tread with

extraordinary caution" in mandating disclosure of relevant Executive Branch communications.

To be sure, Judge Wald was appropriately sensitive to the legal requirement that agencies justify their rules on the basis of the relevant administrative record. She did not believe, however, that Presidential influence behind the scenes undermined the agency's decision-making process. Judge Wald wrote:

> "[A]ny rule issued here with or without White House assistance must have the requisite factual support in the rulemaking record, and under this particular statute [the Clean Air Act] the Administrator may not base the rule in whole or in part on any 'information or data' which is not in the record, no matter the source. The courts will monitor all this, but they need not be omniscient to perform their role effectively. Of course, **it is always possible that undisclosed Presidential prodding may direct an outcome that is factually based on the record, but different from the outcome that would have obtained in the absence of Presidential involvement.** In such a case, it would be true that that the political process did affect the outcome in a way the courts could not police. **But we do no believe that Congress intended that the courts convert informal rulemaking into a rarefied technocratic process, unaffected by political considerations or the presence of Presidential power.** In sum, we find that the existence of intra-Executive Branch meetings during the post-comment period, and the failure to docket one such meeting involving the President, violated neither the procedures mandated by the Clean Air Act nor due process."

In 2002, Judge Wald wrote an academic reflection on her decision in *Sierra Club* in the Georgetown Law Journal. In the article, she rehearsed the circumstances the court reviewed in 1981, and recalled that the pollution control level EPA ultimately adopted in 1979 was very controversial. She noted that "the agency staff had proposed a figure less than half a large" as the one eventually selected by the Administrator. She explained that the relatively lenient standard adopted by the Carter Administration was challenged by environmental groups on the grounds that it "resulted from political pressure placed on EPA from a variety of sources, including pressure exerted by the President in a meeting that was never made part of the agency's rulemaking docket."

Judge Wald characterized her opinion as supporting the proposition that so long as the rule had the requisite factual support in the record, the fact that the political process had affected the outcome was, on balance, acceptable – indeed, desirable.

Judge Wald's law review article stated that **"the President has constitutionally derived power to control and supervise executive policymaking. The [*Sierra Club*] court found such power to be desirable, noting that the President's direction can give a valuable, national perspective to decisions made by a single-mission agency."**

Moreover, she also pointed out that *Sierra Club* explicitly preserved the President's flexibility in directing his or her subordinates:

> "[t]he D.C. Circuit's opinion in Sierra Club protects . . . sensitive presidential information [i.e., "the President's interaction with agency decisionmakers"] by making it legally irrelevant. Under Sierra Club, a presidential directive to an agency engaged in rulemaking will not add anything to the validity of the agency's final rule (which must be otherwise justified by the rulemaking record), but neither will it detract from the validity of the rule (assuming the rule is so justified). By decoupling the legal validity of the rule from any presidential action that may have led to it, **the D.C. Circuit not only protected the President's flexibility to give direction to executive agencies, but also removed any reason why parties challenging the rule would have a valid need to know about the President's actions.** The principle of Sierra Club therefore plays an important role in guarding the confidentiality of the President's activities."

Presidential Involvement in Environmental Rulemaking in the Clinton Administration

President Bill Clinton, further codified and solidified the process and desirability of presidential control over Executive Branch rulemaking. **In 1993, President Clinton issued Executive Order 12866 to ensure that agency regulations are consistent with "the President's priorities, and the principles set forth in this Executive Order."** The Order noted that, in the event of a conflict between regulatory agencies and the Office of Management and Budget, the President or Vice President would review the matter and "notify the affected agency . . . of the President's decision." President Clinton's Order generally tracked the regulatory review principles previously articulated in President Reagan's Executive Order 12291;

however, President Clinton actually extended presidential oversight and control over rulemaking in a number of regards, including application of the regulatory planning process to independent agencies.

Indeed, I believe it is clear that President Clinton directly participated in the approval of the 1997 ozone standard which was the precursor to the standard of interest to the Committee today. Just as is the case with the current ozone rule, and as was the case with President Carter's sulfur and particulate matter rules, EPA ultimately chose a pollution standard that was more lenient than the one favored by agency staff and recommended by the CASAC committee of scientific advisers.

Given President Clinton's activist role in the federal regulatory process, it is no surprise that his White House and OMB advisers provided robust and unapologetic intellectual support for a powerful presidential influence over rulemaking.

In a 2007 Michigan Law Review article, President Clinton's regulatory czar at OMB, Sally Katzen, wrote that she "served as the Administrator of OIRA during the Clinton Administration [and is] unabashedly a proponent of centralized review of rule-making." Interestingly, she made a point of singling out both the career and political appointees at EPA has having particularly intense enthusiasm for the agency's mission and faith in regulatory solutions.

Likewise, another alumnus of President Clinton's OMB, Professor Peter Swire, wrote his 1985 law school note in the Yale Law Journal in "suppor[t of] a greater presidential role in regulation." He expressed the view that "[t]he President, elected nationally, charged with executing all federal laws, and accountable for the sum total of executive action, has a unique potential to balance and coordinate agency action."

The current Dean of the Harvard Law School, Elena Kagan, served President Clinton as both a White House lawyer and domestic policy adviser. She has acknowledged that regulatory activity in the Clinton Administration became **"more and more an extension of the President's own policy and political agenda,"** that President Clinton **"greatly enhanced presidential supervision of agency action,"** and that President Clinton "**personally appropriated significant regulatory action through communicative strategies that presented regulations and other agency work product, to both the public and other governmental actors, as his own.**"

Dean Kagan wrote the following in her 2001 article in the Harvard Law Review:

> **"[P]residential control of administration, in critical respects, expanded dramatically during the Clinton years, making the regulatory activity of the executive branch agencies more and more an extension of the President's own policy and political agenda.**
>
> * * *
>
> "At the front end of the regulatory process, Clinton regularly issued formal directives to the heads of executive agencies to set the terms of administrative action and prevent deviation from his proposed course. And at the back end of the process (which could not but affect prior stages as well), **Clinton personally appropriated significant regulatory action through communicative strategies that presented regulations and other agency work product, to both the public and other governmental actors, as his own, in a way new to the annals of administrative process.**
>
> "By the close of the Clinton Presidency, a distinctive form of administration and administrative control -call it "presidential administration" -had emerged, at the least augmenting, and in significant respects subordinating, other modes of bureaucratic governance. Triggered mainly by the re-emergence of divided government and built on the foundation of President Reagan's regulatory review process, **President Clinton's articulation and use of directive authority over regulatory agencies, as well as his assertion of personal ownership over regulatory product, pervaded crucial areas of administration.** Of course, presidential control did not show itself in all, or even all important, regulation; no President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity. And of course, presidential control co-existed and competed with other forms of influence and control over administration, exerted by other actors within and outside the government. **At times, indeed, presidential administration surely seemed to Clinton and his staff, as it surely also had to their pioneering predecessors, more an aspiration than an achievement. Still, these officials put in place a set of mechanisms and practices, likely to survive into the future,**

> **that greatly enhanced presidential supervision of agency action, thus changing the very nature of administration (and, perhaps too, of the Presidency)."**

Dean Kagan did not merely chronicle the expansion of presidential power over the federal regulatory process during the Clinton Administration – she affirmatively supported the merits of increased direct presidential authority over Executive Branch agencies.

This development, she wrote (sounding positively Hamiltonian):

> **"satisfies legal requirements** and promotes the values of administrative accountability and effectiveness. . . . Presidential administration in this form a**dvances political accountability** by subjecting the bureaucracy to the control mechanism most open to public examination and most responsive to public opinion. And presidential administration **furthers regulatory effectiveness** by providing not only the centralization necessary to achieve a range of technocratic goals but also the dynamic charge so largely missing today from both the administrative sphere and the surrounding political system."

It makes sense, as a matter of public policy, to acknowledge and respect the President's ultimate dominion over the Executive Branch.

In sum, both the effectiveness and accountability of agency rulemaking is promoted by respecting presidential control over the regulatory process. This proposition was most effectively articulated by Alexander Hamilton in the *Federalist Papers*, embodied in the Constitution, and embraced wholeheartedly by Presidents of both parties.

If federal regulations do not serve the public well – either because they are too restrictive or too permissive, or simply not well designed – the President (and Congress, of course) should take the blame. If the regulations are reasonable and accomplish the public's goals efficiently, then the President (and Congress) should receive the credit. Technical advisers are essential to the rulemaking process, but the buck has to stop with the person who answers to the people, the President.

Thank you for considering my views.

Chairman WAXMAN. Thank you very much, Mr. Raul.

We will now proceed to questions, and to start off the questioning, I want to recognize Ms. Watson.

Ms. WATSON. Thank you so much, Mr. Chairman. And, Mr. Goo, I felt your passion in your testimony. I am very passionate, too, because my grandfather, in coming here—once into California I am speaking of—and once he got here he found he had to go over and live in Arizona. When he came back, he fell dead in the streets leaving a widow with seven children. The oldest is my mother. So that was before we had the Clean Air Act.

I spent 17 years as the Chair of Health and Human Services in the California State Senate. We fought viciously with those who did not want to clean up the air because they felt it would impact on, I guess, their profits.

So you have expressed grave concerns that Administrator Johnson's decisions on the new ozone standards were not based on science and the law. In your view, is this failure to base an EPA decision on science and the law an isolated incident? And could you put this in context in terms of this administration's overall record of implementing the Clean Air Act?

Mr. GOO. I would be glad to, Congresswoman Watson. This is not an isolated instance at all, far from it. What we have seen in the past 8 years is a concerted attempt to effectively dismantle the Clean Air Act through implementation and enforcement, and we have seen it in a number of instances from new source review to Mercury pollution, to the National Ambient Air Quality Standards and their position on greenhouse gases.

As I mentioned and as you note, air pollution is very serious business here in the United States. More Americans die from air pollution than die from drunk driving and HIV/AIDS put together, and most of that is from particulate air pollution, which I would mention as a good example of the same kind of decisionmaking that we have seen where the Administrator chose to disregard the clear advice of the Clean Air Scientific Advisory Committee.

The very next decision that we will be seeing in the National Ambient Air Quality Standards area will be with regard to lead and known toxic air pollutants. We are concerned that the next decision with regards to lead may resemble the past two National Ambient Air Quality Standards.

Ms. WATSON. Let me just ask you this. Have you seen this disregard for the scientific input as a problem for the Agency over a period of time?

Mr. GOO. I think over the last 8 years, this has been a very difficult time for people at the Agency. If you look at the depositions and you look at the record that Chairman Waxman has compiled, you see that any number of staff, career staff attorneys, were saying things like, I have never seen this in the last 30 years. It has been extremely distressing.

The career staff at EP are extremely dedicated, and they are dedicated to the science and to pubic health protection. They have not been well served in this administration.

Ms. WATSON. Well, I want to thank you very much. I feel the same exact way. California is my State, and I want to thank you. The Clean Air Act says that the EPA must use its understanding

of science to protect people's health and lives from air pollution. Disregarding the law and the science subjects people in our environment to grave harm.

My family was affected by the fact that we didn't have these standards, and I lost a grandfather whom I never knew. So the rejection of our request in California hit us very, very hard.

Thank you very much, Mr. Chairman, for this time.

Chairman WAXMAN. Thank you, Ms. Watson.

Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. Mr. Goo, how many people die of AIDS each year?

Mr. GOO. I don't have the precise figure, but I will get it for you. More than 45,000 people die of particulate matter pollution from power plants alone in the United States each year.

Mr. CANNON. We are going on with a very short number of minutes, sir, 2 minutes each, so if you don't mind, I am just going to ask some pretty quick and clear questions.

Dr. Grifo, how many members are there in the Union of Concerned Scientists?

Ms. GRIFO. We have members who are citizens and scientists from across the country, roughly 200,000 that work actively with us.

Mr. CANNON. How many of those are scientists, have a Ph.D. in science?

Ms. GRIFO. I can tell you that for our particular issue, the scientific integrity issue, we have an activist list of 15,000 scientists from across the country. The broader one, I can get you that exact number.

Mr. CANNON. I would actually appreciate that, and how many of the members, broader membership of UCS, are Government employees?

Ms. GRIFO. I don't know, but I can potentially find that out.

Mr. CANNON. I would appreciate that. And of those who are active scientists but not Government employees, do you have any idea how many receive Government contracts?

Ms. GRIFO. I am sorry?

Mr. CANNON. How many receive contracts or money from the Federal Government to do research?

Ms. GRIFO. I don't have any way of knowing that, sir. We do not take any Government money at the Union of Concerned Scientists.

Mr. CANNON. I know you don't, but many of your scientists do. Let me just point out that when you have a taxpayer-funded research, and priorities change because times change, you are going to have complaints from scientists.

Are you familiar with the Congressional Research Service's review of the study that you quoted in your testimony?

Ms. GRIFO. I got it about 15 minutes ago.

Mr. CANNON. You should read it, because I think it points out that your study is——

Ms. GRIFO. I did read it, and I am happy to respond to anything in it. It is all completely refutable.

Mr. CANNON. Pardon me?

Ms. GRIFO. I have. I am happy to respond to any of this.

Mr. CANNON. It would be hard for you to respond. I have too short a time, but you are talking about 5,810 people that were surveyed, were asked questions that were EPA scientists. You had about almost 1,600 respondents and 700 complaints. I think that this whole—you should look at that, because I think it deeply undermines the credibility of your statistical inclusions about this administration and the integrity of science, which I think is largely driven by financial interests, and the transition that is happening in society, and the change priorities that we have in America.

Thank you, and, Mr. Chairman, I yield back.

Ms. GRIFO. If I may respond. I would like to direct you to page 5 of the CRS Report where it says, "Consequently, there are no issues related to sampling errors as there was no probability sample." Page 6 of the CRS Report where it says, "This is not an issue here, however, this is not a sample survey but a census." And page 7 of the CRS Report where it says, "The UCS Report does provide sufficient information for any analyst to examine it and highlight some of those limitations."

Chairman WAXMAN. Mr. Bilbray.

Mr. BILBRAY. Thank you, Mr. Chairman. Mr. Chairman, let me first point out that I support the waiver for greenhouse gases for California, and I look forward to working with you at offering some legislation that will authorize that and the Clean Fuel Strategies of California and exempt us from the Federal restrictions.

But I think we need to recognize that a lot of people—this would be the first time a State would have the ability to regulate outside of its jurisdiction because in our California strategies, we are talking about restricting the importation of certain electricity across the State boundary, which is absolutely new, and we need to take a look at that.

Now the Concerned Scientists. I want to pose a question here. There were 71 issues that you took with decisions that the administration had, and you feel that there was undue political influence on these decisions?

Ms. GRIFO. I am sorry, what are you referring to?

Mr. BILBRAY. You listed 71 different times that you felt there was undue political influence and some political agenda pushed by the administration in their decisions, in your testimony.

Ms. GRIFO. Seventy-one? I don't think I used the number 71.

Mr. BILBRAY. Well, there's a list on your testimony. My question is, in all of this, have the Concerned Scientists taken a position about the use of ethanol in our fuel stream and its environmental and health risk?

Ms. GRIFO. Sir, that is a different program at the Union of Concerned Scientists, and I can certainly put you in touch with them.

Mr. BILBRAY. Well, ma'am, let me just tell you something. I have 71 here that has been given to me by your testimony. There is——

Ms. GRIFO. Can you point what the 71 is?

Mr. BILBRAY. Page 25.

Ms. GRIFO. Oh, in the A to Z. It is actually almost 90 now, yes.

Mr. BILBRAY. OK, 90. In that list, I don't see ethanol and its environmental damage that the largest State in the Union is trying to outlaw, eliminate, and you guys have sort of walked away from it, but in the same population issue I see, you know, four or five

issues on abortion or birth control in here. I have to be frank with you—as how you walk away something that is as much of an environmental problem as ethanol, but then talk about the morning-after pill, or abstinence programs as being your major concern.

I will challenge you to abandon your political prepositions and work with us at addressing real science and threat issues. But this testimony here, this and what I would say was the lack of scientific way of approaching your so-called survey, wouldn't you agree that if you were doing this kind of survey, you would, from a scientific point of view, there is no way an environmental regulatory agency would accept that survey as being a substantive document.

Ms. GRIFO. First of all, I think the CRS did accept it as a substantive document. That is the thrust of what is said here, and each of the pieces in here—well, we can go through them one by one, and I am happy to talk about them.

But the point of the A to Z guide is, if you have documentation of political interference in science, I would love to see it. Everything in the A to Z guide has primary documentation. If you have it, we will analyze it, and we will put it up there.

Mr. BILBRAY. Well, then, I would ask that over almost 20 years a group that claims to be scientific, where do you stand on forcing the State of California continue to burn ethanol as fuel when the science says it is bad?

Ms. GRIFO. That is not the issue of this hearing, I am sorry.

Chairman WAXMAN. Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman, and I will be brief. I would ask unanimous consent that the Congressional Research Service Report be, in fact, put into the record.

Chairman WAXMAN. Without objection, that will be the order.

[The information referred to follows:]

Congressional Research Service

Memorandum May 2, 2008

TO: House Oversight and Government Reform Committee
Attention: Ali Ahmad

FROM: Deborah D. Stine
Specialist in Science and Technology Policy
Resources, Science, and Industry Division

SUBJECT: Methodological Analysis of Union of Concerned Scientists Report on Political Interference at EPA

This memorandum is in response to your inquiry requesting a methodological analysis of the Union of Concerned Scientists' (UCS) report, *Interference at the EPA: Science and Politics at the U.S. Environmental Protection Agency*.[1] You requested a critique of Appendices A (survey text and responses), B (selected survey results), and C (CSSM methodology report) of this report, focusing on the fairness of the questions and the statistical soundness. Provided below is a brief summary of the report's methodology, followed by a critique of the analysis in the report.[2]

UCS Report Methodology

UCS worked with the Survey Research Services, Center for Survey Statistics and Methodology (CSSM), Iowa State University on this report. The questions were developed by UCS as was the report. CSSM consulted on project development, implemented the data collection process, and assisted in data analysis. CSSM's report (Appendix C) describes some of the challenges of the analysis.

The list of individuals sampled in the survey were compiled by UCS using online public records. CSSM then contacted these individuals in several waves, including reminder emails, from June 25, 2007 until August 30, 2007. Those who chose to respond did so via the web. Data collection ended on September 30, 2007. A total of 1,583 responses were

[1] Union of Concerned Scientists, *Interference at the EPA: Science and Politics at the U.S. Environmental Protection Agency*, April 2008 at [http://www.ucsusa.org/assets/documents/scientific_integrity/Interference-at-the-EPA.pdf].

[2] Royce Crocker, Specialist in American National Government, Government and Finance Division, also contributed to this memorandum in the discussion of political interference and statistical soundness.

received from an adjusted eligible sample of 5,814, providing a 27.3% response rate according to CSSM or 29.3% according to UCS (see further discussion of this below). The resulting report provides the frequency of responses — both the number and percentage of respondents for a particular answer — to 44 questions.

Fairness of Questions

Fundamentally, one's perception of "fairness" will differ according to who is reviewing the question. As a result, there is no objective criteria for whether or not a question is fair. Measuring bias is possible. To undertake this analysis, however, would require that the same question be asked in different ways to determine if the same results were achieved regardless of how the question was asked. It is not possible to undertake such an analysis in the time available. As a result, the analysis in this memorandum attempts to provide no more than a critique of the UCS questions. Several issues regarding the fairness of the question and the reporting of the related results include the vagueness in term definitions, the need for a control group, and the need for longitudinal analysis. These are discussed in more depth below.

Term Definition. One general issue regarding the questions is the lack of definitions for some terms. For example, the definition of "scientific work" is somewhat vague, so respondents may have different interpretations. Terms used in the survey questions ranged from "appropriate time and resources" to "political interference."[3]

For example, political interference or the charge of political interference at EPA has been an issue for some time. But, exactly what constitutes such interference, as opposed to editorial differences and policy or substantive disagreements, is not spelled out for the respondents. One person's political interference might be another's heavy handed editing. While under many circumstances, it is appropriate to let the respondents build their own views of what is being asked, it is also important to construct questionnaires that provide the same stimulus to the subjects. If each respondent views political interference in a different way, then interpreting the results becomes subject to challenge. While the study did explore various aspects of "political interference," it is not clear whether or not this phrase, in and of itself, created a context that may have influenced how respondents interpreted questions. Again, without further research, one can only speculate about such an effect. However, as all of the questions dealing with political interference came at the end of the questionnaire, it is less likely that the responses to earlier questions were affected.

Control Group. Many scientific studies rely on the use of a "control group." The purpose of the control group is to isolate a particular variable – in this case, EPA. The goal would be to have two similar groups, keeping all variables constant such as the type of respondent (e.g., scientists) and the questions asked, except for the variable of interest (e.g, organization). This is somewhat challenging in surveys, but having a comparison group where similar respondents in another organization were asked the same questions about their organization and its management would have been useful to understand the degree to which

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[3] Examples of other terms used in the survey whose meaning may vary relative to the respondent are integrity and professionalism, effectively and effectiveness, sufficient, impaired, consistently stands behind, best judgment, satisfaction, complete and accurate, speak freely, inappropriately involved, inappropriately induced, incomplete, inaccurate, and misleading, inappropriately exclude or alter, unusual administrative requirements, and misrepresent.

the EPA scientists' views differ from that of another organization's scientists. If such a control group model were used, then it would be possible to determine if there were statistically significant differences between the two sets of respondents.

For example, question 34 of the survey asks "How often have you personally experienced the following situation?...Changes or edits during review that change the meaning of scientific findings?" The results of the responses to this question would have greater meaning if it could be compared against a norm of some kind. Supervisors commonly edit work. Scientists commonly disagree with one another. A senior scientist may overrule, due to their experience, a junior scientist. A junior scientist may believe they are more up-to-date than a senior scientist, and as a result, believe that their interpretation of a scientific finding differs from that of the senior scientist. At what point is it appropriate to call such changes and edits "political interference" as is done in the UCS report? Without a norm by which to judge such responses, it is difficult to interpret the meaning of the result.

Longitudinal Analysis. Another related issue is the degree to which the responses to these questions has changed over time. Would the responses have been the same or different during previous Presidential administrations? Even within an administration, the handling of issues may differ relative to who is appointed as EPA Administrator and who holds other major political positions at EPA. Further, the education and training of those individuals may differ. For example, a manager with a scientific and technical background may have a different view of a situation than one trained as a lawyer. There is some attempt to gain an understanding of the need for longitudinal comparison data in question 40 which asks

> If you compare the past 5 years to the 5-year period prior to it (from 5 to 10 years ago), would you say [political interference] activities or situations like those listed above are occurring:

	Survey Responses
More often than before	34.4%
About the same as before	22.4%
Less often than before	4.4%
Don't know	38.8%.[4]

This question has several challenges to it. The first is that the question does not provide a mechanism for determining whether or not the respondent has been working for EPA for 10 years before determining if they are an appropriate respondent. This may be an indicator for why the "don't know" response is highest for this question relative to the others in the survey. Second, the 5-10 year time frame is a range, so that some respondents will be reporting their perceptions within the same administration, while others will be reporting their perceptions of the previous administration.

To address the issue of time frame relative to experience on question 40, the report uses the available demographic data to break out the responses for this question relative to the years the respondent has worked for EPA.

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[4] *Interference at the EPA*, p. 74.

	Survey Responses	
	Years Working at EPA	
	11-15	More than 15
More often than before	40.3%	42.9%
About the same as before	20.9%	29.1%
Less often than before	6.7%	4.1%
Don't know	32.1%.	23.8%.[5]

One challenge with this data is that it is possible that some of the individuals with that degree of experience are now the managers.

Question 13 is another question that takes into account the time frame:

Compared to five years ago, the effectiveness of my division or office has

	Survey Responses
Increased	20.6%
Stayed the Same	24.9%
Decreased	44.6%
No Opinion	9.9%

This question could be a factor resulting in a lower percentage in the "no opinion" category — providing a defined 5-year period within the same Administration.

Hearsay. A number of questions rely on what a respondent "knew of," commonly termed "hearsay." In other words, what people have heard rather than what they have themselves experienced, which as a result, may not be reliable as they are subject to flaws in memory or perception. For example, question 25 in the section under political interference, asks "How many cases do you know of where the following situations have occurred? . . .Cases where EPA political appointees have inappropriately involved themselves in scientific decisions."

Statistical Soundness[6]

Several issues regarding the statistical soundness of the UCS analysis include who is being sampled, the response rate, questionnaire order, and data presentation. These issues are described in more depth below.

"Sample". The results of the study are not based on a probability "sample," but rather a census of eligible "scientists" at EPA with a limited response rate.[7] The study is based on

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[5] *Interference at the EPA*, p. 84.

[6] This section was written by Royce Crocker, Specialist in American National Government, Government and Finance Division.

[7] A census is a total count of some population–people, cars, tulips or EPA scientists. A sample of that population is a subset of the population, usually selected using some prescribed procedure. In the case of a probability sample, members of the population are, at a minimum, selected to be included in the sample with some known probability (e.g., one in ten, one in five). It would appear from the report that the UCS intended to interview as many EPA active scientists as they could. If

(continued...)

responses to the questionnaire from scientists at the EPA. Most scientists who could be identified by UCS were included in the survey, and just under 30 percent responded. Consequently, there are no issues related to sampling errors as there was no probability sample.

Chapter 3 of the report offers a relatively clear description of the limitations of the attempts to define the population under study, as noted by the authors in the following excerpts.

> To allow as many EPA scientists as possible to participate, we erred on the side of including employees who worked at scientific branches and divisions even if their job duties were unclear. The mailing list was therefore broad but of uneven quality.[8]
>
> ...in divisions that posted names but not job titles, the sample likely included some nonscientists. Conversely, the survey may have improperly excluded some legitimate scientists working in divisions where Internet search was the primary means of obtaining information. This approach produced a notable bias toward agency veterans, as their names were more likely to appear on a website, at the expense of younger scientists, and new hires.[9]
>
> We used a broad definition of "scientist"when compiling the mailing list.[10]
>
> The survey was designed to measure raw numbers of scientists who experienced political interference in their scientific work. Because of unknown selection effects in creating the sample, the self-selection of respondents, it is difficult to extrapolate these raw numbers to a percentage of the EPA's total scientific workforce.[11]

Each one of these limitations has implications for any analysis of the data. The list of scientists eligible to be included in the study, as provided to the CSSM, was not clearly defined with respect to the studied population. It included nonscientists as well as scientists, and, as noted above, was likely to be biased toward more senior scientists (i.e., arguably those who were most likely to question anyone's authority or ability to review their work). The fact that the results of the survey were not designed to provide extrapolations to the total population, while noted in Chapter 3, is not made as clear in the rest of the report.

Response Rates. According to the UCS report, the response rate was 29.3 percent.[12] However, the CSSM's report indicates that the response rate was 27.3 percent. The discrepancy may be attributed to the fact that the UCS researchers incorrectly excluded 395

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[7] (...continued)
they were successful, the report would have been based on all EPA active scientists — a census of EPA scientists. The fact that the UCS was unable to accomplish their goal does not create a sample, but rather a census with significant limitations.

[8] *Interference at the EPA*, p. 20.

[9] Ibid., p. 20.

[10] Ibid., p. 21.

[11] Ibid. p. 21.

[12] Ibid., p. 21.

individuals from the "sample" due to the fact the UCS could not discover e-mail addresses associated with these individuals. CSSM correctly included these individuals in calculating the study's response rate.[13]

While almost 6,000 employees were given the opportunity to participate in the study, a little less than 30 percent completed a questionnaire. Thus, while it may be true that 889 persons at EPA experienced at least one incident of, what the respondents interpreted or accepted UCS's label as, "political interference" during the past five years,[14] this constituted 56.0 percent (889/1586) of those completing the questionnaire, and 15.3 percent (889/5814) of those included in the population under study. This comparative calculation could have been done on all results from the study, producing equally valid figures, depending on what one wanted to emphasize.

Non-response to a survey generally may make it difficult, if not impossible, to project to a larger portion of a population. That is not at issue here, however. This is not a sample survey, but rather a census. For the results of this survey, non-response not only means that the views on the issues dealt with in the questionnaire of over 70 percent of the eligible "sample"/population are not known, but, in this case, it potentially makes the presentation of the data lead to different conclusions. The reader does not know whether the numbers should be viewed as a proportion only of those responding or, because all had an opportunity to participate, as a proportion of the whole population (i.e., all scientists in the agency) under study. As shown above, the two different calculations might lead the reader to different conclusions.

Questionnaire Order. It is difficult to evaluate the questionnaire as it is clear from the CSSM's presentation that the web-based questionnaire included table format questions and was designed using the Tailored Design Method (TDM).[15] As there is nothing like such a questionnaire in the report, one must assume that the original questionnaire is not included. At best, there is a list of questions with their marginal results included in Appendix A.[16] Assuming that the order of the questions shown in Appendix A corresponds to the order of the questions in the original questionnaire, there does not appear to be any obvious order effects. However, to verify this one would need to alter the order of the questions in another similar survey to actually gauge if there are any differences. Even then one could only speculate as to which order resulted in which effect and which order was less 'biased.' That level of research exceeds our resources given the deadline presented to CRS.

Presentation of the Data. The Union of Concerned Scientists are advocates of a point of view; therefore, it is not unrealistic to believe that any study sponsored by them will likely emphasize that point of view. This is not meant to be a criticism of the approach taken, simply a recognition of the organization's advocacy role.

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[13] For a full description of the criteria used by most survey researchers in calculating response rate, non-response rate, and related terms, see: AAPOR, *Standard Definitions*, The American Association for Public Opinion Research (AAPOR), *Standard Definitions, Final Dispositions of Case Codes and Outcome Rates for Surveys*, 4th edition, (Lenaxa, Kansas, AAPOR, 2006), esp. pp. 32-34, at [http://www.aapor.org/uploads/standarddefs_4.pdf].

[14] *Interference at the EPA*, p. 2.

[15] Ibid., p. 89.

[16] Ibid., p. 69-74.

What the presentation of the data does not point out are the limitations of the data. The UCS's report does provide sufficient information for any analyst to examine, and it highlights some of those limitations even if the UCS did not feel that a thorough examination was necessary. For example, while the study presents the actual number of respondents who chose a particular answer, percentages are also calculated. While this is often useful in such a study, it becomes somewhat confusing when it is not clear what the percentages actually mean. This appears to be the case in the calculation of percentages for each of the divisions within EPA.[17] It is not clear whether the denominator of the percentages is all of the respondents in the study or all of the respondents in each of the divisions.

In addition, an examination of the results for each question shown in Appendix A includes results for all types of responses. In the body of the report, there is little or no mention of the "No Opinion" responses. However, in 12 out of 14 questions reporting the results for this category, the percentage choosing the "No Opinion" option exceeded 15 percent. In 7 of the 14 questions, this response exceeded 20 percent. When a fifth to a third of a survey's respondents provide "No Opinion" responses to questions, some of which were important for the conclusions reached in the report, some analysis of these responses might seem appropriate, as well as a discussion of how these responses might affect the conclusions reached, if at all.

Summary

This review of the UCS report identified the following analytical issues:

- Some terms and phrases used in questionnaire are vague, so respondents may have made different interpretations of their meaning, which may have influenced their responses.
- A control group was not included in the analysis, so it is difficult to determine whether survey respondents views of EPA managers differ from that of other science and engineering workforces and their managers.
- A longitudinal analysis was not conducted, so it is difficult to determine whether responses from EPA's current workforce would have differed from those who worked in past administrations.
- Some questions relied on what the respondent "knew of" (hearsay) rather than what the respondent personally experienced.
- The respondents likely included those beyond the intended sample such as non-scientists and was biased toward senior scientists.
- The sample is not designed so that results can be extrapolated to a total population (a condition which is not made clear throughout report).
- The response rate stated by UCS (29.3%) differs from that of CSSM (27.3%). While CSSM does provide the response rate, UCS instead provides what is called a cooperation rate.
- The percentages in the report were calculated using the total response population as the base (usually 1,586). It would have been equally valid to calculate the responses over the entire "sample" (both respondents and non-respondents) indicating what proportion of all scientists at EPA (5814, as determined by UCS) held the views. The two percentages might lead one to draw different conclusions about the magnitude of EPA scientists who

[17] Ibid., pp. 26-27, figures 7-8.

held particular views. For example, using the total response population as the base, 56.0% of respondents indicate that they experienced at least one incidence of political interference, but it would be 15.3% if the entire sample were used as a base.

- The original questionnaire and data limitations are not included in analysis.
- The conclusions drawn from the analysis may be inappropriate in instances in which the "No opinion" responses to a question exceed 20%.

Although this memorandum has outlined analytical issues with regard to the UCS survey and the resulting analysis, UCS did provide a generally transparent overview of their analysis, and brought in a qualified organization, CSSM, to help. In addition, it is difficult to tell whether or not any of the critiques identified above would change the public's perception of the survey results regarding the issue. Further, it is important to keep in mind that for many in the science and engineering community, even one case of political interference would be considered to be improper. Independence is a critical part of this community's value system, regardless of whether they are working for government, universities, or industry.

On the other hand, UCS does extrapolate this survey perhaps farther than it should in its report. For example, UCS states

> The results of these investigations show an agency under siege from political pressures. On numerous issues—ranging from mercury pollution to groundwater contamination to climate change—political appointees of the George W. Bush administration have edited scientific documents, manipulated scientific assessments, and generally sought to undermine the science behind dozens of EPA regulations.[18]

However, depending on the population base used, the percentage who personally experienced at lease one incidence of political interference is either 56.0% or 15.3%, which may influence one's perception of whether or not EPA is "under siege." In addition, the survey respondents were not asked questions about specific environmental issues such as the those in the quote — mercury pollution, groundwater contamination, and climate change — so it is unknown as to which environmental issues survey respondents were referring to when they indicated that political interference had taken place.

I hope this information is responsive to your request. If you have any additional questions regarding the material in this memorandum, please do not hesitate to contact Deborah Stine at 7-8431 or dstine@crs.loc.gov or Royce Crocker at 7-7871 or rcrocker@crs.loc.gov.

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[18] Ibid., p. 2.

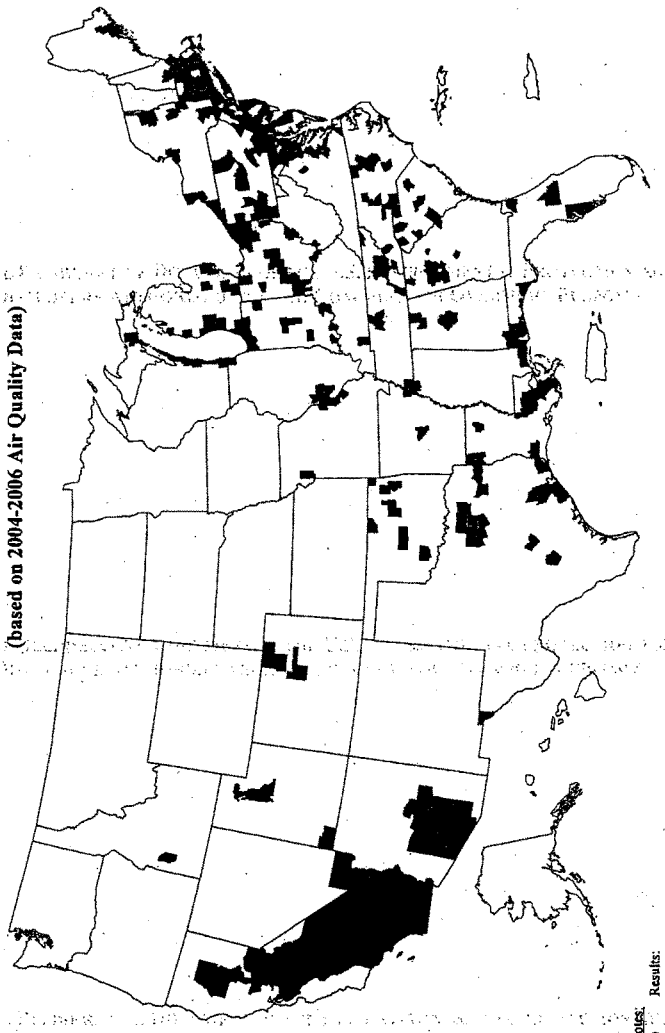
Cumulative Number of Monitored Counties Exceeding Various W126 Levels but Meeting Various 8-hr Standard Levels

(based on 3-year average of monitor values from 2003-2005)

	Levels of 12-hr W126		
8-hr design value	W126 > 21	W126 > 15	W126 > 7
≤ 0.075	0	11	114
≤ 0.070	0	2	25

Counties with Monitors Violating the New (2008) Primary Ozone Standard of 0.075 ppm and/or the New Secondary Ozone Standard of 21 ppm-hrs

(based on 2004-2006 Air Quality Data)



Notes:
1) Results:
   a) 306 counties violate the new primary ozone standard ONLY;
   b) 39 counties violate BOTH the new primary ozone standard and the new secondary standard; and
   c) NO counties violate the new secondary ozone standard only.
2) Monitored air quality data can be obtained from the AQS system at http://www.epa.gov/ttn/airsaqs/
3) These estimates are based on the most recent three years of certified ambient air quality measurements currently available (2004-2006). EPA will not designate areas as nonattainment based on these data but will likely use monitored data from 2006-2008 or later, which we expect to show improved air quality.

Mr. ISSA. And I, for one, will take CRS's independent study and certainly would welcome the Union of Concerned Scientists to submit to us where they think that somehow it is factually wrong. However, I would suggest in the future that if you want to do a survey, do a survey, but if you want to do polling, that there are science practices that would allow for it.

Really, I would just like to take this limited amount of time and say to Dr. McClellan, you are here—and to Mr. Raul—you are both here on your own dime, you are both experts, and, historically, can you give us, briefly, in the remaining time a contrast between today and the period of time in which you served. because, quite candidly, I wasn't here during the Clinton administration and then a Republican majority.

But I would like to have a contrast because I would like to understand, do you believe that there is somehow a rabid change in the way the administration works with your former agencies, or is it substantially the same, and we are simply seeing it different because we see it through different eyes?

Mr. MCCLELLAN. Thank you for the question. I would be very pleased to address that.

As I noted in my opening remarks, I have been associated with the EPA and its advisory structure from the beginning of the Agency. At the time the Agency was created, I was chair of a committee, which was Advisory to the U.S. Public Health Service. That function was brought into EPA, and thus I became a part of the Science Advisory Board at its beginning.

I will have to say that controversy has been a part of the fabric of the EPA since its origins, and it has been a part since the passage of the Clean Air Act, which preceded the Agency. Indeed, one of the first activities I participated in was a visit to Research Triangle Park in the early 1970's as we were putting in place the first Air Quality Standards. We went there based on concerns that came to the surface with a headline story in the L.A. Times about the question of whether scientists were being pressured to come to a particular viewpoint.

Periodically, over time we have seen these controversies. It is natural because you have science, and scientists are not without their own emotions and their own judgment. We are passionate about the use of our science.

Mr. ISSA. I appreciate, and——

Mr. MCCLELLAN. I don't see a big spike.

Mr. ISSA. Thank you. And Mr. Raul, just very briefly so we can go to a vote, I am afraid.

Mr. RAUL. Well, I think there has not been as much change as it may appear, listening to only one hearing. I think President George W. Bush has not been a potted plant with respect to environmental rulemaking in his administration, nor have his predecessor Presidents been potted plants. President Clinton was very involved, President Reagan, President Carter, all very involved in rulemaking.

President Reagan, of course——

Chairman WAXMAN. We are going to have to——

Mr. RAUL. Sure.

Chairman WAXMAN. I think if you would put the rest in for the record, I would very much appreciate it.

Mr. ISSA. Thank you very much, Mr. Chairman.

Chairman WAXMAN. Mr. Raul, even though you assert that the President can direct the Administrator's decision, do you agree that the President must follow the law?

Mr. RAUL. Absolutely, Mr. Chairman.

Chairman WAXMAN. And so when the President intervenes and makes a decision on the secondary—or when he intervened and made a decision on the secondary ozone standard, does the decision still have to meet the requirements of the Clean Air Act?

Mr. RAUL. Absolutely.

Chairman WAXMAN. And the Clean Air Act requires the EPA Administrator to identify the level of air quality requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutants in the ambient air.

Mr. Goo, is it your position that scientific evidence available to the Administrator and the President that the secondary ozone standard was set at a level requisite to protect the public welfare?

Mr. GOO. No, it is not my opinion. The unanimous recommendation of CASAC was that the form of the standard, not the 8-hour standard, the basic point here is that plants and foliage respond differently than human lungs do. The 8-hour standard was set to protect human lungs and human respiratory function. The secondary standard——

Chairman WAXMAN. Well, whoever set that standard, whether it was in fact the President or the Administrator, you don't think it fits with the science?

Mr. GOO. That is correct, Mr. Chairman.

Chairman WAXMAN. And therefore the Clean Air Act.

Mr. GOO. Right.

Chairman WAXMAN. And, Dr. Grifo, your survey is important because it provides us with a big picture of political interference with the work of scientists at EPA. Almost 1,600 EPA scientists filled out survey questionnaires and sent them to the Union of Concerned Scientists, and the cases where EPA political appointees had inappropriately involved themselves in scientific decisions, or interference with political appointees from other parts of the administration like the White House and EPA scientists, who were directed to inappropriately exclude or alter technical information from EPA scientific documents.

This survey shows that there has been a serious problem of political interference with the EPA scientists working under the Bush administration. That I think is unacceptable and has to stop.

I thank the four of you very much for your testimony, and we will keep the record open in case there are other thoughts you want to submit to us for the record, or questions that Members may seek to ask.

That concludes our hearing. We stand adjourned.

[Whereupon, at 4:58 p.m., the committee was adjourned.]

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